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JURISDICTION OVER ALIENS

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DOES *MORGAN* CLARIFY THE LAW?

For the first time in fifty years Canada's highest judicial tribunal has been called to examine and rule on constitutional jurisdiction over aliens. In the recent case of *Morgan and Jacobson* v. *Attorney-General of Prince Edward Island and Leo Blacquiere et al.*,[1] the Chief Justice, on behalf of a unanimous Supreme Court, upheld a provincial statute restricting sales of land to non-residents.

The case arose out of an attempt by two citizens of the United States, resident in Rochester, New York, to purchase a parcel of land in Prince County, Prince Edward Island. The Registrar of the County refused to register the deed of conveyance because of s. 3 of the *Real Property Act*.[2] The appellants brought an action for a declaratory judgment that the legislation was *ultra vires* and for a writ of *mandamus* against the Registrar. By order of Bell, J., the question of the constitutionality of the legislation was referred to the Supreme Court of Prince Edward Island *in banco*.[3]

In the provincial Supreme Court the appellants argued that the legislation entrenched on the exclusive authority of Parliament to legislate in relation to naturalization and aliens under s. 91(25) of the *British North America Act*, 1867, and conflicted with s. 24(1) of the *Canadian Citizenship Act*, and with the Real and Personal Property Convention, 1899 between Her Majesty and the United States, made applicable to Canada by a convention of October 21, 1921. Trainor, C.J., speaking for the Court, ruled against the appellants on all three grounds, holding that s. 3 was legislation in relation to property and civil rights in the Province.[4] The appellants took their case to the Supreme Court of Canada.

In the Supreme Court the appellants relied entirely on the first and second grounds of attack, opting not to press the argument of conflict with treaty obligations. They were supported in their case by the Attorney-General of Canada as an intervenant, while the Attorney-General of Prince Edward Island was joined by the Attorneys-General of the other nine provinces as intervenants. The case was heard by the full court of nine judges.

The impugned legislation read as follows:

> 3. (1) Persons who are not Canadian citizens may take, acquire, hold, convey, transmit, or otherwise dispose of, real property in the Province of Prince

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[1] 26 June, 1975, as yet unreported.

[2] R.S.P.E.I. 1951, c. 138, as amended by S.P.E.I. 1972, c. 49, s. 1.

[3] Supreme Court of Prince Edward Island, 5 February, 1973.

[4] (1973), 42 D.L.R. (3d) 603 (P.E.I.S.C.).

Edward Island subject to the provisions of sub-section two (2) here next following.

(2) Unless he receives permission so to do from the Lieutenant-Governor-in-Council, no person who is not a resident of the Province of Prince Edward Island shall take, acquire, hold or in any other manner receive, either himself, or through a trustee, corporation, or any such like, title to any real property in the Province of Prince Edward Island the aggregate total of which has a shore frontage in excess of five (5) chains.

(3) The grant of any such permission shall be at the discretion of the Lieutenant-Governor-in-Council, who shall notify the applicant in writing by means of a certified copy of an Order-in-Council of his decision within a reasonable time.

(4) An application for any such permission shall be in the form prescribed, from time to time, by the Lieutenant-Governor-in-Council.

(5)(a) For the purposes of this section, "Canadian citizen" means persons defined as Canadian citizens by the Canadian Citizenship Act (R.S.C. 1970, Vol. 1, Cap.C-19).

(b) For the purposes of this section "resident" of the Province of Prince Edward Island means a *bona fide* resident, *animus et factum*, of the Province of Prince Edward Island.

(c) For the purposes of this section "corporation" means any company, corporation, or other body corporate and politic, and any association, syndicate, or other body, and any such the like, and the heirs, executors, administrators, and curators, or other legal representatives of such person, as such is defined and included by The Domiciled Companies Act (Laws of Prince Edward Island 1962).

The statute is successor to legislation dating from before Confederation, which abolished the common law disability of aliens to hold land but limited their holdings to a maximum of two hundred acres.[5] That legislation remained unchanged until 1939 when the words "except with the consent of the Lieutenant-Governor-in-Council" were added.[6] In 1964 the limitation was amended to 10 acres or 5 chains of shore frontage.[7]

The pre-1972 legislation was never challenged in the courts. However, Trainor, C.J., in the provincial Supreme Court, suggested that after 1867 the legislation was probably invalid as being in pith and substance legislation respecting aliens and therefore beyond the powers of the Province.[8] The implied distinction with the 1972 statute was that the former, being legislation respecting *aliens* had invaded the federal jurisdiction while the latter, using the broader criterion of *residence*, had not.

