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## Revisiting Québec's *Jus Commune* in the Era of the Human Rights Charters†

*Québec is a distinct society because of its history, its legal system, and its values. Our analysis examines the delicate issue of the relationship between the Canadian Charter of Rights and Freedoms, the Québec Charter of Human Rights and Freedoms, and the Civil Code of Québec, the primary expression of Québec's jus commune, as noted in its Preliminary Provision. As of the nineteenth century, a doctrinal trend born of the desire to protect the integrity of the civil law system grew worried about the "disruptive" influence of the common law on the civil law and, more specifically, on the Civil Code of Lower Canada. The doctrine later expressed reluctance as to the entry of fundamental rights into Québec private law. The charters of rights were, and are sometimes still, perceived as disruptive elements, capable of distorting the Civil Code. We want to show that the influence of human rights philosophy on Québec's jus commune is not only inevitable but desirable. The Civil Code and, more broadly, Québec's jus commune, can only be enriched by respect for fundamental rights.*

### INTRODUCTION

A Civil Code reflects the vision society has of itself and what it wants to be. It touches the everyday life of each individual from birth to death. It is the framework on which the social fabric is built.<sup>1</sup>

In *Quebec (Attorney General) v. A.*,<sup>2</sup> the Supreme Court of Canada recognized the constitutional validity of the differential treatment of married and de facto spouses under the Civil Code of Québec (C.C.Q.)<sup>3</sup> in the event of separation. In her judgment, Chief

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1. This text appears on the back cover of QUE., MINISTÈRE DE LA JUSTICE, COMMENTAIRES DU MINISTRE DE LA JUSTICE: LE CODE CIVIL DU QUÉBEC (1993) (translated by authors).

2. 2013 SCC 5, [2013] 1 S.C.R. 61.

3. Civil Code of Québec [C.C.Q.], S.Q. 1991, c. 64.

Justice McLachlin held that the provisions under review were discriminatory within the meaning of Section 15(1) of the Canadian Charter of Rights and Freedoms,<sup>4</sup> but that this interference with the right to equality was justifiable in a free and democratic society under Section 1 of the Canadian Charter. In support of this conclusion, she noted the distinct nature of Québec society, its history, its legal system, and its values.<sup>5</sup> She felt that this specificity explained and justified the Québec legislature's choice to set itself apart from the other Canadian provincial legislatures, which had recognized, to varying degrees, de facto relationships.<sup>6</sup> In our opinion, the deference shown by the Chief Justice to civilian provincial law in a dispute involving fundamental rights raises the delicate issue of the relationship between the charters of rights and the Civil Code of Québec, which represents the primary expression of Québec's *jus commune*, as noted in its Preliminary Provision. The Chief Justice's opinion also expresses an implicit concern about the influence of the common law on Québec civil law.

Our analysis examines the reconceptualization of Québec's *jus commune* as influenced by fundamental rights. It focuses more specifically on the sometimes negative perception of this phenomenon by the courts and the doctrine, a perception which in our view has no *raison d'être*. As of the nineteenth century, a doctrinal trend born of the desire to protect the integrity of the civil law system grew worried about the "disruptive" influence of the common law on the civil law and, more specifically, on the Civil Code of Lower Canada, the precursor to today's Civil Code. Some viewed the common law as "contaminating" the civil law.<sup>7</sup> We feel that it was in this same spirit that the doctrine later expressed reluctance as to the entry of fundamental rights into Québec private law. The charters of rights were, and are sometimes still, perceived as disruptive or exogenous elements, capable of distorting, disorganizing, even marginalizing the Civil Code.<sup>8</sup> A review of the jurisprudence reveals that the courts

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4. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11 (U.K.).

5. *Quebec (Att'y Gen.) v. A.*, 2013 SCC 5, paras. 410–15. *See also* Droit de la famille—139, 2013 QCCA 15, [2013] R.J.Q. 9, para. 62.

6. On legislative protection of de facto spouses in Canadian common law provinces, see COHABITATION: THE LAW IN CANADA (Winifred H. Holland & Barbro E. Stalbecker-Pountney eds., 1990 [looseleaf]); HALSBURY'S LAWS OF CANADA: FAMILY LAW (2014 reissue).

7. *See* Adrian Popovici, *Le rôle de la Cour suprême en droit civil*, 34 REVUE JURIDIQUE THÉMIS [R.J.T.] 607, 612ff. (2000).

8. On this issue, see Jean-François Gaudreault-Desbiens, *Les Chartes des droits et libertés comme louves dans la bergerie du positivisme? Quelques hypothèses sur l'impact de la culture des droits sur la culture juridique québécoise*, in TRANSFORMATION DE LA CULTURE JURIDIQUE QUÉBÉCOISE 83 (Bjarne Melkevik ed., 1998).

are also concerned about preserving the uniqueness of the civil law.<sup>9</sup>

We want to show that the influence of human rights philosophy on Québec's *jus commune* is not only inevitable, but desirable. The Civil Code and, more broadly, Québec's *jus commune*, can only be enriched by respect for fundamental rights.<sup>10</sup> Québec's *jus commune* is not distorted by a transformation that includes greater protection of human rights; rather, such a transformation reflects an adaptation to a contemporary context. A civil code is "the most typical reflection of a people's values. One can say, show me your code, and I will tell you who you are!"<sup>11</sup> Thus, the very essence of a civil code is to evolve, including through interpretation, at the same rhythm as the society it governs. Inasmuch as respect for fundamental rights is central to the values of Québec society, the Civil Code provisions can legitimately bear the stamp of these rights and they can serve to inspire those who interpret these provisions. It is in this sense that the legislature was careful to state, in the Preliminary Provision, that the Civil Code of Québec must be interpreted "in harmony" with the province's Charter of Human Rights and Freedoms.<sup>12</sup>

This Article takes a two-pronged approach. First we will examine the defense mechanisms of the courts and the doctrine against the influence of the common law and the charters of rights on the *jus commune* (Part I). We will then show that the growing preoccupation of Québec civil law with respect for human rights is not a sign of its contamination by the common law, but reflects instead a change in mentality (Part II).

## I. DEFENSE MECHANISMS OF QUÉBEC'S *JUS COMMUNE*

Protecting the originality of the civil law system is a recurring theme in Québec doctrine and jurisprudence, both when the civil law was first codified as well as today in the age of charters and globalization. The desire to protect civil law against possibly disruptive influences falls within the larger context of protecting Québec's identity and is added to other distinctive values of Québec society, such as protecting the French language and culture in a North American con-

9. See *Béliveau St-Jacques v. Fédération des employées et employés de services publics inc.*, [1996] 2 S.C.R. 345; *Augustus v. Gosset*, [1996] 3 S.C.R. 268; *Québec (Agence du Revenu) v. Services Environnementaux AES inc.*, 2013 SCC 65, [2013] 3 S.C.R. 838; *Droit de la famille—132495 (N.D. c. B.C.)*, 2013 QCCA 1586, [2013] R.J.Q. 1527.

10. Jean-Louis Baudouin, *Quo Vadis?*, 46 *CAHIERS DE DROIT [C. DE D.]* 613 (2005).

11. PAUL-ANDRÉ CRÉPEAU, *LA RÉFORME DU DROIT CIVIL CANADIEN : UNE CERTAINE CONCEPTION DE LA RECODIFICATION, 1965–1977* 6 (2003) (translated by authors). See also Paul-André Crépeau, *Foreword to 1 REPORT ON THE QUÉBEC CIVIL CODE XXIII–XXIV (1978)* [hereinafter Crépeau, *Foreword*].

12. Charter of Human Rights and Freedoms, C.Q.L.R., c. C-12.

text.<sup>13</sup> The influence of the common law has been perceived as a disruptive element that threatens the “purity”<sup>14</sup> and “integrity” of the civilian tradition. The Québec legal community developed a defense mechanism<sup>15</sup> against common law solutions or interpretations that could be incorporated into civil law (as will be discussed in Part I.A). Without deciding whether this reaction was justified, we note that today the legal community appears to have redirected its attention elsewhere—the Canadian and Québec Charters were, and continue to be, viewed as documents inspired by the common law that, therefore, destabilize<sup>16</sup> the integrity of the civil law system (Part I.B). One author offers a good illustration of this defense mechanism, which he describes as legal nationalism,<sup>17</sup> by first analyzing “contamination by the common law: an exaggerated threat?” and then by discussing “contamination by constitutional law: an insidious threat?”<sup>18</sup>

We have used the term “defense mechanism” to describe this phenomenon, since we believe it best illustrates the dynamic at play: a defensive reaction in response to what is perceived as a threat, an attack, or even a danger. Other terms (resistance, insecurity, concern, fear, reluctance, and susceptibility) seem less appropriate. Far from being neutral, our choice of terminology conveys the idea of a survival response in a minority situation.

#### A. *Mechanisms with Respect to the Common Law*

The idea of preserving the integrity of Québec’s civil law emerged early on in the legal community.<sup>19</sup> In 1866, the Civil Code of Lower

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13. Micheline Labelle, *La politique de la citoyenneté et de l’interculturalisme au Québec : Défis et enjeux*, in LES IDENTITÉS EN DÉBAT, INTÉGRATION OU MULTICULTURALISME? 269, 278 (H. Greven-Borde & J. Tournon eds., 2000).

14. Purity is considered a fiction: “The mixed legal system is a historical fact.” Maurice Tancelin, *Comment un droit peut-il être mixte?*, in LE DOMAINE ET L’INTERPRÉTATION DU CODE CIVIL DU BAS CANADA 1, 25 (1980) (translated by authors). See also Daniel Jutras, *Cartographie de la mixité : la common law et la complétude du droit civil au Québec*, 88 CANADIAN BAR REV. 247 (2009); Popovici, *supra* note 7, at 614; Jean-Louis Baudouin, *L’interprétation du Code civil québécois par la Cour suprême du Canada*, 53 CANADIAN BAR REV. 715, 716 (1975).

15. For the similar metaphor of an immune system, see Sylvio Normand, *Un thème dominant de la pensée juridique traditionnelle au Québec: La sauvegarde de l’intégrité du droit civil*, 32 MCGILL L.J. 559, 574 (1987).

16. On the destabilizing potential of charters, see Gaudreault-Desbiens, *supra* note 8.

17. Adrian Popovici, *Libres propos sur la culture juridique québécoise dans un monde qui rétrécit*, 54 MCGILL L.J. 223, 228 (2009).

18. See the outline of Adrian Popovici’s article, *supra* note 7, at 609 (translated by authors). For a different point of view on the common law influence on Québec civil law, see Baudouin, *supra* note 10; Jean-Louis Baudouin, *Quel avenir pour le Code civil du Québec?*, 88 CANADIAN BAR REV. 497 (2009) [hereinafter Baudouin, *Quel avenir*].

19. See Normand, *supra* note 15; David Howes, *From Polyjurality to Monojurality: The Transformation of Quebec Law, 1875–1929*, 32 MCGILL L.J. 523 (1987).

