

APPLYING PURPOSIVE TEXTUALISM TO QUEBEC'S CODES

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The only approach to statutory interpretation in Canada is Driedger's Modern Principle, which instructs a court to harmoniously interpret the text, context, and purpose when determining the meaning of a statute. While the Modern Principle provides a valid starting point for statutory interpretation, it has been critiqued as failing to provide a coherent methodology. The question, therefore, turns to methodology and what a harmonious interpretation might mean. Recently, various authors across the fields of both ordinary statutory interpretation and constitutional interpretation have pointed to a new methodological approach coming from the Supreme Court of Canada, where the text holds interpretive weight such that highly abstract purposes do not outweigh text. The Supreme Court has called this approach "purposive textualism" and some academics have called it the "New Canadian Textualism."

The author explores the extent to which purposive textualism is compatible with Quebec's codified civil law. Quebec is the only Canadian province to codify its law of general application, or jus commune, which invites the question of whether methods of statutory interpretation born from the common law or constitutional context are compatible with codal interpretation. Through an exploration of the mixed nature of Quebec civil law, history of statutory interpretation in the province, and the textual boundaries in Quebec's codes, the author concludes that purposive textualism can be compatible with codal interpretation — particularly if the methodology accounts for the way a codal provision is drafted, which might cue the interpreter to look to its spirit.

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I. INTRODUCTION

The only approach to statutory interpretation across Canada is Elmer Driedger's Modern Principle, which instructs that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."¹ This passage makes clear that text, context, and purpose must all be considered in statutory interpretation. Since the Supreme Court of Canada adopted the Modern Principle, courts across Canada have consistently stated that they are applying it. The principle, however, has also been no stranger to critique. Stéphane Beaulac and Pierre-André Côté have, for instance, criticized the Supreme Court for making "contradicting statements ... about the applicable interpretive method," all while referring to Driedger's Modern Principle.² They argue that the Modern Principle fulfils a rhetorical function "to explain and justify in objective terms the interpretive decision," but does not "provide an outline of methods that guide judges in the construction of statutes."³ Perhaps this is why it has been pointed out that Canada probably "lacks a coherent and consistent methodology of legal interpretation."⁴ For their part, Beaulac and Côté say that "[a]t most, Driedger's quote provides a valid *starting point* for statutory interpretation, but it cannot define, in and by itself, the approach to follow in all cases."⁵ The question thus turns to methodology, and what a harmonious interpretation might mean. Various authors have considered the question across the fields of both ordinary statutory interpretation⁶ and constitutional interpretation.⁷

The question, however, takes on unique contours in Quebec. Quebec is Canada's only civil law jurisdiction. As a result, it is the only province to codify its *jus commune*, also known as its common law or law of general application. In Quebec, laws related to property and civil rights stemming from section 92(13) of the *Constitution Act, 1867* are laid down

¹ *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27 at para 21 [*Rizzo*], citing Elmer A Driedger, *Construction of Statutes*, 2nd ed (Toronto: Butterworths, 1983) at 87.

² Stéphane Beaulac & Pierre-André Côté, "Driedger's 'Modern Principle' at the Supreme Court of Canada: Interpretation, Justification, Legitimization" (2006) 40:1 RJT 131 at 147.

³ *Ibid* at 140.

⁴ Ruth Sullivan, "Statutory Interpretation in the Supreme Court of Canada" (1999) 30:2 Ottawa L Rev 175 at 178 [Sullivan, "SCC Statutory Interpretation"]. See also Mark Mancini, "The Purpose Error in the Modern Approach to Statutory Interpretation" (2022) Alta L Rev 919 at 920 [Mancini, "Purpose Error"]. Beaulac & Côté, *supra* note 2 at 171 [emphasis in original].

⁶ See e.g. Sullivan, "SCC Statutory Interpretation," *supra* note 4; Mancini, "Purpose Error," *supra* note 4; Randal N Graham, "A Unified Theory of Statutory Interpretation" (2002) 23:2 Statute L Rev 91; Lorne Neudorf, "Taking Comparative Law Seriously: Rethinking the Supreme Court of Canada's Modern Approach to Statutory Interpretation" (2018) 39:2 Statute L Rev 184.

⁷ See e.g. Leonid Sirota, "Purposivism, Textualism, and Originalism in Recent Cases on *Charter* Interpretation" (2021) 47:1 Queen's LJ 78; Benjamin Oliphant, "Taking Purposes Seriously: The Purposive Scope and Textual Bounds of Interpretation under the Canadian Charter of Rights and Freedoms" (2015) 65:3 UTLJ 239; Vanessa MacDonnell, "The Enduring Wisdom of the Purposive Approach to *Charter* Interpretation" (Vancouver: UBC Press) [forthcoming in 2024].

in the *Civil Code of Quebec* (CCQ), while the law of civil procedure is codified in the *Code of Civil Procedure* (CCP).⁸ The role of both the CCQ and CCP (collectively, the Codes) differs from the role of a statute. Though they are ordinary legislative enactments, unlike ordinary statutory law the Codes possess a symbolic place in Quebec's legal order as a "social constitution."⁹ Their provisions are often broadly drafted and indeterminate so that they can apply to myriad situations un contemplated by the drafters. This unique writing style works in tandem with preliminary provisions that identify the Codes' role to fill the gaps of other, more specific statutes when those special statutes are silent. The CCQ's preliminary provision, for example, specifies that the CCQ "comprises a body of rules which, in all matters within the letter, spirit or object of its provisions, lays down the *jus commune*, expressly or by implication" and that, "[i]n these matters, the Code is the foundation of all other laws."¹⁰ The CCP's preliminary provision states that the CCP "must be interpreted and applied as a whole, in keeping with the civil law tradition."¹¹ The Codes thus play a foundational role as the "centre ground" of the civil law, as a "textual referent through which all other sources of law are understood to pass."¹² Of course, Driedger's Modern Principle applies to justify legal interpretation of Quebec's Codes,¹³ but the role of the Codes "prompts consideration that the *methods* of interpretation to be applied to the Code[s] and to statutes ought also to differ."¹⁴

This consideration has not attracted as much notice as one might expect. At the turn of the twentieth century, F.P. Walton wrote a book about interpreting the *Civil Code of Lower Canada* (CCLC) — the CCQ's predecessor — which remains one of the only sources entirely dedicated to the question.¹⁵ More recently, Pierre-André Côté has written that methods of interpretation between ordinary statute and the CCQ are often similar.¹⁶ While true, I also believe that there is value in looking specifically at codal interpretation not only because of the broad way in which codal provisions are drafted, but also specifically because of the Codes' unique and symbolic role as the *jus commune* — the foundation for all other provincial law — in Quebec. Indeed, Côté writes that while drawing a line between statutory and codal interpretation can be difficult, each enactment is not interpreted in the exact same manner.¹⁷ Côté recurrently distinguishes between codal interpretation and ordinary statutory interpretation methods, and I will draw upon this distinction repeatedly in this article.

⁸ *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 92(13), reprinted in RSC 1985, Appendix II, No 5.
⁹ John EC Brierley & Roderick A Macdonald, *Quebec Civil Law: An Introduction to Quebec Private Law* (Toronto: Emond Montgomery, 1993) at 135.
¹⁰ Preliminary provision CCQ.
¹¹ Preliminary provision CCP.
¹² Brierley & Macdonald, *supra* note 9.
¹³ Beaulac & Côté, *supra* note 2 at 138–39.
¹⁴ Brierley & Macdonald, *supra* note 9 [emphasis added]. See also Bruce W Frier, "Interpreting Codes" (1991) 83:8 Mich L Rev 2201 at 2210.
¹⁵ CCLC; Frederick Parker Walton, *The Scope and Interpretation of the Civil Code of Lower Canada* (Toronto: Butterworth, 1980) at 87 [Walton, *Scope and Interpretation*]. See also *Le nouveau Code civil interprétation et application* (Montreal: Éditions Thémis, 1992); Sylvie Parent, *La Doctrine et l'interprétation du Code Civil* (Montreal: Éditions Thémis, 1997).
¹⁶ Pierre-André Côté in collaboration with Stéphane Beaulac and Mathieu Devinat, *The Interpretation of Legislation in Canada*, 4th ed (Toronto: Carswell, 2011) at 29. See also *Épiciers Unis Métro-Richelieu Inc, division 'Econogros' v Collin*, 2004 SCC 59 at para 21; Stéphane Beaulac, "Le Code Civil commande-t-il une interprétation distincte?" (1999) 22:1 Dal LJ 236 at 252–53 [Beaulac, "Interprétation distincte"].
¹⁷ Côté, *ibid* at 32.

On occasion, the Supreme Court has also turned its attention to the unique methodology behind codal interpretation. Justice Gonthier in *Doré v. Verdun (City)* wrote that Quebec’s *jus commune* “must be interpreted broadly so as to favour its spirit over its letter and enable the purpose of its provisions to be achieved.”¹⁸ More recently, the Supreme Court seemed to place primacy on the words of the text in codal interpretation. In *MediaQMI inc. v. Kamel*, Justice Côté wrote that the role of the court is not to interpret or implement the objective of the underlying legislation “at all costs,” but rather to interpret “the text through which the legislature seeks to achieve that objective.”¹⁹ She indicated that there is a significant difference “between an interpretation *that draws* on certain principles and an interpretation *that deviates*, in the name of those principles, from the legislative intent clearly expressed in the wording of a law.”²⁰ Justice Côté confirmed that this exercise is distinctly civilist, when she wrote that “[i]n the civil law context, creating the law remains the legislature’s prerogative” and that “[t]he courts perform ‘only ... a secondary or interstitial function’ in this regard.”²¹ In other words, by codifying the law, the legislature makes deliberate choices of language. It is incumbent on judges to heed those linguistic choices and to give effect to them. As Justice Côté elaborated in *MediaQMI*, “[t]his delimitation of the role of judges reflects a specifically civilian conception of the separation of judicial and legislative functions.”²² In the civil law arena, Justices Gonthier and Côté’s language reflects the Supreme Court’s oscillation between purposive and textualist approaches to statutory interpretation.

In this article, I aim to reconcile these two lines of cases, both of which draw upon accepted civilist principles. I argue that the historical conception of textualism, including the plain meaning rule, is antithetical to Quebec civil law and thus cannot exist as a pan-Canadian theory. Instead, I look to what some scholars have called the “New Canadian Textualism,” and what the Supreme Court has termed “purposive textualism,”²³ which has been identified as a nascent trend at the Supreme Court in mostly constitutional law and common law statutory interpretation cases. This method reconciles both text and purpose, but, as I will explain, cautions against increasingly abstract purposes overriding text that adequately reflects the legislature’s intent. I argue that, as the Supreme Court oscillates between textualist and purposive methods to interpretation, the New Canadian Textualism has largely replaced the plain meaning rule with a more purposive alternative. Just as codal interpretation demands, context and purpose must *always* apply in Canadian statutory interpretation. I also argue that, when interpreting Quebec’s Codes, meaning and legislative intent might not only be communicated through the substance of a provision, but also through its form. When interpreting Quebec’s Codes, honouring the text of a provision might mean looking to the provision’s spirit.

This article will proceed in four parts. In Part II, I will define textualism, trace its historical evolution in Canadian common law, and critique it. In Part III, I will identify a more purposive version of textualism and will argue that it has largely replaced the plain

¹⁸ [1997] 2 SCR 862 at para 15 [*Doré*].

¹⁹ 2021 SCC 23 at para 39 [*MediaQMI*].

²⁰ *Ibid* at para 24 [emphasis in original].

²¹ *Ibid* at para 21.

²² *Ibid* at para 22.

²³ *Toronto (City) v Ontario (Attorney General)*, 2021 SCC 34 at para 53 [*Toronto (City)*].

meaning rule in instances when the Supreme Court employs more textualist methods. In Part IV, I will consider why Quebec's system differs from other Canadian provinces such that we should analyze codal interpretation in the province.

The bulk of the article comes at Part V, in which I will consider statutory interpretation of Quebec's Codes. I provide the caveat that this article does not offer a full survey of codal interpretation; I more modestly aim to demonstrate which methodologies are and are not compatible with Quebec's civil law. Further, in practice, principles of interpretation are merely guides to judges who are confronted with interpretive problems that do not easily fit into neat boxes.²⁴ Caveats aside, in Part V, I will briefly consider historical approaches to codal interpretation in Quebec and identify differences in historical evolution of interpretation between Canada's civil and common law. Then, I will explain how the *jus commune* is broadly drafted and open to external sources to guide interpretation, which complicates textualism's application in the province. I will consider whether and how Quebec's Codes still create boundaries to guide interpretation, either through strictly worded non-*jus commune* provisions or by the wide scope *jus commune* provisions offer, and the implications for courts. Finally, I will conclude by arguing that a form of purposive textualism can only be compatible with Quebec civil law if it adapts to consider that the form a provision takes might very well demand that the interpreter prioritize the provision's spirit over its letter. Ultimately, Quebec's codified civil law is both compatible with and complicates the application of any form of textualism in the province. For the New Canadian Textualism to exist as a pan-Canadian theory, it must account for open-textured provisions drafted in the codal style — not only are such provisions receptive to purpose informing interpretation, but the broadly drafted nature of the provisions demands this receptivity.

II. DEFINITIONS AND HISTORICAL EVOLUTION

A. DEFINITIONS

Given this article's evaluation of a more "purposive textualism" as it applies to Quebec civil law, it is useful to begin with a definition and critiques of textualism. When defining and critiquing the term, I will use sources relating to constitutional law as well as those related to interpretation of ordinary legislation. This is for three reasons. First, while it is true that some (particularly American) authors view constitutional interpretation as separate from statutory interpretation, Richard Risk points out that combining the two in Canada is useful "because they overlap" and the "same issues and ideas illuminate both."²⁵ Second, just as Risk points out that the courts and doctrine often do not distinguish between constitutional and statutory interpretation,²⁶ the scholars and case law to which I will refer also often make no distinction when they define the terms. Finally, while the CCQ and CCP are ordinary statutes, the CCQ has also been described as a "social constitution."²⁷ As I will explain, many of the provisions in the Codes are not drafted in the statutory style, but rather — like much

²⁴ Côté, *supra* note 16 at 33.

²⁵ Richard Risk, "Here Be Cold and Tygers: A Map of Statutory Interpretation in Canada in the 1920s and 1930s" (2000) 63:1 Sask L Rev 195 at 195.

²⁶ Côté, *supra* note 16 at 125–26. See also Beaulac & Côté, *supra* note 2 at 137–39. Beaulac and Côté argue the same interpretive method, Driedger's "Modern Principle," has been applied to interpret legislation in all areas of law, including ordinary statute, constitutional texts, and Quebec civil law.

