



SUPREME COURT OF CANADA

CITATION: Hydro-Québec v. Matta, 2020 SCC 37

APPEAL HEARD: December 10, 2019

JUDGMENT RENDERED: November 13, 2020

DOCKET: 38254

BETWEEN:

Hydro-Québec
Appellant

and

**Louise Matta, Claude Ouellet, Christiane Léveillé, Diane Ouellet, Patrick
Léveillé, Josée Léveillé et Entreprises Caslon Inc.**

Respondents

- and -

Attorney General of Quebec and Canadian Electricity Association
Intervenors

OFFICIAL ENGLISH TRANSLATION

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

REASONS FOR JUDGMENT:
(paras. 1 to 68)

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

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HYDRO-QUÉBEC v. MATTA

Hydro-Québec

Appellant

v.

**Louise Matta,
Claude Ouellet,
Christiane Léveillé,
Diane Ouellet,
Patrick Léveillé,
Josée Léveillé and
Entreprises Caslon Inc.**

Respondents

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Canadian Electricity Association**

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2020 SCC 37

File No.: 38254.

2019: December 10; 2020: November 13.

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

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Property — Real rights — Servitudes — Conventional servitudes — Electrical transmission lines — Hydro-Québec project to construct new electrical transmission line — Construction of new line to be routed in part through lots on which Hydro-Québec already had servitudes established for another line — Owners of lots objecting that rights arising from established servitudes did not permit construction of new line — Whether Hydro-Québec can develop and modernize its system on basis of rights it holds under decades-old servitudes that were established for specific construction projects.

On March 13, 2015, the Régie de l'énergie du Québec authorized Hydro-Québec to construct a proposed electrical transmission line between the Chamouchouane transformer substation in Saguenay-Lac-St-Jean and the Bout-de-l'Île transformer substation in Montréal. Hydro-Québec realized that it would be easier to run the line through a corridor where it already had servitudes that had been established in the 1970s for a transmission line between the Jacques-Cartier substation near Québec and the Duvernay substation in Laval. Hydro-Québec's acquisition of those servitudes had involved two steps. Having been authorized by order in council to acquire them by expropriation, it had first served and published notices of expropriation, after which it had signed, with the then owners, notarial agreements that described the servitudes being established and provided for various indemnities that would be payable, including for any work that might be carried out on the servient land.

Hydro-Québec claimed that these servitudes authorized it to route up to three electrical transmission lines through the servient land. The current owners of the lots contested this claim; they submitted that the rights arising from the servitudes acquired when the Jacques-Cartier–Duvernay line was constructed were limited to that one line only. They denied Hydro-Québec’s employees access to their lots. Hydro-Québec then applied for an injunction. The owners considered the proceedings abusive. In a cross-application, they sought damages for unauthorized use of the servitudes following a reconfiguration of the Jacques-Cartier–Duvernay line in the 1980s and for hardship and inconvenience caused by the existing infrastructure. The proceeding was split so as to have the hearing of the cross-application postponed to a later date, depending on the outcome on the issue of the scope of the servitudes.

The trial judge ruled in Hydro-Québec’s favour. He found that the servitudes at issue had originally been acquired by expropriation, but that the subsequent agreements had clarified their purpose and scope. In his view, the agreements were clear: they authorized Hydro-Québec to erect three electrical transmission lines no matter what the origin or the destination of the electricity was. Having concluded that the servitudes established in favour of Hydro-Québec authorized it to place three electrical transmission lines on the owners’ lots, the trial judge granted the injunction and dismissed the cross-application.

The Court of Appeal allowed the owners’ appeal. It remarked that the trial judge’s decision to dismiss the cross-application had been *ultra petita*, as the splitting

of the proceeding meant that that matter had not been before him. In the Court of Appeal's view, the servitudes at issue had been acquired by expropriation and should be characterized as servitudes established by operation of law. Their scope therefore had to be analyzed in light of the limits imposed by the order in council that authorized them. The Court of Appeal accordingly concluded that Hydro-Québec could not rely on the servitudes in its favour for the construction of the new line and that it had to proceed by way of new expropriations or agreements.

Held: The appeal should be allowed.

All the conclusions of the trial judge's decision are restored, except the one dismissing the cross-application. The case is remanded to the Superior Court for hearing of the cross-application. The power line servitudes in favour of Hydro-Québec are not limited to the Jacques-Cartier–Duvernay Line; they authorize Hydro-Québec to route a second electrical transmission line through the owners' lots.

The trial judge was correct in characterizing the post-expropriation agreements as servitude agreements. The order in council, the notices of expropriation and the agreements are different types of documents, and it is important to distinguish them from one another. An order in council is an administrative act for the purpose of authorizing the exercise of the power to deprive a property owner of the enjoyment of the attributes of his or her right of ownership. Filing a notice of expropriation and the documents related to it is an administrative act that establishes and individualizes the servitude. As for the agreement, it relates to the ordinary exercise of civil rights and to

the private law rules of contract. A servitude acquired by expropriation is, according to the classification set out in art. 1181 of the *Civil Code of Québec*, established by operation of law. This being the case, neither the law nor public order bars the expropriating party and the expropriated party from clarifying or modifying such a servitude by mutual agreement: notices of expropriation thus do not preclude parties from negotiating conventional servitudes. It must be presumed that the servitude agreement, if entered into after the notice of expropriation, contains a more faithful definition of the scope and terms for exercise of the servitude of public utility than does the notice of expropriation. Servitude agreements are subject to the rules applicable to the interpretation of contracts. If their words are clear, effect must be given to the clearly expressed intention of the parties.

In the case at bar, the agreements at issue include a complete description of the servitudes, adding some details that do not appear in the notices of expropriation. In these circumstances, the agreements are the titles to which the owners of the servient land and the dominant land must refer in exercising their respective rights. Because the agreements are clear, the scope of the servitudes must be determined in light of their words. The agreements do not mention any restrictions regarding the origin or destination of the electricity. The servitudes are therefore not limited to the line between the Jacques-Cartier and Duvernay substations. The servitudes on the owners' lots authorize Hydro-Québec to construct the Chamouchouane–Bout-de-l'Île line.

Furthermore, the servitudes concern the lines crossing the servient land, not the substations located at either end of those lines. There is nothing in the words of the agreements that would explicitly or implicitly prevent Hydro-Québec from redirecting one of its lines toward another substation. The right to operate electrical transmission lines includes the right to make modifications such as the one that was made in the reconfiguration of the Jacques-Cartier–Duvernay line.

Hydro-Québec's proceedings are not abusive. It sought to use the servitudes that had been granted to it by the owners' predecessors in title and had been published in the land register. The owners were presumed to be aware of the rights granted by these servitudes. They nonetheless blocked construction of the new electrical transmission line and forced Hydro-Québec to seek injunction orders. It is not up to Hydro-Québec to pay for the steps they took.

