

The COVID-19 Pandemic and Insurance Coverage for Business Interruption in Canada

*Erik S Knutsen**

This article explores the impact of the COVID-19 pandemic on the insurance industry and analyzes whether most Canadian businesses are insured for business interruptions and losses caused by the pandemic. The author suggests that pandemic-related losses are insurable. Insurers have had sufficient time and experience to prepare and model their policies to account for events such as the COVID-19 pandemic. Insurance policies typically protect against risks which are triggered only where a business suffers “direct physical loss of, or damage to” property. Ultimately, whether Canadian businesses are insured against COVID-19 business interruptions will depend on how the courts interpret “direct physical loss of, or damage to, property” in the context of pandemic-related losses. The author cautions against engaging in a literalist or dictionary-focused interpretation of insurance policies. Instead, the author argues that equitable and predictable insurance coverage determinations requires a contextual assessment grounded in the role of insurance as a risk-based financial instrument.

* Professor, Queen’s University, Faculty of Law.

Copyright © 2021 by Erik S Knutsen

Introduction

I. Pandemic-Related Losses Are Insurable

II. Types of COVID-19 Pandemic-Related Business Interruption Losses

III. Commercial Property, Business Interruption, and Civil Authority Insurance Coverage

IV. Policyholder and Insurer Perspectives of Coverage

V. Coverage in Commercial Property Insurance: “Direct Physical Loss or Damage”

VI. Interpreting “Direct Physical Loss or Damage”

VII. The Virus Exclusion

Conclusion

Introduction

Businesses reeling from income loss due to the COVID-19 pandemic may be counting on the commercial insurance policies they purchased to somehow provide financial assistance. In an attempt to curb the spread of the virus, government-forced shutdowns, travel bans, and required re-toolings of ways of doing business have meant that many businesses have been hit hard financially during the pandemic. Retail shops saw in-store patron levels plummet. Restaurants were forced to move from a dine-in to a take-out model. Airlines cut service as there were few travellers. Some businesses have had to temporarily close and decontaminate business premises because employees or patrons were infected with the COVID-19 virus.

But are most Canadian businesses insured for pandemic-related business interruption losses? Can insurance even cover such claims? Will the insurance industry go bankrupt if such claims arose in a widespread fashion?

Some businesses may have purchased business interruption insurance as part of their commercial property insurance policy. That insurance coverage typically provides coverage for “direct physical loss of, or damage to” property.¹ Canadian courts will have to determine if COVID-19 pandemic-related losses involve direct physical loss of, or damage to, property and are thus covered by insurance. This will require courts to construe that coverage clause. Fair and predictable insurance coverage results for pandemic-related business interruption claims can be achieved if policyholders, insurers, courts, and lawyers avoid a literalist, dictionary-focused approach to this insurance coverage issue and instead overtly account for how commercial property insurance should operate as a risk-based financial product.

1. See Craig Brown, *Insurance Law in Canada* (Toronto: Carswell, 1999) (loose-leaf revision 2013), s 20.5(b) (noting the standard wording for the all-risks property insurance coverage clause in Canada). See e.g. *Inland Concrete Ltd v Commonwealth Insurance Co*, 2010 ABQB 600 at para 26; *Acciona Infrastructure Canada Inc v Allianz Global Risks US Insurance Co*, 2015 BCCA 347 at para 11 (both cases noting the standard coverage clause: “This policy insures against all risks of direct physical loss of or damage to the property insured”).

I. Pandemic-Related Losses Are Insurable

Fortuitous risk is the bedrock concept of insurance.² Anything that has an unexpected and accidental element can be insured. The unexpected loss of property or unexpected liability for harm to someone or something are insurable circumstances because they involve unexpected losses. Insurance does not insure certainties. For example, one cannot insure against the legal liability for intentionally punching someone—that punch is a certainty if one meant to punch someone and meant to injure the victim. Because the punch is not a fortuitous risk, it is not insurable. Even among some certain losses, insurance can still exist if the timing or amount of the loss is unexpected. For example, life insurance insures against the inevitable—death. Death can be an insured event because one does not know when one will die; that is fortuitous. The occurrence of the COVID-19 pandemic, the timing of pandemic-related losses, and the extent of such losses are all fortuitous things that can be insured against.³

