File No. 37893

SUPREME COURT OF CANADA

(ON APPEAL FROM A JUDGMENT OF 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)

RESPONDENT'S FACTUM

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

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PART I – OVERVIEW AND POSITION

1. The underlying issue in the present case is simple: can a pension plan claim back pension benefits received by an absent pensioner that was in fact dead for years? The Respondent submits that the answer is yes and that this money should be returned for the benefit of all pensioners.

2. The Respondent wishes to bring the following nuances to the facts description in the Appellant's Factum.[1]

3. Mr. George Roseme ("**Roseme**") went for a walk on September 10, 2007, and never returned home.[2] At that time, the Respondent was not advised by the Appellant or Roseme's family that he went missing and continued to pay the pension payments due pursuant to his "Life Only" pension plan (the "**Plan**").[3]

4. It was only well over a year later that the Respondent was made aware of Roseme's disappearance. On January 25, 2009, the Ottawa Sun published an article concerning Roseme's disappearance which came to the attention of the Respondent.[4] Said article indicated that Roseme's family and friends accepted the fact that he had passed away.[5] This was the first time the Respondent heard from the Appellant regarding Roseme's disappearance.

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1 **Appellant's Factum (hereinafter "AF"), at pp 3-11,** paras. 9 to 52
2 **AF, at p. 3,** at para. 16.
3 Exhibit P-1, **Appellant's Record (hereinafter "AR"), Vol II, Tab 4, at p 140,** at para 8.02(b)(i).
4 Exhibit P-5, **AR, Vol II, Tab 4, at p 176.**
5 Exhibit P-5, **AR, Vol II, Tab 4, at p 176.**

5. On January 29, 2009, a few days after that article was published, the Appellant advised the Respondent that she was appointed as tutor to Roseme.[6]

6. It is under these circumstances that the Respondent sent the first letter to the Appellant on March 18, 2009, indicating that the pension payments would cease and that the Respondent expected to be refunded for the payments made following Roseme's death.[7]

7. In said letter, it is important to highlight that the Respondent indicated that it "*has a legal and fiduciary duty to administer the Plan according to its terms, to treat all members equally based on the Plan terms, and without any discretion to vary from such terms or show preference to any member*".[8] By sending said letter, the Respondent was trying to protect all those contributing to the pension fund, as it is legally required to do so as administrator of the Plan.

8. The payments did in fact cease in May of 2009.[9] However, the Respondent's legal counsel indicated in a November 11, 2009 letter addressed to the Appellant's notary that the Respondent was "*prepared, <u>without admission of any kind</u>, to resume the payment of the pension benefits to the tutor* […]" (Our emphasis)[10] considering that the *Civil Code of Québec* (the "**CCQ**") provides that absentees are presumed alive for a period of seven years.[11]

9. In the same letter, the Appellant was asked to "*provide us with a written statement informing our client of any new facts, information or documents in her possession or in the family's possession that could help determine if Mr. Roseme is still alive.*"[12]

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6 Exhibit P-6, **AR, Vol II, at p 179.**
7 Exhibit P-6, **AR, Vol II, at p 179.**
8 Exhibit P-6, **AR, Vol II, at p 179.**
9 Exhibit P-16, **AR, Vol II, at pp 194 and following.**
10 Exhibit P-9, **AR, Vol II, at pp 184 and 185.**
11 CQLR c. CCQ-1991, art. 85; Trial Transcript.
12 Exhibit P-9, **AR, Vol II, at pp 184 and 185.**

10. Neil Courtemanche explained during his examination before the Québec Superior Court the purpose of such a request:

> A. So I think the pension was restarted on the assumption that he was alive. So on that assumption we continued to pay the pension, but if ever there came about any evidence that he in fact had passed away, either at that date or previously, then we would have adjusted the pension accordingly.
>
> (our emphasis)[13]

11. In a sworn declaration dated December 10, 2010, the Appellant stated that "[…] *I have no facts, information, or documents that could prove for a certainty, that Mr Roseme is deceased*."[14]

12. Therefore, as explained by the Honourable Martin Bédard in the Superior Court decision, "*these payments were made under the implicit assumption that Carleton would seek their reimbursement if it was established that Mr Roseme's death had occurred before the completion of the seven year period of absence.*"[15]

13. Roseme's remains were found on or about July 22, 2013.[16]

14. The registrar of civil status established Roseme's date of death[17] as being September 11, 2007.[18] The Appellant never took action to contest said determination.[19]

15. According to the choice made by Roseme, he was entitled to pension payments until death only, without any surviving benefits, as detailed below.

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13 Trial Transcript, **AR, Vol II, Tab 3, at p 68, lines 2-7; see also at p 89, lines 8-17.**
14 Exhibit P-10, **AR, Vol II, at p 187.**
15 Superior Court of Québec Judgment, **AR, Vol I, Tab 1, at p 3,** at para 17.
16 **AF, at p. 7,** at para 27.
17 Article 127 CCQ.
18 Exhibit P-15, **AR, Vol II, at p 193.**
19 Article 141 CCQ; see also Trial Transcript, **AR, Vol II, Tab 3, at p 58, lines 3-6.**

16. This set of facts begs the question: despite the fact that Roseme was not entitled to pension payments after death pursuant to the Plan (pursuant to his own election), does his absence create a justification to refuse reimbursement of such payments?

