

From Telling to Listening: A Therapeutic Analysis of the Role of Courts in Minority-Majority Conflicts

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In 1998, the Canadian federal government asked the Supreme Court to rule on the constitutionality of a unilateral Québec secession.¹ Asking the question at a time where there was no immediate plan for another referendum on the question of Québec's independence was risky.² It was a move designed to appease the "rest of Canada," not Québec.³ In fact, it angered most Québécois: The Québec government refused to participate in the hearing, arguing that nine federally appointed people had no jurisdiction to decide on the right to self-determination of the Québec people. The Québec media presented the federal argument as an indicator that the constitution of Canada was a "prison" for Québec, an Alcatraz from which Québec could not escape. While the case was being heard, Québécois demonstrators picketed in front of the Supreme Court building, protesting the Court's jurisdiction over the right of self-determination of the Québec people.

On August 20, 1998, the Supreme Court of Canada issued its decision.⁴ Québec did not have the right, under the current Canadian constitutional arrangement, to unilaterally secede, nor did it have that right at international law. However, the court went on to say that a "clear" majority vote in Quebec on a "clear" question in favor of secession would confer "democratic legitimacy on the secession initiative which all of the other participants in Confederation would have to recognize."⁵ Both

sides, the Québec separatists and the spokespersons for the federal government alike, cheered.⁶ Although the debate is far from over on the Québec-Canada relationship, and the implications of the decision continue to be debated,⁷ there was nevertheless a certain sense of relief and peace that emerged after the decision. At a minimum, the predicted outcry and violence did not occur. This article is an attempt to explain why.

I argue that the approach of the Supreme Court of Canada as an appellate court was more "therapeutic" than the one it had used in the past to deal with Québec issues. In the first part, I develop the idea of the therapeutic role of an appellate court dealing with minority-majority disputes. I argue that courts should move from being magical "tellers of the truth" to becoming more process-oriented listeners, translators, educators and, if possible, facilitators. I expose what I see as two powerful insights from the therapeutic jurisprudence movement that could be applicable to the resolution of minority-majority disputes. In the second part, I try to apply this hypothesis of the process-oriented listener to the treatment of two Québec issues by the Supreme Court of Canada. I first situate briefly the decisions in the history of Québec-Canada conflicts, and then contrast them. I conclude with some observations on the potential uses of a "therapeutic" approach in minority-majority disputes.

Footnotes

1. Under Canadian constitutional law, it is possible for the federal government to ask questions of the Supreme Court. See Supreme Court Act § 53, R.S.C. C.S.-26 (1985). The provincial governments have similar powers to refer questions to their respective Courts of Appeal. The limits of such reference power, as it is called, were hotly debated. See also *Ref. re Secession of Québec*, 2 S.C.R., 217 (1998). The "amicus curiae," who represented the Québec side, insisted that such a hypothetical question (although a separatist government is in power in Québec, it lost by a small margin its last referendum on the question) ought not to have been referred to the Supreme Court. The court decided to answer the question on the basis that it raised some interpretation question about the constitution of Canada. *Id.* at 234; see generally, *Id.* at 4-15. [The court distinguished the U.S. Supreme Court precedent of *Muskrat v. United States*, 219 U.S. 346 (1911).]
2. There have been two referenda on the question of Québec's sovereignty, which were both won by the "no" side, the side against the secession of Québec from Canada. However, while the 1980 referendum was won by the "no" side at 60%, in 1995, the "no" side gathered only 50.5% of the votes, prompting the hypothesis that a

third referendum would see a "yes" majority.

3. The "Rest of Canada" or (ROC) is an expression which describes the 9 provinces and 3 territories outside of Québec. It is preferred to the expression "English Canada," which ignores the fact that there are over 500,000 Francophones in Canada outside of Québec, and several other groups, Aboriginal and others, who speak neither French nor English.
4. See Reference Re Secession of Québec, *supra* note 1.
5. *Id.* par. 88.
6. See Robert Young, *A Most Politic Judgment*, 10 CONST. FORUM 14 (1998) for an explanation as to the reasons of such unanimity.
7. On December 10, 1999, the federal government introduced a bill in the House of Commons attempting to prescribe the conditions of "clarity" required for the obligation to negotiate to arise (*An Act to give effect to the requirements of clarity as set out in the opinion of the Supreme Court*). The Québec government replied by introducing its own bill proclaiming the right of the Québec people to decide alone, the "nature, scope and mode of exercise of its right to self-determination." See Bill 99, §3, [*An Act respecting the exercise of the fundamental rights and prerogatives of the Quebec people and the Quebec state*] (December 15, 1999).

PART I - THE ANALYTICAL FRAMEWORK: APPLYING THERAPEUTIC JURISPRUDENCE TO MINORITY-MAJORITY CONFLICTS

The therapeutic jurisprudence movement⁸ posits, quite radically in the context of common-law systems,⁹ that there is no reason why people should feel “worse” after dealing with the justice system. In fact, if at all possible, they should feel better. Therefore, the justice system should be concerned about the effects it has on people and their mental health.¹⁰ It should try to minimize the damage that it does and aspire to help, not destroy, people who come in contact with it.

The movement has known a great deal of success in the context of private law,¹¹ criminal law¹² and mental health law.¹³ What is less clear is whether the insights of the therapeutic analysis are applicable to group conflicts. This has been the focus of some of my research: to see whether some of the analytical framework developed with a therapeutic jurisprudence approach could help in the context of constitutional law.¹⁴ The present part seeks first to define a model of a “therapeutic” approach. Second, it argues for its relevancy in the context of minority-majority conflicts.

