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THE PROSECUTORIAL POWER IN CANADA

by

PRISCILLA ELIZABETH SUSAN JOAN KENNEDY

A THESIS

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ABSTRACT

The constitutional basis for a federal prosecutorial power has long been the subject of litigation in Canada. Prosecutorial authority is an aspect of the executive function of government. It is the ability to execute and apply the laws passed by Parliament. Executive authority, with judicial and legislative authority, compose the three indispensible components of every sovereign body. In a federal constitution there must be a division of power between the governments which make up that federation. Sections 91 and 92 of the Constitution Act, 1867, divide the jurisdiction over legislative powers. There is, however, no express division of executive authority in the Constitution Act, 1867. Accordingly, executive authority must be commensurate with legislative jurisdiction. The Parliament of Canada must possess the authority to execute all laws which it may validly enact.

There is no conflict of legislative jurisdiction between sections 91(27), the criminal law power, and 92(14), the administration of justice. The only relationship between these two sections is that the constitution maintenance and organization of courts of criminal jurisdiction is expressly included in section 92(14) and expressly excluded from section 91(27). Logically, the administration of justice should include the adminstration of all types of justice, civil or criminal. Were this section to apply to federal prosecutions, it should apply to all federal prosecutions. The distinction between the prosecution of criminal and non-criminal federal offences which many courts have adopted since Confederation was arbitrary. The Supreme Court of Canada finally laid to rest this distinction in Canadian National Transport.[1] This decision held that there was no special nexus between sections 91(27) and 92(14).

An examination of the pre-Confederation discussions reveals no intention to separate the executive function from legislative authority. The Constitution Act, 1867

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[1] (1983) 49 N.R. 241.

does not contain any provision explicit enough to vary such a basic constitutional principle. The history of the prosecutorial process does not indicate such a separation of executive authority from legislative jurisdiction. Nor does a careful reading of the case law that developed since 1867 illustrate any basis for a division of the right to execute and apply laws from the law-making power of Parliament. The Parliament of Canada possesses the prosecutorial power to enforce all of its laws including criminal laws.

Table of Contents

I. INTRODUCTION

The purpose of this thesis is to examine the constitutional basis for the federal prosecutorial power in Canada. Prosecutorial authority is an aspect of the executive function of government. Under section 7 of the Constitution Act, 1867 all executive power in Canada is declared to be vested in the Queen. Within a federal system of government, the executive power must be divided between the governments which make up the federation. This division should be specified in the constitution but in the Constitution Act, 1867, it was not explicitly divided. Sections 91 and 92 of the Constitution Act, 1867 divide the subject matters of legislative authority between the Dominion and the provinces but no reference is made to the equivalent executive power. To function effectively, each legislative body must have the executive power to enforce the laws it enacts. This thesis will examine the proposition that all heads of power in section 91 impliedly include the requisite authority to enforce all laws enacted under those heads of power. In particular, section 91(27) "The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters" will be examined to determine whether the execution or administration of federal criminal laws is within the scope of the Parliament of Canada. Necessary to this proposition, is the corollary proposition, that section 92(14) "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" was not intended to include the enforcement of federal laws. The major practical implication of who possesses the prosecutorial power in Canada relates to the manner in which the criminal justice system functions. If the Parliament of Canada can not ultimately control the enforcement of its laws, then Dominion legislation may be neutralized by provinces choosing not to enforce those laws. This proposition describes an anomolous political system, a legislative body without the requisite executive authority. An examination of constitutional authority over prosecutions will determine if this unique system was actually intended by the Fathers of Confederation. The ramifications for Canadian criminal procedure make a thorough analysis of this power necessary.

A lengthy examination of the pre-Confederation Conferences and the resolutions prepared by the delegates to those Conferences will be presented in order to illustrate the intention of the Fathers of Confederation regarding Confederation and, in particular, the criminal law power in the proposed union. The changes made by the British draftsmen are important to consider because of their effect on the overall scheme that the delegates had planned to create. The objective of Sir John A. Macdonald and others to create a federal union with all of the advantages of a

legislative union may explain some of the complexities in the Confederation which was created. It may well be that this objective was impossible to attain.

The often noted references to local input into the administration of criminal justice will be considered in light of the stated intention of the Fathers of Confederation to avoid the pitfalls of the system of criminal law in place in the United States, where the criminal law power is vested in each individual state. In the American system, a citizen is faced with a variety of offences, the severity of those offences and punishments for those offences changing as he or she passes from state to state. This type of complexity in the criminal law may make knowledge of what is and is not a crime beyond the grasp of the average citizen.

The history of prosecutions in England and in Canada will be examined in order to understand the nature of the prosecutorial power and how it was utilized during the nineteenth century. The system of private prosecutions in existence in the British North America colonies prior to Confederation provides the historical context for the lack of detailed consideration given by the delegates to the criminal justice system. During the mid-nineteenth century, private prosecutions were regarded as a safeguard of civil liberties within the English criminal justice system. Any abuse of authority by any official could be prosecuted by the average citizen. The evolution from this very

decentralized system, where every citizen prosecuted, to the present system of public prosecutions will be analyzed to determine the implications these significant changes had for the prosecutorial power.

This analysis will also reveal where the ultimate control of the prosecutorial power rested. The history of the office of attorney general will be considered, with special emphasis on the constitutional basis for his special powers such as the nolle prosequi. An examination of the parliamentary control exercised over the office of attorney general reveals the constitutional check on the possibility of abuse in the exercise of the attorney general's discretion.

The post Confederation legislation enacted by the Dominion Parliament under the criminal law power will be examined to determine how the Parliament of Canada has changed the prosecutorial process and if these changes indicate an assumed legislative jurisdiction over the prosecution of all federal offences. The enactment of, and amendment to, the Criminal Code resulted in a significant change to the prosecutorial process. This change included a shift from private to public prosecutors. The implications of these changes will be examined because of their relevance to the federal claim of jurisdiction in this area.

The case law from this post Confederation period will be analyzed to determine how the role of the Attorney General of Canada has developed vis a vis the provincial

attorneys general. An early distinction in the case law between the prosecution of criminal offences and the prosecution of non-criminal offences will be considered. It is important to determine whether there is any logical, historical or constitutional basis for this distinction.

Note is made of the pattern of challenges to prosecutorial authority. In the first one hundred years after Confederation, the authority of provincial attorneys general to prosecute was challenged in cases such as Attorney General v. Niagara Falls International Bridge Co.[1], Loranger, Attorney General of Quebec v. Montreal Telegraph Co.[2], and Regina v. Yuhasz[3]. Following the amendment of section 2 of the Criminal Code in 1968, challenges to the right of the federal Attorney General to prosecute started to arise in cases such as Regina v. Pelletier[4] and Regina v. Hauser[5]. Another development in the case law following the 1968 amendment to section 2 of the Code was the distinction drawn between the prosecution of criminal offences contained in the Criminal Code and the prosecution of offences under other federal acts, such as the Income Tax Act. These cases involved the prosecution of offences which previously had been characterized as criminal in nature by the courts. This distinction gave rise to a period of recharacterization by the courts. Finally, the

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[1] (1874) 20 Grants Chancery Reports 34.
[2] [1882] The Legal News 429.
[3] (1960) 128 C.C.C. 172.
[4] (1974) 18 C.C.C. (2d) 516.
[5] [1977] 6 W.W.R. 501; [1979] 1 S.C.R. 984.

recent decisions of the Courts of Appeal and Supreme Court of Canada will be analyzed in an attempt to offer a conclusive answer to the question of who has control of the prosecutorial power in Canada.

II. HISTORY

"A page of history may illuminate more than a book of logic"[6]. Unfortunately, the page of history which provides the record of the events leading up to Confederation is incomplete. In particular, there is very little discussion of the criminal law power and no discussion of how the Fathers of Confederation thought that it would be enforced. Just as sparse as the historical record of proceedings leading up to the passage of the Constitution Act, 1867 is the history of the practices relating to prosecutions during this period. Although custom and usage will not provide constitutional authority, they may give some indication of the historical context in which the Constitution Act, 1867 was enacted and hence may help us define the often general and brief pronouncements of legislative jurisdiction found in sections of the Constitution Act, 1867.

A. PRE-CONFEDERATION CONFERENCES

The Charlottetown and Quebec City Conferences

Delegates of the Provinces of Canada, New Brunswick, Nova Scotia, and Prince Edward Island met for the first time to discuss a federal union of the British America colonies at Charlottetown in September, 1864.[7]

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[6] Mr. Justice Dickson, as he then was, Regina v. Wetmore (1983) 49 N.R. 286 at 295.

[7] Letter of Lieutenant Governor Gordon (New Brunswick) to Edward Cardwell September 26, 1864 "Documents on the Confederation of British North America: a compilation based on Sir Joseph Pope's Confederation Documents supplemented by

Originally, the Charlottetown Conference was intended to be a meeting to discuss the legislative union of the maritime provinces; however members of the Canadian cabinet were introduced to the delegates[8] and they proposed the formation of a federal state. According to Lieutenant Governor Gordon's account, one of the outcomes of the Conference was a proposal for the division of powers between a new federal legislature and the local legislatures. This proposal took the following form:

"To the federal Legislature is given the control of

Trade

Currency

Banking

General taxation

---

[7](cont'd)other official material." G.P. Browne (ed.) Toronto: McClelland and Stewart, 1969, p. 44. See Appendix 1. According to Browne, there are three sources of material on the Charlottetown Conference: Gordon's letter to Cardwell which was written after the delegates left Charlottetown and contains information obtained in conversations with the delegates; a letter from George Brown to his wife dated September 13, 1864; and papers written by Sir Charles Tupper as minutes of the Conference. These papers are in the Public Archives of Canada.

[8] No explicit reason is given in any of the accounts of the Charlottetown Conference as to why the Canadian Cabinet, that is, the Cabinet from the Provincial Parliament for Canada, was attending a meeting called to discuss a maritime union. It would appear that the Canadian Cabinet had devised a scheme for federation of the British America colonies as early as 1858. Correspondence had circulated between the colonies and the Colonial Office. As far as can be determined there were no actual meetings held between the colonies until members of the Canadian Cabinet 'invited themselves' to attend the Charlottetown meeting. Correspondence between the Governor General of Canada and the Lieutenant Governor of Prince Edward Island was brought to the attention of the delegates just prior to the introduction of the delegates from the Government of Canada. Id. pp. 1-50.

Interest and Usury Laws

Insolvency and Bankruptcy

Weights and Measures

Navigation of rivers and lakes

Light Houses

Sea Fisheries

Patent and Copyright Laws

Telegraphs

Naturalization

Marriage and Divorce

Postal Service

Militia and Defence

Criminal law

Intercolonial Works

The local legislatures are to be entrusted with the care of

Education (with the exception of Universities)

Inland Fisheries

Control of public lands

Immigration

Mines and Minerals

Prisons

Hospitals and Charities

Agriculture

Roads and Bridges

Registration of Titles

Municipal Laws[9]

This division of powers reflected the opinion of the delegates that the most important areas of legislative authority should rest with the central legislature and that the provincial legislatures should have their law making powers gradually limited until they were more like municipalities[10].

The delegates completed their meetings in Charlottetown on September 7, adjourning to meet in Halifax, Nova Scotia on September 10th and 11th and then in St. John, New Brunswick on September 16th. Final debate on Dr. Charles Tupper's resolution, which proposed legislative union of the maritime provinces, was adjourned until October 10th, 1864 when a meeting was to be held in Quebec City.

From the very first discussions proposing a federal union, it was intended that legislative jurisdiction over

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[9] Id. p. 49.

[10] "This scheme involved as an essential preliminary the entire union of the three Maritime Provinces. It was proposed on this being effected that Upper Canada, Lower Canada and the three Maritime Province [sic] should each possess a local Legislature, the powers of which should be carefully restricted to certain local matters to be specified by the act establishing the Confederation, whilst all general Legislation should be dealt with by, and all undefined powers of legislation reside in, a central Legislature which should in fact be not only a federal assembly charged with the consideration of a few topics specially committed to its care, but the real Legislature of the country, whilst the local assemblies were to be allowed to sink to the position of mere municipalities. I need hardly remark on the importance of the distinction between a federative system in which all powers except those specially conceded are retained by the Local Legislatures, and one where all powers are vested in the central body except such as are explicitly conferred upon the municipal assemblies." Id. p. 42.

the criminal law would rest with the federal Parliament. However, the assignment of legislative authority over the administration of justice did not become a topic of discussion until the motion of the Honourable Oliver Mowat, Postmaster-General of Canada, at the Quebec Conference.[11] This motion proposed that the provincial legislatures have, inter alia, jurisdiction over the administration of justice. Debate on the Honourable Oliver Mowat's motion was

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[11] Minutes of the Proceedings in Conference of the Delegates from the Provinces of British North America. October, 1864. Sir Joseph Pope (ed.) "Confederation Documents Hitherto Unpublished Documents Bearing on the British North America Act." Toronto:Carswell, 1895. pp. 1-88.

Sir Joseph Pope was Sir John A. Macdonald's biographer (literary executor is the term he uses to describe himself). He was willed a large collection of papers relating to the discussions leading up to Confederation during the period from 1864-67. These are the papers that are reproduced in this book.

The motion of October 24, 1864 at page 27 reads "That it shall be competent for the Local Legislatures to make laws respecting -

1. Agriculture
2. Education
3. Emmigration
4. The sale and management of public lands, excepting lands held for general purposes by the General Government
5. Property and civil rights, excepting those portions thereof assigned to the General Legislature
6. Municipal institutions
7. Inland fisheries
8. The construction, maintenance and management of penitentiaries and of public and reformatory prisons
9. The construction, maintenance and, management of hospitals, charities and eleemosynary institutions
10. All local works
11. The administration of justice and the constitution, maintenance and organization of the courts, both of civil and criminal jurisdiction
12. The establishment of local offices, and appointment, payment and removal of local officers
13. The power of direct taxation
14. Borrowing money on the credit of the Province
15. Shop, saloon, tavern and auctioneer licenses
16. Private and local matters."

continued on October 25, 1864 and the motion was carried excluding paragraph 11 - the administration of justice - "the consideration of which was postponed"[12]. Unfortunately there is no further record of discussions relating to paragraph 11, but at some point in the proceedings it received approval since it was included as section 43(17) of the "Report of Resolutions Adopted at a Conference of Delegates ... held at the City of Quebec, 10th October, 1864."[13]

On October 21, 1864 the delegates discussed the resolution[14] defining the powers of the general or federal legislature. The Honourable John A. Macdonald, Attorney General West of the Province of Canada, moved the resolution and the discussion immediately centred upon customs duties. Following brief consideration of some of the other subsections, the discussion turned to the criminal law (subsection 26)[15] but in fact not much was actually said about criminal law except that it should be a "common system" and "one statutory law":

> "Mr. John A. Macdonald - We should discuss the appointment of the judiciary, and as to local and supreme judiciary. In whom should the appointment be vested?
>
> Mr. Tupper - It is of especial value to have a common system of jurisprudence. That is impossible

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[12] Id. p. 29
[13] See Appendix 2.
[14] Id. s.29.
[15] Pope, supra n. 11, pp. 81, 82.

on account of Lower Canada. But as near as possible it should be attempted.

Mr. John A. Macdonald - I am glad to hear that Mr. Tupper and Mr. McCully's views accord with mine. We may have one statutory law, one system of courts, one judiciary, and eventually one bar.

Mr. Mowat - I quite concur in the advantages of one uniform system. It would weld us into a nation. We must, however, provide that the Judges should be appointed and paid by the General Government. But if Lower Canada is excepted, she will still have a voice in deciding for the other provinces."

With slight amendment[16] the motion carried. Although there were further discussions on the division of powers, nothing relevant to the criminal law or the administration of justice was recorded. On October 29, 1864 the Report of Resolutions was approved by the Conference.

Debate in the Provincial Parliament of Canada

Several months passed before the Resolutions adopted at the Quebec City Conference were presented to the Legislative Council of Canada[17] by the Honourable Sir E.P. Tache, Premier of Canada. The entire Third Session of the Eighth Provincial Parliament of Canada, which ran from February 3,

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[16] Paragraph 27 - Roads and Bridges - was struck from the resolution.

[17] The Legislative Council of Canada, at the time of the Third Session Eighth Provincial Parliament, consisted of 29 elected members and 9 Life Members from Upper and Lower Canada.

1865 to March 14, 1865 was devoted to debate on the proposed Resolutions.

Several reoccurring concerns expressed in these debates are pertinent to this analysis. The members of the Legislative Assembly were loyal to the concept of British parliamentary democracy. They did not want to adopt the political system and constitution of the United States. They also considered the possible annexation of the British American provinces by the United States as a threat pressuring them to unite. It is clear from the debates in the Provincial Parliament that a legislative union was desired by all except Lower Canada. In order to ensure the survival of Lower Canada's French culture, and its system of civil law, certain concessions were made. In particular, the members of the Provincial Parliament considered that two heads of power proposed for the Local Legislatures were sufficient to ensure the retention of the civil law:

> s."43(15) Property and civil rights, excepting those portions thereof assigned to the General Parliament."
>
> (17) The Administration of Justice, including the Constitution, Maintenance and Organization of the Courts, both of Civil and Criminal Jurisdiction, and including also the Procedure in Civil Matters."[18]

Other than these matters relating to the preservation of Lower Canada's institutions, the members of the Assembly

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[18]Quebec Resolutions.

repeatedly expressed their desire to make the general Parliament strong.

Section 29 of the Resolutions outlined the legislative powers of the General Parliament of the Federated Provinces and Section 43 listed the law-making powers of the Local Legislatures[19]. The Attorney General West used these words to outline the criminal law power to the Legislative Assembly[20] on February 6, 1865:

> "The criminal law too - the determination of what is a crime and what is not and how crime shall be punished - is left to the General Government. This is a matter almost of necessity. It is of great importance that we should have the same criminal law throughout these provinces - that what is a crime in one part of British America, should be a crime in every part - that there should be the same protection of life and property as in another. It is one of the defects in the United States system, that each separate state has or may have a criminal code of its own, - that what may be a capital

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[19] Refer to Appendix 2.

[20] The Legislative Assembly consisted of 77 elected members from Upper and Lower Canada. There were two Attorneys General - the Hon. G.E. Cartier, A.G. East and the Hon. J.A. Macdonald, A.G. West; two Solicitors General - the Hon. James Cockburn, S.G. West and the Hon. H.L. Langevin, S.G. East; a President of the Council, the Hon. George Brown (Upper Canada); a Minister of Finance, the Hon. A.T. Galt (Lower Canada); a Provincial Secretary, the Hon. William McDougall (Upper Canada); a Minister of Agriculture, the Hon. T. D'Arcy McGee (Lower Canada); and a speaker, the Hon. Lewis Walbridge (Upper Canada). The remainder of the Ministry were from the Legislative Council.

> offence in one state, may be a venial offence, punishable slightly, in another. But under our Constitution we shall have one body of criminal law, based on the criminal law of England, and operating equally throughout British America, so that a British American, belonging to what province he may, or going to any other part of the Confederation, knows what his rights are in that respect, and what his punishment will be if an offender against the criminal laws of the land. I think this is one of the most marked instances in which we take advantage of the experience derived from our observations of the defects in the constitution of the neighboring Republic.[21]

Macdonald's emphasis, as Tupper's and Mowat's had been at the Quebec Conference, was on one uniform, common system of criminal law that operated equally throughout the proposed union of British America colonies. If one theme is evident throughout Macdonald's speech, it is that the American experience was to be avoided at all costs. Implicit in his desire to have the criminal law "operating equally throughout British America" is the need for equal enforcement of the criminal law in each of the united provinces. Even if federal legislation were to prescribe a

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[21] "Parliamentary Debates on the subject of the Confederation of the British North American Provinces. 3rd Session, 8th Provincial Parliament of Canada." Quebec: Hunter, Rose & Co., Parliamentary Printers, 1865. pp. 40, 41.

minimum punishment, the object of equal operation could still be undermined by criminal offences never being charged or alternatively by a writ of nolle prosequi putting an end to a prosecution if such powers were in the hands of provincial attorneys general. If Macdonald and the other framers of the Constitution intended to have uniformity then it is probable that the general Parliament must also have been meant to have control over the process of executing the criminal law. The objective of uniformity of the criminal law system was to be echoed in the House of Lords.[22]

Nowhere in the debates of the Provincial Parliament, is there any discussion of how members envisioned the criminal law being enforced to ensure its uniformity of operation. The problem of the mechanics of enforcement by the central government was not an insignificant one in a developing nation with a sparse population, poor communication and only slow means of transportation. Perhaps one can look for some small guidance on this problem in Macdonald's outline of how the system of pardons was expected to work. Resolution 44[23] provided that the Lieutenant-Governor of each Province would grant pardons "subject to any instructions he may from time to time receive from the General Government". Pardons are an exercise of the royal prerogative of mercy, and in this sense bear no resemblance to the act of executing a law; however Macdonald's focus was on the practical difficulties of having a central government figure (the

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[22] See "Passage of the Act", infra.
[23] See Appendix 2.

Governor-General) be responsible for pardons when it might take months before the Governor-General was made aware of the need for a pardon. By having a local figure (the Lieutenant-Governor) actually grant pardons (subject to instructions from the Governor-General), it was more likely that the pardon would be speedily granted. The Governor General would have ultimate control over the process.[24]

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[24] "Objection has been taken that there is an infringement of the Royal prerogative in giving the pardoning power to the local governors who are not appointed directly by the Crown, but only indirectly by the Chief Executive of the Confederation, who is appointed by the Crown. This provision was inserted in the Constitution on account of the practical difficulty which must arise if the power is confined to the Governor General. For example, if a question arose about the discharge of a prisoner convicted of a minor offence, say in Newfoundland, who might be in imminent danger of losing his life if he remained in confinement, the exercise of the pardoning power might come too late if it were necessary to wait for the action of the Governor General. It must be remembered that the pardoning power not only extends to capital cases but to every case of conviction and sentence, no matter how trifling - even to the case of a fine in the nature of a sentence on a criminal conviction. It extends to innumerable cases, where, if the responsibility for its exercise were thrown on the General Executive, it could not be so satisfactorily discharged. Of course there must be, in each province, a legal adviser of the Executive, occupying the position of our Attorney General, as there is in every state of the American Union. This officer will be an officer of the Local Government; but, if the pardoning power is reserved for the Chief Executive, there must, in every case where the exercise of the pardoning power is sought, be a direct communication and report from the local law officer to the Governor General. The practical inconvenience of this was felt to be so great, that it was thought well to propose the arrangement we did, without any desire to infringe upon the prerogatives of the Crown, for our whole action shews [sic] that the Conference, in every step they took, were actuated by a desire to guard jealously these prerogatives. (Hear, hear) It is a subject, however, of Imperial interest and if the Imperial Government and Imperial Parliament are not convinced by the arguments we will be able to press upon them for the continuation

The arguably relevant point that can be drawn from the proposed scheme for pardons is that even if officers of the local government had day to day control over the issuance of pardons, the central government had the ultimate supervisory power over the process. Analogously, the enforcement of the criminal law would have to occur on the local level because of practical difficulties such as those noted earlier. In order to ensure that the criminal law operated equally in all provinces, the entire process of administration of the criminal law would have to be subject to instructions from the general Parliament.

Macdonald commented that the "legal adviser of the Executive, occupying the position of our Attorney General ... will be an officer of the Local Government"[25]. This statement of Macdonald's is confusing since it would appear from the context that the Executive to which he was referring was the Governor General in Council. Only in the context of a scheme which envisioned the use of provincial officers to carry out federal purposes does this statement make any sense. Section 32 of the Quebec Resolutions reinforces the theme of using local officers to carry out functions of the general Government:

> "All Courts, Judges and Officers of the several Provinces shall aid, assist and obey the General

---

[24](cont'd)of that clause, then, of course, as the over-ruling power, they may set it aside." "Debates", supra n. 21, p. 42. Once this resolution reached the Imperial draftsmen, the section was dropped.

[25] Ibid.

Government in the exercise of its rights and powers, and for such purposes shall be held to be Courts, Judges and Officers of the General Government."

