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WHICH INVESTORS ARE "FOREIGN"?

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I

Bobby Orr, the most famous Canadian player of Canada's national sport of hockey, may be a "non-eligible person" for purposes of the Foreign Investment Review Act (Canada)¹ which would prohibit him from establishing or acquiring a business in Canada without government approval. The Right Honourable Pierre Elliott Trudeau, Canada's Prime Minister, is not a "resident Albertan", that domestic species of whom at least one half of the board of directors of an Alberta company must soon be comprised. Such are the vagaries of various Canadian attempts to restrict "foreign" participation in Canadian economic life.

Commenting on the 1975 decision of the Supreme Court of Canada in *Morgan and Jacobson v. The Attorney General for Prince Edward Island*,² Professor David Phillip Jones says:³

Canadians who value the concept of one country *a mare usque ad mari* should be upset that their constitution permits provinces to discriminate against Canadian citizens resident elsewhere in Canada.

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¹ S.C., 1973-74, c. 46.

² (1975), 55 D.L.R. (3d) 527, [1976] 2 S.C.R. 349.

³ Case Comment (1976), 54 Can. Bar Rev. 381, at p. 391.

Should Canadians also be upset that some Canadian statutes discriminate against Canadian citizens resident *outside* of Canada? What about the contemporaneous easing of the requirements for aliens to become Canadian citizens?⁴

In the last decade or so we have witnessed a proliferation of legislative restraints on foreign enterprises. This has resulted from a debate on the role and value of foreign investment in Canada, a debate whose genesis and development has been well chronicled elsewhere and will not be reviewed here. What will be reviewed here is the conceptual basis for deciding who is "foreign". Surprisingly, the landmark *Gray Report*,⁵ with its litany of complaints about foreign investment, never reviewed what it meant by "foreign", although the assumption seemed to be that "foreign" meant "non-national".⁶ In fact, the words "foreign" and "alien" appear nowhere in any of the relevant legislation except the old Foreign Insurance Companies Act (Canada)⁷ and the title of the Foreign Investment Review Act.

II

The "grid" set out in the appendix to this article attempts to identify existing federal and provincial legislation discriminating against enterprises owned or controlled by persons perceived to be foreign. Sixty-one statutory provisions have been identified. The conceptual bases used are nationality, residence and domicile. Of these sixty-one provisions, forty have a mixed nationality plus residency or domicile definition.⁸ Fifty-two have a nationality requirement, alone or in combination with a residency or domicile requirement, while forty-six have a residency requirement alone or in combination with a nationality requirement. Only seven have a nationality requirement alone and only nine have a pure residency requirement alone. Nineteen have provincial, rather than national, residency requirements. Three have domicile requirements which must, of course, be provincial, and, of these, two also include a nationality requirement. Finally,

⁴ In 1976 Parliament passed legislation to replace the Canadian Citizenship Act, R.S.C., 1970, c. C-19, by the Citizenship Act, S.C., 1974-75-76, c. 108, which was proclaimed in force on February 15th, 1977.

⁵ Foreign Direct Investment in Canada (Ottawa, 1972) published by the Government of Canada.

⁶ *Op. cit.*, *ibid.*, *e.g.*, p. 336.

⁷ R.S.C., 1970, c. I-16. This statute was enacted in 1932, 22-23 Geo. 5 (Can.), c. 47.

⁸ See the definitions of these terms used in the appendix to this article.

only two provinces, New Brunswick and Newfoundland, have no restrictions on foreign investment.

Examples of pure nationality requirements are, therefore, difficult to find. One example is provided by the federal Aeronautics Act⁹ which provides that an aircraft (other than a state aircraft) cannot be registered unless it is exclusively owned by a "qualified person". The Act provides for three classes of qualified persons, namely, (i) Canadian citizens, (ii) landed immigrants who have been resident for not more than six years, and (iii) companies incorporated in Canada, at least two-thirds of whose directors are Canadian citizens. An example of a pure residency requirement is provided by the Prince Edward Island Real Property Act¹⁰ which was the subject of the courts' interpretation in the *Morgan* case.¹¹ That Act limits landholdings that non-residents of Prince Edward Island may acquire in the province without the approval of the provincial government. The most obvious example of a mixed nationality and residency requirement is provided by the Foreign Investment Review Act itself. A foreigner, characterized inelegantly and unhelpfully as a "non-eligible person", includes not only an individual who is neither a Canadian citizen nor a landed immigrant, (a distinction based upon national status) but also certain Canadian citizens not ordinarily resident in Canada including, principally, those persons who have been ordinarily resident outside Canada for five or more consecutive years. Hence, if some of Canada's most illustrious industrialists have substantially avoided Canadian income tax by becoming non-residents,¹² Parliament has successfully deprived them of the right to acquire or establish new Canadian businesses without Cabinet approval. One wonders whether these are the "foreigners" envisaged by the average Member of Parliament in voting for the Foreign Investment Review Act.

The characterization of a foreigner in the various statutes is usually misleading. For example, the regulations¹³ under The Ontario Securities Act refer to a "non-resident" but define that term to mean not only a person not resident in Canada but also a person who is "not a Canadian citizen". Many other statutes

⁹ R.S.C., 1970, c. A-3.

¹⁰ R.S.P.E.I., 1974, c. R-4.

¹¹ *Supra*, footnote 2.

¹² In Canada liability for income tax is based essentially on residence within Canada or, for non-residents, income earned in Canada.

¹³ R.R.O., 1970, Reg. 794, as am., s. 6a.

follow this pattern. The Alberta Companies Act¹⁴ should be lauded, at least from a drafting standpoint, for defining a Canadian citizen ordinarily resident in Alberta as a "resident Albertan". This characterization communicates a fairly precise concept. On the other hand, the Foreign Investment Review Act follows the Kafkian tone of the federal Income Tax Act¹⁵ in referring to a "non-eligible person". But better, perhaps, to communicate little than to mislead.

