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CANADIAN CITIZENSHIP LAWS:

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TWO FACETS

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BY

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## ABSTRACT

This thesis purports to consider two related problems in Canadian citizenship laws. In the first chapter, a comparison is made between the American state citizenship and what could be called a provincial citizenship in Canada. In conclusion, it is asserted that there are more factors in the United States tending to standardize the content of the citizenship status between the states than between the provinces in Canada. Consequently, insofar as this content is determined by the states or the provinces, it can be said that Canadian provinces have been recognized by the laws of the constitution much more leeway than the American states to grant to the people they consider as their citizens a particular status which is distinct from the one possessed by citizens of other provinces.

Moreover, the first chapter demonstrates that, both in Canada and in the United States, the purposes for which a formal citizenship has been created are mostly irrelevant for the determination of the classes of persons who are entitled to share in the rights and privileges granted on a territorial basis. This should normally

lead to a recognition that aliens lawfully landed on the territory will be entitled to these rights privileges for internal purposes, and that classifications against aliens in this respect should be declared invalid in the United States and inoperative in Canada by virtue of the equality before the law provision of the Bill of Rights.

A study, in the second chapter, of the judicial attitudes of Canadian judges concerning the interpretation of section 91 (25) of the B.N.A. Act has revealed that, even today, the judiciary is not likely to use the Bill of Rights as an effective tool to bring about a complete recognition of the rights aliens should have to share in the general citizenship status. The solution proposed is to reform the Supreme Court of Canada so as to give to this organ the representativeness and legitimacy it needs to feel free to depart from a legalistic application of the law; thus, the reliance on the Bill of Rights to render inoperative federal enactments could be supplemented by the availability of some "implied bill of rights" approach capable of effecting the same result as against provincial discrimination. Then, the distribution of persons (aliens and Indians) in the B.N.A. Act would become useless, and it could be removed, either judicially or by a formal constitutional amendment.



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## INTRODUCTION

There have been numerous incoherences, if not absurdities, in the nationality laws of Canada until 1947 when the Canadian Citizenship Act<sup>1</sup> was supposed to bring forth rationality in the whole matter. Since the middle of the 17th century, the various colonies, despite their lack of extra-territorial powers, purported to pass statutes conferring en masse British nationality to aliens on their sole taking of an oath of allegiance.<sup>2</sup> These colonial naturalization Acts were retroactively validated in 1847 by the Imperial Parliament<sup>3</sup>; at the same time, provision was made that, on the one hand, the first general Act in Great Britain dealing with naturalization<sup>4</sup> did not extend to colonies and, on the other hand, the colonial statutes operated only within the borders of each colony.

This, admittedly, created a very odd situation which lasted until 1914. A British subject naturalized in Britain was an alien when in the colonies and vice versa. Everywhere in the Empire, there was a power competent to confer the British nationality, but no such nationality could be valid throughout the Empire!<sup>5</sup>

Only native-born British subjects acquired a universal status<sup>6</sup>. The problem of lack of uniformity was studied at the Imperial Conferences of 1903, 1907 and 1911.

In the latter case, the following principles were agreed to: each Dominion will be free to grant the Imperial nationality upon such terms as its legislature thinks fit, but a minimum of five years of residence within the Empire shall be required, and the status conferred will be recognized in every part of the Commonwealth.<sup>7</sup>

Particular Acts designed to implement this "common code" were passed by Great Britain, Canada, and most of the Dominions, in 1914.<sup>8</sup>

This uniformity within the Commonwealth did not, however, bring the same within Canada itself. Canadians, obviously, were then British subjects first. But for immigration and deportation purposes, they had to be "Canadian citizens" under the Immigration Act of 1910<sup>9</sup>. Moreover, the need to distinguish the population represented by Canada at the League of Nations and through its participation in the International Court of Justice<sup>10</sup> has compelled the adoption of the Canadian Nationals Act of 1921<sup>11</sup>. Hence, there were three different formal definitions of the membership in the Canadian community which clashed with each other and were used for specific unrelated purposes.<sup>12</sup>

The Canadian Citizenship Act was designed to standardize the law in this respect. It repealed and replaced all the previous definitions of nationality. It also established a unique and basic notion of Canadian citizenship, declared that Canadian citizens become at the same time British subjects, and recognized as such the citizens of the other Commonwealth countries: all these principles were soon agreed to at the Imperial Conference of 1947 and implemented by most members of the Commonwealth. Therefore, the status of British subject which was, prior to 1947, an independent one, became a derived status which could only be acquired after a particular citizenship. British nationality no longer carried with it any kind of substantive content, all the rights and privileges of British subjects varying from jurisdiction to jurisdiction.<sup>13</sup>

Accordingly, uniformity had been brought into Canadian citizenship laws at the price of diversity, if not anarchy, within Commonwealth and British nationality laws, but this is obviously a normal consequence of the accession of the Dominions to independence and sovereignty. However, despite the apparent simplicity of the legal set-up in Canada with respect to citizenship, it may appear

that the particular nature of the State itself, federalism, is incompatible with a perfect standardization. One can wonder why there is still no recognition of the existence of a provincial citizenship in Canada while the concept of state citizenship in the United States has always been acknowledged. Of course, the power of the federal Parliament to adopt the Canadian Citizenship Act cannot be questioned,<sup>14</sup> even though there is no bestowment on it by the B.N.A. Act, for reasons that are obvious, of a competence over citizenship as such. But that does not mean that the competence of the provincial legislatures with respect to the same subject-matter is questionable. Secondly, federalism, again, has led to some inconsistencies in the allocation and exercise of powers over the status itself of the people living in Canada; since the Canadian judiciary has traditionally overcome this difficulty in the easy way and has refrained from using the division of powers to entrench some fundamental rights and freedoms as part of the citizenship status, it may be proper to analyze whether the same kind of reaction is likely to arise with respect to the Canadian Bill of Rights. These are two of the incoherences brought in Canadian citizenship laws by the federal nature of the State that have not been and could not have been eliminated by the adoption of the Canadian Citizenship Act: I intend to consider them in the following pages.

## CHAPTER 1

### The Case for a Provincial Citizenship in Canada

A bare affirmation that there actually exists in Canada a provincial citizenship can be made by anyone without fear of being contradicted. Indeed, the terms "citizens" and "citizenship" can carry very different meanings, even in the statute books and the judicial pronouncements: they may as well be assimilated to the Criminal Code's "every one", or to "the people" generally. By analogy, the word "State" has also been used to designate the Canadian provinces on many occasions and, except by some purists,<sup>15</sup> its accuracy has not been questioned. Nevertheless, it is necessary to ascertain in this chapter the actual senses in which these terms will be used. To write on a "provincial citizenship in Canada" implies not only that the word citizenship has been given an accepted legal connotation, but also that the nature of federalism, and in particular of the Canadian federation as a State, has been clarified.

Accordingly, I will analyse the three types of acceptation that the terms "citizens" and "citizenship" can bear, and whether each one of these types can legally

be used for provincial purposes in Canada. Great resort will be had to the laws of the United States, as a comparison, in order to throw light on the Canadian scene. The general, political, and strictly formal natures of a citizenship will be considered: in the first two cases, it will be submitted that the Canadian constitutional law has conferred to the provinces the right to claim that they have their own citizens and to establish a particular citizenship status within the State.

1. The General Citizenship Status.

Generally speaking, there is no need to cite any authority to affirm that citizenship is the quality of being a member of a national community: it is a judicial link between the individual and the State, and such tie provides the justification for the regulatory power of the State. The only status implied in such a notion is a very vague one: the citizen has the obligation of allegiance and in counterpart he possesses the right to be protected.<sup>16</sup> No further content can a priori be given to the status of a citizen because, apart from the allegiance-protection generalization, the laws and the constitution of every State differ to such an extent that it is impossible to enumerate the rights, privileges and obligations of the citizens of a particular State without studying the whole set of its laws. Indeed, the legal obligations of the citizens are to abide by the laws of its State, whilst his rights and privileges are those conferred by such laws and no more.

When asked to define the notion of citizenship in the United States, Lincoln's Attorney-General, in



1862, drew attention to the fact that a persistent abuse of language has left the meaning of the word very obscure and that this situation came from the wrong belief that the term citizenship should be defined by reference to some rights or privileges supposedly inherent in it. He specified that, in his view,

"...the Constitution uses the word citizen only to express the political quality of the individual in his relations to the nation; to declare that he is a member of the body politic, and bound to it by the reciprocal obligation of allegiance on the one side and protection on the other. And I have no knowledge of any other kind of political citizenship, higher or lower, statal or national, or of any other sense in which the word has been used in the Constitution, or can be used properly in the laws of the United States. The phrase, "a citizen of the United States", without addition or qualification, means neither more nor less than a member of the nation." 17

This is the kind of meaning that I want to discuss here. It is the most general approach since it does not provide any precise criterion for ascertaining who are exactly these "citizens", and since their rights and duties cannot be enumerated at the first, save as for saying that they are bound by the law of the land.

Contrary to the notion of citizen is the concept of alien that we have inherited from antiquity. But any attempt nowadays to emphasize this dichotomy between the citizens and the aliens does not conform to the present state of the law because, as far as most democratic countries are concerned, there are very few obligations of the citizens that an alien must not assume and almost as few rights and privileges from which he is excluded.

First of all, and long since, the common law made it clear that an alien owes to the Crown the same kind of allegiance as does the citizen or subject: but this allegiance is local and temporary in the sense that it is due only when the alien is within the realm and under the protection of the Crown.<sup>18</sup> This ancient principle has been applied in Canada and in the United States.<sup>19</sup> Only a person who owes allegiance to a State can commit treason against it.<sup>20</sup> Accordingly, section 46 (2) of our Criminal Code limits its prohibition to Canadian citizens when the overt act is done outside Canada; but on the other hand, if treason is committed within the territory, even an alien can be found guilty of it, presumably because the legislature assumed that

he owes allegiance while in Canada. The criminal law in this respect in Great Britain leads to the same rule.<sup>21</sup> Moreover, in Joyce v Director of Public Prosecutions<sup>22</sup>, the House of Lords confirmed a conviction of treason against an alien even though the accused acted abroad; it was held that since that alien had obtained by fraud a British passport and since he was thus entitled to the protection of the Crown, he owed at the material times an equivalent allegiance. Such a principle can be of great import as regards the crime of espionage which is dealt with in Canada according to the same principle as treason, but there is in the Official Secrets Act<sup>23</sup> a supplementary provision: its section 13 confers to Canadian courts the jurisdiction to convict of such a crime committed abroad not only a Canadian citizen but generally any person who then owed allegiance to Her Majesty !

The above examples show that, when in Canada, the alien is on the same footing as the citizen, even with respect to the general implied status of citizenship, to wit: the right to protection versus the obligation of allegiance. Then, it is needless to say that in almost every other respect not necessarily implied in

such status, the alien is likely to remain on the same level as well. Like a formal citizen, he has the obligation to respect the laws of the country where he happens to be, because, generally speaking, he can enjoy the same rights.<sup>24</sup> As has been put by Justice Rand, after he had elaborated on the status of the Canadian citizen:

"..In a like position is a subject of a friendly foreign country; for practical purposes he enjoys all the rights of the citizen." <sup>25</sup>

The learned judge was obviously referring to the civil rights as opposed to the political rights which I will discuss later.

Among the civil rights that can be enjoyed in Canada, those which relate to property are the most important. Section 24 (1) of the Canadian Citizenship Act makes it clear that aliens have no disability on this account; it provides that "real and personal property of every description may be taken, acquired, held and disposed of by an alien in the same manner in all respects as by a natural-born Canadian citizen" <sup>26</sup> One can obviously raise the question of the constitutionality of such an enactment by the federal Parliament,<sup>27</sup> but nobody can contest the substance of the rule since

it has been embodied both in the Canadian law and in the civil law of Quebec in the nineteenth century.<sup>28</sup> These property rights may be asserted even by alien corporations, and for their enforcement, access to courts have been recognized accordingly.<sup>29</sup>

To put it in a more general way, the aliens can be said to enjoy in Canada the same protection of the laws as Canadian citizens. It is not my purpose here to ascertain whether there is in Canadian constitutional law a certain content to the status of the citizen which is so fundamental that it is specially entrenched as against any kind of intrusion by either level of government; but if such a status exists, it must be remembered that it applies equally to aliens themselves. As soon as Justice Rand developed his celebrated approach to the status of the Canadian citizens, he made it very clear that those principles he cherished were not to be preserved only for the benefit of Canadian citizens in a formal and restricted sense, but for all those who happen to be within the realm.<sup>30</sup> Similarly, in the United States the status of the citizen as flowing from the constitutional provisions has been, in the main, applied to aliens. Justice Murphy of the United States Supreme Court has put it in this way:

"..once an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders."

Accordingly, the aliens enjoy the freedoms of religion, speech, press and assembly of the First Amendment.<sup>31</sup>

Also, the right not to be deprived of life, liberty or property without due process of law conferred by the Fifth Amendment coupled with the protection of the Sixth Amendment have been secured in their favour<sup>32</sup>; their property cannot be taken without just compensation<sup>33</sup>.

The several states could not deny to aliens the right to earn a living, their right to work and, more generally, their economic rights, because the Fourteenth Amendment has been held applicable to them.<sup>34</sup> Consequently, aliens can claim to pass from state to state even though such a right has been termed to be incidental to the "national citizenship".<sup>35</sup> Justice Field of the Supreme Court dissented in a case where the right of the federal government to deport friendly aliens was upheld because he felt that "as men having our common humanity, (aliens) are protected by all the guarantees of the Constitution" except as for political rights.<sup>36</sup>

All this does not mean that no classification can be made in Canada or in the United States which could be detrimental to aliens. In Canada, besides the

possibility that a certain "implied Bill of Rights" may impair the sovereignty of the legislative bodies, it remains that the major part of the "whole area of self-government" can certainly be dealt with in any manner by either level of government according to the doctrine of supremacy of parliament. In fact, one must not deduce from the provisions of the Canadian Citizenship Act conferring property rights to aliens that those persons there received a guarantee against any curtailment of their civil rights by federal or provincial enactments. The Canadian Citizenship Act did not purport to specify the status to be enjoyed by citizens and aliens. Quite the contrary, its section 24 (2) (c) indicates that an alien is not automatically admitted "to any right or privilege as a Canadian citizen except such rights and privileges in respect of property as are hereby expressly given to him". Therefore, nothing can preclude the fact that certain rights and privileges might be withheld to aliens by some particular federal or provincial enactments, according to the scope of their respective competence.<sup>37</sup> As we will see in the second chapter, nobody can tell with precision to what extent the Canadian provinces can incorporate in their laws some classifications that are detrimental to aliens.<sup>38</sup> But one thing is sure: in their field of legislative competence, they can discriminate to a very large extent and in the few cases where a normally valid

discrimination has been struck down, the judges had to use all their available tools to effect such a result.

In the United States, the situation is somewhat analogous. The Supreme Court has laid down the principle that a discriminatory classification against aliens must be plainly irrational if it is to be invalidated.<sup>39</sup> Accordingly, many state enactments, chiefly Californian, were upheld even though they were obviously directed to exclude Japanese and other aliens ineligible for citizenship from the state in that while treaty rights were preserved, the rights of purchase, ownership and lease of real property were almost completely withdrawn.<sup>40</sup> the Supreme Court found that the classification was a rational one because aliens non eligible for citizenship cannot be assumed to have a great interest in the welfare of the people.<sup>41</sup> Even though the states cannot deny to aliens the right to earn a living and a substantial equality of economic opportunities, they can regulate a particular business if there is in it a special public interest: in this vein have been upheld, for instance, prohibitions against aliens from employment on a public work project and even from conduct of pool-rooms and billiard rooms.<sup>42</sup>

Hence, if one tries to deal with the substantial content of the citizenship status in a particular country



beyond the generalities concerning allegiance and protection, he may find it easier to ascertain what are the rights and duties that are part of this status than to determine who are entitled to share in it. That is because the legal status of the individual flows uniformly from the law of the land, but the particular rights and obligations are not conferred uniformly to a unique class of persons. Therefore, some individuals may share in the citizenship status for one purpose, but not for another. This appears clearly when one takes a look at the various constructions of the word "citizens" that have been adopted by the courts. In reality, it is not necessary that those to whom a particular law applies be actually called citizens, since they are such anyway, in a general sense, to the extent that they can share in the citizenship status. But, mostly in the United States, the term "citizen" has been used in statutes of every kind to designate conveniently the scope of their applicability. It is interesting to note rapidly who such a word has been held to cover.

The American courts have construed the word "citizen" in different ways depending on the purpose and the subject-matter of the Act under consideration. Indeed, it was made clear that a person may be a citizen for commercial purposes and not for

political purposes<sup>43</sup>: it is needless to say that a "citizen for commercial or business purposes" does not necessarily possess a certificate of citizenship. Hence, a strict definition of the term has been given up when the law under consideration was designed for purposes other than political: in these cases, "citizen" could as well be synonymous with "resident", "inhabitant" or "person domiciled in..."<sup>44</sup> For example, it has been held that under a statute providing that no person shall be entitled to a divorce unless he shall have been a bona fide resident and "citizen" of the state for one year before the commencement of the action, an alien who in good faith has made the state his home for more than a year, and has no residence elsewhere, can obtain such divorce as well.<sup>45</sup> Even the corporations are covered by the term when used for some particular purposes.<sup>46</sup> Since aliens are guaranteed the equal protection of the Fourteenth Amendment, it has been held by the Court of Appeal of California that the phrases "all citizens within the state entitled to the full and equal privileges of theaters" and "any citizen" in sections 51 and 52 of the Civil Code were not restricted to citizens of the United States or of any of the states, but included unnaturalized residents of foreign birth, white or

black.<sup>47</sup> On the other hand, the Supreme Court has construed the term "citizen" in a strict sense when used in a federal statute inflicting a punishment on those who conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the country.<sup>48</sup> The result could easily have been different since the status of the American citizen which flows from many provisions of the Constitution extends to aliens.

In Canada, the words "citizens" and "citizenship" in their general sense have not been so frequently used because of the nature of our constitutional history. But their equivalent, "subjects of the Crown", must also designate different classes of persons depending on the particular rule of law dealt with. It will cover the case of aliens for example if used for all those matters where they have the same rights and obligations as the formal citizens, such as in the matter of sedition and seditious intent where it has been held that:

"..the expression "His Majesty's subjects", as used by the text writers under consideration, includes all the persons subject to the laws whether included in the term British subject in its narrower acceptance or not." <sup>49</sup>

Anyhow, there is no need to search for all the possible coverages of such terms since it may suffice here to point to the fact that a citizen generally and legally is not necessarily a formal citizen; and it would indeed be very surprising to find a case where the requirement of the Medical Act of British Columbia that a doctor must be a "good character as a citizen"<sup>50</sup> would be construed as meaning that he has to be Canadian citizen!

Therefore, the American citizenship in its general sense, as this status flows from the Constitution and laws of the United States, has been held by the Supreme Court itself to convey uniformly "the idea of membership of (the) nation, and nothing more"<sup>51</sup>. In another occasion, the same court gave the following definition.

"Citizens are the members of the political community to which they belong. They are the people who compose the community, and who, in their associated capacity, have established or submitted themselves to the dominion of a government for the promotion of their general welfare and the protection of their individual as well as their collective rights."<sup>52</sup>

The same has been said for the Canadian citizenship status which, according to Justice Rand, simply connotes the idea of "membership in the class of those of the public to whom (...) a privilege could be extended." <sup>53</sup>

The conclusions that I am brought to adopt from the above observations may be stated as follows. The citizenship status within a State flows from the whole of its legal system, but the rights, privileges and obligations incidental to this status are not conferred uniformly to a particular class of formally defined citizens. This is true, first, because in most of the areas of legislation this status may embrace aliens as well, whether they are resident or not, and the corporations the same, and second, because even though a State has the power to discriminate against aliens in favour of its formal citizens, it appears that neither in Canada nor in the United States are these kinds of classification so in vogue as to reinvest the general applicability of the citizenship status into the hands of formal citizens alone. As will be seen in the further developments, a strictly legal definition of citizens cannot practically be relied on as a criterion for differentiation because it is irrelevant a classification for most internal purposes. Legislatures will usually discriminate against a certain class of aliens, against non-residents, or a particular race and so on, and even though they sometimes adopt their own formal citizenship as a basic trait, supplementary requirements concerning age, sex or whatever qualifications will be embodied at the

same time, so that in final the scope of the legislation will never correspond anyhow to the class of "citizens" as formally determined in citizenship and naturalization laws.

It thus appears clearly that the "citizens" as used in a general legal sense can designate different types of persons within the State depending on the coverage of each particular law under consideration, its purpose and subject-matter. Anyone who is within the territory and whose status depends on its laws and constitution<sup>54</sup> becomes a citizen, though neither native nor naturalized. It is not necessary that a person be in actual enjoyment of all the civil rights and privileges at the same time since he is made a citizen of the State for the purpose of all the enactments conferring on him certain rights and duties. One can conclude that in its general and legal sense, the citizens are the members of the society, the "people", and more precisely those to whom the law applies. They are these persons who can invoke the rights and must assume the obligations flowing from the law of the land: they constitute what has been called the "passive citizens" <sup>55</sup> of the country, those who are

submitted to its rules, in opposition to the "active citizens", that is to say those who are also entitled to political rights. The term, in law, is thus susceptible to cover more or less individuals depending on the scope of applicability of every particular enactment.

It will be submitted hereafter that the Canadian provinces can legally claim to have their own citizens for two reasons. First, the nature of the Canadian state and the laws of the constitution confer to the provinces such a status as to enable them to incorporate in their enactments classifications that are designed to limitate their scope of applicability to certain individuals more tightly linked with the provincial state, and to create in this way special classes of persons to whom provincial laws apply. And second, a judicial link between members of the provincial community and the province itself has been recognized by the courts in that, on the one hand, the provinces have been held to be competent to exercise extra-territorially some powers over their own citizens at the same time these provinces were not supposed to possess any kind of extra-territorial powers, and on

the other hand, the basic rules in the field of the conflict of laws expressly confirm the existence of such a link.

Nobody can deny that federalism is of the essence of the regime established by the British North America Act, 1867. Some authors have preferred to qualify this regime as being "quasi-federal", or federal in law but unitary in practice. We must remember, however, that there is no absolute model of federalism, and as long as the major functions of the State can be freely exercised by two levels of government, such a State must be qualified as a federal one. The sovereignty of the provincial parliaments have been recognized by many celebrated cases in Canada,<sup>56</sup> and so for the sovereignty of the federal Parliament and the sovereignty of Canada as a whole.<sup>57</sup> In the Labour Conventions Case<sup>58</sup>, it has been said, essentially, that the "inter-provincial compact to which the British North America Act gives effect" was designed to confer autonomy to the provinces in their fields of competence and to prevent the central government from interfering with their powers. In whatever way theoreticians of the constitution may designate the Canadian State, it remains uncontroverted that neither the power of reservation and disallowance, nor the judicial construction of the



"peace, order and good government" clause, nor any kind of trend towards centralization during some periods of the constitutional history of Canada, have succeeded in placing the provinces in the rank of mere municipalities and are likely to effect such a result in a foreseeable future. In other words, the label that can be stuck to the Canadian regime is irrelevant for my purpose since, anyway, the "whole area of self-government" in Canada has been divided and bestowed to two levels of supreme authority, each of which does not act under the guidance and according to the whim of the other.

Therefore, the "citizens" of such a federal State, in the sense in which I have used the terms, cannot be defined only by one of the sovereign levels of government. Those to whom the law applies in Canada are those who are regulated by both federal and provincial laws. The classifications deemed proper in federal statutes may not seem advisable for provincial purposes. By virtue of the very nature of our constitution, no particular adoption of legislative traits can be imposed on the provinces by the federal government. In short, the general citizenship status admits of two facets because there exist two sovereign levels of government and because the scope of applicability of their laws determines their respective classes of citizens for each relevant purpose. A simple illustration of the role of

the Canadian provinces in the definition of a particular status of citizenship can be found in the reasons for judgment of Justice Rand in Roncarelli v Duplessis.<sup>59</sup> There, the learned judge stated, inter alia, that the citizenship status contained an unchallengeable right to enjoy a provincial privilege without injurious influence by third persons on the public body selected to grant such a privilege. He based his reasons upon the consideration of the nature or purpose of the provincial statute whose language ought not to be distorted and of the "fundamental postulates of our provincial as well as dominion government" as an aid to the construction of this statute. His approach tends only to demonstrate that the content of the citizenship status that has to be protected does not only flow from basic principles of the constitution such as the freedom of speech and of religion, nor only from federal legislation: a mere provincial Act regulating the sale of alcoholic liquors can confer a "privilege" that becomes part of such status and, in this sense, worthy of judicial protection as against undue interference.

Such is also the case in the United States, but to a much more limited extent. Indeed, almost each provision of the American Constitution can be said to lay down some kind of inherent right or privilege in the status of American citizens because it is beyond the reach of both the national and the state governments.

Besides that, the Fourteenth Amendment provides that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States..." This clause can be invoked only to protect the privileges and immunities" which owe their existence to the Federal government, its national character, its Constitution, or its laws", or in other words, only those "which would not have existed but for the presence of the federal government"<sup>60</sup>. It remains that the combined effect of this clause and of the rigid Constitution as a whole has been to withdraw a set of national privileges and immunities from the competence of state legislatures. In this sense, the powers of the state to build up a peculiar substantive content to the status of their own citizens as compared with the national status as such are somewhat more limited than in Canada. It may be conceded that there exists here also a status so fundamental that it could not be impaired by either level of government, but this has not been and can certainly not be used in Canada to invalidate as many kinds of legislation as in the United States. Apart from the existence of such an "implied Bill of Rights," the general status of the citizen in Canada is determined by the provinces in a manner as original and paramount as by the central Parliament.

Both levels of government confer protection to the people who are on their territory and these people owe allegiance to the Crown both in right of Canada and in right of a particular province. Both their laws grant rights and privileges on those they want to grant them, and impose obligations in the same way.

Moreover, Canadian constitutional law permits many kinds of differentiation between the citizens of each province and provide the basis for an elaboration of not only two but eleven different facets of the citizenship status, while the situation is not the same in the United States. The American Constitution provides no leeway to grant to one or some states a particular status, unless a formal amendment be achieved. On the other hand, the Privy Council has recognized that there was no such thing as a uniform model of province in Canada, and this has been agreed to twice by the Supreme Court.<sup>61</sup> Thus, by virtue of its power to create new provinces out of non-provincial territories<sup>62</sup>, the federal Parliament could theoretically confer to such a province powers that the actual provinces do not possess or deny it some competence that the others have: it has in fact done so, to a very limited extent, when the provinces of Alberta and Saskatchewan were created.<sup>63</sup> Obviously, the federal Parliament

cannot alter any more the provincial constitution thus created inasmuch as the new province becomes exclusively competent to amend its own constitution under section 92 (1) of the B.N.A. Act. But this tends to demonstrate that a particular status is not repugnant at all to the constitutional law of Canada and that it has been conferred and implemented to a certain extent in the past.<sup>64</sup> Indeed, the councils of the Northwest Territories and of the Yukon have been granted a status of this nature since, on the one hand, they possess almost the same legislative powers and the same privileges as the provincial legislatures whilst, on the other hand, these territories have not been recognized as provinces and remain under the ultimate authority of the central Parliament.<sup>65</sup>

A much more important factor likely to lead to great differences in provincial citizenship status in Canada resides in the doctrine of sovereignty of parliament itself. A comparison with the situation that is prevailing in the United States may be accurate here, Article IV, section 2 of the American Constitution provides that "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several states." Justice Field of the Supreme Court said that "no provision in the Constitution has tended so strongly to constitute the citizens of the

United States one people as this"<sup>66</sup>: we could respond that in Canada the absence of such a clause binding on the provinces leaves them with free hands to establish their own citizenship as distinct substantially from those of their sister provinces. Indeed, the American clause has been used to invalidate state legislation that, in Canada, could have been adopted without the slightest shadow of doubt by the provinces. It has been held to secure and protect, among other rights, the following:

"...the rights of a citizen of one State to pass into any other State of the Union for the purpose of engaging in lawful commerce, trade, or business without molestation; to acquire personal property; to take and hold real estate; to maintain actions in the courts of the State; and to be exempt from any higher taxes or excises than are imposed by the State upon its own citizens" <sup>67</sup>.

One could argue that some of these rights are not either within the range of competence of the Canadian provinces, as did Professor Laskin (as he then was) for the right to travel in Canada, passing from a province to another and settling in the place of one's choice<sup>68</sup>. But certainly are applicable here all those cases where a license fee provision imposing higher rates on those who were not citizens of the state (permanent residents) has been invalidated, and so for statutes discriminating against non citizens of the state in taxation or in receivership proceedings.<sup>69</sup>

The clause, however, does not prohibit any kind of differentiation between citizens of the states. It has been recognized that state enactments based upon rational considerations, upon terms which in themselves are reasonable and adequate, "even though they may not be technically and precisely the same in extent as those accorded to resident citizens", were valid.<sup>70</sup> But in Canada, nobody could suggest that the discrimination between citizens of different provinces must remain within the bounds of technicalities. A Canadian citizen may be treated in very diverse ways by the different provinces in which he may settle, depending on whether or not the province in question considers that he is also one of its citizens. There is no way to attack the numerous provincial enactments that impose a certain period of residence within the province in order to qualify for the exercise of professions or for the receipt of welfare benefits, as has been made in the United States.<sup>71</sup> As far as civil rights in general are concerned, the classifications laid down by the provinces can favour local particularism to a very great extent and then lead to a disparity of status between those the legislature considers as its citizens, through the use of criteria like residence and domicile, and the citizens of other provinces.

