

Notes from the Sections: The Insurance Law Section*

Insurance Law Revision

Two resolutions — one each by two Dominion-wide organizations — mark at once the culmination of one phase of intensive consideration of the problem of insurance law revision and a merging of forces for a new approach to its solution.

The first was the resolution adopted at the 1948 annual meeting of the Canadian Bar Association at Montreal, on the recommendation of the Insurance Section: "That a Committee be appointed to confer with the Superintendents of Insurance and co-operate with them in the revision of the Insurance Law of the Provinces of Canada".

Acting on this resolution, the Association of Superintendents of Insurance of the Provinces of Canada, in annual meeting at Victoria in October last, adopted the following resolutions:

THAT the Report of the Insurance Law Revision Committee be received, and the Committee continue as constituted;

WHEREAS the Report of the Insurance Law Revision Committee to this Conference dated July, 1948, containing proposed provisions for control of contracts of property insurance, was circulated to all insurers and others whom the Committee considered would be interested in such proposals, and comments thereon were invited;

AND WHEREAS the proposed contract control provisions are not acceptable to an important part of the insurance industry, the Canadian Manufacturers Association and others, including several members of the legal profession, and it therefore appears that no purpose would be served by giving further consideration to such proposals;

AND WHEREAS the Canadian Bar Association, at its Annual Meeting in Montreal in August, 1948, passed a resolution authorizing the appointment of a committee of its members to confer with the Superintendents of Insurance and co-operate with them in the revision of the insurance law of the provinces of Canada;

THEREFORE BE IT RESOLVED:

1. That the Committee discontinue consideration of the proposed contract control provisions contained in the Report; and

* By B. Jas. Thomson of Toronto, Secretary of the Ontario Committee of the Insurance Law Section of the Canadian Bar Association.

2. That the Committee continue its consideration of a revision of the insurance law, except life and marine, and for such purpose be empowered to co-operate with such committee of the Canadian Bar Association as may be appointed, and with any other person or organization that may proffer assistance.

What lies behind and ahead of these developments?

At least as early as 1935, confusion among fire, marine and casualty coverages, due to inadequate statutory definitions of insurable interest, property, fire insurance, etc. "could not have been in a worse mess if someone had purposely designed it", to quote the then Ontario Superintendent, Mr. Hartley D. McNairn. In that year, Mr. McNairn "inherited" the position of Chairman of the Committee on Definitions of Classes of Insurance and Interpretation of Underwriting Powers of Fire, Marine and Casualty Insurers. By 1940 it was suggested that the work of the Committee should proceed on broader lines. The Committee developed successively into the Drafting Committee on Revision of Insurance Acts and, by 1946, the Insurance Law Revision Committee.

A most thorough revision of Canadian insurance law was visualized, including the administrative law (licensing, deposits, etc.) and the contract law. Realizing the extent of the task undertaken, the Committee confined itself largely to the contract law as being more urgently required by the industry and the insuring public.

It was contemplated that ultimately the part of the Act on contract law might be set up on the following basis:

Division I—The Contract of Insurance

- (1) General provisions applying to all insurance (except life and marine)
- (2) Property insurance, which covers all insurance except liability insurance, insurance of person (life and accident and sickness) and marine insurance
- (3) Liability insurance, *i.e.*, insurance against liability for damage to the person or property of others or for compensation for injuries to others
- (4) Marine insurance—although a type of property or liability insurance, requires special treatment because of its development
- (5) Insurance of the person, further divided into:

- (a) Life insurance
- (b) Accident and sickness insurance

Division II—Compensated Suretyship

Division III—Intermediaries

- (1) Agents and Brokers
- (2) Adjusters.

No action was taken on Divisions II and III and the Committee made the following additional modifications in subdivisions (4) and (5) of Division I, respectively: marine insurance would be largely, if not entirely, a reproduction of the English Act of 1906; life insurance was considered outside the scope of the Committee.

