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Party Paper:
The Effect of Suspension of Insurance
Coverage under the *Emergencies Act*

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Submitting Party: Insurance Bureau of Canada

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Party Paper: The Effect of Suspension of Insurance Coverage under the *Emergencies Act*

Introduction

The Insurance Bureau of Canada (IBC) was formed in 1964 and is the national trade association for Canada’s private (non-government) property and casualty insurers. Since its formation, IBC has been the principal voice of private property and casualty insurance companies in Canada, acting as a liaison between insurers and the federal, provincial and municipal governments, consumer groups and the media. IBC’s member companies account for approximately 90% of the private automobile, home, and business insurance written in Canada.

On February 14, 2022, the Canadian government invoked the *Emergencies Act*, RSC, 1985, c. 22 (4th Supp.) (the “Act”), in response to the “Freedom Convoy” protests. By invoking the Act, the Canadian government declared a public order emergency, and subsequently issued the *Emergency Economic Measures Order* which, among other things, required insurers to cease providing insurance coverage for any vehicle involved in the Freedom Convoy.

This paper will provide a cursory overview of the insurance regime in Canada, and will discuss the public policy justifications that underpin insurance law in Canada. This paper will also discuss the practical difficulties relating to the federal government’s invocation of the *Emergencies Act*, and will provide recommendations intended to support the Commission’s enquiry as it fulfils its mandate to conduct a policy review of the legislative and regulatory framework at issue.

Automobile Insurance in Canada: An Overview

While federal, provincial, and territorial governments all have jurisdiction to legislate in the field of insurance to some extent, these orders of government govern different “spheres” of regulation. The federal government’s authority is limited to matters of federal incorporation and solvency,¹ while provinces and territories have exclusive authority to “legislate with respect to insurance contracts and the market conduct operations of the insurance industry” within the province, as it relates to non-marine insurance.² This exclusive authority is granted to the provinces by s.92(13) of the *Constitution Act, 1982*, which grants exclusive jurisdiction over “property and civil rights”.³ It is settled law that property and casualty insurance falls within this area of jurisdiction.⁴ In some provinces, certain automobile insurance products are provided exclusively by a provincial government body,⁵ while other provinces allow private insurance companies to provide all forms of automobile insurance.⁶ Regardless of the method by which

¹ Denis Boivin, *Insurance Law*, 2nd ed (Toronto: Irwin Law Inc., 2015) at 59 [Boivin].

² Barbara Billingsley, *General Principles of Canadian Insurance Law*, 3rd ed (Toronto: LexisNexis Canada Inc., 2020) at 6 [Billingsley].

³ *Constitution Act, 1982*, being Schedule B to the *Canada Act 182* (UK), 1982, c 11 at s.92(13).

⁴ *Citizens Insurance Co. of Canada v Parsons*, [1881] UKPC 49

⁵ British Columbia, Manitoba, Saskatchewan, Quebec

⁶ Ontario, Alberta, Newfoundland, New Brunswick, Nova Scotia, P.E.I.

insurance is provided, automobile insurance is mandatory in every province and territory in Canada.⁷

Automobile insurance in Canada consists of 3 elements: third party liability coverage, no fault injury benefits, and coverage for loss or damage to a vehicle (property damage). While no fault benefits and property damage coverage are intended to protect a policyholder/insured(s) under the insurance contract, third party liability coverage is also intended to protect those who have been injured or have suffered a loss as a result of the fault of an insured person. These “third-parties” are so named because they are not a party to the insurance contract, and therefore have no privity of contract, and yet they benefit from the coverage provided for in the insurance contract.

The insurance contract is no ordinary contract. While it contains elements of an ordinary contract, such as consideration in the form of an insurance premium or an undertaking to indemnify, it is also subject to many principles that are unique to insurance law. These principles include the duty of utmost good faith, which is a mutual duty that imposes obligations on both the insured and the insurer, as well as the principle that insurance is to be treated as a form of consumer protection. The impact of these principles will be discussed further below. The uniqueness of the insurance contract is especially clear in the context of auto insurance liability. In this context, the relationship between insurers and insureds is not a strictly contractual relationship, but a relationship grounded in a regulatory framework that has been imposed on the parties.⁸

The Public Nature of Automobile Insurance: Compensation for Injured Parties

As noted above, the insurance contract does not merely benefit the policyholder or insureds. It is commonly understood that automobile insurance, at its most fundamental, is a social protection mechanism which spreads the risk of financial loss amongst multiple participants (policyholders).^{9, 10} As such, the insurance contract protects even those who are not a party to the contract, and those who do not have insurance coverage themselves. The public nature of insurance is only fulfilled when parties are compensated after suffering a loss. In order to ensure that this public function is achieved, insurance (and especially automobile insurance) is heavily regulated at the provincial and territorial level (with significant variation in the various provincial and territorial frameworks); this results in legislative provisions that allow an injured person to

⁷ See, for example, *Compulsory Automobile Insurance Act*, RSO 1990, c. C.25.