To recapitulate what has been noted above, it may suffice to say that the determination of a citizenship status in a general sense is made in Canada, first, by two levels of government and second, not necessarily in a uniform way by each legislature of the provincial level. This is true to a much larger extent in Canada than in the United States where, on the one hand, the Constitution and its Fourteenth Amendment tend to equalize the content of the state citizenship with that of a nationwide one, and on the other hand, the Constitution again with its fourth article generalize as between the diverse states the particular status of the citizens, if not for mere technicalities. In Canada, the sovereignty of the provincial parliaments is supposed to preclude any kind of such limitation. Except, to a certain extent, as regards aliens and Indians, the B.N.A. Act did not pretend to confer the competence over special classes of people in Canada to only one level of government, and in this sense, the legislative competence over the citizens and their status is as much divided as the competence over the subject-matters there enumerated and as the sovereignty itself. This does not mean, however, that the non-provincial courts will not tend to equalize the different status of citizenship in Canada by using the relevant rules of statutory interpretation. For instance,



it has been argued that a person was not entitled to receive compensation under the B.C. Workmen's Compensation Act, not because she was an alien, but because she was not a resident of the Province.<sup>72</sup> it was contended that the provincial Act was supposed to be presumed to constitute a beneficial scheme in favour of the actual members of the community alone. In other words, the lack of provincial citizenship instead of the lack of Canadian citizenship was relied upon. The lower court refused to grant compensation because the statute should not be presumed to apply extra-territorially. The Privy Council rejected this argument and applied the express words of the statute that made no limitation as to residence within the Province in order to be entitled to compensation. But obviously, had the statute been explicit to the contrary, the non-resident widow of the workman would have had no legal claim nor any substantive ground to invoke the invalidity of the Act.

The provincial citizenship status flowing from provincial enactments has not only been recognized in an implied way, such as by the approach of Justice Rand to the problem, nor only in a negative sense, that is to say in the sense that provincial classifications favouring their own residents have never been impaired: it has been acknowledged directly in that the courts have

upheld the exercise of extra-territorial powers by the provinces provided that these powers were directed towards their own citizens. In other words, while the provinces have never been competent to deal with the rights of the citizens of other provinces or States outside their own territory, they have been permitted to do so when the persons affected were linked with them by what has been called here a status of provincial citizenship. Indeed, it is common knowledge that the B.N.A. Act has confined the provinces to an exercise of their powers "within the Province".<sup>73</sup> Accordingly, provincial legislatures cannot destroy civil rights outside the province or give another kind of extra-territorial operation to their enactments.<sup>74</sup>

On the other hand, the Canadian provinces have been permitted to effect extra-territorial results with their intra-territorial exercise of powers where they could rely on their "citizens" as a point of contact. For instance, they can enact and enforce a reciprocal legislation with another State because in such a case the action taken abroad may be considered as being only a preliminary step to adduce evidence for its enforcement within the province, or in the converse situation, the

enforcement abroad will be made by the reciprocating government; the majority of the Supreme Court of Canada pointed out that "it would be an extraordinary commentary on what has frequently been referred to as a quasi-sovereign legislative power that a province should be unable within its own boundaries to aid one of its citizens to have such a duty enforced elsewhere."<sup>75</sup>

The provinces also have the power to tax assets situated outside their territory under certain conditions. In 1882, Blackwood v R.<sup>76</sup> was a case involving the Succession Duty Act of the Legislature of Victoria (Australia) which can obviously be assimilated for this purpose with the Canadian provinces by reason of the applicability of the Colonial Laws Validity Act of 1865 prohibiting the exercise of extra-territorial powers. There, the Privy Council made it clear that the Victorian Legislature could tax its citizens with respect to property situated outside the territory but held that in the statute under consideration the words "personal property" had not been intended to bear such a meaning and were accordingly limited to property situated in Victoria. The following dictum of the Board is significant.

"It is said that the expression 'real estate' carries its own limitation with it, because it is something inconceivable - almost a violation of the law of nations - that a State should tax its subjects on the basis of their foreign real estate. But in fact personalty in England is as far beyond the direct power of the Victorian Legislature as realty in England. Suppose that a testator domiciled in Victoria has property of both kinds in England, that he gives his English realty and his Victorian personalty to a domiciled Victorian, and that for his English personalty he appoints an English executor, and gives it to a domiciled Englishman. In such a case the Victorian Government has no point of contact with the English personalty; but as regards the English realty the owner of it is the subject of that Government, and so much the richer and more able to pay taxes by reason of his ownership. There is nothing in the law of nations which prevents a Government from taxing his own subjects on the basis of their foreign possessions. It may be convenient to do so. The reasons against doing so may apply more strongly to real than personal estate. But the question is one of discretion, and it is to be answered by the statutes.."77

There are two kinds of extra-territorial powers that can be exercised by a fully sovereign State: first, powers without point of contact that may or may not constitute an "usurpation" of competence vis - à-vis another State and that can be exercised only by the federal Parliament since the Statute of Westminster,

1931; and second, powers with a point of contact, a link with the State which can only be a personal one, to wit, citizenship. The courts have never recognized expressly that the Canadian provinces could exercise an extra-territorial power because they have used other terms to qualify such a power: since there is a personal tie between the individual affected and the province and since this link can only be created by a residence or a domicile within this province, the courts did not need to qualify the power as extra-territorial. It remains, nevertheless, that their rulings on the matter implemented both the facts that these provinces could exercise extra-territorial powers with a point of contact and that they could revendicate their own citizens, or "subjects" (as the term has been used in our constitutional history).

It is in 1922, in Burland v R.,<sup>78</sup> that the Privy Council made explicit the provincial powers in respect of taxation, upholding the Quebec Succession Duty Act that imposed a duty on all "transmissions within the Province, owing to the death of a person domiciled therein, of movable property locally situate outside the Province at the time of such death". The ratio

laid down by the Board on the point under consideration touches both elements already stated, but qualifies the power as intra-territorial.

"The conditions there stated upon which taxation attaches to property outside the Province are two: (1) that the transmission must be within the Province; and (2) That it must be due to the death of a person domiciled within the Province. The first of these conditions can, in their Lordships' opinion, only be satisfied if the person to whom the property is transmitted is as the universal legatee in this case was either domiciled or ordinarily resident within the Province; for in the connection in which the words are found no other meaning can be attached to the words "within the Province" which modify and limit the word "transmission". So regarded the taxation is clearly within the powers of the Province. It is, however, pointed out that art. 1387g refers to "every person" to whom movable property outside the Province is transmitted as liable for the duty, but this must refer to every person on whom the duties are imposed, and those persons are, as has already been shown, persons within the Province"<sup>79</sup>

It will be contended later that, effectively, what has been called above the "citizens of the province" are those who are, in the terms of the Privy Council, "domiciled or ordinarily resident" in that province.

Other kinds of provincial enactments could be found that are primarily designed to regulate the citizens of the province but have an incidental operation<sup>80</sup> outside the territory. But such cases are not impressive as long as the individual constituting the link or point of contact is regulated while he is still within the provincial realm. A recognition of provincial citizenship would be much clearer if it were made in cases where the citizens whom the law purports to affect are outside the territory of their province. This is a delicate problem because the characteristic of such citizenship remaining the domicile or residence within the province, it is extinguished as soon as a person goes to live elsewhere. But admittedly, the succession duty case cited above would have covered the case of a person who was outside the province, temporarily, when he became entitled to the assets of the deceased, and then, the provincial tax would not only be imposed on assets situated outside the province but also on a person who was and may still be outside too. A recognition of this kind of link between an individual and his province has been effected notably in Workmen's Compensation Board v Canadian Pacific Railway Co.<sup>81</sup>

The Canadian Pacific Railway Company owned a steamship which sank with all hands aboard in waters

outside British territory and sought from the Court a declaration that the Workmen's Compensation Act of British Columbia was ultra vires in so far as it purported to warrant the payment of compensation by the Board to the dependants of certain members of the crew. In this particular case, the extra-territorial elements outnumbered the intra-territorial ones: the railway company operated vessels between ports in British Columbia and ports in the United States and its civil rights were then both determined and created within and without the Province, the accident happened outside Canada, the workmen were required to perform their work or service both within and without the Province, their dependants could not be excluded from compensation because they were non-resident aliens. The only element that was undoubtedly intra-territorial is the fact that the contracts of employment had been passed in British Columbia; also, all the members of the crew resided in the Province but their right to compensation arose while they were outside the territory. The Privy Council held



that the provincial Act was intra vires even in so far as its section 8 purported to cover the case of an accident happening on a steamship to a resident who performed his duties both within and without the Province. They based their judgment on the facts that the contracts of employment were passed in the Province (the rights thus created being civil rights within this Province) and that the workmen in question were and remained citizens of the Province even though they were temporarily but regularly outside its boundaries. The ratio has been laid down in these terms:

"The right conferred arises under S. 8, and is the result of a statutory condition of the contract of employment made with a workman resident in the province, for his personal benefit and for that of members of his family dependent on him. Where the services which he is engaged to perform are of such nature that they have to be rendered both within and without the Province, he is given a right which enures for the benefit of himself and the members of his family dependent on him, not the less that the latter may happen to be non-resident aliens. This right arises, not out of tort,

but out of the workman's statutory contract, and their Lordships think that it is a legitimate provincial object to secure that every workman resident within the Province who so contracts should possess it as a benefit conferred on himself as a subject of the Province." 82

Then, the Privy Council found no difficulty in holding that such a provincial scheme for compensation was not affected by the mere fact that the accident insured against happened in foreign waters. This, it is submitted, is an explicit recognition that the supremacy of provincial parliaments, by entitling them to specify a particular scope of applicability in their enactments, confers at the same time the power to create a class of "subjects" or citizens of the province, the legal link thus defined being strong enough to constitute a source of rights and duties even when these persons are outside the territory. Since this link cannot be a territorial one, the provinces not being competent extra-territorially, it can only be a personal bound, to wit, the fact that the parties there interested are members of the provincial community and subject to the jurisdiction thereof.

A judicial tie of this nature has also been recognized expressly in the field of the conflict of laws. "The conflict of laws is that part of the private law of a country which deals with cases having a foreign

element".<sup>83</sup> The connecting factors that are relied on to solve these kinds of cases are not necessarily designed to relate the interested parties to a particular country, such as the lex loci contractus, the lex loci delicti, or the lex situs. But there are two of these connecting factors which are used to determine what is the country whose legal system will regulate a certain number of legal situations concerning a given individual: those are domicile and nationality, both criteria serving to determine the personal law and thus to relate a person to a particular country. The law of the domicile is the personal law in the whole Commonwealth and in the United States, while in most continental European countries it is the law of the nationality.<sup>84</sup>

It is relevant to indicate here what is the meaning of "country" in the field of the conflict of laws:

"Public international law deals mainly with relations between different States, while the conflict of laws is concerned with differences between the legal systems of different countries. A State in the sense of public international law may or may not coincide with a country (or "law

district" as it is sometimes called) in the sense of the conflict of laws. Unitary States like France, Italy and New Zealand, where the law is the same throughout the State, are "countries" in this sense. But public international law knows nothing of England or Scotland, New York or California, for they are merely component parts of the United Kingdom and the United States. Yet each of them is a country in the sense of conflict of laws, because it has a separate system of law. Since the matter is of fundamental import, it is necessary to be clear exactly what constitutes a country for the purposes of the conflict of laws. England, Scotland, Northern Ireland, the Republic of Ireland, the Channel Islands and the Isle of Man is each a separate country; so is each of the American and Australian states and each of the Canadian provinces, and each colony of the United Kingdom". 85

In this respect and for my purpose, only two things need to be noted. First, the two personal connecting factors already indicated could perfectly be interchangeable because they bear absolutely no relationship with a State as a sovereign power in public international law. Nationality may be a sound criterion to adopt in the case of a unitary State, but it is likely to be irrelevant in a federal State or even in the United Kingdom where there is more than one "country" for the conflict of law purposes. It is true that the non-sovereign states that are considered as countries in such a field could adopt a particular nationality in

order to determine the connection of certain individuals with them, but it is not necessary since the domicile criterion can as well do the task. And even when the federal Parliament legislates in its own field of competence, it will rely on domicile as a criterion although Canada as a whole is a completely sovereign<sup>86</sup> entity.

Second, the Canadian provinces and the American states are countries for the purpose of the conflict of laws simply because they can establish a separate legal<sup>87</sup> system in their field of competence. It is the domicile of the individuals that will be relied on to determine their submission to one of these legal systems, since nobody can have for the same purpose more than one<sup>88</sup> domicile, nor have more than one country. The legal bound in the field of the conflict of laws between individuals and Canadian provinces is a manifestation of their being citizens thereof for the purposes that are within the range of provincial competence. As has been put by Lord Westbury, "domicil is the condition in virtue whereof is ascribed to an individual character of a citizen of some particular country...on the basis (of which) the personal rights of the party, that is to say, the law which determines his majority or minority, his marriage, succession, testacy or intestacy must<sup>89</sup> depend."

There remains only one further question to consider in this section: who are in fact these "provincial citizens"? An exact answer to such a question is incompatible with the very definition that has been given above and with the fact that it is up to each province to determine exactly the scope of applicability of its own laws depending on the particular field regulated and the special interests of the people. In this sense, a comprehensive survey of the provincial enactments would be useless because it could not lead to a uniform finding as between the provinces and even not as between the different types of legislation of the same province. In the cases where the concept of "subjects of the province" has been used, it appeared that these persons were either domiciled or permanent residents of a province. But it is clear that had the enactments been couched in other terms, the relevant criteria could have been different. In the field of welfare laws for example, one province may want to grant assistance to six months residents while another will do the same only for two years domiciled people. In other fields, criteria like British subjects, voters, and so on, may be used and then, the citizens as far as those matters are concerned will be these persons only.

In this respect, it may be indicative of the possibilities of differentiations to analyse briefly certain types of legislation in British Columbia and in Quebec. First of all, a very general consideration can be made without hesitation: the citizens or the scope of applicability of the laws in these two provinces are substantially different in that the latter never relies on British subjects for whatever purpose<sup>90</sup> whereas this kind of classification is very frequent in British Columbia. This leads obviously to a particular status of the British subjects in certain parts of Canada and not in others. The British subject trait has been used in British Columbia quite uniformly in the matter of political rights, as will be seen in the next section; but it has also been relied on as a requirement, or as an advantage, for the exercise of many professions and callings<sup>91</sup>, and even for other purposes where the fact of being a British subject may seem totally irrelevant, such as under the Mothers' Allowances Act<sup>92</sup>, the Change of Name Act<sup>93</sup>, and the Railway Act<sup>94</sup>. On the other hand, in the last few years, the policy has been changed and many provisions in the statutes of British Columbia requiring to be British subject have either been repealed<sup>95</sup> or substituted<sup>96</sup> by a similar provision requiring to be Canadian citizen.

It remains, however, that the fundamental criterion used by the provinces to determine the coverage of their enactments, and hence who are their citizens, is always the residence or domicile within the province. Other traits may be used at the same time, but whatever they be (whether British subjects, Canadian citizens, such or such age, qualified voters, and so on), they remain merely incidental and supplementary qualifications of the basic provincial citizenship constituted by the domicile or residence within the province.<sup>97</sup> This appears clearly when one considers the whole bulk of enactments of a particular province, since the requirements concerning the residence or the domicile within the province are by far the most frequently used and since this sort of trait is the first one to be imposed and the last to be withdrawn after a change in the legislative policy.<sup>98</sup> In many cases, only residence within the province is required,<sup>99</sup> directly or indirectly, without any particular period of time specified by the statute<sup>100</sup>, but the scheme may as well ensure that residence is equivalent with domicile so that no one can have his residence in two provinces at the same time.<sup>101</sup> In other instances, the length of such residence or domicile is specified, and this length will vary considerably depending on the importance that is attached by the legislature to the matter regulated and on whether or not the public



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purse or property is put to contribution . The longer  
the period of residence will be, the more it is likely  
to amount to a domicile requirement as well. Apart  
from these cases, most of the statutes, at both pro-  
vincial and federal levels, do not set down any criterion  
to determine their coverage because they apply at large  
on a territorial basis, that is to say, to all those  
who happen to be on the territory.

On the whole, it appears that, besides the  
express or implied requirement of residence or domicile  
within the province, there is no necessary uniformity or  
rationale between the scopes of applicability of the  
diverse statutes of the same province. It is the task  
of each legislature to rationalize the law in this  
respect so that the clashes be avoided as far as possible.  
In Quebec, there is a certain standardization that has  
been made, at least with respect to the qualifications  
for the exercise of most of the professions; the new  
section 4 of the Professional Matriculation Act<sup>103</sup>  
provides as follows:

"No corporation mentioned in the  
schedule shall refuse to admit a  
person as a member of the corpora-  
tion or to admit a person to the  
study or the practice of the pro-  
fession governed by such corporation  
for the sole reason that such person

is not a Canadian citizen, if such person has been lawfully admitted to Canada to remain there permanently, undertakes to apply for Canadian citizenship as soon as he may do so under the Canadian Citizenship Act (Statutes of Canada) and is domiciled in the province of Quebec".

Nineteen professional corporations are covered by the enactment, and the Lieutenant-Governor in Council has the power to make the section applicable to other corporations.

Uniformity, however, seems to be still more needed as between the laws of the different provinces. Many techniques have been advocated in the past to achieve such a result<sup>104</sup>, but only voluntary endeavours on the part of the provinces could lead to some success, since they remain free to adopt whatever legislation they want. In this sense, the work done by the Conference of Commissioners on Uniformity of Legislation in Canada since 1918 proved to be very positive, and many uniform statutes have been adopted throughout Canada, except Quebec.<sup>105</sup> The latter Province did not participate at all relevant times in the Conference, despite the fact that a clear policy had been adopted not to "interfere with the Civil Code of Quebec or to impose upon that Province a system of law founded upon traditions and

and principles foreign to the wishes of its people" .  
Participation of Quebec resumed in 1942, but it does not appear that it adopted as many proposed uniform legislation as the other provinces. It remains that, in my view and as has been indicated above, no trend towards uniformity can bring any province to disregard the particular relationship entertained by certain individuals with itself, at least in those matters where the benefits and privileges that are conferred may reasonably be thought to pertain only to those who are members of the provincial community. The only kind of uniformity that can be achieved in this respect does not consist in the elimination of every residence or other requirements, but in the standardization as between the provinces of the requirements themselves.

Nevertheless, in the major part of the field of welfare laws, the provinces have been in fact obliged to refrain their natural propensity towards the creation of a particular trait designed to limit the benefits to those only that the legislature considers to have sufficient ties with the province to warrant a special status. The provincial powers to determine in a discretionary manner the scope of applicability of its welfare legislation has been successfully constricted

by the federal government through its policy of conditional grants to the provinces. Indeed, there is not a single piece of federal legislation that confers on the Governor in Council the authority to make agreements with the provinces and provides for the payment to these provinces of certain amounts for welfare purposes without imposing at the same time, either directly or indirectly, that the provinces shall not make a period of residence within its borders a condition for being entitled to some allowance or assistance. The key Act in this respect is the Canada Assistance Plan<sup>107</sup> whose coverage is general and which is designed to establish a system whereby the federal will share any kind of financial aid or other assistance provided by a province to its residents who are in need. The provinces that agree to this federal scheme need not adopt any other particular agreement since it covers every kind of assistance. But one of the conditions that have to be accepted by the province, is, according to section 6 (2)(d), that this province "will not require a period of residence in the province as a condition of eligibility for assistance or for the receipt or continued receipt thereof". Such a direct way of provoking uniformity throughout the country has also been embodied in more specific federal Acts dealing<sup>108</sup> with analogous matters.

The provisions of other particular statutes in this field are not so explicit, but their ultimate result is the same. The Blind Persons Act, the Old Age Assistance Act and the Disabled Persons Act are quasi-<sup>109</sup> identical legislation. Their respective section 3 (1) confers to the federal government the power to make an agreement with any province to provide for the payment to this province of a certain contribution in respect of allowances paid to the persons in question by the province in pursuance to its own legislation. Then, their section 3 (2) enumerates the qualifications that are to be met by the prospective recipient of the allowance or assistance, among which it is provided that this person must have "resided in Canada for the ten years immediately preceding (the date of the proposed commencement of payments to him), or if he has not so resided, has been present in Canada prior to those ten years for an aggregate period equal to twice the aggregate period of<sup>110</sup> absences from Canada during those ten years". With respect to the residence within a province, the conditions of the agreement are absolutely incompatible with any requirement of a certain period of such residence. It is provided, inter alia, that a certain reimbursement will be made by a province to the province which has

to pay the allowance or assistance when the recipient has resided in the former for a longer time during the period preceding his being qualified for the benefits.<sup>111</sup>

And the province must also agree upon the following:

"(iii) that the province will, where a recipient who has been granted an allowance transfers his residence to such province from another province, pay the allowance;

(iv) that where a recipient, to whom the province has granted an allowance, transfers his residence to another province with which no agreement is in force, the province will continue to pay the allowance to such recipient;

(v) that where a recipient, who has been granted an allowance, transfers his residence to some place out of Canada, the province will discontinue payment of the allowance and not resume payment thereof until such recipient has again become resident in Canada" (...)<sup>112</sup>.

It thus appears that no leeway is left for the provinces to specify any kind of residence or domicile criteria of their own if they want to receive the federal contribution.<sup>113</sup>

On the other hand, the ten years' period of residence in Canada is manifestly adopted to make sure that the recipients are members of the community,<sup>114</sup> there being no need, in the federal policy, to further provide that they also are citizens of the province that will have to share in the bill.

Such a voluntary constriction by the provinces is accepted with some reluctance since they would prefer to grant their privileges and their money only to those they naturally tend to consider as their citizens.<sup>115</sup> Accordingly, the provinces tend to require a little more than a mere residence within the province, as long as the conditions of the agreement permit them to do so. On the one hand, they may define the term "resident" as meaning a person domiciled or whose home is in the province, requiring by this an intention from the recipient to remain in the province or to return therein after temporary absences and excluding at the same time the mere visitors and tourists.<sup>116</sup> On the other hand, the provinces have also created a "waiting period" during which the resident has to remain in the province before being eligible to the benefits of the legislation.<sup>117</sup> Both these reasonable expedients have been agreed to by the federal which has embodied them in the recent provisions of its Medical Care Act where resident of a province "means a person lawfully entitled to be or to remain in Canada, who makes his home and is ordinarily present in the province, but does not include a tourist, transient or visitor to the province," and where one of the requirements that have to be met by the provinces is that the provincial

plan must "not impose any minimum period of residence in the province or any waiting period in excess of three months before persons who are or become residents of the province are eligible for or entitled to insured services."<sup>118</sup> The same section also imposes on the provinces the duty to pay the cost of insured services to their residents while temporarily absent or during the time they are in the waiting period of a participating province.

Indeed, it seems to me that it is as legitimate, if not more, for the provinces to seek some protection by minimum citizenship requirements that it is for the federal itself. Obviously, there are many laws, federal or provincial, where no such criterion need be adopted since the benefits they provide for are unlikely to attract within the relevant territory persons who will become a burden on the public purse; even in the welfare field, all those insurance schemes whereby the beneficiary or his legal representatives have to contribute to the fund do not generally embody any special length as to the period of residence.<sup>119</sup> But in the matters which may incite foreigners to come to Canada or in a province for the only purpose of gaining personal benefits at the public expense, it is submitted that the provinces have a more legitimate claim to restrict the coverage of their



enactments than the federal because the latter can always prohibit the entry on its territory by paupers through its immigration powers, which the provinces cannot do.<sup>120</sup>

Despite its powers in immigration, the central government has used in many cases some period of residence in its own legislation as a prior qualification for benefits under them. A period of ten years' residence in Canada embodied in some of its enactments, as we have seen,<sup>121</sup> appears somewhat unconscionable since the government could easily refuse as immigrants those blind or disabled persons or senior citizens whom it does not want to support: it is submitted that as soon as it accepts them within the Canadian community, they should be entitled to the benefits provided to any other Canadian, at least within a reasonable period of time.<sup>122</sup> In any case, effectively, the sole passage by an alien through the procedure of immigration makes almost sure that what he acquired the very first day of his being accepted as a landed immigrant is not a mere residence in Canada but a domicile therein, because otherwise he would have been refused had he not had the intention to settle here.<sup>123</sup>

But as far as the provinces are concerned, the main way to avoid having to support persons from outside the territory who do not really intend to settle permanently and to constitute an asset for the community is to restrict the scope of applicability of their own legislation, and that is what they have been precluded from doing by the conditional grants agreements imposed by the federal government. It is fair to say that there was a need in the field of welfare laws for uniformity in the provisions throughout Canada and for an assurance that a citizen will not be penalized for the sole reason that he happened to change the province of his abode. But either the same schemes are adopted by every province and then the hardship imposed on a particular province which has to pay allowances to persons just coming on to their territory is compensated by its discharge vis-à-vis those who have just left; or else, where the provinces do not sign the same agreements, some of them may acquire a supplementary burden and have to fulfill obligations with respect to persons who should have been indemnified by another province.<sup>124</sup>

Even in all the other fields where they remained completely free to grant their privileges to whom they want, the provinces have nonetheless felt the necessity of conferring powers to negotiate and make agreements

with other provinces in order to uniformize the application of the diverse statutes in pari materia and alleviate the loss of benefits suffered by those who moved from a province to another.<sup>125</sup> It is not my purpose here to analyse what are the agreements that have been implemented as between the provinces, but the diversity in the definitions of residence in the statutes of the same province may indicate how many clashes could be found by comparing the enactments of all the provinces. Agreements may be necessary in order to avoid a complete anarchy in the fields where the federal government has not the bargaining power that it has in welfare matters through its spending power. Another way to force the co-operation of the other provinces is to deny to their citizens certain rights or privileges unless they adopt a similar legislation and grant the same benefits. The Motor Vehicle Act<sup>126</sup> of British Columbia, for example, provides that any person who obtained judgment from a court of the Province or is otherwise entitled to compensation, may apply to the Fund therein constituted, but goes on:

"The amount paid by the Fund to an applicant who ordinarily resides outside the Province shall not exceed the amount limited by this section or the amount that a resident of the Province could recover under the same circumstances from a like fund in the jurisdiction in which the applicant ordinarily resides, whichever is less."

Thus, the non-resident is either penalized or not, depending on the laws of the province whence he comes: in other words, the citizen who travels throughout Canada and becomes subjected to different provincial jurisdictions may be dealt with as if he were tightly linked with a particular province, and his rights and obligations will vary according to the correspondence or disparity between the laws of his "state" and those of the one where he happens to be. Our constitutional system that permits such a disparity by the same time it creates a need for a machinery towards uniformity has led in this way to a firm recognition of the appurtenance of the individual not only to a national community but also to a provincial one. That is what I have called here a provincial citizenship in the general sense of the term, and this is the price that must be paid, to a certain extent, for federalism.<sup>127</sup>

It is true that the standardization compelled in the United States by the Constitution has found its Canadian counterpart in the spending power of the federal government and its policy in the field of welfare legislation through conditional grants. Nevertheless, the provinces have retained an overwhelming power to define who are their citizens in all other fields left untouched by the federal intrusion, such as the qualifications for

the exercise of professions within the province, for sharing in the enjoyment of public property and callings, and so on. In this sense, the possibilities for differentiations remain much more actual in Canada than in the United States, but they are only possibilities since, as the point has been made, the vast majority of the laws in Canada apply to all those who are in the territory, whether federal or provincial: this is true in the major parts of the civil and property rights. In special matters however, where the federal or the provincial authority consider that a right is almost a privilege, the range of "citizens" may be substantially narrowed by some reliance upon criteria that are very diverse but, mainly and fundamentally, the residence or domicile within the realm.

## 2. The Political Citizenship Status

In the preceding section, I relied on the fact that aliens were entitled to most of the rights that were supposedly those of the "citizens" to show that the latter term when used in a general sense had no relevant correspondence with the class of persons formally defined in the Canadian Citizenship Act. Here, however, aliens are almost never entitled to participate in the political life of the country where they have the privilege to remain.<sup>128</sup> Since, in Canada and in the United States generally, it can be said that aliens "differ only from citizens in that they cannot vote or hold any public office"<sup>129</sup>, it has often been accepted as a corollary that the actual possession of political rights was the relevant criterion to determine who are legally the citizens of the State. Such a conclusion is not accurate because a legal system is not necessarily developed along the lines of political scientists' ratiocinations, and because a strict legal definition of citizens flows from a citizenship or naturalization Act which has no direct correlation with the possession or not of political rights.

The confusion in this domain comes from a jumble of philosophical concepts and legal rules and originates with Aristotle's definition of citizenship which I will consider briefly. First of all, Aristotle did not purport to deal with citizenship in a legal sense since he left out of his consideration "those who enjoy the name and title of citizen in some other than the strict sense - for example, naturalized citizens"<sup>130</sup>. He equally dismissed "children who are still too young to be entered on the roll of citizens, or men who are old enough to have been excused from civic duties..." He then excluded from the comprehension of the nature of citizenship those "civic rights" which also belong to aliens. Such an approach will obviously lead to a very strict definition of the citizen, that is "a man who shares in the administration of justice and in the holding of office."<sup>131</sup>

Aristotle, true, was only concerned with an analysis of the relationship between the citizen and his State and not with any relationship between the people and the rights and duties conferred generally by law or between this people and the people of another State. The nature of citizenship in the sense he wanted to discuss it is a political one and it is not surprising to

find that the resulting definition sets the participation in the operation of the State as the leading feature of the nature of citizenship. Aristotle admitted, however, that this test could only be met in a democracy. In order to give it a universal connotation, he amended his definition so as to include citizens of non-democratic States:

"(1) he who enjoys the right of sharing in deliberative or judicial office (for any period, fixed or unfixed) attains thereby the status of a citizen of his state, and (2) a state, in its simplest terms, is a body of such persons adequate in number for achieving a self-sufficient existence." 132

It is interesting to note that modern democracies only respect this second definition and constitute some sort of by-product of a direct democracy, since most of their citizens share remotely in public functions through the sole exercise of their right to vote. In any case, what is worthy of notice is that Aristotle's definition of citizenship refers to the political rights as its primary and essential characteristic: the citizens are only those who are entitled by the constitution of a country to enjoy such political rights.