Since the start of the COVID-19 pandemic, words like “unprecedented” and “unexpected” have been bandied about. From the standpoint of an insurance company who may have to cover pandemic-related claims, such claims are not outside the realm of foreseeable (and thus susceptible to standard insurance underwriting principles to rate risk and charge premiums accordingly). The past decades have seen many instances of pandemics which offered clues to insurers that a disease-causing event could result in significant insured losses. From Ebola to SARS, H1N1, Zika, MERS, swine flu, and HIV/AIDS, insurers have known that these diseases can seriously influence commercial entities. They had the opportunity to model possible future claims costs.

Insurers will not become financially insolvent if expected to pay claims for pandemic-related losses. Insurers had ample opportunity to model and prepare for this pandemic. One global insurer actually had a product on the market to cover pandemic-related losses.⁴ Nobody knows the true extent of the actual

2. See Erik S Knutsen, “Fortuity Clauses in Liability Insurance: Solving Coverage Dilemmas for Intentional and Criminal Conduct” (2011) 37:1 *Queen’s LJ* 73 at 75 [Knutsen, “Fortuity Clauses”].

3. See Erik S Knutsen & Jeffrey W Stempel, “Infected Judgment: Creating Conventional Wisdom and Insurance Coverage Denial in a Pandemic” (2021) 27:1 *Conn Ins LJ* 247 [Knutsen & Stempel, “Infected Judgment”].

4. The PathogenRX coverage by insurer Marsh was released in 2018 and had very little take-up prior to the COVID-19 pandemic. See “Pathogen RX: An Innovative Solution for Pandemic and Epidemic Risks”, online: *Marsh* <www.marsh.com/us/campaigns/pathogenrx.html>; Stuart Collins, “Insurers Wary of Meeting Growing Demand for Specialist Pandemic Cover” (9 April 2020), online: *Commercial Risk* <www.commercialriskonline.com/insurers-wary-meeting-growing-demand-specialist-pandemic-cover>.

pandemic-related losses. There are always exclusions in insurance policies, and not all policies cover all losses. Not all businesses are affected the same way by the pandemic. Some businesses are decimated. Others actually thrive. Online commerce exploded with use. Delivery services became the essential survival tool. So, not every business will have an insurance claim for pandemic-related losses.

Insurers are financially healthy, with amassed wealth equating to the third largest economy in the world.⁵ Insurers take an upfront premium from a policyholder in exchange for a promise to pay for a future potential loss. Insurers have that present-day premium money to invest, because every policyholder will have an insurance claim at once.

Whether pandemic-related losses are actually insurable in a certain situation depends on the wording of the insurance policy and how the loss came about.

II. Types of COVID-19 Pandemic-Related Business Interruption Losses

Losses can be due to:

- i. virus on the premises, whether brought by sick employees or customers, requiring temporary business closure due to sanitization efforts or loss of workforce, or actual closure due to quarantine and isolation of exposed employees;
- ii. forced closures from government-enforced stay at home orders aimed at curbing virus spread (which could be industry-specific limitations or closures, such as services requiring close contact like spas, salons, gyms, and healthcare, or industries reliant on congregations of people such as theatre, cinema, and tourist attractions);
- iii. changes in business practices which reduced or eliminated certain revenue-generating activities (such as limits to patron occupancy, enforcing physical distancing requirements, reconfiguration of business spaces to prevent virus spread, reconfiguration of business models from in-store to curbside pickup, or from dine-in to take-out only, and additional costs of personal protective equipment); and,

5. See “Facts + Statistics: Industry Overview” (last visited 24 March 2021), online: *Insurance Information Institute* <www.iii.org/fact-statistic/facts-statistics-industry-overview>; “GDP Ranked by Country 2021” (last visited 24 March 2021), online: *World Population Review* <worldpopulationreview.com/countries/countries-by-gdp>. See also Richard V Ericson, Aaron Doyle & Dean Barry, *Insurance as Governance* (Toronto: University of Toronto Press, 2003).

- iv. patron downturns as a result of recommended government urging to avoid non-essential outings.