A. A Therapeutic Jurisprudence Approach¹⁵

One of the basic premises of the therapeutic movement has been to refocus the role of the court from a finality to a process. It seeks to examine the psychological effects of the process on the participants. The continuity of the relationship between the

parties, or the evolution of one of the participants¹⁶ after the court process is often recognized and emphasized.¹⁷ I explore two themes of the therapeutic jurisprudence literature that could help in the context of minority-majority relationships:

1. That the process of explanation of one’s position should be valued;
2. That the continuous relationship between the parties should also be valued.

1. THE EMPHASIS ON THE PROCESS

In general, the therapeutic jurisprudence movement, with its effort to unpack what are the psychological consequences for participants, could be said to put greater emphasis on the process of adjudication than on the result of it. The movement has valued the court process not as a rule imposition ritual, but rather as a process of explaining one’s position.¹⁸ The telling of the story has been put at the center of the court process. This focus is said to allow one person to feel like a participant in a process that concerns him or her, and even to be empowered by such an experience, if possible.¹⁹

A number of consequences flow from this shift in emphasis: in order for this process of explanation to be therapeutic, it has

The telling of the story has been put at the center of the court process.

8. The therapeutic jurisprudence has been developed by David B. Wexler and Bruce J. Winick in *Therapeutic Jurisprudence as a New Approach to Mental Health Law Policy Analysis and Research*, 45 U. Miami L. Rev. 979 (1991). See also LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE (David B. Wexler & Bruce J. Winick eds. 1996).
9. In fact, the adversarial system could be said to have been predicated on the assumption that people should not want to resort to the legal system, that they should do so in last resort, and that they should find the experience unpleasant. This is a fundamental assumption of the system that has been, over the years, criticized under different guises: the system was financially inaccessible or unreceptive to concerns of “non-establishment” people, which could be said to be the basis of the feminist and race theory criticisms or class analysis.
10. David Wexler, *Reflections on the Scope of Therapeutic Jurisprudence*, 1 PSYCHOL., PUB. POL. & L. 220, 225 (1995).
11. See Daniel W. Shuman, *Therapeutic Jurisprudence and Tort Law: A Limited Subjective Standard of Care*, 46 SMU L. REV. 409, 410 (1992); B. Feldthusen, *The Civil Action for Sexual Battery: Therapeutic Jurisprudence?*, 25 Ottawa L.R. 203 (1993); N. Des Rosiers, et al., *Legal Compensation for Sexual Violence: Therapeutic Consequences and Consequences for the Judicial System*, PSYCHOL., PUB. POL. & L. 433 (1998); N. Des Rosiers & L. Langevin, *L'INDENNISATION DES VICTIMES DE VIOLENCE SEXUELLE ET CONJUGALE* (1998).
12. The therapeutic jurisprudence movement can be understood as a companion to all the new questions surrounding the re-thinking of the adversarial model and the emergence of a restorative justice, or transformative justice model. See Law Commission of Canada, *Discussion Paper on Restorative Justice* (1999), and David Carson, *Therapeutic Jurisprudence: An Alternative Approach to Issues Affecting the Criminal Justice System*, in DOES PUNISHMENT WORK?, 72 (James McGuire & Beverly Rowson eds., 1995); see also Alan Harland, *Towards a Restorative Justice Future*, in RESTORATIVE JUSTICE: INTERNATIONAL PERSPECTIVES, at 505-507 (Burt Galaway & Joe Hudson eds., 1996); Robert F. Schopp, *Integrating Restorative Justice and Therapeutic Jurisprudence*, 67 REV. JUR. U.P.R., 665 (1998).
13. See THERAPEUTIC JURISPRUDENCE: THE LAW AS A THERAPEUTIC AGENT (David B. Wexler ed., 1990). See also B. Winick, *On Autonomy: Legal and Psychological Perspectives*, 37 VILL. L. REV., 1705, 1755-68 (1992); MICHAEL L. PERLIN, *MENTAL DISABILITY LAW: CASES AND MATERIALS* (1999); BRUCE D. SALES & DANIEL W. SHUMAN, *LAW, MENTAL HEALTH, AND MENTAL DISORDERS*, 163-166 (1996); and BRUCE J. WINICK, *THERAPEUTIC JURISPRUDENCE APPLIED: ESSAYS ON MENTAL HEALTH LAW* (1997).
14. For an earlier attempt published in French, see N. Des Rosiers, *La gérance de l'incertitude en droit constitutionnel*, in LES INCERTITUDES DU DROIT/UNCERTAINTY AND THE LAW (Ejan Mackaay ed., 1999).
15. The therapeutic jurisprudence approach is fairly young and I cannot claim that the description that I give is shared by all its proponents. For a variety of points of view regarding the insights that therapeutic jurisprudence can bring: see WEXLER & WINICK, *supra* note 8.
16. Allison R. Shiff & David B. Wexler, *Teen Court: A Therapeutic Jurisprudence Perspective*, 32 CRIM. L. BULL. 342, 354 - 55 (1996).
17. For example, evidentiary rules that invite secrecy and silencing were denounced: see Kay Kavanagh, *Don't Ask, Don't Tell: Deception Required, Disclosure Denied*, 1 PSYCHOL., PUB. POL. & L., 142, 150-156 (1995).
18. Ellen A. Walman, *The Evaluative-Facilitative Debate in Mediation: Applying the Lens of Therapeutic Jurisprudence*, 82 MAR. L. REV., 155, 161 (1998).
19. Shiff & Wexler, *supra* note 16.

