

CANADIAN REGULATION OF FOREIGN INVESTMENT: THE LEGAL PARAMETERS

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I. Introduction.

The recent increase in the intensity of the debate over foreign investment in Canada has been accompanied by a great increase in writings and reports on the subject. Whereas seven or eight years ago only Walter Gordon and a few scholars were writing about foreign investment, today we have governmental reports such as the *Report of the Ontario Inter-departmental Task Force on Foreign Investment*,¹ business reports such as that by the Committee of the Canadian-Montreal-Toronto-Vancouver Stock Exchanges and of the Investment Dealers Association,² and academic writings ranging from those of Professor A. E. Safarian³ to those of Professor Kari Levitt.⁴ And, of course, we have the "abbreviated but authentic version" of a Memorandum to the federal cabinet which was published by *The Canadian Forum* in December, 1971.⁵

This extensive research and analysis of the economic, political, social and cultural aspects of the issue of foreign investment has not included a corresponding degree of research and analysis of the legal aspects. In view of the significant number of *ad hoc* legislative restraints enacted in recent years, and with the public debate moving rapidly towards more comprehensive approaches, consideration of the many relevant legal questions is urgently required.

The purpose of this article is to explore the two most fundamental legal parameters within which any governmental controls

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¹ (1971).

² The so-called "Moore Report" (1970).

³ The Performance of Foreign-owned Firms in Canada (1969).

⁴ Silent Surrender. The Multi-national Corporation in Canada (1970).

⁵ Colloquially and hereinafter referred to as the Gray Report. This article was completed two months before the Government of Canada on May 2nd, 1972 tabled the document entitled "Foreign Direct Investment in Canada". However, it is clear that the abbreviated Memorandum published in *The Canadian Forum* contained the essence of the document so tabled. While a detailed critique of the federal government's policy announced on May 2nd, 1972 could not be given here, the comments in Part IV of this article are relevant.

on foreign investment in Canada must fall, namely, the limitations on Parliament and the provincial legislatures imposed by the British North America Act of 1867 and the constraints on both imposed by international law.

II. *Constitutional Jurisdiction.*

1. *Introduction.*

The regulation of investment obviously is a matter touching property and civil rights within the provinces,⁶ and, as such, *prima facie* falls within provincial jurisdiction. It is also possible that some authority exists in Parliament under its Trade and Commerce power in section 91 (2) of the British North America Act and under its residuary power.⁷ However, there would appear to be a more specific constitutional directive as to legislative authority over the regulation of *foreign* investment. Item 25 of section 91 of the Act grants to the federal Parliament exclusive legislative authority respecting "Naturalization and Aliens". This item appears to give Parliament both full and exclusive jurisdiction to regulate foreign investment.

2. *The Aliens Power.*

A restriction on foreign investment is, in simplest terms, a restriction of the rights of foreigners, that is, "aliens". It may be an outright prohibition on the acquisition of Canadian property by aliens. It may permit such acquisition subject to compliance with certain terms and conditions. It may involve the regulation or even forced divestiture of Canadian property already acquired. But whatever the legislative scheme may be, the regulation of foreign investment is nothing other than legislation respecting the rights of aliens.

In view of this rather obvious constitutional directive, the lack of scholarly comment on it is surprising.⁸ The reason may be that there have been no judicial considerations of this head of legislative power since the beginning of the modern debate on foreign investment in Canada. The lines of the constitutional issue were

⁶ See, for example, *Lymburn v. Mayland*, [1932] A.C. 318.

⁷ See, generally, MacNab, *Constitutionality of Federal Control of Foreign Investment* (1965), 23 U. of T. Fac. of L. Rev. 95.

⁸ It was referred to briefly but explicitly by Professor Ken Lysyk: Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and House of Commons on the Constitution of Canada, Issue No. 59 (March 25th, 1971), pp. 5-7 and 18-20; *Ibid.*, for Arnold, *Restrictions on Foreign Investment in Canadian Financial Institutions* (1970), 20 U. of T.L.J. 196, at pp. 208-210; but it was completely ignored by MacNab, *Constitutionality of Federal Control of Foreign Investment*, *op. cit.*, *ibid.*; see, generally, Head, *The Stranger in our Midst: A Sketch of the Legal Status of the Alien in Canada* (1964), 2 Can. Y.B. Int'l. L. 107.

drawn out many years ago in a series of cases concerned with discrimination against Orientals and in another line of cases concerned with the insurance industry.

Discrimination against Orientals

The leading case is *Union Colliery Co. v. Bryden*⁹ which involved section 4 of the Coal Mines Regulation Act 1890 of British Columbia. That section provided:

. . . no boy under the age of twelve years and no woman or girl of any age, and no Chinaman, shall be employed-in or allowed to be for the purpose of employment in any mine to which the Act applies, below ground.

The Judicial Committee of the Privy Council held that this provision was *ultra vires* as contrary to item 25 of section 91 of the British North America Act. Lord Watson, delivering the Committee's judgment, concluded that the "leading feature" of the provisions was that they had and could have:

. . . no application except to Chinamen who are aliens or naturalized subjects, and that they establish no rule or regulation except that these aliens or naturalized subjects shall not work, or be allowed to work, in underground coal mines within the Province of British Columbia.¹⁰

It must be noted that Lord Watson did not appear to consider that the enactments might have had application to "Chinamen" who were natural-born British subjects. However, in this regard he was only following the apparent direction of counsel for the Attorney General of British Columbia.¹¹ In any event, having isolated the leading feature of the legislation he delineated the relevant legislative authority in the following classic language:¹²

Their Lordships see no reason to doubt that, 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. They are also of opinion that the whole pith and substance of the enactments of s. 4 of the Coal Mines Regulation Act, insofar as objected to by the appellant company, consists in establishing a statutory prohibition which affects aliens or naturalized subjects, and therefore trench upon the exclusive authority of the Parliament of Canada.

The *Bryden* case was somewhat limited by the Privy Council's decision in *Cunningham and A.G. for B.C. v. Tomey Homma and A.G. for Canada*¹³ concerning the constitutional validity of

⁹ [1899] A.C. 580.

¹⁰ *Ibid.*, at p. 587.

¹¹ *Ibid.*, at p. 582.

¹² *Ibid.*, at p. 587.

¹³ [1903] A.C. 151.

section 8 of the Provincial Elections Act of British Columbia which provided that:

. . . no Chinaman, Japanese, or Indian shall have his name placed on the register of voters for any electoral district, or be entitled to vote at any election.

Tomey Homma, a native of the Japanese Empire who had become a naturalized British subject, had applied to have his name placed on the register of voters but his application had been refused in reliance upon the provincial statute. The Privy Council distinguished the *Bryden* case and found the statute to be *intra vires*. Since Tomey Homma was a British subject Lord Halsbury was forced to consider the point which Lord Watson had missed when dealing with the similar wording in the Coal Mines Regulation Act, 1890, namely, that the statutory prohibition applied to persons on the ground of race and not on the ground of nationality. Lord Halsbury did not specifically deal with this oversight by Lord Watson¹⁴ but observed that:¹⁵

. . . the enactment, supposed to be *ultra vires* and to be impeached upon the ground of its dealing with alienage and naturalization, has not necessarily anything to do with either. 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.

Lord Halsbury experienced some difficulty in defining the "aliens" power:¹⁶

Could it be suggested that the province of British Columbia could not exclude an alien from the franchise in that province? Yet, if the mere mention of alienage in the enactment could make the law *ultra vires*, such a construction of s. 91, sub-s. 25, would involve absurdity. The truth is that the language of that section does not purport to deal with the consequences of either alienage or naturalization. It undoubtedly reserves these subjects for the exclusive jurisdiction of the Dominion — that is to say, it is for the Dominion to determine what shall constitute either the one or the other, but the question as to what consequences shall follow from either is not touched. The right of protection and the obligations of allegiance are necessarily involved in the nationality conferred by naturalization; but the privileges attached to it, where these depend upon residence, are quite independent of nationality. . . .

This, indeed, seems to have been the opinion of the learned judges below; but they were under the impression that they were precluded from acting on their own judgment by the decision of this Board in the case of *Union Colliery Co. v. Bryden*, [1899] A.C. 587. That case depended upon totally different grounds. This Board, dealing with the particular facts of that case, came to the conclusion that the regulations there impeached were not really aimed at the regulation

¹⁴ Martin J. did, however, in *In Re the Coal Mines Regulation Act and Amendment Act, 1903* (1904), 10 B.C.R. 408, at p. 433.

¹⁵ *Supra*, footnote 13, at p. 156.

¹⁶ *Ibid.*, at pp. 156-157.

of coal mines at all, but were in truth devised to deprive the Chinese, naturalized or not, of the ordinary rights of the inhabitants of British Columbia and, in effect, to prohibit their continued residence in that province since it prohibited their earning their living in that province. It is obvious that such a decision can have no relation to the question whether any naturalized person has an inherent right to the suffrage within the province in which he resides.

Did Lord Halsbury, in stating that "the question as to what consequences shall follow from either (alienage or naturalization) is not touched", intend to limit the federal power to that of definition? This would appear to be a strangely restrictive interpretation of a head of legislative authority, and certainly not an interpretation followed in the later cases. But furthermore, in the subsequent sentence Lord Halsbury indicated that jurisdiction concerning the "right of protection" and "the obligations of allegiance" is federal. Hence, something more than a definitional power must have been intended.

Lord Halsbury also appears to have been making a distinction between jurisdiction respecting aliens' rights and that respecting aliens' privileges, the implication being that the former are a necessary incident of the status of an alien while the latter are not. In any event, Lord Halsbury's judgment itself received a rather restrictive interpretation in the next case of *In Re the Coal Mines Regulation Act and Amendment Act, 1903*.¹⁷

Lord Halsbury's judgment having been rendered on December 17th, 1902, in 1903 the British Columbia Legislature re-enacted the Coal Mines Regulation Act,¹⁸ which had been declared *ultra vires* in the *Bryden* case. The re-enactment tried to take advantage of the *Tomey Homma* decision by:

- (a) placing the prohibition on the use of Chinese labour in "regulations" respecting the operation of coal mines, in order that it would appear to be simply a regulation of coal mining, and
- (b) basing the test of exclusion on fitness for work rather than on nationality:

No Chinaman or person unable to speak English shall be appointed to or shall occupy any position of trust or responsibility in or about a mine subject to this Act, whereby through his ignorance, carelessness or negligence he might endanger the life or limb of any persons employed in or about a mine. . . .

