

In the Privy Council.

No. 36 of 1931.

CANADIAN
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CASE OF THE
A.-G. OF QUEBEC

ON APPEAL FROM THE COURT OF KING'S BENCH FOR THE PROVINCE OF QUEBEC (APPEAL SIDE).

IN THE MATTER of a Reference by His Honour the Lieutenant-Governor in Council as to the validity of certain sections of the Insurance Act of Canada.

BETWEEN

THE ATTORNEY-GENERAL OF QUEBEC *Appellant,*

AND

THE ATTORNEY-GENERAL OF CANADA *Respondent,*

AND

BELDING CORTICELLI LIMITED, THE MASSEY HARRIS COMPANY OF CANADA LIMITED, THE ABITIBI POWER & PAPER COMPANY LIMITED, THE MONARCH KNITTING COMPANY LIMITED, MOORE CORPORATION LIMITED and THE ATTORNEY-GENERAL OF ONTARIO *Interveners,*

AND BETWEEN

THE ATTORNEY-GENERAL OF CANADA *Appellant,*

AND

THE ATTORNEY-GENERAL OF QUEBEC *Respondent,*

AND

BELDING CORTICELLI LIMITED, THE MASSEY HARRIS COMPANY OF CANADA LIMITED, THE ABITIBI POWER & PAPER COMPANY LIMITED, THE MONARCH KNITTING COMPANY LIMITED, MOORE CORPORATION LIMITED and THE ATTORNEY-GENERAL OF ONTARIO *Interveners.*

CASE OF THE ATTORNEY-GENERAL FOR THE PROVINCE OF QUEBEC.

Record.
p. 23.
pp. 3, 4.

1. This is an appeal by the Attorney-General for the Province of Quebec from a judgment of the Court of King's Bench (Appeal Side) of that Province delivered on the 28th June, 1930, answering certain questions that were referred to it by the Lieutenant-Governor in Council, under the provisions of chapter 7 of the Revised Statutes of Quebec, 1925.

p. 5.

2. The questions referred are the following :—

Revised
Statutes of
Quebec,
1925, c. 243.
p. 64.

1. Is a foreign or British insurer, who holds a license under the Quebec Insurance Act to carry on business within the Province, obliged to observe and subject to sections 11, 12, 65 and 66 of the Insurance Act of Canada, or are those sections unconstitutional as regards such 10 insurer ?

p. 66.

2. Are sections 16, 20 and 21 of the Special War Revenue Act within the legislative competence of the Parliament of Canada ?

Would there be any difference between the case of an insurer who has obtained, or is bound to obtain under the provincial law a license to carry on business in the Province and any other case ?

3. These statutory provisions are as follows :—

The Insurance Act, Revised Statutes of Canada, 1927, Chapter 101.

PART I.

GENERAL.

20

License.

* * * * * * *

11. It shall not be lawful for,

(A) any Canadian Company ; or,

(B) any alien, whether a natural person or a foreign company,

within Canada to solicit or accept any risk, or to issue or deliver any receipt or policy of insurance, or to grant, in consideration of any premium or payment, any annuity on a life or lives, or to collect or receive any premium, or, except as provided in section 30 one hundred and twenty-nine of this Act, to inspect any risk or adjust any loss, or to advertise for or carry on any business of

insurance, or to prosecute or maintain any suit, action or proceeding, or to file any claim in insolvency relating to such business unless under a license from the Minister granted pursuant to the provisions of this Act.

10 12. It shall not be lawful for any British company, or for any British subject not resident in Canada, to immigrate into Canada for the purpose of opening or establishing any office or agency for the transaction of any business of or relating to insurance, or of soliciting or accepting any risk or issuing or delivering any interim receipt or policy of insurance, or granting, in consideration of any premium or payment, any annuity on a life or lives, or of collecting or receiving any premium, or, except as provided in section one hundred and twenty-nine of this Act, of inspecting any risk or adjusting any loss, or of carrying on any business of or relating to insurance, or of prosecuting or maintaining any suit, action or proceeding, or filing any claim in insolvency relating to such business, unless under a license from the Minister granted pursuant to the provisions of this Act.