For the losing party, being truly heard and respected is extremely important.

to be listened to by the court, and it must be reflected in the court's decision.

(i) Listening

One can find in the therapeutic jurisprudence literature several references to the need for the tribunal to listen fully to all the concerns of the participants,²⁰ and to recog-

nize the value of such expression.²¹ In that context, there is a willingness to avoid blaming, which is seen as silencing the participants.²² The process also must acknowledge the imbalance of power in the relationship²³ and seek to re-establish an equilibrium through it, always, with the view to giving a voice to the participants. One may even posit that reaching the right "result," without having given a party a chance to explain one's position *even if that party wins*, would not be as positive as taking the time to listen to the story.

This emphasis on the process is not to devalue the result: "winning" generates powerful emotions. However, if as one would expect, the point is not that only one party feels psychologically better but all participants feel marginally better, one would want to explore not only how the winner feels but also how the loser does. For the losing party, being truly heard and respected is extremely important.

Therefore, the role of the court as a listener as opposed to the "teller of the rules" is emphasized. This listening function cannot be eliminated for reasons of efficiency because the process then loses one of its great benefits for both parties, the one that tells the story and the one that listens to it. Modelling listening is an important educational function of the judge. It forces the other side also to listen carefully and hopefully to better understand the frailties of his or her own position. The process of accommodation starts by understanding the true nature of the other side's viewpoint.

In essence, the process of explanation to the judge and to the other party values the story and the participant. It may begin the process of teaching the parties to consider seriously the other side's viewpoint. Such teaching must continue in the language of the decision.

(ii) Reflecting

The way in which the court reflects the parties in its decision matters to them, as well as to the rest of society. The decision could be said to be a "letter to the loser," designed to explain why he or she lost but also to help the acceptance of the reality and the recognition that a transition must occur.

A therapeutic analysis subjects the language used by the court to scrutiny,²⁴ not so much to discover the intricacies of a rule or principle, but rather to examine whether it truly reflects the positions of the parties and does not destroy them in the process.²⁵ This analysis of language will be carried out here. It should be completed by empirical research studying the impact on the participants over time. The idea of empirical research in the context of majority-minority disputes will require more studies. For the time being, the use of newspaper coverage and editorials may be useful to ascertain the impact of the language of a decision.²⁶

A true reflection of the parties' position and concerns matters when one considers that there are some long-term consequences to a judicial battle: the parties' relationship does not end with the decision but instead evolves in light of it. This concern for the relationship between the parties is the second aspect that I want to discuss.

2. THE EMPHASIS ON THE RELATIONSHIP

The therapeutic jurisprudence movement has valued the idea of looking at the relationship between the parties in its "continuous aspect" as opposed to breaking the relationship into a series of isolated court battles.²⁷ It could be seen as valuing the way in which the court can enhance the healthy aspects of the relationship between the parties.²⁸ In that context, it may want to avoid "destroying" one party. Such destruction kills the relationship: if there is only one person left, there is no relationship.

This approach is particularly helpful when people cannot simply ignore each other—for those who will meet again with other disputes to solve. Ideally, one would want the court process to teach the parties how to solve their own disputes in a manner that is non-abusive and respectful of the values embodied in the legal rules. This wish to enhance the parties' capacity to resolve their disputes themselves is where there is an overlap between the restorative justice movement and therapeutic jurisprudence.²⁹

20. Des Rosiers, et al., *supra* note 11; Alexander Greer, et al., *Therapeutic Jurisprudence and Patients' Perceptions of Procedural Due Process of Civil Commitment Hearings*, in *LAW IN A THERAPEUTIC KEY* 923, 926 (1996). See also Lenore M. J. Simon, *A Therapeutic Jurisprudence Approach to the Legal Processing of Domestic Violence Cases*, 1 *PSYCHOL., PUB. POL'Y & L.* 43, 75 (1995). See Michael A. Town, *Court as Convener and Provider of Therapeutic Justice*, 67 *REV. JUR. U.P.R.* 671 (1998), for a judge's perspective.

21. Tom R. Tyler, *The Psychological Consequences of Judicial Procedures: Implications for Civil Commitment Hearings*, 46 *SMU L. REV.*, 433 (1992).

22. Des Rosiers, et al., *supra* note 11; Simon, *supra* note 20.

23. Des Rosiers, et al., *supra* note 11, at 444.

24. *Id.* at 448.

25. Simon, *supra* note 20; See Marc W. Patry, et al., *Better Legal*

Counseling Through Empirical Research: Identifying Psycholegal Soft Spots and Strategies, 34 *CAL. W. L. REV.*, 439 (1998), for the implications for the role of the lawyer.

26. One of several studies currently under way attempts to monitor the way in which English-speaking Ontario papers deal with Québec questions. The study analyzes the language used by the editorials and news crews to describe Québec issues: how they assess the complexity of the issues, good faith of the actors, and acknowledgment of difference of opinions among francophone Québécois.

27. See K. E. Maxwell, *Preventive Lawyering Strategies to Mitigate the Detrimental Effects of Clients' Divorces on their Children*, 67 *REV. JUR. U.P.R.* 137 (1998)

28. Michael A. Town, *supra* note 20.

29. See Law Commission of Canada, *supra* note 12; R. Schopp, *supra* note 12.

I now move to explain why I think that these two major characteristics could help in the context of constitutional law.

B. The Application of a Therapeutic Jurisprudence Approach in the Context of the Resolution of Minority-Majority Conflicts.

