

Can a Provincial Referendum Trigger a Legal Duty to Enter Constitutional Negotiations? Alberta's 2021 Equalization Referendum and the *Reference re Secession of Quebec*

Background

The word “referendum” is frequently mentioned by politicians, media, and academics as a potential way of settling contentious public issues. Whether it is to eliminate daylight savings time, create a provincial police force, or initiate negotiations to amend the Constitution of Canada, a referendum typically involves putting a binary “yes” or “no” question to members of the public so that they can directly express their opinion on it.^[1] Due to widely held beliefs that referenda represent the unfiltered voice of the electorate, their results carry a special type of political weight, conferring “the people’s legitimacy ... [on] decisions which may lead a country in a specific direction for years or decades.”^[2]

On October 18th, 2021, Albertans will vote on two referendum questions as part of regularly scheduled municipal elections.^[3] One of these questions asks whether the controversial equalization provision of the 1982 *Constitution Act* (section 36(2)) should be removed from Canada’s Constitution. The question is, what happens if a majority of Albertans vote “yes” in the referendum? Is the equalization provision automatically removed from the Constitution? And, if not, would a “yes” vote impose any legal obligations on Canada’s other governments, or set any further legal processes in motion?

This article provides some background on equalization and presents opposing perspectives on the constitutional implications of the referendum’s results. It explains why the referendum will not remove equalization from the Constitution, and why a “yes” vote likely doesn’t impose any *constitutional* obligation on the federal government or other provincial governments to negotiate with Alberta on removing section 36(2).

Equalization Payments: Two Opposing Streams of Thought

Before considering the legal impact of the referendum, we need a brief primer on its subject matter: [equalization](#). Equalization payments were first made in 1957, and are now constitutionally guaranteed by section 36(2) of the *Constitution Act, 1982*, which states:

Parliament and the government of Canada are committed to the principle of making equalization payments to ensure that provincial governments have sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation.[4]

Equalization payments are sums of federal tax revenues that are transferred to provincial governments to ensure that provinces have sufficient funds to ensure delivery of a consistent level of public services across the country.[5] Provinces that generate less revenue, colloquially referred to as “poorer” provinces,[6] receive a financial top up, whereas “richer” ones do not.[7]

While the Constitution guarantees that equalization payments will apply, it does not specify how equalization payments will be carried out. The formula to calculate equalization payments is a policy question that is left to the federal government of the day. A complex, mathematical formula calculates just how much money a province receives in any given year.[8] This formula was updated in 2009 by the Harper government and renewed in 2018 by Justin Trudeau.[9] For a more detailed explanation of how equalization works, see [here](#).

In any given year, some provinces receive equalization payments, and others do not. This has resulted in two diverging perspectives. On the one hand, some stakeholders frame these transfers as unfair.[10] For example, the current Premier of Alberta, Jason Kenney, has said that “equalization is a powerful symbol of unfairness ... in confederation”[11] whereby hardworking Albertans’ taxes subsidize “have-not provinces.”[12] On the other hand, other stakeholders frame equalization payments as a vital “safety net” to ensure that public services are delivered to a baseline standard for all Canadians.[13] In a public debate, former politician and academic Michael Ignatieff stated that “equalization offers rough equality of opportunity,” guaranteeing assistance when provinces meet the criteria to receive transfer payments.[14]

The Kenney government’s staunch opposition to equalization led Kenney to promise during the 2019 election campaign to hold a referendum on its removal from the Constitution. Accordingly, the government has formulated the following question for the vote on October 18th, 2021:

“Should section 36(2) of the Constitution Act, 1982 — Parliament and the government of Canada’s commitment to the principle of making equalization payments — be removed from the constitution?”[15]

Guidance From the Supreme Court: The Duty to Negotiate from the *Quebec Secession Reference*

In 1998, the SCC ruled in the [Reference re Secession of Quebec](#) that a province could not unilaterally separate from Canada following a provincial referendum in which a majority voted in favour of secession.[24] In the course of this judgment, the Court offered guidance on how federal and provincial governments should respond to the results of provincial referenda on constitutional matters.[25] The Court stated that “the clear repudiation of the

existing constitutional order and the clear expression of the desire to pursue secession ... would give rise to a reciprocal obligation on all parties to Confederation to negotiate constitutional changes to respond to that desire.”[26] A few lines further on, the Court wrote that “[t]he corollary of a legitimate attempt by one participant in Confederation to seek an amendment to the Constitution is an obligation on all parties to come to the negotiating table.”[27] The Court framed this as an obligatory “duty to negotiate” for the federal and other provincial governments.[28] But as the debate over Alberta’s equalization poll shows, different parties have very different interpretations of what the Court meant.