Despite the soundness of this kind of reasoning, a legal system may also provide that certain persons need not be conferred with political rights to be entitled to the status of citizens. In other words, one should not use Aristotle's criterion as the sole possible one for all legal purposes and conclude that the citizens must be those who have "the power to participate directly or indirectly in the establishment or management of government", this participation working mainly through the channels of voting and holding office: indeed, American courts have often adopted such a definition, adding that "political rights are fixed by the constitution (and) every citizen has the right of voting for public officers, and of being elected; these are the political rights which the humblest citizen possesses", contrary to the civil rights which broadly comprehend all rights accorded to every member of a nation or district.<sup>133</sup> It is there assumed that those who only enjoy civil rights are not citizens because even the humblest citizen possesses political rights. Moreover such a definition lacks so much rigour that it equates citizens with the "people", as the term is used in the U.S. Constitution to designate the basis of the political sovereignty.<sup>134</sup> Chief Justice Taney of the Supreme Court of the United States put it in this way:

"The words "people of the United States" and "citizens" are synonymous terms, and mean the same thing. They both describe the political body, who, according to our republican institutions, form the sovereignty, and who hold the power and conduct the government through their representatives. They are what we familiarly call the "sovereign people", and every citizen is one of this people, and a constituent member of this sovereignty." 135

This sort of phraseology is very unfortunate because it is not based on the law but on a political concept which is so broad and vague that it leads and has always led to confusion. There is no use to place such an emphasis on the fact that every person must possess these political rights to be a citizen at all. Obviously, this can hardly be contradicted because it is too vague an assertion. But for the very same reason, it must be criticized.

In reality, the term "people" has absolutely no legal connotation and, even in the popular language, it means sometimes the electorate and sometimes all the inhabitants:

"It has been remarked, with great authority, that "the 'people' is so indeterminate an expression that its use, let alone its abuse, obscures almost all political discussions."

An even more absolute indictment is that of Disraeli, who once said that, as a political expression, "the people" is "sheer nonsense". He regarded it as belonging rather to the realm of natural history than to that of politics. It was, however, only a few years after making these observations that Disraeli introduced a Bill into the House of Commons "to amend the representation of the people", without perhaps considering whether the term "people" in the title of the Bill referred to the electorate or the whole population." 136

This term can thus cover both the "active citizens" who enjoy political rights and the "passive citizens" who are subjected to the laws of the realm, as has been discussed formerly. But the danger of the doctrinaire approach described above is to transfer it on legal ground, as in the following statement:

"Does it (the term "people") in any given country cover, or ought to cover, the whole population or only those who are legally citizens, i.e. entitled to share in the government by expressing their mind and will on public questions?" 137

From what can one infer that the political meaning of "citizens" is the only legal one if he does not rely on the constitution and laws of the country?

A rapid survey of the provisions conferring political rights in Canada and in the United States demonstrates, first, that these rights have not necessarily been exercised only by those who are formally citizens of the country and, second, that all these citizens have never been admitted to exercise them. As for the first point, it has been remarked that in the United States:

"... during the nineteenth century the laws and constitutions of at least twenty-two states and territories granted aliens or declarant aliens the right to vote. It was not until 1928 that a national election was held in which no alien in any state had the right to cast a vote for a candidate for office." 138

Even today, it is common knowledge that British subjects are entitled to the franchise in certain Canadian provinces and will keep this privilege at the federal level until 1975. Accordingly, there is no correlation between the possession of a formal citizenship and the exercise or enjoyment of political rights. There is a sense in which "citizens" may designate those who are entitled to political rights, but this sense is not the only legal one and it does not correspond at all to the meaning given to the term in citizenship and naturalization laws.

Moreover, it has been noted with great accuracy that:

"..no person in the United States did ever exercise the right of suffrage in virtue of the naked, unassisted fact of citizenship. In every instance the right depends upon some additional fact and cumulative qualification, which may as perfectly exist without as with citizenship (...) And, as to voting and holding office, as that privilege is not essential to citizenship, so the deprivation of it by law is not a deprivation of citizenship." 139

The fact that the possession of political rights is not essential to formal citizenship has been recognized judicially,<sup>140</sup> and, in any case, it is a necessary inference from a mere look in the statute books. The Privy Council has put it in this way:

"The term "political rights" used in the Canadian Naturalization Act is, as Walkem, J. very justly says, a very wide phrase, and their Lordships concur in his observation that, whatever it means, it cannot be held to give necessarily a right to the suffrage in all or any of the provinces. In the history of this country the right to the franchise has been granted and withheld on a great number of grounds, conspicuously upon grounds of religious faith, yet no one has ever suggested that a person excluded from the franchise was not under allegiance to the Sovereign." 141

But the confusion in the terms is so deeply rooted in our political traditions that those who desire to perpetuate it have tried to find some justifications for the fact that certain citizens were deprived of their political rights: for instance, it has been said that children of citizens were citizens alike because they partake of the quality of their parents who are exercising political rights. This kind of reasoning is obviously designed to provide an a posteriori justification for an inconsistent premise. And if we were to remain with the absurd belief that it is the rights and privileges which one is entitled to enjoy that make him a citizen, we could be caught to justify in the same way why formal citizens cannot exercise their political rights when, for instance, they have been convicted of a crime, they have not resided in the constituency for enough time, or because they are Japanese.

The truth is that the citizens of a country are not defined by laws conferring political rights but by the citizenship and naturalization statutes of this country. On the other hand, the enactments granting political rights serve to bestow on a particular class of "citizens" (in a political sense) the right to participate directly or indirectly in the establishment or

management of the organs of the State. Such provisions may well use as a basic qualifying trait the fact of being formally citizen, although, as we have seen, it is far from being always the case and, even if it is, the mere possession of citizenship is never sufficient by itself to entitle someone to participate in the conduct of government.

For the very same reasons that have been stated in the first section, the nature of the State in Canada and in the United States makes it necessary that there should be two sets of political citizenship since there are two levels of independent government that need to be established and operated. But here again, the Canadian provinces have been allowed much more leeway to define at their own discretion who should be entitled to political rights than the American states. In other words, Canadian constitutional law provides the basis for large differentiations between the political citizenship of the different provinces while the American Constitution has tended to uniformize the legislative traits in this respect.

In the United States, the Constitution lays down some basic rules as regards political rights, such as the requirements that candidates for election to the

House of Representatives and the Senate must have been formally citizens of the United States for at least 7 and 9 years respectively and citizens of the State in which they are chosen, and that a candidate for the presidency must be a natural-born American citizen and 14 years' resident in the country.<sup>142</sup> But as for the rest, each state has been entrusted with the power to determine what are the qualifications required for the franchise and the eligibility to both federal and state levels, to the extent that Congress has not legislated itself in the matter of federal elections.<sup>143</sup> As has been seen, all states require formal citizenship as a condition for voting since 1928, and most of them, if not all, add one year residence within the state as a cumulative requirement.<sup>144</sup> The same are generally required as conditions of eligibility, except that the period of residence within the state and of possession of citizenship may be extended very substantially.<sup>145</sup> Residence in these kinds of provisions can be designed to mean "legal residence" and to imply the intention of making the state one's home, which cannot be lost by a temporary absence therefrom nor until another one is gained.<sup>146</sup> The states can deny the right to vote and the opportunity to hold public office to non-residents or non-citizens of the state because the clause of the Constitution prohibiting discrimination against citizens of other states does not apply in the matter of political rights.<sup>147</sup>



But this state competence to define most of the qualifications for the exercise of political rights does not mean that they have been empowered to "grant" such rights to the citizens. Quite the contrary, it has been held by the Supreme Court that the right to vote in federal elections had been conferred by the Constitution, and the only power possessed by the several states is to specify reasonable supplementary requirements.<sup>148</sup> The same test of reasonableness applies for the right to vote in state elections, and the Supreme Court decided that "once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment",<sup>149</sup> nor, obviously, with the provisions forbidding a state to deny or abridge, in state or federal elections, the right of anyone to vote, on account of race, color, previous condition of servitude, or sex.<sup>150</sup> Accordingly,

"In ruling on the validity of state-imposed restrictions on this fundamental right the United States Supreme Court has in effect tended to apply the principle that the state must show it has a compelling interest in abridging the right, and that in any event such restrictions must be drawn with narrow specificity. For example, race, creed, color and wealth are impermissible bases for restricting the right to vote; they are "not germane to one's ability to participate intelligently in the electoral process. (...) And

this court has recently adopted a similar approach in considering a county charter provision prohibiting civil servants from participating in a political campaign or election". 151

Moreover, the Supreme Court now requires a fair apportionment of the voting power of the population:

"The Court states that an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with the votes of citizens living in other parts of the state. The states must make an honest and good faith effort to construct districts, in both houses of the legislature, as nearly of equal population as is practicable." 152

These kinds of limits on the power of legislatures to determine those who will be entitled to exercise political rights do not obtain with respect to Canadian provinces. Indeed, by virtue of the interim provision in section 41 of the B.N.A. Act, members of the House of Commons were elected pursuant to each provincial elections Act ever since the 1920's where the federal Parliament passed its own electoral law;<sup>153</sup> henceforth, the provinces could no more legislate in relation to federal parliamentary elections,<sup>154</sup> contrary to what happened in the United States. But in their exercise of power in relation to provincial political rights, the provinces can pass any

kind of statutes, none of which has ever been invalidated: the Privy Council even upheld the validity of a statute withdrawing the franchise from British subjects, that is to say from what were then the formal citizens of the country, on the basis of their Japanese race.<sup>155</sup>

It remains to be considered who are in fact those upon whom the provinces confer political rights. If I retain the definition already adopted, the political rights that can be granted by the provinces cover a very wide range of matters which can be summarized in this way: the right to participate in the establishment and operation of the legislative, judicial and executive functions of the provincial state. Accordingly, where the judges, for example, are denied the right to vote, it cannot be said that they are denied political rights because they actually participate in a significant way in one of the major branches of the State's government: it may just well be that some means of participation are considered to be incompatible with other kinds because of the nature of our constitutional system.

The Canadian Citizenship Act, section 24 (2) (a) and (c), enacts that the rights there conferred to aliens in respect to property do not operate so as to

qualify them "for any office or for any municipal, parliamentary or other franchise", nor so as to entitle them to any other right or privilege as a Canadian citizen. Hence, aliens are not thereby disbarred from the enjoyment of political rights in Canada since this provision only purports to make clear that the possession of such privileges depend on the relevant federal and provincial statutes. At both levels, it can be said that residence or domicile within the realm remains the basic criterion relied on to confer political rights. But the major difference with the legislative traits that I have analysed in the first section is that the supplementary requirement concerning formal nationality no longer appears as a negligible and marginal factor. Quite the contrary, for all kinds of political functions, posts or offices, the provincial legislature has made sure that not only the postulant was resident or domiciled within the province, but also that he was faithful to the form of democratic government in which he was called to participate either directly or indirectly. However, there are two ways of reaching such a moral certitude and that is, first, to require that the official be a British subject or Canadian citizen and than that he owes allegiance to the Crown, or second, simply to require that he takes an oath or affirmation of allegiance before filling the post.<sup>156</sup> Usually, both

these conditions will be imposed at the same time, but the sole fact that in many important cases the oath of allegiance only is required is sufficient to infer that the British subject or Canadian citizen trait is not an indispensable one as far as the participation in the provincial government is concerned.<sup>157</sup>

The right to vote at provincial elections is limited to those who have resided within the province for a certain period of time, or have been domiciled therein, and are either British subjects or Canadian citizens.<sup>158</sup> At least the same requirements are used as for eligibility since one must be an elector to be candidate, coupled with the taking of an oath of allegiance once elected.<sup>159</sup> Not satisfied with the safeguards, the Constitution Act of British Columbia provides that the election of a member of the Legislative Assembly will become void and his seat vacated if he "takes any oath or makes any declaration or acknowledgement of allegiance, obedience, or adherence to any foreign State or Power, or does, concurs in, or adopts any act whereby he may become the subject or citizen of any foreign State or Power..."<sup>160</sup> It is to be noted that by so acting, an individual does not necessarily loose his Canadian citizenship. Because of

the existence of a parliamentary system of government in the Canadian provinces, it is obvious that these residence and allegiance requirements will serve at the same time to determine the qualifications of ministers and prime minister.

At the judicial level, all the judges will either be Canadian citizens or British subjects as long as they are chosen among the members of the bar of a province.<sup>161</sup> In fact, such qualifications have always been imposed on those who seek to become lawyers in Canada because this profession is considered to be tightly connected with the administration of justice and in this sense is an office of public interest. Even in Quebec, the new enactment extending to aliens the right to admission to the study and practice of most of the professions until they become eligible for citizenship does not cover the case of the legal profession where it is still necessary to be Canadian citizen at all relevant times.<sup>162</sup> The same requirement is now prevailing for solicitors and barristers in British Columbia, except for vested rights of British subjects.<sup>163</sup> The holding of other functions closely linked with the administration of justice, such as the function of juror and notary public, has also been restricted to British

subjects in British Columbia and to Canadian citizens in Quebec;<sup>164</sup> residence within the province is always implied or specifically imposed as to its length. At any rate, all the officers of courts in British Columbia who are appointed under the Civil Service Act must necessarily be British subjects and take the oath of allegiance, and this applies to registrars, probation officers, sheriffs and so on.<sup>165</sup>

At the executive level of government, except as for ministers, there is a very wide range of functions that can be said to bear a public interest. It is fair to say that a post will be considered of public interest if it meets at least one of the following criteria: it is a departmental position, it is a function of public trust, or it involves the expenditure or receipt of public money.<sup>166</sup>

With respect to departmental functions at the federal level, the Public Service Commission must not discriminate unjustly by reason of sex, race, national origin, color or religion, and hence, anyone is eligible at the first; however, the Commission will have to admit, in order, persons in receipt of a pension by reason of

war service, veterans, Canadian citizens, and other people. At any rate, every public servant must take an oath of allegiance.<sup>167</sup> In British Columbia, the Civil Service Act enacts that "no person is eligible for appointment to any position unless he is a British subject", and provides for the taking of the oath of allegiance by every permanent employee.<sup>168</sup> It also states that preference shall be given to persons who have served in the Armed Forces and, among them, to those who were formerly domiciled in British Columbia.<sup>169</sup> In the matter of political rights, such provisions are probably the most important of all because there exist innumerable statutes in the Province which enact that appointments must be made pursuant to the Civil Service Act: from members of the staff of the library of the Legislative Assembly to commissioners and inspectors of all kinds, all will have to meet these requirements.<sup>170</sup> In Quebec, there is no express provision respecting the nationality of civil servants, but as a matter of policy, the Commission will accept only Canadian citizens, and an oath of allegiance is always required.<sup>171</sup>

Finally, there are many other public offices of great import which are restricted in the same way: members of the police force must be British subjects or Canadian citizens and subscribe to an oath of allegiance,<sup>172</sup>



and so for all members of the council of a municipality.<sup>173</sup> Besides that, the right to vote on all kinds of public issues within the province will normally depend on the qualifications as an elector either at the provincial or the municipal level, and then the same nationality will be required along with a certain period of residence within the province or the municipality.<sup>174</sup>

In British Columbia, the British subject trait, as a criterion for conferring political rights, is so generalized that it could be said to determine actually the real scope of applicability of the statutes in this respect, while, in Quebec, the Canadian citizenship requirement plays the same role. However, the real basis of provincial citizenship in a political sense remains the residence or domicile within the province: this characteristic is necessarily implied in every provision that has been analysed above and where the privilege conferred is a more important one, the length of such residence or domicile increases at the same time. On the other hand, the formal nationality requirement has been dispensed with in some instances which are all significant:<sup>175</sup> in these cases, the only link between the person who holds the public office and participates in the exercise of the provincial government remains exclusively a residential one.<sup>176</sup>

### 3. The Formal Citizenship Status

The Canadian Citizenship Act adopted in 1946 and effective on January 1st, 1947, purported to define who were Canadian citizens at that time and who will be entitled to such a formal status in the future. It enacted transitionally that two classes of persons became citizens by the sole effect of its provisions: citizens by birth and citizens naturalized automatically by this Act.<sup>177</sup> It also provided how in the future the Canadian citizenship can be acquired, that is in two possible ways: by birth or by naturalization.<sup>178</sup> These provisions constitute the only manner by which a formal citizenship can be obtained in Canada, and this citizenship is a national one; there is no statute, imperial, federal or provincial, that declares the existence of any other kind of formal citizenship in Canada, except that the Canadian Citizenship Act states that every Canadian citizen is at the same time a British subject.<sup>179</sup> Accordingly, the use of an expression like "provincial citizen" may be considered improper and not in accordance with a strictly legal utilization of terms. Contrary to that, it is common knowledge that there exists in the United States two formal definitions of citizenship a national and a statal one. I must now analyse what is the nature of American law in this respect in order to be able to seize the real difference, if any, that obtains as compared with Canadian law.

Before the adoption of the Fourteenth Amendment, the law with respect to citizenship in the United States has been expounded by the Supreme Court in the famous case Scott v Sandford.<sup>180</sup> There, the Court held that even if Negroes had been conferred a state citizenship it did not follow that they acquired in this way the national citizenship. Its conclusion proceeded from an analysis of the nature of the state citizenship, which was "confined to the boundaries of the State, and gave (...) no rights or privileges in other States beyond those secured (...) by the laws of nations and the comity of States".<sup>181</sup> It must be noted that this kind of territorial limitation of a citizenship status is not only the characteristic of a citizenship conferred by non-sovereign states or provinces within a federal union: it is inherent in any kind of citizenship law of any sovereign country, as the point has been made very long ago.<sup>182</sup> How, indeed, could the status of an American citizen, a Russian or anyone else, be recognized abroad otherwise than by virtue of the law of nations and the comitas gentium? It is obvious that the mere coexistence of sovereign States is absolutely incompatible with the possibility for a particular State to enact a citizenship law that will, proprio motu, be effective throughout the world independently of its recognition by other countries.

In this respect, the nature of the state citizenship conferred prior to the adoption of the Fourteenth Amendment is not different at all from the national citizenship of the United States, nor from any other citizenship, nor even from the status of British subject that the North American colonies were empowered to confer ever since the middle of the seventeenth century.<sup>183</sup> But the real difference between the powers of these colonies and those of the American states may be said to reside in the fact that the several states have not surrendered the power of conferring their particular citizenship by adopting the Constitution of the United States,<sup>184</sup> while the British colonies that became part of Canada in 1867 have done so. This, however, is completely wrong and there is absolutely no difference in the evolution of the two systems on that account.

First of all, the competence in the matter of naturalization in Canada and in the United States has been vested in the central government, and in both these countries such power is admittedly exclusive.<sup>185</sup> Then, what is this kind of power that continued to be exercised by the American states with respect to their own citizenship long after the exclusive power of naturalization had been vested in Congress? The answer from the Supreme Court is very clear:

"Each State may still confer (the rights and privileges of their own citizenship) upon an alien, or any one it thinks proper, or upon any class or description of persons; yet he would not be a citizen in the sense in which that word is used in the Constitution of the United States, nor entitled to sue as such in one of its courts, nor to the privileges and immunities of a citizen in the other States. The rights which he would acquire would be restricted to the State which gave them. The Constitution has conferred on Congress the right to establish an uniform rule of naturalization, and this right is evidently exclusive, and has always been held by this court to be so. Consequently, no State, since the adoption of the Constitution, can, by naturalizing an alien, invest him with the rights and privileges secured to a citizen of a State under the federal government, although, so far as the State alone was concerned, he would undoubtedly be entitled to the rights of a citizen, and clothed with all the rights and immunities which the Constitution and laws of the State attached to that character." 186

This power of the American states is so obviously inherent in the very nature of federalism that there is no need to argue for long as to its applicability to Canadian provinces. It is substantially the right to confer a general status of citizenship on the persons who are submitted to the jurisdiction of the state as far as its legislative competence can go: this can also be exercised by the Canadian provinces,

as has been seen in the first section. So far, no difference can be found between the American state citizenship and the provincial citizenship in Canada, except as for the practise of the states to endow the rights and privileges they conferred by the exercise of their powers under the Constitution with a formal appellation of citizenship, whereas in Canada the provinces could attach to their residents (or to any class of persons they think proper) still more rights and immunities, but did not use to clothe the resulting status with any particular term or appellation.

After the Scott case, the Fourteenth Amendment was passed for the purpose, inter alia, of conferring American citizenship on Negroes, and this had the effect of changing the nature of the state citizenship as well. This Amendment declares that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the state wherein they reside." There we find the actual state of the law in the United States. The national citizenship can be acquired in two ways only: by birth within the realm<sup>187</sup> or by naturalization under the provisions of congressional enactments.<sup>188</sup> This national citizenship is completely independent from any state citizenship while, conversely,

the latter results from the citizenship of the United States. The Supreme Court had this to say about the two definitions of citizenship contained in the Amendment:

"Not only may a man be a citizen of the United States without being a citizen of a state, but an important element is necessary to convert the former into the latter. He must reside within the state to make him a citizen of it, but it is only necessary that he should be born or naturalized in the United States to be a citizen of the Union. - It is quite clear, then, that there is a citizenship of the United States and a citizenship of a state, which are distinct from each other and which depend upon different characteristics or circumstances in the individual." 189

The American state citizenship is merely a combination of the formal national citizenship with "residence" in the state. Residence, here, must obviously be taken in the sense of domicile or ordinary residence, because otherwise a person could be citizen of more than one state at the same time: this is what has been held in the cases where the formal state citizenship has been analysed.<sup>190</sup> But every such ordinary resident is not necessarily citizen of the state, because he must previously be citizen of the United States. Nevertheless, the Supreme Court did not hesitate to declare null and void state enactments discriminating against citizens of other states contrary to

Article IV, Section 2, of the Constitution, even though these statutes were couched in terms of residence.<sup>191</sup>

On the other hand, the same Court admitted that by so holding, it did not take for granted that the terms "resident" and "citizen of the state" are synonymous,<sup>192</sup> but the fact of discriminating against non-residents has necessarily the effect of including some citizens of other states in the discrimination and this is sufficient to invalidate the whole provision. Were it not for aliens, there would be a complete identity of meaning for both expressions, because all citizens of the United States are expressly declared to become citizens of the state wherein they ordinarily reside.

It is then easy to find that the several American states have absolutely no control over their own citizenship because they cannot determine who are going to become a citizen of the United States, and because they cannot prohibit them from settling within their territory since the Supreme Court held that:

"...it is a privilege of citizenship of the United States, protected from state abridgment, to enter any state of the Union, either for temporary sojourn or for the establishment of permanent residence therein and for gaining resultant citizenship thereof." 193



Neither have they any control over the matters where their formal citizenship will constitute the basis of a substantial rule of law as far as these matters are provided for by the Constitution. Accordingly, this formal citizenship is completely outside the reach of the several states, as much as for its original definition and its concession than as for the substantial status resulting therefrom.

Only in some interstate matters specified in the American Constitution will this formal state citizenship, per se, be of direct relevance. It is the case for the provision prohibiting discrimination against citizens of other states, which has already been discussed. Also, it is the case where jurisdiction has been conferred to federal courts over controversies "between a State and Citizens of another State; - between Citizens of different States; - between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."<sup>194</sup> But the definition of the Fourteenth Amendment will bear no practical import as for the determination of the internal status of the people living in the American states. First, in all the matters where aliens are on the same footing as citizens, such a definition will not correspond to the scope of applicability of state legislation.

And second, some rights and privileges may depend upon a longer or shorter period of residence within the state according to the importance of the matter, and then, those formal citizens who have not been domiciled therein for long enough will be excluded. It is needless to make here a survey of the state legislation to prove that the citizenship defined in the Amendment does not correspond at all to the actual traits flowing from particular enactments. It may suffice to refer to the cases analysed in the first division<sup>195</sup> and to the provisions requiring more or less years of residence within the state in order to be entitled to exercise most of the political rights.<sup>196</sup>

The distinction between interstate purposes and internal purposes, coupled with the evidence that formal citizenship is irrelevant for the latter, has been magisterially pointed out by the Court of Appeals of Maryland in the recent case Crosse v Board of Supervisors of Elections.<sup>197</sup> There, the appellant sought to compel the Board to accept and certify his candidacy for the post of Sheriff of Baltimore City, even though he had become naturalized citizen of the United States only one month prior to his application while the State Constitution required the candidate to have been, inter alia, "at least five years

preceding his election, a citizen of the State". The court in first instance had upheld the refusal of the Board because, according to the Fourteenth Amendment, it is a necessary prerequisite to be citizen of the United States in order to become formally a citizen of a state and, hence, a mere priod of over five years of residence could not suffice. The Court of Appeal reversed this decision, distinguishing, first, the formal citizenship from the possession of political rights<sup>198</sup> and, second, the formal citizenship from the general citizenship, in these terms:

"Citizenship of the United States is defined by the Fourteenth Amendment and federal statutes, but the requirements for citizenship of a state generally depend not upon definition but the constitutional or statutory context in which the term is used." 199

It then proceeded to distinguish the case City of Minneapolis v. Reum<sup>200</sup> where it had been held that a state could not confer its citizenship on an alien in order to deprive the federal courts of their jurisdiction in cases of diversity of citizenship. Said the Court:

"Reum dealt only with the question of jurisdiction of federal courts under the diversity of citizenship clause of the federal Constitution. That a state cannot affect that jurisdiction by granting state citizenship to an unnaturalized alien does not mean it

cannot make an alien a state citizen for other purposes. Under the Fourteenth Amendment all persons born or naturalized in the United States are citizens of the United States and of the State in which they reside, but we find nothing in Reum or any other case which requires that a citizen of a state must also be a citizen of the United States, if no question of federal rights or jurisdiction is involved." 201

Thus, except for some interstate purposes which are embodied in the Constitution, the formal citizenship of the American states is a completely useless and irrelevant criterion which has no bearing on the status they can confer. In Secretary of State v McGucken,<sup>202</sup> the same Court in the same year had to construe a provision of the Maryland Constitution requiring that "a person to be eligible to the office of Governor, must have attained the age of thirty years, and must have been for ten years a citizen of the State of Maryland, and for five years next preceding his election, a resident of the State, and, at the time of his election, a qualified voter therein". It held that such a person must have been a citizen of the United States for ten years, because if the words "citizen of the State" were not given such a formal sense, they would be synonymous with "resident" and the whole provision would become absurd. Then, like any other formal criterion, state citizenship may be thought convenient to be adopted, sometimes, as a

cumulative requirement for internal purposes. But, such a marginal trait will be equivalent to the national citizenship as a requirement, because it is its main characteristic.<sup>203</sup> It remains that there is absolutely no need to be a citizen of the United States to be a citizen of a state, both before and after the Fourteenth Amendment,<sup>204</sup> for most purposes, the formal definition in this Amendment will not be of fundamental use because the states have neither international, nor extra-territorial, nor immigration powers.

In fact, the nature of a particular citizenship from an internal point of view, as it has been discussed in the two former divisions, must be distinguished from the concept of nationality used in international law by reference to the formal definition of citizenship of the several countries. Both the notions of nationality and formal citizenship have been created for only one reason: the need to differentiate the nationals of a particular State from the nationals of another State.

"Nationality, in the sense of membership of a State, the "belonging" of an individual to a State, presupposes the co-existence of States. Nationality is, therefore a concept not only of municipal law but also of international law." 205

But it is a concept of municipal law only because, first, the law of nations has delegated almost completely to each State the power to determine who are its citizens<sup>206</sup> and because, second, each country is interested in the adoption of rules designed to regulate its relations with other States and their citizens, such as in the fields of immigration and conflict of laws. It must be noted that such a formal determination of citizenship being warranted by the sole coexistence of States, it will be likely to constitute a useful classification only for purposes related to international matters.

To put it in another way, no State would ever need to determine formally who are its citizens if nobody was entitled to cross the border or to deal with persons outside the border. Then, since a sovereign State has necessarily the competence to regulate everyone and everything that is within its realm, it could exercise this territorial competence over them without there being any need for a distinction as to whether the persons affected are domiciled there, aliens or whatever else. As long as people remain within the realm and do not deal with people outside or with other States, they are submitted to the territorial sovereignty of the State. Thus, there are only two hypotheses where a formal citizenship, proprio motu, will have a direct implication on the matter: first, when

a State purports to exercise an extra-territorial competence, and second, when it deals with matters affecting other States or citizens of other States beyond the territory, even though the power exercised is intra-territorial.

The first type of matters which require the use of a formal definition of citizenship are those related to the exercise by a State of a personal competence, that is to say, of a competence over their citizens wherever they are.<sup>207</sup> Most of the time the citizens will be within the borders of their States, and such personal competence will be confounded with and absorbed by its territorial competence; the State will not have to rely upon any personal link justifying it to regulate them. Indeed, the territory of a State, as a justification for the exercise of power over any matter and person, constitutes a much better title than mere citizenship: that is because the territory is a reality much more constant and more universally recognized as being exclusive to a particular State than the nationality of an individual, which can be claimed by different States at the same time and is less evident a relationship justifying a regulatory intervention.<sup>208</sup> It is only when the State purports to exercise an extra-territorial competence that it needs to ascertain who are its citizens because in such a case citizenship remains the sole link between an individual

who is abroad and his own country and thus the sole criterion permitting a State to continue to regulate him. The formal definition of citizenship is then used to confer upon a State the right to exercise a personal competence outside its own territory over those who are its citizens.<sup>209</sup> Because international law lets each State determine its own citizenship, it recognizes implicitly that a State can at discretion establish what will be the scope of its personal competence and the extent of its extra-territorial powers in this respect.

