

**SUPREME COURT OF CANADA**

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| **Citation:** Threlfall *v.* Carleton University, 2019 SCC 50, [2019] 3 S.C.R. 726 |  | **Appeal Heard:** February 22, 2019  **Judgment Rendered:** October 31, 2019  **Docket:** 37893 |

**Between:**

**Lynne Threlfall, personally, in her capacity as**

**liquidator of the succession of George Roseme and**

**as tutor to the absentee George Roseme**

Appellant

and

**Carleton University**

Respondent

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

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| **Joint Reasons for Judgment:**  (paras. 1 to 110) | Wagner C.J. and Gascon J. (Abella, Karakatsanis, Rowe and Martin JJ. concurring) |
| **Joint Dissenting Reasons:**  (paras. 111 to 229) | Côté and Brown JJ. (Moldaver J. concurring) |

threlfall *v.* carleton university

**Lynne Threlfall, personally, in her capacity as liquidator**

**of the succession of George Roseme**

**and as tutor to the absentee George Roseme** Appellant

v.

Carleton University Respondent

**Indexed as:** Threlfall ***v.*** Carleton University

2019 SCC 50

File No.: 37893.

2019: February 22; 2019: October 31.

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

on appeal from the court of appeal for quebec

*Status of persons — Absence — Presumption of life — Absentee presumed to be alive for seven years following disappearance unless proof of death is made before then — Retiree becoming absentee upon disappearance — Retiree’s pension plan providing that pension payments would stop upon his death — Presumption of life requiring former employer to continue making pension payments to retiree despite disappearance — Retiree’s remains discovered six years after disappearance and death recorded as having occurred the day after disappearance — Former employer seeking reimbursement of pension payments made to retiree after recorded date of death — Whether rights and obligations premised on absentee’s continued existence while he or she is presumed alive are retroactively extinguished from true date of death where proof of death is made within seven years of disappearance — Civil Code of Québec, art. 85.*

*Reception of a thing not due — Pension payments made to absentee while presumed alive but actually dead — Requirements of error and of absence of debt not present at time payments made but surfacing at later date — Whether remedy of receipt of payment not due allows for restitution to former employer of payments made to absentee presumed to be alive who is later established to have been dead at time of payments — Civil Code of Québec, art. 1491.*

On September 10, 2007, R, a retiree, decided to go for a walk near his home. Tragically, he never returned and could not be found. Upon his disappearance, R became an absentee under art. 84 of the *Civil Code of Québec* (“*C.C.Q.*”) and T, his former *de facto* spouse, universal legatee and the liquidator of his succession, was appointed as his tutor. The presumption of life in art. 85 *C.C.Q.* required R’s former employer to continue making pension payments to him despite his disappearance, as the terms of his pension plan provided for payments until his death. Almost six years after his disappearance, R’s remains were discovered. The act of death recorded his death as having occurred the day after his disappearance. R’s former employer then sought reimbursement of the amount of pension benefits paid to R between the day after his disappearance and the date of the last payment. The trial judge held that the payments made after the recorded date of death were to be considered not due — as the three conditions that had to be fulfilled in order to make out a claim for receipt of a payment not due were met — and were therefore subject to restitution. The Court of Appeal substantially upheld the trial judge’s decision.

Held (Moldaver, Côté and Brown JJ. dissenting): The appeal should be dismissed.

*Per* **Wagner C.J.** and Abella, Karakatsanis, **Gascon**, Rowe and Martin JJ.: The pension plan unambiguously contemplated the termination of benefits upon R’s actual death, not the date his death was officially recognized. On the plain language of the plan, R was not entitled to benefits following the month of his death. The rebuttal of the presumption of life retroactively extinguished R’s entitlement to the pension payments made while he was an absentee. Because the legal basis for the payments evaporated, R’s former employer’s claim for receipt of a payment not due under art. 1491 *C.C.Q.* must succeed: assessed retrospectively, the payments were made in error and in the absence of any debt.

Under the *C.C.Q.*, an absentee is a person who, while domiciled in Quebec, ceases to appear there, without giving news of himself or herself, and without it being known whether he or she is still alive. Quebec’s current absence regime is a relatively modern innovation and marked a fundamental shift in the traditional Quebec law on absence. No longer is an absentee considered to be neither alive nor dead. Instead, art. 85 *C.C.Q.* provides that an absentee is presumed to be alive for seven years following his or her disappearance, unless proof of death is made before then, and he or she enjoys full juridical personality during this period. Where proof of death is made within seven years of disappearance, in which case the presumption of life is rebutted, rights and obligations premised on the absentee’s continued existence while he or she is presumed alive are retroactively extinguished from the true date of death.

The wording of art. 85 *C.C.Q.* provides limited guidance on the question of retroactivity by the fact that it states that an absentee is presumed to be alive for seven years unless proof of his death is made before then, and not until proof of his death is made. But this textual clue that the rebuttal of the presumption has retroactive effect is reinforced by wider considerations. First, art. 85 is clear on its face that the presumption of life will be rebutted by proof of death made within the seven‑year period. The presumption of life is therefore a simple presumption — that is, a legal presumption of fact lasting for seven years which may be rebutted by proof to the contrary or confirmed by the absentee’s return. Article 85 protects an absentee for a limited period — but in establishing a simple presumption, it creates no permanent rights for that absentee. When rebutted, the presumption falls away and is replaced with reality. Nothing in the *C.C.Q.* dictates that reality should be ignored or juridical personality allowed to continue past death. The *C.C.Q.* would need to be explicit in order for reality to be ignored in such a manner. Contrary to the French *Civil Code*, which contains an expressprovision indicating that the rebuttal of the presumption of life operates prospectively, there is no similar provision in the *C.C.Q*.

Second, when, in other parts of the absence regime, the *C.C.Q.* intends that reality be ignored, this is stated expressly. In particular, the declaratory judgment of death mechanism clearly illustrates when a legal fiction will triumph over the true state of affairs to prioritize certainty. In that situation, the *C.C.Q.* allows a declaratory judgment of death to be pronounced, regardless of whether the absentee’s death may be held to be certain, when the presumption is neither confirmed nor rebutted within seven years of an absentee’s disappearance. Inversely, the presumption of life is a mechanism that primarily protects an absentee’s interests in the hope that he or she will return, but allows the true state of affairs to prevail when that outcome is no longer possible. The Quebec legislature, in drafting the absence regime, has chosen seven years as the key point at which a legal fiction is allowed to prevail in most respects over the true state of affairs.

Third, retroactivity is consistent with the purposes of the presumption of life — injecting stability into what would otherwise be an unclear and unsettled state of affairs, and protecting the absentee’s interests. If the presumption is rebutted with retroactive effect, both of these purposes are advanced. A prospective approach overshoots these purposes. The fact that retroactivity leads to some uncertainty over a small subset of transactions or circumstances does not topple or undermine the transactional stability sought by the presumption of life. In contrast to the older absence regime, the two distinct phases of the current absence regime offer simplicity and stability so that transactions can be conducted without contentious debate or a complex web of rules. While a prospective approach would preserve the absentee’s interests, it would also transform the presumption into a source of substantive rights to generate wealth for the absentee’s succession.

Fourth, interpreting the rebuttal of the presumption as occurring with retroactive effect ensures that, within the seven‑year period, all concerned individuals receive only what they are entitled to, in accordance with the true state of affairs. Conversely, if the rebuttal of the presumption had only prospective effect, restitution for payments premised on the absentee’s existence, made when the absentee was, in reality, both factually and legally dead, would be impossible. A prospective approach would generate windfalls not intended by the absence regime.

Because most obligations must be performed regardless of whether an absentee is alive or not, most of an absentee’s dealings during the absence period will remain unaffected by the rebuttal. However, a small subset of transactions — namely payments that are either received or made by virtue of the absentee’s presumed existence during the absence period — are affected when the presumption of life is rebutted. The very basis for these kinds of obligations, which are directly linked to and premised upon continued existence, retroactively evaporates. There is no direct route from rebutting the presumption of life to any provision which deals with the restitution of prestations. Still, the remedy for receipt of a payment not due is available in such a situation, even when some of the requisite elements of that claim are not present at the time of payment but instead surface at a later date.

There are three essential elements to any claim for receipt of a payment not due under art. 1491 *C.C.Q.*: (1) there must be a payment; (2) the payment must be made in the absence of debt between the parties; and (3) the payment must be made either in error or under protest to avoid injury. When all three requirements are met, restitution will follow under art. 1492 *C.C.Q.*, in accordance with the rules for the restitution of prestations. The absence of debt requirement is essential to the analysis. An absence of debt is what makes a payment “not due”. But the mere absence of a debt between the parties is not enough. The payment must also have been made in error or under protest. Where there is, in fact, no obligation, the payer is usually in error. Once an absence of debt is proven by the payer, it falls to the payee to prove that the payment resulted from a liberal intention. If the payee cannot prove that the payer made a payment while being aware that there is no obligation to do so, the payment is deemed to be made in error and not due. Error prevents art. 1491 from being wielded as a tool to unilaterally conscript others into paying for services under the pretence of seeking restitution.

Under the circumstances, art. 1491 *C.C.Q.* calls for a retrospective approach. The requirements for receipt of a payment not due must be assessed retrospectively from the time of the claim and with the knowledge of the true state of affairs. Where a debt existed at a certain time but the basis for it has subsequently fallen away, the existence of the debt must be determined retrospectively. To meet the goals of the restitution regime, a court should focus on whether the basis for this debt remained intact at the time of the claim. A retrospective approach to art. 1491 fits seamlessly into the broader framework and objectives of similar restitutionary tools throughout the *C.C.Q*. The thread that runs through all of these tools is that a payment is made under an entirely valid and genuine obligation that later falls away due to some subsequent event. Restitution becomes available as a result of an unanticipated or abnormal event. There is no indication that art. 1491 works differently from these other similar restitutionary mechanisms. Assessing absence of debt contemporaneously with payment in such a case would frustrate the aims of art. 1491 and make it an anomaly within the wider family of restitutionary mechanisms in the *C.C.Q.* Without retrospectivity, once valid payments would be forever immunized and parties would be unable to recover payments that were not due, allowing undue payments and windfalls to find refuge just beyond the provision’s reach.

*Per* Moldaver, Côté and Brown JJ. (dissenting): The appeal should be allowed. There is no basis in the *C.C.Q.* to order the tutor to return the monies received from the former employer; the rebuttal of the presumption of life signified the extinction of the former employer’s obligation only with respect to continuing (that is, future) pension payments. Articles 1491 and 1492 *C.C.Q.* cannot be adjusted to allow the courts to go back in time to find that the former employer’s payments to the absentee were made in error, with the effect of unwinding rights and obligations that were validly due at the time they were performed. The former employer’s claim of restitution under the receipt of a payment not due provisions of the *C.C.Q.* must therefore fail.

The rebuttal of the presumption of life in art. 85 *C.C.Q.* cannot be with retroactive effects on the substantive rights and obligations of the absentee. If proof of the absentee’s death is made before the expiry of the seven‑year period of absence, the presumption of life is rebutted only prospectively, such that no right or obligations premised upon the absentee’s existence can be claimed or executed for the future, that is, for the remainder of the seven‑year period.

A prospective approach is consistent with the modifications made to the absence regime between the *Civil Code of Lower Canada* (where uncertainty persisted throughout a 30‑year period of absence and made it impossible for anyone to claim a right accruing to an absentee during this time) and the *C.C.Q.* (where the presumption of life injects certainty during a 7‑year period of absence and ensures rights and obligations of the absentee are valid until the time the presumption is rebutted). The *Civil Code of Lower Canada*’s absence regime was unduly complex, inflexible and — most importantly — riddled with persistent uncertainty. Difficulties with the regime led to revisions. Under the *C.C.Q.*, the absentee is automatically presumed to be alive for seven years following his or her disappearance. The presumption of life contained in art. 85 *C.C.Q.* represented a substantial change to the law on absence in Quebec. It is this presumption which fosters certainty by ensuring that absentees are capable of acquiring rights and being bound by obligations. No longer does the right to claim pension benefits during an absence depend on the claimant proving that the absentee was, in fact, alive at the time the right accrued. It is sufficient, for the acquisition of a right by an absentee during his or her absence, to show that such absentee was presumed at law to be alive at the time the right accrued to him or her. Whether through forced performance via court order, or through voluntary performance by a person bound to comply with the law, the rights and obligations of an absentee benefit from an absolute presumption of validity while the presumption of life operates.

The presumption of life ceases to apply after seven years of absence, as it is displaced by a presumption that the absentee is dead. To obtain a declaratory judgment of death seven years after the absentee’s disappearance, it is not necessary to bring proof positive of the absentee’s death, precisely because the absentee is by then presumed to be dead; it is sufficient to prove the absence of the person and the fact that the absence has lasted seven years from the disappearance. This change to the law of absence brought the law of Quebec closer to that of Germany and of France. Another particularly important revision was that the presumption of death would take effect from the time of the declaratory judgment of death, and not from the time the absentee disappeared. The date fixed as the date of death is the date upon expiry of seven years from the disappearance. The operation of the presumption of death and of the declaratory judgment of death does not displace the presumption of life which was in force during the seven‑year period of absence. Although the date of departure of the absentee was perhaps less arbitrary for determining the date of death, that of the declaratory judgment of death was more certain. The retroactive nature of the presumption of death was rejected because it would have the effect of validating all irregular acts performed since the departure of the absentee. This general rule of non‑retroactivity of the presumption of death is subject only to explicit exceptions.

A prospective approach also accords with the longstanding presumption against retroactivity in statutory interpretation. Given the limited guidance to be found in the text of art. 85 *C.C.Q.*, and given that the text of art. 85 and the context of the *C.C.Q.* do not expressly provide for or support retroactivity, the starting point should be the longstanding presumption against retroactivity. Retroactivity must be grounded in clear legislative intent. To the contrary, there is no need for an express provision to conclude that the presumption of life operates prospectively. The retroactive effects of the rebuttal of the presumption of death and of the annulment of the declaratory judgment of death on substantive rights and obligations are expressly provided for by the *C.C.Q.* This stands in stark contrast to the absolute silence of the *C.C.Q.* on the issue of whether the presumption of life can be rebutted with retroactive effects on the substantive rights and obligations of the absentee. One simply cannot infer from an exception a general rule of retroactivity for all purposes whenever the true date of death is known. The absence of express statutory text directing retroactive application of the rebuttal of the presumption of life does not support retroactivity, but rather militates against it. The rule of law requires, as a general principle, that rights and obligations as they exist at a certain point of time should not be affected by subsequent changes in circumstances.

A prospective approach moreover accords with the related absence regimes of France and of Germany. Both the Quebec and French regimes are inspired by the German model, and each manifestly reaches similar results on similar issues. Given their common Germanic inspiration, the *C.C.Q.* is expected to reach a result similar to the French *Civil Code*, which expressly provides that rights acquired without fraud on the basis of the presumption of absence may not be called in question when the death of the absentee is established or judicially declared, whatever the date fixed for the death may be. A clear provision expressly providing for a presumption of life renders unnecessary and, indeed, superfluous, the existence in the *C.C.Q.* of a provision equivalent to the one in the French *Civil Code*.In the absence of an express provision supporting a retroactive approach, there is no reason to isolate Quebec from the rest of the civil law world and from the European trend which inspired the *C.C.Q.* at the time of its adoption.

Finally, a prospective approach is consistent with, and indeed compelled by, the three purposes of the absence regime and the role of the tutor, and related third parties, in furthering those purposes. The presumption of life seeks, while it is in force, to inject certainty and stability into what would otherwise be an unclear and unsettled state of affairs. A precarious state of affairs, introduced into the absence regime if the presumption of life is rebuttable with retroactive effects, is simply incompatible with the certain state of affairs that the absence regime in general and the presumption of life in particular were intended to achieve. In interpreting the *C.C.Q.* in a way that reflects the true state of affairs, certainty — a significant purpose of the absence regime — is sacrificed on the altar of accuracy. Not knowing whether the income might have to be returned at some point within seven years, the tutor cannot confidently honour the absentee’s obligations, particularly those obligations which could not be the object of an order for restitution in favour of the absentee if the presumption of life is rebuttable with retroactive effects. This undermines the second purpose of the absence regime in general and of the presumption of life in particular, being to protect the interests of the absentee by preserving them for his or her possible return. Imposing retroactive effects on the rights of the absentee paralyzes the tutor, who can no longer safely use the absentee’s incoming revenue streams to discharge his or her obligations as they come due, thereby defeating the purposes of the regime. It represents the antithesis of the certainty which the absence regime was intended to achieve, and it undermines the role a tutor is expected to fulfill in managing an absentee’s affairs. Under a retroactive approach, third parties can no longer safely use the incoming monies, because if the absentee is discovered within seven years to have in fact been dead, the monies must be returned. Such an approach constitutes not only a judicial repeal of the presumption of life as far as rights of an absentee are concerned, but also constitutes such an impermissible repeal as far as obligations of an absentee are concerned. If avoiding windfalls for the absentee’s succession was a concern underlying the absence regime, the legislator would have enacted — upon expiry of the seven‑year delay and absent any return of the absentee — a presumption of death retroactive to the day of disappearance, and the law would require the date of death to be fixed not at the date upon expiry of seven years from the disappearance but at the date of the disappearance. Therefore, avoiding windfalls for the absentee’s succession is simply not a concern underlying the absence regime. Occasional windfalls are an inevitable effect of the certainty objective which informs the whole of the absence regime. Moreover, the use of the term “windfall” fails to recognize the source of the entitlement — a right acquired without fraud.

Adjusting the traditional requirements of art. 1491 *C.C.Q.* is rendered necessary under the retroactive approach in order to solve the problem which arises from the conclusion that the presumption of life may be rebutted with retroactive effects on the substantive rights and obligations of the absentee, as art. 85 *C.C.Q.* does not expressly create an obligation to make restitution. It is a departure from existing law and jurisprudence. The three conditions that must be met before a person who received a payment must restore it to the person who made it should normally be interpreted cautiously, if not restrictively. Absent any remedy, the device which should be used to compensate an impoverished person at whose expense another has been enriched is an action in unjust enrichment — and not an adjustment to the requirements of art. 1491 *C.C.Q*.

In the instant case, the absence of debt requirement was not met insofar as the payments made were legally due when they were paid by reason of the presumption in art. 85 *C.C.Q*. The error requirement was also not met. There was no mistaken belief that the payment was due when it was made. The tutor’s enrichment is justified: the pension benefits were paid in accordance with the presumption of life. The former employer did not meet its burden to prove that the tutor had the obligation to return the pension payments received.

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APPEAL from a judgment of the Quebec Court of Appeal (Kasirer and Émond JJ.A. and La Rosa J. (*ad hoc*)), 2017 QCCA 1632, 36 C.C.P.B. (2nd) 5, 417 D.L.R. (4th) 623, [2017] AZ‑51435317, [2017] Q.J. No. 14553 (QL), 2017 CarswellQue 9114 (WL Can.), affirming a decision of Bédard J., 2016 QCCS 406, 26 C.C.P.B. (2nd) 150, [2016] AZ‑51251116, [2016] Q.J. No. 652 (QL), 2016 CarswellQue 592 (WL Can.). Appeal dismissed, Moldaver, Côté and Brown JJ. dissenting.

Benoit M. Duchesne, for the appellant.

Antoine Aylwin, for the respondent.

The judgment of Wagner C.J. and Abella, Karakatsanis, Gascon, Rowe and Martin JJ. was delivered by

