

FEDERAL VERSUS STATE SUPERVISION OF INSURANCE—A CANADIAN VIEW

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The entry of the Federal Government in the United States of America into the insurance regulatory field has created quite a turmoil in insurance circles on this continent. Canada has had both federal and state supervision of insurance almost since the confederation of the provinces which took place in 1867. The struggle of federal versus state rights is even now being fought out in Canada. What goes on in the United States of America in insurance matters is of major interest to us in Canada, for we are very susceptible to American influences. There is a curious similarity between insurance developments in the United States and Canada, yet remarkable diversities exist between the two countries in this insurance problem.

There are ten provinces in Canada bound by the British North America Act of 1867.¹ There will be no confusion if I use "state" for "province" in dealing with Canada and refer to the "Federal" Government rather than the "Dominion" Government at Ottawa. The Supreme Court of the United States at Washington is the final arbiter on law and the Constitution. In Canada, until very recently, the Judicial Committee of the Privy Council (a committee of the House of Lords) in London, England, exercised this right. In the future this right will be exercised by the Supreme Court of Canada at Ottawa.

To those who would say that on this account Canada is just at the threshold of nationhood, it must be pointed out that the existence of a dual nationality and dual language in Canada gives this problem of "state" rights such importance as to be the dominating factor in constitutional changes.

In Canada 30 per cent of the population of 13½ millions are of French Canadian origin. They are mainly concentrated in the province of Quebec, with an overflow into the adjoining provinces. In the cities the businessmen, shop assistants, and taxi drivers will speak English with varying degrees of proficiency, and an outstanding lawyer as the Prime Minister of Canada, Mr. St. Laurent, and others known to me, are masters of the English language. The rest of the population is predominantly British in origin and sentiment. His language, religion, law, and

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¹ 30 VICT., c. 3, §1.

education mean everything to the French Canadian, and any suggestion of concentration of power in Ottawa raises his fears, natural in a minority, that this power might be used some day to interfere with his enjoyment of the privileges he so cherishes. The common law of Canada, as in the United States, stems from the British common law with the exception of the province of Quebec where the Civil Code, based on the Code Napoléon, is used. In insurance legislation in Canada as with many other matters, it often is a matter of Quebec and the rest of the provincial governments on one side, and the Federal Government on the other in the matter of "state" rights.

A feature of insurance in Canada is that in fire and casualty business the greater part is written by companies where the chief control is outside Canada, mainly British and United States companies. Taking the fire insurance business in Canada for 1948, the total premium income of just over 100 million dollars was written by:

Canadian companies	18%
British companies (including British controlled)	42%
Foreign companies (mainly U. S. A.)	40%

About 65 per cent of the business originated in the provinces of Ontario and Quebec.

For casualty business, the premium income of which in 1948 amounted to 134 million dollars, a similar division and concentration applies. However, for life business the British companies play a very small part, the Canadian companies receiving about 67 per cent of the premium income and the United States companies about 29 per cent. Further, from the latest figures (1949), about one-third of the life insurance premium income and one-half of the annuity premium income of the Canadian life companies come from outside the borders of Canada.

The above insurance picture indicates the complexity of insurance interests in Canada. The country-wide and international basis of fire and casualty insurance is generally acknowledged, but in Canada even life insurance takes on an international character. Canada is now a great world power, but it was not so many years ago that Canada was best known outside her borders by the names of some of her life insurance companies.

The per capita fire loss in Canada is the highest in the world—similarly fire rates are the highest in the world. This is due to the extremes of climate—heat and cold—and the widespread existence of wooden construction.

I

THE BRITISH NORTH AMERICA ACT OF 1867

It has been said, "Federations are by their very nature difficult to govern." This statement applies to Canada particularly. As in the United States, any conflict of jurisdiction means a re-examination of the Constitution, and this is the British North

America Act which is the basis of confederation of the provinces in Canada. The relevant provisions of this Act so far as insurance is concerned are:

Powers of the Parliament

§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 herein-after enumerated; that is to say,

- (2) The Regulation of Trade and Commerce.
- (3) The Raising of Money by any Mode or System of Taxation.
- (21) Bankruptcy and Insolvency.
- (25) Naturalization and Aliens.
- (27) The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.

Exclusive Powers of Provincial Legislatures

§92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next herein-after enumerated; that is to say,

- (11) The Incorporation of Companies with Provincial Objects.
- (13) Property and Civil Rights in the Province.

Agriculture and Immigration

§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 as and as far only as it is not repugnant to any Act of the Parliament of Canada.

Further, Section 91 of the Act gives authority to the Dominion Parliament to make laws for the "Peace, Order and good Government of Canada" in relation to matters not assigned to the Provinces.

One important difference between the Canadian and United States constitutions is that in Canada the residuary power was left with the "Federal" Government whereas in the United States it was left with the States. To quote Dr. Sidney Smith, President of the University of Toronto:²

Canadian statesmen of 1867 were resolved not to make what they considered was the mistake of the framers of the constitution of the United States of America under which the residuary power of legislating is vested in the states. It was thought in Canada that such a provision in the constitution of the United States of America was responsible, in

² PROCEEDINGS OF THE LIFE INSURANCE INSTITUTE OF CANADA, THE BRITISH NORTH AMERICA ACT AND POST-WAR PROBLEMS (1944-1945).

considerable measure, for the Civil War in that country. Undoubtedly, the Fathers of Confederation desired that there should be a strong central government that could not be weakened by attacks from provinces jealous of sovereign rights.

Insurance is not mentioned in the British North America Act, although it is stated that in an early draft of the Act the right to control insurance was given to the Dominion.³ However, at the time of confederation there was a large number of purely parish or county mutual fire insurance companies formed under the legislation of lower Canada in 1834 and of upper Canada in 1836.⁴ It would seem reasonable to leave incorporation and operation of these companies with the provinces. Under the British North America Act the provinces are given the right to incorporate companies with provincial objects, which is again only logical.