The resolution of minority-majority conflicts is particularly apt to be analyzed through the prism of therapeutic jurisprudence, because no case truly solves the conflict between the minority and the majority. A constitutional court is a forum, a place where public policy is analyzed slightly differently than on the political scene.³⁰ The emphasis on both the process and the relationship is helpful in this context.

1. THE EMPHASIS ON THE PROCESS

Truly listening to the position of the parties in all its complexity should be an objective of constitutional decision-making since the reflection of such positions becomes part of the record of the relationship between the majority and minority. Future generations define themselves not only by reading speeches, political platforms, and articles, but also by reading court decisions. The language of the decision educates not only the parties, the lawyers, and law professors, but also the general public now and in the future. To deny the complexity of an argument makes for a facile resolution, but one that may miss the opportunity to translate the minority's concern for the majority and vice versa. The exercise can benefit current understandings and definitely future ones.

A language that destroys one participant serves to exacerbate his or her sense of having been exploited, of being misunderstood, and of having no hope of being respected. When one deals with groups, this creates a deep malaise and a further loss of a sense of belonging. It often feeds the fuel of the extremists within the group who had argued against the compromise, against participation in the court process. This rejection of justice as a value and avenue for resolution of conflicts is very dangerous: it foreshadows serious conflicts and arbitrariness within the group and with its dealings with the outside world.

We should value the constitutional court as a forum, where

actors debate issues of concern to them when they have not been heard elsewhere, or, at least, when they argue that they have not. It is a place where democracy is enhanced by the confrontation of reasons why one group should prevail over another.³¹ It is a place where the majority must justify its choices, where a minority is able to call on the majority to hear it in a relatively equal place (at least, physically, they are equal in front of the court: they have equal time to speak, an equal number of pages to write their arguments, and ought to be treated with equal respect). The process in the courtroom also serves to enhance public understanding and public discussions on the subject of the accommodation of the relationship.³²

In reflecting the parties' positions, courts often create "tests" that make the resolution appear rational and incontrovertible. Creating tests that undermine the sense of identity in a minority group is damaging.³³ It fosters the suspicion that the law is foreign, designed by the majority to oppress it, to justify its continuing power and to be used as a tool of control.³⁴

2. THE EMPHASIS ON THE RELATIONSHIP

It is also important to value the continuity of relationships. For example, whether they are described as "a long series of visits to the dentists"³⁵ or not, Québec-Canada disputes will continue. Other conflicts in constitutional law also have high recurrence levels. The relationship between the provincial and federal governments with the Aboriginal people of Canada continues to be punctuated by court challenges. The conflict is never "solved" by the court battle. To assert a clear winner is always dangerous in the context of minority-majority relationships: we know from experience that assimilation or the crushing of minority discourses re-surface elsewhere. This is particularly true in Canadian history.

Relationships between minority and majority cannot only

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30. See N. Des Rosiers, *Federalism and Judicial Review*, in M. Westmacott & H. Mellon, *CHALLENGES TO CANADIAN FEDERALISM* (H. Mellon & Westmacott eds., 1997). Others have described it as a "dialogue." See Peter Hogg, *The Charter Dialogue Between Courts and Legislatures*, L. TIMES, Jan. 29 - February 4, 1996, at 10. I am not arguing that the constitutional court process could not have other aims, e.g., articulating the values that citizens share (see Jean Leclair, *The Supreme Court, The Environment, and the Construction of a National Identity: R. v. Hydro-Québec*, 4 REV. CONST. STUD. 372 [1998]), or providing needed answers in a relatively quick way. What I am arguing is that it is better to recognize its potential as a forum than to deny this possibility and continue to clothe it with only the "teller" function.

31. See Des Rosiers, *supra* note 14, for a further exploration of such a role.

32. *Id.*

33. An example of when the courts have not used a "therapeutic" process in constitutional law will help explain the concept of listening to the voice of the parties. In the context of aboriginal

rights, in the case of *R. v. Vanderpeet*, 2 S.C.R. 507 (1996), the majority of the S.C.C. established the date of contact with the European culture as the date at which an aboriginal right must have existed to be constitutionally protected. The Aboriginal claimant must prove that at the time of contact with the European culture, there was in existence an aboriginal practice that was integral to the aboriginal culture. This is an example where the court does not "hear" the Aboriginal perspective. For the Aboriginals, to have their right defined by the date of contact with the European culture is symbolically unacceptable. See the dissent of Madam Justice MacLachlin, *id.* at 538. Why should they define themselves through the travels of the Europeans? Why should they have noticed at what time the European had entered into their lives? Why should they have recorded that fact?

34. See Michel Rosenfeld, *JUST INTERPRETATIONS: LAW BETWEEN ETHICS AND POLITICS*, ch. 7 (1998), for the importance of law that addresses the pluralism of interests.

35. A previous separatist premier from Québec has so described the process of Canada-Québec discussions.

A process-driven answer should also allow the parties to continue their discussions outside of the courtroom

be massaged in the courts. It is too costly and too sporadic an exercise. The two sides must learn to develop tools to accommodate their respective concerns. The court can play a helpful role in legitimizing the concerns, framing the dispute around a series of hopefully shared values, identifying the pitfalls of each position and

possibly articulating processes for resolving future disputes. It cannot pretend to have all the answers.

Tests developed by courts ought to enhance the recognition of the real questions between the parties as opposed to engaging in “definition wars.”³⁶ It should also help the parties argue their positions better and recognize the consequences of their positions for other groups in society. A process-driven answer should also allow the parties to continue their discussions outside of the courtroom to refine the resolution to the problem.³⁷ This possibility of fine-tuning the judicial pronouncement is very helpful: it makes for a more practical outcome, concretely linked with all the preoccupations of the parties.

