Court File No. 37893

IN THE SUPREME COURT OF CANADA

(On Appeal from the Court of Appeal of Québec)

BETWEEN:

LYNNE THRELFALL, personally in her capacity as liquidator of the succession of George Roseme, and as tutor to the absentee George Roseme

APPELLANT
(Appellant)

- and -

CARLETON UNIVERSITY

RESPONDENT
(Respondent)

FACTUM OF THE APPELLANT

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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PART I – OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. This appeal raises two questions. The first is a novel question with respect to the presumption of life of an absentee and the retroactive effect, if any, proof of the absentee's death may have on pension payments validly made while the absentee was presumed to be alive. The second question is whether the well understood principles and requirements for the remedy of the restitution of a payment not due can be "adjusted" to create of a new remedy which departs from established legislative policy as set out in the *Civil Code of Québec* [hereinafter, the "C.C.Q.].

2. The novel question regarding the presumption of life raises the issue of whether pension payments validly made during the presumed life of an absentee should be found to be paid without reason on a retrospective and on a retroactive basis when the legislative policy set out in the C.C.Q. is at worst silent on the issue and at best appears to provide otherwise.

3. The decision of the Quebec Court of Appeal of Québec in this matter recognized the validity and effect of the presumption of life of an absentee by finding that pension payments made to an absentee during the operation of the presumption of life of an absentee are properly made and made without error by the debtor. Nevertheless, faced with the apparent silence of the C.C.Q. on the effect of proof of death on that presumption, the appeal court erroneously applies its own policy to the rebuttal of the presumption by analogy from separate, distinct and inapplicable articles of the C.C.Q. Having justified its desired effect of the rebuttal of the presumption of life, the appeal court then proceeded to infer and insert words into a standard-form adhesion contract Retirement Plan from a different jurisdiction to bootstrap its result-oriented reasoning - while holding that the contractual terms of the Retirement Plan was plain and need not to be interpreted.

4. The second question is whether the requirements for the restitution of payments not due as

set out in articles 1491 and 1492 of the C.C.Q. can be disregarded and "adjusted" on an *ad hoc* basis to create a remedy "*likened*"[1] to the remedy of restitution arising from the receipt of a thing not due to be granted.

5. The Court of Appeal of Québec erred created a new obligation as well as a correlative remedy sounding in restitution which depart from and "*adjust"*[2] the well-established and consistent application of the codified requirements for the restitution of a payment not due as set out in articles 1491 and 1492 C.C.Q. The appeal court the new obligation and remedy after having determined that the Respondent did not satisfy the legal requirements for the restitution of payments to be ordered.

6. The decision of the Court of Appeal of Québec represents a marked and dangerous departure from the accepted and "*traditional*[3]" interpretation of articles 1491 and 1492 C.C.Q. for restitution to be ordered.

7. Consistent and clear jurisprudence from this and other courts, most recently in *Banque Amex du Canada c. Adams,* 2014 CSC 56, regarding the clear and codified statement of law for the remedy of restitution of a thing not due set out in articles 1491 and 1492 C.C.Q. has now been disregarded in favour of uncertainty and unpredictability.

8. This appeal asks this Court to resolve the uncertainty and unpredictability created by the Court of Appeal of Québec.

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1 Appeal Decision, Appellant's Factum, Vol I, Tab 1, pages 10 and 32, at paragraphs 9 and 120: " *In my view, while the circumstance does not match the exact requirements of article 1491 – the payments were not made in error; the debt existed when paid – the obligation to make restitution can be "likened" to that remedy*."

2 Appeal Decision, Appellant's Factum, Vol I, Tab 1, page 34, at paragraph 129.

3 Appeal Decision, Appellant's Factum, Vol I, Tab 1, pages 10, 26, 29 and 32, at paragraphs 9, 89, 109, 118.

B. Statement of Facts

I – The Persons Involved and their Relationships

A. The Appellant Lynne Threlfall

9. The Appellant Lynne Threlfall [hereinafter, "Threlfall"] is the sole heir to the Estate of the deceased George Roseme (and the former tutor to the absentee George Roseme) [hereinafter, "Roseme"].

10. Threlfall had cohabitated with Roseme as *de facto* spouses during the period of 1983 to 1994[4]. Roseme had purchased a 150-acre parcel of land in the Municipality of La Pêche, Québec, during the time of their relationship with the intention that Threlfall would use the land for farming and, that she would remain on the land in the future. Title to the real estate was in Roseme's name only[5].

11. Despite their separation in 1994 Roseme and Threlfall continued to be friends and continued to reside on the 150-acre parcel of land in La Pêche in separate homes situated about 500 metres apart from each other[6]. Threlfall and Roseme would see each other almost every day and helped each other with the management of the farming operations carried out on the lands[7].

B. The Respondent Carleton University

12. The respondent Carleton University ["Carleton"] is a post-secondary institution located in the City of Ottawa and is Mr. Roseme's former employer. In this case Carleton had the contractual duty to pay pension benefits to Roseme in accordance with Carleton's Retirement Plan contract[8].

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4 Trial Transcript, Appellant's Record, Vol II, Tab 3, at page 13.

5 Trial Transcript, Appellant's Record, Vol II, Tab 3, at page 15.

6 Trial Transcript, Appellant's Record, Vol II, Tab 3, at pages 13 to 15.

7 Trial Transcript, Appellant's Record, Vol II, Tab 3, at pages 15 and 16.

8 Exhibit P-1, Carleton University Retirement Plan (Office Consolidation of 1/1/92, text and subsequent amendments prepared October, 1996) [the "Retirement Plan"], Appellant's Record, Vol II, at pages 93 to 169.

C. The pensioner, absentee and, deceased George Roseme

13. The late George Roseme was a political science professor employed by Carleton in Ottawa, Ontario, until his retirement on July 1, 1996.

14. Roseme had subscribed to Carleton's Retirement Plan[9] pursuant to which he would be receiving a monthly retirement pension after his retirement. On May 13, 1996, shortly before his retirement, Roseme indicated to Carleton that his desire was to draw pension benefits for the remainder of his lifetime only and up to his death. This communication of intention was made by way of form letter prepared by Carleton[10].

15. Roseme retired on July 1, 1996, and thereafter continued to reside on his property in La Pêche.

16. On or about September 10, 2007, by then diagnosed as being in the early stages of dementia, Roseme left his home in La Pêche to go for a walk. Roseme was neither heard from nor seen again despite significant and repeated ground and aerial search efforts undertaken to find him[11].

17. Roseme, being a person who had ceased to appear at his domicile without advising anyone, and of whom it was unknown whether he was still alive had become an absentee in fact and in law[12].

18. Roseme had an estate valued at approximately $ 350,000 when became an absentee. His estate was comprised of bank accounts, contractual rights, the 150-acre parcel of land, and, debts,

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9 Exhibit P-1, Carleton University Retirement Plan (Office Consolidation of 1/1/92, text and subsequent amendments prepared October, 1996) [the "Retirement Plan"], Appellant's Record, Vol II, at pages 93 to 169, more particularly at 8.02(b)(i) at page 140.

10 Exhibit P-2, Appellant's Record, Vol II, page 170.

11 Exhibit P-5, Appellant's Record, Vol II, page 177.

12 *Civil Code of Québec*, CQRL c CCQ-1991, articles 84 and 3083 [C.C.Q.].

all of which required administration during his absence[13].

19. On February 4, 2008, the Superior Court of Québec instituted a tutorship to the absentee Roseme upon Threlfall's application[14]. The application had been made with the support of Roseme's relatives[15]. Threlfall was designated as tutor to Roseme's property with a right to compensation at the rate of $ 2,500 per month for her administration work[16].

