

Refining Alberta's Equalization Gambit

by Rainer Knopff



MAIN CONCLUSIONS

■ Jason Kenney's threat to seek the removal of equalization from the constitution is designed less to secure its stated purpose than to shine the beam of nationally prominent negotiations on Alberta's broader fight against the ways in which governments who benefit through fiscal federalism from Alberta's resources obstruct the transport and sale of those resources.

■ Kenney rightly thinks the "duty to negotiate" declared by the Supreme Court in the 1998 *Secession Reference* will bring reluctant governments to the table, but he wrongly relies on a provincial equalization referendum to trigger that duty.

■ The *Secession Reference* is most plausibly—and most widely—read to give referendums the independent power to trigger the duty to negotiate only when the question concerns secession.

■ But the Court provides an alternative trigger for the duty to negotiate, one that applies to any amendment initiated in the manner prescribed by the Constitution Act, 1982—that is, by legislative resolution.

■ An equalization resolution by Alberta's legislative assembly would unambiguously impose the duty to negotiate.

■ Kenney must still hold his referendum—Alberta's *Constitutional Referendum Act* requires one "before a resolution authorizing an amendment to the Constitution of Canada is voted on by the Legislative Assembly"—but it is the resolution, not the referendum, that triggers the duty to negotiate.

Introduction

Jason Kenney's equalization gambit—his oft-repeated threat to seek the removal of equalization from the constitution—is not as outlandish as his critics maintain, though it could use some rethinking and fine tuning. The gambit seems silly to its critics for many reasons (Breakenridge, 2019, April 2), but especially because, as Max Fawcett colourfully puts it, “Alberta cannot, on its own, compel the rest of the country to remove equalization from the Constitution any more than it can compel the Toronto Maple Leafs to give all their best players to the Calgary Flames” (Fawcett, 2019, Oct. 31). Why? Because amending the Constitution Act, 1982 to delete section 36, which commits Ottawa “to the principle of making equalization payments”, requires the support of Ottawa and seven provinces having “at least fifty per cent of the population of all the provinces”. Impossible! But Kenney knows and concedes this. The equalization gambit's real objective, he consistently maintains, is less to pursue a quixotic constitutional amendment than to “elevate” Alberta's broader “fight for fairness to the top of the national agenda” (Slade, 2018, Sept. 7).

The unfairness Kenney chiefly wants to fight is not that Alberta taxpayers contribute upwards of \$20 billion a year more to the federal treasury than they receive in federal services; indeed,

Kenney portrays Albertans as “proud to have helped to build schools, hospitals, roads, to fund pensions, health care and social programs from coast to coast” (Kenney, 2019, Dec. 10). What is manifestly unfair, what Alberta “cannot abide” in his telling, is other governments strangling the energy-industry goose that lays the golden eggs of fiscal transfer. Fairness will be established only when governments who “want to benefit from Alberta's resources” stop obstructing “the transport and sale of those resources” (Kenney, 2019, Aug. 19).

Completing the Trans Mountain Pipeline would be a move toward fairness. So would ending the ban on tanker shipments from the west coast “of only one export product—bitumen—produced in only one province—Alberta” (Kenney, 2019, Dec. 10), while tanker imports of OPEC oil to the east coast continue unimpeded. Substantial modification of what Kenney calls Ottawa's “no more pipelines law” would also contribute to fairness. Only if such moves do not occur in a reasonable time frame does Kenney intend to launch the proposed removal of equalization from the constitution. This “wouldn't guarantee a particular outcome”, he concedes, but it would shine the beam of nationally prominent constitutional negotiations on Alberta's fairness claims (Clarke, 2019, March 14).

Triggering the constitutional duty to negotiate: referendums *and* resolutions

The problem, of course, is how to get other governments, especially those who do not concede Alberta's claims, to the negotiating table. This is where rethinking and fine-tuning is needed.

Kenney thinks holding a provincial referendum on an equalization amendment will do the trick. In the 1998 *Secession Reference*, the Supreme Court declared that, if a clear majority of Quebecers

voted affirmatively on a clear question to pursue secession, other governments would have a duty to negotiate the required constitutional amendments in good faith (*Reference re Secession of Quebec*). This duty, Kenney maintains, is triggered whenever “provincial voters seek a constitutional amendment through a referendum”, not just when they seek secession (Kenney, 2018, Dec. 16).

This is also how the *Secession Reference* was understood by the 2001 *Alberta Agenda*. According to that document, the Court's 1998 judgment obliged “the federal government and other provinces” to “seriously consider a proposal for constitutional reform endorsed by a ‘clear majority on a clear question’ in a provincial referendum” (Harper et al., 2001, April 1). The *Alberta Agenda* thus urged premier Klein to use “the Quebec *Secession Reference* to force Senate reform back onto the national agenda”. As Tom Flanagan has recently observed, premier Kenney's equalization gambit reprises the *Alberta Agenda's* senate-reform proposal (Flanagan, 2019, Nov. 22).