The enforcement of the criminal law was an exercise of the rights and powers of the general Government. However, the officers who might enforce the criminal law could easily be officers of the several provinces. In fact, "practical difficulty" made it likely that they would be provincial officers. Section 32 of the Quebec Resolutions would have meant that a provincial officer enforcing these federal laws was deemed to be an officer of the General Government. This view is consistent with the stated intention of the delegates to have one statutory law, one system of courts, and by virtue of section 32 of the Quebec Resolutions, one set of officers. In a system that the Attorney General West described as a strong central government with one administration[26]

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[26] "Here we have adopted a different system [than the United States]. We have strengthened the General Government. We have given the General Legislature all the great subjects of legislation. We have conferred on them, not only specially and in detail, all the powers which are incident to sovereignty, but we have expressly declared that all subjects of general interest not distinctly and exclusively conferred upon the local legislatures, shall be conferred upon the General Government and Legislature. - We have thus avoided that great source of weakness which was the cause of the disruption of the United States. We have avoided all conflict of jurisdiction and authority, and if this Constitution is carried out, as it will be in full detail in the Imperial Act to be passed if the colonies adopt the scheme, we will have in fact, as I said before, all the advantages of a legislative union under one adminstration, with, at the same time the guarantees for local institutions and for local laws, which are insisted upon by so many in the provinces now, I hope,

it seems highly unlikely that the general Government was intended to be deprived of the power to enforce or control the prosecution of its validly enacted criminal law.

The delegates at the Quebec City Conference in October of 1864 intended the central Parliament to have all the powers incident to sovereignty:

> "We have strengthened the General Government. We have given the General Legislature all the great subjects of legislation and in great detail, all the powers which are incident to sovereignty, but we have expressly declared that all subjects of general interest not distinctly and exclusively conferred upon the local legislatures, shall be conferred upon the General Government and Legislature."[27]

The objective implicit in this passage is that the general Parliament was intended to be sovereign. Again, they wanted to avoid a defect they saw in the American constitution where the central government did not possess any residual power. The primary objective of the Fathers of Confederation, that the central government have all of the powers incident to sovereignty, was difficult to convey in the text of the Constitution Act, 1867. A confederation speaks of relatively equal partners but the intention of the draftsmen of our constitution was to establish a general Parliament which possessed the vast majority of important legislative powers. The Fathers of Confederation as they

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[26](cont'd)to be united." "Debates", sup n. 21, p. 33.
[27]Debates p. 33.

prepared the Quebec Resolutions, must have had a definition of sovereignty in their minds similar to:

> "The power to do everything in a state without accountability - to make laws, to execute and to apply them, to impose and collect taxes and levy contributions, to make war or peace, to form treaties of alliance, or of commerce with foreign nations, and the like."[28]

The federal Parliament would be unable to do everything because of the division of powers between the provinces and the general Parliament. However, those laws Parliament could pass were to be executed and applied by Parliament. It would be highly unusual that the general Parliament, a sovereign body, would be able to legislate to make certain actions crimes but would be unable "to execute and apply" these criminal laws. If Parliament may only make a declaration that an act is a crime, and may do nothing more to ensure the enforcement of the criminal law, then the criminal law could be neutralized.

During the debates on the Quebec Resolutions, the Honourable Attorney General East, G.E. Cartier acknowledged that the General Government[29] had "the power of providing for the execution of the laws of the Federal Government ...".[30]

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[28] Definition of 'sovereignty'. "Black's Law Dictionary". 5th ed. St. Paul, Minnesota: West Publishing Co., 1983.

[29] The early drafts refer to the Parliament of Canada as the General Government. This term will be used when making comments on these early drafts.

[30] Excerpt from the "Debates" for Thursday, March 2, 1865 at

The focus of this question and answer, as with all other debate on the criminal law and administration of justice powers, was on the court system and appointment of the judiciary. The power of the General Government to provide for the execution of the laws of the federal Government must include the authority to prosecute those laws. By definition, "execution" is not fulfilled until the act is carried out to completion. Without control over the prosecutorial power, the federal Parliament could never ensure that their laws were carried into operation and effect.

The Honourable Solicitor General East, H.L. Langevin, in answer to a comment of the Honourable Member for Hochelaga, A.A. Dorion, pointed out that article 43, paragraph 17 of the Quebec Resolutions, the power over the administration of justice, was included for the benefit of

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[30](cont'd)pp. 576, 577:

"Hon. Mr. Evanturel - I acknowledge the frankness which the Hon. Attorney General for Lower Canada has evinced in giving the explanations to the House which we have just heard; and I trust that the honourable minister will permit me to ask him one question. Paragraph 32 gives the Federal Government the power of legislation on criminal law, except that of creating courts of criminal jurisdiction, but including rules of procedure in criminal cases. If I am not mistaken, that paragraph signifies that the General Government may establish judicial tribunals in the several Confederate Provinces. I should much like to be enlightened on this head by the Hon. Attorney General for Lower Canada.
Hon. Mr. Cartier - I am very glad that the honourable member for the County of Quebec has put this question, which I shall answer as frankly as that of the hon. member for Montmorency. My hon. friend will find, if he refers to the paragraph which he has cited, that it gives the General Government simply the power of providing for the execution of the laws of the federal Government, not those of the local governments."

Lower Canada:

"It was our desire, as the representatives of Lower Canada at the Conference, that we should have under the control of our Local Legislature the constitution and organization of our courts of justice, both civil and criminal, so that our legislature might possess full power over our courts, and the right to establish or modify them if it thought expedient. But, on the other hand, the appointment of the judges of these courts had to be given, as it has been, to the Central Government.[31]

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[31] Excerpt of the "Debates" for Tuesday, February 21, 1865 pp. 387, 388:

"Hon. Sol. Gen. Langevin - ...He declared that he did not understand the meaning of that article of the resolutions which leaves to the Central Government the appointment of the judges, whilst by another article it is provided that the constitution and maintenance of the courts was entrusted to the Local Parliament. The honourable member should have observed that by the powers conferred on the local governments, Lower Canada retains all her civil rights, as prescribed by the 17th paragraph of article 43, as follows: -

> The administration of justice, including the constitution, maintenance and organization of the courts, both of civil and criminal jurisdiction, and including also the procedure in civil matters.

This is a privilege which has been granted to us and which we shall retain, because our civil laws differ from those of the other provinces of the Confederation. This exception, like many others, has been expressly made for the protection of us Lower Canadians. It was our desire, as the representatives of Lower Canada at the Conference, that we should have under the control of our Local Legislature the constitution and organization of our courts of justice, both civil and criminal, so that our legislature might possess full power over our courts, and the right to establish or modify them if it thought expedient. But, on the other hand, the appointment of the judges of these courts had to be given, as it has been, to the Central Government, and the reason of this provision is at once simple, natural and just. In the Confederacy we shall have a Central

After much debate, the Resolutions were passed by the Province of Canada and transmitted to the Secretary of State for the Colonies, Lord Carnarvon. Although this was in the spring of 1865, nothing further seems to have occurred until delegates from Nova Scotia, New Brunswick and the Province of Canada met in December 1866 for a Conference on Confederation in London, England.

The London Conference

The circumstances which led to this meeting at Christmas in 1866 are not clear and the minutes of these proceedings are very brief[32]. A rough draft of the Conference[33] was prepared and forwarded to Lord Carnarvon on December 26th by John A. Macdonald, Chairman of the Conference. The London Conference Draft, being the final agreement of the delegates from the colonies, expressed

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[31](cont'd)Parliament and local legislatures. - Well, I ask any reasonable man, any man of experience, does he think that, with the ambition which must naturally stimulate men of mark and talent to display their powers on the theatre most worthy of their talents, these men will consent to enter the local legislatures rather than the federal Parliament? Is it not more likely and more reasonable to suppose that they would rather appear and shine on the largest stage, on that in which they can render the greatest service to their country, and where the rewards of their services will be the highest? Yes, these men will prefer to go to the Central Parliament, and among them there will be doubtless many of our most distinguished members of the legal profession. ... And although it may be looked upon as a secondary consideration, yet it may as well be mentioned now, that by leaving the appointment of our judges to the Central Government, we are the gainers by one hundred thousand dollars, which will have to be paid for their services by the central power."

[32] See Pope supra n. 11, pp. 94 to 140.

[33] See Appendix 3.

their vision of Confederation; thereafter, the drafting was in the hands of the British.[34] Drafts of a "Bill for the ...on of the British North American Colonies, and for the ...rnment of the United Colony" were prepared on January ...867[35], were revised on January 30-31, and February 2[36], ... four ... draft[37] (undated) was prepared and again revised ... February ... 186...[38]. This revision, dated February 9, 186... was presented as Bill No. 9 to the House of Lords on February ..., 1867 by the Secretary of State for the Colonies, Lord Ca...narvon.

It is interesting to note that the wording of the paragraph concerning the criminal law power did not change from the Quebec Resolutions[39] through to the final draft of February 9, 1867[40] and the Act itself, as passed on March 29, 1867. Even though the precise meaning of this subsection has been the subject of considerable litigation since Confederation, it must have been self-evident to all

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[34] Although the changes made by the British draftsmen should only have altered the style of the document, many of the articles of the London Conference Draft find no corresponding section in the Bill prepared. This may have been the result of the great speed with which the drafts were prepared or it may have been because of an incomplete understanding of the scheme as proposed by the delegates. The Schedule to the First Draft indicates that the draftsmen felt that some sections could be left to legislation by the general Parliament or local legislatures. See Appendix 4.

[35] See Appendix 4.

[36] See Appendix 5.

[37] See Appendix 6.

[38] See Appendix 7.

[39] "29(32) The Criminal Law, excepting the Constitution of Courts of Criminal Jurisdiction, but including the procedure in Criminal matters."

[40] The third draft contains the words "the procedure on Criminal matters" but the fourth draft reverts to "in Criminal matters".

involved in the drafting process because there was no argument about its meaning and no change in its wording. This should be contrasted with the progress of the paragraph concerning the administration of justice. The British draftsmen must have considered the wording to be ambiguous to some extent because they inserted "administration of justice in the Province" ; "... Organization of Provincial Courts"; and "Civil Matters in those Courts"[41]:

TABLE 1

Quebec Resolution October 10, 1864 Fathers of Confederation	First Draft January 23, 1867 British Draftsmen	Constitution Act March 29, 1867 British Parliament
"43(17) The Administration of Justice, including the Constitution, Maintenance, and Organization of the Courts, both of Civil and Criminal Jurisdiction, and including also the Procedure in Civil Matters."	"37(14) 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."	"92(14) 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."

It seems the draftsmen made an effort to ensure that this section was applied in a more restrictive fashion than would otherwise have been the case. Without any limitation on the phrase "administration of justice", this head of power would have included all legislative jurisdiction over any aspect of the process of executing and applying laws, be they enacted by the provincial legislature or the federal Parliament. The addition of "in the Province", "Provincial

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[41] Emphasis is mine.

[Courts]", and "[Civil Matters in] those Courts", restricted the application of this legislative authority to those laws validly enacted by the province.

Provisions for provincial courts were balanced by the provisions in the London Conference Draft for the "General Court of Appeal" and "additional courts" that the General Parliament could establish:

TABLE 2

Quebec Resolution October 10, 1864 Fathers of Confederation	London Conference Draft December 4, 1866 Fathers of Confederation	Fourth Draft February 3-8, 1867 British Draftsmen	Constitution Act, 1867 March 29, 1867 British Parliament
"31. The General Parliament may also, from time to time, establish additional Courts, and the General Government may appoint Judges and Officers thereof, when the same shall appear necessary or for the public advantage, in order to the due execution of the laws of Parliament."	"36(35). To establish a General Court of Appeal, and in order to the due execution of the Laws of Parliament additional Courts when necessary."	"48(35). The establishment of a General Court of Appeal, and in order to the due execution of the Laws of Parliament, the establishment of additional Courts."	101. The Parliament of Canada may, notwithstanding anything in this Act, from Time to Time, provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada, and for the Establishment of any additional Courts for the better Administration of the Laws of Canada."

But "the administration of justice in the Province" does not appear to have a parallel in the list of enumerated powers of the federal Parliament. Perhaps the draftsmen, in the rush to produce a Bill,[42]

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[42] Given the amount of time the British draftsmen had to work in -that is between January 23, 1867 and February 9, 1867 - it can be assumed that they worked quickly to prepare four drafts and a final version which became the form of the

intended the phrase "the administration of justice in the province", to provide a contrast with the phrase "the better Administration of the Laws of Canada". This parallel seems strained in the Constitution Act, 1867 but at the Fourth Draft stage, when both paragraphs were included within the respective enumerated lists of federal and provincial powers, the parallel is much easier to observe:

TABLE 3

Parliament of Canada	Local Legislatures
"48(35) The establishment of a General Court of Appeal, and in order to the due execution of the Laws of Parliament, the establishment of additional Courts."	"90(14) The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Courts, both of Civil and Criminal Jurisdiction, and including procedure in Civil Matters in those Courts."

For some unexplained reason, the draftsmen withdrew paragraph 48(35) at the final draft stage from what was to become section 91, within Part VI: Distribution of Legislative Powers, and placed it in Part VII: Judicature, as section 101. Sections 96 to 100 (Part VII) of the Constitution Act, 1867 provide for the selection and appointment of judges. These judges sit in provincially constituted courts. But the province's legislative authority to create these courts is provided under section 92(14). It is interesting to speculate on why this

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42(cont'd)Bill in the House of Lords. Not only were five versions prepared but the changes between the drafts are considerable. See Appendixes 4-7.

provision was not contained as a provision in Part VII: "Judicature". If provisions for the creation of federal courts are contained in the "Judicature" part, it would seem reasonable to expect to find the provisions regarding creation of provincial courts within the same part of the Constitution. Perhaps it was an oversight on the part of the British draftsmen or perhaps the draftsmen wanted to isolate the provincial power to establish courts from the powers of the federal Parliament in regard to the appointment, selection, and removal of the judiciary of those courts.[43]

The comments of the Honourable Solicitor General of the Province of Canada may hold the key to why the drafting is inconsistent:

> "This is a privilege [the "administration of justice" head of power] which has been granted to us and which we shall retain, because our civil laws differ from those of the other provinces of the Confederation. This exception, like many others, has been expressly made for the protection of us Lower Canadians. It was our desire, as the representatives of Lower Canada at the Conference, that we should have under the control of our Local Legislature the constitution and organization of the courts of justice, both civil and criminal, so that our legislature might possess full power over our courts, and the right to establish or modify them if

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[43] See "Historical Review of Prosecutions at Common Law" for further discussion on this point.

it thought expedient."[44]

The ultimate objective behind this provision was to protect the civil system of law in Lower Canada. This protection was provided by retaining provincial authority over provincial courts. From this perspective, the power is consistent with the other heads of power in section 92 many of which were also drafted to ensure special protection for Lower Canada. In contrast, the thought behind sections 96 to 100 of Part VII was that the central Parliament would bear the heavy cost of judicial salaries[45] and have the "most distinguished members of the legal profession"[46] to choose from. The motivation behind sections 96 to 100 to was primarily an economic one.

Passage of the Act

Passage of the proposed Bill "for the Union of Canada, Nova Scotia, and New Brunswick, and the Government thereof as united", was speedy. It was introduced in the House of Lords on February 12, 1867; received Second Reading on February 19; went to Committee on February 22; returned on February 25; and Third Reading was given on February 26, 1867. The Bill was introduced into the House of Commons on February 26, Second Reading was on February 28 and Third

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[44] Debates pp. 387, 388.

[45] The Hon. Solicitor General stated: "And although it may be looked upon as a secondary consideration, yet it may as well be mentioned now, that by leaving the appointment of our judges to the Central Government, we are the gainers by one hundred thousand dollars, which will have to be paid for their services by the central power." "Debates" p. 388.

[46] Ibid.

Reading was on March 8. House of Commons amendments were then dealt with in the House of Lords on March 12, 1867 and Royal Assent was given on March 29. Debate on the Bill in the House of Lords and the House of Commons was not extensive.

Lord Carnarvon outlined the scheme for Confederation to the House of Lords prior to Second Reading. In his comments on the criminal law power, he focused - as the Honourable Attorney General West had done in the earlier debates - on the difference between the scheme now presented and that in effect in the United States:

> " To the Central Parliament will also be assigned the enactment of criminal law. The administration of it indeed is vested in the local authorities; but the power of general legislation is very properly reserved for the Central Parliament. And in this I cannot but note a wise departure from the system pursued in the United States, where each State is competent to deal as it may please with its criminal code, and where an offence may be visited with one penalty in the State of New York, and with another in the State of Virginia. The system here proposed is, I believe, a better and safer one; and I trust that before very long the criminal law of the four Provinces may be assimilated - and assimilated, I will add, upon the basis of English Procedure."[47]

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[47] Great Britain. Parliament. "Hansard for February 5 - March 15, 1867" volume CLXXXV, columns 563, 564. (Emphasis

To whom did Lord Carnarvon refer to when he stated that "The administration of it indeed is vested in the local authorities"? It seems unlikely that he was referring to the local legislatures since he used the expressions "Legislatures" or "Parliaments" whenever he spoke of the local legislatures. It is suggested that the phrase "local authorities" more likely refers to the police forces and local councils in the provinces rather than to the local legislatures themselves[48]. As previously discussed, much of the enforcement of laws would have to occur within the populated communities because of the practical difficulties of the time; that is, poor communication, lack of efficient means of transportation, and vast distances between communities in Canada at this time.

Just as the scheme for Confederation had contained a section permitting pardons to be granted by the Lieutenant Governor, a local officer, so may it be assumed that execution of the criminal law would actually be carried out by local officials[49]. It appears clear that the intention of the Fathers of Confederation was that local officers should be deemed to be officers of the General Government:

> "s. 45. For the purposes of this Act, Courts, Judges and Officers of the Several Provinces shall be Courts, Judges and Officers of the

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[47] (cont'd) is mine).

[48] This point is expanded upon in the following chapter "A Historical Review of Prosecutions at Common Law".

[49] See page 19 for a discussion of section 32 of the Quebec Resolutions (Section 45 of the London Conference Draft) but omitted by the British draftsmen in any of their drafts.

Confederation".[50]

Furthermore, the term "officer" included the attorney general of each province [51]. Even if the attorney general of a province was the officer who actually conducted prosecutions, he was to be an officer of the general Government. Local officials would be utilized but the central Parliament would have ultimate control. However, it is important to underline that whatever the reasons of the Fathers of Confederation for including section 45 of the London Conference Draft, it did not appear in any of the drafts prepared by the British. Had this section continued into the Constitution Act, 1867, it is suggested that the entire question of prosecutorial authority for the federal Attorney General would not have arisen. This section would have made it clear that local officials were deemed to be agents of the general Government when they were prosecuting federal offences. Section 45 of the London Conference Draft illustrates that the Fathers of Confederation had practical considerations in mind and hence, included a section to provide for the execution of federal legislation by provincial officers.

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[50] London Conference Draft.

[51] Excerpt from Macdonald's comments on pardons at n. 24 "Of course there must be, in each province, a legal adviser of the Executive, occupying the position of our Attorney General, as there is in every state of the American Union. This officer will be an officer of the Local Government...". (Emphasis is mine).

Conclusion

From the first meeting of the delegates from Nova Scotia, New Brunswick, Prince Edward Island and the Province of Canada in Charlottetown in 1864, until Royal Assent in 1867, their intention was to create a strong central government. Lord Carnarvon summed up his remarks in the House of Lords by emphasizing this:

> "In closing my observations upon the distribution of powers, I ought to point out that just as the authority of the Central Parliament will prevail whenever it may come into conflict with the Local Legislatures, so the residue of legislation, if any, unprovided for in the specific classification which I have explained, will belong to the central body. It will be seen under the 91st clause, that the classification is not intended "to restrict the generality" of the powers previously given to the Central Parliament, and that those powers extend to all laws made "for the peace, order and good government" of the Confederation - terms which, according to all precedent, will, I understand, carry with them an ample measure of legislative authority. I will add, that whilst all general Acts will follow the usual conditions of colonial legislation, and will be confirmed, disallowed, or reserved for Her Majesty's pleasure by the Governor General, the Acts passed by the Local Legislature

will be transmitted only to the Governor General, and be subject to disallowance by him within the space of one twelvemonth."[52]

This hierarchy of government - with the Imperial Parliament overseeing the Parliament of Canada who, in turn, oversaw the provincial legislatures who were responsible for the municipalities - was very evident during this time period.

The power of disallowance mentioned by Lord Carnarvon was considered to be one of the most important aspects of the scheme with many of the Fathers of Confederation expressing the opinion that it was essential to avoid the situation in the United States where the individual states considered themselves to be sovereign.[53] Although disallowance of provincial legislation[54] by the Governor General has fallen into disuse, it is a power that was exercised frequently during the period immediately following Confederation. From 1867 until 1954, there were over one

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[52] Great Britain. "Hansard" column 566.

[53] For example, the Honourable Alexander Mackenzie commented:

> "The veto power is necessary in order that the General Government may have control over the proceedings of the local legislatures to a certain extent. The want of this power was the great source of weakness in the United States, and it is a want that will be remedied by an amendment in their Constitution very soon. So long as each state considered itself sovereign, whose acts and laws could not be called in question, it was quite clear that the central authority was destitute of power to compel obedience to general laws. If each province were able to enact such laws as it pleased, everybody would be at the mercy of local legislatures, and the General Legislature would become of little importance." "Debates" p. 433.

[54] Constitution Act, 1867, s. 56.

hundred and ten provincial acts which were disallowed[55], primarily on the basis that the legislation was ultra vires the provincial legislature. Other reasons advanced by the Minister of Justice in his reports for disallowing legislation included: conflict with Dominion policies or interests; (prior to the Statute of Westminster) conflict with Imperial policies or interests; and abuse of power, lack of justice or wisdom.[56] It is illogical that the Dominion can disallow provincial legislation merely because it conflicts with Dominion policies[57] but that the power of the Dominion Parliament to execute its own criminal laws would be questioned. The power of disallowance indicates the position of strength that the Dominion Parliament was intended to hold in Confederation. This residual power in favour of Parliament is not consistent with the creation of a legislative body unable to execute its criminal law.

Except for Lower Canada, the British America colonies wanted a legislative union. The first conference in Charlottetown had been called precisely to create a legislative union for the Maritime Provinces. What they hoped to create was a federal union with "all the advantages

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[55] See La Forest, G.V. "Disallowance and reservation of provincial legislation". Ottawa: Department of Justice, 1955. Appendix A.

[56] Id. p. 36

[57] La Forest gives the disallowance of "An Act to amend and consolidate the Laws affecting Crown Lands in British Columbia" as an example of legislation disallowed because it conflicted with the Dominion's policies in relation to Indians. See La Forest p. 37.

of a legislative union under one administration"[58] to echo Macdonald. In the areas of the courts and justice system, the scheme the delegates of the colonies had so carefully developed and exhibited in the London Conference Draft was not carried through into the final Act by the British draftsmen. The suggested parallel between the provision "additional courts for due execution of the Laws of Parliament" and the provision for the "administration of Justice in the provinces ... in Provincial Courts", disappeared as the Resolutions were improved as to 'form'.[59]

In fact this particular symmetry in the division of powers was brought through all drafts up to the Final Draft:

TABLE 4

FOURTH DRAFT, FEBRUARY 3-8, 1867	
"48(35) The establishment of a General Court of Appeal, and in order to the due execution of the Laws of Parliament, the establishment of additional Courts."	"90(14) The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Courts, both of Civil and Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts."
FINAL DRAFT, FEBRUARY 9, 1867	
"103 Any Act of the Parliament of Canada, may notwithstanding anything in this Act, from Time to Time provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada, and for the Establishment of any additional Court in any Province."	"100(14) 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."

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[58] Supra n. 24.

[59] See Lysyk, Kenneth. "Constitutional Reform and the introductory clause of section 91: residual and emergency law-making authority." 57 Canadian Bar Review 531 at pp. 535-541 for a discussion of the problems created by "improvements" by the drafters of the final Act. Mr. Lysyk's article relates to the residual powers of the federal and provincial legislatures but the point applies equally well to the "administration of justice" powers.

