



SUPREME COURT OF CANADA

CITATION: 3091-5177 Québec inc. (Éconolodge Aéroport) v. Lombard General Insurance Co. of Canada, 2018 SCC 43

APPEAL HEARD: January 10, 2018

JUDGMENT RENDERED: October 19, 2018

DOCKETS: 37421, 37422

BETWEEN:

3091-5177 Québec inc., c.o.b. as Éconolodge Aéroport
Appellant

and

Lombard General Insurance Company of Canada
(now known as Northbridge General Insurance Corporation)
Respondent

AND BETWEEN:

3091-5177 Québec inc., c.o.b. as Éconolodge Aéroport
Appellant

and

AXA Insurance Inc.
(now known as Intact Insurance Company)
Respondent

- and -

Promutuel Insurance Portneuf-Champlain
Intervener

AND BETWEEN:

Promutuel Insurance Portneuf-Champlain
Appellant

and

Lombard General Insurance Company of Canada
(now known as Northbridge General Insurance Corporation)
Respondent

OFFICIAL ENGLISH TRANSLATION: Reasons of Gascon J.

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

REASONS FOR JUDGMENT: Gascon J. (Wagner C.J. and Abella, Moldaver,
(paras. 1 to 58) Karakatsanis, Côté, Brown and Martin JJ. concurring)

CONCURRING REASONS: Rowe J.
(para. 59)

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ÉCONOLOGDE AÉROPORT v. LOMBARD

3091-5177 Québec inc., c.o.b. as Éconolodge Aéroport

Appellant

v.

**Lombard General Insurance Company of Canada
(now known as Northbridge General Insurance Corporation)**

Respondent

- and -

3091-5177 Québec inc., c.o.b. as Éconolodge Aéroport

Appellant

v.

**AXA Insurance Inc. (now known
as Intact Insurance Company)**

Respondent

and

Promutuel Insurance Portneuf-Champlain

Intervener

Promutuel Insurance Portneuf-Champlain

Appellant

v.

**Lombard General Insurance Company of Canada
(now known as Northbridge General Insurance Corporation)**

Respondent

Indexed as: 3091-5177 Québec inc. (Éconolodge Aéroport) v. Lombard General Insurance Co. of Canada

2018 SCC 43

File Nos.: 37421, 37422.

2018: January 10; 2018: October 19.

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

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Civil liability □ *Contract for services* □ *Obligation to act with prudence and diligence* □ *Theft of cars belonging to guests of park and fly hotel* □ *Guests required to leave their vehicle in open, unfenced, unattended and freely accessible parking lot while travelling* □ *Whether hotel operator liable for theft of cars because of failure to take reasonable steps to secure its parking lot* □ *Civil Code of Québec, art. 2100.*

Insurance □ Liability insurance □ Exclusion □ Theft of cars belonging to guests of park and fly hotel □ During winter, guests required to hand over their vehicle keys to hotel operator while travelling so that parking lot could be cleared of snow □ Hotel operator's liability insurance policy excluding coverage for personal property in its care, custody or control □ Whether handover of keys triggered application of exclusion clause.

The hotel operator owned a park and fly hotel, which invited guests to sleep in its rooms, leave their car in its parking lot while travelling and use its shuttle service to get to the airport. During the winter, guests who left their car in the hotel's parking lot had to hand over their keys at the front desk so that their car could be moved for snow removal. During the winters of 2005 and 2006, two guests had their cars stolen from the hotel's parking lot. The owners were compensated for their losses by their respective insurers, AXA Insurance Inc. and Promutuel Insurance Portneuf-Champlain. Since the insurers were subrogated to the rights of their insured, each of them brought an action against the hotel operator to recover the amount of compensation paid. Promutuel also brought a direct action against the hotel operator's insurer, Lombard General Insurance Company of Canada. In the case between the hotel operator and Axa, the hotel operator impleaded Lombard in warranty. The actions were joined and were heard together.

In the case between the hotel operator and Axa, the trial judge found the hotel operator liable for the theft of the car, while the hotel operator's liability was

accepted in the case between it and Promutuel as a result of a default judgment. The trial judge also found that the clause in the hotel operator's liability insurance policy excluding coverage for property damage (loss of use or physical injury) to personal property in the care, custody or control of the insured did not apply in these cases, despite the fact that the keys to guests' cars had to be left at the hotel's front desk. She therefore ordered Lombard to compensate the hotel operator and Promutuel. The Court of Appeal affirmed the trial judge's judgment with respect to liability for the thefts of cars but allowed the appeal in both cases on the issue of the exclusion clause, which it found to be applicable.

Held: The hotel operator's appeal (file No. 37421) is allowed in part.

Held: Promutuel's appeal (file No. 37422) is allowed.

Per Wagner C.J. and Abella, Moldaver, Karakatsanis, **Gascon**, Côté, Brown and Martin J.J.: The courts below did not err in finding the hotel operator liable for the theft of the car insured by Axa, and there are therefore no grounds for intervention on this issue.

The trial judge did not err in characterizing the contract between the hotel operator and its guests as a contract for services within the meaning of art. 2098 of the *Civil Code of Québec* ("C.C.Q."). The characterization of the contractual relationship between the hotel operator and its guests is a question of mixed fact and law, since it is necessary here to consider the evidence of the parties' common

intention; the characterization is therefore entitled to deference on appeal. In characterizing the contract, the trial judge properly considered the full range of services offered by the hotel operator. As a park and fly hotel, it offered its guests a number of services, including accommodation, parking and a shuttle service. It is not appropriate to separate these services given that a package of services is what was considered by guests and advertised by the hotel operator. Because the hotel operator encouraged its guests to leave their vehicle in its parking lot while they were away, the guests were reasonably entitled to expect that it would look after their interests and take such security measures as were necessary in the circumstances. Since there was a contract for services, the hotel operator had an obligation under art. 2100 *C.C.Q.* to act in the best interests of its guests, with prudence and diligence. The determination that the hotel operator breached its obligation of prudence and diligence by failing to take reasonable steps to secure its parking lot, unbeknownst to its guests, is a finding of mixed fact and law that is also entitled to deference on appeal, since an assessment of the facts is necessary to make such a finding. Finally, the trial judge's finding that there was a clear causal connection between the fault and the damage is not open to review unless a palpable and overriding error was made, since it is a question of fact.