Canada was adopted to, among other things,<sup>20</sup> protect the civil law on the eve of Canadian Confederation (1867). André Morel considered the political situation during the years 1849–1857 to be key to the decision to codify private law. The issue at the time was whether to form a federation of British colonies or to annex Lower Canada (now the province of Québec) to the United States.<sup>21</sup> Louis Baudouin stated that the Code was “born of the need for French survival.”<sup>22</sup> Maximilien Caron viewed codification as an opportunity to “shelter our law from the unjustified influence of the common law.”<sup>23</sup> Maurice Tancelin described Québec civil law as the “law of survival.”<sup>24</sup>

Transformed into an instrument of identity worthy of the highest respect,<sup>25</sup> the Civil Code of Lower Canada was amended very little over the years. This legislative stagnation almost proved fatal. Out of sync with social realities, the Civil Code of Lower Canada could no longer fulfill its role as the *jus commune*.<sup>26</sup> As of the early 1950s, a profound revision of the Civil Code appeared essential so that it could continue to fulfill this role.<sup>27</sup>

At the beginning of the twentieth century, the Supreme Court also played a role in the legal community's development of a defense mechanism against the common law. The highest court's tendency at the time to standardize Canadian law by imposing common law solutions on civil law<sup>28</sup> has been documented by Québec civilians, who

20. Brierley sees other reasons, both technical and legal. A codification could reduce the insecurity arising from many legal sources and make the law accessible to the English community of that time. J.E.C. Brierley, *Quebec's Civil Law Codification: Viewed and Reviewed*, 14 MCGILL L.J. 520 (1968). See also Howes, *supra* note 19, at 520.

21. ANDRÉ MOREL, *HISTOIRE DU DROIT, NOTES DE COURS* 119–58 (1983).

22. LOUIS BAUDOUIN, *LE DROIT CIVIL DE LA PROVINCE DE QUÉBEC* 61 (1953); Jean-Louis Baudouin, *Réflexions sur le processus de recodification du Code civil*, 30 C. DE D. 817, 820 (1989) (translated by authors) [hereinafter Baudouin, *Réflexions sur le processus de recodification*].

23. Maximilien Caron, *De la physionomie, de l'évolution et de l'avenir du Code civil*, in 1 LIVRE DU CENTENAIRE DU CODE CIVIL : LE DROIT DANS LA VIE FAMILIALE 3 (Jacques Boucher & André Morel eds., 1970) (translated by authors). See also Crépeau, *Foreword*, *supra* note 11, at XXV.

24. Tancelin, *supra* note 14, at 20 (translated by authors).

25. On the role of the Civil Code on the Québec legal culture, see Sylvio Normand, *Le Code civil et l'identité*, in DU CODE CIVIL DU QUÉBEC : CONTRIBUTION À L'HISTOIRE IMMÉDIATE D'UNE RECODIFICATION RÉUSSIE 619 (Serge Lortie, Nicholas Kasirer & Jean-Guy Belley eds., 2005).

26. Many scholars denounced the legislative gap between the Civil Code of Lower Canada and society. See, e.g., Jean-Louis Baudouin, *Le Code civil québécois: crise de croissance ou crise de vieillesse*, 44 CANADIAN BAR REV. 391 (1966) [hereinafter Baudouin, *Crise de croissance*]; Baudouin, *Réflexions sur le processus de recodification*, *supra* note 22, at 822; Baudouin, *Quel avenir*, *supra* note 18, at 500.

27. Baudouin, *Crise de croissance*, *supra* note 26.

28. See, e.g., *Magann v. Auger* (1901), 31 S.C.R. 186; *Pacific Railway Co. v. Robinson* (1891), 19 S.C.R. 292, *rev'd* (1892) A.C. 481 (P.C.). See P.-B. Mignault, *Les rapports entre le droit civil et la "common law" au Canada, spécialement dans la province de Québec*, 11 REVUE DU DROIT 201 (1932); P.B. Mignault, *Le Code civil de la Province de Québec et son interprétation*, 1 U. TORONTO L.J. 104 (1935).

viewed this as a threat to the coherence of Québec civil law.<sup>29</sup> During the same period, while Canadian common law lawyers were arguing in favor of standardizing the law in Canada,<sup>30</sup> Québec lawyers, inversely, were proposing either adding a civil division to the Supreme Court of Canada or having the Québec Court of Appeal act as the final court of appeal in civil matters.<sup>31</sup>

The standardization of law by the Supreme Court of Canada dwindled through the twentieth century, with the highest court thus acknowledging the diversity of sources of law in Canada.<sup>32</sup> It has now recognized the autonomy of the civil law with respect to the common law.<sup>33</sup> Moreover, the Supreme Court has refocused its priorities since the Canadian Charter was adopted and now hears few cases that raise civil law issues.<sup>34</sup>

Québec doctrinal writers' defensive reaction against the influence of the common law seems to be less present today. The adoption of a new Civil Code in 1991, a sign of a healthy codified Roman system, has contributed to this situation.<sup>35</sup> In addition, the 1991 Civil Code has served as a model elsewhere,<sup>36</sup> which has reinforced a sense of security. The more abundant and innovative civilian doctrine in Québec is distancing itself from the French model.<sup>37</sup> Common law in-

29. Baudouin, *supra* note 14, at 715; H. Patrick Glenn, *Le droit comparé et la Cour suprême du Canada*, in MÉLANGES LOUIS-PHILIPPE PIGEON 197 (1989); Howes, *supra* note 19.

30. Normand, *supra* note 15, at 578ff.

31. Tancelin, *supra* note 14, at 29; Baudouin, *supra* note 14, at 736; Baudouin, *Crise de croissance*, *supra* note 26, at 412.

32. H.P. Glenn, *La Cour suprême du Canada et la tradition du droit civil*, 80 CANADIAN BAR REV. 151, 165 (2001); Pierre-Gabriel Jobin, *La Cour suprême et la réforme du Code civil*, 79 CANADIAN BAR REV. no. 2, 27 (2000).

33. See Québec (Agence du Revenu) v. Services Environnementaux AES inc., 2013 SCC 65, [2013] 3 S.C.R. 838, paras. 48ff. The Supreme Court of Canada held in that case that there was no need to import the common law doctrine of rectification into Québec's law of obligations because article 1425 of the Civil Code of Québec authorizes the correction of a discrepancy between the common intention of the parties and the intention declared in the acts.

34. See Louis LeBel, *L'influence de la Cour suprême du Canada sur l'application du Code civil du Québec depuis 1994*, 88 CANADIAN BAR REV. 231 (2009); Popovici, *supra* note 7; Glenn, *supra* note 32.

35. Baudouin, *supra* note 10; Baudouin, *Quel avenir*, *supra* note 18; Jutras, *supra* note 14.

36. The Civil Code of Québec served as a model in several jurisdictions. For Catalonia, see Esther Arroyo I Amayuelas, *Le Code civil catalan: choix, finalités et transplantations législatives du Code civil québécois*, 46 C. DE D. 271 (2005); for Argentina, see Julio César Rivera, *Le projet de code civil pour la République argentine*, 46 C. DE D. 295 (2005); for Estonia, see Irene Kull, *Comparative Law in Developing Court Practice in Small Jurisdictions—Mission Possible*, 43 REVUE DE DROIT DE L'UNIVERSITÉ DE SHERBROOKE [R.D.U.S.] 1 (2013); for Romania, see Marian Nicolae & Mircea-Dan Bob, *La refonte du Code civil roumain et le Code civil du Québec*, 88 CANADIAN BAR REV. 445 (2009).

37. In 1966, Jean-Louis Baudouin talked about deficiency in Québec's legal scholarship: Baudouin, *Crise de croissance*, *supra* note 26, at 403. By contrast, in 1993, Pierre-Gabriel Jobin noted the blooming of Québec's legal scholarship, see *L'influence de la doctrine française sur le droit civil québécois : le rapprochement et l'éloignement*

stitutions have been successfully incorporated into Québec civil law without threatening the civilian tradition, one such example being the trust.<sup>38</sup> Punitive damages are another example of successful incorporation of common law institutions into civil law.<sup>39</sup> As Jean-Louis Baudouin said, “[t]o borrow means to make it yours, and to make it yours is to insert the new standard into the receiving legal framework.”<sup>40</sup>

### B. Mechanisms with Respect to the Charters

Some Québec civilians also harbored resistance to the Canadian and Québec Charters<sup>41</sup>—which they saw as a menace,<sup>42</sup> a potential and insidious danger<sup>43</sup>—and their possible “negative” influence as a disruptive or exogenous element in the Civil Code and civil law.<sup>44</sup> And yet, the Québec Charter, adopted prior to the Canadian Charter, could very well have been perceived as a symbol of identity for Québec, like the Civil Code. We surmise that the same defense mechanism is at work here: The resistance to the influence of the charters is based on the concern of some Québec civilian lawyers about the “assimilationist” influence of the common law on the civil law. Associating the common law and charters of rights, these civilians see them as “negative” influences on the coherence of the civil law system and the place occupied by the Code.<sup>45</sup>

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*de deux continents*, in *DROIT QUÉBÉCOIS ET DROIT FRANÇAIS: COMMUNAUTÉ, AUTONOMIE, CONCORDANCE* 91 (H. Patrick Glenn ed., 1993).

38. See Madeleine Cantin Cumyn, *L'origine de la fiducie québécoise*, in *MÉLANGES PAUL-ANDRÉ CRÉPEAU* 199 (1997).

39. C.C.Q. art. 1621.

40. Baudouin, *Quel avenir*, *supra* note 18, at 504 (translated by authors).

41. On the existence of this resistance, see Gaudreault-Desbiens, *supra* note 8.

42. Adrian Popovici, *Personality Rights—A Civil Law Concept*, 50 *LOX. L. REV.* 349, 351 (2004).

43. Popovici, *supra* note 7, at 614.

44. Other civil law scholars adopted a more positive attitude towards charters. See, e.g., Baudouin, *supra* note 10, at 620 (“[the influence of charters] on civil law is an enrichment of traditional private law” (translated by authors)). Others were not resistant, but instead indifferent towards the charters’ influence; they considered that the *jus commune* was enough to protect fundamental rights. According to Madeleine Caron, article 1053 of the Civil Code of Lower Canada was in itself a complete human rights charter. See Madeleine Caron, *Le Code civil québécois, instrument de protection des droits et libertés de la personne?*, 56 *CANADIAN BAR REV.* 197 (1978).