However clear were the intentions of the "Fathers of Confederation," from the very early days of confederation there has been a conflict between the provinces and the Federal Government at Ottawa as to their respective fields of government. On over one hundred occasions since 1867 the matter of interpreting Canada's constitution has been brought before the Judicial Committee of the Privy Council. It is not insurance regulation alone which is the bone of contention. The provinces and Federal Government have met in conference on many occasions (another conference is scheduled for the latter part of 1950) to settle some aspects of this division of authority. The Report of the Royal Commission on Dominion-Provincial Relations is one of the landmarks of this struggle, and the following quotations commenting on the interpretation of Canada's Constitution by the Privy Council will indicate the fundamental issues at stake:⁵

Accordingly, with rare exceptions, if a proposed piece of Dominion legislation does not fall within the specific enumerations of Section 91, it is beyond the enacting power of the Dominion and within the powers of the separate provinces. That is to say, most of the novel legislation of our day, which is not of a type actually contemplated and expressly provided for by the framers of the British North America Act, must be enacted, if at all, by the provinces. There is much truth, as well as some exaggeration, in the contention that the "property and civil rights" clause has become the real residuary clause of the constitution.

The Dominion power under Section 91(2) "Regulation of Trade and Commerce" has received a restricted interpretation, improving on the limitations suggested in *Citizens' Insurance Company v. Parsons* in 1882 until, in 1925, the Privy Council questioned whether it was operative at all as an independent source of legislative power. More recent decisions show that it has some scope but the narrow meaning given to it limits severely the power which it confers on the Dominion to regulate economic life.

Temporary evils of great magnitude may be grappled with by Dominion legislation under the general clause of Section 91 but an enduring and deep-rooted social malaise, which

³ AMERICAN LIFE CONVENTION, J. A. TUCK, GOVERNMENT REGULATION OF INSURANCE IN CANADA (1946).

⁴ PROCEEDINGS OF THE INSURANCE INSTITUTE OF TORONTO, G. D. FINLAYSON, INSURANCE SUPERVISION IN CANADA (1926-1927).

⁵ ROWELL-SIROIS COMMISSION (1940).

requires the mobilizing of efforts on a nation-wide scale to deal with it, is beyond the power of the Dominion unless it is comprised in the enumerated heads of Section 91. Generally, therefore, the power to deal with these pressing social questions rests with the provinces. But this makes it very difficult to secure the uniformity of standards which are desirable in many kinds of social legislation. Moreover, the provinces are limited in their access to revenues by the financial settlement of 1867 (and in practice by Dominion taxation in the same fields) and many of them are unable to carry the financial burden involved.

In 1936 and 1937 several pieces of "New Deal" legislation passed by the Canadian Federal Parliament were declared beyond the powers of the Canadian Federal Parliament to enact as affecting "Property and Civil Rights in the Provinces." Three of them, the Weekly Day of Rest in Industrial Undertakings Act, the Minimum Wages Act, and the Limitation of Hours of Work Act, established, as their titles indicate, nation-wide standards for minimum wages and maximum hours of work. They were enacted pursuant to obligations assumed by the Canadian Federal Government under conventions of the International Labour Organization and were thus, in substance, treaty obligations. Another disallowed for the same reason was the Employment and Social Insurance Act which provided for a nation-wide system of unemployment insurance in specified industries to be supported by compulsory contributions of employers and employees, and in part by contributions of the Federal Government.

The relation of the insurance dispute to the much larger question of "state" sovereign rights and the development of social welfare schemes will now be apparent, and the entirely different trend of events in Canada from that in the United States is remarkable in view of the stated intentions of those who laid the foundations of Canadian nationhood in 1867 to give the Federal Government power to legislate on all matters not specifically assigned to the provinces. It is so different from the situation in the United States where the Supreme Court over the years found more and more matters to be interstate commerce and thus under the jurisdiction of the Federal Government, culminating in the *South-Eastern Underwriters Association* case of June 1944⁵ which reversed the classic *Paul v. Virginia*⁶ decision of 1868 and is the reason for the present symposium.

The following is a brief résumé of the important decisions of the Privy Council in insurance cases relative to the validity of various provincial and Dominion enactments taken from a summary by J. A. Tuck, Associate General Counsel of the Canadian Life Insurance Officers Association.⁷

In 1881 the validity of an Ontario Insurance Act prescribing statutory conditions for fire insurance policies covering property in the province was contested in private litigation. The Privy Council rejected the argument that insurance regulation was within the exclusive competence of the Dominion under the trade and com-

⁵ *United States v. South-Eastern Underwriters Ass'n*, 322 U. S. 533 (1944).

⁶ 8 Wall. 168 (U. S. 1869).

⁷ See note 3 *supra*.

merce power, and held that the Ontario Act was a valid exercise of the province's power to legislate respecting property and civil rights.⁸

In 1916 a Dominion Act providing that no company could do insurance business in Canada unless it received a Dominion license was declared invalid. The Privy Council stated that "the authority to legislate for the regulation of trade and commerce 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";⁹ it was perfectly within the power of one province, the Privy Council decided, to license a provincial company incorporated by another province even though such company was not licensed by the Dominion.

In 1924 the Privy Council held that certain amendments to the criminal law enacted in 1917 and designed to give teeth to the provisions of the Dominion Insurance Acts respecting the licensing of insurers were *ultra vires*.¹⁰

In 1932 the Privy Council had before it Dominion enactments invoking the power of the Dominion over aliens, immigration (Section 95 of the B.N.A. Act), and taxation to support an absolute insurance licensing requirement. The court said that the legislation did not "deal with the position of an alien as such; but under the guise of legislation as to aliens, they [*i.e.*, the Dominion] seek to intermeddle with the conduct of insurance business, a business which . . . has been declared to be exclusively subject to Provincial law."¹¹ As to immigration, the Court said the legislation was not "properly framed law as to immigration, but an attempt to saddle British immigrants [*i.e.*, British 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."¹² Similarly it was said in regard to the taxing provision that the Act was *ultra vires* because it was "linked up with an object which is illegal. . .,"¹³ *i.e.*, the regulation of insurance business.

