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

British Columbia Supreme Court, Aikins, J. *November 18, 1974.*

D. McK. Brown, Q.C., *G. S. Cumming*, Q.C., and *A. D. P. MacAdams*, for plaintiffs.

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

AIKINS, J.:—These reasons for judgment are divided into 14 entitled parts, as shown in the following table of contents:

TABLE OF CONTENTS

PART I

DESCRIPTION OF THE PLAINTIFFS

The 37 plaintiffs in this action are insurance companies. They are identified in paras. 1.1 to 1.37 of the statement of

claim in the same order in which they appear in the style of cause. The averments in those paragraphs have not been traversed and are admitted. In the following descriptions of the plaintiffs, which I take from the paragraphs just mentioned, I have, for the sake of brevity, identified the plaintiffs by number in this way: plaintiff No. 1, etc., following the sequence in which the plaintiffs are named in the style of cause.

Fifteen of the plaintiffs (Nos. 1, 2, 4, 6, 10, 11, 12, 14, 19, 25, 29, 31, 32, 34 and 35) were incorporated by Acts of the Parliament of Canada. Plaintiff No. 22 was originally incorporated by Act of the Legislature of Nova Scotia but now holds letters patent issued on September 14, 1972, by the Minister of Consumer and Corporate Affairs of Canada pursuant to the *Canadian and British Insurance Companies Act*, R.S.C. 1970, c. I-15, as amended by c. 19 (misstated in the statement of claim as c. 18) of the 1st Supp. to the R.S.C. 1970. Plaintiff No. 33 was incorporated in 1851 by an Act of the Legislature of the late Province of Canada. Thus, of the 37 plaintiffs, 17 are companies incorporated in Canada. Of these 17, 11 have their registered and head offices in Ontario, three have their registered and head offices in the Province of Quebec, two have their registered and head offices in Manitoba and one company has its registered and head office in British Columbia at Vancouver.

Of the remaining 20 plaintiff companies, seven (Nos. 5, 8, 17, 20, 21, 23 and 36) were incorporated in the United Kingdom. All of the British companies have their head offices at London, England and each has a chief agency office for Canada, four at Toronto and three at Montreal. One plaintiff (No. 3) was incorporated in New South Wales and has its head office at Sydney, N.S.W. It has its chief agency office for Canada at Vancouver, British Columbia.

Each of the 25 plaintiff companies so far identified was, at all material times, registered and held a certificate of registry under the provisions of the *Canadian and British Insurance Companies Act*.

Of the now remaining 12 plaintiff companies, 11 (Nos. 7, 9, 13, 15, 16, 18, 24, 26, 28, 30 and 37) were incorporated in the United States of America. Two of the 11 (Nos. 9 and 26) were incorporated in the State of Minnesota and two (Nos. 16 and 37) were incorporated in the Commonwealth of Massachusetts. The remaining seven were incorporated in different States of the Union, as follows: No. 7 in Wisconsin, No. 13 in

New York, No. 15 in Connecticut, No. 18 in Maryland, No. 24 in Pennsylvania, No. 28 in Illinois and No. 30 in Washington. Eight of the plaintiff companies incorporated in the United States have their chief agency offices for Canada in Ontario, one has its chief agency office for Canada at Montreal, one has its chief agency office for Canada at Winnipeg and one has its chief agency office for Canada at Vancouver.

The remaining plaintiff company is No. 27. This company was incorporated in the Confederation of Switzerland and has its head office at the City of Zurich in that country. It has its chief agency office for Canada at Toronto.

Each of the plaintiff companies incorporated in the United States and the plaintiff company incorporated in Switzerland were, at all material times, registered and held a certificate of registry under the provisions of the *Foreign Insurance Companies Act*, R.S.C. 1970, c. I-16. Each of the plaintiff companies, other than No. 25, which has its registered and head office at Vancouver, B.C., and those non-Canadian companies having their chief agency offices for Canada at Vancouver, has a branch office for British Columbia at Vancouver, except for the Allstate Insurance Company of Canada (No. 2) which has its chief agency office for British Columbia at Burnaby.

Counsel for the plaintiffs have emphasized the interprovincial and international character of the insurance business and it is, in part, for this reason that I have described at some length the places of incorporation of the plaintiff companies and have given some detail of the location of head offices, chief agency offices and branch offices for British Columbia.

The facts set out in the following subparagraphs about each of the plaintiffs are established on the evidence and were not in dispute:

1. Each plaintiff company, whether by Act of incorporation, charter document, or other instrument of incorporation, has the capacity to carry on, *inter alia*, the business of automobile insurance;
2. Each of the plaintiff companies by certificate of registry issued under either the *Canadian and British Insurance Companies Act* or the *Foreign Insurance Companies Act*, is authorized to transact, *inter alia*, the business of automobile insurance in Canada.
3. Each of the plaintiff companies held a licence, as required

by s. 7 of the *Insurance Act*, R.S.B.C. 1960, c. 197, issued by the Superintendent of Insurance pursuant to Part III of the Act, to undertake, *inter alia*, automobile insurance in British Columbia from March 1, 1973, to the last day of February, 1974.

4. Each of the plaintiff companies applied to the Superintendent of Insurance for British Columbia for renewal of its 1973-1974 licence for the year running from March 1, 1974, to the last day of February, 1975. Each plaintiff received a renewal for all classes of insurance specified in its 1973-1974 licence except for automobile insurance.

It should be noted that the licences to undertake the business of automobile insurance in British Columbia were not cancelled; they were simply not renewed for this class of insurance.

In order to complete this description of the plaintiffs, it will be useful to indicate the magnitude of the business which they write. For this, I refer to ex. 32, a compilation of the admissions of fact made by counsel for both sides. Statistics about the volume of the plaintiffs' business may be found in the plaintiffs' admission of facts pursuant to notice dated May 17, 1974. This consists of two tables, the first is sch. A headed, "Summary of Insurance Business (Direct Premiums) in Canada by the Plaintiff Companies" which was compiled for the year 1972; the second, sch. B, is headed "Summary of Insurance Transacted in B.C. by Plaintiff Companies" and was compiled for the same year. From these tables, but particularly from sch. A, I have extracted information about three of the 37 plaintiff companies, the lead plaintiff the Canadian Indemnity Company, Allstate Insurance Company of Canada (the most active insurer according to the statistics) and Fidelity Insurance Company of Canada (the least active company scheduled). The information I have extracted is set out in the following table. In this table the first line refers to the Canadian Indemnity Company, the second line to Allstate Insurance Company of Canada and the third line to Fidelity Insurance Company of Canada.

Total Insurance Written in all Classes in Canada, (in dollars)	Total Automobile Liability Insurance Written in Canada, (in dollars)	Total Automobile Personal Accident Insurance Written in Canada, (in dollars)	Total Automobile "Other" Insurance Written in Canada, (in dollars)	Total Automobile Insurance of all Kinds Written in British Columbia, (in dollars)
38,611,866	9,425,037	127,459	5,426,653	3,996,616
50,185,679	25,963,327	2,842,289	14,749,356	7,285,414
6,769,893	1,632,128	97,302	882,861	22,671

PART II
THE RELIEF CLAIMED

This is the relief the plaintiffs seek, as set out in the amended statement of claim:

A. A declaration that the Automobile Insurance Act in its form both before and after the amendments made by the Statute Law Amendment Act, 1973 (Second Session) referred to in paragraph 10A hereof and the Insurance Corporation of British Columbia Act and the plan of universal compulsory automobile insurance set out or contemplated therein and in the said amendments and in the Regulations made and to be made thereunder and such plan of extension insurance as may be prescribed by the Regulations thereunder jointly are and each of them severally is ultra vires the Legislature of British Columbia, invalid and of no force or effect.

B. Such further and other relief as to this Honourable Court shall seem meet and as the circumstances of the case may require.

PART III
THE IMPUGNED LEGISLATION

Before considering the grounds on which the legislation is attacked, it is convenient to identify the impugned legislation. The *Automobile Insurance Act* was enacted at the First Session of the British Columbia Legislature in 1973; it is c. 6 of the 1973 statutes and was assented to on April 18, 1973. Section 82 (the last section of the Act) is the only section which came into force on Assent. That section provides that the Act (except s. 82) will come into force by Proclamation on a day to be fixed by the Lieutenant-Governor, with the further proviso that different days may be fixed for the coming into force of the several provisions of the Act. All of the provisions of the Act have been proclaimed with the exception of ss. 8, 35-37 (incl.), 40(4), 54(f), 65-68 (incl.) and 77-81

(incl.). The *Automobile Insurance Act* was amended at the Second Session of the Legislature in 1973 by s. 2 of the *Statute Law Amendment Act*, 1973 (2nd Sess.), c. 152, which was assented to on November 7, 1973. Section 2(a) and (b), which have not been proclaimed, amended s. 8 of the *Automobile Insurance Act*; s. 2(c), which became effective on Assent, repealed cl. (g) of s. 49. The *Automobile Insurance Act* was again amended by s. 4 of the *Statute Law Amendment Act, 1974* (Bill 162, to be designated c. 87 when the 1974 statutes are published). Assent was given to Bill 162 on June 20, 1974 (coincidentally, the day on which this trial began). Section 4 became effective on Assent. Clauses (a) and (b) of s. 4 of the Act amend s. 16 of the *Automobile Insurance Act* and add a new s. 45A to follow s. 45; cl. (c) adds a new s. 46A to follow s. 46.

The second impugned statute is the *Insurance Corporation of British Columbia Act*, 1973 (1st Sess.), c. 44 (the "ICBC Act"), passed at the First Session of the Legislature in 1973 and assented to on April 18th of the same year. This statute incorporates the Insurance Corporation of British Columbia which is referred to therein as "the Corporation". I shall henceforth use this abbreviation. The last section of the Act, s. 34, came into force on Assent and makes provision for the remaining sections of the Act to be brought into force by Proclamation. A Proclamation of April 18, 1973, brought ss. 1 to 33 into force on the day the Act was given Assent (April 18, 1973). Section 33 (providing for initial financing) came into force, retroactively, on March 31, 1973.

The ICBC Act was amended by s. 21 of the *Statute Law Amendment Act, 1974, supra.* Section 21(b) renumbers s. 16 as s. 16(1) and adds a s-s. (2). Section 21(c) repeals s. 18(3) and (4) and substitutes a new s-s. (3) and s. 21(d) adds new ss. 18A and 18B, following s. 18. These amendments became effective on June 20, 1974, the day Assent was given to the Bill.

The Corporation, which may be described as a Crown Corporation, was established as a corporation by s. 2 of the ICBC Act. The Corporation's board consists of the Minister (charged by Order in Council with the administration of the Act) and not less than two or more than four other members appointed by Order in Council. Section 2 provides that the Minister shall be president and chairman of the board.

The objects, powers and capacities of the Corporation are set out in s. 5 of the Act and additional powers are given the

Corporation by s. 6. It is not necessary to reproduce s. 6 as the powers given in that section are essentially ancillary to those given in s. 5. The powers given the Corporation by s. 5 are relevant to the issues in this case. That section provides:

> 5(1) It is the function of the corporation and it has the power and capacity
>
> (a) subject to the approval of the Lieutenant-Governor in Council, to engage in and carry on, both within and without the Province, the business of insurance and reinsurance in all its classes;
>
> (b) subject to the approval of the Lieutenant-Governor in Council, to operate and administer such plans of insurance as may be authorized under any other Act, including a plan of automobile insurance;
>
> (c) to engage in and carry on the business of
>
> (i) repairing any property insured; and
>
> (ii) salvaging and disposing of by public or private sale any property insured and acquired under a contract by which the corporation may be liable as an insurer,
>
> or to make agreements with other persons for those purposes;
>
> (d) subject to the *Medical Act* and the *Hospital Act*, to engage in and carry on the business of providing medical and hospital services to persons insured under a contract by which the corporation may be liable as an insurer or to make agreements with other persons for those purposes;
>
> (e) to acquire by purchase or any other means, including expropriation, and hold as owner or tenant or otherwise, or to take options on, for its own use and benefit, real property
>
> (i) necessary or required for the conduct of its business; or
>
> (ii) conveyed, mortgaged, or hypothecated to it by way of security; or
>
> (iii) acquired and held by it as an investment; or
>
> (iv) conveyed to it in satisfaction in whole or in part in respect of debts and judgments,
>
> and to sell, lease, or otherwise dispose of the whole or any part of such real property;
>
> (f) to acquire by purchase or any other means the business and property or any portion thereof any other insurer, agent, or adjuster, or to enter into agreements to carry on jointly any class of insurance with another insurer whether within or without the Province, and the *Insurance Act* does not apply to such agreements.
>
> (2) Notwithstanding subsection (1), the corporation shall carry on business as insurer only in such classes of insurance and reinsurance as may be designated by order of the Lieutenant-Governor in Council.

Section 9 of the *Automobile Insurance Act* gives the Corporation additional powers, as follows:

9(1) In addition to the powers granted under any other Act, the corporation has the powers and the duties conferred and imposed upon it under this Act and, without limiting the generality of the foregoing, the corporation may

(a) carry out either alone or jointly with any other board, commission, corporation, department or agency of Government, or any private person, agency or association any programme of research, education, training, competition, or the like relating to highway safety;

(b) promote or carry out programmes of research into the causes of accidents and research into the more equitable distribution of losses resulting from highway traffic accidents;

(c) establish and maintain one or more repair shops to investigate, study, and apply techniques used or to be used in the repair of motor-vehicles and trailers and to analyze the cost of repairs; and

(d) negotiate and bargain with persons engaged in the business of motor-vehicle and trailer repairs with a view to establishing fair and reasonable prices for motor-vehicle and trailer repairs in relation to which payments may be made under this Act.

Section 9 of the ICBC Act provides generally that the Corporation's power to engage in any class or classes of insurance depends on authorization by regulations to be made by the Lieutenant-Governor in Council. Section 9 is as follows:

9(1) The Lieutenant-Governor in Council may make regulations authorizing the corporation to engage in and carry on any class of insurance as defined in the *Insurance Act* and the regulations made thereunder, or any insurance plan, upon such terms as the regulations under this Act may provide and he may, by regulation, provide that certain provisions of this Act or the regulations do not apply to a particular class of insurance or insurance plan carried on pursuant to this section.

(2) Upon being authorized as provided in subsection (1), the corporation shall have the power and authority to engage in and carry on, in the Province, the class of insurance or the insurance plan so authorized without any further authority than this Act and the regulations, as fully as if licensed for that purpose under the *Insurance Act*.

Section 2 of the *Automobile Insurance Act* reads:

2. Where, under the *Insurance Corporation of British Columbia Act* and the regulations made thereunder, the Lieutenant-Governor in Council authorizes the corporation to engage in and carry on the activity of automobile insurance, and to operate and administer a plan of universal compulsory automobile insurance, the corporation shall engage in and carry on automobile insurance in all its classes and operate and administer a plan of universal compulsory automobile insurance set out in this Act and the regulations and, in addition thereto, shall provide such plan of extension insurance as may be prescribed by the regulations.

By O.C. 1342 of April 19, 1973, B.C. Reg. 98/73, the Corporation was authorized (retroactively to March 31, 1973) to engage in and to carry on any class of automobile insurance in British Columbia. The authorization is in these terms:

> And that, pursuant to sections 5 and 9 of the Act, the Insurance Corporation of British Columbia be authorized to engage in and carry on any class of automobile insurance and reinsurance as defined in the Act and to operate and administer a plan of universal compulsory automobile insurance as defined in the Automobile Insurance Act:

The role of the Corporation in relation to the Crown in the right of the Province is defined in s. 10 of the ICBC Act:

> 10(1) All property and all moneys acquired, administered, possessed, or received by the corporation shall be deemed to be the property of Her Majesty in right of the Province for all purposes, including exemption from taxation of whatever nature and description.
>
> (2) The corporation is an agent of Her Majesty in right of the Province.
>
> (3) Subject to subsection (4), no moneys, funds, investments, and property acquired, administered, possessed, or received by the corporation may be taken, used, or appropriated by the Government for any purpose whatever, except
>
> (a) as provided in subsection (1) of section 19; or
>
> (b) in repayment of advances by or moneys borrowed from the Government and the interest thereon; or
>
> (c) as provided in subsection (4).
>
> (4) Notwithstanding subsection (3), the corporation shall pay to the Government any tax or impost that, but for subsection (3), would be assessed or levied in respect of the corporation or its business or property under any other Act, except income tax under the *Income Tax Act, 1962*.

It is important to note that although the Corporation is a legal entity distinct from its members, as is a conventional corporation, it differs from a conventional corporation in an important aspect. While a conventional corporation generally acts on its own behalf, the Insurance Corporation of British Columbia does not. In the exercise of its powers and capacities it acts only as agent for Her Majesty in the right of the Province. Thus, it is the Crown in the right of the Province as principal, which, through the Corporation, engages in all classes of automobile insurance in the Province, and other classes of insurance as well. The Corporation administers the universal compulsory automobile insurance plan on behalf of the Crown. The Crown Provincial, in short, has gone into the insurance business.

I have referred to amendments to the *Automobile Insurance Act* in 1973 and 1974 and to amendments to the ICBC Act in 1974. The pleadings do not refer to the 1974 amendments. It goes without saying and, in my view without requiring explanation, that I must consider the validity of the statutes as they now stand amended. I may safely do so because counsel were aware of all the 1974 amendments to both impugned statutes and they were taken into account in argument.

It will be useful at this point to give a brief, general description of the universal compulsory automobile insurance plan introduced by the impugned legislation and known as "Autoplan". The two statutes under attack do not themselves reveal the whole plan because there are related statutes which were amended in order to implement the overall plan. The related statutes are the *Motor-vehicle Act,* R.S.B.C. 1960, c. 253; the *Motor Carrier Act,* R.S.B.C. 1960, c. 252, and the *Insurance Act,* R.S.B.C. 1960, c. 197. I will describe generally the legislative scheme enacted by the impugned statutes and by amendments to related Acts. Motor vehicle insurance is compulsory. Every driver licensed to drive in British Columbia must have driver's insurance evidenced by a driver's certificate. Driver's insurance is valid from and expires on the same date as does the driver's licence: it is coterminous with the driver's licence. A driver cannot get a driver's licence without driver's insurance; put shortly, no driver's insurance, no driver's licence. Every owner of a motor vehicle registered and licensed in British Columbia must have insurance on his vehicle and that insurance must be evidenced by an owner's certificate. Owner's insurance runs for the licence year of the motor vehicle and, therefore, is coterminous with the vehicle licence. Again, put shortly, no owner's insurance, no motor vehicle licence.

The legislative plan provides that the driver's certificate and owner's certificate must be issued by the Corporation. I should note that the Corporation does not issue actual policies of insurance. The Corporation simply issues driver's and owner's certificates. The contract of insurance, and the terms and conditions thereof, are not found in an issued policy of insurance but are to be found in the Regulations made pursuant to the *Automobile Insurance Act.* These Regulations provide, *inter alia,* that owners and drivers must insure to minimum prescribed limits and that extension insurance is available for those who wish to protect themselves to higher limits than the limits of the compulsory minimum coverage.

PART IV
THE PLAINTIFFS' CASE

The grounds on which it is said that the impugned legislation and Regulations are *ultra vires* the Province are set out in para. 20 of the amended statement of claim:

> 20. The Plaintiffs say that the legislative scheme contemplated and provided for in the Automobile Insurance Act and the Insurance Corporation of British Columbia Act, both before and after the amendments made by the Statute Law Amendment Act, 1973 (Second Session) referred to in paragraph 10A hereof, and in particular the plan of universal compulsory automobile insurance set out therein and in the regulations made or to be made thereunder and such plan of extension insurance as may be prescribed by the regulations thereunder jointly are and each of them severally is ultra vires of the Legislative Assembly of the Province of British Columbia, invalid and of no force or effect upon the following grounds, namely that:
>
> (a) They and each of them infringe upon the exclusive authority and jurisdiction of the Parliament of Canada, given by Section 91(2) of the British North America Act, 1867, 30 and 31 Victoria, Chapter 3, to legislate in relation to the regulation of trade and commerce.
>
> (b) They and each of them infringe upon the exclusive authority and jurisdiction of the Parliament of Canada, Section 91(2) and (27) of the British North America Act, 1867, to legislate in relation to trade and commerce and the criminal law and in relation to competition.
>
> (c) They and each of them infringe upon the exclusive authority and jurisdiction of the Parliament of Canada, given by Section 92(10)(a) of the British North America Act, 1867, to legislate in relation to works and undertakings connecting the Province with any other or others of the Provinces or extending beyond the limits of the Province.
>
> (d) They and each of them are intended to and do have such an effect on Dominion Corporations, being authorized by their instruments of incorporation to carry on the business of automobile insurance, that they are forced to surrender their assets and they are sterilized in their functions and activities and their status and essential capacities are impaired wholly or in a substantial degree.
>
> (e) They and each of them are intended to and do have the effect of confiscating the assets of Dominion Corporations and this without due process of law and in a manner not in accordance with the law of the land.

It is not necessary for me to deal with all of the issues raised in para. 20 of the statement of claim. Paragraph 20(b) again invokes the trade and commerce heading of s. 91 of the *British North America Act, 1867* and invokes the federal power to legislate in relation to criminal law (s. 91(27)). What is referred to here is the federal jurisdiction relating to

competition and combines. Mr. Brown, for the plaintiffs, told me in argument that he was not asking this Court to consider whether the impugned legislation trenches upon the exclusive jurisdiction of Parliament to legislate in relation to criminal law. He made it plain that he was not wholly abandoning this argument; if this case goes beyond this Court he hopes to argue the point elsewhere. Counsel does not ask any finding of fact as a foundation for the "criminal law" argument.

I now turn to para. 20(c) of the statement of claim. The bare pleading in that subparagraph does not reveal the issue argued; para. 20(c) must be read in conjunction with para. 7A of the statement of claim, which reads:

> 7A. The Plaintiffs say that the free availability of such contracts (the reference is to motor-vehicle insurance contracts) is an essential attribute of the existence and use of highways connecting the Provinces of Canada, that such highways are a condition of the existence of Canada and without them such existence could not be carried on. The Plaintiffs say that to confer upon the Corporation the exclusive power to deny to the residents of British Columbia the benefit of such contracts is to deny to such residents a liberty of action inherent in their status as citizens of Canada, and the Plaintiffs say that to bestow upon the Corporation the exclusive power to grant such benefits is beyond the powers of the Province or any one of the Provinces of Canada and constitutes the denial of a civil right within the Province and is not a matter of a merely local or private nature in the Province.

Counsel's position on paras. 20(c) and 7A may fairly be put in this way. It is a well-known fact, and indeed I have evidence of it, that the Provinces of Canada are connected by highways and that there are highways which connect the Provinces with the United States of America. The two island Provinces are exceptions, but, no doubt, they are connected with other Provinces by car ferries. The plaintiffs do not say that those highways, as such, are "works and undertakings connecting the Province with any other or others of the Provinces or extending beyond the limits of the Province", within heading 10(*a*) of s. 92 so as to attract exclusive federal jurisdiction, but rather argue that Canadian citizens have a right as citizens to use those highways and that provincial Legislatures are without power to nullify or detract from that right of citizenship. Nor do the plaintiffs take the position in this Court that an insurance business carried on by an insurer in more than one Province is an "undertaking connecting the Provinces with any other or others of the Provincges," etc. (s. 92(10) (*a*), although, as with other issues, they hope to be allowed to argue the point in a higher Court. The plaintiffs' argument in this Court may best be put sequentially, in this way. Highways

connecting the Provinces and connecting the Provinces with the United States of America are essential to the existence of the nation. Drivers and owners of motor vehicles, as citizens, have an inherent right to use the country's highways. Automobile insurance is essential for drivers and owners; in most jurisdictions it is not only essential, in the sense of being desirable, but it is compulsory. Drivers and owners of motor vehicles, as citizens, in the absence of any valid law to the contrary, are free to purchase the automobile insurance they desire, or must have, from any company offering the requisite insurance. The final step in the argument, as I understood it, is that the impugned legislation, by setting up a monopoly in automobile insurance for the Corporation, has denied to drivers and owners as citizens the right to buy automobile insurance where they wish and, because insurance is essential for drivers and owners, as citizens, the right freely to use highways. It is said by the plaintiffs that the Province has no jurisdiction to create such a monopoly which so abrogates citizens' rights freely to use the nation's highways. For convenience, I shall refer to this argument as the "citizenship argument".

Subparagraph (e) of para. 20 of the statement of claim has its statutory base in c. XXIX of the Magna Charta (9 Hen. III, confirmed, 24 Edw. I; reproduced in vol. IV, R.S.B.C. 1911 at p. 7). Mr. Brown did not ask this Court to decide this issue and said that he did not require any factual finding relevant thereto. This pleading is not entirely abandoned; if the case goes further counsel hopes that he may be allowed to argue the "Magna Charta" issue.

In summary, the plaintiffs' case in this Court rests on three grounds:

(1) The automobile insurance business is interprovincial and indeed, in some cases, international in character, and is trade or is commerce within the meaning of head 2 of s. 91 of the *British North America Act, 1867*; thus, the interprovincial regulation of the trade or commerce of insurance is exclusively within the jurisdiction of Parliament. The next step in the submission is that the automobile insurance scheme put into effect by the impugned legislation gives the Corporation a monopoly in automobile insurance in British Columbia. On this premise it is argued that the impugned legislation is *ultra vires* the Province because it clearly trenches upon the federal jurisdiction to regulate trade and commerce. This is the asserted encroachment: the legislation in practical and legal effect prohibits the plaintiffs and all others in the automobile in-

surance business from carrying on their trade or commerce in British Columbia. It is said that the grant of a monopoly in automobile insurance in British Columbia to the Corporation is an invasion of the federal power to regulate trade and commerce just as would be the case if the provincial Legislature had prohibited the import of particular goods or produce into British Columbia. The submission may be put in another way. Under the legislative plan of universal compulsory automobile insurance, owners and drivers of motor vehicles in British Columbia must have automobile insurance. This insurance is substantially the same automobile insurance as the automobile insurance required, and available, before the impugned legislation. The plaintiff companies are in the insurance business throughout Canada and their business, which is either trade or commerce, is of an interprovincial nature. The regulation of trade and commerce in matters of interprovincial concern is assigned to the exclusive legislative jurisdiction of the Parliament of Canada. The provincial Legislature is without power to regulate trade and commerce interprovincially and, thus, is without power to prohibit any trade or commerce in British Columbia by giving a monopoly therein to any one corporation or to a natural person, or, indeed, to any specified corporations or persons. This, in essence, is the "trade and commerce" argument.

