1981

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Prosecutorial Control in Canada: The Definition of Attorney-General in Section 2 of the *Criminal Code*

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In 1969, as a result of the redefinition of "Attorney-General" in section 2 of the Criminal Code, *the federal Attorney-General assumed an increased role in criminal prosecutions within the provinces. This new role has resulted in various challenges to the constitutional validity of the amendment — the provinces claim that the new definition is an enrroachment upon the administration of justice power given to them by section 92(14) of the British North America Act while the federal government relies on its criminal law power to justify the amendment. The author examines the 1969 amendment in light of sections 91(27) and 92(14) and analyzes the various approaches which Canadian courts have taken in their attempts to deal with the problems created by section 2.*

Depuis 1969, le procureur général du Canada a exercé un rôle plus important en matière de poursuites criminelles dans les limites des provinces. Ceci a découlé de la nouvelle définition en 1969 de l'expression "procureur général" à l'article 2 du code criminel. En 1969, se sont ainsi soulevées des contestations sur la constitutionalité de la modification. Les provinces prétendent qu'elle constitue un empiètement par le gouvernement fédéral sur les pouvoirs qu'elles détiennent en vertu du paragraphe 92(14) de l'Acte de l'Amérique du Nord Britannique quant à l'administration de la justice. Le gouvernement fédéral, quant à lui, soutient que sa compétence en matière criminelle le justifie d'agir ainsi.

L'étude de l'auteur porte sur la modification de 1969 en tenant compte des paragraphes 91(27) et 92(14). Il analyse les différents cheminements suivis par les tribunaux canadiens pour aborder ce problème.

INTRODUCTION

In any country in which the legislative powers of the different levels of government are defined in a federal constitution, it is inevitable that overlap, conflict and interpretative difficulties will occur as a result of this division of power. No where in our constitution is this more obvious than in the relationship between ss. 91(27) and 92(14) of the *B.N.A.*

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Act.[1] There is no shortage of cases which comment on the scope of the power given to the federal government to legislate in the area of criminal law and procedure; while the cases might be difficult to reconcile, one can at least draw upon them to form a tentative definition of this federal criminal law power. The same cannot be said of the exclusive authority given to the provinces by s. 92(14) to control the administration of justice in the province; there is a paucity of cases in this area. This is partly due to the fact that in cases where the question has been whether or not an impugned piece of legislation is within the scope of s. 91(27), the alternative provincial head of power has often been s. 92(13)[2] or s. 92(16).[3] Consequently the courts have not been called upon to any great extent to interpret s. 92(14).

The amendment to s. 2 of the *Criminal Code in 1969*,[4] giving the Attorney-General of Canada the authority to prosecute offences against federal statutes other than the *Criminal Code*,[5] especially in light of subsequent judicial treatment of the amendment,[6] has accentuated the need for judicial interpretation of s. 92(14). The provinces have challenged the amendment on the grounds that s. 92(14) includes the exclusive authority of the provincial Attorneys-General to control prosecutions of offences against any statutes deriving their constitutional validity from s. 91(27), and have relied on historical and policy justifications for this interpretation. The rejoinder of the federal government has been that s. 91(27) embodies the authority to control criminal prosecutions as well as to legislate in relation to substantive criminal law and procedure.

A satisfactory resolution of this dispute calls for an analysis by the courts of the relative scopes of ss. 91(27) and 92(14), but the judicial response to the controversy has been disappointing. The courts have relied on, and have extended the existing jurisprudence dealing with s. 91(27), but in the absence of similar precedents defining s. 92(14) they have been unwilling to attempt a definition of the latter. Consequently, the disposition by our courts of s. 2 challenges has been confusing, for in affirming the constitutionality of the section, which they almost inevitably do, the courts have used reasoning which very often defies history, precedent and common sense.

The purpose of this paper is to examine the various ways in which the courts have attempted to deal with the numerous constitutional

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[1]30 & 31 Vict., c. 3 (U.K.).

[2]Property and Civil Rights in the Province.

[3]Generally all Matters of a merely local or private Nature in the Province.

[4]*Criminal Law Amendment Act*, S.C. 1968-69, c. 38, s. 2.

[5]R.S.C. 1970, c. C-34.

[6]Notably *R.* v. *Hauser et al.* (1979), 8 C.R. (3d) 89 (S.C.C.).

challenges to s. 2 in the decade since its amendment and to assess the relative contribution which each of these approaches has made to a solution of the question of prosecutorial control raised by this new definition of Attorney-General.

THE LEGISLATIVE PURPOSE UNDERLYING THE AMENDMENT TO SECTION 2

An examination of the reports of the Standing Committee in which the proposed amendment to s. 2 was discussed reveals, in the concerns expressed by certain committee members, an apprehension that various constitutional challenges would result from the amendment.[7] The responses given to their questions by Mr. Turner, then Minister of Justice, manifest as much apparent confusion and lack of understanding by the Canadian government of the constitutional issues underlying the amendment as was later reflected in the case law dealing with challenges to it.

In the committee discussion, Mr. Turner described the proposed amendment as ". . . fairly complicated . . . it involves the institution of criminal proceedings in this country".[8] He dismissed the criticism that the proposal was ultra vires because it would allow the Attorney-General of Canada to move ". . . into the administration of justice under the guise of amending the Code in the realm of criminal procedure"[9] in the following way:

> We take the position and the Government of Canada has always taken the position since the Criminal Code was enacted in 1892 that the legislative jurisdiction, in deciding by whom and under what circumstances proceedings for violations of the Criminal Code or criminal law are instituted and conducted and defended and terminated and appealed, is a matter purely relating to . . . procedure in criminal matters as found within the meaning of (91(27)).[10]

In using the words "by whom", it seems Mr. Turner was unwilling to recognize any exclusive provincial authority over *Criminal Code* prosecutions pursuant to the power given to the provinces by s. 92(14). This is confirmed by his comments describing the scope of s. 92(14).

> [T]he role of the provincial attorneys-general in enforcing the Criminal Code derives from the Criminal Code itself . . . and not from 92(14) . . . Head 14 of

[7]Minutes of Proceedings of the Standing Committee on Justice and Legal Affairs (March 4, 1969), at 152. See especially . . . Mr. Hogarth, who doubted the constitutional validity of the proposed amendment and who commented, at 159: "But I look forward to seeing the progress of this particular section in the courts."

[8]*Ibid.*, at 152.

[9]*Ibid.*, at 154. Question of Mr. Hogarth?

[10]*Ibid.*, at 155.

> Section 92 is a legislative power to make laws for the administration of justice. It has nothing to do with the prosecution of criminal law and procedure . . . In other words, whatever is conceded to a provincial attorney-general in this statute has been conceded by Parliament under the Code, so that we are not invading any jurisdiction.[11]

What is obvious from Mr. Turner's analysis of the relationship between ss. 91(27) and 92(14) is his failure to recognize a difference between criminal law and procedure on the one hand and criminal justice on the other, the former creating crimes and stipulating the procedure to be followed in their prosecution and the latter giving the provincial Attorneys-General the power to prosecute those crimes according to the procedure set out by Parliament in the Code. It is also clear from the description given by the Minister of Justice of the scope of s. 92(14) that any prosecutorial control exercised by the provinces is, in his view, the result of a delegation to the provincial Attorneys-General by the Parliament of Canada of a part of its criminal law power.

Once the position of the Government of Canada with regard to the scope of its prosecutorial control had been stated the Minister admitted there was no explicit statement of such a power in the Code. That is why the amendment to s. 2 was proposed:

> [T]o cure some gaps in the Criminal Code and to place the Attorney-General of Canada . . . on the same footing as a provincial attorney general respecting those matters in relation to the prosecution under federal statute.[12]

It is obvious that Mr. Turner's intention of putting the Attorneys-General, federal and provincial, "on the same footing" by codifying what in his view was a constitutionally valid practice, federal prosecutorial control over federal non-Code offences, could never be achieved given his narrow view of s. 92(14). If the power given to the provinces by s. 92(14) is only ". . . a legislative power to make laws for the administration of justice. It has nothing to do with the prosecution of criminal law . . .[13] then the provinces have no footing at all in the area of prosecutorial control, let alone an equal footing with the federal government.

Further evidence of the wide interpretation given to s. 91(27) by the Government of Canada is evident from Mr. Turner's use of the Code offence of conspiracy as an example of the importance of federal control over federal statute prosecutions.[14] The use of this example might be questioned, since conspiracy is a *Criminal Code* offence and since the

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[11] *Ibid.*, at 156.

[12] *Ibid.*, at 155.

[13] *Ibid.*, at 156.

