COMMENT
CHRONIQUE DE LÉGISLATION

Balancing the Powers to Prosecnte in Canada: Comment on *A.G. Canada* v. *C.N. Transport* and *R.* v. *Wetmore, Kripps Pharmacy*

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The majority opinions of Laskin C.J.C. in *A.G. Canada* v. *C.N. Transport* and *R.* v. *Wetmore, Kripps Pharmacy* held that the constitutional power to prosecute all federal offences, including those enacted under the section 91(27) criminal law power, lies with the federal government. As provincial authorities have traditionally prosecuted section 91(27) offences, notably *Criminal Code* offences, these holdings ostensibly give to Parliament the power to change dramatically the *status quo*. The author examines the argumcnts adopted in both opinions. While she concludes that the minority position of Dickson J. is the more defensible view, she also suggests that a distribution of power based upon the transprovincial nature of the offence would provide a more rational balance.

Dans *P.G. Canada* c. *C.N. Transport* et *R.* c. *Wetmore, Kripps Pharmacy*, la Cour suprême du Canada, par la voix du juge en chef Laskin, a majoritairement décidé qu'il appartenait à la Couronne fédérale de poursuivre toute personne ayant commis une infraction créée en vertu d'un chef de compétence fédéral. Ces deux jugements reconnaissent donc au Parlement fédéral le pouvoir de rompre avec la tradition ayant laissé à la Couronne provinciale la charge d'appliquer le *Code criminel*. Se ralliant aux opinions dissidentes du juge Dickson, l'auteure propose de plus une règle d'interprétation suivant laquelle seul le caractère transprovincial d'une infraction devrait être attributif de la compétence fédérale de poursuivre.

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Synopsis

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Introduction

The executive power to control the prosecution of offences can be an important tool in the implementation of government policy.[1] Effective law enforcement may depend on whether the appropriate level of government

[1]This executive power typically includes the powers to enter a stay of proceedings, take over the conduct of proceedings, prefer indictments, control the mode of trial and, ultimately, control all appeals. For a review of these prosecutorial powers in Canada, see the judgment of Dickson J. in *R.* v. *Hauser* [1979] 1 S.C.R. 984, 1010-3, (1979) 98 D.L.R. (3d) 193 [hereinafter cited to S.C.R. as *Hauser*], and Gourlie, *Role of the Prosecutor: Fair Minister of Justice with Firm Convictions* (1982) 16 U.B.C. L. Rev. 295, 301-2.

A treatment of the two other related executive powers of policing and investigation are in general beyond the scope of this comment. Of course, the issue of which level of government has constitutional authority to provide for these powers is related to the issue of prosecutorial authority. In *Di Iorio* v. *Warden of the Montreal Jail* [1978] 1 S.C.R. 152, (1976) 33 C.C.C. (2d) 289 [hereinafter cited to S.C.R. as *Di Iorio*], Laskin C.J.C. and Dickson J. took positions on the issue of authority over investigation similar to the ones they hold on prosecutorial authority. The majority finding in *Di Iorio* was that the provinces have constitutional authority over the administration of *criminal* justice and therefore can provide for criminal investigation.

exercises this power for any given offence.[2] The determination, then, of whether the provincial or federal government has constitutional authority to provide for criminal prosecutions is crucial.

In 1979, the Supreme Court of Canada in *R.* v. *Hauser*[3] failed to resolve the issue. The Court concluded that the authority to provide for prosecution of offences corresponds generally to the constitutional powers to create those offences as found in sections 91 and 92 of the *Constitution Act, 1867*.[4] The Court answered, in the affirmative, only the narrow question of whether Parliament has authority over prosecutions for violations of federal enactments which do not depend for their validity on the criminal law power in section 91(27). The question left unanswered was which level of government has authority over the prosecution of offences which do depend for their validity solely on the federal criminal law power.

In *Attorney General of Canada* v. *Canadian National Transportation, Ltd*[5] and *R.* v. *Wetmore, Kripps Pharmacy Ltd and Kripps*,[6] the Supreme Court of Canada divided on the question. For the majority in both cases, Laskin C.J.C. held that the power to legislate in respect of *all* criminal prosecution is vested exclusively in Parliament under section 91(27). In his dissenting opinion, Dickson J., as he then was, contended that the provinces under section 92(14) have exclusive jurisdiction over the prosecution of all federal offences which are in pith and substance criminal law.

The implications of the majority view are far-reaching. Prosecutors of offences under the *Criminal Code*[7] have historically been provincial officials. The majority holding of Laskin C.J.C. ostensibly gives to Parliament the power to change this *status quo*. Parliament could invest the federal Attorney

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[2]For example, it has been argued that offences under the *Combines Investigation Act*, R.S.C. 1970, c. C-23, must be prosecuted by the federal Attorney General because the impugned activity is national in scope. See *R.* v. *Hoffmann-La Roche Ltd* (1980) 28 O.R. (2d) 164, 188, (1980) 53 C.C.C. (2d) 1 (H.C.) (*per* Linden, J.). In *Hauser, supra*, note 1, 1032, 1049, Dickson J. argued that prosecution of criminal offences should be maintained in provincial hands because flexibility of administration in response to local conditions is essential.

[3]*Supra*, note 1. For a fuller discussion of the finding in *Hauser*, see *infra*, notes 29 *et seq.* and accompanying text.

[4]30 & 31 Vict., c. 3 (U.K.). For convenience, all subsequent references to a section 91 or section 92 head of power will not be supported by a citation and may be assumed to be to the *Constitution Act, 1867*.

[5](1983) 7 C.C.C. (3d) 449, (1983) 3 D.L.R. (4th) 16, (1983) 49 N.R. 241 [hereinafter cited to C.C.C. as *C.N. Transport*].

[6](1983) 7 C.C.C. (3d) 507, (1983) 2 D.L.R. (4th) 577, (1983) 49 N.R. 286 [hereinafter cited to C.C.C. as *Kripps Pharmacy*].

[7]R.S.C. 1970, c. C-34, as amended [hereinafter *Criminal Code*].

General with prosecutorial power by simple legislation. This comment examines closely the arguments adopted in both opinions, and finds the majority position to be the weaker. Several remarks of the learned Chief Justice cast uncertainty upon his reasoning and suggest that his finding should be read narrowly. The comment explores briefly the reconciling position which distributes power according to the transprovincial nature of the offence in question.

I. Backgrouud

A. The Division of Powers

Sections 91 and 92 of the *Constitution Act, 1867* fail to allocate in an unequivocal fashion the power to prosecute criminal offences. Section 91(27) grants to Parliament the exclusive power to legislate in respect of:

> The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.

The view that Parliament is empowered to provide for the prosecution of criminal offences is supported by the federal power to create such offences. Federal jurisdiction over criminal procedure reinforces this position.

Section 92(14) gives to the provinces exclusive authority to legislate in relation to:

> 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 those Courts.

The interpretation in favour of provincial authority over criminal prosecution is that "Administration of Justice" includes criminal prosecution, and thus should be read as limiting section 91(27).