PART II — QUESTIONS AT ISSUE

17. The questions in dispute in the present matter are as follows:

a) Is the Respondent correct to claim that Roseme has no entitlement to payments made after death?

b) Does the Appellant have the obligation to reimburse the amounts received after Roseme's date of death?

18. The Respondent's answer to these two questions is affirmative for the reasons below.

PART III — STATEMENT OF ARGUMENT

A. THE RESPONDENT HAS NO OBLIGATION TO PAY AFTER DEATH

Pursuant to the Plan

19. In a letter dated May 13, 1996, addressed to the Respondent's personnel department, Roseme indicated that he had opted for "Life Only" pension benefits, which was one of several options available to him pursuant to the Plan. In particular, Roseme indicated the following in said letter:

> After considering the various pension options available from the Carleton University Retirement Plan, I elect to draw a single life pension from the Plan ffective July 1, 1996, and payable monthly in arrears for my remaining lifetime only.
>
> 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.[20]
>
> (our emphasis)

20. As explained during the testimony of Neil Courtemanche before the Superior Court, the second paragraph of that letter is always inserted to ensure that it is perfectly clear that the payments to any beneficiary shall immediately cease at death.[21] The election made by Roseme is admitted by the Appellant.[22]

21. Specifically, the text of the Plan states the following with regard to the Life-Only option:

> (i) Life Only

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20 Exhibit P-2, **AR, Vol II, Tab 4, at p 170.**
21 Trial Transcript, **AR, Vol II, Tab 3, at p 61, lines 17-21.**
22 Trial Transcript, **AR, Vol II, Tab 3, at p 61, lines 21-15 and at p 62, lines 1-11.**

> An increased monthly benefit which is payable for the remaining lifetime of the retired Member with such benefit ceasing with the payment for the month in which the Member's death occurs.
>
> (Our emphasis)[23]

22. Section 10.02 of the Plan explains what occurs in the event that the member of the pension plan dies after the commencement of his or her pension in such circumstances:

> 10.02. After Retirement
>
> In the event of the death of a Member after the commencement of the Member's pension and prior to the expiry of any applicable guarantee period, then following the Member's death, the designated Beneficiary shall receive any remaining monthly payments until the end of the guarantee period or alternatively, the Beneficiary may elect to receive the payment of the Commuted Value of the remaining instalments in a lump sum cash settlement.
>
> If, however, the Member had been receiving a joint and survivor pension pursuant to Section 8.02(a)(i) or had elected a life only or joint and survivor option pursuant to section 8.02(b), then benefits payable following the Member's death will be paid in accordance with the provisions of the applicable form of pension.
>
> (our emphasis)[24]

23. While it is true that the terms "life", "death" and "remaining lifetime" are not defined in the Plan, this has no impact on the present case. These are terms which need not be defined beyond their plain and ordinary meaning.

24. In the rare situations where there is an issue in determining the date of death of an individual, the legislator established a means to determine the legal date of death, which shall be discussed in more detail in the paragraphs below. Therefore, the allegations contained in paragraph 97 of the Appellant's factum, if they would be found as accurate,

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23 Exhibit P-1, **AR, Vol II, Tab 4, at p 140,** at para 8.02(b)(i).

24 Exhibit P-1, **AR, Vol II, Tab 4, at p 149.**

could only have the effect of creating an uncertainty in the law and creating obligations in addition to contractual agreements.

25. Allegations of paragraph 97 of the Appellant's factum thus merit particular attention:

> **Allegation 1** *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.*

26. The Respondent disagrees. Death can certainly occur while someone is considered an absentee. While someone is an absentee, their status is uncertain, therefore, it is possible that they are either dead or alive while they are missing. As will be discussed in the next section of the present factum, while there may be a legal presumption that an absentee is alive for a certain period of time, this does not mean that it is actually the case and that this presumption is not rebuttable.[25]

27. The present case exemplifies the falsity of the above-cited statement: Roseme died during the period in which he was absent and deemed to be alive, unless proven otherwise. Thus, he was in fact an absentee and dead at the same time. The presumption that he was alive was ultimately rebutted.

> **Allegation 2:** 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.

28. Again, this statement cannot find its basis in fact or in law.

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[25] Article 85 CCQ.

29. The date of death of an individual is not the date of the Act of Death but the date which appears on said Act of Death. This is clear, pursuant to the rules of the CCQ. In particular, article 102 of the CCQ provides the following:

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

30. The date found on the Act of Death "makes proof against all persons"[26] as it is an authentic act.[27]

31. As previously explained, when the exact date and time of death are unknown, the registrar of civil status determines such date and records it on the act of death:

> 127. Where the date and time of death are unknown, the registrar of civil status 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.

32. The date of death as established by the Act of Death is September 11, 2007.[28] This is Roseme's date of death for all intents and purposes.

33. The Appellant had the opportunity to contest the registrar's determination pursuant to article 141 CCQ. The Appellant had 30 days to do so pursuant to section 864.2 of the former *Code of Civil Procedure* CQLR c C-25:[29]

> 864.2. An application for review of a decision of the registrar of civil status may be admitted only if it is presented within 30 days after receipt of the decision by the applicant.

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26 Article 2818 CCQ.
27 Article 2814 (5) CCQ.
28 Exhibit P-15, **AR, Vol II, Tab 4, at p 193.**
29 Section 403 of the actual *Code of Civil Procedure* has the same effect.

