MOBILITY RIGHTS IN CANADA

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&

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I. Pre-Charter Law

A. The Rights of Aliens Resident in Canada

The status of aliens resident in Canada is touched on by the *Immigration Act*. The constitutional authority to pass this Act is found in s. 95 of the *Constitution Act, 1867*, which gives Parliament and the provincial legislatures concurrent jurisdiction over immigration. Under the *Immigration Act*, a person is a “permanent resident” where he has been granted landing, or lawful permission to enter Canada to establish permanent residence, has not become a citizen, and has not ceased to be a permanent resident by leaving Canada with intent to abandon it or by being deported pursuant to the *Act*.²

The *Immigration Act* does not give permanent residents unlimited rights to enter and remain in Canada. Subsections 4(1) and (2) of the Act give a permanent resident the right to come into and remain in Canada except where he is a person “described in subsection 27(1)”. Persons described in the latter subsection include those who have been convicted of serious criminal offences, are judged to be likely to commit violent acts, have violated conditions of landing, are engaged in subversion, were granted landing through fraud or other improper means, or have wilfully failed to provide for themselves or their families.

Certain rights are given to permanent residents by another federal statute, the *Citizenship Act*,³ which is constitutionally founded on the federal power over naturalization and aliens in s. 91(25) of the *Constitution Act, 1867*. Section 33(1)(a) of the *Citizenship Act* gives non-citizens resident in Canada the same right to take, acquire, hold, and dispose of real and personal property that is enjoyed by Canadian citizens. Section 33(1)(b) provides that title to real and personal property may be derived from non-citizens in the same way that it may be derived from citizens. These sections change the common law rule that aliens could not hold real property absolutely during their lifetimes or devise it by will. At common law, any interest in real property held by an alien escheated to the Crown upon his death.

Subsections 33(2) to (6) of the *Citizenship Act* provide that where the Governor in Council makes a proclamation, the Lieutenant Governor of a

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2. Ibid., at s. 2.

province may prohibit or restrict the taking or acquisition of, or succession
to, any interest in real property in the province by non-citizens or corpo-
rations controlled by non-citizens. These sections are in force in Alberta and Manitoba. Alberta has enacted complex regulations pursuant to them. The position of non-citizens resident in Canada, however, remains unchanged, because s. 33(6)(a) prohibits restriction of land ownership by landed immigrants normally resident in Canada. The provinces may not, therefore, restrict ownership of real property by landed immigrants on the basis of their status as non-citizens. The provinces are also prohibited from restricting ownership of land where the restrictions would conflict with Canada’s obligations at international law.

Because the jurisdiction over naturalization and aliens granted to Parliament by s. 91(25) of the Constitution Act, 1867 is exclusive, provincial legislation which would interfere with the status of naturalized persons or aliens is suspect. In Union Colliery v. Bryden, the Privy Council held that a British Columbia statute prohibiting the employment of “Chinamen” below ground in coal mines was ultra vires the legislature, because its

...whole pith and substance ... consists in establishing a statutory prohibition which affects aliens or naturalized subjects, and therefore, trench[es] upon the exclusive authority of the Parliament of Canada.

The court considered that Parliament had exclusive jurisdiction to define not only what would constitute citizenship and alienage, but the “rights, privileges, and disabilities” of these classes of people.

This has not been followed in subsequent cases. In Cunningham v. Tomey Homma, the Privy Council limited the scope of Union Colliery v. Bryden. They held that the language of s. 91(25)

... does not purport to deal with the consequences of either alienage or naturalization.

... 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.

In the result, a British Columbia statute which deprived “Chinamen and Japanese” of the franchise was held to be valid.

The implication of these two cases is that where provincial legislation merely affects the quality of life in a province by attaching consequences to the status of an individual, it is valid. Invalidity results only when the provincial legislation denies naturalized citizens and aliens the right to reside in and pursue the gaining of a livelihood in a province. This is

4. SI/77-99.
7. Supra. n. 3, at s. 33(6)(b).
9. Ibid., at 587.
11. Ibid., at 157.
similar to the ability of a province to legislate with respect to federally incorporated companies. The limits of validity are reached when the company can no longer carry on business in the province and maintain its federally created status.

The fact that the provinces were precluded by s. 91(25) from infringing basic rights of naturalized citizens and aliens did not mean that these rights were beyond reach. Parliament was within its powers in attaching restrictive conditions to residence in Canada. Examples of constitutionally valid restrictions may be found in the Chinese Immigration Act\textsuperscript{12} which required all persons of Chinese origin or descent, irrespective of allegiance or citizenship, to register with the authorities, and in Orders in Council passed during World War II, pursuant to the War Measures Act\textsuperscript{13} which put strict conditions on the residence of persons of Japanese origin in Canada.\textsuperscript{14}

B. The Rights of Citizens

The Immigration Act provisions which give a limited right to enter and remain in Canada to persons with the status of permanent residents give unconditional rights to Canadian citizens. Other than these sections, and the Citizenship Act, which defines entitlement to the status of citizenship, the rights of citizens are undefined by statute law.

A few statements of what Canadian citizenship means may be found in case law. The judgment of Rand J. in Winner v. S.M.T. (Eastern) Ltd.\textsuperscript{15} is often cited in this regard, but there are other relevant decisions. In Re Alberta Legislation,\textsuperscript{16} Mr. Justice Cannon indicated that freedom of discussion was inherent in Canadian citizenship because of the Parliamentary system of government contemplated by the Constitution Act, 1867. A proposed Alberta Act which would have curtailed freedom of the press was held to be ultra vires because it would have interfered with the "fundamental right to express freely … untrammelled opinion[s] about Government policies and discuss matters of public concern."\textsuperscript{17}

This reasoning was expanded by Rand J. in Switzman v. Elbling and A.-G. Quebec.\textsuperscript{18}

Winner v. S.M.T. (Eastern) Ltd.\textsuperscript{19} involved an American citizen, resident in the United States, who wished to operate a passenger bus service passing through New Brunswick. The Supreme Court, with which the Privy Council agreed in part, held that the province could not exclude

\textsuperscript{12} S.C. 1923, c. 38.
\textsuperscript{13} R.S.C. 1927, c. 206.
\textsuperscript{17} Ibid., at D.L.R. 119.
\textsuperscript{19} Supra, n. 15.
non-citizens from using its highways. Mr. Justice Rand in the course of his judgment made statements that directly concern the rights of citizens to inhabit and work in a province. He said:

...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.

... It follows, a fortiori, that a province cannot prevent a Canadian from entering it except, conceivably, in temporary circumstances, for some local reason as, for example, health.

Highways are a condition of the existence of an organized state: without them its life could not be carried on. To deny their use is to destroy the fundamental liberty of action of the individual .... [U]nder such a ban, the exercise of citizenship would be at an end.20

He distinguished the "elements or attributes necessarily involved in status itself" from "incidents of status", which need not be granted equally to all having the status. Parliament, and Parliament alone, has the jurisdiction to define the status itself. The core of the status includes the rights to enter, remain in, and work in a province, and to use its highways. The competence of the province ends where its legislation interferes with these rights. It has jurisdiction only to affect the "incidents" of status.

The Winner case indicates that the limitations on a province's ability to legislate with respect to citizens are similar to the limitations on its ability to legislate with respect to aliens: "In a like position is a subject of a friendly foreign country; for practical purposes he enjoys all the rights of the citizen".21 In other words, a province may regulate a citizen's ability to remain and work in a province, but it cannot deprive him of that basic right, which is inherent in the status of citizenship.

The right of Parliament is not so restricted. By virtue of its ability to define the status of citizenship, it may also define the elements or attributes necessarily involved in it. Parliament may still do this, subject to the Charter of Rights and Freedoms, which grants certain rights to citizens.

C. The Status of Residents of a Province vs. Non-Residents

The cases of Union Colliery v. Bryden, Cunningham v. Tomey Homma and Winner v. S.M.T. (Eastern) Ltd. indicate that a province could not prevent a citizen or a non-citizen from moving to or travelling through the province, or taking up residence and working there.

The case of Morgan v. A.-G. P.E.I.22 demonstrates that other restrictions are within provincial competence. In that case, Prince Edward Island had enacted legislation which restricted ownership of land in the province

20 Ibid., at S.C.R. 919-920.
21 Ibid., at 920 (per Rand J.).
by non-residents. This legislation was challenged by an American citizen resident in the United States. The Supreme Court held that the legislation was *intra vires*. It did not conflict with s. 33 of the *Citizenship Act* (which, it will be recalled, allows non-citizens to hold land in the same manner as citizens), because it treated non-resident citizens and non-resident non-citizens in the same manner. Further, the legislation did not interfere with the right of persons, citizens or not, to move to Prince Edward Island and thereby become eligible under the legislation to own land there. On the basis of *Morgan*, it may be said that a province could, at least until April 17, 1982, discriminate between individuals wishing to acquire land in the province on the basis of their residency, as long as it treated citizens and non-citizens alike.

The *Morgan* case was decided before the amendments to the *Citizenship Act* which make provision for restriction of landholding on the basis of citizenship. The Act now provides that where sections 33(2) to (6) are in force, a province may prohibit or annul or restrict the taking or acquisition of land within the province by non-citizens who are also non-residents of Canada. This means that a province may, in its decision whether to allow individuals to acquire land, discriminate on the basis of lack of Canadian residency where the applicant is not a citizen.