* * * * *

20 PENALTIES AND FORFEITURES.

* * * * *

65. Any Canadian company, or any alien, whether a natural person or a foreign company, who, except under a license from the Minister granted pursuant to the provisions of this Act, within Canada,

- (A) solicits or inspects any risk ; or
- (B) issues or delivers any receipt or policy of insurance ;
- or
- (C) grants in consideration of any premium or payment any annuity on a life or lives ; or
- (D) collects or receives any premiums ; or
- (E) except as provided in section one hundred and twenty-nine of this Act, inspects any risk or adjusts any loss ; or
- (F) advertises for or carries on any business of insurance ;
- or
- (G) prosecutes or maintains any suit, action or proceeding, or files any claim in insolvency relating to the business of insurance ;

40 shall be guilty of an offence and liable upon indictment or upon summary conviction, to a penalty not exceeding one hundred

dollars ; and moreover, in the case of an alien who is a natural person, to imprisonment for any term not exceeding six months ; Provided, however, that nothing in this section shall apply to an individual alien acting on behalf of a provincial company which has not obtained a license from the Minister under this Act.

66. Any British company or British subject not resident in Canada who, except under a license from the Minister granted pursuant to the provisions of this Act, immigrates into Canada for the purpose of

(A) opening or establishing any agency for the trans-10
action of any business of or relating to insurance ; or

(B) soliciting or inspecting any risk or issuing or delivering
any interim receipt or policy of insurance ; or

(C) granting in consideration of any premium or payment
any annuity on a life or lives ; or

(D) collecting or receiving any premium ; or

(E) except as provided in section one hundred and
twenty-nine of this Act, inspecting any risk or adjusting any
loss, or carrying on any business of or relating to the business
of insurance ; or 20

(F) prosecuting or maintaining any suit, action or pro-
ceeding, or filing any claim in insolvency relating to the
business of insurance ;

shall be guilty of an offence and liable upon indictment or summary conviction to a penalty not exceeding one hundred dollars ; and moreover, in the case of a natural person, to imprisonment for any term not exceeding six months ; Provided, however, that nothing in this section shall apply to a British subject acting on behalf of a provincial company which has not obtained a license from the Minister under this Act. 30

* * * * *

The Special War Revenue Act, Revised Statutes of Canada, 1927.
Chapter 179.

Short Title.

1. This Act may be cited as the Special War Revenue Act.

* * * * *

PART III.

Insurance premiums other than life.

* * * * *

16. Every person resident in Canada, who insures his property situate in Canada, or any property situate in Canada in which he has an insurable interest, other than that of an insurer of such property, against risks other than marine risks

Record.

(A) with any British or foreign company or British or foreign underwriter or underwriters, not licensed under the provisions of the Insurance Act, to transact business in Canada ; or

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(B) with any association of persons formed for the purpose of exchanging reciprocal contracts of indemnity upon the plan known as inter-insurance and not licensed under the provisions of the Insurance Act, the chief place of business of which association or of its principal attorney-in-fact is situate outside of Canada ;

shall on or before the thirty-first day of December in each year pay to the Minister, in addition to any other tax payable under any existing law or statute a tax of five per centum of the total net cost to such person of all such insurance for the preceding calendar year.

20

2. For the purposes of this section every corporation carrying on business in Canada shall be deemed to be a person resident in Canada.

* * * * *

20. Every person to whom section sixteen of this Act applies shall on or before the thirty-first day of December in each year make a return in writing to the Superintendent stating the names of the companies, societies of underwriters or associations with whom the insurance was effected by him or on his behalf, the amount of such insurance and the net cost thereof in each case.

30

21. Every person who fails or neglects to make the return required by the last preceding section or pay to the Minister within the time limited by section sixteen hereof the tax thereby imposed, shall incur a penalty of fifty dollars for each and every day during which such default continues.

* * * * *

4. Argument on the Reference took place before a Court composed of Allard, Tellier, Howard, Bernier and Bond JJ.

5. The judgment of the Court is at p. 23 of the Record, and the reasons of the Judges follow. p. 23.

40 6. ALLARD J. answers affirmatively the first part of the first question respecting foreign underwriters and negatively the second part respecting p. 25.

Record. British underwriters, holding the sections to be constitutional as to the former, but not as to the latter.

He answers affirmatively the first part of the second question and negatively the second part, holding these sections constitutional even as to underwriters holding provincial licenses.

The learned Judge appears to base his answer to the first question on an observation of Lord Haldane in delivering the judgment of the Board in *Attorney-General of Canada v. Attorney-General of Alberta* (1916) 1 A.C., 588, to the effect that legislation if properly framed, requiring aliens, whether natural persons or foreign companies, to become licensed, as a condition of 10 carrying on the business of insurance in Canada, might be competently enacted by Parliament.