In 1942 the Supreme Court of Canada was called upon to consider an exercise of the Dominion's taxing powers linked up with the licensing of insurers in the same manner as the taxation provision before the Privy Council in the 1932 case. The Court held that the taxing provision before it could not be considered alone but must be read in conjunction with the provisions of the Dominion Insurance Acts with which it was linked. The Court followed the 1932 case and ruled that the provisions of the Act prescribing absolute licensing requirements are *ultra vires*.¹⁴ Leave to appeal to the Privy Council was refused, apparently on the ground that no new point was involved.¹⁵

Mr. Tuck added that it was noteworthy that four out of five insurance consti-

⁸ *Citizens Insurance Co. v. Parsons*, 7 App. Cas. 96 (1881).

⁹ *Attorney General for Canada v. Attorney General for Alberta*, [1916] 1 A. C. 588, 596.

¹⁰ *Attorney General for Ontario v. Reciprocal Insurers*, [1924] A. C. 328.

¹¹ *In re The Insurance Act of Canada*, [1932] A. C. 41, 51.

¹² *Id.* at 52.

¹³ *Ibid.*

¹⁴ *The Reference re Section 16 of the Special War Revenue Act*, [1942] S.C.R. 429.

¹⁵ [1943] 4 D. L. R. 657.

tutional cases arose from the refusal of the Dominion to grant licenses to British or foreign insurers unless they maintained deposits with the Dominion Government or with trustees approved by it, for the sole security of Canadian policyholders, at least equal to their liabilities to such policyholders. The Dominion has always held the view that such deposits are indispensable if Canadian policyholders are to be adequately protected.

It would be expected from the above that an official of a provincial government would assume that insurance regulation is vested in the provinces. The following statement is by E. B. MacLatchy, K. C., Deputy Attorney General and Superintendent of Insurance for the province of New Brunswick:¹⁶

The principle is now established, beyond hope of successful contradiction, that the business of insurance in Canada consists of entering into contracts within a province and, as such, comes exclusively under the jurisdiction of the Provinces under the heading of property and civil rights; that the Dominion cannot, directly or indirectly, trespass on their jurisdiction by legislation calculated to interfere with such business.

However, in his 1944 report, G. D. Finlayson, then Superintendent of Insurance for the Dominion Government at Ottawa, states:

The 1931 decision of the Privy Council on the Insurance Reference is hard to understand. Near the bottom of page 21 of Appendix 7, there is a reference to this decision as denying the Dominion's claim to regulate British and foreign companies under the heading "Regulation of Trade and Commerce." This is not correct. The 1931 decision affirms the decision of 1916 recognizing the jurisdiction of the Dominion under that head and does not deny that jurisdiction. The result is that the regulation of the business of British and foreign companies rests unmistakably in the Dominion under the head of the regulation of external trade as is indicated in the preambles to The Canadian and British Insurance Companies Act, 1932, and The Foreign Insurance Companies Act, 1932.

The decision clearly indicates a lack of familiarity with the earlier insurance legislation of the Dominion. This is indicated in the comment appearing on page xlv of Volume II of the Department's report for the business of the year 1931 summarizing one feature of the decision illustrative of this characteristic.

II

INSURANCE SUPERVISION IN CANADA

From the above, the state of insurance regulation in Canada might be thought to be "confusion worse confounded," but Canada is a land of contradictions. These legal contests have up to the present not affected the growth or practical operations of Canadian insurance companies. As the following figures indicate, in spite of the diminution of power of the Federal Government in insurance matters, life, fire, and casualty insurers, with few exceptions, hold Dominion licenses and are subject to Dominion supervision. The figures given are the latest available at the time of writing.

¹⁶ 26 CAN. B. REV. 202, 225 (1948).

LIFE INSURANCE IN CANADA—1947
(annuity and sinking fund business excluded)

	<i>New Policies Effectuated</i>	<i>Net Insurance in Force</i>
Dominion Registered	\$1,492 millions (93%)	\$12,187 millions (96%)
Provincial Licensed		
Within Provinces in which incorporated	\$ 91 millions (6%)	\$ 396 millions (3%)
In Provinces other than in which incorporated	\$ 13 millions (1%)	\$ 93 millions (1%)
Total	\$1,596 millions	\$12,676 millions

INSURANCE IN CANADA—1948
(Net Premiums Written)

	<i>Fire</i>	<i>Casualty</i>
Dominion Licensed	\$98 millions (88%)	\$133 millions (91%)
Provincial Licensed	\$ 9 millions (8%)	\$ 6 millions (4%)
Lloyds	\$ 4 millions (4%)	\$ 8 millions (5%)
Total	\$111 millions	\$147 millions

The percentages (taken to the nearest integer) show that over 90 per cent of the life and casualty business and 88 per cent of the fire business is under the regulation of the Dominion Superintendent of Insurance. In life insurance the proportion of business subject to the valuation regulations and standards of the Dominion Department of Insurance would be even greater than the 96 per cent shown if annuity and sinking fund business were included.

Another aspect of the Dominion versus Provincial regulation of insurance is the large amount of deposits held by the Minister of Finance (the Minister of the Dominion Government to whom the Dominion Superintendent of Insurance reports) and Canadian trustees for the protection of Dominion registered insurance companies. It exceeded on June 30, 1949, the sum of one billion dollars (\$1,108,950,037).

The two aspects of regulation of insurance in Canada were dealt with by two outstanding lawyers. The first paper takes the attitude that Federal supervision of insurance is necessary and desirable for effective government, and suggests that Section 91 of the British North America Act be amended by adding the following clause:¹⁷

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.

¹⁷ MacDonald, *The Regulation of Insurance in Canada*, 24 CAN. B. REV. 257, 275 (1946).

The second paper¹⁸ takes the attitude that provincial jurisdiction of insurance is the only sure way of ending the sixty-year dispute as to provincial *versus* federal regulation of insurance in Canada. From the figures given above it is obvious that this would mean a major upheaval of the insurance business in Canada. It might be questioned whether the provinces are in a position to take over the onerous work of inspecting and valuing for solvency which the Dominion Department of Insurance now undertakes. Mr. Gray suggests that a central bureau of inspectors acting presumably for the provinces in concert could do this.

