CITIZENSHIP AS A REQUIREMENT FOR THE PRACTICE OF LAW IN ONTARIO

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I. INTRODUCTION

In recent years, England[1] and the United States[2] have removed the requirement of citizenship as a prerequisite for the practice of law. Canadian citizenship or British subject status is required of lawyers in Ontario.[3] The constitutionality of this restriction and similar ones in other Canadian provinces has not been tested. The question presented herein is two-fold: should a province impose such a restriction and does it have the legal power constitutionally to do so?[4]

II. RATIONALE FOR A CITIZENSHIP REQUIREMENT

Reasons suggested in support of a nationality requirement for lawyers are: (1) a lawyer should have qualifications equal to those required of a member of the provincial parliament; (2) a lawyer is an officer of the court and has a responsibility to see that the administration of justice is carried out; (3) a lawyer must take an oath of allegiance; (4) only people from Commonwealth countries come with a tradition and knowledge which will fit into the system; and (5) there are reciprocal

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[1] Solicitors (Amendment) Act 1974, U.K. 1974, c. 26, s. 1.

[2] *In re* Griffiths, 413 U.S. 717 (1973).

[3] The Law Society Act, R.S.O. 1980, c. 233, s. 28(c). The requirement that lawyers be British subjects first appears in Ontario's statutes in 1912 in The Barristers Act, S.O. 1912, c. 27, s. 3 and The Solicitors Act, S.O. 1912, c. 28, s. 6. In 1927 these statutes were amended to give the benchers of the Law Society the power to make rules to admit residents of Ontario who had declared their intention to become British subjects. The 1927 sections, however, were repealed in 1934.

[4] The question has been posed in view of the federal powers over naturalization and aliens, and immigration under the B.N.A. Act, ss. 91(25), 95. *See generally* B. LASKIN, CANADIAN CONSTITUTIONAL LAW 869 (4th ed. A. Abel 1973).

allowances among the Commonwealth countries for the practice of law.[5] Each reason will be examined.

A. *A Lawyer Should have Qualifications Equal to Those Required of a Member of the Provincial Parliament*

As in the United States and the United Kingdom, Canadian political representatives, both at the federal and provincial levels, are subject to nationality requirements.[6] That lawyers on the same basis or some sort of extension should, therefore, be subject to a nationality requirement is a *non sequitur*. The functions of a lawyer are different from those of appointed or elected officials.[7] The status conferred on a lawyer does not necessarily place a person so close to the core of the political process as to make him an architect of government policy.

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[5] *See* the debates during the second reading on Bill 7 — An Act to Consolidate and Revise The Law Society Act in LEG. ONT. DEB., 28th Leg., 3d sess., at 1484, 1500 (14 Apr. 1970). GOVERNMENT OF ONTARIO, 3 ROYAL COMMISSION ON THE INQUIRY INTO CIVIL RIGHTS 1177 (1968) [hereafter cited as ROYAL COMMISSION] states: "The requirement that barristers and solicitors be British subjects is justified, as barristers and solicitors are officers of the court." *See also* LAW SOCIETY OF UPPER CANADA, SUBMISSION TO THE PROFESSIONAL ORGANIZATIONS COMMITTEE 15-17 (1979).

A contrary position has been taken by some writers. *See* E. MURRAY, CITIZENSHIP AND PROFESSIONAL PRACTICE IN ONTARIO 58 (1978), Working Paper #3 prepared for the Professional Organizations Committee, in which it was recommended that there be no citizenship requirement. The recommendation in this working paper was affirmed by the Staff Study. *See* M. TREBILCOCK, C. TUOHY & A. WOLFSON, PROFESSIONAL REGULATION: A STAFF STUDY OF ACCOUNTANCY, ARCHITECTURE, ENGINEERING AND LAW IN ONTARIO 245 (prepared for the Professional Organizations Committee 1979) in which it was argued that "[t]here is no sense in which Canadian citizenship can be supposed to indicate a high quality service provider; it cannot be said to signify competence, care or trustworthiness." However, in its report the Professional Organizations Committee did not accept this recommendation. *See* ONTARIO MINISTRY OF THE ATTORNEY GENERAL, THE REPORT OF THE PROFESSIONAL ORGANIZATIONS COMMITTEE 158 (1980) [hereafter cited as COMMITTEE REPORT] wherein it was said that "[t]he legal profession has special responsibilities to the community which it serves to uphold its legal institutions and to promote the administration of justice by those institutions. To us, Canadian citizenship connotes a necessary and desirable commitment to our national institutions and traditions."

[6] *E.g.*, The Public Officers Act, R.S.O. 1980, c. 415, s. 1.

[7] In Ontario the professions of accounting, architecture, engineering, and law are self-governing within the statutory framework provided by the legislature. The Royal Commission Report, *supra* note 5, at 1176-77, while not recommending a nationality requirement for any of the professions other than law, did recommend that the governing bodies of these professions should have such a requirement since these bodies were exercising delegated legislative powers. The Staff Study, *supra* note 5, at 247, and Committee Report, *supra* note 5, at 157, agree with this recommendation. Murray, *supra* note 5, at 51-54, 58, takes a contrary view. The question of whether a non-citizen member could vote for office holders was not apparently addressed. The Law Society in its Submission, *supra* note 5, at 15, goes a step further stating that since judges have to be citizens all lawyers should also have to be citizens as judges are selected from the legal profession.

Those involved in the political process are expected to have the best interests of their constituents in mind. A lawyer, however, is often called upon to represent points of view in conflict with a provincial or federal interest. In these cases, as in every case, the lawyer has a duty to pursue a course of conduct by all lawful means within the code of ethics to further the client's interests. A lawyer has an important role in the administration of justice in the jurisdiction in which he or she practises, but it is not political.

B. *The Lawyer as Officer of the Court*

The solicitor's status as "officer of the court" under the English common law connotes the obligation to serve his client's best interests. This duty of loyalty is not absolute, but is qualified by the requirement that the solicitor must always remain within the law and have the objective of advancing the ends of justice. The solicitor who breaches this duty is liable to an action by the client, as well as to proceedings of a penal nature.[8] The court need not look to statutory authority to take action when improper conduct is involved, for it has an inherent disciplinary jurisdiction over the solicitor in his status as officer.[9]

On the basis of this close relationship to the courts it has been suggested that a nationality requirement is proper. However, in addition to solicitors, others have also been classified as officers of the court, including next friends,[10] receivers or managers of assets,[11] and trustees in bankruptcy.[12] A survey of cases indicates that citizenship has not been mentioned as one of the prerequisites for the selection of an officer of the court. The concern instead has been to appoint persons the court feels can be trusted to be fair and diligent in the performance of their duties, and will be in the best position to protect the assets involved or the rights of the parties. If an officer does not act with the utmost propriety, then the court can compel him to do so by way of its inherent jurisdiction. The

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[8] *See Ex parte* Nat'l Mercantile Bank; *In re* Haynes, 15 Ch. D. 42, at 52, [1874-80] All E.R. Rep. 1413, at 1417 (C.A.).

[9] Burton's Case, 2 Keb. 318, 84 E.R. 198 (K.B. 1667); Beal's Case, 12 Mod. Rep. 251, 88 E.R. 1301 (K.B. 1698); Brendon v. Spiro, [1938] 1 K.B. 176, [1937] 2 All E.R. 496 (C.A.).

