



**SUPREME COURT OF CANADA**

**CITATION:** Montréal (Ville) v. Octane Stratégie inc.,  
2019 SCC 57

**APPEALS HEARD:** February 20, 2019  
**JUDGMENT RENDERED:** November 22,  
2019  
**DOCKETS:** 38066, 38073

**BETWEEN:**

**Ville de Montréal**  
Appellant

and

**Octane Stratégie inc.**  
Respondent

- and -

**Union des municipalités du Québec and  
Ville de Laval**  
Interveniers

**AND BETWEEN:**

**Octane Stratégie inc.**  
Appellant

and

**Richard Thériault and  
Ville de Montréal**  
Respondents

**OFFICIAL ENGLISH TRANSLATION**

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

**JOINT REASONS FOR JUDGMENT:** Wagner C.J. and Gascon J. (Abella, Karakatsanis, Rowe and Martin JJ. concurring)  
(paras. 1 to 95)

**JOINT DISSENTING REASONS:** Côté and Brown JJ. (Moldaver J. concurring)  
(paras. 96 to 173)

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MONTRÉAL (VILLE) v. OCTANE STRATÉGIE INC.

**Ville de Montréal**

*Appellant*

v.

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*Respondent*

and

**Union des municipalités du Québec and  
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v.

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**2019 SCC 57**

File Nos.: 38066, 38073.

2019: February 20; 2019: November 22.

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

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

*Municipal law — Contracts — Restitution of prestations — Receipt of payment not due — Large-scale media event designed and produced within short period of time by public relations and communications firm and its subcontractor at request of municipality — Mandate granted to firm without rules of public order for awarding municipal contracts having been complied with and without grant of mandate having been approved by resolution of municipal council or by officer authorized by valid delegation of powers — Municipality refusing to pay firm's invoice for subcontractor's services — Whether rules on restitution of prestations set out in Civil Code of Québec apply under municipal law — Whether contract exists between municipality and firm — Whether restitution of prestations is necessary — Civil Code of Québec, arts. 1491, 1699.*

In April 2007, the City's director of transportation made use of the services of Octane, a public relations and communications firm, to create an event concept for the launch of the City's transportation plan that was to take place on May 17, 2007. The launch was held on the scheduled date and was a success.

Following the event, Octane sought payment for the costs incurred for the services provided by a subcontractor to produce and organize the event, but the City was slow to pay. In view of the City's failure to act, Octane finally sent it an invoice in October 2009. In May 2010, nearly three years after the launch was held, the invoice was still unpaid and Octane instituted an action against the City. The City countered by stating that it had in fact never authorized the mandate, which, for that matter, had not been granted as a result of the tendering process required by law. Octane therefore amended its pleading to add T, a member of the political staff of the mayor's office, as a defendant, arguing that he had given it a mandate to produce the event and had assured it many times that the City would pay the costs incurred.

The Superior Court allowed Octane's action against the City and dismissed the alternative claim against T. It was of the view that T had indeed given Octane a mandate but that the contract was null because it had been awarded in contravention of the rules of public order for awarding municipal contracts. However, it found that the rules on restitution of prestations set out in the *Civil Code of Québec* ("C.C.Q.") apply in the municipal context, and it ordered restitution by equivalence for the services provided in the amount of \$82,898.63. The Court of Appeal dismissed the City's appeal as well as Octane's appeal against T, which it found to be moot. It upheld the Superior Court's findings on the issue of the nullity of the contract between Octane and the City and on the application of the rules on restitution of prestations in the municipal context.

*Held* (Moldaver, Côté and Brown JJ. dissenting): The City's appeal should be dismissed and Octane's appeal is moot.

*Per Wagner* C.J. and Abella, Karakatsanis, **Gascon**, Rowe and Martin JJ.: The rules on restitution of prestations set out in arts. 1699 to 1707 *C.C.Q.* apply in the municipal context. The preliminary provision of the *C.C.Q.* states that the *C.C.Q.* is the foundation of all other laws that apply or rely on civil law concepts. By virtue of arts. 300 and 1376 *C.C.Q.*, this includes the laws that govern legal persons established in the public interest, such as municipalities. Since the rules on restitution of prestations are in the Book on Obligations, they apply to municipalities unless other special rules exclude their application. The fact that ss. 573 et seq. of the *Cities and Towns Act* ("*C.T.A.*"), which require certain rules to be followed when municipal contracts are awarded, are of public order and that their violation is sanctioned by the absolute nullity of the contract is not an express or even an implicit derogation from the rules on restitution of prestations. In the absence of clear, unequivocal legislative direction to this effect, the importance of the *C.T.A.*'s public order provisions is not enough to exclude the application of the rules of the general law. Since there is no such derogation, the principle remains the restoration of the parties to their previous positions, which must occur where a juridical act is annulled with retroactive effect.

Restitution of prestations in the municipal context does not create a bypass. The rules on restitution of prestations give a judge the power to objectively determine the fair value of restitution in order to restore the parties to their previous

positions, based on the evidence in the record and the circumstances of each case, where restitution cannot be made in kind. Article 1699 para. 2 *C.C.Q.* provides that a court may, exceptionally, refuse the restitution of prestations or modify the scope or modalities of restitution where one party derives an undue advantage from it. The legislature thus ensures that the remedy for a first inequity does not create a second one. Obtaining a municipal contract in violation of the rules of public order for awarding such contracts does not necessarily constitute an undue advantage, and a court hearing such a case must not automatically refuse the restitution of prestations. The appropriateness of tempering restitution under art. 1699 para. 2 *C.C.Q.* must be assessed on a case-by-case basis and not on the basis of automatic or pre-established rules.

In the instant case, no contract came into existence between Octane and the City for the event production services. The mandate on which Octane's action is based was never approved by a resolution of the City's municipal council or by an officer authorized by a valid delegation of powers. The appearance of consent is not sufficient, nor can a municipality's consent be inferred from its silence. The rules for awarding municipal contracts require certain formalities to be observed in order to protect the public interest by favouring competition, but they do not exempt a municipality from having to pass a by-law or resolution to express its will to contract. If it does not do so, no contract will cross the threshold of legal existence and restitution cannot be grounded in the retroactive annulment of a juridical act in accordance with the doctrine of nullity. In the case at bar, however, the conditions

imposed by the rules on receipt of a payment not due are satisfied, with the result that the parties must still be restored to their previous positions under arts. 1491 and 1492 *C.C.Q.*

Three conditions must be met to recover a payment not due under art. 1491 *C.C.Q.*: (1) there must be a payment, (2) the payment must have been made in the absence of a debt between the parties, and (3) the payment must have been made in error or to avoid injury. Where these conditions are met, and subject to the exception set out in art. 1491 para. 2 *C.C.Q.*, restitution of payments not due is made according to the rules for the restitution of prestations laid down in arts. 1699 to 1707 *C.C.Q.* It is truly the receipt of something not due that grounds an obligation to restore the parties to their previous positions. An obligation to make restitution will arise only if the payment was made in error or under protest. However, while error is what usually explains a payment made in the absence of debt, the possibility that a payer acted with full knowledge of the facts cannot be ruled out. The burden of proof rests on the person alleging a liberal intention.

The provision of services can constitute payment within the meaning of art. 1553 *C.C.Q.* The payment of a sum of money is not all that can be characterized as a payment in Quebec civil law: art. 1553 *C.C.Q.* expressly provides that payment also means the performance of whatever forms the object of an obligation. Payment may validly be made by a representative of the debtor of an obligation, such as the debtor's mandatary or subcontractor, unless the nature or terms of the contract



prevent such a delegation. In the instant case, it is clear that the subcontractor was acting on Octane's behalf in producing the City's event and that the City did not object to this. The provision of services to the City, that is, payment in the legal sense, therefore originated from Octane. This condition for recovering a payment not due is met.

It does not matter what Octane should or could have done to avoid making an error. The purpose of restitution is not to sanction negligence or fault, but rather to restore the parties to their previous positions where it is shown that one of them received something without having a right to it. The only question is whether the provision of services by Octane resulted from an error and not from a liberal intention. Given the nature of the evidence in the record, it cannot be concluded that Octane had a liberal intention to provide services to the City in the absence of a debt. The testimony of Octane's representatives confirms that they did in fact believe they had an obligation to provide services for the production of the event and that they had no intention of providing those services for free. Octane would not have provided the services in question if it had known that its obligation to the City did not exist in law. In the absence of any liberal intention by Octane or any other cause that could justify its provision of the services to the City for free, it must be concluded that the services were provided as a result of an error, as required by art. 1491 *C.C.Q.*

Restitution for the services provided by Octane for the production of the City's event must be made by equivalence in accordance with art. 1700 *C.C.Q.* The

trial judge's findings concerning the good quality and fair market value of the services provided, the benefit the City derived from them and the fact that the event lived up to expectations were not challenged by the City. Since the City has not proved that full restitution would accord an undue advantage to Octane, restitution by equivalence for the services provided corresponds to the cost of producing the event, \$82,898.63.

Octane's action against the City is not prescribed. Section 586 *C.T.A.* does not apply in this case. According to the wording of that section, the six-month prescriptive period applies only to an action, suit or claim for damages. In the case of recovery of a payment not due, the basis for restitution is that there never existed an obligation to perform a prestation. The parties are restored to their previous positions, but this remedy cannot be characterized as damages. The authorities recognize that an action to recover a payment not due is subject to the general law period of three years provided for in art. 2925 *C.C.Q.*

As for Octane's appeal against T, the dismissal of the City's appeal makes it unnecessary to decide the issue raised by Octane's appeal with regard to T's personal liability. This appeal is therefore moot.

*Per* Moldaver, **Côté** and **Brown** JJ. (dissenting): The City's appeal should be allowed and Octane's appeal should be dismissed.

Article 1385 para. 1 *C.C.Q.* states that “[a] contract is formed by the sole exchange of consents between persons having capacity to contract, unless, in addition, the law requires a particular form to be respected as a necessary condition of its formation”. Sections 573 et seq. of the *C.T.A.* provide in this regard that certain formalities must be observed in the awarding of municipal contracts. These provisions set out imperative standards of public order, the violation of which is sanctioned by absolute nullity. A services contract with a value of \$82,898.63 must be awarded after a call for tenders by written invitation in accordance with the *C.T.A.* A contract entered into in violation of these rules, if it is in fact formed, may be absolutely null in addition to giving rise to the penalties provided for by the *C.T.A.* Article 1422 *C.C.Q.*, which sets out the effect of nullity, expressly creates an obligation to make restitution. According to art. 1699 para. 1 *C.C.Q.*, restitution takes place “where” (“*chaque fois*” (each time) in the French version) a juridical act is annulled with retroactive effect. Recent judgments of the Court of Appeal confirm that it is possible to order the restitution of prestations where a municipal contract is annulled.

However, the annulment of a contract presupposes the existence of the contract. In the present case, the contract on which Octane’s claim is based is quite simply non-existent. In civil law, the existence of a contract is conditional on the manifestation of a will to be bound by contract (arts. 1378 para. 1, 1385 para. 1 and 1386 *C.C.Q.*). Where, objectively speaking, the manifestation of such a will is absent (where there is no offer to contract or where such an offer is refused or not accepted),

there is no contract. By-laws and resolutions are the legal vehicles by which a municipality expresses its will. A municipality may, through a by-law passed by its council, delegate to an officer the power to incur obligations on its behalf. However, since only one professional services firm was solicited, no officer of the City had a delegation of powers authorizing him or her to enter into a contract with a value exceeding \$25,000. As a result, no duly authorized officer could have incurred an obligation in the amount of \$82,898.63 on the City's behalf.

T was not invested with any delegation of powers authorizing him to make contracts on the City's behalf, since he was a member of the political staff of the mayor's office, not a municipal officer or employee. The non-application in the municipal context of the doctrine of apparent mandate codified at art. 2163 *C.C.Q.* is a general principle or rule of public law that prevails over the civil law rules, because those rules are merely suppletive in nature in this area (art. 300 *C.C.Q.*). It is a control measure enacted in the interest of the public to ensure sound administration and transparency. It is very firmly established that persons wishing to enter into a contract with a municipality must at their peril ascertain that the particular person dealt with is acting pursuant to due authority.

Where a contract is non-existent, there can be no restitution of prestations as a consequence of the annulment of an invalid contract (arts. 1422 and 1699 *C.C.Q.*). In the case at bar, there is no juridical act that can be annulled with retroactive effect. Any obligation to make restitution must rather be justified on a

different basis. While recent jurisprudence of the Court of Appeal confirms that it is possible to order the restitution of prestations where a municipal contract is annulled, it is silent on whether it is possible to order the restitution of prestations on the basis of receipt of a payment not due where a party claims to have provided services to a municipality in reliance on a contract it believes it entered into but that turns out not to exist at all.

In civil law, the three conditions for bringing an action to recover a payment not due are: (1) the existence of a payment made by the payer to the payee, (2) the absence of a debt between the parties, and (3) an error by the payer. These three conditions must be interpreted cautiously, if not restrictively, and where they are met, art. 1491 para. 1 *C.C.Q.* expressly creates an obligation to make restitution, subject to the exception set out in art. 1491 para. 2 *C.C.Q.* Article 1492 *C.C.Q.* then requires “[r]estitution of payments not due” to be made according to the rules for the restitution of prestations codified at arts. 1699 to 1707 *C.C.Q.* In principle, the payer bears the burden of establishing that the conditions for bringing an action to recover a payment not due are met. The payer must first prove the existence of a payment and the absence of a debt. An error by the payer is then presumed to be the most likely explanation for a payment that in itself is inexplicable. The payee must then prove that there was no error by the payer.

In the present case, services were provided to the City, which constitutes payment within the meaning of art. 1553 *C.C.Q.* However, the evidence does not

clearly show that the services received by the City were provided by the subcontractor on Octane's behalf. Any ambiguity in this regard that was not resolved at trial stems from the fact that Octane was not relying on receipt of a payment not due as a basis for its claim. It is therefore not advisable for the Court now to dispose of the City's appeal on the basis of that mechanism. However, since Octane's claim must be dismissed in any event, the interpretation of the evidence that is most favourable to it with respect to the condition requiring the existence of a payment will be adopted. As for the absence of a debt between the parties, it stems from the non-existence of a contract between Octane and the City for the services rendered by the subcontractor.

An error, which may be of fact or of law, is an essential condition for an action to recover a payment not due. Article 1554 para. 1 *C.C.Q.* is not a distinct source of the obligation to make restitution: rather, that provision must be read together with art. 1491 para. 1 *C.C.Q.* In principle, the payee can show the absence of an error by the payer by proving that the payer made the payment knowing that he or she was not bound to do so. In such circumstances, the payment will be treated as a liberality and an action to recover a payment not due will be dismissed. The payee can prove the absence of an error by the payer by showing: (1) that the payer made the payment knowing that he or she was not bound to do so (i.e., absence of error as such), or (2) that the payer made the payment with the true intention of providing a gratuitous benefit or making an informal gift to the payee, or that another cause excluding the possibility of error provides legal justification for the payment. Here,

the evidence shows clearly that Octane did not pay the City in error at the time of payment, May 17, 2007, the date on which the services were provided to the City.

Octane knew at the time of payment that it had no contract with the City for the services provided by the subcontractor. The testimony of a senior partner at Octane in 2007 shows that he believed the mandate could not exceed the limit for proceeding by agreement, that is, \$25,000, and that he was aware that the limit was relevant not only because it was the highest threshold for a contract to be awarded without a call for tenders, but also because it was the highest threshold for a contract to be granted by an officer on the City's behalf. Octane knew at the time the transportation plan was launched that no duly authorized officer could lawfully grant a contract with such a value on the City's behalf, that no resolution had been passed by the City's municipal council to award Octane a contract for its subcontractor's services and that no framework agreement between Octane and the City was in effect. Moreover, Octane knew at the time of payment that the City could not grant it a valid contract at a later date for the services provided by the subcontractor. Although the City's executive committee did indeed have the power to grant a contract with a value of up to \$100,000, the contract could not have been valid, because it was too late to issue an invitation to tender or to make a public call for tenders given that the event had already taken place.

While Octane was undoubtedly not acting with a liberal intention, since it was at least hoping to be paid, the fact that there was no liberal intention does not

necessarily mean that the payment was made in error. Octane did not pay in error, because it in fact knew at the time of payment that no contract had been formed between it and the City for the services rendered by the subcontractor. Absence of error by Octane cannot be equated with fault, which is not relevant for the purposes of restitution. The conditions for bringing an action to recover a payment not due are not met. Octane's action to recover a payment not due must therefore be dismissed and the City's appeal allowed.

Octane's appeal against the City and T should be dismissed. Article 2158 *C.C.Q.*, which concerns the personal liability of a mandatary who exceeds his or her powers, cannot apply in the particular circumstances of this case, because the onus was on Octane to ensure that the proper procedure would be followed in entering into the contract, that is, to ensure: (1) that the person with whom Octane was dealing was authorized to act on behalf of the municipality, (2) that the City and its employees were acting within their powers, and (3) that all legal requirements for the formation or awarding of the contract were met. Octane cannot shift the onus which rested on it to T. Furthermore, even if T had committed a fault for which he could be extracontractually liable when he gave Octane an assurance that it would be paid, he would not have caused the injury suffered by Octane. There is no causation, because it seems that Octane (1) made a first payment to the subcontractor, (2) entered into a contract with the subcontractor and (3) provided the services to the City before T gave it any kind of assurance.



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By Wagner C.J. and Gascon J.

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*Longueuil (Ville)*, 2010 QCCA 2265, 21 Admin L.R. (5th) 320; *Cité de St-Romuald d'Etchemin v. S.A.F. Construction inc.*, [1974] C.A. 411; *Bourque v. Hull (Cité)* (1920), 30 B.R. 221; *Verreault (J.E.) & Fils Ltée v. Attorney General of the Province of Quebec*, [1977] 1 S.C.R. 41; *Immeubles Beaurom ltée v. Montréal (Ville de)*, 2007 QCCA 41, [2007] R.D.I. 26; *Aylmer (Ville) v. 174736 Canada inc.*, 1997 CanLII 10176; *Banque de Nouvelle-Écosse (Banque Scotia) v. Ville de Drummondville*, 2018 QCCS 5053; *Quebec (Agence du revenu) v. Services Environnementaux AES inc.*, 2013 SCC 65, [2013] 3 S.C.R. 838; 2736-4694 *Québec inc. v. Carleton — St-Omer (Ville de)*, 2006 QCCS 4726, aff. 2007 QCCA 1789; *Threlfall v. Carleton University*, 2019 SCC 50; *Willmor Discount Corp. v. Vaudreuil (City)*, [1994] 2 S.C.R. 210; 9112-4511 *Québec inc. v. Agence de développement de réseaux locaux de services de santé et de services sociaux de Laval*, 2008 QCCA 848; *C.J. v. Parizeau Popovici*, 2011 QCCS 2005; *Pearl v. Investissements Contempra Ltée*, [1995] R.J.Q. 2697; *Roux v. Cordeau*, [1981] R.P. 29; *Garage W. Martin Ltée v. Labrie*, [1957] C.S. 175; *Green Line Investor Services Inc. v. Quin*, 1996 CanLII 5734; *Confédération, compagnie d'assurance-vie v. Lareau-Lacroix*, 1997 CanLII 10277; *Société canadienne de sel ltée v. Dubord*, 2012 QCCS 1994; *Beaudry v. Cité de Beauharnois*, [1962] B.R. 738; *Pacific National Investments Ltd. v. Victoria (City)*, 2000 SCC 64, [2000] 2 S.C.R. 919; *Tremblay v. 2543-7443 Québec inc.*, 1999 CanLII 11903; *Steckmar Corp. v. Consultants Zenda ltée*, 2000 CanLII 18061; *Young v. Young*, [1993] 4 S.C.R. 3; *Mackin v. New Brunswick (Minister of Finance)*; *Rice v. New Brunswick*, 2002 SCC 13, [2002] 1 S.C.R. 405; *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71, [2003] 3 S.C.R. 371; *Finney v.*

*Barreau du Québec*, 2004 SCC 36, [2004] 2 S.C.R. 17; *Richard v. Time Inc.*, 2012 SCC 8, [2012] 1 S.C.R. 265; *Schachter v. Canada*, [1992] 2 S.C.R. 679.

