[35] Sans aller jusqu'au montant de 50 000 $ fixé dans les affaires *Roy c. Patenaude*[8] ou *Gauthier c. Beaumont*[9], une somme de 30 000 $ soit le triple de la somme accordée me paraît assurer un équilibre adéquat entre la faute commise, sa sanction et sa réprobation, sans pour autant compromettre la nouvelle orientation de l'intimé.

[36] Pour ces motifs, je propose donc d'accueillir l'appel avec dépens à la seule fin de hausser à 30 000 $ le montant de 10 000 $ accordé pour dommages punitifs en première instance.

(8) [1994] R.J.Q. 2503 (C.A.), 2512.
(9) [1998] 2 R.C.S. 3, 62.

[2002] R.J.Q. 84 à 88

Cour d'appel

ALLENDALE MUTUAL
INSURANCE COMPANY et une autre,
demanderesses appelantes, c.
HYDRO-QUÉBEC,
défenderesse intimée,
et LE PROCUREUR GÉNÉRAL
DU QUÉBEC, mis en cause

RESPONSABILITÉ — responsabilité du fournisseur — électricité — incendie — clause d'exonération de responsabilité — clause abusive.
RESPONSABILITÉ — responsabilité du fait des choses — transformateur — électricité — incendie — présomption de responsabilité — clause d'exonération de responsabilité — clause abusive.
CONTRAT DE SERVICES — responsabilité — fourniture d'électricité — incendie — clause d'exonération de responsabilité — clause abusive.
CONTRAT — clauses particulières — clause de limitation de responsabilité — contrat de services — fourniture d'électricité — contrat d'adhésion — clause abusive.

Appel d'un jugement de la Cour supérieure ayant rejeté une action en dommages-intérêts à la suite d'un incendie. Accueilli (1 127 853 $).

En 1994, l'appelante a subi des dommages lors d'un incendie. Le juge de première instance a conclu que le feu a été causé par des étincelles provenant d'un transformateur sous le contrôle de l'intimée Hydro-Québec et tombées sur des matériaux inflammables

Juges Beauregard, Mailhot et Fish — C.A. Montréal 500-09-006603-989, 2001-12-06 (juge Roland Tremblay, C.S. Montréal 500-05-000270-957, 1998-04-22) — *M^e Gordon Kugler*, pour les appelantes — *M^e Jean-Pierre Casavant* et *M^e Raymond Doray*, pour l'intimée — *M^e Guylaine Henri*, pour le mis en cause.

Réf. ant. : (C.S., 1998-04-22), SOQUIJ AZ-98021499, J.E. 98-1098, [1998] R.J.Q. 1493, [1998] R.R.A. 614.

02-01-1027
J.E. 2002-125

entreposés dans la cour de l'appelante. Toutefois, le juge a conclu que la responsabilité de l'intimée ne pouvait être retenue puisqu'elle jouit d'une exonération de responsabilité en vertu de l'article 105 du Règlement n° 411 établissant les conditions de fourniture de l'électricité, *adopté en vertu de l'article 22.0.1 de la* Loi sur Hydro-Québec, *qui lui donne le pouvoir de fixer par règlement les tarifs et les conditions de la fourniture d'électricité.*

Décision

M. le juge Fish : *L'article 105 du règlement n'a pas la portée que voudrait lui donner l'intimée. En effet, en permettant à Hydro-Québec de fixer les tarifs et les conditions de la fourniture d'électricité, le législateur ne lui a pas conféré la discrétion de déterminer l'étendue de son immunité contre les poursuites en responsabilité civile pour les dommages qu'elle pourrait causer aux autres dans le cadre de ses affaires et encore moins une immunité complète. Rien dans l'article 300 du* Code civil du Québec *(C.C.Q.) ni dans la* Loi sur Hydro-Québec *ne soustrait l'intimée à la portée des articles 1457 et 1458 C.C.Q. Toute dérogation à ces principes fondamentaux de notre système juridique requiert une intention claire et un langage précis de la part du législateur qui sont absents ici. Par ailleurs, il n'est pas nécessaire de déterminer s'il s'agit de responsabilité contractuelle ou extracontractuelle puisque, sous l'un ou l'autre régime, le résultat serait le même. En effet, le juge a correctement appliqué la présomption de responsabilité du gardien d'un bien édictée à l'article 1465 C.C.Q. De plus, on ne peut retenir la prétention de l'intimée voulant que l'article 105 du règlement fasse partie du contrat de fourniture d'électricité et qu'il s'agisse d'une exclusion de responsabilité valide. D'une part, pour les motifs déjà énoncés, cet article n'exonère pas des dommages en l'espèce. D'autre part, s'il avait cette étendue, il s'agirait d'une clause abusive et nulle au sens de l'article 1437 C.C.Q. puisque nous sommes en présence d'un contrat d'adhésion.*