Prince Edward Island was not the only province to enact restrictions on land ownership. As noted earlier, Alberta has restricted ownership of land by non-resident aliens under the *Citizenship Act*. Saskatchewan has restricted ownership of farmland by non-residents of the province under *The Saskatchewan Farm Ownership Act*.23

### D. Canada’s Obligations at International Law

Canada is a signatory to the *International Covenant on Civil and Political Rights*24 which came in force in Canada on August 19, 1976. The *Covenant* contains certain provisions which bear on the mobility of persons within states. Article 12 gives any person lawfully within the territory of a state "the right of liberty of movement and freedom to choose his residence", and gives any person the right to leave any country, including his own. These rights are subject only to restrictions provided by law which are "necessary to protect national security, public order, public health or morals or the rights and freedoms of others".

These rights belong to all persons in Canada, whether citizens, landed immigrants, or visitors. Aliens lawfully within the territory of a state party are also entitled, by Article 13, to procedural fairness in any expulsion from that territory, except "where compelling reasons of national security otherwise require". The *International Covenant* is more than a mere statement of principle in Canada, because Canada is a party to the 1966 Optional

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Protocol.25 This gives individuals alleging a violation of the Covenant the right to make application to the United Nations Human Rights Committee.

Another international covenant which ensures certain mobility rights is the European Convention for the Protection of Human Rights and Fundamental Freedoms. Needless to say, Canada is not a signatory and is therefore not bound by this Convention. However, it may be relevant in determining what limitations on the rights granted by the Charter are "demonstrably justified". Limitations imposed by the European Convention arguably may be taken to be demonstrably justified, adopted as they have been by free and democratic societies.

The European Convention, in the Fourth Protocol, gives everyone lawfully within a state mobility rights which are in substance identical to those granted by Article 12 of the International Covenant. However, the basic rights granted may be subject "in particular areas to restrictions imposed in accordance with law and justified by the public interest in a democratic society" as well as to restrictions necessary in the interests of national security or public safety, maintenance of «ordre public», the prevention of crime, the protection of health or morals or the protection of the rights and freedoms of others.

The European Convention also grants individuals the right not to be expelled from their national state, and the right to enter their national state. Collective expulsion of aliens is prohibited.

In Federal Republic of Germany v. Rauca26 the court commented on the right of a citizen of a state not to be expelled from it. It cited the Explanatory Reports to the European Convention, which stated that the word "expulsion" is used in its ordinary, current meaning: "to drive away from a place". The Report stated, and the court agreed, that the right is not equivalent to a freedom from extradition proceedings. Nor would it serve to exempt a citizen from obligations, such as military service, which are not contrary to the Convention and which might entail leaving the territory of the national state.

It should be noted that the International Covenant on Civil and Political Rights does not give a citizen the right not to be expelled from his national state.

II. Mobility Rights Under the United States Constitution

The Constitution of the United States has been interpreted to protect the right to travel, both nationally and internationally, and the right to work and pursue commercial opportunities in states across the Union. The sources of these rights are varied, there being no section which is equivalent to s. 6 of the Canadian Charter of Rights and Freedoms.

A. The Right to Inter-State Travel

Citizens of the various states have long been recognized as having the right to travel without impediment from one state to another. The right is inherent in the purposes of the Union and in the vital importance of intercourse between the states to the political functioning of the United States as a whole. It is therefore a protected and a fundamental right. Although a right to inter-state travel is not specifically laid out in the Constitution, sources of the right may be found in the privileges and immunities clause of Article IV: "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States"; the First Amendment freedoms of speech and assembly; the Fifth Amendment guarantee of due process; the Ninth Amendment assurance of other rights retained by the people; and the Fourteenth Amendment equal protection clause.

State laws which have been struck down as interfering with the right to travel between states include a law which imposed a tax on passengers leaving the state and a law which forbade the bringing into California of any "indigent person who was not a California resident".

More recently, it has been suggested that laws which impose "duralional residency requirements", or which deny a person services in a state until he has resided there for a fixed period of time, impose a "penalty" on persons who exercise their right to travel or migrate between states. In Shapiro v. Thompson a durational residency requirement of one year for the receipt of welfare payments was struck down, and in Memorial Hospital v. Maricopa County it was held unconstitutional to require individuals to have resided in the jurisdiction for one year before they would be eligible to receive non-emergency medical care at government expense.

However, it is too sweeping to say that all such requirements are unconstitutional burdens on the right to travel. In Dunn v. Blumstein a residence requirement of one year before an individual was eligible to vote in state elections was upheld. In Sosna v. Iowa a similar residence requirement limiting access to state divorce courts was held to be constitutional. And, in Sturgis v. Washington, a year long residency requirement for entitlement to lower tuition at a state university was upheld.

The distinguishing factor in these cases may be the importance of the denied amenity to the individual's ability to remain in the state. Clearly,

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29. Ibid.
34. 419 U.S. 393 (1975).
welfare payments and medical care are more essential than voting, access to divorce courts, or lower tuition at a university.

B. Discrimination Against Non-Residents

Closely related to the cases involving durational residency requirements and state-provided services are those involving the right to enter a state and work or pursue recreational activities there. Article IV, s. 2 of the Constitution and the Fourteenth Amendment provide the constitutional mechanism for protection of these rights. The relevant portion of Article IV reads:

The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.

The Fourteenth Amendment provides:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Citizens of the United States are persons who were "born or naturalized in the United States, and subject to the jurisdiction thereof". U.S. citizens who reside in a state are also citizens of that state.

The privileges and immunities clause protects only fundamental rights, or those which bear on the vitality of the United States as a single entity. Among these are the right to pass through and reside in any state for trade, agriculture, or for professional or other reasons.

The Constitution does not provide absolute protection in all cases where distinctions are made between individuals on the basis of their residence. Where, for example, the right in issue is not considered fundamental, the state may be justified in giving its residents preferential treatment. Thus, in Baldwin v. Fish and Game Commission, Montana was found to be justified in charging non-residents at least 7½ times as much as residents for elk-hunting licenses.

Even where the right in issue is fundamental, the state may be justified in discriminating on the basis of residence. Where non-residents are a unique source of the mischief at which the discriminatory program aims, there are substantial reasons for the discrimination independent of the fact of non-residence, and if the differential treatment bears a close relationship to those reasons, it is constitutional. Hicklin v. Orbeck illustrates the operation of what is known as the Toomer principle. In that case, the

39. Supra, n. 37.
42. Supra, n. 40.
court was called on to examine Alaska legislation which would have required all oil and gas leases, easements, and right-of-way permits to provide that qualified Alaska residents would be hired in preference to others. The court in Hicklin found that the ill the statute was supposed to remedy, namely high unemployment in the state, was not caused by an influx of non-residents, but by the residents' lack of adequate education and training, and by geographical remoteness from job opportunities. Therefore, the legislative program did not address a problem uniquely caused by non-residents. Further, although high unemployment within a state could conceivably justify state legislation requiring employers to prefer state residents, the Alaskan program failed to conform closely enough to the actual ill, in that it gave equal preference to employed and unemployed Alaskans. It was therefore unconstitutional.

One further possible situation in which a state's discrimination on the basis of residence may be justifiable is where the state has a property right at stake. In McCready v. Virginia the Supreme Court upheld state legislation which prohibited citizens of other states from planting oysters in tidal waters. The court decided that the right of Virginians in the tidal waters was "a property right, and not a mere privilege or immunity of citizenship". Doubt has been cast on this doctrine in subsequent cases. In Toomer v. Witsell the state's interest in free swimming fish in the Atlantic coastal waters was held not to be of the same type as the property interest in McCready. More recently, in Hicklin v. Orbeck, the fact that Alaska owned oil and gas was held insufficient to justify legislation which imposed sweeping restrictions on the right of related businesses to hire out-of-state employees.

C. The Right to International Travel

Unlike the right to inter-state travel, the right to international travel is not fundamental to the purposes of the Union. It does not, therefore, enjoy the same degree of protection. Nevertheless, important express constitutional rights, such as the First Amendment rights to freedom of speech and assembly, may be infringed if the right to travel internationally is denied. As a result, the right to international travel enjoys some constitutional protection.

Further, it may be argued that the right not to be deprived of liberty without due process of law, guaranteed by the Fifth Amendment, includes a right to international travel. It could also be incidental to other rights, such as the right to form and maintain family relations, and the right to pursue economic opportunities. In general, however, the constitutional basis for a right to international travel has not been pin-pointed by the Supreme Court.

43. 94 U.S. 491 (1876).
The scrutiny with which a court will examine a foreign travel restriction varies. Potential violations of the Fifth Amendment (due process) and Fourteenth Amendment (equal protection) are scrutinized to see if they bear a rational relation to some legitimate legislative purpose, and are applied in a procedurally fair manner. Interference with an individual's First Amendment rights, however, calls for heightened scrutiny. A restriction which incidentally affects these rights may be valid, but only if it furthers a substantial and valid legislative objective, and is not greater than is essential to further the objective. This is the "least drastic means" test.\(^{46}\)

Restrictions aimed directly at the protected freedoms, for example at the suppression of the content of speech, are \textit{prima facie} invalid. However, freedom of speech and association are not absolutely protected by the U.S. \textit{Constitution}. For example, speech which promotes unlawful action, which is obscene, or which amounts to espionage is not protected. If there are legitimate grounds for believing that an individual will, if allowed to travel abroad, engage in speech of this nature, travel restrictions may be justified. This was the conclusion in \textit{Haig v. Agee},\(^{47}\) a case involving the passport revocation of an individual who had published, both within and without the United States, material relating to C.I.A. intelligence operations.