The sheer inconsistency produced by draftsmen from different jurisdictions reflecting different biases at different points in time is evident if one considers the restrictions on foreign ownership of provincially incorporated trust companies. The British Columbia Trust Companies Act requires that the majority of directors must be residents of British Columbia and "subjects of Her Majesty".¹⁶ On the other hand, the Alberta Trust Companies Act¹⁷ requires that three-fourths (not a simple majority) of the directors must be residents of Canada (but not necessarily of the province) and must be Canadian citizens (not merely British subjects). In addition, unlike the provision of the British Columbia Act, there is a prohibition upon the non-resident ownership of capital stock in excess of twenty-five per cent in the aggregate or ten per cent by any single "non-resident". With respect to individuals, a non-resident is defined as "an individual who is not a Canadian citizen ordinarily resident in Canada", that is, a mixed nationality and Canadian residency test. With respect to corporations, the Alberta definition includes not only a corporation *controlled* by individual non-residents but also a corporation *incorporated* in a jurisdiction outside of Canada regardless of the location of corporate control. The Manitoba trust company provisions¹⁸ require that a simple majority (not three-fourths) of the directors must be residents of Canada (but not necessarily Canadian citizens). Similarly, there is a share capital non-resident ownership limitation of twenty-five per cent in the aggregate and ten per cent in any single "non-resident". With respect to individuals, it is a true Canadian residency test with no nationality requirement, although with respect to corporations it includes a corporation incorporated outside of Canada regardless of the location of control. The

¹⁴ R.S.A., 1970, c. 60, as am., s. 29.1.

¹⁵ S.C., 1970-71-72, c. 63.

¹⁶ R.S.B.C., 1960, c. 389, sub-s. 23(5).

¹⁷ R.S.A., 1970, c. 372, as am.

¹⁸ The Corporations Act, S.M., 1976, c. 40, sub-s. 321(6) and s. 344.

Trust Companies Acts of Nova Scotia¹⁹ and Saskatchewan²⁰ are the same as the British Columbia statute, namely, they look only to the composition of the board of directors, not the ownership of the corporation, requiring that a majority of the directors be provincial residents but only British subjects. If this patchwork is confusing, an example may help. Mr. Trudeau would qualify as a director of an Alberta or Manitoba trust company (residency anywhere in Canada sufficing), but not as a director of a British Columbia, Saskatchewan or Nova Scotia trust company (provincial residency being required). Meanwhile, he would not be treated as a non-resident for purposes of the stock ownership restrictions in the Alberta and Manitoba statutes, although neither would a resident alien be treated as a non-resident in Manitoba.

Two interesting twists are provided by Quebec legislation. The James Bay Regional Development Act²¹ provides that no person may act as a director of the James Bay Development Corporation if he is not a Canadian citizen "domiciled in the Province of Quebec". A regulation under the Quebec Mining Act²² provides that the holder of an exploration permit to explore for mineral substances in New Quebec must give preference in any employment to mining engineers, geologists and administrators graduated from universities and schools of Quebec. Furthermore, the permit holder must give preference to Quebec labourers.

III

This legislative hodge-podge does raise the question "What is going on here?" That the federal and provincial governments have sought to restrict the economic opportunities of foreigners is clear. What is less clear is whether there is any consensus as to who is to be considered foreign. Non-nationals,²³ non-residents,

¹⁹ R.S.N.S., 1967, c. 316.

²⁰ R.S.S., 1965, c. 32.

²¹ S.Q., 1971, c. 34, s. 12.

²² S.Q., 1965, c. 34. This statute is not included in the grid in the appendix.

²³ "Non-national" as used herein means, with respect to an individual, an "alien" as that term was defined in the Canadian Citizenship Act, *supra*, footnote 4, i.e. a person who is not a Canadian citizen, Commonwealth citizen, British subject or citizen of the Republic of Ireland, except that it does not include landed immigrants to the extent that various statutes surveyed accord them equal status with Canadian citizens. The term "alien"

whether of the country or of the particular province, and those not domiciled within the province are all considered to be foreigners in different legislative contexts.

Indeed, this hodge-podge indicates a certain confusion, as evidenced by the frequent characterization of non-nationals as "non-residents". It evidences a weakening of the British connection, with very few statutes according to all British subjects the same preferences accorded to Canadian citizens, a phenomenon which has been further emphasized by the enactment of the new Citizenship Act.²⁴ It seems to indicate a degree of not only Canadian economic nationalism but also provincial economic nationalism. Finally, it indicates a lessening of commitment to Canadian citizens who have left the country.

It is submitted that this rather murky situation reflects at least three underlying factors:

(a) *Conceptual Confusion* — There is probably a sheer lack of analysis by not only the legislators but also the legislative draftsmen. This confusion may not be surprising considering the evolution of Canada from a British colony to a "Dominion" to its present status of a sovereign state. It was, after all, only in 1947 that "British nationality"²⁵ was superseded by Canadian

is omitted from the new Citizenship Act, *supra*, footnote 4, which also provides that:

"For the purposes of any law in force in Canada on and after the commencement of this Act that refers to the status of a British subject, the status so described shall after the commencement of this Act refer to the status of a Canadian citizen or a citizen of the Commonwealth or both as the intent of such law may require." See sub-s. 31(2).

Whether this provision will have the effect of, for example, requiring that a majority of the directors of trust companies incorporated under the British Columbia Trust Companies Act, *supra*, footnote 16, must now be Canadian citizens rather than simply subjects of Her Majesty is not immediately clear. Defining who is a Canadian citizen is clearly within the authority of Parliament pursuant to the provisions of the British North America Act of 1867, 30 & 31 Vict., c. 3 (U.K.). Whether Parliament can re-write provincial legislation requiring that directors of provincially incorporated companies must be British subjects is not so clear.