45. Adrian Popovici makes this link in his article, *Personality Rights—A Civil Law Concept*, *supra* note 42, at 357: “There is no doubt that the Canadian Constitution, albeit written, is not a civilian constitution. It is a daughter of the common law, which does not acknowledge the category or concept of subjective rights—*Das subjektive Recht*.” In another article, *Le rôle de la Cour suprême en droit civil*, *supra* note 7, at 614, he affirms: “Nobody would refuse to see the preponderance, indeed the exclusivity, of the common law system in constitutional law” (translated by authors). See also Adrian Popovici, *La renonciation à un droit de la personnalité*, in *COLLOQUE DU TRENTENAIRE 1975–2005 : REGARDS CROISÉS SUR LE DROIT PRIVÉ* 99 (Centre de recherche en droit privé et comparé du Québec ed., 2008); Popovici, *supra* note 17; Adrian Popovici, *De l'impact de la Charte des droits et libertés de la personne sur le droit de la responsabilité civile : un mariage raté?*, in *LA PERTINENCE RENOUVELÉE DU*

The charters of rights are viewed first as a methodological threat. The courts have significant latitude when interpreting them, thereby increasing the role of jurisprudence. Fundamental rights are therefore perceived as potentially causing the civil law to drift toward the common law.<sup>46</sup> In our opinion, this fear is due to a poor understanding of the interpretation methodologies used in both the civil and common law. In reality, it is precisely because they are drafted like a Civil Code (i.e., using general wording in the form of statements of principle) that the charters of rights require a dynamic and evolving interpretation, thus affording the courts this flexibility.<sup>47</sup>

The charters of rights are also perceived as a conceptual threat. Adrian Popovici's example illustrating what he describes as the insidious threat of the constitutionalization of private law by constitutional law is interesting in this regard.<sup>48</sup> In a series of articles,<sup>49</sup> he argues that the personality rights protected in the Civil Code under article 3 differ from the fundamental rights entrenched in the charters. Interferences with fundamental rights (for example, the right to privacy) may be justified under Section 1 of the Canadian Charter or section 9.1 of the Québec Charter. Therefore, there may be a *lawful* interference.<sup>50</sup> In the civil law, conversely, an interference with a personality right (again, such as the right to privacy) cannot be justified—there cannot be any *lawful* interference. Popovici considers that allowing for such a lawful interference is therefore a distortion of civil law, a loss of the uniqueness of the civil law: "In civil law, an interference with a personality *right* is the conclusion of the reasoning; in public law, an interference with a fundamental *right* is the first step in the reasoning."<sup>51</sup>

The courts and the doctrine are, however, somewhat resistant to using human rights concepts. The link between extra-contractual fault (article 1457 C.C.Q.) and unlawful interference with a fundamental right protected by the Québec Charter (under section 49, paragraph 1) is a good illustration. Indeed, a review of the jurisprudence reveals that the remedial scheme put in place by the Charter was, to a large extent, equated with the scheme operating under the

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DROIT DES OBLIGATIONS: RETOUR AUX SOURCES 49 (1999). Jean-Louis Baudouin adopts a different point of view in *Quo vadis?*, *supra* note 10, at 620: "The influence of charters should not be negatively perceived" (translated by authors).

46. See Michel Grimaldi, « Codes et codification » : pour souligner le dixième anniversaire de l'entrée en vigueur du Code civil du Québec et le bicentenaire du Code Napoléon, 46 C. DE D. 11 (2005).

47. See Jean-Louis Baudouin, *Codification : méthode législative*, in CODIFICATION : VALEURS ET LANGAGE ; ACTES DU COLLOQUE INTERNATIONAL DE DROIT CIVIL COMPARÉ 52, 59 (1985).

48. Popovici, *supra* note 7, at 614.

49. See sources cited *supra* note 45.

50. See *Godbout v. City of Longueuil*, [1997] 3 S.C.R. 844.

51. Popovici, *supra* note 7, at 623 (translated by authors).



*jus commune* rules on civil liability. We believe that this interpretation limits the remedial power of the Charter.

The first paragraph of section 49 of the Québec Charter provides that “[a]ny unlawful interference with any right or freedom recognized by this Charter entitles the victim to obtain . . . compensation for the moral or material prejudice resulting therefrom.” In 1996, in *Béliveau St-Jacques*,<sup>52</sup> the Supreme Court of Canada was asked for the first time to specify the nature and conditions for bringing such an action. After first being compensated under the Act Respecting Industrial Accidents and Occupational Diseases (A.I.A.O.D.)<sup>53</sup> (for an occupational injury caused by harassment by a superior), an employee launched an action based on the Charter seeking damages a second time for the same facts. While the A.I.A.O.D. created a no-fault liability regime for workplace accidents and occupational diseases, in exchange it deprived the victim of a workplace injury of the possibility of instituting an action in “civil liability” against his or her employer for that injury.<sup>54</sup> In order to determine whether the employee was nonetheless entitled to reparation under the Québec Charter, the Court had to decide if the action provided for in the first paragraph of section 49 amounted to an action in “civil liability.”

In a split decision of five judges to two, the Supreme Court decided that the action in compensatory damages under section 49 of the Charter is a civil liability action within the meaning of section 438 of the A.I.A.O.D. Mr. Justice Gonthier, writing for the majority, held that “the *Charter* does not create a parallel system of compensation”<sup>55</sup> and that the first paragraph of section 49 of the Québec Charter and article 1053 of the Civil Code of Lower Canada—now article 1457 of the Civil Code of Québec—are based “on the same legal principle of liability associated with wrongful conduct.”<sup>56</sup> As with article 1457 C.C.Q., the plaintiff must, therefore, establish a fault, a prejudice, and a causal connection between the fault and the prejudice to obtain compensatory damages under section 49 of the Charter.<sup>57</sup> In sum, while the arrival of the Québec Charter might have created a new autonomous compensatory remedy in the event of an “unlawful interference” with a fundamental right—and in our opinion provide better compensation for victims—the highest court in the land instead decided in *Béliveau St-Jacques* to consider section 49

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52. *Béliveau St-Jacques v. Fédération des employées et employés de services publics inc.*, [1996] 2 S.C.R. 345.

53. An Act Respecting Industrial Accidents and Occupational Diseases, C.Q.L.R., c. A-3.001.

54. *Id.* s. 438.

55. *Béliveau St-Jacques*, [1996] 2 S.C.R. 345, para. 119. *See also* *Bou Malhab v. Diffusion Métromédia CMR inc.*, 2011 SCC 9, [2011] 1 S.C.R. 214, para. 23.

56. *Béliveau St-Jacques*, [1996] 2 S.C.R. 345, para. 121.

57. *Id.* at para. 122. *See also* *Bou Malhab*, 2011 SCC 9, para. 23.

of the Charter as an aspect of the ordinary rules of civil liability when fault arises in a Charter context.

The Supreme Court did, however, partially review its position after initially totally assimilating the concepts of “unlawful interference” and “fault.” Although it persists in saying that “[t]he concept of an unlawful act, on which s. 49 is based, often coincides with the concept of civil fault,”<sup>58</sup> the Court now seems to recognize that the concept of unlawful interference has a broader scope than that of fault.<sup>59</sup> Finding that “[i]t is sometimes necessary to put an end to actions or change practices or procedures that are incompatible with the *Quebec Charter*, even where there is no fault within the meaning of the law of civil liability,”<sup>60</sup> the highest court in the land in fact admitted that some actions may unlawfully interfere with a protected charter right without, however, constituting a civil fault. This is why the theories of indirect discrimination and systemic discrimination are based on a conception of unlawful interference to which the notion of fault is completely foreign. There is indirect discrimination when the application of a standard—neutral in appearances—results in discrimination. Similarly, systemic discrimination occurs when the combination of a set of standards, practices, policies, and attitudes—even though not designed to discriminate—has the effect of excluding some people with a personal trait that is a prohibited ground of discrimination under the Charter.<sup>61</sup>

Even if the analysis of facts based on the civilian notion of fault and that based on the notion of unlawful interference most often end in the same result, we feel that the courts should develop the reflex of reasoning based on the notion of unlawful interference because it makes it easier for the person whose rights and freedoms have been violated to obtain compensation. In fact, in addition to allowing compensation for actions that might not be considered a fault within the meaning of the civil law, using the notion of unlawful interference alleviates, to a certain extent, the victim’s burden of proof.<sup>62</sup> The

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58. *De Montigny v. Brossard (Succession)*, 2010 SCC 51, [2010] 3 S.C.R. 64, para. 44.

59. *Québec (Commission des droits de la personne et des droits de la jeunesse) v. Communauté urbaine de Montréal*, 2004 SCC 30, [2004] 1 S.C.R. 789, para. 26; *De Montigny*, 2010 SCC 51. See *Calego International inc. c. Commission des droits de la personne et des droits de la jeunesse*, 2013 QCCA 924, [2013] R.J.D.T. 517, where the Court of Appeal looks for a fault (paras. 42, 46) and then looks for an interference to the right to equality (paras. 42, 48ff.). The interference with a right protected under the Charter seems to be a supplementary step and more difficult to prove than the fault. See also *Centre hospitalier St. Mary’s c. Dire*, [1992] R.R.A. 593 (C.A.).

60. *Communauté urbaine de Montréal*, 2004 SCC 30, para. 26.

61. For a case of systemic discrimination, see *Gaz métropolitain inc. c. Commission des droits de la personne et des droits de la jeunesse*, 2011 QCCA 1201, [2011] R.J.Q. 1253.

62. Incidentally, note that the use of the legal presumptions of liability of the principal (art. 1463 C.C.Q.), the mandator of a minor (art. 2164 C.C.Q.), the person having parental authority (arts. 600, 1459 C.C.Q.), the custodian (art. 1460 C.C.Q.),

courts indeed seem to recognize a shared burden of proof between the victim, who must show an *interference* with one of the charter-protected rights, and the defendant, who must then attempt to establish the *lawfulness* of the interference. Borrowed from public law, this bipartite approach means that the burden of proof is transferred midway from the plaintiff to the defendant.<sup>63</sup>

While a desire to protect a cultural and legal identity may have explained the resistance of the Québec legal community to the common law and the charters in the past, mentalities have changed. The Civil Code—the *jus commune*—now serves to protect human rights as well.

## II. HUMAN RIGHTS: A SOURCE OF ENRICHMENT FOR QUÉBEC'S *JUS COMMUNE*

In the years following the end of the Second World War, a growing number of voices decried the Civil Code of Lower Canada's increasing failure to adapt to the social reality and called for its revision.<sup>64</sup> A vast project to reform the Civil Code of Lower Canada was launched in 1955 in order to bridge the gap between the civil law and Québec's social realities, culminating in the Civil Code of Québec's adoption in 1991 and entry into force in 1994. During this long revision process, the legislature did not merely amend the letter of the Code; it signaled a change in spirit.<sup>65</sup> One of the main features of this revision was the preeminence placed on the human person, now considered "the cornerstone of Private Law relationships."<sup>66</sup> Aware that Québec could no longer "stand aside from the vast movement for the extension and protection of human rights," the Civil Code Revision Office wished to express "the fundamental principles which accord a

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and the owner of an animal (art. 1466 C.C.Q.) may also ease the victim's burden of proving an interference with any fundamental right or freedom. Given that these Civil Code rules foster optimal protection of human rights, it seems legitimate for the courts to apply them in the context of the Québec Charter.