Absentee ownership of land has been a matter of great concern in Prince Edward Island since before Confederation. Chief Justice Trainor, who clearly felt that such ownership was a proper subject of provincial jurisdiction suggested that the primary factor which instigated passage of the 1972 legislation was the danger of large portions of the island's recreational and vacation land falling under the control of non-resident owners.[9] This concern had been

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[5] *An Act to Enable Aliens to Hold Real Estate*, S.P.E.I. 1859, c. 4.

[6] S.P.E.I. 1939, c. 44.

[7] S.P.E.I. 1964, c. 27, s. 1.

[8] *Supra*, note 4 at 607.

[9] *Id.*

identified by a Special Legislative Committee whose report preceded the legislation as well as by a Royal Commission set up to study the whole question. The Royal Commission's Interim Report identified as dangers of non-resident ownership declining agriculture, destruction of the countryside by the haphazard spread of summer cottages which remain unoccupied for most of the year, and a rising price of land making it impossible for the next generation of island residents to buy land. All these problems exist whether the non-resident purchasers are American or Canadian.[10]

The implications of absentee ownership have been the subject of scrutiny and legislation in other provinces as well, particularly over the past five years.[11] However, the concerns there have been primarily in relation to land holding by those who were mere aliens, rather than those who were non-residents. Nevertheless, the interests of all the other provinces in the outcome of the *Morgan* appeal were clearly demonstrated by their interventions therein on behalf of Prince Edward Island.

CAN A PROVINCE DISCRIMINATE AMONG CITIZENS AND AMONG ALIENS?

Parliament clearly has jurisdiction to legislate with respect to citizenship. The power derives either by implication from the general power granted in the opening words of s. 91 or from the express words of s. 91(25).[12] Parliament may define the status of citizen and may determine to who and by what means the status is granted. In a similar manner Parliament has jurisdiction over aliens, deriving from the head of power found in s. 91(25). This much has never seriously been disputed and was not at issue in *Morgan.* However, certain questions have remained unanswered since the naturalization and aliens power was first considered in 1899. These were, how far beyond this "definitional" power may Parliament go in investing the status of citizen or alien with attributes that conflict with provincial legislation, and what limitation is there imposed on provincial legislative power as a result of a person being clothed with the status?

The narrow question posed in the *Morgan* case was whether the province under its property and civil rights power in s. 92(13) could discriminate

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[10] See Prince Edward Island Legislature, *Report of the Special Legislative Committee on Land Acquisition,* (Charlottetown: 1971); and *Royal Commission on Land Ownership and Land Use, Interim Report* (Charlottetown: January, 1973).

[11] See, e.g., Ontario Legislature, *Interim Report of the Select Committee on Economic and Cultural Nationalism: Foreign Ownership of Ontario Real Estate,* (Queen's Printer, Toronto: 1973); Alberta Legislature, Select Committee on Foreign Investment: *Interim Report on Public and Private Lands* (Edmonton: 1972); Saskatchewan Legislative Assembly, *Final Report of the Special Committee on the Ownership of Agricultural Lands* (Regina: March 1973);; as for legislative activity see: *Public Lands Act,* R.S.O. 1971, c. 380, as amended by S.O. 1971, c. 46, and *Land Transfer Tax Act,* R.S.O. 1971, c. 235 as amended by S.O. 1974, cc. 8, 16, 93; *An Act to Regulate the Ownership and Control of Agricultural Land in Saskatchewan,* S.S. 1973-74, c. 98; *Land Holdings Disclosure Act,* S.N.S. 1969, c. 13.

[12] See judgment of Rand, J. in *Winner* v. *S.M.T. (Eastern) Ltd.,* [1951] S.C.R. 887 at 918.

between residents and non-residents with respect to landholding in the province as the impugned legislation purported to do. The appellants argued that in so legislating the province had entrenched on the exclusive jurisdiction of Parliament to define the status and to legislate in respect to the essential attributes of citizenship and alienage. An essential attribute of citizenship, it was argued, is that all citizens of Canada residing without a province should have the same capacity as persons residing within the province, that only Parliament can alter this equality of capacity; similarly, only Parliament can alter the capacity of aliens. In fact, it was submitted, aliens benefit from the same rights as citizens as a result of s. 24 of the *Citizenship Act*. The section reads as follows:

> 24(1) Real and personal property of every description may be taken, acquired, held and disposed of by an alien in the same manner in all respects as by a natural-born Canadian citizen; and title to real and personal property of every description may be derived through, from or in succession to an alien in the same manner in all respects as through, from or in succession to a natural-born Canadian citizen.
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> (2) This section does not operate so as to
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> (a) qualify an alien for any office or for any municipal, parliamentary or other franchise;
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> (b) qualify an alien to be the owner of a Canadian ship;
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> (c) entitle an alien to any right or privilege as a Canadian citizen except such rights and privileges in respect of property as are hereby expressly given to him; or
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> (d) affect an estate or interest in real or personal property to which any person has or may become entitled, either mediately or immediately, in possession or expectancy, in pursuance of any disposition made before the 4th day of July, 1883, or in pursuance of any devolution by law on the death of any person dying before that day. R.S.C. 1970, c. 33, s. 24.