Cases Cited

Approved: *Michaud et Simard Inc. v. Commission hydro-électrique de Québec*, [1982] C.A. 169; **referred to:** *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; *H.L. v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401; *Salomon v. Matte-Thompson*, 2019 SCC 14, [2019] 1 S.C.R. 729; *J.G. v. Nadeau*, 2016 QCCA 167; *Schwartz v. Canada*, [1996] 1 S.C.R. 254; *Quebec (Director of Criminal and Penal Prosecutions) v. Jodoin*, 2017 SCC 26, [2017] 1 S.C.R. 478; *Modern Cleaning Concept Inc. v. Comité paritaire de l'entretien d'édifices publics de la région de*

Québec, 2019 SCC 28; *Uniprix inc. v. Gestion Gosselin et Bérubé inc.*, 2017 SCC 43, [2017] 2 S.C.R. 59; *Churchill Falls (Labrador) Corp. v. Hydro-Québec*, 2018 SCC 46, [2018] 3 S.C.R. 101; *Lorraine (Ville) v. 2646-8926 Québec inc.*, 2018 SCC 35, [2018] 2 S.C.R. 577; *Domaine de la rivière inc. v. Aluminium du Canada ltée*, [1996] R.D.I. 6; *Sani Sport inc. v. Hydro-Québec*, 2008 QCCA 2498, [2009] R.J.Q. 26; *Centre de distribution intégré (CDI) inc. v. Développements Olymbec inc.*, 2015 QCCA 1463, 59 R.P.R. (5th) 1; *151692 Canada inc. v. Centre de loisirs de Pierrefonds enr.*, 2005 QCCA 376, [2005] R.D.I. 237.

Statutes and Regulations Cited

Civil Code of Québec, arts. 298 to 303, 1181, 1182, 1425, 2807, 2941.

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Hydro-Quebec Act, R.S.Q. 1964, c. 86, ss. 29 para. 6, 33.

Watercourse Act, R.S.Q. 1964, c. 84, s. 19.

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Robert, Paul. *Dictionnaire alphabétique & analogique de la langue française*. Paris: Société du nouveau Littré, 1976, “céder”, “cession”.

APPEAL from a judgment of the Quebec Court of Appeal (Morissette, Healy and Roy JJ.A.), 2018 QCCA 838, [2018] AZ-51497339, [2018] J.Q. n° 4456 (QL), 2018 CarswellQue 4246 (WL Can.), setting aside a decision of Sansfaçon J., 2017 QCCS 2347, [2018] AZ-51398055, [2018] J.Q. n° 7214 (QL), 2018 CarswellQue 4610 (WL Can.). Appeal allowed.

Claude Marseille and *Ariane Bisailon*, for the appellant.

Vincent Karim and *Ricardo Hrtschan*, for the respondents.

Stéphane Rochette, for the intervener the Attorney General of Quebec.

David Outerbridge and Stacey Reisman, for the intervener the Canadian Electricity Association.

English version of the judgment of the Court delivered by

CÔTÉ J. —

I. Overview

[1] Electricity is increasingly ubiquitous in our lives today . . . and in our land registers.

[2] The appellant operates the largest electrical power system in North America, with more than 34,000 km of transmission lines. The benefits to Quebecers are many, and the acts of servitude that form the legal framework for this system are just as numerous. There are reportedly 37,405 such servitudes in total, including many that were established a long time ago. Can the appellant develop and modernize its system on the basis of rights it holds under decades-old servitudes that were established for specific construction projects? That is the question raised by this appeal.

[3] In a context in which Quebecers' energy needs are growing and the sources of electricity generation are changing, the appellant must adapt its system to ensure that its service remains reliable and safe. The 1998 ice storm was particularly revealing:

major load centres can be especially vulnerable, hence the need for more and more lines and interconnections.

[4] In recent years, the appellant designed a proposed electrical transmission line that would make it possible to reinforce the power supply to the metropolitan loop of Greater Montréal and address a significant increase in demand in Terrebonne. This line was originally supposed to run from the Chamouchouane transformer substation in the Saguenay-Lac-Saint-Jean region to the Bout-de-l'Île transformer substation in Montréal. But it was subsequently decided that the line would be routed to the Judith-Jasmin substation in Terrebonne and that a link would be constructed between that substation and the Bout-de-l'Île substation. The estimated cost of the project is \$1.34 billion.

[5] In planning the route to be taken by the Chamouchouane–Bout-de-l'Île line, the appellant realized that it would be easier to run the line through a corridor in the southern part of the province where it already had servitudes. These servitudes had been established in the 1970s for a transmission line between the Jacques-Cartier substation near Québec and the Duvernay substation in Laval. The land making up this corridor included lots belonging to the respondents.

[6] The appellant held public information sessions and notified the affected individuals in writing of what its project would entail. Its employees went to the respondents' lots in order to conduct surveying and clearing work, but were denied access to them. The appellant then applied for an injunction, the merits of which the

respondents have challenged, arguing, among other things, that the servitudes established in the 1970s are valid only for the Jacques-Cartier–Duvernay line and do not permit the construction of a new line.

II. The Parties

A. *The Appellant*

[7] The appellant operates a public enterprise constituted under the *Hydro-Québec Act*, CQLR, c. H-5, that is engaged in the generation, transmission and distribution of electricity. The *transmission* component of its undertaking consists in sending power produced in its hydroelectric power plants to transformer substations through high-voltage lines. At the substations, voltage is “stepped down” so that the electricity can be distributed to places where it will be consumed: this is the *distribution* component.

[8] As a mandatary of the government, the appellant is required to supply power and to supply Quebecers with heritage pool electricity:¹ *Hydro-Québec Act*, ss. 3.1.1 and 22. It has, besides the special rights and powers conferred upon it by law, all those pertaining to legal persons in general, such as the capacity to enter into

¹ Heritage pool electricity is defined as follows in the *Thésaurus de l'activité gouvernementale* on the Quebec government's web portal: [TRANSLATION] “Heritage pool electricity is the power produced by plants that were in service in 1998, in the amount of 165 TWh (terawatt-hours), for which a lower heritage rate is applied. Hydro-Québec's ‘heritage’ plants include those of the La Grande Complex, the Manicouagan River, the Ottawa River and the St. Lawrence River” (online).

contracts and to possess property: *Hydro-Québec Act*, ss. 3 and 3.1.2; *Civil Code of Québec* (“C.C.Q.”), arts. 298 to 303. It may construct, purchase or lease any immovables required in order to transmit or distribute power: *Hydro-Québec Act*, s. 29 paras. 1 and 2.² It may also, with the authorization of the government, acquire by expropriation any immovable or servitude required for the generation, transmission or distribution of power, even before the execution of the proposed work is authorized: *Hydro-Québec Act*, ss. 33(3)(b) and 35.

B. *The Respondents*

[9] The respondents are the owners of lots on which the appellant claims to hold servitudes that authorize it to construct electrical transmission lines.

III. Background

A. *Construction of the Jacques-Cartier–Duvernay Line and Establishment of the Servitudes at Issue*

[10] The servitudes at issue were established in the 1970s in connection with the construction of the Jacques-Cartier–Duvernay line. The sequence of events surrounding their establishment involved three documents — an order in council, notices of expropriation, and agreements — large excerpts of which are reproduced

² At the time the Jacques-Cartier–Duvernay line was constructed, however, the Act required that the acquisition and construction of immovables first be authorized by the Lieutenant-Governor in Council: *Hydro-Quebec Act*, R.S.Q. 1964, c. 86 (“HQA”), s. 29 para. 6, as amended.

below to elucidate the decisions of the courts below and the arguments raised by the parties.