20. Carleton was informed of Threlfall's appointment as tutor to the absentee Roseme[17] on January 29, 2009.

21. On March 18, 2009, although it had no proof of Roseme's death[18], Carleton wrote to Threlfall and advised her that it intended to and would cease making pension payments to Roseme in May 2009 because:

> "In the circumstances, there are reasonable grounds to believe Professor Roseme passed away in September 2007 and, as a result, the monthly pension has been paid since that time without proper authority and contrary to the Plan terms.
>
> Consequently, the purpose of this letter is to provide you with notice of the University's intention to terminate the monthly pension in 60 days, with the last payment being made in respect of May 2009."[19]

22. On May 15, 2009, Threlfall's notary wrote to Carleton and informed it that Roseme was presumed alive for a period of seven (7) years following the date of his disappearance in accordance with article 85 C.C.Q. Carleton was put on notice at that time that unless it could justify Roseme's death:

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13 Exhibit D-1, Appellant's Record, Vol II, Tab 4, at pages 216 and 217.

14 Exhibit P-3, Appellant's Record, Vol II, page 171.

15 Exhibit P-3, Appellant's Record, Vol II, page 171.

16 Exhibit P-3, Appellant's Record, Vol II, at page 172, paras. 6 and 7; Exhibit P-4, Appellant's Record, pages 173 to 175.

17 Exhibit P-6, Appellant's Record, Vol II, page 179.

18 Trial Transcript, Appellant's Record, Vol II, pages 81 to 84.

19 Exhibit P-6; Appellant's Record, Vol II, page 179.

> "[...] suivant la loi québécoise, Monsieur Roseme est toujours vivant. Il en sera ainsi jusqu'à ce qu'il revienne, que l'on retrouve sa dépouille ou dans sept (7) ans, soit après le 4 février 2015, lorsque l'on aura obtenu un jugement déclaratif de décès. Vous n'avez pas d'autre choix que de continuer les versements de pension au compte de Monsieur Roseme, lequel est géré par sa tutrice, Madame Threlfall."[20]

23. Carleton ceased making the required monthly pension payments to Roseme at the end of May 2009[21].

24. On November 11, 2009, through legal counsel and on a without prejudice and without admission basis, Carleton indicated that it was prepared to resume the payment of the pension benefits to Roseme until his death could "*be held to be certain within the meaning of the Civil Code of Quebec.*"[22]

25. Carleton resumed making monthly pension payments to Roseme pursuant to the Retirement Plan in December 2009. It also paid the pension arrears it had not paid between May and December 2009[23]. Carleton continued to make monthly pension payments directly into Roseme's bank account thereafter until end of July 2013.

26. At trial Carleton admitted that it resumed the payment of the monthly pension installment payments due to the legal presumption that Roseme was alive and still in his "*lifetime*" as per the Retirement Plan's paragraph 8.02(b)(i) despite his status as an absentee:

> Q. Okay. Why was the pension restarted at the end of December?
>
> A. Because of the presumption of being alive. I think the law states that you have to presume he's alive until seven years, or until there is a found body or a declaratory judgment of death before then, and the feeling was there was not enough information on file, or at least at Carleton's disposal, to go

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20 Exhibit P-7, Appellant's Record, Vol II, pages 181 and 182.

21 Exhibit P-16, Appellant's Record, Vol II, pages 194 and following; Trial Transcript, Appellant's Record, Vol II, at page 89.

22 Exhibit P-9, Appellant's Record, Vol II, at pages 184 and 185.

23 Exhibit P-16, Appellant's Record, Vol II, at page 194 and following; Trial Transcript, Appellant's Record, Vol II, at page 105.

> ahead and apply for a declaratory judgment of death, if I'm naming that properly[24].

Proof of Death

27. Skeletal remains were found on or about July 22, 2013, in a forested area on another person's property adjacent to Roseme's property in La Pêche.

28. The skeletal remains were identified by the Coroner through the use of dental records and were confirmed as being the remains of George Roseme[25].

29. Roseme's remains had been found 5 years, 10 months and 12 days after he was last seen and had become an absentee[26].

30. The Coroner who had been called to investigate the causes and circumstances of Roseme's death recorded Roseme's medical death on July 22, 2013, in her "*Autorisation de disposition du corps*" form. The Coroner could not fix the date of Roseme's death, however, and simply noted that Roseme's date of death was "*indéterminée"* although she had indicated that death occurred in 2007[27].

31. On August 16, 2013, Carleton, having learned that Roseme's remains had been found, informed the Appellant that it had suspended any further pension payment to Roseme pending further information[28].

32. On February 17, 2014, almost seven (7) months after the date of the "*Autorisation de disposition du corps*" form and the medical determination that Roseme was deceased, the Registrar

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24 Trial Transcript, Appellant's Record, Vol II, page 89, lines 8 to 17.
25 Exhibits P-11 and P-14, Appellant's Record, Vol II, at pages 188 and 192.
26 Exhibits P-11 and P-14, Appellant's Record, Vol II, at pages 188 and 192.
27 Exhibits P-11 and P-14, Appellant's Record, Vol II, at pages 188 and 192.
28 Exhibit P-13, Appellant's Record, Vol II, page 191.

of Civil Status signed an Act of Death with respect to Roseme[29].

33. The copy of the Act of Death which was eventually provided to the Appellant was certified and issued on April 3, 2014[30].

34. In that Act of Death, the Registrar fixed the date of Roseme's death as being September 11, 2007, the day immediately following the date on which Roseme was last seen or heard from. The Registrar of Civil Status' determination as to Roseme's date of death is not the same as was set out by the Coroner in her *"Autorisation de disposition du corps*" form issued several months earlier.

35. On April 14, 2014, two (2) months after the date of issue the Act of Death, the Coroner signed her investigation report with respect to the causes of Roseme's death. The Coroner's investigation report concluded that it was impossible to determine either the cause or the date of Roseme's death[31].

36. On May 9, 2014, Carleton received a copy of the Coroner's investigation report[32]. Carleton did not make any pension payments to Roseme or his estate after July 31, 2013[33].

Aftermath

37. Threlfall performed her duties as tutor to the absentee Roseme as required during her administration from the date of her appointment as tutor to the absentee to April 3, 2014, the date of issue of the Act of Death[34]. Threlfall interpreted the date of the Act of Death as being the date of proof of Roseme's death which put an end to her tutorship to the absentee as prescribed by

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29 Exhibit P-15, Appellant's Record, Vol II, page 193.
30 Exhibit P-15, Appellant's Record, Vol II, page 193.
31 Exhibit P-14, Appellant's Record, Vol II, page 192.
32 Exhibit P-14, Appellant's Record, Vol II, at page 192.
33 Exhibit P-16, Appellant's Record, Vol II, at page 194.
34 Trial Transcript, Appellant's Record, Vol II, at pages 63 and 64.

article 90 C.C.Q[35].

38. Carleton performed its obligation to make monthly retirement payments to Roseme during his absence pursuant to the Retirement Plan. Those pension payments had been made directly into Roseme's bank account no.7286724 without Threlfall's intervention[36].