III

THE DOMINION DEPARTMENT OF INSURANCE

The history of the Dominion Department of Insurance goes back to 1875 or just seven years after confederation, when it was created as a branch of the Finance Department at Ottawa under the supervision of an officer known as the "Superintendent of Insurance" whose duties were to see that the laws enacted by the Canadian Parliament were duly observed by the companies. In those days actuaries were very rare creatures on this continent, yet the government had the foresight to appoint as first Superintendent of Insurance a fully qualified actuary who was professor of mathematics in Toronto University—Professor J. B. Cherriman, M.A., F.I.A. In January 1948, G. D. Finlayson, A.I.A. retired as Dominion Superintendent of Insurance after 40 years with the Department and 33 years as Superintendent. About the same time A. D. Watson, F.I.A., one who would rank with the first half dozen actuaries on this Continent, retired as Chief Actuary of the Department after a lifetime in its service.

The record of the Dominion Department of Insurance in insurance supervision can challenge that of any state or country in the world; in fact I very much doubt if it is equaled anywhere.

In insurance, companies have come and companies have gone in Canada, but so far as level premium life insurance is concerned, in no single case has the insuring public failed to receive 100 per cent protection. The qualification about "level premium life insurance" is to cover the early days of the Department when there was trouble with so-called "assessment" companies, since outlawed by the Department. In fire and casualty business, considering the hazard of catastrophes which we have had brought to our notice, both in the United States and Canada, by bitter experience in the last few months, the record is equally unchallengeable. It appears that the only cases likely to have involved a loss to policyholders are the following, with the dates of failure:¹⁹

The Dominion Gresham Guarantee & Casualty Company	1928
La Compagnie d'Assurance contre l'Incendie de Rimouski	1914

¹⁸ Gray, *More On the Regulation of Insurance*, 24 CAN. B. REV. 481 (1946).

¹⁹ I REPORT OF SUPERINTENDENT OF INSURANCE FOR CANADA lii-lxi (1945); See also letter from Department dated May 23, 1950.

The Victoria Montreal Fire Insurance Company	1901
The Provincial Insurance Company of Canada	1877

In the case of the Dominion Gresham, I understand that most of the outstanding policies were held by the Government of Canada in connection with excise duties on liquor exports. The other three companies were quite small.

IV

PROVINCIAL JURISDICTION

One year after the enactment of the first Dominion Insurance Act in 1875, the Ontario Legislature provided that all companies without a Dominion license should secure one from the Provincial Treasurer, make deposits, file annual reports, and submit to inspection. In the same year an Ontario statute required all fire insurance companies doing business in the province to insert in their policies certain prescribed terms and conditions, and in later years similar legislation was enacted by other provinces and concerning other types of insurance. By 1879 Ontario had an inspector of insurance, and by 1914 a provincial insurance department, headed by a superintendent, had been established and regulatory machinery very similar to that of the Dominion had been set up.

Over the years as a result of the appeals to the Privy Council there has been achieved a distribution of authority between the provinces and the Dominion with regard to insurance which has been supported by the companies, and efforts have been made to have this accepted and introduced into the law. The Dominion has dropped the question of policy conditions and licensing of agents from its insurance laws, and the Dominion Department of Insurance has concentrated on questions of solvency and financial responsibility of the companies under its registration. As a result, Dominion registration has been much sought after, and the record outlined above indicates how much this has been in the interests of the companies and the public, and the Canadian companies in their business outside Canada. Provincial legislation has been concerned with the solvency of companies incorporated in the province and who confine their business to the province of their incorporation, and with the requirement of fair and equitable terms in insurance contracts. It can now be realized how this has worked with so little friction even in a province such as Quebec with its own Civil Code (differing from that of the rest of Canada) regulating the law of contract, and its own special insurance laws with respect to beneficiaries under insurance policies.

The recommendation of the Rowell-Sirois Commission (1940), referred to above, was to incorporate this status quo of dual control in the law of the land. Their views thus coincided with those presented by the Canadian Life Insurance Officers Association in their brief to the Commission.²⁰ In summary these recommendations were:

²⁰ CANADIAN LIFE INSURANCE OFFICERS' ASSOCIATION YEAR BOOK app. I (1937-1938).

1. 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.
2. The provincial legislatures should 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.
3. The Dominion should have the exclusive jurisdiction and responsibility for licensing all other companies, requiring deposits from them, prescribing annual and statistical insurance returns, conducting financial inspections and supervision, and publishing annual reports concerning such companies.

The submission to the Rowell-Sirois Commission of the All Canada Insurance Federation representing the fire and casualty insurance companies doing business in Canada supported "one central authority . . . to whom all insurance companies would report their operations on a uniform basis, which authority alone should have the right to grant license powers to insurers desiring to do business anywhere in the Dominion and which should be responsible for the maintenance of the solvency of such insurers and have power to require deposits to be maintained in Canada for the protection of Canadian policyholders."²¹ The fact that in large part these fire and casualty companies are incorporated outside of Canada and the nature of their business is essentially country-wide and international so that they would come under Dominion supervision in the event the Rowell-Sirois compromise becomes law, indicates that they would undoubtedly support this compromise.

V

THE SOUTH-EASTERN UNDERWRITERS ASSOCIATION CASE²²

The judgment on this case delivered by the United States Supreme Court on June 5, 1944, reversed the classic decision of *Paul v. Virginia* that the business of insurance is not interstate commerce. It is no surprise to a Canadian insurance official that the fiction of insurance not being commerce was not upheld, once it was presented squarely to the Supreme Court. That it held since 1869 is remarkable. Meanwhile the assets of the United States insurance companies had grown to 37 billion dollars and annual premiums to six billion dollars. We must know the background of the S.E.U.A. case with the trouble over fire insurance rates in the State of Missouri beginning in 1922, and the immediate cause of the litigation—coercion and boycott in six of the southeastern states—before we can appreciate the decision.

This major reversal of the law was carried by only 4 to 3, the three dissenting justices being Chief Justice Stone and Justices Frankfurter and Jackson, the remaining two justices taking no part in the case. What I find to be remarkable (and

²¹ REPORT OF SUPERINTENDENT OF INSURANCE FOR CANADA xxvii (1944).