At some time between February 2 and February 9, 1867[60], without warning, the British draftsmen destroyed this symmetry. Section 101 of the Constitution Act, 1867[61] which provides for "additional courts for the better administration of the Laws of Canada" was no longer part of this symmetry. The provision which deemed that courts, judges and officers[62] of the provinces to be the courts, judges and officers of the General Parliament was also lost in the revisions[63]. The result is an incomplete design with only the criminal law power having any relationship to provincial legislative jurisdiction over the "administration of justice".

The basis of the relationship between sections 91(27) and 92(14) is that section 92(14) exempts a small part of the criminal law from federal authority. Excluded from section 91(27) is "the Constitution of Courts of Criminal Jurisdiction" which is included in section 92(14) "The Administration of Justice in the Province, including the Constitution ... of Provincial Courts ... of Criminal Jurisdiction ...". This is the full extent of the parallel between these heads of power but it has resulted in confusion in the interpretation of sections 91(27) and 92(14). There appears to be no factual or historical

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[60] The Fourth Draft was undated but must have been prepared after Feb. 2 but before Feb. 9th, 1867.
[61] Section 103 of the Final Draft.
[62] Emphasis is mine.
[63] This section - 32 of the Quebec Resolutions and 45 of the London Conference Draft - is inexplicably dropped from the First Draft and fails to reappear in any later draft.

justification for a claim of a special "nexus" between sections 91(27) and 92(14) of the Constitution Act, 1867.[64]

B. A HISTORICAL REVIEW OF PROSECUTIONS AT COMMON LAW

Lord Carnarvon, in his oft-quoted speech from the House of Lords, stated that the central Parliament would have the power to enact criminal laws but that "The administration of it indeed is vested in the local authorities". As stated earlier, Lord Carnarvon always referred to the provinces as Local Legislatures or Local Parliaments, therefore it is unlikely he was referring to them with this phrase. To whom did he refer with the term "local authorities"? An examination of how the criminal law was prosecuted in England and in the British America colonies might clarify his terminology and also provide some understanding of why the issue of enforcement or execution was not explicitly dealt with in the Constitution Act, 1867.

England

Since the very origin of criminal law in England, it has been the duty of the private citizen to bring criminals to justice. The authority of any person to prosecute was recognized to the extent that a grand jury or the Court of Kings Bench would acknowledge the suit as the King's:

> "By our constitution, the King is entrusted with the prosecution of all crimes which disturb the peace

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[64] For further discussion of this point, see page 138.

and order of society. He sustains the person of the whole community, for the resenting [sic] and punishing of all offences which affect the community; and for that reason, all proceedings "ad vindictam et poenam" are called in the law, the pleas or suits of the Crown; and in capital crimes, these suits of the Crown must be founded upon the accusation of a grand jury; but in all inferior crimes, an information by the King, or the Crown, directed by the King's Bench, is equivalent to the accusation of a grand jury, and the proceedings upon it are as legally founded; this is solemnly settled and admitted. As indictments and informations, granted by the King's Bench, are the King's suits, and under his controul [sic]; informations, filed by his Attorney General, are most emphatically his suits, because they are the immediate emanations of his will and pleasure. They are no more the suits of the Attorney General than indictments are the suits of the grand jury.

Indictments and informations are both the voices of those entrusted by the constitution to awaken criminal jurisdiction, and to put it into motion. Who are those persons entrusted? A grand jury for all crimes; the King's Bench, as well as a grand jury, for misdemeanors of magnitude."[65]

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[65] Wilkes v. The King 97 E.R. 123 at 125.

Within this system of private prosecutions, a control mechanism developed. This was the right of the Attorney General to enter a nolle prosequi to put an end to any prosecution:

> "In this country, where private individuals are allowed to prefer indictments in the name of the Crown, it is very desirable that there should be some tribunal having the authority to say whether it is proper to proceed farther in a prosecution. That power is vested by the constitution in the Attorney General, and not in this Court. The Attorney General may enter a nolle prosequi ex mero motu. The practice, that there should be a summons to the prosecutor to shew [sic] cause why the Attorney General should not grant his fiat, is generally satisfactory, but he is the judge where the nolle prosequi should be entered, and there is nothing in the books to shew that he cannot do it without hearing the parties. ...
>
> Then, the nolle prosequi being on the record, there is an end of this prosecution;"[66]

Since the Attorney General was responsible to Parliament, there was parliamentary control of the abuse of the nolle prosequi power. If the Attorney General no longer enjoyed the confidence of the House of Commons, he could be removed from office.

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[66] The Queen v. Allen 121 E.R. 929 at 931.

Prosecution could prove to be a very expensive procedure for the private citizen who was bound[67] to prosecute so finally in 1752 Parliament enacted the first legislation to provide for payment of costs for prosecuting any felony where the prisoner was convicted[68]. By the time the Costs of Criminal Cases Act[69] was passed, it consolidated thirty-six Acts that had been passed between 1798 and 1906[70]. With the passage of the Metropolitan Police Act, 1829 and later the County Constabulary Act, 1856, police forces were established as organized bodies which could investigate and prosecute crimes[71]. Gradually, police forces and other local bodies such as county councils, took over the majority of prosecutions.[72] Although these bodies are thought of as public officials,

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[67] Once a person came forward to prefer an indictment before the grand jury, they had to pay a bond or recognizance to ensure that they would appear at a later date to prosecute. If they didn't appear to prosecute, they forfeited the bond. See generally L.J. Edwards. "Law Officers of the Crown." London: Sweet & Maxwell, 1964 and Douglas Hay. "The Criminal Prosecution in England and its Historians". (1984) 47 Modern Law Rev. 1.

[68] 25 Geo. II, c. 36.

[69] 8 Edw. VII, c. 15.

[70] Edwards "The Law Officers of the Crown." at p. 339.

[71] Infra n. 83 for a further discussion of the powers of a constable at common law.

[72] "The role of the private prosecutor was overwhelmingly important in practice as well as in theory until well into the nineteenth century, even after the introduction of the "new" police in some areas. Private Associations for the Prosecution of Felons were extremely widespread, numbering perhaps 1,000 in the country as a whole by the mid-nineteenth century, although they seem to have been of particular interest to manufacturers and tradesmen, especially in the period of their first rapid growth in the eighteenth century."

Hay, "The Criminal Prosecution". (1984) 47 Modern Law Rev. 1 at 4. See also Douglas Hay. "Controlling the English Prosecutor". (1983) 21 Osgoode Hall L.J. 165.

they have and had no more status or power than any private citizen to prosecute[73].

This system of private prosecutions was not free from attack. The mid-nineteenth century was the time of a great debate that focussed on whether or not a system of public prosecutions should be adopted.[74]

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[73] "The Memoirs of Sir Norman Skelhorn Public Prosecutor: Director of Public Prosecutions 1964-1977". London: Harrap, 1981 at p. 65.

> It is a "firmly entrenched principle in our Constitution that in England and Wales a private individual shall be entitled to institute criminal proceedings and that in this sense the enforcement of law and order should be in the hands of the ordinary citizen, and even today there are strictly speaking, no public prosecutions, but it may come as a surprise ... that in doing so a police officer, with one or two special exceptions, is not acting under any special powers, but is exercising the right of the private citizen."

[74] Douglas Hay notes that the period during the early nineteenth century was a time of great political, economic and social change in England. It was a period of rapid population increase, urbanization, and momentuous economic change such as England had never known. Poverty appears to have been rampant in England. The criminal law had, in many senses been the weapon used by the classes who attained Parliamentary office against the poor. To the person of wealth, the rising criminal statistics (illustrated by data published from 1805 on) seemed to symbolize the political strife within the country:

> "In these circumstances the personal knowledge, local scale, and discretionary accommodations of the eighteenth-century system of private prosecution seemed far less acceptable. Lawyers and magistrates increasingly castigated serious defects: the compounding of offences that should have been prosecuted, the malicious prosecution of innocent individuals by personally interested or blackmailing prosecutors, the inability of grand jurors to sift the evidence when three or four hundred cases now came before them in a week, the blow to the legitimacy of the law when injustices were perpetrated, and the weakening of social and political authority when serious cases were not pursued. Equally distressing, the increased granting of costs had probably admitted more poor prosecutors to the system, and they sometimes used it for their own dubious ends. As a result, critics in Parliament, some of them Chief Justices and Lords Chancellors, attempted in the

Starting in 1833, a Select Committee on Public Prosecutors was formed to review this issue but either a report was not written or did not survive the fire of London in 1834. In their Eighth Report of 1845, the Commissioners on the Criminal Law commented on the corrupt state of the system of prosecutions left to private citizens. Bribery and collusion were said to be rampant in the system. A private members' Bill[75] was introduced out-lining a system of public prosecutors but it was withdrawn on the request of the Attorney General. Again, a Select Committee on Public Prosecutions was appointed in 1855. Evidence[76] was given on the systems of public prosecutions used in Scotland, France and the United States. Statistics comparing commitments, trials and acquittals in England and Scotland were damning[77]. The Attorney General of the day gave evidence that the rich frequently escaped justice by paying the recognizances for the prosecutor and witnesses and then allowing them to be forfeited when the prosecutor and witnessess didn't appear for the trial. Because of

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[74](cont'd) 1830s, again in the 1850s and finally in the 1870s, to introduce a system of public prosecution in England."
"Controlling the English Prosecutor": 21 Osgoode Hall L.J. 165 at 174.

[75] Bill No. 15 of 1854.

[76] British Sessional Papers. House of Commons. 1854-55, Volume XII p. 1.

[77] In 1853 there were 27,057 commitments for England and Wales. 25,585 persons were tried with 1472 discharged and 4793 acquitted. In Scotland in 1853, commitments numbered 3,756 with 3,139 persons tried and 279 acquittals. The relationship of acquittals and discharges to the total number of trials is approximately 21% for England and Wales and only 9% for Scotland.

economic, social and class pressures during the eighteenth and nineteenth centuries, the "poor" were heavily represented as defendants in criminal prosecutions, and seldom assumed the role of prosecutor within the criminal justice system.[78] Even though criticisms of the system of private prosecutions were numerous, no agreement could be reached to solve the situation.[79] In England, the debate over public or private prosecutions continued until the Prosecutions of Offences Act was passed in 1879 and the office of the Director of Public Prosecutions was established.[80]

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[78] The legitimacy of the system of prosecutions in England during this time was an issue of controversy. Douglas Hay notes that at least one fifth of the defendants in theft prosecutions were the "labouring poor" or "working men".

> "An important issue in the nineteenth century is whether more working-class complainants had recourse to the courts as prosecution increasingly fell into the hands of the police. The difficulty of disentangling the actions of complainants from the actions of the police(who in the first half of the nineteenth century were accused of fomenting many vexatious and malicious prosecutions in some jurisdictions) has yet to be resolved. Our findings about the role of the police in prosecutions in the nineteenth century are still, surprisingly, not very far advanced. Surprising, because there is a new and extensive literature on police organization, on the creation of new forces between 1829 and the 1850s, and on popular responses to them." Hay. 47 Modern Law Rev. at 9.

[79] "One strongly-held belief was that private prosecution was an essential constitutional safeguard against possible executive tyranny, a belief which served to preserve in England the right of prosecution relatively unimpaired into the twentieth century. It is also clear that those with property and those who administered the criminal law thought the courts most important for the inculcation of moral values, and a belief in English justice, in a working-class which they did not trust. In part this was to be done through attention to the theatre of justice." Id. at 10.

[80] This debate continues to this day. The Attorney General and the Home Secretary presented a white paper "An

The D.P.P.'s duties under this Act were entirely advisory however, with any prosecutions actually undertaken being conducted by the Treasury Solicitor. This practice has developed so that a panel of barristers, known as Treasury Counsel, are retained to prosecute D.P.P. cases. These barristers are only retained and are not public employees. It is just as likely that on any given day they will appear for the defence as for the prosecution. Only about 8% of all prosecutions are controlled by the Director of Public Prosecutions acting through the Treasury Counsel.[81] Costs of prosecutions[82] are paid by the county in which the prosecution occurs. Treasury Counsel recover their costs just as private individuals do. Today, the focus of prosecutions in England remains at the local level.

After the establishment of police forces, the prosecutorial function was assumed almost exclusively by them. Since this was the system of prosecutions with which Lord Carnarvon was familiar, it is not surprising that he would refer to the administration of the criminal law being

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[80](cont'd)Independent Prosecution Service for England and Wales" (Cmnd. 9074) to Parliament in October, 1983.

[81] Of all prosecutions, approximately 8% of cases are supervised by the D.P.P.; 4% of the total are brought by private individuals (not associated with any public office) and public offices such as the Post Office; while the remaining 88% are brought on behalf of the police through counsel retained by them for that purpose. See Devlin, Patrick. "The Criminal Prosecution in England." London: Oxford University Press, 1960. pp. 20-21. See also Silkin, S.C. "Analysis: The Prosecution Process." Public Law, Spring, 1984 p. 6, which confirms that these statistics are still valid today.

[82] Costs in Criminal Cases Act, (1952) 15 & 16 Geo. VI & 1 Eliz. II, c. 48.

"vested in the local authorities". The English system of prosecutions is based wholly at the local level. In 1867, the London Metropolitan Police Force and police forces throughout the counties of England[83] had been established and their ever expanding role in prosecutions was taking shape. At no point in Hansard does Lord Carnarvon refer to the Provinces as "local authorities", therefore it is much more likely that the phrase "local authorities" was meant to refer to local councils and police forces. Even prosecutions by prosecution societies composed of private individuals would be 'local authorities' of a kind. The only public prosecutions were those few which were actually conducted by the Attorney General of England[84].

The entire system of local administration of justice in England is subject to the ultimate control of the Attorney General. As discussed earlier, only the Attorney General himself, may enter a nolle prosequi. Additionally, since 1850, the oversight function of the Attorney General has expanded to include a requirement that the consent of the Attorney General be obtained before an indictment can be preferred for many offences. The first enactment imposing this condition was the Vexatious Indictments Act, 1859[85] which applied to the offences of perjury, conspiracy,

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[83] See discussion on constables in the next section.
[84] The Attorney General in person only appears in those cases involving the most serious offences, traditionally offences alleging treason and breaches of national security, and occasionally in a crime which is so horrendous as to cause a public outcry.
[85] 22 & 23 Vict. c. 17

obtaining money by false pretences, keeping a gambling or disorderly house, and indecent assault. Today the list of offences requiring consent to prosecute is extensive, and correspondingly, the role of the Attorney General and also that of the Director of Public Prosecutions, have become important in the control of the prosecutorial process.

It is reasonable that Lord Carnarvon would have assumed that the system of criminal justice that was to be established in the united British America colonies would follow the pattern of prosecutions in England. The substantive criminal law was to be within the legislative jurisdiction of the central Parliament. Every sovereign body, such as the Parliament of Canada, possessed executive and judicial authority which was commensurate with its legislative authority. Actual prosecutions would be carried out by private persons, police constables and other local officials just as in the English system. But, no matter how decentralized a system of prosecutions Lord Carnarvon envisaged, there seems little reason to doubt that he presumed the Attorney General of the central Government, like the Attorney General of England, would be the official ultimately responsible for supervising the prosecutorial process. In England, no other law officer had the authority to control prosecutions.[86] It is likely that Lord Carnarvon simply assumed that day to day administration would have to

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[86] The only exception to this rule occurred when there was no English Attorney General and then the Solicitor General fulfilled this function.

be carried out at the local level, but that the oversight of the entire prosecutorial process would rest with the Dominion that was to be created.

Canada

Very little is known about the method of prosecutions in the colonies prior to Confederation. By the time of the Confederation Conferences, each of the colonies had an Attorney General[87] although the role of each of these Attorneys General may or may not have been the same as the English Attorney General. One feature of the British American system which was different was that, at least in the Province of Canada, the Attorneys General were members of the Cabinet, something the English Attorney General was not. It is evident that at common law, the Attorneys General of the colonies would have possessed the same control over prosecutions by writs of nolle prosequi as in England.

There is some indication that the system of private prosecutions was proving unsatisfactory in the colonies during the nineteenth century. As early as 1828, Nova Scotia[88]

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[87] The Honourable John A. Macdonald was Attorney General West and the Honourable George E. Cartier was Attorney General East for the Province of Canada; at the Quebec City Conference, the Honourable William A. Henry was Attorney General for Nova Scotia; the Honourable J.M. Johnson was Attorney General for New Brunswick and the Honourable Edward Palmer was Attorney General for Prince Edward Island.

[88] In Nova Scotia, the Attorney General may have personally prosecuted more than the other attorneys general did. J.M. Beck in his article "Rise and Fall of Nova Scotia's Attorney

enacted provisions which permitted the Supreme Court and any Court of Oyer and Terminer to appoint Counsel "to conduct and manage for and on behalf of His Majesty, the proceedings and trial of any Criminal Prosecutions, depending before the said Court,"[89]. This provision appears as section 65 of the Administration of Criminal Justice Act of 1864[90].

Upper Canada departed further from the English practice by appointing permanent 'official' prosecutors. In 1857, An Act for the Appointment of County Attorneys, and for other purposes, in relation to the Local Administration of Justice in Upper Canada[91] was passed by the Parliament of the Province of Canada. The county attorneys did not have the power to enter a nolle prosequi.[92] The duty of the county

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[88](cont'd)General: 1749-1983". 21 Osgoode Hall L. J. 125 asserts that a major responsibility of Nova Scotia's Attorney General was the initiation, direction and conduct of criminal prosecutions. There appears to be little actual evidence of this, particularly in view of the fact that at least four (Nesbitt 1755-1779; Brenton 1779-1781; Gibbons 1781-1784; and Blowers 1784-1797) of the early attorneys general were also speakers of the assembly. One of two situations must have existed: either the Attorney General was not directly involved in all prosecutions or there were not very many prosecutions during this period. Some prosecutions were conducted by the Attorney General such as the trial of Joseph Howe for criminal libel in 1835. However, during the period 1830 to 1850 the practice of the court appointing King's Counsel in place of the Attorney General was confirmed by statute and a fee of twenty dollars was provided for each prosecution conducted by appointed counsel. As well, since the first three leaders of the government following the establishment of responsible government in Nova Scotia in 1848, held the office of attorney general, it seems even more unlikely that the premier/attorney general was prosecuting criminals before the courts.

[89] An Act to provide for the payment of certain Expenses attending Criminal Prosecutions (1828) Geo IV, cap. XIII.

[90] R.S.N.S. 1864, c. 171.

[91] 20 Vict. cap. LIX , S.C. 1857, c. 59.

[92] Section V.

attorney in the Court of Assize was to assist the law officers of the Crown if they were present or to act as the prosecutor if there was no law officer or counsel appointed by the attorney general present. In the Court of Quarter Session, the county attorney conducted all prosecutions for felonies and misdemeanors and also supervised prosecutions by private individuals. It is difficult to estimate the extent of the role of these 'official' prosecutors; however, their role would have to be characterized as involving private rather than public prosecutions since they appear to have had no more authority before the courts than private individuals had. County attorneys and the counsel appointed by courts in Nova Scotia were in no way directly related to their respective attorneys general. They were not advised by the attorney general nor were they immune from his nolle prosequi. In Upper Canada, county attorneys were certainly not his agents since counsel appointed by the Attorney General took precedence over any county attorney. County attorneys appear to have been nothing more than creatures of necessity to ensure that "prosecutions at the Assizes and Quarter Sessions may not be unnecessarily delayed or fail through want of existing proof that might be secured"[93], just as counsel in Nova Scotia were appointed by the court when it appeared "expedient and necessary"[94].

Coincidental with the development of the system of county attorneys was the enactment of legislation which

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[93] Ibid.
[94] N.S. 1828 cap. XIII.

authorized the appointment of permanent police forces by the Court of General Quarter Sessions of the Peace[95]. This legislation, authorizing the establishment of police forces by the judiciary, follows the pattern set by English history and legislation.[96] The duties of the early police forces in Canada were the same as the duties of the constable at common law; that is, the keeper of the Queen's peace, and the executive to the Justice of the Peace [97]. Permanent appointments under this Act were made in 1861, but prior to that time annual appointments had been made. From the legislative history, it would appear that county attorneys in Upper Canada were assuming the role that the police in England had assumed in regard to prosecutions. However as stated earlier, this role of 'official' prosecutor was only a type of private prosecution[98].

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[95] 23 Vict. cap. 8, S.C. 1860, c. 8.

[96] Historically, constables have been considered the executive of the Justice of the Peace. As early as 1285, High Constables were appointed by the court of hundred: Statute of Winchester (13 Edw. I, c. 6 repealed), later they were appointed by the court of quarter sessions and then finally by justices at sessions. Constables duties were twofold; first, they possessed ministerial duties in relation to justices of the peace, etc. and secondly, a constable was a preservor of the peace. It is interesting to note that once permanent police forces were established in England, the Secretary of State assumed control of them, exercising the power to make rules in regard to the constables and to approve the appointment of the chief constable. Borough police forces were not under the control of the Secretary of State however since under the Municipal Corporations (New Charters) Act 1877 (40 & 41 Vict. c. 69) s. 8 (repealed), no borough of under 20,000 population could form a police force. See Halsbury's Laws of England (3d) volume 30 p. 43.

[97] See Stenning, Philip C. "Legal Status of the Police: a study paper prepared for the Law Reform Commission of Canada". Ottawa:Law Reform Commission, 1981. pp. 7-55.

[98] See pp. 41-50 for earlier discussion.

III. THE PROSECUTORIAL POWER UNDER THE CONSTITUTION ACT, 1867

The immediate post-Confederation period brought little change to the process of private prosecutions in Canada. 'Official' prosecutors conducted a significant number of prosecutions in Nova Scotia and Ontario. The role of the private (individual) prosecutor continued on the basis of the common law and statutory enactments such as the Procedure in Criminal Cases Act[99]. Neither the federal Parliament nor the provincial legislatures made any fundamental changes to the prosecutorial process until the Criminal Code was enacted by the Parliament of Canada in 1892.

A. LEGISLATIVE HISTORY AFTER 1867

During the first session of the Parliament of Canada "An Act respecting the Department of Justice"[100] was passed. This was the general Parliament's first declaration of jurisdiction over the administration of justice in Canada. The Minister of Justice was to be "ex-officio, ... Her Majesty's Attorney General of Canada" and to "have the superintendence of all matters connected with the administration of Justice in Canada, not within the jurisdiction of the Governments of the Provinces composing the same".[101] Section 3 provided:

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[99] S.C. 1869, c. 29.
[100] 31 Vict. cap. XXXIX; S.C. 1867, c. 39.
[101] ss. 1 & 2.

> "The duties of the Attorney General of Canada shall be as follows: He shall be entrusted with the powers and charged with the duties which belong to the Office of the Attorney General of England by law or usage so far as the same powers and duties are applicable to Canada, and also with the powers and duties which by the laws of the several Provinces belonged to the office of Attorney General of each Province up to the time when the British North America Act, 1867 came into effect, and which Laws under the provisions of the said Act are to be administered and carried into effect by the Government of the Dominion; ... He shall have the regulation and conduct of all litigation for or against the Crown ... in respect of any subjects, within the authority or jurisdiction of the Dominion".

Little time was wasted in passing other legislation to consolidate the criminal law and procedure for the newly formed Dominion. The Second Session of the First Parliament held in 1869 was particularly productive with eight acts relating to criminal law and procedure being passed.[102]

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[102] These acts were:
An Act respecting Procedure in Criminal Cases, and other matters relating to the Criminal Law [S.C. 1869, c. 29];
An Act respecting the duties of Justice of the Peace, out of sessions, in relation to persons charged with Indictable Offences [c. 30];
An Act respecting the duties of Justice of the Peace, out of sessions, in relation to summary convictions and orders [c. 31];
An Act respecting the prompt and summary administration of

As well, in 1868, Parliament passed "An Act respecting Police of Canada"[103] which provided for the appointment of Commissioners of Police to enforce the criminal law and other laws of the Dominion.