III. Commercial Property, Business Interruption, and Civil Authority Insurance Coverage

Not all insurance policies cover all business-related losses. The most common forms of insurance coverage to be implicated for most businesses in the COVID-19 pandemic setting are business interruption coverage or civil authority coverage. Both types of coverage can be added to a business' commercial property insurance policy for an additional premium. A commercial property insurance policy protects against any losses to a business' property, such as losses from fire, theft, or weather damage. The modern commercial property insurance policy is an "all risks" policy that provides coverage for all "direct physical loss of or damage" to property.⁶ Although the policy insures the property against "all risks," each policy does include enumerated exclusions, which will be specific risks the policy does not insure the property against.⁷ Both business interruption coverage and civil authority coverage rely on the main coverage clause in the commercial property policy. Coverage is only triggered if a business suffers direct physical loss of or damage to property. In the wake of the COVID-19 pandemic, that is the threshold coverage question courts will have to decide—are losses a business suffers due to COVID-19 a result of direct physical loss of or damage to property.

The specific business interruption coverage provision is designed to replace the income a business would have earned due to the necessary suspension of its business as a result of a covered loss under the policy.⁸ Only business interruption resulting from a direct physical loss of or damage to property is covered. So, if a store's building is damaged by fire and the store must close for repairs until the building is repaired, the store's business interruption coverage would pay for the store's lost income during that period of restoration.

Civil authority coverage is triggered if a governmental body prevents access to the policyholder's place of business. Civil authority coverage replaces the policyholder's income stream until access is again granted. In most policies, in order for civil authority coverage to be triggered, the governmental order must

6. See e.g. *Goderich Elevators Ltd v Royal Insurance Co* (1999), 42 OR (3d) 577, 169 DLR (4th) 763 (CA) (property insurance for grain elevator provided coverage for "all risks of direct physical loss or damage" at para 9).

7. For things like damage from earthquakes, nuclear radiation, flood, or wear and tear.

8. See e.g. *Joroga Real Estate Ltd v State Farm Fire and Casualty Company*, 2019 ONSC 2730. The coverage language in this case reads: "We will pay for the actual 'Loss of Income' you sustain due to the necessary 'suspension' of your 'operations' during the 'period of restoration'. The

have been made as a result of direct physical loss of or damage to property that is adjacent to the policyholder's property.⁹ If a derelict building suddenly becomes structurally unsafe after a huge snowstorm, the businesses adjacent to it may be ordered to evacuate until the building is safe. Civil authority coverage may cover that period of lost income a business suffered during evacuation.

The challenge for businesses making an insurance claim for lost income due to the COVID-19 pandemic is thus to be able to prove that the losses are a result of direct physical loss of or damage to property. Determining the existence of insurance coverage in a given situation will require courts to construe that coverage clause to determine what, in law, it means. Courts should follow through with that interpretive exercise using basic bedrock principles of insurance policy interpretation that acknowledge insurance as a risk-based financial instrument. Merely using a dictionary to define each word in the coverage clause—devoid of context—leads to absurd coverage results which will prove disastrous and unfair to the commercial fabric disrupted by the COVID-19 pandemic.

IV. Policyholder and Insurer Perspectives of Coverage

To an insurance company, business interruption and civil authority coverage are not designed to be blanket “lost profits” insurance for businesses for any time a business downturn occurs, no matter why. That would be a near-impossible product for insurers to underwrite, because businesses lose profits for all sorts of reasons. There is no guarantee in business; income risk is part of any commercial venture. To the insurer, business interruption and civil authority coverage are secondary add-on coverages tied to commercial property insurance, the aim of which is to reimburse the policyholder for related losses arising from physical loss of or damage to the business’ property.

No policyholder would expect business interruption coverage for lost income in all scenarios. Income loss due to forced closure during a nuclear war is probably not the type of losses policyholders expect would be insured.¹⁰ But imagine

‘suspension’ must be caused by accidental direct physical loss to the property at the described premises. The loss must be caused by a Covered Cause of Loss” (*ibid* at para 43).

