

Business insurance trends: Climate change litigation, D&O risk, force majeure and transport insurance

October 28, 2021

From COVID-19 to consumer advocacy, the forces affecting Canadian businesses are also having an impact on the availability, cost and coverage of business insurance. This three-part round up of insurance industry trends for 2022, compiled by lawyers across BLG's [national insurance practice](#), will help businesses identify the issues and fill the gaps.

Part 1 This article explores five trends that corporate leadership, insurance brokers, autonomous vehicle owners, cargo carriers and any business with a force majeure clause in an insurance policy should watch.



D&O insurance



Climate change



Force majeure exclusions



AV insurance confusion



International cargo scrutiny

Part 2 and Part 3 explore product recalls, municipal insurance, shipping, the Québec context and more. Reach out to individual lawyers listed with each trend for more information.

Trend 1

Companies will need to prove they are a good risk to get Directors & Officers (D&O) insurance

[Patrick Heinsen](#) and [Sarah Makson](#)

Background. In Canada, shareholder class actions are at an all-time high, thanks in part to the complexity of the world we do business in (think cyber risks, climate change, diversity and, of course, COVID-19) and a downturn in the Canadian economy. At the same time, pressure to perform is making some underwriters more risk averse than in the past.

Impact. There are fewer insurers willing to underwrite D&O insurance. Those that continue to write this business are being more selective in the companies they will write policies for and charging much higher

premiums for the privilege. D&O insurance is essential to running a business safely. To get it, we predict that businesses will have to convince insurers that they are a good risk.

Top tip. If they want D&O insurance at reasonable premiums, corporate execs and board members will have to take the ESG and risk management aspects of their business well beyond corporate social responsibility reports and ad campaigns. Corporate and commercial legal experts who understand what insurers are looking for, and the best ways to achieve their corporate responsibility requirements, will be key to achieving this.

Trend 2

More climate change related litigation against insurance brokers

[Ross McGowan](#) and [Ingrid Vanderslice](#)

Background. Wild fires. Wind storms. Floods. Drought. Rising sea levels. Hail and ice storms. Heat waves. Everyone, everywhere will feel the impacts of climate change. This makes them different from the risks traditionally covered by insurance, which are isolated events experienced by the few. The only certainty is the risk of cataclysmic losses will continue to grow exponentially over the coming years and it will no longer work to shift the burden of loss from those few that are affected to the many that could be.

Impact. We expect massive change in the insurance industry as a result of climate change, but one of the 2022 trends is an increase in climate change-related lawsuits against insurance brokers. Whether a dam bursts because of an event that was outside of historic norms, a forest fire consumes everything in its path or someone takes their own life out of despair for the future, brokers are left exposed to claims by those loss victims that say their broker failed to place adequate or appropriate cover.

Top tip. Brokers should follow best practices as independent professionals — for example, asking the right questions of the insured, understanding local risks, ensuring cover is with an appropriate insurer, and treating renewals with the critical eye of a new policy — all to meet the needs of an anticipated future, not historic norms. In addition, brokers need to document their policies and procedures related to climate change properly. Contact [Ross McGowan](#) or [Ingrid Vanderslice](#) if you'd like help developing a climate change checklist for your brokerage.

Trend 3

Force majeure in insurance policies will get a careful review

[Jean-Marie Fontaine](#) and [Nigah Awj](#)

Background. During 2020 and into 2021, traditional insurers considered losses related to the pandemic to be outside the control of the parties to the contract. As a result, they invoked the force majeure clause (also known as the “Act of God” clause) and excluded claims related to COVID-19. During the early days of the pandemic, the government restrictions that made it impossible to conduct certain types of business fit the force majeure definition. Not so in 2022, as people and businesses make adjustments and it becomes more difficult to argue that pandemics and their impacts were unforeseeable.

Impact. We anticipate an increase in lawsuits related to force majeure exclusions, as businesses attempt to convince the courts that their losses should be covered. We also expect insurers will look more closely at the language in their force majeure clauses, explicitly excluding pandemics, health orders and regulations of government agencies such as [Health Canada](#), Homeland Security and [Canadian Border](#)

[Services Agency](#). Businesses burned once by an Act of God will look carefully at their coverage to prevent the situation from happening twice.