(2) The Province is without jurisdiction to sterilize federally incorporated companies in their functions and activities, or to impair their status and essential capacities. This argument is made on behalf of those plaintiffs incorporated by Act of Parliament. This is the "Dominion Companies' argument" which is clearly stated in subpara. (d) of para. 20 of the statement of claim. I add one comment by way of amplification. The plaintiffs invoked the citizenship argument to support the Dominion companies argument. It was said that Dominion companies are "citizens", that they have the rights of citizens (within their capacities), that a citizen has a right to carry on business in any Province and that that right cannot be taken away by provincial legislation creating a monopoly.

(3) The third ground is what I have called the "citizenship argument" which is based, as I have said, on para. 20(c) and para. 7A of the statement of claim.

It will be readily understood from what I have written thus far that the foundation of the plaintiffs' case, on all three issues, is the assertion that the impugned legislation creates a monopoly for the Corporation in automobile insurance in the

Province and thus prohibits the plaintiffs and others from engaging in that business in the Province. This monopoly is crucial to the plaintiffs' case in this Court.

The position taken by counsel for the plaintiffs is somewhat broader than I have so far indicated, and I should make his position clear. By letter dated June 14, 1974 (ex. 25), to Mr. McAlpine (counsel for the defendant), Mr. Brown stated the plaintiffs' position in this way:

> I intend to ask the Court to review the subject of automobile insurance in its modern context, and we will ask the Court to consider whether the whole subject of automobile insurance belongs in the Dominion field of jurisdiction. Upon a limited view of the subject, we will argue that (at) the most a Province is entitled to operate an insurance company, but not as a monopoly. While in a larger context, we will be inviting the Court to find that the jurisdiction is wholly under the Dominion.

Mr. Brown acknowledged that authorities clearly binding on this Court would make it futile for him to argue before me that jurisdiction over automobile insurance is exclusively federal. Mr. Brown reserves that argument for a higher Court. The argument in this Court was confined to the proposition that the provincial Legislature is without power to grant a monopoly in automobile insurance to the Corporation, thus excluding all others from this trade or commerce in the Province. In short, in this Court the plaintiffs do not question the power of the Legislature to establish a Crown corporation to engage in the automobile insurance business in the Province provided that the Corporation is not given a monopoly.

PART V
THE MONOPOLY ISSUE

I turn now to the question of whether the impugned legislation gives the Corporation a monopoly in automobile insurance in British Columbia. There is an initial complication which arises because, as I noted earlier, ss. 8, 35-37, 40(4), 54(f), 65-68 and 77-81 of the *Automobile Insurance Act* have not been proclaimed. Of those unproclaimed sections, ss. 8, 77, 78, 79 and 80 are directly relevant to the monopoly issue. Indeed, those sections are the sections of the Act which, in plain terms, create the monopoly for the Corporation. The unproclaimed sections of the *Automobile Insurance Act* may never be proclaimed and, if not proclaimed, they will never become part of the law of the Province. If I were to hold that the Corporation has been given a monopoly in automobile insurance, as asserted for the plaintiffs, and if that conclusion

turned, in whole or in part, on the unproclaimed sections of the Act, then the judgment would be of academic interest only, because the sections of the Act not now in force may never be proclaimed. It follows, therefore, that I must consider the impugned legislation as it now stands in force and effect to see whether that legislation establishes a monopoly in automobile insurance for the Corporation.

The failure to proclaim the just mentioned sections of the *Automobile Insurance Act* creates a problem. It has not been contended for the Attorney-General that the plaintiffs lack a sufficient interest in the subject-matter of the impugned legislation to give them standing to sue for the declaratory judgment which they seek. Indeed, in my view, it is so obvious that the plaintiffs, who have all engaged in the automobile insurance business in the Province, have a sufficient interest that no more need be said about it. However, this is the further question: Should I consider only the legislation which is in force and effect without regard to the sections of the impugned legislation which have not been proclaimed, or should I consider the impugned legislation as a whole including the unproclaimed sections? The point is whether the plaintiffs may properly call upon the Court to consider unproclaimed provisions of the statute which are not, and may never be, the law of this Province. The question I am now considering was not raised in terms in argument but, in response to my queries after the trial, I have had the benefit of argument on the point. I have concluded that I may properly consider the whole of the impugned legislation, including the unproclaimed sections of the *Automobile Insurance Act,* but that I must, as well, consider the legislation as it is now in force and effect so that the judgment of this Court will have practical effect.

I now explain my conclusion that I may properly consider the unproclaimed provisions of the impugned legislation. Counsel for each side ask that I take into account the unproclaimed provisions and, indeed, the case was initially argued as if the unproclaimed sections had been brought into force. Nevertheless, agreement by counsel cannot settle a question of law. The principle which suggests that the unproclaimed sections of the *Automobile Insurance Act* should not be considered is well known and was stated with particular clarity by Lord Dunedin in *Russian Commercial & Industrial Bank v. British Bank for Foreign Trade, Ltd.,* [1921] 2 A.C. 438 at p. 448, as follows:

> The question must be a real and not a theoretical question; the person raising it must have a real interest to raise it; he must be able to secure a proper contradictor, that is to say, someone pres-

ently existing who has a true interest to oppose the declaration sought.

The same principle, in essence, was stated by the Supreme Court of Canada in *Coca-Cola Co. of Canada Ltd. v. Mathews*, [1945] 1 D.L.R. 1, [1944] S.C.R. 385. In that case the Court of Appeal for Ontario granted leave to appeal to the Supreme Court of Canada on an undertaking by the appellant to pay, in any event of the cause, the sum of $350 assessed as damages and costs to the respondent. The judgment of the Court was given by Rinfret, C.J.C. I cite two passages, the first is at p. 2 D.L.R., p. 386 S.C.R.:

> The result is that the terms put on the appellants are such that no further *lis* exists between the parties and that they leave nothing for the respondent to fight over.
>
> As was said by Lord Loreburn L.C., in *Glasgow Nav. Co. v. Iron Ore Co.*, [1910] A.C. 293 at p. 294: "It is not the function of a Court of law to advise parties as to what would be their rights under a hypothetical state of facts."

The second passage is at p. 4 D.L.R., p. 389 S.C.R.:

> It may now, therefore, be regarded as well-settled that this Court will not decide abstract propositions of law, even if to determine the liability as to costs, which is not the case in the present instance.

The problem I face is not, I think, essentially one of standing, although the standing of the plaintiffs to bring this action is related to the question of whether, so far as the unproclaimed sections of the impugned legislation are concerned, the issues are entirely theoretical or hypothetical. Because of this interrelation I address myself to the question of standing. If the provisions of the *Automobile Insurance Act* plainly creating a monopoly for the Corporation had been proclaimed there could be no question of the standing of the plaintiffs to seek a declaratory judgment in regard to the constitutional validity of those provisions. This is so because if the monopoly provisions were proclaimed, the plaintiffs would be "exceptionally prejudiced", to use the well-known words of Duff, J., in *Smith v. A.-G. Ont.*, [1924] 3 D.L.R. 189, 42 C.C.C. 215, [1924] S.C.R. 331, in the often cited portion of his judgment at p. 193 D.L.R., p. 337 S.C.R. If the unproclaimed provisions of the *Automobile Insurance Act* creating a monopoly for the Corporation in plain terms were in force and effect the plaintiffs would be "exceptionally prejudiced" thereby, for the simple reason that those provisions, if valid, would effectively shut them out of the automobile insurance business in British Columbia. The plaintiffs would plainly be affected by those provisions in a special way, not simply in

the way in which those provisions would affect the public at large.

In my view, a determination of the validity of the unproclaimed monopoly provisions of the *Automobile Insurance Act* is not a hypothetical or theoretical exercise. This is so because the plaintiffs are affected in a practical business way by the bare enactment of those provisions, notwithstanding that they are not in force and effect. I should explain this conclusion. When the impugned legislation received Assent, each of the plaintiffs was engaged in the business of automobile insurance in British Columbia and each was licensed for this class of insurance. The plaintiffs were engaged in the automobile insurance business in this Province when the writ was issued and they were licensed to engage in this class of insurance until the end of February, 1974. The plaintiffs are affected in the conduct of their businesses in British Columbia in a practical way by the overhanging unproclaimed monopoly provisions of the *Automobile Insurance Act* simply because they do not know where they stand in respect to their business affairs.

The plaintiffs are left, in a sense, paralyzed in the conduct of their automobile insurance businesses in British Columbia. Because they do not know what the future holds they cannot make sensible business decisions. For instance, should they shut down their automobile insurance offices in British Columbia and discharge staff? Or, should they hang on indefinitely to see what happens? Should they carry out a planned expansion of their office facilities, or terminate an expansion underway? One could doubtless conjure up other practical quandaries which the plaintiffs face. However, the point is that the plaintiffs are in fact affected in a special way in respect to their businesses by the unproclaimed monopoly provisions of the impugned legislation, notwithstanding that those provisions are not in force and effect. In so far as the plaintiffs are concerned, the validity of those provisions is not theoretical or hypothetical; the validity of those provisions is an important practical issue which affects them in their businesses. It follows, therefore, that there is a real question for the Courts; the constitutional validity of the unproclaimed provisions is neither theoretical nor hypothetical. The matter may, I think, properly be put this way: the validity of the unproclaimed provisions is a justiciable issue between the parties to this action.

I have been referred to many cases but I have not been given any case, nor have I been able to find one, which deals

specifically with the propriety of a Court deciding upon the constitutional validity of enacted legislation which has not been proclaimed. In my view the governing consideration on the problem as I have stated it, is that it would be less than just that the plaintiffs should be denied access to the Court to question the validity of the unproclaimed provisions of the legislation which, because of the bare enactment of the provisions, seriously affects the plaintiffs in a practical way in their business affairs.

The most recent authority in a long line of cases in which plaintiffs have sought declaratory judgments on the validity of legislation is *Thorson v. A.-G. Can. et al. (No. 2)* (1974), 43 D.L.R. (3d) 1, [1975] 1 S.C.R. 138, 1 N.R. 225. The majority judgment in *Thorson* was given by Mr. Justice Laskin, now Chief Justice of Canada. In my respectful view *Thorson* marks an important departure from the long line of preceding cases dealing with actions questioning the validity of legislation. In *Thorson,* the appellant (plaintiff), as a member of the public, brought a class action for a declaration that the *Official Languages Act,* R.S.C. 1970, c. O-2, and Appropriation Acts, providing money to implement the *Official Languages Act,* were unconstitutional. On reviewing Mr. Justice Laskin's judgment, it appears to me that two principles may properly be drawn from the case. The first is that the restraints on the Courts, in actions in which a declaration is sought on the validity of legislation, imposed by earlier authorities (of which *Smith v. A.-G. Ont., supra,* is a leading example) do not necessarily govern in a case in which the constitutional validity of a statute is questioned. The second principle is perhaps just the corollary of the first, in any event, I think it to be this: that the Court in a constitutional case has a discretion, having in mind the nature of the legislation under attack and how that legislation affects the plaintiffs, to entertain an action questioning the constitutional validity of an enactment if there is a justiciable issue to be tried. I find support for these conclusions in the following passages from Mr. Justice Laskin's judgment in *Thorson.* The first passage is at p. 8:

> I am of the opinion that the Court is entitled in taxpayer actions to control standing no less than it is entitled to control the granting of declaratory orders sought in such actions. In short, the matter to me is one for the discretion of the Court, and relevant to this discretion is the nature of the legislation under attack.
>
> Where regulatory legislation is the object of a claim of invalidity, being legislation which puts certain persons, or certain activities theretofore free of restraint, under a compulsory scheme to which

such persons must adhere on pain of a penalty or a prohibitory order or nullification of a transaction in breach of the scheme, they may properly claim to be aggrieved or to have a tenable ground upon which to challenge the validity of the legislation. In such a situation, a mere taxpayer or other member of the public not directly affected by the legislation would have no standing to impugn it. *Smith v. A.-G. Ont.* is this class of case.

The second citation is at p. 10. The principle to which Mr. Justice Laskin refers in this passage is the principle enunciated by Duff, J., in *Smith v. A.-G. Ont., supra,* at p. 193 D.L.R., p. 337 S.C.R.:

An individual, for example, has no status to maintain an action restraining a wrongful violation of a public right unless he is exceptionally prejudiced by the wrongful act.

This is what Mr. Justice Laskin said at p. 10, in *Thorson*:

This is not a principle which is capable of wholesale transfer to a field of federal public law concerned with the distribution of legislative power between central and unit Legislatures, and with the validity of the legislation of one or other of those two levels. There is no question in such a case of respecting legislative sovereignty, as in unitary Great Britain, but rather a question of whether Parliament or a Legislature has itself respected the limits of its authority under the Constitution.

The next passage from the judgment in *Thorson* is at p. 11:

The question of the constitutionality of legislation has in this country always been a justiciable question. Any attempt by Parliament or a Legislature to fix conditions precedent, as by way of requiring consent of some public officer or authority, to the determination of an issue of constitutionality of legislation cannot foreclose the Courts merely because the conditions remain unsatisfied: *Electrical Development Co. of Ontario v. A.-G. Ont.* (1919), 47 D.L.R. 10, [1919] A.C. 687; *B.C. Power Corp. Ltd. v. B.C. Electric Co. Ltd. and A.-G. B.C. et al.* (1962), 34 D.L.R. (2d) 196, [1962] S.C.R. 642, 38 W.W.R. 701. Should they then foreclose themselves by drawing strict lines on standing, regardless of the nature of the legislation whose validity is questioned?

The final passage which I cite from the judgment in *Thorson* is at p. 19:

It is not the alleged waste of public funds alone that will support standing but rather the right of the citizenry to constitutional behaviour by Parliament where the issue in such behaviour is justiciable as a legal question.

In the present case, I would, as a matter of discretion, hold that the appellant should be allowed to proceed to have his suit determined on the merits.

The unproclaimed provisions of the *Automobile Insurance Act* relating to monopoly raise a constitutional question of importance. The plaintiffs are affected in the conduct of their business by the bare existence of those unproclaimed provi-

sions. The unproclaimed provisions raise a justiciable issue between the parties. I am of the opinion that I have a discretion to consider the validity of the unproclaimed monopoly provisions of the impugned legislation and I exercise that discretion in favour of doing so. For these reasons I shall now go on to consider the unproclaimed sections of the *Automobile Insurance Act* which in plain terms set up the monopoly for the Corporation. The sections are those numbered 8, 77, 78, 79 and 80.

Section 8 of the *Automobile Insurance Act* was amended by s. 2 of the *Statute Law Amendment Act*, 1973 (2nd Sess.), c. 152, which adds words to cls. (a) and (b) of that section. I now reproduce s. 8 as amended. In order that the amendments will be clear I have placed the added words in brackets. Section 8 now reads:

> 8. Notwithstanding any other Act or regulation, where the corporation is authorized under section 2 to engage in and carry on the activity of automobile insurance,
>
> (a) every person who applies (in the Province) for a policy of automobile or trailer insurance or a motor-vehicle liability policy in respect of a motor-vehicle or trailer registered or licensed in the Province shall apply to the corporation and, upon compliance with this Act and the regulations and paying the appropriate premium, he shall be provided with a motor-vehicle liability policy sufficient for the purposes of the *Motor-vehicle Act*, and such extension insurance as he applies for and pays for on the terms and conditions set out in the plan; and
>
> (b) every contract of automobile insurance (in the Province) and every motor-vehicle liability policy made or issued (in the Province) after the coming into force of this section, in respect of a motor-vehicle or trailer registered or licensed in the Province by an insurer other than the corporation is void and of no effect.

Section 8 is plain enough; it is mandatory for every person purchasing automobile or trailer insurance in the Province to purchase that insurance from the Corporation and all other contracts of automobile insurance made or issued in the Province after s. 8 is in force will be void.

Section 77 of the *Automobile Insurance Act* amends s. 8 of the *Insurance Act*, R.S.B.C. 1960, c. 197 by renumbering s. 8 as s-s. (1) and by adding a s-s. (2). Section 8 of the *Insurance Act*, as amended, provides:

> 8(1) No contract shall be rendered void or voidable as against the insured or a beneficiary by reason of any failure on the part of the insurer to comply with any provision of this Act.
>
> (2) Notwithstanding subsection (1), a contract of automobile insurance made by any insurer in respect of an automobile or trailer

licensed in the Province, on or after the date to be fixed by Order of the Lieutenant-Governor in Council, is void and of no effect; and the insurer shall forthwith upon demand refund to the insured any unearned premium paid in respect of the contract.

Section 78 of the *Automobile Insurance Act* amends s. 29 of the *Insurance Act* by renumbering s. 29 as s-s. (1) of s. 29 and by adding a s-s. (2). The section now provides:

29(1) No insurer shall be licensed unless it is a corporation or an unincorporated Lloyd's association.

(2) Notwithstanding subsection (1), on or after a date to be fixed by Order of the Lieutenant-Governor in Council, no insurer shall be licensed to carry on, in the Province, any class of automobile insurance.

Section 79 of the *Automobile Insurance Act* amends s. 37 of the *Insurance Act* by renumbering that section as s-s. (1) and by adding s-ss. (2) and (3). Section 37 of the *Insurance Act* provides, as amended:

37(1) Every licence shall expire on the last day of February in each year, but may, subject to any conditions or limitation thought advisable by the Superintendent, be renewed from year to year on application to him in such form as he requires, and on compliance by the insurer with the provisions of this Act and payment of the prescribed fees.

(2) Notwithstanding subsection (1), every licence authorizing an insurer to carry on in the Province any class of automobile insurance is revoked and cancelled, in respect of that class of insurance, on a date to be fixed by Order of the Lieutenant-Governor in Council.

(3) Where a licence is revoked and cancelled under subsection (2), it shall be deemed to be a suspension or revocation under section 41, and the provisions of section 41, excepting subsection (3) thereof, and all other provisions of the Act respecting the revocation, suspension, or cancellation of a licence apply, with the necessary changes and so far as are applicable, to a revocation and cancellation under this section.

Section 80 of the *Automobile Insurance Act* amends s. 217 of the *Insurance Act* by adding thereto s-ss. (3) and (4). Subsections (1) and (2) of s. 217 deal respectively with definitions and with the applicability of Part VII of the *Insurance Act*. It is not necessary to reproduce the first two subsections; the added s-ss. (3) and (4), are as follows:

217(3) On or after a date to be fixed by Order of the Lieutenant-Governor in Council, no insurer, other than the Insurance Corporation of British Columbia, shall make a contract in respect of an automobile or trailer licensed in the Province.

(4) A contract made by an insurer in contravention of subsection (3) is void and of no effect.

In my view, s. 8 and ss. 77 to 80 of the *Automobile Insur-*

ance Act when proclaimed will plainly have the practical and legal effect of giving the Corporation a monopoly in automobile insurance in British Columbia.

The plaintiffs referred to the unproclaimed ss. 8, 77, 78, 79 and 80 of the *Automobile Insurance Act,* in the statement of claim. The plaintiffs' case, however, is neither wholly nor partly dependent on those unproclaimed provisions. It is argued, aside from the unproclaimed legislation, that the plan of universal compulsory automobile insurance introduced by the impugned legislation and by amendments to related statutes, in legal and practical effect gives the Corporation a monopoly in automobile insurance in British Columbia. I go on now to consider the legislation which is now in force and effect to determine whether it does establish the asserted monopoly.

For the sake of clarity and convenience, but at the expense of brevity, I again reproduce s. 2 of the *Automobile Insurance Act*:

> 2. Where, under the *Insurance Corporation of British Columbia Act* and the regulations made thereunder, the Lieutenant-Governor in Council authorizes the corporation to engage in and carry on the activity of automobile insurance, and to operate and administer a plan of universal compulsory automobile insurance, the corporation shall engage in and carry on automobile insurance in all its classes and operate and administer a plan of universal compulsory automobile insurance set out in this Act and the regulations and, in addition thereto, shall provide such plan of extension insurance as may be prescribed by the regulations.

As I explained earlier, the necessary Regulation by Order in Council has been made under the ICBC Act so that the Corporation has the authority to do those things specified in s. 2 of the *Automobile Insurance Act.* The duty to engage in and carry on automobile insurance in all its classes and to operate and administer a plan of universal compulsory automobile insurance, as set out in s. 2, is stated in mandatory terms. The section does not say, in plain terms, that the Corporation, to the exclusion of all others, shall engage in and carry on automobile insurance and administer the universal compulsory automobile insurance plan or that all other insurers are precluded from engaging in the business of automobile insurance outside the scope of the plan to be administered by the Corporation. The legislation now in force does not explicitly give the Corporation a monopoly in the way in which the unproclaimed provisions do. The question is whether the proclaimed legislation gives the Corporation a monopoly in practical and legal effect, notwithstanding the lack of express

monopoly provisions. In order to answer this question, I now must give a somewhat detailed description of the provisions of the impugned legislation.

Sections 47-62 (incl.) of the *Automobile Insurance Act* amend various sections of the *Motor-vehicle Act*, R.S.B.C. 1960, c. 253. Section 54 amends s. 18 of the *Motor-vehicle Act*. Clause (a) of s. 54 repeals s-s. (2a) of s. 18 and substitutes the following:

> 18(2a) No person shall drive or operate a motor-vehicle or trailer on a highway unless
>
> (a) he is insured under a valid and subsisting driver's certificate;
>
> and
>
> (b) the motor-vehicle is insured; and
>
> (c) the trailer, if any, is insured
>
> under a valid and subsisting motor-vehicle liability policy evidenced by an owner's certificate.;

Clause (a) of s. 54 (proclaimed March 14, 1974) became effective on July 1st [proclaimed in force July 15, 1974, by amended Proclamation B.C. Reg. 433/74]. Subsection (2a) of s. 18 of the *Motor-vehicle Act* was itself amended in 1974 by s. 5 of the *Motor-vehicle Amendment Act* (Bill 138, to be designated 1974 (B.C.), c. 55); but this amendment is of no significance because it relates only to an exception for student drivers.

Section 18(2b) of the *Motor-vehicle Act* is important: it makes it an offence for any person to contravene the provisions of s-s. (2a) of s. 18.

Thus, under cl. (a) of s-s. (2a) of s. 18 of the *Motor-vehicle Act*, in order to drive lawfully in British Columbia a person who requires a British Columbia driver's licence must have a driver's certificate. Section 47(c) of the *Automobile Insurance Act* amended s. 2 of the *Motor-vehicle Act* by adding the following definition: " 'driver's certificate' means a driver's certificate as defined in the *Automobile Insurance Act*".

Section 1(1) of the *Automobile Insurance Act* gives this definition:

> "driver's certificate" means a certificate issued under this Act or the regulations to a person who, under the *Motor-vehicle Act*, may obtain a driver's licence, and may be part of the driver's licence or a separate document;

The important point is that the Corporation is the only source from which a person may obtain a driver's certificate. Thus, before a person licensed to drive in British Columbia can lawfully drive, he must go to the Corporation and take

out driver's insurance with the Corporation and be given a driver's certificate. Even with a driver's certificate, a driver cannot lawfully drive a vehicle or trailer licensed and registered in British Columbia unless the vehicle is insured under a subsisting motor vehicle liability policy which, as will appear, can only be obtained from the Corporation.

By cls. (b) and (c) of s. 18(2a) of the *Motor-vehicle Act*, it is unlawful for any person to drive a motor vehicle or trailer which is registered and licensed in British Columbia, unless the motor vehicle or trailer is insured under a valid and subsisting motor vehicle liability policy evidenced by an owner's certificate. Section 2 of the *Motor-vehicle Act* as amended by s. 47(f) of the *Automobile Insurance Act* gives this definition:

> "motor-vehicle liability policy" means a certificate of insurance issued by the Insurance Corporation of British Columbia in the form, and providing insurance against such perils and for such amounts, as is prescribed by the *Automobile Insurance Act* and the regulations under that Act;

Section 2 of the *Motor-vehicle Act* as amended by s. 47(g) of the *Automobile Insurance Act*, defines "owner's certificate": " 'owner's certificate' means an owner's certificate as defined in the *Automobile Insurance Act*;".

Section 1(1) of the *Automobile Insurance Act* then gives this definition: " 'owner's certificate' means a certificate issued under this Act or the regulations to an owner".

Section 1.02 of *Regulation No. 1 Pursuant to the Automobile Insurance Act*, B.C. Reg. 428/73 (ex. 9A), made pursuant to the *Automobile Insurance Act* provides this definition:

> 1.02 . . .
>
> (102) "owner's certificate" means a certificate issued to an owner under the Act or regulations, and confirming the terms of coverage applicable to the motor-vehicle described therein;

In the same Regulation and again in s. 1.02, there is this definition of "owner":

> 1.02 . . .
>
> (101) "owner" means a person in whose name a motor-vehicle or trailer is registered and licensed under the *Motor-vehicle Act* or the *Department of Commercial Transport Act*, and includes
>
> (a) a person who is in possession of a motor-vehicle under a contract by which he may become the owner of the motor-vehicle upon full compliance with the terms of the contract; and

(b) includes a person in whose name a motor-vehicle is registered, where in fact the registered owner is holding the title to the motor-vehicle on behalf of another person, if the interests of both the registered owner and the actual owner are fully disclosed to the corporation;

This complicated network of statutory and regulatory provisions comes down to this. An owner of a motor vehicle or trailer licensed and registered in British Columbia must have motor vehicle insurance and an owner's certificate evidencing such insurance. The only source of the required motor vehicle insurance and the required owner's certificate is the Corporation.

Not only are drivers and owners compelled to go to the Corporation for insurance by the statutory and regulatory provisions which I have already considered, but, as well, they are driven to the Corporation for owner's certificates and driver's certificates by s. 40 of the *Automobile Insurance Act*. Subsections (1) and (2) of s. 40 provide:

40(1) Except in respect of a motor-vehicle or trailer exempted by the regulations, no permit of any kind and no licence, licence-plate, or decal for a motor-vehicle or trailer or for the use or operation thereof shall be granted, issued, or renewed under the *Motor-vehicle Act*, the *Department of Commercial Transport Act*, or the *Motor Carrier Act*, unless at the time of, or prior to, application therefor the applicant has applied to the corporation or its agent for, and is entitled to, an owner's certificate under this Act in respect of the motor-vehicle or trailer for the term of the permit or licence, or such part of that term as the regulations may prescribe, and unless the applicant has paid the premium prescribed for that owner's certificate and any additional premium assessed by the corporation, and the premium, if any, for excess insurance required under subsection (6) of section 38.

