Culture, Postmodernism, and Canadian Legal Hermeneutics: A Comment on Reference Re Secession of Quebec

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When I was an undergraduate, I recall having heard Canada described as the world’s “first postmodern state” in a history seminar. The professor who made this contention based this opinion on the fact that Canada is unlike most of the world’s nation-states in that it was founded and structured to accommodate the needs and aspirations of two founding “peoples,” instead of one. At the time, I was quite taken with this idea. I return to it now in order to explore and interrogate the “postmodernity” of the Canadian polity and Canadian law. In the years since that history seminar, Quebeckers have voted in a second sovereignty referendum, and I feel that I have developed a more sophisticated understanding of postmodern ideas and the (in)ability of the Canadian state to accommodate cultural difference. I am no longer so optimistic that Canadian law is capable of reconciling the often divergent demands of liberal statehood and cultural pluralism.

To date, most culturally-based critiques of Canadian law have been articulated with regard to the difficulties faced by First Nations in their encounters with the law. Mary Ellen Turpel and others have argued persuasively that the whole structure of Canadian law, with its complex of ingrained cultural assumptions, militates against a genuine recognition of the cultural difference of aboriginal peoples. Such a recognition seems an impossibility to Turpel given the current state of Canadian law, since it would reveal “a lack of interpretive authority in legal reasoning and decision-making,” and “problematic . . . the rule of
law as one particular expression of social life.”¹ While this failure of Canadian law is deplorable, it is perhaps not surprising given the long history of oppression and discrimination suffered by aboriginal people and peoples in Canada. My goal in this paper is to determine whether the inability of Canadian law to take proper notice of the cultural difference of aboriginal peoples is an indication of a broader incapacity, and whether the status of Quebec as a legal entity within Canada is limited in similar ways.

The power differential between Canada’s dominant (Anglo-Canadian) culture and aboriginal culture is obviously far more pronounced than any possible differential between anglophone Canadians and Quebec sovereigntists. I make no claim that the position of Quebec in the Canadian constitutional order is in any way cognate to that of the First Nations. Moreover, most of the arguments that I make with regard to Quebec’s relations with Anglo-Canadian culture would be just as, if not more, effective in criticizing the relations between Aboriginal nations and Quebec. Nevertheless, I do feel that the arguments made by aboriginals and sovereigntists are similar in that both groups hold up culture as an important, if not the pre-eminent, principle both in criticizing the current operation of Canadian law and proposing ways in which law should be transformed. In this paper I examine a recent and already famous decision of the Supreme Court of Canada, Reference Re Secession of Quebec,² the most recent in a long series of legal negotiations of Quebec’s status as a part of the Canadian polity. I hope to demonstrate Canadian law’s inability to give credence to arguments that take culture as their starting point—an inability that results in the occlusion of cultural difference from Canadian law.

In areas like the protection of language rights, the cultural import of Quebec’s constitutional arguments is obvious. However, in agitating for constitutional change, Quebec has sought to gather to itself jurisdiction and powers that are not easily subsumed under any simple rubric like “cultural powers.” As Jeremy Webber observes of division of powers litigation involving Quebec and the federal government,

[t]he restricted demand for additional, distinctively cultural powers does not adequately account for the depth of Quebeckers' concerns with the division of powers. In any case, Quebec's concerns clearly go beyond the strictly cultural.³

Nevertheless, there are cultural forces underlying Quebec's desire for greater autonomy, be it within the federalist *grundnorm* or without, as is contemplated in *Re Secession*. The government of Quebec, more than any other provincial legal entity, can claim authority on the basis of cultural difference because it is in Quebec that a minority cultural-linguistic group can claim to have its own government within the federal structure. The close association between the government of Quebec and Canada's francophone minority gives Quebec's claims for greater autonomy certain cultural weight. It has also posed a challenge to advocates of a pan-Canadian identity, as there exists among citizens of Quebec a distinct "asymmetry of allegiance" when compared to citizens of other provinces.⁴ Large numbers of Quebeckers, due to their differences from the rest of Canada, typically view themselves as Quebeckers first and Canadians second. Still, while Quebec's attempts to shape Canadian constitutional law may be informed by cultural imperatives, those cultural arguments are typically not made when "cultural powers" are not in issue. However, in *Re Secession*, the cultural content of Quebec's legal arguments was placed squarely before the Supreme Court of Canada.

Before analyzing the Supreme Court's judgment in *Re Secession of Quebec*, I will first set out the jurisprudential frame in which I intend to place the decision. That frame is made up of two separate, but interpenetrating, sets of ideas that are currently the subject of much discussion in the project of "thinking about law." The first mode may be loosely described as "cultural studies," and the second is postmodernism.

