CANADIAN INDEMNITY CO. et al. v. ATTORNEY-GENERAL OF BRITISH COLUMBIA

British Columbia Court of Appeal, McFarlane, Robertson and Carrothers, JJ.A. November 4, 1975.

D. McK. Brown, Q.C., *G. S. Cumming*, Q.C., *D. W. Roberts*, *A. D. P. MacAdams* and *R. F. Wilson*, Q.C., for appellants.

J. D. McAlpine, *M. H. Smith*, Q.C., and *P. D. Leask*, for respondent.

MCFARLANE, J.A.:—This appeal is from the judgment of Aikins, J., pronounced November 18, 1974, and reported 56 D.L.R. (3d) 7, 21 C.P.R. (2d) 1, [1975] 1 W.W.R. 481. By that judgment the appellants claim for a declaration that certain legislation enacted by the Legislature of British Columbia and a plan of universal compulsory automobile insurance in implementation thereof are *ultra vires* was dismissed. The impugned legislation consists of the *Automobile Insurance Act*, 1973 (B.C.), c. 6, and the *Insurance Corporation of British Columbia Act*, 1973 (B.C.), c. 44, both with amendments.

The reasons for judgment of the trial Judge disclose that he considered, with care, the provisions of both statutes as a whole, severally and together, all of the arguments addressed to him, the legislative history of the enactments and the contents of the reports of a Royal Commission and of two special committees of the Legislature. He also admitted and considered extensive evidence related to the nature and extent of the appellant's businesses and the effect of the legislation from the point of view of its affecting extra-provincial concerns and interests. While I am of the opinion that a large part of these extrinsic aids to interpretation and ascertainment of the true nature and character of the legislation was unnecessary and irrelevant, there is no need to pursue that aspect of the case further.

The trial Judge clearly recognized that his primary function in the case was to determine the true nature and character of the legislation — its pith and substance — and then to decide whether that matter was in relation to a subject-matter or subject-matters assigned exclusively to the provincial Legislature under either head 13, "Property and Civil Rights in the Province" or head 16, "Generally all matters of a merely local or private nature in the Province", of s. 92 of the *British North America Act, 1867*, or was in relation to a subject-matter assigned exclusively to the Parliament of Canada under head 2, "The Regulation of Trade and Commerce", of s. 91, or, was in relation to, or "aimed at" Dominion companies in a manner not permitted to a provincial Legislature.

The finding by the trial Judge on these essential aspects of the case is that the "matter" of the legislation, "its pith and substance" or "aim and object" is "the establishment of a universal compulsory scheme of motor vehicle insurance in the Province with a monopoly in that class of insurance for the Corporation". The Corporation is given that monopoly, not for itself, but in its capacity of agent for the Crown in right of the Province. Appellants' counsel submitted the finding should be that the "matter" of the legislation is solely the establishment of a monopoly in the field of automobile insurance in favour of the Corporation to the exclusion of the appellants and all other private insurers. In doing so they concede, and correctly in my opinion:

(1) That the Province may legislate to regulate contracts of insurance in the Province and to incorporate a company with the object of carrying on an insurance business or to authorize the Crown to carry on that business, and

(2) That the creation of a monopoly is not, in itself, beyond provincial legislative powers. They said that while the "thrust" of their argument is against the monopoly that consideration is relevant only to the issues of "regulation of trade and commerce" and interference with the status and capacities of Dominion companies.

In my opinion, the "matter" of the legislation cannot be so confined to the establishment of the monopoly. I think the establishment of a universal compulsory scheme of motor vehicle insurance in the Province is an essential part of the legislative plan and object. In my opinion the conclusion follows clearly from a study of the two statutes as a whole. It is not necessary to consider the regulations which are the acts of Government in determining the intention and purpose of the Legislature. Reference to the extrinsic aids such as the commission and committee reports, if resort be had to them, provides ample support for the finding of the trial Judge with which I agree.

I also agree with the reasoning and conclusion of the trial Judge on "the Trade and Commerce issue" dealt with in Part X of his judgment. I think there is little I can add usefully to what he said there. The nature of the problem is explained in what Kerwin, C.J.C., said in *Reference re Farm Products Marketing Act, R.S.O. 1950, c. 131, as amended* (1957), 7 D.L.R. (2d) 257 at pp. 264-5, [1957] S.C.R. 198 at p. 205, is justly considered as the *locus classicus* on the subject, namely, the judgment of Duff, C.J.C., in *Reference re Natural Products Marketing Act*, [1936] 3 D.L.R. 622, [1936] S.C.R.

398, 66 C.C.C. 180 [affd *sub nom. A.-G. B.C. v. A.-G. Can. et al.*, [1937] 1 D.L.R. 691, 67 C.C.C. 337, [1937] A.C. 377 (P.C.)]. In that case Duff, C.J.C., said at p. 629 D.L.R., p. 410 S.C.R.:

> It would appear to result from these decisions that the Regulation of Trade and Commerce does not comprise, in the sense in which it is used in s. 91, the regulation of particular trades or occupations or of a particular kind of business such as the insurance business in the Provinces, or the regulation of trade in particular commodities or classes of commodities in so far as it is local in the provincial sense; while, on the other hand, it does embrace the regulation of external trade and the regulation of interprovincial trade and such ancillary legislation as may be necessarily incidental to the exercise of such powers.

The trial Judge did not think it necessary to refer to what he called "hard goods" cases (at p. 101 D.L.R., p. 581 W.W.R.). I think, however, useful guidance may be derived from two recent decisions of the Supreme Court of Canada in such cases. *Carnation Co. Ltd. v. Quebec Agricultural Marketing Board et al.* (1968), 67 D.L.R. (2d) 1, [1968] S.C.R. 258, involved Quebec legislation creating a marketing board with power to approve a joint milk marketing plan and to determine the price to be paid by the Carnation Company for milk to be purchased by it from producers. The Carnation Company, which it is of some interest to note was incorporated under the Canadian *Companies Act*, processed raw milk and shipped and sold the major part of its production outside the Province of Quebec. The Supreme Court held that the legislation and the orders of the marketing board, in the exercise of the powers conferred, did not infringe on the exclusive legislative powers of Parliament under head 2 of s. 91 of the *British North America Act, 1867* to regulate trade and commerce. Delivering the judgment of the Court, Martland, J., observed that it was unquestionable the price determined by the impugned orders could have a bearing on the company's export trade since it affected its cost of doing business. He continued at p. 14 D.L.R., pp. 252-3 S.C.R.:

> It is not the possibility that these orders might "affect" the appellant's interprovincial trade which should determine their validity, but, rather, whether they were made "in relation to" the regulation of trade and commerce. This was a test applied, in another connection, by Duff, J. (as he then was), in *Gold Seal Ltd. v. Dominion Express Co. and A.-G. Alta.*, 62 D.L.R. 62 at pp. 81-2, 62 S.C.R. 424, [1921] 3 W.W.R. 710.
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> Thus, as Kerwin, C.J.C., said in the Ontario Reference, in the passage previously quoted [7 D.L.R. (2d) at p. 264]: "Once a statute *aims* at 'regulation of trade in matters of inter-provincial

> concern' . . . it is beyond the competence of a Provincial Legislature."

The *ratio* of the decision is that while the impugned orders affected extra-provincial trade they were not aimed at that trade, *i.e.*, the legislation was not enacted in relation to interprovincial trade.

Then in *A.-G. Man. v. Manitoba Egg & Poultry Ass'n et al.* (1971), 19 D.L.R. (3d) 169 at p. 179, [1971] S.C.R. 689 at p. 703, [1971] 4 W.W.R. 705, Martland, J., speaking for the majority of the Supreme Court, summed up the effect of the *Carnation* judgment thus:

> Our conclusion was that each transaction and regulation had to be examined in relation to its own facts, and that, in determining the validity of the regulatory legislation in issue in that appeal, the issue was not as to whether it might *affect* the interprovincial trade of the appellant company, but whether it was made *in relation to* the regulation of interprovincial trade and commerce.

(My italics.)

Counsel for the appellants submitted that it was the Province's interference with "who" may conduct automobile insurance business in this Province that infringes on the powers of Parliament under s. 91(2). They said that the nature and scale of the business as carried on by the appellants made that business a trade with important aspects of extra-provincial concern. It has been said on more than one occasion that the business of insurance may, in a sense, be regarded as a trade. In my opinion, however, the Privy Council and Supreme Court of Canada have never decided that it is a trade within the meaning of the words "the regulation of trade and commerce" in s. 91(2). I cannot accept the argument that "who" may exclusively do the business in this Province involves regulation of an extra-provincial interest or concern as that expression is used in the relevant authorities. Moreover, if it be assumed that the legislation affects trade having such an extra-provincial concern or interest, it is not, in my opinion, enacted in relation to, nor is it aimed at, trade in that aspect.

The Dominion companies' argument is dealt with in Part XII of the judgment of the trial Judge. I agree with his reasons and conclusion and again think there is little I can add usefully. The argument must be, as it was, that the effect of the legislation is to deprive those of the appellants which are Dominion companies of their status and powers as such: *John Deere Plow Co. v. Wharton* (1914), 18 D.L.R. 353 at pp. 360-1, [1915] A.C. 330 at p. 341, 7 W.W.R. 706; that it is so directed by the Legislature as to sterilize, or to effect

the destruction of, the capacities and powers validly conferred by the Dominion: *Great West Saddlery Co. v. The King* (1921), 58 D.L.R. 1 at pp. 5-6, [1921] 2 A.C. 91 at p. 100, [1921] 1 W.W.R. 1034.

