

**SUPREME COURT OF CANADA**

|  |  |
| --- | --- |
| **Citation:** Uniprix inc. *v.* Gestion Gosselin et Bérubé inc., 2017 SCC 43, [2017] 2 S.C.R. 59 | **Appeal Heard:** January 12, 2017  **Judgment Rendered:** July 28, 2017  **Docket:** 36718 |

Between:

Uniprix inc.

Appellant

and

Gestion Gosselin et Bérubé inc. and

Manon Gosselin et Bernard Bérubé, pharmaciens, S.E.N.C.

Respondents

**Official English Translation:** Reasons of Wagner and Gascon JJ.

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

|  |  |
| --- | --- |
| **Joint Reasons for Judgment:**  (paras. 1 to 106) | Wagner and Gascon JJ. (Abella, Moldaver, Karakatsanis and Brown JJ. concurring) |

|  |  |
| --- | --- |
| **Dissenting Reasons:**  (paras. 107 to 168) | Côté J. (McLachlin C.J. and Rowe J. concurring) |

Uniprix inc. *v.* Gestion Gosselin et Bérubé inc., 2017 SCC 43, [2017] 2 S.C.R. 59

Uniprix inc. Appellant

v.

Gestion Gosselin et Bérubé inc. and

Manon Gosselin et Bernard Bérubé, pharmaciens, S.E.N.C. Respondents

**Indexed as: Uniprix inc. *v.* Gestion Gosselin et Bérubé inc.**

2017 SCC 43

File No.: 36718.

2017: January 12; 2017: July 28.

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

on appeal from the court of appeal for quebec

*Contracts — Interpretation — Intention of parties — Contract of affiliation — Term and renewal procedure — Contract clause stipulating that contract renewable at discretion of only one party — Validity of contract whose effects could be perpetual — Whether trial judge erred in finding that renewal clause was clear and that it faithfully represented parties’ common intention of granting one of parties unilateral option to renew contract every five years, which other party would be unable to oppose — Whether possibility of contract of affiliation having perpetual effect is unlawful in Quebec civil law on basis that it is contrary to Civil Code of Québec or to public order — Civil Code of Québec, arts. 1425, 1512.*

In 1998, the respondent companies (“member pharmacists”) decided to affiliate their pharmacy with the Uniprix banner. The parties entered into a contract of affiliation for a fixed term of five years. The contract contained a clause to the effect that it would be renewed automatically unless the member pharmacists gave notice to the contrary. By virtue of that clause, the contract was renewed automatically in 2003 and 2008. On July 26, 2012, Uniprix notified the member pharmacists that their contractual relationship would terminate as of January 28, 2013. The member pharmacists objected, arguing that the contract of affiliation was to be renewed automatically unless they gave notice to the contrary. In their view, nothing in the renewal clause entitled Uniprix to oppose this renewal. Uniprix argued that it could oppose the renewal and terminate the contract upon the expiry of the term. Uniprix added that the interpretation proposed by the member pharmacists could have the effect of binding the parties in perpetuity, which would be contrary to public order. According to its position, the contract would therefore be considered to be one for an indeterminate term and could be resiliated at any time on reasonable notice.

The Superior Court declared that the contract was renewed and that Uniprix could resiliate the contract only for cause, not without cause as it had tried to do. The court concluded that unilateral renewal clauses are valid in Quebec law even though they might give a contract perpetual effect. The majority of the Court of Appeal affirmed that judgment. In their opinion, the *Civil Code of Québec* (“*C.C.Q.*”) does not prohibit contracts that could be perpetual, and such contracts violate no fundamental value of our society. The Chief Justice, in dissent, would have allowed the appeal. In her view, the renewal clause made it impossible for Uniprix to know the contract’s termination date, which turned the contract into one for an indeterminate term. The contract could therefore be resiliated on reasonable notice, six months in this case.

*Held* (McLachlin C.J. and Côté and Rowe JJ. dissenting): The appeal should be dismissed.

*Per* Abella, Moldaver, Karakatsanis, Wagner, Gascon and Brown JJ.: The trial judge made no palpable and overriding error in interpreting the contract. The unilateral renewal option granted to the member pharmacists in the contract of affiliation is consistent with the other provisions of the contract, with the circumstances surrounding its signature and its object, and with the parties’ conduct in applying it.

To resolve the disagreement between the parties, the words of the contract, and more specifically those of the clause that fixes its term and the procedure for renewing it, must be interpreted. The first step in interpreting a contract is to determine whether its words are clear or ambiguous. If the words of the contract are clear, the court’s role is limited to applying them to the facts before it. If, on the other hand, the court identifies an ambiguity, it must resolve the ambiguity by proceeding to the second step of contractual interpretation. The cardinal principle that guides the second step is that “[t]he common intention of the parties rather than adherence to the literal meaning of the words shall be sought” (art. 1425 *C.C.Q.*). This interpretation exercise makes it possible to establish the term of the contract at issue and the procedure for renewing it.

Characterizing and interpreting a contract are two distinct actions. In Quebec civil law, it is the classification of the contract — based on the rules that apply to it, the conditions that apply to its formation, its object and how it is performed — that makes it possible to define the nature of the contract and thereby determine how it should be characterized. In other words, a contract is characterized on the basis of its nature, by associating it with a category of nominate contracts or with a specific class of contracts, but the term of the contract is not characterized, as it instead depends on the interpretation of the contract’s words.

Contractual interpretation involves the consideration of a multitude of facts. It is a question of mixed fact and law, and the Court’s role is limited to deciding whether the trial judge committed a palpable and overriding error in this regard. In this case, the trial judge’s interpretation to the effect that the renewal clause gave the member pharmacists the right to renew the contract of affiliation as they saw fit every five years is not tainted by a palpable and overriding error. On the contrary, it is perfectly consistent with the other undertakings stipulated in the contract and with the circumstances in which it was formed.

First of all, the renewal clause itself is in no way ambiguous. It specifically provides that the member pharmacists can notify Uniprix of their intention to renew or not to renew the contract. But it does not stipulate that Uniprix can give a similar notice to the member pharmacists. Furthermore, the second paragraph clearly provides that should the member pharmacists fail to send the prescribed notice to Uniprix, the agreement will be deemed to have been renewed. By virtue of art. 2847 *C.C.Q.*, the word “deemed” in the contract creates a presumption that is absolute and irrebuttable. As a result, if the member pharmacists send no notice to Uniprix, renewal is automatic and Uniprix cannot oppose it. The other clauses dealing with the termination of the contract relate solely to the option to resiliate the contract for cause that is conferred on Uniprix. All of these provisions form an integral part of the agreement between the parties, and they must be read and interpreted as a whole.

Moreover, it is not inappropriate to interpret an otherwise clear contract on a subsidiary basis in order to conclude that that interpretation confirms the clear meaning of its words. In this case, an analysis of the circumstances in which the contract was concluded confirms that the parties intended to leave the renewal of the contract to the discretion of the member pharmacists. First, Uniprix was created for the benefit of member pharmacists who had joined together for the purpose of developing their respective commercial and professional practices. Uniprix exists to serve its members. It thus makes sense that Uniprix will serve its members until they themselves decide to withdraw from the group, and that Uniprix therefore cannot terminate the contract without cause. Second, the very conduct of the parties supports this interpretation: twice, Uniprix recognized that the silence of the member pharmacists bound the parties for an additional five‑year term. To interpret the contract of affiliation in such a way as to give Uniprix the power to oppose the renewal desired by the member pharmacists would therefore be contrary to the words of the renewal clause, to the general scheme of the contract of affiliation, to the circumstances in which it was concluded, and to how it has been applied by the parties.

The fact that the term of Uniprix’s obligations pursuant to the contract of affiliation depends on the will of the member pharmacists to renew it does not transform the contract into one for an indeterminate term. In this case, the parties agreed on a clear term of five years together with an equally clear renewal mechanism that would enable them to pursue their business relationship for fixedfive‑year periods. A conclusion that the contract is one for an indeterminate term would fly in the face of logic and the clearly expressed intention of the parties. In the same way, art. 1512 *C.C.Q.* cannot be applied to fix a term for the contract of affiliation. It applies where there is no term or where the term is uncertain, but does not apply to thwart the automatic renewal of a contract whose term is, as in this case, clearly defined. In any event, neither party has applied for this independent remedy. The Superior Court and the majority of the Court of Appeal were right in holding that the parties intended to be bound by a renewal mechanism whose effects could be perpetual.

Nothing in the *Code* prohibits contracts such as the contract of affiliation from having effects that could be perpetual. Nor is there any basis for concluding that such contracts are contrary to public order. When it enacted the *Code*, the legislature decided to place limits on only certain specific types of contracts, declining to enact a general provision prohibiting all perpetual contracts. Nothing in the *Code*, the academic literature or the case law supports the position that a contract of affiliation whose effects could be perpetual is contrary to Quebec civil law. It is true that the courts may raise to the rank of a principle of public order any unwritten rule that is consistent with the fundamental values of society. Nevertheless, it must in every case be possible to tie the concept of public order to specific values or principles that might be violated by the contractual provisions at issue. Perpetual obligations do not in themselves offend any of our fundamental societal values and are not generally contrary to public order. There are circumstances in which the imposition of perpetual obligations whose nature is such as to affect an individual’s person and freedom could offend public order. But in the context of a corporate and commercial partnership such as the one between Uniprix and the member pharmacists, the individual freedom of the contracting parties is not at stake, and public order cannot override the parties’ intention.

There is no basis for reversing the trial judge’s conclusion that the contract of affiliation is for a fixed term and that the option to renew it upon the expiry of each term is limited to the member pharmacists. The notice of non‑renewal sent by Uniprix accordingly violates the terms of the contract of affiliation and may not be set up against the member pharmacists. Because the contract is not for an indeterminate term, Uniprix could not resiliate it without cause on reasonable notice as it tried to do.

*Per* McLachlin C.J. and Côté and Rowe JJ. (dissenting): A contract without ambiguity is to be applied, not interpreted. But the trial judge’s conclusion that the contract of affiliation is clear and need not be interpreted is a palpable and overriding error. A reading of the entire contract reveals ambiguities which should have led the trial judge to go on to interpret the parties’ common intention under art. 1425 of the *Civil Code of Québec*.

First, it is not clear from the renewal clause’s wording that it is stipulated uniquely in favour of the member pharmacists. The clause clearly makes Uniprix the beneficiary of a notice obligation. But nothing about the wording of the clause clarifies that the presumption of renewal in paragraph two of the clause is stipulated in favour of one party or the other. Second, reference to other portions of the contract does nothing to resolve the ambiguity. Third, the ambiguity is magnified by the interaction between the express term of 60 months and the renewal clause. The presence of an express 60‑month contractual term typically denotes the termination of obligations for both parties on expiry of the term. But when read in light of the renewal clause, the term apparently functions asymmetrically to bind Uniprix, though not the member pharmacists, in potential perpetuity. Fourth, when the member pharmacists’ tendered interpretation — that Uniprix is bound forever solely at the member pharmacists’ discretion — is considered in the context of the agreement’s other clauses, the unreasonable result produced suggests an inquiry into whether the parties intended to be so bound. The potential for the interests of a particular member to conflict with those of the collective raises a question as to whether the parties intended that Uniprix be forever beholden to any individual member. Finally, the extent to which the renewal is automatic is itself an open question. The clause’s wording suggests the renewal is contingent, not automatic. The renewal clause kicks in only if the member pharmacists fail to provide notice of whether they will leave or stay.

However, even if it is assumed that the trial judge’s reading of the renewal clause was correct, the contract of affiliation should be characterized as an indeterminate one and the appeal should be allowed on this basis. The characterization of a contract determines the juridical category into which it falls and the legal consequences attaching to it as a result. Characterization and interpretation of a contract are discrete tasks that should not be confused. Unlike the interpretive exercise, where the trial judge seeks out the parties’ common intention, the trial judge is not bound by the parties’ ostensible, or even preferred, characterization. Instead, characterization is a question of law that is left to the determination of the court. The determination of the contract’s term is a matter of legal characterization, since it is concerned with the intended legal effectsof the agreement and the presence or absence of an extinctive term is essential to the nature of contracts of successive performance with a fixed term.

In this case, the juridical effect of the renewal clause is to extend the same contract for a further period of time. Since only the member pharmacists may oppose renewal, only they have the benefit of a certain term that will extinguish their obligations. The result is that the contract of affiliation would effectively have a hybrid term: one of five years as applied to the member pharmacists; but one of potential perpetuity, or indeterminacy, as applied to Uniprix. However, a contract’s term must function symmetrically for both parties and the possibility of a hybrid term should not be endorsed. Therefore, there are two possible characterizations of this agreement. The contract either has a perpetual term — that is, a fixed term of forever with an option to exit arising periodically for the member pharmacists, in which case the public order analysis becomes relevant — or is for an indeterminate term, because there is no clear extinctive term. The correct characterization is the latter one. This conclusion is consistent with the well‑established principle that contracts with a purportedly certain extinctive term are to be characterized as indeterminate where the realization of the term is dependent on the decision of only one of the parties. It is also consistent with the law’s reluctance to infer perpetuity in the absence of the parties’ express stipulation to that effect.

A contract for an indeterminate term may be resiliated on reasonable notice. The reasonableness of the notice of resiliation in any given case is a fact‑driven, contextual inquiry. Considering the fact that Uniprix sent a notice of resiliation on July 26, 2012, the member pharmacists will have benefitted from a reasonable notice by the date of this decision. Therefore, the contract of affiliation should be declared to be terminated as of this date.

**Cases Cited**

By Wagner and Gascon JJ.