(1) Order in Council 3360-72

[11] On November 8, 1972, the government issued Order in Council 3360-72, which authorizes the appellant to obtain, by mutual agreement or by expropriation, any immovable property and real rights it needs in order to construct power transmission and distribution lines between the Jacques-Cartier and Duvernay substations. The key portions of this order in council read as follows:

[TRANSLATION]

IN THE MATTER OF authorization for Hydro-Quebec to construct electrical transmission and distribution lines between the Jacques-Cartier transformer substation and the Duvernay transformer substation and to acquire the immovable property and real rights required for this purpose.

WHEREAS section 33 of the “Hydro-Quebec Act” (R.S.Q. 1964, chapter 86, as amended) provides that Hydro-Quebec may “acquire by expropriation any immovable, servitude or construction required for the exploitation of waterpowers held by the Commission or for the generation, transmission or distribution of power”;

WHEREAS Hydro-Quebec wishes to construct the electrical power transformer substations, high-voltage or other electrical power transmission and distribution lines, communications networks of any kind, access roads and buildings required for the construction and operation of the said lines between the Jacques-Cartier transformer substation and the Duvernay transformer substation . . .

. . .

WHEREAS Hydro-Quebec asks that the Lieutenant-Governor in Council authorize it to acquire, by mutual agreement or by expropriation

and prior possession, the immoveables and real rights it needs for the above-mentioned purposes,

IT IS THEREFORE ORDERED, on a proposal of the Minister of Natural Resources:

THAT Hydro-Quebec be authorized to construct electrical power transformer substations, high-voltage or other electrical transmission and distribution lines, communications networks of any kind, access roads and buildings required for the construction and operation of the said lines between the Jacques-Cartier transformer substation and the Duvernay transformer substation, and to acquire by mutual agreement, if it deems that appropriate, or by expropriation and prior possession with filing of plans at the registry office, if it deems that more appropriate, the immoveables or real rights it needs for the purposes set out above, on the land, farms or lots located in the parishes

(2) Notices of Expropriation and Documents Related to Them

[12] Having obtained the authorizations it needed by way of Order in Council 3360-72, the appellant acquired, by expropriation, the servitudes required for the construction of the Jacques-Cartier–Duvernay line. Following the procedure that applied at that time, it served on the owners — and published at the registry office — notices of expropriation and prior possession (“notices of expropriation”), plans, and overall assessment certificates for the expropriated real rights. The lots currently owned by the respondents were all affected by these expropriation procedures.

[13] The notices of expropriation were all composed similarly. They read as follows:

[TRANSLATION] The Quebec Hydro-Electric Commission, acting pursuant to the powers conferred upon it by the Hydro-Quebec Act (R.S.Q.

1964, chapter 86, as amended) and by the Code of Civil Procedure and duly authorized by Order in Council number 3360-72 of November 8, 1972, hereby files general plan number . . . for the purpose of obtaining the perpetual real rights of servitude it needs for the construction, operation and maintenance of one (or more) 735-kV electrical transmission line(s), JACQUES-CARTIER–DUVERNAY, together with an overall assessment certificate.

The said perpetual real rights of servitude consist of:

- a) a right to place, replace, maintain and operate, on the said servient land, one or more high- or low-voltage electrical transmission line(s), and communication lines, including towers and/or poles with the necessary footings, wires, cables, counterweights, anchor rods, guy lines and any other necessary or useful accessories;
- b) a right to cut, prune, remove and destroy, in any manner whatsoever and at any time, on the said servient land, any trees, shrubs, branches and bushes, and to remove any objects that may be found there;
- c) a right to move about on the said servient land at any time, on foot or in a vehicle of any kind, in order to exercise any right granted to it hereunder;
- d) a right to cut, prune and remove any trees located outside the said servient land that could impede or interfere with the functioning, construction, replacement or maintenance of the said line(s), and, for these purposes, to move about on the land adjacent to the said servient land; and
- e) a prohibition against any person erecting any construction or structure on, above or under the said servient land, except for the erection of dividing fences and their gates, and against modifying the current elevation of this servient land.

In accordance with section 19 of the Watercourses Act (R.S.Q 1964, chapter 84, as amended), the said perpetual real rights of servitude are created in favour of the dominant land constituted by the electrical transmission line(s) to be erected on the servient land consisting of the immovables indicated in red on the above-mentioned general plan.

(A.R., at pp. 149-50)

(3) Agreements

[14] After serving and publishing the notices of expropriation, the appellant signed notarial agreements (“agreements” or “agreements at issue”) with the respondents’ predecessors in title. Among other things, these agreements describe the servitudes established in favour of the appellant, identify the servient land and the dominant land, and fix the amounts of the indemnities payable for the acquired servitudes and for any work that might be carried out on the servient land.

[15] The agreements in question, which were also published at the registry office, differ from one another in only a few details relating, for example, to the amount of the indemnity or to dates. Only one of them says nothing about the number of lines authorized on the servient land; all the other agreements limit this number to three. Their wording conforms to the following template:

[TRANSLATION]

Before . . . notary for the Province of Quebec

APPEARED:

Mr. . . .

hereinafter called the “OWNER”;

AND:

The QUEBEC HYDRO-ELECTRIC COMMISSION (HYDRO-QUEBEC), a corporation duly constituted under the “Hydro-Quebec Act” (R.S.Q. 1964, chapter 86, as amended) . . . the said Quebec Hydro-Electric Commission being duly authorized for the

purposes of this agreement by order of the Lieutenant-Governor in Council number 3360-72, dated November 8, 1972.

hereinafter called the "COMMISSION";

WHICH PARTIES, prior to the acquittance and the agreements which are the subject hereof, do declare as follows:

1. The COMMISSION, acting pursuant to the powers conferred upon it by the Hydro-Quebec Act (R.S.Q. 1964, chapter 86, as amended) and by the Code of Civil Procedure, has become the owner, by expropriation, of the perpetual real rights of servitude required for the construction, replacement, maintenance and operation, on, above and under the servient land hereinafter described belonging to the OWNER, of one (or more) electrical transmission line(s) and of communication lines, by the deposit of a plan and the other documents prescribed by the Act, in the office of the registration division of

2. The said perpetual real rights of servitude consist of:

(a) a right to place, replace, maintain and operate, on the said servient land, three (3) high- or low-voltage electrical transmission line(s), and communication lines, including towers and/or poles with the necessary footings, wires, cables, counterweights, anchor rods, guy lines and any other necessary or useful accessories;

(b) a right to cut, prune, remove and destroy, in any manner whatsoever and at any time, on the said servient land, any trees, shrubs, branches and bushes, and to remove any objects that may be found there;

(c) a right to move about on the said servient land, on foot or in a vehicle of any kind, in order to exercise any right granted to it hereunder;

(d) a right to cut, prune and remove any trees located outside the said servient land that could impede or interfere with the functioning, construction, replacement or maintenance of the said line(s), and, for these purposes, to move about on the land adjacent to the said servient land; and

(e) a prohibition against any person erecting any construction or structure on, above or under the said servient land, except for the erection of dividing fences and their gates, and changing the current elevation of this servient land.