The diplomatic protection of citizens abroad affords a good example of such extra-territorial power. On the one hand, it is the nationality, as a recognized personal relationship between individuals and their State, which justifies, vis-à-vis other States, the intervention by a government to protect the property and person of its citizens.<sup>210</sup> On the other hand, mere possession of citizenship is a sufficient qualification to be entitled to such protection.<sup>211</sup> The rule embodied in international law and agreed to by all nations is that the injured party must have been, at all relevant times, a citizen or a national corporation of the claimant State.<sup>212</sup> This now applies to Canada as a fully sovereign State. Since the end of the Second World War, Canada has exercised itself the diplomatic



protection of its citizens abroad, and its practice has never deviated from the rule: the Canadian government has accepted to intervene only on behalf of those who were formally citizens both at the time of the occurrence of damage and of the settlement.<sup>213</sup>

Secondly, a State may exercise some powers that are undoubtedly intra-territorial but which carry with them extra-territorial effects or consequences. Then, the relationships between States or between a State and citizens of other States are affected, and this is the case in the field of immigration.<sup>214</sup> There, the formal definition of citizenship has, per se, a basic role to play. Public international law requires that each State accepts within its territory its own citizens and nationals. Article 13 (2) of the Universal Declaration of Human Rights enacts that "everyone has the right to leave any country, including his own, and to return to his country".<sup>215</sup> It is an obligation resulting from a duty towards other countries and that cannot be dispensed with except by an agreement or a treaty with another State.<sup>216</sup> And this rule has many corollaries: the State must not deport its own citizens, nor denaturalize them arbitrarily in order to achieve such a result, nor impose arbitrarily its own nationality on aliens so as to prevent them from regaining their country, and so on.<sup>217</sup>

Of course, it cannot be contested that, by virtue of the supremacy of its Parliament, Canada could refuse to Canadian citizens or British subjects access to its territory, "nor is there any doubt about federal power to exclude or deport either aliens or naturalized persons (usually upon revocation of their naturalization under stipulated circumstances), or even natural-born persons, although this raises question of international law relative to the reception of such persons abroad."<sup>213</sup> However, long ago Canada has embodied in its legislation the rules of international law in this respect and Canadian citizens have always had the guarantee that they will be entitled to return to their country after having been abroad.<sup>219</sup> Unless there are express words to the contrary, courts will presume that Parliament did not intend to depart from such a principle.<sup>220</sup> In the case of immigration and deportation, it is sufficient to rely upon the sole possession of a formal citizenship: a new-born Canadian citizen cannot be deported, nor can a citizen of any race, nor could have been deported those who accepted in the Fall of 1970 a voluntary exile to Cuba.<sup>221</sup>

International law recognizes at the same time that the admission of aliens upon its territory remains at the entire discretion of a State: this is a logical inference from the concept of sovereignty or independence and may be compelled by the imperatives for security.

"It is an accepted maxim of international law, that every sovereign nation has the power as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe." 222

Accordingly, the inherent right of formal citizens to enter or remain in Canada or in the United States has its counterpart in the uniformly adopted rule that, in the case of an alien, this can only be a privilege, a matter of permission and tolerance.<sup>223</sup> That such a judicially developed concept has been brought about by reason of the connection of the matter with international relations or by reason of the co-existence of States is a mystery to no one. The American Supreme Court has justified its ruling in saying that it was a "weapon of defense and reprisal confirmed by international law" and specified its views in this way:

"It is pertinent to observe that any policy towards aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." 224

But this does not mean that only Canadian citizens will have the guarantee to be re-admitted in Canada. What

was formerly a privilege conferred on certain aliens has become a right since section 3 (2) and (3) of the Immigration Act permits those who have a Canadian domicile to enter Canada, except if such domicile has been lost or if the person assisted the enemy.<sup>225</sup> This clearly establishes that formal nationality is not the only criterion that may be thought proper for the purpose of connecting an individual with a State, even in cases involving more than one State or citizens of more than one State. We have already seen that in the field of the conflict of laws, the connecting factor that had been deemed proper in English and American law was domicile instead of nationality. For sure, nationality constitutes the main link between individuals and the international society, and a formal definition of citizenship has a direct relevance, per se, only in matters related to the international scene where there is a need to differentiate nationals of diverse States; but it is not the sole criterion that can be relied on in these matters and for such purpose.

The six "benefits" for which the Canadian Citizenship Act has been adopted in 1946 were enumerated by the then Secretary of State in moving second reading of the bill in the House of Commons.

"When the bill is passed it will mean that a Canadian citizen will be entitled as a Canadian citizen to receive a Canadian passport, to enter Canada, to be deported to Canada under circumstances in which deportation is required under existing principles of international law, to receive diplomatic protection, to enjoy full political and economic rights within Canada and to own a Canadian ship or part of a ship". 226

I endeavoured to demonstrate that this cannot be rigorously exact, both in Canada and in the United States, and both at the federal and provincial or state levels, because the formal citizenship is irrelevant as for ascertaining the class of persons entitled to political, civil or whatever rights for internal purposes: it may constitute a useful marginal or cumulative trait when the rights conferred are deemed privileged, but it cannot be used to determine who possesses the citizenship status because this status is never granted only to those citizens nor to all of them at the same time.

"With respect to the citizenship status of Canadian citizens in Canada, it must be borne in mind that in spite of the fact that the (Canadian Citizenship Act) is phrased in terms of citizenship, it does not immediately affect political and civil rights. Moreover, the constitutional set-up of Canadian federalism makes it difficult for the Dominion of Canada to ensure to Canadian citizens the equality of citizenship rights consequent upon birth or naturalization in Canada, in the same sense as does citizenship in the United States of America." 227

If it is necessary to venture an enumeration of the fields where the "population" of Canada as formally determined by this Act will constitute an indispensable trait, it could run as follows: Canadian citizens will be those entitled to Canadian passports, to diplomatic protection abroad, to re-enter Canada at any time and remain therein as long as they want, and, altogether, they will be the actual scope of applicability of extra-territorial legislation and of treaty rights and obligations, being those Canada officially represents on the international scene.<sup>228</sup>

Consequently, both the qualifications required from those who intend to obtain the formal citizenship and the cases where they will lose this citizenship will be designed to ascertain that the individual is more connected with Canada than with another State. Section 10 of the Canadian Citizenship Act requires that the applicant had been lawfully admitted to Canada for permanent residence: this means that he must be landed immigrant and thus, have complied with every condition set forth in the Immigration Act and not to be under order of deportation. Further residence qualifications will come to strengthen the candidate's bounds to Canada, and anyway, he must intend to make the country his permanent home.<sup>229</sup> Finally, he will normally have to possess adequate knowledge of English

or French language and of the privileges and responsibilities of Canadian citizenship; he must intend to comply with the oath of allegiance. But even though a person fulfills all these conditions, the grant of citizenship remains a privilege that the minister is empowered to confer at his own discretion.<sup>230</sup>

As for the loss of Canadian citizenship, it can be effected only in two specified ways: voluntary expatriation or revocation by the Governor in Council. In the first case, the provisions aim at the avoidance of double nationality and statelessness.<sup>231</sup> an individual can expatriate himself only when he voluntarily acquires, otherwise than by marriage the nationality of another State while being outside the realm, or when he formally renounces his Canadian citizenship if he has a double nationality.<sup>232</sup> Section 18 of the Act lays down four cases which can lead to revocation of citizenship; fraudulent acquisition of citizenship; voluntary and formal acquisition in Canada of a foreign nationality (except by marriage); taking of an oath, affirmation or declaration of allegiance to a foreign country; making of a declaration renouncing Canadian citizenship. Thus, the acquisition in Canada of a foreign nationality (other than the nationality of a country of the Commonwealth) leads to the loss of the Canadian citizenship only if the Governor in Council decides to revoke it. In all these cases, children

of those who lose their citizenship will remain citizens if they would otherwise become stateless.<sup>233</sup>

In the United States, the Supreme Court has significantly restricted the power of Congress to strip individuals of their citizenship to cases where they had falsely and fraudulently represented that they were attached to the principles of the American Constitution.<sup>234</sup> The provisions in federal legislation purporting to withdraw the American citizenship for different reasons have almost all been invalidated by the Supreme Court which held that there is "a constitutional right to remain a citizen in a free country unless he voluntarily relinquishes that citizenship."<sup>235</sup> The Court is no more impressed by the consideration that it is a matter related to foreign relations and not supposed to be within the province of the judiciary.



## Conclusion

In the case of the federal government, a formal definition of citizenship was adopted as early as in 1910 and embodied in the Immigration Act<sup>236</sup> where there is admittedly a need for distinguishing between local citizens and those of other countries. Indeed, this kind of enactment is so tightly connected with international law and the co-existence of States that it is on the very first manifestation of its international presence that Canada had to adopt a general Act precisely defining its citizens: in 1921, the Canadian Nationals Act was passed simply because Canada had become an independent member of the League of Nations and had to specify the population for whom it gained representation as a different category of people than the other British subjects represented by the United Kingdom.<sup>237</sup> The Canadian Citizenship Act of 1946 came to implement the further evolution of the international status of Canada.<sup>238</sup> Generally speaking, the tendency to adopt a formal citizenship is a normal parallel to the acquisition by a State of its independence.<sup>239</sup>

Of course, the Canadian provinces could also formally define their own citizens but that would be so futile that it would not even be worth the effort:

"Il semble par ailleurs que rien n'empêcherait un Etat provincial d'instituer sa propre citoyenneté et de la décerner selon ses propres critères. Vu toutefois la compétence exclusive de l'Etat fédéral en matière de naturalisation et les pouvoirs qu'il exerce à l'égard des relations extérieures, cette citoyenneté provinciale ne pourrait avoir de signification légale, du moins sous le présent régime constitutionnel, que dans les limites de l'Etat provincial." 240

We have already seen that there is no direct use of such a citizenship within the province, and only in matters of inter-provincial concern could this be relevant. But the domicile criterion relied on for the purposes of the conflict of laws is sufficient and accurate there. Moreover, the provinces have been in fact denied any competence in the field of immigration,<sup>241</sup> and since they officially have no extra-territorial powers, a formal citizenship of their own would be as meaningless as it is in the American states.

Ontario has enacted the Department of the Provincial Secretary and Citizenship Act, 1960-61, whereby the Minister shall, inter alia, "advance and encourage the concept and ideal of full and equal citizenship among the residents of Ontario in order that all may exercise effectively the rights, powers and privileges and fulfill the obligations, duties and liabilities of citizens of

Canada within the Province of Ontario".<sup>242</sup> This nice statement did not prevent in any sense the Legislature of the Province from conferring rights and imposing obligations to aliens even though they were not "citizens of Canada within Ontario" and from requiring different periods of residence within the Province for all kinds of more important purposes even though it might lead to an unequal "citizenship among residents of Ontario". The only possible use of a formal definition of membership in the provincial community would be to standardize the length of residence or domicile required for the exercise and enjoyment of privileges in certain matters, thus making it easier to reach uniformity amongst the provinces. But apart from these basic traits, there will always remain some concurrent need for supplementary requirements, depending on the importance of the matter, its political impact, and the socio-economic set-up conditioning each particular policy at every material time. The provinces in this respect are fully sovereign and it is their own role, in our system, to determine whether in each case the needs for uniformity outweigh the advantages of these peculiar regional policies that the constitution entitles them to adopt.

CHAPTER 2

A Pattern of Judicial Attitudes in  
Relation to the  
Citizenship Status in Canada

The recent case R. v. Drybones<sup>243</sup> has generated many hopes in those who are advocating the adoption by the highest Canadian tribunal of a different conception of its role in the elaboration and development of the law. It is my purpose here to consider what, in the future, could be the kind of approach accorded by the Canadian judiciary and the Supreme Court itself, to the interpretation and application of the broadly-termed human freedoms established and declared in this Bill of Rights to which Drybones has given life. This will be inferred from a brief analysis of the types of reaction Canadian courts had to the original interpretation by the Privy Council of the attribution in section 91 (25) of the B.N.A. Act to the federal Parliament of "aliens" as an exclusive subject-matter of legislation. The impact caused in this respect by the Bryden case<sup>244</sup> and the types of judicial attitudes that ensued will be compared with the judicial reactions to the Canadian Bill of Rights and the Drybones case, especially on the question of equality before the law and the Indian Act. Since the first approaches of the judiciary related to the recognition and preservation

of civil liberties inherent in the citizenship status were negative, this will give us an understanding of the possible means whereby the judiciary can still sterilize the effect of Drybones, and it will provide an outline of the stumbling-blocks that courts will have to avoid if this recent landmark in our constitutional law is to meet the expectations that many have put in it. It will be shown that there is not much to expect from the Canadian Bill of Rights if judges are to react to Drybones in the way they have reacted to Bryden, and there are already some indications that it is not unlikely to happen.

1. Negative Types of Judicial Reaction to the Possibility of Entrenching Some Fundamental rights by a Reliance on Section 91 (25) of the B.N.A. Act.

Section 91 (25) of the B.N.A. Act would never have raised any problem if it had been made clear at the outset that it could not be used to invalidate provincial legislation affecting aliens or naturalized citizens. Indeed, this is what seems to have been decided in Cunningham v Homma where a provincial statute denying the franchise to Japanese, inter alia, was upheld, the Lord Chancellor stating that "the language of that section does not purport to deal with the consequences of either alienage or naturalization."<sup>245</sup> But this is not so clear a ruling because the latter statement was obiter and not necessary for the disposition of the case as such. Moreover, the decision did not reject the Bryden case but only distinguished it, and there, the Privy Council, after having stated that the provincial act prohibiting Chinese of full age from employment in underground coal working was ultra vires as affecting in pith and substance "aliens" which is a subject-matter exclusively reserved to the federal Parliament, departed, as in Homma, from the practice of ruling only to the extent to which it is necessary for the disposition of the case at bar<sup>246</sup> and laid down the following general rule:

"...by virtue of S. 91, sub.s. 25,  
the legislature of the Dominion is  
invested with exclusive authority in

all matters which directly concern  
the rights, privileges, and disabilities  
of the class of Chinamen who are resident  
in the provinces of Canada". 247

These two decisions of the Privy Council pretend to stand together but they have seemed irreconcilable to most authorities who have analysed them.<sup>248</sup> One thing remains however: Bryden having been left intact by Homma, the "Naturalization and Aliens" clause was to have a certain content, more or less extended, as to the consequences of alienage at least, and for this reason, the judges who had from then on to deal with the matter could not cope with such a finding by adopting a legalistic and positivist approach without reaching a constitutional dead-end, as I will attempt to demonstrate. Then, I will consider the expedients adopted by the courts to nullify the effects of that constitutional "absurdity" or "anomaly".<sup>249</sup>

The common feature of the first cases dealing with the status of persons in Canada is that the judges explicitly claim not to be concerned with the reasonableness of wisdom of the Acts under review and that they intend to give effect to the supremacy of parliament:

"In so far as they possess legislative jurisdiction, the discretion committed to the parliaments, whether of the Dominion or of the provinces, is unfettered. It is the proper function of a court of law to determine what are the limits of the jurisdiction committed to them; but, when that point has been settled, courts of law have no right whatever to inquire whether their jurisdiction has been exercised wisely or not." 250

But so long as the distribution of legislative powers in the B.N.A. Act remains the only criterion available for the courts to scrutinize the validity of provincial legislation affecting the rights of people in Canada, it becomes obvious that these provisions can only be invoked for the protection of aliens and naturalized persons.<sup>251</sup> Besides sections 93 and 133, it is impossible to find anything in the B.N.A. Act that would preserve the rights and privileges of natural-born British subjects (and now Canadian citizens) against interference by the provincial level of government as long as the latter acts within the scope of its legislative powers; moreover, it would be contrary to the whole scheme of the Act of 1867 to assume that there is only one level of government that can legislate so as to affect the status of the majority of Canadians, since this would destroy the root of federalism in Canada.<sup>252</sup>

Even though we assume for a moment that Bryden and Homma cases where policy decisions in which the wording



only was based on the B.N.A. Act, it is submitted that the same model of decision-making cannot be efficient in respect of natural born Canadian citizens. Since the courts decline the power to review legislation on a policy basis, it remains impossible for them to obviate the difficulty by hiding their preferences behind the curtain of judicial legalism so long as the words of both the B.N.A. Act and the legislation under review point to a sole possible conclusion. Therefore, the courts faced a dilemma; while a traditional legalistic approach could give them sufficient tools to invalidate discriminatory enactments with respect to aliens and naturalized persons,<sup>253</sup> the same approach was impotent to permit any judicial review of legislation affecting the rights and privileges of natural-born citizens. Judges found only one way out of this, and it was a negative solution: to refrain from using the division of powers approach for the benefit of aliens or naturalized people in order not to give them more rights than natural born. But what is much more important than this result is the kind of arguments they accepted in support of it, because if we assume that the judicial reasoning process is identical when confronted with analogous situations, we will be able to understand what today could become the stereotyped reaction to the same kind of "absurdity" concerning equality before the law of Indian people and other issues raised by the Canadian Bill of Rights.

A rough description of the reasoning of the judges who explained their negative approach to citizens' status in Canada can be described as follows: since natural born citizens do not possess some guaranteed rights by reason of the supremacy of both federal and provincial parliaments and by reason of the internal sovereignty of the Canadian federation, it must follow that aliens and naturalized persons cannot have guaranteed rights either. Hence, there are two principal applications of such an attitude: first, some judges have simply applied the basic principle of parliamentary supremacy to uphold provincial enactments as long as they affected or could have also affected the rights of natural-born citizens; second, other judges have applied the rule that since the distribution of legislative powers covers the whole area of self-government in Canada, a specific power must belong either to the federal Parliament or to the provincial legislatures.<sup>254</sup> In other words, the real characteristic of the negative approach is to take for granted that there exists at one or the other level the power to take away any right or privilege pertaining to any class of persons in Canada, and that, accordingly, it is useless for the courts to resist discriminatory legislation since that could only result in a privileged position for aliens in particular.

The first application of the above-stated rule was developed shortly after the Bryden case. Indeed, it appeared in the Homma case where one of the main motives for the decision has been that since many other statutes in Canada and elsewhere have withheld the franchise from many classes of persons (including formal citizens) and on a great number of grounds, it would be absurd to construe section 91 (25) in such a way that provincial enactments will be invalid every time they affect some aliens or naturalized persons.<sup>255</sup> The reliance on statutes in pari materia as an argument for the validity of the impugned legislation can also be found in the concise reasons of Fitzpatrick C.J. in Quong-Wing where he had to consider the validity of a provincial act prohibiting Chinese from employing white women or girls in their places of business or amusement: after having noted the existence of many other provincial "factory Acts" fixing the age of employment, authorizing disciplinary and police regulations, and so on, the learned judge concluded in this significant way:

"The difference between the restrictions imposed on all Canadians by such legislation and those resulting from the Act in question is one of degree, not of kind." 256

Or, as Davis, J. stated in the same case (Anglin J. concurring):

"There is no inherent rights in any class of the community to employ women and children which the legislature may not modify or take away altogether." 257

Such considerations led the judges to give much weight to the fact that the discrimination was against a race instead of a nationality: the inclusion of some natural-born citizens in the legislative trait was sufficient to uphold the validity of a provincial enactment without it being necessary to resort to the doubtful argument that section 91 (25) does not cover the consequences of alienage or naturalization.<sup>258</sup> In reality, it sufficed to say that the Act was not in relation to "Naturalization and Aliens" since the classification included native-born persons. Despite the obvious futility of such a reasoning,<sup>259</sup> it has been adopted on many occasions.<sup>260</sup> For instance, Justice Duff has made it very clear:

"If the enactment in question had been confined to Orientals who are native-born British subjects it would have been impossible to argue that there was any sort of invasion of the Dominion jurisdiction under section 91 (25); and it seems equally impossible to say that this legislation deprives any Oriental, who is a naturalized subject, of any

of "the rights, powers and privileges" which an Oriental, who is a native-born British subject, is allowed to exercise or retain." 261

In other words, provincial legislatures only have to include some natural-born in their discrimination and their enactments will be free from judicial interference.<sup>262</sup>

The second aspect of the negative approach leads to the same result, according to which aliens and naturalized persons should not be privileged as compared with natural-born citizens. But instead of relying on the supremacy of provincial legislatures in relation to most citizens as such, it applies the principle of internal sovereignty of the federation as a whole. Taking for granted that there must exist a parliament competent to withhold any right, the only question that remains to be settled is which one, federal or provincial. Such an attitude is "negative" in the sense that it cannot afford any ground upon which the judiciary could build some kind of entrenchment of fundamental rights embodied in the Canadian citizenship status.

Thus, the Privy Council upheld in 1923 the validity of a provincial statute which confirmed the condition imposed for the granting of licenses and leases on certain lands of the province that no Chinese or Japanese

shall be employed in connection therewith: the basis of the decision is to be found in the assumption that if "the Dominion is not empowered by (section 91) to regulate the management of the public property of the Province..",<sup>263</sup> such a competence pertains to the provincial legislature by virtue of sections 92 (5) and 109 of the B.N.A. Act. Much more explicitly, Duff, J., dealing with the same problem one year earlier, proceeded on a lengthy analysis in order to determine whether the federal Parliament would have been competent to pass the provincial Act there impugned; since his answer was negative, he felt free to confirm the provincial competence in the matter.<sup>264</sup> At the same time, he restated his conviction that discrimination against race could not fall within the purview of section 91 (25) of the B.N.A. Act.

"An attempt on the part of the Dominion to enact the Act of 1921 would pass beyond the scope of the authority given by section 91. The restrictions imposed by the scheduled order-in-council affect, it must be observed, naturalized British subjects and native born British subjects. Clearly the Dominion could not on any ground capable of plausible statement pass a law restricting the right of grantees of interests in provincial property in relation to the employment of native born British subjects; the Tomey Homma Case seems to negative the existence of such an authority in relation to naturalized subjects. The proportion of naturalized and native born British subjects of Japanese and Chinese race to

the whole of the population within that category in the province of British Columbia must be considerable. These considerations alone seem to present a formidable difficulty in the way of supporting such legislation as Dominion legislation under its authority in relation to aliens and naturalization." 265

After becoming Chief Justice, somewhat later, the learned judge will have to initiate the "implied Bill of Rights" approach to avoid the dead-end to which he knew this type of legalist reasoning would lead.<sup>266</sup>

But in fact, the real difference between the negative judicial attitudes described above and what would have been positive ones does not necessarily correspond to the dichotomy between positivism and realism or between the division of powers' approach and the implied bill of rights' approach. Quite the contrary, it has been enough demonstrated that there is much room for policy even in a technical approach because a proper use of the principle of stare decisis (or absence thereof) and of the rules of statutory interpretation may allow any judge to reach the desired result in each case.<sup>267</sup> Then, "negative" types of rulings are not even in accord with the genius of the common law because they shut the door to any possible reconsideration or new developments

in the future: and the fact that section 91 (25) has not served, for more than fifty years, to challenge provincial enactments is certainly significant. It is submitted that there is no need for a judge to recognize that the power to discriminate in any respect must reside somewhere neither to uphold an actual discrimination for the mere reason that similar legislation has been enacted in the past or could be enacted against other classes of persons.

A good example of the possibilities of the traditional approach can be found in the reasons of Idington, J. who dissented in Quong-Wing. There, he showed that the expression "no Chinamen" was not a plain phrase in the statute under consideration, although the contrary had been found in Bryden, and he held that this statute must not be construed so as to give effect to a "doubtful" power ! Accordingly, he did not even have to determine which level of government had competence to discriminate in the manner under review nor to preclude the possibility of denying such power to either parliament in the future. Moreover, because it is impossible to know whether section 91 (25) covers the consequences (and which ones) of alienage and naturalization,<sup>268</sup> it would have been possible to invalidate federal discriminations as invading property and civil rights within the province and provincial discriminations as falling under the rule in Bryden or under any federal power.<sup>269</sup>



Of course, the best way to reach positive results would have been to strike down provincial statutes discriminating on the basis of race because they necessarily affect as well some aliens or naturalized persons, protecting at the same time natural-born citizens. This type of reasoning, however, has not been popular in Canada while American courts have often used it, for example when they have considered immaterial the fact that a discrimination included more than only citizens of other states.<sup>270</sup> But Justice Rand has resorted to it when, recognizing that the effect of Bryden was to place the fundamental rights of aliens beyond the reach of provincial legislatures, he extended the rule to natural-born citizens. In his words,

"The contrary view would involve the anomaly that although British Columbia could not by mere prohibition deprive a naturalized foreigner of his means of livelihood, it could do so to a native-born Canadian".<sup>271</sup>

Accordingly, when Rand, J., after having enumerated the content of the Canadian citizenship status, states that a "subject of a friendly foreign country is in a similar position" as any Canadian citizen in this respect, it may well be the reverse way to say that in a like position as aliens should be the Canadian citizens themselves. But

these kinds of positive attitudes in the construction of section 91 (25) have been extremely rare, and they certainly do not counterpoise the judicial habit of negating rights to everybody equally rather than recognizing them to all alike.

The best way to conclude on this point may be to illustrate by referring to the judgment of Martin, J. of the British Columbia Court of Appeal in Re The Coal Mines Regulation and Amendment Act, 1903<sup>272</sup> which was decided immediately after the Bryden and Homma cases. After section 4 of its Coal Mines Regulation Act had been struck down in Bryden, the Legislature of British Columbia proceeded to re-enact it in almost the same terms, and the majority of the court had no difficulty to declare ultra vires the new provision, seeing no difference with the one impugned in Bryden and being bound by the precedent. But Martin, J. dissented from that view and defied the very recent ruling of the Privy Council. He began by saying that if "no part of the Federal jurisdiction can be found to apply to this matter, then the Provincial Legislature is the absolute master of the situation".<sup>273</sup> He then proceeded to consider the fact that natural-born citizens are effectively affected by such legislation and also that there exist analogous enactments of the provincial legislature that are valid. Pursuing his discourse in the same vein, he

stated quite bluntly that the province could validly exclude from such employment in coal mines all Negroes and Indians, and laid down an argument ab absurdo:

"And what greater rights in this country have, or should have the Chinese as a race than the Indians of Canada, almost all of whom are natural born British subjects, or than the Negro natural born subjects of the Crown? The term "Indian" or "Negro" would clearly be used in a racial and descriptive sense, and hence unassailable." 274

Applying those premises to the case at bar, Martin J. found that the term "Chinaman" defines not a national class but a racial one and that when provincial enactments touches Chinese who are native-born, they must be upheld, as in Homma. The learned judge distinguished Bryden on its particular facts and on the ground that the Privy Council there took for granted that only two classes of Chinese could be affected by the legislation, not being aware of the existence in the Province of natural-born Chinese who will also be affected.<sup>275</sup> He then concluded in two significant ways: first, a discriminatory legislation against race, including natural-born persons, is within the powers of the provinces, "provided it applies to them all alike"; and second, if we take account of section 15 of the Naturalization Act which provides that naturalized

persons have the same rights and obligations as the native-born subjects, we see that "no naturalized Chinaman, and much less an alien, can therefore have greater rights in British Columbia than one who is a natural-born British subject."<sup>276</sup>

Thus, the negative approach has led us to a complete vacuum, from a civil liberties point of view, as far as the content of the Canadian citizenship status is concerned: naturalized Canadians, and a fortiori aliens, have the "obligation" not to achieve greater rights and freedoms than natural-born citizens, that is to say none at all. Almost one half a century later, the same kind of judicial sophism reappeared in some cases dealing with the Canadian Bill of Rights.<sup>277</sup> It then becomes important to analyse and compare the most recent cases on this point in order to determine whether we are heading towards an analogous deadlock.

2. Negative Types of Judicial Reaction to the Possibility of Giving Content to the Fundamental Freedoms Declared in the Canadian Bill of Rights.

A problem of the same nature as the one just discussed has been raised by the enactment of the Canadian Bill of Rights and its recognition that laws of Canada shall be construed and applied so as not to abrogate, abridge or infringe the freedoms therein declared, and in particular the right of individuals to equality before the law. Because the Bill cannot serve to render inoperative provincial statutes, R. v Drybones<sup>278</sup> has created a situation similar to the one that resulted from Bryden, but now, it manifests itself in the opposite way: the judiciary disposes of sufficient tools to bring about a complete entrenchment of fundamental rights and freedoms as against federal interference, but it does not yet possess the means capable of effecting the same result as against provincial enactments. It is, of course, in the case of Indians that such a situation may cause the greatest problems because they are, more than aliens themselves, a class of persons subject to the exclusive jurisdiction of the federal Parliament. Hence, by virtue of the enactment of the Bill of Rights, the absurdity may as well follow, here also, that Indians will be guaranteed more rights and freedoms than non-Indians who remain for a substantial part

under the Damocles' sword of provincial parliamentary supremacy. But even in cases not related to the Indian problem, the mere factor that provincial enactments cannot be subjected to the same judicial scrutiny as federal statutes will certainly constitute a break in the expansion of the meaning of the basic freedoms declared in the Bill, simply because the judiciary will be reluctant to cause discrepancies in the overall allocation of powers by refusing that the federal Parliament enacts some legislations that the provinces could pass either identically or analogously. It is my purpose to analyse what types of negative judicial reactions this apparent dilemma has caused and the rationale underlying them.

In assuming that the judges who are prepared to adopt a negative approach in dealing with the Bill of Rights by reason of the above factors will follow the same pattern of reasoning as the one utilized in the case of section 91 (25), there will be two main aspects in it. First, the judges will be very sensible to the "this has been done in the past" argument, because inasmuch as certain discriminations are found long since in diverse analogous situations, it will be more improper to invalidate them only for federal purposes while the experience of the past has shown that it is at the provincial level that most rights and freedoms are likely to be infringed. In this

sense, the invocation of statutes in pari materia discriminating against the same or other classes of citizens in a similar or analogous manner will bear much weight. Secondly, as has already been seen, a consideration of the powers of both levels of government would serve to impose on the one the same standards as the other, that is to say, most of the time, none at all. For example, if Indians are subject to federal discriminations that certain provinces themselves inflict upon non-Indians, or if the provinces simply could inflict them on non-Indians, judges may be brought to conclude that it would be absurd to entrench for the benefit of Indians what cannot be fully guaranteed to other people, and to refuse to impose on the federal Parliament standards that the provinces need not meet. Let us consider the instances where these kinds of arguments have been used.

The first aspect of the negative approach to the question of equality before the law has not yet been applied by the Supreme Court in the case of Indians, but the propensity of its judges to be favourable to it may be found in Robertson and Rosetanni v The Queen.<sup>279</sup> In this case, the Lord's Day Act was held not to abrogate, abridge or infringe the freedom of religion recognized by the Bill of Rights. It may be that the appellants should also have invoked the "equality before the law" clause, but at any

rate, it appears that the result would have been the same because the majority agreed that religious freedoms means "religious equality, not civil immunity."<sup>280</sup> The rationale in this case is largely similar to the one in Homma. Justice Ritchie for the majority stressed the fact that "there have been statutes in this country since long before Confederation passed for the express purpose of safeguarding the sanctity of the Sabbath (Sunday),"<sup>281</sup> that the human rights and fundamental freedoms declared in the Bill had been recognized long before by the Courts of Canada and that the Bill itself recognized these rights and freedoms to have existed; accordingly, the Lord's Day Act had never been considered as an infringement of freedom of religion, and its effect being purely secular, it does not run counter to the Bill of Rights.