Cultural studies jurisprudence sees law as a force in society that is at once culturally constructed and culturally constructive. A body of law, itself the product of a network of cultural influences, operates in order to validate and protect the particular assumptions about cultural identity held by the dominant culture in the jurisdiction where those

⁴ Ibid. at 212.
laws have effect. The relationship between culture and law is not unidirectional or static; law and culture are mutually supportive. Clifford Geertz describes this complex relationship:

[L]aw, rather than a mere add-on to a morally (or immorally) finished society, is, along… with a whole range of other cultural realities from the symbolics of faith to the means of production, an active part of it.⁵

If we accept Geertz’s contention that law is a manifestation of culture and is “constructive of social life not reflective, or anyway not just reflective, of it,”⁶ then we must also transform our ideas about the cultural significance of legal disputes. A cultural criticism of law treats legal disputes as “contests over how to represent society or its parts, expressive contests of meaning rather than instrumental contests over resources.”⁷ As such, legal disputes are discursive confrontations, competitions over what legal language means.

In legal studies, as in many academic disciplines, it has become almost commonplace to treat the signifying power of language with a great deal of scepticism. Following the deconstructionist project most often associated with Jacques Derrida, this scepticism rejects logocentrism and its contention that language can convey any immediate experience of reality or truth. Instead, users and interpreters of language, such as lawyers and judges, operate in a field composed of language, and their statements of law can have no actual connection to a stable referent like reality or truth. The effect of this realization is to challenge many of the claims to authority that powerful speakers make by virtue of their positions as expert or judge. The authority such speakers do possess exists because they use a dominant legal discourse that remains dominant because it is more powerful than other discourses, not because it is more true.⁸ This discursive power can flow from a particular discourse’s alignment with a set of cultural assumptions and standards shared by a powerful group in a given jurisdiction. So, if we accept the presence and legitimacy of cultural

⁶ Ibid.
difference, as well as the culturally-grounded nature of virtually any system of laws, cultural studies jurisprudence presents a potentially intractable quandary. In order to claim legitimacy in a culturally heterogeneous society, law must be able to make space for cultural difference. However, how can law take account of the potentially enormous variety of cultural perspectives present in pluralistic societies and yet retain the universality and uniformity of treatment that characterizes the liberal conception of the rule of law?

The answer to this rhetorical question is that law as it is conceived of in liberal democracies may not be capable of accepting cultural differences. This inability may be seen as one manifestation of an idea that characterizes many postmodern critiques of law. Postmodern legal theorists have often taken as one of their starting points a repudiation of the modern idea of progress. They are sceptical about law's ability to improve over time, gradually reconciling and achieving the various goals held by individuals and groups in heterogeneous societies. For the purposes of my analysis, one of the most important ways in which law frustrates progress is in its tendency to create totalizing meta-narratives. Narrative is a powerful and highly seductive means of explaining human activity. It can lend structure and coherence ("virtues" that are often associated with constitutionalism and the rule of law) to that which is chaotic and incoherent. However, as attractive as narrative may be, it is an inadequate means of understanding and representing reality, because the structure it imposes cannot "do justice" to the complexity of postmodern existence. As Costas Douzinas explains,

[the phenomenal world, past or present, does not appear in the form of a closed segment, with beginning and end. On the contrary, we swim in incoherent streams of events and sequences that have no clear line of development and connection.]

Still, the will to narrate remains central to legal reasoning, because it renders the operation of law intelligible. Narrative is perhaps the most effective cognitive tool in law's arsenal, because it "emplots the diffusion and dispersal of lived experience as the facts of a moral drama." This kind of emplotment can lend persuasive force to words

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that would otherwise be susceptible to competing interpretations. Thus the power of law is the power to emplot social phenomena and thereby contain and control them within legal narratives.

The narratives that law creates are contingent—they depend for their signifying power upon cultural norms and assumptions. So when other cultures propose alternative narratives or discursive modes, legal proceedings where the parties articulate two divergent cultural standpoints may be seen as competitions between those discursive modes. It is unlikely that any tribunal or court will be able to decide "objectively" between two incommensurable cultural narratives: the arbiter will inevitably have his or her own culturally conditioned narrative or discursive preferences, but the success of the privileged narrative mode is not always total. Even in contests between cultures and their respective narratives where the dominant culture is successful, there are different levels of success. The degree of success enjoyed by one cultural discourse over another can be plotted on a continuum between hegemony and ideology.\(^\text{11}\) When a dominant culture manages to impose a hegemonic relationship upon a subordinate cultural group, its victory is very nearly total. Hegemony is characterized by the adoption by the subordinate culture of the dominator's preferred modes of discourse. Turpel invokes the words of Audre Lorde to describe this situation as one where subordinate cultural groups are compelled to use "the 'master's' language and conceptual apparatus to dismantle the 'master's' house."\(^\text{12}\) Conversely, when the dominant discourse is forced to confront an alternative discourse directly, the victory that it achieves is ideological rather than hegemonic. An ideological victory is one where it is clear that a particular discourse is being imposed on a group who would clearly prefer to narrate their experiences using an alternative discourse. Though the subordinated group may be compelled to continue using a discourse with which it is uncomfortable, the dominant group is at least confronted with the alternative discourse and is itself put in the uncomfortable position of having to account for it or explain it away. When conflicts between narratives or discourses are


decided ideologically rather than hegemonically, the operation of power is made visible, and may be more easily recognized and combated.