The question of the validity of this statute was referred to the Supreme Court of British Columbia which held that it was *ultra vires*.¹⁹ Hunter C.J. stated that:²⁰

¹⁷ *Supra*, footnote 14.

¹⁸ S.B.C., 1903, c. 17.

¹⁹ *Re the Coal Mines Regulation Act and Amendment Act, 1903*, *supra*, footnote 14.

²⁰ *Ibid.*, at p. 413.

That case [the *Bryden* case] expressly decided that the enactment that no Chinaman shall be employed below ground was *ultra vires* of the Legislature of the Province on the ground that the leading feature of the legislation is to debar all persons belonging to a named nationality from engaging in a particular employment or class of labour, and that power to pass legislation of this character resides in the Parliament of Canada to the exclusion of the Legislatures of the Provinces.

Rule 34 (the regulation to be construed) is, *quoad* this question, an identical re-enactment of the legislation thus reviewed, and is therefore to such an extent null and void.

With respect to the argument that "no Chinaman" has reference to the factor of race and not to the factor of nationality or alienage, Hunter C.J. held that he was bound by the earlier decision in the *Bryden* case. He found that that decision was unimpaired by the decision in the *Tomey Homma* case because:²¹

The questions raised in the two cases are not in the same plane. The one case decided that the power to exclude a particular nationality from a given employment was vested in the Parliament of Canada, and the other that each Legislature in the exercise of its power to regulate the provincial franchise could exclude any particular nationality from the right to vote.

Irving J. rejected the argument that the purpose of the Act was to regulate coal mines:²²

Is not the pith and substance of this so-called rule to prevent Chinamen from working underground, regardless of their individual fitness or capacity to properly perform the work?

In the paragraph quoted (rule 34), I can see no rule or regulation, established or sought to be established, by which the fitness of a Chinaman to properly perform the work of an underground miner can be tested. He may speak the English language perfectly; he may be a skilled mining engineer; but these points are immaterial. He is debarred by reason of the fact that he is a Chinaman. I refer to these matters not because I wish to discuss the policy or impolicy of the enactment, but in order to shew, by the absence of these tests, that there is in truth no real difference between this Statute of 1903 and the Statute of 1890 considered in the case of *Bryden v. Union Colliery Co.*

For these reasons I think the decision in the *Bryden* case should govern our answer to the question submitted to us.

This points the way to a method for determining the pith and substance of legislation affecting aliens: if the legislation in question discriminates against a person on the grounds of his alienage, then in pith and substance it is legislation respecting aliens.

In *Quong-Wing v. The King*²³ a Saskatchewan statutory provision which prevented Chinese restaurant owners and others from

²¹ *Ibid.*, at p. 414.

²² *Ibid.*, at p. 416.

²³ (1914), 49 S.C.R. 440.

employing "any white woman or girl" was held to be *intra vires* of the Saskatchewan Legislature. The conviction of a naturalized British subject of Chinese origin for employing white females was upheld. It is quite clear from the judgment that the basis for the holding was that the statute, by its very term, applied to persons by race rather than by nationality. Davies J. stated:²⁴

The prohibition against the employment of white women was not aimed at alien Chinamen simply or Chinamen having any political affiliations. It was against "any Chinaman" whether owing allegiance to the rulers of the Chinese Empire, or the United States Republic, or the British Crown. In other words, it was not aimed at any class of Chinamen, or at the political status of Chinamen, but at Chinamen as men of a particular race or blood and whether aliens or naturalized.

Both a finishing touch and a new twist to the oriental discrimination cases were added by the decisions resulting from the Oriental Orders in Council Validation Act²⁵ passed by the British Columbia Legislature in 1921. This Act purported to validate certain 1902 Orders in Council of the Executive Council of the Province of British Columbia which had provided that no Chinese or Japanese should be employed in connection with certain Crown leases and licences. However, in 1913 a treaty had been concluded between His Majesty the King and the Emperor of Japan by which it was agreed that the subjects of each of the sovereigns should have full liberty to enter, travel and reside in the territories of the other, and that, in all that related to the pursuit of their industries, callings, professions and educational studies, such respective subjects should be placed in all respects on the same footing as the subjects or citizens of the most favoured nation. Subsequently, the Dominion Parliament had passed The Japanese Treaty Act²⁶ of 1913 sanctioning the Treaty and declaring it to have the force of law in Canada.

Two cases resulted.²⁷ The first was an action commenced by the holders of certain special timber licences granted by the British Columbia Minister of Lands under the British Columbia Crown Lands Act. The licences were subject to the stipulation inserted in accordance with the Orders in Council of 1902 that no Chinese or Japanese were to be employed in connection therewith. In the face of a threat of the Minister of Lands to cancel the licences, the licencees claimed a declaration that they were entitled to employ Chinese and Japanese on the timberlands and an injunction against the interference with their enjoyment under the licences. While this case was being argued the Act was re-

²⁴ *Ibid.*, at p. 449.

²⁵ 11 Geo. 5, c. 49 (B.C.).

²⁶ 3 & 4 Geo. 5, c. 27 (Can.).

²⁷ *Brooks-Bidlake and Whittall, Ltd. v. A.G. for B.C.*, [1923] A.C. 450; *A.G. of B.C. v. A.G. of Canada*, [1924] A.C. 203.

ferred to the Supreme Court of Canada by the Governor General.

In both cases it was argued that the provincial statute was *ultra vires* for two reasons:

- (a) on the ground that it was legislation respecting naturalization and aliens and therefore within the exclusive jurisdiction of the Parliament of Canada; and
- (b) on the ground that it conflicted with the Japanese Treaty Act of 1913.

The Privy Council upheld the dismissal of the licences' action in *Brooks-Bidlake and Whittall, Ltd., v. A.G. for B.C.*,²⁸ holding that the Oriental Orders in Council Validation Act did not contravene section 91 (25) of the British North America Act. Viscount Cave stated:²⁹

Sect. 91 [of the B.N.A. Act] reserves to the Dominion Parliament the general right to legislate as to the rights and disabilities of aliens and naturalized persons; but the Dominion is not empowered by that section to regulate the management of the public property of the Province, or to determine whether a grantee or licensee of that property shall or shall not be permitted to employ persons of a particular race. These functions are assigned by s. 92, head 5, and s. 109 of the Act to the Legislature of the Province; and there is nothing in s. 91 which conflicts with that view. In *Union Colliery Co. v. Bryden*, [1899] A.C. 580, this Board held that a section in a statute of British Columbia which prohibited the employment of Chinamen in coal mines underground was beyond the powers of the Provincial Legislature; but this was on the ground that the enactment was not really applicable to coal mines only — still less to coal mines belonging to the Province — but was in truth devised to prevent Chinamen from earning their living in the Province. On the other hand, in *Cunningham v. Tomey Homma*, [1903] A.C. 151, where another statute of British Columbia had denied the franchise to Japanese, the Board held this to be within the powers of the Provincial Legislature, which had the exclusive right to prescribe the conditions under which the Provincial legislative suffrage was to be conferred.

Viscount Cave apparently felt that the pith and substance of the provincial legislation was not restrictions concerning aliens but rather the "management of the public property of the province" or the determination of "whether a grantee or licensee of that property shall or shall not be permitted to employ persons of a particular race". Great reliance was placed on head 5 of section 92 of the British North America Act which provides that the province shall have exclusive jurisdiction relating to,

The Management and Sale of Public Lands belonging to the Province and of the Timber and Wood thereon.

as well as the jurisdiction arising from section 109 of the British

²⁸ *Brooks-Bidlake and Whittall, Ltd. v. A.G. for B.C.*, *ibid.*

²⁹ *Ibid.*, at p. 457.

North America Act providing that property, land and mines and so on belong to the province.

Since the particular licence stipulation which had been broken by the plaintiff licencees was that concerning the employment of Chinese, not Japanese, labour, and since such stipulation was found to be severable, Viscount Cave held that any contravention of the Japanese Treaty Act of 1913 was irrelevant. On the other hand, in the general reference,³⁰ Viscount Haldane disallowed the Act on the ground that it contravened the Japanese Treaty Act of 1913. Hence, while the general reference ultimately provided no useful illumination of the law respecting the "aliens" power, it did point out another area of constitutional concern relevant to the issue of foreign investment.³¹

The oriental discrimination cases indicate that the Parliament of Canada has exclusive jurisdiction to legislate generally as to the rights and disabilities of aliens and naturalized persons. Beyond that, these cases indicate that the Parliament of Canada has exclusive jurisdiction concerning the rights of aliens or naturalized persons in the province, while the province's exclusive jurisdiction relates to provincial benefices, be they privileges such as the provincial franchise or the opportunity to work on government contracts. The key question in each of these cases was as to the legislation's pith and substance, that is whether it was really directed at the class of aliens as such or at the distribution and regulation of such benefices.

Insurance cases

In a series of cases concerning legislation respecting the insurance industry, the "aliens" power was explored in the context of more modern economic regulation. In *Citizens Insurance Co. v. Parsons*³² the Privy Council had upheld the authority of the Legislature of Ontario to enact legislation regulating contracts of insurance. However, in 1910 the Parliament of Canada enacted an Insurance Act³³ which purported to provide for a system of licensing of insurers across Canada. Section 4 of such Act provided:

In Canada, except as otherwise provided by this Act, no company or underwriters or other person shall . . . carry on any business of insurance . . . unless it be done by or on behalf of a company or underwriters holding a licence from the Minister.

This enactment led to the *Insurance Reference*³⁴ and Viscount Haldane's judgment that it was *ultra vires* of the Parliament of Canada. In the main branch of the case the judge rejected the

³⁰ *A.G. of B.C. v. A.G. of Canada, ibid.*

³¹ See below.

³² (1881-2), 7 App. Cas. 96.

³³ 9 & 10 Edw. 7, c. 32 (Can.).

³⁴ *A.G. for Canada v. A.G. for Alberta*, [1916] 1 A.C. 588.

federal authority to enact a licencing scheme under either "Trade and Commerce" or "Peace, Order and Good Government".

