



SUPREME COURT OF CANADA

CITATION: *Resolute FP Canada Inc. v. Hydro-Québec*, 2020 SCC 43

APPEAL HEARD: January 21, 2020
JUDGMENT RENDERED: December 11, 2020
DOCKET: 38544

BETWEEN:

Resolute FP Canada Inc.
Appellant

and

Hydro-Québec and Gatineau Power Company
Respondents

OFFICIAL ENGLISH TRANSLATION

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

REASONS FOR JUDGMENT:
(paras. 1 to 177)

Kasirer J. (Wagner C.J. and Abella, Moldaver, Karakatsanis, Brown and Martin JJ. concurring)

DISSENTING REASONS:
(paras. 178 to 279)

Côté J. (Rowe J. concurring)

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RESOLUTE FP CANADA INC. v. HYDRO-QUÉBEC

Resolute FP Canada Inc.

Appellant

v.

**Hydro-Québec and
Gatineau Power Company**

Respondents

Indexed as: Resolute FP Canada Inc. v. Hydro-Québec

2020 SCC 43

File No.: 38544.

2020: January 21; 2020: December 11.

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

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Contracts — Assignment — Power supply contract entered into in 1926 by forest products company and private electricity supply company — Private company and Hydro-Québec entering into contract for sale of movable property and lease of immovables in 1965 in context of nationalization of electricity in Quebec — Whether

1965 contract made Hydro-Québec forest products company's other contracting party by way of assignment of 1926 contract, thereby enabling Hydro-Québec to claim from company payment of levies imposed on it by two Quebec statutes.

In 1926, the corporate predecessor of Resolute FP Canada Inc. (“Resolute”) and the Gatineau Power Company (“Gatineau Power”) signed a synallagmatic contract of successive performance for the supply of electric power. Article 20 of that contract provided that Resolute would accept any increases in the price of electricity that might result from future increases in taxes or charges levied by the provincial or federal government on electrical energy generated from water power. In the early 1960s, the Quebec government acquired the capital stock of a number of private power production companies, including Gatineau Power, which became a wholly owned subsidiary of Hydro-Québec. In 1965, Hydro-Québec entered into a bilateral contract with Gatineau Power that was designed to unify that company’s management and operations. This contract provided for the sale of all of Gatineau Power’s movable property to Hydro-Québec and the lease to the latter of all of the former’s immovables for a term of 25 years. Hydro-Québec was to benefit from the revenue derived from Gatineau Power’s power contracts, and was entitled to use the premises leased from the latter as if they were its own. In 1982, Resolute and Hydro-Québec entered into a contract for the supply of additional power. Between 2005 and 2009, Gatineau Power assigned to Hydro-Québec three power plants that Hydro-Québec had been leasing from it and that had supplied Resolute before the nationalization.

Starting in 2007, Hydro-Québec had two levies imposed on it under provincial legislation: a new amount fixed by s. 32 of the *Hydro-Québec Act* (“HQA”) and an amount provided for in s. 68 of the *Watercourses Act* (“WA”) from which it had previously been exempted. The levied amounts are paid into the Generations Fund, a fund established by the Quebec government in 2006 for the purpose of reducing the public debt. In 2011, Hydro-Québec sent Resolute an electricity bill for over \$3 million. Relying on the price adjustment clause in the 1926 contract, Hydro-Québec claimed from Resolute an increase in the price of electricity that resulted from the levies it paid to the Quebec government. Resolute paid this bill under protest and asked the Superior Court to declare that it did not owe the amount being claimed from it to either Hydro-Québec or Gatineau Power.

The Superior Court granted Resolute’s motion to institute proceedings for a declaratory judgment. It declined to find that the effect of the 1965 contract was that Gatineau Power had assigned its rights and obligations under the 1926 contract to Hydro-Québec, and declared that Hydro-Québec could not claim payment of the levies from Resolute. The Court of Appeal allowed Hydro-Québec’s appeal in part, declaring that the levies in question constituted taxes or charges that were payable by Resolute to Hydro-Québec under the 1926 contract.

Held (Côté and Rowe JJ. dissenting): The appeal should be dismissed.

Per Wagner C.J. and Abella, Moldaver, Karakatsanis, Brown, Martin and **Kasirer** JJ.: The 1965 contract effected an assignment of the 1926 contract. As a result,

Hydro-Québec is a party to the 1926 contract and can therefore invoke art. 20 of that contract with respect to Resolute. Because the two levies at issue are a “tax or charge” on electricity generated from water power within the meaning of that same art. 20, the 1926 contract applies to them and they are therefore payable by Resolute to Hydro-Québec under that agreement.

The Court of Appeal was justified in intervening in this case. It took note of Resolute’s argument that Hydro-Québec and Gatineau Power had admitted that no assignment had been made. Observing that Hydro-Québec had framed its arguments differently in its appeal, the court rightly rejected this argument. The trial judge understood Hydro-Québec to be essentially arguing that it was Resolute’s other contracting party and that the 1926 contract had been assigned. In her analysis, she not only referred to that argument, but also took it into account and formally rejected it.

Resolute in fact made specific submissions on the interpretation of the 1965 contract at trial. Moreover, the position of Hydro-Québec and Gatineau Power has at all times been that art. 20 of the 1926 contract applies and that Hydro-Québec may request a price increase. There is every reason to believe that the trial judge understood that Hydro-Québec had made no concession in this regard. The Court’s role at this stage of the litigation consists in determining whether the trial judge made a palpable and overriding error in interpreting the 1965 contract, not whether she made the exact error identified by the Court of Appeal.

It is necessary, in interpreting a contract, to seek the common intention of the parties while taking into account the nature of the contract, the circumstances in which it was formed, the interpretation which has already been given to it by the parties or which it may have received, and usage (arts. 1425 and 1426 *C.C.Q.*). Each clause is to be interpreted in light of the others so that each one is given the meaning derived from the contract as a whole (art. 1427 *C.C.Q.*). In this case, none of these considerations suggest that Gatineau Power and Hydro-Québec intended to achieve anything other than the assignment contemplated in the text of the 1965 contract.

Assignment of contract is known in Quebec civil law. It is firmly rooted in commercial life, and it enables contracting parties to meet complex objectives. It is a business technique with a legitimate malleability that is supported by the principle of autonomy of the will. Assignment of contract — seen as a transfer to the assignee not merely of rights and obligations but also of the contract itself — can be achieved in a manner that, while protecting the interests of the assigned party, is compatible with the principles of binding force and relativity of contract. There is thus no conceptual or moral bar to the assignment of a contract, seen as a patrimonial asset in itself, provided that the operation protects the interests of the assigned party. Although, according to the subjective conception of contract, the contract is viewed as a legal relationship, it is also possible to consider the contract from another angle, as being patrimonial in nature. It is this conception that helps to explain the fact that a contract can be assigned.

In this case, the key clauses of the 1965 contract have the effect of assigning the 1926 contract and are incompatible with the very essence of the concepts of mandate and administration of the property of others. It is true that the 1965 contract confers certain powers of administration on Hydro-Québec; however, Gatineau Power, in selling its movables and leasing its immovables to the state-owned enterprise, transferred legal rights to Hydro-Québec that the latter may exercise in its own interest, which is something that a mandatary or an administrator of the property of others cannot do. What is more, Hydro-Québec took on personal obligations that are incompatible with the functions of a mandatary or an administrator of the property of others, who as a general rule does not give undertakings in his or her own name. This operation means that the 1965 contract is one that could be characterized as a contract of sale, lease, assignment and mandate whose assignment component was necessary in order to achieve the objective of nationalizing electricity stated in the preamble.

In the absence of evidence from the time of formation of the 1965 contract that would indicate the common intention of the parties, the preamble to the agreement is particularly important for the purpose of identifying the objectives of the parties to the contract, Gatineau Power and Hydro-Québec. It is true that a preamble is not generally intended to create obligations, but it is helpful to make connections between the undertakings of Hydro-Québec on the one hand and the expectations of Gatineau Power on the other. The objectives of the parties as stated in the preamble provide insight into the fundamental structure of the contract: Hydro-Québec undertook to assume liability for Gatineau Power's obligations and, in return, Hydro-Québec was to

control the production of energy under Gatineau Power's power supply contracts for the term of the agreement and would receive the revenue derived from it. To conclude that Hydro-Québec acts only in Gatineau Power's name and in its interest in managing its assets and contracts is inconsistent with the objectives stated in the preamble. The contract forms part of the process of nationalization of electricity: it is Hydro-Québec that is charged with generating, acquiring, selling, transmitting and distributing electric power and energy throughout the province of Quebec, which it does in its own name, in accordance with the law, and not in the name or in the interest of others; it does so by exercising rights it holds, not by exercising powers in Gatineau Power's interest.

Thus, the 1965 contract does not name Hydro-Québec mandatary of Gatineau Power in relation to its power contracts. Rather, the entire 1926 contract was assigned by operation of the relevant provisions of the 1965 contract, as interpreted having regard to the objectives stated in the preamble and to the totality of the 1965 contract. If the contract is read as a whole, the interpretation to the effect that Hydro-Québec has managed Gatineau Power's assets and contracts must be rejected. On the contrary, for the term of the lease, Gatineau Power did not simply confer powers over the 1926 contract on Hydro-Québec; rather, it transferred rights and obligations to Hydro-Québec, subject to an extinctive term. On entering into the 1965 contract, Hydro-Québec undertook personally to perform the obligations provided for in the 1926 contract, including the obligation to supply electricity to Gatineau Power's customers. At the same time, Hydro-Québec obtained a right to all the advantages of

the 1926 contract, including the right to be paid, personally, for the electricity it is contractually obliged to supply to Resolute.

Furthermore, the term imposed by the parties for the 1965 contract does not preclude the existence of an assignment of contract. There is no legal bar to an assignment of contract being limited in time if the parties agree to this, subject to the rules concerning the assigned party's consent — the general conditions for validity of a contract apply to an assignment of contract, which is, like any contract, subject to the general provisions of the *C.C.Q.*, including those relating to the term of the contract (arts. 1508 et seq.). Even though an assignment is a translatory act through which rights and obligations are transferred from one patrimony to another, a type of act that is ordinarily absolute, there is nothing in the civil law that precludes the parties from devising a translatory act or an act of alienation whose effects are not permanent. Freedom of contract is key: assignment of contract does not follow a single model but may on the contrary, like any contract, be tailored to the intention of the parties, provided that it is consistent with the rules governing its validity. In this case, the parties were therefore free to limit the translatory effect of the assignment in time so as to tailor it to the business model that was consistent with their objectives. The assignment of the 1926 contract had full translatory effect — the assignor, Gatineau Power, transferred all of its rights and all of its obligations under this power contract to the assignee, Hydro-Québec — but only for the term of the agreement.

Factors extrinsic to the 1965 contract also confirm that there was an assignment of the 1926 contract and that that assignment is still in effect. The assignment of the 1926 contract cannot have expired as a result of the sale of the three plants on the Gatineau River given that, despite that sale, the lease provided for in the 1965 contract on which the assignment is based continued to be in effect, because Gatineau Power leased all its immovables to Hydro-Québec. In addition, the 1965 agreement transferred all of Gatineau Power's claims and obligations without distinguishing contracts on the basis of the plants to which they related. Resolute's mill is now supplied by Hydro-Québec's integrated network, and it is not possible to say that the electricity it receives comes from a particular plant. The lease remained in effect in 2011, when Hydro-Québec claimed, as assignee of the 1926 contract, the agreed payment for electricity as increased under art. 20 of that contract.

Resolute's consent, which was necessary in order for the assignment of the contract to be valid, was given in the 1926 contract. It is clear from the very words of art. 22 of that contract that the parties consented in advance to any possible assignment of the contract. If the conception of assignment of contract as a whole is adopted, the assigned party's consent is required. If assignment is seen as the transfer of the contract itself, which implies the transfer of party status to the assignee, the assigned party's consent is necessary from the standpoint of both relativity of the assignment and binding force of the assigned contract. In order to give effect to the principle of relativity of contract, the transfer of the existing contract to a new contracting party requires the consent of a party on which a new partner is imposed that has

characteristics not possessed by the assignor. The principle of binding force of contract also leads to the conclusion that the assignee cannot assert him or herself as a new contracting party of the assigned party without the latter's consent. The assigned party's consent is required even where the assignment of contract is imperfect in order to ensure conformity with the general principles of the law of contracts and to protect the assigned party. The assigned party's consent can, as in this case, be given in advance: because Resolute's predecessor had consented to the assignment in advance in the 1926 contract, Gatineau Power validly transferred its status as party to the contract to the assignee, Hydro-Québec. Gatineau Power thus serves as a personal surety against any future breach by Hydro-Québec of its obligations. The fact that the assignment in this case is imperfect does not change the outcome, since it is nonetheless Hydro-Québec that, as a principal debtor that also has party status, supplies electricity and can therefore raise the price of the electricity under art. 20.

If consent was given in advance, however, the assignment of a contract cannot be set up against the assigned party if he or she was never informed of the assignment. In the absence of express rules on assignment of contract, the conditions for setting up such an assignment can be clarified by considering the rules with respect to assignment of claim. An assignment of claim may be set up against the assigned party as soon as that party has acquiesced in it or received a copy or a pertinent extract of the act of assignment or any other evidence of the assignment which may be set up against the assignor. In this case, the evidence shows that Resolute's predecessor and Hydro-Québec signed a new contract in 1982 for the distribution of power that was in

addition to what was provided for in the 1926 contract. Thus, Resolute knew it was doing business with Hydro-Québec well before the litigation began and had acquiesced in that situation. The assignment may therefore be set up against it.

The assignment of the 1926 contract does not violate the rule against making an assignment of claim (and therefore, by extension, an assignment of contract) that is injurious to the rights of the debtor or that renders his or her obligation more onerous (art. 1637 para. 2 *C.C.Q.*). The increase in the price of electricity resulted not from the assignment of contract, but from legislative changes. The parties to the 1926 contract expressly provided that they would be subject to future provincial laws and that those laws would affect their contractual relationship. The assignment of the 1926 contract therefore had full effect with respect to Resolute, and Hydro-Québec is entitled, as a party to that contract, to claim payment from it for the taxes and charges contemplated in art. 20.

Article 20 of the 1926 contract applies to the levies provided for in s. 32 of the *HQA* and s. 68 of the *WA*, and Hydro-Québec can therefore claim payment for them from Resolute. First, although Hydro-Québec is a mandatary of the government, it is nonetheless a separate entity, and the legislature can therefore impose a tax or charge on it. The amounts that are collected differ from the revenues collected by the government when Hydro-Québec declares dividends, even though all of Hydro-Québec's shares are owned by the government; they cannot be lumped together. Next, the amounts payable under s. 68 of the *WA*, like the levy under s. 32 of the *HQA*,

constitute a tax or a charge, and not an allocation of government revenues. The fact that the legislature decided to allocate the collected amounts to the Generations Fund does not change the nature of the levy. The nature of the levy must not be confused with the place where it is to be deposited. Moreover, a reading of the contract suggests that the parties' intention was to have the price for electricity remain stable, subject to the imposition of new taxes and charges, such that the seller company's net revenue would remain constant but it would not be penalized if its production costs rose because of an unforeseen tax or charge levied upon electricity. Lastly, no claim for payment of the tax under the WA was extinguished by prescription or tacitly waived.

Per Côté and Rowe JJ. (dissenting): The appeal should be allowed and the Superior Court's decision restored. The trial judge did not make a reviewable error in finding that Gatineau Power had not assigned the 1926 contract to Hydro-Québec and that the 1965 contract had instead made Hydro-Québec a mandatary of Gatineau Power. Gatineau Power's status as a party to the 1926 contract was therefore not transferred to Hydro-Québec, and Hydro-Québec is a third person in relation to that contract. The relativity of the 1926 contract prevents Hydro-Québec from invoking the price adjustment clause to pass on the taxes or charges for which it may be liable. As a result, Resolute is not required to pay either the charge under s. 32 *HQA* or the one under s. 68 *WA*. The Court of Appeal should not have intervened by analyzing the case from a new angle without regard for the Superior Court's findings of fact and the judicial contract before it.

The characterization of a contract must be considered to be a question of mixed fact and law when it involves the consideration of a multitude of facts, such as the circumstances surrounding the formation of the contract and how the parties subsequently applied it. In such a case, the applicable standard for appellate intervention is palpable and overriding error, unless there is an extricable error of law. Appellate courts must take a highly deferential approach to mixed questions, because the answer to such questions is intertwined with the weight assigned to the evidence by the trial judge, who is in a much better position than an appellate court to assess and weigh such matters. To determine whether there is a reviewable error in the trial judge's reasons in this case, the Court must review the Superior Court's decision and consider the arguments presented to that court and the manner in which it disposed of them.

First, the trial judge did not make a reviewable error in rejecting the three arguments made by Hydro-Québec and Gatineau Power with respect to assignment. At no time did Hydro-Québec and Gatineau Power argue in the Superior Court that the 1965 contract had effected an assignment of the 1926 contract. Rather, they argued that the assignment had occurred either in 1982, when Hydro-Québec and Resolute entered into a contract for the supply of additional electric power, or in 1997, when Hydro-Québec became the exclusive distributor of electricity under the *Act respecting the Régie de l'énergie*, or in 2005-2006, when Gatineau Power transferred the ownership of its power plants to Hydro-Québec. The trial judge correctly understood that the issue was whether the contract had been assigned either in 1982, in 1997 or in 2005-2006. She decided the case as it had been presented to her. She did not make a

reviewable error in interpreting the 1982 contract as not effecting an assignment, in not accepting the argument that the coming into force of the *Act respecting the Régie de l'énergie* in 1997 had affected the relativity of the 1926 contract, or in rejecting the argument that the transfer of the ownership of the plants in 2005-2006 had effected an assignment of the 1926 contract, given the absence of evidence of the setting up of an assignment against Resolute and the fact that a reading of the acts of transfer reveals no so-called assignment of contract.

Second, the trial judge did not make a palpable and overriding error in accepting Resolute's argument — uncontested before her — that the 1965 contract had not effected an assignment. The evidence in the record supported such a conclusion, and it was entirely justified for her to give effect to the judicial contract between the parties by accepting Resolute's uncontested argument after she rejected the three arguments made by Hydro-Québec and Gatineau Power.

The parties' subsequent conduct confirms the trial judge's conclusion in this regard. Article 1426 of the *C.C.Q.* calls for consideration of the parties' subsequent conduct when interpreting a contract. This rule is based on the following premise: it is assumed that the parties seek to perform their obligations rather than to evade them, and that their conduct until the day a dispute arises is an indicator of their common intention crystallized earlier in their contract. The parties' subsequent conduct takes on even greater importance in the case of long-term contracts, because the more time has elapsed, the more compelling the parties' subsequent conduct will be as evidence of

their original intent. The trial judge relied largely on the facts put before her and did not make a palpable and overriding error in relying on the parties' subsequent conduct. Indeed, the absence of evidence of the setting up of an assignment against Resolute was in addition to the financial statements making no reference to any assignment, the notices of renewal all addressed to Gatineau Power, the invoices indicating the electricity supplied under the 1926 contract separately from that supplied under the 1982 contract, the testimony of a Hydro-Québec manager confirming that there had been no assignment, and the opportunistic reinterpretation of the parties' legal situation in order to treat it as an assignment of the 1926 contract.

The trial judge was also bound by the judicial contract between the parties, in which the characterization of the 1965 contract was not in dispute. Hydro-Québec and Gatineau Power, which had the burden of proof, did not dispute the fact that the 1965 contract had made Hydro-Québec a mandatary and had not assigned the 1926 contract. Rather, their position was that the 1965 contract was a mandate, sale and lease agreement and that the assignment had occurred later, in 1982 at the earliest. Only Resolute discussed how the terms of the 1965 contract should be interpreted, and it did so to establish that the contract had not effected an assignment, despite the fact that it did not have the burden of proof. Hydro-Québec and Gatineau Power offered no interpretation of the terms of the 1965 contract that would give it a scope different from that proposed by Resolute. It is justified for a trial judge to accept an uncontested argument and not to undertake a needless interpretation exercise. To require otherwise would undermine the very foundations of the adversarial system. Article 10 of the *Code*

of Civil Procedure reiterates the adversarial nature of the civil justice system. It is the parties who control the course of their case, not the courts (art. 19 para. 1 *C.C.P.*). Accordingly, the courts cannot base their decisions on arguments or rationales that have not been debated (art. 17 para. 2 *C.C.P.*). The principle of proportionality and of proper administration of judicial resources requires nothing less of them (art. 18 *C.C.P.*).

The issues between the parties become joined once both sides have presented their arguments; the judicial contract then reflects the procedural relationship (*lien d'instance*) between the parties with respect to the questions that are in issue and those that are not in dispute. The trial judge is also bound by this judicial contract. This means that the judge cannot disregard the contract and rule on a ground or an argument that is not in issue. This holds true even when the judicial contract relates to a question of law, unless it is a matter of public order that would allow the judge to go beyond the parties' consent. Although an admission of law is not, strictly speaking, binding on the courts, they must nonetheless take note of a party's decision not to contest, and thus to acknowledge, the existence of a legal situation. The judge's task is primarily to look where the parties ask him or her to look, not to reframe the debate. The role of a court that has to render a declaratory judgment is limited to resolving a genuine problem between the parties with respect to the scope of a specific juridical act; the court must therefore take care to remain within the defined parameters of the debate before it so as to avoid prejudicing the future legal arguments raised by the parties or the interests of third persons who are not parties to the proceeding.

In this case, the core of the issue forming the judicial contract between the parties had to do with the assignment at one of the three suggested points in time. The parties' procedural relationship did not encompass the characterization of the 1965 contract. The trial judge focused her analysis on the core of that issue. After she rejected the arguments of Hydro-Québec and Gatineau Power, all that remained was Resolute's uncontested argument that the 1965 contract had not effected an assignment either, a legal situation that was confirmed, in her view, by the absence of evidence of the setting up of an assignment against Resolute and by the evidence in the record concerning the parties' subsequent conduct. As a result, the trial judge did not have to consider the interpretation of the 1965 contract in detail, and it is not appropriate on appeal to engage in an exercise that was not fully before the trial judge by analyzing the 1965 contract at length.

Since the trial judge did not make a reviewable error in finding that the 1926 contract had not been assigned to Hydro-Québec, Gatineau Power did not transfer its status as a party to that contract to Hydro-Québec. As it is not a party to the 1926 contract, Hydro-Québec cannot increase the price of the electricity supplied to Resolute. This is because status as a party to the 1926 contract is what makes it possible to invoke the price adjustment clause in order to pass on any "tax" or "charge" paid. The principle of relativity of contract means that a contract has effect only between the contracting parties and that it does not affect third persons (art. 1440 *C.C.Q.*). As a result, third persons cannot rely on the content of a contract for their own benefit, except in a few very limited cases, none of which applies here. The 1926 contract states that

the only contracting parties are Resolute and Gatineau Power. The relativity of the 1926 contract therefore prevents Hydro-Québec from invoking the price adjustment clause in that contract in order to pass on the charges it paid under the *HQA* and the *WA*.

Cases Cited

By Kasirer J.

Applied: *Uniprix inc. v. Gestion Gosselin et Bérubé inc.*, 2017 SCC 43, [2017] 2 S.C.R. 59; **approved:** *N.C. Hutton Ltd. v. Canadian Pacific Forest Products Ltd.*, 1999 CanLII 13538; **considered:** *Modern Cleaning Concept Inc. v. Comité paritaire de l'entretien d'édifices publics de la région de Québec*, 2019 SCC 28; **referred to:** *Quebec (Attorney General) v. Algonquin Développements Côte-Ste-Catherine inc. (Développements Hydroméga inc.)*, 2011 QCCA 1942, [2011] R.J.Q. 1967; *Salomon v. Matte-Thompson*, 2019 SCC 14, [2019] 1 S.C.R. 729; *Pincourt (Ville de) v. Construction Cogerex ltée*, 2013 QCCA 1773; *Groupe Sutton-Royal inc. (Syndic de)*, 2015 QCCA 1069; *Aqueduc du Lac St. Jean v. Fortin*, [1925] S.C.R. 192; *General Accident Insurance Co. v. Cie de chauffage Gaz naturel*, [1978] C.S. 1160; *Banque royale du Canada v. P.G. du Québec*, [1976] C.S. 634; *Hamel v. Banque de Montréal*, 2008 QCCS 3603; *Nesterenko v. Skierka*, 2010 QCCS 3613, [2010] R.J.Q. 2007; *Alberta (Treasury Branches) v. M.R.N.*, [1996] 1 S.C.R. 963; *Place Québec inc. v. Desmarais*, [1975] C.A. 910; *Denis Cimaï inc. v. Caisse populaire d'Amos*, 1997 CanLII 10252; *Comité paritaire de l'entretien d'édifices publics de la région de Québec v. Modern Concept d'entretien inc.*, 2017 QCCA 1237, aff'd 2019

SCC 28; *Lee v. Pointe of View Developments (Encore) Inc.*, 2010 ABQB 558, 35 Alta. L.R. (5th) 42; *Immobilière Natgen inc. v. 2897041 Canada inc.*, [1998] R.D.I. 545; *Caisse populaire de Maria v. Beauvais et Verret Inc.*, [1994] R.D.J. 592; *Westbank First Nation v. British Columbia Hydro and Power Authority*, [1999] 3 S.C.R. 134; 620 *Connaught Ltd. v. Canada (Attorney General)*, 2008 SCC 7, [2008] 1 S.C.R. 132.

