

**SUPREME COURT OF CANADA**

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| **Citation:** Ostiguy *v.*Allie, 2017 SCC 22, [2017] 1 S.C.R. 402 | **Appeal Heard:** October 7, 2016  **Judgment Rendered:** April 6, 2017  **Docket:** 36694 |

Between:

Alain Ostiguy and

Valérie Savard

Appellants

and

Hélène Allie

Respondent

**Official English Translation:** Reasons of Gascon J.

**Coram:** McLachlin C.J. and Moldaver, Karakatsanis, Wagner, Gascon, Côté and Brown JJ.

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| **Reasons for Judgment:**  (paras. 1 to 96) | Gascon J. (McLachlin C.J. and Moldaver, Karakatsanis, Wagner and Brown JJ. concurring) |

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| **Dissenting Reasons:**  (paras. 97 to 164) | Côté J. |

Ostiguy *v.* Allie, 2017 SCC 22, [2017] 1 S.C.R. 402

Alain Ostiguy and

Valérie Savard Appellants

v.

Hélène Allie Respondent

**Indexed as:** Ostiguy ***v.*** Allie

2017 SCC 22

File No.: 36694.

2016: October 7; 2017: April 6.

Present: McLachlin C.J. and Moldaver, Karakatsanis, Wagner, Gascon, Côté and Brown JJ.

on appeal from the court of appeal for quebec

*Prescription — Acquisitive prescription — Immovables — Publication of rights — Effective possession of parking space on neighbouring lot for more than 10 years — Application by new owners for injunction to stop possessor from parking on their property being dismissed by Superior Court and Court of Appeal — Provision of Civil Code stating that person who has possessed immovable as its owner for 10 years “may acquire the ownership of it only upon a judicial application” — Whether right of ownership acquired by prescription that has not been subject of judicial application may be set up against new owner of immovable who has registered title in land register — Respective roles of acquisitive prescription and publication of rights system in Quebec civil law — Nature of judgment resulting from application for judicial recognition of right of ownership acquired by prescription — Civil Code of Québec, arts. 922, 2910, 2918.*

Between 1994 and 2011, A and her family used one or two parking spaces situated on the property of their then neighbour in full view of everyone, and there was no objection to their doing so. Between 2004 and 2011, after 10‑year prescription had been acquired, A nevertheless did not bring legal proceedings to have her right recognized. In 2011, O and S purchased this neighbouring lot by act of sale. A few months after taking possession of their property, they applied for an injunction to stop A from parking on it. A replied by arguing that she had acquired the parking spaces by 10‑year prescription and that that acquisition took precedence over the title of O and S that was registered in the land register.

The Superior Court agreed with A in part, holding that the evidence showed that she had acquired by prescription one of the two parking spaces she claimed. In the Court of Appeal, the majority dismissed the appeal, concluding that the legislature had not, in enacting art. 2918 of the *Civil Code of Québec* (“*C.C.Q.*”), intended to change the principles that applied to acquisitive prescription at the time of its enactment. They observed that acquisitive prescription makes it possible to prove the existence of a right of ownership, whereas the role of land registration is not that of a guarantee of title. A’s possession could be set up against an owner whose title was registered in the land register. The dissenting judge, on the other hand, would have allowed the appeal and confirmed the title of O and S. He argued that the right to prescribe acquired by A in 2004 is distinct from the real right she was seeking, which can be obtained only upon a judicial application under art. 2918 *C.C.Q.* In his opinion, the judgment resulting from that application is an essential condition for acquiring ownership by prescription. A thus had to obtain such a judgment and publish her right to be able to set it up against O and S.

*Held* (Côté J. dissenting): The appeal should be dismissed.

*Per* McLachlin C.J. and Moldaver, Karakatsanis, Wagner, Gascon and Brown JJ.: The parties on each side in this case have a legitimate right to assert. O and S acquired their title legally, by act of sale. A’s effective possession of one of the parking spaces on her neighbours’ lot is recognized and is just as legitimate. What must be done in order to determine which of the parties should prevail is to define the respective roles of acquisitive prescription and the publication of rights in Quebec civil law, and then to interpret and apply the relevant provisions of the *C.C.Q.*, taking into account its overall scheme and its consistency.

In the *C.C.Q.*, acquisitive prescription is recognized as a “means of acquiring a right of ownership, or one of its dismemberments, through the effect of possession” (art. 2910 *C.C.Q.*). The possessor must prove that, for at least 10 years in the case of an immovable, he or she in fact exercised the right in question with the intention of exercising it as the holder of the right. His or her possession must be “peaceful, continuous, public and unequivocal” in order to produce effects (art. 922 *C.C.Q.*). A possessor claiming ownership of an immovable must also obtain a judgment confirming the right so acquired.

As for the role of the publication of rights, it did not change significantly with the enactment of the *C.C.Q.* Although the Civil Code Revision Office had initially, in 1977, proposed a substantial modification in procedures and in the consequences of the publication of immoveable rights that was based on the cardinal principle of absolute confidence in titles, the Quebec legislature did not carry the reform through to completion. In fact, it abandoned the reform in 2000, confirming the traditional purely declarative role of publication. This decision to abandon most of the reform of the land register confirms that under the current *C.C.Q.*, for rights acquired by prescription to be set up against third parties, there is no greater requirement that they be published than was the case under the *Civil Code of Lower Canada* (“*C.C.L.C.*”).

Thus, it can be seen that the effect of the distinct roles of acquisitive prescription and the publication of rights is that rights validly acquired by prescription apply regardless of the rights registered in the land register. This solution is the one that is most consistent with the general scheme of the *C.C.Q.* and with the relevant provisions on prescription, as well as on the publication of rights and on sale.

This solution is consistent with art. 2885 *C.C.Q.*, which requires the publication of a renunciation of acquired prescription with respect to immovable real rights. Given that acquired prescription jeopardizes a right that is registered in the land register, a renunciation thereof must be published to enable third parties to take notice of it. The solution is also consistent with art. 2957 *C.C.Q.*,which provides that “[p]ublication does not interrupt prescription”. It would indeed make no sense to conclude that the publication of rights cannot interrupt prescription while the period is still running, but that it can negate the effects of prescription that has already been acquired.

This solution is also consistent with the repeal of art. 2962 *C.C.Q.*, the effect of which was that third parties could no longer rely entirely on entries in the land register. As for the theory of apparent rights, there is nothing to suggest that the legislature intended it to apply more generally in situations other than the ones in which the legislature decided to specifically recognize it. In any event, if it did apply, there would be no reason why appearances of right created artificially by the land register should prevail over the tangible appearances of right that result from effective possession. Finally, this solution is just as consistent with art. 1724 para. 2 *C.C.Q.*, which preserves the rights of all parties. Under that provision, the seller warrants the buyer “against any encroachment commenced with his knowledge by a third person before the sale”. Thus, although it is true that in this case the acquisitive prescription A has set up against O and S denies them a portion of the right of ownership that the act of sale purported to transfer to them, it is nevertheless possible for them to claim the corresponding loss from their predecessors in title if they can prove that the latter were aware of A’s encroachment before the sale and failed to disclose it to them.

As for the advance registration of a judicial application concerning a real right that is provided for in arts. 2966 and 2968 *C.C.Q.*, it is of no assistance in the case of acquisitive prescription. The effective possession on which this form of prescription is based is already public and can already be set up against third parties. Since acquisitive prescription has its effects regardless of any rights registered in the land register, there is no need for a possessor to register a judicial application in advance in order to protect his or her rights.

Finally, the nature of the judgment under art. 2918 *C.C.Q.* is not determinative of the issue before the Court. In any event, the sole purpose of that judgment is to recognize pre‑existing rights resulting from effective possession and the lapse of time; when all is said and done, the legislature merely intended to restore the situation that existed under the *C.C.L.C.* in this regard. It is true that when the *C.C.Q.* was enacted in 1991, the legislature seems to have intended that acquiring ownership of an immovable by prescription should be contingent upon obtaining a judgment. However, the role of art. 2918 *C.C.Q.* was altered when the reform of the publication of rights system was subsequently suspended and abandoned. That article and the relevant provisions of the *Code of Civil Procedure* should instead be interpreted in light of the abortive reform and the many changes that resulted from it. This leads to the conclusion that prescription depends on achieving effective possession, not on obtaining a judgment; it is acquisitive prescription that grants the right, not the judgment. In fact, the judgment attests to the existence of a pre‑existing right; it does not create a new right. In this respect, the requirement in art. 2918 *C.C.Q.* is more like a procedural condition than a substantive one. All these characteristics suggest a nature that is more declarative than right‑granting or constitutive.

In the end, the solution adopted in this case does not weaken the land register and introduces no more uncertainty into real estate transactions in Quebec than there already was. Rather, it accounts for the inevitable effect of acquisitive prescription, a key institution of Quebec civil law that has been recognized by the legislature and whose purpose is to ascribe legal consequences to possession that is already peaceful, continuous, public and unequivocal.

*Per*CôtéJ. (dissenting): Under art. 2918 of the *Civil Code of Québec* (“*C.C.Q.*”), the acquisition of ownership of an immovable by prescription is conditional on first obtaining a judgment following a judicial application. That judgment is constitutive of the right of ownership and without retroactive effect. Reading down the plain language of art. 2918 so as to render the judgment declaratory and retroactive cannot be reconciled with the legislative balance struck between the right of ownership and the operation of prescription. Such a reading is also inconsistent with the property and publication books of the *C.C.Q.*, and with the rationale behind acquisitive prescription.

The concept of prescription operates in tension with real rights, including the primordial real right in the *C.C.Q.*, ownership. Prescription is nonetheless grounded in a valid two‑fold purpose. First, it operates to efficiently quiet title such that a party to a translatory act need not prove the validity of each link in the chain of title. Second, it operates so as to allow a possessor in fact to acquire the right of ownership to the detriment of the true owner, whose own right is extinguished. In both cases, the regime of prescription has a clear underlying rationale: to promote the efficiency, stability and security of property relationships.

In the modern era, this rationale is only served by recognizing that the conditions for acquisitive prescription of an immovable did in fact change with the introduction of the *C.C.Q*. Previously, under art. 2242 of the *Civil Code of Lower Canada* (“*C.C.L.C.*”), a possessor in bad faith and without title could acquire an immovable only after possessing it for 30 years. Article 2251 *C.C.L.C.* provided for prescriptive acquisition after only 10 years, but only if the possessor in good faith could found his or her possession upon a translatory title. Article 2918 *C.C.Q.* replaced these conditions with a single possessory period of 10 years, regardless of the good or bad faith of the possessor, or the presence or absence of translatory title.

In view of these changes — and given that a reduction in the prescription period inherently affects the balance between the rights of the possessor and those of the true owner — art. 2918 imposes a requirement that the possessor may acquire the right of ownership only upon a judicial application. This requirement has no antecedent in the *C.C.L.C.*, and as a result its meaning cannot be defined by reference to practices prevailing under the *C.C.L.C*.

The abandonment of the land register reform did not relieve possessors of art. 2918’s judicial application requirement. To the contrary, a careful reading of the legislative history of art. 2918 *C.C.Q.* and s. 143 of the *Act respecting the implementation of the reform of the Civil Code* reveals that the legislature intended the judgment on the judicial application to be constitutive of the right of ownership and without retroactive effect. Rather than merely surviving the legislature’s purge following the abandonment of the reform, the judicial application requirement took on added importance given that the reduction of the prescription period to 10 years — which was initially premised on the successful completion of the register reform — was maintained. Under the current art. 2918, the lapse of time alone no longer gives the possessor a right of ownership; only a judgment can do that. Holding otherwise conflates possession in fact with the creation or transfer of real rights, and fundamentally upsets the legislative balance struck between the rights of the possessor and those of the true owner.

Giving effect to the plain wording of art. 2918 is consistent with the *C.C.Q.*’s publication regime which, pursuant to art. 2966 para. 1, permits a possessor to register the judicial application in advance of obtaining the necessary judgment under art. 2918. Under art. 2968 para. 1, the date of advance registration is then deemed to be the date of publication. The effect of these articles is to encourage a prudent possessor who has complied with the wording of art. 2918 to register the judicial application in advance. This aligns art. 2918 with the general publication requirement in art. 2938 *C.C.Q.* for the “acquisition, creation, recognition, modification, transmission or extinction” of immovable real rights. It also minimizes the prospect of litigation and priority contests, and promotes the efficiency, stability and security of relationships between title holders by encouraging publication. Treating the judgment under art. 2918 as if it had a declarative and retroactive effect does not.

In this case, A did not make the required judicial application under art. 2918 until well after O and S acquired title to the contested immovable and published their title in the land register. O and S are therefore prior in time and — as revealed by the register — prior in rank. The result is that A’s possession is not opposable against O and S’s title.

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By Côté J. (dissenting)

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*Act to amend the Civil Code and other legislative provisions relating to land registration*, S.Q. 2000, c. 42.

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*Civil Code of Lower Canada*, arts. 406, 1508, 2082, 2089, 2098, 2183, 2183a, 2206, 2242, 2251.

*Civil Code of Québec*, arts. 331, 627, 884, 912, 916, 921, 922, 928, 930, 947, 1037, 1559, 1643, 1724, 2163, 2847, 2875, 2879, 2885, 2910, 2911, 2912, 2917, 2918 [am. 2000, c. 42, s. 10], 2938, 2941, 2943, 2944 [*idem*, s. 15], 2945, 2946, 2957, 2962 [rep. *idem*, s. 19], 2966, 2968, 3026, 3046 to 3053 [*idem*, s. 73], 3075.

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APPEAL from a judgment of the Quebec Court of Appeal (Savard and Schrager JJ.A. and Jacques J. (*ad hoc*)), 2015 QCCA 1368, [2015] AZ‑51208986, [2015] J.Q. no 7834 (QL), 2015 CarswellQue 7807 (WL Can.), affirming a decision of Dumas J., 2013 QCCS 5808, [2013] AZ‑51020921, [2013] J.Q. no 16027 (QL), 2013 CarswellQue 11635 (WL Can.). Appeal dismissed, Côté J. dissenting.

