8. Interpreting constitutions and statutes: convergence more than specificity, whether in common law or civil law

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1. INTRODUCTION

My research addresses statutory interpretation[1] and constitutional interpretation[2] as well as the comparative study of the civil law and common law systems (rooted in my identity as a French-Canadian and my legal training in both traditions).[3] Combining these research interests, I examine how to interpret constitutions and statutes from the vantage point of comparative law. Statutory interpretation is often said to differ fundamentally from constitutional interpretation. Moreover, the civil law and common law traditions are thought to differ in their approach to interpreting legal documents. Against both of these positions, my main argument is that there is little, if anything at all, that fundamentally differentiates the construction of constitutions and statutes in either common law or civil law jurisdictions, especially in regard to the scope and methodology dimensions of interpretation (expressions that I define below).

2. SETTING OUT THE DEBATE: CONSTITUTIONS VERSUS STATUTES

For the underlying theme of this chapter, relating to the (non) specificity of constitutional interpretation as it compares to statutory interpretation, Canada provides an interesting point

[1] See Stéphane Beaulac, *Handbook on Statutory Interpretation – General Methodology, Canadian Charter and International Law* (LexisNexis 2008); Stéphane Beaulac and Pierre-André Côté, 'Driedger's "Modern Principle" at the Supreme Court of Canada: Interpretation, Justification, Legitimization' (2006) 40 Revue juridique Thémis 131. See also Pierre-André Côté, Stéphane Beaulac and Mathieu Devinat, *The Interpretation of Legislation in Canada* (Carswell 2011).

[2] See, in particular, Stéphane Beaulac, 'Constitutional Interpretation: On Issues of Ontology and of Interlegality' in Peter Oliver, Patrick Macklem and Nathalie Des Rosiers (eds), *Oxford Handbook of the Canadian Constitution* (OUP 2017) 867; Stéphane Beaulac, '"Texture ouverte", droit international et interprétation de la Charte canadienne' (2013) 61 Sup Ct L Rev (2d) 191; Stéphane Beaulac, 'L'interprétation de la Charte: reconsidération de l'approche téléologique et réévaluation du rôle du droit international' (2005) 27 Sup Ct L Rev (2d) 1.

[3] See Stéphane Beaulac and Jean-François Gaudreault-DesBiens, *Common Law and Civil Law: A Comparative Primer/Droit civil et common law: convergences et divergences* (Éditions Thémis 2017).

of reference, one that goes above and beyond the famous 'living tree' metaphor[4] from the *Edwards* case.[5] Right or wrong, the idea that constitutional interpretation is fundamentally different to statutory interpretation is very much associated with the 'Maple Leaf' country and even more so since the adoption of the Canadian Charter of Rights and Freedoms[6] in 1982. For instance, former president of the Supreme Court of Israel and world-renowned author on the interpretation of law and constitutions,[7] Professor Aharon Barak, likes to refer to Canada's case law on Canadian Charter interpretation, in particular, to the parts on the specificity of the construction of constitutional texts.[8]

Justice Brian Dickson, later Chief Justice of the Supreme Court of Canada, was the main proponent, in the 1980s, of grand statements differentiating constitutional interpretation from the construction of regular legislation. In the 1984 decision of *Hunter v Southam,*[9] after referring to Professor Paul Freund – who wrote, in the constitutional context of the United States, that courts should 'not read the provisions of the Constitution like a last will and testament, lest it become one'[10] – Dickson J marked the supposedly ontological difference between the two: 'The task of expounding a constitution is crucially different from that of construing a statute'.[11] That same year in *Skapinker*, Justice Estey had suggested that the interpretation of the Canadian Charter was, indeed, a 'new task',[12] referring to Lord Sankey in the *Edwards* case and emphasizing the distinction with the simple interpretation of ordinary statutes.

This approach contrasts drastically with (in fact, it is 180 degrees opposite to) the opinion expressed some 100 years before in the old case of *Bank of Toronto v Lambe,*[13] in which the

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[4] This theme of living constitutionalism is at the centre of Aileen Kavanagh's contribution in this book. On the historical significance of this case, see also Stéphane Beaulac, 'Post-World War I/The Quiet Revolution (1920–1970) – Through the Lenses of Legal Interpretation and International Law' in Errol Mendes (ed) *Canada's Constitutional Democracy: The 150th Anniversary Celebration* (LexisNexis Canada 2017) 79.

[5] *Edwards v Canada (Attorney General)* [1929] UKPC 86, [1930] AC 124 (Privy Council) (*Edwards*).

[6] Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 (Canadian Charter).

[7] See, generally, Aharon Barak, *Purposive Interpretation in Law* (PUP 2005).

[8] See Aharon Barak, 'Constitutional Interpretation' in Ferdinand Mélin-Soucramanien (ed) *L'interprétation constitutionnelle* (Dalloz 2005) 96.

[9] *Hunter v Southam Inc* [1984] 2 SCR 145 (*Hunter*).

[10] Paul A Freund, 'The Supreme Court of the United States' (1951) 29 Can Bar Rev 1080, 1086.

[11] *Hunter* 155 (Justice Dickson). After this statement, Justice Dickson further writes: 'A statute defines present rights and obligations. It is easily enacted and as easily repealed. A constitution, by contrast, is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a *Bill* or a *Charter of Rights*, for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. The judiciary is the guardian of the constitution and must, in interpreting its provisions, bear these considerations in mind' (ibid).

[12] *Law Society of Upper Canada v Skapinker* [1984] 1 SCR 357, 365 (*Skapinker*).

[13] *Bank of Toronto v Lambe* [1887] 12 AC 575 (Privy Council). See also George H Ross, 'Interpreting the B.N.A. Act' (1929) 7 Can Bar Rev 704.

Judicial Committee of the Privy Council laid down the following rule in construing the provisions of the British North America Act (renamed Constitution Act, 1867):

> Questions of this class have been left for the decision of the ordinary Courts of law, which must treat the provisions of the Act in question by the same methods of construction and exposition which they apply to other statutes.[14]

What happened between *Lambe* in 1877 and *Hunter* in 1984? The short answer, obviously, is the *Edwards* case in 1930 and its 'living tree' dictum.[15]

3. FOCUSING ON PURPOSIVE, LARGE AND LIBERAL INTERPRETATION

One needs to be more precise, however, when addressing these issues. Dynamic (or non-originalist) interpretation, on the one hand, is not one and the same, and must not be confused with a large and liberal reading, on the other hand; the latter is not strictly confined to the letter of the law but, rather, geared toward the objective pursued, whether in a piece of legislation or in a constitutional text. In fact, it is useful to recall the three axes – or kind of oppositions – relevant to legal interpretation, which, though surely overlapping somewhat, represent different dimensions:

- dynamic (evolving) *versus* static (original) interpretation – the time dimension
- large and liberal *versus* strict and restrictive interpretation – the scope dimension
- textual *versus* purposive (object) interpretation – the methodology dimension

The *Edwards* case, with its 'living tree' metaphor, is generally associated with the first dimension, interested in time and the possible changing circumstances that can prove important in dynamic interpretation. But the 1930 Privy Council decision contains other passages addressing the two dimensions of scope and methodology. They are:

> The object of the Act was to grant a Constitution to Canada. 'Like all written constitutions it has been subject to development through usage and convention.' ... Their Lordships do not conceive it to be the duty of this Board – it is certainly not their desire – to cut down the provisions of the Act by a narrow and technical construction, but rather to give it a large and liberal interpretation.[16]

Put another way, it seems that the paradigm shift that occurred in the 1930 *Edwards* case was not only with respect to the time dimension ('living tree' metaphor)[17] but also in regard to the scope and methodology dimensions.