3. In accordance with section 19 of the Watercourses Act (R.S.Q. 1964, chapter 84, as amended), the dominant land in whose favour the above-mentioned rights have thus been established as a perpetual real

servitude consists in the electrical transmission line(s) erected or to be erected on the said servient land.

4. The servient land on which the above-mentioned rights have thus been established as a perpetual real servitude consists in the following immovable, namely:

...

7. The total indemnity owed to the OWNER as a result of the expropriation of the above-mentioned perpetual real rights of servitude has been fixed by mutual agreement between the parties in the amount of . . . in full and final settlement of any amounts owed for any reason whatsoever.

THESE FACTS BEING DECLARED, the parties hereto make the following declarations and agreements:

ACQUITTANCE

The OWNER hereby acknowledges that the above-mentioned perpetual real rights of servitude affecting the servient land described above have been duly expropriated by the COMMISSION and that he has today received from the latter, to his entire satisfaction, the amount of . . . representing the indemnity mutually agreed upon between the OWNER and the COMMISSION, in full and final payment of any amount owed for any reason whatsoever, by the COMMISSION, further to the aforesaid expropriation, WHEREOF FULL AND FINAL ACQUITTANCE.

As a consequence of the aforesaid payment, the parties hereto require the Registrar to mention this agreement wherever doing so is necessary.

This indemnity takes into account, among other things, the value of the above-mentioned perpetual real rights of servitude and of the depreciation of the residual part of the said immovable, and covers the value of any timber situated at any time on the said servient land, which timber may be retrieved by the OWNER, in whole or in part, at his or her own expense and risk, as and when it is cut down, provided that it has not otherwise been used by the COMMISSION or its agents for the purposes of its undertaking.

Furthermore, this indemnity takes into account zero (0) hole(s) dug and used for towers, poles, guy lines and anchor rods placed or to be placed on the said servient land, as well as the existence of such towers, poles, guy lines and anchor rods.

Should the COMMISSION place a larger number of towers, poles, guy lines and anchor rods on the said servient land, it shall pay, once the work has in each case been completed, to the person who is the owner of the said servient land at that time, the additional indemnity set out below, calculated as follows:

...

CONVEYANCE

In consideration of the said indemnity, the OWNER also hereby conveys and transfers to the COMMISSION, accepting, for all legal purposes and insofar as they may be needed, the above-mentioned perpetual real rights of servitude in the servient land described above, in favour of the dominant land described above.

CONDITION

The COMMISSION shall pay all costs related to this agreement, its registration and the necessary copies, including one copy for the OWNER.

INTERPRETIVE CLAUSES

...

2. All the clauses, conditions, obligations and agreements stipulated herein shall benefit and be binding on the OWNER's representatives, successors and assigns by particular or general title.

(A.R., at pp. 179-84)

[16] Having acquired the servitudes, the appellant went ahead with the construction of the Jacques-Cartier–Duvernay line.

B. *Reconfiguration of the Jacques-Cartier–Duvernay Line*

[17] In the early 1980s, the appellant reconfigured the Jacques-Cartier–Duvernay line to carry electricity from dams in northwestern Quebec southward. The electricity, which until then had come from hydroelectric power plants on the North

Shore through the Jacques-Cartier substation, would from then on come from James Bay plants through the La Vérendrye substation.

[18] The Quebec government authorized new expropriations by Order in Council 899-80 of March 26, 1980. These measures did not affect the respondents' lots. No changes were made to the existing infrastructure. Only the origin of the electrons changed. The transmission line passing through the respondents' lots was no longer the Jacques-Cartier–Duvernay line, but the La Vérendrye–Duvernay line. Up until the time of the trial, the respondents were unaware that a reconfiguration had taken place.

C. *Construction of the Chamouchouane–Bout-de-l'Île Line*

[19] On March 13, 2015, the Régie de l'énergie du Québec authorized a proposed electrical transmission line between the Chamouchouane and Bout-de-l'Île substations. This time, the construction of the new line had obvious, tangible repercussions on the respondents' lots. It involved routing a second electrical transmission line through them.

[20] By Order in Council 720-2016, (2016) 148 G.O. 35, 4927, of August 9, 2016, the government authorized the appellant to go ahead with the required expropriations. The respondents' lots were excluded from the scope of the order in council. According to the appellant, the servitudes granted in the 1970s allowed it to route up to three lines through the respondents' lots, which meant that the project did not require any new expropriations there. The respondents disagreed with this

interpretation, taking the view that the rights arising from the servitudes established when the Jacques-Cartier–Duvernay line was constructed were limited to that one line only.

[21] The appellant then applied for an injunction and obtained a safeguard order as well as interlocutory injunctions, to remain in force pending judgment in its application for a permanent injunction. In a cross-application, the respondents sought damages for unauthorized use of the servitudes following the reconfiguration of the Jacques-Cartier–Duvernay line and for hardship and inconvenience caused by the existing infrastructure. On November 17, 2016, the parties had the proceeding split so as to have the hearing of the cross-application postponed to a later date, depending on the outcome on the issue of the scope of the servitudes: see 2018 QCCA 838, at para. 5.

IV. Judicial History

A. *Quebec Superior Court (Sansfaçon J.), 2017 QCCS 2347*

[22] At trial, Sansfaçon J. ruled in favour of the appellant. He found that the servitudes at issue had originally been acquired by expropriation (para. 24), but that the subsequent agreements had clarified their purpose and scope while also recording the amounts of the indemnities that were paid and the fact that acquittances had been given: paras. 6-7 and 38.

[23] In the trial judge's opinion, the solution to the dispute could be found in the description of the servitudes set out in the notices of expropriation and the agreements, and there was nothing in that description that limited the appellant's rights to the Jacques-Cartier–Duvernay line (paras. 28-29 and 38). He found that the reference to the construction of that line in the preamble to the notices of expropriation had no impact on the scope of the servitudes: paras. 34 and 36. In his view, the agreements were clear and left no room for doubt in this regard: they authorized the appellant to erect three electrical transmission lines (or more, in some cases) and did not mention the origin or the destination of the electricity (para. 38).

[24] Sansfaçon J. rejected the argument regarding unauthorized use of the servitudes following the reconfiguration of the Jacques-Cartier–Duvernay line on the basis that the notices of expropriation and the agreements contained no restrictions in this regard: paras. 41-43. He noted in passing that this work had in no way affected the respondents' lots or the servitudes at issue: paras. 41-42.

[25] Having concluded that the appellant benefited from servitudes authorizing it to place three electrical transmission lines on the respondents' lots, and therefore to proceed with the construction of the Chamouchouane–Bout-de-l'Île line, he granted the injunction and dismissed the cross-application.