In addition, there is no palpable and overriding error in the trial judge's finding on the issue of custody of the stolen vehicles that could justify the Court of Appeal's intervention. The guests' handover of their car keys to the hotel operator did

not trigger the application of the care, custody or control exclusion clause in the insurance policy.

While custody is a legal concept, the determination of custody is a highly factual question that depends on the specific circumstances of each case. Whether the hotel operator had custody of the vehicles is therefore a question of mixed fact and law, and the trial judge's answer to this question is entitled to deference on appeal. In the instant cases, the judge's finding on the limited effect of the handover of keys was firmly based on an assessment of the evidence.

The handover of keys is certainly a relevant fact in determining custody of the property, since the keys provide access to the vehicle. However, the handover of keys does not automatically transfer custody. To determine whether there has been a transfer of custody and thus control of property, a court must consider all the circumstances, including the reason for any handover of keys. That reason is important because it distinguishes custody from mere physical holding of the vehicles, which are two distinct concepts. A holder of property does not have custody of it where the holder is able to exercise only a limited, and not a general, power over the property. Here, the trial judge's finding that the keys were handed over solely for the purpose of snow removal in the parking lot is supported by the evidence concerning the parties' intention. It was open to the judge to conclude from her analysis of the evidence heard that the hotel operator had the power to move vehicles

only when there was a build-up of snow and that this was not sufficient in itself to transfer custody of the stolen cars.

Lastly, there is no inconsistency in the findings of the trial judge, who recognized both that the hotel operator had an obligation of prudence and diligence and that the cars were not in its care, custody or control. The obligations are different in nature. The hotel operator's obligation of prudence and diligence originates in art. 2100 C.C.Q., which governs contracts for services, and attaches to its performance of services. The care, custody or control clause excludes coverage for property over which the insured exercises certain powers; it does not attach to the insured's acts. The hotel operator's obligation to take reasonable steps to secure its parking lot does not imply a sufficient transfer of control and of responsibility for the preservation of a vehicle to result in a change in legal custody.

Per Rowe J.: There is agreement with Gascon J.'s analysis and disposition. With respect to the characterization of the contract between the hotel operator and its clients, it is a question of mixed fact and law because the trial judge found it necessary to have regard to extrinsic evidence in order to ascertain the true nature of the contract. However, where having regard to extrinsic evidence is not needed, characterization remains a question of law.

Cases Cited

By Gascon J.

Referred to: *Uniprix inc. v. Gestion Gosselin et Bérubé inc.*, 2017 SCC 43, [2017] 2 S.C.R. 59; *Station Mont-Tremblant v. Banville-Joncas*, 2017 QCCA 939; *Montréal, Maine & Atlantique Canada Cie (Montreal, Maine & Atlantic Canada Co.) (MMA), Re*, 2014 QCCA 2072, 49 R.P.R. (5th) 210; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *Groupe Ledor inc., mutuelle d'assurances v. 7041730 Canada inc. (Éconolodge Aéroport (TM))*, 2014 QCCQ 2920; *Tremblay v. 4328175 Canada inc. (Marriott Fairfield Inn & Suites Montréal Aéroport)*, 2017 QCCQ 13774; *St-Jean v. Mercier*, 2002 SCC 15, [2002] 1 S.C.R. 491; *Montréal (Ville) v. Lonardi*, 2018 SCC 29; *Benhaim v. St-Germain*, 2016 SCC 48, [2016] 2 S.C.R. 352; *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, [2016] 2 S.C.R. 23; *American Home assurances inc. v. Compagnie d'assurances générales Lombard*, 2006 QCCA 112, [2006] R.R.A. 35; *Arkwright-Boston Manufacturers Insurance Co. v. Zurich Insurance Co.*, [1996] R.R.A. 923; *Guay inc. v. I.C.I. Canada inc.*, [1997] R.R.A. 717; *Guardian Insurance Co. of Canada v. Dale and Co.*, [1972] C.A. 231; *United States Fire Insurance Co. v. Bouchard et Blanchette Marine ltée*, [1990] R.R.A. 667; *Indemnity Insurance Co. of North America v. Excel Cleaning Service*, [1954] S.C.R. 169; *Atlantic Consolidated Foods Ltd. v. Barnes Security Ltd.*, [1981] C.S. 7; *9144-6765 Québec inc. v. Plante*, 2013 QCCS 1279; *Société d'assurance des caisses populaires v. Hains*, [1986] R.R.A. 644; *Garage G.T.D. inc. v. Lévesque*, [1986] R.J.Q. 466; *Groupe Commerce Compagnie d'assurances v. Service d'entretien Ribo inc.*, [1992] R.R.A. 959; *3457265 Canada inc. v. 9124-8948 Québec inc.*, 2016 QCCS 2462; *Consolidated-Bathurst Export Ltd. v. Mutual Boiler and Machinery Co.*, [1980] 1 S.C.R. 888.

By Rowe J.

Referred to: *Uniprix inc. v. Gestion Gosselin et Bérubé inc.*, 2017 SCC 43, [2017] 2 S.C.R. 59.

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Civil Code of Québec, arts. 2098, 2100.