²⁷ Brierley & Macdonald, *supra* note 9 at 135.

of our *Constitution Act, 1982* — are drafted in an open-textured way.²⁸ Côté writes that “interpretive methods recommended for the interpretation of charters of rights are not too different from those traditionally used to interpret the civil law.”²⁹ A parallel to constitutional interpretation is thus not out of place.

For a definition of textualism in Canada, Leonid Sirota’s work offers a helpful starting point. As Sirota points out, “textualism” does not have a universally accepted meaning and a definition can therefore be “elusive.”³⁰ Just as Adam Dodek has written that “[o]riginalism is a dirty word” in Canadian law,³¹ Sirota has extended the sentiment to textualism, originalism’s cousin.³² Textualism is “hotly debated” and is “ostensibly disfavoured,” including by academics and judges,³³ perhaps because of its association with American conservatives like Justices Antonin Scalia and Amy Coney Barrett.³⁴ The term is used “primarily in derision, which does not help with establishing generally acceptable understandings.”³⁵

Despite these caveats, Sirota defines textualism as “the view that the meaning of the [text] (understood in context) is what is binding on the courts, which may not disregard the text to give effect to abstract purposes.”³⁶ For the purposes of this article, I unpack the nuances behind Sirota’s definition by tracing textualism’s evolution in Canadian law.

B. THE EVOLUTION OF STATUTORY INTERPRETATION IN CANADA

Throughout history, the goal of statutory interpretation has always been to give effect to legislative intent,³⁷ though the preferred method to do so has shifted to and away from textualism over time. Sullivan, writing in the 1990s, has noted that “in Canada, textualism is expressed primarily through the plain meaning rule,” which experienced a revival in the 1990s.³⁸ The plain meaning rule can be defined as an approach whereby “considerations like purpose, context, and consequence and the extrinsic aids to interpretation are taken into account only if the ordinary meaning is ambiguous.”³⁹ That is, if the “meaning that would be understood by a competent language user upon reading the words in their immediate context” is clear, the text governs without resort to other sources.⁴⁰ Because of its closure to sources other than the text, the plain meaning rule is often contrasted against purposivism. Sirota defines “purposivism” as an approach whereby courts invoke the purpose behind a provision to choose among conflicting readings, supplement them, or even to “give purposes

²⁸ *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

²⁹ Côté, *supra* note 16 at 34.

³⁰ Sirota, *supra* note 7 at 81, 84.

³¹ Adam M Dodek, “The Dutiful Conscript: An Originalist View of Justice Wilson’s Conception of Charter Rights and Their Limits” (2008) 41 SCLR (2d) 331 at 333.

³² Sirota, *supra* note 7 at 106.

³³ *Ibid* at 81.

³⁴ *Ibid* at 81, 85. See also Preston Jordan Lim, “Justice Scalia’s Impact on Canadian Jurisprudence” (2022) 2:106 SCLR 443 at 453.

³⁵ Sirota, *supra* note 7 at 81.

³⁶ *Ibid* at 100.

³⁷ Mancini, “Purpose Error,” *supra* note 4 at 922; *Michel v Graydon*, 2020 SCC 24 at para 21 [*Michel*].

³⁸ Sullivan, “SCC Statutory Interpretation,” *supra* note 4 at 182.

³⁹ Ruth Sullivan, *Statutory Interpretation*, 3rd ed (Toronto: Irwin Law, 2016) at 71.

⁴⁰ *Ibid* at 61. See also Risk, *supra* note 25 at 196.

direct effect regardless of textual details.”⁴¹ In Sullivan’s words, under a purposive approach, “if the extra-textual evidence is sufficiently compelling,” the literal meaning of the text may be rejected in favour of “the legislature’s apparent intent.”⁴²

As Sullivan implies by her use of the word “revival,” the plain meaning rule — as a manifestation of textualism — has existed in Canadian law for decades and has over time alternatively fallen into and out of courts’ favour.⁴³ As Risk explains, in the late nineteenth century in Canada, the primary step to interpretation “was to determine whether the words being interpreted had a clear meaning” and, if they did, to follow those words without reference to other sources.⁴⁴ If the words were not clear or the result of applying their plain meaning was absurd, then the meaning could be made clear by reference to the textual context of the rest of the statute.⁴⁵ At the same time, lawyers at the time believed words were often ambiguous and that the legislature’s intent — its general object or policy — must inform interpretation in light of this ambiguity.⁴⁶

In the 1930s, challenges to the earlier plain meaning approach began to slowly emerge. A handful of American authors argued that text most often was not clear, and, at any rate, it is often incoherent to distinguish between clear and ambiguous texts.⁴⁷ The text, however, even if generously construed, “set limits beyond which the judge must not go, and within which a choice must be made.”⁴⁸ Similar analyses existed in Canada: academics agreed that text set limits on possible interpretations, though disagreed on the extent to which the text truly was plain. For example, Professor Alex Corry argued that text was most often ambiguous, and that the judge ought to respect the legislature’s ascertainable objective when choosing between interpretations within those textual bounds.⁴⁹ Professor Russell Hopkins had more faith that statutes did often have plain meaning. He argued that fidelity to a text’s plain meaning was the best way to avoid judges infusing their own preferences into statutory interpretation.⁵⁰

Around the same time, some scholars began to argue that extraneous sources and contexts might be considered, at least when interpreting the *Constitution Act, 1867*.⁵¹ Eventually, the plain meaning rule came under attack as a suspect method of judging.⁵² Professor John Willis, concerned with what courts did rather than what they said, argued that judges in actuality employed various interpretive methods besides the plain meaning approach to

⁴¹ Sirota, *supra* note 7 at 100.

⁴² Sullivan, “SCC Statutory Interpretation,” *supra* note 4 at 183.

⁴³ Beaulac & Côté, *supra* note 2 at 147.

⁴⁴ Risk, *supra* note 25 at 196.

⁴⁵ *Ibid.*

⁴⁶ *Ibid* at 197.

⁴⁷ *Ibid* at 200. See also Sullivan, “SCC Statutory Interpretation,” *supra* note 4 at 201–209: Sullivan makes a similar critique of the plain meaning rule.

⁴⁸ Risk, *supra* note 25 at 200–201.

⁴⁹ *Ibid* at 202. See also JA Corry, “Administrative Law and the Interpretation of Statutes” (1936) 1:2 UTLJ 286.

⁵⁰ Risk, *ibid* at 204. See also E Russell Hopkins, “The Literal Canon and the Golden Rule” (1937) 15:9 Can Bar Rev 689.

⁵¹ Risk, *ibid* at 199, 211, 213.

⁵² Sherwin Lyman, “The Absurdity and Repugnancy of the Plain Meaning Rule of Interpretation” (1969) 3:2 Man LJ 53.

justify their desired result.⁵³ Risk argues that this eclecticism paved the way for a “new approach,”⁵⁴ concerned less with description than prescription, under which judges were to make interpretive choices conforming with the social good because the text alone could not answer the legal problem.⁵⁵ These thinkers must have also paved the way for purposive approaches to statutory interpretation, and by extension the more recent oscillation between textualism (often in its “plain meaning rule” manifestation) and purposivism at the Supreme Court.⁵⁶

Today, the dominant and only approach to statutory interpretation is Driedger’s Modern Principle. The principle was adopted by the Supreme Court of Canada in *Rizzo*, where Justice Iacobucci indicated that Driedger’s Modern Principle “best encapsulates” the preferred approach to statutory interpretation, where interpretation “cannot be founded on the wording of the legislation alone.”⁵⁷ Rather, “the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.”⁵⁸ Since its adoption by the Supreme Court, Canadian courts consistently claim to apply Driedger’s Modern Principle as the only approach to statutory interpretation in Canada. Because of its emphasis on text, context, and purpose, Driedger’s Modern Principle is incompatible with the plain meaning rule.

C. CRITIQUES OF TEXTUALISM

As the primary way textualism has historically been expressed in Canada, the plain meaning rule has been met with criticism from Canadian writers. Many of these critiques are well-founded. Sullivan has four principal critiques to the plain meaning rule. I will unpack each in turn.

First, Sullivan argues that the ordinary meaning of a text cannot be established simply by reading it. Rather, establishing meaning “is a creative, interpretive activity that involves more than the simple application of language rules,”⁵⁹ For example, identifying the text to be interpreted is a choice that affects the outcome of the dispute,⁶⁰ as is identifying the relevant co-text (the portion of the surrounding text considered when determining meaning).⁶¹ Purpose, consequence, and common sense all have a role to play in interpretation regardless of whether the text is clear, and indeed, are often determinative when the text is ambiguous.⁶²

Second, whether a text is “clear” varies from person to person. A reader’s prior knowledge is required to determine the meaning of the text by drawing inferences, making predictions, and eliminating implausible interpretations.⁶³ This dispels any myth that text can mean the

⁵³ Risk, *supra* note 25 at 205. See also John Willis, “Statute Interpretation in a Nutshell” (1938) 16:1 Can Bar Rev 1.

⁵⁴ Risk, *ibid* at 206.

⁵⁵ *Ibid* at 207.

⁵⁶ See Beaulac & Côté *supra* note 2 at 147.

⁵⁷ *Rizzo*, *supra* note 1 at para 21.

⁵⁸ *Ibid*, citing Driedger, *supra* note 1 at 87.

⁵⁹ Sullivan, *Statutory Interpretation*, *supra* note 39 at 71.

⁶⁰ *Ibid* at 88.

⁶¹ Sullivan, “SCC Statutory Interpretation,” *supra* note 4 at 190.

⁶² Sullivan, *Statutory Interpretation*, *supra* note 39 at 71.

⁶³ Sullivan, “SCC Statutory Interpretation,” *supra* note 4 at 208.

same thing to all people. Moreover, courts have not instructed what qualities make a text “plain.”⁶⁴ Judges mean different things by the term “plain meaning” and apply different versions of the principle.⁶⁵ For example, does “plain meaning” mean ordinary, literal, common sense, grammatical, or natural meaning?⁶⁶ Sullivan argues that such “terminological problems reflect genuine uncertainty and inconsistency in the Court’s understanding of what is meant by plain meaning and how it is established.”⁶⁷ As such, whether judges find that a text is sufficiently clear “appear[s] to be arbitrary or result driven.”⁶⁸

Third, Sullivan argues that there is no satisfactory reason why interpreters must only consider the text in its immediate context. If interpreters are to give effect to the legislature’s intention, then all relevant evidence of that intention should be considered.⁶⁹ Sherwin Lyman makes a similar argument, asking how anyone could ascertain meaning — even plain meaning — “without considering the entire scheme, which is to say including all relevant matters thereto such as preambles and scheduled draft conventions?”⁷⁰

Finally, in practice, courts invoke the plain meaning rule simply as a “rhetorical strategy designed to discount the weight of the arguments that favour alternative interpretations” and not to constrain their own interpretation.⁷¹ First, Sullivan argues that courts abandon the rule when it leads to an undesired result.⁷² Second, courts do not simply read the text and stop the process of interpretation. Rather, they consider other contextual factors before concluding that there is nothing to rebut the ordinary meaning presumption and thus that the text is “plain.”⁷³

III. A “NEW” PURPOSIVE TEXTUALISM?

A. EXPANDING THE DEFINITION OF TEXTUALISM

At this point, it is worth recalling Sirota’s warning that “textualism” does not have a universally accepted definition. Indeed, there are various manifestations of textualism. The plain meaning rule is but one manifestation, albeit historically the most common one in Canada. But might some of Sullivan’s critiques of textualism — expressed through the plain meaning rule — at least be partially answered if the definition of textualism is expanded?

⁶⁴ Sullivan, *Statutory Interpretation*, *supra* note 39 at 71.

⁶⁵ Sullivan, “SCC Statutory Interpretation,” *supra* note 4 at 195; Lyman, *supra* note 52 at 55. Lyman argues that if text truly had a “plain meaning,” there would first be no dispute at all. Moreover, judges would not come to different views on the meaning of the text.

⁶⁶ Sullivan, “SCC Statutory Interpretation,” *supra* note 4 at 192.

⁶⁷ *Ibid* at 196.

⁶⁸ Sullivan, *Statutory Interpretation*, *supra* note 39 at 71.

⁶⁹ *Ibid* at 71–72. See also Sullivan, “SCC Statutory Interpretation,” *supra* note 4 at 209.

⁷⁰ Lyman, *supra* note 52 at 55, 56–58.

⁷¹ Sullivan, *Statutory Interpretation*, *supra* note 39 at 72.

⁷² Sullivan, “SCC Statutory Interpretation,” *supra* note 4 at 211.

⁷³ Sullivan, *Statutory Interpretation*, *supra* note 39 at 72.

Recall Sirota’s proposed definition of textualism and contrast it against Sullivan’s definition of the plain meaning rule:

[Textualism:] the view that the meaning of the [text] (understood in context) is what is binding on the courts, which may not disregard the text to give effect to abstract purposes.⁷⁴

[Plain meaning rule:] considerations like purpose, context, and consequence and the extrinsic aids to interpretation are taken into account only if the ordinary meaning is ambiguous.⁷⁵

Sirota’s definition of textualism is broader than Sullivan’s definition of the plain meaning rule. While the plain meaning rule eschews considerations extraneous to the text when the text is clear, Sirota does not say that courts should not consider context or purpose. Rather, he simply says that abstract purposes cannot give judges licence to ignore the text. This is not a rejection of context or purpose. Sirota explicitly assumes that each will be considered. Textualism is thus an overarching category that can accommodate and give weight to context and purpose. The plain meaning rule is simply a narrow (and outdated, considering Driedger’s Modern Principle) manifestation of textualism.

B. ACCOUNTING FOR PURPOSE

To unpack how textualism can account for context and purpose and yet remain textualism, I turn to Mark Mancini’s scholarship.⁷⁶ Mancini argues against the “purpose error,” which is “(1) an acceptance [by courts] of a rhetorically abstract purpose; and (2) the attachment of too much weight to this abstract purpose, without paying sufficient attention to text, scheme, and secondary purposes” to the point where “courts base their reasoning on an abstract purpose with little representation in text.”⁷⁷ In other words, Mancini argues that the “primary purposes of a statute,” or the reason a statute was enacted expressed at a highly abstract level, should not outweigh the “secondary purposes” of a statute. The secondary purposes of a statute are represented by the legal rules and standards expressed by the text itself — *how* the legislature has chosen to achieve its goals.⁷⁸ As Justice Moldaver wrote in *TELUS Communications Inc. v. Wellman*, policy considerations expressed at a highly abstract level, including access to justice, “cannot be permitted to distort the actual words of the statute, read harmoniously with the scheme of the statute, its object, and the intention of the legislature, so as to make the provision say something it does not.”⁷⁹ Benjamin Oliphant expresses a similar sentiment in the context of the *Canadian Charter of Rights and Freedoms*⁸⁰ interpretation. He cautions that allowing abstract purposes expressed at such a high degree of abstraction (such that “it is difficult to conceive of a principle that could not be added to a constitution”) to override the text would render the text “largely otiose” when the text itself is meant to hold interpretive weight.⁸¹ Oliphant argues that this would run

⁷⁴ Sirota, *supra* note 7 at 100.