However, the reference by the Governor General had also asked a second and more specific question, namely, whether section 4 of such federal Insurance Act operated to prohibit an insurance company incorporated by a foreign state from carrying on the business of insurance within Canada if such company did not hold a licence from the Minister of Finance and if such business was confined to a single province. Viscount Haldane dealt with this question in the following fashion:³⁵

The second question is, in substance, whether the Dominion Parliament has jurisdiction to require a foreign company to take out a licence from the Dominion Minister, even in a case where the company desires to carry on its business only within the limits of a single province. To this question their Lordships' reply is that in such a case it would be within the power of the Parliament of Canada, by *properly framed legislation*, to impose such a restriction. It appears to them that such a power is given by the heads in s. 91, which refer to the regulation of trade and commerce and to aliens. This question also is therefore answered in the *affirmative*.

The federal policy-makers were undaunted. Immediately after the Privy Council's decision, Parliament enacted The Insurance Act of 1917.³⁶ In place of the old section 4, there were now enacted sections 11 and 12 which, in requiring the federal licence, specifically differentiated between (a) Canadian companies, (b) aliens (both dealt with in section 11) and (c) British companies or non-resident British subjects (section 12) in an obvious attempt to take advantage of Viscount Haldane's dictum. In addition, section 508C was inserted in the Criminal Code constituting as a criminal offence the carrying on of insurance business without a Dominion licence.

It will be recalled that Ontario had its own Insurance Act which had been upheld in *Citizens Insurance Co. v. Parsons*.³⁷ In addition, in 1922 Ontario had enacted The Reciprocal Insurance Act³⁸ which provided specifically for the licensing of insurers who exchanged reciprocal contracts of insurance.

Three months after Viscount Haldane's decision in the general reference concerning the Oriental Orders in Council Validation Act of 1921 (British Columbia),³⁹ Mr. Justice Duff, as he then

³⁵ *Ibid.*, at p. 597, italics added. This is perhaps the pithiest exposition of the "aliens" jurisdiction. Nevertheless, it should be noted that Viscount Haldane presumed to re-phrase the "second question" before him from that asked by the federal government. And, in fact, it was not argued. See Gray, *More on the Regulation of Insurance* (1946), 24 *Can. Bar Rev.* 481, especially at pp. 485-487.

³⁶ 7 & 8 *Geo. 5*, c. 29 (Can.).

³⁷ *Supra*, footnote 32.

³⁸ 12 & 13 *Geo. 5*, c. 62 (Ont.).

³⁹ *Brooks-Bidlake and Whittall, Ltd. v. A.G. for B.C.*, *supra*, footnote 27.

was, delivered the Judicial Committee's decision in the *Reciprocal Insurers* case.⁴⁰ This case involved a consolidated appeal, including a reference by the Lieutenant-Governor of Ontario and appeals by a British subject and by a resident alien from separate convictions for soliciting insurance in Ontario contrary to the Criminal Code. Hence, the validity of both the Insurance Act (Canada) of 1917 and The Reciprocal Insurance Act, 1922 (Ontario) were at issue.

Duff J. held that section 508C of the Criminal Code was not valid criminal law and that therefore the making of reciprocal insurance contracts within Ontario pursuant to The Reciprocal Insurance Act, 1922 (Ontario) would not thereby be rendered illegal. In essence, it was held that the Criminal Code provision, when taken with the Insurance Act (Canada) of 1917, constituted an attempt by the Dominion Parliament to regulate the insurance industry rather than to legislate on the criminal law.

The validity of The Reciprocal Insurance Act, 1922 (Ontario) itself was upheld in the face of the allegation that it was *ultra vires* as dealing with the subject of aliens. Duff J. dealt with this contention as follows:⁴¹

. . . it is only necessary to observe that contracts of insurance form the subject of the statute, a subject peculiarly within the sphere of Provincial control. It is true that its provisions may *incidentally* affect aliens and Dominion companies who are, or may wish to become, subscribers to an inter-insurance exchange; it is nevertheless not a statute in relation to aliens, *as such*, or Dominion companies as such. It is unnecessary and undesirable to attempt to say how far, if at all, the Dominion in execution of its powers in relation to the subjects of aliens and Dominion companies may dictate the rules governing contracts of insurance, to which an alien or a Dominion company may be a party. Nothing in s. 91 of the British North America Act, in itself, removes either aliens or Dominion companies from the circle of action which the Act has traced out for the Provinces. Provincial statutes of general operation on the subject of civil rights *prima facie* affect them. It may be assumed that legislation touching the rights and disabilities of aliens or Dominion companies might be validly enacted by the Dominion in some respects conflicting with the Ontario statute, and that in such cases the provisions of the Ontario statute, where inconsistent with the Dominion law, would to that extent become legally ineffective. . . .

Having determined that the *provincial* legislation did not deal with aliens, Duff J. turned to the validity of the *federal* legislation. It had been contended that section 508C of the Criminal Code

⁴⁰ *A.G. for Ontario v. Reciprocal Insurers*, [1924] A.C. 328.

⁴¹ *Ibid.*, at p. 345, italics added. Note the parallel allusions to aliens and Dominion companies. It might be useful to explore an analogy between the regulation of aliens and the regulation of federal companies. Indeed, in *John Deere Plow Co. Ltd. v. Wharton*, [1915] A.C. 330, Viscount Haldane, at pp. 343-344 applied a specific analogy to Lord Watson's judgment in *Union Colliery Co. v. Bryden*, *supra*, footnote 9. See, also, Wegenast, *The Law of Canadian Companies* (1931), pp. 827-828.

could receive a limited effect as applying to aliens within the meaning of section 11 of the federal Insurance Act and to companies and natural persons not aliens immigrating to Canada within the meaning of section 12 of that statute, and to a parallel contention as to the effect of the said sections 11 and 12 themselves. Duff J. replied:⁴²

Assuming that it would be competent to the Dominion Parliament, under its jurisdiction over the subject of aliens, to pass legislation expressed in similar terms, but limited in its operation to aliens, their Lordships think it too clear for discussion that s. 508C is not an enactment on the subject of aliens (just as the Ontario statute of 1922 is not an enactment on that subject); . . . It follows that the third question must be answered in the negative, but with this qualification, that, in so answering it their Lordships do not express any opinion as to the competence of the Dominion Parliament, by virtue of its authority in relation to aliens and to trade and commerce, to enact ss. 11 and 12, sub-s. 1, of the Insurance Act. . . . Their Lordships think it sufficient to recall the observation of Lord Haldane in delivering the judgment of the Board in *Attorney-General for Canada v. Attorney-General for Alberta*, [1916] 1 A.C. 588, to the effect that legislation, if properly framed, requiring aliens, whether natural persons or foreign companies, to become licenced, as a condition of carrying on the business of insurance in Canada, might be competently enacted by Parliament. . . .

The Privy Council's final word on the "aliens" power came in 1931 in the decision of *In re The Insurance Act of Canada*.⁴³ The persistent federal politicians had apparently simply decided to try again to regulate the insurance industry. Parliament had amended the Criminal Code by making a specific exception as to reciprocal insurance companies so as to avoid the direct result of the 1924 judgment. On a reference by the Lieutenant-Governor of Quebec as to whether a foreign insurer who held a licence under the Quebec Insurance Act was obliged to observe the federal statute, Viscount Dunedin answered:⁴⁴

What has got to be considered is whether this is in a true sense of the word alien legislation, and that is what Lord Haldane meant by "properly framed legislation". 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 inter-meddle with the conduct of insurance business, a business which by the first branch of the 1916 case has been declared to be exclusively subject to Provincial law. Their Lordships have, therefore, no hesitation in declaring that this is not "properly framed" alien legislation.

⁴² *Ibid.*, at p. 346.

⁴³ [1932] A.C. 41.

⁴⁴ *Ibid.*, at p. 51, italics added.

The second question which Viscount Dunedin had to consider was the validity of section 16 of the Special War Revenue Act (Canada)⁴⁵ which purported to impose a tax on customers of British or foreign insurance companies which were not licensed under the provisions of the Insurance Act (Canada). Viscount Dunedin rather testily dismissed the federal tax on the ground that it was "linked up" with an illegal object, namely, Parliament's attempt to regulate the insurance business, an attempt previously made under the guise of trade and commerce legislation, then criminal legislation, and now taxing legislation.

The Special War Revenue Act (Canada) is relevant to the issue at hand because *Re Section 16 of the Special War Revenue Act*⁴⁶ provides a rather curious conclusion to the decisions on the "aliens" power. Section 16 of that Act had been amended insignificantly after Viscount Dunedin's judgment. Duff C.J. held that the amended section was *ultra vires* of the Parliament of Canada but, in doing so, he found that The Canadian and British Insurance Companies Act, 1932 (Canada) and The Foreign Insurance Companies Act, 1932 (Canada) were also *ultra vires*.⁴⁷ Such statutes remain on the statute books in substantially the same form,⁴⁸ presumably on the grounds that, technically, Duff C.J.'s decision related only to the Special War Revenue Act and that his comments on the two insurance statutes were *obiter dicta*.

This rather extreme judgment of Duff C.J. must be read in the context of decades of obvious attempts by the federal government to regulate the insurance industry despite the explicit views of the highest courts that this regulation was a matter for the provincial legislatures. In fact, the Foreign Insurance Companies Act and the Canadian and British Insurance Companies Act probably *are* directed at regulation of insurance rather than at control of aliens or British subjects, as such. And, indeed, one can sense a growing feeling of frustration in the Privy Council's judgments over the years at having to bother with the obvious attempts of the federal government to invade an area which had been declared as a provincial preserve.⁴⁹

Hence, while superficially the insurance cases limited the "aliens" power in that no federal legislation was upheld on this ground, the exposition of federal authority made in the Oriental

⁴⁵ R.S.C., 1927, c. 179.

⁴⁶ [1942] S.C.R. 429. Leave to appeal was refused by the Privy Council: [1943] 4 D.L.R. 657.

⁴⁷ 22-23 Geo. 5 (Can.), cc. 46 and 47 respectively.

⁴⁸ The Canadian and British Insurance Companies Act, R.S.C., 1970, c. I-15; The Foreign Insurance Companies Act, R.S.C., 1970, c. I-16.