⁸ Boivin, *supra* note 1 at 7.

⁹ Billingsley, *supra* note 2 at 1.

¹⁰ The International Association for the Study of Insurance Economics, “The Social and Economic Value of Insurance” (2012).

pursue a claim, not only against a tortfeasor, but also against the insurer of the tortfeasor directly.¹¹

The public nature of automobile insurance across Canada means that it is not just a shield for a policyholder, but also a sword that gives injured parties access to a reliable compensation fund.¹² This is especially true for liability insurance, which exists for the benefit of society, and not just for the insured. This is clear when considering that third-party claims may succeed even despite a contractual default by the policyholder, such as a late payment of premiums.^{13,14} In fact, legislation has also determined that, even in the case of criminal conduct by an insured, a third-party may still have recourse to seek compensation.¹⁵ Professor Denis Boivin described the important function of third-party liability insurance as follows:

“Third-party claimants are the very essence of liability insurance. Coverage exists because of them, and they are most impacted by the absence of coverage. When an insurer refuses to defend an insured, or refuses to pay a judgment rendered against him, the real loser is not the contracting party. Unless the insured is wealthy, he would not have faced a civil action but for the existence of liability insurance. The real loser is the claimant. For injured parties, liability insurance is often the only source of reasonably accessible compensation.”¹⁶

The importance of third-party liability coverage in the protection of innocent victims is also reflected in legislative enactments such as the statutory requirement for auto insurance in all provinces¹⁷ and statutory minimums in insurance coverage.¹⁸

Claims Administration and Underwriting of Insurance Policies: Consequences on Innocent Third-Parties

In light of the public nature of automobile insurance, it is clear that the suspension of automobile insurance coverage as a result of the behaviour of an insured will have consequences, not only to the insureds themselves, but also on innocent third-parties who would have benefited from the existence of insurance coverage.

The clearest example of innocent third parties that will bear the consequences of suspended insurance coverage can be found in the residents of Ottawa themselves, especially those

¹¹ Craig Brown, *Introduction to Canadian Insurance Law*, 4th ed (Toronto: LexisNexis Inc., 2018) at 6 [Brown].

¹² Boivin, *supra* note 1 at 44.

¹³ Brown, *supra* note 11 at 6.

¹⁴ *Insurance Act*, RSO 1990, c. I. 8 at s.258.

¹⁵ Boivin, *supra* note 1 at 336.

¹⁶ Boivin, *supra* note 1 at 45.

¹⁷ See, for example, *Compulsory Automobile Insurance Act*, RSO 1990, c. C.25.

¹⁸ See, for example, *Insurance Act*, RSO 1990, c. I. 8 at s.251.

residents and businesses involved in the class action lawsuit currently being pursued against the Freedom Convoy organizers and members. It is clear from the testimony given during the Commission hearing that residents and businesses in Ottawa may well be pursuing claims for pain and suffering, as well as a loss of income. The extent of these claims cannot yet be quantified, and may not be known until at least February 2024, after which time such claims will be barred by the expiry of the statutory limitation period. The *Emergency Economic Measures Order* could raise complex factual and legal determinations as to whether or not insurance coverage will be available to respond to these alleged losses.

Implementation and Operational Issues Arising from the Order and Regulations

In addition to the public policy concerns relating to injured parties and innocent victims, consideration should also be given to the practical difficulties of the emergency order, as it relates to the rule of law.

The *Emergency Economic Measures Order*¹⁹ imposed various duties on insurers, including duties to suspend the insurance policies of vehicles being used in a public assembly, to cease providing any further insurance policies whatsoever (automobile insurance or otherwise) to “designated persons”, and to cease making any payments whatsoever (in respect of insurance claims or otherwise) to “designated persons”.