When such discursive contests occur in Canadian constitutional law, the stakes are high for all concerned. As the “supreme law of Canada,” the constitution is the textual foundation on which all legal authority is ostensibly based.\(^{13}\) If we view judicial interpretation of law as the creation of narratives that render disputes and their resolutions intelligible and manageable, then it is in the area of constitutional law that the temptation to create unifying meta-narratives will be greatest. In the specific context of Canadian constitutional law, the process of constitutional decision-making may be seen as an act both of interpretation and of representation. Particularly since the advent of the \textit{Canadian Charter of Rights and Freedoms}, the debate over whether judges merely interpret or actively represent constitutional law has raged.\(^{14}\) However, the questions about the hermeneutical function of judges in constitutional disputes may be leveled at all areas of constitutional litigation. The power of the judicial interpreter lies in his or her power to “inscribe” meaning, to fix words or groups of words with a particular signifying force. As Geertz suggests, the analysis of texts must look beyond the words themselves to this process of inscription to gain a full understanding of the textual significance of narrative configurations.\(^{15}\) In Canadian constitutional litigation, this process of inscription has a strong cultural element, and the meanings that courts attach to the texts they interpret are, at least partially, culturally determined.

Given the cultural and linguistic differences between Quebec and the rest of Canada, \textit{Re Secession} is bound up in the debate over how much power is to be attendant upon Quebec’s status as home to the largest and best-defined minority cultural group in Canada. The arguments advanced in \textit{Re Secession} are a part of the negotiations between different ways of articulating the Canadian state, compelling

\(^{13}\) \textit{Constitution Act, 1982}, s. 52, being Schedule B to the \textit{Canada Act 1982} (U.K.), 1982, c. 11.


\(^{15}\) Geertz, \textit{supra} note 5 at 31.
the Supreme Court of Canada to choose which alternative vision of the country it will give legal effect to. Moreover, this case may be especially susceptible to postmodern critique, as the Court is compelled in its judgment to depart from the comfortable realm of textual interpretation and move into a more representational mode. In *Re Secession*, the Court decides issues upon which Canada’s constitutional text gives little guidance. The Constitution is silent on the issue of the secession of provinces from the federation. When freed from the Constitutional text in the manner permitted by this issue, the Court gains great latitude for the hegemonic or ideological imposition of dominant discourses on subordinate groups.

Finally, a possible intersection between cultural and postmodern critiques of law may be available in the work of theorists who explore the possibility of “legal pluralism.” Geertz thought of legal pluralism as a means of comparing legal cultures without creating a subordinating hierarchy; in order to talk about difference in an informative way, Geertz felt that any such discussions should take alterity as their starting point: “[M]uch is to be gained, scientifically and otherwise, by confronting that grand actuality [alterity] rather than wishing it away in a haze of forceless generalities and false comforts.”\(^{16}\) Lyotard’s call for a “justice of multiplicity,” which would explode any one form of narrative’s claims to universality,\(^{17}\) may also be seen as a call for a legal pluralism. Given the fragmentation of interpretation inherent in postmodernity, the claims to interpretive authority made by courts must be scrutinized with an eye to their receptiveness to alterity. If Canada is to live up to the label of “postmodern state,” Canadian law must do more than profess a tolerance for alterity. It must create a legal space in which alterity may flourish, and strive for a “normative heterogeneity . . . between various normative regimes which inhabit the same intellectual space.”\(^{18}\)

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\(^{16}\) *Ibid.* at 234.


II. DEFINING/INScribing “CANADA”:
REFERENCE RE SecessIon OF QUEBEC

Few recent decisions of the Supreme Court of Canada have generated as much publicity or attracted as much commentary from politicians and the punditocracy as Reference Re Secession of Quebec. Before the decision was handed down, the reference sparked debate among federalists about the wisdom of “Plan B,” and prompted recriminations from sovereigntists about legal meddling in a purely political decision to be made by the citizens of Quebec. On the day that the decision was to be released, a photograph of a pensive Chief Justice Lamer made the front page of the Globe and Mail, and photographs of all of the Justices, accompanied by brief commentaries on their general political views, were published as well.19 CBC Newsworld covered the decision in a live report from the foyer of the Supreme Court. In the hours and days following the release of the decision, political leaders from the both the federalist and sovereigntist camps were quick to claim victory, mostly by removing snippets of the judgment from their context and ignoring the rest of a highly nuanced judgment. Prime Minister Chretien stated that “the Court ha[d] well served Canadians by bringing clarity to certain fundamental rules which must guide our democratic life.”20 Conversely, Quebec Intergovernmental Affairs minister Jacques Brassard argued that