⁴⁹ Even so, the recent decision of the Supreme Court of Canada in *A.G. for Ontario v. Policyholders of Wentworth Insurance et al.*, [1969] S.C.R. 779, indicates that a court which has forgotten the issues of an earlier generation will not be so ready to slap down a federal initiative.

discrimination cases emerged unscathed. In addition, the insurance cases contained very clear dicta illuminating the nature of the federal authority to regulate foreign investment. Viscount Haldane indicated that the federal Parliament had the jurisdiction, by properly framed legislation, to require a foreign company to take out a licence from a federal minister, even in a case where the company desired to carry on its business only within the limits of a single province.⁵⁰ Viscount Dunedin stated that Parliament could pass an Act forbidding aliens to enter Canada or forbidding them to enter to engage in any business without a licence, and further that Parliament might furnish rules for the conduct of aliens while in Canada, requiring them, for example, to report at stated intervals.⁵¹

In addition, Chief Justice Duff, who had been instrumental in rejecting pleas for the legitimacy of federal insurance legislation, acknowledged that legislation touching the rights and disabilities of aliens might be validly enacted by the federal government in some respects conflicting with provincial legislation and that in such cases the provincial legislation, where inconsistent with the federal law, would to that extent become "legally ineffective".⁵²

Purpose of the "Aliens" power

What is the purpose of the "aliens" power? Lord Atkinson's statement in upholding the validity of the federal Alien Labour Act⁵³ is instructive:

One of the rights possessed by the supreme power in every State is the right to refuse to permit an alien to enter that State, to annex what conditions it pleases to the permission to enter it, and to expel or deport from the State, at pleasure, even a friendly alien, especially if it considers his presence in the State opposed to its peace, order and good government, or to its social or material interest; Vattel, Law of Nations, book 1, s. 231; book 2, s. 125. . . .⁵⁴

This statement puts in some perspective the type of jurisdiction envisaged by the reference in section 91 of the British North America Act to "aliens". To paraphrase Lord Atkinson, the federal Parliament has the right to refuse to permit an alien to enter Canada and the right to annex what conditions it pleases to the permission to enter Canada. The federal Parliament has the right, at pleasure, to expel an alien from Canada, especially if the federal government considers his presence is opposed to the peace, order and good government of Canada, or if it considers his presence is opposed to Canada's *social* or *material* interest.

⁵⁰ *The Insurance Reference*, *supra*, footnote 34.

⁵¹ *In Re The Insurance Act of Canada*, *supra*, footnote 43, at p. 51.

⁵² *The Reciprocal Insurers case*, *supra*, footnote 40, at p. 345.

⁵³ Now found in R.S.C., 1970, c. A-12.

⁵⁴ *A.G. for Canada v. Cain*, [1906] A.C. 542, at p. 546.

The corresponding obligation to the "right" referred to by Lord Atkinson is that the host state must answer to the other states in the international community for the way in which aliens are treated within the host state.⁵⁵ Assuming that it is Canada, and not each of the provinces, which has international personality then the policy behind granting exclusive legislative authority to the federal Parliament respecting aliens is clear. If Canada has to answer to the international community for discrimination against aliens,⁵⁶ then it seems appropriate that Canada, and not the provinces, should be accorded jurisdiction over aliens.

Who are "Aliens"?

To restrict foreign investment effectively, legislation would have to be directed at non-Canadians as such. The *ad hoc* federal and provincial legislation which has appeared to date contains a rather curious mixture of restrictions aimed at non-residents, as such, and restrictions aimed at non-Canadians, as such.⁵⁷ But as the debate has matured the legislators have shifted their aim from non-residents to non-Canadians.⁵⁸

The question arises as to whether all non-Canadians are "aliens" within the meaning of section 91 (25) of the British North America Act. This question arises because of the rather inadequate definition of "alien" provided by Commonwealth law.

Alienage is a nationality concept. From the standpoint of international law, nationality is a status in municipal law extended by sovereigns to persons and other entities and creating a relationship which is recognized by international law as providing the conferring sovereign with a proprietary and protective right over the recipient national.⁵⁹ Alienage is simply the lack of national status in relation to any conferring state, every person being a national or an alien in respect of every such state.

⁵⁵ See following discussion.

⁵⁶ O'Connell, *International Law* (2nd ed., 1970), vol. 2, p. 965.

⁵⁷ Although, even when directed at non-Canadians as such the legislation usually defines the non-Canadianism in terms of "non-residency"; see, for example, Ontario Regulation 296/71, as am., passed under The Securities Act (Ontario), R.S.O., 1970, c. 426, as am.

⁵⁸ Compare the definitions of "non-resident" in the Bank Act, R.S.C., 1970, c. B-1, s. 52 (1), The Canadian and British Insurance Companies Act, *supra*, footnote 48, as am., s. 18 and The Loan and Trust Corporations Act (Ontario), R.S.O., 1970, c. 254, s. 54 (1) (b), with that in Ontario Regulation 296/71, as am., passed under The Securities Act (Ontario), *ibid.* The Direction to Canadian Radio-Television Commission, the Canada Gazette, Part II, Vol. 103, No. 23, S.O.R./69-590, P.C. 1969-2229, pp. 1695-1698 as am., was directed at "persons who are not Canadian citizens or eligible Canadian corporations". For a historical survey and comparative analysis of differing requirements in U.S. federal legislation, see Vagts, *The Corporate Alien: Definitional Questions in Federal Restraints on Foreign Enterprise* (1961), 74 Harv. L. Rev. 1489.

⁵⁹ Brown, *Public International Law* (1970), p. 152.

However, for historical reasons, the precise definition of nationality and of alienage is somewhat cloudy in Canada and elsewhere within the Commonwealth.⁶⁰ In essence, Canada, as well as the other members of the Commonwealth, have enacted citizenship legislation which, technically, does not define nationality but does define citizenship. Having defined citizenship, the Canadian Citizenship Act⁶¹ defines an "alien" as:

. . . a person who is not a Canadian citizen, Commonwealth citizen, British subject or citizen of the Republic of Ireland;

Hence, could it be argued that legislation discriminating against all persons who are not Canadian citizens, including Commonwealth citizens, British subjects and citizens of the Republic of Ireland, is not legislation directed at aliens only?

The constitutional delimitation of powers between the federal Parliament and the provincial legislatures obviously cannot turn on the vagaries of the current federal definition of "alien", which does not even purport to apply to juridical persons. The conceptual distinction derived from international law provides the only definition relevant to such constitutional question. Furthermore, citizenship legislation is in fact legislation respecting national status, being the only such definition that we have. The Canadian Citizenship Act itself provides:⁶²

Where a person is required to state or declare his national status, any person who is a Canadian citizen under this Act *shall* state or declare himself to be a Canadian citizen. . . .

Hence, statutory discrimination against non-citizens is discrimination based upon national status, a subject matter falling within item 25 of section 91 of the British North America Act.⁶³

Implications for federal and provincial competence

Parliament would appear to have exclusive legislative authority to legislate generally as to the rights and disabilities of aliens as such. This authority includes the right to refuse to permit an alien to enter Canada and the right to annex conditions to his entry. It includes the right to expel him from Canada. It includes, for example, the right by properly framed legislation, to require a foreign company to take out a licence from a federal minister even in a case where the company desires to carry on its business

⁶⁰ See Halsbury's Laws of England (3rd ed.), vol. 1, pp. 527-529; O'Connell, *op. cit.*, footnote 56, vol. 2, pp. 673-678.

⁶¹ R.S.C., 1970, c. C-19, s. 2.

⁶² *Ibid.*, s. 3. italics added.

⁶³ In any event, in the age of Canadian nationalism, creeping republicanism and British membership in the European Economic Community, can anyone doubt that a redefinition of the word "alien" in the Canadian Citizenship Act will be long coming?

only within the limits of a single province. It includes the right to furnish rules for the conduct of aliens while in Canada.

This federal authority would appear virtually to exclude any jurisdiction whatsoever in the provinces to regulate foreign investment. The "evil" sought to be controlled in such regulation is that of the foreign or alien character of the investment. And it is precisely this discrimination between the foreign and the non-foreign which betrays the pith and substance.⁶⁴ It must be concluded that legislation which discriminates against aliens, be it their property rights or otherwise,⁶⁵ will of necessity fall within section 91 (25) of the British North America Act.

Prima facie, then, existing federal restrictions on foreign ownership in the Bank Act,⁶⁶ The Canadian and British Insurance Companies Act⁶⁷ (assuming that the Act itself is valid at all), the Loan Companies Act (Canada),⁶⁸ the Trust Companies Act (Canada),⁶⁹ the Investment Companies Act (Canada),⁷⁰ and the Direction to The Canadian Radio-Television Commission referred to earlier⁷¹ would be *intra vires*.⁷²

On the other hand, there would appear to be great doubt about the constitutional validity of provincial restrictions⁷³ on foreign investment such as those contained in The Loan and Trust Corporations Act (Ontario),⁷⁴ The Trust Companies Act (Alberta)⁷⁵ and the loan and trust companies part of The Companies Act (Manitoba).⁷⁶ The same can be said of the 1971 regulation under The Securities Act (Ontario) relating to the qualification for registration as securities dealers.⁷⁷

3. *Paramountcy and the Canadian Citizenship Act.*

It will be recalled that, in the *Reciprocal Insurers* case,⁷⁸ Duff J. had raised the paramountcy doctrine by opining that if federal legislation "touching the rights and disabilities of aliens"

⁶⁴ See comment of J. S. Ziegel in reference to provincial legislation affecting federal companies in *Constitutional Aspects of Canadian Companies*, Ziegel, *Studies in Canadian Company Law* (1967), p. 182.

⁶⁵ See, generally, Laskin, *Canadian Constitutional Law* (3rd ed., 1969), pp. 996-997.

⁶⁶ R.S.C., 1970, c. B-1, ss 53 & 56 (2) (a).

⁶⁷ *Supra*, footnote 48, s. 19.

⁶⁸ R.S.C., 1970, c. L-12, as am., s. 19.

⁶⁹ R.S.C., 1970, c. T-16, as am., s. 19.

⁷⁰ S.C., 1970-71, c. 33, s. 11.

⁷¹ *Supra*, footnote 58.

⁷² This does not purport to be an exhaustive list.

