MORE ON THE REGULATION OF INSURANCE

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The profession is indebted to the Dean of Dalhousie, Mr. Vincent C. MacDonald, for the advantage it has had from his generous industry on many occasions. The article entitled "The Regulation of Insurance in Canada", in the April number of the Review,[1] is another considerable item to be credited to his account with his colleagues of the Canadian Bar, whatever opinion one may hold as to the validity of his thesis.

His argument invites contradiction both on the merit and the form of the constitutional amendment suggested. Strangely enough, he seems to take for granted the need for the suggested change or to regard this question as one outside the scope of his analysis of legal principle. But what reason is there to think that the result of the litigation reviewed is undesirable? Perhaps a too-willing acceptance of the Sirois Report is chiefly responsible for Dean MacDonald's assumption as to a desirable result.

The regulation of insurance is one subject-matter upon which constitutional litigation has achieved a definition of jurisdiction both certain and complete. There remain no embarrassing overlapping of competing authorities and no judicial disagreement. The Supreme Court of Canada and Judicial Committee of the Privy Council are in unanimous accord as to the law; by judicial decision, the board has been swept clear of conflicting legislation. This is surely "a clear statement of powers designed for prompt action and effective administration". Provincial legislatures have attained an unhampered and unqualified jurisdiction to regulate the business of insurance in all aspects within the provinces. Would it not be well to leave such a situation undisturbed?

Twenty-five years of intimate contact with the regulation of the insurance business and with the litigation which Dean MacDonald reviews has convinced this writer that the exclusive Provincial jurisdiction now achieved is much better than any divided jurisdiction which has been suggested or might be effectually designed. Moreover, that co-operation of Provincial authority in regulatory legislation and administration which is desirable has in fact been attained in greater measure in the insurance business than in any other field of private business in Canada. The Association of Superintendents of Insurance is a

[1] (1946), 24 Can Bar Rev. 257.

continuing and successful agency for this purpose. Why then does the Dean take such a dark view of the present situation?

Among persons directly concerned in the business of insurance, support will be found for the view that a central bureau of inspectors, trained to report upon the financial solvency and security of all insurers which do business in more than one province is desirable for reasons of economy and efficiency in administration. I am in agreement with that view. But it is not necessary, and probably not desirable, that that bureau be set up or maintained by Dominion legislative authority. Provincial authority can secure this measure of centralized administration by co-operation of autonomous provinces without any constitutional amendment; and, it may be, with better results than a Dominion administration could attain.

The recommendations of the Sirois Report covered wide areas of public affairs with varying degrees of thoroughness and efficiency. Not even scripture is of uniform value and authority and the Sirois Report has not yet attained the traditional authority of scripture. Regulation of the business of insurance received scant attention in public hearings or investigation and no member or employee of the Commission had special knowledge of the subject-matter. The recommendation cited by Dean MacDonald carries no weight of special authority; the form it took could be easily explained by adventitious circumstances, such as the state of Dominion insurance legislation at that date, and the determined effort of officials of the Dominion Insurance Department to maintain some legal basis for continuation of their activity.

Now while the case for Federal authority in insurance regulation fails for lack of demonstration or has not yet been stated, the case for provincial autonomy has positive support in experience on the very point on which Dean MacDonald presumes Federal authority should prevail. That crucial point is the determination of which insurers may and which insurers may not carry on business within Canada or in any province. The struggle to secure adequate competitive service of the public need for insurance is the essence of those litigations which established provincial autonomy. The judicial decisions can only be interpreted when that issue is understood.