What Does the Kenney Government Claim the *Secession Reference* Means?

Kenney directly cited the *Secession Reference* when speaking publicly about the referendum. In a June 7th, 2021 press conference, he said that “a positive vote on a proposed constitutional amendment, if it has a clear question and a clear majority of Albertans vote in favour of it, ... [will] meet the threshold of the *Quebec Secession Reference* to compel the Government of Canada to engage in good faith negotiations with Alberta.”[29] Thus, his interpretation of the “duty to negotiate” suggests that when any province holds a referendum with a clear majority result on *any constitutional topic*, the federal government is legally obliged to commence negotiations.[30]

Kenney has also described the specific process through which this duty to negotiate would arise. Following a positive vote in favor of eliminating equalization, Kenney’s government would ratify the proposed amendment via a vote in the Legislative Assembly.[31] Kenney believes this act of legislative ratification would then legally oblige the federal government and the other provincial governments to commence formal negotiations on the removal of section 36(2) from the Constitution.[32]

Furthermore, Kenney has suggested that the referendum is also an important strategic move on the part of his government. In the June 7th press conference cited above, he said that the referendum is part of a “strategy to elevate Alberta’s fight for fairness in Confederation to the top of the national agenda ... [and] to get Ottawa’s attention.”[33] While Kenney acknowledged that a province cannot unilaterally change the Constitution[34] and that a “yes” vote in the referendum is not “immediately going to fundamentally change equalization”[35] in Canada, he nevertheless calls the referendum a “legal tool to make a strong political point.”[36]

What Do Constitutional Scholars Claim the *Secession Reference* Means?

In light of Kenney’s reliance on the *Secession Reference* to justify holding the referendum on section 36(2), academics have chimed in with their opinions on the proper interpretation of the “duty to negotiate.”

Constitutional scholar Emmett McFarlane stated in 2019 on Twitter that “the [duty to negotiate] articulated in the Quebec Secession [R]eference only applies to secession.”[37] University of Alberta law professor Eric Adams similarly argues that Kenney is misrepresenting the *Secession Reference*, reasoning that the SCC “chose its words

deliberately” so that the duty to negotiate applies only “to the most foundational constitutional crisis: the breakup of confederation itself.”[38] Further, Professor Adams points out that it would be a public policy nightmare if negotiations were automatically triggered following any provincial referendum on an any given constitutional topic. He reasons that this would create “an endless quagmire of constitutional dysfunction ... [something that] the Supreme Court did not place us on [a path towards].”[39] Adams thus provides a relatively narrow interpretation of the *Secession Reference*, one which is diametrically opposed to Kenney’s.

While Adams acknowledges that Kenney has the right to initiate constitutional dialogue, he suggests that he can do this without holding a costly provincial referendum.[40] If Kenney asked for the issue to be addressed at a first ministers’ meeting, Adams argues that other provinces and the federal government “have an obligation to acknowledge and address”[41] the matter of equalization, but that they needn’t do more than “listen” to Alberta’s concerns.[42] Adams further suggests that Kenney’s interpretation may be more political than legal, and may be rooted in a politics of “anger, accusation, and blame” rather than a real desire to formally change the Constitution.[43] Whatever Kenney’s motives: for Adams, the referendum will have “nothing ... tangible to say about whether or not the constitution [is actually] changed.”[44]

By contrast, University of Calgary professor Rainer Knopff characterizes Kenney’s interpretation as “partly right ... [but] also partly wrong.”[45] Like Adams, he argues that the duty to negotiate is only triggered following a referendum on secession.[46] However, Knopff departs from Adams’ arguments and suggests that a different section of the *Secession Reference* provides a path forward where a referendum may be part of the process for triggering binding legal negotiations.[47]

