V.C.M.

DOMINION - PROVINCIAL CONFERENCE

Opinions on Constitutional Law

No. 4. The Regulation of Insurance

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I. PROVISIONS OF B. N. A. ACT

91. It is hereby declared that (notwithstanding anything in this Act) the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated, that is to say:-

(2) The regulation of trade and commerce.

(3) The raising of money by any mode or system of taxation.

(25) Naturalization and aliens.

92. In each province the legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated, that is to say:-

(11) The incorporation of companies with provincial objects.

(13) Property and civil rights in the province.

95. In each province the legislature may make laws in relation to immigration into the province; and it is hereby declared that the Parliament of Canada may from time to time make laws in relation to immigration into all or any of the provinces; and any law of the legislature of a province, relative to immigration, shall have effect in and for the province, as long and as far only as it is not repugnant to any Act of the Parliament of Canada.

II. RECOMMENDATIONS OF SIROIS COMMISSION (Book II, pp. 59-62)

... ...

4. Insurance

The business of insurance in Canada in 1867 was on a comparatively small scale and such regulation as was attempted was of a very simple nature. It is not, therefore, remarkable that no specific mention of the subject of insurance appears in the British North America Act. But in the last seventy years the business of insurance has grown enormously and governmental regulation has grown with it in extent and variety. This regulation has been of three types, namely, imposition of conditions on incorporation, regulation of the terms and incidents of insurance contracts, and supervision designed to secure the solvency of insurers.

... ...

The Dominion has never attempted to regulate provincially-incorporated companies doing business only within the province, and it was with such companies that the earliest provincial legislation was concerned.

... ...

The provincial power to legislate respecting conditions of insurance contracts was established in an early case, and the Dominion has not since attempted to prescribe such conditions directly. But it ~~is~~ attempted to deal with certain phases of insurance contracts and to require insurers to obtain a Dominion licence. It was held by the Privy Council that such legislation was invalid and could not be supported under the Dominion's powers to legislate for the peace, order and good government of Canada, or for the regulation of trade and commerce. Following this decision the Dominion passed new statutes permitting the issue of licences to insurers and requiring the inclusion of certain provisions in insurance contracts as a condition of obtaining a licence. This attempt to support legislation under Dominion jurisdiction over criminal law, aliens, and immigration was also unsuccessful. Another attempt to require insurers to take out a Dominion licence was made by imposing an additional tax on unlicensed insurers. This attempt to

regulate insurance by the use of the taxing power was also held to be invalid in 1932. Following this last decision of the Privy Council new legislation was passed by the Dominion Parliament, based evidently on its power over bankruptcy and insolvency. ...

This survey of legislation, and of litigation arising therefrom, indicates that there has been little doubt about jurisdiction over certain portions of the field of insurance. Thus, for example, there has never been any serious question of the powers of the provincial legislature to regulate the terms of the contract or to licence insurance agents and brokers. But over some portions of the field there is still grave uncertainty. This uncertainty has led to administrative difficulties and has encouraged attempts to expand jurisdiction which would probably not have been made had jurisdiction been clearly defined.

Apart altogether from the decisions of the courts, there appears to be no inherent reason for a single unified administration over all phases of the insurance business, and no reason why the division of regulative power over insurance should lead to administrative inefficiency, provided the jurisdiction is clearly defined and provided different authorities do not attempt to duplicate each other's functions. It would seem possible not only to divide the field of insurance regulation according to function, but according to the type of company as well.

We are of the opinion that the jurisdiction to regulate the incidents and conditions of insurance contracts should remain with the provincial legislature, which has hitherto performed this function satisfactorily. ... ...

The provincial legislatures already provide for licenses of many kinds, and provincial officials are accustomed to the administrative details of licensing regulation. The licensing of insurance agents, brokers and adjusters, is a matter in which detailed administration and particular local knowledge are necessary, and we are of the opinion that the provincial jurisdiction in this regard is satisfactory and should continue. ... ...