> The registrar of civil status transmits forthwith to the office of the court the record relating to the decision the review of which is applied for.

34. No such contestation was made, and as a result, the determination that Roseme died on September 11, 2007 is binding against the Appellant.

35. Even if the decision of the registrar was contested, as explained in *Booth (Succession de) c Québec (Directeur de l'état civil)*, there needs to be some sort of proof that the registrar made some form of error in determining the date of death. Otherwise, the Court cannot intervene:

> 32 Le Tribunal considère que le directeur de l'État civil a bien exercé sa discrétion en fixant la date du décès à celle où le corps de Madame Booth est retiré des eaux du lac artificiel des Pères Oblats à Rougemont. L'heure de son décès demeurera indéterminée. En l'absence d'erreur dans l'exercice de la discrétion par le directeur de l'État civil, le Tribunal n'est pas autorisé à ordonner la rectification d'un acte de l'État civil.[30]

36. As the registrar's decision was not contested, the decision stands.

37. Finally, this allegation is simply preposterous because it would mean that the Respondent would have the obligation to continue paying the pension payments even after there was conclusive evidence that Roseme was dead, just because the Act of Death was not yet issued. His body was found in July of 2013, and the Act of Death was issued in April 2014. It is simply unreasonable to argue that the Respondent had the obligation to continue paying the pension payments during this period of time.

> **Allegation 3:** *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.*

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30 *Booth (Succession de) c Québec (Directeur de l'état civil)*, 1998 CanLII 9576 (QC CS).

38. The terms of the Plan are clear and require no exercise in interpretation.[31] By putting forth this argument, the Appellant is essentially stating that there would be different dates of death, depending on the purpose and that she may pick and choose the one which is most beneficial to her.

39. In any event, even if the terms of the Plan were ambiguous with regard to the definitions of the terms "life", "death" and "remaining lifetime", we would have no other choice but to refer to the provisions of the CCQ, which defines how a date of death is set.

40. Since Roseme's uncontested date of death was September 11, 2007, there is no question that pursuant to the clear terms of the Plan and his own election, the Respondent had no obligation to pay any pension payments after that date.

41. Based on the terms of the Plan, the Court of Appeal came to the same conclusion. In such circumstances, much deference must be given to the trial judge given that, as explained in *Heritage Capital Corp. v Equitable Trust Co.*[32], the applicable standard of review for contractual interpretation matters is that of palpable and overriding error:

> [23] In 604's submission, the chambers judge in the case at bar erred in interpreting the HRA and this tainted his interpretation of the Incentive Agreement and the 604 Offer, which means that the applicable standard of review for the latter interpretation is correctness. We disagree. While it is true that correctness is the appropriate standard for reviewing the chambers judge's interpretation of the HRA given that statutory interpretation is a question of law (Canadian National Railway Co. v. Canada (Attorney General), 2014 SCC 40 (CanLII), [2014] 2 S.C.R. 135, at para. 33), we do not find that this standard applies to his contractual interpretation of the Incentive Agreement and the 604 Offer. As the chambers judge's interpretation of the HRA was correct, it did not taint the interpretation of the agreements.
>
> (our emphasis)[33]

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31 *Uniprix inc. v Gestion Gosselin et Bérubé inc.*, 2017 SCC 43, at para 36.

32 2016 SCC 19.

33 *Ibid*, see also *Uniprix inc. v Gestion Gosselin et Bérubé inc.*, 2017 SCC 43, at para 44

42. One must note that it is common procedure for the Respondent to claim back sums paid after the date of death in the event that they were either not advised or advised late of the death of the beneficiary.[34]

During the time Roseme was an Absentee pursuant to Article 85 CCQ

43. Nobody contests that Roseme was considered to be an absentee from the date he went missing until his remains were finally found. As such, during such time, he was rebuttably presumed to be alive pursuant to article 85 of the CCQ which reads as follows:

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

44. This principle was first stated by the Court of Appeal in Chancery in 1869 in *Re Phené's Trusts*, and provides that, where a person has been missing for seven (7) years, he or she is presumed to be deceased.[35]

45. All of the provincial legislatures across Canada have adopted legislation codifying this notion[36]. These legislative schemes define the term "absentee" or "missing person" as a person usually residing or domiciled in the province, or having property in the province, whose whereabouts are unknown and whose living status is uncertain, such that it is unknown whether the person is living or deceased.

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34 Trial Transcript, **AR, Vol II, Tab 3, at p 66, line 25 and at p 66, lines 1-13.**

35 [1861-73] ALL ER Rep 514, **Respondent's Book of Authorities (hereinafter "RBOA"), tab 1.**

36 See: *Absentees Act*, RSO 1990 c A.3; *Declarations of Death Act*, SO 2002 c 14, Sched.; *Presumption of Death Act*, RSNS 1989 c 354; *Presumption of Death Act*, RSNB 1973 c 110; *Presumption of Death Act*, RSNL 1990 c P-20; *Probate Act*, RSPEI 1974 c P-21; *Presumption of Death Act*, RSM 1987 c P120; *Missing Persons and Presumption of Death Act*, SS 2009 c M-20.01; *Public Trustee Act*, SA 2004 c P-44.1; *Presumption of Death Act*, RSBC 1996 c 444; *Survivorship and Presumption of Death Act*, RSBC 1979 c 398; *Presumption of Death Act*, RSY 2002 c 174; *Presumption of Death Act*, RSNWT 1988 c P-9; *Presumption of Death Act*, SNU 2010 c 4.