I think it pertinent to this argument to note, as the trial Judge did (at p. 12 D.L.R., p. 486 W.W.R.), that each of the appellant companies held licences under the *Insurance Act*, R.S.B.C. 1960, c. 197, to undertake insurance from March 1, 1973 to February 28, 1974. In the case of the "lead" plaintiff, the Canadian Indemnity Company, the licence covered some twenty-four classes of insurance, including automobile insurance. As of March 1, 1974, these licences were renewed for all classes of insurance specified in the preceding licence except automobile insurance. In my opinion, it cannot be right to say that the status, capacities and powers of this Dominion company as such have been sterilized or destroyed. Even less can it be correct, in my opinion, to say the legislation is directed at such sterilization or destruction. In *Lukey et al. v. Ruthenian Farmers' Elevator Co.*, [1924] 1 D.L.R. 706, [1924] S.C.R. 56, [1924] 1 W.W.R. 577, Duff, J. (as he then was), discussed the authority of Parliament to incorporate companies vis-à-vis the legislative powers of the Provinces. He said at pp. 712-3 D.L.R., pp. 72-3 S.C.R.:

> The authority to incorporate companies and endow them with status and powers, maintainable and exercisable independently of provincial sanction, would appear at least to involve the authority to dictate the constitution of the company including the procedure by which membership in the corporation is acquired, as well as to prescribe the character of relations which shall obtain between the corporation and its members. And legislation defining this procedure and creating powers expressly or impliedly to enable it to be carried out, is strictly not within the scope of legislation on the subject of "civil rights" as contemplated by 92(13) but belongs to the class of legislation on the subject of "incorporation of companies" and therefore is not within the scope of section 92 when governing companies with objects other than "provincial rights" within the meaning of 92(1).
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> The enactments of the impugned statute necessarily have as already mentioned the immediate effect of preventing Dominion companies with head offices in Saskatchewan exercising in the normal way the power to obtain capital through subscription for their shares. Not only is that the effect of the legislation, it is of the essence of its design.

and, at p. 714 D.L.R., p. 74 S.C.R., speaking of Dominion companies:

> This is not to say that such companies are withdrawn from the operation of provincial laws dealing generally with matters that may be embraced in whole or in part within the objects of the

> company. Dominion companies empowered to deal in intoxicating liquors for example are subject to provincial laws regulating or suppressing the sale of liquor; but such laws are not laws aimed at Dominion companies as such or at joint stock companies as such and do not in effect or in purpose prohibit or impose conditions upon the exercise of powers of Dominion companies which are essential in the sense that they are necessary to enable them in a practical way to function as corporations according to the constitutions imposed upon them by the Dominion.

For present purposes I emphasize the words "aimed at Dominion companies as such or at joint stock companies as such" and "in effect or in purpose".

Fifteen of the 37 appellant companies were incorporated by Acts of the Parliament of Canada. On the assumption, therefore, that the Dominion companies should prevail it would be necessary to consider what the consequence would be. Would the position be as in *Lukey v. Ruthenian Farmers' Elevator Co., supra,* where a provincial statute, otherwise *intra vires,* was held to be inapplicable to Dominion companies? Appellants' counsel, when asked for their views on this question, suggested that certain specified sections and subsections of the *Insurance Corporation of British Columbia Act* should be declared invalid and that certain specified provisions of the *Automobile Insurance Act* should be allowed to remain. In my opinion the suggestion is impracticable and fails to deal with the position of the remaining 22 appellants. In view of my conclusion on this issue it is not necessary to pursue that aspect of the matter further.

Since the dictation of the foregoing, the Court has received from counsel copies of the recent judgment of the Supreme Court of Canada in *Morgan et al. v. A.-G. P.E.I. et al.,* which was pronounced on June 26, 1975, and is not yet reported [now reported 55 D.L.R. (3d) 527, 7 Nfld. & P.E.I.R. 537, 5 N.R. 455]. I find important support for the opinion I have expressed in that judgment which involved a consideration of the status and capacity of a Canadian citizen as such. In the penultimate paragraph [at p. 539 D.L.R.] of the judgment Laskin, C.J.C., speaking for all of the Justices of the Supreme Court of Canada, said:

> The issue here is not unlike that which has governed the determination of the validity of provincial legislation embracing federally-incorporated companies. The case law, dependent so largely on the judicial appraisal of the thrust of the particular legislation, has established, in my view, that federally-incorporated companies are not constitutionally entitled, by virtue of their federal incorporation, to any advantage, as against provincial regulatory legislation, over provincial corporations or over extra-provincial or foreign corporations, so long as their capacity to establish them-

selves as viable corporate entities (beyond the mere fact of their incorporation), as by raising capital through issue of shares and debentures, is not precluded by the provincial legislation. Beyond this, they are subject to competent provincial regulations in respect of businesses or activities which fall within provincial legislative power.

I should record that the citizenship argument dealt with in Part XIII of the judgment under appeal was not advanced in this Court and is therefore deemed to be abandoned. The appellants reserved the right to advance an alternative argument not argued here in the following terms:

> That while their submission in respect to the "trade and commerce argument" assumes that the Provinces have the power to legislate in relation to the intra-provincial aspects of the field of automobile insurance, nevertheless the Appellants reserve their right to argue that legislative jurisdiction in relation to the whole field of automobile insurance is subject to the legislative power of Parliament under s. 91(2) of the *B.N.A. Act*, much as the federal power to legislate in this field has evolved in the United States. Therefore any reference to the provincial power to regulate the automobile insurance business is subject to this general reservation.

I would dismiss the appeal.

ROBERTSON, J.A. (dissenting):—This is an appeal from a judgment by Aikins, J., dismissing an action for reasons that are reported at 56 D.L.R. (3d) 7, 21 C.P.R. (2d) 1, [1975] 1 W.W.R. 481. Those reasons describe the plaintiffs, the relief claimed — briefly a declaration that two Acts of the Province, a plan of universal compulsory automobile insurance and a plan of extension insurance, are *ultra vires*, invalid and of no force or effect — the impugned legislation and the evidence, and make findings of fact upon the evidence. The reasons, if I may say so, deal so fully and accurately with the evidence that I need say comparatively little about the facts, the basic findings on which were not challenged by either side. Also, they refer so fully to the impugned legislation (to which I shall sometimes refer as "the legislation") and dispose so adequately of a number of subsidiary issues that I find it possible to concentrate almost wholly upon the two main issues argued before us by the appellants, that is to say, the trade and commerce issue dealt with in Part X of the reasons and the Dominion companies issue dealt with in Part XII of the reasons.

I shall refer to class (2) (or head No. 2) in s. 91 of the *British North America Act, 1867*, as s. 91(2) and in corresponding fashion to the classes in s. 92.

It will be helpful to state in greatly simplified form the

essence of what the learned trial Judge held and of what each of the parties has submitted on the appeal.

Aikins, J. held [at p. 106 D.L.R., p. 586 W.W.R.]:

> . . . that the impugned legislation in pith and substance is in relation to "Matters of a merely local or private nature in the Province" and is, therefore, *intra vires* the provincial Legislature.

Upon the trade and commerce issue he pointed out that insurance does not exist apart from contracts, and that each insurance contract must be made in one or other of the Provinces. From this he reasoned that the insurance business was not affected with an interprovincial concern, and so he was of the opinion that it is not a trade within the meaning of s. 91(2). On the Dominion companies issue he was of the opinion that, as insurance (in some aspects at least) falls within provincial competence under s. 92 and the impugned legislation enacts a law of general application and is not in relation to Dominion companies *qua* Dominion companies or in relation to any other kind of company *qua* company, it is valid.

The appellants submitted on the trade and commerce issue that the insurance business is a trade within the meaning of "trade and commerce" in s. 91(2); that the business activity of automobile insurance is affected with substantial extra-provincial concerns; that Parliament has exclusive legislative authority in relation to the extra-provincial concerns of trade and commerce; and that legislation establishing a monopoly that intrudes upon extra-provincial concerns and interests is *per se* invalid. Their submission on the Dominion companies issue was that Parliament has the power to create companies; that a Province may not make it impossible for a Dominion company to exercise its powers; and that the impugned legislation, as it would have that effect, is invalid.

The respondent submitted that the impugned Acts are in relation to property and civil rights in the Province and to matters of a merely local or private nature in the Province, the focus of the scheme being upon the resident; that they were not aimed at interprovincial trade and commerce and therefore did not conflict with the Dominion power to regulate trade and commerce; and that they enacted a law of general application which was not in relation to Dominion companies *qua* Dominion companies or in relation to any other kind of company *qua* company. Among other things, the respondent submitted that the essence of insurance lies in the contract or policy; that monopoly has no special sig-

nificance but is only relevant to pith and substance; and that the ambit of the scheme was intra-provincial.

At the outset I shall state what in my opinion were the true nature and character, the pith and substance, of the legislation: they were to push out of the automobile insurance business in the Province all the corporations and Lloyd's associations (which under s. 29 of the *Insurance Act* could alone be licensed as insurers) that were then engaged in the business in the Province and to place the business, then and thereafter, in the sole hands of the Corporation, charged with the duty of administering a plan of universal compulsory automobile insurance essentially the same as the system previously in force. This was the effect of the legislation and it is the effect of legislation that determines its pith and substance. In saving this I rely, *inter alia*, on the *Insurance Corporation of British Columbia Act*, 1973 (B.C.), c. 44, ss. 5(1)(a) and (b), 10(1) and (2) and 24, and on the *Automobile Insurance Act*, 1973 (B.C.), c. 6, ss. 2, 7(1), 8 [am. 1973 (2nd Sess.), c. 152, s. 2], 18, 33(1) and 40 [am. 1975, c. 5, s. 8], and I am influenced by this statement of Aikins, J., at 8 A.B., p. 1176 (p. 44 D.L.R., pp. 520-1 W.W.R.), with which I agree:

> . . . that in all essentials the automobile insurance coverages provided by the Corporation under Autoplan are the same as those coverages which were previously provided by the plaintiffs and by other private insurers.

I think that the powers conferred on the Corporation with respect to surveys, research, repairing, medical and hospital services, etc., were merely ancillary to the main objects and do not affect their pith and substance. Also I think that the evidence about saving of costs, the hoped-for greater return of the premium dollar for compensation, accident prevention and administrative advantages does not help in deciding what is the nature and character of the legislation.

I come now to the trade and commerce issue.

The way in which the automobile insurance business is carried on in Canada and extends into the United States is outlined in the evidence and is referred to by Aikins, J., in his reasons.

I take judicial notice of the facts recited in this part of the preamble to the *Canadian and British Insurance Companies Act*, R.S.C. 1970, c. I-15:

> WHEREAS the insurance business transacted within and outside Canada by companies incorporated by the Parliament of Canada, and by the Legislature of the former Province of Canada, and within

> Canada by British insurance companies, constitutes an important factor in the international and interprovincial trade and commercial relations of Canada . . .