In sum, the appellants submitted, s. 3 was legislation in pith and substance discriminating against non-resident citizens and aliens, something which only Parliament had the power to do. As such it conflicted with s. 24 of the *Citizenship Act*. In any case they submitted, s. 3 of the *Real Property Act* was in pith and substance in relation to naturalization and aliens within s. 91(25) and was therefore *ultra vires*.

To succeed the appellants had to deal with the case of *Walter* v. *Attorney-General of Alberta*,[13] relied upon strongly by the respondents in *Morgan*. In that case provincial legislation which sought to regulate further acquisitions of land by colonies of Hutterites, (a religious sect whose members held land communally) was upheld. In addition to regulating further acquisitions by colonies already resident in the province, the statute prohibited absolutely acquisitions by non-resident colonies.[14] The challenge to the legislation was that it related to religion, a subject within federal jurisdiction, and was therefore invalid. Declining to decide the question of jurisdiction over religion, Martland, J., speaking for the court, held that the legislation was in pith and substance in relation to the ownership of land within the

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[13] [1969] S.C.R. 383.

[14] *The Communal Property Act*, R.S.A. 1955, c. 52, as amended.

province and therefore within the competence of the legislature. The statute, his Lordship ruled, was not directed at controlling the religious beliefs of the Hutterites but at the practice of holding large areas of Alberta land as communal property.

In *Walter* it may be noted, the legislation was upheld in spite of being directed at a particular class of persons. The conclusion might therefore be drawn, by implication, that a province can validly restrict landholding by non-resident Canadian citizens, as well as by aliens.[15] Thus only if the legislation can be said to be in relation to a class of subject within exclusive federal jurisdiction would it be invalid. The respondents in *Morgan* sought to interpret the *Walter* decision in these terms. The appellants in *Morgan*, however, sought to distinguish the case. The argument was made that the Alberta legislation was of *general* application imposing restrictions on *all* persons whether they be residents within or without the province, as to the *manner* in which they could hold land as community property. As such, it was submitted, it could be contrasted with the P.E.I. legislation: the latter could not be said to be of general application but affected only certain persons; it was not in pith and substance legislation in relation to property and civil rights in the province. The purpose of s. 3, it was submitted, was to change an essential element of the status of non-resident citizens and aliens, as opposed to regulating the manner in which property was held.

Chief Justice Laskin rejected this suggested interpretation of the *Walter decision.* Referring to the Alberta legislation his Lordship said:

> It is true that no differentiation was expressly made on the basis of residence or citizenship or alienage, and that all who fell within the regulated groups were treated alike. Yet it is also clear that the definition of the regulated bodies of persons was for the province, and if the province could determine who could hold or the extent to which land could be held according to whether a communal property regime was observed, it is difficult to see why the province could not equally determine the extent of permitted holdings on the basis of residence.[16]

Laskin, C.J. thus construed the *Walter* decision broadly: a province may regulate not only the manner by which land is held but also the groups of persons who own land.

The learned Chief Justice furthermore rejected the contention that because of the discriminatory nature of the legislation it must be regarded as in pith and substance in relation to citizenship and to aliens.

> I do not agree with this characterization and I do not think it is supportable either in principle or under any case law. No one is prevented by Prince Edward Island legislation from entering the province and from taking up residence there.[17]

The assertion that "no one is prevented . . . from entering the province" is

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[15] It was admitted at trial in the case that two of the plaintiffs were U.S. citizens resident in Alberta. The legislation prohibited the acquisition of land in Alberta by persons communally owning land outside Alberta. It should be assumed it was argued in *Morgan* that some of these persons were Canadian citizens resident outside Alberta.

[16] *Supra*, note 1 at 9.

[17] *Id.* at 8.

suggestive of the dominant theme throughout the *Morgan* decision: provincial legislation is valid so long as it does not have the effect of closing provincial borders to entry. The principle stems from a well-known *dictum* of Rand, J., in the case of *Winner* v. *S.M.T. (Eastern) Ltd.*[18] where the learned judge stated:

> A province cannot prevent a Canadian from entering it except, conceivably, in temporary circumstances, for some local reason, as for example health.