**Distinguished:** *BMW Canada inc. v. Automobiles Jalbert inc.*, 2006 QCCA 1068; *9077‑0801 Québec inc. v. Société des loteries vidéo du Québec inc.*, 2012 QCCA 885; *Bombardier Produits récréatifs inc. (BRP) v. Christian Moto Sport inc. (CMS)*, 2012 QCCA 1670; *Placements Sergakis inc. v. Société des loteries vidéo du Québec inc.*, 2009 QCCS 4976; *E. & S. Salsberg inc. v. Dylex Ltd.*, [1992] R.J.Q. 2445; *Bussières (Véhicules récréatifs Gascon enr.) v. Yamaha Motor Canada Ltd.*, 2006 QCCS 905; *Bertrand Équipements inc. v. Kubota Canada ltée*, [2002] R.J.Q. 1329; *Équipement LDL inc. v. Toyota Canada inc.*, 2008 QCCS 4943; **approved:** *Triou v. Teman*, 2016 QCCA 908; **considered:** *Consumers Cordage Co. v. St. Gabriel Land & Hydraulic Co.*, [1945] S.C.R. 158; *Parkway Pontiac Buick inc. v. General Motors du Canada ltée*, 2012 QCCS 618; **referred to:** *Tétreault v. Gagnon*, [1962] S.C.R. 766; *Montréal, Maine & Atlantique Canada Cie (Montreal, Maine & Atlantic Canada Co.) (MMA), Re*, 2014 QCCA 2072, 49 R.P.R. (5th) 210; *Station Mont‑Tremblant v. Banville‑Joncas*, 2017 QCCA 939; *Martin v. Dupont*, 2016 QCCA 475; *Provigo Distribution inc. v. Supermarché A.R.G. inc.*, [1998] R.J.Q. 47; *Droit de la famille — 171197*, 2017 QCCA 861; *Samen Investments Inc. v. Monit Management Ltd.*, 2014 QCCA 826; *Éolectric inc. v. Kruger, groupe Énergie*, 2015 QCCA 365; *Rouge Resto‑bar inc. v. Zoom Média inc.*, 2013 QCCA 443; *Habitations Gilles Stébenne inc. v. 9166-9929 Québec inc.*, 2016 QCCS 2953; *Larouche v. Néron*, 2016 QCCA 692; *Lamco II s.e.c. v. Québec (Ville)*, 2016 QCCA 757; *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633; *Immeubles Régime XV inc. v. Indigo Books & Music Inc.*, 2012 QCCA 239; *Cie canadienne d’assurances générales Lombard v. Promutuel Portneuf‑Champlain, société mutuelle d’assurances générales*, 2016 QCCA 1903; *2320‑4035 Québec inc. v. Centre intégré universitaire de santé et de services sociaux du Centre‑Sud‑de‑l’Île‑de‑Montréal (CIUSSS CSIM) (Centre de réadaptation en déficience intellectuelle et en troubles envahissants du développement de Montréal)*, 2017 QCCA 427; *Construction BFC Foundation ltée v. Entreprises Pro‑Sag inc.*, 2013 QCCA 1253; *Pépin v. Pépin*, 2012 QCCA 1661; *Ferme Vi‑Ber inc. v. Financière agricole du Québec*, 2016 SCC 34, [2016] 1 S.C.R. 1032; *Lac‑Sergent (Ville) v. Lapointe*, 2012 QCCA 1935; *Association des diplômés de l’École des hautes études commerciales de Montréal v. Aeterna‑Vie Cie d’assurance*, [1995] R.R.A. 111; *Cyclorama de Jérusalem Inc. v. Congrégation du Très Saint Rédempteur*, [1964] S.C.R. 595; *Neale v. Katz*, [1979] C.A. 192; Cass. civ. 1re, January 18, 2000, *Bull. civ.* 1 10, no 98‑10.378; Cass. civ., June 25, 1907, D.P. 1907.1.337; *Goulet v. Transamerica Life Insurance Co. of Canada*, 2002 SCC 21, [2002] 1 S.C.R. 719; *Desputeaux v. Éditions Chouette (1987) inc.*, 2003 SCC 17, [2003] 1 S.C.R. 178; *Asphalte Desjardins inc. v. Québec (Commission des normes du travail)*, 2013 QCCA 484, rev’d 2014 SCC 51, [2014] 2 S.C.R. 514.

By Côté J. (dissenting)

*Samen Investments Inc. v. Monit Management Ltd.*, 2014 QCCA 826; *Bisignano v. Système électronique Rayco ltée*, 2014 QCCA 292; *Turenne v. Banque Nationale du Canada*, [1983] J.Q. no 354 (QL); *J.V. v. Cie d’assurance‑vie Croix Bleue*, 2013 QCCA 1686; *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633; *Gregory v. Château Drummond inc.*, 2012 QCCA 601; *Pépin v. Pépin*, 2012 QCCA 1661; *Alexis Nihon Cie v. Dupuis*, [1960] S.C.R. 53; *National Bank of Greece (Canada) v. Katsikonouris*, [1990] 2 S.C.R. 1029; *Centre de santé et de services sociaux de l’Énergie v. Société immobilière Lemieux inc.*, 2011 QCCA 972; *Cogefimo inc. v. Société Coinamatic inc.*, [1998] R.D.I. 193; *J.G. v. Nadeau*, 2016 QCCA 167; *Tétreault v. Gagnon*, [1962] S.C.R. 766; *Services Matrec inc. v. CFH Sécurité inc.*, 2014 QCCA 221; *Neale v. Katz*, [1979] C.A. 192; *E. & S. Salsberg inc. v. Dylex Ltd.*, [1992] R.J.Q. 2445; *Standard Broadcasting Corp. v. Stewart*, [1994] R.J.Q. 1751; *BMW Canada inc. v. Automobiles Jalbert inc.*, 2006 QCCA 1068; *9077‑0801 Québec inc. v. Société des loteries vidéo du Québec inc.*, 2012 QCCA 885.

**Statutes and Regulations Cited**

*Civil Code of Lower Canada*, art. 1013.

*Civil Code of Québec*, arts. 9, 365 to 377, 380, 1378 to 1384, 1379, 1380, 1381, 1383, 1414, 1425, 1425 to 1432, 1426, 1427, 1428, 1434 to 1439, 1437, 1512, 1517, 1590, 1604, 1605, 1708 to 2643, 1880, 2086, 2362, 2376, 2847.

*Code civil* (France), art. 1210.

*Rules respecting the solemnization of civil marriages and civil unions*, CQLR, c. CCQ, r. 3.

**Authors Cited**

Azéma, Jacques. *La durée des contrats successifs*. Paris: L.G.D.J., 1969.

Baudouin, Jean‑Louis, et Pierre‑Gabriel Jobin. *Les obligations*, 7e éd. par Pierre‑Gabriel Jobin et Nathalie Vézina. Cowansville, Que.: Yvon Blais, 2013.

Carbonnier, Jean. *Droit civil*, t. 4, *Les obligations*, 22e éd. Paris: P.U.F., 2000.

Fréchette, Pascal. “La qualification des contrats: aspects théoriques” (2010), 51 *C. de D.* 117.

Gendron, François. *L’interprétation des contrats*, 2e éd. Montréal: Wilson & Lafleur, 2016.

Ghestin, Jacques, Christophe Jamin et Marc Billiau. *Les effets du contrat*, 3e éd. Paris: L.G.D.J., 2001.

Goldstein, Gérald, et Najla Mestiri. “La liberté contractuelle et ses limites — Études à la lueur du droit civil québécois”, dans Benoît Moore, dir., *Mélanges Jean Pineau*. Montréal: Thémis, 2003, 299.

Grammond, Sébastien, Anne‑Françoise Debruche and Yan Campagnolo. *Quebec Contract Law*. Montréal: Wilson & Lafleur, 2011.

Kasirer, Nicholas. “Pothier From A to Z”, dans Benoît Moore, dir., *Mélanges Jean Pineau*. Montréal: Thémis, 2003, 387.

Lluelles, Didier, et Benoît Moore. *Droit des obligations*, 2e éd. Montréal: Thémis, 2012.

Mestre, Jacques. “Obligations et contrats spéciaux: Obligations en général” (1993), 2 *R.T.D. civ.* 343.

Pineau, Jean, Danielle Burman et Serge Gaudet. *Théorie des obligations*, 4eéd. par Jean Pineau et Serge Gaudet. Montréal: Thémis, 2001.

Quebec. Ministère de la Justice. *Commentaires du ministre de la Justice*, t. II, *Le Code civil du Québec — Un mouvement de société*. Québec: Publications du Québec, 1993.

Starck, Boris, Henri Roland et Laurent Boyer. *Droit civil: les obligations*, t. 2, *Contrat*, 6e éd. Paris: Litec, 1998.

Tancelin, Maurice. *Des obligations en droit mixte du Québec*, 7e éd. Montréal: Wilson & Lafleur, 2009.

APPEAL from a judgment of the Quebec Court of Appeal (Duval Hesler C.J. and Levesque and Émond JJ.A.), 2015 QCCA 1427, [2015] AZ‑51213425, [2015] J.Q. no 8478 (QL), 2015 CarswellQue 8578 (WL Can.), affirming a decision of Dugré J., 2013 QCCS 6251, [2013] AZ‑51027703, [2013] J.Q. no 17551 (QL), 2013 CarswellQue 12767 (WL Can.). Appeal dismissed, McLachlin C.J. and Côté and Rowe JJ. dissenting.

*Hubert Sibre*, *Julien Archambault* and *Jean‑Yves Fortin*, for the appellant.

*André Joli‑Cœur*, *Nathalie Vaillant* and *Bénédicte Dupuis*, for the respondents.

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

Wagner and Gascon JJ. —

1. Overview
2. Autonomy of the will is a fundamental principle of Quebec civil law. This contractual freedom allows the parties to a contract to structure their relationship as they see fit within the limits imposed by legislation and the requirements of public order. This appeal affords this Court an opportunity to define some of those limits in relation to the legality of certain obligations stipulated in a contract whose effects could be perpetual.
3. The appellant, Uniprix inc., and the respondent companies (“member pharmacists”) entered into a contract of affiliation in 1998 for a fixed term of five years. The contract contained an automatic renewal clause, which was triggered twice, in 2003 and 2008. In 2012, however, Uniprix sent the member pharmacists a notice of non‑renewal, purporting to terminate the contract as of January 2013. The renewal mechanism provided for in the contract of affiliation is central to this appeal. The member pharmacists submit that they can renew the contract as they wish, while Uniprix argues that it can oppose the renewal and terminate the contract upon the expiry of the term. Uniprix adds that the interpretation proposed by the member pharmacists could have the effect of binding the parties in perpetuity, which would be contrary to public order. According to its position, the contract would therefore be considered to be a contract for an indeterminate term, and either of the parties could resiliate it at any time on reasonable notice.
4. The trial judge and the majority of the Court of Appeal concluded that the renewal clause is clear: it reserves for the member pharmacists an option to unilaterally renew the contract, which is perfectly legal even though its effects could be perpetual. The Chief Justice of the Court of Appeal, who dissented, would instead have concluded that the contract was one for an indeterminate term; she would have fixed a term for it pursuant to art. 1512 of the *Civil Code of Québec* (“*C.C.Q.*” or “*Code*”) or would have allowed Uniprix to terminate it on reasonable notice.
5. We would dismiss the appeal. The trial judge made no palpable and overriding error in interpreting the contract. On the contrary, the unilateral renewal option granted to the member pharmacists in the contract of affiliation is consistent with the other provisions of the contract, with the circumstances surrounding its signature and its object, and with the parties’ conduct in applying it. Nothing in Quebec law precludes the parties from agreeing on such a mechanism even though its effects could be perpetual.
6. Background
7. Uniprix was founded in 1977 by a number of Quebec owner pharmacists, including Manon Gosselin. Their objective was to give themselves a common identity, pool their purchases and, more generally, provide support for the incidental aspects of their professional activities. To become a member of this group, one had to be an owner pharmacist and subscribe for one share in Uniprix.
8. In 1979, Ms. Gosselin and her spouse opened a pharmacy in Saint‑Lambert‑de‑Lauzon, a town with a present‑day population of approximately 6,000. It is that pharmacy that is at issue in this appeal. Originally an independent pharmacy, it became an affiliate under the Uniclinique banner in 1988. At about that time, Ms. Gosselin and her spouse became partners with Bernard Bérubé, another pharmacist, with whom they created the respondent companies, and those companies have owned the pharmacy ever since.
9. In 1998, the respondent companies decided to affiliate their pharmacy with the Uniprix banner. At that time, the two owner pharmacists — Ms. Gosselin and Mr. Bérubé — subscribed for one share of Uniprix through their general partnership, and the parties entered into a contract of affiliation. The contract included a clause that fixed its term and the procedure for renewal:

[translation]

10. TERM:

Regardless of any written or verbal provisions to the contrary, this agreement shall commence on the day of its signing and shall remain in effect for a period of sixty (60) months, or for a period equal to the term of the lease for the premises where the pharmacy is located. [The member pharmacist] shall, six (6) months before the expiration of the agreement, notify [Uniprix] of its intention to leave [Uniprix] or to renew the agreement;

Should [the member pharmacist] fail to send the prescribed notice by registered mail, the agreement shall be deemed to have been renewed in accordance with the terms and conditions then in effect, as prescribed by the board of directors, except with regard to the fee.[[1]](#footnote-1)