The right to international travel served to invalidate a federal law in \textit{Aptheker v. Secretary of State}.\(^{48}\) The law prohibited the issuance, renewal or use of passports by members of registered Communist organizations. The court held that the ostensible purpose of the legislation, namely the protection of state security, could not be achieved by overly broad infringement of guaranteed First Amendment rights. Here, the restrictions were unconstitutional because they created an irrebuttable presumption that members of registered organizations would, if allowed to travel abroad, engage in activities inimical to United States security. Further, they applied regardless of the individual's actual motives for travel or his destination.

III. Mobility Rights in the \textit{Canadian Charter}

A. Historical Background

Mobility rights were perceived as essential by the federal government early in the constitutional negotiations. However, they were opposed by the provinces on the ground that they would seriously interfere with provincial legislative supremacy in the area of property and civil rights. In particular, Saskatchewan and other provinces with legislation restricting land ownership, and Quebec and Newfoundland, with legislation imposing preferential hiring, resisted the proposals. As a result, what was to

\(^{46}\) \textit{Ibid.}


\(^{48}\) 378 U.S. 500 (1964).
become sections 6(2), (3) and (4) of the Charter went through a number of important changes. The international mobility rights, now guaranteed by s. 6(1), achieved their present form fairly early in the negotiations, probably because no substantial provincial concerns were involved in them.

Much of the discussion between the federal and provincial Ministers focussed on two issues: the inclusion of some form of property rights, and the scope of the limitation on the mobility rights section.

The right to acquire and hold property in any province was specifically included in the drafts of the mobility rights section until late in 1980. It was in addition to the other rights which are now guaranteed by section 6; the right to move to and take up residence in any province, and the right to pursue the gaining of a livelihood in any province. Like these rights, property rights were to be subject to laws of general application that did not discriminate on the basis of residence. Clearly, the property rights provisions of the various federal proposals put forward before October, 1980 would have rendered legislation such as The Saskatchewan Farm Ownership Act49 unconstitutional. This was legislation which severely restricted land ownership by non-residents of the province — the sort of legislation that the Supreme Court of Canada found constitutional in Morgan v. A.-G. P.E.I.50 Thus, the proposed property rights clause was strongly opposed by Saskatchewan.

The federal draft of October, 1980 dropped the protection for property rights formerly contained in the proposed mobility rights section. This was a direct response to the concerns of Saskatchewan and other provinces, which wished to retain control over ownership of their land and resources. The removal of this provision has not, however, removed legal doubt about the validity of restrictive provincial ownership legislation. Under the current wording of section 6, any property ownership necessary to the gaining of a livelihood in a province may well be protected. It may also be argued that the right to own property for recreational or other purposes not connected with the gaining of a livelihood is protected by s. 6(2). This will be discussed further below.

A second point of contention between the federal and provincial governments was the wording of provisions which would limit the operation of the guaranteed mobility rights. In the early versions of the section, these rights were subject to laws of general application in force in a province which did not discriminate on the basis of province of present or previous residence, and to other laws which were reasonably justifiable in a free and democratic society in the interests of national security, public safety, order, health or morals, or overriding economic or social considerations. The provinces considered that these enumerated categories, and in partic-
ular, "national security", gave Parliament more scope to abridge the rights than they gave to the legislatures.

The category "overriding economic or social considerations" could have given the provinces a considerable advantage. For example, it could have been argued that *The Saskatchewan Farm Ownership Act* was reasonably justified because it tended to protect small family farms by preventing the accumulation of Saskatchewan farmland by non-resident individuals and corporations. This category was, however, removed from the limitation section in the summer of 1980.

Later negotiations considered joining the mobility rights section to a revised version of section 121 of the *Constitution Act, 1867*. This new s. 121 would have provided for a strengthened "economic union" by protecting the free movement of persons, goods, services, and capital throughout Canada. It contained limitations ensuring Parliament's ability to provide for equalization and regional development, and to legislate in relation to a matter declared to be of overriding national interest. Further, the legislatures' ability to make reasonable residency requirements for the receipt of publicly provided goods and services, and to reduce economic disparities between regions within the province, was retained. However, nothing came of these discussions.

The limiting provisions now contained in s. 6(3) were not changed after October, 1980. The categories of national security, public safety, order, health, and morals had been removed. Mobility rights are now subject to laws of general application which do not discriminate primarily on the basis of present or previous residence, and to laws providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services.

The limitation now contained in s. 6(4) was added last, at the insistence of Newfoundland. This limitation provides that laws, programs, or activities that have as their object the amelioration of conditions of individuals in a province who are socially or economically disadvantaged are not precluded by subsections 6(2) and (3), if the rate of employment in that province is "below the rate of employment in Canada".

Section 6 rights are also subject to the general limitation contained in s. 1 of the *Charter*. A law which on its face contravenes the mobility rights contained in s. 6 may nevertheless be valid, if it is a reasonable limit prescribed by law which can be demonstrably justified in a free and democratic society.

The limitations provided by s. 6 itself in subsections (3) and (4), and by s. 1 are the only limiting forces on the mobility rights guaranteed by the *Charter*. Although the provinces can, pursuant to s. 33(1), declare that an Act shall operate notwithstanding the provisions of certain sections

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51. *Supra*, n. 49.
of the Charter, s. 6 is not one of the enumerated sections. It is therefore “more entrenched” than section 2, freedom of religion, expression, assembly, and association, sections 7 to 14, legal rights, and section 15, equality rights.

B. Section 6(1) — International Mobility Rights

Section 6(1) provides:

Every citizen of Canada has the right to enter, remain in and leave Canada.

A fundamental issue which arises under this section is the definition of “citizen”, because s. 6(1) gives rights only to citizens. Citizenship is a concept which traditionally has applied only to natural persons. Under the United States constitution, corporations are not entitled to the “privileges and immunities” of the citizens of the United States.\(^{52}\)

In international law, the “nationality” of corporations may be recognized, for example in deciding whether a state is entitled to give a corporation diplomatic protection,\(^{53}\) but the analogy is a limited one and arguably should not be expanded to give corporations rights under s. 6.

Other arguments supporting the conclusion that corporations have no rights under s. 6(1) include the fact that under current principles of company law, corporations by their very nature do not possess the capacity for the mobility that s. 6(1) envisages. Since corporations are not the kind of entity that could benefit from the rights granted by s. 6(1), they therefore may be assumed not to have been in the framers’ contemplation. In Southam Inc. v. Director of Investigation and Research of the Combines Investigation Branch\(^{54}\) the court adopted similar reasoning. Cavanagh J. said,

\[\ldots\] in interpreting constitutions a broad and liberal interpretation ought to be given. Having that in mind, I would hold that ‘everyone’ as used in s. 8 should include all human beings and all entities that are capable of enjoying the benefit of security against unreasonable search.\(^{55}\)

In international law, it is within the power of individual states to determine who are its citizens.\(^{56}\) In Canadian constitutional law, jurisdiction over citizenship belongs to Parliament.

[A]s it lies at the foundation of the political organization, as its character is national, and by the implication of head 25, section 91, “Naturalization and Aliens”, it is to be found within the residual powers of the Dominion.\(^{57}\)

The Citizenship Act\(^{58}\) was passed pursuant to this jurisdiction. The Act defines who shall be entitled to Canadian citizenship, but does not deal extensively with what Rand J. in Winner called “the incidents of status”.

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55. Ibid., at 682 (emphasis added).
56. See Article 1, 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws, 179 L.N.T.S. 89.
57. Supra, n. 15, at S.C.R. 919.
58. Supra, n. 3.
Parliament is bound by s. 6(1) to give certain rights to "citizens of Canada", but in international law and according to the division of legislative powers under the Constitution Act, 1867, Parliament may define what "citizenship" is. But does the fact of being bound by s. 6(1) impose inherent limits on Parliament's constitutional power to define? Probably, the answer is yes. In other constitutional cases involving the definition of some relevant concept, the legislative body with jurisdiction has not had the final say in what the concept means. For example, the Indian Act does not provide the definition, for constitutional purposes, of the word "Indian". The provinces cannot, in order to extend their powers of taxation under s. 92(2), prescribe the conditions fixing the situs of property. On the other hand, the federal Bank Act provides what comes close to a definition of the word "bank" within the meaning of s. 91(15) of the Constitution Act, 1867.

In the context of the rights defined by s. 6(1), the limitation on Parliament's jurisdiction to define citizenship may be provided by s. 15 of the Charter when it comes into force in 1985. If Parliament limits the right to citizenship on an unreasonable basis, there is a prima facie violation of s. 15 because every individual does not then have equal benefit of the law. A reviewing court would then have reference to s. 1, and would consider whether the prima facie violation was demonstrably justified in a free and democratic society. The court would probably look at criteria for citizenship in other "free and democratic" nations, and if the limitation was not unusual, it would be justifiable.

Canada's current Citizenship Act probably represents a demonstrably justifiable degree of limitation. The Act puts limits on the availability of citizenship based on, inter alia, birth in Canada, parentage, and length of residence in Canada. In addition, since it was in force at the time the Charter was drafted, it was likely in the contemplation of the framers when they used the word "citizen" in s. 6(1). For this reason alone, challenges such as a recent case involving a pregnant woman about to be deported will likely be unsuccessful. In that case, the woman's lawyers argued that the unborn child could not be deported because it was conceived in Canada and the father was Canadian. Addy J. of the Federal Court rejected the argument, and referred to the Citizenship Act, which makes birth in Canada a prerequisite to Canadian citizenship.

