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Résumé de l'article

Nous reproduisons ici un premier extrait du rapport que le surintendant des Assurances fédéral a présenté à la Commission Porter en octobre 1962 sous le titre de « *Submission to the Royal Commission on Banking and Finance by the Superintendent of Insurance* ». Dans le chapitre intitulé « *Jurisdiction over Insurance* », monsieur MacGregor recherche les origines du contrôle et définit les positions de son département. Il nous a paru très intéressant de présenter cette partie du texte à nos lecteurs afin de donner le point de vue officiel à l'aide d'un document de première source. Nous pensons qu'ainsi ils auront les deux aspects d'une question très controversée. Nous leur avons donné déjà un extrait du Rapport Tremblay, dans lequel la Commission provinciale indiquait le point de vue de la province de Québec. Il nous a semblé qu'on aurait un dossier plus complet en ayant celui d'un haut fonctionnaire fédéral qui dirige le service des Assurances avec une grande dignité; ce qui lui vaut d'ailleurs le respect de ses administrés. A.

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Jurisdiction over Insurance

Nous reproduisons ici un premier extrait du rapport que le surintendant des Assurances fédéral a présenté à la Commission Porter en octobre 1962 sous le titre de "Submission to the Royal Commission on Banking and Finance by the Superintendent of Insurance". *Dans le chapitre intitulé* "Jurisdiction over Insurance", *monsieur MacGregor recherche les origines du contrôle et définit les positions de son département. Il nous a paru très intéressant de présenter cette partie du texte à nos lecteurs afin de donner le point de vue officiel à l'aide d'un document de première source. Nous pensons qu'ainsi ils auront les deux aspects d'une question très controversée. Nous leur avons donné déjà un extrait du Rapport Tremblay, dans lequel la Commission provinciale indiquait le point de vue de la province de Québec. Il nous a semblé qu'on aurait un dossier plus complet en ayant celui d'un haut fonctionnaire fédéral qui dirige le service des Assurances avec une grande dignité; ce qui lui vaut d'ailleurs le respect de ses administrés.* A.

Discussion Preceding Confederation

The subject of insurance is not mentioned in Part VI of the British North America Act setting forth the distribution of legislative powers between Parliament and the provincial legislatures. However, it is not correct to say (as has sometimes been said) that this omission is explained by the relative unimportance of insurance at the time of Confederation or that such subject was not though of at all. An examination of the minutes of the Quebec Conference in 1864 will

show that the Hon. Mr. Mowat moved on October 25, 1864, that, among other things, it should be competent for the *general* legislature to pass laws respecting the following matters:

1. The Indians.
2. Ferries between any province and foreign country or between any two provinces.
3. *For the regulation and incorporation of fire and life insurance companies.*
4. Respecting Savings Banks.

This motion was resolved in the affirmative but a long discussion subsequently ensued about the specific matters that should be allotted to the provinces, including the power to incorporate companies with local objects. The subject of insurance was not singled out in this discussion but it would appear that the existence of many county or parish mutual fire insurance companies formed under the legislation of Lower Canada in 1834 and of Upper Canada in 1836, and operating locally, may have influenced or induced the deletion of item 3 at a later stage of the Conference. However, there seems to be nothing in Pope's Confederation Documents to lend any support whatever to the view that it was ever intended to allot the incorporation, regulation and supervision of insurance companies in general to the provinces. On the contrary, it is abundantly clear that the intention was to allot to the *general* legislature all matters not specifically allotted to the provinces and, as respects insurance, all that seems to have been intended to be allotted to the provinces was the power to incorporate companies with purely provincial objects.