[14] *Ibid.*, at 154-155.

justification often given for the amended version of s. 2 is federal prosecutorial control over federal act violations *other than the Code*[15] While some judges have since 1969 attempted to explain this inclusion in s. 2 of the Code by relying on the inherent executive authority of a legislative body to enforce its statutes,[16] it appears the Government of Canada had no need to make such an argument in 1969. This is manifest in the response given by the Minister of Justice to a committee member whose concerns for the constitutional validity of s. 2 led him to ask this question:

> Mr. Turner, you have moved into the *Criminal Code* when you included conspiracy because that is an offence under the *Criminal Code*. Why could you not move in on theft?[17]

The answer was: "We could." The Minister then went on to explain the view held by the Government of Canada that s. 91(27) included prosecutorial power of all kinds, any deviation from their exclusive exercise of such control indicating a delegation by them of their power. Therefore, given his expansive view of s. 91(27) and his concomitant restrictive view of s. 92(14), it follows that he would view federal control of any criminal prosecution, Code or non-Code, as constitutionally valid.

This position taken by the Government of Canada on the question of prosecutorial control, as explained by the Minister of Justice three months before the amendment to s. 2, presents an interesting contrast to the opinion of the same government, on the identical issue, expressed by Mr. Turner during debate in the House of Commons five months after the s. 2 amendment received final consent. When Mr. Turner was asked by some opposition members whether the Government of Canada had taken any action pursuant to allegations of criminal activities of the Company of Young Canadians within Quebec, he gave the following reply:

> [W]hile the federal government is responsible for deciding what action to take in respect of the management and the future of the Company of Young Canadians . . . any question of instituting legal proceedings regarding alleged violations of the Criminal Code is, under the heading of the administration of justice, a provincial responsibility.[18]

On reiterating this same position, Mr. Turner said any such legal proceedings ". . . would . . . *have* to be taken"[19] by provincial officials.

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[15]This justification is evident both in Mr. Turner's stated reasons for the proposed amendment (see *supra*, footnote 12) and in the clear language of s. 2: ". . . other than this Act."

[16]See, for example *R.* v. *Pelletier* (1975), 18 C.C.C. (2d) 516, at 526 (Ont. C.A.), *per* Estey J.A.

[17]*Supra*, footnote 7, at 155.

[18]Debates, House of Commons of Canada, 2nd Session, 28th Parliament, Vol. II, Nov. 24-Dec. 19, 1131-2207, at 1300, Nov. 27.

[19]*Ibid.*, at 1301 (emphasis added).

The mandatory nature of the language clearly rules out any view of provincial prosecutorial control as depending on a delegation by the federal government of its criminal law power.

One might speculate that the difference in these two conflicting views of the Minister of Justice lies in his implicit distinction, in the House debates, between criminal justice and criminal law and procedure, but his failure to formulate a view of s. 92(14)leaves much uncertainty. Even if one were to accept this explanation, it does not explain how such a sudden change of position could occur between March and November. It is submitted that the most realistic explanation, though not the most helpful in clarifying s. 2 and the constitutional issues raised by it, is that political expediency and necessity can easily result in statements which are irreconcilable.

The confusion and contradiction out of which the amendment to s. 2 became law, as revealed in this search for the legislative intent underlying the amendment, has not been dispelled. Since 1969 the issue raised in the Committee and House discussions at the time of the amendment has been dealt with in various ways by Canadian courts. It is submitted that all these debates, discussions and decisions are the result of one basic question, a question raised by the amendment to s. 2: Given that the provincial Attorneys-General before Confederation exercised within their respective boundaries prosecutorial control of criminal offences, did the subsequent division of powers in the *B.N.A. Act* vest in the Attorney-General of Canada exclusive prosecutorial control by virtue of s. 91(27), or did the framers intend to reserve to the provinces their control over criminal prosecutions?

PROSECUTORIAL CONTROL AND THE DISTRIBUTION OF POWERS IN THE CONSTITUTION

The definition which one accepts of either s. 91(27) or s. 92(14) has a determinative effect on the degree of prosecutorial control one recognizes in the respective Attorneys-General. An examination of the cases dealing with ss. 91(27) and 92(14) sheds some light on the relative scope of these conflicting heads of power.

Section 91(27): The Criminal Law Power

One of the earliest statements of the scope of the federal criminal law power was made in the *Hamilton Street Railway* case,[20] where the Privy Council found the *Lord's Day Act*,[21] *ultra vires* the Ontario legislature due

[20]*A.G. of Ontario* v. *Hamilton Street Railway Company*, [1903] A.C. 524 (P.C.).

[21]R.S.O. 1897, c. 246.

to the very wide interpretation given to the federal criminal law power. They concluded that ". . . the criminal law in its widest sense"[22] had been reserved to the federal government by s. 91(27), and were willing to recognize as the only limitation on this exclusive authority ". . . the constitution of the courts of criminal jurisdiction".[23] While the Privy Council did not provide us with a detailed explanation of what "the criminal law in its widest sense" entails, that question for the purpose of defining ss. 91(27) and 92(14) might be considered moot since the broad view of the criminal law power expounded in *Hamilton Street Railway* seems to have been subsequently rejected by the Privy Council.[24] The comments of Laskin C.J., speaking for the majority of the Supreme Court in *R.* v. *Zelensky*,[25] however, have apparently resuscitated the former test presumed by many to be defunct, and are perhaps an indication of a continued weakening of s. 92(14).

At issue in *Zelensky* were the compensation and restitution provisions of the *Criminal Code*. In deciding these provisions could be upheld as a valid part of the sentencing process Laskin C.J. rejected[26] the test articulated by Lord Haldane in the *Board of Commerce* case, which suggested that the federal power over criminal law must be restricted to subject matter which ". . . by its very nature, belongs to the domain of criminal jurisprudence."[27] Such rejection is not surprising, for the Privy Council in the *P.A.T.A.* case had similarly refused to accept the *Board of Commerce* test:

> It appears . . . to be of little value to seek to confine crimes to a category of acts which by their very nature belong to the domain of "criminal jurisprudence"; for the domain of criminal jurisprudence can only be ascertained by examining what acts at any particular period are declared by the State to be crimes, and the only common nature they will be found to possess is that they are prohibited by the State and that those who commit them are punished.[28]

To hold otherwise and to accept the narrow view of s. 91(27) stated in the *Board of Commerce* case would effectively preclude the federal government from creating new crimes; while there is definite disagreement among courts and legal writers as to the limits of the criminal law power, most agree that it must include at least the authority to create new crimes.

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[22]*Supra*, footnote 20, at 529, *per* Earl of Halsbury L.C.

[23]*Ibid.*

[24]*Proprietary Articles Trade Association* v. *A.G. of Canada*, [1931] A.C. 310 (hereinafter referred to as *P.A.T.A.*).

[25](1978), 41 C.C.C. (2d) 97 (S.C.C.).

[26]*Ibid.*, at 104.

[27]*Re Board of Commerce Act, 1919*, [1922] 1 A.C. 191, at 198-199, *per* Viscount Haldane L.C.

[28]*Supra*, footnote 23 at 324.

What is surprising about the judgment of the Chief Justice in *Zelensky* is his reliance on the *Hamilton Street Railway* case — he recognized that the narrow "domain of criminal jurisprudence" test had been abandoned but he did not seem to think that the "criminal law in its widest sense" test had met the same fate. Not only did he rely on the test but he expanded it to include criminal procedure, something which it is hard to accept as being intended by the Privy Council. According to Laskin C.J.:

> The Privy Council itself had a different view in *A.G. Ont.* v. *Hamilton Street Railway* . . . where it noted that it was the criminal law in its widest sense that fell within exclusive federal competence. If that was true of the substantive criminal law, it was equally true of "procedure in criminal matters", which is likewise confided exclusively to Parliament.[29]

Chief Justice Laskin also relied on *Provincial Secretary of P.E.I.* v. *Egan* in arriving at a definition of the criminal law power, particularly on that court's inclusion in s. 91(27) of the authority ". . . to create crimes, impose punishment for such crimes, and to deal with criminal procedure".[30] Given the majority judgment in *Zelensky* with its reliance on the *Hamilton Street Railway* and *Egan* cases we can tentatively describe the scope of s. 91(27) as follows: both substantive criminal law and procedure in criminal matters, in their widest sense, are confined exclusively to the Parliament of Canada. This authority would include creation of crimes, imposition of punishments, and the power to deal with criminal procedure. The basic question raised by s. 2 and by the cases on its constitutional validity is still not answered by this tentative definition however, for it does not explain if "the power to deal with criminal procedure in its widest sense" gives to the Attorney-General of Canada the power to control prosecutions of criminal offences.

It can be argued that Laskin C.J. imposed a restriction on his definition of the criminal law power with his recognition that while it can properly re-examine decisions on the scope of legislative power as fresh issues are presented to it, the Court must always remember ". . . that it is entrusted with a very delicate role in maintaining the integrity of the constitutional limits imposed by (the B.N.A. Act)."[31] The *Zelensky* decision does not tell us whether or not Laskin C.J. would give to s. 92(14) a scope which would limit the federal power to deal with criminal procedure and thus exclude the Attorney-General of Canada from the control of prosecutions relying on s. 91(27) for their constitutional validity. His restrictive view of s. 92(14) in *Di Iorio*,[32] where he would have excluded the provinces from any inquiry into criminality, indicates he would not be willing to interpret the administration of

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[29]*Supra*, footnote 24, at 104.