On every occasion since 1910, when Dominion authority was attacked in the courts, it was the restrictive legislative policy of the Dominion Government that created the issue and it was the Provincial legislative policy, defending a freely competitive system, that won the day. In 1915 Dominion prosecution of

brokers in Montreal representing underwriters at London Lloyds raised the question of "ultra vires" of Dominion legislation by a magistrate's adverse decision. In 1922 it was Dominion opposition to provincial licensing of reciprocal insurers having their principal offices outside Canada that had to be faced and adjudicated. This reference also followed a prosecution in a magistrate's court. In 1931 Canadian members of the New England factory mutual insurers had to defend themselves in Quebec against Dominion prohibition of their right to insure and against discriminatory taxation, used as an instrument to destroy their freedom of contract. In 1942 it was a renewed Dominion attack on a certain mutual boiler insurance company with provincial licenses in Ontario and Quebec that brought about the downfall of the whole structure of the Dominion insurance legislation. These occasions all belong to a clear pattern of economic policy in insurance regulation: an anachronistic Chinese wall of exclusion erected upon the borders of Canada against British and foreign insurers (other than joint stock companies).

This policy did not fail in parliament; it failed in the courts. But the issue would never have been made in courts, if parliament had understood the legislation it was invited to enact. The policy of this legislation was not made in parliament, nor in Cabinet Council nor even in the south-east corner of the East Block. It was made in the offices of the Dominion Insurance Department on Rideau Street, Ottawa, irrespective of the party or the minister for the time being nominally responsible for Dominion legislative policy. This fact is the key to what is regarded as a series of unfortunate judicial defeats for Dominion jurisdiction by those who persistently seek to establish at Ottawa a centralized control of Canada's business economy.

The temptation offered to Dominion-licensed insurers, to support a special privilege enjoyed under this Dominion policy, has not always been resisted. There have been times when Dominion-licensed life insurance companies have yielded to the plausible suggestion that one regulatory authority might be easier to placate than ten; or that company prestige in the United Kingdom or elsewhere outside Canada might be well served by a license under Dominion Government authority, preferably with the Great Seal affixed. At other times, however, the preference for "trial by jury" has entered a caveat against unitary control; the possibility that a centralized authority might sometime become a socialized authority has given pause to those who lusted for royal patronage. A few experiences with the

heavy hand of unitary control greatly aided the swingback to support of provincial autonomy in regulation of the insurance business.

The joint stock fire insurance companies have not always seen these issues as clearly as the life insurance companies did. Why should they not accept the "protection" of Dominion authority from licensed competition with London Lloyds and foreign mutuals and reciprocals? Only uncontrolled rate competition in their own ranks discounted the value of this inducement. But this favoured group of licencees was human enough to lend its financial and moral support to Dominion authority in all the litigations of 1915, 1923, 1931 and 1942 above-mentioned. In the realm of imponderables, which determine the fate of law-suits, this probably added strength to the cause of the provincial autonomy which won the day.

In his comment on the decision in *Citizens Insurance Co.* vs. *Parsons*,[2] Dean MacDonald seems to deplore the fact that the Attorney-General of Canada was not formally represented in the litigation. It is not clear just what submission Dean MacDonald would like to have had put forward for the Dominion in that issue which was not urged by the appellant; but if it had succeeded in changing the result so that Dominion incorporated companies were declared exempt from the regulatory law of insurance enacted by the provinces, what an intolerable confusion would have followed in the practical conduct of insurance thereafter! A civil law for companies incorporated by Dominion authority differing from the civil law for all other persons within the province would surely not have been a happy result either in the business of insurance or any other within Canada. That no Dominion legislation was in question in this litigation, that the Ontario legislation in dispute was recommended for enactment by an Ontario commission of judges (1875-6, 39 Vict. c. 24), that Hon. Oliver Mowat, Premier and Attorney-General of Ontario, was personally present on the hearing of the appeal in the Privy Council in 1881, are interesting facts, which take something from the suggestion of Dean MacDonald that this was "private litigation".