Actual Distribution of Powers understood and accepted

The actual distribution of powers between the Dominion and the provinces at the time of Confederation appears to have been well understood and agreed upon. Legislation enacted before Confederation dealing with purely provincial companies was allowed to remain unrepealed by the Dominion; legislation respecting alien companies was repealed and new legislation respecting Dominion, British and foreign companies was enacted by the Dominion. The duty of supervising the incorporation and operations of insurance companies operating locally was logically left with the provinces. Likewise, the incorporation and

supervision of Diminion companies and British and foreign companies presumably looking to extension of their business throughout the new Dominion was logically placed in the hands of the federal authorities. Incidentally, it might here be mentioned that for nearly half a century after Confederation it seems to have been generally believed that a provincially-incorporated company could not legally extend its operations beyond the province of incorporation unless empowered to do so in some manner by federal authority. This point was clarified by the judgment of the Privy Council in the Bonanza Creek case in 1916.

Some questions arose subsequently

By reason of the fact that insurance was not specifically mentioned in the British North America Act, it is perhaps not surprising that some questions subsequently arose concerning jurisdiction over certain aspects of tht business. It may not, however, be generally realized that in most cases that were taken to the Privy Council, the origin lay not with the respective governments but with some particular kind of foreign insurer that wished to do business in Canada without complying with federal requirements, including deposit requirements, generally applicable to all companies.

The first case was in 1881 (Citizens v. Parsons) where the Privy Council held that the enactment of statutory conditions in fire insurance policies by the Province of Ontario was within the power of the province by reason of its jurisdiction over property and civil rights. However, at that time, there were no such conditions in federal legislation and there is room for doubt what the decision would have been if federal legislation respecting policy provisions had existed with regard to Dominion, British and foreign companies. In the later judgment of the Privy Council in the Liquor Licence case in 1896, the earlier decision of 1881 was referred to in the following words:

> "The scope and effect of No. 2 of section 91 were discussed by this Board at some length in Citizens Insurance Company v. Parsons where it was decided that, in the absence of legislation upon the subject by the Canadian Parliament, the Legislature of Ontario had authority to impose conditions as being matters of civil right, upon the business of fire insurance which was admitted to be a trade, so long as those conditions only affected provincial trade."

No. 2 of section 91 of the British North America Act, referred to above, gives Parliament the exclusive authority to legislate respecting the regulation of trade and commerce and it is to be noted that in the above decision, it was admitted that insurance falls under this heading.

Subsequently, several cases involving the licensing of foreign insurers in Canada were referred to the courts and in the three cases dealt with by the Privy Council in 1916, 1924 and 1931, it was consistently held that Parliament is competent to legislate with respect thereto, not only through its jurisdiction over trade and commerce but also over aliens. The following quotation from the decision in 1916 was reaffirmed in both the 1924 and 1931 cases:

> "The second question is, in substance, whether the Dominion Parliament has jurisdiction to require a foreign company to take out a licence from the Dominion Minister, even in a case where the company desires to carry on its business only within the limits of a single province. To this question their Lordships' reply is that in such a case it would be within the power of the Parliament of Canada, by properly framed legislation, to impose such a restriction. It appears to them that such a power is given by the heads in s. 91, which refer to the regulation of trade and commerce and to aliens. This question also is therefore answered in the affirmative."

The foregoing comments relate to the authority of Parliament to legislate respecting alien insurers transacting business in Canada. There has never been any particular doubt about the authority of Parliament to incorporate and regulate insurance companies of its own creation. The status of such companies as compared with the status of provincially incorporated insurance companies was also dealt with in the 1916 decision in the following terms:

> "Where a company is incorporated to carry on the business of insurance throughout Canada, and desires to possess rights and powers to that effect operative apart from further authority, the Dominion Government can incorporate it with "such rights and powers, to the full extent explained by the decision in the case of John Deere Plow Co. v. Wharton (1915, A-C., 330). But if such a company seeks only provincial rights and powers, and is content to trust for the extension of these in other provinces to the Governments of those provinces, it can at least derive capacity to accept such rights and powers in other provinces from its province of incorporation, as has been explained in the case of the Bonanza Company."

NOTE: It is of interest and probably of significance that the decision of the Privy Council in the case of the Bonanza Creek Gold Mining Company was rendered immediately before, but at the same sitting, as the decision in the Insurance Case, February 24, 1916.