⁷³ Whether a provincial enactment which purports to assist aliens would suffer from the same constitutional disability is questionable; consider, e.g., The Aliens' Real Property Act, R.S.O., 1970, c. 19.

⁷⁴ *Supra*, footnote 58, s. 55.

⁷⁵ R.S.A., 1970, c. 372, s. 67.

⁷⁶ R.S.M., 1970, c. 160, as am., s. 253.2.

⁷⁷ *Supra*, footnote 57.

⁷⁸ *Supra*, footnote 40, at p. 345.

conflicted with provincial legislation then the provisions of such provincial legislation would "to that extent become legally ineffective". Hence, even if provincial legislation restricting aliens' rights as to investment could not be found to relate solely to aliens, as such, there would remain the question of whether it conflicted with any federal legislation. In this context section 24 (1) of the Canadian Citizenship Act⁷⁹ must be kept in mind:

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; and a title to real and personal property of every description may be derived through, from or in succession to an alien in the same manner in all respects as through, from or in succession to a natural-born Canadian citizen.

Disregarding, for the moment, the position of a corporate alien, it could well be argued that provincial legislation such as the above-noted regulation under The Securities Act (Ontario) conflicts with this federal provision. Such regulation purports to limit the right of aliens to acquire and hold certain personal property, namely, shares in registered securities dealers.

A corporation probably cannot be held to fall within the definition of "alien" in the Canadian Citizenship Act. Section 2 of that statute defines an alien as follows:

. . . "alien" means a person who is not a Canadian citizen, Commonwealth citizen, British subject or citizen of the Republic of Ireland.

This definition would be applicable only to natural persons. Nevertheless, it was assumed by Maclean J. in *The Creamette Co. v. Famous Foods Ltd.*⁸⁰ that "either a natural or an artificial person" could be a "friendly alien" within the meaning of section 20 of the Naturalization Act (Canada),⁸¹ which was the direct forerunner of the Canadian Citizenship Act.

4. *The Federal Treaty Power.*

It will be remembered that in the *Employment of Aliens* case⁸² Viscount Haldane had disallowed the Oriental Orders in Council Validation Act (British Columbia) of 1921 on the ground that it contravened the Japanese Treaty Act (Canada) of 1913. The point was that the Japanese Treaty had stated that the subjects of the High Contracting Parties:

. . . shall in all that relates to the pursuit of their industries, callings, professions and educational studies be placed in all respects on the same footing as the subjects or citizens of the most favoured nation.

⁷⁹ *Supra*, footnote 61.

⁸⁰ [1933] Ex C.R. 200.

⁸¹ R.S.C., 1927, c. 138.

⁸² *Supra*, footnote 30.

Duff J. had given a useful analysis in the Supreme Court of Canada:⁸³

The treaty validated by statute of 1913 deals with subjects which are ordinary subject matters of international convention: with precisely the kind of thing which must have been in the contemplation of those who framed this section. The effect of the Act of 1913 is, in my opinion, at least this: that with respect to the right to dispose of their labour, the Japanese are to be in the same position before the law as the subjects of the most favoured nation. Equality in the eye of the law in respect of these matters is what I think the legislation establishes. Does the Act of 1921 in its true construction infringe these rights of Japanese subjects? In my opinion it does. It excludes them from employment in certain definite cases. It is not, I think, material that the Province in passing the Act is engaged in administering its own corporate economic affairs. If it goes into effect, it goes into effect (as a law of the Province) abrogating rights guaranteed by the treaty. It is thus not only a law passed against the good faith of the treaty but it is, in my opinion, a law repugnant to the treaty and as such I think it cannot prevail.

The current extent of the federal treaty-making power is an issue far too broad and complex to be analyzed here. Suffice it to say that there may well be treaties to which Canada is a party which might be violated by some of the proposals for restricting foreign investment. While one may assume that the federal government keeps in mind its various treaty obligations in drafting legislation,⁸⁴ the same may not be the case for the provinces.

An example is provided by The Spanish Treaty Act, 1928 (Canada),⁸⁵ which sanctions and declares to be in force in Canada three treaties between the United Kingdom and Spain. One of these, a treaty of Commerce and Navigation signed at Madrid on October 31st, 1922 provides in part:

The subjects of each of the two contracting parties shall have liberty freely to come, with their ships and cargoes, to all places and ports in the territories of the other, to which subjects of that contracting party are or may be permitted to come, and shall enjoy the same rights, privileges, liberties, favours, immunities, and exemptions in matters of commerce and navigation as are or may be enjoyed by subjects of that contracting party.

It might therefore be argued that Spanish subjects are entitled to enjoy in Canada the same rights, privileges, liberties and so on, in matters of commerce as may be enjoyed by Canadian citizens and that any provincial legislation which prevented that was *ultra vires*.

⁸³ (1923), 63 S.C.R. 293, at p. 330.

⁸⁴ Perhaps one should not be so sure even with respect to the federal government. At least, it might be very useful to have a public discussion as to which treaties relevant to a consideration of foreign investment in Canada are binding on Canada and as to what their precise provisions are.

⁸⁵ S.C., 1928, c. 49.

Another treaty which provides for "national treatment" of aliens is the La Paz Treaty of Commerce between the United Kingdom and Bolivia signed on August 1st, 1911, and ratified on July 5th, 1912. It is understood that Newfoundland acceded to this treaty on November 19th, 1912. This treaty provides in part:

The subjects or citizens of each of the high contracting parties in the dominions and possessions of the other shall be at full liberty to exercise civil rights, and therefore to acquire, possess, and dispose of every description of property, movable and immovable. They may acquire and transmit the same to others whether by purchase, sale, donation, exchange, marriage, testament, succession *ab intestat*, and in any other manner, under the same conditions as national subjects or citizens.

To the extent that this treaty is binding on Canada, conflicting provincial legislation would appear to be *ultra vires*.

5. Canadian Bill of Rights.

An important issue which can only be raised here but which deserves detailed attention is whether federal legislation restricting foreign investment would be held to be "inoperative" as discriminating against aliens because of their "national origin" contrary to the Canadian Bill of Rights.^{85a} It may well be that since the landmark decision in *The Queen v. Drybones*^{85b} any such legislative restrictions would be found to infringe one or more of aliens' rights (i) to the enjoyment of property, (ii) not to be deprived of their property except by due process of law and (iii) to equality before the law and the protection of the law. Hence, it may be that the federal legislators will want to declare in any regulation of foreign investment that this quasi-constitutional direction is inapplicable.

III. The Constraints of International Law.

When a State admits into its territory foreign investments or foreign nationals, whether natural or juristic persons, it is bound to extend to

^{85a} R.S.C., 1970, Appendix III, s. 1.

^{85b} [1970] S.C.R. 282. See Cavalluzzo, *Judicial Review and the Bill of Rights: Drybones and its Aftermath* (1971), 9 Osgoode Hall Law Journal 511, at p. 543; but Mr. Justice Laskin noted that "the equal protection clause does not extend to exclusion of discrimination because of nationality; this is something different from national origin" in Laskin, *An Inquiry into the Diefenbaker Bill of Rights* (1959), 37 Can. Bar Rev. 77, at p. 129. *Quaere* the effect or relevance of international obligations such as those under the United Nations Universal Declaration of Human Rights of 1968 or the various provincial human rights statutes; see generally Castel, *International Year for Human Rights* (1968), 46 Can. Bar Rev. 543 and the Appendix thereto.

them the protection of the law and assumes obligations concerning the treatment to be afforded them.⁸⁶

Introduction

The *Barcelona Traction* case⁸⁷ involved the Barcelona Traction, Light and Power Company, Limited which was a Canadian company incorporated as a holding company for the electric power production and distribution system in Catalonia, Spain. It had a number of subsidiaries, both Canadian and Spanish. At all relevant times eighty-eight per cent of the shares of Barcelona Traction were owned by Belgians although before World War II these shares had been transferred to American nominees for protection. Barcelona Traction had issued several series of bonds, borrowing both sterling and pesetas. In 1936 interest payments on both types of bonds were suspended because of the Spanish Civil War. In 1940 the interest payments were resumed for the peseta bonds but, because permission for the transfer of foreign currency was refused by the Spanish authorities, interest payments were never resumed for the sterling bonds.

In 1948 three Spanish holders of Barcelona Traction bonds secured a bankruptcy declaration against Barcelona Traction in a Spanish court on the grounds of failure to make interest payments. The assets of Barcelona Traction and two of its subsidiaries were seized by the receiver. Barcelona Traction did not receive adequate notice of the proceedings and therefore failed to enter a plea of opposition within eight days of the judgment as required by Spanish law. In 1949 trustees in bankruptcy were appointed who created new shares, cancelled the shares located outside Spain, and resolved that the head office of Barcelona Traction should be at Barcelona instead of Toronto. In 1951 the trustees in bankruptcy sold the company's shares in the subsidiaries by way of new share certificates.

Between 1948 and 1955 Canada made unsuccessful diplomatic representations on behalf of Barcelona Traction and its Canadian subsidiaries. Meanwhile, a series of litigations in the Spanish courts were unsuccessful. In 1962 Belgium filed an application before the International Court of Justice claiming reparation for the damages allegedly sustained by the Belgian shareholders on account of acts said to be contrary to international law and committed in respect of the company by organs of the Spanish state. In 1970 the International Court of Justice dismissed⁸⁸ this claim on the ground that Belgium, being only the national state of the shareholders in a Canadian company, lacked capacity to present the claim.

⁸⁶ *Case concerning the Barcelona Traction, Light and Power Company, Limited*, I.C.J. Rep. 1970, p. 32.

⁸⁷ *Ibid.*

⁸⁸ *Ibid.*

While the specific upholding of Spain's preliminary objection⁸⁹ raises some interesting technical issues, this case is significant in illustrating the problems arising from constraints imposed by public international law against host country treatment of foreign investment. None of the Canadian writings, governmental or private, on the regulation of foreign investment appear to have considered this problem. Yet very real issues are at stake. While it may be disquieting to Canadians, the fact is that the same legal problems posed by the 1951 Iranian seizure of the business of the Anglo-Iranian Company, or by the Mexican expropriations of agrarian and oil properties between 1915 and 1940, are posed by many of the policies being advocated in the current Canadian debate.