39. On June 24, 2014, Carleton's legal counsel wrote to Threlfall and her notary and asserted Carleton's claim to the pension funds which had been paid to Roseme during his absence[37]. Threlfall's notary responded on July 17, 2014, and set out Threlfall's position that Carleton had no claim against Roseme's estate because there is no retroactive debt due to Carleton given the application of the presumption of life set out in article 85 C.C.Q.[38]

40. Carleton thereafter commenced litigation for a judgment condemning Threlfall to "*refund to the Plaintiff the amount of $ 497,332.64.*"[39]

The Retirement Plan

41. The standard form letter prepared and provided by Carleton to Roseme for Roseme's remittance to Carleton in May 1996 referred to above at paragraph 13 with respect to his election of form of pension is worded as follows:

> "After considering the various pension options available from the Carleton University Retirement Plan, I elect to draw a single life pension from the Plan effective July 1, 1996, and payable monthly in arrears <u>for my remaining lifetime only.</u>
>
> I am aware that on my death, my pension will cease and no payments of any kind will be due from the Plan to my beneficiaries, heirs or estate, even if my death occurs immediately following the date of my first pension payment".[40] (the underline is ours)

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35 Trial Transcript, Appellant's Record, Vol II, Tab 3, at pages 63 and 64.

36 Trial Transcript, Appellant's Record, Vol II, Tab 3, at page 50.

37 Exhibit P-18, Appellant's Record, Vol II, Tab 4, at pages 210 and 211.

38 Exhibit P-19, Appellant's Record, Vol II, Tab 4, at page 212.

39 Motion to Institute Proceedings, Appellant's Record, Vol I, Tab 2, pages 39 to 42, at page 42.

40 Exhibit P-2, Appellant's Record, Vol II, Tab 4, at page 170.

42. The "*single life*" pension is described in the Retirement Plan under the title "*Life Only*" as:

> "An increased monthly benefit which is payable for the remaining lifetime of the Member with such benefit ceasing with the payment for the month in which the Member's death occurs."[41] (the underline is ours)

43. Carleton admitted at trial that it was "*obligated to pay the pension in accordance with the retirement text and the election he [Roseme] chose, which was to pay it up until the date of death."*[42]

44. Payment in accordance with the "retirement text", however, also meant accepting Roseme's right to receive monthly pension payments and Carleton's obligation to continue paying the monthly pension amounts "*during [Roseme's] remaining lifetime."*[43]

45. The words and expressions "*life*", "*death*" and "*remaining lifetime*" are not defined in the Retirement Plan as fixed terms or otherwise.

46. The parties agreed at trial and there was no dispute that Roseme's status is to be determined pursuant to article 3083 C.C.Q. It follows that Roseme's status as an absentee, a person who is alive, or dead, is to be determined in accordance with the C.C.Q.

47. During the period between Roseme's disappearance on September 10, 2007 and Carleton's cessation of pension payments at the end of July 2013, Carleton had paid $ 497,332.64, in gross retirement payments inclusive of withholding tax.

Succession

48. On May 14, 2004, Roseme executed his Last Will and Testament before a notary in

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41 Exhibit P-1, Appellant's Record, Vol II, Tab 4, at page 140, para 8.02(b)(i).

42 Trial Transcript, Appellant's Record, Vol II, Tab 3, at pages 75 and 76.

43 Exhibit P-1, Appellant's Record, Vol II, Tab 4, at page 140, at para 8.02(b)(i).

Québec[44]. Through Article III of his Will, Roseme had named Threlfall the sole universal legatee of his estate and also the liquidator of his estate.

49. Threlfall, acting in her capacity as tutor to the absentee, prepared the final accounting of Roseme's estate on the direction of the Public Curator and on a form provided by the Public Curator. Threlfall signed the final accounting of the tutorship on June 17, 2014[45].

50. On the same date of June 17, 2014, Threlfall accepted the accounting of the tutorship of the absentee as the beneficiary of the estate of the deceased George Roseme[46].

51. A few weeks later in early July 2014, Threlfall withdrew approximately $ 106,000 from the estate bank account based on her belief on information from her notary that she could withdraw those monies at that time pending the completion of the liquidation of the non-cash assets included in Roseme's estate[47]. Threlfall used those monies pay personal debts.

52. Aside from the liquidation of some of the cash held in the deceased Roseme's bank accounts by payment to the beneficiary Threlfall, the remaining assets in Roseme's estate continued to be unliquidated[48].

Trial Decision – Superior Court of Québec, sitting in Gatineau

53. Trial was held for one-half day on January 27, 2016. Two witnesses testified: Lynne Threlfall and Neil Courtemanche, the manager of pension and payroll at Carleton.

54. The trial judge delivered his judgment on February 2, 2016. The trial judge granted Carleton's Motion to Institute Proceedings and condemned Ms. Threlfall to pay Carleton the amount of $ 497,332.60, retroactively to December 31, 2007, with legal interest as of the same

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44 Exhibit D-9, Appellant's Record, Vol II, Tab 4, at page 239.

45 Exhibit P-20, Appellant's Record, Vol II, Tab 4, at page 214; Trial Transcript, Appellant's Record, Vol II, Tab 3, at pages 61 to 67.

46 Exhibit P-20, Appellant's Record, Vol II, Tab 4, at page 214.

47 Trial Transcript, Appellant's Record, Vol II, Tab 3, at pages 69 and 70.

48 Trial Transcript, Appellant's Record, Vol II, Tab 3, at pages 69 and 70.

date.

55. The trial judge held Roseme was in fact and in law an absentee from the moment of his disappearance pursuant to article 84 C.C.Q. with the effect that presumption of life contained in article 85 C.C.Q. applied[49].

56. The effect of the presumption of life as found by the trial judge was that Carleton had the legal obligation to continue making the pension payments to Roseme until either a declaratory judgment of death was issued, the seven (7) year presumption of life expired, or proof of death was established before that date[50].

57. The trial judge held that Roseme's death was established by the copy of the Act of Death delivered on April 13, 2014 [51].

58. The trial judge held that once Roseme's remains were found, however, what had been pension payments validly made due to an obligation to pay arising under the Retirement Plan contract became pension payments made in "error" once the presumption of life ceased to apply[52].

59. The trial judge reasoned that the discovery of the remains in 2013 had the effect of retroactively changing the nature of the pension payments from payments validly required to be made to payments made when such payments were not due to Roseme, and therefore, the payment of a thing not due.

60. The trial judge considered the three (3) necessary requirements and conditions precedent for the remedy of restitution relating to the payment not due as set out at articles 1491 and 1492

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49 Superior Court of Québec Judgment, Appellant's Record, Vol I, Tab 1, page 3, at paragraphs 21 and 22.

50 Superior Court of Québec Judgment, Appellant's Record, Vol I, Tab 1, page 5, at paragraph 33.

51 Superior Court of Québec Judgment, Appellant's Record, Vol I, Tab 1, page 4 at paragraph 27, referring to Exhibit P-15, Appellant's Record, Vol II, page 193.

52 Superior Court of Québec Judgment, Appellant's Record, Vol I, Tab 1, page 5, at paragraph 38.

C.C.Q. and held that those requirements and conditions precedent had been met by Carleton[53]. More specifically, the trial judge held that:

a) Carleton had made payments to Roseme's estate;

b) the payments were not due as there was no debt; and,

c) the pension payments were made by mistake, as the payments were made on the presumption that the absentee was alive while he was not[54];

with the effect that Threlfall was ordered to pay the sum sought to be refunded to Carleton[55].

61. The trial judge held that Threlfall's role as tutor to Roseme ceased when his death was established on April 3, 2014, by the issue of the Act of Death.[56]

62. Threlfall appealed from the decision of the Superior Court of Québec to the Court of Appeal of Québec.

Appeal Decision – Court of Appeal of Québec

63. The Court of Appeal of Québec heard the appeal on May 2, 2017, and delivered its unanimous reasons on October 23, 2017[57]. The appeal court granted Threlfall's appeal in part and reduced the quantum of interest payable on the amount to be restituted but otherwise maintained the significant portions of the trial decision albeit on different grounds and after having agreed

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53 Superior Court of Québec Judgment, Appellant's Record, Vol I, Tab 1, page 6, at paragraphs 43 to 47.