Législation citée

Code civil du Québec (L.Q. 1991, c. 64), art. 300, 1376, 1437, 1457, 1458, 1465, 1472 — *Hydro-Québec (Loi sur)*, (L.R.Q., c. H-5), art. 13, 22.0.1 (1983) — *Conditions de fourniture de l'électricité (Règlement n° 411 établissant les)*, Décret 477-87 du 25-03-1987, (1987) 119 G.O. II 1918, art. 105 — *Conditions de fourniture de l'électricité (Règlement n° 634 sur les)*, Décret 607-96 du 22-05-1996, (1996) 128 G.O. II 2998, art. 102.

●

TEXTE INTÉGRAL DU JUGEMENT

[1] **La Cour :** Statuant sur le pourvoi des appelantes contre un jugement de la Cour supérieure (Montréal, 22 avril 1998, l'honorable Roland Tremblay) qui a rejeté l'action en dommages des appelantes par suite d'un incendie ;

[2] Après étude du dossier, audience et délibéré ;

[3] Pour les motifs du juge Fish, auxquels souscrivent les juges Beauregard et Mailhot ;

[4] Accueille le pourvoi avec dépens ;

[5] Infirme le jugement de la Cour supérieure ;

[6] Accueille l'action des appelantes ;

[7] Condamne l'intimée à payer 977 853 $ à l'appelante Allendale Mutual Insurance Company et 150 000 $ à l'appelante Kruger Inc., avec intérêts et l'indemnité additionnelle depuis l'assignation et les dépens, y compris les frais d'expertise à être établis, sur demande, par le juge du procès.

Reasons of Fish J.A.

I

[8] On July 13, 1994, Kruger Inc., the appellant, suffered a loss by fire.

[9] The trial judge found that the fire was caused by sparks from a transformer under the sole care and control of the respondent, Hydro-Québec, (1) and he rejected Hydro-Québec's alternative hypothesis.

(1) Indeed, the respondent explicitly admitted in its defence appellant's allegation that "at all relevant times [Hydro-Québec] owned and/or was responsible for the maintenance of the transformer."

[10] The sparks were projected onto bales and rolls of paper stored in Kruger's courtyard, setting them ablaze.

[11] Kruger's loss is admitted: $1,026,963, of which Kruger has received $977,853 from its insurer, Allendale Mutual Insurance Company. Allendale thus now stands in Kruger's place to that extent.

[12] The appeal raises several issues. In my view, only one is decisive: can Hydro-Québec escape responsibility for Kruger's loss on the basis of the sweeping exoneration of liability stipulated in one of its bylaws?

[13] When the other issues are disposed of, the smoke is gone, but the fire and its consequences remain. The origin of the fire is established. So too are the fault of Hydro-Québec, the damages suffered by appellants, and their causal connection.

[14] Accordingly I would allow the appeal, set aside the judgment of the Superior Court, and order the respondent to pay appellant Allendale $977,853 and appellant Kruger $150,000, with interest, the additional indemnity from the date of service of the proceedings, and costs in both courts, including expert's fees to be determined, upon application, by the trial judge.

II

[15] In refusing to indemnify appellants, respondent invokes an exonerating provision of one of its own bylaws.

[16] Pursuant to that provision — section 105 of *Bylaw No. 411 establishing the conditions governing the supply of electricity*(2) — Hydro-Québec can "[i]n no case. . . be held liable for damages or losses caused to individuals or property resulting from the supply or delivery of electricity," or, *inter alia*, from "mechanical failure on its system."

[17] This exclusion of liability, as respondent reads it, immunizes Hydro-Québec against actions in damages of virtually any sort: since Hydro-Québec's business is the supply and delivery of electricity, its responsibility for practically *any* fault that it commits in carrying out that business would be excluded by section 105.

[18] At the hearing of the appeal, Mr. Kugler, for the appellants, advised the Court that he has found no comparable exoneration of responsibility with respect to any other public utility in Canada. None has been drawn to our attention by either the respondent or the Attorney General of Quebec, *mis en cause*.

[19] The decisive issue, in my view, is whether section 22.0.1 of the *Hydro-Québec Act*,(3) the enabling legislation relied on by respondent, empowered it to exclude its contractual and extra-contractual responsibility in so sweeping a manner.