9. See e.g. *Strata Plan KAS3058 v St. Paul Fire and Marine Insurance Co*, 2013 BCSC 2197. The coverage language in this case reads: “Interruption by Civil Authority: We will pay your actual loss of revenue when a civil authority denies access to an insured location as a direct result of physical loss or damage by a covered cause of loss to property not at an insured location” (*ibid* at para 3).

10. There are standard exclusions for nuclear radiation and war in commercial property policies. See Jeffrey W Stempel & Erik S Knutsen, *Stempel and Knutsen on Insurance Coverage* (looseleaf) at § 15.02.

a scenario where there is a zombie apocalypse, and flesh-eating monsters roam the streets. If a government entity orders people to shelter in place to protect themselves from the zombies, would that business interruption expect to be covered? The zombies are not harming the property—they are out for the people. Is the COVID-19 pandemic situation any different? The answer may lie in the fact that, in both the COVID-19 and the zombie scenarios, the policyholder loses the use of its business property such that its income-generating efforts are frustrated. Is loss of property use sufficient to trigger insurance coverage?

Understandably, many businesses may be shocked to learn that their business interruption or civil authority insurance coverage does not simply insure their lost profits—no matter what. But if they thought about it for a moment, what right-minded insurance company would create a product that would remove all risk from running a business? The issue, as noted above, is much finer than that. Something must happen to the business' property to trigger coverage.

Perhaps the packaging of these types of coverage as “business interruption insurance” or “civil authority insurance” does generate false expectations among policyholders. That issue may well be worth a revisit in the future by insurers. What did insurance brokers and agents say when they sold policyholders this coverage?

V. How Insurance Law Works to Solve Coverage Disputes

The insurance policy looks like a legal contract. In exchange for an up-front premium, the insurance company agrees to pay in the future if the policyholder suffers a loss covered by the terms of the policy. But because insurance has some unique qualities compared to other contracts people encounter, Canadian law has developed a particular way to deal with disputes over insurance policies. Insurance policies are called contracts of adhesion.¹¹ The wordings of the policies are written on a standard form basis, offered on a take-it-or-leave-it basis from the insurance company. Insurance also acts as the financial backstop of so much of Canadian life, from driving, to owning a home, to running a business.¹² So special principles of insurance law have developed to reflect two fundamentals: (a) a consumer protectionist stance, because insurance companies hold the balance of power when determining the parameters of insurance coverage, and (b) the importance of insurance as a compensatory safety net in society.

11. See Erik S Knutsen, “Auto Insurance as Social Contract: Solving Automobile Insurance Coverage Disputes Through a Public Regulatory Framework” (2011) 48:3 *Alta L Rev* 715 at 723–24.

12. See Knutsen, “Fortuity Clauses”, *supra* note 2 at 111.

To determine whether or not a specific loss is covered by an insurance policy, one must look to the specific language of the policy. The meaning of the words in the policy often only feel relevant to the policyholder after a particular loss arises. This is why reading the policy before purchase often does not help a policyholder guess whether or not they will have insurance coverage when disaster strikes. The context of the loss drives the quest for meaning.

In Canadian law, the insurance policy interpretation process has three stages:

- i. a “plain meaning” stage, where courts attempt to discern the plain meaning of the insurance policy language at issue as an average person would understand it, by reading the policy as a whole, with an eye to the policy’s purpose and a reasonable commercial result;¹³
- ii. if two or more reasonable but different meanings of the language arise after stage one, such that the language in question is ambiguous, courts then move to the “intention” stage, where courts attempt to discern the reasonable objective intention of the insurer and policyholder—what did they mean to mean by the language in question; and,
- iii. if the language is still at issue, courts move to the “consumer protection” stage, where interpretive tools ensure that any ambiguities are resolved against the insurer who drafted the policy language.

Because insurance policy language is often triggered based on how a certain loss comes about in the world, insurance law also has particular rules about how to determine the cause of a loss.¹⁴ The causation assessment for commercial property insurance is an amoral payout question: what “hurt” or “touched” the property such that it gave rise to the insurance claim.

V. Coverage in Commercial Property Insurance: “Direct Physical Loss or Damage”

Commercial property insurance (including business interruption and civil authority coverage) is triggered if there is a direct physical loss of or damage to property. This coverage clause is not defined anywhere in the policy. This means that coverage disputes must be decided using insurance policy interpretation principles to determine what the clause means in a particular insurance claim context.