Logically the first question to consider is whether the automobile insurance business in Canada is capable of being a part of "trade and commerce" within the meaning of that phrase in s. 91(2). I choose not to treat the two nouns separately, for the reason indicated by Laskin, J. (now C.J.C.), in *A.-G. Man. v. Manitoba Egg & Poultry Ass'n et al.* (1971), 19 D.L.R. (3d) 169 at pp. 183-4, [1971] S.C.R. 689 at pp. 707-8, [1971] 4 W.W.R. 705, thus:

> What this balance points to is a more particular understanding of the meaning of the terms "trade" and "trade and commerce" as they relate respectively to the areas of provincial and federal competence. In *City of Montreal v. Montreal Street R. Co.*, 1 D.L.R. 681 at p. 687, [1912] A.C. 333, 13 C.R.C. 541, the Judicial Committee referred to s. 91(2) as expressing "two of the matters enumerated in s. 91". That provision is perhaps better seen as specifying a single class of subject in words that indicate a stronger source of authority than would be found if "trade" alone was used or "commerce" alone. . . . Etymologically, commerce refers to the buying and selling of goods, and trade has among its meanings (other than commerce) that of mercantile occupation. Although literal application is unthinkable, these meanings do indicate the capacity which inheres in s. 91(2).

In *Citizens Ins. Co. of Canada v. Parsons* (1881), 7 App. Cas. 96, the question whether the business of insurance properly falls within the description of a "trade" was expressly left open: see the paragraph beginning at the bottom of p. 111 and the first full paragraph on p. 113. Apparently, however, in argument it was conceded that the business was a trade, as appears from the words I have italicized in this passage from the judgment of Lord Watson for the Judicial Committee in *A.-G. Ont. v. A.-G. Can.*, [1896] A.C. 348 at p. 363:

> The scope and effect of No. 2 of s. 91 were discussed by this Board at some length in *Citizens' Insurance Co. v. Parsons* 7 App. Cas. 96, where it was decided that, in the absence of legislation upon the subject by the Canadian Parliament, the Legislature of Ontario had authority to impose conditions, as being matters of civil right, upon the business of fire insurance, *which was admitted to be a trade*, so long as those conditions only affected provincial trade.

In *A.-G. Can. v. A.-G. Alta, and A.-G. B.C.* (1916), 26 D.L.R. 288, [1916] A.C. 588, 10 W.W.R. 405, the question was touched upon indirectly but was not answered.

In *Re Reciprocal Insurance Legislation; Craigon v. The King*, [1924] 1 D.L.R. 789, 41 C.C.C. 336, [1924] A.C. 328 *sub nom. A.-G. Ont. v. Reciprocal Insurers et al.*, Duff, J.

(as he then was), wrote for the Judicial Committee at p. 803 D.L.R., p. 347 A.C.:

> . . . in so answering it their Lordships do not express any opinion as to the competence of the Dominion Parliament, by virtue of its authority in relation to aliens and to trade and commerce, to enact secs. 11 and 12(1) of the Insurance Act.

Re Insurance Act and Special War Revenue Act, [1932] 1 D.L.R. 97, [1932] A.C. 41, [1931] 3 W.W.R. 689, dealt with the powers of the Dominion with respect to insurers but did not express any opinion on the point under discussion.

In *Reference re s. 16 of the Special War Revenue Act*, [1942] 4 D.L.R. 145 at p. 149, [1942] S.C.R. 429 at p. 433, 9 I.L.R. 425 [leave to appeal to P.C. refused [1943] 4 D.L.R. 657, 10 I.L.R. 285], only an assumption was made:

> Assuming that the Dominion, in exercise of its control of trade and commerce under the second clause of s. 91, may regulate the business of insurance carried on by British companies as a branch of external trade and commerce, this does not give the Dominion authority to regulate their strictly provincial business . . .

I refer again to the last part of my quotation above from *A.-G. Man. v. Manitoba Egg & Poultry Ass'n et al.*

There does not, therefore, appear to be any case in the Supreme Court of Canada or the Judicial Committee that has decided specifically whether the insurance business or any of its branches is "trade and commerce" within the meaning of s. 91(2). There are, however, some judicial remarks that I find helpful.

In *Citizens' Ins. Co. v. Parsons* (1880), 4 S.C.R. 215, Taschereau, J., who dissented, said at p. 300:

> To revert to the case of *Paul V. Virginia*, the *obiter dictum* of Mr. Justice Field, "that issuing a policy of insurance is not a transaction of commerce," seems to me nothing but a truism. In the same sense, as I have remarked before, it may be said that making a contract of sale is not a transaction of commerce. It is the fact of a person or corporation making a business of selling and buying, or of issuing policies of insurance, which gives to the contract of sale, or the contract of insurance, and the seller or insurer, a commercial character.

In the passage last quoted reference was made to the case of *Paul v. Virginia* (1868), 8 Wall. 168, in the Supreme Court of the United States. That case was later overruled in *United States v. South-Eastern Underwriters Ass'n* (1944), 322 U.S. 533, where Black, J., for the majority said at p. 539:

> Surely, therefore, a heavy burden is on him who asserts that the plenary power which the Commerce Clause grants to Congress to regulate "Commerce among the several States" does not include the power to regulate trading in insurance to the same extent that it

> includes power to regulate other trades or businesses conducted across State lines.

Later, after referring to the ramifications of the business, Black, J., said at p. 542:

> . . . despite the fact that most persons, speaking from common knowledge, would instantly say that of course such a business is engaged in trade and commerce . . .

When *A.-G. Can. v. A.-G. Alta. and A.-G. B.C., supra,* was before the Supreme Court of Canada — *sub nom. Re Insurance Act (Can.) 1910* (1913), 15 D.L.R. 251, 48 S.C.R. 260, 5 W.W.R. 488 — Davies, J., said this at p. 271 (S.C.R.):

> That insurance is a trade in one sense at least seems clear, and that it is one affecting the whole Dominion and all classes and conditions of its people is beyond controversy. . . . My general conclusion in the absence of any distinct authority is that the subject-matter of insurance generally throughout the Dominion but not including provincial insurance limited to the province may well be held as within the regulative power of Parliament under the enumerated clause relating to trade and commerce.

Based upon the foregoing and my own view of the natural meaning of the words, I am of the opinion that, if other requirements are satisfied, the insurance business can be said to fall within the meaning of the phrase "trade and commerce" in s. 91(2); it is a part of trade and commerce.

I should add that counsel for the respondent did not argue on the appeal that the insurance business could not be trade.

The next question to consider is whether the insurance business falls *prima facie* within s. 91 or s. 92.

A long line of authorities has established that, speaking generally, provisions as to insurance are within the exclusive legislative jurisdiction of the Provinces under s. 92: see *Citizens' Ins. Co. v. Parsons* (1880), 4 S.C.R. 215; affirmed 7 App. Cas. 96; *Re Insurance Act (Can.) 1910* (1913), 15 D.L.R. 251, 48 S.C.R. 260, 5 W.W.R. 488; affirmed *sub nom. A.-G. Can. v. A.-G. Alta. and A.-G. B.C.* (1916), 26 D.L.R. 288, [1916] A.C. 588, 10 W.W.R. 405; *Re Reciprocal Insurance Legislation; Craigon v. The King,* [1924] 1 D.L.R. 789, 41 C.C.C. 336, [1924] A.C. 328 *sub nom. A.-G. Ont. v. Reciprocal Insurers et al.*; *Re Insurance Act and Special War Revenue Act,* [1932] 1 D.L.R. 97, [1932] A.C. 41, [1931] 3 W.W.R. 689; *Reference re Employment and Social Insurance Act,* [1936] 3 D.L.R. 644, [1936] S.C.R. 427; affirmed *sub nom. A.-G. Can. v. A.-G. Ont. et al.,* [1937] 1 D.L.R. 684, [1937] A.C. 355, [1937] 1 W.W.R. 312; and *Reference re s. 16 of the Special War Revenue Act,* [1942] 4 D.L.R. 145,

[1942] S.C.R. 429; leave to appeal to the Privy Council refused [1943] 4 D.L.R. 657, 10 I.L.R. 285.

To hold, however, that a provision in a provincial Act relates in pith and substance to insurance does not inevitably establish that it is *intra vires*. *Citizens' Ins. Co. v. Parsons*, *supra*, was brought upon "contracts of insurance against fire of buildings situate in the province of Ontario" (at p. 104); s. 1 of the Act [1924 (Can.), c. 24] made it applicable to policies "entered into, or renewed, or otherwise in force in Ontario, with respect to any property therein" (p. 105); the Board confined itself to the "particular question in hand" (p. 109); and at p. 113 the decision was predicated on the view that Parliament's "authority to legislate for the regulation of trade and commerce does 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". In the *Unemployment Insurance Reference*, *supra* (which had to do with a Dominion Act), in the Judicial Committee Lord Atkin said at p. 686 D.L.R., p. 365 A.C.:

> There can be no doubt that prima-facie provisions as to insurance of this kind, *especially where they affect the contract of employment*, fall within the class of Property and Civil Rights in the Province . . .

and at pp. 687-8 D.L.R., p. 367 A.C.:

> In the present case, their Lordships agree with the majority of the Supreme Court in holding that in pith and substance this Act is an insurance Act affecting the civil rights of employers and employed in each Province, and as such is invalid.

The Dominion Act was not invalid simply because it was in relation to insurance.

In *Reference re s. 16 of the Special War Revenue Act*, *supra*, Duff, C.J.C., said at p. 149 D.L.R., p. 433 S.C.R.:

> Assuming that the Dominion, in exercise of its control of trade and commerce under the second clause of s. 91, may regulate the business of insurance carried on by British companies as a branch of internal trade and commerce, this does not give the Dominion authority to regulate *their strictly provincial business* . . .

and at p. 149 D.L.R., p. 434 S.C.R.:

> The principle of exclusive provincial control of the *business of insurance within the Province* lies at the foundation of the judgment.

(My emphasis in each quotation.)

There is, of course, the obvious limitation that provincial legislation under any head of s. 92 that trenches on a power of the Dominion under s. 91 is invalid because of the concluding paragraph in s. 91. (In this connection s. 91(2) must

be given the limited effect indicated in *Parsons'* case among other cases.)

This brings me to the questions, whether the impugned legislation is wider in its scope than "strictly provincial business" or "the business of insurance within the province" and whether it impinges upon the power of the Dominion under s. 91(2) to regulate trade and commerce.