[20] I believe it did not.

[21] At the relevant time, section 22.0.1 read:(4)

> The rates and conditions upon which power is supplied must be consistent with sound financial management.
>
> The rates and conditions are fixed by by-law of the Corporation according to the categories it determines, or by special contracts.
>
> The by-laws and contracts are subject to the approval of the Government.

[22] In respondent's submission, the comprehensive exclusion of responsibility which it finds in section 105 of Bylaw No. 411 is nothing more than a "condition" upon which power is supplied.

[23] I am not persuaded that the National Assembly, in empowering Hydro-Québec to determine the "rates and conditions" upon which power is supplied in Quebec, delegated to that corporation an unbridled discretion (subject only to cabinet approval) to determine the scope of its immunity from civil liability from the dam-

(2) *Règlement n° 411 établissant les conditions de fourniture de l'électricité*, Décret 477-87 du 25-03-1987, (1987) 119 G.O. II 1918, ci-après nommé « Bylaw No. 411 ». The bylaw has since been replaced: *Bylaw No. 634 respecting the conditions governing the supply of electricity* [*Règlement n° 634 sur les conditions de fourniture de l'électricité*, Décret 607-96 du 22-05-1996, (1996) 128 G.O. II 2998], ci-après nommé « Bylaw No. 634 ».

(3) *Loi sur Hydro-Québec* (L.R.Q., c. H-5).

(4) *Loi modifiant la Loi sur l'Hydro-Québec et la Loi sur l'exportation de l'énergie électrique* (L.Q.1983, c. 15). This section, too, has since been amended: *An Act respecting the Régie de l'énergie* [*Loi sur la Régie de l'énergie* (L.R.Q., c. R-6.01)], s. 123; *An Act to harmonize public statues with the Civil Code* [*Loi concernant l'harmonisation au Code civil des lois publiques* (L.Q. 1999, c. 40)], s. 145; *An Act to amend the Act respecting the Régime de l'énergie and other legislative provisions* [*Loi modifiant la Loi sur la Régie de l'énergie et d'autres dispositions législatives* (L.Q. 2000, c. 22)], s. 63.

ages it causes to others in carrying out its business. Still less am I persuaded that this phrase is sufficiently clear in its reach to authorize *the total exclusion* of the corporation's responsibility for the consequences of its own faults, *extra-contractual and contractual.*

[24] Section 105 of Bylaw No. 411, which sets out the exonerating text upon which respondent relies, begins this way:

> Hydro-Québec guarantees neither the maintenance of voltage and frequency at a stable level nor the continuity of the supply and delivery of electricity.

[25] The validity of this exclusion of warranty is conceded, appropriately in my view, by the appellants. And it strikes me as a permissible exercise of respondent's authority, under section 22.0.1 of the *Hydro-Québec Act*, to determine the "rates *and conditions*" under which it undertakes to supply power to its subscribers.

[26] It is quite another matter to read into the phrase "rates and conditions" the right of Hydro-Québec to exclude its liability for setting your home on fire by keeping and using faulty equipment on or near your property.

[27] At the time of the incident that concerns us here, section 105 of Bylaw No. 411 excluded Hydro-Québec's responsibility *even for damages caused to individuals*. This, of course, contravened article 1474 of *Civil Code of Québec*.[5] Its successor, section 102 of Bylaw No. 634, excludes Hydro-Québec's liability for damage to *property only.*

[28] We need not decide in this case whether, pursuant to the adoption of clear and specific enabling legislation, Hydro-Québec's liability for the breach of its contractual and extra-contractual obligations may validly be provided by regulation. The decisive question, as I mentioned earlier, is whether the corporation was empowered by section 22.0.1 of the *Hydro-Québec Act*, as it read, to exclude its liability for the fault that concerns us here.

[29] Accountability is a fundamental precept of the civil law of Quebec.

[30] In matters contractual, the governing principle is that all persons must honour their contractual undertakings. Where they fail in this duty, they are liable for the resulting prejudice — bodily, moral or material — thereby caused to other contracting parties (art. 1458 C.C.Q.).

[31] Likewise, pursuant to article 1457 C.C.Q.:

> Every person has a duty to abide by the rules of conduct which lie upon him, according to the circumstances, usage or law, so as not to cause injury to another.
>
> Where he is endowed with reason and fails in this duty, he is responsible for any injury he causes to another person and is liable to reparation for the injury, whether it be bodily, moral or material in nature.
>
> He is also liable, in certain cases, to reparation for injury caused to another by the fact or fault of another person or by the act of things in his custody.