Top tip. Use your legal team to review your insurance coverage, including force majeure provisions, to help you determine if you need supplemental coverage. Your legal team—particularly external counsel—can determine whether the existing force majeure provisions apply to your situation and if there are exceptions that can be invoked.

Trend 4

Level 3 autonomous vehicles will cause insurance confusion across Canada

[Bob Love](#) and [Edona Vila](#)

Background. In 2022, vehicles equipped with SAE Level 3 autonomous technology will be on Canada's roads. Level 3 technology is conditional automation, where the vehicle drives itself under limited circumstances but the human driver must be ready to resume driving at any time. Drivers will be allowed to use the technology, but the question remains: when something goes wrong, whose responsibility is it?

Current legislation, which is different for each province, doesn't adequately consider accidents involving Level 3 automation. The [Insurance Bureau of Canada recommends](#) a single policy approach, where one policy insures both driver negligence and the automated technology, but each province and territory has jurisdiction to develop its own highway traffic laws and insurance regime. This could leave Canada with a confusing patchwork of motor vehicle insurance regulations and liability across the country.

Impact. When technology is in use before regulatory support is in place, everyone is impacted. Regulators will likely scramble to update provincial traffic and insurance acts, with pressure for quick passage into law — meaning national harmonization is unlikely. Insurers may take off cover positions, resulting in uninsured losses for owners and operators of vehicles. Manufacturers of vehicles and autonomous technology may find themselves subject to increasing numbers of claims from individuals whose insurance doesn't cover losses following an accident.

Top tip. Individual drivers who plan to use Level 3 automation can ask their insurance provider what is covered and who is liable in different scenarios, but without regulation there is little that insurers can do on a case-by-case basis to clarify policy wording. Fleet owners using Level 3 autonomous technology, however, may have power that individual vehicle owners do not. They should seek clarity in their policies. For example, they may wish to ask their insurer to sign a certificate declaring vehicles are insured whether they are in automated mode or not. Changes in technology happen quickly, stay current by [signing up for *The Sensor*](#), BLG's autonomous vehicle newsletter.

Trend 5

International cargo carriers and intermediaries will have their operations scrutinized

[Robin Squires](#) and [Sarah Sweet](#)

Background. With brick-and-mortar stores closed by COVID-19 and folks trapped at home with nothing to do but shop online, the purchase of goods from overseas has exploded. Increased demand, coupled with capacity issues related to the pandemic, such as an undersupply of containers, employees and warehouse space, has led to delayed shipments. As a result, there has been an increase in claims

against carriers for damages related to service levels, delays and spoiled cargo. Unhappy shippers and receivers are also lobbying regulators to address what they perceive as poor treatment by carriers and intermediaries, and the Federal Maritime Commission (FMC) in the U.S. is looking closely at the treatment of customers by ocean shipping lines.

Impact. We expect the FMC's scrutiny of shipping lines to lead to scrutiny of other links in the shipping chain, including the rail, trucking and aviation sectors, as well as intermediaries such as warehouses, freight forwarders and logistics providers. We also suspect U.S. regulatory changes may be on the horizon. We expect that Transport Canada will follow the U.S. lead and scrutinize the treatment of customers by carriers in Canada. If regulations come into effect, carriers will bear the enormous organizational costs of complying in multiple jurisdictions with similar — but not the same — laws. On the disputes front, the increase in claims against carriers will mean increased internal and external costs to defend those claims.

Top tip. Cargo carriers and intermediaries need to make sure they're living up to the terms and conditions of their own contracts and avoid making promises they can't keep. A key strategy is to ensure the messages customers receive from the sales and customer service departments are ones the legal and claims side of the business would agree with. This will help prevent and defend claims and may be a step towards offering the service regulators will expect.

No business likes surprises, particularly when it comes to insurance. To stay in the know on the future of insurance and take steps to close any gaps, check out Part 2 and Part 3 of this insurance industry trends series.

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