B. Historical Perspective — Legislation and Practice

Although not decisive, a review of past legislation in respect of criminal prosecution and an examination of which level of government has in fact prosecuted criminal offences has some importance. As Dickson J. reiterated in *Hauser*,[8] it is not "that jurisdiction in the strict sense can come through

[8]*Supra*, note 1, 1028.

consent or laches; however, history and governmental attitudes can be helpful guides to interpretation".[9]

Prior to Confederation, the Attorney General for each colony had the responsibility for the prosecution of criminal offences. These powers remained vested in the provincial Attorneys General by virtue of sections 129 or 135 of the *Constitution Act, 1867*.[10]

For the one hundred years from Confederation to the *Criminal Law Amendment Act, 1968-69*,[11] Parliament passed legislation which appeared to acknowledge this provincial authority. The first federal enactment on criminal procedure in 1869, by the plain meaning of its words, suggests a

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[9]*Di Iorio, supra*, note 1, 206. Dickson J. also said in *Kripps Pharmacy, supra*, note 6, 519: "A page of history may illuminate more than a book of logic." Compare the remarks of Estey J.A., as he then was, in *R.* v. *Pelletier* (1974) 4 O.R. (2d) 677, 691, (1974) 18 C.C.C. (2d) 516 (C.A.) [hereinafter cited to O.R. as *Pelletier*] (leave to appeal to the S.C.C. refused [1974] S.C.R. X).

[10]Section 129 provides that:

> Except as otherwise provided by this Act, all Laws in force in Canada, Nova Scotia, or New Brunswick at the Union, and all Courts of Civil and Criminal Jurisdiction, and all legal Commissions, Powers, and Authorities, and all Officers, Judicial, Administrative, and Ministerial, existing therein at the Union, shall continue in Ontario, Quebec, Nova Scotia, and New Brunswick respectively, as if the Union had not been made; subject nevertheless (except with respect to such as are enacted by or exist under Acts of the Parliament of Great Britain or of the Parliament of the United Kingdom of Great Britain and Ireland,) to be repealed, abolished, or altered by the Parliament of Canada, or by the Legislature of the respective Province, according to the Authority of the Parliament or of that Legislature under this Act.

Section 135 states:

> Until the Legislature of Ontario or Quebec otherwise provides, all Rights, Powers, Duties, Functions, Responsibilities, or Authorities at the passing of this Act vested in or imposed on the Attorney General, Solicitor General, Secretary and Registrar of the Province of Canada, Minister of Finance, Commissioner of Crown Lands, Commissioner of Public Works, and Minister of Agriculture and Receiver General, by any Law, Statute, or Ordinance of Upper Canada, Lower Canada, or Canada, and not repugnant to this Act, shall be vested in or imposed on any Officer to be appointed by the Lieutenant Governor for the Discharge of the same or any of them; and the Commissioner of Agriculture and Public Works shall perform the Duties and Functions of the Office of Minister of Agriculture at the passing of this Act imposed by the Law of the Province of Canada, as well as those of the Commissioner of Public Works.

The relevance of section 135 is questionable, at least with regard to legislative jurisdiction. See *C.N. Transport, supra*, note 5, 459-60, 469, *per* Laskin C.J.C.

[11]S.C. 1968-69, c. 38, s.2.

simple affirmation of the pre-Confedcration powers.[12] Section 3(b) of the *Criminal Code, 1892*[13] defined Attorney General as:

> the Attorney-General or Solicitor-General of any province in Canada in which any proceedings are taken under this Act, and, with respect to the North-west Territories and the district of Keewatin, the Attorney-General of Canada. . . .

This definition remained virtually unchanged for seventy-five years.

Of course it is possible to take the view that by such legislation Parliament delegated, or at least purported to delegate, prosecutorial authority over criminal offences to the provincial Attorneys General. Not surprisingly, this was the view espoused by Laskin C.J.C. in *C.N. Transport.* The argument is that it was merely "practical accomodation" to allow the pre-Confederation practice to continue, and that federal affirmation of this practice did not in any way jeopardize federal authority over the prosecution of federal criminal law.[14] In *Hauser*, Spence J. went even further and suggested that it was only because of this federal legislation that the provincial Attorneys General had authority at all to prosecute criminal offences.[15]

Legislation by the provinces in the field of criminal prosecution is the subject of some controversy. The Attorney General of Canada alleged in *Kripps Pharmacy* and *C.N. Transport* that the provinces have never attempted to assert any legislative authority over criminal prosecutions,[16] and Laskin C.J.C. apparently accepted this submission.[17]

The assertion is not entirely true. There are indeed provincial statutes in this field, albeit comparatively recent ones for the most part, which lay claim to provincial authority. For example, two Ontario statutes, noted by Dickson J. in *Kripps Pharmacy*,[18] clearly aim to delegate to provincial officials authority in criminal prosecutions. These are the *Ministry of the*

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[12]See, *e.g., An Act respecting Procedure in Criminal Cases, and other matters relating to Criminal Law*, S.C. 1869, c. 29, s. 28. For a discussion of this and other contemporaneous federal legislation, see *C.N. Transport, supra*, note 5, 460, *per* Laskin C.J.C. and *Hauser, supra*, note 1, 1031-2, *per* Dickson J.

[13]S.C. 1892, c. 29, s. 3(b).

[14]*C.N. Transport, supra*, note 5, 463. See also the learned Chief Justice's remarks at p. 471.

[15]*Hauser, supra*, note 1, 1003.

[16]*Kripps Pharmacy, supra*, note 6, 521.

[17]*C.N. Transport, supra*, note 5, 463. See also his remarks at p. 461.

[18]*Supra*, note 6, 521-2.

Attorney General Act[19] and the *Crown Attorneys Act*.[20] Further, as Dickson J. also noted: "Similar legislation is of course in force in other provinces."[21]

The view that the provinces never asserted their authority prior to these enactments is countered with the statement that there simply has never been a need for such legislation. The provinces have held prosecutorial authority since Confederation, and federal legisation recognized such authority for over one hundred years. Pre-Confederation practice simply continued without the need of further provincial legislation.[22]

Both the preceding arguments are glaring examples of circular reasoning. If the provinces have always had the authority, then specific legislation was never required and federal legislation has merely "recognized" this provincial power. If Parliament has had since Confederation authority over criminal prosecution, then this power has merely been delegated to the provinces for the one hundred years following Confederation. Both statements merely beg the ultimate question.

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[19]R.S.O. 1980, c. 271. Section 5(d) of this *Act* states that the Attorney General of Ontario

> shall perform the duties and have the powers that belong to the Attorney General and Solicitor General of England by law or usage, so far as those duties and powers are applicable to Ontario, and also shall perform the duties and have the powers that, up to the time of the *British North America Act, 1867* came into effect, belonged to the offices of the Attorney General and Solicitor General in the provinces of Canada and Upper Canada and which, under the provisions of that Act, are within the scope of the powers of the Legislature;

This provision was first passed in *The Department of Justice Act*, 1968-69, S.O. 1968-69, c. 27, s. 5(d).

[20]R.S.O. 1980, c. 107. Section 12(b) of this *Act* provides:

> The Crown attorney shall aid in the local administration of justice and perform the duties that are assigned to Crown attorneys under the laws in force in Ontario, and, without restricting the generality of the foregoing, every Crown attorney shall, ...
> (b) conduct, on the part of the Crown, preliminary hearings of indictable offences and prosecutions for indictable offences,
> (i) at the sittings of the Supreme Court where no law officer of the Crown or other counsel has been appointed by the Attorney General,
> (ii) at the court of general sessions of the peace,
> (iii)at the county or district court judges' criminal court, and
> (iv)before provincial judges in summary trials of indictable offences under the *Criminal Code* (Canada)....