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APPEALS from a judgment of the Quebec Court of Appeal (Chamberland, Bélanger and Hogue JJ.A.), 2016 QCCA 1903, [2016] AZ-51345275, [2016] J.Q. n° 16781 (QL), 2016 CarswellQue 11276 (WL Can.), setting aside in part a decision of Chalifour J.C.Q., 2015 QCCQ 1539, [2015] AZ-51156874, [2015] J.Q.

n° 1736 (QL), 2015 CarswellQue 1949 (WL Can.). Appeal of 3091-5177 Québec inc., c.o.b. as Éconolodge Aéroport, allowed in part. Appeal of Promutuel Insurance Portneuf-Champlain allowed.

Maurice Cantin, Q.C., and Marc Cantin, for the appellant 3091-5177 Québec inc., c.o.b. as Éconolodge Aéroport (37421).

Amélie Thériault and Ronald Silverson, for the respondent Lombard General Insurance Company of Canada (now known as Northbridge General Insurance Corporation) (37421 and 37422).

Yan Romanowski and Gabriel Romanowski, for the respondent AXA Insurance Inc. (now known as Intact Insurance Company) (37421).

Louis Dufour and Pierre Gourdeau, for the intervener (37421) and appellant (37422) Promutuel Insurance Portneuf-Champlain.

English version of the judgment of Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown and Martin JJ. delivered by

GASCON J. —

I. Overview

[1] This appeal concerns both a hotel establishment's civil liability for the theft of cars belonging to its guests and the applicability of an exclusion clause in its liability insurance policy in this situation.

[2] Éconolodge Aéroport ("Éconolodge") is a park and fly hotel located near Montréal–Pierre Elliott Trudeau International Airport. Its main purpose is to provide travellers with accommodation before they leave for the airport and upon their return from a trip. During the winters of 2005 and 2006, two of Éconolodge's guests had their cars stolen from the hotel's parking lot while they were abroad. The owners were compensated for their losses by their respective insurers, AXA Insurance Inc. (now Intact Insurance Company) ("Axa") and Promutuel Insurance Portneuf-Champlain ("Promutuel"). Since each insurer was subrogated to the rights of its insured, it brought an action against Éconolodge to recover the amount of compensation paid to its client. Promutuel also brought a direct action against Éconolodge's insurer, Lombard General Insurance Company of Canada (now Northbridge General Insurance Corporation) ("Lombard"). In the case between Éconolodge and Axa, Éconolodge itself impleaded its insurer, Lombard, in warranty.

[3] The actions concerning the two thefts were joined and were heard together in the Court of Québec. In the case between Éconolodge and Axa, the trial judge found Éconolodge liable for the theft of the car and the Court of Appeal upheld that finding. In the case between Éconolodge and Promutuel, Éconolodge's liability was accepted, since a default judgment had been rendered in that case

against the hotel operator. It should be noted that, at the times the thefts occurred, Éconolodge was owned successively by two different entities, 3091-5177 Québec inc. (theft from Axa's insured) and A.M.A. Investments inc. (theft from Promutuel's insured).

[4] The judge also held that the standard care, custody or control exclusion clause in Éconolodge's liability insurance policy did not apply in these cases, with the result that Lombard had to compensate its insured in the first case and Promutuel in the second. However, the Court of Appeal found that the judge had made a palpable and overriding error in this regard; in its view, the clause applied in the circumstances and the stolen cars were therefore excluded from Éconolodge's insurance coverage. The central point on which the courts below were divided was how the guests' handover of car keys to the hotel operator affected the determination of who had custody of the vehicles.

[5] This Court is called upon to decide two issues in this context. First, in the case involving Axa only, it must be decided whether Éconolodge is liable for the theft of the car because it did not take reasonable steps to secure its parking lot. Second, in both cases, it must be determined whether the clause in Éconolodge's insurance contract excluding coverage for property damage (loss of use or physical injury) to personal property in the care, custody or control of the insured applies on the facts.

[6] With respect, I am of the view that the Court of Appeal erred in intervening and that the judgment of the Court of Québec should be restored. I would therefore dismiss the appeal of 3091-5177 Québec inc. against Axa in the first file (37421), but I would allow its appeal in the same file against its insurer, Lombard, as well as Promutuel's appeal against the same insurer in the second file (37422).

II. Factual Background

[7] In the two cases before us, Éconolodge was owned successively in 2005 and 2006 by 3091-5177 Québec inc. (theft from Axa's insured) and A.M.A. Investments inc. (theft from Promutuel's insured). Under both of those companies, Éconolodge adopted the same promotional strategy. Capitalizing on its convenient location a few minutes from the site of the airport, the hotel invited travellers to sleep in its rooms, leave their car in its parking lot while travelling and use its shuttle service to get to the airport.

[8] Éconolodge's parking lot was located behind the hotel. It was an open, unfenced and unattended lot that was freely accessible to guests of the hotel, clients of the neighbouring office building and restaurant and others who were passing by. Éconolodge's guests kept their car keys after parking. However, during the winter, guests who left their car in the hotel's parking lot while travelling had to hand over their keys at the front desk so that their car could be moved if necessary for snow removal. They filled out a registration form to enable the hotel staff to identify their

car. The form did not indicate the date when the vehicle was expected to be picked up.

[9] On returning from a trip in January 2005, a first guest of Éconolodge discovered that his car was no longer in the parking lot. He turned to his insurance company, Axa, which compensated him for his loss. As Axa was subrogated to the rights of its insured, it sued Éconolodge (3091-5177 Québec inc.) to recover the amount of compensation it had paid. Éconolodge impleaded its insurer, Lombard, in warranty.

[10] In March 2006, a second guest of Éconolodge made the same discovery. His insurance company, Promutuel, also compensated him and became subrogated to his rights. It instituted proceedings both against Éconolodge (A.M.A. Investments inc.) and against Lombard directly.