1. Throughout the term of their contractual relationship, the member pharmacists never specifically informed Uniprix of their intentions regarding the renewal of the contract. By virtue of the second paragraph of clause 10, the contract was therefore automatically renewed on January 28, 2003 and on January 28, 2008 without any comment on Uniprix’s part.
2. In 2010, Uniprix learned that one of its competitors was planning to open an outlet in new premises located less than 200 metres from the pharmacy operated by the member pharmacists. In December of that year, unknown to the member pharmacists, Uniprix approached the owner of the premises in question with an offer to rent them. A year later, on December 14, 2011, it met with the member pharmacists to convince them to move their business into these new premises, but was unable to do so.
3. Uniprix nonetheless leased the premises in question for a 15‑year term on March 1, 2012. On July 26, 2012, a little more than six months before the expiration of the third term of its contract with the member pharmacists, it notified them that their contractual relationship would terminate as of January 28, 2013. In the months that followed, Uniprix tried once again to convince the member pharmacists to relocate, but they refused Uniprix’s proposal, considering it to be less viable than their existing situation.
4. The member pharmacists then tried to have Uniprix confirm that their contractual relationship would continue after January 28, 2013. Having received no reply, they asked the Superior Court to declare that the contract had been renewed until January 28, 2018. On January 9, 2013, they obtained a safeguard order that enjoined Uniprix to honour its contractual obligations until the matter could be resolved by way of a final judgment.
5. Judicial History
   1. Quebec Superior Court (Dugré J.), 2013 QCCS 6251
6. Dugré J., who heard the case on its merits, declared that the contract was renewed until January 28, 2018 in accordance with the terms in effect as of July 28, 2012, the last day on which it was possible for the member pharmacists to inform Uniprix whether they intended to renew their contract of affiliation.
7. Finding that the language of clause 10 was clear and did not need to be interpreted, he added that the clause had been stipulated for the benefit of the member pharmacist, who could thus [translation] “renew the agreement as [he or she] saw fit every five years” (para. 40 (CanLII)), and that this was confirmed by an analysis of the contract as a whole. This interpretation implied as a corollary that Uniprix could resiliate the contract only for cause, not without cause as it had tried to do.
8. In the trial judge’s opinion, the parties’ conduct was a contextual factor that confirmed this interpretation. In this regard, he observed that they had in 2003 and 2008 accepted the automatic renewal of the contract pursuant to clause 10. It is well established that how the parties to a contract interpret and apply it is particularly helpful for the purpose of determining the substance of and the intention behind the contract.
9. The trial judge found that this clause was perfectly valid because it was contrary neither to prohibitive legislation nor to public order. He concluded that unilateral renewal clauses are valid in Quebec law even though there may be cases in which they give a contract perpetual effect.
   1. Quebec Court of Appeal, 2015 QCCA 1427
      1. Majority Reasons of Levesque and Émond JJ.A.
10. The majority of the Court of Appeal dismissed the appeal. In their view, although Uniprix had originally been created for the sole purpose of serving its members, it was now trying to insinuate itself into their business decisions by prevailing on the member pharmacists to participate in a project that was not to their advantage, threatening to terminate their business relationship with it if they did not.
11. The majority agreed with the trial judge that the clause was clear and did not need to be interpreted. In their opinion, the contract was for a fixed term and was renewed automatically unless the member pharmacists gave notice to the contrary. In agreeing to this mechanism, Uniprix had agreed to be bound for many years and had accepted that the member pharmacists’ silence would bind it for an additional term of the same duration. Clause 13 of the contract, which provided for damages should the member pharmacists terminate the contract before the expiration of the term, was a corollary to this principle.
12. The majority found that the fact that this renewal mechanism might cause the contract to become perpetual did not make the notice given by Uniprix valid. The Court of Appeal had never considered this issue, but some authors had addressed it. In the *Code*, the legislature limited the term of a lease and the duration of payment of an annuity to 100 years. The legislature also made it possible to terminate a contract of employment for an indeterminate term and an unlimited suretyship, as the perpetual nature of these undertakings seemed to be contrary to public order. However, the limits imposed on certain contracts were not evidence that the legislature intended to proscribe all contracts that could be perpetual. For the other types of contracts, the autonomy of the will must be reconciled with freedom of the person, but that is not generally a problem where agreements of an economic nature entered into by legal persons are concerned. In short, the *Code*, the source of the general law of Quebec, does not prohibit perpetual contracts.
13. In the majority’s view, the courts may of course elevate certain principles grounded in the fundamental values of our society to the rank of public order. However, no such value was violated by the possibility of the contract becoming perpetual. Uniprix was not in a vulnerable position, and the contract at issue was a standard form contract that Uniprix had itself drafted. Moreover, it was normal for Uniprix to want to bind itself in the long term and not to be able [translation] “to jettison its members as it pleases”, since the company had been created for their benefit, to promote their interests (para. 71 (CanLII)). This position does not contradict *BMW Canada inc. v. Automobiles Jalbert inc.*, 2006 QCCA 1068,and *9077‑0801 Québec inc. v. Société des loteries vidéo du Québec inc.*, 2012 QCCA 885, which apply more to franchise agreements.
14. In any event, the majority found that even if the contract had been for an indeterminate term, Uniprix had not acted in good faith, which barred it from resiliating the contract. As for art. 1512 *C.C.Q.*, it did not apply, given that the contract was for a fixed term. Émond J.A. added that that article creates an independent remedy for which one of the parties must apply, but that was not done in the case at bar.
    * 1. Minority Reasons of Duval Hesler C.J.Q.
15. The Chief Justice, in dissent, would have allowed the appeal and terminated the contract as of six months after the date of the Court of Appeal’s judgment. Even if clause 10 had been drafted for the benefit of the member pharmacists, the only possible conclusion was that that clause made it impossible for Uniprix to know the contract’s termination date and that this turned the contract into one for an indeterminate term. The contract could therefore be resiliated on reasonable notice.
16. The dissenting judge was also of the opinion that art. 1512 *C.C.Q.* allowed the court to impose a term for the contract of affiliation. That article is often used to fix a repayment date for a loan agreement in which none is specified. The contract of affiliation provided for a minimum term of five years to ensure a degree of stability in the relations between the parties, but the renewal mechanism implied that only the member pharmacists could determine when the contract would terminate. As for the second paragraph of art. 1512 *C.C.Q.*, it can be used to fix a term, given that a contract of affiliation or a franchise agreement is, in its very essence, not perpetual.
17. In the dissenting judge’s opinion, the fact that the parties had not raised this article did not mean that it could not be applied, as it had been discussed at the hearing and the court could take judicial notice of it. Because the parties did not have a common intention regarding the term of their contract, art. 1512 *C.C.Q.* would make it possible to provide the contractual stability that they had failed to establish.
18. Finally, six months constituted reasonable notice, given that it was the time the parties themselves had chosen, and in particular given that the member pharmacists had the option of joining another banner or operating their business independently.
19. Issues
20. This appeal raises two issues. It must first be determined whether the trial judge erred in finding that clause 10 of the contract of affiliation is clear and that it faithfully represents the parties’ common intention of granting the member pharmacists a unilateral option to renew the contract every five years, which Uniprix would be unable to oppose. If that was indeed their intention, it will also be necessary to determine whether the result, namely the possibility of the contract becoming perpetual, is valid in Quebec civil law.
21. Analysis
    1. Common Intention of the Parties
       1. Nature and Characterization of the Contract of Affiliation
22. The parties signed a contract entitled contract of affiliation. This type of contract is not a nominate contract within the meaning of the *Code*. Rather, it is an onerous, bilateral contract of successive performance in which the parties obligate themselves reciprocally, each to the other (arts. 1380, 1381 and 1383 *C.C.Q.*). Because the contract was freely negotiated, it can hardly be characterized as a contract of adhesion (art. 1379 *C.C.Q.*).
23. In Quebec civil law, it is this classification of the contract — based on the rules that apply to it, the conditions that apply to its formation, its object and how it is performed — that makes it possible to define the nature of the contract and thereby determine how it should be characterized (J.‑L. Baudouin and P.‑G. Jobin, *Les obligations* (7th ed. 2013), by P.‑G. Jobin and N. Vézina, at Nos. 55‑56, 410 and 413; D. Lluelles and B. Moore, *Droit des obligations* (2nd ed. 2012), at No. 1562; M. Tancelin, *Des obligations en droit mixte du Québec* (7th ed. 2009), at No. 83; F. Gendron, *L’interprétation des contrats* (2nd ed. 2016), at pp. 16 and 18‑19; arts. 1378 to 1384 *C.C.Q.* and Book Five, Title Two of the *C.C.Q.*)*.*
24. With this in mind, it is in our opinion inappropriate to view this characterization of the contract as a purely objective exercise. This [translation] “crucial operation for the judge” can in fact be accomplished only by “seek[ing] to identify the parties’ true intention in this regard” (Baudouin and Jobin, at No. 56; see also Lluelles and Moore, at No. 1728; P. Fréchette, “La qualification des contrats: aspects théoriques” (2010), 51 *C. de D.* 117, at p. 151; *Tétreault v. Gagnon*, [1962] S.C.R. 766, at p. 770; *Montréal, Maine & Atlantique Canada Cie (Montreal, Maine & Atlantic Canada Co.) (MMA), Re*, 2014 QCCA 2072, 49 R.P.R. (5th) 210, at para. 34; *Station Mont‑Tremblant v. Banville‑Joncas*, 2017 QCCA 939, at para. 63 (CanLII); *Martin v. Dupont*, 2016 QCCA 475, at paras. 19‑21 (CanLII)).
25. To characterize a contract, the court must thus consider not only [translation] “the obligations and other effects of the contract that [the parties] have stipulated”, but also “in some cases the circumstances of its formation and how they have applied it” (Baudouin and Jobin, at No. 56). In this respect, although “the judge will never be bound by the parties’ own characterization, and [although] he or she has the power to attribute to the agreement the legal nature that, in his or her view, truly corresponds to its content” (*ibid.*), the judge nevertheless remains bound by the common intention of the parties as regards the content of their agreement. In other words, [translation] “the judge asks whether the name given to a contract actually corresponds to the effects being sought”, and “it is up to [him or her] to impose on the parties the nature of their agreement that results from the expression of their intention” (Fréchette, at pp. 151 and 157 (emphasis added)).
26. In the case at bar, the contract of affiliation between the parties is an innominate contract. It is true that some of its characteristics resemble those of a franchise agreement, another type of innominate contract. For example, Uniprix provides the member pharmacists with centralized purchasing and marketing services. But what distinguishes it from such an agreement is the particularly close relationship between the parties. In a franchise agreement, the franchisor and franchisees are normally independent entities, each of which acts for its own benefit (*Provigo Distribution inc. v. Supermarché A.R.G. inc.*, [1998] R.J.Q. 47 (C.A.)). In the case at bar, Uniprix was expressly created for the benefit of its members, which have stakes in the business given that they are all shareholders (clauses 1 and 4 of the contract of affiliation). Uniprix did not itself, as would be true in the case of a franchise agreement, develop a brand and a business model with the intention of subsequently selling them to pharmacists. Rather, it was created by a group of owner pharmacists who wished to join together under a common banner. There is no doubt as to the intention of the parties in this regard.
    * 1. Term of the Contract of Affiliation and Procedure for Renewing It
27. The nature of the contract having thus been clarified, the parties disagree on its term and on the renewal mechanism set out in clause 10. The member pharmacists submit that the contract of affiliation is to be renewed automatically, as it was in 2003 and 2008, unless they give notice to the contrary. In their view, nothing in clause 10 entitles Uniprix to oppose this renewal.
28. Uniprix counters that clause 10 gives it an implied right to oppose the renewal of the contract. In the alternative, it submits that the interpretation proposed by the member pharmacists could have the effect of binding the parties in perpetuity, which would be contrary to public order. The adoption of that interpretation would necessarily, in Uniprix’s view, lead to the conclusion that the contract is one for an indeterminate term and that it can therefore be resiliated on reasonable notice. In either case, Uniprix argues, the notice sent to the member pharmacists was sufficient to terminate their contractual relationship as of January 2013.
29. To resolve this disagreement, the words of the contract, and more specifically those of clause 10, which fixes its term and the procedure for renewing it, must be interpreted. It will be necessary to briefly review the principles that guide this exercise in Quebec civil law. Only once this exercise has been completed will it be possible to establish the term of the contract and the procedure for renewing it together with the associated legal consequences.
    * + 1. Principles of Contractual Interpretation
30. The first step in interpreting a contract is to determine whether its words are clear or ambiguous (*Droit de la famille — 171197*, 2017 QCCA 861, at para. 62 (CanLII); *Samen Investments Inc. v. Monit Management Ltd.*, 2014 QCCA 826, at para. 46 (CanLII)). The purpose of this step, which some authors refer to as the clear act rule (*règle de l’acte clair*) (Gendron, at p. 27), is to prevent judges from departing, deliberately or unexpectedly, from a clearly expressed intention of the parties. In short, a judge must defer to a clear contract. This step thus [translation] “‘serves as a bulwark’ against the risk of an interpretation that deviates from the true intention of the parties and subverts the scheme of their agreement” (Baudouin and Jobin, at No. 413 (citation omitted); see also Lluelles and Moore, at No. 1570).
31. Although this step is based first and foremost on a reading of the words themselves, it is not necessarily limited to that in every case, as there may be situations in which a contract’s language is not faithful to the parties’ common intention (Lluelles and Moore, at No. 1574; *Droit de la famille — 171197*, at para. 62). Indeed, [translation] “[w]hen considered in the context of the agreement’s other clauses or of the circumstances in which it was concluded, the seemingly clear words of a clause may [sometimes] prove to be ambiguous and to be inconsistent with the scheme of the contract, the true intention of the parties” (Baudouin and Jobin, at No. 413; see also Lluelles and Moore, at Nos. 1572‑74; Tancelin, at No. 316; Gendron, at pp. 27, 31 and 34; *Éolectric inc. v. Kruger, groupe Énergie*, 2015 QCCA 365, at paras. 18‑19 (CanLII); *Rouge Resto‑bar inc. v. Zoom Média inc.*, 2013 QCCA 443, at paras. 78‑79 (CanLII)). Likewise, a clause that might be perceived to be ambiguous may be perfectly clear when considered in its context.
32. If the words of the contract are clear, the court’s role is limited to applying them to the facts before it. If, on the other hand, the court identifies an ambiguity, it must resolve the ambiguity by proceeding to the second step of contractual interpretation (Baudouin and Jobin, at No. 413; Lluelles and Moore, at Nos. 1584‑86; *Samen Investments*, at paras. 46‑47). The distinction between these two steps can be difficult to see, but it is fundamental. At the first step, the judge might, for example, consider the context of the conclusion and performance of the contract in order to confirm that its language is clear (see e.g. *Habitations Gilles Stébenne inc. v. 9166‑9929 Québec inc.*, 2016 QCCS 2953, at paras. 34 and 41‑47 (CanLII)). In principle, however, the judge should not have recourse to the principles of interpretation set out in arts. 1425 to 1432 of the *Code* (Baudouin and Jobin, at No. 413; Lluelles and Moore, at No. 1571). In this sense, the interpretation of the contract is more superficial at the first step than at the second (Lluelles and Moore, at No. 1572).
33. The cardinal principle that guides the second step of the interpretation exercise is that “[t]he common intention of the parties rather than adherence to the literal meaning of the words shall be sought” (art. 1425 *C.C.Q.*). In this exercise, it is necessary to consider intrinsic aspects of the contract, such as the words of the clause at issue and the other clauses, in order to ensure that each of them is given a meaningful effect and that each is interpreted in light of the others (arts. 1427 and 1428 *C.C.Q.*; Baudouin and Jobin, at No. 417; Lluelles and Moore, at Nos. 1593‑94). The interpretation of a contract also requires consideration of the nature of the contract and of the context extrinsic to it, including the factual circumstances in which it was formed, how the parties have interpreted it, and usage (art. 1426 *C.C.Q.*; Baudouin and Jobin, at No. 418; Lluelles and Moore, at Nos. 1600, 1603 and 1607).
34. This interpretation exercise makes it possible to establish the term of the contract at issue and the procedure for renewing it. In this regard, it must be noted that the two actions of characterizing and interpreting the contract are distinct, although in both cases one [translation] “seeks to determine the intention of the parties” (Lluelles and Moore, at No. 1727). Characterization, first of all, serves to determine “what object the parties intended to give to their agreement as a whole”, and its “essential object . . . is the linking of the contract at issue to a legal category” (*ibid.*, at Nos. 1727 and 1729). For this purpose, the judge must “determine, sometimes, the overriding purpose of the agreement and, at other times — most often, in fact — the essential prestation that is central to the agreement” (*ibid.*, at No. 1733 (footnote omitted)). As for interpretation, its purpose is instead to determine “what meaning the parties seem to have intended to give to a specific part of the agreement” (*ibid.*, at No. 1727).
35. In other words, a contract is characterized on the basis of its nature, by associating it with a category of nominate contracts (arts. 1708 to 2643 *C.C.Q.*) or with a specific class of contracts (arts. 1378 to 1384 *C.C.Q.*), but the term of the contract is not “characterized”, as it instead depends on the interpretation of the contract’s words. It is true that an extinctive term that is attached to all the obligations of a contract has the effect of terminating the contract in its entirety (Lluelles and Moore, at No. 2507; Baudouin and Jobin, at No. 559; Tancelin, at No. 443). However, the fact that this term has an effect on the contract as a whole does not mean that the purpose of interpreting the term is to identify the essential prestation or the purpose of the agreement. From this perspective, it is wrong to apply to the determination of the term of the contract the principles applicable to the characterization of its nature. Even one of the French commentators to whom our colleague refers on this point recognizes that although the term of the contract may be a relevant consideration in the characterization of certain contracts — where, for example, a category of nominate contracts is defined on the basis of their term — the determination of the contract’s term does not in itself constitute characterization (J. Azéma, *La durée des contrats successifs* (1969), at Nos. 113‑33).
36. In the instant case, the Chief Justice of the Court of Appeal, in dissent, purported to “characterize” the contract of affiliation as a contract for an indeterminate term — that is, in relation to its term — without first undertaking this interpretation exercise and without identifying the parties’ common intention. With respect, it was not open to her to do so, especially without first establishing that the trial judge had made a palpable and overriding error.
37. Indeed, contractual interpretation involves the consideration of a multitude of facts. It is a question of mixed fact and law in respect of which courts of appeal may not intervene in the absence of a palpable and overriding error (*Larouche v. Néron*, 2016 QCCA 692, at para. 5 (CanLII); *Lamco II s.e.c. v. Québec (Ville)*, 2016 QCCA 757, at para. 2 (CanLII); see also *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, at paras. 47‑50). The same is true for [translation] “[d]etermining whether a contract is clear or ambiguous”, which “is a discretionary process” in respect of which “a court of appeal must show restraint and deference” (*Immeubles Régime XV inc. v. Indigo Books & Music Inc.*, 2012 QCCA 239, at paras. 9‑10 (CanLII); see also *Éolectric*, at para. 16; Baudouin and Jobin, at No. 413; Lluelles and Moore, at No. 1579).
38. The characterization of a contract can also be considered to be a question of mixed fact and law in certain circumstances. Although certain authors see it as a pure question of law (Gendron, at pp. 16‑17; Lluelles and Moore, at No. 1738), the fact remains that the characterization of a contract can depend on evidence of the parties’ common intention as regards its nature and its content. When it is necessary to consider evidence of that intention, the Quebec Court of Appeal rightly recognizes that, in such cases, the characterization of the contract is a question of mixed fact and law (*MMA*, at para. 20; *Banville‑Joncas*, at paras. 63‑64; *Cie canadienne d’assurances générales Lombard v. Promutuel Portneuf‑Champlain, société mutuelle d’assurances générales*, 2016 QCCA 1903, at para. 17 (CanLII)).
39. On this point, our colleague argues that the “characterization”, not of the nature of the contract but of its term, raises a question of law in the instant case. With respect, we find that our colleague is mistaken. First of all, this argument is inconsistent with the recent case law of the Quebec Court of Appeal, which, moreover, only recently observed that the definition of the term of a contract and of its renewal mechanism is a question in respect of which an appellate court may intervene only where there is a palpable and overriding error (*2320‑4035 Québec inc. v. Centre intégré universitaire de santé et de services sociaux du Centre‑Sud‑de‑l’Île‑de‑Montréal (CIUSSS CSIM) (Centre de réadaptation en déficience intellectuelle et en troubles envahissants du développement de Montréal)*, 2017 QCCA 427, at paras. 12‑16 (CanLII)). Our colleague’s argument is not supported by the academic commentary to which she refers either. The characterization exercise that some authors treat as a question of law concerns not the term of the contract as stipulated in one of its clauses, but the characterization of the nature of the contract as a whole (see e.g. Gendron, at pp. 16‑17; Lluelles and Moore, at Nos. 1729 and 1738). Furthermore, while it can sometimes make sense to consider the characterization of a contract as a whole to be a question of law where the purpose of that exercise is only to define the specific legal scheme of the contract without resorting to any evidence, the same cannot be said for the interpretation of a clause that fixes the contract’s term and the procedure for renewing it. The result of the interpretation exercise is to identify the parties’ common intention as regards that specific clause and not to characterize the nature of their contract as a whole.
40. In the case at bar, this Court’s role is in fact limited to deciding whether the trial judge committed a palpable and overriding error in applying the relevant principles of interpretation to clause 10 of the contract of affiliation.
    * + 1. Clause 10 of the Contract of Affiliation
41. The trial judge first found that clause 10 of the contract of affiliation was clear. In his view, the parties intended to [translation] “give the member [pharmacist] the right to renew the agreement as [he or she] saw fit every five years” (para. 40). The majority of the Court of Appeal confirmed this interpretation, finding that as a result of clause 10 the contract was [translation] “automatically renewed for the same term unless the [member pharmacists] give notice to the contrary” (para. 57). In our view, their interpretation of the renewal clause is not tainted by a palpable and overriding error. On the contrary, it is perfectly consistent with the other undertakings stipulated in the contract and with the circumstances in which it was formed.
42. Clause 10 itself is in no way ambiguous. It specifically provides that the member pharmacists can notify Uniprix of their intention to renew or not to renew the contract. But it does not stipulate that Uniprix can give a similar notice to the member pharmacists. Furthermore, the second paragraph clearly provides that [translation] “[s]hould [the member pharmacists] fail to send the prescribed notice [to Uniprix] . . . the agreement shall be deemed to have been renewed”. By virtue of art. 2847 *C.C.Q.*, the word “deemed” in the contract creates a presumption that is absolute and irrebuttable (see *Construction BFC Foundation ltée v. Entreprises Pro‑Sag inc.*, 2013 QCCA 1253, at paras. 67 and 91 (CanLII)). Because the member pharmacists actually sent no notice whatsoever, the second paragraph applies and the agreement is renewed for an additional five‑year term. No interpretation of clause 10 can escape the impact of this second paragraph, which is a determining factor in the analysis of the parties’ common intention.
43. Uniprix nevertheless submits that the contract gives it the power to oppose the renewal. Its interpretation of clause 10 is that the member pharmacists may give notice only of their *intention* to leave the group or to renew the agreement. Uniprix argues that it then has the power to oppose this notice of their intention and to refuse the renewal of the contract of affiliation. Since there is no provision to this effect, its position is essentially based on the addition of an implied term to the contract. In Uniprix’s view, clauses 11, 15.1 and 16 confirm the existence of this implied term:

[translation]

11. TERMINATION:

In the event of the resiliation or termination of this contract, [Uniprix] shall not be liable to [the member pharmacist] for any damages whatsoever.

. . .

15. CONSEQUENCES OF TERMINATION OF THE CONTRACT:

15.1 In the event of the termination of this agreement for any reason whatsoever, [the member pharmacist] shall, at its own expense, remove the official sign or any other distinguishing marks of [Uniprix] within ten (10) days following the annulment or termination of this contract. . . .

. . .

16. WAIVER OF DAMAGES:

In the event of the resiliation or termination of this contract, [Uniprix] shall not be liable to [the member pharmacist] for any damages whatsoever . . . . [Emphasis added.]

1. These arguments are not persuasive. Uniprix’s proposed reading of clause 10 disregards the absolute presumption of renewal provided for in the clause’s second paragraph. When, as in the instant case, the member pharmacists send no notice to Uniprix, renewal is automatic and Uniprix cannot oppose it. It is true that clauses 11, 15.1 and 16 indicate that there are circumstances in which Uniprix may terminate the contract, as it would otherwise serve no purpose to exempt Uniprix from liability for damages related to the termination of the contract. Contrary to Uniprix’s position, however, and as the trial judge noted, those clauses are limited to its option to resiliate the agreement *for cause*, which is the only option conferred on it by the contract.
2. In this regard, the contract provides that the member pharmacists must [translation] “faithfully honour [it] on pain of having [their] privilege of doing business with [Uniprix] suspended or revoked” (clause 7.1). Section 9 of the internal regulations, which form an integral part of the contract of affiliation pursuant to clause 8.1, also provides for this possibility. In any event, the *Code* gives Uniprix the right to resiliate the contract, under certain conditions, should the member pharmacists “[fail] to perform [their] obligation without justification” (art. 1590 *C.C.Q.*; see also arts. 1604 and 1605 *C.C.Q.*). In short, clauses 11, 15.1 and 16 of the contract apply if Uniprix terminates the contract for cause. An option not to renew the contract or an option to resiliate it without cause cannot be read into those clauses, not even implicitly.
3. Uniprix adds that it would have been illogical for the parties to provide for a specific five‑year term if their intention had been to possibly bind themselves in perpetuity. This argument, too, must fail. The term is totally relevant for the member pharmacists, as it permits them to choose to renew or not to renew the contract every five years. It is also of benefit to Uniprix, as it precludes member pharmacists from resiliating the contract at any other time, which would lay them open to the damages provided for in clause 13 of the contract. Furthermore, the term makes it possible to update the contract from time to time, given that the contract is renewed [translation] “in accordance with the terms and conditions then in effect”. It was therefore not illogical for the parties to provide that the conditions of their affiliation would be updated every five years even if their intention was to possibly bind themselves in perpetuity.
4. All of these provisions form an integral part of the agreement between the parties, and they must be read and interpreted as a whole. Moreover, the parties to this bilateral, onerous contract, which was entered into by corporate partners in a business context, acknowledged that [translation] “[n]o provision of this agreement is abusive or is excessively or unreasonably detrimental to [Uniprix] or [the member pharmacists]” (clause 21.2).
5. In principle, because clause 10 is not at all ambiguous whether it is read in isolation or in the overall context of the contract, all that need be done is to apply it. However, in this case, as can be seen from the reasons of the courts below, there is more. In this regard, although it may be erroneous to proceed to interpret the contract without first finding that it is ambiguous (see e.g. *Pépin v. Pépin*, 2012 QCCA 1661, at para. 91 (CanLII)), it is not inappropriate to interpret an otherwise clear contract on a subsidiary basis in order to conclude that that interpretation confirms the clear meaning of its words. As well, Professor Gendron rightly notes that the courts often take such an approach (p. 36). In the case at bar, looking beyond the words of the contract, an analysis of the circumstances in which it was concluded confirms that the parties intended to leave the renewal of the contract to the discretion of the member pharmacists.
6. First of all, Uniprix was [translation] “created for the benefit of owner pharmacists who have joined together for the purpose of developing their respective commercial and professional practices” (clause 1). As counsel for the member pharmacists correctly observed at the hearing, Uniprix exists to serve its members. It thus makes sense that Uniprix will serve its members until they themselves decide to withdraw from the group, and that Uniprix therefore cannot terminate the contract without cause. The context of the commercial relationship between the parties thus readily supports the meaning that must be attributed to the words of clause 10.
7. Next, as the trial judge and the majority of the Court of Appeal rightly noted, the very conduct of the parties supports this interpretation. In the absence of notice from the member pharmacists, the contract was automatically renewed on January 28, 2003 and January 28, 2008. Twice, Uniprix recognized that the silence of the member pharmacists bound the parties for an additional five‑year term. As the *Code* provides, this interpretation given by the parties to their contract in the context of its performance is relevant to the identification of their common intention (art. 1426 *C.C.Q.*; see also *Ferme Vi‑Ber inc. v. Financière agricole du Québec*, 2016 SCC 34, [2016] 1 S.C.R. 1032, at paras. 76‑82; *Lac‑Sergent (Ville) v. Lapointe*, 2012 QCCA 1935, at para. 40 (CanLII)).
8. To interpret the contract of affiliation in such a way as to give Uniprix the power to oppose the renewal desired by the member pharmacists would therefore be contrary to the words of clause 10, to the general scheme of the contract of affiliation, to the circumstances in which it was concluded, and to how it has been applied by the parties. The trial judge committed no palpable and overriding error in this regard, and the Court of Appeal was right not to intervene.
9. It would, moreover, be just as inconsistent with the common intention of the parties to conclude, as did the Chief Justice of the Court of Appeal, in dissent, that the contract of affiliation is one for an indeterminate term. It can be seen from her reasons that she reached this conclusion solely on the basis that [translation] “the effect of . . . clause [10] is that the [contract of affiliation’s] termination date becomes unknown, at least for Uniprix” (para. 20). But this argument was not preceded by an interpretation of the contract and identification of the parties’ common intention, which, however, are always required when determining a contract’s term. By proceeding as she did, the dissenting judge skipped an important step in the process of interpreting and identifying the modalities of the contract, and improperly substituted her own view for the trial judge’s interpretation of the contract.
10. Furthermore, with all due respect, the fact that the term of Uniprix’s obligations pursuant to the contract of affiliation depends on the will of the member pharmacists to renew it does not transform the contract into one for an indeterminate term. Although it is true that the contract provides for a renewal procedure that depends on a decision by only one of the parties, what must be done here is to identify their common intention, not to characterize the term of the contract from the limited perspective of each of the parties. Uniprix’s argument in this regard would, taken to the extreme, mean that the contract is, for Uniprix, for an indeterminate term and, for the member pharmacists, for a fixed term. These two positions are of course incompatible, hence the importance of the interpretation exercise in order to identify the parties’ common intention.
11. In this regard, it should be mentioned that a contract is for an indeterminate term if the parties have fixed no extinctive term for their obligations (Lluelles and Moore, at No. 2122). In the case at bar, the parties agreed on a clear term of five years together with an equally clear renewal mechanism that would enable them to pursue their business relationship for fixedfive‑year periods. As Professors Lluelles and Moore note, such a contract, which [translation] “provides for a fixed term and stipulates that it is to be renewed automatically”, should not become “*ipso facto* a contract for an indeterminate term”, which would “fly in the face of logic and the clearly expressed intention of the parties” (No. 2124). In the words used by Vaillancourt J. of the Superior Court in a case involving a clause similar to the one at issue in the instant case, [translation] “[i]f the parties had intended to be bound by the same terms and conditions for an indeterminate period, they would not have stipulated such a fixed term and so specific a renewal mechanism” (*Association des diplômés de l’École des hautes études commerciales de Montréal v. Aeterna‑Vie Cie d’assurance*, [1995] R.R.A. 111, at p. 120).
12. Along the same lines, other authors point out that a contract of employment [translation] “for five years, renewable every five years in perpetuity at the request of the employee alone” is valid and is not a contract for an indeterminate term even though the employer does not know when it will terminate (J. Pineau, D. Burman and S. Gaudet, *Théorie des obligations* (4th ed. 2001), by J. Pineau and S. Gaudet, at para. 282; see also Lluelles and Moore, at No. 2149). If such a renewal mechanism can thus be valid in employment law, in respect of which the *Code* directs that contracts must be for either a fixed or an indeterminate term (art. 2086 *C.C.Q.*), that is all the more likely to be the case in a commercial context, for which no similar article exists.
13. We note, moreover, that on this point Uniprix itself has argued in all the courts that the contract of affiliation is one for a fixed term. It was only in the alternative, and hypothetically, that Uniprix contended that if the contract were for an indeterminate term, it could resiliate it on reasonable notice. As for the member pharmacists, they have argued in all the courts that the contract is for a fixed term. It would be strange to conclude that the contract of affiliation is for an indeterminate term when neither party’s primary argument is based on its being so designated.
14. What is more, a conclusion that the contract is one for an indeterminate term would produce results contrary to what the parties logically contemplated. As counsel for Uniprix conceded at the hearing in this Court, if the term of the contract were so defined, the same definition would necessarily apply to all the parties. It would therefore become possible for both Uniprix and the member pharmacists to terminate it at any time on reasonable notice. No provision of the contract of affiliation in any way suggests this was the parties’ common intention, quite the contrary. This would also mean that, even in the first few months of their relationship, it would have been possible for either the member pharmacists or Uniprix to terminate the contract had they so desired. This conclusion would be completely contrary to the intention of the parties, which wished at the very least, in binding themselves for fixed five‑year terms, to give their relationship a certain stability, as the dissenting judge in the Court of Appeal acknowledged (para. 27). Finally, the conclusion in question would be incompatible with the very nature of their relationship, which, given the significant initial investments it required, meant that a longer‑term perspective was essential.
15. Our colleague counters this with a concept to which none of the parties to the contract of affiliation referred. She suggests that the extinctive term of the contract is a “hybrid” term and thus contrary to art. 1517 *C.C.Q.* This concept of a “hybrid” term, which would be contrary to Quebec civil law and would lead to the conclusion that the contract is therefore for an indeterminate term, has never been discussed either in the academic commentary or by the courts. We cannot agree with this approach. The contractual interpretation exercise that we must undertake in Quebec civil law leads to the same conclusion whether at its first step or at its second. The intention of the parties to the contract of affiliation was that they would be bound for definite, successive five‑year periods and that the member pharmacists would have full discretion to decide to renew or not to renew the contract. To interpret clause 10 as stipulating an indeterminate term for the contract would frustrate this common intention of the parties, which a Quebec judge can do neither in the interpretation exercise nor in that of characterization.
    * + 1. Effect of Article 1512 C.C.Q. on the Term of the Contract
16. In the same way, the argument that art. 1512 *C.C.Q.* should be applied to fix a term for the contract of affiliation is hardly more convincing. Neither party raised it in the courts below. Only the Chief Justice of the Court of Appeal referred to it in her dissenting reasons. Uniprix addressed this argument in its submissions to this Court, although without much conviction. In our view, this argument, too, must fail.
17. Article 1512 *C.C.Q.* reads as follows:

**1512.** Where the parties have agreed to delay the determination of the term or to leave it to one of them to make such determination and where, after a reasonable time, no term has been determined, the court may, upon the application of one of the parties, fix the term according to the nature of the obligation, the situation of the parties and any appropriate circumstances.