Rand, J., discussing the status of citizenship, went on to draw a line between "incidents of status" and "elements or attributes necessarily involved in the status itself". The freedom to enter any province, to live and to earn a living there, his Lordship suggested, is an attribute of the status of citizenship which is beyond nullification by provincial action.[19]

Chief Justice Laskin, in supporting a broad interpretation of *Walter,* appears to suggest that a restriction on landholding placed on any group of persons, aliens or citizens, residents or non-residents, does not constitute a closing of provincial borders. However, in the application of Rand's principle to the facts in *Morgan,* his Lordship does not find it necessary to base his decision on such a broad ground. The legislation, he rules is directed solely at non-residents and "no one is prevented from . . . taking up residence there". Furthermore, he states, s. 3 merely placed restrictions on the ownership of land by non-residents, it does not prohibit it entirely. One must query if legislation *prohibiting absolutely* the acquisition of land by aliens, or by citizens, were enacted by a provincial government whether it would not be depriving the persons of the means to earn a living and to live in the province.

While this broad interpretation of the *Walter* decision might well have resolved the question in *Morgan,* Chief Justice Laskin saw fit to treat separately the argument that s. 3, in purporting to alter the capacity of aliens to hold land, had entrenched on Parliament's exclusive jurisdiction under s. 91(25), and was in direct conflict with s. 24 of the *Citizenship Act.*

His Lordship suggested initially that the question of jurisdiction over capacity of aliens might be resolved by a "paramountcy" approach. Referring to the forerunner of s. 24, s. 4 of the *Naturalization and Aliens Act* (1881) (Can.), c. 13, his Lordship indicated that it was open to any province, following Confederation, to pass legislation enabling aliens to own land, in the absence of federal legislation restricting that capacity:

> Simply because it is for Parliament to legislate in relation to aliens does not mean that it alone can give an alien capacity to buy or hold land in a province or take it by devise or by descent. No doubt, Parliament alone may withhold or deny capacity of an alien to hold land or deny capacity to an alien in any other respect, but if it does not, I see no ground upon which provincial legislation recognizing capacity in respect of the holding of land can be held invalid.[20]

S. 3 of the Prince Edward Island statute is in fact the successor to legisla-

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[18] *Supra,* note 12 at 920.

[19] *Id.*

[20] *Supra,* note 1 at 10.

tion, pre-dating Confederation, with precisely this purpose.[21] Such a purpose was contained in subsection (1) of the impugned section. However, subsection (2) went on to place restrictions on the exercise of this general capacity by certain aliens, to wit, those who did not reside in the province. Thus, the question in *Morgan* was:

> whether s. 24(1) of the *Canadian Citizenship Act,* as an affirmative exercise of the power of Parliament in relation to aliens, obliges a province to treat non-resident aliens (and citizens can surely be on no worse footing) on a basis of equality with resident aliens.[22]

To answer this question his Lordship proceeded to consider the scope of the federal aliens power.

SCOPE OF THE ALIENS POWER

The law on the aliens power was laid down some seventy years ago in two British Columbia cases.[23] The issue in both cases concerned discriminatory legislation affecting Chinese immigrants. In one case the legislation was struck down, in the other it was upheld. While they can be distinguished on their facts the two cases produced inconsistent statements of principle. Subsequent authority was not extremely helpful in clarifying the position. As controls over foreign investment, and, in particular the ownership of land, were proposed at both federal and provincial levels during the late 1960's and early 1970's, questions were raised as to constitutional jurisdiction.[24] *Morgan,* being the first direct test of the aliens power in over fifty years, was looked to as an important prospective clarification of the law, at least with respect to control of foreign land ownership.[25]

The first time the Privy Council considered the federal aliens power was in the case of *Union Colliery Co.* v. *Bryden.*[26] The impugned legislation in that case, s. 4 of the British Columbia *Coal Mines Legislation Act, 1890,*[27] read as follows:

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

The Privy Council, construing the word "Chinaman" to mean all Chinese whether aliens or naturalized citizens,[28] found the provision to be in pith and substance in relation to aliens and naturalized subjects and therefore invading

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[21] *Supra,* note 5.

[22] *Supra,* note 1 at 11.

[23] *Union Colliery Co.* v. *Bryden,* [1899] A.C. 580; *Cunningham* v. *Tomey Homma,* [1903] A.C. 151.

[24] See, J.E. Arnett, *Canadian Regulation of Foreign Investment the Legal Parameters,* (1972), 50 C.B.R. 211; and John Spencer, *The Alien Landowner in Canada,* (1973), 51 C.B.R. 389.

[25] See comments, *supra,* re provincial initiatives, note 11.