By Côté and Brown JJ. (dissenting)

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38; *Construction Irebec inc. v. Montréal (Ville de)*, 2015 QCCS 4303; *J.E. Verreault & Fils Ltée v. Attorney General (Quebec)*, [1977] 1 S.C.R. 41; *Cité de St-Laurent v. Boudrias*, [1974] C.A. 473; *Hinse v. Canada (Attorney General)*, 2015 SCC 35, [2015] 2 S.C.R. 621; *Finney v. Barreau du Québec*, 2004 SCC 36, [2004] 2 S.C.R. 17; *Prud'homme v. Prud'homme*, 2002 SCC 85, [2002] 4 S.C.R. 663; *Canadian Food Inspection Agency v. Professional Institute of the Public Service of Canada*, 2010 SCC 66, [2010] 3 S.C.R. 657; *Immeubles Beaurom ltée v. Montréal (Ville de)*, 2007 QCCA 41, [2007] R.D.I. 26; *Pacific National Investments Ltd. v. Victoria (City)*, 2000 SCC 64, [2000] 2 S.C.R. 919; *Beaudry v. Cité de Beauharnois*, [1962] B.R. 738; *Lalonde v. City of Montreal North*, [1978] 1 S.C.R. 672; *Olivier v. Corporation du Village de Wottonville*, [1943] S.C.R. 118; *Cité de St-Romuald d'Etchemin v. S.A.F. Construction inc.*, [1974] C.A. 411; *Corporation municipale de Havre St-Pierre v. Brochu*, [1973] C.A. 832; *Cité de Montréal v. Teodori*, [1970] C.A. 401; *Bourque v. Cité de Hull (1920)*, 30 B.R. 221; *Threlfall v. Carleton University*, 2019 SCC 50; *Pearl v. Investissements Contempra Ltée*, [1995] R.J.Q. 2697; *Roux v. Cordeau*, [1981] R.P. 29; *Garage W. Martin Ltée v. Labrie*, [1957] C.S. 175; *Sodexo Québec ltée v. Cie de chemin de fer du littoral nord de Québec & du Labrador inc.*, 2010 QCCA 2408, 89 C.C.P.B. 203; *Agence de développement de réseaux locaux de services de santé et de services sociaux de Laval (Régie régionale de la santé et de services sociaux de Laval) v. 9112-4511 Québec inc.*, 2006 QCCS 5323, aff'd 2008 QCCA 848; *Canadian Imperial Bank of Commerce v. Perrault et Perrault Ltée*, [1969] B.R. 958; *Aussant v. Axa Assurances inc.*, 2013 QCCQ 398, [2013] R.J.Q. 533; *Société nationale de fiducie v. Robitaille*, [1983] C.A. 521; *Commission des*

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APPEALS from a judgment of the Quebec Court of Appeal (Schrager, Mainville and Hogue JJ.A.), 2018 QCCA 223, 81 M.P.L.R. (5th) 39, [2018] AZ-51468022, [2018] J.Q. n° 893 (QL), 2018 CarswellQue 742 (WL Can.), affirming a decision of Lefebvre J., 2015 QCCS 5456, 46 M.P.L.R. (5th) 309, [2015] AZ-51233047, [2015] J.Q. n° 12811 (QL), 2015 CarswellQue 11236 (WL Can.). Appeal of Ville de Montréal dismissed, appeal of Octane Stratégie inc. moot. Moldaver, Côté and Brown JJ. dissenting.

*Olivier Nadon, Pierre-Yves Boisvert and Steven Rousseau*, for the appellant Ville de Montréal (38066) and the respondents Richard Thériault and Ville de Montréal (38073).

*Sylvain Dorais and Jocelyn Ouellette*, for the respondent (38066)/appellant (38073) Octane Stratégie inc.

*Sébastien Laprise and Jean-Benoît Pouliot*, for the intervener Union des municipalités du Québec (38066).

*Jean Prud'homme and Gabrielle Robert*, for the intervener Ville de Laval (38066).



English version of the judgment of Wagner C.J. and Abella, Karakatsanis, Gascon, Rowe and Martin JJ. delivered by

THE CHIEF JUSTICE AND GASCON J. —

I. Overview

[1] This case consolidates two files relating to an unpaid invoice for \$82,898.63 for the production of a launch event for the appellant Ville de Montréal (“City”) more than 10 years ago. The issues raised in these appeals go beyond, however, the mere payment of that invoice. The Court is called upon to determine whether the principles of Quebec civil law concerning the formation of contracts and the restitution of prestations apply under municipal law.

[2] The respondent Octane Stratégie inc. (“Octane”) is a public relations and communications firm. In April 2007, the City’s director of transportation made use of its services to create an event concept for the launch of the City’s transportation plan that was to take place the following month. After a meeting at which several key players in the City’s administration, including the respondent Richard Thériault (“Mr. Thériault”), discussed their high expectations for the project, Octane developed a concept with the help of a specialized firm whose services it retained for the production of the event.

[3] The launch was held on the scheduled date and was a success. Octane repeatedly sought payment for the costs incurred for its subcontractor's services, but the City was slow to pay. In view of the City's failure to act, Octane finally sent it an invoice for those expenses in October 2009. In May 2010, nearly three years after the event was held, Octane instituted an action against the City because the invoice was still unpaid. The City countered by stating, for the first time, that it had in fact never authorized the mandate, which, for that matter, had not been granted as a result of the tendering process required by law. Octane therefore amended its pleading to add Mr. Thériault as a defendant. It argued that, at the initial meeting, he had given it a mandate to produce the event for the City and that he had assured it many times that the City would pay the costs incurred.

[4] The Superior Court allowed Octane's action against the City. The trial judge concluded from the evidence that Mr. Thériault had indeed given Octane a mandate but that the contract was null because it had been awarded in contravention of the rules of public order for awarding municipal contracts. However, he rejected the City's argument that the restitution of prestations does not apply in the municipal context because of the imperative rules set out in the *Cities and Towns Act*, CQLR, c. C-19 ("*C.T.A.*"). He therefore ordered restitution by equivalence for the services provided, and he determined that the fair value of those services was the cost of producing the event, \$82,898.63. The City appealed that award, and Octane filed an appeal against Mr. Thériault. The Court of Appeal dismissed the City's appeal as well as Octane's appeal, which had become moot. Considering itself bound by the trial

judge's findings concerning the existence of a mandate between Octane and the City for the production of the launch event, the Court of Appeal affirmed that the *C.T.A.* does not derogate from the rules on restitution of prestations and accepted the trial judge's reasoning with respect to the application of those rules to the facts. The majority added that, even if the parties were not bound by a contract, it was nonetheless necessary to restore them to their previous positions under the rules on receipt of a payment not due. The City and Octane both appeal to this Court.

[5] In our view, the City's appeal must be dismissed. This makes it unnecessary to rule on Octane's appeal. While we agree with the Court of Appeal's conclusions with respect to the application of the rules on restitution of prestations in the municipal context, we are of the opinion that it erred in according deference to the trial judge's findings concerning the existence of a contract between the City and Octane. The mandate given to Octane was not authorized by a resolution of the municipal council or by an officer acting under a delegation of powers, with the result that the City simply never expressed its will to be bound by contract to Octane. This leads to another conclusion: no contract for the production of the launch event came into existence between the City and Octane. Because it is not possible to annul a juridical act that never came into existence, the trial judge erred in ordering that the parties be restored to their previous positions on this basis.

[6] We agree, however, with the majority of the Court of Appeal that the rules on receipt of a payment not due apply in this case, which means that the

restitution of prestations is nonetheless necessary. Octane provided services to the City through its subcontractor even though it had no contract with the City. The City therefore received and benefited from services that were not due to it. Unless Octane had a liberal intention, which cannot be presumed, that payment must be restored to it. Since the City has not shown that the trial judge erred in assessing the fair value of the services provided or in declining to exercise his discretion to refuse restitution or to modify its scope or modalities under para. 2 of art. 1699 of the *Civil Code of Québec* (“*C.C.Q.*” or “*Civil Code*”), there is no basis for reviewing his conclusion in this regard. The City must therefore restore the sum of \$82,898.63 to Octane.

## II. Background

[7] In June 2002, during the Sommet de Montréal, the City and its various partners emphasized the City’s need for a transportation plan. The City laid out its vision of that plan in March 2005, but the final version was not ready to be presented to the public until 2007. Between 2005 and 2007, the City relied on the expertise of Octane, among others, to develop the plan in collaboration with its employees. The launch event was planned for May 17, 2007, which was a symbolic date because it was the anniversary of the City’s founding.

[8] Originally, preparations for the event were to be handled internally by the City’s communications branch. However, with less than a month to go before the event, André Lavallée, the member of the City’s executive committee responsible for shared transportation, was dissatisfied with the proposed project. On April 20, he

contacted Marc Blanchet, the City's director of transportation, to share his concerns. Mr. Blanchet immediately contacted Pierre Guillot-Hurtubise, a partner at Octane, to seek assistance with the matter. He invited him to a meeting at city hall on April 23, during which he asked him to prepare a strategic plan for the May 17 event. That mandate involved a few hours of work relating to strategic advice; the budget agreed upon was \$10,000.

[9] On April 27, a second meeting was held at city hall to discuss the organization of the event. In addition to Mr. Guillot-Hurtubise and Louis Aucoin — another partner at Octane — several members of the City's administration and of the mayor's office staff were present, including Mr. Lavallée and his political attaché, Mr. Blanchet, Mr. Thériault, who at the time was the director of communications and administration in the office of the mayor, as well as the coordinator of communications for the office of the mayor and of the executive committee, the communications officer and operations manager in the communications branch, and the communications officer for transportation and the plan. On that occasion, the City's representatives shared their vision of the event and emphasized how important it was that the launch concept be imaginative and that the event be a [TRANSLATION] "landmark" event that was "lavish" and "glitzy". The individuals responsible for liaising with Octane and the various municipal actors who were to play a role in the project were chosen. According to the evidence accepted by the trial judge, Mr. Thériault, with the agreement of everyone present, asked Octane to prepare a concept that would live up to their expectations.

[10] In the days following that meeting, Octane worked to develop a launch concept. It contacted, among others, Gilles Blais, the president of Productions Gilles Blais (“PGB”), a firm specializing in event production and organization. At the same time, City representatives asked Octane to be responsible, in addition to its initial mandate, for graphic design and the production of certain tools for the event, including the guest lists, invitation cards, labels and CD-ROMs.

[11] Between April 30 and May 15, Octane sent the City several scenarios for the launch, accompanied by its budget estimates. The estimates went from \$274,975 to \$196,000, then \$178,000 and finally \$123,470. That final estimate, which was sent to the City on May 15, included Octane’s fees for its consulting services, costs and expenses for the preparation of materials, and PGB’s production costs and staging and technical equipment costs, which amounted to \$82,898.63. The same day, Octane and PGB made their agreement official and signed a subcontract for the production of the event.

[12] It should be noted that Octane paid the \$82,898.63 to PGB in three instalments on May 14, May 25 and August 10, 2007. On August 10, 2007, the two firms signed a document stating that Octane had paid PGB that amount [TRANSLATION] “as an advance on a contract signed by the [C]ity of Montréal and Gilles Blais”. Mr. Blais stated that he undertook to repay that advance to Octane upon payment by the City. However, five days later, Mr. Blais specified in a letter to Octane that no contract had been signed with the City and that it was in fact with

Octane that a subcontracting agreement had been [TRANSLATION] “negotiated, reached and signed” on May 15, 2007 for “the design, production, creation and public and media presentation” of the City’s transportation plan.

[13] The event was held on the scheduled date, May 17, 2007. The trial judge found from the evidence that it was a great success: Sup. Ct., at para. 21.

[14] On June 4, Octane sent the City three invoices for its consulting services for the development of the launch concept, graphic design and the production of materials for the event. The invoices, which totalled \$52,203.34, were paid by the City in March and April 2008. The City’s municipal council approved the purchase orders for those services on October 27, 2008.

[15] However, payment of the production costs for the launch event was a different matter. Octane had several informal discussions about payment for PGB’s services, but to no avail. There was confusion at the City over the matter: it was not clear whether the transportation branch or the communications branch was responsible for paying for the services. On October 27, 2009, nearly 30 months after the launch, Octane, which had not yet been paid for PGB’s services, officially sent the City a fourth invoice, which was for the \$82,898.63 paid to PGB.

[16] On May 14, 2010, Octane instituted an action against the City because the invoice was still unpaid. On October 21, 2010, the City disclosed its grounds of defence, in which it stated, for the first time, that it had never authorized the contract,

which, for that matter, had not been awarded in accordance with the tendering procedure provided for in the *C.T.A.* On November 22, 2011, Octane amended its pleading to add Mr. Thériault as a defendant. It argued that he had given it a mandate to produce the event for the City at the preparatory meeting on April 27, 2007 and that he had reassured it many times that the City would pay for PGB's services. On August 21, 2015, the City amended its grounds of defence to allege that Octane's action was prescribed in relation to both defendants.

### III. Judicial History

#### A. *Quebec Superior Court (2015 QCCS 5456, 46 M.P.L.R. (5th) 309)*

[17] The Superior Court allowed Octane's motion to institute proceedings and ordered the City to pay it \$82,898.63. Octane's alternative claim against Mr. Thériault was dismissed, although the judge noted that he would have allowed it if he had dismissed the claim against the City.

[18] The trial judge first found that neither the claim against the City nor the claim against Mr. Thériault was prescribed. The six-month period provided for in s. 586 *C.T.A.* did not apply to contractual matters. By arguing that the rules for awarding contracts had not been complied with, the City was admitting that the action had a contractual basis. Moreover, Octane could not have added Mr. Thériault as a defendant before being informed that the City intended to contest the existence of the alleged contract. It was not until October 21, 2010, the date the City had disclosed its



grounds of defence, that Octane could see the possibility of making an alternative personal liability claim against Mr. Thériault. Because Octane had amended its motion on November 22, 2011 for that purpose, the trial judge found that its action was not prescribed.

[19] The trial judge then rejected the City's arguments to the effect that it had never authorized a mandate in favour of Octane. In fact, the City had given Octane four separate mandates for the launch of the transportation plan. The fourth mandate was specifically for the production of the event, which Octane had chosen to subcontract to PGB and the cost of which was \$82,898.63. The judge also rejected the City's argument that Octane had deliberately divided up its invoices to bypass the requirement that a public call for tenders be made for any contract over \$100,000.

[20] The trial judge noted that it was Mr. Thériault who had given that fourth mandate: he was the one who had conducted the meeting on April 27, 2007 and received all the proposed scenarios and the budget estimates for the launch of the plan. The judge found Mr. Thériault personally liable to pay the invoice for \$82,898.63 because he had not only given Octane the mandate but had reassured it several times that the City would pay the costs incurred. The judge further noted that Mr. Thériault had subsequently done nothing to make sure that Octane was paid even though he could have recommended to the City's executive committee that the invoice be paid.

[21] Having said that, the trial judge acknowledged that the City should have issued an invitation to tender because the value of the contract awarded to Octane for the production of the event was estimated at more than \$25,000. However, he noted that no one at the City had brought up the need to comply with that rule and that it was also [TRANSLATION] “inconceivable” that the City could have issued an invitation to tender between the meeting on April 27 and the event planned for May 17. The judge nonetheless concluded that, since those rules of public order had not been complied with, the contract had to be annulled and the parties restored to their previous positions in accordance with art. 1699 *C.C.Q.* He therefore rejected the argument that the imperative rules in the *C.T.A.* preclude the restitution of prestations in the municipal context. In the judge’s view, if the legislature had wanted to create an exception to that general law principle in the municipal context, it could have done so in the *C.T.A.* or the *C.C.Q.*, but it had not. In reaching this conclusion, the judge relied on the jurisprudence of the Court of Appeal affirming that art. 1699 *C.C.Q.* applies in the municipal context.

[22] Finally, since restitution for the services could not be made in kind, the trial judge found that it had to be made by equivalence as provided for in art. 1700 *C.C.Q.* He noted that Octane’s services had been provided in good faith, had been of good quality and had benefited the City. In his view, the amount claimed by Octane, \$82,898.63, was equivalent to the fair value of the services provided in this case.

B. *Quebec Court of Appeal (2018 QCCA 223, 81 M.P.L.R. (5th) 39)*

[23] The City appealed, and Octane filed an incidental appeal against Mr. Thériault because the trial judge had not made any award against him despite finding him liable. Mr. Thériault moved for the summary dismissal of that appeal on the ground that Octane could not file an incidental appeal against him because he was not an appellant in the principal appeal. The Court of Appeal dismissed the motion but gave Octane leave to file a notice of appeal in a separate file. In the end, it unanimously dismissed the City's appeal, though one judge wrote concurring reasons. In light of that outcome, Octane's appeal was declared to be moot.

[24] On the issue of whether a contract had been entered into by Octane and the City, the majority were of the view that the City had not identified any palpable and overriding error in the trial judge's findings on this point. The majority therefore stated that they were bound by those findings. They upheld the trial judge's reasoning on the application of art. 1699 *C.C.Q.* in the municipal context, including where rules of public order in the *C.T.A.* have been breached. In their opinion, it is precisely where a juridical act is annulled because one of the conditions essential to its validity is not met that the parties must be restored to their previous positions. In this regard, they noted that art. 1699 *C.C.Q.* marked a change of direction from the situation that existed under the *Civil Code of Lower Canada* and that it had been recognized in many Court of Appeal decisions since then that the restitution of prestations applies in the municipal context. They concluded from a review of the case law on the matter that the trial judge had properly ordered the restitution of prestations.

[25] The majority added, however, that even if there had been no contract between Octane and the City, the restitution of prestations could still have been ordered under the rules on receipt of a payment not due. In their view, the conditions that must be met for those rules to apply were met, since Octane, through its subcontractor, PGB, had produced the launch event believing mistakenly, but in good faith, that it was bound to provide the services in question to the City.

[26] Finally, the majority noted that the application of the rules on restitution of prestations in the municipal context is not contrary to the public interest underlying the provisions of the *C.T.A.*, since in such a case a municipality is bound to return only the actual value of what it received. A municipality that has overpaid for services it received can therefore show that it is required only to restore a lower amount equivalent to the actual value of the services. The majority added that a breach of good faith may lead a court to exercise its discretion to refuse the restitution of prestations if the circumstances warrant. They found that, in the instant case, the trial judge's findings of fact on this issue were supported by the evidence, so there was no reason to refuse restitution or to modify its scope or modalities using the discretion conferred by para. 2 of art. 1699 *C.C.Q.*

[27] The judge who wrote concurring reasons agreed with the majority's analysis of the application of restitution of prestations in the municipal context. She also agreed that the City had to restore the prestation it had received to Octane because of the nullity of the contract. However, she found that it was not necessary to

deal with the issue of receipt of a payment not due. She expressed reservations about the application of the rules on receipt of a payment not due in this case because, in her view, the services in question had been provided by PGB, not by Octane, and it was doubtful that Octane had made a payment to the City.

#### IV. Issues

[28] Two preliminary remarks are in order before we outline the issues raised by this case.

[29] First, although the case involves two files, Octane's appeal against Mr. Thériault and the City (38073) remains subsidiary to the City's appeal (38066). Octane is appealing to this Court for the same reason it appealed to the Court of Appeal, that is, to obtain an award against Mr. Thériault in the event that the City is successful in the principal appeal. The City is also a respondent in file 38073 because it is required to assume Mr. Thériault's defence under ss. 114.10 and 604.6(2) *C.T.A.*

[30] Second, Octane's claim is only for PGB's production costs and staging and technical equipment rental costs, which amount to \$82,898.63. In March and April 2008, the City paid Octane's other three invoices for its consulting services for the development of the launch concept, graphic design and the production of the materials used during the event. But it should be noted that the City has brought an action in the Court of Québec seeking reimbursement of these amounts paid to Octane. That action has been stayed for the moment. In this Court, the City explained

that it is seeking reimbursement of these amounts because they were paid in error given the non-existence of any contract between it and Octane. By its own admission, therefore, the City is relying in that action, for its own benefit, on the rules governing restitution of prestations based on receipt of a payment not due.

[31] With this in mind, the issues before the Court are as follows:

1. Do the rules on restitution of prestations apply in the municipal context?
2. Is the restitution of prestations necessary in the instant case and, if so, on what basis?
3. Should an award be made against Mr. Thériault personally?