⁷⁵ Sullivan, *Statutory Interpretation*, *supra* note 39 at 71.

⁷⁶ Mancini, “Purpose Error,” *supra* note 4.

⁷⁷ *Ibid* at 929.

⁷⁸ *Ibid* at 921.

⁷⁹ *TELUS Communications Inc v Wellman*, 2019 SCC 19 at para 79 [*TELUS Communications*].

⁸⁰ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

⁸¹ Oliphant, *supra* note 7 at 248–50.

counter to the typical approach followed by the Supreme Court⁸² and would have adverse implications for the rule of law.⁸³

The first aspect of the purpose error is when a purpose is stated at such a high level of rhetorical abstraction that a court can justify any result, including those inconsistent with the statutory scheme.⁸⁴ The purpose, even if it is an abstract one, might be reflected in the “particular expression in a statute.”⁸⁵ Indeed, Justice Stratas and David Williams write that, in practical terms, to avoid being overturned on judicial review, administrative decision makers should normally draw the purpose of the legislation from the text itself.⁸⁶ Other external sources may also be relevant but they “rarely form the core of the interpretive exercise.”⁸⁷ The second aspect is when courts give undue weight to an abstract purpose — even one reflected in the legislation — without giving appropriate weight to the statute’s secondary purposes.⁸⁸ This theory rests on the presumption that focusing on the way the legislature attempts to achieve its goals via the text is an important — and even essential — element of adhering to legislative intent in statutory interpretation.⁸⁹ For their part, Justice Stratas and Williams write that the way the legislature has chosen to achieve their goals via the ordinary meaning of the text, as well as the surrounding text of a provision (“including the legislation as a whole, its components, surrounding provisions, and any explicit statement of purpose”), should always be central to statutory interpretation.⁹⁰

Colin Feasby helpfully points out that there is a spectrum of this type of “structured purposivism.” On the one hand, those who believe purpose should be grounded in text and that context should not be given undue interpretive weight advocate simply for a “gentle nudge in the direction of a more structured approach that remains within the Supreme Court’s traditional interpretive paradigm.”⁹¹ On the other hand, thinkers like Oliphant — who write that a purposive approach should function to narrow the scope of constitutional text⁹² — advocate for a form of structured purposivism that limits a judge’s interpretive power much more.⁹³ As I will explain later in this article, these structured approaches are not necessarily inconsistent with codal interpretation if they are simply the “gentle nudge” that Feasby describes.

Elsewhere, Mancini and other scholars have labelled this method the New Canadian Textualism because of its focus on the text in its purposive context.⁹⁴ Feasby, drawing on the Supreme Court’s language in *Toronto (City)*, has called it “purposive textual

⁸² *Ibid* at 248; Hon David Stratas & David Williams, “The Bullet-Proof Administrative Decision-Maker: Maximizing the Chances of Surviving a Judicial Review” (26 October 2020) at 1, online (pdf): *SSRN* [perma.cc/Y658-N5HR].

⁸³ Oliphant, *ibid* at 249.

⁸⁴ Mancini, “Purpose Error,” *supra* note 4 at 922, 929–30.

⁸⁵ *Ibid* at 930.

⁸⁶ Stratas & Williams, *supra* note 82 at 4.

⁸⁷ *Ibid* at 5.

⁸⁸ Mancini, “Purpose Error,” *supra* note 4 at 930–31.

⁸⁹ *Ibid* at 921.

⁹⁰ Stratas & Williams, *supra* note 82 at 5.

⁹¹ Colin Feasby, “The Evolving Approach to Charter Interpretation” (2022) 60:1 *Alta L Rev* 35 at 46.

⁹² Oliphant, *supra* note 7.

⁹³ *Ibid* at 65; Feasby, *supra* note 91 at 51–52.

⁹⁴ Mark Mancini, “Entertainment Assoc, 2020 FCA 100: A New Canadian Textualism” (8 June 2020), online (blog): *Double Aspect* [perma.cc/8Y88-CTT6] [Mancini, “New Canadian Textualism”]. See also Lim, *supra* note 34 at 453.

interpretation.”⁹⁵ Some have identified it as a nascent trend at the Supreme Court in both constitutional⁹⁶ and ordinary statutory interpretation.⁹⁷ Recent cases from the Supreme Court reveal the court’s flirtation with placing primacy on the text over abstract purposes,⁹⁸ which, the Supreme Court has been clear to say, is not a purely textual interpretation in the plain meaning sense.⁹⁹

This form of textualism is still nascent, and its contours are still developing. First, it is worth pointing out that the New Canadian Textualism undoubtedly will attract people who approach textualism in different ways. Proponents might look to the text or, alternatively, to the legislative intent (as manifested through the text interpreted in its purposive context) as the object of interpretation. Though it remains to be seen how the theory will develop, it may thus encompass a variety of approaches. Second, it is unclear whether this form of textualism accounts for the existence of two authentic legislative texts (that is, English and French versions of legislation at the federal level and in some provinces). To be viable, the theory should account for both English and French versions of the text when each is authoritative.

C. DISPELLING MYTHS

Feasby and Vanessa MacDonnell both identify some legitimate concerns about purposive textualism in the *Charter* context. These concerns relate to issues of stare decisis (it would not be appropriate to revisit the existing scope of rights), the potential narrowing of rights, and the fact the classical purposive approach has “generally worked well” to date.¹⁰⁰ These concerns are valid, particularly in the *Charter* context and if purposive textualism evolves beyond the “gentle nudge” described above. But, for the purposes of my argument, it is important to dispel some myths about this more gentle, purposive textualism.

First, the approach is consistent with Driedger’s Modern Principle, which has been lauded for its explanatory value but critiqued as failing to provide a method for interpretation, and which “purposive textualism” arguably provides. Mancini argues that avoiding the purpose error is consistent with both Driedger’s Modern Principle and recent instruction from the Supreme Court. A court should not reason from only text or only purpose, because to do so would ignore why a statute was enacted or alternatively to ignore how it achieves its goals. To interpret the scheme “harmoniously,” as Driedger’s Modern Principle requires, purpose and text must also be harmonized. This means that courts should neither allow the text’s plain meaning nor “some rarified ‘object’ or ‘purpose’” to dominate interpretation.¹⁰¹ The approach is also consistent with Sullivan’s argument that interpreters do not seek to discover

⁹⁵ Feasby, *supra* note 91 at 38; *Toronto (City)*, *supra* note 23.

⁹⁶ Feasby, *ibid*; Sirota, *supra* note 7; MacDonnell, *supra* note 7.

⁹⁷ Mancini, “Purpose Error,” *supra* note 4; Mancini, “New Canadian Textualism,” *supra* note 94; Lim, *supra* note 34 at 453; Stratas & Williams, *supra* note 82 at 4–5.

⁹⁸ See the following illustrative list of recent cases from the Supreme Court wherein the majority reasons do not commit the “purpose error”: *R v Breault*, 2023 SCC 9; *R v McColman*, 2023 SCC 8; *Society of Composers, Authors and Music Publishers of Canada v Entertainment Software Association*, 2022 SCC 30; *Toronto (City)*, *supra* note 22. *MediaQMI*, *supra* note 18; *Quebec (Attorney General) v 9147-0732 Québec inc.*, 2020 SCC 32 [*Québec inc.*]; *Michel*, *supra* note 36; *TELUS Communications*, *supra* note 78; *R v Stillman*, 2019 SCC 40; *R v Poulin*, 2019 SCC 47; *R v Rafilovich*, 2019 SCC 51.

⁹⁹ *Québec inc.*, *ibid* at 12–13. Note that this case was a 5 to 4 split decision. These paragraphs are in the majority’s opinion.

¹⁰⁰ MacDonnell, *supra* note 7 at 19–21; Feasby, *supra* note 91 at 57–59.

¹⁰¹ Mancini, “Purpose Error,” *supra* note 4 at 924.

the text's abstract meaning, but rather seek to discover its meaning in relation to particular facts.¹⁰² Indeed, it is also consistent with Sullivan's argument in favour of a pragmatic approach: "The clearer the text" or "the more compelling the evidence of specific legislative intent" gleaned from context and purpose, "the harder it will be to justify departure from those constraints."¹⁰³ In other words, a harmonious approach simply asks that the text hold interpretive weight.

Second, it is also worth underscoring that this version of textualism is different from the plain meaning rule. Unlike under the plain meaning rule, purpose is vital to understand the text. It is not "hypertextualism" to focus on the text as "understood in its purposive context."¹⁰⁴ One might be forgiven for thinking that this approach somewhat resembles purposivism because of its emphasis on purpose. Recall that purposivism means that courts invoke purpose to choose among conflicting readings, supplement them, or — pushed to its furthest — give purposes effect over the text. The New Canadian Textualism similarly invokes purpose to interpret text in its purposive context, including by choosing among conflicting readings and supplementing them (though undue weight is not to be placed on abstract purposes). Indeed, "it has for some time been recognized that the differences between [textualism and purposivism] may be less sharp than one might think."¹⁰⁵ One might even argue that purposive textualism, as an "expanded" conception of textualism, is an instance of a legal theory working itself impure.¹⁰⁶

Finally, the approach does not accord with American textualism. The Canadian approach much more generously accounts for purpose. It is true that even the most passionate American textualists, Justice Scalia and Bryan Garner, recognize that purpose plays a limited, but important, role in interpretation. But, according to Justice Scalia and Garner, purpose may only be gathered from the text itself, historical patterns of past linguistic use, and the words that surround the text.¹⁰⁷ In Canada, courts will more flexibly consider legislative intention to ascertain the meaning of the text.¹⁰⁸ Unlike his American counterparts, Mancini more generously argues that purpose should always play a role in interpretation even though an abstract purpose should not overwhelm the legal rules and standards found in the text.¹⁰⁹ His point aligns with instruction from the Supreme Court that a judge may only resort to external interpretive aids — like legislative history, Hansard, and other similar material — when it is relevant and not given undue weight.¹¹⁰

It remains to be seen whether the New Canadian Textualism will truly take hold at the Supreme Court. But, in its infancy, it appears that it has at least largely replaced the plain

¹⁰² Sullivan, *Statutory Interpretation*, *supra* note 39 at 29.

¹⁰³ Sullivan, "SCC Statutory Interpretation," *supra* note 4 at 226.

¹⁰⁴ Mancini, "Purpose Error," *supra* note 4 at 940, 942.

¹⁰⁵ Sirota, *supra* note 7 at 84. See also Jonathan T Molot, "The Rise and Fall of Textualism" (2006) 106:1 *Colum L Rev* 1; John F Manning, "What Divides Textualists from Purposivists?" (2006) 106:1 *Colum L Rev* 70.

¹⁰⁶ See Jeremy K Kessler & David E Pozen, "Working Themselves Impure: A Life Cycle Theory of Legal Theories" (2016) 83:4 *U Chicago L Rev* 1819.

¹⁰⁷ Antonin Scalia & Bryan A Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul, Minn: Thomson/West, 2012) at 33.

¹⁰⁸ Lim, *supra* note 34 at 453; John James Magyar, "The Evolution of Hansard Use at the Supreme Court of Canada: A Comparative Study in Statutory Interpretation" (2012) 33:3 *Stat L Rev* 363.

¹⁰⁹ Mancini, "Purpose Error," *supra* note 4 at 921.

¹¹⁰ *Németh v Canada (Justice)*, 2010 SCC 56 at para 46; Magyar, *supra* note 108 at 372.

meaning rule with a more purposive alternative — and one that aligns with Driedger’s Modern Principle — in the Supreme Court’s oscillation between textualism and purposivism.

IV. QUEBEC’S CODES: A MIXED CIVILIST SYSTEM

Why look at civilist approaches to statutory interpretation in the Canadian context? Looking at traditional civilist principles remains important because Quebec’s legal system is inherited from the continental civil law system. French law applied in Quebec when it was a colony, and Quebec maintained its civil law system when the colony was transferred to the British. Therefore, the CCQ has historically been aligned in both form and content with the French *Code civil*, previously the *Code Napoléon*.¹¹¹ In addition, Quebec originally received its civil procedure from the continental French system.¹¹² The history of Quebec’s inheritance of the French legal system is well-trodden academic ground, and for the purposes of this article it suffices to say that continental and Quebec civilist legal systems share common influences and that each system continues to resemble and even influence the other to some extent.¹¹³ But Quebec’s system has also evolved into its own legal order. When approaching Quebec civil law, it is important to remember that the law is civilist in its roots — allowing for some comparison with other civil law systems like France and Louisiana — but is also uniquely mixed in its nature.

A. QUEBEC’S MIXED SYSTEM

Quebec enjoys a mixed legal system, meaning that there are both traditional civilist and Anglo-Saxon common law features within the system. A mixed system might be defined as one that is “representative of (at least) two recognizable legal traditions” with “different or multiple identities [that] function at the interface or point of contact of the different traditions.”¹¹⁴ While there is no single paradigm for a mixed system, according to Vernon Valentin Palmer, there are two broad features that comprise a framework for mixed systems: first, an edifice with a “cultural divide ... between private Continental law (possibly infiltrated) on the one hand, and public Anglo-American/Canadian law on the other”; and second, fundamental bijurality with a “confrontation between civil and common law” that is “fairly balanced” but also of a magnitude “that makes it a characteristic unto itself.”¹¹⁵

Rosalie Jukier has pointed out that Quebec’s legal system today is mixed in three important respects. First, Quebec enjoys a bijural system wherein private law is civilist and codified while federal law is very much in accordance with the common law precedent-based tradition. Second, despite the civilist nature of Quebec private law, judicial institutions in Quebec are generally modelled after the British system. Finally, unlike in continental civilist

¹¹¹ FP Walton, “The Legal System of Quebec” (1913) 13:3 Colum L Rev 213 at 217.

¹¹² Rosalie Jukier, “The Impact of Legal Traditions on Québec Procedural Law: Lessons from Quebec’s New Code of Civil Procedure” (2015) 93:1 Can Bar Rev 212 at 213 [Jukier, “Impact of Legal Traditions”].

¹¹³ See Philippe Brun, “Les projets de réforme du droit français des obligations et l’influence du droit québécois” (2009) 88:2 Can Bar Rev 455; Vernon Valentin Palmer, “Quebec and Her Sisters in the Third Legal Family” (2009) 54:2 McGill LJ 321.

