The British North America Act, 1867, divides the field of economic regulation like that of social welfare between the Dominion and the provinces. On the one hand, the Dominion has extensive regulatory power over economic activities through its jurisdiction to regulate "trade and commerce", and such matters as "interest", "banking", "weights and measures", "bills of exchange and promissory notes". On the other, the provinces have the proprietary right over natural resources, and have as well considerable regulatory power over economic activities through their exclusive power over "property and civil rights within the province", "the incorporation of companies with provincial objects", "generally all matters of a merely local or private nature within the province", and the right to issue licences. This division of jurisdiction over economic life has occasioned considerable friction between the provinces and the Dominion; in some cases it has induced overlapping of services between governments; in some it has greatly hindered effective governmental action in dealing with economic problems.

Ideally, we should, perhaps, have begun with an examination of the whole field of economic life, under modern conditions, and have based our recommendations as to jurisdiction on this examination, ignoring the settlement of 1867. But we have considered that a more practical approach would be to concentrate our attention on certain specific problems of jurisdiction brought to our notice in our public hearings. We feel that, in particular, five problems in this field demand examination; the marketing of natural products; the regulation and incorporation of companies; fisheries; the regulation of insurance; and the problem of freedom of trade between the provinces. As in the case of the social services, we have assumed that we should not recommend any change in jurisdiction except for strong and compelling reasons. In certain instances we recommend a new method of approach by delegation of powers.

1. Marketing of Natural Products

The term "marketing" is an economic or commercial, rather than a legal concept, and describes a process which may involve many steps and transactions. This process does not fall easily under any head of jurisdiction in section 91 or section 92 of the British North America Act. It straddles the line between provincial and federal fields and falls in certain aspects under several of the enumerated powers in both sections 91 and 92. Some phases of marketing fall within the Dominion jurisdiction over "trade and commerce", "copyright", "patents of invention and discovery", "weights and measures", "the criminal law", and probably also under the Dominion taxing power. In certain aspects marketing also falls under the provincial jurisdiction over "property and civil rights within the province", "matters of a merely local or private nature in the province", "direct taxation within the province", and "shop... and other licences".

In the broad meaning of the term, "marketing" might include buying and selling, organization of buyers or sellers, prices, grades and standards, market and other commercial practices, etc. While we are fully aware of these broader implications of the word and of recent developments in Canada and elsewhere of a trend toward fuller commercial regulation, we have, none the less, limited our discussion of marketing to the field of natural products. We do this both because virtually no other phase of the subject was raised in our public hearings, and because a wide variety of other problems engaged our time and attention. But in thus limiting our discussion we do not mean to imply that there are no other phases which may require attention or that changes in jurisdiction over certain other aspects of marketing (such as the regulation of prices) may not be needed in the future. We have merely concentrated on pressing problems.

We have already made reference to the fact that demands for social legislation have been made on governments which were not contemplated in 1867. In commercial matters there has likewise been a growing demand for governmental interference, which, though not requiring the same governmental expenditures as the social services, may profoundly affect the national income. These demands could not have been foreseen at the time of Confederation. In 1867 most trade within Canada was on a small scale and the buyer and seller stood in positions of comparative equality. But as the
Canadian economy became more complex and the volume of sales and the distances to markets increased, the old equality of bargaining position between buyer and seller was disturbed to the disadvantage particularly of the small producer of natural products. Likewise in foreign trade there was little need in 1867 for standardization of products because foreign trade consisted largely of staples in bulk, but as competition in foreign markets increased and modern systems of merchandising through organized exchanges developed, the need arose for grading and standardization of products. Early governmental activities were directed toward the encouragement and assistance of producers of natural products in the use of better methods in order to increase and improve production. Later legislation sought to establish grades of quality, standard packages, and a system of accurate marking for a variety of natural products, including live stock, fruits, vegetables, fish, and dairy products. In more recent years there has been a demand that the state should seek to assure minimum prices to producers by organizing and controlling the production and marketing of natural products, and both the Dominion and the provinces have attempted to do this by legislation. State interference of this character is quite foreign to the laissez faire theories which dominated in 1867 and which undoubtedly influenced the Fathers in their distribution of powers between the Dominion and the provinces. It is therefore not surprising that it should have encountered constitutional difficulties.

Under the provisions of the British North America Act, which have already been quoted, the provinces had exclusive legislative power over "property and civil rights" and local matters within the province, and, therefore, alone could deal with many phases of marketing which were intra-provincial in their scope. The supply of milk to large cities is an example of this type of marketing regulation. The provinces, however, had no power to legislate concerning interprovincial and foreign trade, but in this trade the need for uniformity of standards and accuracy of grading may be even more essential than in local trade. Various attempts were made by the Dominion to establish standards and grades but with little success except for wheat. The prime difficulty encountered by both provincial and Dominion legislation arose from the fact that grading of many products to be effective must take place when the individual producer first sells his produce, but that then it is often impossible to say whether the particular articles will remain in local trade or will pass into interprovincial or export trade. A similar constitutional difficulty was encountered in recent legislation designed to aid producers by enabling them to establish marketing boards financed by the imposition of licence fees. Dominion legislation of this type was held invalid because of its interference with local trade. Provincial legislation of this type has been held to be valid but it is applicable to commodities whose chief market is local and would probably be inapplicable to commodities entering largely into interprovincial or foreign trade; it might even be possible that provincial legislation which was originally valid would become invalid if the commodity concerned ceased to be merely the subject of local trade and came to be widely sold in foreign markets.

It is unnecessary to examine the lengthy series of legal decisions which have held invalid various attempts to enact marketing legislation. Dominion statutes have, in general, been held invalid because they interfered with local trade; provincial statutes have been invalidated because their provisions purported to interfere with interprovincial and foreign trade. A number of devices have been employed in an attempt to circumvent these constitutional difficulties. Of these the most important was the device of enabling legislation. The Dominion would pass a statute in general terms and the provinces would pass enabling acts which provided that any provisions of the Dominion act which might be ultra vires were declared to have the force of law in the province. The validity of the device of enabling legislation has not been decided by the Supreme Court of Canada or the Privy Council, but it has been determined in three decisions of provincial appeal courts that the provincial enabling acts did not remedy the defects in the Dominion statute. The basis of these decisions appears to have been that the provincial legislatures cannot by a subsequent act give validity to a Dominion statute which was invalid when it was enacted, and that delegation of legislative power to Parliament was beyond the provincial power.