[30][1941] S.C.R. 396, at 401.

[31]*Supra*, footnote 25, at 104.

[32]*Di Iorio and Fontaine* v. *Warden of the Common Jail of Montreal* (1976), 35 C.R.N.S. 57, at 115 (S.C.C.).

justice power so as to include control by the provincial Attorneys-General over criminal prosecutions. His reliance on *Egan* and *Hamilton Street Railway* in his *Di Iorio* dissent is identical to his approach in *Zelensky*, and he was careful to point out in *Di Iorio* that s. 92(14) was qualified to include procedure in civil matters only, not procedure in criminal matters.[33] Whatever the approach of Laskin C.J., any decision to give to s. 92(14) a restricted meaning in order to accommodate an expansive view of s. 91(27) would have to contend with the majority decision in *Di Iorio* which determined that the provincial authority over matters relating to the administration of justice includes the administration of criminal justice and the right of the provinces to control criminal prosecutions.[34]

The adoption by the Supreme Court of Canada in *Zelensky* of the broad view of s. 91(27) without a comment from it on whether or not this test gives to the federal government prosecutorial control of criminal offences, combined with the expansive view of s. 92(14) adopted by the same court in *Di Iorio*, does little to clarify the relationship between ss. 91(27) and 92(14). Furthermore, recent Supreme Court of Canada decisions have upheld provincial legislation which would have been struck down if subjected to the wide definition given by Laskin C.J. to s. 91(27).[35] The *Zelensky* decision is similar to *Di Iorio* and these other decisions in that the impugned legislation in all cases was found *intra vires*. Several writers have suggested that there is a trend toward functional concurrency developing in the Supreme Court of Canada,[36] *i.e.*, an attempt to uphold the enactments of both levels of government wherever possible. The operation of this trend has been described in the following way:

> Permissive attitudes towards provincial legislation, possibly susceptible of classification in whole or in part as in relation to criminal law seem evident, particularly in fields where the provinces have some plausible title to intervene, and in which provincial coverage has become fairly comprehensive. In the result, a movement or trend towards a functional concurrency in the criminal law field seems to be occurring.[37]

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[34]*Ibid*, at 113-115.

[34]*Ibid*, at 83 *per* Dickson J.; at 94 *per* Beetz J.

[35]See, for example, *A.G. of Quebec & Keable* v. *A.G. of Canada*, [1979] 1 S.C.R. 218; *A.G. of Canada* v. *Dupond* (1978), 84 D.L.R. (3d) 420 (S.C.C.); *Faber* v. *The Queen* (1976), 65 D.L.R. (3d) 423 (S.C.C.).

[35]Leigh, L.M., "The Criminal Law Power: A Move Towards Functional Concurrency?", (1967) 5 *Alta. Law Rev.* 237, at 250, 252-3; MacPherson, J.C., "The Constitutionality of the Compensation and Restitution Provisions of the Criminal Code — The Picture After *Regina* v. *Zelensky*", (1979) 11 *Ottawa Law Rev.* 713, at 730-2.

[37]Leigh, *supra*, footnote 36, at 252.

Another writer has more recently confirmed this trend:

> Thus, in the criminal law area, s. 91(27) has not proved useful as a shield against provincial legislation. But that fact does nothing to deny the strength of s. 91(27) as an effective sword in the federal hand, one which the courts seldom stay.[38]

This statement seems to be the only way to reconcile the recent cases in which ss. 91(27) and 92(14) have been in question, but it does not provide us with a very satisfactory answer to the question of prosecutorial control raised by s. 2. If it is true that because of the trend toward functional concurrency, "[i]t is unlikely that a *Criminal Code* provision would be struck down by the court as being outside Parliament's criminal law power",[39] then the fears expressed by Dickson J. in *Hauser* with regard to concurrency are well-founded.[40] Leigh states[41] that *restricted* use of both the repugnancy and the paramountcy doctrines is an essential part of the functional concurrency principle, but it must be noted that utilization of the concurrency doctrine necessarily results in conflicts between the legislative powers in question being resolved in favor of the federal government. Since it is obvious that s. 2 does give rise to conflicts between the federal and provincial Attorneys-General,

> . . . [t]he result of declaring concurrent jurisdiction is, so far as the office of provincial attorney-general is concerned in relation to prosecution of criminal offences, the same as a declaration of exclusive federal power. Whether one speaks in terms of federal power or of concurrency, the provincial power, being subservient, must give way. There can never be two attorneys-general in respect of the same proceeding. Acceptance of the notion of concurrency would have the effect of removing from the provincial attorney-general the primary right and duty to prosecute in the province.[42]

In spite of the various policy reasons which can be cited to justify ultimate federal prosecutorial control of criminal and non-criminal legislation,[43], for instance the desirability of uniformity and the increasingly national scope of many offences, there are also policy reasons which justify provincial control of criminal prosecutions.[44] These would include the local nature of much crime and the greater accountability in the provinces of the respective provincial Attorneys-

[38]MacPherson, *supra*, footnote 36, at 731.

[39]*Ibid.*, at 732.

[40]*R.* v. *Hauser et al.*, *supra*, footnote 6, at 126-7.

[41]*Supra*, footnote 36, at 250, 253.

[42]*R.* v. *Hauser et al.*, *supra*, footnote 6, at 126, *per* Dickson J.

[43]See, *e.g.* MacPherson, J.C., "Developments in Constitutional Law: The 1978-79 Term", (1980) 1 *Sup. Ct. Rev.* 77, at 99-103.

[44]See, *e.g.* Taman, Larry, "*Hauser* and Control over Criminal Prosecutions in Canada", (1980) 1 *Sup. Ct. Law Rev.* 401, at 413-15.

General. More convincing than policy reasons is the argument that s. 92(14) of the *B.N.A. Act* gives the provinces exclusive authority to prosecute criminal offences, and to employ the functional concurrency doctrine is to ignore the obvious division of jurisdiction in criminal matters envisaged by the constitution. While there has not been a great deal of judicial interpretation of s. 92(14), some of the cases that have dealt with that head of power should be examined in an attempt to determine the validity of the provincial claims to prosecutorial control.

Section 92(14): The Administration of Justice in the Province[45]

The decision of the Supreme Court of Canada in *Di Iorio*, where the Court upheld provincial legislation establishing an inquiry into organized crime within the province, is one of the few cases in which a thorough explanation was attempted of the power enjoyed by the provinces pursuant to s. 92(14) and of the relationship between that section and s. 91(27). In relying on the function of the inquiry in question to justify provincial authority to conduct it, Dickson J. stated that since the impugned legislation establishing the inquiry made no attempt to alter criminal procedure, to create new crimes or to alter old ones, it was not an encroachment by the provinces on the criminal law power of the federal government but was a valid exercise of the power of the provinces to administer justice within their respective boundaries.[46] According to Dickson J. then, the criminal law power encompasses a determination of what activities are criminal and of what procedure is to be followed in the courts to enforce this criminal law. He was careful however, to distinguish between criminal procedure and criminal law on the one hand, and criminal justice on the other:

> [T]he phrase "criminal procedure" as used in the B.N.A. Act cannot drain from the words "Administration of Justice" in s. 92(14) that which gives those words much of their substance — the element of "criminal justice".[47]

Dickson J. considered both "criminal investigation and prosecutions"[48] and "the ferreting out of crime and identification of criminals"[49] as powers encompassed by the element of criminal justice in s. 92(14). Only if the provinces in attempting to administer criminal justice were to encroach upon the authority of the federal government to create and

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[45]The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in these Courts.

[46]*Supra*, footnote 32, at 76.

[47]*Ibid.*, at 83.

[48]*Ibid.*, at 80.

[49]*Ibid.*, at 89.

alter crimes and to stipulate the procedure to be followed in prosecuting these crimes (such procedure, it should be emphasized, not including control over the actual prosecution of the crime) would they have exceeded the jurisdiction given t them by s. 92(14).

Beetz J. was in agreement with the need to differentiate criminal justice from criminal law and procedure. He relied upon the situation which prevailed before Confederation in reaching his decision as to the present relationship of ss. 91(27) and 92(14), stating:

> It was contemplated by s. 91(27) of the B.N.A. Act that criminal law, substantive and procedural, would come under the exclusive legislative authority of the Parliament of Canada. But subject to this provision and to the paramountcy of federal law enacted under primary or ancillary federal jurisdiction, the provinces were to remain responsible in principle for the enforcement of criminal law and to retain such power as they had before with respect to the administration of criminal justice. They continued in fact . . . to investigate crime, (and) . . . to prosecute criminals . . . [50]

He found support for his position in *Attorney-General of Quebec* v. *Attorney-General of Canada* where Taschereau J. defined the power given to the federal government by s. 91(27) as ". . . the power to determine what shall or what shall not be 'criminal', and to determine the steps to be taken in prosecutions and other criminal proceedings before the courts."[51] Based on *Di Iorio,* then, the questions of the procedure to be followed and which Attorney-General will prosecute are not the same: to hold otherwise would be to ignore the historical context in which the divided jurisdictions of ss. 91(27) and 92(14) were drafted.