Professor Knopff’s interpretation begins with paragraph 69 of the *Secession Reference*, which specifies that the *Constitution Act, 1982* “confer[s] a right to initiate constitutional change on each participant in Confederation”[48] and imposes a “corresponding duty on ... [Canada’s other governments] to engage in constitutional discussions in order to acknowledge and address democratic expressions of a desire for change”[49] in the initiating province. Knopff suggests that this process does not require a referendum but is rooted in section 46 of the *Constitution Act, 1982*. [50] Section 46 states that “procedures for [constitutional] amendment ... may be initiated either by the Senate or the House of Commons or by the legislative assembly of a province.”[51]

Turning to the mechanics of how this would take place, Knopff speculates that the Alberta legislature could pass a simple resolution on the elimination of equalization and that this would impose a constitutional duty to negotiate on other governments.[52] However, he notes that Alberta’s *Referendum Act* requires a constitutional referendum before any such resolution can be enacted.[53] Thus, Knopff suggests that the referendum on equalization is an important step in the legal process of bringing about intergovernmental negotiations on the removal of section 36(2), although it is the legislative resolution that would ultimately “trigger the [constitutional] duty to negotiate,”[54] not the referendum.

The Results of a Single Referendum Probably Don't Trigger a Legal Duty to Enter Constitutional Negotiations

So, even if a majority of Albertans vote to eliminate equalization, experts generally agree that this would not, by itself, impose a duty on other Canadian governments to enter into constitutional negotiations on equalization. Of course, a referendum is a useful tool for capturing public opinion, and it may be in the best political interests of the Kenney government to hold it, or in the federal government's political interests to initiate negotiations in the event of a "yes" vote. However, if a vote in favour of eliminating equalization does result in constitutional negotiations, it is more likely that this would stem from political positioning and calculations, not constitutional law. Given the difficulty of getting seven provincial legislatures representing 50% of the population of the provinces to agree on a particular issue, as required by the Constitution's general amending procedure, it is not likely that the Kenney government will succeed in repealing the equalization provision, even if intergovernmental negotiations did take place

[1] Yves Beigbeder, "Referendum" (June 2011), online: *Oxford Public International Law* <<https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1088>>.

[2] *Ibid.*

[3] Drew Anderson, "Premier Jason Kenney Announces Equalization, Daylight Savings Referendums" (15 July 2021), online: *CBC News* <<https://www.cbc.ca/news/canada/calgary/alberta-jason-kenney-referendum-equalization-1.6103528>>.

[4] *Constitution Act*, 1982, s 36(2), being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11.

[5] Edison Roy-Cesar, "Canada's Equalization Formula" (2013) at 1, online (pdf): *Library of Parliament* <<https://lop.parl.ca/staticfiles/PublicWebsite/Home/ResearchPublications/InBriefs/PDF/2008-20-e.pdf>>.

[6] Ben Eisen & Mark Milke, "The Real Have-Nots In Confederation: British Columbia, Alberta, and Ontario" (1 May 2010), online: *Policy Options* <<https://policyoptions.irpp.org/magazines/the-fault-lines-of-federalism/the-real-have-nots-in-confederation-british-columbia-alberta-and-ontario/>> [Eisen].

[7] *Ibid.*

[8] *LOP Equalization Formula*, *supra* note 5 at 2-3.

[9] Paul Wells, "The Trudeau Liberals' Fast One on Equalization: Not So Fast" (22 June 2018), online: *Macleans* <<https://www.macleans.ca/politics/ottawa/the-trudeau-liberals-fast-one-on-equalization-not-s>

[o-fast/>](#).

[10] Senator Paula Simons, “Equalization Town Hall” (28 July 2021) at 00h: 11m: 57s — 00h: 12m: 24s, online (video): *YouTube* <https://www.youtube.com/watch?v=jPg_QZ2hqz8&t=1s> [Simons Town Hall].

[11] Janet French, “Alberta Equalization Referendum Will Have No Bearing on the Constitution, Experts Say” (7 June 2021), online: *CBC News* <<https://www.cbc.ca/news/canada/edmonton/kenney-update-equalization-referendum-1.6056251>>.