The fallacy of such an approach in the light of section 5 (2) of the Bill has been pointed out in Drybones, but it was mentioned, however, that Robertson and Rosetanni was not an authority for the proposition that the freedoms recognized in the Bill must be circumscribed by the laws of Canada as they existed in 1960.<sup>282</sup> In the latter case, Cartwright, J. dissented and rejected expressly "the argument that because the Lord's Day Act had been in force for more than half a century when the



Canadian Bill of Rights was enacted, the Parliament must be taken to have been of the view that the provisions of the Lord's Day Act do not infringe freedom of religion."<sup>283</sup> It is submitted that the distinction between the effect and the purpose of the Lord's Day Act was very secondary and had been created to justify the result compelled by the fact that this Act had stood for so long without there being anybody to question its propriety. What is worthy of emphasis however, is that Drybones has in no way precluded the reliance in the future of the type of negative argument here under consideration because it approved implicitly the conclusion of the Court in Rosetanni and because it makes clear that its own holding does not apply to all the provisions of the Indian Act.<sup>284</sup>

Accordingly, after the Drybones case, the mere fact that the disputed legislation existed before the Bill will have a great impact, and the longer it has been in existence, the less likely it is that it will be declared inoperative by the courts. For example, the judgment of Wells C.J. in R. v. Smythe<sup>285</sup> was based on a lengthy consideration of the kind of equality before the law that existed at the time the Bill was passed, and emphasis was placed on the declaration of the Bill that the human rights and freedoms enumerated have existed until then.<sup>286</sup> The learned judge went back to the 13th century

in order to consider the nature of the office of Attorney-General, and his conclusion is very significant:

"From the above discussion it becomes very clear that there has existed in the United Kingdom, and thus in Canada, a constitutional discretion in the Attorney-General, which discretion is exercised on behalf of the Crown, to deal with the institution and control of prosecutions. It therefore follows that the right of the individual to equality before the law, a right which is recognized by the Canadian Bill of Rights to have always existed in our law, is modified by the exclusive constitutional right of the Attorney-General, as the chief law officer of the Crown, to deal with the prosecution of the offences under our law. This modification has existed since early time and has never been regarded as discriminatory." 287

However, the attitude of the Court of Appeal in this case<sup>288</sup> seems much preferable because it simply approved the decision in R. v Court of Sessions of the Peace, Ex p. Lafleur<sup>289</sup> where the same question had received the same answer, but the main reason for judgment being that there was still no better system conceivable for enforcing the law. Besides, what probably had much weight in the eyes of the courts is that the same types of powers are vested in Attorneys-General of the provinces by provincial enactments, and in these cases the Bill of Rights

could not be invoked: thus, a serious discrepancy would be inserted in Canadian laws by applying the Bill only when these powers are conferred by federal statute.<sup>290</sup>

In the Smythe case, the Attorney-General himself seemed to have understood that an argument showing the effects of a departure from the status quo would be successful: he filed with the court a memorandum enumerating 44 examples from 16 different statutes where discretion was given to proceed summarily or by indictment.<sup>291</sup> The judge was also impressed by the fact that the Attorney-General possessed other discriminatory powers of an analogous nature.<sup>292</sup> Similarly, in Dowhopoluk v Martin,<sup>293</sup> the respondent, in his motion, filed a statement that between 2,000 and 3,000 applicants for citizenship had been refused certificates since the Canadian Citizenship Act came into force, but the judge, having more legalistic grounds to make the Bill of Rights inapplicable to the case at bar, pointed to the irrelevancy of the statement.<sup>294</sup>

Finally, it is interesting to note that in cases raised in Ontario and British Columbia, the vagrancy subsection of the Criminal Code<sup>295</sup> has not been rendered

inoperative despite its application to females only: the courts held that such discrimination by reason of sex was not incompatible with the principle of equality before the law and stressed that there are many other offences of a particular nature in the Code which are applicable to people of one sex only.<sup>296</sup> The weak point in these cases, of course, is that it is far from convincing that only a woman can be a "prostitute" or "nightwalker"; this admittedly harsh provision of the Criminal Code<sup>297</sup> could easily have been made inoperative by the court without risk of "emasculating" the Code because Drybones had showed the possibility of striking down one provision without worrying about the rest of the Act, and it is very unfortunate that judges still rely on this kind of reason to refrain from applying the Bill of Rights. Moreover, it is not because an enactment, or analogous ones, have traditionally stood before the Bill that they ought to be perpetuated as against an original elaboration of a substantial content to the fundamental rights and freedoms therein declared.

The second aspect of the negative approach has some foundation, if not benediction, in the Drybones case itself. There, Justice Ritchie, speaking for the majority, said that "law" in the phrase "equality before the law" means "law of Canada" as defined in section 5 (2) of the Bill.<sup>298</sup> Strictly speaking, provincial laws would

be irrelevant to determine whether or not people are treated equally by the laws of Canada since they could not be made one term of the comparison. This conclusion, however, has not been expressly made by the majority, and the question was declined as immaterial since both terms of the comparison in the case at bar were federal enactments.<sup>299</sup> But in his dissent, Justice Pigeon noted that the construction of equality before the law given in the courts below implied that Indians will have "to be subject in every province to the same rules of law as all others in every particular not merely on the question of drunkenness," and that it was absurd in so far as complete uniformity in provincial legislation was not to be expected.<sup>300</sup> Lyon and Atkey have pointed to the problem in the following way:

"Fortunately for Drybones, the "law" with which section 94 (b) implicitly was compared as a test for equality was an ordinance of the Northwest Territories, clearly a federal "law" under section 5 (2) of the bill. But what if Drybones had been charged in one of the provinces under Section 94 (b) of the Indian Act where the test for equality (or denial thereof) would have been a provincial law relating to the control and use of liquor in the province? Would Drybones' counsel still have been able to persuade a majority of the Supreme Court of Canada that he was denied "the right to equality before the law" in view of

section 5 (2) of the bill and the fact that the "equality test" would have to relate to provincial legislation over which parliament has no control?" 301

It seems obvious that if the same approach as has been adopted in the case of aliens is to be repeated here, the answer will be in the negative.

Indeed, this is what has been decided recently by a Saskatchewan District Court in R. v. Whiteman (No. 1)<sup>302</sup> There, section 96 (b) of the Indian Act providing that "a person who is found (...) intoxicated on a reserve, is guilty of an offence" was attacked as infringing, inter alia, the equality before the law recognized by the Bill. The accused was an Indian and had been convicted after having been found intoxicated in his home on the reserve. One of his contentions was that since Saskatchewan law did not make an offence to be intoxicated in one's home, section 96 (b) imposed "a disability under law on an Indian living on a reserve not imposed on other persons."<sup>303</sup> This argument was rejected by the Court which refused to rely on standards adopted by the provinces, by virtue of their powers under "property and civil rights", in order to determine the content of equality before the law. The Court stressed the fact that it cannot render inoperative

laws of Canada which would abridge some privilege granted by provincial law, "a privilege which may vary from province to province and from time to time".<sup>304</sup> The learned judge distinguished Drybones in that, first, the offense before him applied to any "person" rather than to any "Indian"<sup>305</sup> and, second,

"In the Drybones case it was a Territorial Ordinance dealing with intoxication enacted pursuant to authority granted by the Parliament of Canada, that placed Indians subject to the Indian Act at a disadvantage under the law. In the case before me it is a provincial statute dealing with intoxication enacted pursuant to the province's exclusive jurisdiction to legislate on "property and civil rights" that gives Saskatchewan residents not living on reserves greater freedom with respect to intoxication than that enjoyed by persons who are subject to the Indian Act while on a reserve." 306

It is to affirm that Joseph Drybones, indeed, had been very lucky to live in the Northwest Territories and that the ruling in his case will be inapplicable most of the time because the vast majority of the federal discrimination against Indians would come, with respect to non-Indians, under the "property and civil rights" clause and would be imposed or not by provincial legislation with which a law of Canada cannot be compared. Accordingly, purely criminal discriminations will be the sole ones the courts

will be prepared to eliminate because both terms of the comparison are within federal competence; but we already know that in this field the courts are very reluctant to interfere and no provision of the Criminal Code has been yet rendered inoperative.<sup>307</sup>

Possibly, as noted by Lyon and Atkey,<sup>301</sup> the provincial legislation, in so far as applicable to Indians, could be considered as having been validly incorporated in the federal legislation, especially in the light of section 87 of the Indian Act, and then, the difficulty would be overcome. But that could not be applied in cases arising under all the federal statutes which do not incorporate or refer to provincial legislation. At any rate one hardly sees why the courts should refrain from using provincial laws as a test for the equality before the law clause under the pretence that these laws may vary from province to province and from time to time when, in reality, they are identical and the right sought is recognized everywhere, such as was the right to get intoxicated in one's home.<sup>308</sup> And were such a right denied by a province, it would be a good opportunity for the court to entrench it as being a fundamental one out of the reach of provincial legislatures. Here is certainly a task for the Supreme Court if it does not want its ruling in Drybones to become practically futile and nugatory.



## Conclusion

It can be inferred from the above considerations that Canadian judges have a greater propensity towards status quo than innovation. Because they do not like to run risks, their bias in favour of conservatism will increase with the length of time or with the number of times things went in a particular way. This is an attitude which is adopted in every field of the law,<sup>309</sup> and it may be warranted, most of the time, by an imperative need for certainty. Such an attitude may even be justified in constitutional matters, but it is certainly out-of-place in cases related to civil liberties, and still more in the construction and application of a general text like the Canadian Bill of Rights.

"The meaning of such expressions as "due process of law", "equality before the law", "freedom of religion," "freedom of speech", is in truth unlimited and undefined. According to individual views and the evolution of current ideas, the actual content of such legal concepts is apt to expand and to vary as is strikingly apparent in other countries." 310

What the dissenting judges in Drybones were not prepared to accept from mere implication was this wide delegation by Parliament of its "responsibility for updating the statutes in this changing world",<sup>311</sup> but if the challenge

created by the holding of the majority in this case is to be fully met, it becomes clear that the courts will have to resist any temptation to adopt an approach which will tie its hands for the future.

First of all, in dealing with the Bill of Rights, the Supreme Court will have to depart from the habit of deciding a case by relying on the wording of previous decisions.<sup>312</sup> The limitation of rules by rules and of words by words limits, at the same time, the possibility of deciding cases on their own merits. In the matter of individual rights and freedoms, Dicey had magisterially demonstrated that carefully-worded constitutional documents have not given results comparable to what the English judiciary has achieved by constantly safeguarding these rights in individual cases. It is true that the traditional common law model of decision-making has played a very important role and is still capable of protecting all these fundamental freedoms declared in the Bill of Rights. Writing in 1964, D.A. Schmeiser noted that

"The Bill has rarely made any difference in particular cases, and the same results probably could have been reached by applying well-established common law principles." 313

If, then, the enactment of the Bill of Rights is supposed to have endowed the judiciary with a larger role in the preservation of civil liberties than what was conceded to it in the past, it becomes clear that the judges must supplement the slow pace of common law development with a constant adaptation of the vague declarations of the Bill to the fast evolution of the needs and feelings of our society, and that they must be able to cope with the accelerated interventions of Parliament and government in the life of individuals.

In this sense, even the suggestion of Lyon and Atkey that "we are not going to have a constitution worth worrying about" if the Supreme Court comes short of giving to Chief Justice Duff's obiter in the Alberta Press case an authoritative value<sup>314</sup> seems improper. However illuminative such judicial pronouncement and others might be, it is now time that civil liberties issues be decided in context rather than forced into authoritative frameworks presumably out-of-touch with the new needs of an ever-changing society.<sup>315</sup> It is a meagre consolation to know that our courts could "manipulate"<sup>316</sup> the language of former decisions so as to reach desired results when it is clear that they would have achieved much more if they had departed

from certain authoritative statements given during the era of pure liberalism. In dealing with the Bill of Rights, they should not replace a form of stare decisis by another one, sticking to the values and assumptions of the past, imposing forever a way of life and of thinking which each generation has felt should be integrally perpetuated. It may be proper to adhere to what Justice Rand has called the "shadowy provisional postulates of a transcendental nature" underlying our system of social law,<sup>317</sup> but judges do not have to worry about preserving them since courts are obviously impotent to prevent a revolutionary change even peacefully achieved.

Commenting on the fact that Drybones went short of explaining what equality before the law really means, Professor J.C. Smith noted:

"This is very wise. A good many cases may well come before the courts in the next few years, challenging federal legislation in terms of this concept. A premature definition could saddle the courts with a principle which on later experience, will turn out to be inadequate. Issues of this kind are, however, questions of principle and can only be decided in terms of principle. Lower courts in particular will need a clear statement from the Supreme Court of the nature and limitations of this doctrine." 318

It seems to me that what has been "wise" to do in Drybones will remain so in any future case dealing with the content of the freedoms declared in the Bill of Rights. Even a formal test designed to determine whether or not a substantive principle is respected cannot but hinder the Court in preventing it from deciding what common sense of justice compels at a particular time and in particular circumstances. The achievements of the Supreme Court of the United States have been great when they were the result of a thorough re-evaluation of cases and principles in a contemporaneous context. It may suffice to recall that recently this Court has held that states must distribute the seats for the elections of the members of the legislatures so as to apportion equally the votes of the electors, and it has also decided that every citizen, naturalized or native-born, has the right to remain a citizen.<sup>319</sup> Both these stands constitute a departure from previous rulings and are adapted to the stage of evolution of the American society itself. This is what a formal test of equality before the law, for example, is unable to do, not being flexible enough to strike down shocking techniques such as gerrymandering, polling inequality and denaturalization.<sup>320</sup> It is only normal that a rigid frame of reference cannot meet the new demands in a changing society. Our principles should, of course, apply for the time being to all those who are in the same circumstances, but they need not last forever like a religious dogma.

It seems to me that if there is a need for a clear statement on the part of the Supreme Court of Canada, it should be a direct recognition that since the beliefs and ideals of the society are constantly in a dynamic process, each case under the Bill of Rights will have to be decided on its own merits and to conform as far as possible with the "intuitive sense of justice"<sup>321</sup> of the current society. Common sense as understood at the time of the litigation being henceforth the criterion for certainty, the rulings of the courts will be more predictable than they ever were in the past. In the field of civil liberties, while nobody could have guessed what would be the rulings of the Supreme Court nor have foreseen its main achievements in the 1950's,<sup>322</sup> no one should be surprised at the kind of decisions the Supreme Court will reach if they are to reflect a coeval sense of justice. Attorney-General of Canada v Lavell which is bound to be the next important case on the Canadian Bill of Rights to be considered by the Supreme Court<sup>323</sup> should be disposed of in this light. It would be relevant indeed for the Court to determine whether the holding of the Federal Court of Appeal endangers the status of Indians by putting their bands in such a position as to increase the likelihood of assimilation, and it is significant that many Indians themselves would want to see their colleague losing her case. The weighing of

competing values in such a case illustrates the fact that a rational decision today cannot serve to reach a future decision on the same issue because then, the threat of assimilation may be more or less acute, thus having more or less impact as compared to the problem of sex discrimination.

It remains that the study of the judicial attitudes in relation to both section 91 (25) of the B.N.A. Act and the Canadian Bill of Rights has shown that the courts are reluctant to expand the content of entrenched rights and freedoms when they can only be safeguarded as against one level of government. Thus, if the Supreme Court is to accept the challenge of consistently applying the Bill of Rights on the federal scene, it will have to supplement its attitude by adopting, with respect to provincial enactments, some sort of "implied Bill of Rights" approach, which in the past has only been adopted by a minority of judges in a minority of cases, and develop in this way a uniform citizenship status throughout Canada. By so doing, the answer to the argument that federal acts cannot be rendered inoperative if equality before the law is to be measured by reference to very diverse provincial laws will also be provided.

In the actual state of affairs, however, this is very unlikely to happen, for two reasons. First, Canadian judges in general are not prepared to accept the roles realists have suggested for them because they are still the product of a kind of legal education whose main feature resides in a positivist conception and exposition of the law. Accordingly, most "hunches" of our judges are likely to come from recalls of legal rules rather than from personal factors or habits of considering policy issues.<sup>324</sup> In this sense, Professor Weiler's inquiry as to whether we "should await the advent of judges who are products of a different legal education"<sup>325</sup> before thinking of confiding a Bill of Rights to the judiciary may have had some merit. For sure, the judges of the Supreme Court, among others, are aware of the fact that their continued disregard for policy considerations has led to harsh criticisms on the part of some eminent authorities. But their decision-making process did not evolve sensibly as a result of these attacks; they only have been brought to explain on the public place the reasons why they believe in the traditional judicial behaviour. Speaking at the Ninth International Symposium on Comparative Law held in Ottawa in September, 1971, Justice Pigeon noted that the Supreme Court had not exercised an improper role, as



suggested by Professor Weiler.<sup>326</sup> He admitted that courts do not have to blindly apply statutes, but he stated that they must not either pronounce beyond what is necessary for the solution of the case.<sup>327</sup> In his view, since judges have to keep up with the requirements of the adversary system, they cannot consider at the same time general interests which are often opposed to those of the parties at bar, and this must be left to the legislator. Justice Laskin, for his part, is not prepared to go further, as appears from the address he made to the Students' Law Society at Queen's University in November, 1970.<sup>328</sup> The most liberal judges of the Court still remain fervent advocates of our traditional parliamentary supremacy,<sup>329</sup> and the most they could be prepared to admit is that there are some factors of uncertainty in the judicial process that enable the judges to make the law.<sup>330</sup> Hence, some of them could go as far as accepting the "first model" of decision-making described by Weiler, a limited creative role in the disposition of individual controversies:

"The courts have a not inconsiderable part in the totality of the legislative process, that is the shaping of the law as it is effectively applied in individual cases." 331

Second, and much more important, is the fact that even though the Supreme Court's general approach to

the law may be open to criticism, so is its organization as such. The criticisms on the latter point, ever since the creation of the Court<sup>332</sup>, are usually directed to the fact that the Supreme Court is a body created by, and with a jurisdiction determined by, the federal Parliament alone, that its judges are appointed by the federal government, and that it is part of a judicial system which is not federated as are the legislative and executive functions. It appears that the judges of the Supreme Court are as much aware of this second kind of criticism as they are of the first, and probably as vulnerable therefrom. Being conscious that the position they hold has given grounds for attacks of bias in favour of centralization and of illegitimacy, the judges of the Supreme Court of Canada are certainly not willing to imitate their American counterparts, thereby substantiating these attacks every time their policy will dissatisfy the provinces. Professor Weiler has noted that judges evolving in a system where they can use a policy-maker model should have a political program and should ideally be elected, or at least nominated by participation of all the interested parties.<sup>333</sup> He also pointed to the difficulty of forcing lower courts to respect and implement the decisions of the highest tribunal when they not only disagree with the results but distrust the legitimacy of the organ. As long as our Supreme Court will remain organized and its judges appointed as they are

now, it will always refrain from adopting the kind of role the American Court can afford to play by reason of the supremacy of the Constitution and of a long-lasting tradition of policy-making. If the "role" flowing from the position of the judge in any society is determined by a "set of shared expectations about the type of conduct that is appropriate to that position,"<sup>334</sup> it seems that the one of Canadian judges is likely to remain positivist for a long time.

### GENERAL CONCLUSION

It is at the moment he is applying for the status of immigrant that an alien should be rejected or not from the Canadian community. But once he is accepted therein, it has been demonstrated that his lack of formal citizenship which has served to submit him to the requirements of the Immigration Act and which continue to make him an alien for extra-territorial purposes should not be considered as a justification for denying him the right to share in the general status of all the citizens. Hence, every freedom recognized in the Bill of Rights should undoubtedly apply to them for all internal purposes. Of course, the provisions of the Bill dealing with procedural requirements of natural justice or with the conduct of criminal prosecutions apply to aliens as well, even in immigration matters where the "privilege" conception of immigration has been somewhat "mitigated in the sense that, no matter what the final decision on an alien's attempt to enter or remain in Canada might be, he can be assured at least of being heard by an impartial tribunal".<sup>335</sup> An alien will also be entitled, while in Canada, "to the benefit of the writ of habeas corpus to test in Court if his detention is according to law."<sup>336</sup> But what about the substantive freedoms declared in the Bill, and in particular the right aliens should have to equality before the law with formal citizens?

It has been suggested that an alien is assured "by the Canadian Bill of Rights that he is afforded protection of the law without discrimination by reason of his national origin."<sup>337</sup> If this would be so, aliens would as well be entitled to equality before the law. It is doubtful, however, that such a construction of "national origin", as the phrase appears in the first section of the Bill of Rights, would be sustained by the courts. The phrase may mean that citizens must not be discriminated against by reason of their national origin, which is quite different from saying that anybody must not be discriminated against by reason of his actual nationality or of his actual lack of citizenship. If, on the other hand, the types of discrimination the Bill would serve to eliminate are not limited to the enumeration laid down in section one,<sup>338</sup> aliens could be entitled to equality before the law with formal citizens. Whatever it be, the judiciary should use the Bill so as to eliminate the unnecessary distinctions in federal legislation between citizens and aliens lawfully landed in Canada.

In fact, it is unlikely that the courts will deny aliens of their right to seek redress by invoking any provision of the Canadian Bill of Rights. But there must be a point where outsiders will not be entitled to equality before the law with Canadians; in immigration

matters, this is obvious: it would be absurd to recognize to everyone in the world the right to enter and remain in Canada which is given to Canadian citizens and to aliens domiciled herein. Accordingly, foreigners seeking to immigrate or to remain in Canada will not be entitled to such substantive right (as opposed to procedural) as equality before the law. This is warranted at least by considerations of internal security and it is so fundamental that there is no way the courts will strike down the type of discrimination made in immigration and deportation matters. But their reasoning may be quite eccentric. In Re Shea<sup>339</sup> for instance, the learned judge found that the Drybones case did not imply that the Bill shall prevail over any statute of Canada which is in conflict with it and he held that in the case of the Immigration Act, it was sufficient that its provisions apply equally to all those to whom they apply. Of course, the result is satisfactory, but there is no sense in reverting to the futile definition of equality before the law given in Gonzales and in limiting arbitrarily the application of Drybones in order to keep the Immigration Act operative.

Such reasoning may incite the judges to think that discrimination against aliens is more acceptable than any other kind and to perpetuate the false assumptions I have denounced in the first chapter that there are, even for internal purposes, some inherent rights linked

with formal citizenship which it is just normal to deny to aliens. In the Dowhopoluk case, the judge stated his reasons as follows:

"As to S. 1 (b) above, unlike the accused in the case of (Drybones) who, by reason of the fact that he was an Indian, would have been guilty of an offence which would have been no offence if committed by a man of another race, the plaintiff in this case cannot possibly complain of inequality before the law since the portion of the Canadian Citizenship Act on which he complains applies equally to all aliens, and that part of the Canadian Bill of Rights cannot possibly be interpreted to mean that all aliens are to have the same rights as Canadian citizens. If such were the case the absurd result would be that Canadian citizenship would have no meaning whatsoever, and, incidentally, the plaintiff would then have no cause of action". 340

Here also, the result probably should not be different because the grant of citizenship to an alien is also a "privilege" related to the imperatives for security and sovereignty. The problem is to know where the line should be drawn, where aliens cease to be only entitled to procedural fairness and become full members of the Canadian community with the right to equality with all other Canadians. The danger in the kind of argument set forth above is that the judges do not consider directly the merits of the case and may be led to assume that equality before the law in Canada is not for aliens - an unfortunate conclusion.

It is submitted that we need clear recognition that all aliens will be entitled, for internal purpose, to equality before the law with Canadian citizens not before but as soon as they have met the requirements of the Immigration Act (that is to say as soon as they have been accepted in the community), and that they will be entitled to the same equality, for international purposes, as soon as they have satisfied the requirements of the Canadian Citizenship Act (that is to say as soon as they have been accepted in the class of those Canada represents on the international plane). As for the rest, the same type of approach as suggested previously should be adopted: each discrimination will be considered by the courts in the light of what the intuitive or common sense of justice of the moment compels. Aliens, indeed, need not be conferred every political right to be equal before the law with formal citizens. As long as the judiciary would not bind itself to a dogmatic approach, there is no reason why it could not decide each case on its merits and uphold the cases of discrimination against aliens as are justifiable at the stage of evolution of our society. If we consult the record of the Supreme Court of the United States for instance, the day may not be far off when it will no longer consider it reasonable to deny aliens lawfully landed in the country the right to vote in municipal



or other types of elections, and this would not mean that it was unreasonable to do so 50 years before. In any case, it seems that another approach would be unsatisfactory to aliens, and, for example, a formal test of equality before the law would probably not protect them as their status is not necessarily gained at birth nor unchangeable in the future.

The Bill of Rights should serve to improve the status of aliens in Canada even to the point of rendering nugatory, except with respect to immigration and naturalization and save as for the non obstante clause, the federal competence over aliens qua aliens bestowed by section 91 (25) of the B.N.A. Act, just as Drybones, brought to its logical conclusion, would annihilate the federal authority over Indians qua Indians granted by section 91 (24).<sup>341</sup> These two subsections of the B.N.A. Act are the only ones which have conferred legislative power over individuals instead of subject-matters, thus creating two categories of "federal persons".<sup>342</sup> This is a little absurd because the purpose of distributing legislative powers in a federation is to decentralize the State ratione materiae, the decentralization ratione personae being effected by the mere creation of two levels of government.<sup>343</sup> The day when aliens and Indians are no longer viewed as

potentially dangerous intruders and as burdensome second-class citizens will nullify the need for legislative competence over them as such. The provinces do not need legislative competence over Indians to promote their cultural and economic welfare;<sup>344</sup> at the federal level, there is no need of legislative competence over veterans to create a Department of Veterans' Affairs, nor over old-age and blind persons to pass legislation for their benefit.<sup>345</sup> The judicial obliteration of the words "Indians" and "aliens" in section 91 (24) and (25) of the B.N.A. Act would in no way threaten Canadian security and sovereignty and would constitute at least a withdrawal of the temptation to discriminate against these people. This alone would be a significant step for the better.

FOOTNOTES

1. R.S.C., 1970, c. C-26, Adopted in 1946, this Act came into force on January 1st, 1947.
2. For an enumeration of these ancient Acts, see C. Parry, Nationality and Citizenship Laws of the Commonwealth and of the Republic of Ireland, London, Stevens and Sons Ltd., 1957, at p. 439 s, and G.T. Tamaki, "The Canadian Citizenship Act, 1946" (1947-48) 7 V.T.L.J. 68, at p. 69. Usually, they enacted that all aliens having resided in the colony for 3 to 7 years will automatically become British subjects by taking the oath of allegiance.
3. (1847) 10 - 11 Vict. c. 83
4. (1844) 7-8 Vict., c. 66; nor the naturalization Act of (1870) 33 Vict. c. 14
5. N.W. Hoyles, "Naturalization of Aliens," (1905) 25 Can. L.T. 181, at p. 190 s; J.S. Ewart, "Naturalization", (1911) 31 Can. L.T. 837, at p. 840 s. Thus, the Canadian naturalization Acts of 1868 and 1881 only had a local operation: S.C. 1867-68, vol. 2, c. 66, and s.c. 1880-81, c. 13.
6. This is why a person naturalized in Canada, for instance, was sometimes designated as "Canadian subject of the Queen" or "British subject as regard Canada" rather than simply as a British subject: Union Colliery Co. of British Columbia v. Bryden, (1899) A.C. 580, at p. 586; Newman v Bradshaw, (1915-16) 23 B.C.R. 492 (B.C.C.A.), at p. 498.
7. Tamaki, note (2), at p. 70-71; M. Ollivier, Problems of Canadian Sovereignty, Toronto, Can. Law Book, 1945, at p. 265.
8. British Nationality and Status of Aliens Act, 4-5 Geo V, c. 17; in Canada, s.c. 1914, c. 44. See A.H. Clarke, "Citizenship and Naturalization", (1915) 35 Can L.T. 317, at p. 321-2.
9. R.S.C., 1927, c. 93, s. 2 (c).
10. Tamaki, note (2), at p. 72; W.J. Lindal, Canadian Citizenship and our Wider Loyalties, Winnipeg, Can. Press Club, 1946, at p. 104-5; Canadian Citizenship Branch of the Dept. of the Secretary of State, "The Canadian Citizenship Act," (1947) 25 C.B.R. 365; W.P.M. Kennedy, The Constitution of Canada, 1534-1937. An Introduction to its Development, Law and Custom, 2nd ed., Oxford U.P., 1938, at p. 372-3.