Section 6(1) will likely become an issue in a limited number of situations. Among these are:

— extradition proceedings;

— proceedings in which limitations are placed on the mobility of individuals who have been charged with a criminal offence;

— proceedings in which non-custodial parents are asked to surrender their passports as a condition of access;

— situations in which a Canadian citizen is convicted of an offence and imprisoned in a foreign country.

To date, the cases which have considered s. 6(1) have involved extradition proceedings. The leading case is Federal Republic of Germany v. Rauca. In that case Rauca, a Canadian citizen since 1956, was alleged to have been a party to approximately 10,500 murders in Lithuania during the Second World War. He was arrested in Canada pursuant to a warrant issued under the Extradition Act. His argument against extradition was that it denied him his right, as a Canadian citizen, to remain in Canada. The Ontario Court of Appeal held that although the order for extradition did interfere with Rauca’s prima facie right to remain in Canada, legal extradition was demonstrably justified in a free and democratic society.

It is interesting that the Ontario Court of Appeal referred to the European Convention on Human Rights as a standard of what is “demonstrably justified”. The convention gives nationals the right not to be “expelled” from their national state. The court considered that the guarantee referred to a right not to be “driven away” and did not encompass a right not to be extradited.

The conclusion reached in Rauca will, in all likelihood, also be reached in other cases involving legislation which currently puts limits on the international mobility of individuals. For example, s. 457(4)(e) of the Criminal Code provides that a justice may, in making an order releasing an accused on his undertaking to appear, require the accused to deposit his passport. This effectively denies an accused Canadian citizen of his right under s. 6(1) to leave Canada. Section 663(2)(f) allows a court to insert in a probation order a provision that the accused must remain in the jurisdiction of the court. This interferes with domestic as well as international mobility. It is submitted that both these provisions are “demonstrably justifiable in a free and democratic society” so that although they prima facie interfere with the rights given by s. 6(1) of the Charter, they are “saved” by s. 1.

A similar conclusion will likely be reached about the constitutionality of court-ordered restrictions on mobility such as requirements that a non-custodial parent surrender his or her passport before exercising access rights to a child. The international concern about parents’ absconding with

64. Supra, n. 26.
their children and defying custody orders is demonstrated by Acts such as *The Extra-Provincial Custody Orders Enforcement Act.*

The right to enter Canada may present problems in cases where a Canadian citizen is in custody in a foreign country. The question arises whether the right to enter Canada gives that person a right to be returned to Canada to serve out his sentence here. There now exists a mechanism whereby a prisoner may be returned to his native country. This is provided for in Canada by the *Transfer of Offenders Act* wherever Canada has entered into a treaty with a foreign state. To date, Canada has entered into only three such treaties. Since the right to return to Canada is meaningless without the corresponding right to leave the country of imprisonment, the exercise of s. 6(1) rights by an individual imprisoned abroad will be impossible in many cases. Does this mean that Canada is now obliged to take active steps to enter into reciprocal arrangements, or at least negotiations, with a foreign state in every case in which a Canadian is imprisoned abroad? At least one author has suggested that the "radical repercussions" which would result from the imposition of an active duty imply that s. 6(1) creates only a right to use the mechanism, where it exists. However, it could also be argued that the *Charter* right in such cases is meaningless unless there is a way to make it effective. It is submitted that at least the right to return to Canada might reduce to nil the discretion of the Minister now conferred by s. 6(1) of the *Transfer of Offenders Act* to "disapprove" the transfer of a Canadian to Canada where a foreign state has approved it.

Similar questions may arise under the *Fugitive Offenders Act* which provides for the return of a convicted offender, unlawfully at large, to the state from which he is a fugitive. The issue is whether the right to remain in Canada gives a Canadian citizen the power to resist rendition to a state with which Canada has no treaty for exchange of prisoners.

Another potential area where s. 6(1) may become important is the issuance of passports, which are necessary, in practice, to the exercise of the right to leave Canada. Currently, the decision to issue a passport is a matter of the Crown prerogative. It may be argued under the *Charter* that the prerogative is now limited to the administrative procedure which must be followed before a passport is issued. Other than that, no individual should be refused a passport unless there are reasons which make limiting his travelling abroad demonstrably justifiable. Such reasons may include health risks, and involvement with the criminal justice system. In the

68. S.C. 1977-78, c. 9.
72. See supra, n. 69, at 91.
73. This point has been discussed supra in the text.
United States, danger to national security is sufficient\textsuperscript{74}. Although the *United States Constitution* protects the right to travel abroad indirectly through other protected rights, such as the First Amendment rights to freedom of speech and association, and the *Charter* protects it directly, the U.S. experience will very likely be influential in deciding which limitations are demonstrably justifiable in a free and democratic society.

In time of war, Canada might attempt to impose a program of conscription which would force Canadians to leave Canada, infringing their s. 6(1) right to remain in Canada. It is likely that such provisions would be demonstrably justifiable if the war threatened Canada’s security. On the other hand, if the war were a “foreign war”, such as that fought by the United States in Viet Nam, a military draft might not pass muster. Whether the draft is demonstrably justified or not would depend on the weighing of the interests in issue, Canada’s security compared to the mobility rights of individual Canadians.

### C. Section 6(2) — Domestic Mobility Rights

Section 6(2) reads:

Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right

(a) to move to and take up residence in any province; and

(b) to pursue the gaining of a livelihood in any province.

This section seems to give substantial rights to Canadians and permanent residents. It must be remembered, however, that the rights given in s. 6(2) are subject to the limitations provided by ss. 6(3) and (4), as well as to the general limitation provided by s. 1. When these sections are read together, it is clear that s. 6(2) is intended to prevent excessive regionalism in Canada. Section 6(3) indicates, however, that provincial legislation which may in fact impede the mobility of persons, but which is enacted to achieve legitimate provincial ends, may still be valid.

The rights given by s. 6(2) are given only to two classes of persons, citizens and permanent residents of Canada. The meaning of “citizen” has been discussed earlier, but the question remains whether a non-natural person may satisfy the description “person who has the status of a permanent resident of Canada”.

It is a general rule of statutory interpretation that the word “person” should be read to include a corporation.\textsuperscript{75} If, however, a contrary intention appears from the enactment, the word “person” would mean a natural person only.\textsuperscript{76} In any case, neither the Canadian nor the British *Interpretation Act* can be taken to apply strictly to the *Charter*; the Canadian

\textsuperscript{74} See *Haig v. Agee*, 101 S. Ct. 2766 (1981).

\textsuperscript{75} See generally *Union Colliery v. The Queen* (1900), 31 S.C.R. 81, at 88-9; *Interpretation Act*, R.S.C. 1970, c. I-23, s. 28; *Interpretation Act*, 1899, U.K., s. 19.

\textsuperscript{76} *Interpretation Act*, R.S.C. 1970, c. I-23, s. 3.
because the *Charter* was enacted by the British Parliament, the British because, although enacted there, the *Charter* was drafted in and intended to apply only in Canada.

In the case of s. 6(2) of the *Charter*, factors which may imply a contrary intention include the modifying words, "having the status of a permanent resident of Canada". It can be argued that these words refer to the status defined in the *Immigration Act*,77 which may be enjoyed only by natural persons. Furthermore, the fact that incorporation in one province by definition "creates" an entity only in that province means that allowing a provincially incorporated company to move to, take up residence in, and pursue the gaining of a livelihood in a second province without first re-incorporating or registering there is a radical restructuring of basic principles of company law. It may be argued that such a change should not be presumed.

On the other side of the coin, arguments exist for the proposition that s. 6(2) rights extend to corporations. For one thing, this subsection uses the word "person", which usually may be taken to apply to non-natural persons, whereas other *Charter* provisions employ different terms such as "individual",78 "everyone",79 or "citizen".80 Section 11 uses "person" unmodified, and various subsections of s. 11 already have been held to apply to corporations.81

In *Re P.P.G. Industries Canada and the Queen*82 the British Columbia Court of Appeal commented on the *Charter*'s use of different words to refer to the recipient of rights. The majority suggested that the word "person" should be read more narrowly than the word "everyone". If this is correct, arguments that "person" as used in s. 6(2) does not include a corporation are bolstered.

It is notable that s. 6(2) is drafted in such a way that the clauses, and presumably the rights described in them, are separate. This means that the right to move to and take up residence in a province and the right to pursue the gaining of a livelihood in a province are not interdependent. Therefore, the right of an individual to move to a province would be safeguarded, although he did not intend to take up employment there. More importantly, the right of an individual to pursue the gaining of a livelihood in a province would not be dependent on moving to and taking up residence in that province.