46. In Québec, the presumption of life used to be for a duration of thirty (30) years but was subsequently reduced to seven (7) years due to advancements in technology.[37]

47. This being said, the effects of such presumption are the object of the Appellant's arguments, despite being put aside by the Act of death.

48. The aforementioned presumption is merely a simple presumption and is thus rebuttable. This is clear from the text of article 85, which clearly indicates that the absentee is presumed alive for a seven-year period "*unless proof of death is made before then*". This is exactly what occurred in the present case. The non-absolute nature of this presumption is made even clearer with articles 94 and 96 of the CCQ which clearly indicate that the date of death can be established prior to the termination of the seven-year period, should the facts support such a determination:

> 94. The date fixed as the date of death is either the date upon expiry of seven years from the disappearance, 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.
>
> In the absence of other proof, the place fixed as the place of death is that where the person was last seen.
>
> […]
>
> 96. If the date of death is proved to precede that fixed by the declaratory judgment of death, the dissolution of the matrimonial or civil union regime is retroactive to the true date of death and the succession is open from that date.

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37 Jean-Louis Baudouin and Yvon Renaud, *Code Civil du Québec Annoté*, 21st ed (Montréal: Wilson & Lafleur, 2018). It is to be noted that the Appellant cited the 2005 version of this book in support of its argument and not the 2018 version. Therefore, we are filing the most recent version equivalent to what was produced by Appellant in support of the present factum, **RBOA, tab 2.**

> If the date of death is proved to follow that fixed by the declaratory judgment of death, the dissolution of the matrimonial or civil union regime is retroactive to the date fixed by the judgment but the succession is open only from the true date of death.
>
> Relations between the apparent heirs and the true heirs are governed by those rules contained in the Book on Obligations which concern the restitution of prestations.
>
> (our emphasis)

49. Given the fact that the succession of Roseme opened on September 11, 2007, there is no justification for it to keep any pension benefits received thereafter, as Roseme chose an option where there would be no surviving benefits.

50. Moreover, the Respondent submits that the effects of the presumption being rebutted are retroactive to the date of death.

51. The Respondent thus wholly agrees with the Court of Appeal's assertions at paragraphs 59 and 74 of its judgment:

> [59] But the judge made no mistake in holding that, for the purpose of determining entitlement to the pension, the presumption was rebutted with retroactive effect to the true date of death in 2007.
>
> […]
>
> [74] Article 85 does not specify that the presumption is rebutted with retroactive effect but this can be inferred from a consideration of the whole of the treatment of absentees in the Code. An analogy can be drawn with the effects of a declaratory judgment of death for an absentee. Article 85 provides that the presumption operates for seven years. After that time, a declaratory judgment of death can be rendered. That judgment produces the same effects as death (article 95) but if the true date of death is proved to have preceded that fixed by the judgment, article 96 C.C.Q. directs that the dissolution of the absentee's matrimonial regime is not the date of the judgment but it is "retroactive to the true date of death / rétroagit à la date réelle du décès". The succession opens from the true date of death (art. 96, para. 2) such that restitution of prestations might be necessary as between apparent and true heirs (art. 96, para. 3). Similarly, when a person returns after the

> judgment declaring his or her death is rendered, the effects of the judgment, generally speaking, cease. The returning person may recover his or her property, again, according to the principles of retroactivity for the restitution of prestations (art. 99).[38]
>
> (our emphasis) (references omitted)

52. The same is to be said for an Act of Death which can retroactively establish the date of death of an individual.[39]

53. In general, as explained in *Zusman v Tremblay*[40] rendered by this Honourable Court, when a judgment is declarative in nature it merely clarifies a past situation for the parties:

> En principe, un jugement est déclaratif de droits préexistants. Il est vrai que certains jugements, comme ceux prononçant la séparation de biens ou de corps, ou ordonnant l'interdiction, sont créateurs ou attributifs de droits, parce qu'ils donnent naissance à une situation nouvelle, et ont en conséquence un effet constitutif. Mais quand un jugement se borne à dégager le droit du doute et de l'imprécision qui l'entourent, quand il détermine les contours incertains d'une situation juridique, alors, il ne fait que constater un état de chose qui lui est antérieur, et qui lui est par conséquent distinct. "C'est la préexistence du droit ou sa création par le jugement qui est le critère de la distinction. (Mazeaud, Rev. Trim. D.C. 1929, p. 17); (Dalloz, Nouveau Répertoire, Vol. 2, p. 859, N° 115.)
>
> (our emphasis)[41]

54. Further, the Respondent submits that the presumption of life as provided by article 85 CCQ imposes both a suspensive and resolutory condition upon the parties depending on when the date of death is established in case of death.

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38 Appeal Decision, **AR, Vol I, Tab 1, at pp 19 and 22.**
39 See articles 102 and 127 CCQ.
40 *Zusman v Tremblay*, [1951] SCR 659.
41 *Ibid*, at pp 671-672.