There are other cases which affirm this broad view of the administration of justice in the province adopted by the majority in *Di Iorio*. In *R.* v. *St. Louis,* Wurtele J. held that:

> As the conduct or supervision of criminal prosecutions before the criminal courts devolves upon the provincial law officers, the Attorney-General of Canada has no ministerial duties or official legal functions to perform in that connection . . . [52]

Similarly, in *Re Public Inquiries Act* s. 92(14) was held to include the taking of "requisite steps in court to prosecute persons accused of crime."[53] The court in *R.* v. *Yuhasz* attributed to the provincial Attorney-General the primary right to appear in any criminal proceeding at any stage and doubted "the constitutionality of any federal legislation that might attempt to exclude him".[54]

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[50]*Ibid.*, at 94. The reference of Beetz J. to the paramountcy of federal laws, it can be argued, puts a restriction on s. 92(14) not imposed by the analysis of Dickson J.

[51][1945] S.C.R. 600, at 603.

[52](1898), 1 C.C.C. 141, at 145-146 (Que. Q.B.).

[53](1919), 48 D.L.R. 237, at 239-240 (B.C. C.A.).

[54](1961), 128 C.C.C. 172, at 178-179 (Ont. C.A.).

In spite of these authorities, the recent decisions upholding the constitutionality of s. 2 must be contended with, and it is hard to reconcile the broad interpretation of s. 92(14) found in *Di Iorio* with them. Is it because the Canadian courts are convinced that the jurisdiction of s. 92(14) was intended by the framers of the *B.N.A. Act* to be construed narrowly enough to exclude provincial prosecutorial control over criminal offences that they have consistently found s. 2 *intra vires*? On the contrary, the diligence with which the courts have avoided characterizing legislation as deriving its constitutionality from the federal criminal law power in cases where a s. 2 challenge is the issue indicates an awareness on the part of these courts that s. 2 might have to be found invalid once it is held to give to the federal government prosecutorial control over criminal offences. This opinion is substantiated not only by the present trend of the Supreme Court of Canada to uphold legislation whenever possible,[55] but also by a study of some of the cases in which the courts have addressed themselves to the constitutional validity of s. 2. What will become evident from the following examination of such cases is the variety of approaches which the courts have adopted in finding s. 2 *intra vires* without any significant comment on s. 92(14), and consequently without any solution to what the provinces consider to be the main problem created by s. 2: the dual prosecutorial role in criminal matters.

THE INTERPRETATION OF SECTION2: JUDICIAL TRENDS

The Broad View of Section 91(27)

One way to resolve, or avoid, the constitutional questions raised by s. 2 is to reject the distinction made in *Di Iorio* between criminal procedure and criminal justice. Such a rejection gives prosecutorial control to the federal government.

In the recent case of *R.* v. *Hoffman LaRoche Ltd.*[56] the question before the Ontario High Court was the constitutional authority of the Attorney-General of Canada to prefer an indictment and conduct the prosecution for an offence under the *Combines Investigation Act*.[57] Counsel for the accused relied on the distinction between criminal law and procedure, and criminal justice in arguing that the institution and control of these criminal proceedings was within the exclusive control of the Attorney-General of the province pursuant to the provincial power to administer criminal justice in the province. He contended, in analyzing the relationship of ss. 91(27) and 92(14), that

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[55]See *supra*, footnotes 36-41.

[56](1980), 28 O.R. (2d) 164 (Ont. H.C.).

[57]R.S.C. 1970, c. C-23.

> [t]he criminal law power as set out in s. 91(27) covered the substantive issues, which he described as the "what" . . . Criminal procedure as set out in 91(27) embraced the rules of the game, what he considered to be the "how", . . . (he distinguished), however the "what" and the "how" from the "who", which he suggests includes rules relating to the players in the proceedings, that is, "who" institutes the proceedings and "who" conducts them. These matters, he says, are neither criminal law nor criminal procedure, but fall within the "Administration of Justice", pursuant to s. 92(14) and, consequently, are under the exclusive authority of the various provincial Attorneys-General.[58]

The Court considered the analysis an ingenious one, but refused to accept it. Linden J. was willing to recognize that a certain amount of overlap necessarily results from the existence of ss. 91(27) and 92(14), and that jurisdiction to enforce federal laws ". . . from one aspect . . . may be viewed as within the administration of justice in the province under s. 92(14)."[59] While reliance on the double aspect doctrine is also evident in the judgment of Dickson J. in *Di Iorio*,[60] the two judgments differ in that Linden J. views the actual prosecution of criminal offences as subject to this double aspect doctrine and consequently subject also to the concurrent jurisdictions of both levels of government. He then goes one step further to rely upon the doctrine of paramountcy, effectively stripping the provinces of any control over criminal prosecutions where there is an inconsistency between federal and provincial views. Dickson J., on the other hand, relying on historical evidence as well as on his threefold division of criminal matters (law, procedure and justice) put the enforcement of criminal laws within the exclusive sphere of the provinces pursuant to the power granted to them by s. 92(14).

The decision in *Hoffman LaRoche* indicates the effect which acceptance of the broad view of s. 91(27) has on the disposition of challenges to s. 2. If the prosecution of offences against federal acts other than the *Criminal Code* is included within the federal criminal law power, then the constitutional validity of an enactment of the Parliament of Canada giving to the federal Attorney-General such prosecutorial power cannot be disputed.

Characterization of Legislation

Characterization and Section 2

In addition to the wide view of s. 91(27) and the accompanying rejection of a separation between criminal justice and criminal law and procedure, courts have also relied upon dubious characterization of legislation in dealing with the question of prosecutorial control. Perhaps

[58] *Supra*, footnote 56, at 184.

[59] *Ibid.*

[60] *Supra*, footnote 32, at 81-82.

the most notable example of such an approach is the use of the federal residual power in *Hauser* to characterize narcotics legislation.[61] The effect of such characterization is to remove the impugned legislation from the purview of the federal criminal law power, thereby avoiding a determination of whether or not s. 2 is an encroachment upon the exclusive authority of the provinces to enforce criminal justice pursuant to s. 92(14).

The judgments in *R.* v. *Walden*[62] and *R.* v. *Parrot*[63] present at best a novel approach to the constitutional problems raised by s. 2 and are at worst a further example of an evasion of these problems by Canadian courts. In both cases the accused union leaders had been charged under s. 115(1)[64] of the *Criminal Code* with failure to obey an Act of Parliament, by contravening s. 3(1) of the *Postal Services Continuation Act.*[65] The Attorney-General of Canada had preferred the indictments in both cases, and his jurisdiction to do so was the basic issue in the appeals.

In *Walden* the challenge was twofold. First, counsel for the accused argued that s. 115(2), which gave the Attorney-General of Canada his authority, was *ultra vires* in that it encroached upon the powers of the provinces with respect to the administration of justice. The reliance of the court on *Hauser,* which had been decided only one week before, made it unnecessary for the court to deal with this contention in any detail.[66] Murray J. was able to dispose of the constitutional challenge to s. 115(2) by following the judgment of Pigeon J., whose decision, in turn, had been facilitated by the concessions of Ontario, Quebec and British Columbia in the *Hauser* appeal that the federal government enjoys exclusive authority to prosecute violations of or conspiracies to violate federal acts ". . . which do not depend for their constitutional validity on head 27 of s. 91".[67] Pigeon J. went one step further and reached what he considered to be a solution to the constitutional

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[61]*Supra,* footnote 5, at 106-109.

[62](1979), 8 C.R. (3d) 255 (B.C.S.C.).

[63](1979), 51 C.C.C. (2d) 539 (Ont. C.A.).

[64]S. 115(1): Everyone who, without lawful excuse contravenes an Act of the Parliament of Canada by wilfully doing anything that it forbids or by wilfully omitting to do anything that it requires to be done is . . . guilty of an indictable offence . . . .

S. 115(2): Any proceedings in respect of a contravention of or conspiracy to contravene an Act mentioned in subsection (1), other than this Act, may be instituted at the instance of the Government of Canada and conducted by or on behalf of that Government.

[65]S.C. 1978-79, c. 1. The contraventions consisted of not informing union members that any strike engaged in after the coming into force of the Act would be illegal.

[66]*Supra,* footnote 62, at 258-259.