The Chief Justice and Gascon J. —

1. Overview
2. On September 10, 2007, George Roseme, a political science professor who had retired from the respondent, Carleton University (“Carleton”), decided to go for a walk near his home. Tragically, he never returned. Despite the best efforts of rescuers, family and friends, he could not be found.
3. Upon his disappearance, Mr. Roseme became an “absentee” in the eyes of the *Civil Code of Québec* (“*C.C.Q.*”)*.* Pursuant to art. 85 *C.C.Q.*, absentees are presumed to be alive for seven years unless proof of their death is made before then. Notwithstanding Mr. Roseme’s uncertain status, this presumption of life thus required Carleton, his former employer, to continue making pension payments to him under his “life only” retirement plan. This plan provided that these payments would stop upon the death of the beneficiary. About six years following his disappearance, Mr. Roseme’s remains were discovered, and the presumption of life was then rebutted. His date of death was established as September 11, 2007 — one day after his disappearance.
4. The overarching question raised by this appeal is whether Mr. Roseme’s succession is entitled to retain the pension payments of close to half a million dollars made to him while he was presumed to be alive even though this presumption was subsequently rebutted.
5. In answering this question, the Court is called upon for the first time to consider the *C.C.Q.* regime governing the phenomenon of “absence”. The current regime was introduced nearly 30 years ago and represented a fundamental shift with respect to the legal effects of an individual’s absence. Under this regime, an absentee is presumed to be alive for seven years following his or her disappearance (art. 85 *C.C.Q.*). If this presumption of life is not rebutted by proof of death within the seven-year period, a declaratory judgment of death may be pronounced; such a judgment establishes the absentee’s date of death as “the date upon expiry of seven years from the disappearance” (art. 94 para. 1 *C.C.Q.*; see also art. 92 para. 1 *C.C.Q.*). This regime reflects the balancing of two competing principles: accuracy (by seeking to ensure that relationships best reflect the absentee’s true status) and certainty (by giving an absentee’s heirs and counterparties a stable and predictable state of affairs).
6. In our view, the structure of the absence regime clearly demonstrates that during the first seven years of absence, accuracy is intended to prevail over certainty. It is only after seven years of absence, and the pronouncement of a declaratory judgment of death, that certainty is intended to govern — with some narrow exceptions — even if this is at odds with the absentee’s true date of death. In other words, the accuracy objective is advanced by creating a simple presumption of life, while the certainty objective is achieved by having a hard cut-off point at which a legal fiction triumphs over reality.
7. This appeal also requires consideration of the interplay between this absence regime and the rules for restitution following the “receipt of a payment not due” under art. 1491 *C.C.Q*. We are of the view that the remedy for receipt of a payment not due is available even when, in unique circumstances such as those of the instant case, some of the requisite elements of that claim — specifically, absence of debt and error — are not present at the time of payment but instead surface at a later date.
8. The lower courts ruled in favour of Carleton and ordered restitution of the pension payments. We agree, and we would dismiss the appeal. Once Mr. Roseme’s death was confirmed within the seven-year period, his legal entitlement to the pension payments made while he was absent and presumed to be alive evaporated. The true state of affairs — Mr. Roseme’s death — rebutted and superseded the presumption in art. 85 *C.C.Q.* that an absentee is alive. Although Carleton was legally obligated to make the pension payments while Mr. Roseme was absent, it is entitled to restitutionary relief because the payments were, viewed retrospectively, not due.
9. Background
   1. Facts
10. Mr. Roseme was a political science professor at Carleton. On May 13, 1996, he signed a memorandum of election by which he opted to draw a “single life pension” under the Carleton University Retirement Plan (“Plan”). Of note, the memorandum stated the following: “I am aware that on my death, my pension will cease and no payments of any kind will be due from the Plan to my beneficiaries, heirs or estate, even if my death occurs immediately following the date of my first pension payment” (A.R., vol. II, at p. 170).
11. Mr. Roseme retired on July 1, 1996, and began to receive his pension from the Plan. On September 10, 2007, Mr. Roseme — who was 77 years old and in the early stages of Alzheimer’s disease — left his home in La Pêche, Quebec, for a walk and disappeared. Despite six days of extensive searching, he was not located. Several months after the disappearance, the appellant, Lynne Threlfall — Mr. Roseme’s former *de facto* spouse, his universal legatee and the liquidator of his succession —, brought a motion in the Quebec Superior Court for the institution of tutorship to the absentee. This was granted on February 4, 2008, and Ms. Threlfall was appointed tutor to Mr. Roseme.
12. Carleton was not notified of Mr. Roseme’s disappearance and thus continued to make payments to him from the Plan. It first learned of the disappearance through media reports in January 2009. Carleton suspected from Mr. Roseme’s prolonged disappearance that he had passed away and that its contractual obligation had therefore come to an end. On March 18, 2009, Carleton informed Ms. Threlfall that it intended to stop paying Mr. Roseme’s monthly pension benefits and demanded repayment of the sum it had paid to Mr. Roseme since January 2008. In reply, Ms. Threlfall referred to art. 85 *C.C.Q.*, noting that as an absentee Mr. Roseme was presumed to be alive and was thus entitled to continued pension payments. Following receipt of a formal demand letter from Ms. Threlfall in October 2009, Carleton agreed to reinstate Mr. Roseme’s pension payments and pay the pension arrears, “without admission of any kind”, on condition that Ms. Threlfall provide a written statement setting out any facts she might know that could help determine if Mr. Roseme was still alive. Ms. Threlfall provided an affidavit stating that she had no information concerning whether Mr. Roseme was alive or dead.
13. On July 22, 2013, almost six years after Mr. Roseme’s disappearance, human remains were discovered on his neighbour’s property. These were determined to be Mr. Roseme’s remains. Carleton, which had continued to make pension payments to Mr. Roseme since resuming them, was informed of the discovery, and stopped paying on August 16, 2013. The act of death for Mr. Roseme was signed on February 17, 2014, and was certified by the Registrar of Civil Status on April 3, 2014. This act recorded his death as having occurred on September 11, 2007, the day after his disappearance. This date of death was established by the Registrar of Civil Status in accordance with art. 127 *C.C.Q*. The coroner’s report issued on April 21, 2014 concluded that the death was likely natural or accidental; it indicated “2007” as the date of death.
14. It is important to note immediately that the recital of the facts in the act of death certified by the Registrar of Civil Status makes proof against all persons (arts. 107 and 2818 *C.C.Q.*). As the Court of Appeal explained, Ms. Threlfall chose not to attack the validity of this act as an authentic deed or to ask for its correction, as she might have done under the applicable rules in the *Code of Civil Procedure*, CQLR, c. C-25.01. She also chose not to challenge the Registrar’s exercise of discretion under art. 127 *C.C.Q.* in establishing Mr. Roseme’s date of death to have been September 11, 2007.
15. In June 2014, Ms. Threlfall prepared a final accounting of her tutorship and, in her capacity as liquidator of Mr. Roseme’s succession, accepted that accounting. A few weeks later, she withdrew $106,000 from the succession’s bank account and used it to pay her personal debts. Seeking to recover the pension benefits paid to Mr. Roseme during the period when he was an absentee, Carleton commenced proceedings on November 21, 2014, against Ms. Threlfall personally, in her capacity as liquidator of the succession, and in her capacity as tutor to Mr. Roseme. Carleton sought reimbursement of $497,332.64, which was the amount of benefits paid to Mr. Roseme between September 11, 2007, and the date of the last payment in 2013. Although Ms. Threlfall initially argued against the possibility of personal liability, the trial judge found otherwise, and the question of her personal liability is not disputed in this Court. Accordingly, if we find a basis on which to order restitution to Carleton, the order will be against Ms. Threlfall both personally and in her capacity as liquidator of the succession and as tutor.
    1. Decisions Below
       1. Quebec Superior Court, 2016 QCCS 406, 26 C.C.P.B. (2nd) 150 (Bédard J.)
16. The trial judge noted that Carleton had not made voluntary payments to Mr. Roseme following his disappearance. It paid only because it was legally obligated to do so pursuant to art. 85 *C.C.Q*. Its obligation to make payments would have come to an end either following a declaratory judgment of death after seven years of absence, or at an earlier date if proof of death was established. In this case, Mr. Roseme’s remains were discovered before the expiration of the seven-year presumption of life. Carleton was not wrong to continue payments during the absence period when Mr. Roseme was presumed to be alive, but those payments became an error once the presumption was rebutted and the death established. The presumption of life did not change the Plan — the benefits ended when the beneficiary died.
17. The trial judge further held that the three conditions that had to be fulfilled in order for Carleton to make out a “receipt of a payment not due” claim under art. 1491 *C.C.Q.* were met: (1) Carleton made payments to the absentee; (2) the debt was not due, as the payments were to cease at the time of death; and (3) the payments were made in error on the basis that they were made in accordance with the absentee being presumed to be alive. Accordingly, the payments made after the date of death were to be considered not due and were subject to restitution under art. 1492 *C.C.Q*.
    * 1. Quebec Court of Appeal, 2017 QCCA 1632, 417 D.L.R. (4th) 623 (Kasirer and Émond JJ.A. and La Rosa J. (*ad hoc*))
18. Although it allowed the appeal in part to correct some calculations made by the trial judge, the Court of Appeal substantially upheld the Superior Court’s decision.
19. The Court of Appeal did not accept Ms. Threlfall’s argument that Carleton was obligated under the Plan to pay pension benefits to Mr. Roseme until proof of death was made. The contract unambiguously terminated Mr. Roseme’s entitlement to the benefits on his date of death — not when proof of death was made.
20. The Court of Appeal then rejected Ms. Threlfall’s argument that the presumption of life in art. 85 *C.C.Q.* was rebutted with prospective, as opposed to retroactive, effect. While art. 85 *C.C.Q.* does not expressly indicate whether the rebuttal of the presumption has retroactive effect, the court pointed to art. 96 *C.C.Q.* as evidence that “the legislature prefers, with noted exceptions, to give effect to the true date of death when it is known” (para. 75). Because the purpose of the presumption is to reduce uncertainty, once that uncertainty is eliminated by the absentee’s return or death, the presumption no longer has any reason to apply.
21. Finally, the Court of Appeal considered Ms. Threlfall’s contention that the trial judge had erred in applying the rules on receipt of a payment not due in art. 1491 *C.C.Q*. The court acknowledged that, strictly speaking, the prerequisites for a claim for receipt of a payment not due were not met in this case. Because Mr. Roseme was presumed alive, the payments were due at the time they were made. As the payments were due as a matter of law, there could not be any error. Nor could Carleton claim that it paid under protest: it acknowledged that it was under an obligation to continue to make the pension payments. Simply put, “there was a valid debt owed by the University and the University was not mistaken in making the payment” (para. 109).
22. But after finding that Carleton could not satisfy the traditional requirements of art. 1491 *C.C.Q.*, the Court of Appeal went on to consider whether there was another basis to order restitution. Drawing upon the principles underlying arts. 1491, 1554 and 1699 *C.C.Q.* as well as the preliminary provision of the *C.C.Q.*, the Court of Appeal “adjusted” the requirements of art. 1491 *C.C.Q.* “to recognize this remedy as the source of the obligation to make restitution” in this case notwithstanding the presence of a debt and the absence of an error at the time of payment by Carleton (para. 123). As a result, the Court of Appeal, reasoning differently, upheld the trial judge’s decision to order restitution in the amount of $497,332.64.
23. Analysis
24. This appeal raises three issues. The first is the proper interpretation of the Plan and whether Mr. Roseme’s contractual entitlement to benefits ended on his “true date of death” or on the date his death was recognized by the State. The second is the presumption of life created by art. 85 *C.C.Q.* and whether rebuttal of the presumption has retroactive effect. The third is whether the “receipt of a payment not due” remedy in art. 1491 *C.C.Q.* allows for the restitution of payments made to an absentee presumed to be alive who is later established to have been both legally and factually dead at the time of the payments.
    1. The Plan Contemplated the Termination of Pension Benefits Upon Mr. Roseme’s Death
25. Ms. Threlfall first raises an argument rooted in the contractual interpretation of the Plan (reproduced in A.R., vol. II, at pp. 93 et seq.). In her view, the Plan contemplated that Carleton would continue to make pension payments to Mr. Roseme until the date when the State formally recognized his death. On this reading of the Plan, Mr. Roseme was entitled to pension payments until the date his act of death was certified or at least until the date his remains were discovered. Carleton disputes Ms. Threlfall’s interpretation and argues that the Plan envisioned payments only until Mr. Roseme’s date of death — not the date when his death was formally recognized by the State. Like both courts below, we agree with Carleton: the Plan unambiguously terminated Carleton’s obligations on the date of Mr. Roseme’s actual death, not the date his death was officially recognized.
26. In accordance with an option to elect to receive an increased monthly benefit set out in s. 8.02(b)(i) of the Plan, Mr. Roseme signed a memorandum of election by which he chose to draw a “single life pension” payable monthly for his “remaining lifetime only”, with all payments to stop upon his “death”. Interpreting this language, the trial judge found that “[t]he pension benefits end when the beneficiary dies”, specifically “once the date of death is established, either at the end of the seven year period or before it [if] the death can be proven” (para. 40). We concur with this reading of the “single life pension” option of the Plan.
27. In our view, Ms. Threlfall has not demonstrated any palpable and overriding or other reviewable error in the trial judge’s interpretation of the “single life pension” option of the Plan. Ms. Threlfall relies heavily on the fact that the Plan does not define the terms “life”, “remaining lifetime” and “death”. She contends that, given this definitional void, “[t]here is quite simply no indication in the Retirement Plan that [Mr.] Roseme’s ‘remaining lifetime’ or ‘life’ would end at a ‘true date of death’, as opposed to the date when his death was proven and . . . formally recognized by the State by the certification and issue of an Act of Death” (A.F., at para. 95).
28. Despite the lack of definitions for these terms, we reject the argument advanced by Ms. Threlfall. There is no ambiguity in the words “remaining lifetime”, “life” and “death”. These are far from obscure terms. We agree with Carleton that “[t]hese are terms which need not be defined beyond their plain and ordinary meaning” (R.F., at para. 23). These terms clearly refer to an individual’s *actual* life and *actual* death, not the date on which death is recognized by the State.
29. We note that while the Plan also provides that it is to be “governed and construed in accordance with the laws of the Province of Ontario” (s. 14.09(3)), given the absence of any ambiguity, there is no need to consult these laws for the meaning of these terms. In any event, it is well established that in the absence of any evidence being led on the law of the foreign jurisdiction (Ontario), the trial judge was required to apply the law in force in Quebec on the interpretation of these terms (art. 2809 *C.C.Q.*; *Tolofson v. Jensen; Lucas (Litigation Guardian of) v. Gagnon*, [1994] 3 S.C.R. 1022; *Pettkus v. Becker*, [1980] 2 S.C.R. 834, at pp. 853-54; S. G. A. Pitel and N. S. Rafferty, *Conflict of Laws* (2nd ed. 2016), at pp. 249-50).
30. The interpretation of the Plan urged upon this Court by Ms. Threlfall is inconsistent with its plain language, which stipulates that payments will cease when “the Member’s death occurs”, not when the Member’s death is *certified* (s. 8.02(b)(i)). The common intention of the parties (art. 1425 *C.C.Q.*) was clearly for benefits to cease on the true date of death. Furthermore, the interpretation of the Plan proposed by Ms. Threlfall would require Carleton to have continued making pension payments to Mr. Roseme until his act of death was certified in April 2014, despite the discovery of his remains in July 2013. This cannot have been what the parties contemplated.
31. The act of death establishes Mr. Roseme’s death as having occurred the day after his disappearance. On the plain language of the Plan, Mr. Roseme was not entitled to benefits following the month of his death. We reject Ms. Threlfall’s argument that Mr. Roseme was contractually entitled to pension benefits under the Plan following his true date of death. However, she further contends that Mr. Roseme’s succession is entitled to retain the payments he received from Carleton during the time he was an absentee by virtue of the presumption of life in art. 85 *C.C.Q*. We accordingly turn now to the *C.C.Q.*’s absence regime and art. 85 *C.C.Q.*
    1. The C.C.Q.’s Absence Regime and the Presumption of Life in Article 85
       1. The *C.C.Q*.’s Absence Regime
32. Under the *C.C.Q.*, an absentee is a person who, while domiciled in Quebec, ceases to appear there, without giving news of himself or herself and without it being known whether he or she is still alive (art. 84 *C.C.Q.*; É. Deleury and D. Goubau, *Le droit des personnes physiques* (5th ed. 2014), at para. 38). An absentee is presumed to be alive for seven years following his or her disappearance, unless proof of death is made before then (art. 85 *C.C.Q.*; Deleury and Goubau, at para. 40; É. Gascon and J. Gelfusa, “Absence et décès”, in *JurisClasseur Québec* — *Collection droit civil* —  *Personnes et famille* (loose-leaf), by P.-C. Lafond, ed., fasc. 8, at No. 4). While presumed alive, an absentee, through his or her tutor (or administrator of property), remains liable to perform obligations (e.g.,art. 88 *C.C.Q.*) and continues to accrue rights (art. 86 *C.C.Q.*) — such as “life only” pension benefits — as if he or she had never disappeared (M. Ouellette, “Livre premier: Des personnes”, in *La réforme du Code civil*, t. 1, *Personnes, successions, biens* (1993), 11, at paras. 168-69; Deleury and Goubau, at paras. 46-49; Gascon and Gelfusa, at Nos. 5-8).
33. Quebec’s current absence regime is a relatively modern innovation. It was introduced in 1991 as part of the new *C.C.Q*. It is modelled after German law, which for centuries has included a scheme whereby an absentee (1) is presumed to be alive until declared dead and (2) retains full juridical rights while presumed alive (É. Cloutier, “Origines et évolution du droit québécois de l’absence: de l’existence incertaine aux présomptions de vie et de mort” (2017), 63 *McGill L.J.* 247, at p. 278). It is noteworthy that the French absence regime — which has similar Germanic roots — contains an express provision indicating that the rebuttal of the presumption of life operates prospectively (art. 119 of the French *Civil Code*). This type of specific provision is notably missing from the *C.C.Q*.
34. In order to understand the objectives of the current absence regime, it is important to reflect upon its origins and its predecessor. The idea of an absence regime in the civil law is a longstanding one. An official title on the subject was adopted in France in 1803 as part of the *Code Napoléon* and was entitled “*Des Absens*” (Absentees). In Quebec, the *Civil Code of Lower Canada* contained a regime governing absence commencing in 1866. It was largely modelled on the *Code Napoléon* (Cloutier, at pp. 255 and 262; Commissioners appointed to codify the Laws of Lower Canada in Civil Matters, *Civil Code of Lower Canada: First, Second and Third Reports* (1865), at pp. 167 and 169). Under that regime, an absentee’s continued existence was considered to be uncertain. An absentee was considered by the law to be neither living nor dead and could not inherit. After five years of absence, the absentee’s presumptive heirs were allowed to take provisional possession of the absentee’s property. That provisional possession had some inherent limits, given its uncertain character. Only after 30 years of absence were the presumptive heirs given absolute possession of the absentee’s property, thus allowing them to alienate or hypothecate it (G. Brière, *Traité de droit civil:* *Les successions* (2nd ed. 1994), at para. 45; Deleury and Goubau, at para. 71; H. Roch, *L’absence* (1951), at pp. 27-34; F. Langelier, *Cours de droit civil de la province de Québec*, t. 1 (1905), at pp. 200 et seq.; G. Trudel, *Traité de droit civil du Québec*, vol. 1 (1942), at pp. 310 et seq.; Cloutier, at pp. 257-66).
35. The absence regime in the *C.C.Q.* marked a fundamental shift in the traditional Quebec law on absence. No longer is an absentee considered to be neither alive nor dead (Ministère de la Justice, *Commentaires du ministre de la Justice*,vol. I, *Le Code civil du Québec* — *Un mouvement de société* (1993), at pp. 65-66). Nor is an absentee ignored if a succession opens (art. 617 para. 1 *C.C.Q.*; Deleury and Goubau, at para. 41; Ouellette, at para. 168; Cloutier, at pp. 276-77). Instead, an absentee is presumed to be alive for seven years and enjoys full juridical personality during this period.
36. The *C.C.Q.*’s absence regime contemplates three possible scenarios at that stage: (1) return within the seven-year period; (2) proof of death being made within seven years following the disappearance, in which case the presumption of life is rebutted; or (3) proof of death not being made within seven years following the disappearance (but without the absentee having returned). It is not disputed that in this case, the presumption of life *was* rebutted within the seven-year period set out in art. 85 *C.C.Q*. Mr. Roseme’s remains were discovered 5 years, 10 months and 12 days after his disappearance. The certification of his act of death likewise occurred comfortably within seven years of his disappearance.
37. After seven years of absence, the absentee is no longer presumed to be alive. Where the presumption of life in art. 85 *C.C.Q.* is *not* rebutted within the seven-year period, a declaratory judgment of death may be pronounced (art. 92 para. 1 *C.C.Q.*). Such a declaratory judgment establishes the absentee’s date of death as “the date upon expiry of seven years from the disappearance” (art. 94 para. 1 *C.C.Q.*). “A declaratory judgment of death produces the same effects as death” (art. 95 *C.C.Q.*), and the Registrar of Civil Status is notified of the judgment and draws up the absentee’s act of death in accordance with its particulars (art. 133 *C.C.Q.*; Deleury and Goubau, at paras. 55-58; Gascon and Gelfusa, at Nos. 12-13 and 18-19). Where a declaratory judgment of death is pronounced, the *C.C.Q.* contemplates that a divergence may ultimately be discovered between the absentee’s true date of death and the date of death fixed by the declaratory judgment of death only in certain narrow exceptions (art. 96 *C.C.Q.*; Deleury and Goubau, at paras. 59-68; Gascon and Gelfusa, at Nos. 20-34).
38. This is not, however, the case with Mr. Roseme. Mr. Roseme became an absentee following his disappearance on September 10, 2007. As the presumption of life was rebutted within the seven-year period, no declaratory judgment of death was pronounced for him. Rather, an act of death was issued, in the same manner as for any non-absentee who dies in Quebec. Given this, there are only two important dates that must be kept in mind here: Mr. Roseme’s true date of death (September 11, 2007), and the date the presumption of life was rebutted (which, as we have explained, was certainly within seven years of his disappearance).
39. We note that the Court of Appeal left open the question of whether the date the presumption of life in art. 85 *C.C.Q.* is rebutted is the date of the discovery of an absentee’s remains or the date of the certification of the absentee’s act of death. In some circumstances, the distinction between these two dates could be meaningful. However, given that the discovery of Mr. Roseme’s remains and the certification of his act of death both occurred within seven years of his disappearance, and given our conclusion on the retroactive effect of the rebuttal of the presumption, we agree with the Court of Appeal that there is no need in this case to reach a final determination as to the proper date on which the presumption of life is rebutted. On either possibility the outcome of this appeal is the same.
40. The issue relating to the absence regime that is directly raised by this appeal is accordingly a relatively discrete one. What is disputed by the parties is whether the rebuttal of the presumption of life in art. 85 *C.C.Q.* occurs with retroactive effect. We are concerned only with a situation where proof of death is made within seven years of disappearance. The question we must answer is whether, under such circumstances, rights and obligations premised on the absentee’s continued existence while he or she is presumed alive are *retroactively* extinguished from the true date of death. Put in more concrete terms, did the rebuttal of the presumption of life retroactively extinguish Mr. Roseme’s entitlement to the pension payments made while he was an absentee, or did the rebuttal simply end the continued application of the presumption on a go-forward basis and therefore have no effect on the payments made by Carleton while Mr. Roseme was presumed to be alive?
    * 1. The Presumption of Life in Article 85 *C.C.Q.*
41. The relevant provisions of the *C.C.Q.* and the academic literature on this subject do not provide an immediate answer as to whether the presumption of life in art. 85 is rebutted with retroactive effect. Other than the reasons given at trial and on appeal in the instant case, there is very little useful authority on this question, be it judicial or academic. Answering this question therefore requires us to look at not just the wording of art. 85, but also wider considerations, including the nature of the presumption of life, the structure of the absence regime as a whole, its purpose and objectives, and the respective consequences of the two proposed interpretations. For the following reasons, we are of the view that when the presumption of life in art. 85 *C.C.Q.* was rebutted, it retroactively extinguished Carleton’s obligation to pay Mr. Roseme beyond his true date of death. We accordingly are in agreement with the outcome reached by the Court of Appeal on this issue.
    * + 1. Wording of Article 85 C.C.Q.
42. We begin with the wording of art. 85 *C.C.Q*. Some limited guidance on the question of retroactivity is provided by the fact that art. 85 *C.C.Q.* states that an absentee is presumed to be alive for seven years “unless proof of his death is made before then”, not *until* proof of his death is made. While our colleagues rely on the use of the word “for” in art. 85 *C.C.Q.* as being indicative of the period of time during which the presumption operates (para. 165), this interpretation is not supported by the full wording of the provision. Indeed, if the absentee was presumed alive *until* proof of his or her death was made, then he or she would not be presumed alive “for seven years” as worded in the *C.C.Q.*, but rather “for a period up to seven years”. Ultimately, the wording of art. 85 *C.C.Q.* is just one clue that the rebuttal of the presumption of life established by this article has retroactive effect. The wording is certainly not determinative on its own, but this textual clue is, in our view, reinforced by the wider considerations noted above.
    * + 1. Simple Presumptions Are Not Permanent Sources of Rights
43. Article 85 *C.C.Q.* is clear on its face that the presumption of life will be rebutted by proof of death made within the seven-year period. The presumption of life is therefore, in the terminology of art. 2847 *C.C.Q.*, a “simple” presumption. It is a legal presumption of fact (the fact that the absentee is alive) lasting for seven years, which may be rebutted by proof to the contrary (i.e., proof of death) or confirmed by the absentee’s return (Deleury and Goubau, at para. 40). As this Court recently noted in another context, a simple presumption as to the existence of a right “must yield where . . . there is proof that the right does not exist” (*Ostiguy v. Allie*, 2017 SCC 22, [2017] 1 S.C.R. 402, at para. 50).
44. In contrast, our colleagues characterize the rights stemming from the presumption in art. 85 *C.C.Q.* as benefitting rather from an “absolute presumption of validity” (paras. 182, 184 and 188). This conclusion is not sourced in the *C.C.Q.*, which says that only the authority of *res judicata* is an “absolute presumption” (art. 2848 *C.C.Q.*).
45. To support this point, our colleagues rely on the supposedly “absolute presumption of validity” in the French *Civil Code* (para. 184). Yet French academic commentary stands for the opposite conclusion:

[translation] Once the absentee’s death is established or judicially declared — where it appears that the absentee in fact disappeared in circumstances likely to imperil his or her life — the presumption of absence period ends, retroactively to the date fixed for the death (which marks the opening of the succession). All acts performed since that date by the administrator of the absentee’s property, such as sale or lease, are, in principle, null. [Emphasis added.]

(B. Teyssié, *Droit des personnes* (20th ed. 2018), at p. 233)

As we understand it, the rebuttal of the French presumption of life operates prospectively only in the cases contemplated by art. 119 of the French *Civil Code*, which states that [translation] “[r]ights acquired without fraud on the basis of the presumption of absence, may not be called in question when the death of the absentee is established or judicially declared, whatever the date fixed for the death may be”. As indicated earlier, there is no similar provision in the *C.C.Q*.