63. On this "bipartite" approach, see *Syndicat Northcrest v. Amselem*, 2004 SCC 47, [2004] 2 S.C.R. 551, paras. 155–56 (Bastarache, J., dissenting), *rev'g* [2002] R.J.Q. 906; Stéphane Bernatchez, *Un tribunal spécialisé pour résister à l'approche civiliste en matière de droits de la personne*, 42 R.D.U.S. 203, 214–17 (2012); Christian Brunelle, *La sécurité et l'égalité en conflit : la structure de la Charte québécoise comme contrainte excessive?*, in *LA CHARTE DES DROITS ET LIBERTÉS DE LA PERSONNE : POUR QUI ET JUSQU'OU?* 343, 355ff. (Barreau du Québec & Tribunal des Droits de la Personne eds., 2005); Louis LeBel, *La protection des droits fondamentaux et la responsabilité civile*, 49 MCGILL L.J. 231, 249.

64. Normand, *supra* note 25, at 633; Sylvio Normand, *An Introduction to Quebec Civil Law*, in *ÉLÉMENTS DE COMMON LAW CANADIENNE: COMPARAISON AVEC LE DROIT CIVIL QUÉBÉCOIS* 25, 42 (Louise Bélanger-Hardy & Aline Grenon eds., 2008) [hereinafter Normand, *An Introduction to Quebec Civil Law*]; Jean Pineau, *Codes et histoire*, 39 R.J.T. 223, 236–37 (2005).

65. Jean-François Niort, *Le Code civil face aux défis de la société moderne : une perspective comparative entre la révision française de 1904 et le nouveau Code civil du Québec de 1994*, 39 MCGILL L.J. 845, 873 (1994).

66. Crépeau, *Foreword*, *supra* note 11, at XXIX.

central position to the individual in private law.”<sup>67</sup> Like other civil codes from which its drafters drew inspiration,<sup>68</sup> the Civil Code of Québec contains several provisions whose primary purpose is to protect a fundamental right (see Part II.A). Moreover, its Preliminary Provision directs that the Civil Code articles should be interpreted in light of human rights (Part II.B). Adopted in the age of charters of rights, the Code therefore reflects the social values of its time.<sup>69</sup>

### A. *The Civil Code of Québec: A Tool for Protecting Human Rights*

At the outset, it should be noted that the text that was to become the Québec Charter of Human Rights and Freedoms was initially supposed to be in the Civil Code of Québec itself. In 1968, the members of the Civil Code Revision Office had in fact proposed including a “declaration of civil rights” in the new Code.<sup>70</sup> Borrowing heavily from the draft Charter of Human Rights drawn up several years earlier by Professor Jacques-Yvan Morin,<sup>71</sup> as well as from international human rights instruments,<sup>72</sup> the text proposed by the Office prohibited some forms of discrimination, protected a series of fundamental freedoms and rights, and provided a remedy in the event of unlawful interference with these same rights and freedoms. By the drafters’ own admission, inserting such a declaration within the Code could not, however, “take the place of a complete charter of human rights, especially as regards political, social and economic rights.”<sup>73</sup> Therefore, with the consent of the Civil Code Revision Office, Québec equipped itself with an instrument to protect human rights separate from the Code.<sup>74</sup>

Although the idea of entrenching the Québec Charter in the Code was rejected, the Civil Code of Québec does place significant emphasis on human rights and freedoms; in some way, it constitutes a “continuation of the charter.”<sup>75</sup> Several articles in the first Book of

67. CIVIL CODE REVISION OFFICE, REPORT ON CIVIL RIGHTS 5 (1968).

68. *See id.* at 7.

69. France Allard, *L’impact de la Charte canadienne des droits et libertés sur le droit civil: une relecture de l’arrêt Dolphin Delivery à l’aide d’une réflexion sur les sources du droit civil québécois*, 63 REVUE DU BARREAU [R. DU B.] (SPECIAL ISSUE) 1, 60–61 (2003).

70. CIVIL CODE REVISION OFFICE, *supra* note 67, at 5.

71. Jacques-Yvan Morin, *Une Charte des droits de l’homme pour le Québec*, 9 MCGILL L.J. 273 (1963). *See also* André Morel, *La Charte québécoise: un document unique dans l’histoire législative canadienne*, 21 R.J.T. 1, 6 (1987).

72. The Civil Code Revision Office was inspired by the Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948). *See* CIVIL CODE REVISION OFFICE, *supra* note 67, at 5, 19.

73. CIVIL CODE REVISION OFFICE, *supra* note 67 at 9.

74. *See* Morel, *supra* note 71, at 6; Alain-Robert Nadeau, *La Charte des droits et libertés de la personne: origines, enjeux et perspectives*, 66 R. DU B. (SPECIAL ISSUE) 1, 6–7 (2006).

75. M. (M.) c. V. (S.) (1998), J.E. 99-375 (C.S.) (translated by authors). *See also* Québec (Commission des droits de la personne et des droits de la jeunesse) c. Poulin,

the Code reproduce provisions of the Québec Charter almost word for word.<sup>76</sup> Such is the case for articles guaranteeing the right to life,<sup>77</sup> integrity,<sup>78</sup> safeguard of reputation,<sup>79</sup> and privacy.<sup>80</sup> Other provisions spread out elsewhere in the Code protect vulnerable persons and guarantee their fundamental rights.<sup>81</sup>

The influence of human rights is especially noticeable in family law, which was part of an early and partial revision of the Civil Code which came into force in 1980;<sup>82</sup> that revision was subsequently integrated with some changes and adaptations into the global Civil Code revision that came into force in 1994. Several fundamental rights in fact contributed to remodeling Québec family law, including freedom of religion,<sup>83</sup> the best interests of the child,<sup>84</sup> the maintenance and recognition of multiculturalism,<sup>85</sup> and individual autonomy.<sup>86</sup> However, the greatest changes resulted from introducing the right to equality in filiation and conjugal relationships.

With the 1980 sectorial revision, equality between children was recognized regardless of their parents' matrimonial status (article 522 C.C.Q.). In conjugal relationships, the authority of the husband as head of the family (the marital authority) was replaced by equal rights and obligations of spouses (article 392 C.C.Q.). The spouses together now "take in hand the moral and material direction of the

J.E. 2004-719, para. 45 (T.D.P.Q.); France Allard, *La Charte des droits et libertés de la personne et le Code civil du Québec : deux textes fondamentaux du droit civil québécois dans une relation d'« harmonie ambiguë »*, 66 R. DU B. (SPECIAL ISSUE) 33, 37 (2006).

76. Jean-Maurice Brisson, *Le Code civil, droit commun?*, in LE NOUVEAU CODE CIVIL : INTERPRÉTATION ET APPLICATION ; LES JOURNÉES MAXIMILIEN-CARON 1992, at 292, 311 (1993); Louise Langevin, *Les rapports entre la Charte des droits et libertés de la personne et le Code civil du Québec : harmonie, interaction ou subordination?*, BULLETIN DE LA SOCIÉTÉ DE DROIT ADMINISTRATIF DU QUÉBEC (SPECIAL ISSUE), Oct. 1994, at 11; QUE., MINISTÈRE DE LA JUSTICE, *supra* note 1, at 3.

77. C.C.Q. art. 3; Charter of Human Rights and Freedoms, C.Q.L.R., c. C-12, s. 1.

78. C.C.Q. art. 10; Charter of Human Rights and Freedoms s. 1.

79. C.C.Q. art. 35; Charter of Human Rights and Freedoms s. 4.

80. C.C.Q. art. 35; Charter of Human Rights and Freedoms s. 5.

81. For a list of these articles, see MÉLANIE SAMSON, *LES INTERACTIONS DE LA CHARTE DES DROITS ET LIBERTÉS DE LA PERSONNE AVEC LE CODE CIVIL DU QUÉBEC: UNE HARMONIE À CONCRÉTISER* 132-46 (2014).

82. These provisions were adopted under the title *Civil Code of Québec*, but since the global Civil Code revision came into force in 1994, reference to this early Code always includes the mention "1980" or "L. II/L. IV" (for the Books of the Civil Code then envisaged for the future). Therefore, for a decade, Québec was in the unusual situation of having two civil codes in force, i.e., the Civil Code of Lower Canada and the Civil Code of Québec (1980). In the present text, reference is made to the provisions of the Civil Code of Québec now in force, rather than those of the 1980 Civil Code.

83. *See Bruker v. Marcovitz*, 2007 SCC 54, [2007] 3 S.C.R. 607; Louise Langevin et al., *L'affaire Bruker c. Marcovitz : variation sur un thème*, 49 C. DE D. 655 (2008).

84. Charter of Human Rights and Freedoms s. 39. *See Droit de la famille—102247*, 2010 QCCA 1561, [2010] R.J.Q. 1904.

85. *Bruker*, 2007 SCC 54.

86. *See Quebec (Att'y Gen.) v. A.*, 2013 SCC 5, [2013] 1 S.C.R. 61.

family" (article 394 C.C.Q.). They also contribute "in proportion to their respective means" to the household expenses, including "by their activities within the home" (article 396 C.C.Q.). Further, "[a] spouse who enters into a contract for the current needs of the family also binds the other spouse for the whole, if they are not separated from bed and board" (article 397 C.C.Q.). In addition, "[t]he spouses choose the family residence together" (article 395 C.C.Q.). "[B]oth spouses retain their respective names" during the marriage, as well (article 393 C.C.Q.). The Québec legislature, to counter any potential injustices resulting from a conjugal breakdown, especially to women, adopted the compensatory allowance (article 427 C.C.Q.), a mechanism by which a spouse who enriched the former spouse's patrimony by work in the home can obtain compensation.<sup>87</sup> Faced with the courts' reluctance to apply this measure (which has a similar purpose to a claim for unjustified enrichment, article 1493 C.C.Q.) after it was introduced in the 1980 Civil Code, the legislature imposed the family patrimony in 1989,<sup>88</sup> applicable regardless of the matrimonial regime chosen by the spouses. Marriage thus became an economic union between spouses, the purpose of which was, among other things, to protect the most vulnerable.

The measures adopted over the years to protect the vulnerable spouse in the marriage excluded same-sex spouses. This form of discrimination was, however, partially remedied by redefining the term "spouse." Already in 1999 the Supreme Court of Canada had stated that laws granting benefits to heterosexual *de facto* spouses should apply equally to same-sex spouses.<sup>89</sup> In 2002, well before the federal government introduced a law recognizing same-sex marriage,<sup>90</sup> Québec adopted a law allowing "civil unions" (a type of registered partnership) for both same-sex and different-sex couples that produced exactly the same effects as marriage<sup>91</sup> (article 521.1, paragraph 1, C.C.Q.). Then, in 2004, the Québec Court of Appeal declared that the definition of marriage as it appeared in federal law<sup>92</sup> could not exclude same-sex couples.<sup>93</sup> In 2005, a federal statute

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87. See ALAIN ROY, *LE CONTRAT DE MARIAGE RÉINVENTÉ : PERSPECTIVES SOCIO-JURIDIQUES POUR UNE RÉFORME* (2002).