[26] *Supra,* note 23.

[27] R.S.B.C. 1897, c. 138, s. 4.

[28] Thus leaving open the question of whether the aliens' power applied to members of *racial* rather than *national* groups.

the exclusive federal power under s. 91(25). Lord Watson, speaking on behalf of the Board indicated that the naturalization power was broad indeed:

> . . . it seems *prima facie* to include the power of enacting what shall be the consequences of naturalization, or in other words, what shall be the rights and privileges pertaining to residents in Canada after they have been naturalized.[29]

His Lordship went on:

> Their Lordships see no reason to doubt that by virtue of s. 91, sub-s. 25, the legislature of the Dominion is invested with exclusive authority in all matters which directly concern the rights, privileges and disabilites of the class of Chinamen who are resident in the provinces of Canada.[30]

This far-reaching statement, if left untouched, would probably have resolved the issue. However, the Judicial Committee considered the aliens' power again four years later and, in doing so, apparently retreated from its position in *Bryden.*

In *Cunningham* v. *Tomey Homma,*[31] their Lordships were asked to consider the validity of a British provincial law which prevented Asians from being registered on the voters' list in any provincial election.[32] The Lord Chancellor, Earl of Halsbury, speaking for the Privy Council Board, found that the legislation was not in pith and substance in relation to aliens or naturalization but was validly enacted under s. 92(1) of the *British North America Act* which authorizes the province to amend its own constitution. He went on to define the extent of the federal power in s. 91(25):

> The truth is that the language of that section does not purport to deal with the consequences of either alienage or naturalization. It undoubtedly reserves these subjects for the exclusive jurisdiction of the Dominion — that is to say, it is for the Dominion to determine what shall constitute either the one or the other, but the question as to what consequences shall follow from either is not touched. The right of protection and the obligations of allegiance are necessarily involved in the nationality conferred by naturalization; but the privileges attached to it, where these depend upon residence, are quite independent of nationality.[33]

This *dictum* as a statement of the law was clearly inconsistent with that of Lord Watson in *Bryden's* case. In the earlier case the learned law lord suggested that the federal jurisdiction not only included the power to define the status of alienage or citizenship but also to govern *the consequences* thereof — the rights, privileges, and disabilities pursuant to the status. In the later case, however, Lord Halsbury clearly drew the line between definition of the status and the consequences thereof, a distinction which apparently was analogous to that between rights and privileges.

While it might be possible to argue that *Tomey Homma's* case, being the more recent, overruled *Bryden's,* the Lord Chancellor did not see fit to

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[29] *Supra,* note 23 at 586.

[30] *Id.* at 587.

[31] *Supra,* note 23.

[32] *Provincial Elections Act* R.S.B.C. 1897, c. 67.

[33] *Supra,* note 23 at 156-57.

disapprove of it explicitly. He merely distinguished the earlier case on the facts:

> That case depended on totally different grounds. This Board dealing with the particular facts of that case came to the conclusion that the regulations there impeached were not really aimed at the regulation of coal mines at all, but were in truth devised to deprive the Chinese, naturalized or not, of the ordinary rights of the inhabitants of British Columbia and, in effect, to prohibit their continued residence in that province, since it prohibited their earning their living in that province. It is obvious that such a decision can have no relation to the question whether any naturalized person has an inherent right to the suffrage within the province in which he resides.[34]

The aliens power was considered again eleven years later by the Supreme Court of Canada. In *Quong-Wing* v. *The King*,[35] a Saskatchewan statute forbidding the employment of white women by Asians was challenged. The Supreme Court upheld the legislation. Mr. Justice Duff found that the statute was not in pith and substance in relation to aliens. While this would have sufficiently disposed of the question his Lordship went on the consider which of two earlier cases was the law. He suggested that:

> . . . in applying *Bryden's Case* we are not entitled to pass over the authoritative interpretation of that decision which was pronounced some years later by the Judicial Committee itself in *Cunningham* v. *Tomey Homma*. . . .[36]

His Lordship continued:

> . . . we should not be entitled to adopt and act upon a view as to the construction of item 25 of section 91 (B.N.A. Act) which was distinctly and categorically rejected in the later judgment.[37]

Such an interpretation, it is submitted, clearly was not warranted by the actual language of the judgment. As pointed out above, the extent of the "interpretation" which the Privy Council made in *Tomey Homma's* case consisted of no more than a distinction of the earlier case on the facts. For this reason, apart from being *obiter*, his Lordship's remarks should not be taken as authority for the proposition that Bryden was overruled by the later case.[38]

The Privy Council itself in subsequent decisions appears to have treated both *Bryden's* and *Tomey Homma's* cases as good law. Their Lordships considered the aliens power for the last time when in a pair of related cases the power of the British Columbia government to restrict employment of aliens on Crown lands was challenged.[39] In the first case *Bryden* was again distinguished on the facts: the provincial statute was found to relate to the regulation of public property in the province and not to aliens and was there-

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[34] *Id.* at 157.