1. Still, our colleagues posit that the French art. 119 has the same effect as art. 85 *C.C.Q.*, although these separate so-called “absolute presumptions of validity” stem from two different sources: in Quebec, from the presence of a presumption of life; in France, from an express provision that allows some rights acquired in good faith during an absence to stand upon a declaration of death. Our colleagues therefore argue that Quebec’s laws should be interpreted so as to align with France’s, not because we should follow the same interpretative pathway from our common roots, but rather so that we can follow the “European trend” (paras. 187-88).
2. For our part, given that the *C.C.Q.* does not contain a provision equivalent to art. 119 of the French *Civil Code*, we would decline to assume that the French and Quebec presumptions of life are intended to operate identically. In the same manner, we would decline to rely on the French jurisprudence that has applied or interpreted a provision not found in the *C.C.Q*.
3. In our view, the presumption of life in the *C.C.Q.* is nothing more than a simple presumption, and simple presumptions are not permanent sources of rights (Deleury and Goubau, at para. 40). The presumption of life is just a legal presumption of a fact; it is not equivalent to the fact itself (arts. 2846 and 2847 *C.C.Q.*). When the presumption is rebutted, it falls away and is replaced with reality — the reality being that the absentee has been dead since his or her true date of death.
4. In this respect, while we have described the presumption of life as being rebutted with retroactive effect, we stress that the presumption is not retroactive in and of itself. This is not a case about whether newly enacted or amended legislation should apply to past actions, as discussed, for instance, in *Gustavson Drilling (1964) Ltd. v. Minister of National Revenue*, [1977] 1 S.C.R. 271. The absence regime is not reaching back in time to modify or extinguish pre-existing substantive rights. Instead, because the substantive rights are generated by a mere presumption of life, they are qualified from their inception. The presumption simply falls away upon its rebuttal and, in the absence of another legal instrument, gives way to reality — which, in this case, happens to create a retroactive effect.
5. That reality cannot be easily ignored. Death is an event with important legal significance in the civil law: it marks the end of juridical personality (Deleury and Goubau, at paras. 22-24). Article 1 *C.C.Q.* provides that “[e]very human being possesses juridical personality and has the full enjoyment of civil rights.” It is through the vehicle of juridical personality that a person acquires rights. Death, whether [translation] “attested or pronounced”, has been described as the “end point of the enjoyment of a person’s civil rights” (S. Bourassa et al., “Les personnes physiques”, in Collection de droit de l’École du Barreau du Québec 2018-2019, vol. 3, *Personnes et successions* (2018), 15, at p. 21). Unlike death, absence does not mark the end of juridical personality, given that an absentee is presumed to be alive for seven years. But once the presumption of life is rebutted and falls away, nothing in the *C.C.Q.* dictates that reality should be ignored or juridical personality allowed to continue past death. The *C.C.Q.* would need to be explicit in order for reality to be ignored in such a manner.
6. All obligations and corresponding rights need a source (art. 1372 *C.C.Q.*; J. Pineau, D. Burman and S. Gaudet, *Théorie des obligations* (4th ed. 2001), by J. Pineau and S. Gaudet, at No. 20; J.-L. Baudouin and P.-G. Jobin, *Les obligations* (7th ed. 2013), by P.-G. Jobin and N. Vézina, eds., at No. 49). Mr. Roseme’s right to pension payments is no exception. Without such a source, the right disappears. While he was an absentee, Mr. Roseme was undisputedly entitled to payments from the Plan. This entitlement was dependent upon the fact that he was presumed to be alive — but this was not a permanent source of entitlement. Article 85 *C.C.Q.* protects an absentee for a limited period — but in establishing a simple presumption, it creates no permanent rights for that absentee. Indeed, even if Ms. Threlfall, as tutor, had obtained a court decision setting out Mr. Roseme’s entitlement to receive the pension payments during the absence period, the court would most likely have made an order without prejudice to the parties’ rights should the presumption ultimately be rebutted, given the unique circumstances of Mr. Roseme’s “life only” pension benefits. Such a without prejudice order would not have attracted *res judicata* (*85363* *Canada Ltée v. Maxpac Refuse Collector Services Ltd.*, 1993 CanLII 4231 (Que. C.A.)). Eventually, in the instant case, either the presumption would have been rebutted or Mr. Roseme’s entitlement would have been confirmed, whether by his return or by a declaratory judgment of death. Through the rebuttal of the presumption, Mr. Roseme’s entitlement disappeared, leaving him with no rights in the past or present.
   * + 1. Declaratory Judgments of Death Illustrate When the C.C.Q. Allows Reality to Be Ignored
7. When, in other parts of the absence regime, the *C.C.Q.* intends that reality be ignored, this is stated expressly. In particular, the declaratory judgment of death mechanism clearly illustrates when a legal fiction will triumph over the true state of affairs. Indeed, the presumption of life and the declaratory judgment of death are inverse legal tools that complement each other in Quebec’s absence regime. The former is a mechanism that primarily protects an absentee’s interests in the hope that he or she will return, but allows the true state of affairs to prevail when that outcome is no longer possible. The latter represents the point at which the legislature has chosen to prioritize certainty over the hope of the absentee’s return and over the post-mortem protection of his or her interests should the true date of death be discovered.
8. When the presumption of life is neither confirmed nor rebutted within seven years of an absentee’s disappearance, the *C.C.Q.* allows a declaratory judgment of death to be pronounced (art. 92 para. 1). A declaratory judgment of death may be pronounced at that time regardless of whether the absentee’s death “may be held to be certain” — all the *C.C.Q.* requires is the absentee’s uninterrupted and continued seven-year absence (Deleury and Goubau, at para. 55).
9. Although a declaratory judgment of death may be issued for an absentee prior to seven years of absence, this is possible only where the absentee’s death “may be held to be certain” (art. 92 para. 2 *C.C.Q.*; Deleury and Goubau, at para. 54; Gascon and Gelfusa, at Nos. 3 and 14; Ouellette, at para. 165). It is not disputed that to hold an absentee’s death to be certain without the discovery of remains would require a disappearance in a situation of significant peril and would definitely require far more than a mere unexplained disappearance of an elderly man. For example, declaratory judgments of death have been pronounced prior to the passage of seven years following a devastating fire in a seniors’ residence (*Caron et Directeur de l’état civil*, 2014 QCCS 4894; *Thériault et Directeur de l’état civil*, 2014 QCCS 4896; *Michaud et Directeur de l’état civil*, 2014 QCCS 4895; Cloutier, at p. 275) or in cases of apparent suicide (*Gariépy v. Directeur de l’état civil*, [1997] R.D.F. 50 (Que. Sup. Ct.)). These reasons deal solely with the usual variety of declaratory judgments of death — those pronounced after seven years of absence.
10. The pronouncement of the declaratory judgment of death establishes the absentee’s death as having occurred, legally, on the date upon expiry of seven years from the disappearance. As noted, this date is then incorporated into the absentee’s act of death by the Registrar of Civil Status (art. 133 *C.C.Q.*). The fact that a declaratory judgment of death may be pronounced after seven years of absence — despite the lack of certainty that the absentee is factually dead — shows that the Quebec legislature has selected seven years as the dividing line for prioritizing certainty, through the vehicle of a legal fiction, over the true state of affairs (with some narrow exceptions noted below).
11. After seven years of absence, the *C.C.Q.* no longer allows for rebuttal of the fact that the absentee was legally alive during the absence period. The only way the declaratory judgment of death can be annulled, or the register of civil status altered, is if the absentee returns — but this confirms, not negates, the absentee’s legal existence during the absence period (Deleury and Goubau, at paras. 59-65; Gascon and Gelfusa, at Nos. 20-34).
12. The declaratory judgment of death pronounced following seven years of absence thus serves as an essential cut-off point and provides a measure of certainty to all interested parties. Even when knowledge as to the true state of affairs changes subsequent to the pronouncement of the declaratory judgment of death, the *C.C.Q.* contemplates only two exceptions under which this true state of affairs will supersede and prevail over the legal date of death established by the judgment: (1) when the absentee returns (arts. 97 to 101 *C.C.Q.*); and (2) when the discovery of the true date of death affects the timing of “the dissolution of the matrimonial or civil union regime” and of the opening of the absentee’s succession (art. 96 *C.C.Q.*; Deleury and Goubau, at paras. 59-65; Gascon and Gelfusa, at Nos. 20-34).
13. In the case of return, the *C.C.Q.* specifically contemplates that the returnee (or an interested party) shall apply to a court for annulment of the declaratory judgment of death and rectification of the Register of Civil Status (art. 98 *C.C.Q.*; Gascon and Gelfusa, at Nos. 24-25; Deleury and Goubau, at para. 63; Ouellette, at para. 185). Conversely, although discovery of the true date of death has an effect on the timing of the dissolution of the absentee’s matrimonial or civil union regime and of the opening of the absentee’s succession, the *C.C.Q.* does not require or permit the annulment of the declaratory judgment of death or the rectification of the Register of Civil Status in such a case (Gascon and Gelfusa, at Nos. 20-23; Deleury and Goubau, at paras. 60-61; Ouellette, at paras. 179-80).
14. As can be seen, the Quebec legislature, in drafting the absence regime, has chosen seven years as the key point at which a legal fiction is allowed to prevail in most respects over the true state of affairs (*Commentaires du ministre*, at p. 68; Civil Code Revision Office, *Report on the Québec Civil Code*, vol. II, t. 1, *Commentaries* (1978), at pp. 73-74). Prior to seven years of absence, the situation is fluid and prone to change: there is a mere presumption of life, which can be confirmed by the absentee’s return or rebutted by proof of the absentee’s death. After seven years of absence, a much more certain and concrete picture emerges: the declaratory judgment of death ends the absentee’s legal existence and, in turn, confirms that the absentee was, legally speaking, alive during the previous seven years. The presumption of life does not have the same powers as the declaratory judgment of death — it is crafted in a fundamentally different way. The former can be rebutted by new facts (proof of death), while the latter requires judicial annulment (art. 98 *C.C.Q.*) or an express override in the *C.C.Q.* for particular scenarios (art. 96 *C.C.Q.*).
15. Incidentally, we note that the Quebec legislature did not pluck the seven-year period out of thin air. The commentary of the Minister of Justice indicates that given modern technology, such as enhanced search techniques and modern communications, the circumstantial evidence of seven years of absence permits the legislature to comfortably conclude that an absentee is most likely deceased after such a period (*Commentaires du ministre*, at p. 68; Cloutier, at p. 276). Furthermore, as noted by the Civil Code Revision Office:

The seven‑year period is inevitably an arbitrary one, although it has been deemed sufficient for payment of life insurance after the disappearance of the insured [art. 2529 *C.C.Q.*]. It is also sufficiently long to permit a person whose consort is absent to remarry without being found guilty of bigamy [*Criminal Code*, s. 290(2)]. [p. 74]

1. In this case, the presumption of life was rebutted within the seven-year period. As a result, no declaratory judgment of death was pronounced for Mr. Roseme. Mr. Roseme’s act of death is unusual only because the date of the certification of the act of death (April 3, 2014) was separated in time by some six and a half years from the date of death indicated on it (September 11, 2007). However, this unusual gap in time between the true date of death and the certification of the act of death does not change the nature or operation of the act of death. There is no legal instrument that displaces the reality of Mr. Roseme’s true date of death.
   * + 1. Retroactivity Is Consistent With the Purposes of the Presumption of Life
2. The presumption of life in art. 85 *C.C.Q.* serves two key purposes: it injects stability into what would otherwise be an unclear and unsettled state of affairs, and it protects the absentee’s interests. By injecting stability into the situation, the presumption facilitates the absentee’s transactions and protects third parties’ interests. By protecting the absentee’s interests, the presumption of life ensures that the absentee can resume his or her life with minimal difficulties if he or she returns within seven years. Both of these purposes are advanced if the presumption is rebutted with retroactive effect. Conversely, a prospective approach — which is at odds with and undermines the true state of affairs — is not needed to advance these purposes. Indeed, as we will discuss, a prospective approach overshoots these purposes.
3. The fundamental changes made to Quebec’s absence regime in 1991 as part of the *C.C.Q.* further these purposes in two ways.
4. First, the presumption of life reduces the transactional uncertainty created by the phenomenon of absence (Cloutier, at p. 276). In contrast to the old regime, the presumption of life injects some needed stability by dictating that an absentee is for all purposes, at least legally, alive. According to the Minister of Justice at the time, technological developments meant that the preservation of uncertainty, as under the old regime, was no longer called for:

[translation] [T]he improvement of means of communication and the growing efficiency of search techniques had made the idea of preserving uncertainty about whether the absentee was living or dead — an idea associated with the Napoleonic model — an outdated one.

(Cloutier, at p. 276, citing *Commentaires du ministre*, at p. 68.)

1. Without a clear and across-the-board presumption, an absentee’s tutor, heirs and counterparties would be left paralyzed by transactional uncertainty. For example, in the instant case, the presumption of life averted what would otherwise have been an intractable battle over whether Carleton was required to make pension payments at a time when Mr. Roseme’s death was likely but not certain. Unlike the old regime, the current absence regime sets out a clear presumption that is easy to follow. Here, upon being informed of the presumption, Carleton quickly recommenced payments. Carleton also knew that its obligation to make payments would cease after seven years should Mr. Roseme remain missing.
2. While the period of absence is somewhat precarious — the presumption is always liable to be rebutted, making it impossible to rely fully on obligations that are premised upon the absentee’s existence — this precariousness can be anticipated and managed. The seven-year presumption of life, in conjunction with the declaratory judgment of death procedure, establishes a logical and temporally limited regime. For seven years, there exists an easily discernible (albeit slightly precarious) state of affairs: the absentee is deemed to be alive unless there is evidence to the contrary. After seven years, the absentee is deemed to have died at that seven-year mark unless he or she returns (Deleury and Goubau, at paras. 55-62; Gascon and Gelfusa, at Nos. 19-25). In contrast to the older absence regime, these two distinct phases offer simplicity and stability so that transactions can be conducted without contentious debate or a complex web of rules. This remedies the primary flaw in the prior absence regime.
3. We emphasize that the presumption of life does not, however, promise absolute certainty. Having clear rules about the absentee’s existence helps avoid undue complexity in the administration of property. But the level of certainty to which our colleagues refer and aspire (paras. 184 et seq.) exists only after the seven-year absence period and the pronouncement of a declaratory judgment of death. It is at that point — again, subject to certain express and narrow exceptions — that the *C.C.Q.* permits a legal fiction to triumph over reality. As we have discussed, key differences in the *C.C.Q.* between the initial seven-year absence period and the period following a declaratory judgment of death reveal and highlight how and when the *C.C.Q.* intends to displace the ordinary results of an individual’s death. In our view, the absence regime generates permanent substantive rights only upon the pronouncement of a declaratory judgment of death. In contrast, our colleagues’ position would allow permanent substantive rights to grow out of a rebutted presumption rather than a clear legal instrument. The fact that our position leads to some uncertainty over a small subset of transactions or circumstances does not topple or undermine the transactional stability sought by the presumption of life.
4. Second, the presumption of life protects the absentee’s interests by allowing an absentee who returns within the seven-year period to resume life as if he or she had never disappeared (Deleury and Goubau, at paras. 43-49; Gascon and Gelfusa, at Nos. 5-10). The presumption of life saves a returned absentee the time and expense of regaining his or her footing against each and every debtor amassed during his or her absence. An absentee who returns within seven years is effectively spared the hassle of seeking restitutionary relief. For example, in this case, the presumption of life preserved Mr. Roseme’s entitlement to his “life only” pension payments. If he had instead returned alive in July 2013, he would not have had to pursue Carleton for over five years of outstanding pension payments. The presumption likewise ensures that the absentee’s ongoing obligations are met — for example, life insurance premiums will continue to be paid over the seven years, avoiding a lapse in a policy.
5. A presumption of life rebutted only with prospective effect would overshoot this objective. While a prospective approach would preserve the absentee’s interests, it would also transform the presumption into a source of substantive rights to generate wealth for the absentee’s succession. In this case, allowing Ms. Threlfall, as Mr. Roseme’s sole heir, to walk away with an increased inheritance bears no connection to the regime’s objective of preserving Mr. Roseme’s interests in the event of a return. And all of this would be at the expense of an innocent third party, Carleton, which would be forced to effectively enrich Ms. Threlfall with almost six years of pension benefits simply because Mr. Roseme’s remains were belatedly discovered.
6. These two purposes of the presumption of life — injecting stability into an uncertain state of affairs and preserving the absentee’s interests in case he or she returns — are no longer applicable once the unknown is replaced with the certainty that the absentee has in fact been dead since an earlier date. When the presumption is rebutted, there is no longer any need to protect the absentee’s interests: the absentee will not be returning. Furthermore, there is no longer any uncertainty: the unknown has been replaced with the certainty of the true date of death. As the Court of Appeal noted, once the absentee’s status is confirmed, “the presumption serves no purpose” (para. 69).
   * + 1. A Prospective Approach Would Generate Windfalls Not Intended by the Absence Regime
7. Our view that the presumption of life in art. 85 *C.C.Q.* is rebutted with retroactive effect is further reinforced by a comparison of the consequences of this interpretation with the consequences of the interpretation under which the presumption is rebutted prospectively. Interpreting the rebuttal of the presumption as occurring with retroactive effect ensures that, within the seven-year period, all concerned individuals receive only what they are entitled to, in accordance with the true state of affairs. As we will discuss in the next section of these reasons, this return to the true state of affairs is accomplished through the use of the *C.C.Q.*’s restitutionary provisions. Windfalls are thus avoided.
8. Conversely, if the rebuttal of the presumption had only prospective effect, restitution for payments premised on the absentee’s existence, made when the absentee was, in reality, both factually and legally dead, would be impossible. The result would be an inevitable windfall, either for the absentee’s succession or for third parties that received payments from the absentee. There is no indication that the absence regime was intended to generate windfalls, nor should such an intention be presumed.
9. We acknowledge that windfalls may still occur where a declaratory judgment of death has been pronounced following seven years of absence. As we have explained, after seven years, the absentee’s rights crystallize and certainty is (for the most part) prioritized. This demonstrates that the objectives of the absence regime shift once the absentee has been missing for seven years. After seven years, the purposes of the presumption — protecting the absentee’s interests and injecting temporary stability — take a back seat to long-term certainty and pragmatism. But this shift is rooted in the specific language of the *C.C.Q.* and is motivated by different policy considerations. These goals are not present during the initial seven years of absence, when there is only a rebuttable simple presumption.
10. Allowing the legal fiction of a declaratory judgment of death and possible associated windfalls after the seven-year absence period is necessary in order for the reforms to the absence regime to work — the legislature had to draw the line somewhere. Life, at some point, must move on. Payments to and from the absentee that are premised on his or her continued existence cannot be required to continue forever. Pension benefits and life insurance premiums cannot roll on into eternity. Heirs cannot be permanently locked out of the succession. At a certain point, it is necessary to have a state of affairs that can be relied upon in the long term, even if it winds up being erroneous. The fact that the absence regime switches gears and pursues different objectives after seven years cannot inform the question of whether the presumption of life should be interpreted in a manner that allows for windfalls prior to seven years.
    * 1. Conclusion on the Presumption of Life
11. Accordingly, in our view, the rebuttal of the presumption of life in art. 85 *C.C.Q.* by proof of death is retroactive to the true date of death. This means that the discovery of Mr. Roseme’s true date of death caused Carleton’s obligations to be retroactively expunged. We turn now to the discussion of whether and on what basis Carleton may therefore be entitled to restitution of the pension benefits it paid Mr. Roseme after his disappearance.
    1. Carleton Is Entitled to Restitution Under Article 1491 C.C.Q.
       1. Restitution Following the Rebuttal of the Presumption of Life
12. While the presumption of life in art. 85 *C.C.Q.* is rebuttable with retroactive effect, this does not mean that every transaction carried out during the absence period is immediately reversed when the absentee is found to have died at some earlier date within the seven-year time frame. Indeed, as alluded to earlier, most of an absentee’s dealings during the absence period will remain unaffected by the rebuttal. This is because most obligations must be performed regardless of whether an absentee is alive or not. For instance, an absentee’s obligation to make mortgage payments is unaffected by art. 85 *C.C.Q.* — this obligation survives his or her death.Similarly, if an absentee is entitled to dividends from a public corporation, the rebuttal of the presumption will not imperil the absentee’s earnings. A tutor’s compensation also falls into this category of payments: like the transactions discussed above, the obligation to pay a tutor for services provided during the absence period is not dependent on or rooted in the absentee’s continued existence. Payment to the tutor would be possible even if the *C.C.Q.* presumed that the absentee was dead.
13. However, there is a small subset of transactions that are affected when the presumption of life is rebutted — namely payments that are either received or made by virtue of the absentee’s presumed existence during the absence period. For example, the obligation to pay life insurance premiums depends on the policy owner’s continued existence. Once the policy owner dies, the obligation stops.
14. The pension benefits in this case fall into this small subset of payments. Mr. Roseme elected the “life only” option set out in s. 8.02(b)(i) of the Plan. This gave him an increased monthly benefit. But this increased benefit was payable only for his remaining lifetime. Carleton’s ongoing obligation to pay Mr. Roseme’s pension benefits was therefore directly linked to and premised upon his continued existence. When the presumption of life is rebutted, the very basis for these kinds of obligations retroactively evaporates.
15. In this case, Mr. Roseme was presumed alive under art. 85 *C.C.Q.* during his absence*.* As a result, Carleton was obliged to continue the payments. But given that the presumption of life has been rebutted, it is now clear that this obligation ended on September 11, 2007, the date of Mr. Roseme’s death. When the true state of affairs overcame the presumption of life in art. 85 *C.C.Q.*, it eliminated the source of Carleton’s obligations and Mr. Roseme’s entitlement to the payments received during his disappearance.
16. Still, no mechanism for restitution embedded in art. 85 *C.C.Q.* or the absence regime generally is applicable to this case; there is no direct route from rebutting the presumption of life to any provision in Chapter IX of Title One of Book Five, which deals with the restitution of prestations. Carleton needs a restitutionary vehicle in the *C.C.Q.* to reel back the pension benefits. In this respect, Carleton points to art. 1491 *C.C.Q.* in Division II of Chapter IV of Title One of Book Five — the “receipt of a payment not due” or “*réception de l’indu*” provision — and argues that the pension benefits were a “payment not due”.
    * 1. Receipt of a Payment Not Due
17. There are three essential elements to any claim for receipt of a payment not due under art. 1491 *C.C.Q.*:
18. There must be a *payment*;
19. The payment must be made in the *absence of debt* between the parties;
20. The payment must be made either *in error* *or* *under protest to avoid injury*.

(See Baudouin and Jobin, at Nos. 530-31; D. Lluelles and B. Moore, *Droit des obligations* (3rd ed. 2018), at No. 1367.1; Pineau, Burman and Gaudet, at p. 468.)

When all three requirements are met, restitution will follow under art. 1492 *C.C.Q.*, in accordance with the rules for the restitution of prestations set out in arts. 1699 to 1707 *C.C.Q*.