88. Act to Amend the Civil Code of Québec and Other Legislation in Order to Favour Economic Equality Between Spouses, S.Q. 1989, c. 55. The concept of "family patrimony" is roughly analogous to that of "matrimonial property" or "family property" in the common law.

89. *M. v. H.*, [1999] 2 S.C.R. 3.

90. Civil Marriage Act, S.C. 2005, c. 33.

91. An Act Instituting Civil Unions and Establishing New Rules of Filiation, S.Q. 2002, c. 6.

92. The Federal Law–Civil Law Harmonization Act, No. 1, S.C. 2001, c. 4, s. 5, provided at the time that marriage was strictly between "a man and a woman."

93. *Ligue catholique pour les droits de l'homme c. Hendricks*, [2004] R.J.Q. 851 (C.A.), *aff'g* *Hendricks et Leboeuf c. Québec (P.G.)*, [2002] R.J.Q. 2506 (C.S.).

amended the definition of marriage to include same-sex couples.<sup>94</sup> The expanded definition of marriage encompassing same-sex couples was also accompanied by new rules on filiation allowing any couple or single person to adopt (article 546 C.C.Q.) or to access assisted procreation services without discrimination.<sup>95</sup>

While Québec recognized same-sex civil unions and ultimately marriages, thereby eliminating discrimination toward gay and lesbian couples, the same was not true for de facto unions (both same-sex and different-sex). A vulnerable spouse who separated from a de facto spouse was not legally protected under the Civil Code of Québec, in contrast to married spouses.<sup>96</sup>

In 2013, in a very highly publicized case due to the amounts involved and the fame of the couple concerned, Canada's highest court ruled on the constitutional validity of the differential legislative treatment of married and unmarried couples under Québec law.<sup>97</sup> In a very split (nine judges, four opinions), very complex, and very long decision, the Supreme Court held that the Civil Code articles exclusively protecting married couples in the event of a breakdown (that is, providing for support for the vulnerable spouse and partition of the family patrimony) were valid under the Canadian Charter. An analysis of this decision exceeds the scope of this study. Note, however, that the decision of Mr. Justice LeBel and Chief Justice McLachlin's concurring opinion in the result, as well as the dissenting opinion of Madam Justice Abella, all discuss the interaction of the civil law with the common law. While Justice LeBel, the three judges who concurred with him,<sup>98</sup> and Justice Abella<sup>99</sup> appeared open to the

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94. Civil Marriage Act, S.C. 2005, c. 33.

95. See Marie-Christine Kirouack, *Le projet parental et les nouvelles règles relatives à la filiation : une avancée ou un recul quant à la stabilité de la filiation?*, in DÉVELOPPEMENTS RÉCENTS EN DROIT FAMILIAL 369 (Service de la formation permanente du Barreau du Québec ed., 2005).

96. However, both married and unmarried parents owe support to their children. C.C.Q. art. 585.

97. *Quebec (Att'y Gen.) v. A.*, 2013 SCC 5, [2013] 1 S.C.R. 61.

98. These judges found that the Civil Code provisions depriving de facto couples of any protection were not discriminatory, but recognized that the lack of protection could result in social difficulties. In their view, only the Québec legislature could intervene to modify this legislative policy and rectify any difficulties encountered by former de facto spouses. The majority judges recalled that this type of legislative intervention had already occurred elsewhere in Canada. The law in force in the common law provinces was therefore provided as an example to somehow pressure the Québec legislature.

99. In her dissent, Madam Justice Abella recognized that Québec has "a separate system of private law from the rest of Canada" and that it has "unique historical and societal values which it has a right to express through its legislation." *Quebec (Att'y Gen.) v. A.*, 2013 SCC 5, para. 371. Nonetheless, when it came time to decide whether the discriminatory nature of the provisions in dispute was justified within the meaning of Section 1 of the Canadian Charter, it seemed useful to examine the systems in place in the other provinces to determine if there was a way for the Québec legislature to respect the autonomy of de facto couples and their freedom of choice while interfering less with the right to equality. After reviewing the solutions chosen in the other

civil law borrowing from the common law to legislate de facto spouses, Chief Justice McLachlin was more concerned with respecting Québec's legislative position on allowing freedom of choice of de facto couples to prevail over all other considerations. In her eyes, the absence of legislation governing de facto relationships fell into the "range of reasonable alternatives for maximizing choice and autonomy in the matter of family assets and support."<sup>100</sup> Accordingly, the discrimination that resulted from the differential treatment was justified. The Chief Justice particularly emphasized "the need to allow legislatures a margin of appreciation on difficult social issues and the need to be sensitive to the constitutional responsibility of each province to legislate for its population."<sup>101</sup> In our opinion, in so doing, she was attempting to counter the criticism regarding the "contamination" of the civil law that has been directed at the highest court since the late nineteenth century,<sup>102</sup> in particular since the Canadian Charter was adopted.

We feel that the Québec legislature should rapidly intervene and enact legislation on de facto unions, and if it does, this should not be seen as a symptom of any undue influence of the common law or human rights on the civil law. It will instead be a sign of the Civil Code's vitality and its capacity to fully assume its role of *jus commune* in family matters. De facto unions are a widely accepted family model in Québec. According to the most recent statistics, de facto couples account for 37% of Québec families.<sup>103</sup> These couples at present do not fall under the family law provisions of the Civil Code—the *jus commune*—which, as a result, is out of sync with the new social reality. This situation is a concern, especially because many de facto couples wrongly believe that they will be protected under the Civil Code should they separate.<sup>104</sup> In short, by ignoring de facto spouses, the Civil Code is failing to respond to the needs or expectations of a large proportion of the population. Legislating de facto unions would allow the Civil Code to operate in symbiosis with Québec society and

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Canadian provinces, Justice Abella concluded that there were mechanisms that would allow the freedom of choice of de facto couples to be preserved and that would interfere less with the right to equality.

100. *Id.* at para. 447.

101. *Id.* at para. 447.

102. Popovici, *supra* note 17.

103. *2011 Comparative Table: Married Couples and Common Law Couples in Canada in 2011*, CHAMBRE DES NOTAIRES DU QUÉBEC—UNION DE FAIT, <http://uniondefait.ca/en/commonlawspouses-comparativetable.php>.

104. The Québec Chamber of Notaries conducted a survey on this topic in March 2013, after the decision in *Quebec (Att'y Gen.) v. A.* was rendered. As the results showed, despite the media coverage surrounding the case, the population in general does not know its rights in the event of a separation. CROP & CHAMBRE DES NOTAIRES DU QUÉBEC, CROP A MESURÉ LES PERCEPTIONS DES QUÉBÉCOIS VIVANT EN UNION DE FAIT QUANT À LEUR ÉTAT MATRIMONIAL (Mar. 2013), available at <http://www.ledevoir.com/documents/pdf/uniondefaitcrop2013.pdf>.



to better fulfil its role as the *jus commune*, which is intended to apply to the greatest number of people.

*B. Human Rights: A Paramount Element in Interpreting the Civil Code of Québec*

A civil code often begins with a preliminary title whose provisions express the major orientations and fundamental principles underlying the statute as a whole, guide its application and interpretation, and govern its incorporation into the overall legal system.<sup>105</sup> In the Civil Code of Québec, this function is fulfilled by one single Preliminary Provision, which states:

The *Civil Code of Québec*, . . . in harmony with the *Charter of human rights and freedoms* . . . and the general principles of law, governs persons, relations between persons, and property.

The Civil 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. In these matters, the Code is the foundation of all other laws, although other laws may complement the Code or make exceptions to it.<sup>106</sup>

The Preliminary Provision of the Civil Code of Québec contains extremely important information about the Québec legal system. One, it places the Civil Code in a “harmonious” relationship with the province’s Charter of Human Rights and Freedoms and the general principles of law (see Part II.B.1). And two, it expressly grants the Code the status of *jus commune* (Part II.B.2). In sum, it introduces a nurturing relationship between the Québec Charter and the Civil Code of Québec.

1. Interpreting the Civil Code in Harmony with the Charter of Human Rights and Freedoms

Employed by the legislature in a provision intended to guide the Civil Code’s interpretation, the notion of “harmony” is itself open to interpretation. Two major trends emerge from the jurisprudence and the doctrine. Some see “the Preliminary Provision [as] an expression of the legislature’s intention to place the [Civil Code and the Québec Charter] on an equal footing.”<sup>107</sup> For others, ourselves included, the

105. See, e.g., the French, Spanish, Louisiana, Chilean, Swiss, and Romanian civil codes.

106. Emphasis added.

107. Alain-François Bisson, *La Disposition préliminaire du Code civil du Québec*, 44 MCGILL L.J. 539, 556 n.70 (translated by authors); see literature cited therein. See also Pierre Bosset, *La Charte des droits et libertés de la personne dans l'ordre consti-*

Preliminary Provision should instead be read as the “solemn confirmation of the Charter’s primacy”<sup>108</sup> over the other laws, including the Code.

On a formal level, the Charter of Human Rights and Freedoms is an ordinary statute that can be amended or repealed like any other, without any particular formality. Like other federal and provincial human rights laws, however, the Québec Charter has been recognized by the jurisprudence as having quasi-constitutional status,<sup>109</sup> which grants it primacy over other legislation,<sup>110</sup> including the Civil Code of Québec.<sup>111</sup> The paramountcy of sections 1 to 38 is, furthermore, expressly stated in section 52. Given the preparatory work, there is every reason to believe that the Québec Charter was mentioned in the Preliminary Provision of the Civil Code of Québec in order to confirm its privileged status and subject the Code to its provisions.<sup>112</sup>

The primacy of the Québec Charter over the Civil Code means that a provision of the Code may be declared inoperative to the extent it is inconsistent with those of the Québec Charter.<sup>113</sup> However, the assertion—in a Preliminary Provision whose primary purpose is to guide the Code’s interpretation—that the Civil Code and the Québec Charter are harmonious implies much more. In so saying, the legislature established “a ‘formality’ (‘canon’) requiring that a civil standard must always be interpreted as encompassing human rights.”<sup>114</sup> In other words, the Code “must be interpreted in the spirit of rights and

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*tutionnel québécois : « acte fondateur » ou « loi ordinaire »*, BULLETIN QUÉBÉCOIS DE DROIT CONSTITUTIONNEL, winter 2006, at 3, 7.

108. Bosset, *supra* note 107, at 8 (translated by authors). See Michèle Rivet, *La discrimination dans la vie au travail : le droit à l'égalité à l'heure de la mondialisation*, 34 R.D.U.S. 275, 282 (2003); COMMISSION DES DROITS DE LA PERSONNE DU QUÉBEC, COMMENTAIRES SUR LE PROJET DE LOI 125 (CODE CIVIL DU QUÉBEC) 6 (1991).