The underlying claim of both proposals—that the duty to negotiate is triggered by referendums on constitutional reform other than secession—has been hotly disputed. Emmett Macfarlane speaks for many constitutional scholars (Markusoff, 2019, April 9) when he denies “that a referendum would force the rest of Canada to negotiate” an equalization amendment. “The rule articulated in the Quebec *Secession Reference*”, he insists, “applies only to secession” (Macfarlane, 2019, Oct. 22).

I have come to see both sides in this dispute about the *Secession Reference* as partly right (hence also partly wrong)—and yes, I know this means I have changed my mind since I signed the *Alberta Agenda* in 2001. The Court's judgment, I now concede, gives referendums the independent power to trigger the “duty to negotiate” only

when the question concerns secession. A referendum on senate reform or equalization will not, by itself, compel other governments to come to the negotiating table.

At the same time, the Court sets out a non-referendum-based trigger for the duty to negotiate that applies to any and all amendments requiring multilateral consent. This alternative trigger, which Kenney's critics do not mention, is less debatable and thus harder for other governments to ignore. It provides an easy fix for Kenney's problem, a way to put his equalization gambit on a more solid footing.

The alternative trigger appears first, at paragraph 69 of the *Secession Reference*, where the Court declares that “the Constitution Act, 1982” confers on “each participant in Confederation” the “right to initiate” amendments, adding immediately that this right “imposes a corresponding duty on the participants in Confederation to engage in constitutional discussions”. Whereas the “right to initiate” is textually explicit in the constitution, its corollary duty to discuss “is inherent in the democratic principle which is a fundamental predicate of our system of government” (*Reference re Secession of Quebec*: para. 69).

Note the general language of paragraph 69. Whenever a participant initiates an amendment requiring multilateral consent, the other relevant parties are obliged to discuss it. Any participant and any amendment—nothing in this formulation limits the duty to negotiate to a secession amendment. But neither does this formulation say anything about referendums triggering the duty to negotiate. Paragraph 69 invokes the “right to initiate” conferred by the Constitution Act, 1982. The relevant provision of that Act is section 46, which specifies that amendments requiring multilateral consent “may be initiated either

by the Senate or the House of Commons or by the legislative assembly of a province.” A “resolution” by any of these legislative bodies is the constitutional “initiating” mechanism, and thus what triggers the paragraph-69 duty to negotiate (Constitution Act, 1982: ss. 38, 39, 41, 42, 43). At this point in its judgment, the Court has clearly established a duty for other jurisdictions to discuss amendments initiated by the legislative resolution of any one of them, including a resolution proposing the deletion of equalization from the constitution.

Only after this resolution-based duty to negotiate is in place does the Court turn its attention to referendums. It begins by emphasizing their subordinate status in the process of constitutional amendment. A referendum, the Court acknowledges, “may provide a democratic method of ascertaining the views of the electorate on important political questions” but, lacking any “direct role or legal effect in our constitutional scheme”, it cannot circumvent the legislatively controlled process of constitutional amendment (*Reference re Secession of Quebec*: para. 87). Far from giving referendums an independent power to trigger the duty to negotiate, this initial argument weighs against it. Without more, the general duty to negotiate established in paragraph 69 remains resolution based.

Of course, there is more. Things change at paragraph 88 of the judgment, where the Court announces that “the clear expression of the desire to pursue secession by the population of a province would give rise to a reciprocal obligation on all parties to Confederation to negotiate constitutional changes to respond to that desire” (*Reference re Secession of Quebec*: para. 88). A secession referendum, at least, *can* independently trigger the duty to negotiate.

And *only* a secession referendum can do so, add critics of the *Alberta Agenda* and Jason Kenney’s equalization gambit. The Court, they insist, never confers on other referendums the power to trigger negotiations that paragraph 88 gives to secession referendums. Yes it does, counters the other side, and especially in paragraph 88. It is paragraph 88 that enables a referendum “to force” national discussions on senate reform, according to the *Alberta Agenda*, and that now supports a referendum “to remove equalization from the Canadian Constitution” according to Wheatland County (east of Calgary) (Fieldberg, 2019, Nov. 6).

We obviously need a closer look at paragraph 88 (divided here into three parts to facilitate analysis):

88 The federalism principle, in conjunction with the democratic principle, dictates that the clear repudiation of the existing constitutional order and the clear expression of the desire to pursue secession by the population of a province would give rise to a reciprocal obligation on all parties to Confederation to negotiate constitutional changes to respond to that desire.