And as to the second question, he is of opinion that the constitutionality of sections 16, 20 and 21 of the Special War Revenue Act follow from his opinion on the constitutionality of sections 11 and 12 of the Insurance Act of Canada.

p. 36.

7. BERNIER J. takes as a starting point the dictum of Lord Haldane when giving judgment in re : *Attorney-General of Canada v. Attorney-General of Alberta* (1916) 1 A.C., 588, that the Federal Parliament could by properly framed legislation require foreign companies to take out licenses, even to 20 carry on business in a single province ; he then says that the control that the Federal authority could thus assume would extend to examining the actual incorporation of these companies, their solvency, to requirements as to giving security for liabilities, to giving weight to the relations between Canada and the Countries to which these companies belong, but that beyond that these companies should remain subject to provincial legislation and he holds that the statute under consideration, particularly sections 91, 123, 124 and 135 go much beyond that and that therefore the present legislation is not properly framed.

He therefore answers the first question in the negative, but does not 30 deal specially with British Companies.

He, however, without giving reasons, answers the first part of the second question affirmatively and the second part negatively.

p. 53.

8. BOND J. answers the first part of the first question affirmatively ; the second part negatively and answers the first part of the second question affirmatively and the second part negatively.

Referring also to Lord Haldane's dictum he states the question to be : Is this properly framed legislation ?

He holds that these sections being in an Insurance Act and not in an Alien Act makes no difference nor does the fact that the law applies only 40 to insurance and not to all business done by Aliens and concludes that the particular sections are valid while refraining from expressing his opinion as to whether or not other sections of the Act (Example, section 134) are valid, as their validity in his view is not before the Court.

He, however, holds that British non-Canadian companies not being aliens and not immigrating in Canada, in the real sense of the word, so as to bring themselves under the Federal legislative power over immigration, sections 12 and 66 of the Insurance Act which apply to them are ultra vires.

Record.

Dealing with the second question, he says that it seems to be conceded that it depends to a large extent upon the answer to the first question.

He nevertheless apparently holds the section to be valid both as regards foreign and British companies without giving further reasons.

9. TELLIER J. holds that while the Federal Parliament can require a
10 license from aliens as a condition of their doing business in any part of Canada it cannot through that license control the contracts that these aliens will enter into and thus invade provincial jurisdiction. p. 32.

He therefore holds in answer to question 1 that the sections are unconstitutional even as regards aliens.

Dealing with the second question, he says that these tax enactments were clearly enacted as an additional means of enforcement of the sections of the Insurance Act that he had just held to be unconstitutional. Nevertheless, he holds these tax enactments to be valid and that the fact that a company might have a provincial license made no difference, the taxable
20 powers of the Dominion Parliament being unlimited.

10. HOWARD J. answers in the affirmative the first part of the first
question, expressing doubts as to the second part. p. 43.

He answers affirmatively the first part and negatively the second part of the second question.

He is of opinion that section 11 of the Insurance Act, as it now stands, affects only a particular set of people—aliens—over whom the Dominion unquestionably has jurisdiction, and as to section 12 of the Act, he says :
“ If they (British insurers) are ‘ aliens ’ within the meaning of the B.N.A. Act, the same answer must be given in respect of said section 12, as in
30 “ respect of section 11. I do not think that, when the Act was passed, any
“ jurisconsult would have given it as his opinion that British subjects were
“ meant to be included in the term ‘ aliens ’ .”

11. If, as pointed out in the above judgments, the answer to the first question as respects foreign underwriters depends on whether or not this is “ properly framed legislation,” it is submitted that this legislation is not properly framed.

It is now settled that the matter of insurance is provincial but that any jurisdiction the Dominion may have over foreign companies must depend on its legislative power concerning “ Naturalisation and Aliens,” aided by
40 its power over “ Regulation of Trade and Commerce.”

It is submitted that in order to appreciate the character of the license required from foreign insurers, the entire Act must be looked at and that Bond J. is mistaken in suggesting that the other sections of the Act should be ignored.

The license is conditional on the provisions of the Act being fully complied with by the licensee and the license is mainly a means of securing observance of the whole Act.