The court may also fix the term where a term is required by the nature of the obligation and there is no agreement as to how it may be determined.

1. This article provides for three distinct situations in which a court may fix the term of a contract: where the parties have delayed the determination of the term and no term has been fixed after a reasonable time; where the parties have left it to one of them to make such determination and that has not been done after a reasonable time; or where a term is required by the nature of the obligation and there is no agreement as to how it may be determined.
2. In each of these three situations, no term has been fixed in the contract itself. Article 1512 *C.C.Q.* applies where there is no term or where the term is uncertain. It was not enacted for the purpose of thwarting the automatic renewal of a contract whose term is clearly defined. It cannot therefore apply in this case, as the parties have fixed a term of five years for their contract. The fact that the term is renewable does not alter the fact that it is a fixed term.
3. In any event, art. 1512 *C.C.Q.* cannot apply in this case, because neither party has made an application under it. Émond J.A., one of the judges of the majority of the Court of Appeal, pointed this out: the article provides that it is applicable upon the application of one of the parties. This is therefore an independent remedy that must be specifically sought if it is to apply. Moreover, the Quebec Court of Appeal recently endorsed this position in a unanimous decision rendered subsequently to its decision in the case at bar in which it stated that [translation] “[a] formal application to fix a term for the . . . obligation [must] therefore . . . be made to the court in order to alert the [affected party] to the fact that his [or her] rights [are] liable to be modified” (*Triou v. Teman*, 2016 QCCA 908, at para. 14 (CanLII)).
4. In sum, no matter what approach is taken in analyzing the situation, the trial judge made no palpable and overriding error in concluding that the contract of affiliation is for a fixed term and that, under clause 10, the member pharmacists have a unilateral option to renew the contract every five years and Uniprix is unable to oppose such a renewal. Because the contract is not for an indeterminate term, Uniprix may not resiliate it on reasonable notice, and art. 1512 *C.C.Q.* cannot be applied to fix a term for it.
   1. Validity of Contracts Whose Effects Are Perpetual in Quebec Civil Law
5. Uniprix’s second argument is that, if the contract does not confer on it either a power to oppose the renewal of the contract or a power to terminate it without cause, the effects of the contract may therefore be perpetual, as Uniprix may be bound by the contract for as long as the member pharmacists comply with their obligations and wish to renew it for successive five‑year terms. Uniprix submits that such perpetual effects are unlawful in Quebec civil law because they are contrary to the *Code* and to public order. It adds that this defect of perpetuity must be cured by overriding the renewal procedure created by the parties and defining the contract as one for an indeterminate term, in which case Uniprix would be able to terminate the contract without cause on giving reasonable notice.
6. In our opinion, this argument is without merit. As both the Superior Court and the majority of the Court of Appeal found, nothing in the *Code* prohibits contracts such as the contract of affiliation from having effects that could be perpetual. Nor is there any basis for concluding that such contracts are contrary to public order.
7. Our colleague does not address this question, which in our view is central to this case. She instead declines to do so on the basis that a clause whose effects could be perpetual cannot be inferred where there is no express stipulation. We disagree. Neither the Quebec authors or courts nor even the parties in this case have suggested that an express stipulation is required in order to give effect to the term of a contract whose effects could be perpetual. On the contrary, Professors Lluelles and Moore, for example, note that [translation] “[a]side from the scenario — quite unlikely in practice — of an express stipulation of perpetuity, a perpetual nature can be found to exist in [certain] hypothetical cases”, including where “the contract is one for a fixed term (for example, one year, five years), but subject to automatic renewal at the expiry of each term for an identical period, and it is impossible for either party to oppose the renewal” (No. 2144). This last situation is analogous to that of the contract of affiliation: a context in which the intention to possibly bind oneself in perpetuity can be inferred from the terms of the contract although there is no express stipulation to that effect. In *BMW Canada inc.*, the Quebec Court of Appeal also held that a perpetual renewal can be implicit and be found to exist on the basis of evidence of usage (para. 140 (CanLII)).
8. In Quebec civil law, the fundamental principle of consensualism prevails unless a “particular or solemn form is required as a necessary condition for the formation of a contract” (art. 1414 *C.C.Q.*). As Professors Baudouin and Jobin point out, [translation] “a contractual obligation arises from the meeting of two minds and does not have to be expressed in a particular form prescribed by law in order for the contract to be valid” (No. 90). The problem raised by the possibility of the contract having perpetual effect must be resolved not by taking a formalistic approach, but by analyzing the common intention of the parties having regard to the provisions of the *Code* and to public order. Once this common intention has been identified, it does not matter whether the possibly perpetual effects of the contract result from an express stipulation. In our opinion, the metaphor our colleague employs in this regard (at para. 167) seems inappropriate. While it is true that the *Code* requires the observance of formalities, on pain of nullity, for the exchange of marriage vows (arts. 365 to 377 and 380 *C.C.Q.*; *Rules respecting the solemnization of civil marriages and civil unions*, CQLR, c. CCQ, r. 3), it does not do so for an innominate commercial contract of affiliation entered into by sophisticated parties.
   * 1. Provisions of the *C.C.Q.*
9. The *C.C.Q.* does not prohibit a contract like the one at issue here from having effects that could be perpetual. Before we turn to an analysis of the *C.C.Q.*’s provisions, it will be helpful to briefly review the history of contracts that were said to be perpetual under the *Civil Code of Lower Canada* (“*C.C.L.C.*”).
   * + 1. Perpetual Contracts and the C.C.L.C.
10. When the *C.C.L.C.* was in force, nothing prevented contracting parties from binding themselves in perpetuity. No provision of the *C.C.L.C.* imposed such a prohibition. The commentators confirm that such contracts were perfectly legal at the time (Baudouin and Jobin, at No. 102). They rely in this regard mainly on the case law of this Court.
11. In one case decided in 1945, the Court upheld the validity of a contract that permitted the use of water power from the Lachine Canal for a term of 21 years that was renewable at the sole discretion of the user (*Consumers Cordage Co. v. St. Gabriel Land & Hydraulic Co.*, [1945] S.C.R. 158, at p. 161). The Court concluded that “under Quebec law the covenant for perpetual renewal is not contrary to public policy, nor prohibited by law” (p. 166). It ultimately decided that it should defer to the intention of the contracting parties, stating that “[their] intention . . . must prevail” (p. 167).
12. Nearly 20 years later, this Court upheld the validity of a one‑year lease that was to be renewed automatically [translation] “until the said lease is cancelled by written notice from the lessee to the lessor” (*Cyclorama de Jérusalem Inc. v. Congrégation du Très Saint Rédempteur*, [1964] S.C.R. 595, at p. 597). Interpreting the words of the contract, the Court concluded that the parties had, in stipulating that only the lessee could cancel the lease, excluded the possibility “that the lease could also be terminated by notice from the lessor” (p. 600). The Court found that the contract was valid despite its perpetual effects, noting that “the perpetual lease issue was conclusively decided by this Court in *Consumers Cordage*” (p. 599).
13. In the same vein, the Quebec Court of Appeal echoed those decisions in 1979 when it upheld a one‑year residential lease “[that could] be renewed on my request ([translation] i.e. that of the appellant lessee) on a year to year basis at same rental and conditions etc.” (*Neale v. Katz*, [1979] C.A. 192, at p. 193). In that case, Mayrand J.A. wrote, despite the opinion of some Quebec and French commentators of the time, that since *Consumers Cordage*, it [translation] “appears . . . highly doubtful that a lease in perpetuity is void or even voidable in Quebec civil law” (p. 194). In our view, it would be inappropriate to overturn that precedent, which is based on those two judgments of this Court.
14. Although *Cyclorama* and *Neale* dealt more specifically with lease agreements, it should be noted that the contract at issue in *Consumers Cordage* was an innominate contract, which supports the argument that the *C.C.L.C.* did not prohibit contracts, whether leases or any others, from being perpetual.
    * + 1. Perpetual Contracts and the C.C.Q.
15. In enacting the *C.C.Q.*, the legislature did not change the general state of the law in this regard, although it did opt in the case of certain contracts to limit their term for very specific reasons. For example, it limited the duration of payment of an annuity to a maximum of 100 years after the annuity is constituted (art. 2376 *C.C.Q.*). It also provided that a commercial lease may continue for up to 100 years from its effective date (art. 1880 *C.C.Q.*). As the *Commentaires du ministre* indicate, the latter article was enacted to [translation] “put an end to the debate surrounding the validity of the perpetual lease by expressly prohibiting such leases” (Quebec, Ministère de la Justice, *Commentaires du ministre de la Justice*, vol. II, *Le Code civil du Québec — Un mouvement de société* (1993), at p. 1181). Finally, the legislature specifically provided for the possibility of resiliating an unlimited suretyship (art. 2362 *C.C.Q.*). The *Commentaires du ministre* indicate that this article was enacted because it “seemed contrary to public order that such an agreement could be perpetual” (p. 1482).
16. Uniprix submits that these few articles illustrate an intention on the legislature’s part to prohibit any obligation whose effects could be perpetual in Quebec civil law. However, this reasoning is contradicted by most of the authors who have written on this topic.
17. Professors Lluelles and Moore refuse to read into the limits imposed on certain contracts a more general prohibition against perpetuity in Quebec. In their view, [translation] “the term of a contract has no upper limit other than where the legislature has provided for an exception, unless a judge characterizes an *intuitu personae* contract as *perpetual*, as such a term would be excessive having regard to basic human rights” (No. 2044 (emphasis in original; footnote omitted)). As they see it, “Quebec’s modern‑day codifiers did not proscribe the perpetual contract generally[, but] simply placed limits on it by narrowing its scope, in a small number of contracts” (No. 2154). They are also of the view that automatic renewal clauses like the one adopted by the parties in the case at bar are entirely valid, stating that “[i]f the contract does not provide for . . . a blocking power [for one of the parties], it should be presumed that the renewal cannot be prevented” (No. 2194 (footnote omitted)). Professors Lluelles and Moore suggest, but only hypothetically in the event — which they do not accept — that perpetuity were found to be unlawful or contrary to public order, that a contract with perpetual effects would in that case have to be considered valid, “but that its unlimited term should then be recharacterized as simply an indeterminate term, which would clear the way for a power to resiliate” (No. 2158).
18. Professors Baudouin and Jobin take a slightly different position. In their opinion, the provisions limiting the term of certain contracts [translation] “reflect the legislature’s policy on the term of a contract and must therefore be extended by analogy to all other contracts” (No. 102). However, rather than treating a perpetual contract as a contract for an indeterminate term, as Uniprix proposes, they suggest reducing the term of such a contract to 100 years (*ibid.*). The idea behind this solution seems to be to give effect to the parties’ intention to bind themselves for a long period, but to ensure that they cannot do so for an unlimited time.
19. Only one isolated academic authority supports Uniprix’s argument. Professors Pineau, Burman and Gaudet, relying on the same articles of the *C.C.Q.* and their own analysis of French law, conclude [translation] “that in Quebec law, as in French law, perpetual obligations are considered to be contrary to public order” (para. 284). In their view, a contract that is renewable at the discretion of only one party must necessarily be considered to be a contract for an indeterminate term (para. 280, fn. 929). Yet they find that a contract of employment that binds an employer in perpetuity for successive five‑year terms is valid. Indeed, they express the opinion that such a contract would not be for an indeterminate term, as “the employer could not decide unilaterally to dismiss the employee (without cause) on the pretext that the contract is perpetual” (para. 282).
20. In addition to being contradictory at times, the analysis proposed by Professors Pineau, Burman and Gaudet leaves something to be desired and is of no assistance in resolving the issue on its merits. It suggests that, by limiting the term of certain contracts when the *C.C.Q.* was enacted, the legislature in fact intended to implement a blanket prohibition against contracts with perpetual effects. In our view, this line of reasoning is not persuasive. When it enacted the *C.C.Q.*, the Quebec legislature was obviously familiar with the law as it existed under the *C.C.L.C.* It was well aware of the issues raised by such contracts, as can be seen from the *Commentaires du ministre*, in which perpetuity is discussed with respect to only certain specific articles. Nonetheless, it decided to place limits on only certain specific types of contracts, declining to enact a general provision prohibiting all perpetual contracts. It follows that there is no prohibition against perpetual contracts in the *C.C.Q.*, except in the specific cases for which the legislature has provided.
21. As for the analogy with French law on which Professors Pineau, Burman and Gaudet rely, we find it flawed and inconclusive. First of all, it should be noted that the French legislature recently enacted a provision expressly prohibiting all perpetual contracts (art. 1210 *C. civ.*). The Quebec legislature has not seen fit to do the same; the positions of the two legislatures are therefore not comparable.
22. This being said, it is true that before that recent legislative amendment in France, some French authors had concluded on the basis of a few articles of specific application that perpetuity was, *in principle*, contrary to public order (see e.g. J. Carbonnier, *Droit civil*, vol. 4, *Les obligations* (22nd ed. 2000), at No. 140). Their opinion was based largely on [translation] “the objective of protecting individual freedom” (J. Ghestin, C. Jamin and M. Billiau, *Les effets du contrat* (3rd ed. 2001), at No. 264; see e.g. Cass. civ. 1re, January 18, 2000, *Bull. civ.* 1 10, No. 98‑10.378), however, and individual freedom is at stake only in the context of certain types of contracts. Other authors had noted the more nuanced approach taken by certain French courts, which had upheld the validity of certain perpetual obligations, especially in commercial matters, while finding such obligations to be invalid if they might have had a real effect on individual freedom (Ghestin, Jamin and Billiau, at No. 200, quoting Cass. civ., June 25, 1907, D.P. 1907.1.337; see also Lluelles and Moore, at No. 2153). As we will see in discussing the concept of public order, this nuanced approach is preferable to a categorical prohibition against all perpetual obligations. However, it has no bearing on this case.
23. Like most of the academic literature, the existing Quebec case law is of no assistance to Uniprix on this point. The only decision rendered since the enactment of the *C.C.Q.* that relates directly to the issue before us is that of the Court of Appeal in the instant case. No other decision has dealt with the legality of innominate contracts whose effects could be perpetual. In short, nothing in the *Code*, the academic literature or the case law supports Uniprix’s position that a contract of affiliation whose effects could be perpetual is contrary to Quebec civil law.
    * 1. Public Order
24. Despite the fact that contracts whose effects could be perpetual, like the contract of affiliation, are not contrary to any provision of the *Code*, Uniprix insists and maintains that the renewal clause should nonetheless be considered unlawful. This position is based on the application of the more general concept of public order. In our view, Uniprix is mistaken on this point as well.