With respect to a *corporation*, the term "non-national" is used herein to mean a corporation which is incorporated in a jurisdiction outside of Canada plus, where the relevant legislation discriminates against it because it is owned or controlled by non-national individuals or by a corporation incorporated outside of Canada, such a corporation.

²⁴ See *supra*, footnote 23, for sub-s. 31(2) of the new Citizenship Act.

²⁵ Donald Creighton, *The Forked Road, Canada 1939-1957* (1976), p. 129.

citizenship by virtue of the Canadian Citizenship Act.²⁶ The new Citizenship Act²⁷ continues this conceptual confusion. Instead of redefining the meaning of "alien" it simply ignores the word!

(b) *Political Ambivalence* — If one starts to ask who is "foreign", that is, who is "not one of us", the question is how tightly the circle should be drawn. A Martian would not be an Earthman. An American is not a Canadian. Mr. Trudeau is not a resident Albertan. You are not a member of my family. Clearly, the Québécois consider an English Canadian not to be one of them.²⁸ Maritimers and Western Canadians have a feeling of regional identity. One suspects that some of these provincial restrictions indicate a feeling that even Canadians outside the province are "foreign".

Similarly, at a time when we are restricting investment by foreigners, the new Citizenship Act actually makes it easier to become a Canadian citizen by reducing the length of time during which a landed immigrant must have resided in Canada from five to three years. This may reflect a re-evaluation of the importance attached by the Canadian government to citizenship. Certainly the combined effect of the new Citizenship Act and the Foreign Investment Review Act is to reduce the importance of citizenship and increase the importance of permanent residence.²⁹

There may even be reflected an ambivalence in Canadian policy about the essential validity of any restrictions on foreign investment, an ambivalence indicated by the Canadian government's agonizing over the signing of the Declaration by the governments of the Organization for Economic Co-operation and Development member countries on International Investment and Multinational Enterprises on June 21st, 1976 in Paris.³⁰ The Canadian government agreed on the general principle of national treat-

²⁶ See, generally, George T. Tamaki, *The Canadian Citizenship Act, 1946* (1947), 7 U. of T.L.J. 68.

²⁷ *Supra*, footnote 4.

²⁸ The November 15th, 1976, election of the Parti Québécois to form a government of the Province of Quebec is, of course, by far the most dramatic example of the centrifugal forces at work in Canadian society. The Parti Québécois has as its central purpose the political independence of the Québécois.

²⁹ Because the new Citizenship Act makes it easier for an alien to become a Canadian citizen while the Foreign Investment Review Act divests a non-resident Canadian citizen of the right to acquire or establish a new business without the approval of the federal government.

³⁰ Organization for Economic Co-operation and Development, 1976.

ment³¹ in Canada for enterprises owned or controlled by nationals of other member countries although at the same time insisting on its right not to do so.³² Perhaps this reflects an even more elemental concern about the propriety of any kind of discrimination, such as the concern evidenced by the Canadian Bill of Rights' admonition against discrimination by reason of "national origin".³³

(c) *Constitutional Problem* — There is the question of the legislative competence of the Canadian provinces to discriminate on the basis of national status, upon which this writer has commented elsewhere.³⁴ The Supreme Court of Canada decision in the *Morgan* case did not provide a final answer because, as Chief Justice Laskin pointed out, the Prince Edward Island legislation in question did not purport to distinguish between aliens and Canadian citizens.³⁵ Suffice it to say that a perception of a constitutional limitation was apparently the reason that the legislation was drafted to discriminate against non-residents of the province rather than aliens. As Senator M. L. Bonnell from Prince Edward Island has stated:³⁶

While I was a member of the government of Prince Edward Island we amended the Real Property Act to provide that an alien could not own more than five acres of our land without the consent of the Lieutenant Governor in Council. We were informed that the Province did not have the power or the right to decide who was an alien, or to become involved in immigration matters, which were under federal jurisdiction. The only means by which we could preserve our lands for our farming people was by stipulating that no non-resident could buy land in Prince Edward Island. That prohibition would include Canadians from Saskatchewan, Alberta, Nova Scotia and the remainder of the Provinces. That was not the wish of the people of Prince Edward Island who only wanted to keep the land away from Americans. . . .

The Senator made those remarks in a speech supporting an amendment to the new Citizenship Act providing that Parlia-

³¹ The Declaration defines "national treatment" by a member country as treatment of foreign-controlled enterprises no less favourable than that treatment accorded in like situations to domestic enterprises.

³² At Canada's insistence, an emasculating proviso was inserted to the effect that the Declaration did "not deal with the right of Member countries to regulate the entry of foreign investment or the conditions of establishment of foreign enterprises".

³³ R.S.C., 1970, Appendix III, s. 1.

³⁴ E. James Arnett, *Canadian Regulation of Foreign Investment: The Legal Parameters* (1972), 50 Can. Bar Rev. 213.

³⁵ *Supra*, footnote 2, at p. 531 (D.L.R.).

³⁶ Canada, *Debates of the Senate*, 1976, Vol. 123, p. 2313.

ment may delegate to the provinces the power to discriminate against non-nationals³⁷ in the matter of landholdings. This amendment was ultimately passed and constitutes an all too infrequent example of constructive co-operation between our two senior levels of government, although it does raise the troublesome questions of (a) constitutional authority to make such delegation and (b) the implications for those other provincial restrictions directed at non-nationals for which there is no similar Parliamentary base.

IV

The grid in the appendix indicates that existing legislation regulating foreign investment determines who is "foreign" by reference to residence, domicile or national status, or a combination of these. The use of these concepts bears some elaboration:

(a) *Residence* — The Prince Edward Island Real Property Act, which was the subject of litigation in the *Morgan* case, distinguishes on the basis of residence within the province. In other words, all persons who are non-residents of the province are treated as foreign. Other statutes use residence, either within a given province or within Canada as a whole, as a point of distinction, usually in combination with some requirement as to nationality. The Prince Edward Island Real Property Act defines a "resident of the Province of Prince Edward Island" as a "*bona fide* resident, *animus et factum*, of the Province of Prince Edward Island". More usually such statutes use the phrase "ordinarily resident" in the jurisdiction in question but without any further definition.