B. *Quebec Court of Appeal (Morissette, Healy and Roy J.J.A.), 2018 QCCA 838*

[26] The Court of Appeal allowed the respondents' appeal. It remarked at the outset that Sansfaçon J.'s decision to dismiss the cross-application had been *ultra petita*, as the splitting of the proceeding meant that that matter had no longer been before him: paras. 2, 5-6 and 38.

[27] In the Court of Appeal's view, the servitudes at issue had been acquired by expropriation and should therefore be characterized as servitudes established by operation of law: paras. 17-18. This led the Court of Appeal to find that the agreements should be analyzed in light of the limits imposed by Order in Council 3360-72 and that the scope of the servitudes did not extend beyond what had been authorized by that order in council: para. 18. Noting that the existence of a notice of expropriation does not preclude the negotiation of conventional servitudes, the court stated that the agreements entered into in this case should not be characterized in that way, given that they referred to servitudes that had been acquired by expropriation: para. 21.

[28] The Court of Appeal expressed the opinion that the appellant could not rely on the servitudes in its favour for the construction of the new Chamouchouane–Bout-de-l'Île line, because [TRANSLATION] “Order in Council 3360-72, the plan, the notices of expropriation and prior possession, the agreements and the acquittances all refer to servitudes for the construction of transmission lines between Jacques-Cartier and Duvernay”: para. 22. Having found that Order in Council 720-2016 of August 9, 2016 empowered the appellant to acquire servitudes by expropriation, the court invited the appellant to proceed by way of new expropriations or agreements: para. 24.

[29] The Court of Appeal rejected the respondents' argument that the reconfiguration of the Jacques-Cartier–Duvernay line had resulted in a substitution for the dominant land: para. 29. It nonetheless determined that, since the reconfiguration, the appellant had been using the servitudes in its favour for a purpose other than the one provided for in the acts establishing them: para. 37. The court referred the matter of monetary compensation to the judge who would be hearing the cross-application.

C. *Quebec Court of Appeal (Savard J.A.), 2018 QCCA 1189*

[30] The appellant announced that it intended to appeal to this Court, and applied for a stay of the Court of Appeal's judgment. The respondents pointed out that their proceedings were intended not to prevent the Chamouchouane–Bout-de-l'Île line from being completed, but to obtain financial compensation. Savard J.A. ordered a stay, noting that other owners in the same situation were relying on the Court of Appeal's judgment to prevent the appellant from going ahead with its work.

V. Issues

[31] This appeal raises the following issues:

- A. Did the Quebec Court of Appeal err by reassessing the evidence?

- B. Are the power line servitudes in favour of the appellant limited to the Jacques-Cartier–Duvernay line?

C. Was the appellant’s reconfiguration of the Jacques-Cartier–Duvernay line in the 1980s incompatible with the servitudes?

D. Are the appellant’s proceedings abusive?

VI. Analysis

A. *Did the Quebec Court of Appeal Err by Reassessing the Evidence?*

[32] The appellant submits that the Court of Appeal reassessed the evidence in the absence of a palpable and overriding error in concluding at para. 22 that [TRANSLATION] “the agreements and the acquittances . . . refer to servitudes for the construction of transmission lines between Jacques-Cartier and Duvernay” (emphasis added). The appellant also claims that the court conducted its own research regarding Order in Council 720-2016 of August 9, 2016 after the conclusion of oral argument. The respondents’ position on this point is not entirely clear. After acknowledging that the Court of Appeal [TRANSLATION] “conducted a full, in-depth analysis of all the evidence” (R.F., at para. 29), they submit that it did not reconsider any questions of fact and that its intervention in the trial judge’s findings presupposed the existence of a reviewable error.

[33] Absent a palpable and overriding error, an appellate court must refrain from interfering with findings of fact and findings of mixed fact and law made by the trial judge: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paras. 10-37;

Benhaim v. St-Germain, 2016 SCC 48, [2016] 2 S.C.R. 352. An error is *palpable* if it is plainly seen and if all the evidence need not be reconsidered in order to identify it, and is *overriding* if it has affected the result: *H.L. v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401, at paras. 55-56 and 69-70; *Salomon v. Matte-Thompson*, 2019 SCC 14, [2019] 1 S.C.R. 729, at para. 33. As Morissette J.A. so eloquently put it in *J.G. v. Nadeau*, 2016 QCCA 167, at para. 77, [TRANSLATION] “a palpable and overriding error is in the nature not of a needle in a haystack, but of a beam in the eye. And it is impossible to confuse these last two notions”: quoted in *Benhaim*, at para. 39. The beam in the eye metaphor not only illustrates the obviousness of a reviewable error, but also connotes a misreading of the case whose impact on the decision is plain to see.

[34] The respondents submit that in itself the intervention of a court of appeal with regard to findings of fact or of mixed fact and law presupposes, at least implicitly, that the court first identified a palpable and overriding error. I disagree. The appellate court must point to a palpable and overriding error before such an intervention; otherwise, this Court, if it does not identify a reviewable error, must restore the trial judge’s decision: *Schwartz v. Canada*, [1996] 1 S.C.R. 254, at para. 36; *H.L.*, at paras. 56 and 70; *Quebec (Director of Criminal and Penal Prosecutions) v. Jodoin*, 2017 SCC 26, [2017] 1 S.C.R. 478, at para. 51; *Salomon*, at paras. 109-10, per Côté J., dissenting, but not on this point; *Modern Cleaning Concept Inc. v. Comité paritaire de l’entretien d’édifices publics de la région de Québec*, 2019 SCC 28, at para. 71, per Côté, Brown and Rowe JJ., dissenting, but not on this point. The role of this deferential

standard of review would not be fulfilled if every intervention for which no justification was given had to be assumed to be implicitly consistent with it. It would be desirable for an appellate court to precisely identify the palpable and overriding errors in respect of which it is intervening; but in every case, it must be clear from the court's reasons that it has applied the appropriate standard of review.

[35] In the case at bar, the Court of Appeal made the two errors it is purported to have made.

[36] First, it substituted its own opinion for that of the trial judge regarding a question of fact in reaching, I would add, a conclusion that was clearly contrary to the evidence. At para. 22 of its reasons, it wrote:

[TRANSLATION] Because Order in Council 3360-72, the plan, the notices of expropriation and prior possession, the agreements and the acquittances all refer to servitudes for the construction of transmission lines between Jacques-Cartier and Duvernay, Hydro-Québec cannot rely on these servitudes for the construction of the new Chamouchouane–Bout-de-l'Île line. [Emphasis added.]

This statement is incorrect. One need only read the words of the agreements and the acquittances to realize that they do not contain even the most obscure allusion to a line between the Jacques-Cartier and Duvernay substations. The error is especially significant given that it is intimately linked to the findings on the main issue in the case: the scope of the servitudes established in favour of the appellant.