¹¹⁴ H Patrick Glenn, “Mixing It Up” (2003) 78:1/2 Tul L Rev 79 at 80.

¹¹⁵ Palmer, *supra* note 113 at 340.

systems, judges in Quebec are chosen from the bar and written judgments resemble those of the British system much more so than judgments of the French system.¹¹⁶

Quebec's legal system is mixed largely because there has been cross-fertilization between civil law and common law over time.¹¹⁷ Both common law and civil law in Canada undoubtedly influence each other.¹¹⁸ Quebec civil law has offered a helpful reference point for Canadian common law, as seen recently in Justice Kasirer's judgment in *CM Callow Inc. v. Zollinger*.¹¹⁹ Indeed, as Beaulac has written, the civilist approach to writing legislation, and consequently legislative interpretation, has had an influence on the pan-Canadian legal reality.¹²⁰

The common law influence on Quebec civil law is also apparent. For example, when the text in the CCQ is ambiguous or demands interpretation, an element that judges used to take into consideration is the interpretation given to the same term or concept in the common law of other provinces.¹²¹ Jean-Louis Baudouin argues that while helpful for legal unity in Canada, the practice may have served to assimilate the common law into Quebec civil law.¹²² To Baudouin's point, Justice Gonthier has commented that until the 1920s and 1930s, the Supreme Court tended to "apply common law solutions to civil law cases with little regard for their effect on the civil law" in a quest for uniformity across Canada's legal traditions.¹²³ And, in the domain of statutory interpretation, the "only one principle or approach" across Canada is Driedger's Modern Principle,¹²⁴ which is a creature of Canadian common law.

Some might argue that there is no need to look at traditional civilist traditions of statutory interpretation because Quebec is a mixed system, or a "third legal family,"¹²⁵ and has incorporated key tenets of Anglo-Saxon common law. In other words, one might presume that the barrier between traditional civilist concepts and the Anglo-Saxon common law system has been broken down in Quebec due to the common law's influence on the civil law and thus that there is no difference between interpreting codes and ordinary statutes. I will address this argument in the following section.

¹¹⁶ Rosalie Jukier, "Inside the Judicial Mind: Exploring Judicial Methodology in the Mixed Legal System of Quebec" (2011) 6:1 *J Comparative L* 54 at 56–58 [Jukier, "Judicial Methodology"].

¹¹⁷ Jean-Louis Baudouin, "L'Interprétation du Code Civil Québécois par la Cour Suprême du Canada" (1975) 53:4 *Can Bar Rev* 715; Stéphane Beaulac, "'Texture ouverte', droit international et interprétation de la Charte canadienne" (2013) 61 *SCLR* (2d) at paras 11–12 [Beaulac, "Texture ouverte"]; Daniel Jutras, "Cartographie de la Mixité: La Common Law et la Complétude du Droit Civil au Québec" (2009) 88:2 *Can B Rev* 247.

¹¹⁸ See Charles D Gonthier, "Some Comments on the Common Law and the Civil Law in Canada: Influences, Parallel Developments and Borrowings" (1993) 21:3 *Can Bus LJ* 323; Gil Rémillard, "Codification et mondialisation" (2005) 46:1/2 *C de D* 601.

¹¹⁹ 2020 SCC 45 at paras 57–63.

¹²⁰ Beaulac, "Texture ouverte," *supra* note 117 at para 11. See also Côté, *supra* note 16 at 34.

¹²¹ Baudouin, *supra* note 117 at 722. See also David Howes, "From Polyjurality to Monojurality: The Transformation of Quebec Law, 1875–1929" (1987) 32:3 *McGill LJ* 523.

¹²² Baudouin, *supra* note 117 at 722.

¹²³ Gonthier, *supra* note 118 at 324.

¹²⁴ Rizzo, *supra* note 1 at para 87.

¹²⁵ See Palmer, *supra* note 113.

B. QUEBEC'S CIVILIST ROOTS

While Quebec has undoubtedly been influenced by common law Canada, care should be taken to not overstate the above assumption. Quebec's system is distinctly civilist in its roots. The Supreme Court confirmed Quebec's civilist character, despite its mixed system, in *Lac d'Amiante du Québec Ltée v. 2858-0702 Québec Inc.*¹²⁶ Speaking in the context of civil procedure, Justice Lebel for the majority wrote, “[a]lthough Quebec civil procedure is mixed, it is nonetheless codified, written law, governed by a tradition of civil law interpretation.”¹²⁷

Indeed, the CCLC — the predecessor to the CCQ — bore close similarity to the French *Code Civil* of 1804 by virtue of its structure and style.¹²⁸ The current CCQ is rooted in and has grown out of the CCLC, even as the legislature has revised provisions to reflect a more “modernized and distinctive view” of Quebec civil law.¹²⁹ Various judges at the Supreme Court, including Justices Mignault and Lebel, have been proponents of a parallel approach, where the integrity of the civil law is to be protected “through autonomous interpretation” using “civilian procedure, methodology and principles.”¹³⁰ Today, “it is generally recognized that, in dealing with Quebec civil law cases, the [Supreme Court] draws essentially upon the methods and principles of the civil law.”¹³¹ The Supreme Court itself has said that its goal is to “[ensure] that the common law and the civil law would evolve side by side, while each maintain[s] its distinctive character.”¹³² Therefore, it is important to look at traditional civilist principles as they manifest in Quebec when interpreting Quebec's Codes.

V. STATUTORY INTERPRETATION IN THE CIVIL LAW

How does the interpretation of a code differ from the interpretation of a statute? The Codes lay down the *jus commune*, or common law, in Quebec.¹³³ In this way, the Codes are envisaged as a symbolic social constitution that governs, among other things, relations between persons and their property in the province.¹³⁴ Quebec's Codes are thus not analogous to an ordinary statute, either symbolically (Macdonald writes that the CCQ “is an icon”)¹³⁵ or in how they are written as a particular form of legislative enactment.¹³⁶ Indeed, unlike

¹²⁶ 2001 SCC 51 [*Lac d'Amiante*].

¹²⁷ *Ibid* at para 39.

¹²⁸ Rémillard, *supra* note 118 at 606; see also CcF.

¹²⁹ Rosalie Jukier, “Canada's Legal Traditions: Sources of Unification, Diversification, or Inspiration” (2018) 11 J Civ L Studies 75 at 92 [Jukier, “Canada's Legal Traditions”]. Further, recodifying the CCLC into the CCQ is arguably a “re-civilization” of Quebec law, which lays down the civil code as holding a central position in the legal order and contains “some borrowings that have been civilized”: Matthieu Juneau, “The *Mixité* of Quebec's Recodified Civil Law: A Reflection of Quebec's Legal Culture” (2016) 62:3 Loy L Rev 809 at 819–20.

¹³⁰ Jukier, “Impact of Legal Traditions,” *supra* note 112 at 245–46. See also Sylvio Normand, “Un thème dominant de la pensée juridique traditionnelle en Québec: La sauvegarde de l'intégrité en droit civil” (1987) 32:3 McGill LJ 560.

¹³¹ Gonthier, *supra* note 118 at 325.

¹³² *Reference re Supreme Court Act ss 5 and 6*, 2014 SCC 21 at para 85. See Jukier, “Canada's Legal Traditions,” *supra* note 129 for further discussion about how Quebec has maintained its distinct civil law culture, even as ideas and concepts are sources of inspiration between the two legal systems.

¹³³ Preliminary provision CCQ. The CCP, along with the CCQ, constitute elements of Quebec *jus commune* in the matter of civil procedure: see Côté, *supra* note 16 at 411, 444.

¹³⁴ Brierley & Macdonald, *supra* note 9 at 135.

¹³⁵ Roderick A Macdonald, “Encoding Canadian Civil Law” in *Mélanges Paul-André Crépeau* (Cowansville: Yvon Blais, 1997) 579 at 598.

¹³⁶ John EC Brierley, “Quebec's ‘Common Laws’ (*Droits Communs*): How Many Are There?” in Ernest Caparros et al, eds, *Mélanges Louis-Philippe Pigeon* (Montreal: Wilson & Lafleur, 1989) at 114 [Brierley, “Quebec's Common Laws”].

special statutes, codal provisions are most often drafted broadly and are capable of supporting several meanings. It follows that the interpretation of civil codes may differ from the interpretation of ordinary statutes and thus merits special consideration.¹³⁷

A. HISTORICAL APPROACHES

Unlike Canadian common law, it is more difficult to delineate a historical and modern approach to Quebec codal interpretation. Sylvie Parent cautions that perspectives on codal interpretation in Quebec diverge based on both author and time period.¹³⁸ Nonetheless, it does seem clear that the influence of formalism in Quebec civil law has not been as prevalent as in the common law,¹³⁹ as the civil law has historically been very open to external sources, allowing for nearly unlimited use of travaux préparatoires to guide interpretation.¹⁴⁰ It does remain possible, however, to broadly trace out historical and modern approaches to codal interpretation.

Parent writes a wonderful account of the history of codal interpretation in Quebec. In the first part of her book, Parent argues that, unlike in France, Quebec commentators did not adopt an overly dogmatic approach to codal interpretation following codification.¹⁴¹ One of the first commentators, Justice Loranger, believed that the CCLC did not represent the totality of civil law¹⁴² nor was it the first source of civil law; rather, it was its reflection.¹⁴³ Before commenting on a provision's scope, therefore, the interpreter ought to first investigate the origin of the rule.¹⁴⁴ Even though France's more dogmatic interpretive approach was not adopted in Quebec, Parent does point to Justice Loranger's laudable effort to try not to introduce changes when the text did not provide for them.¹⁴⁵

Divergent views on interpretation dominated the early twentieth century. Justice Mignault, at the time, favoured a doctrinal interpretation of the law inspired by the French commentator Frédéric Mourlon,¹⁴⁶ while François Langelier considered the CCLC to be a complete code¹⁴⁷ and legislative intent to be a key part of the interpretive equation.¹⁴⁸ Walton was the first to treat the subject of codal interpretation as an autonomous study. In his book published at the turn of the twentieth century, *The Scope and Interpretation of the Civil Code of Lower Canada*, Walton expressed a sequence of rules to interpret the CCLC. Walton's primary rule

¹³⁷ Brierley & Macdonald, *supra* note 9 at 135.

¹³⁸ Parent, *supra* note 15 at 4.

¹³⁹ Côté, *supra* note 16 at 277.

¹⁴⁰ Stéphane Beaulac, "Parliamentary Debates in Statutory Interpretation: A Question of Admissibility or of Weight" (1998) 43:2 McGill LJ 287 at 307. See also Sylvio Narmand, "Les travaux préparatoires et l'interprétation du Code civil du Québec" (1986) 27:2 C de D 347. Normand argues that looking to the travaux préparatoires — which includes the *Codifiers' Reports* and the *Report on the Quebec Civil Code* by the Civil Code Revision Office — has fallen alternatively in and out of fashion in Quebec, but doing so in the modern era is allowed. Judges thus may look to the *Codifiers' Reports* or the *Report on the Quebec Civil Code* by the Civil Code Revision Office when interpreting the Codes. See e.g. *Rapports des Commissaires pour la codification des lois du Bas-Canada qui se rapportent aux matières civiles* (Quebec: GE Desbarats, 1865).

¹⁴¹ Parent, *supra* note 15 at 35.

¹⁴² *Ibid* at 37; CCLC.

¹⁴³ Parent, *ibid* at 38.

¹⁴⁴ *Ibid* at 41.

¹⁴⁵ *Ibid* at 42.

¹⁴⁶ *Ibid* at 61.

¹⁴⁷ *Ibid* at 70.

¹⁴⁸ *Ibid* at 74.

(expressed in his Rules One and Four) was that when the Code was clear, it “cannot be controlled or explained away by reference to any other source.”¹⁴⁹ Parent argues that this rule demonstrates that Walton saw the CCLC as a complete code, whereby its interpretation must be based on its provisions.¹⁵⁰ Somewhat similarly, Justice Mignault, commenting later in 1935, wrote that it would be superfluous to dig into the provision any further if the rule is clear and applies directly to the litigation, which therefore closes the interpretive debate.¹⁵¹

As already alluded, the interplay between text and purpose was more complicated than might initially appear. It does not follow from Walton’s general principle that the plain meaning of the text always governs. Indeed, even though there was a certain positivism at play in his work, Beaulac suggests that Walton cautioned against a literal interpretation of text that could restrict its scope.¹⁵² Walton’s Rule Six provided that when the Code is ambiguous, it must be interpreted. For example, when a provision encompassed a general principle or the legislature intended to employ opaque language, that provision could not support a plain meaning. Recourse to the rest of the Code first (Walton’s Rule Seven),¹⁵³ and then to external sources (Walton’s Rules Eight, Nine, and Eleven),¹⁵⁴ was thus permitted and encouraged.

Through the first decades of the twentieth century until about the 1960s, writers were concerned with protecting the integrity of Quebec civil law against common law infiltration — and interpretive approaches became more formalist and nationalist.¹⁵⁵ Parent argues that more recently, legal thinkers have been preoccupied with the role of judgments and doctrine in civil law rather than with the interpretation of the Codes themselves.¹⁵⁶

The enactment of the new CCQ in 1994 did, however, herald the clarification of how the Codes should be interpreted. First, it is worth noting that scholars have argued that the CCLC “lost its centrality as an expression of the *jus commune* in Quebec” through the twentieth century,¹⁵⁷ which might have contributed to an overly restrictive interpretive approach. At the same time, John E.C. Brierley and Roderick Macdonald, writing in 1993 at the precipice of the new CCQ coming into force after it had already received royal assent, commented on a “new theory of progressive interpretation.”¹⁵⁸ This new theory rested on a method of “free scientific research,” meaning that “the intention of the legislature is not to be found in the literary materials of the Code and its sources, but in the ideas that these materials reflect.”¹⁵⁹ Brierley and Macdonald underscored that this new theory did not gain a significant following in Quebec, meaning that in many ways the traditional civilist methods of interpretation still undergird the modern CCQ. This new theory did, however, leave important traces on judicial interpretation.¹⁶⁰

¹⁴⁹ *Ibid* at 80.

¹⁵⁰ *Ibid* at 83.

¹⁵¹ Hon PB Mignault, “Le Code Civil de la Province de Québec et son Interprétation” (1935) 1:1 UTLJ 104 at 124.

¹⁵² Beaulac, “Interprétation distincte,” *supra* note 16 at 239.

¹⁵³ Walton, *Scope and Interpretation*, *supra* note 15 at 101.

¹⁵⁴ *Ibid* at 101, 104, 116.

¹⁵⁵ Beaulac, “Interprétation distincte,” *supra* note 16 at 240. See also Howes, *supra* note 121.