Comprehension of the problem requires a fundamental initial distinction: a sovereign state has virtually unlimited rights to prevent aliens from entering into its territory and to prevent the acquisition by aliens of rights, whether respecting property or otherwise, in its territory. However, once an alien has entered or has acquired rights within the territory of the host state then certain definite obligations are imposed upon such state by international law, the breach of which will be enforceable by diplomatic efforts, international adjudication or otherwise. And since international law imposes certain minimum standards which may, in some cases, be higher than the standards of behaviour required under the municipal law of any given state, an alien may in some circumstances have greater rights in a given state than have the nationals of that state.⁹⁰

1. *Rules Against Confiscation.*⁹¹

Foreign investors have "acquired rights" within the meaning of international law. Hence the host state must observe certain minimum standards failing which it will be liable to an international claim by the government of the national state of the foreign investors. It is not conceivable that the federal government, or the government of any Canadian province, would proceed by way of outright confiscation⁹² of foreign interests (at least in the absence of a national calamity in the nature of a war). However, expropriation with compensation is indeed possible.

⁸⁹ Referred to again below.

⁹⁰ The United States government implied this in the note to the Mexican government referred to below.

⁹¹ This discussion is concerned only with the rules of customary international law. A thorough review of relevant treaties by which Canada is bound is extremely important in order to ascertain what obligations may be thereby imposed which limit Canada's rights to regulate foreign investment.

⁹² Confiscation is, essentially, expropriation without adequate compensation.

While there is some debate about certain of the refinements, an adequate summary, for our purposes, of the law relating to the protection of foreign investments has been provided by Dr. O'Connell.⁹³ Expropriation of alien private property is lawful on four conditions:

1. the property must be amenable to the jurisdiction of the expropriating state;
2. the nationalization must be motivated by some *bona fide* social or economic purpose;
3. there must be no discrimination against the property nationalized or its owners; and
4. the nationalization must be accompanied either by contemporaneous payment of adequate compensation or effective measures which ensure and make certain its prompt payment.

Not surprisingly, the question of what constitutes a "*bona fide* social or economic purpose" has been the subject of a great deal of controversy, the under-developed nations tending to a broader interpretation than the capital-exporting nations. The distinction would clearly not authorize a nationalization measure taken capriciously or for the personal aggrandizement of an autocrat. Some assistance in interpretation may be afforded by the notes and comments to article 3 of the Organization for Economic Co-operation and Development (O.E.C.D.) Draft Convention of 1967 on the Protection of Foreign Property.⁹⁴ This article states in part:

No party shall take any measures depriving, directly or indirectly, of his property a national of another Party unless the following conditions are complied with:

- i. the measures are taken in the public interest and under due process of law . . .

While there seems to be some doubt about the meaning, let alone the acceptability, of the "due process" requirement, the notes on the "public interest" requirement are of interest:⁹⁵

In order to be in conformity with the rules of international law, the taking of property must be justified by public interest, i.e. the measures must be adopted in the interest of the State or any political subdivision thereof. Thus seizure undertaken ostensibly for public purposes but, in fact, to be used by persons connected therewith solely for private gain is unlawful and gives rise to a claim for damages.

The *bona fides* of any Canadian expropriations of alien property is unlikely to be questionable. However, the prohibition against

⁹³ *Op. cit.*, footnote 56, vol. 2, pp. 776-7. For a selected bibliography see Castel, *International Law* (1965), pp. 985-986.

⁹⁴ Organization for Economic Co-operation and Development, Paris, 1967.

⁹⁵ *Ibid.*, p. 25.

discrimination would appear to rule out many policies being proposed.

The prohibition against discriminatory measures is fundamental to international law. Under the Draft O.E.C.D. Convention a breach of obligations by a party is established if it can be shown that the exercise of the rights of use or enjoyment of acquired property by an alien is impaired by a "discriminatory" measure. The notes state:⁹⁶

For the very fact that the history of international relations abounds in examples of representations by Governments against measures of economic discrimination resulting in injury, implies the recognition of the principle that measures, otherwise lawful, may be deprived of the protection of the law on the grounds of discrimination. Prohibition of discrimination is in accordance with the principles laid down by the Permanent Court of International Justice in the Case of Certain German Interests in Polish Upper Silesia and the Case of Treatment of Polish Nationals in Danzig. . . . It is immaterial whether the measure complained of is expressly or exclusively directed against the property of the national for whom redress is sought or is couched in general terms which bring such property within its scope. In other words, "de facto discrimination" is unlawful.

And Dr. O'Connell comments:⁹⁷

There is little doubt that if an alien is singled out for expropriation the State exceeds its powers in international law, though in most cases the discrimination will be less an autonomous head of wrong-doing than an index of non-public interest motivation. When the nationals of only one State are selected for expropriation this is *a fortiori* illegal discrimination, which likewise perhaps exposes the motivation. . . . Even the writers who allow States to expropriate for any purpose and without compensation agree upon the one minimal rule that if an alien or class of aliens is singled out for expropriation this is unlawful. The rule in question goes back to Vattel and has been sanctioned by many tribunals.

Prima facie this would appear to prohibit any kind of "Canadianization" of foreign enterprises already established in Canada. Yet this seems to be a rather unreasonable result and surely requires further research and consideration. It is one thing to prohibit discrimination between two classes of aliens. It is quite another thing to suggest that a sovereign state cannot adopt a general policy of requiring a minimum domestic position in the national economy if there has been full compensation. Dr. Schwarzenberger has commented with reference to article 3 of the O.E.C.D. Draft Convention:⁹⁸

. . . the prohibition of *all* forms of discrimination, as distinct from those of an arbitrary or unreasonable character, appears to go beyond

⁹⁶ *Ibid.*, p. 17.

⁹⁷ O'Connell. *op. cit.*, footnote 56, vol. 2, p. 780.

⁹⁸ Schwarzenberger, *Foreign Investments and International Law* (1969), p. 163.

the requirements of the minimum standard of international customary law and the protection needed by foreign property.

Yet, he provides no detailed justification for this comment. He does state:⁹⁹

What is meant by discrimination? Does it cover any kind of unequal treatment or is it limited to arbitrary differentiation? Does every privileged treatment of some constitute discrimination against others? What is *tertium comparationis* — the nationals of the States taking the measures in question, the nationals of other Contracting Parties, foreigners, at large, or all these categories together?

It is widely accepted that, at least in the field of expropriation, non-discrimination is an absolute condition of lawful expropriation. On closer examination the picture becomes more complicated. Extracts from State practice and judicial pronouncements which are based on treaties and others in which reliance is placed on international customary law are not always kept sufficiently apart. Moore's careful distinction between just and unjust forms of discrimination is not always remembered. Evidence of rules prohibiting discrimination between foreigners and nationals in the application of municipal law and between foreigners according to criteria such as race or religion tends to be treated as proof of the illegality of *all* forms of discrimination.

The implication remains that any policy of "rolling-back" existing foreign investment in Canada will run afoul of the prohibition against discriminatory expropriation. Indeed, the action of the Canadian Radio-Television Commission in forcing the "buy-back" of the Canadian broadcasting industry would appear to have exposed Canada to charges of violation of international law. Presumably, the prices received by the foreign interests were satisfactory enough to forestall complaints to their national governments.

The expropriation of alien private property must be compensated for and there must be a reasonable promptness of payment. There is little doubt about this principle although there are arguments on some of the finer points.¹⁰⁰ But the fact is that virtually all nationalizations of foreign interests have been accompanied by compensation. The final result of the 1951 nationalization by the Iranian Parliament of the business of the Anglo-Iranian Oil Company Ltd. was a compensation agreement in 1954 between the Iranian government and the Anglo-Iranian Oil Company Ltd. Whereas the Anglo-Iranian Oil Company Ltd. had, at the time of nationalization, claimed compensation of about £350 million, the company actually received about £300 million plus a

⁹⁹ *Ibid.*, p. 120, italics added.

¹⁰⁰ There have been three relevant resolutions of the U.N. General Assembly, in 1952, 1962 and 1966. No. 1803 (XVII) on "Permanent Sovereignty over Natural Resources" referred only to the need for "appropriate compensation". This was the only one of the three receiving an affirmative U.S. vote. See generally Castel, *op. cit.*, footnote 93, p. 1007.

forty per cent interest in the oil consortium which has since then operated the Iranian oil industry.¹⁰¹

Similarly, on July 14th, 1971 the government of Guyana and Alcan Aluminum Ltd., announced agreement on compensation for the nationalization of Alcan's subsidiary Demerara Bauxite. Under the settlement Guyana is to pay Alcan a sum of approximately \$53.5 million (U.S.) over a period of no more than twenty years. The interest will be six per cent a year subject to withholding tax.¹⁰²

As a result of the Mexican expropriation of agrarian and oil properties owned by United States citizens, a series of diplomatic notes ensued in which the two governments discussed the question of compensation. Secretary of State Cordell Hull's note to the Mexican Ambassador on July 21st, 1938 is an exposition of the classic view, and part of it is therefore related here:¹⁰³

The taking of property without compensation is not expropriation. It is confiscation. It is no less confiscation because there may be an expressed intent to pay at some time in the future.

If it were permissible for a government to take the private property of the citizens of other countries and pay for it as and when, in the judgment of that government, its economic circumstances and its local legislation may perhaps permit, the safeguards which the constitutions of most countries and established international law have sought to provide would be illusory. Governments would be free to take property far beyond their ability or willingness to pay, and the owners thereof would be without recourse. We cannot question the right of a foreign government to treat its own nationals in this fashion if it so desires. This is a matter of domestic concern. But we cannot admit that a foreign government may take the property of American nationals in disregard of the rule of compensation under international law. . . . The whole structure of friendly intercourse, of international trade and commerce, and many other vital and mutually desirable relations between nations indispensable to their progress rest upon the single and hitherto solid foundation of respect on the part of governments and of peoples for each other's rights under international justice. The right of prompt and just compensation for expropriated property is a part of this structure. It is a principle to which the Government of the United States and most governments of the world have emphatically subscribed and which they have practiced and which must be maintained. It is not a principle which freezes the status quo and denies changes in property rights but a principle that permits any country to expropriate private property within its borders in furtherance of public purposes. It enables orderly change without violating the legitimately acquired interests of citizens of other countries.

¹⁰¹ This case is discussed in detail by Schwarzenberger, *op. cit.*, footnote 98, pp. 66-83.