Automobile insurance would remain untouched for the time being "because of the standardization and uniformity of present automobile policy forms and the necessity of complying with the Financial Responsibility Laws of the various provinces".

Since legislation in the Province of Quebec is based largely on the civil law, the Committee primarily directed its attention to the contract law of the eight common-law provinces.

Returning to the above Divisions and Subdivisions, it was proposed that subdivision (1) might deal with the following points:

1. Insurance interest
2. Insurance for third persons
3. Disclosures and representations
4. Warranties and conditions affecting the risk
5. Collection of premium, failure of consideration, etc.
6. Evidence of contract, delivery of policy, amendment, renewal, etc.
7. Effect of contract forms or clauses prescribed by regulations
8. Assignment and transfer of interest
9. Loss payee's rights
10. Notice and proof of loss
11. Relief from forfeiture relating to 10 above
12. Payment by insurer into court
13. Consolidation of actions
14. Subrogation
15. Cancellation or termination of contract
16. Place of payment of insurance moneys
17. Agency
18. Notices to insurers and assureds.

Under subdivision (2) the following were contemplated:

1. Disclosure of other insurance
2. Salvage, etc.
3. Measure of indemnity
4. Reduced indemnity clauses
5. Recovery by assured with limited interest
6. Apportionment and contribution
7. Person to make proof of loss
8. Appraisal
9. Abandonment
10. Replacement
11. Delay for payment of claim and action
12. Limitation of actions:

And under subdivision (3) the following:

1. Effect of public policy defence
2. Voluntary third party compensation
3. Right of third party claimants against insurers
(see section 91 of the Ontario Act)
4. Contribution and apportionment
5. Conditions re co-operation of insured
6. Limitation of actions
7. Special provisions relating to automobile liability insurance.

Within this general formula the Superintendents' Committee concentrated in successive reports in 1945, 1946 and 1947¹ on contract law, with particular reference to property insurance generally and, more specifically, to the fire contract. The direction of the Committee's efforts may be best indicated by passages from its final Report released in July 1948:

The matter took definite shape with the Interim Report of the Subcommittee on Insurance Law Revision at the Halifax Conference in 1946. That Report set forth the reasons for the revision and enunciated the principles proposed to be followed and, in dealing with the question of contract provisions or conditions, recommended:

'abandonment of any attempt at rigid control of selected perils or contracts in favour of a general control of all contracts, the principle underlying this control to be freedom to all parties provided the insured is adequately put on caution in respect to conditions which might either void or curtail the prima facie insurance payable'.

The Committee in reaching this conclusion recognized the present anomalous situation where statutory conditions are required to be set out

¹Proceedings of Association of Superintendents of Insurance: 1945, p. 108; 1946, p. 140; 1947, p. 145. The 1946 report appeared, with an introduction by Mr. W. B. Cromarty, at (1948), 26 Can. Bar Rev. 444.

in policies covering fire, automobile, accident and sickness, live stock and weather, but are not required in policies of any other class of insurance. It also recognized the rapid development of multi-peril policies which, in its opinion, dictated action along the lines recommended.

The matter was further considered at the 1947 Conference of the Superintendents held at Jasper and the Conference authorized the Committee to prepare draft legislation substantially in accord with the principles set out in the 1946 Report and to submit this to the next Conference. The Committee however, on further consideration, concluded that before a complete draft in legal form was provided, it would be advisable to develop the Contract Control provisions and sample policies in order to enable the insurance industry to test the Contract Control provisions and to see clearly the type of policy which would require to be drafted following the adoption of the Contract Control provisions.