(2) No driver's licence, permit, or other authority to drive or operate a motor-vehicle shall be issued or renewed under the *Motor-vehicle Act*, unless at the time of, or prior to, application therefor the applicant has applied to the corporation or its agent for, and is entitled to, a driver's certificate under this Act for the term of that licence or permit or such part of that term as the regulations may prescribe, and unless the applicant has paid the premium prescribed for that driver's certificate and any additional premium assessed by the corporation.

It is sufficient to say that s-s. (3) of s. 40 provides that registration of a transfer of a motor vehicle or a trailer will be refused by the Superintendent of Motor Vehicles or by the Motor Carrier Commission (under the *Motor Carrier Act*) unless the transferee has paid to the Corporation the amount of any premium and all moneys due under the *Automobile Insurance Act* or the Regulations, for every motor vehicle and

trailer owned by the transferee and for every owner's certificate issued to the transferee under the Act or the Regulations.

Subsection (4) of s. 40 compels owners of motor vehicles or trailers licensed in British Columbia and drivers licensed to drive in British Columbia to take out motor vehicle liability policies with the Corporation and to obtain driver's certificates from the Corporation. That section does this by prescribing that the driver's licences of those owners or drivers who do not obtain the requisite policies and certificates will, without any act or notice, be suspended and rendered invalid and of no force and effect.

Section 40(1) and (2) effectively tie licences for motor vehicles and licences for drivers to insurance which only the Corporation provides. Thus, insurance provided by the Corporation is a practical necessity for those who have driver's licences issued in British Columbia and for those who own vehicles registered and licensed in the Province.

Section 4 of the *Motor-vehicle Act* deals with licensing motor vehicles and trailers. Section 4 of the *Motor-vehicle Act* was amended by s. 49 of the *Automobile Insurance Act.* Section 4 provides, to put its provisions generally, that a condition precedent to the operation of a motor vehicle in the Province is the registration and licensing of the motor vehicle and the acquisition by the owner of a certificate of insurance on payment of the prescribed fees and insurance premium to the Superintendent of Motor Vehicles or to persons authorized as agents of the Corporation.

The certificate of automobile insurance referred to in s-s. (1) of s. 4 means, by s. 1(1) of the *Automobile Insurance Act,* a certificate issued under that Act or under its Regulations. Persons authorized to issue licences may act as agents for the Corporation to issue the Corporation's certificate of insurance and to receive premiums. The licensing authority cannot license any person who is insured otherwise than by the Corporation. To put the matter shortly, the insurance which only the Corporation can provide, is a condition precedent to the licensing of motor vehicles and trailers in British Columbia.

Legislation about motor carriers generally is set out in the *Motor Carrier Act,* R.S.B.C. 1960, c. 252, as amended and in the Regulations made thereunder. Section 63 of the *Automobile Insurance Act* amended s. 2 of the *Motor Carrier Act* by adding a definition:

> "motor-vehicle liability policy" means a certificate of insurance issued by the Insurance Corporation of British Columbia in the form, and providing insurance against such perils and for such amounts, as is prescribed by the *Automobile Insurance Act* and the regulations under that Act;

Section 5 of the *Motor Carrier Act* was amended by s. 64 of the *Automobile Insurance Act*. I reproduce the amended section in which I have bracketed the words added to the section by s. 64:

> 5. Except as exempted under this Act, no person shall operate or cause or permit to be operated a motor-vehicle on any highway in the Province as a public passenger-vehicle, a public freight-vehicle, a limited passenger-vehicle, or a limited freight-vehicle unless he or the person for or on whose behalf the motor-vehicle is operated holds a subsisting licence authorizing the operation of that motor-vehicle in the manner and for the purposes in or for which it is operated (and unless he is insured under a valid and subsisting motor-vehicle liability policy, or gives to the Motor Carrier Commission proof of financial responsibility, in the manner prescribed under section 91 of the *Motor-vehicle Act* and the regulations under that Act.)

Motor carriers must, therefore, either have a motor vehicle liability policy (which can only be issued by the Corporation) or must give proof of financial responsibility under s. 91 of the *Motor-vehicle Act*. That section drives the carrier back to the Corporation because s. 91(1) of the *Motor-vehicle Act*, as amended by s. 61(a) of the *Automobile Insurance Act*, provides:

> 91(1) Where proof of financial responsibility is required to be given, it shall be given by an insurance certificate issued under the *Automobile Insurance Act*.

The question which I am considering is whether the impugned legislation now in force (without regard to the unproclaimed sections) establishes for the Corporation a monopoly in automobile insurance in the Province. The answer to that is qualified. As will appear, I have concluded that the impugned legislation, presently in force, clearly establishes a monopoly for the Corporation in the automobile insurance which drivers and owners of motor vehicles in British Columbia must have before they may lawfully drive. For convenience, I shall call this insurance "compulsory insurance".

The compulsory insurance which is mandatory for owners and drivers is insurance to certain prescribed minimum limits. The detail is not of any significance. Still, in order that what follows may be understandable, I shall give a general description of the minimum coverages. The Regula-

tions to which I refer are those made under the *Automobile Insurance Act*. The compulsory insurance coverages for an owner are as follows:

(1) Coverage for third party liability for injury to persons, for death and for property damage to the amount of $50,000 (Reg. 1, Part VI).

(2) Coverage for accident benefits for death, for disability and for medical rehabilitation and funeral expenses, payable on a "no fault basis" (Reg. 1, Part VII).

(3) Coverage for third party rights for bodily injury, for death and for property damage caused by an uninsured or by an unidentified driver (Reg. 1, Part VIII).

(4) Coverage for damage to the owner's vehicle (Reg. 1, Part IX), sometimes referred to as "collision" or "own damage" insurance.

Coverage under Part IX is not compulsory for all vehicles. The Regulations divide vehicles into two categories, designated category 1 and category 2. Those categories are defined in Reg. 1, s. 1.02(138) and (139) [am. B.C. Reg. 1/74, s. 2]. It is sufficient to say generally that category 1 includes all private passenger vehicles less than nine years old and all commercial vehicles less than nine years old and of a gross vehicle weight of 8,000 pounds or less. All other vehicles are within category 2. Insurance under Part IX of Reg. 1 (collision insurance) is compulsory for all owners of category 1 vehicles, with a maximum "deductible" of $250. Insurance under Part IX is optional for owners of category 2 vehicles.

The compulsory driver's insurance provided by the Corporation and evidenced by a driver's certificate issued by the Corporation is similar to the coverages that are mandatory for a motor vehicle owner: see Reg. 1, Part III, s. 3.19. Driver's insurance provides coverage for third party liability to the amount of $50,000 under Reg. 1, Part VI, and also provides coverage under Reg. 1, Parts VII and VIII.

In addition to providing the compulsory insurance for owners and drivers, the Corporation offers optional "extension insurance" to owners under the owner's certificates. Extension insurance is defined in s. 1(1) of the *Automobile Insurance Act* as follows:

> "extension insurance" means automobile insurance that may be made available by the corporation under the regulations that is in excess of the limits, or that reduces the deductible amount, or otherwise supplements one or more of the

> coverages, in any universal compulsory automobile insurance plan prescribed by the regulations;

Regulation 1, Part III, s. 3.19(c) and (d) provide that a driver's certificate shall not include extension insurance but, putting it generally, that additional insurance may be obtained by a driver at his option by a separate policy of insurance issued by the Corporation.

In discussing the legal and practical effect of the impugned legislation which is presently in force, I have directed my attention to the legislation as it affects drivers licensed to drive in British Columbia and owners of motor vehicles or trailers licensed and registered in British Columbia. In order to round out the picture, I should say something about exemptions. There are exemptions for drivers who are not resident in British Columbia whose vehicles are not registered and licensed in British Columbia. There are exemptions for non-resident owners and drivers of commercial vehicles and for students and members of the Armed Forces temporarily, but not ordinarily, resident in the Province. Moreover, there are exemptions for owners or operators of "extra provincial undertakings". Patently, exemptions had to be made for tourists, for people visiting British Columbia on business and for commercial vehicles plying to and from the Province, but the fact that the legislation provides these exemptions, which I have described in very general terms, does not in a practical way touch the question of whether the Corporation has been given a monopoly of automobile insurance in British Columbia.

On reviewing the provisions of the impugned legislation now in force, I am satisfied that owners of motor vehicles or trailers in British Columbia and drivers licensed to drive in British Columbia can obtain the compulsory insurance and the required owner's and driver's certificates only from the Corporation. It follows that in legal and practical effect the impugned legislation now in force gives the Corporation a monopoly in the compulsory automobile insurance in the Province. Put in another way, the legal and practical effect of the impugned legislation now in force is to exclude all insurers other than the Corporation from participating in what is, on the evidence, the major part of the automobile insurance business in British Columbia.

Putting aside the compulsory insurance, which I have just discussed, and putting aside for the moment the question of licensing insurers, there is nothing that I have been able to find in the legislation or in the Regulations now in force

which prohibits insurers, other than the Corporation, from engaging in the business of automobile insurance in this Province. Nor have I been able to find any provision which voids any contract of automobile insurance made in British Columbia by an insurer other than the Corporation.

I now turn to licensing and in particular to the refusal by the Superintendent of Insurance to renew the plaintiffs' licences for automobile insurance for the year 1974-1975. Under the *Insurance Act*, it is a summary conviction offence punishable by fine for an insurer to sell insurance in the Province if not licensed to do so: see ss. 4 and 7 and Part III (which deals with licensing and the regulation of insurers) and ss. 328 and 333 of the Act. I remark parenthetically that if an unlicensed insurer entered into a contract of automobile insurance in British Columbia, the validity of that contract could not be questioned: see s. 8 of the *Insurance Act*. It might be thought that the plaintiffs' licences for automobile insurance were not renewed because of a provision of the impugned legislation or the Regulations made thereunder. If this were the case, then the impugned legislation would, in terms, have excluded all insurers other than the Corporation, and in this way would have given the Corporation a monopoly in all automobile insurance in British Columbia. But this is not the case. I have not been able to find any provision in the proclaimed legislation which prohibits the licensing of insurers to engage in automobile insurance in this Province.

This would not be so if the unproclaimed sections of the *Automobile Insurance Act* were in force. Sections 78 and 79 of the *Automobile Insurance Act*, respectively providing that no insurer be licensed for any class of automobile insurance in the Province and for the revocation, suspension, etc., of existing licences, have not been proclaimed. But because Part III of the *Insurance Act* has not been touched by the impugned legislation, such discretions as the Superintendent has over licensing remain unchanged. Thus, it follows that the Superintendent, in refusing to renew the plaintiffs' licences for automobile insurance, did not do so pursuant to any provision of the impugned legislation which has been brought into force. The Superintendent may have refused renewals anticipating the imminent Proclamation of the unproclaimed sections of the *Automobile Insurance Act*. He may have thought that his discretionary powers under the licensing provisions of the *Insurance Act* were sufficient to justify him in refusing to renew the plaintiffs' licences. It is idle to speculate. The fact is that the Superintendent had no author-

ity stemming from the impugned legislation now in force or from the Regulations to refuse to renew the plaintiffs' licences for automobile insurance. The only justification for the refusal, and this is the main point, is that it was made in the exercise of a discretion which the Superintendent, as an administrator, possessed, or assumed he possessed.

However, the fact is that the Superintendent refused to renew the plaintiffs' licences to engage in automobile insurance in British Columbia and, because of the provisions of the *Insurance Act,* so long as they are without licences, the plaintiffs cannot lawfully engage in automobile insurance in this Province without subjecting themselves to penalties under the *Insurance Act.* The Superintendent, by administrative decision, has in a practical way given the Corporation the complete monopoly in automobile insurance it would have had if ss. 78 and 79 of the *Automobile Insurance Act* had been proclaimed. Can it properly be said that the practical complete monopoly enjoyed by the Corporation is the product of the impugned legislation when patently the monopoly, as a complete monopoly, exists because the Superintendent, exercising an administrative discretion, refused to renew the licences? The Superintendent may have been wrong in refusing renewals. It may be that he could be compelled to renew the plaintiffs' licences for automobile insurance. The question I face on the monopoly issue is not whether the Superintendent exercised his discretion rightly or wrongly, but whether the impugned legislation now in force gives the Corporation a complete monopoly in automobile insurance. In my view, the principle enunciated by Martin, C.J.S., in *Cairns Construction Ltd. v. Gov't of Sask.* (1958), 16 D.L.R. (2d) 465 at p. 475, 27 W.W.R. 297 [affd 24 D.L.R. (2d) 1, [1960] S.C.R. 619, 35 W.W.R. 241], is applicable. The issue in *Cairns* was the constitutional validity of a sales tax imposed on consumers on retail purchases of tangible personal property. The passage, at p. 475, is as follows:

> Mr. Schuck, the Administrator of the Act, was examined for discovery and as part of the respondent's case at the trial counsel read into the record questions and answers from his examination, showing the practice and Rulings given by the taxing authorities in dealing with the various questions which have come before them. The Regulations made and the Rulings given in particular cases are of no value in determining whether the Act is valid or not; Acts of the Legislature cannot be declared valid or invalid because of practices adopted by officials in the Courts of administration.

I propose to deal with the monopoly issue on the basis of the provisions of the impugned legislation which are in force

without regard to the way in which the Superintendent exercised his discretion in refusing renewal licences to the plaintiffs. I hold that the impugned legislation creates a monopoly for the Corporation in the compulsory automobile insurance. This is a monopoly in the major market for automobile insurance in British Columbia. I do not further pursue the question of the propriety of the refusal by the Superintendent to renew the plaintiffs' licences for automobile insurance, and I do not further pursue the question, which I have briefly canvassed, of whether, under the impugned legislation which is now in force, insurers other than the Corporation are entirely foreclosed from engaging in the automobile insurance business in British Columbia. Even if the plaintiffs are not wholly precluded from engaging in the automobile insurance business in this Province, the legal effect of the impugned legislation in practical terms, is to exclude insurers other than the Corporation from the compulsory automobile insurance field, because no one is likely to buy compulsory insurance from the Corporation and then duplicate that insurance by contracting with another insurer.

The monopoly which I hold has been given to the Corporation in compulsory insurance is sufficient to raise the issues argued on behalf of the plaintiffs. It appears to me obvious that if the Legislature is without power to create a complete monopoly in automobile insurance for the Corporation, then it is without power to create a partial monopoly for the Corporation. This is so because if the Legislature has encroached upon an exclusive federal power, it is no answer to say that the encroachment is something less than a total encroachment.

PART VI

A COMPARISON: MOTOR VEHICLE INSURANCE BEFORE AND AFTER THE ENACTMENT OF THE IMPUGNED LEGISLATION

Having considered the monopoly issue, I now proceed to another topic. In the first part of the opening for the plaintiffs, Mr. Cumming gave me a detailed comparison of the legislation relating to automobile insurance in British Columbia as it was before and after the universal compulsory automobile insurance scheme, known as Autoplan, came into effect on March 1, 1974. Mr. Cumming's purpose was to show that the compulsory automobile insurance now required in British Columbia under the impugned legislation, and the extension

insurance offered by the Corporation, are essentially the same insurances which were, respectively, compulsory and optional before the impugned legislation became effective.

The significance of the comparison may not be immediately apparent and requires some explanation. It is, as I have already said, essential to the plaintiffs' case in this Court that the Corporation has been given a monopoly in automobile insurance in the Province. For this reason, it was important for the plaintiffs to show that under Autoplan the Corporation is engaged in the automobile insurance business and that the automobile insurance provided by the Corporation is insurance in a conventional sense. The plaintiffs say that whatever the ultimate goal of the Legislature may have been, the vehicle chosen to achieve that goal is nothing more than conventional automobile insurance in the sense that the insurance provided by the Corporation, by and large, is the same insurance provided by the plaintiffs and the other companies which engaged in the automobile insurance business in British Columbia before Autoplan took effect.

Putting the point in another way: the Legislature, in order to achieve whatever its ultimate goal may have been, might have provided by statute for some compulsory scheme of compensation for injury, death and property loss suffered in motor vehicle accidents which could not properly be characterized as conventional automobile insurance. Such a scheme might be, for instance, one similar to the plan for workers' compensation now in effect in British Columbia. If this had been done, then the arguments advanced for the plaintiffs founded on the proposition that insurance falls within the trade and commerce clause (*British North America Act, 1867*, s. 91(2)), might have little or no weight because the scheme would not have been insurance in any conventional sense. The point was put cogently in the course of Mr. Brown's argument. It was said that the "product" sold by the Corporation under Autoplan is the same "product" sold by the plaintiffs. As Mr. Brown graphically put it, under the impugned legislation there is no change in the product sold to motorists in British Columbia: the only change made by the impugned legislation is in who may sell the product.

Notwithstanding my indebtedness to Mr. Cumming for his useful comparison and my indebtedness to Mr. McAlpine for his analysis of the comparison given me in his opening, and to Mr. MacAdams (junior counsel for the plaintiffs) for his rejoinder to Mr. McAlpine, I do not think it necessary to consider in detail the complicated statutory and regulatory pro-

visions on which the comparisons were made. It is sufficient to say, with some amplification, that I agree with Mr. Cumming's argument that in all essentials the automobile insurance required and regulated by statute before Autoplan is the same as the insurance which is now provided by the Corporation.

Before stating the common features of automobile insurance before and after Autoplan, it will be useful to say, by way of preface, that the impugned legislation does not effect any changes in the law of tort as it affects liability for injury to people, for death and for damage to property caused by motor accidents.

The salient common characteristics of automobile insurance provided for and regulated by statute and sold by private insurers before the impugned legislation took effect and automobile insurance as it is now provided for and regulated by the impugned legislation are set out in broad terms in the following numbered paragraphs.

1. The major part of automobile insurance was liability insurance before Autoplan and is still liability insurance under Autoplan. Liability insurance is required by, and provided for, motorists so that they may protect themselves against legal liability for injury to persons, deaths and property damage caused by negligent driving. Liability insurance was compulsory to minimum limits before Autoplan and is, as I have already pointed out, compulsory to minimum limits, under Autoplan.

2. Automobile insurance under Autoplan is in part "no fault" insurance. I have earlier in these reasons set out the no fault compulsory coverages for accident benefits for death, disability, and for medical, rehabilitation and funeral expenses under Autoplan (Reg. 1, *Automobile Insurance Act,* Part VII). Before Autoplan, by amendments made to the *Insurance Act* (*An Act to Amend the Insurance Act,* 1969, c. 11) and by amendments made to the *Motor-vehicle Act* (*An Act to Amend the Motor-vehicle Act,* 1969, c. 20), essentially the same no-fault insurance was introduced and made compulsory in British Columbia. That insurance was provided by the plaintiffs and by other private insurers before Autoplan.

3. Automobile insurance under Autoplan is contractual; automobile insurance provided by private insurers before Autoplan was contractual.

4. Certain minimum insurance coverages are compulsory under Autoplan and were compulsory before Autoplan. I have

already reviewed the compulsory insurance coverages required under Autoplan, in which the Corporation has a monopoly. It is sufficient to say, without going into the statutory detail, that before Autoplan insurance to minimum limits was required. Before Autoplan, it was unlawful to drive without insurance coverages to prescribed limits.

5. Before and after Autoplan, automobile insurance was universal. Before Autoplan, insurance companies as a group were practically obliged to provide automobile insurance to all who applied for it. The mechanics of how this was done are complex, but are of no material significance. Under Autoplan, while there is no provision in the ICBC Act that places on the Corporation the duty to provide insurance to all applicants, it is plain enough on reading s. 2 of the *Automobile Insurance Act* that the Corporation is charged with the duty, "to operate and administer a plan of universal compulsory automobile insurance . . .". Moreover, s. 8 of the *Automobile Insurance Act* provides, to paraphrase, that every person who applies for automobile insurance in the Province shall apply to the Corporation and such person:

> . . . shall be provided with a motor-vehicle liability policy sufficient for the purposes of the *Motor-vehicle Act*, and such extension insurance as he applies for and pays for on the terms and conditions set out in the plan;

Admittedly, s. 8 has not been proclaimed, but from a practical point of view, it seems to me that the Corporation provides automobile insurance which, without regard to the technical detail of the scheme, is designed to serve all applicants and is universal.

As I have said, I am satisfied on Mr. Cumming's argument 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. To use Mr. Brown's apt word again, the "product" is the same. This conclusion is strengthened by the definitions of "insurance" and of "automobile insurance" which appear, respectively, in the ICBC Act and in the *Insurance Act*. Section 1 of the ICBC Act defines insurance in this way:

> "insurance" means the undertaking by one person to indemnify another person against loss or liability for loss in respect of a certain risk or peril to which the object of the insurance may be exposed, or to pay a sum of money or other thing of value upon the happening of a certain event;

"Automobile insurance" is defined in s. 2 of the *Insurance*

Act, as amended by s. 20 of the *Statute Law Amendment Act, 1974*. The 1974 amendment provides only for some exceptions, which are not material in the present context. The definition [rep. & sub. 1969, c. 11, s. 1(1) (*c*)], without the 1974 amendments, is as follows:

> 2(1) ...
> "automobile insurance" means insurance
> (*a*) against liability arising out of
> (i) bodily injury to or the death of a person; or
> (ii) loss of or damage to property
> caused by an automobile or the use or operation thereof; or
> (*b*) against loss of or damage to an automobile and the loss of use thereof,
> and include insurance otherwise coming within the class of accident insurance where the accident is caused by an automobile or the use or operation thereof, whether liability exists or not, if the contract also includes insurance described in clause (*a*);

Plainly enough, the "automobile insurance" in which the Corporation is authorized to engage is conventional insurance and the "automobile insurance" provided by the Corporation is conventional automobile insurance.

I should not leave this matter without referring to Mr. McAlpine's argument, the main thrust of which lay in the assertion that the plaintiffs had failed to give proper emphasis to the real differences between private insurance and insurance under Autoplan. He said that those differences appear in the legislation itself and in the evidence of the practical effect of Autoplan in operation. Mr. McAlpine took me through Mr. Cumming's various headings of argument on this issue, but his principal point seems to me to have been that insurance under Autoplan is not, and was not intended to be, insurance in the traditional sense as carried on by private insurers. Now, this may have been the intention of the Legislature, but the point is that the vehicle chosen by the Legislature for achieving whatever its ultimate goal may have been, was conventional automobile insurance.

PART VII

THE DEFENCE

I have not, as yet, said anything about the Attorney-General's defence to this action. I now turn to the defence and I reproduce what seem to me to be the key paragraphs which set out the case for the Attorney-General. In para. 17 of

the defence, the Attorney-General invoked the aid of extrinsic evidence in order to reveal the true purpose and effect of the impugned legislation. Paragraph 17 reads:

> 17. In answer to the whole of the Amended Statement of Claim herein the Defendants say that the true purpose and effect of the legislation in issue should be determined from an examination of:
>
> (a) the statistics of motor-vehicle accidents, the economic loss and social consequence arising from bodily injury and property damage, the distribution of compensation, the social and health insurance plans affected and the cost of automobile insurance to the public;
>
> (b) the history of automobile insurance as provided by the private carriers licensed and regulated in the Province of British Columbia as appears, inter alia, from:
>
> (i) the findings and recommendations of the Royal Commission on automobile insurance dated July 30, 1969, known as the "Wootton Report";
>
> (ii) the legislation subsequent to the "Wootton Report" governing automobile insurance up to the date of the enactment of the legislation in issue;
>
> (iii) the reports of the Special Committees of the Legislature on automobile insurance dated March 18, 1969, and March 24, 1970;
>
> (iv) the regulation of the Insurance industry by the Automobile Insurance Board and in particular the Order made on the 17th day of January, 1972 by the British Columbia Automobile Insurance Board requiring private carriers to set a maximum rate of $15.00 effective March 1, 1972 which evidenced the failure of the private carriers to set a reasonable premium for the schedule of accident benefits following its introduction in 1970 as compulsory coverage.
>
> (v) the failure of the Insurance industry to govern itself so as to take corrective steps to reduce administrative costs, claims costs, commission expenses and to meet the criteria described in the "Wootton Report" and of the Special Committees of the Legislature referred to above in fact and to the satisfaction of the Legislature.

Paragraph 17(b)(iv) may be ignored because no evidence was led of the order or other matters referred to therein.

The "Wootton Report" referred to in the pleading is the report of the Royal Commission on Automobile Insurance, dated July 30, 1968, and presented to the Legislative Assembly on January 23, 1969. The Commission was authorized and its three members were appointed by Order in Council in January of 1966. Mr. Justice Wootton was Chairman of the Commission and his name has been given to the Report. The Wootton Report consists of two volumes which are exs. 39A and 39B. The reports of Special Committees of the Legislature

on automobile insurance dated March 18, 1969 and March 24, 1970, are respectively set out in exs. 40 and 42.

Although, in my view, para. 18 of the defence is of no factual or legal significance, I reproduce it for the sake of continuity:

> 18. The Defendant says that in light of the situation described above in British Columbia and in view of the alternative automobile insurance schemes operated by the Governments of the Provinces of Saskatchewan and Manitoba, the Legislature of British Columbia in 1973 supported by the mandate given to the government of British Columbia by the electorate in August, 1972, developed and adopted its own plan for automobile insurance for the Province of British Columbia.