[11] Both victims of the thefts in question had handed over their keys at the hotel's front desk before leaving. Éconolodge was not aware that their cars had been stolen from its parking lot until they informed it. The keys were, at that point, still in the same place and in the hotel operator's possession. At the time of the thefts, Éconolodge held property and liability insurance policies issued by Lombard. Two successive policies, which were identical with respect to the issues in these cases, were therefore in effect during the relevant period. Both of them contained a clause excluding liability insurance coverage for property damage to personal property in the care, custody or control of the insured.

III. Judicial History

A. *Court of Québec (2015 QCCQ 1539)*

[12] The actions brought by Axa and Promutuel were joined and were heard together by Judge Chalifour of the Court of Québec. In both cases, the quantum of damages was agreed.

[13] In the case between Éconolodge and Promutuel, Éconolodge's liability for the theft of the car was accepted, since a default judgment had been rendered against A.M.A. Investments inc. The judge found that the hotel operator was also liable for the theft of the car insured by Axa. Refusing to separate the various services offered through Éconolodge's park and fly system, the judge found the contractual relationship between Éconolodge and its guests to be a contract for services that included an obligation to look after the guests' interests with prudence and diligence. In light of its business model, the hotel operator's failure to take reasonable steps to secure its parking lot was a fault that engaged its liability.

[14] In Éconolodge's action in warranty against its insurer, Lombard, and Promutuel's direct action against Lombard, the judge found that the thefts of the guests' cars were covered by Éconolodge's liability insurance policies. In her view, the exclusion clause relied on by Lombard did not apply in these cases because Éconolodge had neither custody nor real control or care of its guests' cars. The fact that the keys had been left at the front desk so that the parking lot could be cleared of

snow did not have the effect of transferring custody of the cars to Éconolodge. The judge noted that applying the exclusion clause in such a manner would produce absurd results.

B. *Quebec Court of Appeal (2016 QCCA 1903)*

[15] Lombard filed an appeal against Éconolodge and Promutuel on the issue of the applicability of the care, custody or control exclusion clause. Éconolodge appealed the judge's finding concerning its liability for the theft of the car insured by Axa.

[16] The Court of Appeal affirmed the trial judge's judgment with respect to Éconolodge's liability. However, it came to a different conclusion on the application of the exclusion clause. In its view, the judge had made a reviewable error by failing to consider the evidence concerning the handover to the hotel operator of the keys to the stolen cars. The Court of Appeal found that possession of the keys meant that Éconolodge had custody of the cars and that the insurance coverage was therefore inapplicable. It added that the judge had been wrong to [TRANSLATION] "try to come up with a single solution applicable to every case" (para. 22 (CanLII)). The Court of Appeal stated that it would be incongruous for the hotel operator to have an obligation of prudence and diligence without having custody of its guests' vehicles.

IV. Analysis

A. *Éconolodge's Civil Liability for the Theft*

[17] To begin with, I am of the view that the courts below did not err in finding Éconolodge liable for the theft of the car insured by Axa. I note that Éconolodge's civil liability is in issue only in the case between it and Axa. The hotel operator's liability for the theft of the car insured by Promutuel is not disputed by anyone before this Court.

[18] As the Court of Appeal stated, the characterization of the contractual relationship between Éconolodge and its guests is a question of mixed fact and law (para. 17). Characterizing a contract involves determining the purpose of the contract or the essential prestation that is central to it (D. Lluelles and B. Moore, *Droit des obligations* (2nd ed. 2012), at No. 1733). However, the characterization of a contract is not a pure question of law when this determination makes it necessary, as it does here, to consider the evidence of the parties' common intention (*Uniprix inc. v. Gestion Gosselin et Bérubé inc.*, 2017 SCC 43, [2017] 2 S.C.R. 59, at para. 42; *Station Mont-Tremblant v. Banville-Joncas*, 2017 QCCA 939, at paras. 63-64 (CanLII); *Montréal, Maine & Atlantique Canada Cie (Montreal, Maine & Atlantic Canada Co.) (MMA), Re*, 2014 QCCA 2072, 49 R.P.R. (5th) 210, at para. 20). As a mixed question, the trial judge's characterization of the contract is therefore entitled to deference on appeal (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 32).

[19] In characterizing the contract, the trial judge properly considered the full range of services offered by Éconolodge. As a park and fly hotel, Éconolodge offered its guests a number of services, including accommodation, parking and a shuttle service. It is not appropriate to separate these services given that a package of services is what was considered by guests and advertised by Éconolodge. In fact, Éconolodge encouraged its guests — mainly travellers — to leave their vehicle in its parking lot while they were away. In doing so, the guests were reasonably entitled to expect that Éconolodge would look after their interests and take such security measures as were necessary in the circumstances.

[20] This holistic approach to the contract between Éconolodge and its guests is consistent with the testimony given by the owner of the car insured by Axa, the prestations provided for in the contract and the case law on park and fly hotels (*Groupe Ledor inc., mutuelle d'assurances v. 7041730 Canada inc. (Éconolodge Aéroport (TM))*, 2014 QCCQ 2920, at paras. 41-43 (CanLII); *Tremblay v. 4328175 Canada inc. (Marriott Fairfield Inn & Suites Montréal Aéroport)*, 2017 QCCQ 13774, at paras. 14-15 (CanLII)).

[21] On the basis of this analysis, the trial judge characterized the contract between Éconolodge and its guests as a contract for services within the meaning of art. 2098 of the *Civil Code of Québec* (“C.C.Q.”) (C.Q. reasons, at para. 24). Under art. 2100 C.C.Q., Éconolodge therefore had an obligation “to act in the best interests of [its] client[s], with prudence and diligence”.