An exotic variation is provided by the Saskatchewan Farm Ownership Act³⁸ which defines a resident person as "an individual who resides in Saskatchewan for 183 days or more a year" but also includes "a farmer who resides for 183 days or more a year *outside* Saskatchewan but within twenty miles of the border of Saskatchewan". Hence, an American farmer resident (for at least 183 days per year) in the State of Montana but within twenty miles of the border of Saskatchewan would

³⁷ The actual reference in sub-s. 32(2) of the statute is to "persons who are not Canadian citizens" and corporations that are "effectively controlled by persons who are not Canadian citizens". Para. 33(6)(a) further prevents a province from restricting land purchases by "a landed immigrant ordinarily resident in Canada". *Supra*, footnote 4.

³⁸ S.S., 1973-74, c. 98, sub-s. 2(i).

be treated as a resident and not subject to that Act's restrictions on farmholdings.

(b) *Domicile* — Certain legislation in the Province of Quebec uses domicile as the distinguishing factor. Under the Quebec Civil Code domicile means the place where a person has his "principal establishment", and change of domicile is effected by actual residence in another place, coupled with the intention of the person to make it the seat of his principal establishment.³⁹ None of the common law Canadian jurisdictions uses domicile for these purposes although it is obviously a concept which might provide a useful criterion. The common law concept has been the subject of much legal analysis but without too much agreement as to its exact definition. Perhaps the most generally accepted definition is that provided by Kindersley V.C. in *Lord v. Colvin*:⁴⁰

That place is properly the domicile of a person in which he has voluntarily fixed the habitation of himself and his family, not for a mere special and temporary purpose, but with a present intention of making it his permanent home, unless and until something (which is unexpected, or the happening of which is uncertain) shall occur to induce him to adopt some other home.

(c) *Nationality* — Increasingly, legislation aimed at regulating foreign ownership uses nationality as the basis for determining whether a person is foreign. As has been noted elsewhere,⁴¹ citizenship is a reasonably recent concept in Canada and, indeed, in the Commonwealth as a whole, but represents an attempt to deal with the concept of national status within the context of the old British Commonwealth of Nations. Much of the legislation treats a landed immigrant as being the same as a citizen. In some provincial statutes the older concept of allegiance to the Crown is the criterion upon which the distinction is made.⁴²

The use of these various concepts raises the question of which is the most appropriate. Residence, domicile and nationality all have been used and are used as connecting factors for various aspects of personal law in various jurisdictions.⁴³ In addition,

³⁹ Arts 79 and 80.

⁴⁰ (1859), 4 Drew 366, at p. 376.

⁴¹ Tamaki, *op. cit.*, footnote 26, at pp. 71-73.

⁴² See, for example, the requirement in the British Columbia Trust Companies Act, R.S.B.C., 1960, c. 389, sub-s. 23(5), that a majority of the directors of a provincially incorporated trust company must be "subjects of Her Majesty by birth or naturalization".

⁴³ See, generally, J. H. C. Morris, *The Conflict of Laws* (1971), Ch. 2.

there is another use for nationality, namely, the basis upon which a conferring sovereign has a proprietary and protective right over the recipient national under public international law. In fact, an "alien", is a person who lacks national status in respect of any particular conferring state.

What then is the most appropriate test? Residence is simply a fact of length of stay within a particular jurisdiction. It implies nothing except that an individual lives there for whatever is the appropriate period of time depending upon whether "ordinary residence", "habitual residence", or whatever, is required. It is, in short, a relationship lacking any emotional or social commitment.

The Quebec Civil Code and Kindersley V.C.'s statement suggest that domicile requires a degree of *animus*, some degree of emotional, or at least psychological, commitment to a place. This would appear to offer a somewhat more suitable conceptual basis than that of residence for determining what is truly foreign. However, the reliance upon intention involves a subjectivity which makes it a rather impractical legal concept.⁴⁴

Nationality would appear to be the most appropriate single test for determining "foreignness". It combines *animus*, which residence lacks, with objectivity, which domicile lacks. As stated by the International Court of Justice in the *Nottebohm* case:⁴⁵

... nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred, either directly by the law or as the result of an act of the authorities, is in fact more closely connected with the population of the State conferring nationality than with that of any other State.

The existence of reciprocal rights, such as the right to diplomatic protection abroad, and duties, such as the duty of allegiance,⁴⁶ would appear to provide the very factors which are relevant in determining who is a foreigner. The underlying reason for the creation as between the state and its national of such reciprocal rights and duties is the "social fact of attachment" to which the

⁴⁴ See J.-G. Castel, *Canadian Conflict of Laws* (1975), pp. 133-134.

⁴⁵ *Lichtenstein v. Guatemala*, I.C.J. Rep. 1955, p. 4.

⁴⁶ The Canadian Citizenship Act, *supra*, footnote 4, required an applicant for citizenship to take an "oath of allegiance": see para. 10(1)(f). The new Citizenship Act, *supra*, footnote 4, requires what is called an "oath of citizenship": see sub-s. 11(3).

International Court of Justice referred. As Professor J. H. C. Morris states in discussing the shift for the determination in Europe of one's personal law:⁴⁷

The change from domicile to nationality on the continent of Europe was accelerated by Mancini's famous lecture delivered at the University of Turin in 1851. In this lecture he advocated the principle of nationality on the ground that laws are made more for an ascertained people than for an ascertained territory. A sovereign (he said) in framing laws for his people should consider their habits and temperament, their physical and moral qualities, and even the climate, temperature and fertility of the soil.