1. The parties and the courts below agreed that Carleton made a payment to Ms. Threlfall and therefore satisfied the first condition. “Payment” is to be understood broadly as “the delivery to another — voluntary or otherwise — of a sum of money or a thing” (*Willmor Discount Corp. v. Vaudreuil (City)*, [1994] 2 S.C.R. 210, at p. 218; art. 1553 *C.C.Q.*). But Ms. Threlfall argues that Carleton has not satisfied the latter two requirements: (1) that there be an absence of debt and (2) that the payment be made in error or under protest to avoid injury. Carleton’s principal submission is that there was no debt and that, as a result, the payment was made in error.
2. The absence of debt requirement is essential to the analysis. An absence of debt is what makes a payment “not due”. Where a payment is made to satisfy a genuine debt (either in part or in full), that payment is “due”. And when payments are due, there is, of course, no need or basis for restitution.
3. But the mere absence of a debt between the parties is not enough. The payment must also have been made in error or under protest. Once an absence of debt is proven by the payer (here, Carleton), it falls to the payee (here, Ms. Threlfall, as Mr. Roseme’s sole heir) to prove that the payment “resulted from a ‘liberal intention’” (*Amex Bank of Canada v. Adams*, 2014 SCC 56, [2014] 2 S.C.R. 787, at para. 31). If the payee cannot prove this, the payment is deemed to be made in error and not due (para. 31).
4. A liberal intention exists where a payer makes a payment while being aware that there is no obligation to do so. For example, if a person mows a neighbour’s lawn[[1]](#footnote-1) knowing full well that he or she is under no obligation to do so, restitution for this service will not be available under art. 1491 *C.C.Q*. There is no error because the person performs the service knowing that there is no debt — or, in other words, with a liberal intention.
5. In many cases, error will flow naturally from an absence of debt. Parties do not, in general, make payments or provide services for the fun of it — payments are usually made because the payer believes that there is an obligation to do so (art. 1554 *C.C.Q.*). So where there is, in fact, no obligation, the payer is usually in error. Indeed, as discussed, error is presumed to exist absent evidence from the payee to the contrary (*Amex*,at para. 31; Baudouin and Jobin, at No. 532; Lluelles and Moore, at Nos. 1378 and 1382; *C.J. v. Parizeau Popovici*, 2011 QCCS 2005; *Pearl v. Investissements Contempra Ltée*, [1995] R.J.Q. 2697 (Sup. Ct.); *Roux v. Cordeau*, [1981] R.P. 29 (Que. Sup. Ct.); *Garage W. Martin Ltée* *v. Labrie*, [1957] C.S. 175 (Que.)).
6. While this means that absence of debt and error will often walk in lockstep, this is not always the case. And in those cases where absence of debt and error do not overlap, error plays an independent and vital role in determining whether restitution is owed under art. 1491 *C.C.Q*. For example, without error, an individual could wake up one morning, mow every lawn in the neighbourhood and meet the requirements for restitution under art. 1491 *C.C.Q.* because there is (1) a payment and (2) an absence of debt. In this sense, error prevents art. 1491 *C.C.Q.* from being wielded as a tool to, in effect, unilaterally conscript others into paying for services, like lawn mowing, under the pretence of seeking restitution. While it may sometimes be easy or convenient to lump together the error and absence of debt requirements, it is incorrect to do so. Error cannot be lost in the shadows of the absence of debt requirement.
7. Alternatively, restitution under art. 1491 *C.C.Q.* is available where a payment was made under protest to avoid injury (Baudouin and Jobin, at No. 531; Lluelles and Moore, at Nos. 1374-77; see also *The Queen v. Premier Mouton Products Inc*.,[1961] S.C.R. 361, at p. 363; *Résidences Melior inc. v. Québec (Ville de)*, 2009 QCCS 3843; *Développements Iberville Ltée v. Québec (Ville)*, 2005 CanLII 578 (Que. Sup. Ct.)). For instance, a person may pay an outstanding utility bill under protest in response to a utility company’s threat to stop delivering services unless payment is received (*6001149 Canada inc. v. Hydro‑Québec*, 2007 QCCQ 12042; *Marleau v. Hydro‑Québec*, 2003 CanLII 6507 (C.Q.)). In such a case, even though there is no error (the payer makes the payment believing that there is no debt), art. 1491 *C.C.Q.* recognizes that a payment made solely to avoid injury is not made with a liberal intention.
8. It is with this foundational understanding of payment, debt, error and protest that we will now consider Carleton’s claim for restitution under art. 1491 *C.C.Q.*
   * 1. Carleton’s Claim for Receipt of a Payment Not Due
9. In our view, Carleton’s claim hinges on how the second requirement — absence of debt — is interpreted. Whether there is an absence of debt between Carleton and Mr. Roseme is far from straightforward. In most garden variety claims, a debt will be static: either it is there or it is not. But in this case, the debt was there one day and gone the next. A debt between Carleton and Mr. Roseme undoubtedly existed at a certain point in time: the combined effect of the presumption of life in art. 85 *C.C.Q.* and Carleton’s obligation to pay pension benefits for Mr. Roseme’s “remaining lifetime” created a genuine debt. But when viewed retrospectively from the time of the claim for restitution, there was no longer any debt: once the presumption of life was rebutted, the very basis of the once valid debt vanished. The existence of a debt was not fixed. At the time of payment, there was a debt, but at the time Carleton made its claim, there was no debt.
10. Carleton’s claim for restitution turns on how art. 1491 *C.C.Q.* deals with this unusual and rather unique situation — that is, how it treats debts that once existed but have subsequently fallen away. One possibility would be to require that the absence of debt always be *contemporaneous* with payment. On this approach, Carleton’s claim quickly collapses, because a debt did exist at the time the payments were made. On another approach, a court could look *retrospectively* from the time Carleton commenced its claim to determine whether there was a debt. On this view of the matter, the question is not merely whether a debt ever existed, but also whether — with the benefit of hindsight and with knowledge of the true state of affairs — the foundation of the debt remains intact.
11. In our view, art. 1491 *C.C.Q.* calls for the retrospective approach in the unique circumstances of this case. In substance, the Court of Appeal reached a similar conclusion:

If the [payer] can establish that the payment was made without cause, retrospectively, the rules on the receipt of a payment not due should be read to fashion a remedy in order to avoid the [payee] enriching himself or herself unjustly. Indeed in this case, the University has conferred a benefit upon Ms. Threlfall which, once it was later revealed that Mr. Roseme was dead at the time of payment, should be repaid to avoid her being enriched without proper cause. [Emphasis added; para. 123.]

Like the Court of Appeal, we are of the view that, here, the requirements for receipt of a payment not due must be assessed retrospectively from the time of the claim and with knowledge of the true state of affairs. The fact that a debt existed “at the time of payment” by Carleton is not fatal to its claim for receipt of a payment not due under art. 1491 *C.C.Q*.Instead, a court should focus on whether the basis for this debt remained intact at the time of the claim.

1. We note that, in reaching this conclusion, the Court of Appeal weaved its way through a constellation of clues — both inside and outside the *C.C.Q.* — suggesting that art. 1491 *C.C.Q.* should be “adjusted” (para. 129) and given an “expansive reading” (para. 130). These clues led the Court of Appeal to query whether restitution by way of art. 1491 *C.C.Q.* “should . . . always be constrained by the rule on error or absence of debt” (para. 129). In our view, the Court of Appeal was not saying that the requirements of absence of debt and error are expendable. They are not. As discussed earlier, if the error requirement was set aside, a devious neighbour could devise a plot to unilaterally provide services, like lawn mowing, and successfully receive restitution for the delivery of these undesired services under art. 1491 *C.C.Q.* because there is a payment and an absence of debt. So while we reach the same end destination as the Court of Appeal, we wish to make it clear that this conclusion can and must be reached by applying the essential requirements contained in art. 1491 *C.C.Q*. — (1) payment, (2) absence of debt and (3) error or protest. These requirements are not optional. But they cannot be assessed exclusively at the time of payment.
2. While some general and decontextualized passages from the relevant academic literature may lead one to conclude that an absence of debt must always exist contemporaneously with the payment (see C.A. reasons, at paras. 96‑109), it is clear, on closer review, that these passages do not envision or speak to the unusual circumstances in which a debt existed at a certain moment but has subsequently fallen away. Given the lack of academic guidance on this specific point, the somewhat fluid underpinnings of restitution in the Quebec civil law tradition (see P. Fréchette, *La restitution des prestations* (2018), at pp. 1‑6), and the novelty of this factual situation, it would be imprudent to mindlessly submit to these generalized statements of law that do not have the unique circumstances of this case in mind. It appears that the Court of Appeal came to the same realization when it decided to venture beyond the traditional confines of art. 1491 *C.C.Q.* to adopt an innovative and “expansive” reading of that provision.
3. We emphasize that this is not an ordinary claim for receipt of a payment not due. The vast majority of cases will yield identical results regardless of whether absence of debt is assessed contemporaneously with payment or retrospectively from the time of the claim. In most claims for receipt of a payment not due, if there was a debt at the time of payment, there will likely be a debt at the time of the claim. It is only these unique and unusual circumstances — namely where the basis for a debt subsequently falls away — that call for a closer examination of the principles underlying claims for receipt of a payment not due. Outside of these unusual circumstances, claims under art. 1491 *C.C.Q.* should proceed as usual.
   * + 1. There Was an Absence of Debt
4. As mentioned, there are two ways of understanding the absence of debt requirement in art. 1491 *C.C.Q*. Absence of debt is assessed either *contemporaneously* with payment or *retrospectively* from the time of the claim. In our view, in the unique situations where a debt existed at a certain time but the basis for it has subsequently fallen away, the existence of the debt must be determined retrospectively. In such circumstances, focusing on whether the foundation of the debt remained intact at the time of the claim is the only way to meet the goals of the restitution regime.
5. In support of its position, Carleton cites two municipal tax cases from this Court — *Willmor* and *Abel Skiver Farm Corp. v. Town of Sainte‑Foy*, [1983] 1 S.C.R. 403. Though tempting, the similarities between those cases and the case at bar are ultimately superficial. In *Abel Skiver* and *Willmor*, taxpayers succeeded in having municipal taxing instruments annulled by challenging the municipalities’ legal authority to demand payment (*Abel Skiver*, at pp. 415-16 and 423; *Willmor*,at p. 214). After the taxing instruments were annulled, the Court explained that “recovery of a thing not due” was the appropriate vehicle for the taxpayers’ restitutionary relief (*Abel Skiver*,at p. 423; *Willmor*,at p. 220). Carleton argues that the same principles apply here: while the taxpayers in those two cases were under the impression that a debt existed, they later discovered that it did not actually exist, and they were entitled to restitution on that basis.
6. However, there was no annulment in the instant case. This is important. Nullity may be invoked where an essential condition for the formation of a contract is missing (art. 1416 *C.C.Q.*). Without that essential condition, the legal instrument is tainted from its very inception (art. 1422 *C.C.Q.*). In these tax cases, although there is no question that the taxing instruments came into existence, the municipalities *never* had the legal authority to generate a debt because they acted outside of their jurisdictional limits. There may have been “the appearance of a debt” (*Willmor*,at p. 218), but — from day one — there was no debt. Here, Carleton was not led astray by the “appearance” or illusion of a debt. Instead, it had a genuine debt rooted in sturdy legal authority: its contract with Mr. Roseme, in tandem with art. 85 *C.C.Q.*, gave rise to a concrete obligation.This obligation was not tainted or defective. It was only upon the occurrence of a subsequent event — namely the rebuttal of the presumption of life — that this otherwise valid obligation fell away. Had that subsequent event never occurred, Carleton would have had no recourse against Mr. Roseme’s succession under art. 1491 *C.C.Q.* and the obligation would have remained intact. The taxpayers in *Willmor* and *Abel Skiver* did not need a similar subsequent event; while the municipalities insisted that there was a debt, the taxpayers were not under any obligation.
7. Although those tax cases and other examples of nullity are not directly on point, there are other restitutionary mechanisms in the *C.C.Q.* that do offer useful parallels and insight into how art. 1491 *C.C.Q.* is intended to operate when subsequent events cause the basis for a debt to fall away. In our view, these examples help illustrate why art. 1491 *C.C.Q.* calls for a retrospective assessment of the absence of debt in circumstances analogous to those of Carleton. To be clear, while these examples speak to the general tendency for restitutionary remedies in the *C.C.Q.* to operate retrospectively, they have no impact on, nor are they relevant to, our conclusion that the rebuttal of the presumption of life has retroactive effect. These two discrete issues — (1) whether the rebuttal of the presumption of life in art. 85 *C.C.Q.* has retroactive effect and (2) whether art. 1491 *C.C.Q.* can adopt a retrospective vantage point — cannot be blurred, as our colleagues seemingly suggest (paras. 168 and 172-73).
8. The resolution of a contract under art. 1606 para. 1 *C.C.Q.* is a good example of where a once valid obligation falls away following a subsequent event. Consider a situation where an individual purchases a car from a vendor for $1000. The individual makes the payment but, at a later point in time, the vendor fails to uphold his or her end of the bargain and does not deliver the car. Under arts. 1606 para. 1 and 1736 *C.C.Q.*, the purchaser is now entitled to a return of the initial payment, notwithstanding the fact that it was made pursuant to an entirely valid and binding obligation. In contrast to nullity, where the contract is tainted from its inception, the resolution of a contract does not negate the fact that genuine and valid debts and obligations existed at the time of the payment. It is only upon a party’s breach — a subsequent, unanticipated event — that they are retroactively extinguished (S. Grammond, A.‑F. Debruche and Y. Campagnolo, *Quebec Contract Law* (2011), at No. 578). This too makes sense: the vendor cannot resist the purchaser’s claim in restitution simply because the $1000 was — at some other point in time — paid under a valid and genuine contractual obligation. Instead, art. 1606 para. 1 *C.C.Q.* adopts a retrospective vantage point. As one author explains:

[translation] . . . as a result of the . . . resolution of the contract, the contract disappears. Thus, each obligation that has already been performed loses its cause. Retroactively, there is no reason to pay a sale price if the contract is subsequently . . . resolved.

(Fréchette, at p. 105; see also in the common law context: L. Smith, “Demystifying Juristic Reasons” (2007), 45 *Can. Bus. L.J.* 281, at pp. 291‑92.)

1. Impossibility of performance under arts. 1693 and 1694 *C.C.Q.* operates similarly. Under these provisions, where valid obligations can no longer be performed by reason of “superior force”, not only are the parties released from future obligations, but restitution is owed for the payments already made. Consider again the example of an individual purchasing a car from a vendor for $1000. But in this case, a natural disaster destroys the car before it is conveyed to the purchaser, making the vendor’s performance impossible. The vendor must return the $1000 under art. 1694 *C.C.Q*. Again, the purchaser was undoubtedly indebted to the vendor at the time of payment, but subsequent events — namely, the natural disaster — erased that obligation retrospectively.
2. Another example of retrospectivity is found in the revocation of a gift under arts. 1836 to 1838 *C.C.Q*. These provisions acknowledge that a valid gift may be subsequently revoked because of a donee’s reprehensible conduct. The fact that the gift was valid and untainted at a certain point in time does not insulate the gift from retrospective revocation.
3. Retrospective restitution is also common in other areas of the absence regime. For example, retrospectivity is necessary when untangling entitlements to inheritance between an absentee’s apparent and true heirs. Consider an absentee who goes missing for the entire seven-year period under art. 85 *C.C.Q*. After seven years, a declaratory judgment of death is issued, and the absentee’s succession opens on that date (Deleury and Goubau, at paras. 55 and 58; Gascon and Gelfusa, at Nos. 12-13 and 19; Brière, at para. 46). Because only “[n]atural persons who exist at the time the succession opens” can inherit (art. 617 para. 1 *C.C.Q.*), any deceased heirs cannot inherit. But if it is later discovered that the absentee actually died prior to the declaratory judgment of death, the opening of the succession becomes retroactive to the true date of death (art. 96 para. 1 *C.C.Q.*). Changing the date on which the succession opens can undo and reallocate a once valid inheritance. For instance, an heir may have been deceased on the date of the declaratory judgment of death and therefore incapable of inheriting, but alive on the true date of death and therefore capable of inheriting. In these cases, that heir becomes the true heir and is entitled to restitution under art. 627 *C.C.Q*. This is notwithstanding the fact that the apparent heir — prior to the discovery of the true date of death — properly and lawfully inherited the deceased’s property. Discovery of the true date of death therefore disrupts the once valid succession. As Fréchette puts it, [translation] “[t]he apparent inheritance is disturbed by the recognition of a new successor” (p. 57). Here again, a valid transfer of property remains subject to restitution should certain unanticipated events occur — like the discovery of the deceased’s true date of death.
4. An absentee’s return under art. 99 *C.C.Q.* also demands a retrospective approach. As discussed, under that provision, a returnee is entitled to use restitutionary tools to regain his or her footing against others — including his or her heirs — notwithstanding the fact that the devolution of the succession was not only permitted but also required by law. A subsequent event — here, the absentee’s return — transforms the once valid opening and devolution of the succession. The basis for opening the succession, the absentee’s death, falls away upon the absentee’s return, and this has a cascading effect on the prior devolution of the succession.
5. The thread that runs through all of these examples is that a payment is made under an entirely valid and genuine obligation that later falls away due to some subsequent event. In each of these examples, the contemporaneous existence of a debt and a payment does not immunize the payment from restitution at a later point in time. Restitution in these cases becomes available as a result of an unanticipated or abnormal event — like a party’s failure to uphold its bargain (art. 1606 para. 1 *C.C.Q.*), superior force that makes an obligation impossible to perform (art. 1694 *C.C.Q.*), a donee’s seriously reprehensible conduct (art. 1836 *C.C.Q.*), discovery of an absentee’s true date of death (arts. 96 para. 1 and 627 *C.C.Q.*) or an absentee’s return (art. 99 *C.C.Q.*) (see Fréchette, at pp. 53-57; M. Malaurie, *Les restitutions en droit civil* (1991), at p. 35).
6. In this respect, a retrospective approach to art. 1491 *C.C.Q.* fits seamlessly into the broader framework and objectives of similar restitutionary tools throughout the *C.C.Q*. Ms. Threlfall’s position — whichwould require that absence of debt be assessed only contemporaneously with payment — would put art. 1491 *C.C.Q.* out of sync with these similar obligations and avenues for restitution.
7. It is no surprise why these similar restitutionary mechanisms operate retrospectively. They all share [translation] “a common objective: to correct the effects associated with an ineffective juridical act”, and it is this common objective that “makes it possible for cases that seem different at first glance to be considered together” (Fréchette, at p. 58). To fulfill this objective, the restitutionary recourses in the *C.C.Q.* require retrospective approaches — they need a window into the true state of affairs in order to reallocate prestations to the proper person. Without retrospectivity, once valid payments would be forever immunized from restitution regardless of whether the underlying basis for them has disappeared. Such an approach would be an unusual and illogical curtailing of the *C.C.Q.*’s remedial reach.
8. There is no indication that art. 1491 *C.C.Q.* works differently from these other similar restitutionary mechanisms. This Court has explained that the provisions on receipt of a payment not due are premised on the idea that [translation] “[a]ny person is required to pay only what he or she owes, and owes only what he or she has an obligation to pay” (*Amex*,at para. 29, quoting Lluelles and Moore, *Droit des obligations* (2nd ed. 2012), at p. 725). When once valid obligations subsequently fall away, the payer winds up having made a payment that was not due. Here, without recourse to art. 1491 *C.C.Q.*, Carleton would have made payments that were not due: it would have been required to pay pension benefits for a period of time during which Mr. Roseme was both factually and legally deceased, even though the underlying obligation to pay them was expressly premised on his existence — the pension plan was a “life only” plan. Put simply, failing to adopt a retrospective approach would require Carleton to pay what it does not owe and permit Mr. Roseme’s heir, Ms. Threlfall, to retain something to which she has no contractual nor legal entitlement — an outcome that art. 1491 *C.C.Q.* is expressly designed to rectify. The fact that there was once a debt between Carleton and Mr. Roseme should not detract from the fact that this debt no longer has any basis.
9. In sum, adopting Ms. Threlfall’s narrow reading of art. 1491 *C.C.Q.* would frustrate the aims of that article and make it an anomaly within the wider family of restitutionary mechanisms in the *C.C.Q*.Assessing absence of debt contemporaneously with payment — as Ms. Threlfall suggests — would feed inaccurate and incomplete information into art. 1491 *C.C.Q*. This would allow undue payments and windfalls to find refuge just beyond the provision’s reach. Without retrospectivity, once valid payments would be forever immunized and parties would be unable to recover payments that were not due. That cannot be correct.
   * + 1. Carleton Paid in Error
10. As discussed, the mere absence of debt is not enough. Payment must be made in error or under protest. We agree with the Court of Appeal that the payments in the instant case were not made under protest to avoid injury. Carleton did not dispute the existence of a debt at the time the payments were made; it acknowledged that the presumption of life in art. 85 *C.C.Q.* required it to continue to make payments. While Carleton resumed the pension payments during the absence period “without admission of any kind”, its protest was “[a]t best . . . a disagreement with the legislature that a presumption should apply in like circumstances” (C.A. reasons, at para. 108). In any event, the payments were not made to avoid injury. Instead, Carleton simply resigned itself to the fact that art. 85 *C.C.Q.* required it to continue to make payments under the Plan.
11. But Carleton did pay in error: there was no intention to make the payments in the absence of a debt. Ms. Threlfall cannot establish that Carleton paid with a liberal intention. Upon discovering that Mr. Roseme had disappeared, Carleton initially sought to terminate the pension payments, but in the end reluctantly continued to make the payments once informed of the effect of art. 85 *C.C.Q*. It was only the temporary pull of art. 85 *C.C.Q.* that caused Carleton to make the payments. There was no liberal intention to continue the pension benefits in the absence of a debt.
    * + 1. Remedy
12. Carleton paid a debt that was not due in error. Under art. 1492 *C.C.Q.*, when the requirements for receipt of a payment not due are made out, restitution is governed by arts. 1699 to 1707 *C.C.Q*. Neither party has suggested that this Court should exercise its discretion to refuse restitution under art. 1699 para. 2 *C.C.Q.* on the basis that restitution would confer an undue advantage on one party. Indeed, this is a clear example of a case in which failing to order restitution would allow one party (Ms. Threlfall) to retain an undue advantage.
13. Conclusion
14. In sum, Mr. Roseme is not entitled to the pension benefits paid out following his death either under the Plan or under art. 85 *C.C.Q.*:the Plan unambiguously contemplated the termination of benefits upon Mr. Roseme’s actual death, and the rebuttal of the presumption in art. 85 *C.C.Q.* retroactively extinguished the rights rooted in that presumption. Because the legal basis for the payments evaporated, Carleton’s claim for receipt of a payment not due under art. 1491 *C.C.Q.* must succeed: assessed retrospectively, the payments were made in error and in the absence of any debt. We would therefore dismiss the appeal with costs.

The reasons of Moldaver, Côté and Brown JJ. were delivered by

Côté and Brown JJ. (dissenting) —

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1. Overview
2. Mr. George Roseme left his home near Gatineau, Quebec, to take a walk in September 2007. He never came home. An extensive search in the days following his disappearance could not locate him. The appellant, Ms. Lynne Threlfall, was court-appointed to manage Mr. Roseme’s affairs during his absence.
3. Carleton University, the respondent and his former employer, continued its monthly pension payments to him while he was absent. In Quebec, where a person disappears in circumstances that leave doubt as to whether he or she is alive or dead, art. 85 of the *Civil Code of Québec* (“*C.C.Q.*”) provides that the person is *presumed alive for seven years* following the disappearance, or until this presumption of life is *rebutted by proof to the contrary within the seven years* following the disappearance.
4. Mr. Roseme’s remains would later be found in 2013. But his true date of death was determined by the Registrar of Civil Status to be the day after he disappeared in 2007. In other words, Mr. Roseme was *in fact* dead the whole time that he was presumed *at law* to be alive. This is not in dispute.
5. What *is* in dispute is whether Ms. Threlfall, as tutor to the absentee Mr. Roseme, must return the pension payments (totaling $497,332.64) received after his true date of death in 2007 — that is, the payments made while Mr. Roseme was still presumed at law to be alive, but (as the later discovery of his remains confirmed) was in fact dead. On the one hand, Carleton argues that pension payments received during this time were not actually owed to him and must be returned, as they were received contrary to the terms of his pension plan. Those terms guaranteed payments for his “remaining lifetime” only, with payments ceasing upon “death”. Ms. Threlfall, on the other hand, says that the *C.C.Q.* does not require restitution since, at the time the payments were made, they were validly due as Mr. Roseme was presumed at law to be alive*.*
6. We all agree that the presumption of life in art. 85 *C.C.Q.* is a simple presumption which can be rebutted by proof of the absentee’s death. And we acknowledge that our colleagues, the Chief Justice and Gascon J., correctly identify the issue presented by this appeal: “did the rebuttal of the presumption of life retroactively extinguish Mr. Roseme’s entitlement to the pension payments made while he was an absentee, or did the rebuttal simply end the continued application of the presumption on a go-forward basis and therefore have no effect on the payments made by Carleton while Mr. Roseme was presumed to be alive?” (para. 37).
7. What divides us is the answer to that question. With great respect to our colleagues, the rebuttal of the presumption of life does not, as a consequence, impose *retroactive effects* on the substantive rights and obligations of the absentee. Simply put, arts. 1491 and 1492 *C.C.Q.* cannot be “adjusted” to allow the courts to go back in time to find that Carleton’s payments to Mr. Roseme were made “in error”, with the effect of unwinding rights and obligations *that were validly due at the time they were performed*. Carleton’s claim of restitution under the receipt of a payment not due provisions of the *C.C.Q.* must therefore fail.
8. Further, and while we agree with our colleagues that (1) injecting stability into an uncertain state of affairs, and (2) preserving the absentee’s interests for his or her possible return, are purposes of the presumption of life in the absence regime, the effect of their reasons for judgment is to ensure that neither of these purposes can be achieved. Quite the contrary. Imposing retroactive effects on the rights of the absentee paralyzes the tutor, who can no longer safely use the absentee’s incoming revenue streams to discharge his or her obligations as they come due. Our colleagues’ reasons do not account for a third purpose of the presumption of life, which is the protection of third parties connected to the absentee during the seven-year period of absence. Under our colleagues’ approach, third parties, such as those who receive child support or spousal support from an absentee during the seven-year period of absence as provided by art. 88 *C.C.Q.*, can no longer safely use the incoming monies, because if the absentee is discovered within seven years to have in fact been dead, the monies must be returned. In short, in interpreting the *C.C.Q.* in a way that reflects “the true state of affairs”, “certainty” — a significant purpose of the absence regime — is sacrificed on the altar of “accuracy”.
9. Our colleagues’ reasons repeatedly refer to the acquired rights of Ms. Threlfall as a “windfall” (paras. 68-71), signalling a kind of implicit unfairness argument bolstered by their emphasis on the quantum at issue (“close to half a million dollars” (para. 3)). With respect, the use of the term “windfall” fails to recognize the source of the entitlement — a right acquired without fraud (*un droit acquis sans* *fraude*). The pension payments received are not a windfall that the tutor, Ms. Threlfall, is using for her personal benefit; the money is being used to maintain the absentee’s estate and discharge the absentee’s obligations as they come due, to third parties and otherwise. Further, we believe that even our colleagues would agree that the quantum at stake is not relevant to the exercise of statutory interpretation or the resolution of the particular legal issue at play in this case. In this sense, the reference to the quantum at issue is superfluous and unfortunate.
10. Our colleagues’ reasons also repeatedly refer to this case and its circumstances as “unique” (paras. 6, 48 and 88-93), but, with respect, this is beside the point. Whether or not the facts of this case are unique or unusual is not relevant; what is relevant here — and what we argue — is that this is precisely the sort of situation that was contemplated by the *C.C.Q.*, and is properly addressed by the presumption of life. We do not see how the “unique” nature of the facts of this case adds any strength to our colleagues’ reasons. This is especially so when, as discussed in the preceding paragraph, this case boils down fundamentally to an exercise of statutory interpretation.
11. In any event, and in our view, the “true state of affairs” is simply this: the absence regime in Quebec contemplates that an absent person may in fact be dead, yet legally treated as being alive insofar as that person’s rights and obligations are concerned. There is, as a consequence, no basis in the *C.C.Q.* to order Ms. Threlfall to return the monies received from Carleton; the rebuttal of the presumption of life in 2013 signified the extinction of Carleton’s obligation only with respect to *continuing* (that is, *future*)pension payments. Such payments as received by Mr. Roseme (via his tutor) *prior* to the presumption of life being rebutted *were validly due to him at the time they were made*. Nothing in the *C.C.Q.* empowers this Court or any other to order those monies returned.
12. We would therefore allow the appeal and dismiss Carleton’s motion to institute proceedings, with costs throughout.
13. Analysis
    1. The Retirement Plan
14. As our colleagues note, Mr. Roseme drew monthly pension benefits, described in the Retirement Plan (reproduced in A.R., vol. II, at pp. 93 et seq.) under the title “Life Only” as:

An increased monthly benefit which is payable for the remaining lifetime of the retired Member with such benefit ceasing with the payment for the month in which the Member’s death occurs. [Emphasis added; s. 8.02(b)(i).]