109. Béliveau St-Jacques v. Fédération des employées et employés de services publics inc., [1996] 2 S.C.R. 345, para. 42; Québec (Public Curator) v. Syndicat national des employés de l'hôpital St-Ferdinand, [1996] 3 S.C.R. 211, para. 91; Augustus v. Gosset, [1996] 3 S.C.R. 268, para. 59; Québec (Commission des droits de la personne et des droits de la jeunesse) v. City of Montréal, [1999] 1 S.C.R. 381, para. 27.

110. De Montigny v. Brossard (Succession), 2010 SCC 51, [2010] 3 S.C.R. 64, para. 45.

111. 2747-3174 Québec Inc. v. Québec (Régie des permis d'alcool), [1996] 3 S.C.R. 919, para. 90.

112. See SAMSON, *supra* note 81, at 37–39.

113. Allard, *supra* note 75, at 51; Langevin, *supra* note 76; Robert P. Kouri & Charlotte Lemieux, *Les Témoins de Jéhovah et le refus de certains traitements : problèmes de forme, de capacité et de constitutionnalité découlant du Code civil du Québec*, 26 R.D.U.S. 77, 122–27 (1995).

114. Bjarne Melkevik, *Le nouveau Code civil du Québec et les Droits de l'homme : le paradigme d'un nouveau « droit commun »*, in LE CODE CIVIL ET LES DROITS DE L'HOMME : ACTES DU COLLOQUE INTERNATIONAL DE GRENOBLE, 3 ET 4 DÉCEMBRE 2003, at 403, 410 (Jean-Luc Chabot, Philippe Didier & Jérôme Ferrand eds., 2005) (translated by authors). See Gauthier c. Commission scolaire Marguerite-Bourgeoys, 2007 QCCA 1433, [2007] R.J.D.T. 1376, para. 51.

freedoms.”<sup>115</sup> The Preliminary Provision of the Civil Code echoes section 53 of the Québec Charter,<sup>116</sup> under which the Charter must “be considered a code for the proper interpretation of laws.”<sup>117</sup>

*Syndicat Northcrest v. Amselem*<sup>118</sup> is a good example of an interpretation of the Civil Code in light of the Québec Charter. In this case, the Jewish owners of a condominium unit had installed sukkahs (small huts used for religious purposes) on their balcony during the Jewish holiday of Sukkot, in violation of the condominium agreement’s prohibition against any construction on the balconies of the luxury complex for safety and aesthetic reasons.<sup>119</sup> Unable to come to an agreement, the condominium’s “syndicate” (i.e., board) applied for an injunction forcing the recalcitrant owners to demolish their sukkahs. The condo owners claimed that their freedom of religion prevailed over the condominium agreement. The case ended up before the Supreme Court of Canada. In a very split decision that overturned the lower courts, the Supreme Court acknowledged that the condominium agreement violated the condo owners’ freedom of religion. According to an observer, the highest court in Canada arrived at this conclusion by interpreting article 1056 C.C.Q. in accordance with the Québec Charter: “While the letter of the Civil Code may impose restrictions on the rights of [condominium owners] when justified by the purpose, characteristics, or location of the immovable, now such restrictions must also respect fundamental rights, specifically religious freedom.”<sup>120</sup>

The Québec Charter not only serves as a guide to interpreting the Civil Code provisions; it offers means of protection that supplement those in place under the Code for some fundamental rights violations. For example, section 48 of the Charter provides that “[e]very aged person and every handicapped person has a right to protection against any form of exploitation.”<sup>121</sup> This section, which protects vulnerable persons in society, comes into play in, among other situations, cases where the legislature has refused to legislate—namely, “lesion” (akin to unconscionable use of bargaining

115. Maurice Drapeau, *La responsabilité pour atteinte illicite aux droits et libertés de la personne*, 28 R.J.T. 31, 93 (1994) (translated by authors).

116. “If any doubt arises in the interpretation of a provision of the Act, it shall be resolved in keeping with the intent of the Charter.” Charter of Human Rights and Freedoms, C.Q.L.R., c. C-12, s. 53.

117. HENRI BRUN, GUY TREMBLAY & EUGÉNIE BROUILLET, *DRIT CONSTITUTIONNEL* 983 (6th ed. 2014) (translated by authors).

118. *Syndicat Northcrest v. Amselem*, 2004 SCC 47, [2004] 2 S.C.R. 551.

119. The Civil Code of Québec allows the declaration of co-ownership to limit the rights of the co-owners. C.C.Q. arts. 1056, 1063.

120. Pierre-Gabriel Jobin, *L'application de la Charte québécoise des droits et libertés de la personne aux contrats: toute une aventure*, 2007 REVUE TRIMESTRIELLE DE DROIT CIVIL [R.T.D. CIV.] 33, 36 (translated by authors).

121. For application of this provision, see *Vallée c. Commission des droits de la personne et des droits de la jeunesse*, 2005 QCCA 316, [2005] R.J.Q. 961.

advantage) between persons of full age. Indeed, the Civil Code recognizes lesion in only three situations: in respect of protected persons of full age, in respect of minors, and where the law expressly provides for it (article 1405 C.C.Q.).<sup>122</sup> This situation has been decried by doctrinal writers.<sup>123</sup> According to the Québec Court of Appeal, which has adopted a broad interpretation of section 48 of the Charter, “[t]he different measures provided in the Civil Code do not offer an appropriate or satisfactory solution to the different forms of exploitation that elderly or handicapped persons might suffer.”<sup>124</sup> Section 48, however, adds an extra dimension to the Civil Code’s provisions: “One, [it] extends protection to elderly persons who are exploited regardless of the validity of their consent or the existence of a scheme of protection and two, [it] covers any form of exploitation and is not limited to simply controlling juridical acts or obligations entered into by elderly persons.”<sup>125</sup> The court recognized both the similarity between lesion and exploitation under section 48 and the difference, specifically that section 48 has a broader scope and goes beyond any consent to a juridical act.

If the Québec Charter guides the Civil Code’s interpretation and palliates its deficiencies, the inverse is also partly true. In fact, we will see in the next part of the text that its status as the *jus commune* implies that the Civil Code informs the Québec Charter’s interpretation.

## 2. Interpreting the Civil Code as an Expression of the *Jus Commune*

The Civil Code of Lower Canada was the *jus commune* of Québec in private law relationships, even though the text itself made no mention of this status.<sup>126</sup> In public law, the role of *jus commune* was reserved instead for the common law.<sup>127</sup> When it adopted the Civil Code of Québec in 1991, the Québec legislature innovated by ex-

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122. Sections 8 and 9 of the Consumer Protection Act, C.Q.L.R., c. P-40.1, offer a solution to this problem. In case of exploitation of the consumer, the contract is void. These provisions admit both “objective” and “subjective” lesion. Objective lesion takes into account the unconscionable treatment of the vulnerable party based on objective circumstances (e.g., price), whereas subjective lesion takes into account personal circumstances (e.g., financial capacity of the disadvantaged party).

123. See literature cited in PIERRE-GABRIEL JOBIN & NATHALIE VÉZINA, BAUDOIN ET JOBIN : LES OBLIGATIONS 452 (7th ed. 2013).

124. *Vallée*, 2005 QCCA 316, para. 29 (translated by authors).

125. *Id.*, para. 24 (translated by authors).

126. John E.C. Brierley, *Quebec’s “Common Laws” (Droits Communs): How Many Are There?*, in MÉLANGES LOUIS-PHILIPPE PIGEON 109, 120–21 (1989); Brisson, *supra* note 76, at 295; Rémy Cabrillac, *Le nouveau code civil du Québec*, 1993 RECUEIL DALLOZ 267, 269.

127. DICTIONNAIRE DE DROIT PRIVÉ 74 (Paul-André Crépeau ed., 1985).

pressly granting it the status of Québec's *jus commune*, even in matters of public law.<sup>128</sup>

Due to this status, the Civil Code was accorded “an important suppletive role: The Civil Code rules apply when no other solution is provided under any other statute.”<sup>129</sup> In other words, the Code is a “reservoir of rules” that apply as long as “there is no derogation under any other law.”<sup>130</sup> It is the “normative supplement” to these laws.<sup>131</sup>

The Civil Code even plays a suppletive role in human rights protection.<sup>132</sup> This is why, for example, the Civil Code rules on prescription,<sup>133</sup> on the liability of the person having parental responsibility or their substitute;<sup>134</sup> on the liability of mandators,<sup>135</sup> principals,<sup>136</sup> directors,<sup>137</sup> and animal owners;<sup>138</sup> on the lifting of the corporate veil;<sup>139</sup> on the solidarity of debtors;<sup>140</sup> on determining the quantum of compensatory or punitive damages;<sup>141</sup> and on calculating

128. C.C.Q. art. 1376. *See also* Prud'homme v. Prud'homme, 2002 SCC 85, [2002] 4 S.C.R. 663, paras. 28–29; Denis Lemieux, *Le rôle du Code civil du Québec en droit administratif*, in ACTES DE LA CONFÉRENCE DES JURISTES DE L'ÉTAT 359 (2006).

129. Cabrillac, *supra* note 126, at 269 (translated by authors). On the suppletive role of the *jus commune*, see Fédération des producteurs acéricoles du Québec v. Regroupement pour la commercialisation des produits de l'érable inc., 2006 SCC 50, [2006] 2 S.C.R. 591, para. 10; QUE., MINISTÈRE DE LA JUSTICE, *supra* note 1, at 1.

130. Allard, *supra* note 75, at 60 (translated by authors). *See also* Brisson, *supra* note 76, at 296; DICTIONNAIRE DE DROIT PRIVÉ, *supra* note 127, at 197 (*sub verbo* “droit civil”), 199 (*sub verbo* “droit commun”).

131. PIERRE-ANDRÉ CÔTÉ WITH THE COLLABORATION OF STÉPHANE BEAULAC & MATHIEU DEVINAT, *INTERPRÉTATION DES LOIS 402* (4th ed. 2009) (translated by authors).

132. ÉDITH DELEURY & DOMINIQUE GOUBAU, *LE DROIT DES PERSONNES PHYSIQUES* § 81 (5th ed. 2014).

133. C.C.Q. art. 2925. *See* Gauthier v. Beaumont, [1998] 2 S.C.R. 3; Engler-Stringer c. City of Montréal, 2013 QCCA 707, J.E. 2013-824; Québec (Procureur général) c. Commission des droits de la personne et des droits de la jeunesse, 2013 QCCA 141, [2013] R.J.D.T. 1.

134. C.C.Q. arts. 1459–1460. *See* Mottet c. Commission scolaire Sir-Wilfrid-Laurier, 2002 CanLII 30764, B.E. 2002BE-808 (C.Q.).

135. C.C.Q. art. 2164. *See* Commission des droits de la personne et des droits de la jeunesse c. Gestion S.I.B. inc., J.E. 2000-343 (T.D.P.Q.); Commission des droits de la personne et des droits de la jeunesse c. Pigeon, D.T.E. 2002T-1156 (T.D.P.Q.); Commission des droits de la personne et des droits de la jeunesse c. Panacci, 2013 QCTDP 28.