54 Superior Court of Québec Judgment, Appellant's Record, Vol I, Tab 1, page 6, at paragraphs 43 and 46.

55 Superior Court of Québec Judgment, Appellant's Record, Vol I, Tab 1, page 7, at paragraph 59.

56 Superior Court of Québec Judgment, Appellant's Record, Vol I, Tab 1, page 7, at paragraph 55.

57 Appeal Decision, Appellant's Record, Vol I, Tab 1, pages 8 to 37.

with Threlfall that Carleton had not met the requirements for an order of restitution pursuant to articles 1491 and 1492 C.C.Q.[58].

64. In summarizing its reasoning, the appeal court held as follows:

> "While articles 1491 and 1492 C.C.Q. as traditionally interpreted do not readily apply here, I am of the view that the judge made no mistake in ordering restitution of the pension benefits. The remedy he imposed may fairly be likened to the "receipt of a payment not due". The source of the obligation to return the benefits may properly be traced beyond article 1491 to the general principles of the civil law relating to the performance of obligations and unjust enrichment. A valid payment presupposes an obligation with cause; what has been paid where that cause has subsequently been expunged may, in circumstances like these, be recovered to avoid the unjust enrichment of the payee at the expense of the payor. As such, the quasi-contractual obligation to reimburse the pension payments claimed in this case has ancient lineage in the civil law, even if it is not strictly supported by the texts of the Civil Code relating to the receipt of a payment not due"[59]. (the emphasis is ours)

65. The appeal court approached the issues by reframing the questions at hand as questions, firstly, pertaining to Roseme's entitlement to pension benefits after 2007 notwithstanding the presumption in article 85 of the CCQ, and secondly, pertaining to a right to the restitution of pension payments made on the basis of either the rules of "receipt of a payment not due" in articles 1491 and 1492 C.C.Q. or otherwise[60].

Entitlement to Pension Benefits

66. The Court of Appeal of Québec held that the payments made by Carleton to Roseme during his absence were validly made at the time they were made between 2007 and 2013 because of his continued entitlement to pension benefits during the operation of the presumption of life created by article 85 C.C.Q. Nevertheless, the appeal court also held that the subsequent establishment of a presumed "*true date of death*" by the Registrar of Civil Status as contained in the Act of Death issued on April 3, 2014[61], gave rise to an implied retroactive requirement to "undo" the effects of

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58 Quebec Court of Appeal Decision, October 23, 2017, at paragraph 144.

59 Appeal Decision, Appellant's Record, Vol I, Tab 1, page 10, at paragraph 9.

60 Appeal Decision, Appellant's Record, Vol I, Tab 1, page 15, at paragraph 40.

61 Appeal Decision, Appellant's Record, Vol I, Tab 1, page 22, at paragraph 27. Article 127 C.C.Q. states: "Where the date and time of death are unknown, the registrar of civil status

the presumption to the presumed "true date of death" of September 11, 2007, because the uncertainty as to Roseme's existence had been lifted[62].

67. The appeal court first considered the interpretation to be applied to the Retirement Plan so as to determine when in time the obligation to make pension payments ended. The Retirement Plan itself as well as the pension payment election documentation were prepared and written entirely by Carleton.

68. After reviewing the language contained in sections 8.01 and 8.02 of the Retirement Plan, the Court of Appeal of Québec held that the reference to pension benefits "ceasing with the payment for the month in which the Member's death occurs" as referred to in section 8.02(b)(i) of the Retirement Plan was "*a plain indication that entitlement [to pension payments] ends at the true date of death."*[63]

69. The appeal court further held that even if contractual language such as "*my remaining lifetime*" contained in the Retirement Plan could be considered ambiguous, then the rules of interpretation contained at articles 1426 and 1427 C.C.Q. requiring that the Retirement Plan be read as a whole and that the common intention of the parties should be considered in light of the meaning already given to it by the parties lead to the conclusion that Roseme's "*true date of death*" would be the moment in time when his right to pension payments would end[64]. It followed, in the appeal court's view, that the "*true date of death*" (September 11, 2007) as determined by the Registrar of Civil Status was the end date of any pension entitlement as a matter of contract regardless of the effect of article 85 C.C.Q. and of the presumption of life[65].

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establishes them on the basis of the report of a coroner and the presumptions that may be drawn from the circumstances. If the place of death is unknown, it is presumed to be the place where the body was discovered."

62 Appeal Decision, Appellant's Record, Vol I, Tab 1, pages 18 to 24, paragraphs 51 to 82; page 22, at paragraph 75 *in fine.*

63 Appeal Decision, Appellant's Record, Vol I, Tab 1, page 17, at paragraph 48.

64 Appeal Decision, Appellant's Record, Vol I, Tab 1, page 17, at paragraph 49.

65 Appeal Decision, Appelleant's Record, Vol I, Tab 1, pages 23 and 24, at paragraphs 80 and 81.

70. Turning to the effect of article 85 C.C.Q. and the presumption of life of the absentee contained in it, the Court of Appeal of Québec agreed with Threlfall that Roseme was presumed alive and continued to be presumed alive until such time as "proof of his death" was made. The appeal court also agreed with Threlfall that "proof of death" was made only on April 3, 2014, when the Act of Death was certified by the Registrar of Civil Status[66].

71. Notwithstanding that proof of death was made on April 3, 2014, the appeal court considered that the presumption of life had been rebutted on the date that the Act of Death was certified (April 3, 2014) and that that rebuttal carried an inferred retroactive effect which required that that pension payments be "undone" to the "*true date of death*" as determined by the Registrar of Civil Status in April 2014 to have occurred on September 11, 2007[67] .

72. The appeal court's inference of retroactivity arising from the rebuttal of the presumption of life was said to have been found in the court's "*consideration of the whole of the treatment of absentees in the Code*[68]". The Court of Appeal of Québec then proceeded by analogy to compare the treatment in law of absentees for which no declaratory judgment of death is sought to the legislated treatment of rights of absentees and others when a declaratory judgment of death is sought and granted. The appeal court compared two different legislative policies and held that the articulated legislative choices should dictate the policy to be applied by when the legislature's policy choice as enacted shows that there are distinctions in the legislative choices made:

> "These provisions suggest strongly to me that, in our case, the effects of the rebuttal of the presumption in article 85 should be retroactive to the true date of death, *i.e.* September 11, 2007, as the legislature prefers, with noted exceptions, to give effect to the true date of death when it is known[69]. (the emphasis is ours)

73. By doing so and notwithstanding that the legislature did not provide for any express retroactivity to any date with respect to an absentee whose death is proven but no declaration of death is sought, the appeal court found and held that the legislature made the policy choice to i)

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66 Appeal Decision, Appellant's Record, Vol I, Tab 1, page 19, at paragraphs 58 and 60. See also article 102 C.C.Q.

67 Appeal Decision, Appellant's Record, Vol I, page 20, at paragraphs 58 to 64.

68 Appeal Decision, Appellant's Record, Vol I, page 22, at paragraphs 74 and 75.

69 Appeal Decision, Applicant's Record, Vol I, Tab I, page 22 at paragraph 75.

give the rebuttal of the presumption of life a retroactive effect to the "true date of death"; or, that ii) the policy applicable in the case the rebuttal of the presumption of life consider the "true date of death".

74. The Court of Appeal of Québec concluded on the issue of the presumption of life and Roseme's entitlement to pension payments as follows:

> "The better view, in keeping with the rebuttable character of the presumption in article 85 and its protective purpose, is that Mr Roseme's entitlement under the Plan ended when, as he had agreed in the Memorandum of Election, "my death occurs". While the payments were due while he was absent and presumed to be alive, that entitlement lapsed on the true date of death, with a right to reimbursement for overpayment for the period during which he was presumed to be alive. Indeed, to allow Ms Threlfall to retain the payments made without cause between 2007 and 2013 would result in her unjust enrichment at the expense of the University." [70] (the emphasis is ours.)