There is nothing in the ordinary meaning of the words "pursue the gaining of a livelihood" which suggests that the pursuer must live where

77. *Supra*, n. 1, at s. 2.
78. See *Charter* s. 15.
80. See *Ibid.*, at ss. 3, 6(1).
he gains his livelihood. Thus, if an individual makes his livelihood by investment in provinces other than the one in which he lives, his right to do so should be protected by s. 6(2). A professional, such as a lawyer, should be able to engage in professional activity elsewhere than in his province of residence. However, it must be kept in mind that the limitations expressed in s. 6(3) may be relevant in such cases. It is still very much within the legislative competence of a province to regulate income-producing activities within its territory, professional or otherwise, as long as it does not do so by discriminating between individuals on the basis of province of present or previous residence. The hypothetical lawyer should not be able to appear in a province where he is not qualified to practice. The restriction on his right to "pursue the gaining of a livelihood" is based on competence in such a case, not on residence. It is therefore constitutional. 83

The separation of the rights described in ss. 6(2)(a) and (b) also indicates that an individual may enjoy the right to pursue the gaining of a livelihood in a province without having just moved there from another place. This interpretation is borne out by the Ontario Court of Appeal decision in the leading case of Re Skapinker and Law Society of Upper Canada. 84 Skapinker had trained as a lawyer in South Africa, England, and Canada. He was a South African national but had resided in Canada since 1977 and had been granted permanent resident status in 1981. Because he was not a Canadian citizen, he was barred from the practice of law by s. 28(c) of the Law Society Act. 85 This section permitted only "Canadian citizens or other British subjects" to practise law in Ontario. Counsel for the Law Society of Upper Canada argued that s. 6(2)(b) "relates to a right upon movement and gives that right ... only to those moving from one province to another". Grange J.A. writing the majority decision, stated:

This argument has much force but I reject it for many reasons or perhaps for the combined effect of many reasons. First, it is not what the subsection plainly says; the right is given to pursue the gaining of a livelihood in any province (not in any other province). Secondly, para. (b) is separated from the right to move to and take up residence in any province found in para. (a); it is only para. (a) which clearly implies a movement from province to province. It would have been easy to combine the two paragraphs to provide the right 'to move to, to take up residence in and to pursue the gaining of a livelihood in any province', or even to leave the two rights separate and reword para. (b) so as to read 'to pursue the gaining of a livelihood in that province'. Either of these alternatives might well be interpreted to associate the benefit given with a move to another province. It may not be of great importance but it is interesting that s-s. (3) refers to the rights specified in s-s. (2), thus indicating that separate and perhaps distinct rights were granted thereby. 86

He also rejected the contention that the heading, "Mobility Rights", and the marginal notes, "Rights to move and gain livelihood", linked the right to gain a livelihood with movement from one province to another.

83. See Macarthur Hygrade Mines Ltd. v. The Queen in Right of Quebec (1982), 142 D.L.R. (3d) 512 (Que. S.C.).
86. Supra, n. 84, at O.R. 485.
Given that two distinct rights are created by s. 6(2), the question remains: What is the content of these rights? It will be remembered that before the adoption of the Charter, Canadian citizens and aliens resident in Canada had certain rights to move about and work in Canada. The cases which discussed these rights did not distinguish between the right to enter and reside in a province, and the right to work there. This has led one author to suggest that s. 6(2)(a) encompasses a right to work, and that in order to retain some meaning for s. 6(2)(b), it must refer to the right of an individual "to occupy the particular employment of his choice, and not just employment generally, as that right is included in the right to establish a residence".

Whatever the scope of s. 6(2)(a), it must mean more than just the right to take oneself physically into another province and exist there. Taking up residence involves more than the right to walk on the soil and breathe the air. The latter implies some minimum standard of life. The United States law which suggests that there are "essential" and "non-essential" aspects to existence in a place may well be relevant here.

The Shapiro and Memorial Hospital decisions are particularly relevant, in light of the wording of s. 6(3)(b) of the Charter. This subsection makes the rights enumerated in s. 6(2) subject to "reasonable residency requirements as a qualification for the receipt of publicly provided social services". It is not obvious that receipt of social services is a subset of the right to take up residence in a province. However that is the clear meaning of ss. 6(2)(a) and 6(3)(b) read together.

This makes sense. If a province could deny social benefits to persons coming into the province, it would, in practice, make it impossible for many persons to exercise their rights under s. 6(2)(a). This would amount to a sterilization of a constitutional right, something which has consistently been held unconstitutional. It should follow that any restriction on the exercise of a fundamental activity would be unconstitutional. Such restrictions could include provincial barriers, based on present or previous residence, in the areas of education, at least to the high school level, and acquisition of property.

What kind of permanency or stability is inherent in "residence"? Is it possible for an individual to have more than one "residence" in different provinces? These are questions that may arise under s. 6(2)(a).

Residence usually does imply some measure of permanence. How-

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87. Union Colliery v. Bryden, supra, n. 8; Cunningham, supra, n. 10; Winner, supra, n. 15.
88. Supra, n. 70, at 247.
89. See Baldwin, supra, n. 37, elk hunting for sport non-essential; Sturgis, supra, n. 35, lower tuition at university non-essential; Shapiro, supra, n. 31, welfare payments essential; Memorial Hospital, supra, n. 32, medical treatment essential.
90. See supra, n. 69, at 96.
91. See e.g., Union Colliery v. Bryden, supra, n. 8; province cannot sterilize the capacity of a naturalized citizen or alien to live in a province; John Deere Plow Co. v. Wharton, [1915] A.C. 330; province cannot sterilize the capacity of a federally incorporated company to do business.
ever, it does not, as the concept of domicile does, require an intention to make a place one’s permanent home for the foreseeable future. It is likely, then, that the use of “residence” as opposed to “domicile” means that a person may establish a residence casually, without making a permanent commitment to a province. Nevertheless, the inclusion of the words “reasonable residency requirements” in s. 6(3)(b) indicates that a province is within its rights in requiring some degree of commitment for at least one purpose: ascertaining which of persons physically present in the province are entitled to receive publicly provided social services. Section 1 may further authorize a province to exact “demonstrably justified” degrees of commitment in other contexts.

Residence, according to current principles, may be established in more than one place. Thus, for example, under an English statute authorizing residents to vote in an election, students were held entitled to vote either at their parents’ place of residence or at the place where they lived during the school year. There is nothing about the wording of s. 6(2)(a) which would lead to the conclusion that the right may be exercised in one province only. On the contrary, the fact that a person may take up residence in any province leads more to the opposite conclusion. Thus, s. 6(2)(a) should support the right of a student to leave his home province to pursue a post secondary education in another province, and the right of any person to maintain a vacation home in a province other than the one in which he works. In each case, the person concerned would be “resident” in more than one province.

The question of the content of s. 6(2)(b) raises issues sensitive to provincial interests. The right given by that section, “to pursue the gaining of a livelihood in any province”, is not, it is submitted, merely the same right that was recognized in the pre-Charter case law. That right was the right to go to a province, and, once there, to pursue the gaining of a livelihood there. Rand J. in Winner said “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”.

Section 6(2)(b) of the Charter, it is submitted, goes further. It protects the right of any Canadian or permanent resident to gain a livelihood in any province. Since, as discussed above, the right to do this is not contingent on movement from one province to another, the right to reside in one province while pursuing the gaining of a livelihood in another province is safeguarded, within demonstrably justifiable limits.

The ability to “pursue the gaining of a livelihood” is not, it is submitted, the same thing as the ability to “get a job” or to “be employed” in a province. It is the ability to make money, however one legally chooses to do it. This would include the right to be self-employed as well as to be

93. Ibid.
94. Supra, n. 15, at S.C.R. 919 (emphasis added).
employed by others, the right to be an entrepreneur as well as to be an employee. If an individual gains his livelihood by investing in property, there is nothing within the reasonable meaning of the words used in s. 6(2)(b) which would deny him the right to do that in any province in Canada. It is submitted, for this reason, that the removal of the right to acquire and hold property in any province from the text of the drafts of s. 6(2) is insufficient, taken alone, to protect restrictive legislation such as The Saskatchewan Farm Ownership Act.

It will be recalled that legislation of this sort was upheld in the Morgan case. The fact which saved the P.E.I. legislation in that case was that all non-residents were treated alike, citizens as well as aliens. The court also pointed out that the legislation did not prevent any person from coming to P.E.I. and thereby becoming eligible to own land there. This latter fact will not suffice to save such legislation under the Charter, if land acquisition is essential to the gaining of a person’s livelihood, as the right protected is to pursue the gaining of a livelihood in any province, whether the person has moved there or not. Legislation restricting land ownership on the basis of residency will henceforth be constitutional only if it is "demonstrably justified in a free and democratic society". There are some who would argue that the Saskatchewan legislation, and other similar legislation, passes this test. Whether a court will agree is doubtful.

Section 6(2)(b) should not be read, it is submitted, to give merely the right to work at any job which happens to be available. It should be read to give the right to pursue any specific occupation which a citizen or permanent resident wishes to pursue. A province cannot, therefore, restrict some occupations merely because it does not restrict all of them. Case law to date under the Charter supports this argument. In the Skapinker case, for example, it was not argued that the applicant’s s. 6 rights were not violated because he could have earned a living otherwise than by being a lawyer.

A failure to make any particular occupation available without discrimination on the basis of present or previous residence may be argued to amount to a sterilization of the individual’s right to pursue the gaining of a livelihood. This was the view taken in at least one case, Cunningham v. Tomey Homma. There Halsbury L.C., speaking for the Privy Council, said of Union Colliery v. Bryden that the restrictions in that case, that of prohibiting the hiring of "Chinamen" for work in underground coal mines, "prohibited their earning their living in that province". However, in Morgan v. A.-G. P.E.I., the court doubted whether "the mere prohibition against employment of Chinese persons in underground mining could be taken to be a general prohibition against their earning a living in British Columbia".