1 See J. A. Corry, Growth of Government Activities Since Confederation. (Mimeographed.)

2 Re Natural Products Marketing Act [1937], A.C. 377.
3 Re British Columbia Natural Products Marketing Act [1937], 4 D.L.R. 298; Shannon v. Lower Mainland Dairy Products Board [1938], A.C. 708.
4 See Ex. 252, Brief of Canadian Chamber of Agriculture, for details of various enabling statutes.
6 See Appendix 7—J. A. Corry, Difficulties of Divided Jurisdiction.
Doubts as to the constitutionality of enabling legislation have led to its virtual abandonment. In its place a new device which might be termed "conjoint legislation" has appeared. The provincial legislation, dealing solely with transactions within the province, provides for the Lieutenant-Governor in Council setting up grades and standards and appointing inspectors to administer the act. In practice the grades and standards adopted conform to those of the Dominion, and the inspectors appointed to administer the provincial statute are Dominion inspectors. Although there has been little or no experience of the working of "conjoint legislation" a number of difficulties would seem likely to arise. It will not be easy to preserve uniformity, which is so desirable, where changes in the statute must be enacted both by Parliament and by each provincial legislature as well. There will also be danger of confusion in having the same set of officials responsible to two different authorities, and difficulties would seem to be inevitable where conflicting instructions are given to these officials. Possibilities of unnecessary duplication in administration and serious friction between the Dominion and the provinces seem to be inherent in the device.\(^7\)

The present position of marketing legislation was, in our opinion, accurately summarized in one of the briefs presented to the Commission when it was said: "It would appear, therefore, that the position after almost 20 years of legislating and referring the constitutionality of various acts of Parliament and of the legislative assemblies to the Courts, finds us exactly where we began, namely, no one knows how to draft workable legislation dealing with the regulation of grading, packing, storing and marketing of agricultural products, which will come squarely within the respective jurisdictions of the Dominion and the Provinces without the exercise of almost incredible caution."\(^8\)

There are a number of reasons why complete and exclusive jurisdiction over marketing legislation cannot appropriately be vested in either the Dominion or the provinces. Exclusive provincial jurisdiction to regulate trade in all commodities including articles entering into interprovincial and foreign trade would tend to destroy the uniformity necessary for foreign trade, and to create barriers to interprovincial trade that would be highly undesirable and contrary to the spirit, if not the letter, of section 121 of the British North America Act. Exclusive Dominion jurisdiction would involve the regulation of local sales of certain commodities, such as milk and vegetables, which it would be highly inconvenient for the Dominion to do. Moreover, it is possible that public opinion on economic and social policy in one province may be different from that which prevails in another province. The desire to have more comprehensive marketing legislation in one province should not be compelled to await the development of a similar desire in all provinces. With regard to the compulsory control of production there has been little practical experience, and it is far from easy to decide between the legitimate control of production for the purpose of ensuring a reasonable living to producers, and the prevention of combinations which tend to enhance prices to consumers. In such a matter a certain amount of regional experimentation is desirable.

Submissions made in our public hearings were almost unanimous in protesting against the present jurisdiction over marketing legislation and in urging that some change was desirable, but they were not unanimous in suggesting the form that this change should take. But in general the submissions urged that the Dominion and the provinces should share the jurisdiction over marketing, either by creating a concurrent jurisdiction analogous to that over agriculture and immigration in section 95 of the British North America Act,\(^9\) or by creating a power for the Dominion and a province to delegate full authority one to the other to legislate concerning certain phases of marketing.\(^10\)

We believe that either method would accomplish the desired result which is to provide for uniformity where the circumstances demand it, allow for local experimentation where it can be carried on without confusion and difficulty and, above all, to provide for certainty, and at the same time flexibility, of jurisdiction. We think it is desirable that the regulation of local marketing, such as the supply of milk for local consumption, should, in practice, be left to the provinces. But the marketing of commodities entering largely into interprovincial and foreign trade should be governed by Dominion legislation, which should be valid notwithstanding the fact that it may also regulate intra-provincial trade in these products.

\(^7\) For detailed discussion of these difficulties see J. A. Corry, Ibid.

\(^8\) Ex. 252, Brief of Canadian Chamber of Agriculture, p. 13.

\(^9\) E.g. Ex. (Director, Dominion Marketing Service), pp. 4913-14; Ex. 80, Brief of League for Social Reconstruction, pp. 26-36, Ex. p. 2810; Ex. 172, Brief of B.C. pp. 353-54; Ex. 206, Brief of Provincial Council of Women, B.C.; Ex. 210, Brief of C.C.F. (B.C. Section); Ex. 140, Brief of N.S., pp. 20-32 and Ex. pp. 9005, 4185-86; Ev. (Ont. Minister of Agriculture), p. 7876.

\(^10\) Ex. 252, Brief of Canadian Chamber of Agriculture; Ex. 140, Brief of N.S., p. 24; Ex. 84, Brief of Sask., p. 338.
The creation of concurrent jurisdiction over grading and marketing, analogous to that over agriculture and immigration in section 95 of the British North America Act, would provide a solution of most of the difficulties which have been encountered in attempts to regulate the marketing of natural products. In practice the Dominion would probably legislate concerning only those phases of marketing which had importance for interprovincial and foreign trade, and the provinces would regulate marketing in its local aspects. There are, however, certain difficulties which it would be necessary to guard against if such concurrent jurisdiction were created. The terms "grading" and "marketing" are not of such precise meaning that they could, without further definition, be inserted in a constitutional amendment, and, as they involve economic rather than legal concepts, it might be extremely difficult to give definitions which would avoid legal controversy. Moreover, the term "natural products" is vague and difficult of definition, and it might be found desirable in the future to legislate for manufactured and semi-manufactured products which would not fall within any definition of natural products.11

We think that the happiest solution might be to provide specifically for concurrent jurisdiction (analogous to that in section 95 of the British North America Act) over the grading and marketing of a list of defined products, and to provide for the provinces adding other products to the list from time to time. There appears to be no reason why some of the provinces should not add designated products without waiting for the action of all provinces. The designation might be in perpetuity, or a province might be allowed to concede concurrent jurisdiction over the grading and marketing of added products for a defined period. The exact procedure for designating added products should be defined, and we think that the provision need not be restricted to "natural products" but that manufactured or semi-manufactured products might be similarly dealt with by the Dominion and provinces if it should seem desirable to do so.12

whole problem of regulation of marketing would, of course, be greatly simplified if our general recommendation, made elsewhere, providing for delegation of power by a province to the Dominion, or vice versa, were implemented.13

2. COMPANY INCORPORATION AND REGULATION

A number of representations were made at our public hearings concerning companies and their regulation. The nature and allocation of corporation taxes may be more conveniently discussed in connection with our financial proposals,14 and certain of the special problems of insurance companies will be discussed separately.15 Other representations concerning company matters may be grouped under three headings, namely, problems of company incorporation, the regulation of the issue and sale of corporate securities, and the difficulties from lack of uniformity in legislation requiring company returns.