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[14] ibid 579 [emphasis added].

[15] See generally Peter W Hogg, 'Canada: From Privy Council to Supreme Court' in Jeffrey Goldsworthy (ed) *Interpreting Constitutions – A Comparative Study* (OUP 2006) 55.

[16] *Edwards* [n 5] 136 [emphasis added].

[17] Interestingly, there is a new revisionist take on the *Edwards* case in Canada. See Bradley W Miller, 'Origin Myth: The Persons Case, the Living Tree, and the New Originalism' in Grant Huscroft and Bradley W Miller (eds), *The Challenge of Originalism: Theories of Constitutional*

To be clear, this chapter is interested in the specificity of constitutional interpretation as it compares to the construction of regular statutes in comparative perspective, but it is more focused than that. It shall concentrate on the latter two dimensions – scope and methodology – and actually look into the impact of legal traditions and 'mentalités'[18] on such specificity. Accordingly, the hypothesis is that, be it in civil law or common law countries, there is little, if anything at all, that fundamentally differentiates the construction of constitutions and statutes, as far as the scope and the methodology dimensions of interpretation are concerned.

The discussion fleshes out a demonstration by examining the mother jurisdictions, as far as legal families are concerned, of the United Kingdom (England)[19] and France. The objective is to extract some contemporary lessons in terms of common law and civil law construction of statutes and constitutions, respectively.

4. INTERPRETING CONSTITUTIONS AND STATUTES: UNITED KINGDOM AND FRANCE

No doubt, it is an oversimplification to associate common law solely with England (and by extension, the United Kingdom) and civil law only with France. However, given that my background jurisdiction is Canada – to which I will return in the next section – with its dual heritage from these two European countries, the criticism loses bearing considerably. Thus, as far as legal interpretation is concerned, there is a truism ('*vérité de la Palisse*') that remains: the civil law approach to legislation is generally large and liberal, embracing the underlying purpose, while the one associated with common law is deemed strict and restrictive, focusing on the letter of the law. Although clear and simple, this would still sum it all up. Or would it?

Interpretation (CUP 2011) 120; Asher Honickman, 'The Original Living Tree' (2019) 28 Const Forum 29; Léonid Sirota and Benjamin Oliphant, 'Originalist Reasoning in Canadian Constitutional Jurisprudence' (2017) 50 UBC L Rev 505. See also what seems to be an endorsement by a (former) justice of the Supreme Court of Canada, writing extra-judicially, of this revisionist version of *Edwards*: Marshal Rothstein, 'Checks and Balances in Constitutional Interpretation' (2016) 79 Sask L Rev 1.

[18] On the concept of 'mentalités' in comparative law, see Pierre Legrand, 'Legal Traditions in Western Europe: The Limits of Commonality' in Robert W Jagtenberg, Esin Örücü and Annie J De Roo (eds), *Transfrontier Mobility of Law* (Kluwer Law International 1995) 63; Pierre Legrand, 'European Legal Systems Are Not Converging' (1996) 45 Int'l and Comp L Q 52, 60–64. See also on a similar theme: Jean-François Gaudreault-DesBiens, *Les solitudes du bijuridisme au Canada – Essai sur les rapports de pouvoir entre les traditions juridiques et la résilience des atavismes identitaires* (Éditions Thémis 2007).

[19] Of course, the common law legal family is associated with England, predominantly; but as far as constitutional interpretation is concerned, it is much more useful to refer to the whole United Kingdom. This is because, unlike England, the other main constituent parts of the UK have their constitutional law in written instruments, thus providing opportunities to assess the interpretation of constitutional documents. It is worth mentioning here as well, without going into any detail, that the civil law specificities of Scotland have no bearing with respect to constitutional interpretation and to statutory interpretation. Bearing witness to the commonality in interpretative approaches, see the collaboration on the topic by the Law Commission and the Scottish Law Commission, *The Interpretation of Statutes* (Law Com No 21 / Scot Law Com No 11, 1969).

(a) England (or UK) and the Common Law

The common law attitude toward statutes must be appreciated in light of the difficult rapport between Anglo-Saxon judges and written law (‘*droit écrit*’), in general. Harlan Stone once wrote that statute law was deemed ‘an alien intruder in the house of the common law [i.e., case law, or ‘*droit jurisprudential*’]’.[20] Typical for a British scholar of his time, Frederick Pollock expressed the view that, with enactments, ‘Parliament generally changes the law for the worse’.[21] In the golden age of the common law, the situation was presented thus: ‘[I]n England, it is unwritten law that is regarded as normal and written law as exceptional’.[22] As a result, no one is surprised that judges in a common law country will have an a priori view that is strict and restrictive toward statute law, giving legal effect to nothing more than what the letter of the law stipulates.[23]

Be that as it may, in the United Kingdom and in other countries of Anglo-Saxon legal tradition, things have been changing for some time now. My favourite illustration of a shift in regard to written law and statutory interpretation is the decision of the House of Lords in the famous case of *Pepper v Hart*.[24] At issue was how to tax some benefits linked to the tuition of school teachers’ children, specifically whether the word ‘cost’ in a tax provision[25] meant marginal cost (lower) or average cost (higher) to the school. This prompted the reconsideration of a long-established rule of statutory interpretation excluding references to parliamentary debates in ascertaining legislative intent, which, incidentally, also used to exist in Canada.[26] While repudiating the exclusionary rule,[27] the Law Lords expressed some general views on statutory interpretation – especially the scope and methodology dimensions (see above) – including this very apposite one by Lord Griffiths:

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[20] Harlan F Stone, ‘The Common Law in the United States’ (1936) 50 Harvard L Rev 4, 15.

[21] Frederick Pollock, *Essays in Jurisprudence and Ethics* (Macmillan 1882) 85. See also Lord Reid, ‘The Judge as Law Maker’ (1972) 12 Journal of the Society of Public Teachers of Law (New Series) 22, 27.

[22] Frederick H Lawson, *The Rational Strength of English Law* (Stevens & Sons 1951) 17. See also – though the author suggests that the European Union has seen a convergence in approaches – Roderick Munday, ‘The Common Lawyer’s Philosophy of Legislation’ (1983) 14 Rechtstheorie 191, 193: ‘In short, whilst the English lawyer is forced to acknowledge the necessity of legislation, for him the common law – that cautious, organic, accretion of slow-won judicial wisdom – remains the true bedrock of English law’.

[23] In an incredible statement in a late nineteenth century judicial decision, Justice Steven of the Queen’s Bench in England and Wales suggested that the text of the law must not only be intelligible for a good faith reader, ‘but it is necessary to attain, if possible, a degree of precision which a person reading in bad faith cannot misunderstand’: see *In re Castioni* [1891] 1 QB 149, 167. See also Brian Flanagan, ‘Revisiting the Contribution of Literal Meaning to Legal Meaning’ (2010) 30 Oxford Journal of Legal Studies 255.

