

SCC File No.:

**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 Rosme and as tutor to the absentee George Rosme**

**APPLICANT
(Appellant)**

-and-

CARLETON UNIVERSITY

**RESPONDENT
(Respondent)**

**APPLICATION FOR LEAVE TO APPEAL
(Pursuant to Section 40 of the *Supreme Court Act*, and
Rule 25 of the *Rules of the Supreme Court of Canada*)**

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APPLICANT'S MEMORANDUM OF ARGUMENT

PART I – OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. The proposed appeal raises two questions. The first is a novel question with respect to the presumption of life of an absentee and the retroactive effect of death on pension payments validly made during the currency of the presumption of life. The second question is whether the well understood principles and requirements for the remedy of the restitution of a payment can be jettisoned entirely in favour of the creation of a new legal obligation and remedy departing from established legislative policy as set out in the *Civil Code of Quebec*.
2. The novel question regarding the presumption of life raises the issue of whether pension payments validly made during the life of an absentee should be retroactively declared as not being payable when the legislative policy set out in the *Civil Code of Quebec* would appear to provide otherwise.
3. The decision of the Quebec Court of Appeal recognizes the validity and effect of the presumption of life by recognizing that pension payments made during the life of an absentee are properly made without error by the payor. However, faced with the apparent silence of the *Civil Code of Quebec* on the effect of death, the Quebec Court of Appeal erroneously applies a policy on the effects of death borrowed from a separate, distinct and inapplicable section of the legislation.
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 *Civil Code of Quebec* can be disregarded entirely in favour of a legally unmoored approach to the restitution of payments not due based on an *ad hoc* “adjustment” to the explicit conditions precedent required for the remedy of restitution to be granted.

5. The Quebec Court of Appeal erred in law by creating a new obligation at law as well as a correlative restitutionary remedy which depart from the well-established and consistent application of the law of restitution set out in articles 1491 and 1492 CcQ 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 Quebec Court of Appeal represents a marked and dangerous departure from the accepted and “traditional” interpretation of articles 1491 and 1492 CcQ which affects the whole of litigation within the Province of Quebec in which a restitutionary remedy is sought.
7. The definition of the source of the obligation to make restitution which had been delineated through years of constant Quebec and Supreme Court of Canada jurisprudence based on a clear statement of the law contained in the CcQ has now been disregarded in favour of uncertainty and unpredictability.
8. The uncertainty created by the Quebec Court of Appeal’s decision raises questions which by reason of their public importance and importance in law ought to be decided by the Supreme Court.

B. Statement of Facts

9. The Applicant Lynne Threlfall is the sole heir to the Estate of the deceased George Roseme and former tutor to the absentee George Roseme [“Roseme”].
10. The respondent Carleton University is a post-secondary institution located in the City of Ottawa [“Carleton”] and Mr. Roseme’s former employer.
11. The late Roseme was a professor at Carleton until his retirement on July 1, 1996. The litigation and the proposed appeal arise out of events following Roseme’s retirement and his disappearance on September 10, 2007, while still entitled to receive monthly pension payments from Carleton.

12. Roseme had subscribed to Carleton's Retirement Plan prior to his retirement and had elected to draw a "single life" pension as that pension option is defined in the Retirement Plan. Pursuant to that election, Roseme was entitled to receive an increased monthly benefit which is payable for his remaining lifetime.
13. Carleton admitted at trial that it is was obligated to pay Roseme's pension in accordance with the retirement plan text until Roseme's death.
14. Payment in accordance with the "retirement text", however, meant accepting Roseme's right to receive monthly pension payments and required Carleton to continue paying the monthly pension amounts "*during [Roseme's] remaining lifetime*".
15. During his retirement Roseme resided on a 150-acre parcel of brush and farm land located in La Pêche outside of the City of Gatineau. On or about September 10, 2007, by then diagnosed as being in the early stages of dementia, Roseme left his home to take a walk and was neither heard from nor seen again despite large ground and aerial search efforts undertaken to find him. Roseme was an absentee.
16. Roseme's remains were found in skeletal form on or about July 22, 2013, 5 years, 10 months and 12 days after he was last seen. The remains were identified by being Roseme's remains by the Coroner through the use of dental records.
17. On July 22, 2013, the Coroner fixed Roseme's date of death in its "*Autorisation de disposition du corps*" form as "*indéterminée*" although likely in 2007. The Act of Death pertaining to Mr. Roseme was signed by the Registrar of Civil Status approximately 7 months later, on February 17, 2014. 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' determinations as to Roseme's true date of death are not the same as those made by

the Coroner on the same issue.