As a matter of comparative jurisprudence it is interesting to recall that as long ago as 1869, the Supreme Court of the United States decided, in the case of *Paul* v. *Virginia*,[3] that the business of insurance was not "inter-state commerce", even when

[2] (1881), 7 App. Cas. 96.
[3] (1869), 8 Wallace 168, at p. 183.

carried on by companies with a nation-wide business. This judgment brought to the United States an exclusive state jurisdiction for the regulation of the insurance business which is parallel to the condition achieved in Canada by our constitutional litigation.

It is incorrect to suppose that the full scope of the Dominion head of "Bankruptcy and Insolvency" jurisdiction was not explored in the several insurance references. The case-books will show that, on the facts presented, that heading was quite irrelevant to the questions submitted in 1923, 1931 and 1942, or any other of the cases. Indeed, counsel could only advance such suggestion in support of Dominion insurance legislation on a basis which involved the proposition that any and every project of legislative regulation of private business was within the scope of "bankruptcy and insolvency" as a means of "avoiding insolvency". This proposition carried its own negative answer.

Attention might have been directed in the April article to the extraordinary nature of the answer to the second question submitted to the court in the *Insurance Reference* of 1915 (Case "B"):

> Does section 4 of the Insurance Act, 1910, operate to prohibit an insurance company incorporated by a foreign state from carrying on the business of insurance within Canada if such company does not hold a license from the Minister under the said Act and if such carrying on of the business is confined to a single province?

Mr. Newcombe, opening the argument for the Dominion in the Privy Council, said:[4]

> The first question raises the constitutional question as to the power of the Parliament of Canada to enact section 4 of the Insurance Act. The second question is only a minor question, and involves, I think, only a matter of construction, which is not very difficult when once the constitutional point has been determined.

The Committee answered the first question in the affirmative; that is to say, section 4 is "ultra vires". Therefore, the literal answer to the second question was necessarily a negative: section 4 has no operation. So far as the Order in Council of Reference was concerned that answer would have been complete. But the Committee, on its own motion, chose to answer a question not submitted, to which it gave an affirmative answer, saying in substance, that the Parliament of Canada can by properly framed legislation require a foreign company to take out a license

[4] Cameron: "Canadian Companies"—printed transcript of the argument in the Privy Council on the Insurance and Company References, 1915.

from the Dominion Minister even where the company desires to carry on its business only within the limits of a single province. Now whatever that dictum may or may not mean (it is clear from what follows that Mr. Geoffrion knows what it means), it is certainly not a judgment that can have any legal effect whatever. The essentials of a statutory reference are lacking. No such question was asked nor argued; therefore the answer is *nihil ad rem*, as the late Mr. Justice Riddell would probably have expressed it. Yet in pursuit of that will-o'-the-wisp of Dominion authority, suggested by this answer, years of legislative experiment were afterward expended and perennial litigation has ensued.

In 1915 the second question was not argued: I have above quoted in full Mr. Newcombe's only reference to it. Mr. Upjohn, supporting the Dominion case, said:[4]

> Then as to the construction of section 4, I think no question really arises. . . . . .
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> VISCOUNT HALDANE: Do you say the second question as to foreign companies does not arise?
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> MR. UPJOHN: No, I say it is quite plain on the construction that it is mere construction.
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> VISOUNT HALDANE: You do not mean that you do not want it answered?
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> MR. UPJOHN: No, my Lord; I am sorry if I did not express myself accurately. It is mere construction, and does not involve the great constitutional question. So I propose to leave that to a word or two at the end.

And, at the end, he said nothing more about it. Instead of doing so, after conferring with Mr. Newcombe, he closed his argument with these words:

> My Lords, I have conferred with the Attorney-General and he rather accepts my view that as far as the appellants are concerned, they will rest it on the 'regulation of trade and commerce'.

Sir Robert Finlay, opening for the provinces, said:

> My Lords, the course of the argument has very much simplified my task in dealing with the case on behalf of the respondents, because the four reasons on which they applied for reversal of the judgment are now reduced to one (regulation of trade and commerce). There was first the point about aliens. I always regarded that point as one of those touches of humour with which it is always pleasant to have a somewhat dull case enlivened. I do not propose to add anything whatever to what my learned friend, Mr. Newcombe, said about that.