By Côté J. (dissenting)

Hydro-Québec v. Matta, 2020 SCC 37; *Uniprix inc. v. Gestion Gosselin et Bérubé inc.*, 2017 SCC 43, [2017] 2 S.C.R. 59; 3091-5177 *Québec inc. (Éconolodge Aéroport) v. Lombard General Insurance Co. of Canada*, 2018 SCC 43, [2018] 3 S.C.R. 8; *Churchill Falls (Labrador) Corp. v. Hydro-Québec*, 2018 SCC 46, [2018] 3 S.C.R. 101; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *Benhaim v. St-Germain*, 2016 SCC 48, [2016] 2 S.C.R. 352; *J.G. v. Nadeau*, 2016 QCCA 167; *Salomon v. Matte-Thompson*, 2019 SCC 14, [2019] 1 S.C.R. 729; *Nelson (City) v. Mowatt*, 2017 SCC 8, [2017] 1 S.C.R. 138; *Skyline Holdings Inc. v. Scarves and Allied Arts Inc.*, 2000 CanLII 9274; *Richer v. Mutuelle du Canada (La), Cie d'assurance sur la vie*, [1987] R.J.Q. 1703; *Rainboth v. O'Brien* (1915), 24 B.R. 88; *Imperial Oil v. Jacques*, 2014 SCC 66, [2014] 3 S.C.R. 287; *Compagnie d'assurances générales Co-Operators v. Coop fédérée*, 2019 QCCA 1678, aff'd 2020 SCC 41; *Gervais v. Association canadienne de protection médicale*, 2007 QCCS 4564; *Janacek v. Bell Canada*, [2001] R.J.Q. 584; *Godbout v. Pagé*, 2017 SCC 18, [2017] 1 S.C.R. 283; *Droit de la famille — 871*, [1990] R.J.Q. 2107; *Apple Canada Inc. v. St-Germain*, 2010

QCCA 1376, [2010] R.J.Q. 1627; *Sunoco inc. v. Église Vie et Réveil inc., les ministères d'Alberto Carbone*, 2002 CanLII 62388; *Lizotte v. Aviva, Compagnie d'assurance du Canada*, 2015 QCCA 152, aff'd 2016 SCC 52, [2016] 2 S.C.R. 521; 4077334 *Canada inc. (Solutions Voysis IP) v. Sigmasanté*, 2013 QCCS 2859.

Statutes and Regulations Cited

Act respecting the Quebec Hydro-Electric Commission, R.S.Q. 1941, c. 98A [am. 1944, c. 22], ss. 4, 10, 29, 40.

Act respecting the Régie de l'énergie, S.Q. 1996, c. 61, s. 62.

Act to amend the Act to insure the progress of education, S.Q. 1947, c. 32, s. 9.

Act to assure budgetary control of certain expenditure, S.Q. 1961, c. 8, ss. 13, 18.

Act to insure the progress of education, S.Q. 1946, c. 21, ss. 2, 3, 19 paras. 1 and 2.

Act to reduce the debt and establish the Generations fund, CQLR, c. R-2.2.0.1, s. 2.

Act to reduce the debt and establish the Generations fund, S.Q. 2006, c. 24.

Business Corporations Act, CQLR, c. S-31.1, s. 227.

Civil Code of Lower Canada, arts. 1138, 1571, 1619, 1655, 2577, 2578.

Civil Code of Québec, arts. 1110, 1113, 1114, 1310, 1425, 1426, 1427, 1434, 1439, 1440, 1508 et seq., 1517, 1637, 1641, 1671, 1870 to 1873, 2130, 2138 paras. 1 and 2, 2475, 2476.

Code civil (France), arts. 1216, 1216-1.

Code of Civil Procedure, CQLR, c. C-25.01, arts. 10, 17 para. 2, 18, 19 para. 1, 79, 142.

Hydro-Québec Act, CQLR, c. H-5, ss. 3.1.1, 3.1.2, 3.1.3, 16, 32.

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APPEAL from a judgment of the Quebec Court of Appeal (Vauclair, Marcotte and Roy JJ.A.), 2019 QCCA 30, [2019] AZ-51560250, [2019] J.Q. n° 56 (QL), 2019 CarswellQue 102 (WL Can.), setting aside in part a decision of Le Bel J.,

2016 QCCS 3862, [2016] AZ-51315251, [2016] J.Q. n° 10288 (QL), 2016 CarswellQue 13488 (WL Can.). Appeal dismissed, Côté and Rowe JJ. dissenting.

Yves Martineau, Patrick Girard and Guillaume Boudreau-Simard, for the appellant.

Dominique Ménard, Max R. Bernard and Nicolas Roche, for the respondents.

English version of the judgment of Wagner C.J. and Abella, Moldaver, Karakatsanis, Brown, Martin and Kasirer JJ. delivered by

KASIRER J. —

I. Overview

[1] In 2011, the appellant, Resolute FP Canada Inc. (“Resolute”) — a forest products company — received an unexpected electricity bill. The respondent Hydro-Québec, relying on a clause of a power contract dating from 1926, sought to significantly increase the price of electricity purchased from it by Resolute, citing taxes or charges Hydro-Québec paid to the Quebec government that it could, under the 1926 contract, claim from Resolute.

[2] Resolute sees this as unfair. It asserts that, because Hydro-Québec was not incorporated until the 1940s, it had not signed the 1926 contract, which remains in effect and instead binds Resolute and the Gatineau Power Company (“Gatineau Power”), a private electricity producer. Hydro-Québec counters that this is not true, because even though Gatineau Power continues to exist, it assigned that contract to Hydro-Québec in 1965 at one stage of the nationalization of electricity in Quebec, and the Canadian International Paper Company (“CIP”), Resolute’s corporate predecessor, consented to that assignment in advance in the original contract.

[3] Resolute in turn argues that, properly understood, the contract between Gatineau Power and Hydro-Québec merely made the latter a mandatary for purposes of managing the 1926 contract, as opposed to a true party to the contract in its own name. As well, it would be unacceptable to consider the 1965 arrangement between Gatineau Power and Hydro-Québec, which was concluded without Resolute’s knowledge, to be a valid assignment of contract. To do so would be to impose on it, without its consent, a counterparty in the 1926 contract with which it has not agreed to do business. Resolute says it owes nothing to Hydro-Québec in this regard, because it is a debtor only to Gatineau Power. It therefore seeks a declaration that the taxes or charges being claimed by Hydro-Québec, the effect of which is to raise the price of electricity, cannot be claimed from it — a declaration that was granted at trial (2016 QCCS 3862), but was then denied on appeal (2019 QCCA 30).

[4] In this appeal, this Court is asked to reconsider the conditions for and effects of assignment of contract, a juridical operation by which, according to the conclusion of the Court of Appeal, the assignor, Gatineau Power, a contracting party, had carried out an *inter vivos* transfer to the assignee, Hydro-Québec, of claims and debts arising from the 1926 contract with the assigned party, which had since become Resolute.¹

[5] Conventional assignment of contract, which is viewed sometimes as the addition of an assignment of claims to a transfer of debts and sometimes as the transfer of a contract as a whole, has long been a source of uncertainty among jurists. One might assume that this uncertainty, which is conceptual and moral in nature, results in part from the absence of a nominate scheme in the civil codes. Although the *Civil Code of Lower Canada* (“C.C.L.C.”) and the *Civil Code of Québec* (“C.C.Q.”) do regulate certain specific forms of assignment of contract (e.g. assignment/transfer of lease in arts. 1870 to 1873 C.C.Q. and arts. 1619 and 1655 C.C.L.C.; assignment/transfer of a contract of insurance in arts. 2475 and 2476 C.C.Q. and arts. 2577 and 2578 C.C.L.C.), they provide no explicit general scheme for this well-known business practice.

[6] Thus, civilians have long raised questions about assignment of contract because, according to a subjective conception, the contract is [TRANSLATION] “a relationship, not property”, and “a contractual relationship cannot be assigned, since,

¹ See, e.g., the definition of “assignment of contract” proposed in the context of the *Civil Code of Lower Canada* in *Private Law Dictionary and Bilingual Lexicons* (2nd ed. 1991), by P.-A. Crépeau, ed., at p. 37.

like a debt, it has no patrimonial value” (see the description by J. Flour, J.-L. Aubert, and É. Savaux, *Les obligations*, vol. 3, *Le rapport d’obligation* (8th ed. 2013), at No. 400 (emphasis deleted)). From a moral perspective — and this relates directly to the points raised by Rolute in its appeal — the fact that the assigned party did not consent to the assignment between the assignor and the assignee is the central concern. Some authors have pointed out that it could be unfair to impose on the assigned party a new debtor who might prove to be unreliable, if not insolvent, after the assignment of the contract. Even more fundamentally, the principles of binding force and relativity of contract are sometimes seen as a complete bar to the transfer of a contract if the assignment would impose on the assigned party a new contracting party and new undertakings to which it has not consented (see the explanations of F. Levesque, *Précis de droit québécois des obligations: contrat, responsabilité, exécution et extinction* (2014), at paras. 928 and 1019; and of J.-L. Baudouin and P.-G. Jobin, *Les obligations* (7th ed. 2013), by P.-G. Jobin and N. Vézina, at No. 1042).

[7] Despite this uncertainty and the apparent silence of the general law, however, assignment of contract is firmly rooted in commercial life, and it enables contracting parties, as in this case, to meet complex objectives (see, e.g., D. Lluellas and B. Moore, *Droit des obligations* (3rd ed. 2018), at No. 3227). This appeal confirms that assignment of contract has a key role to play as a business technique, given that, being a contract itself, assignment has a legitimate malleability that is supported by the principle of autonomy of the will. Here, the parties set up a novel assignment mechanism, one with a translatory effect on the rights and obligations under the

contract, although that effect is temporally limited by a lease to which the assignment is accessory. In this case, the technique of assignment made it possible, at one stage of the nationalization of electricity, to balance the interests of the assignor, Gatineau Power, and that company's secured creditors with those of the government and Hydro-Québec and even, despite the objections it now raises, those of Resolute in the assigned contract.

[8] In fact, the dispute between the parties shows how assignment of contract — seen as a transfer to the assignee not merely of rights and obligations but also of the contract itself — can be achieved in a manner that, while protecting the interests of the assigned party, is compatible with the principles of binding force and relativity of contract. In addition to being a composite technique comprising two mechanisms involving the transfer of, respectively, claims and debts under a contract, assignment represents first and foremost, in this case, a legal mechanism by which one party to the 1926 contract, the assignor, Gatineau Power, transferred its [TRANSLATION] “status as contracting party”² to a third person, the assignee, Hydro-Québec, in a manner that is consistent with the moral foundation of relativity of the original contract. Overall, the answer to Resolute's objections, the most important of which is that it did not consent to the operation, lies in legal rules that protect the assigned party's interests by requiring that party's consent in order for the assignment to be valid. The interpretation I propose here is thus consistent with an important current in Quebec doctrine and jurisprudence,

² I take this expression from Lluellas and Moore, at No. 3238. It is based on the notion provided for in the new definition of assignment of contract in art. 1216 para. 1 of the French *Code civil*, which was adopted in the 2016 reform of the law of obligations and which I will discuss below, that a party can [TRANSLATION] “assign his status as party to the contract”.

as well as with recently reformed French law. According to all these authorities, there is no conceptual or moral bar to the assignment of a contract, seen as a patrimonial asset in itself, provided that the operation protects the interests of the assigned party.

II. Background

[9] In 1926, CIP and Gatineau Power signed a synallagmatic contract of successive performance for the supply of electric power in which Gatineau Power undertook to deliver 40,000 kW of electricity per month to CIP, while the latter undertook in exchange to pay for that electricity. In the preamble to the contract, the parties mentioned that Gatineau Power was building hydroelectric plants on the Gatineau River and that CIP wished to obtain electrical energy from those plants for the operation of its mills. The original term of the contract was 40 years, a term that CIP had an option to renew for additional 10-year periods. It is admitted that the 1926 contract has been renewed several times and is still in effect. It is also admitted that, as a result of various transactions that are not at issue in this case, Resolute is the holder of CIP's rights and obligations under the 1926 contract.

[10] The 1926 contract provided for a stable price for electricity. However, art. 20 provided that CIP would accept any increases in the price that might result from future increases in taxes or charges levied by the provincial or federal government on electrical energy generated from water power:

The Purchaser agrees that if during the term of this Agreement any future Dominion or Province tax or charge is levied upon electrical energy generated from water power in such manner as to increase the taxes and charges presently effective then the amount of such tax or charge, but not more than the amount of the increase shall be added to the billing for electrical energy under this Agreement.

(A.R., vol. I, at p. 174)

This price adjustment clause was never invoked by Gatineau Power.

[11] The contract contains a number of provisions concerning the quantities of electricity to be delivered by Gatineau Power and the terms for payment of the price for that electricity, even including a clause that gives Gatineau Power the right to request that payments be made “in gold coin” (art. 15). It also provides for mutual undertakings related to the sale of electricity, including clauses concerning renewal (art. 21), dispute settlement (arts. 18 and 19), and civil liability of the parties in the event of personal injury or damage to property (art. 7). In addition to art. 20 with respect to the price, two provisions are of particular relevance to the issues in this case. In art. 17, the parties agreed that the contract was to be subject to both present and future provincial and federal regulation. And they stipulated in art. 22 that “[t]his Agreement shall enure to the benefit of and be binding upon the successors or assigns of both parties”.

[12] In the early 1960s, the Quebec government acquired the capital stock of a number of private power production companies, including Gatineau Power. Since then, Gatineau Power has been a [TRANSLATION] “wholly owned subsidiary” of

Hydro-Québec (A.F., at para. 7). This phase of the nationalization of electricity followed the creation of Hydro-Québec and the expropriation of a Montréal company in 1944; that expropriation had included all the movable and immovable property used in the production of electricity as well as the bulk of the expropriated company's contracts. In this new phase involving Gatineau Power, the Quebec government was no longer acting by way of expropriation, but instead purchased shares of the companies concerned, which was a method contemplated by law (see *An Act respecting the Quebec Hydro-Electric Commission*, R.S.Q. 1941, c. 98A (inserted into the Revised Statutes by S.Q. 1944, c. 22), s. 40, to which Act the 1965 contract refers).

[13] Thus, in 1965, Hydro-Québec entered into a bilateral contract with Gatineau Power that was part of a broader process designed to unify the management and operations of Gatineau Power and the other private companies whose shares Hydro-Québec had already purchased. This contract provided for the sale of all of Gatineau Power's movable property to Hydro-Québec and the lease to the latter of all of the former's immovables for a term of 25 years. It further provided that Hydro-Québec would assume certain responsibilities toward Gatineau Power's creditors, including with respect to bonds subscribed to under a trust deed referred to in the contract. The contract was subject to approval by the "holders of the bonds" in question. Hydro-Québec was to benefit from the revenue derived from Gatineau Power's power contracts, and was entitled to use the premises leased from the latter as if they were its own.

[14] According to the parties' agreed statement of admissions, this contract is still in effect. Until 2011, the year when the dispute between the parties arose, Gatineau Power's financial statements in fact indicated that the 1965 lease continued to apply, having been tacitly renewed.

[15] The central question in the case is as follows: Did the 1965 contract make Hydro-Québec Resolute's other contracting party by way of an assignment of the 1926 contract?

[16] There is almost no evidence in the record regarding the circumstances of formation of the 1965 contract, and evidence of the parties' conduct since the contract was signed is fragmentary. What we do know, however, is that since at least 1999, all bills for electricity supplied under the 1926 contract have been issued by Hydro-Québec. In 1986, 1996 and 2006, notices of renewal of the 1926 contract were sent to [TRANSLATION] "Gatineau Power Company c/o Hydro-Québec". According to a record dated 2012 from Quebec's enterprise register and to undisputed testimony, Gatineau Power is inactive, has no employees actively working for it and does not even have a bank account. It is domiciled at Hydro-Québec's head office, and Hydro-Québec appoints its officers and directors.

[17] In 1982, CIP and Hydro-Québec entered into a contract for the supply of additional power. The new contract identified Hydro-Québec as [TRANSLATION] "[t]he provider [that] already supplies the subscriber with 40,000kW of power" and referred explicitly to the contract originally entered into "between Gatineau Power and

Canadian International Paper Company” in 1926 (art. 4a)). Gatineau Power did not participate in that agreement, which is binding on Resolute as CIP’s successor.

[18] In 1996, the province passed the *Act respecting the Régie de l’énergie*, S.Q. 1996, c. 61, which granted Hydro-Québec, with a few exceptions, a monopoly over the distribution of electric power in Quebec (s. 62).

[19] Between 2005 and 2009, Gatineau Power assigned to Hydro-Québec three power plants on the Gatineau River that Hydro-Québec had been leasing from it and that had supplied CIP before the nationalization. After the assignment of these three plants, Gatineau Power still owned immovables, as can be seen from its financial statements. In 2011, Gatineau Power reported that these fixed assets had an unconsolidated value of approximately \$18 million. It is admitted that Gatineau Power owns a hydroelectric power plant on the Ottawa River.

[20] Starting in 2007, Hydro-Québec had two levies imposed on it: a new amount fixed by s. 32 of the *Hydro-Québec Act*, CQLR, c. H-5 (“*HQA*”), and an amount provided for in s. 68 of the *Watercourses Act*, CQLR, c. R-13 (“*WA*”), from which it had previously been exempted. The levied amounts are paid into the Generations Fund, a fund established by the Quebec government in 2006 for the purpose of reducing the public debt.

[21] On November 30, 2011, Hydro-Québec sent AbiBow Canada Inc., CIP’s successor, which has since become Resolute, an electricity bill for over \$3 million. A

covering letter referred to the 1926 contract, including the price adjustment clause. A significant portion of the amount Hydro-Québec was now claiming from Resolute corresponded to an increase in the price of electricity that resulted from the levies imposed on Hydro-Québec over the preceding three years under s. 32 of the *HQA* and s. 68 of the *WA*.

[22] Resolute objects to this increase. It paid the bill from Hydro-Québec under protest and filed an action in the Superior Court for a declaratory judgment and for reimbursement. It asked the court to declare that it did not owe the amount being claimed from it to either Hydro-Québec or Gatineau Power.

A. *Judgment of the Quebec Superior Court (Le Bel J.)*

[23] The Superior Court granted Resolute's amended motion to institute proceedings for a declaratory judgment. It declared that Hydro-Québec could not claim the levies under s. 32 of the *HQA* and s. 68 of the *WA* from Resolute, and also could not claim arrears or administrative fees related to those levies. The trial judge ordered that the overpayments be reimbursed.

[24] The trial judge declined to find that the effect of the 1965 contract was that Gatineau Power had assigned to Hydro-Québec the rights and obligations it had agreed to in 1926. She observed that there was no indication that the 1965 contract had been brought to Resolute's attention. She also noted that Resolute was still benefiting from

the 1926 contract, the existence of which had been confirmed in 1982 when it entered into the contract with Hydro-Québec for additional power.

[25] The trial judge wrote that [TRANSLATION] “[i]t is difficult to pinpoint the exact moment [an] assignment of contract [would have taken] place”, adding that since the nationalization of electricity, Hydro-Québec has held all the shares in Gatineau Power and “managed its assets and contracts” (para. 53 (CanLII)). She pointed out that Hydro-Québec had decided to acquire Gatineau Power’s three plants on the Gatineau River that were covered by the acts of assignment concluded in the 2000s. She went on to say that, if those transactions were to have any effect on the application and interpretation of the 1926 contract, Hydro-Québec had “never informed [Resolute FP] in due time[, and i]t is difficult to find that these transactions effected an assignment of contract” (para. 54).

[26] Even if art. 22 of the 1926 contract did authorize an assignment of the contract, the trial judge added, such a change could not be set up against the other party to the contract [TRANSLATION] “without first being brought to its attention” (para. 55). In any event, if there had been an assignment of contract, such an assignment would not have released Gatineau Power from its obligations (para. 56).

[27] The trial judge concluded that the parties to the 1926 contract are still Gatineau Power and Resolute, and that Hydro-Québec cannot avail itself of art. 20 of the 1926 contract (para. 60).

[28] The trial judge also expressed the opinion that the amounts claimed by Hydro-Québec do not constitute a “tax or charge” within the meaning of art. 20 of the 1926 contract, but are instead amounts already belonging to the government that are being allocated to the reduction of the public debt (paras. 65-66). In this context, she concluded that it cannot be said that the amounts thus taken from Hydro-Québec, which already belonged to the province, are a “tax or charge” within the meaning of the 1926 contract (para. 67).

B. *Judgment of the Quebec Court of Appeal (Vauclair, Marcotte and Roy J.J.A.)*

[29] In a unanimous decision, the Court of Appeal allowed Hydro-Québec’s appeal in part. It declared that the levies provided for in s. 32 of the *HQA* and s. 68 of the *WA* constituted taxes or charges that were payable by Resolute to Hydro-Québec under art. 20 of the 1926 contract. It also confirmed that Hydro-Québec could not claim arrears from before October 2011 and that, as the Superior Court had decided, Hydro-Québec had to reimburse the overpayments.

[30] The Court of Appeal began by examining the question whether the levies at issue were taxes or charges within the meaning of art. 20 of the 1926 contract. It stated that the words “tax or charge” must be given their ordinary meaning here (para. 12 (CanLII)). The court proposed to follow *Quebec (Attorney General) v. Algonquin Développements Côte-Ste-Catherine inc. (Développements Hydroméga inc.)*, 2011 QCCA 1942, [2011] R.J.Q. 1967, in which it had been held that [TRANSLATION] “the amounts payable under section 68 of the *Watercourses*

Act constitute a tax” (C.A. reasons, at para. 13). As for the levy under s. 32 of the *HQA*, the Court of Appeal held that it was not necessary to determine whether it constituted a tax or a charge, since the 1926 contract applied to both (para. 15).

[31] The Court of Appeal rejected Resolute’s argument that the levies constituted an [TRANSLATION] “allocation” of government revenues rather than “taxation”; in its view, Resolute was “confusing the legal nature — tax or charge — of the fees payable to the government with the place where the levied amounts are deposited” (para. 16). On this point, the Court of Appeal therefore concluded that the trial judge had made a reviewable error in holding that the 1926 contract did not apply to the levies payable under s. 68 of the *WA* and s. 32 of the *HQA* (para. 19).

[32] The Court of Appeal then sought to identify the parties to the 1926 agreement in light of Hydro-Québec’s argument that the 1965 contract had effected an assignment of that contract from Gatineau Power (assignor) to Hydro-Québec (assignee).

[33] The court reviewed the provisions of the 1965 contract. In its view, the mandate concerned only the immovables, given that Hydro-Québec had purchased Gatineau Power’s movable property. Quoting art. 6 of the 1965 contract, the judges stated that the 1926 contract, including the right to demand the supply of electricity and the obligation to pay for it, had been sold as movable property, and stressed that [TRANSLATION] “[t]he parties provided that contracts, as negotiable instruments, were included in the sale” and that money and electricity are movable property (para. 26).

The Court of Appeal also noted that Hydro-Québec retained all revenue from power contracts, “whereas a mandatary would have collected them in order to remit them to its mandator” (para. 28).

[34] The court observed, relying on *N.C. Hutton Ltd. v. Canadian Pacific Forest Products Ltd.*, 1999 CanLII 13538 (Que. C.A.), that the parties to the 1926 contract had consented in advance to a possible assignment of their contract.

[35] In sum, the court was of the view that the trial judge had [TRANSLATION] “made a reviewable error in holding that the 1926 [c]ontract had not been assigned to Hydro-Québec” (para. 40). Hydro-Québec could therefore bill Resolute under art. 20 of the 1926 contract for the amount of the charges paid to the government. But it could not bill for charges relating to the period preceding October 2011, as the trial judge had not erred regarding retroactivity and arrears. This conclusion with respect to arrears was not appealed to this Court.

III. Analysis

[36] Resolute raises two main objections to the Court of Appeal’s conclusion that the levies provided for in s. 32 of the *HQA* and s. 68 of the *WA* constitute taxes or charges that are payable to Hydro-Québec under art. 20 of the 1926 contract.

[37] First, Resolute submits that Hydro-Québec cannot invoke art. 20, because in its view the only parties to that contract are itself and Gatineau Power. Resolute

disputes the characterization adopted by the Court of Appeal in its analysis of the 1965 contract — that it effected an assignment of contract — insisting that the trial judge made no reviewable error in interpreting that agreement. In any event, even if the characterization of the agreement as an assignment of contract were found to be correct, Resolute maintains that it never consented to such an assignment, which means that the purported assignment would not be valid and could not be set up against it. What is more, that assignment could not render its obligations more onerous, which would be the case, Resolute argues, if the price fixed in 1926 were increased as Hydro-Québec requests.

[38] Second, Resolute maintains that, even if Hydro-Québec were a party to the 1926 contract, the levies provided for in s. 32 of the *HQA* and s. 68 of the *WA* are not a “tax or charge” on electricity generated from water power within the meaning of art. 20 of that contract.

[39] It should be noted that the two contracts at the heart of the litigation were entered into before the *C.C.Q.* came into force. The parties essentially agree that whether the *C.C.L.C.* or the *C.C.Q.* is applied does not affect the outcome of the litigation. They did not dwell on this point, nor did the Superior Court and the Court of Appeal consider it necessary to detail the differences between the two codes in order to resolve the case.

A. *Is Hydro-Québec a Party to the 1926 Contract, and Can It Invoke That Contract With Respect to Resolute?*

[40] Resolute disputes the Court of Appeal's conclusion. It maintains that Hydro-Québec is, as the trial judge stated, a mandatory and not an assignee of Gatineau Power under the 1965 contract. Because Hydro-Québec is doing business with Resolute as a representative of Gatineau Power, it cannot invoke art. 20 of the 1926 contract in its own name in order to increase the price for electricity.

