

1927  
May 17.  
July 30.

CASES  
DETERMINED BY THE  
EXCHEQUER COURT OF CANADA  
AT FIRST INSTANCE  
AND  
IN THE EXERCISE OF ITS APPELLATE  
JURISDICTION

THE SUN LIFE ASSURANCE COM- } APPELLANT;  
PANY OF CANADA..... }

AND

THE SUPERINTENDENT OF INSUR- } RESPONDENT.  
ANCE .....

*Insurance Act—Superintendent of Insurance—Jurisdiction*

The Policy-holders of the appellant are divided into two classes, participating and non-participating, the former constituting about 90 per cent of the whole. This class is represented on the Board of Directors by four of the policy-holders, who meet with the shareholders' directors and have a vote on all business matters. At a meeting of the Board of Directors so constituted a sum of \$25,000 was recommended and voted to the Banting Research Foundation, which action of the Directors was approved of at an annual meeting of the company. In the annual statement of the company to the Minister of Finance this amount was charged as a matter of general expenditure under the head of public health and welfare. Under section 73, ss. 2, of the Insurance Act, the Superintendent of Insurance, of his own motion, amended this statement, making this amount a charge against the shareholders' surplus account alone. It was contended that he had no power to act as he did; that the contribution was not in conflict with the objects and powers of the company and was advantageous to the company's business.

*Held*, that the act of the superintendent aforesaid was *ultra vires* of the powers conferred upon him by the Insurance Act.

APPEAL by the company appellant from the ruling of the Superintendent of Insurance.

The appeal was heard before the Honourable Mr. Justice Maclean, President of the Court, at Ottawa.

*Eugène Lafleur, K.C.* and *J. A. Ewing* for the appellant.

*F. P. Varcoe* for the respondent.

1927

The facts are stated in the reasons for judgment.

SUN LIFE  
ASSURANCE  
Co. OF  
CANADA

THE PRESIDENT, now (30th July, 1927), delivered judgment.

v.  
SUPT. OF  
INSURANCE.

The Sun Life Assurance Company of Canada, a company having capital stock, made a contribution of \$25,000.00 to what is known as the Banting Research Foundation, established by private contributions so far as I know. The purposes of the Foundation have been specifically defined in the public appeal made for funds by the promoters of the Foundation, as being:

(a) To supplement the sum at present available, in the University of Toronto, for the support of the Banting and Best Chair of Medical Research.

(b) To establish a fund for the adequate financial support of such scientific workers as may have proposed definite problems of medical research, and for whom funds are not otherwise available. Such assistance may be given to persons working in the University of Toronto or elsewhere:

The life insurance policy-holders of this company are divided into two principal classes, participating and non-participating policy-holders. The former constitute about ninety per cent of all the policy-holders in the company, and are represented on the Board of Directors by four of that class of policy-holders, and elected by that class. The number of policy-holder directors must be at least one-third of the total number, which is fixed by the by-laws of the company. The qualification for a participating policy-holder director is that he be the holder of a policy or policies in the sum of \$4,000 and upwards, upon which no premiums are due. Every holder of a participating policy of \$2,000 and upwards, upon which no premiums are due, shall be a member of the company and may attend the general meetings of the company, but he cannot vote for the election of shareholders' directors, who are elected by the shareholders only. Policy-holders' directors may meet with the shareholders' directors and shall have a vote on all business matters. Under the provisions of the Insurance Act, the participating policy-holders participate to the extent of not less than ninety per cent of the profits derived, declared, and set apart, from that branch of the company's insurance business, and the shareholders are entitled to the balance. As a matter of fact, the shareholders of the company in ques-

tion have voluntarily reduced their participation in the declared profits of that class of business to five per cent, and the participating policy-holders are now receiving ninety-five per cent.

The contribution in question was initiated by a resolution passed by the Board of Directors in July, 1925, recommending the granting of the sum of \$25,000.00 to the Foundation. At the annual meeting of the company held in February, 1926, a resolution was passed approving and confirming, in general terms, all the acts and decisions of the Board of Directors during the year 1925.

