

REIGNING IN AUTO INSURANCE RATES BY REGULATION By Ingrid Sapona

In 2013 Ontario's liberal government pledged to take steps to reduce auto insurance rates for Ontario drivers by 15% on average. Cynics might have labelled the then minority government's plan as mere political pandering, but the reality is that auto insurance rates in Ontario are very high. In fact, at that point, the average Ontario premium was more than 45% higher than the average premium in Alberta, which has the second highest average.¹

According to the Insurance Bureau of Canada, in April 2012, the average annual private passenger auto premium in Ontario was \$1,534, versus \$1,051 in Alberta, \$989 in Newfoundland & Labrador, and in the \$800 range in the other Maritime Provinces.² At the same time, according to the Ontario Road Safety Annual Report 2011 (the latest available), Ontario roads are among the safest in North America, registering 0.53 fatalities per 10,000 licensed drivers.³ (In all of North America, only the Northwest Territories has a better rate.)

Insurance industry experts agree that there are multiple factors contributing to Ontario's high auto insurance rates.⁴ Claims costs that are out of control, rich benefits packages, and insurance fraud are the primary culprits, but not the only ones. Costs associated with towing and storage of vehicles involved in auto accidents also contribute to the high cost of auto insurance in Ontario. A provincial task force estimated that fraud perpetrated by tow truck drivers add an estimated \$700 to the insurance bill of every driver in the Greater Toronto Area.⁵

After winning a majority in the June 2014 election, the Ontario government has embarked on a multi-prong strategy aimed at reducing the cost of auto insurance. This Trends Paper focuses on Ontario's most recent actions in this regard: Bill 15, the Fighting Fraud and Reducing Automobile Insurance Rates Act, 2014 (Bill 15).⁶ The bill, which was introduced on July 15, 2014, does not address all the insurance premium cost drivers – it deals primarily with the costs associated with vehicle towing and storage. In doing so, the Bill makes changes to a variety of Ontario laws, including⁷:

¹ http://www.ibc.ca/en/Car_Insurance/Ontario_Car_Rates/rates_too_high.asp.

² Remarks to the Ontario Standing Committee on General Government by Ralph Palumbo, Vice President, Ontario, Insurance Bureau of Canada, May 28, 2012. (You can find a link to this report at http://www.ibc.ca/en/Car_Insurance/Ontario_Car_Rates/rates_too_high.asp.)

³ Ontario Road Safety Annual Report 2011, <http://www.ontario.ca/orsar>.

⁴ Id.

⁵ "Pirates on the highway are costing Ontario drivers billions," by Peter Cheney, Globe and Mail article, Nov. 27, 2013, <http://www.theglobeandmail.com/globe-drive/adventure/trends/highway-robbery-pirates-on-the-highway-are-costing-ontario-drivers-billions/article15618989/?page=all>.

⁶ The Bill was introduced and received 1st reading on July 15, 2014. Because, at the time this Paper is being written, the Bill is still pending, references to provisions included in the Bill are referred to as "proposals". It is expected that the Bill will be passed, but until it receives royal assent the provisions are not law. The status of the Bill can be monitored on-line at: http://www.ontla.on.ca/web/bills/bills_current.do?locale=en.

⁷ Bill 15 also includes some amendments to the Insurance Act that relate to the licensing of insurance agents and adjusters, but these proposals will not be covered in this Paper.

- the Consumer Protection Act – these changes relate to how tow truck operators do business and the information they must provide customers;
- the Highway Traffic Act – these change will make tow truck operators subject to the province’s Commercial Vehicle Operator’s Registration (CVOR);
- the Repair and Storage Liens Act – these changes are aimed at regulating how the fair value of repair and storage of vehicles is determined.

Though there are a myriad of reasons why towing and storage costs have gotten out of hand in Ontario, one of the main reasons is the fact that licensing tow operators was left to municipalities.⁸ Of the 444⁹ municipalities in the province, only a handful have enacted by-laws related to towing and storage operations.¹⁰ And, even where a municipality has got a by-law, tow operators have found a number of ways to dodge them. For starters, some so-called “pirate” operators don’t even bother getting a municipal license.¹¹ Often, before the driver even has a chance to determine where the truck is from, unscrupulous tow operators arrive on the scene and jump into action, claiming there’s a local requirement to “clear the roadway quickly” (regardless of whether there is, in fact, such a requirement). Drivers, who are likely already feeling distressed, are left with little say, or bargaining power.¹²

Another well-known tactic operators use to get around municipal by-laws is to tow vehicles from one jurisdiction to another where more favourable, or perhaps no, rules apply. Besides adding to the tow bill, this kind of activity often results in the vehicle ending up in a storage location from which it might have to be subsequently towed (thus incurring additional costs, such as “arrival fees”, hook-up fees, towing fees, mileage fees, storage fees, and so on), or where it may be held hostage by the operator until the bill is paid.¹³

Regulating How Tow Trucks Deal with the Public

The changes to the Consumer Protection Act are aimed at regulating how tow and storage providers deal with customers, with special emphasis on the information they must provide to customers and when it must be provided. The rules will apply to tow and storage operators, which is a term that will be defined in regulations, as well as to tow truck drivers.