[32] In our view, the rules on restitution of prestations apply in the municipal context. Although it is true that no contract came into existence between the City and Octane for the production of the launch event because the City did not pass a resolution or by-law to authorize one, the restitution of prestations is nonetheless necessary under the rules on receipt of a payment not due. Restitution must be made by equivalence in the amount of \$82,898.63, as the trial judge found, there is no basis for refusing restitution or for modifying its scope or modalities in any way, and Octane's action in this regard is not prescribed. It follows that Octane's appeal against Mr. Thériault personally is moot. We will deal with each of these issues in turn.

V. Analysis

A. *Restitution of Prestations in the Municipal Context*

[33] The City argues that the provisions of the *Civil Code* governing the restitution of prestations, arts. 1699 to 1707 *C.C.Q.*, are inconsistent with the rules of public order set out in the *C.T.A.* It submits that the application of the rules on restitution of prestations in the municipal context creates a [TRANSLATION] “bypass” or “formula” for avoiding the application of the rules in the *C.T.A.* (A.F., at paras. 5 and 36). As the City sees it, the restitution of prestations defeats the application of the *C.T.A.* by allowing a person to be paid out of public funds even though the person has contravened rules designed to protect the interests of the public. It maintains that because restitution is contrary to the spirit and letter of the rules for awarding municipal contracts set out in ss. 573 et seq. *C.T.A.*, the general law must yield to the special Acts applicable to legal persons established in the public interest, as provided for in art. 1376 *C.C.Q.* According to the City, the *C.T.A.* thus derogates expressly from the rules on restitution of prestations, which are, as a result, inapplicable under municipal law.

[34] We agree with the trial judge and the Court of Appeal that the rules on restitution of prestations in the *C.C.Q.* apply in the municipal context. The City’s arguments do not withstand scrutiny. The general law applies to municipalities unless the legislature derogates from it. Neither the *C.C.Q.* nor the *C.T.A.* provides for such a derogation. We would add that it is rather paradoxical that the City, which in this

Court is contesting the application of the rules on restitution of prestations in the municipal context, is itself relying on those rules in the Court of Québec in seeking restitution of the payments made to Octane in 2008 for the first three invoices.

[35] As for the concerns raised by the City and the interveners about the danger of creating a “bypass”, they are largely tempered by the control mechanisms built into the rules on restitution of prestations. Those rules are based on fairness, and the provisions of the *Civil Code* give judges the flexibility they need to decide whether it is appropriate to order the restitution of prestations and, if so, to determine the modalities and scope of restitution in light of the circumstances of each case. These robust control mechanisms are sufficient to ensure that the rules on restitution of prestations are not used improperly in the municipal context.

(1) Application of the General Principles in the C.C.Q. to Municipalities

[36] The *Civil Code* sets out a number of guiding principles of Quebec civil law. Its preliminary provision indicates that it is the foundation of all other laws that apply or rely on civil law concepts. By virtue of arts. 300 and 1376 *C.C.Q.*, this includes the laws that govern legal persons established in the public interest, such as municipalities (art. 298 *C.C.Q.*). Article 300 para. 1 *C.C.Q.* thus provides that legal persons established in the public interest are primarily governed by the special Acts by which they are constituted and by those which are applicable to them. Paragraph 2 of that article refers directly to the suppletive nature of the *Civil Code*; it states that the *C.C.Q.*'s general rules concerning their status as legal persons, their property or



their relations with other persons are applicable to them. Further, art. 1376 *C.C.Q.* provides that the rules set forth in Book Five, Obligations, “apply to the State and its bodies, and to all other legal persons established in the public interest, subject to any other rules of law which may be applicable to them”. This provision indicates that, where obligations are concerned, the *C.C.Q.* represents the general law applicable to legal persons established in the public interest (*Doré v. Verdun (City)*, [1997] 2 S.C.R. 862, at paras. 25 et seq.; *Prud’homme v. Prud’homme*, 2002 SCC 85, [2002] 4 S.C.R. 663, at para. 27; see also P.-A. Côté, “La détermination du domaine du droit civil en matière de responsabilité civile de l’Administration québécoise — Commentaire de l’arrêt Laurentide Motels” (1994), 28 *R.J.T.* 411, at p. 423). Since the rules on restitution of prestations are in the Book on Obligations, they apply to municipalities unless other special rules exclude their application. According to the City, this is precisely the effect of ss. 573 et seq. *C.T.A.*, which govern the awarding of municipal contracts.

[37] On this point, the City argues that the purpose of these provisions, in their spirit and letter, is to strictly regulate the formation of municipal contracts in order to protect public funds. From this perspective, if the restitution of prestations applies in the municipal context in cases where these rules of public order have been infringed, a contracting party could, after the fact, rely on the benefit derived by a municipality from services provided to it in order to obtain “compensation” paid out of public funds, despite the fact that the process was unlawful (A.F., at para. 4). According to

the City, these provisions of the *C.T.A.* therefore derogate from the rules established by the *C.C.Q.* for the restitution of prestations.

[38] Before we address this argument, a terminological clarification is required. Where a juridical act is subsequently annulled with retroactive effect, the principle is that the parties must be restored to their previous positions under the rules on restitution of prestations (arts. 1422 and 1699 to 1707 *C.C.Q.*). Contrary to what the City argues, this is not [TRANSLATION] “compensation” or “payment” for a service received. A contract that is annulled or resolved disappears from a legal standpoint; the effects it may have produced since its formation must therefore disappear with it. In such a case, not only are the parties relieved of their respective obligations, but they must also be restored to the legal and economic positions they were in before the contract was concluded (J.-L. Baudouin and P.-G. Jobin, *Les obligations* (7th ed. 2013), by P.-G. Jobin and N. Vézina, at Nos. 377 and 920; D. Lluelles and B. Moore, *Droit des obligations* (3rd ed. 2018), at No. 1223; J. Pineau, D. Burman and S. Gaudet, *Théorie des obligations* (4th ed. 2001), by J. Pineau and S. Gaudet, at No. 413). Whether such restoration is ordered to be made in kind or by equivalence makes no difference. According to art. 1700 *C.C.Q.*, restitution of prestations in kind is the rule, while restitution by equivalence is the exception; in both cases, however, restitution flows from the same principle of restoring the parties to their previous positions.

[39] Sections 573 et seq. *C.T.A.* require certain rules to be followed when municipal contracts are awarded. Since the purpose of these provisions is to protect public funds and taxpayers' interests, a contract entered into in violation of these rules is absolutely null (arts. 1416 to 1418 *C.C.Q.*; *Autobus Dufresne inc. v. Réseau de transport métropolitain*, 2017 QCCS 5812, at para. 41 (CanLII); *Construction Irebec inc. v. Montréal (Ville de)*, 2015 QCCS 4303, at para. 104 (CanLII); *Centre de téléphone mobile (Québec) inc. v. Marieville (Ville de)*, 2006 QCCS 1179, AZ-50359395, at para. 32; P. Garant, *Droit administratif* (7th ed. 2017), at p. 476; J. Héту and Y. Duplessis, with L. Vézina, *Droit municipal: Principes généraux et contentieux* (2nd ed. (loose-leaf)), vol. 1, at para. 9.73; P. Giroux and D. Lemieux, *Contrats des organismes publics québécois* (loose-leaf), at para. 5-800; Baudouin and Jobin, at No. 372). The fact that these provisions are of public order and that their violation is sanctioned by the absolute nullity of the contract is not an express or even an implicit derogation from the rules on restitution of prestations. It is precisely because the contract is held to be null, and is therefore deemed never to have existed under art. 1422 *C.C.Q.*, that the restitution of prestations is important: a person who has received something under a null contract has received it without right (Lluelles and Moore, at No. 1224). The fact that ss. 573 et seq. *C.T.A.* are of public order and that their violation is sanctioned by absolute nullity is not inherently incompatible with the principle of restitution. In fact, these provisions make it all the more necessary that the parties be restored to their previous positions.

[40] In the absence of clear, unequivocal legislative direction to this effect, the importance of the *C.T.A.*'s public order provisions is not enough to exclude the application of the rules of the general law. As the trial judge rightly noted, if the legislature had intended to derogate from the rules on restitution of prestations in the municipal context, it would have stated this clearly, either in the *C.T.A.* or in the *C.C.Q.* (Sup. Ct., at para. 153). Since there is no such derogation, the principle remains the restoration of the parties to their previous positions, which must occur “where” (“*chaque fois*” (each time) in the French version) a juridical act is annulled with retroactive effect (art. 1699 *C.C.Q.*; Baudouin and Jobin, at No. 920; Pineau, Burman and Gaudet, at No. 206; C.A., at para. 38). Moreover, there is no support in the case law or the academic literature for the City’s argument that the rules on restitution of prestations have no place in the municipal context. In fact, the jurisprudence of the Court of Appeal indicates just the opposite: *Ville de Saguenay v. Construction Unibec inc.*, 2019 QCCA 38, at paras. 43-44 (CanLII); *Québec (Ville) v. GM Développement inc.*, 2017 QCCA 385, 72 M.P.L.R. (5th) 203; *Lacroix & Fils ltée v. Carleton-sur-Mer (Ville)*, 2014 QCCA 1345, 27 M.P.L.R. (5th) 10, at paras. 77-83; *Montréal (Ville de) v. St-Pierre (Succession de)*, 2008 QCCA 2329, [2009] R.J.Q. 54; *Habitations de la Rive-Nord inc. v. Repentigny (Ville)*, 2001 CanLII 10048 (Que. C.A.).

(2) Restitution of Prestations in the Municipal Context Does Not Create a “Bypass”

[41] In this regard, the “bypass” argument raised by the City is not persuasive. First of all, the rules on restitution of prestations give a judge the power to determine the fair value of restitution. Where restitution cannot be made in kind, it may be made by equivalence (art. 1700 *C.C.Q.*). It is up to the judge to objectively determine the value for which restitution must be made in order to restore the parties to their previous positions, based on the evidence in the record and the circumstances of each case (Baudouin and Jobin, at No. 922; Pineau, Burman and Gaudet, at No. 210). It is true that the value the parties assign to a service in their contract will often correspond to its true value, but this will not always be the case (Baudouin and Jobin, at No. 25; Pineau, Burman and Gaudet, at No. 210). It follows that a municipality will not necessarily be bound by the price charged or even by the terms of the agreement once restitution must be made for a prestation provided under a contract for services that is declared null. The Court of Appeal correctly noted that a municipality that has undertaken to pay far too much for services because it has failed to comply with the competitive bidding procedure will be able to prove the fair value of the services provided and will be required to restore only that value (para. 62).

[42] In addition, para. 2 of art. 1699 *C.C.Q.* provides that a court may, exceptionally, refuse the restitution of prestations or modify the scope or modalities of restitution where one party derives an undue advantage from it. The Superior Court stated in a recent decision that [TRANSLATION] “[d]eriving an undue advantage means receiving a profit or securing a gain or benefit that seems to a reasonable person to be unfair — in short, that offends against reason and fairness” (*Rouleau v. Canada*

(*Procureur général*), 2016 QCCS 4887, at para. 132 (CanLII)). This could be the case, for example, where restitution results in a gain for one party or causes a loss that is reflected in a corresponding gain for the other party, because the purpose of restitution is to restore the parties to their previous positions, not to enrich them (*Langevin v. Mercier*, 2010 QCCA 1763, at paras. 67-73 (CanLII); *Boucher v. Développements Terriglobe inc.*, [2001] R.D.I. 2013 (Que. C.A.), at para. 31; *Fortier v. Compagnie d'arrimage de Québec ltée*, 2014 QCCS 1984, at paras. 90-92 (CanLII); *Hakim v. Guse*, 2013 QCCS 1020; *9112-2648 Québec inc. v. Cauchon et associés inc.*, 2005 CanLII 44114 (Que. Sup. Ct.), at paras. 21-22; *Marcotte v. Longueuil (City)*, 2009 SCC 43, [2009] 3 S.C.R. 65, at paras. 35-36).

[43] The reason why restitution is tempered in this way is readily understandable: since the purpose of the rules on restitution is to restore the parties to their previous positions, it would be paradoxical if restitution were to be a source of unjust enrichment (Ministère de la Justice, *Commentaires du ministre de la Justice, Le Code civil du Québec — Un mouvement de société*, vol. 1 (1993), at pp. 1056-57; Lluelles and Moore, at No. 1237). By giving a court the power to refuse restitution or to modify its scope or modalities, the legislature ensures that the remedy for a first inequity does not create a second one. Of course, the existence of an undue advantage is not presumed, and the debtor of the restitution bears the burden of proving that the creditor of the restitution enjoys such an advantage in each case (*Amex Bank of Canada v. Adams*, 2014 SCC 56, [2014] 2 S.C.R. 787, at para. 38; Lluelles and Moore, at No. 1237; Baudouin and Jobin, at No. 921; Pineau, Burman and Gaudet, at

No. 219; K. A. Desfossés, *L'extinction de l'obligation et la restitution des prestations (Art. 1671 à 1707 C.c.Q.)* (2015), at para. 1699 560; S. Gaudet, “La restitution des prestations: premiers regards sur les articles 1699 à 1707 du Code civil du Québec”, in *Les Obligations: quoi de neuf? — Reprenons par le commencement, voulez-vous?* (1995)). But to the extent that undue advantage tempers the requirement that the parties be restored to their previous positions and gives the court the flexibility needed to assess the circumstances surrounding restitution, para. 2 of art. 1699 *C.C.Q.* ensures that the application of the rules on restitution in the municipal context will not create an incentive to bypass rules of public order.

[44] We note in this regard that the fair value of the services provided and the undue advantage that one party would derive from restitution are two separate concepts. According to the wording of art. 1700 *C.C.Q.*, restitution by equivalence is an exception to restitution in kind. A judge ruling on restitution by equivalence must determine the fair — or objective — value of the property or service provided. This determination is separate from the question of whether one party would derive an undue advantage from full restitution, which falls within the exceptional discretion conferred on a court by para. 2 of art. 1699 *C.C.Q.* For example, the value of a prestation does not necessarily exclude the profit the other contracting party would have made if the contract had not been declared null (Baudouin and Jobin, at No. 925; Pineau, Burman and Gaudet, at No. 210). However, a judge might find that including such a profit when granting restitution for services provided could accord an undue advantage in the municipal context. In other words, there must [TRANSLATION]

“remain an undue advantage only after the general rules are applied”, including the rules governing the assessment by equivalence of the value of services rendered (P. Fréchette, *La restitution des prestations* (2018), at p. 426).

[45] The City, supported by the interveners, suggests that obtaining a municipal contract in violation of the rules of public order for awarding such contracts necessarily constitutes an undue advantage and that a court hearing such a case should automatically refuse the restitution of prestations. We cannot accept that argument. The discretion to refuse restitution or to modify its scope or modalities under para. 2 of art. 1699 C.C.Q. is exceptional (*Amex*, at para. 38; *St-Pierre (Succession de)*; *Lluelles and Moore*, at No. 1237; *Baudouin and Jobin*, at No. 921; *Pineau, Burman and Gaudet*, at Nos. 395-96; *Desfossés*, at para. 1699 560). To suggest that restitution must be refused automatically where there has been a failure to comply with the law is contrary to the very wording of this provision. The discretion to refuse restitution or to modify its scope or modalities cannot be exercised unless it has first been shown that restitution would accord an undue advantage. The violation of a rule of public order will not necessarily result in such an advantage (*Lluelles and Moore*, at No. 1237). Moreover, because the purpose of the restitution of prestations is not to punish negligent conduct but simply to restore the parties to their previous positions after their obligational relationship is nullified, it seems unwise to endorse a rule that would automatically preclude any restitution. Such a rigid approach would be inconsistent with the purpose underlying the restitution of prestations. In this regard, the discretion conferred on a court is an



equitable one that must be exercised with a view to achieving a balance between the parties (*Langevin*, at para. 71; Baudouin and Jobin, at No. 921; Fréchette, at pp. 423-24). The appropriateness of tempering restitution under para. 2 of art. 1699 *C.C.Q.* must be assessed on a case-by-case basis and not, as the City suggests, on the basis of automatic or pre-established rules.

B. *Restitution of Prestations in the Instant Case*

[46] Chapter IX of Title One of the Book on Obligations, which is the chapter dealing with the restitution of prestations, does not create a right to restitution. Rather, it sets out the mechanism for restoring the parties to their previous positions, that is, the modalities involved and the circumstances in which the mechanism operates. Such restoration presupposes the existence of an obligation that can ground restitution.

[47] According to para. 1 of art. 1699 *C.C.Q.*, there is an obligation to make restitution where a person is bound to return to another person that which he or she has received without right, in error or under a juridical act which is subsequently annulled with retroactive effect. The last of these situations is provided for in art. 1422 *C.C.Q.*, which states that a contract that is null is deemed never to have existed. In such a case, the past effects of the contract are erased and the parties are restored to the legal and economic positions they were in before the juridical act was entered into (Desfossés, at para. 1699 555; Lluelles and Moore, at Nos. 1222-23; *Fortin v. Chrétien*, 2001 SCC 45, [2001] 2 S.C.R. 500, at para. 25). The rules on

receipt of a payment not due in arts. 1491 and 1492 *C.C.Q.* are also one of the sources of the obligation to make restitution (Lluelles and Moore, at No. 1362; Baudouin and Jobin, at No. 529; Pineau, Burman and Gaudet, at No. 263; Desfossés, at para. 1699 555). Thus, a payment made in error, in the absence of an obligational relationship, requires the person who receives it to make restitution (art. 1554 *C.C.Q.*; *Amex*, at paras. 28-39).

[48] Here, the trial judge concluded that the City had an obligation to restore to Octane the prestations received on the basis of a contract that was declared null. In his view, a contract had indeed been entered into by the City and Octane for the production of the launch event of May 17, 2007, but that contract had to be annulled because it had been entered into in violation of the rules for awarding contracts set out in ss. 573 et seq. *C.T.A.* The Court of Appeal considered itself bound by that conclusion and upheld the trial judge's decision. The majority added that, even if they had found that the City and Octane had not entered into a contract, they would nonetheless have ordered the restitution of prestations under the rules on receipt of a payment not due.

[49] In this Court, the City argues that the courts below erred in ordering restitution. First, it submits that no contract was entered into by the parties because it could not have given its consent to an agreement without a resolution duly passed by its municipal council or authorization by an officer acting under a delegation of powers who was entitled to consent in its name. As a result, it argues, an obligation to

make restitution cannot have originated in a juridical act that was subsequently annulled pursuant to art. 1422 *C.C.Q.*, because no such juridical act ever existed. Nor, the City adds, can an obligation to make restitution be grounded in receipt of a payment not due, because the conditions set out in art. 1491 *C.C.Q.* are not met. According to the City, Octane made a payment of \$82,898.63 to PGB, not to the City. And even if there was a payment, it was not made in error.

[50] We agree with the City that no contract came into existence between it and Octane for the event production services and that restitution therefore cannot be grounded in the retroactive annulment of a juridical act in accordance with the doctrine of nullity. Nonetheless, we are of the view that the conditions imposed by the rules on receipt of a payment not due are satisfied in the instant case, with the result that the parties must still be restored to their previous positions under arts. 1491 and 1492 *C.C.Q.* We will begin by looking at why the trial judge erred in finding that Octane and the City had a contract for the production of the event of May 17, 2007. We will then explain why the rules on receipt of a payment not due apply in the circumstances of this case.

(1) Non-existence of a Juridical Act That Could Be Annulled

[51] According to para. 1 of art. 1378 *C.C.Q.*, a contract is “an agreement of wills by which one or several persons obligate themselves to one or several other persons to perform a prestation”. In the absence of such an agreement of wills, no contract comes into existence. This is because the parties must express their will to

bind themselves in order for a contract to become a legal reality (M. Cumyn, *La validité du contrat suivant le droit strict ou l'équité: étude historique et comparée des nullités contractuelles* (2002), at No. 203; Lluelles and Moore, at No. 274; Baudouin and Jobin, at Nos. 172 and 420). As Lluelles and Moore explain, [TRANSLATION] “[c]onsent results, so to speak, from the uniting of two wills, which then become just one: this uniting of wills creates the legal relationship — the contract” (Lluelles and Moore, at No. 274). These two wills represent, on the one hand, the offer to contract and, on the other, the acceptance of that offer (arts. 1386 to 1397 *C.C.Q.*). Baudouin and Jobin note that there cannot truly be a contract without a meeting of the minds (Baudouin and Jobin, at No. 420). Therefore, before the quality of consent is even spoken of, consent must first exist (Lluelles and Moore, at No. 274).