Paragraphs 19 and 20 of the defence state the position of the defendant Attorney-General in more specific terms:

> 19. The Defendant says that the insurance scheme envisaged by the legislation in issue is designed to provide insurance to deal with loss and injury resulting from automobile accidents as a form of social insurance administered by a public agency. The Defendant says that the true character of the legislation in issue is:
>
> (a) to establish a non-profit scheme for providing universal compulsory automobile insurance within British Columbia;
>
> (b) to provide automobile insurance at the lowest possible cost to the consumers through;
>
> (i) the elimination of profit and,
>
> (ii) the reduction of administrative costs and commissions, and
>
> (iii) the reduction and eventual abolition of adversary approach toward compensation;
>
> (c) to permit the extension of "no-fault" principle;
>
> (d) to provide a more efficient means of loss settlement through the adoption of new techniques;
>
> (e) to permit the burden of insurance to be borne by certain classes of drivers in a more socially just manner;
>
> (f) to provide for one authority to integrate and promote insurance protection, with power to engage in research into matters relating to highway safety, the causes of accidents and their possible correction, to deal with the health and rehabilitation of the injured and to reduce the cost of automobile repairs;
>
> (g) to develop new approaches to the compensation of victims of automobile accidents in a manner similar to the approaches for compensation for workmen's accidents developed by the Workmen's Compensation Board.
>
> 20. In answer to the whole of the Amended Statement of Claim herein and the Particulars thereof the Defendant says that the Automobile Insurance Act and the Insurance Corporation of British Columbia Act lie within the exclusive jurisdiction of the legislature of the Province of British Columbia, as enumerated by Section 92

of the British North America Act, and without limiting the generality of the foregoing fall within the following classes of subjects:

92(13) Property and Civil Rights in the Province

(16) Generally all matters of a merely local or private nature in the Province.

These pleadings in the defence were amplified and explained by counsel for the Attorney-General in his opening. The following passage from the opening is lengthy, but is worth reproducing because it will assist in understanding the scope of the defence:

> Sketched and outlined, the position of the Attorney-General is that the statutory scheme enacted by the Automobile Insurance Act, (and) the Insurance Corporation of British Columbia Act, is the latest effort by the Legislature of this province to address itself to the solution of a social and economic problem in the province by providing a broad net of protection to the public of insurance and compensation against risks arising from motor vehicle accidents. The scheme is in its nature of a public utility scheme.
>
> The province does so pursuant to the province's constitutional power to legislate in relation to property and civil rights and in relation to matters of a local or private nature within the province. Thus the legislation is not in relation to trade and commerce. The dimensions of insurance companies, whether national or international, are not constitutionally relevant to the issues before the court, nor is the legislation aimed at dominion companies. Their corporate status endows them with no immunity from valid provincial laws.
>
> To characterize the legislation impugned, reference will of course be made to the legislation itself. The factual circumstances existing prior to the enactment of the legislative scheme are also important to indicate its aim and purpose. This is particularly true where it is contended that the legislation is an encroachment on the Federal field of dominion companies and results in a confiscation of their assets.
>
> Specifically, the Report of the Royal Commission on Automobile Insurance, notice (this is a corruption — the sense is "known as") the Wootton Report of July 1968, and the Special Legislative Committee Reports of 1969 and 1970 that followed Wootton and preceded the legislation in issue will be tendered in evidence.
>
> The effect of the legislation is also relevant to the extent that it reveals its aim and purpose. Evidence will be adduced to show the role and effect . . . of government automobile insurance.
>
> Evidence has been called on behalf of the Plaintiff Companies as to the nature of the insurance industry today. Evidence will be called on behalf of the Attorney-General to demonstrate that the subject matter of automobile accidents, compensation and insurance have broad ramifications to the individual and family affected and to society as a whole, and that this falls within the jurisdiction of the province.

In order to resolve the issues, I must examine the impugned legislation and decide whether it is in relation to a matter

coming within a class of subjects in s. 91 or in s. 92. This "in relation to" question is to be determined by ascertaining the "pith and substance" of the legislation (*Union Colliery Co. of B.C. Ltd. v. Bryden*, [1899] A.C. 580 at p. 587) or, "the true nature and character of the legislation" (*Russell v. The Queen* (1882), 7 App. Cas. 829 at pp. 839-40).

The impugned legislation is clearly legislation about (to use a convenient neutral word) automobile insurance in the Province and is about the establishment of a monopoly for the Corporation in the Province in that field of insurance. To say this, however, does not assist in the search for the pith and substance of the legislation because insurance is not a designated subject either in s. 91 or in s. 92 of the *British North America Act, 1867*. Therefore, to say that the impugned legislation is about automobile insurance and about a monopoly in automobile insurance does not identify the problem in a constitutional context. Further inquiry is necessary. It must be asked: what is insurance? To put this question more specifically: what are the essential characteristics of insurance which will enable it to be properly identified so that it may be decided whether the impugned legislation is, in law, an encroachment on a federal power.

A convenient starting point is to give the definition of insurance in Black's Law Dictionary, 4th ed. (1951):

> INSURANCE. A contract whereby, for a stipulated consideration, one party undertakes to compensate the other for loss on a specified subject by specified perils. The party agreeing to make the compensation is usually called the "insurer" or "underwriter"; the other, the "insured" or "assured"; the agreed consideration, the "premium"; the written contract, a "policy"; the events insured against, "risks" or "perils"; and the subject, right, or interest to be protected, the "insurable interest." . . . A contract whereby one undertakes to indemnify another against loss, damage, or liability arising from an unknown or contingent event and is applicable only to some contingency or act to occur in future.

(Citations omitted.)

It is immediately apparent that insurance does not exist in a vacuum apart from contracts of insurance; the rights and liabilities which constitute the relationship between an insurer and an insured can only be brought about by agreement. In Canada, disregarding the Territories, which do not enter into the matter, contracts of insurance must be made in one or other of the Canadian Provinces. It is firmly embedded in our constitutional law that contracts of insurance as such fall exclusively within provincial jurisdiction under heading 13 of s. 92, "Property and Civil Rights in the Province". I

note, parenthetically, that I have chosen the words "contracts of insurance as such" deliberately because it is contended for the plaintiffs that the general business of entering into insurance contracts in more than one Province, as opposed to making an insurance contract, or a number of insurance contracts within a single Province, falls within the power to regulate trade and commerce given exclusively to Parliament by the second head of s. 91. The proposition I have stated in this paragraph is sufficiently well established that it need not be supported by extensive reference to authority. The point was first considered in *Citizens Ins. Co. of Canada v. Parsons* (1881), 7 App. Cas. 96. I cite this passage from the judgment, at pp. 109-10:

> The main contention on the part of the respondent was that the Ontario Act in question had relation to matters coming within the class of subjects described in No. 13 of sect. 92, viz., "Property and civil rights in the province." The Act deals with policies of insurance entered into or in force in the province of Ontario for insuring property situate therein against fire, and prescribes certain conditions which are to form part of such contracts. These contracts, and the rights arising from them, it was argued, came legitimately within the class of subject, "Property and civil rights." The appellants, on the other hand, contended that civil rights meant only such rights as flowed from the law, and gave as an instance the status of persons. Their Lordships cannot think that the latter construction is the correct one. They find no sufficient reason in the language itself, nor in the other parts of the Act, for giving so narrow an interpretation to the words "civil rights." The words are sufficiently large to embrace, in their fair and ordinary meaning, rights arising from contract, and such rights are not included in express terms in any of the enumerated classes of subjects in sect. 91.

I do not give further authority on this point because the principle stated in *Parsons* has been consistently followed. If the whole subject-matter of insurance is limited to contracts of insurance, which must be entered into in one or other of the Canadian Provinces, then *prima facie* legislation about insurance is in relation to property and civil rights and is within provincial competence. Counsel for the plaintiffs concede that this Court is bound by the principle enunciated in *Parsons* and do not argue that, in so far as the impugned legislation deals with the form and substance of insurance contracts and prescribes compulsory minimum insurance coverages, the legislation is *ultra vires* the Legislature. Counsel, as will be recalled, does not contend in this Court that it is beyond the power of the Legislature to give the Corporation the power and capacity to engage in automobile insurance provided no monopoly is given. In summary, this is the plain-

tiffs' argument in this Court. It is said that the plaintiffs have been and are engaged in the *business* of entering into contracts of automobile insurance in all or most of the Provinces of Canada. It is said that this business is interprovincial in character. It is then said that the business in which the plaintiffs are engaged interprovincially is affected by an interprovincial interest or concern so that the plaintiffs are not simply engaged in a particular line of business in more than one Province, but are engaged in trade or commerce. Thus, the argument goes, the plaintiffs' business falls under the exclusive federal power to regulate trade and commerce and, therefore, it is beyond the power of the Legislature to shut them out of the automobile insurance business in British Columbia.

It should be understood that it is implicit in Mr. Brown's argument that there is a distinction between entering into a contract or contracts of automobile insurance in a Province and being in the general business of entering into those contracts in more than one Province. On these arguments, Mr. Brown says that the impugned legislation in pith and substance, is in relation to the regulation of interprovincial trade and commerce through the vehicle of a monopoly given to the Corporation.

The argument for the Attorney-General has two branches. First, counsel says, in effect, that the whole content of automobile insurance is contracts, so that the plenary power to legislate in relation to automobile insurance lies with the Provinces, under head 13 of s. 92. It is submitted that the fact that the plaintiffs engage in the insurance business in all or most of the Canadian Provinces is a fortuitous circumstance and does not elevate that business to the category of trade or commerce. I can state the argument best by using the lead plaintiff, the Canadian Indemnity Company, as an example. The Canadian Indemnity Company has its head office in Winnipeg and engages in the insurance business in every Province of Canada. Counsel says that the business in which Canadian Indemnity engages is a business which is wholly within provincial jurisdiction so that the fact that the company engages in that business in more than one Province is irrelevant to the issue of whether the business of insurance is trade or commerce. The argument for the defendant may be put in another, and perhaps clearer, way: if a proprietor of a business theretofore carried on in one Province only, opens a branch office of the same business in another Province, then that will not, *per se*, transform the business into an

interprovincial trade and commerce affected by an interprovincial interest or concern. Whether the business is elevated to trade and commerce, and thereby subjected to federal regulation, will depend upon matters other than the bare fact that the business is carried on in two Provinces rather than one.

The second branch of the argument for the Attorney-General has a broader base. It is that the legislation, in pith and substance, is in relation to matters of a merely local or private nature in the Province and accordingly within exclusive provincial competence under s. 92(16) of the *British North America Act, 1867*. This wider base for the Attorney-General's case is summarized in the passage from the opening reproduced earlier in these reasons.

It may be fairly said that the argument founded on s. 92 (16) is that the legislation, in pith and substance, is in relation to a whole group of problems created by motor vehicle accidents in British Columbia, and that those problems considered separately or as a group are matters of a merely local or private nature in the Province. These problems may be conveniently divided into four groups. I give a summary description of the problems in the following four numbered paragraphs:

(1) Motor vehicle accidents in British Columbia cause injury and death, and damage to property, and as a result there is a need arising in the Province for compensation to be made available to those who have suffered injury or loss and a need for indemnification for those who are responsible for such injuries and losses. The need for indemnification arises under the law of tort which, as I observed earlier, has not been changed by the impugned legislation.

(2) The burden of the cost of medical services provided as a consequence of injuries suffered in automobile accidents in the Province falls upon the citizens of the Province as individuals, or as a whole as taxpayers supporting Government subsidized medical services, hospitalization and rehabilitation facilities. This consequence of motor vehicle accidents, it is said, is a matter of a merely local or private nature in the Province.

(3) Vehicle accidents in the Province, it is said, have various causes, but included in those causes are faulty highway design or construction, unsafe automobiles and unsafe driving. These matters, it is again argued, are matters of a merely local or private nature in the Province.

(4) The cost of automobile insurance for the people of British Columbia.

The sense of the second branch of the argument for the Attorney-General is that it was the legislative goal to solve these problems through the scheme of universal compulsory automobile insurance, with a monopoly for the Corporation, and that in practical effect the scheme will enable the Province to cope with all of those problems — of a merely local or private nature — in a co-ordinated way through the Corporation and at less cost to the people of the Province than would be the case if private insurers continued to provide automobile insurance for owners and drivers of motor vehicles in the Province. It is not the case for the defendant that Autoplan will, in absolute terms, provide automobile insurance at less cost than hitherto has been the case, but is rather that, relatively, the cost will be less to the people of the Province if automobile insurance is provided by the Corporation as a single carrier, because that single carrier will be able to pay out a larger part of each premium dollar for compensation than could private insurers. It is contended that this will be so because the Corporation will not seek a profit and that, being the only source of automobile insurance in the Province, the Corporation will be able to effect savings in adjusting costs, legal costs and overheads. As well, it is suggested that the Corporation will save money because it will be able, as a single carrier, to settle claims more expeditiously. I should note here that it seems to me irrelevant to the constitutional issue whether the compulsory automobile insurance scheme established by the impugned legislation either may, or will, lessen the burden of the cost of automobile insurance for the citizens of the Province. I say this because if the legislative scheme is constitutionally valid, then whether the scheme will actually achieve the legislative goal is a matter for the Legislature and is not the concern of the Court.

Counsel for the plaintiffs led evidence to support the trade and commerce argument. I now turn to this evidence.

PART VIII

THE EVIDENCE LED FOR THE PLAINTIFFS AND FINDINGS OF FACT

During the course of argument, Mr. Brown for the plaintiffs asked me to make a finding of fact in specific terms. The finding of fact asked for is this: that the business carried on by the plaintiff companies is affected by an interprovincial

interest. The word "concern" appears in some of the cases and may I think be properly equated with the word "interest". I should say at the outset that I do not propose to make a finding of fact in the precise terms requested, because, in my view, the word "interest" and the word "concern" import an issue of law as well as of fact. Thus the issue is one of mixed fact and law . The questions of fact seem to me to be these: how do the plaintiffs go about carrying on their businesses (a neutral word in relation to the trade and commerce issue)? What is the nature and extent of their businesses, with emphasis on the interprovincial and, indeed, the international scope of those businesses? And, what is the nature of the automobile insurance provided by the plaintiffs, with particular reference to protection afforded to policy-holders which is not limited to protection in the Province in which policies are written and which give protection extra-provincially.

I now turn to the evidence. The main focus of my attention in reviewing the evidence will be on the testimony of Mr. Vannan and of Mr. Wilkie who were, respectively, president and chief executive officer of the lead plaintiff, the Canadian Indemnity Company, and claims manager for that company. There is no question of the reliability of the testimony given by these witnesses. Mr. Vannan and Mr. Wilkie described the way in which Canadian Indemnity operates throughout Canada and in the United States and gave evidence of the automobile insurance coverages furnished by the company. Counsel did not lead evidence about how the other plaintiff companies carried on business. This was a sensible course because, in my view, I may reasonably assume that the way in which Canadian Indemnity carries on business is typical and that the other plaintiffs, and other insurers in the automobile insurance field, carry on business in much the same way.

The Canadian Indemnity Company is one of the plaintiff companies incorporated by Act of Parliament of Canada. The company was incorporated in 1916 (Can.), c. 52, and was authorized to engage in limited classes of insurance. The legislative history of the company is not important and it will be sufficient to say that the company was subsequently amalgamated with another company and that it is now authorized by its incorporating statutes to engage in some 25 enumerated classes of insurance, one of which is automobile insurance.

The Canadian Indemnity Company is a joint stock company. It is licensed to write general insurance, including automobile insurance, in all the Provinces of Canada (except

automobile insurance in British Columbia after the end of February, 1974). It is authorized to write general insurance in four American States. The company's head and registered office is at Winnipeg, and its executive office is at Toronto. The company's American operations are centred in Los Angeles, California. I will sketch in rather lightly the detail of how Canadian Indemnity operates throughout Canada because its *modus operandi* is about what one would expect. The company has branch offices in each Province which handle all lines of insurance for the company. For the most part, the company operates in each Province through local agents in various communities. Applications for insurance are usually made through local agents who pass applications on to the underwriting department of the provincial branch office. The provincial branch office may, when necessary, solicit underwriting assistance from the company's head office in Winnipeg. Premiums are usually paid to the local agents and then pass through branch offices to the company's head office. The company invests a good deal of the money representing unearned premiums and derives a substantial income from this source.

Usually, claims under policies are brought to the attention of local agents who inform the appropriate provincial branch office. Adjustment of claims is initiated and carried out at provincial level where branch offices are authorized to settle claims not exceeding $10,000. Any claim in excess of that amount is referred to the company's claims department at Winnipeg. This department, in any event, receives copies of all claims filed and particulars of all claims paid by branch offices and, generally, receives copies of adjusters' investigation reports. Provincial branch offices provide the company's head office with statistical information necessary for the company's administration. Each branch office maintains its own bank account. The Winnipeg office is kept informed of the state of those accounts and of reserves held; when reserves are depleted, money is sent from head office to replenish branch accounts.

As might be expected, there is a great deal of communication required between the head office in Winnipeg, the executive office in Toronto and the provincial branch offices. Mr. Vannan testified about the extent of these communications. In 1973, 870,000 individual pieces of mail passed between the company's various offices and there were, in the same year, some 27,000 long distance calls, and 40,000 communications by Telex. In addition to this flow of communica-

tion, there is also a steady flow of company personnel from the executive offices in Toronto and the company's head office in Winnipeg to and from branch offices for audit and other purposes.

It is abundantly clear that a great volume of communications across provincial boundaries and across the international boundary with the United States is an essential feature of the company's business. It is also clear that in the conduct of the company's business in Canada, and internationally, there is a steady flow of money passing from provincial branch offices and from offices in the United States to the company's head office in Winnipeg, or to the company's executive office in Toronto, and that there is a lesser flow from those offices to branch offices in the Provinces and in the United States. This flow of money, whether it be done by cheque, draft or direction to the company's bank, is essential to the conduct of the company's business. In addition to the flow of communications and money there is movement of company personnel across provincial boundaries and into and out of the United States. There is another important characteristic of the company's business which is relevant to the issue with which I am now concerned. It is patent that the company is able to carry on its business throughout Canada and in parts of the United States because the company has and maintains a reservoir or pool of capital for its business purposes. The use of this reservoir of capital is important to the trade and commerce issue in two respects. First, the reservoir of capital enables the company, and thus indirectly the shareholders, to engage in the business of insurance throughout Canada and in parts of the United States. Secondly, the company by engaging its reservoir of capital in doing business throughout Canada, makes that capital available to serve the needs of Canadians requiring insurance in all the Provinces of Canada. The sense of the submission for the plaintiffs is that there is a federal or Canadian interest (as opposed to a provincial interest) in ensuring that the capital of insurers in Canada may be used for their business purposes throughout Canada and that there is a federal interest in ensuring that such capital is available to Canadians throughout Canada to serve their needs for insurance. If the plaintiffs' businesses are thus affected by an interprovincial interest, which I equate with a Canadian federal interest, then it is submitted that it should follow that the plaintiffs, engaged in the insurance business interprovincially, are engaged in "trade and commerce" so that the regulation of their inter-

provincial insurance business is within the exclusive power of Parliament.

I have further evidence relating to the interprovincial and international character of the insurance business. Mr. Wilkie was asked to produce Canadian Indemnity claim files on accidents which had taken place in a Province or State other than the Province or State in which the policy of insurance had been written. Mr. Wilkie prepared a summary illustrating 48 examples of this sort of claim. I do not find the details, as such, of any particular significance. One fairly typical example given by Mr. Wilkie was that of the settlement of a claim by the company for an insured, resident in Ontario, who had purchased insurance from the company in Manitoba and who was involved in an accident in Quebec. It is sufficient to say that I am satisfied that the company has undoubtedly dealt with many claims in which an accident, giving rise to a claim, occurred in a jurisdiction other than the jurisdiction in which the company wrote the policy of insurance.

There are three aspects of the automobile insurance coverages provided by Canadian Indemnity, and by the other plaintiffs, upon which the plaintiffs place strong reliance for the proposition that the automobile insurance business is affected by an interprovincial interest. First, a policy of automobile insurance written in one Province has extraterritorial effect in the sense that if an insured owner or driver has a policy of insurance written in British Columbia and has a motor accident in Canada, elsewhere than in British Columbia, or in the United States, then the insured is protected by his insurance notwithstanding the fact that the accident did not happen in British Columbia. That this is so is clear enough; the evidentiary foundation, if evidence be needed, is to be found in the evidence given by Mr. Wilkie, which I have already reviewed. In my view, the fact that an automobile insurance policy written in British Columbia may be effective outside the Province has no constitutional significance on the trade and commerce issue. After all, it is well known that a contract made in British Columbia affecting the civil rights of the parties may have extra-provincial effect, in the sense that it may be so framed as to cover events which may occur outside the Province. An insurance contract made in a Province gives the insured certain rights against the insurer on the happening of certain events; the fact that the events may occur outside the Province in which the contract was made does not derogate from the character of the transaction: it remains a contract made in the Province. I refer to *Workmen's*

Compensation Board v. C.P.R. Co. (1919), 48 D.L.R. 218, [1919] 3 W.W.R. 167, [1920] A.C. 184. In that case, it was held by the Privy Council that provision of a right under workmen's compensation legislation for a benefit incidental to a contract of employment made in the Province between employer and employee was *intra vires* the Province, notwithstanding that the claims for such benefits were made by dependents of members of the crew of a steamship which was lost with all hands in waters outside Canadian territory.

The second aspect of automobile insurance provided by Canadian Indemnity and, no doubt, by the other plaintiffs as well, is that under arrangements with Provinces and States policies of automobile insurance are accorded recognition in jurisdictions other than those in which policies are written and that those policies, through undertakings given by the insurers, conform to the law of the recognizing jurisdictions. Evidence of this practice was given by Mr. Vannan and Mr. Wilkie. What it amounts to is this; Canadian Indemnity has filed powers of attorney and undertakings in the office of the Superintendent of Motor Vehicles in British Columbia, and in the offices of corresponding provincial authorities in other Provinces and corresponding State authorities in all the States of the American Union (except those four states in which the company is licensed to do business). Copies of the powers of attorney and supporting documents filed with the proper authority in States of the American Union are contained in the file marked ex. 30A. There is some variation in the forms of powers of attorney and in the forms of the resolutions passed by the directors of Canadian Indemnity. However, it is sufficient to say, in general, that by these powers of attorney Canadian Indemnity appoints a named official in each State as its attorney in the state to accept service of notices of proceedings against the company arising out of motor vehicle accidents. The effect of this is that a policy issued by Canadian Indemnity is accepted as proof of financial responsibility in the State in which the power of attorney has been filed. Perhaps the more important aspect of filings made with the appropriate authorities in the States of the American Union is that Canadian Indemnity, vis-á-vis the State in which a filing is made, undertakes that its policies of automobile insurance will be deemed to be varied to comply with the laws relating to the terms of automobile insurance of the State in which the filing is made. The effect of this, on the evidence given by Mr. Vannan and Mr. Wilkie, is that if a policy of automobile insurance is writ-

ten in the Province of British Columbia for a minimum public liability limit of $50,000 and the law of an American State prescribes that the minimum limit be $75,000, then the policy issued by Canadian Indemnity is deemed to be amended accordingly so that, without varying the policy, the insured involved in an accident in that State is covered to the $75,000 limit. A resolution of the board of directors of Canadian Indemnity about filing a power of attorney in the State of Illinois sets out, in clear terms, how Canadian Indemnity policies are varied by resolution and filing, to conform with the law of the State of Illinois. The resolution reads, in part:

> that in all cases, wherein a certificate is filed under said law by The Canadian Indemnity Company, the insurance policy, declared by such certificate, shall be deemed to be varied to comply with the laws of the state of Illinois relating to the terms of a motor vehicle liability policy issued in the state of Illinois.

Essentially the same procedure is followed in the Provinces of Canada. Exhibit 27D is a power of attorney made by Canadian Indemnity appointing, severally, the Superintendents of Insurance in the four western Provinces, the Director of the Motor Vehicle Bureau in Quebec, the Registrars of Motor Vehicles in the remaining Provinces and the Commissioners of the Yukon Territory and the Northwest Territories as the company's attorneys to accept service of process on the company's behalf. By this power of attorney, Canadian Indemnity entered into the following undertakings:

A. To appear in any action or proceeding against it or its insured in any Province or Territory in which such action has been instituted and of which it has knowledge:

B. That upon receipt from any of the officials aforesaid of such notice or process in respect of its insured, or in respect of its insured and another or others, it will forthwith cause the notice or process to be personally served upon the insured:

C. Not to set up any defence to any claim, action, or proceeding, under a motor-vehicle liability insurance contract entered into by it, which might not be set up if the contract had been entered into in, and in accordance with the law relating to motor-vehicle liability insurance contracts of the Province or Territory of Canada in which such action or proceeding may be instituted, and to satisfy any final judgment rendered against it or its insured by a Court in such Province or Territory, in the claim, action, or proceeding, up to

(1) the limit or limits of liability provided in the contract; but

(2) in event an amount not less that the limit or limits fixed as the minimum for which a contract of motor-vehicle liability insurance may be entered into in such Province or Territory of Canada, exclusive of interest and costs and sub-

ject to any priorities as to bodily injury or property damage with respect to such minimum limit or limits as may be fixed by the Province or Territory.

D. That it will not issue motor-vehicle liability insurance cards supplied to it by the Superintendent of Insurance of British Columbia, except to persons who are non-residents of Canada and who are insured with it under a contract of motor-vehicle liability insurance.

The arrangements under which Canadian insurers may file powers of attorney with appropriate authorities of the States of the American Union are reciprocal, that is, American insurers may file powers of attorney with the appropriate motor vehicle authorities in Canada.

The arrangements for reciprocal recognition of automobile insurance policies, and the arrangements whereby automobile insurance policies, pursuant to undertakings given by insurers, no matter how written, conform to the law of the State or Province in which a claim is made, are arrangements made as a matter of comity between the Provinces in Canada, the States of the American Union and, internationally, between Provinces and States. I agree with Mr. Brown's submission that such arrangements are necessary in the sense of being highly desirable in North America where there is an immense amount of travel by motor vehicle for private and business purposes across provincial boundaries and across the international boundary. However, in my view, the arrangements for reciprocal recognition of insurance policies between States and Provinces, and the arrangements by which automobile insurance policies conform to the law of different jurisdictions simply allow an insurer in British Columbia 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, and which will give the insured insurance coverage which conforms to the legal requirements for automobile insurance in any such Province or State. These features, in my view, are no more than attributes of automobile insurance contracts entered into in the Province, which give those contracts certain extraterritorial effect which those contracts would not otherwise have. But this extraterritorial effectiveness does not alter the character of the transaction: the transaction remains a contract of insurance made in the Province and subject to provincial jurisdiction.

The third aspect of automobile insurance which, it is said for the plaintiffs, is interprovincial in nature is the so-called omnibus clause of usual contracts of automobile insurance,

which provides insurance coverage for an unnamed insured to the same extent as if named in the policy. Mr. Brown told me that the usual omnibus clause reads as follows:

> The insurer agrees to indemnify the insured and to the same extent as if named therein every person using or operating the vehicle with his consent against liability imposed by law.