Initially, the federal Parliament made few changes to pre-Confederation prosecution practices. Bills of indictment were to continue to be presented to a grand jury by a prosecutor bound by recognizance to prosecute, or the Attorney General or Solicitor General for the Province could direct that an indictment be preferred or, a judge of a court having jurisdiction to so direct, could direct the indictment be tried by a grand jury[104]. By the end of 1869, the Parliament of Canada had enacted thirty pieces of legislation regarding the criminal law and it became necessary to clarify the status of a large number of pre-Confederation acts of the various colonies. Schedule B of "An Act respecting the Criminal Law and to repeal certain enactments therein mentioned"[105] lists the extent of repeal of these Acts.

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[102](cont'd)Criminal Justice in certain cases [c. 32];
An Act respecting the trial and punishment of Juvenile Offenders [c. 33];
An Act respecting Juvenile Offenders within the Province of Quebec [c. 34];
An Act for the speedy trial, in certain cases, of persons charged with felonies and misdemeanors, in the Provinces of Ontario and Quebec [c. 35];
An Act respecting the Criminal Law and to repeal certain enactments therein mentioned [c. 36].

[103] 31 Vict. cap. LXXIII, S.C. 1868, c. 73.

[104] Procedure in Criminal Cases Act, S.C. 1869, c. 29, s. 28.

[105] S.C. 1869, c. 36.

Both the provisions relating to county attorneys in Ontario and 'Court Appointed Counsel' in Nova Scotia remained in place. In fact, new duties and responsibilities were delegated to county attorneys by the Dominion legislation for "the more speedy trial ... in the Province of Ontario ..."[106]. In response to this Act, the Legislative Assembly of Ontario passed "An Act to renumerate Sheriffs, Clerks of the Peace, and County Attorneys for services rendered in the County Judges' Criminal Court"[107] which provided a table of fees payable "in respect of services rendered and performed by them respectively in all prosecutions, matters and proceedings, ... by virtue of the Act passed by the Parliament of Canada ..."[108]. The Local Crown Attorneys Act[109] also reflected the change in the duties of county attorneys. In 1857, ten years prior to Confederation, the predeceasor section 1 provided:

> "In every County in Upper Canada, there shall be a County Attorney for such County, to aid in the Local Administration of Justice, and to perform the several duties by this Act assigned to County Attorneys."

But by 1877, the equivalent section of the Act had been changed to read:

> "The County Crown Attorney for each County shall aid in the local administration of justice, and perform

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[106] S.C. 1869, c. 35.
[107] S.O. 1869, c. 10.
[108] Id. s. 1.
[109] R.S.O. 1877, c. 78.

the duties by this Act or any other Act, either of Canada or of this Province assigned to County Crown Attorneys."[110]

An argument can be made that by virtue of section 130[111] of the Constitution Act, 1867, county crown attorneys would have been deemed to be officers of Canada when discharging duties under federal legislation and in areas of federal legislative competence. This change in the section indicates that at least Ontario recognized that offices created under provincial legislation would now be carrying out federal duties and responsibilities. During this transitional period it was only natural that officers, county attorneys or court appointed counsel in Nova Scotia, should continue to perform their function as 'official' prosecutors. Their status before the courts was no different than that of any other private prosecutor so that the system of criminal prosecutions which was perpetuated was the same system of prosecutions that had previously existed under the common law. It would appear that the provinces, in particular Ontario, thought that 'official' prosecutors would discharge duties that were assigned by the

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[110] (Emphasis is mine).

[111] s. 130
"Until the Parliament of Canada otherwise provides, all Officers of the several Provinces having Duties to discharge in relation to Matters other than those coming within the Classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces shall be Officers of Canada, and shall continue to discharge the Duties of their respective Offices under the same Liabilities, Responsibilities, and Penalties as if the Union had not been made."

federal Parliament, including the duty to enforce the criminal law. John A. Macdonald's dream was to have one administration; it seems only reasonable that in a fledgling nation, the administration that was already in place at the local level would carry out duties for both levels of government at least until the federal government made other arrangements.

B. THE EARLY CASES PRIOR TO PASSAGE OF THE CRIMINAL CODE

The precise status of the attorneys general of the provinces vis a vis the Attorney General of Canada in the years immediately following Confederation is a most difficult issue. Section 129 of the Constitution Act, 1867[112] provided that until legislation was enacted which altered the pre-Confederation position all of the laws in force, all courts, all legal commissions and powers, and all officers, would continue as if the union had not been created. In the area of prosecutions, the role of the provincial attorney general was to continue to be the same

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[112] "s. 129 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 the Legislature under this Act."

until it was statutorily changed. No legislation during this period attempted to exclude the provincial attorney general from prosecuting but federal legislation passed in 1867, 1868 and 1869 did create a role for the federal Attorney General[113] in relation to "any subjects, within the authority or jurisdiction of the Dominion"[114].

One of the earliest cases to attempt to define the powers of the provincial attorney general in relation to the federal Attorney General was The Attorney-General v. The Niagara Falls International Bridge Company[115]. The information in this case was filed by the Attorney General of Ontario and it alleged a common nuisance - that of refusing to carry the traffic of the Erie and Niagara Railway Company over the Niagara Falls suspension bridge thereby causing an injury to the public. The information further alleged that an agreement between the bridge companies and the Great Western Railway Company, which restricted the access of the Erie and Niagara Railway Company to the Niagara Falls suspension bridge, was ultra vires. The defendant, the Great Western Railway Company demurred[116]

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[113] See chapter, supra "Legislative History after 1867".
[114] An Act respecting the Department of Justice, S.C. 1867, c. 39 s. 3.
[115] (1874) 20 Grants Chancery Reports 34.
[116] "Demurrer" is defined as "assuming all that was set forth in the statement of claim to be true, the action brought must fail." The Encyclopedia of Words and Phrases Legal Maxims: Canada 1825 to 1978. (3d) Toronto: Richard De Boo, 1979. In this particular action, to have the agreement between the companies declared void and to restrain them from limiting the access of the Erie and Niagara Railway Company, the defendant must have been arguing that the

for want of equity in the Ontario Court of Chancery. The first ground for demurrer was that the Attorney General for the Dominion was the proper officer to file the suit. No action by the federal Attorney General was at issue in these proceedings. This argument was based on the fact that an international bridge was the subject of the litigation but the Court characterized the nuisance as one against the public of Ontario.

It is important to note that the "Canadian Act" which incorporated the company to construct the Niagara Falls Suspension Bridge was passed by the Provincial Parliament of Canada about twenty years before Confederation[117] and therefore the corporation was not a Dominion company and the Attorney General of Ontario would normally be the law officer to enforce a section of that Act. Vice Chancellor Strong held that the Attorney General of the province was the proper officer to file the information "in respect of a violation of the rights of the public of Ontario" and in obiter, he was of the opinion that the Attorney General of the province was the proper officer to prosecute all criminal law:

> "The Attorney-General files this information; not complaining of any injury to property vested in the Crown, as representing the Government of the Dominion, but in respect of a violation of the rights of the public of Ontario. The

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[116](cont'd)information did not disclose a cause of action.

[117] (1846) 10 Vict., c. 11?

Attorney-General of this Province is the officer of the Crown, who must be considered to be present in the Courts of the Province to assert the rights of the Crown and those who are under its protection. If an ex-officio information in respect of a nuisance caused by illegal interference with a railway, which is a public highway, were to be filed in a Court of Common Law, there would, I should think, be no doubt but that the Provincial Attorney - General was the proper officer to prosecute. Then on what principle could it make any difference that the railway in the supposed case, as the bridge here, belonged to a class of works over which, as extending beyond the limits of the Province, the British North America Act had conferred legislative powers on the P liament of the Dominion? I can discover nothing incongrous or inconvenient in the Attorney-General for the Province being admitted to sue on behalf of the public, even in respect of the violation of rights created by an Act of the Parliament of the Dominion. So far from that being so the whole system of the administration of criminal justice furnishes an analogy to the contrary. The power of making criminal laws is in the Legislature of the Dominion; but it has never been doubted that the Attorney-General of the Province is the proper officer to enforce those laws

by prosecution in the Queen's Courts of Justice in the Province."[118]

Vice Chancellor Strong's comment that "it has never been doubted that the Attorney General of the Province is the proper officer to enforce those laws by prosecution in the Queen's Courts of Justice in the Province" is without foundation. Since 1857[119] county attorneys prosecuted the majority of crimes in Upper Canada/Ontario. County attorneys were not representatives of the Attorney General of Ontario. Other prosecutions, particularly for minor offences, were conducted by private individuals. The County Attorneys Act required county attorneys to oversee and assist private prosecutors. There is no evidence to indicate that the Attorney General of Ontario was actively involved in criminal prosecutions. In the period immediately before Confederation, the Attorney General for Upper Canada, the Honourable John A. Macdonald was too involved in preparations for union to be in the courts prosecuting. Vice Chancellor Strong does not cite any authority for his statment which appears to go against the practice of the day.

The companies involved in construction and operation of this international bridge were established by acts of the State of New York and the Parliament of the Province of Canada.[120]

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[118] 20 Grants Chancery Reports at 38.

[119] An Act for the Appointment of County Attorneys S.C. 1857 c. 59.

[120] After 1867 the federal government had authority over

Within the charter of the Canadian (after 1867, Ontario) company was the section primarily relied on in this action: "if any toll-gatherer shall unreasonably, and without cause delay or hinder any passenger, or the passage of any property ... he shall be liable to a prosecution."[121] The Erie and Niagara Railway Company had, by virtue of an indenture dated October 1, 1853 a right to carry passengers and freight across the bridge for a toll. The Erie and Niagara Railway Company could have brought an action to enforce this contractual obligation to permit use of the bridge. Instead, the action at issue in this demurrer was brought by the Attorney General of the province, primarily to obtain an injunction to restrain the defendant's actions.

Vice Chancellor Strong held that the information was sustainable on demurrer. To come to this decision, the Vice Chancellor had only to find that a provincial company incorporated by an act of the Parliament of the Province of Canada was the subject of the action. The legislative body which granted a company its charter should also be the one to seek its revocation. Or, the Vice Chancellor could have found that any breach of section 12 made the company liable

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[120](cont'd) ernational bridges since they were expressly excluded from provincial authority by s. 92(10): "Local Works and Undertakings other than such as are of the following Classes, - (a) Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province:".

[121] Niagara Falls Bridge Co. at 39 (section 12 of 10 Vict. c. 112).

to prosecution.[122]

The question for Vice-Chancellor Strong to determine was in relation to an objection to the application for an injunction. No criminal proceedings were involved. The federal Attorney General did not assert any role in the proceedings. The company involved in the bridge construction was provincially incorporated but following Confederation all railways and any international bridges were under federal jurisdiction. There was absolutely no evidence that the provincial Attorney General would have been the proper officer to prosecute an offence of nuisance in a court of common law in Ontario. The decision on appeal that the actions of the company were ultra vires under its charter addressed the only question that the court was required to answer. Therefore, Vice Chancellor Strong's comments regarding the prosecution of criminal offences were clearly obiter and are also suspect as to their accuracy in view of cases such as those discussed below.

In British Columbia and in Nova Scotia the federal Attorney General prosecuted nuisance offences. The British Columbia Supreme Court in Attorney General of Canada v. Ewen[123] did not follow the opinion of the Court of Chancery

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[122] Vice Chancellor Strong's order overruling the demurrer was affirmed on re-hearing. Chancellor Spragge, on the rehearing held that the agreement by the bridge company to lease to the Great Western Railway Company was equivalent to a transfer of their franchise and therefore ultra vires the company. No discussion of the role of the Attorney General of Ontario was included in the judgment on the rehearing.

[123] (1895) 3 B.C.R. 468. Decision upheld on appeal.

of Ontario in Niagara Bridge Co.. Ewen involved an action in public nuisance to restrain the defendants from actions detrimental to navigation of the Fraser River, a public harbour. Mr. Justice Drake held that the right of the Attorney General of Canada to prosecute was co-extensive with that of the provincial attorney general. Similiarly, the right of the Attorney General of Canada to apply for an injunction to restrain the defendant from a nuisance affecting a public navigable harbour was upheld in The Queen v. Fisher[124].

The views of Vice Chancellor Strong in the Niagara Falls Bridge case to the effect that the attorney general of a province was the only officer who could sue on behalf of the public were not followed in two cases dealing with Dominion companies. In Loranger, Attorney General of Quebec v. The Montreal Telegraph Co.[125], Mr. Justice Torrance of the Quebec Superior Court was of the opinion that the provincial attorney general "has a right to petition as he has done" (for the forfeiture of the Charter of the Montreal Telegraph Co., a Dominion company) but that "It may be competent to the Attorney-General of the Dominion to intervene in this suit"[126]. This view was followed by the Supreme Court of Canada in Dominion Salvage v. The Attorney General of Canada[127] where the Attorney General of Canada successfully prosecuted for the forfeiture of the

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[124] (1891) 2 Ex. C. R. 365.
[125] [1882] The Legal News 429.
[126] Ibid.
[127] (1891) 21 S.C.R. 72.

Charter of a federally incorporated company under the Quebec Civil Code.[128] The significance of these cases is that the courts acknowledged the office of the Attorney General of Canada.[129] The standing of the federal Attorney General before the courts was never seriously disputed in any of these prosecutions.

The Attorney General of Canada prosecuted breaches of the Inland Revenue Act in cases such as The Attorney General of Canada v. Flint,[130] and his right to do so was not questioned.

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[128] It would appear that the Quebec Civil Code provision was invoked because the company had defrauded the public of Quebec. Mr. Justice Taschereau wrote in his judgment for the majority of the Court:

> "It seems to me unquestionable, as held by all the judges in the two courts below, that the Attorney General of the Dominion has the right to impeach the legality or ask the forfeiture [sic] of a Dominion statutory charter. Whether, and in what cases, the Attorney-General for the province could also exercise that right we have not here to consider."

Although this case was never overturned, there would appear to be considerable merit to the argument advanced by counsel for the appellant company that "An Act of the parliament [sic] of Canada cannot be declared forfeited, annulled, set aside or repealed except by the same parliament which passed it,"(at 75). The facts of the case indicate that the company only carried on business in Quebec and this may have accounted for the nature of proceedings that were taken.

[129] An Act respecting the Department of Justice S.C. 1867, c. 39, s. 3. Later R.S.C. 1886, c. 21.

[130] (1883) 16 S.C.R. 707. Flint involved an allegation that the accused with three others was illegally distilling spirits contrary to provisions of the Inland Revenue Act. His machinery and apparatus for distilling along with a large quantity of spirits and mash were seized from his premises. The charge was brought in the Vice-Admiralty Court. The defendant brought an application for prohibition on the ground that the Vice-Admiralty Court lacked jurisdiction. The Supreme Court of Canada followed their earlier decision in Valin v. Langlois and held that the court had jurisdiction. No argument was advanced that the Attorney General of Canada was not the proper officer to prosecute the offence.

The case of Valin v. Langlois[131] referred to instances where the Attorney General of Canada was assuming a more active role in the prosecution of customs and trade and navigation offences.[132] Valin considered the constitutional validity of The Dominion Controverted Elections Act, 1874. This act provided that the jurisdiction and duty for trying controverted elections of members to the House of Commons lay with provincial superior courts and the judges of those courts. The exclusive right to legislate regarding elections to the House of Commons belongs to the Parliament of Canada.[133] An argument was advanced that the Parliament of Canada had no authority to impose a duty on the superior courts of the province to try issues under the Act since "the constitution, maintenance and organization of Provincial Courts" is exclusively within the legislative competence of the local legislatures. Chief Justice Ritchie dismissed this argument:

> "They are the Queen's Courts, bound to take cognizance of and execute all laws, whether enacted by the Dominion Parliament or the Local

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[131] 3 S.C.R. 1; 5 A.C. 115 aff'd.

[132] Chief Justice Ritchie commented at pages 22-23 of Valin: "In the first session of the Dominion Parliament in the Act respecting Customs, 31 Vic., cap. 6, by sec. 100, all penalties and forfeitures relating to the Customs or to Trade and Navigation, unless other provisions be made for the recovery thereof, are to be sued for by the Attorney-General, or in the name or names of some officer of Customs, or other persons thereinto authorized by the Governor-in-Council, and if the prosecution be brought before any County Court or Circuit Court, it shall be heard and determined in a summary manner upon information filed in such court."

[133] Constitution Act, 1867, section 41.

> Legislatures, provided always, such laws are within the scope of their respective legislative powers."[134]

In addition he goes on to point out the anamoly that would be created if the Parliament of Canada, competent to legislate in an area, passed laws that could not be executed by it. The Chief Justice stated that this would "neutralize, if not ...destroy ... the legislation of Parliament"[135]. Mr. Justice Fournier also suggested that it was illogical that the federal Parliament not be possessed of the "three indispensable elements of every government" - that is the legislative, the executive and the judicial powers.[136]

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[134] Valin (1879) 3 S.C.R. 1 at 20.

[135] "To hold that no new jurisdiction, or mode of procedure, can be imposed on the Provincial Courts by the Dominion Parliament, in its legislation or subjects exclusively within its legislative power, is to neutralize, if not to destroy, that power and to paralyze the legislation of Parliament. The Statutes of Parliament, from its first session to the last, show that such an idea has never been entertained by those who took the most active part in the establishment of Confederation, and who had most to do with framing the British North America Act, the large majority of whom sat in the first Parliament. A reference to that legislation will also show what a serious effect and what unreasonable consequences would flow from its adoption." Id. at 22.

[136] "If the proposition which I have above laid down be not correct [that the federal Parliament has the power to impose new duties upon the Courts] it necessarily follows that the authors of Confederation have omitted to create, for the execution of federal laws, a judicial power co-existing with the new order of things.

The preamble of the British North America Act indicates, however, that their first duty was to endow the federal union of the Provinces with a constitution based on the same principles as that of the United Kingdom. One of the essential elements of the British Constitution, as of every regular government, is the creation of a judicial power, such power and the

Equally as important as the judicial power that the federal Parliament conferred upon 'provincial' courts is the executive power. The executive power is "one of the essential elements of the British Constitution, as of every regular government"[137] and as such, the federal Parliament must be able to control the process for enforcing its laws. Although Valin was concerned with the judicial power in Canada - that is the constitution, organization and maintenance of provincial courts - many of the arguments apply by analogy to the executive power in Canada and in particular, the authority to prosecute and enforce federal laws. Without control over the prosecutorial function, the criminal law could be neutralized by an unwillingness or refusal on the part of the provincial attorney general to enforce the law.[138]

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[136](cont'd) legislative and executive powers forming the three indispensable elements of every government. Have they committed a mistake of such a grave nature as never to have thought of the creation of a judicial power? In the opinion of some, this strange omission was made," Id. at 50, 51 & 52.

[137] Ibid.

[138] Chief Justice Ritchie argues the analogous point in relation to the judicial power:

> "If it is ultra vires for the Dominion Parliament to give these courts jurisdiction over the matter, which is peculiarly subject to the legislative power of the Dominion Parliament, must not the same principle apply to all matters which are in like manner exclusively within the legislative power of the Dominion Parliament; and if so, would it not follow, that in no such case could the Dominion Parliament invoke the powers of these courts to carry out their enactments in the manner they, having the legislative right to do so, may think it just and expedient to prescribe. If so, would it not leave the legislation of the Dominion a dead letter till Parliament should establish courts throughout the Dominion for the special administration of the laws enacted by the Parliament of Canada: a state of things,

If the answer to this problem is that the federal Attorney General has the same standing as a private prosecutor before the courts - and in this manner the laws can be enforced - then there is a grave error of omission in the Constitution. The provincial attorney general could enter a nolle prosequi putting an end to the proceedings of the federal Attorney General and the only legislative body that could hold the provincial attorney general responsible for an abuse of prosecutorial discretion would be the provincial legislature. The creation of a legislative body competent to enact criminal law but ultimately unable to oversee the process of enforcing those laws would seem to be too great an error to ascribe to the Fathers of Confederation. The significant factor that the Honourable John A. Macdonald, Lord Carnarvon, the Honourable Mr. Addersley[139] and many others had emphasized was that Canada was to have one criminal law "operating equally"[140]

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[138](cont'd)I will venture to assume, never contemplated by the framers of the British North America Act, and an idea to which, I humbly think, the Act gives no countenance; on the contrary, the very section authorizing the establishment by Parliament of such courts, speaks only of them as "additional courts for the better administration of the laws of Canada. It cannot, I think, be supposed for a moment that the Imperial Parliament contemplated that until an Appellate Court, or such additional courts, were established, all or any of the laws of Canada enacted by the Parliament of Canada, in relation to matters exclusively confided to that Parliament, were to remain unadministered for want of any tribunals in the Dominion competent to take cognizance of them." Id. at 20. (Emphasis is mine).

[139] Second Reading of the Bill in the House of Commons in Great Britain. See "Hansard" column 1164 for February 28, 1867.

[140] John A. Macdonald supra n. 21.

throughout the Dominion. If the Attorney General of Canada does not control the nolle prosequi in relation to federal legislation, then the opportunity exists for the attorneys general of the provinces to exercise their respective discretions in a manner that is destructive of the uniform operation of the criminal law. As well, the only parliamentary control of this discretion would be within the local legislatures. The functional effect that this would have is that the criminal law within a province could reflect the viewpoint of the attorney general of that province. Accordingly, the criminal law would cease to be the same throughout Canada for all practical purposes. The framers of the Constitution intended to avoid that very situation from occurring.

Valin[141] considered the meaning that can be attached to section 92(14) of the Constitution Act, 1867, "the administration of justice". The Supreme Court of Canada held that common sense dictated that the interpretation of this section must fit within the context of the Act as a whole:

> "The 14th section gives local authority to deal with the "administration of justice in the Province," which I construe to mean the power of legislating for the administration of justice in the Province in regard to the subjects given by the Act, and, to that extent only, to provide for "the constitution,

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[141] (1879) 3 S.C.R. 1.

maintenance and organization of Provincial Courts," including the procedure necessary for the administration of justice in reference to those and kindred subjects. I have not failed to notice the comprehensiveness of the provision, including as it does procedure in civil matters in those courts. These words, I hold, must be considered with the context and with the objects and other provisions of the Act, and common sense and reason suggest how inartificial and incomplete the legislation must be that would confer unlimited power on the Dominion Parliament to deal with a subject such as the trial of contested elections, and leave the necessary procedure to give effect to its legislation to Local Legislatures which one or more might not enact at all, or in such a way as to be useless, or by such measures as would, in one Province be essentially different from those in others. To contend that such was intended by the Act would, in my opinion, be a libel on the intelligence of the British Parliament."[142]

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[142] Id. at 67. See also Mr. Justice Taschereau at 74 - 76 where he discusses the administration of justice.

"I take, for one instance, the criminal law. The constitution, maintenance and organization of Provincial Courts of criminal jurisdiction is given to the Provincial Legislatures, as well as the constitution, maintenance and organization of courts of civil jurisdiction, yet, cannot Parliament, in virtue of section 101 of the Act, create new courts of criminal jurisdiction, and enact that all crimes, all offences shall be tried exclusively before these new courts? I take this to be beyond controversy. ... So, the

There is merit in Mr. Justice Henry's argument that the administration of justice in the province relates only to the other subjects that are contained within section 92 of the Constitution Act, 1867. The cogency of this position would be clearer if the provisions in section 92(14) regarding the "administration of justice in the province" and "provincial courts" had been paralleled in section 91 with "due execution of the laws of Parliament" and the provisions for "additional courts"[143] - as the delegates at the London Conference had proposed. It may well be that it was precisely for this reason (restricting the operation of section 92(14) to provincial subject matters) that the draftsmen included the phrase "in the Province". This interpretation of section 92(14) would bring it into line with section 92(15) which provides for the imposition of punishment by fine, penalty, or imprisonment ... "in relation to any matter coming within any of the Classes of Subjects enumerated in this Section". Perhaps the justice that is to be administered is only in relation to provincial laws. To the British draftsmen, intimately acquainted with the principles of British constitutional law, it would have been obvious that a sovereign body such as the Parliament of Canada, would have the executive power to administer its

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[142](cont'd)administration of justice is given to the Provinces, it is true, but that cannot be understood to mean all and everything concerning the administration of justice."