[67]*Supra,* footnote 6, at 105.

challenge to s. 2 by characterizing the *Narcotic Control Act*[68] under the federal residual power rather than under the criminal law power.[69] This decision has become an unfortunate precedent, one which has hampered the development of a clear understanding of the relationship between prosecutorial control and the administration of justice in the province. A brief look at the judicial interpretation of the *Narcotic Control Act* seems to indicate that the peace, order and good government characterization arrived at by Pigeon J. was not supported by precedent.

In 1971 the Supreme Court of Canada stated that the *Narcotic Control Act* was truly criminal legislation.[70] In *R.* v. *Pontbriand,* the Quebec Superior Court referred to the same Act as having been passed by Parliament exclusively under its criminal law power, with "... no independent federal constitutional underpinning"[71] apart from s. 91(27). An examination of the *Pelletier*[72] and *Collins*[73] cases, both dealing with charges under the *Narcotic Control Act,* seems also to indicate an acceptance by the courts of the characterization of narcotics control legislation as criminal law.[74] The earlier Supreme Court of Canada decision in *I.A.C.* v. *The Queen*[75] was also an affirmation of the criminal nature of narcotics legislation. Pigeon attempted, in *Hauser,* to distinguish this decision on the grounds that the matter was *obiter* in the *I.A.C.* case and that the appellants had conceded the criminal nature of the legislation in argument.[76] This is a tenuous distinction, as the clear language used by the court in the *I.A.C.* case puts the criminal nature of narcotics control legislation beyond dispute.[77] One might note at this point the following concession made by the Attorney-General of Canada in the *Hauser* appeal: "[i]t has already been held by this Court in *I.A.C.* v. *The Queen* . . . that the Act is within the scope of s. 91(27)."[78]

A consideration of the history of narcotics control legislation in Canada renders even more untenable the argument of Pigeon J. that

[68]R.S.C. 1970, c. N-1.

[69]*Supra,* footnote 6, at 109.

[70]*R.* v. *Pierce Fisheries Ltd.,* [1971] S.C.R. 5, at 17.

[71](1978), 39 C.C.C. (2d) 145, at 152.

[72]*R.* v. *Pelletier supra,* footnote 16.

[73]*R.* v. *Collins* (1972), 10 C.C.C. (2d) 52 (Ont. Dist. Ct.).

[74]See Elliot, Robin, "Constitutional Law - Federal Prosecutions - narcotic Control Act - Criminal Code, s. 2- *R.* v. *Hauser*", (1979) 14 *U.B.C. Law Rev.* 163, at 167: "Certainly there is no indication in the judgments that the *Narcotic Control Act* could be characterized in any other manner."

[75]*Industrial Acceptance Corp.* v. *The Queen,* [1953] 4 D.L.R. 369.

[76]*Supra,* footnote 6, at 106.

[77]*Supra,* footnote 75, at 372, 374.

[78]Elliot, *supra,* footnote 74, at 177.

this legislation can be justified under the federal residual power because it deals with a genuinely new problem. Drug addiction has been a problem in Canada for at least 120 years,[79] and even if this were not so the definitions given to the criminal law power by the Supreme Court of Canada in the *Zelensky* case[80] and by the Privy Council in the *P.A.T.A.* case indicate that this power ". . . is wide, and may cover activities which have not hitherto been considered to be criminal."[81] Yet Pigeon J. gave little weight to either the historical factors or previous case law in arriving at his decision. Consequently, he was able to use the peace, order and good government clause to avoid an interpretation of the scope of s. 92(14), especially the criminal justice element of that head of power and its effect on prosecutorial control in Canada.

If Pigeon J. can be questioned for his classification of the *Narcotic Control Act* under a federal power other than s. 91(27), application of his criminal/non-criminal analysis by Murray J. to the facts of the *Walden* case is even less tenable. Faced with a challenge to s. 115 of the Code, and specifically to the prosecutorial authority of the Attorney-General of Canada, Murray J. drew the conclusion that s. 115 was not necessarily criminal law just because it was contained within the Code. Such a view is not only contrary to common sense but is contradicted by the complete title of the *Criminal Code*: *viz. An Act Respecting the Criminal Law.* Pigeon J. had reached his conclusion as to the nature of the *Narcotic Control Act* by recognizing that penalties by themselves do not stamp out a piece of legislation as criminal.[82] He used the example of revenue acts, which are not classified as criminal law but which contain severe penalties for their breach. Murray J. paraphrased these comments and drew an analogy to this case in the following way:

> . . . I do not consider that the mere fact that a maximum penalty of imprisonment for two years, as provided for in s. 115, stamps out that section as criminal law per se, nor, in my view, does the mere fact that the legislation appears in the *Criminal Code* so stamp it.[83]

If one accepts for the sake of argument that the comments of Pigeon J. concerning penalties are correct, one can see the rationale in the first part of the above comments of Murray J. with regard to s. 115. It is in trying to grasp the second part of his statement, that merely because a piece of legislation is in the Code does not mean it is criminal law, that difficult conceptual problems arise. One cannot help but wonder why the Parliament of Canada would put something in the

[79]See Trasov, G.E. "History of the Opium and Narcotic Drug Legislation in Canada", (1961-62) 4 *Crim. L.J.* 274, at 275. See also Dickson, J. in *Hauser, supra,* footnote 6, at 152-158.

[80]*Supra,* footnote 25.

[81]*P.A.T.A., supra,* footnote 24, at 323.

[82]*Supra,* footnote 6, at 108.

[83]*Supra,* footnote 62, at 259.

Criminal Code which is not criminal law. If Parliament can impose penalties for violations of federal legislation without making the legislation criminal, can they also put such penalty charging sections in the *Criminal Code* and still avoid a classification of such sections as criminal law? The revenue acts relied upon by Pigeon J. in making his argument embody the penalty for their breach; it is quite a different matter to use a penalty in the *Criminal Code* as a charging section for a violation of a non-Code federal act. It is because s. 115(2) falls in the latter category that the analogy drawn by Murray J. between the characterization by Pigeon J. of narcotics control legislation and s. 115(2) is defective.

The second objection of counsel for the accused in *Walden* was based on the adoption in *Hauser* of the judgment of the Quebec Court of Appeal in *R.* v. *Miller*[84] wherein it was held that the Attorney-General of Canada does not have the authority to prosecute a violation of a *Code* section.[85] Since Walden was charged under s. 115, it was argued the Attorney-General of Canada and no authority to prefer an indictment. This would be a valid argument in spite of the previous finding of Murray J. that s. 115(2) was not criminal law, for the distinction made in *Miller* was Code/non-Code and not criminal/non-criminal. Yet Murray J. dismissed the challenge by relying on the absence of a section similar to s. 115(2) in the charging section[86] at issue in *Miller,* saying

> . . . if the definition of the words "Attorney General" had been modified (in *Miller*) by a section or subsection equivalent to s. 115(2), the interpretation given to those words in the *Miller* case would have been entirely different. In my view, all that s. 115(2) does is to create a further proper and logical exception to the definition of "Attorney General" contained in s. 2 of the *Criminal Code.*[87]

While this distinction might have been the only one available to Murray J. which would enable him to reconcile his reliance on *Hauser* with its acceptance of *Miller*, it does not withstand scrutiny. Since both ss. 2 and 115(2) give the Attorney-General of Canada a role in proceedings where there is a violation of or conspiracy to violate any act of the Parliament of Canada other than the *Criminal Code* it is difficult to see how s. 115 is in any way a modification of s. 2.

The issues dealt with by the court in *R.* v. *Parrot*[88] were similar to those raised in *Walden* as was the disposition of those issues. Counsel for

[84]*Regina* v. *Miller* (1975), 27 C.C.C. (2d) 438 (Que. C.A.) (leave to appeal to the S.C.C. refused May 5, 1975). See Pigeon J. in *Hauser, supra,* footnote 6, at 100: "As to the interpretation of the definition of "Attorney General", I see no reason to disagree with the view taken by the Quebec Court of Appeal in *Miller* v. *R.* . . ."

[85]*Ibid.*, at 446-447.

[86]S. 169 (*c*), *Bankruptcy Act,* R.S.C. 1970, c. B-3.

[87]*Supra,* footnote 62, at 260.

[88]*Supra.*, footnote 62.

the accused assumed that Parliament had determined the conduct proscribed in s. 115 to be criminal in nature by the very fact that it was put in the *Criminal Code.* The court disagreed, accepting instead the argument of the Crown that s. 115 did not depend on the criminal law power for its validity, because it was related to other competent federal legislation, the *Postal Services Continuation Act.*[89] This decision was reached only after an acknowledgement by the court that *Hauser* had firmly established the constitutional validity of s. 2 to the extent that it gives authority to the Attorney-General of Canada to control prosecutions of federal non-criminal offences. The convenient conclusion reached by the court based on *Hauser* was that s. 115 was not criminal just because it was in the Code. The court adopted, at least implicitly, the reasoning used by Pigeon J. in his characterization of the *Narcotics Control Act,* stating that the *Postal Services Continuation Act* had been enacted "... to meet what was clearly ... an immediate urgent national problem ..."[90] The exclusive power of the federal government pursuant to s. 91(5) of the *B.N.A. Act* over postal services was also relied upon. In this way the question of whether or not it is within the power of the Attorney-General of Canada to control a prosecution for a criminal offense was again avoided, no criminal offence having been found.