Incorporation of Companies

By section 92, subsection 11 of the British North America Act the provinces were given power to make laws in relation to the incorporation of companies with provincial objects. In section 91 there is no specific Dominion power, but the incorporation of companies by the Dominion rests upon the residuary clause of section 91 which gives jurisdiction to the Dominion in relation to all matters not coming within the exclusive jurisdiction of the provinces. Under these respective powers the Dominion and all nine provinces have enacted Companies Acts which have undergone frequent amendment and have increased in length and complexity. Not only are there substantial differences between the ten statutes, but the provisions for incorporation follow one or other of two widely divergent models. In British Columbia, Alberta, Saskatchewan and Nova Scotia, the Companies' Acts follow the English method of incorporation by means of a memorandum of association; in the statutes of the Dominion and the other five provinces the incorporation is achieved by the issue of letters patent from the Crown. Although the powers of both types of company are similar, this fundamental difference in the method of incorporation creates a substantial obstacle to the attainment of uniformity in the ten statutes. Uniformity could, of course, be achieved automatically if sole jurisdiction to incorporate companies were transferred to the Dominion. But,
if this took place, it seems probable that the Dominion would be required to establish local administrative centres for the public convenience, and that the cost of these would be as great or greater than the present cost of the companies' branches maintained by the provincial governments.16 In the absence of such centres it seems likely that delay and inconvenience in the incorporation of companies would be unavoidable. Moreover, there appears to be a proper field for provincial incorporation of companies. For certain enterprises whose operations do not extend beyond the boundaries of a single province the advantages of local incorporation are obvious; for certain other enterprises it may be convenient that companies having power to operate in the province of incorporation should have capacity to receive additional powers from other jurisdictions. The present system of provincial incorporation of such companies in general is operating satisfactorily and with convenience to the public, and should not, in our opinion, be disturbed. It is noteworthy that the Dominion officials in the Department of the Secretary of State seek to discourage Dominion incorporation of companies whose sphere of operation appears to be merely local, and we believe this to be a proper attitude.17

Although we do not recommend that exclusive jurisdiction to incorporate companies should be vested in the Dominion, we believe that the advantages of substantial uniformity in the ten Companies Acts would be very great. These advantages were generally recognized by provincial governments and public organizations which made representations to us.18 We believe that the desirable uniformity in Companies Acts can be achieved by Dominion-provincial collaboration without any reallocation of legislative power, and we are informed that steps have already been taken in this direction. At the Dominion-Provincial Conference in 1935 a sub-committee on company matters, composed of representatives of the Dominion and all provinces, was appointed. This committee has met several times and a draft uniform Act has been prepared and circulated. We believe that this is the most practicable method of dealing with this matter and urge upon all parties the desirability of achieving, as speedily as possible, substantial uniformity of company law in all jurisdictions.

The Sale of Securities

Although the provincial legislatures may not impair the corporate powers of a Dominion company, they may compel such a company to comply with laws of general application. In this way they have obtained a large and effective measure of control over the sale of securities issued not only by provincial companies but also by Dominion companies. The Dominion Under-Secretary of State gave as his opinion that there is great advantage in having statutes designed to prevent frauds in the sale of corporate securities administered by people who have local knowledge rather than by a central board, and with this opinion we fully agree. But the same official stated that "a great deal might be done to lessen the inconvenience and expense to companies in respect of licensing and the preparation and filing of returns."19 It seems to us that there is a useless duplication of labour and expense in having substantially the same information supplied in different forms to the various jurisdictions in which a company desires to sell securities. Either agreement should be reached by the provinces and the Dominion that the investigation and licensing of one jurisdiction should be accepted by all, or else they should agree that identical applications for permission to issue and sell securities should be accepted by all jurisdictions. In this matter also steps have been taken in the direction of achieving uniformity through the work of the Dominion-Provincial Committee to which we have already referred, and we urge that this work should be pushed forward rapidly to a successful conclusion. An important advance in Dominion-provincial co-operation was taken when the provinces requested the Dominion to establish a clearing house for information as to company promotions and stock salesmen, and we understand that this request is about to be implemented by the Dominion.

Uniformity in Company Returns

Complaint from business organizations was made to us at our hearings in all parts of Canada, concerning the unnecessary complexity and lack of uniformity of returns required from corporations doing business in several provinces of Canada. It was said that governmental costs were increased by

---

16 See evidence of Dominion Under-Secretary of State, p. 3467, and Ex. 14, Memo. of Manitoba Companies' Branch.
17 Ev. p. 3445.
18 Ev. (B.C.), pp. 5540-41; Ev. (N.B.), p. 9166; Ev. (N.S.), p. 4068; Ev. (Ont.), p. 7851; Ex. 394, Canadian Chamber of Commerce; Ex. 169, Halifax Board of Trade; Ex. 17, Winnipeg Board of Trade; Ex. 342, Montreal Board of Trade; Ex. 188, Associated Boards of Trade of British Columbia.
19 Ev. p. 3449.
the duplication of the work of examining and checking these returns, and that the cost of compliance by the companies with a number of differing statutes, all demanding substantially the same information, was large and quite unnecessary. Complaint was also made of the annoyance of investigations and audits by officials representing several jurisdictions.\footnote{Ex. 88, Brief of Canadian Manufacturers' Association; Ex. 95, Brief of Dominion Mortgage and Investments Association. For discussion of cost of tax compliance arising from preparation of governmental returns, see Sect. B, Chap. III, 2.} If the recommendations which we make elsewhere\footnote{Ibid.} as to the jurisdiction to impose and collect corporation taxes are implemented the duplication of corporation tax returns should be largely eliminated. But, in any event, it is only elementary common sense that this type of unnecessary duplication and waste should be eliminated as far as possible. The ideal arrangement, from the point of view of business, would be a common form of return on which all information requested by any government concerned could be tabulated. The purposes for which information is needed are likely, however, to differ as between different governments, even if those governments are not taxing authorities. We recognize, therefore, that there are great difficulties involved in devising a common form for all corporation returns which would not be entirely eliminated even if corporation taxes were paid to a single jurisdiction. But the information requested by various governments for the same purpose (e.g. licensing) is likely to be similar, and in such matters a common form of return would appear to be both practicable and desirable. It should also be possible to eliminate much of the duplication in inspection and audit of company affairs by reciprocal agreements between governments to accept each other's audits wherever possible. Every effort should be made by all governments to reduce and to keep at a minimum the nuisance to business of compliance with governmental demands for returns of information.

3. Fisheries

The respective jurisdictions of the Dominion and the provinces over fisheries have been the subject of a number of complicated and elaborate legal decisions. We do not propose to enter upon a detailed discussion of those decisions but, for the purposes of this chapter, the legal situation may be summarized in the words of the Dominion Deputy Minister of Fisheries:

"... The exclusive power to regulate fisheries, no matter where these fisheries may lie, is a federal function. The administrative jurisdiction of all tidal fisheries and, under the decisions, in Quebec of all fisheries in waters that are navigable from the sea, is a federal function.