[143]Supra p. 28. The parallel provision from the London Conference Draft read: 36(35)"To establish a General Court of Appeal, and in order to the due execution of the Laws of Parliament additional Courts when necessary."

laws but it may not have been as obvious that the provincial legislatures were to have such authority in relation to those matters enumerated in section 92.[144]

C. THE CRIMINAL CODE, 1892

In 1892, the Minister of Justice, Sir John Thompson introduced a Bill in the Spring Session of Parliament to codify the existing common law and statute law relating to criminal law and procedure. "An Act Respecting the Criminal Law", the Criminal Code[145], received Royal Assent on July 9, 1892 and came into force on July 1, 1893. The Criminal Code was based on the English Draft Code, Stephen's Digest of Criminal Law (1887), Burbridge's Digest of the Canadian Criminal Law (1889) and the Statutes of Canada.

One of the key aspects of the common law which was codified by the passage of the Criminal Code was the nolle prosequi. This common law right of the attorney general became the statutory right of the attorney general to enter a stay of proceedings.[146]

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[144] Because the British draftsmen were unfamilar with a federal system, it must have seemed unusual to them to have any other legislature [other than the Parliament of Canada] possessing any executive authority that might have been considered incident to sovereignty.

[145] 55-56 Vict. cap. 29, 1892 S.C. c. 29.

[146] Criminal Code, 1892 s. 732:
"The Attorney-General may, at any time after an indictment has been found against any person for any offence, and before judgment is given thereon, direct the officer of the court to make on the record an entry that the proceedings are stayed by his direction, and on such entry being made all such proceedings shall be stayed accordingly.
2. The Attorney-General may delegate such power in any particular case to any counsel nominated by him."

As discussed earlier[147] the nolle prosequi was the most important control that the attorney general exercised over the process of prosecutions by individual citizens. Codification of the nolle prosequi changed the common law slightly. Any counsel nominated by the attorney general, rather than the attorney general personally, could now exercise the right to put an end to a proceeding under the Criminal Code. This one feature provides the distinguishing point between a private prosecution carried out by an 'official' prosecutor and a public prosecution in the true sense. This provision permitted the development of the system of public prosecutions that exists today in Canada. Once the attorney general could appoint counsel to act on his behalf and delegate to them powers such as the right to enter a stay of proceedings, he was able to create a department of prosecutors. The attorney general's nominees would be accountable to him as he would be able to withdraw their appointments. Therefore, it was only through statutory changes that Canada was able to develop a system of public prosecutions.[148]

The attorney general was defined in the Criminal Code as (i) the attorney general of the province and (ii) the

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[147] See chapter "A Historical Review of Prosecutions at Common Law", supra p. 40.

[148] England has chosen not to legislate in this regard. In England, the Attorney General or if there is no Attorney General, the Solicitor General or D.P.P., alone exercises the nolle prosequi. See chapter "Historical Review of Prosecutions at Common Law", supra for other significant differences between the English and Canadian systems of prosecutions.

Attorney General of Canada for the Northwest Territiories and the District of Keewatin (now the Yukon). The significance of this definition of attorney general would have been minimal in 1892. The Attorney General of Canada was involved in prosecutions; however, the nature of the prosecutorial process at this time was such that the Attorney General possessed few powers beyond those exercised by any other person who might choose to prosecute. Within the provinces, the role of the provincial attorney general, although increasing in importance, was not that significant prior to the codification of the criminal law. Although the attorney general exercised significant powers at common law, the most vital role in the prosecutorial process at this time belonged to the private prosecutor and the grand jury. Only as the use of the grand jury (and private prosecutions) was restricted by revisions to the Criminal Code procedure did the role of the attorney general and his department become all pervasive.

D. PRIVATE PROSECUTIONS

The Criminal Code, 1892 also codified the common law and previous statute law regarding who might prosecute and how an indictment was to be preferred. All prosecutions, except those by the attorney general or counsel nominated by him, whether by an individual or by 'official' prosecutors such as police officers, municipal authorities, counsel appointed by a Superior Court or even county crown attorneys

in Ontario, were private prosecutions and governed by the provisions and conditions set out in sections 594, 595, 598 and 641 of the Criminal Code.[149]

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[149] Provisions regarding prosecutions, other than by the attorney general:

"s. 594. When all the witnesses on the part of the prosecution and the accused have been heard the justice shall, if upon the whole of the evidence he is of opinion that no sufficient case is made out to put the accused upon his trial, discharge him; and in such case any recognizances taken in respect of the charge shall become void, unless some person is bound over to prosecute under the provisions next hereinafter contained.

595. If the justice discharges the accused, and the person preferring the charge desires to prefer an indictment respecting the said charge, he may require the justice to bind him over to prefer and prosecute such an indictment and thereupon the justice shall take his recognizance to prefer and prosecute an indictment against the accused before the court by which such accused would be tried if such justice had committed him, and the justice shall deal with the recognizance, information and depositions in the same way as if he had committed the accused for trial.

2. Such recognizance may be in the form U in schedule one hereto, or to the like effect.

3. If the prosecutor so bound over at his own request does not prefer and prosecute such an indictment, or if the grand jury do not find a true bill, or if the accused is not convicted upon the indictment so preferred, the prosecutor shall, if the court so direct, pay to the accused person his costs, including the costs of his appearance on the preliminary inquiry.

4. The court before which the indictment is to be tried or a judge thereof may in its or his discretion order that the prosecutor shall not be permitted to prefer any such indictment until he has given security for such costs to the satisfaction of such court or judge.

s. 598. When any one is committed for trial the justice holding the preliminary inquiry may bind over to prosecute some person willing to be so bound, and bind over every witness whose deposition has been taken, and whose evidence in his opinion is material, to give evidence at the court before which the accused is to be indicted."

Private prosecutions were subject to costs being awarded to the accused if the prosecutor was unsuccessful in obtaining a true bill from the grand jury[150].

The Queen v. St. Louis [151] is an example of a case where a private prosecutor was ordered to pay costs because the grand jury did not find a true bill. Arthur Sherwood, the Commissioner of Dominion Police, was bound before a magistrate by recognizance to prosecute Emmanuel St. Louis for receiving money under false pretences. On June 6, 1895, the Attorney General of Canada intervened in the prosecution

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[149](cont'd) 4. Every such recognizance shall bind the person entering into it to prosecute or give evidence (both or either as the case may be), before the court by which the accused shall be tried.

5. All such recognizances and all other recognizances taken under this Act shall be liable to be estreated in the same manner as any forfeited recognizance to appear is by law.

641. Any one who is bound over to prosecute any person whether committed for trial or not may prefer a bill of indictment for the charge on which the accused has been committed, or in respect of which the prosecutor is so bound over, or for any charge founded upon the facts or evidence disclosed on the dispositions taken before the justice. ...

2. The Attorney-General or any one by his direction or any one with the written consent of a judge of any court of criminal jurisdiction or of the Attorney-General, may prefer a bill of indictment for any offence before the grand jury of any court specified in such consent: and any person may prefer any bill of indictment before any court of criminal jurisdiction by order of such court.

3. It shall not be necessary to state such consent or order in the indictment. An objection to an indictment for want of such consent or order must be taken by motion to quash the indictment before the accused person is given in charge.

4. Save as aforesaid no bill of indictment shall after the commencement of this Act be preferred in any province of Canada.

[150] Section 595(3) of the Criminal Code, 1892.

[151] (1897) 1 C.C.C. 141 (Que. Q.B.).

by notifying the Attorney General of Quebec that he would cover the costs of the Crown Prosecutor if he would lay the indictment before the grand jury. Until the Attorney General of Canada came forward on June 6, 1895, the prosecution commenced by Sherwood, Commissioner of Dominion Police, was no different than that of any other private prosecutor under the Criminal Code. He was bound by recognizance to prosecute and was also liable for the accused's costs should the grand jury find "no bill". On June 15, 1895 the grand jury threw out the indictment. Mr. Justice Wurtele of the Quebec Court of Queen's Bench held that Mr. Sherwood was liable for St. Louis's costs until the Attorney General of Canada intervened on June 6, 1895[152] since he was acting as a private prosecutor:

> "In the absence of any express provision of law, the attorney-general either of Canada or of one of the Provinces, as the case may require, is alone authorized to represent the Queen, and I have therefore to see if any such authorization has been given to the Commissioner of the Dominion Police. The office is created by ch. 184 of the Revised Statutes of Canada ... No power or authority is conferred upon the Commissioner of the Dominion Police to represent Her Majesty the Queen or to act on her behalf in criminal proceedings before the Courts, and he, consequently, could and did only act

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[152] Id. at 148.

> in the present case as a private individual who had reason to believe that a person had committed an indictable offence, and who was desirous of bringing such person to justice ... He may have been instructed by the Dominion law officers to lay the information as the charge affected the Government of the Dominion. But in so far as the accused and the magistrate were concerned, he was acting as a private individual under the authority of article 558[153] of the Criminal Code."[154]

Mr. Justice Wurtele's decision to award costs against Sherwood is correct in law, since Sherwood was only acting as a private prosecutor until the Attorney General of Canada intervened. He had paid a sum of $ 1,000.00 as a recognizance binding him to prosecute. This sum was subject to forfeiture if he should fail to prosecute. Mr. Justice Wurtele found that he would not have incurred this obligation if he had been acting for the Crown because it would have been tantamount to the Crown making an obligation to pay money to itself[155]. Although Mr. Justice Wurtele stated that the Attorney General of Canada had standing only

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[153] Section 558
"Any one who, upon reasonable or probable grounds, believes that any person has committed an indictable offence against this Act may make a complaint or lay an information in writing and under oath before any magistrate or justice of the peace having jurisdiction to issue a warrant or summons against such accused person in respect of such offence.
2. Such complaint or information may be in form C in schedule one hereto, or to the like effect."

[154] (1897) 1 C.C.C. 141 at 146, 147.

[155] Id. at 148.

as a private prosecutor, he did not award costs against Sherwood once the federal Attorney General entered the prosecution on June 6, 1895. If the Attorney General of Canada was acting as a private prosecutor only, then costs should have been awarded to the accused for the entire prosecution. Although an argument could be made that the Attorney General of Canada would not have to provide a recognizance to prosecute because this would be a promise by the Crown to pay money to itself, the payment of the accused's costs in an unsuccessful prosecution would not be subject to the same argument.

Mr. Justice Wurtele determined that there were two questions that were relevant to his decision in this case. The first question he asked was whether Mr. Sherwood was acting in a representative capacity or whether he was acting as an "ordinary individual"[156]. He found that Sherwood was acting as an "ordinary individual" until the Attorney General of Canada intervened. Second, having found that Sherwood was a private prosecutor, he asked what: "fees and disbursements should be allowed against him"[157]. On this question, he ordered Arthur Sherwood to pay $ 1,166.08 to the accused[158].

Mr. Justice Wurtele's statement in <u>obiter</u> that the Attorney General of Canada "occupies a position which is analogous to that of a private prosecutor"[159] is

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[156] Id. at 144.
[157] Ibid.
[158] Id. at 151.
[159] Id. at 146.

inconsistent with his comment that "The Attorney-General of Canada is the legal and proper representative of the Crown in all matters which concern the Government of the Dominion".[160] This disjunction seems to result from Mr. Justice Wurtele confusing the constitutional issue - that is whether the prosecution of criminal law falls squarely within the administration of justice - with the issue of statutory interpretation - that is, the proper application of the sections of the Criminal Code which limited the role of the Attorney General of Canada.

The provisions of the Criminal Code require the Attorney General of Canada first be authorized to prosecute "by the order of a judge or of the court"[161]. This quotation has repeatedly been interpreted as authority for the proposition that the status of the Attorney General of Canada in criminal prosecutions is equivalent to that of a private prosecutor:[162]

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[160] The late Chief Justice Laskin in Canadian National Transport v. A.G. Can. (1983) 49 N.R. 241 at 252, commented: "The remarks of Wurtele J. suggesting provincial primacy were merely obiter and, indeed, are difficult to reconcile with the ratio."

[161] St. Louis (1897) 1 C.C.C. 141 at 145.

[162] See for example, Mr. Justice Dickson's judgment in R. v. Hauser (1979) 26 N.R. 541 at 587 where he stated:

> "We come then to the much discussed decision of Wurtele, J., of the Quebec Court of Queen's Bench in Regina v. St. Louis (1897), 1 C.C.C. 141. ... Wurtele, J., held that the Commissioner was not acting as legal representative of the Queen, but had bound himself over to prosecute as a private individual, and hence was liable for all costs incurred by St. Louis until the Attorney General of Canada intervened with leave of the court."

Later at 599, Mr. Justice Dickson, as he then was, concluded:

> "Among the older cases, in particular Niagara Falls

"By the Act of Confederation, the administration of justice in each of the Provinces is entrusted to the Provincial Government, and it is therefore the provincial law officers of the Crown whose duty it is to conduct or to supervise, as the case may be, all criminal prosecutions. The proceedings are generally commenced by a private prosecutor, who lays his complaint before a magistrate; but in cases which concern the Government of the country or affect the public interests, the prosecution may be commenced by the provincial attorney-general himself or a crown prosecutor duly authorized by him, directly preferring a bill of indictment before the grand jury, or when the matter regards the federal government by the Attorney-General of Canada doing so, who must, however, be first authorized to do so by the order of a judge or of the court; or Her Majesty, under the provisions of article 558 of the Criminal Code, may lay an information before a magistrate and thus initiate a prosecution, but, in doing so, the Crown must be represented and must act by the attorney-general of the Dominion or of one of the provinces, as the case may relate either to the Dominion or to a province.

162(cont'd) Bridge and St. Louis, 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."

> he Attorney-General of Canada is the legal and proper representative of the Crown in all matters which concern the Government of the Dominion, and he has the superintendence of all matters connected with the administration of justice in Canada not within the express jurisdiction of the Governments of the Provinces. 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, and consequently when he, with the consent of a judge or under an order of the court, prefers a bill of indictment, and conducts a prosecution before the petit jury in which the Government of the Dominion is interested, he occupies a position which is analogous to that of a private prosecutor."[163]

Mr. Justice Wurtele's remarks are particularly confusing because he starts his analysis with a discussion of the division of powers under the Constitution Act, 1867 but in his second sentence, he moves to a consideration of the statutory provisions in the Criminal Code, 1892. In the next paragraph, Mr. Justice Wurtele appears to have been commenting on the legislation establishing the office of Minister of Justice when he stated that the Attorney General

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[163] St. Louis (1897) 1 C.C.C. 141 at 145-146.

of Canada represents the Dominion Government in all matters that concern that government. Again in the second sentence of this paragraph, he returned to his interpretation of the Criminal Code. Finally he reached the conclusion that, based on the sections of the Code, the Attorney General of Canada followed the same procedure as a private prosecutor when he prosecuted. When Mr. Justice Wurtele commented that "the conduct or supervision of criminal prosecutions before the criminal courts devolves upon the provincial law officers" it is not clear whether he based his opinion on the definition of attorney general in the Criminal Code or whether he based his opinion on what he felt was the correct interpretation of section 92(14) of the Constitution Act, 1867. No constitutional issue was argued in this case. There was no suggestion that the Attorney General of Canada did not have the right to intervene as he did. The Attorney General of Quebec did not appear to have had any role in the prosecution nor to have advanced the proposition that the Attorney General of the province was the proper law officer of the Crown to intervene. Finally, it is difficult to reconcile Mr. Justice Wurtele's statement that

> "the Attorney-General of Canada is the legal and proper representative of the Crown in all matters which concern the Government of the Dominion, and he has the superintendence of all matters connected with the administration of justice in Canada not within the express jurisdiction of the Governments

of the Provinces."[164]

with his earlier statements. These remarks are consistent with the position that the administration of justice in Canada applies to all subject matters enumerated in 91 and that the federal Parliament has simply choser delegate the duty to prosecute offences under the Code to the provincial attorneys general.[165] This type of delegation of duty had been upheld by the Supreme Court of Canada in the cases of Re Henry Vancini,[166] Valin v. Langlois[167] and Attorney General v. Flint .[168]

The Changing Status of Private Prosecutions

During the twentieth century, two significant changes have occurred in the system of prosecutions in Canada. First, the role of individuals in the prosecutorial process has been restricted by changes to the Criminal Code. Second, there has been a shift in the status of officials such as county crown attorneys from that of private prosecutors to that of public prosecutors. The Commissioner

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[164] Ibid.

[165] S.C. 1892, c. 29, s. 3(b)
"The expression "Attorney-General" means 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;"

[166] (1904) 34 S.C.R. 621. Vancini, stands for the proposition "that the Dominion Parliament can, in matters within its sphere, impose judicial duties upon any subjects of the Dominion, whether they be officials of provincial courts, other officials or private citizens". The King v. La Bell 39 N.B.R. 468.

[167] (1879) 3 S.C.R. 1.

[168] 16 S.C.R. 707.

of Dominion Police in Regina v. St. Louis[169] was held to be a private prosecutor (although he reportedly acted on the directions of the Attorney General of Canada) until the federal Attorney General actually intervened; counsel appointed by the court[170] were private prosecutors operating under the authority of the court; county crown attorneys[171] were private prosecutors since they had no more power before the courts than a private citizen had; even a deputy attorney general[172] did not have the status of a public prosecutor. Today all of these officials would either be counsel/agents of the attorney general (county crown attorneys, deputy attorney general) and therefore public prosecutors or would work closely with the attorney general's department (police forces). It is very unlikely that any court in Canada would find it necessary to appoint counsel to conduct a prosecution.

The Criminal Code, as amended in 1954,[173] altered the common law status of the private prosecutor before the courts. These amendments also repealed the provisions which permitted a judge to order that a private individual be paid the costs of any prosecutions he undertook. This placed an individual in exactly the same position as he or she was in prior to 1752, when legislation to pay the costs of

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[169] (1892) 1 C.C.C. 141.
[170] For example under the Administration of Criminal Justice Act R.S.N.S. 1864 c. 171, s. 65 or under the Expenses in Criminal Prosecutions Act S.N.B. 1894 c. 19 s. 1.
[171] R.S.O. 1877 c. 78.
[172] (1917) Re The Criminal Code and the Lord's Day Act 16 C.C.C. 459 (S.C.C.).
[173] S.C. 1953-54 c. 51.

successful prosecutions was first passed in England. When all costs, even in a successful prosecution, are borne by the individual, it is tantamount to prohibiting private prosecutions since it is unlikely that anyone can afford to prosecute.

In Regina v. Schwerdt[174], Mr. Justice Wilson of the Supreme Court of British Columbia analyzed the role of the private prosecutor under the 1954 Code in the following terms:

> "...Part 16 ... results ... in there being ... three different situations [for private prosecutors] created by the Code in respect of the trial of the same offence: 1. On summary trial before a Magistrate the private prosecutor is heard as of right; 2. on speedy trial before a Judge he cannot be heard unless the Attorney-General or the Clerk of the Peace prefer a charge, or the Attorney-General allows him to prefer a charge; 3. On trial by Judge and jury he may be heard by leave of the Court, or the Attorney-General".[175]

Mr. Justice Wilson held that, unless prohibited by statute, the common law still applied to permit a private prosecution[176].

One of the other significant changes in the 1954 Criminal Code was the addition in section 2 of the

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[174] (1957) 119 C.C.C. 81 (B.C. S.C.).
[175] Id. at 91.
[176] Id. at 88.

definition of 'prosecutor':

> "s. 2(33) prosecutor means the Attorney General or, where t[illegible]torney general does not intervene, means the person who institutes proceedings to which this Act applies and includes counsel acting on behalf of either of them."

The importance of this definition was that it excluded all persons (in private prosecutions) from prosecuting except the person who actually laid the information. This provision, which limited who could prosecute, should be contrasted with the position at common law where every private person could prosecute a criminal offence and in fact, it was their duty to do so[177]. This definition of prosecutor was another indication of the shift from a system of community involvement through private prosecutions to a system controlled by public prosecutors.

The case of Regina v. Edmunds[178] is an example of the limiting effect of the definition of prosecutor in section 2(33) of the Criminal Code. Edmunds marked the end of the practice in Newfoundland of police officers, who were not the informants, prosecuting in summary trials. This pre-Confederation practice "was so universally accepted as to be recognized as part of the law of Newfoundland" by the Supreme Court of Canada in Edmunds. At trial, Edmunds was prosecuted by a R.C.M.P. officer who was not the informant.

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[177] Stephen's Criminal Law of England volume I, p. 495 quoted with approval in Re McMicken 20 C.C.C. 334 at 342.
[178] [1981] 1 S.C.R. 233 at 243.

Edmunds was eventually convicted of "breaking and entering". An appeal to the Court of Appeal of Newfoundland[179] was dismissed. An appeal to the Supreme Court of Canada was successful. Mr. Justice McIntyre, with the late Chief Justice Laskin and Justices Estey and Martland concurring, held that the R.C.M.P. officer did not fall within the definition of 'prosecutor' in section 2 of the Criminal Code. The accused had been charged with an indictable offence; therefore the majority held that the procedure in Part XVI of the Criminal Code - Indictable Offences: Trial Without Jury - was applicable and the definition of prosecutor in section 2 applied.[180]

At no point in the decisions of the Court of Appeal or the Supreme Court of Canada did the justices directly deal with the issue that the definition of "prosecutor", either in section 2 or in section 720 of the Criminal Code, was ultra vires the Parliament of Canada because the legislative authority to define who has the power to prosecute falls squarely within the exclusive jurisdiction of the province under section 92(14) of the Constitution Act, 1867. Mr. Justice Morgan of the Newfoundland Court of Appeal held that

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[179] (1978) 42 A.P.R. 108, 45 C.C.C. (2d) 104.

[180] Mr. Justice Ritchie dissented because he found that the procedure which was applicable was that outlined in Part XXIV of the Code which dealt with summary conviction matters. This was the mode of trial under which the accused elected to be tried. Part XXIV provides a different definition of prosecutor than that found in section 2(33). "s. 720 "prosecutor" means an informant or the Attorney General or their respective counsel or agents;". All Justices agreed that the R.C.M.P. officer was an "agent" of the attorney general.

the constitutional issue did not arise:

> "However, objection is taken with the provisions of the Criminal Code which define "prosecutor". That objection is based on the premise that the right of the Attorney-General to appoint agents for the purpose of conducting criminal prosecutions is granted by the Law Society Act. I can find nothing in that Act to support such a proposition. Members of the police forces, as such, have no status as advocates in Courts of justice [sic]. However, it has long been the practice in this province to permit police officers to conduct the prosecution of certain criminal offences in Magistrate's Courts. Section 86(i) of the Law Society Act merely recognizes that practice and exempts police officers from the penalties prescribed by that Act when acting as advocates. In my opinion, then s. 86(i) is not in conflict with the provisions of the Criminal Code and the constitutional issue does not arise."[181]

However, Mr. Justice Morgan did not consider that the practice itself, if indeed part of the law of Newfoundland, conflicted with the provisions of the Criminal Code.

Mr. Justice Gushue, in dissent, decided that it was not necessary to go into this issue at this time:

> "... it is obviously questionable whether the

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[181] Id. at 111, 112.

> designation of "prosecutor" comes under the head of administration of justice or that of criminal law and procedure. That these various above sections have been, and continue to be, tested in various ways in the Courts is well known and I do not feel it necessary to go into these cases at this time. I am of the view that for the purposes of the point presently before this Court, the provisions of the Criminal Code must govern my decision. The powers of a Magistrate are set forth in the Criminal Code and, while these are not necessarily exclusive, they can be limiting."[182]

Since this decision was rendered after Di Iorio and Fontaine v. Warden of the Common Jail of Montreal and Brunet[183], a judgment which many regard as the high water mark for a broad and far-reaching definition of "administration of justice," it is surprising that the Newfoundland Court of Appeal[184] would not have discussed the argument for provincial jurisdiction more thoroughly.