Under the proposals, tow and storage operators must get authorization from the customer (or someone authorized by the customer) for the services. The authorization must be given in writing. Specifics about the nature of the written authorization are to be set out in the regulations. Interestingly, the proposals do not require that the authorization include an estimate for the cost of the services. But, if the authorization includes an estimated amount or a method for calculating the charges, the final bill must not be more than 10% higher than the authorized estimate.

Before being paid, tow and storage providers will have to give customers an itemized invoice that specifies every service provided and the cost of each service, as well as the total. The Bill also requires that tow and storage operators maintain an up-

⁸ <http://www.mah.gov.on.ca/Page8392.aspx>.

⁹ <http://www.mah.gov.on.ca/Page1591.aspx>.

¹⁰ “Rogue Towing Pirates Target Accident Victims on Major Ontario Highways,” by Gary Parkinson, Nov. 29, 2013, <http://www.lowestrates.ca/news/rogue-towing-pirates-target-accident-victims-major-ontario-highways-806>.

¹¹ Id.

¹² Id.

¹³ “Pirates on the highway are costing Ontario drivers billions,” by Peter Cheney, Globe and Mail article, Nov. 27, 2013, <http://www.theglobeandmail.com/globe-drive/adventure/trends/highway-robbery-pirates-on-the-highway-are-costing-ontario-drivers-billions/article15618989/?page=all>.

to-date statement of their rates and they must make this information available publicly. As well, the rates operators charge for their services must be consistent, regardless of whether the fee is being paid, or reimbursed, by an insurer. The Bill does not specify how or where the operators must publish their rates, so it's not clear whether they must proactively provide this information to the customer. It remains to be seen whether the regulations will specify this.

Tow and storage providers will have to accept payment by credit card or cash, whichever the customer chooses. (The Bill does not specify that debit must be accepted, though this could be specified in the regulations.)

Perhaps one of the most significant provisions being introduced is the requirement that tow or storage operator disclose to customers if the operator has an interest in a location or facility that a vehicle is towed to, the operator must disclose this to the customer. The operator must describe the nature and type of interest. These provisions apply regardless of whether the vehicle is towed there for storage, repair, or appraisal. According to story in the Globe and Mail in November 2013, there are many stories of tow operators receiving kickback by body shops and storage facilities for vehicles they bring in.¹⁴ If the tow or storage operator fails to disclose this, they are not entitled to be paid for tow or storage services provided before disclosure is made. The requirement to disclose such interests is significant because many tow truck operators own storage facilities and body shops, or have been known to receive kickbacks from those who do.¹⁵

The proposals make it clear that when a customer asks a tow or storage operator for access to their vehicle to remove any property in the vehicle, tow and storage operators must allow such access (unless a member of a police force directs the operator not to). As well, operators may not charge a fee for such access, unless permitted by the yet-to-be-written regulations. The time within which such access must be granted will also be set out in the regulations.

And finally, tow and storage operators will be required to provide customers with a copy of the Tow and Storage Consumers Bill of Rights. Details about what this Bill of Rights will include are to be included in the regulations.

Regulating Tow Truck Operations

As noted, the changes to the Highway Traffic Act bring tow truck operators under the Commercial Vehicle Operator's Registration (CVOR) system – the same system that governs large trucks and buses. Making them subject to the CVOR means that the Registrar of Motor Vehicles can suspend or cancel their CVOR certificate if the Registrar believes the operator poses a risk to road safety. Bringing tow trucks under the CVOR system is significant in terms of ensuring tow trucks are safe, that drivers have sufficient skills, and that their collision record is within acceptable ranges. Ontario tow trucks are involved in more collisions than other commercial vehicles and passenger vehicles. According to one report, Ontario tow truck drivers have a collision rate of about 20%, compared to 1% for other commercial vehicles, and about 3% for private passenger cars.¹⁶ Some in the industry blame the "first on the scene" policy some law enforcement officers apply and which can cause reckless behaviour by operators as they rush to disabled vehicles quickly. The Bill does not regulate first on the scene policies.

As well, the name of the owner of the tow truck will have to be clearly indicated on the sides of the vehicle. This provision is aimed at helping ensure that consumers know who they are dealing with.

¹⁴ See, for example, "Pirates on the highway are costing Ontario drivers billions," by Peter Cheney, Globe and Mail article, Nov. 27, 2013, <http://www.theglobeandmail.com/globe-drive/adventure/trends/highway-robbery-pirates-on-the-highway-are-costing-ontario-drivers-billions/article15618989/?page=all>.