The origin of section 12 extends through many changes, codifications and re-enactments. In substance, the provision pre-dates Confederation. It was first consolidated after Confederation as *The Local Crown Attorneys Act*, R.S.O. 1877, c. 78, s. 9.

[21]*Kripps Pharmacy, supra*, note 6, 522. The learned Justice does not refer to any specific legislation, but see, for example, *Department of the Attorney General Act*, R.S.A. 1980, c. D-13, s. 2(e), *Attorney General Act*, R.S.B.C. 1979, c. 23, s. 2(e), *An Act Respecting the Ministère de la Justice*, R.S.Q. 1977, c. M-19, s. 3(c) and *An Act Respecting Attorney-General's Prosecutors*, R.S.Q. 1977, c. S-35, s. 4(c).

[22]This was the view of Dickson J. in *Kripps Pharmacy, supra*, note 6, 522.

While some federal statutes prior to 1969 purported to give limited prosecutorial power to federal officials,[23] it was not until the *Criminal Law Amendment Act, 1968-69* that the ultimate challenge to provincial prosecutorial authority arose. This *Act* amended the definition of "Attorney General" in section 2(2) of the *Criminal Code*:

> "Attorney General" means the Attorney General or Solicitor General of a province in which proceedings to which this Act applies are taken and, with respect to
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> (a) the Northwest Territories and the Yukon Territory, and
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> (b) proceedings instituted at the instance of the Government of Canada and conducted by or on behalf of that Government in respect of a violation of or conspiracy to violate any Act of the Parliament of Canada or a regulation made thereunder other than this Act,
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> means the Attorney General of Canada and, except for the purposes of subsections 505(4) and 507(3), includes the lawful deputy of the said Attorney General, Solicitor General and Attorney General of Canada. . . .

The actual effect and validity of this amendment soon became the object of much judicial dispute.

C. Authorities

The constitutional validity of most of the pre-1969 legislation unfortunately was never tested in the courts. The authorities from this period are therefore scant; in the cases that were litigated, support can be found for both the provincial and federal sides of the present debate.[24] The post-1969 case law is perhaps more instructive.

The passage of the *Criminal Law Amendment Act, 1968-69* raised numerous issues, and the first to be addressed concerned the precise meaning and effect of the new definition of "Attorney General".

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[23]See, for example, the legislation referred to by Laskin C.J.C. in *C.N. Transport, supra*, note 5, 458, 460-1.

[24] In *Hauser, supra*, note 1, 1034-44, Dickson J. carefully examined the limited pre-1969 case law and concluded at page 1048:

> Among the older cases, in particular [*A.-G.* v. *Niagara Falls Int'l Bridge Co.* (1873) 20 Gr. 34 and *R.* v. *St. Louis* (1897) 1 C.C.C. 141, 6 Que. Q.B. 389], there are clear statements to the effect that the provincial Attorney General is the representative of the Crown responsible for the conduct and supervision of criminal proceedings. In support of the federal position, one finds at best [*Proprietary Articles Trade Ass'n* v. *A.-G. Can.* [1931] A.C. 310, [1931] 2 D.L.R. 1 (P.C.) and *Reference Re Dominion Trade and Industry Commission Act* [1936] S.C.R. 379, [1936] 3 D.L.R. 607], neither of which provides any basis for a claim to constitutional jurisdiction over the Attorney General's role.

In *R.* v. *Miller*[25] the accused was charged with an offence contrary to the *Bankruptcy Act*[26] and with the *Criminal Code* offence of disposing of property with the intention to defraud creditors.[27] The Quebec Court of Appeal interpreted the new section 2(2) as follows:

> (a) When proceedings are instituted in a Province pursuant to the *Criminal Code*, the bill of indictment must be preferred and the proceedings conducted by the Attorney-General of the Province;
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> (b) when proceedings are instituted in the Northwest Territories or in the Yukon Territory, "Attorney General" means the Attorney-General of Canada;
>
> (c) when proceedings are instituted in a Province in respect of a violation of an Act of the Parliament of Canada other than the *Criminal Code*, the bill of indictment can be preferred, and the proceedings conducted by the Attorney-General of the Province or by the Attorney-General of Canada. . . .[28]

The Supreme Court of Canada expressly approved this interpretation in *Hauser*, and noted further that federal intervention in a prosecution results in the exclusion of provincial authority.[29] Section 2(2) therefore clearly gives the Attorney General of Canada a real and substantial role in the prosecution of certain federal offences.

A number of other issues were settled before *C.N. Transport* and *Kripps Pharmacy* came to be litigated, and it is helpful to summarize these briefly. First, executive authority to enforce legislation generally follows the power to legislate found within sections 91 and 92.[30] With regard to prosecutorial powers, the provinces may make provision for provincial offences and *in general* Parliament can provide for prosecution of federal offences.[31] Second, exceptions do exist to this general rule on executive authority — "mainly in respect of judicial appointments".[32] Third, if an exception exists for prosecutorial authority, the real distinction for the purposes of constitutional law lies between section 91(27) offences and other federal offences and *not*

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[25](1975) 27 C.C.C. (2d) 438, [1975] C.A. 358 [hereinafter cited to C.C.C. translation].

[26]R.S.C. 1970, c. B-3, s. 169.

[27]S. 350.

[28]*R.* v. *Miller*, *supra*, note 25, 444. The Court of Appeal therefore concluded that the Attorney General of Canada could not prosecute the *Criminal Code* charge. The Court of Appeal also held that the question of the constitutional validity of the amendment did not arise because Parliament did not attempt to alter the jurisdiction of the provincial Attorneys General. Instead, the enactment gave the federal Attorney General concurrent jurisdiction.

[29]*Hauser*, *supra*, note 1, 991-2, *per* Pigeon J. Dickson J. came to a similar conclusion at pp. 1008-10.

[30]*Hauser*, *supra*, note 1, 993, *per* Pigeon J., and 1053, *per* Dickson J.

[31]*Hauser*, *supra*, note 1, 1053-4, *per* Dickson J.

[32]*Hauser*, *supra*, note 1, 993, *per* Pigeon J.

between *Criminal Code* and non-*Criminal Code* offences.[33] (Section 2(2) makes this latter distinction.) Finally, following the general rule, it has become clear that Parliament has at minimum the constitutional jurisdiction to invest federal officials with the power to prosecute offences validly enacted under a section 91 head of power other than section 91(27).[34]

The one question remaining — which level of government has authority to prosecute section 91(27) offences — was not confronted directly until *C.N. Transport* and *Kripps Pharmacy*. Leading up to these two cases were three lower court opinions, and the Supreme Court judgments in *Hauser*. While they failed to resolve the question, their findings shed some light on the matter.[35]

In *R.* v. *Pelletier*,[36] the accused appealed a conviction of conspiracy to commit an offence contrary to the *Narcotic Control Act*.[37] One ground of appeal was the argument that the Attorney General of Canada, the prosecutor in the case, did not have any authority, since the *Act* was criminal law and thus depended upon section 91(27) for its validity. For the Ontario Court of Appeal, Estey J.A. appeared to assume that the *Narcotic Control Act* was criminal law in nature.[38] He decided that the purported delegation in section 2(2) to the federal Attorney General of authority to prosecute

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[33]*Hauser*, *supra*, note 1, 992, *per* Pigeon J. and 1014, *per* Dickson J.