The answers to both questions depend upon whether the legislation is in relation to matters of interprovincial concern; if it is, it is *ultra vires* of the provincial Legislature. As authority for this proposition I need to refer to one case only, *A.-G. Man. v. Manitoba Egg & Poultry Ass'n et al., supra.* There Martland, J., delivered the judgment of Fauteux, C.J.C., and of Abbott, Martland, Judson, Ritchie and Spence, JJ., and Pigeon, J., agreed with that judgment, subject to some observations of his own. I quote from Martland, J., beginning at p. 177 D.L.R., p. 701 S.C.R.:

> We have, therefore, a Plan which is intended to govern the sale in Manitoba of all eggs, wherever produced, which is to be operated by and for the benefit of the egg producers of Manitoba, to be carried out by a Board armed with the power to control the sale of eggs in Manitoba, brought in from outside Manitoba, by means of quotas, or even outright prohibition.
>
> The issue which has to be considered in this appeal is as to whether the Plan is *ultra vires* the Manitoba Legislature because it trespasses upon the exclusive legislative authority of the Parliament of Canada to legislate on the matter of the regulation of trade and commerce conferred by s. 91(2) of the *B.N.A. Act, 1867.*
>
> When the Privy Council first addressed itself to the meaning of that provision it was stated that it included "regulation of trade in matters of inter-provincial concern": *Citizens Insurance Co. of Canada v. Parsons* (1881), 7 App. Cas. 96 at p. 113. That proposition has not since been challenged. However, the case went on to hold that the provision did not include the regulation of the contracts of a particular business or trade in a single Province.
>
> This limitation on the federal power was reiterated in subsequent decisions of the Privy Council, the effect of which is summarized in *Shannon et al. v. Lower Mainland Dairy Products Board,* [1938] 4 D.L.R. 81 at pp. 84-5, [1938] A.C. 708, [1938] 2 W.W.R. 604:
>
> > "It is now well settled that the enumeration in s. 91 of "The Regulation of Trade and Commerce" as a class of subject over which the Dominion has exclusive legislative powers does not give power to regulate for legitimate Provincial purposes particular trades or business so far as the trade or business is confined to the Province . . ."
>
> In that case the *Natural Products Marketing (British Columbia) Act,* 1936, was held to be *intra vires* the provincial Legislature because it was confined to dealings with such products as were situate within the Province, even though not necessarily produced there. The basis of this decision was that "The pith and substance

of this Act is that it is an Act to regulate particular businesses entirely within the Province . . ." (at p. 86).

Similarly, this Court upheld, in *Home Oil Distributors Ltd. et al. v. A.-G. B.C.*, [1940] 2 D.L.R. 609, [1940] S.C.R. 444, provincial legislation authorizing the fixing of wholesale or retail prices for coal or petroleum products sold in British Columbia for use in that Province. This judgment was based upon the decision in the *Shannon* case.

. . . . .

The earlier authorities on the matter of provincial marketing regulation were considered by various members of this Court in the *Reference re Farm Products Marketing Act, R.S.O. 1950, c. 131, as amended*, 7 D.L.R. (2d) 257, [1957] S.C.R. 198 [the *Ontario Reference*], which case, as well as some of those authorities, was reviewed in the judgment of this Court in *Carnation Co. Ltd. v. Quebec Agricultural Marketing Board et al.*, 67 D.L.R. (2d) 1, [1968] S.C.R. 238. It was said, in that case, at p. 15:

> "While I agree with the view of the four Judges in the Ontario Reference that a trade transaction, completed in a Province, is not necessarily, by that fact alone, subject only to provincial control, I also hold the view that the fact that such a transaction incidentally has some effect upon a company engaged in interprovincial trade does not necessarily prevent its being subject to such control."

Our conclusion was that each transaction and regulation had to be examined in relation of its own facts, and that, in determining the validity of the regulatory legislation in issue in that appeal, the issue was not as to whether it might affect the interprovincial trade of the appellant company, but whether it was made in relation to the regulation of interprovincial trade and commerce. There was cited the following passage from the reasons of Kerwin, C.J.C., in the *Ontario Reference* (at p. 264):

> "Once a statute aims at "regulation of trade in matters of interprovincial concern" (*Citizens Ins. Co. v. Parsons* (1881), 7 App. Cas. 96 at p. 113) it is beyond the competence of a Provincial Legislature."

It is my opinion that the Plan now in issue not only affects interprovincial trade in eggs, but that it aims at the regulation of such trade. It is an essential part of this scheme, the purpose of which is to obtain for Manitoba producers the most advantageous marketing conditions for eggs, specifically to control and regulate the sale in Manitoba of imported eggs. It is designed to restrict or limit the free flow of trade between Provinces as such. Because of that, it constitutes an invasion of the exclusive legislative authority of the Parliament of Canada over the matter of the regulation of trade and commerce.

I turn next to the question whether the impugned legislation is in relation to matters of extra-provincial concern — or, to use an expression of Martland, J., above, whether it was made in relation to the regulation of interprovincial trade and commerce — and I include in my inquiry the question whether the legislation is "confined to regulating trans-

actions that take place wholly within the Province", a test used in *Shannon et al. v. Lower Mainland Dairy Products Board*, [1938] 4 D.L.R. 81, [1938] A.C. 708, [1938] 2 W.W.R. 604, and quoted by Laskin, J., in the *Manitoba Egg* case at p. 185 D.L.R., p. 710 S.C.R.

I am, with respect, in substantial agreement with this paragraph in Part X of the reasons of Aikins, J., at 8 A.B., p. 1250 (at p. 102 D.L.R., p. 582 W.W.R.):

> I begin by saying that in my view the mass of communications and movement of personnel back and forth across provincial boundaries by which insurers are able to carry on the general business of insurance interprovincially is wholly neutral on the issue of whether their businesses are affected by an interprovincial concern. Equally, the mere fact that money passes back and forth across provincial boundaries does not show that the plaintiffs' businesses are affected by an interprovincial concern. Further, I am not of the opinion that because contracts of insurance entered into by the plaintiffs in the Provinces have extraterritorial effect that the plaintiffs' businesses are thereby affected by an interprovincial concern.

Further, I do not think that the fact that the plaintiffs are able to carry on their businesses throughout Canada because they have central reservoirs of capital which are made available to meet the insurance needs of people throughout the country affects the businesses with an interprovincial concern.

The essence of the insurance business, and of the transactions that are at its core, is the making of contracts, that is, the issuing of policies. Assume a policy issued by an insurer that does business only in British Columbia to a resident of the Province to protect him against risks arising in respect of a car registered in the Province while it is in the Province; clearly this is a matter of strictly provincial concern. Then assume that an endorsement extends the coverage to risks arising while the insured is driving the car outside the Province; this does not change the nature of the matter in its constitutional aspect, for the relationship between the insurer and the insured is still governed by the policy issued in the Province. Next assume a second endorsement, extending the coverage to anyone who may drive the car anywhere with the insured's consent; the policy remains a matter of provincial concern; the fact that the parties have contracted with respect to risks outside the Province does not change the essential nature of the contract. Finally assume that on the expiration of the policy a new one giving the same coverage (as enlarged by the endorsements) is issued by the insurer to the insured, but that in the meantime the insurer has

extended his business into several other Provinces of Canada and has employees and communications moving back and forth: will this change the essential nature of the contract? Or will the making by the insurer of arrangements for the protection of the insured with authorities in other Provinces and States? Or will performance of the omnibus clause? Or will the maintenance and use by the insurer of a central reservoir of capital inside or outside the Province? In each case I think not. Everything that the insurer or the insured has to do has to be done because the contract between them requires, directly or indirectly, that it be done. Those things are not "transactions" within the meaning of the word in the expression I have quoted from the *Shannon* case. The fact that many of the things may have to be done outside the Province does not alter the "strictly provincial" establishment of the relationship between the parties.

As I understood Mr. Brown, he agrees with me, for he concedes, and indeed asserts (subject to a reservation with which I am not presently concerned), that the provincial legislation in respect of automobile insurance that was in force before the impugned legislation came into force was valid. A note that I made when Mr. Brown answered a question that I had put the day before and he had considered overnight reads in part:

> S. 91(2) relates only to the extraprovincial aspects of the trade. The local aspects will be left to the province. The pre-impugned-Acts legislations was not bad. The policies issued were good.

Another note that I made during Mr. Brown's argument reads:

> We do not ask you to upset the practices of regulations developed over many years.

Quite apart from Mr. Brown's concession, I am, as I have indicated, of the opinion that the essence of the automobile insurance business is the issuing of policies in the Province and that the business, immediately before the legislation came into effect, was not affected with an interprovincial concern and so did not fall within s. 91(2). The only difference between the pre-legislation situation and the post-legislation situation is the exclusion of the private insurers and the granting of a monopoly to the Corporation. I cannot see how the making of this change can have affected the business with an interprovincial concern. One might almost say that it removed an extra-provincial feature from the business and made it still more strictly provincial. It is for me an impossible step to reason that a business which, when it was

conducted by a number of private insurers, was not affected with an interprovincial concern became so affected by the removal of the private insurers and the putting in their place of a creature of the Province.

Reference was made by the appellants to this language of Kerwin, C.J.C., in *Reference re Farm Products Marketing Act, R.S.O. 1950, c. 131, as amended* (1957), 7 D.L.R. (2d) 257 at p. 265, [1957] S.C.R. 198 at p. 205:

> Once an article enters into the flow of inter-provincial or external trade, the subject-matter and all its attendant circumstances cease to be a mere matter of local concern.

In the same connection I refer to this statement of Martland, J., for the Court in *Carnation Co. Ltd. v. Quebec Agricultural Marketing Board et al.* (1968), 67 D.L.R. (2d) 1 at p. 15, [1968] S.C.R. 238 at p. 253:

> The view of the four Judges in the Ontario Reference was that the fact that a transaction took place wholly within a Province did not necessarily mean that it was thereby subject solely to provincial control. The regulation of some such transactions relating to products destined for interprovincial trade could constitute a regulation of interprovincial trade and be beyond provincial control.