The provisions in the 'Contract Control Section' above referred to, would be binding on the companies in the preparation of all their property insurance policies, except automobile, and would not be limited to fire policies only. The Contract Control Section sets out the methods of dealing with limits of coverage and perils and conditions governing provisions which might void a policy or bar a claim or reduce the amount of insurance. In its application to a fire policy, the suggested method provides that instead of the present wording of the fire policy statutory conditions presently laid down by the Act, the actual wording of all conditions will be left to the companies, governed however by the Contract Control provisions in the Act which will control the substance of some of the conditions as well as the method to be followed in setting them out. The purpose of this is to allow the conditions to be framed to fit cases where additional perils are added to the fire policy either by supplemental contracts or where the fire peril is included with other perils as in the multi-peril policies which are today in such widespread use. It is proposed also to retain the power at present vested in the Superintendent under the present law to deal with any policy or application which is considered unfair, fraudulent or not in the public interest.

The tentative or experimental nature of the Committee's Alpha Policy and Contract Control Section is evident from its own observation in the July 1948 Report:

The Alpha Policy above referred to is in skeleton form only and has been prepared merely to indicate how the provisions of the proposed Contract Control Section when inserted in The Insurance Act might work out in actual practice. It would still be possible to draft many variations of this policy which would still meet the requirements of the proposed Contract Control Section. The intention of the proposal is to avoid any mandatory form of contract in any class of property insurance, but to allow the companies to develop any form of contract provided it complies with the proposed Contract Control provisions which will form part of the Act.

The Superintendents' Committee did not work alone or behind closed doors. Wide circulation was given its reports from year

to year. The 1947 Proceedings record the distribution of 1222 copies of the Committee's report for 1946, most of them to insurance companies, insurance company associations and insurance agents' associations; additional copies went to bodies representative of the buying public, such as the Montreal and Toronto Boards of Trade, The Canadian Manufacturers Association and the Ontario Motor League, and "12 to Insurance lawyers".

"Insurance lawyers" as a body, through the medium of the Canadian Bar Association, were raising no corporate voice.² The proposed disposal of the fire statutory conditions was, however, the subject of two thoughtful papers at the Winnipeg Annual Meeting in 1946. At the 1947 Annual Meeting in Ottawa, Mr. Roy B. Whitehead, K.C., Ontario Superintendent of Insurance and Chairman of the Revision Committee, reported to the Insurance Section on questions to be considered at the forthcoming conference of Superintendents of Insurance. At the same meeting, Mr. W. B. Cromarty, K.C., Calgary, read a paper reviewing the insurance law revision deliberations and proposals.³ Mr. Cromarty was appointed to attend the 1947 Superintendents' Conference as an observer and to report to the next meeting of the Section.

The problem of Dominion versus Provincial jurisdiction was extensively discussed in two papers in the Canadian Bar Review.⁴ Twenty-five years of insurance development (1923-1947) were admirably reviewed in the Anniversary Number of the Canadian Bar Review by Mr. E. B. MacLatchy, K.C., Deputy Attorney-General and Superintendent of Insurance for New Brunswick.⁵

But the reports of the Superintendents' Committee were receiving study in provincial committees of the Insurance Section. More concerted action developed following publication of the July 1948 Report of the Superintendents' Committee. Release of the proposed Alpha Policy and Contract Control Section brought the revision movement out of the realm of theory and general principles, heretofore largely the interest and concern of the insurance industry, into concrete statutory and policy forms that lawyers, as such, saw as drastically affecting their professional

² Lawyers, of course, carried a large share of the work as members of the Superintendents' Committee: Roy B. Whitehead, K.C., Chairman; E. B. MacLatchy, K.C., Leslie A. Ham, Wilson E. McLean, K.C., and Hartley D. McNairn, K.C.

³ Printed in 1947 Proceedings of Association of Superintendents of Insurance, 172.

⁴ Vincent C. MacDonald, *The Regulation of Insurance in Canada* (1946), 24 Can. Bar Rev. 257, and V. Evan Gray, K.C., *More on the Regulation of Insurance* (1946), 24 Can. Bar Rev. 481.