By the date of the Supreme Court of Canada's decision in Edmunds on March 19, 1981, judgment had been given in Regina v. Hauser[185] (May 1, 1979) and Regina v. Aziz[186] was decided less than two months earlier, on January 27, 1981. Both Hauser and Aziz were concerned with the constitutional

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[182] Id. at 120.
[183] (1976) 33 C.C.C. (2d) 289, 73 D.L.R. (3d) 491.
[184] Edmunds was decided by the Newfoundland Court of Appeal on March 10, 1978.
[185] 26 N.R. 541.
[186] 35 N.R. 1.

validity of section 2 of the Criminal Code. In Edmunds the Supreme Court of Canada took the position that the practice of R.C.M.P. officers prosecuting was part of the law of Newfoundland but that the provisions of the Criminal Code were fully in force in Newfoundland. The Court appears to have missed the inconsistency of these two propositions. Once the Supreme Court had determined that this practice had attained the status of law in Newfoundland, it is suggested that a strong argument could have been advanced that the province had exclusive constitutional jurisdiction over the prosecutorial function by virtue of section 92(14) of the Constitution Act, 1867. If the province had exclusive legislative jurisdiction under section 92(14) to define "prosecutor", then section 2 of the Criminal Code was ultra vires. The federal Parliament could not legislate to define prosecutor under any enumerated head of power in section 91 if the prosecutorial function and the definition thereof fell squarely within the "administration of justice" in section 92(14). Since the definition of "prosecutor" was exclusively within the legislative competence of the province, paramountcy could not be invoked.

The Supreme Court of Canada, having determined that the practice of police officers prosecuting in magistrate's court was law in Newfoundland, did not discuss the issue further. The case was decided solely on the basis of which definition of 'prosecutor' in the Criminal Code applied, that is the definition in section 2 or the definition in

section 720, and not on whether the Criminal Code provisions were constitutionally valid in the first place. Neither the Attorney General of Newfoundland nor the Attorney General of Canada intervened in this case. One can only assume that since the power of the attorney general to prosecute was not directly at issue, neither attorney general deemed it necessary to argue this point regarding the constitutional validity of the definition of "prosecutor" enacted by the federal Parliament. Whatever the compelling reasons of geography, isolation and transportation that resulted in this practice being initiated early in Newfoundland's history,[187] this practice must no longer have been thought to be necessary in the late 1970's or the Attorney General of Newfoundland would have intervened to argue the validity of section 86(i) of the Law Society Act and of the practice of police officers' prosecutions.

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[187] "This practice, as is pointed out by all judges of the Court of Appeal, stemmed from the difficulties of transportation to and from the outposts of the Province and the consequent impracticability involved in having to attach qualified lawyers as Crown prosecutors in the various magistrate's courts. It was thus recognized in Newfoundland before Confederation that prosecutions in summary conviction courts, whether they concerned summary conviction offences or indictable offences in respect of which the accused had elected trial by a magistrate, could legally be prosecuted by a police officer. [1981] 1 S.C.R. 233 at 242, 243. (Mr. Justice Ritchie).

E. FEDERAL PROSECUTIONS

Since the creation of the office of the Minister of Justice (ex-officio the federal Attorney General) in 1868[188], the federal Attorney General has prosecuted offences under federal legislation, other than those offences enacted in the Criminal Code. These prosecutions have been under acts such as the Narcotic Control Act and its predeceasor acts,[189] the Inland Revenue Act[190], the Excise Act[191], the Customs Act[192], the Immigration Act[193], and the Income Tax Act[194]. These prosecutions by the federal Attorney General were not to the exclusion of the provincial attorneys general. Provincial law officers also prosecuted under these Acts and prior to the 1954 Criminal Code, had the exclusive right to appeal from acquittals even if the prosecution was conducted on the instructions of the Attorney General of Canada[195]. Section 601 of the 1954 Criminal Code provided the Attorney General of Canada with

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[188] An Act Respecting the Department of Justice S.C. 1868 c. 39.

[189] See for example, Re Knechtel (1975) 35 C.R.N.S. (B.C.S.C.) 185 at 186: "Federal prosecutors have appeared in court to prosecute drug cases since Parliament first enacted drug abuse legislation in 1908 and they have appeared unchallenged as agents of the Attorney General of Canada."

[190] The Attorney General of Canada v. Flint (1883) 16 S.C.R. 707.

[191] For example Regina v. Gallant and Gallant(No. 2) (1944) 83 C.C.C. 55.

[192] Referred to in Regina v. Yuhasz (1960) 128 C.C.C. 172.

[193] Regina v. Badall [1975] 2 S.C.R. 503, 2 N.R. 524.

[194] These proceedings were usually undertaken by the Minister of National Revenue but occasionally, as in Regina v. Smythe [1971] 2 O.R. 209; aff'd [1971] 2 O.R. 2, [1971] 1 S.C.R. 680, the Attorney General of Canada was the prosecutor.

[195] See for example Regina v. Gallant and Gallant (No. 2) (1944) 83 C.C.C. 55.

the same right of appeal as the provincial attorneys general.

Courts at this time were hestitant, however, to characterize prosecutions by the federal Attorney General as criminal proceedings. For example, proceedings under the Customs Act were held to be in the nature of civil proceedings to collect penalties in Regina v. Yuhasz[196]:

> "It contemplates a civil process by which the Attorney General of Canada may sue for, prosecute and recover with costs, penalties and forfeitures imposed by the Act. These are in one aspect revenues due to the Crown in the right of the Dominion."[197]

In the majority's opinion, even though the Attorney General of Canada had prosecuted at the trial, the Attorney General for Ontario[198] had the status to appeal from the acquittal because the attorney general of the province was responsible

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[196] (1960) 128 C.C.C. 172 approving Regina v. Paquin (1955) 115 C.C.C. 146 and Regina v. Albert (1935) 63 C.C.C. 363.

[197] Yuhasz (1960) 128 C.C.C. 172 at p. 173, 174.

[198] Id. at 183, Mr. Justice MacKay stated:

> "The prosecution was conducted by counsel acting on the instructions of the Minister of Justice, and the same counsel appeared on the appeal. The notice of appeal is signed:
>
> "The Attorney General for Ontario
> by his counsel
> W.S. Martin, Q.C."
>
> Counsel states that he was acting on written instructions of the Minister of Justice and had verbal authority from the Attorney - General of Ontario to act in the matter on the appeal."

It is unclear from the judgment why the appeal was taken in the name of the Attorney General of Ontario and not the Attorney General of Canada. By sections 601 and 720 of the Criminal Code, 1954, the Attorney General of Canada had the same right of appeal as the provincial Attorney General.

for the enforcement of all criminal laws in all criminal proceedings:

> "The primary right to appear in any criminal proceeding at any stage is at all times in the Attorney - General of the Province. I would doubt the constitutionality of any federal legislation that might attempt to exclude him. In my opinion the legislation before us in this case does not purport to do so."[199]

The majority also held that s. 250 of the Customs Act, which provided that only the Attorney General of Canada, the Deputy Minister or any officer(s) or person(s) authorized by the Governor in Council and "no other person" could prosecute[200], was auxilary to the provisions under the Criminal Code relating to indictments. These provisions of the Customs Act would apply to "civil" proceedings and the provisions of the Criminal Code[201] would apply to "criminal" proceedings by way of indictment. Chief Justice Porter held that section 267(1)[202]

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[199] Id. at 179.

[200] "All penalties and forfeitures imposed by this Act, or by any other Act relating to the Customs or to trade or navigation shall, unless other provisions are made for the recovery thereof, be sued for, prosecuted and recovered with costs by Her Majesty's Attorney General of Canada, or in the name or names of the Deputy Minister, or any officer or officers, or other person or persons thereunto authorized by the Governor in Council, either expressly or by general regulation or order, and by no other person."

[201] The Attorney General of the province had the authority to prefer indictments under ss. 487 and 2(2) of the Code, and the right to appeal against a judgment or verdict of acquittal by virtue of s. 584.

[202] s. 267(1) "An appeal lies from a conviction or order dismissing an information or complaint made by any

of the Customs Act was to be interpreted in such a way that the provisions of the Criminal Code relating to summary conviction appeals applied to appeals under the Customs Act. He also held that the right of appeal provided by the Customs Act was an alternative to the general right of appeal applying to indictable offences. The majority based these comments on Vice Chancellor Strong's obiter in Attorney General v. Niagara Falls International Bridge Co.[203] and on Mr. Justice Rinfret's decision in People's Holding Co. v. Attorney General of Quebec.[204] Mr. Justice MacKay in dissent, held "that prosecutions and

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[202](cont'd)magistrate, judge, justice, or justices of the peace under this act, in the manner provided by the provisions of the Criminal Code relating to summary convictions, in that province in which the conviction or order was made, on the appellant furnishing security by bond or recognizance with two sureties to the satisfaction of such magistrate, judge, justice or justice of the peace, to abide the event of such appeal."

[203] (1873) 20 Grant's Chancery Reports 34 at 37.

[204] [1931] S.C.R. 452. People's Holding Co. was a case which involved a federally incorporated company that was defrauding the public in Quebec. Mr. Justice Rinfret found that the Attorney General of Quebec was acting as an officer of the Crown and therefore represented all of "His Majesty's subjects":

> "Now the Crown, as parens patriae, represents the interests of the whole of His Majesty's subjects, and we can discover no reason why the Attorney - General for the Province, acting as the officer of the Crown, should not be empowered to go before the Courts to present the violation of the rights of the public of the Province, even if the perpetrator of the deeds complained of be a creature of the federal authority. ...[quote in French]
>
> This accords with the position taken at bar by the Attorney - General of Canada who stated that he did "not desire to contest the right of an Attorney - General of a Province to take such proceedings as may be open to him to take, according to the practice of the Courts of the Province, for the purpose of compelling the observance within the Province of any law, federal or provincial, which may be in force therein."

Id. at 458.

appeals on charges laid under the Customs Act are within the exclusive jurisdiction of the Attorney General of Canada,"[205] since "both custom and excise and criminal law, including procedure, are within the exclusive jurisdiction of the Dominion"[206].

Yuhasz[207] is important for several reasons: first, it is an example of the federal Attorney General's involvement in enforcing acts passed by the Parliament of Canada; second, it shows the difficulty courts were having in justifying the role of provincial attorneys general when legislation expressly excluded them from prosecuting; third, it indicates that in 1960, there was no argument between the Attorney General of Canada and the provincial attorneys general over who undertook an appeal[208]; and fourth, since no argument was made that s. 203 of the Customs Act was ultra vires, the right of the federal Parliament to pass legislation providing for the enforcement of its laws was not disputed.

The Ontario Court of Appeal in Yuhasz[209] did not consider either Proprietary Articles Trade Association v. Attorney General of Canada[210] or Attorney General for Ontario v. Attorney General for Canada[211]

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[205] Id. at 183.
[206] Ibid.
[207] (1960) 128 C.C.C. 172.
[208] Counsel, appearing for the Minister of Justice, conducted the prosecution and then appeared on the appeal acting on written instructions from the Minister of Justice and verbal authority from the Attorney General of Ontario.
[209] (1960) 128 C.C.C. 172.
[210] [1931] A.C. 310.
[211] Sub nom. Ref. Re Dominion Trade and Industry Commission

In both of these cases it was primarily because the legislation[212] was characterized as criminal law[213] that the provisions regarding the Dominion law officers were held to be intra vires. It is impossible to reconcile the position of Lord Atkin in Proprietary Articles Trade Ass'n that "The Dominion may ... employ its own executive officers for the purpose of carrying out legislation which is within its constitutional authority",[214] and the position of Chief Justice Porter in Yuhasz[215] that the federal Attorney General may only participate in civil proceedings and not those proceedings under the criminal law power. If the Ontario Court of Appeal had applied Proprietary Articles Trade Ass'n, only two positions would have been available to them: first (as Mr. Justice MacKay stated in his dissent)

211(cont'd)Act [1937] A.C. 405; [1936] S.C.R. 379.

212 In Prop. Articles Trade Ass'n. the Combines Investigation Act R.S.C. 1927, c. 26 and the Criminal Code R.S.C. 1927, c. 36 s. 498; and in Dominion Trade, the Dominion Trade and Industry Commission Act, S.C. 1935, c. 59.

213 Lord Atkin in Proprietary Articles Trade Ass'n at 323:

> "In their Lordships' opinion s. 498 of the Criminal Code and the greater part of the provisions of the Combines Investigation Act fall within the power of the Dominion Parliament to legislate as to matters falling within the class of subjects, "the criminal law - including the procedure in criminal matters" (s. 91, head 27)."

and Chief Justice Duff in Dominion Trade and Industry at 382:

> "As regards sections 16 and 17, it would appear that in view of the responsibilites of the Dominion Parliament in respect of the criminal law and trade and commerce, Parliament may ... exercise a wide latitude in prosecuting investigations for ascertaining the facts with regard to fraudulent commercial practices, including adulteration; for that reason we think these two sections, 16 and 17, are intra vires."

214 Proprietary Articles Trade Ass'n [1931] A.C. 310 at 327.

215 (1960) 128 C.C.C. 172.

the power of the federal Attorney General to prosecute was exclusive; or alternatively, the power of the Attorney General of Canada was concurrent with that of the attorney general of the province who had a right to appeal provided by the Criminal Code. The majority had held that the right of appeal set out in the Criminal Code was an alternative to that set out in the Customs Act. Since the Attorney General of Canada had given written authority permitting counsel for the Attorney General of Ontario to proceed, these issues were not truly in dispute.

Prior to the 1970's, the Attorney General of Canada conducted prosecutions of offences under a number of federal statutes free from attack by defence counsel or the attorney general's department of any of the provinces. At the same time the provincial attorneys general conducted prosecutions under some of these acts.[216]

> "[I]n practice, whether with or without lawful authorization so to do, the Minister of Justice (of Canada) conducted most, if not all, of the prosecutions under the other Acts of Parliament such

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[216] "A prosecution may be formally in the hands of the Attorney - General's Department even though the Government of Canada and the Minister of Justice are directly interested in it. In the administration of criminal law and justice, I find much to commend such a working arrangement or practice, and apparently it has already received a certain amount of recognition and approval: Re Provincial Treasurer [1937] 3 D.L.R. 225 at 231-2, [1937] S.C.R. 403, 68 C.C.C. 177 at 185; Re. v. Unwin [1938] 1 D.L.R. 529 at 531, 69 C.C.C. 197 at 200; A.G. Can. v. Toronto [1942] 4 D.L.R. 410, 78 C.C.C. 171; [aff'd [1943] 3 D.L.R. 123, 79 C.C.C. 297; aff'd [1946] 1 D.L.R. 1, A.C. 32, 85 C.C.C. 1]" (Regina v. McGavin Bakeries et al. 98 C.C.C. 1).

as the Narcotic Control Act, the Income Tax Act, the Combines Investigation Act, the Customs Act, the Excise Act, the Unemployment Insurance Act and others and it is said that he did so in proceedings by indictment without the consent of the Attorney - General of the Province."[217]

In some instances, the agent for the provincial attorney general also acted on the instructions of the Minister of Justice.[218]

This period of peaceful co-existence came to an end when the Parliament of Canada amended the Criminal Code[219] to formalize the procedure that had developed during the preceding 100 years. Challenges to this amendment to the definition of attorney general followed immediately. Interestingly, these challenges were first made by defence counsel representing accused persons and not by provincial attorneys general.

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[217] Regina v. Collins (1973) 10 C.C.C. (2d) 52 at 57.
[218] See Regina v. Yuhasz (1960) 128 C.C.C. 172.
[219] S.C. 1968-69, c. 38 s. 2
"In this Act
"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
(a) the Northwest Territories and the Yukon Territory, and
(b)proceedings instituted at the instance of the Government of Canada and conducted by or on behalf of the 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,
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 first case to come before the courts was Regina v. Collins[220] in 1972. The Attorney General of Ontario did not intervene[221] and it was defence counsel who questioned the authority of the federal Attorney General to prosecute. In Collins, the prosecutorial authority of the federal Attorney General was at issue whereas in Yuhasz[222], Niagara Falls International Bridge Co.[223], and Loranger, Attorney General of Quebec v. Montreal Telegraph Co.[224], for example, it was the authority of the provincial attorney general which was at issue. This is significant because the decisions in these earlier cases held that the provincial attorney general had the authority to prosecute and they did not decide, because the question was not before them, that the federal Attorney General did not have prosecutorial authority. The prosecutorial power of the provincial attorney general in, for example, Yuhasz and Montreal Telegraph Co. was held to be in addition to, or an alternative to, the prosecutorial power of the federal Attorney General. Only in Niagara Falls International Bridge Co. did the court assert in obiter that the role of the provincial attorney general was exclusive. Therefore, in this respect, Collins raised a point not at issue in any earlier cases.

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[220] (1973) 10 C.C.C. (2d) 52 (Ont. D.C.); application for prohibition dismissed 11 C.C.C. (2d) 40 (Ont. S.C.); appeal dismissed 13 C.C.C. (2d) 172 (Ont. C.A.).
[221] Id. at 54.
[222] (1960) 128 C.C.C. 172.
[223] (1873) 20 Grants Chancery Reports 34.
[224] [1882] The Legal News 429.

The offence charged in Collins was unlawful possession of a narcotic for the purpose of trafficking contrary to section 4(2) of the Narcotic Control Act[225]. Judge Vannini held that the definition of Attorney General in section 2 of the Criminal Code was intra vires the Parliament of Canada based on his decision that the process of designating a prosecutor was criminal procedure.[226] Regina v. Yuhasz was considered by Judge Vannini in Collins. Judge Vannini dismissed the Ontario Court of Appeal's decision as obiter, except for that portion of the judgment which related to section 250 of the Customs Act.[227]

An application for prohibition before Mr. Justice Donnelly of the Ontario High Court was dismissed:

> "Paragraph (b) of the definition 'Attorney General" in s. 2 does not affect or deal with any matter

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[225] Now R.S.C. 1970 c. N-1.

[226] "From the procedure prescribed by the Criminal Code it would appear that Parliament chose to retain some ministerial, executive or administrative function in the Government of Canada in the enforcement of the criminal law and to delegate such functions to other persons or to other ministerial, executive or administrative officials appointed by the Province. Of the right to designate or appoint the persons to administer the various proceedings established by the procedure in criminal matters, assistance may be had from the judgments in some of the cases already noted and in others and in the texts of the learned authors on Canadian constitutional law". Id. at 78.
(Cases referred to are: Proprietary Articles Trade Ass'n supra; Re Vancini supra; Reference Re Dominion Trade supra; Re McNutt (1912) 47 S.C.R. 259; The Queen v. Cox (1898) 31 N.S.R. 311; Valin v. Langlois supra, and the texts referred to are: Clement, "The Law of the Canadian Constitution" 3d (1916); Lefroy "Short Treatise of Canadian Constitutional Law" (1918); Varcoe, "Distribution of Legislative Power in Canada" (1954).

[227] Collins at 68.

> excepted from the authority of Parliament under s. 91(27) and if it does not fall strictly within "criminal procedure" in the words of Duff, C.J. in Reference Re Dominion Trade, supra, "the authority to enact conditions in respect of the institution and the conduct of criminal proceedings is necessarily incidental to the powers given to the Parliament of Canada under head no. 27".[228]

Albyn Edward Collins died before his appeal to the Ontario Court of Appeal was heard and accordingly the Court held that the appeal had abated on the death of the appellant.[229]

Regina v. Pelletier[230] was before the Ontario Court of Appeal less than a year after Collins. Again the Attorney General of Ontario took "no position on any of the constitutional questions with which this appeal is mainly concerned".[231] But unlike Collins, Pelletier involved a charge of conspiracy to traffic in a narcotic and the charge was laid under s. 408 of the Criminal Code[232]. Since the actual charge was under the Criminal Code, the Ontario Court of Appeal had to address the additional issue of whether the Attorney General of Canada was precluded from prosecuting by virtue of the plain meaning of section 2(2)(b) which limited

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[228] (1972) 10 C.C.C. (2d) 52 at 53.
[229] (1974) 13 C.C.C. (2d) 172 at 176.
[230] (1974) 18 C.C.C. (2d) 516. Leave to appeal to the Supreme Court of Canada refused because of the accused's death before the appeal was heard. (See Canadian National Transport (1983) 49 A.R. 39 at 52.)
[231] Id. at 522.
[232] Now section 423.

the authority of the federal Attorney General to "proceedings ... other than this Act". Judgment for the Court of Appeal was delivered by Mr. Justice Estey, who held that the difference between proceedings relating to a narcotics offence as charged in Collins and proceedings relating to conspiracy to violate the Narcotic Control Act charged under the Code, was "one of form and not of substance":

> "It would be a strange and unhappy result if the Attorney General of Canada were found to be competent to enforce drug abuse legislation where the charges are laid directly thereunder, with all the appropriate provisions of the Code operating in support, but would be powerless to do so if the offence had been committed in such a manner as to make a conspiracy charge under the Code more appropriate to the circumstances."[233]

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[233] Id. at 540. Mr. Justice Estey concludes at 539: "More logically the wording of s. 2(2)(b)(ii) refers to any charge of conspiracy to commit an offence against any statute of Parliament. Section 2(2)(b)(ii) already excludes all the conspiracies established as complete offences under s. 423(1)(a), (b) and (c) of the Code. Construed in this manner, s. 2(2)(b)(ii) then excludes proceedings under s. 423 (1)(d) which refer to other offences under the Code. To read s. 2 (2)(b)(ii) otherwise would be to give status to the Attorney - General of Canada in proceedings under those Acts with a self-contained code of offences, but to deny such status in relation to those statutes which establish the primary offences but which rely on the Interpretation Act and the Code to incorporate the offence of conspiracy to commit the primary offence.

Such a reading of this section indicates a legislative intent to treat a charge of conspiracy to violate a federal statute, such as the Narcotic Control Act, even though in form founded on s. 423(1)(d) of the

Mr. Justice Estey held the Attorney General of Canada had the authority to prosecute criminal law based on three propositions: first, "that executive power to enforce the statutes of Parliament and of the Legislatures respectively follows upon the legislative authority to enact those statutes"[234]; second, that the prosecutorial function is contained within the meaning of criminal procedure;[235] and lastly that there is a "national interest"[236] in uniform prosecution of the criminal law which the federal Attorney General alone can provide. Mr. Justice Estey concluded that enforcement of the criminal law in Canada is a concurrent function of the provincial attorneys general and the federal Attorney General. This conclusion is based on the argument that even if the subject matter of prosecutions falls squarely within s. 92(14) -the administration of justice - and accordingly outside the scope of s. 91(27), the responsiblility of the central Parliament over peace, order and good government provides the basis for the executive authority to enforce Dominion laws.

Although he did not consider that the issue was before the Court, Mr. Justice Estey stated that the right of the Attorney General of Canada to prosecute offences under the

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[233](cont'd)Code, as in substance a charge in respect of a federal statute other than the Code."

[234] Ibid.

[235] He quoted (at 529) with approval Chief Justice Duff's opinion in Reference Re Dominion Trade, supra at p. 383 (S.C.R.).

[236] "...the need for the right in the Government of Canada to appoint a prosecutor may spring from the same requirements of the national interest" Pelletier at 529.

Criminal Code "does not appear to offend the theory underlying our constitutional law nor the practical considerations encountered by the Province in discharging its function in the administration of justice"[237]. Once the court had answered the constitutional question "[is there a special nexus between section 91(27) and section 92(14)] in the negative, the only basis for separating prosecutions under the Criminal Code from all other criminal prosecutions is provided by section 2 of the Code. The definition of attorney general contained in section 2 of the Code, which restricts the Attorney General of Canada from prosecuting offences contained in the Criminal Code, could be changed at any time by the Parliament of Canada to include the Attorney General of Canada within the definition. Mr. Justice Estey's assertion that this amendment would not "offend .... the practical considerations encountered by the Province in discharging its function in the administration of justice" certainly is counter to the position that was taken by the provinces in later cases where this issue was argued.[238]

Since Pelletier[239] was decided in May, 1974, it has been considered in numerous cases with the result that two lines of authority have developed: those cases which

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[237] Id. at 543.

[238] Regina v. Hauser [1977] 6 W.W.R. 501 (Alta. C.A.) appears to be the first case where a provincial attorney general intervened to present the "province's" position. Prior to Hauser defence counsel had advanced the "province's" position but the provincial attorneys general had not indicated any support for defence counsel's arguments in any manner.