75. Having already determined that permitting Ms. Threlfall to retain the payments made to Mr. Roseme during the currency of the presumption of life would result in unjust enrichment, the appeal court turned its mind to considering whether there was any basis in law for ordering restitution of the payments made between 2007 and 2013[71]. No unjust enrichment analysis was carried out by the Court of Appeal of Québec.

A Right to Restitution

76. The appeal court confirmed that Carleton was required to meet the *"traditional requirements*" as set out in articles 1491 and 1492 CCQ in order to oblige Threlfall to restitute the pension payments on the basis of the rules for the "receipt of payment not due"[72]. Those requirements are that:

a) there must be a payment by the *solvens* (*i.e*. the payor, here the University) to the *accipiens* (*i.e*. the payee, here the absentee Roseme, as represented by Ms

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70 Appeal Decision, Applicant's Record, Vol I, Tab 1, page 24, at paragraph 81.

71 Appeal Decision, Applicant's Record, Vol I, Tab 1, page 24, paragraphs 81 and 82.

72 Appeal Decision, Appellant's Record, Vol I, Tab 1, pages 25 to 30, at paragraphs 83 to 110 generally, and at paragraph 89 specifically.

Threlfall);

b) that payment must be made in the absence of a debt; and,

c) the payment must be made by the *solvens* in error or to avoid injury while protesting that he or she owes nothing[73]. (the emphasis is in the Court of Appeal of Québec reasons)

77. The Court of Appeal of Québec found and held that:

a) there were indeed payments made by Carleton to Roseme[74];

b) there was a debt owed by Carleton to Roseme between 2007 and 2013 because Carleton had a contractual obligation based on a valid cause to make pension payments while Roseme was alive and was presumed to be alive pursuant to article 85 C.C.Q.[75]; and,

c) Carleton had not paid in error or under protest, but with the knowledge that the payments were due and payable because of the presumption of life and the terms of the Retirement Plan, and that, "*at best, its "protest" was a disagreement with the legislature that a presumption should apply in like circumstances*"[76];

These three findings taken together led the Court of Appeal of Québec to conclude that Carleton had not met and did not meet the requirements for articles 1491 and 1492 C.C.Q. to apply, with the foreseeable result that restitution should be denied and that its claims should be dismissed[77].

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73 Appeal Decision, Appellant's Record, Vol I, Tab 1, page 26, at paragraph 89.

74 Appeal Decision, Appellant's Record, Vol I, Tab 1, pages 26 and 27, at paragraph 92.

75 Appeal Decision, Appellant's Record, Vol I, Tab 1, page 27, at paragraphs 96 and 97.

76 Appeal Decision, Appellant's Record, Vol I, Tab 1, page 29, at paragraphs 106 to 108.

77 Appeal Decision, Appellant's Record, Vol I, Tab 1, page 29, at paragraph 109: "*To conclude on this point, it is plain to me that the traditional requirements under article 1491 present an obstacle to saying that the "receipt of a payment not due" is the source of an obligation on Ms Threlfall to make restitution of the payments received between 2007 and 2013. At the time of*

78. Notwithstanding having found that Carleton did not meet the requirements for restitution pursuant to articles 1491 and 1492 C.C.Q., the appeal court "*turned to the problem of identifying the source of the obligation to make restitution given that, on their face, articles 1491 and 1492 appear not to apply*"[78], because it had already decided that "*it would be unfair that Ms. Threlfall retain the benefits wrongly conferred on her by the University*"[79], when the benefits were not considered to be have been conferred for any reason other than Carleton's obligations at law and under contract.

79. The appeal court held that even though the requirements of articles 1491 and 1492 C.C.Q. for the restitution of a payment not due were not met due to the pension payments were not made in error and an obligation to pay having existed when the payments were made, the "*obligation to make restitution can be likened to that remedy*"[80]. The court went on to reason that,

> "[t]he civil law recognizes, beyond the specific instances referred to in article 1491 C.C.Q., an obligation on the *accipiens* to make restitution of a payment the cause of which has been subsequently expunged by operation of law. In other words, the whole of the law relating to the "receipt of a payment not due" is not found in the text of articles 1491 and 1492 C.C.Q."[81]

80. The appeal court then unmoored the remedy of restitution of a payment not due from its codified statement as provided by articles 1491 and 1492 CCQ and held that:

> "rules on the "receipt of a payment not due" should be interpreted to recognize this remedy as the source of the obligation to make restitution, notwithstanding the absence of debt and of error at the time of payment by the University. If the solvens can establish that the payment was made without cause, retrospectively, the rules on the receipt of a payment not due should be read to fashion a remedy in order to avoid the accipiens enriching himself or herself unjustly. Indeed in this case, the University has conferred a benefit upon Ms Threlfall which, once it was later revealed that Mr Rosme was dead at the time of payment, should be repaid to avoid her being enriched without proper cause. (the emphasis is ours)

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the payments, there was a valid debt owed by the University and the University was not mistaken in making the payment."

78 Appeal Decision, Appellant's Record, Vol I, Tab 1, page 29, at paragraph 110.

79 Appeal Decision, Appellant's Record, Vol I, Tab 1, page 29, at paragraph 110.

80 Appeal Decision, Appellant's Record, Vol I, Tab 1, page 32, at paragraph 120.

81 Appeal Decision, Appellant's Record, Vol I, Tab 1, page 32, at paragraph 121.

81. By doing so, the Court of Appeal of Québec held that the requirements of article 1491 C.C.Q., "***<u>may be adjusted</u>*** *to encompass this variant on the remedy for the receipt of a payment not due. The obligation to make restitution in such circumstances should not always be constrained by the rule on error or absence of debt*."[82]

82. The appeal court then reconsidered its earlier finding that article 1699 CCQ and its language regarding the restitution of prestations did not operate[83], and determined that:

> "In the circumstances, the law of payment and unjust enrichment, along with the echo of the *condictio ob causam finitam* in the law relating to the receipt of a payment not due, command that the funds be repaid. I am inclined to read the reference in article 1699 C.C.Q. to property received "without right / sans droit" expansively where the source of the obligation to make restitution can be plainly identified elsewhere in the law."[84]

83. Restitution was thus ordered and the Court of Appeal of Québec confirmed the trial judge's conclusion to order the reimbursement of the pension benefits to Carleton[85].

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82 Appeal Decision, Appellant's Record, Vol I, Tab 1, pages 34 and 35, at paragraph 129.

83 Appeal Decision, Appellant's Record, Vol I, Tab 1, page 31, at paragraphs 116 and 117.

84 Appeal Decision, Appellant's Record, Vol I, Tab 1, page 35, at paragraph 131.

85 Appeal Decision, Appellant's Record, Vol I, Tab 1, page 36, at paragraph 132.

PART II – STATEMENT OF QUESTIONS IN ISSUE

84. The Appellant submits that the questions in issue are as follows:

Question 1 Did the Court of Appeal of Québec make reviewable errors of law or of mixed fact and law in its interpretation of Roseme's entitlement to pension payments:

a) pursuant the Retirement Plan?; and,

b) during the time he was an absentee pursuant to article 85 C.C.Q.?

Question 2 Did the Court of Appeal of Québec make reviewable errors of law or mixed fact and law in its interpretation of the law applicable to the restitution of a thing not due as set out in articles 1491, 1492 and 1699 CCQ by "adjusting" the requirements set out by the legislature to craft a remedy in restitution based on the obligation to make restitution of a payment not due when the payment was, in fact, due and not paid in error?