Roseme's Estate and its Administration

18. When Roseme disappeared on September 10, 2007, he had an estate valued approximately at \$ 350,000 comprised of bank accounts, contractual rights, immovables and debts which needed to be administered during his absence.
19. The Applicant Threlfall had cohabitated with Roseme as "common law" spouses during the period of 1983 to 1994, and the two remained close friends once their relationship had ended.
20. On February 4, 2008, the Superior Court instituted a tutorship to the absentee Roseme upon Threlfall's application. Threlfall was designated as tutor to Roseme's property during his absence. At the end of her administration as tutor to the absentee Roseme, Roseme's estate was inventoried at a value of \$ 504,244.67.
21. Threlfall administered Roseme's property including his pension installment payments paid by Carleton in performance of the Retirement Plan. Carleton meanwhile, had been depositing Roseme's pension payments directly into one of Roseme's bank accounts without Threlfall's intervention.

Carleton, Threlfall and the Pension Payments during Administration

22. On March 18, 2009, Carleton wrote to Threlfall and advised that it intended to and would cease making pension payments to Roseme in May 2009 because it believed that Roseme was dead although it had no proof of Roseme's death.
23. On May 15, 2009, Threlfall's notary wrote to Carleton and informed Carleton that Roseme was and is presumed alive for a period of seven (7) years following the date

of his disappearance in accordance with article 85 of the *Civil Code of Quebec*.

24. Carleton had ceased making the monthly pension installment payments to Roseme's estate at the end of May 2009, but reinstated the pension payments in December 2009 due to its legal obligation to make those payments pursuant to the presumption of life applicable to Roseme.

The Trial Decision

25. The trial judge held Roseme was in fact and in law an absentee from the moment of his disappearance pursuant to article 84 of the *Civil Code of Quebec* with the effect that presumption of life contained in article 85 of the *Civil Code of Quebec* applied¹. 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 until either a declaratory judgment of death was issued, the 7 year presumption of life expired, or proof of death was established before that date².

26. 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 contract became pension payments made in "error" once the presumption of life ceased to apply³.

27. 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.

¹ Superior Court of Quebec Judgment, February 2, 2016, at paragraphs 21 and 22.

² Ibid, at paragraph 33.

³ Ibid, at paragraph 38.

28. The trial judge considered the three (3) necessary requirements and conditions precedent for a restitutionary remedy relating to a payment not due as set out at articles 1491 and 1492 of the *Civil Code of Quebec* and held that those requirements and conditions precedent had been met⁴. More specifically, the trial judge held that: a) Carleton had made a payment to Roseme's estate; b) the payments were not due as there was no debt; and, c) the pension payments were made in error.

29. The trial judge then applied this Court's decision in *Abel Skiver Farm Corp. v. Town of Ste-Foy*, [1983] 1 S.C.R. 403, at page 423, and held that the principle of retroactive restitution of undue payments in the context of municipal taxation should be applied and ordered all pension payments made to Roseme during his absence to be restituted to Carleton⁵.

30. The Applicant appealed from the decision of the Superior Court of Quebec.

a. The Quebec Court of Appeal Decision

31. The Quebec Court of Appeal granted Threlfall's appeal in part and reduced the quantum of the restitution ordered but maintained the core of the trial decision albeit on different grounds⁶.

Restitution Issues

32. The Quebec Court of Appeal recognized at the outset of its decision that the restitutionary remedy for the payment of a thing not due "*is generally understood to require, as preconditions to restitution*", that the relevant payment be "not due" at the time it was made and that it be paid in error or under protest⁷.

⁴ Ibid, at paragraphs 43 to 47

⁵ Ibid, at paragraphs 48 to 52

⁶ Quebec Court of Appeal Decision, October 23, 2017, at paragraph 144.

⁷ Ibid, at paragraph 8

33. The Quebec Court of Appeal held that the pension payments due to Roseme during the application of the presumption of life were legally due and payable at the time they were made⁸.
34. The Court of Appeal also held that the pension payments were due and compellable had Carleton maintained the cessation of pension payments and the fact that Roseme's death was proved in 2013 or 2014 did not change the fact the pension payments were due at the time they were made⁹.
35. Similarly, the Court of Appeal held that the payments made by Carleton were not made in error or under protest. There had been no mistake made by Carleton on the facts: it had understood that it was required to make the pension payments because of the effect of the presumption of life¹⁰. As to protest, the Court of Appeal found that at best the "protest" from Carleton was its disagreement with the legislature and the *Civil Code of Quebec*¹¹.
36. The Quebec Court of Appeal acknowledged that Carleton had not met any of the preconditions for restitution as required by articles 1491 and 1492 of the *Civil Code of Quebec*:
- "[...] 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 the payments, there was a valid debt owed by the University and the University was not mistaken in making the payment."*¹²

⁸ Ibid, at paragraph 107

⁹ Ibid, at paragraph 99

¹⁰ Ibid, at paragraphs 105 to 108

¹¹ Ibid, at paragraph 108

¹² Ibid, at paragraph 109.