¹⁰² Reported in International Canada, C.I.I.A., July and August, 1971, p. 166.

¹⁰³ Quoted in Steiner and Vagts, *Transnational Legal Problems* (1968), pp. 320-321. A White House statement of January 19th, 1972 used remarkably similar language; reported in *The Globe and Mail*, Toronto, January 20th, 1972.

The Mexican government disagreed to some extent with the American position, mainly on the thesis that the "time and manner of payment" must be determined by Mexico's own laws. However, Mexico did pay compensation for both agrarian and oil properties as a result of agreements reached with the United States.

While "nationalization" is the process most often relied upon by countries in expropriating foreign interests, sometimes, as with the "buy-back" idea, there is a taking in which title to property passes to one or more of the nationals of the expropriating state, the undertaking thus remaining in the private sector. The principles as to lawful and unlawful expropriation are equally applicable to this type of situation. For example, the 1967 O.E.C.D. Draft Convention refers not to nationalization but rather provides in part:¹⁰⁴

No party shall take any measures depriving, directly or indirectly, of his property a national of another Party unless. . . .

The notes comment on this:¹⁰⁵

In the case of *direct* deprivation ("expropriation" or "nationalization") the loss of the property rights concerned is the *avowed* object of the measure. By using the phrase "to deprive . . . directly or *indirectly* . . ." in the text of the Article it is, however, intended to bring within its compass *any* measures taken with the *intent* of wrongfully depriving the national concerned of the substance of his rights and *resulting* in such loss (e.g. prohibiting the national to sell his property or forcing him to do so at a fraction of the fair market-price).

If, for example, the effect of the Canadian Radio-Television Commission's edict had been that foreign owners of broadcasting licences had to sell "at a fraction of the fair market-price" then there would have been the taking of a measure "depriving" such persons "indirectly" of their property.

A related issue is that some times referred to as "creeping nationalization". The commentaries to the O.E.C.D.'s Draft Convention of 1967 describe this as follows:¹⁰⁶

Under it, measures otherwise lawful are applied in such a way as to deprive ultimately the alien of the enjoyment or value of his property, without any specific act being identifiable as outright deprivation. As instances, may be quoted excessive or arbitrary taxation; prohibition of dividend distribution coupled with compulsory loans; imposition of administrators; prohibition of dismissal of staff; refusal of access to raw material or of essential export or import licences.

Most of these types of measures have been suggested at one time or another in the current debate in this country. While the O.E.C.D. Draft Convention of 1967 is not necessarily declaratory

¹⁰⁴ *Op. cit.*, footnote 94, Art. 3.

¹⁰⁵ *Op. cit.*, footnote 94, pp. 24-25.

¹⁰⁶ *Ibid.*

of customary international law on this point, and may represent the undue influence in the O.E.C.D. of the capital-exporting nations, nevertheless such commentaries illuminate the point. They are presumably also indicative of the position which the United States might take.

2. *Enforcement on the International Level.*

Breaches of international law may, of course, give rise to diplomatic protest or a legal claim by the injured state.¹⁰⁷ If Canada were to expropriate foreign property contrary to international law, any serious diplomatic protest by an offended state such as the United States would in itself be a formidable sanction, and would probably lead to a compensation agreement whereby Canada would be forced to provide compensation.¹⁰⁸

However, there is the further sanction provided by international litigation. Without at this time exploring the possible forums in which such claims might be presented,¹⁰⁹ it is entirely probable that some international forums could be forced upon Canada to hear the claims of major states. Such forums would probably take the form of arbitral tribunals or mixed claims commissions such as those to which Mexico agreed with Britain and the United States.¹¹⁰

Of more immediate interest is the question of which foreign states would be able to present claims on behalf of foreign interests affected by any alleged Canadian breaches of international law. Essentially, states may present claims on behalf of persons who are their own nationals.¹¹¹ Hence, in the simple situation

¹⁰⁷ Classical theory is that the national state of the injured individual itself suffers an injury. This raises the further question of whether the damages are measured by the injury to the state or to the individual. In the "*Pm Alone*" case (*Canada v. U.S.*), 2 Hackworth, Digest of International Law (1941), pp. 703-708, a case involving illegal seizure of a Canadian vessel by an American cruiser, an arbitral tribunal awarded \$25,000.00 damages to the Canadian Government for insult to the flag but nothing for loss of the ship. However, full compensation and even restitution are more usual; see O'Connell, *op. cit.*, footnote 56, vol. 2, pp. 1114-1116, although Professor J-G Castel argues in favour of the theory of "unjust enrichment" to the injured state, *op. cit.*, footnote 93, pp. 1006-1007.

¹⁰⁸ See, e.g., 1951 Convention between Canadian Government and French Government, quoted in Castel, *op. cit.*, *ibid.*, pp. 992-993.

¹⁰⁹ Presumably Canada could invoke in its own favour the "Connally reservation" to the U.S. declaration of submission to I.C.J. to make a subjective determination as to whether any dispute was essentially within Canada's domestic jurisdiction. See generally R. St. J. Macdonald, The New Canadian Declaration of Acceptance of the Compulsory Jurisdiction of the International Court of Justice (1970), 8 Can. Y.B. Int'l. L. 3.

¹¹⁰ The 1962 U.N. Resolution on Permanent Sovereignty over Natural Resources, No. 1803 (XVII) stated that foreign investment disputes should be settled through "arbitration or international adjudication".

¹¹¹ Although since *The Nottebohm* case (*Liechtenstein v. Guatemala*) I.C.J. Rep. 1955, p. 4, it appears that formal nationality, in the absence of any real connection between the conferring state and the individual, may

where Canadian assets of an individual American citizen were confiscated it would be clear¹¹² that the United States government would have the capacity to present an international claim on his behalf to the Canadian government.

However, since modern economic enterprise is normally conducted through the vehicle of the corporation, more complex questions arise, the nature of which should be explored in detail by Canadian lawyers but can only be alluded to in this article. The concept of nationality, which is the connecting link upon which historically the status to present international claims has been based, is rather ill-suited to provide the necessary link where shareholders of corporations are concerned. However, the legal fiction of the nationality of corporations has been generally recognized. A corporation will be deemed to be a national of the state in which it is incorporated and in whose territory its head office is located, and such state may exercise diplomatic protection and present international legal claims on behalf of such corporation. Indeed, this was the basis for the judgment of the International Court of Justice in the *Barcelona Traction* case¹¹³ and had been assumed by the Canadian government during the years in which it had made diplomatic interventions on behalf of the company. Whether, beyond that, the national states of shareholders of corporations have the status to exercise diplomatic protection on behalf of those shareholders is arguable.¹¹⁴ The majority opinion of the International Court of Justice denied that Belgium had status to bring a claim on behalf of Belgian shareholders but this holding was clearly based on the fact that no infringement with the "direct rights of shareholders as such" had been claimed.¹¹⁵ Aside from that refinement, it is possible that there is:

- (a) a narrow exception to the general rule where the corporation has ceased to exist;
- (b) a narrow exception to such rule where the delinquent state is the state of incorporation but the shareholders are the nationals of a second state; or
- (c) a general principle, as was argued by several dissenting members of the International Court of Justice in the *Barcelona Traction* case,¹¹⁶ to the effect that the national state of the shareholders may as such exercise diplomatic protection over their economic interests in the corporation.

be insufficient. See generally Wang, *Nationality of Claims and Diplomatic Intervention* (1965), 43 *Can. Bar Rev.* 136.

¹¹² Subject to *The Nottebohm* case, *ibid.*

¹¹³ *Supra*, footnote 86.

¹¹⁴ *The Barcelona Traction* case, *ibid.*; see O'Connell, *op. cit.*, footnote 56, vol. 2, pp. 1039-1049.

¹¹⁵ *The Barcelona Traction* case, *ibid.*, pp. 36-37.

¹¹⁶ *Ibid.*

Certainly the opinions of both the majority of the International Court of Justice and its dissenting members make very germane reading today for Canadian lawyers and policy-makers.

The issue of status to present claims against Canada for illegal expropriations would turn on the variables, which would include:

- (a) whether the investments in Canada were by foreign individuals or foreign corporations;
- (b) whether the rights of corporations, or of shareholders as such, were infringed;
- (c) whether the foreign investments operated through the medium of domestic Canadian corporations or not;
- (d) whether Canada were actually to nationalize foreign property or simply to force its sale to Canadian interests; and
- (e) whether the government measures were directed at physical assets or corporate shares.

A further technical issue which would arise in international litigation is the need for the alien property owners who claimed injury at the hands of Canada "to exhaust" their remedies in the Canadian courts. It is, of course, a basic principle of international law that a state is not internationally responsible to foreign nationals until such foreign nationals have exhausted all remedies available under the host state's own laws.¹¹⁷ Since, however, Canada does not have constitutional compensatory and due process provisions such as those contained in the United States Constitution, is it not likely that litigation by expropriated aliens in Canadian courts would be futile?¹¹⁸ The question would thus arise as to whether such aliens needed to waste time, expense and effort in attempting to obtain redress in the Canadian courts.¹¹⁹

3. *Enforcement on the Municipal Level.*

It has often been stated as a general principle that the rules of public international law are part of the common law. Many other legal systems take the same position. The question then arises as to whether the courts of other states in the international community would provide remedies to private litigants alleging damages resulting from Canadian breaches of international law.

¹¹⁷ See, e.g., extract from correspondence of Department of External Affairs (1970), 8 Can. Y.B. Int'l. L. at p. 359. See generally Head, A Fresh Look at the Local Remedies Rule (1967), 5 Can. Y.B. Int'l. L. 142.

¹¹⁸ Unless any relief against discriminatory treatment would be provided by the Canadian Bill of Rights, *supra*, footnote 85a; compare with the situation in the U.S. where it is apparently the law that even aliens, at least friendly aliens, are entitled to the protection of the Fifth Amendment: *Sardino v. Federal Reserve Bank of New York* (1966), 361 F. 2d 106, at p. 111; and see Steiner and Vagts, *op. cit.*, footnote 103, pp. 34-36.

¹¹⁹ See O'Connell, *op. cit.*, footnote 56, vol. 2, pp. 1057-1058.