25. Public order is one of the few limits on contractual freedom in Quebec civil law (art. 9 *C.C.Q.*). It can be defined [translation] “as ‛the imposition of the social, moral, economic or political considerations’ of society on legal relationships” (Baudouin and Jobin, at No. 97, quoting G. Goldstein and N. Mestiri, “La liberté contractuelle et ses limites”, in B. Moore, ed., *Mélanges Jean Pineau* (2003), 299, at p. 310). Although “[m]ost of the principles of public order . . . are codified . . . [they] may [also] be created by the courts”, since “the courts may raise any unwritten rule to the rank of a principle of public order where that rule is consistent with the fundamental values of the society at a particular point in its development” (*Goulet v. Transamerica Life Insurance Co. of Canada*, 2002 SCC 21, [2002] 1 S.C.R. 719, at paras. 43 and 46).
26. It is true that the “variable, shifting or developing nature of the concept of public order sometimes makes it extremely difficult to arrive at a precise or exhaustive definition of what it covers” (*Desputeaux v. Éditions Chouette (1987) inc.*, 2003 SCC 17, [2003] 1 S.C.R. 178, at para. 52). Nevertheless, it must in every case be possible to tie the concept of public order to specific values or principles that might be violated by the contractual provisions at issue. Tautologies will not suffice. However, Uniprix was unable, either in its factum or at the hearing, to identify the fundamental values that would be undermined by a perpetual contract, and more specifically by its contract of affiliation with the member pharmacists. Similarly, Professors Pineau, Burman and Gaudet, on whose work Uniprix relies, assert that perpetual contracts are contrary to public order but fail to identify the fundamental values that they consider to be threatened (para. 284). In our view, perpetual obligations do not in themselves offend any of our fundamental societal values and are not generally contrary to public order.
27. We agree that there are circumstances in which the imposition of perpetual obligations could offend public order. For example, the protection of individual freedom and fundamental rights is one of our fundamental societal values. It is why the legislature has limited the term of contracts of employment: to preserve the freedom of employees (Baudouin and Jobin, at No. 441; *Asphalte Desjardins inc. v. Québec (Commission des normes du travail)*, 2013 QCCA 484, at para. 50 (CanLII), reversed on appeal, but not on this point: 2014 SCC 51, [2014] 2 S.C.R. 514). For contracts whose attributes have not been regulated by the legislature, it is also necessary to [translation] “reconcile two principles, autonomy of the will and freedom of the person — especially that of natural persons” (Lluelles and Moore, at No. 2154). It follows that it would likely be contrary to public order to impose in perpetuity obligations whose nature is such as to affect an individual’s person and freedom (*ibid.*, at No. 2156).
28. These various principles apply to automatic renewal clauses like the one between the parties. In the context of a corporate and commercial partnership such as the one between Uniprix and the member pharmacists, the fact that a contract leaves the option to renew entirely to the discretion of one of the contracting parties does not offend public order. The individual freedom of the contracting parties is not at stake, and public order cannot override the parties’ intention. As Professors Lluelles and Moore suggest, [translation] “[i]n contracts over which public order does not hold sway in any significant way, such as commercial leases or distribution or franchise agreements, a clause that makes this option available to only one of the contracting parties should be lawful” (No. 2196).
29. From this perspective, it should be noted that the *Code* provides a way out for vulnerable parties who are purportedly bound in perpetuity by a contract of adhesion. Depending on the circumstances, a clause that makes a contract of adhesion perpetual to the detriment of the adhering party could be found to be abusive and therefore null (arts. 1379 and 1437 *C.C.Q.*). But this, too, is of no assistance to Uniprix. The record shows that the contract of affiliation resulted from negotiations between the member pharmacists and Uniprix. In the commercial context of their relationship, it can hardly be characterized as a contract of adhesion. Even if the contract were so characterized, it is the member pharmacists who would be considered the adhering parties (art. 1379 *C.C.Q.*), and it would be very difficult for Uniprix to argue that the renewal clause might be abusive (art. 1437 *C.C.Q.*).
    * 1. Decisions Cited by Uniprix
30. The majority of the Court of Appeal, who endorsed the foregoing principles with respect both to the interpretation of the *Code* and to public order, concluded that the contract of affiliation was perfectly legal in Quebec civil law even though its effects could be perpetual. Although their judgment is the only one in which this issue has been clearly decided under the *Code*, Uniprix counters that conclusion with certain cases in which, in its view, the opposite was held. However, contrary to its position, no general principle — whether on the basis of the *Code*’s provisions or of public order — that contracts with perpetual effects are invalid in Quebec law can be drawn from the cases in question. The contracts at issue in those cases quite simply did not reveal that the parties intended to possibly bind themselves in perpetuity. They are consequently of little assistance in resolving the problem raised by this appeal.
31. The contract at issue in *BMW Canada inc.* can be distinguished from the contract of affiliation in the instant case, as it stipulated no term or renewal mechanism (paras. 11‑12). It simply gave the dealer an option to terminate without cause, but it did not give BMW Canada a similar option. It was in that very specific context that the Court of Appeal held, after interpreting the contract, [translation] “that it would be unreasonable to conclude that the fact that no term is indicated, in this specific case, mean[t] that BMW Canada was thereby forever waiving its right to terminate the contract without cause” (para. 109 (emphasis added)).
32. Far from proscribing perpetual contracts generally, the Court of Appeal in that case raised the possibility, depending on the parties’ intention, of other contracts having perpetual effect. In its view, [translation] “[e]vidence of usage might have supported a finding that, although the contract is silent, the parties implicitly intended the manufacturer to be subject to an obligation of perpetual renewal” (para. 140). If the perpetual renewal of a contract can result from usage, then it is all the more likely to result from the terms adopted by the parties themselves in their contract.
33. *Bombardier Produits récréatifs inc. (BRP) v. Christian Moto Sport inc. (CMS)*, 2012 QCCA 1670, can also be distinguished from the case at bar in that it concerned a contract for a fixed term that the parties had mutually agreed to renew over a period of several years (para. 11 (CanLII)). The sole issue in that case was whether it was abusive for one of the parties to decide not to renew the contract upon the expiry of the agreed term (para. 40). It was in that context that the Court of Appeal pointed out that the requirements of good faith alone cannot give [translation] “the dealer a right to renew its contract in perpetuity” contrary to the terms of the contract (paras. 41‑43).
34. The contract at issue in *Placements Sergakis inc. v. Société des loteries vidéo du Québec inc.*, 2009 QCCS 4976, expressly granted each party an option to resiliate it unilaterally (para. 25 (CanLII)). The issue was limited to whether the Société had exercised that right abusively. It was in that specific context that the Court of Appeal wrote that [translation] “a franchisee has no right to the indefinite renewal of its contract even where the franchisor cannot point to a breach of the franchisee’s contractual obligations” (*9077‑0801 Québec inc.*, at para. 33 (CanLII)).
35. *E. & S. Salsberg inc. v. Dylex Ltd.*, [1992] R.J.Q. 2445 (C.A.), can also be distinguished from the instant case. It concerned an oral contract for an indeterminate term, which the two contracting parties had agreed to renew on a year‑to‑year basis and under which they set the purchase price annually (p. 2449). However, renewal was not left to the discretion of only one of the parties as in the case at bar; it was subject to the parties’ agreement on the price. It was in that very specific context that the Court of Appeal held that the parties had intended to bind themselves for an indeterminate term and that it was accordingly necessary to allow the contract to be resiliated without cause if reasonable notice was given (*ibid.*).
36. These four Quebec Court of Appeal cases certainly show that, where contracting parties have not fixed a term for their obligations, their contract is for an indeterminate term and may be resiliated by one of them on reasonable notice. But the cases in question are of no assistance in a situation in which the parties have given their contract a clear term and renewal mechanism whose effects could be perpetual. Only in *BMW Canada inc.* was this possibility touched on briefly, but the court left the door open to perpetual renewal where, as here, that is the parties’ common intention.
37. It is true that the Superior Court has stated that [translation] “[n]o one can expect that such a dealership agreement will be perpetual and that the parties, upon entering into it, will be unable to terminate it” (*Bussières (Véhicules récréatifs Gascon enr.) v. Yamaha Motor Canada Ltd.*, 2006 QCCS 905, at paras. 88‑93 (CanLII)). It has also stated that [translation] “[n]o contract of successive performance over time may last forever or purport to apply in perpetuity” (*Bertrand Équipements inc. v. Kubota Canada ltée*, [2002] R.J.Q. 1329, at pp. 1331 and 1333‑34; *Équipement LDL inc. v. Toyota Canada inc.*, 2008 QCCS 4943, at para. 15 (CanLII)). However, the cases in question predate the Court of Appeal’s decision in the instant case, which greatly limits their relevance. Also, the contract at issue in each of those cases expressly provided for an option to resiliate without cause in favour of the party that had terminated the contract. The issue was whether that option had been exercised abusively. When read in context, the Superior Court’s comments cannot justify a blanket prohibition against perpetual contracts.
38. Finally, Uniprix relies on *Parkway Pontiac Buick inc. v. General Motors du Canada ltée*, 2012 QCCS 618, in which the contract at issue stipulated that the dealer was “assured the opportunity to enter into a new [agreement] at the expiration date” (para. 59 (CanLII)). But that seemingly automatic renewal was not found by the court to be invalid, quite the contrary. The court did, in considering a motion for an interlocutory injunction, raise certain doubts about how the contract should be interpreted, noting that that exercise would be a matter for the trial judge, but it nevertheless concluded that the dealer had established a *prima facie* entitlement to have the contract renewed (paras. 64 and 73). The court did not address the perpetuity issue, and no judgment was rendered on the merits, because the case was settled out of court.
    * 1. Application to the Contract of Affiliation
39. The contract of affiliation between the member pharmacists and Uniprix does not fall within any of the categories of contracts on which the Quebec legislature has imposed a maximum term. Nor does it create any obligations whose possible perpetuity might be contrary to public order. Uniprix corresponds, to draw on the words of Professors Lluelles and Moore, to a [translation] “[large‑scale] legal perso[n]” whose individual freedom is not threatened by having to assume obligations in perpetuity (No. 2154).
40. A conclusion that Uniprix’s obligations are perpetual is all the more reasonable given that, as we mentioned above, it was created for the sole purpose of serving its shareholder members, including the member pharmacists. As counsel for the latter explained at the hearing, [translation] “Uniprix was created by Manon Gosselin and about a hundred other pharmacists in 1977”; it was “the intention of those pharmacists to be served forever, to have a permanent relationship with the entity they had created” (transcript, at pp. 55 and 59). The renewal clause reflects this: “[T]hey are allowed to leave . . . . But . . . Uniprix is not allowed to leave. It is not allowed to [do so], because it is our creation” (*ibid.*, at pp. 59‑60). In other words, the commercial purpose of the relationship between the parties means that it makes perfect sense for Uniprix to have agreed to assume obligations toward the member pharmacists for as long as they wish to remain affiliated with it.
41. Conclusion
42. There is no basis for reversing the trial judge’s conclusion that the contract of affiliation is for a fixed term and that the option to renew it upon the expiry of each term is limited to the member pharmacists. The Superior Court and the majority of the Court of Appeal were right in holding that the parties to the case intended to be bound by a renewal mechanism whose effects could be perpetual. This renewal mechanism is perfectly legal, as the contract between the parties is not a type whose term has been limited by the Quebec legislature, and as the possibility of the obligations it imposes being perpetual does not offend and is not contrary to public order in Quebec civil law. The notice of non‑renewal sent by Uniprix accordingly violates the terms of the contract of affiliation and may not be set up against the member pharmacists. Because the contract is not for an indeterminate term, Uniprix could not resiliate it without cause on reasonable notice as it tried to do.
43. For these reasons, we would dismiss the appeal with costs.

The reasons of McLachlin C.J. and Côté and Rowe JJ. were delivered by

1. Côté J. (dissenting) — The issues raised by this appeal boil down to two questions: Did the trial judge err in declining to interpret the contract at hand? And even if he did not, did he err by failing to characterize the contract as indeterminate, despite the fact that, on his reading of the contract, it binds the appellant in potential perpetuity? I would answer both questions in the affirmative.
2. With respect to the first issue, the trial judge held that clause 10 of the contract of affiliation is clear and needs no interpretation (2013 QCCS 6251). In my view, that was an error. A reading of the entire contract reveals ambiguities which should have led the trial judge to go on to interpret the parties’ common intention under art. 1425 of the *Civil Code of Québec* (“*C.C.Q.*”), rather than determining the matter at the first stage of the interpretation analysis.
3. However, even if the trial judge’s conclusion on the first point is permitted to stand, his failure to properly characterize the contract’s term cannot withstand appellate scrutiny. According to his reading of the contract, the intended legal effect of the parties’ bargain is to bind the appellant in potential perpetuity, but the respondents for a period of only five years. On the basis of that, the majority of the Court of Appeal characterized the contract as one for a fixed term of five years, notwithstanding that it binds the appellant in potential perpetuity. It did so despite the fact that, as applied to the appellant, the contract’s purported five-year term is not an extinctive term at all. In my view, this was an error of law. Given the trial judge’s reading of the contract, the contract’s term may be characterized as either fixed for perpetuity with a unilateral possibility of exit arising every five years for one party — i.e., a fixed term of *forever* — or as indeterminate. I agree with Duval Hesler C.J., dissenting (2015 QCCA 1427), that the appropriate characterization is the latter, and this permits the parties to resiliate the contract on reasonable notice. A perpetual term should not be inferred in the absence of the parties’ explicitly stated desire to that effect.
4. I would accordingly allow the appeal and declare that the contract of affiliation is terminated as of the date of this Court’s decision.
   1. The Question of Fact: Interpreting Clause 10 of the Contract
      1. The Interpretive Framework
5. As my colleagues explain, this appeal arises out of a dispute concerning the meaning of a renewal clause in a contract of affiliation between the parties. It is therefore helpful to begin by reviewing the general framework governing contractual interpretation under Quebec law. This framework essentially consists of two steps.
6. First, the trial judge must apply the “clear act rule” (*règle de l’acte clair*). To do so, the trial judge 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 (*Samen Investments Inc. v. Monit Management Ltd.*, 2014 QCCA 826, at paras. 45-48 (CanLII)).
7. 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).
8. Therefore, at the first step of the analysis, the relevant context lies primarily within the four corners of the contract (Baudouin and Jobin, at No. 413). If something within those four corners gives rise to a doubt as to the meaning of the contract’s terms, then it is necessary to interpret the contract by proceeding to the second step of the analysis (see, e.g., *J.V. v. Cie d’assurance-vie Croix Bleue*, 2013 QCCA 1686, at para. 17 (CanLII)).
9. The second step requires the trial judge to ascertain the intention of the parties. Like its predecessor provision, art. 1013 of the *Civil Code of Lower Canada*, art. 1425 *C.C.Q.* provides the cardinal principle of interpretation:

**1013.** When the meaning of the parties in a contract is doubtful, their common intention must be determined by interpretation rather than by an adherence to the literal meaning of the words of the contract.