I now move to analyze two decisions of the Supreme Court of Canada that dealt with symbolically charged issues for Québec in light of the proposed framework.

PART II - A CASE STUDY: THE SUPREME COURT ON QUÉBEC-CANADA CONFLICTS

The question of the constitutional status of Québec in Canada has always been controversial. Is it a province—like the nine others—with a special history but no special constitutional consequences? Or is the nature of the historical attachment such as to create special constitutional responsibilities? Before looking at the two judicial pronouncements on this question, I briefly review the background to Québec-Canada relationships.

36. *Supra* note 13.

37. A positive example, in the Aboriginal context, is the requirement that governments “consult” with Aboriginal communities as part of their justification for a policy that otherwise infringes an aboriginal right. See *R. v. Sparrow*, 1 S.C.R. 1075 (1990). This is a process-based suggestion that deals with the true question, which is the way in which Aboriginal people were in the past excluded from decision making that affected them. It does not provide the answer, it invites the parties to find the solution by themselves.

38. What follows is an attempt to summarize a very complex history for an American reader. It certainly does not do justice to the richness of the context.

39. There are over 500,000 Francophones outside of Québec and a little less than 400,000 Anglophones in Québec. Some Aboriginal peoples have kept their native language, others use French or English. There are as well several other cultural minorities, which make out the cultural mosaic of Canada. This paper deals mostly with the French-English debate, and the particular position of

A. Background³⁸

Québec is the only province in Canada where Francophones composed the majority of the population.³⁹ Francophones are, for the most part, the descendants of the early French colonists in the sixteenth to eighteenth centuries. After the defeat of the French in North America, the British Crown has had ambivalent positions toward the French inhabitants of North America. It needed their support, particularly as U.S. independence threatened to limit the influence of Britain. It also needed the expertise acquired by the French in developing the land and dealing with the Aboriginal nations. However, over the years, as the usefulness of this help was perceived to decrease, it grew worried about the cultural cohesion that could lead to revolutionary movements. Some attempts to assimilate the French were undertaken, but ultimately failed.

In 1867, the federal structure that Canada continues to have today was adopted, and the province of Québec, with a definite French majority, was created. In the Québec conception of history, 1867 was the joining of “two founding partners,” the French and the English.⁴⁰ The provincial powers, given to Québec and the three other initial provinces, were designed to allow for the control of the development of the regional cultures. This article is not the appropriate place to give a full account of the history of Canadian federalism, but suffice it to say that what was then a French-English debate became, in a way, a Québec-Canada debate. Over time, Québécois claimed that with the addition of six provinces to the initial four, their power at the federal level had decreased. The lack of bilingualism at the federal level made it impossible for Québécois to really influence federal politics unless they spoke English. As Canada grew, the relative population base of Québec, and more so of its Francophone majority, decreased.⁴¹ However, in Québec, the power of the English minority diminished as the Francophone population became better educated and economically stronger.

The independence movement in Québec began in the 1960s and the first referendum in 1980 had a 60% majority saying “no” to the proposal toward the sovereignty of Québec. However, during the referendum campaign, the federal Prime

the Aboriginals in that context.

40. This idea of the two founding peoples, which ignores the fundamental place of the Aboriginal Nations, is now recast as the union of “three peoples.”

41. Several incidents at the beginning of the twentieth century accentuated the gap between the French and the English. Some English-speaking provinces banned school teaching in French, attempting to assimilate their Francophone minorities. While a majority of Francophones were not in favor of conscription during the First World War, conscription went ahead anyway, and Québec soldiers were drafted. An advocate for Francophone and Metis rights in Manitoba, often portrayed as a hero, Louis Riel, was tried and hung in Western Canada. Each of these events is a highly complex and nuanced conflict that would require much greater explanation. The point is that in the way in which Québécois understand their history, these events are viewed as an indication that they are not understood by the English majority in Canada, and cannot trust the majority to always act in their interest.

Minister promised “constitutional change” to Québécois, in order to diffuse the rhetoric that voting “no” was voting for the constitutional *status quo*. And there was change. Federal proposals that would have British Parliament finally relinquish the power it had to make laws for Canada were drafted. They included a formula for the amendment of the constitution as well as a Charter of Rights. Although there was some protection for linguistic minorities in the proposals, the amending formula was seen as unsatisfactory for Québec. The process of adopting the federal proposals, initially opposed by several provinces, was restrained by the Supreme Court of Canada, which decided that a “substantial amount of provincial consent” was conventionally required for such sweeping amendments to be enacted.⁴² After negotiations, modifications, and additions to the federal proposals, nine out of ten provinces agreed with the federal package. Only the province of Québec did not agree. Despite this opposition, the federal government proceeded and England passed the *Canada Act*, which became binding on the federal government and all provinces, including Québec.

