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Care, Custody or Control Exclusion Clause in Insurance—The SCC's Interpretation

October 24, 2018

On October 19, 2018, the Supreme Court of Canada handed down its decision in *3091-5177 Québec inc. (Éconolodge Aéroport)* v. *Lombard General Insurance Company of Canada*[1], written by the Honourable Mr. Justice Clément Gascon, in an appeal of a Quebec Court of Appeal decision. It deals primarily with the application of the standard care, custody or control exclusion clause.

Summary

This decision helps clarify the application of a care, custody or control exclusion clause on the basis of the distinction between the notions of custody and of mere physical holding. Insurers must determine, on the basis of the particular facts of each claim, if custody was truly transferred to the insured before relying on the exclusion, while bearing in mind that the exclusion should not eliminate coverage in situations for which the application of such coverage is expected by or reasonable for the insured.

The facts

Éconolodge Aéroport (hereinafter *"**Éconolodge**"*) offered accommodations, parking and park and fly shuttle services near the Montréal—Pierre Elliot Trudeau International Airport. In winter, guests were required to give their car keys to Éconolodge representatives so that snow could be cleared from the parking lot.

In the winter of 2005–2006, the vehicles of two Éconolodge guests were stolen from said parking lot. After having compensated their respective clients, the guests' property insurers both instituted subrogatory recourse against Éconolodge to recover the compensation paid out, arguing that Éconolodge had not taken reasonable measures to prevent theft. In each case, Éconolodge's insurer, Lombard General Insurance Company of Canada (hereinafter *"**Lombard**"*), was either sued directly or impleaded in warranty. Ultimately, the lawsuits for both cases of theft were joined.

Lombard argued that it was not required to pay the claims, as per the exclusion, according to which the insurer was not liable for the loss of vehicles in Éconolodge's custody and control. The exclusion read as follows:

> *[Translation] This insurance does not apply to:*
>
> *(...)*

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H. “Property damage” to:

(...)

(d) Personal property in your care, custody or control;

Judicial history

The lower courts all concluded that Éconolodge was liable for the theft of the two vehicles. In characterizing the contract between Éconolodge and its guests as a contract for services, they concluded that Éconolodge breached its obligation, as defined in article 2100 of the *Civil Code of Québec*, to act with prudence and diligence in the best interests of its guests.

With regard to the care, custody or control exclusion clause, the Court of Québec concluded that it did not apply because Éconolodge had neither custody nor real control or care of the vehicles. In the Court’s view, the fact that the keys had been handed over to Éconolodge representatives in order to clear the parking lot of snow did not constitute a real transfer of custody of the vehicles.

The Court of Appeal, for its part, was of the opinion that since the guests had handed over their keys to Éconolodge representatives, this meant that the vehicles were necessarily in Éconolodge’s custody. According to the Court, it was also incongruous to conclude that there was an obligation of prudence and diligence toward the vehicles without concluding there was a transfer of custody. The Court of Appeal thus found that the exclusion clause should apply.

The SCC decision

Like the lower courts, the Supreme Court concluded that Éconolodge was liable for the theft of the vehicles. However, it set aside the Quebec Court of Appeal’s conclusion that the exclusion clause relied on by Lombard was applicable, determining that the hotel operator did not have custody or control of the vehicles in the legal sense of these terms.

It considered that in this case there was no ambiguity in the exclusion clause that needed to be resolved through an interpretation. For the purposes of applying this clause, the Court had to determine the effect of the guests handing over their keys on the notion of custody, given the distinction between custody and mere physical holding of property. Context determines whether a person or entity has custody or mere physical holding of property.

In the aforementioned cases, the guests handed over their keys to the hotel operator for a specific reason—to facilitate parking lot snow removal. Moreover, guests were not required to hand over their keys in the summer. The Court determined that Éconolodge did not have real custody of the vehicles since it only had limited, clearly circumscribed power, namely to move the vehicles in the event of an accumulation of snow.

In its analysis, the Court stated that the rationale behind the exclusion clause is to prevent the insurer from *[Translation]* “tying its obligation to pay compensation to uncertainties resulting from initiatives that may be taken by an insured [...] and have nothing to do with the kind of commercial activities engaged in by the insured and known to the insurer”. However, according to the Court, parking is an essential part of the range of services offered by Éconolodge, as it is a park and fly hotel. As Éconolodge’s insurer, Lombard knew the business model of the hotel operator and had knowingly issued the insurance policy. The Court was of the opinion that applying the exclusion would undercut the usefulness of the coverage for one of the insured’s three main activities. Finally, according to the Court, it would be absurd for the exclusion to be applicable dependent on the season. The Court concluded that Lombard must compensate Éconolodge for the theft of the cars.

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Conclusion

The very contextual nature associated with characterizing the notion of custody requires a rigorous analysis of the facts surrounding the legal relationship between the insured and the lost or damaged property. In this analysis, insurers must attempt to determine if custody has truly been transferred to the insured or if it is a case of mere physical holding. Moreover, it should be noted that the application of the exclusion must not ultimately undercut or eliminate coverage in situations for which the application of such coverage is expected or reasonable for the insured.

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1. *3091-5177 Québec inc. (Éconolodge Aéroport)* v. *Lombard General Insurance Company of Canada*, 2018 SCC 43.

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