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\text{[t]he Supreme Court ha[d] recognized the democratic legitimacy of both the option and the process leading up to the realization of the sovereignty project, whereby a majority Yes vote would imply that the federal government and the other provinces would have the obligation to recognize the majority vote.}
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For my purposes, however, the most interesting aspect of the Globe’s coverage is a single sentence from an article by reporter Sean Fine, in which he recounts some comments made by Major J. in a press conference given after the judgment was released. According to Fine,

“[a]s [the Court] saw it, their task was nothing less than to define the nature of their country.”22 The ability to “define” the nature of Canada may be seen as the ultimate form of judicial power in this country, and in Re Secession, the Court exercises that power in an unusually overt fashion. The challenge to the Court’s power to inscribe Canadian law in Re Secession is so strong that the victory won by Canada’s dominant cultural discourses is far less complete than is usually the case. Although dominant cultural assumptions are given voice in the judgment, the Court is not able to subsume the caviling voice with its usual degree of success.

The first indication that the Court faces an ideological battle in Re Secession and cannot simply hegemonically impose its preferred modes of discourse on dissenting groups comes very early in the Court’s unanimous judgment. The decision begins with some general commentary about the immense importance of the issues to be discussed—issues that “go to the heart of our system of constitutional government.”23 However, before answering the three questions put to the Court by the Governor-in-Council, the Court goes to some lengths to establish a foundation for their pronouncements on those questions. The Court even seems to express a certain reluctance to speak to the questions put to it. After affirming the constitutionality of section 53 of the Supreme Court Act,24 which allows the Court to express advisory opinions on reference questions, the Court says that it “imposes a duty on the Court to render”25 those opinions. The Court concludes its discussion of jurisdictional issues with a reiteration that it is “duty bound”26 to answer the questions. However, despite this show of reluctance, the Court does not seriously question its own power to deliver authoritative opinions on the three questions. In its discussion of “Justiciability,” the Court takes great care to define its “proper role” and its “area of expertise” in such a way as to allow a determination of the reference questions. The Court insists that it does not mean to “usurp

23 Re Secession, supra note 2 at para. 1.
25 Re Secession, supra note 2 at para. 8.
26 Ibid. at para. 31.
any democratic decision that the people of Quebec may be called upon to make” as was contended by the *amicus curiae*. Instead, the Court’s proper role is “strictly limited” to setting out the legal framework in which such a decision would be taken. One wonders whether this role is “limited” at all, let alone “strictly limited” as the Court suggests. The Court implies that its pronouncements will merely provide a legal framework within which Quebeckers will be able to proceed toward a democratic and legal declaration of sovereignty.

In creating a space in which it may speak authoritatively, the Court argues that it has jurisdiction to answer questions that fall “within its area of expertise: the interpretation of law.” Although this statement of the Court’s area of expertise is framed to give the impression of modesty, the claim to authority that the Court makes in gathering this power to itself is significant. This apparent modesty is made possible by the Court’s rather sanguine assertion that, even where the questions may raise extra-legal issues, the Court “may interpret the question so as to answer only its legal aspects.” However, the Court does not give any indication of its opinion about where the “legal” ends and where the “extra-legal” begins, although they hold up the distinction between the two as part of their claim to interpretive authority. This may be an unstable foundation on which to build, since postmodern jurisprudents and cultural theorists have argued that it is impossible to hive off a realm of “the legal” from the rest of social and political discourse. Nevertheless, the very fact that the Court takes such care to justify its speech before speaking about the issues before it suggests an awareness that *Re Secession* requires a foray into an ideological battle, rather than a mere imposition of a hegemonic form of discourse.

After dispensing with the supposedly preliminary issues of jurisdiction and justiciability, the Supreme Court begins creating a unifying mythology as the basis of Canadian law, and in the process bolsters its authority to interpret, shape, and create that law. In “Nomos and Narrative,” Robert Cover describes precisely the kind of enabling narrative that the Supreme Court of Canada seeks to create when he asserts that

[n]o set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning. For every constitution there is an epic, for each decalogue there is a scriptive.31

In explaining this necessary step in the creation of a legal regime, Cover develops the idea of “Nomos.” A Nomos is a “world of law” arising out of a population’s deepest desires and knowledge, comprising “visions,” “constructions of reality,” and “norms.”32 The Supreme Court of Canada’s efforts to create a Nomos in Re Secession are most visible in two aspects of the judgment: the Court’s review of the origins of the Canadian federation and their description of the four principles that underlie Canadian constitutional law.