The Québec government moved to challenge the enactment of the act, on the basis that there was a constitutional convention in Canada that required that Québec consent to any constitutional amendment that would affect its powers. “A substantial amount of provincial consent,” it argued, could not be indifferent to the special minority status of Francophones in Canada and the role of Québec to protect the French culture. The theory of the “two founding peoples” was referred to. In 1982, in the *Québec Veto Reference*,⁴³ the Supreme Court of Canada rejected Québec’s position: the province of Québec had no historical special status that would allow it to veto amendments to the constitution even if such amendments, as they were, affected its powers.⁴⁴

I have chosen to analyze this decision because it has a great symbolic importance for Québécois and could be viewed as key to the “sense of rejection” that underlies the support for the nationalism movement in Québec.⁴⁵

B. The Decision in the *Québec Veto Reference*

An analysis of the language and the structure of the *Québec Veto* decision is interesting. First, the lawyers representing Québec are blamed for the loss. Second, the Court emphatically imposes the burden on Québec, and then states that Québec did not meet the burden. There is generally a denial of the complexity of the problem and an undermining of the value of Québec’s position. Finally, the focus of the decision is on the past, not the future. I review each of these aspects with examples and conclude, predictably, with how the decision scores on a therapeutic scale.

42. The *Patriation Reference*, 1 S.C.R. 753 (1981).

43. 2 S.C.R. 793 (1982).

44. Young, *supra* note 6.

45. Robert Young, *Québec Secession and the 1995 Referendum*, in *CHALLENGES TO CANADIAN FEDERALISM* (H. Mellon and Wetmacott eds., 1997).

1. BLAMING THE LAWYER

In the *Veto Reference*, the lawyers for the province of Québec are often blamed: they have presented an incoherent position,⁴⁶ they have read sentences out-of-context, they have over-simplified and presented an erroneous view of the test elaborated by the leading British constitutional expert, Jennings.

This exercise has a silencing impact on the minority. It is as though the court is saying: “I could not hear you because you had a bad lawyer. It is your own fault if you lose.” The examples in the *Veto Reference* are particularly virulent when the Court notes that the lawyers representing Québec quoted the federal Minister of Justice Guy Favreau out of context when he said:

. . . the [amending] procedure does not impose any legal constraint that thwarts the traditional forces of constitutional change; on the contrary, it mirrors these forces with utter realism. *In the past, Ottawa has never amended the Constitution on matters touching essential provincial rights (as defined in clause 2 of the formula) without the consent of all the provinces.* Given the current—and I think, fruitful—resurgence of provincial initiative, a change in this convention becomes inconceivable. However much some people may regret this convention, it remains an undeniable political reality. The formula does not invent that reality; it merely acknowledges it.

However, it takes the court several pages to explain how such a sentence does not mean what it says, and that contrary to what it seems to say, there had *never been* any recognition of a right by federal political actors of a convention not to amend the constitution without the consent of a province that was going to be affected by the change.

2. THE BURDEN ON QUÉBEC

The structure of the decision is quite traditional: the rules are exposed and then the court concludes that the evidence presented does not satisfy the burden. Again, the minority is blamed for not understanding the rules of the majority well enough, and for not securing the proper evidence.

One could argue that the process of establishing rules a *posteriori*, while making them look like they always existed, is a traditional legal reasoning approach. I am not debating the

It is as though the court is saying: “I could not hear you because you had a bad lawyer.”

46. “While both submissions [from Québec] seek the same answer to the constitutional question, they are alternative ones, as they have to be, for not only are they quite distinct from each other, they actually contradict one another.” 2 S.C.R. at 801.

[I]n the . . .
Québec Veto
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“therapeutic”
perspective

approach. I am reflecting on the allocation of the burden, its scope, and the blaming that goes on when the burden is not met. In the *Veto Reference*, the imposition of the burden on Québec is not obvious. The court had, in the past, concluded that there was uncertainty as to the rules surrounding constitutional amendment.⁴⁷ Why is it that the burden to con-

vince is imposed on the party attempting to maintain a traditional practice, i.e., securing approval of the province affected? Why isn't it on the party seeking to change this traditional practice?

3. THE DENIAL OF THE COMPLEXITY OR OF AMBIGUITY

In its decision, the Supreme Court concluded that the lawyers for Québec “failed *completely* to demonstrate compliance with the *most important* requirement for establishing a convention, that is acceptance or recognition by the actors in the precedents. . . . Neither in his factum nor in oral argument did counsel for the appellant quote a single statement made by any representative of the federal authorities recognizing . . . that Québec had a conventional power of veto.” (Emphasis added.)

There is clearly a desire to make vigorous pronouncements that without any doubt Québec had no veto right. Absolutely not. No ifs, ands, or buts. The matter was put to rest. The solution was found, and Québec had lost. The harshness of the tone and the lack of nuance is used not to placate Québec, but to silence it. One may make the hypothesis that the court did not want any doubt to be left as to the constitutional validity of what was to become the new Constitution of Canada, even if this clarity was to be achieved at the detriment of a nuanced presentation of the parties' positions. Interestingly, the destruction of the argument in court did not “solve” the problem, it just resurfaced in more emotional political speeches and a refusal later by the Québec government to recognize the legitimacy of the Supreme Court.⁴⁸

4. THE EMPHASIS ON THE PAST AS OPPOSED TO THE FUTURE

In the *Veto Reference*, the emphasis on the past is particularly clear. Québec loses because no federal official has ever recognized the principle of the duality of Canada, despite the fact that numerous scholars and politicians had done so. Because of the past, it cannot assert its power. Because of others, it cannot get its veto. Its position depends only on the willingness of the others to agree. The decision does not suggest any tool that could enhance the process to ensure that the party could

be heard or understood. There is no hope given, no mechanism by which the loser can be made whole or can proceed outside of its loser status. The wisdom has come, the magic has played itself.