Whether the modern Canadian conception of nationality matches Mancini's conception is, of course, another question. We live in an era in which the acquisition of citizenship through naturalisation is being made easier, is based theoretically on a right⁴⁸ to do so, is supposed to be non-discriminatory as to race, creed or national origin and is designed to develop a "multicultural" society. This at a time when respect for the constitutional sovereign seems to be diminishing. One might well ask to what "essential community"⁴⁹ the body of Canadian nationals are really to belong so as to serve as a base for distinguishing against "les autres".

Hannah Arendt described nationalism as "the precious cement for binding together a centralized state and an atomised society". What she was talking about was the European state without a monarch in which the only essential community was "national, that is, of common origin".⁵⁰ One can see the logic of a state based upon tribal nationalism discriminating against those who are not members of the state, that is, not members of the tribe. Does the same hold true for a multicultural democratic federation such as Canada? Some natural-born Canadians may have difficulty in feeling more affinity with landed immigrants from an alien culture than with other natural-born Canadian citizens who happen to be resident outside of Canada.

⁴⁷ *Op. cit.*, footnote 43, p. 34.

⁴⁸ The new Citizenship Act, *supra*, footnote 4, provides that the Minister *shall* grant citizenship to a person who satisfies certain requirements whereas the old Canadian Citizenship Act, *supra*, footnote 4, provided that the Minister "*may*, in his discretion" grant citizenship to a person who satisfies certain requirements. The heading to Part I of the new Act, which Part includes the acquisition of citizenship by naturalization, is "The Right to Citizenship".

⁴⁹ Hannah Arendt, *The Origins of Totalitarianism* (new ed., 1973), p. 230.

⁵⁰ *Op. cit.*, *ibid.*, p. 232.

A single test of "foreignness" is not, of course, required and, in fact, two-thirds of the statutory provisions surveyed have a mixed nationality plus residence (or domicile) requirement. In other words, a person is foreign unless he passes both a nationality and residence (or domicile) test. This suggests a perception that both the legal bond of nationality and raw fact of physical presence are required to ensure that one is not foreign. Perhaps this approach, as exemplified by the "non-eligible person" of Foreign Investment Review Act fame, is the most suitable. Yet it does have the undeniable effect of disinheriting non-resident citizens even if natural-born.

Perhaps the underlying motivation for restricting investment by foreigners should be re-examined to determine an appropriate test of "foreignness". For example, if the motivation were to ensure that investors, including managers, are responsive to Canada's domestic environment, then a combination of nationality and residence (or domicile) would appear to be appropriate. Nationality should provide the fundamental attachment ensuring an understanding of our traditions while residence should provide a familiarity with current conditions. Combined, they would exclude both the expatriate and the transient. On the other hand, if the motivation were to ensure that investors are legally and, perhaps, socially accountable then physical presence within the jurisdiction would be the relevant criterion. This would suggest Canadian residence with respect to matters under federal jurisdiction and provincial residence with respect to matters under provincial jurisdiction. If, of course, the motivation were to husband our patrimony then nationality would be the only relevant criterion. The exclusion of non-resident nationals would not be particularly logical since they are still members of the nation. Whether policies designed to encourage immigration and to facilitate the acquisition of citizenship accord with that motivation is perhaps worthy of more consideration. They may, in fact, ultimately cause provincial governments to adopt provincial residency requirements because of a feeling that Canadian citizenship no longer implies a "social fact of attachment" or "essential community".

V

Restrictions on foreign investment represent understandable attempts by the state to deal with at least two phenomena of modern industrial society, namely, the interdependence of national economies and the approaching exhaustion of Earth's resources. The Foreign Investment Review Act is a federal attempt to

control that "crystallization and epitome"⁵¹ of the trend towards economic interdependence, the multinational enterprise. The land-holding limitation of the Prince Edward Island Real Property Act is a provincial attempt to restrict the demand for an increasingly precious natural resource. The reflex in either case is protective, that is, to build a defence around a known area and known people. The danger, however, is that the defence is being drawn both inconsistently and, in some cases, too tightly. As a result, Canada is developing not only an incoherent and contradictory mosaic but also a Balkanization damaging to the concept of one country *a mare usque ad mari*.

APPENDIX

Statutes/ Regulations	Juris- diction	Nation- ality	Residency Can. Prov.	Domi- cile	Mixed
1. Foreign Investment Review Act	Fed.	s	s		s
2. Bank Act	Fed.	d s	d s		d s
3. Broadcasting Act	Fed.	d s			s
4. Canada Business Corporations Act	Fed.	d	d		d
5. Canada Development Corporation Act	Fed.	d s	d s		d s
6. Canadian and British Insurance Companies Act	Fed.	d s	d s		d s
7. Loan Companies Act	Fed.	d s	d s		d s
8. Canada Mining Regulations	Fed.	s			

⁵¹ Raymond Vernon, *Storm over the Multinationals: Problems and Prospects* (1977), 55 *Foreign Affairs* 243.