[24] *Pepper v Hart* [1992] UKHL 3, [1993] AC 593 (House of Lords).

[25] Finance Act 1976, s 63.

[26] See Stéphane Beaulac, ‘Recent Developments at the Supreme Court of Canada on the Use of Parliamentary Debates’ (2000) 63 Sask L Rev 581.

[27] See, generally, Stéphane Beaulac, ‘Parliamentary Debates in Statutory Interpretation: A Question of Admissibility or of Weight?’ (1998) 43 McGill LJ 287.

> The days have long passed when the courts adopted a strict constructionist view of interpretation which required them to adopt the literal meaning of the language. The courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation and are prepared to look at much extraneous material that bears upon the background against which the legislation was enacted.[28]

This less narrow view on statutory interpretation in the UK had been advocated for some time in legal writings and, at last, was, thus, endorsed, in no uncertain terms, by the courts in the Anglo-Saxon legal tradition.[29] One of the main proponents of such a change in interpretative methods was British author Francis Bennion. He suggested setting aside the so-called 'first glance approach' in statutory interpretation, advocating, instead, a broader take on legislation: 'The informed interpretation rule is to be applied no matter how plain the statutory words may seem at first glance'.[30]

Some ten years after *Pepper v Hart*, the House of Lords had another opportunity to make a strong statement about interpreting statutory texts,in the 2003 case of *Secretary of State for Health*.[31] Giving effect to parliamentary intent in the act,[32] specifically the expression 'where fertilisation is complete', the Law Lords emphasized the clear purpose of the legislation and broadened the scope of application to cover the practice of cell nuclear replacement. Highlighting both the scope and the methodology dimensions (see above), Lord Bingham said the following:

> The basic task of the court is to ascertain and give effect to the true meaning of what Parliament has said in the enactment to be construed. But that is not to say that attention should be confined and a literal interpretation given to the particular provisions which give rise to difficulty. Such an approach [may] lead to the frustration of that will, because undue concentration on the minutiae of the enactment may lead the court to neglect the purpose which Parliament intended to achieve when it enacted the statute. … The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment.[33]

Specifically on the teleological feature, it is noteworthy that the House of Lords once said quite clearly that, if a literalist construction of the law is contrary to the intention imputed to

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[28] *Pepper v Hart* (n 24) 617.

[29] See, generally, John Bell and George Engle (eds), *Cross on Statutory Interpretation* (3rd edn, Butterworths 1995).

[30] Francis A R Bennion, *Statutory Interpretation: A Code* (4th edn, Butterworths 2002) 500.

[31] *R (on the application of Quintavalle) v Secretary of State for Health* [2003] UKHL 13, [2003] 2 AC 687 (House of Lords).

[32] Human Fertilisation and Embryology Act 1990, s 1(1)(a).

[33] *R v Secretary of State for Heath* (n 31) [8] [emphasis added]; see, too, to the same effect, Lord Steyn's opinion at [21]. See also *Inland Revenue Commissioners v McGuckian* [1997] UKHL 22 (House of Lords): 'During the last 30 years, there has been a shift away from the literalist approach to purposive methods of construction … the modern emphasis is on a contextual approach designed to identify the purpose of a statute and to give effect to it'.

Parliament, 'then it is not merely legitimate but desirable that they should be construed in the light of the purpose of the legislature in enacting the provision'.[34]

Recently in legal writings, Professor Andrew Burrows – who has since been appointed as a Justice of the UK Supreme Court – dwelled upon the present situation of English law on statutory interpretation. He offered the following general observation:

> [I]t is tolerably clear today that our judges have moved from an old literal to a modern contextual and purposive approach. We no longer give words their literal or dictionary meaning in so far as the context and purpose of the statute indicate that that is not the best interpretation of what parliament has enacted.[35]

To recap, the situation in common law England (or United Kingdom), with respect to statutory interpretation, has changed considerably, meaning that the a priori strict and restrictive approach is not generally favoured anymore. Has the balance been tipped equally in regard to both the scope and the methodology dimensions (see above)? This is less certain, as the above statements are generally viewed as a plea for large and liberal interpretation (the scope dimension), which has definitely been heard, more than a stern affirmation that purposive interpretation (the methodology dimension) is necessarily the predominant approach to the construction of statutes.

As regards the latter dimension, the modern trend in the UK seems to indicate that the methodology is now more or less neutral, in the sense that there is no a priori view in favour of textualism anymore, nor is there an a priori view in favour of teleological interpretation either – not automatically or necessarily at least. In other words, the systematic textual approach that used to be expressed in terms of 'plain meaning rule' or 'literal rule' has surely faded away, although sometimes there are cases reminiscent of this era. But it does not mean that the scale has shifted on the other side because there is no witnessing of a new sort of systematic purposive approach across the board in UK statutory interpretation – not at all. Hence the suggestion that, with regard to the methodology dimension (see above), the default position is neutral,[36] that is to say, with no a priori view. Having said that, this constitutes a significant development in the common law legal family, no doubt.

What about constitutional interpretation? Has there been a similar evolution in methods? Would a large and liberal construction of constitutional texts, one that gives proper weight to the underlying purpose, be what one observes in contemporary case law in the motherland of the Anglo-Saxon legal tradition?[37]

Here, the illustrations will come from the constituent parts of the United Kingdom, where constitutional law is founded, at least in part, on written constitutional texts (cases arising out of British dominions with written constitutions and decided by the Privy Council are not

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[34] *R v Z (Attorney General for Northern Ireland's Reference)* [2005] UKHL 35, [2005] 2 AC 645 (House of Lords) (Lord Carswell).

[35] Andrew Burrows, *Thinking about Statutes: Interpretation, Interaction, Improvement (The Hamlyn Lectures)* (CUP 2018) 5.

[36] For a similar position in legal writings, see my former law professor at the University of Cambridge (Peterhouse), Roderick Munday (n 22).

[37] See, generally, David Feldman, 'Statutory Interpretation and Constitutional Legislation' (2014) 130 Law Quarterly Review 473.

considered).[38] An important decision by the House of Lords in 2002, *Robinson v Secretary of State for Northern Ireland,*[39] seems to be the case for constitutional interpretation too. Witness, in Lord Bingham's speech:

> The 1998 Act does not set out all the constitutional provisions applicable to Northern Ireland, but it is in effect a constitution. So to categorise the Act is not to relieve the courts of their duty to interpret the constitutional provisions in issue. But the provisions should, consistently with the language used, be interpreted generously and purposively, bearing in mind the values which the constitutional provisions are intended to embody.[40]

At issue in this case – revolving around Section 16A(8) of the 1998 Act[41] – was whether the late election by the assembly of the First Minister in Northern Ireland was, nevertheless, valid, which it was, indeed, held to be. It is worth noting in the above quote that reference is made to both the scope and methodology dimensions (see before), that is to say, to both the need for a 'generous' interpretation and the appropriateness also of a 'purposive' interpretation of the constitutional provision.