... ... <u>We recommend</u>, therefore, that all provincially-incorporated insurance companies doing business only in the province of their incorporation should be subject for all purposes to the exclusive legislative jurisdiction of the province concerned. We think, however, that the Dominion Department of Insurance should have power to undertake the supervision of provincially-incorporated companies when requested to do so by the province. ... ...

In regard to companies doing business in more than one province, duplication and overlapping exist in the matter of licences to do business, annual returns, and statistical reports.

... ...

Is it not obvious that where an insurereis doing business in more than one province, there should, in the interests of efficiency and economy, be only one supervision of that insurer concerning matters of solvency? In view of the difficulty of otherwise determining jurisdiction, and in view of the Dominion's experience in such matters which has been built up over many years, we recommend that the Dominion Superintendent of Insurance should be charged exclusively with the duty of examining as to solvency all insurance companies, other than provincially-incorporated companies doing business only in the province of incorporation. Subject to the same exception, the Dominion should have exclusive power to license all insurance companies, provide for such deposits as may be necessary, inspect for solvency, and require annual and statistical returns. ... ... But an insurance company licensed by the Dominion should be entitled to commence business in any province of Canada without question, and should be able to continue business subject only to the financial supervision of the Dominion Department of Insurance. In recommending a single jurisdiction for the financial supervision of insurance companies (except provincially-incorporated companies doing business only in the province of incorporation) we aim to avoid not only unnecessary costs to the insurance companies and the public, which we have already mentioned, but also the increased governmental costs arising from duplication of governmental machinery by the Dominion and provinces for the inspection and supervision of insurance companies.

Summary of Conclusions

Our recommendations thus involve a clear-cut division of functions throughout the whole field of insurance law. The provincial legislatures should have exclusive jurisdiction to prescribe the statutory conditions and incidents of insurance contracts, and exclusive jurisdiction to license insurance agents, brokers and adjusters. They should also have power to supervise the financial affairs of all insurance companies incorporated and operating solely within the province of incorporation; but a province should be enabled to delegate this function to the Dominion if it so desires. The Dominion should have the exclusive jurisdiction and responsibility for licensing all other companies, requiring deposite from them, prescribing annual and statistical insurance returns, conducting financial inspections and supervision, and publishing annual reports concerning such companies.

III. PRESENT JURISDICTION

1. In general, it is well settled doctrine that it is the substance and not the form of legislation which determines its validity as being "in relation to" a subject matter of legislation confided to the Dominion or to the Provinces; but "legislative bodies are proverbially impatient of constitutional limitations upon their power" and often seek to attain desired ends by casting their enactments into forms calculated to conceal their real character. The courts, on the other hand, seek to discover the "true substance" of the legislation and "its real aspect and purpose" in order to defeat such encroachments. (A.G. for Ontario v. Reciprocal Insurers (1924) AC at 337-342.) Illustrations of this contest between the ingenuity of legislators and the astuteness of the courts are to be found in the topic of this Opinion; for the Dominion has failed repeatedly in legislative attempts to escape from the fact that in the eyes of the Courts the whole business of insurance is founded on the making of individual contracts of insurance; and that such contracts, their form and their incidents are within the exclusive jurisdiction of the Provinces as matters of "property and civil rights in the Provinces.

2. The Dominion has power to incorporate insurance companies with "non-Provincial" objects; but even these are subject to provincial legislation prescribing how they shall carry on their insurance business in the Province. (Re Insurance Act (1932) A.C. at 45.)

3. So far as the Dominion has any jurisdiction to regulate insurance companies, it is derived primarily from the Trade and Commerce clause, the scope of which has been restrictively construed in favour of the competing Provincial power as to Property and Civil Rights. Accordingly the Dominion has failed to establish the Trade and Commerce clause as an effective source of power in relation to insurance. Moreover, though it has invoked almost every conceivably relevant provision in the Act - e.g., those relating to Criminal Law, Aliens, Immigration and Taxation - by legislation carefully framed as "aspects" of those subjects - it has failed invariably in its attempt to do indirectly what it cannot do directly.