APPENDIX

	Statutes/ Regulations	Juris- diction	Nation- ality	Residency Can.	Prov.	Domi- cile	Mixed
9.	Northern Mineral Exploration Assistance Regulations	Fed.	s				
10.	Income Tax Act (advertising expense deduction)	Fed.	d s				
11.	Income Tax Act (small business deduction)	Fed.	s	s			s
12.	Foreign Insurance Companies Act	Fed.	s				
13.	Western Grain Stabilization Act	Fed.	s				
14.	Canada Oil and Gas Land Regulations	Fed.	s				
15.	Aeronautics Act	Fed.	d s				
16.	Investment Companies Act	Fed.	s	s			s
17.	Canada Corporations Act (<i>re</i> special act companies)	Fed.	d	d			d
18.	Telesat. Canada Act	Fed.	d s	d s			d s
19.	Trust Companies Act	Fed.	d s	d s			d s
20.	Insurance Act	Alta	d		d		d
21.	Companies Act	Alta	d		d		d
22.	Liquor Licensing Act	Alta	s				

APPENDIX

	Statutes/ Regulations	Juris- diction	Nation- ality	Residency Can.	Prov.	Domi- cile	Mixed
23.	Nursing Homes Act	Alta	d s		d s		d s
24.	Public Lands Act	Alta	s		s		s
25.	Agricultural Development Act	Alta	s		s		s
26.	Securities Act	Alta	d	d s	s		
27.	Trust Companies Act	Alta	d s	d s			d s
28.	Companies Act	B.C.		d	d		
29.	Government Liquor Act	B.C.	d s	d s	d s		d s
30.	Land Act	B.C.	s				
31.	Mineral Act	B.C.	d s	d s			d s
32.	Securities Act	B.C.		d s	d s		
33.	Trust Companies Act	B.C.	d		d		d
34.	Liquor Control Act	Man.	s	s			s
35.	Securities Act	Man.		d s	d s		
36.	Corporations Act (trust and loan corporations)	Man.	s	d s			s
37.	Corporations Act	Man.		d			
38.	Trust Companies Act	N.S.	d		d		d
39.	Business Corporations Act	Ont.	d	d			d
40.	Collection Agencies Act	Ont.	s	s			s
41.	Insurance Act	Ont.	s	s			s

APPENDIX

	Statutes/ Regulations	Juris- diction	Nation- ality	Residency Can.	Prov.	Domi- cile	Mixed
42.	Land Transfer Tax Act	Ont.	d s	d s			d s
43.	Land Speculation Tax Act	Ont.	d s	d s			d s
44.	Liquor Licence Act	Ont.	s				
45.	Loan and Trust Corporations Act	Ont.	d s	d s			d s
46.	Mortgage Brokers Act	Ont.	s	s			s
47.	Ontario Energy Corporation Act	Ont.	d s	d s			d s
48.	Ontario Transporta- tion Development Corporation Act	Ont.	d s	d s			d s
49.	Paperback and Periodical Distributors Act	Ont.	s	s			s
50.	Public Lands Act	Ont.	s				
51.	Securities Act	Ont.	s	d s	d		s
52.	Real Property Act	P.E.I.			s		
53.	Booksellers Accreditation Act	Que.	d s			d s	s
54.	James Bay Regional Development Act	Que.	d			d	d
55.	Land Transfer Duties Act	Que.		d	s		

APPENDIX

Statutes/ Regulations	Juris- diction	Nation- ality	Residency Can.	Prov.	Domi- cile	Mixed
56. Industrial Development Assistance Act	Que.				s	
57. Agricultural Incentives Act	Sask.	s		s		s
58. Farm Ownership Act	Sask.			s		
59. Liquor Licensing Act	Sask.	s	s			s
60. Securities Act	Sask.			d s		
61. Trust Companies Act	Sask.	d		d		d

DEFINITIONS

- "d" — Indicates a directorship requirement. See Assumption No. 3 below.
- "s" — Indicates a status requirement. See Assumption No. 3 below.
- "Nationality" — This refers to distinctions based upon national status, including, for individuals, distinctions based upon Canadian citizenship, the status of a landed immigrant in Canada and the status of a British subject, and including, for business corporations, distinctions based upon their jurisdictions of incorporation or upon the nationality of their owners or controllers. See discussion in footnote 23.
- "Residency" — This refers to distinctions based upon the fact of residency, by whatever test or measure.
- "Can." — This refers to residency anywhere in Canada.
- "Prov." — This refers to residency within a particular province of Canada.
- "Domicile" — This refers to distinctions based upon domicile as used both in the Quebec Civil Code and in the common law.
- "Mixed" — This refers to regulatory schemes which make a distinction based upon a combination of a nationality factor plus a domicile factor or a residency factor, whether national or provincial.

ASSUMPTIONS

1. The approach taken in the above grid is to survey each federal and provincial statute or regulation which discriminates against persons by reason of their "foreignness" and to analyze the fundamental basis of that distinction. It is not the purpose of this exercise to analyze a discriminatory regulatory scheme or, indeed, to analyze definitional problems such as differing methods for ascertaining the fundamental character of corporations.

2. For the purposes of this grid no distinction is made between the treatment of individuals, whether alone or in partnership or other association, and business corporations. Naturally, in most statutes individuals and business corporations are in fact dealt with distinctly, though usually relatedly. It might have been more useful to separate the two but it would have complicated the grid and, in any event, the treatment of individuals and corporations in a given statute or regulation is usually consistent, that is, if there is a mixed nationality and residency requirement for individuals there is usually a mixed nationality and residency requirement for business corporations.

3. The analysis has proceeded along the following lines:

(a) It was found that in fact the statutes and regulations surveyed discriminate against investors on one or more of three grounds, namely, nationality, residence (either within the country as a whole or within a given province) and domicile, and, therefore, columns for each were established in the grid.

(b) Since it was decided to consolidate statutory treatment of individuals and of business corporations, and that it was useful (as mentioned below) to identify statutory treatment of boards of directors of corporations, a means of distinguishing between treatment of basic status and treatment of boards of directors had to be devised. Therefore, the identification of whether a person (whether an individual or a corporation) is discriminated against by reason of his status as a non-national, non-resident or non-domiciled person, is made by use of the letter "s" in the appropriate column. The identification of a nationality, residency or domicile requirement for membership of boards of directors is made by use of the letter "d" in the appropriate column.