**1425.** The common intention of the parties rather than adherence to the literal meaning of the words shall be sought in interpreting a contract.

1. 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 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, [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).
2. It follows from the two-step logic of the above framework that proceeding to interpret a contract in the absence of an ambiguity constitutes a reversible error (*Gregory v. Château Drummond inc.*, 2012 QCCA 601, at paras. 55-61 (CanLII); *Pépin v. Pépin*, 2012 QCCA 1661, at para. 91 (CanLII)). The rule that an ambiguity is a prerequisite to interpretation long predates the introduction of the *C.C.Q.* (see *Alexis Nihon Cie v. Dupuis*, [1960] S.C.R. 53, at pp. 58-59 ([translation] “When the words of a contract are clear and unambiguous, no testimonial evidence may be admitted to interpret the document”); *Turenne*, at para. 26 ([translation] “The rules of interpretation in the Civil Code must be used only if there is a doubt as to the meaning to be given to a contract. Recourse should not be had to those rules if the contract’s wording or the clause in issue is clear”); *National Bank of Greece (Canada) v. Katsikonouris*, [1990] 2 S.C.R. 1029, at p. 1044 (“where the contract is unambiguous, and its meaning clear, there is no occasion for construction”)).
3. Therefore, against the backdrop of this two-step framework, I turn to the question of whether clause 10 of the contract is ambiguous.
   * 1. The Clause at Issue
4. The dispute at hand centres on the meaning of clause 10 of the contract:

[translation]

10. TERM:

Regardless of any written or verbal provisions to the contrary, this agreement shall commence on the day of its signing and shall remain in effect for a period of sixty (60) months, or for a period equal to the term of the lease for the premises where the pharmacy is located. THE MEMBER shall, six (6) months before the expiration of the agreement, notify THE COMPANY of its intention to leave THE COMPANY or to renew the agreement;

Should THE MEMBER fail to send the prescribed notice by registered mail, the agreement shall be deemed to have been renewed . . . .

(A.R., vol. VII, at p. 26)

1. The appellant — the company — argues that this clause requires the respondents to give notice of their intent to renew or not to renew the contract. In its view, this notice requirement is stipulated for its benefit and does not prevent it from refusing to accept the renewal of the contract. The respondents — the member — prevailed in both courts below and stand firm on the words “shall be deemed to have been renewed”. They argue that unless they give notice of non-renewal, these words create an absolute presumption of renewal. In other words, they say that clause 10 binds the appellant perpetually, subject only to their discretion. On this view, only the respondents may decide, six months prior to the expiration of each period, whether or not to renew the contract.
2. The trial judge found that clause 10 is unambiguous:

[translation] Having studied this clause from every angle, the Court concludes that it is clear and unambiguous. In such a case, the Court’s task is not to interpret the clause but to apply it. Moreover, in this case, it is neither necessary nor helpful to refer to the extrinsic evidence adduced by the parties. [Citation omitted; para. 30 (CanLII).]

1. Accordingly, the trial judge did not go on to interpret the contract. He concluded that clause 10 conferred on the member [translation] “the right to renew the contract as it saw fit every five years” (para. 40). Therefore, he held that the appellant could not oppose the renewal (para. 45).
2. The trial judge’s conclusion that the contract is clear and need not be interpreted is reviewable only for palpable and overriding error (*Centre de santé et de services sociaux de l’Énergie v. Société immobilière Lemieux inc.*, 2011 QCCA 972, at para. 5 (CanLII)). The majority of the Court of Appeal held that the trial judge’s finding at the first stage of the analysis did not constitute such an error (para. 56 (CanLII)). With respect, I disagree.
3. First, it is not clear from its wording that clause 10 is stipulated uniquely in favour of the respondents. Clause 10’s plain wording creates a notice obligation on the part of the respondents: [translation] “THE MEMBER shall . . . .” The corollary of that obligation is the appellant’s right to receive notice: “. . . notify THE COMPANY of its intention to leave THE COMPANY or to renew the agreement” (emphasis added). From a textual perspective, it is therefore clear that the appellant is the beneficiary of the notice obligation. Nothing about the wording of the clause, however, clarifies that the presumption of renewal in paragraph two of the clause is stipulated in favour of one party or the other. The fact that the presumption is triggered only if the respondents default on their notice obligation suggests that it exists to protect the appellant’s settled expectations in the absence of any notice to the contrary, not to bind the appellant perpetually.
4. Second, reference to other portions of the contract does nothing to resolve the ambiguity. The respondents emphasize that the appellant was created [translation] “for the benefit of owner pharmacists” (clause 1). But this does not imply that any particular clause of the contract is stipulated in the respondents’ favour. Indeed, the provisions relating to termination damages (clause 11), indemnification (clause 12), punitive damages (clause 13) and other liquidated damages upon termination of the contract (clause 15) are all clearly stipulated against the respondents. Further, while the contract clearly contemplates the possibility of resiliation and expiration in clause 11 and elsewhere, it is silent as to resiliation rights *per se*, apart from the reference to the member’s duty to give notice of the member’s intent to leave the company or to renew the contract in clause 10.
5. Third, the ambiguity is magnified by the interaction between the express term of 60 months and the renewal provision. The presence of an express 60‑month contractual term typically denotes the termination of obligations for both parties on expiry of the term. But when read in light of the renewal provision, the term apparently functions asymmetrically to bind the appellant, though not the respondents, in potential perpetuity. The term’s plain meaning therefore would not apply to the appellant, since its obligations never terminate. In this scenario, the Court of Appeal’s logic in *Cogefimo inc. v. Société Coinamatic inc.*, [1998] R.D.I. 193, is apposite:

[translation] Thus, there can be no term, in the true sense of the word, if renewal is automatic, and renewal cannot be obligatory in the sense of the French word “*automatique*” where there is a term, that is, the expiry or extinction of the right.

In my view, and with all due respect for the trial judge, this apparently contradictory combination of words justifies the application of the rules of interpretation . . . . [p. 196]

1. On this basis, the Court of Appeal held that the trial judge had erred in finding that the clause in question is clear, and that he should have gone on to interpret it. It is obvious that the coexistence of a term and a renewal clause does not always, or in itself, lead to an ambiguity. However, the renewal clause here conflicts with, and colours the stipulated term so as to distort its ordinary meaning by rendering it effective for only one of the parties. This adds to clause 10’s ambiguity.
2. Fourth, when the respondents’ tendered interpretation — that the appellant is bound forever solely at the respondents’ discretion — is considered in the context of the agreement’s other clauses, the unreasonable result produced suggests an inquiry into whether the parties intended to be so bound. Clause 1 provides that the appellant exists for the benefit of its *members* — plural — not for the benefit of any individual member. The potential for the interests of a particular member to conflict with those of the collective raises a question as to whether the parties intended that the appellant be forever beholden to any individual member.
3. Finally, the extent to which the renewal is “automatic” is itself an open question. For example, the renewal clause does not state that “this contract shall be renewed automatically unless THE MEMBER gives notice to the contrary”. Rather, renewal depends on the member clearly providing notice of the member’s intent to leave or to stay, and a consequence is imposed for defaulting on that obligation: [translation] “Should THE MEMBER fail to send the prescribed notice by registered mail, the agreement shall be deemed to have been renewed . . . .” This wording makes the renewal contingent, not automatic. Clause 10 requires the respondents to provide notice of whether they will leave or stay. The renewal clause kicks in only if they fail to do so.
4. This constellation of considerations should have led the trial judge to proceed to the second stage of the analysis and interpret the contract. Instead, he found that an interpretation was unnecessary. He therefore refused to consider evidence going to the parties’ common intention (para. 30). As Morissette J.A. put it, a palpable and overriding error is [translation] “in the nature not of a needle in a haystack, but of a beam in the eye” (*J.G. v. Nadeau*, 2016 QCCA 167, at para. 77 (CanLII)). In my view, the trial judge’s finding that he need not interpret the contract constitutes such an error.
5. This brings me to my colleagues’ approach. According to them, the trial judge did not err at the first stage of the analysis when he determined that the contract did not require interpretation. Nonetheless, my colleagues go on to reason that the resolution of this appeal hinges on interpretation of the contract at the second stage of the analysis (paras. 33 and 52). In support of their approach, they endorse academic criticism of the clear act rule to the effect that even clear acts should be interpreted (para. 52, citing Gendron, at p. 36). By proceeding to the second stage of inquiry, my colleagues engage in an exercise, in their words, involving “the consideration of a multitude of facts” (para. 41). In doing so, they survey the law that supplements the parties’ intention, the context of the parties’ relationship, and the conduct of the parties. But the trial judge did not go that far. Having concluded that the contract was clear, the trial judge determined it was unnecessary to make findings concerning the factual matrix. If his conclusion on the first point was right, then reference to the contract’s surrounding context would be unnecessary.
6. Further, in my respectful view, nothing about my colleagues’ inquiry into that context at paras. 53-54 of their reasons resolves the ambiguity in favour of the respondents. First, as explained above, the fact that the appellant exists for the benefit of all of its *members* (clause 1) suggests that it would not bind itself in perpetuity to *any single member* in the event that member’s interests conflicted with those of the collective. Indeed, the appellant here sought to move the pharmacy to a new location in order to protect its brand and market share, to the benefit of all of its members. This conflicted with the respondents’ personal interest, and thus gave rise to the dispute.
7. Second, the fact that the contract was renewed in two earlier instances with the appellant’s tacit *approval* says nothing about whether or not the appellant may *oppose* renewal. Rather, this fact is equally consistent with the interpretation that the presumption of renewal kicks in *for the appellant’s benefit* only if the respondents default on their notice obligation. In my view, then, my colleagues’ interpretation of the contract just underscores the internal textual conflicts which make it ambiguous.
8. With respect, my colleagues’ progression to the second stage of the inquiry and their endorsement of the respondents’ submissions concerning the contract’s factual matrix belie the conclusion that the contract need not be interpreted. If it is necessary to seek out the parties’ common intention, as my colleagues do, then clause 10 is ambiguous, and the trial judge erred in holding otherwise.
9. However, the trial judge’s error on the first point does not require this Court to intervene on the facts. Even if we assume, on the first issue, that the trial judge’s reading of clause 10 was correct — i.e., that the contract is automatically renewable subject only to the respondents’ opposition — the contract should be characterized as an indeterminate one and the appeal should be allowed on this basis. As I explain below, and contrary to my colleagues, I am of the view that the second issue on appeal — the proper characterization of the contract’s term — raises an extricable question of law that is determinative of this appeal.
   1. The Question of Law: Characterizing the Term of the Contract
10. The thrust of the appellant’s position is that if the entirety of the contract — and not merely one of the obligations created by it — has a five-year term, then both parties are subject to that term. In other words, the appellant argues that, as a matter of law, the contract’s term cannot be a hybrid one that binds the respondents for five years but the appellant forever.[[2]](#footnote-2) This raises a question that has not been considered by this Court: Can a contract properly be characterized as having a fixed term of five years where that term does not apply to one of the parties who is potentially bound in perpetuity?
11. As I explain below, that question should be answered in the negative, and the contract of affiliation should be characterized as one for an indeterminate term. While the trial judge did not explicitly characterize the term of the contract, he implicitly held that the contract could potentially bind the appellant in perpetuity. The majority of the Court of Appeal held that the contract had a fixed term of five years, but that it nonetheless bound the appellant in potential perpetuity (para. 57). In dissent, Duval Hesler C.J. held that the contract is properly characterized as one for an indeterminate term (para. 20). In my view, she was right.
    * 1. Characterization as a Legal Concept
12. Before characterizing the term of the contract of affiliation, it is helpful to review the concept of characterization generally.
13. The characterization of a contract determines the juridical category into which it falls and the legal consequences attaching to it as a result (Lluelles and Moore, at No. 1729). Depending on how it is characterized, a contract may contain obligations implied at law or be subject to special rules of interpretation. Although the characterization and interpretation of a contract are discrete tasks that should not be confused, the two may sometimes resemble one another (Baudouin and Jobin, at No. 56). There is, however, a crucial difference between interpretation and characterization. Unlike the interpretive exercise, where the trial judge seeks out the parties’ common intention, the trial judge is not bound by the parties’ ostensible, or even preferred, characterization:

[translation] The process of characterizing a contract depends exclusively on the judge, who is not bound by the title the parties give their agreement, the language they use in its clauses or the contract form they use. “The judge will not confine himself or herself . . . to the ‘legal label’ attached by the parties to their contract, but will restore to it its correct characterization. The judge will therefore endeavour to ‘recharacterize’ the contract in order to apply the legal rules that actually govern it”. [Emphasis added; footnotes omitted.]