The contribution was duly paid over to the Foundation, and charged as a general expense against all branches of the company's business, in proportion to the income of such branches of the company's business. There is in the accounting of the company, what is known as the shareholders surplus account, which is credited from time to time with the five per cent of the profits derivable from the participating policies branch, and any profits flowing from the non-participating branch, and other branches, of the company's business. In the annual statement of the company filed with the Minister of Finance for 1925, the contribution to the Foundation was charged as a matter of general expenditure just as I have indicated, under the heading of Public Health and Welfare Work. The Superintendent of Insurance amended this statement, so that the \$25,000.00 so contributed, was made a charge against the shareholders surplus account alone, and not as the directors had done, namely to distribute it as a charge against the different branches of the company's insurance business. In a word, the contribution was entirely deducted from the amount standing to the credit of the shareholders surplus account, instead of being charged against and distributed over the various branches, in the proportion of respective incomes. This had the effect of reducing the shareholders' surplus account and the companies liabilities by \$25,000 and increasing the company's surplus by the same amount, and the appeal before me is to restore the contribution to the place in the annual statement where the directors had placed it.

I perhaps might here say that the company claims that the change made in the annual statement by the Super-

1927  
 SUN LIFE  
 ASSURANCE  
 Co. OF  
 CANADA  
 v.  
 SUPT. OF  
 INSURANCE.  
 Maclean J.

1927  
 SUN LIFE  
 ASSURANCE  
 Co. OF  
 CANADA  
 v.  
 SUPT. OF  
 INSURANCE.  
 Maclean J.

intendent, as already explained, was in excess of his powers and duties; that the contribution was not in conflict with the objects and powers of the company, particularly, in that it tended to promote the general public health and lessen mortality, which was advantageous to the company's business, and also that of its policy-holders and shareholders; and that the action of the directors in this respect having been approved by the shareholders and members of the company, the same could not be questioned by the Superintendent. Then I am urged to take into consideration the fact, that the surplus of the Sun Life Ass. Co., in 1925, was over \$21,000,000 out of which only \$74,000.00 had been paid out as contributions to public services of the nature in question, and this it is said amounts only to 34 cents out of every \$100.00 of surplus.

It is necessary now to examine the provisions of the Insurance Act with some care, particularly as to the powers and duties conferred upon the Superintendent of Insurance, and such of its provisions, as may assist in ascertaining the policy and purpose of the Statute and the means adopted for giving effect to that policy, in order to decide whether or not the Superintendent is given power in reference to the particular act here in issue. Sec. 37, enables the Governor-in-Council to appoint an officer to be called the Superintendent of Insurance, and his duties and powers are to be found in various sections of the Act. He is required, by sec. 38, to keep a record of the securities deposited by each company with the Minister; before the issuance of a license or a renewal of a license to a company, to report to the Minister whether the requirements of the law have been complied with, and that from the statement of the affairs of the company it is in a condition to meet its liabilities; to visit personally, or cause a duly qualified member of his staff, at least annually to visit the head office of each company, and examine the statements of the condition and affairs of each company; and to prepare an annual report showing the particulars of each company's business together with an analysis of each branch of its business. He is empowered by sec. 39, when deemed necessary, to visit the chief agency of any company, and to thoroughly inspect and examine into all its affairs, and to make all such further inquiries as are neces-