Neither *Parrot* nor *Walden* gives any satisfactory explanation for the amendment of s. 115 in 1975 to include s. 115(2). It seems that s. 2 is identical to s. 115(2) in giving to the Attorney-General of Canada (questions of constitutional validity aside) the power to control the prosecution for a breach of any federal non-Code act. These cases, and *Hauser* do indicate that the courts in attempting to uphold s. 2 have been forced to avoid classifying legislation as criminal in situations where s. 2 is challenged by provinces as an encroachment upon s. 92(14). This evasion of the constitutional problem presented by s. 2 has manifested itself in at least two questionable solutions: the characterization of the *Narcotic Control Act* under the federal residual power instead of under s. 91(27), notwithstanding overwhelming authority to the contrary, and an even more spurious decision that not all provisions of the *Criminal Code* are necessarily enacted under the criminal law power of the Parliament of Canada.

Characterization: Some Recent Cases

In addition to the hindering effect which such characterization of legislation has had on the development of an understanding of the scope of s. 92(14) and its relation to s. 91(27), and of the respective prosecutorial powers of the federal and provincial Attorneys-General, other problems have resulted. The decision of the British Columbia

[89] *Supra,* footnote 64.

[90] *Supra,* footnote 62, at 552.

Supreme Court in *Schneider* v. *The Queen in Right of British Columbia*[91] illustrates what one writer has referred to as the most obvious consequence of the majority decision in *Hauser:* the inability of the provinces to deal with the drug problem.[92] In this case the *Heroin Treatment Act,*[93] which provided for compulsory treatment of persons addicted to certain narcotics, was found *ultra vires* the provincial Legislature. While this case has been recently overturned on appeal,[94] a comparison of the two judgments indicates the havoc which strict adherence to *Hauser* can wreak on the division of legislative powers in the constitution. Such adherence effectively precludes any characterization of narcotics legislation under a head of power other than the federal residual power.

The decision of the B.C. Supreme Court is based on such an adherence to *Hauser* and a concomitant unwillingness to consider any alternate characterization of narcotics legislation. Having decided that the subject matter of the impugned legislation was narcotics, McEachern C.J. stated: "I am commanded by the Supreme Court of Canada to deal with the subject-matter of the *Narcotic Control Act* on the same footing as such other new developments as aviation and radio communication."[95] The impugned legislation was therefore justified under the federal residual power, and was held to be outside the legislative competence of the province.[96] The Court of Appeal, on the other hand, was able to avoid such a result without disagreeing with *Hauser* by finding that the subject matter of the *Heroin Treatment Act* was in relation to ss. 92(7),[97] (13)[98] and (16),[99] having as its chief purpose the establishment of facilities ". . . for the purpose of terminating or diminishing use of or dependency on narcotics . . .".[100] Such a characterization is preferable to those found in *Hauser, Parrot* and *Walden.*

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[91](1979), 49 C.C.C. (2d) 129 (B.C.S.C.).

[92]Elliot, *supra,* footnote 74, at 200.

[93]S.B.C. 1978, c. 24. [R.S.B.C. 1979, c. 166.]

[94](1980), 52 C.C.C. (2d) 321 (B.C.C.A.).

[95]*Supra,* footnote 91, at 155.

[96]A somewhat confusing aspect of the lower court judgment was its finding, at 175-176, that the *Heroin Treatment Act* was, alternatively, justifiable under s. 91(27). It is inconsistent to rely on the majority decision in *Hauser* to support the proposition that provincial legislation is *ultra vires* because its subject matter falls within the federal residual power, then to say the same piece of legislation is also *ultra vires* because it is in pith and substance criminal law, since the purpose of the introductory clause of s. 91 ". . . is to accommodate the matters which do not come within any of the enumerated federal or provincial heads." See Hogg, *Constitutional Law of Canada,* at 246.

[97]The Establishment, Maintenance and Management of Hospitals, Asylums, Charities . . . in and for the provinces.

[98]Property and Civil Rights in the Province.

[99]Generally all Matters of a Local or Private Nature.

[100]*Supra,* footnote 94, at 330.

The Court of Appeal was not faced in the *Schneider* case with the issue of the constitutional validity of s. 2. Its willingness to characterize the subject matter as being within provincial competence in spite of the strong precedent set by *Hauser* raises the hope that future courts called upon to deal with a challenge to the power of the federal Attorney-General to control the prosecution of an offence which should properly be nharacterized as criminal (*e.g.*, a s. 423 conspiracy to violate the *Narcotic Control Act),* will take a similar approach. This; in turn, might provide the much needed judicial interpretation of s. 92(14).

Such an approach is evident in *R.* v. *Kripps Pharmacy Ltd.*,[101] wherein the court was faced with a prosecution conducted by the Attorney-General of Canada for offences against the *Food and Drugs Act,*[102] the accused having sold new drugs without first filing the manufacturer's name as required by the Act. In recognizing "... the overriding authority of the provinces under s. 92(14)"[103] in the enforcement of the criminal law, Wetmore Co. Ct. J. adopted the dissenting judgment of Dickson J. in *Hauser* as well as the reasoning in *Di Iorio* to conclude that the exclusive authority to control the prosecution of criminal offences is within the power of administration of justice. Therefore, s. 2 was found *ultra vires* to the extent that it vested power in the federal Attorney-General to control the administration of criminal justice, including prosecutions, in the province.

The conclusions of *Kripps* and *Di Iorio* affirm the exclusive prosecutorial role of provincial Attorneys-General with regard to criminal offences. We have seen however, that courts have utilized various approaches in disposing of s. 2 challenges which manage to avoid such an affirmation. The application of the doctrine of concurrency is an example of such an approach.

Concurrency

In *R.* v. *Miller*[104] the accused had been charged with intent to defraud contrary to s. 350(*a*)(ii) of the *Criminal Code* and with two offences contrary to the federal *Bankruptcy Act.*[105] The Attorney-General of Canada had preferred both indictments and the accused contended that the language of s. 2 was clear in exempting from the power of the Attorney-General of Canada the control of prosecutions of *Criminal Code*

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[101](1980), 14 C.R. (3d) 355 (B.C. Co. Ct.).

[102]R.S.C. 1970, c. F-27.

[103]*Supra,* footnote 101, at 377.

[104]*Supra,* footnote 84.

[105] *Supra,* footnote 86.

offences. It was also contended that s. 2 was *ultra vires* to the extent that it gave the federal govenment the power to prosecute non-Code offences, since such prosecutorial control was vested in the provinces by vitrue of s. 92(14). The court decided that the indictment preferred by the Attorney-General of Canada for the s. 350 offence was a nullity, since the language of s. 2 clearly reserves to the provincial Attorneys-General prosecution of Code offences.[106] With regard to the prosecution of offences under federal Acts other than the *Criminal Code*, the court found that s. 2 created concurrent power in both levels of government.[107]

Lajoie J.A. was able to find concurrency by reading the second part of s. 2, giving to the federal Attorney-General the power to prosecute federal non-Code offences, as inclusive not exclusive. In other words, Attorney-General means the Attorney-General of a province and means *also*, with respect to the Northwest Territories, the Yukon and proceedings in relation to a violation of or a conspiracy to violate a federal act, the Attorney-General of Canada.[108] According to this interpretation the provincial Attorney-General has exclusive control over the prosecution of Code offences, and both the federal and provincial Attorneys-General can prosecute other federal act violations, the Parliament of Canada having explicitly recognized in the language of s. 2 concurrency of federal and provincial powers for such prosecutions.

This interpretation of s. 2 by Lajoie J.A. is not convincing. The second part of s. 2 can just as easily be read as constituting a blanket exception to the power given to the provincial Attorneys-General in the opening part of the section. This is the interpretation counsel for the appellant adopted in *Miller*, and an examination of statements made by federal officials when the amendments to s. 2 were enacted apparently supports the latter approach.[109] These officials expressed the view that any control which the provinces exercised over prosecutions was given to them by the federal government pursuant to the criminal law power and had nothing to do with the administration of justice in the province. They did not see so fine a line between ss. 91(27) and 92(14) that the matter of prosecutions could be considered as having both federal and provincial aspects so as to be competent to both Parliament and the Legislatures.

This federal govenment view, while questionable on constitutional grounds, is more realistic than the view of the court in *Miller*. As Dickson J. commented in his dissent in *Hauser:*

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[106]*Supra*, footnote 84, at 442-447.

[107]*Ibid.*, at 447.