[10] Morgan v. Thorne, 7 M. & W. 400, 151 E.R. 821 (Ex. 1841).

[11] Boehm v. Goodall, [1911] 1 Ch. 155, at 160, 80 L.J. Ch. 86, at 88 (1910); Parsons v. Sovereign Bank of Canada, [1913] A.C. 160, at 167, 82 L.J.P.C. 60, at 62 (1912) (Can.). Only if an individual is appointed by the court is he or she an officer. If appointed out of court by individuals or corporations, then he or she is an agent. *See* 32 HALSBURY'S LAWS OF ENGLAND 380 (3d ed. 1960).

[12] *Ex parte* James; *Re* Condon, 9 Ch. App. 609, at 614, [1874-80] All E.R. Rep. 388, at 390 (C.A. 1874).

court can exercise this power even though the officer has technically acted within the law.[13]

In England it has been suggested that a solicitor, as an officer of the court, held an "office or place of trust" within The Act of Settlement, which required British nationality.[14] The Solicitors (Amendment) Act

[13] For instance, an officer of the court will not be permitted to take advantage of money paid over to him under a mistake of law. The rule disallowing suits where money was paid over under mistake of law had developed to put an end to litigation, but it was never considered proper to keep the money. A court, therefore, will direct its officer to do that which any high-minded person should do, *viz*, not to take advantage of a mistake of law. *Ex parte* Simmonds; *In re* Carnac, 16 Q.B.D. 308, at 312, [1881-85] All E.R. Rep. 895, at 897 (C.A. 1885).

[14] The Act of Settlement, 12 & 13 Will. 3, c. 2, s. 3 (1700). *See* Payne, *Restrictions on Lawyers Qualified in One Country and Practising in Another Country*, in INTERNATIONAL BAR ASSOCIATION, 11TH CONFERENCE REPORT 33 (1966).

In England a barrister is not an officer of the court. Barristers, unlike solicitors who are regulated by statute, are controlled by the Inns which are independent of the state. The Inns are outside the jurisdiction of the courts, but are subject to the visitatorial jurisdiction of the judges. *See* 3 HALSBURY'S LAWS OF ENGLAND 2 (3d ed. 1953). *See also* Wettenhall v. Wakefield, 10 Bing. 335, 131 E.R. 934 (C.P. 1833).

1974[15] expressly removed any possible disqualification by The Act of Settlement due to citizenship, but it is questionable whether solicitors were within the ambit of the Act.[16]

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[15] U.K. 1974, c. 26.

[16] A review of statute and case law prior to the passage of The Act of Settlement indicates that lawyers did not come within coverage of similar terminology of other acts In Rex v. Hurst, 1 Keb. 675, 83 E.R. 1179 (K.B. 1663), it was held that an attorney of a corporation court was not an officer within the Corporation Act, 13 Car 2, c. 1, s. 4 (1661), which required an oath for persons in "any Office . . . or Places, or Trusts, or other Imployment relating to or concerning the Government of the said respective Cities, Corporations and Boroughs, and Cinque Ports. . . ."

The Tests Act, 25 Car. 2, c. 2, s. 2 (1672), required an oath of "every Person . . admitted, entered, placed or taken into any Office . . . Civil or Military . . . or Place of Trust from or under his Majesty. . . ." It would seem that lawyers were not supposed to be included within that Act for Parliament otherwise would not have thought it necessary to subject them to the oath by a special statute in 1696. *See* An Act Requiring the Practisers of Law to take the Oath and Subscribe the Declaration Therein Mentioned, 7 & 8 Wm. 3, c. 24 (1695).

An Act for the Further Security of His Majesty's Person, and the Succession of the Crown in the Protestant Line, and for Extinguishing the Hopes of the Pretended Prince of Wales, and all other Pretenders, and their Open and Secret Abettors, 13 Wm. 3, c. 6, s. 3 (1701), put lawyers in a separate class from that of "office or place of trust", and also used the alternative words for lawyers, "or shall take upon him or them any such Practice", and this could be taken to indicate that Parliament did not view the legal profession as an office or place of trust under the government. *See* the discussion in Leigh's Case, 1 Munf. 468 (Va. 1810).

Although the matter is now moot with the passage of the Solicitors (Amendment) Act 1974, U.K. 1974, c. 26, the English Council of the Law Society appears to have maintained that it did not matter if an English solicitor subsequently abandoned British nationality and became, for example, a United States attorney, for the date of admission was viewed as the material date and the solicitor, despite the call to the Bar of another country, could still remain on the Roll and practise as an English solicitor. *See* Payne, *supra* note 14, at 34.

This position was a dubious one. The Act of Settlement did not take loss of British subject status into account, for not until An Act to Amend the Law Relating to the Legal Condition of Aliens and British Subjects, 33 & 34 Vict., c. 14, s. 3, in 1870 could a subject renounce British citizenship. If a person becomes an alien it is doubtful whether such person can continue to hold an office or place of trust within The Act of Settlement. This is evidenced by the South Africa Act, U.K. 1962, c. 23, s. 1(3), and the Pakistan Act 1973, U.K. 1973, c. 48, s. 3(1); 1974, U.K. 1974, c. 34. In order to prevent the loss of any office or place of trust within The Act of Settlement, by reason of a person becoming an alien upon the withdrawal of these countries from the Commonwealth, these Acts provided special relief for a specified time, enough time for an individual to register as an English citizen.

Ontario statutes have designated the holders of a wide variety of positions "officers of the court".[17] The statutes do not define the phrase and, like the common law, make no mention of a nationality requirement. Statutory history in Ontario does, however, indicate that citizenship or British subject status has not been required for an officer of the court. The Notaries Act had no nationality requirement until 1962.[18] Commissioners for taking affidavits need not be citizens, but until 1968 they were deemed by statute to be officers of the court.[19] Solicitors in Ontario were deemed officers of the court in 1873, but there was no nationality requirement until 1912.[20]

In the United States the contention that a lawyer is an officer of the court and must therefore be a citizen has been reviewed by various state courts with conflicting results.[21] The United States Supreme Court settled the question in *In re Griffiths*,[22] holding that a state could not require citizenship as a prerequisite for the practice of law.

C. *The Oath of Allegiance*

Taking an oath of allegiance signifies recognition of a political authority as having legitimate political power over oneself and accep-

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[17] *See* E. MURRAY, *supra* note 5, at 24.

[18] An Act respecting the Appointment of Notaries Public, S.O. 1869, c. 6, s. 2; The Notaries Act, 1962-63, S.O. 1962-63, c. 91, s. 2(1). The 1962-63 Act requires Canadian citizenship for notaries other than barristers and solicitors.

[19] An Act respecting Commissioners for Taking Affidavits and Affirmations Act, R.S.O. 1877, c. 63, s. 3; The Commissioners for Taking Affidavits Amendment Act, S.O. 1968-69, c. 12, s. 2.

[20] *Supra* note 2. Supreme Court of Judicature Act, S.O. 1873, c. 66, s. 87.