[35] [1914] S.C.R. 440.

[36] *Id.* at 466.

[37] *Id.* at 486.

[38] The point is made here because the Chief Justice in *Morgan* appears to rely on Duff, J.'s *dictum* as authority for finding that *Bryden* was overruled by later authority.

[39] *Brooks-Bidlake and Whittal Ltd.* v. *A.-G. B.C.*, [1923] A.C. 450 and *A.-G. B.C.* v. *A.-G. Canada*, [1924] A.C. 203.

fore a valid exercise of legislative power.[40] In the second case on a general reference by the Governor-General, the statute was struck down as being in contravention of a 1913 treaty between Canada and Japan. While not applied, the two earlier cases were again referred to without any indication of disapproval of one or the other.[41] In these two cases and in other decisions,[42] the Privy Council appears to have treated *Bryden's* case as standing for the proposition that a statute which is nominally directed at a valid provincial object but which in pith and substance relates to a class of subjects within federal jurisdiction is *ultra vires*. This is clearly the interpretation placed on *Bryden's* case by Lord Halsbury in *Tomey Homma*.

Possibly the most useful attempt at clarification of the aliens power, prior to the *Morgan* decision, may be found in the well-known passage of Rand, J. in the *Winner* case, referred to above,[43] where he discusses the status of citizenship. In examining the two earliest British Columbia cases his Lordship suggests that a distinction should be drawn between "incidents of the status" and "elements necessarily involved in the status itself":

> Citizenship is membership in a state; and in the citizen inhere those rights and duties, the correlatives of allegiance and protection, which are basic to that status. . . .
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> But incidents of status must be distinguished from elements or attributes necessarily involved in status itself. British subjects have never enjoyed an equality in all civil or political priviliges or immunities as is illustrated in *Cunningham* v. *Tomey Homma,* in which the Judicial Committee maintained the right of British Columbia to exclude a naturalized person from the electoral franchise. On the other hand, in *Bryden's* case, a statute of the same province that forbade the employment of Chinamen, aliens or naturalized, in underground mining operations, was found to be incompetent. As explained in *Homma's* case, that decision is to be taken as determining,
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> "that the regulations there impeached were not really aimed at the regulation of metal mines at all, but were in truth devised to deprive the Chinese, naturalized or not, of the ordinary rights of the inhabitants of British Columbia and, in effect, to prohibit their continued residence in that province, since it prohibited their earning their living in that province".
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> What this implies is that a province cannot by depriving a Canadian of the means of working, force him to leave it: it cannot divest him of his right or capacity to remain and to engage in work there: that capacity inhering as a constituent element of his citizenship status is beyond nullification by provincial action. The contrary view would involve the anomaly that although British Columbia could not by mere prohibition deprive a naturalized foreigner of his means of livelihood, it could do so to a native-born Canadian. He may, of course, disable himself from exercising his capacity or he may be regulated in it by valid provincial law in other aspects. But that attribute of citizenship lies outside of those civil rights committed to the province, and is analogous to the capacity of a Dominion corporation which the province cannot sterilize.[44]

As we have already seen, Chief Justice Laskin, in *Morgan,* reveals a

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[40] *Brooks-Bidlake, id.* at 457-58.

[41] *A.-G. B.C.* v. *A.-G. Canada, supra,* note 39 at 211.

[42] See *John Deere Plow Co.* v. *Wharton,* [1915] A.C. 330 at 343-44 and *Brooks-Bidlake, supra,* note 39 at 457.

[43] *Supra,* note 12 at 10.

[44] *Id.* at 919-20.

predilection for Rand, J.'s concepts of federal and provincial jurisdiction.[45] Strangely enough, however, his Lordship does not cite the above *dictum* as an authority to be followed. He merely quotes it, early on in his judgment, more to serve as a statement of the issues before him.[46] Nor does the learned Chief Justice expressly adopt Rand, J.'s "incidents" and "elements" distinction. Instead, his Lordship adopts the *Tomey Homma* view of the law, and implicitly therefore the distinction between definition, of and consequences to, status. However, even these concepts are not developed as a framework or applied to the facts of the case.