²² United States v. South-Eastern Underwriters Association, 322 U. S. 533 (1944).

they are probably not generally known) are the opinions of the dissenting justices, and that of the Chief Justice who stated that "it is often more important that a rule of law be settled than that it be settled right . . . before overruling a precedent in any case it is the duty of the Court to make certain that more harm will not be done in rejecting than in retaining a rule of even dubious validity."²³ Another extract from the Chief Justice's opinion will enlighten us further as to the reasons for upholding over all these years the *Paul v. Virginia* decision:

In the years since this Court's pronouncement that insurance is not commerce came to be regarded as settled constitutional doctrine, vast efforts have gone into the development of schemes of state regulation and into the organization of the insurance business in conformity to such regulatory requirements. Vast amounts of capital have been invested in the business in reliance on the permanence of the existing system of state regulation. How far that system is now supplanted is not, and in the nature of things could not well be, explained in the Court's opinion. The Government admits that statutes of at least five states will be invalidated by the decision as in conflict with the Sherman Act, and the argument in this Court reveals serious doubt whether many others may not also be inconsistent with that Act. The extent to which still other state statutes will now be invalidated as in conflict with the commerce clause has not been explored in any detail in the briefs and argument or in the Court's opinion.²⁴

VI

THE DUAL REGULATORY SYSTEM IN CANADA

To the Canadian insurance business these statements of Chief Justice Stone have a peculiar application. In Canada it is not the states which have in years built up the proper regulatory machinery but rather the Federal Government itself. The supervision of the Federal Government Insurance Department has been highly successful and highly beneficial to all concerned. Should this system be discarded? That the dual system in Canada of both state *and* federal supervision has not been detrimental to the insurance business is due to many factors.

1. An inherent love of law and order. The French-Canadians are related to pre-revolutionary France—a closely knit social system where the seigneur had his place as "leader" with obligations on his side and loyalties on the side of the people he governed. The situation of a minority as large as the French-Canadian in Canada is an explosive one, and there are not lacking those on both sides who would seek to profit by it. Such situations in Europe have been the tinder boxes in two world wars. Canada is fortunate in this inherent soundness of heart in her two races, the French Canadian and the British-Canadian.
2. The implied division of authority. The provincial insurance authorities supervising licensing of agents and policy conditions whereas the federal department of insurance concerns itself with valuation of securities, type of investment permitted, deposits, and solvency. There is, and will con-

²³ *Id.* at 579-580.

²⁴ *Id.* at 581.

tinue to be, a minimum of overlapping, provided the various parties do not seek to encroach on each other's fields.

3. The uncertainties of the legal position obliged each of the parties to restrain its hand so as not to drive opinion among the public or the companies against them. Another way of putting this is: There is a level-headed realization among all parties that whatever be the jockeying for position by provincial and federal authorities, the insurance business must not suffer.
4. The efforts of the provinces of Canada to enact uniform legislation.

VII

PROVINCIAL UNIFORM LEGISLATION

There are now ten provinces in Canada, Newfoundland having very recently joined the confederation. In law, as mentioned already, the province of Quebec follows a different system from the rest of Canada. As long ago as 1914 the first step was taken in uniformity of legislation in Canada, when the Superintendents of Insurance of the four western provinces met to consider standardization of the statutory conditions relating to contracts of fire insurance. In 1917 there was organized the Association of Provincial Superintendents of Insurance of the Dominion of Canada, whose primary object is the uniformity of insurance legislation and practice in Canada. The Canadian Bar Association has played a prominent part in this search for uniformity through its Conference of Commissioners on Uniformity of Legislation in Canada. The joint efforts of these bodies resulted in the drafting of a Uniform Fire Insurance Act and a Uniform Life Insurance Act in 1923. Both Acts were subsequently enacted in all the eight common-law provinces.

Statutory conditions are peculiar to Canadian insurance law. As a result of the efforts of the Canadian Bar Association, the Provincial Superintendents of Insurance, and the companies concerned, complete uniformity in contract provisions exists in the eight common-law provinces in the following major classes of insurance: life, fire, automobile, and accident and sickness. It is only a matter of time before Newfoundland joins the eight provinces in adopting the uniform insurance legislation.

In *Stone and Cox Life Insurance Tables*, which is a Canadian life insurance agent's book giving the rates and other details of all the life insurance companies operating in Canada (65 in the 1949 edition), the provisions of the Uniform Life Insurance Act are summarized in less than five pages. The great benefit of this uniformity to the life insurance business cannot be referred to in too high terms of praise. Of course in the United States with many more states concerned, such uniformity would be very difficult to accomplish. But this does not diminish the prestige to the Canadian Provincial Superintendents of Insurance of carrying it out, and what is even more creditable, maintaining it for the past twenty-five years.

The necessity for American life insurance companies to maintain a huge card index of the different laws and regulations in various states in order to conduct their

operations amazed me when I first became acquainted with it over twenty-five years ago. A less virile people would have given up many years ago any attempt to do business throughout their country and confined themselves to a few of the states only, thus depriving the country of that free and wide competition which is the achievement of American life.

VIII

COMBINES IN RESTRAINT OF TRADE

The first Canadian federal legislation in this field was enacted in 1889, and is still effective in amended form as Section 498 of the Criminal Code. Legislation providing special facilities for the investigation of combines was first enacted in 1907 and was included in the Customs Tariff of 1907. The Combines and Fair Prices Act of 1919 was declared invalid by the Judicial Committee of the Privy Council and was replaced by the present Combines Investigation Act in 1923, which was upheld by the Privy Council in 1931 following a reference of questions by the Governor in Council to the Supreme Court of Canada. This Act provides means for the investigation of trade combinations, mergers, trusts, and monopolies alleged to have operated in restraint of trade and to the detriment of the public.

Various inquiries and investigations have been made by the Commissioner and an occasional action has been instituted. The political atmosphere is different in Canada from that in the United States, and to a layman it appears that the Combines Act in Canada is not used as a cudgel to beat big business "to please the groundlings," or to paraphrase Shakespeare, "to play to the gallery." The Commissioner in 1947 reported that representatives of trade associations have on occasions discussed their tentative plans with him to insure that they would not be questioned as being restrictive and possibly contrary to the Act. This association of trade and government in the public interest is a feature of Canadian business life.