sary, to ascertain its condition and ability to meet its engagements, and whether it has complied with all the provisions of the Act applicable to its transactions. Sec. 41 is to the effect, that if it appears to the Superintendent that the assets of any company are insufficient to justify its continuance of business, having regard to sections 14 to 20 inclusive, or that it is unsafe for the public to effect insurance in it, he shall make a special report to the Minister on the affairs of such company, and the Act prescribes the action that the Minister, together with the Governor-in-Council, may take in the premises. If it appears to the Superintendent that the liabilities of any company, including matured claims and the full reserve or reinsurance value for outstanding policies estimated or computed on the basis mentioned in sec. 43 of the Act, exceed its assets, he is directed by sec. 44 to report the fact to the Treasury Board, which body, after hearing the company, may withdraw the company's license, or prescribe a period within which the company shall make good the deficiency, failing which the license shall be withdrawn. Sec. 20 is somewhat similar to sec. 44 and perhaps should be here mentioned. It enacts that subject to the powers and duties vested in and imposed upon the Treasury Board, if it appears from the annual statements, or from an examination as provided for by the Act of the affairs and conditions of any company carrying on the business of life insurance, that its liabilities to policy-holders in Canada, including matured claims, and the full reserve or reinsurance value for outstanding policies, as described by sec. 43, after deducting any claim the company has against such policies, exceed its assets in Canada, including the deposit in the hands of the Minister, the company may be called upon by the Minister to make good the deficiency, and upon failure to do so within a specified time, he may withdraw its license. By sec. 46 the Superintendent is empowered to address any inquiries to any insurance company, or any of its officers, relative to its assets, investments, liabilities, doings, or condition, or any other matter connected with its business or transactions, and the company is required to properly reply in writing to such inquiries, but, it is stated, this is for the purpose of carrying out the provisions of the Act. Sections 59 and 60 prescribe the powers of lend-

1927  
 SUN LIFE  
 ASSURANCE  
 Co. OF  
 CANADA  
 v.  
 SUPT. OF  
 INSURANCE.  
 Maclean J.  
 —

1927  
 SUN LIFE  
 ASSURANCE  
 Co. OF  
 CANADA  
 v.  
 SUPT. OF  
 INSURANCE.  
 Maclean J.

ing and investment by Canadian Life Insurance Companies.

Sec. 69 provides that if upon the examination of the assets of any Canadian company licensed under the Act, it appears to the Superintendent, that the value placed by the company upon the real estate owned by it is too great, he may require the company to procure an appraisalment of the same by competent valuers, or he may procure such appraisalment himself, and if such appraised value, varies materially from the return made by the company, it may be substituted in the annual report prepared for the Minister by the Superintendent. If he is of the opinion that any amount secured by mortgage upon any real estate, is greater than the value of such real estate, or is not sufficient security for any loan and accrued interest, he may in the like manner procure an appraisalment, and if from the appraised value it appears that such real estate is not adequate security for the loan and interest, the Superintendent may write off from such loan and interest a sum sufficient to reduce the same to such an amount as may be fairly realizable from such security, and may insert such reduced amount in his annual report.

Sec. 73 is of special importance in the matter under consideration, inasmuch as the Act of the Superintendent appealed from, and the appeal asserted by the Sun Life Assurance Company, were made under the provisions of this section, and perhaps it might appropriately be mentioned almost in full:

73. (1) In his annual report prepared for the Minister under the provisions of paragraph (e) of section thirty-eight of this Act, the Superintendent shall allow as assets only such of the investments of the several companies as are authorized by this Act, or by their Acts of incorporation, or by the general Acts applicable to such investments.

(2) In his said report the Superintendent shall make all necessary corrections in the annual statements made by the companies as herein provided and shall be at liberty to increase or diminish the liabilities of such companies to the true and correct amounts thereof as ascertained by him in the examination of their affairs at the head office thereof in Canada, or otherwise.

(3) The Superintendent may request any Canadian company to dispose of and realize any of its investments acquired after the passing of this Act and not authorized by this Act, and the company shall within sixty days after receiving such request absolutely dispose of and realize the said investments, and if the amount realized therefrom falls below the amount paid by the company for the said investments, the directors of the company shall be jointly and severally liable for the payment to

the company of the amount of the deficiency: Provided that if any director present when any such investment is authorized does forthwith, or if any director then absent does, within twenty-four hours after he becomes aware of such investment and is able to do so, enter on the minutes of the Board of Directors his protest against the same, and within eight days thereafter gives notice of his protest by registered letter to the Superintendent, such director may thereby, and not otherwise exonerate himself from such liability.

1927  
 SUN LIFE  
 ASSURANCE  
 Co. OF  
 CANADA  
 v.  
 SUPT. OF  
 INSURANCE.

Maclean J.