(Lluelles and Moore, at No. 1735)

1. Characterization is therefore an objective exercise which assigns legal consequences based on the effects sought by the parties, as ascertained through an examination of the terms of their agreement. In the majority of cases, the parties’ common intention is irrelevant (P. Fréchette, “La qualification des contrats: aspects théoriques” (2010), 51 *C. de D.* 117, at p. 146). Parties accordingly have “limited influence on the characterization of their agreement” (*ibid.*, at p. 118). Instead, characterization is a question of law that is “left to the determination of the court” (*ibid.*; *Tétreault v. Gagnon*, [1962] S.C.R. 766; Gendron, at p. 17).
2. Characterization also conveys a broader meaning insofar as it reflects the law of obligations’ preference for reasoning from categories and then determining the legal consequences flowing from categorization. This approach is to be contrasted with that of the common law, which “shuns taxonomy as a point of principle, relying on *in concreto* facts rather than *in abstracto* categories as a starting point for legal reasoning” (N. Kasirer, “Pothier from A to Z”, in B. Moore, ed., *Mélanges Jean Pineau* (2003), 387, at p. 389).
3. My colleagues adopt a different view. At para. 40 of their reasons, they state that Duval Hesler C.J. erred in characterizing the contract as indeterminate. In their view, such a characterization is impossible, since a term is a modality of a contract that is to be interpreted as a matter of fact, not characterized as a matter of law (para. 39). As I understand it, my colleagues’ position is that because clause 10 stipulates a five-year term *as a matter of fact*, the contract is necessarily for a five-year fixed term *as a matter of law*, notwithstanding that it is potentially perpetual for one of the parties. Thus, on their view, the question of whether [translation] “the Court of Appeal created a legal incongruity in accepting that the Contract of Affiliation was at once for a fixed term and perpetual” (A.F., at para. 51) is not a question of law at all, since its resolution is dictated purely by fact.
4. With respect, I would decline to adopt my colleagues’ narrow approach to characterization. It conflicts with well-established doctrine providing that the determination of a contract’s term is a matter of legal characterization (J. Azéma, *La durée des contrats successifs* (1969), at Nos. 113-33; see also the treatment of whether or not a contract has a fixed term as a matter of characterization in J. Mestre, “Obligations et contrats spéciaux: Obligations en général” (1993), 2 *R.T.D. civ.* 343, at p. 356; B. Starck, H. Roland and L. Boyer, *Droit civil: les obligations*, vol. 2, *Contrat* (6th ed. 1998), at para. 1308). Further, it is difficult to reconcile with the purpose of characterization, since it is concerned with the *legal effects* of the agreement, and, on the trial judge’s reading, the intended *legal effect* of the renewal clause is to bind the appellant in potential perpetuity, not just for five years. Further still, as I explain below, it is at odds with the fact that the presence or absence of an extinctive term goes to the essential nature of contracts of successive performance.
5. Nor do I share my colleagues’ view that the resolution of the second issue depends on the facts. Given that, for the purposes of the following characterization analysis, I adopt the trial judge’s reading of the contract, neither the intent of the parties nor the factual matrix surrounding the contract is relevant to its characterization. Indeed, the trial judge did not explicitly conduct the characterization exercise, and insofar as he did so implicitly, he refused to consider the parties’ common intention relating to the term’s negotiation, or any other extrinsic evidence relating to the contract. In this scenario, I can see no basis on which to treat the question of qualification at hand as one of mixed fact and law, as suggested by my colleagues at para. 41. The only question remaining, to which I now turn, is one of pure law.
   * 1. Juridical Effect of a Term and Characterization of the Contractual Term in This Case
6. Does the contract of affiliation at issue have a fixed term? And if so, what is its duration?
7. [translation] “The contract for a fixed term is defined as ‘one whose extinction is based on a future and certain event the occurrence of which does not depend exclusively on the will of the parties’” (Azéma, at No. 84 (citation omitted)).
8. Where an extinctive term ends the contract in its entirety, it extinguishes all of the obligations created by the contract (see art. 1517 *C.C.Q.*; Baudouin and Jobin, at No. 559; see also M. Tancelin, *Des obligations en droit mixte du Québec* (7th ed. 2009), at No. 443). As noted by some authors, because the extinctive term is an essential or constitutive element of a contract of successive performance, it is only inaptly called a modality:

[translation] But one should not be deceived by this reference to an *extinctive term* [in art. 1517]. It is not really a modality that affects one of the obligations under a contract; rather, it is simply the end of a contract of successive performance, stipulated in advance by the parties. Thus, a lease may stipulate a term: that it has a duration of two years, for example. As can be seen, this purported extinctive term applies to the *entirety of an obligational relationship* (such as a contract) — and not to one of the obligations (contrary to the letter of article 1517). Moreover, unlike the suspensive term, the extinctive term relates to the very existence of obligations and not simply to when they become exigible. Upon the expiry of an extinctive term, the parties’ obligations cease to exist; it cannot be said that they cease only to be exigible. In principle, therefore, the idea that the extinctive term is a modality of an obligation is false. [Underlining added; footnotes omitted.]

(Lluelles and Moore, at No. 2507)

[translation] Although this element of duration is referred to in the specific rules on nominate contracts, the essential problems raised by the term of a contract in fact fall under general contract theory. Whether a contract may be perpetual is a central question that certainly lies outside the realm of modalities, which are characterized by their being optional and thus secondary, in the sense of being non‑compulsory. [Emphasis added.]

(Tancelin, at No. 443)

1. The *Code* thus contemplates two types of contracts of successive performance: those with an extinctive term (i.e., those with a fixed term) and those without one (i.e., those that are indeterminate).
2. Based on the trial judge’s reading of the contract, the intended legal effect of the parties’ agreement is to bind the appellant for a term of potential perpetuity, but the respondents for a term of only five years. How should this arrangement be characterized in light of the law’s binary distinction between contracts with a single extinctive term and contracts without one? Answering this question necessitates an inquiry into the legal mechanics of the contract.
3. On the trial judge’s reading, clause 10 creates an automatic renewal mechanism triggered by the parties’ silence. Since the contract is renewed without negotiations, no changes to the essential terms of the agreement can occur on renewal. The agreement remains the same. In the past, some academic authorities were uncertain as to whether, in these circumstances, a new contract is formed or the same contract is merely extended, but still, they suggested that

[translation] [t]he contract would appear to be the same one given the absence of any break in time and of any formality for its completion, unlike in the case of an option or tacit renewal. [Footnote omitted.]

(Lluelles and Moore, at No. 2195)

1. Recently, the Court of Appeal resolved this uncertainty, holding that an automatic renewal clause extends the same contract rather than creating a new one:

[translation] By providing for the automatic renewal of their agreement, the parties essentially agreed to extend the contract beyond its initial term. Ultimately, this was merely a change to the initially specified term, which was, in a sense, pushed back in time. On the expiry of the initially specified term, therefore, it was the same contract that would continue.

The renewal clause was worded such that the decision to push the term of the contract back another 60 months would be known even before the expiry of the initial term. Clause 6 provided that the contract would be renewed automatically unless either party gave notice of non‑renewal at least 90 days before the end of the initial (or renewed) period. The parties’ silence during the allotted time would constitute, as it were, their agreement to extend the contract, thereby confirming that it would remain in effect beyond the initially specified term. [Emphasis added.]

(*Services Matrec inc. v. CFH Sécurité inc*., 2014 QCCA 221, at paras. 38‑39 (CanLII))

1. The juridical effect of the renewal clause is therefore to extend the same contract for a further period of time. The renewal clause does not create iterative five-year contracts, but rather extends the first contract. The juridical link between the parties is accordingly never severed. In other words, the contract’s term is never spent. And since only the respondents may oppose renewal, the juridical effect of the five-year term — the extinction of the contract — is engaged only for them. That is, only the respondents have the benefit of a certain term that will extinguish their obligations (see Azéma, at No. 93). From the appellant’s standpoint, the date that the contract is extinguished is entirely uncertain.
2. As stated above, the result is that the contract would effectively have a hybrid term: one of five years as applied to the respondents; but one of potential perpetuity, or indeterminacy, as applied to the appellant. The question this Court must answer is whether such a hybrid term can exist as a matter of law, or whether a purported term must function symmetrically for the benefit of both parties in order to be characterized as an extinctive term.
3. At para. 57 of their reasons, my colleagues recognize that a contract cannot have both a fixed term for one party and an indeterminate term for the other. However, my colleagues do not address the characterization issue directly, instead asserting that the contract has a fixed term of five years (*in law*), yet is perpetual *in effect* for the appellant, before going on to assess the validity of a perpetual contract *in law*.
4. With respect, I find my colleagues’ distinction between the term *in law* and the term *in effect* artificial. The parties’ use of the words “60 months” should not dictate the contract’s characterization in law (Lluelles and Moore, at No. 1735). For example, if a lease in a dispute provided for a fixed term of less than a 100 years, but by virtue of a unilateral renewal clause, bound one party in excess of that term, then surely the fact that the parties initially specified some lesser period would not immunize the agreement from art. 1880 *C.C.Q.*, which reduces leases to 100 years. Yet, on my colleagues’ approach, that would appear to be the result, since the parties’ stated term would be sacrosanct.
5. Of the authorities cited by my colleagues, only one explicitly contemplates a hybrid term based on a distinction between a stated perpetual term and a shorter stated term that is perpetual *in effect*. In *Neale v. Katz*, [1979] C.A. 192, Mayrand J.A. distinguished in *obiter* between a lease with a perpetual term — that is, a stated term of *forever* — and a lease that has a lesser fixed term but assumes a perpetual character for only one of the parties by operation of a renewal clause (p. 194). In support of that distinction, however, Mayrand J.A. relied on two common law authorities as well as a strained reading of French academic commentary. I would therefore decline to adopt his reasoning.
6. In my view, a contract’s term must function symmetrically for both parties. In other words, a contract does not have a fixed term if that term does not apply to both parties. This coheres with the legal effect of the contract’s term, since it extinguishes personal obligations. It also coheres with the correlative nature of those personal obligations as created by the contract, since one party’s rights are the mirror image of the other’s obligations, but only for so long as the two mutually subsist. I would therefore conclude that, when it comes to characterization, this Court should not endorse the possibility of a hybrid term without conducting a careful inquiry into the lawfulness of such a mechanism.
7. In so concluding, I am mindful of the fact that commercial parties may wish to enter into long-term, even perpetual, agreements and that permitting these agreements may be desirable from a policy perspective. As I see it, the legal mechanism of an extinctive term contemplated by art. 1517 *C.C.Q.* is sufficiently robust to these commercial realities, and there is accordingly no need to distort it by endorsing the possibility of a hybrid term.
8. Given that the contract’s term cannot be characterized as a hybrid one, what is the proper characterization of the term based on the trial judge’s reading of the agreement? The trial judge held that, as a result of the automatic renewal, the appellant is potentially bound forever, subject only to the respondents’ discretion. As I see it, there are two possible characterizations of this agreement. The contract either has a perpetual term — that is, a fixed term of forever with an option to exit arising periodically for the member, in which case my colleagues’ public order analysis becomes relevant — or is for an indeterminate term, because there is no clear extinctive term.
9. In my view, and as Duval Hesler C.J. held, the correct characterization is the latter one:

[translation] In this case, clause 10 makes the contract of affiliation, whose term is on the face of it fixed, a contract for an indeterminate term, since the effect of that clause is that the contract’s termination date becomes unknown, at least for Uniprix. [para. 20]

1. This conclusion is consistent with the well-established principle that contracts with a purportedly certain extinctive term are to be characterized as indeterminate where the realization of the term is dependent on the decision of only one of the parties (see Azéma, at No. 89; Starck, Roland and Boyer, at para. 1308; Mestre, at p. 356; endorsed in Lluelles and Moore, at No. 2045, fn. 21 and 23).
2. It is also consistent with the law’s reluctance to infer perpetuity in the absence of the parties’ express stipulation to that effect. Even assuming, without deciding, that my colleagues are right that perpetuity is not contrary to public order, I would not go so far as to infer a perpetual term from the wording of clause 10. Quebec courts have refused to infer perpetuity where the parties did not clearly create a fixed term *in the eyes of the law*, and have characterized such contracts as for an indeterminate term (*E. & S. Salsberg inc. v. Dylex Ltd.*, [1992] R.J.Q. 2445 (C.A.); *Standard Broadcasting Corp. v. Stewart*, [1994] R.J.Q. 1751 (C.A.); *BMW Canada inc. v. Automobiles Jalbert inc.*, 2006 QCCA 1068; *9077-0801 Québec inc. v. Société des lotteries vidéo du Québec inc.*, 2012 QCCA 885). Accordingly, I conclude that the contract of affiliation should be characterized as one for an indeterminate term.
3. In light of this conclusion, it is unnecessary to consider what role — if any — art. 1512 *C.C.Q.* plays in this appeal. Rather, the question that remains is whether the notice of resiliation given by the appellant was reasonable in the circumstances.
   * 1. The Contract of Affiliation May Be Resiliated on Reasonable Notice
4. As the Court of Appeal recognized in *BMW Canada*, a contract for an indeterminate term may be resiliated on reasonable notice:

[translation] In short, in the case of a contract for an indeterminate term, the courts, after reviewing the contract, and in the absence of clauses to the contrary, conclude that it is possible to resiliate the contract without cause on giving reasonable notice. They are of the view that, absent exceptional circumstances, it would be unreasonable to suggest that the parties to a business agreement, at the time they enter into the agreement, intend or expect it to continue indefinitely, particularly where their relationship is one that requires trust and collaboration. [Footnote omitted; para. 108 (CanLII).]

1. The right to resiliate on reasonable notice [translation] “is of the essence of a contract for an indeterminate term and . . . the cases of resiliation provided for in the contract are therefore not exhaustive” (Pineau, Burman and Gaudet, at p. 506, fn. 930 (emphasis added)).
2. The reasonableness of the notice of resiliation in any given case is a fact-driven, contextual inquiry (see, e.g., *9077-0801 Québec inc.*,at para. 30 (CanLII); and *BMW Canada*, at para. 116). Given his reading of the contract, the trial judge did not make any findings on this point. However, it is clear from the facts that the appellant sent a notice of resiliation on July 26, 2012. In light of that, I conclude that by the date of this Court’s decision, the respondents will have benefitted from a reasonable notice. And, in doing so, I decline to definitively state the minimum time period required to constitute a reasonable notice period in this case. I would accordingly hold that pursuant to the July 26, 2012 notice, the contract of affiliation between the parties is terminated as of the date of this Court’s decision.
3. I acknowledge that the civil law’s workings in this case are somewhat complex. But, as always, its underlying rationale is simple. A court should not forever wed two parties in an unhappy marriage where only one of them has an avenue for exit, in the absence of express vows to that effect. In other words, in characterizing the term of a contract, perpetuity should not be inferred.
   1. Disposition
4. For these reasons, I would allow the appeal and declare that the contract of affiliation is terminated as of the date of this Court’s decision.

*Appeal dismissed with costs,* McLachlin C.J. *and* Côté *and* Rowe JJ*. dissenting.*

Solicitors for the appellant: Miller Thomson, Montréal; LCM Attorneys Inc., Montréal; Robinson Sheppard Shapiro, Montréal.

Solicitors for the respondents: Jolicœur Lacasse, Québec.

1. On October 12, 2000, the parties deleted the following words from clause 10: “as prescribed by the board of directors, except with regard to the fee”. This change is not relevant for the purposes of this appeal. [↑](#footnote-ref-1)
2. See, e.g., A.F., at p. 11, stating the second issue on appeal: [translation] “Did the Court of Appeal err in creating a perpetual obligation for a fixed term?” See also A.F., at para. 51: “. . . the Court of Appeal created a legal incongruity in accepting that the Contract of Affiliation was at once for a fixed term and perpetual.” [↑](#footnote-ref-2)