¹⁵⁶ Parent, *supra* note 15 at 171–191; Beaulac, “Interprétation distincte,” *supra* note 16 at 246.

¹⁵⁷ Macdonald, *supra* note 135 at 603 [emphasis in original].

¹⁵⁸ Brierley & Macdonald, *supra* note 9 at 142–43.

¹⁵⁹ *Ibid* at 143.

¹⁶⁰ *Ibid*.

Notably, the new Code itself mandated a progressive method of interpretation. In the new CCQ, a preliminary provision dictates that the Code operates in harmony with, among other things, unenacted and unwritten general principles of law. The preliminary provision of the CCP provides the same. The CCQ's preliminary provision also specifies that the Code "comprises a body of rules which, in all matters within the letter, spirit or object of its provisions, lays down the *jus commune*, expressly or by implication."¹⁶¹ Extra-textual implication might include the spirit or object of its provisions rather than simply the letter.

Providing a clear story of historical evolution of civil code interpretation in Quebec is not as easy as in the Anglo-American context. It is quite right that the same "new" theory of progressive interpretation that Risk identifies in his work¹⁶² did not gain a significant following in Quebec.¹⁶³ But, at the same time, the civil law has historically been more open to the spirit of the law than the common law. And, with reforms leading up to the CCQ, the legislature mandated an open mode of codal interpretation by adding the preliminary provision. I argue that while there are features of traditional methods that continue to inform present day interpretation, there are also features of modern codal interpretation that challenge traditional civilist modes of interpretation. These features together require that any form of textualism — if it is to exist in a pan-Canadian manner — adapt to always account broadly for context and purpose.

B. COMPLICATING HISTORICAL APPROACHES

There are at least three main reasons why, in my view, a strictly positivist approach to interpreting Quebec's Codes, best exemplified in Walton's rules, ought to be complicated. First, the CCQ — and the CCP in the context of civil procedure as well — lay down the *jus commune*. The *jus commune*, in the way it is drafted and because of its symbolic value as Quebec's common law, demands broad interpretation. Second, Driedger's Modern Principle demands that all of text, context, and purpose are accounted for in statutory interpretation, no matter how clear a provision looks on its face. Finally, and relatedly, the CCQ is to be read in harmony with sources undergirding the code, including general principles of law: the principles underlying the code but not always expressed through the text. In other words, civilist interpretation "aims to solve problems arising *under* a code through reference to broader principles that the code may be held to embody" and "aims to solve problems arising *outside* a code through extension of these same principles, by the application of analogy."¹⁶⁴

1. DRAFTING THE *JUS COMMUNE*

Some might assume that textualism easily applies to Quebec civil law simply because it is codified. That is untrue. As laid out in its preliminary provision, the CCQ "comprises a body of rules which, in all matters within the letter, spirit or object of its provisions, lays down the *jus commune*, expressly or by implication." The preliminary provision elaborates that the CCQ "is the foundation of all other laws, although other laws may complement the

¹⁶¹ Preliminary provision CCQ.

¹⁶² Risk, *supra* note 25 at 206.

¹⁶³ Brierley & Macdonald, *supra* note 9 at 143.

¹⁶⁴ Frier, *supra* note 14 at 2210 [emphasis in original].

Code or make exceptions to it.”¹⁶⁵ Like the CCQ, the CCP “establishes the principles of civil justice” and governs civil procedure along with the CCQ and general principles of law. The CCP “must be interpreted and applied as a whole, in keeping with the civil law tradition.”¹⁶⁶ Because the CCQ lays down the *jus commune*, or “droit commun” or common law, in the province, it necessarily demands broad interpretation.¹⁶⁷ The CCQ, with its expressed broad applicability, is meant to apply to a plethora of situations — indeed, to *all* situations where no specialized law of exception exists — that might arise in civil law. The CCP’s preliminary provision indicates that it broadly establishes the principles of civil justice. Indeed, the CCP, along with the CCQ, constitutes elements of Quebec *jus commune* in the matter of civil procedure.¹⁶⁸

With laws and provisions of general application, the legislature recognizes that it cannot account for, and therefore cannot codify, all matters that might come before a court. In the civilist tradition, codal provisions are therefore often written in broad, general, and sometimes even vague terms simply because they are meant to apply to myriad situations.¹⁶⁹ As Macdonald writes, codal provisions are rarely “univocal” or capable of only one meaning.¹⁷⁰ He elaborates that a “well-drafted civil code is even able to maintain [its] centrality in times of rapid social change” because its “rules and principles are cast at a level of generality that permits changing value judgements to be accommodated within its normative framework.”¹⁷¹ For his part, Jean-Marie Portalis said that however complete a code seems, it “is no sooner finished than thousands of unexpected questions present themselves to the magistrate.”¹⁷² While codes remain as written, people’s movement “continually produces some new fact, some new outcome.”¹⁷³ The Codes’ function, then, is to broadly set down “the general maxims of the law, to establish principles rich in consequences, and not to deal with the particulars of the questions that may arise on every subject.”¹⁷⁴ Thus, codes are often formed of provisions that are general, have limited detail,¹⁷⁵ are ambiguous, and are susceptible to more than one interpretation.¹⁷⁶ Some authors have described these provisions as “open textured” or “notions à contenu variable” (“notions of variable content”).¹⁷⁷

¹⁶⁵ Preliminary provision CCQ.

¹⁶⁶ Preliminary provision CCP.

¹⁶⁷ Côté, *supra* note 16 at 30. A note on terminology: to avoid confusion with the Anglo-Saxon Common Law tradition built on a precedent-based system, I use the term *jus commune* when I speak of Quebec’s “common law” or “droit commun.” The CCQ usually expresses common and general laws, as opposed to specialized ones (or “la généralité nécessaire d’un droit commun”: Patrick Glenn, “La Disposition préliminaire du Code civil du Québec, le droit commun et les principes généraux du droit” (2005) 46:1/2 C de D 339 at 341).

¹⁶⁸ Côté, *supra* note 16 at 411, 444.

¹⁶⁹ Beaulac, “Texture ouverte,” *supra* note 117 at para 10.

¹⁷⁰ Macdonald, *supra* note 135 at 601.

¹⁷¹ *Ibid.*

¹⁷² Canada, Department of Justice, *Preliminary Address on the First Draft of the Civil Code*, Presented in the Year IX by Messrs Portalis, Tronchet, Bigot-Préameneu & Maleville (Ottawa: Government of Canada, 2022), online: [perma.cc/K348-BMU7] [*Preliminary Address on the First Draft of the Civil Code*].

¹⁷³ *Ibid.*

¹⁷⁴ *Ibid.*

¹⁷⁵ Charlotte Lemieux, “Éléments d’interprétation en droit civil” (1994) 24:2 RDUS 221 at 232.

¹⁷⁶ Gerard Carney, “Comparative Approaches to Statutory Interpretation in Civil Law and Common Law Jurisdictions” (2015) 36:1 Stat L Rev 46 at 52.

¹⁷⁷ Beaulac, “Texture ouverte,” *supra* note 117 at para 10.

Quebec's Codes are thus differentiated from the statutes in other Canadian provinces largely because the normative dispositions in their written law embody notions of variable content; the language is that of general application.¹⁷⁸ In common law provinces, the historically default approach to statutory interpretation held that statutes are interpreted restrictively because statutes are exceptions to the common law expressed in a more detailed and precise style; therefore, they are to be narrowly construed.¹⁷⁹ Conversely, provisions of general application in Quebec's Codes — the codified *jus commune* — are to be interpreted broadly.

The fact that the CCQ lays down the *jus commune* and is to apply to many situations leaves a role for the judge to interpret broad and general provisions when applying them to specific circumstances. Indeed, Jacques Derrida has said that justice addresses singularities even as it reaches for universality.¹⁸⁰ This logic fits well with the CCQ, as the general and broad provisions must always be applied to individual situations. This means that a large and liberal interpretation of the text is necessary when applying it to circumstances which the legislature may not have contemplated. The vague wording and unclear terminology typically associated with the civilist tradition invites interpreters to liberally interpret those provisions.¹⁸¹ The CCQ, because it establishes the *jus commune*, demands this same large and liberal interpretive approach.¹⁸² A civil code is to be interpreted with recognition that the code is permanent, which demands an interpretation that is “dynamique ou évolutive.”¹⁸³

What does this large and liberal interpretation mean in practice for the interpreter? In short, codified rules generally are not to receive a restrictive interpretation.¹⁸⁴ The interpreter may validly reason by analogy from the principles that the code sets out,¹⁸⁵ as there is room for extension of the articulated rule by analogy.¹⁸⁶ Indeed, the preliminary provision of the CCQ itself advocates for reasoning by analogy, as the *jus commune* is laid down by “all matters within the letter, spirit or object of [the code's] provisions ... expressly or by implication.”¹⁸⁷ Côté argues that this language indicates that the body of rules must be capable of being extended by analogy to answer questions that neither the CCQ nor other statutes expressly envision. A strict — or non-extensive — interpretation of the rules of the *jus commune* would therefore be “absurd.”¹⁸⁸

¹⁷⁸ *Ibid* at para 13.

¹⁷⁹ *Ibid* at paras 13–14, 16.

¹⁸⁰ Jacques Derrida, “Force de loi : Le fondement mystique de l'autorité” (1950) 11:5/6 *Cardozo L Rev* 920 at 954–55.

¹⁸¹ Beaulac, “Texture ouverte,” *supra* note 117 at paras 10, 12, 14.

¹⁸² *Ibid*. See also Mélanie Samson, “Interprétation Large et Libérale et Interprétation Contextuelle : Convergence ou Divergence?” (2008) 49:2 *C de D* 297 at 301. Note that Samson also points out that this interpretive method is in line with the requirements of the Canadian *Interpretation Act*, RSC, 1985, c. I-21, s 12 which demands a “large and liberal” interpretation. See also *Doré*, *supra* note 18.

¹⁸³ Lemieux, *supra* note 175 at 236.

¹⁸⁴ *Ibid*.

¹⁸⁵ Côté, *supra* note 16 at 31, 394.

¹⁸⁶ Lemieux, *supra* note 175 at 235.

¹⁸⁷ Preliminary provision CCQ.

¹⁸⁸ Côté, *supra* note 16 at 358.

2. EXTERNAL SOURCES

The open textured nature of codal provisions also makes it more likely that elements outside the text will be received into the text through interpretation. Based on the way a codal provision is drafted, a large and liberal interpretation might make use of general principles of law, doctrine, and the Codifiers' Report.¹⁸⁹ These extrinsic materials are accorded considerable persuasive force and — as indicated already — have historically been accepted as valid interpretive tools in Quebec.¹⁹⁰ While courts have cautioned against the use of Hansard or the Minister of Justice's Commentaries in settling interpretive debates, the reports of the codifiers — which have an official character — have historically been important interpretive tools used in Quebec and at the Supreme Court to discover legislative intent.¹⁹¹

The first paragraph of the preliminary provision reminds readers that the CCQ is harmonized with general principles of law. This is important because even though a civil code aims to be exhaustive, no civil code can be "sufficient unto itself."¹⁹² I have already alluded to a definition of general principles of law, but for a more robust definition I turn to John E.C. Brierley. Brierley defines these general principles of law as a range of implicit norms, varying in scope and significance, and drawn from the "experience and knowledge" of every "civilized community."¹⁹³ These general notions are also derived from "political organization, the economic system, and social regulation."¹⁹⁴ The general principles of law provides the foundation for the CCQ and also exist as part of its normative structure.¹⁹⁵ For example, the CCQ may refer to these terms without defining them or elaborating on them. A good example is the concept of good faith,¹⁹⁶ which by virtue of being left undefined extends an invitation to judges to develop "the moral character of the law."¹⁹⁷ General principles of law may also transcend the Code's own formal expression because they may apply absent a specific enactment.¹⁹⁸

3. IMPLICATIONS FOR TEXTUALISM

Civilist interpretive methods challenge the way textualism might apply across Canada. Since the Codes together lay down the common law of Quebec, their provisions are usually drafted broadly. Indeed, they are Codes of general application, meant to apply to unforeseen situations that come before courts. The Codes could be said to codify a system or tradition, into which the text offers a window. As Portalis notes, codification "would be beyond human powers, if it entailed giving this people an entirely new institution and if . . . one did not deign to benefit from the experience of the past and from that tradition of good sense, rules and maxims which has come down to us and informs the spirit of centuries."¹⁹⁹ Interpreters

¹⁸⁹ *Ibid* at 31–32. Interestingly, Côté, *ibid* at 33 notes that "[t]raditionally, legislative debates were not consulted for the purposes of interpreting the *Civil Code* or its amendments."

¹⁹⁰ *Ibid*.

¹⁹¹ Mignault, *supra* note 151 at 125.

¹⁹² Macdonald, *supra* note 135 at 595. See also Brierley, "Quebec's Common Laws," *supra* note 136 at 116.

¹⁹³ Brierley, "Quebec's Common Laws," *supra* note 136 at 117.

¹⁹⁴ Brierley & Macdonald, *supra* note 9 at 128.

¹⁹⁵ *Ibid* at 129.

¹⁹⁶ Arts 6, 7, 1375 CCQ.

¹⁹⁷ Brierley & Macdonald, *supra* note 9 at 129 [footnotes omitted].

¹⁹⁸ Brierley, "Quebec's Common Laws," *supra* note 136 at 118.

¹⁹⁹ *Preliminary Address on the First Draft of the Civil Code*, *supra* note 172.

should search for the principles behind civil codes to facilitate their general application.²⁰⁰ The civil law thus calls for a large and liberal interpretation that might extend beyond the text and make use of external sources and general principles when interpreting the text.

Textualism, then, cannot be compatible with Quebec civil law if it is a method of interpretation that always hews to the literal meaning of the text in all contexts. However, if the definition of textualism is expanded such that purpose and context are *always* accounted for, as in Sirota's definition, then perhaps this more purposive textualism can be compatible with Quebec's system. Indeed, textualism and liberal interpretation should not be seen as incompatible in civil law because the first constitutes a method and the second a result.²⁰¹

The New Canadian Textualism seems to provide the requisite flexibility. In Quebec, purpose (as ascertained historically through codifiers' travaux préparatoires, doctrine, and general principles of law, among other sources) necessarily will play a role in interpreting codal provisions. At the same time, as will be unpacked, Quebec's Codes do create textual boundaries — albeit often broad ones — within which interpreters must operate. Under this model, civilist interpretation can be compatible with an adapted definition of purposive textualism that accounts for context and purpose. As I will explain, this purposive textualism should in certain circumstances even allow the spirit of the law to prevail.