Eric Lalanne, for the appellants.

Philippe Dumaine and *Sarah Laplante Bazzi*, for the respondent.

English version of the judgment of McLachlin C.J. and Moldaver, Karakatsanis, Wagner, Gascon and Brown JJ. delivered by

Gascon J. —

1. Overview
2. This appeal highlights the occasional friction between acquisitive prescription and the apparent certainty of entries in the land register. Like any other source of friction between two or more parts of the *Civil Code of Québec* (“*C.C.Q.*” or “*Code*”), this one must be resolved by adopting the solution that accords best with the general scheme of the *Code*, but without singling out one of its articles at the expense of others. The concern here is with the consistency of the *Code*, which is unquestionably one of its fundamental characteristics.
3. The parties are owners of contiguous lots on which their respective chalets are located. Between 1994 and 2011, the respondent, Ms. Allie, and her family used one or two parking spaces situated on the property of their then neighbour in full view of everyone, and there was no objection to their doing so. In 2011, the appellants, Mr. Ostiguy and Ms. Savard, purchased this neighbouring lot. A few months after taking possession of their property, they applied for an injunction to stop the respondent from parking on it. The respondent replied that she had acquired the two parking spaces by 10‑year prescription. The trial judge agreed with her in part, holding that the evidence showed that she had acquired by prescription one of the two parking spaces she claimed.
4. The appellants no longer contest the trial judge’s findings of fact regarding the status of the respondent’s possession. However, they do raise a question of law on which this appeal is based: Can acquisitive prescription be set up against a new owner whose title was registered in the land register before the possessor’s right was asserted in court?
5. In the Court of Appeal, the majority answered this question in the affirmative and dismissed the appeal. The dissenting judge, on the other hand, would have allowed the appeal and confirmed the appellants’ title.
6. I would dismiss the appeal. The *Code* has not changed the process of acquisitive prescription, which may be set up against the registered owner regardless of when his or her right was registered. This conclusion is based on the legislative history of the provisions at issue and reflects the need for consistency between the relevant books of the *Code*. In contrast, the solution proposed by the appellants is based on a literal interpretation of art. 2918 *C.C.Q.* that would be incompatible with several provisions of the *Code*, that would result in inconsistencies the legislature could not have intended, and that must therefore be rejected.
7. Background
8. The facts of this case are no longer in dispute. They can be summarized briefly. In 1993, the respondent’s predecessor in title, her deceased spouse, purchased the lot of which she is now the owner. From 1994 to 2011, their family had peaceful, continuous, public and unequivocal possession of one of four parking spaces located on their neighbour’s lot. Between 2004 and 2011, after the space had been acquired by 10‑year prescription, the respondent nevertheless did not bring legal proceedings to have her right recognized.
9. The appellants acquired this neighbouring lot in 2011 by act of sale. Relying on their title, which was registered in the land register, they moved quickly to send the respondent a formal notice to stop parking on their property. A few months later, they applied for an injunction to the same effect. The respondent objected to that application. She filed a cross demand, arguing that she had acquired not one but two of the parking spaces by 10‑year prescription and that that acquisition took precedence over the appellants’ title.
10. Judicial History
    1. Quebec Superior Court (2013 QCCS 5808)
11. The trial judge found that the respondent and her predecessor in title had had effective possession of one parking space on the appellants’ lot for 10 years. The respondent had in that way acquired ownership of the space in question by prescription. The judge therefore declared her to be the sole owner of the parking space and ordered that the judgment be registered in the land register.
    1. Quebec Court of Appeal (2015 QCCA 1368)
12. All three judges of the Court of Appeal adopted the trial judge’s findings of fact regarding the respondent’s effective possession. However, they were divided on whether that possession could be set up against the appellants.
    * 1. Majority reasons of Savard and Schrager JJ.A.
13. Savard J.A., writing for the majority, concluded that the respondent’s possession could be set up against the appellants. She mentioned that there is some debate among academic authors and in the case law about whether a judgment under art. 2918 *C.C.Q.* recognizes or grants a right of ownership. However, she found that this issue was not relevant in the context of the appeal. Neither art. 2918 nor the *Code* as a whole had changed the principles with respect to acquisitive prescription that had applied under the *Civil Code of Lower Canada* (“*C.C.L.C.*”), according to which possession could be set up against an owner whose title was registered in the land register.
14. Savard J.A. noted that a possessor can acquire rights by prescription without a title, even if in bad faith. Accordingly, the presumptions of knowledge and of the existence of a right published in the land register, set out in arts. 2943 and 2944 *C.C.Q.*, can at best serve to prove bad faith on the respondent’s part. They do not, however, change how prescription is acquired and may be rebutted by proof to the contrary, as provided for in art. 2847 *C.C.Q.*
15. Savard J.A. observed that acquisitive prescription makes it possible to prove the existence of a right of ownership, whereas the role of land registration is limited to deciding between competing successors to the same predecessor in title (art. 2946 *C.C.Q.*) and to the ranking of security interests, but is no guarantee of title. She noted that the appellants’ argument would lead to an irrebuttable presumption of the existence of published rights in respect of any immovable, thereby giving the land register a probative value greater than the legislature had intended to give it in the initial version of the *Code*, which had limited this presumption to immatriculated immovables (art. 2944 para. 2 *C.C.Q.*, since repealed (2000, c. 42, s. 15)). It was in the context of the reform of the land register, which has since been abandoned, that the initial version of art. 2918 *C.C.Q.* was enacted, and it, too, drew a distinction between immatriculated and non‑immatriculated immovables.
16. Savard J.A. was also of the opinion that the appellants’ argument would resurrect art. 2962 *C.C.Q.*, which had been enacted as part of the same reform but had since been repealed (2000, c. 42, s. 19), and which had protected rights in an immatriculated immovable that were acquired in good faith. She acknowledged that acquisitive prescription can sometimes come as a surprise, but noted that it is not open to the courts to interfere with the legislature’s choices in this regard.
17. In Savard J.A.’s view, the solution proposed by the appellants was inconsistent with art. 2957 *C.C.Q.*, which provides that the publication of rights does not interrupt prescription. This solution would also lead to the untenable conclusion that the possessor had waived prescription simply by failing to bring a judicial application upon the expiry of the 10‑year period. In addition, advance registration of a judicial application would be of no assistance, given that the possessor is generally unaware that his or her right may be contested. Finally, art. 2946 *C.C.Q.* did not apply in this case, because the parties did not hold their title from the same predecessor.
18. Savard J.A. concluded that the legislature did not, in enacting art. 2918 *C.C.Q.*, intend to fundamentally change the principles applicable to acquisitive prescription. A possessor is not therefore required to take legal action upon the expiry of the 10‑year period. In closing, she noted that the respondent was not a concealed third party, as there were signs that could have shown the appellants, when they purchased the property, that the respondent was using a parking space on it.
    * 1. Dissenting Reasons of Jacques J. (*ad hoc*)
19. Jacques J., on the other hand, was of the opinion that the need for stability of real estate transactions means that the respondent must not be able to set up her possession against the appellants. In his view, the primary purpose of acquisitive prescription is to protect the true right of ownership by making it easier to prove; it does not allow a [translation] “usurper” to strip an owner of rights unless the owner has not exercised due diligence. In short, its purpose is above all to correct defects of title, not to confer a right upon a “squatter”.
20. Jacques J. argued that the right to prescribe acquired by the respondent in 2004 is distinct from the real right she was seeking, which can be obtained only upon a judicial application under art. 2918 *C.C.Q.* In his opinion, the judgment resulting from that application is an essential condition for acquiring ownership by prescription. It thus grants a right of ownership, as is confirmed by the language of that article and of arts. 805 and 806 of the *Code of Civil Procedure*, CQLR, c. C‑25 (“*C.C.P.*”), and by certain commentators and judicial decisions. The retroactive effect sought by the respondent would be contrary to s. 50 of the *Interpretation Act*, CQLR, c. I-16, and would make it impossible for third parties to rely on the land register.
21. Jacques J. found that acquisitive prescription is subject to the publication of rights under art. 2938 *C.C.Q.*; the respondent thus had to publish her right to be able to set it up against others. In his view, she could also have registered her application in advance (art. 2966 *C.C.Q.*), which would have made a judgment in her favour retroactive to the date of the advance registration and capable of being set up as of that date (art. 2968 *C.C.Q.*). Thus, although registering in advance is not mandatory, anyone who fails to do so risks losing his or her right. In this respect, the possessor has no more rights than any other holder of an immovable real right. The onus is on the possessor to verify his or her title and exercise due diligence to correct any defect that might affect it.
22. In Jacques J.’s opinion, acquisitive prescription could not be set up against the appellants, who had not been negligent and would be left without recourse. Financial institutions would also see their security diminished and they, too, would have no recourse, a situation that could have been prevented had the respondent’s application been registered in advance. A finding against the appellants, who had relied on their title in good faith, would make the land register practically worthless. Moreover, art. 2962 *C.C.Q.* had been repealed for a technical reason related to a change to the concept of immatriculation; the repeal did not preclude the application of the theory of “apparent rights” (*droits apparents*), which was already recognized in Quebec law.
23. Jacques J. concluded that the appellants were third parties in relation to the respondent. Their rights would prevail over hers pursuant to arts. 2945 and 2946 *C.C.Q.*, as they had been published in a timely manner. The respondent, on the other hand, was [translation] “a concealed third party who [came] out of nowhere” (para. 141 (CanLII)), and her position was in direct conflict with the applicable provisions on the publication of rights. It would make no sense if the unpublished rights of an acquirer by prescription could be set up against third parties but those of an acquirer by act of sale could not.
24. Issue
25. According to the trial judge’s findings of fact, the respondent and her predecessor had peaceful, continuous, public and unequivocal possession of the parking space at issue from 1994 to 2011. Given that this effective possession satisfies the requirements of the *Code*, the only remaining issue is whether prescription that has already been acquired can be set up against a new owner who registers his or her title in the land register before the possessor takes legal action.
26. Analysis
27. First of all, it should be mentioned that the parties on each side in this case have a legitimate right to assert. The appellants acquired their title legally, by act of sale. The respondent’s effective possession of one of the parking spaces on her neighbours’ lot is recognized and is just as legitimate. In light of the evidence accepted by the trial judge, and contrary to the suggestion of the dissenting judge in the Court of Appeal, the respondent cannot be described as a concealed third party, a usurper or a “squatter”.
28. It is also important to mention that the completeness of the right of ownership is not at issue in this appeal. The Court is not being asked to determine the substance or the limits of that right, but to clarify the operation of one of the means for acquiring it. In the end, the right of ownership is just as absolute regardless of whether it is found to be held by the appellants or by the respondent.
29. What must be done in order to determine which of the parties should prevail is to define the respective roles of acquisitive prescription and the publication of rights in Quebec civil law, and then to interpret and apply the relevant provisions of the *Code*, taking into account its overall scheme and its consistency. An analysis in this regard persuades me that the solution adopted by the majority of the Court of Appeal is the one that should prevail here. In light of the provisions of the four books of the *Code* that interact in this case (namely the books on Property, Obligations, Prescription, and Publication of Rights), I find that the acquisitive prescription claimed by the respondent with regard to the parking space at issue must prevail over the title registered by the appellants in the land register.
    1. Acquisitive Prescription in Quebec Civil Law
30. Acquisitive prescription was once described as the patron of humankind (A. Mayrand, “Bonne foi et prescription par tiers acquéreur” (1942), 2 *R. du B.* 9, at p. 9). The drafters of the *Code Napoléon*, from which the drafters of the *C.C.L.C.* borrowed heavily, even considered that among civil law institutions, acquisitive prescription was [translation] “the most necessary for social order”, finding that without its capacity for legalizing situations resulting from possession, “everything would be uncertain and confused” (F. J. J. Bigot de Préameneu, “Motifs exposés au Corps législatif sur la loi, titre XX, livre III du Code civil, relative à la Prescription”, in *Recueil des lois composant le Code civil* (1804), vol. 9, 26, at pp. 27‑29).
31. Although the primary function of acquisitive prescription is to ensure the stability of property rights by helping true owners prove their rights, it also enables third parties to acquire property by the lapse of time in accordance with the conditions established by law (P.‑B. Mignault, *Le droit civil canadien* (1916), vol. 9, at p. 336; P.‑C. Lafond, *Précis de droit des biens* (2nd ed. 2007), at paras. 2487‑89). The identification of its main elements requires a review of the provisions of two books of the *Code*: Book Four, Property, and Book Eight, Prescription.
32. In the *Code*, acquisitive prescription is recognized as a “means of acquiring a right of ownership, or one of its dismemberments, through the effect of possession” (art. 2910 *C.C.Q.*). However, this possession must “confor[m] to the conditions set out in the Book on Property” (art. 2911 *C.C.Q.*). The possessor must prove the exercise in fact of the right in question and the intention of exercising it as the holder of the right, which intention is presumed (art. 921 *C.C.Q.*). His or her possession must be “peaceful, continuous, public and unequivocal” in order to produce effects (art. 922 *C.C.Q.*). Because of its public nature, the possession on which prescription is based is necessarily [translation] “a material fact that is openly displayed” (P. Martineau, *La Prescription* (1977), at p. 119). In contrast, [translation] “[p]ossession that is (objectively) secret or concealed does not aid in establishing prescription, as there is no apparent encroachment” (D.‑C. Lamontagne, *Biens et propriété* (7th ed. 2013), at p. 470 (footnote omitted)).
33. The *Code* attributes many effects to possession. Thus, a possessor is presumed to hold a real right he or she is exercising (art. 928 *C.C.Q.*), and possession vests the possessor with the right in question if he or she complies with the rules on prescription (art. 930 *C.C.Q.*). A possessor claiming ownership of an immovable must show that he or she has possessed it as an owner for at least 10 years (arts. 2917 and 2918 *C.C.Q.*). Possessors may, for this purpose, join to their possession that of their predecessors (art. 2912 *C.C.Q.*). They must also obtain a judgment confirming the right so acquired (art. 2918 *C.C.Q.*; arts. 805 and 806 *C.C.P.*; new *Code of Civil Procedure*, CQLR, c. C‑25.01, art. 468). There is some debate over whether the effect of such a judgment is to recognize a right of ownership that has already been acquired or to grant such a right. I will return to this point after discussing the role of the publication of rights under the *Code*.
    1. Publication of Rights in Quebec Civil Law
34. Unlike prescription, the publication of rights, the subject of Book Nine of the *Code*, [translation] “plays no part in the process of creating rights” (F. Brochu, “Critique d’une réforme cosmétique en matière de publicité foncière” (2003), 105 *R. du N.* 761, at p. 783). Professor Gidrol‑Mistral notes that [translation] “publication does not have the effect of creating a right, nor does it even consolidate one by purging it of its defects” (G. Gidrol‑Mistral, “Publicité des droits et prescription acquisitive: des liaisons dangereuses?” (2016), 46 *R.G.D.* 303, at p. 316). The role of publication is limited to allowing rights to be set up against third persons, establishing their rank and, where the law so provides, giving them effect (art. 2941 *C.C.Q.*). The land register also makes it possible to decide between the rights of two persons who have acquired their titles of ownership from the same predecessor in title (art. 2946 *C.C.Q.*).
35. The current provisions are so clearly rooted in those of the *C.C.L.C.* that it can be said that the role of the publication of rights did not change significantly with the enactment of the *Code* (arts. 2082, 2089 and 2098 *C.C.L.C.*). This is confirmed by the recent history of the provisions on the publication of rights.
36. In 1977, the Civil Code Revision Office (“C.C.R.O.”) — the body responsible for reviewing and recodifying the *C.C.L.C.* — had initially proposed to the Quebec legislature “a substantial modification in procedures and in the consequences of the publication of immoveable rights” (Civil Code Revision Office, *Report on the Québec Civil Code* (1978), vol. II, t. 2, *Commentaries*, at p. 923).
37. The primary purpose of this reform would be to reorganize the registry offices and computerize the registers (*ibid.*, at pp. 924 and 927‑28). It would be accompanied by a significant legal reform based on one cardinal principle:

. . . that every person should be able to rely on the registers as they stand at any given time, in the belief that what is recorded there is true, that nothing else can be set up against him except what is recorded there, and that nothing that might be entered afterwards will take priority or have any prejudicial effect on what is already published. This principle can be described simply as “absolute confidence” in the titles. [Emphasis added; *ibid.*, at p. 926.]

The C.C.R.O. was proposing that the land register be given absolute probative value, drawing its inspiration in this regard from the German and Swiss systems (M. Cantin Cumyn, “Les principaux éléments de la révision des règles de la prescription” (1989), 30 *C. de D.* 611, at p. 622).

1. The Quebec legislature originally followed these recommendations for the most part in enacting the new *Code* in 1991 by, for example, giving absolute probative value to a registration regarding an immatriculated immovable that had been published for 10 years:

**2944.** Registration of a right in the register of personal and movable real rights or the land register carries, in respect of all persons, simple presumption of the existence of that right.

Registration in the land register of a right of ownership in an immovable that has been immatriculated carries the same irrefutable presumption of the existence of the right if not contested within ten years.

1. The legislature also codified the principle of public confidence proposed by the C.C.R.O. to the effect that third parties should be able to rely entirely on the land register:

**2962.** A person who acquires a real right in an immovable which has been immatriculated, relying in good faith on the entries in the registers, is secure in his right if it has been published.

1. As can be seen from the words of these provisions, however, arts. 2944 para. 2 and 2962 *C.C.Q.* (both since repealed) applied only to immatriculated immovables. This limit stemmed from the legislature’s intention, in light of the practical difficulties associated with the implementation of this reform, to prepare a progressive transition to the new publication of rights system. One by one, each immovable in the province was to be immatriculated, that is, its exact position was to be determined and a unique number was to be assigned to it in the cadastre (art. 3026 *C.C.Q.*). In addition, the *Code* provided that the rights concerning all immovables would be gradually catalogued and carried over to the new register (arts. 3046 to 3053 *C.C.Q.*, also since repealed).
2. This exhaustive search for and characterization of existing rights was a necessary precondition for the attribution of absolute probative value to the land register, since it was to lead to the extinguishment of any uncatalogued rights, thereby ensuring the reliability of the remaining rights (art. 3046 para. 3 *C.C.Q.*, since repealed; G. Rémillard, “Présentation du projet de Code civil du Québec” (1991), 22 *R.G.D.* 5, at p. 68). This process would take time to complete, however, so the former publication of rights system was to remain in place for immovables that had not been immatriculated or for which the carry‑over of rights had not yet taken place.
3. But when this reform was implemented in 1994, the legislature ran into more serious difficulties than had been expected with regard to the immatriculation of all immovables and the exhaustive characterization of existing rights (Brochu, “Critique”, at p. 764). It therefore decided, by means of the 1992 *Act respecting the implementation of the reform of the Civil Code* and the amendments made to that Act in 1995, to suspend the effect of the main articles of the reform (including arts. 2944 para. 2 and 2962 *C.C.Q.*, mentioned above) and [translation] “extend . . . the application of the legal principles that had applied under the *Civil Code of Lower Canada*” (*ibid.*; *An Act respecting the implementation of the reform of the Civil Code*, s. 155 para. 1; *An Act to amend the Act respecting the implementation of the reform of the Civil Code and other legislative provisions as regards security and the publication of rights*, S.Q. 1995, c. 33).
4. Six years later, in December 2000, the legislature realized that its reform would cost more than expected and would involve certain risks relating to the professional liability of notaries (Brochu, “Critique”, at p. 789). It therefore decided to concentrate on computerizing the existing land register and to drop the rest of the reform for good, simply repealing the provisions that had previously been suspended (*An Act to amend the Civil Code and other legislative provisions relating to land registration*, S.Q. 2000, c. 42). The record of the legislative debate speaks volumes in this regard:

[translation] **Mr. Charbonneau (Pierre):** The conclusions of the Auger report were along the following lines: to proceed as quickly as possible with computerizing the register on the basis of the law that has actually applied since 1995, that is, the old way of doing things, if you will, and to leave for another day the feasibility or opportunity studies on what had been contemplated for Phase II.

. . .

. . . And the bill is intended to reflect that situation. [Emphasis added.]

(Quebec, National Assembly, *Journal des débats de la Commission permanente des institutions*, vol. 36, No. 82, 1st Sess., 36th Leg., June 2, 2000, at p. 52)

1. In sum, although the legislature aspired, in 1991, to give the publication of rights a probative value that would create rights by means of, among others, arts. 2944 para. 2 and 2962 *C.C.Q.*, it did not carry the reform through to completion. In fact, it abandoned the reform in 2000 (Gidrol‑Mistral, at pp. 307 and 314). In Professor Gidrol‑Mistral’s words, [translation] “the abandonment of that reform . . . confirmed the traditional purely declarative role of publication” (p. 338) and put an end to the “dream of the publication of rights” (p. 340). In short, as regards the role of the publication of rights, despite initial intentions to do otherwise, the current version of the *Code* essentially restates the law as it stood under the *C.C.L.C.* (p. 315; Brochu, “Critique”, at pp. 778 and 783). This background must be borne in mind in interpreting and applying the provisions of the *Code* on the basis of which the appellants assert that the respondent cannot set up against them unpublished rights resulting from her 10‑year prescription.
   1. Interplay of Acquisitive Prescription and Publication of Rights
2. It can be seen from the foregoing analysis that, on the one hand, acquisitive prescription remains a recognized means of acquiring immovable real rights in Quebec civil law and that, on the other hand, the publication of rights system provided for in the *Code* retains the limited role it had under the *C.C.L.C.* In my opinion, the effect of these distinct roles is that rights validly acquired by prescription apply regardless of the rights registered in the land register.
   * 1. Prescription May Be Set Up Against a Third Party in the Absence of Publication
3. In the context of the *C.C.L.C.*, the provisions of which resembled those of the *Code*, it was settled law that [translation] “[t]o be set up against third parties, acquisition by prescription [did] not have to be registered” (Martineau, at p. 234; *Deschesnes v. Boucher*, [1961] B.R. 771, at p. 776; *Noiseux v. Savio* (1982), 27 R.P.R. 179 (C.A.)). Moreover, in his treatise on prescription, written when the *C.C.L.C.* was still in force, Professor Martineau contemplated a situation identical to the one in the instant case:

[translation] The owner against whom prescription has become effective then sells [his or her] immovable to a third party, who brings a petitory action against the possessor. The possessor can set prescription up against the plaintiff, and the plaintiff cannot object that when he or she bought the immovable, the seller — not the defendant — was registered as its owner at the registry office. [Footnote omitted; pp. 234‑35.]

1. Some argue that this conclusion still holds true under the *Code*. For example, Pierre Pratte states:

[translation] The new neighbour cannot claim that the prescription that became effective in the time of his or her predecessor cannot be set up against him or her, or that the possessor had to act before the sale by obtaining and publishing a judgment. The possessor can accordingly assert the acquired prescription against the new neighbour.

(P. Pratte, “La demande judiciaire relative à la prescription acquisitive d’un immeuble” (2014), 73 *R. du B.* 509, at p. 563)

Professor Gidrol‑Mistral agrees with this point of view. In her opinion, [translation] “the only logical solution is the one adopted by the majority [of the Court of Appeal]: acquisitive prescription became effective, and it applies to subsequent acquirers of the property in question” (p. 335). Similarly, Professor Vincelette writes that after 10 years, [translation] “possession is crowned with an irrebuttable presumption of ownership” (D. Vincelette, *En possession du Code civil du Québec* (2004), at para. 516 (emphasis added)).

1. Others, however, are of the view that the *C.C.Q.* changed the rules and that acquisitive prescription can no longer negate rights registered in the land register by third parties. For example, Professor Lafond states that [translation] “[a]n unpublished right of ownership that a person claims to have by virtue of 10 years of possession can be of no value in opposition to a title of ownership duly registered by a third party who holds it from the same predecessor in title” (Lafond, at para. 2569; see also L. Laflamme, M. Galarneau and P. Duchaine, *L’examen des titres immobiliers* (4th ed. 2014), at p. 113).
2. With respect, in light of the unfinished reform discussed above, I find that the first of these positions must prevail. The situation might have been different had the legislature followed through on the changes contemplated in 1991. However, its decision to abandon most of them confirms that under the current *Code*, for rights acquired by prescription to be set up against third parties, there is no greater requirement that they be published than was the case under the *C.C.L.C.*
3. The appellants’ arguments in support of the contrary view are not persuasive.
4. First of all, the appellants argue on the basis of arts. 2938 and 2941 *C.C.Q.* that, without publication, the respondent’s possession cannot be set up against them and should not permit her to acquire ownership of the parking space at issue. It is true that the *C.C.Q.* provides that any acquisition, creation or recognition of an immovable real right requires publication (art. 2938) and that, unless they are published, the rights involved in such legal transactions cannot be set up against third parties (art. 2941).
5. However, as is stated in the *Commentaires du ministre*, arts. 2938 and 2941 *C.C.Q.* simply represent a continuation of the law as it stood under the *C.C.L.C.* Article 2938 *C.C.Q.* [translation] “substantially restates the former law in a simplified form and in a general rule”, while art. 2941 *C.C.Q.* “restates, in part, articles 2082 and 2083 C.C.L.C. The rule does not break new ground” (Ministère de la Justice, *Commentaires du ministre de la Justice*, t. II, *Le Code civil du Québec — Un mouvement de société* (1993), at pp. 1845 and 1848). In short, there is no basis for regarding this as a substantial change to the applicable rules.
6. Next, despite what the appellants say, arts. 2943 and 2944 *C.C.Q.*, two articles on the publication of rights that are new law, and on which the appellants place great emphasis, do not support their argument that rights acquired by prescription cannot be set up against third parties unless they are published.
7. It is true that the first paragraph of art. 2943 *C.C.Q.* creates a presumption of knowledge with regard to rights published in the registers:

**2943.** A right registered in a register in regard to property is presumed known to any person acquiring or publishing a right in the same property.

However, as Savard J.A. mentioned, that article at most supports a finding of bad faith on the respondent’s part. The Quebec Court of Appeal recently confirmed that [translation] “[b]oth the *Civil Code of Lower Canada* and the new *Civil Code of Québec* allow a possessor in bad faith to acquire an immovable by prescription” (*Dupuy v. Gauthier*, 2013 QCCA 774, [2013] R.J.Q. 662, at para. 31). Under the *C.C.L.C.*, bad faith in this context had the effect of extending the prescription period to 30 years, whereas a possessor in good faith who had a translatory title could prescribe in just 10 years (art. 2206 *C.C.L.C.*). In the *C.C.Q.*, the legislature abolished this distinction, providing for a single prescription period of 10 years for all immovables, and not requiring good faith as a condition for prescription. Under the current *Code*, therefore, bad faith is no longer a relevant consideration for acquisitive prescription (*Dupuy*, at paras. 50‑52). Article 2943 *C.C.Q.* is thus of no assistance to the appellants.

1. As for art. 2944 *C.C.Q.*, it creates a presumption of the existence of rights registered in the registers:

**2944.** Registration of a right in the register of personal and movable real rights or the land register entails, as against all persons, a simple presumption of the existence of that right.

However, since this is a simple presumption, it may be rebutted by proof to the contrary (art. 2847 *C.C.Q.*). It must yield where, for example, there is proof that the right does not exist, particularly where the evidence establishes that the conditions for acquisitive prescription have been met (Gidrol‑Mistral, at p. 338; F. Brochu, “Nouvelle posologie pour la prescription acquisitive immobilière” (2003), 105 *R. du N.* 735, at p. 750). In other words, this presumption in no way supports the appellants’ position.