Another situation involving constitutional texts, this time in Scotland,[42] saw the United Kingdom Supreme Court adopt a similarly large and liberal interpretation, considering the underlying purpose of the text, to ascertain the normative content of the constitutional provisions at stake. Specifically, the problematic words were 'related to' matters of sale and supply of goods to consumers or product safety, these being a head of power reserved to the central authority in Westminster under the Scotland Act 1998.[43] The issue was whether the Holyrood legislation prohibiting the display, sale and purchase of tobacco products was ultra vires. The answer was no, that, indeed, the Scottish statutory prohibition was constitutionally valid. Interestingly for our discussion, in refusing to see constitutional interpretation as a different process, Lord Hope in *Imperial Tobacco* expressed the view that, 'the description of the Act as a constitutional statute cannot be taken, in itself, to be a guide to its interpretation'.[44] In terms of interpretative dimensions (see above), beginning with scope, there was nothing said about a strict or generous interpretation. Next, regarding methodology, the Court emphasized both the ordinary meaning of the words found and the purpose of the 1998 Act, aimed at having effective devolution of powers to the Scottish Parliament.

In truth, there are other recent cases in the United Kingdom that seem to suggest that a constitutional interpretation need not necessarily favour a purposive, nor a large and liberal reading of the provisions under consideration.[45] Accordingly, whether there is convergence in

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[38] For those cases, please refer to Brenda Hale's Chapter 33 in this book.

[39] *Robinson v Secretary of State for Northern Ireland* [2002] UKHL 32 (House of Lords).

[40] ibid [11] [emphasis added].

[41] Northern Ireland Act 1998, s 16A(8): 'But no person may take up office as First Minister, deputy First Minister or Northern Ireland Minister by virtue of this section after the end of the period mentioned in subsection (3)', the latter being a period of six weeks.

[42] See *Imperial Tobacco Ltd v Lord Advocate* [2012] UKSC 61 (Supreme Court) (*Imperial Tobacco*).

[43] Scottish Act 1998, s 29 and schs 4–5.

[44] *Imperial Tobacco* (n 42) [15].

[45] See *Mills v HM Advocate (No 2)* [2001] ScotHC 52 (High Court of Justiciary) [19]; and *HM Advocate v R* [2002] UKPC D2 (Privy Council) [155].

methods between constitutional interpretation and the construction of statutes in the UK is unclear. Keeping in mind the two different dimensions – scope and methodology (see above) – while there would seem to be a trend in favour of a large and liberal interpretation, indeed for both statutory and constitutional provisions, there is no equivalent tipping the scale across the board toward purposive interpretation and away from textualism, as the letter of the law remains important for both statutes and, as we just saw, for constitutional texts.

Going back to the idea of convergence, what can be concluded? In legal writings, some have ventured to suggest, tentatively, that there is an enthusiasm, based on these few cases just discussed, to give constitutional texts special treatment when it comes to interpretation.[46] But this is too categorical; a more nuanced assessment is needed.

When the analysis goes into more depth, these cases suggest that judges will adopt, more likely than not, purposive and generous modes of interpretation in constitutional cases. Indeed, for reasons linked to both the underlying object of such texts, and also because of the legislative language used in the provisions, an interpretation that is large and liberal, giving weight to the object of the constitution, appears to be appropriate in many situations. In short, more often than not, judges favour an expansive scope of application in the context of constitutional interpretation and to accomplish this, emphasis is put on the methodology, giving weight to legislative purpose, thus opting for a large and liberal interpretation.[47]

Would it not be fair to say, nonetheless, that there is a sort of bias in British constitutional interpretation for purposive and generous interpretation? The answer entirely depends on how much importance one gives to this default position in approaching constitutional texts, and then again, this is probably more verifiable for the scope dimension (generous interpretation) than for the methodology dimension (purposive interpretation). More importantly, the question remains as to whether this bias in favour of large and liberal readings, as well as teleology, is specific to the domain of constitutional law. Indeed, as we have seen, there are plenty of circumstances in which the same methods are appropriate for the simple construction of regular statutes. In the United Kingdom and other common law jurisdictions, broad scope of application for written law, reached by means of a generous interpretation, often in combination with the purposive argument, has been common since *Pepper v Hart* more than 25 years ago.

Put another way, it cannot be said that courts approach the task of constitutional interpretation in the United Kingdom truly differently than they do the task of statutory interpretation,

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[46] See, for example, Tarunabh Khaitan, '"Constitution" as a Statutory Term' (2013) 129 Law Quarterly Review 589, 596: 'What is clear from this discussion is that there seems to be nascent judicial recognition of the need to accord constitutional statutes special legal protection, and for interpreting them using special tools. For these reasons, it matters in law whether a statute is constitutional or not'.

[47] Of course, I am not suggesting that giving weight to legislative purpose necessarily brings an interpretation that is large and liberal. We all know that, in some circumstances, the teleological argument may be used to back up a strict and restrictive reading of a legislative provision, be it statutory or constitutional. Having said that, there is a natural connection between these scope and methodology dimensions, in that on volume, purposive and generous interpretation go hand in hand, indeed, more often than not. Witness also how Section 12 of the Canadian Interpretation Act, RSC, c. I–23 makes such a natural association between the two facets: 'Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects'.

at least in relation to the dimensions of scope and methodology.[48] At most, one could find a lightweight bias in favour of a broader scope and, to a lesser extent, also in favour of the teleological methodology, which is more present when one interprets a constitutional text as opposed to a regular piece of legislation.

(b) France and the Civil Law

Drawing comparative lessons from this civil law landmark jurisdiction, in particular with respect to legal interpretation of judicial decision-makers, is not an easy task for two reasons. First and foremost, and unlike their Anglo-Saxon counterparts (even more so in countries such as Canada or the United States), French judges are known for being extremely succinct in their reasons for judgements. This situation gives very little material to chew on to determine whether there is a different approach adopted to the interpretation of constitutional text from that adopted in construing legislative text (whether the Civil Code or other legislation), let alone attempting to show specificity of the former type in contrast with the latter one.

The second reason why drawing comparative lessons from France is difficult comes from the country's judiciary, as it relates to our hypothesis that there is no fundamental distinction between interpreting constitutions and statutes. Although a detailed analysis of the French judicial system and organization of courts and tribunals is beyond our reach – something that AV Dicey and his rule of law even struggled with[49] – suffice it to say one or two things. Basically, there is no unified judicial system in France but, rather, a three-branch organization. The judiciary proper, one could say, is divided up into the first two branches: (i) the courts of law (criminal and civil), with the Court of Cassation (Cour de cassation) at the top; and (ii) the administrative courts and tribunals, for public law, with the Council of State (Conseil d'État) at the top. Another branch or adjudicative body, (iii) the Constitutional Council (Conseil constitutionnel), though not part of the judiciary as such,[50] traditionally (before 2010) fulfilled a

[48] To quote, again, from Lord Hope, in *Attorney General v National Assembly for Wales Commission* [2012] UKSC 53, [2013] 1 AC 792 (Supreme Court) [80] – After he repeated that the description of a text as constitutional is not a guide to its interpretation, he then further explained thus: 'The rules which the court must apply in order to give effect to it are those laid down by the statute, and the statute must be interpreted like any other statute. But the purpose of the Act has informed the statutory language, and it is proper to have regard to it if help is needed as to what the words mean'. This was a case involving the interpretation of what is 'incidental to, or consequential on' the authority of the local government, pursuant to the Local Government Act 1972 (UK), a constitutional document.

[49] On Dicey's rule of law, including the so-called third limb on constitutionalism and rights (that compared Britain's and France's court systems), see Stéphane Beaulac, 'The Rule of Law in International Law Today' in Gianluigi Palombella and Neil Walker (eds), *Relocating the Rule of Law* (Hart 2009) 197, 199–200.