95. Supra, n. 10, at 157.
96. Supra, n. 22, at D.L.R. 537.
The use of a sterilization test under s. 6(2) may limit its protection unduly. If restrictions that sterilize, or make it impossible to enjoy capacity, are the only restrictions prohibited by s. 6(2), a host of lesser restrictions may pass scrutiny. For example, is legislation restricting some, but not all, professions beyond reproach? Is partial discrimination on the basis of residence valid? As an illustration of the problem, the Saskatchewan Power Corporation recently proposed a policy under which 80% of its workers would be Saskatchewan residents. It could be argued that since up to 20% of S.P.C. workers could be non-Saskatchewan residents, there would be no sterilization of capacity of non-residents. However, it seems that such a hiring restriction would amount to discrimination of the sort s. 6(2)(b) was designed to prevent. The fact that it is only a partial, albeit substantial, restriction rather than a total one should not save it. If sterilization is the key, then in theory, as long as some non-residents are hired, the provisions would be constitutional. It is submitted, however, that the Charter should be read in a more liberal spirit, and that any interference with the rights ostensibly given by s. 6(2) should be unconstitutional unless "saved" by the limitations in ss. 6(3), (4), or s. 1.

In the United States, it is unclear whether a state can restrict public sector employment to state residents. There are suggestions that such a restriction would be constitutional, in spite of the commerce clause and the privileges and immunities clause, which protect non-state residents against other discrimination in employment. Such suggestions may be based on the idea that public sector employment if sufficiently related to "core state functions", like voting and the holding of public office, access to which may constitutionally be restricted on the basis of residence. In Canada, it is submitted, any similarity between voting and the ability to hold public office, and public sector employment, would not overcome the fact that the right to public sector employment must, as a means of gaining a livelihood, be protected by s. 6(2)(b), while voting is not. The right to hold public office, while arguably a means of gaining a livelihood, might be validly restricted under s. 1 on the basis of residence within a province because effective public service requires familiarity with local issues, and a commitment to the geographical unit.

D. The Limitations on Mobility Rights

The limiting provisions of s. 6 are key to its operation. Two of these provisions are internal to s. 6 and relate specifically to the rights given by s. 6(2). The third is s. 1, the general limitation clause which applies to all rights given by the Charter. It would appear that s. 1 applies as well to a limitation to s. 6(2) which is apparently justified by s. 6(3).

98. Ibid., at 522.
Section 6(3) reads:

The rights specified in subsection (2) are subject to

(a) any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence; and

(b) any laws providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services.

This section limits the scope of s. 6(2) only. It does not in any way affect the right to international mobility given by s. 6(1).

As has been noted earlier, s. 6(2) is drafted broadly. The wording of s. 6(3), however, cuts down on the scope of s. 6(2). The two subsections cannot be read independently, because the wording of s. 6(3) makes it abundantly clear that the right given by s. 6(2) is a qualified one. A discussion of how s. 6(3) qualifies the rights safeguarded by s. 6(2), and the effect of s. 1, will follow an analysis of the potential problems posed by the wording of the two subsections of s. 6(3).

1. Section 6(3)(a)

This subsection delineates the operation of s. 6(3). Its effect is to "save" laws or practices of general application which interfere with the rights safeguarded by s. 6(2), but not when those laws or practices discriminate on the basis of province of residence. Section 6(3)(a) will serve to uphold many laws and practices which currently impede the movement of individuals between provinces. For example, Quebec's Charter of the French language unquestionably tends to prevent non-Francophone people from pursuing the gaining of a livelihood in that province, since a majority of non-Quebecois Canadians do not speak French. However, because the law discriminates on the basis of language, not residence, it is not assailable under s. 6. It would not be contrary to s. 6 unless, possibly, there was clear evidence that non-Francophone individuals from outside Quebec were put at more of a disadvantage than non-Francophone individuals from Quebec. To give another example, provincial legislation regulating the legal profession, which requires compliance by out-of-province lawyers with provincial bar admission standards, should be valid under s. 6. As long as such legislation does not discriminate on the basis of residency, but on the basis of bar membership, in order to safeguard competence and control, it should be valid. It would only be invalid if it restricted membership to residents of the province or unfairly discriminated against out-of-province lawyers.

The following major problems of interpretation of s. 6(3)(a) can be identified:

— the meaning and effect of the word "primarily" in s. 6(3)(a);
— the meaning of "laws or practices ... in force in a province";
— the meaning of "laws or practices of general application";
— whether the rights protected by s. 6(2) are protected equally for citizens and permanent residents; and
— the meaning and import of the phrase "or practices".

Legislation which discriminates against individuals on the basis of present or previous residence is contrary to s. 6(3)(a) only if it discriminates "primarily" on that basis. If the legislation discriminates only incidentally on that basis, it may survive constitutional challenge. The word "primarily" emphasizes that s. 6 was designed to prevent only excessive regionalism in Canada.

The problem arises when one attempts to define "primarily". It may be argued that the test suggested by s. 6(3)(a) is no different from existing constitutional law tests of validity. Canadian constitutional law uses the "pith and substance" test for determining when Parliament or a provincial legislature has gone beyond its legislative authority. A law is ultra vires only if its pith and substance is outside of the enacting body's jurisdiction. Laws otherwise valid may incidentally affect matters coming within the competence of the other level of government.103 Similarly, under s. 6, it may be that a law which discriminates on the basis of province of residence but whose pith and substance concerns some other distinction between individuals is valid, while a law which in pith and substance discriminates on the basis of province of residence is not.

American constitutional law may provide an important element of the definition of "primarily". Under the equal protection clause, the Toomer v. Witsell test, discussed earlier, will preserve laws which discriminate against non-residents where the discriminatory treatment bears a close relation to legitimate reasons which are independent of residence. Such laws are therefore valid if they further substantial and independent government objectives.104 Arguably, those seeking, under the Charter, to uphold a law which classified individuals on the basis of province of residence would have to show not only that the classification was not the pith and substance of the provision, but also that the classification was made in the course of furthering a valid and independent government objective.

The distinction between primary and incidental discrimination should not, it is submitted, dictate the conclusion that legislation which is neutral on its face but which results in discrimination on the basis of province of residence is valid. The important question under s. 6 surely is the effect, not the form, of the legislation. Any other conclusion would mean that the doctrine of colourability does not apply to s. 6 and that a province could achieve indirectly what it could not achieve directly. A province should not be able to distinguish between individuals on the basis of a "neutral"  

104. See supra, n. 45.
categorization which happens to coincide with provincial borders, if there is no valid and independent government objective gained thereby. Where laws or practices discriminate primarily on the basis of residence, whether through direct classification or through disguised means, they will be open to attack under s. 6. Of course, in any case involving such discriminatory effects, the legislation or practice may yet be constitutional if the "demonstrably justifiable" standard of s. 1 is met.

Section 6(3)(a) specifies that the rights safeguarded by s. 6(2) are subject only to laws which are "of general application" and which are "in force in a province". Both these phrases appear in s. 88 of the Indian Act, which makes "laws of general application from time to time in force in any province" applicable to Indians. The question arises whether judicial interpretation of this section may aid in interpreting s. 6(3)(a).

One potential problem which cases interpreting s. 88 have identified is whether a law "in force in a province" means both federal and provincial, or only provincial laws. Under the Indian Act it has been held that federal laws are not encompassed by the section. If this logic applies to s. 6, then s. 6(3)(a) would protect provincial laws restricting mobility, but not federal laws.

Although most laws and practices interfering with mobility are probably provincial, there are some federal laws, and probably some federal practices, having the same effect. For example, the Supreme Court Act requires the judges of the Supreme Court of Canada to reside in or within forty kilometres of the National Capital Region. Under the Regional Development Incentives Regulations, 1974 it is a condition of a development incentive or loan given pursuant to the Regional Development Incentives Act that the applicant undertake to hire residents of the designated region. If s. 6(3)(a) does not apply to federal laws, then the validity of these provisions would be determined on the basis of s. 1 alone.

It is submitted that case law under the Indian Act should not be determinative on this point. An important distinction between s. 88 of that Act and s. 6(3)(a) is that the former makes laws of general application applicable to Indians "subject to the terms of any treaty and any other Act of the Parliament of Canada". The emphasized words make it clear that when the section refers to "laws of general application from time to time in force in any province" it did not include in that expression the statute law of Canada. If it did, the section, in so far as federal legislation is concerned, would provide that the statute law of Canada applies to Indians, subject to the terms of any Act of the Parliament of Canada, other than the Indian Act. This would be a rather unusual provision.

106 See supra, n. 84, where the Ontario Court of Appeal referred to case law on s. 88.
109 C.R.C. 1978, c. 1388, s. 17(a).
111 Supra, n. 107, at 280 (per Martin J.).
Section 6(3)(a) does not contain any similar reference to federal laws which would compel a similar conclusion.

Further, it is submitted that a construction of s. 6(3)(a) which would result in a different standard of validity for federal and provincial laws makes little sense, given the apparent purpose of s. 6, to prohibit discrimination based on province of residence. The Supreme Court Act does not interfere with the mobility of individuals by discriminating on the basis of province of residence. Rather, it restricts residence to a region which is part of two provinces. Similarly, since the designated region under the Regional Development Incentives Act is not necessarily the same territory as a province, the regulations do not necessarily discriminate on the prohibited basis. If these provisions were provincial, they would be saved by s. 6(3)(a). There is no apparent reason why a different standard should be applied to them merely because they are federal enactments.

Cases interpreting s. 88 of the Indian Act have also considered the meaning of "laws of general application". In Re Skapinker and Law Society of Upper Canada the Ontario Court of Appeal used a test for deciding whether a law was of general application which was formulated in Kruger and Manuel v. The Queen. In the latter case, Dickson J. said:

There are two indicia by which to discern whether or not a provincial enactment is a law of general application. It is necessary to look first to the territorial reach of the Act. If the Act does not extend uniformly throughout the territory, the inquiry is at an end and the question is answered in the negative. If the law does extend uniformly throughout the jurisdiction the intention and effects of the enactment need to be considered. The law must not be 'in relation to' one class of citizens in object and purpose. But the fact that a law may have graver consequence to one person than to another does not, on that account alone, make the law other than one of general application. There are few laws which have a uniform impact. The line is crossed, however, when an enactment, though in relation to another matter, by its effect, impairs the status or capacity of a particular group. The analogy may be made to a law which in its effect paralyzes the status and capacities of a federal company .... Such an act is no 'law of general application'.