PART III – STATEMENT OF ARGUMENT

A. The Standard of Review:

85. The applicable standard of review in this case is correctness. Pure errors of law are characterized as errors independent of the factual matrix at issue. The application of the incorrect legal test or the application of the incorrect legal principle to a set of facts constitutes an error of law[86]. Errors in statutory interpretation are also errors of law[87].

86. The first step in contractual interpretation is the application of the "clear act rule". To do so, the court must examine the wording of the contract. If the wording is clear, that ends the analysis — a contract without ambiguity is to be applied, not interpreted. Proceeding to interpret an unambiguous contract constitutes a reversible error[88].

> [113] For an interpretation to be necessary, the contract must contain an ambiguity (Bisignano v. Système électronique Rayco ltée, 2014 QCCA 292, at para. 11 (CanLII)). An ambiguity is present where the contract's wording would raise a doubt as to its meaning in the mind of a reasonable person (F. Gendron, L'interprétation des contrats (2nd ed. 2016), at p. 27). The mere fact that the parties tender competing interpretations of a clause does not, by itself, give rise to an ambiguity (J.-L. Baudouin and P.-G. Jobin, Les obligations (7th ed. 2013), by P.-G. Jobin and N. Vézina, at No. 413). Instead, in determining whether an ambiguity exists, the trial judge engages in an analysis that is "superficial" in the sense that the primary focus is on the wording of the contract. Recourse to arts. 1425 to 1432 C.C.Q. ("Interpretation of contracts") at the first stage of the analysis is accordingly an error in principle (D. Lluelles and B. Moore, Droit des obligations (2nd ed. 2012), at No. 1571; Baudouin and Jobin, at No. 413; J. Pineau, D. Burman and S. Gaudet, Théorie des obligations (4th ed. 2001), by J. Pineau and S. Gaudet, at pp. 399-400; see also Turenne v. Banque Nationale du Canada, [1983] J.Q. no 354 (QL) (C.A.), at para. 26).
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> […]
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> [116] Unlike the common law, art. 1425 requires the interpreter to give the parties' common intention precedence over the wording of the contract. Article 1425's interpretive starting point "is thus the reverse from that of the common law, according to which one must seek the objective meaning of the words used in contracts in the context . . . in which they are used" (S. Grammond, A.-F. Debruche

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86 *Housen v Nikolaisen*, 2002 SCC 33 at paragraph 33.

87 *Heritage Capital Corp. v Equitable Trust Co*., 2016 SCC 19 at paragraph 23.

88 *Uniprix Inc. v Gestion Gosselin Bérubé*, 2017 SCC 43, at paragraphs 112 to 117.

> and Y. Campagnolo, Quebec Contract Law (2011), at para. 284 (emphasis added); regarding the common law approach, see Sattva Capital Corp. v. Creston Moly Corp., 2014 SCC 53 (CanLII), [2014] 2 S.C.R. 633, at paras. 57-58). In ascertaining the parties' common intention, the trial judge is guided by the interpretive rules laid out in arts. 1425 to 1432 ("Interpretation of contracts") and 1434 to 1439 ("Binding force and content of contracts") of the C.C.Q. At this stage, both the wording of the contract itself and extrinsic evidence relating to, for example, the surrounding circumstances, preparatory documents, negotiations, usage and the parties' common intention and conduct may be considered. The approach at the second stage of interpretation is therefore highly contextual (Baudouin and Jobin, at Nos. 416 and 418-19).

87. Qualifying the intentions of the parties to a standard form contract of adhesion as being plain, and then inserting words into the contract to discern a common intention constitutes a reviewable error in principle and an error or law which may be extricated from the larger context of the contract at issue[89].

B) Question 1.A) - Did the Court of Appeal of Québec make reviewable errors of law or of mixed fact and law in its interpretation of Roseme's entitlement to pension payments pursuant to the Retirement Plan?

88. Roseme and Carleton entered into a Retirement Plan which, after Roseme's election in May 1996, was a pension plan which entitled him to pension payments in accordance with a "Life Only" payment plan. The relevant sections of the Retirement Plan stipulate as follows:

> 8.01 Normal Form of Pension
>
> The normal form of pension under the Plan for Members who terminate employment or return on and after July 1, 1993, is one which commences one month after the date of the Member's retirement, and is payable in monthly instalments during the Member's remaining lifetime, but guaranteed for a minimum of 60 months in any event.
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> 8.02 Optional Forms of Pension
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> (a) Members with Spouses

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89 *Ledcor Construction Ltd. v Northbridge Indemnity Insurance Co*., 2016 SCC 37, at paragraphs 36, and 46 to 48.

(i) If a Member has a Spouse at the date pension payments are to commence, the Member's pension shall be payable monthly in a reduced amount for the remaining lifetime of the retired Member, with 60% of the Member's reduced monthly pension continuing after the Member's death, for the Spouse's remaining lifetime. Such pension shall be the Actuarial Equivalent of the Member's normal form of retirement benefit.

(ii) In lieu of the pension described in Section 8.02(a)(i) above, a Member who has a Spouse may elect to receive a single life pension pursuant to Section 8.01 or an optional form pursuant to Section 8.02(b), provided, however, that an election providing for a continuation of less than 60% of a Member's pension to his or her surviving Spouse shall not be valid unless it is accompanied by a waiver filed by the Spouse on the form prescribed under the *Pension Benefits Act* for that purpose.

(b) Other Members

In lieu of the normal form of pension payable under the Plan in accordance with Section 8.01 above, or the option form in Section 8.02(a) above, a Member may elect prior to commencement of the Member's pension to have the payment mode on a different basis by filing with the University prior to such commencement an election on forms provided by the University for that purpose. Such election may be amended or cancelled by written notice to the University prior to commencement of the Member's pension while the Member is a participant in the Plan.

The Member may elect to have the pension paid in any of the following optional forms with the amount of the monthly payment to be adjusted to the Actuarial Equivalent of the Member's normal form of retirement benefit:

(i) Life Only

An increased monthly benefit which is payable for the remaining lifetime of the Member with such benefit ceasing with the payment for the month in which the Member's death occurs."[90] (the underline is ours)

[90] Exhibit P-1, Appellant's Record, Vol I, Tab 3, para 8.02(b)(i).

89. These sections distinguish between forms and amounts of pension payments as between reduced payment amounts to a retiree with a spouse who has elected to have spousal pension benefits, and payment amounts where no spousal pension benefit is elected. They do not inform the meaning of the words "*remaining lifetime*", "*life*", or "*death*" used in the Retirement Plan itself with respect to the moments in time when a "*remaining lifetime*" or "*life*" ends.

90. The Retirement Plan itself contains a definition provision at its Section 1. The words and expressions "*life*", "*remaining lifetime*", and "*death*" are not defined.

91. The Retirement Plan contains a construction clause which stipulates that it is to be "*governed and construed in accordance with the laws of the Province of Ontario*[91]". No evidence as to the laws of Ontario was led a trial.

92. The contractual language describing the event which triggers the end of an entitlement to pension payments and the correlative end of the Carleton's obligation to make pension payments for a "Life Only" pension is alternatively described as the pensioner's "*death*" or the end of the pensioner's "*remaining lifetime*" or "*life*".

93. No language in the Retirement Plan suggests any potential refinement of any of those concepts beyond the words and expressions used.

94. The Retirement Plan does not contemplate that a pensioner's legal existence could continue in circumstances where the pensioner's physical existence could be uncertain. It similarly does not contemplate or leave any impression that adherents to the Retirement Plan had turned their minds as to when Carleton's obligation to make pension payments would end based on distinctions between the date when proof of a pensioner's death is made would not coincide with the "*true date of death*" as determined by a government official as set out in an Act of Death issued in a place other than Ontario.