(a) *Consent Under Municipal Law*

[52] As we have stated, the *C.C.Q.*'s rules apply to municipalities, but the special Acts by which they are constituted and which govern them may modify or derogate from those general law principles (art. 300 *C.C.Q.*). It is therefore important to determine how municipalities can express their will to be bound by contract under the applicable rules of municipal law.

[53] Under the rules of public law, resolutions and by-laws are the legal vehicles by which a municipality, through its decision-making body, the municipal council, expresses its will and its decisions (*Air Canada v. City of Dorval*, [1985] 1 S.C.R. 861, at p. 866; *Silver's Garage Ltd. v. Town of Bridgewater*, [1971] S.C.R.

577; *Poulin De Courval v. Poliquin*, 2018 QCCA 1534, at para. 18 (CanLII); *Amar v. Dollard-des-Ormeaux (Ville)*, 2014 QCCA 76, 18 M.P.L.R. (5th) 277, at para. 8; *Belœil (Ville de) v. Gestion Gabriel Borduas inc.*, 2014 QCCA 238; *9129-6111 Québec inc. v. Longueuil (Ville)*, 2010 QCCA 2265, 21 Admin. L.R. (5th) 320, at para. 18; *Cité de St-Romuald d'Etchemin v. S.A.F. Construction inc.*, [1974] C.A. 411, at pp. 414-15; *Bourque v. Hull (Cité)* (1920), 30 B.R. 221, at p. 224; Héту and Duplessis, at para. 8.3; A. Langlois, *Les contrats municipaux par demandes de soumissions* (3rd ed. 2005), at p. 153). These principles are set out in ss. 47 and 350 C.T.A., which provide, respectively, that a municipality shall be represented and its affairs administered by its council and that by-laws, resolutions and other municipal orders must be passed by the council in session (see also arts. 79 and 438 para. 1 of the *Municipal Code of Québec*, CQLR, c. C-27.1).

[54] A municipality may therefore, by by-law, delegate to an officer the power to incur obligations on its behalf (s. 477.2 C.T.A.; Héту and Duplessis, at paras. 8.3 and 9.40). Other bodies, such as an executive committee, may also be established to facilitate the effective management of a municipality (ss. 70.1 et seq. C.T.A.); the City itself has an executive committee that can grant contracts up to a maximum of \$100,000 (s. 33 para. 2 of the *Charter of Ville de Montréal, metropolis of Québec*, CQLR, c. C-11.4; Héту and Duplessis, at paras. 9.31-9.40).

[55] The purpose of these rules is clear: they are intended to safeguard and protect the collective interests of taxpayers while preventing anyone from being able

to squander public funds in a municipality's name (*Town of Bridgewater*, at p. 592). The protection of taxpayers' interests thus ensures that the "business of the inhabitants, by whom the town councillors are elected, can[not] be conducted at the whim of individual councillors or town employees" (*Town of Bridgewater*, at pp. 587-88). This reality also explains why the civil law doctrine of apparent mandate does not apply in the municipal context (*Verreault (J.E.) & Fils Ltée v. Attorney General of Quebec*, [1977] 1 S.C.R. 41; *GM Développement inc.*, at para. 21). The protection of taxpayers' interests requires that a municipality's consent be subject to conditions stricter than the ones set out in the *C.C.Q.* The appearance of consent is not sufficient, nor can a municipality's consent be inferred from its silence (*Town of Bridgewater*, at p. 588; *Bourque*, at p. 228; Hétu and Duplessis, at para. 9.31).

(b) *Absence of Consent in the Instant Case*

[56] It is not in dispute here that the City did not pass any resolution granting Octane a mandate to produce the event of May 17, 2007. The City passed resolutions only to approve the purchase orders for the first three mandates, which concerned, respectively, consulting services for the development of the launch concept, graphic design and the production of the materials used during the event. The invoices for those three mandates, which totalled \$52,203.34, were approved and paid by the City in March and April 2008, and the purchase orders were approved by the City's municipal council on October 27, 2008. However, none of those resolutions was

passed to authorize the fourth mandate for the production of the event of May 17, 2007, for which the invoice amounted to \$82,898.63.

[57] This leaves only the possibility that an authorized officer approved the mandate on the City's behalf. At the relevant time, a by-law granting such a delegation of powers to certain officers was in force: *By-law concerning the delegation of powers to officers and employees*, By-law 02-004, June 26, 2002 ("*Delegation By-law*"). The only officer who played a role in the project and who was acting under such a delegation is the City's director of transportation, Mr. Blanchet. However, as the trial judge noted, Mr. Blanchet's delegation did not authorize him to approve contracts with a value exceeding \$15,000, because only one professional services firm was solicited in this case. He had no authority to bind the City for a contract for \$82,898.63 (Sup. Ct., at para. 116). As for Mr. Thériault, he was not an officer of the City but rather a member of the political staff of the mayor's office. The *Delegation By-law* did not apply to him. As a result, he had no delegation of powers authorizing him to bind the City (Sup. Ct., at paras. 62 and 66; s. 114.7 C.T.A.).

[58] The bottom line is that the mandate on which Octane's action is based was never approved by a resolution passed by the City's municipal council or by an officer authorized by a valid delegation of powers. The Superior Court therefore erred in finding that a contract had been entered into by Octane and the City on the basis of the representations made by Mr. Thériault, and the Court of Appeal erred in according deference to a finding that was wrong in law. Absent any expression of the

City's will to be bound by such an agreement, no contractual relationship could arise between the parties (see *Amar*, at paras. 8-10; *Immeubles Beaurom ltée v. Montréal (Ville de)*, 2007 QCCA 41, [2007] R.D.I. 26, at paras. 22 and 29; *Aylmer (Ville) v. 174736 Canada inc.*, 1997 CanLII 10176 (Que. C.A.), at pp. 5-7; *Banque de Nouvelle-Écosse (Banque Scotia) v. Ville de Drummondville*, 2018 QCCS 5053, at para. 150 (CanLII)). Articles 1416 and 1422 *C.C.Q.* do not apply in such circumstances. It is not possible to annul an agreement that never came into existence (S. Gaudet, "Inexistence, nullité et annulabilité du contrat: essai de synthèse" (1995), 40 *McGill L.J.* 291 ("Gaudet"), at pp. 331-32).

[59] In such a context, as the Court of Appeal rightly noted in *GM Développement inc.*, there can be no restitution of prestations on this basis because [TRANSLATION] "the nullity or resolution of a non-existent contract cannot be shown" (para. 32). In that case, the appellant sought reimbursement from the City of Québec for professional expenses and fees incurred in the development phase of a project to revitalize a public square. The Court of Appeal found that there was no contractual relationship between the appellant and the city because the city had never passed a resolution or by-law authorizing the project. In *Unibec*, the Court of Appeal affirmed the principle that a municipality cannot be bound in the absence of a resolution or by-law because it speaks only through its municipal council (paras. 35-37). In that case, however, the court found that a verbal contract for additional work relating to an existing contract was null in the absence of a resolution by the municipal council. Without deciding whether this principle also applies to the amendment of an existing



contract, we are of the view that the absence of a resolution or by-law does not result in the nullity of the contract, but leads rather to the conclusion that no contract came into existence. Where a municipality has not expressed its will to be bound by contract, there is simply no contract to annul. That is the case here.

[60] This being established, some additional remarks are necessary with regard to the City's position. The City argues that, in order for a contract to arise, it is not enough for a municipality to express its will to be bound through a resolution or by-law; the procedures for awarding municipal contracts set out in ss. 573 et seq. *C.T.A.* must also be followed. The City thus contends that those rules are not merely conditions for the validity of the contract. Rather, they govern the expression of a municipality's will, and their violation therefore prevents an agreement that binds the municipality from even coming into existence. We do not accept this argument. Although the City correctly emphasizes the distinction between the existence and the validity of a contract, we cannot agree that compliance with the rules for awarding contracts is necessary for a municipality to express its will to contract.

[61] As we have said, a contract is defined as an agreement of wills by which one or several persons obligate themselves to one or several other persons (art. 1378 para. 1 *C.C.Q.*). Without such an agreement of wills, there is no contract. Where there is no offer, where an offer to contract is refused or where there is no acceptance, the end result is the same: the proposal to enter into a contract fails and therefore a

contract never comes into existence (arts. 1386 and 1387 *C.C.Q.*). This is what we mean here by the non-existence of a contract.

[62] However, once a contract crosses the threshold of legal existence (*Quebec (Agence du revenu) v. Services Environnementaux AES inc.*, 2013 SCC 65, [2013] 3 S.C.R. 838, at para. 27), certain conditions must be met to ensure its validity (Cumyn, at Nos. 223-24). In particular, the parties must have the capacity to consent and their consent must not be vitiated by error, the contract must have a cause and an object and, if the law requires, it must also have a particular form (art. 1385 *C.C.Q.*; Cumyn, at Nos. 223-24). Where one of these conditions is not met, the contract may be annulled; it will then be deemed never to have existed (arts. 1416 and 1422 *C.C.Q.*; Cumyn, at No. 224; Lluelles and Moore, at No. 1087; Baudouin and Jobin, at No. 377; Gaudet, at p. 332). But this does not mean that the contract never actually existed. Logically, a contract must exist before it can be annulled: if a contract did not become a legal reality, it cannot be deemed never to have existed, because it does not in fact exist. The distinction is important: the non-existence of a contract, unlike failure to meet a condition for validity, cannot be sanctioned by nullity (Gaudet, at pp. 331-32), and where a contract does not exist, the obligation to restore a prestation that has been provided must therefore be justified on a different basis.

[63] In our view, contrary to what the City argues, the rules for awarding contracts are not conditions for the existence of a municipal contract. The rules for awarding municipal contracts set out in ss. 573 et seq. *C.T.A.* do not concern the

manner in which a municipality expresses its will to be bound by contract. Rather, these provisions require a municipality to observe certain formalities, including a call for tenders, in order to give all citizens an equal opportunity to contract with the municipality, in addition to protecting the public interest by favouring competition (Garant, at pp. 405-08; Héту and Duplessis, at paras. 9.9-9.10; Giroux and Lemieux, at para. 5-005; 2736-4694 *Québec inc. v. Carleton—St-Omer (Ville de)*, 2006 QCCS 4726, aff'd 2007 QCCA 1789). The effect of these provisions is therefore to derogate from the principle of consensualism by limiting the method by which a municipality can choose the other party to certain types of contracts it enters into (Héту and Duplessis, at para. 9.73; Giroux and Lemieux, at para. 5-800; Langlois, at pp. 225-28; G. Pépin and Y. Ouellette, *Principes de contentieux administratif* (2nd ed. 1982), at p. 537).

[64] In this respect, calls for tenders and the rules for awarding contracts in general do not play the same role as resolutions or by-laws in the formation of municipal contracts. Resolutions and by-laws are the means by which a municipality expresses its will to be bound by contract, whereas the rules for awarding contracts establish the formalities that must be observed for a contract to be valid (Baudouin and Jobin, at No. 372; Giroux and Lemieux, at para. 5-800; Héту and Duplessis, at para. 9.73). The rules for awarding contracts do not exempt a municipality from having to pass a by-law or resolution to express its will to contract, and if it does not do so, no contract will cross the threshold of legal existence. Conversely, a contract entered into by resolution or by-law will in fact cross that threshold even if the rules

for awarding contracts have been violated. It follows that failure to comply with the procedure for awarding contracts taints the validity of the act and thus requires it to be annulled. This interpretation is also consistent with the case law and academic literature on this point: the courts sanction non-compliance with the rules for awarding contracts by annulling a contract, not by finding that it never existed (*Autobus Dufresne inc.*, at para. 41; *Construction Irebec inc.*, at para. 104; *Centre de téléphone mobile (Québec) inc.*, at para. 32; *Garant*, at p. 476; Hétu and Duplessis, at para. 9.73; Giroux and Lemieux, at para. 5-800; Baudouin and Jobin, at No. 372; Gaudet, at p. 361).

[65] Although restitution cannot be based on the doctrine of nullity in the instant case given the non-existence of a contract that could be annulled, this does not settle the matter. The rules on receipt of a payment not due can ground an obligation to restore the parties to their previous positions. We will now consider whether the conditions laid down by art. 1491 *C.C.Q.* in this regard are met.

(2) Receipt of a Payment Not Due

[66] Although the Court of Appeal upheld the trial judge's decision ordering the restitution of prestations on the basis of a juridical act that was declared null, the majority added that an obligation to restore the parties to their previous positions could also have been grounded in receipt of a payment not due. They noted that if they had found that no agreement had been entered into by the parties, they would have accepted that Octane had believed mistakenly, but in good faith, that it had been

given a mandate by the City to organize the launch of May 17, 2007. Because Octane had provided services without any obligation and in error, that payment would have been recoverable (C.A., at paras. 49-55).

[67] We agree. Octane provided services for the production of the City's launch event even though, in law, no agreement had been entered into because the City had not passed a resolution or by-law to express its will to bind itself by contract. As a result, the obligation that Octane believed it was performing did not exist. Given that liberal intention is not presumed, the City had to show that Octane provided those services knowing that it was not bound to do so. The City's arguments on this point do not support a conclusion that Octane had a purely liberal intention. In these circumstances, Octane is entitled to recovery for the services provided.

(a) *Conditions for Bringing an Action to Recover a Payment Not Due*

[68] Three conditions must be met to recover a payment not due under art. 1491 C.C.Q.: (1) there must be a payment, (2) the payment must have been made in the absence of a debt between the parties, and (3) the payment must have been made in error or to avoid injury (*Threlfall v. Carleton University*, 2019 SCC 50, at para. 78; *Willmor Discount Corp. v. Vaudreuil (City)*, [1994] 2 S.C.R. 210, at pp. 218-19; *9112-4511 Québec inc. v. Agence de développement de réseaux locaux de services de santé et de services sociaux de Laval*, 2008 QCCA 848, at para. 3 (CanLII); Boudouin and Jobin, at Nos. 530-31; Lluellas and Moore, at No. 1367; Pineau, Burman and Gaudet, at No. 264). Where these conditions are met, and subject

to the exception set out in art. 1491 para. 2 *C.C.Q.*, restitution of payments not due is made according to the rules for the restitution of prestations laid down in arts. 1699 to 1707 *C.C.Q.* (art. 1492 *C.C.Q.*; *Amex*, at para. 29; Baudouin and Jobin, at No. 529).

[69] The rules on receipt of a payment not due are based on the general principle set out in art. 1554 *C.C.Q.* that every payment presupposes an obligation. Absence of debt is essential to an action to recover a payment not due; it is what distinguishes a payment that is due from one that is not. Where a payment is due, there can be no obligation to make restitution, since the payment is meant to discharge the payer from an existing obligation; in such a case, the payee is entitled to keep the payment received (arts. 1554 and 1671 *C.C.Q.*; Pineau, Burman and Gaudet, at No. 263; Baudouin and Jobin, at No. 530). On the other hand, a person who receives a payment to which he or she has no right is bound to return it; otherwise, the person would be enriched without any justification in law for the gain (arts. 1491 and 1492 *C.C.Q.*; Baudouin and Jobin, at No. 529; Lluelles and Moore, at Nos. 1362-64; Pineau, Burman and Gaudet, at No. 263; *Amex*, at para. 29). It is truly the receipt of something not due that grounds an obligation to restore the parties to their previous positions (Pineau, Burman and Gaudet, at No. 263; see also Lluelles and Moore, at Nos. 1362-63; Fréchette, at p. 103).

[70] That being said, absence of debt alone will not suffice to make a payment recoverable. An obligation to make restitution will arise only if the payment was made in error or under protest. In many cases, proof of error will flow naturally from

proof of absence of debt. In principle, a payment is not made unless there is an obligation to do so: a person who provides property or a service generally does so in the belief that this will discharge an obligation that actually rests on him or her (art. 1554 *C.C.Q.*). However, while error is what usually explains a payment made in the absence of debt, the possibility that a payer acted with full knowledge of the facts cannot be ruled out. By making error an essential condition for an action to recover a payment not due, the legislature therefore ensures that property or a service provided purely as a liberality cannot become a source of obligation for a person who receives it without having intended to be bound. However, since liberal intention is not presumed, the burden of proof rests on the person alleging it (*Luelles and Moore*, at Nos. 1377-78; *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; Fréchette, at pp. 103-04). This was the approach adopted by this Court in *Amex*:

Once the payer proves that no debt exists, the payee must prove that the payment was not made in error, i.e. that it resulted from a [TRANSLATION] “liberal intention” . . . Liberal intention is not presumed. If the payee cannot prove this, the payment will be deemed undue and the debt inexistent. [para. 31]

[71] In the case at bar, the trial judge did not consider the issue of receipt of a payment not due given his finding that the City and Octane had entered into a contract. While the Court of Appeal upheld the Superior Court’s findings concerning the basis for restitution, the majority concluded that restitution could have also been

ordered on the basis of the rules on receipt of a payment not due. This issue was argued in this Court. In this regard, the City does not dispute the fact that the absence of debt condition is met here; in fact, it argues that it did not enter into an agreement with Octane and that there is therefore no obligational relationship. However, the City submits that the same is not true of the other two conditions for recovering a payment not due. The City essentially argues that Octane made no payment to it and that PGB was the one that actually provided the services in issue. It also argues that, if the Court finds that Octane did indeed make a payment to the City, restitution cannot be ordered because Octane, which was fully aware of the rules for the formation of municipal contracts, knew that no contract could be entered into unless the City passed a resolution or by-law. We reject each of these arguments.

(b) *Payment Made by Octane*

[72] The City's first argument is that it cannot have an obligation to restore the \$82,898.63 claimed by Octane because it was not the payee of that amount. The City bases this argument on an agreement signed by Octane and dated August 10, 2007, in which Gilles Blais of PGB acknowledged receiving \$82,898.63 from Octane for the services provided during the launch on May 17, 2007 and undertook to repay that amount to Octane upon payment by the City. The City alleges that it is a third party in relation to that agreement. In its view, it was PGB that received a payment.

[73] This reasoning is not persuasive. The City's argument is based on the incorrect premise that only the payment of a sum of money — here, the \$82,898.63



paid by Octane to PGB — can be characterized as a payment in Quebec civil law. However, art. 1553 *C.C.Q.* expressly provides that payment also means the performance of whatever forms the object of an obligation (*Willmor Discount Corp.*, at p. 218; Baudouin and Jobin, at Nos. 529 and 648; Lluelles and Moore, at No. 2627; Pineau, Burman and Gaudet, at No. 314). The provision of services can constitute payment within the meaning of art. 1553 *C.C.Q.* The City is wrong to exclude the services provided to it by Octane through its subcontractor, PGB, that is, the production of the event of May 17, 2007. From this perspective, it does not matter that Octane did not perform those services personally. Payment may validly be made by a representative of the debtor of an obligation, such as the debtor's mandatary or subcontractor, unless the nature or terms of the contract prevent such a delegation (arts. 1555 and 2101 *C.C.Q.*; Baudouin and Jobin, at Nos. 32 and 650; Lluelles and Moore, at No. 2646; Pineau, Burman and Gaudet, at No. 316). It is not in dispute that the City received services for the production of the event of May 17, 2007, which constituted a payment within the meaning of art. 1553 *C.C.Q.* The only question is therefore whether that payment can be attributed to Octane. In our opinion, it can.

[74] According to the evidence in the record, Octane and PGB signed a subcontracting agreement on May 15, 2007 for the production of the May 17 event for a lump sum of \$82,898.63. Although the City was not involved in choosing that subcontractor, the budget estimates submitted by Octane incorporated and detailed PGB's costs in the description of its services. It is clear that PGB was acting on Octane's behalf in producing the City's event and that the City did not object to this.

Indeed, this was the conclusion reached by the trial judge. He ordered restitution after finding that [TRANSLATION] “[t]he City benefited from the services provided by Octane and by its subcontractor, PGB, which handled the production of the event as such” (Sup. Ct., at para. 159; on this point, see also C.A., at paras. 49 and 52).