13. See *Ledcor Construction Ltd v Northbridge Indemnity Insurance Co*, 2016 SCC 37; *Sabeen v Portage La Prairie Mutual Insurance Co*, 2017 SCC 7.

14. See Erik S Knutsen, “Causation in Canadian Insurance” (2013) 50:3 *Alta L Rev* 631.

Can the COVID-19 virus cause a direct physical loss of or damage to property? We know that the virus is highly contagious, especially in the air, and can be deadly to people. It can contaminate the surfaces of property for the short-term. There has been government-mandated restriction of use of property in order to curb the spread of the virus, from closures to stay-at-home orders to mandatory limitations on particular service provisions. The health effect of the virus can be transient. It can be cleaned from surfaces. People can get well after infection or isolation concludes.

We also know that the virus is highly prevalent in the general community, which is the reason for the government-ordered limitations on property use. It may be safe to assume that there is the actual presence of the virus on most property frequented by the public. Finally, we know that the threat of COVID-19 infection is serious, whether or not there is actual presence of the virus itself on property.

VI. Interpreting “Direct Physical Loss or Damage”

The first step in interpreting insurance policy language is to ascertain the plain meaning of the words, as understood by the average person, keeping an eye to the purpose of the policy and aiming for a reasonable commercial result. Does the coverage clause “direct physical loss of or damage” to property mean that there must be a tangible physical alteration to the property in order for insurance coverage to attach? Can the COVID-19 virus cause loss or damage to property, if surfaces can be disinfected or the virus expires after some days? The property still stands, even if it is temporarily contaminated.

However, during that contamination period, the property is dangerous. A policyholder loses the use of the property while it is being cleaned and disinfected. Loss is mentioned in the coverage clause separately from damage. Therefore, perhaps tangible physical alteration is not necessary if the policyholder suffers some loss of use of the property. To be sure, a civil authority order interferes with use of the property. For civil authority coverage to attach, perhaps virus presence on the property is not even necessary to allege. Was it not the government order curbing commercial activity that resulted in the loss to the business, and not the virus at all?

These are difficult insurance policy interpretation questions. The plain meaning of the phrase “direct physical loss of or damage to property” does not appear obvious at first blush when one reads it. Some courts may think that the dictionary may prove helpful in understanding the meaning of these terms. Dictionary use is highly problematic for a number of reasons. To parse out individually unrelated words one by one and insert each’s dictionary meaning as *the* legal meaning may arrive at results that are at best randomly unsound for insurance underwriting purposes and at worst ludicrous. Also, the dictionary is not stapled to the insurance policy. A dictionary is a separate document, built

for non-insurance purposes. Most words in a dictionary have many different definitions, some of which may be applicable and others not. The order in which word definitions appear in a dictionary are not based on popular use, but historical first use.¹⁵ People also do not talk or think like the dictionary. So, the interpretive analysis must be far more nuanced than merely dictionary-driven.

Courts in Canada and the United States have often found insurance coverage in instances where the policyholder suffered seemingly intangible and transient contamination issues similar to those experienced in the COVID-19 pandemic. Courts have found that policyholders experienced direct physical loss of or damage to property for cases involving asbestos contamination,¹⁶ ammonia release,¹⁷ mould and bacteria in a house,¹⁸ radiation,¹⁹ carbon monoxide,²⁰ gases from drywall,²¹ fuel fumes,²² odours,²³ e. coli contamination in wells,²⁴ lead contamination,²⁵ and even infestation of spiders.²⁶ Courts have also found civil authority coverage in cases where governments impeded access to insured property due to riots and civil unrest²⁷ and impending major weather.²⁸ Courts

15. See Knutsen & Stempel, “Infected Judgment”, *supra* note 3 at 300.

16. See *Sentinel Management Co v Aetna Casualty and Surety Co*, 615 NW 2d 819 (Minn Sup Ct 2000).

17. See *Gregory Packaging v Travelers Prop Cas Co of Am*, 2014 WL 6675934 (NJ Dist Ct 2014).

18. See *Sullivan v Standard Fire Ins Co*, 956 A 2d 643 (Del Super Ct 2008); *Prudential Property and Casualty Ins Co v Lillard-Roberts*, 2002 WL 31495830 at 8–9 (Or Dist Ct 2002).