⁵ (1948), 26 Can. Bar Rev. 202.

responsibilities to the public. What would become of seventy-five years of jurisprudence developed around the existing statutory conditions? Would partial revision, pointed expressly at the fire statutory conditions, solve the problems of insurable interest, misrepresentation, subrogation, rights of donee claimants, and other questions that have become increasingly difficult in the legal field as insurance has sought to adapt itself to an increasingly complicated society? Before an effort was made to preserve some statutory conditions, discard some that had become obsolete, and transfer others to an already (in the view of some) strained substantive law, had not the time come for a thorough "restatement" of that substantive law?

Among members of the Insurance Section committees there was a diversity of view on objective and method comparable to the diversity revealed in briefs prepared by other bodies. The largest measure of agreement to emerge was that in favour of a general codification of the insurance law, together with very general commendation of the efforts and accomplishments of the Superintendents' Committee. Such was the spirit of the submissions urged upon the Insurance Section and culminating in the 1948 resolution of the Canadian Bar Association cited at the outset.

Implementing the Montreal resolution, an unusually large delegation of unbriefed members of the Canadian Bar Association, generally representative of all provinces of Canada, attended the annual conference of the Superintendents' Association at Victoria in October 1948, reported the diversity of views and measure of apprehension, and tendered the proposed offer of co-operation in the task of revision. The unqualified acceptance of the offer is demonstrated in the terms of the Superintendents' resolution already quoted.

Thus the stage is set in the matter of insurance law revision for history to repeat, at least in part, the process by which, starting about thirty years ago, "complete uniformity in contract provisions in the common-law provinces has now been accomplished in the following major classes of insurance: Life, Fire, Automobile, and Accident and Sickness" — a process that commenced with a succession of reports on insurance law by a committee of the Canadian Bar Association, reference of the final report to the Conference of Commissioners on Uniformity of Legislation, subsequent collaboration between the Uniformity Commissioners and the newly-formed Association of Provincial Superintendents of Insurance of the Dominion of Canada in

achieving uniformity in the four classes of insurance, and the formal relinquishment of the field of uniformity of insurance legislation to the Superintendents' Association by the Uniformity Commissioners in 1933.⁶

While the two Associations are presently engaged in the appointment of their joint committee, the provincial committees of the Insurance Section are active in their study of insurance-law topics. Douglas K. Brown, Vancouver, is preparing a paper on the problem of the defence of the insurer when the claim exceeds the policy limit; A. B. Gilbert, K.C., Saint John, has undertaken an examination of the rights of the donee class as discussed in Mr. E. B. MacLatchy's article; and Brendan O'Brien, K.C., Toronto, has delivered to the Ontario Committee an exhaustive study of changes material in the risk.

The Mid-Winter Meeting of the Ontario members of the Canadian Bar Association will see an innovation when T. N. Phelan, K.C. will conduct for the Insurance Section a seminar on Practice and Procedure in Fire Insurance Claims, embracing requirements after loss, mortgage interests, the assured's duty in respect of books, etc., Statutory Condition 16 in respect of fraud, relief from forfeiture, neglect to file proof of loss for ten months but the necessity of suing within one year, the Statutory Conditions generally, risks not covered and not covered except by permission, arbitration, other insurance, co-insurance, rectification and subrogation.

Recent Appointments

ROY T. GRAHAM, Esq., K.C., of Swift Current, to be a Judge of the Court of King's Bench for Saskatchewan.

THE HON. J. A. GLEN, K.C., to be a member of the International Joint Commission.

To be members of the Income Tax Appeal Board constituted by section 1 of the Third Schedule to the Income War Tax Act.: THE HON. ROY T. GRAHAM, Judge of the Court of King's Bench, Saskatchewan, to be chairman of the Board for a period of one year; FABIO MONET, K.C., of Montreal and WILLIAM STANLEY FISHER, K.C. of Ottawa, to be members for a period of ten years.

⁶ E. B. MacLatchy, K.C. (1948), 26 Can. Bar Rev. 202, at pp. 220-21.