[50] Although the nature of the Constitutional Council is ambiguous, *de facto*, no one would doubt that it is akin to a court of law, a type of constitutional court. See Marcel Waline, 'Préface' in Patrick Gaïa and others, *Les grandes décisions du Conseil constitutionnel* (19th edn, Dalloz 2018) v.

principal role more parliamentary in nature, i.e., to review the constitutional validity of statutes before they are adopted – that is to say ex ante.[51]

It becomes quite obvious that, with this kind of judicial/adjudicative organization in a jurisdiction, which carves out the constitutional legal feature and entrusts it to a separate public body, it will deprive the regular courts and administrative ones of the opportunity to address such issues, by means of judicial review or otherwise.[52] In other words, as far as France's constitutional interpretation is concerned, the Constitutional Council has the lead and, in fact, has exclusive authority in that regard.[53] For their part, the institutions of the judiciary – be it for civil law and criminal law matters at the Court of Cassation, or administrative law justice with the Council of State – are concerned with the construction of legislation, not constitutional texts. Thus, not only the judicial organization is separated in different branches, but the actual endeavour of legal interpretation is also divided up into silos – one constitutional and the other legislative. It makes the task of evaluating their specificity or their convergence all the more tricky to say the least.[54]

Mais qu'à cela ne tienne ('Be that as it may'), as the French would say, there is now an interesting and useful comparative legal take for our purposes that is associated with the civil law tradition. It comes from a somewhat recent major reform, some ten years ago, in the role of the Constitutional Council, which now can conduct ex post (not only ex ante) a review of the constitutional validity of legislation. This procedure is called the *question prioritaire de constitutionnalité* ('priority preliminary ruling on constitutionality') (or 'PPRC'), which was introduced by means of an organic law adopted in December 2009 and entered into force in March 2010.[55] This is considered a major reform, going to the heart of the public law tradition in France; some legal scholars even suggest that it is the country's *Marbury v Madison*[56] constitutional moment, in a sense, because it allows for a constitutional review of laws in full force, ex post, by an adjudicative body.[57]

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[51] See, generally, Dominique Rousseau, 'The Conseil Constitutionnel Confronted with Comparative Law and the Theory of Constitutional Justice (or Louis Favoreu's Untenable Paradoxes)' (2007) 5 Int'l J Const'l L 28.

[52] See Julien Bonnet, '*Le juge ordinaire français et le contrôle de la constitutionnalité des lois – Analyse critique d'un refus*' (Dalloz 2009) 1: 'Depuis leur création, les juridictions françaises de l'ordre judiciaire et administratif s'estiment incompétentes, au contentieux, pour examiner par voie d'exception un moyen tiré de l'inconstitutionnalité d'une loi. …. cette prise de position jurisprudentielle est considérée comme un monument inaltérable du droit français'. Here is my translation: 'Since their creation, the French courts of the judicial and administrative orders have considered themselves incompetent, in the course of a litigation, to examine by way of exception a plea alleging the unconstitutionality of a law. … This position in case law is considered an unalterable monument of French law'.

[53] See, generally, Charles-Édouard Sénac, *L'Office du juge constitutionnel: Étude du contrôle de constitutionnalité par les juridictions françaises* (LGDJ 2015).

[54] See, generally, Bertrand Mathieu and Michel Verpeaux, *Contentieux constitutionnel des droits fondamentaux* (LGDJ 2002).

[55] See, generally, Guy Carcassonne, 'The French Parliament and the Priority Preliminary Ruling on Constitutionality' (2011) 137 Pouvoirs 73.

[56] 5 US 137 (1803).

[57] See for instance Mathieu Disant, *Droit de la question prioritaire de constitutionnalité: Cadre juridique, Pratiques jurisprudentielles* (Lamy 2011) 11. See also generally William E Nelson,

Although relatively novel and still little known to the general public, this constitutional review procedure represented, at the time of its tenth anniversary in 2020, about 80% of the Constitutional Council's work.[58] For the present purposes, this new main function of the French adjudicatory body could allow for a more valuable case of comparison with regard to judicial decision-making, including constitutional and statutory interpretation. This is a major shift that occurred in France, summed up thus by Sorbonne Professor Bertrand Mathieu:

> En recentrant d'abord, prioritairement, le contrôle sur le respect des exigences constitutionnelles, elle place le Conseil constitutionnel au centre du mécanisme. Réduits à une fonction de filtrage les juridictions les plus hautes de l'ordre judiciaire [Cour de cassation] et de l'ordre administratif [Conseil d'État] se trouvent *de facto* placées sous le contrôle du Conseil constitutionnel.[59]

Through the PPRC procedure, the Constitutional Council is invested, it would seem, with the task of interpreting an ordinary piece of legislation, on the one hand, and construing constitutional normative texts, on the other, with a view to determining whether the former is in conformity with the latter. In theory at least, a possible comparison between the two types of legal interpretation by the Constitutional Council appears certainly logical. Unfortunately for our purposes, however, it is not at all the case.

Very early on in the *jurisprudence* ('case law'), especially when the Court of Cassation was making a reference under the PPRC, it became quite obvious that statutory interpretation was going to stay the exclusive domain of the judicial courts and tribunals (civil law, criminal law, administrative law) and that the construction of constitutional texts, this time ex post, was the only feature that the Constitutional Council was going to be responsible for. In a case decided in 2010–11, among the first under the PPRC, the Court of Cassation asked for a ruling on the validity of a provision of the General Code of Property of Public Persons under the constitutional human rights guarantees. In its brief decision, the Constitutional Council explained the following: 'en posant une question prioritaire de constitutionnalité, tout justiciable a le droit de contester la constitutionnalité de la portée effective qu'une interprétation jurisprudentielle constant confère à cette disposition'.[60]

Marbury v Madison: The Origins and Legacy of Judicial Review (University Press of Kansas 2000) especially Chapter 8, 'The Worldwide Spread of Judicial Review'.

[58] For statistics on the PPRC, see Village de la Justice, 'La QPC a déjà 10 ans' (26 November 2020) <www.village-justice.com/articles/qpc-deja-ans,36514.html> (accessed 21 October 2022).

[59] Bertrand Mathieu, 'Le contrôle des décisions de justice par le Conseil constitutionnel français exercé dans le cadre des questions prioritaires de constitutionnalité' in Marthe F-R Stefanini and Caterina Severino (eds), *Le contrôle de constitutionnalité des décisions de justice: Une nouvelle étape après la QPC?* (2017) Aix-en-Provence, Droits international, comparé et européen 233 <http://dice.univ-amu.fr/fr/dice/dice/publications/confluence-droits>. Here is my translation of this excerpt: 'By refocusing, first and foremost, the control on constitutional requirements, it places the Constitutional Council at the center of the mechanism. Reduced to a filtering function, the highest courts of the judicial order [Court of Cassation] and administrative order [Council of State] find themselves placed *de facto* under the control of the Constitutional Council'.

[60] Conseil constitutionnel, décision no 2010-96 du 4 février 2011, Question prioritaire de constitutionnalité, point no 4 (emphasis added). Here is my translation of this excerpt: 'by asking a priority preliminary ruling on constitutionality, any person has the right to challenge the constitutionality of the effective scope that a constant judicial interpretation confers on this provision'.