In the non-tidal waters, broadly speaking, and in Quebec in those waters that are not navigable from the sea, ownership in the fisheries is vested in the riparian owners, and in most of the provinces it means that the ownership of practically all the fisheries is therefore vested in the province. So that at the present time the administration of the fisheries in the different provinces that have non-tidal waters is carried on by the departments of the provincial governments concerned.

The Federal Government is regulating the fisheries in these provinces, and it administers as well as regulates the fisheries in all tidal waters with the exception of those in Quebec and, again, with the exception of those about the Magdalen Islands, where since 1921 there has been an agreement whereby the province carries on the administration in the tidal waters there with the exception of those about Quebec. . . .\footnote{Ex. 140, Brief of N.S., p. 139, Ex. pp. 4090-83; Ex. 161, Brief of P.E.I., p. 42, Ex. pp. 4506-07.}

From this division of jurisdiction over fisheries a number of administrative difficulties have arisen. For fisheries in tidal waters the Dominion both makes and administers regulations subject, however, to a special arrangement in Quebec which ignores the constitutional division and provides for provincial administration. Although the Dominion administration of fisheries in tidal waters may not be completely satisfactory to the provinces concerned, it was not suggested to us that this function should be transferred from the Dominion to the provinces. But it was suggested that the Dominion should decentralize its administration by appointing resident directors of fisheries\footnote{Ex. (B.C.), p. 5441; Ex. 190, Memo. B.C. Dept. of Fisheries.} and that there might be more co-operation between the Dominion and provincial departments\footnote{Ex. 120, Memo. Dominion Dept. of Fisheries; Ex. 190, Memo. B.C. Dept. of Fisheries.}

For fisheries in non-tidal waters the Dominion is responsible for making all regulations, but their actual administration falls within the powers of the provinces. While the evidence suggests that no actual overlapping occurs,\footnote{Ex. 15, Memo. Man. Dept. of Natural Resources; Ev. pp. 755-56.} it was said that this division of jurisdiction was highly unsatisfactory. The principal objection was based mainly upon the difficulties of remote control.\footnote{Ex. 140, Brief of N.S., p. 139, Ex. pp. 4090-83; Ex. 161, Brief of P.E.I., p. 42, Ex. pp. 4506-07.} In the case of provinces which administer non-tidal fisheries the practice is for the provincial department concerned to decide on appropriate regulations and recom-

\footnote{Ev. pp. 3506-07. See also Appendix 7—J. A. Corry, Difficulties of Divided Jurisdiction. \footnote{Ex. 120, Memo. Dominion Dept. of Fisheries; Ex. 190, Memo. B.C. Dept. of Fisheries.}}
mend them to the Dominion Department which then passes them on to the Governor General in Council for approval. At best this cumbersome system may give rise to annoying delays. In provinces with no tidal fisheries there would seem to be no reason why fisheries regulations could not be handled by the provinces with more efficiency and less Dominion-provincial friction than at present. But in provinces with both tidal and non-tidal fisheries certain types of fish resort to non-tidal waters for reproduction, and regulation by the federal authorities in non-tidal waters may be essential to their regulation of fisheries in tidal waters.

In our opinion the regulation of fisheries in Canada comprises not one, but several problems. The problems of the Maritime fisheries are different from those of the Prairie Provinces, and different again from those of British Columbia. It is probably impossible to draw a clear-cut line of demarcation between federal and provincial responsibilities which will be suitable for all provinces.

Two solutions of this difficulty suggest themselves. A power of concurrent jurisdiction over fisheries (analogous to that over agriculture and immigration in section 95 of the British North America Act) might be created. This would permit the Dominion to pass regulations in connection with matters of national or international importance, and leave to the provinces regulation of fisheries in their local aspects. There is, however, a possible disadvantage in such a method in that it might create resentment if the Dominion, whose power to regulate would be necessarily paramount, entered into a field already occupied, possibly at some expense, by the province. Another method of dealing with the difficulty would be to give the Dominion power to delegate its right of regulation to any province which desired to take over this function. Proper conditions could be attached at the time of such delegation to safeguard legitimate Dominion interests, and the delegation might be limited to certain types or aspects of fisheries. We recommend elsewhere that there should be a general power conferred on the Dominion and the province to delegate legislative powers one to the other. If this suggestion were implemented it would, of course, be applicable to the Dominion power to regulate fisheries, but in any event a specific power might be created to enable the Dominion to delegate jurisdiction to make fisheries regulations to such provinces as could perform this function more conveniently.

We think that either suggestion—concurrent power or power of delegation—would eliminate the difficulties experienced in the exercise of the existing jurisdiction over fisheries. If neither is adopted we think that substantial improvement might result if the Dominion decentralized its administration so that resident officials in the provinces could make changes in regulations, subject to the power of veto in the Minister at Ottawa.

4. INSURANCE

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

As there was no specific provision in the British North America Act legislative authority for such regulation had to be sought in the general powers appearing in sections 91 and 92. Legislation on insurance by the Dominion and the provinces began almost contemporaneously, and an early conflict over jurisdiction developed and was intensified as the business grew in importance. In 1868 the earliest post-Confederation Dominion statute provided that all insurance companies, except provincial companies doing business in only one province, should secure a licence from the Minister of Finance, make deposits and file annual statements. In 1875 the Dominion established the office of Superintendent of Insurance to examine the annual statements and investigate the financial position of insurers.

27 Ev. (Dominion Deputy Minister of Fisheries), p. 3507.
28 It is interesting that in the Quebec Resolutions (Nos. 29 and 38) it was proposed that jurisdiction over sea-coast and inland fisheries should be conferred on both the general Parliament and the local governments. For suggestions as to concurrent power of regulation of natural resources see Ex. 387, Brief of Federation of Ontario Naturalists.
29 See p. 72.
The Dominion has never attempted to regulate provincially-incorporated companies doing business only within the province, and it was with such companies that the earliest provincial legislation was concerned. In 1876 the Ontario Legislature provided that all companies without a Dominion licence should secure one from the Provincial Treasurer, make deposits, file annual reports and submit to inspection. In the same year an Ontario statute required all fire insurance companies doing business in the Province to insert in their policies certain prescribed terms and conditions. and in later years similar legislation was enacted by other provinces and concerning other types of insurance. By 1879 Ontario had an inspector of insurance, and by 1881 a provincial insurance department, headed by a superintendent, had been established and regulatory machinery very similar to that of the Dominion had been set up.