37. Yet, it ordered the restitution of all pension payments with retroactive effect to September 11, 2007. The reasoning of the Court of Appeal for its judgment was summarized at paragraph 9 of its decision as follows:

- b. [9] 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.

38. To arrive at this conclusion the Court of Appeal held that it was appropriate for it to “*adjust*” the requirements of article 1491 of the *Civil Code of Quebec* to provide for a variant on the remedy for the receipt of a payment not due¹³, so as to avoid perceived unjust enrichment.

39. The Court of Appeal held that notwithstanding that there was a valid cause for the pension payments when they were made¹⁴, the rules on the “receipt of a payment not due” should be interpreted to recognize this remedy as the source of the obligation to

¹³ Ibid, at paragraph 129.

¹⁴ Ibid, at paragraph 98

make restitution, notwithstanding the absence of debt and of error at the time of payment by the University¹⁵.

Presumption of Life Issues

40. The Court of Appeal recognized that article 85 of the *Civil Code of Quebec* contains a presumption of life for an absentee. However, the Court of Appeal held that that presumption of life is but a rule of evidence rather than a substantive right, and only a temporary one at that¹⁶.

41. The Court of Appeal noted that “Article 85 does not specify that the presumption is rebutted with retroactive effect” but nevertheless maintained that retroactivity can be inferred from the whole treatment of absentees in the *Civil Code of Quebec*¹⁷.

42. The Court of Appeal then considers the legislative policy set out in the treatment of absentees in the event of a declaratory judgment of death and holds that those provisions suggest strongly that the effects of the rebuttal of the presumption in article 85 should be retroactive to “the true date of death, [...] as the legislature prefers, with noted exceptions, to give effect to the true date of death when it is known”¹⁸.

PART II – QUESTION IN ISSUE

43. The question in issue on this Application is whether the proposed appeal raises questions which by reason of their public importance and importance in law ought to be decided by the Supreme Court.

¹⁵ Ibid, at paragraph 123

¹⁶ Ibid, at paragraphs 68 and 70

¹⁷ Ibid, at paragraph 74

¹⁸ Ibid, at paragraph 75

PART III - ARGUMENT

44. The Applicant submits that the proposed appeal raises questions of public importance in the Province of Quebec because:

- a) The decision of the Quebec Court of Appeal throws the law of restitution generally and the law of restitution of a thing not due into a state of confusion by its marked and dangerous departure from well-established and well-understood law; and,
- b) That the interpretation of the presumption of life of an absentee and its impact on otherwise valid legal transactions occurring during the presumption of life is a novel issue which should be determined on the basis of the proper legislative policy set out in the *Civil Code of Quebec*.

Restitution of a Payment Not Due

45. The Quebec Court of Appeal recognizes in its decision that there are three (3) preconditions for restitution to be ordered as a remedy. Those requirements are set out at articles 1491 and 1492 of the *Civil Code of Quebec*.

46. This Court has recently elaborated on the bases of a restitutionary remedy in connection with the payment of a thing not due in *Amex Bank of Canada v. Adams*, 2014 SCC 56. As this Court has said, articles 1491, 1492 and 1554, para. 1 of the *Civil Code of Quebec* codify the principle that any person is required to pay only what he or she owes, and owes only what he or she has an obligation to pay". 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 amount¹⁹.

¹⁹ *Amex Bank of Canada v. Adams*, 2014 SCC 56, at paragraph 29

47. This Court noted that the question to be determined (in payment of a thing not due) is if a payment, in whole or in part, is without basis — whether an obligation to pay ever existed²⁰. 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 obligation²¹
48. The requirements for the restitutionary remedy ordered by the Quebec Court of Appeal are well settled, recognized by this Court, and were acknowledged repeatedly by the Quebec Court of Appeal in its decision²².
49. Notwithstanding the acknowledgement that the law is settled and that its conditions of application are “traditionally understood” to mean that the three preconditions referred to above must be met before restitution may be ordered, the Court of Appeal “adjusted the requirements” set out in article 1491 of the *Civil Code of Quebec* which have long been understood and applied, and recognized the remedy of the restitution of prestations as the source of the obligation to make restitution when there was valid cause for the payment until the presumption of life of an absentee was rebutted²³.
50. The Court of Appeal’s disregard for and unmooring of the restitutionary remedy ordered from requirements set out in article 1491 of the *Civil Code of Quebec* is based on an *ad hoc* “adjustment” of the requirements for a remedy to found. Moreover, the obligation which is held to give rise to the obligation to retribute is presented by the Court of Appeal as being the remedy itself.
51. Restitutionary conclusions are commonly sought in litigation in the Province of Quebec. The robustness of the requirements for the availability of such conclusions

²⁰ Ibid, at paragraph 32

²¹ Ibid.