(c) The regulatory schemes surveyed most frequently determine the status of business corporations by reference to the status of their shareholders, that is, ownership or control. For example, the determinant of whether a business corporation is a "non-eligible person" within the meaning of the Foreign Invest-

ment Review Act (Canada) is by whom control of the business corporation is in fact exercised: see Warren Grover, *The Foreign Investment Review Act: Phase 1* (1975), 1 Can. B.L.J. 54, at pp. 61 *et seq.* However, as Grover points out: "the concentration on shareholder control in the definition suggests that . . . shareholding is to be the primary *indicium* of control." Therefore, a control test has been equated with an ownership test for the purposes of this grid.

(d) With respect to business corporations, there is often either a positive requirement that the membership of the board of directors must include a certain number of individuals with the requisite status or that the status of the corporation is to be determined by reference, at least in part, to whether the board of directors includes a certain number of individuals with a certain status.

4. A business corporation's "nationality" is assumed to be that of its jurisdiction of incorporation. Nevertheless, where a regulatory scheme surveyed determines the status of a business corporation by reference to the nationality of its shareholders, for the purposes of the grid a nationality requirement for the corporation is indicated. On the other hand, where a regulatory scheme purports to determine the "residency" of a business corporation by reference to its jurisdiction of incorporation, the author treats this as being in fact a nationality requirement rather than a residency requirement.

5. It is assumed that the true residency of a corporation is determined by reference to the location of its central management and control. In fact, none of the regulatory schemes surveyed make any distinction based upon the location of the central management and control of a corporation.

6. Discrimination against a foreign government, or agency thereof, or against a business corporation owned or controlled by a foreign government, or agency thereof, is assumed to be discrimination based upon nationality.

7. Where landed immigrants are treated the same as Canadian citizens they are assumed to be meeting a nationality requirement.

8. It is important to note that the column entitled "Mixed" reflects both:

(a) where the regulatory scheme *acknowledges* that both nationality and residence (or domicile) are required, and

(b) where the definition of "resident" in the statute is *misleading* in that it requires nationality in addition to residency.

The Loan Companies Act (Canada), exemplifies both these phenomena. As to the former, section 19 provides that at least three-fourths of the directors of a loan company must be "Canadian citizens ordinarily resident in Canada". As to the latter, for the purposes of the limit on shares held by non-residents a "non-resident" is defined by subsection 1 of section 44 to mean, *inter alia*:

- (a) An individual who is not ordinarily resident in Canada (residence), and
- (b) A corporation incorporated, formed or otherwise organized, elsewhere than in Canada (nationality).

9. The information gathering devices contained in the Land Titles Act (Alberta), R.S.A., 1970, c. 198, and the Land Holdings Disclosure Act (Nova Scotia), S.N.S., 1969, c. 13, have not been included because they are just monitoring devices and in fact contain no discrimination against foreigners.

10. The definition of "resident of Alberta" in the Nursing Homes Act (Alberta), namely,

"An individual who is entitled to be and remain in Canada and who ordinarily resides in Alberta"

is treated as a mixed nationality and provincial residency requirement.

11. The Employment Agencies Act (Ontario), R.S.O., 1970, c. 146, as am., has not been included. It provides that an employment agency must have a permanent place of business in Ontario. Essentially the same holds true for The Real Estate and The Business Brokers Act (Ontario).

12. Not included is the Detective and Security Agencies Act (Quebec), S.Q., 1964, c. 42, which provides that employees must be Canadian citizens.

13. Not included are the regulations under the Mining Act (Quebec), see *supra*, footnote 22, which give preference to graduates from universities and schools of Quebec and to Quebec labourers.

14. In Canada liability for income tax is based essentially on residence in Canada or, for a non-resident, income earned in Canada. However, two provisions, (i) the limitations on advertising expense deductions for advertising space in non-Canadian newspapers or periodicals and (ii) the small business deduction allowed for Canadian controlled private corporations, have been included as two separate statutory provisions in the grid.

There are, of course, many other provisions in the Income Tax Act (Canada) which are of interest to non-residents. For example:

(a) The so-called "thin capitalization rule" limits the allowable deduction, in respect of interest paid to non-residents with whom a corporation was not dealing at arm's length, to three times the corporation's capital.

(b) Where a consideration has been paid to a non-resident as rental, royalty, and so on and the Canadian taxpayer making the payment was not dealing at arm's length with the non-resident payee then the amount that would have been reasonable in the circumstances if the parties had been dealing at arm's length is, for the purpose of computing the Canadian taxpayer's income, deemed to be the amount that was paid.

(c) There is a flat twenty-five percent withholding tax on payments to non-residents by Canadian residents for interest, dividends and management fees.

However, these kinds of provisions have not been included in the grid because, in essence, they represent an attempt to collect tax on Canadian income of non-residents.

15. The small business deduction allowed for "Canadian-controlled private corporations" has been listed in the grid as a mixed nationality and Canadian residency status requirement. However, the nationality requirement is not necessary as long as a corporation is in fact resident in Canada. The "Canadian-controlled" aspect of the definition requires that the private corporation be:

(a) a Canadian corporation, which means either that it be incorporated in Canada (a nationality requirement) or that it in fact have been continuously resident in Canada since June 18th, 1971, and

(b) it in fact be controlled by resident persons.

STATUTE AND REGULATION CITATIONS

Federal

1. Foreign Investment Review Act, S.C., 1973-74, c. 46.
2. Bank Act, R.S.C., 1970, c. B-1.
3. Direction to Canadian Radio-Television Commission, the Canada Gazette, Part II, Vol. 103, No. 23, S.O.R./69-590, P.C. 1969-2229, as am., made pursuant to the Broadcasting Act, R.S.C., 1970, c. B-11.