[41] Resolute advances, in support of the trial judge's interpretation of the 1965 contract, three arguments that I propose to discuss in turn: (1) Hydro-Québec did not allege assignment of contract, and even argued the contrary at trial; (2) the Court of Appeal intervened on the highly factual issue of contractual interpretation without identifying a palpable and overriding error on the trial judge's part; and (3) the Court of Appeal erred in concluding that the sale of Gatineau Power's movable property to Hydro-Québec entailed an assignment of the 1926 contract. After doing so, I will consider Resolute's alternative arguments on its first ground of appeal: (4) it had not consented to the assignment; (5) the assignment could not be set up against it; and (6) the effect of the assignment of contract was to render its obligations under the 1926 contract more onerous.

(1) Hydro-Québec's Position at Trial

[42] Resolute asserts that Hydro-Québec did not allege at trial that there had been an assignment of the 1926 contract, and that counsel for Hydro-Québec even recognized in his arguments before the trial judge that there had been no assignment.

[43] This argument was rightly rejected by the Court of Appeal (para. 39). The trial judge — who heard the evidence and arguments — understood Hydro-Québec to be essentially arguing that it was Resolute’s other contracting party and that the 1926 contract had been assigned (see paras. 34 and 44). In her analysis, she not only referred to that argument several times, but also took it into account and formally rejected it (paras. 59 and 60).

[44] Resolute in fact made submissions on this point at trial (plaintiff’s outline of argument of April 26, 2016, R.R., at paras. 3 and 23-80; see also A.R., vol. VI, at pp. 137-72). One of the key issues raised in this case, in its view, was [TRANSLATION] “who is Resolute’s other contracting party?” Not long after saying that, it noted that “it’s a question of interpretation of D-1 [the 1965 contract] that brings us here today”. Resolute aptly summed up the two possibilities: “assignment or mandate”.

[45] The Court of Appeal took note of Resolute’s argument that the respondents had admitted that no assignment had been made. Observing that Hydro-Québec had framed its arguments [TRANSLATION] “differently”, the court rejected this argument (para. 39). I agree with its reasons. I would point out that the respondents’ position has at all times been that art. 20 of the 1926 contract applies and that Hydro-Québec may request a price increase (see, e.g., A.R., vol. VII, at pp. 118-19, 124, 126 and 144; see also A.R., vol. VIII, at pp. 27 and 39; defendants’ outline of argument of May 4, 2016, R.R., at paras. 1, 7, 20, 25, 29-34, 85, 106 and 109). A Hydro-Québec manager even

testified at trial that he had had no knowledge of the Gatineau Power Company or of its activities before taking over the file at issue in this case in 2011.

[46] A review of the transcript of the hearing at trial supports a conclusion that the apparent incoherence in the parties' positions can be explained in part by the fact that there was some confusion as to the scope of the agreed statement of admissions (see, on this point, A.R., vol. VIII, at pp. 1-19). Counsel for the respondents at trial seems to have assumed that the 1926 contract [TRANSLATION] "has effect as between AbiBow Canada Inc. and Hydro-Québec". The objection of counsel for Resolute on this point had taken him "by surprise" in the middle of oral argument. After this exchange, the parties agreed that the question "who is a contracting party?" in respect of the 1926 contract, to quote counsel for Resolute, remained to be answered. This can also be seen from Hydro-Québec and Gatineau Power's notice of appeal.

[47] Logically, it is clear that Hydro-Québec can only avail itself of the 1926 contract's price increase clause if it is Resolute's other contracting party. There is every reason to believe that the trial judge understood that Hydro-Québec had made no concession in this regard either in its pleadings or in its argument. In fact, in their defence, Hydro-Québec and Gatineau Power formally denied the following allegation by Resolute in its motion to institute proceedings: [TRANSLATION] "To the best of Resolute FP's knowledge, the Contract was not assigned by Gatineau Power to [Hydro-Québec], but [Hydro-Québec] is responsible for administering it and for collecting the amounts payable to Gatineau Power in the latter's name". When all is

said and done, the trial judge clearly understood that the assignment issue was central to the case, and she disposed of this argument in her reasons.

(2) Intervention of the Court of Appeal

[48] Resolute argues that, because the Court of Appeal identified no palpable and overriding error by the trial judge, it could not overrule her interpretation of the 1965 contract. In Resolute's view, the Court of Appeal merely proposed a different interpretation of that contract and thereby failed to show deference to the interpretation adopted by the trial judge.

[49] Resolute is of course right that, in accordance with the principles set out by this Court in *Uniprix inc. v. Gestion Gosselin et Bérubé inc.*, 2017 SCC 43, [2017] 2 S.C.R. 59, the interpretation of the 1965 contract proposed by the trial judge must be accepted absent a palpable and overriding error. Let us take a closer look at the approaches taken in turn by the Superior Court and the Court of Appeal in order to determine whether this Court should intervene in the case at bar.

[50] In discussing the facts, the trial judge quoted various clauses of the 1965 contract (arts. 3, 4, 5, 8, 9a), 9b) and 9g)), but did not explicitly analyze them. She certainly did not quote arts. 6 and 7 of that contract. The quotation reproducing the above-mentioned provisions of the 1965 contract was in fact [TRANSLATION] "taken from the plaintiff's [Resolute's] memorandum" (para. 15, note 6) and was preceded by an introductory phrase, added in the memorandum, in which that contract was called

the “Lease / Mandate (D-1)” (para. 15). It can also be seen that the trial judge was concerned more with the question of the “exact moment [an] assignment of contract [would have taken] place” than with the basis in the 1965 agreement that would confirm or refute a conclusion to that effect (para. 53). That being said, she nonetheless stated that, in the 1965 contract, Gatineau Power “named [Hydro-Québec] mandatary for the management of its operations and contracts” (para. 51) and that it is Hydro-Québec that “has . . . managed [Gatineau Power’s] assets and contracts” (para. 53). Given the trial judge’s conclusions on the meaning of the contract, it can be assumed that, in her view, the articles she quoted established a mandate to manage the 1926 contract and were inconsistent with an interpretation to the effect that there was an assignment from Gatineau Power to Hydro-Québec. The trial judge also relied on certain factors extrinsic to the 1965 contract, such as the nationalization of electricity and the parties’ actions after entering into the contract, in support of her interpretation (see para. 51). Her analysis, based as it was on evidence intrinsic and extrinsic to the contract, was thus at the second step of the interpretation exercise described by this Court in *Uniprix*, at paras. 36-37, namely the identification, in the absence of clear language, of the common intention of the parties.

[51] The respondents argue that errors in “characterizing” the 1965 contract led the trial judge to conclude that there was a mandate rather than an assignment of contract, which implies that the standard for intervention in this case is that of an error of law. But I agree with Resolute that the standard is palpable and overriding error. Characterization of a contract often requires that it first be interpreted (see *Uniprix*, at

paras. 39-40). Even though the ultimate question relates to the characterization of the contract — its association with the proper normative category, that is, with assignment of contract or mandate — it seems clear to me that, in this case, this step is in large part the result of an “interpretation exercise”, to use the expression of Wagner J. (as he then was) and Gascon J. in *Uniprix* (para. 43). That result necessarily depends on the meaning to be given to the clauses of the contract that condition Hydro-Québec’s exercise of its rights and fulfillment of its obligations.

[52] Thus, it was open to the Court of Appeal to intervene only if the trial judge had made a palpable and overriding error. But while Resolute is right about the applicable standard, it is mistaken in submitting that the Court of Appeal was not justified in intervening in this case.

[53] I wish to be clear that there is no suggestion that the Court of Appeal identified the wrong standard here, that is, that it sought an error of law and not a palpable and overriding error. It is true that the Court of Appeal referred to a [TRANSLATION] “reviewable error” in the trial judge’s finding that the 1926 contract had not been assigned to Hydro-Québec (para. 40). This expression — which encompasses any error that justifies an appellate court’s intervention — is perfectly adequate to indicate that the trial judge had made an error of the type identified in *Uniprix* (see also, e.g., *Salomon v. Matte-Thompson*, 2019 SCC 14, [2019] 1 S.C.R. 729, at paras. 40-42).

[54] A careful reading of the Court of Appeal's reasons shows that it was of the view that the trial judge had made a palpable error in concluding on the basis of her interpretation of the 1965 contract that the mandate established in that contract was not limited to the management of immovables, but included the management of contracts (see paras. 25 and 28). The Court of Appeal also identified, in interpreting the 1965 contract and in assessing the parties' actions after entering into the contract, errors that confirmed, contrary to the trial judge's interpretation, that the 1926 contract had been assigned in 1965 (see para. 32). The court considered these to be overriding errors in that they had led the trial judge to find that the 1926 contract had not been assigned by the 1965 contract (see para. 40). I cannot therefore accept Resolute's argument that the Court of Appeal intervened without identifying a palpable and overriding error on the trial judge's part.

[55] As to this Court's role at this stage of the litigation, it is also shaped by the standard of appellate intervention. As was explained in *Uniprix*:

In the case at bar, this Court's role is in fact limited to deciding whether the trial judge committed a palpable and overriding error in applying the relevant principles of interpretation to . . . the contract [para. 44]

[56] Thus, our role consists in determining whether the trial judge made a palpable and overriding error in interpreting the 1965 contract, not whether she made the exact error identified by the Court of Appeal.

[57] As I will explain below, although I disagree with the Court of Appeal's interpretation regarding certain clauses of the contract, I agree with its view that the 1965 agreement effected an assignment of the 1926 contract and — with all due respect — that the trial judge made a palpable and overriding error in her interpretation of that agreement in stating that Gatineau Power had named Hydro-Québec [TRANSLATION] “mandatary for the management of its operations and contracts” (paras. 15 and 51). This error can also be seen in the trial judge's assertion that Gatineau Power had not assigned its rights and obligations to Hydro-Québec (see para. 53). The trial judge's findings were incompatible with the words of the 1965 contract and disregarded clauses that relate directly to the issue raised in this case: whether the rights and obligations under the 1926 contract were assigned. With respect, the content of her reasons suggests that the totality of the 1965 contract was not considered. More specifically, given the objectives stated in the preamble of that contract and the circumstances in which it was concluded, the 1926 contract was assigned by the combined effect of arts. 4 through 8 of the 1965 contract.

[58] The 1965 contract, which was entered into following the acquisition of all of Gatineau Power's capital stock by Hydro-Québec in one phase of the nationalization of electricity, concerns a wide range of relations between the two companies, but does not refer specifically to the 1926 contract. The trial judge described the 1965 contract as a [TRANSLATION] “mandate, sale and lease agreement” (para. 51). It is true that it has characteristics of each of these three juridical operations. The fact that the 1965 contract has, among other things, a sale component, a lease component and a mandate

component is not in dispute. Nor, of course, is there anything to bar a subsidiary from selling assets to its parent company or to preclude the existence of a lease or mandate between companies that are thus related. But it is the balance between these elements that was, I find, misunderstood at trial because of a palpable and overriding error. As I will endeavour to explain, the trial judge erred in stating, in relation to Gatineau Power's operations as an electricity producer, that Hydro-Québec had been "manag[ing] its assets and contracts" since the nationalization of electricity (para. 53).

[59] The trial judge's conclusion suggests that Hydro-Québec is, in managing assets and contracts under the contract, acting in Gatineau Power's *name* as mandatary and in its *interest* as administrator of the property of another. With respect for the contrary view, to say without qualification that Hydro-Québec manages Gatineau Power's assets is to disregard the totality of the contract and the approach according to which each clause of a contract is interpreted in light of the others so that each is given the meaning that flows from the contract as a whole.

[60] I find that these errors justify appellate intervention to reverse the trial judge's finding that no assignment of contract resulted from the 1965 contract.

(3) Interpretation of the 1965 Contract

(a) *Overview of the Applicable Legal Principles*

[61] It should be noted that it is necessary, in interpreting a contract, to seek “[t]he common intention of the parties” (art. 1425 *C.C.Q.*) while taking into account, in the words of the *C.C.Q.*, “the nature of the contract, the circumstances in which it was formed, the interpretation which has already been given to it by the parties or which it may have received, and usage” (art. 1426 *C.C.Q.*). Each clause is to be interpreted “in light of the others” so that each one is given the meaning derived from the contract as a whole (art. 1427 *C.C.Q.*). In this case, none of these considerations suggest that Gatineau Power and Hydro-Québec intended to achieve anything other than the assignment contemplated in the text of the contract.

[62] To begin, it should be borne in mind that mandate is a contract by which the mandator confers upon the mandatary the power to represent him or her in “the performance of a juridical act” (art. 2130 *C.C.Q.*; see also C. Fabien, “Mandate”, in *Reform of the Civil Code*, vol. 2-C, *Obligations VII, VIII* (1993), at pp. 3-5; A. Popovici, *La couleur du mandat* (1995), at pp. 17-18). An essential aspect of the contract of mandate is that mandataries are not personally liable to third persons except in very specific circumstances, in particular when they act in their own names, exceed their powers or commit faults in the performance of their mandates (Fabien, at pp. 15-17).

[63] Furthermore, the law imposes two duties on mandataries. A mandatary must (1) “act honestly and faithfully in the best interests of the mandator, and . . . avoid placing himself in a position where his personal interest is in conflict with that of his

mandator” (art. 2138 para. 2 *C.C.Q.*; see also Fabien, at pp. 8-9; *Pincourt (Ville de) v. Construction Cogerex ltée*, 2013 QCCA 1773, at paras. 180-81 (CanLII)); and (2) “act with prudence and diligence” in performing the mandate (art. 2138 para. 1 *C.C.Q.*). Regarding the first duty, it is important to bear in mind that even mandataries charged with full administration of the property of others cannot use the mandator’s property for their own needs or purposes (art. 1310 *C.C.Q.*; see also *Groupe Sutton-Royal inc. (Syndic de)*, 2015 QCCA 1069, at para. 122 (CanLII)). As Professor Cantin Cumyn observes, the duty to act faithfully [TRANSLATION] “prohibits using the powers in the personal interest of the person in whom they are invested” (“Le pouvoir juridique” (2007), 52 *McGill L.J.* 215, at p. 231; see also M. Cantin Cumyn and M. Cumyn, *L’administration du bien d’autrui* (2nd ed. 2014), at Nos. 301 et seq.). As for the second duty, Professor Cantin Cumyn explains that the conduct of an administrator of the property of others will be prudent and diligent “if it is consistent with the conduct expected of a person who . . . acts for another or in an interest other than his or her own” (Cantin Cumyn (2007), at p. 233 (emphasis added); see also Cantin Cumyn and Cumyn, at Nos. 272 et seq.).

[64] It should also be mentioned that assignment of contract is known in Quebec civil law and that there is every indication that this operation was part of the positive law in 1965. It is true that before *Hutton*, there were some who argued that the idea of assigning a contract, as a *legal relationship*, was conceptually problematic and that the assignment of debts caused difficulties in light of the principle of relativity of contract. That being said, Baudouin J.A. did not in that case, in explaining how assignment of

contract can be effected in Quebec law by combining the assignment of claims and the transfer of debts, invent a novel juridical operation for Quebec law. In its instructively helpful explanation in *Hutton*, the Court of Appeal simply explained itself more completely on the subject than any court before it had, because courts had [TRANSLATION] “rarely had occasion to address the issue” (p. 8). I would add that the original contract in that case — which included a clause authorizing an assignment of contract — had been concluded in 1959 (p. 2), while the assignment of the contract had been effected in 1990 (pp. 4-5). As in the case at bar, therefore, all the events took place while the *C.C.L.C.* was still in force.

[65] Baudouin J.A. cited in particular some cases in which the autonomy and viability of an assignment of contract had been recognized, including a unanimous judgment of this Court penned by Mignault J. in 1925, that is, one year before the conclusion of the 1926 contract and long before the conclusion of the 1965 contract of assignment, the two that are at issue in the instant case (see *Aqueduc du Lac St. Jean v. Fortin*, [1925] S.C.R. 192). Mignault J. explained in that case, regarding one of the assignees, that it had been put “in the place [of the assignor] with respect to those contracts” (p. 195). In *Hutton*, Baudouin J.A. also quoted the Superior Court, which had noted that [TRANSLATION] “[t]he courts have recognized a broader operation called ‘assignment of contract’” and that this operation implies that “everything is assigned, *i.e.*, the obligations and rights inherent in the contract” (*General Accident Insurance Co. v. Cie de chauffage Gaz naturel*, [1978] C.S. 1160 (Que.), at p. 1164; see also *Banque royale du Canada v. P.G. du Québec*, [1976] C.S. 634 (Que.), at p. 635).

[66] In this Court, Resolute is not really challenging the concept of assignment of contract, but is instead suggesting that, in the instant case, the 1965 contract provides for a mandate. In the alternative, it proposes that, if there is an assignment of contract, that assignment is not valid and cannot be set up against it. I therefore do not see any legal obstacle to the possible application of assignment of contract to the facts of this case. I would also point out that art. 22 of the 1926 contract confers on the parties a right to assign the contract — it is similar to the clause at issue in *Hutton* — which strongly suggests that the parties to that agreement considered assignment of contract to be a valid juridical operation.

[67] It is true that, as Resolute observes, according to the subjective conception of contract, the contract is viewed as a legal relationship. But it is also possible to consider the contract from another angle, as being patrimonial in nature. It is this conception that helps to explain the fact that a contract can be assigned. The authors of *Quebec Civil Law* explain this as follows in commenting on the law under the former Code:

Most of the rules in Title Three [the title of the *Civil Code of Lower Canada* on obligations] envision an obligation in its character as a relationship between debtor and creditor. But an obligation is also a species of property, which can have an existence and value independent of the specific performance that it commands. Viewed in this light, the claim that the obligation represents can be transferred, as can any type of property. The Code contemplates three distinct operations by which claims may be transferred: the assignment of a contract; the assignment of claims; and delegation. [Emphasis added.]

(J. E. C. Brierley and R. A. Macdonald, eds., *Quebec Civil Law: An Introduction to Quebec Private Law* (1993), at No. 555.)

[68] To the same effect, Lluellas and Moore, after observing that a minority of commentators are opposed to viewing contracts as assignable property, conclude that, [TRANSLATION] “[b]eing patrimonial in nature, a contract can be assigned, especially given that the assignment furthers the purposes of the contract by ensuring the survival of its binding force” (No. 3226; see also *Aqueduc du Lac St. Jean*, at p. 195). In short, while I agree that a contract can easily be regarded as a legal relationship, I am of the opinion that, conceptually, there is no impediment to the conclusion reached by the Court of Appeal in this regard.

[69] Although the 1965 contract establishes, in art. 9, a mandate for other purposes, we will see below that the key clauses of that contract, the effect of which was to assign the 1926 contract, are incompatible with the very essence of the concepts of mandate and administration of the property of others. This is true in particular because Hydro-Québec undertakes personally to perform obligations and acts in its own interest in exercising its rights with regard to the 1926 contract. It is easier to understand the source of the disagreement between the parties in this case by bearing in mind the fundamental distinction in civil law between a “power” and a “legal right”. A power, like one granted to a mandatary or to an administrator of the property of others, [TRANSLATION] “can be defined as a prerogative conferred upon one person in the interests of another person or for the achievement of a goal”. A legal right, which includes a real right and a personal right, “is a prerogative that confers a benefit upon its holder, in the holder’s own interest” (Cantin Cumyn (2007), at p. 225; see also Cantin Cumyn and Cumyn, at Nos. 79 et seq.). The powers of an administrator of the

property of others thus enable the administrator “to autonomously carry out juridical acts that have effects with regard to another person or in a patrimony other than his or her own” (Cantin Cumyn (2007), at pp. 230-31 (emphasis added); see also p. 223). A legal right, on the contrary, has effects with regard to its holder or in the holder’s patrimony. In short, whereas a legal right is considered to be an “egoistic” prerogative, a power has an “altruistic” nature (p. 225). As Professor Popovici points out, the difference between an assignment of contract and a mandate is a difference in kind: [TRANSLATION] “In an assignment of contract, each party acts in his or her personal interest, whereas a mandatary and a substitute mandatary act in the mandator’s interest” (p. 138).

[70] As we will see below, the 1965 contract confers certain powers of administration on Hydro-Québec. However, Gatineau Power, in selling its movables and leasing its immovables to the state-owned enterprise, transferred legal rights to Hydro-Québec that the latter may exercise in its own interest, which is something that a mandatary or an administrator of the property of others cannot do. What is more, Hydro-Québec took on personal obligations that are incompatible with the functions of a mandatary or an administrator of the property of others, who as a general rule does not give undertakings in his or her own name. This operation means that the 1965 contract is one that could be characterized as a contract of “sale, lease, assignment and mandate” whose assignment component was necessary in order to achieve the objective of nationalizing electricity stated in the preamble.

(b) *Factors Intrinsic to the 1965 Contract*

[71] Let us take a closer look at what the parties said in the provisions of the contract itself.

[72] In the absence of evidence from the time of formation of the contract that would indicate the common intention of the parties, the four recitals of the preamble to the agreement are particularly important for the purpose of identifying the objectives of the parties to the contract, Gatineau Power and Hydro-Québec. It is true that a preamble is not generally intended to create obligations, but it will be helpful in this case to make connections between the undertakings of Hydro-Québec on the one hand and the expectations of Gatineau Power on the other.

[73] The preamble refers first to the status and purpose of Hydro-Québec. It mentions Hydro-Québec's constituent statute and states that Hydro-Québec was incorporated for the purposes of generating, acquiring, selling, transmitting and distributing electric power throughout the province (see also *An Act respecting the Quebec Hydro-Electric Commission*, s. 29).

[74] The second recital states a fundamental purpose of the contract: "to unify the management of the Company and those of the other electric power companies whose shares [Hydro-Québec] has purchased" (A.R., vol. III, at p. 96). Gatineau Power was to be integrated into the state-owned enterprise's provincial network. This desire for unification is confirmed by the fourth recital: "in order to achieve the desired

unification”, Gatineau Power agreed in the contract to sell its movable property to Hydro-Québec and to lease to the latter its “immoveables, constructions, apparatus and plant” (p. 97). This arrangement would allow Hydro-Québec to run these facilities as it saw fit with a view to discharging its obligations. The third recital completes the picture by stressing that, in this contract, Hydro-Québec was making a commitment to Gatineau Power’s creditors, in particular by stating that it and the province have “unconditionally guaranteed the repayment in capital, interests and premium, if any, of the bonds issued by the Company” (p. 96). The contract sets out a series of obligations that Hydro-Québec agreed to perform, thereby assuming personal liability.

[75] In short, the preamble announces what the clauses of the contract will confirm: the arrangement between Gatineau Power and Hydro-Québec was to unify the subsidiary, Gatineau Power, and the parent company, Hydro-Québec, with the agreement of certain secured creditors of Gatineau Power (“the holders of the bonds of the Company in accordance with the provisions of the Trust Deed”), who, moreover, had to approve the contract (A.R., vol. III, at p. 102, art. 16). The objectives of the parties as stated in the preamble provide insight into the fundamental structure of the contract. Hydro-Québec undertook to assume liability for Gatineau Power’s obligations. In return, Hydro-Québec was to control the production of energy under Gatineau Power’s power supply contracts for the term of the 1965 contract and would receive the revenue derived from it. In a statement of Gatineau Power’s commitments taken from its financial statements, this arrangement was described as an exchange:

[TRANSLATION] Under a contract in effect since January 1, 1966, the parent company undertook to advance to the Company such monies as would be required for it to fulfill all its obligations. In consideration, the Company undertook to lease its fixed assets to the parent company and to allow the parent company to benefit from the revenue deriving from them for a term of 25 years in exchange for an annual rental in an amount equal to the depreciation on its assets. [Emphasis added.]

(A.R., vol. III, at p. 92; see also pp. 41-92.)

[76] To conclude that Hydro-Québec acts only in Gatineau Power's name and in its interest in managing its assets and contracts is inconsistent with the objectives stated in the preamble. The contract forms part of the process of nationalization of electricity: it is Hydro-Québec that is charged with "generating, acquiring, selling, transmitting and distributing electric power and energy throughout the Province of Quebec" (A.R., vol. III, at p. 96). It does so in its own name, in accordance with the law, and not in the name or in the interest of others; for the most part, it does so by exercising rights it holds, not by exercising powers in Gatineau Power's interest.

[77] The 1965 contract confirms this business reality: operationally, Gatineau Power can no longer generate, acquire, sell, transmit or distribute electricity, because it no longer has the resources to do so. The assets needed in order to generate and sell electricity are now controlled by Hydro-Québec. As set out in the contract, the unification of Gatineau Power's operations with the rest of the network was to be achieved by two principal means: the sale of Gatineau Power's movable property to Hydro-Québec and the lease of the former's immovable property to the latter. The preamble does not mention the mandate in this regard — a mandate that exists, but that

the parties did not see as reflecting the fundamental relationship established between them in the contract.

[78] Article 1 of the contract provides that the lease granted by Gatineau Power to Hydro-Québec concerns “all its immoveables, constructions, apparatus and plant”, which are then defined as the “leased premises”. The parties excluded from the lease certain corporeal property used in the production of electricity that was being sold to the state-owned enterprise (art. 2). Hydro-Québec was to operate the leased premises “as it would its own”; it would have full and complete use and enjoyment of the leased premises for the term of the lease, and would also be fully responsible for maintaining them (p. 97, art. 4). At various points in the contract, the parties specified that Hydro-Québec would be responsible for managing, operating and maintaining the leased premises (see arts. 4, 5 and 14).