1. Nobody disputes that Carleton had a contractual obligation to pay monthly pension benefits to Mr. Roseme pursuant to Carleton’s Retirement Plan. The question is when this obligation ceased. Did it cease on his true date of death (i.e., the day after he disappeared), or on the date his remains were found, more than five and a half years later? Our colleagues and the courts below construe the Retirement Plan’s language as plainly referring to Mr. Roseme’s *true* date of death, which was fixed by the Registrar as having occurred on September 11, 2007 (para. 25). Since Mr. Roseme had signed a “life only” option of the Retirement Plan, the “[p]ayments were bound to cease at the time of death”. In other words, “[t]he pension benefits end when the beneficiary dies” (trial reasons, 2016 QCCS 406, 26 C.C.P.B. (2nd) 150, at paras. 40 and 43).
2. Significantly, however, the terms “life”, “death”, and “remaining lifetime” are not defined in the Retirement Plan. The parties therefore agreed at trial that Mr. Roseme’s status (alive or dead) at the time of the payments should be determined according to the absence regime of the *C.C.Q.* (A.F., at para. 46). It is to that regime which we now turn.
   1. The Law of Absence in Quebec
3. We agree with our colleagues’ observation (at para. 32) that the absence regime has undergone substantial modification since its earlier iteration in the *Civil Code of Lower Canada* (“*C.C.L.C.*”). Our point of respectful departure from our colleagues is on *the effect* of this modification. While the absence regime in the *C.C.L.C.* allowed uncertainty to persist throughout the 30-year period of absence and made it impossible for anyone to claim a right accruing to an absentee during this time, the renewed absence regime in the *C.C.Q.* introduces certainty to a 7-year period of absence and ensures that the rights and obligations of the absentee remain valid until such time as the presumption is rebutted.
   * 1. The *Civil Code of Lower Canada*
4. Under the *C.C.L.C.*, a person became an “absentee” within the meaning of art. 86 *C.C.L.C.* where three conditions were satisfied: (1) the person had his or her domicile in Quebec; (2) the person had disappeared; and (3) no one had since received any news of his or her existence (P.-B. Mignault, *Le droit civil canadien* (1895), vol. 1, at p. 254; H. Roch, *L’absence* (1951), at p. 27). In the eyes of the law, an absentee was neither alive, nor dead (Roch, at p. 33). The absentee was reputed to be dead only if the absence had continued during 30 years from the day of disappearance, or from the latest news received, or if 100 years had elapsed since his or her birth (art. 98 *C.C.L.C.*).
5. The person’s absence was divided into three distinct periods, and each was governed by specific rules (Mignault, at p. 252; Roch, at pp. 33-34). During the first period — which lasted five years from the day of disappearance, or from the latest news received — the person was only *presumed* to be an absentee (Roch, at p. 73; Mignault, at pp. 251-52). A curator could be appointed where necessary to administer the absentee’s property (art. 87 *C.C.L.C.*), but the curator’s powers extended only to acts of administration; the curator could not alienate, pledge, or hypothecate the property of the absentee (art. 91 *C.C.L.C.*).
6. During the second period — which followed the first 5 years of absence, and lasted 25 more years — the absentee’s presumptive heirs could obtain court authorization to take provisional possession of the absentee’s property (art. 93 *C.C.L.C.*; Roch, at pp. 34 and 73-74). As explained by Mignault, at p. 251: [translation] “The judgment for possession is a true declaration of absence, since it is not pronounced until after the absence is confirmed.”
7. A court could abridge the five-year period if satisfied that there were “strong presumptions” that the absentee was dead and the heirs could be given provisional possession of the absentee’s property earlier than otherwise possible (art. 94 *C.C.L.C.*; Roch, at pp. 76-77). The difficulty, however, was that, even where a person had disappeared in circumstances which left virtually no doubt as to his or her death, a declaration of death was unavailable (É. Deleury and D. Goubau, *Le droit des personnes physiques* (5th ed. 2014), at para. 39). In 1969, the National Assembly consequently enacted *An Act respecting declaratory judgments of death*, S.Q. 1969, c. 79, inserting arts. 70 to 73 into the *C.C.L.C.* which empowered courts to make declarations of death where death was certain, and it was impossible to draw up an act of burial (see E. Deleury-Bonnet, “La Loi concernant les jugements déclaratifs de décès” (1970), 11 *C. de D.* 330).
8. During the third period — where absence had exceeded 30 years from the day of disappearance or from the latest news received, or if 100 years had elapsed since the absentee’s birth — the absentee was “reputed to be dead from the time of his [or her] disappearance or from the latest [news] received” (art. 98 *C.C.L.C.*). In other words, art. 98 *C.C.L.C.* *expressly* legislated a retroactive “presumption of death”. This allowed for the heirs or other rights-holders to obtain partition and absolute possession of the absentee’s property (art. 98 *C.C.L.C.*; Mignault, at p. 253). And, given the retroactive application of the presumption of death, the absentee’s succession devolved from the time of his or her disappearance or from the latest news received (except where the absentee was proven to have died at another date) (art. 99 *C.C.L.C.*; Roch, at p. 117).
9. As even this brief review makes plain, the *C.C.L.C.*’s absence regime was unduly complex, inflexible and — most importantly — riddled with persistent uncertainty. For example, under art. 108 *C.C.L.C.*, the spouse of the absentee could not remarry without providing proof positive of the death of the absentee, no matter the duration of absence (Roch, at pp. 155-56). In a similar vein, under art. 104 *C.C.L.C.*, whoever claimed a right accruing to an absentee[[2]](#footnote-2) had to first prove that the absentee was in fact living at the time the right accrued — failing which, the claim would fail (Mignault, at pp. 309-10; Roch, at pp. 137-39). Similarly, pursuant to art. 105 *C.C.L.C.*, if an absentee was called to a succession, the absentee could not assert those rights, leaving the benefits to devolve exclusively to others with rights of succession (Roch, at p. 140).
10. The problem, in essence, was that without any presumption (whether of life or death) during the first 30 years of absence, the absentee’s affairs and the affairs of those with whom the absentee was associated, including family members, business partners and others, would effectively grind to a halt. Uncertainty as to status persisted either throughout the absence or until it was definitively proven that the absentee was in fact dead or alive:

[translation] The law on absence in the *Civil Code of Lower Canada* was dominated by the idea that an absentee’s return was always possible. As time passed, uncertainty progressively gave way to the improbability of a return. The law was therefore increasingly concerned with the interests of the absentee’s heirs, but it refused to decide the question of whether the absentee was living or dead. In fact, the situation was resolved only by proof of the absentee’s survival or death.

In addition, since by definition the uncertainty persisted throughout the absence, it was impossible to claim rights that might accrue to an absentee but were predicated on proof of his or her existence. This was why, for instance, an absentee could not be called to a succession once the absence was confirmed. Conversely, it was equally impossible to enforce rights or modify a legal situation where this depended on proof of an absentee’s death. For example, absence did not result in the dissolution of marriage and, had it not been for the opening provided in 1968 by the federal divorce legislation, an absentee’s spouse would have been condemned to live in widowhood while not having the title of widow or widower.

The only exception to the never‑ending doubt on which the entire law on absence was based was in the area of insurance law. Article 2529 C.C.L.C. authorized the beneficiary of life insurance taken out by an absentee before his or her disappearance to claim payment of the amount insured after seven years of absence. [Emphasis added.]

(Deleury and Goubau, at para. 71)

1. As explained by Deleury and Goubau, the sole exception to this state of uncertainty was the right of any person entitled to the proceeds of a life insurance to obtain from the court a “declaration of presumption of death” where the insured person had disappeared from the place of his or her usual residence and had not been heard from for a period of seven years (art. 2529 *C.C.L.C.*).
   * 1. The Civil Code Revision Office
2. The difficulties we have recounted with the *C.C.L.C.*’s absence regime led to revisions, which this Court is now asked to interpret. This appeal turns on two particularly important revisions, proposed by the Civil Code Revision Office (“C.C.R.O.”) and substantially adopted in the *C.C.Q*. The first empowered a court to make a declaratory judgment of absence,[[3]](#footnote-3) based on the declaratory judgment of death provided for in arts. 70 et seq. *C.C.L.C.*, where an absentee has been absent for seven consecutive years (rather than 30 years under the *C.C.L.C.*), *even where* death remains *uncertain* (Civil Code Revision Office, *Report on the Québec Civil Code*, vol. I, *Draft* *Civil Code* (1978), at p. 38 (art. 209 of Book One); Civil Code Revision Office, *Report on the Québec Civil Code*, vol. II, t. 1, *Commentaries* (1978), at pp. 73-74). The second was that “[t]he presumption of death would take effect from the time of the declaratory judgment of absence, and not, as provided in Article 98 [*C.C.L.C*.], from the time the absentee leaves or the last news of him is received” (*Commentaries*, at p. 74; *Draft Civil Code*, at p. 38 (art. 210 of Book One) (emphasis added)). As explained by the C.C.R.O. at the time: “After some hesitation, it seemed that, although the date of departure of the absentee was perhaps less arbitrary for determining the date of death, that of the declaratory judgment of absence was more certain” (*Commentaries*, at p. 74). As further explained by the C.C.R.O., “the retroactive nature of the presumption [was rejected because it] would have the effect of validating all irregular acts performed since the departure of the absentee” (*Commentaries*, at pp. 74-75).
3. This general rule of *non*-retroactivity of the presumption of death was subject to *explicit* exceptions proposed by the C.C.R.O. For instance, according to art. 213 of Book One of the *Draft Civil Code*, at p. 39, if the absentee was proved to have died prior to that of the declaratory judgment of absence, his or her matrimonial regime should be dissolved on the true date of death. We stress that the C.C.R.O. could not have been clearer that this was an *exception* to the general rule: “After long deliberations, it was decided to make an exception to Article 210 when the absentee is proven to have died on a date prior to the declaratory judgment of absence. In this event, distribution of the matrimonial regime may perhaps have to be readjusted” (p. 75 (emphasis added)).
   * 1. The *Civil Code of Québec*
4. The *C.C.Q.* now contains the substance of both of these proposed revisions. More broadly, the *C.C.Q.* contemplates two different scenarios involving the “disappearance” of a person. (On the distinction between these two scenarios, see *Sandaldjian v. Directeur de l’état civil*, 2003 CanLII 71896 (Que. C.A.); *Assurance-vie Desjardins v. Duguay*, [1985] C.A. 334 (Que.); *Gariépy v. Directeur de l’état civil*, [1997] R.D.F. 50 (Que. Sup. Ct.); Deleury and Goubau, at para. 37.)
5. The first scenario occurs where a person disappears in circumstances which leave virtually *no doubt* as to his or her death, but where it may not be possible to attest to the person’s death (e.g., the person’s body cannot be discovered or identified following a plane crash). Here, no presumption of life arises since the death is a virtual certainty. Instead, a declaratory judgment of death may be obtained under art. 92 para. 2 *C.C.Q.* (see M. Ouellette, “Livre premier: Des personnes”, in *La réforme du Code civil*, t. 1, *Personnes, successions, biens* (1993), at para. 165; Deleury and Goubau, at para. 54; *Minville, Re*, 2004 CanLII 39875 (Que. Sup. Ct.), at para. 24; *Ashodian (Succession de) v. Directeur de l’état civil*, 2015 QCCS 6141, at paras. 54‑55 (CanLII); *Auclair (Re)*, 2016 QCCS 2065, at para. 6 (CanLII)). The date of death is fixed at the date when “the death of [the] person [can] be held to be certain” according to “the presumptions drawn from the circumstances” (art. 94 para. 1 *C.C.Q.*).
6. The second scenario — absence — occurs where a person disappears, as Mr. Roseme disappeared, in circumstances which leave *doubt* or *uncertainty* as to his or her death. In these circumstances, the person becomes an “absentee” within the meaning of art. 84 *C.C.Q.* where three conditions are satisfied: (1) the person had his or her domicile in Quebec; (2) the person ceased to appear at his or her domicile without advising anyone; and (3) it is unknown whether the person is still alive (see Ministère de la Justice, *Commentaires du ministre de la Justice*, t. I, *Le Code civil du Québec — Un mouvement de société* (1993), at p. 67; Mignault, at p. 252; Roch, at p. 27).
7. Under this second scenario (and unlike the first scenario), the *C.C.Q.* furnishes a presumption: specifically, the absentee is presumed automatically — i.e., without the need for a “declaratory judgment of absence” or for any other similar mechanism — to be *alive* for seven years following his or her disappearance (art. 85 *C.C.Q.*):

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

The presumption of life contained in art. 85 represented a substantial change to the law on absence in Quebec. As explained by the Minister of Justice in his *Commentaires*, at p. 68:

[translation] This article makes a significant change to the previous law. Article 98 C.C.L.C. presumed death only thirty years after the disappearance, whereas article 85 presumes that the absentee is alive for seven years after his or her disappearance and then presumes that the absentee is dead. [Emphasis added.]

As further explained by the Minister of Justice, at p. 66:

Under the Civil Code of Lower Canada . . . [a]bsentees did not inherit and it was impossible to claim the rights belonging to them unless their existence was proved.

The Civil Code of Québec reworks the concept of absence: it presumes that absentees are alive and can therefore inherit and acquire rights.

1. It is this presumption — which is, again, that the absentee is *alive* for seven years after his or her disappearance — which fosters certainty by ensuring that absentees [translation] “[are] capable of acquiring rights and being bound by obligations” (Deleury and Goubau, at para. 41; see also majority reasons, at para. 29: “While presumed alive, an absentee, through his or her tutor . . . remains liable to perform obligations (e.g., art. 88 *C.C.Q.*) and continues to accrue rights (art. 86 *C.C.Q*.)”). Thus, an absentee who is “presumed to be alive” at the time a succession opens “may inherit” (art. 617 para. 1 *C.C.Q.*; see also art. 638 *C.C.Q.*; G. Brière, *Traité de droit civil:* *Les successions* (2nd ed.1994), at para. 68). Further, where an absentee “has rights to be exercised or property to be administered” during the seven-year absence period, a tutor may be appointed by the court (art. 86 *C.C.Q.*; Deleury and Goubau, at para. 44). And, because the tutor holds powers of simple administration of the property of another (arts. 87 and 208 *C.C.Q.*), he or she may perform “all the acts necessary for the preservation of the property or useful for the maintenance of the use for which the property is ordinarily destined”, including the collection of the fruits and revenues of the property under his or her administration, the exercise of the rights pertaining to the property, and the collection of the claims under his or her administration (arts. 1301 et seq. *C.C.Q.*; Deleury and Goubau, at para. 48; Roch, at pp. 54-57).
2. The presumption of life ceases to be in force (i.e., is confirmed or rebutted) and tutorship to an absentee is consequently terminated by (1) the absentee’s return; (2) the appointment by him or her of an administrator to his or her property; or (3) proof of his or her death (arts. 85 and 90 *C.C.Q.*; see Deleury and Goubau, at para. 53). The presumption of life also ceases to apply after seven years of absence, as it is displaced by a presumption that the absentee is *dead* (art. 85 *C.C.Q.*; *Commentaires du ministre*, at pp. 66 and 68: [translation] “death will be presumed after seven years of continuous absence . . . . [A]rticle 85 presumes an absentee to be alive for seven years following his or her disappearance and then presumes the absentee to be dead”; *Salman et Gagnon*, [1996] R.D.F. 324 (Que. Sup. Ct.), at p. 327: [translation] “an absentee is presumed to be alive for seven years following his or her disappearance and is then presumed to be dead”; majority reasons, at para. 63: “After seven years, the absentee is deemed to have died at that seven-year mark unless he or she returns”).
3. When the presumption of life is neither confirmed nor rebutted within seven years of absence, the presumption of life ceases to apply seven years after the absentee’s disappearance, as we have just explained, while tutorship to an absentee may continue after the expiration of that delay until a declaratory judgment of death is rendered. In other words, the expiry of the seven-year period of absence and the operation of the presumption of death do not terminate the tutorship. As É. Cloutier explains in “Origines et évolution du droit québécois de l’absence: de l’existence incertaine aux présomptions de vie et de mort” (2017), 63 *McGill* *L.J.* 247, at p. 273 (fn. 144): [translation] “Although an absentee is considered to be dead after the period established by article 85 of the *C.C.Q.*, his or her death must still be judicially declared” (see also Deleury and Goubau, at para. 40: [translation] “Following the period provided for in article 85 C.C.Q., an absentee is considered to be dead, but the death must be judicially recognized. Failure to have the person judicially declared to be dead . . . results in an extension of protective measures beyond the seven‑year period. Thus, until a declaratory judgment of death is rendered or the death is proved, tutorship remains in place.”).
4. To obtain a declaratory judgment of death seven years after the absentee’s disappearance pursuant to art. 92 para. 1 *C.C.Q.*, it is not necessary to bring proof positive of the absentee’s death, precisely because the absentee is by then presumed to be dead; it is sufficient to prove the absence of the person (i.e., the three definitional elements of absence) and the fact that the absence has lasted seven years from the disappearance (see É. Gascon and J. Gelfusa, “Absence et décès”, in *JurisClasseur* *Québec* — *Collection droit civil* — *Personnes et famille* (loose-leaf), by P.-C. Lafond, ed., fasc. 8, at No. 4).
5. A declaratory judgment of death is necessary not only to terminate tutorship to an absentee; it is also required so that the Registrar — who is notified of the judgment — may draw up the absentee’s act of death in accordance with its particulars (arts. 129 and 133 *C.C.Q.*). Moreover, it is the declaratory judgment of death — and not the presumption of death — which produces the same legal effects as death; a declaratory judgement of death is therefore necessary to open the absentee’s succession and to dissolve his or her marriage (see arts. 95, 465, 516 and 613 para. 1 *C.C.Q.*; Gascon and Gelfusa, at No. 19). And, where a declaratory judgment of death is rendered after the expiry of the seven-year period of absence, the date fixed as the date of death is “the date upon expiry of seven years from the disappearance” (art. 94 para. 1 *C.C.Q.*). Consequently, and significantly in our view, the operation of the presumption of death and of the declaratory judgment of death does not displace the presumption of life which was in force during the seven-year period of absence.
   * 1. Conclusion on the Law of Absence
6. From the foregoing, we draw two conclusions. First, the legal regimes of absence and of disappearance in circumstances that leave virtually no doubt as to the person’s death are distinct and must not be confused. And, secondly, the right of Ms. Threlfall to claim the pension benefits on Mr. Roseme’s behalf during his absence is the upshot of a substantial change to the law of absence at the time of the adoption of the *C.C.Q*.
7. As to the first conclusion, as we have shown, the *C.C.Q.* contemplates two distinct scenarios involving the “disappearance” of a person: first, disappearance in circumstances that leave virtually *no doubt* as to the person’s death, and secondly, absence, which is disappearance in circumstances that *do* leave *doubt* as to the person’s death. These are distinct forms of “disappearance” under the *C.C.Q.*, with distinct legal consequences, and must not be confused. Hence, in *Assurance-vie Desjardins*, the Court of Appeal quite rightly held that the trial judge erred by granting a declaratory judgment of death in circumstances which left *doubt* or *uncertainty* as to the person’s death or survival (*albeit*, in the *C.C.L.C.* context). While, where death *is* a virtual certainty, no presumption of life arises, where death is *not* a virtual certainty, the person becomes an “absentee” and is presumed *alive* for seven years following his or her disappearance. It is only the first scenario that allows for the date of death to be immediately fixed *at the date of disappearance* by a declaratory judgment of death (art. 94 para. 1 *C.C.Q.*).In the second scenario, a declaratory judgment of death can be granted only upon expiry of the seven-year period, and the date of death is fixed at “the date upon expiry of seven years from the disappearance”, *and not at the date of disappearance* (art. 94 para. 1 *C.C.Q.*).
8. Here, it is common ground that Mr. Roseme’s circumstances fell within the second scenario — meaning, he was *an absentee* who was therefore presumed *alive* from September 10, 2007, to (at least) July 22, 2013. Indeed, Carleton did not seek a declaratory judgment of death before the expiry of the seven-year period, as it considered that the conditions necessary to obtain such a judgment (that is, that death be certain upon disappearance) were not met here (A.R., vol. II, at p. 89: “there was not enough information on file, or at least at Carleton’s disposal, to go ahead and apply for a declaratory judgment of death”). Rather, on February 4, 2008, the Superior Court of Quebec instituted *a tutorship to the absentee* Mr. Roseme upon Ms. Threlfall’s application. As explained by Gascon and Gelfusa, at No. 6, such a judgment had the effect of recognizing the existence of a situation of absence.
9. Not surprisingly, Quebec case law confirms that there *are* circumstances in which what has been paid during the *absence* of a person because of the legal consequences attached to that person’s status as an absentee *cannot* be recovered. In *Savard v. Metropolitan Life Insurance*, [1971] C.S. 631, for example, a plaintiff sought to obtain the proceeds of a life insurance policy pursuant to art. 2529 *C.C.L.C.* (then art. 2593a *C.C.L.C.*) (which, it will be recalled, exceptionally provided that a life insurance beneficiary could obtain a “declaration of presumption of death” where the insured person had been absent for seven years). The plaintiff sought such a declaration, *as well as* an order for the reimbursement of the insurance premiums paid since the day of the disappearance of the absentee. While the court allowed the plaintiff’s request for a declaration of presumption of death, it did not order the reimbursement of the insurance premiums, noting that to obtain such an order the plaintiff should have proceeded pursuant to arts. 70 et seq. *C.C.L.C.*, which allowed for an order fixing the date of death at the date of disappearance, but only where death could be held to be certain (which was not the case there). But when a judgment granting a request for a presumption of death was rendered under art. 2529 *C.C.L.C.*, the date of death was fixed *at the date of the judgment*. On this point, Brière explains as follows (at para. 53):

[translation] It should be noted that, unlike a declaratory judgment of death, a judicial declaration of presumption of death made under article 2529 *C.C.L.C.*, in the life insurance context, could not fix the date of death at the time the death likely occurred; the court could only declare that the assured was presumed to be dead at the date of the judgment; as a result, it was impossible to obtain reimbursement of the premiums paid since the start of the absence. In contrast, a declaratory judgment of death could be set up immediately against the insurer that had insured the life of the deceased as long as that insurer had been impleaded (art. 71 para. 3 *C.C.L.C.*). [Footnote omitted.]