(4) An appeal shall lie in a summary manner from the ruling of the Superintendent as to the admissibility of any asset not allowed by him, or as to any item or amount so added to liabilities, or as to any correction or alteration made in any statement, or as to any other matter arising in the carrying out of the provisions of this Act, to the Exchequer Court of Canada, which court shall have power to make all necessary rules for the conduct of appeals under this section.

Sec. 75 is perhaps of some importance. It empowers the directors of a company, upon the authorization of its shareholders to reduce its paid up capital, providing it has been impaired, and this section, I would emphasize, states that the capital of a company shall be deemed to be impaired when its assets, exclusive of its paid up capital, are less than its "liabilities" calculated according to the requirements of the Act. In preparing its statement of "liabilities," sec. 43 prescribes the basis to be adopted by the companies in valuing their policies of insurance. Sec. 104 enacts that in the case of Canadian companies which have a capital stock, the directors may from time to time set apart such portion of the net profits as they deem safe and proper for distribution as dividends or bonuses, to shareholders, and holders of participating policies, ascertaining the part thereof, that is the portion of the amount set apart which has been derived from participating policies, and distinguishing such part from the profits derived from other sources; and the holders of participating policies shall be entitled to share in that portion of the profits so set apart which has been distinguished as having been derived from participating policies, to the extent of not less than ninety per cent thereof, etc.

The charter of the Sun Life Assur. Co. perhaps should be referred to. Sec. 15 enacts that any number of Directors of the said company, being a majority of the said Directors, shall have full power and authority to make, prescribe and order such by-laws, rules, regulations and ordinances as shall appear to them proper and needful, touching the rates and amounts of insurance and issuing

1927  
 SUN LIFE  
 ASSURANCE  
 CO. OF  
 CANADA  
 v.  
 SUPT. OF  
 INSURANCE.  
 Maclean J.

of policies, the management and disposition of its stock, property, estate and effects, etc. This would all of course be subject to any general enactments regarding Insurance Companies. Sec. 17 states that there shall be weekly or semi-weekly meetings of the board of Directors, or a quorum, for the purpose of transacting and managing, the details of the business and affairs of the company.

From the provisions of the Act to which I have at length referred, it will be seen I think, that the important and substantial duties and powers, imposed and conferred upon the Superintendent, relate entirely to that of assuring those vitally interested, policy-holders, of the true financial condition of life insurance companies from time to time, their continuing ability to meet their liabilities to policy-holders, and their observance of the statutory requirements. Over and over again there are to be found sections which make it clear, that the duties imposed upon the Superintendent are to be directed to this end, and that is what one would expect to find. Investments must be made within the classes of securities authorized by the Act, and are subject to reduction in the annual statements at the instance of the Superintendent, if there has been a depreciation in such investments. Liabilities may be increased or diminished by the Superintendent to conform to the true and correct amount as ascertained by him in the examination of the affairs of the company, so as to reflect the real financial position of the company. Sec. 75 states that the capital of a company may be reduced on account of impairment of capital, and the capital of a company shall be deemed to be impaired, when its assets exclusive of paid up capital, exceed liabilities calculated according to the requirements of the Act. The liabilities referred to in this section must I think have been intended to refer to a company's liabilities to its policy-holders, as the only liabilities for which the Act prescribes a method of calculation, is that of liabilities under policies of insurance. Companies shall retain in Canada and under their own control, assets of a market value equal to their total liabilities to policy-holders in Canada. Sec. 64. (3). If a company's liabilities to policy-holders in Canada exceed its assets, the Minister may suspend the license of the company. Enquiry may be made by the Superintendent concerning any company's