Three sections of the *Insurance Act* relate to insurance for the unnamed insured. The first is s. 225 which reads, in part, as follows:

> 225(1) Every contract evidenced by an owner's policy insures the person named therein and every other person who with his consent personally drives an automobile owned by the insured named in the contract and within the description or definition thereof in the contract against liability imposed by law . . .

Section 226 reads:

> 226. Every contract evidenced by a non-owner's policy insures the person named therein and such other person, if any, as is specified in the policy against liability imposed by law upon the insured named in the contract or that other person for loss or damage.

Section 229 reads:

> 229. Any person insured by but not named in a contract to which section 225 or 226 applies may recover indemnity in the same manner and to the same extent as if named therein as the insured, and for that purpose shall be deemed to be a party to the contract and to have given consideration therefor.

[Sections 217 to 250, rep. & sub. 1969, c. 11, s. 36.]

I preface my comments on the argument for the plaintiffs founded on the omnibus clause by saying that such a clause is necessary because of provisions throughout Canada for vicarious liability similar to those set out in s. 70 of the British Columbia *Motor-vehicle Act*. The plaintiffs' argument is that under an omnibus clause, an insurer who enters into a contract of automobile insurance in British Columbia does not simply enter into a contract in British Columbia but commits itself to entering into contracts of insurance with anyone who, with the permission of the named insured, is allowed to drive the insured's motor vehicle whether in or outside British Columbia. The point of the submission is that if a named insured takes his motor vehicle to Ontario and there consents to another person driving it, then as soon as that other person begins to drive, a contract comes into being in Ontario between the insurer and the unnamed insured. Thus, an insurer in British Columbia making a contract of automobile insurance is committed to an almost indefinite number of further contracts, some or all of which might come into existence outside British Columbia.

Counsel first says that quite aside from the statutory provisions in British Columbia (cited, *supra*), the omnibus clause is alone sufficient to give rise to a contract between the insurer and an unnamed insured when and wherever the named insured permits an unnamed insured to drive. Secondly, it is said that even if, on the omnibus clause itself, there can be no contract between the insurer and the unnamed insured, nevertheless insurance companies would treat the commitment as an "honour contract" so that in practical effect, the insurer would be bound. This submission is based on the evidence of Mr. Vannan that his company would honour the omnibus clause in their contracts with an unnamed insured even if in law it was not bound to do so. The third branch of the argument, as I understood it, is that the position is the same if the omnibus clause is considered in conjunction with the statutory provisions of the *Insurance Act, viz.*: if an unnamed insured drives with consent of a named insured, a contract then comes into being between the insurer and the unnamed insured.

The essential premise of the argument is that a contract of insurance arises between an insurer and an unnamed insured when the unnamed insured, with the consent of the named insured, begins to operate the latter's motor vehicle. I have been given authority said to support this proposition. The first case is *Beswick v. Beswick*, [1968] A.C. 58. It is sufficient to say that *Beswick* does not seem to me to touch the issue. Next, I was referred to *Brown v. Northern Assurance Co. Ltd.*, [1954] 4. D.L.R. 417, [1954] O.R. 794, [1954] I.L.R. 746 (Ont. H.C.) [affd [1955] 2 D.L.R. 606, [1955] O.R. 373, [1955] I.L.R. 857; affd 3 D.L.R. (2d) 705, [1956] S.C.R. 658, [1956-60] I.L.R. 82]. This case was given to me as authority for the proposition that an unnamed insured, apart from statutory provisions, was given a right to indemnification by an omnibus clause. I was referred to a passage from the judgment of Danis, J., at p. 420:

> Having regard to the agreement to indemnify by the Insurance Company, it seems clear to me that Corbett is an "insured" and the claim against him is one "for which indemnity is provided by a motor vehicle liability policy".

Later in the judgment, it is made clear that the view of the Court was that the right was acquired only by statute. The later passage reads: ". . . privity of contract is no longer required by a person insured but not named in the policy". Thus, the issue of the omnibus clause alone creating a contract did not arise.

Counsel also referred me to *Couk et al. v. Ocean Accident & Guarantee Corp. Ltd.* (1941), 33 N.E. 2d 9, a decision of the Supreme Court of Ohio. The Court held that two plaintiffs were entitled to recover under a policy of insurance in which they were not named as insureds. The case supports counsel's assertion that a right to indemnification could arise wholly apart from statutory provisions, but the case does not touch the issue of where and when a contract between the unnamed insureds and the insurer comes into existence. Moreover, there is no discussion in the case of privity of contract or of the absence of consideration.

The next case referred to was *Tattersall v. Drysdale*, [1935] 2 K.B. 174. In that case, Goddard, J. (later C.J.), directed himself to *Vandepitte v. Preferred Accident Ins. Co.*, [1933] 1 D.L.R. 289, [1932] 3 W.W.R. 573, [1933] A.C. 70, a decision in which, quoting Goddard, J.'s summary at p. 180, the Privy Council concluded that a provision in a policy of insurance purporting to give rights to an unnamed insured:

> . . . confers no rights on such a person either at common law or in equity unless there was an intention on the part of the assured to create a trust for such a person, or unless the assured was acting with the privity and consent of such person so as to be contracting on his behalf.

To Goddard, J., who found it necessary to consider s. 36 (4) of the *Road Traffic Act, 1930*, the question (at p. 180) was "whether the statute has conferred a right of action on . . . [an unnamed insured] and thereby altered the law". That is, did the statute confer rights on an unnamed insured which would otherwise have arisen before the Act only where a trust had been created in the favour of that person, or where that person himself could be said to have contracted through an agent. In the result, Goddard, J., did not have to take the *Vandepitte* route to protect an unnamed insured; he simply found that s. 36(4) of the *Road Traffic Act, 1930*, was sufficient to impose liability upon the insurer.

On my consideration of the cases, it does not appear to me that the omnibus clause, itself apart from statutory provisions, gives rise to a contract between an insurer and an unnamed insured which comes into being when and in the place at which the unnamed insured begins to operate a named insured's vehicle. However, it is said, as I have observed, that insurers would honour omnibus clauses even if not legally bound thereby. This may well be so on Mr. Vannan's evidence, but even if it is, the carrying out of the terms of a contract which is not binding, on an honour basis, is irrelevant to the legal issue.

In any event the existing statutory provisions govern this question. Sections 225, 226 and 229 of the *Insurance Act* contemplate a single contract, the contract made between the insurer and the named insured. In my view, the rights of an unnamed insured are rights which arise under that contract which is, in part, imposed by statute so that there is no second contract which springs into existence when an unnamed insured takes the wheel of a named insured's automobile with his consent. I am supported in this conclusion by what was said by Davey, J.A. (later C.J.B.C.), speaking for the British Columbia Court of Appeal in *Hartford Fire Ins. Co. v. Sask. Mutual Ins. Co.* (1966), 59 D.L.R. (2d) 649, 57 W.W.R. 718. At p. 651 D.L.R., p. 721 W.W.R., Davey, J.A., referring to the then equivalent of the present s. 225, said:

> Section 232(1) and (4) provides, in effect that every owner's policy shall insure owner and driver against third party liability, that the driver may recover indemnity as if he had been named in the policy as insured, and that he shall for that purpose be deemed to be a party to the contract and to have given consideration therefor. That clearly indicates one contract insuring both owner and driver.

For these reasons, I am unable to hold that insurance coverage provided for an unnamed insured involves the insurer in a contract apart from the contract entered into with the named insured in British Columbia.

I have now considered the three aspects of automobile insurance which, it is argued for the plaintiffs, demonstrate that an automobile insurance contract written in British Columbia has extraterritorial effectiveness and so should be regarded as interprovincial in character. I have dealt with the three aspects separately, and my piecemeal disposition of the issues perhaps does less than justice to the breadth of the plaintiffs' case. The case, as I understood it, is not wholly or partly dependent upon the rather technical points made concerning the three aspects of automobile insurance which I have discussed. On a broader base, it is argued that the interprovincial and international effectiveness of automobile insurance contracts written in one Province is simply part, paraphrasing Mr. Brown, of the invisible network of the automobile insurance business throughout Canada and the United States. The extra-provincial effectiveness of insurance contracts, it is contended, tends to strengthen the case for the plaintiffs that the insurance business in a modern context (Mr. Brown's phrase) should be categorized as a trade or commerce affected with an interprovincial concern.

The plaintiffs led evidence of the numbers of motor vehicles

crossing interprovincial boundaries and the international boundary with the United States. The point of the evidence was that there is an immense amount of motor vehicle traffic between the Provinces and between Canada and the United States. Drivers and owners of motor vehicles crossing provincial boundaries and the international boundary require insurance. Automobile insurance serves the needs of those drivers and owners and, therefore, it is said that it is a matter of interprovincial concern that those owners and drivers should be free to purchase automobile insurance from any insurer able to serve their needs. This evidence appears to me to be directed rather more to the plaintiffs' citizenship argument than to the trade and commerce argument. However this may be, I should review the evidence and state my findings.

Evidence was led from two witnesses, Mr. Dumbleton, the supervisor of the Eastern Gateway of the Banff National Park which straddles the boundary between British Columbia and Alberta, and Mr. Thexton, a well-qualified expert in market research who specialized in the statistical study of the travel habits of Canadians. The evidence of these two witnesses was aimed at establishing as a fact that there is a very great volume of Canadian motor vehicle traffic crossing provincial boundaries in Canada and crossing the international boundary into the United States, and of American motor vehicle traffic crossing into Canada and returning to the United States. I am satisfied that this is so and I might have taken judicial notice of the well-known fact. Nevertheless, I refer to the evidence to make the picture clear.

I illustrate the immense traffic by extracting a few figures from Mr. Dumbleton's evidence. The number of vehicles entering Banff National Park in the year ending March 31, 1974, was 1,011,798. The number of passengers comes to 2,696,544, including drivers. Of the 1,011,798 vehicles, 45,270 were foreign and carried 130,589 passengers. I illustrate from the evidence of Mr. Thexton. Mr. Thexton produced a summary of vacation travel by Canadians in 1973 (ex. 29A). This discloses that in 1973, there were 5,197,500 vacationing parties in Canada. A vacationing party is a group of people travelling together. The total number of automobiles crossing provincial borders in 1973 was 981,300.

In direct examination, Mr. Vannan (chief executive officer, Canadian Indemnity) was asked about the magnitude of the insurance business. Mr. Vannan told me, relying on his own knowledge of the industry and on the Blue Book published by

the Federal Superintendent of Insurance that, including all kinds of investments, the total assets of all the general insurance companies in Canada was something in the order of $3,350,000,000. This figure excludes life insurance and accident and sickness insurance. Mr. Vannan was asked to give me some idea of the size of the labour force involved in the conduct of the general insurance business. Mr. Vannan did not have accurate statistics but, working with what he had and working from the number of people employed with Canadian Indemnity, Mr. Vannan estimated that there were probably some 30,000 people involved in the insurance business in Canada and, perhaps, two or three times that number if one included personnel in insurance agencies and adjusters. So, he said, at a guess, that there were approximately 100,000 people involved in the industry in Canada. I do not doubt, although the figures given me are approximations, that they are accurate enough for practical purposes.

In the introductory portion of these reasons, in which I described the plaintiff companies, I gave some statistics of the volume of insurance written in Canada. Further detail is not necessary here so that I need not repeat or amplify the figures given earlier.

I did not understand Mr. Brown to argue that the volume of business *per se,* or the number of employees *per se* had relevance to the constitutional issue. The issue, after all, is not whether the Province has purported to regulate the interprovincial trade or commerce of a particularly large industry, but whether the business which the Province has purported to regulate, large or small, is a regulation of trade and commerce beyond the power of the Province. On this point, I refer to the judgment of Duff, J., in *Re Insurance Act (Can.) 1910* (1913), 15 D.L.R. 251, 48 S.C.R. 260, 5 W.W.R. 488 [affd *sub nom. A.-G. Can. v. A.-G. Alta. and A.-G. B.C.*, 26 D.L.R. 288, 10 W.W.R. 405, 34 W.L.R. 192], in which his Lordship said, at p. 304 S.C.R.: "I do not think that the fact that the business of insurance has grown to great proportions affects the question in the least."

The argument for the plaintiffs does not rest on the size, as such, of the insurance business, but rather on the assertion that the businesses carried on by the plaintiffs are affected by an interprovincial interest so that they should be categorized as falling within the trade and commerce clause (s. 91(2)).

The facts I find established are these. In what follows, I treat the evidence about Canadian Indemnity as typical and I generalize therefrom. The plaintiffs carry on the business of

entering into automobile insurance contracts in the Provinces of Canada. In this sense, the businesses they carry on are interprovincial. The plaintiffs are able to carry on business interprovincially because each has a sufficient central reservoir of capital to enable it to carry on business throughout the country. By so carrying on the business throughout the country, each of the plaintiff companies makes its central reservoir of capital available to serve the insurance needs of all Canadians. In carrying on business throughout Canada, each plaintiff company makes available to Canadians throughout the country such expertise as it may have in the insurance business. Each plaintiff company is able to carry on business throughout Canada by means of communications of various kinds passing between head offices and provincial branches. An essential feature of the businesses carried on throughout Canada by each of the plaintiff companies is a flow of money (whether by cheque, draft, banker's order or debits and credits is immaterial), from agents to branch offices, from branch offices to head offices, and a reverse flow from head offices to branch offices for operating expenses and for the settlement of claims.

PART IX

THE EVIDENCE LED FOR THE ATTORNEY-GENERAL AND THE "MATTER" OF THE LEGISLATION

I return now to the central issue of the "matter" of the impugned legislation. I propose to adopt the course indicated by Cartwright, J. (later C.J.C.), in *Munro v. National Capital Com'n* (1966), 57 D.L.R. (2d) 753, [1966] S.C.R. 663. In that case, Cartwright, J., pointed out that it is first necessary to decide the matter in relation to which the impugned legislation was enacted and, that task having been carried out, then to decide whether the subject-matter comes within any of the classes of subjects assigned exclusively to provincial jurisdiction by s. 92 of the *British North America Act, 1867*. The utility of this approach is obvious, because if the subject-matter of the legislation does not fall within any heading of s. 92 of the Act, then the legislation is invalid because the Provinces have no powers other than those specifically allocated by that section. This approach, in my respectful view, is essentially the same as that adapted by Sir Montague E. Smith in *Citizens Ins. Co. of Canada v. Parsons* (1881), 7 App. Cas. 96, although Sir Montague E. Smith pointed out

that if the legislation *prima facie* falls within one of the classes of subjects enumerated in s. 92, then the further question arises (see p. 109):

> . . . whether, notwithstanding this is so, the subject of the Act does not also fall within one of the enumerated classes of subjects in sect. 91, and whether the power of the provincial legislature is or is not thereby overborne.

It will be useful to bear in mind the narrow focus of the plaintiffs' attack, in this Court, on the impugned legislation. The plaintiffs do not question the power of the Province to establish a corporation which, as agent for the Crown, is authorized to engage in automobile insurance and in other classes of insurance. Nor do the plaintiffs question the power of the Legislature to prescribe the nature of the compulsory insurance coverages, or the power of the Legislature to prescribe that, as a condition of lawful driving in British Columbia, drivers and owners of motor vehicles be insured to minimum limits. The plaintiffs' case in this Court has a narrow base: they say that the Legislature was without power to create a monopoly for the Corporation. Put shortly, the question for this Court is whether the legislation, establishing as it does a monopoly for the Corporation in automobile insurance, is in relation to a matter which lies exclusively within provincial jurisdiction under s. 92. This is not to say, of course, that the legislation, apart from those provisions which establish a monopoly for the Corporation, is to be ignored. The legislation as a whole, in so far as it reveals a legislative plan or scheme, is to be taken into account to ascertain the matter of the legislation and whether, in pith and substance, the matter is in relation to a class of subject enumerated in s. 92.

It will be recalled that in Part VII of these reasons I outlined the argument for the Attorney-General to the effect that the impugned legislation is in relation to a matter of a merely local or private nature in the Province, namely, the group of problems arising from motor vehicle accidents, and that I divided those problems into four sub-groups. I need not repeat that analysis here. I shall first look to the legislation itself and then turn to the extrinsic evidence led for the Attorney-General.

I have already described the impugned legislation so that any further description would be superfluous. I simply note that the impugned legislation clearly sets up a universal compulsory scheme of automobile insurance in the Province with a monopoly for the Corporation. The plaintiffs say that the scheme and the monopoly are what the legislation is in rela-

tion to, and that on the face of the legislation it is impossible to say that it is in relation to anything other than setting up the compulsory scheme and the monopoly. Put differently, the plaintiffs say that the legislation itself does not reveal anything more than that the legislative goal was to put the Crown provincial into the automobile insurance business with a monopoly and does not reveal any matter of a merely local or private nature in the Province with which the Legislature was concerned. Counsel for the plaintiffs, in support of this proposition, point to s. 5(1)(a) of the ICBC Act which gives the Corporation the power and capacity to engage in the business of insurance and re-insurance in all classes. About this they argue, correctly, that there is no suggestion in the legislation or in the evidence of any merely local problem which might be solved by the Corporation writing, for instance, fire, boiler or earthquake insurance.

However, the Corporation being authorized to go into classes of insurance other than automobile insurance is not, in my view, at the heart of the over-all legislative plan as revealed by the impugned statutes and, properly regarded, is a power which is peripheral to the principal subject-matter of the legislation. In any event, the grant of power and capacity to the Corporation to engage in all classes of insurance is not under attack in this Court.

It would be wrong for me to assume, without further inquiry, that the legislative purpose in enacting the impugned legislation was no more than simply to put the Crown provincial into the insurance business, with a monopoly for the Crown's agent, the Corporation. This further inquiry will carry me to a consideration of the evidence led for the Attorney-General. But, before discussing that evidence, there are two sections of the impugned legislation which I should consider.

Section 9 of the *Automobile Insurance Act* gives the Corporation powers in addition to those conferred upon it by the ICBC Act. Section 9 reads:

> 9(1) In addition to the powers granted under any other Act, the corporation has the powers and the duties conferred and imposed upon it under this Act and, without limiting the generality of the foregoing, the corporation may
>
> (a) carry out either alone or jointly with any other board, commission, corporation, department or agency of Government, or any private person, agency, or association any programme of research, education, training, competition, or the like relating to highway safety;
>
> (b) promote or carry out programmes of research into the causes of accidents and research into the more equitable

distribution of losses resulting from highway traffic accidents;

(c) establish and maintain one or more repair shops to investigate, study, and apply techniques used or to be used in the repair of motor-vehicles and trailers and to analyze the cost of repairs; and

(d) negotiate and bargain with persons engaged in the business of motor-vehicle and trailer repairs with a view to establishing fair and reasonable prices for motor-vehicle and trailer repairs in relation to which payments may be made under this Act.

Section 26 of the ICBC Act gives the Corporation additional powers:

> 26. The corporation may, either alone or in co-operation with one or more departments of Government, persons, other corporations, boards, or commissions, introduce, establish, supervise, finance, and promote research or educational programmes relating to health, rehabilitation, safety, and the reduction of risk in respect of any branch or class of insurance in which the corporation is engaged.

It is suggested that these sections are of assistance in revealing the legislative purpose. The power given in s. 9(1)(d) of the *Automobile Insurance Act* was obviously necessary in order that the Corporation could carry out its functions. Those powers conferred by cls. (a), (b) and (c) are not in any way determinative of the constitutional issue because they might well have been given to the Corporation simply as powers collateral to those allowing it to write automobile insurance and, in my view, the three clauses do no more than give some slight indication that the Legislature may have had some broader purpose in mind than simply creating a monopoly in automobile insurance for the Corporation. I take the same view of s. 26 of the ICBC Act.

When discussing Autoplan, counsel for the defendant emphasized those provisions by which driver's insurance and owner's insurance were to be made coterminous with driver's licences and motor vehicle licences, and suggested that these provisions indicate an over-all concern for problems local to the Province. I am unable to accede to that suggestion because, in my view, the coterminous provisions are simply designed to tighten up the administrative machinery in order to ensure that drivers and owners of motor vehicles do not drive without the compulsory insurance. Coterminous provisions might well have been worked into an over-all insurance plan to be served by private insurers. These show that the Legislature may have thought that there was an administrative problem, and probably did, but I do not think the mat-

ter of the legislation is to be found in these administrative provisions.

I now turn to the evidence led for the Attorney-General. *First*, counsel for the Attorney-General invited me to consider the legislation preceding the enactment of the impugned statutes. *Secondly*, counsel asked me to consider the Wootton Report and the reports of the two special committees of the Legislative Assembly. I should note that, although those reports are part of legislative history, I will consider them independently of the preceding statutes. *Thirdly*, counsel asked me to consider the evidence of the situation in the Province in respect to motor vehicle accidents and the consequences thereof. *Fourthly*, counsel asked me to consider the evidence of the way in which Autoplan functions in a practical way, that is to say, the evidence of the practical effect of the impugned legislation.

I have in mind the limited utility of a consideration of legislative history and refer to *Proprietary Articles Trade Ass'n v. A.-G. Can.*, [1931] 2 D.L.R. 1, 55 C.C.C. 241, [1931] A.C. 310, and to what was said by Lord Atkin at p. 4 D.L.R., p. 317 A.C.:

> Both the Act and the section have a legislative history, which is relevant to the discussion. Their Lordships entertain no doubt that time alone will not validate an Act which when challenged is found to be *ultra vires*: nor will a history of a gradual series of advances till this boundary is finally crossed avail to protect the ultimate encroachment. But one of the questions to be considered is always whether in substance the legislation falls within an enumerated class of subject, or whether on the contrary in the guise of an enumerated class it is an encroachment on an excluded class. On this issue the legislative history may have evidential value.

I do not propose to set out a complete history of the provincial legislation relating to automobile insurance, but will confine my attention to the legislation that reveals a concern on the part of the Legislature, not simply for regulating private insurers as such, but for establishing private insurance as the vehicle for solving problems arising from motor vehicle accidents in the Province. These problems were the need to provide compensation for injury, death or property damage and the need to provide indemnification for those responsible for such losses.

The legislative history shows a steadily increasing regulation of insurers and of insurance in British Columbia. I was first referred to the *Insurance Act*, 1913 (B.C.), c. 33, about which it is sufficient to say that it provided for licensing insurers in the Province and, essentially, was legislation regula-

tory of the insurance business. I was referred next to the *Automobile Insurance Policy Act*, 1922 (B.C.), c. 35, which appears to be the first restriction by the Province of the right of an insurer and an insured freely to enter into such contracts of insurance as they might agree upon. The Act provided for statutory conditions in policies of automobile insurance, the introduction of which was, in my view, intended by the Legislature to ensure that adequate protection be given to insured persons in the Province. Viewed in that light, the statute compelled insurers to provide the sort of insurance which the Legislature thought necessary to meet local needs.

Counsel referred to the *Contributory Negligence Act*, 1925 (B.C.), c. 8, but I do not think that this statute has any particular significance. The statute effected a well-known change in the law of tort and its only connection with automobile insurance, as such, was that private insurers continued to insure, meeting the changed needs for insurance.

The most significant statutory changes were enacted in 1932. By the *Insurance Act Amendment Act*, 1932 (B.C.), c. 20, s. 5, s. 159F was added to the then *Insurance Act*. That section made omnibus provisions covering an unnamed insured compulsory in policies of automobile insurance. Section 159F (1) and (2) are the progenitors, in sense and effect, of the present ss. 225 and 229 of the *Insurance Act*, sections which I discussed at some length earlier in these reasons. The point to be made is that by this amendment the Legislature was not simply regulating insurance but was compelling insurers to serve what must have been seen as a local need in the Province — coverage for the unnamed insured.

By enacting the *Motor-vehicle Act Amendment Act*, 1932 (B.C.), c. 37, the Legislature made its first move to relate automobile insurance to driving privileges. The Act provided for the suspension of a driver's licence where it was shown that a driver had been unable to satisfy a judgment against him for damages arising out of a motor vehicle accident. This, it appears to me, is the first tentative step toward compulsory automobile insurance, because drivers would obviously be encouraged to seek the protection of automobile insurance against third party liability to avoid the risk of licence suspension.

The *Motor-vehicle Act Amendment Act*, 1937 (B.C.), c. 54, s. 11, enacted s. 74A of the *Motor-vehicle Act* and thereby extended vicarious liability by rendering the owner of a motor vehicle liable for the negligence of defined classes of persons, *viz.* members of his family living with him in his household

and all persons driving his motor vehicle with his consent. The section was clearly intended to benefit persons injured in accidents because it allowed those injured to sue the owner of the motor vehicle and thus, by the omnibus clause and by the statutory provisions providing for compensation for unnamed insured drivers, gave victims the right to recover from the owner's insurer.

Further steps were taken toward making automobile insurance compulsory with the enactment of the *Motor-vehicle Act Amendment Act*, 1947 (B.C.), c. 62. This amending Act repealed [by s. 16] Part II of the *Motor-vehicle Act* and replaced it with a new Part II containing, among others, a new s. 85 which provided, subject to certain exceptions, that the Superintendent of Motor Vehicles was obliged to suspend a driver's licence and motor vehicle registration where driver or vehicle were involved in a motor accident causing bodily injury, death or damage to property, except for those who could produce a motor vehicle liability insurance card or could prove financial responsibility. The 1947 legislation also provided for the establishment of a Unsatisfied Judgment Fund, and although the sections enacted were never proclaimed, the fact of the provisions being enacted is the first legislative recognition that protection was necessary for persons suffering losses at the hands of an uninsured driver.

In 1961, by the *Insurance Act Amendment Act, 1960*, 1961 (B.C.), c. 29, the Legislature made membership in the Assigned Risk Plan mandatory for all insurers licensed in the Province. At some time before the enactment of this amending Act, insurers had voluntarily established an Assigned Risk Plan under which coverage was provided to persons with bad driving records who might otherwise have had difficulty obtaining insurance. The Plan, in theory at least, made automobile insurance universally available to drivers in the Province. By compelling licensed insurers to subscribe to the Assigned Risk Plan and thereby to be governed by its provisions, it appears to me that the Legislature recognized that it was desirable that automobile insurance should be universally available in British Columbia, and also that it was desirable that all licensed insurers should participate in the risk of making such insurance available to all drivers.