The portion of the judgment entitled “Historical Context: The Significance of Confederation” is the most blatant attempt in the judgment to create a narrative that will lend stability to Canadian federalism and the rule of law. This is an interesting manoeuvre on the Court’s part, because it is in the writing of the history of Confederation that anglophone and francophone academics in Canada have differed considerably. In Canadian historical studies, culture has demonstrated its power to shape understanding. Among francophone historians, the version of Canadian history that has found most currency is the “compact theory” of Confederation, which casts the Canadian federal union as a “compact” between Canada’s two founding nations, the British and the French.33 This narrative of Confederation views the two founding nations, rather than the four initial provincial bodies, as the crucial parties to the agreement to unify under the aegis of Canada. While this version of Canadian history has long been popular among academics in Quebec, it has not found much support among leading Anglo-Canadian historians, who like Donald Creighton, have articulated a theory of Confederation that posits a Canadian state where power is centred in and exercised by, the federal government.34 Some legal academics in Quebec have discerned a similar leaning in the

32 Ibid. at 132.
34 Ibid. at 595.
jurisprudence of the Supreme Court of Canada, and have argued that the Court performs a "political function." In describing Quebecois perspectives on the Supreme Court, André Bzdera argues that "[s]a fonction principale est de promouvoir, en association avec les autres institutions de l'Etat central, la centralisation graduelle des pouvoirs étatiques."35

So, in venturing into the contested ground of the history and purpose of Confederation, the Court was faced with two potentially irreconcilable narratives of Canadian history. The Supreme Court seeks to inscribe that history as the foundation of the Canadian constitutional order, so it is forced to navigate and ultimately choose between two "nomoi," to use Cover's terminology. In so doing, the Court steps into volatile territory. According to Cover, when nomoi collide, "[t]he discontinuities between the respective visions, constructions of reality, and norms by some such associations and by the state's authoritative legal institutions may be considerable."36 In order to overcome such discontinuities, Cover calls for a "redemptive constitutionalism" capable of reconciling different nomoi by way of a "transformational politics that cannot be contained within the autonomous insularity" of either cultural group.37 Cover's idea of redemptive constitutionalism may be seen as another manifestation of "legal pluralism"—a world of law that is capable of recognizing competing legal paradigms without forcing subordinate groups to mold their language and thinking to suit the preferences of the dominant group.

The Supreme Court of Canada's summary of Canadian political history from 1864 to the present makes little attempt to articulate such a transformational politics. What recognition the court does offer regarding the cultural diversity that pre-existed the Confederation agreement is overtaken by a narrative that casts the four initial provinces as equal partners in the agreement. Moreover, the Court places great emphasis on the choice of a federal form of government, describing it as a way of successfully, perhaps even finally, reconciling the differing interests of the four entities who sent delegates to the various

36 Cover, supra note 31 at 132.
37 Ibid.
conferences that developed the *British North America Act 1867*. The Court insists that the terms of the Confederation agreement satisfied the demands of Quebec, as there were included in the agreement guarantees to protect French language and culture, both directly (by making French an official language in Quebec and Canada as a whole) and indirectly (by allocating jurisdiction over education and “Property and Civil Rights in the Province” to the provinces). The effect of these “guarantees,” in the Supreme Court’s opinion, was to reaffirm “the protection of minorities.” It is worth noting that the Court chooses the word “minority” to describe Quebec in this context, and not a potentially more powerful word like “culture.” Nevertheless, the Court’s description of the history of Canada’s constitutional structure does not obliterate the importance of culture to the arrangement. The court describes federalism as “a legal response to the underlying political and cultural realities that existed at Confederation and continue to exist today.” This assertion suggests that Confederation was contingent upon certain independent cultural realities.

Still, the logic of the Court’s description of Confederation suggests that, though “cultural realities” may have preceded the federal arrangement, having confederated, cultural minorities gave up their claim to cultural authority and exchanged their status as relatively autonomous cultural groups for membership in the federation. According to the Court,

[The federal-provincial division of powers was a legal recognition of the diversity that existed among the initial members of Confederation, and manifested a concern to accommodate that diversity within a single nation by granting significant powers to provincial governments. The Constitution Act, 1867 was an act of nation building.]

In this passage, the Court severely curtails the authority that may be claimed by appealing to cultural difference. Recognitions of cultural diversity are followed closely by references to unity which seem to trump any authority that may be derived from that alterity. The Court

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38 *Re Secession*, supra note 2 at para. 38.
comes closest to recognizing a genuine cultural alterity in Quebec in the section of the judgment extolling the virtues of federalism, where the Court admits that Quebec is unique in that "the majority of the population is French-speaking" and that Quebec possesses "a distinct culture." However, the recognition the Court does give to Quebec's alterity does not permit a recognition of even the possibility of incommensurability, or the presence of an alternative "Nemos" unique to Quebec. Quebec's distinctiveness is no different, in the Court's view, from that of Nova Scotia and New Brunswick, "both of which also affirmed [in welcoming federalism] their will to protect their individual cultures." The Court's emplotment of Canadian law moves ineluctably toward a unity that may gesture at tolerating cultural alterity, but severely circumscribes that alterity's operation as a legal force by creating all alterities equal; the law of the state overtakes culture and asserts its limiting power on cultural alterity.

After constructing its problematic account of Canada's constitutional history, the Court draws certain conclusions from its historical summary:

We think it apparent even from this brief historical review that the evolution of our constitutional arrangements has been characterized by adherence to the rule of law, respect for democratic institutions, the accommodation of minorities, insistence that governments adhere to constitutional conduct and a desire for continuity and stability.