[108]*Ibid.*, at 445.

[109]*Supra*, footnotes 9 and 10.

> . . . the constitutional conflict engendered by s. 2(2) is too sharp and too complete to make this an appropriate case for an application of the "double aspect" doctrine. It is difficult to perceive in what "aspect" and for what "purpose" the two governments can differentiate their claims to jurisdiction. Both claim jurisdiction over the powers of the attorney-general in criminal proceedings for the identical aspect and the identical purpose, namely, the prosecution and supervision of criminal offences.[110]

What we are faced with then in s. 2, is a problem of divided jurisdiction in criminal matters (ss. 91(27) and 92(14)) and a single subject matter (prosecutorial control). It is for the courts to resolve this problem by attributing the subject matter to one or the other heads of power — where the conflict is so obvious as in this case, the aspect doctrine should not be used to ignore the obvious jurisdictional question.

The accepted view of the aspect doctrine, as stated by the Privy Council in *Hodge* v. *The Queen,*[111] acknowledges ". . . that some kinds of laws (have) both a federal and a provincial matter . . ."[112] The cases upholding the provincial offences of driving without due care and attention and the Code offences of dangerous driving are examples of the use by the courts of this aspect doctrine. It is clear from these cases that laws prescribing rules of conduct on the roads have a "doube aspect" and are therefore, competent to both Parliament and a Legislature. In order to fully understand the doctrine one must ask when it can properly be applied to justify concurrency of federal and provincial powers. The answer is: when the conflict between the two aspects is not a sharp one.[113] If the conflict is sharp, then the doctrine of paramountcy would result in the federal power taking precedence over the provincial power.

A sharp conflict between federal and provincial powers is raised by the competing claims of the two levels of govenment to prosecutorial control. Since there can only be one Attorney-General for each proceeding before the court, and since the effect of the paramountcy doctrine is to make provincial powers subservient to those of the federal government where a conflict arises, the result would be, as described by Dickson J. in *Hauser*,

> . . . so far as the office of provincial attorney-general is concerned in relation to prosecution of criminal offences, the same as a declaration of exclusive federal power. . . . Acceptance of the notion of concurrency would have the effect of removing from the provincial attorney-general the primary right and duty to prosecute in the province.[114]

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[110]*Supra,* footnote 6, at 125.

[111](1883), 9 A.C. 117, at 130.

[112]Hogg, P.W., *Constitutional Law of Canada,* (1977), at 84.

[113]*Ibid.*

[114]*Supra,* footnote 6, at 126-127.

Therefore, it seems that the provinces have as much to lose from a "concurrent jurisdiction" solution to the problems raised by s. 2 as they do by a Supreme Court of Canada decision which gives a direct answer to the question of which Attorney-General has prosecutorial control over criminal offences. The latter approach would necessitate a characterization by the court of s. 2; since strong arguments can be made for a characterization of the legislation under s. 92(14),[115] this approach would not automatically remove from the provincial Attorneys-General the primary right to prosecute in the province. Reliance on the doctrine of concurrency, on the other hand, because it would obviate characterization and because of its relationship to the paramountcy principle, would take such prosecutorial control from the provinces in the case of a conflict. This would occur notwithstanding the possibility that right which the provinces would be losing is perhaps, because of s. 92(14), one which is exlusively theirs and which should not be affected by any federal attempt to legislate in the area. Wetmore J. expressed such a view in *Kripps* suggesting that co-operative federalism is a better solution than concurrency to the type of problem presented by the conflict between ss. 91(27) and 92(14), and stating that failing such a solution, ". . . the remedy is in constitutional change, not in a judicial avoidance of powers clearly designated to the provinces."[116]

Delegation

We saw in the examination of the committee discussions preceeding the amendment to s. 2 that the federal government viewed any prosecutiorial power exercised by the provinces as delegation of federal authority pursuant to s. 91(27)[117] This view is deficient in that it fails to take into consideration the possible inclusion within s. 92(14) of exclusive provincial power to prosecute criminal offences and must be premised, therefore, on a definition of s. 91(27) which does not separate criminal justice from criminal law and procedure.

The principle stated by Taschereau J. in the *N.S. Inter-Delegation* case that ". . . the whole scheme of the Canadian Constitution would be entirely defeated . . ." if Parliament were to be permitted to hand over any of its primary legislative power,[118] has been modified by subsequent cases[119] so that delegation to provincial officials by Parliament is now permitted. The caveat to this ability to delegate was

[115]See, *e.g.*, *Dripps*, *Di Iorio*, Dickson J. dissenting in *Hauser*.

[116]*Supra*, footnote 101, at 377.

[117]*Supra*, footnote 11.

[118][1950] 4 D.L.R. 369, at 382 (S.C.C.).

[119]See especially *P.E.I. Potato Marketing Board* v. *H.B. Willis Inc. and the Attorney General of Canada*, [1952] 4 D.L.R. 146 (S.C.C.).

stated in *Hodge* v. *The Queen*[120] and referred to by Estey J.A. in *Pelletier*, wherein he suggested that any delegation in s. 2 might ". . . be condemned as a delegation of authority amounting to abdication . . . ".[121] The situation which exists pursuant to a valid delegation is explained by Hogg as follows:

> A delegation of power does not divest the delegator of its power; nor does it confer a permanent power on the delegate. The delegator Legislature has the continuing power to legislate on the same topic concurrently if it chooses and, more important, it can withdraw the delegation at any time.[122]

Applying these principles to s. 2 we can conclude that if it is within the exclusive authority of the Parliament of Canada, pursuant to the federal criminal law power, to create crimes and to stipulate the procedure to be followed in enforcing these crimes (which is not disputed), and if the power to prosecute those offences determined to be crimes is inseparable from the power to legislate in relation to criminal procedure (which is disputed) then the Parliament of Canada can delegate the enforcement power to the provincial Attorneys-General, as long as there is no abdiction. More important is the fact that having delegated the power, they can take it back when they choose to do so. Therefore, if we accept the broad view of s. 91(27), the amendment to s. 2 could be justified as a reacquisition by the Parliament of Canada of power given them by the *B.N.A. Act* which they had delegated to provincial Attorneys-General.

It has been suggested that s.. 91(27) and 92(14) are an example of inter-governmental delegation being called for by the terms of the *B.N.A. Act*, such a delegation of some federal power to the provinces being implicit in s. 92(14):

> Accordingly, ever since 1867, provincial Attorneys-General . . . have administered the federal Criminal Code in their respective Provinces. Moreover, most of the criminal trials under the Criminal Code of Canada are conducted by provincially-appointed magistrates who are *given* their authority in this respect by the procedural section of the Criminal Code of Canada.[123]

Implicit in this argument are the assumptions that s. 91(27) includes the enforcement of criminal law and that the framers of the constitution created simultaneously both s. 92(14) *and* a delegation of some federal power pursuant to s. 91(27). There is a conceptual problem with the notion that provincial Attorneys-General have been prosecuting in their respective provinces since 1867 because of a constitutional imperative for

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[120]*Supra*, footnote 111.

[121]*Supra*, footnote 16, at 541.

[122]Hogg, *supra*, footnote 112, at 224.

[123]Lederman, W.R., "Some Forms and Limitations of Co-operative Federalism", (1967) 45 *Can. Bar Rev.* 409, at 425 (emphasis added).

the Parliament of Canada to delegate having been created by the co-existence of ss. 91(27) and 92(14). Delegation implies that one level of government has power and allows officials of the other level to exercise that power. The framers of the *B.N.A. Act* created both s. 91(27) and s. 92(14), and before we can decide if there is a valid delegation we have to decide the scope of these two heads of power.

In commenting on Lederman's analysis, LaForest has proposed what he considers to be the better view:

> [t]he administration of justice includes the administration of criminal justice, but . . . the federal Parliament can, in the exercise of its paramount power over criminal law, vest the administration of criminal law in persons other than provincial authorities.[124]

While this suggestion circumvents the conceptual problem inherent in the former analysis, it presents once more the difficulties referred to in the discussions of concurrency and paramountcy, *i.e.,* these doctrines make it unnecessary to define the relative scope of ss. 91 (27) and 92(14) and they result in any conflict being resolved automatically in favour of the federal government.

In conclusion, before the nature of s. 2 as a delegation of federal power can be discussed it must first be decided whether s. 92(14) embodies the power to control criminal prosecutions. If we accept the view that the criminal law power is wide enough to enable the Parliament of Canada to delegate prosecutorial control to the provincial Attorneys-General, then the delegation, given the various policy reasons favouring local control of criminal prosecutions[125] would be a welcome one. The *Di Iorio* decision cannot be forgotten however, and it is the emphasis placed by that judgment on the "element of criminal justice" in s. 92(14) which makes the various judicial approaches to a solution of the constitutional issues raised by s. 2 unsatisfactory.