[34]*Hauser*, *supra*, note 1, 996, *per* Pigeon J. and 1053-4, *per* Dickson J. Two other issues appear to have been resolved. First, a statute which could be validly enacted under s. 91(27) is still enforceable by a federal prosecutor so long as that statute is *also* supportable under another s. 91 head. See *R.* v. *Hoffmann-La Roche Ltd* (1981) 33 O.R. (2d) 694, 729-31, (1981) 62 C.C.C. (2d) 118 (C.A.) [hereinafter cited to O.R. as *Hoffmann-La Roche*] and *C.N. Transport*, *supra*, note 5, 504, *per* Dickson J. Second, the difficult problem of conspiracies was settled. In general, non-*Criminal Code* federal statutes rely on the conspiracy provision in s. 423(1) of the *Criminal Code* to supplement the substantive offences found in such other federal statutes. This is made possible by s. 27(2) of the *Interpretation Act*, R.S.C. 1970, c. I-23. *R.* v. *Aziz* [1981] 1 S.C.R. 188, (1981) 57 C.C.C. (2d) 97 decided that a conspiracy charge, even if the information is laid under s. 423(1) of the *Criminal Code*, is most closely associated with the statute wherein the substantive offence is found. Therefore, if the Attorney General of Canada could prosecute offences laid under a statute (because the statute was supportable under a s. 91 head other than s. 91(27)), he could also prosecute conspiracies to commit such offences.

[35]These four cases are: *Pelletier*, *supra*, note 9; *R.* v. *Pontbriand* [1978] C.S. 134, (1978) 39 C.C.C. (2d) 145 [hereinafter cited to C.S. as *Pontbriand*]; *Hauser*, *supra*, note 1; and *Hoffmann-La Roche*, *supra*, note 34. These are the cases considered relevant by Laskin C.J.C. in *C.N. Transport*, *supra*, note 5, 466.

[36]*Supra*, note 9.

[37]R.S.C. 1970, c. N-1, s. 4(1) [hereinafter *Narcotic Control Act*].

[38]This is the interpretation of *Pelletier* taken in *Hoffmann-La Roche*, *supra*, note 34, 718. *Hauser*, *supra*, note 1, later established that the *Narcotic Control Act* was supportable under the "Peace, Order and good Government" federal power.

criminal offences was valid on the ground that *both* the provincial and federal levels have concurrent jurisdiction in this field:

> On the one hand, the Province, under the guise of "administration of justice" or the included authority to "constitute criminal courts", has the authority to legislate (at least until Parliament expands the *Criminal Code* prosecutorial functions to exclude the provincial function), with reference to the appointment of a prosecutor in provincial criminal Courts.
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> On the other hand, Parliament, by reason of the combination of exclusive sovereignty in criminal law and criminal procedure, and by its overriding authority in matters properly related to "Peace, Order and good Government", has jurisdiction to legislate with reference to the prosecutorial function at least to the extent that a manifest national interest invokes its "Peace, Order and good Government" authority. In that event the inherent and heretofore largely somnambulant executive function lies in support of the enforcement of the *Criminal Code* by the Attorney-General of Canada and his agents.[39]

In *R.* v. *Pontbriand*,[40] which also dealt with offences under the *Narcotic Control Act*, the Quebec Superior Court came to the opposite conclusion, on the ground that section 92(14) includes the administration of criminal justice:

> [T]he powers and privileges of the Attorney General to conduct, supervise and control criminal prosecutions are more than a matter of simple procedure but go to the very heart of the administration of criminal justice. The right to legislate in relation to those powers and privileges was, by sections 92.14 and 135 of the *British North America Act, 1867*, reserved to the provincial legislatures. Parliament, having the right to legislate on the procedure in criminal matters, may add to those powers and privileges but cannot take them away. In particular, Parliament cannot create its own Attorney General and seek to give him rights relating to the administration of criminal justice similar in nature and scope to those exercised by the Attorney General at the time of Confederation. Since the definition of "Attorney General" in section 2 of the *Criminal Code* purports to do just this, it is to that extent *ultra vires*.[41]

In *R.* v. *Hauser*, after the Alberta Court of Appeal had also held that section 2(2) was *ultra vires*,[42] the Supreme Court of Canada had an opportunity to resolve finally the section 91(27) issue. Pigeon J., for the majority, however, concluded that the *Narcotic Control Act* was supportable under the federal "Peace, Order and good Government" power,[43] and therefore

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[39]*Pelletier, supra*, note 9, 703. It should be noted here that *Hoffmann-La Roche, supra*, note 34, picks up on the phrase which begins "at least" (see *infra*, notes 58 *et seq.* and accompanying text).

[40]*Supra*, note 35.

[41]*Pontbriand, supra*, note 35, 141.

[42](1977) 7 A.R. 89, (1977) 37 C.C.C. (2d) 129 (S.C., App. Div.).

[43]*Hauser, supra*, note 1, 997-1001. To some this was a surprising conclusion: see, *e.g.*, Henkel, Comment, (1980) 18 Alta L. Rev. 265, 275 and Hovius, *Hauser: Narcotic Drugs, Criminal Law, and Peace, Order and Good Government* (1980) 18 U.W.O. L. Rev. 505, 517-8.

he did not have to deal with the section 91(27) question.[44] The majority's narrow *ratio*, then, was that Parliament can *at least* invest a federal official with the authority to prosecute offences which are validly enacted under a federal power other than section 91(27).[45]

Spence J., in a separate opinion, concurred in the majority's result, but his reasons were broader. Giving a sweeping interpretation to "Procedure in Criminal Matters" in section 91(27), he concluded that this provision allows federal prosecutorial authority over *all* federal offences.[46] Spence J. then went on to make the curious statement that "it is difficult to understand how much of the federal legislative field could be dealt with efficiently by other methods."[47] The statement is curious, because a strong argument in favour of provincial authority is precisely that certain federal offences, namely local or intraprovincial criminal offences, are most effectively dealt with if investigation, policing and prosecution are conducted by local authorities.

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[44]*Hauser, supra,* note 1, 992, 1001. Pigeon J. relied upon Lord Atkin's "second principle" (of only deciding that which is necessary) in *Proprietary Articles Trade Ass'n* v. *A.-G. Can.* [1931] A.C. 310, 316-7, [1931] 2 D.L.R. 1 (P.C.). The author prefers the viewpoint expressed by Laskin in *The Role and Functions of Final Appellate Courts: The Supreme Court of Canada* (1975) 53 Can. Bar Rev. 469, 475:

> Now, even more in its supervisory role than in its heretofore more traditional appellate role, the Supreme Court's main function is to oversee the development of the law in the courts of Canada, *to give guidance in articulate reasons* and, indeed, direction to the provincial courts and to the Federal Court of Canada on issues of national concern or of common concern to several provinces, issues that may obtrude even though arising under different legislative regimes in different provinces. This is surely the paramount obligation of an ultimate appellate court with national authority. [Emphasis added]

[45]*Hauser, supra,* note 1, 996.