[37] Second, the Court of Appeal compromised the fairness of the proceeding by drawing conclusions regarding the application of Order in Council 720-2016, of which it took judicial notice after the hearing without notifying the parties. The court wrote:

[TRANSLATION] On August [9], 2016, after the proceedings began, the government issued another order in council to enable Hydro-Québec to acquire the necessary servitudes for the construction of the Chamouchouane–Bout-de-l'Île line. Hydro-Québec therefore has the authority to acquire servitudes for the construction of the new line, but must follow the appropriate procedure, that is, either proceed by expropriation or obtain conventional servitudes. [Emphasis added; footnote omitted.]

[38] This order in council with respect to expropriation has never been raised by the parties. It was not formally filed in the trial record, nor did it appear in the appeal record. It was touched on in passing at trial, and counsel for the respondents confirmed that the 2016 order in council did *not* cover his clients' lots. It did not come up at all in oral argument in the Court of Appeal.

[39] In all likelihood, the Court of Appeal conducted its own research after the conclusion of oral argument. Because the order in council had been published in the *Gazette officielle du Québec*, the court could take judicial notice of it: art. 2807 *C.C.Q.* But the court did much more than that: it decided the case on the basis of the order in council without giving the parties the opportunity to be heard on this subject. However, the scope of Order in Council 720-2016 is not clear from its words. It authorizes Hydro-Québec

[TRANSLATION] to acquire, by expropriation, the immovables or servitudes required for the construction and operation of the 735-kV Chamouchouane–Bout-de-l'Île project, as well as the related infrastructure and equipment on the land hereinafter defined in accordance with the plans prepared by Éric Deschamps, Land Surveyor, on March 10, 2016, under number 10838 of his minutes, and by Richard Lamontagne, Land Surveyor, on March 15, 2016, under number 236 of his minutes

[40] It is therefore necessary to refer to the plans in question in order to determine whether the appellant's expropriation powers under Order in Council 720-2016 extend to the respondents' lots. Those plans were not published in the *Gazette officielle du Québec*, nor were they filed in evidence or even alleged or argued by the parties. This could mean one of two things: either the Court of Appeal considered plans that were not in evidence and drew erroneous conclusions from them, or it assumed, without verifying, that the respondents' lots appeared on the land surveyors' plans. Whichever is the case, the approach taken raises serious concerns relating to procedural fairness, as the appellant never had the opportunity to make representations regarding this non-viable solution which has been imposed on it, and which could not have been foreseen given what was actually discussed in the course of the litigation.

[41] On November 22, 2019, my colleague Brown J. granted the appellant leave to adduce new evidence for the purpose of establishing that Order in Council 720-2016 does *not* authorize the expropriation proceedings on the respondents' lots. It in fact appears that the section of the Chamouchouane–Bout-de-l'Île line where those lots are located was excluded from the plans to which the order in council refers. The appellant

explains that it did not ask the government for authorization to expropriate the lots in question, because it believed it already had the real rights it needed to carry out its project. It cannot therefore be said that the appellant is authorized to acquire, by expropriation, new servitudes on the respondents' lots for the construction of the Chamouchouane–Bout-de-l'Île line: C.A. reasons, at para. 24. Indeed, it has no such authorization.

[42] The two errors discussed above are significant enough to persuade me to allow this appeal. However, given the circumstances of this case, I think it is necessary to reconsider the Court of Appeal's conclusions regarding the scope and exercise of the servitudes established in favour of the appellant.

B. *Are the Power Line Servitudes in Favour of the Appellant Limited to the Jacques-Cartier–Duvernay Line?*

[43] In this Court, the appellant submits that the servitudes should be characterized as conventional servitudes given that they were negotiated with the respondents' predecessors in title after the notices of expropriation were published. The agreements, which alone define the object and scope of the servitudes, should therefore prevail over the notices of expropriation. It would be inappropriate to interpret the servitudes having regard to an external document such as Order in Council 3360-72 which, moreover, does not appear in the land register. Under the agreements, the appellant can construct three electrical transmission lines regardless of the origin or destination of the electricity they carry.

[44] The respondents counter that the servitudes were acquired by expropriation and that the agreements concern only the indemnity that was payable. In oral argument, their counsel essentially maintained that the agreements on which the appellant relies have two parts. The first part begins with the following words:

[TRANSLATION] WHICH PARTIES [i.e., the parties to the act], prior to the acquittance and the agreements which are the subject hereof, do declare as follows

The second begins as follows:

THESE FACTS BEING DECLARED, the parties hereto make the following declarations and agreements

(A.R., at pp. 180 and 182)

In the respondents' view, this structure suggests that the first part of the agreements, in which the real rights flowing from the servitudes are enumerated, plays the role of a mere declaratory preamble, while the content of the agreement proper is limited to the indemnities and the acquittance stipulated in the second part. Accordingly, the servitudes, having been established by operation of law, should be interpreted in light of Order in Council 3360-72 and the documents subsequent to it — namely the notices of expropriation and the plans — which prevail over the declaratory provisions in the first part of the notarial agreements. Because the order, the notices of expropriation and the plans refer to the Jacques-Cartier–Duvernay line, it follows, they submit, that the

servitudes only permit the construction or operation of lines between those two substations.

(1) Characterization of the Post-expropriation Agreements

[45] The disagreement between the courts below with regard to the characterization of the servitudes at issue essentially rests on the characterization of the post-expropriation agreements. The Court of Appeal recognized that publishing a notice of expropriation does not bar the expropriating party and the expropriated party from subsequently negotiating conventional servitudes, but it concluded that the appellant and the respondents' predecessors in title had negotiated nothing of the sort, given that their agreements referred to servitudes acquired by expropriation and that such references would preclude the servitudes being characterized as conventional servitudes: para. 21.

[46] The characterization of the agreements at issue is so intimately linked to the assessment of the facts that I see this more as a question of mixed fact and law than as a pure question of law: *Uniprix inc. v. Gestion Gosselin et Bérubé inc.*, 2017 SCC 43, [2017] 2 S.C.R. 59, at paras. 38 and 42; *Churchill Falls (Labrador) Corp. v. Hydro-Québec*, 2018 SCC 46, [2018] 3 S.C.R. 101, at para. 49. With respect, I find that the Court of Appeal erred in interfering with the trial judge's conclusions in the absence of a palpable and overriding error. There is no such error in Sansfaçon J.'s conclusion, which is perfectly justifiable in light of the evidence.

[47] First, the agreements contain a clause entitled “*Cession*” (Conveyance), by which:

[TRANSLATION] . . . the OWNER . . . conveys and transfers to the COMMISSION, accepting, for all legal purposes and insofar as they may be needed, the above-mentioned perpetual real rights of servitude in the servient land . . . in favour of the dominant land

This clause appears after the acquittance, that is, in the part of the agreement that opens with the phrase “THESE FACTS BEING DECLARED, the parties hereto make the following declarations and agreements”. It is thus, according to the respondents’ argument, at the core of the agreement proper. It explicitly states that the owner of the servient land grants the owner of the dominant land the servitudes described in para. 2 of the preceding part. This is confirmed by the use of the word “*cession*” in the heading of the clause in question. At the time the agreements at issue were signed, leading French dictionaries defined this word as follows:

[TRANSLATION] [**Conveyance**]. . . The action of conveying, transferring to another that which one owns.