[79] The initial term of the lease of the leased premises was fixed at 25 years (art. 3), and the annual rent was to be equal to the annual depreciation on Gatineau Power’s capital assets “plus the interest payments payable on the funded debt during that year” (A.R., vol. III, at p. 101, art. 13). According to Gatineau Power’s consolidated financial statements dated December 31, 2011, the lease, which had been [TRANSLATION] “tacitly renewed”, was still in effect when Hydro-Québec issued its increased bill (A.R., vol. III, at p. 92). It should be noted that despite the sale of the plants on the Gatineau River, Gatineau Power continues to this day to own immovables

to which the lease applies, including, as can be seen from the agreed statement of admissions filed by the parties at trial, a plant on the Ottawa River.

[80] The lease of the immovables deprives the lessor of the water power needed in order to generate hydroelectricity. It is not Gatineau Power that has full enjoyment of the immovables, because the very first clause of the contract provides that Hydro-Québec “shall be vested with the full and complete use and enjoyment of the leased premises”. This is consistent with the nature of the civil law contract of lease: regarding use and enjoyment of the leased property, the lessor does not simply grant powers to the lessee, but undertakes to provide the lessee, in return for a rent, with the enjoyment of the property for the term of the lease. Thus, the lessee has a personal claim against the lessor and exercises it in his or her own interest; from the perspective of use and enjoyment, the lessee does not exercise powers in the lessor’s interest.

[81] In short, as regards the operational site for electricity production — the use and enjoyment of the leased premises — Hydro-Québec does not manage the assets in Gatineau Power’s name. The words “manage” and “management” used in arts. 4 and 5 of the 1965 contract cannot refer to the concept of management that is central to a mandate or to the administration of the property of others. A lessee manages the leased premises, as Hydro-Québec does in this case, in its own interest and not in the interest of any mandator or beneficiary. As Professor Cantin Cumyn and Professor Cumyn explain, status as a lessee must not be confused with status as an administrator of the property of others:

[TRANSLATION] *Outline of subtitle.* An administrator of the property of others is a person who is vested with powers over property or a patrimony that is not the administrator's own. It follows that this status does not apply to someone who exercises a right over the property of others. Nor is it consistent with legal relationships arising out of contracts for the performance of services that do not involve the exercise of powers of representation or personal powers.

...

Lessees and borrowers. Status as an administrator of the property of others is, *a fortiori*, inapplicable to the holder of a personal right to the enjoyment of a thing belonging to another under a lease, a loan for use or another agreement that produces legal effects of the same nature. Such contracts make the lessee, borrower or other user merely a creditor of enjoyment of the thing (*jus ad rem*). Rights under them are exercised as against the other contracting party; they do not confer direct prerogatives in respect of things belonging to others such that the holders' legal status could be confused with that of an administrator of the property of others. [Emphasis added; footnotes omitted; Nos. 153 and 155.]

[82] As for the movable property, it was sold and transferred to Hydro-Québec as provided for in art. 6. This sale included corporeal and incorporeal property that was not covered by the lease, such as accounts receivable. The effect of the 1965 contract is that Hydro-Québec owns the movables that are essential to the production of electricity; it does not manage them in Gatineau Power's name. Had there been no sale, these movables might have been characterized as immovables by destination and remained in the patrimony of the owner of the immovables. But as of the day on which Hydro-Québec took possession of the leased premises, it acquired all rights of enjoyment in the means of production of electricity, which it exercises in its own name and not in the name or in the interest of another. The sale of movable property is incompatible with the existence of any mandate or power of administration in the name of another in respect of the property in question. It was understood that

Hydro-Québec's ownership of the movable property required for the production of electricity together with effective control of the immovables under the lease would enable Hydro-Québec to produce electricity on Gatineau Power's premises in performing the 1926 contract, and that it would be doing so in its own interest.

[83] Hydro-Québec also gave other personal undertakings in relation to Gatineau Power (art. 15), as well as to that company's employees (art. 11) and creditors (arts. 10, 13 and 16), that are at first blush incompatible with the existence of a relationship of mandator and mandatary.

[84] Hydro-Québec's undertaking to the secured creditors under Gatineau Power's trust deed was clearly a fundamental aspect of the 1965 contract. The interest in the agreement of the "holders of the bonds" and of their trustee was a guarantee of protection of their investment in Gatineau Power. Gatineau Power, in a non-arm's length transaction with its parent company, was selling all its movable property to that company, and the result may have been that the guarantee did not include the property in question. Gatineau Power was retaining the immovables, but was leasing them to Hydro-Québec for rent equal to the annual depreciation. To protect the interest of the creditors in question in the circumstances, Hydro-Québec gave them a guarantee that Gatineau Power would fulfill its obligations (art. 10). This undertaking was to continue "until the bonds of the Company are repaid" (art. 13; see also art. 15). Article 15 specifically provides that Hydro-Québec "undertakes to advance to [Gatineau Power] such monies as will be required . . . to fulfil all its obligations, including the obligations

in respect of all bonds issued” (p. 101). A key fact is that the agreement between Gatineau Power and Hydro-Québec had to be approved by the holders of the bonds (art. 16).

[85] Hydro-Québec’s undertaking in relation to Gatineau Power’s creditors was thus substantial. It is therefore easy to understand that, in exchange for honouring that undertaking, the state-owned enterprise required, as was agreed in art. 8, that it “benefit from the entire revenue deriving from the leased premises” for the term of the agreement (A.R., vol. III, at p. 99).

[86] In light of Hydro-Québec’s personal undertaking to Gatineau Power and to that company’s secured creditors, it is unthinkable that this revenue was to be paid to Hydro-Québec as a mandatary. Hydro-Québec’s personal undertaking meant that it was to benefit from Gatineau Power’s revenues, including those resulting from the 1926 contract, for the duration of its undertaking (or, as art. 8 provides, “during the continuance of this agreement” (p. 99)). Furthermore, the fact that these amounts were to be paid directly to Hydro-Québec would, if they were to belong to Gatineau Power, be contrary to the principle that no administrator may mingle administered property with his or her own property.

[87] Given this background, what does the 1965 contract say about whether the 1926 contract was assigned? The Court of Appeal held that the 1926 contract was sold, together with the movable property used for the production of electricity, under art. 6 of the 1965 contract. Its reasoning was that the contracts, as negotiable instruments,

were included in the sale and that the property involved in that transaction — money and electricity — was movable property. Resolute disputes that interpretation, noting correctly that art. 5 applies expressly to rights under “power contracts” and that art. 4 applies to “all the duties for which [Gatineau Power] is or may be liable”, including the obligation to supply electricity.

[88] I agree with Resolute that the assignment of the 1926 contract is not dealt with solely by the sale of movable property under art. 6. My reading of the 1965 contract leads me to conclude that art. 6 explicitly applies only to claims due under the 1926 contract, and only to those in the form of “accounts receivable”, a point that Resolute does not dispute. In my opinion, there are also other provisions involving the assignment of rights or obligations under the contract, including art. 5, which expressly refers to “power contracts” I nevertheless agree with the Court of Appeal that the 1965 contract does not name Hydro-Québec mandatary of Gatineau Power in relation to its power contracts. Rather, the entire 1926 contract was assigned by the combined operation of arts. 4 through 8 of the 1965 contract, as interpreted having regard to the objectives stated in the preamble and to the totality of the 1965 contract.

[89] To conclude that Gatineau Power mandated Hydro-Québec to manage the 1926 contract as its representative would in fact be incompatible with arts. 4 through 8 of the 1965 contract, which derogated from the general mandate provided for in art. 9. In those clauses, Gatineau Power, the assignor, transferred to Hydro-Québec the claim relating to the payment for electricity sold to Resolute and the obligation to supply

Resolute with electricity. It transferred them for the term of the agreement, and in particular of the lease established by the 1965 contract. The transfer of claims and obligations attests to a broader intention to assign the contract to a third person, an assignment to which, as I will explain below, the assigned party — now Resolute — consented and in which it acquiesced, and one that did not render its obligations more onerous.

[90] Regarding, first of all, the claims that were exigible in 1965 but had not yet been settled by Gatineau Power’s clients, the “accounts receivable”, there was indeed an assignment of claims in art. 6, which Resolute concedes.

[91] Next, it can be seen that the 1965 contract expressly provided for the transfer to Hydro-Québec of certain debts that were already due. In art. 7 of the agreement, Gatineau Power transferred to Hydro-Québec “all deposits which it has from its customers to guarantee the payment of their accounts”. Hydro-Québec explicitly assumed responsibility for those debts: “The Commission agrees to assume the obligations of the Company in relation to such deposits”. Article 7 is not a simple indication of payment, as would be the case in the context of a mandate, in which the mandatary does not have a personal obligation (see Popovici, at p. 278; *Hamel v. Banque de Montréal*, 2008 QCCS 3603, at paras. 67-70 (CanLII)): here, Hydro-Québec was to honour the debts personally, subject to the validity of such a transfer.

[92] Thus, the 1965 contract contains an initial indication of the existence of an assignment in relation to the payable debts and exigible claims, an assignment that is

incompatible with a mandate. That being said, the transfers carried out in arts. 6 and 7 related only to assets or liabilities that were already in Gatineau Power's patrimony. But the 1926 contract is a synallagmatic contract of successive performance that has effect throughout its term. What, then, was to happen in the case of Gatineau Power's future claims and debts, that is, its future claims for payment for electricity sold to Resolute and its obligation to supply Resolute with that electricity?

[93] The answer can be found in arts. 5 and 8 for the transfer of claims, and art. 4 for the transfer of future debts.

[94] The parties agreed, in art. 5, to a specific provision referring to, among other things, power contracts such as the one at issue:

To assist in the management, operation and maintenance of the leased premises, it is hereby agreed that the Company shall make available and furnish to the Commission all the rights, franchises and privileges which it has and all the advantages which it enjoys under all agreements, purchase agreements, power contracts and all other contracts of whatever nature and kind to which it is a party but only to the extent that it may legally do so without violating any of the provisions thereof. [Emphasis added.]

(A.R., vol. III, at p. 98)

[95] Article 5 applies to all rights, advantages and privileges under power contracts. This description is, on the basis of its very words, sufficiently broad to encompass future claims payable by Resolute in respect of electricity purchased under the 1926 contract. It can be seen by reading art. 4 that this undertaking was intended to assist Hydro-Québec in its use and enjoyment of the leased premises as lessee: it

involves an extension of the rights provided for in the lease. This would enable Hydro-Québec to personally honour the undertaking it was agreeing to in art. 4.

[96] A subsequent provision, art. 8, states that Hydro-Québec is to benefit from the entire revenue deriving from the leased premises, which includes revenue from the sale of electricity. The amount paid belongs to Hydro-Québec, the assignee of the claim; Hydro-Québec does not collect it as Gatineau Power's mandatary. The reference in this clause to "meter readings" helps make it clear that the revenue derived from "power contracts" that is mentioned in art. 5 belongs to Hydro-Québec and is paid to it directly, and not through Gatineau Power. There is no indication that these amounts are to be paid to Hydro-Québec as a representative of Gatineau Power. Quite the contrary: the contract provides that Hydro-Québec has a right to that revenue, which it can in the event of non-payment claim directly from the debtors in its own name. I would add that a mandatary or an administrator must not, in principle, mingle his or her property with that of the mandator or the beneficiary. The interpretation of these clauses proposed by Resolute is incompatible with this fundamental principle, the purpose of which is to prevent conflicts of interest.

[97] This means that, so long as arts. 5 and 8 of the 1965 contract apply, Hydro-Québec is the creditor of the amount Resolute must pay in consideration for the electricity it purchases under the 1926 contract, subject to the rules with respect to the validity and setting up of this assignment.

[98] As for art. 4 of the 1965 contract, it concerns the obligations assumed by Hydro-Québec for the term of the agreement:

The Commission shall, during the continuance of this agreement, manage, operate and maintain the leased premises as it would its own, make all repairs, reconstructions, improvements and additions to the leased premises, perform to the fullest extent and to the complete exoneration of the Company all the duties for which the Company is or may be liable. [Emphasis added.]

(A.R., vol. III, at p. 97)

[99] By this stipulation, the parties provided for a personal undertaking by Hydro-Québec to perform all of Gatineau Power's obligations, which amounts to a transfer of both present and future debts. Here, too, the contract has a broad embrace. Indeed, for the term of the agreement, Hydro-Québec undertakes in its own name to perform "all the duties for which the Company is or may be liable" (art. 4). This includes the prestations owed to Resolute under the 1926 contract. Insofar as art. 4 applies, Hydro-Québec is thus the debtor of this obligation. Once again, because Hydro-Québec undertakes personally to perform Gatineau Power's obligations, there is a real transfer of debts and not a simple indication of payment by Gatineau Power to a mandatary (see Lluellas and Moore, at para. 3111). Hydro-Québec is therefore an assignee, if not a delegate, of this obligation, subject of course to the rules with respect to the validity and setting up of such a transfer.

[100] The use of the word "perform" in art. 4 of the 1965 contract is not on its own enough to justify a conclusion that there is instead a mandate in this case. The

broader context of this clause and of the contract weighs against the existence of a mandate. First, I note that it is also important not to disregard the phrase “to the complete exoneration of the Company”, which confirms that Hydro-Québec was assuming personal liability and acting in its own interest, a strong indication that its undertaking extended beyond the responsibility incumbent upon a mandatary. It should be mentioned that the contract of assignment considered in *Hutton* also included the phrase “to the complete and entire exoneration of the Assignor” (p. 4). Second, the assignment effected by the 1965 contract must be placed in its specific context, that of an imperfect assignment. I will return to this, but suffice it to say for now that the word “perform” is not incompatible with the tripartite relationship that results from an imperfect assignment, as can be seen from the reasons of Abella J. in *Modern Cleaning Concept Inc. v. Comité paritaire de l’entretien d’édifices publics de la région de Québec*, 2019 SCC 28 (“*Modern Cleaning (SCC)*”), at paras. 39-42.

[101] I would add that the rights and obligations assigned by Gatineau Power under these articles are broad and are not limited solely to claims (amounts to be collected) and debts (electricity to be supplied). There is every reason to believe that, where the “power contracts” in question are concerned, Gatineau Power transferred the entire contract to Hydro-Québec, which means that Hydro-Québec, by that very fact, assumed responsibility for the entire contract as well as for all the related rights, and that it received from Gatineau Power the status of party to the 1926 contract.

[102] But what can be said of the mandate under art. 9? In that article, the parties provided for a general mandate empowering Hydro-Québec to act on behalf of Gatineau Power “in all things, matters, deeds, acts and transactions”, and set out a non-exhaustive list of actions Hydro-Québec can take in Gatineau Power’s name, such as collecting income “belonging to the Company”, cashing cheques, signing documents and purchasing immovable property. It is true that the scope of this mandate is broad. But it should be noted that this general mandate does not explicitly apply to the 1926 contract. Certain of the listed powers relate to the leased premises, such as the power to give *mainlevée* of a hypothecary claim on an immovable belonging to Gatineau Power (art. 9d)) or the right to sell “such of the leased premises as are no longer necessary or useful” (art. 9f)). These powers must of course be exercised in Gatineau Power’s interest. Nevertheless, this general mandate does not negate Gatineau Power’s fundamental obligation under the lease to provide Hydro-Québec with the enjoyment of the leased premises and does not preclude Hydro-Québec from exercising its right of enjoyment in its own interest.

[103] In other words, there is no denying that the 1965 contract gives Hydro-Québec a mandate, but contrary to Resolute’s argument, the scope of the general mandate given by Gatineau Power notwithstanding, it does not take precedence over the special rules departing from it that are provided for in the contract and apply expressly to “power contracts” and the rights and obligations related to them. As Resolute itself argues, art. 5 of the contract establishes a special regime applicable to “power contracts” for the term of the lease. This special regime is not the same as the

one with respect to the “things, matters, deeds, acts and transactions” that are referred to in the general clause: *specialia generalibus derogant* (special, specific provisions derogate/deviate from general ones: G. Cornu, *Dictionary of the Civil Code* (2014), at p. 533; F. Gendron, *L’interprétation des contrats* (2nd ed. 2016), at p. 91 ([TRANSLATION] “specific clauses take precedence over general clauses, just as an exception takes precedence over the rule from which it departs”)).

[104] In short, if the contract is read as a whole, taking into account the objectives stated in the preamble, the trial judge’s interpretation to the effect that Hydro-Québec [TRANSLATION] “has . . . managed” Gatineau Power’s assets and contracts must be rejected. That conclusion does not account for several clauses of the contract that she did not consider, and as a result there are palpable errors in her reading of the agreement, and in particular in her statement that the mandate provided for in the 1965 contract extends to the administration of the 1926 contract. The effect of these errors was that the trial judge did not see that, for the term of the lease, Gatineau Power had not simply conferred powers over the 1926 contract on Hydro-Québec; rather, it had transferred rights and obligations to Hydro-Québec, subject to an extinctive term. On entering into the 1965 contract, Hydro-Québec undertook personally to perform the obligations provided for in the 1926 contract, including the obligation to supply electricity to Gatineau Power’s customers. At the same time, Hydro-Québec obtained a right to all the advantages of the 1926 contract, including the right to be paid, personally, for the electricity it is contractually obliged to supply to Resolute.

(c) *Term of the 1965 Contract*

[105] And what can be said about the term of the agreement?

[106] I note that neither the trial judge nor the Court of Appeal addressed this issue. The existence of an extinctive term was not considered as a factor relevant to the analysis, perhaps because, despite the sale of the three plants on the Gatineau River, the lease established by the 1965 contract continues to apply. Because of the arguments raised by Resolute in this Court, however, I feel I must explain why the term imposed by the parties does not preclude the existence of an assignment of contract.

[107] As long as the agreement remains in effect, the contract is assigned — this is an act of alienation that transfers, at the very least for the term of the lease, the claims and debts resulting from the 1926 contract. In arts. 4 and 8, the term is explicit, that is, “during the continuance of this agreement”, whereas art. 5 indicates that the purpose of the transfer of claims is “[t]o assist in the management . . . of the leased premises”. In Resolute’s view, an assignment of contract is, by its very nature, an act of permanent alienation. Resolute argues in its factum that [TRANSLATION] “[t]he limited term of the assumption of [Gatineau Power’s] obligations by Hydro-Québec is a complete bar to the existence of an assignment”.

[108] My view is that, contrary to Resolute’s argument, there is no legal bar to an assignment of contract being limited in time if the parties agree to this, subject to

the rules concerning the assigned party's consent. The autonomy of the will of the parties to the contract permits them to organize their affairs in this way.

[109] It is true that an assignment of contract is ordinarily an act of alienation that definitively transfers rights and obligations from the assignor's patrimony to that of the assignee, and it is also true that, [TRANSLATION] "[i]n an assignment of contract, the assignor usually transfers all of his or her rights of claim" (Baudouin and Jobin, at No. 1046 (emphasis added)). As a result, the word "assignment" is often considered a synonym of "sale", which admits of a translatory effect that Resolute characterizes as "permanent" (A.F., at para. 55; relying on its interpretation of M. Tancelin, *Des obligations en droit mixte au Québec* (7th ed. 2009), at No. 1268).

[110] However, I would start by pointing out that there are authors who stress the fact that assignment of claim is distinct from sale in the *C.C.Q.* and that, in this regard, the model of sale of a personal right does not necessarily apply (see P.-G. Jobin and M. Cumyn, *La vente* (4th ed. 2017), at No. 1). As well, Lluelles and Moore state that, in an assignment of claim, the relationship of the assignor and the assignee is [TRANSLATION] "primarily governed by the stipulations of [their] agreement" (No. 3184; see also *Nesterenko v. Skierka*, 2010 QCCS 3613, [2010] R.J.Q. 2007, at paras. 68-70, quoting in particular *Alberta (Treasury Branches) v. M.N.R.*, [1996] 1 S.C.R. 963, at paras. 22 and 35). This principle also applied when referring to the "sale" of claims in the *C.C.L.C.* (see *Place Québec inc. v. Desmarais*, [1975] C.A. 910 (Que.), at p. 912; *General Accident*, at p. 1164; *Denis Cimaf inc. v. Caisse populaire d'Amos*,

1997 CanLII 10252 (Que. C.A.), at pp. 7-9; L. Sarna, “Assignments of Book Accounts, Assignor’s Warranties and Standing to Sue” (1978), 56 *Can. Bar Rev.* 626, at pp. 636 and 643-47).

[111] Although an assignment of contract is usually a definitive act of alienation, nothing prevents the parties, on the basis of freedom of contract, from altering such an arrangement. In fact, as noted in the scholarly literature, the general conditions for validity of a contract apply to an assignment of contract (see Lluelles and Moore, at No. 3230; see also Baudouin and Jobin, at No. 1041). The special rules with respect to its validity do not relate to its term, and the assignment is, like any contract, subject to the general provisions of the *C.C.Q.*, including those relating to the term of the contract (arts. 1508 et seq. *C.C.Q.*). In my view, therefore, the parties were free to limit the translatory effect of the assignment in time so as to tailor it to the business model that was consistent with their objectives and to protect the interests of the “holders of the bonds” of Gatineau Power, who had to approve the arrangement.

[112] Furthermore, even though an assignment is a translatory act through which rights and obligations are transferred from one patrimony to another, a type of act that is ordinarily absolute, there is nothing in the civil law that precludes the parties from devising a translatory act or an act of alienation whose effects are not, as Resolute puts it, “permanent”. Although a transfer can be pure and simple, a translatory act can be accompanied with conditions or with any other stipulation that is compatible with public order. A resolute condition that affects the transfer by contract of a right of

ownership is a helpful example: when the resolutive condition is fulfilled, the translatory act transferring the right of ownership is annulled with retroactive effect (see M. Cantin Cumyn, “Essai sur la durée des droits patrimoniaux” (1988), 48 *R. du B.* 3, at pp. 12-13). The *C.C.Q.* provides, in arts. 1110, 1113 and 1114, that superficies can result from transfer of the right of accession and that this can be fixed for an extinctive term. I would observe, without saying more on this subject, that, in the opinion of certain authors, a transfer of ownership can be accompanied with an extinctive term and thus be considered to have created the equivalent of “temporary ownership”: [TRANSLATION] “The principle is that ownership will return to the original owner, who alienated with an extinctive term . . .” (J. Carbonnier, *Droit civil* (2004), vol. II, at No. 751; see also W. deMontmollin Marler, *The Law of Real Property — Quebec* (1932), at No. 64: “A person may be temporary owner Ownership, then, is incomplete: 1° When it will end at a certain time or by the happening of some event; or 2° When the thing owned is subject to some real right in favour of another”; the author gives as an example, in the case of a substitution, the temporary transfer to the institute of property that is to go to the substitute upon the opening of the substitution).

[113] One example relating specifically to the assignment of contract is *Modern Cleaning* (SCC), in which this Court considered the assignment of a contract by a cleaning services company to a franchisee. In that case, a cleaning contract with a client bank had been assigned to the franchisee with the bank’s consent. The assigning company contractually reserved the right to take the contract back should the franchisee fail to perform it (see *Modern Cleaning* (SCC), at para. 48; *Comité paritaire de*

l'entretien d'édifices publics de la région de Québec v. Modern Concept d'entretien inc., 2017 QCCA 1237 (“*Modern Concept (C.A.)*”), at para. 197, note 63 (CanLII). This may be viewed, therefore, as an assignment of contract that was not “permanent”, because the parties’ intention was to make a reconveyance of the contract possible if that were necessary. Similarly, the assignor retained [TRANSLATION] “significant supervisory powers over any possible transfer of the cleaning contracts by the franchisee to a third person” (*Modern Concept (C.A.)*, at para. 197). Accordingly, despite the assignment, it could not be said unequivocally that the cleaning contract “belong[ed]” to the assignee or that the assignee could freely dispose of it (*ibid.*).

[114] This example clearly illustrates the fact that, contrary to Resolute’s argument, an assignment of contract is not always a translatory act entailing a definitive alienation. It serves to show the malleability of assignment of contract. Freedom of contract is therefore key: assignment of contract does not follow a single model but may on the contrary, like any contract, be tailored to the intention of the parties, provided that it is consistent with the rules governing its validity.

[115] In the instant case, the assignment of the 1926 contract had full translatory effect — the assignor, Gatineau Power, transferred all of its rights and all of its obligations under this “power contract” to the assignee, Hydro-Québec — but only for the term of the agreement. The contract’s structure is clear: for the term of the lease of the leased premises, Gatineau Power assigns its rights and advantages under “power contracts” to Hydro-Québec, while at the same time and for the same term,

Hydro-Québec is to perform all of Gatineau Power's obligations, including the obligation to supply Gatineau Power's customers with electricity (see arts. 4 and 5 of the 1965 contract). In practical terms, Gatineau Power has assigned the 1926 contract to Hydro-Québec for the term of the lease on the immovable property (see arts. 4, 5 and 8, and in particular the phrase "during the continuance of this agreement" in arts. 4 and 8). For as long as Hydro-Québec is the lessee of the "leased premises", it has a personal right to all revenue and advantages under the "power contracts", but it must also "perform to the fullest extent and to the complete exoneration of [Gatineau Power] all the duties for which [Gatineau Power] is or may be liable". These are attributes of an assignment of contract — the rights belong to the assignee, and the assignee's liability for the obligations is personal — and not of mandate. But these rights and obligations are only transferred to the assignee for the term of the lease. This extinctive term terminates the lease as well as the transfer of rights and obligations under "power contracts" which are accessory to the lease. This makes sense: for the term of the lease, Hydro-Québec controls all the means of electricity production, and Gatineau Power would accordingly not be able to personally perform its obligations. The fact that Hydro-Québec gave a personal undertaking that it would perform them was reassuring for the "holders of the bonds".