[239] (1974) 18 C.C.C. (2d) 516.

followed Pelletier;[240] and those which did not[241]. Primarily, the courts in Ontario and Saskatchewan followed the so called 'broad' proposition which was expressed in Pelletier: that there was an inherent jurisdiction in the Dominion to enforce its laws including criminal law. The courts in Quebec and Alberta rejected this proposition, although there was a consensus that the federal Attorney General could enforce all of its laws other than criminal laws. The approach of the courts at this time was that there was a concurrency in prosecutorial authority in relation to non-criminal law based offences, for example, offences under the Customs Act. The provincial attorney general had jurisdiction to prosecute based on provincial legislative competence over the administration of justice while the federal Attorney General had authority to prosecute in non-criminal matters because of the federal Parliament's executive authority. Concurrency led to technical problems, such as the necessity for preliminary determinations as to whether the proceeding had been "instituted at the instance of the Government of Canada"[242].

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[240] See for example Regina v. Betesh (1975) 35 C.R.N.S. 238 (Ont. Co. Ct.); Regina v. Pfeffer et al. [1976] 5 W.W.R. 452 (B.C. Co. Ct.); Regina v. Dunn (1977) 36 C.C.C. (2d) 495 (Sask. C.A.), [1979] 5 W.W.R. 454 (Not overturned by S.C.C.); Regina v. Guenot, Kocsis and Lukacs (1980) 51 C.C.C. (2d) 315 (Ont. C.A.).

[241] See for example Regina v. Pontbriand (1978) 1 C.R. (3d) 97 (Que. C.A.); Regina v. Hauser [1977] 6 W.W.R. 501 (Alta. C.A.).

[242] See for example Re Knechtel (1975) 35 C.R.N.S. 185 (B.C.S.C.) or Regina v. McLarty (No. 1) (1978) 40 C.C.C. (2d) 69 where counsel purported to act under the authority of both the Attorney General of Canada and the Attorney General of Ontario.

The approach of those courts which followed Pelletier was to ask two questions: first was the offence a Code or non-Code offence? and second, if it was a Code offence, was it based in a non-Code substantive offence? In comparison, the approach of the courts in Quebec and Alberta, which did not follow Pelletier was to ask: was the offence based on the criminal law power? If so, then the federal Attorney General could not prosecute.

Many of the decisions which distinguished Pelletier did so on the basis of factual differences. Re Knechtel[243] was a case where the British Columbia Supreme Court found that the proceedings were not instituted at the instance of the Attorney General of Canada. Mr. Justice McKenzie noted that the information was sworn by a police officer of the Vancouver Police department. The Attorney General for British Columbia did not intervene.[244] The Attorney General of Canada was excluded from acting as the prosecutor by reason of a technical reading of the provisions of section 2[245]

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[243] (1975) 35 C.R.N.S. 185.

[244] "Prior notice had been given to the Attorney General of Canada and the Attorney General for the Province of British Columbia that a constitutional question would be raised in these proceedings. The Attorney General of Canada was represented by counsel but the Attorney General of the province did not intervene." Id. at 187.

[245] "We are dealing with a penal statute and it must be strictly construed. To draw an inference that the police officer had a standing warrant from the federal government to institute a federal prosecution would, in my view, be arbitrary and perhaps the fulfillment of an unconscious wish not to disturb a time-honoured practice rich in common sense.

The language of the definition of "Attorney General" in s. 2 of the Code proclaims emphatically that

but it appears that Mr. Justice McKenzie would have followed Pelletier had the statutory requirements that the proceedings be instituted at the instance of the Government of Canada been fulfilled:

> "No one would challenge the right of the agent of the Attorney General for Canada to appear as prosecutor so long as he is there to conduct proceedings "instituted at the instance of the Government of Canada".[246]

Similarly in Miller v. The Queen[247] where charges were laid under the Criminal Code and under the Bankruptcy Act Mr. Justice Lajoie of the Quebec Court of Appeal held that the charge[248] under the Criminal Code was a nullity by virtue of section 2. The charges under the Bankruptcy Act were validly prosecuted by the Deputy Attorney General of Canada[249]

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[245](cont'd)such an inference should not be drawn. As I read it, the intention of Parliament was to yield up to the provinces in a general way the conduct of criminal proceedings in this country but at the same time to reserve unto the Attorney General of Canada the right to prosecute certain cases in which Canada has a special interest." Id. at 190.

[246] Id. at 192.

[247] (1976) 30 C.R.N.S. 372, 27 C.C.C. (2d) 438 (Que. C.A.). Leave to appeal to the S.C.C. refused (Martland, J., Ritchie, J. and Dickson, J., as he then was) May 5, 1975.

[248] "350. Every one who,
(a) with intent to defraud his creditors,
(ii) remove, conceals or disposes of any of his property, or is guilty of an indictable offence and is liable to imprisonment for two years."

[249] "In my opinion, the Parliament of Canada itself, by the definition it gives to the words "Attorney General", deprives its own Attorney General of Canada of any power to lay charges or to prosecute them where they relate to violations of the Criminal Code ...

. The Court's reading of section 2 excluded the federal Attorney General from prosecuting Criminal Code offences. The prosecutor in this case should have been authorized to act as the agent for both the federal Attorney General and the Attorney General of Quebec to overcome the restriction in section 2.

The British Columbia Supreme Court misinterpreted Miller in the case of Re Miller and Thomas.[250] It must be

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[249](cont'd)On the other hand, it is my opinion that the charges laid in case 71-7209 by the Deputy Attorney - General of Canada for proceedings under the Bankruptcy Act, are valid although they would have also been valid if they had been laid by the Attorney - General of Quebec." Id. at 446, 447.

[250] (1975) 23 C.C.C. (2d) 257 (B.C.S.C.). Re Miller and Thomas was a motion for certiorari to quash an authorization to wiretap the private communications of the accused. In Re Miller and Thomas there was some question about which attorney general should have provided the special designation to the agent. The applicant for the wiretap authorization was designated as an agent of the Attorney General of British Columbia. The offence alleged was conspiracy to murder. On a careful reading of section 178.12 of the Criminal Code,

> "178.12 (1) An application for an authorization shall be made ex parte and in writing to a judge of a superior court of criminal jurisdiction, or a judge as defined in section 482 and shall be signed by the Attorney General of the province in which the application is made or the Solicitor General of Canada or an agent specially designated in writing for the purposes of this section by
>
> (a) the Solicitor General of Canada personally, if the offence under investigation is one in respect of which proceedings, if any, may be instituted at the instance of the Government of Canada and conducted by or on behalf of the Attorney General of Canada, or
>
> (b) The Attorney General of a province personally, in respect of any offence in that province,
>
> and shall be accompanied by an affidavit ..."

Mr. Justice Anderson held that the designation by the Attorney General of British Columbia was valid since it referred to offences other than those which could be prosecuted by the federal Attorney General.

remembered that Miller was distinguished from Pelletier on the factual basis that the charge in Miller was a substantive offence under the Criminal Code. Because the offence charged in Miller did not relate to any federal legislation outside of the Criminal Code, section 2 of the Code prohibited any prosecution by the federal Attorney General. No action by the federal Attorney General was in question in Re Miller and Thomas although the constitutional validity of section 178.12 of the Criminal Code was questioned.

Mr. Justice Anderson reviewed the position of the Ontario Court of Appeal in Pelletier[251] and that of the Quebec Court of Appeal in Miller[252]. He was of the opinion that Pelletier decided that "the Attorney General of Canada may institute proceedings in any Province in Canada for any offence committed under any federal statute, including the Criminal Code."[253] In fact Pelletier held that the federal Attorney General could prosecute any offence which was "in substance a charge in respect of a federal statute other than the Code" [254]. Mr. Justice Anderson also concluded that Miller stood for the proposition that the provincial attorney general may prosecute any offence "committed under any federal statute in the Province," while the Attorney General of Canada may prosecute any offence committed under a federal statute, other than the Criminal Code. It is

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[251] (1974) 18 C.C.C. (2d) 516.
[252] (1976) 30 C.R.N.S. 372, 23 C.C.C. (2d) 257.
[253] Re Miller at 274.
[254] Pelletier at 539.

important to note that the result reached in Miller and Pelletier is actually the same, that is the federal Attorney General may prosecute all federal non-Code offences. The only difference between Miller and Pelletier was that in Miller the offence charged was a substantive offence found in the Code, while in Pelletier the offence of conspiracy depended upon a substantive offence found in an act other than the Criminal Code. However, Mr. Justice Anderson reached the conclusion:

> "that Miller was correct. I am also of the opinion, with respect, that it was not necessary for Estey, J.A. (as he then was), to deal with abstract questions of law which were not required to be decided. All that was necessary for him to find, as he did find, was that the Attorney General of Canada could prosecute a conspiracy to violate s. 4(1) of the Narcotic Control Act".[255]

Further, Mr. Justice Anderson expressed the opinion that the attorney general of the province could not be prohibited directly or indirectly from investigating and prosecuting all Criminal Code offences, unless the national interest was involved. An argument can be made that the prosecution of criminal law is by definition a matter of national interest since uniform enforcement is required to have a national system of criminal law in Canada as was envisaged by the Fathers of Confederation when they prepared

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[255] Re Miller and Thomas (1975) 23 C.C.C. (2d) 257 at 280.

the Constitution Act, 1867. When a criminal offence is committed, it is a crime against all of the people of Canada because the Parliament of Canada, as representative of all of the citizens of Canada, has legislated that the offence be a crime. A crime, such as a robbery, may actually affect only the individual victim, but a crime by definition is aginst the state as a whole, not just one individual or one community or even one province, but every person in Canada. For this reason, the enforcement of Criminal Code offences is national in scope.

The confusion that was developing from courts' interpretations of Miller and Pelletier led to uncertainty at lower court levels:

> "The difficulty lies in attempting to reconcile the decision in Regina v. Pelletier with the reasoning in Miller v. The Queen ... That decision [Miller] was followed and the reasoning expressly approved in Regina v. Hancock and Proulx [1975] 5 W.W.R. 608. Similarly, the reasoning in the Miller case was preferred by Anderson, J. in Regina v. Miller and Thomas ... The argument is that by the reasoning in those cases, the definition of Attorney General in s. 2(b) has stripped the federal Attorney General of authority in the prosecution of matters under the Criminal Code."[256]

Up to this point all courts had agreed with the proposition

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[256] Regina v. Pfeffer et al. [1976] 5 W.W.R. 452 (B.C. Co. Ct.).

that the federal Attorney General could prosecute non-Code offences. Section 2 of the Criminal Code statutorily provided for these prosecutions. From a constitutional standpoint, this position was supported primarily on the basis of the inherent right of the federal government to enforce federal legislation but also to some extent it was supported by a 'national dimensions' theory.[257]

Both of these theories would also support the right of the federal government to enforce Criminal Code offences, since there is no difference between criminal offences created within acts other than the Criminal Code and those offences that are enacted in the Criminal Code. This limitation which prevents the federal Attorney General from prosecuting Criminal Code offences is the result of the wording of section 2 of the Criminal Code. The position of the federal Attorney General was not held to be exclusive in non-Code prosecutions but, in any given prosecution, it would be paramount. The logical conclusion to be derived from the proposition that the Attorney General of Canada may prosecute all non-Code federal offences - as defined by section 2 of the Criminal Code - is that the federal Parliament may validly legislate to remove this fetter. The distinction between Code and non-Code offences drawn by most

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[257] See for example Pelletier at 542:
"... it may then be found [respecting criminal prosecutions] that a matter of national concern arises as in Toronto v. A.-G. Can. (1945) 85 C.C.C. 1, [1946] 1 D.L.R. 1, [1946] A.C. 32. In such event, the "Peace, Order and good Government" power and responsibility of the central Government applies, ..."

courts to this point[258] was not based on the theory that Code offences were created pursuant to the federal power over criminal law while non-Code offences were created pursuant to other heads of power. Generally, offences under the Combines Investigations Act, Immigration Act, and Narcotic Control Act, for example, were considered to be criminal law offences.

The confusion surrounding Pelletier and Miller was compounded when the Alberta and Quebec Courts of Appeal rendered their decisions in Regina v. Hauser[259] and Regina v. Pontbriand,[260] respectively.[261] For the first time since Yuhasz[262] courts were differentiating between criminal law offences and offences based in other areas of federal legislative competence:

> "After careful consideration of the relevant legislation, of the legislative history, of the practice and of the apparent entrenching effect of s. 135. I have come to the conclusion that any

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[258] The line of cases exemplified by Regina v. Yuhasz (1960) 128 C.C.C. 172, where prosecutions by the federal Attorney General were characterized as being 'civil' in nature are in opposition to this point.

[259] [1977] 6 W.W.R. 501.

[260] (1978) 1 C.R. (3d) 97. The accused, a practising member of the criminal bar of Quebec, was charged with five counts of substantive offences under ss. 4 and 5 of the Narcotic Control Act (trafficking and importing offences) and five allegations of conspiracy to commit those substantive offences.

[261] Chief Justice Hugessen in Pontbriand Id. at 106, expressed this feeling of confusion: "It is my unenviable task to decide now a question of great constitutional significance, on which widely differing opinions have been expressed by various courts of appeal and which is presently pending before the Supreme Court of Canada".

[262] (1960) 128 C.C.C. 172.

> attempt by Parliament to vest in the federal Attorney General the supervision and control of the ordinary criminal process is ultra vires as being legislation in relation to the administration of justice in the province. ... As long as Parliament does not interfere with the provincial Attorney General's overriding privileges of supervision and control of the process ... what it [Parliament] has purported to do is to create another "Attorney General", whose powers are in certain circumstances coterminous with those of the provincial Attorney General."[263]

This view was also put forward by Chief Justice McGillivray in the majority decision of the Alberta Court of Appeal in Regina v. Hauser[264]. The accused had been charged with possession of a narcotic for the purpose of trafficking contrary to the Narcotic Control Act, s. 4(2). The

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[263] Pontbriand at 109, 110. The late Chief Justice Laskin in Canadian National Transportation Limited and Canadian National Railway Company v. Attorney General of Canada 49 A.R. 39 at 47 discussed s. 135:

> "Since the Province of Canada was to be separated into two Provinces of Ontario and Quebec, provision had to be made for maintaining the power and authority of certain executive officers "until the Legislature of Ontario or Quebec otherwise provides", as set out in s. 135. This section, [was] specially tailored to the preconfederation Province of Canada ..."

Up to the time of Confederation the Province of Canada had had two Attorneys General - the Honourable G.E. Cartier was Attorney General East, and the Honourable John A. Macdonald was the Attorney General West. Section 135 would have permitted these ministers to remain in office until other provisions were enacted. There can be little doubt that this was one of the provisions required for the change from a colony to the confederated union.

[264] [1977] 6 W.W.R. 501.

indictment was preferred by an agent for the Attorney General of Canada. An application for prohibition was dismissed[265]. The Alberta Court of Appeal allowed the appeal and granted the order for prohibition. This was the first time a provincial attorney general had intervened to support a challenge to the federal Attorney General's authority to prosecute. Prior to 1977, no provincial attorney general had taken any position, either in favour of or against the argument that section 2 of the Criminal Code was ultra vires the Parliament of Canada. It is difficult to understand why it took almost ten years after the amendment to the Criminal Code before the provinces presented an argument against its validity. This objection appears to have been a part of the overall hostility between the provinces and the federal Government that developed in the late 1970s. Furthermore, there would appear to be evidence[266] that the provinces had acquiesed to federal prosecutions for seventy years before they intervened in Hauser to present the 'position' of the provinces.

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[265] Unreported Alberta District Court decision, 1976.

[266] For example Re Knechtel (1975) 35 C.R.N.S. 185 where Mr. Justice McKenzie of the Supreme Court of British Columbia refers to a period of almost seventy years when agents for the federal Attorney General prosecuted drug offences unchallenged:

> "In due course the federal prosecutor appeared in the provincial courtroom traditionally reserved for the hearing of "federal cases". All of this was in conformity with normal practice. Federal prosecutors have appeared in court to prosecute drug offences since Parliament first enacted drug abuse legislation in 1908 and they have appeared unchallenged as agents of the Attorney General of Canada."

The Court of Appeal, with Justices McDermid and Haddad dissenting, held that the Narcotic Control Act was legislation in relation to a criminal matter. They also held that the prosecution of criminal matters fell squarely within section 92(14) of the Constitution Act, 1867, the administration of justice power: Chief Justice McGillivray with Mr. Justice Lieberman concurring, stated that he agreed with Pelletier to the extent that prosecutions by the federal Attorney General under federal statutes not based on the criminal law power were within federal jurisdiction:

> "With this expression I agree to the extent that it relates to the enforcement of federal statutes other than those which are in substance criminal law."[267]

This distinction between criminal law offences and non-criminal law offences was consistent with the view that the only interaction in this area was between section 92(14), the administration of justice and section 91(27), the criminal law power. The distinction between Code and non-Code offences was arbitrary and had no constitutional basis since criminal law is not restricted to Criminal Code offences. If the provisions of section 2 of the Criminal Code are intra vires, then the Parliament of Canada could also legislate to have the Attorney General of Canada prosecute offences under the Criminal Code.

Regina v. Hauser[268] was the first case to be appealed to the Supreme Court of Canada on this point but the

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[267] Hauser [1977] 6 W.W.R. 501 at 520.
[268] [1979] 1 S.C.R. 984.

judgment did not settle the question of whether the Attorney General of Canada could prosecute criminal law. The majority decision that the Attorney General of Canada could prosecute offences based on federal heads of power other than the criminal law was not new law. The majority judgment of Mr. Justice Pigeon with Justices Martland, Ritchie and Beetz concurring; the separate opinion of Mr. Justice Spence; and the dissent of Mr. Justice Dickson, as he then was, with Mr. Justice Pratte concurring, all held that the federal Attorney General could prosecute non-criminal law offences. The majority decision held that the Narcotic Control Act was not criminal law and accordingly, the Attorney General of Canada could prosecute.

Mr. Justice Spence followed Pelletier and was of the opinion that all federal laws could be enforced by the Attorney General of Canada.[269] Mr. Justice Dickson held that the Narcotic Control Act was legislation passed pursuant to the criminal law power, therefore, only the provincial attorney general could prosecute:

> "Accepting, as I think one must that the Narcotic Control Act is criminal legislation, it follows from what has gone before that provincial supervisory power is maintained in respect of prosecutions of offences under that Act."[270]

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[269] "If the legislative field is within the enumerated heads in Section 91, then the final decision as to administrative policy, investigation and prosecution must be in federal hands." Id. at 559.

[270] Id. at 610.

At no point in the earlier proceedings, either in the District Court or in the Court of Appeal, had the issue of whether the Narcotic Control Act was criminal law been seriously considered. All parties had conceded that it was criminal law. In fact, in none of the cases[271] prior to Hauser which raised the same issue of prosecutorial discretion for drug offences, had the validity of the Narcotic Control Act as criminal law ever been questioned. Mr. Justice Dickson had sufficient authority before him requiring him to hold that the Narcotic Control Act was criminal law.[272] In fact, over 25 years earlier, the Supreme Court of Canada in Industrial Acceptance Corp. v. The Queen[273], had upheld sections of the predecessor act, the Opium and Narcotic Drug Act[274] as being intra vires the Parliament of Canada because they were valid criminal law enactments. Mr. Justice Pigeon commented that he did not accept these previous statements by the Supreme Court of Canada as conclusive, since he relied on the assertion that it was "conceded on behalf of the appellant that the Opium and Narcotic Drug Act 1929 is, in pith and substance criminal

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[271] For example Miller (1975) 23 C.C.C. (2d) 257; Re Knechtel (1975) 35 C.R.N.S. 185; or Regina v. Dunn [1977] 5 W.W.R. 454.

[272] The following cases are cited by Mr. Justice Dickson as having upheld the Narcotic Control Act as criminal law: Dufresne v. The King (1912) 5 D.L.R. 501 (Que. K.B.); Ex. p. Wakabayashi, Ex. p. Lore Kip [1928] 3 D.L.R. 226 (B.C.S.C.); Industrial Acceptance Corp. v. The Queen [1954] S.C.R. 34; and Beaver v. The Queen [1957] S.C.R. 531. See Hauser at 605 to 610.

[273] (1953) 107 C.C.C. 1.

[274] S.C. 1929, c. 49.

law ..."[275]. He considered that the question of characterization of the Narcotic Control Act as an exercise of the criminal law power, had not been conclusively determined. Mr. Justice Pigeon only considered Industrial Acceptance [276] and no attempt was made to distinguish any of the other authorities cited by Mr. Justice Dickson. Since these other authorities, including Beaver v. The Queen[277], were not distinguished by Mr. Justice Pigeon, their status became unclear. In fact, it would appear that these authorities were ignored simply because they would have been difficult to distinguish.[278]

It would appear that the major factor which induced Mr. Justice Pigeon to reach the conclusion that the drug legislation in question was not criminal law was that it was "control" legislation rather than "prohibitory" legislation. He stated:

> "The history of the drug control legislation, as its general scheme, shows in my view that it is what the English title calls it: an act for the control of narcotic drugs.
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> The first statute was passed in 1908 (7 & 9 Edw. VII, c. 50). It prohibited the importation, manufacture and sale of opium for other than medicinal purposes. It was designed to put out of

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[275] Hauser at 553.
[276] (1953) 107 C.C.C. 1.
[277] (1957) 118 C.C.C. 129, [1957] S.C.R. 531.
[278] Elliot, Robin. "Notes - Regina v. Hauser" (1979) 14 U.B.C. L.J. 163 at 180.

> business a few opium merchants in British Columbia who were operating under municipal licenses ...
>
> It does not appear to me that the fact that the specific drugs with which we are concerned in this case are completely prohibited, alters the general character of the Act which is legislation for the proper control of narcotic drugs rather than a complete prohibition of such drugs."[279]

Viewed from Mr. Justice Pigeon's perspective, many offences previously thought to be criminal in nature are not criminal at all because there is not a complete prohibition of the activity. For example, even the sections of the Code which define murder 'permit' the taking of another's life in circumstances of self-defence[280]. This decision brought into issue many of the sections of the Criminal Code which were commonly thought of as control legislation - gun control is a good example[281].

Equally as unfortunate was Mr. Justice Pigeon's test for justifying the Narcotic Control Act as being enacted pursuant to the peace, order and good government clause of section 91. In essence, Mr. Justice Pigeon asked whether the Narcotic Control Act was a 'new' area not enumerated in either section 91 or section 92. Mr. Justice Beetz in Anti-Inflation Act Reference[282] set out two clear tests for

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[279] Hauser at 553 to 555.
[280] Elliot "Notes - Regina v. Hauser" .
[281] See for example Regina v. Pattison; Regina v. Metcalfe [1981] 1 W.W.R. 141 and Re Motiuk and the Queen (1981) 60 C.C.C. (2d) 161 where this argument was unsuccessful.
[282] (1976) 68 D.L.R. (3d) 452.

the peace, order and good government power. Briefly stated they are, first: the emergency power which by definition must be legislation in regard to a problem of a temporary duration; and second: new categories of subject matters that did not fall under any enumerated head in s. 92, and in particular were outside the scope of s. 92(16), matters of a local nature, and also matters that did not fall within any of the enumerated heads of s. 91.

Hauser has been criticized[283] for its novel approach to constitutional principles and policy considerations. Mr. Justice Dickson described the Supreme Court of Canada as being in the position where: "A constitutional modus vivendi is necessary in order to accomodate both levels of government"[284]. In their effort to accomodate both levels of government, the majority found it necessary to recharacterize the Narcotic Control Act by holding that it did not depend on s. 91(27), the criminal law power, for its constitutional basis. In the process of recharacterizing the Narcotic Control Act as a non-criminal federal statute, Mr. Justice Pigeon's judgment called into doubt the three part test traditionally used to define criminal law[285]

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[283] See for example Robin Elliot. "Notes - Regina v. Hauser". (1979) 14 U.B.C.L.J. 163; Francis C. Muldoon "The Queen v. Hauser: a Saga of the Old Federal Cougar and the Provincial Sheep." 10 Man. L.J. 3:301; William Henkel "Case Comments and Notes: Regina v. Hauser" (1980) 18 Alta L. Rev. 265.

[284] Hauser (1979) 26 N.R. 541 at 599.