19. See *MDS Inc v Factory Mutual Insurance Company*, 2020 ONSC 1924.

20. See *Matzner v Seaco Insurance Company*, 1998 WL 566658 (Mass Super Ct 1998).

21. See *TRAVCO Insurance Company v Ward*, 715 F Supp 2d 699 (Va Dist Ct 2010).

22. See *Jessy's Pizza v Economical Mutual Insurance Co*, 2008 NSSM 38, 2008 168 ACWS (3d) 846 (Sm Ct Ct).

23. See *Essex Ins Co v BloomSouth Flooring Corp*, 562 F 3d 399 (US 1st Cir 2009) (“locker room” smell); *Mellin v Northern Security Insurance Company Inc*, 167 NH 544 (Sup Ct 2015) (cat urine odor); *Farmers Ins Co v Trutanich*, 858 P 2d 1332 (Or App Ct 1993) (meth lab odor).

24. See *Motorists Mutl Ins Co v Hardinger*, 131 F App'x 823 (US 3d Cir 2005).

25. See *Stack Metallurgical Services Inc v Travelers Indemnity Co*, 2007 WL 464715 (Or Dist Ct 2007).

26. See *Cook v Allstate Ins Co*, 2007 Ind Super LEXIS 32 at 7–9 (Ind Super Ct 2007).

27. See *Sloan v Phoenix of Hartford Ins Co*, 207 NW 2d 434 (Mich Ct App 1973).

28. See *Houston Casualty Company v Lexington Insurance Company*, 2006 WL 7348102 (Tex Dist Ct 2006).

also now regularly conclude that physical loss or damage to property has ensued when a policyholder suffers losses to intangible electronic data.²⁹ All of these examples have resulted in court findings that policyholders either experienced property damage or in many cases lost the use of their property (even temporarily) such that insurance coverage attached.

In some cases, courts found coverage even before loss or damage occurred, because of an imminent threat of things like landslide, riots, collapse, impending hurricanes, or asbestos release.³⁰ Owners experienced a covered loss through loss of use of the property due to contamination, where the property use was restricted due to cleaning issues or government impeding access to the property.

Thus, one must ask how unique are the claims for business interruption or civil authority coverage in the COVID-19 pandemic? The ensuing claims share many particulars of many of the above scenarios of past successful coverage claims. We already know that, in the United States insurance jurisprudence, there are two distinct branches of reasoning as to what this clause means.³¹ One branch holds that direct physical loss of or damage to property requires some physical alteration of the property in order for coverage to attach. In those cases, American courts have held that the COVID-19 virus harms people, not property, and therefore there should be no property insurance coverage for these losses.

Yet there are problems with this interpretive result. It ignores the fact that the word “loss” appears in addition to the word “damage” in the clause, and surely loss must mean something different than damage.³² A policyholder who has its use of its property frustrated to the point that it becomes incapable of using the property surely suffers a loss. This interpretation also runs afoul of a basic principle of insurance policy interpretation: that clauses that grant coverage are to be construed broadly, and clauses that take away coverage are to be construed narrowly. It is counter to that principle to read in additional limitations as to *how* the loss or damage must occur when such limitations are not in the words of the policy.

The second branch of reasoning in the American jurisprudence holds that the coverage clause extends insurance coverage to loss of use of property to the policyholder, such that if the COVID-19 virus prevents a policyholder from enjoying the use of its property, such losses are covered (and thus the interrupted income stream of the policyholder is covered).³³ This branch of

29. See Erik S Knutsen & Jeffrey W Stempel, “The Techno-Neutrality Solution to Navigating Insurance Coverage for Cyber Losses” (2018) 122:3 Penn St L Rev 645 at 645–60.

30. See Knutsen & Stempel, “Infected Judgment”, *supra* note 3 at 308–09.

31. See *ibid* at 312.

32. See Craig Brown, *Insurance Law in Canada* (Toronto: Carswell, 1999) (loose-leaf updated 2020, release 5), ch 20 at 27–29 (making the same point).