IX

ASSOCIATION OF UNDERWRITERS

The right of insurers to associate for the regulation of their business has never been challenged in the Canadian courts. In 1916 a Commissioner was appointed by the Ontario government to report on the operations of insurance companies (other than life and marine) in the province, and the report by The Honourable Mr. Justice Masten in 1919 is a valuable commentary on insurance in Canada. The proceedings developed into a dispute between the Canadian Manufacturers Association and the Canadian Fire Underwriters Association, the latter being an organization of fire insurance companies for the regulation of rates, commissions, policy forms, and the business generally; the former objecting to the rules and regulations made by the Association. The Honourable Justice Masten in his report stated:²⁵

²⁵ REPORT ON INSURANCE COMMISSION, LEGISLATIVE ASSEMBLY OF ONTARIO, TORONTO (1919).

. . . Past experience affords the only guide as to what rates should be charged. The experience of one Company or of many companies in a limited field, or over a short period of time, would obviously not give a sound basis on which to predicate rates. The only method by which there can be an even approximately equitable distribution of insurance cost is by combining the experience of many companies over a wide territory, and over a period of years.

Again it is obvious that the determination of proper rates would be valueless, unless steps could be taken to maintain them. . . .

On the grounds which I have here set forth, I am of the opinion that the operations of the Canadian Fire Underwriters Association have been and are to the advantage and in the interests of the public, and that such a combination tends strongly to maintain the solvency of the companies, to stabilize rates, to eliminate discrimination, and assist in controlling the expenses of carrying on the business.

This conclusion accords with findings of the strongest Commissions in the United States that have considered this question.

These opinions have not the power of a court decision or of legislation, but they do indicate the general opinion in Canada as to regulation of insurance rates by associations of insurers. Undoubtedly, the fact that membership in the Association was voluntary and there was no coercion or boycott is important. Further the non-members of the Association, as the Non-Tariff Companies, the Farmers' Mutuels, other Domestic Mutuels, Reciprocals, and Lloyds, give so much effective competition to Tariff companies (*i.e.*, members of the Association) that nothing of the character of a monopoly can be said to exist. The quotation given and the Report itself indicate the great influence on Canadian opinion of trends in the United States.

Although laws similar to the Sherman and other antitrust laws in the United States exist in Canada, they are not the "bogey" which it appears to me they have become in the United States. Beyond a certain point such antitrust legislation can become harmful to the development of a country. Some instances in the life insurance field may be of interest. Some years ago several of the Canadian and United States life insurance companies collaborated in investigating their mortality on lives subject to various impairments—both physical and medical. When the work was published, a committee of experts, both medical and actuarial, published a volume indicating the actuarial equivalent ratings for various impairments. These opinions were based not only on the statistics but on developments in medical sciences since the period the statistics covered. The work was one of the landmarks of life insurance history. Yet owing to the fear of prosecution for associating in restraint of trade, it is unlikely that this work will be developed further or brought up to date.

I can vouch that the work referred to is to the advantage of the public and in the interests of life insurance science. With a handful of exceptions, no company could individually develop similar material, and even the exceptions would prefer to consider statistics and opinions combined with their experience rather than their own experience alone. There is no obligation for anyone to use the material. However, many companies which would otherwise have avoided the substandard field in

life insurance have been encouraged by the weight of authority behind these ratings to undertake such business.

Another instance which applies to Canada is the use of uniform extras for occupational hazards. An association of Canadian actuaries appointed a committee to study the existing statistics and visit various hazardous industries to obtain at first hand information on the extra hazards involved. Undoubtedly the ratings of some of the large American life insurance companies were also studied. This work, begun many years ago, has been periodically brought up to date. There is no compulsion on anyone to use these rates, but it is not considered gentlemanly to cut a rate merely to take advantage of another company. After all, if there is any reason to change any rate it is a simple matter to bring about a discussion and get the rate changed, and if you could not carry the general opinion there is no reason why you cannot act on your own opinion. This is different from rate cutting, which is generally of a piratical character. It should be emphasized that here we are dealing with a very minor part of the business—extras for occupations—for with sixty-five odd life insurance companies in Canada there are sixty-five odd sets of premium rates, cash values, dividends, and policy conditions, varying among the companies.

No small company could undertake this research work in occupational risks, and it is the small companies which find such cooperative work among the companies of the greatest value. Undoubtedly cooperation among actuaries or life insurance companies or fire and casualty companies could reach such a stage that it became a monopoly existing for the purpose of keeping rates at a higher level than would otherwise be the case. I question whether a country can be run by the "letter of the law" without common sense and common interest being considered. A friend at the home office of one of the United States life insurance companies was told by his company's counsel that if he wrote to the official of another life insurance company about their practice regarding a certain matter it might be considered as a "conspiracy in restraint of trade"!

X

RATING ORGANIZATIONS IN CANADA

The Ontario Insurance Act²⁶ contains the following two sections dealing with the filing of a company's experience in fire and automobile insurance:

§71 (1) Every licensed insurer which carries on in Ontario the business of fire insurance shall keep a record of its premium income derived from risks located in Ontario and of claims paid in respect of such risks so as to show at any time its experience according to the classification of occupancy hazards of the National Board of Fire Underwriters, with such modifications as the Superintendent may prescribe.

§72 (1) Every licensed insurer which carries on in Ontario the business of automobile insurance shall prepare and file, when required, with the Superintendent, or with such statistical agency as he may designate, a record of its automobile insurance premiums, and

²⁶ REV. STAT. ONTARIO C. 256 (1937).

of its loss and expense costs in Ontario, in such form and manner, and according to such system of classification, as he may approve.