4. Canada Business Corporations Act, S.C., 1974-75, c. 33, s. 100.
5. Canada Development Corporation Act, S.C., 1970-71, c. 49, sub-s 12(3) and 20(1).
6. Canadian and British Insurance Companies Act, R.S.C., 1970, c. I-15, as am., sub-ss 6(4) and 19(1).
7. Loan Companies Act, R.S.C., 1970, c. L-12, as am., ss 19 and 45.
8. Canada Mining Regulations, S.O.R./61-86, P.C. 1961-325, as am., made under the Territorial Lands Act, R.S.C., 1970, c. T-6.
9. Northern Mineral Exploration Assistance Regulations, S.O.R./66-404, P.C. 966-1641, as am., made under the Appropriation Act No. 9, 1966, S.C., 1966, c. 55.
10. Income Tax Act, S.C., 1970-71-72, c. 63, as am., s. 19. (advertising expense deduction).
11. *Ibid.*, s. 125 (small business deduction).
12. Foreign Insurance Companies Act, R.S.C., 1970, c. I-16.
13. Western Grain Stabilization Act, S.C., 1974-75-76, c. 87, sub-s. 7(1).
14. Canada Oil and Gas Land Regulations, S.O.R./61-253, P.C. 1961-797, as am., made under the Territorial Lands Act, R.S.C., 1970, c. T-6.
15. Regulations, S.O.R./61-10, as am., made under the Aeronautics Act, R.S.C., 1970, c. A-3.
16. Investment Companies Act, S.C., 1970-71, c. 33, s. 11.
17. Canada Corporations Act, R.S.C., 1970, c. C-32, s. 167.
18. Telesat Canada Act, R.S.C., 1970, c. T-4, s. 13 and Schedule II.
19. Trust Companies Act, R.S.C., 1970, c. T-16, as am., ss 19 and 38.

Alberta

20. The Insurance Act, R.S.A., 1970, c. 187, sub-s. 138(3).
21. The Companies Act, R.S.A., 1970, c. 60, as am., s. 76.1.
22. The Liquor Licensing Act, R.S.A., 1970, c. 219, s. 29.
23. The Nursing Homes Act, R.S.A., 1970, c. 264, as am., sub-s. 8(3).
24. The Public Lands Act, R.S.A., 1970, c. 297, s. 83 (homestead sales) and s. 116 (grazing leases).

25. Alberta Regulation 323/72, O.C. 1657/72 made under The Agricultural Development Act, S.A., 1972, c. 5.
26. The Securities Act, R.S.A., 1970, c. 333, as am., s. 14.
27. The Trust Companies Act, R.S.A., 1970, c. 372, as am., sub-s. 30(6) and s. 67.

British Columbia

28. The Companies Act, S.B.C., 1973, c. 18, s. 131.
29. The Government Liquor Act, R.S.B.C., 1960, c. 166, s. 38.
30. The Land Act, S.B.C., 1970, c. 17, sub-s. 7(3).
31. The Mineral Act, S.B.C., 1973, c. 52, as am., s. 4.
32. The Securities Act, S.B.C., 1970, c. 43, as am., s. 15.
33. The Trust Companies Act, R.S.B.C., 1960, c. 389, sub-s. 23(5).

Manitoba

34. The Liquor Control Act, R.S.M., 1970, c. L-160, as am., s. 74.
35. The Securities Act, R.S.M., 1970, c. 50, as am., s. 14.
36. The Corporations Act, S.M., 1976, c. 40, sub-s 321(6) and s. 344.
37. *Ibid.*, sub-s. 100(3).

Nova Scotia

38. The Trust Companies Act, R.S.N.S., 1967, c. 316, s. 17.

Ontario

39. The Business Corporations Act, R.S.O., 1970, c. 53, as am., sub-s. 122(3).
40. The Collection Agencies Act, R.S.O., 1970, c. 71, as am., ss 10 and 11.
41. The Insurance Act, R.S.O., 1970, c. 224, as am., s. 353.
42. The Land Transfer Act, 1974, S.O., 1974, c. 8, as am., sub-s. 2(2).
43. The Land Speculation Tax Act, 1974, S.O., 1974, c. 17, sub-s. 2(2).
44. The Liquor Licence Act, R.S.O., 1970, c. 250, sub-s. 29(1).

45. The Loan and Trust Corporations Act, R.S.O., 1970, c. 254, as am., sub-s. 35(4) and s. 55.
46. The Mortgage Brokers Act, R.S.O., 1970, c. 278, as am., ss 8 and 9.
47. The Ontario Energy Corporation Act, S.O., 1974, c. 101, sub-s. 4(2) and s. 13.
48. The Ontario Transportation Development Corporation Act, S.O., 1973, c. 66, ss 7 and 14.
49. The Paperback and Periodical Distributors Act, S.O., 1971, c. 82, as am., ss 8 and 9.
50. Regulation, O.R. 246/71, made pursuant to The Public Lands Act, R.S.O., 1970, c. 380.
51. Regulations, R.R.O., 1970, Reg. 794, as am., s. 6c., made under The Securities Act, R.S.O., 1970, c. 426, as am.

Prince Edward Island

52. The Real Property Act, R.S.P.E.I., 1951, c. 138, as am., s. 3.

Quebec

53. Regulations, O.C. 354 Feb. 2, 1972, O.G. Feb. 26 and March 25, 1972, pp. 1957 and 2923 (made under The Booksellers Accreditation Act, S.Q., 1965, c. 21).
54. The James Bay Regional Development Act, S.Q., 1971, c. 34, s. 12.
55. The Land Transfer Duties Act, S.Q., 1976, c. 46.
56. The Industrial Development Assistance Act, S.Q., 1971, c. 64, as am., s. 21.

Saskatchewan

57. The Agricultural Incentives Act, S.S., 1973, c. 2, s. 19.
 58. The Saskatchewan Farm Ownership Act, S.S., 1973-74, c. 98, s. 7.
 59. The Liquor Licensing Act, R.S.S., 1965, c. 383, as am., s. 74.
 60. The Securities Act, S.S., 1967, s. 81, s. 15.
 61. The Trust Companies Act, R.S.S., 1965, c. 32, s. 19.
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