4. It is possible that by "properly framed legislation" (Attorney-General for Canada v. Attorney-General for Alberta (1916) A.C.588) it may yet succeed in establishing a measure of control over insurance; but in a practical sense such attempts seem foredoomed to failure.

For, in the words of a recent judgment of the Privy Council, "it is not competent for theDominion . . . under the guise, or the pretence, or in the form of an exercise of its own powers, to carry out an object which is beyond its powers and a trespass on the exclusive powers of the Provinces." (Attorney-General for Alberta v. Attorney-General for Canada (1939) A.C. at 130.)

Power of Incorporation of Companies

5. The power to make laws in relation to "the incorporation of companies with Provincial objects" ((Section 92(11)) is conferred on the provinces. No similar power being enumeratively vested in the Domini n as to companies with non-Provincial objects, the Privy Council has held that "such a power is covered by the general enabling words of Section 91 which, because of the gap, confers it exclusively on the Dominion. (Great West Saddlery Co. v. The King (1921), 2 A.C. at 114; Citizens Ins. Co. v. Parsons (1881), 7 App. Cas. at 116; John Deere Plow Co. v. Wharton (1915), A.C. at 339-340; Colonial Building Asso. v. A. G. for Quebec, 9 App. Cas. 157. As to what is comprehended in the phrase "incorporation of companies", see Reference re S.110 Dominion Companies Act (1934) S.C.R. 653.)

Accordingly the Dominion has power under the Residuary Clause to incorporate insurance companies with Dominion objects and to confer upon them the corporate status to do business in the Provinces. It is beyond the power of a Province to destroy this corporate status or to sterilize or destroy the corporate powers of a Dominion company or to interfere with its general right to carry on business where it chooses. (John Deere Plow Co. v. Wharton (1915) A.C. 330; Great West Saddlery v. The King, supra; A.G. Manitoba v. A.G. Canada (1929) A.C. 260; Lymburn v. Mayland (1932) A.C. 318.)

Provincial Regulation of Dominion Companies

6. It is competent to a Province to subject Dominion companies to laws of general application such as laws imposing taxation or relating to the power to hold land or requiring licenses for certain purposes, or as to the form of contracts, or the registration of documents, or prescribing "the way in which insurance business or any other business shall be carried on in the province." (Great West Saddlery Co. v. The King (1921) 2 A.C. 91; in re Insurance Act (1932) A.C. 41.)

7. For full reviews of the cases dealing with the destinction between the inability of a Province to affect the corporate status of a Dominion company and its ability to subject same to regulation in the

actual exercise of its powers in that province. (See R. v. Arcadia (1932) 2 D.L.R. 475 and Motor Supply Co. v. A.G. Alberta (1939) 3 D.L.R. 660.)

8. These principles as to the respective powers of the Dominion to incorporate companies and as to the extent to which Dominion companies are subject to the general legislative control of the Provinces apply to insurance as well as to other companies. Thus, for example, the Privy Council has said that:

> "It is within the power of the Dominion to create a company and endow it with power to carry on the business of insurance and nothing that the Provinces can do can intefere with the status so created; but none the less the Provinces can by legislation prescribe the way in which insurance business shall be carried on in the Provinces." (Re Insurance Act of Canada (1932) A.C. at 45.)

9. On these principles the Courts have upheld Provincial legislation prescribing the form and conditions of contracts of fire, automobile, accident and sickness insurance (see Citizens Insurance Co. v. Parsons (1888) 7 Appeal Cases 96; Re Insurance Contracts 58, O.L.R. 404); and regulating the making of reciprocal contracts of insurance. (A.G. Ontario v. Reciprocal Insurers (1924), A.C. 328.)

Dominion Regulation of Insurance

10. As opposed to its power of incorporating insurance companies (which, though untouchable as to status, are subject to provincial laws as to the conditions upon which they may do business in a given Province), the Dominion has sought to secure an effective control over all insurance companies by way of licensing, etc.