1. Finally, art. 2946 *C.C.Q.* is of no assistance to the appellants. It provides that “[w]here two acquirers of an immovable hold their title from the same predecessor in title, the right is acquired by the acquirer who first publishes his right.” But it cannot apply in the case at bar, as the appellants hold their title from two specific predecessors, the sellers from whom they purchased the property, whereas the respondent holds her title from no predecessor, having acquired it by prescription.
2. Contrary to the appellants’ position, the solution adopted by the majority of the Court of Appeal, with which I agree, reaffirms the place of acquisitive prescription in Quebec civil law and recognizes the limited role of the publication of rights by not giving the land register the higher probative value that the appellants would like to confer on it (Gidrol‑Mistral, at pp. 318 and 324). From this perspective, this solution is the one that is most consistent with the general scheme of the *Code* and with the relevant provisions on prescription, as well as on the publication of rights and on sale.
3. Consistency is a well‑established principle of statutory interpretation, one that the Quebec legislature has expressly recognized:

**41.1.** The provisions of an Act are construed by one another, ascribing to each provision the meaning which results from the whole Act and which gives effect to the provision.

(*Interpretation Act*, CQLR, c. I‑16)

Consistency is even more crucial in the interpretation of a code, which [translation] “is generally defined as a ‘coherent corpus (or at least one that strives to be coherent) of texts encompassing, and arranged according to a systematic plan, all the rules relative’ to the civil law” (J. Pineau, “Le nouveau Code civil et les intentions du législateur”, in B. Moore, ed., *Mélanges Jean Pineau* (2003), 3, at p. 6). In concrete terms, this means [translation] “that each portion of the Code has been drafted in a manner consistent with the others” (M. Tancelin, “L’acte unilatéral en droit des obligations ou l’unilatéralisation du contrat”, in N. Kasirer, ed., *La Solitude en droit privé* (2002), 213, at pp. 216‑17). When there is friction between different parts of a code, it is therefore necessary to identify the solution that best accords with “the other provisions, its general structure and basic legal principles” (P.‑A. Côté, with the collaboration of S. Beaulac and M. Devinat, *The Interpretation of Legislation in Canada* (4th ed. 2011), at p. 328).

1. The solution I am adopting in this case is, first of all, consistent with the relevant articles on prescription. Thus, art. 2885 *C.C.Q.* provides that “renunciation of acquired prescription with respect to immovable real rights shall be published”. But if acquired prescription could not jeopardize a right that is registered in the land register, as suggested by the appellants and the dissenting judge in the Court of Appeal, there would be no need to publish such a renunciation to enable third parties to take notice of it. To accept the conclusion they propose would therefore strip this article of any useful purpose.
2. This solution is just as consistent with art. 2957 *C.C.Q.*,which provides that “[p]ublication does not interrupt prescription”. It would indeed make no sense to conclude that the publication of rights cannot interrupt prescription while the period is still running, but that it can negate the effects of prescription that has already been acquired. Moreover, Professor Lamontagne confirms that this article means that [translation] “an adverse possessor will eventually be able to prescribe even if an opposing right is published, provided that he or she proves that prescription has been acquired” (Lamontagne, *Biens et propriété*, at p. 91).
3. This solution is also consistent with the repeal of art. 2962 *C.C.Q.*, which I mentioned above, and the effect of which was that third parties could no longer rely entirely on entries in the land register. As Professor Brochu mentions, [translation] “the failure, in terms of legal effects, of the reform of the land registration system meant that acquisitive prescription retained its probative value” (Brochu, “Nouvelle posologie”, at p. 748). In contrast, the appellants’ position would resurrect this article and extend its application to any immovable, whether immatriculated or not, thereby conferring a greater probative value on it than the legislature initially intended to give it. In this respect, to quote Professor Gidrol‑Mistral, [translation] “Jacques J. [who adopted that position] does not seem to have fully understood the abolition of the legal arsenal that was supposed to confer a greater probative value on the publication of rights” (p. 338).
4. In response to this, the appellants state, as did the dissenting judge in the Court of Appeal, that art. 2962 *C.C.Q.* was repealed for purely technical reasons related to the modification of the concept of immatriculation and that, at any rate, the theory of apparent rights, which has always existed in Quebec law, would lead to the same outcome.
5. This argument must fail. The repeal of art. 2962 *C.C.Q.* was intended to be more than a strictly technical one, since it removed from the *Code* the absolute probative value that would otherwise have been conferred on the land register and which is in fact what the appellants are seeking. The legislative debate at the time of the repeal leaves little doubt as regards the intention of the legislature, which considered that art. 2962 *C.C.Q.*, far from simply recognizing an already applicable doctrine, [translation] “establishe[d], in favour of third parties in good faith, an irrebuttable presumption of the validity of registered rights” (*Journal des débats de la Commission permanente des institutions*, at p. 69 (emphasis added)). Like most of the amendments that were made at that time, the repeal of this article was a logical consequence of the decision to abandon the reform of the publication of rights system.
6. As for apparent rights, it is important to remember that this theory was originally developed by the French courts to protect third parties in their dealings with the apparent heir of a deceased person (J. Carbonnier, *Droit civil* (2004), vol. I, at p. 317). It was recognized by the Quebec legislature, which applied it to certain specific situations in order to protect certain appearances of right (see, among others, arts. 331, 627, 1559, 1643, 2163 and 3075 *C.C.Q.*). But there is nothing to suggest that the legislature intended this theory to apply more generally in situations other than the ones in which the legislature decided to specifically recognize it. Moreover, no Quebec court has ever applied it in relation to acquisitive prescription. If, as the appellants submit and Jacques J. maintained, art. 2962 *C.C.Q.* merely codified a theory that had already been recognized, then it is difficult to understand why the Minister of Justice described this article in 1991 as [translation] “new law” that “[was] consistent with the principles of the new system” (*Commentaires du ministre*, at p. 1862). Finally, if the legislature were simply recognizing a theory that had already been adopted by the courts, it would certainly not have taken pains to limit the theory’s application to immatriculated immovables — with the exhaustive search and the carry‑over of rights immatriculation entailed at the time when the *C.C.Q.* was enacted.
7. In any event, even if the theory of apparent rights did apply in this case, it would logically have to protect all legitimate appearances of right, including those stemming from the respondent’s possession. This concept and this principle are in fact closely related: [translation] “Possession establishes an appearance of right in the eyes of third parties, so much so that the fact actually produces the right, as in the case of apparent mandate” (Lamontagne, *Biens et propriété*, at p. 470). There is no reason why appearances of right created artificially by the land register should prevail over the tangible appearances of right that result from effective possession.
8. Moreover, the solution I am adopting is just as consistent with the provisions of Book Five of the *Code* on sale, and in particular with art. 1724 para. 2:

**1724.** The seller warrants the buyer against any encroachment on his part unless he has declared it at the time of the sale.

The seller also warrants against any encroachment commenced with his knowledge by a third person before the sale.

1. This article preserves the rights of all parties. In this respect, contrary to the erroneous statement of the dissenting judge in the Court of Appeal (para. 122), the appellants are not without recourse here. It is true that the acquisitive prescription the respondent has set up against them denies them a portion of the right of ownership that the act of sale purported to transfer to them. Nevertheless, it is possible for them to claim the corresponding loss from their predecessors in title if they can prove that the latter were aware of the respondent’s encroachment before the sale and failed to disclose it to them (D.‑C. Lamontagne, *Droit de la vente* (3rd ed. 2005), at para. 185; J. Deslauriers, *Vente, louage, contrat d’entreprise ou de service* (2nd ed. 2013), at para. 378; see also *Medeiros v. St‑Louis*, [2002] R.D.I. 352 (Que. Sup. Ct.), at paras. 83‑92, decided under the equivalent rules of the *C.C.L.C.*, in particular art. 1508). This personal action is of course not a perfect substitute for the desired right of ownership, and whether the appellants succeed would depend on their ability to prove the essential elements of their claim. However, it is the legislature’s response to situations in which, as in the instant case, a third party’s encroachment prevails over the right the buyer thought he or she held.
2. In closing, given that the respondent’s effective possession can be set up against the appellants despite the fact that their right is registered in the land register, I cannot agree with the appellants’ argument ― this one, too, adopted by the dissenting judge in the Court of Appeal ― that the respondent had only to register her judicial application in advance in order to preserve her rights should the prescribed lot eventually be transferred. Advance registration is provided for in arts. 2966 and 2968 *C.C.Q.*:

**2966.** Any judicial application concerning a real right which shall or may be published in the land register may, by means of a notice, be the subject of an advance registration.

. . .

**2968.** Rights which are the subject of a judgment or transaction terminating an action are deemed published from the time of their advance registration, provided they are published within 30 days after the judgment becomes final or the transaction takes place.

. . .

1. By means of presumptions of publication and knowledge, advance registration is intended to safeguard rights that would be jeopardized if they remained unknown (*Commentaires du ministre*, at p. 1865; F. Brochu, “Le mécanisme de fonctionnement de la publicité des droits en vertu du nouveau *Code civil du Québec*, et le rôle des principaux intervenants” (1993), 34 *C. de D.* 949, at p. 1022). However, advance registration is of no assistance in the case of acquisitive prescription. The effective possession on which this form of prescription is based is already public and, as I mentioned above, can already be set up against third parties. Since acquisitive prescription has its effects regardless of any rights registered in the land register, there is no need for a possessor to register a judicial application in advance in order to protect his or her rights.
2. In sum, what the appellants would like is that the publication of their right guarantee its validity. I find that the land register has no such probative value and is no guarantee of the titles registered in it. Ultimately, as far as acquisitive prescription in Quebec civil law is concerned, the role of land registration under the current *Code* is as it was under the *C.C.L.C.* and no more. In light of this limited role, the fact that rights acquired by prescription have not been published does not on its own preclude their being set up against third parties.
   * 1. Nature of the Judgment Under Art. 2918 *C.C.Q.*
3. In addition to their arguments to the effect that the acquisitive prescription claimed by the respondent cannot be set up against them, the appellants submit that the respondent quite simply has no right to assert against them, because she had neglected to obtain a judgment and publish it before they registered their right in the land register. They maintain that her failure to do so had rendered her right precarious on the basis that obtaining such a judgment is essential to the acquisition of immovable real rights by prescription. This argument, which is central to the appellants’ position, is based on the current wording of art. 2918 *C.C.Q.*:

**2918.** A person who has for 10 years possessed an immovable as its owner may acquire the ownership of it only upon a judicial application.

1. In their opinion, art. 805 *C.C.P.*echoes this by also providing that a judgment must be obtained in order to acquire a right of ownership in an immovable by prescription:

**805.** A person who, in accordance with the rules of the Book on Prescription of the Civil Code, has possessed an immovable as owner may acquire the ownership of that immovable by applying to the court of the district in which it is situated.

1. Under the *C.C.L.C.*, possessors were in practice required to obtain a judgment in order to confirm their acquisitive prescription. The need to take legal action to have acquisitive prescription confirmed is thus not entirely new in the *C.C.Q.* As the appellants acknowledge, such a judgment obtained under the *C.C.L.C.* was merely declarative in nature, however, given that the right itself was acquired upon the expiry of the prescription period (arts. 2183 para. 2 and 2183a *C.C.L.C.*; see also *Code of Civil Procedure*, S.Q. 1965, c. 80, art. 806; *An Act respecting the implementation of the reform of the Civil Code*, s. 143 para. 2; *Dupont v. Saint‑Arnaud*, [1992] R.D.J. 88 (Que. C.A.), at p. 91; Martineau, at p. 233; Brochu, “Nouvelle posologie”, at pp. 753‑54).
2. The commentators are divided over whether this declarative nature survived the enactment of art. 2918 *C.C.Q.* Some authors argue that it has (Lamontagne, *Biens et propriété*, at p. 490; P. Pratte, “Chronique ― Le jugement en prescription acquisitive immobilière: déclaratif ou attributif?”, *Repères*, October 2012 (available online in La référence); and “La demande judiciaire”, at pp. 550‑51; Vincelette, at para. 515; Gidrol‑Mistral, at pp. 331‑33). But others maintain that art. 2918 *C.C.Q.* makes such a judgment an essential condition for the very acquisition of the right sought by the possessor, and that the judgment therefore has the effect of granting this right (S. Normand, *Introduction au droit des biens* (2nd ed. 2014), at p. 354; C. Gervais, *La prescription* (2009), at p. 193; Lafond, at para. 2566; Brochu, “Nouvelle posologie”, at p. 754). The depth of these authors’ analyses is variable; some are relatively brief, while others are more detailed. However, none of these commentators suggest that a judgment can be right‑granting if it confirms an encroachment, but declarative if it cures a defect of title. Indeed, Pratte raises this possibility, but concludes that [translation] “[i]f a certain uniformity is desired, a declaration by a court should be preferred to the granting of a right by a court” (“La demande judiciaire”, at p. 551). As well, there is no indication in the *Code* that the nature of the judgment might vary depending on the circumstances.
3. The appellants embrace the second school of thought, arguing that the judgment under art. 2918 *C.C.Q.* always has the effect of granting a right. They assert that the enactment of that article in 1991 and the amendment of art. 805 *C.C.P.* in 1992 thus radically changed the prior law, such that the respondent could not claim to have a right to the parking space before obtaining a judgment to that effect. The dissenting judge in the Court of Appeal agreed, but the majority found that it was not necessary to deal with this issue in order to resolve the appeal.
4. I agree with the majority of the Court of Appeal that it is not necessary to decide this issue in the way sought by the appellants in order to dispose of this appeal. Even if the judgment under art. 2918 *C.C.Q.* were right‑granting in nature, which I do not admit, the respondent could be granted the right of ownership she wishes to obtain despite the fact that the appellants’ title has been published, because her possession meets the criteria under the *Code* and because, as I explained above, acquisitive prescription operates regardless of rights registered in the land register. In other words, the nature of the judgment under art. 2918 *C.C.Q.* is not determinative of the issue before us.
5. This being said, it is my opinion that, in any event, the sole purpose of the judgment under art. 2918 *C.C.Q.* is to recognize pre‑existing rights resulting from effective possession and the lapse of time and that, when all is said and done, the legislature merely intended to restore the situation that existed under the *C.C.L.C.* in this regard.
6. In concluding that what the judgment in question does is to grant a right, the appellants rely, as did the dissenting judge in the Court of Appeal, on a literal interpretation of art. 2918 *C.C.Q.* that is based on the supposed clarity of its wording. However, care should be taken before adopting such a reading of an article that was enacted and then amended in the context of an abandoned reform; otherwise, the interpretation of the provision could well be incompatible with its context, its history and its evolution. As this Court has mentioned in the past, “[w]ords that appear clear and unambiguous may in fact prove to be ambiguous once placed in their context” (*Montréal (City) v. 2952‑1366 Québec Inc.*, 2005 SCC 62, [2005] 3 S.C.R. 141, at para. 10). Moreover, the modern approach to statutory interpretation requires consideration of the legislature’s intention, which means taking into account not only the words of the provisions in question, but also their context, including the legislative reforms and the debate that led up to them (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21). In Professor Côté’s words, “[the] authorities and case law have unequivocally rejected the idea that a statute’s context can be ignored, and its interpretation founded on no more than the wording of the legislation” (p. 310 (citations omitted)). That approach does not lead to a reading down of art. 2918 *C.C.Q.* but, rather, makes it possible to identify the article’s real effect.
7. In light of the foregoing, it is obvious that art. 2918 *C.C.Q.* is not as clear as the appellants and the dissenting judge in the Court of Appeal suggest. The sharp differences between commentators on the interpretation of this article show how ambiguous it is. Furthermore, some of them expressly criticize its clumsy drafting in the context of this unfinished reform (Gidrol‑Mistral, at pp. 317 and 340; F. Brochu, “Prescription acquisitive et publicité des droits” (2005), 107 *R. du N.* 203, at p. 210; and “Revue de jurisprudence 2012 en prescription acquisitive et en publicité des droits” (2013), 115 *R. du N.* 205, at p. 211).
8. It is true that when the *Code* was enacted in 1991, the legislature seems to have intended that acquiring ownership of an immovable by prescription should be contingent upon obtaining a judgment. At the time, the Minister of Justice stated, in a way that was in itself quite equivocal, that such an acquisition would from then on have to [translation] “be recognized by a court, as the right is not acquired by possession alone” (*Commentaires du ministre*, at p. 1831 (emphasis added)). However, as the majority of the Court of Appeal rightly noted, these comments must be read with caution, as they were written in respect of the initial version of art. 2918 *C.C.Q.*, which read as follows:

**2918.** A person who has for ten years possessed, as owner, an immovable that is not registered in the land register may acquire the ownership of it only upon a judicial demand.

The possessor may, under the same conditions, exercise the same right in respect of a registered immovable where the owner of the immovable is not identified in the land register; the same rule applies where the owner is dead or an absentee at the beginning of the ten‑year period or where the land register indicates that the immovable has become a thing without an owner.

1. This first version was very different from the current one, which I reproduce again for ease of comparison:

**2918.** A person who has for 10 years possessed an immovable as its owner may acquire the ownership of it only upon a judicial application.

1. As can be seen, the initial version of art. 2918 *C.C.Q.* was closely linked to the reform of the publication of rights being contemplated by the legislature when it enacted the original version of the *Code*. The effects of the article varied depending on whether the immovable in question had been immatriculated. Moreover, art. 2918 *C.C.Q.*, which, like the new publication of rights system, was inspired by Swiss and German law, reflected [translation] “the necessary relationship between the publication of rights and prescription” in the form that they were intended to have at that time (*Commentaires du ministre*, at p. 1830; see also *Journal des débats de la Commission permanente des institutions*, at p. 51).
2. In light of this close relationship between the publication of rights and prescription, it was natural for the role of art. 2918 *C.C.Q.* to be altered when the reform was subsequently suspended and abandoned. The legislative debate concerning the amendment of art. 2918 *C.C.Q.* in 2000 is revealing:

[translation] . . . we’re abandoning phase II of the amendment of the Civil Code that existed, since it was not consistent with practice.It has been suspended since 1995. So we’re going back to the old method, with the current prescription period, namely 10 years. [Emphasis added.]

(*Journal des débats de la Commission permanente des institutions*, at p. 51)

1. At that same time, s. 143 of the *Act respecting the implementation of the reform of the Civil Code* was also amended by repealing the portion that had since 1992 provided that the purpose of “the judicial demand [under art. 2918 *C.C.Q.* was] to acquire ownership” of an immovable (S.Q. 2000, c. 42, s. 87).
2. In my opinion, this shows that when the legislature abandoned the reform it had originally planned, it intended to stick with the situation that had existed under the *C.C.L.C.*, one aspect of which was the declarative nature of the judgment recognizing a right acquired by prescription to which art. 2918 *C.C.Q.* now refers. With all due respect, the claim made by certain authors that the words of this article and of arts. 805 and 806 *C.C.P.*clearly show that the judgment under art. 2918 *C.C.Q.* grants a right is outdated (Normand, at p. 355; Gervais, at p. 193; Lafond, at para. 2566; Brochu, “Nouvelle posologie”, at p. 754). These articles should instead be interpreted in light of the abortive reform of the publication of rights system and the many changes that resulted from it. This leads to the conclusion that prescription depends on achieving effective possession, not on obtaining a judgment; it is acquisitive prescription that grants the right, not the judgment (Lamontagne, *Biens et propriété*, at p. 490). The judgment attests to the existence of a pre‑existing right; it does not create a new right (Pratte, “La demande judiciaire”, at p. 550; Gidrol‑Mistral, at pp. 331 and 333). In this respect, the requirement in art. 2918 *C.C.Q.* is more like a procedural condition than a substantive one (Vincelette, at para. 515). All these characteristics suggest a nature that is more declarative than right‑granting or constitutive (Lamontagne, *Biens et propriété*, at p. 490; Pratte, “La demande judiciaire”, at pp. 550‑51; Gidrol‑Mistral, at p. 333; Vincelette, at para. 514).
3. It is in fact relevant in this regard that art. 468 of the new *Code of Civil Procedure*, which has replaced arts. 805 and 806 *C.C.P.*, refers not to the granting of the right of ownership, but simply to “[a]n application relating to acquisitive prescription of an immovable” and to the fact that the court “is to determine the right of ownership”. This new article in no way suggests that the judgment under art. 2918 *C.C.Q.* has the proposed right‑granting effect.
4. Furthermore, the view that the judgment under art. 2918 *C.C.Q.* is declarative in nature is more consistent with the very nature of prescription, which is acquired simply through the “effect of possession”, once “the last day of the period has elapsed” (arts. 2879 and 2910 *C.C.Q.*). If the right is acquired simply by the lapse of time, the judgment [translation] “cannot create a right, because that right already exists . . . . Since the judgment recognizes a pre‑existing right, it is necessarily declarative” (Gidrol‑Mistral, at p. 335). Moreover, at the risk of repeating myself, if no right existed before the judgment under art. 2918 *C.C.Q.*, there would be no need to specify in the *Code* that “renunciation of acquired prescription with respect to immovable real rights shall be published” (art. 2885 *C.C.Q.*).
5. I would add that even though the Quebec Court of Appeal has not ruled directly on this issue, what it has continually done since 1994 is to *declare* the possessor to be an owner under art. 2918 *C.C.Q.*, not to *grant* a right of ownership to the possessor (see, among others, *Dupuy*, at paras. 6, 53 and 71; *Dion v. Ouellet‑Latulippe*, 2008 QCCA 1812, at para. 6 (CanLII); *Sylviculture et exploitation J.M.J. inc. v. Mayer Hill*, 2012 QCCA 1377, at paras. 1 and 4 (CanLII)).
6. As for the Quebec Superior Court, it has ruled on several occasions that [translation] “the judgment [under art. 2918 *C.C.Q.*] has the effect of declaring or confirming ownership”, or at the very least, that it always operates retroactively (*De Repentigny v. Fortin (Succession)*, 2012 QCCS 905, at para. 55 (CanLII); see also *Breton v. Fortin*, 2016 QCCS 6149, at paras. 64‑65 (CanLII); *Gosselin v. Turner*, 2012 QCCS 388, at para. 57 (CanLII); *Caron v. Gauthier*, 2011 QCCS 2898, at paras. 51‑52 (CanLII)). The Superior Court recently stated that effective possession [translation] “prevails over titles and leads to prescription, which has force of title once it has been confirmed in a judgment” (*Beauséjour v. Centre de ski Le Relais*, 2015 QCCS 127, at para. 23 (CanLII)). It is true that the Superior Court has at times concluded [translation] “that legal proceedings are required in order to ‘acquire’ ownership of an immovable by prescription” (*Cabana v. Valiquette*, 2013 QCCS 4710, at para. 86 (CanLII)). In *Cabana*, however, it stated that the possessors were “entitled to have the parcel of land at issue granted to them because they ha[d] acquired it through prescription” (para. 94 (emphasis added)). Moreover, in affirming that decision, the Court of Appeal noted that [translation] “prescription had therefore already been acquired for several years” as of 2007, that is, well before the trial judge’s decision (2015 QCCA 1520, at para. 18 (CanLII) (emphasis added)). As for the Superior Court decisions cited by the dissenting judge in the Court of Appeal in the instant case to argue that the judgment under art. 2918 *C.C.Q.* grants a right, they were rendered several years earlier; they do not appear to be consistent with the line of authority the court follows today (*Re Gagné*, 2009 QCCS 6064, at paras. 10 and 16 (CanLII); *Re Montmagny (Ville)*, 2005 CanLII 11604 (Que. Sup. Ct.), at para. 6; *Re Béland*, 2005 CanLII 24349 (Que. Sup. Ct.), at para. 6).
7. Finally, no conclusion regarding the nature of the judgment under art. 2918 *C.C.Q.* can be drawn from the fact that the length of the period applicable to acquisitive prescription was reduced from 30 to 10 years at the time of the enactment of the *C.C.Q.* Nor have any commentators or courts suggested that one can. By reducing most of the periods applicable to extinctive or acquisitive prescription in the *C.C.Q.*, the Quebec legislature was simply responding to the fact that [translation] “certain long prescription periods [under the *C.C.L.C.*] . . . were quite poorly suited to modern legal life”, which is characterized by “the speed and stability of economic transactions” (J.‑L. Baudouin and P.‑G. Jobin, *Les obligations* (7th ed. 2013), by P.‑G. Jobin and N. Vézina, at paras. 1113 and 1119). What it thus wanted in 1994 was for legal situations to crystallize more quickly in a modern society that was quite different from that of 1866. There is no indication that it considered as a necessary consequence of that change that the judgment under art. 2918 *C.C.Q.* would, as suggested, be one that granted a right.
8. In sum, I am of the view that acquisitive prescription operates regardless of rights registered in the land register and that whether the judgment under art. 2918 *C.C.Q.* is right‑granting or declarative is immaterial to this issue. In any event, I find that the fundamental premise for the argument of the appellants and the dissenting Court of Appeal judge to the effect that the judgment is right‑granting is incorrect. In the context of the current *Code*, it must be concluded that that judgment retains the declarative role it had under the *C.C.L.C.*
   * 1. Incongruous Effects of Reading Art. 2918 *C.C.Q.* in Isolation
9. Before I conclude, a few additional comments are in order.
10. Contrary to the appellants’ argument, which the dissenting judge in the Court of Appeal accepted, holding that rights acquired by prescription can be set up against third parties regardless of entries in the land register introduces no more uncertainty into real estate transactions in Quebec than there already was. First of all, this result simply reflects the legislature’s intention to preserve the status quo in this regard. Next, the current situation is similar to the one that existed under the *C.C.L.C.* Such continuity cannot in itself be a cause of uncertainty. Finally, it should be borne in mind that, when all is said and done, the conflict that may at times arise between acquisitive prescription and the publication of rights in Quebec civil law is quite limited. Apart from this appeal, neither the Court of Appeal nor the recognized commentators nor the parties have referred to another case in which the same issue has been raised before a Quebec court.
11. In reality, it is instead the appellants’ position that is incompatible with the current state of the law in Quebec. To claim as they do that rights registered in the land register must prevail over rights acquired by prescription could, moreover, have consequences that the legislature certainly did not intend. This confirms that the solution they propose cannot be preferred.
12. First, their position would for all intents and purposes negate the consequences of acquisitive prescription — an institution that is nonetheless clearly recognized by the *Code* — where ownership is transferred to a third party, even if it is recognized that the aggrieved party has effective possession. In the case at bar, the effect would be to completely nullify the right the respondent had acquired by having effective possession for more than 18 years and would call into question the certainty that had thus been created both for the respondent and for third parties. Moreover, such a solution would leave the respondent without a remedy, whereas the opposite approach, on the contrary, preserves the rights of all the parties; as I mentioned above, the appellants would still have a right of action against the sellers under art. 1724 para. 2 *C.C.Q.*, provided that they are able to prove the essential elements of their claim.
13. Second, by the appellants’ own admission, their position means that the prescription period would start again from the beginning if the immovable were transferred to a new owner after the 10‑year period had expired, whereas it would continue to run if the transfer were to take place before prescription was acquired. As counsel for the respondent pointed out at the hearing, the effect of this would be that a possessor who has had possession for 9 years and 11 months at the time of the sale would subsequently be able to prescribe, whereas if the sale were to take place a few weeks later, he or she would have to wait another 10 years before being able to do so. This is an arbitrary distinction that the legislature certainly could not have intended.
14. Third, another effect of the appellants’ position would be to confer more rights upon the acquirer than the predecessor in title had, which is contrary to the usual rule that one cannot transfer more than what one has.
15. Finally, this solution would favour a possessor in bad faith who, knowing that his or her possession does not reflect the true ownership of the immovable in question, would be more inclined to go to court upon the expiry of the prescription period (see, on this point, Gidrol‑Mistral, at p. 339). In contrast, it would penalize a good‑faith possessor, such as the respondent, who is unaware that his or her effective possession could be in doubt and who therefore has no interest in going to court so long as that possession is not challenged.
16. Conclusion
17. In the end, the solution I would accept does not weaken the land register. Rather, it accounts for the inevitable effect of acquisitive prescription, a key institution of Quebec civil law that has been recognized by the legislature and whose purpose is to ascribe legal consequences to possession that is already peaceful, continuous, public and unequivocal.
18. As at least one author suggests, given that art. 2918 *C.C.Q.* was enacted in the context of a reform that has not been completed and has now been abandoned, there are those who will say that the Quebec legislature would be well advised to clarify its language, the ambiguity of which gave rise to the dispute in this case (Brochu, “Prescription acquisitive et publicité des droits”, at p. 210; and “Revue de jurisprudence 2012”, at p. 211; see also Gidrol‑Mistral, at p. 340). I agree that this would be a wise course of action to consider. This being said, when the courts are faced with such ambiguity, it is up to them to resolve it by interpreting the provisions at issue in a manner that preserves the internal consistency of the *Code* and, where possible, protects the rights of all the parties, especially when all of them are asserting legitimate rights.
19. With this in mind, I am of the opinion that the solution adopted by the majority of the Court of Appeal should prevail over that of the dissenting judge. I would therefore dismiss the appeal with costs.