[22] Both the Court of Québec and the Court of Appeal found that Éconolodge had breached its obligation of prudence and diligence by failing to take reasonable steps to secure its parking lot, unbeknownst to its guests (C.Q. reasons, at para. 30; C.A. reasons, at para. 20). The evidence before the trial judge showed that Éconolodge was not taking even minimal steps to watch over or monitor the parking lot. The judge was also of the view that the discrepancy between the guests' reasonable expectations and Éconolodge's nonchalant attitude toward the security of its parking lot was such that the hotel operator could be found to have deceived its guests.

[23] This determination of fault is a finding of mixed fact and law (*St-Jean v. Mercier*, 2002 SCC 15, [2002] 1 S.C.R. 491, at paras. 60 and 104). It is entitled to deference on appeal, since an assessment of the facts is necessary to make such a finding (*Housen*, at para. 32). In the instant case, there is no error that would justify reversing the trial judge's finding on this point.

[24] The judge further found that [TRANSLATION] “the causal connection between this fault and the damage is clear” (para. 30). Again, the determination of causation is a question of fact that is not open to review by an appellate court unless a palpable and overriding error has been made (*Montréal (Ville) v. Lonardi*, 2018 SCC 29, at para. 41; *Benhaim v. St-Germain*, 2016 SCC 48, [2016] 2 S.C.R. 352, at para. 36; *St-Jean*, at paras. 104-5). In any event, the parties are not challenging the judge's finding on this point.

[25] The Court of Appeal was therefore right to uphold Éconolodge's liability for the theft of the car insured by Axa. There are no grounds for this Court's intervention on this first issue.

B. *The Care, Custody or Control Exclusion Clause*

[26] On the second issue raised by these cases, this Court must decide whether the Court of Appeal was correct in stating that the trial judge had made a reviewable error by finding that the handover of keys did not trigger the application of the care, custody or control exclusion clause. This issue relates to Lombard's defence both to the direct action brought against it by Promutuel and to Éconolodge's action in warranty in the case between it and Axa.

[27] In this regard, Lombard argues that it does not have to compensate Éconolodge for the theft of its guests' cars because that property is excluded from its liability insurance coverage. Lombard relies on the care, custody or control exclusion clause in its insurance policies, which reads as follows:

[TRANSLATION]

This insurance does not apply to:

...

H. "Property damage" to:

...

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

(see A.R., vol. II, at pp. 123-24, and A.R., vol. III, at pp. 64-65)

[28] It is well established that the party relying on an exclusion clause in an insurance policy has the onus of proving that the clause applies on the facts of the case (*Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, [2016] 2 S.C.R. 23, at para. 52; *American Home assurances inc. v. Compagnie d'assurances générales Lombard*, 2006 QCCA 112, [2006] R.R.A. 35, at para. 23). In order to succeed, Lombard therefore had to establish that the vehicles in question were in Éconolodge's care, custody or control. In this regard, Lombard submits that custody of a vehicle is necessarily transferred by handing over the keys, which are needed to start it.

[29] In the instant cases, the applicability of the exclusion clause is the point on which the judges below were divided. The Court of Québec judge found the exclusion inapplicable because Éconolodge did not have care, custody or control of its guests' vehicles (C.Q. reasons, at paras. 39-49). The Court of Appeal was rather of the view that Éconolodge had [TRANSLATION] "a real power of preservation, safekeeping, direction and physical control over its guests' cars while they were travelling" (para. 33).

[30] As the Court of Appeal correctly stated, whether Éconolodge had custody of the vehicles is, once again, a question of mixed fact and law; the trial judge's answer to this question is entitled to deference on appeal (para. 22). While custody is a legal concept, the determination of custody is a highly factual question that [TRANSLATION] "depends on the specific circumstances of each case"

(J.-L. Baudouin, P. Deslauriers and B. Moore, *La responsabilité civile* (8th ed. 2014), at No. 1-958). The applicability of the care, custody or control clause is therefore [TRANSLATION] “largely a question of fact” (*Arkwright-Boston Manufacturers Insurance Co. v. Zurich Insurance Co.*, [1996] R.R.A. 923 (Que. C.A.), at p. 928; *Guay inc. v. I.C.I. Canada inc.*, [1997] R.R.A. 717 (Que. Sup. Ct.), at p. 727).

[31] I also note that the issue before us involves the application of the clause, not its interpretation. It is true that this Court established in *Ledcor* that the interpretation of a standard form contract is a question of law subject to correctness review where the interpretation is of precedential value and is not based on any meaningful factual matrix (para. 24). However, this principle does not apply here. There is no ambiguity in the care, custody or control clause that needs to be resolved through the interpretation process. Rather, what is in issue is the application of the clause to the facts (see *Guardian Insurance Co. of Canada v. Dale and Co.*, [1972] C.A. 231 (Que.), at p. 239). Specifically, the issue before us is whether the clause applies in a factual context in which guests handed over the keys to their vehicle at the hotel’s front desk.

[32] This being the case, I am of the view that the trial judge’s finding of mixed fact and law with regard to custody of the stolen vehicles was not open to appellate review unless a palpable and overriding error had been made. As a result, in my view, the Court of Appeal’s intervention was unwarranted, for three reasons.

[33] First, it is not accurate to say that the judge did not consider the handover of keys. On the contrary, she did consider it, but she found that, in the circumstances, it was not sufficient in itself to transfer custody of the vehicles to Éconolodge. Second, the record did not permit the Court of Appeal to review the judge's finding on the reason why the guests handed over their keys to the hotel. Third, there is no contradiction or inconsistency in law between the judge's finding that Éconolodge had an obligation of prudence and diligence and her finding that the stolen cars were not in its care, custody or control.