136. C.C.Q. art. 1463. *See* Gauthier, [1998] 2 S.C.R. 3.

137. C.C.Q. arts. 2164, 2270. *See* Fillion c. Chiasson, 2007 QCCA 570, [2007] R.J.Q. 867.

138. C.C.Q. art. 1466. *See* Allard c. Perron, B.E. 97BE-258 (C.Q.); Rail c. Ouellette, B.E. 2008BE-341 (C.Q.).

139. C.C.Q. art. 317. *See* Coutu c. Commission des droits de la personne et des droits de la jeunesse, J.E. 98-2088 (C.A.).

140. C.C.Q. art. 1526. *See* Syndicat du transport de Montréal–CSN c. Commission des droits de la personne et des droits de la jeunesse, 2010 QCCA 165, J.E. 2010-370; Calego International inc. c. Commission des droits de la personne et des droits de la jeunesse, 2013 QCCA 924, [2013] R.J.D.T. 517.

141. C.C.Q. arts. 1607, 1611, 1621. *See* Augustus v. Gosset, [1996] 3 S.C.R. 268; Québec (Public Curator) v. Syndicat national des employés de l'hôpital St-Ferdinand, [1996] 3 S.C.R. 211; Cinar Corporation v. Robinson, 2013 SCC 73, [2013] 3 S.C.R. 1168.

interest and the additional indemnity<sup>142</sup> have all already been used as the suppletive *jus commune* when applying the Québec Charter.

In addition to having a suppletive role, the Civil Code's status as the *jus commune* influences how its provisions are interpreted.<sup>143</sup> One of these effects is to make the Code very receptive to the influence of human rights. In his comments on the Civil Code, the Minister of Justice noted that enshrining the Code as the *jus commune* dictates that its provisions are to receive a "dynamic interpretation."<sup>144</sup> The interpreter must be creative because the *jus commune* "needs to be fertilized or risk becoming inadequate."<sup>145</sup> Indeed, "the Code must be able to transcend time, taking social changes over the years into account, but without having to be periodically revised. This endurance requires a dynamic or evolving interpretation."<sup>146</sup>

A review of the jurisprudence reveals that for a long time, human rights have had a "fertilizing" effect on the *jus commune*. We know that the text of the Civil Code abounds with easily adaptable concepts.<sup>147</sup> These concepts are all "pores through which the code can breathe, be reinvigorated and adapt according to the interpretation it will be given as our society evolves."<sup>148</sup> Over time, the meaning of these concepts has progressively developed so that a growing number of actions that interfere with human rights and freedoms are now punished.

Well before the charters of rights came into force, the concepts of fault,<sup>149</sup> public order,<sup>150</sup> and good morals<sup>151</sup> gave rise to sanctions for infringements of the rights to life, equality, freedom, physical integrity, safeguard of honor and reputation, privacy, free enjoyment of property, and information, as well as for violations of the freedoms of conscience and religion, opinion, assembly, association, and expres-

142. C.C.Q. art. 1619. See *Fondation québécoise du cancer c. Patenaude*, 2006 QCCA 1554, [2007] R.R.A. 5.

143. Pierre-André Côté, *L'interprétation de la loi en droit civil et en droit statutaire : communauté de langue et différences d'accents*, 31 R.J.T. 45 (1997).

144. QUE., MINISTÈRE DE LA JUSTICE, *supra* note 1, at 1 (translated by authors).

145. Pierre Carignan, *De l'exégèse et de la création dans l'interprétation judiciaire des lois constitutionnelles*, 20 R.J.T. 27, 40 (1986) (translated by authors).

146. Jean-Louis Baudouin, *Conférence de clôture*, in *LE NOUVEAU CODE CIVIL : INTERPRÉTATION ET APPLICATION ; LES JOURNÉES MAXIMILIEN-CARON 1992*, *supra* note 76, at 319, 324 (translated by authors). See also QUE., MINISTÈRE DE LA JUSTICE, *supra* note 1, at 2.

147. Louise Langevin, *Mythes et réalités : la personne raisonnable dans le livre « Des obligations » du Code civil du Québec*, 46 C. DE D. 353, 356 n.10 (2005). See also Jean-Louis Bergel, *Spécificités des codes et autonomie de leur interprétation*, in *LE NOUVEAU CODE CIVIL : INTERPRÉTATION ET APPLICATION ; LES JOURNÉES MAXIMILIEN-CARON 1992*, *supra* note 76, at 3, 19.

148. QUE., MINISTÈRE DE LA JUSTICE, *supra* note 1, at VII (translated by authors).

149. Civil Code of Lower Canada [C.C.L.C.] (1866) art. 1053; LeBel, *supra* note 63, at 235.

150. C.C.L.C. arts. 13, 545, 760, 831, 989–90, 1062; Allard, *supra* note 75, at 58.

151. C.C.L.C. arts. 13, 989–90, 1062.

sion, both contractually and extra-contractually.<sup>152</sup> Article 1053 of the Civil Code of Lower Canada, now article 1457 C.C.Q., was even portrayed as a “genuine charter of rights.”<sup>153</sup> That said, recourse to traditional civil law concepts and principles did not always translate into optimal protection for human rights.<sup>154</sup>

The legislature decided to adopt a Charter of Human Rights and Freedoms in particular to remedy the uncertainty resulting from the use of general civil liability rules to protect human rights. Even if actions under section 49 of the Québec Charter are having difficulty being recognized as truly autonomous from the *jus commune* civil liability, as mentioned earlier,<sup>155</sup> the Charter's coming into force appears to have at least contributed to the notions of fault and public order becoming more effective tools for the protection of human rights. The current concept of a reasonable person refers to one who “respects fundamental rights,”<sup>156</sup> with the result that any action that violates one of these rights is generally considered a civil fault.<sup>157</sup> Similarly, “[t]he advent and subsequent development of rights and freedoms are in the process of shaking up traditional legal concepts of public order.”<sup>158</sup> By adopting a “broader”<sup>159</sup> definition of this notion,

152. CIVIL CODE REVISION OFFICE, *supra* note 67, at 5. *See also* Allard, *supra* note 75, at 40; Caron, *supra* note 44; Pierre-Gabriel Jobin, *Contrats et droits de la personne : un arrimage laborieux*, in *MÉLANGES JEAN PINEAU* 357, 360–68 (Benoît Moore ed., 2003); LeBel, *supra* note 63, at 235–39; Normand, *An Introduction to Quebec Civil Law*, *supra* note 64, at 41–42; Louis Perret, *De l'impact de la Charte des droits et libertés de la personne sur le droit civil des contrats et de la responsabilité au Québec*, 12 *REVUE GÉNÉRALE DE DROIT* 121, 123–36 (1981); Bertrand Roy, *La Charte située dans son contexte*, in *LES DROITS DE LA PERSONNE DANS LEUR APPLICATION* 3, 18–23 (Barreau du Québec ed., 1980); F.R. Scott, *The Bill of Rights and Quebec Law*, 37 *CANADIAN BAR REV.* 135 (1959).

153. Caron, *supra* note 44, at 199 (translated by authors). *See also* Madeleine Caron, *Le droit à l'égalité dans le Code civil et dans la Charte québécoise des droits et libertés*, 45 *R. DU B.* 345, 351 (1985); Hailou Wolde-Giorghis, *Le fardeau de la preuve en matière de discrimination*, 21 *R.J.T.* 169, 183 (1987).

154. LeBel, *supra* note 63, at 238. *See also* Perret, *supra* note 152, at 132; Roy, *supra* note 152, at 21.

155. *Béliveau St-Jacques v. Fédération des employées et employés de services publics inc.*, [1996] 2 S.C.R. 345; *Bou Malhab v. Diffusion Métromédia CMR inc.*, 2011 SCC 9, [2011] 1 S.C.R. 214, para. 23. In legal scholarship, see Sylvie Gagnon, *Quelques observations critiques sur le droit à une réparation en vertu de la Charte des droits et libertés de la personne*, in *LA CHARTE DES DROITS ET LIBERTÉS DE LA PERSONNE : POUR QUI ET JUSQU'OU?*, *supra* note 63, at 261; Michèle Rivet & Manon Montpetit, *L'incorporation doctrinaire des éléments constitutifs de responsabilité civile dans l'analyse de la charte Québécoise : dérives conceptuelles*, in *MÉLANGES JEAN-LOUIS BAUDOIN* 921 (2012); SAMSON, *supra* note 81, at 263ff.

156. *Bou Malhab*, 2011 SCC 9, para. 40. *See the opinion of Madam Justice L'Heureux-Dubé in R. v R.D.S.*, [1997] 3 S.C.R. 484, para. 46. *See also* Langevin, *supra* note 147, at 363–64.

157. *Béliveau St-Jacques*, [1996] 2 S.C.R. 345, para. 120.

158. *Jobin & Vézina*, *supra* note 123, at 198 (translated by authors).

159. Roy, *supra* note 152.

the courts tend to find that any conduct that interferes with a right protected under the Québec Charter contravenes public order.<sup>160</sup>

The affinities between civil law and the Québec Charter have become clearer since the Civil Code of Québec came into force in 1994. The Québec Charter and the Civil Code of Québec are in large part “a reflection of shared principles.”<sup>161</sup> The notion of harmony in the Preliminary Provision of the Civil Code of Québec does not merely introduce an equal or even subordinate relationship between the Code and the Québec Charter. The reality it describes is both richer and more complex. The stated harmony between the Civil Code and the Charter means that the courts must consider the interaction between these two laws so as to ensure that “human rights and freedoms are better protected.”<sup>162</sup>

### CONCLUSION

Adopted with a view to simplifying the study and practice of law,<sup>163</sup> the Civil Code of Lower Canada quickly became a strong symbol of identity.<sup>164</sup> Presented as “one of the most precious bequests received” from our French ancestors alongside the French language and the Catholic religion,<sup>165</sup> it became a symbol of “the resistance of the French fact in British North America.”<sup>166</sup> The Code reflected the

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160. See, e.g., *Coutu c. Commission des droits de la personne et des droits de la jeunesse*, J.E. 98-2088 (C.A.), para. 37.

161. Charles D. Gonthier, *L'influence d'une cour suprême nationale sur la tradition civiliste québécoise*, in ENJEUX ET VALEURS D'UN CODE CIVIL MODERNE : LES JOURNÉES MAXIMILIEN-CARON 1990, at 3, 6 (1991) (translated by authors). See also *Présentation de mémoires en regard des modifications à apporter à la Charte des droits et libertés de la personne* (3), in QUE., NAT'L ASSEMBLY, COMMISSION PERMANENTE DE LA JUSTICE, JOURNAL DES DÉBATS : COMMISSIONS PARLEMENTAIRES, 32d Leg., 2d Sess., No. 5 (Oct. 13, 1981) at B-1648.