While his Lordship articulates a rule which draws heavily on Rand, J.'s "closing provincial borders" concept, he appears in the end to apply very much the sort of pith and substance test to be found in *Bryden's* case. It will be remembered that s. 3 places restrictions on non-residents, not on aliens *per se*. Distinguishing *Bryden's* case, his Lordship suggests that it

> is a far different case from the present, which does not involve any attempt, direct or indirect, either to exclude aliens from Prince Edward Island or to drive out any aliens now residing there.[47]

His Lordship goes on to state that in his appraisal there is no attempt here to regulate or control alien residents of the province but simply a limitation on the landholding of the broader class, non-residents. The true test, he suggests, is one of pith and substance:

> The question that would have to be answered is whether the provincial legislation, though apparently or avowedly related to an object within provincial competence, is not in truth directed to, say, aliens or naturalized persons so as make it legislation striking at their general capacity or legislation so discriminatory against them as in effect to amount to the same thing.[48]

His Lordship finds that no such sterilization results from the impugned legislation.

The analogy between aliens and federally-incorporated companies, cited by Rand, J. in *Winner,* had been articulated initially in a number of Privy Council decisions defining the federal incorporation power.[49] Chief Justice Laskin also draws on the analogy, and applies it to the facts in *Morgan.* Federal companies, it will be remembered, are subject to valid provincial regulatory legislation and are entitled to no special immunity over provincial corporations so long as their capacity to establish themselves as viable corporate entities is not precluded by the provincial legislation. In like manner, his Lordship suggests non-resident aliens are entitled to no special immunity over other classes of non-residents simply because the provincial regulatory legislation may affect one class more than another with what may be thought to be undue stringency. The concept is again strongly reminiscent of Rand, J.

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[45] *Supra,* note 1 at 11.

[46] *Id.* at 7, 8.

[47] *Id.* at 14.

[48] *Id.* at 16.

[49] *John Deere Plow Co.* v. *Wharton, supra,* note 42; *Great West Saddlery* v. *The King,* [1921] 2 A.C. 91.

in *Winner*. Closing provincial borders to entry is the equivalent to sterilization of a citizen's or an alien's general capacity. It is at that point where provincial jurisdiction terminates. However, Prince Edward Island has not gone that far. His Lordship concludes that the residency requirement, affecting both aliens and citizens alike, can in no way be regarded as a sterilization of the general capacity of an alien or citizen who is a non-resident especially when there is no attempt to seal off provincial borders against entry.[50] Thus Chief Justice Laskin's framework is essentially this: Parliament's jurisdiction extends to definition of the status of alien and citizen; the borderline between definition and consequences (or elements and incidents if you like) is sterilization of general capacity. How is it determined? By that age-old yardstick (meter stick, now!) of Canadian constitutional law, pith and substance.

In conclusion, his Lordship states that federal power as exercised in s. 24 of the Citizenship Act, or as it might otherwise be exercised, may not be invoked to give aliens, naturalized persons or natural born citizens any immunity over provincial regulatory legislation. Thus s. 3 of the *Real Property Act* neither occupies the same ground as s. 24 of the *Citizenship Act* nor entrenches on any legitimate federal jurisdiction.

THE UNANSWERED QUESTIONS

The decision in *Morgan and Jacobson* is striking in two respects. First and most evidently it represents a strong statement from out highest court for provincial primacy in an area where hitherto considerable doubt existed as to jurisdiction. The unanimity of the full nine judges, as articulated by the Chief Justice is an unequivocal indication of the court's position: the province should have jurisdiction in the regulation of all aspects of land ownership within its borders. In upholding the P.E.I. legislation, the Court has sanctioned a formula whereby all provinces can effectively control *alien* landownership, albeit "through the back door". What is disturbing, however, about the decision in *Morgan* is the apparent unwillingness of the court to discuss, or at least recognize, that landownership can no longer be considered a constitutive characteristic of Canadian citizenship.

Despite a subsequent disclaimer regarding the Court's concern with the wisdom of the legislation, his Lordship echoes Trainor, C.J. and the various provincial study groups when he states:

> Absentee ownership of land in a province is a matter of legitimate provincial concern and, in the case of Prince Edward Island, history adds force to this aspect of its authority over it territory.[51]

While the concerns in Prince Edward Island can be appreciated, at what cost?

The result of the *Morgan* decision it is submitted is as follows. If all other provinces do in fact adopt P.E.I.-type legislation (in most cases as a "back door" means of regulating alien landholding), then Canadians will find themselves in no better position than foreigners when seeking to buy

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[50] *Supra*, note 1 at 17.

[51] *Id.* at 8-9.

land in any province but their own. In sum, they will be little better than "provincial citizens" when it comes to landownership.