1. Our second conclusion from the foregoing account of the law on absence goes to Ms. Threlfall’s right to claim the pension benefits on Mr. Roseme’s behalf during his absence. Here, we see the modifications of the law of absence in Quebec from the old provisions of the *C.C.L.C.* to today’s *C.C.Q.* as highly significant. Had we been called upon to decide Mr. Roseme’s entitlement to pension benefits during his absence according to the *C.C.L.C*., we would have to conclude that Mr. Roseme (or Ms. Threlfall on his behalf) had no such entitlement, given arts. 104 and 1913 *C.C.L.C.*, the latter of which deals with the similar notion of life-rent:

**104.** Whoever claims a right accruing to an absentee must prove that such absentee was living at the time the right accrued; in default of such proof his demand is not admitted.

**1913.** The creditor of a life-rent on demanding payment of it must establish the existence of the person on whose life it is constituted, up to the time for which the arrears are claimed.

1. But a different outcome is mandated here, because of art. 85 *C.C.Q.* No longer does the right to claim pension benefits during an “absence” depend on the rights claimant proving that the absentee was, in fact, *alive* at the time the right accrued. Instead, it is sufficient to show that the absentee was (1) *presumed* at law to be alive (2) at the time the right accrued to him or her. Indeed, it is clear under the *C.C.Q.* that an absentee, who is presumed at law to be alive *at the time a right accrues*, can acquire such a right. This is apparent, for example, from the wording of art. 617 para. 1 *C.C.Q.*:

**617.** Natural persons who exist at the time the succession opens, including absentees presumed to be alive at that time and children conceived but yet unborn, if they are born alive and viable, may inherit.

1. Article 617 is a specific application of the general presumption of life provided in art. 85:

[translation] [A]rticle [617], as a whole, replicates the rules set out in the Civil Code of Lower Canada. The statement that absentees may inherit is new, but it is in line with the provisions on absence in the book on *Persons*, which now establish that an absentee is presumed to be alive for seven years following his or her disappearance, unless proof of the absentee’s death is made before then.

(*Commentaires du ministre*, at p. 365)

[translation] . . . there is no doubt that absentees, insofar as they are presumed to be alive under article 85 of the *CCQ*, may “inherit and acquire rights”. The *CCQ* even expressly provides, in the book on *Successions*, that “[n]atural persons who exist at the time the succession opens, including absentees presumed to be alive at that time . . . may inherit”. [Footnotes omitted.]

(Cloutier, at pp. 276-77)

1. We note that this change to the law of absence effected by the *C.C.Q.* brought the law of Quebec closer to that of Germany, and of France which had also adopted the German model in 1977:

[translation] . . . the model chosen by the legislature, which involves a presumption of life that is replaced by a presumption of death after a certain time, is by no means novel in the law on absence.

. . . this idea has long been part of the German absence model . . . That model provided, in fact, that an absentee was presumed to be alive until his or her death was declared and could therefore acquire rights during that period. . . .

The modern absence system in Quebec thus appears to be strongly inspired by the German model given the use of presumptions of life and death to overcome uncertainty, which moves it away from its Napoleonic origins. It should be noted that Quebec is not the only jurisdiction to have made such a shift. France, the birthplace of the Napoleonic model, has also made this change. [Emphasis added; footnotes omitted.]

(Cloutier, at p. 278)

1. H. Corral Talciani and M. S. Rodriguez Pinto in “Disparition de personnes et présomption de décès: observations de droit comparé” (2000), 52(3) *R.I.D.C.* 553, at pp. 561 and 572, also find:

[translation] The current French legislation, which dates back to a radical reform of the Civil Code in 1977, completely replaced the title on *Absentees* in the Napoleonic Code in order to create a regime similar to the German system. The new rules deal with two situations: the *presumption of absence*, under which the person who has disappeared is deemed to be alive and may acquire property (arts. 112 to 121 of the Civil Code); and the *declaration of absence*, from the date of which the person who has disappeared is considered to be legally dead (arts. 122 to 132 of the Civil Code). Starting in 1977, France therefore abandoned the concept of doubt as the distinguishing feature of its legal regime and adopted the German doctrine of certainty, even though, contrary to the model, there is no effort to ensure that the date of death resulting from the French amendment is close to the date on which the person died or the time the death might actually have occurred.

. . .

The new Civil Code of Québec . . . is therefore very similar to the German system referred to above and to the new French rules. [Emphasis added; italics in original; footnote omitted.]

1. Of course, the specific provisions of the *C.C.Q.* and of the French *Civil Code* on the law of absence are, in their wording, very different. But both the Quebec and French regimes of absence are inspired by the German model, and each manifestly reaches similar results on similar issues. For example, while the French *Civil Code* — contrary to the *C.C.Q.* — does not contain a clear provision expressly providing for a presumption of life during the period of absence or of “presumed absence”,[[4]](#footnote-4) the French academic literature and jurisprudence have inferred the existence of such a presumption of life on the basis of other provisions of the French *Civil Code*:

[translation] Every person is presumed to be alive even when presumed to be absent. This presumption of existence is not set out in an enactment, but it has been affirmed by many legal commentators on the basis of the parliamentary record, *a contrario* reasoning from article 128 [Article 128 provides that a judgment declaring an absence produces the same effects as an act of death; *a contrario*, a judgment stating a presumption of absence does not produce the same effects] and an inference from article 725, paragraph 2 [The reasoning, in the form of a reverse syllogism, is as follows. To inherit, a person must exist at the time the succession opens (art. 725 para. 1); a presumed absentee may inherit (art. 725 para. 2); therefore, a presumed absentee is presumed to be alive]. [Emphasis added; footnotes omitted.]

(P. Malaurie, *Droit des personnes: La protection des mineurs et des majeurs* (10th ed. 2018), at pp. 45-46)

1. H., L. and J. Mazeaud and F. Chabas in *Leçons de droit civil*, t. I, vol. 2, *Les personnes: La personnalité, Les incapacités* (8th ed. 1997), at para. 448-2, also add:

[translation] . . . a person who has not reappeared and of whom there is no news is, during a first period, almost considered to be a person presumed to be alive, which is inferred generally from the parliamentary debates on the 1977 statute and which the courts have affirmed, at least as regards the patrimonial effects of the presumption of absence; during a second period, the person is presumed to be dead. [Emphasis added; footnotes omitted.]

1. Conversely, the *C.C.Q.* does not contain (as the French *Civil Code* contains) a clear provision expressly providing that [translation] “[r]ights acquired without fraud on the basis of the presumption of absence, may not be called in question when the death of the absentee is established or judicially declared, whatever the date fixed for the death may be” (art. 119 of the French *Civil Code*; see F. Terré and D. Fenouillet, *Droit civil: Les personnes* — *Personnalité, incapacité, protection* (8th ed. 2012), at para. 36; B. Teyssié, *Droit des personnes* (20th ed. 2018), at p. 233: [translation] “Rather than leaving their protection to an uncertain application of the theory of appearance, the legislature made it a general rule that rights acquired without fraud on the basis of the presumption of absence — such as arrears of a retirement pension — would not be called in question, whatever the date of the death may have been” (emphasis added; footnotes omitted)).
2. Given the absence of an equivalent provision in the *C.C.Q.*, we must look deeper into the *C.C.Q.*’s legal regime of absence — and, in particular, into rebutting the presumption of life — to determine whether the rights acquired by an absentee according to the presumption of life during his or her absence are, as the Court of Appeal said, only “presumptively valid” and therefore “subject to review if proof of death operate[s] to rebut the presumption” (C.A. reasons, 2017 QCCA 1632, 417 D.L.R. (4th) 623, at para. 71). Given their common Germanic inspiration, we would expect that the *C.C.Q.* should reach a result similar to the French *Civil Code* on this issue.
   1. The Rebuttal of the Presumption of Life
3. As already acknowledged, we agree that the presumption of life, as provided by art. 85 *C.C.Q.*, is a “simple presumption” that can be rebutted by proof to the contrary (see art. 2847 para. 2 *C.C.Q.*; majority reasons, at para. 40). But our view is that, if proof of the absentee’s death is made before the expiry of the seven-year period of absence, the presumption of life is rebutted *only* *prospectively*, such that no rights or obligations premised upon the absentee’s existence can be claimed or executed *for the future*, that is, for the remainder of the seven-year period.
4. And so, in the case at bar, on July 22, 2013, when Mr. Roseme’s remains were found, his death became a “factual certainty” (C.A. reasons, at para. 62), he was no longer considered an “absentee”, and the presumption of life necessarily ceased to be in force.[[5]](#footnote-5) The Registrar, who has the discretion to establish the date of death on the basis of presumptions that may be drawn in the circumstances (art. 127 para. 1 *C.C.Q.*), did so by fixing the date of death on September 11, 2007, the day after Mr. Roseme’s disappearance. We say that Quebec law contemplates, on these facts, that the presumption of life was rebutted *only as of July 22, 2013* — that is, *only* *prospectively*, such that no rights or obligations premised upon Mr. Roseme being alive can be claimed or executed *for the future*. But the presumption was *not* rebutted *retroactively*, stripping him of all benefits accruing while the presumption operated.
5. This is not, of course, what the Court of Appeal concluded, and what our colleagues conclude, in the case at bar. In the view of the Court of Appeal, the exercise by the Registrar of his discretion to establish the date of death in the act of death upon discovery of Mr. Roseme’s remains had the effect of “rebutt[ing] [the presumption of life] with retroactive effect[s]” and Ms. Threlfall was bound to restore the pension payments received “without right”. Similarly, our colleagues say that once the presumption of life is rebutted within the seven-year period of absence, “nothing in the *C.C.Q.* dictates that reality should be ignored or [that] juridical personality [be] allowed to continue past death” (para. 47).
6. With respect, we see the matter quite differently. We do not dispute that, as an authentic deed (art. 107 *C.C.Q.*), the act of death establishes proof of death (art. 102 *C.C.Q.*). And, the date fixed by the Registrar is conclusive proof of when that death occurred (arts. 2814(5) and 2818 *C.C.Q.*). There is no room for doubt or dispute here. Mr. Roseme was, in fact, not alive, but dead, from September 11, 2007, to July 22, 2013, during which time the pension benefits in dispute here were paid to him. But none of this changes the conclusion that, while he was *in fact* dead, i.e. not *alive*, Mr. Roseme was an absentee[[6]](#footnote-6) and therefore (1) *at law* *presumed alive* (2) at the time those pension benefits accrued to him. We do not see our colleagues’ reasons as accounting for the legal significance of this conclusion. And yet, it cannot just be swept aside since, as we have already explained, it is sufficient, for the acquisition of a right by an absentee during his or her absence, to show that such absentee was (1) presumedat law to be alive (2) at the time the right accrued to him or her. It is no longer necessary to prove that the absentee was, in fact, alive at the time the right accrued. In our view, this should be sufficient to dispose of this appeal.
7. But our colleagues’ approach further presupposes that rights or obligations which are premised upon the absentee’s existence and which are claimed or executed by the absentee’s tutor on his or her behalf while the presumption of life is in force can *retrospectively* be viewed as payments made in the absence of valid rights or obligations. In this way, our colleagues make those payments subject to an order for restitution where it can later be shown that the absentee was, in fact, dead at the time these rights or obligations were claimed or executed.
8. This, of course, brings us to the main issue to be decided in this appeal: what is the effect on the substantive rights and obligations of an absentee when the presumption of life is rebutted? To answer this question, we must interpret art. 85 *C.C.Q.* by considering the text, context and purpose of the presumption of life in particular and of the absence regime in general (*Montréal (Ville) v. Lonardi*, 2018 SCC 29, [2018] 2 S.C.R. 103, at para. 22; *Canada (Attorney General) v. Thouin*, 2017 SCC 46, [2017] 2 S.C.R. 184, at para. 26).
   * 1. The Text of Article 85 *C.C.Q.* Does Not Expressly Provide for Retroactivity
9. In support of their position, our colleagues stress that art. 85 *C.C.Q.* states that an absentee is presumed alive “unless proof of his death is made”, and not “until proof of his death is made” (para. 39 (emphasis in original)). In our respectful view, this point carries no legal significance. The presumption of life is *already* expressed in temporal terms: “[a]n absentee is presumed to be alive for seven years following his disappearance, unless proof of his death is made before then”. If proof of the absentee’s death is made “before then” (i.e., before the expiry of the seven-year period of absence), the presumption of life is rebutted *prospectively*, as we have already explained, and no rights or obligations premised upon the absentee’s existence can be claimed or executed for the future — meaning, for the remainder of the seven-year period of absence.
10. The term “for” used in the first part of art. 85 *C.C.Q.* (“*durant*” in the French version) “indicat[es] . . . the length of (a period of time)” during which an absentee is presumed to be alive (*Concise Oxford English Dictionary* (12th ed. 2011)). Specifically, an absentee is presumed to be alive “for” seven years following his or her disappearance. In other words, an absentee is presumed to be alive *until* the expiration of a seven-year delay following his or her disappearance. (See the definition of “until”: “up to (the point in time or the event mentioned)”.) We note that the French version of art. 85 expressly refers to the concept of “*l’expiration de ce délai [de sept ans]*” ([translation] “the expiration of this period [of seven years]”). We also note the definition of “*durant*” (“for”) — [translation] “During the period of” — compared to the definition of “*jusque*” (“until”) — “Indicates the end point, the limit” (*Le Petit Robert* (new ed. 2020)). The terms “unless / *à moins que*” used in the second part of art. 85 cannot be read in isolation from the terms “for / *durant*” and “before then / *avant l’expiration de ce délai*”. If the first part of art. 85 means that an absentee is presumed to be alive *until* the expiration of a seven-year delay following his or her disappearance, the second part of this article simply adds that an absentee is presumed to be alive *until* the expiration of a seven-year delay following his or her disappearance, *or until proof of his or her death is made within the seven-year delay*.
11. In that regard, we note the wording of the German presumption of life: “As long as a missing person has not been declared dead, he shall be presumed to be, or to have been, alive until expiration of the periods specified” (*Act concerning Missing Persons, Declarations of Death and the Determination of the Time of Death* *of July 4th,* *1939*, RGBI.I, p. 1186/1, s. 10, quoted in American Joint Distribution Committee, *European Legislation on Declarations of Death* (1949), by the Office of General Counsel, ed., at p. 81; see also majority reasons, at para. 30: “Quebec’s current absence regime . . . is modelled after German law, which for centuries has included a scheme whereby an absentee (1) is presumed to be alive until declared dead and (2) retains full juridical rights while presumed alive”, citing Cloutier, at p. 278 (emphasis added)).
12. We do, however, agree with our colleagues that only “limited guidance on the question of retroactivity is provided” by art. 85 *C.C.Q.* (para. 39 (emphasis added)). And our colleagues supplement that “limited guidance” by reasoning that “once the presumption of life is rebutted and falls away, nothing in the *C.C.Q.* dictates that reality should be ignored or juridical personality allowed to continue past death”, and that “[t]he *C.C.Q.* would need to be explicit in order for reality to be ignored in such a manner” (para. 47).
13. In our view, the presumption of life is *per se* a departure from reality or from what the courts should normally consider to be reality. As explained above, the presumption of life arises when the person disappeared in circumstances which do not authorize a conclusion that his or her death is “certain”. Thus, the presumption of life may arise in circumstances where it is possible, probable, or even highly probable, that the person is in fact dead. Normally, evidence rendering the existence of a fact (here, death) more probable than its non-existence is sufficient (art. 2804 *C.C.Q.*). The legislator has nonetheless provided that — despite the “high probability” of a person’s death — a presumption of life should arise. This seems to us to be a clear departure from reality or from what the courts should normally consider to be reality. Thus, our colleagues’ statements (at para. 5) that “the accuracy objective is advanced by creating a simple presumption of life” or (at para. 49) that “the presumption of life . . . is a mechanism that . . . allows the true state of affairs to prevail” are unfounded.[[7]](#footnote-7) Indeed, and again with respect, they cite *no authority* in support of this supposed principle of statutory interpretation favouring retroactive application in the absence of an express statutory provision.
14. In any event, we see the matter quite differently. Given the “limited guidance” to be found in the text of art. 85 *C.C.Q.*, our starting point is not our colleagues’ novel presumption of statutory interpretation *favouring* retroactivity, but rather the longstanding presumption *against* retroactivity. In other words, the absence of express statutory text directing retroactive application of the rebuttal of the presumption of life does not *support* retroactivity, but rather militates *against* it.
15. Our colleagues reason that retroactivity is aligned with the purposes of the absence regime whereby “precariousness can be anticipated and managed” (para. 63). But this is a tenuous basis for displacing the presumption against retroactivity. Again, not to belabour the point but, as a matter of trite law, retroactivity must be grounded in clear legislative intent. On this point, Professor Côté says that “[t]he presumption against retroactive operation of statutes is an extremely strong one, and the courts expect legislatures to express retroactivity very clearly. By its very nature, retroactivity is and must be exceptional” (P.-A. Côté, in collaboration with S. Beaulac and M. Devinat, *The Interpretation of Legislation in Canada* (4th ed. 2011), at p. 123).
16. While we acknowledge that these statements were made in the context of retroactivity as a matter of transitory law, the same principle applies here: the rule of law requires, as a general principle, that rights and obligations as they exist at a certain point of time should not be affected by subsequent changes in circumstances. Our colleagues’ approach does not, in our view, respect this principle (see, e.g., para. 89: “the requirements for receipt of a payment not due must be assessed retrospectively from the time of the claim and with knowledge of the true state of affairs”, and para. 91: “a debt existed at a certain moment but has subsequently fallen away”).
    * 1. The Context of the *C.C.Q.* Does Not Support Retroactivity
         1. Article 94 para. 1 C.C.Q.
17. As we have already recounted, in cases of absence, the date of death is fixed by declaratory judgment of death at “the date upon expiry of seven years from the disappearance”. As the Minister of Justice explained, this coincides with the date upon which the presumption of life ends, and the presumption of death begins:

[translation] . . . the date fixed as the date of death is the date upon expiry of seven years from the disappearance rather than the date of the disappearance. This is consistent with the rule that an absentee is presumed to be alive during the first seven years of absence.

(*Commentaires du ministre*, at p. 73)

1. And as we have also recounted, this represented a substantial change to the law at the time of the adoption of the *C.C.Q*. Under art. 98 *C.C.L.C.*, after 30 years of absence (or 100 years after the absentee’s birth), the presumption of death took effect *from the time of the absentee’s disappearance*. The C.C.R.O. explained that it rejected “the retroactive nature of the presumption [because it] would have the effect of validating all irregular acts performed since the departure of the absentee” (*Commentaries*, at pp. 74-75 (emphasis added)). To be clear, this is *precisely* the effect of our colleagues’ approach; it would effectively validate any irregular and unjustified refusal by Carleton, during the time the presumption of life was in effect, to pay the pension benefits that Carleton *acknowledged* it was required to pay. In our view, the approach taken by our colleagues — an approach that was considered *and rejected* by the C.C.R.O. — cannot be correct.
2. Again, we stress: our colleagues are resurrecting an element of the *C.C.L.C.* which was repealed by the National Assembly and *deliberately* *rejected* by the C.C.R.O. in crafting the new absence regime. And they do so by turning the presumption *against* retroactivity on its head, converting it into a presumption *of* retroactivity. We respectfully, but strenuously, object.
   * + 1. Article 96 para. 1 C.C.Q.
3. To buttress its conclusion that the presumption of life can be rebutted with retroactive effects, the Court of Appeal relied on art. 96 para. 1 *C.C.Q.*, according to which the dissolution of the matrimonial or civil union regime is retroactive to the true date of death, if the date of death is proved to precede that fixed by the declaratory judgment of death (para. 74). Our colleagues also rely on this provision to support their statement that “[r]etrospective restitution is . . . common in . . . the absence regime” (para. 100). Again, with respect, we disagree. Article 96 para. 1 *C.C.Q.* is “an exception” to art. 94 para. 1 *C.C.Q.*, made “[a]fter long deliberations” (*Commentaries*, at p. 75). One simply cannot infer from this “exception” a general rule of retroactivity for all purposes whenever the “true date of death” is known.
   * + 1. Article 99 C.C.Q.
4. The Court of Appeal also relied on art. 99 *C.C.Q.*, which it explained provides that “[t]he returning person may recover his or her property . . . according to the principles of retroactivity for the restitution of prestations” (para. 74). Our colleagues also rely on this same provision as a supposed example of another “are[a] of the absence regime . . . demand[ing] a retrospective approach” (paras. 100-101). But in our respectful view, this conclusion is also erroneous since the *C.C.Q.* provisions respecting the return of a person following the issuance of a declaratory judgment of death actually support the *opposite* conclusion: that the presumption of life cannot be rebutted with retroactive effects on the substantive rights and obligations of the absentee.
5. As we have already explained, after the expiry of a seven-year period following an absentee’s disappearance, he or she is presumed dead, and a declaratory judgment of death may therefore be pronounced, fixing the date of death at the date of the expiry of the seven-year period (arts. 92 para. 1 and 94 para. 1 *C.C.Q.*).One might argue, as our colleagues implicitly do by relying on art. 99 *C.C.Q.*, that the provisions respecting the return of a person after he or she has been declared dead can be seen as a rebuttal of this so-called “presumption of death”, with retroactive effects on substantive rights and obligations. We offer, however, three comments in response.
6. First, the return of a person after he or she has been declared dead by a declaratory judgment of death, while sufficient to rebut the so-called “presumption of death”, does not, without more, produce retroactive effects on substantive rights and obligations. Indeed, art. 98 para. 1 *C.C.Q.* says that “[a] person who has returned shall apply to the court for annulment of the declaratory judgment of death and rectification of the register of civil status”.[[8]](#footnote-8) Similarly, pursuant to art. 101 *C.C.Q.*, “[a]n apparent heir who learns that the person declared dead is alive retains possession of the property and acquires the fruits and revenues there of until the person who has returned asks to recover the property.” As explained by the Minister of Justice in his *Commentaires*, at p. 77: [translation] “[T]hus, the absentee’s mere return does not terminate the apparent heir’s rights in the absentee’s property. The apparent heir retains possession of that property and acquires the fruits and revenues thereof until the person who has returned asks to recover the property” (emphasis added).
7. Secondly, *all* the effects of the so-called “presumption of death” and of the declaratory judgment of death on substantive rights and obligations cannot be “erased” retroactively upon application (under art. 98 *C.C.Q.*) or request (under art. 101 *C.C.Q.*) by the returned absentee. Article 97 para. 1 *C.C.Q.* says that “[w]here a person declared dead by a declaratory judgment of death returns, the effects of the judgment cease but the marriage or civil union remains dissolved.” As explained by the Minister of Justice in his *Commentaires*, at p. 75: [translation] “As a result, the spouse retains the property received when the regime was dissolved as well as the matrimonial advantages resulting from the dissolution of the marriage” (emphasis added). In French law, Cornu (2007), at para. 82, mentions: [translation] “However, the annulment of the declaratory judgment does not erase the absence period. It does not resurrect the past. It does not give the absentee back either his or her spouse or the entire patrimony that he or she left.”
8. Finally, it simply cannot be ignored that these retroactive effects of the rebuttal of the so-called “presumption of death” and of the annulment of the declaratory judgment of death on substantive rights and obligations are *expressly* provided for by the *C.C.Q*. This stands in stark contrast to *the absolute silence* of the *C.C.Q.* on the issue of whether the presumption of life can be rebutted with retroactive effects on the substantive rights and obligations of the absentee.
   * 1. The Purposes of the Absence Regime Do Not Support Retroactivity
9. The presumption of life is not merely a “rule of evidence” in a civil law system; it is also a substantive rule of law (Corral Talciani and Rodriguez Pinto, at p. 558 and fn. 10: [translation] “[In] systems of Anglo‑Saxon origin . . . the presumption of death [is] dealt with . . . from an evidentiary standpoint much more than from a substantive one. . . . In fact, the presumption of death appears to be an evidentiary matter in these systems . . . . This is not the case in civil law systems, where disappearance and the presumption of death are part of the civil law.”).[[9]](#footnote-9) Under Quebec’s law of absence, the presumption of life is intended to create substantive rights and obligations while it is in force. As we noted earlier, the absentee [translation] “is capable of acquiring rights and being bound by obligations” (Deleury and Goubau, at para. 41; see also arts. 86, 88 and 617 *C.C.Q.*). Such rights and obligations can be enforced by the courts, as the Court of Appeal found (at para. 100):

The best indication of this occurred in 2009 when the University chose, from May to December, to stop payments based on what it considered were “reasonable grounds to believe” that Mr. Roseme was dead. On legal advice, the University retreated from that position and resumed payments when it understood that the law imposed a presumption of fact that the absentee was alive at the time. Had the University not resumed payments in 2009, it would have been exposed to legal proceedings to force performance of a valid obligation. [Emphasis added.]