[21] Application of Park, 484 P. 2d 690, at 695 (Alaska 1971): "There seems to us nothing in the phrase 'officer of the court' which automatically should exclude aliens who are educated, well-versed in our laws, competent, honest, and ready to serve both client and court." Raffaelli v. Committee of Bar Examiners, 496 P. 2d 1264, at 1273 (Cal. 1972): "Without detracting in any degree from the high responsibility and trust placed in members of the bar and their privileged and intimate relationship with the courts . . . we perceive no demonstrable nexus between that status [officer of the court] and a requirement that every lawyer be a United States citizen." *Contra*, Application of Griffiths, 294 A. 2d 281, at 283-84 (Conn. 1972):

> A member of the Connecticut bar is much more than a lawyer in the sense of [a dictionary definition]. . . . [A]ttorneys in Connecticut are granted extraordinary powers to perform their duties before the courts of the state and they are charged with using these powers and acting by the authority of the state in the interests of justice.

[22] *Supra* note 2. On appeal from Connecticut's Supreme Court the United States Supreme Court found no merit in the argument that the "special" role of an attorney in the state of Connecticut as a statutory officer justified the requirement of citizenship: "[We] observe that the powers 'to sign writs and subpoenas, take recognizances, [and] administer oaths' hardly involve matters of state policy or acts of such unique responsibility as to entrust them only to citizens. . . ."

tance and support for its laws.[23] A lawyer may be required by a province to take the Canadian oath of allegiance,[24] but citizenship or British subject status is not, nor has it ever been, a prerequisite to taking this oath.[25] In fact the oath was viewed as something of a minimal standard, or substitute for a requirement of citizenship, in Canada's early history. This is evidenced by the fact that many alien land-holders in those times were required to take an oath of allegiance.[26]

Under An Act respecting Commissions, and Oaths of Allegiance and of Office, 1868, a province could require an oath from certain persons including barristers and solicitors.[27] The Act provided, as it does today,[28] that it is not necessary for barristers and solicitors to take any other oath unless it be an oath for the due exercise of the profession.

The oath of allegiance is not permanent nor absolute, for it can be formally renounced. International law requires certain standards of conduct from individuals over and above political or military orders.[29] This is not to say that the oath may not serve a useful purpose.

Factors beyond their control have been determinative for some people to leave their old country and to look for peace and a new start in Canada, for example the Doukhobors. In other cases immigrants have come simply seeking new opportunities. In neither case should it be assumed that these peoples have resolutely broken all ties, family or otherwise, with their former country any more than has been necessary. Entry into a new country is indicative of an intent to accept and live in

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[23] *See* E. MURRAY, *supra* note 5, at 31. Oaths of allegiance were perhaps more significant in feudal times in England when birth records were not kept, there was mobility of peoples, and the concept of citizenship was not well established.

The origins of the oath law are not clear. COKE, 2 COMMENTARY UPON LITTLETON, c. 3, s. 94, n. 68b (1628) states that the oath law goes back to the times of King Arthur. Current historians, however, have had difficulty finding information on King Arthur, and one writes: "[I]f we knew that he actually lived we would place him in the late fifth century . . . he . . . was either a Briton, that is, a member of the native race of the island, or a Roman, fighting beside the Britons. His opponents were largely the Anglo-Saxons, although it is certainly conceivable that he fought against the Britons too." S. EISNER, THE TRISTAN LEGEND 10 (1969).

[24] Oaths of Allegiance Act, R.S.C. 1970, c. O-1, s. 3.

[25] S. 2(1). *See also* National Defence Act, R.S.C. 1970, c. N-4, s. 23(2); Bacon's vote, [1872] H.E.C. 137; Healey's vote, [1872] H.E.C. 129, at 138.

The oath of allegiance was considered to be a barrier to aliens seeking admission to the English Bar, until it was abolished by the Promissory Oaths Act, 1868, 31 & 32 Vict., c. 72, s. 9. *See* 3 HALSBURY'S LAWS OF ENGLAND 7, n. (d) (3d ed. 1953). But Blackstone states: "[T]he oath of allegiance may be tendered to all persons above the age of twelve years, whether natives, denizens, or aliens. . . ." [footnote omitted]. W. BLACKSTONE, 1 COMMENTARIES ON THE LAWS OF ENGLAND 368 (1765).

[26] *See* Head, *The Stranger in Our Midst: A Sketch of the Legal Status of the Alien in Canada*, [1964] CAN. Y.B. INT'L L. 107, at 116.

[27] S.C. 1868, c. 36, s. 3.

[28] Oaths of Allegiance Act, R.S.C. 1970, c. O-1, s. 3.

[29] For instance, this is indicated by the various post-World War II war crimes trials. *See generally* D'Amato, Gould & Woods, *War Crimes and Vietnam The 'Nuremberg Defense' and the Military Service Resister*, 57 CAL. L. REV. 1055 (1969).

harmony with its laws and constitution. The oath of allegiance might be a further indication of this intent, but it has not been, nor should it be, a prerequisite which requires citizenship in order to pursue a profession or trade.

Furthermore, immigrants to Canada from the republican countries of the Commonwealth do not owe allegiance to the English crown, and once they have otherwise qualified themselves they are permitted to practise law in Ontario after taking the oath of allegiance.[30] The proponents for requiring the oath, or for citizenship as a prerequisite to practice, do not offer a rationalization for permitting lawyers to practise who happen to have, under a well recognized concept of international law, duality of citizenship.[31]

D. *Commonwealth Tradition*

Another reason suggested in support of a nationality requirement is that only citizens from Commonwealth countries come with a tradition and knowledge which will fit into Ontario's system. If an individual does not possess a proper knowledge of law, this should be indicated in law school and bar admission course work. It should not be supposed that any missing "necessary tradition" will simply be acquired immediately upon receipt of citizenship papers.

In international law, Commonwealth members are sovereign states with various forms of government.[32] If a country is in the Commonwealth it was at one time connected economically and/or politically with

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[30] The Canadian Citizenship Act, S.C. 1946, c. 15, s. 28, and the British Nationality Act, 1948, 11 & 12 Geo. 6, s. 56, s. 1(2) altered the traditional concept of the status of "British subject". The status became a secondary one depending upon the possession of citizenship in a Commonwealth country. The concept of allegiance was not incorporated into the rules governing local citizenship but was altogether swept away, together with all other rules of the common law respecting nationality. *See* C. JOSEPH, NATIONALITY AND DIPLOMATIC PROTECTION — THE COMMONWEALTH OF NATIONS 92 (1969). The author states, at 54: "India's reception as a republican state within the Commonwealth fundamentally altered the constitutional role of the Crown as the basis of association. . . . India merely recognized the King as the symbolic Head of the association of states without attributing in the India Constitution any function to the Crown."

[31] This has a parallel in feudal times with the predicament a tenant had when he was under homage to two lords and those two lords declared war on each other. *See* T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 534 (5th ed. 1956).

[32] *See* Toxey, *Restrictive Citizenship Policies Within the Commonwealth*, 13 MCGILL L.J. 494, at 495 (1967):

> When a former colony becomes free of outside control, it also typically develops a different attitude toward the British two-party system. The position of the Opposition is considerably circumscribed. In like manner the independence of the courts and the basic civil liberties have been more restricted in new member countries.