affairs in order to ascertain, its condition and ability to meet its engagements. If the assets of a company are insufficient to justify the continuance in business of a company, or if it is unsafe for the public to effect insurance in it, the Superintendent must report the same to the Minister. It need occasion no surprise that the duties and powers of the Superintendent, as laid down by the Act, all point towards assuring himself, the Minister and the public, of the ability of insurance companies to meet their engagements, and their observance of the requirements of the Act. It is true of course, that while insurance companies may be private in their inception, they are affected with a public interest. In fact the charter of the Sun Life Ass. Co. is declared to be a public Act, but this was done I apprehend only because of the public interest in its liabilities to policy-holders, and not because of any interest in its shareholders. The public interest would appear to be abundantly and adequately safeguarded by so many of the provisions of the Act, including the wide supervisory powers given to the Superintendent to ensure observance of such safeguards that there would seem to be required, express and clear authorization to support the act of the Superintendent, which is here in question. If the Superintendent were given powers beyond this, he would virtually be in control of the administration of a company's affairs, which parliament I think never intended. He is not given an unregulated discretionary power concerning all the affairs of insurance companies. Such a power might conceivably be as objectionable and undesirable in the case of a public company, such as a life insurance company, as it would be to leave it altogether free from any control or regulation by a public officer. The acceptance of risks, and the making of investments within the authorized classes, the really vital and important thing in the administration of the affairs of a life insurance company, is left in the first instance entirely to the judgment and prudence of the management, and I cannot make myself believe that parliament ever intended to give to the Superintendent the power of regulating the smaller affairs and expenditures of the company, such as the one in question. That I think is left to the directors, shareholders and policy-holders to settle as best they can, and failing

1927  
 SUN LIFE  
 ASSURANCE  
 CO. OF  
 CANADA  
 v.  
 SUPT. OF  
 INSURANCE.  
 Maclean J.

1927  
 SUN LIFE  
 ASSURANCE  
 Co. OF  
 CANADA  
 v.  
 SUPT. OF  
 INSURANCE.  
 Maclean J.

that, then the courts. An interesting discussion of our jurisprudence upon administrative powers, is to be found in the text book entitled, Law of the Constitution, by Dicey, Ch. 12, 8th Ed. Those who act under a jurisdiction given by an Act of Parliament must I think clearly show their jurisdiction. Furthermore I may point out that under the rule of statutory construction, *expressum facit cessare tacitum*, where there is express mention of certain powers, any power not mentioned is excluded.

Making contributions to public services of one kind or other, might be carried to a degree that would threaten the financial stability of a company, and be unjust and oppressive to policyholders and all interests and in such circumstances the intervention of the Superintendent might be justified. The extreme case need not however be considered here. If the directors appointed by the shareholders and policy-holders to direct the affairs of the company, decide that a contribution might be made to some public service, and it is not contrary to the express objects of the company, and does not suggest dissipation of the resources of the company or impairment of the security of any others of interest, when it may directly or indirectly relate to and conceivably might further the objects of the company, when bad faith is not suggested, when the same is not objected to by a single shareholder or policy-holder, to say that the Superintendent may of his own motion intervene when others of interest have not, is I think a thing that parliament never intended, nor do I think that such is the meaning of sec. 73 (2) and (4). I can find nothing in the Act of a positive nature suggestive of this power being reposed in the Superintendent, and I think the whole spirit of the Act would seem to negative the idea of such powers being conferred upon him. In my opinion one would require to do violence to the provisions of sec. 73, to hold that the Superintendent was there authorized to amend the annual statement of the company, as he did, and upon the facts and grounds disclosed. That section I think merely authorizes the doing of anything within the limits of his powers.

Having reached the conclusion that the Superintendent is not possessed of the statutory authority to amend the annual statement in the manner he did, under the facts