11. R.S.C., 1927, c. 21.
12. Tamaki, note (2), at p. 72; Can. Cit. Branch, note (10), at p. 365 s; Kennedy note (10), at p. 484 s and in "Nationality", (1935-36) 1 V.T.L.J. 139, at p. 41. Such a situation was likely to provoke some hardship: for instance, a British subject naturalized in Canada or a Canadian national could obtain a Canadian passport and receive abroad diplomatic protection from the Canadian or British government, but he remained subject to deportation (or to be refused re-entry in Canada) if he did not fall within the definition of the Immigration Act.
13. The status of British subjects was henceforth a "symbolic" one: Parry, note (2), at p. 109; M.A. Banks, "The Franchise in Britain and Canada", (1967) 17 U.T.L.J. 187; R.R. Wilson and R.E. Clute, "Commonwealth Citizenship and Common Status," (1963) 57 Am. J. Int. L. 566.
14. B. Laskin, Canadian Constitutional Law, 3rd Ed. Toronto, Carswell, 1966, at p. 990; and see the opinion of Rand, J. in Winner v S.M.T. (Eastern) Ltd., (1951) S.C.R. 887 at p. 919.
15. M. St-Aubain, "La province de Quebec est-elle un Etat?" (1963) 13 R.J.T. 51. M. Caron, "La Province de Québec est-elle un etat?" (1938) 14 Actualité économique 121.
16. T. Hodgins, "The Law of Allegiance in Canada", (1881) 1 Can. L.T. 1.
17. E. Bates, 10 Op. Atty. Gen. 382, at p. 388. See also In re Rousos, (1909) 119 N.Y.S. 34 (S.C.), at p. 36. In other words, we must distinguish between the status (the fact of being a citizen or an alien) which is determined by public law and the rights of the individuals flowing from private law: see Hodgins, note (16), at p. 13-14, and Ewart, note (5), at p. 845-6.
18. Johnstone v Pedlar, (1921) 2 A.C. 262 (H.L.)
19. In Canada, see The Providence, (1810) Stewart's 186 (N.S. Vice-Adm.), at p. 196; R. v. Felton (1915) 9 W.W.R. 819 (Alta. S.C., App. D.) In the United States, this principle appeared as soon as 1776, in the following proceedings of a convention of the State of New York, as reproduced in E. Freund et al., Constitutional Law, 2nd ed., Boston, Little, Brown and Co., 1961, vol. II, at p. 828:

"Resolved unanimously, that all persons abiding within the state of New York, and deriving protection from the laws of the same, owe allegiance to the said laws, and are members of the state; and that all persons passing through, visiting, or making a temporary stay in said state, being entitled to the protection of the laws during the time of such passage, visitation, or temporary stay, owe, during the same allegiance thereto. - That all persons, members of or owing allegiance to this state, as before described, who shall levy war against the said state, within the same, or be adherent to the king of Great Britain, or others, the enemies of the said state, within the same, giving to him or them aid or comfort, are guilty of treason against the state, and being thereof convicted, shall suffer the pains and penalties of death."

And it follows from the judgments in Ross v MacIntyre, (1891) 140 U.S. 453, and Husar v. United States, (1928) 26 F. (2d) 847 (C.C.A.), at p. 850, that a member of the crew of an American ship need not be formally citizen to be "entitled to the protection and benefits of all the laws passed by Congress on behalf of American seamen, and subject to all their obligations and liabilities"; and that such is also the case for those holding official positions under the American government.

20. Calvin's Case, (1609) 7 Rep. 1. See also Kawakita v United States, (1952) 343 U.S. 717.
21. "A friendly alien resident in this country can undoubtedly be prosecuted for high treason: De Jager v. Attorney-General of Natal (1907) A.C. 326, because it can then be averred that he acted contra ligentiae suae debitum: Calvin's case (7 Rep. 6 b)": per Lord Atkinson in Johnstone v Pedlar, note (18), at p. 283-4.
22. (1946) A.C. 347 (H.L.)
23. R.S.C. 1970 c. 0-3.
24. "...so long as (an alien friend) remains in this country with the permission of the Sovereign, express or implied he is a subject by local allegiance with a subject's rights and obligations.": per Viscount Care in Johnstone v. Pedlar, note (18), at p. 276.

25. Winner case, note (14), at p. 920
26. This has been applied in Re Krasnak (Krasnakora) Estate, (1951) 3 D.L.R. 412 (Sask. C.A.) and Re Lukac; Hayzel v Public Trustee, (1963) 40 D.L.R. (2d) 120 (Alta. S.C.)
27. In re Daniluk Estate, (1935) 1 W.W.R. 142 (Sask.K.B.), at p. 143.
28. All restrictions upon aliens' property rights have been abolished in 1849 in Canada by the Act 12 Vict. c. 197, s. 12, See also the Aliens Act, R.S.B.C., 1960, c. 8, and the Civil Code of Quebec.
29. The Creamette Co. v Famous Food Ltd., (1933) Ex. C.R. 200 See also L. L. Head, "The Stranger in Our Midst: a Sketch of the Legal Statue of the Aliens in Canada", (1964) 2 C. Yearbook Int. L. 107, p. 131 s; Parry, note (2), at p. 4s. In Quebec, see s. 57 and 65 of Code of Civil Procedure.
30. See note (25)
31. Bridges v Wixon, (1945) 325 U.S. 135, at p. 161. See also Harisiades v. Shaughnessy, (1953) 342 U.S. 580.
32. Wong Wing v United States, (1896) 163 U.S. 228; Kwong Hai Chew v Colding, (1953) 73 S. Ct. 472, at p. 477. Thus, aliens are entitled to invoke the writ of habeas corpus Ekiu v. United States, (1892) 142 U.S. 651, at p. 660.
33. Russian Volunteer Fleet v United States, (1931) 282 U.S. 481
34. Truax v Raich, (1915) 239 U.S. 33; Yick Wo v Hopkins, (1886) 118 U.S. 356; Takahashi v Fish & Game Commission, (1948) 334 U.S. 410 E. Freund, Standards of American Legislation, Chicago, Univ. of Chic. P. 1965 at p. 9-10.
35. Edwards v. California, (1941) 314 U.S. 160, reasons of Jackson J.
36. Fong Yue Ting v United States (1893), 149 U.S. 698, at p. 754. For a general survey of the rights of aliens under the U.S. Constitution, see C.J. Antieau, Modern Constitutional Law, California, Bancroft Whitney Co., 1969, Vol. 1, p. 715 s.

37. As for the federal competence, it was said in *Re Insurance Act*, (1932) 1 D.L.R. 97 (P.C.), at p. 105: "Their Lordships have no doubt that the Dominion Parliament might pass an Act forbidding aliens to enter Canada or forbidding them so to enter to engage in any business without a licence, and further they might furnish rules for their conduct while in Canada, requiring them, e.g. to report at stated intervals. But the sections here are not of that sort, they do not deal with the position of an alien as such; but under the guise of legislation as to aliens they seek to intermeddle with the conduct of insurance business.." and hence they were held *ultra vires*.
38. The uncertainty on that account has been pointed out by Head, note (29), at p. 125 s; B. Laskin, note (14), at p. 990 and 996-7; J. Mercier, "Immigration et droits des provinces", (1944) 4 R. du B. 149, at p. 156s; J. Brossard, *L'Immigration*, Montreal, P.U.M., 1967, at p. 43s and 119-120.
39. This rule seems, however, to have been significantly restricted in the recent case *Graham v Richardson*, (1971) 91 S. Ct. 1848 where it was indicated that classifications based on alienage, nationality or race are inherently suspect and will be subject to close judicial scrutiny.
40. M.R. Konvitz, *The Alien and the Asiatic in American Law*, New York, Cornell U.P., 1946, at p. 157s; J. Tussman and J. tenBroek, "The Equal Protection of the Laws", (1949) 37 Calif. L.R. 341, at p. 375 s.
41. *Oyama v California*, (1948) 68 S. Ct. 269; *Crockrill v California*, (1924) 268 U.S. 258; *Frick v. Webb*, (1923), 263 U.S. 326; *Webb v O'Brien*, (1923) 263 U.S. 313; *Terrace v Thompson*, (1923) 263 U.S. 197.
42. *Heim v McCall*, (1915) 239 U.S. 175; *Clarke v Deckebach*, (1927) 274 U.S. 392. Justice Black once pointed out that these state laws affecting aliens were upheld only because they were not inconsistent with treaties and federal legislation. Consequently, it has been said that, by occupying the field, Congress could render unconstitutional any kind of state enactment discriminating against aliens in the matter of professions, property rights and so on. See Konvitz, note (40), at p. 239; and *Graham v Richardson*, note (39).

43. Greenough v Board of Police Com'rs, (1909) 74 A. 785 R.I.S.C.), at p. 787, Field v Adreon, (1854) 7 Md. 209 (Md.C.A.), at p. 214.
44. For instance, the formal definition of citizen of a state in the Fourteenth Amendment has been transformed in a requirement of domicile within the state for jurisdictional purposes in cases of diversity of citizenship, this applying to corporations as well, but not to aliens: Bird Machine Co. v Day, (1969) 303 F. Supp. 834 (D.C.) at p. 836; Kaiser v Loomis, (1968) 391 F. (2d) 1007 (C.A.); Deese v. Hundley, (1964) 232 F. Supp. 848 (D.C.) See also Edgewater Realty Co. v Tennessee Coal, Iron & Railroad Co., (1943) 49 F. Supp. 807 (D.C.), at p. 809 Dorsey v Kyle, (1869) 30 Md. 512 (Md.C.A.), at p. 518 where citizen was held to be synonymous with inhabitant or permanent resident; In re Wehlitz, (1863) 16 Wis. 468 (S.C.); Halaby v Board of Directors of University of Cincinnati, (1954) 123 N.E. 2d. 3 (Ohio S.C.), at p. 7.
45. Sedgwick v Sedgwick, (1911) 114 p. 488 (Col. S.C.), at p. 490.
46. For jurisdictional purposes, among others; and, for instance, corporations have also been held to be "citizens resident" for the purpose of conducting a liquor business in the Greenough case, note (43). But they are not "citizens" as the word is used in the Constitution: Paul v Virginia (1869) 19 L. Ed. 357 (Sup. Ct.); Asbury Hospital v Cass County, (1945) 326 U.S. 207; D.D.B. Realty Corp. v. Merrill, (1964) 232 F. Supp. 629 (D.C.), at p. 637; Pilgrim Real Estate, Inc. v. Superintendent of Police of Boston, (1953) 112 N.E. 2d 796 (Mass. S.J.C.), at p. 798.
47. Prowd v Gore, (1922) 207 p. 490 (Calif. C.A.) at p. 491.
48. Baldwin v Franks, (1887) 120 U.S. 678
49. R. v. Felton, note (19), at p. 823
50. R.S.B.C. 1960 c. 239 s 34 (c)
51. Minor v Happersett, (1875) 88 U.S. 162, at p. 166.
52. United States v Cruikshank, (1876) 92 U.S. 542, at p. 549



53. Roncarelli v Duplessis, (1959) S.C.R. 121, at p. 141.
54. This condition may serve to exclude ambassadors, members of tribal communities not subject to the jurisdiction of the State, and so on.
55. See C.S. Emden, The People and the Constitution, 2nd ed. Oxford, Clarendon Press, 1956, at p. 319.
56. Among which are Hodge v The Queen (1883), 9 A.C., 117, and Liquidators of Maritime Bank v Rec. Gen. of New Brunswick (1892) A.C. 437.
57. British Coal Corp. v The King, (1935) A.C. 500
58. A.-G. of Canada v A.G. for Ontario (1937) A.C. 326, p. 351s.
59. Note (53), at p. 140s.
60. Slaughter-House Cases, (1873) 21 L.Ed. 394 (Sup. Ct.), and C.J. Antieau, Commentaries on the Constitution of the United States, Buffalo, Dennis & Co., 1960, at p. 165.
61. Att.-Gen for Saskatchewan v. Can. Pac. Ry. Co. (1953) A.C. 594; Re Constitutional Validity of S. 17 of the Alberta Act, (1927) S.C.R. 364; Att.-Gen for Manitoba v Com. Pac. Ry. Co., (1958) S.C.R. 744. See, contra, the opinion of Stuart J. in R. v Ulmes, (1923) 1 D.L.R. 304 (Alta. C.A.).
62. B.N.A. Act of 1871, s. 2.
63. S.C. 1905, c. 3 and 42.
64. There are, obviously, political arguments that can be put forward to resist the bestowment of a particular status to a province. See, for example, R. I. Cheffins, The Constitutional Process in Canada, Toronto, McGraw-Hill, 1969, at p.165.
65. As for the powers of these legislatures, which are similar to those of the provinces but must not be construed as being wider than these, see Northwest Territories Act, R.S.C., 1970, c. N.-22, s. 13 and 14 (1); and Yukon Act, R.S.C., 1970, c. Y-2, p. 16 and 17 (1); both as mod. by R.S.C. 1970, 1st supp. c. 49. See also O'Brien v Allen, (1900) 30 S.C.R. 340; Dinner v Humberstone, (1896) 26 S.C.R. 252. The principle in Hodge v The Queen, note (56), is applicable.

to these inferior legislatures: see R. v. Lynn Holdings Ltd. (1969) 68 W.W.R. 64 (Yukon Terr. Mag C.), and the opinion of Duff J. in Re. Gray, (1918) 57 S.C.R. 150, at p. 170-1. Their sovereignty is however limited by the paramount powers of the federal Parliament: The North British Canadian Investment Co. v Trustees of St. John School District (1904) 35 S.C.R. 460.

66. Paul v Virginia, (1869) 19 L. Ed. 357 (Sup. Ct.) at p. 360.
67. Ward v. Maryland, (1871) 20 L. Ed. 449 (Sup. Ct.) at p. 452.
68. B. Laskin, "Constitutional Law - State Legislation Prohibiting Interstate Migration - Applicability of Problem to Canada," (1941) 19 C.B.R. 750.
69. See note (67), and Toomer v Witsell, (1948) 68 S. Ct. 1157; Chalker v Birmingham & N.W.R. Co. (1919) 249 U.S. 522; Travis v Yale & Towne Mfg. Co., (1920) 252 U.S. 60; Blake v McClung, (1898) 172 U.S. 239. All these cases have noted that the fact that the discrimination was aimed at "non-residents" instead of "non-citizens" was immaterial: see notes (191) and (192), infra.
70. Canadian Northern Ry. Co. v Eggen, (1920) 252 U.S. 553 at p. 562; Douglas v New Heaven Ry. Co., (1929) 279 U.S. 377, at p. 387. But in McCready v Virginia, (1877) 94 U.S. 391, the Court confirmed the validity of a denial to citizens of other states of a substantial interest in the public property.
71. In La Tourette v McMaster, (1919) 248 U.S. 465, the state legislation requiring two years' residence to be licensed as insurance broker was upheld, but for the sole reason that the discrimination there included also the citizens of the enacting state who resided elsewhere. In Graham v Richardson, (1971) 91 S.Ct. 1848, it was held that a state could not deny welfare benefits to resident aliens who have not been residents for a number of years.
72. Kryus v Crow's Nest Pass Coal Co. Ltd., (1912) A.C. 590, at p. 594.
73. See the preamble of s. 92 and most of its enumerated powers; also, A.-G. for Ontario v. A.-G. for Canada, (1947) A.C. 127.
74. Royal Bank of Canada v. The King (1913) A.C. 283; Beauharnois L., H. & P. Co. v Hydro Electric Power Com'n, (1937) 3 D.L.R. 458 (Ont. C.A.); B.C. Electric Ry. Co. v. The King, (1946) A.C. 527; Re: Offshore Mineral Rights of B.C., (1967) S.C.R. 792.
75. A.-G. for Ontario v. Scott, (1956) S.C.R. 137, at p. 142.
76. (1882) 8 A.C. 82

77. Ibid., at p. 95-6, My underlining.
78. (1922) 1 A.C. 215
79. Ibid., at p. 228
80. Krzus case, note (72), at pp. 577: "Where that employment is carried on in the Province of British Columbia, one of the results of this intra-territorial operation of the statute may, the respondents admit, possibly be that in some cases a non-resident alien may derive a benefit under it..." In Bonanza Creek Gold Mining Co. v R. (1916) 1 A.C. 566, it was held that the provinces had power, wither by virtue of prerogative rights or by statutory provisions, to endow a corporation with a status similar to the one of a natural person and to confer in this way the capacity to act even extra-territorially upon receiving ab extra powers to that effect.
81. (1920) A.C. 184
82. Ibid., at p. 191; my underlining.
83. J.H.C. Morris, The Conflict of Laws, London, Stevens and Sons Ltd., 1971, at p. 3.
84. Ibid., at p. 13
85. Ibid., at p. 4
86. Ibid., at p. 14, the point is made that as a general rule there is no such thing as domicile in Canada because the relevant countries where domicile is relevant are the provinces. But by legislation in the field of its competence, Canada can create a uniform domicile criterion, such as in the Canadian Divorce Act, 1968, s. 5 (1) (a). Admittedly, Canada could have relied on the concept of formal nationality, but since it has not been done, this illustrates the fact that nationality is not a factor more appropriate to connect individuals with a sovereign country than is domicile.
87. Vezina v Will H. Newsome Co., (1907) 14 O.L.R. 658 (Ont. Div. C.), ab p. 664; A.-G. for Alberta v. Cook, (1926) A.C. 444, at p. 450: "Uniformity of law, civil institutions existing within ascertained territorial limits and juristic authority in being there for the administration of the law under which rights attributable to domicil are claimed, are indicia of domicil, all of which are found in the Provinces. Unity of law in respect of the matters which depend on domicil does not at present extend to the Dominion.

The rights of the respective spouses in this litigation, therefore, cannot be dealt with on the footing that they have a common domicile in Canada, but must be determined upon the footing of the rights of the parties and the remedies available to them under the municipal laws of one or other of the Provinces."

88. J.-G. Castel, Private International Law, Toronto, Canada Law Book Co., 1960, at p. 54; and Morris, note (83) at p. 16.
89. Udny v Udny, (1869) L.R. 1 H.L. Sc 441, at p. 457, cited in Cook case, note (87).
90. Where the Legislature of Quebec deems necessary to add further requirements to the basic residence or domicile criterion, it is likely that the Canadian citizen trait will be used instead of the British subject one, such as for the granting of a permit under the Liquor Board Act, R.S.Q., 1964, c. 44, p. 42 as amended.
91. Optometry Act, R.S.B.C., 1960, c. 272, s. 12 (a) and (b); Medical Act, R.S.B.C., 1960, s. 35 (1) c. 239 (a doctor need not be British subject, but the Council has only the power to admit other medical practitioners from countries of the Commonwealth, upon reciprocal terms); Barbers Act, R.S.B.C., 1960, s. 6 (1) c. 24; Land Surveyors Act, R.S.B.C. 1960, c. 211, s. 46 (a); Trust Companies Act, R.S.B.C. 1960, c. 389, s. 23 (5); Government Liquor Act, R.S.B.C. 1960, c. 166, s. 38 (2); Protection of Children Act, R.S.B.C., 1960, c. 303, s. 21 (1).
92. R.S.B.C., 1960, c. 250, s. 3 (b), where one of the qualifications required from the applicant is that she "is a British subject or was formerly a British subject by birth or naturalization" (SIC).
93. R.S.B.C., 1960, c. 50, s. 4 (1): "A person who is the full age of twenty-one years, and is domiciled in the Province, and is a British subject by birth or naturalization, may, unless prohibited by any of the provisions of this Act, change his name on complying with the provisions herein contained."
94. R.S.B.C., 1960, c. 329, where, by virtue of s. 98, any shareholder is eligible to office in the company whether he is British subject or not, resident in the Province or not, but it is provided by s. 110 (3) that "if the company received aid towards the construction of tis railway or any part thereof from the Province, a majority of its directors shall be British subjects." See also

the Prospectors' Grub-stake Act, R.S.B.C., 1960, c. 302 s. 2 and 3; only the prospectors who are British subjects can make application for a grub-stake.

95. Coal Mines Regulation Act, S.B.C., 1969, c. 3 s. 26, replacing R.S.B.C., 1960, c. 61, s. 21 (1)(a); Chiropractic Act Amendment Act, S.B.C., 1964, c. 10 s. 21, Public Libraries Act Amendment Act, S.B.C., 1968, c. 44, s. 10.
96. Compare the Land Act, R.S.B.C., 1960, c. 206, s. 12, with the Land Act, S.B.C., 1970, c. 17, s. 7 (3); and the Game Act, R.S.B.C., 1960, c. 160, s. 43 (1) (a) and 61 (1), with the Wildlife Act, S.B.C., 1966, c. 55, s. 6 (1) and 32 (1), as amended by S.B.C., 1971, c. 69. See also the Legal Professions Act Amendment Act, S.B.C., 1941, c. 31 and S.B.C., 1965, c. 15; The Pharmacy Act Amendment Act, S.B.C., 1964, c. 38, s. 4.
97. This is the same situation at the federal level where the very formal class of persons defined in the Canadian Citizenship Act is as much irrelevant for the determination of the general citizenship status as it is in the provinces. The Canadian citizen trait may be of convenient use, but only as an alternative or a supplementary criterion. The scope of applicability of the federal enactments conferring rights and imposing obligations to persons in Canada does not correspond at all to the restricted sense of the term "Canadian citizen", is determined by each particular Act in this respect, and covers most of the time aliens as well. For instance, see the Canada Council Act, R.S.C. 1970, c. C-2, s. 8 (1) (b) and (c); and the provisions cited infra, note (122).
98. See notes (95) and (96). For instance, in the case of eligibility for membership in the council of their association under the former B.C. Foresters Act, R.S.B.C. 1960, c. 37, s. 5 (5), the candidates had only to be resident in the Province, while has been added the requirement of being Canadian citizen in the B.C. Professional Foresters Act, S.B.C., 1970, c. 4, s. 7 (3): thus, the latter requirement is an additional one and not a basic one.
99. Indirectly, as, for example, under the Securities Act, 1967, S.B.C., 1967, c. 45, s. 32, where the auditors must have practiced in B.C. Indirectly also, in every provincial statute where no explicit provision is made, because they can only apply intra-territorially, in principle.
100. Universities Act, S.B.C., 1963, c. 52, s. 20 (1) (f) and 21; Pharmacy Act, R.S.B.C., 1960, c. 282, s. 5 (1); Physiotherapists and Massage Practitioners Act, R.S.B.C. 1960, c. 283, s. 27 (3) and 32 (c); Certified General Accountants Act, R.S.B.C., 1960 c. 47, s. 13; Chartered Accountants Act, R.S.B.C., 1960, c. 51, s. 5 and 18 (1);

Engineering Profession Act, R.S.B.C. 1960, c. 128, s. 11 (1) and (4); Securities Act, 1967, S.B.C., 1967, c. 45, s. 15 as amended by S.B.C., 1970, c. 43, and 1971, c. 58; Agrologists Act, R.S.B.C., 1960, c. 6, S. 6b and 10 (4); Architectural Profession Act, R.S.B.C., 1960, c. 16, s. 15 (d), 32 (e), 33 (a) and 41; Companies Act, R.S.B.C., 1960 c. 67, s. 103-104; Marriage Act, R.S.B.C. 1960, c. 232, s. 4 and 6; Medical Act, R.S.B.C., 1960, c. 239, s. 11, 13 and 17 (d) and 18 (1); Revenue surplus Appropriation Act, R.S.B.C. 1969, c. 33 s. 6; Provincial Home Act, S.B.C. 1969, c. 29, s. 3 and 4; Stock Brands Act, R.S.B.C. 1960, c. 371, s. 44 (1) as amended; Trust Companies Act, R.S.B.C., 1960, c. 389, s. 6 and 23 (5); Credit Unions Act, S.B.C., 1961, c. 14, s. 11 (2) (a); Gas Act, R.S.B.C., 1960, c. 161, s. 21 (1) as amended by S.B.C. 1966, c. 19, s. 5.

101. That is to say that the intention of continuing to reside in the province will then be as important as the actual residence therein. For instance, the Mental Health Act, 1964, S.B.C. 1964, c. 29, s. 2, as modified by 1968, c. 27, and 1969, c. 17, defines resident of the Province as meaning "a person who has resided in the Province for a period determined by the Lieutenant-Governor in Council", and the regulations thereunder, B.C. Reg. 233-64, s. 1.01, have adopted the definition contained in the Residence and Responsibility Act, R.S.B.C. 1960, c. 340, s. 2, where the term means "to have a home (...), a permanent place of abode to which, wherever a person is absent, he has the intention of returning..." In the Mother's Allowances Act, R.S.B.C., 1960, c. 250, s. 2, resident in the Province means that "the person has his main place of abode in this Province, to which whenever he is absent he has the intention of returning, but in no case shall a person be considered resident in the Province during any period of absence from the Province which exceeds six months." Theoretically, a person may have more than one residence, but the very type of residence that is required in many cases, combined with its length, is almost incompatible with such a situation and amounts to a domicile requirement. As for the notion of domicile itself, which is the same in all the Canadian provinces, see Castel, note (88), at p. 52s; Morris, note (83), at p. 13; Trahan v Vezina, (1947) 3 D.L.R. 769 (P.C.) and Crosby v Thompson, (1926) 4 D.L.R. 56 (N.B.S.C. App. D.)
102. Six months' residence: Wildlife Act, S.B.C. 1966, c. 55, as amended by 1971, c. 69, s. 2. One year's residence; Government Liquor Act, R.S.B.C., 1960, c. 166, s. 38 (2); Savings and Loan Associations Act, R.S.B.C., 1960, c. 346 s. 10 (3) (a) and 38 (2); Provincial Home Acquisition Act, S.B.C., 1967, c. 39, s. 3 and 3A, as modified by

S.B.C. 1968, c. 42; Medical Grant Act, S.B.C., 1967, c. 25, s. 2; Prospectors' Grub-stake Act, R.S.B.C., 1960, c. 302, s. 2 and 3. Three years' residence: Mother's Allowances Act, R.S.B.C. 1960, c. 250, s. 3 (a). In the Revenue Surplus Appropriation Act, 1969, S.B.C. 1969, c. 33, s. 3, the "First Citizen's Fund" there established for the advancement and expansion of the culture, education and economic life of the North American Indians is restricted to the benefit of those who were born in and are still residents in the Province.

103. R.S.Q., 1964, c. 246, as amended by S.Q. 1970, c. 57, s. 2.
104. J. Willis, "Securing Uniformity of Law in a Federal System - Canada", (1943-44) 5 U.T.L.J. 352, at p. 360 s; L.R. Mactavish, "Uniformity of Legislation in Canada - An Outline," (1947) 25 C.B.R. 35, at p. 42.
105. For uniform statutes in the field of the conflict of laws, see Castel, note (88), at p. 10-11; and for a general table of 36 model statutes of which Quebec adopted only one, see H.E. Read, "The Public Responsibilities of the Academic Law Teacher in Canada," (1961) 39 C.B.R. 232, at p. 249-250.
106. MacTavish, note (104), at p. 49.
107. R.S.C., 1970, c. C-1.
108. Unemployment Assistance Act, R.S.C., 1970, c. U-1, s. 3 (3) providing that the agreement must be substantially as laid down in the Schedule whose s. 4 is as follows: "Length of residence shall not be made a condition for the receipt of assistance if (a) the applicant has come from a province whose government has entered into an agreement similar to this respecting unemployment insurance, and (b) such agreement includes a like clause as herein contained in respect of length of residence not being a condition for receipt of assistance." Hospital Insurance and Diagnostic Services Act, R.S.C., 1970, c. H-8, s. 5 (2), whereby the province must covenant and agree, inter alia, "(a) to make insured services available to all residents of the province upon uniform terms and conditions (...), and s. 8 (1) whereby the Governor in Council may make regulations, inter alia," (a) defining "residents of a province" for the purposes of this Act, but no specified period of residence shall be required as a condition precedent to the establishment of residence in a province (...)"

109. R.S.C., 1970, c. B-7; c. O-5; and c. D-6 respectively.
110. S. 3 (2) (iii), 3 (2) (ii) and 3(2) (ii) respectively.
111. S. 7 (c) (ii), 7 (d) (ii) and 7 (d) (ii) respectively.
112. Blind Persons Act, note (109), s. 7 (c). Corresponding sections in the two other Acts are substantially identical.
113. In British Columbia, the Blind Persons' Allowances Act, R.S.B.C., 1960, c. 29, and the Old-Age Assistance Act, R.S.B.C., 1960, c. 270, confer on the Lieutenant-Governor in Council the power to enter into agreements with the federal government pursuant to the provisions of the corresponding federal Acts. More generally, the Social Assistance Act, R.S.B.C., 1960, c. 360, s. 12, grant the same power "as to any measures or general schemes of family allowances, social insurance, or other forms of social legislation in the Province, pursuant to the provisions of any Act of Canada heretofore or hereafter passed (...)". See also the Mental Health Act, 1964, S.B.C., 1964, c. 29, s. 17.
114. In fact, this residence requirement may be equated with a domicile within Canada since there is an implied condition that the recipient shall have the intention either to remain or to return in Canada while temporarily abroad, as appears from the regulations adopted under the relevant federal Acts: S.O.R. 1960 (1549), s. 10, and (1564) s. 16.
115. Thus, as we have seen, they will impose a period of residence where the scheme adopted is not part of an agreement with the federal government. See, for instance, the regulations under the Social Assistance Act, note (113), in B.C. Reg. 444-59, s. 5 (c).
116. As in the case of the Medical Services Act, S.B.C., 1967, c. 24, s. 2, and the Hospital Insurance Act, R.S.B.C., 1960, c. 180, s. 2, where resident "means a person who has made his home in British Columbia and is ordinarily present therein, but does not include a tourist, a transient, or a visitor to the Province." S. 3 of this Act also confers to the government the power to pass regulations, inter alia, "for determining whether a person has made his home in British Columbia and is ordinarily present therein and for determining the conditions under which a person ceases to be a resident of the Province": regulation 4 dealing with the loss of residence by beneficiaries makes it clear that the intention of these



persons to remain or come back to the province is a major factor to be taken into account: B.C. Reg. 25-61 as amended by 65-66. As we have seen, supra note (108), the corresponding federal Act also confers to the Governor in Council the power to define "residents of a province".