In conclusion under this part, one could argue that, in the decision from the *Québec Veto Reference* case, the court failed to adopt a “therapeutic” perspective. It did not acknowledge the uncertainty and the complexity of accommodating a minority's wishes within a majoritarian context. It did not always acknowledge Québec's voice, nor did it frame the debate in a helpful way. In fact, it could be said that it sought to “destroy” the position of Québec. It put itself in the position of the “know-it-all” magical teller of the rules.

In the next section, I explore how the court did better in the *Sécession Reference* and how it could, in the future, continue in this vein.

C. The Québec Secession Reference

The case involved a reference from the federal government to the Supreme Court of Canada on three questions:

1. Under the Constitution of Canada, can the National Assembly, legislature, or government of Quebec affect the secession of Québec from Canada unilaterally?
2. Does international law give the National Assembly, legislature, or government of Québec the right to affect the secession of Québec from Canada unilaterally? In this regard, is there a right to self-determination under international law that would give the National Assembly, legislature, or government of Québec the right to affect the secession of Québec from Canada unilaterally?
3. In the event of a conflict between domestic and international law on the right of the National Assembly, legislature, or government of Québec to affect the secession of Quebec from Canada unilaterally, which would take precedence in Canada?

In response, the Supreme Court decided that Québec did not have the right to unilaterally secede at constitutional law nor did it have that right at international law. The court developed the idea, however, that a “clear” majority vote in Quebec on a “clear” question in favor of secession would impose on the government of Canada an obligation to negotiate with the Québec people.

Several aspects of the language in the decision reflect a stark contrast to the approach used in the *Veto Reference*. It is helpful, however, before proceeding to the analysis of the decision to situate the context in which it was issued.

The *Québec Veto Reference* decision discussed above was symbolically highly problematic for federalists (the non-separatists) in Québec. They were elected to power in 1984 and sought to propose constitutional changes that would have had the effect of erasing this symbolic non-adherence of Québec to the new Canadian constitution. In 1988, the “Meech Lake Accord” was agreed to by the federal and the ten provincial governments. It included five proposals to accommodate

47. *Patriation Reference*, *supra* note 42.

48. The Québec government refused to participate in the hearing of

the *Secession Reference* case and the court had to appoint an *amicus curiae* to present Québec's position.

Québec. The accord was not approved by three provincial legislatures, and hence did not become part of the Canadian constitution in accordance with the rules established in the 1982 amending formula. This was perceived as a serious rejection by Québécois. A second attempt at changing the constitution to accommodate Québec and other groups was made in 1992.⁴⁹ The “Charlottetown Accord” was submitted to a referendum across Canada; it failed to gather enough support and did not become part of the Canadian constitution, either.

In 1995, with a separatist government elected in Québec, a second referendum on the issue of Québec’s sovereignty was called.⁵⁰ The arguments were that Canada neither understood nor wanted Québec, that the unharmonious Québec-Canada marriage had gone on long enough, and that an amicable divorce was appropriate. The federalists thought that they would win easily: the citizenry seemed to have tired of referenda and to be more interested in the economy or in social issues. However, in the middle of the referendum campaign, a popular figure, Lucien Bouchard, took the lead of the separatists forces. On referendum night, the federalist side barely won: the final results were 50.6% for the “no” side and 49.4% for the “yes” side. The “rest of Canada” was astonished: how could it have been so close? What would have happened if the “yes” side had won? There was a sense that no planning for the “after referendum day” had really been done and that the federal government had been too passive in its approach on the issue.

The federal government then developed a strategy designed to deal with the Québec question. It would attempt to continue on the road to accommodation (Plan A), while creating some pressures in the public opinion about the risks of separation (Plan B). Part of Plan B was to ensure that Québécois knew the real costs of separation. The true economic costs have been debated for decades, the federal government wanted to pursue the idea that the Québec sovereignty project could not be done “legally” and hence appeal to the Québec public’s insecurities of such illegality. Plan B had some symbolic costs as well, such as the Québécois who were “scared” into voting for a status quo that did not respect them.

Nevertheless, the federal government pursued the idea of asking the Supreme Court of Canada to rule on the constitutionality of a unilateral Québec Secession. The Québec govern-

ment refused to participate in the hearing. Eventually the court had to appoint an *amicus curiae* to present Québec’s side. Me André Jolicoeur, a separatist lawyer, first argued that the court had no jurisdiction to hear the case and, in the alternative, that the democratic principle ought to be recognized as giving the Québec people the right to secede if it so decided.⁵¹ The federal government was arguing that the principle of the rule of law⁵² prevented a unilateral secession.⁵³

[T]he Court starts by acknowledging the complexity of the issues

Although there were some criticisms that the “obligation to negotiate”⁵⁴ in case of a clear vote on secession was unwarranted judicial interventionism,⁵⁵ the decision was generally applauded.⁵⁶ I now propose to analyze the decision from a “therapeutic viewpoint” as defined earlier.

First, the Court starts by acknowledging the complexity of the issues: “the present [case] combines legal and constitutional questions of the utmost subtlety and complexity with political questions of great sensitivity.”⁵⁷ The Court then goes through a historical analysis to conclude that the principle of federalism prevents unilateral secession. However, the tone of the narration is sympathetic to Québec’s sensitivities: a famous Québec proponent of confederation, Georges-Étienne Cartier, is quoted at length⁵⁸ and Québec is described as a “distinct culture.”⁵⁹ Its distinctiveness is heralded as the reason for federalism. One may want to explore further the role of using the minority’s own narratives and histories, or to at least acknowledge their existence.⁶⁰

Interestingly, for my purposes, is the “duty to engage in constitutional discussions in order to acknowledge and address democratic expressions of a desire for change.” The Court suggests that other parties would have to negotiate if Québécois expressed their desire for independence after a referendum on a “clear” question approved by a “clear” majority of citizens.⁶¹ It then goes on to say that the process of negotiation should deal with the protection of minority interests, which would be affected by independence, and the Aboriginal interests, among others.