The problem can only be sketched there.¹²⁰ By way of example, it is useful to consider the controversial case commonly known as the *Rose Mary*.¹²¹ This case arose out of the 1951 nationalization by Iran of the oil industry, which took the form of an Act of the Iranian Parliament breaching a 1933 concession granted to the Anglo-Iranian Oil Company Ltd. In 1952 the tanker *Rose Mary* arrived at Aden carrying 700 tons of oil which had been taken aboard in Iran. The Anglo-Iranian Oil Company Ltd. brought an action in the Supreme Court of Aden claiming either delivery of the oil as its property or a declaration that it was its property. The main issue was whether the company formed by the Iranian government to manage the oil industry had been able to pass good title to the purchasers, being the charterers of the *Rose Mary*. The plaintiff argued that since there had been no compensation¹²² accompanying the expropriation it amounted to a confiscatory measure rendered illegal by international law. Campbell J. of the Supreme Court of Aden accepted this argument, holding that:¹²³

... following international law as incorporated in the domestic law of Aden, this court must refuse validity to the Persian Oil Nationalization Law insofar as it relates to nationalized property of the plaintiffs which may come within its territorial jurisdiction.

It was thus held that the oil was still the property of the Anglo-Iranian Oil Company Ltd.

While there remains some doubt as to the ultimate fate of the legal reasoning in the *Rose Mary* case,¹²⁴ it is quite possible that Canadian measures deemed confiscatory of foreign property would not be recognized in Commonwealth courts. The same could be said respecting American courts.¹²⁵ These are problem areas to which the attention of Canadian lawyers should be immediately turned. For example, if American-owned shares of International Nickel Ltd. were transferred, by governmental decree, to Cana-

¹²⁰ See for example, Katz and Brewster, *International Transactions and Relations* (1960), pp. 782-831.

¹²¹ *Anglo-Iranian Oil Co. Ltd. v. Jaffrate et al.*, [1953] 1 W.L.R. 246.

¹²² The compensation agreement was not reached until 1952.

¹²³ *Supra*, footnote 121, at p. 259.

¹²⁴ Schwarzenberger, *op. cit.*, footnote 98, p. 130. And see the reference in footnote 79 of Schwarzenberger. See also, *Ado Laane and Frederick Balster v. Estonian State Cargo and Passenger Steamships Line*, [1949] S.C.R. 530. See generally Cheshire, *Private International Law* (8th ed., 1970), pp. 133-142.

¹²⁵ The limitations of the *Sabbatino* case (1964), 376 U.S. 398 appear to have been removed by the "Sabbatino Amendment", 78 Stat. 1013, 22 U.S.C. # 2370 (e) (2) (1964), as amended by the Foreign Assistance Act of 1965, P.L. 89-171, 79 Stat. 653. See generally Steiner and Vagts, *op. cit.*, footnote 103, pp. 603-640. In fact the U.S. Court of Appeals hinted in *Sardino v. Federal Reserve Bank of New York*, *supra*, footnote 118, that the "ultimate sanction" would be for Congress to expropriate assets in U.S. of foreign nationals to compensate U.S. nationals expropriated abroad.

dian interests without adequate compensation, could such Canadian interests be sued in American courts for conversion?

4. *Implications for Canadian Legislation.*

In summary, international law would not prevent Canada from prohibiting the further investment of foreign capital. On the other hand, any taking of foreign property which is,

- (a) unjustifiable on the grounds of overriding public policy,
- (b) discriminatory, or

(c) unaccompanied by prompt and adequate compensation, would contravene international law. Hence, virtually all the calls for "Canadianization" or "roll-back" involve illegality because they are by definition discriminatory. Furthermore, even if such legislation can be framed in such a way as to be non-discriminatory, care must be taken to meet the minimum international standards relating to compensation.

Recognition of these constraints of international law is implicit in most of the restrictions on foreign ownership which have been enacted to date in this country. For example, the restrictions on foreign ownership placed in the Bank Act contain "grandfather clauses"¹²⁶ which have the effect of exempting foreign ownership of banks existing at the time of the legislation. The same can be said of the Canadian and British Insurance Companies Act,¹²⁷ the Loan Companies Act (Canada),¹²⁸ the Trust Companies Act (Canada),¹²⁹ the Investment Companies Act (Canada),¹³⁰ The Loan and Trust Corporations Act (Ontario)¹³¹ and the loan and trust companies part of the Companies Act (Manitoba).¹³² The same can be said of the regulation under The Securities Act (Ontario) relating to qualification for registration of securities dealers.¹³³

On the other hand, the direction¹³⁴ given in 1969 to the Canadian Radio-Television Commission that after January 12th, 1971, broadcasting licences could not be issued or renewed to persons who were not "eligible Canadian citizens" or "eligible Canadian corporations" would appear to have been unlawfully discriminatory insofar as it affected acquired alien rights in the broadcasting industry. An analysis of the resultant "buy-back" of the broadcasting industry would be extremely useful. One can only assume

¹²⁶ *Supra*, footnote 66, s. 56, sub-s. (3), (4) and (6).

¹²⁷ *Supra*, footnote 48, s. 22 (2) and (3).

¹²⁸ *Supra*, footnote 68, s. 48.

¹²⁹ *Supra*, footnote 69, s. 41.

¹³⁰ *Supra*, footnote 70, s. 14.

¹³¹ *Supra*, footnote 58, ss 55 (2) and 56 (4).

¹³² *Supra*, footnote 76, s. 253.3.

¹³³ *Supra*, footnote 57.

¹³⁴ *Supra*, footnote 58.

that the foreign owners of broadcasting licences, or of corporations which owned broadcasting licences, were in fact able to obtain sufficiently satisfactory prices for the forced sale of their interests that the issue of confiscation was irrelevant and the issue of discrimination forgotten. Whether such would be the result in industries larger, or less profitable, than the broadcasting industry is open to speculation.

IV. Legal Implications of Policy Alternatives.

The *Gray Report* isolated three main alternative policy approaches:

1. The screening process;
2. Key sectors; and
3. Minimum nationality requirements.

It might be useful to consider, in summary form, the legal implications of these three approaches.

1. The Screening Process.

The *Gray Report* indicated¹³⁵ that the screening authorities would be given jurisdiction respecting:

- (i) takeovers;
- (ii) new investments;
- (iii) licences and franchises;
- (iv) expansions of existing foreign controlled firms in Canada;
- (v) foreign controlled firms in Canada that are not expanding; and
- (vi) Canadian multi-national companies.

The federal government would appear to have jurisdiction under the "aliens" power¹³⁶ to regulate the first five categories. However, if, as is sometimes hinted in the *Gray Report*, the primary purpose of the screening authority were to be the "influencing [of] the economic environment"¹³⁷ in general then its constitutional legitimacy would become questionable. In other words, if the conditions attached to the right of entry of foreign investment extended to the regulation, in effect, of a specific industry jurisdiction under the "aliens" power might be exceeded. At what point this would occur must be the subject of further enquiry. The "aliens" power itself would not justify a federal screening agency in regulating

¹³⁵ P. 54.

¹³⁶ Whether a federal screening agency, like the proposed Competitive Practices Tribunal, could be authorized under any of the other heads of federal legislative authority must be the subject of another enquiry. The Competitive Practices Tribunal itself would apparently have a considerable power over foreign investments: see Bill C-256, 3rd sess., 28th Parliament 19-20 Elizabeth II, 1970-71, ss 33 and 34.

¹³⁷ P. 59.

Canadian multi-national companies, but their regulation would presumably not pose a constitutional problem in view of the federal authority over external trade and commerce.

Conversely, it seems that the provinces would not have constitutional authority to screen foreign investment as such.

While, from the standpoint of international law, a screening authority could "block" foreign takeovers of domestic enterprises, new investments in Canada or the entering of new licences and franchises with Canadian firms, any interference with existing foreign investment on the grounds of its foreign character would be discriminatory and thus illegal. Such interference would also raise the issues of "creeping nationalization" and adequate compensation therefor.

2. *Key Sectors.*

Essentially, the key sector approach involves minimum nationality requirements or even total prohibition of alien ownership in certain "key sectors" of the economy. Provided that this approach does not amount to a disguised attempt to regulate generally the sector in question¹³⁸ there would appear to be ample federal jurisdiction under the "aliens" power. Conversely, again, inasmuch as legislation respecting aliens as such is involved, the provinces would appear to be impotent in this area.

To the extent that any "roll-back" of acquired alien interests is involved then there would appear to be an international legal problem. In view of the high degree of foreign investment in most sectors of the Canadian economy, the creation of such a problem seems highly likely in the event of further declarations of key sectors.

3. *Minimum Canadian Requirements.*

It is difficult to visualize any legal concern about requirements as to Canadian directorships. However, problems would arise from any suggestions, such as that of the *Wahn Committee Report*,¹³⁹ that there be a mandatory majority of Canadian shareholders in all Canadian firms of economic significance. Public international law would appear to prohibit such legislation to the extent that it discriminated against the acquired rights in Canada of aliens. Again, the issues of expropriation and adequate compensation therefor are presented.

Federal legislation in this regard would appear to be authorized constitutionally by the "aliens" head of jurisdiction, while provincial jurisdiction is lacking.

¹³⁸ See the "insurance cases", *supra*.

¹³⁹ 1970 Proceedings of House of Commons Standing Committee on External Affairs and National Defence, No. 33, 33:138.

V. *Conclusion.*

Now that the Canadian debate on the implications of foreign ownership has reached a degree of maturity on the substantive issues, the time has come to crystallize the policy possibilities in the light of hard law. Firstly, the areas of legislative authority appear to be clear: Parliament possesses full authority to regulate foreign investment, provided that such regulation does not constitute a disguised attempt to regulate a particular industry not otherwise within federal jurisdiction. On the other hand, the provincial legislatures, at least in the absence of sweeping economic regulation of general application, do not possess such authority. Secondly, even Parliament must take care lest it violates the constraints of international law against unlawful expropriations.

Failure by our legislators to move with careful regard for the constitutional limitations would undoubtedly lead to a disastrous morass of uncertainty and litigation. Their failure to move with careful regard for the international legal limitations would lead not only to diplomatic and political problems for Canada but also to litigation, both on the international and municipal levels. It is, therefore, to be hoped that the legal profession will come forward with further research and analysis on the many intricate problems involved to assist in a rational and useful formulation of public policy on this critical issue.