(1) Trial Judge's Consideration of the Handover of Keys

[34] The Court of Appeal stated that the judgment of the Court of Québec [TRANSLATION] “contains an overriding error in that it fails to take into account the specific circumstances in which the two losses occurred. The judge had to consider the evidence concerning the handover of keys by the guests . . .” (para. 22). With respect, I believe that this statement does not do justice to the judge's reasons. She specifically considered the handover of keys at paras. 38 and 39 of her judgment:

[TRANSLATION] Counsel for Lombard argues that the handover of keys during the winter months is fatal to the insured; the exclusion then becomes applicable. Had the theft occurred in the summer, Lombard could not have relied on the exclusion. The Court cannot accept this argument; it might lead to absurd results, depending on the situation.

In the cases at bar, the hotel does not have a “*real power of preservation, safekeeping, direction and physical control*” over its guests' cars. The hotel operator's duties do not change simply because the keys to vehicles are left on site during the winter in case the parking lot needs to be cleared of snow. [Emphasis in original.]

[35] Based on these paragraphs, it cannot be said that the judge failed to consider the handover of keys by the hotel's guests. She considered it, but she found that it was insufficient in itself to transfer custody of the car to Éconolodge in the circumstances. In my view, the judge did not make a palpable and overriding error on this point, and her finding on the limited effect of the handover of keys was firmly based on an assessment of all of the evidence. Essentially, the Court of Appeal criticized her for coming to a different conclusion than it did on the transfer of custody of the vehicles because of the limited effect she attributed to the handover of keys. With respect, this did not justify appellate intervention.

[36] The clause at issue here excludes liability insurance coverage for personal property that is in the care, custody or control of the insured. Its purpose is to prevent liability coverage from being transformed into property coverage (here, for the property of another). Since liability insurance is not intended to cover the risk of loss of the insured's property, it is equally not intended to cover the risk of loss of property of which the insured assumes custody. An insurer does not want to cover a risk that is unrelated to the purpose for which coverage is purchased, since it is unable to assess the value of the property entrusted to the insured and to set premiums that reflect the risk of its loss (*United States Fire Insurance Co. v. Bouchard et Blanchette Marine Itée*, [1990] R.R.A. 667 (Que. C.A.), at pp. 671-72). In short, the exclusion attaches to certain property, not to the acts of the insured (Baudouin, Deslauriers and Moore, at No. 2-533; C. Massé, "L'exclusion des biens sous les 'soin, garde et contrôle' de l'assuré: où en sommes-nous?", in *Barreau du Québec*, vol. 243,

Développements récents en droit des assurances (2006), at p. 127; *Bouchard et Blanchette Marine*, at p. 671; *Guay*, at p. 727).

[37] While the clause in the instant cases is clear and does not need to be interpreted, it is helpful to consider the meaning given by the authorities to the words used in the original French: “*garde*” (custody), “*direction*” (direction) and “*gestion*” (management). It is not a matter of determining the nature of these concepts, which is already well established. Rather, this exercise offers guidance in assessing whether the particular facts of these cases show that these concepts apply here (see *Guardian Insurance*, at p. 239).

[38] The authorities indicate that “*garde*” (custody) and “*pouvoir de direction ou de gestion*” (power of direction or management) are related concepts pertaining to control over property. According to Professor Karim, [TRANSLATION] “the custodian of a thing is the person that exercises a power of supervision, control or direction” (V. Karim, *Les obligations* (4th ed. 2015), vol. 1, at para. 3109). Baudouin, Deslauriers and Moore state that [TRANSLATION] “custody is assessed directly by reference to the power of control, supervision and direction over the property” and that the “power of direction and management must . . . enable the insured to prevent the damage that may be caused to the property . . .” (at Nos. 1-970 and 2-533, respectively). Chantale Massé notes that the concept of [TRANSLATION] “power of direction or management” has guided the courts in determining when a person has custody of property (Massé, at p. 126).

[39] In *Indemnity Insurance Co. of North America v. Excel Cleaning Service*, [1954] S.C.R. 169,¹ this Court interpreted the clause at issue here — the French version of which used the words “*soin, garde et contrôle*” (care, custody and control) at the time — as requiring that control and responsibility for the preservation of the property be transferred sufficiently to change legal custody of the property (pp. 174-75, per Rand J., and 179, per Estey J.; see also Baudouin, Deslauriers and Moore, who note at No. 2-533 that while the French wording of this standard clause has changed somewhat over the years, its logic has remained the same). In *Arkwright*, the Quebec Court of Appeal determined that this clause [TRANSLATION] “will apply only if the insured exercises a real power of preservation, safekeeping, direction and physical control over the property” (p. 927). This is the same language used by the courts below in the instant cases (C.Q. reasons, at para. 39; C.A. reasons, at para. 33). In *Guay*, the Superior Court similarly found that [TRANSLATION] “[c]ustody is . . . in a broad sense, the relationship between the person responsible and the object, a relationship based on a power of supervision, control and direction that enables the former to prevent the damage that may be caused to the latter” (p. 726).

[40] Here, there is no doubt that the handover of keys is a relevant fact in determining custody of the property, since the keys provide access to the vehicle (see *Atlantic Consolidated Foods Ltd. v. Barnes Security Ltd.*, [1981] C.S. 7 (Que.), at pp. 10-11). Nevertheless, I cannot accept Lombard’s argument that custody is transferred automatically when the keys to a vehicle are handed over. Such an

¹ *Excel Cleaning* is a common law case. However, the principles laid down in that case have been reiterated by the Quebec courts on many occasions: see, for example, *American Home*, at para. 29; *Arkwright*, at pp. 926-27; *Guardian Insurance*, at p. 240.

absolute rule is inconsistent with the highly contextual nature of the determination of custody and with the principles developed in the case law. For example, in *9144-6765 Québec inc. v. Plante*, 2013 QCCS 1279, the Superior Court held that custody of a boat had not been transferred despite the handover of keys because the delegated power over the boat was too limited in time (para. 55 (CanLII)). In *Société d'assurance des caisses populaires v. Hains*, [1986] R.R.A. 644 (Que. C.A.), and *Garage G.T.D. inc. v. Lévesque*, [1986] R.J.Q. 466 (Sup. Ct.), the Court of Appeal and the Superior Court both found that custody of immovable property had not been transferred despite the handover of keys because the keys had been handed over solely to provide access and to accommodate the insured.