In other words, the principal role of the Court of Cassation – and the same could be said for the Council of State, in administrative law – officially remained the sole interpreter of legislation. What the Constitutional Council does under the PPRC involves not interpreting (or reinterpreting) the legislation under review; there is no substitution of the original judicial court's legal interpretation. Its role is strictly limited to the evaluation of the constitutional validity of the law, as it was interpreted by either the Court of Cassation or the Council of State.[61] As a result, the silos are kept intact, one could say.[62] This being so, where does that leave us, in terms of examining the interpretation of constitutions and statutes in France?

As with issues of substantive law, questions relating to legal interpretation are considered and dwelled upon not so much by judges in case law (*en jurisprudence*) but by academics in legal writings (*en doctrine*). In interrogating the specificity of constitutional interpretation as it compares to the construction of legislation, Michel Troper offered this statement: 'quiconque aborde le thème de l'interprétation constitutionnelle rencontre inévitablement la question de savoir si elle présente quelque trait spécifique qui la distingue d'autres objets ou d'autres formes de l'interprétation juridique'.[63] Although contested by many,[64] the dominant narrative suggests that, indeed, constitutions call for an interpretation that would be different than that for ordinary legislation.[65]

This position, however, is often expressed as a *petitio principii* (in French, *une pétition de principe*) – or begging the question – as it holds that it is the fact that a constitution is supreme and different that means that its interpretation must be distinctive as well. This myth was debunked forcefully by French author Pierre Brunet: 'Or, de ce point de vue, l'interprétation de la Constitution n'a rien de spécifique, elle n'exige aucun savoir-faire particulier, aucune

[61] See Mathieu (n 59) 237: 'Le rôle éminent de la Cour de cassation en tant qu'interprète de la loi est ainsi reconnu. En cas d'interprétation constante, ou consolidée, de la loi, le Conseil constitutionnel ne substitue pas sa propre interprétation à celle de la Cour de cassation mais apprécie la constitutionnalité de la loi telle qu'interprétée par la Cour de cassation'. Here is my translation: 'The eminent role of the Court of Cassation as the interpreter of the law is, thus, recognized. In the event of a constant or consolidated interpretation of the law, the Constitutional Council does not substitute its own interpretation for that of the Court of Cassation; instead, it assesses the constitutionality of the law, as interpreted by the Court of Cassation'.

[62] See Guillaume Drago, 'La qualité de l'argumentation constitutionnelle' (2015) 15 Revue française de Droit constitutionnel 335, 339: 'À cet égard, l'exemple du contentieux constitutionnel français ne révèle pas de différences considérables, sur le fond de l'argumentation constitutionnelle'. Here is my translation: 'In this regard, the example of French constitutional litigation does not reveal any considerable differences on the basis of the constitutional argument'.

[63] Michel Troper, *Le droit et la nécessité* (PUF 2011) 155. Here is my translation of this excerpt: 'anyone approaching the topic of constitutional interpretation inevitably encounters the question of whether it has some specific traits that distinguish it from other objects or forms of legal interpretation'.

[64] For a critical analysis of the false specificity of constitutional interpretation, see Ernst-Wolfgang Boïckenfoïrde, *Le droit, l'État et la constitution démocratique* (LGDJ 2000) especially the chapter 'Les méthodes d'interprétation de la Constitution: un bilan critique'.

[65] See Pierre Brunet, 'Le juge constitutionnel est-il un juge comme les autres? Réflexions méthodologiques sur la justice constitutionnelle' in Constance Grewe and others (eds), *La notion de 'justice constitutionnelle'* (Dalloz 2005) 119.

méthode originale'.[66] One must keep in mind that, similar to regular pieces of legislation, constitutional texts provide for legal norms – supreme in the first case, ordinary in the second – and it is these norms that judicial decision-makers must read, interpret and apply. In the words of Professor Brunet: 'Interpréter la Constitution, c'est interpréter un texte – retrouver sous l'énoncé les diverses normes que cet énoncé permet de justifier'.[67]

5. CANADA'S EXPERIENCE IN CONVERGENCE OF INTERPRETATIVE APPROACHES

Canada brings us full circle, in a way, on the theme of (non) specificity of constitutional interpretation, considered in light of the comparative prism of civil law and common law. When it comes to the interpretation of legislation (*droit écrit*), however, the distinctive feature of bi-juralism in Canada – with the province of Quebec being civil law based for its private law (public law being common law based), and the rest of Canada (ROC) being all common law – must be put in relative terms. The other main parameter of the discussion, for its part, remains very relevant on the other hand, as there has been a clear convergence of approaches for the interpretation of statutes and of constitutional texts (as we will see).

Generally considered a matter falling under the ontological classification of public law, the rules and principles (or canons) involved in the interpretation of legislation come from the practice of the judiciary, constitutionally entrusted to interpret and apply the law, including statutory law. Put another way, the field of knowledge referred to as the construction of statutes, at least in Canada's legal perspective, is judge-made law; that is to say, it is based on judicial practice as evidenced in case law. To be clear, there are codifications in so-called Interpretation Acts of some elements and arguments used for the construction of statutes, but the bulk of the rules and principles (or canons) remain solely based on case law.

Incidentally, as regards Interpretation Acts, one must note that the one in the province of Quebec, considered civil law based (for its private law), is not at all different, in any way, shape or form, from the other such codifications in other common law based provinces, such as Ontario, or from the act applicable at the federal level. To give but one example, Section 40(2) of the Quebec Interpretation Act[68] provides that legislation 'shall receive such fair, large and liberal construction as will ensure the attainment of its object and the carrying out of its provisions, according to their true intent, meaning and spirit'. In truth, the exact same rule, provided for with very similar language, is found in Section 10 of the Ontario Interpretation Act,[69] as well as Section 12 of the Federal Interpretation Act.[70] No doubt, this is hard evidence that there is little inherently specific to the civil law tradition in Quebec, if at all, as far as the field of interpretation of legislation is concerned, *per se*.

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[66] ibid 120. Here is my translation of this excerpt: 'But from this point of view, the interpretation of the Constitution is not specific; it requires no particular know-how, no original method'.

[67] ibid. Here is my translation of this excerpt: 'To interpret the Constitution is to interpret a text – to find within the message the various legal norms that this message allows to justify'.

[68] Interpretation Act, RSQ, c. I–16.

[69] Interpretation Act, RSO, c. I.11.

[70] Interpretation Act, RSC, c. I–23.

Professor Pierre-André Côté studied this very issue in a paper entitled 'L'interprétation de la loi en droit civil et en droit statutaire: communauté de langue et différences d'accents'.[71] One of his conclusions goes along with my suggestion of non-specificity in Quebec civil law interpretation: '[Il faut] éviter de concevoir l'interprétation en droit civil et en droit statutaire [common law] comme relevant de méthodes entièrement différentes: leur communauté de sources et les nombreuses directives qu'elles ont en common excluent une telle conception'.[72] What Professor Côté also highlights is that these rules and principles (or canons) of interpretation are gauged or weighed differently, typically, in civil and common law, with more emphasis on the teleological facet for the former, while the latter tradition is still focusing on the letter of the law.