of this particular case, then the only other question that could arise, would be whether the expenditure was *ultra vires* of the company or not. This is a matter I think, that only a dissenting shareholder or policy-holder, or the Attorney-General may protest, and bring into the courts if necessary for adjudication, and they each may do this. Also see sec. 90 (1). It is I think for the Courts to determine whether or not an expenditure of this kind is *ultra vires* or not, and this can be done only at the instance, or on behalf, of one who has an interest to protect. Consequently I do not feel called upon to decide whether or not the contribution was *ultra vires* of the company; that point is really not before me. It is altogether a different question from that as to whether the Superintendent had authority to amend the annual statement as he did. Evidence was given to show that the expenditure in question was one conducive to the objects of the company, or incidental to the carrying on of its business or its proper management. That evidence however, I presume, was presented more to show the character and the reasons for the expenditure, and to elucidate and support the contention, that it was not one of the matters falling within the scope of the powers of the Superintendent to regulate. It is true that the charter of a corporation is the measure of its powers, and the enumeration of its powers implies the exclusion of all others, and ordinarily speaking the property and assets of a corporation belong to its shareholders, and cannot be devoted to any uses which are not in accordance with the purposes and objects of the corporation, as contained in its charter, unless possibly by unanimous consent. The expenditure in question is not justified by the company as being one made within any of the enumerated objects of the company, but as falling within the inherent powers of the company to do anything conducive to the objects of the company, or as being relative to its administration or management. And there is a distinction between the objects and the powers, of an incorporated company. The propriety of granting the contribution here is not contested, it is only said that it was charged improperly as a general expense, against all branches of the company's business, instead of against the shareholders surplus account only. I must assume upon the evidence, that the

1927  
 SUN LIFE  
 ASSURANCE  
 CO. OF  
 CANADA  
 v.  
 SUPT. OF  
 INSURANCE.  
 Maclean J.

1927  
 SUN LIFE  
 ASSURANCE  
 Co. OF  
 CANADA  
 v.  
 SUPT. OF  
 INSURANCE.  
 Maclean J.

directors, the shareholders and the participating policy-holder members approved of the contribution, upon some ground or other. Then, as no dissentient shareholder or policy-holder has protested it, I think I am warranted in concluding that no persons, other than those just mentioned can now challenge the validity of the expenditure, more particularly when, as I have already said, I am unable to find anything in the Act which can be construed as prohibiting such an expenditure, or which empowers the Superintendent to treat it as he did.

The power of increasing or diminishing the liability in a company's annual statement to the true and correct amount, sec. 73 (2), I would think was intended to mean, that the Superintendent might add items which are really liabilities but which have been treated otherwise by the company, or some asset has been estimated in excess of its market value requiring an increase in the total of liabilities, or that the company's liabilities under its policies of insurance have not been calculated according to the Act, or something of that nature. I do not think it can mean that an expenditure which has been treated as an item of expense, such as that under consideration, and at the time of the making of the annual statement was fully paid and no longer a liability, can be charged up against the shareholders' surplus account or any other one account, by the Superintendent.

I am not unmindful of the fact that the profits accruing to certain policy-holders, constitute contractual rights, and that claims arising thereunder must be recognized and equitably discharged, but I do not think that the Superintendent has the power to determine and arbitrarily settle this by a readjustment of the annual return on his own motion. Perhaps I should observe that in respect of the distribution of profits to participating policy-holders, it is the directors, under sec. 104, that determine and set apart what portion of the net profits shall be made available for distribution as dividends or bonuses, to shareholders and participating policy-holders, ascertaining the part thereof derived from participating policies and distinguishing such part from the profits derived from other sources. They are not under any legal obligation to set aside the full and exact profits for dividend or bonus purposes. The amount

of profits available for distribution to shareholders and holders of participating policies, is to be determined in a safe and proper way. This again rather indicates, that the Superintendent is not authorized to intervene, in order to determine what the precise amount of a company's profits shall be made available for distribution to participating policy-holders, yet this would seem to be the effect of his amendment to the annual return. I think this is for the directors in the first instance to determine, but their action in this respect is open to attack by or on behalf of one of interest.

1927  
 SUN LIFE  
 ASSURANCE  
 Co. OF  
 CANADA  
 v.  
 SUPT. OF  
 INSURANCE.  
 Maclean J.

Accordingly I am of the opinion that the appeal should be allowed, the ruling of the Superintendent set aside, and the annual statement restored to the condition it was in before the amendment in issue was made. As this is a case of first impression, involving the determination of the statutory powers of the Superintendent of Insurance, I think there should be no order as to costs.

*Judgment accordingly.*