[41] To determine whether there has been a transfer of custody and thus control of property, a court must consider all the circumstances, including the reason for any handover of keys. This is precisely what the trial judge did in the instant cases. This brings me to the second error in the Court of Appeal's intervention.

(2) Reason for the Handover of Keys

[42] The Court of Appeal found that, when guests hand over their car keys at the front desk, Éconolodge [TRANSLATION] "is then responsible for looking after the vehicles, not only when there is a build-up of snow, but also if anything at all occurs that may affect them while they are parked in its lot" (C.A. reasons, at para. 33; see also para. 23). However, in writing this, the Court of Appeal unjustifiably overturned the trial judge's finding of fact that the keys were handed over solely for the purpose

of snow removal in the parking lot (C.Q. reasons, at paras. 15 and 39). With all due respect for the appellate judges, I am of the view that this intervention was unwarranted.

[43] The reason the guests handed over their keys is important because it distinguishes custody from mere physical holding of the vehicles. Of course, both custody and physical holding imply that there is some power to control property. They are nonetheless two distinct concepts. A holder of property does not have custody of it where the holder is able to exercise only a limited, and not a general, power over the property (Baudouin, Deslauriers and Moore, at No. 1-962).

[44] Where a contractual relationship exists, as in the instant cases, [TRANSLATION] “reference must be made to the obligational content of the agreement to determine whether custody has been transferred” (Baudouin, Deslauriers and Moore, at No. 1-964). For example, in *Excel Cleaning*, Estey J. noted that the owner of the property had given the service provider permission to deal with the property only to the extent necessary to perform the service. Because of the nature of the service in question, that limited permission was not sufficient to transfer custody of the property. Thus, mere permission to handle a rug in order to clean it did not give rise to an obligation to keep it intact and to preserve it generally (p. 179).

[45] Here, the trial judge’s finding that the keys were handed over solely for the purpose of snow removal in the parking lot is supported by the evidence concerning the parties’ intention, particularly the testimony given by the owner of one

of the stolen cars and by the first owner of the hotel. Moreover, the fact that Éconolodge required keys to be handed over only during the winter by guests who left their car in the hotel parking lot while they were away supports the finding that the handover of keys gave the hotel operator only a limited, clearly circumscribed power. It was therefore open to the judge to conclude from her analysis of the evidence heard that Éconolodge had the power to move vehicles only when there was a build-up of snow and that this was not sufficient in itself to transfer custody of the stolen cars. Contrary to what Lombard argues, the handover of keys does not automatically transfer custody regardless of the circumstances.

[46] With respect, the Court of Appeal's statement that the handover of keys could serve other purposes was not based on the facts in evidence, let alone on an improper assessment of that evidence by the trial judge that could be characterized as a palpable and overriding error.

(3) Distinction Between Custody and an Obligation of Prudence and Diligence

[47] Lastly, I am of the view that the Court of Appeal erred in suggesting that there was an inconsistency in the findings of the trial judge, who recognized both that Éconolodge had an obligation of prudence and diligence and that the cars were not in its care, custody or control (C.A. reasons, at paras. 3 and 33).

[48] In *Arkwright*, the Quebec Court of Appeal specifically rejected the idea of equating a contractor's obligation of prudence with a power of direction or management under a care, custody and control exclusion clause in a liability insurance policy:

[TRANSLATION] . . . I understand that the [care, custody and control] exclusion will apply only where the insured exercises a real power of preservation, safekeeping, direction and physical control over the property and does not merely have a duty of prudence or care in carrying out an activity in respect of the property. [Emphasis added; p. 927]

[49] The obligations are indeed different in nature. Éconolodge's obligation of prudence and diligence originates in art. 2100 *C.C.Q.*, which governs contracts for services. It therefore attaches to the performance of *services* by the hotel operator. But as I have stated, unlike the obligations in art. 2100 *C.C.Q.*, the care, custody or control clause excludes coverage for *property* over which the insured exercises certain powers; it does not attach to the insured's *acts*. The fact that the insured breached its duty of prudence and diligence in performing a service does not mean that it necessarily had legal custody of the property in question; it must still be found that the insured had control over the property and an obligation to preserve it.

[50] In *Excel Cleaning*, Rand J. emphasized the distinction between an obligation that exists in performing a service and the powers granted in relation to property: "Clearly custody [of the property] was not transferred; the only care called for was in the execution of the service, not toward the property as such; and no control [over the property in question], in a proprietary sense, was intended" (p. 175).

More recently, the Quebec Court of Appeal reiterated this admonition against confusing the insured's obligations relating to the manner of providing a service with the insured's obligations toward the property (*American Home*, at paras. 27-29). In these two decisions, the courts were specifically considering the application of the exclusion clause at issue here.

[51] In her judgment, the trial judge properly distinguished Éconolodge's obligation of prudence and diligence from custody of the cars. The hotel operator's obligation to take reasonable steps to secure its parking lot — such as monitoring the lot or putting up fences, cameras or concrete blocks — did not *ipso facto* lead to a change in custody of the vehicles left in the lot. There was no inconsistency in the judge's findings in this regard. Éconolodge could very well have been merely holding a vehicle physically and been subject to an obligation of prudence and diligence in performing a service. In itself, this obligation does not imply a sufficient transfer of control and of responsibility for the preservation of the vehicle to result in a change in legal custody.