[12] Eisen, *supra* note 6.

[13] Marni Soupcoff, “Equalization is Doing Alberta No Favors — Michael Ignatieff’s Patronizing Arguments Notwithstanding” (19 October 2012), online: *National Post* <<https://nationalpost.com/opinion/marni-soupcoff-equalization-is-doing-alberta-no-favours-michael-ignatieffs-patronizing-arguments-notwithstanding>>.

[14] *Ibid*.

[15] Alberta Legislative Assembly, *Hansard Transcripts*, 30-2, No 109 (3 June 2021) at 5220.

[16] *Constitution Act, 1982*, *supra* note 4, ss 38-49.

[17] French, *supra* note 11.

[18] *Constitution Act, 1982*, *supra* note 4 at ss 38-40, 42.

[19] *Constitution Act, 1982*, *supra*, note 4 at ss 38-42.

[20] Richard Albert, “The Conventions of Constitutional Amendment in Canada” (2016) 53 *Osgoode Hall L J* 399 at 409-410.

[21] CPAC, “Alberta Premier Jason Kenney Discusses Equalization Referendum, Apologizes for Cabinet Patio Dinner” (7 June 2021) at 00h: 15m: 44s — 00h: 16m: 04s, online (video): *YouTube* <<https://www.youtube.com/watch?v=D1rGj0vp-eE>> [Kenney Press Conference].

[22] James Keller, “Albertans To Vote on Equalization in Fall Referendum: A Breakdown” (18 July 2021), online: *The Globe and Mail* <<https://www.theglobeandmail.com/canada/alberta/article-a-breakdown-of-albertas-referendum/>> [Keller].

[23] *Ibid*.

[24] *Reference re the Secession of Quebec*, [1998] 2 SCR 17, 161 DLR 4th 385 .

[25] *Ibid* at paras 88-92.

[26] *Ibid* at para 88.

[27] *Ibid* [emphasis added].

[28] *Ibid* at para 90.

[29] Kenney Press Conference, *supra* note 21 at 00h: 15m: 43s — 00h: 16m: 03s.

[30] Eric M Adams, “Jason Kenney’s Equalization Referendum is Built on a Crucial Misrepresentation” (28 June 2021), online: *The Globe and Mail* <<https://www.theglobeandmail.com/opinion/article-jason-kenneys-equalization-referendum-is-built-on-a-crucial/>> [Adams].

[31] Kenney Press Conference, *supra* note 21 at 00h: 16m: 03s — 00h: 16m:16s.

[32] *Ibid*.

[33] *Ibid* at 00h: 16m: 33s — 00h: 16m: 44s.

[34] *Ibid* at 00h 16m: 29s — 00h: 16m: 33s.

[35] *Ibid* at 00h 16m: 23s — 00h: 16m: 29s.

[36] *Ibid* at 00h: 17m: 01s — 00h 17m: 10s.

[37] Emmett MacFarlane, “Kenney still operating on presumption that a referendum would force the rest of Canada to negotiate” (22 October 2019 at 15:48), online: *Twitter* <<https://twitter.com/EmmMacfarlane/status/1186761303341371394>>.

[38] Adams, *supra* note 30.

[39] *Ibid*.

[40] Keller, *supra* note 22.

[41] *Ibid*.

[42] *Ibid*.

[43] Adams, *supra* note 30.

[44] Simons Town Hall, *supra* note 10 at 00h: 19m: 54s — 00h: 20m: 02s.

[45] Rainer Knopff, “Refining Alberta’s Equalization Gambit” (2020) at 3, online (pdf): *Fraser Institute* <<https://www.fraserinstitute.org/sites/default/files/refining-albertas-equalization-gambit.pdf>> [Knopff].

[46] *Ibid* at 1.

[47] *Ibid* at 3.

[48] *Secession Reference*, *supra* note 24 at para 69.

[49] *Ibid*.

[50] Knopff, *supra* note 45 at 3.

[51] *Constitution Act, 1982*, *supra* note 4, s 46.

[52] Knopff, *supra* note 45 at 4.

[53] *Ibid* at 6.

[54] *Ibid* at 1.