It is submitted that the Act deals to a considerable extent with property and civil rights which is a provincial matter, and that this invasion of the provincial field cannot be justified, in the only way it can ever be, by the claim that it is necessarily incidental to a proper exercise of the Dominion power over aliens aided by its power in respect of regulation of trade and commerce.

The Act, on its face, is obviously an attempt to legislate fully respecting insurance rather than respecting aliens. Both the fact that insurance is minutely regulated by its provisions, and the fact that such provisions apply equally to Dominion insurance companies, foreign and British non-Canadian underwriters, establish that point. 10

This seems even more obvious, if it is remembered that this Act is practically the same as was declared unconstitutional by the Privy Council in 1916, which Act was admittedly an attempt to legislate fully on the whole subject of Insurance. Then it applied to all underwriters except provincial companies carrying on business wholly within the limits of the province of incorporation and a few other irrelevant exceptions. 20

The prohibitions in the statute are now restricted to Dominion companies, British non-Canadian underwriters and foreign underwriters.

Provincial companies carrying on business in more than one province may place themselves under the Act by applying for and obtaining a license but are no more bound to do so.

Canadian unincorporated underwriters are no more under the prohibition of the Act but, notwithstanding the 1924 judgment of the Privy Council declaring unconstitutional section 508c of the Criminal Code, which purported to make it an indictable offence for any one, subject to certain exceptions, to insure without a license, the Dominion Parliament in 1927 30 re-enacted that section as section 507 of the new Criminal Code.

There is, therefore, still an attempt by the Dominion Parliament to bring these Canadian unincorporated underwriters under the Statute.

The new Act differs from the one considered in 1916 in only two material aspects: certain provincial companies are excepted and this prohibition respecting Canadian unincorporated insurers is transferred from the Insurance Act to the Criminal Code.

In 1916, the Act was undoubtedly an Insurance Act and not an Act respecting Aliens, Dominion companies, Canadian incorporated underwriters and British non-Canadian underwriters and provincial companies 40 carrying on business in more than one province.

Can the elimination of provincial companies carrying on business in more than one province and the transfer of the prohibiting clause in respect of Canadian unincorporated underwriters from the Insurance Act to the Criminal Code, the Act remaining otherwise practically the same, change so fundamentally its character as an Insurance Act and make it an Act

respecting Dominion companies, Aliens and British non-Canadian underwriters.

In the 1916 judgment, it was said that the Act was not properly framed and the whole Act was declared void. It was not suggested that it was void only as regards unincorporated Canadian underwriters, but that it could stand or could be verbatim re-enacted as to the three other classes.

It is now decided by this Board's judgment in the Reciprocal Insurance case delivered in 1924, that control over British non-Canadian underwriters by the Dominion Parliament cannot be justified under its jurisdiction over
 10 immigration and no other basis for this jurisdiction was or could be suggested. Therefore there is still one of the three classes to which it is attempted to make the Act applicable, over which the Dominion has no jurisdiction, and the situation has not changed in any way from what it was in 1916, except that there are three classes over some or all of which the Dominion has no jurisdiction, while then there were four.

The question of the power of the Dominion over "Trade and Commerce" should be considered jointly with that of its attempt to regulate by this Act Dominion insurance companies.

The latter question, though not submitted, requires to be considered.

20 In the Reciprocal Insurance judgment above referred to, Dominion companies are assimilated to foreign underwriters. Moreover, it has been held by this Board that the Dominion power over Dominion companies is partly based on its jurisdiction in respect of "Regulation of Trade and Commerce," so that the case is in that respect also similar to that of aliens.

It was held by this Board in 1916 that the power in respect of "Regulation of Trade and Commerce" alone could not justify the then submitted Insurance Act. It can therefore be only as a help to the otherwise existing power over aliens or over Dominion companies that this can be considered.

It is settled by decisions of this Board that notwithstanding this juris-
 30 diction over incorporation of Dominion companies and regulation of trade and commerce, the Dominion cannot make laws invading the provincial field in respect of these companies. It could not thus make a Sale of Goods Act applicable to Dominion companies incorporated to sell goods nor can it exempt its companies from the mortmain laws of the Province.

As was said in 1928, in the Manitoba case, the restriction on the provincial powers in respect of Dominion companies is only that they cannot legislate so as to impair the status and essential capacities of the Dominion companies in a substantial degree.