1. If and when enforced by the courts, the rights and obligations of an absentee would benefit from the authority of *res judicata*, which is, according to art. 2848 para. 1 *C.C.Q.*, an “absolute presumption” (i.e., a presumption that is irrebuttable). In our view, Mr. Roseme’s rights and obligations during his absence should not be treated any differently merely because Carleton voluntarily complied with the law (as it was bound to do). Simply put, the legal status of his rights and obligations does not diminish merely because it was unnecessary to go to court to enforce them. Either way, whether through forced performance via court order, or through voluntary performance by a person bound to comply with the law, the rights and obligations of an absentee benefit from an absolute presumption of validity while the presumption of life operates (i.e., until proof of death is made or the seven-year period expires).[[10]](#footnote-10)
2. By concluding that the presumption of life can be rebutted with retroactive effects on the substantive rights of an absentee, our colleagues would — as we have already explained — retroactively validate any irregular and unjustified refusal by a party to comply with the law during the time the presumption of life was in effect. But by adding that a court enforcing an absentee’s rights during the absence period “would most likely have made an order without prejudice to the parties’ rights should the presumption ultimately be rebutted” (para. 48), our colleagues further deprive the tutor of any meaning*ful* mechanism to force compliance with the law during the time the presumption of life is in effect. Why would a tutor engage a legal fight to obtain a meaning*less* judgment that could be revisited after the presumption is rebutted? And, more to the point, why would a tutor engage a legal fight to obtain a meaning*less* judgment ordering the payment of use*less* monies (that is, monies which could be used by the tutor *only by assuming the risk that those monies may retroactively be clawed back* if it is later proved that the absentee was in fact dead the whole time)?
3. Manifestly, the correct interpretation is that rights and obligations of an absentee benefit from an absolute presumption of validity while the presumption of life operates, and until proof of death is made or the seven-year period expires. This is, as we have already discussed, also the law in France (art. 119 of the French *Civil Code*).
4. Our colleagues rely on the fact that a specific provision expressly indicating that the rebuttal of the presumption of life operates prospectively “is notably missing from the *C.C.Q.*” (para. 30). But to conclude that the rebuttal of the presumption of life operates prospectively — as we do —, there is no need for an “express” provision, given the longstanding presumption against retroactivity in statutory interpretation. To the contrary, an express provision would be needed to conclude — as our colleagues do — that the rebuttal of the presumption of life can retroactively affect the substantive rights and obligations of an absentee.
5. The absence in the French *Civil Code* of a clear provision expressly providing for a presumption of life during the period of “presumed absence” may also explain the existence, in that code, of art. 119 (see paras. 154-56 of our reasons). To the contrary, art. 85 *C.C.Q.* expressly provides for a presumption of life during the seven-year period of absence. This and other provisions of the *C.C.Q.* (e.g., arts. 617 para. 1 and 638) clearly demonstrate that it is sufficient, for the acquisition of a right by an absentee during his or her absence, to show that such absentee was presumed at law to be alive at the time the right accrued to him or her. This renders unnecessary and, indeed, superfluous, the existence, in the *C.C.Q.*, of a provision equivalent to art. 119 of the French *Civil Code*.
6. And, while our interpretation of the *C.C.Q.* is consistent with the related absence regimes of Germany (see the use of “until” in the German presumption of life, at para. 166 of our reasons) and France (see art. 119 of the French *Civil Code*, at para. 156 of our reasons), our colleagues fail to identify a single example — domestic or international — of a presumption, expressed in temporal terms, which would retroactively affect substantive rights and obligations upon rebuttal. In the absence of an express provision supporting our colleagues’ approach, we see no reason to isolate Quebec from the rest of the civil law world and from the [translation] “European trend” which has inspired the *C.C.Q.* at the time of its adoption (see Cloutier, at pp. 279-80).
7. Most importantly, our conclusion that rights and obligations of an absentee benefit from an absolute presumption of validity while the presumption of life operates, and until proof of death is made or the seven-year period expires, is also necessary to achieve the purposes of the absence regime in general and of the presumption of life in particular. We agree with our colleagues that the first of these purposes is to “reduc[e] the transactional uncertainty created by the phenomenon of absence” (para. 61) and to “injec[t] stability into what would otherwise be an unclear and unsettled state of affairs” (para. 59). As already explained, the Quebec law of absence as adopted in the *C.C.Q.* was inspired by the German model, which is characterized by a marked preference for [translation] “solutions providing a reasonable degree of certainty in legal relationships with a person who has disappeared” (Corral Talciani and Rodriguez Pinto, at p. 565). As Cloutier explains (at pp. 279-80):

[translation] The shift that occurred in the Quebec law on absence with the advent of the *CCQ*, that is, the switch from a system rooted in the Napoleonic tradition to a German‑inspired model, is not unlike the path taken by certain European countries, including Italy, Switzerland and Spain.

. . .

The European trend, which favours “solutions providing a reasonable degree of certainty in legal relationships with a person who has disappeared”, seems to have had an impact on the choices made by the Quebec legislature. . . . [I]t is not unreasonable to think that this revision of the Quebec law on absence was, to some extent, spurred by the developments observed internationally. [Footnote omitted.]

The presumption of life therefore seeks, *while it is in force* (i.e., “within the first seven years of absence”), to inject certainty and stability into what would otherwise be an unclear and unsettled state of affairs (see Cloutier, at p. 272: [translation] “The purpose of article 85 of the *CCQ* is . . . to alleviate for legal purposes, for seven yearsfollowing the disappearance, the continuing factual uncertainty regarding the absentee’s existence” (emphasis added)).

1. Having identified the first purpose of the absence regime in general and of the presumption of life in particular as “reduc[ing] the transactional uncertainty created by the phenomenon of absence” (para. 61) and “inject[ing] stability into what would otherwise be an unclear and unsettled state of affairs” (para. 59), our colleagues later on seem to artificially, and without judicial or academic authority in support, confine any certainty objective to the period *following* a declaratory judgment of death after the seven-year absence period (para. 64). They then unequivocally acknowledge (paras. 63-64) the *in*stability their approach introduces *during* the seven-year absence period. “[T]he presumption is always liable to be rebutted”, they concede, “making it impossible to rely fully on obligations that are premised upon the absentee’s existence” (para. 63). This state of affairs, they further say, while “precarious”, presents no difficulty because such “precariousness can be anticipated and managed” (para. 63), and because “during the first seven years of absence, accuracy is intended to prevail over certainty” (para. 5).
2. We observe that a “precarious” state of affairs is simply incompatible with the “certain” state of affairs that the absence regime in general and the presumption of life in particular were intended to achieve.
3. The consequences of the “precariousness” which our colleagues acknowledge introducing to the absence regime are worth reflecting upon. To begin, we should acknowledge that this “precariousness” would not affect *all* of an absentee’s dealings during the absence period. As our colleagues quite rightly say, only those “payments that are either received or made by virtue of the absentee’s presumed existence during the absence period” would be so impacted when the presumption of life is rebutted with retroactive effects (para. 74 (emphasis added)). What this means is that only the transactions *which are premised upon the absentee’s existence* could be the object of an order for restitution — *in favour of* the absentee (or his or her tutor on his or her behalf) as far as payments *made* by the absentee during his or her absence are concerned, but *against* the absentee (or his or her tutor on his or her behalf) as far as payments *received* by the absentee during his or her absence are concerned.
4. Our colleagues correctly identify Mr. Roseme’s entitlement to “life only” pension payments as an instance of a right which *is* premised upon the absentee’s existence and which is therefore the object of an order for restitution *against* the absentee (or his or her tutor on his or her behalf) when the presumption of life is rebutted with retroactive effects (para. 75). Our colleagues also correctly state that an absentee’s obligation to make mortgage payments (or, we would add, to pay rent) could not be the object of an order for restitution *in favour of* the absentee (or his or her tutor on his or her behalf), because such transactions are not premised upon the absentee’s existence (para. 73). The result of this distinction — which follows logically from our colleagues’ position — between rights or obligations which *are* premised upon the absentee’s existence and rights or obligations which are *not*, is that an absentee (or his or her tutor on his or her behalf) may be subject to an obligation to *return* the full amount of any incoming revenue (if it is premised upon the absentee’s existence, as is the case here), while at the same time being unable to *recover* the payments made during the absence to the absentee’s mortgagee or landlord.
5. It follows that, not knowing whether the income might have to be returned at some point within seven years, the tutor cannot confidently honour the absentee’s obligations, particularly those obligations which could not be the object of an order for restitution in favour of the absentee (or his or her tutor on his or her behalf) if the presumption of life is rebuttable with retroactive effects. This undermines the second purpose of the absence regime in general and of the presumption of life in particular — which purpose our colleagues also acknowledge (paras. 59 and 67) — being, to protect the interests of the absentee by “preserving the absentee’s interests in case he or she returns”.
6. In short, our colleagues’ interpretation of the absence regime leaves the tutor *not* in a state of *certainty*, but of *paralysis*, thereby defeating the purposes of the regime. Their approach leaves the tutor facing an impossible choice. On one hand, the tutor could take the risk and use incoming monies to pay the absentee’s obligations, in the hope that those monies are not retroactively clawed back if it is later shown that the absentee was in fact dead the whole time. Or, a more risk-averse tutor might simply put aside and not use any incoming monies from the moment the absentee goes missing, perhaps then seeking out other sources of revenue to pay the absentee’s obligations. This may entail selling the absentee’s property or other assets (which, in most circumstances, will be incompatible with the tutor’s task of ensuring that the absentee, in the event of his or her return, will “resume life as if he or she had never disappeared” (majority reasons, at para. 65)). This leads to a third scenario: the tutor, out of concern for the “precariousness” of his or her ability to “fully” rely on incoming revenue, may opt to do nothing (stop making mortgage payments or paying rent, for instance), which is of course no more compatible with the tutor’s duty to ensure that the absentee will resume life as if he or she has never disappeared.
7. Again respectfully, we object to our colleagues’ approach. It represents the antithesis of the certainty which the absence regime was intended to achieve, and it undermines the role a tutor is expected to fulfill in managing an absentee’s affairs. Relatedly, this is the concern underlying art. 119 of the French *Civil Code* which, as we have already recounted, provides that [translation] “[r]ights acquired without fraud on the basis of the presumption of absence, may not be called in question when the death of the absentee is established or judicially declared, whatever the date fixed for the death may be”. As explained by Teyssié, at p. 233: [translation] “. . . this provision . . . helps ensure better management of the absentee’s interests. Without it, the precariousness of the acts performed would often have made the administration of the absentee’s patrimony difficult, if not impossible” (emphasis added).
8. We also note that our colleagues’ approach raises the practical question of how tutors are to be compensated for their work if not through the monies received by absentees during their absence, and while they are presumed alive. Here, the Superior Court designated Ms. Threlfall in 2008 as tutor to Mr. Roseme’s property, and provided compensation out of his account, at the rate of $2,500 per month for her administration work (A.F., at para. 19).
9. Finally, our colleagues completely ignore the third purpose of the presumption of life, which is to protect the rights and interests — not of the absentee — but *of third parties* connected to the absentee:

[translation] During the absence period, it is necessary not only to protect the absentee’s interests but also to ensure that the obligations the absentee may owe to third parties, as well as to his or her spouse and children, are performed.

(Deleury and Goubau, at para. 40)

1. To this end, under art. 88 *C.C.Q.*, the court, on the application of the tutor or of an interested person and according to the extent of the property, “fixes the amounts that it is expedient to allocate to the expenses of the marriage or civil union, to the maintenance of the family or to the payment of the obligation of support of the absentee” (see Deleury and Goubau, at para. 50: [translation] “Because an absentee is presumed to be alive, the law introduces a mechanism that allows a tutor to assume, on the absentee’s behalf, any financial responsibilities that the absentee may have to his or her spouse and children”). The Minister, in his *Commentaires*, at p. 69, also mentions:

[translation] This article of new law is a consequence of article 85. An absentee is presumed to be alive and is therefore still required to contribute to the expenses of the marriage and the maintenance of his or her family and to pay his or her obligation of support.

The Civil Code of Lower Canada limited itself to protecting the absentee’s patrimony. The purpose of this provision is to protect the absentee’s family. [Emphasis added.]

1. The absentee’s obligation to pay support — and the corollary right of his or her spouse and children to receive such support — is premised upon the absentee’s existence, as the death of a person puts an end to his or her obligation of support (see S. Harvey, “L’obligation alimentaire”, in Collection de droit de l’École du Barreau du Québec 2019-2020, vol. 4, *Droit de la famille* (2019), 171, at pp. 250-51). The absentee’s obligation to pay support is therefore part of this “subset of transactions” which, according to our colleagues, “are affected when the presumption of life is rebutted” (para. 74). Meaning, under our colleagues’ approach, the payments made by an absentee (or his or her tutor) to his or her spouse and children during his or her absence could be the object of an order for restitution *in favour of* the absentee (or his or her tutor on his or her behalf) if the presumption of life is rebutted with retroactive effects. Indeed, our colleagues say their retroactive approach is necessary precisely to prevent what they see as “an inevitable windfall . . . for third parties that received payments from the absentee” (para. 69). In our respectful view, our colleagues’ approach would consign the spouse and children of the absentee to an impossible state of uncertainty and precariousness during the seven-year period of absence. Any prudent legal advisor should warn the spouse and children *against* the use of the monies paid by the absentee as support,[[11]](#footnote-11) as those monies could be retroactively clawed back if it were later shown that the absentee was in fact dead the whole time. At the same time, the spouse and children of the absentee would be unable during the seven-year period of absence to claim as support a financial contribution from the absentee’s succession under arts. 684 et seq. *C.C.Q.*, as the absentee is presumed alive during that time.
2. Our colleagues offer *no counter-argument whatsoever* to the point we raise here, and simply continue to ignore the third purpose of the presumption of life, which is to protect the rights and interests of third parties connected to the absentee during the absence period. Just as our colleagues’ approach constitutes a judicial repeal of the presumption of life as far as *rights* of an absentee are concerned, it also constitutes such an impermissible repeal as far as *obligations* of an absentee are concerned: a right to receive support during the absence of a person — and the corollary obligation of the absentee to pay such support — is, again, meaning*less* if the monies paid as support cannot safely be used during the absence period.
3. To be clear, our colleagues do not dispute that *our* approach advances the purposes of art. 85 *C.C.Q*. They simply state (at para. 59) that it is “not needed” to advance those purposes. Regrettably, we cannot reciprocate. Rather, we say that *their* approach does not account for the purposes of the absence regime in general, and of the presumption of life in particular and of art. 88 *C.C.Q.* as it relates to the protection of third parties connected to the absentee.
4. Our colleagues add, however, that our prospective approach “overshoots” the objectives of the absence regime (paras. 59 and 66). They say a prospective approach “would . . . transform the presumption into a source of substantive rights to generate wealth for the absentee’s succession” (para. 66). In their view, “allowing Ms. Threlfall, as Mr. Roseme’s sole heir, to walk away with an increased inheritance bears no connection to the regime’s objective of preserving Mr. Roseme’s interests in the event of a return” (para. 66). But our position is simply that the presumption of life generates *valid* rights and obligations while it is in force, (1) *until proof of death is made within the seven-year period*, or (2) *until the seven-year delay expires and a declaratory judgment of death is rendered*. Our colleagues criticize our prospective approach because it may generate “windfalls” for the absentee’s succession (1) *if proof of death is made within the seven-year period*. But at the same time our colleagues acknowledge that *their* approach may also generate “windfalls” for the absentee’s succession (2) *if proof of death is made after the seven-year delay expires and a declaratory judgment of death is rendered* (para. 70). Indeed, according to our colleagues, “the declaratory judgment of death . . . confirms that the absentee was, legally speaking, alive during the previous seven years” (para. 56), and “after seven years of absence”, certainty is intended to govern, “with some narrow exceptions — even if this is at odds with the absentee’s true date of death” (para. 5). In other words, our colleagues quite rightly acknowledge that if Mr. Roseme’s remains had been discovered after the seven-year delay had expired and after a declaratory judgment of death had been rendered, Ms. Threlfall would be entitled to “walk away with an increased inheritance” (para. 66) despite any evidence that Mr. Roseme had died the day after his disappearance.
5. With respect, we fail to see the coherence of that interpretation. Obviously, avoiding “windfalls” for the absentee’s succession is *simply not* a concern underlying the absence regime. Occasional “windfalls”, as our colleagues call them, are an inevitable *effect* of the certainty *objective* which informs the *whole* of the absence regime. If avoiding “windfalls” for the absentee’s succession was a concern underlying the absence regime, the legislator would have enacted — upon expiry of the seven-year delay and absent any “return” of the absentee — a presumption of death *retroactive to the day of disappearance* (as was the case under the *C.C.L.C.*), and the law would require the date of death to be fixed not at “the date upon expiry of seven years from the disappearance” but at the date of the disappearance. As explained by the C.C.R.O., it would have been “less arbitrary” to so provide (*Commentaries*, at pp. 74-75). But this was not the choice made by the legislator. In our view, just as the operation of the presumption of death and of the declaratory judgment of death that may be rendered *after* the expiry of the seven-year period of absence does not, as we have explained above, displace the presumption of life which was in force *during* that period, proof of death made *within* the seven-year period of absence may *no more* displace the presumption of life which was in force *until then*.
6. Nor is avoiding “windfalls” for the absentee’s succession a concern underlying the related absence regime of France. Were it otherwise, it would have been necessary, in order to avoid any “windfall” for the absentee’s succession, to interpret art. 119 of the French *Civil Code* as establishing a protection *only* for rights acquired *by third parties* during the period of “presumed absence”, and *not* for rights acquired *by the absentee* during that same period (since rights acquired by the absentee are transmitted to his or her heirs upon his or her death, and may therefore be a source of “windfalls” for the absentee’s succession). And because such an interpretation of art. 119 actually finds support in academic literature, it would have been open to the courts to adopt it in order to avoid any “windfall” for the absentee’s succession:

[translation] . . . while it is certain that the provision does apply to rights acquired *by third parties*, there remains uncertainty with regard to what becomes of rights acquired by the deceased while he or she was an absentee. . . . [W]e think that article 119 cannot concern rights acquired by the deceased, because the presumed absentee would then be regarded as a person *irrebuttably* presumed to be alive. [Emphasis in original.]

(H., L. and J. Mazeaud and F. Chabas, at para. 452)

But this is not what has happened. Instead, and despite the interpretation suggested by some authors (such as Mazeaud and Chabas cited above), the French Cour de cassation has adopted an interpretation of art. 119 which does *not* distinguish between rights acquired *by third parties* during the period of “presumed absence” and rights acquired *by the absentee* during that same period.