11. The present situation may be seen by brief reference to the cases in which it asserted this right of control and the reasons wherefor its asserted right was rejected.

On this subject reference may usefully be made to the following Appendixes to the Sirois Report: "Legislative Expedients Adopted by the Dominion and the Provinces" (No. 8) by L. M. Gouin and Brooke Claxton; and "Difficulties of Divided Jurisdiction" (No. 7) by J. A. Corry).

12. <u>In Citizens Insurance Co. v. Parsons</u> (1881) 7 App. Cas.96, the Privy Council upheld the validity of an Ontario statute prescribing certain conditions which were to form part of all policies of fire insurance entered into or in force in Ontario for insuring property in that Province and applicable to all such contracts whether entered into by insurers incorporated under Dominion, British or foreign authority.

13. The Dominion's contention that such legislation was within the exclusive competence of the Dominion under the Trade and Commerce power was rejected. In the view of the Privy Council a consideration of this clause in S. 91 showed that "<u>regulations relating to general trade and commerce</u> were in the mind of the legislature when conferring this power" and that the words "regulation of trade and commerce" . . . "would include political arrangements in regard to trade requiring the sanction of Parliament, regulation of trade in matters of inter-provincial concern and it may be that they include general regulation of trade affecting the whole Dominion . . . <u>but do not comprehend the power to regulate by legislation the contracts of a particular business or trade, such as the business of fire insurance in a single province</u>."

14. As the Privy Council later said (in In re The Insurance Act (1932) A.C. at 45) "the great point of the case is the clear distinction drawn between the question of the <u>status of a company</u> and the way in which the business of the company shall be carried on." (See paragraphs 5 - 6 supra.)

15. <u>The Insurance Reference</u> (1916) 1 A.C. 588, involved a provision in the Dominion Insurance Act of 1910 which prohibited under penalties all life insurance companies from selling insurance in Canada <u>unless first licensed by the Dominion Government</u>.

16. It was sought to support it under the Residuary and the Trade and Commerce Clauses. Both contentions were rejected. It was not valid under the Residuary Clause because that Clause did not extent to allow the Dominion to trench on subjects allotted to the Province by the Property and Civil Rights Clause of Section 92. It was not valid under the Trade and Commerce Clause because "the authority to legislate for the Regulation of Trade and Commerce <u>does not extend to the regulation by a licensing system of a particular trade in which Canadians would otherwise be free to engage in the Provinces</u>."

17. In this defeat there was a ray of hope; for the Privy Council said in answer to another question which involved the possible jurisdiction of the Dominion to require a foreign company to take out a Dominion license (even where it wished to carry on business only in a single province) "that in such a case it would be within the power of Canada

by properly framed legislation to impose such a restriction" under the heads in Section 91 relating to Trade and Commerce and to Aliens.

It may be interjected that the Dominion has not yet been able to devise such "properly-framed legislation."

18. Attorney-General for Ontario v. Reciprocal Insurers (1924) A.C. 328, dealt with two Dominion enactments made in 1917, one the Insurance Act and the other an amendment to the Criminal Code which the Privy Council said were "complementary parts of a single legislative plan" and admittedly an attempt to produce by a different legislative prodedure the results aimed at in the legislation held ultra vires in the 1916 case. Involved in this case was the question whether certain American reciprocal insurance associations were entitled to carry on fire insurance business in Ontario under licenses issued by the Ontario Government contrary to provisions in the Dominion Insurance Act and the Criminal Code but under an Ontario insurance statute.

19. The Insurance Act empowered the Minister of Finance to grant licenses authorizing companies to carry on the business of insurance and setting out a comprehensive system of regulations for controlling the licensees in relation to the form and terms of contracts of insurance. By the amendment to the Criminal Code, all persons (except provincially incorporated insurance companies) were prohibited from soliciting or accepting any insurance risk or carrying on any business of insurance, etc., except on behalf of or as agent of a company licensed by the Minister under the Insurance Act.