[32] In this context, "person" includes legal persons such as the respondent, which is a mandatory of the State (*Hydro-Québec Act*, s. 13).

[33] Moreover, article 1376 C.C.Q. specifically provides that *all* of the rules set out in Book Five of the *Civil Code of Québec* (s. 1371-1707), which deals with obligations:

> . . .apply to the State and its bodies, and to all other legal persons established in the public interest, subject to any rules of law which may be applicable to them.

And I see nothing in article 300 C.C.Q. or in the *Hydro-Québec Act* itself that places Hydro-Québec beyond the reach of the principles set out in articles 1457 and 1458 C.C.Q.

[34] Any intended departure from these defining characteristics of our system of civil justice require, on the part of the legislature, clear and precise language to that effect.

[35] Section 22.0.1 of the *Hydro-Québec Act*, in simply empowering the corporation to enact bylaws determining "the rates and conditions" upon which it supplies electricity, falls far short of the required standard.

III

[36] Much was said on the hearing of the appeal regarding the distinction between contractual and extra-

(5) *Code civil du Québec* (L.Q. 1991, c. 64).

contractual responsibility under the *Civil Code of Québec*.

[37] I am inclined to believe that the fault imputed to respondent by the appellants is extra-contractual rather than contractual, since the damages suffered by Kruger resulted from a fault which is only incidentally related, if at all, to the respondent's contractual obligations to its customers.

[38] It is unnecessary, however, to express a decided view on this issue. Under either branch of Quebec's present regime of responsibility, the result would be the same. Kruger's damages were foreseeable, there is no question of prescription and respondent's submissions based on distinctions between contractual and extra-contractual claims are all, in this case, of no moment.

[39] Respondent contended, for example, that appellants' claim was necessarily contractual and that the trial judge therefore erred in applying the presumption of fault set out in article 1465 C.C.Q.

[40] This submission appears to me to be very different from, if not inconsistent with, the position taken by Hydro-Québec at trial. But that is of little consequence: it is in any event plain to me that the trial judge would have reached the same conclusion had the applicability of article 1465 C.C.Q. been raised before him. There is no suggestion that appellant's loss resulted from a fortuitous event or irresistible force and, in the light of the judge's findings of fact as to the origin of the fire and as to its direct consequences, the evidence at trial gives rise to a presumption of fact, unrebutted, that appellants' loss is directly attributable to respondent's fault.

[41] Respondent argued as well that section 105 of Bylaw No. 411 forms part of its contract with its subscribers, including Kruger, and therefore amounted to a valid, contractual exclusion of its liability to compensate appellants for the damages resulting from its fault in this case.

[42] I would reject this submission for two reasons.

[43] First, because, for the reasons given earlier, I believe that section 105, to the extent that it purports to exonerate Hydro-Québec from responsibility for the kind of fault that concerns us here, is *ultra vires* the corporation's authority, under section 22.0.1 of the *Hydro-Québec Act*, to make regulations concerning the "rates and conditions" under which its power is supplied to consumers. Section 105 can therefore hardly form part of the contract imposed on its subscribers by Hydro-Québec.

[44] Second, had I concluded otherwise in this regard, I would in any event have held that section 105, if it does indeed amount to a contractual undertaking by appellants to relinquish their present claim, is abusive, and therefore null in virtue of article 1437 C.C.Q.

[45] Article 1437 C.C.Q. stipulates that "[a]n abusive clause in a consumer contract or contract of adhesion is null, or the obligation arising from it may be reduced." There is no dispute that the contract invoked by respondent is a contract of adhesion.

[46] In my view, it is plainly abusive for Hydro-Québec, a monopoly, to impose on the persons it was created to serve, *as a condition of supplying them with electricity*, an obligation to renounce not only to claims for the damages they incur as a result of Hydro-Québec's *failure to supply electricity*, but also that they waive in advance any right to compensation for *any other damages caused to them by any fault, contractual or extra-contractual, attributable to Hydro-Québec*.

[47] Accordingly, I would hold that section 105 of Bylaw No. 411, to the extent that it has this effect, is null and of no effect.

IV

[48] For all of these reasons, I would, as stated at the outset, set aside the judgment of the Superior Court, and order the respondent to pay $977,853 to appellant Allendale Mutual Insurance Company and $150,000 to appellant Kruger Inc., with interest, the additional indemnity from the date of service of the proceedings, and costs in both courts, including experts' fees to be determined, upon application, by the trial judge.