55. As illustrated in article 94 CCQ, when the presumption is in effect, the status of the absentee is precarious. The Appellant acknowledged the precarious nature of the absentee's status in the Ottawa Sun article in which she states, "*It does leave people feeling in limbo and it always makes you wonder.*"[42]

56. In order to establish the date of death, one must either wait for the expiration of the seven-year period (suspensive condition), or until "*the circumstances allow the death of a person to be held to be certain*" at a specific date before the expiration thereof (resolutory condition).

57. In other words, since the aforementioned presumption is not irrefutable, and proof can be made after the fact to demonstrate that the absentee was in fact dead all along, a resolutory condition is imposed upon the parties if "*an earlier date [is set] if the presumptions drawn from the circumstances allow the death of a person to be held to be certain at that date*". In the present case, as Roseme's death was found to be at the beginning of the absence, the resolutory condition was fulfilled.

58. Pursuant to article 1507 CCQ, when a resolutory condition is fulfilled, there is an obligation to return the prestations, in this case, the pension payments, as the obligation is deemed to have never existed:

> 1507. The fulfillment of a suspensive condition obliges the debtor to perform the obligation, as though it had existed from the day on which he obligated himself under that condition.
>
> The fulfillment of a resolutory condition obliges each party to return to the other the prestations he has received pursuant to the obligation, as though the obligation had never existed.

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42 Exhibit P-5, **AR, Vol II, Tab 4, at p 176.**

59. This point is further elaborated upon in *Les obligations*, in which they explain that while there may be an obligation to do something for a certain period of time, if a resolutory condition is fulfilled, restitution is owed:

> 595 — **Réalisation de la condition. Obligation sous condition résolutoire** — La condition résolutoire se réalise d'une façon semblable à la condition suspensive, mais elle produit les effets contraires. Elle entraîne l'extinction de l'obligation, met fin aux rapports juridiques entre les parties et, le cas échéant, oblige chacune d'elles à rendre à l'autre ce qu'elle a reçu (art. 1507 C.c.Q.). Si l'obligation constitue une partie essentielle du contrat dans lequel elle s'insère, ce contrat disparaît rétroactivement, est censé n'avoir jamais existé et les parties se trouvent replacées dans la même position que si elles n'avaient jamais contracté (art. 1507, al. 2 C.c.Q.), à moins qu'elles aient écarté ou modulé le principe de l'effet rétroactif de façon conventionnelle. L'anéantissement du contrat survient de plein droit, sans nécessité d'une intervention judiciaire. Le créancier est obligé de remettre au débiteur la prestation reçue, selon les modalités prévues au chapitre de la restitution des prestations (art. 1699 et s. C.c.Q.). Dans le cas d'un contrat translatif de propriété, l'acquéreur est réputé n'avoir jamais été propriétaire et donc tous les droits sur le bien qu'elle a consentis à des tiers, en principe, tombent rétroactivement.
>
> […]
>
> 592 — **Droits des parties *pendente conditione* dans l'obligation sous condition résolutoire** — Lorsque l'obligation est contractée sous condition résolutoire, elle entre immédiatement en existence, même si cette existence demeure incertaine. Le créancier a donc, comme tout créancier d'une obligation pure et simple, le droit de requérir du débiteur l'exécution de l'obligation. Dans le contexte d'une vente sous condition résolutoire, l'acquéreur se trouve dans une situation juridique comparable à celle d'un propriétaire ordinaire, avec la réserve toutefois que son droit n'est pas parfait et peut être rétroactivement anéanti par la réalisation de la condition ; le cas échéant, il peut aliéner l'objet de la prestation exécutée par le débiteur, l'hypothéquer et l'utiliser généralement comme bon lui semble. Le débiteur, pour sa part, ne pourra récupérer ses droits sur l'objet de la prestation offerte au

> créancier pendente conditione qu'advenant la réalisation de la condition et l'anéantissement rétroactif de l'obligation.[43]
>
> (references omitted) (our emphasis)

60. The Appellant thus cannot use the presumption of life in order to shield it from the effects of reality: all amounts paid during the time when Roseme was actually dead must be repaid.

61. In fact, the presumption of life does not render invalid the Plan or the decision made by Roseme to receive "life only" benefits.

B. THE APPELLANT HAS AN OBLIGATION TO RETURN THE AMOUNTS RECEIVED AFTER THE DATE OF DEATH

62. Since the Plan provides no right to surviving benefits, since there was no liberal intent to pay the amounts in dispute after death, and since law does not create any such obligation, there is no legal justification for the Appellant to keep the pension benefits received after death, regardless of the presumption of life provided for in article 85 CCQ.

63. As a result, the Respondent respectfully submits that the Appellant has an obligation to reimburse the Respondent for all sums received after Roseme's date of death.