[116] This mechanism was perfectly suited to the sale of electricity by successive performance that was effected in 1926: every month from the time of the assignment, Hydro-Québec would have the obligation to deliver electricity to Resolute in Gatineau Power's place and the right to be paid for that delivery in its own name. However,

Hydro-Québec’s assumption of the obligations and its right to all the revenue, like its status as a party to the contract, is temporary and is accessory to the lease and to its obligations to the “holders of the bonds” (on the relationship between a principal contract and an accessory contract [TRANSLATION] “intended to support another agreement”, see G. Goubeaux, *La règle de l’accessoire en droit privé* (1969), at p. 75).

[117] What will happen when the 1965 contract expires, and more specifically when the lease terminates? The *C.C.Q.* provides that obligations are extinguished by, among other things, the expiry of an extinctive term (arts. 1517 and 1671; see also Baudouin and Jobin, at No. 559; art. 1138 *C.C.B.C.*). If the assignment is terminated, that does not mean that the object of the assignment — the 1926 contract — ceases to exist, and it might be assumed that the contract would then be reconveyed by operation of law from the assignee, Hydro-Québec, to the assignor, Gatineau Power. Although the termination of the 1965 contract should logically put an end to the assignment, that question is not before the Court and I will not give a definitive answer to it. Because the evidence shows that the lease continues to run, the assignment of contract continues to have effects. Even if I were to accept Resolute’s interpretation to the effect that the term of the “agreement” referred to in arts. 4 and 8 of the 1965 contract is limited to the term of the lease, I would conclude that the assignment of contract is still in effect.³

³ I note that the term of the 1965 contract is not necessarily that of the lease. The contract involves other term bonds in favour of the “holders of the bonds” (see arts. 13 and 15). Thus, the words “during the continuance of this agreement”, found in particular in arts. 4 and 8, could correspond to a term longer than that of the lease. But it is clear that the term of the agreement cannot be shorter than that of the lease.

(d) *Factors Extrinsic to the 1965 Contract*

[118] It cannot be concluded that the assignment of the 1926 contract expired as a result of the sale of the three plants on the Gatineau River on the basis that they were the specific plants that were supplying CIP at the time. As we have seen, despite that sale, the lease provided for in the 1965 contract on which the assignment is based continued to be in effect, because Gatineau Power leased “all its immoveables” to Hydro-Québec. In addition, the 1965 agreement transferred all of Gatineau Power’s claims and obligations without distinguishing contracts on the basis of the plants to which they related. I recall as well the objective of unification and the supply of electricity referred to in the 1965 contract. Resolute’s mill is now supplied by Hydro-Québec’s integrated network, and it is not possible to say that the electricity it receives comes from a particular plant.

[119] I would add that, as the Court of Appeal mentioned, other factors extrinsic to the contract confirm that there was an assignment of contract and that that assignment is still in effect (paras. 32-38). The evidence shows, for example, that, since at least 1999, all bills for electricity supplied under the 1926 contract have been issued by Hydro-Québec.

[120] Moreover, in 1982, Hydro-Québec and CIP entered into a contract for the distribution of additional power. This was a new contract, one to which Gatineau Power was not a party, that referred expressly to the 1926 contract. Like the respondents, I see this as an extrinsic factor that tends to confirm that the 1965 contract effected an

assignment. It is true that Hydro-Québec's bill distinguishes electricity supplied under the 1926 contract. However, this distinction exists because there are two different rates: one for the original block from 1926 and another for the additional block from 1982.

[121] There are also two facts that the trial judge did not discuss but that were raised, and rightly so, by the Court of Appeal. First, Resolute availed itself, for power supplied under both the 1926 contract and the 1982 contract, of the interruptible electricity option, a form of financial compensation offered only to Hydro-Québec's customers. As the Court of Appeal explained, Resolute could not have received this compensation if Hydro-Québec was not its other contracting party (C.A. reasons, at para. 35). Second, it should be pointed out that in responding to Hydro-Québec's claim in 2011, Resolute did not argue that Gatineau Power was still its other contracting party (C.A. reasons, at para. 38). Rather, it argued that the amounts at issue were not a "tax or charge", which implied that they [TRANSLATION] "are not contemplated by article 20 of the [1926] Contract". I see these facts as other extrinsic indications of an intention to assign the 1926 contract in entering into the 1965 agreement.

[122] The lease therefore remained in effect in 2011, when Hydro-Québec claimed, as assignee of the 1926 contract, the agreed payment for electricity as increased under art. 20 of that contract. With all due respect, the 1965 contract does not, as the trial judge stated, indicate that Gatineau Power mandated Hydro-Québec to manage the 1926 contract, but instead stipulates that Gatineau Power assigned the latter

contract to the state-owned enterprise, at least for the period of the lease of the immovables.

(4) Consent to the Assignment of Contract

[123] I note that the parties, in their arguments concerning, among other things, the role of consent, relied on both the dualistic conception and the unitary conception of assignment of contract to explain why the assigned party's consent is, or is not, required in order for such an operation to be valid. In my opinion, the outcome of the case remains the same regardless of which conception is chosen. However, given that the back-and-forth between the two conceptions of assignment of contract has been a recurring theme in this case, a theme that is also reflected in the academic literature and the case law, it seems appropriate to me to briefly explain why the unitary conception of assignment of contract is legitimate in Quebec law and how it can help in elucidating the outcome of this case.

[124] Some jurists adopt a dualistic conception according to which assignment of contract is defined as the addition of an assignment of claim to an assignment of debt or delegation of payment (see Baudouin and Jobin, at No. 1034). Others instead see assignment of contract as the transfer of the contract itself to a third person, thus placing the focus on the object of the contract — its economic cause — and in their view assignment of contract serves to [TRANSLATION] “maintain the binding force of the contract even though the identity of one of the contracting parties has changed” (L.

Aynès, *La cession de contrat et les opérations juridiques à trois personnes* (1984), at p. 21; see also p. 170).

[125] In Quebec, the Court of Appeal's decision in *Hutton* is sometimes cited as an example of the dualistic approach because of the fact that Baudouin J.A., in explaining the assignment of the contract, broke the parties' operation down into an assignment of claim and an assignment of debt. He did so to assist him in articulating why, in his view, the transfer of debts required in particular the assigned party's consent. I find Baudouin J.A.'s exercise helpful in clarifying both why this consent is necessary and why it can be given in advance. But it must not be forgotten that, even while he was breaking down the contract in *Hutton*, Baudouin J.A. was considering the assignment of the contract as a whole — a conception that was compatible with the one adopted by this Court in *Aqueduc du Lac St. Jean* in 1925.

[126] In the unitary approach, the focus is in fact on the transfer of the contractual relationship as a whole — claims, debts, potestative rights and other undertakings. From this perspective, the operation is understood to involve a transfer of status as a contracting party to the assignee, while leaving the original contract intact. This approach is especially apposite in circumstances in which the parties are disputing the transfer not only of claims and debts, but also of other undertakings made in the original contract. In the case at bar, aside from the provisions of the 1926 contract with respect to the delivery of power and the price to be paid for it, the parties are concerned in particular with arts. 17 (application of present and future provincial and federal laws)

and 22 (transferability of the contract) of that contract given the relevance of these articles to Hydro-Québec's claim based on the price increase clause. Resolute states in its factum that it does not matter whether the dualistic approach or the unitary approach is taken in analyzing the central issue in its appeal, that is, whether its consent was necessary to the assignment from Gatineau Power to Hydro-Québec. I take note of that, but I would stress that the unitary approach is particularly helpful in making it clear that, if Hydro-Québec acquired the status of party to the 1926 contract, that enabled it to demand, in its own name and by reason of its status, the increased price resulting from the two levies.

[127] The circumstances clarify the fact that assignment effects [TRANSLATION] “the replacement of a party by a third person” (Lluelles and Moore, at No. 3214 (footnote omitted); see also *Modern Concept* (C.A.), at paras. 149-50, aff'd 2019 SCC 28; or, in the case of an imperfect assignment, the addition of a new party, Lluelles and Moore, at No. 3217). Viewed from this perspective, the unitary approach is an elegant solution that serves to stress the parties' freedom of contract and to connect the law to the factual reality. As Mignault J. put it in *Aqueduc du Lac St. Jean*, the assignee is thus put [TRANSLATION] “in the place” of the assignor (p. 195). Moreover, this approach is echoed by the manner in which a recent reform of French law incorporated assignment of contract into that country's *Code civil*. In the 2016 reform, the French legislature explicitly adopted the unitary conception of assignment of contract by allowing a party to [TRANSLATION] “assign his status as party to the contract” (French *Code civil*,

art. 1216; see J. Colliot, “La cession de contrat consacrée par le Code civil” (2016), 4 *R.J.O.* 31, at p. 40).

[128] In the case at bar, it will be more useful to review, in accordance with the unitary approach, the entirety of the contractual relationship from 1926 that was assigned by Gatineau Power to Hydro-Québec rather than focusing only on the addition of claims and debts in accordance with the dualistic approach. The assignment included not only Resolute’s claim — the supply of electricity — and its debt — payment of the price for that service — but also art. 17, in which the parties agreed that the contract would be subject to present and future provincial and federal regulation, and art. 22, in which the parties provided that “[t]his Agreement shall enure to the benefit of and be binding upon the successors or assigns of both parties”.

[129] I now turn to Resolute’s arguments.

[130] Resolute submits that the assignment of contract agreed to in 1965 by the assignor, Gatineau Power, and the assignee, Hydro-Québec, could not be valid without its consent no matter which conception is adopted. It argues that it, as the assigned party, was affected the most by the assignment of the 1926 contract. In its opinion, that operation imposed on it a contracting party, Hydro-Québec, with which it had not contracted, thereby violating the principle of relativity of contract while exposing it to risks it had never accepted. The substitution of Hydro-Québec as a contracting party — to which Resolute did not consent — resulted in an increase in the price paid for electricity and thus in an unforeseen consequence of an assignment made without its

knowledge. But, Resolute says, any assignment of contract, whether viewed as the assignment of a whole or as a transfer of claims and debts, requires the assigned party's consent.

[131] The respondents counter that the assignment of contract did not require Resolute's consent, because it was imperfect. Because Gatineau Power remained bound as personal surety, the assignment caused no injury to Resolute. In any event, the respondents argue, the 1926 contract contains a clause in which consent is given to a possible assignment of the contract.

[132] The parties' difference of opinion reflects a significant disagreement in the scholarly literature on the question whether an assignment of contract requires the assigned party's consent. For some authors, the assigned party's consent is essential to the validity of the assignment, while for others, it is required only in order to release the assignor from his or her obligations to the assigned party. A claim, on the one hand, can validly be assigned without the assigned party's consent (see, in the context of the *C.C.Q.*, art. 1637). In the case of a debt, on the other hand, there is some disagreement as to whether consent must be obtained from the party that is the creditor. According to one approach, the creditor's interest in the debtor's identity, and particularly in the debtor's solvency, makes it inappropriate to transfer a debt without the creditor's consent. But there are others who argue that an imperfect assignment of debt (or delegation of payment) is possible without the creditor's consent, because the assigned party, or delegatee, retains his or her remedies against the original other contracting

party (on this disagreement, see M. Cumyn, “La délégation du *Code civil du Québec*: une cession de dette?” (2002), 43 *C. de D.* 601).

[133] The same disagreement exists if assignment of contract is analyzed as a transfer of the contractual relationship as a whole. Given the absence of a formal rule on this point in the *Civil Code of Québec*, a number of authors take the position that the assigned party’s consent is necessary in order to protect the binding force of the original contract that is being transferred. Others are of the view that the assigned party’s consent is required only where the assignor seeks to be released from his or her debt. According to proponents of this approach, an imperfect assignment of contract can be made without the assigned party’s consent, because that party retains his or her remedies against the original other contracting party (see the explanations given by Lluelles and Moore, at Nos. 3234 et seq.).

[134] This being said, was Resolute’s consent required in order for the assignment to be valid?

[135] It will be useful to begin the analysis by pointing to a major concession made by Hydro-Québec that helps clarify the issue. In this Court, Hydro-Québec acknowledges that neither CIP nor Resolute consented to release Gatineau Power from its obligations under the 1926 contract. An assignment of contract that does not release the assignor from his or her obligations is characterized as an imperfect assignment (see *Modern Cleaning (SCC)*, at paras. 41-43). Insofar as the assignment was valid, it did not release Gatineau Power: Resolute thus has two debtors bound to supply it with

electricity, because the assignment added a new contracting party (Hydro-Québec), as opposed to definitively replacing the original contracting party (Gatineau Power) (see Lluelles and Moore, at No. 3217).

[136] The real question is therefore whether Resolute's consent was necessary in order for an imperfect assignment of the 1926 contract to be valid.

[137] In *Hutton*, Baudouin J.A. discussed the difference of opinion among authors with respect to the requirement of consent and drew on French law to resolve the question. He found that the assigned party's consent is necessary in order for an assignment of contract to be valid but that, in the case of an imperfect assignment, [TRANSLATION] "consent to a possible assignment can be given in advance, upon entering into the original undertaking, for example" (p. 9). The Court of Appeal adopted that position by taking a dualistic approach to assignment of contract; it clearly reached that conclusion because there was an assignment of debt.

[138] In my opinion, Baudouin J.A.'s reasoning suggests that if the conception of assignment of the contract as a whole is adopted, the assigned party's consent is required. If assignment is seen as the transfer of the contract itself, which implies the transfer of party status to the assignee, it is easy to understand why, from the standpoint of both relativity of the assignment and binding force of the assigned contract, the assigned party's consent is necessary (at least in the absence of a legislative provision to the contrary).

[139] It is true that assignment of contract implies not the creation of a new relationship, but a transfer of the original contract. In order to give effect to the principle of relativity of contract (see art. 1440 *C.C.Q.*), however, the transfer of the existing contract to a new contracting party requires the consent of a party like Resolute on which a new partner is imposed that has [TRANSLATION] “characteristics” not possessed by the assignor, as Baudouin J.A. put it (*Hutton*, at p. 9). The principle of binding force of contract also leads to the conclusion that the assignee cannot assert him or herself as a new contracting party of the assigned party without the latter’s consent (see arts. 1434 and 1439 *C.C.Q.*).

[140] Of course, the addition of Hydro-Québec as a debtor, through an imperfect assignment of contract under which Gatineau Power remained bound by the 1926 contract, was not in itself particularly hazardous for the creditor, Resolute. The latter obtained the possibility of having remedies against two debtors, including the one with which it had originally contracted, and was therefore protected should the new other contracting party become insolvent. But the assignment, though imperfect, resulted in Hydro-Québec becoming Resolute’s principal debtor, which was not without significance for Resolute. Such an assignment may require adjustments by the assigned party, which is now dealing with a new contracting party with which it has never done business. The situation in this case shows that it is preferable — in order to ensure conformity with the general principles of the law of contracts and to protect the assigned party — to require the assigned party’s consent even where the assignment of contract is imperfect. Although Gatineau Power remained in the picture as a debtor,

Resolute had to deal with a new contracting party that could, because of its status, demand a price increase.

[141] I therefore consider it preferable to follow *Hutton* and to hold, as proposed in much of the academic literature, that the assigned party's consent must be obtained in order for an assignment of contract to be valid (see, e.g., Levesque, at para. 1017; Lluelles and Moore, at No. 3236).

[142] Furthermore, this has continued to be the applicable solution in French law even since the 2016 reform of that country's law of obligations. Assignment of contract, which is now provided for in the French *Code civil*, requires the [TRANSLATION] "agreement" of the assigned party, which may be given in advance (art. 1216).⁴ Requiring the assigned party's agreement means that effect can be given to the principles of binding force of contract and relativity of agreements (see Colliot, at p. 35). The French *Code civil* also requires the assigned party's express consent in order for the assignor to be discharged, thereby addressing the legitimate concern that the assigned party will be faced with a new debtor party that is insolvent or unreliable

⁴ Article 1216 of the French *Code civil* provides:

[TRANSLATION] A contracting party, the assignor, may assign his status as party to the contract to a third party, the assignee, with the agreement of his own contractual partner, the person subject to assignment.

This agreement may be given in advance, notably in a contract concluded between the future assignor and person subject to assignment, in which case assignment takes effect as regards the person subject to assignment when the contract concluded between the assignor and the assignee is notified to him or when he acknowledges it.

An assignment must be established in writing, on pain of nullity.

(art. 1216-1). I note that in the new French law, the reference is to the “agreement” rather than the “consent” of the assigned party, which indicates that this authorization can be given in advance and that it does not necessarily result in the discharge of the assignor (Colliot, at p. 44). From this standpoint, the assigned party does not consent to the assignment in the narrow sense of the word — in that he or she does not formally accept the assignment as a juridical act — but authorizes it. This being said, “consent” is the word used in Quebec law by almost all authors and in almost all the decided cases, and I will use it in these reasons in order to avoid confusion.

[143] In my view, even in the absence of express rules concerning assignment of contract in the *C.C.Q.*, the same justifications with regard to the assigned party’s consent are relevant in Quebec because of the general principles of the law of contracts. Resolute is therefore correct in arguing that its consent was necessary in order for the assignment of the 1926 contract to be valid, given that the assignment had the effect of transferring party status to Hydro-Québec, a third person from Resolute’s standpoint.

[144] However, I must stress that it was held in *Hutton* that the assigned party’s consent can be given in advance. In that case, it had been given in advance, at the time of signing of the original contract, in the form of consent to a possible assignment. And that is also what had happened in *Modern Cleaning* (SCC), as can be seen from the facts of that case (see para. 42). In the instant case, the parties’ disagreement over the need for Resolute’s consent is moot, since it is clear from the very words of art. 22 of

the 1926 contract that the parties did consent in advance to any possible assignment of the contract.

[145] Resolute argues that art. 22 is not a blank cheque given to Gatineau Power for any assignment of contract, but merely a [TRANSLATION] “reference to the rule that personal rights are transferable to successors”. It asks this Court not to follow *Hutton* on this point, citing an Alberta judgment, *Lee v. Pointe of View Developments (Encore) Inc.*, 2010 ABQB 558, 35 Alta. L.R. (5th) 42, in which the Court of Queen’s Bench held that a clause in the original contract did not amount to consent to the assignment of the contract. But unlike in the case at bar, the parties in that case had provided that the contract could be assigned only to “permitted assigns” (paras. 3 and 15). That case is therefore in no way comparable to this one.

[146] *Hutton*, on the other hand, bears strong similarities to the instant case.⁵ I find the explanation given by Baudouin J.A. in that case particularly helpful: by consenting to a future assignment, the assigned party [TRANSLATION] “assumed the risk that it might become bound to a contracting party whose characteristics might not all be to its liking!” (p. 9). This was the risk — negotiated and assumed — that CIP ran in 1926 by accepting art. 22 of its contract with Gatineau Power.

⁵ Article 15 of the contract at issue in *Hutton* read as follows:

This Agreement shall enure to the benefit of and be binding upon the parties hereto, the successor of Hutton and the successor and assigns of Hygrade. Neither this Agreement, nor any of the rights, interests, privileges or obligations hereunder, shall be assignable or transferable by Hutton. [Emphasis deleted; p. 2]

[147] In short, Resolute is right to insist that its consent was necessary in order for the assignment of the contract to be valid, but CIP had in fact consented to the assignment in advance in the 1926 contract. As a result, Gatineau Power validly transferred its status as party to the contract to the assignee, Hydro-Québec. Gatineau Power thus serves as a personal surety against any future breach by Hydro-Québec of its obligations (see Lluelles and Moore, at No. 3114). The fact that the assignment in this case is imperfect does not change the outcome, since it is nonetheless Hydro-Québec that, as a principal debtor that also has party status, supplies electricity and can therefore raise the price of the electricity under art. 20.

(5) Setting Up of the Assignment of Contract

[148] Because the assigned party can have consented in advance to a possible assignment of contract without being a party to the act of assignment should one be effected, it will be necessary to consider the conditions that must be met in order for that operation to be set up against the assigned party. It is clear that an assignment can be set up against an assigned party who is a party to the act of assignment or who consented to it at the time it was entered into. If consent was given in advance, however, the assignment of a contract cannot be set up against the assigned party if he or she was never informed of the assignment. This is what Resolute argues in the alternative: even if there was an assignment of contract, it was not informed of the assignment until 2016, upon the commencement of the appeal proceeding. As a result, it was not possible to set the assignment up against Resolute before that date. On my reading of the record,

however, it has been possible to set the assignment up against Resolute since well before the litigation began.

[149] In the absence of express rules on assignment of contract, the conditions for setting up such an assignment can be understood by considering the rules with respect to assignment of claim. An assignment of claim may be set up against the assigned party “as soon as [that party] has acquiesced in it or received a copy or a pertinent extract of the act of assignment or any other evidence of the assignment which may be set up against the assignor” (art. 1641 *C.C.Q.*). Lluelles and Moore explain that [TRANSLATION] “[a]cquiescence does not require any particular form. It can therefore be implied, but mere knowledge of the assignment does not suffice” (No. 3170 (footnotes omitted)). The *C.C.L.C.* had a slightly different wording but followed the same logic, as it required the signification and delivery of the act of sale to, or acceptance of the assignment by, the assigned debtor (art. 1571; see *Immobilière Natgen inc. v. 2897041 Canada inc.*, [1998] R.D.I. 545 (Que. C.A.), at p. 548).

[150] In the instant case, the evidence does not show when CIP was made aware of the 1965 assignment, but it does indicate that CIP knew it was doing business with Hydro-Québec well before the litigation began and that it had acquiesced in that situation. As I mentioned above, CIP and Hydro-Québec signed a new contract in 1982 for the distribution of additional power — *additional* in relation to what was provided for in the 1926 contract. The Court of Appeal rightly noted, at para. 32, that [TRANSLATION] “[i]t is Hydro-Québec that has supplied Resolute with electricity since

1965 and that issues bills, and it is Hydro-Québec to which Resolute makes payments and to which CIP turned in order to obtain additional power and to enter into a new agreement in 1982”.

[151] I therefore conclude that the assignment of contract may be set up against Resolute.

(6) More Onerous Obligations Resulting From the Assignment of Contract

[152] Resolute argues, continuing with the theme that the assignment of contract was unfair to it, that even if the assignment was valid and may be set up against it, the assignment could not have the effect of authorizing Hydro-Québec to claim payment of the increased price for electricity supplied to it. That would, it says, render its obligations more onerous than the ones to which CIP consented in 1926, because Gatineau Power did not pay the taxes in question. Resolute relies for this on the rule against making an assignment of claim (and therefore, by extension, an assignment of contract) “that is injurious to the rights of the debtor or that renders his obligation more onerous” (art. 1637 para. 2 *C.C.Q.*; see also, in the context of the *C.C.L.C.*, *Caisse populaire de Maria v. Beauvais et Verret Inc.*, [1994] R.D.J. 592 (Que. Sup. Ct.), at p. 596).

[153] This argument must fail. The increase in the price of electricity resulted not from the assignment of contract, but from legislative changes. Any possible difference

between the rule under the *C.C.Q.* and the one under the *C.C.L.C.* is therefore immaterial, because Resolute's argument is unfounded in any case.

[154] As we know, the parties to the 1926 contract expressly provided in art. 17 that they would be subject to future provincial laws and that those laws would affect their contractual relationship. In 2007, Hydro-Québec lost the benefit of the exemption under s. 68 of the *WA*, and an additional levy was established in the *HQA*. The increase in electricity rates resulting from those legislative changes was a risk that CIP had clearly agreed to take in arts. 17 and 20 of the 1926 contract. In other words, the cause of the price increase was not the assignment of the contract in 1965, but the amendments made to the legislation in 2007. The assignment did not in itself render Resolute's obligation more onerous.

[155] I conclude that the assignment of the 1926 contract had full effect with respect to Resolute and that Hydro-Québec is entitled, as a party to that contract, to claim payment from it for the taxes and charges contemplated in art. 20.

B. *Can Hydro-Québec Claim Payment of the Levies Provided for in Section 32 of the HQA and Section 68 of the WA?*

[156] Hydro-Québec is claiming, pursuant to art. 20 of the 1926 contract, an increased amount for electricity supplied to Resolute. It explains that the levies provided for in s. 68 of the *WA* and s. 32 of the *HQA* were added to Resolute's bill

dated November 30, 2011 as well as to that company's bills for the preceding three years.

[157] In Resolute's view, the Court of Appeal erred in concluding that those levies are taxes or charges within the meaning of the 1926 contract. First, it submits that Hydro-Québec's status as a mandatary of the government means that the amounts levied under s. 32 of the *HQA* and s. 68 of the *WA* constitute an allocation of public funds already belonging to the government, and not taxes or charges in the legal sense. Second, Resolute argues that the levies in question cannot be considered to be taxes or charges within the meaning of art. 20 of the 1926 contract, because to characterize them as such would be inconsistent with the parties' intention at the time they entered into that agreement. Third, Resolute maintains that any claim for payment of the amounts levied under the *WA* was either extinguished by prescription or tacitly waived by the respondents, given that in 65 years, Gatineau Power had never passed the bill on to the other contracting party.

[158] As the Court of Appeal explained, the trial judge had first expressed the opinion that the *Act to reduce the debt and establish the Generations Fund*, CQLR, c. R-2.2.0.1, had not imposed a new tax, because the tax in question had already existed before being extended to Hydro-Québec in 2007. The levy at issue is thus a "tax" according to this conclusion of the Superior Court (see C.A. reasons, at para. 11). Yet the trial judge had then accepted Resolute's argument that the levy in question is not a "tax", because in her view it constitutes an allocation of public funds. Given these

apparent contradictions, the Court of Appeal was justified in intervening. In any event, as it explained, it had not been essential for the trial judge to answer the question whether the levy at issue is a “tax”, as art. 20 of the 1926 contract applies to both taxes and charges (para. 14).

[159] I will now consider each of Resolute’s three arguments.