The decision in Skapinker was based on the premise that s. 28(c) of the Law Society Act, which made non-citizens ineligible for admission to the bar, was not a law of general application. The majority of the court held that although the law met the first criterion of the Kruger and Manuel test, being in force throughout the province, it did not meet the second because it impaired the status of a particular group: permanent residents of Canada. Since the court found that the law was not "of general application", the rights specified in s. 6(2) could not be subject to it, even though it discriminated on the basis of citizenship, not province of residence. The majority went on to find s. 28(c) invalid, because it was not demonstrably justifiable under s. 1.

112. Supra, n. 110, at s. 3.
114. Ibid., at D.L.R. 438.
115. Supra, n. 85.
Whatever may be said about the applicability of the "two indicia" in the context of s. 88 of the Indian Act, it is suggested that they are not an appropriate test under s. 6(3)(a) of the Charter. The category of laws and practices which are not "of general application" must be fairly small if the rights in s. 6(2) and the limitation in s. 6(3) are to be meaningful. Strict adherence to the Kruger and Manuel test, which was developed in the context of a different section, may result in inconsistencies.

For example, the first of the "two indicia" identified in Kruger and Manuel is that the law must be in force throughout the territory if it is to be a law of general application. Immediately the question arises, "what territory?" In Kruger, the "territory" assumed was the "province". Since s. 6(3) and s. 88 of the Indian Act both say "laws of general application in force in a province", it may be argued that the province is the relevant "territory" under s. 6(3) as well. What, then, is the position of a municipal by-law? If a city passed a by-law requiring city employees to live within the city limits and the province were assumed to be the relevant territory, the by-law could not by definition be a "law of general application", being in force only within the city limits. However, the by-law does not discriminate on the basis of province of residence which s. 6(3) identifies as the relevant basis of discrimination under s. 6. Is it reasonable to conclude that it must be struck down under s. 6 unless it is demonstrably justifiable although it discriminates on a basis not relevant to s. 6? Arguably, it is not. If not, perhaps the relevant territory should be redefined, or, more likely, the first of the "two indicia" is not an appropriate factor in the context of s. 6 at all.

Neither is the second part of the test necessarily applicable. In the Kruger case, the court was concerned with whether the law in question impaired the status of Indians. If it had, being a provincial law, it would have been unconstitutional by virtue of s. 91(24) of the Constitution Act, 1867. Section 6 and s. 91 are fundamentally different because s. 91 gives jurisdiction to Parliament whereas s. 6 is designed to curtail jurisdiction. Section 6 thus does not "create" a status which cannot be interfered with, as s. 91 does. It is suggested that as a result of this fundamental difference between the two sections, it is misleading to apply the same test under them both.

It is submitted that the mere fact that a law applies only to a particular group cannot be determinative. Yet this is what the second branch of the Kruger and Manuel test implies. Many laws single out particular groups in regulating particular professions or activities and may interfere with the mobility of individuals. For example, the section of the Supreme Court Act mentioned above singles out Supreme Court judges vis-a-vis other Canadians, and prevents them from living wherever they please. This fact alone should not make the laws suspect. The mere setting apart of Supreme Court judges, lawyers, engineers, or Justices of the Peace should not make s. 6(3)(a) inapplicable, because the distinctions drawn between these
groups and others is irrelevant to discrimination on the basis of province of residence. Generally, then, the Law Society Act considered in Skapinker should be considered to be a law of general application.

Having said all this, it should not be assumed that the result of the Skapinker case cannot be justified. While distinguishing between citizens and non-citizens may not prevent a law from being a law of general application, a provision which discriminates between citizens and permanent residents should be contrary to s. 6. It is submitted that this is so because the rights safeguarded by s. 6(2) are safeguarded equally for both classes. Equality may be presumed because the section specifically grants rights to both citizens and permanent residents without distinguishing between their entitlement. The necessary implication is that the section grants both groups the same rights.

Consideration of s. 6(3) is not necessary to decide the validity of any law which distinguishes between citizens and permanent residents. This is because s. 6(3) makes only the rights granted by s. 6(2) subject to the limitations. It does not purport to affect who may enjoy the rights thus limited. Section 28(c) of the Law Society Act is contrary to s. 6 because it interferes with the equality of entitlement presumed by s. 6(2). The fact that it is a law of general application cannot save it, unless it is demonstrably justifiable under s. 1. In Skapinker, the court concluded that restricting access to the legal profession to citizens and British subjects was not demonstrably justified.

Many existing laws contain provisions which interfere with protected mobility rights on the basis of citizenship. Although it is submitted that these are contrary to s. 6, some of them may be saved by s. 1. For example, British Columbia has legislated a statutory preference for Canadian citizens in its Public Service Act. In Alberta, Provincial Court Judges must be Canadians. A case may be made for the proposition that it is demonstrably justifiable to require public servants and judges to be citizens of Canada. On the other hand, it is doubtful whether a provision such as s. 74 of The Liquor Licensing Act could be said to be demonstrably justifiable in a free and democratic society. This section would absolutely disqualify permanent residents who apply for liquor licenses under the Act and thus impairs their ability to pursue the gaining of a livelihood in Saskatchewan.

The fact that s. 6(3) speaks of both laws and practices indicates that s. 6(2) rights extend to both. If this were not the case there would be no purpose served by the reference to "practices" in the limitation section. This is a reasonable interpretation, given the doctrine of colourability. A province should not be able to do indirectly, for example through unlegislated "practices", what it cannot do directly, through legislation.

116. R.S.B.C. 1979, c. 343, s. 34.
117. Provincial Court Act, R.S.A. 1980, c. P-20, s. 3.
An interpretation which subjects "practices in force in a province" to scrutiny under s. 6 may present problems, however. Practices which are not of general application or which are of general application but discriminate on the basis of province of residence would be as unconstitutional as laws in these categories. Such practices could not be "saved" by s. 1, however, because they are not "prescribed by law". This could result in a situation where a practice which prima facie violates s. 6(2) rights, but which is demonstrably justified, cannot constitutionally be continued. By way of illustration let us compare the different provincial approaches to hiring for public sector positions. Most provinces have a practice of preferring their own residents for such positions. This practice is achieved by advertising public sector openings first in provincial newspapers. In the normal course of events, only provincial residents answer the ads. In choosing between two qualified persons, one a resident and one not, the resident is often given priority. If no qualified resident can be found, advertisements are placed in out-of-province newspapers. This is a practice which discriminates on a prohibited basis: province of present residence. It therefore violates the broad rights given by s. 6(2). The practice, not being legislated, is not "prescribed by law". Therefore, the fact that it may be demonstrably justified as a practice would not help it under s. 1 if it were to be challenged.

In British Columbia, by contrast, the Public Service Act\textsuperscript{119} legislates a preference for hiring Canadian citizens in the public service. If no qualified citizen can be found, the Act permits the hiring of non-citizens as a "temporary appointment". This provision violates the prima facie rights given by s. 6(2). Assuming for the sake of argument that it is a demonstrably justified restriction, it is "saved" by s. 1 because it is prescribed by law.

2. Section 6(3)(b)

The limitation provided by s. 6(3)(b) will also present problems of interpretation, but in a more circumscribed number of situations than will arise under s. 6(3)(a). Unlike s. 6(3)(a), s. 6(3)(b) does not refer to "practices". Only laws providing for reasonable residency requirements are saved by the subsection. If a province does not legislate its reasonable residency requirements, s. 6 prevents it from imposing them at all.

There are two basic kinds of residency requirements. The first, and most common in Saskatchewan, is a "simple" residency requirement. A provision incorporating such a requirement would make persons "who are residents" or "who have established residency" in the province eligible for a social service. It would not require the person to have resided in the province for any set period of time. The second kind of residency requirement is a "durational" residency requirement. Such a requirement makes

\textsuperscript{119} Supra, n. 116.
persons ineligible to receive a social service until they have been residents for a period of time. An example of a durational residency requirement is provided by Saskatchewan's three month residency requirement for receipt of medicare. $^{120}$

It will be necessary to decide what constitutes a social service. It does not appear that the phrase has been judicially considered to date. Nor is it defined in the Charter. A common sense definition would include welfare benefits, medicare coverage and perhaps legal aid. However, most provinces provide a wide range of benefits that might also be called "social services". For example, Saskatchewan legislation provides for criminal injuries compensation,$^{121}$ dental care,$^{122}$ education,$^{123}$ hearing aids,$^{124}$ subsidies on prescription drugs,$^{125}$ and financial aid for students.$^{126}$ It is possible that a province would be justified by s. 6(3)(b) in imposing reasonable residency requirements before any of these services would be available.

It was suggested earlier that the wording of s. 6(3)(b) implies that the right to receive publicly provided social services is a part of the right to take up residence in a province. If the two sections are so linked, then the definition of social services adopted for the purposes of s. 6(3)(b) may bear on the range of rights protected by s. 6(2)(a). For example, if "social services" is defined to include medicare but not assistance with prescription drugs, then a new resident would not, as of right, be entitled to a subsidy on prescription drugs. A preferable approach, however, is to argue that the right to receive social services is the right to receive whatever social programs a province offers, without discrimination. Thus, if Saskatchewan offers assistance with prescription drugs but other provinces do not, persons taking up residence in Saskatchewan should be entitled to receive the full range of Saskatchewan assistance, including the assistance with prescription drugs.