20. The Privy Council held that the Province was entitled to grant licenses to reciprocal insurance associations and held the amendment to the Criminal Code ultra vires as a measure attempting to regulate the exercise of civil rights in the Provinces and as a merely colourable use of the Criminal Law power. As to this latter it said:

> "It is no longer open to dispute that the Parliament of Canada cannot, by purporting to create penal sanctions under section 91, head 27, appropriate to itself exclusively a field of jurisdiction in which, apart from such a procedure, it could exert no legal authority, and that if, when examined as a whole, legislation in form criminal is found, in aspects and for purposes exclusively within the Provincial sphere, to deal with matters committed to the Province, it cannot be upheld as valid. ... ...
>
> The enactment in question being in substance, notwithstanding its form, an enactment in regulation of contracts of insurance and the business of insurance, subjects not within the legislative sphere of the Dominion, and, subject to the proviso which is not here material, being general in terms, is in their Lordships' opinion invalid in its entirety."

21. <u>In re Insurance Act of Canada</u> (1932) A.C. 41 also involved an attempt by the Dominion to establish its exclusive right <u>to regulate foreign or British insurers</u> upon the basis of another Insurance Act as modified as the result of the previous case. It also involved Section 16 of the Special War Revenue Act, which imposed upon every person resident in Canada a tax in respect of the cost of insuring any property in Canada with any British or foreign insurer not licensed by the Dominion. (Note this Section 16 reappears in the latest case - see paragraph 28.)

22. In point of fact, the case arose through the licensing by Quebec of certain American mutual insurance companies which were not licensed by the Dominion.

23. The Dominion sought to justify this legislation as relating to matters covered by (a) Section 91 No. 25 "Aliens" and Section 95 "Immigration"; and as (b) "Taxation" under No. 3 of Section 91.

24. The Privy Council rejected both contentions because (a) the sections did not "deal with the position of <u>aliens as such</u> but, under the guise of legislation as to aliens, they seek to intermeddle with the conduct of insurance business in Canada, a business which ... ... has been declared to be exclusively subject to Provincial law" (p. 59); similarly, it was not "properly framed as to <u>immigration</u>, but an attempt to saddle British immigrants (i.e., insurers) with a different code as to the conduct of insurance business from the Code which has been settled to be the only valid code, i.e., the Provincial Code" (p.52). As to the taxing provision (b), it was <u>ultra vires</u> because "linked up with an object which is illegal" (i.e., the regulation of insurance business). Their Lordships said of this latter provision:-

> "Section 16 clearly assumes that a Dominion licence to prosecute insurance business is a valid licence all over Canada and carries with it the right to transact insurance business. But it has already been decided that this is not so; for <u>a Dominion license</u>, so far as authorizing transactions of insurance business in a Province is concerned, <u>is an idle piece of paper</u> conferring no rights which the party transacting in accordance with Provincial legislation has not already got, if he has complied with provincial requirements. It is really the same old attempt in another way." (pp. 52-53)

25. In the result, this case held that a foreign or British insurer licensed under the Quebec Insurance Act to carry on business in that Province, could do so without being also licensed by the Dominion, since the Dominion legislation was <u>ultra vires</u> as a colourable attempt to regulate the conduct of insurance business by such companies.

26. The case is also noteworthy for the hope expressed by their Lordships that it would be "the last of the series of litigations between the Dominion and the Provinces with regard to insurance." (p. 45) But this hope was illusory (see paragraph 28).

27. The net effect of the cases up to this point has been well summarized by C. P. Plaxton, K.C., Acting Deputy Minister of Justice of Canada, to be "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." (Canadian Constitutional Decisions of the Judicial Committee, 1930-1939", Ottawa, 1939, at p. xxviii.) Mr. Plaxton goes on to point out the distinction emphasized by all the decisions "that there is a constitutional disjunction between creating or controlling or limiting the subjective status 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." (p.xxix)

28. The final case, Reference re Section 16 of the Special War Revenue Act (1942),D D.L.R. 145, was decided by the Supreme Court of Canada and leave to appeal from its decision was refused by the Privy Council (1943) 4 D.L.R. 657, without reasons.