By the *Traffic Victims Indemnity Fund Act*, 1961 (B.C.), c. 63, the Legislature incorporated a body named the "Traffic Victims Indemnity Fund" whose objects and powers, *inter alia*, under s. 3, were ". . . generally to ensure that victims of uninsured or otherwise irresponsible motorists are expedi-

tiously indemnified to the extent prescribed from time to time by or pursuant to the *Motor-vehicle Act*". The Act provided that the Corporation was to consist of two groups, the second of which, by s. 5, was to be comprised of the insurers from time to time licensed to issue policies of motor vehicle insurance in the Province. Section 20 of the Act provided:

> 20. The cost of operating the Corporation, together with any obligations it may assume, shall be shared by all members of Group Two rateably in proportion to each such member's share of the total motor-vehicle liability insurance premiums written in the Province of British Columbia.

In this way, the Legislature saddled private insurers with the responsibility for providing compensation to victims of uninsured or otherwise irresponsible motorists. There can be no doubt that there was in the Province a problem about the provision of compensation for victims of motorists who drove without insurance, and the method chosen by the Legislature to solve that problem was to cast the burden on private insurers.

In 1969, the Legislature amended the *Motor-vehicle Act* by enacting 1969 (B.C.), c. 20, s. 2 which added s-s. (2*a*) to s. 18 of the *Motor-vehicle Act*. The new subsection provided:

> 18(2*a*) No person shall drive or operate a motor-vehicle on a highway unless he is insured under a valid and subsisting motor-vehicle liability policy or gives to the Superintendent proof of financial responsibility, and holds a motor-vehicle liability insurance card or a financial responsibility card.

Section 18(2*b*) made a breach of s. 18(2*a*) an offence. The significant fact about this amendment is that it is not, in essence, legislation about insurance at all. While it would affect private insurers in the automobile field, the legislation must be seen as reflecting the view of the legislators that insurance was necessary in the Province in order to compensate persons who suffered losses in motor vehicle accidents at the hands of wrongdoers, and to indemnify those responsible for the losses.

Also in 1969, the Legislature made more extensive amendments to the *Insurance Act* by 1969 (B.C.), c. 11. Section 250P was added [by s. 36] to a new Part VII to provide that the Lieutenant-Governor in Council might establish a fund named the "British Columbia Automobile Insurance Fund". Subsection (2) of s. 250P reads:

> 250P(2) The purpose of the automobile insurance fund is to provide all or part of the motor-vehicle liability insurance prescribed under Part VII of this Act to every person entitled thereto in the event that the insurance so prescribed is not otherwise ob-

tainable at a cost that is, in the opinion of the Lieutenant-Governor in Council, commensurate with the risk.

Subsection (3) of s. 250P authorizes the Lieutenant-Governor in Council to make regulations, among others, to prescribe the rates and charges payable by persons applying for automobile insurance under the Act, to administer the fund, to assess injuries and damage and payment of claims from the fund, and to govern any other necessary matters. In sum, the section demonstrates that the Legislature, in 1969, was concerned about the cost of automobile insurance to the people of the Province.

By s. 250M of the same Act, the Lieutenant-Governor in Council was authorized to establish the "British Columbia Automobile Insurance Board". Section 250O prescribes the duties, functions and powers of the Board, as follows:

> 250O(1) The board shall have the duties, functions, and powers as may be imposed on or granted to it under this Act or under any other Act of the Legislature.
>
> (2) Without limiting the generality of subsection (1), the board may
>
> (*a*) investigate all matters respecting automobile insurance in the Province, including rates, coverage, cost, and benefits provided, and make recommendations to the Minister;
>
> (*b*) correlate statistical date to establish in each year the maximum premium chargeable by insurers for insurance required under this Part;
>
> (*c*) administer moneys paid to the board under any other Act for the purpose of
>
> (i) automobile-driver education and training; or
>
> (ii) research respecting automobile and highway safety; and
>
> (*d*) make recommendations to the Minister respecting the provision of automobile insurance by the Government of the Province in the event of failure or refusal by insurers to provide adequately for automobile insurance for the persons entitled to such insurance.

The significance of the creation of a board clothed with these powers appears to me to be that the Legislature was concerned about whether conventional automobile insurance could meet provincial needs.

In order to complete the legislative history, I note that the minimum limit for liability coverage prescribed by statute increased in various steps, between 1932 and 1974, from $5,000 to $50,000.

In my view, the legislative history which I have recited demonstrates an ever-increasing concern in the Legislature for the problems created by motor vehicle accidents in the

Province, that is to say, problems of compensation and indemnification. It is clear from the legislative history that there has been a concern for more than the technical regulation of the automobile insurance business. Amendments to the *Insurance Act* and to the *Motor-vehicle Act* show a fundamental awareness of the problems described. The ever-increasing regulation of automobile insurance and interference with the right of the insurer and the insured freely to contract were not aimed at controlling the automobile insurance business as such, but rather were aimed at providing solutions to what the Legislature from time to time saw to be local problems in the Province. Regulation of the automobile insurance business was merely the vehicle by which the problems were sought to be solved.

I pass now to the branch of legislative history which consists of the Wootton Report and of the reports of the two Special Committees of the Legislature. It will be useful to recall that the Royal Commission on Automobile Insurance, chaired by Mr. Justice Wootton, was appointed in January, 1966, and that the Commission's report, which came to be known as the Wootton Report, was presented to the Legislative Assembly in January of 1969. The two Special Committee Reports are dated respectively March 18, 1969, and March 24, 1970.

There was much argument about the admissibility in evidence of these reports. In reasons for judgment given during the trial and dated July 3, 1974, I held that the reports were admissible for limited purposes. I reproduce what I said in admitting the Wootton Report:

> A Royal Commission report, if admissible in a constitutional case, may, as I understand the cases, be used only as being the material before the Legislature which may reveal the problem confronting that body, sometimes referred to as the "mischief" or the "evil" with which the Legislature was concerned. In short, a Royal Commission may give legislation some context which otherwise would be unrevealed.

Of the Special Committee Reports, I said:

> I can see no reason in principle, if I am correct in holding that the report of the Wootton Commission is admissible for the limited purposes stated earlier, why the reports of the Special Committees of the Legislative Assembly should not likewise be admissible for the same purposes.

The argument against the admissibility of the reports rested, in part, on the proposition that neither the Wootton Report nor the Special Legislative Committee Reports were before the Legislature that enacted the impugned legislation.

The argument was that a new Legislative Assembly was elected in August, 1972, at which time the former opposition formed the present provincial Government. I did not deal specifically with that argument. I wish to add now that I am not prepared to take the limited view that legislators would not have been aware of such important matters as the report of the Wootton Commission and the reports of previous legislative Committees, any more than I would be prepared to take the view that members of the Legislature should be assumed, unless the contrary was shown, to be unaware of preceding legislation.

Because the terms of reference of the Wootton Commission indicate the nature of the concern of the then Legislature for the problems arising from motor vehicle accidents in the Province, I reproduce them in full:

> To make inquiry into and concerning monetary losses and expense resulting from motor-vehicle accidents involving persons adverse in interest and into feasible and sound proposals for moderation thereof, and in so doing to inquire particularly into:
>
> (a) the costs and delay involved in the determination and recovery of compensation by victims of motor-vehicle accidents,
>
> (b) the portion of total damages that are recovered by victims of motor-vehicle accidents by court proceedings and by settlement and whether adequate compensation is obtainable by such victims under present procedures,
>
> (c) the cost to insurers, to persons who pay insurance premiums, and to the public generally of providing present forms of automobile insurance determined on the basis of past and current experience and whether the cost is in proper relationship to the effective protection obtained,
>
> (d) the operation of the arrangements with Traffic Victims Indemnity Fund,
>
> (e) the changes in the need for insurance resulting from the availability of hospital insurance, prepaid medical services plans, and compensation under the *Workmen's Compensation Act*,
>
> (f) the justification for recent variations in automobile insurance premium rates,
>
> (g) whether the public of this Province will be better served by the continuation of present procedures for the recovery of damages arising out of motor-vehicle accidents and by the preservation of present forms of insurance coverage or by some variation or variations thereof, or by a plan whereby compensation for damage arising from motor-vehicle accidents may be paid without determination and attribution of responsibility therefor, or by a combination thereof,
>
> (h) whether such a variation or a plan for compensation or such a combination, if recommended, should be administered privately or by or through a governmental department or agency or a combination thereof, and

(i) the method and procedures that would be most effective in the introduction of change if recommended.

In the introduction to the Report, at p. 10, the Commissioners set out the problem as they saw it:

> Before advancing further it should be said, as is quite apparent, that automobiles have become a great problem to all communities having them. With that we have the problems of the safety of the citizen, his healing and recovery when he is injured, his rehabilitation, and his compensation, and the compensation of his dependents if he be slain upon the highway. The automobile (or, rather, the motor vehicle) has become ubiquitous.

Statistics were then provided of deaths caused by automobile accidents which demonstrated what the Report calls the "accident explosion". At p. 10, the Commissioners give statistics of the increase in the cost of automobile insurance over the period 1960-64, in which the numbers of claims rose by 61%. I do not propose to set out in detail the statistics referred to in the Report because, by and large, they are about what one would expect drawing on one's ordinary common knowledge. It is sufficient to say that throughout the Report the Commissioners emphasize the increasing cost of automobile insurance and the ever-increasing amounts paid out for compensation.

In the following numbered paragraphs I shall summarize what appear to me to be the main problems to which the Report draws attention.

(1) The Commissioners were concerned in chapter 1 about "cost and delay in the determination and recovery of compensation". "Cost" was said to include legal fees, and adjusters' fees, both of which contributed to increase ultimate claims cost. "Delay" in the settlement of claims was seen by the Commissioners as an undesirable characteristic of automobile insurance provided by private insurers under a fault system.

(2) In chapter 2, the Commissioners considered the subject of recovery and adequate compensation, and concluded at p. 112:

> It is apparent from (our) analysis that overall compensation received by the victims of automobile accidents falls far short of their economic loss. Specifically, for the 1,253 cases surveyed, such losses totalled $2.7 million while compensation amounted to under $900,000.

(3) Chapter 8 was devoted to the question of competition between private insurers, a question that was also considered, in part, in chapter 11. It was the view of the Commissioners that there was little true competition between insurers in setting premium rates and that this was attributable primar-

ily to a centralized rate-setting procedure. While the Report did not conclude that the private insurance industry was a "natural monopoly", nevertheless at p. 386, it was said by the Commissioners, in the course of a discussion of insubstantial productivity increases, that there was "a state of competition too comfortable to be effective".

(4) In chapter 9, the Commissioners dealt with the cost to insurers of providing automobile insurance. The problem which the Commission saw was an inordinately high percentage of each premium dollar consumed by expenses.

(5) The Commissioners also considered the cost of automobile insurance in chapters 10 and 11 which were respectively entitled "The Cost to Persons who Pay Insurance Premiums of Providing Present Forms of Automobile Insurance" and "The Cost to the Public Generally of Providing Present Forms of Automobile Insurance". Conclusions about these subjects were stated in chapter 12, the most significant of which, at p. 406, relates to cost:

> The Commissioners conclude that, without doubt, the sizable sums presently being spent to provide protection do not represent an effective, much less optimum use of such monies.

(6) In chapter 13, the Commissioners directed their attention to traffic safety, because it was their opinion, stated in the first sentence of the chapter that:

> The premiums on automobile insurance are regulated in a considerable degree by the incidence of accidents upon the highway. The causes, frequency and severity of these, therefore, warrant the most careful consideration.

(7) In chapter 15, the Commissioners considered the way in which automobile insurance was related to schemes of compensation for hospital and medical services, to hospital insurance and prepaid medical service plans already existing in the Province, and to services provided under the *Workmen's Compensation Act*, R.S.B.C. 1960, c. 413 [now 1968 (B.C.), c. 59]. The Commissioners saw that there was only a limited recovery of hospital and medical costs by subrogation from the proceeds of automobile insurance and the unrecovered costs, it was said, were a burden on the citizens of the Province as a whole.

I have, I think, sufficiently pointed out the primary problems indicated by the Wootton Report. Some of the detailed recommendations made by the Commissioners may be found in chapter 20 where, in broad terms, it was recommended that a wholly no-fault scheme of automobile insurance be adopted, a scheme which, of course, would have brought to an end

actions in tort for compensation for losses suffered in motor accidents. In chapter 24, the Commissioners dealt with the question of whether this recommended scheme of no-fault insurance should be provided by private insurers or by the Government of the Province. At p. 729, the Report states:

> The Commission, based on its study of the advantages and disadvantages of each method outlined in this Chapter, recommends that, initially, the opportunity be given to the private insurers solely to market in British Columbia the Basic Policy, the Supplementary Insurance, and the Collision Coverage.
>
> However, if the industry shows a disinclination to participate in the offering to the public of the new types of contracts recommended by the Commission, and under the conditions which it has proposed, or other conditions satisfactory to government, or at a later date shows a disinclination to compete, then the Government of British Columbia should take over the sole selling in British Columbia of all automobile insurance.

I should note, in order that this quotation will be comprehensible, that the basic policy, the supplementary insurance and the collision coverage referred to are the forms of no-fault insurance recommended by the Commissioners.

It remains for me to consider the two reports of the Special Committees of the Legislative Assembly. The first Report was the work of the "Capozzi Committee" whose terms of reference were

> . . . to study the report of the Royal Commission on Automobile Insurance . . . and to consider any legislation respecting automobile insurance and any other legislation affected thereby that may be referred by this House to the Special Committee and to report their recommendations to this House . . .

This Committee accepted the Wootton Report recommendation that automobile insurance continue to be provided by private insurers, but suggested that the Province investigate the possibility of providing basic no-fault coverage. I agree with Mr. McAlpine that the significance of this Report is that the Committee did not adopt the recommendation of the Wootton Report that the Province turn to a wholly no-fault insurance scheme for compensation of victims of automobile accidents.

The second Special Committee of the Legislature was charged by its terms of reference with the duty "to consider whether automobile insurance premiums in British Columbia, including the premiums charged for accident benefits, are commensurate with the risks assumed". The Report of this Committee recommended the establishment of an automobile insurance board with power to investigate insurance costs and to institute driver training schools and defensive driving

courses, and suggested that motor vehicle licence plates be issued only upon proof of insurance coverage.

The third heading of the evidence led for the defendant is the one which I have earlier called "evidence about motor-vehicle accidents and the consequences thereof". This evidence was directed toward showing the situation in the Province and the extent and nature of the problems created by motor vehicle accidents. It is notorious that there were and are an immense number of motor vehicle accidents in Canada each year and an immense number, relatively, in British Columbia. It is also well known that a great many people are injured in motor accidents in each year and many die as a result of motor accidents, and that there are large losses from property damage. Statistics on injuries, deaths and property damage caused in motor accidents have no particular constitutional value because it is the problem, not its size, that is of greatest concern. For this reason, I do not propose to recite statistics at any length, but shall do so only when it seems appropriate to illustrate a point.

The first witness on this branch of the evidence was Mr. John Green who is the manager of the Saskatchewan Government Insurance Office, a member of the Bar and a man who has had a long and distinguished career in the public service of Saskatchewan in forming and administering the Government automobile insurance scheme there. Mr. Green's evidence was lengthy and detailed. I think it sufficient to summarize its main elements. Mr. Green's basic premise, which seems to me indisputable, is that the automobile in Canada today is not a luxury but is a necessity of day-to-day life. This being so, and there being inherent risks of accidents, it is inevitable that there will be automobile accidents with consequential property damage, personal injuries and death. The heart of Mr. Green's evidence was that problems created by automobile accidents cannot be separated and dealt with piecemeal in modern society. Mr. Green's main point was that, for society, there is simply one overall problem consisting of the causes of automobile accidents and all the consequences flowing from automobile accidents. The theme running through Mr. Green's evidence was that it was desirable to have one over-all legislative scheme and one co-ordinating authority to deal with all the problems involved in the causation and consequences of motor vehicle accidents, rather than to take a piecemeal approach with regulated private insurers coping with the compensation aspects of the overall problem, and various Government agencies and departments dealing with the other aspects of the overall problem.

I did not find the detail of Mr. Green's evidence to be of any particular assistance and whether Mr. Green is right or wrong is not, in my view, material. The point is that I do not think that his opinion or the detail of his evidence in support of his opinion is of assistance in the search for the matter of the legislation. At the highest, it opens the door to the possibility that the legislative aim and purpose was to establish a general scheme for the solution of all problems connected with motor vehicle accidents.

Mr. K. V. Godfrey (a witness for the defendant) is a well-qualified engineer and a research officer with the British Columbia Research Council and, as an officer of the Council, has participated in a series of studies conducted by the Council of the effect of the demerit system on driver behaviour, and enforcement of legislation in respect to driving, the effect of advertising on driving behaviour and the effectiveness of seat-belts. Put broadly, the Council's studies were designed to find out why people become involved in accidents and the consequences for people involved in accidents. Counsel for the Attorney-General told me that Mr. Godfrey's evidence was directed to show the magnitude of the problems connected with motor vehicle accidents in British Columbia, the consequences of accidents for individuals, families and society and to indicate methods generally of improving the standards of driving and highway safety. In so far as Mr. Godfrey's evidence indicated particular consequences of motor vehicle accidents, it is sufficient to say that the problems themselves are, by and large, notorious and that specific statistics illustrating the magnitude of the various problems are of no real assistance in dealing with the issue of the matter of the legislation. Whether the problems are of great magnitude or otherwise is not determinative of whether they are problems of a merely local or private nature in the Province. At the best, Mr. Godfrey makes it plain that there are major problems involved in the causation of motor accidents and in the consequences of motor accidents. There is, in my view, no useful purpose to be served in reviewing Mr. Godfrey's evidence in detail.

The witness who followed Mr. Godfrey was Mr. R. A. Hadfield, the Superintendent of Motor Vehicles for the Province and a senior civil servant who has had many years of experience in the Motor Vehicle Branch. The first part of Mr. Hadfield's evidence was directed toward showing that the system under Autoplan of tying driver and motor vehicle licensing to drivers' insurance and to motor vehicle insurance

would be effective to cut down on the number of uninsured drivers and uninsured motor vehicles in the Province. As I pointed out earlier, tying licensing to insurance may well be a sensible administrative measure to limit the number of uninsured drivers and uninsured motor vehicles on the roads of the Province. But the system does not lie at the heart of the legislation and does not, in my view, carry the matter any further than showing that one legislative goal was to set up machinery whereby the executive arm of Government could more efficiently see to it that all drivers licensed in the Province and all motor vehicles licensed in the Province are insured. Mr. Hadfield pointed out that the Motor Vehicle Branch (responsible for licensing) worked in close liaison with the Corporation and that statistics and records of one are made available to the other. I do not doubt that this is so, but this, again, is purely a matter of administration and does not go to any principle which touches the constitutional issue.

Mr. Burrowes, Assistant Director of Vital Statistics for the Province, gave evidence of causes of death in the Province in 1972. There is no doubt that deaths, caused in motor accidents are a major problem. Precise statistics, as such, have little virtue because the problem is notorious. The detail of total deaths in the Province in the years 1969-72 inclusive, in various age groups, with deaths due to motor vehicle accidents set out separately, may be found in ex. 48. However, statistics do not help in the search for the matter of the legislation.

The following witnesses also gave evidence for the defendant: Mr. Wallace (director of the hospital finance division of the British Columbia Hospital Insurance Service), Mr. Thomson (director of the research division of the B.C. Hospital Insurance Service), Mr. Brayshaw (administrative officer with the B.C. Hospital Insurance Service in charge of administering the arrangements made between the service and private insurers for reimbursement to the service of hospital costs) and Mr. Weir (assistant to the chairman, the British Columbia Medical Services Commission). The evidence of these witnesses may conveniently be considered together. The evidence was adduced to show that the care required for persons injured in motor accidents places a financial burden on British Columbia hospitals and, in consequence, on the tax-supported British Columbia Hospital Insurance Service and upon the tax-supported B.C. medical plan. It is plain enough on the evidence that the cost of hospitalization of people injured in motor vehicle accidents is considerable. It is also

plain on the evidence that the recovery made by the Hospital Insurance Service is rather haphazard, and falls far below actual cost. Likewise with the medical plan: the cost is considerable, and recovery of medical costs is effective only in those cases where there is a settlement or a judgment (which is paid) and then, apparently, only if the medical plan authorities are aware of the settlement or the judgment.

No doubt the problem of unrecovered medical and hospital costs might be easier to solve, administratively, if the medical and hospital authorities work in co-operation with one insurer, the Corporation, if the purpose is to recover those costs from those who pay for automobile insurance. However, I think this to be essentially administrative policy and it does not seem to me that the impugned legislation itself reveals that this is any part of the "matter" of the legislation.

Evidence was called for the Attorney-General to show that one of the consequences of motor vehicle accidents was to cast additional burdens on the social welfare services of the Province. Mr. Brooke, who administers the provincial guaranteed minimum assistance programme ("MINCOM"), gave evidence for the defendant. It did not appear to me that the problems arising from automobile accidents involved MINCOM to any appreciable extent. As I understood it, MINCOM is no more than part of the social assistance or social welfare programme of the Department of Human Resources. Mr. Brooke's evidence makes it plain that some people injured in motor accidents and off work require and are given social assistance. Further, the evidence makes it plain that the Department assumes some responsibility for the rehabilitation of those injured in motor accidents by granting assistance for re-education, allowances to cover costs of "education-in-training" and in helping the injured to find suitable employment. Aside from those injured, the Department often has to provide assistance for widows and children in those cases in which a husband and father has been killed in a motor accident. The whole social assistance programme is one which costs a great deal of money. Mr. Brooke was not able to give any indication of the cost of helping those who are injured in motor accidents. One part of Mr. Brooke's cross-examination pointed up the nature of the problem. Mr. Brooke told me that often a person away from work because of injury in a motor accident will receive social assistance, perhaps for an extended period, and later recover a substantial judgment or settlement and thus gain compensation for his injuries. The Department has no requirement for repayment and, although

the Department attempts to recover from settlement money or a judgment, in most cases the Department is unable to do so. I take the same view of this evidence as I have of the evidence of unrecovered hospital and medical costs. The impugned legislation itself does not reveal that recovery of social welfare costs forms any part of the matter of the legislation.

The fourth head of extrinsic evidence for the defendant was the evidence of the practical effect of the impugned legislation. The two witnesses whose evidence was particularly directed to this issue were Mr. Straight and Mr. Scrivener. Mr. Straight is a consulting actuary who has done some actuarial work in connection with automobile insurance and has been a member of the Automobile Insurance Board of the Province. He was retained as an adviser by the Special Legislative Committee known as the Capozzi Committee and has been retained by the Corporation on an *ad hoc* basis to deal with various problems. Mr. Scrivener is the senior executive of the claims administration for the Corporation and is a member of the Corporation's policy-making committee.

The evidence led from Mr. Straight, according to Mr. McAlpine in argument on its admissibility, was offered to show that in its practical operation the Corporation would be able to provide less expensive insurance for the people of British Columbia than could private insurers, in the sense that, with the monopoly scheme, a greater part of the premium dollar paid would be available for benefits. Mr. Scrivener's evidence was directed primarily to the same matter, although the approach was different, because Mr. Scrivener testified about the practical way in which the Corporation could save money.

Mr. Scrivener said that the Corporation, as insurer of both sides in disputes, would be able to settle contested claims more expeditiously and at less cost than could private insurers. In addition, Mr. Scrivener testified that the Corporation intended to engage in projects not ordinarily associated with the insurance business as such, and which would be designed to come to grips with the broad range of problems stemming from motor vehicle accidents. I give some examples. Mr. Scrivener said that the Corporation planned to establish a research body repair shop in the hope, as I understood it, that less expensive and more satisfactory repair techniques could be developed which would be of benefit to the public. The Corporation has a research division which Mr. Scrivener told me was a department charged with full-time responsibility for research into such things as the operation of motor

vehicle insurance schemes in other jurisdictions, the operation of the scheme in British Columbia, and which is responsible for those matters referred to in s. 9 of the ICBC Act, to which I have already referred. Mr. Scrivener also told me that plans were in preparation for the claims division of the Corporation to set up a research section under a director of rehabilitation whose responsibilities would be generally to implement the powers given the Corporation by s. 5(1) (d) and s. 26 of the ICBC Act (cited, *supra*).

Mr. Scrivener was questioned about classes of insurance other than automobile insurance in which the Corporation engaged. He acknowledged that in these other classes the Corporation was in competition with private insurers, but told me that Autoplan was managed as an entirely separate branch by the Corporation, and that it is operated on a non-profit basis. He also said that the very substantial income which the Corporation derives from investment of unearned premiums is taken into account in setting the Corporation's premium rates. This is to be contrasted with the evidence which showed that the private insurers do not take into account investment income in rate-setting.

It should be understood that the evidence which I am now considering was led to establish that the practical effect of the impugned legislation would be to provide motor vehicle insurance for the people of British Columbia at less cost (in the relative sense I indicated earlier) than could private insurers. The importance of this evidence to the Attorney-General's case is that, if this is indeed the practical effect of the legislation, then it might be said that the legislation is in relation to the cost of insurance, a matter of "a merely local or private nature in the Province". The Corporation may or may not be able to provide more protection for fewer dollars than could private insurers, but I need not decide whether it ever will because, if the impugned legislation is within provincial competence, then whether it will actually bring about the ends desired is not a matter for the Court. The most that need be said on the evidence is that it is possible that this goal may be achieved.

Of the plans developed by the Corporation, or in the course of development, for various research projects under empowering sections of the impugned statutes, it is sufficient to say, as I have said earlier, that the matter of the legislation is not to be found in the peripheral powers given the Corporation to undertake such activities.

I now leave the evidence for the Attorney-General and re-

turn to the central issue of the matter of the legislation. On the legislative history and on the evidence I have reviewed, I do not doubt that the legislative goal in enacting the impugned legislation was not simply to put the Crown provincial, by its agent the Corporation, into the motor vehicle insurance business in the Province. I shall return to the extrinsic evidence when I come to the question of the pith and substance of the legislation. However, whatever the legislative intent may have been, the matter of the legislation must be found in what the Legislature has done, not in what it intended to do. If intention governed, then ss. 91 and 92 of the *British North America Act, 1867* would be ineffective to control plain encroachments by a Province on federal jurisdiction or plain encroachments by Parliament on provincial jurisdiction. Extrinsic aids are of assistance in pointing out a pith and substance which otherwise might go unnoticed. However, it is not necessary to have to resort to any extrinsic aid to reach the conclusion that the impugned legislation, including the unproclaimed provisions of the *Automobile Insurance Act*, gives the Corporation a monopoly in automobile insurance in the Province, and that the legislation presently in force gives the Corporation a monopoly in the compulsory insurance. In my opinion, the matter of the legislation 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.