However, when the Court proceeds to discuss the "principles" that ostensibly govern the Canadian constitutional order, it attempts to explain the relationship between those principles, Canadian history, and the text of the Constitution:

Our Constitutional text is primarily a written one, the product of 131 years of evolution. Behind the written word is an historical lineage stretching back through the ages, which aids in the consideration of the underlying constitutional principles. These principles inform and sustain the constitutional text: they are the vital unstated assumptions upon which the text is based.
This is an interestingly circuitous statement. The court begins in the comfortable realm of textual certainty, with a supposedly knowable “written” text. Nevertheless, there exists “behind” the text an historical narrative from which the Court intuits principles. These principles in turn are employed to “inform and sustain” the text. Ultimately, the principles or “vital unstated assumptions” seem to supercede the text, as the Court announces its intention to evaluate unilateral secession with reference to the principles, despite the Court’s inability to clearly state their provenance. The Court seems perfectly content with the principles, despite their origins “behind the written word,” “underlying” the text, and as “unstated assumptions.” That contentment justifies the Court’s movement from an interpretive function to a freer, more representational one. Even though the principles are “not explicitly made part of the Constitution by any written provision,” it would nevertheless “be impossible to conceive of our constitutional structure without them.” The Court requires these principles to enable a conceptual process, though the court does not acknowledge that the principles themselves, and their connection to history and the text of the Constitution, were in fact conceived. Instead, relying on the Patriation Reference, the court insists the principles “are not merely descriptive, but are also invested with a powerful normative force, and are binding on both courts and governments.”

In elaborating the four constitutional principles of federalism, democracy, the protection of minorities, and the rule of law, the Court stresses the idea that they operate in concert: “These defining principles function in symbiosis. No single principle can be defined in isolation from the others, nor does any one principle trump or exclude the operation of any other.” Although the scientific-sounding concept of “symbiosis” may give the illusion of precision and reliability to this pronouncement, the Court’s treatment of the “principle of effectivity” raised in argument by the amicus curiae shows that one of the four principles may clearly take precedence over the others. The argument for effectivity forces the Court to confront the possibility of Quebec’s exercising a raw political power untrammelled by legal niceties. Not

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46 Ibid. at para. 51.
47 Ibid. at para. 54.
48 Ibid. at para. 49.
surprisingly, the Court’s discussion of effectivity is peremptory. Instead of locating effectivity in a cultural context that might lend some credence to Quebec’s desire for cultural self-determination, the Court forces the principle of effectivity into the confines of a discourse with which the Court is very familiar: the discourse of rights:

A distinction must be drawn between the right of a people to act, and their power to do so. They are not identical. A right is recognized in law: mere physical ability is not necessarily given status as a right. 49

This is an interesting discursive move, especially since the Court, in its discussion of the jurisdictional issues that preceded its answers to the reference questions, had asserted that “[n]o matter how closely the procedure on a reference may mirror the litigation process, a reference does not engage the court in a disposition of rights.” 50

Nevertheless, the Court does make use of the discourse of rights to contain the potentially destabilizing influence of a recognized power of effectivity grounded in cultural alterity. The phenomenon of “rights-talk” has been criticized for its tendency to decontextualize disputes and oversimplify difficult political situations. In criticizing the application of the Canadian Charter of Rights and Freedoms, Allan C. Hutchinson argues that

[i]t is not possible to think of rights-talk as an autonomous discourse. It is part of politics, not a precondition or boundary to the legitimate realm of contested politics. Lawyers and Judges cannot exculpate themselves from the charge of exercising arbitrary power by expressing their decisions in the familiar rhetoric of rights-talk. 51

By framing the issue of effectivity in the language of rights, the Supreme Court of Canada defines the question as an either/or proposition; either Quebec has “the right” to realize secession by way of effective control or it does not. In addition to obscuring the political and cultural forces that underlie a claim to effectivity, the Court’s decision to impose the discourse of rights upon the question of effectivity may tilt the discursive field against Quebec’s claim. Effectivity, if it were seen as a right, would be a collective right to be exercised by the government

49 Ibid. at para. 106.
50 Ibid. at para. 25.
of Quebec on behalf of its citizens. However, as Turpel has argued, rights as they are conceived of in Canadian law are primarily individualistic, and "are seen as a special zone of exclusion where the individual is protected against harm from others." 52 Given its preference for individualistic formulations, the discourse of rights as it is used in Canadian law militates against the conceptualization of a collective subjectivity that would be a necessary precondition of recognizing effectivity; a right requires a right-holder.