The following are the reasons delivered by

1. Côté J. (dissenting) — In my view, this appeal does not turn on an analysis of the reform of the Quebec land register or on a resurrection of art. 2962 of the *Civil Code of Québec* (“*C.C.Q.*”). To the contrary, its resolution depends on whether or not effect must be given to the clear expression of legislative intent reflected in the plain wording of art. 2918 *C.C.Q*.
2. Article 2918 is unambiguous in stating that a person who has otherwise met the conditions for acquisitive prescription of an immovable “may acquire the ownership of it only upon a judicial application”.
3. A question has nevertheless arisen as to whether or not the judgment rendered on such an application is constitutive of the right of ownership or merely declaratory with retroactive effect. If the judgment required under art. 2918 is declaratory, then the respondent here acquired ownership of the contested parking space from the appellants’ predecessor in title. It would then follow that the appellants have no claim to the parking space, since their predecessor could not have transferred it to them: *nemo dat quod non habet* (no one can give what he or she does not have). If, on the other hand, the judgment under art. 2918 is constitutive of the right of ownership and has no retroactive effect, then the parking space rightfully belongs to the appellants.
4. Although it expressly refused to answer this question, which lies at the heart of this appeal, the majority of the Court of Appeal implicitly held that the judgment required under art. 2918 is declaratory.
5. In my view, and with respect, it erred in doing so.
6. Only a reading of art. 2918 that is consistent with its plain wording will respect the balance struck by the legislature between the true owner’s right of ownership and the possessor’s rights. Reading down the judicial application requirement so as to render the judgment on the application declaratory and retroactive — as both the majority of the Court of Appeal and the majority of this Court propose — cannot be reconciled with legislative intent. Such a reading is also inconsistent with the property and publication books of the *C.C.Q.*, and with the rationale behind acquisitive prescription. With respect, there is nothing about the language and context of art. 2918 *C.C.Q.*, or the intent underlying it, that supports treating the judicial demand requirement as a legislative mistake requiring judicial correction through a downgrading of its plain wording.
7. Consequently, and as Justice Jacques (*ad hoc*) found in dissent in the Court of Appeal, I am of the view that under art. 2918 *C.C.Q.*, the acquisition of ownership of an immovable by prescription is conditional on first obtaining a judgment following a judicial application. That judgment is constitutive of the right of ownership and without retroactive effect. Here, the respondent did not obtain the requisite judgment before the appellants acquired title to the contested parking space. The appellants are therefore not only first in time but also first in rank, and I would accordingly allow the appeal.
   1. The Right of Ownership in the Civil Law of Property
8. In a contest over ownership of an immovable, it is helpful to begin by recalling the essential nature of the rights at stake, starting with the most fundamental of these rights.
9. The right of ownership occupies a primordial position among real rights in the *C.C.Q.* Its conceptual lineage can be traced back to the resurgence of Roman ideals of property law following the French Revolution. The *Declaration of the Rights of Man and of the Citizen* of 1789 — emblematic as it was of the rejection of the *Ancien Régime —* espoused a notion of property rights consistent with Roman ideals of sole ownership. Article II listed property as one of four natural rights that was imprescriptible. Article XVII described it as sacred and inviolable.
10. The prevailing liberal ethos of the period found direct expression in the Book on Property in the *Code Napoléon* (1804). When Portalis presented Book II, Title II, on the right of ownership to the legislature, he urged lawmakers to “consecrate” by their vote “the great principle of ownership, presented in the proposed law as the right to enjoy and to dispose of things in the most absolute manner possible” (N. Kasiner, “Portalis Now”, in N. Kasirer, ed., *Le droit civil, avant tout un style?* (2003), 1, at p. 32 (emphasis deleted)). Article 544 of the *Code Napoléon* was accordingly unequivocal in its wording:

[translation] Ownership is the right to enjoy and dispose of things in the most absolute manner, provided they are not used in a way prohibited by statutes or regulations. [Translation taken from the French government’s Légifrance website.]

1. The drafters of the French version of the *Civil Code of Lower Canada* (“*C.C.L.C.*”) adopted identical wording in codifying the right of ownership in art. 406. The original wording of art. 406 endured until the enactment of the *C.C.Q.* in 1994, which recast it in art. 947. That article now reads as follows:

**947.** Ownership is the right to use, enjoy and dispose of property fully and freely, subject to the limits and conditions for doing so determined by law.

Ownership may be in various modalities and dismemberments.

1. Article 947 *C.C.Q.* thus realigned the right of ownership with contemporary social mores. [translation] “[M]odern ownership”, writes Professor Lafond, “is tending toward socialization in the name of the public interest” (P.-C. Lafond, *Précis de droit des biens* (2nd ed. 2007), at para. 51). Yet, even today, the right of ownership retains a quasi-constitutional dimension under ss. 6 and 8 of the *Charter of human rights and freedoms*, CQLR, c. C‑12, and remains the primordial real right in the *C.C.Q.*: [translation] “This right is distinct from other real rights in being absolute, exclusive and perpetual” (S. Normand, *Introduction au droit des biens* (2nd ed. 2014), at p. 83). As Professor Normand notes, it gives its holder “total mastery over property, whereas other real rights confer only partial mastery” (p. 99 (citation omitted)). “The owner alone can lay claim to all the attributes of the subject of his or her right” (p. 100). And, crucially, for the purposes of this appeal:

[translation] The perpetual nature of the right of ownership means that the right lasts as long as the property to which it relates. . . . [O]wnership is extinguished by the loss of property that results from its destruction or abandonment. . . . In this regard, ownership differs from other real rights, which are extinguished simply because their holder ceases to use them for a period of ten years (1162(5); 1191(5); 1208(5) C.C.Q.). [Citations omitted; *ibid.*]

* 1. Prescription in the Civil Law

1. Prescription is one mode of acquiring the right of ownership over property (see arts. 916, 2875, and 2910 *C.C.Q.*). This is the acquisitive aspect of prescription. But the operation of prescription has a dual function insofar as the prior owner’s right is extinguished. The concept of prescription therefore creates a tension “in relation to powerful real rights, and especially with the most powerful of these, ownership” (D. Lametti, “Prescription *à la recherche du temps*: In Search of Past Time (or Recognition of Things Past)”, in M.-F. Bureau and M. Devinat, eds., *Les livres du Code civil du Québec* (2012), 267, at p. 273).
2. It is this tension between the operation of prescription and the right of ownership — inherent in acquisitive prescription — which may beget social scorn. As Martineau writes, prescription [translation] “evokes the image of owners stripped of their right of ownership in favour of usurpers” (P. Martineau, *La Prescription* (1977), at p. 14). Clearly, this was not the rationale which led the legislature to introduce prescription into the law (*ibid.*). Rather, the regime of prescription is essentially grounded in a two-fold purpose.
3. First, prescription operates to efficiently quiet title such that a party to a translatory act need not prove the validity of each link in the chain of title:

[translation] Thus, if prescription did not exist, owners of immovables who had to prove their right of ownership in legal proceedings would have to start by establishing that they had acquired the immovables in issue by way of translatory acts: sale, exchange, gift, will, etc. That evidence would not be sufficient, since the acquirers could not have become owners unless their predecessors were themselves owners. And the predecessors could be owners only if they themselves had acquired the immovables from true owners. It would therefore be necessary to go back through successive alienations to the origins of the immovables. It is easy to see that such undertakings would be extremely difficult, if not next to impossible.

(Martineau, at p. 15)

1. Second, and as referenced above, prescription operates so as to allow a possessor in fact to acquire the right of ownership to the detriment of the true owner, whose own right is extinguished. Prescription thereby generates certainty and stabilizes property relationships by coating longstanding situations of fact with a legal veneer:

[translation] The purpose of acquisitive prescription is precisely to regularize *de facto* situations that have persisted; a mere *de facto* situation becomes a *de jure* situation as well. . . . A possessor who was not an owner becomes one. . . . Fact and law are now consistent.

(Martineau, at p. 17)

1. This latter rationale is the one that applies in what is colloquially called the squatter scenario (see Normand, at p. 349; F. Brochu, “Prescription acquisitive en 2007” (2008), 110 *R. du N*. 225, at p. 236). As Justice Jacques correctly noted in his dissent in the Court of Appeal, that is the scenario in the instant case. As for the true owner in such a scenario, Martineau writes:

[translation] For an owner who is stripped of his or her right by the operation of prescription in favour of a possessor who may be in bad faith, the least that can be said is that the owner was not diligent in protecting and preserving that right. For many years, the law continued to recognize the right and to provide the owner with ways to assert it even though he or she no longer had possession. The owner had enough time to ensure that his or her interests were protected; by acting within that time, the owner could have prevented prescription from occurring and thereby avoided losing the right; if the owner did not do so, he or she was negligent and therefore no longer deserves the protection of the law. [pp. 17-18]

1. In addition to ceasing to protect a true owner who has been negligent, the law generally prefers an owner who is not wasteful, and who will put the property to use (H., L. and J. Mazeaud et F. Chabas, *Leçons de droit civil* (8th ed. 1994), t. II, vol. II, *Biens*, at p. 263). Practically speaking, the example of the squatter who installs himself illegally on a negligent owner’s property is more or less folkloric (Normand, at p. 349). Instead, [translation] “[a]cquisitive prescription is generally used to rectify defects of title rather than to confer a right of ownership on a squatter” (Brochu, “Prescription acquisitive en 2007”, at p. 236).
2. Whether operating to cure a defect in title or to permit acquisition at the expense of the true owner’s right, the regime of prescription has a clear underlying rationale: to promote the efficiency, stability and security of property relationships.
3. Given my colleague’s conclusion — which I do not share — that, with respect to the acquisitive prescription of an immovable “the legislature . . . intended to stick with the situation that had existed under *C.C.L.C.*” (para. 80), it is instructive to review the prescription regime as it existed under the *C.C.L.C*.
   1. Acquisitive Prescription of an Immovable Under the Civil Code of Lower Canada
4. Under the *C.C.L.C.*, the rationale of promoting the efficiency, stability and security of property relationships inhered in the possessory periods and conditions attaching to the acquisitive prescription of an immovable under arts. 2242 and 2251. Under art. 2242 *C.C.L.C.*, a possessor in bad faith could acquire ownership of an immovable by possessing it for *30 years*. Under art. 2251 *C.C.L.C.*, the prescriptive period was reduced to *10 years* for a purchaser in good faith under a translatory title.
5. These differing periods were no doubt a reflection of the underlying rationale of prescription as it played out in different scenarios. Article 2242 *C.C.L.C.* contemplated the “squatter scenario”. It permitted, *inter alia*, a possessor in bad faith to acquire ownership at the expense of the true owner, but the possessor needed to wait the full period of *30 years — la trentenaire*. If, over the course of 30 years, the true owner did not assert his or her rights, then it could truly be said, as Martineau does, that the true owner [translation] “had enough time to ensure that his or her interests were protected; by acting within that time, the owner could have prevented prescription from occurring and thereby avoided losing the right; if the owner did not do so, he or she was negligent and therefore no longer deserves the protection of the law” (Martineau, at pp. 17-18).
6. On the other hand, where the possessor acquired the immovable in good faith through a translatory act, but the title was defective, the period was shortened to 10 years. As explained earlier, the 10-year period provided an efficient avenue for quieting title. But it was also shorter in light of the fact that the possessor had met the essential condition of acquiring the right of ownership by translatory act (see *Croisetière v. Gélinas*, [1977] C.A. 183, at pp. 185-86). Concerns about the extinguishment of the true owner’s right were therefore attenuated in this scenario. In the absence of such concerns, the efficiency of quieting title was paramount, and the legislature deemed that the shorter 10-year window was appropriate.
7. In both cases, if the possessor had met the requirements of effective possession, the lapse of time alone solidified his or her right under art. 2183 *C.C.L.C.*, which stated that “[p]rescription is a means of acquiring, or of being discharged, by lapse of time and subject to conditions established by law.”
8. Article 2183a *C.C.L.C.* provided as follows:

**2183a.** The judicial recognition of the absolute right of ownership acquired by prescription by ten years or by thirty years may take place by following the formalities provided in this respect by the Code of Civil Procedure.