162. Langevin, *supra* note 76 (translated by authors).

163. Normand, *supra* note 25, at 623–25.

164. Rémy Cabrillac, *Les enjeux de la codification en France*, 46 C. DE D. 533, 543–44 (2005); Normand, *supra* note 25, at 637; Sylvie Parent, *Le Barreau du Québec et la réforme du Code civil*, in DU CODE CIVIL DU QUÉBEC : CONTRIBUTION À L'HISTOIRE IMMÉDIATE D'UNE RECODIFICATION RÉUSSIE, *supra* note 25, at 429, 433 [hereinafter Parent, *Le Barreau du Québec*]; Sylvie Parent, *Le Code civil du Québec : incivilité ou opportunité?*, 36 REVUE INTERDISCIPLINAIRE D'ÉTUDES JURIDIQUES 15, 18 (1996) [hereinafter Parent, *Incivilité ou opportunité?*].

165. Parent, *Incivilité ou opportunité?*, *supra* note 164 (translated by authors). See also J.E.C. BRIERLEY & R.A. MACDONALD, QUEBEC CIVIL LAW: AN INTRODUCTION TO QUEBEC PRIVATE LAW § 61 (1993).

166. Parent, *Incivilité ou opportunité?*, *supra* note 164, at 18 (translated by authors). See also Jean-Louis Baudouin & Pierre-Gabriel Jobin, *Le Code civil français et les codes civils québécois*, in LE CODE CIVIL 1804–2004 : LIVRE DU BICENTENAIRE 629, 630 (2004); Baudouin, *supra* note 10, at 616; Crépeau, *Foreword*, *supra* note 11, at XXV; Marcel Guy, *Le Code civil du Québec: un peu d'histoire, beaucoup d'espoir*, 23 R.D.U.S. 453, 461 (1992); Normand, *An Introduction to Quebec Civil Law*, *supra* note 64, at 38; Parent, *Le Barreau du Québec*, *supra* note 164, at 433.



values, language, and culture of Lower Canada, and was to contribute to ensuring its survival;<sup>167</sup> it was part of its “immune system.”<sup>168</sup>

In this context, it is understandable that the legal community was concerned about preserving the integrity of the Civil Code of Lower Canada and fought against the common law's influence on its interpretation. The argument about protecting the Code's integrity was first raised with respect to methodology. The idea emerged in both the jurisprudence and the doctrine that the Civil Code interpretation rules differed from the common law statutory interpretation rules.<sup>169</sup> Furthermore, authors were opposed to the courts using common law notions to define civil law institutions. For its part, the legislature was hesitant to amend the Code; it preferred to adopt specific statutes that derogated from or supplemented it.

For several decades now, the doctrine has seemed less preoccupied by the influence of the common law *per se* on the interpretation of the Civil Code. With the advent of the Québec and Canadian Charters, there has in fact been more concern about the influence of human rights on the civil law. This new “threat” to the originality of the civil law is, however, often confused with the former. Fundamental rights are expected to cause the civil law to drift toward the common law because they originate in public law<sup>170</sup>—derived in part from the common law, even in Québec<sup>171</sup>—and because the courts have significant latitude in how they are interpreted, increasing the role of jurisprudence.<sup>172</sup>

In our opinion, the influence of the common law on the civil law must be distinguished from the ascendancy of human rights philosophy over the same civil law; these are two very distinct phenomena. It is not for us to say whether the resistance of the doctrine and the jurisprudence to the influence of the common law on the civil law was or was not justified in the last century. It seems clear, however, that resistance to the rise of human rights in Québec private law has no *raison d'être*. The increased sensitivity of Québec civil law to human rights is a logical evolution in a Western context and contributes to its enrichment. It respects the hierarchy of sources of law as well as the objectives underlying the civil law's codification and its function as the *jus commune*.

The spread of human rights in the civil law is not singular to Québec. Even though it is not happening everywhere at the same speed, the entry of human rights into the law is evident in several

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167. Normand, *supra* note 25, at 630; Normand, *supra* note 15.

168. Normand, *supra* note 15, at 574.

169. *Id.* at 575.

170. Rivet & Montpetit, *supra* note 155, at 934 n.47.

171. Prud'homme v. Prud'homme, 2002 SCC 85, [2002] 4 S.C.R. 663.

172. Grimaldi, *supra* note 46.

civilian jurisdictions, including Germany,<sup>173</sup> Spain,<sup>174</sup> Italy,<sup>175</sup> Portugal,<sup>176</sup> and France.<sup>177</sup> It forms part of a vast movement to constitutionalize law, in which “constitutional standards progressively become the common foundation of various branches of the law.”<sup>178</sup>

In Québec, fundamental rights are protected by the Canadian and Québec Charters, which have primacy over all other laws, including the Civil Code. The influence of human rights on the Civil Code’s interpretation is therefore dictated by the hierarchy of sources of law. Moreover, it is legitimated by the Preliminary Provision of the Civil Code directing that harmony must be sought between the Code and the Charter of Human Rights and Freedoms.

In addition to this explanation, which can be described as formal or Kelsenian, the influence of human rights on Québec civil law appears inherent in its codification and its status as the *jus commune*. It is the very essence of a Civil Code to translate the dominant values of the society it governs into law. In 1977, when the Civil Code Revision Office sent the Québec government its report containing the new draft Civil Code, the legislature had just entrenched the Charter of Human Rights and Freedoms, “a document that expresses the most

173. DAVID CAPITANT, *LES EFFETS JURIDIQUES DES DROITS FONDAMENTAUX EN ALLEMAGNE* (2001); Sabine Corneloup, *Code civil et Constitution(s) : le cas de l’Allemagne*, in *CODE CIVIL ET CONSTITUTION(S)* 85 (Michel Verpeaux ed., 2005); Michel Fromont, *Les droits fondamentaux dans l’ordre juridique de la République fédérale d’Allemagne*, in *RECUEIL D’ÉTUDES EN HOMMAGE À CHARLES EISENMANN* 49 (1977); Michel Fromont, *L’autonomie de la volonté et les droits fondamentaux en droit privé allemand*, in *LE RÔLE DE LA VOLONTÉ DANS LES ACTES JURIDIQUES : ÉTUDES À LA MÉMOIRE DU PROFESSEUR ALFRED RIEG* 337 (2000).

174. Pierre Bon, *La constitutionnalisation du droit espagnol*, *REVUE FRANÇAISE DE DROIT CONSTITUTIONNEL* [REV. FR. DR. CONSTIT.] 35 (1991) [hereinafter Bon, *La constitutionnalisation du droit espagnol*]; Pierre Bon, *Code civil et Constitution(s) : le cas de l’Espagne*, in *CODE CIVIL ET CONSTITUTION(S)*, *supra* note 173, at 95.

175. Thierry Di Manno, *Code civil et Constitution en Italie*, in *CODE CIVIL ET CONSTITUTION(S)*, *supra* note 173, at 99.

176. Bon, *La constitutionnalisation du droit espagnol*, *supra* note 174, at 53.

177. Christian Atias, *La civilisation du droit constitutionnel*, *REV. FR. DR. CONSTIT.* 435 (1991); Anne-Claire Aune, *La réception de « droits à » dans le Code civil sous l’impulsion des Droits de l’homme*, in *LE CODE CIVIL ET LES DROITS DE L’HOMME : ACTES DU COLLOQUE INTERNATIONAL DE GRENOBLE, 3 ET 4 DÉCEMBRE 2003*, *supra* note 114, at 191; Jean-François Brisson, *Règles ou principes? Le Code civil à l’épreuve du droit public : transversalité et transcendance*, in *LE CODE CIVIL : UNE LEÇON DE LÉGISLATION?* 85 (Bernard Saintourens ed., 2006); Jacqueline de Guillen Schmidt, *La jurisprudence du Conseil constitutionnel et le droit civil*, *Presentation to the Rencontre franco-arménienne sur le patrimoine juridique commun* (Jan. 23, 2007), available at [http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank\\_mm/discours\\_interventions/2007/20070123.pdf](http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/discours_interventions/2007/20070123.pdf); Louis Favoreu, *La constitutionnalisation du droit*, in *LA CONSTITUTIONNALISATION DES BRANCHES DU DROIT* 181 (Bertrand Mathieu & Michel Bon eds., 1996); MARC FRANGI, *CONSTITUTION ET DROIT PRIVÉ : LES DROITS INDIVIDUELS ET LES DROITS ÉCONOMIQUES* (1992); François Luchaire, *Les fondements constitutionnels du droit civil*, 1982 R.T.D. CIV. 245; Bertrand Mathieu, *Droit constitutionnel et droit civil : « de vieilles outres pour un vin nouveau »*, 1994 R.T.D. CIV. 59.

178. Favoreu, *supra* note 177, at 193 (translated by authors).

fundamental values of Québec society.”<sup>179</sup> Canada was about to do likewise by enshrining in the Canadian Charter of Rights and Freedoms “the fundamental values of Canadian society,”<sup>180</sup> such as human dignity and equality.<sup>181</sup> The Civil Code necessarily bears the stamp of these same values. In the words of Professor Paul-André Crépeau, then president of the Civil Code Revision Office, the Code had “to reflect the social, moral, and economic realities of today’s Québec,”<sup>182</sup> including its concern that human rights be respected.

In sum, the place accorded to human rights in the Civil Code of Québec is not a symptom of the contamination of Québec civil law, but a sign of its healthy evolution. The legislature did a fine job of accomplishing this when it reformed the Civil Code, and it is now left to the courts to continue this evolution. Because it is enduring and, mostly, because it is the *jus commune*, the Civil Code of Québec must receive a dynamic interpretation to ensure its “ability to adjust to society.”<sup>183</sup> Consequently, its interpreters cannot ignore the transformation that occurred in Québec’s legal culture as a result of the advent of the charters of rights.<sup>184</sup>

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179. *De Montigny v. Brossard (Succession)*, 2010 SCC 51, [2010] 3 S.C.R. 64, para. 53.

180. Nicole Duplé, *L’enchâssement des valeurs de la démocratie libérale dans les chartes : Qu’en est-il du positivisme juridique?*, in *TRANSFORMATION DE LA CULTURE JURIDIQUE QUÉBÉCOISE*, *supra* note 8, at 121 (translated by authors).

181. *R. v. Andrews*, [1990] 3 S.C.R. 870, para. 32.

182. Crépeau, *Foreword*, *supra* note 11, at XXIV.

183. *Aetna Casualty and Surety Co. c. Groupe Estrie, Mutuelle d’assurance contre l’incendie*, [1990] R.J.Q. 1792 (C.A.) (translated by authors). *See also* Bergel, *supra* note 147.

184. Concerning the transformation of Québec legal culture under the influence of the charters, see Gaudreault-Desbiens, *supra* note 8; Sylvio Normand, *La culture juridique et l’acculturation du droit : le Québec*, 1 *ISAIDAT L. REV.*, no. 2 (SPECIAL ISSUE 1), art. 23, at 22ff. (2011); Popovici, *supra* note 17, at 235–36.