The amendment of the Constitution begins with a political process undertaken pursuant to the Constitution itself. In Canada, the initiative for constitutional amendment is the responsibility of democratically elected representatives of the participants in Confederation. Those representatives may, of course, take their cue from a referendum, but in legal terms, constitution-making in Canada, as in many countries, is undertaken by the democratically elected representatives of the people. The 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.

The clear repudiation by the people of Quebec of the existing constitutional order would confer legitimacy on demands for secession, and place an obligation on the other provinces and the federal government to acknowledge and respect that expression of democratic will by entering into negotiations and conducting them in accordance with the underlying constitutional principles already discussed. (*Reference re Secession of Quebec*: para. 88)

Both the already quoted opening sentence and the concluding sentence of paragraph 88 establish that a *secession* referendum has the independent power to trigger the obligation to negotiate, but neither sentence generalizes that power to referendums outside the secession context. Had paragraph 88 contained only these two sentences, it would not enable provincial referendums on senate reform or equalization to force other governments to the negotiating table.

But the middle portion of paragraph 88 *does* say in more general language—language not limited to the secession context—that the “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”. At the same time, however, this part of the paragraph underlines the primacy of “democratically elected representatives” in initiating amendments that trigger the more general duty to negotiate. True, elected representatives “may take their cue from a referendum” but the Court portrays this cueing

function as decidedly subordinate to the legislative role. Rather than establishing a generalized referendum-based duty to negotiate, the middle portion of paragraph 88 arguably does no more than restate the resolution-based duty for amendments outside the secession context (as does a similar passage in *Reference re Secession of Quebec*: para. 150).

Why, though, would the Court restate the resolution-based duty to negotiate in a paragraph obviously devoted to establishing a referendum-based duty? Even if the opening and closing sentences mention only the example of secession referendums, does the general principle they convey not apply to the whole paragraph? If so, the function of paragraph 88 is to add a referendum-based duty to negotiate to the resolution-based duty for all amendments requiring multilateral consent. This reading underlies the *Alberta Agenda*'s senate-reform proposal and Jason Kenney's equalization gambit.

Alternatively, paragraph 88 shows the Court going out of its way to limit the newly proclaimed referendum-based duty to negotiate to secession referendums, leaving all other multilateral amendments—those discussed in the paragraph's middle section—subject to the resolution-based duty. After all, paragraph 88 occurs in a part of the judgment sub-headed “The Operation of the Constitutional Principles in the *Secession Context*” (emphasis added). The paragraph's explicit references to a referendum-based duty to negotiate emphasize secession referendums, as do all of the judgment's subsequent references to the referendum-based duty. Neither in paragraph 88 nor anywhere else in the judgment does the Court plainly say that referendums on other issues of constitutional reform can independently trigger the duty to negotiate.

Conclusion

One need not concede victory to the secession-only view of the referendum-based duty to negotiate, as I now do, to conclude that premier Kenney should refine his equalization gambit. It is enough to acknowledge the plausibility of this view and its widespread support in the community of constitutional scholars—enough plausibility and support to give reluctant governments an excuse to ignore an equalization referendum.

There is no similar excuse to ignore an equalization resolution by Alberta's legislative assembly. By exercising the "right to initiate" conferred by the Constitution Act, 1982 on "each participant in Confederation", a resolution would unambiguously impose the corollary duty to negotiate introduced in paragraph 69 and reiterated in paragraphs 88 and 150. Other governments could refuse this invitation to negotiate only by manifestly ignoring the Supreme Court.

Kenney must still hold his referendum—Alberta's Constitutional Referendum Act requires one "before a resolution authorizing an amendment to the Constitution of Canada is voted on by the Legislative Assembly" (Province of Alberta, 2002)—but it is the resolution, not the referendum, that triggers the duty to negotiate. To take Alberta's fight for fairness into the nationally prominent forum of constitutional discussions, Kenney needs to bring reluctant governments to the negotiation table. Adding a legislative resolution to the proposed referendum strengthens his hand; it's the better way to leverage the *Secession Reference*.

A referendum to "cue" the resolution that unambiguously triggers the duty to negotiate—that's the fix for Jason Kenney's equalization gambit.

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Rainer Knopff

Rainer Knopff, Professor Emeritus of Political Science at the University of Calgary and Senior Fellow with the Fraser Institute, has written widely on constitutional law and politics. His books include *The Charter Revolution and the Court Party* and *Charter Politics* (both with F.L. Morton), and *Human Rights and Social Technology* (with Tom Flanagan). Professor Knopff has served as a researcher and consultant for the House of Commons Standing Committee on Justice and Human Rights, the Government of Alberta, and the federal Department of Justice. He was also a member of the Governor General Consultation Committee and the federal Electoral Boundaries Commission for Alberta.