49. The most understandable criticism against the Meech Lake Accord had been that it only dealt with Québec’s constitutional problem and failed to provide a solution to other equally pressing problems; the Aboriginal issues, for example.

50. I use here “nationalist” or “separatist” to identify the Québécois who generally support the idea that Québec should become a separate country from Canada.

51. See B. Ryder, *A Court in Need and a Friend Indeed: An Analysis of the Arguments of the Amicus Curiae in the Quebec Secession Reference*, 10 CONST. F 9, 9-13 (1998), for a critical analysis of the submissions of the *amicus curiae*.

52. J. Leclair, *Impoverishment of the Law by the Law: A Critique of the Attorney General’s Vision of the Rule of Law and the Federal Principle*, 10 CONST. F 1, 1-8 (1998).

53. This argument was designed to “scare” Québécois who are lukewarm toward the secession: they may not want to participate in an illegal movement. See Young, *supra* note 6, at 14.

54. Alan C. Cairns, *The Quebec Secession Reference: The Constitutional Obligation to Negotiate*, 10 CONST. F 26 (1998).

55. Rob Martin, *Treating the Constitution like a Toy*, OTTAWA CITIZEN, Aug. 22, 1998, at B3.

56. See David Mullan, *It Will Stand the Test of Time*, PUB. L. (1998). See also N. Des Rosiers, *The Court as the Real Winner*, (unpublished conference paper on file with author) (Oct. 1998).

57. See *Ref Re Secession of Québec*, 2 S.C.R. at 227.

58. See 2 S.C.R. at 244.

59. See *id.*

60. See Robert Fulford, *THE TRIUMPH OF THE NARRATIVE—STORYTELLING IN THE AGE OF MASS CULTURE* 33 (1999) (“Children grow into adults by learning stories, and so do nations and communities”).

61. See D. Greshner, *The Québec Secession Reference: Goodbye to Part V?*, 10 CONST. F. 19, 19-25 (1998) and Cairns, *supra* note 54, for a commentary on the scope of such obligation.

[The Court] preserved its legitimacy, and the approach it took has some merit, “therapeutically.”

The reconciliation between the different minorities in Québec is hence placed at the center of the debate. The decision, in fact, calls on all the participants to acknowledge their power and their ability to destroy other groups. It frames the discourse in a way that addresses squarely the potential for change and the impact on

the ones who would be affected by the secession. After all, the treatment of minorities, Aboriginal and ethnic, under a new sovereign Québec is the question that holds the most potential for violence.

The decision of the Court seeks to foster a public debate on the issue of the treatment of minorities. It also imposes a duty of participants in a democracy to acknowledge the desire for change of the other partners. I view this not as giving the solution but as helping the participants to come to grips with the frailties of their positions. It educates the public on the issues of principles involved and it educates the parties of the weaknesses of their positions, but it gives them a chance to move beyond such difficulties. In fact, it enhances the discussion process among the players.

Therefore, the “duty to negotiate” can be seen as a brilliant, process-oriented response to the quandary. Not that it solves anything. Nothing could. But it allows for the debate to continue without shutting up one participant. Québec’s wishes may require constitutional accommodation, and the rest of Canada would have, at least, the obligation to listen and respond.

The court did not define what would be a “clear” question nor what is a “clear” majority, which may at first glance appear skittish on the part of the court. However, this nebulous message on clarity is also helpful. It is now at the center of public debate: the two sides attempting to control the meaning of the word. Nevertheless, the value of clarity has been stated and the debate is now engaged on the form that such “clarity” should take. Giving the solution would have been dis-empowering. Stating the value is much more powerful.

It is true that it is easier for a court to be “therapeutic” when the case presented is “hypothetical,” as the *Secession Reference* was. However, there is still a lesson to be learned in the approach adopted by the Supreme Court. Its attention to the language it used in order not to create a problem of legitimacy for itself in Québec has been fruitful. Particularly welcome is the process-driven solution it offered, which called for respect for other minorities and defined the values which had to be taken into account.

It could be that an inventory of process-driven solutions ought to be offered to courts. The imposition of an obligation to negotiate, as was done here, is one example. The creation

of duties to consult, as was done in the Aboriginal context, may also be of value. Several mechanisms that exist in other fields, the obligation to negotiate in good faith in labor law or the obligation to inform in tort law, for example, could be explored. More must be done in this area. It could also be that lawyering will have to be done differently: if the process is to have the therapeutic benefits argued for, it requires that the “true” story be told, that the groups’ narratives be heard. It may require that lawyers relinquish control of the story told by the group-client. Again, the implications for lawyers of a judicial therapeutic approach will have to be examined further.⁶²

In conclusion, I have argued, as have others,⁶³ that the Supreme Court was the real winner in the *Secession Reference*. It preserved its legitimacy, and the approach it took has some merit, “therapeutically.” Contrary to the *Veto Reference* case, it sought neither to destroy nor to undermine the position of the minority, but instead to respond with care and empathy. Maybe that is all that one can ask from the court on these questions—to do as little damage as possible. It could be that this is a way of judging that could be used again in other minority-majority conflicts, where it is not enough just to tell, one must also listen.



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62. See Wexler, et al., *supra* note 25.

63. Young, *supra* note 6.