Dominion legislation was directed at the beginning chiefly to the questions of solvency and financial responsibility of the companies to which it applied. Provincial legislation dealt with the solvency of local provincial companies and with the requirement of fair and equitable terms in insurance contracts. But in providing for the requirements for a Dominion licence it was easy to include conditions as to the manner in which the licensee should do business, and in the provincial attempt to regulate the business methods of insurers a local licence could be used effectively. In the absence of a clear definition of jurisdiction disputes arose and produced a lengthy series of legal cases.

The provincial power to legislate respecting conditions of insurance contracts was established in an early case and the Dominion has not since attempted to prescribe such conditions directly. But it attempted to deal with certain phases of insurance contracts and to require insurers to obtain a Dominion licence. It was held by the Privy Council that such legislation was invalid and could not be supported under the Dominion's powers to legislate for the peace, order and good government of Canada, or for the regulation of trade and commerce. Following this decision the Dominion passed new statutes permitting the issue of licences to insurers and requiring the inclusion of certain provisions in insurance contracts as a condition of obtaining a licence. By amendments to the Criminal Code it was made an offence to carry on the business of insurance without a licence. This attempt to support legislation under Dominion jurisdiction over criminal law, aliens, and immigration was also unsuccessful. Another attempt to require insurers to take out a Dominion licence was made by imposing an additional tax on unlicensed insurers. This attempt to regulate insurance by the use of the taxing power was also held to be invalid in 1932. Following this last decision of the Privy Council new legislation was passed by the Dominion Parliament, based evidently on its power over bankruptcy and insolvency. The validity of this most recent legislation has not yet been challenged in the courts, and the uncertainty as to the Dominion's legislative power still persists.

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

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

We are of the opinion that the jurisdiction to regulate the incidents and conditions of insurance contracts should remain with the provincial legislature, which has hitherto performed this function satisfactorily. We are strengthened in this conclusion by the consideration that in Quebec the rights
which are the subject matter of insurance contracts are defined by the Civil Code, and, in our opinion, it would be inappropriate to separate legislative power over civil rights and over insurance contracts. We were impressed also by the argument addressed to us by provincial Superintendents of Insurance that the annual conference of the "Association of Superintendents of Insurance of the Provinces of Canada" affords a useful forum for the discussion of the form of insurance contracts and prevents hasty or unwise changes in the law. Through the efforts of this Association uniformity of law has been achieved in the common law provinces, and we feel that this provincial jurisdiction should not be disturbed.

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

It was represented to us that there are in certain provinces, especially Ontario and Quebec, a large number of provincially-incorporated companies, usually of a mutual type.44 These companies, dealing mainly in fire and weather insurance, provide protection at low cost, and because of the local nature of their business can be supervised most economically and efficiently by the provincial departments of insurance. We recommend, therefore, that all provincially-incorporated insurance companies doing business only in the province of their incorporation should be subject for all purposes to the exclusive legislative jurisdiction of the province concerned. We think, however, that the Dominion Department of Insurance should have power to undertake the supervision of provincially-incorporated companies when requested to do so by the province. Such a system has been used in Nova Scotia with, we believe, great success.45

In regard to companies doing business in more than one province, duplication and overlapping exist in the matter of licences to do business, annual returns, and statistical reports. The memorandum of the Ontario Superintendent of Insurance46 discloses that the functions in Ontario of the Dominion and provincial insurance departments are in many respects identical so far as they relate to licensing of insurers, administration of deposits, examination for solvency, filing of annual and statistical returns, annual reports and related matters. There is, therefore, duplication, or possible duplication, of governmental activity, and also a field within which friction between the two departments may arise. Insurance companies are forced to undertake an expensive and useless duplication of effort which presumably results in increased insurance costs to policyholders. It is true that in most, if not all provinces, Dominion licensees are entitled to provincial licences on compliance with merely formal requirements, and when a deposit is made with the Dominion, the provinces do not demand a deposit. Nevertheless, uncertainty is created by the mere existence of the power to impose additional requirements for licence and deposit, and duplication exists in the compilation of annual and statistical returns to the Dominion and provincial departments which often require calculations on different bases.47

Is it not obvious that where an insurer is doing business in more than one province, there should, in the interests of efficiency and economy, be only one supervision of that insurer concerning matters of solvency? In view of the difficulty of otherwise determining jurisdiction, and in view of the Dominion's experience in such matters which has been built up over many years, we recommend that the Dominion Superintendent of Insurance should be charged exclusively with the duty of examining as to solvency all insurance companies, other than provincially-incorporated companies doing business only in the province of incorporation. Subject to the same exception, the Dominion should have exclusive power to license all insurance companies, provide for such deposits as may be necessary, inspect for solvency, and require annual and statistical returns. It should be open to the provinces to inspect and obtain copies of such returns, and in fixing the form of statistical returns the wishes of the provinces for information should be ascertained and respected. But an insurance company licensed by the Dominion should be entitled to commence business in any province of Canada without question, and should be able to continue business subject only to the financial supervision of the Dominion Department of Insurance. In recommending a single jurisdiction for the financial

45 Ex. 118, Memo. Dominion Supt. of Insurance, p. 7.
46 Ex. 321, pp. 2-4.
47 Ex. 94, Brief All-Canada Insurance Federation, p. 5; Ex. 321, Memo. Ont. Supt. of Insurance, p. 8.
supervision of insurance companies (except provincially-incorporated companies doing business only in the province of incorporation) we aim to avoid not only unnecessary costs to the insurance companies and the public, which we have already mentioned, but also the increased governmental costs arising from duplication of governmental machinery by the Dominion and the provinces for the inspection and supervision of insurance companies.

**SUMMARY OF CONCLUSIONS**

Our recommendations thus involve a clear-cut division of functions throughout the whole field of insurance law. The provincial legislatures should have exclusive jurisdiction to prescribe the statutory conditions and incidents of insurance contracts, and exclusive jurisdiction to license insurance agents, brokers and adjusters. They should also have power to supervise the financial affairs of all insurance companies incorporated and operating solely within the province of incorporation; but a province should be enabled to delegate this function to the Dominion if it so desires. The Dominion should have the exclusive jurisdiction and responsibility for licensing all other companies, requiring deposits from them, prescribing annual and statistical insurance returns, conducting financial inspections and supervision, and publishing annual reports concerning such companies. This division of jurisdiction should be expressed with the greatest possible definiteness and clarity since vagueness in definition of powers would permit attempts by both the Dominion and the provinces to extend jurisdiction to ancillary matters, and would thus tend to continue the long series of constitutional battles over insurance jurisdiction which should be brought to an end.

In the event that these recommendations are not carried out we think it essential that the respective jurisdictions now exercised by the Dominion and the provinces should be defined beyond question. The evident desire of the larger insurance companies to have Dominion supervision, and the obvious advantages of Dominion supervision to certain of such companies in their foreign business, suggest the advisability of establishing the present exercise of function on a sound constitutional basis. Duplication and possible inefficiency of administrative control, resulting from uncertainty over the constitutional position, should not be allowed to continue.