117. For example, Regulation 3 of the B.C. Reg. 65-66 amending 25-61 adopted under the Hospital Insurance Act, Ibid., require a three months' waiting period.
118. Medical Care Act, R.S.C. 1970, c. M-8, s. 2 and 4 (1) (d).
119. Health Insurance Act, R.S.B.C., 1960, c. 171, s. 2, 4 and 5; The Unemployment Insurance Act, R.S.C. 1970, c. U-2, s. 64. But a period of residence will be required if the government pays a substantial part of the premium of eligible persons, as in the Medical Grant Act, S.B.C. 1965, c. 25.
120. The provinces can only refrain from, or prohibit persons in the province from, encouraging non-residents to come therein to benefit from its welfare laws and facilities, as in the Community Care Facilities Licensing Act, S.B.C. 1969, c. 4, s. 13, and the Protection of Children Act, R.S.B.C., 1960, c. 303, s. 44s. and 58 whereby the person who brought in the Province a child who becomes a public charge will be liable for his maintenance.
121. Supra note (110). See also the Old Age Security Act, R.S.C., 1970, c. O-6, which is exclusively for federal purposes and does not provide for agreements with the provinces: its s. 3 (1) requires, however, at least the same lengthy period of residence, and its s. 7 (1) and 9 (2) (c) deal with the effect of an absence from Canada for six months.
122. As in the case of the Family Allowances Act, R.S.C., 1970 c. F-1, s. 2 where "'child" means any person under the age of sixteen years who is a resident of Canada at the date of registration, and (a) who was born in Canada and has been a resident of Canada since birth.  
(b) who has been a resident of Canada for one year immediately prior to the date of registration,  
(c) whose father's or mother's domicile at the time of such person's birth and for three years prior thereto was in Canada and has continued to be in Canada up to the date of registration, or  
(d) who was born while his father or mother was a member of the Canadian Forces or the naval, army or air forces of Canada or within twelve months after his father or mother had ceased to be a member of the

Canadian forces or those forces,

but does not mean any person who is in Canada contrary to the provisions of the Immigration Act". Or in the case of the Canada Student Loans Act, R.S.C. 1970, c. S-17, s. 2 (a) as amended by R.S.C. 1970, 1st supp., c. 42, s. 1 (3), where a qualifying student is either a Canadian citizen or a landed immigrant who resided in Canada for one year.

123. Under the Immigration Act, R.S.C. 1970, c. I-2, s. 2, "landing" means the lawful admission of an immigrant to Canada for permanent residence, and under the new regulations, S.O.R. 67-434, s. 31s, the objective criteria upon which the immigration officer must rely to accept such application for permanent residence are supposed to "reflect the particular applicant's chances of establishing himself successfully in Canada": s. 32 (4).
124. For instance, a participating province will have to support its former resident who departed for a non-participating province, as has been seen supra, text and note (112), at the same time it indemnifies all its residents without being able to require from them any period of residence. The welcoming province may, nevertheless, be exempted from paying assistance to a new resident for a short period of time when this person is still deemed to be a resident of the original province and entitled to benefits therefrom, as provided in S.O.R. 58-261, s. 3 (2A), adopted under the Hospital Insurance and Diagnostic Services Act, note (108). Also, it must be noted that a clause of the kind embodied in the Unemployment Assistance Act, note (108), to the effect that provinces can specify a period of residence in the case of the people coming from a non-participating province, does not solve the problem of those who are leaving for such a province.
125. In British Columbia, for instance, see the Workmen's Compensation Act, 1968, S.B.C., 1968, c. 59, s. 8-9; Mothers' Allowances Act, note (102), s. 6; Tuberculosis Institutions Act, R.S.B.C., 1960, c. 391, s. 7.
126. R.S.B.C., 1960, c. 253, s. 106 (B) (6) as modified by S.B.C. 1965, c. 27. See also s. 108 (4).
127. "Federalism is union without uniformity": A.S. Abel, "The Role of the Supreme Court in Private Law Cases", (1965) 4 Alta L.R. 39, at p. 47.
128. Public international law acknowledges that aliens have no right to the franchise or to eligibility for any kind of public office or function in the State where

they happen to be: in their case, they can only possess the "privilege" of sharing in the political rights of the citizens. See J. Charpentier, L'etranger en droit international, Paris, Institut des Hautes Etudes Internationales, 1966-67, at p. 90s.

129. Fong Yue Ting v United States, (1893) 149 U.S. 698, at p. 754, per Justice Field, dissenting in the result.
130. The Politics of Aristotle, translated with an introduction notes and appendixes by E. Barker, Oxford, Clarendon Press, 1946, at p. 93.
131. Loc. cit.
132. Ibid, at p. 95
133. It is Bouvier's definition of "political rights" which has been adopted in such cases as Blackman v Stone, (1936) 17 F. Supp. 102 (D.C.) at p. 107; Winnett v Adams, (1904) 99 N.W. 681 (Neb.S.C.), at p. 684; Anthony v Burrow, (1904) 129 F. 783 (c.c.) at p. 789; People v Barrett, (1903) 67 N.E. 742 (Ill. S.C.) at p. 744; Friendly v Olcott, (1912) 123 P. 53 (Ore. S.C.), at p. 56; State ex rel. McGovern v. Gilkison, (1935) 196 N.E. 231 (Ind. S.C.), at p. 232; Caven v. Clark, (1948) 78 F. Supp. 295 (D.C.) at p. 298; Herken v. Glynn, (1940) 101 P. 2d 946 (Kan.S.C.) at p. 954; Litzelman v. Town of Fox, (1936) 1 N.E. 2d 915 (Ill. App. C.), at p. 917.
134. Greenough v Board of Police Com'rs of Town of Tiverton, (1909) 74 A. 785 (R.I.S.C.), at p. 787: "In American law (a citizen is) one who, under the Constitution and laws of the United States, has a right to vote for Representatives in Congress and other public officers, and who is qualified to fill offices in the gift of the people. One of the sovereign people. A constituent member of the sovereignty, synonymous with the people. A member of the civil state, entitled to all its privileges"; Gardina v Board of Registrars of Jefferson County, (1909) 48 So. 788 (Ala. S.C.), at pp. 790-1.
135. Scott v Sandford, (1857) 19 How. 393 (S.Ct.) at p. 404, as relied on in In re Silkman, (1903) 84 N.Y.S. 1025 (S.C. App.D.), at p. 1031; Civil Rights Cases, (1883) 109 U.S. 3, at p. 31, per Harlan J. dissenting; Boyd v Nebraska, (1892) 143 U.S. 135, at p. 159.
136. Emben, note (55), at p. 317.
137. Bryce, Modern Democracies, vol. 1, p. 162, as cited in Emden, ibid, at p. 320. My underlining.
138. Konvitz, note 40, at p. 1.

139. E. Bates, 10 Op. Atty. Gen. 382, at p. 387-8. This opinion seems accurate as for the point under consideration here, but the learned Attorney-General in the same pages, equates the general meaning of citizenship with its formal sense, which, I think, it is not better than confusing its political acceptation with the formal one. He said that "the phrase", a citizen of the United States", without addition or qualification, means neither more or less than a member of the nation. And all such are, politically and legally, equal - the child in the cradle and its father in the Senate, are equally citizens of the United States. And it needs no argument to prove that every citizen of a State is, necessarily, a citizen of the United States; and to me it is equally clear that every citizen of the United States is a citizen of the particular State in which he is domiciled." I submit that a "member of the nation" need not be citizen in this latter sense, as has been demonstrated in the first section.
140. United States v Morris, (1903) 125 F. 322 (D.C.) at p. 325; State ex rel. McCampbell v County Court, (1887) 2 S.W. 788 (Miss. S.C.), at p. 789; Crosse v Board of Supervisors of Elections, (1966) 221 A. 2d 431 (Md. C.A.), at p. 435: "A person does not have to be a voter to be a citizen of either the United States or of a state, as in the case of native-born minors."
141. Cunningham v Homma, (1903) A.C. 151, at p. 156.
142. Art. I, sect. 2, cl. 2 and sect. 3, cl. 3; Art. II, sect. 1, cl. 5.
143. Art. I, sect. 2.
144. Constitution of Colorado, art. VII, sect. 1: a voter is a citizen of the United States and one year resident in Colorado. Constitution of California, art. II, sect. 1: "Every native citizen of the United States of American, every person who shall have acquired the rights of citizenship under and by virtue of the Treaty of Querataro, and every naturalized citizen thereof, who shall have become such 90 days prior to any election, of the age of 21 years, who shall have been a resident of the State one year next preceding the day of the election, and of the county in which he or she claims his or her vote 90 days, and in the election precinct 54 days, shall be entitled to vote at all elections which are now or may hereafter be authorized by law.." This combination of citizenship and residence criteria is substantially the same in the other states: see Cal. Const. A., vol. 2, p. 723.

145. Constitution of California, art V, sect. 2: the Governor "shall be an elector who has been a citizen of the United States and a resident of this State for 5 years immediately preceding his election"; and art. IV, sect. 2 (c): "A person is ineligible to be a member of the Legislature unless he is an elector and has been a resident of his district for one year and a citizen of the United States and a resident of California for 3 years immediately preceding his election." As for these kinds of provisions in the constitutions of other states, see Cal. Const. A., vol. 2, p. 735.
146. As in the provisions under consideration in Huston v. Anderson, (1904) 78 P. 626 (Calif. S.C.), at p. 635.
147. Blake v McClung, (1898) 172 U.S. 239, at p. 256, per Justice Harlan.
148. Harper v Virginia State Board of Elections, (1966) 86 S. Ct. 1079, at p. 1080; United States v Classic, (1941) 313 U.S. 299, at p. 315; Ex parte Yarbrough, (1884) 110 U.S. 651, at p. 663-4; Baker v Carr, (1962) 369 U.S. 186 at p. 242-3. In Breedlove v Suttles, (1937) 302 U.S. 277, a poll tax not designed to disfranchise a particular race or color has been held to be reasonable, but this is obsolete by reason of the 24th Amendment and the Harper case, supra, at p. 1082. A literacy test which left no leeway for racial discrimination has been upheld as reasonable in Lassiter v Northampton County Board of Elections, (1959) 79 S. Ct. 985, at p. 989-991, but tests of this nature permitting much discretion for their enforcement have been invalidated in Davis v Schnell, (1949) 81 F. Supp. 872 (D.C.) affirmed at 336 U.S. 933, and in Louisiana v United States, (1965) 85 S. Ct. 817. It is reasonable to require a declaration of intention from newcomers: Pope v Williams (1904) 193 U.S. 621.
149. Harper case, preceding note, at p. 1080-1. See also Carrington v Rash, (1965) 85 S.Ct. 775.
150. U.S. Constitution, 15th and 19th Amendments; Guinn v United States, (1915) 238 U.S. 347; Lane v Wilson, (1939) 309 U.S. 268.
151. Otsuka v Hite, (1966) 414 P. 2d 412 (Calif. S.C.), at p. 416.
152. Antieau, note (60), 1967 Supplement, at p. 73, and the cases there cited.
153. S.C. 1919-20, c. 46.
154. Oil, Chemical & Atomic Workers International Union v. Imperial Oil Ltd. (1963) S.C.R. 584; McKay v The Queen (1965), S.C.R. 798. It seems also that they could not interfere with the working of our parliamentary institutions: Re Alberta Statutes (1938) S.C.R. 100; Switzman v Elbling, (1957) S.C.R. 285.

155. Cunningham v Homma, (1903) A.C. 151.
156. In British Columbia, an oath of allegiance only is required from every judge appointed under the Provincial Court Act, S.B.C., 1969, c. 28, s. 4 (1); from the coroners under the Coroners Act, R.S.B.C. 1960, c. 78, s. 4; from every person appointed under the Corrections Act, S.B.C. 1970, c. 10, s. 4 (4); and from all officers and permanent employees of a municipality under the Municipal Act, R.S.B.C. 1960 c. 255, s. 190. In Quebec, the Public Officers Act, R.S.Q. 1964, c. 12, s. 9 as amended by 1969, c. 14, s. 14, enacts that "Every person appointed to any office, function or employment, every mayor, every member or officer of any public corporation, and every person admitted to practise as a land surveyor, advocate or notary shall make and subscribe the oath or declaration of allegiance and office.(...)"
157. This is also true at the federal level, and in the United State, In 1966, in the Crosse case, note (140), at p. 435, the Court of Appeals of Maryland held that, even though the state constitution required to have been a "citizen of the State" for "at least five years preceding his election" in order to qualify for the office of sheriff, an alien who had been resident therein was qualified, but the court admitted that the provisions implied "that a sheriff cannot owe allegiance to another nation"; since the appellant there had been naturalized one month preceding its application, his allegiance could not be questioned, but the remarks of the Court point out that if in such political matters the formal requirements of citizenship are to be disregarded, allegiance as such remains an implied condition.
158. Provincial Elections Act, R.S.B.C. 1960, c. 306, s. 3: British subjects, 12 months' residence in Canada, and 6 months' residence in the Province. Election Act, R.S.Q. 1964, c. 7, s. 133: Canadian citizens and 1 year's domicile in the Province. At the federal level, the Canada Elections Act, R.S.C. 1970, 1st Supp., c. 14, s. 14, requires the Canadian citizenship, but British subjects who were qualified for the previous election and who still ordinarily reside in Canada may vote until June 26th, 1975; under s. 17 (3) and (4), place of residence may be equated with domicile, but no particular length of such residence within Canada is required.
159. Provincial Elections Act, Ibid., s. 55, and Constitution Act, R.S.B.C., 1960, c. 71, s. 22, and s. 27: "No person is capable of being elected a member of the Legislative

Assembly unless he is duly registered or entered as a voter on the list of voter for some electoral district in the Province, according to the provisions of the Provincial Elections Act, at the time of his election, and has been resident within the Province for one year previous to the date of his election". In Quebec, see the Election Act, Ibid., s. 47 (4) combined to s. 131 as amended by S.Q. 1965, c. 12. At the federal level, see s. 20 of the Canada Elections Act, ibid., and s. 23 of the B.N.A. Act.

160. R.S.B.C., 1960, c. 71, s. 54.

161. Judges appointed by the federal government must have been barristers or advocates standing at the bar of any province for at least 10 years' Judges Act, R.S.C. 1970, c. J-1, s. 3. Analogous requirements are provided for in Quebec, for most of the judges appointed by the Province: Courts of Justice Act, R.S.Q., 1964, c. 20, as amended. But in British Columbia, judges of the Provincial Court need not be barristers or solicitors so that the sole express statutory requirement is their taking of an oath of allegiance, as has been seen, note (156).

162. Supra, note (103), and Bar Act, S.Q. 1966-67, c. 77, s. 61.

163. Legal Professions Act, R.S.B.C., 1960, c. 214, s. 41 (c) as amended by S.B.C. 1969, c. 15, and 1971, c. 31: "... any person who is not a Canadian citizen, but is a British subject, may be called to the Bar if he is enrolled as a student-at-law before the first day of July, 1971, but, in this case, the person shall cease to be a member of the Society if he fails to file with the secretary proof of his having become a Canadian citizen within seven years of his call to the Bar, unless the Benchers otherwise direct." See also the Inferior Courts Practitioners Act, R.S.B.C. 1960, c. 194, s. 2.

164. Notaries Act, R.S.B.C., 1960, c. 266, s. 6: "Every person who seeks enrolment as a Notary Public shall make application therefor to the Court (...) but no application shall be considered unless the applicant is a British subject and has resided within the Province for a period of three years immediately preceding the date of his application"; Jury Act, S.B.C., 1970, c. 14, s. 4 and 5 (d): since the juror must have the qualifications of a voter, he shall be British subject and six months' resident at least. In Quebec, see the Jury Act, R.S.Q. 1964, c. 26, s. 2 (a), and s. 26 of the Civil Code.

165. Are appointed pursuant to the provisions of the Civil Service Act each District Registrar, Deputy District Registrar, other officers and clerks, the Accountant of the Court, official reporters to the Court and deputy official reporters, under the Supreme Court Act, R.S.B.C., 1960, c. 374, s. 22; the Director of Correction and his staff under the Corrections Act, S.B.C., 1970, c. 10, s. 4; Sheriffs, Deputy Sheriffs, clerks and employees, under the Sheriffs Act, R.S.B.C., c. 355, s. 52-3, as amended by S.B.C. 1965, c. 48; clerks, officers and employees of the Court and of the Judicial Council, under the Provincial Court Act, S.B.C., 1969, c. 28, s. 8 (4) and 21 (2); Inspector of Legal Offices Registrars and Deputy Registrars (who, anyway, have to be members of the Bar), and other officers and clerks, under the Land Registry Act, R.S.B.C., 1960, c. 208, s. 9 to 13.
166. These are the criteria used in the definition of "public officer" given in the Public Officer's Security Act, R.S.B.C., 1960, c. 317, s. 2.
167. Public Service Employment Act, R.S.C. 1970, c. P-32 s. 12 (2), 16 (3), 17 and 23.
168. R.S.B.C., 1960, c. 56, s. 53 and 54.
169. Ibid., s. 80
170. It should be noted that such conditions of employment constitute discrimination by reason of nationality and place of origin contrary to the B.C. Human Rights Act, S.B.C. 1969, c. 10, s. 5, although this Act does not bind the Crown. Are to be made pursuant to the Civil Service Act the appointments under the following, inter alia: Government Liquor Act, R.S.B.C. 1960, c. 166, s. 134 and 139, as amended by S.B.C. 1965, c. 50, s. 10; Law Reform Commission Act, S.B.C., 1969, c. 14; Corrections Act, S.B.C., 1970, c. 10, s. 4; Provincial Museum Act, 1967, S.B.C., 1967, c. 41, s. 6; Public Trustee Act, S.B.C., 1963, c. 38 s. 3; Hospital Act, R.S.B.C., 1960, c. 178, s. 30; Mental Health Act, S.B.C., 1964, c. 29, s. 9 (1) as amended by S.B.C. 1969, c. 17; Electrical Energy Inspection Act, R.S.B.C., 1960, c. 126, s. 4-5; Insurance Act, R.S.B.C., 1960, c. 197, s. 309; Legislative Library Act, R.S.B.C., 1960, c. 216, s. 7; Milk Industry Act, R.S.B.C., 1960, c. 243, s. 51; Mineral Act, R.S.B.C. 1960, c. 244, s. 89 and 96, as amended by 1965, c. 26;



Motor Vehicle Act, R.S.B.C., 1960, c. 253, s. 119; Motion Pictures Act, S.B.C. 1970, c. 27, s. 3; Protection of Children Act, R.S.B.C., 1960, c. 303, s. 4 (1).

171. Civil Service Act, S.Q. 1965, c. 14, s. 46 as amended by S.Q. 1969, c. 14, s. 33: "Before entering upon their duties or receiving any salary, the deputy-heads and permanent functionaries and the members of the office of a minister, of the Leader of the Opposition, of the President of the National Assembly, of the Vice-President of the National Assembly, of the Chief Government Whip or of the Chief Opposition Whip shall make the oath or solemn affirmation (of allegiance and office) contained in Schedule A to this Act. - the same oath or affirmation may be required of temporary or supernumerary employees by the head of the department."
172. Police and Prisons Regulation Act, R.S.B.C., 1960, c. 288, s. 7 (1); Municipal Act, R.S.B.C., 1960, c. 255, s. 674 as amended by S.B.C., 1967 c. 28, s. 30. Police Act, S.Q. 1967-68, c. 17, s. 3 (a). In British Columbia, the same apply to members of the Board of Commissioners of Police, under the Municipal Act, *ibid.*, s. 664 (4).
173. In British Columbia, see Municipal Act, *ibid.*, s. 49, 50 155 (2) and 190, as amended. In Quebec, Canadian citizenship and two years' residence in the municipality are required: Cities and Towns Act, R.S.Q. 1964, c. 193, s. 122 as amended by S.Q. 1969, c. 55; and s. 226 of the Municipal Code as modified.
174. See the Public Schools Act, R.S.B.C., 1960, c. 319, s. 35 (a) as amended by S.B.C., 1971, c. 47; Regional Hospital Districts Act, S.B.C., 1967, c. 43, as amended, s. 2; Water Act, R.S.B.C., 1960, c. 405, s. 57 (1); Liquor-control Plebiscites Act, R.S.B.C., 1960, c. 221, s. 2; Public Libraries Act, R.S.B.C. 1960, c. 316 s. 2, as amended by S.B.C. 1971, c. 46. As for qualifications of electors at the municipal level in British Columbia, see the Municipal Act, *ibid.*, s. 31s, but an "owner-elect" does not necessarily have to reside within the municipality. In Quebec, Canadian citizenship and one year's domicile are required, except in the case of a corporation: Cities and Towns Act, *ibid.*, s. 128 (a) as amended by S.Q. 1965, c. 55; and s. 243, 244 as modified, of the Municipal Code.
175. Supra, note (156)

176. For instance, the Public Libraries Act, R.S.B.C., 1960, c. 316, s. 29 as modified by S.B.C. 1968, c. 44, s. 10, struck out the British subject's qualification needed for being appointed a member of the Board. Now, if the person is not an elector in the meaning of the Municipal Act, he must at least have resided in the municipality for not less than six months last preceding his appointment.
177. R.S.C., 1970, c. C-19, s. 4 (1) constitutes a transitional provision declaring citizens by birth a certain number of persons born before the Act came into operation, and s. 9 conferred Canadian citizenship on certain categories of persons in Canada who did not meet the conditions to be natural born citizens: the latter provision is thus some sort of massive naturalization enactment of a transitional nature which cannot serve any more to confer citizenship on anyone else.
178. S. 5 (1) and (2) is the definitive provision used to determine whether those who are born after the coming into force of the Act are citizens by birth. All other persons may only acquire Canadian citizenship by following a procedure of naturalization (in the general sense of the term) and meeting the qualifications essentially laid down in s. 10 of the Act. Both citizens by birth and by naturalization gain a completely identical status: s. 22.
179. S. 21
180. (1857) 19 How. 393 (S. Ct.)
181. Ibid., at p. 405, per Taney C.J.
182. Ewart, note (5), at p. 839s.
183. Supra, text and notes (2)s.
184. Scott case, note (180), at p. 405
185. B.N.A. Act, s. 91 (25); U.S. Constitution, Art. I, s. 8.
186. Scott case, note (180), at p. 405-6. My underlining.
187. The phrase "and subject to the jurisdiction thereof" is supposed to exclude children of alien enemies in hostile occupation of the country, and children of foreign diplomatic representatives, just as the common law previously provided. Freund et al, note (19) at p. 840; United States v. Wong Kim Ark, (1898) 169 U.S. 649.

188. According to the decisions of the United States' Supreme Court "from the standpoint of the basic freedoms, there is to be no differentiation between the native-born and the naturalized citizen: they are on equal footing"; Konvitz note (40) at p. 146. The same applies also in Canada, by virtue of s. 22 of the Canadian Citizenship Act.
189. Slaughter-House Cases, (1873) 16 Wall. 36 (S.Ct.) at p. 74.
190. For jurisdictional purposes in cases of diversity of citizenship, see Bird, Kaiser and Deese case, note (44); for the purpose of Art. IV, s. 2, of the Constitution, see the cases in notes (66)s.
191. Toomer v Witsell, (1948) 334 U.S. 385, at p. 397. Chalker v. Birmingham & Northwestern R. Co., (1919) 249 U.S. 522 at p. 527. In La Tourette v McMaster, (1919) 248 U.S. 465, at p. 469, the state legislation was upheld because even the supreme court of the state construed the discrimination as affecting as well the "citizen of this state, who is not a resident of the state, and has not been a licensed insurance agent of this state for two years". It is, however, very unlikely that a citizen of the state will not be resident therein since he is domiciled there.
192. Travis v Yale & T. Mfg. Co. (1920) 252 U.S. 60, at p. 78-9; Blake v McClung, (1898) 172 U.S. 239, at p. 247.
193. Edwards v California (1941) 314 U.S. 160, at p. 183, per Jackson, J.
194. U.S. Constitution, Art. III, s. 2, cl. 1.
195. Notes (43) and following.
196. Notes (144) and (145).
197. (1966) 221 A. 2d 431 (Md. C.A.)
198. See note (140).
199. At p. 434.
200. (1893) 56 F. 576 (c.c.), at p. 581.
201. Crosse case, note (197), at p. 436.
202. (1966) 222 A. 2d 693 (Md.C.A.).
203. See, for instance, the provisions cited in notes (144) and (145).

204. Crosse case, note (197), at p. 433, and authorities there cited.
205. P. Weis, Nationality and Statelessness in International Law, London, Stevens & Sons Ltd., 1956, at p. 239.
206. Stoeck v Public Trustee (1921) 2 Ch. 67. G. Schwarzenberger, A Manual of International Law, 5th ed. London, Stevens and Sons, Ltd., 1967, at p. 141; L. Cavare, Le droit international public positif, Paris, Ed. A. Pedone, 1967, at p. 279; L. Delbez, Les principes généraux du droit international public, Paris, 1964, at p. 191s. International law imposes certain limits on municipal competence in this respect, by prohibiting, for instance, massive revocations of nationality coupled with deportation, massive imposition of nationality to foreigners, and so on. But it must be noted that there is no unanimity concerning what these rules are and what is their authority: see Weis, ibid., at p. 65s and 97s; Parry, note (2), at p. 9s; Dr. I. Brownlie, "The Relations of Nationality in Public International Law", (1963) 39 Br. Y. Int. L. 284, at p. 286s.
207. Brossard, at note (38), at p. 27: "La souveraineté comporte entre autres le droit pour un Etat de régir ses citoyens où qu'ils se trouvent (compétence personnelle) et celui de régir - à quelque exceptions près - les personnes et les biens qui se trouvent sur son territoire (compétence territoriale)."
208. See generally Parry, note (2), at p. 19; Brossard, loc. cit.; Carpentier, note (128), at p. 1, 9. It is because the several States are free to define at their own discretion who are their citizens that inconsistencies result necessarily as between their respective citizenship and naturalization laws, and lead to cases of double or multiple nationality and cases of statelessness. On the one hand, they can rely on different criteria to confer their citizenship at birth: jus soli, jus sanguinis, or a combination of both. On the other hand, naturalization (or the grant of citizenship to an alien) is a completely discretionary power and the State to whom the person belonged needs not be consulted, whether it permits or not the expatriation of its nationals: Re Herzfeld, (1914) Que. S.C. 281, at p. 282. Many efforts have been made both on municipal and international planes to eliminate the conflicts of nationality laws and the hardship of statelessness and double nationality. Internally, a change of nationality should always result from the conjunction of the laws of both countries in that the one terminates the former allegiance as soon as the other naturalizes the individual; a State cannot

withdraw by its own means the former nationality of those it naturalizes and "it will thus be seen that the laws of most countries now reciprocally contain general assent to the expatriation of citizens as a consequence of their naturalization in other countries": Ewart (note 5) at p. 845. Internationally, The Hague Conference of 1930 for the codification of law brought some results in this respect: see Weis, note (205), at p. 29s, and Brownlie, note (206), at p. 329s. Other efforts have been made in treaties to better the condition of stateless persons, refugees, etc.

209. If we take for granted that the exercise of a personal competence is always made outside the territory, we must admit that such competence is not exclusive, but concurrent with the territorial competence of another State. Therefore, the obligations imposed by a State to its citizens abroad can only be enforced with the consent of the other State, according to the principles of international law and comitas gentium. Cf. Parry, *ibid.*, at p. 15; Brossard, *ibid.*, at p. 27-28; Delbez, note (206) at p. 190s. Without such a consent, the enforcement will be likely to take place only by virtue of the territorial competence, that is to say, when the citizen will have come back to his own State. Thus, the exercise of a personal competence does not differ substantially from any other kind of extra-territorial power in that any State can, with the consent of another State, enforce all the measures it wants to pass, even against pure foreigners, as in the case of extradition, for example.
210. Weis, note (205), at p. 35; Brownlie, note (206), at p. 333; Parry, note (2), at p. 89s and 352s.
211. Citizens as such are entitled to diplomatic protection of their government without having to possess further qualifications, but that does not prevent non-citizens, in certain cases, from enjoying such privilege, as the "British protected persons" for example. "There does exist a certain correlation between nationality and the right of protection. But it is impossible to identify a State's nationals with those whom it is entitled to protect or vice versa": Parry, *ibid.*, at p. 11.
212. There exist other substantial rules ("clean hands", exhaustion of all internal recourses...), but they are irrelevant for my purpose. See Charpentier, note (128) at p. 39s; E.B. Wang, "Nationality of Claims and Diplomatic Intervention - Canadian Practice", (1965) 43 C.B.R. 136.

213. Wang, Ibid., at p. 144.
214. In Att.-Gen. of Canada v Cain, (1906) A.C. 542, the Privy Council held that the power to deport implied, if it is to be enforced, the power to impose extra-territorial constraint, and that the Parliament of Canada was competent to deal with such a matter despite the Colonial laws Validity Act.
215. Text reproduced in (1949) 27 C.B.R. 204. See Delbez, note (206), at p. 195.
216. See Weis, note (205), at p. 49s. In the matter of deportation, the need to take account not only of the removal of the individual from Canada but also of his acceptance by another country appears in the following cases: Chan v McFarlane, (1962) O.R. 798 (Ont. C.A.); Re Santa Singh, (1924) 3 D.L.R. 1088 (B.C.S.C.); Re Immigration Act and Hanna, (1957) 21 W.W.R. 400 (B.C.S.C.); Moore v Minister of Manpower and Immigration (1968) S.C.R. 839.
217. Charpentier, note (128), at p. 54s and 73s.
218. Laskin, note (14), at p. 990. Re Immigration Act and Munshi Singh, (1914) 6 W.W.R. 1347 (B.C.C.A.); Co-operative Com. on Japanese Canadians v Att. Gen of Can. (1947) A.C. 87, at p. 105.
219. By virtue of the Immigration Act of 1910, R.S.C. 1927, c. 93 s. 18; and now, the Immigration Act, R.S.C. 1970, c. I-2, s. 3 (1) enacts that "a Canadian citizen has the right to come into Canada". A person may have the burden to prove that he is a Canadian citizen: R. v Smith; Ex p. Soudas, (1939) 3 D.L.R. 189 (N.B.S.C.); Varin v Cormier, (1937) 3 D.L.R. 588 (Que. S.C.). But a preponderance of evidence will be sufficient: R. v Soon Gin An, (1941) 3 D.L.R. 125 (B.C.C.A.); Re Lee Wo Haw, (1941) 3 W.W.R. 223 (B.C.S.C.)
220. Re Chin Chee, (1905), 11 B.C.R. 400 (B.C. in Ch.); Shin Shim v. R., (1938) S.C.R. 378, at p. 380, per Duff, C.J. construing the Chinese Immigration Act, R.S.C. 1927, c. 95, repealed in 1947: "I do not think I am justified in concluding that it was the intention of Parliament to prevent Canadian citizens of Chinese origin or descent generally from entering Canada..."
221. In Louie Yuet Sun v R., (1961) S.C.R. 70, a Chinese woman had given birth to a child in Canada and contended that she could not be deported because her child, as a Canadian citizen, had the right to remain in the country. The Supreme Court unanimously rejected this argument but admitted that the infant could remain in Canada (SIC).