Having determined the matter in relation to which the legislation was made, the next step is to inquire whether that matter comes within a class of subjects assigned exclusively to provincial jurisdiction by s. 92 of the *British North America Act, 1867*, or whether the matter of the legislation comes within a class of subjects wholly for the jurisdiction of Parliament. In order to answer this question, I must determine whether the establishment of the scheme with a monopoly (the matter) comes within either of the classes of subjects described as ss. 92(13) and 92(16) or whether, as the plaintiffs contend, the matter comes within s. 91(2).

PART X

THE TRADE AND COMMERCE ISSUE

The matter of the impugned legislation has two elements: First, the establishment of a universal compulsory scheme of automobile insurance in the Province, and, secondly, the grant of a monopoly in that class of insurance to the Corporation.

The attack on the legislation in this Court is confined to the second element. At the end of Part VIII of these reasons, I made findings of fact about how the plaintiff companies carry on business in all, or most, of the Provinces and I particularly emphasized the importance of what I called their "central reservoirs of capital". On those findings of fact, counsel for the plaintiffs argue that the business carried on by the plaintiffs should be held to be affected by an interprovincial interest or concern and thus should be held to come within the trade and commerce heading of s. 91 of the *British North America Act, 1867* and hence under exclusive federal regulatory jurisdiction. The final step in the argument is that the provincial grant of a monopoly in automobile insurance to the Corporation trenches on that exclusive federal power and is *ultra vires* the Legislature because it excludes the plaintiffs from participating in the trade or commerce of automobile insurance in the Province.

Counsel for the plaintiffs say that it is appropriate to make a new assessment of the ambit of the trade and commerce power in relation to insurance and that in the present case there is a firm factual base for doing so. Counsel for the plaintiffs rely heavily on American authorities. Authorities from the Courts of the United States are not, of course, binding on this Court and may be misleading because of differences in the American and Canadian constitution. Nevertheless, the principal American case on which Mr. Brown relies is important to his argument because it clearly indicates the importance of a factual consideration of the nature of the business of insurance carried on in more than one jurisdiction.

I shall consider first the American cases. The starting point must be *Paul v. Virginia* (1869), 8 Wall. 168, in which a State law requiring insurers from other States to file security was questioned on the ground that the law was in conflict with the power given Congress by the Constitution to regulate commerce among the several States of the Union. Field, J., who gave the opinion of the Supreme Court of the United States, dealt with the "commerce" argument in a way reminiscent of the approach in *Citizens Ins. Co. v. Parsons*. It is worth noting that *Paul v. Virginia* was referred to in *Parsons* in argument before the Supreme Court of Canada and is mentioned in the judgments of Henry, Fournier and Taschereau, JJ. I cite from *Paul v. Virginia* at pp. 183-4:

> The defect of the argument lies in the character of their business. Issuing a policy of insurance is not a transaction of commerce. The

policies are simple contracts of indemnity against loss by fire, entered into between the corporations and the assured, for a consideration paid by the latter. These contracts are not articles of commerce in any proper meaning of the word. They are not subjects of trade and barter offered in the market as something having an existence and value independent of the parties to them. They are not commodities to be shipped or forwarded from one State to another, and then put up for sale. They are like other personal contracts between parties which are completed by their signature and the transfer of the consideration. Such contracts are not interstate transactions, though the parties may be domiciled in different States. The policies do not take effect—are not executed contracts — until delivered by the agent in Virginia. They are, then, local transactions, and are governed by the local law. They do not constitute a part of the commerce between the States any more than a contract for the purchase and sale of goods in Virginia by a citizen of New York whilst in Virginia would constitute a portion of such commerce.

Later cases make it clear that the principle in *Paul v. Virginia* was not limited to contracts of insurance made in individual states but applied to the general business of insurance carried across State lines: see, *Hooper v. California* (1894), 155 U.S. 648, and *New York Life Ins. Co. v. Deer Lodge County* (1913), 231 U.S. 495.

The law in the United States was well settled when the key case on which Mr. Brown relies — *United States v. South-Eastern Underwriters Ass'n et al.* (944), 322 U.S. 533 — came before the Supreme Court. The case was one of alleged criminal violation of the federal Anti-Trust Act. Black, J., speaking for the majority, described the business of insurance in a factual way at pp. 540-2:

Perhaps no modern commercial enterprise directly affects so many persons in all walks of life as does the insurance business. Insurance touches the home, the family, and the occupation or the business of almost every person in the United States.

This business is not separated into 48 distinct territorial compartments which function in isolation from each other. Interrelationship, interdependence, and integration of activities in all the states in which they operate are practical aspects of the insurance companies' methods of doing business. A large share of the insurance business is concentrated in a comparatively few companies located, for the most part, in the financial centers of the East. Premiums collected from policyholders in every part of the United States flow into these companies for investment. As policies become payable, checks and drafts flow back to the many states where the policyholders reside. The result is a continuous and indivisible stream of intercourse among the states composed of collections of premiums, payments of policy obligations, and the countless documents and communications which are essential to the negotiation and execution of policy contracts. Individual policyholders living in many different states who own policies in a single

company have their separate interests blended in one assembled fund of assets upon which all are equally dependent for payment of their policies. The decisions which that company makes at its home office—the risks it insures, the premiums it charges, the investments it makes, the losses it pays—concern not just the people of the state where the home office happens to be located. They concern people living far beyond the boundaries of that state.

Black, J., continued at pp. 546-8:

One reason advanced for the rule in the *Paul* case has been that insurance policies "are not commodities to be shipped or forwarded from one State to another." But both before and since *Paul v. Virginia* this Court has held that Congress can regulate traffic though it consist of intangibles. Another reason much stressed has been that insurance policies are mere personal contracts subject to the laws of the state where executed. But this reason rests upon a distinction between what has been called "local" and what "interstate," a type of mechanical criterion which this Court has not deemed controlling in the measurement of federal power. Cf. *Wickard v. Filburn*, 317 U.S. 111, 119-120 [87 L. ed. 122, 131, 132, 63 S. Ct. 82]; *Parker v. Brown*, 317 U.S. 341, 360 [87 L. ed. 315, 331, 63 S. Ct. 307]. We may grant that a contract of insurance, considered as a thing apart from negotiation and execution, does not itself constitute interstate commerce. Cf *Hall v. Geiger-Jones Co.*, 242 U.S. 539, 557-558 [61 L. ed. 480, 492, 493, 37 S. Ct. 217, LRA1917F 514, Ann Cas. 1917C 643]. But it does not follow from this that the Court is powerless to examine the entire transaction, of which that contract is but a part, in order to determine whether there may be a chain of events which becomes interstate commerce.

I cite a later passage from the judgment of Black, J., which is particularly pertinent to Mr. Brown's argument. It is at p. 547:

Another reason advanced to support the result of the cases which follow *Paul v. Virginia* has been that, if any aspects of the business of insurance be treated as interstate commerce, "then all control over it is taken from the States and the legislative regulations which this Court has heretofore sustained must be declared invalid." Accepted without qualification, that broad statement is inconsistent with many decisions of this Court. It is settled that, for Constitutional purposes, certain activities of a business may be intrastate and therefore subject to state control, while other activities of the same business may be interstate and therefore subject to federal regulation. And there is a wide range of business and other activities which, though subject to federal regulation, are so intimately related to local welfare that, in the absence of Congressional action, they may be regulated or taxed by the states.

On this analysis, which depended upon a factual examination of the way in which interstate insurers carried on business, the Supreme Court rejected the conclusion reached in *Paul v. Virginia* and held that fire insurance transactions crossing State lines constituted interstate commerce and were thus subject to Congressional regulation. I have referred to

South-Eastern Underwriters at such length because Mr. Brown relied heavily on Justice Black's emphasis on the way, as a matter of fact, in which insurers engage in their business. As to this, I agree that findings of fact about the geographic reach of the plaintiffs' businesses and of how they carry on business are relevant, although I think not necessarily determinative, of the question of whether they are engaged in trade or commerce within the meaning of those words in head 2 of s. 91. However, I do not regard *South-Eastern Underwriters* as having strong persuasive authority in its result because, in my view, the United States Courts have generally given to the commerce clause a wider interpretation (that is, favouring federal power) than the Privy Council or the Supreme Court of Canada have in interpreting the second head of s. 91 of the *British North America Act, 1867*. I think that our Courts have been rather more apt to protect assigned provincial powers against being overridden by federal power. To illustrate this point, I refer to *Wickard v. Filburn et al.* (1942), 317 U.S. 111. In that case, the Supreme Court of the United States faced this issue: whether the Agricultural Adjustment Act of 1938 was effective to regulate a small crop of winter wheat on an Ohio farm, part of which was sold locally, part used to feed stock, part used for making flour for home consumption and part kept for seed. The different approach taken in the United States is apparent from this passage from the opinion of the Court, delivered by Jackson, J., at p. 125:

> But even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as "direct" or "indirect".

I now turn to the Canadian insurance cases relevant to the trade and commerce issue. In considering the cases, I have had in mind the classic passage from the judgment of Lord Halsbury, L.C., in *Quinn v. Leathem*, [1901] A.C. 495 at p. 506:

> Now, before discussing the case of *Allen v. Flood* [[1898] A.C. 1] and what was decided therein, there are two observations of a general character which I wish to make, and one is to repeat what I have very often said before, that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only

> an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all.

I have cited this passage because, on my consideration of the insurance cases in which constitutional issues have been considered, I have reached the conclusion that the question of the legal nature of the insurance business as raised in factual terms in the present case has not been decided, although it has been discussed. I do not think that the precise issue in the present case was decided in *Parsons* or in any of the later cases and I think this to be so because in each case the matter of the impugned legislation was held to be in relation to a subject exclusively assigned to the Provinces by s. 92 of the *British North America Act, 1867*. It was never necessary, therefore, for a Court to decide whether the general business of entering into insurance contracts throughout the country fell within the trade and commerce head of s. 91.

On my reading of the constitutional cases in which insurance was an issue, it has been seen as a trade in the sense of an occupation or business, local in nature, but has not been firmly characterized either as being, or not being, a trade in the sense contemplated by s. 91(2). It has not been firmly characterized because, in my opinion, it was never found necessary to decide the question.

Nevertheless, the constitutional cases in which insurance was considered afford considerable guidance. In *Citizens Ins. Co. of Canada v. Parsons* (1881), 7 App. Cas. 96, it is plain that what was said about trade and commerce in relation to insurance, although of the highest authority, did not form part of the *ratio* of the case. I cite from the judgment of the Board, given by Sir Montague E. Smith, at pp. 111-2:

> A question was raised which led to much discussion in the Courts below and this bar, viz., whether the business of insuring buildings against fire was a trade. This business, when carried on for the sake of profit, may, no doubt, in some sense of the word, be called a trade. But contracts of indemnity made by insurers can scarcely be considered trading contracts, nor were insurers who made them held to be "traders" under the English bankruptcy laws; they have been made subject to those laws by special description. Whether the business of fire insurance properly falls within the description of a "trade" must, in their Lordships' view, depend upon the sense in which that word is used in the particular statute to be construed; but in the present case their Lordships do not find it necessary to rest their decision on the narrow ground that the business of insurance is not a trade.

At p. 113, Sir Montague E. Smith enlarged on his consider-

ation of head 2 of s. 91 but, again, in my view made it clear that their Lordships did not purport to decide whether insurance was a trade:

> Construing therefore the words "regulation of trade and commerce" by the various aids to their interpretation above suggested, they would include political arrangements in regard to trade requiring the sanction of parliament, regulation of trade in matters of inter-provincial concern, and it may be that they would include general regulation of trade affecting the whole dominion. Their Lordships abstain on the present occasion from any attempt to define the limits of the authority of the dominion parliament in this direction. It is enough for the decision of the present case to say that, in their view, its 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, and therefore that its legislative authority does not in the present case conflict or compete with the power over property and civil rights assigned to the legislature of Ontario by No. 13 of sect. 92.
>
> Having taken this view of the present case, it becomes unnecessary to consider the question how far the general power to make regulations of trade and commerce, when competently exercised by the dominion parliament, might legally modify or affect property and civil rights in the provinces, or the legislative power of the provincial legislatures in relation to those subjects; . . .

There was discussion in argument before me of the views expressed by the Judges of the Supreme Court of Canada in *Parsons* on the question of whether insurance was a trade. I do not think it necessary to pursue the matter because, as I have said, the question of insurance being a trade did not form part of the reasons for the final decision in the case. I simply observe that on my reading of the judgments in the Supreme Court of Canada I conclude that Chief Justice Ritchie, Taschereau and Gwynne, JJ., were of the view that insurance was a trade, Henry and Fournier, JJ., took the contrary view. It is not clear what position Strong, J., took.

The next case in sequence is *Re Insurance Act (Can.) 1910* (1913), 15 D.L.R. 251, 48 S.C.R. 260, 5 W.W.R. 488. This case eventually went on appeal to the Privy Council and is reported *sub nom. A.-G. Can. v. A.-G. Alta. and A.-G. B.C.*, 26 D.L.R. 288, [1916] 1 A.C. 588, 10 W.W.R. 405. The question posed for the Supreme Court of Canada on a reference was, put simply, whether a Dominion statute requiring insurers to hold a federal licence was *ultra vires* Parliament. The conclusion of the majority (Idington, Duff, Anglin and Brodeur, JJ.) was that the Act was beyond federal power because it purported to regulate a single business within a Province — a matter of contract: "Property and Civil Rights

in the Province". This appears to be the *ratio* of the case. Each of the Justices of the Supreme Court who participated in the decision, including those who were in dissent (Fitzpatrick, C.J., and Davies, J.) commented on the trade and commerce element of the problem. The comments, in my view, emphasize the Court's focus on the local nature of insurance there under study. Idington, J., stated his views in this way at p. 277 S.C.R.:

> It has never struck me that the phrase "Trade and Commerce" could be properly broken into two or more pieces in order to give this sub-section its correct interpretation; and still less to make every trade, as such, subject to the exclusive authority of Parliament as a way out of the difficulty of finding an appropriate meaning for the whole phrase.
>
> I do not think the busy insurance agent following his trade or calling, falls any more within the scope of this sub-section than the farmer, or fisherman, or blacksmith, or grocer, or anybody else following his trade; not even the lawyer following his honest trade, and undoubtedly having much to do with commerce.

Duff, J., dealt with the matter in this way at p. 302:

> First, as to the power of the Dominion under No. 2 of section 91:—
> I think this does not embrace the regulation of occupations as such. "Trades," the pursuit of which constitutes a part of the trade and commerce of the country, may very well be subject to regulation under this power but only as branches of trade and commerce. The regulation of occupations as such seems in its nature to be a matter rather of local than of general importance and I think it requires some straining of the language of No. 2 to bring that matter within it. I do not think that the various kinds of business which are comprehended under the term "insurance" as used in the Act in question can be said to be part of the trade and commerce of the country; or that the transactions dealt with by section 4 of the Act are operations of trade or commerce in the sense in which those words are used in this provision.

I do not think that what was said by Duff, J., should be qualified simply because he directed himself to "the term insurance as used in the Act in question", because on examining the *Insurance Act*, 1910 (Can.), c. 32, it is clear that it applies to all classes of insurance except for those few classes expressly exempted by s. 3.

Anglin, J., appears to me to agree with the view expressed by Idington and Duff, JJ. At p. 308, he said:

> The argument based on "the regulation of trade and commerce," while perhaps more plausible, appears upon consideration to be equally fallacious. Whether the business of insurance can ever properly be spoken of as a trade is at least doubtful. But, read, as it must be, in connection with the word "commerce," with which it is associated, I think it reasonably clear that the word "trade" in clause 2 of section 91 of the "British North America Act" does

not cover the business of insurance. The weight of authority certainly supports that view.

Brodeur, J., at pp. 312-3, said:

> The business of insurance is not necessarily a trade. The large companies that are carrying out that business are, generally speaking, commercial ventures with an object of gain or profit for their shareholders. But alongside of that we have the Mutual Benefit Insurance Association, which is entirely beneficial, we have also in the large railway and other companies an insurance fund for the employees to which the employees themselves and their employers contribute that could certainly not rank as commercial enterprise and there is the contract of indemnity made by insurers which can scarcely be considered a trading contract.

Fitzpatrick, C.J., who dissented, dealt with the issue briefly at p. 262:

> It is quite obvious that this Act is intended merely to regulate the business of insurance in Canada and in the *Prohibition Case* [*A.-G. Ont. v. A.-G. Can.*, [1896] A.C. 348], Lord Watson said that in *Citizens Insurance Company v. Parsons*, the business of fire insurance was admitted to be a trade.

It is true that is what Lord Watson said, but in my respectful view what was said cannot be supported by *Parsons* in the sense, at any rate, that insurance is a trade which falls within the trade and commerce head of s. 91.

Davies, J., who dissented, said at p. 271:

> 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 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.

It is enough to say that in my opinion the weight of authority in the Supreme Court of Canada in the *Insurance Act, 1910* case favours the proposition that insurance does not fall within the trade and commerce power assigned to Parliament by s. 91(2).

The Privy Council agreed with the conclusions of the Supreme Court of Canada in the *Insurance Act, 1910* case: 26 D.L.R. 288, [1916] 1 A.C. 588, 10 W.W.R. 405. Viscount Haldane, after referring to *Russell v. The Queen* (1882), 7 App. Cas. 829, and *Hodge v. The Queen* (1883), 9 App. Cas. 117, put the Board's reasoning in this way, at p. 292 D.L.R., pp. 596-7 A.C.:

> Their Lordships think that, as the result of these decisions, it must now be taken that the authority to legislate for the regulation of

> trade and commerce does not extend to the regulation by a licensing system of a particular trade in which Canadians would otherwise be free to engage in the provinces. Section 4 of the statute under consideration cannot, in their opinion, be justified under this head. Nor do they think that it can be justified for any such reasons as appear to have prevailed in *Russel v. The Queen, supra.* No doubt the business of insurance is a very important one, which has attained to great dimensions in Canada. But this is equally true of other highly important and extensive forms of business in Canada, which are to-day freely transacted under provincial authority. Where the B.N.A. Act has taken such forms of business out of provincial jurisdiction, as in the case of banking, it has done so by express words, which would have been unnecessary had the argument for the Dominion Government addressed to the Board from the Bar been well-founded.

It might be said that Viscount Haldane's use of the word "trade" is some indication that the insurance business is a trade within head 2 of s. 91, but I do not think that what was said may properly be taken as such a broad pronouncement on the subject, because it was not necessary in order to dispose of the issues raised in the case to decide whether the general business of insurance carried on interprovincially fell within the meaning of the word "trade" in a constitutional sense. In my view, all that Viscount Haldane points out is that federal power did not extend to the regulation of a particular "trade" carried on within a Province.

I am strengthened in this interpretation by what was said by Duff, J., in *Lawson v. Interior Tree Fruit & Vegetable Committee*, [1931] 2 D.L.R. 193, [1931] S.C.R. 357 in which, at p. 204 D.L.R., p. 370 S.C.R., speaking of the decision of the Privy Council in the *Insurance Act, 1910* case, his Lordship said:

> The statute which the Board had to consider in the *Insurance case* was one which professed to regulate, by a licensing system, the whole business of insurance, including business entirely local, within a particular Province; and his Lordship is here dealing with the business of insurance in so far as it might be regarded as a branch of trade, as a local matter.

In the *Insurance Act, 1910* case, Viscount Haldane, in answering the second question, which raised the issue of jurisdiction over foreign insurers, said at p. 293 D.L.R., p. 597 A.C.:

> To this question their Lordships' reply is that in such a case it would be within the power of the Parliament of Canada, by properly framed legislation, to impose such a restriction. It appears to them that such a power is given by the heads in sec. 91, which refer to the regulation of trade and commerce and to aliens. This question also is, therefore, answered in the affirmative.

However, what Viscount Haldane said appears to me to leave the question open because what he said was not necessary to the decision of the case because, patently, the impugned legislation was not "properly framed".

That the question was left open by Viscount Haldane is borne out 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.*, the next case in the sequence. It seems to me clear from what was said by Duff, J., speaking for the Board in *Reciprocal Insurers*, at p. 803 D.L.R., pp. 346-7 A.C., that the applicability of the trade and commerce power to insurance was left open. In answering the third question posed in that case, his Lordship said:

> It follows that the third question must be answered in the negative, but with this qualification, that, 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. This, although referred to on the argument before their Lordships' Board, was not fully discussed, and since it is not directly raised by the question submitted, their Lordships, as they then intimated, consider it inadvisable to express any opinion upon it.

The next "insurance" case is *Re Insurance Act and Special War Revenue Act*, [1932] 1 D.L.R. 97, [1932] A.C. 41, [1931] 3 W.W.R. 689. While there were two questions before the Court, I need only state the first which was whether a foreign or British insurer licensed under the Quebec *Insurance Act* to carry on business within that Province could do so without also being licensed under the *Insurance Act* of Canada, R.S.C. 1927, c. 101. Viscount Dunedin, who gave the judgment of the Board, referred to *A.-G. Can. v. A.-G. Alta.* (*Insurance Act, 1910* case) and to the answer given therein to the second question by Viscount Haldane and, as well, to *Reciprocal Insurers*. At pp. 103-4 D.L.R., p. 49 A.C., his Lordship reproduced the same passage from the judgment of the Board given by Duff, J., which I have earlier quoted in this part of these reasons. At p. 104 D.L.R., p. 50 A.C., Viscount Dunedin remarked, referring to the trade and commerce power and jurisdiction over aliens, that, "It is clear from the quotations from *Re Reciprocal Insurance Legislation* that the question is technically still open . . .". Lord Dunedin did not find that the legislation in question was "properly framed"; at p. 105 D.L.R., p. 51 A.C. his Lordship said:

> But the sections here are not of that sort, they do not deal with

> the position of an alien as such; but under the guise of legislation as to aliens they seek to intermeddle with the conduct of insurance business, a business which by the first branch of the 1916 case has been declared to be exclusively subject to provincial law. Their Lordships have, therefore, no hesitation in deciding that this is not "properly framed" alien legislation.

In the result, the first question was answered: "No". The case, in my view, falls short of deciding that the federal trade and commerce power extends to the regulation of insurers who engage in the business of entering into insurance contracts in more than one of the Provinces.

In 1935, Parliament enacted legislation to establish a nation-wide plan of unemployment insurance by the *Employment and Social Insurance Act*, 1935 (Can.), c. 38. Its validity was challenged in a case reported at [1936] 3 D.L.R. 644, [1936] S.C.R. 427 [affd [1937] 1 D.L.R. 684, 7 W.W.R. 312, [1937] A.C. 355]. The majority of the Court, Duff, C.J.C., and Davis, J., dissenting, held the legislation to be *ultra vires* the Parliament. Rinfret, J., who gave the lead judgment for the majority, spoke of insurance generally, at p. 664 D.L.R., p. 451 S.C.R., and of trade and commerce at pp. 664-5 D.L.R., p. 452 S.C.R. This is the passage at p. 664 D.L.R., p. 451 S.C.R.:

> Insurance of all sorts, including insurance against unemployment and health insurances, have always been recognized as being exclusively provincial matters under the head "Property and Civil Rights," or under the head "Matters of a merely local or private nature in the Province."

At p. 664-5 D.L.R., p. 452 S.C.R.:

> Nor is this legislation for the regulation of trade and commerce. It is not trade and commerce as defined by the Privy Council in its numerous decisions upon the subject. It deals with a great many matters which are trade and commerce in no sense of the word, such as the contract of employment, employment service, unemployment insurance and benefit, and health.

The passages just quoted lend support to the argument that the business of insurance is not a trade in a constitutional sense. Nevertheless, in my view, what was said by Rinfret, J., must be considered in context and it appears to me plain that his Lordship's attention was focused on the specific aspects of insurance as contract or as a matter of a merely local or private nature, rather than on the broad question raised in the present case of whether the general business of an insurer entering into insurance contracts in more than one Province should be held to be within the trade and commerce head of s. 91 of the *British North America Act, 1867*.

Mr. Brown, for the plaintiffs, has invited me to conclude that the plaintiff's business of entering into contracts of insurance in all or in several of the Provinces of Canada is affected by an interprovincial interest or concern. The word "concern" first appears in the present context, so far as my research goes, in the judgment of the Privy Council in *Parsons*. I am of the opinion that Mr. Brown is right in emphasizing the matter of "interprovincial concern" because I conclude, on my reading of the cases, that the pivotal question in determining whether a particular business carried on in more than one Province falls within the trade and commerce clause is whether the business is affected by an interprovincial concern. I refer again to *Lawson v. Interior Tree Fruit & Vegetable Committee*, [1931] 2 D.L.R. 193, [1931] S.C.R. 357. In that case, the Supreme Court of Canada considered the validity of the *Produce Marketing Act* of British Columbia which gave the respondent exclusive power to control and regulate the marketing of tree fruits and vegetables grown in a prescribed part of British Columbia. In considering the first ground of attack on the impugned statute, that it was an attempt to regulate trade within the meaning of s. 91(2) of the *British North America Act, 1867*, Duff, J., after reviewing the nature of the impugned marketing scheme, with particular reference to its extra-provincial effects, said this at pp. 199-200 D.L.R., p. 365 S.C.R.:

> 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 also 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 inter-provincial 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. No doubt the commitee also regulates the local trade in British Columbia, but the regulation of the trade with other Provinces is no mere incident of a scheme for controlling local trade; it is of the essence of the statute and of the object and character of the committee's activities.