Advantage in Dominion incorporation

Since the question is sometimes asked whether there is any advantage in Dominion incorporation as compared with provincial (such question is referred to in the evidence in connection with the brief of the Trust Companies Association of Canada), the views of the Privy Council as quoted above provide at least a partial answer. The following excerpt from the further judgment of the Privy Council in the Great West Saddlery Co. case in 1921 also seems pertinent:

> "For the power of a province to legislate for the incorporation of companies is limited to companies with provincial objects, and there is no express power conferred to incorporate companies with powers to carry on business throughout the Dominion and in every province. But such a power is covered by the general enabling words of Section 91, which because of the gap, confer it exclusively on the Dominion. It must now be taken as established that Section 91 enables the Parliament of Canada to incorporate companies with such status and powers as to restrict the provinces from interfering with the general right of such companies to carry on their business, where they choose, and that the effect of the concluding words of Section 91 is to make the exercise of this capacity of the Dominion Parliament prevail in case of conflict over the exercise by the provincial legislatures of their capacities under the enumerated heads of Section 92."

Thus it is clear that a Dominion company possesses capacity to transact business throughout Canada that is lacking, except in a conditional way in the case of a provincial company. Experience also seems to demonstrate that Dominion incorporation is a distinct advantage, at least in the field of insurance, where a company seeks to extend its operations outside Canada.

Notwithstanding the authority of Parliament to legislate respecting Dominion, British and foreign insurance companies under the headings of the regulation of trade and commerce, aliens and immigration, bankruptcy and insolvency, together with its possession of all residual powers not specified in section 92 of the constitution, including the power to incorporate companies, it is at the same time

clear that the provinces are competent to legislate with respect to many features of the business through their jurisdiction over property and civil rights. Although this might suggest the possibility of duplication or conflict, the fact is that the existing legislation of the Dominion and of the provinces is largely complementary with little or no overlapping and has not given rise to any serious problem in recent years.

Present situation

The situation that has evolved in Canada appears to be very satisfactory to all concerned. The Federal Government is responsible for the registration and supervision of all Dominion, British and foreign insurance companies and fraternal benefit societies operating in Canada, especially from the point of view of solvency, while the provincial governments are responsible for provincially-incorporated companies and societies along with legislation respecting policy provisions, licensing of agents and brokers, and other matters of a more local nature. At the present time, federally registered companies do about 95% of the life business in Canada and nearly 90% of the fire and casualty business. There is complete co-operation between the federal and provincial insurance departments and this has resulted in uniform annual statements and other uniform practices greatly to the benefit of the companies and the insuring public.

Even though the existing situation is presently satisfactory from the practical standpoint, it would nevertheless be desirable if the situation were confirmed in the British North America Act. Under existing conditions, it is always possible that uncertainties may arise concerning the respective authority of Parliament and the provincial legislatures which should be avoided in the interests of all concerned. Much time and money have already been spent over the years in attempts to determine or clarify the respective powers of the federal and provincial governments in this field and it would be unfortunate if this should ever happen again in any substantial way. Nothing that has been said above is intended to minimize or gloss over the fact that the Privy Council decisions respecting the business of insurance in Canada have sometimes lent much support to the provincial side but at the same time it must be admitted all around that such decisions have sometimes also been difficult to understand and have tended to confuse rather than clarify the situation.

The following quotations from "Canadian Constitutional Decisions of The Judicial Committee of the Privy Council, 1930 to 1939" by C. P. Plaxton, K.C., written while Acting Deputy Minister of the Department of Justice, maybe summarize the composite effect of the several decisions respecting insurance as succinctly as possible:

> "The real and only point of Lord Dunedin's judgment is that it forcibly reaffirms and makes clear the constitutional principle upon which the earlier decisions of the Board really proceeded, namely, that all persons, whether Canadians, Britishers or foreigners, are subject in the conduct of the business of insurance (whether in respect of contracts or other incidents of that business) to provincial laws of general operation on the subject of property and civil rights and that the Dominion Parliament has no jurisdiction to trench upon that field. It is apprehended that, compatibly with Provincial control over the exercise of the business of insurance in relation to property and civil rights, the Dominion Parliament has distinct legislative authority to determine the conditions upon which Dominion, foreign or British companies shall be permitted to transact the business of insurance in Canada or in any province thereof.
>
> "The distinction which seems to be recognized and emphasized by all the decisions, including Lord Dunedin's judgment, appears to be this: that there is a constitutional disjunction between creating or controlling or limiting the subjective status and powers and the field of operations of a Dominion, British or foreign company incorporated for the purpose of carrying on the business of insurance, on the one hand, and the regulation of the objective exercise of its powers, in respect of property and civil rights in a Province, on the other hand. The former class of regulation is within the exclusive competence of the Dominion Parliament; the latter is within the exclusive competence of the Provincial legislatures."

As an illustration of the undesirability of further conflict or confusion in the absence of a clarifying amendment to the constitution, perhaps the situation in the U.S.A. might be referred to briefly.

Just as in the case of Canada, the subject of insurance was not mentioned in the constitution of the United States. In the United States, inter-state commerce is subject to federal law but the Supreme Court of the United States held in about a dozen cases, beginning with Paul v. Virginia in 1869, that insurance is not commerce. The incorporation of companies also falls generally within the legislative authority of the states and, unlike Canada, all residual powers rest with the states. In these circumstances, supervision of insurance companies rather

naturally grew up under the authority of the states with the result that companies there operate in a very complex web involving about fifty different sets of state laws, insurance departments, etc., the requirements of which, although very detailed, vary greatly.

There is no doubt that the situation in the U.S.A. has had an effect upon the situation in Canada notwithstanding the essential differences between the constitutions of Canada and of the U.S.A., including the essentially different allocation of powers to the federal government in each case. On several occasions, the United States case of Paul v. Virginia and sometimes a few other United States cases were cited as precedents by Canadian courts and even by the Privy Council. However, the Supreme Court of the United States reversed its position in 1944 in the Southeastern Underwriters case and held that insurance when conducted across state lines falls under the Commerce Clause and is therefore subject to the regulatory power of Congress. Even the dissenting judges in the latter case admitted that the business of insurance is commerce, in effect that earlier judgments were wrong, but they dissented simply because reversal would create turmoil in the light of the elaborate system of state laws and state supervision that had evolved over a long period. As a consequence of this important decision, the federal government in the U.S.A. has already taken several steps relating to regulation of the business and great uncertainty and confusion prevail as to the future. This kind of situation is not in the best interests of the companies or the insuring public and any risk of similar confusion arising in Canada should be avoided by clarification of the constitution so as to confirm the existing situation in Canada.

Needless to say, what has been said above concerning the constitutional aspects of jurisdiction over insurance is not put forward in any sense to revive controversy but simply in an endeavour to outline what is believed to be the true situation. There are probably only a very few persons on the scene today who had any close contact with past disputes in the checkered history of this subject and the inaccurate statements that are sometimes heard indicate a rather glaring lack of familiarity with its complicated background.

Provincial Companies

If a constitutional amendment be made to confirm the status quo, the position of provincially-incorporated insurance companies

should receive special attention. In most previous recommendations to this end, it has been generally agreed that the supervision of provincial companies and societies operating solely in their respective provinces of incorporation should be left to those particular provinces. This is logical and appropriate having regard for the local nature of a great many small companies and societies. Previous recommendations have usually been framed to provide also that provincial companies transacting business in more than one province should be subject to federal jurisdiction. This, too, is logical and appropriate but in such cases the recommendation should carry with it the necessity of re-incorporation as a Dominion company or society, as the case may be, and should further apply where a provincial company or society seeks to extend its operations outside Canada even though operating in only one province. There is not presently a large volume of business done by provincial companies outside their province of incorporation (about 1% of the total), as the following data show, but the situation would likely change and many new problems would likely be created if registration of provincial companies by the Federal Government were to become a regular practice:

DISTRIBUTION OF BUSINESS IN CANADA AMONG FEDERALLY-REGISTERED AND PROVINCIALLY-LICENSED ORGANIZATIONS

1961

Class of Company or Society	Amount of Life Insurance in Force December 31	% of Total	Net Premiums* written during year	% of Total
	$	%	$	%
Federally registered				
Companies	48,284,484,000	93.1	823,156,846	86.5
Societies	739,493,000	1.4	—	—
Totals	49,023,976,000	(94.5)	823,156,846	(86.5)
Provincially registered only				
Within province of incorporation				
Companies	2,230,465,000	4.3	81,706,486	8.6
Societies	165,259,000	.3	—	—

* Fire and casualty insurance.

Outside province of incorporation				
Companies	342,627,000	.6	10,082,101	1.0
Societies	135,610,000	.3	—	—
Lloyds	—		37,337,100	3.9
Totals	2,873,961,000	(5.5)	129,125,687	(13.5)
Grand Totals	51,897,937,000	100.0	952,282,533	100.0

If a provincial company desires to operate beyond its province of incorporation and thus act virtually as a Dominion company and at the same time seeks federal registration, it seems reasonable and right that it should be reincorporated as a Dominion company so that it will have the same powers as Dominion companies generally. This has, in fact, been the practice for more than thirty-five years and is much the best course for all concerned. Otherwise, registration of a provincial company as such leaves the company in the position where it can only derive its powers from the province of incorporation but is subject to the restrictions in both federal and provincial legislation. Also, there may be doubt whether some provincial companies have the capacity to accept powers from another province or especially from a foreign country or whether the necessary powers can be conferred upon provincial companies by some provinces or foreign countries. At the same time, by reason of the Bonanza Creek decision and subsequent provincial legislation, some provincial companies in the absence of specific restrictions may have all the powers of a natural person, which might not be in the best interests of policyholders. From the point of view of supervision, it also seems better as a matter of principle that the government or legislature creating a company should be primarily responsible for it; incorporation of a company by one government in the knowledge that some other government will be responsible for its operations does not seems to be consistent with "responsible government". Furthermore, if provincial companies could look forward to registration as such by the Federal Government, it would probably soon become the custom to seek incorporation in whatever province might have the most liberal laws and some of them have been very liberal indeed. In general, provincial incorporation has always been obtainable more quickly and more easily than Dominion incorporation; among other things, the latter requires a special Act of

Parliament in every case whereas the former is available through letters patent in many provinces.

As respects the operations of provincial insurance companies outside Canada, such operations have up to date been relatively insignificant but it is a matter of regret that the failure of some provincial companies has done considerable damage to the cherished reputation that Canadian insurance companies have built up the world over. Prior to 1940, a provincially-incorporated life insurance company transacting business in the British West Indies as well as in Canada got into difficulties and loss to policyholders was avoided only by the willingness of a number of other Canadian companies jointly to take over the assets and liabilities in order to preserve the reputation of the business. About the same time, another life insurance company incorporated in the same province but doing business in some other provinces also got into difficulties and had to be taken over by other companies in the same manner. This experience, while it did not result in any loss to policyholders of the provincial companies, nevertheless led the province of incorporation to amend its Insurance Act soon after so as to require Federal registration of every life insurance in that province, regardless of the manner of incorporation. In the field of fire and casualty insurance, the failure two years ago of a provincial company that had been transacting business in the U.S.A. precipitated a very large volume of complaints from United States policyholders, agents, government officials and other persons who naturally looked upon all Canadian insurance companies alike, regardless of Dominion or provincial status. This case, which involved substantial losses to both Canadian and United States policyholders, has created a blot on the record of Canadian companies operating outside Canada that may take a long time to erase. Several other provincial insurers have failed in recent years resulting in losses to policyholders but at least they were not operating outside Canada.