Also, in Voicy v Minister of Citizenship and Immigration (1959) Que. P.R. 38, at p. 44-5, the same contention was rejected because it was said that a person does not acquire Canadian citizenship by the mere fact of giving birth to a Canadian citizen.

222. Ekin v United States, (1892) 142 U.S. 651, at p. 659.
223. Charpentier, note (128), at p. 56s; Brossard, note (38), at p. 90; R.D. Yachetti, "Natural Justice and the Alien", (1965) 4 Western L.R. 68, at p. 68-9. In Canada, Re Janoczka, (1932) 3 W.W.R. 29 (Man. C.A.), at p. 31-2; Musgrove v Chung Teeong Toy, (1891) A.C. 272, at p. 282; Masella v Langlais, (1955) S.C.R. 263 at p. 281; Vaaro v R., (1933) S.C.R. 36 at p. 40. In the United States, Harisiades v Shaughnessy, (1952) 342 U.S. 580, at p. 586s; Fong Yue Ting v United States, (1893) 149 U.S. 698, at p. 707, 711-714, 730; Knauff v Shaughnessy, (1950) 338 U.S. 537; Calvan v Press, (1954) 347 U.S. 522, at p. 529-30; Shaughnessy v Mezei, (1953) 73 S. Ct. 625.
224. Harisiades case, ibid., at p. 588-9, and the cases there cited. Also, Ekin case, note (222); and Hines v. Davidowitz, (1941) 312 U.S. 52, where a federal statute requiring registration of aliens was upheld because the power was connected with naturalization and international affairs.
225. This "domicile" is acquired by having one's place of domicile in Canada for at least 5 years after being lawfully admitted for permanent residence: s. 4 (1), and s. 4 (2)s giving certain exceptions. Also, aliens who have a Canadian domicile cannot be deported in any of the cases established in s. 18 (e).
226. House of Commons, Debates, April 2, 1946, at p. 504, See also Can. Cit. Branch, note (10), at p. 367-8.
227. Tamaki, note (2), at p. 82.
228. Ibid., at 72 and 82.
229. S. 10 (1) (b), (c) (i) and (g). Re Albrecht, (1968) 2 Ex. C.R. 388.
230. See Dowhopoluk v Martin (1972) 1 O.R. 311 (Ont. H.C.), and Tamaki, note (2), at p. 76; Parry, note (2), at p. 492.

231. Double nationality was a very frequent result of the common law rule "nemo potest exuere patriam": "once a British subject, always a British subject." This principle was abolished in Great Britain in 1870 by the Naturalization Act, 33 Vict. c. 4, whereby naturalization in a foreign country led to the loss of British nationality, and in Canada in 1881 by the first general Act of naturalization, S.C. 1880-81, c. 13.
232. S. 15 (1) and 16 of the Canadian Citizenship Act.
233. Ibid, s. 20.
234. Knauer v. United States, (1946) 328 U.S. 654. But Communist Party membership is not sufficient, unless convincing evidence is given of the knowledge of the Party's illegal advocacy of governmental overthrow: Nowak v United States, (1958) 78 S.Ct. 955; Maisenberg v United States, (1958) 78 S. Ct. 960. Convincing evidence was given in Polites v. United States, (1960) 81 S. Ct. 202.
235. Afroyim v Rusk, (1967) 87 S. Ct. 1660, at p. 1668; overruling Percy v Brownell, (1958) 356 U.S. 44, at p. 60, where a provision making "voting in a political election in a foreign state or participation in an election or plebiscite to determine the sovereignty over foreign territory" a ground for withdrawal of citizenship had been upheld because it was "reasonably calculated to effect the end that is within the power of Congress to achieve, the avoidance of embarrassment in the conduct of our foreign relations attributable to voting by American citizens in foreign political elections." See also Mackenzie v Hare, (1915) 239 U.S. 299. In Nishikawa v Dulles, (1958) 356 U.S. 129, the fact of having involuntarily served in a foreign army was held not to be a reasonable ground for deprivation of citizenship; and so for the fact of having been convicted of war-time desertion from the armed forces, in Trop v Dulles, (1958) 356 U.S. 86; for remaining out of the United States in time of war to avoid military service, in Mendoza-Martinez v Mackey, (1958) 356 U.S. 258; Kennedy v Mendoza-Martinez, (1963) 83 S.Ct. 554. In Schneider v Rusk, (1964) 84 S.Ct. 1187, a provision that a naturalized citizen will lose his citizenship if he resides abroad continuously for 3 years was held ultra vires because there was no such limitation imposed on natural-born citizens.
236. R.S.C., 1927, c. 93, s. 2 (b).



237. Kennedy, note (10), at p. 372-3: "The covenant of the league of nations is perhaps the most remarkable recognition of Canada's constitutional development. Canada is included as an original member of the league in its own rights, possessing a vote in the assembly of the league and the right to be represented there by not more than three delegates, in the same manner as the British Empire. (note) The covenant of the league recognizes that each member has "nationals" of its own. As a consequence "Canadian nationals" were defined by a federal Act in 1921 (11-12 Geo V C.H.). The status of "Canadian nationals" as British subject is not touched. Certain British subjects are merely declared to have a status as "Canadian nationals."
238. See House of Commons, Debates, April 2nd, 1946, at p. 502s.
239. W.W. Toxey, "Restrictive Citizenship Policies Within the Commonwealth", (1967) 13 McGill L.J. 494.
240. Brossard, 1st Div., note (23), at p. 48.
241. S. 95 of the B.N.A. Act confers a concurrent competence with respect to immigration to federal and provincial legislatures, but the courts have seriously limited, if not completely denied, provincial competence in the matter by relying on the paramountcy doctrine, invalidating provincial Acts even though they were not inconsistent with federal legislation, because the latter had "provided a complete code dealing with immigration" and the former was not "in furtherance or aid of the federal legislation": Brossard, *ibid.*, at p. 46 and 59s; Laskin, note (14), at p. 990; R. v Narain, (1908) 8 W.L.R. 790 (B.C. Full C.); Re Nakane and Okazake, (1908) 13 B.C.R. 370 (B.C. Full C.); Re Munshi Singh, (1914) 20 B.C.R. 243 (B.C.C.A.,) at p. 265. The only power remaining to the provinces are to render more or less attractive the life in the province for certain persons by excluding them from sharing in the provincial privileges, as far as possible, and by legislating where the field is unoccupied, such as for the reception, recruitment and integration of immigrants. In the United States it has been held unconstitutional for the states to pass legislation affecting the entry of immigrants into their respective jurisdiction since the matter is vested exclusively in Congress: Chy Lung v Freeman, (1875) 92 U.S. 272.
242. R.S.O. 1970, c. 121.

243. (1970) S.C.R. 282.
244. Note (6)
245. (1903) A.C. 151, at p.156.
246. In Bryden, note (6), it was mentioned, at p. 586, that it was not "necessary, in the present case, to consider the precise meaning which the term "naturalization" was intended to bear"; accordingly, the Privy Council construed only the term "aliens" in section 91 (25), but it was not necessary either to go as far as it went.
247. Ibid., at p. 587.
248. See R.R. Price, "Mr. Justice Rand and the Privileges and Immunities of Canadian Citizens", (1958) 16 U.T. Fac. L.R. 16; and the authorities cited in note (38).
249. These terms have been used by the Lord Chancellor in Homma, note (245), at p. 156, and by Justice Rand in Winner, note (14), at p. 919.
250. Bryden, note (6), at p. 585. See also Homma, ibid., at 155-6; Ouong-Wing v The King, (1914) 49 S.C.R. 440 at p. 445 and 465.
251. See Price, note (248), at p. 19.
252. As has been noted by Lord Watson in Bryden, note (6), at p. 586, while speaking of the "natural-born Canadians It can hardly have been intended to give the Dominion Parliament the exclusive right to legislate for the latter class of persons resident in Canada."
253. ...at least as far as provincial legislation is concerned, because Homma did not so restrict Bryden as to empty s. 91 (25) of all consequential content. See In re The Japanese Treaty Act, 1913, (1920) 3 W.W.R. 937 (B.C.C.A.), at p. 940 per Macdonald C.J.A. (Gallihier J.A. concurring): ("Bryden decided) that the statute was aiming at both alien and naturalized Chinese and that, as to both classes their rights and disabilities were in the hands of the Dominion Parliament". And Brooks-Bidlake and Whittall, Ltd. v. Att. Gen. for B.C., (1923) A.C. 450, at p. 457, per Viscount Cave L.C.: "Sect. 91 reserves to the Dominion Parliament the general right to legislate as to the rights and disabilities of aliens and naturalized persons..."

254. Bank of Toronto v Lambe, (1887) 12 A.C. 575, at p. 588; Att-Gen. for Ont. v. Att.-Gen for Canada (1912) A.C. 571, at p. 581 and 584; Att.-Gen for Ont. v. Att.-Gen for Canada, (1947) A.C. 127, at p. 150.
255. Homma, note (245), at p. 156: "The extent to which naturalization will confer privileges has varied both in this country and elsewhere (...) In the history of this country the right to the franchise has been granted and withheld on a great number of grounds, conspicuously upon grounds of religious faith, yet no one has ever suggested that a person excluded from the franchise was not under allegiance to the Sovereign".
256. QuongWing case, note (250), at pp. 445. My underlining.
257. Ibid., at p. 447-8.
258. For example, such argument was given by Davies, J. Anglin conc., loc. cit. But it is a doubtful one by reason of the fact that even Homma, note (245), at p. 157, recognized at least that s. 91 (25) covered the "ordinary rights of the inhabitants" of a province, and among these, the right to reside in the province and to earn one's living therein.
259. See the argument of Idington, J., dissenting, in Quong-Wing, ibid., at p. 457-8, and also Att.-Gen. of B.C. v. Att. Gen of Canada (1924) A.C. 203, at p. 212.
260. Homma, note (245), at p. 156: "A child of Japanese parentage born in Vancouver City is a natural born subject of the King, and would be equally excluded from the possession of the franchise." Quong-Wing, ibid., at p. 444, 449s and 463s, where the four judges of the majority make much use of expressions like "independent of nationality", "racial prohibition" and so on.
261. Quong-Wing, Ibid., at p. 469. Also, Re Employment of Aliens, (1921-22) 63 S.C.R. 293, at p. 337, per Brodeur, J: "A provincial legislature cannot discriminate against an alien upon the ground of his lack of British nationality, but a person may nevertheless be under disability, civil or political by reason of racial descent, a disability which he would share with natural born or naturalized British subjects of like extraction."
262. See H.R. Eddy and W.W. Black, Casebook on Civil Liberties U.B.C., at p. I-17.
263. Brooks-Bidlake case, note (253), at p. 457.

264. Re Employment of Aliens, note (261), at p. 320 to 323.
265. Ibid., at p. 321.
266. Re Alberta Statutes, (1938) 2 S.C.R. 100.
267. See Cheffins, note (64) at p. 50; and J. Willis, "Statute Interpretation in a Nutshell," (1938) 16 C.B.R. 1, at p. 23 and 17: "Only one conclusion can be drawn from the present judicial addiction to the ancient presumptions and that is that the presumptions have no longer anything to do with the intent of the legislature; they are means of controlling that intent. Together they form a sort of common law "Bill of Rights" English and Canadian judges have no power to declare Acts unconstitutional merely because they depart from the good old ways of thought; they can, however, use the presumptions to mould legislative innovation into some accord with the old notions. The presumptions are in short "an ideal constitution" for England and Canada."
268. This point is so obscure that even the same judges contradict themselves when dealing with it. Compare the attitude of Davies and of Anglin J.J. in Quong-Wing, note (250), with their reasons in Re Employment of Aliens, note (261), at p. 301-2 and 333-4.
269. See for instance R. v Priest, Jan. 18th, 1904, on note at (1901-04) 10 B.C.R. 436, at p. 437: "If these persons are aliens, the case is governed by (Bryden). If they are British subjects, it affects trade and commerce.(...) Although the Province may make laws relating to property and civil rights, I do not think the latter can be treated as enabling the Legislature to exclude a large number of persons from earning a living in the manner they were brought up to".
270. See notes (191) and (192), and Goodwin v State Tax Commission, (1955) 146 N.Y.S. 2d 172 (N.Y.S.C., App. D.).
271. Winner case, note (14), at p. 919.
272. (1901-04) 10 B.C.R. 408.
273. Ibid., at p. 418.
274. Ibid., at p. 422.

275. Ibid., at p. 432-4; but Martin J. seems to have omitted to read the first sentence of Bryden, at p. 586.
276. Ibid., at p. 434-5: "...to hold otherwise would result in the conclusion that the rights of the natural-born subjects of the King in British Columbia are less than those of aliens or naturalized Chinese," and that, it is said, would be contrary to common sense and natural justice.
277. For instance, in Att.-Gen of B.C. v McDonald, (1961) 131 C.C.C.126 (B.C.Co.Ct.), section 94 (a) of the Indian Act was upheld because, being enacted for the protection of Indians, the accused had the right to equality with other Indians before the law! See also R. v Whiteman (No. 1), (1971) 2 W.W.R. 316 (Sask. Dist. C.), at p. 318.
278. (1970), S.C.R. 282
279. (1963), S.C.R. 651
280. Ibid., at p. 656 per Ritchie, J. Taschereau, Fauteux and Abbott, J.J. concurring, citing Frankfurter, J. in Board of Education v. Barnette, (1943) 319 U.S. 624, at p. 653.
281. Loc. cit. See also at p. 658: "...legislation for the preservation of the sanctity of Sunday has existed in this country from the earliest times and has at least since 1903 been regarded as a part of the criminal law in its widest sense. Historically, such legislation has never been considered as an interference with the kind of "freedom of religion" guaranteed by the Canadian Bill of Rights."
282. Drybones, note (278) at p. 295-6.
283. Robertson and Rosetanni, note (279), at p. 661.
284. Drybones, note (278), at p. 298.
285. (1971) 3 C.C.C. (2d) 98 (Ont. H.C.).
286. Ibids., at p. 103 and 101.
287. Ibid., at p. 109-110.
288. Ibid., at p. 122. Affirmed by the Supreme Court of Canada.
289. (1967) 3 C.C.C. 244 (Que. Q.B.), at p. 248. Leave to appeal was refused by the Supreme Court.

290. Smythe, note (285), at p. 110: "I have dealt at considerable length with the position of the Attorney-General in the administration of our criminal law. It, of course, applies also to the Attorneys-General of the Provinces, although their authority is not in question here. But in greater or lesser degree they are all entitled in the administration of their offices to make decisions regarding prosecution in an independent and judicial manner."
291. Ibid., at p. 106.
292. Ibid., at p. 105: "it would seem to me that the constitutional aspect of the Attorney-General's discretion in deciding whether to proceed by indictment or summarily is the same as his discretion in deciding whether to proceed at all, under which offence to proceed, or whether to exercise his right to withdraw a charge or enter a nolle prosequi on an indictment."
293. (1972) 1 O.R. 311 (Ont. H.C.).
294. Ibid., at p. 314.
295. 164 (1) (c)
296. R. v Beaulne, Ex p. La treille, (1971) 1 O.R. 630 (Ont. H.C.); R. v Lavoie, (1971) 1 W.W.R. 690 (B.C.Co.Ct.) approved by the Court of Appeal on July 14th, 1971, unreported. Contra, R. v Viens, (1970) 10 C.R.N.S. 363 (Ont. Prov. C.).
297. A significant fact is that the Royal Commission on the Status of Women in Canada had recommended its repeal because it was discriminatory and susceptible of abuse: see comment on Lavoie case by L. Smith at (1971) 6 U.B.C. L.R. 442, at p. 445 and 448.
298. Drybones, note (278), at p. 297.
299. Ibid., at p. 291. But by having limited "law" in "equality before the law" to laws of Canada, Drybones can be taken to have settled the matter; for instance the Federal Court of Appeal in Lavell, note (323), at p. 4-5, spoke about Drybones in these terms: "It is of course clear that the discrimination in that case was between the rights of Drybones, as an Indian to whom the Indian Act applied, and those of other Canadians not subject to the particular provision but nevertheless subject only to the laws of Canada as distinguished from laws of particular provinces of Canada..." (my underlining).

300. Ibid., at p. 303.
301. J.N. Lyon and R.G. Atkey, Canadian Constitutional Law in a Modern Perspective, Toronto, Univ. Tor. P. 1970, at p. 434.
302. (1971), 2 W.W.R. 316 (Sask. Dist.C.).
303. Ibid., at p. 317.
304. Ibid., at p. 320.
305. But he did in no way answer the contention of the appellant that such a wording was irrelevant since the provision amounted in practice "to discriminate against Indians who, with rare exceptions, are the only persons living on reserves": ibid., at p. 317.
306. Ibid., at p. 319.
307. The most recent challenges were directed at the new breathalyzer provisions, but none has succeeded: see R. v. Curr, (1971) 4 C.C.C. (2d) 24 (Ont. H.C.); R. v. Ness, (1971) 4 C.C.C. (2d) 42 (Sask. C.A.); R. v. McKay, (1971) 4 C.C.C. (2d) 45 (Man. C.A.); R. v. Brownridge, (1971) 4 C.C.C. (2d) 462 (Ont. C.A.); R. v. Vrchychyn, (1971) 4 C.C.C. (2d) 481 (Alta S.C., App. D.); R. v. Russell, (1971) 4 C.C.C. (2d) 494 (N.S.S.C., App.D.); R. v. Duke, (1971) 4 C.C.C. (2d) 504 (Ont. C.A.).
308. And it remains that the federal Parliament had not prohibited the same conduct off a reserve (i.e. to non-Indians in fact) by using its criminal law competence; then, it would have been easy to hold that it cannot legislate to this effect by virtue of section 91 (24) only.
309. See, for instance, A. Bradbrook, "An Empirical Study of the Attitudes of the Judges of the Supreme Court of Ontario Regarding the Workings of the Present Child Custody Adjudication Laws". (1971) 49 C.B.R. 557, especially at p. 564-5.
310. Drybones, note (278), at p. 306, per Pigeon J., dissenting.
311. Loc. cit. See also at p. 299, Abbott, J. dissenting.
312. See P. Weiler, "Two Models of Judicial Decision-Making", (1968) 46 C.B.R. 406, at p. 423.
313. Civil Liberties in Canada, London, Oxford U.P. 1964, p. 42.

314. Note (301), at p. 64. See also J.N. Lyon, "A Fresh Approach to Constitutional Law: Use of a Policy-Science Model", (1967) 45 C.B.R. 554, at p. 561.
315. See the approach of Clement J.A. in R. v Vrchyshyn, note (307).
316. J. Frank, as reproduced in J. Matkin, The Legal Process of the Supreme Court of Canada, preliminary draft edition, U.B.C., 1971, at p. 257.
317. I.C. Rand, "The Role of an Independent Judiciary in Preserving Freedom", (1951-52) 9 U.T.L.J. 1, at p. 4.
318. J.C. Smith, "Regina v. Drybones and Equality Before the Law", (1971) 49 C.B.R. 163, at p. 170.
319. Notes (152) and (235).
320. It is the same kind of test as the one proposed by Professor Smith in his article, loc. cit., that has been applied in R. v Lavoie, note (296), at p. 695s, where it was decided that since a woman acquires voluntarily the status of prostitute, she is not in a position to complain that she is unequal before the law. Such test would also come short of rendering inoperative the provision impugned in Lavell, note (323), if the court wants to consider that the Indian woman only has not to get married if she wants to remain in the band.
321. Smith, *ibid.*, at p. 186. See also P. Weiler, "Legal Values and Judicial Decision-Making", (1970) 48 C.B.R. 1; and Rand, note (317), at p. 6: "...although in the public aspect, the conclusion of controversies is of paramount importance, it will be nullified in so far as it falls short of general acceptance by the community."
322. For an enumeration of them, see Schmeiser, note (313, ) at p. 287.
323. On appeal from Lavell v Att.-Gen of Can., Oct. 8, 1971, Fed. C. of App., Jackett, C.J., Thurlow and Pratte, J.J. unreported yet.
324. Frank, note (316), recognizes that rules and principles of law are among the factors susceptible of influencing the judge in his decision-making process, besides his personality itself which is one of the most important "hunch producer". But the more this personality will



have been moulded, through passage in the law school and evolution in the legal arena, in positivist and legalistic patterns, the less likely it is that other kinds of prejudices or individual factors will weigh in the balance.

- 325. Note (312), at p. 471.
- 326. P. Weiler, "The Supreme Court of Canada and the Doctrines of Mens Rea," (1971) 49 C.B.R. 280.
- 327. L.-P. Pigeon, speech at the Ninth International Symposium on Comparative Law, Ottawa, September, 1971, mimeo, at p. 15.
- 328. Reproduced in Matkin, note (316), at p. 376s.
- 329. For instance, see the reasons of Laskin J.A., as he then was, in R. v. Tarnopolsky, Ex parte Bell, (1970) 11, D.L.R. (3d) 658 (Ont. C.A.) at p. 668-9.
- 330. Laskin, note (328), at p. 383; and L-P. Pigeon, "The Human Element in the Judicial Process", (1970) 8 Alta. L.R. 301, at p. 310.
- 331. Pigeon, ibid., at p. 304. See also Laskin, ibid., at p. 384
- 332. For a general account of them, see P.H. Russell, The Supreme Court of Canada as a Bilingual and Bicultural Institution, Documents of the Royal Commission on Bilingualism and Biculturalism, Ottawa, Information Canada, 1969, 1st and 2nd chapters.
- 333. Note (312), at p. 437s.
- 334. Ibid., at p. 407.
- 335. Yachetti, note (223), at p. 89.
- 336. Vaaro v The King, (1933) 1 D.L.R. 359 (S.C.C.) at p. 362, per Lamont J. Consequently, the right to habeas corpus declared in s. 2 (c) (iii) of the Bill of Rights will be available to aliens, even in immigration matters: Hecht v McFaul, (1961) Que. S.C. 392.
- 337. Head, note (29), at p. 139.
- 338. "...without discrimination by reason of race, national origin, colour, religion or sex..." Prof. Smith, note (318), at p. 170, noted that the judges of the majority in Drybones took "subsection (b) to be not limited by the enumerated forms of discrimination in the opening sentence of the first section". However, the contrary has been decided recently in Smythe, note (285), and the point must be taken as unsettled..

- 339. (1970) 5 C.C.C. 107 (N.S.S.C.).
- 340. Note (293), at p. 318.
- 341. See Pigeon J., dissenting in Drybones, note (278), at p. 303-4.
- 342. The phrase has been used by K. Lysyk, "The Unique Constitutional Position of the Canadian Indian," (1967) 45 C.B.R. 513, at p. 535.
- 343. Then, it would be just normal that each of these levels be entitled to act, within the range of its legislative powers, with respect to all people who are in its borders, irrespective of what status they possess.
- 344. See note (102) in fine, for example.
- 345. See, for instance, the Acts cited in note (109).

## LITERATURE CITED

- A.S. Abel, "The Role of the Supreme Court in Private Law Cases", (1965) 4 Alta L.R. 39.
- C.J. Antieau, Commentaries on the Constitution of the United States, Buffalo, Dennis & Co., 1960.
- C.J. Antieau, Modern Constitutional Law, California, Bancroft Whitney Co., 1969.
- M.A. Banks, "The Franchise in Britain and Canada", (1967) 17 U.T.L.J. 187.
- A. Bradbrook, "An Empirical Study of the Attitudes of the Judges of the Supreme Court of Ontario Regarding the Workings of the Present Child Custody Adjudication Laws," (1971) 49 C.B.R. 557.
- J. Brossard, L'immigration, Montreal, P.U.M. 1967.
- Dr. I. Brownlie, "The Relations of Nationality in Public International Law", (1963) 39 Br. Y. Int. L. 284.
- Canadian Citizenship Branch of the Dept. of the Secretary of State, "The Canadian Citizenship Act", (1947) 25 C.B.R. 364.
- M. Caron, "La Province de Quebec est-elle un etat?" (1938) 14 Actualite economique 121.
- J.-G. Castel, Private International Law, Toronto, Canada Law Book Co. 1960.
- L. Cavare, Le droit international public positif, Paris, Ed. A. Pedone, 1967.
- J. Charpentier, L'etranger en droit international, Paris, Institut des Hautes Etudes Internationales, 1966-67.
- R.I. Cheffins, The Constitutional Process in Canada, Toronto, McGraw-Hill, 1969.
- A.H. Clarke, "Citizenship and Naturalization," (1915) 35 Can. L.T. 317.
- L. Delbez, Les principes generaux du droit international public, Paris, 1965.

- H.R. Eddy and W.W. Black, Casebook on Civil Liberties, U.B.C., 1971
- C.S. Emden, The People and the Constitution, 2nd ed., Oxford, Clarendon Press, 1956.
- J.S. Ewart, "Naturalization", (1911) Can. L.T. 837.
- E. Freund et al, Constitutional Law, 2nd ed. Boston, Little, Brown and Co., 1961.
- E. Freund, Standards of American Legislation, Chicago, Univ. of Chic. P.1965.
- I.L. Head, "The Stranger in Our Midst; A Sketch of the Legal Status of the Alien in Canada", (1964) 2 Can. Y. Int. L. 107.
- T. Hodgins, "The Law of Allegiance in Canada", (1881) 1 Can. L.T. 1.
- N.W. Hoyles, "Naturalization of Aliens", (1905) 21 Can. L.T. 181.
- W.P.M. Kennedy, The Constitution of Canada, 1534-1937. An Introduction to its Development, Law and Custom, 2nd ed., Oxford U.P., 1938.
- W.P.M. Kennedy, "Nationality", (1935-36) 1 U.T.L.J. 139.
- M.R. Konvitz, The Alien and the Asiatic in American Law, New York, Cornell U.P. 1946.
- B. Laskin, Canadian Constitutional Law, 3rd ed., Toronto, Carswell, 1966.
- B. Laskin, "Constitutional Law - State Legislation Prohibiting Interstate Migration - Applicability of Problem to Canada", (1941) 19 C.B.R. 750.
- W.J. Lindal, Canadian Citizenship and our Wider Loyalties, Winnipeg, Can. Press Club, 1946.
- J.N. Lyon, "A Fresh Approach to Constitutional Law: Use of a Policy-Science Model", (1967) 45 C.B.R. 554.
- J.N. Lyon and R.G. Atkey, Canadian Constitutional Law in a Modern Perspective, Toronto, University of Toronto Press, 1970.

- K. Lysyk, "The Unique Constitutional Position of the Canadian Indian," (1967) 45 C.B.R. 513.
- L.R. MacTavish, "Uniformity of Legislation in Canada - An Outline," (1947) 25 C.B.R. 36.
- J. Matkin, The Legal Process of the Supreme Court of Canada, preliminary draft edition, U.B.C. 1971.
- J. Mercier, "Immigration et droit des provinces", (1944) 4 R. du B. 149.
- J.H.C. Morris, The Conflict of Laws, London, Stevens and Sons Ltd., 1971.
- M. Ollivier, Problems of Canadian Sovereignty, Toronto, Can. Law Book, 1945.
- C. Parry, Nationality and Citizenship Laws of the Commonwealth and of the Republic of Ireland, London, Stevens and Sons Ltd., 1957.
- L.P. Pigeon, "The Human Element in the Judicial Process", (1970) 8 Alta L.R. 301.
- L.P. Pigeon, speech at the Ninth International Symposium on Comparative Law, mimeo, Ottawa Sept. 197.
- R.R. Price, "Mr. Justice Rand and the Privileges and Immunities of Canadian Citizens", (1958) 16 U.T. Fac. L.R. 16.
- I.C. Rand, "The Role of an Independent Judiciary in Preserving Freedom", (1951-52) 9 U.T.L.J. 1.
- H.E. Read, "The Public Responsibilities of the Academic Law Teacher in Canada", (1961) 39 C.B.R. 232.
- P.H. Russell, The Supreme Court of Canada as a Bilingual and Bicultural Institution, Documents of the Royal Commission on Bilingualism and Biculturalism, Ottawa, Information Canada, 1969.
- M. St.-Aubain, "La province de Québec est-elle un Etat?", (1963) 13 R.J.T. 51.
- D.A. Schmeiser, Civil Liberties in Canada, London, Oxford U.P., 1964.

- G. Schwarzenberger, A Manual of International Law, 5th edition, London, Stevens and Sons Ltd., 1967.
- J.C. Smith, "Regina v Drybones and Equality Before the Law," (1971) 49 C.B.R. 163.
- L. Smith, "Case and Comment", (1971) 6 U.B.C.L.R. 442.
- G.T. Tamaki, "The Canadian Citizenship Act, 1946", (1947-48) 7 U.T.L.J. 68.
- W.W. Toxey, "Restrictive Citizenship Policies Within the Commonwealth", (1967) 13 McGill L.J. 494.
- J. Tussman and J. tenBrock, "The Equal Protection of the Laws", 1949 37 Calif, L.R. 341.
- W.B. Wang, "Nationality of Claims and Diplomatic Intervention - Canadian Practice", (1965 43 C.B.R. 136.
- P. Weiler, "Legal Values and Judicial Decision-Making" (1970) 48 C.B.R. 1.
- P. Weiler, "The Supreme Court of Canada and the Doctrines of Mens Rea", (1971) 49 C.B.R. 280.
- P. Weiler, "Two Models of Judicial Decision-Making", (1968) 46 C.B.R. 406.
- P. Weis, Nationality and Statelessness in International Law, London, Stevens and Sons Ltd., 1956.
- J. Willis, "Securing Uniformity of Law in a Federal System - Canada", (1943-44) 5 U.T.L.J. 352
- J. Willis, "Statute Interpretation in a Nutshell", (1938) 16 C.B.R. 1.
- R.R. Wilson and R.E. Clute, "Commonwealth Citizenship and Common Status", (1963) Am.J. Int.L. 566.
- R.D. Yachetti, "Natural Justice and the Alien", (1965) 4 Western L.R. 68.