1. The language of art. 2183a *C.C.L.C.* was clear insofar as the legislature’s use of the past participle “acquired” showed that the acquisition of the right of ownership had already taken place through prescription. In other words, any judgment obtained pursuant to art. 2183a *C.C.L.C.* was clearly declaratory or confirmatory, and not constitutive of the right of ownership.
2. As I explain below, the language of art. 2918 *C.C.Q*. today is equally clear, but in the opposite direction. Unlike my colleague, however, I cannot accept the premise that a court is entitled to read down its express words to arrive at the conclusion that nothing has changed despite its introduction.
   1. Article 2918 C.C.Q. and Acquisitive Prescription of an Immovable Under the Civil Code of Québec
3. Under the *C.C.Q.*, effective possession over time remains an important criterion in order for a *de facto* set of circumstances to result in a *de jure* ownership through the operation of acquisitive prescription. Yet it is not the sole criterion.
4. Like its predecessor provision, art. 2183 *C.C.L.C.*, art. 2875 *C.C.Q.* provides, in relevant part, that “[p]rescription is a means of acquiring or of being released by the lapse of time and according to the conditions determined by law”. The *C.C.Q.* now explicitly states that “[a]cquisitive prescription requires possession conforming to the conditions set out in the Book on Property” (art. 2911 *C.C.Q.*). In addition to the exercise of possession in fact (the *corpus*), the possessor must act with the intention (the *animus*) of an owner, which is presumed (art. 921 *C.C.Q.*), and the possession itself must be “peaceful, continuous, public and unequivocal” to produce “effects in law” (art. 922 *C.C.Q.*). These conditions relating to the nature of the possession did not change with the introduction of the *C.C.Q*. That these conditions were met by the respondent is not at issue before this Court.
5. However, some of the conditions for acquisitive prescription of an immovable did change with the introduction of the *C.C.Q*. First, a single possessory period of 10 years was set regardless of the good or bad faith of the possessor or the presence or absence of translatory title. Second — in view of this expansion of possessors’ rights — the legislature imposed a condition that the possessor may acquire the right of ownership only upon a judicial application. In my view, the majority of the Court of Appeal erred in failing to enforce the latter condition, as required by art. 2918 *C.C.Q*.
6. Article 2918 *C.C.Q.* differs significantly from art. 2183a *C.C.L.C.*:

**2183a.** The judicial recognition of the absolute right of ownership acquired by prescription by ten years or by thirty years may take place by following the formalities provided in this respect by the Code of Civil Procedure.

**2183a.** La reconnaissance judiciaire du droit de propriété absolue acquis par la prescription de dix ans ou celle de trente ans peut avoir lieu en suivant les formalités prescrites à ce sujet par le Code de procédure civile.

**2918.** A person who has for 10 years possessed an immovable as its owner may acquire the ownership of it only upon a judicial application.

**2918.** Celui qui, pendant 10 ans, a possédé un immeuble à titre de propriétaire ne peut en acquérir la propriété qu’à la suite d’une demande en justice.

1. Notwithstanding the fact that art. 2918 *C.C.Q.* plainly lies at the heart of this appeal, the majority of the Court of Appeal expressly declined to answer the question of whether its plain wording should be given effect. However, insofar as the majority held that the respondent had already acquired the right of ownership over the contested parking space, it implicitly treated the judgment under art. 2918 as a declaratory one (see also G. Gidrol-Mistral, “Publicité des droits et prescription acquisitive: des liaisons dangereuses?” (2016), 46 *R.G.D.* 303, at p. 335).
2. In my view, it erred in doing so. The clear wording of art. 2918 makes a judicial application a prerequisite to acquiring the right of ownership over an immovable. A court’s sole objective in interpreting the *C.C.Q.* — and indeed, all legislation — is to ascertain the will of the legislature. It is obvious that its “interpretation cannot be founded on the wording of the legislation alone” (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21). But where the words of a provision are devoid of all ambiguity and are supported by a context that aligns with a clear legislative intent, we cannot distort that intent by referring to other contextual considerations, lest we put the Court in the legislature’s shoes.
3. The prerequisite of a judicial application under art. 2918 has no antecedent in the *C.C.L.C*. Given the absence of any ambiguity in the wording of art. 2918, and the deliberate legislative choice to retain the judicial application requirement when the article was amended, the effects of the article cannot be defined by reference to practices prevailing under the *C.C.L.C*.
4. Nor, in my view, can its meaning be determined by reference to the repeal or amendment of arts. 2962, 2944 para. 2, and 2943 *C.C.Q*. The efficacy of these articles hinged on the completion of the land register reform. Because of the difficulties and costs associated with the characterization of rights, as well as the potential liability of notaries for any mischaracterization of rights, the National Assembly abandoned the reform in 2000 (F. Brochu, “Critique d’une réforme cosmétique en matière de publicité foncière” (2003), 105 *R. du N*. 761, at p. 789).
5. As a result, art. 2962, which codified the principle of public confidence — the notion that an acquirer of a real right could rely on the land register — was repealed. Similarly, art. 2944 para. 2 — which created an irrebuttable presumption of a right of ownership if, after 10 years of registration in the register, the right was not contested — was also repealed, leaving only “a simple presumption of the existence of that right” (art. 2944 *C.C.Q.*). Finally, art. 2943 — which originally provided that any published right was “deemed known” to any “person acquiring or publishing a right in the same immovable” — was amended to provide for only a simple presumption. When the land register reform was abandoned in 2000, these articles of the *C.C.Q.* became unworkable and had to be amended or repealed.
6. With respect, however, I do not find that a discussion of the abandonment of the land register reform, and the resulting amendment or repeal of articles relating to the reform, provides context that supports reading down the express words of art. 2918 *C.C.Q*. Indeed, I find such a discussion to be misguided for a number of reasons. Chief among them is the fact that it misconstrues the *raison d’être* of art. 2918 as being grounded solely in the publication regime envisioned by the land register reform and consequently treats the judicial application requirement as an incidental casualty of the abandonment of that regime.
7. Article 2918 *C.C.Q.* is “new” in the sense that it makes a judicial application a prerequisite to the acquisitive prescription of an immovable. But art. 2918 *C.C.Q.* replaces arts. 2242 and 2251 *C.C.L.C.* insofar as it substitutes a single 10-year period and a judgment for the conditions previously attaching to 30-year prescription and 10-year prescription under the *C.C.L.C*. To reiterate, under art. 2242 *C.C.L.C.*, a possessor in bad faith and without title could acquire an immovable only after possessing it for 30 years. Article 2251 *C.C.L.C.* provided for prescriptive acquisition after only 10 years, but only if the possessor in good faith could found his or her possession upon a translatory title. This streamlined the resolution of clouds on title. In light of this context, a careful reading of the legislative history of art. 2918 *C.C.Q.* plainly reveals that the legislature intended the judgment on the judicial application to be constitutive of the right of ownership and without retroactive effect.With respect, it is difficult to see how my colleague’s reference to the amendment of art. 2918 favours reading down the judicial application condition, when maintaining the condition was precisely the result of that amendment.
8. As originally drafted in 1991, prior to the abandonment of the land register reform, art. 2918 *C.C.Q.* read as follows:

**2918.** A person who has for ten years possessed, as owner, an immovable that is not registered in the land register may acquire the ownership of it only upon a judicial demand.

The possessor may, under the same conditions, exercise the same right in respect of a registered immovable where the owner of the immovable is not identified in the land register; the same rule applies where the owner is dead or an absentee at the beginning of the ten-year period or where the land register indicates that the immovable has become a thing without an owner.

1. The original art. 2918 took effect on January 1, 1994, before the land register reform was implemented. In its original formulation, the article essentially limited the possibility of acquisitive prescription to scenarios where the information in the land register was in some way defective: the immovable was not registered, the owner was unidentified, dead or absent, or the immovable in question did not have an owner. These were rare scenarios in which the publication regime could not produce its constitutive effects due to a defect in registration (see Gidrol-Mistral, at p. 312). Given the absence of a registered owner, they were also scenarios in which the tension between acquisitive prescription and the right of ownership did not arise. Assuming — as the legislature did at that time — the successful completion of the register reform and the absolute probative force of the register, the extinctive aspect of acquisitive prescription was not in play. As a result of the “rigorous bias towards the integrity of the register under the 1991 Code”, the legislature saw “less of a need for maintaining [30-year prescription], as the possibility of acquisitive prescription of an immovable through possession had been greatly reduced — if not effectively eliminated” (Lametti, at p. 292). In other words, the 30-year period which the legislature viewed as striking a sufficient balance between the right of ownership and the operation of prescription was unnecessary given the fact that the prospect of a true owner losing his or her ownership right had been greatly diminished. The 10‑year prescription period therefore conformed to [translation] “the technology, customs and values of modern society” (D. Dumais, “La prescription”, in Collection de droit, vol. 4, *Responsabilité* (2016), 219, at p. 231). But contrary to my colleague’s suggestion at para. 85, this conformity lies largely in the fact that the possibility of a squatter acquiring the true owner’s rights had been tempered by the addition of the judicial application requirement in art. 2918.
2. Like the amendment or repeal of arts. 2962, 2944 para. 2, and 2943 *C.C.Q.*, the changes which brought art. 2918 to its current form can be, and indeed were, explained by reference to the abandonment of the land register reform:

[translation] **President (Mr. Gautrin):** . . .Article 2918 of the said Code is amended . . . . So you’re going to explain this to us, Minister?

. . .

**Ms. Goupil [Minister of Justice]:** . . . quickly, but it’s very technical. . . . In short, this is the first article where we’re going to have somewhat the same explanation for other articles, which is to say that we’re abandoning phase II of the amendment of the Civil Code that existed, since it was not consistent with practice.It has been suspended since 1995. So we’re going back to the old method, with the current prescription period, namely 10 years. Is that right? [Emphasis added.]

(*Journal des débats de la Commission permanente des institutions*, vol. 36, No. 82, 1st Sess., 36th Leg., June 2, 2000, at p. 51)

1. Only the second paragraph of the original art. 2918 related to the integrity of the register, and accordingly, only the second paragraph of art. 2918 was deleted following the abandonment of the register reform. Indeed, the second paragraph of art. 2918 was never in effect:

[translation] The application of the second paragraph had been suspended pending the implementation of phase II of the initial reform of the land registration system. But it was abandoned by the legislature. [Dumais, at p. 231]

However, nothing about the deletion of art. 2918’s second paragraph militates in favour of reading down the judicial application requirement in current wording of the art. 2918.

1. My colleague is of the view that the amendment of s. 143 of the *Act respecting the implementation of the reform of the Civil Code* indicates that art. 2918 did not change the prescription regime under the *C.C.L.C*. I cannot agree. As with the legislative changes to art. 2918, the changes to s. 143 cannot explain why we should ignore its current wording, namely that a person who “has not yet acquired by prescription ownership of an immovable . . . is subject to the provisions of article 2918 of the new Code”.
2. In 1992, prior to the abandonment of the land register reform, s. 143 initially read as follows:

**143.** A person who, [on January 1, 1994], has not yet acquired ownership by prescription is subject to the provisions of the first paragraph of article 2918 of the new Code if he has possessed, as owner, an immovable registered in the land register consisting of the index of immovables . . .; the judicial demand to acquire ownership thereof by prescription shall be the subject of an advance registration.

A person who, [on January 1, 1994], has become the owner of an immovable by prescription, pursuant to the former legislation, may still apply to the court in whose territory the immovable is located to obtain, by motion, judicial recognition of his right of ownership.

1. When the reform was abandoned, s. 143 was amended to its current form:

**143.** A person who, on 1 January 1994, has not yet acquired by prescription ownership of an immovable which he has possessed as owner is subject to the provisions of article 2918 of the new Code.

A person who, on 1 January 1994, has become the owner of an immovable by prescription, pursuant to the former legislation, may still apply to the court in whose territory the immovable is located to obtain, by motion, judicial recognition of his right of ownership.

1. The debates in the National Assembly reveal that the sole intention underlying the amendment of s. 143 was to make advance registration of the judicial application optional rather than mandatory:

[translation] **Ms. Goupil:** So . . . [the amendment] proposes the elimination of the advance registration requirement for a judicial demand to acquire an immovable by prescription for a person who had not yet acquired the immovable when the Civil Code came into force. Well, we thought it appropriate to remove the obligation to register the judicial demand in advance, since there is no similar rule in cases in which a person begins to prescribe under the new law.

So as you know, advance registration is an optional protective measure for the beneficiary of the notice. It seems inappropriate to dismiss a judicial demand to acquire ownership of an immovable by prescription on the ground that the applicant has failed to register the demand in advance given that the purpose of publishing the notice of advance registration is to protect the applicant. [Emphasis added.]

(*Journal des débats de la Commission permanente des institutions*, vol. 36, No. 101, 1st Sess., 36th Leg., November 7, 2000, at p. 24)

1. Further, by specifying that someone who has already acquired ownership of an immovable by prescription under the *C.C.L.C.* “may still apply” to a court to obtain “judicial recognition of his right of ownership”, s. 143 para. 2 demonstrates that the *C.C.L.C.*’s prescription regime did not survive the advent of the *C.C.Q.*:

[translation] . . . the possessor has the choice of availing himself or herself of 10-year or 30-year prescription under the old code, or of 10-year prescription under the new code. This choice is not without consequences. Judgments rendered under the rules of the *Civil Code of Lower Canada*, that is, after the filing of a motion to obtain judicial recognition of the right of ownership, are declarative, not constitutive.

(F. Brochu, “Prescription acquisitive et publicité des droits” (2006), 108 *R. du N*. 197, at p. 201)

1. Under s. 143 para. 2 of the *Act respecting the implementation of the reform of the Civil Code*, only someone who has already acquired ownership of an immovable is exempt from art. 2918 *C.C.Q.*’s requirements.
2. It is clear that nothing in s. 143 of the *Act respecting the implementation of the reform of the Civil Code*, or in the amendment thereof, signals a legislative intent to treat the judicial application requirement as anything less than an essential element of the prescriptive acquisition of an immovable. To the contrary — and again — the very wording resulting from the amendment shows that the legislature intended the judicial application to be an indispensable prerequisite to any such acquisition.
3. Turning back to art. 2918 *C.C.Q.*, while it is clear that the amendment of the article resulted from the abandonment of the land register reform, it does not follow that the modified language, including the requirement of a judicial application, which the legislature deliberately maintained, should be effectively read down by a court on the same basis. Absent now is the requirement of a 30-year period for a bad faith possessor. So too is the requirement that 10-yearprescriptionbe founded on good faith and translatory title (see *Dupuy v. Gauthier*, 2013 QCCA 774, [2013] R.J.Q. 662). Given that the prescription period inherently strikes a balance between the rights of the possessor and the true owner’s right of ownership — which, it is helpful to recall, is in principle absolute, exclusive and perpetual — the legislature replaced the conditions applicable under the *C.C.L.C.* with a requirement to obtain a judgment under art. 2918. This avoided shifting the balance markedly in favour of the possessor. The Minister’s comments were unequivocal about the fact that the right of ownership could not be acquired without a judicial application:

[translation] . . . possession as an owner for ten years justifies the acquisition of the right of ownership, but the latter must then be the subject of judicial recognition, since the right is not acquired through possession alone. [Emphasis added.]