[52] I therefore conclude that the trial judge's judgment contained no error warranting appellate intervention as regards Éconolodge's liability insurance coverage. My conclusion is also supported by two additional considerations.

[53] First, the care, custody or control exclusion clause should not be applied in such a way that the coverage offered by the insurer becomes ineffective (Baudouin, Deslauriers and Moore, at No. 2-533; J.-G. Bergeron, *Les contrats d'assurance*

(terrestre): *lignes et entre-lignes* (1989), t. 1, at p. 237). The courts have therefore been reluctant to exclude coverage for the main activities engaged in by an insured (*Excel Cleaning*, at p. 179, per Estey J.; *Groupe Commerce Compagnie d'assurances v. Service d'entretien Ribo inc.*, [1992] R.R.A. 959, at p. 964 (Que. C.A.); *3457265 Canada inc. v. 9124-8948 Québec inc.*, 2016 QCCS 2462, at paras. 37-38 (CanLII); *Atlantic Consolidated*, at p. 11). This approach helps to maintain some balance between the coverage taken out by an insured and the exclusions in the policy (*3457265 Canada inc.*, at para. 35) and promotes a sensible commercial result in accordance with *Consolidated-Bathurst Export Ltd. v. Mutual Boiler and Machinery Insurance Co.*, [1980] 1 S.C.R. 888, at pp. 901-2; see also D. Lluelles, *Droit des assurances terrestres* (6th ed. 2017), at Nos. 130, 133 and 157.

[54] In this regard, I note that one rationale for the care, custody or control 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 who agrees to store items that belong to third parties and have nothing to do with the kind of commercial activities engaged in by the insured and known to the insurer” (*Bouchard et Blanchette*, at p. 671). In the instant cases, however, parking was a key component of the package of services offered by Éconolodge as a park and fly hotel. Excluding liability for its guests’ cars from its insurance coverage would have undercut the usefulness of the coverage for one of its main activities. The trial judge found that Lombard was well aware of Éconolodge’s business model and had chosen to insure it with full knowledge of the situation (C.Q. reasons, at

paras. 43-48). As the judge put it, [TRANSLATION] “Lombard is not taken by surprise by the claims in issue” (para. 48).

[55] Second, I agree with the trial judge that Lombard’s argument leads to results that are incongruous, if not absurd. In the Court of Québec, Lombard’s senior analyst conceded that the exclusion clause was inapplicable in the summer, since Éconolodge did not have the keys to parked vehicles in its possession during that time. In short, in the same year of coverage, the applicability of the exclusion clause would depend on the season or even on the amount of precipitation. Moreover, if we follow Lombard’s line of reasoning, the insurance policy would cover the theft of a car during the winter if its owner remained at the hotel, but not the contemporaneous theft of the car next to it whose owner went abroad and handed over the keys at the front desk in case the parking lot needed to be cleared of snow. The purpose of highlighting the absurdity of this situation is not to [TRANSLATION] “come up with a single solution applicable to every case”, as the Court of Appeal suggested (para. 22). Rather, it is to emphasize the importance of considering all the relevant facts and not presumptively giving decisive weight to a particular fact without factoring in all the relevant circumstances.

V. Conclusion

[56] The finding by the courts below that Éconolodge is liable for the theft of the car insured by Axa does not warrant any intervention by this Court. I would

therefore dismiss the appeal of 3091-5177 Québec inc. against Axa in file 37421, with costs.

[57] However, the trial judge did not make any palpable and overriding error that is reviewable on appeal in finding that the keys were handed over solely for the purpose of snow removal in the parking lot and that this was insufficient to transfer custody and control to Éconolodge. Since the exclusion clause in Éconolodge's liability insurance policy is therefore inapplicable on the facts, I would allow the appeal of 3091-5177 Québec inc. against Lombard in file 37421 as well as Promutuel's appeal against the same insurer in file 37422, with costs throughout. I would thus restore the trial judge's decision ordering Lombard to pay damages, interest and the additional indemnity to 3091-5177 Québec inc. and Promutuel.

[58] I note in closing that the parties have agreed on terms for the payment by Lombard of Éconolodge's extrajudicial defence costs for the proceedings in the Court of Appeal and this Court. It is therefore unnecessary for me to deal with this aspect of the case.

The following are the reasons delivered by

ROWE J. —

[59] I agree with my colleague Justice Gascon in his analysis and in the result. I would add only the following regarding the jurisprudence relating to contract characterization. My colleague states (at para. 18) that characterization of the contract between Éconolodge and its clients is a question of mixed fact and law. As the trial judge found it necessary to have regard to extrinsic evidence in order to ascertain the true nature of the contract (2015 QCCQ 1539, at paras. 17-24 (CanLII)), I would agree that, in this case, characterization is a mixed question. By contrast, where having regard to extrinsic evidence is not needed, characterization remains a question of law: *Uniprix inc. v. Gestion Gosselin et Bérubé inc.*, 2017 SCC 43, [2017] 2 S.C.R. 59, at para. 42.

Appeal of 3091-5177 Québec inc., c.o.b. as Éconolodge Aéroport, allowed in part. Appeal of Promutuel Insurance Portneuf-Champlain allowed.

Solicitors for the appellant 3091-5177 Québec inc., c.o.b. as Éconolodge Aéroport (37421): Martel, Cantin, Montréal.

Solicitors for the respondent Lombard General Insurance Company of Canada (now known as Northbridge General Insurance Corporation) (37421 and 37422): Gasco Goodhue St-Germain, Montréal.

Solicitors for the respondent AXA Insurance Inc. (now known as Intact Insurance Company) (37421): Romanowski & Associés, Île-des-Sœurs, Quebec.

Solicitors for the intervener (37421) and appellant (37422) Promutuel Insurance Portneuf-Champlain: Carter Gourdeau, Québec.