At p. 200 D.L.R., p. 366 S.C.R., Duff, J., pointed out that the scope of head 2 of s. 91 had "necessarily been limited, in order to preserve from serious curtailment, if not from virtual extinction, the degree of autonomy which, as appears from

the scheme of the Act as a whole, the Provinces were intended to possess." His Lordship then went on to cite the passage from the judgment by Sir Montague Smith in *Parsons*, which I have earlier reproduced in these reasons, in which the construction of the trade and commerce power was considered and the words used, "regulation of trade in matters of inter-provincial concern, and it may be that they would include general regulation of trade affecting the whole dominion". Duff, J., then continued at p. 201 D.L.R., p. 367 S.C.R., as follows:

> This passage received formal approval by the Judicial Committee in *John Deere Plow Co. v. Wharton* (1914), 18 D.L.R. 353, at pp. 359-60, where Haldane, L.C., said:—"Their Lordships find themselves in agreement with the interpretation put by the Judicial Committee in *Citizens Insurance Co. v. Parsons*, 7 A.C. at pp. 112, 113, on head 2 of sec. 91, which confers exclusive power on the Dominion Parliament to make laws regulating trade."
>
> In *A.-G. Can. v. A.-G. Alta. & A.-G. B.C. (Insurance Case)* (1916), 26 D.L.R. 288, it was laid down that the authority of the Dominion Parliament to legislate for the regulation of trade and commerce does not extend to the regulation by a licensing system of a particular trade in which Canadians would otherwise be free to engage in the Provinces. The distinction signalized in these cases is that indicated above, and fully expounded in *Montreal v. Montreal Street R. Co.* [(1912), 1 D.L.R. 681], between what is national in its scope and concern and that which in each of the Provinces is of private or local, that is to say, of provincial, interest.

After a further review of authorities, Duff, J., concluded at p. 205 D.L.R., p. 371 S.C.R.:

> I do not think further examination of the authorities would be useful. The more recent cases leave entirely untouched the view embodied in the passage quoted from *Parsons'* case, and expressly adopted in *Wharton's* case, that foreign trade and trading matters of inter-provincial concern are among the matters included within the ambit of s. 91(2).

In summary, it is sufficent to say of *Lawson* that the impugned legislation was held *ultra vires* because the provincial Legislature had trenched upon the exclusive federal power to regulate trade and commerce. The test of "interprovincial concern" as it relates to the trade and commerce head of s. 91 seems to me so firmly established in our law that I need not consider later authority on the point at any great length.

However, I refer to one later case which points up the importance of the "interprovincial concern" test. The validity of one section of the *Ontario Farm Products Marketing Act*, of certain Regulations made thereunder, of an order of the Ontario Hog Producers Marketing Board (a Board created by the Act) and of a proposed amendment to the Act came before

the Supreme Court of Canada in *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. The "interprovincial concern" test was referred to by Chief Justice Kerwin at p. 264 D.L.R., p. 204 S.C.R.:

> It is, I think, impossible to fix any minimum proportion of such last mentioned sales or intended sales as determining the jurisdiction of Parliament. This applies to the sale by the original owner. Once a statute aims at "regulation of trade in matters of inter-provincial concern" . . . it is beyond the competence of a Provincial Legislature.

Mr. Justice Locke, in the same case said, at p. 290 D.L.R., p. 232 S.C.R.:

> The passage from the judgment in *Lawson's* case which is above quoted makes it clear that to attempt to control the manner in which traders in other Provinces will carry out their transactions within the Province, or to prohibit them from purchasing natural products for export, is not a matter of merely provincial concern but also directly and substantially the concern of the other Provinces.

I was referred to a number of what may be called "hard goods" cases, the most recent of which are *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, and *Burns Food Ltd. et al. v. A.-G. Man. et al.* (1973), 40 D.L.R. (3d) 731, [1974] 2 W.W.R. 537, 1 N.R. 147. I do not think it is necessary to refer to this line of cases because it appears to me to be well-established that the power to regulate the passage of hard goods between the Provinces falls within the exclusive regulatory power of Parliament under head 2 of s. 91 and that the problems presented by these cases have largely involved a determination of whether impugned provincial legislation in practical and legal effect trenched upon the exclusive federal power, or whether impugned provincial legislation was in relation to contracts ("Property and Civil Rights in the Province") or in relation to a matter of a merely local or private nature in the Province.

To this point in these reasons, in discussing the present issue I have spoken generally of "trade and commerce", but I have concluded that if insurance falls within the trade and commerce power, and if it is necessary to attach one or other of the two labels to the business of insurance, then it should be classified as "trade". Laskin, J. (now C.J.C.), dealt with the etymological aspect of the problem in these terms in the *Manitoba Egg* case, at pp. 183-4:

> 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).

I now come directly to the issue I face: are the plaintiff companies which carry on the business of entering into contracts of insurance in all or in some of the Provinces engaged, on the factual findings I have made, in trade within the meaning of that word as used in head 2 of s. 91 of the *British North America Act, 1867*? In order to resolve this problem I must consider whether the general business of insurance carried on interprovincially by the plaintiffs is affected by an interprovincial concern.

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. The important factual finding which, in my view, might lead to the conclusion that the plaintiffs' businesses are affected by an interprovincial concern is the finding that the plaintiffs are able to carry on their businesses throughout Canada because they have central reservoirs of capital and the finding that those central reservoirs of capital are made available to meet the insurance needs of people throughout the country.

While I think that the insurance business may, in one sense, be characterized as a trade, I am not of the opinion that it is affected with an interprovincial concern; it is not a trade within the meaning of the trade and commerce power assigned to exclusive federal regulatory jurisdiction by head 2 of s. 91. It is true that insurance companies make their central reservoirs of capital available for the insurance needs of people throughout the country. However, to treat this as a determinative factor avoids the real issue. The real issue, in my view, is not to be determined on how and by what means insurers are able to carry on business throughout the country, but rather is to be determined by considering the legal character of the business in which they engage to see whether, *qua* the

legal character of their business that business is affected by an interprovincial concern. Insurance contracts must be made in one or other of the Provinces; those contracts, on the authorities, are under exclusive provincial jurisdiction (*British North America Act, 1867*, s. 92(13)). As I pointed out earlier in these reasons, insurance does not exist apart from contracts. As a matter of law the whole "content" of insurance is contract. The important question to consider is whether, having regard to the division of legislative powers between Parliament and the provincial Legislatures and having regard to the present authorities by which it is laid down that contracts of insurance made in a Province fall within exclusive tracts of insurance made in a Province fall within exclusive provincial legislative power, Parliament is competent to pass legislation which would be effective to regulate insurance in any substantial way. There is a passage in *Laskin's Canadian Constitutional Law* (4th ed., by Albert S. Abel), which brings the point I am making into focus. The passage, at p. 346, under the heading "Business (Non-Commodity) Transactions", is as follows:

> It cannot escape notice that just as the liquor cases were the medium through which the federal general power was first examined so were the insurances cases the medium for initial exposition of the federal trade and commerce power. There is a singular dearth of definition of "trade" or "commerce" in the Privy Council's decisions, perhaps because that tribunal assumed or came to a considered conclusion that the problems in the area lay not so much in the words used to define the power granted but rather in the feasibility of local or national control of economic activities which belonged as much to the Provinces under s. 92(13)(16) of the B.N.A. Act as to the Dominion under s. 91(2).

One is apt to think of insurance as being national in scope and of national concern for the simple reason that, as the business has developed in Canada, insurers incorporated by Act of Parliament and British and foreign insurers have provided for insurance needs in the Provinces. Insurance does not exist for an end in itself, but to provide contracts of insurance which are entered into in the Provinces of Canada and which serve local needs in the Provinces. Insurance contracts in Canada are entered into in the Provinces so that, if one disregards the perhaps fortuitous circumstance that insurance needs in the Provinces have been served by insurers doing business throughout Canada, it becomes immediately apparent that insurance is fundamentally a means by which people in the Provinces, by contracts of indemnification, protect themselves against the risk of losses. Contracts of insur-

ance made in the Provinces are wholly within provincial legislative competence as to form and substance. With these considerations in mind, I am unable to see how federal regulation of insurance would be feasible in any substantial and effective way. If the general business of entering into insurance contracts by an insurer in more than one Province was under exclusive federal regulatory jurisdiction, that jurisdiction would be a virtually empty vessel because of the dominance of provincial power in relation to "Property and civil rights in the Province" and in relation to "matters of a merely local or private nature in the Province".

In this connection, it is worth repeating what was said by Viscount Haldane in *A.-G. Can. v. A.-G. Alta. and A.-G. B.C.* (the *Insurance Act, 1910* case), 26 D.L.R. 288 at p. 292, [1916] 1 A.C. 588 at p. 597, 10 W.W.R. 405:

> No doubt the business of insurance is a very important one, which has attained to great dimensions in Canada. But this is equally true of other highly important and extensive forms of business in Canada which are to-day freely transacted under provincial authority. Where the B.N.A. Act has taken such forms of business out of provincial jurisdiction, as in the case of banking, it is done so by express words which would have been unnecessary had the argument for the Dominion Government addressed to the Board from the Bar been well founded.

What was said by Viscount Haldane echoes what was said by Sir Montague E. Smith in *Citizens Ins. Co. of Canada v. Parsons* (1881), 7 App. Cas. 96 at p. 112:

> In the first place the collocation of No. 2 with classes of subjects of national and general concern affords an indication that regulations relating to general trade and commerce were in the mind of the legislature, when conferring this power on the dominion parliament. If the words had been intended to have the full scope of which in their literal meaning they are susceptible, the specific mention of several of the other classes of subjects enumerated in sect. 91 would have been unnecessary; as, 15, banking; 17, weights and measures; 18, bills of exchange and promissory notes; 19, interest; and even 21, bankruptcy and insolvency.

A passage from the judgment of Duff, J., in the *Insurance Act, 1910* case (1913), 15 D.L.R. 251, 48 S.C.R. 260 at pp. 304-5, is illuminating in pointing out the fact that it would not be feasible for the Dominion to exercise regulatory control over certain types of businesses which might be thought to fall within the trade and commerce power. This is the passage:

> I do not think that the fact that the business of insurance has grown to great proportions affects the quesion in the least. The importance of some such provisions as this Act contains may be conceded. The question is: On what ground can it be contended that

> this is a matter which because of its importance has ceased to be substantially of local interest? The matter of the solvency and honesty of persons assuming fiduciary relations is at least as important as the matter of the solvency of the insurance companies. It would be difficult to argue that the qualifications of trustees and executors and financial agents is a matter with which the Dominion could deal by a uniform law applicable to the whole Dominion. The Act before us illustrates the extremes to which people may be carried when acting upon the theory that because a given matter is large and of great public importance it is for that reason a matter which is not substantially local in each of the provinces. The business of "guarantee insurance" by section 2(*w*) includes the executing of "bonds in legal actions and proceedings," and section 4 would appear to prohibit the making of such contracts by persons who are not licensees under the Act. That seems very obviously a purely local matter when the proceedings are in the provincial courts; but if it once be admitted that the Dominion can prescribe the qualifications necessary to entitle anybody to enter into a contract of life insurance or fire insurance it is very difficult to see why it cannot also regulate the qualifications of persons entitled to enter into contracts of suretyship. Such legislation, in my judgment, involves a degree of interference with matters "substantially local" that could not have been contemplated by the framers of the Act.

For these reasons, I am not of the opinion that the general business of entering into contracts of motor vehicle insurance by an insurer in more than one Province comes within the exclusive power to regulate trade and commerce assigned to Parliament by head 2 of s. 91 of the *British North America Act, 1867*.

PART XI

THE PITH AND SUBSTANCE OF THE IMPUGNED LEGISLATION

In the penultimate paragraph of Part IX of these reasons, I expressed the view that the legislative goal in enacting the impugned legislation was not simply to put the Crown provincial, by its agent the Corporation, into the motor vehicle insurance business in the Province. I pointed out that while I did not consider that the extrinsic evidence led for the Attorney-General was of assistance in identifying the matter of the legislation, that evidence might be of assistance in pointing out a pith and substance which otherwise might go unnoticed. I have found the extrinsic evidence of some assistance in ascertaining what I think to be the pith and substance of the impugned legislation. The legislative history, which I reviewed at length in Part IX of these reasons, reveals that the Legislature has had an ever-increasing con-

cern to ensure that there be money available to compensate those suffering losses in motor vehicle accidents in the Province. The specific recommendations of the Wootton Commission were not adopted by the present Legislature in enacting the impugned legislation. However, I have found the Report of some assistance in revealing the situation in the Province, that is, the problems existing in the Province arising from motor vehicle accidents. In particular, I refer to the great emphasis placed by the Commissioners on the ever-increasing cost of providing motor vehicle insurance for the people of British Columbia and the conclusion expressed by the Commission that there was some lack of competition between private insurers and that an undue proportion of the premium moneys paid for motor vehicle insurance was not available for compensation.

I pointed out earlier that the matter of the impugned legislation had two elements: first, the establishment of a universal compulsory scheme of automobile insurance in the Province and, secondly, the grant of a monopoly in that class of insurance to the Corporation. The first element is largely in relation to contracts in the Province. However, as will be recalled, the attack on the impugned legislation in this Court is directed to the second element — the creation of the monopoly. I am not of the opinion that the creation of the monopoly is, as such, in relation to contracts ("Property and civil rights in the Province"). On the reasoning which I have now developed at such length, I hold 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. I should make it plain that, in my opinion, the impugned legislation including those provisions of the *Automobile Insurance Act* which have not been proclaimed and the impugned legislation without those unproclaimed provisions, is *intra vires* the Province.

PART XII

THE DOMINION COMPANIES' ARGUMENT

The second ground on which counsel for the plaintiffs say that the impugned legislation should be declared *ultra vires* the Province, in so far as insurers incorporated by Act of Parliament are concerned, is that the legislation sterilizes federally incorporated companies in their functions and activities, and impairs wholly or in a substantial degree their status

and essential capacities. 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.

I have read and considered the reasons for judgment on the Dominion companies' point in the *Parsons* case; in *Colonial Building & Investment Ass'n v. A.-G. Que.* (1883), 9 App. Cas. 157 (P.C.); in *Compagnie Hydrauligue de St. Francois v. Continental Heat and Light Co. et al.*, [1909] A.C. 194 (P.C.); in *John Deere Plow Co. v. Wharton* (1914), 18 D.L.R. 353, [1915] A.C. 330, 7 W.W.R. 635, 706 (P.C.); in *Great West Saddlery Co. v. The King* (1921), 58 D.L.R. 1, [1921] 2 A.C. 91, [1921] 1 W.W.R. 1034 (P.C.); in *Lukey v. A.-G. Sask. v. Ruthenian Farmers Elevator Co.*, [1924] 1 D.L.R. 706, [1924] S.C.R. 56, [1924] 1 W.W.R. 577; in *A.-G. Man. v. A.-G. Can.*, [1929] 1 D.L.R. 369, [1929] A.C. 260, [1929] 1 W.W.R. 136 (P.C.); in *Lymburn et al. v. Mayland et al.*, [1932] 2 D.L.R. 6, 57 C.C.C. 311, [1932] A.C. 318 (P.C.); and in *B.C. Power Co. Ltd. v. A.-G. B.C. et al.* (1963), 47 D.L.R. (2d) 633, 44 W.W.R. 65 (B.C.S.C.).

The principle which I think can properly be drawn from these cases and the principle which I apply in holding that the impugned legislation is not *ultra vires* the Province, in so far as it affects Dominion companies, is that which was stated by 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. In that case, the constitutional validity of the Alberta *Coal Miners' Wages Security Act* was challenged. The statute had purported to prohibit the operation of any mine within the Province where a bond or security satisfactory to the Minister had not been furnished to him. McGillivray, J.A., for the Court, declared the Act to be *intra vires* the Province, and in coming to that conclusion stated, at pp. 487-8 D.L.R., pp. 784-5 W.W.R., what he took to be the effect of the authorities:

> 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.

In my view an enactment of a provincial Legislature limited in direct effect by provincial boundaries which relates to a particular trade or business carried on within its boundaries, quite regardless of whether or not that trade or business is carried on by natural persons or companies, is valid, but the moment that a provincial Legislature legislates concerning companies as such, then if such legislation constitutes regulation or impairment or sterilization of the powers and capacities which the Dominion has conferred, the legislation will be invalid.

I may add, as pointed out by Viscount Sumner in *A.-G. Man. v. A.-G. Can.*, such last-mentioned legislation is not saved by the fact that all kinds of companies provincial as well as Dominion are aimed at without special discrimination against Dominion companies.

The distinction between enactments affecting Dominion companies that are of general application and those that may be termed company law, is simply this: in the former case there is no attempt to interfere with powers validly granted to the company by the Dominion nor with the status of the company as such. The circumstance that the company consistently with the general laws of the Province may not exercise those powers, does not destroy or impair the powers. In the latter case the enactment prohibits or imposes conditions upon the exercise of the powers of Dominion company as such. In short it is aimed at and affects Dominion company powers as distinguished from being aimed at and affecting a trade or business in the Province which Dominion companies may happen to be engaged in in common with provincial companies and natural persons.

In the one case the legislation has to do with a provincial matter, Dominion companies being only incidentally affected; in the other case the legislation is aimed either at Dominion companies or at all companies which includes Dominion companies, and so the Province with power to legislate only as to provincial companies must be said to have entered the Dominion field.

In quoting this passage, I should not be taken as saying that it is possible to reconcile what was said in *Arcadia* with every word written in reasons for judgment in all the earlier cases. Rather, I am of the view that the statement of the law in *Arcadia* is sound and it is one which is supported by the authorities to which I have referred.

My opinion that *Arcadia* correctly states the law is confirmed by the application of its principle in *R. v. City of New Westminster, Ex p. Canadian Wirevision Ltd.* (1965), 55 D.L.R. (2d) 613, 54 W.W.R. 238 (B.C.C.A.). There, the appellant, a federally incorporated company whose objects included the distribution of "cablevision", sought but was refused, a municipal licence to carry on its business in New Westminster, British Columbia. McFarlane, J.A., for the British Columbia Court of Appeal, encountered no difficulty in upholding the

validity of the provincial statute under which the refusal had been made. He said, at p. 615:

> . . . it is said that the refusal of the licence in effect prohibits the appellant from carrying on its business — exercising its powers — within the city area. Assuming this to be so it does not follow that the provincial legislation and the municipal regulations enacted in pursuance thereof have the effect of destroying or sterilizing the company's corporate powers and its status *qua* company . . .

I think that, in using the phrase "*qua* company", McFarlane, J.A., was saying precisely what had been said in *Arcadia* where the phrase "as such" was used. I quote again from pp. 615-6:

> In later cases there has been developed the concept that Dominion companies (to use the recognized description) are bound by provincial laws of general application but are not bound by provincial laws otherwise valid which are directed against such companies so as to interfere with their powers and status as such. In essence the time honoured test of ascertaining the true nature and character — the real pith and substance — of the legislation remains the reliable test. 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*.

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.

PART XIII

THE CITIZENSHIP ARGUMENT

The final issue is the one I have called the "citizenship argument". A detailed analysis of what counsel for the plaintiffs contended on this point may be found in Part IV of these reasons, where I outlined the case for the plaintiffs under para. 20(c) of the statement of claim. I do not repeat here what I said earlier, but will briefly restate the argument. It was said that every Canadian, as a citizen of Canada, has a right to use the highways of the nation. The contention is that it follows from this inherent right that the citizens of Canada, for whom automobile insurance is a necessity in using the nation's highways, have a right as citizens to be free to purchase automobile insurance from whomever they wish and that it is beyond the power of a Province to deny them that right because to do so impairs the inherent right of citizens to use the highways.

Counsel for the plaintiffs asserts that the foundation for this argument is to be found in what was said by Rand and Kellock, JJ., in *Winner v. S.M.T. (Eastern) Ltd. and A.-G. N.B. et al.*, [1951] 4 D.L.R. 529, [1951] S.C.R. 887, 68 C.R.T.C. 41. In that case, Winner was the proprietor of a bus company which embussed passengers in the State of Maine and carried them through the Province of New Brunswick and into the Province of Nova Scotia. It was a common occurrence that some of these passengers would debus at destinations in New Brunswick. The New Brunswick Motor Carrier Board ordered that Winner desist from allowing his passengers to disembark in New Brunswick, but Winner refused to comply with the order. The result was a suit brought by S.M.T. (Eastern) Limited whose purpose was to secure an injunction against Winner to force him to do what the Motor Carrier Board had ordered. In the Supreme Court of Canada, it was held unanimously that Winner's enterprise — the interprovincial and international transportation of passengers — was an "undertaking" within the meaning of s. 92(10)(*a*) of the *British North America Act, 1867* and that, therefore, it fell to be regulated by Parliament. The provincial statute under which the New Brunswick Motor Carrier Board had acted was held to be *ultra vires* the Province.

I reproduce three passages from the judgment of Rand, J., on which counsel for the plaintiffs rely. The first is at pp. 557-8 D.L.R., pp. 918-9 S.C.R.:

> The claim made for provincial control is, in my opinion, exces-

sive. The first and fundamental accomplishment of the constitutional Act was the creation of a single political organization of subjects of His Majesty within the geographical area of the Dominion, the basic postulate of which was the institution of a Canadian citizenship. Citizenship is membership in a state; and in the citizen inhere those rights and duties, the correlatives of allegiance and protection, which are basic to that status.

The Act makes no express allocation of citizenship as the subject-matter of legislation to either the Dominion or the Provinces; but as it lies at the foundation of the political organization, as its character is national, and by the implication of head (25), s. 91, "Naturalization and Aliens", it is to be found within the residual powers of the Dominion: . . .

The second passage is at pp. 558-9 D.L.R., pp. 919-20 S.C.R., where, after speaking of *Cunningham v. Tomey Homma*, [1903] A.C. 151, and *Bryden's* case [*Union Colliery Co. of B.C. v. Bryden*], [1899] A.C. 580, Rand, J., said:

What this implies is that a Province cannot, by depriving a Canadian of the means of working, force him to leave it: it cannot divest him of his right or capacity to remain and to engage in work there: that capacity inhering as a constituent element of his citizenship status is beyond nullification by provincial action. The contrary view would involve the anomaly that although British Columbia could not by mere prohibition deprive a naturalized foreigner of his means of livelihood, it could do so to a native-born Canadian. He may, of course, disable himself from exercising his capacity or he may be regulated in it by valid provincial law in other aspects. But that attribute of citizenship lies outside of those civil rights committed to the Province, and is analogous to the capacity of a Dominion corporation which the Province cannot sterilize.

The third passage is at pp. 559-60 D.L.R., pp. 920-21 S.C.R.:

Highways are a condition of the existence of an organized state: without them its life could not be carried on. To deny their use is to destroy the fundamental liberty of action of the individual, to proscribe his participation in that life: under such a ban, the exercise of citizenship would be at an end. A narrower constitutional consideration arises. Civil life in this country consists of inextricably intermingled activities and relations within the legislative jurisdiction of both Parliament and Legislature; and deprivation of the use of highways would confound matters appertaining to both. To prevent a person from engaging in business at a post office or a customs house or a bank by forbidding him the use of highways is, so far, to frustrate a privilege imbedded in Dominion law. These considerations are, I think, sufficient to demonstrate that the privilege of using highways is likewise an essential attribute of Canadian citizenship status.

The Province is thus seen to be the *quasi*-trustee of its highways to enable the life of the country as a whole to be carried on; they are furnished for the Canadian public and not only or primarily that of New Brunswick. Upon the Province is cast the duty of

> providing and administering them, for which ample powers are granted; and the privilege of user can be curtailed directly by the Province only within the legislative and administrative field of highways as such or in relation to other subject-matter within its exclusive field. The privilege of operating on the highway now enjoyed by Winner so far constitutes therefore the equivalent of a right-of-way.

Kellock, J., dealt with the right of a "subject" to use highways at p. 566 D.L.R., pp. 927-8 S.C.R.:

> In the words of Lord Coleridge in *Bailey v. Jamieson* [(1876), 1 C.P.D. 329], "The common definition of a highway that is given in all the text-books of authority is, that it is a way leading from one market-town or inhabited place to another inhabited place which is common to all the Queen's subjects." It therefore appears at once that the right to the use of a highway is a right vested in the "subject" who is entitled to the exercise of that right throughout the kingdom. As the preamble to the *British North America Act* states that the constitution of Canada was intended to be similar in principle to that of the United Kingdom, this right, belonging equally to all Canadian subjects of His Majesty, is one which would normally be within the jurisdiction of Parliament unless another disposition has been made by the *British North America Act*. The only provision of that statute which is pointed to for such a result is head 13 of s. 92, but the mere statement of the nature of the right is sufficient to exclude it from the class of civil rights *within* the Province.

Winner went on appeal to the Privy Council (reported as *A.-G. Ont. et al. v. Winner et al.*, [1954] 4 D.L.R. 657, [1954] A.C. 541, 13 W.W.R. (N.S.) 657). The Board upheld the conclusion of the Supreme Court of Canada that Winner's enterprise was an undertaking within the meaning of s. 92(10) (*a*) and was, therefore, within a legislative field reserved for Parliament. Lord Porter, who gave the judgment for the Board, did not adopt the citizenship approach taken by Rand and Kellock, JJ. It is not, in my view, necessary for me to consider the citizenship right, of which Rand and Kellock, JJ., spoke, because I am unable to interpret from what their Lordships said that the right of a citizen to use the highways, whatever the extent of the right, could not be regulated by valid provincial legislation. It follows, in my opinion, that *valid* provincial legislation can limit the sources from which insurance necessary to use highways may be obtained. I have held that the impugned legislation is *intra vires*; I simply add that the impugned legislation, in pith and substance, is not in relation to citizenship or a citizen's inherent right to use highways. For these reasons, I am unable to accede to Mr. Brown's citizenship argument.

PART XIV

CONCLUSION

For these reasons, I hold that it was within the competence of the Legislative Assembly of British Columbia to enact the *Automobile Insurance Act*, 1973 (B.C.), c. 6, and amendments thereto, and the *Insurance Corporation of British Columbia, Act*, 1973 (B.C.), c. 44, and amendments thereto. It was within the power of the Province to enact the two statutes; they are not *ultra vires*, they are valid enactments. I wish to make it clear that I hold the *Automobile Insurance Act* including the unproclaimed provisions thereof, which are not in force, to be *intra vires*, and I hold that, without taking into account the provisions thereof which have not yet been proclaimed and are not in force, the Act is *intra vires*. It follows that the plaintiffs' action must be dismissed. Counsel did not speak to the matter of costs. Unless counsel wish to speak to costs, costs will follow the event. If counsel wish to speak to the matter, I ask that they arrange for a convenient date to do so.

Action dismissed.