To a large extent, it brings us back to the general statement at the start of this chapter, as well as to the different interpretative dimensions identified. Although the construction of statutes relies on the same rules and principles (or canons), typically in civil law, they are used to favour an interpretation that is dynamic, large, liberal and teleological; on the other hand, typically in common law, the different interpretative elements lead to a static, strict and restrictive interpretation, focusing on the legislative text. I once explained that the debate is not about legal tradition but, rather, on the style of legislative drafting: 'ce n'est pas tant la tradition juridique (droit civil, common law) qui expliquerait un a priori quelconque, favorable ou défavorable à la portées d'une disposition législative, c'est plutôt le style de redaction'.[73] Indeed, legislative drafting favoured in civil law (i.e., open texture) is very much different from the wording and formulation generally found in statutes in common law jurisdictions (i.e., detailed and specific).

To the question of whether Canada, as well as the province of Quebec (civil law based, for its private law),[74] adopted a French or an English approach to legislation, there can be no short and straightforward answer. At least, there is no easy dichotomy based on legal traditions, that is for sure.[75] Recalling the three interpretative dimensions (see above), it will remain true that,

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[71] (1997) 31 Revue juridique Thémis 45.

[72] ibid 84. He is my translation of this excerpt: '[We must] avoid conceiving of interpretation in civil law and in statutory law [common law] as relying on entirely different methods: their community of sources and the many directives they have in common exclude such a conception'.

[73] Beaulac (n 2) 201. Here is my translation of this excerpt: 'It is not so much the legal tradition (civil law, common law) that would explain any a priori, favourable or unfavourable to the scope of a legislative provision, it is rather the style of drafting'.

[74] See (former SCC Justice) Louis LeBel and Pierre-Louis Le Saunier, 'L'interaction du droit civil et de la common law à la Cour suprême du Canada' (2006) 47 Cahiers de droit 179, 230–23: 'La différence entre les méthodes d'interprétation du Code civil et du droit statutaire en common law s'est toutefois estompée avec l'évolution des méthodes d'interprétation des lois à un point tel que nous pouvons désormais affirmer que le droit statutaire ne s'interprète plus automatiquement d'une manière restrictive, bien qu'il conserve sa nature d'exception relativement à la common law [i.e., judge-made law]'. Here is my translation: 'The difference between the interpretative methods for the Civil Code and the ones for statutory law in common law has, however, become blurred with the evolution of methods of statutory interpretation to such an extent that we can now say that statutory law does not automatically call for a restrictive interpretation, although it retains its exceptional nature in relation to the common law [i.e., judge-made law]'.

[75] See *Épiciers Unis Métro-Richelieu Inc v Collin* 2004 SCC 59, [2004] 3 SCR 257 [20]–[21]: 'The approaches to interpreting the *Civil Code of Québec* and the statute law of the common law

with respect to Quebec's private law – such as for the Civil Code of Quebec – the legislative drafting (open texture) will generally see judges favour an evolving, generous and purposive interpretation. Conversely, statutory text in Quebec's public law, and more importantly for any type of legislation in the ROC, will generally have a type of wording and formulation (detailed and specific) that is more prone to an interpretative process that will be originalist, strict and restrictive, with an emphasis on the text. Hence my suggestion, at the start of this section, that the parameter concerned with legal traditions in Canada is inconclusive, though it remains of interest, of course.

The other main parameter for the present discussion, contrasting statutory interpretation and the construction of constitutional documents, can certainly draw much more from the Canadian experience. The first thing to set out is how, for a while now, there has been a shift in statutory interpretation, away from static, rigid, black-letter type of construction and toward dynamic, generous and teleological reading of legislation. Interestingly, this change that comes from legal writings (i.e., '*la doctrine*') has a precise date and is associated with a specific case: the 1984 Supreme Court of Canada judgement in the *Stubart* case,[76] which endorsed the so-called 'modern principle' of statutory interpretation, which comes from the work of Professor Elmer Driedger.[77]

The proposed approach has become some kind of mantra in this country:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the Intention of Parliament.[78]

In a law article I wrote with Pierre-André Côté, we summed up the tremendous impact of the modern principle thus:

> Driedger's quote is used in all areas of the law and, in fact, in all facets of legal interpretation: from tax law to human rights law, from criminal law to family law, as well as to qualify legislation in constitutional challenges (Charter cases or division of powers cases), to interpret constitutional or quasi-constitutional texts, to construe delegated legislation like regulations and by-laws to interpret transitional provisions in an enactment; it was extended to Quebec civil law in order to construe Civil Code provisions and even one to help interpret a contract[!].[79]

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provinces have traditionally been different, indeed totally opposite … In the common law provinces, statutes were considered exceptions whose nature often justified a narrow and at times quite formalistic interpretation. In contrast, the *Civil Code of Quebec*, which sets out the *jus commune* of that civil law province, must be interpreted liberally. … However, this distinction between the approaches to interpreting civil law and statute law has become blurred as methods for interpreting legislation have evolved. The distinction is practically non-existent today, as statute law is no longer automatically given a narrow reading'.

[76] *Stubart Investment Ltd v Canada* [1984] 1 SCR 536 (*Stubart*) (578).

[77] Elmer A Driedger, *Construction of Statutes* (2nd edn, Butterworths 1983). ('Construction of Statutes').

[78] ibid 87.

[79] Beaulac and Côté (n 1) 137–139.

To give but one illustration of the Supreme Court of Canada's profession of faith about it, here is what Iacobucci wrote in *Bell ExpressVu,*[80] a 2002 case involving the interpretation of broadcasting legislation: 'Driedger's modern approach has been repeatedly cited by this Court as the preferred approach to statutory interpretation across a wide range of interpretive settings'.[81]

To be clear, the modern principle of statutory interpretation in Canada acts upon all three dimensions (see above), especially the latter two, that is to say, favouring a construction of legislation that is large and liberal (or at least not systematically strict), as well as one that gives full weight to legislative purpose. One good example comes from the judgement of the Supreme Court of Canada in *Hasselwander,*[82] a case involving the interpretation of a Criminal Code provision (prohibited weapons), incidentally a legal field that generally calls for a rigid interpretation of the letter of the law. Relying on Section 12 of the Federal Interpretation Act (see above), and with a view to relegating the restrictive presumption of intent to a secondary role, Justice Cory wrote the following: 'even with penal statutes, the real intention of the legislature must be sought, and the meaning compatible with its goals applied'.[83]

Ironically, in a sense, at the same time that this paradigm shift was happening in Canada with regard to the construction of statutes in general – that is, around the mid-1980s – the country's top court found it necessary to make grand statements on how the interpretation of the new constitutional instrument, the Canadian Charter of Rights and Freedoms, was something completely different. This, indeed, brings us right back to the statement of the Supreme Court of Canada in the 1984 *Hunter* case – constitutional interpretation of the Charter 'is crucially different from that of construing a statute'[84] – and *Skapinker*, also in 1984: 'This Court recognized the distinction between simple "statutory interpretation" and "a constitutional role"'.[85]

6. CONCLUSION

What are these 'special' rules and principles of constitutional interpretation, applicable to the Canadian Charter? Drawing from *Hunter* and *Skapinker* – both handed down in 1984, the same year as the first endorsement of Driedger's modern principle in *Stubart* – and in the spirit of Lord Sankey's 'living tree' in the *Edwards* case, Canada's top court set out the approach to the construction of the Canadian Charter in *Big M Drug Mart,*[86] dealing with the validity of the Lord's Day Act under the freedom of conscience and religion. Justice Dickson (later chief justice) wrote that, 'this Court expressed the view that the proper approach to the definition of the rights and freedoms guaranteed by the Charter was a purposive one'.[87] More specifically, he added:

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[80] *Bell ExpressVu Ltd Partnership v Rex* 2002 SCC 42, [2002] 2 SCR 559.
[81] ibid [26].
[82] *R v Hasselwander* [1993] 2 SCR 398 (*Hasselwander*).
[83] ibid 413.
[84] *Hunter* (n 9) 155.
[85] *Skapinker* (n 12) 365–366.
[86] *R v Big M Drug Mart Ltd* [1985] 1 SCR 295 (*Big M Drug Mart*).
[87] ibid 344.