33. See Knutsen & Stempel, “Infected Judgment”, *supra* note 3 at 312–13.

reasoning follows the multitude of cases that grant insurance coverage for intangible contamination losses. It follows then that, even though the virus can be cleaned, its actual or potential contamination is enough to interfere with the very property rights the policyholder sought to insure against losing. Coverage should attach. This interpretation best fits with the insurance principle that coverage clauses are to be construed broadly. It also produces a more sensible commercial result instead of chasing what certain disease-causing agents actually do to physical property. The coverage clause includes “loss”—was the property, in essence, lost to the policyholder?

With two distinct branches of interpretation arriving at opposite results in American jurisprudence, and with past Canadian case law finding that loss of use of property is covered in some situations but not others, it appears that the coverage clause “direct physical loss of or damage” to property is ambiguous.³⁴ A court would then move to the second “intention” phase of the interpretation process to discern the reasonable expectations of the parties. Such an analytic exercise would draw courts back to the purpose of business interruption and civil authority coverage: to insure against a lost income stream that resulted from interference with a policyholder’s property. If it is not clear whether or not virus contamination or threat of virus contamination or civil authority orders to curb property use are covered, then the interpretation that favours coverage for the policyholder prevails.

VII. The Virus Exclusion

Some, but not all, commercial property insurance policies contain an exclusion which excludes loss or damage caused by viruses. A typical example is as follows: “We will not pay for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness, or disease.”³⁵ The presence of an exclusion such as this does not automatically oust coverage for any claims resulting from COVID-19 pandemic-related losses. It depends on what caused the loss being claimed.

If the claim is for business interruption losses because the virus contaminated the property through infected employees or customers, and the business suffered income suspension due to that, then it probably is the case that the loss or damage resulted from a “virus” and coverage for the loss would be excluded.

But in the case where a civil authority restricted access to property, it could be argued that it is the government order restricting access, and not a virus, that caused the loss to the policyholder. In that case, the exclusion does not appear

34. See Brown, *supra* note 32, ch 20 at 27–29 (noting potential ambiguity in this coverage clause).

35. *10E, LLC v Travelers Indemnity Co of Connecticut*, 2020 WL 5359653 (Cal Dist Ct 2020).

to be applicable. Coverage would not be ousted simply because the topic of the order had to do with the COVID-19 virus. The harm done to the property is done by the government order. The exclusion clause does not demand that one chase the cause of the civil order—it would be counter to insurance causation principles to do so.

If this virus exclusion features in only some Canadian commercial property insurance policies, and if a particular “all risks” policy is silent about excluding losses caused by viruses, then it stands to reason that that policy should cover virus-related damages (unless some other exclusion brings the loss out of coverage). Insurers had language available to them to exclude virus-related losses if they wished to do so.

Conclusion

Canada may not experience the fractious COVID-19 pandemic business interruption insurance litigation flurry that is currently still raging in the United States.³⁶ The Financial Conduct Authority in the United Kingdom, by contrast, launched a test case to resolve the most prevalent business interruption insurance issues in Britain.³⁷ The United Kingdom Supreme Court found in favour of policyholders for the majority of the coverage issues (although the case’s relevance is limited in Canada, as the British policies are worded very differently). Some Canadian law firms have already launched class actions against major Canadian insurers.³⁸

Canadian insurance coverage results will depend on how Canadian courts interpret the “direct physical loss of or damage” to property coverage clause in the context COVID-19 pandemic-related losses. Courts would do well to think beyond a simplistic dictionary approach and instead interpret any coverage questions with an eye to how the particular insurance at issue operates as a risk-based financial product in Canadian commerce.

36. See Knutsen & Stempel, “Infected Judgment”, *supra* note 3 at 312–13 (there are, at present, over seventy reported American pandemic-related business interruption insurance coverage cases).

37. See *Financial Conduct Authority v Arch Ins (UK) Ltd*, [2020] UKSC 0177.

38. See “Business Interruption Insurance Class Action”, online: *Koskie Minsky* <kmlaw.ca/cases/business-interruption-insurance-class-action>.