1. In Civ. 2e, June 21, 2012, *Bull. civ.* VI, No. 114, the Cour de cassation quashed and set aside a decision of the court of appeal on the ground that it erred in not asking whether, up until the declaratory judgment of death was issued, a child receiving pension payments on behalf of her father determined to be an absentee could be considered to have acquired the right to such payment in good faith, as set out in art. 119 of the French *Civil Code*. If they did acquire the right to such payment in good faith, the rights they acquired on their father’s behalf during that period were protected by art. 119 of the French *Civil Code*. This, despite any “windfall” generated for the absentee’s children (as their father’s heirs).
2. In Civ. 1re, May 17, 2017, *Bull. civ.* V, No. 112, the Cour decassation similarly confirmed that pension payments made during the period of “presumed absence”, but after the absentee’s true date of death (as later established upon discovery of his remains), could not be considered to be “not due”. In that case, the absentee had disappeared on March 17, 2003 and, *seven years later*, after the discovery of his remains, his true date of death had been determined to be March 20, 2003. The liquidator of the absentee’s succession had then spontaneously restituted to the *Caisse de mutualité sociale agricole* the pension payments made during the period of “presumed absence”, but after the absentee’s true date of death. The absentee’s heirs later introduced a motion asking for the reimbursement of those pension benefits to the absentee’s succession. The Cour de cassation agreed, saying restitution was not required. It emphasized that, during the period of “presumed absence”, an absentee was presumed alive. While this was a “simple” presumption which necessarily ceased to be in force upon proof of death, the point is that the rebuttal of the presumption of life did not retroactively affect the substantive rights of the absentee. The pension payments made during the period of “presumed absence”, but after the absentee’s true date of death, were therefore part of the absentee’s succession and were rightly transmitted to his heirs upon his death as a consequence of having acquired the right without fraud.
3. For all these reasons, we are of the view that the rebuttal of the presumption of life in art. 85 *C.C.Q.* cannot be with retroactive effects on the substantive rights and obligations of the absentee. Rather, when an opposing party rebuts the presumption of life by proving the absentee’s death, solely the *continuing* obligations between the parties — that is, the obligations from that point forward in time — are extinguished. This is consistent with our understanding of the modifications made to the absence regime between the *C.C.L.C*. (where uncertainty persisted throughout the 30-year period of absence and made it impossible for anyone to claim a right accruing to an absentee during this time) and the *C.C.Q.* (where the presumption of life injects certainty during the seven-year period of absence and ensures rights and obligations of the absentee are valid until the time the presumption is rebutted). It accords with the longstanding presumption against retroactivity in statutory interpretation and with the related absence regimes of France and of Germany. And it is consistent with, and indeed compelled by, the three purposes of the absence regime and the role of the tutor, and related third parties, in furthering those purposes.
4. Our colleagues’ reasons cite stability as a motive for their interpretation of the law and claim that their interpretation of the presumption of life “inject[s] stability into the situation” (para. 59). We agree that stability is the object to be achieved in interpreting the statute at issue here. It is for that precise reason that we do not subscribe to our colleagues’ reasons, for their interpretation would result in *less* stability, and not *more*. In fact, it would “injec[t] stability into the situation” by allowing the tutor to undertake the expense of preserving the absentee’s interests during the seven-year period, irrespective of whether he or she returns, and irrespective of whether he or she is confirmed to have died. Instead, as this case demonstrates, future tutors will be in limbo over a seven-year period, unsure whether their rights will be retroactively affected by a finding that the absentee has died earlier. This state of precariousness is conceded by our colleagues: “[p]rior to seven years of absence, the situation is fluid and prone to change” (para. 56). This is the very definition of instability.
5. To reiterate, we are in agreement with our colleagues that the governing principle underlying an absence regime ought to be certainty. We also do not disagree with our colleagues when they write that the rebuttable presumption creates certainty insofar as it “ensures that the absentee can resume his or her life with minimal difficulties if he or she returns within seven years” (para. 59). However, this certainty is achieved only if we presuppose that the absentee will, in fact, return. Further, our colleagues’ approach considers certainty from only the absentee’s perspective. Beyond this particular scenario, interpreting the presumption as rebuttable with retroactive effect is fundamentally disruptive: it leads not only to a potential vitiation of valid transactions entered into by the tutor and third parties but also to a disregard for acquired rights. While our colleagues cite stability and certainty as the objects of an absence regime, their interpretation only defeats those objects.
6. Finally, that the Court of Appeal had to “create” a remedy for the alleged retroactive effects of the rebuttal of the presumption of life seems a strong indicator that the rebuttal of this presumption simply cannot have the effects that our colleagues say it does. Indeed, the Court of Appeal concluded that the “traditional requirements” of “receipt of a payment not due” were *not* satisfied, because “[a]t the time of the payments”, there was a valid debt owed by Carleton and Carleton was therefore not mistaken in making the payment (para. 109). But the Court of Appeal went on to consider whether there was “another source” for Ms. Threlfall’s obligation to return the pension benefits paid by Carleton after Mr. Roseme’s “true date of death” (paras. 111-33). It found this other source “beyond article 1491”, “in the general rules on payment” and in an “expansive reading of articles 1491, 1554 and 1699 C.C.Q.” (paras. 9, 124 and 130). The Court of Appeal was “encouraged to adopt this expansive reading . . . by the idea, central to the development of the civil law, that all the law is not necessarily to be found in the text of the Code” (para. 130). In short, the “traditional requirements” of art. 1491 *C.C.Q.* had to be “adjusted” and Ms. Threlfall’s obligation to make restitution could be “likened” to art. 1491 *C.C.Q.* and “to the general rules on payment and basic principles of the civil law relating to unjust enrichment” (paras. 120 and 129).
7. Our colleagues now endorse this “adjustment” to the “traditional requirements” of art. 1491 *C.C.Q.* (paras. 20 and 89-90). To be clear, this “adjustment” to the “traditional requirements” of “receipt of a payment not due” — which is, in our view, as we will now explain, a departure from existing law and jurisprudence — is rendered necessary under our colleagues’ approach in order to solve the problem which arises from their conclusion that the presumption of life may be rebutted with retroactive effects on the substantive rights and obligations of the absentee.
   1. Receipt of a Payment Not Due
8. According to our colleagues, “[b]ecause the legal basis for the payments evaporated, Carleton’s claim for receipt of payment not due under art. 1491 *C.C.Q.* must succeed” (para. 110). With respect, this mischaracterizes the issue, as it implicitly requires a legal basis for Ms. Threlfall to retain the benefits. Ms. Threlfall does not have a burden to prove a *right* to *retain* the pension payments. Rather, Carleton has the burden to prove that Ms. Threlfall has the *obligation* to *return* the pension payments received (art. 1699 para. 1 *C.C.Q.*).
9. Moreover, under art. 1699 para. 1 *C.C.Q.*, restitution of prestations takes place where a person “is bound by law to return to another person the property he has received”. As the Court of Appeal observed, it follows from this clear wording that art. 1699 para. 1 *C.C.Q.* “does not, on its own, create an obligation to make restitution” as it does not constitute “a free-standing basis for the source of an obligation to make restitution” (paras. 114 and 116). Instead, it speaks merely to “circumstances in which restitution of prestations, based on obligations having a source elsewhere in the law, takes place” (C.A. reasons, at para. 116 (emphasis added); see also M. Tancelin, *Des obligations en droit mixte du Québec* (7th ed. 2009), at p. 390).
10. The area covered by restitution of prestations is vast. Article 1699 para. 1 *C.C.Q.* contemplates at least three scenarios: (1) where a person has received property “without right or in error”; (2) where a person has received property “under a juridical act which is subsequently annulled with retroactive effect”; and (3) where a person has received property under a juridical act, the obligations of which have “become impossible to perform by reason of superior force” (see J.-L. Baudouin and P.-G. Jobin, *Les obligations* (7th ed. 2013), by P.-G. Jobin and N. Vézina, eds., at No. 920; D. Lluelles and B. Moore, *Droit des obligations* (3rd ed. 2018), at No. 1227).
11. The second scenario — where a person has received property “under a juridical act which is subsequently annulled with retroactive effect” — includes cases such as nullity of a contract (art. 1422 *C.C.Q.*), the fulfillment of a resolutory condition (art. 1507 para. 2 *C.C.Q.*), and the resolution of a contract (art. 1606 para. 1 *C.C.Q.*). It is important to note that, in all those instances, the pertinent *C.C.Q.* provisions *expressly* provide for retroactivity; and *expressly* create an obligation to make restitution. This, again, is in stark contrast to art. 85 *C.C.Q.* which, as we have seen, does not expressly provide for retroactivity. Furthermore, and as our colleagues note, there is “no mechanism for restitution embedded in art. 85 *C.C.Q.* or the absence regime generally” and “there is no direct route from rebutting the presumption of life to any provision in Chapter IX of Title One of Book Five, which deals with the restitution of prestations” (para. 77). In other words, art. 85 *C.C.Q.* does not expressly create an obligation to make restitution.
12. The Court of Appeal acknowledges that Carleton’s cause of action does not rest on nullity of a contract, the fulfillment of a resolutory condition, or the resolution of a contract (para. 86). Rather, at first instance, Carleton relied on arts. 1491 and 1492 *C.C.Q.* as the source of Ms. Threlfall’s obligation to make restitution. Those provisions (to which we add art. 1554 *C.C.Q.*) read as follows:

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

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

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

**1554.** Every payment presupposes an obligation; what has been paid where there is no obligation may be recovered.

Recovery is not admitted, however, in the case of natural obligations that have been voluntarily paid.

1. As our colleagues explain, three conditions must be met before a person who received a payment must restore it to the person who made it pursuant to art. 1491 *C.C.Q.*: (1) there must be a payment by the *solvens* (i.e., the payer, here Carleton) to the *accipiens* (i.e., the payee, here the absentee Mr. Roseme, as represented by Ms. Threlfall); (2) that payment must be made in the absence of a debt; and (3) the payment must be made by the *solvens* in error or to avoid injury while protesting that he or she owes nothing (para. 78; see also C.A. reasons, at para. 89; Baudouin and Jobin, at Nos. 530-31; Lluelles and Moore, at No. 1367.1; J. Pineau, D. Burman and S. Gaudet, *Théorie des obligations* (4th ed. 2001), by J. Pineau and S. Gaudet, at p. 468). These conditions should normally be interpreted [translation] “cautiously, if not restrictively” (Baudouin and Jobin, at No. 513).
2. There is no dispute that the “payment” requirement is satisfied here. Ms. Threlfall, as tutor to the absentee, has received $497,332.64 for the period between his disappearance, on September 10, 2007, and July 22, 2013, when Carleton, having learned of the discovery of Mr. Roseme’s remains, stopped paying the pension benefits (C.A. reasons, at para. 92). But, as the Court of Appeal concluded, neither the “absence of debt” nor the “error” requirements are satisfied here.
   * 1. The “Absence of Debt” Requirement
3. As noted by the Court of Appeal, the “absence of debt” requirement was not met “insofar as the payments made . . . between 2007 and 2013 were due when they were paid by reason of the presumption in article 85” (para. 95; see also F. Levesque, *Précis de droit québécois des obligations: contrat, responsabilité, exécution et* *extinction* (2014), at p. 189: [translation] “Receipt of a payment not due implies the absence of any legal or contractual *obligation* with respect to the payment” (underlining added)). Had Carleton refused to pay the pension benefits during Mr. Roseme’s absence, “it would have been exposed to legal proceedings to force performance of a valid obligation” (C.A. reasons, at para. 100).
4. It is important to stress here that the pension payments made by Carleton between 2007 and 2013 not only *appeared* to be due at the time they were made: they *were* legally due at the time they were made. The Court of Appeal’s reasons repeatedly (and quite rightly) acknowledge this (at paras. 7-8, 81, 95-101 and 107). This distinguishes this appeal from *Willmor Discount Corp. v. Vaudreuil (City)*, [1994] 2 S.C.R. 210, which involved an action to quash a municipal by-law and a tax assessment and to obtain recovery of the taxes paid accordingly. This Court emphasized in *Willmor* that “the debt was declared retroactively non-existent by the judgment quashing the municipal by-law that created it” and that there was only “the appearance of a debt” when the payment was made (p. 218 (first emphasis added; second emphasis in original)).
5. In cases where a payment is made under a contract, a by-law, or even a statute which is subsequently declared to be invalid, the payment only *appears* to be due at the time it is made. But the payment was not *legally* due at the time it was made, because the contract, by-law or statute was invalid *at the time the payment was made*. And, where that occurs, as further explained by the Court of Appeal, “nullity allow[s] for retroactivity”:

As to *Abel Skiver*, the appellant is right to point out the differences between that case and the present appeal. Key to the retroactive application of restitutionary principles in that case was the fact that the taxpayer requested reimbursement of the taxes in the same proceedings in which it sought a declaration that the taxation rolls be annulled. The nullity allowed for retroactivity and, accordingly, the recovery of the payments that were not properly due on that basis. In our case, there was no declaration of nullity of the Retirement Plan. [Footnote omitted; para. 77.]

1. *Willmor* is, then, a traditional case of “receipt of a payment not due”. The “absence of debt” *and* “error” requirements *were* satisfied. As explained by this Court, the remedies available to taxpayers are “actions which cannot be distinguished from actions to recover things not due” (*Willmor*, at p. 220 (emphasis added), quoting *Abel Skiver Farm Corp. v. Town of Sainte-Foy*, [1983] 1 S.C.R. 403, at p. 423; see also *J.E. Fortin inc. v. Commission de la santé et de la sécurité du travail*, 2007 QCCA 1099, [2007] R.J.Q. 1937).
   * 1. The “Error” Requirement
2. The “error” requirement was also not met here (C.A. reasons, at para. 105). The relevant error for the purposes of the receipt of a payment not due is the *solvens*’ mistaken belief that the payment was due when it was made (C.A. reasons, at para. 106; *Willmor*, at p. 219: “The error, for the *solvens*, is the belief that he has to pay”). The existence of an “error” is determined *at the time the payment is made* (*Canadian Imperial Bank of Commerce v. Perrault et Perrault Ltée*, [1969] B.R. 958 (Que. Q.B.); *Aussant v. Axa Assurances inc.*, 2013 QCCQ 398, [2013] R.J.Q. 533; *Société nationale de fiducie v. Robitaille*, [1983] C.A. 521; *Roux v. Cordeau*, [1981] R.P. 29 (Que. Sup. Ct.); *Commission des écoles catholiques de Verdun v. Giroux*, [1986] R.J.Q. 2970 (Prov. Ct.)). Here, Carleton made no such error (C.A. reasons, at para. 106). The Court of Appeal, again correctly, noted the following (at para. 107):

There was no error made at the time of the payments because, as noted, during the period of absence between 2007 and 2013, the payments were due as a matter of law by reason of the presumption in article 85 C.C.Q. and the University understood this, except for a short period. Key is [translation] “that there was no error by the ‘payer’ at the time of payment”. . . . [Here, there] was no mistake: the payments were due. Had the University refused to make the payments at the time, that refusal would have been unjustified. [Emphasis added.]

1. This should have been the end of the matter. But the Court of Appeal went on to opine that “[l]ike in the case of a nullity, it [was] irrelevant [in this case] whether or not the *solvens* was in error when making the payment” (para. 126). We disagree. In Quebec civil law, in cases of nullity of a contract, restitution of prestations is ordered under art. 1422 *C.C.Q*— and *not* on the basis of the rules respecting “receipt of a payment not due”. There is therefore no requirement that the payment be made in error in cases of nullity of a contract (Lluelles and Moore, at Nos. 1368 and 1374; Baudouin and Jobin, at No. 530; Pineau, Burman and Gaudet, at p. 470). By contrast, Quebec rules respecting “receipt of a payment not due” *do* require, in all cases, that the payment be made in error. Indeed, this represented a change to the law and therefore reflects a legislative choice clearly expressed at the time of the adoption of the *C.C.Q.* (Lluelles and Moore, at No. 1375; Pineau, Burman and Gaudet, at p. 470).
2. Moreover, the rules respecting “receipt of a payment not due” are codified in arts. 1491 and 1492 *C.C.Q*. Article 1554 para. 1 *C.C.Q.* may therefore not be used to circumvent the strict requirements — including the requirement that the payment be made in error — of those rules. Article 1554 para. 1 *C.C.Q.* is not a distinct source of the obligation to make restitution. It is linked to arts. 1491 and 1492 *C.C.Q.* (see *Amex Bank of Canada v. Adams*, 2014 SCC 56, [2014] 2 S.C.R. 787, at para. 29 (emphasis added): “The receipt of a payment not due provisions (arts. 1491, 1492 and 1554 para. 1) codify the principle that [translation] ‘[a]ny person is required to pay only what he or she owes, and owes only what he or she has an obligation to pay’ (D. Lluelles and B. Moore, *Droit des obligations* (2nd ed. 2012), at p. 725)”). As explained by Levesque, at p. 191:

[translation] Article 1554 para. 1 C.C.Q. must be read together with article 1491 C.C.Q. Read on its own, article 1554 para. 1 C.C.Q. may suggest that an error is not necessary to an action for receipt of a payment not due. But an error is fundamental. If a payment was made where there was no obligation, as stated in article 1554 para. 1 C.C.Q., but without any error, receipt of a payment not due cannot be relied on. [Emphasis added.]

1. Further, the reference in art. 1699 para. 1 *C.C.Q.* to property received “without right” obviously refers to other provisions of the *C.C.Q.* which *expressly* create an obligation of restitution in circumstances where there is no “error” on the part of the *solvens*, but where property was nonetheless received “without right” (see, e.g., arts. 96 para. 3, 99 and 627 *C.C.Q.*).
   1. Unjust Enrichment
2. According to the Court of Appeal, the rules on “receipt of a payment not due” had to be read to “fashion a remedy” in order to avoid Ms. Threlfall “enriching . . . herself unjustly” and “without proper cause” (para. 123). Indeed, the Court of Appeal expressed the view that “to allow [Ms.] Threlfall to retain the payments made without cause between 2007 and 2013 would result in her unjust enrichment at the expense of the University” (para. 81; see also paras. 9, 122 and 131). But under Quebec civil law, and absent any other remedy, the device which should be used to compensate an “impoverished” person at whose expense another has been enriched is an action in unjust enrichment — and *not* an “adjustment” to the requirements of art. 1491 *C.C.Q.* (requirements which, as explained above, should normally be interpreted [translation] “cautiously, if not restrictively” (Baudouin and Jobin, at No. 513)) (see arts. 1493 to 1496 *C.C.Q.*; *Cie Immobilière Viger Ltée v. Lauréat Giguère Inc.*, [1977] 2 S.C.R. 67, at p. 77; *Mac Rae v. Hammond*, 2014 QCCA 1359, at paras. 26 and 80-82 (CanLII); *Bourbonnais v. Andjorin*, 2016 QCCA 1721, at para. 9 (CanLII); Lluelles and Moore, at Nos. 1392 and 1412). The difficulty here, however, is that at least one of the conditions of unjust enrichment was not met: Ms. Threlfall’s enrichment *is* justified. Indeed, Ms. Threlfall inherited the pension benefits as the sole universal legatee of Mr. Roseme’s succession,[[12]](#footnote-12) and these pension benefits were paid by Carleton between 2007 and 2013 in accordance with the presumption of life stated in art. 85 *C.C.Q.* (see Lluelles and Moore, at No. 1401: [translation] “Enrichment that has its source in the law is also justified”; see also J. Carbonnier, *Droit civil*, vol. 2 (2004), at para. 1233; Pineau, Burman and Gaudet, at pp. 482-83).
3. We add this. The remedy created by the Court of Appeal in this case is functionally equivalent to the imposition of a constructive trust: because it concluded that the presumption of life was retroactively rebutted, it found in substance that the pension payments made between 2007 and 2013 were held by Ms. Threlfall in trust — not on behalf of Mr. Roseme, who was actually dead the whole time — but on behalf of Carleton. But under Quebec civil law, as expressed in art. 1262 *C.C.Q.*, a trust may be established by judgment *only* “[w]here authorized by law” (Baudouin and Jobin, at No. 535; *L. (L.) v. B. (M.)* (2003), 231 D.L.R. (4th) 665 (Que. C.A.), at para. 31; *Waters’ Law of Trusts in Canada* (4th ed. 2012), by D. W. M. Waters, M. R. Gillen and L. D. Smith, at pp. 1435-36).
4. Conclusion
5. We would allow the appeal, and dismiss Carleton’s motion to institute proceedings, with costs throughout.

*Appeal dismissed with costs,* Moldaver*,* Côté *and* Brown JJ. *dissenting.*

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1. Keeping in mind that payment can include the provision of services (see *Willmor*,at p. 218; art. 1553 *C.C.Q.*). [↑](#footnote-ref-1)
2. A right accruing to an absentee is a right which is premised upon the absentee’s existence: [translation] “the class of *contingent* rights includes those that accrue to the person meant to enjoy them *only if that person is still alive upon the occurrence of the event*, that is, upon the fulfilment of *the condition that is to give rise to them*; in other words, rights whose acquisition depends *on the existence of the person who is meant to obtain them*” (see Mignault, at pp. 309-10 (emphasis in original)). [↑](#footnote-ref-2)
3. Declaratory judgment of *death* in the *C.C.Q*. [↑](#footnote-ref-3)
4. The French *Civil Code* divides the absence regime into two distinct periods: the period of “presumed absence” (*présomption d’absence*) and the period of “declared absence” (*déclaration d’absence*). In the first period, the absentee is presumed alive and, in the second period, he or she is presumed dead. See G. Cornu, *Droit civil: Les personnes* (13th ed. 2007), at paras. 77-82; H., L. and J. Mazeaud and F. Chabas, at paras. 446-54; J.-P. Lévy and A. Castaldo, *Histoire du droit civil* (2nd ed. 2010), at para. 208. [↑](#footnote-ref-4)
5. The presumption of life depends on a person’s status as an “absentee”, as per art. 85 *C.C.Q.*, only “[a]n absentee is presumed to be alive for seven years”. Therefore, the presumption can no longer stand when one of the definitional elements of absence (in particular, that it be unknown whether the person is still alive) is no longer present. Nonetheless, Ms. Threlfall performed her duties as tutor to the absentee until April 3, 2014, the date of issue of the act of death. This is understandable, as per arts. 90 and 102 *C.C.Q.*, “[t]utorship to an absentee is terminated . . . by proof of his death” and “[p]roof of death is established by an act of death”. It may seem odd that “tutorship to an absentee” would continue between July 22, 2013, and April 3, 2014, while there was no longer any “absentee”. But this possibility is acknowledged by academic literature and jurisprudence (see Roch, at pp. 68-69). [↑](#footnote-ref-5)
6. An absentee may *in fact* be alive *or* dead; as explained below (at para. 168 of our reasons), it may even be highly probable that an absentee is in fact dead. [↑](#footnote-ref-6)
7. By analogy, when a declaratory judgment of death is obtained pursuant to art. 92 para. 1 *C.C.Q.*, the date of death is fixed at “the date upon expiry of seven years from the disappearance”, even if it would be “less arbitrary” to fix the date of death at the date of the absentee’s disappearance (*Commentaries*, at pp. 74-75). As explained by Corral Talciani and Rodriguez Pinto: [translation] “In civil law systems, it was customary for a long time to focus more attention on determining the likely date of death. However, this is not the course taken under the current approach, which establishes the date of death as the date of the order declaring the death or fixes it arbitrarily at another date that has no necessary connection with the date on which the person most likely died” (p. 573 (emphasis added)). [↑](#footnote-ref-7)
8. It is worth noting that the provisions respecting the return of a person after he or she has been declared dead involve the *annulment* of the declaratory judgment of death. Generally, and as explained by the Court of Appeal, at para. 77: “. . . nullity allow[s] for retroactivity . . .”. See also Deleury and Goubau, at para. 392: [translation] “Where a judgment . . . annulling a declaratory judgment of death is notified to him or her, the Registrar of Civil Status must annul . . . the act . . . of death . . . as the effect of such [a] judgmen[t] is to retroactively nullify . . . the declaratory judgment of death”. [↑](#footnote-ref-8)
9. We cite Corral Talciani and Rodriguez Pinto to simply indicate our agreement with their well-founded general distinction between an Anglo-Saxon system and a civil law system with regards to the presumption of death. Our agreement with Corral Talciani and Rodriguez Pinto is limited to that effect. We acknowledge that the authors find that it [translation] “seems” that Quebec’s absence regime is similar to an Anglo-Saxon one, but we emphasize the authors’ finding is uncertain in that regard. In short, we agree simply with the authors’ well-researched distinction between presumptions of death in civil law and Anglo-Saxon regimes, and not with their unsubstantiated classification of Quebec within said regimes. [↑](#footnote-ref-9)
10. In this sense, the presumption of life is not only a mere rule of evidence: it becomes a *legal fiction* once, at a certain point of time, the conclusion of the presumption is accepted, that is, once, at a certain point of time, it is accepted that, *because no proof to the contrary exists at that time*, the absentee is *at law* to be considered *alive*. For that period of time during which the conclusion of the presumption of life has been accepted, the *presumption* has become a *legal fiction*, and a legal fiction *is* an irrebuttable presumption. Later proof that the absentee was *in fact* dead during that whole period of time simply *confirms* — rather than *rebuts* — the fact that all interested parties have been acting under a *fiction* during that period of time. See G. Cornu, *Vocabulaire juridique* (12th ed. 2018), *sub verbo* “*fiction*”: [translation] “Device of legal technique (in principle reserved to a sovereign legislature), ‘lie of the law’ (and benefit of the law) that involves ‘acting as if’, assuming a fact contrary to reality, in order to produce a legal effect”; P. Foriers, “Présomptions et fictions”, in C. Perelman and P. Foriers, eds., *Les présomptions et les fictions en droit* (1974), 7; O. Guerrier, “Les fictions juridiques et leurs avatars humanistes” (2013), 91 *Pallas* 135, at p. 136: [translation] “The fiction helped . . . enhance judicial protection by extending the limits of the law of persons. . . . [Fictions] sometimes altered even the basic facts of human life, the laws of filiation or the conditions of birth and death . . .”; Cornu (2007), at para. 77 (fn. 147): [translation] “. . . presumed absence rests on a presumption of life . . . . [T]he law . . . superimposes its vision (its fiction, its presumption) . . . on a state of doubt that remains the basic natural situation and the cause that gives rise to the entire legal construct . . .” (emphasis added). [↑](#footnote-ref-10)
11. Or at least *against* the use of any money exceeding the financial contribution which the spouse and children could claim as support from the absentee’s succession pursuant to arts. 684 et seq. *C.C.Q*. [↑](#footnote-ref-11)
12. We acknowledge that the succession of a person always opens from his or her true date of death (arts. 96 paras. 1 and 2 and 613 para. 1 *C.C.Q.*; art. 99 *C.C.L.C.*; Deleury and Goubau, at para. 60: [translation] “The succession therefore always opens on the true date of death, in accordance with article 613 para. 1 C.C.Q.”; see also Ouellette, at para. 179: [translation] “The succession always opens on the true date of death, in accordance with art. 613 para. 1”). But the fact that Mr. Roseme’s succession is open from September 11, 2007 (that is, from his “true date of death”) does not preclude Ms. Threlfall, as the sole universal legatee of Mr. Roseme’s succession, from inheriting the pension benefits paid by Carleton after September 11, 2007. The pension benefits paid by Carleton are “revenues” within the meaning of art. 910 *C.C.Q.*, and fruits and revenues produced by any property of the *de cujus* after the opening of the succession are nonetheless part of the succession (subject to the rights of a possessor in good faith). Indeed, it is one of the duties of the liquidator of the succession, as an administrator of the property of another charged with simple administration pursuant to art. 802 *C.C.Q.*, “to collect the fruits and revenues of the property under his administration” (art. 1302 para. 1 *C.C.Q.*), and to “collec[t] the claims under his administration” (art. 1302 para. 2 *C.C.Q.*) (see Brière, at para. 651). [↑](#footnote-ref-12)