---

5. **Prevention of Interference with Interprovincial Trade**

One aspect of the regulation of trade and commerce which gives rise to more or less serious difficulty in every federal system is that of safeguarding the freedom of interstate or interprovincial trade which national unity requires. The member states of a federation at the outset are likely to be states which have imposed tariff barriers and, perhaps, other obstacles as well, to their trade with one another. These states or provinces after federation are apt to reach a stage of development at which there is bound to be political pressure in favour of some form of local protectionism. The desire to maintain and to augment the provincial revenue, to develop new industries, to ensure employment during a period of depression, to protect wage levels and working conditions against "unfair competition" or "social dumping" may all, at one time or another, contribute to this demand for local protectionism, which may appear even in municipal politics.

A federation usually starts off with good intentions and the most obvious forms of undesirable discrimination are usually prohibited. Thus, in Canada, the Federal Parliament alone was authorized to impose customs and excise taxes and indirect taxation generally; the Federal Parliament was given "exclusive" power to legislate concerning trade and commerce; the Federal Government was equipped with power to disallow provincial legislation; and the provinces were required to admit each other's produce freely. While these provisions of the constitution discontenanced barriers to interprovincial trade they did not preclude them altogether and, under the stress of political pressure, various expedients have recently been devised which, in one way or another, afford some degree of provincial protectionism. Various briefs presented to the Commission contained protests against one or another form of this regional protectionism. Research studies undertaken on behalf of the Commission show the magnitude and complexity of the problem. All

---

48 Ex. 94, Brief All-Canada Insurance Federation, p. 12; Ex. 92, Brief Canadian Life Insurance Officers' Ass'n, p. 16.

49 "All Articles of the Growth, Produce, or Manufacture of any one of the Provinces shall, from and after the Union, be admitted free into each of the other Provinces." Section 121, B.N.A. Act.

50 Ex. 17, Winnipeg Board of Trade commented on the tendency "more noticeable than ever, to restrict freedom of interprovincial trade by devices which have the same ultimate effect as imposition of tariffs upon business between provinces." Also Ex. 159, Halifax Board of Trade; Ex. 258, Toronto Board of Trade; Ex. 38, Native Sons of Canada; Ex. 384, Canadian Chamber of Commerce. The Canadian Chamber of Commerce protested against laws and regulations hampering the conduct of business and the "free movement of trade from Vancouver to Halifax."
forms of local protectionism are not necessarily objectionable; but it is not possible to segregate completely the good from the bad. While we have no panacea to offer it seems desirable to review the situation briefly and to indicate various remedial possibilities.

Examples of Provincial Protectionism

An exhaustive examination is not here attempted but some examples may be noted to indicate the nature of the methods, legislative and administrative, by which provincial protectionism is being advanced. Certain taxes which in 1867 would have been considered essentially indirect at least by economists, and within the exclusive power of the Dominion, can now be so framed as to be deemed direct by the courts and, therefore, within the jurisdiction of the province. They can then be applied in such a way as to weigh more heavily on "outside" products than on local products. It was fear of an extension of this type of taxation which inspired much of the successful resistance to the proposal to amend the British North America Act so as to enable the provinces to impose certain taxes on retail sales, and to remove doubts as to the constitutionality of legislation which has already been enacted. Further, the regulation of retail selling and the control of prices by the provinces may be applied in a discriminatory manner, and might also lead to "interprovincial dumping" (e.g. if price cutting is prohibited in one province, a dealer's stock might be exported to another province for sale there at sacrifice prices). Inspection and grading laws can be applied so as to hamper interprovincial trade. So also can licensing provisions. Provincial governments, as liquor vendors, can give substantial preferences to local products either by the prices which they charge to the public, or by their purchasing policies, or in both these ways.

Provincial legislation which aims at fixing local prices has possibilities of serious interference with interprovincial trade. The less objectionable but still questionable methods by which provinces (and sometimes municipalities which the province creates) may "encourage" local industries by bounties or by exemptions from particular forms of taxation should also be noted. Finally, propaganda in favour of buying provincial products is a form of provincial protectionism.

The case for and against Provincial Protection

The growing demand for provincial protectionism must not be under-rated. This demand found expression in submissions made to the Commission. The Government of New Brunswick suggested the possibility of regional tariffs being applied for the purpose of protecting local interests. This suggestion was two-sided. It envisaged the possibility of tariffs of this character imposed by the Dominion to encourage certain industries or certain business conditions in a particular area; and as well the practicability of the imposition by New Brunswick of tariffs against the rest of Canada or against individual provinces, though the counsel of the province agreed that "it was doubtful whether this could be done." Suggestions somewhat similar

---

51 For an extensive study into these measures see Appendix 8—L. M. Gouin and Brooks Claxton, Legislative Expedients and Devices Adopted by the Dominion and the Provinces.

52 Thus the taxation of fuel-oil in B.C. (Revised Statutes of British Columbia, 1936, c. 278) is protective of coal which is a chief product of the Province.

53 See Debates, House of Commons, May 14, 1936 at p. 2806 (Cahan); Debates of the Senate, May 19, 1936 at p. 317 (Meighen); June 10, 1936, at p. 464 (Meighen).

54 Cf., Closing-out Sales Act, (Statutes of British Columbia, 1937, c. 7.) By this legislation a licence is required for a closing-out sale.

55 Manitoba has by the Government's Liquor Control Act fixed the price of beer sold but not brewed in the Province above that of beer locally brewed under authority conferred by an act of the Legislature.

56 By the Commodities Retail Sales Act, 1937, c. 9, B.C. provides that commodities shall not be sold by retail in the Province at a price less than the cost of manufacture and sale.

57 E.g., Bounties on iron and steel in N.S., B.C., Que., and Ont., and fixed assessments granted by municipalities to certain industries.

58 It is not merely in matters of trade and commerce that one government may be accused of violating the spirit of the constitution to the prejudice of other governments while observing its letter. Elsewhere the abuses which have arisen from the imposition of provincial inheritance taxes in respect of both the domicile of the decedent and the situs of his property have been discussed. In the course of the Commission's hearings the Dominion Government was not infrequently reproached in provincial submissions and in evidence given by representatives of the provinces with having imposed a substantial tax on incomes without due consideration for the needs of the provinces and with having unduly enlarged its field of direct taxation. As for instance Mr. Patullo, Premier of B.C. (Ev. p. 5203): "Every question which is asked here really gets back to the basic principle of the Dominion Government being an ogre—I am not saying that offensively—coming into our pantry where we have a full larder, everything in wonderful shape, then the government comes in and entirely pushes us out of our own pantry; that is the difficulty." See also Ex. 190, Brief of Argument of B.C., p. 4; Ex. 297, Brief of Ont., Pt. II, p. 29; Evidence of Hon. Mr. Conant, Attorney-General of Ont., pp. 7907-09.

