

Newsletter



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Cities' and towns' liability in cases of water main breaks: presumption of fault and financial capacity

Article 1465 of the Civil Code of Quebec [CCQ] has been the object of many debates and comments with respect to its application in cases where the liability of a city or town is sought in relation to damages caused by a water main break. In Montréal (Ville de) c. Compagnie d'assurances Cosesco 2016 QCCA 2062, the Court of Appeal had the opportunity to address key issues to be applied in similar cases.

The facts of this matter are quite simple: Plaintiff, Compagnie d'assurances Cosesco, was the insurer of a third party which had sustained damages caused by water further to the breakage of a water main owned by the City of Montréal; consequently, Cosesco filed for damages against the City. The parties agreed that there was indeed a rupture of the City's water main and that this was at the cause of the damages.

Before the Court of Quebec,¹ the City, trying to rebut the presumption of fault in article 1465 CCQ, produced as witnesses seven City employees in charge of maintenance, repairs, planning, optimization and strategical orientation of the City's water system. From these testimonies, the Court concluded that the budget was the first criterion utilized by the City in determining the priority of its

intervention. In other words, the City had a policy of risk management.

The Court added that the City should have filed an expert's report to establish that the maintenance performed on the water system respected the best practices and standards. The Court concluded that: "The Citizen cannot be a victim of the City's choice to wait that its water system reaches the end of its useful life, assessed by means of its repair ratio, before it proceeds to the rehabilitation or replacement of a pipe."² [Our translations throughout]

Furthermore, the trial judge specified: "The financial difficulty of the City does not allow the Court to presume that it took all reasonable means to prevent the damage."



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In the end, the Court ruled that the City of Montréal failed to rebut the presumption of fault in article 1465 CCQ, and therefore allowed Coseco's claim for damages.³

Before the Court of Appeal, the City raised three points: the trial judge erred in the application of article 1465 CCQ; she erred in requesting that the City's evidence be supported by an independent expertise; and she wrongfully questioned the City's policy decisions regarding the supervision and maintenance of its water system.⁴ The Court of Appeal agreed unanimously with the City, pointing out that the testimonies were exhaustive and sufficient to conclude that the City's water system maintenance program complied with the reasonable standards to which cities are held. By questioning the effectiveness of the City's maintenance program, the Court of Quebec had imposed an obligation of result on the City, whereas article 1465 CCQ only requires that the City prove that it took all reasonable means in the maintenance of its water system. Bearing this in mind, the Court of Appeal stated:

There is always a possibility of doing better, but this is not the test. We

cannot require from a City that it act without taking into account its financial capacity. There is a question of balance. In this context, the trial judge made an error in holding it against the City that it chose the best possible strategy for the best price. It is natural for the City to make this choice. The taxpayers would be astonished if it were otherwise.⁵

In a nutshell, to rebut the presumption of fault in article 1465 CCQ, a city or town must prove that it took all reasonable means to see to the maintenance of its water system. It should therefore not be held liable if it has implemented a thorough maintenance program in which priorities are identified while bearing in mind its financial capacity.

¹ *Compagnie d'assurances Coseco c. Montréal (Ville de)*, 2015 QCCQ 5843.

² *Ibid*, para 251.

³ *Ibid*, para 250.

⁴ *Montréal (Ville de) c. Compagnie d'assurances Coseco*, 2016 QCCA 2062, para 3.

⁵ *Ibid*, para 20.