(1) Hydro-Québec’s Status

[160] Resolute submits that the government cannot tax Hydro-Québec because that would amount to taxing itself. This argument must fail.

[161] Mandataries of the government must pay taxes if the law so requires. As Gérard V. La Forest wrote before becoming a judge, “[a] province may tax its own instrumentalities, such as Crown corporations and municipalities” (*The Allocation of Taxing Power Under the Canadian Constitution* (2nd ed. 1981), at p. 175). And this Court affirmed in *Westbank First Nation v. British Columbia Hydro and Power Authority*, [1999] 3 S.C.R. 134, that a province may tax its agents (or mandataries) (para. 40). Moreover, s. 16 of the *HQA* expressly provides that Hydro-Québec must pay certain taxes. I would add that there is in the record an admission that the Quebec government has billed Hydro-Québec for the amount of the levies provided for in the two Acts in question.

[162] Resolute's argument that the government does not generate any revenue by taxing Hydro-Québec disregards the distinct juridical personality of the state-owned enterprise. Although Hydro-Québec is a "mandatary of the State" (*HQA*, s. 3.1.1), it is nonetheless a separate entity (see, e.g., *HQA*, ss. 3.1.2 and 3.1.3). The amounts collected from the taxation of Hydro-Québec differ from the revenues collected by the government when Hydro-Québec declares dividends, even though all of Hydro-Québec's shares are owned by the government. The government and Hydro-Québec cannot be lumped together as Resolute proposes.

[163] Furthermore, Resolute has not identified an error in the Court of Appeal's conclusion that the amounts payable under s. 68 of the *WA* constitute a tax (para. 13). Since there is nothing to indicate that the word "tax" is given a special meaning in the contract, the Court of Appeal was right to intervene, relying in particular on *Algonquin*. It is true that *Algonquin* concerned taxes paid by a private business and turned on, among other things, the distinction between a tax and a charge (para. 46). But the nature of the levy did not change as a result of being imposed on Hydro-Québec. In any event, even if Hydro-Québec's status made the levy a charge, that would be of no consequence in the case at bar, given that the contract applies to any "tax or charge".

[164] For the same reasons, the levy under s. 32 of the *HQA* does not cease to be a tax or charge because it is imposed on Hydro-Québec. Regardless of exactly how the levy is characterized, a plain reading of this section confirms that its effect is to impose on Hydro-Québec under s. 16 of the *HQA* the payment of a "tax or charge . . . levied

upon electrical energy generated from water power” within the meaning of art. 20 of the 1926 contract. Furthermore, contrary to Resolute’s submission, the absence of an enforcement mechanism in the statute does not make the levy any less of a tax that is “enforceable by law” (A.F., at para. 135, quoting *620 Connaught Ltd. v. Canada (Attorney General)*, 2008 SCC 7, [2008] 1 S.C.R. 132, at para. 22): the levy becomes payable by operation of law.

[165] Resolute argues that what is at issue here is not a tax or a charge, but an allocation of government revenues. However, the fact that the legislature decided to allocate the collected amounts to the Generations Fund does not change the nature of the levy. I agree with the Court of Appeal: the appellant, like the trial judge (Sup. Ct. reasons, at paras. 64 and 67), is confusing the nature of the levy with the place where it is to be deposited (para. 16).

[166] The Court of Appeal was therefore right to conclude that art. 20 of the 1926 contract applies to the levies provided for in s. 32 of the *HQA* and s. 68 of the *WA*.

(2) Meaning of the Words “Tax or Charge” Intended by the Parties

[167] Resolute points out that the words “tax or charge” used in the 1926 contract may have a meaning different than the one given to them in a statute; what is important in this case is the meaning of these words based on the common intention of the parties in 1926. In Resolute’s view, that intention is clear: art. 20 of the contract concerns a “tax or charge” payable to a stranger to the contract — a government — and not to a

contracting party. Resolute is thus suggesting a variation on its argument concerning the legal nature of the levies: the parties' intention was to authorize the company having an obligation to supply electricity to apply a future tax or charge collected by a government to the price paid by the purchaser, not to allow the company to unilaterally increase the price of electricity for its own benefit.

[168] This argument cannot be accepted. Even if it is assumed that the parties did not foresee the nationalization of electricity when they entered into the 1926 contract, increases in taxes or charges were expressly provided for in the contract, as was the possible impact of those increases on the price of electricity. The parties also stipulated that the agreement would be subject to future provincial laws (art. 17) and that the contract could be assigned (art. 22).

[169] Resolute's argument that the parties sought to limit the effects of arts. 17 and 20 to payments made to governments that are strangers to the contract by excluding a situation in which payments are made to a government through a corporation it owns must also be rejected. As we have seen, the imposed taxes and charges are payable to the government, which is a stranger to the contract, and not to Hydro-Québec, a party to the contract. The charges paid to the government actually increase the cost of producing the electricity supplied by Hydro-Québec, whose juridical personality and patrimony are distinct from those of the government.

[170] Resolute also argues, again on the basis of its analysis regarding the common intention of the parties, that the charge provided for in s. 68 of the *WA* is not

a “future” charge within the meaning of the 1926 contract, because this statutory levy already existed when the contract was renewed in 2006. This argument is not persuasive. It is inconsistent with the ordinary meaning of the words used in art. 20. Any charge imposed after 1926 is a “future” charge within the meaning of arts. 17 and 20 of the contract. This is easy to explain: the purchaser has the right to renew the contract indefinitely without renegotiating the price, but the seller is protected in the event that electricity costs rise as a result of a new tax or charge. A reading of the contract suggests that the parties’ intention was to have the price for electricity remain stable, subject to the imposition of new taxes and charges, such that the seller company’s net revenue would remain constant but it would not be penalized if its production costs rose because of an unforeseen tax or charge levied upon electricity. Since the purchaser company has the option to renew or not to renew the contract, it is protected from any future price increase that is excessive: in the event of an increase in taxes or charges, it can choose not to renew the agreement.

[171] Resolute submits that the levy provided for in the *HQA* relates not to “electrical energy”, the term used in art. 20 of the 1926 contract, but to “water power” (*HQA*, s. 32). This argument must also fail. In art. 20 of the contract, the parties specified that the amounts in question would be levied “upon electrical energy generated from water power”, but they did not make the distinction suggested by Resolute. The words of art. 20 do not exclude electricity from the “water power [Hydro-Québec] develops”, which are the words used in s. 32 para. 2 *HQA*. The Act

provides that the rate of the levy is computed in kilowatt-hours, which clearly suggests, contrary to Resolute's argument, that the levy relates to electricity.

[172] In sum, all of Resolute's arguments to the effect that the Court of Appeal misunderstood the intention of the parties to the 1926 contract are rejected.

(3) Waiver or Prescription

[173] Resolute's final argument is that any claim for payment of the tax under the WA was extinguished by prescription or tacitly waived. Before being imposed in s. 68 of the WA, this charge had existed since 1946 under s. 3 of the *Act to insure the progress of education*, S.Q. 1946, c. 21. At the hearing, the parties were unable to explain why Gatineau Power had never billed Resolute for it. The legislative history shows that the appellant's argument is unfounded, however.

[174] The fact is that from 1946 to 1964, the *Act to insure the progress of education* barred Gatineau Power from billing Resolute for the charge. Section 19 para. 1 provided that "[n]o holder or owner of hydraulic powers shall increase the rates of his electricity services or obtain an increase in such rates, by reason of the contribution he pays or which he shall be called upon to pay to the education fund". The next paragraph provided that charges, including the one provided for in s. 3, "must be borne exclusively by those upon whom this act imposes them, and [that] they cannot, directly or indirectly, claim the reimbursement thereof from anyone, notwithstanding any past or future arrangement or agreement to the contrary" (after 1946, no legislation

altered the substance of this provision: *An Act to amend the Act to insure the progress of education*, S.Q. 1947, c. 32, s. 9; *An Act to assure budgetary control of certain expenditures*, S.Q. 1961, c. 8, s. 18). Gatineau Power therefore could not avail itself of art. 20 of the 1926 contract.

[175] As of 1965, the charge incorporated into s. 68 of the *WA* was no longer accompanied with a prohibition against increasing electricity rates or claiming a reimbursement of the charge. However, Hydro-Québec was exempted from the charge until 2007 (see *Act to reduce the debt and establish the Generations Fund*, S.Q. 2006, c. 24). Accordingly, there was no extinction by prescription or tacit waiver as a result of the renewals in 1996 and 2006.

[176] I conclude that the words “tax or charge” in art. 20 of the 1926 contract encompass the two levies at issue that were imposed under s. 32 of the *HQA* and s. 68 of the *WA*, and I would therefore declare that those levies are payable by Resolute to Hydro-Québec under that agreement. The Court of Appeal did not err in reaching this conclusion. Like the Court of Appeal, given the absence of the Attorney General of Quebec, I will not address the question whether Hydro-Québec will be required to pay the levy provided for in s. 32 of the *HQA* in the future such that it will be entitled to an increase on the basis of that levy. To dispose of the case, it will suffice to note that the Quebec government required Hydro-Québec to pay the charges at issue and that the latter was entitled to apply them to the amount billed to Resolute.

IV. Conclusion

[177] I would dismiss the appeal with costs.

English version of the reasons of Côté and Rowe JJ. delivered by

CÔTÉ J. —

TABLE OF CONTENTS

	Paragraph
I. <u>Introduction</u>	178
II. <u>Summary of the Relevant Facts</u>	189
III. <u>Issue</u>	202
IV. <u>Standards for Appellate Intervention</u>	204
V. <u>Trial Judge’s Decision</u>	208
VI. <u>Appellate Intervention</u>	227
A. <i>Arguments Concerning Assignment at Three Possible Points in Time</i>	232
B. <i>Uncontested Argument That the 1965 Contract Did Not Effect an Assignment</i>	239
(1) <u>Subsequent Conduct of the Parties</u>	240
(2) <u>Judicial Contract Between the Parties</u>	257
VII. <u>Adjustment in the Price of Electricity</u>	271
VIII. <u>Conclusion</u>	279

I. Introduction

[178] The nationalization of the production and distribution of electricity was a flagship project of the Quiet Revolution in Quebec. At the time, the Quebec

government created a state-owned enterprise, Hydro-Québec, to take control of Quebec's electricity market. After initially using expropriation to take over private electricity producers, Hydro-Québec opted instead to proceed by way of agreement in order to acquire those companies and complete the nationalization process. This case raises the following question: how are two companies to be unified in the context of a takeover? Does unification necessarily imply that one company is completely absorbed by the company that acquires it, such that it then becomes merely an empty shell? Or is it possible to devise a more flexible form of unification with takeover terms and a phased approach that will ensure the target company's survival?

[179] According to my colleague Kasirer J., nationalization necessarily means complete absorption. Since the nationalization of electricity, the target companies, such as the Gatineau Power Company ("Gatineau Power"), have, in his view, become nothing more than empty shells that serve no purpose and have no legal existence. He therefore considers it highly unlikely that a parent company like Hydro-Québec could, in some cases, be a mandatary of its subsidiary, Gatineau Power. Like the Court of Appeal (2019 QCCA 30), he relies exclusively on the 1965 contract to arrive at that conclusion.

[180] The central question raised by this appeal concerns the relativity of a power contract entered into in 1926 by Gatineau Power and the Canadian International Paper Company ("CIP"), the predecessor of the appellant, Resolute FP Canada Inc. ("Resolute"). The principle of relativity of contract means that a contract has "effect

only between the contracting parties” and that “it does not affect third persons” (art. 1440 of the *Civil Code of Québec* (“C.C.Q.”)). As a result, third persons cannot rely on the content of a contract for their own benefit, except in a few very limited cases. Specifically, the question is therefore whether Hydro-Québec, a third person in relation to the 1926 contract, can avail itself of the price adjustment clause in that contract in order to pass on to Resolute the taxes or charges it paid under s. 32 of the *Hydro-Québec Act*, CQLR, c. H-5 (“HQA”), and s. 68 of the *Watercourses Act*, CQLR, c. R-13 (“WA”). Hydro-Québec is retroactively claiming more than \$3 million in taxes or charges from Resolute on the basis of that clause. To succeed in Superior Court, Hydro-Québec and Gatineau Power therefore had the burden of showing that Hydro-Québec was also a party to the contract. Allegedly, Hydro-Québec became a party to the 1926 contract as a result of an assignment of that contract in its favour.

[181] This appeal is a typical case involving the correction of errors allegedly found in the trial judge’s decision. First, this appeal requires this Court to consider the judicial contract between the parties to the proceedings in order to understand the nature of the debate that took place in the Superior Court. Second, the appeal requires this Court to look carefully at the trial judge’s reasons in order to determine whether she made a reviewable error in disposing of the arguments presented to her, since the Court of Appeal limited itself to stating that she had made a reviewable error, without identifying or describing it (see *Hydro-Québec v. Matta*, 2020 SCC 37, at para. 34).

[182] A careful reading of the pleadings, the parties' outlines of argument and the transcript of the oral argument in the Superior Court shows that Hydro-Québec and Gatineau Power did *not* argue that the 1965 contract had effected an assignment. In fact, they described that contract in their defence as a [TRANSLATION] "mandate, sale and lease agreement" (A.R., vol. I, at p. 44). Hydro-Québec and Gatineau Power argued that the assignment had occurred at the earliest in 1982, when Resolute's predecessor and Hydro-Québec entered into a contract for the supply of additional electric power. In the alternative, Hydro-Québec and Gatineau Power submitted that the assignment had occurred in 1997, when the *Act respecting the Régie de l'énergie*, S.Q. 1996, c. 61, gave Hydro-Québec the exclusive right to distribute electricity in Quebec, or in 2005-2006, when Gatineau Power transferred the ownership of its power plants to Hydro-Québec.

[183] The trial judge correctly understood that the issue was whether the contract had been assigned either in 1982, in 1997 or in 2005-2006 (2016 QCCS 3862). In my view, she decided the case as it had been presented to her, without making a reviewable error. Nor did she make such an error by accepting Resolute's argument, which was not contested at trial, that the 1965 contract had not effected an assignment. The judge was bound by the judicial contract between the parties, in which the characterization of the 1965 contract was not in dispute. It was not argued before her, either by Resolute or by Hydro-Québec and Gatineau Power, that the 1965 contract had effected an assignment. In this regard, Hydro-Québec and Gatineau Power, on which the burden of proof rested, proposed no interpretation of the 1965 contract to that effect.

[184] As a result, the trial judge did not have to consider the interpretation of the 1965 contract in detail, which, and I say this with great respect, the Court of Appeal erred in doing, as does my colleague Kasirer J. In any event, even if the characterization of the 1965 contract had been part of the judicial contract and the judge had therefore considered it at length, in my view, the words of that contract, its object and the parties' subsequent conduct confirm the existence of a mandate. Although Gatineau Power did sell the vast majority of its movable property and lease all its immovables, it did not "assign" its power contracts. Deprived of its production tools, Gatineau Power mandated Hydro-Québec to supply its customers with the electricity that Gatineau Power was normally required by contract to supply to them. To facilitate the performance of that task, Gatineau Power made its rights under the power contracts available to Hydro-Québec, though without assigning them, so that Hydro-Québec could assert those rights as a mandatary acting in Gatineau Power's name. The parties also stipulated that Hydro-Québec's remuneration for its services as mandatary was to be equal to the revenue derived from carrying on Gatineau Power's operations.

[185] Since the trial judge did not make a reviewable error in finding that the 1926 contract had not been assigned to Hydro-Québec, Gatineau Power's status as a party to the 1926 contract was not transferred to Hydro-Québec. Hydro-Québec is therefore a third person in relation to that contract, and the relativity of the contract prevents it from invoking the price adjustment clause to pass on the taxes or charges for which it may be liable.

[186] As for Gatineau Power, it cannot pass on the taxes or charges either, as the evidence does not show that it paid them. In any event, even if Gatineau Power had paid them, it could not pass them on to Resolute because it was not legally bound to pay them for the years for which they are being claimed. The charges provided for in s. 32 *HQA* and s. 68 *WA* are in fact levied only on holders of water power. The price increase is being claimed for 2009 to 2011. However, Gatineau Power has not been a holder of water power since well before 2009; Hydro-Québec has been the holder of that power since 1965, first in its capacity as lessee and then, as of 2005-2006, in its capacity as owner.

[187] In light of the conclusion I reach, I see no need to comment on the theoretical debate between the unitary and dualistic approaches to assignment of contract.

[188] For the reasons that follow, I would allow the appeal.

II. Summary of the Relevant Facts

[189] In 1926, Gatineau Power entered into a power contract with Resolute's corporate predecessor — CIP — for a term of 40 years. The contract gave CIP an option to renew it unilaterally for additional 10-year periods. Resolute and its predecessors renewed the 1926 contract several times, with the result that it is still in force. The 1926 contract contains a clause authorizing Gatineau Power to raise the price of electricity by an amount equal to the increases in any “tax” or “charge” payable by

it (art. 20, reproduced in A.R., vol. III, at p. 110). The 1926 contract also contains the following stipulation: “This Agreement shall enure to the benefit of and be binding upon the successors or assigns of both parties” (art. 22).

[190] In 1946, the *Act to insure the progress of education*, S.Q. 1946, c. 21, was enacted. The purpose of that statute was to create a special fund to finance public education in Quebec, some of the contributions to which were to come from a charge levied on the electricity generated by holders of hydraulic powers in the public domain and owners of hydraulic powers in the private domain (ss. 2 and 3c and d). The Quebec Hydro-Electric Commission — Hydro-Québec’s predecessor — was also required to pay a share of its revenues into the fund (s. 3e). In 1961, s. 13 of the *Act to assure budgetary control of certain expenditure*, S.Q. 1961, c. 8, changed how the amounts were allocated by providing that, from then on, the charges were to be paid into the consolidated revenue fund. As a result of the 1964 statute revision, this charge became the one provided for in s. 68 WA. The charge under s. 68 WA is one of the two charges at the centre of this case.

[191] It is not in dispute that Gatineau Power was bound to pay this charge as of 1946. However, the record does not show whether Gatineau Power paid the charge. Nor is it in dispute that the price adjustment clause in the 1926 contract was not invoked until 2011, 65 years later, as discussed below.

[192] In 1963, the Quebec government began nationalizing electricity production in Quebec. As a result, the Quebec Hydro-Electric Commission acquired all of

Gatineau Power's shares in 1964 and 1965. Gatineau Power thus became a wholly owned subsidiary of the Commission and of its successor, Hydro-Québec.

[193] In 1965, following the purchase of Gatineau Power's shares, Hydro-Québec entered into a contract with Gatineau Power to unify the management of the two companies. The trial judge described the content of the 1965 contract as follows:

[TRANSLATION] In 1965, electricity was nationalized. [Gatineau Power] continued to exist, but [Hydro-Québec] acquired all of its shares. A mandate, sale and lease agreement was entered into on May 12, 1965, between [Hydro-Québec] and [Gatineau Power], and under this agreement, [Gatineau Power] leased its immovables to [Hydro-Québec], sold it its movable assets, and named [Hydro-Québec] mandatary for the management of its operations and contracts. Consequently, [Gatineau Power] retained ownership of the three plants situated on the Gatineau River — Paugan, Chelsea, and [Rapides]-Farmer — but they were leased to [Hydro-Québec]. This agreement was entered into for a term of twenty-five years, but there is nothing to indicate that it came to an end at the expiration of that term. It was therefore tacitly renewed upon its expiry, at least until 2005-2006, when the plants in question were assigned to [Hydro-Québec]. [Emphasis added; para. 51 (CanLII).]

[194] It is important to note that, in the defence filed in Superior Court, Hydro-Québec and Gatineau Power both referred to the 1965 contract as a [TRANSLATION] “mandate, sale and lease agreement”. Moreover, a manager from Hydro-Québec testified that, to his knowledge, that contract had not effected an assignment.

[195] In 1982, Resolute's predecessor and Hydro-Québec entered into a contract, in which Gatineau Power did not participate, for the supply of electric power in addition to that provided for in the 1926 contract. Importantly, the 1982 contract describes the 1926 contract as being between Resolute's predecessor and Gatineau Power only. Moreover, the contract entered into in 1982 makes no reference to the existence of the 1965 contract between Gatineau Power and Hydro-Québec. On this point, Hydro-Québec and Gatineau Power conceded in the Superior Court that [TRANSLATION] "the evidence does not show that CIP [Resolute's predecessor] had knowledge of the 1965 Agreement when it signed the 1982 Contract" (outline of argument of Hydro-Québec and Gatineau Power at trial, at para. 78, reproduced in R.R., at p. 61). The trial judge described the situation as follows:

[TRANSLATION] Of course, there is nothing to indicate that this 1965 agreement was ever brought to the attention of [Resolute]. [Resolute] continued to benefit from the 1926 agreement, the existence of which was recognized and confirmed when it entered into an agreement with [Hydro-Québec] in 1982 to obtain the additional power it required. Furthermore, for a great many years, [Resolute] received a single invoice for the electricity provided to its Gatineau mill, which was issued by and paid to [Hydro-Québec]. The invoice did, however, indicate the electricity provided under the 1926 agreement separately. [Emphasis added; para. 52.]

As the judge noted, Hydro-Québec is responsible for supplying Resolute with the electricity owed under the 1926 contract on behalf of Gatineau Power. Hydro-Québec issues a single invoice both for the original power supplied under the 1926 contract and for the additional power provided for in the 1982 contract, but it takes care to indicate

the electricity supplied under the 1926 contract separately from the rest of the electricity delivered to Resolute.

[196] Resolute and its predecessors renewed the 1926 contract several times, i.e. in 1986, 1996 and 2006. Each notice of renewal contained similar language indicating that Gatineau Power was the recipient:

[TRANSLATION]

REGISTERED MAIL

Gatineau Power Company
c/o Hydro-Québec
Mr. Jean Bernier
Secretary General
75 Dorchester Boulevard West
Montréal, Quebec
H2Z 1A4

(A.R., vol. II, at p. 1)

[197] In 1997, the *Act respecting the Régie de l'énergie* gave Hydro-Québec the exclusive right to distribute electricity in Quebec, with some limited exceptions.

[198] In 2005-2006, Gatineau Power transferred its three plants on the Gatineau River to Hydro-Québec, without Resolute being informed.

[199] In 2006, the National Assembly of Quebec created the Generations Fund, which was to be used to repay Quebec's public debt (*Act to reduce the debt and establish the Generations Fund*, CQLR, c. R-2.2.0.1, s. 2). At the same time, the

Quebec legislature amended the *HQA* and the *WA* to make Hydro-Québec subject to the charges provided for in those statutes (s. 32 *HQA*; s. 68 *WA*) and to specify that the amounts were to be paid into the Generations Fund.

[200] Hydro-Québec began paying the taxes or charges under s. 32 *HQA* and s. 68 *WA* in January 2007. However, it was not until nearly five years later, in December 2011, that the price adjustment clause in the 1926 contract was invoked for the first time.⁶ Hydro-Québec — not Gatineau Power — sent Resolute an invoice, retroactively claiming more than \$3 million for the charges paid by Hydro-Québec to the Quebec government on the electricity produced during the preceding three years. Resolute objected to that retroactive claim, which was how this dispute originated.

[201] The parties entered into a payment under protest agreement. Under that agreement, Resolute paid the amounts claimed by Hydro-Québec in order to avoid paying interest and additional administrative fees until a judgment was rendered on the merits of the case. The agreement also provided that Resolute was to bring a motion to institute proceedings for a declaratory judgment within the time agreed upon and that, if it did not do so, Hydro-Québec would keep the amounts. Accordingly, in

⁶ Hydro-Québec sent Resolute a letter dated November 30, 2011 referring to its right to invoke the price adjustment clause in the 1926 contract, a letter to which an invoice dated December 1, 2011 was attached. The trial judge stated that the price adjustment was claimed in November 2011 (at para. 42, quoted at para. 218 of these reasons), whereas the parties state that it was on December 1, 2011 (A.F., at para. 16; R.F., at para. 22, fn. 26). Although this is not determinative, I will refer to the latter of these dates, i.e. December 1, 2011, as the parties do.

September 2012, Resolute filed a Motion in Superior Court to Institute Proceedings for a Declaratory Judgment.

III. Issue

[202] The question before the trial judge was whether Hydro-Québec could avail itself of the price adjustment clause in the 1926 contract in order to pass on to Resolute the taxes or charges it paid under s. 32 *HQA* and s. 68 *WA*. The judge answered this question in the negative. Hydro-Québec and Gatineau Power are asking this Court to reach a contrary conclusion. The Court's answer to the question turns on the application of the proper standard for intervention in the trial judge's decision, understood in its factual and procedural context.

[203] After considering the factual and procedural context of this case, I am of the view that the trial judge did not make a reviewable error in finding that the 1926 contract had not been assigned. She clearly understood the arguments made by Hydro-Québec and Gatineau Power, on which the burden of proof rested, and she disposed of them without making an error that warranted the Court of Appeal's intervention.

IV. Standards for Appellate Intervention

[204] In *Uniprix inc. v. Gestion Gosselin et Bérubé inc.*, 2017 SCC 43, [2017] 2 S.C.R. 59, this Court explained that the characterization of a contract must “be

considered to be a question of mixed fact and law” (at para. 42) when it “involves the consideration of a multitude of facts” (at para. 41), such as the circumstances surrounding the formation of the contract and how the parties subsequently applied it (para. 29; see *3091-5177 Québec inc. (Éconolodge Aéroport) v. Lombard General Insurance Co. of Canada*, 2018 SCC 43, [2018] 3 S.C.R. 8, at para. 18; *Churchill Falls (Labrador) Corp. v. Hydro-Québec*, 2018 SCC 46, [2018] 3 S.C.R. 101, at para. 49). In such a case, the applicable standard for appellate intervention is palpable and overriding error, unless there is an extricable error of law.