The Canadian Underwriters Association, the successors to the Canadian Board of Fire Underwriters mentioned in the Masten Report above, as one of their functions, arrange for details regarding the automobile experience of their member companies to be collaborated and presented to the various provincial authorities. There is an Independent Underwriters Association representing those not members of Canadian Underwriters Association which arranges for a similar compilation of automobile statistics. The Ontario government prior to the war published each year the analysis as regards Ontario business. The analysis is in sufficient detail to enable one to judge the reasonableness of automobile insurance premium rates in the province. The system at present in vogue is that a committee representing the companies, after studying the figures for the past year and trends from previous years, approaches the Superintendent of Insurance for the province concerned and comes to an understanding that the changes proposed, if made, will not be challenged by the Superintendent. It is a sort of "self rule by the industry" subject to supervision, quite unofficial, and it appears to work quite well. It will be noted that the Federal Department of Insurance does not come into the picture at all. No statistics regarding classes of insurance which could be used for rate making purposes are published regarding other classes of insurance, nor are any such statistics furnished to the provincial or federal authorities.

With respect to fire insurance, before the war statistics of premiums written and claims paid were published by the province of Ontario in the National Board of Fire Underwriters Classification in aggregate for the previous five years. There are several hundred classes, separated into five main divisions, "Frame Protected," "Frame Unprotected," "Brick Protected," "Brick Unprotected," and "Fire Proof." The terms protected and unprotected refer to the degree of fire protection in the vicinity. During and since the war Ontario has reduced its requirements to those of the Federal Department of Insurance. In the latest Ontario report, amounts written, premiums written, losses incurred, and the percentage of losses incurred to premiums written are shown for the twenty-one classes for 1948, and for the four years 1945-1948 in the aggregate.

For many years the Federal Department of Insurance at Ottawa has published the fire experience by classes of the companies registered with it. Until and including the year 1944 a classification of twenty-seven classes was used, but beginning with the year 1945 these classes have been modified somewhat and are now the twenty-one classes shown below. The published schedules²⁷ show the experience by classes for *each* province as well as the totals for Canada as a whole. As indicated earlier, the proportion of fire business written by companies licensed by the Federal Department of Insurance is 88 per cent of the total, so that these figures do give a

²⁷ DEPARTMENT OF INSURANCE, OTTAWA, CANADA, SCHEDULES OF CLASSIFICATION OF FIRE INSURANCE RATES.

picture of fire insurance experience in Canada by provinces and by classes. The publication gives the experience of the last year and of the last five years in the aggregate. A complete quinquennial experience on the twenty-one classes is not yet available; it will cover the years 1945 to 1949 inclusive.

The twenty-one classes are as follows:

Dwellings, excluding farms

- No. 1. Protected, brick.
2. Protected, frame.
3. Unprotected.
4. Farm buildings.
5. Churches, public buildings, educational and social service institutions.
6. Warehouses.
7. Retail stores, office buildings, banks, hotels.
8. Contents of No. 7.
9. Foods, food and beverage plants.
10. Flour and cereal mills, grain elevators.
11. Oil risks of all kinds.
12. Saw and shingle mills.
13. Lumber yards, pulpwood, standing timber.
14. Woodworking plants.
15. Metalworking plants, garages, hangers.
16. Mining risks.
17. Railway and public utility risks.
18. Miscellaneous manufacturing risks.
19. Miscellaneous non-manufacturing risks.
20. Sprinklered risks of whatever nature or occupancy.
21. U. and O. and profits excluding rental insurance.

The figures given for each class are (1) Amounts written, (2) Premiums written, (3) Losses incurred, (4) Losses incurred percent of premiums written, and (5) Losses incurred percent of amounts written. The Annual Reports of the Superintendent give the figures for Canada as a whole only, and in the latest published Report (1948) the figures are given for each of the three years 1945, 1946, and 1947, and in the aggregate.

I have deliberately shown the twenty-one classes. It is obvious even to the uninitiated that these broad subdivisions are of little value in determining the reasonableness or otherwise of existing rates, except possibly in the total of all classes for which the subdivision would not be required. It will be noted that contents are shown only separately for No. 7, the combined "Retail stores, office buildings, banks, hotels."

XI

RATE REGULATION

Apart from the twenty-one classes in fire insurance referred to above, no figures for fire insurance experience by classes are supplied by Canadian fire insurance companies to anyone. It will immediately be asked how the Tariff fire companies who use the same rates operate if no rate-making statistics are available. Here is the stumbling block where fire insurance officials take a stand which I, as an actuary, cannot understand, and after nearly twenty years' consideration I am still as far from comprehending their point of view as ever. The turmoil over the reversal of the classic legal fiction that "insurance is not commerce" is due more to fire insurance rate regulation than any other matter. To the outsider this turmoil over the reversal of the *Paul v. Virginia* decision seems difficult to understand. The McCarran Act,²⁸ Public Law 15, reaffirms state regulation of insurance and states that the antitrust laws will apply to the business of insurance "to the extent that such business is not regulated by State law." A great deal must be read into these few words to cause such a turmoil. Rating organizations will have to be licensed by the states and laws to this effect will have to be enacted where they do not exist. It is quite possible that insurance will go on very much as before except that incidents such as occurred in Missouri or other states where local insurance interests overplayed their hand may have the Federal Government to deal with. The attitude in Canada has always been that so long as association for the regulation of business was in the public interest there was little to fear from antitrust laws. The business of insurance, which affects every individual in a country and every article of trade and commerce, is too important to be free from supervision. The price "free enterprise" must pay for the privilege of being free is to have its actions subject to scrutiny and challenge at any time by the government.

As one whose daily interest is the life insurance business, I have read much of and studied the recommendations of the Armstrong Investigation into life insurance in New York State in 1905-1906, for out of them has grown the regulation of the business as it is practiced in New York, which has been a model on which much legislation in other states and countries has been based. For many years, judging by its avoidance in the published transactions of the Actuarial Society of America, it was not considered polite to refer to the Investigation, even indirectly. Yet it proved an inestimable boon to the American people. In no country in the world has life insurance grown to the extent it has in the United States of America, nor has it anywhere else become such a great part of the social and economic structure of the country. It has contributed much to the country's well-being.

²⁸ 59 STAT. 33 (1945), as amended, 61 STAT. 448 (1947), 15 U. S. C. §§1011-1015 (Supp. 1949).