¹⁵ Id.

¹⁶ <http://www.cbc.ca/news/canada/toronto/tow-truck-industry-ontario-drafts-new-rules-1.2610604>.

Rules Related to Storage and Repair

The Repair and Storage Liens Act is meant to ensure that repairers and those who store vehicles are paid for the services they render. But, unscrupulous tow and storage operators have been known to provide services that were not authorized or to inflate the cost of their services, often refusing to release the vehicle until the customer (or insurer) pays. The Bill includes provisions that attempt to clarify the lien that repairers and storage providers can claim against a vehicle.

Under the proposals, the lien is the amount that the person who requested the service agreed to pay, or, if no amount was agreed upon, it is the “fair value” of the repair or storage, as determined by regulation. The proposals also make it clear that if the storage or storage and repair is made in conjunction with a tow or storage where the operator did not comply with the Consumer Protection Act provisions, no lien arises.

When a storage provider receives an “article” that is subject to a lien, if they receive it from someone other than the owner or someone authorized by the owner, the storage provider must give the owner (and anyone having a perfected security interest in the article) notice of the fact that they have the vehicle. The notice must be in writing and it must be provided within 60 days after receiving the vehicle. The notice must include: a description of the article; the address where it is being stored; the date it was received; who it was received from; notice that a lien is being claimed by the storer with respect to the article; and information about how to retrieve the article. A storer that fails to provide proper notice is limited in the amount of lien it can claim. The limit is the unpaid amount owing for the actual storage period to a maximum of 60 days.

The Devil’s in the Details

As noted throughout this Paper, many significant details that are likely to be fairly contentious will be “prescribed”, which means they will be set out in Ontario regulations. For example, the Bill includes a provision that allows, but does not require, the Province to set by regulation the maximum rates allowable for tow or storage services, or the methods used to calculate charges. It’s easy to imagine that there will be a lot of political discussion around whether such rules will be prescribed.

Besides details that may be ironed out by regulation, other issues will likely be subject to interpretation and, ultimately, legal precedent. What constitutes the fair value of repair and storage is one such issue.

Indeed, the specifics set out in the regulations will be crucial in terms of ensuring that the tow truck industry remains viable. According to Doug Nelson, Executive Director of the Provincial Towing Association (Ontario) Inc., over the past three years or so

the number of tow operators in the province has dropped from about 1200 to 1000 because there is little money in it for legitimate operators. According to Nelson, many tow and storage operators welcome the changes because they should go a long way toward improving the industry's reputation. But, Nelson also points out that depending on the strictures included in the regulations, if more operators find it simply is not worth their while to comply, they'll exit the industry, which, in fact, could end up increasing pressure on towing costs.

Nelson also believes that rather than simply trying to regulate the way tow operators do business, what's needed is a properly planned provincial incident management system that includes only qualified tow operators and that does away with policies like "first tow truck on the scene", which police dispatchers often apply, because it has perpetuated reckless behavior. Nelson says a good incident management program can be designed, for example, with qualified tow operators assigned to patrol heavy populated and high traffic volume areas and, in rural areas, qualified tow operators could be used in a rotation system. Improving incident management would be good for the police and public in terms of keeping traffic moving, and it would help attract dedicated, qualified operators to the industry. As Nelson points out, however, there is no mention of improving incident management in the bill.

Is Ontario a Bellwether for Other Provinces?

Why should anybody outside Ontario (or, some would say, outside the Greater Toronto Area) care about these proposals? Quite simply, insurance fraud is a growth business and, as RBC Insurance noted in a Financial Post article in 2010, fraud will rear its ugly head in any jurisdiction that is ripe for the picking. "Organized fraud migrates where there are opportunities," said Catherine Honor, president of RBC Insurance Company. Right now, that opportunity is Ontario where injury payouts are higher.¹⁷ It's not hard to imagine that other jurisdictions that don't have fairly comprehensive regulation of the tow and storage industry could see costs escalate to the point of being a concern.

And, should other provinces find that towing and storage costs are contributing to escalating auto insurance premiums, they might look to Ontario's approach as an example. Taking a consumer protection approach, the province decided it was best to set rules to regulate tow and storage operators, rather than leaving it entirely in the hands of municipalities, as it had been, rather than having the tow industry self-regulate, as they had proposed. Of course, the extent of relief these measures will actually have in terms of cost pressure on insurance remains to be seen. Another benefit of the consumer protection focus is that there's a bigger push on educating consumers of their rights and making them aware of the role they play in helping fight insurance fraud that might otherwise be perpetrated by tow and storage operators.

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¹⁷ "Insurance fraud rears its ugly head," by Garry Marr, Financial Post, July 31, 2010, available at: <http://www.canada.com/business/fp/Insurance+fraud+rears+ugly+head/3342763/story.html>.