59 W. P. Jones, Ev. pp. 8739ff; "I had in mind the great advantage that would accrue to this province if it had been enabled to set up a tariff against the provinces of Ontario and Quebec." And "We could make agreements with the United States, we could make an agreement with Great Britain which would surely give us a better market than the markets of Ontario and Quebec."
in import were also submitted to the Commission by the Saint John Board of Trade and by the British Columbia Chamber of Agriculture.

It is beyond dispute that, as was emphasized in briefs submitted to us, already noted, local protectionism does tend to hamper national economic life and thus to reduce the income of the people of Canada upon which the prosperity of the whole Dominion rests. It is probable that there is no single province so situated as to gain on balance by the existence of local protectionism in Canada. In each case the desired objective is sought with such immediacy that the longer view, taking account of secondary results and ultimate consequences, is excluded from consideration. It is obvious that if one province can invoke these expedients to serve or protect a local interest, other provinces can do likewise; and that if a protective provincial tariff can be imposed for the advantage of a particular interest, other interests in the same province will exact the same advantage by the employment of political pressure. With the expansion of these experiments in provincial self-sufficiency, it would be speedily found that the local market obtained at such a cost would be a poor substitute for the lost freedom of trade throughout the Dominion. The damage done by local protectionism takes many forms: among them, the artificial location of industries within the national economy; the wastes of uneconomic competition; the financial burdens involved in supporting uneconomic industries; the uncertainty to business everywhere if markets in other provinces are in danger of being shut off by protectionist devices; the emphasis laid on rivalry and jealousy between the provinces. The short-turn gains that appear in the guise of increasing employment within the province (by diminishing employment in other provinces), or of increasing the revenue resources of the province (by decreasing those of other provinces), or of building up a self-contained community within provincial boundaries, will lose much of their importance if our main recommendations regarding unemployment relief and adjustment grants are implemented.

Interprovincial discrimination in Canada appears to be considerably less dangerous than interstate discrimination in the United States. But it has already become serious, and American experience shows that it may become much worse. It is, therefore, a matter of which any thorough examination of Dominion-provincial relations must take account. For these reasons it is important to consider the practicability of remedial action. The strength and weakness of a number of alternative methods will be briefly reviewed.

The heart of the problem lies in the fact that the simplest requirements of provincial autonomy in legislation for the control of everyday life, and in matters of taxation, involve the use of powers which are capable of abuse, in the sense that they may be used to establish some sort of provincial protection. No doubt our proposals that corporation taxes should be levied by the Dominion alone

60 This submission (Ex. 369) outlined a scheme for imposing equalizing taxation on manufactured goods or agricultural produce brought into the Province from outside and offered for sale at a price lower than those asked in the local market. All shipments to the Provinces were to be accompanied by an invoice showing the price, attested by oath. This invoice would accompany the bill of lading and where it crosses the border, the customs authority would take it and clear the package. An enlargement of the customs staff to supply the necessary personnel was assumed.

61 In an argument supporting its brief (Ex. 204) the Chamber proposed that the powers of the Dominion with respect to trade and commerce should be transferred to the provinces so far as they apply to the marketing of agricultural products. It was suggested that the province might be given exclusive powers with respect to trade and commerce in any agricultural product produced within the province, irrespective of 'whether the trade or commerce so carried on with respect to such agricultural product has its beginning and end wholly within the province or not.' The following interchange of views took place between the first Chairman of the Commission, Hon. N. W. Rowell, and Mr. W. E. Haskins who represented the B.C. Chamber of Agriculture (Ex. p. 5802): "The Chairman: The logic of your position is this: That each province could prohibit goods going out and coming in from the other province. You destroy the very basis of interprovincial trade and commerce in Canada."

Mr. Haskins: With the over-riding power of the Dominion, where the matter was one of general concern, to deal with the matter.

The Chairman: Which the over-riding power of the Dominion to-day prevents. It is not intended we should have nine watertight compartments. This is one country—Canada, and these provincial boundaries are matters for legislation or for convenience of administration. As far as trade and commerce is concerned, it is intended to flow freely throughout Canada."
will, if implemented, remove one source of discrimination. There can, however, be no question of depriving provinces of all powers that are capable of abuse. The problem is to preclude or restrict abuses without interfering with legitimate and even necessary powers.

Possible Methods of Prevention

The device which naturally suggests itself to those familiar with the constitutional practice of the United States is to prohibit in the constitution the abuse of legislative power and to rely on the courts to determine how far provincial legislation does purport to interfere with interprovincial trade, and to declare the legislation, to that extent, invalid. But in practice it is a matter of extreme difficulty to disentangle legitimate measures designed to promote purely provincial objectives from those measures, the indirect effects of which may be undue discrimination against the products of other provinces, or against the activities of citizens of other provinces, or which may prejudice the revenues of other provinces. The elaboration, by a court, of strict and binding rules on such matters as these might in practice prevent the enactment of useful provincial legislation and might in destroying one type of abuse create shelter for other and even worse abuses. And it is doubtful whether the personnel best suited for purely judicial functions is likely to be the personnel best suited for dealing with somewhat technical questions of economics and business.

A second method would consist in relying on the Dominion to use the power of disallowance (a power which is always available to the Dominion in its discretion) to protect one province against undue discrimination incidental to the legislation of another province; or in giving to the Parliament of Canada a special head of legislative power enabling it to pass legislation to correct the discriminatory effects of provincial legislation. But this method is open to several objections. There is controversy concerning the appropriate use of disallowance. Any action which is discretionary, whether it be action of the Federal Government or of the Parliament of Canada, is political action and is open to the suspicion of being used with greater regard for one province than for another. Finally, interference by the Dominion is not likely to improve Dominion-provincial relations; and even inaction by the Dominion, when it had undoubted power to act, might embitter opinion in a province which felt itself aggrieved because of injuries received from protective measures enforced by another province.

A third method would be to allow a government aggrieved by the action of another to bring its complaint before the proposed Dominion-Provincial Conference. While such action is always possible and might in some cases lead to settlement of an issue by mutual consent, it has certain obvious weaknesses. The Conference will be a political rather than a judicial body; it will not readily act on a majority decision; in arguing a case before it a provincial premier might feel some repugnance to admitting that action which he had staked his reputation on defending in his own legislature was an infringement of "interprovincial comity"; and the disapproval of a majority could not be conveniently made public as a guide to popular opinion. Again, there is bound to be considerable reluctance on the part of a provincial government to censure the act of another provincial government or legislature lest by so doing it prejudice its own freedom of action.