England. The extent to which the English common law has been adopted or exists in Commonwealth countries today varies.[33]

A related contention is that it was the custom or tradition at common law not to admit non-subjects as solicitors.[34] Lord Coke cited the *Mirror of Justices*, written about 1290, as a precedent for the ineligibility of women, infants, serfs, persons not sworn to the king, criminals, and others to be attorneys.[35] Since Coke's time the *Mirror* has been critically reviewed by legal historians as a proper source of precedent for this practice in early English law.[36] Nonetheless, precedents involving human rights, especially when they are questionable both as to their grounds and historical validity, should be re-examined in light of our present system and development.[37]

E. *Reciprocal Allowances*

The idea that if a lawyer is admitted to practise law in one Commonwealth country, then he will reciprocally be allowed to practise or be given special preference in the others, is misconceived. Just as the citizenship acts of the Commonwealth countries are varied and often highly restrictive as they relate to other members of the Common-

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[33] *See Re* Gill & Law Soc'y of Manitoba, 23 D.L.R. (3d) 241, at 245-46 (Man. Q.B. 1971): "The laws of a people — unlike their own physiology, or the behaviour of the rules of engineering — vary significantly from country to country, and indeed from time to time in any country."

[34] *See* Kahn v. Board of Examiners, 62 C.L.R. 422, at 443-44 (1939): "[N]o instance is known of an alien being admitted to practise in the Supreme Court of Victoria. This inveterate practice supports the view that an alien is not entitled to be admitted as a barrister and solicitor of the Supreme Court of Victoria." *See also* Bebb v. Law Soc'y, [1914] 1 Ch. 286, at 294, denying a woman the right to practise law: "In the first place, no woman has ever been an attorney-at-law. No woman has ever applied to be, or attempted to be, an attorney-at-law. There has been that long uniform and uninterrupted usage which is the foundation of the greater part of the common law of this country, and which we ought, beyond all doubt, to be very loth to depart from."

[35] COKE, 2 COMMENTARY UPON LITTLETON, c. 11, s. 1961 (1628).

[36] *See* T. PLUCKNETT, *supra* note 31, at 267.

[37] The courts denied women the right to practise law on the basis of custom. *Bebb*, *supra* note 34; *Re* French, 17 B.C.R. 1, 1 D.L.R. 80 (1912); Langstaff v. Bar of Quebec, 47 C.S. 131 (1915).

For a classic article on the re-examination of historical custom and precedent, *see* Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, at 469 (1896-97):

> The rational study of law is still to a large extent the study of history. History must be a part of the study, because without it we cannot know the precise scope of rules which it is our business to know. It is a part of the rational study, because it is the first step toward an enlightened scepticism, that is, toward a deliberate reconsideration of the worth of those rules. . . . It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.

wealth,[38] so too are admission requirements for law practices.[39] Some jurisdictions allow only their citizens to practise law, some only British subjects, and others make no stipulation in regard to citizenship.[40]

A number of Commonwealth countries recognize the status of persons admitted as a barrister or solicitor in England, Scotland, Northern Ireland, and the Republic of Ireland facilitate entry, or admit outright, such persons to the practice of law.[41] Apparently none, however, gives such a privilege to lawyers from the other Commonwealth countries.[42] Ontario previously recognized legal experience

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[38] *Supra* note 32, at 494: "That there is racial exclusiveness [in the immigration laws of] the older members, Canada, Australia, and New Zealand, is well known. That the newer Afro-Asian members have established highly restrictive citizenship laws is less widely recognized." [footnote omitted]

[39] *See generally* THE WORLD PEACE THROUGH LAW CENTRE, LAW AND JUDICIAL SYSTEMS OF NATIONS (3d rev. ed. 1978).

[40] Even in Canada an example of all three positions can be seen. Quebec and British Columbia require Canadian citizenship (An Act Respecting the Barreau du Québec, R.S.Q. 1977, c. B-1, s. 43(*a*); The Legal Professions Act, S.B.C. 1971, c. 31, ss. 8-9). Alberta, Nova Scotia, Prince Edward Island, Saskatchewan, and Manitoba require British subject status or Canadian citizenship (The Legal Profession Act, R.S.A. 1970, c. 203, ss. 39-40; The Barristers and Solicitors Act, R.S.N.S. 1967, c. 18, ss. 3, 6; The Law Society and Legal Professions Act, S.P.E.I. 1974, c. L-9, ss. 14-15; The Legal Profession Act, R.S.S. 1978, c. L-10, s. 5(3); The Law Society Act, R.S.M. 1970, c. L-100, s. 36).

In New Brunswick an individual may be admitted to practice if he is a Canadian citizen or someone legally resident in Canada who declares an intention to become a citizen (The Barristers Society Act, S.N.B. 1973, c. 80, s. 9(1)(*b*), (3)). In Newfoundland, there is no citizenship or nationality requirement (The Law Society Act, R.S.N. 1970, c. 201, s. 53).

[41] *See* LAW AND JUDICIAL SYSTEMS OF NATIONS, *supra* note 39. *E.g.*, Antigua (but not the Republic of Ireland); Botswana (also the Republic of South Africa or Southern Rhodesia); Dominica (persons who have passed the Bar Examinations of the English Inns of Court or the Examinations of the Law Society of England); Fiji (also Australia or New Zealand); Gambia; Grenada (also Canada).

[42] *Id.*

obtained in other countries, but not all Commonwealth countries were so recognized, nor did the Law Society concern itself with the question of whether other jurisdictions made similar privileges available for Ontario lawyers.[43] In any event, the public interest is best protected by proper

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[43] R.R.O. 1970, Reg. 556, ss. 5-8, recognizes legal experience in the United States, the Republic of Ireland, Northern Ireland, England, Australia, New Zealand, and Scotland. These sections were revoked by O. Reg. 160/73 and O. Reg. 220/75, and new sections were substituted requiring Canadian citizenship or British subject status.

In the early 1800's English lawyers who had come to Ontario found strict restrictions. Earl of DURHAM, A REPORT ON CANADA 121, 123 (1st ed. Methuen 1902) reported:

> [A]n Englishman emigrating to Upper Canada, is practically as much an alien in that British Colony as he would be if he were to emigrate to the United States. . . . If an attorney, he has to submit to an apprenticeship of five years before he is allowed to practise. If a barrister, he is excluded from the profitable part of his profession and though allowed to practise at the bar, the permission thus accorded to him is practically of no use in a country where, as nine attorneys out of ten are barristers also, there can be no business for a mere barrister. Thus, a person who has been admitted to the English bar, is compelled to serve an apprenticeship of three years to a Provincial lawyer.
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> It is, therefore, not merely a monopoly of profit, but, to a considerable extent, a monopoly of power, which the present body of lawyers contrive . . . to secure to themselves. No man of mature age emigrating to a Colony could afford to lose five years of his life in an apprenticeship from which he could acquire neither learning nor skill. The few professional men, therefore who have gone to Upper Canada have turned their attention to other pursuits, retaining, however, a strong feeling of discontent against the existing order of things.

In more recent years the Law Society was perhaps being overly self-protective at the expense of the public when it required

> those applying to become members from outside the Province in addition to passing the prescribed examinations, to pay a fee of $1,500 as a condition precedent to being called to the Bar, while a candidate who received his training in Ontario paid a fee of $100. This form of discrimination has now been corrected but it did exist for many years.

ROYAL COMMISSION, *supra* note 5, at 1173.

standards and testing and not by blanket reciprocal measures based on qualifications such as citizenship, which have no relevance to an individual's abilities, background or character.[44]

III. The Constitutional Framework Regarding the Alien in Canada

Historically, aliens have often encountered economic and other difficulties.[45] The distinction between subjects and aliens developed piecemeal in various contexts in England.[46] The need for immigrants to settle and develop Canada was great, and aliens were encouraged to immigrate.[47]

The English common law was adopted in Upper Canada in 1792.[48] The issue of the applicability of restrictive measures in the common law towards aliens in Canada led to confusion over land titles and positions of

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[44] *See* Royal Commission, *supra* note 5, at 1179:

> The principle on which reciprocal arrangements are made for admission to the relevant professions or occupations should be: Are the training and qualifications required for admission in the other jurisdiction equivalent to those in Ontario? The test should be whether the standards for admission to practice in Ontario are met, not whether Ontario licensees are admissible in the other jurisdiction.