C. THE BOUNDARIES OF QUEBEC'S CODES

The historical currents of interpretation have continued to influence how Quebec's Codes are interpreted, and have evolved in light of the CCQ and CCP's preliminary provisions. These observations are supported by conflicting language from the Supreme Court. For example, in *Doré*, Justice Gonthier said that because the CCQ is the *jus commune* of Quebec, the Code "must be interpreted broadly so as to favour its spirit over its letter and enable the purpose of its provisions to be achieved."²⁰² But, only one paragraph prior, he had said that while legislative history may be considered, "the interpretation of the *Civil Code* must be based first and foremost on the wording of its provisions"²⁰³ Can these two seemingly contradictory statements be reconciled? I believe they can be. There is a central role for the Codes' spirit to influence interpretation of the broadly drafted *jus commune* because the text is capable of bearing myriad meanings that apply to myriad situations. At the same time, an interpreter must use the text, interpreted in its context and purpose, as a guiding framework that cannot be discounted.

There are three interrelated reasons why purposive textualism, or the New Canadian Textualism, may align with the civil law. First, interpretation of many mandatory and exceptional provisions is often strict — those provisions are not generally to be extended to situations not formally prescribed. Second, text is a touchstone through which the interpreter operates, even when the provisions are broadly drafted. Finally, in the civil law tradition, the judge has historically been seen as subordinate to the text. As I will argue, however, for purposive textualism to be compatible with Quebec civil law, textualism must be understood

²⁰⁰ Beaulac, "Interprétation distincte," *supra* note 16 at 249.

²⁰¹ Lemieux, *supra* note 175 at 245.

²⁰² *Doré*, *supra* note 18 at 874.

²⁰³ *Ibid* at 873.

in a specific way. Any methodology that applies in Quebec should account for the legislature's deliberate choice of the *form*, in addition to substance, of broadly drafted provisions. As I will explain, these legislative choices conveyed through textual cues may communicate to courts that the spirit of certain provisions may be prioritized over their letter. These choices allow those provisions to apply by analogy to previously unanticipated situations.

I. INTERPRETING MANDATORY AND EXCEPTIONAL PROVISIONS

While Quebec's Codes are the *jus commune* in the province, it is worth pointing out that "a civil code is not a monolith."²⁰⁴ Some of its provisions form part of the *jus commune* while others do not.²⁰⁵ Further, while most rules in the CCQ, for example, are suppletive²⁰⁶ and facilitative — or, in other words, "are not imperative in the sense of requiring or prohibiting certain types of activity"²⁰⁷ — there are also some rules that are not suppletive, such as certain mandatory and exceptional provisions.

Mandatory, or imperative, provisions command.²⁰⁸ It is worth noting that in the civil law, though imperative rules can be rules of public order, they are not always so.²⁰⁹ In the civil law, provisions of public order "do not concern the form of a legal institution, but rather their legitimate use and proper social and economic content and operation."²¹⁰ Conversely, the notion of an imperative rule is "much richer."²¹¹ This type of rule is "imperative not because it is posited, but because it is, plain and simply, true."²¹² Certain codal rules — in progressive degrees of imperative intensity — are "constitutive of a legal institution," "elaborate an essential feature of the institution that cannot be disregarded" by parties, or "restrict the power to stipulate certain terms or conditions."²¹³ In other words, they are most often provisions "governing juridical acts, those granting powers, and those requiring the observance of formalities."²¹⁴ As David Stevens and Jason Neyers write, when providing an example of an imperative rule that is constitutive of a legal institution, "[t]he legislator may

²⁰⁴ Macdonald, *supra* note 135 at 593.

²⁰⁵ *Ibid.*

²⁰⁶ Brierley, "Quebec's Common Laws," *supra* note 136 at 126.

²⁰⁷ Macdonald, *supra* note 135 at 599.

²⁰⁸ Côté, *supra* note 16 at 242.

²⁰⁹ Christianne Dubreuil & Brigitte Lefebvre, "L'ordre public et les rapports patrimoniaux dans les relations de couple" (1999) 40:2 C de D 345 at 346, n 1; Brierley & Macdonald, *supra* note 9 at 105.

²¹⁰ David Stevens & Jason W Neyers, "What's Wrong with Restitution?" (1999) 37:1 Alta L Rev 221 at 232. Stevens and Neyers give the example of art 25 CCQ: "The alienation by a person of part or product of his body shall be gratuitous; it may not be repeated if it involves a risk to his health."

²¹¹ Brierley & Macdonald, *supra* note 9 at 105.

²¹² Stevens & Neyers, *supra* note 210 at 232. Stevens and Neyers give the example of art 1708 CCQ: "Sale is a contract by which a person, the seller, transfers ownership of property to another person, the buyer, for a price in money which the latter obligates himself to pay."

²¹³ Brierley & Macdonald, *supra* note 9 at 105. See also Sullivan, *Statutory Interpretation*, *supra* note 39 at 90–91. Sullivan points out the difference between mandatory and directory provisions. The judge must interpret whether a given provision is mandatory or directory if the legislation is silent as to the consequences of breaching the binding requirement contained in the provision. If the provision is mandatory, the consequence of a breach is nullity. If it is directory, "the result is an irregularity that can be cured." Nonetheless, this distinction, while interesting, is not particularly useful for the purpose of this article. As Sullivan points out, both mandatory and directory provisions are "always imperative in the sense" that they impose "binding duties or requirements." The distinction between mandatory and directory provisions thus comes into play at the consequences phase of analysis.

²¹⁴ Côté, *supra* note 16 at 243.

attempt to state the essential characteristics or the real definition of an institution: the contract of sale, for example, by stating that sale is translative of title."²¹⁵

These imperative rules can be found in codal articles. Brierley notes that some portions of the Codes do constitute "peremptory" legislation.²¹⁶ H.P. Glenn concedes that though the CCQ is mostly suppletive, there are other types of law within the Codes, including imperative rules.²¹⁷ He writes that "le régime impérative applicable de manière uniforme et obligatoire sur un territoire donné grâce à volonté d'un législateur national, ne fait pas partie de la notion de droit commun."²¹⁸

Since imperative provisions are not part of the *jus commune*, it follows that they may not attract the same interpretative method as the *jus commune*. Indeed, many of these provisions are not open textured. For example, the Supreme Court in *Desputeaux v. Éditions Chouette (1987) inc.*²¹⁹ considered CCP rules relating to the annulment of an arbitration award. The Supreme Court considered the limits on judicial review over an arbitration decision, including when a court could annul or refuse to homologate²²⁰ an arbitration award. It noted that under article 946.2 of the CCP, the court examining a motion for annulment is not permitted to investigate the merits of the dispute, and that articles 946.4 (which the Court of Appeal of Quebec has called an "imperative provision")²²¹ and 946.5 CCP exhaustively lay out the reasons why a court might refuse to homologate or annul an arbitration award. The Supreme Court of Canada found that a broad view of judicial power over the annulment of arbitration awards awarded under the CCP inappropriately "extends judicial intervention ... well beyond the cases intended by the legislature."²²² This is because the provisions at issue were mandatory and specific. To extend judicial intervention beyond what was provided would be to ignore the legislature's will in placing deliberate limits on that judicial review. In that case, legislative intention was reflected in the language of provisions that were, "plain and simply, true."²²³

A codal norm drafted in suppletive and abstract terms can also admit of exceptions and derogations, which might be found in the Codes themselves.²²⁴ These can include "an increasingly detailed articulation of ideas, as the Code progresses, in its ordering of things, into the innermost reaches of a given subject matter" in line with the logic of the Code.²²⁵ They can also include inelegant legislative amendments to address a perceived mischief.²²⁶ For example, Brierley laments that the text of the new CCQ expresses many more specific definitions, classifications, and starting points than the CCLC; these are not the general

²¹⁵ Stevens & Neyers, *supra* note 210 at 232.

²¹⁶ Brierley, "Quebec's Common Laws," *supra* note 136 at 126.

²¹⁷ Glenn, *supra* note 167 at 351.

²¹⁸ *Ibid.* Translated by author: "[T]he imperative rule, applicable in a uniform and obligatory way on a given territory thanks to the will of a national legislature, is not part of the notion of *jus commune*."

²¹⁹ 2003 SCC 17 [*Desputeaux*].

²²⁰ In modern civil law, homologate means "[t]o approve; to confirm; as a court homologates a proceeding": Henry Campbell Black, *Black's Law Dictionary* (St Paul, MN: West Publishing Co, 1910) sub verbo "homologate."

²²¹ *Coderre c Coderre*, 2008 QCCA 888 at para 94.

²²² *Desputeaux*, *supra* note 219 at para 68.

²²³ Stevens & Neyers, *supra* note 210 at 232.

²²⁴ Brierley & Macdonald, *supra* note 9 at 107. See also *Threlfall v Carleton University*, 2019 SCC 50.

²²⁵ Brierley & Macdonald, *ibid* at 108.

²²⁶ *Ibid* at 109.

principles, maxims, or modes of thinking preferable in codes laying down the *jus commune*.²²⁷ Laying down laws in the statutory (narrowly-construed), rather than codal (open-textured), style is to make them forever inflexible.²²⁸ As Brierley and Macdonald point out, there have been chapters and provisions drafted in a statutory rather than codal style, in which “specific definitions abound, ... the language is inelegant, and the articles are presented as a detailed specification of exceptions.”²²⁹ Indeed, exceptional provisions are simply exceptions to the general rules set out in provisions of broader application.²³⁰ Particular laws may make exceptions to the more general, gap-filling *jus commune* as the preliminary provision provides.²³¹ For example, when interpreting the CCP’s provisions, the Supreme Court has found that “the general rule must be given a broad and liberal interpretation and the exception, on the other hand, must be strictly interpreted.”²³² Therefore, generally, these rules of exception are exhaustive and are to be strictly construed.²³³

A note on terminology is useful here. Côté helpfully points out that “strict interpretation” and “restrictive interpretation” are interchangeably used in the common law to explain a “limited” interpretation of a provision. In the civil law, these terms are distinct. “Strict interpretation” means that one must not extend a provision of exception to situations not formally provided for in the text. It does not mean these provisions attract the most restrictive meaning. Conversely, “restrictive interpretation” means that, when faced with two competing possible interpretations, the narrowest one is to be favoured.²³⁴ In the civil law, we are not concerned with “restrictive interpretation” because there is “no reliance” in the civil law on restrictive principles of interpretation.²³⁵ In the civilist tradition, looking to context and purpose is always important to avoid absurdity and to ensure the provision is interpreted consistently with the Code’s scheme. What we are concerned with, however, is the notion of strict interpretation. When a rule is narrowly construed and is mandatory or exceptional, there is little room for the civilist interpreter to extend the text (interpreted in its context and purpose) beyond the circumstances to which the provision says it applies.

This analysis is different from Walton’s Rules One and Four (when codal provisions are clear in their grammatical sense, they “cannot be controlled or explained away by reference to any other source”).²³⁶ Today, there is always a necessary “pre-interpretation” to determine whether a rule is “clear.”²³⁷ One must interpret whether a codal provision is mandatory or exceptional versus suppletive and facilitative before applying it,²³⁸ and the distinction is often

²²⁷ John EC Brierley, “Les langues du Code civil du Québec” in *Le nouveau Code civil interprétation et application* (Montreal: Éditions Thémis, 1992) 129 at 134 [Brierley, “Les langues”]. See also Jean Pineau, “La philosophie générale du Code civil” in *Le nouveau Code civil interprétation et application* (Montreal: Éditions Thémis, 1992) 271 at 280. Pineau points out that there has been an integration of “lois particulières” in the CCQ.

²²⁸ Brierley, “Les langues,” *ibid* at 134.

²²⁹ Brierley & Macdonald, *supra* note 9 at 109.

²³⁰ Côté, *supra* note 16 at 536–37; Sullivan, *Statutory Interpretation*, *supra* note 39 at 233.

²³¹ Côté, *ibid* at 387.

²³² *Construction Gilles Paquette ltée v Entreprises Végo ltée*, [1997] 2 SCR 299 at para 15; *Québec (Communauté urbaine) v Services de santé du Québec*, [1992] 1 SCR 426.

²³³ Côté, *supra* note 16 at 535–36; see also *Québec (Communauté urbaine) v Corp Notre-Dame de Bon-Secours*, [1994] 3 SCR 3.

²³⁴ Côté, *ibid* at 495.

²³⁵ *Ibid* at 32.

²³⁶ Walton, *Scope and Interpretation*, *supra* note 15 at 80 [emphasis omitted].

²³⁷ Jean-Louis Bergel, “Spécificités des codes et autonomie de leur interprétation” in *Le nouveau Code civil interprétation et application* (Montreal: Éditions Thémis, 1992) 3 at 10.

²³⁸ Brierley & Macdonald, *supra* note 9 at 106.

a difficult one to make.²³⁹ Doing so requires analyzing the provision in its purposive context, as is required by modern statutory interpretation. But we can also reconcile Walton's points with modern statutory interpretation. Once the rule is deemed to be a strictly construed mandatory or exceptional one applicable to the facts at hand (which, to reiterate, is no easy task), it suffices to directly apply it, subject to the key exception of absurdity identified below.²⁴⁰

It cannot be overstated that these situations are rare. Rarely does the text alone dispose of an interpretive problem; most provisions in Quebec's Codes are not drafted so narrowly that they are completely unambiguous.²⁴¹ I would also decline to be overly categorical — there may be situations in which certain mandatory or exceptional provisions are broadly drafted, suppletive, and part of the *jus commune*. But, at least with narrowly construed mandatory or exceptional rules, there may still be an intellectual priority of the letter over the spirit of the law in civil law.²⁴² The legislature's intent of when and how to apply that rule is likely reflected in the text. Conversely, if the text is broadly drafted, as when the *jus commune* is laid down, it leaves ample room for interpretive creativity.

2. ABSURD RESULTS

It is important to underscore that interpreting mandatory and exceptional provisions does not mean a reversion to the plain meaning rule, under which there is no need to interpret an applicable provision if its text is clear. Brierley writes that the “identification of any particular codal rule as either imperative or suppletive may be a matter of interpretation because its character is not always stated unambiguously.”²⁴³ This is especially true for codes, which are filled with open-textured, suppletive rules as well as with narrowly construed, exceptional and mandatory ones. And, as Côté notes, “[i]n the civil law tradition, which allows for the analogous extension of a provision to situations not formally covered, the characterisation of a provision as general or exceptional is fundamental to its interpretation, as this is the basis for the choice between liberal and strict approaches.”²⁴⁴ This is because the *jus commune* attracts a liberal approach and can be extended by analogy, while exceptional provisions in the same code attract a strict — though not restrictive — one. And, at any rate, it is important to interpret even a seemingly clear rule in its purpose and context to ensure its application does not lead to absurdity and fits in the general scheme of the code. A civilist judge will not hesitate to allow legislative intent to prevail over the text when giving the text its literal meaning would lead to absurdity in light of the scheme or would deprive the provision of its usefulness.²⁴⁵

²³⁹ Lemieux, *supra* note 175 at 252.