[46]*Hauser, supra,* note 1, 1004-5. Spence J. states:

> It first must be noted that s. 91(27) grants to the federal Parliament jurisdiction in "the Procedure in Criminal Matters" and that power is, by virtue of the concluding sentence of s. 91, exclusive to Parliament. Secondly and most important, s. 92(14) is by its very words limited to administration of justice "in the Province". I do not contend that those words mean the administration of justice in civil matters only for, in the same enumerated head, both "civil" and "criminal" are expressly mentioned and contrasted and it would have been inevitable that the draftsman would have inserted the word "civil" in the phrase "in the Province" if such a limitation were intended. But I am of the opinion that the words "in the Province" indicate that the legislator was concerned with the operation of the judicial machinery within the confines of the province and not with the vital matter of who should enforce and prosecute breaches of federal statues.

[47]*Hauser, supra,* note 1, 1003-4. This passage of the judgment is confusing. The proposition about efficiency clearly contradicts the idea of giving prosecution to the federal level for offences enacted under *all* heads in s. 91. The Court in *Hoffmann-La Roche, supra,* note 34, relies on this very remark in order to narrow the judgment: see *infra* note 63 and accompanying text.

Dickson J. dissented in *Hauser* in both reasoning and result. Holding that the *Narcotic Control Act* relied solely upon section 91(27) for its constitutional validity,[48] he necessarily turned to the question of authority over the prosecution of a section 91(27) offence. He concluded that the provinces should have exclusive jurisdiction. Agreeing that the general rule under the *Constitution Act, 1867* is that prosecutorial authority follows legislative authority,[49] Dickson J. contended that an exception exists in favour of the criminal law power. The reason is that there is a "special relationship" between sections 91(27) and 92(14).[50] According to this view, section 92(14) must include the administration of *criminal* justice and therefore limits the scope of section 91(27).[51] As Dickson J. in *C.N. Transport* and *Kripps Pharmacy* remained consistent with his view in *Hauser*, these earlier remarks merit close attention:

> The inescapable conclusion to be drawn from the legislative history, governmental attitudes, and case law is that the supervisory functions of the Attorney General in the administration of criminal justice have been considered to fall to the provinces under s. 92(14), as opposed to the competing federal power under s. 91(27).[52]

The basic argument, then, is that the *Constitution Act, 1867* created a "subtle balance" which should not be disturbed;[53] the prosecution of criminal offences should remain in provincial hands where the administration is more responsive to local conditions.[54] In short, the federal executive should not be given such a broad power, susceptible of abuse in a central government's hands.[55] Furthermore, Dickson J. rejected the notion of concurrent jurisdiction in this matter, because the issue is "too sharp" to fit easily within the double aspect doctrine.[56] Because of the doctrine of paramountcy, "the 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."[57]

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[48]*Hauser, supra*, note 1, 1054 *et seq.*

[49]See *supra*, notes 30-1 and accompanying text.

[50]*Hauser, supra*, note 1, 1053.

[51]*Hauser, supra*, note 1, 1017. See also pp. 1026-7 and 1049.

[52]*Hauser, supra*, note 1, 1048. Dickson J. discusses the legislative history at pp. 1028-33 and the case law at pp. 1034-47. For a summary of the older cases, see *supra*, note 24.

[53]*Hauser, supra*, note 1, 1032 and 1049.

[54]*Hauser, supra*, note 1, 1032 and 1049.

[55]*Hauser, supra*, note 1, 1032.

[56]*Hauser, supra*, note 1, 1023.

[57]*Hauser, supra*, note 1, 1025. See also the comments of Dickson J. at pp. 1049-50.

In *Hoffmann-La Roche*,[58] the Ontario Court of Appeal held that Parliament had jurisdiction over the prosecution of offences under the *Combines Investigation Act*,[59] even if this *Act* depends upon section 91(27) for its constitutional validity.[60] Martin J.A., for the Court, refused to decide whether Parliament had jurisdiction to enforce "*all* federal enactments creating criminal offences".[61] Instead, he narrowed his finding by underscoring the national interest at stake in this case:

> I am satisfied that, *at the least*, Parliament has concurrent jurisdiction with the Provinces to enforce federal legislation validly enacted under head 27 of s. 91 which, like the *Combines Investigation Act*, is mainly directed at suppressing in the national interest, conduct which is essentially transprovincial in its nature, operation and effects, and in respect of which the investigative function is performed by federal officials pursuant to powers validly conferred on them and using procedures which only Parliament can constitutionally provide.[62]

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[58]*Supra*, note 34.

[59]R.S.C. 1970, c. C-23 [hereinafter *Combines Investigation Act*].

[60]The Court held *obiter* (p. 728), that the *Combines Investigation Act* is also supportable under the federal power of "Peace Order and good Government" (pp. 728-33) and under s. 91(2) "The Regulation of Trade and Commerce" (pp. 733-6).

[61]*Hoffmann-La Roche, supra*, note 34, 720.

[62]*Hoffmann-La Roche, supra*, note 34, 720. In the following passage from pages 722-3 of Mr Justice Martin's judgment, one finds some indication of what might constitute a "transprovincial" test. The elements one might isolate are: transprovincial nature of the conduct; necessity of enforcement by one level of government or the other; and efficacy of enforcement:

> The transprovincial dimension of the conduct sought to be suppressed, and the vital necessity for the federal Government to have the capacity to initiate and conduct the prosecution of offences under the *Combines Investigation Act* is well stated by the learned trial Judge (at p. 188 O.R., p. 25 C.C.C., p. 29 D.L.R., p. 171 C.P.R.):
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> > The capacity of the federal Government to prosecute its own criminal laws, if this is felt to be desirable, is particularly necessary in the field of unfair competition legislation, for to forbid that might impair the efficacy of these laws. This type of criminal activity is often national in scope. Sometimes it may have an international dimension. These crimes frequently involve large corporations, which operate on a national and international scale. To prohibit the federal Government from prosecuting these offenders might allow some of them to go unprosecuted in certain circumstanees, for there is little incentive for the Attorney-General of any one Province to assume, at the enormous costs often involved, the burden of prosecuting unlawful aetivities which may be largely perpetrated in other Provinces. The federal Governmnent must, therefore, be permitted to prosecute criminal activity of national scope, if it feels it must for the national good.
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> Where a federal enactment, like the *Combines Investigation Act*, is mainly directed to the suppression as criminal of activities which are essentially transprovincial in nature, as distinct from being merely local or provincial in nature, and in respect of which the investigative function is performed by federal officers, Parliament, in my view, has concurrent jurisdiction with the Provinces to enforce such legislation, even though in a particular case the activities giving rise to the charge occur within a single Province. In the present case, however, the activities giving rise to the charge were, in fact, transprovincial.