Despite the absence of reciprocity in the United States a number of jurisdictions recognize British and Canadian legal training. *See* Boshkoff, *Access to State Bar Examinations for Foreign-Trained Law School Graduates*, 6 Hofstra L. Rev. 807 (1978).

[45] *See* Head, *supra* note 26, at 115. At the time of the Magna Carta, 1215, there was enough concern to include in that document (c. 41) a guarantee of the right of alien merchants to do business in England.

[46] The seizure of English land of the Normans who elected to adhere to Philip was the penalty for treason. Later, English kings took the lands of enemy French subjects. Since England had originally been conquered by a foreigner at the head of an army recruited from many lands, it took generations to develop the law that land of aliens other than traitors and enemies was subject to forfeiture.

Another root of the law of aliens is seen in the "odious plea" of alien enmity in the 13th century which was initiated to delay the suits of enemy Frenchmen until the King of England was able to again control France. These rules, initially imposed because of treason and wartime discrimination, were later applied to all foreigners.

> The medieval lawyers followed up the implications of the alien's inability to hold real property at common law by denying him a real action. This led Littleton following the natural tendency of the property lawyer, to regard his department as the whole law, to refuse the alien both real and personal actions.

See C. Perry, Nationality and Citizenship Laws of the Commonwealth and of the Republic of Ireland 28-29 (1967). It is clear that he was overstating the restrictions in this regard. *See also* F. Pollock & F. Maitland, 1 The History of English Law 458-67 (2d ed. 1968).

[47] *See* Head, *supra* note 26, at 115.

[48] Stat. U.C. 32, c. 1, s. 3.

public office in Ontario's early history.[49] However, to impose such measures as forfeiture of land or other English common law discriminatory practices would have caused confusion and hardship, as well as being inconsistent with the policy of developing the country through immigration.[50]

The British North America Act, 1867, gave the Canadian Parliament the power to legislate over "Naturalization and Aliens" by section 91(25), a general or residuary power in section 91 to make laws for the peace, order, and good government of Canada, and a joint but overriding power shared with the provinces in matters of immigration under section 95. The legislative powers of the provinces of Canada include property and civil rights in the provinces by section 92(13), and the administration of justice in the province under section 92(14).

Shortly after Confederation, with the influx of Chinese immigrants into Canada, the question of provincial power over aliens arose in a number of cases testing provincial enactments.[51] The first Privy Council

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[49] *Supra* note 47.

[50] There were apparently no restrictions imposed by the Law Society on persons born in the United States after the winning of independence. One of them, Marshall S. Bidwell, became a prominent lawyer. *See* 1 ENCYCLOPEDIA CANADIANA 386 (1957).

The development in the United States of the law of aliens with respect to the right to work parallels that of Canada. Most of the legislation was enacted at the turn of the century at the time of a large Oriental immigration. *See* M. KONVITZ, THE ALIEN AND THE ASIATIC IN AMERICAN LAW 188-89 (1946) citing occupations closed to aliens.

Until this time most states did not have legislation restricting aliens from the practice of law. This is evidenced by *dicta* in Bradwell v. Illinois, [1872] U.S. 130, at 139, a case holding that a state's refusal to license a woman to practise law was not unconstitutional. The Supreme Court stated that

> the right to admission to practice in the courts of a State . . in no sense depends on citizenship of the United States. It has not, as far as we know, ever been made in any State, or in any case, to depend on citizenship at all. Certainly many prominent and distinguished lawyers have been admitted to practice both in the State and Federal Courts, who were not citizens of the United States. . . .

[51] In Tai Sing v. Maguire, 1 B.C.R. (Pt. 1) 101 (S.C. 1878), a British Columbia statute requiring all Chinese in British Columbia to take out a licence costing $10 every three months and to use it to report their employment, address, *etc.*, was held *ultra vires* on the ground that it was an unconstitutional interference with aliens and with trade and commerce in that merchants employing Chinese labour also had to make certain reports and were subject to penalties if found to be in violation of the Act.

In Regina v. Wing Chong, 1 B.C.R. (Pt. 2) 150 (S.C. 1885), a provincial tax on anyone hiring Chinese was held to be *ultra vires* on the grounds of interference with rights of aliens, trade and commerce, and existing treaties with China.

In Regina v. Victoria, 1 B.C.R. (Pt. 2) 331 (S.C. 1888), a municipal resolution to exclude particular nationalities from getting a pawnbroker's licence was held *ultra vires* on the ground that to exclude a person from pursuing a vocation on such a basis was an interference with the Dominion's power over trade and commerce and the rights of aliens.

decision was *Union Colliery Co. of British Columbia v. Bryden*,[52] which was decided on the basis of aliens' rights, although it dealt with the power of a province to exclude "Chinese", whether naturalized or not, from coal mine employment. The legislation was held to be *ultra vires* by reason that section 91(25) of the B.N.A. Act gave the Canadian Parliament exclusive authority over all matters which "directly concern the rights, privileges, and disabilities of the class of Chinamen who are resident . . . in the provinces of Canada".[53]

The scope of provincial power under section 95 of the B.N.A. Act became an issue in 1900 after British Columbia enacted statutes providing that immigrants must be able to fill out an application form in some European language, and that no employer was to employ a workman, who, when asked to do so by a duly authorized officer, should fail to be able to read in a European language.[54] At the insistence of representatives of Japan, these statutes were disallowed.[55] Under the threat of disallowance of other statutes dealing with immigration, the legislature of British Columbia repealed the discriminatory provisions.[56]

In *Cunningham v. Tomey Homma*[57] the Privy Council held that a province could properly exclude a Japanese person, whether naturalized or not, from voting. The Council reasoned that *Union Colliery* dealt with the "ordinary rights" of the inhabitants of British Columbia to earn a living in order to reside in that province, but in the case at hand there was involved a "privilege" of being eligible to vote in provincial elections. This would be encompassed by section 92(1), which gives the provinces power to amend their constitution.[58] The provincial legislature took the

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[52] [1899] A.C. 580, 68 L.J.P.C. 118 (Can.). In this case 26 provincial statutes passed since 1879, all of which had the intention of preventing or restricting the settlement of Chinese aliens in order to prevent competition with whites, were cited to the Judicial Committee of the Privy Council. *See* Angus, *The Legal Status in British Columbia of Residents of Oriental Race and Their Descendants*, 9 CAN. B. REV. 1 (1931).

[53] *Id.* at 587, 68 L.J.P.C. at 120.

[54] *See* A. LEFROY, CANADA'S FEDERAL SYSTEM 670-71 (1913).

[55] *Id.* at 670.

[56] *Id.* at 671. In a report of 27 Dec. 1901, in reference to these statutes, the Minister of Justice said:

> 'The subject of aliens is clearly within the exclusive authority of Parliament. Immigration, is also, within Dominion jurisdiction, and it has been, and is, the policy of your Excellency's Government to promote immigration. . . . The efforts . . . would . . . be certainly paralysed if the immigrant, upon coming to Canada, is to find the way of employment closed to him by provincial legislation.'