64. The Appellant was made aware of the Respondent's intention to claim back said amounts since 2009 as the Respondent clearly indicated in its letter dated March 18, 2009 that "*the University expects Professor Roseme's estate to return to the Pension Plan the monthly pension payments received following his death*".[44]

65. It would, in fact, be contrary to the Respondent's fiduciary duty as a pension administrator not to claim back the amounts owed. Administrators of pension plans in Ontario are bound

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43 Jean-Louis Baudoin and Pierre-Gabriel Jobin, *Les obligations*, 7th ed, by Pierre-Gabriel Jobin and Nathalie Vézina (Cowansville, Qc: Éditions Yvon Blais, 2013), **RBOA, tab 3.**

44 Exhibit P-6; **AR, Vol II, Tab 4 at p 179**

by both a statutory duty of care under the *Pension Benefits Act*[45] (the "**PBA**") and fiduciary duty of care at common law. From a statutory perspective, article 22 of the PBA provides the following:

> 22 (1) The administrator of a pension plan shall exercise the care, diligence and skill in the administration and investment of the pension fund that a person of ordinary prudence would exercise in dealing with the property of another person.[46]

66. At common law, both case law and commentators have noted the duty of care is a fiduciary standard. Author Ari Kaplan explains in *Pension Law*[47] that:

> Independent of its statutory obligations, a pension administrator is a fiduciary at common law vis-à-vis the beneficiaries of the pension fund and, as such, can be liable for damages, restitution or other equitable relief for a breach thereof. […]
>
> […]
>
> There is little doubt that an administrator stands in a fiduciary relationship to persons entitled to pension benefits and other money payable under the pension plan, including employees, pensioners and other former members, and, where applicable, their spouses, former spouses and beneficiaries […].[48]

67. It would furthermore be unfair to the retirees and beneficiaries of the Plan who have and continue to contribute thereto for reimbursement not to be ordered.[49] It is to be noted that the Respondent is not claiming back said payments for its own benefit but is doing so in

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45 RSO 1990, c P.8.
46 *Ibid.*
47 Ari N. Kaplan, *Pension Law*, Irwin Law, 2nd ed (Toronto: Irwin Law, 2013), **RBOA, tab 4.**
48 *Ibid*, at pp 319-320.
49 See Exhibit P-1, **AR, Vol II, Tab 4, at p 111,** art. 4.01 regarding member contributions.

order to protect the members of the Plan, as the pension fund constitutes a separate and distinct patrimony pursuant to section 13 of the Plan[50]

68. Neil Courtemanche's testimony before the Québec Superior Court eloquently summarizes the Respondent's position in this regard:

> Well, if we overpay for one pensioner then basically we're taking away a benefit from the common member of the pension plan. Everybody shares in this pension plan; so if we do not pay any pension in accordance with the retirement text, well, that represents a deduction against the overall fund which is shared by all of the members of the plan. So in order to have a fiduciary responsible plan, we have to adhere to the retirement text for all members and treat them fairly and equally[51]
>
> (our emphasis)

69. The Appellant submits that it has no obligation to return the sums owed because both parties only found out in 2013 that Roseme had been dead the whole time he was considered an absentee. Curiously enough, the Appellant argues that it is not in 2013 that Roseme must be considered as dead but on the date of the Act of Death. In other words, the Appellant argues that since the mistake was only discovered after the payments were made, the Respondent is precluded from claiming back the amounts paid.

70. With regard to the resolutory condition, as previously explained, the Respondent submits that the effect of the presumption provided for in article 85 CCQ is that it imposes, in this case, a resolutory condition on the obligation to make pension payments to Roseme.

71. The effect of the fulfillment of such conditions in law is clear and codified in article 1507 CCQ: the Appellant must return "*the prestations he has received pursuant to the obligation*".

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50 See Exhibit P-1, **AR, Vol II, Tab 4, at p 154.**

51 Trial Transcript, **AR, Vol II, Tab 3, at p 72,** lines 2-11.

72. Moreover, since a juridical act, in this case, the act of paying the pension payments, was annulled retroactively to Roseme's date of death, pursuant to article 1699 CCQ, restitution is owed:

> 1699. Restitution of prestations takes place where a person is bound by law to return to another person the property he has received, either unlawfully or in error, or under a juridical act which is subsequently annulled with retroactive effect or whose obligations become impossible to perform by reason of superior force.
>
> The court may, exceptionally, refuse restitution where it would have the effect of according an undue advantage to one party, whether the debtor or the creditor, unless it considers it sufficient, in that case, to modify the scope or modalities of the restitution instead.
>
> (our emphasis)

73. As explained in *Les Obligations*, it is not even necessary to proceed to the next step of our analysis on the receipt of the payment not due in such circumstances:

> Si un paiement a été effectué en vertu d'un contrat qui est subséquemment annulé ou résolu, il y a en quelque sorte paiement par erreur. Cependant, cette situation est directement visée par le régime juridique de la restitution des prestations (art. 1699 et s. C.c.Q.) ; il n'est donc aucunement besoin de parler de l'institution de la réception de l'indu, ni de démontrer que le paiement a été fait par erreur. Quant aux effets, les règles sont les mêmes puisque la réception de l'indu obéit au régime de la restitution des prestations (art. 1492 C.c.Q.).[52]
>
> (references omitted)

74. While the Respondent does not argue that the entire Plan with regard to Roseme is annulled in such circumstances, it does submit that part of the payments received were subsequently found to be subject to a resolutory condition. As explained in *Amex Bank of Canada v*

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[52] Jean-Louis Baudoin and Pierre-Gabriel Jobin, *Les obligations*, 7th ed, by Pierre-Gabriel Jobin and Nathalie Vézina (Cowansville, Qc: Éditions Yvon, 2013), at para 530, **RBOA, tab 3.**

Adams[53] rendered by this Honourable Court, such payments can be recovered pursuant to article 1554 CCQ:

> [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.
>
> [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). <u>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</u> (art. 1554 CCQ).[54]
>
> (our emphasis)

75. Article 1554 CCQ is clear in this respect:

> 1554**.** Every payment presupposes an obligation; what has been paid where there is no obligation may be recovered.
>
> Recovery is not admitted, however, in the case of natural obligations that have been voluntarily paid.
>
> (our emphasis)

76. This reasoning is perfectly in line with the other provisions of the CCQ, as it is the regime that would apply in the event that Roseme reappeared, as article 99 CCQ provides the following:

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53 2014 SCC 56.