As Laskin C.J.C. in *C.N. Transport* referred to the reasons of Martin J.A. as "unassailable", close attention should be paid to two other passages in *Hoffman-La Roche.* Martin J.A. addressed the reasons given by Estey J.A. in *Pelletier* and Spence J. in *Hauser*, and again suggested that their holdings of federal authority should be restricted to transprovincial matters:

> It may be that some of the language of Estey J.A. and Spence J. is capable of supporting a wider view of the field in which Parliament has concurrent jurisdiction with the Provinces in relation to the enforcement of federal enactments creating criminal offences than is necessary for the decision in this case. Both the learned Justices in the cases before them were, however, dealing with a federal enactment, the *Narcotic Control Act*, which they considered was directed at conduct that was transprovincial or national in its dimension.[63]

Martin J.A. thus found that the relevant provisions of the *Combines Investigation Act* were clearly directed at transprovincial conduct and that, for efficient enforcement, the federal government must be able to prosecute offences under this *Act.*[64] He further cited with approval the remark made by Dickson J. in *Hauser* that there is "a certain unity and cohesion between the three aspects of law enforcement, namely, investigation, policing, and prosecution, which would be imperilled if the investigatory function were discharged at one level of government and the prosecutorial function at another".[65]

II. *C.N. Transport* and *Kripps Pharmacy*

In *C.N. Transport*[66] and *Kripps Pharmacy*,[67] the long unresolved question came squarely before the Supreme Court of Canada: to the extent that federal legislation depends solely upon the section 91(27) criminal law power for its constitutional validity, is Parliament competent to authorize the Attorney General of Canada to prosecute offences under that legislation? The issue was particularly significant in *Kripps Pharmacy* because the *Act* in issue, the *Food and Drugs Act*,[68] was found to depend for its validity solely upon the section 91(27) criminal law power.[69] The statute under scrutiny in *C.N. Transport*, the *Combines Investigation Act*, evidently was found to

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[63]*Hoffmann-La Roche, supra*, note 34, 719-20.
[64]*Hoffmann-La Roche, supra*, note 34, 722.
[65]*Hauser, supra*, note 1, 1032, quoted in *Hoffmann-La Roche, supra*, note 34, 727.
[66]*Supra*, note 5.
[67]*Supra*, note 6.
[68]R.S.C. 1970, c. F-27.
[69]*Kripps Pharmacy, supra*, note 6, 511, *per* Laskin C.J.C. and 518, *per* Dickson J.

be supportable also under the "Trade and Commerce" power in section 91(2).[70]

A. The Majority View of Laskin C.J.C.

Laskin C.J.C. gave the majority judgment in both cases.[71] Early in his opinion in *C.N. Transport*, he adopted a proposition which forms the major premise of his entire argument. This is his assertion that no distinction can be made between criminal offences and other federal offences. Curiously enough the proposition was accepted without further discussion:

> I may say that I find it impossible to separate prosecution for offences resting on a violation of valid trade and commerce legislation and those resting on a violation of the federal criminal law. . . .Indeed, counsel for the respondent Canadian National Transportation, Limited [J.J. Robinette] was bold enough — and I think he was logically right — to sweep all offences under federal legislation [together]. . .[72]

If one accepts this view, then only two, radically different, conclusions are possible. Either the provinces have constitutional authority to prosecute all federal offences, criminal and non-criminal, or the provinces have no prosecutorial power at all in respect of any federal offences. Since *Hauser* had already decided that Parliament has authority to provide for prosecution of non-criminal law offences,[73] it would follow necessarily that the provinces can not have total prosecutorial authority, and therefore must have none.[74]

Unfortunately Laskin C.J.C. did not demonstrate *why* he believed his major premise to be "logically right". It is submitted, then, with the greatest of respect for the late Chief Justice, that the majority opinion rests on a crucial assumption which is inadequately defended. The rhetorical device of defining a problem as having only two mutually-exclusive solutions often leads to fallacy, and in the present case is unconvincing at best. The majority opinion failed to address the alternate view advanced by Dickson J. in

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[70]This was the view of three members of the Court: *C.N. Transport, supra*, note 5, 504, *per* Dickson J. and 506, *per* Beetz and Lamer JJ. Because Laskin C.J.C., speaking for himself and three other members of the Court, argued that there could be no distinction between s. 91(27) and other federal powers (see *infra* notes 72-4 and accompanying text) he apparently felt that it was unnecessary to decide under what federal power the *Combines Investigation Act* was supportable. However, Laskin C.J.C. wrote his decision "assuming that the *Combines Investigation Act* rests only on the criminal law power" (p. 457).

[71]Laskin C.J.C. wrote the majority judgment in both *C.N. Transport, supra*, note 5, and *Kripps Pharmacy, supra*, note 6. His reasoning is set out in the former case; he merely makes a conclusion in the latter judgment and refers to his reasoning in *C.N. Transport.*

[72]*C.N. Transport, supra*, note 5, 457.

[73]See *supra*, note 45 and accompanying text.

[74]Laskin C.J.C. did not set out this final obvious step.

Hauser, which is that there is a "special nexus" between sections 91(27) and 92(14).[75]

In reviewing the history of post-Confederation prosecution, Laskin C.J.C. naturally took the view that provincial criminal prosecutors merely exercised authority which had been delegated from Parliament. He noted further that certain powers were exercised by federal officials.[76] Laskin C.J.C. also examined, in *C.N. Transport*, some of the older cases. While recognizing that there are cases which support a finding of provincial authority, he contended that nothing in them prevented a conclusion in favour of federal jurisdiction.[77] In the end, however, the learned Chief Justice turned the question into one of statutory interpretation:

> Although it is possible to tease from the case-law some support for a limitation on federal prosecutorial authority, the issue must be decided on the basis of the language of ss. 91 and 92 and the principles of federal exclusiveness and paramountcy embodied therein.[78]

Laskin C.J.C. decided that it is impossible to read section 92(14) as including prosecutorial authority.[79] He agreed that this provision does narrow section 91(27), but only with regard to "the Constitution, Maintenance, and Organization of Provincial Courts . . . of Criminal Jurisdiction".[80] In his view the term "administration of Justice" in section 92(14) cannot be read to include criminal justice.[81] Parliament's authority rests on the general power over criminal law or the specific power over criminal procedure.[82] Parliament's claim therefore overrides any provincial authority.

It is submitted that this argument on interpretation is unconvincing. It is interesting, first, to note that Laskin C.J.C. paraphrased section 92(14) in a manner curiously favourable to his position. He stated that the section "grants jurisdiction over the administration of justice, including procedure in civil matters and including also the constitution, maintenance and organization of civil and criminal provincial courts".[83]

As section 92(14) actually grants provincial jurisdiction over "Administration of Justice in the Province", an argument can be made based on

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[75]See *supra*, notes 49-50 and accompanying text. See also *infra*, notes 101-2 and accompanying text.

[76]See *supra*, notes 11-7 and accompanying text.

[77]*C.N. Transport*, *supra*, note 5, 458-9, 462-3.

[78]*C.N. Transport*, *supra*, note 5, 471.

[79]*C.N. Transport*, *supra*, note 5, 462.

[80]This is the express exception found in s. 92(14) of the *Constitution Act, 1867*.

[81]*C.N. Transport*, *supra*, note 5, 462.

[82]*C.N. Transport*, *supra*, note 5, 462. Laskin C.J.C. did not expressly state where the federal authority is found.

[83]*C.N. Transport*, *supra*, note 5, 462.

the very words which Laskin C.J.C. omits from his version. The argument is that federal authority is justifiable for transprovincial offences, but the provinces must have authority over that group of offences which are essentially intra-provincial. The use of the words "in the Province" in section 92(14), it is submitted, suggests that this was precisely the view shared by the framers of the Constitution.