In general then, a province would not be bound to offer particular services, but would be bound to offer whatever services it provided equally to all, excepting only that they could define reasonable residency requirements, whether durational or simple, as a prerequisite. This implies that the provinces are at liberty to choose which services they shall offer and to what extent, and is in accordance with American law, under which there is no vested right to receive welfare, but if a state implements welfare programs, it must do so within constitutional limits.$^{127}$ An argument could

$^{120}$ The Medical Care Insurance Commission Beneficiary and Administration Regulations, R.R.S., c. S-29, Reg. 1, s. 4, Saskatchewan Gazette (Part II), Dec. 24, 1980.

$^{121}$ The Criminal Injuries Compensation Act, R.R.S. 1978, c. C-47.

$^{122}$ The Dental Care Act, R.S.S. 1978, c. D-4.


$^{125}$ The Prescription Drugs Act, R.S.S. 1978, c. P-23.

$^{126}$ The Student Assistance and Student Aid Fund Act, R.S.S. 1978, c. S-61.

be made for the proposition that a province is bound to provide, at a minimum, bare subsistence level social services, such as welfare, to needy persons in order to safeguard their right to “move to and take up residence in” the province. This, however, would be like arguing that s. 6(2)(b) requires the provinces to provide jobs and other means of pursuing a livelihood to every individual in their territories. The object of s. 6 is to prevent discrimination based on province of residence, not to affirmatively provide every person with the means of residing and pursuing a livelihood.

The word “reasonable” is used in s. 6(3)(b) to modify “residency requirements”. What is reasonable will likely be viewed as a question of fact, taking into account the nature of the service offered. American cases concerning receipt of various types of social assistance may be helpful in defining where the line should be drawn. Presumably, the three month residency requirement in Saskatchewan for eligibility for medicare is reasonable. In other cases, it may be unreasonable to impose any residency requirement other than simple residence. For example, if American law is any guide, it is unreasonable to impose durational residency requirements on eligibility for welfare. 128

3. Section 6(3) and Section 1

One of the difficulties with interpreting s. 6(2) is that it is subject to three limitation sections. Though it can be argued that the ss. 6(3) and (4) limitations are intended to be the only limits on s. 6(2), it is submitted that a better view is that s. 1 applies to it as well. This is borne out by existing case law, which has not neglected to consider both limiting sections. 129 An examination of each subsection of s. 6(3) makes it clear that the tests there are substantially different from the test imposed by s. 1.

The s. 6(3)(a) residency limitation bears no resemblance to s. 1. When a law infringes the rights protected by s. 6(2) and is scrutinized under s. 6(3)(a), there are two possible outcomes: the law is either saved, being a law of general application which does not discriminate on the basis of province of residence, or it is not saved, because it does discriminate on the prescribed basis. It is submitted that neither outcome is final. Either way, the law may still be seen as a limitation on a Charter right. As such, it must also be determined whether it is a limitation which is prescribed by law and can be demonstrably justified in a free and democratic society.

A recent unreported decision of the Nova Scotia Supreme Court adopted this two-tiered analysis. The court was asked to decide whether a Nova Scotia law requiring direct sellers to be residents of the province violated s. 6. Richard J. held that the law did not offend s. 6(3)(a). He went on, however, to consider s. 1 and decided that it was also a reasonable limitation which was demonstrably justifiable. 130

129. See Skapinker, supra, n. 84.
The position of "practices" saved by s. 6(3)(a) is different, as noted earlier. If the two-tiered approach is correct it must always be necessary to consider whether a limitation on a right given by s. 6 is a reasonable limit "prescribed by law as can be demonstrably justified in a free and democratic society." However, a practice by definition will never be "prescribed by law". The inevitable result is that whether a practice is supported by s. 6(3)(a) or not, it will be unconstitutional. This result is odd, given the express inclusion of "practices" in the s. 6(3)(a) limitation. The apparent intention was to allow practices to be saved by s. 6(3)(a). It seems, however, that the wording of s. 1 will not permit that result.

A similar two-tiered approach should be taken under s. 6(3)(b). Although that section and s. 1 appear to adopt the same test, because both use the word "reasonable", it is submitted that in fact the tests are different. "Reasonable" as used in s. 6(3)(b) refers specifically to "residency requirements". "Reasonable" in s. 1 may refer to many other factors. The s. 6(3)(b) test is therefore much narrower. It would be possible for a residency requirement to be reasonable, but for the limitation in general to be unjustifiable. A "reasonable" residency requirement is still a limitation on s. 6(2) rights and would have to be scrutinized under s. 1. Similarly, an "unreasonable" residency requirement is a limitation on s. 6(2) rights and must be considered in light of the s. 1 test.

4. Section 6(4)

Section 6(4) reads as follows:

Subsections (2) and (3) do not preclude any law, program or activity that has as its object the amelioration in a province of conditions of individuals in that province who are socially or economically disadvantaged if the rate of employment in that province is below the rate of employment in Canada.

The limitation provided by this subsection was inserted in s. 6 at the request of Newfoundland. Essentially, its purpose is to permit a province which has high unemployment to institute preferential hiring practices. However, its wording will support other kinds of practices. For example, a law or program restricting access to limited housing to disadvantaged residents of the province might be valid by virtue of the section.

Section 6(4) will protect federal as well as provincial laws. Therefore, preferential hiring regulations passed pursuant to the Regional Development Incentives Act, which identify an entire province as a region, would not be precluded as long as the rate of employment in the designated province is lower than the average rate in Canada.

Section 6(4) operates as a limitation on both ss. 6(2) and (3). Its operation may be illustrated by The Newfoundland and Labrador Petroleum Regulations, 1977. These regulations require permitholders and

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131. Supra, n. 110.
132. Nfld. Reg. 139/78, s. 124(1).
lessees to give preference in hiring to Newfoundland residents. They constitute a restriction on the right of individuals to pursue the gaining of a livelihood in Newfoundland, and they discriminate on the basis of province of residence. Thus, they would violate s. 6(2) and would not be saved by s. 6(3). Nevertheless, they are likely covered by s. 6(4) and so are not "precluded" by ss. 6(2) and (3).

It was argued earlier that whether or not a law appeared to be protected by s. 6(3), it had to be scrutinized under s. 1. It is submitted that a similar procedure is not necessary when a law, program or activity comes within the terms of s. 6(4). This is because the wording of s. 6(4) makes it clear that the subsection operates notwithstanding the contents of ss. 6(2) and (3). As a result, where the s. 6(4) criteria are met, no s. 6 rights are being infringed. It follows that since there is no limitation of a Charter right, s. 1 does not come into play. A different conclusion on this point would render meaningless the words "program" or "activity", creating the same problem that was encountered with the word "practices" in s. 6(3)(a). Programs and activities, not being prescribed by law, could not be justified under s. 1, and thus would be unconstitutional. However, s. 6(4) expressly says that s. 6 does not preclude programs and activities which meet certain criteria. It must be concluded that s. 1 does not apply to laws, programs, or activities protected by s. 6(4) in order to give meaning and effect to this wording.

IV. Conclusion

As Deschene C.J.S.C. observed in Malartic Hygrade Gold Mines Ltd. v. The Queen, "[t]he exact scope of s. 6 of the Charter presents a serious problem of interpretation". Some of the problems of interpretation have been highlighted in the preceding discussion.

Under the Charter, Canadians have been assured of international mobility rights. The rights to enter, remain in, and leave Canada had not previously been recognized in constitutional law. It is suggested that entrenchment of these rights will not seriously interfere with provisions currently in force, such as the obligation of an accused to surrender his passport. This is because of the impact of s. 1 of the Charter. Federal Republic of Germany v. Rauca confirms that extradition of citizens is demonstrably justifiable.

The Charter reaffirms and expands the rights of Canadian citizens and permanent residents of Canada to live and move around in any province. The right to reside in a province appears to include the right to receive publicly provided social services. It also includes amenities which are essential to a minimum standard of life, such as primary and secondary education, and the right to acquire property. The right to pursue the gaining of a livelihood in a province is broader than might at first be supposed.

133. Supra, n. 83, at 520.
and is not dependent on a person’s having moved to and taken up residence there. It includes the right to be self-employed, and the right to make money through investments. Thus, the right to acquire income-producing property is safeguarded.

Determining the impact of the various limitation provisions is more difficult. The rights are subject to the limitation of ss. 6(3), 6(4), and s. 1. Section 6(3)(a) ensures that laws which restrict mobility otherwise than by discriminating on the basis of province of present or previous residence are preserved. Section 6(3)(b) affirms that a province may impose reasonable residency requirements before allowing individuals access to social services. Section 6(4) allows discriminatory provisions aimed at improving the condition of disadvantaged individuals in a province of high unemployment.

It is suggested that the s. 1 criteria must be satisfied whether or not a law appears to be protected by s. 6(3). The phrase “or practices” in s. 6(3)(a) creates an insurmountable difficulty. The phrase contemplates the validity of non-legislated infringement of s. 6(2) rights, but since they are not “prescribed by law”, they cannot be saved by s. 1. This difficulty does not arise with programs or activities coming under s. 6(4), as the latter subsection operates notwithstanding s. 6(2) rights.