> In my view, this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the *Charter* itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the *Charter*. The interpretation should be, as the judgment in *Southam* emphasizes, a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the *Charter*'s protection.[88]

The two interpretative dimensions of scope and methodology (generous and teleological) are intertwined clearly in Charter constitutional interpretation.[89]

This approach has since been followed and reiterated on numerous occasions.[90] For instance, in the 2020 case *Québec inc,*[91] involving the interpretation of Section 12 of the Canadian Charter (cruel and unusual treatment or punishment), Justices Brown and Rowe wrote: 'The approach is "generous, purposive and contextual" and should be done in a "large and liberal manner".'[92] Interestingly, however, they felt the need to point out that, just as with any type of interpretation, the 'starting point'[93] is the legislative language found in the text: 'constitutional interpretation, being the interpretation *of the text of the Constitution*, must first and foremost have reference to, and be constrained by, that text'.[94] This was once referred to as 'the primacy of the written text of the Constitution'.[95] This latest case may be deemed to be the pendulum swinging back, away from purposive interpretation and back toward textualism, as far as the construction of the Canadian Charter is concerned and, indeed, perhaps, in constitutional interpretation, generally.

Going back to the teaching of Justice Dickson in the *Big M Drug Mart* case, and to the hypothesis at the centre of this chapter that there is convergence between statutory and constitutional interpretation, it is useful to close the discussion by drawing a parallel with Driedger's modern principle (see above). Justice Dickson's directives highlight, first and foremost, the 'purpose of the right or freedom'[96] in the Canadian Charter, relating to the interpretative dimension relating to the methodology. But actually, this is something on which the modern principle of statutory interpretation also emphasizes, speaking of the 'object of the Act and the intention of Parliament'.[97]

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[88] ibid [underline added].

[89] See for instance *Doucet-Boudreau v Nova Scotia (Minister of Education)* 2003 SCC 62, [2003] 3 SCR 3, [23]: 'It is well accepted that the *Charter* should be given a generous and expansive interpretation and not a narrow, technical, or legalistic one … The need for a generous interpretation flows from the principle that the *Charter* ought to be interpreted purposively'.

[90] See *Re BC Motor Vehicle Act* [1985] 2 SCR 486, 499; *Reference Re Provincial Electoral Boundaries* [1991] 2 SCR 158, 179-180; for a recent example, see *R v Poulin* 2019 SCC 47, [32].

[91] *Quebec (Attorney General) v 9147-0732 Québec inc* 2020 SCC 32 (*Québec inc).*

[92] ibid [8].

[93] *R v Grant* 2009 SCC 32, [2009] 2 SCR 353, [15].

[94] *Québec inc* (n 91) [9] [italics in original]. See also Benjamin J Oliphant, 'Taking Purposes Seriously: The Purposive Scope and Textual Bounds of Interpretation under the Canadian Charter of Rights and Freedoms' (2015) 65 University of Toronto Law Journal 239, 243.

[95] *Caron v Alberta* 2005 SCC 32, [2015] 3 SCR 511, [36].

[96] *Big M Drug Mart* (n 86) 344.

[97] *Construction of Statutes* (n 77) 87.

On the other hand, Justice Dickson's constitutional interpretation is also keen on 'the language chosen to articulate the specific right or freedom'[98] of the Canadian Charter, which also concerns the methodology dimension. Similarly, Driedger relies on 'the words of the Act', insisting on 'their grammatical and ordinary sense'.[99] This is '*blanc bonnet, bonnet blanc*' ('tomato, tomato'), as the French quip goes. To be complete, both Justice Dickson and Driedger refer to context as an important element of interpretation, be it in regard to the provision or statutes *in pari materia*, as well as 'linguistic, philosophic and historical contexts',[100] which is particularly relevant for the Canadian Charter. As for the scope dimension, maybe the construction of constitutional documents is more conducive to blanket-type of generous interpretation, but we saw that with simple statutes also, even the Criminal Code – recall the Canadian example of *Hasselwander* – many circumstances will see judges favour a large and liberal interpretation of regular legislation as well.

To recap, in light of both *jurisprudence* and *doctrine*, the civil law model jurisdiction of France does not seem to provide a definite answer as to whether there is specificity in constitutional interpretation as compared to the construction of statutes. There may be grand statements to that effect, but scratching the surface quickly reveals that, essentially, the same methods of interpretation are resorted to, which often translate into a large and liberal reading of both constitutional texts and legislative enactments, one that seeks to determine the underlying object or purpose of the law. Going back to the situation of the common law model jurisdiction of the United Kingdom, observations to similar effect have been made about the contemporary trends in legal interpretation, be it of constitutional texts or of ordinary statutes.

Therefore, the conclusion on the comparative law parameter of this chapter is that, even assuming the specificity of constitutional interpretation as compared to the construction of statutes, the situation does not appear to be any different in common law and in civil law. The legal tradition seems to be an insignificant factor, as both the United Kingdom and France still struggle to justify resorting to different approaches for the interpretation of constitutional documents.[101] On the other parameter (constitutions *versus* statutes) of the discussion relating to convergence, especially in light of the Canadian experience, we saw that a large and liberal

[98] *Big M Drug Mart* (n 86) 344.

[99] Driedger (n 77) 87.

[100] *Big M Drug Mart* (n 86) 344.

[101] A similar conclusion was reached by Cambridge professor David Feldman, 'Factors Affecting the Choice of Techniques of Constitutional Interpretation' in Mélin-Soucramanien (n 8) 123: 'It is sometimes supposed that lawyers from different legal traditions approach the task of constitutional interpretation in different ways. Indeed, the organisers of the round table initially suggested that this paper should explore differences between common law and civil law methods of constitutional interpretation. However, there seems to be no convincing evidence for this. … The choice of an interpretative method is affected by other factors, including the form and history of the constitutional and the judiciary's interpretative strategy, far more than the judges' common law backgrounds. Similarly lawyers from civil law systems appear to be capable of adopting a full range of interpretative techniques' [footnotes omitted]. For a peek at the German experience – another civil law jurisdiction – see Donald P Kommers, 'Germany: Balancing Rights and Duties' in Goldsworthy (n 15) 207.

reading of legal norms, conducted in light of their object, is arguably the default approach in interpreting constitutions, though the language found in the text remains a crucial element. But these are the methods also deemed appropriate in many situations for regular legislation. In the end, there is simply no short answer based on legal tradition nor on the constitutional versus statutory interpretation dichotomy.