XII

FIRE RATING SYSTEM OF CANADA

The Universal Mercantile System is the basis of the fire rates of the Canadian Underwriters Association (Tariff companies). With other competing companies it is mostly a matter of cutting the tariff rates. The system originated in the United States and was first published in 1903. The bulk of the rating in the eastern section of the United States is based on schedules developed on this system. It would be out of place here to go into the matter in detail. Briefly, a rate is determined on a building of certain construction and in a certain area, and modifications are made in the rate for the multitude of variations which occur in building construction, having regard to the fire hazard and the location; there are also modifications to be made on account of the area in which the building is located in regard to fire-fighting equipment, dangerous exposures, and the record of the area in fire losses. The factor of occupancy is allowed for, and so it goes on. Starting from the *key* rate in a given city, there are about 130 items to be considered before the rate on a non-fireproof building in that city can be determined.

It follows that the rating of a risk is a specialized business to be carried out by experts. The multitude of additions and deductions which are made in schedule rating have no statistical foundation. The idea was that in the aggregate the rates obtained should cover losses and expenses and provide a reasonable profit to the insurers. Equity as to charges made for the large number of deviations from the "standard" is based on judgment rather than statistical investigation.

One of the most beneficial aspects of the Universal Mercantile System is that the system of credits acts as an incentive to improvement of fire risk by the owner or occupant. Although one hates the thought of bureaucratic compulsion, when the appalling amount of fire loss and waste is considered, one wonders whether some further compulsion than the incentive of a few cents off the fire rate should not be tried. Cities have by-laws but they are more honoured in the breach than in the observance where fire prevention is concerned.

In a paper, "Fire Insurance Rates in Canada,"²⁹ I dealt with the statistical problem of fire rates and opposed the general attitude of fire insurance officials that fire rates are not subject to statistical measurement by class. Results based on the study of mortality by cause of death have been challenged on statistical grounds because of the variations of medical opinion of the doctors and different definitions of different diseases. But in spite of the difficulties, investigators have persevered and interesting and valuable results have emerged. There is no excuse for ignorance. Fire insurance officials have so reiterated decade after decade that fire rates are not subject to statistical investigation that they have come to believe the statement. The few details given above indicate the difficulties, but there is nothing like trying. If this turmoil over Public Law 15 stirs the insurance companies of the United States to new efforts and achievements, it may prove a landmark in the development of insurance in the

²⁹ ELEVENTH INTERNATIONAL ACTUARIAL CONGRESS, PEDOE, FIRE INSURANCE RATES IN CANADA (1937).

United States. There is nothing more harmful than surrounding a business with an air of mystery. There is nothing more conducive to government interference than the insistence that the cloak of mystery be retained. I cannot conceive of any other business so essential to commerce as fire and casualty insurance. It is not to be expected that governments will long remain indifferent to any shortcomings of the insurance business in its service to the public. The method by which governments have heretofore met the problem of unsatisfactory conditions in business is to *insure* that competition has free play. The rates of the Canadian Underwriters Association are not fixed for all time. Changes are continually made. But without wishing to appear critical it might be said that rate cutting by non-tariff, mutuals, and reciprocals is more of a factor in reducing rates to retain the business than statistical investigation. Although so many fire insurance officials argue as to the lack of value of detailed statistics by classes, the leading companies do have their own statistics, and I know that these are highly valued by their underwriters.

XIII

COINSURANCE

In my paper on fire insurance rates in Canada there was another aspect of the fire insurance business with which I took issue, and it covers a matter in which Canada and the United States differ from the rest of the world: With certain exceptions there are no laws determining the relationship between the amount of insurance to be carried and the value of the property. In Europe the general practice is to limit the amount which a party may recover for fire loss under his insurance policy to an amount not exceeding that proportion which the amount of his insurance bears to the value of the property insured. In such a case the company receives the premium corresponding to the value exposed to risk of fire which it is insuring. The question arises whether an equitable system of fire insurance rating can be devised with the practice regarding coinsurance in Canada and the United States in its present form. It follows that in an inflationary period most fire losses become "total" losses, and losses in relation to premium income tend to get out of hand. Thus, apart from a high rate of fire hazard, there is an abnormal tendency to wide swings in fire loss experience: larger contingency funds are thus essential than otherwise would be the case, and this makes for higher fire rates.

XIV

AGENTS AND BROKERS

One essential difference between life and the other branches of insurance such as fire and casualty is that in life insurance when the policy has once been sold, the business belongs to the insurance company. In fire and casualty insurance, because of the general year to year nature of the policies, the business is controlled by the agents and brokers. In life business with the development of the branch office system, which is almost general throughout Canada, agents are employees of one

company, and the development of pension plans and security measures tends to tie them more and more to their company as any other employees of the company. There are opposing tendencies in the life business, which are not so beneficial as the "vesting" of commissions so that the agent acquires a vested right to any commissions due under the policy whether he stays with the company, whether he services the policy, or whether he stays in the life insurance business at all. In my opinion this is not in the interest of the business. In fire and casualty business there is no "employer-employee" relationship between agent and broker and insurance company. The agents and brokers control the business and place it where and how and with whom they please; it is no exaggeration to say that they are the dominating factor in the business. In parts of the country where there are very few head offices of insurance companies, the local "general" agents form the local Underwriters' Association and determine rates and other fundamental conditions under which the business is operated. This gives the background of some of the difficulties which have arisen and which culminated in the reversal of the *Paul v. Virginia* decision. In Canada the head offices of the fire and casualty companies are almost exclusively concentrated in the provinces of Ontario and Quebec; in the United States there is a similar concentration in the northeastern states.

XV

CONCLUSION

In Canada a dual system has developed over the years under which policy provisions and licensing of agents are within the exclusive jurisdiction of the provinces, and all other matters, particularly solvency, are in charge of the Federal Government. It would seem to be most desirable to continue this.

In the United States there has grown up over the years a system of insurance regulation by the individual states and little would be gained by disturbing this. The new position of the Federal Government as holding a "watching" brief in insurance can act to the advantage of the business.