[205] This Court has reiterated on many occasions that appellate courts must take a highly deferential approach to mixed questions, like the characterization of a contract, because the answer to such questions is “intertwined with the weight assigned to the evidence” by the trial judge, who is in a much better position than an appellate court to assess and weigh such matters (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 32, see also paras. 12-14 and 18; see *Benhaim v. St-Germain*, 2016 SCC 48, [2016] 2 S.C.R. 352, at para. 37).

[206] In this case, the applicable standard is palpable and overriding error. The Court has to review the trial judge’s characterization of the parties’ legal relationship, a task that required her to consider a multitude of facts. Indeed, to determine whether Hydro-Québec had become a party to the 1926 contract as a result of an assignment, the trial judge relied on the wording of the contractual documents in question, the factual context surrounding them, the arguments made by Hydro-Québec and Gatineau

Power themselves concerning any of the three points in time when the assignment could have occurred and, above all, the parties' subsequent conduct. The judge actually found several facts that, in her view, negated the existence of an assignment:

- Gatineau Power continues to exist and had not been dissolved;
- Gatineau Power had retained ownership of the plants until 2005-2006;
- the notices of renewal of the 1926 contract had all been addressed to Gatineau Power care of Hydro-Québec, which suggested that Hydro-Québec had a mandate to receive them on behalf of Gatineau Power;
- the electricity invoices sent to Resolute indicated the electricity supplied under the 1926 contract separately; and
- Resolute had never been informed that Gatineau Power had assigned the 1926 contract to Hydro-Québec and, in this sense, there was no evidence that Hydro-Québec had observed the formalities for setting up the alleged assignment of the contract against it (paras. 16, 20 and 51-54).

It was therefore in light of this factual context that the trial judge concluded that the 1926 contract had not been assigned to Hydro-Québec and [TRANSLATION] “that the parties to the 1926 agreement remain [Gatineau Power] and [Resolute]” (para. 60).

[207] This Court’s task is not to review the Court of Appeal’s reasons and its interpretation of the 1965 contract, but rather to review the Superior Court’s decision (*Uniprix*, at para. 44).

V. Trial Judge’s Decision

[208] To determine whether the trial judge made a reviewable error in concluding as she did, it is important to consider the arguments presented to her and the manner in which she disposed of them.

[209] The 1926 contract states that the only contracting parties are CIP, Resolute’s predecessor, and Gatineau Power. The principle of relativity of contract therefore prevents Hydro-Québec from invoking the price adjustment clause in the 1926 contract. As a result, Hydro-Québec and Gatineau Power had the burden of proving that Resolute owed Hydro-Québec the taxes or charges claimed under that contract. Though the burden of proof was on Hydro-Québec and Gatineau Power, it was instead Resolute that filed the Motion to Institute Proceedings for a Declaratory Judgment, as provided for in the payment under protest agreement. This meant that Resolute was the plaintiff for the purposes of the litigation and presented its case first.

[210] In its motion, Resolute alleged that, to its knowledge, the 1926 contract had not been assigned to Hydro-Québec by Gatineau Power. When Hydro-Québec and Gatineau Power filed their defence, the parameters of the debate became clearer. In their defence, they denied Resolute's allegation that there had been no assignment. However, they did not explain when and how an assignment had occurred. In fact, Hydro-Québec and Gatineau Power instead alleged that Hydro-Québec had been supplying the electricity owed under the 1926 contract since entering into the 1965 contract, the one they described as a "mandate, sale and lease agreement":

[TRANSLATION] Since acquiring the Gatineau Power Company and entering into the mandate, sale and lease agreement referred to above, Hydro-Québec has been supplying all the electricity under all the above-mentioned contracts for supplying the Gatineau Mill; [Emphasis added.]

(A.R., vol. I, at p. 48; see also p. 44.)

[211] Resolute, technically the plaintiff from a procedural standpoint, presented its case first at the hearing before the trial judge. Because Hydro-Québec and Gatineau Power had denied its allegation that no assignment had occurred, Resolute undertook to argue that the 1965 contract had not effected an assignment, even though Hydro-Québec and Gatineau Power had not argued, either in their defence or in their outline of argument, that the 1965 contract had done so.

[212] After indicating that, in its opinion, the [TRANSLATION] "central issue is the identity . . . [of] the contracting party" (A.R., vol. VI, at p. 126), Resolute argued that "Gatineau [Power] has always been the contracting party under the contract at issue"

(p. 128). Resolute began by stating that Hydro-Québec acted as a mandatary under the 1965 contract. It heavily emphasized the fact that Hydro-Québec and Gatineau Power “call it the mandate, sale and lease agreement” (p. 129). Resolute then set about showing that the 1982 contract for additional electric power and the acts of transfer of the plants in 2005-2006 had also not effected an assignment. According to Resolute, the 1982 contract recognized the “existence in black and white” of the 1926 contract and was “a separate contract” (pp. 159 and 162). As for the acts of transfer of the plants, Resolute argued that they had transferred only the ownership of the plants and had not assigned the contracts and that, in any event, the formalities for setting up the acts against it had not been observed.

[213] It was then the turn of Hydro-Québec and Gatineau Power to present their arguments to the trial judge. Their main argument was that the principle of relativity of contract was not relevant. Once a tax or charge was levied, the price adjustment clause in the 1926 contract would be triggered and the price would then automatically be increased by an amount equal to the applicable taxes or charges. This was true regardless of whether or not there had been an assignment. The following excerpts from the transcript give a clear picture of the main argument made by Hydro-Québec and Gatineau Power:

[TRANSLATION]

[COUNSEL FOR HYDRO-QUÉBEC AND GATINEAU POWER]:

...

So our contention is that the exercise we have just done disposes of the question, that is, it's sufficient to read the contract to determine what the price will be. And all of this is very logical, because the power is supplied by the plants in the context, context, hydroelectric development on the Gatineau River, supplied to the paper mill by these works, as stated in the second recital, in a long-term context. So if the very specific trigger in article 20 occurs, the price changes automatically. Regardless of whether the contract was assigned or not assigned, performed by a mandatary or not, the price changes. It's a pricing formula.

...

What I'm alleging, basically, what I'm arguing is that, especially at the start of the quotation, the concept of the binding force of contracts. Therefore, the contract is, in my opinion, it's clear, its context is well understood, its application is obvious, in our view, there is a price adjustment clause that applies. The party that has to pay more won't be pleased, of course, but beyond that, it's an application of the principle of binding force of contracts

...

I will explain it to you again, since it's my first argument. When I said to you, that argument disposes of the case, that's it. In other words, we look at the contract of nineteen twenty-six (1926), we see that it contains a pricing formula, and we simply apply the article. Is there a new tax? Yes. And I think it's reasonable to say that this clause will be applied from the first (1st) of January two thousand seven (2007), because that was when both Gatineau and Hydro-Québec became subject to the tax. That is the argument, the contract is applied. It isn't written that it has to be Gatineau that pays or Hydro-Québec that pays. They are subject to a tax. Is there a new tax? Yes.

JUDGE:

You, what you're saying is that ultimately the effect of 16 and 68 is that, in any case, regardless of who pays, Hydro-Québec and Gatineau Power are subject.

[COUNSEL FOR HYDRO-QUÉBEC AND GATINEAU POWER]:

Exactly.

JUDGE:

And Hydro-Québec doesn't need to say all the time, well, here I am acting as mandatary . . . It comes to the same thing.

[COUNSEL FOR HYDRO-QUÉBEC AND GATINEAU POWER]:

That is exactly right. It isn't tied to the person who pays or doesn't pay. . . .

. . .

But from the moment there's a tax, that is, the suppliers, and whatever they may be, Gatineau, Hydro, mandataries or not, they are both subject to it. The debate ends there.

So that is our main argument and it disposes of the issue. [Emphasis added.]

(A.R., vol. VII, at pp. 113, 118 and 171-74)

[214] I would add that, when counsel for Hydro-Québec and Gatineau Power began his oral argument, he expressed his surprise at the fact that Resolute had devoted so much energy to the issue of assignment even though, in his view, it was merely an alternative argument. In my opinion, this confusion resulted from the fact that Resolute argued first even though it did not have the burden of proof:

[TRANSLATION]

[COUNSEL FOR HYDRO-QUÉBEC AND GATINEAU POWER]:

. . .

OK then, I will start with my outline of argument. So in our view, the . . . everything I heard from my colleagues yesterday about the assignment of the contract, in our view, it's an alternative argument, alternative, alternative, I should even say, that comes at the very end. So yes, I discuss it in my arguments, but it's at the very end, the last section of my outline, section E.

JUDGE:

In fairness to your colleagues, I think they tried to anticipate your arguments in order to make complete submissions.

[COUNSEL FOR HYDRO-QUÉBEC AND GATINEAU POWER]:

Yes, absolutely. I don't hold it against them, but OK.

JUDGE:

They could not guess ahead of time . . .

[COUNSEL FOR HYDRO-QUÉBEC AND GATINEAU POWER]:

Perhaps.

JUDGE:

. . . the order in which you would do it.

[COUNSEL FOR HYDRO-QUÉBEC AND GATINEAU POWER]:

That's right, and I think the same thing because we are also getting various kinds of arguments.

So in our view, it's really a contract application case, a case on the application of the nineteen twenty-six (1926) contract. [Emphasis added.]

(A.R., vol. VII, at pp. 91-92)

[215] Hydro-Québec and Gatineau Power then presented their alternative argument that, if an assignment of contract was necessary for the price adjustment clause to apply, the assignment had occurred at one of the following three points in time:

1. The assignment had taken place in 1982 when Resolute's predecessor and Hydro-Québec entered into a contract for the supply of additional electric power.

2. In the alternative, if the court was of the view that the 1982 contract had not effected an assignment, Hydro-Québec had become a party to the 1926 contract by operation of law when the *Act respecting the Régie de l'énergie* gave it the exclusive right to distribute electricity in Quebec.

3. And if that alternative argument was not accepted and the court was of the view that the change in the regulatory framework had not substituted Hydro-Québec for Gatineau Power under the 1926 contract, the assignment had taken place when Hydro-Québec became the owner of Gatineau Power's plants in 2005-2006 under the acts of transfer of the immovables.

[216] When the trial judge's decision is read carefully in light of the parties' respective outlines of argument and the transcript of the oral argument, it therefore becomes clear that although the question of assignment was in issue, the arguments presented by Hydro-Québec and Gatineau Power in the Superior Court were very different from those presented in the Court of Appeal and in this Court. At no time did Hydro-Québec and Gatineau Power argue in the Superior Court that the 1965 contract had effected an assignment of the 1926 contract. Rather, they argued that the assignment had occurred either in 1982, when Hydro-Québec and Resolute's predecessor entered into a contract for the supply of additional electric power, or in 1997, when Hydro-Québec became the exclusive distributor of electricity under the *Act*

respecting the Régie de l'énergie, or in 2005-2006, when Gatineau Power transferred the ownership of its power plants to Hydro-Québec. Thus, Hydro-Québec and Gatineau Power did not dispute the claim made by Resolute in Superior Court that the 1965 contract had *not* effected an assignment. Nor did they go to the trouble of analyzing the 1965 contract in order to show the contrary.

[217] The trial judge clearly understood the parties' arguments and the parameters of the debate. At paras. 25-34 and 42-45 of her reasons, she described the arguments of Hydro-Québec and Gatineau Power. She explained that they were arguing in the alternative [TRANSLATION] "that, since the 1982 agreement, [Hydro-Québec] has been [Resolute's] sole provider of electricity and its other contracting party" (para. 28 (emphasis added)). The central argument with respect to assignment was therefore that Hydro-Québec had become a party to the 1926 contract, but *only* as a result of the 1982 contract. The following passages from the trial judge's decision are enlightening:

[TRANSLATION] As [Hydro-Québec] points out in paragraph 74 of its memorandum:

Since the 1982 Agreement, Hydro-Québec provides all the electricity to the Gatineau mill and invoices any energy use, including the 40,000kW pool that was the subject of the 1926 Agreement. Payments are made to Hydro-Québec by [Resolute] and its authors. Hydro-Québec found invoices dating back to 1999 confirming this fact.

...

In the alternative, the defendants argue that, since the 1982 agreement, [Hydro-Québec] has been the plaintiff's sole provider of electricity and its other contracting party. Since 1982, the plaintiff cannot reasonably claim that it thought that [Gatineau Power] was its electricity provider. [Emphasis added; paras. 19 and 28.]

[218] The judge went on to say that the central question was whether Hydro-Québec and Gatineau Power had discharged their burden of proving that Hydro-Québec could invoke the price adjustment clause by demonstrating [TRANSLATION] “that it has acquired the rights of [Gatineau Power] under the 1926 agreement”:

[TRANSLATION] [Hydro-Québec] is the party invoking article 20 of the 1926 agreement, and it has done so since November of 2011, resulting in the dispute brought before us today.

To succeed, therefore, [Hydro-Québec] must demonstrate that it has acquired the rights of [Gatineau Power] under the 1926 agreement and that article 20 of that agreement applies. If the Court agrees with [Hydro-Québec’s] arguments on this matter, it will then determine whether the plaintiff [Resolute] is right to claim that [Hydro-Québec] cannot claim three years of arrears or administrative fees. [paras. 42-43]

[219] When the trial judge then turned to the analysis of the issue of assignment, there is every indication that she clearly understood the fact that the argument of Hydro-Québec and Gatineau Power that Hydro-Québec had become a party to the 1926 contract centred around three possible points in time, none of which related to the 1965 contract:

[TRANSLATION] According to [Hydro-Québec], the 1926 agreement should now be read and interpreted as if [Hydro Québec] itself had become [Resolute’s] contracting party. It is not entirely clear whether it is arguing that we should merely substitute the name Hydro-Québec for that of Gatineau Power when reading the agreement, or whether the contracting party is both Hydro-Québec and Gatineau Power.

This change [would have] occurred for many reasons: the nationalization of electricity, the fact that [Hydro-Québec] holds 100% of the shares of [Gatineau Power], the wording of the 1982 agreement

between [Hydro-Québec] and [Resolute], the effect of the *Act Respecting the Régie de l'Énergie* which enshrined the “exclusive right to distribute of Hydro-Québec when carrying out its power distribution activities”, the assignment of the Paugan, Chelsea, and Rapides-Farmer plants in 2005-2006 which allegedly extinguished “Hydro-Québec’s obligations with respect to these plants, as a supposed mandatary”, which in a way finalized the agreement assignment that was otherwise expressly authorized under article 22 of the 1926 agreement. [Emphasis added; paras. 44-45.]

[220] Before I analyze how the Superior Court judge disposed of these arguments, it is important to note that she was well aware of the fact that Hydro-Québec and Gatineau Power were not contesting Resolute’s argument that the 1965 contract had not effected an assignment of the 1926 contract, as can be seen from paras. 19 and 28 of her reasons. The judge thus understood that Hydro-Québec and Gatineau Power were standing by the position taken in their defence that the 1965 contract was a “mandate, sale and lease agreement”. What they were relying on instead was the effect on the parties’ legal relationship of the 1982 contract, the enactment of the *Act respecting the Régie de l'énergie*, and the acts transferring ownership of the plants. That being said, let us look at these arguments.

[221] First, the judge rejected the argument that the assignment had taken place in 1982 when Hydro-Québec and Resolute’s predecessor entered into a contract for the supply of additional electric power. In her view, clause 4a) of the 1982 contract was concerned only with the supply of additional electric power and did not affect the relativity of the 1926 contract. In fact, she was of the view that the 1982 contract

[TRANSLATION] “expressly provides” that the 1926 contract is only between Gatineau Power and CIP, Resolute’s predecessor:

[TRANSLATION] In 1982, an agreement was entered into between CIP, now [Resolute], and [Hydro-Québec] for the supply of additional power to the Gatineau mill (D-7). The agreement expressly provides that:

4(a) The provider already supplies the subscriber with 40,000kW of power, called the original firm power, in accordance with the agreement between Gatineau Power and Canadian International Paper Company, dated July 19, 1926, . . .

. . .

Of course, there is nothing to indicate that this 1965 agreement was ever brought to the attention of [Resolute]. [Resolute] continued to benefit from the 1926 agreement, the existence of which was recognized and confirmed when it entered into an agreement with [Hydro-Québec] in 1982 to obtain the additional power it required. Furthermore, for a great many years, [Resolute] received a single invoice for the electricity provided to its Gatineau mill, which was issued by and paid to [Hydro-Québec]. The invoice did, however, indicate the electricity provided under the 1926 agreement separately. [Emphasis added; paras. 18 and 52.]

The trial judge therefore did not hold that the 1982 contract had effected an assignment, as Hydro-Québec and Gatineau Power had argued at paras. 71 et seq. of their outline of argument (reproduced in R.R., at pp. 59-62) and at the hearing.

[222] Second, Hydro-Québec and Gatineau Power submitted that Hydro-Québec had become a contracting party through [TRANSLATION] “the effect of the *Act Respecting the Régie de l’Énergie* which enshrined the ‘exclusive right to distribute of Hydro-Québec when carrying out its power distribution activities’” (trial reasons, at para. 45, citing outline of argument of Hydro-Québec and Gatineau Power at trial, at

para. 86, reproduced in R.R., at p. 62). The judge did not specifically discuss this argument, but it can be assumed that she rejected it implicitly, since she analyzed the issue of whether Hydro-Québec could invoke the price adjustment clause exclusively on the basis of assignment of contract and not by operation of law.

[223] Finally, the judge rejected the third assignment argument made by Hydro-Québec and Gatineau Power, namely that the assignment of the 1926 contract had taken place when Gatineau Power transferred its Paugan, Chelsea and Rapides-Farmer power plants to Hydro-Québec in 2005-2006. According to that logic, even if Hydro-Québec had been a mandatary under the 1965 contract, the mandate would have ended in 2005-2006 when it became the owner of the power plants in question. From that moment on, according to Hydro-Québec, it could no longer logically act as a mandatary responsible for operating the power plants it owned. The object of the mandate having been accomplished, it would have come to an end. At the hearing, Hydro-Québec and Gatineau Power presented this argument in the following manner:

[TRANSLATION]

[COUNSEL FOR HYDRO-QUÉBEC AND GATINEAU POWER]:

...

The only thing that can be argued by the plaintiff is that perhaps Hydro-Québec went a bit far, perhaps it took over the contract, perhaps it shouldn't have. This is a debate that could take place, but between two companies, not between CIP and Hydro-Québec or Gatineau. This relationship is not shared with the customer that consumes the electricity. So that is the point I want to make about this, that if there is any doubt that it was Hydro-Québec in its capacity as mandatary, well, clearly, since the

transfers [of the power plants in 2005-2006], as we have seen, the articles in question of the sixty-five (1965) agreement on that point, to the effect that Hydro-Québec is a mandatary, well, they no longer apply. Their object has been accomplished. Hydro-Québec holds, is the owner of the “leased premises”. It can’t act as a mandatary for another; they belong to it. And the acts of transfer say so, including water power, buildings, it’s all in the acts, and my colleague even argued that before you yesterday. [Emphasis added.]

(A.R., vol. VIII, at pp. 48-49)

[224] The trial judge was also not persuaded by this last argument made by Hydro-Québec and Gatineau Power. In her view, the fact that they had not adduced any evidence showing that they had brought the acts of transfer of the power plants to Resolute’s attention — and thus the fact that they had not observed the formalities for setting up the assignment of the 1926 contract against it — showed that the acts transferring ownership of the power plants could not be interpreted as having assigned the 1926 contract:

[TRANSLATION] Thus, it was [Hydro-Québec] that decided that the [transfer] of the three [Gatineau Power] plants to [Hydro-Québec] would be opportune, and when it would take place. If these transactions were to have any effect on the application and interpretation of the 1926 agreement, [Hydro-Québec] never informed [Resolute] in due time. It is difficult to find that these transactions effected an assignment of contract when [Resolute] was never informed of their execution. [Emphasis added; para. 54.]

[225] After disposing of the argument that there had been an assignment at one of the three points in time proposed by Hydro-Québec and Gatineau Power, the judge accepted Resolute’s uncontested argument that the 1965 contract had not effected an

assignment but had instead made Hydro-Québec a mandatary of Gatineau Power (paras. 15 and 52-53).

[226] Is there a reviewable error in that decision by the trial judge?

VI. Appellate Intervention

[227] In my view, the trial judge did not make a reviewable error either in analyzing the three arguments made by Hydro-Québec and Gatineau Power with respect to assignment, or in accepting Resolute’s uncontested argument concerning the 1965 contract.

[228] The Court of Appeal nevertheless reversed the trial judge’s findings in this regard, limiting itself to stating that she had made a reviewable error without explaining how, in assessing the facts, she had supposedly made an error so palpable and overriding that it was in the nature of a [TRANSLATION] “beam in the eye” (*J.G. v. Nadeau*, 2016 QCCA 167, at para. 77 (CanLII), quoted in *Benhaim*, at para. 39; *Salomon v. Matte-Thompson*, 2019 SCC 14, [2019] 1 S.C.R. 729, at para. 33; *Matta*, at paras. 33-34). The Court of Appeal analyzed the case from a new angle, without regard for the Superior Court’s findings of fact and the judicial contract before it. As my colleague Brown J. pointed out in *Nelson (City) v. Mowatt*, 2017 SCC 8, [2017] 1 S.C.R. 138, “[i]t is not the role of appellate courts to second-guess the weight to be assigned to the various items of evidence” simply on the basis of “a difference of opinion” (para. 38).

[229] The Court of Appeal did not consider the arguments made by the parties in Superior Court and how the trial judge had disposed of them. Instead, it chose to disregard the parties' judicial contract and to reject Resolute's uncontested argument. The Court of Appeal took no account of the judge's analysis of the argument concerning assignment at one of the three points in time mentioned above, and it decided to consider how the 1965 contract should be interpreted. Because the Court of Appeal proceeded in that manner, it is not surprising that it was unable to explain where the judge had supposedly made a palpable and overriding error or an error of law in her reasoning, and what the nature of that error was, otherwise than by stating categorically that there was a [TRANSLATION] "reviewable error" (para. 40 (CanLII)).

[230] The Court of Appeal's analysis focused exclusively on the interpretation of the 1965 contract. In its view, this new [TRANSLATION] "legal argument" could be raised on appeal because the evidence was in the record and the trial judge had dealt with the question of assignment (para. 39). First of all, I note that this is a mixed question and not a question of law, as I indicated above. In fact, the characterization of the 1965 contract was already before the trial judge, who accepted Resolute's uncontested argument, supported by the evidence, that the 1965 contract had not effected an assignment. The Court of Appeal should not have assumed the role of a trial court and improperly set about analyzing the 1965 contract, as a trial judge would have done by applying the facts to the law for the first time. Rather, it should have considered whether the judge had made a reviewable error by adhering to the judicial

contract entered into by the parties and by relying on the factual evidence concerning the parties' subsequent conduct.

[231] It was open to the trial judge to conclude as she did in light of the factual and procedural context of the case and the arguments made by the parties, as I explain below.

A. *Arguments Concerning Assignment at Three Possible Points in Time*

[232] To begin with, I am of the view that the judge did not err in rejecting the arguments made by Hydro-Québec and Gatineau Power concerning assignment at one of the following three points in time.

[233] With regard to the first point in time — when the 1982 contract was entered into — the trial judge did not make a reviewable error in interpreting that contract as not effecting an assignment. The only part of that contract of a dozen pages that refers to the 1926 contract is clause 4a), reproduced above. However, that clause simply refers to the fact that, as the supplier, Hydro-Québec “already supplies the subscriber with 40,000kW of power . . . in accordance with the agreement between Gatineau Power and Canadian International Paper Company, dated July 19, 1926”. There are no words in clause 4a) of the 1982 contract that would suggest that the 1926 power contract was assigned or transferred somehow.

[234] In addition, the 1982 contract could not assign the 1926 contract unless Gatineau Power participated in the 1982 contract. However, it was not a party to that contract.

[235] The question of whether Hydro-Québec supplies that original power as a mandatary or as an assignee is simply not discussed in the 1982 contract. Faced with a clause so inexplicit, the trial judge properly relied on the facts relating to the parties' subsequent conduct, which, in her view, made the argument that there had been an assignment of contract implausible.

[236] With regard to the second possible point in time when an assignment would have occurred according to Hydro-Québec and Gatineau Power, namely when the *Act respecting the Régie de l'énergie* came into force in 1997, the trial judge took note of the argument but did not address it in her analysis. Presumably, she was of the view that the *Act respecting the Régie de l'énergie* would not have affected the relativity of the 1926 contract. In any event, Hydro-Québec and Gatineau Power do not suggest in this Court that the judge should have accepted that argument.

[237] As for the third possible point in time when an assignment would have occurred, namely when the ownership of the plants was transferred in 2005-2006, I am of the view that the trial judge did not make any error. Given that an assignment of claim or of contract requires certain formalities to be observed for the setting up of the assignment (art. 1571 of the *Civil Code of Lower Canada* ("C.C.L.C."); art. 1641 *C.C.Q.*; J.-L. Baudouin and P.-G. Jobin, *Les obligations* (7th ed. 2013), by P.-G. Jobin

and N. Vézina, at Nos. 1043-45), the judge was quite right to reject this argument in the absence of such evidence. The contracts in question are, after all, recent ones (2005-2006) in view of the parties' lengthy contractual relationship. There is no legitimate reason for having failed to document the fact that the alleged assignment could be set up against Resolute. In addition to the absence of such evidence, a reading of these acts of transfer reveals no so-called assignment of contracts.