29. This case is a good illustration of the lengths to which the courts will go in unmasking a colourable purpose. What was referred to the Supreme Court was the question as to the validity of Section 16 of the Special War Revenue Act, but its intimate relation to two other Acts, viz., The Canadian and British Insurance Companies Act 1932, and the Foreign Insurance Companies Act 1932, was such that Section 16 was seen to depend upon them for its validity. Accordingly the validity of those Acts was discussed and when they were held ultra vires Section 16 shared the same fate.

30. Section 16 imposed on persons resident in Canada a tax in respect of premiums paid by them to a British or foreign company not registered by the Dominion.

The two Insurance Acts required British companies (other than those incorporated by the Dominion or a Province) and foreign companies to become registered as a pre-requisite to doing business in Canada. One of the conditions to be complied with in order to become registered was the deposit with the Dominion of securities to the amount of $100,000 or other sum as the Treasury Board determined.

Taken in conjunction with the references in the preambles to these statutes, one of their major purposes was to ensure against such companies becoming insolvent as regards policy-holders in Canada and to declare when they should be liable to be wound up.

31. Taken together, the three pieces of legislation would seem to depend for validity upon the power to legislate as to Aliens and as to Bankruptcy and Insolvency.

32. The Supreme Court held that such regulatory legislation as that requiring British and foreign companies to register and to deposit securities was competent to the Provinces; that ~~the Dominion could~~ even assuming that the Dominion could regulate the business of such British and foreign companies as a branch of external or inter-provincial trade, it could not do so as to their strictly provincial business; and that in substance they dealt with the business of insurance within the Provinces and were not legislation in relation to Aliens in the sense in which such legislation was held possible in the 1916 Insurance Reference. Accordingly the two insurance Acts were invalid and Section 16 was so related to them as also to be invalid.

33. It is noteworthy that no reference is made in the judgment to the power to legislate in relation to Bankruptcy and Insolvency as a basis for such Dominion legislation; but it is clear that even this pretence of legislating in respect of an undoubted Dominion power would have been dismissed as just another colourable attempt to secure control of the provincial business of British and foreign companies.

34. The writer concurs in the Editorial Note to this case:

> "From the time that Citizens Insurance Co. v. Parsons (1881) marked out the regulation of the business of insurance for exclusive provincial legislative control, the Dominion has failed in every attempt to justify before the courts the validity of federal regulatory legislation, even as to foreign companies. The burden of precedent that has been built up against the Dominion would seem to leave it little hope for successful legislation to achieve its purpose. Only a revolutionary about-face by the courts in respect of the content of "The Regulation of Trade and Commerce" will help the Dominion unless, of course, a constitutional amendment is introduced."

Such attempts to usurp desired functions by colourable devices should cease and whatever degree of Dominion control over the business of insurance which is deemed expedient should be sought by way of constitutional amendment.

IV. SUMMARY OF SIROIS RECOMMENDATIONS

35. A. That all insurance companies doing business only in the Province of their incorporation should be subject to the exclusive control of the Prov nce for all purposes, including the conditions and incidents of insurance contracts, the licensing of agents, brokers and adjusters, and the supervision of the financial affairs of such companies.

B. That as to all other companies (including British, foreign and Dominion and Provincial companies doing business in more than one Province) the Dominion should have exclusive legislative jurisdiction, including jurisdiction to license them, require deposits from them, inspect them for solvency, and require annual and statistical returns.

C. That (mirabile dictu) "this division of jurisdiction should be expressed with the greatest possible definiteness and clarity."