I am unable to assimilate what goes on in the automobile insurance business, or the subject-matter of that business, to the flow of articles from one Province to another in trade, or to transactions relating to products destined to move interprovincially. If the insurance policy is the article or the product, it does not move at all, but remains stationary. In order to conduct their business and to discharge their obligations, the insurers move their staff about and transfer funds from one office to another and pay moneys as required by policies and do other things described in the evidence, but the elements of those movements, transfers, payments and acts are different from the elements of the flow of articles in trade.

It is easy to see how trading in tangible articles or products can constitute matters of interprovincial concern. For example, *Lawson v. Interior Tree Fruit & Vegetable Committee*, [1931] 2 D.L.R. 193, [1931] S.C.R. 357, involved the marketing of tree fruits and vegetables, and at pp. 199-200 D.L.R., p. 365 S.C.R., Duff, J., said:

> I am unable to convince myself that these matters are all, or chiefly, matters of merely British Columbia concern, in the sense that they are not directly and substantially the concern of the other Provinces, which constitute in fact the most extensive market for these products. In dictating the routes of shipment, the

> places to which shipment is to be made, the quantities allotted to each terminus *ad quem*, the Committee does, altogether apart from dictating the terms of contracts, exercise a large measure of direct and immediate control over the movement of trade in these commodities between British Columbia and the other Provinces.
>
> Such matters seem to constitute "matters of interprovincial concern," that is to say, of direct, substantial and immediate "concern", to the receiving Province as well as to the shipping Province. Otherwise you seem to denude the phrase of all meaning.

I am, however, unable to transfer this conception of "matters of interprovincial concern" in relation to tangible things to the intangibles of the insurance business. Insurers in British Columbia do not ship the intangible subject-matter of their trade to other Provinces or receive like intangibles from other Provinces. True, as an incident of their business they make with other Provinces and States arrangements of the kind described by Aikins, J., in his reasons beginning at 8 A.B., p. 1193 (at pp. 56-7 D.L.R., p. 534 W.W.R.), for the purpose of enabling themselves to provide an insured in British Columbia with a contract of automobile insurance which will be recognized in any Province or State in which the insured chooses to drive; but this incident of the business cannot, in a trading sense, be "of direct, substantial and immediate 'concern' to the" other Provinces and States as well as to British Columbia.

In my opinion, in pith and substance the legislation is not in relation to the subject of s. 91(2) but is in relation to one or both of the subjects of s. 92(13) and (16).

I think that the appellants must fail on the trade and commerce issue.

I turn now to the Dominion Companies Issue.

The law as to the invalidity of provincial legislation that prohibits a Dominion company from carrying on business in a Province was expressed thus by Lord Atkin for the Judicial Committee in *Lymburn et al. v. Mayland et al.*, [1932] 2 D.L.R. 6 at p. 9, [1932] A.C. 318 at p. 324, 57 C.C.C. 311:

> It is said that these provisions so far as they affect Dominion companies are *ultra vires* according to the principles adopted by this Board in *John Deere Plow Co. Ltd. v. Wharton* (1914), 18 D.L.R. 353; *Gt. West Saddlery Co. v. The King* (1921), 58 D.L.R. 1; and *A.-G. Man. v. A.-G. Can., supra.*
>
> In those cases there was a general prohibition to companies either to trade at all or to issue their capital unless the company was registered. The legislation was held *ultra vires* because the legislative powers of the Province are restricted so that "the status and powers of a Dominion company as such cannot be destroyed" (*John Deere Plow Co., supra*) and legislation will be invalid if a Dominion company is "sterilised in all its functions and activities"

or "its status and essential capacities are impaired in a substantial degree" (*Great West Saddlery Co., supra*).

An example of what is meant by "to destroy the status and powers" of a company is given in *Great West Saddlery Co. v. The King* (1921), 58 D.L.R. 1 at p. 27, [1921] 2 A.C. 91 at p. 123, [1921] 1 W.W.R. 1034:

> But the effect of imposing upon such a company a penalty for carrying on business while unregistered is to make it impossible for the company to enter into or to enforce its ordinary business engagements and contracts until registration is effected, and so to destroy for the time being the status and powers conferred on it by the Dominion.

The evidence here (including the admissions) shows that the effect of the legislation will be to impair the status and essential capacities of each of the Dominion company plaintiffs in a substantial degree, including the destruction of the automobile insurance business that each has built up in the Province. Each of the companies will henceforth be absolutely prohibited from carrying on in the Province the automobile insurance business that the Dominion has expressly empowered it to carry on throughout Canada. Applying the thinking in *Reference re Alberta Legislation*, [1938] 2 D.L.R. 81 at pp. 101-4, [1938] S.C.R. 100 at pp. 127-9, if all the Provinces enacted similar legislation, an essential capacity of the Dominion companies would be impaired completely and their powers in that regard would be destroyed.

Let me now examine three cases that were earlier than *Lymburn v. Mayland.*

The law was expounded in more detail in *Lukey et al. v. Ruthenian Farmers' Elevator Co.*, [1924] 1 D.L.R. 706, [1924] S.C.R. 56, [1924] 1 W.W.R. 577, which was later approved in *A.-G. Man. v. A.-G. Can.*, [1929] 1 D.L.R. 369, [1929] A.C. 260, [1929] 1 W.W.R. 136. In *Lukey* at pp. 707-8 D.L.R., p. 58 S.C.R., Sir Louis Davies, C.J., said:

> In my judgment the power of a Dominion company to sell its own shares throughout the Dominion goes to the root of its essential powers and capacities and any attempt by a Provincial Legislature to prohibit altogether the sale by a Dominion company of its own shares in a Province, or to make the legality of such sale depend upon the company's first obtaining a licence, or a certificate from a Local Government Board, must necessarily be beyond the powers of a Provincial Legislature.

Idington, J., dissented. Duff, J., said this at pp. 710-11 D.L.R., pp. 70-1 S.C.R.:

> The general principles governing the respective authorities of the Dominion and the Provinces in relation to the subject of

Dominion companies, in so far as presently relevant, are stated by Lord Haldane on behalf of the Judicial Committee in *John Deere Plow Co. v. Wharton*, 18 D.L.R. 353, [1915] A.C. 330, at pp. 339-341. The view there expressed may be summarized for our present purposes thus:—The power of legislating with reference to the incorporation of companies with other than provincial objects belong exclusively to the Dominion Parliament, as being a matter not coming within the classes of subjects assigned exclusively to the Legislatures of the Provinces within the initial meaning of the words of sec. 91 of the B.N.A. Act, 1867, and as being a matter affecting the Dominion generally and covered by the expression, "the Peace, Order and Good Government of Canada."

Moreover, the power to regulate trade and commerce conferred by the second head of sec. 91 upon the Dominion enables the Parliament of Canada to prescribe to what extent the powers of companies, the objects of which extend to the entire Dominion, should be exercisable and what limitations should be placed on such powers. This is not to say that the power to regulate trade and commerce is lawfully capable of execution in such a way as to trench on the exclusive jurisdiction of the Provincial Legislatures over civil rights in general within the Provinces but a Province in exercise of its jurisdiction cannot legislate so as to deprive a Dominion company of its status and powers. It was also laid down that the Parliament of Canada had power to enact certain sections of the Companies Act, R.S.C. 1906, ch. 79, and the Interpretation Act, R.S.C. 1906, ch. 1.

In *Great West Saddlery Co. v. The King*, 58 D.L.R. 1, at p. 6, [1921] 2 A.C. 91, their Lordships in applying these general principles observed that even in the case of provincial laws competently enacted and applicable to Dominion companies they had carefully refrained from saying, in the judgment just referred to, that the sanctions by which such provincial laws might be enforced "could validly be so directed by the Provincial Legislatures as indirectly to sterilise . . . if the local laws were not obeyed . . . the capacities and powers which the Dominion had validly conferred."

He then referred to the *Interpretation Act*, which vests in Dominion companies the power to sue and to be sued and to contract and be contracted with in their corporate names, and he went on at p. 712 D.L.R., pp. 71-2 S.C.R.:

This is an express decision that the authority of the Dominion under the residuary clause fortified by that under sec. 91(2) of the B.N.A. Act, 1867, embraces authority to provide for the constitution of companies falling within the class of joint stock companies as that phrase is commonly understood, companies, that is to say, having capital divided into shares owned by shareholders who are the members of the company, whose liability in respect of the debts and obligations of the company is limited, possessing independently of provincial legislation in each of the Provinces the status of a juridical person, having the right to contract, and having the right to invoke the jurisdiction of the Courts, subject always, of course, to the measures passed by Provincial Legislatures of general application in relation to

such civil rights. And I think upon principle no distinction can be drawn between the provisions of the Act dealing with these subjects and those which imply power to acquire capital by selling the company's shares; nor do I think any sound distinction can be drawn between such provisions and those which expressly authorize the company to borrow money on its own credit and to give as security for the money so borrowed its bonds and debentures charged upon its property.

Concluding his judgment, Duff, J., said at pp. 713-4 D.L.R., pp. 73-4 S.C.R.:

It is quite true that the provinces have a large authority in relation to the suppression of local evils and the prevention of them and although legislation devoted to such purposes almost invariably affects civil rights, the better view is that such legislation falls under sec. 92(16) or under one of the more specifically defined categories of sec. 92 but is not legislation in relation to civil rights under sec. 92(13). *Russell v. The Queen* (1882), 7 App. Cas. 829; *Att'y Gen'l of Manitoba v. Manitoba Licence Holders' Ass'n*, [1902] A.C. 73; *Quong Wing v. The Queen* (1914), 18 D.L.R. 121, 23 Can. Cr. Cas. 113, 49 S.C.R. 440. But Provinces exercising such authority must in doing so observe the constitutional limitations to which they are subject and not effect their objects by means of enactments which both in necessary result and in purpose constitute regulation of Dominion companies in the exercise of powers which belong to them as essential and characteristic.

This is not to say that such companies are withdrawn from the operation of provincial laws dealing generally with matters that may be embraced in whole or in part within the objects of the company. Dominion companies empowered to deal in intoxicating liquors for example are subject to provincial laws regulating or suppressing the sale of liquor; but such laws are not laws aimed at Dominion companies as such or at joint stock companies as such and do not in effect or in purpose prohibit or impose conditions upon the exercise of the powers of Dominion companies which are essential in the sense that they are necessary to enable them in a practical way to function as corporations according to the constitutions imposed upon them by the Dominion.