[57] [1903] A.C. 151, 87 L.T. 572 (P.C. 1902) (Can.).

[58] *Id.* at 157. 87 L.T. at 574. The Privy Council did not refer to the B.N.A. Act, s. 84, which gives Ontario and Quebec the power to determine qualifications for voting and for government officials. This section would reasonably have extended to British Columbia when it was admitted into the Union on 20 Jul. 1871 by an Order-in-Council dated 16 May 1871.

After this decision, inclusion on the voters' list in British Columbia became a prerequisite for many types of economic activity, such as admission to a professional society (law and pharmacy), obtaining a hand logger's licence, and a beer licence. *See* Head, *supra* note 26, at 128.

view that *Cunningham* did not distinguish but overruled *Union Colliery*, and it re-enacted the provision which had previously been declared *ultra vires*. In *In Re Coal Mines Regulations Act and Amendment Act, 1903*, the British Columbia Supreme Court, *in banco*, held that *Union Colliery* was still law,[59] to be confirmed by the Supreme Court of Canada and the Privy Council in subsequent decisions.

In *Quong-Wing v. The King*,[60] the Supreme Court of Canada upheld provincial legislation prohibiting the employment of white female labour in places of business or amusement kept or managed by any "Chinaman", on the basis that there was a valid provincial aspect. The legislation was deemed to embody the protection of morals of a class of Canadian workers — white female — and, in the Supreme Court's view, by so doing, this legislation was similar to provincial factory safety legislation.[61]

The cases of *Brooks-Bidlake and Whittall, Ltd. v. Attorney-General for British Columbia*,[62] and *Attorney-General of British Columbia v. Attorney-General of Canada*,[63] arose out of the same fact situation. Legislation in British Columbia stipulated that no Chinese or Japanese were to be used under government contract in work on provincial crown lands. The plaintiff company employed both Chinese and Japanese workers and sought a renewal of a timber cutting licence, but was refused for failing to meet the statutory condition. A most favoured nation treaty between England and Japan in 1911, declared in force in Canada by the Dominion Parliament pursuant to section 132 of the B.N.A. Act, provided that the subjects of both countries "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".[64] In *Brooks-Bidlake* the Privy Council held that the treaty issue did not have to be decided since there was no similar treaty with China, and because Chinese had been used in violation of the statutory condition, the licence had been properly refused by the

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[59] 10 B.C.R. 408, at 414 (Full Ct. 1904) (Hunter C.J.):

> The questions raised in two cases [*Union Colliery* and *Cunningham*] 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.

[60] 49 S.C.R. 440, 18 D.L.R. 121 (1914).

[61] *Id.* at 452, 18 D.L.R. at 130. Justice Idington in a dissenting opinion stated:

> It may well be argued that the highly prized gifts of equal freedom and equal opportunity before the law, are so characteristic of the tendency of all British modes of thinking and acting in relation thereto, that they are not to be impaired by the whims of a legislature; and that equality taken away unless and until forfeited for causes which civilized men recognize as valid.

[62] [1923] A.C. 450, 92 L.J.P.C. 124 (Can.).

[63] [1924] A.C. 203, 93 L.J.P.C. 33 (1923) (Can.).

[64] The Japanese Treaty Act, 1913, S.C. 1913, c. 27, Art. 1, s. 3.

province. The basis of the decision was that the province had the power to regulate its public property under sections 92(5) and 109 of the B.N.A. Act.[65]

The provincial statute considered in *Brooks-Bidlake* was subsequently disallowed. In *Attorney-General of British Columbia v. Attorney-General of Canada* the Privy Council was asked to ascertain "the limits within which the Legislature of the Province can attempt further legislation on the subject".[66] This involved reconsideration of the statute held valid in *Brooks-Bidlake*. The Privy Council found the provincial statute *ultra vires* because it was inconsistent with the Treaty, which was overriding pursuant to section 132 of the B.N.A. Act. The Council did suggest that the province could redraft it so that Japanese subjects were excluded from coverage.[67]

The federal power over aliens is quite broad but it cannot be used in an effort to justify federal legislation merely because such legislation might touch on aliens, and thereby attempt to take over a field or subject matter within provincial authority.[68] In *In re The Insurance Act of Canada*[69] it was held that the Canadian Parliament, by virtue of its power over aliens, could not regulate the insurance industry and foreign insurers.[70] In *Morgan v. Attorney General for the Province of Prince Edward Island*[71] a provincial statute was upheld even though it might touch on the subject of aliens. In *Morgan* a provincial statute limiting the size of land holdings by all non-residents of the province was held valid as being within section 92(13) (property and civil rights), and not an infringement of the Dominion's power over aliens since the statute

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[65] *Supra* note 62, at 457, 92 L.J.P.C. at 128:

> Section 91 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.

[66] *Supra* note 63, at 210, 93 L.J.P.C. at 37.

[67] *Id.* at 212, 93 L.J.P.C. at 38.

[68] *See* Ladore v. Bennett, [1939] A.C. 468, at 482, [1939] 3 All E.R. 98, at 105 (P.C.) (Can.):

> It is unnecessary to repeat what has been said many times by the Courts in Canada and by the Board, that the Courts will be careful to detect and invalidate any actual violation of constitutional restrictions under pretence of keeping within the statutory field. A colourable device will not avail.

[69] [1932] A.C. 41, [1932] 1 D.L.R. 97 (P.C. 1931) (Can.).

[70] *Id.* at 51, [1932] 1 D.L.R. at 105:

> [T]he sections here . . . do not deal with the position of an alien as such; but under the guise of legislation as to aliens they seek to intermeddle with the conduct of insurance business, a business which by the first branch of the 1916 case has been declared to be exclusively subject to Provincial law.

[71] [1976] 2 S.C.R. 349, 55 D.L.R. (3d) 527 (1975).

applied equally to non-resident aliens and to Canadian citizens resident outside the province.[72]

A number of conclusions can be drawn from the case law. First, the Canadian Parliament has taken complete control and authority over immigration by passing immigration statutes.[73] Second, it also has wide control and power over aliens, with provincial legislation being held valid only when there is a proper provincial aspect. Such aspects have included matters concerning provincial crown property, safety of workers, the privilege to vote, and control of the sale of land within the province by applying restrictions to all non-residents. The right to work cases have been limited to coal mining employment and the profession of pawnbroker.[74] In both cases the legislation was held invalid.

A provincial nationality requirement for lawyers might be valid given a proper provincial aspect to justify it. If law is to be considered as a profession in the same category as medicine, accounting, or engineering, it is doubtful whether there is such an aspect. Under section 92(14) of the B.N.A. Act a province has the power to legislate for the proper administration of justice. It is suggested that a province would have to justify the necessity for lawyers to be "British subjects or Canadian citizens" in order to accomplish the proper administration of justice, for a province cannot enter a field under section 91 unless it is necessary in

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[72] The court's approach in the *Morgan* decision leaves much to be desired, as one constitutional law scholar subsequently pointed out. *See* Jones, *Comment*, 54 CAN. B. REV. 381, at 389 (1976):

> [T]he . . . judgement in *Morgan* . . . [attempts] to reconcile the exact *ratios* of *Union Colliery*, *Tomey Homma*, *Quong Wing v. The King*, and *Brookes-Bidlake & Whittal Ltd. v. A.G. (B.C.)* — without any acknowledgement of the Supreme Court's "liberation" from the binding effect of earlier decisions, nor any indication of the need to re-examine and justify the application of the principles contained in these earlier decisions in light of present social needs. What a lost opportunity to clarify whether *stare decisis* still applies to the court! [Footnotes omitted]

[73] *In re* Narain Singh, 13 B.C.R. 477, 8 W.L.R. 790 (Full Ct. 1908) held the British Columbia Immigration Act, which subjected immigrants to a provincial test, *ultra vires* on the basis that the Dominion Parliament had occupied the field.