40 What is true of Dominion companies in respect of other contracts such as Sale of Goods or Purchase of Land must be equally true in respect of Dominion companies in respect of insurance, and what is true of Dominion companies and the Dominion power over them helped by the latter's jurisdiction in respect of the "Regulation of Trade and Commerce" must be equally true concerning aliens, over whom the Dominion power is helped in the same manner.

The way the Dominion power over "Regulation of Trade and Commerce" operates in respect of Dominion companies is therefore a conclusive

answer to the present claim of the Dominion in so far as it is based on the same power.

Two consequences result from this analysis of the situation respecting Dominion companies, namely that the present Dominion legislation is as unjustified in respect of Dominion companies as it is in respect of British non-Canadian companies and that the power of the Dominion to invade the provincial field under its jurisdiction over aliens is as limited as under its jurisdiction over Dominion companies and the latter, as previously shown, does not extend to legislating concerning any contract, including insurance, made by these companies. 10

Therefore the Insurance Act as regards aliens unduly invades the provincial field as it does as regards Dominion companies and British non-Canadian underwriters.

If the Dominion could invade the provincial field respecting insurance when the underwriter is an alien or a Dominion company, or a British non-Canadian company, why could it not do so in respect of any other contract made by these parties with Canadians and the provincial jurisdiction over "Property and Civil Rights" would thus remain exclusively provincial only as regards contracts between Canadians, but it would be open to invasion by the Federal authority as respects all contracts between Cana- 20
dians and any of the three above mentioned classes.

Further, insurance is not a trade, at least mutual insurance is not.

As to British non-Canadian underwriters, it is submitted that there can be no difficulty. The question has already been incidentally dealt with.

12. On the second question, it is submitted that Tellier J. is right when stating that the obvious purpose of these tax provisions is to impose a penalty for failure to comply with the provisions of the Insurance Act purporting to require a license from British non-Canadian or foreign underwriters.

As stated by Bond J., it follows that these sections must stand or fall with the above mentioned sections of the Insurance Act. 30

It is suggested that the Dominion Parliament cannot use its taxing power to impose penalties on those who do not comply with statutes that it has not the power to enact.

Alternatively, it is suggested that if the answer to the first question is as suggested by the Attorney-General for the Province of Quebec, it follows that no license can be granted by the Dominion under existing legislation for foreign or British non-Canadian underwriters.

On the other hand, the taxing statute under consideration clearly contemplates that such licenses can be issued and is intended to be not an Act taxing all those who insure with any British non-Canadian or foreign 40
underwriters, but rather an Act taxing those who insure with such of those underwriters as do not choose to take the advantage that the law gives them of obtaining such license and thus escaping the tax.

The Act, therefore, on account of the invalidity of the provision respecting the license is void, as this exception cannot be severed from the Act without changing its purport and intent.

13. The Appellant suggests that question 1 should be answered in the negative, both as to foreign and British underwriters and the provisions of the Insurance Act referred to be held to be unconstitutional as to both, and that question 2 be answered in the negative and the taxing provisions therein referred to held unconstitutional, whether the underwriter has or has not a license of the province, for the following, among other

REASONS.

- 10 1. Because the subject of insurance is in itself provincial as being property and civil rights and not regulation of trade and commerce or any other item assigned to the Dominion Parliament by the British North America Act.
2. Because the statute under consideration is a statute respecting insurance and not a statute respecting Dominion insurance companies, alien underwriters and immigration.
3. Because it is the same statute as was considered and declared void by the Privy Council in 1916, except that Canadian unincorporated underwriters are excluded from its operation and this difference does not change its character.
- 20 4. Because the sections submitted for consideration to the Court are not severable from the other sections of the Act, compliance with which is required as a condition of the license.
5. Because the taxing provisions submitted for consideration to the Court are really penalties imposed for non-compliance with the above mentioned insurance provisions.
- 30 6. Because the Dominion Parliament cannot enforce obedience to legislative provisions that it has no power to pass by imposing an extra tax on those who do not comply with such provisions.
7. Because these taxing provisions must be construed to depend on the assumption that there is a power to exact the license therein referred to, which power does not exist.
8. Because the invalidity of the provisions of the Insurance Act requiring the license must involve the invalidity of the legislative provisions imposing a special tax on those who do not comply with such provisions.

CHARLES LANCTOT.

AIMÉ GEOFFRION.

In the Privy Council.

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CASE OF THE ATTORNEY-GENERAL
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