Anglin, J., did not find it necessary to deal with the question I am discussing. Mignault, J., at p. 718 D.L.R., pp. 78-9 S.C.R., said:

No matter how praiseworthy may be the object which the Legislature had in view, the question to be decided is whether in attempting to attain this object it has transcended its powers, in so far as these enactments apply to a Dominion company.

The test or crucial question, the answer to which determines whether legislation of this character is within the jurisdiction of the Provincial Legislature, in so far as it affects Dominion companies, was stated by Lord Haldane in *Great West Saddlery Co. v. The King*, 58 D.L.R. 1, at p. 19, [1921] 2 A.C. 91, as follows:— "do these provisions interfere with such powers as are conferred on a Dominion company by the Parliament of Canada to carry on its business anywhere in the Dominion, and so affect its status?"

And the legislation cannot be sustained as coming within property and civil rights, or as being a matter of a merely local or private nature in the Province. It really conflicts with the right of the Dominion Parliament to incorporate companies, and to grant them power to carry on their business throughout the Dominion.

The statute therefore is not a defence to the respondent's action.

A.-G. Man. v. A.-G. Can., supra, contains some language by Lord Sumner that is important here. It begins at p. 374 D.L.R., p. 267 A.C.:

As a matter of construction it is now well settled that, in the case of a company incorporated by Dominion authority with power to carry on its affairs in the Provinces generally, it is not competent to the legislatures of those Provinces so to legislate as to impair the status and essential capacities of the company in a substantial degree. The reasoning, by which this result has been arrived at, has been most fully developed in the judgments of the Board in the *John Deere Plow Co. v. Wharton* (1914), 18 D.L.R. 353, and *Great West Saddlery Co. v. The King* (1921), 58 D.L.R. 1. In their Lordships' view the statutes now under consideration do so impair the status and powers of such a company, and accordingly decisions as to property and civil rights like *Citizens Ins. Co. v. Parsons* (1881), 7 App. Cas. 96, and *Colonial Bldg. & Inv. Ass'n v. A.-G. Que.* (1883), 9 App. Cas. 157, or as to local taxation like *Bk. Toronto v. Lambe* (1887), 112 App. Cas. 575, or as to local regulations of the liquor traffic or other similar matters, like *A.-G. Ont. v. A.-G. Dom.*, [1896] A.C. 348, and the case of *A.-G. Man. v. Man. Licence Holders' Ass'n*, [1902] A.C. 73, do not govern the present case.

This is not a mere case of fixing the conditions of local trade or of regulating the form or the formalities of the contracts, under which business is to be carried on within the Province, or of prescribing the restrictions under which property within the Province can be acquired, nor is it a mere matter of local police regulation, or local administration, or raising of local revenue, or a mere means of attaining some exclusive provincial object. The capacity of a Dominion company to obtain capital by the subscription, or so called sale, of its shares, is essential in a sense, in which holding particular kinds of property in a Province or selling particular commodities, subject to provincial conditions or regulations, is not.

Neither is the legislation which is in question saved by the fact, that all kinds of companies are aimed at and that there is no special discrimination against Dominion companies. The matter depends upon the effect of the legislation not upon its purpose.

In these passages I call particular attention to: (1) the statement to the effect that the necessity to keep unimpaired the status and powers of a Dominion company overrides certain provincial powers; (2) the sentence beginning "The capacity of a Dominion company", which contrasts the essentiality of a company obtaining capital by the subscription of its shares with the non-essentiality of its being able to hold

particular kinds of property, or to sell particular commodities, free of provincial conditions or regulations; (3) the sentence "Neither is the legislation which is in question saved by the fact, that all kinds of companies are aimed at and that there is no special discrimination against Dominion companies"; and (4) the sentence "The matter depends upon the effect of the legislation not upon its purpose."

Re Insurance Act and Special War Revenue Act, [1932] 1 D.L.R. 97, [1932] A.C. 41, [1931] 3 W.W.R. 689, had to do with the power to license a foreign or British insurer. Referring to *Citizens' Ins. Co. v. Parsons, supra*, Viscount Dunedin said at p. 100 D.L.R., p. 45 A.C.:

> The arguments turned on what may be called the competing claims of ss. 91 and 92 of the B.N.A. Act. The principle laid down was clear. It is within the power of the Dominion Legislature to create the person of a company and endow it with powers to carry on a certain class of business, to wit, insurance; and nothing that the provinces can do by legislation can interfere with the status so created; but none the less the provinces can by legislation prescribe the way in which insurance business or any other business shall be carried on in the Provinces. The great point of the case is the clear distinction drawn between the question of the status of a company and the way in which the business of the company shall be carried on.

As I have already shown, the principle was next recognized in *Lymburn v. Mayland, supra*. It, like some of the earlier ones, was a case of a Dominion company being regulated by legislation of a Province in the "sale" of its own shares. The *ratio* of the decision appears in this passage at pp. 9-10 D.L.R., pp. 324-5 A.C.:

> If it is formed to trade in securities there appears no reason why it should not be subject to the competent laws of the Province as to the business of all persons who trade in securities. As to the issue of capital there is no complete prohibition, as in *A.-G. Man. v. A.-G. Can.* in 1929; and no reason to suppose that any honest company would have any difficulty in finding registered persons in the Province through whom it could lawfully issue its capital. There is no material upon which their Lordships could find that the functions and activities of a company were sterilised or its status and essential capacities impaired in a substantial degree.

This affords an example of what, in addition to prohibition of the issue of capital, may sterilize the functions and activities of a company or impair its status and essential capacities in a substantial degree, namely, the creation of an inhibiting situation that cannot be cured by finding persons through whom the company can lawfully issue its capital.

In *Reference re s. 16 of the Special War Revenue Act*, [1942] 4 D.L.R. 145, [1942] S.C.R. 429, 9 I.L.R. 425, Duff,

C.J.C., delivering the judgment of the Court, at p. 150 D.L.R., p. 434 S.C.R., applied "the principle of exclusive provincial control of the business of insurance within the province", but then added:

> It is perhaps unnecessary to add that nothing I have said is in any way inconsistent with the principle which precludes a Province from impairing by legislation the status and powers of a Dominion company.

Provincial legislation controlling the business of insurance within the Province which is otherwise competent may nevertheless be invalid if it impairs the status and powers of a Dominion company.

I call attention to the way in which the cases I have discussed have been decided without distinction between companies that are interfered with in "selling" their own shares and companies that are interfered with in carrying on their ordinary businesses. This is specifically mentioned by Duff, J., in the passage that I have quoted above from p. 712 D.L.R., p. 71 S.C.R., of *Lukey v. Ruthenian Farmers*. In no case is the application of the principle confined to instances of what, in *R. v. Arcadia Coal Co., infra*, is called "company law".

It appears to me that each of the decisions which has upheld provincial legislation that interferes with Dominion companies is predicated on the idea that the company is left free to carry on in the Province a business that is within its objects and that the Province can regulate; if it is so left, it must conform to and be bound by general laws of the Province that provide how businesses such as that which it conducts shall be carried on, such, for example, as laws for the regulation of contracts generally. This basic idea is entirely at variance with the concept of a power in the Province to prohibit the company from carrying on at all a business that is within its objects. The decisions do not recognize such a concept.

The learned trial Judge reached a different conclusion. At 8 A.B., p. 1256 (at p. 107 D.L.R., p. 587 W.W.R.), he said:

> Because I have decided that the challenged statutes, in pith and substance, are in relation to matters of a merely local or private nature in the Province, the Dominion companies argument does not require consideration at any great length. As I read the authorities, once it is determined that legislation is in pith and substance in relation to matters coming within a provincial class of subjects, it follows that it is not in relation to Dominion companies as such: it does not sterilize their functions and activities or impair their status and essential capacities *qua* Dominion companies.

With respect, these statements appear to me to be incorrect

and, *inter alia*, to be inconsistent with what Lord Sumner said at pp. 374-5 D.L.R., pp. 267-8 A.C. in *A.-G. Man. v. A.-G. Can.*, *supra*, and with what Duff, C.J.C., said in *Reference re s. 16 of the Special War Revenue Act*, *supra*.

Then, after referring to a number of cases, the learned Judge adopted the language of McGillivray, J.A., for the Appellate Division of the Alberta Supreme Court in *R. v. Arcadia Coal Co. Ltd.*, [1932] 2 D.L.R. 475, 58 C.C.C. 17, [1932] 1 W.W.R. 771, that he set out at 8 A.B., p. 1257 (at pp. 107-8 D.L.R., p. 588 W.W.R.). The essence of what McGillivray, J.A., said appears in the first paragraph so quoted (from p. 487 D.L.R., p. 784 W.W.R.) and is this:

> "A provincial Legislature may enact laws, province wide, of general application (*i.e.*, including the public generally) in respect of any of the subjects enumerated in s. 92 and in so doing may completely paralyze all activities of a Dominion trading company provided that in the enactment of such laws it does not enter the field of company law and in that field encroach upon the status and powers of a Dominion company as such."

Finally, applying what McGillivray, J.A., had said, Aikins, J., expressed his conclusion in the following paragraph at 8 A.B., p. 1259 (at p. 109 D.L.R., p. 590 W.W.R.):

> In the present case, it seems to me plain that the Province, through its agent the Corporation, has gone into the motor vehicle insurance business and has given the Corporation a monopoly in that class of insurance, and thereby the Province as principal has taken a monopoly in that class of insurance. By so doing, the Province has excluded all other insurers, federally incorporated companies, provincially incorporated companies, foreign insurers and British insurers from engaging in that class of insurance within British Columbia. The impugned legislation is within provincial competence. The impugned legislation enacts "a law of general application" in the Province. In my opinion, it is clear that the impugned legislation is not in relation to Dominion companies *qua* Dominion companies and is not in relation to any other kind of company *qua* company.

With the greatest respect for McGillivray, J.A., and the other members of the Appellate Division for whom he spoke (and noting that he spoke without reference to *Re Insurance Act and Special War Revenue Act* and before *Reference re s. 16 of the Special War Revenue Act*, both quoted above), I must say that I cannot extract from the cases the principle that McGillivray, J.A., has extracted and that Aikins, J., has adopted.