A fourth method would consist in frank recognition that the proper working of the federal system and national unity alike require that both provincial and Dominion legislatures should abstain from some types of legislation which are unquestionably within their constitutional powers; that the spirit as well as the letter of the constitution must be observed; and that constant goodwill is essential if good relations are to be maintained. This method runs the risk of being little better than a pious admonition addressed by men exposed to no temptation to act with bias to others whose political careers may be at the mercy of political pressure with the full force of local interests behind it. In practice it is probable that the Premier of a province, or the Prime Minister of the Dominion, with a parliamentary majority in thorough agreement with his policy, would have very little difficulty in persuading that majority that the policy of which it approved was in full accord with the spirit as with the letter of the constitution.

If, therefore, this fourth method is to be made effective it must be possible to oblige a government (whether provincial or federal) to defend the propriety of its legislation, just as it may now be compelled to defend its constitutionality, before an impartial tribunal. Similar considerations apply if it is not the propriety of legislation which is in dispute but the propriety of administrative practice. An appropriate tribunal would have to include

---

63 See recommendations re corporation taxes, Section B, Ch. III, 2.

8335–5
both a judicial element and an element familiar with economics and with business. There are several possibilities. If one province complained of the legislation of another, but admitted either absolutely or for the purposes of the discussion, the constitutionality of the legislation, it might be entitled to have the fairness of the legislation judged by a tribunal consisting of the chief justice of the province which had enacted it together with, perhaps, one assessor nominated by that province and one nominated by the complainant province. The strong point of this tribunal is that a province might feel more confidence in its own chief justice than in an outside authority. The weak point of this sort of tribunal would be that it would be differently composed in different cases and that conceivably two identical provincial acts might be differently dealt with in different provinces. Furthermore, the employment of assessors nominated by the parties would be apt to tend to dissenting opinions and to dissatisfaction with any decision which was not unanimous. A second possibility would be that the decision as to the propriety of provincial legislation might rest with the Chief Justice (or some other judge) of the Supreme Court of Canada together with assessors, either designated for each case or chosen permanently for all cases. A third possibility would be the creation of a special tribunal. The drawback to this course, which might have the advantage of securing the best possible personnel for a difficult task, would be that the tribunal might have too little work to justify its cost—for the mere fact that an appeal from provincial enactment was possible might serve to discourage the more provocative forms of local protectionism.

The need for decisions which take account of all the circumstances of the case is imperative. Some minor interference with interprovincial trade may be involved in legislation which is in all good faith concerned with the adjustment of a local matter which could not be effectively dealt with except by measures which incidentally involve this interference. Of two enactments, which are indistinguishable as regards their form, one may interfere substantially and the other very little with interprovincial trade. A measure which, at the time of its enactment, inflicts no injury whatever on the citizens of other provinces may, as conditions change, become discriminatory in its operation, and it may be a matter of very delicate judgment to decide at what moment of time it becomes desirable that it should be amended to take account of extra-provincial interests. Our suggestions are based on the assumption that governments will, on the whole, not object to being told if and when their legislation or their administrative practice becomes unfair; and that they will realize that hard and fast rules would be inappropriate and even dangerous.

It is probably not desirable that the decision of such a tribunal should be mandatory in the sense of invalidating legislation found to be unduly discriminatory. The decision might be declaratory in character. Ultimately a province could probably be relied on not to offend against "interprovincial comity" by insisting on legislation which had thus been declared unfair to other provinces. The effect of the decision of the tribunal would be that a province would not be the sole judge if its legislation was unfair to others. The very existence of the tribunal would derive from recognition of the simple fact that a provincial legislature is not a good or reliable judge of such a question. It by no means follows that it cannot be relied on to correct abuses, once these have been authoritatively pointed out.

A fifth method would consist in direct agreement between provinces not to obstruct the trade of each other's citizens. This method might take the form of an interprovincial conference behind closed doors in which protests could be made and conceivably threats of retaliation. But this sort of bargaining would tend to give each province a quid pro quo in the form of concessions by other provinces for abandoning local protectionism, while our hope is that the advantages conferred on the weaker provinces by our main financial recommendations might be such as to induce them in return to agree to renounce such measures.

A sixth method would consist in formal agreements entered into by two or more provinces. Such agreements might deal with a wide range of matters in which some degree of uniformity was desired and might include engagements with regard to "protectionist" measures. Their use is exposed to some dangers. They might build up blocs which would be protectionist as against the rest of Canada and might thus intensify the very evil we are seeking to eradicate. Finally, enforcement presents difficulties as an agreement would have the nature of a treaty between the provinces concerned and hence would not be enforceable by ordinary legal processes.

In many instances, of course, it is municipalities, or other bodies on which the province has conferred powers, rather than provinces themselves, which are the immediate offenders in the matter of
economic discrimination, and the local protectionism of municipalities may be exercised to the detriment of other municipalities in the same province. This matter lies beyond the purview of the Commission except in so far as interprovincial discrimination results from municipal action or from that of other bodies such as professional organizations. In this case the province, which creates a municipality or organization and confers powers on it, is completely responsible for the action of that municipality or organization and owes it to other provinces that it should retain and, when occasion arises, exercise adequate administrative powers of control.

Conclusions

We have purposely left our discussion of this important question vague because, in our opinion, it is essential that all the legislatures concerned should agree wholeheartedly to some review of their legislation, and because it is probably a Dominion-Provincial Conference which can best agree on the type of review which would be most acceptable to them. There seems to be every reason why they should agree, for while it is easy to slip into measures which others will think unfair, and difficult to recede from a position which has once been assumed, it is easy to express readiness to abstain from unfair or discriminatory use of legislative power provided that other provinces give the same undertaking. There is also a distinct advantage in separating the question of the constitutionality of legislation from that of its general merits. If, as at present, only the former question can be reviewed by the courts, the latter is almost certain to become involved in the debate. It is notorious that "hard cases make bad law".

There are not the same reasons for our being vague as to the principles which should be observed in giving effect to what we have termed the spirit of the constitution. There should, we think, be complete freedom of trade and commerce throughout Canada; complete freedom of investment; complete freedom of movement and freedom from arbitrary restrictions (as distinct from a bona fide test of vocational qualifications) in the practice of a trade or profession; and complete freedom from discriminatory taxation. If there are to be exceptions to these general principles they should be authoritatively and unambiguously declared.

64 See Appendix 8—L. M. Gouin & Brooke Claxton, Legislative Expedients and Devices Adopted by the Dominion and the Provinces, p. 63: "There is also municipal taxation, particularly in Quebec, which, if allowed to develop, would divide Canada into walled towns. Though hardly of national importance in itself, this municipal legislation is important as indicating what might happen if narrow-minded local feeling forced economic nationalism to its ultimate conclusion."