[75] In this context, it does not matter that PGB was responsible [TRANSLATION] “for performing the physical act” of producing the event (Baudouin and Jobin, at No. 650) and that Octane paid it \$82,898.63 as consideration. The provision of services to the City, that is, payment in the legal sense, originated from Octane. This condition for recovering a payment not due is met.

(c) *Error Made by Octane*

[76] The City’s next argument is that, even if there was a payment, Octane ought to have known that it had no contract with the City. The City maintains that the provision of services for which Octane seeks restitution by equivalence was not the result of an error. According to the City, because Octane neglected to make the necessary inquiries, it cannot rely on its error in seeking restitution of the prestations provided to the City.

[77] We disagree. The question is not what Octane should have known when it made the payment, but rather whether it in fact made an error. It is well established that a payer’s fault or negligence is not a bar to an action to recover a payment not due (*Green Line Investor Services Inc. v. Quin*, 1996 CanLII 5734 (Que. C.A.), at

pp. 7-12; *Confédération, compagnie d'assurance-vie v. Lareau-Lacroix*, 1997 CanLII 10277 (Que. C.A.), at pp. 10-12; *Société canadienne de sel ltée v. Dubord*, 2012 QCCS 1994, at paras. 92, 99 and 104-06 (CanLII); *Lluelles and Moore*, at No. 1379). In fact, para. 2 of art. 1705 *C.C.Q.* expressly contemplates the possibility that restitution may be due to the fault of one of the parties. Moreover, the payer's fault is not one of the exceptions to restitution provided for in para. 2 of art. 1491 *C.C.Q.* To conclude otherwise would mean that a person who receives a payment without right can keep it even though there is no justification for doing so (art. 1554 *C.C.Q.*). While an action in extracontractual liability may be brought by anyone who suffers injury as a result of the payer's fault, this does not preclude the application of the rules on receipt of a payment not due (*Green Line Investor*, at pp. 14-15; *Société canadienne de sel ltée*, at paras. 102-05; *Fréchette*, at pp. 148-60).

[78] Contrary to what the City states, this conclusion does not call into question the importance of the principle, which is well established in the case law and academic literature, that any person wishing to enter into a contract with a municipality must ensure that the requirements of the law have been complied with and that the municipality is acting within its powers (*Beaudry v. Cité de Beauharnois*, [1962] B.R. 738, at p. 743; *Pacific National Investments Ltd. v. Victoria (City)*, 2000 SCC 64, [2000] 2 S.C.R. 919, at para. 68; *Immeubles Beaurom ltée*, at para. 30; *Hétu and Duplessis*, at paras. 8.3, 9.34 and 9.36; *Garant*, at p. 374). This principle simply confirms the substance of the rules already discussed concerning the formation and validity of municipal contracts; those rules are a separate matter from the

appropriateness of restoring the value of services received without right. In this regard, the purpose of restitution is not to sanction negligence or fault, but rather to restore the parties to their previous positions where it is shown that one of them received something without having a right to it (Luelles and Moore, at Nos. 1367, 1367.1 and 1379; *Amex*, at para. 31). In the case at bar, we have already concluded that there was no contract between the City and Octane, so the only question to be answered in this regard is whether the provision of services by Octane resulted from an error and not from a liberal intention. For this purpose, it does not matter what Octane should or could have done to avoid making such an error.

[79] Given the nature of the evidence in the record, it cannot be concluded that Octane had a liberal intention to provide services to the City in the absence of a debt; quite the contrary. First of all, we reiterate that the trial judge found from the evidence that the City had indeed granted Octane a mandate for the production of the event (Sup. Ct., at paras. 75, 79 and 85). Although the trial judge's conclusion concerning the existence of a mandate is not correct in law because the City did not express its will, his findings of fact provide some insight into what Octane believed with regard to its understanding of an obligation to be performed, as well as into Octane's lack of liberal intention. The trial judge in fact found that Mr. Thériault had given Octane a mandate for the production of the event and had reassured it several times that it would be paid for the costs incurred.

[80] Furthermore, if the issue of Mr. Thériault’s personal liability is left aside for the moment, the testimony of Octane’s representatives filed in the record confirms that they did in fact believe they had an obligation to provide services for the production of the City’s May 17 event and that they had no intention of providing those services for free:

[TRANSLATION]

- “[T]he order came from an office of the mayor. It was a structuring event for the municipality. . . . We had an order to deliver an event. Later, more was added and people, staff were needed to organize the event.” [p. 52]
- “We were given an order on the twenty-first (21st) of April or around then to deliver . . . or the twenty-fifth (25th) of April . . . to deliver an event on the seventeenth (17th) of May.” [p. 52]
- “[I]t was necessary to deliver. So our mandate was to deliver.” [pp. 52-53]
- “We were called for . . . there was a big project. It had to be carried out. There were twenty-three (23) days to carry it out.” [p. 62]
- “We were told to go forward, and it was necessary to start making significant expenditures”. [p. 66]
- “I had to deliver, but at the same time the office was procrastinating . . . . We weren’t told where to send it. Up till then, I . . . the rules were complied with. We had an order.” [p. 72]
- “I would never, never, never have gone forward if I had no verbal approval, never.” [p. 74]
- “[W]e had approval for all our activities, approval to go forward with a show, with the related budgets. [A]s I see it, approval to go forward necessarily implies that the budget is also accepted.” [p. 81]

(testimony of Jean Battah, A.R., vol. VI)

- “There is no doubt in my mind that we had a mandate . . . we were carrying out and delivering a transportation plan launch in three (3) weeks.” [pp. 118-19]
- “[M]y understanding was that the City wasn’t able to issue a cheque because it wasn’t capable of moving quickly, so we were asked for the cheque, and we did it because it had to get done; it was the only way that the event would happen”. [p. 149]

(testimony of Pierre Guillot-Hurtubise, A.R., vol. XIV)

[81] This testimony shows that Octane sincerely believed that, given the urgency of the situation, the mayor’s office had the prerogative to approve a budget and then circulate the information to the City department responsible for the project (testimony of J. Battah, *ibid.*, at pp. 34-35, 40-41 and 60-61; testimony of Louis Aucoin, A.R., vol. VIII, at pp. 53-54 and 73-74). This explains why Octane [TRANSLATION] “assumed that the mayor’s office was passing on the information through its machinery to say that this was an event that was important to the City’s administration” (testimony of J. Battah, *ibid.*, at p. 54). In light of these extracts, we cannot conclude that Octane would have intended to provide the services in question if it had known that its obligation to the City did not exist in law.

[82] Finally, the doubt that the City is attempting to raise on the basis of the agreement of August 10, 2007 between Octane and PGB must be dispelled. In that agreement, Octane acknowledged that it had given PGB \$82,898.63 [TRANSLATION] “as an advance on a contract signed by the [C]ity of Montréal and Gilles Blais” (P-123, A.R., vol. IV, at p. 117). According to the City, the fact that Octane referred to a contract between PGB and the City establishes that Octane knew it had not itself

been given a mandate for this project. In our view, that agreement does not have the importance the City attributes to it. Octane's president testified that it did not matter whether it was PGB that signed an agreement with the City or whether it was the City that paid Octane's invoice: what was important was that Octane ultimately be paid for the costs incurred (testimony of J. Battah, *ibid.*, at pp. 22 and 87-88). Everything suggests that that agreement, signed three months after the events, merely provided the protection that Octane wanted to have to ensure that it would be reimbursed for the costs it had paid. The agreement simply tells us nothing about Octane's alleged liberal intention at the time the services in question were provided. On the contrary, it shows that Octane was actively seeking reimbursement and that it did not intend to provide the services to the City for free.

[83] We disagree with our colleagues that Octane provided the services knowing that it owed nothing and that therefore the error required for recovery of a payment not due has not been established. The argument advanced in this regard amounts to making Octane bear the burden of the error of law underlying the non-existence of its obligation; but as we said, the purpose of restitution under arts. 1491, 1492 and 1699 et seq. *C.C.Q.* is not to sanction negligence or fault, but rather to restore the parties to their previous positions where it is shown that one of them received something without having a right to it (see para. 78). As this Court noted in *Amex*, "the basis for restitution is that there never existed an obligation to perform the prestations, and the remedy is a return of any prestations made without obligation (arts. 1492 and 1699 para. 1)" (para. 32). Fault does not play any relevant

role. Apart from hazardous speculation in which this Court should not, in our view, be engaging, there is no basis for suggesting here that Octane had a personal interest in providing the services in question for free, that it sought to secure future contracts by doing so or that it chose simply to act at its own risk. In the absence of any liberal intention by Octane or any other cause that could justify its provision of the services to the City for free, it must be concluded that the services were provided as a result of an error, as required by art. 1491 *C.C.Q.*

[84] We will add the following. The fact that Octane's representatives never doubted, prior to 2010, that the City would pay these expenses says a great deal about the parties' understanding of the situation, even though that understanding was wrong in law. The sanitized facts presented by the City contrast sharply with the context in which the parties were acting. It was not until April 2007, barely four weeks before the proposed event, that Octane was first contacted by the City's director of transportation, who told it that the services provided internally were unsatisfactory. As the trial judge found, the City's transportation plan was one of the main commitments made by the City's administration in the 2005 municipal election. Octane was also one of the outside firms that had been involved in drafting that plan between 2005 and 2007. It was therefore in a very good position to understand the crucial importance of this project launch for the City. When the City invited Octane to a meeting at city hall with the main people working on the project, Mr. Thériault told Octane's representatives that [TRANSLATION] "the budget will be commensurate with the quality of your ideas" (Sup. Ct., at paras. 123-26). It was stressed that the



event would have to be a [TRANSLATION] “landmark” event that was “lavish” and “glitzy” (Sup. Ct., at para. 10), which confirms its importance. In addition, several hundred people from all circles were expected. It is difficult to argue, in such a context, that Octane intended to provide the services in question purely as a liberality.

[85] We conclude that the conditions imposed by the rules on receipt of a payment not due are met, such that the restoration of the parties to their previous positions must be ordered on this basis.

(3) Modalities and Scope of Restitution

[86] Clearly, restitution for the services provided by Octane for the production of the City’s May 17 event cannot be made in kind. As the trial judge stated, restitution must be made by equivalence in accordance with art. 1700 *C.C.Q.* The City is not challenging the trial judge’s finding that the services provided by Octane were of good quality and benefited the City (Sup. Ct., at paras. 100 and 160). It is also not challenging his finding concerning the fair value of those services (Sup. Ct., at para. 161), nor is it disputing the fact that the event lived up to expectations. In short, the City has identified no palpable and overriding error that would warrant this Court’s interference with the trial judge’s assessment, which must accordingly be upheld. Restitution by equivalence for the services provided corresponds to the cost of producing the event, \$82,898.63.

[87] With regard to the judicial discretion to refuse restitution or to modify the scope or modalities of restitution under para. 2 of art. 1699 *C.C.Q.*, the City has not satisfied us that the findings of the courts below on this point should be disturbed. We have already rejected the City's central argument that a court should systematically exercise its discretion to refuse restitution where the procedure for awarding municipal contracts has not been complied with. And in this case, the City has not proved that full restitution would accord an undue advantage to Octane. As the Court of Appeal noted, the trial judge found that the services provided by Octane for the transportation plan launch were of good quality and benefited the City (C.A., at para. 63; Sup. Ct., at paras. 159-60). The Court of Appeal also noted that the City was not disputing the fact that it had received the full benefit of those services (para. 64). Indeed, it is clear that refusing restitution for the value of the services rendered here would instead confer an undue advantage on the City. By benefiting from services that it received entirely for free without any right, it would be enriched at the expense of Octane, which would suffer a loss corresponding to that unjust gain.

(4) Applicable Prescriptive Period

[88] Lastly, the City argues that, in the absence of a contract between the parties, Octane's action to recover a payment not due is necessarily extracontractual in nature. According to the City, the action is therefore prescribed because it was brought after the expiry of the six-month period provided for in s. 586 *C.T.A.* The Superior Court and the Court of Appeal found that Octane's action was not

prescribed. In our view, the City's argument must fail. It reflects a misunderstanding of the concept of restitution of prestations in Quebec civil law.

[89] Section 586 *C.T.A.* simply does not apply in this case. That provision reads as follows:

**586.** Every action, suit or claim against the municipality or any of its officers or employees, for damages occasioned by faults, or illegalities, shall be prescribed by six months from the day on which the cause of action accrued, any provision of law to the contrary notwithstanding.

This section derogates from the general law rules of prescription. As such, it must be interpreted restrictively (C. Gervais, *La prescription* (2009), at p. 80; Héту and Duplessis, at para. 10.87). According to its wording, the six-month prescriptive period applies only to an action, suit or claim for damages. In *Amex*, this Court wrote that “the basis for restitution is not the commission of a wrongful act, and the potential remedy is not damages” (*Amex*, at para. 32; Lluelles and Moore, at No. 1253; Fréchette, at pp. 149-50 and 266-67). This reasoning reflects the fact that the restitution of prestations is governed by a specific mechanism that differs from the awarding of damages. While the rules of liability are based on the obligation to make reparation for injury caused to another by one's fault (art. 1457 *C.C.Q.*), the rules on restitution of prestations are based on the need to restore the parties to their previous positions, regardless of the fault committed by one of them (Fréchette, at pp. 139-40). In the case of recovery of a payment not due, the basis for restitution is that there never existed an obligation to perform a prestation (*Amex*, at para. 32). The parties are

restored to their previous positions, but this remedy cannot be characterized as damages.

[90] Moreover, the authorities recognize that an action to recover a payment not due is subject to the general law period of three years provided for in art. 2925 *C.C.Q.* (Baudouin and Jobin, at No. 533; *Tremblay v. 2543-7443 Québec inc.*, 1999 CanLII 11903 (Que. Sup. Ct.); *Steckmar Corp. v. Consultants Zenda ltée*, 2000 CanLII 18061 (Que. Sup. Ct.)). This is the period that applies here. The action brought by Octane against the City on May 14, 2010 is not prescribed.

### C. *Octane's Claim Against Mr. Thériault*

[91] We note in closing that the trial judge found that Mr. Thériault could be held personally liable on the facts because he had not only granted the mandate to Octane but had also provided assurances, before the payments to PGB, that the City would pay the costs incurred. The judge added that Mr. Thériault had done nothing to follow through on those promises and to make sure that Octane was paid (Sup. Ct., at paras. 128-35). He noted that, if he had not granted the principal conclusion against the City, he would have granted the alternative conclusion against Mr. Thériault (Sup. Ct., at para. 169).

[92] Since we are of the view that the City's appeal must be dismissed, there is no need to decide the issue raised by Octane's appeal with regard to Mr. Thériault's personal liability. However, we believe that it will be helpful to state the following.

The general law rules of civil liability apply to the various municipal actors, whether they are elected officials, officers or political staff members. In the words of L'Heureux-Dubé and LeBel JJ. in *Prud'homme*, “like anyone else, elected municipal officials may commit wrongful acts that cause injury to individuals in the performance of the duties of their office. . . . Outside the context of the collegial acts of the council, [they] are, as a rule, personally liable for their wrongful individual acts” (*Prud'homme*, at paras. 16 and 21). These words apply with even greater force to municipal officers and political staff members, since they do not have the “ambiguous” or “hybrid” legal status of elected municipal officials, who are representatives of both the municipality and their constituents (*Prud'homme*, at paras. 20 and 23). These persons may be liable if they make undertakings or provide assurances claiming that they are doing so on the municipality’s behalf, while knowing full well that this is not the case.

## VI. Conclusion

[93] The Superior Court and the Court of Appeal correctly stated the law when they found that the rules on restitution of prestations in arts. 1699 et seq. *C.C.Q.* apply in the municipal context. However, the restoration of the parties to their previous positions could not be ordered on the basis of a null juridical act given the non-existence of a contract between the City and Octane for the provision of services relating to the production of the launch event of May 17, 2007. Such restoration must instead be based here on the rules on receipt of a payment not due and must be for the

value of the services received by the City without right. The trial judge's finding that the fair value of the services provided was the cost paid by Octane for the production of the event, \$82,898.63, is not tainted by any palpable and overriding error that would justify this Court's intervention. Nor did the courts below err in declining to exercise the discretion to refuse restitution or to modify its scope or modalities. Accordingly, the City's appeal in file 38066 is dismissed. It follows that Octane's appeal in file 38073 is moot.

[94] On the issue of costs, Octane is claiming them on the usual basis for the proceedings in the courts below but on a solicitor-client basis for the proceedings in this Court. It argues that the exceptional circumstances that warrant an award of such costs are established here. It notes that its claim is only for reimbursement of an expense, namely PGB's costs, without any profit or management fee. In this context, it would be disproportionate to make it pay the legal fees and disbursements for the proceedings in this Court. It submits that the City's interest in having the issues decided goes beyond the facts of this case, particularly as regards the application of the rules on restitution of prestations in the municipal context and the coming into existence of municipal contracts.

[95] This request should not be granted. This Court awards costs on a solicitor-client basis only in exceptional cases, for example where one of the parties has displayed reprehensible, scandalous or outrageous conduct (*Young v. Young*, [1993] 4 S.C.R. 3, at p. 134; *Mackin v. New Brunswick (Minister of Finance)*; *Rice v.*

*New Brunswick*, 2002 SCC 13, [2002] 1 S.C.R. 405, at para. 86; *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71, [2003] 3 S.C.R. 371, at para. 60) or where the appeal raises issues of general importance that go beyond the particular case of the successful party (*Finney v. Barreau du Québec*, 2004 SCC 36, [2004] 2 S.C.R. 17, at para. 48; *Richard v. Time Inc.*, 2012 SCC 8, [2012] 1 S.C.R. 265, at para. 216; *Schachter v. Canada*, [1992] 2 S.C.R. 679, at p. 726). That is not the situation here. The fact that Octane has incurred additional costs to defend its position in this Court or that the issues in the case are of particular interest to the City does not justify departing from the usual practice in such matters. We would therefore award costs throughout to Octane on the usual basis in file 38066. In file 38073, in which the appeal is moot, no costs are awarded.

English version of the reasons of Moldaver, Côté and Brown JJ. delivered by

CÔTÉ AND BROWN JJ. —

## I. Introduction

[96] We have read the reasons of the Chief Justice and Gascon J.; they provide a thorough and comprehensive account of the facts and the judicial history, and we see no need to duplicate their efforts here, other than to briefly outline the context of the two appeals before us.

[97] The appeal of Ville de Montréal (“City”) in file No. 38066 seeks the dismissal of a claim for \$82,898.63 made by the respondent Octane Stratégie inc. (“Octane”) concerning professional and technical services provided by one of its subcontractors, Productions Gilles Blais (“PGB”), for the launch of the City’s transportation plan on May 17, 2007. Octane’s appeal in file No. 38073 is subsidiary in nature, since its only purpose is to obtain an award against a member of the political staff of the mayor’s office, the respondent Richard Thériault, in lieu of the City in the event that the City is successful in the main file.

[98] It is not in dispute that no valid contract was formed between Octane and the City for the services provided by PGB. It is therefore not disputed by the parties or by our colleagues that Octane’s claim could only be allowed through the application of the rules on restitution of prestations codified at arts. 1699 to 1707 of the *Civil Code of Québec* (“C.C.Q.”). There is, however, a debate about the source of the City’s alleged obligation to make restitution: would restitution be a consequence of the annulment of a contract formed between Octane and the City (art. 1422 C.C.Q.), or would it rather be a consequence of the City’s receipt of a payment that was quite simply not due (arts. 1554, 1491 and 1492 C.C.Q.)?

[99] Like our colleagues, we find that, in the instant case, the restitution of prestations cannot result from the mechanism of annulment of a contract, since the “contract” on which Octane bases its claim is quite simply non-existent in the absence of a by-law or resolution passed by the City’s municipal council expressing its



intention to be bound by contract to Octane for the services rendered by PGB. Moreover, no municipal officer duly authorized by a valid delegation of powers consented to such a contract on the City's behalf. As for the prescription of Octane's action against the City, like our colleagues, we accept that the action is not prescribed.

[100] However, we part ways from our colleagues where they conclude that the conditions for bringing an action to recover a payment not due are met, and particularly where they find that Octane paid the City in error. Octane knew the rules governing the formation and awarding of municipal contracts, and it therefore knew that it had no contract with the City at the time of payment. It is true that Octane paid when it was not bound to do so, but it paid with full knowledge in such a way that it cannot now rely on the mechanism of receipt of a payment not due. Moreover, the onus was on Octane to ensure that the proper procedure would be followed in entering into the contract, and it cannot claim that this onus, which rested on it, shifted to Mr. Thériault.