—and he didn't.

Mr. Aimé Geoffrion, supporting Sir Robert Finlay for the provinces, said:

> The foreign companies would be the only companies as to which it might be possible to suggest that the alien law applied. I submit this is not a case about aliens. Foreign companies are not treated in this way because they are foreign. The same provisions apply to British Companies . . . . . This is not a law against foreign companies because they are foreign; it is a law because they are insurance companies and therefore, it is not alien legislation.

Then after citing a paragraph from the *Cunningham* case, about aliens, the whole discussion of this second question ended.

The answer to the second question in the 1915 *Insurance Reference* is not law at all: it is fantasy. Even if it was intended to be a pleasantry at the expense of Sir Robert Finlay, it became indeed a mirage to the Dominion Insurance Department.

Now Dean MacDonald has offered a proposal for the constitutional amendment of section 91 of the British North America Act although, in his own words, "the writer does not pretend to know exactly how the totality of jurisdiction in such matters should be re-allocated so as to attain the best functional result". What-for, is a constitution in a federal system, except a division of authority to find "the best functional result"? And how shall we find the answer without first asking the question? The hope for finding a right answer by a wrong method seems illusory.

The amendment proposed would immediately destroy the certainty of our constitutional jurisprudence, so laboriously and expensively attained in more than sixty years of effort. Whatever words are used in such an amendment, the whole long contest would begin again to find and establish a new line of division between overlapping and competing jurisdictions.

Suppose the lumbermen of British Columbia need the insurance service of a specialist company, with head office in Seattle, Washington? Would they or the company have to wait upon Dominion law and Ottawa officialdom to learn on what terms British Columbia might have it? Or must the hail insurance companies operating in the three prairie provinces of Canada try to explain to a Dominion Minister of Finance or the Parliament of Canada what are appropriate regulations for the supervision of crop insurance companies in those provinces? Or shall the licensing and regulation of insurance agents, which Dean MacDonald rightly says is a matter of local concern, hereafter be governed by Dominion law like that (section 78a enacted by 1922 Statutes of Canada, c. 28, s. 19) which endeavoured to establish a separate qualification law for local agents of Dominion companies regardless of the provincial licensing systems? Or, if

the automobile clubs of the Maritime provinces decided to establish a mutual automobile liability fund, with or without a compulsory insurance feature, must they find federal authority for the enterprise and Dominion regulatory legislation of it?

I could in a few minutes multiply examples of the unhappy and intolerable confusion in ordinary business which such an amendment to the British North America Act would produce; but perhaps the foregoing are sufficient to show the impractical nature of the proposed division of jurisdiction. Our continuing experience with Dominion war-time rental regulations, superimposed on the Provincial law of landlord and tenant, gives a fair example of what would be involved. Such an amendment would not contribute to "a clear statement of powers designed for prompt action and effective administration" cited by Dean MacDonald as the objective of constitutional revision.

THE TRAVAIL OF THE WRITER

Le travail de la composition n'a rien que d'agréable pour un homme qui a fait une étude suivie d'une science; qui en a saisi l'ensemble, & en possede toutes les parties. Les idées dont il est rempli, se présentent en foule & s'empressent de s'arranger sous sa plume: s'il a de la méthode dans l'esprit, elles se placent d'elles-mêmes & sans effort, dans l'ordre le plus naturel. Les difficultés qu'il rencontre, loin de le rebuter, deviennent pour lui un nouvel attrait. La nécessité de prendre parti dans les questions importantes, le force de chercher les objections, & de s'assurer par la discussion de la vérité du sentiment qu'il embrasse. (From the Éloge Historique de M. Pothier by M. Le Trosne in Pothier's Traité de Droit Civil et de Jurisprudence Françoise Paris and Orléans, 1773).