(Ministère de la Justice, *Commentaires du ministre de la Justice*, t. II, *Le Code civil du Québec* (1993), at p. 1831)

1. It is equally instructive to note that, given the plain wording of art. 2918, the weight of academic authority lies against the suggestion that the judgment obtained on the judicial application is merely declaratory (see Lafond, at para. 2566; Normand, at p. 355; C. Gervais, *La prescription* (2009), at p. 193; F. Brochu, “Nouvelle posologie pour la prescription acquisitive immobilière” (2003), 105 *R. du N.* 735, at p. 754; É. Lambert, *La prescription (Art. 2875 à 2933 C.c.Q.)* (2014),at pp. 835-36; Dumais, at pp. 231-32). Even Pierre Pratte, on whom my colleague relies for the proposition that the judgment is declaratory, recognizes that in the case of an encroachment, like the instant one, the judgment may take on an attributive character:

[translation] Although the concept of a right-granting judgment might not necessarily be inappropriate in the case of an encroachment, the same cannot be said, in our view, where what the judgment in acquisitive prescription does is cure a defect in an existing title. In the latter case . . . the acquirer is the owner by virtue of a title . . . . In this context, it seems more appropriate for the court to declare that the plaintiff is the owner of the immovable than for it to grant (and thus transfer) to the plaintiff ownership of an immovable that already belongs to him or her.

(P. Pratte, “La demande judiciaire relative à la prescription acquisitive d’un immeuble” (2014), 73 *R. du B.* 509, at pp. 550-51)

Indeed, the logic underlying a declaratory reading of the judicial application requirement could only extend to those cases where prescription operates to cure a defect in title. In those cases, another party’s ownership right is not truly at stake. But that is not this case. This case demonstrates how that logic unravels where the true owner’s right of ownership would be extinguished or transferred to the benefit of the encroaching possessor.

1. In sum, in the spirit of the land register reform, the original version of art. 2918 “dropped the prescription period for immovable[s] to ten years, regardless of good or bad faith” but the “possibility of acquisitive prescription [was made] extremely difficult”, because the legislature “prioritiz[ed] the information contained on the face of the register” and created “presumptions that worked against the possessor” (Lametti, at p. 294). It is true that, following the abandonment of the reform, the “prescription period remains ten years regardless of good or bad faith, but acquisitive prescription is once again a more serious possibility” (*ibid.*). This in itself favours the possessor over the true owner. However, had the National Assembly decided to tip the balance even further in favour of the possessor, it would have done so by deleting the judicial application condition from art. 2918. In my view, and in light of the legislature’s decision to maintain the condition, it does not fall within the province of a court to read it down through interpretive doctrines. Rather than merely surviving the legislature’s purge following the abandonment of the reform, the judicial application requirement took on added importance given that the reduction of the prescription period to 10 years — which was initially premised on the successful completion of the register reform — was maintained.
2. Under the current art. 2918, the lapse of time alone no longer gives the possessor a right of ownership; only a judgment can do that. Holding otherwise conflates possession in fact with the creation or transfer of real rights. Only the holder of an ownership *right* may have that right *acknowledged*:

**912.** The holder of a right of ownership or other real right has the right to take part in judicial proceedings to have his right acknowledged.

**912.** Le titulaire d’un droit de propriété ou d’un autre droit réel a le droit d’agir en justice pour faire reconnaître ce droit. [*C.C.Q.*]

Possessors have no such *right* to be acknowledged; they have only the *fact* of possession.

1. In the context of acquisitive prescription, the correlative of a judicially imposed expansion of the possessor’s rights is a diminution of the right of ownership contained in art. 947 *C.C.Q*. Reading down the judicial application requirement in art. 2918 — as the majority of the Court of Appeal implicitly proposes — leads to precisely such a diminution. Indeed, on the majority’s reading of art. 2918, it is not the case that the situation today is the same as under the *C.C.L.C*. Instead, the possessor’s rights are now vastly expanded. Given the reduction of the prescriptive period from 30 years to 10 years, disregarding the judicial application requirement makes it much easier for a possessor to prescribe against the true owner today than it was under the *C.C.L.C*.The majority’s implied reading of art. 2918 therefore fundamentally upsets the legislative balance struck between the rights of the possessor and those of the true owner.
2. Without the judicial application requirement in art. 2918, the balance between possessors’ rights and the right of ownership could be restored only by maintaining the *C.C.L.C.*’s 30-year prescriptive period for possessors without a translatory title like the respondent. Absent that, I cannot accept that the majority of the Court of Appeal’s implied reading of art. 2918 coheres with the publication regime in Book Nine of the *C.C.Q*. Article 2966 para. 1 *C.C.Q*. provides:

**2966.**Any judicial application concerning a real right which shall or may be published in the land register may, by means of a notice, be the subject of an advance registration.

Article 2966 para. 1 works in tandem with art. 2968 para. 1 *C.C.Q.*:

**2968.** Rights which are the subject of a judgment or transaction terminating an action are deemed published from the time of their advance registration, provided they are published within 30 days after the judgment becomes final or the transaction takes place.

1. Article 2966 para. 1 therefore permits a possessor to register the judicial application in advance of obtaining the necessary judgment under art 2918. Under art. 2968 para. 1, the date of advance registration is then deemed to be the date of publication. The effect of these articles is to encourage a prudent possessor who has complied with the wording of art. 2918 to register the judicial application in advance. This aligns art. 2918 with the general publication requirement in art. 2938 *C.C.Q.* for the “acquisition, creation, recognition, modification, transmission or extinction” of immovable real rights. It also minimizes the prospect of litigation and priority contests.
2. Treating the judgment under art. 2918 as declarative and retroactive perverts these incentives. On such a reading, a prudent possessor who has met the requirements of arts. 2918, 2966 para. 1, and 2968 para. 1 and has registered a judicial application in advance would be worse off than a possessor who has not, since the latter would benefit from his or her inaction through the retroactivity of the judgment. Incentivizing this inaction permits title to remain precarious indefinitely — the subject of some future dispute. In harmony with the objectives of the publication regime, it is clear that the overarching goal of art. 2918 is to confer title upon a possessor through a judgment, so that the possessor may then register his or her real right. In the absence of a judgment, the possessor has nothing to publish. According to the majority’s opinion, the possessor will then be the sole owner of an immovable in Quebec who is incapable of publishing his or her ownership, but who is nevertheless immune from the effects of publication.
3. In addition to being inconsistent with these articles of the publication regime, this result is hard to square with the rationale underlying the prescription regime itself. Rather than promoting the efficiency, stability and security of relationships between title holders by encouraging advance registration, it promotes uncertainty by encouraging a delay in the final determination of ownership. This uncertainty is amplified given the potential effect of retroactivity on third parties: [translation] “Retroactivity thus makes it possible to preclude setting up against a third party any acts entered into by the [true owner] during the period of usucapion, rendering them of no effect” (Gidrol-Mistral, at p. 341). Giving effect to the plain wording of art. 2918 resolves these problems and removes the risk of any future litigation.
4. Like the requirement of a judicial application in art. 2918, art. 2885’s requirement that the “renunciation of acquired prescription with respect to immovable real rights shall be published” contributes to certainty in transactions involving immovables. It permits a seller to resolve any potential clouds on title stemming from a neighbour’s possession of the land subject to sale. Rather than undermining the importance of publication, art. 2885 *C.C.Q.* points to the utility — and indeed, the necessity — of publication in the context of prescription by making the renunciation of prescription subject to the publication regime.
5. As Justice Jacques noted in his dissent in the Court of Appeal (at paras. 93-97), treating the judgment under art. 2918 as retroactive is at odds with s. 50 of the *Interpretation Act*, CQLR, c. I-16, which provides:

**50.** No provision of law shall be declaratory or have a retroactive effect, by reason alone of its being enacted in the present tense.

1. When an article of the *C.C.Q.* is intended to have retroactive effect, the legislature has taken heed of s. 50 of the *Interpretation Act* by making this clear. For example, art. 884 *C.C.Q.* provides that “Partition is declaratory of ownership”. Article 1037 *C.C.Q.*, on the other hand, states that the “act of partition which terminates indivision, other than indivision by succession, is an act of attribution of the right of ownership”. Insofar as art. 2918 explicitly states that a possessor “may acquire the ownership” of an immovable “only upon a judicial application”, I agree that these illustrations, [translation] “drawn from other books of the Code, favour . . . the view that a judgment recognizing the acquisition of ownership by prescription is attributive in nature” (J. McCann, “Commentaire sur la décision *De Repentigny* *c.* *Fortin* *(Succession de)* — L’acquisition de la propriété par prescription décennale: effet déclaratif, attributif, rétroactif?”, *Repères*, February 2013 (available online in La référence)).
2. I therefore agree with Justice Jacques that the judgment on a judicial application under art. 2918 is constitutive of the right of ownership and is without retroactive effect. I would accordingly endorse the line of jurisprudence to this effect: *Craig v*. *Béton Chevalier inc.*, 2012 QCCS 2888, at para. 33 (CanLII); *Granby (Ville) v. Gestion Rainville ltée*, 2011 QCCS 4259, at paras. 56-59 (CanLII); *Re Gagné*, 2009 QCCS 6064, at paras. 10-16 (CanLII); *Re Montmagny (Ville)*, 2005 CanLII 11604 (Que. Sup. Ct.), at para. 6; *Re* *Béland*, 2005 CanLII 24349 (Que. Sup. Ct.), at para. 6.
   1. Application in This Case
3. The appellants acquired the land on which the contested parking space is located through a translatory title in July 2011. Despite the majority of the Court of Appeal’s suggestions to the contrary, the appellants’ good faith is not at issue. As Justice Jacques noted, the appellants then published their title in the land register, triggering the application of arts. 2941, 2943, 2944, and 2945 *C.C.Q.*, which provide as follows:

**2941.** Publication of rights allows them to be set up against third persons, determines their rank and, where the law so provides, gives them effect.

Rights produce their effects between the parties even if they are not published, unless the law expressly provides otherwise.

**2943.** A right registered in a register in regard to property is presumed known to any person acquiring or publishing a right in the same property.

A person who does not consult the appropriate register and, in the case of a right registered in the land register, the application to which the registration refers, as well as the accompanying document if the application is in the form of a summary, may not invoke good faith to rebut the presumption.

**2944.** Registration of a right in the register of personal and movable real rights or the land register entails, as against all persons, a simple presumption of the existence of that right.

**2945.** Unless otherwise provided by law, rights rank according to the date, hour and minute entered on the memorial of presentation or, if the application concerning them is presented for registration in the land register, entered in the book of presentation, provided that the entries have been made in the appropriate registers.

Where publication by delivery is authorized by law, rights rank according to the time at which the property or title is delivered to the creditor.

1. Under art. 2918 *C.C.Q.*, the prescriptive acquisition of ownership of an immovable is conditional on first obtaining a judgment following a judicial application by the possessor. In this case, the respondent did not make such an application before the appellants acquired title to the property in July 2011. In fact, the respondent waited until the appellants brought an action against her for a permanent injunction before filing her counterclaim asking for a declaration of ownership. Given that the trial court’s judgment in the respondent’s favour was rendered on October 22, 2013, the appellants are, with respect to the immovable in question, prior in time and — as revealed by the register — prior in rank. Therefore, the respondent’s possession cannot be set up against the appellants’ title.
2. I would add the following. Contrary to what my colleague suggests, the equities of this case do not weigh in favour of awarding the contested immovable to the respondent. The respondent is not a possessor who happened to have acquired a defective title. The respondent was encroaching on the immovable when the appellants acquired it by translatory act. And the appellants acquired a real right through that act, not a personal claim against their vendor. Even if we assume, as my colleague does, that the appellants have a claim against their predecessor in title under art. 1724 *C.C.Q.* — such assumption being far from borne out on the facts of this case — there is no equivalence between real rights and personal rights under the *C.C.Q*. Unlike personal rights, real rights are fundamentally enforceable *erga omnes* (enforceable against all). It is this essential feature of real rights that underlies the logic of art. 2938, which is central to the *C.C.Q.*’s publication regime:

**2938.** The acquisition, creation, recognition, modification, transmission or extinction of an immovable real right requires publication.

Renunciation of a succession, legacy, community of property, partition of the value of acquests or of the family patrimony, and the judgment annulling renunciation, also require publication.

Other personal rights and movable real rights require publication to the extent prescribed or expressly authorized by law. Modification or extinction of a published right shall also be published.

1. As Justice Jacques recognized, this same feature of enforceability against third parties — notably third party purchasers and creditors — underscores the importance of the land register in a modern society:

[translation] By providing information on which acquirers, hypothecary creditors and others rely in assessing the validity of a title of ownership, the land register promotes the security of transactions and the exploitation of the economic value of immovables. No one, for example, would be interested in acquiring an immovable if there were no way to verify that the person claiming to own it has a valid title of ownership. The land registration system therefore has a vital importance, although non‑specialists are unaware of that importance, that makes it central to the state’s mission. [Emphasis added; footnotes omitted.]

(F. Brochu, *Mémoire portant sur le Projet de loi no 35, Loi modifiant le Code civil en matière d’état civil, de succession et de publicité des droits*, Commission des institutions, May 23, 2013 (online), at p. 4)

1. When the plain wording and structure of the *C.C.Q.* cohere with these modern realities, it is difficult to see why we should be eager to equate the *C.C.Q.*’s regimes with those that existed under the *C.C.L.C*. Indeed, this is all the more difficult to see in light of the interpretive principle that “the will of the legislature must be interpreted in light of prevailing, rather than historical, circumstances” (*R. v. 974649 Ontario Inc.*, 2001 SCC 81, [2001] 3 S.C.R. 575, at para. 38). *A fortiori*, I would think that a court should exercise caution before retrograding legislative amendments, like the judicial application requirement in art. 2918, or the publication regime in Book Nine of the *C.C.Q*.
2. For these reasons, I would allow the appeal.

*Appeal dismissed with costs,* Côté J. *dissenting.*

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