## II. Analysis

### A. *The City's Appeal (File No. 38066)*

#### (1) Restitution of Prestations in the Civil Law

[101] Article 1699 para. 1 *C.C.Q.* provides that “[r]estitution of prestations takes place where a person is bound by law to return to another person the property he has received”. As Octane acknowledges in its factum (para. 76), it follows from the clear wording of this provision that it does not create any [TRANSLATION] “stand-alone equitable remedy”; it simply describes the circumstances in which restitution takes place on the basis of obligations whose source lies elsewhere in the law (M. Tancelin, *Des obligations en droit mixte du Québec* (7th ed. 2009), at p. 390).

[102] The rules on restitution of prestations are broad. Article 1699 para. 1 *C.C.Q.* refers to at least three scenarios: (1) where a person has received property “without right or in error” (for example, the receipt of a payment not due: arts. 1554, 1491 and 1492 *C.C.Q.*), (2) where a person has received property “under a juridical act which is subsequently annulled with retroactive effect” (for example, the annulment of a contract: art. 1422 *C.C.Q.*), and (3) where a person has received property under a juridical act but the person’s “obligations become impossible to perform by reason of superior force” (J.-L. Baudouin and P.-G. Jobin, *Les obligations* (7th ed. 2013), by P.-G. Jobin and N. Vézina, at No. 920; D. Lluelles and B. Moore, *Droit des obligations* (3rd ed. 2018), at No. 1227).

[103] In any of these three scenarios, the restitution of prestations is, in principle, required. Article 1699 para. 2 *C.C.Q.* allows a court to exceptionally refuse restitution or modify its scope or modalities where it would have the effect of

according an undue advantage to one party. However, the court’s discretionary power under art. 1699 para. 2 *C.C.Q.* is quite exceptional (*Amex Bank of Canada v. Adams*, 2014 SCC 56, [2014] 2 S.C.R. 787, at para. 38; *Montréal (Ville de) v. St-Pierre (Succession de)*, 2008 QCCA 2329, [2009] R.J.Q. 54; Baudouin and Jobin, at No. 921; Lluelles and Moore, at No. 1237; J. Pineau, D. Burman and S. Gaudet, *Théorie des obligations* (4th ed. 2001), by J. Pineau and S. Gaudet, at pp. 395-96).

[104] In this case, the majority of the Court of Appeal (2018 QCCA 223, 81 M.P.L.R. (5th) 3, at paras. 47-49) relied on two distinct sources to ground the City’s obligation to make restitution: first, the annulment of a contract allegedly formed between Octane and the City (art. 1422 *C.C.Q.*), and second, the City’s receipt of a payment that was simply not due to it (arts. 1554, 1491 and 1492 *C.C.Q.*). Our colleagues, for their part, rely solely on receipt of a payment not due, as they recognize that no contract was formed between Octane and the City (paras. 32 and 50).

[105] A few observations are in order here.

[106] At the hearing before this Court, counsel for Octane admitted that [TRANSLATION] “the case was not put together that way [and] the evidence was not adduced with receipt of a payment not due in mind” (transcript, at p. 63). At trial, Octane “did not raise receipt of a payment not due” because it simply “replied to the City’s arguments . . . alleging that the contract was null” (p. 58). Counsel for Octane

also candidly acknowledged before us that “other questions or other evidence or other witnesses would perhaps have been necessary” regarding this issue (p. 63).

[107] Nor did Octane rely on receipt of a payment not due before the Court of Appeal, including [TRANSLATION] “in oral argument”, where there was no “debate on receipt of a payment not due” (transcript, at p. 64). In other words, it appears that receipt of a payment not due was raised by the majority of the Court of Appeal on its own initiative while the case was under advisement, without the parties having been heard on this point. In her concurring reasons, Hogue J.A. in fact found that it was unnecessary [TRANSLATION] “to determine whether the scheme for recovery of a payment not due could apply if no contract had been entered into”, since that scheme “has its own rules, which are not easy to apply in the context of the instant case, where the known facts are limited” (para. 74 (emphasis added)).

[108] We share Hogue J.A.’s concerns. The evidence adduced at trial is simply insufficient for us to properly apply the mechanism of receipt of a payment not due to the facts of this case. The parties’ submissions concerning this mechanism in the courts below and in this Court are also insufficient. In its factum (para. 162), Octane in fact agrees with the concurring reasons of Hogue J.A. of the Court of Appeal on this point:

[TRANSLATION] . . . articles 1422, 1699 and 1700 C.C.Q. provide a complete solution to Octane’s situation, without it being necessary to consider whether Octane would also have been entitled to one under articles 1491 and 1492 C.C.Q. [Emphasis added.]

[109] However, Octane did not completely abandon the argument concerning receipt of a payment not due before our Court, since it essentially raised this argument on an alternative basis at the hearing. We are therefore prepared to analyze the mechanisms of annulment of a contract and receipt of a payment not due as possible sources of the City's alleged obligation to make restitution. In fact, our colleagues' reasons invite us to do so.

(2) Restitution of Prestations as a Consequence of the Annulment of a Contract (Article 1422 C.C.Q.)

(a) *Restitution of Prestations Can Be Ordered Where a Municipal Contract Is Annulled*

[110] Any contract which does not meet the necessary conditions of its formation may be annulled (art. 1416 C.C.Q.). A contract is absolutely null where the condition of formation sanctioned by its nullity is necessary for the protection of the general interest (art. 1417 C.C.Q.). It is relatively null where the condition of formation sanctioned by its nullity is necessary for the protection of an individual interest (art. 1419 C.C.Q.).

[111] Article 1385 para. 1 C.C.Q. states that “[a] contract is formed by the sole exchange of consents between persons having capacity to contract, unless, in addition, the law requires a particular form to be respected as a necessary condition of its formation”. Sections 573 et seq. of the *Cities and Towns Act*, CQLR, c. C-19

(“C.T.A.”), provide in this regard that certain formalities must be observed in the awarding of municipal contracts.

[112] Pursuant to those rules, all contracts for less than \$25,000 may be entered into by agreement (*An Act to amend various legislative provisions concerning municipal affairs*, S.Q. 2001, c. 25, ss. 34, 54 and 512; J. Héту and Y. Duplessis, with L. Vézina, *Droit municipal: Principes généraux et contentieux* (2nd ed. (loose-leaf)), vol. 1, at para. 9.53). However, a contract referred to in any of the subparagraphs of s. 573 para. 1 C.T.A., including a services contract (other than for services provided exclusively by certain listed professionals, professional services that are necessary for the purposes of a proceeding before a court or quasi-judicial tribunal, and professional services excluded pursuant to, among other provisions, s. 573.3 C.T.A.), may only be awarded after a call for tenders by written invitation, if it involves an expenditure of at least \$25,000 but less than \$100,000<sup>1</sup> (s. 573.1 C.T.A.; Héту and Duplessis, at paras. 9.59 and 9.63). In addition, a contract referred to in any of the subparagraphs of s. 573 para. 1 C.T.A., including a services contract (subject to the above-mentioned exceptions), may be awarded only after a public call for tenders published by means of an electronic tendering system, if it involves an expenditure equal to or greater than \$100,000 (Héту and Duplessis, at paras. 9.57, 9.59 and 9.85).

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<sup>1</sup> Since Bill 155, *An Act to amend various legislative provisions concerning municipal affairs and the Société d'habitation du Québec*, S.Q. 2018, c. 8, was assented to on April 19, 2018, the \$100,000 threshold has been increased by ministerial regulation, and in 2018 it was set at \$101,100: see, in this regard, J. Héту and Y. Duplessis, at para. 9.53.

[113] As our colleagues note (para. 39), the purpose of ss. 573 et seq. *C.T.A.* is to protect public funds and taxpayers' interests. These provisions set out imperative standards of public order. Absolute nullity therefore sanctions a contract entered into in violation of these rules, since they are necessary for the protection of the general interest (art. 1417 *C.C.Q.*; Baudouin and Jobin, at No. 372; Hétu and Duplessis, at paras. 9.13 and 9.73; P. Giroux and D. Lemieux, *Contrats des organismes publics québécois* (loose-leaf), at para. 5-800; *Community Enterprises Ltd. v. Acton Vale (Ville)*, [1970] C.A. 747 (Que.); *Construction Hydrex inc. v. Havre St-Pierre (Corporation municipale de)*, [1980] C.S. 1038; *Jourdain v. Ville de Grand-Mère*, [1983] J.Q. No. 360 (QL) (Sup. Ct.); *Boisvert v. Baie-du-Febvre (Municipalité de)*, [1992] J.Q. No. 2574 (QL) (Sup. Ct.)).

[114] In the present case, the Superior Court (2015 QCCS 5456, 16 M.P.L.R. (5th) 309) expressed the view that a contract had been formed between Octane and the City for the services rendered by PGB but that the contract was null because it had been entered into in violation of the imperative standards of public order set out in ss. 573 et seq. *C.T.A.* concerning the awarding of municipal contracts (paras. 75, 136-38, 140 and 148). The Superior Court therefore ordered the restitution of prestations based on the annulment of a contract (paras. 148-65). The Court of Appeal considered itself bound by the finding that a contract had been formed and also endorsed the Superior Court's reasoning concerning the annulment of that contract and the resulting restitution of prestations (paras. 47-48). Of course, a services contract with a value of \$82,898.63 like the one which, according to the courts below,

was formed between Octane and the City for the services rendered by PGB should have been awarded after a call for tenders by written invitation in accordance with s. 573.1 *C.T.A.* (Sup. Ct., at para. 138; C.A., at para. 47). If such a contract had in fact been formed, which, as we shall see, is not the case, it would have been absolutely null in addition to giving rise to the penalties provided for by the *C.T.A.* (s. 573.3.1.1.1 *C.T.A.*).

[115] Article 1422 *C.C.Q.*, which sets out the effect of nullity, expressly creates an obligation to make restitution. It makes specific reference to the rules on restitution of prestations codified at arts. 1699 to 1707 *C.C.Q.* Restitution of prestations is therefore the natural consequence of the annulment of a contract with retroactive effect (Lluelles and Moore, at No. 1224). Indeed, the French version of art. 1699 para. 1 *C.C.Q.* leaves no doubt in this regard: restitution takes place “*chaque fois*” (each time) a juridical act is annulled with retroactive effect. As D. Lluelles and B. Moore explain with respect to art. 1699 para. 1 *C.C.Q.*, at No. 1229: [TRANSLATION] “The imperative tone of this provision makes it clear that judges have no choice but to order restitution following annulment”, and “[t]he very fact that the second paragraph of this provision gives judges the exceptional power to refuse restitution — to avoid ‘an undue advantage’ — reinforces the mandatory nature of restitution”. Moreover, as our colleagues again note (para. 40), recent judgments of the Court of Appeal confirm that it is possible to order the restitution of prestations where a municipal contract is annulled: see, e.g., *Repentigny (Ville de) v. Les Habitations de la Rive-Nord inc.*, 2001 CanLII 10048 (Que. C.A.); *St-Pierre*



(*Succession de*); *Lacroix & Fils ltée v. Carleton-sur-Mer (Ville)*, 2014 QCCA 1345, 27 M.P.L.R. (5th) 10; see also Lluelles and Moore, at No. 1227 ([TRANSLATION] "[t]he necessary restitution of prestations applies not only to private law contracts, whether commutative or aleatory, but also to provincial or municipal administrative contracts, subject, in the latter case, to statutory provisions that are explicitly to the contrary"). Such case law is no doubt compatible with this Court's decision in *Pacific National Investments Ltd. v. Victoria (City)*, 2004 SCC 75, [2004] 3 S.C.R. 575, which was a common law decision but which, in the civil law under the *C.C.Q.*, would have resulted in restitution of prestations based on the annulment of a municipal contract.

[116] However, the annulment of a contract presupposes the *existence* of the contract. As the Court of Appeal stated in *Québec (Ville) v. GM Développement inc.*, 2017 QCCA 385, 72 M.P.L.R. (5th) 203, at para. 32, [TRANSLATION] "the nullity or resolution of a non-existent contract cannot be shown". In the present case, the City is in fact arguing that the issue is not the nullity of a municipal contract, but rather the non-existence of any "contract" between it and Octane (A.F., at para. 47).

(b) *The Annulment of a Contract Presupposes the Existence of the Contract*

[117] Like our colleagues (paras. 59, 61-62 and 65), we are of the view that the City's alleged obligation to make restitution cannot originate in the annulment of a contract pursuant to art. 1422 *C.C.Q.*, because no contract was formed between Octane and the City. The "contract" on which Octane's claim is based is quite simply

non-existent, and there is therefore no “juridical act” that can be “annulled with retroactive effect” within the meaning of art. 1699 para. 1 *C.C.Q.* As our colleagues rightly note, at para. 62, “[l]ogically, a contract must exist before it can be annulled: if a contract did not become a legal reality, it cannot be deemed never to have existed, because it does not in fact exist”.

[118] We also agree with our colleagues’ conclusion (para. 62) that the distinction between a non-existent contract and a null contract is important, because where a contract is non-existent, there can be no restitution of prestations as a consequence of the annulment of an invalid contract (arts. 1422 and 1699 *C.C.Q.*). Rather, any obligation to make restitution must be justified on a different basis, such as receipt of a payment not due (arts. 1554, 1491, 1492 and 1699 *C.C.Q.*). Indeed, the non-existence of a contract, or debt, between the parties is precisely one of the conditions for bringing an action to recover a payment not due: see, in this regard, *Aliments Breton (Canada) inc. v. Oracle Corporation Canada inc.*, 2015 QCCA 336, at para. 14 (CanLII) ([TRANSLATION] “[r]eceipt of a payment not due suggests the absence of an obligation owed to the party bound to make restitution, whereas the resolution [or nullity] of an agreement connotes the existence of a contractual obligation”). As M. Cumyn states:

[TRANSLATION] **Consequences of non-existence in strict law.** The consequences of non-existence are very similar in factual terms to those of absolute nullity, but their legal basis is different. In the case of non-existence, unlike nullity, there is no response by the law against the material effects of the apparent act. Parties that have performed prestations in reliance on the appearance of a contract that turns out to be

non-existent end up in exactly the same position as if they had acted spontaneously, without any contract. The rules associated with lack of title or the making of payments not due must therefore be applied to them. A party that thinks it sold its property under a non-existent contract can claim the property, because it never stopped being the owner thereof. A party paid in error must return the payment. [Emphasis added.]

*(La validité du contrat suivant le droit strict ou l'équité: étude historique et comparée des nullités contractuelles* (2002), at p. 174)

[119] Contemporary authors have difficulty accepting the very concept of non-existence of a contract: see, e.g., Baudouin and Jobin, at No. 385; Lluelles and Moore, at Nos. 1103-04 and 1113. Indeed, Hogue J.A. of the Court of Appeal noted this in her concurring reasons (para. 72) when she stated that, in principle, there is no longer any reason under the *C.C.Q.* to distinguish between acts that are null and acts that are annulable. Most authors under the *Civil Code of Lower Canada* drew a distinction between acts that were “void” (or null) and acts that were “voidable” (or annulable). An act was “void” where it contravened an imperative standard of public order (such an act would now be referred to as “absolutely null”) or where there was a complete absence of consent (which had to do with the “non-existence” of the contract itself). However, an act was simply “voidable” where an important, but non-essential, condition of formation of a contract was not met (a defect of consent, for example) (on this point, see Lluelles and Moore, at Nos. 1101 and 1102). Nevertheless, it can be seen that certain other authors affirm the importance of the concept of non-existence: see, e.g., Cumyn; S. Gaudet, “Inexistence, nullité et annulabilité du contrat: essai de synthèse” (1995), 40 *McGill L.J.* 291; X. Barré, “Nullité et inexistence ou les bégaiements de la technique juridique en France”

(1992), 26 *R.J.T.* 20; P.-G. Jobin, “L’inexistence dans le droit commun des contrats” (1974), 15 *C. de D.* 173. As M. Cumyn explains, at p. 37: [TRANSLATION] “Many contemporary authors recognize that non-existence cannot be dispensed with entirely, because it is conceptually necessary to distinguish a situation where no contract has been formed from a situation where a contract has been formed but is not valid”.

[120] In civil law, the existence of a contract is conditional on the manifestation of a will to be bound by contract. A contract is defined as “an agreement of wills” (art. 1378 para. 1 *C.C.Q.*) and is formed “by the sole exchange of consents” (art. 1385 para. 1 *C.C.Q.*), and this exchange of consents is accomplished “by the express or tacit manifestation of the will of a person to accept an offer to contract made to him by another person” (art. 1386 *C.C.Q.*). In the absence of such [TRANSLATION] “facts giving rise” to a contract, “then no act exists at all” (Gaudet, at pp. 336-37). Indeed, a contract’s non-existence results from the absence of the formal conditions for its existence, namely offer and acceptance (Cumyn, at pp. 150 and 155). Where, objectively speaking, the manifestation of a will to be bound by contract is absent, that is, where there is no offer to contract or where such an offer is refused or not accepted, [TRANSLATION] “there is no contract” (Cumyn, at p. 155).

[121] As our colleagues note (para. 53), by-laws and resolutions are the legal vehicles by which a municipality, through its decision-making body, the municipal council, expresses its will (*Air Canada v. City of Dorval*, [1985] 1 S.C.R. 861, at p. 866; *Silver’s Garage Ltd. v. Town of Bridgewater*, [1971] S.C.R. 577, at p. 586;

*Poulin De Courval v. Poliquin*, 2018 QCCA 1534, at para. 18 (CanLII); *Habitations Germa inc. v. Ville de Rosemère*, 2017 QCCA 1294, at para. 6 (CanLII); *Amar v. Dollard-des-Ormeaux (Ville)*, 2014 QCCA 76, 18 M.P.L.R. (5th) 277, at para. 8; *Belœil (Ville de) v. Gestion Gabriel Borduas inc.*, 2014 QCCA 238; 9129-6111 *Québec inc. v. Longueuil (Ville)*, 2010 QCCA 2265, 21 Admin. L.R. (5th) 320, at para. 18; *Lévesque v. Carignan (Corp. de la ville de)*, AZ-98026278 (Que. Sup. Ct.); Héту and Duplessis, at paras. 9.31, 9.33-9.34 and 9.38). In other words, it is through by-laws or resolutions of members of its council in session that a municipality has the general power to bind itself by contract (ss. 47 and 350 *C.T.A.*; *Ville de Saguenay v. Construction Unibec inc.*, 2019 QCCA 38, at para. 35 (CanLII)). As the Court of Appeal put it in *Unibec* (para. 35):

[TRANSLATION] a local municipality cannot be bound financially to a third party unless a resolution or by-law so provides. This is a measure enacted in the interest of local municipalities, and therefore of the public, to promote the sound administration of public funds and transparency in decision making and to prevent collusion and corruption. [Emphasis added; footnotes omitted.]

[122] Certain other bodies, such as an executive committee, may also be established to facilitate the effective management of a municipality (ss. 70.1 et seq. *C.T.A.*), and a municipal charter may thus give an executive committee the power to enter into contracts on behalf of the municipality (Héту and Duplessis, at paras. 9.31 and 9.39). A municipality may also, through a by-law passed by its council, delegate to an officer the power to incur obligations on its behalf (s. 477.2 *C.T.A.*; Héту and Duplessis, at para. 9.39). [TRANSLATION] “An officer may exercise

the power delegated by the council only if there are funds available for the proposed expenditure” (Hétu and Duplessis, at para. 9.39; see also *Construction Irebec inc. v. Montréal (Ville de)*, 2015 QCCS 4303, at para. 89 (CanLII)).

[123] In the case at bar, a by-law granting such a delegation of powers to certain officers was in force at the relevant time (*By-law concerning the delegation of powers to officers and employees*, By-law 02-004, June 26, 2002 (“*Delegation By-law*”). However, since only one “professional services” firm was solicited, no officer of the City had a delegation of powers authorizing him or her to enter into a contract with a value exceeding \$25,000 (art. 22 of the *Delegation By-law*; testimony of Gilles Robillard, A.R., vol. XIII, at pp. 96-97). As a result, no duly authorized officer could have incurred an obligation in the amount of \$82,898.63 on the City’s behalf. The City’s executive committee could certainly have expressed the will to do so on the City’s behalf, given that the committee has the power to grant “any contract involving an expenditure that does not exceed \$100,000” (s. 33 para. 2 of the *Charter of Ville de Montréal, metropolis of Québec*, CQLR, c. C-11.4), but it is not alleged here that the executive committee exercised such a power on the City’s behalf. It is also not disputed that no by-law or resolution of the City’s municipal council exists in which the City expressed its will to be bound by contract to Octane for the services rendered by PGB (our colleagues’ reasons, at para. 56; A.F., at para. 79).