R. v. Arcadia Coal Co. was referred to in this Court in *R. v. City of New Westminster, Ex p. Canadian Wirevision Ltd.* (1965), 55 D.L.R. (2d) 613, 54 W.W.R. 238. Two companies, one of which (the appellant) was a Dominion com-

pany with the necessary powers and authority, applied to the City Council for trade licences in respect of cablevision operations. The Council reached the conclusion that operations by two competing companies involving duplication of wires and cables could not be conducted on an economically sound basis and, in the interest of the city and its citizens, decided that only one licence should be granted. It then had to choose between the two applicants, and it chose the appellant's competitor as the grantee of the licence. The appellant applied for an order directing the issue of a writ of *mandamus* to require the respondent city to grant a trade licence to it, claiming a right as a Dominion company to be granted a licence. The application was dismissed and the appellant appealed. This Court dismissed the appeal. In the judgment that McFarlane, J.A., delivered for the Court, the principle that I have been discussing was referred to and this was said at pp. 615-6 D.L.R., p. 241 W.W.R.:

> The relevant authorities are reviewed and analyzed by McGillivray, J.A., delivering the judgment of the Supreme Court of Alberta, Appellate Division, in *R. v. Arcadia Coal Co. Ltd.*, [1932] 2 D.L.R. 475, 58 C.C.C. 17, 26 A.L.R. 348, [1932] 1 W.W.R. 771. The *Municipal Act* and the by-law in question are laws of general application in the sense indicated. Further they are clearly and rightly admitted to be legislation in relation to subject matters assigned exclusively to provincial legislative jurisdiction by s. 92 of the *B.N.A. Act*.

I cannot read into this any adoption of all that McGillivray, J.A., had said as to the principle to be extracted from the cases.

Since this appeal was argued counsel for the respondent have called our attention to *Morgan et al. v. A-G. P.E.I. et al.*, 55 D.L.R. (3d) 527, 7 Nfld. & P.E.I.R. 537, 5 N.R. 455, in which the judgment of the Supreme Court of Canada was pronounced on June 26, 1975, and particularly to this paragraph in the reasons of Laskin, C.J.C., in which Judson, Spence, and Dickson, JJ., concurred [at p. 539 D.L.R.]:

> The issue here is not unlike that which has governed the determination of the validity of provincial legislation embracing federally-incorporated companies. The case law, dependent so largely on the judicial appraisal of the thrust of the particular legislation, has established, in my view, that federally-incorporated companies are not constitutionally entitled, by virtue of their federal incorporation, to any advantage, as against provincial regulatory legislation, over provincial corporations or over extra-provincial or foreign corporations, so long as their capacity to establish themselves as viable corporate entities (beyond the mere fact of their incorporation), as by raising capital through issue of shares and debentures, is not precluded by the provincial legislation. Beyond this, they are

> subject to competent provincial regulations in respect of businesses or activities which fall within provincial legislative power.

I do not think that this throws any doubt on the principle that prohibits the destruction or impairment by provincial legislation of the status and powers of Dominion companies. It recognizes the principle in the words "so long as their capacity to establish themselves as viable corporate entities (beyond the mere fact of their incorporation) . . . is not precluded by the provincial legislation". The words "as by raising capital through issue of shares and debentures" give an example of a step that a company may have to take in order to establish itself as a viable corporate entity, but they do not suggest that that is the only step. As I have shown in my quotations from *Great West Saddlery* at pp. 26-7 D.L.R., p. 1059 W.W.R., and *Lukey v. Ruthenian Farmers* at pp. 710-12 D.L.R., pp. 71-3 S.C.R., entering into ordinary business engagements and contracts and having the right to contract are other steps. Further, as I have already shown, the principle did not find its first expression in cases dealing with the right to raise capital, but in cases where the provincial legislation prohibited unlicensed Dominion companies from suing on contracts made in the Province (*John Deere*), or from carrying on their businesses within the Province (*Great West Saddlery*). A company established to carry on the business of automobile insurance cannot establish itself as a viable corporate entity if it is prohibited from issuing policies.

I do not think that the fact that a Dominion company may be authorized to carry on other branches of insurance in addition to automobile insurance and that the legislation does not prohibit it doing so makes the legislation good against the company, while it would have been bad had automobile insurance been its only business. The several powers of a company are not kept unimpaired if one of them is impaired.

One of the grounds for Aikins, J.'s decision expressed in the last passage from his judgment that I have quoted above was this: "The impugned legislation enacts 'a law of general application' in the Province." The weight to be given such a factor was commented on by Laskin, C.J.C., in *Morgan et al. v. A.-G. P.E.I. et al., supra,* thus:

> The fallacy in the position of the respondents in this case and, indeed, in that of all the intervenors, including the Attorney General of Canada, is in the attribution of some special force or special effect to a provincial law by calling it a "provincial law of general application", as if this phrase was self-fulfilling if not also self-revealing. Nothing, however, accretes to provincial legislative power by the generalization of the language of provincial legislation if it does not constitutionally belong there.

As I have indicated, my opinion is that the impugned legislation impairs in a substantial degree the status and essential capacities of each of the Dominion companies plaintiffs and so is *ultra vires* of the Legislature of the Province.

The question now arises whether the impugned legislation can be saved in part by so construing it as to exclude Dominion companies from its operation. I do not think that part of it can be so severed from the rest as to accomplish this. The intention was to create in favour of the Corporation a complete monopoly in the business of automobile insurance. So to construe the legislation as to permit any and all Dominion companies which are empowered to engage in automobile insurance to engage in it in the Province in competition with the Corporation would be to produce a result which was the opposite of that intended by the Legislature.

Upon the ground of the Dominion companies issue I am of the opinion that the appellants are entitled to a declaration to the effect of the declaration lettered "A" that is set out in Part II of the reasons at 8 A.B., p. 1136 (at p. 13 D.L.R., p. 487 W.W.R.). I would allow the appeal accordingly.

CARROTHERS, J.A.:—This appeal is in regard to the constitutional validity of certain provincial legislation held by the trial Judge (Aikins, J., reported 56 D.L.R. (3d) 7, 21 C.P.R. (2d) 1, [1975] 1 W.W.R. 481) to be valid. Effective March 1, 1974, the Province of British Columbia enacted and proclaimed in force legislation (the *Automobile Insurance Act*, 1973 (B.C.), c. 6, and the *Insurance Corporation of British Columbia Act*, 1973 (B.C.), c. 44, and amendments, but not including proclamation of ss. 8 [am. 1973 (2nd Sess.), c. 152, s. 2], 35 [am. 1975, c. 5, s. 6] to 37, 40(4) [am. 1975, c. 5, s. 8], 54(f), 57, 59, 65 to 68 [all repealed 1975, c. 5, s. 12] and 77 to 81 of the first mentioned statute) whereby the automobile insurance business in this Province as previously carried on by private insurers (including the 37 appellants) was in its entirety superseded by what is commercially known as Autoplan, being compulsory and extension automobile insurance conducted exclusively by the Province through a corporate agent, the Insurance Corporation of British Columbia ("I.C.B.C.").

Autoplan, as found by the trial Judge and not successfully challenged on this appeal, is in all essential respects the same as the automobile insurance previously provided by the private insurers. The implementation of Autoplan brought about no change in the no-fault provisions, no change in the com-

pulsory aspect (except to make it more effective), and no change in the law of tort as it affects liability for injury to people, for death and for damage to property caused by automobile accidents.

As, in my view, the overall effect of the introduction of the Autoplan monopoly, its "pith and substance", was to supplant completely the previous automobile insurance business of the private insurers, including the appellants, it is convenient and appropriate to refer herein to the impugned legislation and the resulting universal compulsory monopolistic scheme of motor vehicle insurance succinctly as "Autoplan". Autoplan is fundamentally the conversion to a publicly-owned utility of motor vehicle insurance (both compulsory and extension) as part of the motor vehicle licensing function of the Province.

This Court is not concerned with the wisdom, economics, expediency or effectiveness of Autoplan but simply whether its enactment and implementation has exceeded the limits of provincial legislative competence or has invaded exclusive federal authority.

Inasmuch as the learned trial Judge dealt with the facts and subsidiary issues of law fully and, as it turned out on this appeal, uncontrovertedly, it is possible here to have regard simply to the main constitutional questions raised in this appeal, which fall to be considered under two heads: the analysis and determination of the pith and substance or the true nature and character of Autoplan in order:

(a) to classify its subject matter as being assigned by the *British North America Act*, 1867 ("B.N.A. Act") to provincial legislative authority (s. 92(13) property and civil rights in the province or s. 92(16) generally all matters of a merely local or private nature in the province) or to federal legislative authority (s. 91(2) the regulation of trade and commerce); and

(b) to determine whether Autoplan was improperly "aimed" at federally incorporated companies.

The impugned legislation is avowedly designed to establish Autoplan and, while the appellants concede the right of the Province to regulate automobile insurance generally within the Province and even to legislate itself into the automobile insurance business, they challenge the monopolistic or exclusionary aspect of Autoplan and also contend that Autoplan is affected by extra-provincial concerns and invades federal legislative authority.

This latter point is essentially the "trade and commerce" issue. I suggest that it is relatively easy to categorize Autoplan by its nature and character as being a matter coming

within property and civil rights in the Province or a matter of merely local or private nature in the Province, as enumerated respectively in s. 92(13) and (16) of the *British North America Act, 1867*. But to ascertain whether Autoplan is exclusively within the competence of the provincial Legislature under those heads or goes beyond that competence and intrudes upon the exclusive legislative authority of the Parliament of Canada, one must consider the attributes or elements of the area of federal competence thought to be impinged upon. Section 91(2) specifically extends the authority of Parliament to all matters coming within "the regulation of trade and commerce".

Thus three hurdles must be overcome to constitute Autoplan an invalidating intrusion on federal legislative authority:

(a) it must be a matter of more than provincial concern, not of a merely local or private nature in the Province;
(b) it must be a matter of "trade"; and
(c) it must aim at the "regulation" of extra-provincial or interprovincial trade (not intra-provincial trade).