V. PREREQUISITES TO EFFECTIVE AMENDMENT

36. Amendment of the Constitution so as to divide regulatory functions in the matter of insurance companies and their business must take into account the following:-

(a) that the mere power of incorporation by the Dominion or a province presents no present difficulties; similarly it is unnecessary (as recommended) expressly to preserve Provincial power over insurance agents, brokers or adjusters, as this is already the law;

(b) that Dominion companies and indeed all companies are subject to provincial regulatory laws which (as long as they do not strike at their corporate status) may prescribe or control the practical exercise of their powers in the Province and dictate the way in which their business shall be carried on. (Cf. paragraphs 5 - 8 and 27 supra.);

(c) that the present inability of the Dominion to regulate insurance companies comes from the fact that the Trade and Commerce Clause, under which the power to regulate would naturally fall, has been held not to include it, so far at least as to enable regulation of the business of companies within a Province. Instead, the ability to regulate such companies and the conduct of their business in any Province inheres in the Property and Civil Rights Clause of Section 92;

(d) that both the incorporation of insurance companies and the regulation of them within the Province of incorporation are matters which are and should remain in the Province's jurisdiction;

(e) that the real problem is to give the Dominion power to regulate - by licensing or otherwise - the conduct within any Province of Dominion and foreign companies or of provincial companies which carry on business in a plurality of Provinces, particularly as to matters affecting proper actuarial practice or potential insolvency.

37. It is not clear from the Sirois Report whether as to companies created by an authority external to a Province it is intended that the form, conditions and incidents of their contracts of insurance should be subject to Dominion jurisdiction. It is submitted that such

matters should be left to Provincial jurisdiction as being essentially matters of "property and civil rights" or matters of "a merely local or private nature." As indicated in paragraph 6, other Dominion companies are subject to general provincial laws in all matters pertaining to the formation, incidents and effect of contracts. There is no reason why insurance companies should be treated differently from trading companies as to contracts made within a Province.

As this is now the law, no amendment is necessary as to the contracts of insurance, made by any company within a Province.

38. *What is required is legislation in aid of a Dominion power of regulation* now non-existent. Apart from its phrasing, this can be done in three ways: by subtracting from the provincial clause as to Property and Civil Rights; by addition to the Trade and Commerce Clause; or by adding a new clause to the enumeration in Section 91.

39. It is submitted that it is inadvisable to attempt to proceed by way of amending the Trade and Commerce Clause because:

(1) that clause, enervated as it has been, still covers many other matters than insurance companies;

(2) an addition to it might be held to qualify its meaning in unintended ways; and

(3) certain recent pronouncements indicate that the courts are aware that they have unduly weakened this clause and no possible obstacle should be placed in the way of its possible resuscitation as a source of Dominion power to control trade and the instrumentalities of trade. ~~Accordingly the Dominion should seek power of insurance regulation~~

Accordingly the Dominion should seek power of insurance regulation by some other type of amendment.

40. *The best way* is to proceed by inserting a special clause in Section 91, giving the Dominion power of regulation in affirmative terms.

41. *An alternative, but less preferable way*, is to amend the Property and Civil Rights Clause of Section 91 by excluding therefrom the power to regulate the business of non-local insurance companies.

42. In any event the new provision should follow the language of the Act as far as possible, even though in another context a different form of language might seem more appropriate. It must always be remembered that any change in a particular provision may have an effect on other provisions, for, as repeatedly held, the Act is to be construed as a whole and the language of each provision interpreted and, where necessary modified in the light of all the others. (Citizens Insurance Co. v. Parsons, supra.)

VI. DRAFT AMENDING SECTIONS

43. Section 91 of the British North America Act 1867 is amended by inserting therein the following clause:

> "(2B) The conditions under which insurance companies shall be entitled to carry on the business of insurance in any Province in Canada (except as to insurance companies incorporated in any Province and carrying on business solely in that Province) but in no case shall such conditions relate to the form, content or validity of contracts of insurance made in a Province."

Alternative Section

43. Clause 13 of Section 92 of the British North America Act 1867 is amended to read:

> "(13) Property and Civil Rights in the Province; but not including the regulation of the business of insurance companies incorporated outside the Province and not carrying on their business in Canada solely witnin the Province, except so far as provided by laws applicable to all companies doing business in the Province."

Vincent C. MacDonald.

July, 1944.