(*Dictionnaire de l’Académie française* (8th ed. 1932), vol. 1, at p. 212)

[TRANSLATION] [**C]onveyance**. . . 1. The action of abandoning to another person a right which one holds or owns 2. The action of conveying to another person property in one’s possession.

(*Grand Larousse de la langue française* (1971), vol. 1, at p. 652)

[TRANSLATION] [**Conveyance**]. . . *Law*. The action of conveying (a right, property). See transfer; assignment, sale.

. . .

Convey. . . . 2. *Law.* To transfer ownership of a thing to another person. See grant, divest, deliver, reconvey, transfer, sell

(P. Robert, *Dictionnaire alphabétique & analogique de la langue française* (1976), at p. 250 and p. 242)

[48] Second, Sansfaçon J. found that after the notices of expropriation were published, the parties' predecessors in title had [TRANSLATION] "sign[ed] an agreement . . . in which they detailed the object of the servitude": para. 6 (emphasis added).³ After reproducing the substantive portions of the notices of expropriation, he pointed to the provisions of the notarial agreements, which vary as regards the number of electrical transmission lines that can be placed on the servient land: paras. 5-7. Although the notices of expropriation are vague regarding the number of lines authorized by the servitudes, "in most of the contracts at issue, this number of lines is set at three": para. 7. A discrepancy between the two instruments regarding such an important stipulation tends to confirm that negotiations with respect to the scope of the servitudes themselves were conducted after the notices of expropriation had been published.

[49] Third, I have difficulty seeing how the agreements at issue can be characterized without taking into account the real rights obtained by the appellant, focusing instead on the monetary consideration as if these were merely compensation agreements. I cannot agree with the respondents' argument that their predecessors in title *agreed* to the amount of the indemnity but only *recognized* the expropriation itself. According to the very words of the agreements, the indemnity is simply the

³ The Court of Appeal repeated this finding at para. 15 of its reasons, but ascribed no legal consequences to it.

consideration for the main prestation set out in the [TRANSLATION] “Conveyance” clause, which is reproduced above: it is “[i]n consideration of the said indemnity” that the owner of the servient land “conveys and transfers . . . accepting, for all legal purposes and insofar as they may be needed, the . . . perpetual real rights of servitude” described at the beginning of the agreements.

[50] I find that Sansfaçon J. was correct in concluding that the agreements at issue are servitude agreements. What now remains to be done is to determine their effect having regard to Order in Council 3360-72 and the notices of expropriation.

(2) Distinction Between the Agreements, the Notices of Expropriation and the Order in Council

[51] To determine the scope of the servitudes established in favour of the appellant, Sansfaçon J. considered the notices of expropriation and the agreements, relying on the latter to clear up any ambiguities: paras. 34-38. In the Court of Appeal’s view, the appropriate approach was instead to analyze all the documents —notices of expropriation, plans, agreements and acquittances — in the context of the limits imposed by Order in Council 3360-72: paras. 18 and 22.

[52] The order in council, the notices of expropriation and the agreements are different types of documents, and it is important to distinguish them from one another. An order in council issued in accordance with s. 33(3)(b) *HQA*, as amended,⁴ is an

⁴ Today, the reference would instead be to the *Hydro-Québec Act*.

administrative act for the purpose of authorizing the exercise of the “power . . . to deprive a property owner of the enjoyment of the attributes of his or her right of ownership”: *Lorraine (Ville) v. 2646-8926 Québec inc.*, 2018 SCC 35, [2018] 2 S.C.R. 577, at para. 1. This authorization is a form of administrative tutorship exercised by the Lieutenant-Governor in Council (today one would say by the government) over the appellant’s discretion with respect to expropriation: P. Issalys and D. Lemieux, *L’action gouvernementale: Précis de droit des institutions administratives* (4th ed. 2020), at pp. 173-74 and 353; P. Garant, with P. Garant and J. Garant, *Droit administratif* (7th ed. 2017), at pp. 445-51. Filing a notice of expropriation and the documents related to it is an administrative act that establishes and individualizes the servitude. As for the agreement, it relates to the ordinary exercise of civil rights and to the private law rules of contract.

[53] A servitude acquired by expropriation is, according to the classification set out in art. 1181 *C.C.Q.*, a servitude established by “operation of law”: S. Normand, *Introduction au droit des biens* (3rd ed. 2020), at p. 322; D.-C. Lamontagne, *Biens et propriété* (8th ed. 2018), at No. 611; P.-C. Lafond, *Précis de droit des biens* (2nd ed. 2007), at para. 2046. This being the case, neither the law nor public order bars the expropriating party and the expropriated party from clarifying or modifying such a servitude by mutual agreement. Agreements similar to the ones at issue have come before our courts on several occasions: *Michaud et Simard Inc. v. Commission hydro-électrique de Québec*, [1982] C.A. 169 (Que.); *Domaine de la rivière inc. v.*

Aluminium du Canada Ltée, [1996] R.D.I. 6 (C.A.); *Sani Sport inc. v. Hydro-Québec*, 2008 QCCA 2498, [2009] R.J.Q. 26; Lafond, at paras. 2046-47.

[54] *Michaud et Simard Inc.* is of particular interest in this regard. It concerned the scope of power line servitudes for which notices of expropriation had been issued and agreements had subsequently been entered into. Bisson J.A. wrote the following for a unanimous panel:

[TRANSLATION] . . . I conclude that the conventional servitudes must prevail in this case. It is true that there were notices of expropriation, but these notices were followed by negotiations and conventional servitudes.

The expropriated party attempted to draw a distinction between servitudes of public utility, which were referred to as administrative servitudes, and conventional servitudes.

I find that an entity such as Hydro, which is empowered to obtain servitudes of public utility by expropriation, does not in so doing lose the capacity to acquire servitudes by agreement.

Hydro, which has all the general powers of a corporation, obviously has the power to negotiate the acquisition of a servitude.

From this, I conclude that the agreements subsequently entered into with the owners of the servient land must prevail over notices of expropriation R-19 of 1953 as amended in 1953 for Bersimis I and R-20 of 1957 for Bersimis II.

What now remains to be seen is what rights and obligations were acquired by Hydro, on the one hand, and conveyed by the owners of the servient land, on the other hand, in each of these agreements. [Citations omitted; pp. 175-76.]

I agree with this reasoning. It must be presumed that the servitude agreement, if entered into after the notice of expropriation, contains a more faithful definition of the scope

and terms for exercise of the servitude of public utility than does the notice of expropriation. This is particularly true in the case at bar, given that the agreements at issue include a complete description of the servitudes, adding some details that do not appear in the notices of expropriation (such as the authorized number of lines). In these circumstances, the agreements are the titles to which the owners of the servient land and the dominant land must refer in exercising their respective rights.

