

# SHILLINGTONS<sup>LLP</sup> | LAWYERS

1500 – 148 Fullarton Street  
London, ON N6A 5P3  
www.shillingtons.ca

## INSURANCE LAW BULLETIN

November 2018 – Drew McArthur – Student-At-Law

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### THE SUPREME COURT OF CANADA’S RECENT DECISION IN *LOMBARD GENERAL INSURANCE*:

### APPLICATION OF EXCLUSIONARY CLAUSES – “CARE, CUSTODY, AND CONTROL”

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#### | OVERVIEW |

On October 19<sup>th</sup>, 2018, the Supreme Court of Canada released its decision in *3091-5177 Québec Inc. (Éconolodge Aéroport) v. Lombard General Insurance Co. of Canada*. In this case, the respondents (*Éconolodge*) owned and operated a park-and-fly hotel where guests could leave their vehicles for extended periods of time while away on vacation or business. In the winter months, *Éconolodge* forced guests to leave their car keys with the hotel staff in order to move the vehicles to allow for snow plowing. On two occasions, guests of the hotel had their vehicles stolen from the open and unfenced parking lot. The insurers for the stolen vehicles brought subrogated actions against the *Éconolodge* for the amounts paid to the insured.<sup>1</sup>

At trial, the judge found the hotel operator liable for the theft of the vehicles. The trial judge also found that the clause in the hotel operator’s liability insurance policy excluding coverage for property damage to personal property “in the care, custody or control of the insured” did not apply, despite the fact the keys to each vehicle had been left with the hotel.<sup>2</sup> At the Quebec Court of Appeal, the panel affirmed the trial judge’s decision regarding the hotel operator’s liability, but allowed the appeal in both cases on the issue of the exclusion clause.<sup>3</sup>

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<sup>1</sup> *3091-5177 Québec Inc. (Éconolodge Aéroport) v. Lombard General Insurance Co. of Canada*, 2018 SCC 43.

<sup>2</sup> *Ibid*, at paras 13 and 14.

<sup>3</sup> *Ibid*, at para 16.

In a unanimous decision, the SCC upheld the trial judge's decision with respect to both the finding of civil liability and applicability of the exclusion clause.

In general, two issues were addressed at the SCC. The first dealt with whether the hotel incurred civil liability for the thefts of its guests' vehicles. However, this issue was addressed using statute (*Civil Code of Quebec*) and thus is likely not widely applicable in jurisdictions outside of Quebec. The second issue is both relevant and applicable to Canadian insurance law generally, as it dealt with the applicability of an exclusionary clause. As a result, this bulletin narrows its focus to the second issue.

## | LEGAL RULES AND PRINCIPLES |

*Éconolodge's* insurer, Lombard General Insurance, argued that it had no obligation to indemnify against the subrogated actions by relying on an exclusionary clause. This clause stated that if the vehicles were deemed to be in the care, custody, and control of *Éconolodge*, the exclusion applied and thus Lombard was not required to indemnify. Thus, the issue for the SCC to consider was how to determine when property is in the care, custody, and control of an entity, and if in this case *Éconolodge* took effective control of the vehicles.

In order to determine the applicability of the exclusionary clause, the SCC used several principles of insurance law contract application and interpretation laid out in numerous earlier decisions (see *Ledcor Construction Ltd. v. Northbridge*).<sup>4</sup> With respect to exclusionary clauses and determining when care, custody, and control of property has effectively been transferred, the SCC stated:

1. To determine whether there has been a transfer of custody and thus control of property, a court must consider both **A**) the definition of the terms “care, custody, and control” and **B**) the factual matrix (surrounding circumstances) of the transfer.<sup>5</sup>
2. Exclusionary clauses should not be interpreted such that coverage offered by the insurer is rendered ineffective. In essence, exclusionary clauses are to be read narrowly.<sup>6</sup>
3. The application of exclusionary clauses should promote a “sensible commercial result” as described in the 1979 case of *Consolidated Bathurst v. Mutual Boiler*.<sup>7</sup>

## | APPLICATION OF RULES & PRINCIPLES |

Using the principles listed above, the SCC concluded that the exclusionary clause found in Lombard's contract of indemnity was inapplicable. In applying these legal principles to the facts, the SCC found:

**1. A)** The caselaw indicates that “care, custody, and control” provisions pertain to control over property. In essence, “custody is assessed directly by reference to the power of control, supervision and discretion over the property.” A holder of property does not have custody of it where the holder is only able to exercise a limited, not general power of the property.<sup>8</sup>

**B)** Considering the factual matrix in this case required one to consider why the keys were handed over to the hotel. Here, the keys were handed over only in the winter months with the express purpose of

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<sup>4</sup> *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37 at paras 49 through 52.

<sup>5</sup> *Supra* note 1, at paras 38-41.

<sup>6</sup> *Ibid*, at para 53.

<sup>7</sup> *Ibid*.

<sup>8</sup> *Ibid*, at para 43.

moving the car in order for the removal of snow from the storage lot. Thus, in accordance with **A**), there was a clear limitation on the amount of control the hotel was authorized to have over its guests' vehicles. This indicated that the hotel did not have control over the vehicles.<sup>9</sup>

2. The SCC noted that if it accepted Lombard's argument and concluded that the exclusionary clause was applicable, this would necessitate a broad reading of an exclusionary clause which would also render insurance purchased specifically to indemnify in these types of scenarios inapplicable.<sup>10</sup>

3. *Consolidated-Bathurst* noted insurance policies should be interpreted to promote a commercially sensible result. Important in this analysis is what the parties bargained for, and whether it was the intention of both parties that such a loss be covered at the initial outset of the policy. Here, the trial judge found that Lombard was aware of *Éconolodge's* business model and had chosen to insure it with full knowledge of the situation.<sup>11</sup> Additionally, the SCC argued that to agree with Lombard's reasoning leads to absurd results. For instance, Lombard's senior analyst conceded that the exclusion clause was inapplicable in the summer. Thus, in the same year of coverage, the applicability of the exclusionary clause would depend on the season, or even the amount of precipitation.<sup>12</sup>

### | CONCLUSION – MOVING FORWARD |

*Éconolodge v. Lombard* highlights the importance of sound policy drafting and consideration of ingrained common law insurance principles. While this case dealt with an unusual fact scenario, the SCC's reasoning and use of legal rules and principles is applicable in the vast majority of insurance contract disputes. Additionally, cases which depend, at least in part, on a reading of a care, custody, and control clause will no doubt look and indeed be bound by the reasoning in this decision.

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<sup>9</sup> *Ibid*, at para 45.

<sup>10</sup> *Ibid*, at para 53.

<sup>11</sup> *Ibid*, at para 54.

<sup>12</sup> *Ibid*, at para 55.