[124] The Superior Court nonetheless found that Mr. Thériault had given Octane a mandate and had assured it that it would be paid (para. 135). However,

Mr. Thériault was not invested with any delegation of powers authorizing him to make contracts on the City's behalf, since he was a member of the political staff of the mayor's office, not a municipal officer or employee (Sup. Ct. reasons, at paras. 62-66; ss. 114.7 and 477.2 *C.T.A.*).

[125] Like our colleagues (para. 55), we must also insist on the fact that the doctrine of apparent mandate codified at art. 2163 *C.C.Q.* does not apply in the municipal context (*Verreault (J.E.) & Fils Ltée v. Attorney General of Quebec*, [1977] 1 S.C.R. 41, at p. 47; *GM Développement inc.*, at para. 21; *Gestion Gabriel Borduas inc.*, at para. 69 (CanLII); *Cité de St-Laurent v. Boudrias*, [1974] C.A. 473 (Que.), at p. 475; Héту and Duplessis, at para. 9.36; P. Garant, *Précis de droit des administrations publiques* (6th ed. 2018), at p. 160).

[126] On this point, it is useful to recall that legal persons established in the public interest, such as municipalities, are primarily governed by the special Acts by which they are constituted and that the *C.C.Q.* is therefore merely suppletive in nature in this area (art. 300 *C.C.Q.*). Article 1376 *C.C.Q.* provides in this regard that the rules set forth in the Book on Obligations — including art. 2163 *C.C.Q.* and the doctrine of apparent mandate it codifies — “apply to the State and its bodies, and to all other legal persons established in the public interest, subject to any other rules of law which may be applicable to them”. This Court has found, for example, that “general principles” or “rules of public law” may either prevent the general rules of civil liability from applying or substantially alter how they are applied: *Hinse v.*

*Canada (Attorney General)*, 2015 SCC 35, [2015] 2 S.C.R. 621, at para. 22; *Finney v. Barreau du Québec*, 2004 SCC 36, [2004] 2 S.C.R. 17, at para. 27; *Prud'homme v. Prud'homme*, 2002 SCC 85, [2002] 4 S.C.R. 663, at para. 31; *Canadian Food Inspection Agency v. Professional Institute of the Public Service of Canada*, 2010 SCC 66, [2010] 3 S.C.R. 657, at para. 26.

[127] In our view, the non-application of the doctrine of apparent mandate in the municipal context is a “general principle” or “rule of public law” that prevails over the civil law rules. It is a control measure enacted in the interest of the public to ensure sound administration and transparency (*Immeubles Beaurom ltée v. Montréal (Ville de)*, 2007 QCCA 41, [2007] R.D.I. 26, at paras. 23 and 30). As our colleagues note (para. 55), in order to safeguard and protect the collective interests of taxpayers, it is necessary to prevent “anyone from being able to squander public funds in a municipality’s name”.

[128] This rule therefore seems to us to be entirely justified. A mandate to enter into contracts on a municipality’s behalf cannot exist in the absence of a valid delegation of powers through a by-law of the municipal council, in accordance with s. 477.2 *C.T.A.* The municipality must make such a delegation by-law accessible by publishing it on the Internet (s. 573.3.1.2 *C.T.A.*; Hétu and Duplessis, at para. 9.39). There can therefore be no reasonable grounds to believe in the existence of a non-existent mandate; ignorance of the law is no excuse in this context. “[I]n light of the old adage ‘ignorance of the law is no excuse’, everyone is taken to know the



scope of the powers of a public agent” (R. Dussault and L. Borgeat, *Administrative Law: A Treatise* (2nd ed. 1985), vol. 1, at p. 501). As the Court of Appeal stated in *Boudrias*, [TRANSLATION] “[a]n administrative contract is subject to mandatory formalities intended to protect the public purse”, and a person wishing to enter into a contract with a municipality “cannot evade administrative law requirements by relying on their good faith, their ignorance of the law, the doctrine of apparent mandate or the doctrine of tacit mandate” (p. 475).

[129] Moreover, and most importantly, it is very firmly established that persons wishing to enter into a contract with a municipality “must at their peril ascertain that the statutory body which assumes to delegate important functions involving the exercise of discretion to committees or persons has in fact the power so to delegate and that the particular person dealt with is acting pursuant to due authority so lawfully delegated” (*Silver’s Garage Ltd.*, at p. 593; see also *Pacific National Investments Ltd. v. Victoria (City)*, 2000 SCC 64, [2000] 2 S.C.R. 919, at para. 68; *St-Pierre (Succession de)*, at para. 35; *Beurom*, at para. 30; *Beaudry v. Cité de Beauharnois*, [1962] B.R. 738 (Que.), at pp. 743-44 ([TRANSLATION] “it has always been recognized by authors and the courts that those who contract with a municipality must ensure not only that the municipality is acting within its powers but also that all legal requirements have been met; otherwise, the municipality is not bound to them”); Hétu and Duplessis, at para. 9.34 ([TRANSLATION] “it is [up to] those dealing with a municipality to ensure that both the municipality and its employees are acting within their powers and that all legal requirements for entering into the contract have been

met, [and] [t]hose who contract with a municipality must ensure that the person with whom they are dealing is authorized to act on the municipality's behalf"). As Hétu and Duplessis indicate, this [TRANSLATION] "requirement [is] strict, but it serves the general public interest and it is the price to be paid for dealing with a municipality" (para. 9.2).

[130] In short, the "contract" on which Octane's claim is based is quite simply non-existent. No municipal contract can come into existence in the absence of any manifestation whatsoever of a municipality's will to be bound by contract. Logically, therefore, the restitution of prestations cannot in the instant case be the consequence of the annulment of a contract. The City's obligation to make restitution must instead be justified on a different basis. According to our colleagues, the mechanism of receipt of a payment not due provides a basis for the restitution of prestations in this case. We are in complete but respectful disagreement with them on this point.

(3) Restitution of Prestations as a Consequence of Receipt of a Payment Not Due (Articles 1554, 1491 and 1492 C.C.Q.)

[131] The mechanism of receipt of a payment not due is [TRANSLATION] "infused with the principle that no one should enrich themselves unjustly at the expense of another" (Pineau, Burman and Gaudet, at p. 491 (emphasis added)). This mechanism is one of those [TRANSLATION] "concrete cases for which courts, under the influence of the academic literature, have transposed the rules to similar, related

scenarios, known as unjust enrichment (in French, “*enrichissement sans cause*”, which became “*enrichissement injustifié*”), 1493 C.C.Q.” (Tancelin, at p. 370).

[132] But just as they rejected the application of the doctrine of apparent mandate in this area, courts have traditionally rejected the application of the *principle* of unjust enrichment in the municipal context (*Lalonde v. City of Montreal North*, [1978] 1 S.C.R. 672, at p. 695; *Olivier v. Corporation du Village de Wottonville*, [1943] S.C.R. 118, at pp. 124-25; *Cité de St-Romuald d’Etchemin v. S.A.F. Construction inc.*, [1974] C.A. 411 (Que.), at p. 415; *Corporation municipale de Havre St-Pierre v. Brochu*, [1973] C.A. 832 (Que.); *Cité de Montréal v. Teodori*, [1970] C.A. 401 (Que.); *Beaudry; Bourque v. Cité de Hull* (1920), 30 B.R. 221 (Que.), at p. 229).

[133] The non-application of the principle of unjust enrichment in the municipal context that was established under the *Civil Code of Lower Canada* continues under the *Civil Code of Québec*, contrary to what the Court of Appeal suggested (para. 40). In fact, the Court of Appeal itself reaffirmed this rule in a recent decision: [TRANSLATION] “[i]n general, courts dismiss claims based on a contract or on the principle of unjust enrichment when all of the formalities required by the [Charter] (valid resolution or by-law, finance certificate) have not been observed” (*Beaumont*, at para. 25 (emphasis added)). The rule is also widely discussed by contemporary authors in their treatises:

[TRANSLATION] case law has established the rule that persons who contract with the government must ensure not only that the government is acting within its powers but also that each and every legal requirement has been met. If this is not done . . . it is generally impossible for the other contracting party to rely on, for example, the doctrine of apparent mandate or of unjust enrichment in order to be compensated by the government. [Footnotes omitted.]

Baudouin and Jobin, at No. 60; see also P. Garant, *Droit administratif* (7th ed. 2017), at pp. 363-81; Héту and Duplessis, at paras. 9.164-9.166.

[134] The rationale for the rule is simple. As Héту and Duplessis state, at para. 9.165, [TRANSLATION] “[c]ourts have . . . refused to apply the doctrine of unjust enrichment because the rules concerning municipal contracts are of public order and because they did not want parties to do indirectly what the law prohibits them from doing”. Moreover, while recent jurisprudence of the Court of Appeal confirms that it is possible to order the restitution of prestations where a municipal contract is annulled (see para. 115 of our reasons), it is silent on whether it is possible to order the restitution of prestations in favour of a private party on the basis of receipt of a payment not due where that party claims to have provided services to a municipality in reliance on a contract it believes it entered into but that turns out not to exist at all. In our view, the application of the principle of unjust enrichment in the municipal context must be excluded. We will now consider receipt of a payment not due.

[135] In civil law, the three conditions for bringing an action to recover a payment not due are: (1) the existence of a payment made by the payer (also known as the *solvens*) to the payee (also known as the *accipiens*), (2) the absence of a debt

between the parties, and (3) an error by the payer<sup>2</sup> (arts. 1554 para. 1 and 1491 para. 1 *C.C.Q.*; Baudouin and Jobin, at Nos. 530-31; Lluelles and Moore, at No. 1367.1; Pineau, Burman and Gaudet, at p. 468; *Threlfall v. Carleton University*, 2019 SCC 50, at paras. 78 and 217). These three conditions must be interpreted [TRANSLATION] “cautiously, if not restrictively” (Baudouin and Jobin, at No. 513) and, where they are met, art. 1491 para. 1 *C.C.Q.* expressly creates an obligation to make restitution, subject to the exception set out in art. 1491 para. 2 *C.C.Q.* Article 1492 *C.C.Q.* then requires “[r]estitution of payments not due” to be made according to the rules for the restitution of prestations codified at arts. 1699 to 1707 *C.C.Q.*

[136] In principle, the payer bears the burden of establishing that the conditions for bringing an action to recover a payment not due are met (art. 2803 para. 1 *C.C.Q.*; Baudouin and Jobin, at No. 532; Lluelles and Moore, at No. 1382). The payer must first prove the existence of a payment and the absence of a debt (Lluelles and Moore, at No. 1382). An error by the payer is then [TRANSLATION] “presumed to be the most likely explanation for a payment that in itself is inexplicable” (J. Carbonnier, *Droit civil* (2004), vol. II, at No. 1219). In practice, the burden of proof is then reversed and it is the payee who must prove that there was no error by the payer (Baudouin and Jobin, at No. 532; Lluelles and Moore, at No. 1382; *Amex*, at para. 31; *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.)).

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<sup>2</sup> Any alteration of the payer’s will is treated like error. Also, art. 1491 *C.C.Q.* provides that a payer who, knowing that he or she owes nothing, pays merely to avoid injury while protesting that he or she owes nothing may bring an action to recover a payment not due.

[137] We will look at each of the three conditions for bringing an action to recover a payment not due and attempt to determine whether they are met here.

(a) *Existence of a Payment*

[138] Services were provided to the City. It is true that a “payment” within the meaning of art. 1553 *C.C.Q.* may involve the provision of services and not only the handing over of a sum of money or a material thing (our colleagues’ reasons, at para. 73). The fact remains that the services provided to the City in the instant case were provided by PGB, not by Octane. As M. Planiol and G. Ripert write:

[TRANSLATION] **Who may bring an action.** — The action belongs only to the person who actually paid, whether the prestation was performed by that person or was performed by a third party on that person’s behalf. [Emphasis added.]

(*Traité pratique de droit civil français*, vol. VII, *Obligations* (2nd ed. 1954), at p. 32)

[139] In order to allow Octane’s action against the City, it is therefore essential to conclude that the services received by the City were rendered by PGB on Octane’s behalf. The opposite conclusion would result in the dismissal of the action brought by Octane directly against the City, since Octane would then have made no payment to the City. As Hogue J.A. of the Court of Appeal noted in her concurring reasons, at para. 75, [TRANSLATION] “[b]ecause the services were provided here by a third party, namely . . . PGB . . ., I also doubt that we can find that Octane . . . made a payment to the City” (Sup. Ct., at paras. 128 and 131). In fact, Octane paid a sum of money to

PGB, not to the City. In other words, our colleagues' conclusion (paras. 73-75) that the services received by the City were rendered by PGB on Octane's behalf is crucial.

[140] To reach such a conclusion, our colleagues rely on a [TRANSLATION] "subcontracting agreement" signed by Octane and PGB on May 15, 2007 (Exhibit P-3, A.R., vol. II, at p. 11) and on a letter dated August 15, 2007 (Exhibit D-22, A.R., vol. V, at p. 105) in which PGB stated that it had not entered into any contract with the City but that it had entered into a contract with Octane for the design, production, creation and public and media presentation of the City's transportation plan. Our colleagues also rely on an excerpt from the Superior Court's judgment in which it stated that PGB was a [TRANSLATION] "subcontractor" of Octane (paras. 159-60). However, the issue of whether, for the purposes of an action to recover a payment not due, the services received by the City could be considered to have been provided by PGB on Octane's behalf was not before the Superior Court. In fact, Octane did not rely on receipt of a payment not due as a basis for its claim at trial.

[141] As a result, the Superior Court makes no mention anywhere in its judgment of the agreement signed by PGB and Octane on August 10, 2007 (Exhibit P-123, A.R., vol. IV, at p. 117), in which they confirm that Octane had paid PGB \$82,898.63<sup>3</sup> as an advance for a contract signed by the City and PGB, and in which PGB undertakes to "repay that same amount to Octane" as soon as "the

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<sup>3</sup> Difference of one cent between the amount claimed and the agreement.

City . . . pays [\$82,898.63] to [PGB]” (A.R., vol. IV, at p. 117). This document suggests, first, that Octane agreed, with full knowledge of the facts, to pay the City’s debt to PGB and, second, that those two firms intended PGB to provide services to the City on its own behalf in exchange for a payment that ought to have come directly from the City, not from Octane. Other excerpts from the evidence confirm the possibility that this was the case.

[142] In fact, Louis Aucoin, who in 2007 was a senior partner at Octane, testified that Octane knew at the time of payment that there was no contract between PGB and the City, but that it expected them to enter into one at a later date (testimony of Louis Aucoin, A.R., vol. VII, at pp. 124-25). Thus, Octane [TRANSLATION] “would have wanted” PGB “to be able to issue its own invoice” to the City after the launch of the City’s transportation plan (*ibid.*, at pp. 152-53 (emphasis added)). According to Mr. Aucoin, the decision to pay PGB directly was made by Octane “reluctantly” (A.R., vol. VIII, at pp. 9-10). Shortly before the day of the launch, Octane supposedly suggested to PGB, which wanted an advance, that it contact the mayor’s office to try to obtain “a first cheque”, but this was unsuccessful (*ibid.*). Octane therefore released a first cheque payable to PGB, but continued to believe that PGB could invoice the City at some point (*ibid.*, at pp. 11-12). Octane issued “a second cheque a week or two later” because “the first cheque didn’t cover all the expenses that [PGB] had to advance” (*ibid.*, at pp. 15-16). It was at the time of the “last instalment” that Octane signed “an agreement” with PGB stating that PGB would repay \$82,898.63 to Octane



as soon as it was paid by the City (*ibid.*, at pp. 16-18; Exhibit P-123, A.R., vol. IV, at p. 117).

[143] In short, these excerpts from the evidence confirm the possibility that Octane and PGB intended the latter to provide services to the City on its own behalf in exchange for a payment that ought to have come directly from the City, not from Octane. In other words, the evidence does not clearly show that the services received by the City were provided by PGB on Octane's behalf. Any ambiguity in this regard that was not resolved at trial stems from the fact that Octane was not relying on receipt of a payment not due as a basis for its claim. In our view, it is therefore not advisable for this Court now to dispose of the City's appeal on the basis of that mechanism. However, we are prepared to adopt the interpretation of the evidence that is most favourable to Octane with respect to the condition requiring the existence of a payment, since, in our view, its claim must be dismissed in any event.

(b) *Absence of a Debt*

[144] The absence of a debt between the parties stems from the non-existence of a contract between Octane and the City for the services rendered by PGB. It is moreover not contested that the facts giving rise to the parties' dispute occurred in 2007, during the period in between two framework agreements for professional services entered into by Octane and the City in 2004 and 2008 (C.A., at para. 9; Exhibits P-33 and P-34, A.R., vol. II, at pp. 77-83; Exhibits P-118 and P-119, A.R., vol. IV, at pp. 106-12).

(c) *Error by the Payer*

[145] A payer is said to have made a payment “in error” if the payer [TRANSLATION] “mistakenly believed that he or she was a debtor” (M. Fabre-Magnan, *Droit des obligations* (3rd ed. 2013), vol. 2, at p. 491; A. Sériaux, *Droit des obligations* (1992), at p. 271). An error, which may be of fact or of law (Baudouin and Jobin, at No. 531; Lluelles and Moore, at No. 1379; Pineau, Burman and Gaudet, at pp. 469-70), is an essential condition for an action to recover a payment not due; it is not, however, a condition for the annulment of a contract (D. Lluelles and B. Moore, at No. 1374 ([TRANSLATION] “[i]n [the] case [of the annulment of a contract], an error by the ‘payer’ is unnecessary, because . . . restitution for the parties is dictated by the disappearance of the contract”); Baudouin and Jobin, at No. 530; Pineau, Burman and Gaudet, at p. 470; P. Malaurie, L. Aynès and P. Stoffel-Munck, *Les obligations* (5th ed. 2011), at No. 723). Contrary to what the majority of the Court of Appeal suggested in its reasons (paras. 53-55), an error is always required in an action to recover a payment not due (Lluelles and Moore, at No. 1375; Pineau, Burman and Gaudet, at p. 470). In this respect, it must be noted that art. 1554 para. 1 *C.C.Q.* is not a distinct source of the obligation to make restitution: rather, that provision must be read together with art. 1491 para. 1 *C.C.Q.* (*Amex*, at para. 29). As F. Levesque states:

[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.]

*(Précis de droit québécois des obligations (2014), at p. 191)*

[146] As we mentioned above, the burden is on the payee (here, the City) to prove that there was no error by the payer (here, Octane) once the payer has discharged the burden of proving the existence of a payment and the absence of a debt. In the instant case, one cannot ignore the fact that, by not relying on receipt of a payment not due at trial as a basis for its claim, Octane deprived the City of the opportunity to adduce evidence to discharge its burden of “show[ing] that Octane provided . . . services knowing that it was not bound to do so” (our colleagues’ reasons, at para. 67). As Hogue J.A. of the Court of Appeal stated in her concurring reasons, at para. 74, the rules on receipt of payment not due [TRANSLATION] “are not easy to apply in the context of the instant case, where the known facts are limited”, and “[o]ne need only think of the concept of error, which would likely raise many questions on its own”.

[147] In principle, the payee can show the absence of an error by the payer by proving that the payer made the payment knowing that he or she was not bound to do so (Lluelles and Moore, at No. 1377 ([TRANSLATION] “[t]he making of a payment not due must be understood as the discharge of a debt that does not exist . . . without the ‘payer’ being aware of this fact”, and “[t]hose who, with full knowledge of the facts, pay an amount they do not owe cannot rely on receipt of a payment not due” (emphasis added); *Sodexo Québec ltée v. Cie de chemin de fer du littoral nord de*

*Québec & du Labrador inc.*, 2010 QCCA 2408, 89 C.C.P.B. 203, at paras. 170-75). In such circumstances, the payment will be treated as a liberality and an action to recover a payment not due will be dismissed (Baudouin and Jobin, at No. 531 ([TRANSLATION] “[i]f [the *solvens*] ‘paid’ where no debt existed but *with full knowledge of the facts*, the alleged payment should normally be treated as a liberality and recovery denied” (emphasis added; footnote omitted)); Pineau, Burman and Gaudet, at pp. 469-70 ([TRANSLATION] “[w]here the *solvens* makes a payment knowing full well that he or she owes nothing, the *solvens* is not making a payment that is not due, since that prestation will be regarded as having been performed with a liberal intention” (emphasis added; footnote omitted))).