²² Court of Appeal decision, at paragraphs 88, 89, 98, 101, 105 and 108

²³ Court of Appeal decision, at paragraphs 123 and 129

have permitted the judiciary to properly administer justice fairly and effectively because of the predictability of the conditions under which restitution of a payment not due may be ordered.

52. The Quebec Court of Appeal's decision in this matter, left unreviewed by this Court, throws that predictability into a state of confusion and indeed leaves a newly created obligation to retribute which is specifically created on the basis of the remedy rather than on an existing obligation left open to dangerous application.
53. The questions raised by the Court of Appeal's decision are of sufficient public importance in the Province of Quebec and indeed in law to be reviewed and decided by this Court.

Presumption of Life Issues

54. The legal effect of the presumption of life of an absentee on otherwise valid legal transactions occurring during the presumption of life is a novel issue which has not been decided by this Court.
55. The determination of whether the presumption of life of an absentee is a substantive right rather than merely a temporary rule of evidence are significant determinations which inform the law with respect to retroactivity generally, particularly so when the legal status of persons is at issue. Correctness is not only desired, but required in such circumstances.
56. The proper interpretation of the presumption of life of an absentee and its effects, as well as the interpretation and effects of the death of an absentee previously presumed alive are important in law. They call upon the proper interpretation of the legislative policy set out in the *Civil Code of Quebec* and the recognition that the legislator creates and uses different words, meanings and sections in the *Code* to articulate policy.

57. Given the novelty of the question raised by the proposed appeal, the Applicant submits that this Court should review the Quebec Court of Appeal's decision and decide the questions proposed on this application for leave to appeal.

PART IV – SUBMISSION ON COSTS

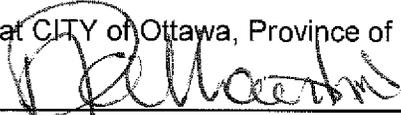
58. The Applicant submits that costs be in the cause.

PART V – ORDER SOUGHT

59. The Applicant submits that leave for the proposed appeal be granted, with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at CITY of Ottawa, Province of Ontario this 22nd day of December, 2017.



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PART VI – TABLE OF AUTHORITIES

Authority	Paras.
<u><i>Abel Skiver Farm Corp. v. Town of Ste-Foy</i>, [1983] 1 S.C.R. 403</u>	29
<u><i>Amex Bank of Canada v. Adams</i>, 2014 SCC 56</u>	46

PART VII - LEGISLATION

Civil Code of Quebec

84. An absentee is a person who, while he had his domicile in Québec, ceased to appear there, without giving news of himself, and without it being known whether he is still alive.

85. An absentee is presumed to be alive for seven years following his disappearance, unless proof of his death is made before then

86. A tutor may be appointed to an absentee who has rights to be exercised or property to be administered if the absentee did not designate an administrator to his property or if the administrator is unknown, refuses or neglects to act or is prevented from acting.

102. Proof of death is established by an act of death, except in cases where the law authorizes another mode of proof.

DIVISION II RECEIPT OF A PAYMENT NOT DUE

1491. A payment made in error, or merely to avoid injury to the person making it while protesting that he owes nothing, obliges the person who receives it to make restitution.

However, a person who receives the payment in good faith is not obliged to make restitution where, in consequence of the payment, the person's claim is prescribed or the person has destroyed his title or relinquished a security, saving the remedy of the person having made the payment against the true debtor.

84. L'absent est celui qui, alors qu'il avait son domicile au Québec, a cessé d'y paraître sans donner de nouvelles, et sans que l'on sache s'il vit encore.

85. L'absent est présumé vivant durant les sept années qui suivent sa disparition, à moins que son décès ne soit prouvé avant l'expiration de ce délai.

86. Un tuteur peut être nommé à l'absent qui a des droits à exercer ou des biens à administrer si l'absent n'a pas désigné un administrateur de ses biens ou si ce dernier n'est pas connu, refuse ou néglige d'agir, ou en est empêché

102. La preuve du décès s'établit par l'acte de décès, hormis les cas où la loi autorise un autre mode de preuve.

SECTION II DE LA RÉCEPTION DE L'INDU

1491. Le paiement fait par erreur, ou simplement pour éviter un préjudice à celui qui le fait en protestant qu'il ne doit rien, oblige celui qui l'a reçu à le restituer.

Toutefois, il n'y a pas lieu à la restitution lorsque, par suite du paiement, celui qui a reçu de bonne foi a désormais une créance prescrite, a détruit son titre ou s'est privé d'une sûreté, sauf le recours de celui qui a payé contre le véritable débiteur

1492. Restitution of payments not due is made according to the rules for the restitution of prestations.

1492. La restitution de ce qui a été payé indûment se fait suivant les règles de la restitution des prestations.