Insurers were faced with practical obstacles in applying the Emergency Order. Namely, the identification of “designated persons” and vehicles involved in the “Freedom Convoy” fell to insurers. In identifying these vehicles, reference may be made to s.2(1) of the *Emergency Measures Regulations*, which defines a “public assembly” as an assembly that “may reasonably be expected to lead to a breach of the peace” by disrupting the movement of persons or goods, seriously interfering with trade, interfering with the functioning of critical infrastructure, or support the threat or use of acts of serious violence, while in identifying these persons, reference may be made to s.1 of the *Regulations*, defining them as “any individual or entity that is engaged, directly or indirectly, in an activity prohibited by” the *Regulations*; these definitions are notably broad and perhaps, in practical application, indeterminate.²⁰ As noted by several members of the police forces who testified during the hearing in this matter, identifying the vehicles that were involved in the “Freedom Convoy” was no easy feat, and the City of Ottawa itself hesitated to issue tickets to vehicles as it was unclear which vehicles were and were not actually part of the “Freedom Convoy”, and the task of identifying designated persons was similarly no easy feat.

¹⁹ *Emergency Economic Measures Order* (SOR/2022-22)

²⁰ *Ibid* at s.1, 2(1) and 2(2).

Use of Insurance as a Tool for Law Enforcement

Pronouncing on the permissibility of property and casualty insurance policies in order to address public order emergencies is both unnecessary and ineffective in light of the existing measures that exist to deter the exploitation of those insurance contracts.

The integrity of insurance funds are protected by the principle of fortuity – that the losses covered occur randomly, and do not arise as a result of the deliberate actions of a claimant.²¹ Insurance contracts are built to not respond to non-fortuitous losses by denying such claims on the basis of the terms of the insurance contract and legislative provisions. This principle ensures that only a tortfeasor that deliberately intended to take advantage of the insurance contract is not able to do so.

Insurance contracts are also founded on the principle of indemnity – coverage of a loss is intended to put the claimant back in the position that they were prior to the loss, and not to pay any more or any less than the loss actually sustained.²² Unlike other financial services, a claimant cannot profit from an insurance contract.

Insurance contracts also benefit from the principle of criminal forfeiture. This allows insurance companies to void any contractual obligations to a policyholder who has engaged in criminal activity for the purpose of taking advantage of the insurance contract. Here, as well, legislatures and the courts have expressly drawn limits to the extent of the criminal forfeiture rule. The rule cannot be relied upon if the insured did not intend to cause loss or damage, for example.²³ The rule also cannot be relied upon to deny entirely payment of insurance proceeds to innocent third-parties.^{24, 25} As such, even where payment of insurance proceeds is prohibited by public policy concerns (for example, where completion of the insurance contract would violate social or moral values, such as where the policyholders have been found to be engaged in criminal activity), the Supreme Court of Canada has been clear that this does not prevent payment of insurance proceeds to innocent third-parties who did not participate in and who did not benefit from the criminal acts.²⁶

To use insurance contracts alongside other financial services as a method of law enforcement is especially ineffective considering the differences between insurance contracts and other financial services. The property and casualty insurance industry, while providing a financial service, differs significantly from other financial service providers, such as banks and life insurers. Unlike banks and life insurers, property and casualty insurers are not in the business of financial intermediation. Instead, as mentioned above, they are solely in the business of intermediating

²¹ Brown, *supra* note 11 at 5.

²² Brown, *supra* note 11 at 4.

²³ Billingsley, *supra* note 2 at 178.

²⁴ Billingsley, *supra* note 2 at 173.

²⁵ Billingsley, *supra* note 2 at 179-180.

²⁶ Billingsley, *supra* note 2 at 173.

risk, and take on a great deal of risk themselves in order to fulfil this function.²⁷ Their purpose is not to make funds and assets available to insureds at will, but rather to indemnify claimants for losses suffered. This distinction is especially clear when considering the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, SC 2000, c. 17 (“the PC Act”), which does not apply to property and casualty insurers. Under the PC Act, property and casualty insurers are not required to report to FINTRAC, as a result of the comparatively low risk of property and casualty insurers being utilized as part of a money laundering scheme. In addition, mutual dependency, or the reciprocal duty of utmost good faith that exists in an insurance contract, distinguishes insurance contracts from other commercial transactions.²⁸ Both in the formation and the performance of the insurance contract, the parties to the insurance contract depend on each other to meet a minimum standard of behaviour.²⁹

Recommendations

In light of the above, we would recommend that the Commission consider the following:

1. Recognize a distinction between P&C insurance and other financial services, especially with respect to addressing public order emergencies;
2. The public policy underlying automobile insurance, particularly as it relates to compensation for innocent third-parties; and
3. The public policy underlying general liability insurance as it relates to compensation for innocent third-parties.

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²⁷ Coopers & Lybrand, “The Property/Casualty Insurance Industry”, Task Force on the Future of the Canadian Financial Services Sector (1998), online: (<https://publications.gc.ca/collections/Collection/F21-6-1998-15E.pdf>)

²⁸ Boivin, *supra* note 1 at 40.

²⁹ Boivin, *supra* note 1 at 41.