95. There is quite simply no indication in the Retirement Plan that Roseme's "*remaining*

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[91] Exhibit P-1, Appellant's Record, Vol II, Tab 4, at page 158, at section 14.09(3).

lifetime" or "*life*" would end at a "*true date of death*" as opposed to the date when his death was proven and his legal existence formally recognized by the State by the certification and issue of an Act of Death.

96. The appeal court erred in law when it determined that the common intention set out in the Retirement Plan referred to the concept of "*true date of death*" used in Québec legislation[92]. By reading in these words as a specific expression found at article 96 C.C.Q. into the Retirement Plan the Court of Appeal of Québec made an error in principle and in law.

97. Threlfall submits that a proper application of the Retirement Plan to the facts must be lead to the conclusion that "*death*" could not occur while someone's was an absentee and their legal and physical existence is uncertain. Hence, an absentee cannot be dead and must be considered to remain alive until the absentee's death is proven and recognized by the State by way of the issue of an Act of Death. It is at that moment – the date of the Act of Death – that a person's legal existence can be taken to ended and that they can be legally dead. The common intention discernible from the words of the Retirement Plan is that Carleton had the obligation to make pension payments until such time as Roseme's death was established by an Act of Death irrespective of the date of death which may be inscribed in the Act of Death.

Question 1.B) - Did the Court of Appeal of Québec make reviewable errors of law or of mixed fact and law in its interpretation of Roseme's entitlement to pension payments during the time he was an absentee pursuant to article 85 C.C.Q.?

98. The appeal court properly and correctly held that,

> "In article 85, the law thus creates a presumption to obviate that uncertainty: as an absentee, Mr Rosme was presumed to be alive unless proof to the contrary was made. Proof of death did not come until 2013 and was not formally established until 2014 with the certification of the act of death."[93]

99. Where the appeal court erred is in holding that the rebuttal of the presumption of life prescribed at article 85 C.C.Q. carried with it a retroactive effect and retroactively relieved

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92 See articles 94 and 96 C.C.Q.

93 Appeal Decision, Appellant's Record, Vol I, Tab 1, page 19, at paragraph 61.

Carleton from their obligations owed to Roseme during the operation of the presumption of life:

> [71] In our case, as long as the presumption operated, and Mr Rosme was presumed to be alive, the University had the obligation to pay his pension. This was protective of his entitlement under the "life only" option in the Retirement Plan, but did not create a right that he did otherwise not have. Accordingly, when the payments were made between September 2007 and July 2013, they were presumptively valid, but subject to review if proof of death operated to rebut the presumption.
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> [72] The presumption was rebutted when proof of death was made at which time the uncertainty as to Mr Rosme's existence ended. Until that time, his property was administered by Ms Threlfall, as tutor to the absentee. When proof of death was made, the presumption ceased to operate (article 85) and the tutorship to the absentee was terminated, as it served no further purpose (article 90 C.C.Q.).
>
> [73] But if the presumption held until the certification of the act of death, that deed established that death had occurred on September 11, 2007.

100. The appeal court inferred that the rebuttal of the presumption of life of an absentee has a retroactive effect based on its cursory "*consideration of the treatment of absentees in the C.C.Q. as a whole*" and found that "*an analogy can be drawn with the effects of a declaratory judgment of death for an absentee*."[94] This consideration led the appeal court to infer retroactivity because,

> "These provisions [declaratory judgment of death] suggest strongly to me that, in our case, the effects of the rebuttal of the presumption in article 85 should be retroactive to the true date of death, i.e. September 11, 2007, as the legislature prefers, with noted exceptions, to give effect to the true date of death when it is known.[95]"

101. The C.C.Q. contains the legislature's policy decisions on the regulation of matters concerning an absentee. The Minister's Comments issued at the time of the reform of the C.C.Q. show that the legislature had intended to significantly change the law as it pertained to absentees by establishing a presumption of life where previously there was a presumption of death[96]. While doing so, the legislature provided for specific instances where retroactive effects might occur.

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94 Appeal Decision, Appellant's Record, Vol I, Tab 1, page 22, at paragraph 74.

95 Appeal Decision, Appellant's Record, Vol I, Tab 1, page 22, at paragraph 75.

96 Jean-Louis Baudouin and Yvon Renaud, *Code Civil du Québec Annoté* (Montréal: Wilson & Lafleur, 2005) 8th ed, Vol 1, pages 153 to 187, at page 154.

102. The appeal court correctly identified the limited circumstances set out in the C.C.Q. which provide for retroactive effect in the event of a declaratory judgment of death. Those specific instances are set out and described at article 96 C.C.Q., in Section II of the Code's Chapter Three titled "Absence and Death". The policy choices made for absentees which do not necessarily lead to or require a declaratory judgment of death are contained in Section I of the Code's Chapter Three[97].

103. In the case of a declaratory judgment of death the court fixes the date of death of the absentee as either the date upon expiry of seven (7) years from the disappearance of the person, or an earlier date if the presumptions drawn from the circumstances allow the death of a person to be held to be certain at that date[98].

104. A declaratory judgment of death puts an end to the matrimonial or civil regime between the absentee and his/her spouse. In those cases the net family patrimony is determined as of the date of death of the spouse, that is, the date of death fixed by the court in the declaratory judgment of death unless the date of death is proved to precede the date fixed by the declaratory judgment of death[99].

105. In those cases where the date of death can be proven to precede that fixed by the court in the declaratory judgment of death, then the court can dissolve the marriage or civil union retroactively to the "*true date of death*" if that true date of death has been proved to the court's satisfaction. The date of opening of the succession can also be fixed by the court to the "*true date of death*" when there has previously been a declaratory judgment of death and an earlier "*true date of death*" can be subsequently proven[100].

106. Other than in these two specific situations in the C.C.Q., there is no provision for retroactive effects pertaining to an absentee or his/her affairs contained in the Chapter on

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97 Articles 84 to 92 C.C.Q.

98 Article 94 C.C.Q.

99 Article 96 C.C.Q. Pursuant to article 417 C.C.Q., the value of the net family patrimony is determined on the "date of death" of the spouse.

100 Article 96 C.C.Q.

absentees. For example, an application for the dissolution of marriage or a civil union is not retroactive when the absentee's death has not been determined by a declaratory judgment of death[101]. Similarly, the succession of an absentee is opened by the absentee's death unless there is a declaratory judgment of death which fixes another date[102].

107. The Court of Appeal of Québec is incorrect in law when it states:

> "These provisions [declaratory judgment of death] suggest strongly to me that, in our case, the effects of the rebuttal of the presumption in article 85 should be retroactive to the true date of death, i.e. September 11, 2007, as the legislature prefers, with noted exceptions, to give effect to the true date of death when it is known."[103]

108. The legislature did not provide for retroactivity in all cases where a "*true date of death*" may be known.

109. The legislature provided for retroactivity in two (2) very specific cases of a declaratory judgment of death which fixes the date of death to a "*true date of death*" based on evidence tendered before it.

110. It is therefore incorrect to state as the appeal court did that the legislature "*prefers to give effect to the true date of death when it is known*"[104] when it clearly does not do so. Retroactivity is possible only in the circumstances of a declaratory judgment of death pursuant to article 96 C.C.Q.

111. No declaratory judgment of death was sought or granted in this case. As such, the requirements to be met for retroactivity to potentially be ordered were not met.

112. Threlfall submits that the Court of Appeal of Québec erred in law when it declared that the rebuttal of the presumption of life contained at article 85 C.C.Q. lead to the retroactive undoing of

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[101] Article 89 C.C.Q.