[238] To conclude, the judge did not err in rejecting the three arguments made by Hydro-Québec and Gatineau Power. The next question is whether intervention was warranted because of the fact that, after rejecting those three arguments, the judge accepted Resolute's uncontested argument that the 1965 contract had not effected an assignment.

B. *Uncontested Argument That the 1965 Contract Did Not Effect an Assignment*

[239] In my view, the trial judge did not make a palpable and overriding error in accepting Resolute's argument — uncontested before her — that the 1965 contract had not effected an assignment. The evidence in the record supported such a conclusion, and it was entirely justified for her to accept that argument made by Resolute. I reiterate that the burden of proof rested not on Resolute, but rather on Hydro-Québec and Gatineau Power. Moreover, even though the judge did not have to undertake a detailed interpretation of the terms of the 1965 contract, whose characterization was not in dispute, I am of the opinion that the parties' subsequent conduct confirms her conclusion in this regard.

(1) Subsequent Conduct of the Parties

[240] Article 1426 *C.C.Q.* calls for consideration of the parties' subsequent conduct when interpreting a contract. This rule is based on the following premise: it is assumed that the parties seek to perform their obligations rather than to evade them, and that their conduct until the day a dispute arises is an indicator of their common intention crystallized earlier in their contract (S. Grammond, "The Interpretation of Contracts in Civil Law" (2010), 52 *S.C.L.R.* (2d) 411, at pp. 421-22; S. Grammond, "Interprétation des contrats", in *JurisClasseur Québec — Collection droit civil — Obligations* (loose-leaf), vol. 1, by P.-C. Lafond, ed., fasc. 6, at No. 10).

[241] The Honourable Justice Sébastien Grammond of the Federal Court has explained that in the case of long-term contracts, like the one at issue here, the parties' subsequent conduct takes on even greater importance:

This method is particularly useful when dealing with long-term contracts, also called "relational contracts".

...

The more time has elapsed, the more compelling the subsequent conduct of the parties will be as evidence of their original intent. For example, in cases involving long-term commercial leases, a lessor who attempted, several years after the beginning of the lease, to impose additional fees on the lessee based on a new interpretation of the contract, had his prior contrary practice set up against him. [pp. 422-23]

(See also F. Gendron, *L'interprétation des contrats* (2nd ed. 2016), at pp. 116-17.)

[242] As noted above, the judge relied largely on the facts put before her. In her view, the parties' subsequent conduct made the argument that there had been an assignment less plausible than the argument that there was a mandate. I agree.

[243] First, the judge noted that Hydro-Québec and Gatineau Power, on which the burden of proving an assignment rested, had not proved that the [TRANSLATION] “1965 agreement was ever brought to the attention of [Resolute]” (at para. 52), with the result that it was “difficult to pinpoint the exact moment [an] assignment of contract [would have taken] place and [Hydro-Québec would have become] the contracting party of [Resolute] under the 1926 agreement” (para. 53). The trial judge can hardly be faulted for considering the absence of evidence that the formalities for the setting up of an assignment had been observed. Compliance with these formalities is essential to avoid causing injury to one party when the other contracting party is replaced by another. The absence of such evidence makes it difficult to establish the existence of an assignment. Yet there was no evidence clearly showing that a copy or an extract of some act — the 1965 contract, the 1982 contract or the acts of transfer of the power plants in 2005-2006 — had been sent to Resolute to comply with the formalities for setting up an assignment against it. Hydro-Québec and Gatineau Power were unable to tell the trial judge what would constitute evidence that an assignment had been set up against Resolute.

[244] It was only before the Court of Appeal and this Court that Hydro-Québec and Gatineau Power referred to the 1982 contract as an implicit indication that Resolute

was aware of an alleged assignment that would have taken place in 1965. Even if it is assumed that Hydro-Québec and Gatineau Power could raise this new argument on appeal, I am of the view that it would not have sufficed to alter the trial judge's finding of fact. The relevant passage in the 1982 contract reads as follows:

[TRANSLATION]

4- Additional contract power

- a) The provider already supplies the subscriber with 40,000kW of power, called the original firm power, in accordance with the agreement between Gatineau Power and Canadian International Paper Company, dated July 19, 1926, as amended on October 1, 1930.
- b) In addition, the supplier undertakes to supply to the subscriber and the subscriber undertakes to purchase from December 16, 1981 and to use 123,845kW of additional contract power at the rates and on the conditions established in this contract. The available additional power that the subscriber may purchase and use under this contract shall not exceed 135,000 kilovolt-amperes without the prior written authorization of the distributor. [Emphasis added.]

(A.R., vol. III, at p. 114)

[245] This evidence is not very probative. First of all, the 1982 contract refers to the 1926 contract but does not say a single word about the 1965 contract. In the absence of any reference to the act of assignment, it is very difficult to view the 1982 contract as evidence of the setting up of the 1965 contract against Resolute. Moreover, the 1982 contract is for the supply of electricity in addition to that provided for in the 1926 contract. There is nothing expressly indicating that Hydro-Québec may have become Resolute's other contracting party under the 1926 contract. The 1982 contract, which,

I would add, makes just one reference to the 1926 contract in clause 4a), merely states that Hydro-Québec is responsible for supplying electricity under that contract. The wording of the contract does not exclude the possibility of Hydro-Québec acting as supplier in its capacity as a mandatary rather than as an assignee. Finally, the 1982 contract continues to indicate that Resolute's predecessor and Gatineau Power are the parties to the 1926 contract, as the trial judge in fact noted (paras. 18 and 52).

[246] Second, Gatineau Power's financial statements approved by its directors (s. 227 of the *Business Corporations Act*, CQLR, c. S-31.1), all of whom are appointed by Hydro-Québec in its capacity as sole shareholder, reflect the existence of a mandate. The following excerpt from the financial statements is enlightening:

[TRANSLATION]

Note 4 Undertakings and Contingencies

Lease of Capital Assets

Under a contract in effect since January 1, 1966, Hydro-Québec undertook to advance to Gatineau Power Company such monies as would be required for it to fulfill all its obligations. In consideration, the Company undertook to lease its capital assets and to allow Hydro-Québec to benefit from the revenue deriving from them for a term of twenty-five years, in exchange for an annual rental in an amount equal to the depreciation on its capital assets, excluding those held by its subsidiaries. This contract was tacitly renewed and remains in effect between the parties. [Emphasis added.]

(A.R., vol. III, at p. 48)

The content of this note was reproduced in the financial statements for 2005, 2006, 2007, 2008, 2009, 2010 and 2011.

[247] The financial statements confirm that Gatineau Power leases its immovables to Hydro-Québec and that Hydro-Québec can operate the facilities and benefit from the revenue deriving from them for the term of the contract. Nowhere is it stated that Gatineau Power assigned its rights to the revenue from the power contracts for a specified term. Rather, Gatineau Power simply “allow[ed]” Hydro-Québec to receive the revenue.

[248] Third, in 1986, 1996 and 2006, Resolute and its predecessors sent notices of renewal of the 1926 contract addressed to [TRANSLATION] “[Gatineau Power] c/o Hydro-Québec” (trial reasons, at para. 20). In the mind of Resolute and its predecessors, Gatineau Power remained their other contracting party and Hydro-Québec was its mandatary responsible for sending invoices, collecting payment and receiving notices of renewal or any other correspondence intended for Gatineau Power. At no time did Hydro-Québec, despite being aware of the 1965 contract, see fit to “correct” this so-called “mistake” made by Resolute.

[249] Fourth, all the invoices sent to Resolute by Hydro-Québec indicated the electricity supplied under the 1926 contract separately from that supplied under the 1982 contract (trial reasons, at para. 52).

[250] Fifth, a manager from Hydro-Québec testified that he was not aware that there had been an assignment of the 1926 contract to Hydro-Québec and that, in his opinion, the 1965 contract had not had that effect. Although an admission of law concerning the characterization of the 1965 contract was not binding on the Superior

Court, the statements made by Hydro-Québec's witness were nonetheless relevant in assessing the common intention of the parties (see *Uniprix*, at para. 29).

[251] Finally, the fact that Hydro-Québec did not invoke the price adjustment clause until 2011, even though it had been subject to the taxes or charges since January 1, 2007, contradicts the argument that there was an assignment of contract.

[252] As noted by Justice Grammond, “[t]he more time has elapsed, the more compelling the subsequent conduct of the parties will be as evidence of their original intent.” For example, in *Skyline Holdings Inc. v. Scarves and Allied Arts Inc.*, 2000 CanLII 9274 (Que. C.A.), the lessor allowed several years to pass before it reinterpreted the leases, on its accountant's recommendation, in order to charge its lessees administrative fees that had never previously been charged (para. 30). The Court of Appeal relied on that post-contract conduct to find that the parties had never intended the lessees in question to have to pay such administrative fees (para. 31).

[253] In *Richer v. Mutuelle du Canada (La), Cie d'assurance sur la vie*, [1987] R.J.Q. 1703 (C.A.), the lease contained an escalation clause under which the rent could be adjusted to cover increases in municipal taxes and operating costs. For six years, the lessor raised the rent by an amount equal to the tax increase (p. 1707). At the end of the sixth year, a new senior manager working for the lessor reinterpreted the rent adjustment clause so that administrative fees of 12 percent could be charged in addition to the amount of the tax increase (pp. 1707-8). In the Court of Appeal's view, the parties' subsequent conduct showed that they had interpreted the clause as permitting

only the tax amount to be passed on, without it being possible for administrative fees to be added to that amount and for the lessor to derive a profit from them. The Court of Appeal therefore rejected that opportunistic interpretation.

[254] In the instant case, Hydro-Québec, which considers itself to be a party to the 1926 contract, allowed nearly five years to pass before it invoked the price adjustment clause. Indeed, Hydro-Québec has been paying the taxes or charges provided for in the *HQA* and the *WA* since January 2007. Yet, it was not until December 1, 2011 that it sent Resolute a letter accompanied by an invoice retroactively claiming more than \$3 million from Resolute for the preceding three years, which were not yet prescribed. That letter bears all the hallmarks of an opportunistic, after-the-fact interpretation of the parties' legal situation in order to treat it as an assignment that allowed Hydro-Québec to inflate the price, even though it had originally regarded it as a mandate.

[255] The following quotation from *Rainboth v. O'Brien* (1915), 24 B.R. 88 (Que.), aptly summarizes the situation that exists here:

In regard to such a question, a long period of inaction on the part of a claimant, in circumstances in which inaction tends to confirm the version of his adversary whilst, if his own version were the true one, he would have had reason to have acted and spoken, affords a strong support to the version of the adversary. [pp. 93-94]

[256] Before turning to the next point, I would note that it is not appropriate to rely on the fact that, in 2011, Resolute did not argue initially, in its response to the

invoice for more than \$3 million, that Gatineau Power was still its other contracting party (Kasirer J.'s reasons, at para. 121). In their agreed statement of admissions, the parties recorded the fact that Resolute was not admitting that the 1926 contract bound Hydro-Québec. As a result, no reliance can be placed on this “failure” by Resolute prior to the agreed statement of admissions.

(2) Judicial Contract Between the Parties

[257] In addition to rendering a decision consistent with the evidence in the record, the trial judge cannot be faulted for giving effect to the judicial contract between the parties. I am therefore of the view that she did not make a palpable and overriding error by accepting Resolute's uncontested argument after she rejected the three arguments made by Hydro-Québec and Gatineau Power. It bears repeating that Hydro-Québec and Gatineau Power did *not* dispute the fact that the 1965 contract had made Hydro-Québec a mandatary and had not assigned the 1926 power contract. They offered no interpretation of the terms of the 1965 contract that would give it a scope different from that proposed by Resolute. In light of the arguments presented at trial by Hydro-Québec and Gatineau Power, it is understandable why the judge, in her analysis of the assignment argument, did not consider the terms of the 1965 contract in detail at paras. 44-60 of her reasons but merely referred to it as a “mandate, sale and lease agreement” at paras. 15 and 51, in her description of the factual context. She did so simply because Hydro-Québec and Gatineau Power had themselves described the

contract as such and had *not* argued the contrary, even though the burden of proof was on them.

[258] Only Resolute discussed how the terms of the 1965 contract should be interpreted. However, it did so to establish that the contract had *not* effected an assignment, despite the fact that it did not have the burden of proof. Hydro-Québec and Gatineau Power, which did have that burden, made no attempt to show the contrary. If they intended to rely on the 1965 contract to show that there had been an assignment to Hydro-Québec, they had to allege and argue this. They did not do so. Rather, their position was that the 1965 contract was a “mandate, sale and lease agreement” and that the assignment had occurred later, in 1982 at the earliest.

[259] In such circumstances, it is justified for a trial judge to accept an uncontested argument and not to undertake a needless interpretation exercise. To require otherwise would undermine the very foundations of our adversarial system.

[260] Article 10 of the *Code of Civil Procedure*, CQLR, c. C-25.01 (“*C.C.P.*”), reiterates the adversarial nature of our civil justice system. As a result of this, it is the parties who “control the course of their case”, not the courts (art. 19 para. 1 *C.C.P.*). Not long ago, this Court reaffirmed the importance of this principle in our adversarial system:

Although the power of judges to intervene in the conduct of civil proceedings has become increasingly broad, judges generally do not play an active part in the search for truth (L. Ducharme and C.-M. Panaccio,

L'administration de la preuve (4th ed. 2010), at p. 7; *Technologie Labtronix Inc. v. Technologie Micro Contrôle Inc.*, [1998] R.J.Q. 2312 (C.A.), at p. 2325). In an accusatory and adversarial system, the delicate task of bringing the truth to light falls first and foremost to the parties (see art. 2803 *C.C.Q.*; arts. 76 and 77 *C.C.P.*). In this context in which the objective of seeking the truth remains the priority, the Quebec legislature has established general rules of evidence to govern and facilitate this process, which remains under the control of the parties (see L. Ducharme, “Rapports canadiens — première partie: la vérité et la législation sur la procédure civile en droit québécois”, in *Travaux de l'Association Henri Capitant des amis de la culture juridique française*, vol. 38, *La vérité et le droit — Journées canadiennes* (1987), 657). [Emphasis added.]

(*Imperial Oil v. Jacques*, 2014 SCC 66, [2014] 3 S.C.R. 287, at para. 25)

[261] Accordingly, the courts cannot base their decisions on arguments or rationales that have not been debated (art. 17 para. 2 *C.C.P.*; see also *Compagnie d'assurances générales Co-Operators v. Coop fédérée*, 2019 QCCA 1678, at para. 46 (CanLII), aff'd 2020 SCC 41). The principle of proportionality and of proper administration of judicial resources requires nothing less of them (art. 18 *C.C.P.*). Otherwise, if the courts had a mandate to conduct their own inquiry and to consider the arguments that should, in their view, have been raised by the parties, the civil justice system would be turned on its head. The courts would also have to invest considerable resources to redefine the factual and legal debate delineated by the parties to the proceedings.

[262] The issues between the parties become joined once both sides have presented their arguments; the judicial contract then reflects the procedural relationship (*lien d'instance*) between the parties with respect to the questions that are in issue and those that are not in dispute, in accordance with an approach that likens this relationship

to a contractual one (H. Reid, with S. Reid, *Dictionnaire de droit québécois et canadien* (5th ed. 2015), at p. 152, “*contrat judiciaire*”; *Gervais v. Association canadienne de protection médicale*, 2007 QCCS 4564, at para. 33 (CanLII)).

[263] The trial judge is also bound by this judicial contract (*Janacek v. Bell Canada*, [2001] R.J.Q. 584 (C.A.), at para. 11; *Godbout v. Pagé*, 2017 SCC 18, [2017] 1 S.C.R. 283, at paras. 85-87, per Côté J., dissenting; D. Ferland and B. Emery, *Précis de procédure civile du Québec* (5th ed. 2015), vol. 1, at No. 1-83). This means that the judge cannot disregard the contract and rule on a ground or an argument that is not in issue:

[TRANSLATION] The procedural legal relationship is that of the parties. The hearing is conducted by the parties. The factual and legal grounds are raised by the parties. It is on the basis of the parties’ respective arguments that the trial judge must decide.

(*Droit de la famille — 871*, [1990] R.J.Q. 2107 (C.A.), at p. 2108)

[264] This holds true even when the judicial contract relates to a question of law, unless it is a matter of public order that would allow the judge to go beyond the parties’ consent (*Janacek*, at para. 11). Although an admission of law is not, strictly speaking, binding on the courts, they must nonetheless take note of a party’s decision not to contest, and thus to acknowledge, the existence of a legal situation. Such an approach preserves the essence of our adversarial system, as noted by Duval Hesler J.A. (as she then was) of the Quebec Court of Appeal:

Our judicial system is an adversarial one and the initiative of adopting a position, leading evidence and choosing arguments rests on the parties.

...

In addition, it is debatable whether admissions made in first instance can be revoked in appeal. And while it is true that the law itself cannot be the object of an admission, nothing prevents a party from acknowledging the existence of a legal situation and limiting the debate before the court to the consequences that flow from that situation. [Emphasis added.]

(*Apple Canada Inc. v. St-Germain*, 2010 QCCA 1376, [2010] R.J.Q. 1627, at paras. 138 and 142; see also *Sunoco inc. v. Église Vie et Réveil inc., les ministères d'Alberto Carbone*, 2002 CanLII 62388 (Que. C.A.), at para. 6.)

[265] The judicial contract therefore forms the basis of our adversarial system, since it determines the task given to the judge in his or her search for judicial truth. The truth that the trial judge must seek to ascertain lies somewhere between the two competing versions given by the opposing parties; it does not lie in the aspects that are not disputed by either side:

[TRANSLATION] The adversary principle is essential to procedure, as it is a principle of public order. Without the opposition between the respective claims of the two parties, the case could not exist or be tried. From this constructive dialectic emerges the truth, the most just result for the judge. Through the clash of the competing versions presented by the parties, the judge is supposed to perceive, at least symbolically, the manner in which the law must resolve the case, and the judge understands how the law applies to the situation at hand. Essentially, the judge chooses how to make good and fair use of the law. [Emphasis added.]

(C. Piché, “Le ‘dialogue’ des parties et la vérité plurielle comme nouveau paradigme de la procédure civile québécoise” (2017), 62 *McGill L.J.* 901, at p. 917)

Indeed, it is the “parties [who] are in charge of establishing the truth” and who “control how that truth is brought to light” (p. 920). Subject to public order, the judge’s task is primarily to look where the parties ask him or her to look — not elsewhere. Although the more active role played by judges under modern civil procedure allows them to manage cases in a sound and proportionate manner, these powers do not permit them to reframe the debate (p. 920).

[266] It is important to note that the role of a court that has to render a declaratory judgment is limited to resolving a “genuine problem” between the parties with respect to the scope of a specific juridical act; the court must therefore take care to remain within the defined parameters of the debate before it so as to avoid prejudicing the future legal arguments raised by the parties or the interests of third persons who are not parties to the proceeding (art. 142 *C.C.P.*; *Lizotte v. Aviva, Compagnie d’assurance du Canada*, 2015 QCCA 152, at paras. 35-36 (CanLII), aff’d 2016 SCC 52, [2016] 2 S.C.R. 521; see also 4077334 *Canada inc. (Solutions Voysis IP) v. Sigmasanté*, 2013 QCCS 2859, at para. 18 (CanLII)).

[267] As I have already stated, it was Hydro-Québec and Gatineau Power that bore the burden of proving on a balance of probabilities that there had been an assignment of the 1926 contract that had purportedly added or substituted Hydro-Québec as a contracting party. If they failed to discharge their burden, the 1926 contract had to be applied as written, that is, as being only between the parties named in that contract — Gatineau Power and Resolute, in its capacity as CIP’s successor.

There is no justification for finding that a party has discharged its burden on the basis of a contrary argument that the party has not contested. If the judge had held otherwise, she would in fact have been shifting the burden of proof to Resolute.

[268] The core of the issue forming the judicial contract between the parties had to do with the assignment at one of the three suggested points in time. The window of time in question was therefore the period from 1982 to 2005-2006. The parties' procedural relationship did not encompass the characterization of the 1965 contract. The trial judge focused her analysis on the core of that issue. After she rejected the arguments of Hydro-Québec and Gatineau Power, all that remained was Resolute's uncontested argument that the 1965 contract had not effected an assignment either. In her view, that legal situation was confirmed by the absence of evidence of the setting up of an assignment against Resolute (para. 52). Moreover, the evidence in the record concerning the parties' subsequent conduct did not permit her to depart from that conclusion, as discussed above. Indeed, the absence of evidence of the setting up of an assignment against Resolute was in addition to the financial statements making no reference to any assignment, the notices of renewal all addressed to Gatineau Power, the invoices indicating the electricity supplied under the 1926 contract separately from that supplied under the 1982 contract, the testimony of a Hydro-Québec manager confirming that there had been no assignment, and the opportunistic reinterpretation of the parties' legal situation in order to treat it as an assignment rather than a mandate. All of this taken together made the argument that there was a mandate more plausible than the argument that there had been an assignment.

[269] For all these reasons, I cannot find that the trial judge made any reviewable error whatsoever. Her conclusion that there had been no assignment and that the 1965 contract had made Hydro-Québec a mandatary of Gatineau Power for the purposes of the 1926 contract should have been left undisturbed. With respect, I am of the view that the Court of Appeal should not have intervened.

[270] The foregoing is sufficient to dispose of the appeal. My colleague makes a detailed analysis of the 1965 contract and concludes that it was a contract of assignment—even though Hydro-Québec and Gatineau Power never took that position at trial, as they themselves identified the 1965 contract as a “mandate, sale and lease agreement” and did not dispute the characterization proposed by Resolute to the same effect. For all these reasons, I do not think it is appropriate for me to engage in an exercise that was not fully before the trial judge.

VII. Adjustment in the Price of Electricity

[271] Status as a party to the 1926 contract is what makes it possible to invoke the price adjustment clause in order to pass on any “tax” or “charge” paid. In other words, Hydro-Québec can increase the price of the electricity supplied to Resolute only if it is a party to the 1926 contract.

[272] However, Hydro-Québec is not a party to the 1926 contract, as it simply has a mandate to supply the electricity owed under that contract and to receive payments from Resolute, the customer. Since the trial judge did not make a reviewable

error in finding that the 1926 contract had not been assigned to Hydro-Québec, Gatineau Power did not transfer its status as a party to that contract to Hydro-Québec.

[273] Only Gatineau Power and Resolute are parties to the 1926 contract. Relativity of contract means that the 1926 contract has “effect only between the contracting parties” and that “it does not affect third persons”. This is a fundamental principle of contract law to which there are only very limited exceptions. However, none of the exceptions applies here. The relativity of the 1926 contract therefore prevents Hydro-Québec from invoking the price adjustment clause to pass on the charges it paid under the *HQA* and the *WA*.

[274] If Gatineau Power had paid the charges itself, it would not, in any event, have been able to pass them on to Resolute. To be able to pass on the charges, Gatineau Power would have had to be legally bound to pay them. However, it was not bound to pay them during the period at issue, for the following reasons. The essential condition for being subject to the charges provided for in s. 32 *HQA* and s. 68 *WA* is being a holder of water power. The respondents are claiming the price increase for 2009 to 2011, but during that time it was Hydro-Québec that held the water power that formerly belonged to Gatineau Power. Hydro-Québec has been the holder of that power since 1965, first in its capacity as lessee under the 1965 contract and then, as of 2005-2006, in its capacity as owner under the acts of transfer it entered into with Gatineau Power.

[275] In the alternative, even if it were to be found that there was an assignment, I am of the opinion that Resolute would not be required to pay either the charge under s. 32 *HQA* or the one under s. 68 *WA*.

[276] In the case of the charge under s. 32 *HQA*, Hydro-Québec could not pass it on to Resolute because Hydro-Québec is not legally bound to pay it. Section 32 of the *HQA* sets out four conditions for this charge to be payable: (1) the water power forms part of the public domain; (2) the Minister of Natural Resources and Wildlife or the Minister of Sustainable Development, Environment and Parks has placed the water power at Hydro-Québec's disposal; (3) the government has authorized the water power to be placed at Hydro-Québec's disposal; and (4) the water power is required for the objects of Hydro-Québec. However, the second and third conditions are not met. The water power in question was not placed at Hydro-Québec's disposal by one of the two ministers, since all of it was acquired from Gatineau Power without their involvement. As well, the respondents have conceded that no government authorization was granted with regard to the water power in question.

[277] If, as I said, it were to be found that there was an assignment, the charge under s. 68 *WA* could be claimed by Hydro-Québec only as of December 17, 2012 — the day on which Resolute first received a copy of the 1965 contract. This is because the assignment could not be set up against Resolute unless Hydro-Québec observed the formalities provided for by law for that purpose (art. 1571 *C.C.L.C.*; art. 1641 *C.C.Q.*). However, Resolute did not become aware of a potential assignment

until December 17, 2012, when Hydro-Québec sent it a copy of the 1965 contract as an attachment to its defence.

[278] Furthermore, if there had been an assignment, its effect would not, however, have been to render Resolute's obligations more onerous, because Gatineau Power was bound to pay the charge under s. 68 WA between its introduction in 1946 and the alleged assignment taking effect on January 1, 1966, as Resolute concedes. Prior to the assignment, Gatineau Power would have been entitled to pass on that charge as long as it actually paid it, which the record does not show. If there had been an assignment, Resolute's obligations would therefore have remained unchanged with regard to the charge provided for in s. 68 WA.

VIII. Conclusion

[279] For the reasons stated above, I would allow the appeal and restore the trial judge's decision.

Appeal dismissed with costs, CÔTÉ and ROWE JJ. dissenting.

Solicitors for the appellant: Stikeman Elliott, Montréal.

Solicitors for the respondents: LCM Avocats inc., Montréal.