It is not suggested that such an argument on language is determinative. Indeed, an argument based *solely* on the interpretation of the words in sections 91(27) and 92(14) is necessarily no more than an exercise in semantics. The issue of allocating the powers to prosecute is too complex to be reduced to such a simplistic debate.

With regard to a possible analysis of policy and efficiency of law enforcement, Laskin C.J.C. was remarkably brief. He seemed to acknowledge that these ends would be better served by a finding of provincial authority, but avoided the issue:

> It would be one thing to assert that practical considerations would best be served by recognizing provincial prosecutorial authority in the general run of criminal law offences, but this is a matter to be considered by the Legislature that has constitutional authority to enact the relevant provisions. It cannot of itself determine where that constitutional authority lies.[84]

Considering the recent case law, Laskin C.J.C. quoted extensively and approved the decisions of *Pelletier* and of Spence J. in *Hauser*.[85] He dismissed in more summary fashion the views expressed in *Pontbriand* and the judgment of Dickson J. in *Hauser*.[86]

Laskin C.J.C. also made a number of remarks which make his reasoning more confusing. In discussing *Hoffmann-La Roche*, he stated: "There are a number of passages in the reasons of Martin J.A. which I fully endorse".[87] In his concluding remarks, Laskin C.J.C. decided that:

> it is sufficient in my view to rely on the *Pelletier* case, the reasons of Justice Spence in *Hauser* and the reasons of the Ontario Court of Appeal in the *Hoffmann-La Roche* case. . . .I would add that the reasons of Mr Justice Martin

[84]*C.N. Transport, supra*, note 5, 471. This statement, it is submitted, is simply unsatisfactory. It is true that "practical considerations" are not the *sole* criteria. But the Constitution was not made in a vacuum; nor are consitutional decisions. Beyond the passage quoted, Laskin C.J.C. failed to discuss the practical consequences of his decision.

[85]*C.N. Transport, supra*, note 5, 466-8, 472-4, 478.

[86]*C.N. Transport, supra*, note 5, 468-70, 474-5. The author submits, with the highest respect, that the diseussion by Laskin C.J.C. (at pp. 474-5) of the judgment of Dickson J. is obseure, perhaps off the point and certainly inadequate considering the extensive discussion given to this issued by Dickson J. in *Hauser*.

[87]*C.N. Transport, supra*, note 5, 475.

> in *Hoffmann-La Roche* are in my view unassailable and, in themselves, would justify responding affirmatively to the federal claim of prosecutorial authority.[88]

Among the passages quoted from *Hoffmann-La Roche* were those which restrict that decision's holding to "transprovincial" offences which are validly investigated by federal officials.[89] Much of this reasoning would seem to contradict his own broad reasoning, and therefore it is not clear whether Laskin C.J.C. meant to import all, or only part, of the *Hoffmann-La Roche* decision. In short, it is not certain how widely Laskin C.J.C.'s decision should be interpreted. These questions are particularly relevant with regard to *C.N. Transport*, because both *C.N. Transport* and *Hoffmann-La Roche* were concerned with offences under the *Combines Investigation Act*.

In *Kripps Pharmacy*,[90] Laskin C.J.C. found that the relevant sections of the *Food and Drugs Act* were properly assigned to the federal criminal law power.[91] Accordingly, it would appear that he simply applied his finding from *C.N. Transport*. Stating that the "same considerations apply and for the reasons there given", Laskin C.J.C. found that the federal government had prosecutorial authority.[92]

B. The Dissenting View of Dickson J.

In *C.N. Transport* and *Kripps Pharmacy*, Dickson J. made it clear that he had not changed his position since *Hauser*,[93] and held that only the provinces have authority to provide for the prosecution of offences supportable solely by section 91(27).[94] Thus in *C.N. Transport* he concurred in result with Laskin C.J.C., but only on the basis that the relevant sections of the *Combines Investigation Act* were supportable under section 91(2) as well as under section 91(27). Parliament therefore has the authority to delegate the prosecution of these offences to the federal Attorney General.[95] In

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[88]*C.N. Transport*, *supra*, note 5, 478.

[89]*C.N. Transport*, *supra*, note 5, 475-8.

[90]*Kripps Pharmacy*, *supra*, note 6. Three judges concurred with Laskin C.J.C. Beetz and Lamer J.J. concurred in result (p. 527), giving the reason that they felt "bound" by the majority judgment in *C.N. Transport*.

[91]*Kripps Pharmacy*, *supra*, note 6, 511.

[92]*Kripps Pharmacy*, *supra*, note 6, 511-2.

[93]*Supra*, note 1. For the reasons of Dickson J. in *Hauser*, see *supra*, notes 48-57 and accompanying text.

[94]*C.N. Transport*, *supra*, note 5, 504-5.

[95]*C.N. Transport*, *supra*, note 5, 504. Because the legislation is valid under s. 91(2) and under s. 91(27), there is concurrent federal and provincial prosecutorial authority. By virtue of the doctrine of federal paramountcy, s. 2(2) of the *Criminal Code* may exclude the provincial Attorneys General (504). Dickson J. was careful to emphasize that he had not changed his views in *Hauser* against concurrency of authority when the legislation can only be supported under s. 91(27): see *supra*, notes 56-7, and accompanying text.

Kripps Pharmacy, Dickson J. held that Parliament could not empower the Attorney General of Canada to prosecute the particular *Food and Drugs Act* offences in question,[96] because these provisions were supportable only under section 91(27).[97]

In general Dickson J. relied upon his reasoning in *Hauser*,[98] reiterating and developing several fundamental points. He reaffirmed his view that section 92(14) includes the administration of *criminal* justice as well as *civil* justice. While this interpretation, in his opinion, had been conclusively adopted in an earlier case,[99] he concluded that a careful examination of the wording of section 92(14) also leads to this conclusion. For, "in s. 92(14) the words 'civil' and 'criminal' are expressly mentioned and contrasted; if any attenuation of the word 'justice' had been intended the draftsman could readily have inserted the word 'civil' before 'justice'."[100]

Continuing his interpretation of sections 92(14) and 91(27), Dickson J. addressed the proposition that one should "sweep all offences under federal legislation" together. This view is logically incorrect, he argued, on the ground that a "special nexus" exists between sections 92(14) and 91(27):[101]

> There is. . .a special relationship between ss. 92(14) and 91(27), a relationship that cannot be said to obtain between s. 92(14) and the other heads of power in s. 91. Sections 91(27) and 92(14) together effect a careful and delicate division of power between the two levels of government in the field of criminal justice. Constitutional authority to enact substantive criminal law . . . as well as authority to pass laws in relation to procedure in criminal matters is vested in the federal government by s. 91(27). Authority over the administration of criminal justice, including the constitution, maintenance and organization of courts of criminal jurisdiction, is given to the provinces by s. 92(14). The singling out and express conferral on the provinces under s. 92(14) of responsibility to constitute, maintain and organize courts for *the administration of one particular area of federal law, namely, criminal law*, is unique. For this reason also there is a "special nexus" between s. 92(14) and 91(27).[102]

Dickson J. did not restrict his reasoning to statutory analysis. Instead he presented four additional points to support his position. First, because of the "geographical enormity" of Canada, and the infant state of the transportation and communication infrastructures in 1867, the draftsmen of the

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[96]*Kripps Pharmacy, supra*, note 6, 518-26.