[148] Such a correlation between the absence of an error and the existence of a liberal intention, or, conversely, between the absence of a liberal intention and the existence of an error, flows from an expansive view of the concept of liberal intention. In their reasons (paras. 67 and 79-84), our colleagues largely equate the absence of a liberal intention with the existence of an error. In reality, the payer may well have made a payment knowing that he or she owed nothing, but without having the true intention of providing a gratuitous benefit or making an informal gift to the payee. For example, the payer might hope that the payee will provide a counterprestation; the payer may have a personal interest in the transaction; the payer may have intended to manage the business of another; the payer may have assumed the risks of his or her behaviour; or the “payment” may have been made by the payer with a view to a broader agreement, etc.: Carbonnier, at Nos. 1219, 1223 and

1227-28; Pineau, Burman and Gaudet, at p. 471 ([TRANSLATION] “those who intentionally, and with full knowledge of the facts, pay a debt they know they do not owe thereby indicate that they are making a gift or that they intend to manage the business of another” (emphasis added)). It would therefore be more accurate from a theoretical standpoint to say that the payee can prove the absence of an error by the payer by showing: (1) that the payer made the payment knowing that he or she was not bound to do so (i.e., absence of error as such), or (2) that the payer made the payment with the true intention of providing a gratuitous benefit or making an informal gift to the payee, or that another cause excluding the possibility of error provides legal justification for the payment:

[TRANSLATION] Finally, it should be noted that proof of error — or another defect of consent — is not always necessary: once the “payer” has proved an absence of debt or an overpayment, it is up to the “payee” to prove liberal intention, which cannot be presumed, or another cause that can provide legal justification for the payment. [Emphasis added; footnotes omitted.]

(Lluelles and Moore, at No. 1378)

[TRANSLATION] However, the *accipiens* may oppose the action for recovery, not by trying to establish the absence of error, a negative that is impossible to prove, but by bringing forward positive evidence that the payment had a cause that makes it definitive. What cause? There are various types.

- It may be a liberal intention: the *solvens* intended to provide a gratuitous benefit to the *accipiens* or to the third party whose debt he or she extinguishes, or perhaps to make an informal gift.
- It might also be an intention to manage the debtor’s business, or a view to a broader agreement: it is not uncommon for the making of a payment not due to be one element of a transaction (within the meaning of art. 2044), an assignment made to the *accipiens* in the expectation of receiving concessions in return. [Emphasis added.]

(Carbonnier, at No. 1219)

[149] For example, in *Agence de développement de réseaux locaux de services de santé et de services sociaux de Laval (Régie régionale de la santé et de services sociaux de Laval) v. 9112-4511 Québec inc.*, 2006 QCCS 5323, aff'd 2008 QCCA 848, the payee alleged — albeit unsuccessfully — that an overpayment was justified by a transaction entered into by the parties to settle a potential action for damages.

[150] In the case at bar, our colleagues agree in their reasons (paras. 66-67) with the conclusion of the majority of the Court of Appeal that Octane provided services based on its mistaken, but good faith, belief that the City had entered into a contract with it (paras. 25 and 66).

[151] In our opinion, the evidence shows rather clearly that Octane did not pay the City in error. It is helpful to note from the outset that the error must exist at the time of payment (*Canadian Imperial Bank of Commerce v. Perrault et Perrault Ltée*, [1969] B.R. 958 (Que.); *Aussant v. Axa Assurances inc.*, 2013 QCCQ 398, [2013] R.J.Q. 533; *Société nationale de fiducie v. Robitaille*, [1983] C.A. 521 (Que.); *Roux v. Cordeau*; *Commission des écoles catholiques de Verdun v. Giroux*, [1986] R.J.Q. 2970 (Prov. Ct.)). Here, the time of payment was May 17, 2007, the launch date for the City's transportation plan, since that was the date on which the services were provided to the City. However, it cannot be said that Octane believed it had a contract with the City at the time of payment. Nor can it be said that Octane believed at the

time of payment that it was possible the City would grant it a valid contract *at a later date*.

(i) Octane Knew at the Time of Payment That It Had No Contract With the City for the Services Provided by PGB

[152] When it left the meeting on April 27, 2007, Octane had allegedly obtained a [TRANSLATION] “mandate” for consulting services (the “concept mandate” or “consulting mandate”); the costs associated with payment for the services provided by PGB were thus considered expenses included in that “mandate” (testimony of Louis Aucoin, A.R., vol. VIII, at pp. 5-9). Louis Aucoin testified at trial that, following the meeting on April 27, 2007, he believed that the “mandate could not . . . exceed the limit for proceeding by agreement”, that is, “twenty-five thousand dollars (\$25,000)” (*ibid.*, at pp. 61-63 and 75).

[153] Louis Aucoin was well aware that the \$25,000 limit was relevant not only because it was the highest threshold for a contract to be awarded by agreement (i.e., without a call for tenders by written invitation or a public call for tenders published by means of an electronic tendering system), but also because it was the highest threshold for a contract to be granted by an officer on the City’s behalf (*ibid.*, at pp. 63-75). The rules for the formation of a contract with the City were briefly (but helpfully) summarized by Gilles Robillard as follows: (1) a duly authorized officer could have granted a contract with a value of up to \$25,000 on the City’s behalf, (2) the City’s executive committee could have granted a contract with a value of up to

\$100,000 on the City's behalf, and (3) the City's municipal council could have granted any contract with a value of more than \$100,000 (testimony of Gilles Robillard, A.R., vol. XIII, at p. 9).

[154] However, according to a quote for consulting services dated April 28, 2007 (Exhibit P-6, A.R., vol. II, at pp. 17-18), the value of the "mandate" for consulting services was estimated at \$27,600 plus tax. According to the budget estimates dated May 4, 2007 (Exhibit P-13, A.R., vol. II, at pp. 38-41), the value of the "mandate" for consulting services was estimated at \$28,350 and then at \$34,650 plus tax (*ibid.*, at pp. 75-76).

[155] Moreover, in the same budget estimates dated May 4, 2007 (Exhibit P-13, A.R., vol. II, at pp. 38-41), the services rendered by PGB were an item of expenses separate from the "mandate" for consulting services.<sup>4</sup> They involved a "mandate" for the production of the event, which, on May 4, 2007, nearly two weeks *before* the launch of the transportation plan on May 17, 2007, was estimated at \$120,250 plus tax and then at \$138,250 plus tax. As the Court of Appeal noted (para. 14), the final budget estimate dated May 15, 2007 (Exhibit P-12, A.R., vol. II, at pp. 36-37), two days *before* the launch of the transportation plan on May 17, 2007, forecast fees, costs and expenses of \$72,750 plus tax *solely* for PGB's services (see also Sup. Ct., at para. 94). These estimated values for the "mandate" for PGB's production of the event greatly exceed the \$25,000 limit, and it is clear that Octane was well aware of

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<sup>4</sup> The Superior Court also found that the mandate for consulting services was different from the mandate for the production of the show organized by PGB for the launch of the City's transportation plan (paras. 70-85).



this at the time the services were provided by PGB on May 17, 2007. Indeed, Louis Aucoin admitted at trial that, *before* the launch of the transportation plan on May 17, 2007, he had [TRANSLATION] “a very good idea” of the value of the services that would be provided by PGB (*ibid.*, at pp. 131-38). In short, Octane knew at the time the City’s transportation plan was launched that no duly authorized officer could lawfully grant a contract with such a value on the City’s behalf.

[156] Furthermore, Mr. Aucoin knew that no resolution had been passed by the City’s municipal council to award Octane a contract for PGB’s services (*ibid.*). He also knew that no framework agreement between Octane and the City was in effect at the time the City’s transportation plan was launched (*ibid.*, at pp. 144-46, 341 and 348).

(ii) Octane Knew at the Time of Payment That the City Could Not Grant It a Valid Contract at a Later Date for the Services Provided by PGB

[157] Gilles Robillard, who in 2007 was the associate general director of the City’s infrastructure, transportation and environment division, testified at trial that, after the launch of the City’s transportation plan, Mr. Thériault could have [TRANSLATION] “forwarded” the file to the executive committee for authorization of payment (testimony of Gilles Robillard, A.R., vol. XIII, at pp. 36-37; Sup. Ct., at para. 134). As we mentioned above, the executive committee does indeed have the power to grant a contract with a value of up to \$100,000, but even if that committee had granted a contract with Octane after the fact, the contract could not have been

valid because, as the Superior Court noted, at para. 133, [TRANSLATION] “[i]t was too late to issue an invitation to tender or to make a public call for tenders given that the event had already taken place”. It is important to focus here on the evidence showing that Octane knew the rules for awarding municipal contracts:

- Octane [TRANSLATION] “was committed to complying with the rules for awarding contracts”. [pp. 35-36]
- It “regularly” had contracts with the City; it also did business with “other municipalities”. [pp. 45-47]
- In 2007, Louis Aucoin knew full well what differentiated a contract entered into by agreement, a contract awarded through a written invitation and a contract awarded through a public call for tenders; he was also well aware that the “lowest threshold” for a contract to be awarded through a written invitation was “twenty-five thousand dollars (\$25,000) at the time”. He also knew that the lowest threshold for a contract to be awarded through a public call for tenders was “one hundred thousand dollars (\$100,000)”. [pp. 55-58 and 71]
- Octane was well aware at the material time that the normal procedure for awarding a contract through a written invitation was not followed in this case. It was also well aware that the normal procedure for entering into a contract by agreement was not followed in this case (“normally what we want is written proof that the quote has been accepted by a person in authority”). [pp. 58-61 and 63-65]

(testimony of Louis Aucoin, A.R., vol. VIII; see also Sup. Ct., at para. 126)

(iii) Conclusion on the Error by the Payer

[158] Octane was undoubtedly not acting with a liberal intention, since it was at least hoping to be paid. As we have noted, however, the fact that there was no liberal intention does not necessarily mean that the payment was made in error.

[159] Because Octane provided services to the City knowing that it was not bound to do so, there is no need to determine the specific legal cause that could justify the payment (see para. 148 of our reasons). In any case, the evidence is not sufficient to establish what Octane's motivation was in performing the services, and we can therefore only speculate in this regard.

[160] Perhaps Octane had a personal interest in the performance of the services in question. The services were provided in 2007, during the period between the two framework agreements for professional services entered into by Octane and the City in 2004 and 2008 (C.A., at para. 9; Exhibits P-33 and P-34, A.R., vol. II, at pp. 77-83; Exhibits P-118 and P-119, A.R., vol. IV, at pp. 106-12). Perhaps Octane therefore had a personal interest in staying in the City's "good graces" to ensure that a new framework agreement would be concluded. In such a scenario, the payment made by Octane would have been made with a view to a broader agreement.

[161] Or perhaps Octane simply wanted to ensure that other contracts would be granted to it by the City in the future. Indeed, when attempts were made to settle this case, Octane allegedly received [TRANSLATION] "promises of future mandates" from the office of the mayor and of the executive committee (testimony of Louis Aucoin, A.R., vol. VIII, at pp. 23-24 and 27-28).

[162] It may also be that Octane must be considered to have acted at its own risk. It knew the rules governing the formation and awarding of municipal contracts; in any case, the onus was on it to ensure that the proper procedure would be followed

in entering into the contract. As this Court stated in *Silver's Garage Ltd.*, at p. 593, persons wishing to enter into a contract with a municipality “must at their peril ascertain that the statutory body which assumes to delegate important functions involving the exercise of discretion to committees or persons has in fact the power so to delegate and that the particular person dealt with is acting pursuant to due authority so lawfully delegated” (emphasis added). Since Octane decided to provide services to the City even though the imperative rules governing the formation and awarding of municipal contracts — rules that were known to it — had not been complied with, it could be argued that Octane must now be regarded as having assumed the risks associated with its actions. And as we noted above, assumption of risk is one of the other legal causes that can provide justification for a payment, exclude the possibility of error and make an action to recover a payment not due unavailable (see para. 148 of our reasons).

[163] In any event, Octane did not pay in error, because it in fact knew at the time of payment that no contract had been formed between it and the City for the services rendered by PGB. Its action to recover a payment not due must therefore be dismissed and the City’s appeal allowed.

[164] It is important to note that, in arriving at this conclusion, we are not sanctioning Octane’s conduct as fault or negligence. With respect, it is not correct to read our reasons in this manner (our colleagues’ reasons, at para. 83). Absence of error by Octane cannot be equated with fault, which — we agree — is not relevant for

the purposes of restitution (*Amex*, at para. 32). Octane seems rather to have taken a business risk by providing services to the City while knowing that no contract had been nor could be entered into because of the rules for awarding contracts in the municipal context. It may be that such conduct does not constitute fault, but nor does it support a finding of error. The conditions for bringing an action to recover a payment not due are therefore not met in the instant case.

[165] Because Octane did not in fact pay the City in error, it is not necessary to determine what the proper outcome of its action to recover a payment not due would be if it had actually believed that it had a contract with the City at the time of payment. In particular, it is not necessary to determine whether this should be understood to be an inexcusable error that precludes an order for restitution of prestations under the rules on receipt of a payment not due because of the fact that Octane breached its obligation to ensure that the proper procedure was followed in entering into the contract. Indeed, the majority of the jurisprudence requires that the payer's error be "excusable" in order to form the basis for restitution of prestations based on receipt of a payment not due: *Pelletier v. SSQ, société d'assurance-vie inc.*, 2015 QCCS 132; *Faucher v. SSQ, société d'assurance-vie inc.*, 2010 QCCS 4072, [2010] R.R.A. 1111; *Steckmar Corp. v. Consultants Zenda ltée*, 2000 CanLII 18061 (Que. Sup. Ct.); *London Life, cie d'assurance-vie v. Leclerc*, 2002 CanLII 17098 (C.Q.); see, however, *L'Unique, assurances générales inc. v. Roy*, 2017 QCCS 3971; *Société canadienne de sel ltée v. Dubord*, 2012 QCCS 1994. (With regard to the academic and jurisprudential debate surrounding the concept of inexcusable error, see

Baudouin and Jobin, at Nos. 531-32; Lluellas and Moore, at No. 1379; Levesque, at p. 192; S. Lanctôt, “Gestion d’affaires, réception de l’indu et enrichissement injustifié”, in *JurisClasseur Québec — Collection droit civil — Obligations et responsabilité civile* (loose-leaf), by P.-C. Lafond, ed., fasc. 8, at para. 50.)

[166] Nor is it necessary to decide whether it should rather be understood as a “general principle” or “rule of public law” that a payer who fails to fulfill his or her obligation to ensure that the proper procedure is followed in entering into a contract cannot obtain restitution of prestations based on receipt of a payment not due where that failure is the only error relied on by the payer. Suffice it to say here that the non-application of the doctrine of apparent mandate is such a “general principle” or “rule of public law” because it is based on the same obligation incumbent on anyone wishing to enter into a contract with a municipality.

B. *Octane’s Appeal (File No. 38073)*

[167] Octane is asking the Court, in the event it allows the City’s appeal in the main file, to reverse the Superior Court’s judgment in order to make an award against Mr. Thériault personally in lieu of the City. Octane emphasizes the fact that the Superior Court concluded its judgment by specifically stating that if it had not allowed Octane’s main claim against the City, it would have allowed its alternative claim against Mr. Thériault (paras. 118-35 and 169). Indeed, the Superior Court would have found Mr. Thériault personally liable to pay the sum of \$82,898.63 for the reasons stated at para. 135 of the Superior Court’s judgment: (1) Mr. Thériault

gave Octane a mandate on April 27, 2007 to organize the launch of the City's transportation plan; (2) he gave Octane the assurance that it would be paid, which he reiterated on May 23, 2007, before the last two payments to PGB; (3) he subsequently did nothing to ensure that Octane would be reimbursed for the amounts it paid PGB, even though he could have recommended to the executive committee that the invoice be paid.

[168] The legal basis for the personal award that the Superior Court would have made against Mr. Thériault on an alternative basis if it had not allowed Octane's principal claim against the City is not clear from its reasons for judgment. The Court of Appeal did not address this point, since its dismissal of the City's appeal in the main file made Octane's appeal against Mr. Thériault moot (paras. 7 and 66). Octane's factum also does not specify the legal basis justifying a personal award against Mr. Thériault in lieu of the City. When counsel for Octane was asked about this at the hearing in this Court (transcript, at pp. 82-83 and 87-88), he stated that the only basis is art. 2158 *C.C.Q.*:

A mandatary who exceeds his powers is personally liable to the third person with whom he contracts, unless the third person was sufficiently aware of the mandate, or unless the mandator has ratified the acts performed by the mandatary.

[169] This article applies where a "mandatory . . . exceeds his powers". It is not clear from this wording that art. 2158 *C.C.Q.* can apply in the total absence of any powers. As we noted above, Mr. Thériault had *no* delegation of powers authorizing

him to make contracts on the City's behalf, since he was a political employee, not a municipal officer or employee (Sup. Ct., at paras. 62-66; ss. 114.7 and 477.2 *C.T.A.*). Nevertheless, certain judgments might support the position that art. 2158 *C.C.Q.* can apply even in the total absence of any powers: *Puits du Québec Inc. v. Lajoie*, [1986] J.Q. No. 447 (QL) (C.A.); *Sotramex Inc. v. Ste-Marthe-sur-le-Lac (Ville de)*, [1988] AZ-880Z1171 (Sup. Ct.).

[170] Be that as it may, art. 2158 *C.C.Q.* cannot apply in the particular circumstances of this case, because the onus was on Octane to ensure that the proper procedure would be followed in entering into the contract, and Octane cannot [TRANSLATION] “shift to [Mr. Thériault] the onus which rests on it” (*Tableaux Indicateurs International inc. v. Cité de Beauharnois*, Que. Sup. Ct., No. 13617, April 11, 1975; 2736-4694 *Québec inc. v. Carleton — St-Omer (Ville de)*, 2006 QCCS 4726, at para. 108 (CanLII), aff'd 2007 QCCA 1789). With respect, it is apparent from the Superior Court's reasons for judgment that it tried to shift Octane's onus to Mr. Thériault, particularly when it stated (at para. 101) that [TRANSLATION] “[n]o one at the political or administrative level raised a red flag concerning the need for an invitation to tender or a public call for tenders” and (at para. 118) that Mr. Thériault “was . . . aware of the rules set out in the CTA”. The onus was on Octane, not on Mr. Thériault, to ensure (1) that the person with whom Octane was dealing was authorized to act on behalf of the municipality, (2) that the City and its employees were acting within their powers, and (3) that all legal requirements for the formation or awarding of the contract were met (Héту and Duplessis, at para. 9.34).



[171] On another note, counsel for Octane did not try to persuade the Court during the hearing that Mr. Thériault had committed a fault for which he is extracontractually liable when he gave Octane an assurance that it would be paid, which assurance he reiterated on May 23, 2007 (transcript, at pp. 85, 87-88 and 94).

[172] In any case, even if Mr. Thériault had committed a fault in this regard, it would not have caused the injury suffered by Octane. The Superior Court did not specify when and in what circumstances Mr. Thériault had given Octane the initial assurance that it would be paid. The Superior Court simply stated that the assurance had been reiterated on May 23, 2007, before the last two payments to PGB. In this context, it seems that Octane (1) made a first payment to PGB, (2) entered into a contract with PGB and (3) provided the services to the City before Mr. Thériault gave it any kind of “assurance”. There is therefore no causation, and Octane’s appeal must be dismissed.

### III. Conclusion

[173] In file No. 38066, the City’s appeal should be allowed, and in file No. 38073, Octane’s appeal should be dismissed, with costs to the City throughout.

*Appeal of Ville de Montréal dismissed with costs, appeal of Octane Stratégie inc. moot, MOLDAVER, CÔTÉ and BROWN JJ. dissenting.*

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