Closely connected to the idea of rights, both theoretically and in the Supreme Court’s decision in Re Secession, is the notion of the rule of law. The rule of law’s rise as a fundamental legal principle coincided with the rise of the nation state in the nineteenth century. Although appeals to the rule of law as a bulwark against the excesses of absolute monarchs and military power have been made since medieval times, it was in the nineteenth century that the rule of law took its current form through “the association of rule-governance with formal state structures, an association epitomized by the notion of the ‘lawstate’ or ‘state of law.’” 53 Given this close connection between the rule of law and the nation-state, it is not surprising that the rule of law plays such an important part in the Supreme Court of Canada’s decision in Re Secession—a case that contemplates the dissolution, or at least a major revisioning, of an existing state. When he announced his intention to send the reference questions to the Court, Justice Minister Alan Rock placed great emphasis on the rule of law in his statements in the House of Commons. 54 Before the decision was handed down, commentators speculated as to how the Court would account for the rule of law in its decision, and the consensus was that it should be given paramount importance. The comments of H. Wade McLauchlan are typical:

a sane and effective political process requires a legal framework, both constitutional and international. That is particularly true for such potentially traumatic legal events as secession from a long-standing

52 Turpel, supra note 1 at 509.
McLauchlan's article is also typical in that it treats the rule of law as self-evident and incontestable. In this regard, McLauchlan accurately predicts the Supreme Court of Canada's reasoning in *Re Secession*.

In discussing the rule of law, the Court calls it "a fundamental postulate of our constitutional structure." The textual basis on which the rule of law rests in the Canadian Constitution is section 52 of the *Canada Act, 1982* that establishes the Constitution as "the supreme law of Canada." The Court calls this section the embodiment of "[t]he essence of constitutionalism" in Canada, and insists that any movement toward secession, negotiated or otherwise, must be made in conformity with the Constitution. However, in the context of secession, the meaning of section 52 becomes problematic. The section presupposes an agreed-upon jurisdiction that it calls "Canada." The Court does not consider how the meaning of "Canada" would be altered by a successful sovereignty referendum, or the ways in which its meaning may be fluid even now. The meaning ascribed to that term is indeterminate, and is, at least in part, a cultural phenomenon. The meaning of "Canada" relies on certain assumptions about the relationship between law and society. Given the Court's long discussion of the development of the Canadian state, one of these assumptions is that a society of persons came together to create a unified system of legal regulation and labeled it "Canada." However, when confronted with the possibility of secession, the Supreme Court makes law anterior to society—the boundaries of society are set with reference to law, rather than the other way round. In such a formulation, society becomes the product of law. As Roger Cotterell observes, "[t]he stability of the idea of law as essentially state law, the law of the nation state, has depended on the continued possibility of treating state and nation as coterminous—having the same scope, as in the nation state concept."  

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56 *Re Secession, supra* note 2 at para. 70.


By asserting the primacy of the Constitution as the "supreme law of Canada," the Court establishes a unitary legal consciousness that does not allow space for a culturally based legal subjectivity.

In the event of a successful sovereignty referendum, the meaning of "Canada" would be bedeviled by indeterminacy, not only for francophone Quebeckers, but for anglophone Canadians too. Any appeals then made to the importance of the "supreme law of Canada" would be of little persuasive force. In assuming that the requirement that all governmental action must be "legal" under the Constitution, the Court inscribes the meaning of "Canada" as a knowable and definable concept, instead of recognizing that it can only sustain a meaning that citizens are willing to give. Nor does the Court acknowledge that the content of the meaning given to "Canada" may be influenced by cultural difference. Seen in this light, the Court's suggestions regarding how a negotiated settlement would be reached in the wake of a "yes" vote begin to ring hollow. After describing a litany of potentially intractable practical problems that would require attention in such a negotiation, the Court insists that these problems would have to be resolved "within the overall framework of the rule of law," in order to ensure a "measure of stability."59 By stressing the importance of stability in areas like internal trade and the protection of minority interests, the Supreme Court of Canada fails to recognize the more fundamental destabilizing effect that a recognition of cultural sovereignty must create for the meaning and role of Canadian law. In fact, by asserting that the rule of law would continue unimpeded, the Court is implicitly stating that cultural difference may only exist within the confines that are set out in the Canadian constitution, and may not form the basis of any legal argument in favour of separation.

The role of the rule of law, in the words of the Court, is that it "vouchsafes to the citizens and residents of the country a stable, predictable and ordered society in which to conduct their affairs."60 In this formulation, the rule of law serves as a means of protecting the interests of individual citizens—no reference is made to the interests of significant groupings of citizens. This preoccupation with individuals rather than groups or cultures is repeated throughout the Court's

59 Re Secession, supra note 2 at para. 96.
60 Ibid. at para. 76.
discussion of the rule of law, and its effect is to divide governments from their citizens. It prevents the government of Quebec from becoming the vehicle for the expression of French-Canadian cultural aspirations. By focusing so unswervingly on the obligations of governments to their citizens, the Court discounts the possibility that citizens may choose to give voice to a cultural goal through their governments. This focus on the individual as the primary unit of legal subjectivity is a fundamental aspect of “liberal” conceptions of law.\(^61\) In Re Secession, the Supreme Court of Canada’s articulation of the rule of law as a bulwark against unconstitutional government action reinforces this “liberal” atomism. By seeing certain individual rights as pre-eminent and disallowing government actions that would violate those rights, the Court makes collective, cultural action a virtual impossibility. This assumption that the individual is the primary unit of legal subjectivity is so ingrained in Canadian law that it becomes difficult to see that the status given to the individual is chosen rather than self-evident. As Kleinhaus and MacDonald observe: “Legal subjects are exclusively constituted by law, and legal subjectivity is concomitant with the criteria of identification in each such legal order.”\(^62\) By inscribing the rule of law in Canada along liberal lines, and thereby fixing the individual as the essential “building-block” of Canadian society, the Court prevents the development of a legal consciousness that allows space for arguments based on cultural or linguistic difference. A focus on individual rights prevents the emergence of group rights, and forecloses any possibility that a group may express an effective legal subjectivity under the Canadian constitution.