[55] The Court of Appeal agreed with the principle from *Michaud et Simard Inc.* that notices of expropriation do not preclude parties from negotiating conventional servitudes, but it concluded that that principle did not apply, because the agreements at issue [TRANSLATION] “refe[r] to the acquisition of servitudes by expropriation”: para. 21. To me, such a distinction seems excessively formalistic. First, it is based on a textual argument that does not take into account the real content of the agreements: see paras. 47-49 of these reasons. Second, the reference to the means by which the servitudes were established becomes irrelevant when one recognizes that a servitude acquired by expropriation may be amended by agreement. Third, if it were to be accepted that two different sets of rules applied depending on whether the post-expropriation agreements *referred* to the means of establishment of the servitudes, it would become practically impossible to draw a clear line between cases in which the servitude must be analyzed on the basis of the notice of expropriation and documents related to it, and cases in which it must be analyzed on the basis of the subsequent agreement.

[56] In my view, the approach according to which the servitudes should be analyzed in light of the order in council is also wrong. An order in council issued in accordance with s. 33 of the *HQA* is concerned with the public use relied on to justify the expropriation. It expresses an administrative authorization to intrude on the owner's right to the free disposition of his or her property, but it does not in itself grant any real rights. It makes it possible to establish a servitude without the consent of the owner of the servient land, but does not establish a servitude on that land. What define the rights granted by the servitudes are the titles: *Domaine de la rivière inc.*; Normand, at p. 320; Lafond, at para. 2050. In the instant case, the titles are the servitude agreements.

[57] Servitude agreements are subject to the rules applicable to the interpretation of contracts: *Centre de distribution intégré (CDI) inc. v. Développements Olymbec inc.*, 2015 QCCA 1463, 59 R.P.R. (5th) 1, at para. 17; *151692 Canada inc. v. Centre de loisirs de Pierrefonds enr.*, 2005 QCCA 376, [2005] R.D.I. 237, at para. 30; Normand, at p. 329; see also *Uniprix*, at paras. 34-41. If their words are clear, effect must be given to the clearly expressed intention of the parties. If, however, the agreements, read as a whole, are vague, ambiguous or incomplete, the common intention of the parties must be sought: art. 1425 *C.C.Q.*

[58] But there is no need to go to that second step in this case, as Sansfaçon J. has already found that the agreements were clear: para. 38. Whether a contract is clear or ambiguous is, in the context of an appeal, a question of mixed fact and law for which the applicable standard for intervention is palpable and overriding error: *Uniprix*, at

para. 41. Because no such errors have been established, the scope of the servitudes must be determined in light of the words of the agreements at issue.

(3) Rights Under the Servitude Agreements

[59] In substance, the agreements grant the appellant:

- servitudes allowing it to place, replace, operate and maintain up to three electrical transmission lines;⁵
- servitudes for tree cutting and pruning;
- servitudes of right of way; and
- servitudes of non-construction.

[60] They do not mention any restrictions regarding the origin or destination of the electricity. The argument that the servitudes are limited to the line between the Jacques-Cartier and Duvernay substations must therefore fail. Moreover, the respondents' suggestion that a restrictive interpretation of the powers of expropriation

⁵ These "lines" should not be confused with the [TRANSLATION] "electrical wires" (trial reasons, at paras. 45-50).

is required cannot be accepted either. What we must rule on here is not the exercise of a public power, but the scope of contractual agreements.

[61] The servitudes on the respondents' lots authorize the appellant to construct the Chamouchouane–Bout-de-l'Île line. As I mentioned above, there is no need to refer to the provisions of the notices of expropriation: the agreements must prevail. I wish to be clear, however, that had it been necessary to do so, my conclusion would have been the same. I agree with Sansfaçon J. that the reference in the preamble of the notices of expropriation to Order in Council 3360-72 and the Jacques-Cartier–Duvernay line has no impact on the description of the scope of the servitudes: trial reasons, at paras. 34 and 36.

C. *Was the Appellant's Reconfiguration of the Jacques-Cartier–Duvernay Line in the 1980s Incompatible With the Servitudes?*

[62] Having unduly limited the appellant's rights on the respondents' land to the Jacques-Cartier–Duvernay line, the Court of Appeal concluded that the redirection of that line to the La Vérendrye substation in the early 1980s was incompatible with the servitudes.

[63] The appellant submits that this conclusion seriously compromises the principle of stability of real rights on which the evolution of its system depends, especially given that redirecting an electrical transmission line to another substation

has no effect on the situation of the servient land. As for the respondents, they see this change as a substitution for the dominant land.

[64] To identify the dominant land, the agreements at issue refer to s. 19 of the *Watercourses Act*, R.S.Q. 1964, c. 84.⁶ Contrary to what the respondents suggest, the dominant land is not the transmission line between the Jacques-Cartier and Duvernay substations. Rather, it is [TRANSLATION] “the electrical transmission line(s) erected or to be erected on the said servient land”: art. 3 of the agreements. On this point, I agree with the Court of Appeal that there is no new dominant land, because the transmission line is still there: C.A. reasons, at para. 29.

[65] However, I find that the Court of Appeal erred in concluding that the appellant [TRANSLATION] “is using the line for a purpose other than the one provided for in the act of servitude” (para. 37). As I explained above, the servitudes at issue must be analyzed in light of the agreements subsequent to the notices of expropriation, and those agreements contain no restrictions as to the origin of the electricity. They grant the right to [TRANSLATION] “place, replace, maintain and operate, on the said servient land, three (3) high- or low-voltage electrical transmission line(s), and communication lines”. The servitudes concern the lines crossing the servient land, not the substations located at either end of those lines. I see nothing in the words of the agreements that would explicitly or implicitly prevent the appellant from redirecting one of its lines toward another substation. The right to operate electrical transmission lines clearly

⁶ Now the *Watercourses Act*, CQLR, c. R-13.

includes the right to make modifications such as the one that was made in the early 1980s.

D. *Are the Appellant's Proceedings Abusive?*

[66] The respondents submit that the appellant is abusing its rights and that the proceedings it has undertaken are themselves abusive. They seek a substantial indemnity that, they claim, corresponds to the expenditures and costs they incurred.

[67] No evidence has been adduced in this regard. At first glance, however, there is nothing abusive about these proceedings. The appellant sought to use the servitudes that had been granted to it by the respondents' predecessors in title and had been published in the land register. The respondents were presumed to be aware of the rights granted by these servitudes: arts. 1182 and 2941 *C.C.Q.* They nonetheless blocked construction of the new Chamouchouane–Bout-de-l'Île line, which forced the appellant to seek injunction orders. Unsuccessful at trial, the respondents appealed the case, and they now claim that the appellant must [TRANSLATION] “be found liable to [them] for all the expenditures it caused them to incur in all three (3) courts”: R.F., at para. 128. With respect, it is not up to the appellant to pay for the steps they took.

VII. Conclusion

[68] For these reasons, I would allow the appeal, set aside the Court of Appeal's decision and restore all the conclusions of the trial judge's decision, except the one

stated in para. 66. I would remand the case to the Superior Court for hearing of the cross-application. The appellant is entitled to its costs throughout.

Appeal allowed with costs throughout.

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Solicitors for the respondents: Vincent Karim & Als, Saint-Laurent; Me Hrtschan, Montréal.

Solicitor for the intervener the Attorney General of Quebec: Attorney General of Quebec, Québec.

Solicitors for the intervener Canadian Electricity Association: Torys, Toronto.