I deal with these hurdles *seriatim*. The principles employed in resolution of these issues are found in: *Citizens Ins. Co. of Canada v. Parsons* (1881), 7 App. Cas. 96; *A.-G. Ont. v. A.-G. Can.*, [1896] A.C. 348; *A.-G. Can. v. A.-G. Alta. and A.-G. B.C.* (1916), 26 D.L.R. 288, [1916] A.C. 588, 10 W.W.R. 405; *Reference re Natural Products Marketing Act*, [1936] 3 D.L.R. 622, 66 C.C.C. 180, [1936] S.C.R. 398; *Reference re Farm Products Marketing Act, R.S.O. 1950, c. 131, as amended* (1957), 7 D.L.R. (2d) 257, [1957] S.C.R. 198; *Carnation Co. Ltd. v. Quebec Agricultural Marketing Board et al.* (1968), 67 D.L.R. (2d) 1, [1968] S.C.R. 258; and *A.-G. Man. v. Manitoba Egg & Poultry Ass'n et al.* (1971), 19 D.L.R. (3d) 169, [1971] S.C.R. 689, [1971] 4 W.W.R. 705.

In analysing the subject-matter of Autoplan legislation, the learned trial Judge adopted the strict view that automobile insurance for residents of the Province was solely a matter of contract with the *situs* of the contract being in the Province and hence not affected by extra-provincial concern. I do not adopt such a narrow concept of Autoplan. I am inclined to the view that the *situs* of an automobile insurance contract (that is whether it is in one or other of the Provinces or in Canada) ought in the first instance to be determined as a constitutional issue instead of conversely predetermining such *situs* as a matter of conflict of laws

(which laws are somewhat confused and unreliable in their application within a federal state such as Canada) and then applying that predetermination of *situs* as a governing factor in the resolution of the constitutional issue of legislative competence. I do not consider such predetermination of *situs* of the insurance contract can provide a clear and certain solution to the constitutional issue.

The enabling statutes in reference to the objects, powers and capacity of I.C.B.C. speak of authority to engage in and carry on the "business" or the "activity" of automobile insurance. A contract *simpliciter* is constitutionally a neutral thing. Autoplan is not merely inert pieces of paper but, as is clear from the evidence, is a vital business or activity. Autoplan is the ambivalent performance of automobile insurance involving choses in action, claims in tort, liability for and indemnity of those claims and payment of compensation in settlement thereof.

Automobile insurance relates to the risks of and the indemnity and compensation arising from damage, injury or loss caused to or suffered by persons and property as a result of highly mobile objects operating not only within the Province but actually or potentially outside the Province. The extra-provincial dimension of the automobile insurance business or activity would appear to affect Autoplan with an extra-provincial concern and thus overcome the first hurdle.

I put no particular stress on the fact that under Autoplan actually there is no formal contract of automobile insurance to have a physical *situs* within the Province. The traditional automobile insurance policy does not exist under Autoplan and the coverage must be gleaned and shaped from the Autoplan legislation and a myriad of regulations thereunder. But what this lack of contractual documentation does is to underscore the fact that Autoplan is not merely the provision of indemnity by contract but is in reality that and more: the business or activity of processing and settling claims.

This perception of automobile insurance as a business or trade activity rather than simply a matter of contract must be coupled with recognition of the fact that this case is concerned fundamentally with legislation relating to automobile insurance and not insurance generally. While the powers of I.C.B.C. extend to other classes of insurance, Autoplan in "pith and substance" relates essentially to automobile insurance and for the purposes of this case, and more specifically for determination of the "Trade and Commerce"

issue, it is legislation in this narrower field that must be categorized as falling within the purview of the heads of either s. 91 or s. 92 of the *British North America Act, 1867*. Earlier constitutional cases categorizing insurance for purposes of s. 91 and s. 92 of the *British North America Act, 1867* must be viewed through this narrower scope as well as in the present-day perspective of the mechanization and mobility of contemporary life in Canada in which automobile insurance is directly involved.

It was also suggested that automobile insurance is an intangible transaction and not a proper subject of the regulation of trade and commerce within the meaning of s. 91(2) of the *British North America Act, 1867*. Trade is not limited to the barter and shipment of commodities. To me the settlement of a personal injury or property damage claim by a Manitoba resident against a British Columbia motorist arising out of an automobile accident in Manitoba would be to that Manitoba resident just as tangible a piece of business as would be the provision of a British Columbia egg on his breakfast table. I have no particular difficulty in overcoming the second hurdle by concluding that the automobile insurance business is "trade" within the meaning of that word as used in s. 91(2) of the *British North America Act, 1867*.

The third hurdle presents a domain in which provinical and federal legislative competence appear to overlap, when neither is *ultra vires* assuming neither clearly impinges on the other, but, where the provisions of resulting legislation by both are operatively repugnant or incompatible, the federal legislation prevails under the paramountcy doctrine. In this grey area the legislative fields would seem open and clear if not already occupied but there is no right of pre-emption of legislative authority available to the Provinces, who would have to give way should Parliament enter the field.

In order for Autoplan to intrude upon Parliament's field of regulating trade and commerce, Autoplan would have to "aim" at regulating or have the effect of regulating a trade that was a matter of extra-provincial concern. I cannot conceive how the extra-provincial provision by Autoplan of automobile insurance cover, including the activity of processing claims outside the Province, can be construed as being "aimed" at the regulation thereof, by intent or actually. However, it is not so difficult to detect in the unproclaimed sections of the *Automobile Insurance Act* (and notwithstanding the provisions of s. 45A [enacted 1974, c. 87, s. 4(*b*); am. 1975, c. 5, s. 10] thereof) an attempt, consciously or other-

wise, to regulate the availability of extension insurance to residents of the Province who could more properly, by the nature of their enterprise or vehicular activity, be said to be operating in Canada rather than in the Province. Insurance cover to the compulsory level is of provincial concern as part of the licensing function of the Province but insurance cover over that level is elective to each individual insured and could in each case have an extra-provincial dimension or purpose. Proclamation of these sections would be an attempt to legislate in relation to the regulation of extension insurance and would in my view constitute an overreaching of provincial legislative competence and would be invalid. I have particularly in mind s. 8 and ss. 77 to 80 of the *Automobile Insurance Act*.

The evidence discloses that Autoplan was intended to have and does have substantial business outside the Province, but whether its extra-provincial activity is relatively such as to clothe it with a severable or overall extra-provincial concern is a distinction of law to be empirically decided as a distinction of degree. After a review of the cases which make this distinction one way or the other, I am inclined to the view that in this case Autoplan is not sufficiently imbued with extra-provincial concern so as to render the whole *ultra vires* as not coming within either s. 92(13) or (16) and that portion of Autoplan which entails extra-provincial activity, being not regulatory in nature, does not invade or impinge upon the authority of Parliament under s. 91(2). I leave open the matter of operatively conflicting enactments and paramountcy should Parliament choose in future to enter the regulatory field.

What of the "aim" of the Autoplan legislation as directed to the destruction or otherwise of those of the appellants being federally incorporated companies? Does it exceed the bounds of what is constitutionally lawful?

The following authorities are of assistance in answering these questions: *John Deere Plow Co. v. Wharton* (1914), 18 D.L.R. 353, [1915] A.C. 330, 7 W.W.R. 706; *Great West Saddlery Co. v. The King* (1921), 58 D.L.R. 1, [1921] 2 A.C. 91, [1921] 1 W.W.R. 1034; *Lukey et al. v. Ruthenian Farmers' Elevator Co.*, [1924] 1 D.L.R. 706, [1924] S.C.R. 56, [1924] 1 W.W.R. 577; *Lymburn et al. v. Mayland et al.*, [1932] 2 D.L.R. 6, 57 C.C.C. 311, [1932] A.C. 318; and *Morgan et al. v. A.-G. P.E.I. et al.* (Supreme Court of Canada June 26, 1975, not yet reported [now reported 55 D.L.R. (3d) 527, 7 Nfld. & P.E.I.R. 537, 5 N.R. 455]).

The evidence is clear that a direct and foreseeable consequence of the establishment of Autoplan, a compulsory monopoly, is the deprivation to the appellants of the automobile insurance business in this Province. This is clearly an anticipated and devastating result, but none the less a consequential result. The legislative intent and the effect of the Autoplan legislation are to be likened to the two sides of the same coin: the obverse, being the pith and substance of the legislation, is the establishment of the compulsory monopoly Autoplan and the reverse, being an inevitable result, is the prohibition of the business of automobile insurance to private industry, including those companies in the industry which are federally incorporated.

It is also necessary in considering the "aim" of the Autoplan legislation to identify the target that becomes the butt of its effect. Constitutionally the Province is precluded, with intent or in necessary result, from legislatively cutting off the vital corporate lifelines of a federally incorporated company (that is its essential capacity to maintain itself and exercise its powers) but is able to regulate the business activity in the Province of such a federally incorporated company so long as it does not impair the status and essential capacities of such a company to a substantial degree. In this regard, distinction is to be made between the sustenance and maintenance of a viable body corporate as differentiated from the business activity of that body corporate. Autoplan has cut out a class of insurance from the overall business activity of the appellants in the Province but the capacity of those of the appellants who are federally incorporated companies to establish and maintain themselves has not been sterilized, rather the Province has put on a legislative chastity belt which simply bars those federal companies from conducting a particular class of insurance in the Province. As to the matter of directness of the "aim" of the impugned legislation, and assuming for the moment that that "aim" is the prohibition of certain business activity of the appellants and not the establishment of Autoplan, a look at the juristic origins of each of the appellants (presumably a reasonably representative sample of the persons affected by that legislation) indicates that the "aim" is neither selective nor specially discriminatory. In the first place, the "aim" is at all persons, not just corporations. Secondly, the "aim" is at all corporations not just federally incorporated companies. The employment of grapeshot measures to multiply the target and indiscriminately ban all persons from the automobile

insurance business in the Province can scarcely be said to be selectively "aimed" at federally incorporated companies. It is a law of general application and the fact that some are federally incorporated companies is merely incidental to an overall annihilation.

"Aim" implies intention or purpose on the part of the legislator and I must add that in the above analysis "aim" extends to the effect of the legislation as well as to its intent. In my view such effect is not selective or specially discriminatory as against federally incorporated companies. I conclude that the so-called Dominion companies argument fails.

The doubts that I have expressed as to the validity of those provisions of the Autoplan legislation are limited to unproclaimed sections which might well be severable and not affect the Autoplan legislation as a whole. This ground was not argued before us and I am not prepared to find the whole of the legislation *ultra vires* because of it. I would dismiss the appeal.

Appeal dismissed.