[102] Article 613 C.C.Q.

[103] Appeal Decision, Appellant's Record, Vol I, Tab. 1, page 22, at paragraph 75.

[104] Appeal Decision, Appellant's Record, Vol I, Tab 1, page 22, at paragraph 75.

Roseme's right to receive pension payments between his disappearance and the date his death was certified by the State by the issue of the Act of Death on April 3, 2014.

Question 2 - Did the Court of Appeal of Québec make reviewable errors of law or mixed fact and law in its interpretation of the law applicable to the restitution of a thing not due as set out in articles 1491, 1492 and 1699 CCQ by "adjusting" the requirements set out by the legislature to craft a remedy in restitution based on the obligation to make restitution of a payment not due when the payment was, in fact, due and not paid in error?

113. This Court has previously identified the principles, the purpose and the conditions of application of the remedy of restitution for a payment not due in *Amex Bank of Canada v. Adams*[105]. In that decision this Court wrote as follows:

> [29] The receipt of a payment not due provisions (arts. 1491, 1492 and 1554 para. 1) codify the principle that [TRANSLATION] "[a]ny person is required to pay only what he or she owes, and owes only what he or she has an obligation to pay" (D. Lluelles and B. Moore, *Droit des obligations* (2nd ed. 2012), at p. 725). Receipt of a payment not due allows someone to recover an amount paid in excess by creating an obligation on the part of the party who received the amount paid without debt, to return that amount.
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> [30] In the contractual context, the absence of an obligation or debt can be general or specific. It is general when all the prestations received or executed are invalid, for example if a court nullifies an agreement because a formation requirement is missing (art. 1422 *CCQ*). It is specific when only part of the prestations received or executed are invalid, for example if a clause of a contract is nullified or, as pleaded here, certain prestations of the contract were demanded from a party who did not actually owe them (art. 1554 *CCQ*).
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> […]
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> [32] The question to be determined is if a payment, in whole or in part, is without basis — whether an obligation to pay ever existed. The Court here is limited to determining if the conversion charges are the object of a civil obligation binding the cardholders. According to the principles applicable to receipt of a payment not due, the basis for restitution is not the commission of a wrongful act, and the potential remedy is not damages. Rather, the basis for restitution is that there never existed an obligation to perform the prestations, and the remedy is a return of any prestations made without obligation (arts. 1492 and 1699 para. 1). Neither fault, nor statutory violations — here, for example, of the *Bank Act*'s disclosure requirements — nor the notion of compensation play any role in determining whether the receipt of a payment not due provisions apply. As a result, the absence of prejudice to the

[105] *Amex Bank of Canada v Adams*, 2014 SCC 56.

> class action plaintiffs cannot be pleaded, and any rules regarding disclosure in the *Bank Act* are irrelevant. Amex's argument that the *Bank Act* does not contain any civil remedies for violations of its provisions has no bearing on whether the receipt of a payment not due provisions apply. (the emphasis is ours).

114. The remedy of restitution of a payment not due was codified by the National Assembly in articles 1491 and 1492 C.C.Q. The codification of the remedy and the words used in setting out the requirements reflect the legislative choice as to when such a remedy may be available in light of established law in Québec. The Minister's comments issued in connection with the reform of the C.C.Q. in 1994 confirm that article 1491 "*traite des conditions de la réception de l'indu comme source autonome des obligations*" while reformulating the former provisions of the Civil Code of Lower Canada[106].

115. The conditions for the availability of the remedy of restitution of a payment not due set out at article 1491 C.C.Q. by the National Assembly are exhaustive. The courts below both properly and correctly identified that those requirements are: a) a payment by the *solvens* to the *accipiens*; b) that the payment be made in the absence of a debt; and c), that the payment by *solvens* was made in error or to avoid an injury while protesting that he or she owes nothing[107].

116. The appeal court described these conditions precedent for the granting of the remedy as the "*traditional approach*" to a demand for the restitution of a payment not due. The appeal court fails to take into account the source of the conditions applied through the jurisprudence and confirmed by the Minister's Comments: the conditions set out in article 1491 C.C.Q. are the result of an intentional legislative choice which exhaustively identifies the conditions necessary for the availability of the remedy at law. The satisfaction of the legislated conditions is not the result of a *"traditional approach".*

117. Applying what this Court has established in *Amex Bank of Canada*, *supra*, the operative question and the focus of the inquiry in this case is as follows: were the pension payments made

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[106] Jean-Louis Baudouin and Yvon Renaud, *Code Civil du Québec Annoté* (Montréal: Wilson & Lafleur, 2005) 8th ed, Vol 2, pages 1887 to 1893.

[107] Superior Court of Québec Judgment, Appellant's Record, Vol I, Tab 1, page 6, at paragraph 43; Appeal Decision, Appellant's Record, Vol I, Tab 1, page 26, at paragraph 86.

to Roseme between 2007 and the proof of his death on April 3, 2014, without basis? The Court of Appeal of Québec answered this question directly and repeatedly in its reasons: the pension payments were due and payable when they were made[108].

118. It follows that the inquiry as to the availability of the remedy of restitution of a payment not due ends once it is determined that the conditions for its availability are not met by the Plaintiff as was the case here.

119. The codification of the remedy of restitution for the payment not due and the described conditions precedent highlight that the legislature did not choose to provide the courts with the ability to "*adjust"* the requirements of article 1491 C.C.Q. to create a *"variant on the remedy for the receipt of a payment not due"*[109] which jettisons entirely the characteristic requirements of a payment in error or the absence of debt as conditions precedent for a judgment.

120. The Court of Appeal of Québec misinterpreted the law of restitution for the payment of a thing not due and created a new and distinct remedy by ignoring the explicit conditions for restitution set out in article 1491 C.C.Q.. The creation of such a remedy, if warranted, must be by the legislature and not by the courts.

121. The Court of Appeal of Québec made errors of law in its decision on appeal. Its conclusion as to restitution based on its "*adapted variant*" remedy of restitution of a payment not due couched in bald statements of unjust enrichment without any analysis of whether unjust enrichment occurred at all[110], should be quashed.

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[108] Appeal Decision, Appellant's Record, Vol I, Tab 1, page 28, at paragraph 98: "*Strictly speaking, it cannot therefore be said that the payment was made without cause or in the absence of a debt. At the time of payment, the obligation to pay was intact, based on a valid cause. From 2007 to 2013, Mr Rosme's existence, as an absentee, was uncertain. At the time of each successive payment between September 10, 2007, and August 2013, Mr Rosme was, as an absentee, presumed to be alive. Until proof of death was made, the debt was valid and the monthly payments were due."*

[109] Appeal Decision, Appellant's Record, Vol I, Tab 1, pages 34 and 35, at paragraph 129.

[110] Articles 1493 and 1494 C.C.Q.

122. The Court of Appeal of Québec properly noted in its decision that Carleton did not meet the requirements for there to be a judgment for the restitution of pension payments validly made while Roseme's legal personality was alive pursuant to the presumption of life contained in article 85 C.C.Q. Its efforts to create a new remedy which is not provided for by the C.C.Q. and to obviate its finding that Carleton fails to meet the requirements for restitution should be disregarded as errors of law.

PART IV – SUBMISSION ON COSTS

123. The Appellant submits that the Appellant should be entitled to her costs of the proceedings below and before this Court.

PART V – ORDER SOUGHT

124. The Appellant submits that this Court should grant this appeal and dismiss the Respondent's Motion to Institute Proceedings.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 18th day of October, 2018.

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PART VI – TABLE OF AUTHORITIES & STATUTORY PROVISIONS