The Court does allow the possibility that an effective legal subjectivity may be available to cultural groups at international law during their discussion of the second question put to the court in Re Secession. The Court acknowledges that “[t]he existence of the right of peoples to self-determination is now so widely recognized that the principle has acquired a status beyond “convention” and is considered a general principle of international law.”\(^63\) In deciding whether that right

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\(^62\) Kleinhaus & MacDonald, supra note 18 at 37.

\(^63\) Re Secession, supra note 2 at para. 111.
is applicable to the hypothetical situation of a unilateral declaration of Quebec independence, the Court considers this “general principle” in such a way as to leave the possibility of cultural authority indeterminate. The Court is of the opinion that it need not evaluate whether or not Quebeckers constitute a “people” within the meaning of the principle in order to make a determination on the existence of any right of unilateral secession:

While much of the Quebec population certainly shares many of the characteristics (such as a common language and culture) that would be considered in determining whether a specific group is a “people”... it is not necessary to explore this legal characterization to resolve Question 2 appropriately.\(^6\)

Instead, the court determines its answer to Question 2 by exploring the scope of the right to self-determination. After reviewing a number of international treaties and conventions and stating the respect accorded at international law for the “territorial integrity of existing states,”\(^6\) the Court decides that the right to self-determination may only be asserted in situations of former colonies, where a people is oppressed, as for example under military occupation; or where a definable group is denied meaningful access to government to pursue their political, economic, social and cultural development.\(^6\)

After setting out these specific criteria, the Court quickly determines that Quebec, whether comprising a “people” or not, does not fit the definition.

This analysis is troubling, given the Court’s refusal to decide the preliminary question of whether Quebeckers are a “people.” The Court here suggests that the scope of the right can be understood without reference to the status of the people seeking to exercise it. Furthermore, any determinations that the Court makes with regard to the status of Quebec is framed negatively—Quebeckers are not oppressed, nor are they denied access to government, and so on. If the Court were to make culturally-based arguments possible in the deciding of this question, it would be required to recognize Quebec as some sort of cultural legal entity instead of merely as a province within the Canadian constitution.

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64 Ibid. at para. 125.
65 Ibid. at para. 127.
66 Ibid. at para. 138.
By divorcing the operation of the right from the subjectivity of the entity seeking to gain that right, the Court decontextualizes the right to the point of unintelligibility.

III. Conclusion

In *Re Secession*, Canadian law fails to live up to the challenges of postmodernity and cultural pluralism. In its judgment, the Supreme Court of Canada deploys powerful discourses and narratives to configure legal issues and shape legal subjectivity in such a way as to prevent the emergence of a genuine legal pluralism allowing scope for the articulation of cultural difference. In order to take up the challenge of postmodernity in a culturally various society, the Supreme Court of Canada must revision its hermeneutical role and praxis. A respect for cultural difference and the potentially incommensurable interpretive difference that accompanies it would require the Court to assume the role of hermeneutical mediator, and relinquish its monopoly on interpretive power. In the division of powers context, this means making room for cultural arguments instead of insisting on tests that occlude culture and allow the extension of federal power even when there exists no intellectual space for provincial arguments that rest on an authority derived from cultural alterity. The Court must also be wary of the creation of meta-narratives that inscribe “Canada” with a meaning that is culturally specific, and eschew the sorts of discursive moves that, in *Re Secession*, prevent the development of a legal subjectivity founded on cultural difference. As Dallmayr observes,

> [h]ermeneutical mediation comes to an end whenever one party arrogates to itself a sovereign prerogative, that is, the capacity to determine the meaning of legal and other texts unilaterally in a binding fashion. 67

In *Re Secession*, the Supreme Court of Canada performs just such a unilateral arrogation of interpretive power; in order to live up to the requirements of a genuine cultural pluralism and create a concomitant legal pluralism, the Court must allow space for difference and listen

67 Dallmayr, *supra* note 53 at 299.
when that difference is articulated. This listening would require a fundamental re-evaluation of the political utility of a number of the Supreme Court of Canada's interpretive tools, such as narrative, rights-talk, and the rule of law. Although such a revisioning would be radical and difficult, and would likely displace the accepted meaning of legal "statehood," it is nevertheless necessary to the project of making the Canadian state genuinely "postmodern."