[74] *See* Regina v. Victoria, *supra* note 51.

order to accomplish a proper provincial purpose under section 92.[75] No suggested reason for requiring citizenship or British subject status for barristers and solicitors stands up to close scrutiny on this basis.

The pattern of discrimination in the cases increases the doubt of the necessity of the requirement. The fact that other professions in Ontario have had discriminatory legislation, some of which was originally enacted about the same time as that for lawyers, but which has subsequently been repealed, also strikes at the necessity for such legislation for lawyers. The professions of dentistry,[76] stationary engineering,[77] and dental hygiene[78] have had either nationality or residency requirements, and restrictions have yet to be removed from the architectural profession in Ontario.[79] The province was probably encroaching on federal power under section 91 of the B.N.A. Act when in 1972 the Ontario Business Corporations Act was amended to require Canadian citizenship and residency for a majority of the board of directors of every resident corporation.[80] The Act was amended again in 1974 by redefining "resident Canadian" to include anyone "lawfully

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[75] *Cf.* COMMITTEE REPORT, *supra* note 5, at 158, recommending a citizenship requirement for lawyers and stating in part: "To us, Canadian citizenship connotes a necessary and desirable commitment to our national institutions and traditions."

Cf. also the Law Society's SUBMISSION TO THE PROFESSIONAL ORGANIZATIONS COMMITTEE, *supra* note 5, at 15-16:

> There is moreover a very practical reason for requiring Canadian citizenship. To a substantial degree Canadian industry and commerce is a branch plant economy and there can be little doubt that if the attorneys of the parent companies located in the United States could become lawyers in Ontario without having to become citizens, the consequences would be most unsatisfactory. The development of a strong banking, industrial, commercial and natural resources bar would be inhibited and there would be an adverse effect upon the growth of indigenous Canadian jurisprudence.

The Submission speaks to the "problem of protecting Canadian identity" and notes that "[i]t is also recognized that in Great Britain and the United States citizenship is not required. Different conditions prevail in Canada and the practical considerations greatly outweigh the arguments favouring any change in the law as it now stands."

[76] *See, e.g.*, An Act Respecting Dentistry, S.O. 1868 (1st sess.), c. 37, s. 12.

[77] An Act to amend The Act respecting Stationary Engineers, S.O. 1909, c. 65, s. 1, required British subject status or Canadian residence for three years.

[78] O. Reg. 237/68 removed the nationality requirement for dental hygienists. Previously they had been required to be British subjects, Canadian citizens, or persons who had made a declaration of intent to become such. O. Reg. 332/65, s. 7.

[79] The Architects Act, R.S.O. 1980, c. 26, s. 5(1)(*e*), requires British subject status, or the oath of allegiance and a declaration of intent to become a British subject.

[80] The Business Corporations Amendment Act, 1972, S.O. 1972, c. 138, ss. 1(2), 30.

admitted to Canada for permanent residence and who is ordinarily resident in Canada".[81]

A recent controversy concerning aliens has been in the field of education, with the policy of hiring non-Canadian teachers[82] and the admission of students of Oriental races into professional schools[83] coming under criticism. Although section 93 of the B.N.A. Act gives the provinces power to legislate in the field of education, such authority would not necessarily be absolute in so far as it might infringe on Dominion powers over aliens in section 91. The right to education is similar to the right to work and to deprive immigrants of it at any level appears to be in conflict with section 91(25) of the B.N.A. Act.[84]

IV. NEW DEVELOPMENTS

International lawyers point out that modern growth in international trade and investment has intensified the need for competent lawyers to advise on the laws of more than one country and the interrelation of those laws.[85] This would best be accomplished by admitting qualified persons

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[81] The Business Corporations Amendment Act, 1974, S.O. 1974, c. 26, s. 1(2).

The Law Society's SUBMISSION TO THE PROFESSIONAL ORGANIZATIONS COMMITTEE, *supra* note 5, at 16, takes the position that citizenship should be required to avoid the "problem of carpet-bagging attorneys" for a residence requirement alone would be difficult to police. This categorization is unjust. First it is a phrase questioning an attorney's character. Second, the typical immigrant applicant to the Bar will have taken three years of work at a recognized Canadian law school, articled for a year, and taken the six month Bar Admission Course. Moreover, the Law Society has not suggested any problem has arisen with respect to members of the Ontario Bar who are presently residing in other provinces, or even other countries, or perhaps working for international corporations. Furthermore the practice of law is built up on the basis of goodwill which necessarily precludes someone from being a so-called "carpet-bagging attorney".

[82] *See* Lipovenko, *185 Foreign Teachers Face Losing Jobs*, The Globe and Mail (Toronto), 20 Oct. 1978, at 13. *See also* the Law Society's SUBMISSION TO THE PROFESSIONAL ORGANIZATIONS COMMITTEE, *supra* note 5, at 15-16.

[83] Students of the Chinese race wishing to enter professional schools have been criticized for devoting themselves entirely to academic studies, for not having broad outlooks, and for an inability to communicate effectively. *See* Stein, *The Alien Enemy*, The Varsity (U. of T.), 19 Mar. 1975, at 16-17, documenting this criticism and alleging the use of quotas, language requirements, and residence restrictions by the university's medical, engineering, dental and pharmacy schools directed against students of the Chinese race regardless of their citizenship.

[84] *See also* the Universal Declaration of Human Rights, Art. 26, s. 1 adopted by the United Nations General Assembly on 10 Dec. 1948: "Everyone has the right to education. . . . Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit."

[85] *See* Payne, *supra* note 14; Note, *Foreign Branches of Law Firms The Development of Lawyers Equipped to Handle International Practice*, 80 HARV. L. REV. 1284 (1967); Knoppke-Wetzel, *Employment Restrictions and the Practice of Law by Aliens in the United States and Abroad*, [1974] DUKE L.J. 871; White, *The Reform of the French Legal Profession: A Comment on the Changed Status of Foreign Lawyers*, 11 COLUM. J. TRANSNAT'L L. 435 (1972).

to the practice of law in different countries. A look to the bar memberships held by Canadian lawyers shows that this idea is neither novel nor unrealistic.[86]

The Canadian government recognized the need to permit international practice in the area of patent law. In 1937, a treaty agreement was entered into with the United States allowing American lawyers to represent their clients before the Canadian Patent Court, with the United States extending a reciprocal right to Canadian lawyers to appear before the United States Patent Court.[87]

In 1974, the General Council of the Bar in England laid down conditions under which a lawyer admitted to practice in any foreign jurisdiction could practise from chambers.[88] The free movement of goods and services in the European Economic Community has also had its influence on English law. Lawyers from other member-states of the European Economic Community, subject to certain conditions, can now provide legal services in the United Kingdom.[89]

V. CONCLUSION

The subject of aliens is within the Canadian Parliament's jurisdiction under section 91 of the B.N.A. Act. Legislation in a provincial field may touch on aliens if there is a valid provincial aspect. The validity of a purported provincial aspect depends on whether its purpose is reasonable. The reasons suggested in support of a nationality requirement for lawyers do not withstand close scrutiny. The pattern of discrimination indicated by the case law casts further doubt on the purported necessity as do the repeals of nationality requirements in other professions in Ontario.

