

Legal update

Supreme Court of Canada will look into interpretation of an insurance contract's care, custody or control exclusion clause under Quebec law

May 2017 Insurance

On May 18, the Supreme Court of Canada granted an application for leave to appeal a dispute between Lombard General Insurance Company of Canada (Lombard), and Promutuel Insurance Portneuf-Champlain, AXA Insurance inc. (AXA) and 3091-5177 Québec inc. c.o.b. as Econo Lodge Aéroport (Econo Lodge). It is uncommon for the country's highest court to agree to hear appeals in a Quebec commercial litigation file, which makes the recent grant of interest for all players in the province's insurance industry.

Facts

In January 2005, Econo Lodge operated a hotel near Pierre Elliott Trudeau airport. Econo Lodge offered a "park and fly" service, which included lodging, breakfast, parking and a shuttle service to the airport. Econo Lodge had liability insurance coverage with Lombard. In January 2005, a client of Econo Lodge discovered his vehicle had disappeared during his trip. He filed a claim with his insurer AXA, and AXA reimbursed him. In March 2006, a second client suffered a similar fate. Promutuel, his insurer, reimbursed him as well. Subrogated to the rights of their respective insureds, AXA and Promutuel filed a suit against Econo Lodge and impleaded Lombard as a third-party defendant. Lombard refused to defend and indemnify Econo Lodge, or indemnify Promutuel and AXA, raising in defence a clause that excludes damages caused to third parties' property under Econo Lodge's care, custody or control.

Justice Chalifour from the Court of Quebec held that Econo Lodge was at fault and liable for the damages. Nevertheless, she rejected the application of the exclusion clause and ordered Lombard to indemnify the insured, Econo Lodge, as well as Promutuel and AXA. Econo Lodge and Lombard appealed the court's decision.

Quebec Court of Appeal's decision

Negligence

Quebec Court of Appeal Justices Chamberland, Bélanger and Hogue agreed with Justice Chalifour on the nature of the contract binding Econo Lodge to its clients: it was a contract for services as defined in article 2098 C.C.Q. In accordance with article 2100 C.C.Q., Econo Lodge had to act "in the best interests" of its clients. The court found Econo Lodge was at fault for misrepresenting to its clients that it had security and surveillance measures in place, which were not in place in actuality. Econo Lodge then turned to Lombard, its insurer.

Exclusion Clause

The insurance community has progressively adopted exclusion clauses for particular property under the care, custody or control of the insured.¹ In doing so, insurers sought to protect themselves from claims relating to property and activities of the insured that were unrelated to the particular commercial activities known by the insurers.²

In its analysis, the Court of Appeal first assessed the wording of the clause to evaluate the scope of the exclusion.³ In this particular case, the clause provided for two situations: (1) when the insured had legal care of the property in question, and (2) when the insured had custody or control over the property.

The court, citing its own decision in *United States Fire Insurance v Bouchard et Blanchette Marine Itée*,⁴ reaffirmed that an exclusion clause relating to the care, custody or control of property only concerns the property itself. A court should therefore disregard the insured's conduct relating to said property and any damage derived from it.⁵ The court drew three lessons from case law: (1) the insurer must prove the insured has assumed responsibility in respect to preservation, safekeeping, protection, direction or domination over the property; (2) the court should not interpret the insurance contract in such a way that renders it inoperative; and (3) applying an exclusion clause is predominantly a question of fact.⁶

The Court of Appeal held that Justice Chalifour erred in rejecting the application of the exclusion clause. In her interpretation, Justice Chalifour failed to consider key facts, namely, that the aforementioned losses occurred in the winter and the clients had given their vehicle's keys to Econo Lodge during their trip. From these facts, the court concluded that Econo Lodge was responsible for clearing the snow from the vehicles and would be liable for any incident that occurred to the vehicles while parked on its grounds. The court held that Econo Lodge had assumed responsibility for safekeeping, direction and control over the vehicles. Lombard rightly raised the exclusion clause's application.

At times, there is a fine line between applying or not applying an exclusion clause involving the care, custody or control of property. It will be interesting to see how the Supreme Court interprets the case at hand. We will follow the matter closely.

Charles A. Foucreault

Footnotes

- ¹ André Legrand and Josée Noiseux, "La portée et les limites de l'assurance" in Olivier F. Kott et Claudine Roy, dir, *La construction au Québec : perspectives juridiques*, Montreal, Wilson & Lafleur, 1998, 687 at p 735.
- ² *United States Fire Insurance v Bouchard et Blanchette Marine Itée*, J.E. 90-850, 1990 CanLII 3674 (QCCA) at p 671.
- ³ André Legrand and Josée Noiseux, "La portée et les limites de l'assurance" in Olivier F. Kott et Claudine Roy, dir, *La construction au Québec : perspectives juridiques*, Montreal, Wilson & Lafleur, 1998, 687 at p 734.
- ⁴ *United States Fire Insurance v Bouchard et Blanchette Marine Itée*, J.E. 90-850, 1990 CanLII 3674 (QCCA)
- ⁵ *Ibid.*
- ⁶ *Arkwright-Boston Manufacturers Ins. Co. v Zurich Insurance Co.*, J.E. 96-1754, 1996 CanLII 5778 (QC CA); *American Home assurances inc. v Compagnie d'assurances générales Lombard*, 2006 QCCA 112; *Indemnity Insurance v Excel Cleaning Service*, [1954] S.C.R. 169 at pp 178-180; *Guardian Insurance Company of Canada v Dale and Company Limited*, 1972 QCCA 213.

For further information, please contact one of the following lawyers:

> Charles A. Foucreault	Montréal	+1 514.847.6072	charles.foucreault@nortonrosefulbright.com
> André Legrand	Montréal	+1 514.847.4412	andre.legrand@nortonrosefulbright.com
> Sally A. Gomery	Ottawa	+1 613.780.8604	sally.gomery@nortonrosefulbright.com
> Éric Hardy	Québec	+1 418.640.5022	eric.hardy@nortonrosefulbright.com
> Randy C. Sutton	Toronto	+1 416.216.4046	randy.sutton@nortonrosefulbright.com

Norton Rose Fulbright Canada LLP, Norton Rose Fulbright LLP, Norton Rose Fulbright Australia, Norton Rose Fulbright South Africa Inc and Norton Rose Fulbright US LLP are separate legal entities and all of them are members of Norton Rose Fulbright Verein, a Swiss Verein. Norton Rose Fulbright Verein helps coordinate the activities of the members but does not itself provide legal services to clients.

References to "Norton Rose Fulbright", "the law firm", and "legal practice" are to one or more of the Norton Rose Fulbright members or to one of their respective affiliates (together "Norton Rose Fulbright entity/entities"). No individual who is a member, partner, shareholder, director, employee or consultant of, in or to any Norton Rose Fulbright entity (whether or not such individual is described as a "partner") accepts or assumes responsibility, or has any liability, to any person in respect of this communication. Any reference to a partner or director is to a member, employee or consultant with equivalent standing and qualifications of the relevant Norton Rose Fulbright entity.

The purpose of this communication is to provide general information of a legal nature. It does not contain a full analysis of the law nor does it constitute an opinion of any Norton Rose Fulbright entity on the points of law discussed. You must take specific legal advice on any particular matter which concerns you. If you require any advice or further information, please speak to your usual contact at Norton Rose Fulbright.