[97]*Kripps Pharmacy, supra*, note 6, 518.

[98]*Kripps Pharmacy, supra*, note 6, 519. For the reasons of Dickson J. in *Hauser*, see *supra*, note 48-57 and accompanying text.

[99]*Kripps Pharmacy, supra*, note 6, 519-20.

[100]*Kripps Pharmacy, supra*, note 6, 521.

[101]*Kripps Pharmacy, supra*, note 6, 523-4.

[102]*Kripps Pharmacy, supra*, note 6, 524 [emphasis added].

Constitution Act, 1867 "were not thinking in terms of a centralized prosecutorial authority."[103] Second, provincial prosecution of criminal offences is essential to ensure "a careful weighing of the multitude of local considerations".[104] Third, "the need for local sensitivity in the enforcement of the criminal law has been supplemented historically, by a desire to keep law enforcement out of the hands of the central government" to ensure that the exercise of such power would not be seen as politically tainted.[105] Finally, Dickson J. recalled from his judgment in *Hauser* that "there is a certain unity and cohesion between the three aspects of law enforcement, investigation, policing and prosecution, which would be imperilled if the investigation function were discharged at one level of government and the prosecutorial function at the other level".[106]

B. The "Transprovincial" Solution

It is submitted that there exists a position which would reconcile the majority and minority views, and which provides the most appropriate balancing of prosecutorial power between the two levels of government. It is also submitted that this position constitutes the correct interpretation of sections 92(14) and 91(27). The view, which could be called the transprovincial solution, would read into section 92(14) the authority to prosecute all criminal offences which are intra-provincial or local in scope. This jurisdiction would include the great majority of offences under the *Criminal Code* and therefore the majority of section 91(27) offences. The federal government would have the authority to prosecute offences which seek to suppress conduct which is transprovincial or national in scope. Such jurisdiction would include, almost by definition, all offences under *Acts* which are supportable under section 91 heads of power other than section 91(27).

The advantages of this position would be numerous. Chief Justice Laskin's reliance on the "transprovincial" reasoning of Martin J.A. would be respected. Mr Justice Dickson's concerns about effective law enforcement would be respected. Provincial authorities would be responsible for policing, investigation and prosecution in respect of local offences, while the federal

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[103]*Kripps Pharmacy, supra*, note 6, 525.
[104]*Kripps Pharmacy, supra*, note 6, 524.
[105]*Kripps Pharmacy, supra*, note 6, 525.
[106]*C.N. Transport,supra*, note 5, 504-5.

government would have jurisdiction over policing, investigation and prosecution concerning all offences which, in the national interest, seek to suppress certain conduct.[107]

Since this transprovincial position is appropriately attributed to Martin J.A., it is regrettable that Chief Justice Laskin, who regarded the reasons of Mr Justice Martin as "unassailable", did not deal more carefully with the argument. What remains particularly unclear in Laskin C.J.C.'s judgment is the extent to which he relies on the broad, but unsubstantiated, proposition that all federal offences must be treated together. Had Laskin C.J.C. explicitly applied the "transprovincial" reasoning, his judgment would not contain this lack of clarity, and he likely would have arrived at the same results in both cases. In *C.N. Transport* the conduct sought to be suppressed was a conspiracy to lessen competition in the *interprovincial* transportation of general merchandise. Such an offence would clearly meet the test of being transprovincial in scope and should therefore be prosecuted by federal officials. In *Kripps Pharmacy*, it would seem convincing to argue that the *Food and Drugs Act* is aimed at suppressing, in the national interest, various kinds of conduct and therefore also meets the criteria set out in *Hoffman-La Roche.*

Conclusion

The distribution of authority to prosecute offences is an important and complex constitutional issue. A balance must be struck which respects the interests of both levels of government and which ensures effective law enforcement. A cursory reading of the majority in *Kripps Pharmacy* and *C.N. Transport* suggests that Parliament now has the power to provide for federal prosecution of all offences, including all offences validily enacted under section 91(27). In short, simple federal legislation could uproot the *status quo* which has existed and worked well since prior to Confederation.

A more careful reading raises a number of questions about the scope of the majority view. Of the two opinions, it is submitted that the stronger position is articulated by Mr Justice Dickson, who held that local control of the prosecution of criminal offences is essential to effective and balanced law enforcement.[108] Laskin C.J.C. did not discuss such "practical considerations", arguing that these matters are of concern to the legislature that

[107]While the aim of this comment is not to develop conclusively the "transprovincial test", an appropriate starting point would be the elements articulated by Mr Justice Martin in *Hoffman-La Roche, supra*, note 62. Thus it would seem correct to examine: (a) the transborder nature of the conduct sought to be suppressed, (b) the necessity and (c) the efficacy of enforcement by one level of government over the other.

[108]See *supra*, notes 53-5, 104-5, and accompanying text.

has the constitutional authority.[109] With great respect, this position is unsatisfactory. The *Constitution Act, 1867* was not enacted in a vacuum; the Fathers of Confederation were greatly concerned with "practical considerations". Furthermore, there are serious weaknesses in the reasoning of the majority judgment. The premise that all federal offences must be treated alike is not defended satisfactorily.

A reasonable solution is available in the assertion that *C.N. Transport* and *Kripps Pharmacy* did not hold anything beyond what was decided in *Hoffmann-La Roche*: Parliament has authority, at least, to provide for the prosecution of offences directed at conduct which is transprovincial in nature. While there may be some difficulties with this test, they are not insurmountable. The value of this test lies in alleviating concerns about the effective enforcement of certain criminal law offences which are national in scope, and at the same time allowing constitutional protection of provincial prosecutorial control.

For all of the above reasons, it is submitted that a reversion of prosecutorial authority to the federal government would be unfortunate. In this regard, it is altogether fitting to close with an eloquent submission of the Attorney General of Saskatchewan, which Dickson J. adopted in *Kripps Pharmacy*:

> The balance struck between section s. 91(27) and 92(14) of the *Constitution Act* is a reflection of the faith the framers of the Constitution placed in a co-operative, federalist approach to addressing an issue both of national dimension and of local concern. On the one hand, Canada's founders wished to guard against a proliferation of different, and possibly inconsistent, regional criminal enactments. On the other hand, they wanted to ensure that centrally enacted criminal laws were flexibly and sensitively administered in light of local needs and conditions. Their solution was to divide jurisdiction over criminal justice, placing the power to enact criminal prohibitions and procedures in the hands of the federal Parliament while giving to the provinces the authority to administer those laws in response to local circumstances.
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> Over the years, the fundamental wisdom of these founders has been borne out. Parliament has effectively exercised its jurisdiction to ensure national uniformity of criminal laws and procedures, while each of the provincial Legislatures, through its Attorney General, has acted to ensure that those laws and

[109]See *supra*, note 84 and accompanying text.

procedures were applied responsibly and responsively to individual cases. The field of criminal justice has proved to be one of federalism's quiet success stories, providing for a "subtle balance" of national interests with local needs and concerns.

Now it is suggested that this balance can be upset.[110]

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[110]*Kripps Pharmacy, supra,* note 7, 526.