²⁴⁰ See J Gareth Morley, “Dead Hands, Living Trees, Historic Compromises: The Senate Reform and Supreme Court Act References Bring the Originalism Debate to Canada” (2016) 53:5 Osgoode Hall LJ 745 at 764–65. A parallel might be drawn to the “rules, standards, principles” distinction of legal norms in constitutional interpretation. For example, a rule is a speed limit, “which can be applied to a set of facts by simple deductive reasoning without reference to their underlying purpose” (Morley, *ibid* at 764). A standard “calls for an act of normative judgment,” like the reasonable person standard (Morley, *ibid* at 764). A principle, like freedom of speech, “must be balanced against other principles to derive a legal answer” (Morley, *ibid* at 764–65). Standards and principles are more abstract and vaguer than rules.

²⁴¹ Brierley & Macdonald, *supra* note 9 at 138.

²⁴² *Ibid* at 136–37.

²⁴³ Brierley, “Quebec's Common Laws,” *supra* note 136 at 126, n 48.

²⁴⁴ Côté, *supra* note 16 at 536–37.

²⁴⁵ *Ibid* at 427.

The Supreme Court's decision in *Ostiguy v. Allie*²⁴⁶ provides a helpful example. In that case, the Supreme Court split on the appropriate application of article 2918 of the CCQ, which, on its face, clearly specifies that “[a] person who has for 10 years possessed an immovable as its owner may acquire the ownership of it only upon a judicial application.”²⁴⁷ Allie and her family had acquired their neighbours' parking spaces by acquisitive prescription because they had possessed them in a peaceful, continuous, public, and unequivocal way for over ten years.²⁴⁸ The neighbours sold their property to Ostiguy, who registered the property and applied for an injunction to stop Allie from parking in the spaces.²⁴⁹ But Allie had not brought legal proceedings forward as required by CCQ 2918.²⁵⁰ The question therefore became whether her right was recognized.

Writing alone in dissent, Justice Côté would have given effect to the provision's clear wording and found that Allie did not have a legal right to the spaces because she had not brought forward legal proceedings.²⁵¹ Justice Gascon, writing for the majority, interpreted the article in its context and purpose. He looked to the legislature's intent based on a proposed reform of the publication of rights regime, which was based on the principle of absolute confidence in titles. In his view, the legislature's abandonment of the reform confirmed that the old CCLC standards applied and that there was no requirement that rights acquired by prescription be published.²⁵² Justice Gascon essentially found that the article's plain interpretation was not supported by the rest of the scheme. For example, Justice Gascon considered several other codal articles to achieve consistency with the Code's scheme on the subject, as well as to avoid stripping other articles “of any useful purpose.”²⁵³ He found that his “solution is the one that is most consistent with the general scheme of the CCQ and with the relevant provisions on prescription, as well as on the publication of rights and on sale.”²⁵⁴

Ostiguy represents the majority's read of the CCQ as a coherent whole, even when parts of it pulled in different directions. This is not unusual. In Quebec's civil law tradition, emphasis on coherence is “particularly crucial when interpreting a code,” at least in part because the idea of a code itself “implies ... systematicity and coherence.”²⁵⁵ The civilist judge will correct a rule and give effect to the “fundamental legislative intent” if giving the text its literal meaning would lead to absurd results or deprive the provision of any use.²⁵⁶ Even though article 2918 of the CCQ was clear on a literal read, it was important to interpret it in its purposive context; to apply the clear text in that case would have been absurd in the context of the rest of the codal scheme. But if had article 2918 of the CCQ had been supported by the rest of the scheme and did not lead to an absurd result, it ought to have been applied.

²⁴⁶ 2017 SCC 22 at para 6 [*Ostiguy*]

²⁴⁷ Art 2918 CCQ.

²⁴⁸ *Ostiguy*, *supra* note 246 at para 6.

²⁴⁹ *Ibid* at para 7.

²⁵⁰ Art 2918 CCQ.

²⁵¹ *Ostiguy*, *supra* note 246 at para 129.

²⁵² *Ibid* at para 39.

²⁵³ *Ibid* at para 54; see also paras 55–64.

²⁵⁴ *Ibid* at para 52.

²⁵⁵ Côté, *supra* note 16 at 328.

²⁵⁶ *Ibid* at 427.

3. BROADLY DRAFTED TEXT IS A TOUCHSTONE

As already analyzed, because the Codes lay down the *jus commune* in Quebec, most codal provisions are written in generous terms. This necessitates a broad interpretation, with recourse to external sources and the possibility of extending provisions by analogy. Broadly drafted text is a touchstone rather than a straitjacket.

First, when the legislature has deliberately drafted the text broadly as the *jus commune*, it signals that a judge must employ interpretive creativity and perhaps even have recourse to external sources to ascertain a provision's spirit. This is part of *how* the legislature has chosen to achieve their goals. Indeed, when the law is ambiguous, equivocal, or incomplete, the judge must determine the spirit of the law and the intent of the legislature.²⁵⁷ Looking to external sources or principles underlying the Code in those instances specifically *conforms* to the legislature's intent. "[T]he recognition of the ultimate insufficiency of legislative enactment is a central tenet of the very philosophy of a Civil Code as a style of law-making."²⁵⁸ Indeed, the legislature drafted those provisions broadly and vaguely so that they could apply to myriad untemplated situations.²⁵⁹ I will address this point more fully in the sections to follow.

Second, in civil law it is necessary to start with the text when interpreting, and to return to it. Charlotte Lemieux lays out four unavoidable methods to interpret the new CCQ — the first (though not only) being a literal method, simply because interpretation of text must always begin with the text.²⁶⁰ Alain-François Bisson references three pillars of interpretation identified in the CCQ's preliminary provision: the letter, the spirit, and the object. He points out that the letter is the first interpretive tenet.²⁶¹ Indeed, a previous proposed version of the preliminary provision that put the spirit before the letter of the law in the interpretive order was rejected at least in part because putting the spirit before the law was perplexing in the civilist tradition, where general principles were assigned a very secondary place.²⁶² Since the system is one where the legislated law is listed as the first official source of interpretation, one must begin with the text and might return to it to uncover its meaning.²⁶³ All this is to say simply that the text of the *jus commune* is the starting point for assessing a provision's meaning and must be accounted for in civilist interpretation.

Third, the Codes are drafted to "reduce the appeal to extra-codal general principles to a minimum."²⁶⁴ Macdonald writes that to codify "is to presume that there can be a basic rationality and system to private law and to the *ius commune*; and it is to presume that this rationality can be expressed in a way that dependence upon non-codal sources is minimized."²⁶⁵ What Macdonald means is that the Codes are a system in and of themselves

²⁵⁷ Lemieux, *supra* note 175 at 247.

²⁵⁸ Brierley, "Quebec's Common Laws," *supra* note 136 at 116.

²⁵⁹ Côté, *supra* note 16 at 358.

²⁶⁰ Lemieux, *supra* note 175 at 245.

²⁶¹ Alain-François Bisson, "Disposition préliminaire du Code civil du Québec" (1999) 44:3 McGill LJ 539 at 557.

²⁶² *Ibid* at 548.

²⁶³ *Ibid* at 557–58.

²⁶⁴ Macdonald, *supra* note 135 at 595.

²⁶⁵ *Ibid* at 600.

— though “no legislation can be complete in itself”²⁶⁶ — and are emblematic of the entire civilist tradition (which is the focus of interpretation).²⁶⁷ This is because the *jus commune* in the Codes is drafted broadly and in a suppletive way, making the Code applicable to many situations without needing to look elsewhere. It is also because of the Code’s foundation on general principles of law, which operate “at the same level of legislation and are internal to the normative structure of the law.”²⁶⁸ General principles of law do “transcend the Code’s own formal expression,”²⁶⁹ but they are also rooted in the CCQ particularly as the preliminary provision accounts for them. This citation in the preliminary provision is relatively recent in the life of Quebec’s Codes; before the textual reference to general principles during codal reform in the 1980s, their ability to be an independent source of law “ha[d] not attracted great notice in Quebec.”²⁷⁰

Lemieux quotes Saleilles to express how the spirit that emerges from the codal scheme is used as an interpretive tool: “Au-delà du *Code civil*, mais par le *Code civil*.”²⁷¹ A similar sentiment was expressed by Portalis, as quoted by Brierley: “[I]t is through the Code that one must reach beyond it.”²⁷² The Supreme Court has also indicated in the context of the CCP that “[i]n the civil law tradition, Quebec courts must find their latitude for interpreting and developing the law within the legal framework comprised by the Code and the general principles of procedure underlying it.”²⁷³ While again, modern interpretation has evolved past Walton’s approach, his influence is clear: when the meaning of a provision is ambiguous, the Code itself is the best — though not necessarily only — guide.²⁷⁴

4. THE ROLE OF JUDGES

In traditional conceptions of civil law, the judge is subordinate to the text and must apply the codified law. Justice Côté indicated in *MediaQMI* that in civil law there is a “delimitation of the role of the judge,” with courts performing merely a “secondary or interstitial function” vis-à-vis the legislature’s primary function in law-making.²⁷⁵ The judge’s creative role is limited in principle to the case at hand.²⁷⁶ Justice Côté’s commentary regarding the

²⁶⁶ Brierley & Macdonald, *supra* note 9 at 129.

²⁶⁷ Côté, *supra* note 16 at 459.

²⁶⁸ Brierley & Macdonald, *supra* note 9 at 130, n 195.

²⁶⁹ John EC Brierley, “The Renewal of Quebec’s Distinct Legal Culture: The New Civil Code of Quebec” (1992) 42:4 UTLJ 484 at 500 [Brierley, “Distinct Legal Culture”].

²⁷⁰ Brierley & Macdonald, *supra* note 9 at 130. Translated by author: “Beyond the *Civil Code*, but by the *Civil Code*.” The Supreme Court used unexpressed general principles to develop the doctrine of abuse of rights in 1990 (after the 1980 reform), though Justice L’Heureux-Dubé also linked abuse of rights back to the “fundamental principles of Quebec civil law” that found textual expression in the CCLC: see *Houle v Canadian National Bank*, [1990] 3 SCR 122 at 145. In *Cie Immobilière Viger Ltée c Lauréat Giguère Inc.*, [1977] 2 SCR 67 at 76 [*Cie Immobilière*], Justice Beetz developed the concept of unjust enrichment in the civil law before the reform. Though he found that the *Civil Code* does not contain all of the civil law because it is based on principles not expressed in the Code, he also found support for unjust enrichment “in an extrapolation from the numerous provisions of the *Civil Code*.” Each justice referred to the text to justify recourse to the general principles, even though doing so was not necessary.

²⁷¹ Lemieux, *supra* note 175 at 234 [translated by author].

²⁷² Brierley, “Distinct Legal Culture,” *supra* note 269 at 497.

²⁷³ *Lac d’Amiante*, *supra* note 126 at para 39.

²⁷⁴ Walton, *Scope and Interpretation*, *supra* note 15 at 100.

²⁷⁵ *MediaQMI*, *supra* note 19 at paras 21–22.

²⁷⁶ Pierre J Dalphond, “Le style civiliste et le juge: le juge québécois ne serait-il pas le prototype du juge civiliste de l’avenir?” in Nicolas Kasirer, ed, *Le droit civil, avant tout un style?* (Montreal: Éditions Thémis, 2004) 81 at 87.

“delimited” role of judges highlights a historical feature of the civilist system, though, this feature requires further explanation.

The traditional civilist conception of judging is that the judge is subordinate to the text because of the separation of powers. The legislature organizes social order through the Codes. In so doing, the legislature has decided which interests prevail over others and codified them.²⁷⁷ The judge then applies the law that the legislator has made.²⁷⁸ In *MediaQMI*, Justice Côté draws upon this traditional division of powers to highlight that in civil law, “creating the law remains the legislature’s prerogative,” that “judges [give] life to the dead letter of the law,” and that this understanding of the judicial role “reflects a specifically civilian conception of the separation of judicial and legislative functions.”²⁷⁹ Of course, the judge’s “mere application” of the law only really pertains when the text is clear (and potentially of a mandatory or exceptional character), which is rare. Also, judges must embark on an exercise of “pre-interpretation” to determine the provision’s character.

Thus, this conception of judging should not be understood as precluding the judge’s interpretive role, particularly in Quebec. First, despite a unanimous Supreme Court judgment indicating the contrary,²⁸⁰ it has been argued that, like everywhere else in Canada, judges of the Superior Court of Quebec have inherent jurisdiction to make law.²⁸¹ To the extent the judge is subordinate to the text, it is when the judge is in the realm of applying codal rules. Second, the judge must apply the broad codal provisions to a specific case, or, as one author put it, “transform a ready-made garment into a tailor-made suit.”²⁸² The legislature often drafts general codal provisions specifically so judges can apply the broad provision to a particular case, all in light of changing social conditions.²⁸³ When the provision is silent or obscure, the judge is called upon to fill those gaps, and has a creative role in doing so. As the judge applies general or vague laws to specific situations, they apply and define the rules and therefore develop the law,²⁸⁴ which gives the judge significantly more creative power than might be initially appreciated.²⁸⁵ Portalis said that civilist judges do not engage with “authoritative interpretation” (creating rules or general provisions to settle disputes), but must engage in “doctrinal interpretation” (“grasping the true meaning of laws, in applying them judiciously and in supplementing them in cases where they do not apply”).²⁸⁶ Similarly, Justice Lebel has argued that judges do not create “la loi” (the codified law) but do have a role in creating the system of “le droit,” including principles which manifest in jurisprudence and doctrine and which may be later drawn upon to inform interpretation.²⁸⁷

²⁷⁷ James L. Dennis, “Interpretation and Application of the Civil Code and the Evaluation of Judicial Precedent” (1993) 54:1 *Louisiana L Rev* 1 at 9.

²⁷⁸ Carney, *supra* note 176 at 58.

²⁷⁹ *MediaQMI*, *supra* note 19 at paras 21–22.

²⁸⁰ *Lac d’Amiante*, *supra* note 126 at paras 37–39.

²⁸¹ Jukier, “Judicial Methodology,” *supra* note 116 at 60–61.

²⁸² Roger Perrot, “Judge: The Extent and Limit of His Role in Civil Matters” (1976) 50:3 *Tul L Rev* 495 at 496.

²⁸³ Brierley, “Distinct Legal Culture,” *supra* note 269 at 496. See also Beaulac, “Texture ouverte,” *supra* note 116 at para 10; Dalphond, *supra* note 276 at 87–88.