54 *Ibid.*

> 99. A person who has returned recovers his property in accordance with the rules contained in the Book on Obligations which concern the restitution of prestations. He reimburses the persons who, in good faith, were in possession of his property and who discharged his obligations otherwise than with his property.

77. The provisions on prescription in the CCQ also recognize the right for the Respondent to obtain reimbursement, as it only learned five (5) to six (6) years after the fact that Roseme passed away. Had the Respondent known that he was in fact dead, they would have stopped the pension payments much earlier. As a result, the Respondent was in a situation where it was impossible to act otherwise.

The Receipt of a Payment not Due

78. The bulk of the debate before the Court of Appeal concerned the possibility of claiming back the amounts paid based on the concept of receipt of a payment not due or "*la réception de l'indu*" in French. This concept merits particular attention as an alternative legal ground to confirm the Respondent's position.

79. The Respondent submits that based on the principles relating to the receipt of a payment not due, as codified in articles 1491 and 1492 of the CCQ, the Appellant has an obligation to return the amounts received following Roseme's date of death. These articles read as follows:

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

80. Pursuant to the caselaw and doctrine applying these articles, restitution is owed when the following three criteria are fulfilled:

a) A payment was made;

b) That was not due;

c) That was made by mistake;[55]

81. The Honourable Justice Kasirer explained these criteria in greater detail at paragraph 89 of the decision on appeal as they relate to the particular facts of the case:

> [89] Quite correctly, the judge observed that under the regime set forth in article 1491 C.C.Q., it is traditionally understood that three conditions must be met before a person who received a payment must restore it to the person who made it: (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 Rosme, as represented by Ms 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. When these conditions are met, the *accipiens* is subject to an obligation to make restitution of the payment, which obligation has its source in the receipt of the payment not due.[56]
>
> (references omitted)

82. The bulk of the debate in the present case concerns the fact that the debts were due at the time they were paid and whether they were thus paid in error. There is no debate, however, that payments in the amount of $497,332.60 were made.

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55 Vincent Karim, *Les obligations*, 4e éd, Vol 1 (Montréal: Wilson & Lafleur, 2015), at para 3584, **RBOA, tab 5.**

56 Appeal Decision, **AR, Vol I, Tab 1, at p 26.**

83. Before entering into specifics, it is important to note that the mistake in question can be one of fact or of law.[57]

84. The Respondent submits that while the payments were in fact due at the time they were made, there is still an obligation to return the amounts paid because of the retroactive effect of the presumption of article 85 CCQ being reversed. In other words, no payment was really due considering the effect of the resolutory condition.

85. In *Willmor Discount Corp. v Vaudreuil (City)*[58], rendered by this Honourable Court, restitution was ordered to the appellant who had his immovable seized and sold for taxes based on a regulation which was subsequently declared null. This Honourable Court described such a situation as an "appearance of a debt" for the following reasons:

> 20 Was there a debt in the present case when the payment was made? It could be said that there was the appearance of a debt. Subsequent to the payment the debt was declared retroactively non-existent by the judgment quashing the municipal by-law that created it. The sale of the Immovable property to the City, which constituted payment, was also quashed by the courts. The avoidance of a contract gives rise to a judicial restitutio in integrum by which the judge puts the parties back in the situation they were in prior to the execution of the contract. When an immovable is conveyed, the "vendor" recovers his property and reimburses to the purchaser the price the latter paid for it.[59]
>
> (our emphasis)

86. Thus, the Respondent submits that the "error" or "mistake" in the present case directly concerns the second criterion mentioned above: the existence of a debt as was the case in the *Willmor* decision.[60]

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57 Jean-Louis Baudoin and Pierre-Gabriel Jobin, *Les obligations*, 7th ed, by Pierre-Gabriel Jobin and Nathalie Vézina (Cowansville, Qc: Éditions Yvon, 2013), at para 531, **RBOA, tab 3.**

58 [1994] 2 SCR 210.

59 *Ibid*, at para 20.

60 *Ibid*, at para 21.