Chief Justice Laskin declines to discuss these implications of his decision. However, it appears that he feels implicitly confronted with them. It will be remembered that his Lordship cites Rand J.'s proposition "that a province cannot prevent a Canadian from entering it except, conceivably, in temporary circumstances, for some local reason".[52] His preoccupation with demonstrating that provincial borders are not closed suggests that his Lordship remains uncomfrontable with the *dictum,* in spite of his attempts to distinguish it. And rightly so. The *Winner* case involved an American citizen operating an interprovincial bus line through New Brunswick. It was held that the province had no right to bar entry to a citizen of Canada; nor could it bar entry to the citizen of a foreign country who, for all practical purposes, enjoys the same rights. There was no question of residence; however, it is clear from the case that "entry" was perceived as no more than the crossing of the border by the appellant's vehicles. A provincial law which sought to regulate this activity was struck down; there was no question of residence. Why in *Morgan* should entry be equated with establishing residence *"bona fide, animus et factum"*?[53] It is submitted that the movement of capital into or the establishment of a business in a province is just as much of a crossing of provincial borders as that of taking up residence. Why should acquisition of land by non-residents be any different?

His Lordship omits reference to the sentence immediately following Rand, J.'s famous *dictum,* a sentence which surely must have been urged upon him:

> With such a prohibitory power, the country could be converted into a number of enclaves, and the 'union' which the original provinces sought and obtained, disrupted.[54]

Unhappily the *Morgan* decision is suggestive of precisely such a "Balkanization".

The second striking aspect of the Morgan decision is its failure to clarify significantly the alien's power. In the well-known passage cited, Mr. Justice Rand sought to identify the "local reason" for which a province could validly prevent a citizen from entry. As we saw above he examined the aliens cases and concluded that such local reason was analogous to the province's jurisdiction to regulate federal companies — it cannot sterilize them. Chief Justice Laskin picks up the analogy. Uneasy with the "residence" basis for circumventing Rand, J.'s rule his Lordship seeks to found his decision on a surer ground: that the impugned legislation does not in any case sterilize the non-resident's general capacity. He characterizes the statute as a "limitation on the size of landholding", rather than an outright prohibition of the purchase of land by non-residents.

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[52] *Supra,* note 12 at 920.

[53] *Supra,* note 2, s. 3(5)(6).

[54] *Supra,* note 12 at 918.

It is here that we must register the strongest dissatisfaction with the *Morgan* decision. His Lordship disappoints our expectations for a definitive statement of the aliens power. Instead, various aspects of the statutory provision are relied on *in toto* to find that the legislation, in *pith and substance,* is not in relation to aliens and naturalization. But there is no articulation of the limits of the test. What if the statute had been directed solely at aliens? (or, as it might be argued, similar legislation in British Columbia or Ontario will in reality be intended)? What if the statute had *prohibited all landholding* by non-residents?[55] His Lordship as we know is not disposed to answering hypothetical questions.[56] However, his reliance on pith and substance, a test "dependent so largely on the judicial appraisal of the thrust of the particular legislation" as his Lordship himself admits,[57] must be disappointing to many students of constitutional law.

In spite of these deficiences we may draw certain conclusions from the decision. The Supreme Court clearly supports provincial primacy in the regulation of landholding within a province. In other areas of the economy, however, where it might be suggested Ottawa's leadership is more crucial, we may posit that federal jurisdiction would be upheld. It may be argued, along the lines suggested[58] that Ottawa's power to regulate aliens *per se* may have been enhanced by the *Morgan* decision. If this is so, reliance thereon in conjunction with the federal trade and commerce power, could see a future court upholding Parliament's jurisdiction to control foreign investment generally in Canada.

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[55] The analogy with federal companies could have been taken one step further to resolve at least one of these questions. In *Great West Saddlery* v. *The King, supra,* note 49, it was held that while a province could validly enact a mortmain statute which would curtail the right of any corporation, federal or provincial, to hold land within the province, it could not pass an Act limiting the right of a federal corporation alone to hold land. On this basis it could be found that a restriction on landholding by aliens *per se* strikes at their general capacity and is therefore beyond the powers of the provincial legislature.

[56] See *A.-G. for Manitoba* v. *Manitoba Egg and Poultry Association et al,* [1971] S.C.R. 689 at 704. We may note that Laskin, C.J. furthermore declined to answer the question "Who is a resident of Prince Edward Island?" He did not doubt that the appellants in the present case were non-residents. However, the only definition cited by his Lordship was that given in s. 3(5)(6) of the statute, "a *bona fide* resident, *animus et factum*" which is not too helpful. Does this mean the future litigants will have to look for assistance from other areas of law such as conflicts and taxation?

[57] *Supra,* note 1 at 16.

[58] *Supra,* note 55.