²⁸⁴ Louis Lebel, “La loi et le droit: la nature de la fonction créatrice du juge dans le système de droit québécois” (2015) 56:1 *C de D* 87 at 92–93.

²⁸⁵ Dalphond, *supra* note 276 at 87–88.

²⁸⁶ *Preliminary Address on the First Draft of the Civil Code*, *supra* note 172.

²⁸⁷ Lebel, *supra* note 284 at 91. See also *Cie Immobilière*, *supra* note 270.

There is a strong counterargument that this phenomenon now exists in the common law and is therefore not unique to the civil law. In his seminal article “Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws,” Justice Scalia argues that, in the common law, “[w]e live in an age of legislation, and most new law is statutory law.”²⁸⁸ Common law is now often codified, taking the form of statutes from Parliament or rules from administrative bodies. Justice Scalia notes that “[e]very issue of law resolved by a federal judge [in the United States] involves interpretation of text — the text of a regulation, or of a statute, or of the Constitution.”²⁸⁹ In his mind, common law judges operate in a civil law world as they are increasingly being called upon to interpret and apply statutes.

Justice Scalia does concede, however, that the “old private-law fields — contracts, torts, property, trusts and estate, family law — remain firmly within the control of state common-law courts” and that judicial lawmaking remains healthy and “more freewheeling than ever” in these fields.²⁹⁰ Justice Scalia implicitly acknowledges that there was a philosophical difference between the two systems historically. Civilist systems codified law while common law systems operated via a system of precedent. He notes that a realistic view of common law judicial lawmaking sits uncomfortably alongside democracy. If the judge makes the law, is the judge then the legislator? As Justice Côté noted in *MediaQMI*, the civil law has not been confronted with this problem so squarely — the legislature codifies the law, the judges apply it, and the civilist conception of the division of powers is maintained.²⁹¹ Even aside from a historical difference, in civilist systems, these old-private law fields remain codified in their entirety, whereas in the common law they are not.

All this is to say, if the text is broadly drafted *jus commune*, the judge has abundant room for interpretation. Conversely, the judge generally has less room to operate if the text is narrowly construed and is imperative or exceptional. Though the judge must determine whether a rule is imperative, exceptional, or suppletive — which is no easy task — a judge ultimately is guided by the legislative choice of how the language is drafted. As Daniel Jutras has noted in the context of the CCP, the creative power of the judge is circumscribed, at least in form, by the codified nature of procedural law in Quebec.²⁹² So too with the CCQ.

5. APPLICATION TO A MORE PURPOSIVE TEXTUALISM

Unlike the plain-meaning rule form of textualism, Quebec’s civil law potentially could align with purposive textualism, or the New Canadian Textualism. But, if this form of purposive textualism is to exist as a pan-Canadian theory, it must adapt to account for *jus commune* provisions, which are open-textured and sometimes demand that the spirit transcend the letter.

Elements of interpretation in civil law are compatible with the New Canadian Textualism on its face. It is apparent that the interpretation of narrowly drafted mandatory and

²⁸⁸ Antonin Scalia, *A Matter of Interpretation* (Princeton: Princeton University Press, 2018) at 13.

²⁸⁹ *Ibid.*

²⁹⁰ *Ibid.* at 12.

²⁹¹ *MediaQMI*, *supra* note 19 at para 22.

²⁹² Jutras, *supra* note 117 at 265.

exceptional provisions aligns with purposive textualism. Those provisions are to be strictly interpreted. They are not to be extended to situations that are not formally provided for precisely because they generally do not comprise part of the *jus commune*, or the suppletive law of general application. Yet, looking to the purpose behind even a seemingly clear rule is still important to determine whether it is a mandatory or exceptional rule, and to determine whether its application would lead to absurdity considering the entire codal scheme.

Purposive textualism obviously does not eschew purpose. Mancini argues that purpose must always play a role in interpretation, and also that the text, context, and purpose “must be dealt with authentically.”²⁹³ Sometimes, the legislation’s purpose is “established simply by reading the words of the legislation.”²⁹⁴ While in Quebec’s civil law, external purpose might be considered when determining whether a provision is suppletive or not, the purpose of narrowly-worded imperative or exceptional provisions is most often reflected in the text. This is because this type of provision “is, plain and simply, true”²⁹⁵ in line with the will of the legislature, and those provisions should not be extended to apply beyond their stated scope.²⁹⁶ Côté agrees that textual arguments are “perfectly acceptable” in the civil law, even though the civil law is not generally formalist.²⁹⁷ He writes that “[n]ot only does the Preliminary Provision of the *Civil Code of Quebec* clearly state the necessity of holding fast to the letter of the law, but the case law which interprets the Code contains numerous instances in which an interpretation was accepted or rejected solely on the basis of its compatibility or incompatibility with the letter of the Code.”²⁹⁸ Thus, when interpreting Quebec’s Codes, legislative intent might simply be reflected in the text of a provision.²⁹⁹ Stated differently, the scope of clear text might be simply confirmed after interpreting the text in its purposive context. I argue, however, that this is only really manifest in the limited cases of mandatory and exceptional provisions.

Though the civilist judge plays a vital role in applying and interpreting the law, the division of powers between the legislature and the judiciary is philosophically central in the civil law. The legislature, not the judge, creates the common law to be interpreted.³⁰⁰ As such, the way the legislature chooses to draft the text — broad, open-textured provisions of the *jus commune* versus strictly construed mandatory or exceptional ones — guides the judge as they interpret the text. This is consonant with the New Canadian Textualism, in which the focus remains “on the text as the object of interpretation, as required by [Driedger’s] modern approach.”³⁰¹ As I have suggested, however, codal interpretation also necessitates a further evolution of purposive textualism if it is to apply across Canada.

²⁹³ Mancini, “New Canadian Textualism,” *supra* note 94; see also Mancini, “Purpose Error,” *supra* note 4 at 930, 941, 947.

²⁹⁴ Sullivan, *Statutory Interpretation*, *supra* note 39 at 193.

²⁹⁵ Stevens & Neyers, *supra* note 210 at 232.

²⁹⁶ Côté, *supra* note 16 at 536–37.

²⁹⁷ *Ibid* at 297.

²⁹⁸ *Ibid* at 277.

²⁹⁹ Brierley & Macdonald, *supra* note 9 at 138.

³⁰⁰ While true that legislatures in common law jurisdictions also create statutory law, they do not create the *jus commune* as legislatures do in civil law jurisdictions. Thus, the courts are the guardians of the *jus commune* in common law jurisdictions.

³⁰¹ Mancini, “Purpose Error,” *supra* note 4 at 931.

Purposive textualism must also account for provisions that comprise the *jus commune*. In many ways, interpreting *jus commune* provisions is compatible with purposive textualism. Text is a touchstone, meaning that the Code's interpreters should start with the text and return to it to guide their interpretation.³⁰² Looking to other provisions and the overarching logic of the Codes is the best way to resolve interpretive difficulties, minimizing the need to resort to extra-codal principles.³⁰³ Clearly, the words matter in the civil law, which makes sound sense. Otherwise, why codify the *jus commune* at all?

There is, however, more to the story. As explained, *jus commune* provisions are open-textured. They are receptive to external sources to guide interpretation (like non-codified general principles of law) and may be extended by analogy to situations not formally contemplated. As analyzed, these features preclude the application of the plain-meaning rule. Codes are often "the enemy of a literal, grammatical construction" because the general provisions demand that interpreters take a broad, teleological approach to interpretation.³⁰⁴ They also pose problems for purposive textualism, particularly as the spirit of the law might override the letter of the *jus commune* provision so that the provision's purpose might be achieved. This challenges the New Canadian Textualism's instruction that highly abstract purpose should not override text.

It is clear from the way the text of an open-textured provision is crafted — working in tandem with the explicit instructions in the preliminary provision — that an interpreter must search for the spirit of the law. Here, I will mirror Mancini's language that courts must look to the "why" and "how" legislation was enacted (its purposes and the way it seeks to achieve them) to give that legislation effect. Mancini argues that courts fail to give effect to both by "by prioritizing more abstract purposes at the expense of the text."³⁰⁵ To account for provisions drafted as the *jus commune*, proponents of purposive textualism should account for how the secondary purposes of a provision (that is, *how* the legislature has chosen to achieve its goals) might very well demand that judges or interpreters emphasize the primary purposes of a provision (that is, *why* the provision was enacted). In other words, the means the legislature chose to achieve its goals — by drafting open-textured, broad provisions that are part of the *jus commune* — deliberately communicates to the interpreter that they must emphasize the spirit of the text, even sometimes over its letter, so that the provision may apply to un contemplated situations. Thus, giving effect to both the *why* and the *how* might be to prioritize the reason a statute was enacted, even if expressed at a high level of abstraction.

To elaborate, the reason why an interpreter looks to the text is to discern legislative intent. Such intent might simply be reflected in the text, including when it is interpreted in its purposive context. Legislative intent, as reflected in the text, might be communicated via its substantive content — what the text clearly says. This comports with both Sirota's definition of textualism and Mancini's methodology, each of which asks that the meaning of the text binds and may not be disregarded by reference to highly abstract purposes.

³⁰² Bisson, *supra* note 261 at 557–58; Côté, *supra* note 16 at 277.

³⁰³ Macdonald, *supra* note 135 at 595; Walton, *Scope and Interpretation*, *supra* note 15 at 100.

³⁰⁴ Brierley, "Distinct Legal Culture," *supra* note 269 at 497.

³⁰⁵ Mancini, "Purpose Error," *supra* note 4 at 921.

Essentially, I posit that legislative intent might also be communicated in the *form* a provision takes, which a study of Quebec civil law illuminates. That is, if the legislature constructs a *jus commune* provision grounded on general principles and drafted in an open-textured way, the interpreter *must* give considerable and even overriding weight to the underlying principles and purposes external to the text to interpret the provision, if that is what the provision calls for. These considerations are important when interpreting Quebec's codified *jus commune* because those provisions may be extended by analogy, and interpreters may draw on general principles precisely to apply those provisions to situations un contemplated by the legislature. Indeed, the preliminary provision of the CCQ demands it by asking the court to look to the spirit of a provision (the CCQ "in all matters within the letter, *spirit or object* of its provisions, lays down the *jus commune*, expressly or by *implication*").³⁰⁶ The legislature, by virtue of the instructions in the preliminary provision and the way it drafted a specific provision, has communicated to the court that this is the interpretive exercise to be embarked upon.

This argument draws upon, but also slightly differs from, the definition of textualism that Sirota proposes.³⁰⁷ Rather than the substantive meaning of the text binding the courts in all cases, the text's form can give the interpreter cues to look to the spirit of the law and prioritize it. It is closer to, though also differs from, Oliphant's thesis that in *Charter* interpretation "the text and purpose of a provision operate in tandem: the text defines the outer bounds of a purposive inquiry, while the purposive approach serves to structure and limit the scope of vague or ambiguous text within those confines."³⁰⁸ While true that textual boundaries guide interpretation³⁰⁹ even when interpreting broadly drafted codal provisions,³¹⁰ codal text might also specifically cue the interpreter to prioritize its spirit so that the provision may apply to situations not formally contemplated. The text's form operates in tandem with the instruction provided in the preliminary provision. This expands the Canadian definition of textualism beyond its current iteration. It is also not incompatible with textualism, because the textual cues encompassed in the form of a provision communicate the legislature's intent about the scope of a provision.

Under this logic, this theory (and the logic of Quebec civil law from which it emanates) can only be compatible with an adapted form of textualism. If, as Mancini argues, under a textualist approach the reason why a provision was enacted at a highly abstract level should not outweigh the rules and standards expressed in the provision itself, then we must consider a scenario in which the rules and standards in the provision — and, indeed, the Codes as a whole — point to prioritizing the spirit of a provision. The interpretive focus remains the text, interpreted in its purposive context — but part of focusing on the text means assessing its form and the corresponding clues it gives to the court. The cues are also rooted in the CCQ's substantive text: the preliminary provision accounts for looking to the spirit and object of a provision and as clarifies that law may be laid down by implication. Perhaps

³⁰⁶ Preliminary provision CCQ [emphasis added].

³⁰⁷ Sirota, *supra* note 7 at 100.

³⁰⁸ Oliphant, *supra* note 7 at 3.

³⁰⁹ *Ibid* at 18.

³¹⁰ As an extreme example, one would never extend a private international law rule by analogy to a purely domestic obligations problem, no matter how broadly the former was drafted, simply because it does not pertain.

counter-intuitively, in Quebec civil law, honouring the text of a provision might mean prioritizing its spirit.

VI. CONCLUSION

This article has aimed to offer a nuanced approach to statutory interpretation in Quebec, one that aligns with Driedger's Modern Principle and accounts for the unique nature of codified *jus commune* and deliberate legislative choice. I have argued that doing justice to codal text might mean looking to the legislature's cues about when to prioritize the spirit of a provision over its letter. In so doing, I have argued that if Quebec civil law is compatible with textualism, then it is only compatible with a purposive form of textualism. This form of textualism always accounts for text, context, and purpose while also giving significant weight to the text as it communicates meaning to the interpreter. Otherwise, there would be little point to codifying the *jus commune* as the social constitution of private relations in Quebec. I have argued that meaning and legislative intent might not only be communicated by the substance of a provision, but also by its form. This theory aligns well with interpretation of mandatory and exceptional provisions, which are drafted to apply to a limited set of situations. It also aligns well with interpreting the *jus commune*, as the text itself might demand that courts look to the spirit of a *jus commune* provision and prioritize it so that the provision may be applied to situations not formally contemplated by the legislature. In these situations, heeding legislative intent as reflected by the form of the text would be to favour the provision's spirit.

Using Quebec as a case study gives rise to three parting thoughts. First, Quebec courts' relationship to codal interpretation challenges traditional understandings of textualism. The plain meaning rule cannot apply to Quebec's Codes and is today incompatible with codal interpretation. Any form of adapted textualism cannot mean applying text in a rote way. Courts should always look to context and purpose, even when looking to seemingly clear exceptional or mandatory provisions in the Codes. Second, the New Canadian Textualism or purposive textualism can be a pan-Canadian theory if it accounts for the form of a provision rather than just its substance. Doing justice to the legislative intent reflected in the text might be to prioritize the purpose of a provision, as demanded by the broadly drafted and open-textured form of the article combined with the instructions in the preliminary provision's text. In this way, the *jus commune* may apply to many unanticipated situations. Finally, the Quebec example reveals that the New Canadian Textualism, or a method like it, might not be as new in Canada as previously imagined. The method described, including as adapted, is quite compatible with Walton's theories. As a result, those who study and apply the theory would do well to remember that its roots are inherently Canadian in both history and methodology.