87. This Honourable Court ruled in a similar manner in a case with analogous facts in *Abel Skiver Farm Corp. v Town of Sainte-Foy*[61], in which it was clearly indicated that the action taken by the appellant was one to recover a payment that was not due:

> There are two aspects to the proceedings brought by appellant. First, appellant asked that the valuation and collection rolls of the Town and the collection rolls of the Commission scolaire be annulled in respect of appellant for the relevant years, in view of the failure by the Town and the Commission scolaire to observe s. 523 of the Towns and Cities Act. Second, it asked to be reimbursed the taxes and assessments wrongly paid.
>
> […]
>
> In their second aspect, these proceedings are in my opinion — and I say so with respect—actions which cannot be distinguished from actions to recover things not due, at least once they have been obtained by the same proceedings, annulment of the relevant rolls: Faribault, Traité de Droit civil du Québec, t. 7 bis, at pp. 128-29. However, the conclusions to recover things not due do not stand by themselves. Dismissing the conclusions in nullity would logically entail dismissing the conclusions to recover things not due.[62]
>
> (our emphasis)

88. Moreover, in *Eadie v Brantford (Township)*[63], another case with facts analogous to the previous two cases, this Honourable Court explained that the remedy in the event of a mutual mistake, is repayment of the amount that was paid in error:

> In this case, the appellant, as a taxpayer and inhabitant of the defendant corporation, was dealing with the Clerk-treasurer of the corporation and that Clerk—treasurer was under a duty toward the appellant and other taxpayers of the municipality. When that Clerk-treasurer demands payment of a sum of money on the basis of an illegal by-law despite the

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61 [1983] 1 SCR 403.
62 *Ibid*, at p 423.
63 [1967] SCR 573.

> fact that he does not then know of its illegality, he is not *in pari delicto* to the taxpayer who is required to pay that sum.
>
> […]
>
> For these reasons, I am of the opinion that the appellant is entitled to have returned to him the sum of $800 paid under compulsion and in mutual mistake of law.[64]

89. The trial judge made the following comment with regard to the applicability of this logic to the facts of the present case:

> [51] Paying taxes is a legal obligation. Tax assessment is calculated on the basis of the municipal evaluation of an immovable. If the evaluation of an immoveable is modified after the taxes have been paid, the new evaluation will apply retroactively and the Tax due will be reassessed based on the revised evaluation. Any overpayment then becomes subject to restitution as payment not due.
>
> [52] I agree with Carleton that the same principle should apply in this case.[65]

90. The Respondent wholly agrees with the aforementioned comments. If we break the two situations down to their most basic level, the same operation occurred: a payment was made under the belief that it was owed and subsequently, it was discovered that the amounts should not have been paid out in the first place.

91. As such, when the legal and factual grounds to make payment existed at the time the payments were made but such obligation was subsequently annulled, the *accipiens* has the obligation to return the payments received to the *solvens*.

92. There was, in fact, a fundamental mistake that was made during that period: Roseme was not alive. There are multiple causes of this mistake: not yet having found the body and the

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64 *Ibid*, at p 683.

65 Superior Court of Québec Judgment, **AR, Vol I, Tab 1, at pp 6 and 7.**

legal presumption that he was alive. That error concerned the very existence of a debt. As already explained in detail, the debt was deemed to have never existed.

93. As indicated in the *Amex* decision, there is a clear relation between the error and the lack of liberal intention: "*Once the payer proves that no debt exists, the payee must prove that the payment was not made in error, i.e. that it resulted from a [translation] "liberal intention*".[66] No such proof was made. To the contrary, as already indicated, the payments were not made with a liberal intention, but under the express condition that they be returned if it was determined that Roseme had been deceased all along.

94. In summary, absence is a legal regime created for the protection of persons who have disappeared. This regime effectively creates two different periods. The first being the period during which the absentee is presumed to be alive and the second, the period during which the absentee is conclusively presumed to be dead.

95. When the absentee is presumed to be alive, everything in law operates on that presumption. The individual's succession is not devolved, debts that are owed must be paid and claims must be honoured.

96. During the second period, i.e. when death of the individual is certain or upon expiry of the seven-year period, the absentee is irrevocably presumed to have died at the dated fixed by the registrar of civil status. It is on that date which the resolutory condition comes into effect. Consequently, the retroactive effect of the condition comes into place and all legal acts validly made during the first period are deemed to have never existed or even taken place. Anyone then who, in the name and for the benefit of the absentee, received money due to the absentee under the presumption that the absentee was alive must repay the amounts received.

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66 *Amex Bank of Canada v Adams*, 2014 SCC 56.

97. The Respondent submits that if restitution is not ordered, the result would be that the Appellant would be unjustly enriched.

98. Restitution must thus occur in accordance with the modalities described in articles 1699 and following of the CCQ. This conclusion is fully supported by the teachings of the *Amex Bank of Canada v Adams*[67] decision recently rendered by this Honourable Court as it is explained that:

> […] 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.[68]

99. On a final note, while it is Carleton the party that is claiming back the sums in dispute, it is doing so pursuant to its fiduciary duties on behalf of "roughly 1,973 active employees, I guess, 1,200 pensioners, and about 450 deferred members"[69] as it is they who shall be prejudiced[70] in the event that the Appellant is not ordered to return the amounts received after the date of Roseme's death.

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67 2014 SCC 56.
68 *Ibid*, at para 32.
69 Trial Transcript, **AR, Vol II, Tab 3, at p 61, lines 2-6.**
70 Trial Transcript, **AR, Vol II, Tab 3, at p 71, line 25 and at p 72, lines 1-11.**

PART IV — SUBMISSIONS CONCERNING COSTS

100. The Respondent submits that it should be granted its full legal costs for the present proceedings and all proceedings leading to the present appeal.

PARTI V – ORDER SOUGHT

101. The Respondent respectfully submits that the present appeal be dismissed.

Montréal, December 12, 2018

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PART VI — TABLE OF AUTHORITIES

Legislation **Paragraph(s)**

Legislation ***(cont'd)*** **Paragraph(s)**

Jurisprudence

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