THE CONSPIRACY CASES

In many of the cases in which there was a challenge to the authority of the Parliament of Canada to enact s. 2 the accused had been charged with conspiracy to violate a federal act contrary to s. 423 of the *Criminal Code.*[126] Since the Attorney-General of Canada conducted the prosecutions it would seem inevitable that the courts would be forced to decide which Attorney-General could properly control the prosecution

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[124]LaForest, G., "Delegation of Legislative Power in Canada", (1975) 21 *McGill L.J.* 131, at 133.

[125]For example, the greater accountability of provincial Attorneys-General at the local level, and regional and local differences.

[126]See, *e.g., R.* v. *Pelletier, supra,* footnote 16; *R.* v. *Dunn* (1977), 36 C.C.C. (2d) 495 (Sask C.A.), approved (1980), 52 C.C.C. (2d) 127 (S.C.C.); *R.* v. *Aziz* (1980), 4 C.R. (3d) 299 (Que. C.A.).

of a criminal offence, the assumption being that s. 423 creates such an offence by the very fact of its being enacted as part of the *Criminal Code.* We have seen, however, that the courts have often characterized impugned legislation under an alternative head of power to s. 91(27) *(e.g.,* the federal residual power) in spite of the history and the case interpretation of the legislation. What is surprising is the resort by the courts to such characterization when the offences in question have been Code offences, particularly ss. 115 and 423, thereby exposing to challenge something which seems self-evident: the criminal law basis of Code offences.

The case of *R.*v. *Aziz,*[127] argued before the Supreme Court of Canada in November, 1979, in which the issue was prosecutorial control over the Code offence of conspiracy, might finally force the court to answer the question raised by s. 2 and left unanswered in *Hauser* and in subsequent cases. The question can be disposed of without such a response if the court relies on the decisions in *Parrot* and *Walden* that an offence is not made criminal in nature merely because it is in the *Criminal Code.*[128] If on the other hand, the court accepts the contention of the provinces that the offence of conspiracy can only be characterized as criminal law, then the issue of prosecutorial control of criminal offences will have to be resolved.

A decision that s. 2 is *intra vires* might be given in the final disposition of the *Aziz* appeal if the precedent of *R.* v. *Dunn* is followed. In that case the court was faced with an appeal by the Attorney-General of Canada from an acquittal of the accused, who had been charged with conspiring to traffic in a narcotic. In upholding the constitutionality of the power given to the Attorney-General by s. 2 to control the prosecution of a s. 423 conspiracy to breach a federal statute, the Saskatchewan Court of Appeal held that:

> The Crown in the right of Canada has an inherent right to prosecute offences under federal statutes and neither the provisions of s. 92(14) nor s. 2 of the *Criminal Code* are inconsistent with this right.[129]

The Court of Appeal found strong authority for its decision that the federal government had such an inherent right of enforcement in *R.* v. *Pelletier.* The charge in that case was also conspiracy to traffic in a narcotic and Estey J.A. relied upon the inherent executive authority of the federal government to enforce its own laws as a justification for federal prosecutorial control concluding:

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[127](1978), 4 C.R. (3d) 299 (Que. C.A.).

[128]See, for a reliance on *Hauser* and *Parrot,* the judgment of Esson J. in *R.* v. *Prine et al.,* (unreported), May 12, 1980 (B.C.S.C.).

[129]*Supra,* footnote 128, at 498.

> [t]hat there should be a right in the Attorney-General of Canada to enforce the *Criminal Code* as well as other federal criminal statutes does not appear to offend the theory underlying our constitutional law. . . . [130]

One problem with such an approach is that is ignores the clear language of s. 2 which excludes the federal Attorney-General from *Criminal Code* prosecutions. A more serious defect is that it does nothing to solve the apparent conundrum created by the interface of ss. 91(27) and 92(14). While the inherent executive authority argument night be acceptable with reference to certain federal statutes, any federally enacted criminal statute must be subjected to close scrutiny in light of the right of the provinces to administer criminal justice. This is what Dickson J. had in mind when he commented on the inherent executive authority argument as follows:

> A different situation obtains with respect to s. 91(27) and s. 92(14) because of the specific conferral upon the provinces of the right and responsibility to administer justice, particularly criminal justice. The quarrel here is not over the right of Parliament to enforce its own enactments, but rather, and this bears repeated emphasis, the attempt by Parliament to exclude the provinces from the right to supervise criminal prosecutions.[131]

While Estey J.A. did not address himself to the issue of legislative competence over the prosecution of criminal offences when discussing the inherent executive authority of the federal government, he did recognize the existence of the problem as described by Dickson J. Such a recognition is evident in his comments about concurrency: ". . . s. 2(2) does not purport to grant exclusivity . . . and thus *the most difficult potential issue* is deferred to another day and *another court*."[132] The problem is: for how long can this issue be deferred?

The conspiracy cases and their comments on s. 2 are yet another example of the need for the courts to define s. 92(14) if the constitutional validity of s. 2 is to be clarified. We can hope that such a clarification will be provided by the decision in *R.* v. *Aziz.*

CONCLUSION

There is no doubt that the problems created by the definition of Attorney-General in the *Criminal Code* have been exacerbated by the issue-avoidance approach the courts seem to have taken to most of the s. 2 challenges. The overlap which characterizes the relationship between ss. 91(27) and 92(14), when combined with a lack of case law interpreting the latter section, has apparently obstructed a satisfactory

[130] *Supra*, footnote 16, at 542-543.

[131] *Supra*, footnote 6, at 123.

[132] *Supra*, footnote 16, at 541 (emphasis added).

analysis of the constitutional validity of s. 2. The most desirable solution to the issue would be an interpretation by the Supreme Court of Canada of s. 92(14) and of the authority, if any, which that section gives to the provincial Attorneys-General to exercise prosecutorial control.

While concurrency is in some respects an attractive solution in that it is expedient, such an approach would be superficial and undesirable because it would subvert whatever prosecutorial jurisdiction is comprehended by s. 92(14) without the scope of that head of power having ever been articulated.

There are persuasive policy reasons for giving the federal Attorney-General a greater degree of control over prosecutions than was enjoyed prior to 1969. It is true that some crime is becoming increasingly national and international in scope and is beyond the capabilities of local enforcement. These reasons are not determinative however, for it is also true that much crime is still local in nature and that provincial Attorneys-General are more accountable within their respective provinces for the manner in which prosecutions are carried out than federal officials are or could hope to be.

It has been argued by the proponents of increased federal prosecutorial control that it would be against the basic concept of federalism to give to the provinces control of the prosecution of any federally enacted offence, the rationale being that each legislature should have the authority to enforce its own laws. One of the basic principles of our federal system is the distribution of powers in the constitution; it would equally be an affront to the concept of federalism if we were to ignore the significance of this distribution.

It may be that s. 2 is poorly drafted, since the distinction between Code and non-Code offences in that section, as opposed to a contrast between criminal and non-criminal offences, is not one which makes the relationship of ss. 91(27) and 92(14) easy to discern. Regardless of the way the definition of Attorney-General is drafted, the conclusion is that both the independent existence of s. 92(14) and the history of prosecutorial control indicate that prosecution of *criminal* offences lies within exclusive provincial authority. If there are policy reasons which justify increased federal authority for certain prosecutions, then these should be worked out by the two levels of government. It is suggested that any such co-operative attempt ought to begin with the following question: do we need a dual prosecutorial system in Canada and, if so, to what extent should the federal Attorney-General exercise a role?

We will always come back, however, to the question of the distribution of powers in the constitution. The response of Canadian courts to this question has been discouraging and has not contributed to a solution of the problems created by the increased role the federal Attorney-General has assumed in the control of the prosecution process.

ADDENDUM

Since this manuscript appeared in proof, the decision of the Supreme Court of Canada in *R.* v. *Aziz* became available (27 January 1981). It was thought that this decision might finally provide an answer to the question of which Attorney-General has prosecutorial control over criminal offences. Such as answer was not forthcoming. The Court chose instead to look behind the actual criminal conspiracy charge to the nature of the unlawful act to which the conspiracy related. That act was the importation of narcotics, a subject within the legislative competence of the Parliament of Canada. In unanimously holding that the federal Attorney-General had the authority to control the prosecution of a conspiracy to violate the *Narcotic Control Act,*[133] the Court stated that such prosecutorial control was necessarily incidental to the power to enforce the federal statute. The existence of conspiracy as a distinct criminal offence appears not to have been a factor in the decision, as part of the *Narcotic Control Act,* a section giving the federal Attorney-General the control of a prosecution for a conspiracy to violate that statute. The Court affirmed the decision in *Hauser,* and no comment was made on the desirability of a dual prosecutorial system in Canada.

It seems, therefore, that *Aziz* neither clarified the relationship between ss. 91(27) and 92(14), nor does it assist us in determining which Attorney-General has prosecutorial control over criminal offences.

[133]*Supra,* footnote 68.