All professions should assume a responsibility to the public, *a fortiori* the self-governing professions. Nationality requirements in the

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[86] *E.g.*, The Honourable F.W. Rhodes, editor of F. WILLIAMS, THE CANADIAN LAW OF LANDLORD AND TENANT (4th ed. 1973), is a member of the Ontario Bar, the Inner Temple, and the California Bar.

[87] Exchange of Notes, 3-28 Dec. 1937, between Canada and the United States Concerning the Reciprocal Recognition of Duly Registered Patent Attorneys, [1937] Canada Treaty Series, No. 19.

[88] The chambers head, however, must ensure that the lawyer signs an acceptance of the General Council's conditions. *See* HALSBURY'S LAWS OF ENGLAND, [1974] ANNUAL ABRIDGMENT para. 216, at 36.

[89] EEC Council Directive 77/249. This Directive is implemented in the United Kingdom by The European Communities (Services of Lawyers) Order 1978, S.I. 1978/1910.

professions have occasionally resulted in extreme individual hardship.[90] The English and American bars have removed these restrictions with no adverse effect.[91]

The practice of law has been called a right rather than a privilege. This right is not absolute, for the maintenance of professional standards depends on high moral character and legal training. Accordingly, law societies have been allowed great autonomy in determining moral fitness, and the courts have supported this action despite an incidental impingement on religion, speech, belief, or political organization.[92]

The proper purpose behind occupational licensing is to protect the public from unqualified practitioners. Citizenship has not been shown to bear a correlation to one's professional or vocational competency or qualification.[93] Persons entrusted with substantial sums of money, such

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[90] The problem of delay in admission and other problems are indicated in the Commonwealth cases, *infra* note 93. Not until 27 Jun. 1952, c. 477, Title III, ch. 2, s. 311, 66 Stat. 239 did the United States end the policy of denying to aliens, upon the basis of race, the right to become citizens through naturalization. *See* 1952 U.S. Code Cong. and Admin. News, at 1653; Immigration and Nationality Act, 1970, 8 U.S.C.A., s. 1422. *In re* Takuji Yamashita, 70 P. 483 (Wash. 1902), held that though a person had passed the bar examination and met the character requirements he was properly refused admission to the bar on the basis that his naturalization papers were void on their face since he was of Japanese origin. A similar decision was made in *In re* Hong Yen Chang, 24 P. 156 (Cal. 1890).

In Canada citizenship was denied on the basis of an applicant's religious conviction against war in *Re* Jensen, [1976] 2 F.C. 665, 67 D.L.R. (3d) 514 (App. D.), a case leading to an amendment to the Canadian Citizenship Act. *See* Hunter, *Conscientious Objection and Canadian Citizenship*, 4 DAL. L.J. 781, at 791 (1977-78).

Problems may arise under the current Law Society Act, s. 32, if a country withdraws from the Commonwealth and a citizen of that country practising law in Ontario has not become a Canadian citizen. On recognition of the country's withdrawal from the Commonwealth by the Canadian government then that individual under s. 32 would be ineligible to practise. A similar result would occur where citizenship in a Commonwealth country is terminated for reasons such as prolonged residence outside it, or for political reasons. If the Law Society Act is amended to require solely Canadian citizenship then there may be problems for non-citizen members who are currently resident outside Canada in positions such as law school professorships, international company work, or otherwise, and these persons may have a waiting period to meet in order to comply with the residence requirements of the Canadian Citizenship Act.

[91] *See* E. MURRAY, *supra* note 5, at 21-23.

[92] *See* Martin v. Law Soc'y of British Columbia, [1950] 3 D.L.R. 173 (B.C.C.A.).

[93] Citizenship status, however, has no bearing on moral character and legal training. Yet some courts have gone to some length to keep aliens out of the legal profession. In Khan v. Board of Examiners, 62 C.L.R. 422 (H.C. Aust. 1939) a person who had been admitted to practise in England as a barrister was denied admission to practise in Victoria because he was not a British subject, though other English barristers had been admitted and there was no express rule as to nationality. *See also* Borensztejn v. Board of Examiners, [1961] V.R. 209 (S.C. 1960). Also, in the absence of any express statute or regulation requiring citizenship, the court in *Ex parte* Korten, 59 N.W. (N.S.W.) 29 (S.C. 1941) and *In re* Scholer, [1955] N.Z.L.R. 1190 (S.C.), found that the applicants were not "fit and proper" persons as required by the rules. Korten was a member of the Jewish faith who had fled Hitler's Germany, and Scholer was a distinguished Dutch jurist who had moved to New Zealand.

as real estate brokers or trustees, need not be citizens.[94] A person can testify or argue his or her own case in court regardless of nationality. What added dimension is there to insist on citizenship for a lawyer to represent another? The lawyer's function is but to rely on training and skill to formulate the issues and arguments for the client. Nor is there reason to suppose that special insurance and compensation funds used by law societies to protect the public from wrongdoing would be put in jeopardy, or the premiums increased by admitting lawful residents who have met the prescribed character and academic standards set by a law society.

In Canada, as in the United States, immigrants have been discriminated against in many occupations, far beyond anything done under the common law of England.[95] Such discrimination does not follow the best Canadian traditions. Canada is a country which has been largely founded and developed by peoples from other lands. Citizenship is a status which should be sought for reasons of pride and dedication, not due to economic pressures.[96] A change of citizenship may have ramifications of forever closing the option to return to one's former country, or upon such return, loss of privileges there.

The United States Supreme Court, in the *Griffiths* case,[97] handed down a decision which indicated an international appreciation and understanding by that Court. Canada has had a remarkable record in its international relations. In the mid 1800's Canada opened its doors to runaway slaves who came by the thousands. Canada was a new home for peaceful Russians sponsored by Tolstoy and others during the time of the tsars. More recently, Canadians offered assistance and entry to American war resisters. Political and war refugees from Hungary, Czechoslovakia, Cuba, Uganda, Vietnam, and Cambodia can also be included. By these actions and by its lead in attempting to find peaceful solutions to international problems, Canada has demonstrated itself to be internationally broadminded. Requirements such as Ontario's that a lawyer should be a Canadian citizen or British subject are not founded on sound reasoning nor are they in accord with Canada's more liberal attitudes.

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[94] *See* The Trustee Act, R.S.O. 1980, c. 512.

[95] *See* Angus, *supra* note 52.

[96] *See Aliens Pass Up Citizenship Status*, London Free Press, 26 Aug. 1976, at 26. The article states that the average immigrant waits 12 years before taking out Canadian citizenship. The clerk of the citizenship court in Ottawa is noted as saying that it is almost impossible for an immigrant to get a federal public service job unless he is the only qualified person available in Canada. The provincial public service jobs usually have similar requirements. "Many professional associations bar non-citizen membership and thereby prevent landed immigrants from practicing a particular trade or profession. 'You can't even be a barber in Halifax'."

[97] *Supra* note 2.