[285] This test was:
1. criminal law proscribes a particular act or omission: Proprietary Articles Trade Ass'n v. Attorney General of Canada [1929] S.C.R. 409; [1931] A.C. 310.
2. criminal law prescribes penal consequences in the

by adding the additional qualification that criminal law be exclusively prohibitory rather than "control" legislation. In an effort to reach a decision that carefully avoided the true issue before the Court, the majority also created uncertainity regarding the definition of the peace, order and good government clause.[286]

Finally, the Supreme Court of Canada's decision in Hauser must be recognized as an attempt by the Court to accomodate the polarized positions of the federal government and the provinces. Their decision meant that neither side actually lost, it was as if the result had been achieved

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[285](cont'd)event of a breach: Proprietary Articles Trade Ass'n Ibid.
3. criminal law must serve a typically criminal purpose: Reference Re Section 5(a) of the Dairy Industries Act (Margarine Reference) [1949] S.C.R. 1.

[286] Hauser has never been overruled regarding what was said about the peace, order and good government power. Mr. Justice Pigeon also enunciated a 'gap' test for peace, order and good government that allows every subject matter which did not exist in 1867 to fall under the peace, order and good government clause, or matters of merely local nature - s. 92(16). Mr. Justice Dickson contrary to his position in Hauser that the tests for peace, order and good government were those enunciated in Anti-Inflation Act Reference [1976] 2 S.C.R. 373, applied this 'gap' test from Hauser in Wetmore (1983) 49 N.R. 286 at 293, but held that Food and Drug legislation was not a "genuinely new" problem that "did not exist at the time of Confederation". The particular section of the Food and Drug Act which was considered in Wetmore was in relation to adulteration of drugs. Mr. Justice Dickson, as he then was, commented that it "can be traced back not only through the early nineteenth century but all the way back to the Statute of the Pillory and Tumbrel and of the Assize of Bread and Ale 51 Hen. III, stat. 6 which was enacted in 1266." The continued approval of this test from Hauser leaves the characterization of such provisions of the Criminal Code as wiretapping - a genuinely new problem since 1867 or computer crime another genuinely new problem not in existence in 1867 - subject to the argument that they are provisions passed under the peace, order and good government clause.

through the process of political negotiations. By sidestepping the question, the Supreme Court of Canada failed to address the issue of whether section 91(27) and Section 92(14) do conflict. Future challenges to the authority of the federal Attorney General's prosecutorial power were inevitable given that the Hauser decision could only apply to the Narcotic Control Act. The question of authority to prosecute Food and Drug Act offences, Combines Investigation Act offences, and Customs Act offences, for example, was not resolved by the judgment in Hauser.

Mr. Justice Dickson, as he then was, gave a lengthy and considered dissent in Hauser. He utilized the test for peace, order and good government from Re Anti-Inflation Act[287] and held in Hauser that the Narcotic Control Act was not enacted pursuant to that power. Mr. Justice Dickson recognized the executive authority of the federal Parliament to enforce federal laws other than criminal law:

> "I am quite prepared to accept the proposition that, in respect of heads of federal power other than Head 27, there may be implicit and inherent power residing in the federal executive to enforce the Acts validly enacted by Parliament such as Revenue, Customs, Fisheries, and Bankruptcy statutes and regulations."[288]

Mr. Justice Dickson accepted the argument of the provinces in his dissenting judgment in Hauser. This argument is that

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[287] [1976] 2 S.C.R. 373.
[288] Hauser (1979) 26 N.R. 541 at 575.

in section 91(27) the criminal law refers to the substantive criminal law and the reference to criminal procedure is "limited to the right to define the form or manner of conducting criminal prosecutions".[289] Section 92(14):

> "... the administration of justice, embodies the right to direct the judicial process by which are enforced, in accordance with prescribed federal procedures, the rights and duties recognized by validly enacted federal criminal law. It includes control over putting the machinery of the criminal courts in motion and taking the requisite steps to prosecute those accused of crime, as well as discretion exercised in terminating criminal process."[290]

The provinces' position was and is, that the administration of justice contains an implicit reference to criminal justice. Because of this special nexus between the administration of justice and the enforcement of criminal justice, the distinction between offences based on the criminal law power and offences based on other federal heads of power became very important. However, this distinction is not logically borne out by the words of section 92(14). If "justice" includes criminal justice, it surely includes the enforcement of all other (non criminal) justice. According to this interpretation, the federal Attorney General should not have authority to prosecute any offences

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[289] Hauser at 581.
[290] Ibid.

contained in federal legislation. This approach, which divides the prosecutorial authority between criminal and non-criminal federal legislation, has led to the recharacterization of numerous acts and of individual sections of acts.

Recharacterization cases

Within one week of the decision in Hauser[291] being rendered, the issue of the proper characterization of an offence was before the British Columbia Supreme Court[292]. In this case, Regina v. Walden (No. 1),[293] as with Regina v. Parrot[294] which followed in November, 1979, sections of the Postal Services Continuation Act were breached. The Postal Services Continuation Act did not contain any offence provisions and therefore the charges were laid under s. 115 of the Criminal Code.[295] The argument before the courts was whether Parliament, by defining and placing an offence within the Criminal Code, had made it criminal conduct and not a 'mere' violation of federal legislation. Parrot contravened section 3(1) of the Postal Services Continuation Act[296] by not advising Postal Union

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[291] Ibid.
[292] Regina v. Walden (No. 1) (1979) 8 C.R. (3d) 255.
[293] Ibid.
[294] (1980) 106 D.L.R. (3d) 298 (Ont. C.A.).
[295] Section 115 "Every one 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, unless some penalty or punishment is expressly provided by law, guilty of an indictable offence and is liable to imprisonment for two years".
[296] S.C. 1978-79, c. 1.

members that they were required by law to return to work. The Ontario Court of Appeal held:

> "The placing of this section in the Criminal Code does not, ipso facto, make it criminal legislation for the purpose of the question presented by this appeal. The purpose of the section must be looked at and, once it is acknowledged that such a section could have been enacted as an integral part of the Postal Services Continuation Act, any doubt as to the power of the Attorney General of Canada to prefer the indictment is, in our view, dispelled."[297]

Once the court found as a fact that the offence was based in a federal statute which was valid under another head of power in section 91, Hauser[298] was applied and the indictment by the Attorney General of Canada was upheld.

Recharacterization of an offence previously considered to be criminal occurred in the Ontario Court of Appeal decision in Regina v. Hoffman-LaRoche Ltd.[299]. The accused was charged with contravening s. 34(1)(c) of the Combines Investigation Act (a breach of the unfair competition provisions). Mr. Justice Martin, in his judgment for the Court, upheld the decision of Mr. Justice Linden at trial. He decided that the Attorney General of Canada had the authority to prosecute combines offences for two reasons:

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[297] Regina v. Parrot (1980) 106 D.L.R. (3d) 298 at 311.
[298] (1979) 26 N.R. 541.
[299] (1981) 33 O.R. (2d) 694.

first, the Court ruled that Pelletier had never been overruled[300] therefore the federal Attorney General could prosecute criminal law offences; and alternatively, the combines legislation could be characterized as trade and commerce legislation[301] and following Hauser the Attorney General of Canada could prosecute.

This procedure of recharacterization was approved and utilized by the Supreme Court of Canada in The Queen v. Aziz.[302] In Aziz, the accused was charged with conspiracy to import drugs contrary to subsection 5(1) of the Narcotic Control Act, thereby committing an indictable offence contrary to s. 423(1) of the Criminal Code. This was basically the same issue that had been before the Ontario Court of Appeal in Pelletier. Mr. Justice Martland stated:

> " ... the mere fact that it appears as a general provision in the Criminal Code [s. 423] does not affect its constitutional validity. ... While it is true that conspiracy is, in itself, a crime distinct from the unlawful act to which it relates, we are

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[300] Id. at 718
"The decision in R. v. Pelletier , supra, has been followed by the Saskatchewan Court of Appeal in Regina v. Dunn et al. (1977) 36 C.C.C. (2d) 495 [52 C.C.C. (2d) 127 S.C.C.] ... It has not been overruled by any judgment of the Supreme Court of Canada, and I have not been persuaded that it was wrongly decided."
See also Regina v. Guenot, Kocsis and Lukacs (1980) 51 C.C.C. (2d) 315.

[301] Id. at 735
"The legislation in question must be viewed as a whole and classified and if viewed as a whole, it may be constitutionally supported under s. 91(2) as the regulation of trade affecting the whole country ..."

[302] (1981) 35 N.R. 1.

> entitled, in dealing with the constitutional issue before us, to give consideration to the nature of the conspiracy."[303]

Once it was determined that the nature of the conspiracy was a violation of an act other than the Code, the decision in Hauser was followed and the Attorney General of Canada was found to have the authority to prosecute.

There are numerous reasons for criticizing the process of recharacterization of offences and whole acts. The difficulty and time delay in bringing a preliminary application in order to determine whether an offence is being validly prosecuted by the federal Attorney General only adds to the congestion of the courts. Although previous judicial determinations regarding the characterization of a federal offence should not be blindly adherred to, the courts should not overturn precedent without regard to the resultant confusion it may cause in an otherwise settled area of law. In the final analysis, recharacterization was only a means to an end, that end being a finding that the Attorney General of Canada had prosecutorial authority in relation to federal statutes enacted under heads of power other than section 91(27). Whenever judicial reasoning disregards previous decisions to the extent that Mr. Justice Pigeon did in Hauser it needs to be condemned. When a court uses this approach to achieve a convenient result, it completely fails to deal with the real

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[303] Id. at 8.

issues before the court and creates inconsistencies in the case law.

Recognition of the Federal Role in Criminal Prosecutions

This period of re-examination of 'criminal' offences appears to have come to an end with the Supreme Court of Canada decisions in Canadian National Transportation Limited and Canadian National Railway Company v. Attorney General of Canada; Canadian Pacific Transport Company Limited and Paulley v. Attorney General of Canada and Attorneys General for Ontario, Quebec, New Brunswick, British Columbia, Saskatchewan and Alberta[304] and Wetmore, Kripps Pharmacy Ltd. and Kripps and Attorneys General of Ontario, Quebec, New Brunswick, British Columbia, Saskatchewan, Alberta (intervenants).[305] Wetmore was a case which raised issues identical to those in Canadian National Transport. Wetmore and Canadian National Transport were heard together and the Supreme Court of Canada released their decisions in these two cases on the same day. The Supreme Court of Canada's decision in Canadian National Transport clarified a number of outstanding issues[306]

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[304] (1983) 49 N.R. 241, 49 A.R. 39.
[305] (1983) 49 N.R. 286.
[306] One of the uncertainities which this case clarified, was in relation to the status the Ontario Court of Appeal decision in Regina v. Pelletier, (1974) 18 C.C.C. (2d) 516. On November 6, 1979, six months after its decision in Hauser, [1979] 1 S.C.R. 984, the Supreme Court of Canada dismissed the appeal of Regina v. Dunn [1979] 5 W.W.R. 454, from the Saskatchewan Court of Appeal. The Supreme Court of Canada stated only that they found no error in the "disposition made by the Court of Appeal". The decisions of Mr. Justice Woods (Mr. Justice Hall concurring) and Mr.

regarding the prosecutorial power in Canada.

An examination of the late Chief Justice Laskin's judgment in Canadian National Transport and the dissents of Mr. Justice Dickson, as he then was, in Hauser and Wetmore provide a complete analysis of the constitutional arguments relating to the prosecutorial power in Canada. The majority judgment[307] in Canadian National Transport held that the Attorney General of Canada may prosecute all federal offences including those passed pursuant to the criminal law power. In reaching this conclusion, the late Chief Justice Laskin relied on Pelletier[308], the reasons of Mr. Justice Spence in Hauser[309] and those of the Ontario Court of Appeal in Hoffman-LaRoche[310].

The late Chief Justice Laskin held that there was no special nexus between s. 91(27) criminal law and procedure, and s. 92(14) the administration of justice in regard to the prosecutorial power:

> "Language and logic inform constitutional interpretation, and they are applicable in considering the alleged reach of s. 92(14) and the allegedly correlative limitation of criminal

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[306](cont'd)Justice Bayda both followed Pelletier. The Ontario Court of Appeal had also stated that in their opinion Pelletier had never been overruled by the Supreme Court of Canada: See for example Regina v. Guenot, Kocsis and Lukacs (1980) 51 C.C.C. (2d) 315 at 319. The majority decision in Canadian National Transport, (1983) 49 N.R. 241, (1983) 49 A.R. 39, approved Pelletier, at 49.

[307] The late Chief Justice Laskin, and Justices Ritchie, Estey and McIntyre.

[308] (1974) 18 C.C.C. (2d) 516.

[309] (1979) 26 N.R. 541.

[310] (1981) 33 O.R. (2d) 694.

> procedure in s. 91(27). I find it difficult, indeed impossible, to read s. 92(14) as not only embracing prosecutorial authority respecting the enforcement of federal criminal law but diminishing the ex facie impact of s. 91(27), which includes procedure in criminal matters. As a matter of language, there is nothing in s. 92(14) which embraces prosecutorial authority in respect of federal criminal matters. Section 92(14) grants jurisdiction over the administration of justice, including also the constitution, maintenance and organization of civil and criminal provincial courts. The section thus narrows the scope of the criminal law power under section 91, but only with respect to what is embraced within "the Constitution, Maintenance and Organization of Provincial Courts ... of Criminal Jurisdiction". By no stretch of language can these words be construed to include jurisdiction over the conduct of criminal prosecutions."[311]

The executive authority of each level of government flows from the legislative authority as provided in sections 91 and 92 of the Constitution Act, 1867. There can be no doubt that criminal law and procedure (excluding courts of criminal jurisdiction) are exclusively within the jurisdiction of the Parliament of Canada and therefore the execution of the criminal law as with all other federal law

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[311] Canadian National Transport 49 A.R. 39 at 49.

should be within the competence of the federal government unless a specific provision was to be found elsewhere in the Constitution Act, 1867. Section 92(14) does not expressly include the execution of criminal law. The only express reference within the wording of section 92(14) which has any bearing on section 91(27) is that the "Constitution, Maintenance, and Organization of Provincial Courts ... of ... Criminal Jurisdiction" is an area of provincial legislative competence.

It was also unfortunate that the late Chief Justice Laskin was not more specific when he approved the judgment of the Ontario Court of Appeal in Hoffman-La Roche[312]. The Ontario Court of Appeal's decision contained references to a transprovincial aspect to the charged offence of predatory pricing[313]. Mr. Justice Martin alluded to a national dimension to federal prosecutions:

> "It may be that some of the language of Estey, J.A. [in Pelletier] and Spence, J. [in Hauser] 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

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[312] (1981) 33 O.R. (2d) 694.
[313] Combines Investigation Act, R.S.C. 1970, c. C-23, s. 34(1)(c).

> Narcotic Control Act, which they considered was directed at conduct that was transprovincial or national in its dimension. ...
>
> 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."[314]

In the reasoning of Mr. Justice Martin, this transprovincial aspect lent support to the criminal law power so that the Attorney General of Canada had a concurrent right to prosecute. Mr. Justice Martin found further support for the Attorney General of Canada's right to prosecute because of the trade and commerce aspect of the combines legislation.[315] Although the late Chief Justice Laskin found it unnecessary to discuss Mr. Justice Martin's observations on the peace, order and good government power and the trade and commerce power, the implication of his remark could lead to the conclusion that valid prosecution of criminal law

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[314] Id. at 719, 720.
[315] Id. at 735-736.

offences by the federal Attorney General depends on some additional factor of national or transprovincial character:

> "I would add that the reasons of Mr. Justice Martin in Hoffman-La Roche are in my view unassailable and, in themselves, would justify responding affirmatively to the federal claim of prosecutorial authority."[316]

Following this view would place courts in the position of determining whether the criminal offence in issue was truly local in character or whether it transcended provincial boundaries. This would appear to be an addition of a local/transprovincial distinction to the existing civil/criminal or Code/non-Code dichotomy utilized to justify and differentiate the roles of the provincial attorneys general and the Attorney General of Canada. Any dependence on a factor such as the transprovincial nature or implications of an offence continues an analysis that depends on a special nexus between s. 91(27) and s. 92(14). Logically, the administration of justice would extend to all kinds of justice and therefore all offences enacted in federal legislation. If section 92(14) includes prosecutorial power, it must cover all of the heads of power of section 91, not just section 91(27).[317]

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[316] Canadian National Transport (1983) 49 A.R. 39 at 62.

[317] The the late Chief Justice Laskin (in dissent) in Di Iorio and Fontaine v. Warden of the Common Jail of Montreal (1976) 33 C.C.C. (2d) 289 at 295, commented on the inconsistency of having criminal inquiries be within the jurisdiction of the province but not inquiries into other fields of exclusive federal authority:

> "The argument before this Court, as advanced by the

Earlier, the late Chief Justice Laskin dismissed this special relationship between these two heads of power when he stated that s. 92(14) did not, by any stretch of language include prosecutorial power over criminal matters[318].

In Wetmore the constitutional validity of a federal prosecution of two offences under the Food and Drug Act was

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[317](cont'd)proponents of the validity of this inquiry, appeared to me to rest, to some degree at least, on a distinction between a coercive inquiry into criminality and a coercive inquiry into other fields where there is exclusive federal legislative power. The one is said to relate to the administration of justice in the Province; the others, apparently, not so. I fail to see the distinction. A coercive inquiry, say into operation of bankruptcy laws or practices relating to bankruptcy and insolvancy is as much an inquiry into the administration of justice, civil justice in fact, as an inquiry into crime and criminality; and if the latter is validly open to a Province, so must be the former; and so must be any coercive inquiry which a Province may wish to mount into fields where exclusive legislative power rests with the Parliament of Canada. Why not, to take another example, an inquiry into penitentiary operations, which are within exclusive federal power under s. 91(28) of the British North America Act, 1867 [now the Constitution Act, 1867], on the ground that under s. 92(6) public and reformatory prisons are within provincial jurisdiction? No doubt, the Province would not claim power to authorize its tribunal to require the presence of penitentiary inmates at the inquiry, any more than it, could require their attendance in the present case but, apart from that, former inmates and anyone else whom the inquiry tribunal wished to hear could be compelled, if the provincial contention is correct.

It seems to be quite plain, that if "Administration of Justice in the Province" within s. 92(14), extends to civil and criminal justice without limitation (and this is the contention here of the Provinces), it must extend to any area of civil law or public law or criminal law, regardless of where the legislative power resides substantively in those various fields. True enough, areas other than the criminal law area are not before us, but they can hardly be ignored when an assertion as commanding as the one made by the Provinces is presented."

[318] Id. at 49.

at issue.[319] In the majority decision of the late Chief Justice Laskin,[320] he held that the enforcement of standards of purity in relation to food and drugs fell squarely within s. 91(27), the criminal law power.[321]. Because the issue in question in Wetmore was the same as that in Canadian National Transport, the late Chief Justice Laskin stated there was nothing more to add to his reasons given in Canadian National Transport.

Two statements appear in the late Chief Justice Laskin's judgment in Wetmore which may give rise to some uncertainity. He alluded to the presence of an additional factor, the strong trade and commerce overtones of the Food and Drug Act, to support his conclusions that the federal Attorney General had exclusive prosecutorial authority:

> "The ramifications of the legislation, encompassing food, drugs, cosmetics and devices and the emphasis on marketing standards seem to me to subjoin a trade and commerce aspect beyond mere criminal law alone."[322]

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[319] S. 8. "No person shall sell any drug that
(a) was manufactured, prepared, preserved, packed or stored under unsanitary conditions; ..."

S. 9 "(1) No person shall label, package, treat, process, sell or advertise any drug in a manner that is false, misleading or deceptive or is likely to create an erroneous impression regarding its character, value, quantity, composition, merit or safety."

[320] Justices Ritchie, Estey and McIntyre concurring with Justices Beetz and Lamer concurring in the result.

[321] The late Chief Justice based this part of his decision on the authority of Standard Sausage Co. v. Lee [1933] 4 D.L.R. 501; aff'd [1934] 1 D.L.R. 706.

[322] Wetmore 49 N.R. 286 at 289.

But earlier in his judgment the late Chief Justice had stated that provincial authority to prosecute was delegated to the provinces by the Parliament o. Canada:

> "I have pointed out in my reasons in the earlier case that there seems to be a confusion in some courts at least between the Criminal Code and the criminal law. It is only prescriptions under the former that assign prosecutorial authority to the provincial Attorney General. Moreover, the assignment has depended and continues to depend on federal enactment."[323]

If provincial prosecutorial authority exists only by virtue of a delegation of power from the federal Parliament, then the characterization of federal prosecutions should be irrelevant. Elsewhere in his judgment, the late Chief Justice described two categories of offences in the Food and Drug Act. He stated that s. 8, provisions for the protection of public health and safety, fell under the criminal law power whereas s. 9, provisions related to marketing and invited "the application of the trade and commerce power". The upholding of federal prosecutions commenced under s. 8, a purely criminal law offence, supports the conclusion that a transprovincial aspect is not necessary or relevant to the constitutional determination.

In the final analysis, the late Chief Justice Laskin approved one constitutional basis for the prosecutorial

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[323] Id. at 288.

power in Canada. The Government of Canada has the executive authority to enforce the statutes of Parliament. These statutes include all legislation passed under head 27 of section 91 - criminal law and procedure[324]. The administration of justice does not include any limitation on this executive authority:

> "Section 92(14) does not disclose any such limitation and any authority of the kind which it may confer cannot be read as excluding paramount federal authority under s. 91(27)"[325].

The issue of concurrency of constitutional jurisdiction is not clearly addressed in Canadian National Transport[326]. Furthermore, the confusion surrounding the delineation of the concurrent federal and provincial powers is somewhat continued in Wetmore. The late Chief Justice Laskin rejected the 'double aspect' doctrine in Canadian National Transport.[327]. This opinion of the late Chief Justice is at odds with the earlier decisions, for example, Pelletier[328], Hauser[329] and Hoffman-LaRoche[330], where the courts had held that the prosecutorial authority of the federal Attorney General was concurrent with the authority of the provincial attorneys general to prosecute. He decided Parliament had legislated and therefore its position was paramount because

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[324] Canadian National Transport at 54.
[325] Id. at 55.
[326] Ibid.
[327] Id. at 51.
[328] (1974) 18 C.C.C. (2d) 516 at 544.
[329] The decision of Mr. Justice Spence [1979] 1 S.C.R. 984 at 1004.
[330] (1981) 33 O.R.(2d) 694 at 719.

section 91(27) created exclusive federal jurisdiction "notwithstanding anything in s. 92"[331].

In contrast to the position of the majority, the "inescapable conclusion" for Mr. Justice Dickson in dissent, was that the prosecutorial power in Canada fell squarely within s. 92(14), the administration of justice[332]. Because the prosecutorial power fell squarely within s. 92(14), the federal authority over criminal law and procedure was limited to aspects of criminal law excluding its enforcement. However, in the opinion of Mr. Justice Dickson, the role of the Attorney General of Canada was exclusive in prosecuting all other federal offences[333]. In Wetmore he summarized Hauser as standing for the principle that "validity under a federal head of power other than 91(27) carries with it federal jurisdiction to legislate with regard to enforcement"[334]. This has been the position of Mr. Justice Dickson throughout these cases: in Hauser he found that the Narcotic Control Act was criminal legislation[335] and therefore the Attorney General of Canada could not conduct prosecutions under that Act; in Canadian

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[331] Id. at 52:
"These two references [Attorney General of Canada v. C.P.R. and C.N.R. [1958] S.C.R. 285 and Attorney - General Of Canada v. Nykorak (1962) 33. D.L.R. (2d) 373] exhibit the strength of the force residing in an enumerated class of subject in s. 91 when all those classes are expressed to repose legislative authority in Parliament, both exclusively and notwithstanding anything in s. 92. The effect so given resides in s. 91(27) no less than in other enumerations in s. 91."

[332] Hauser at 599.

[333] Id. at 604.

[334] Wetmore at 291.

[335] Hauser at 610.

National Transport he found the Combines Investigation Act was legislation in relation to the trade and commerce power, s. 91(2) and accordingly the Attorney General of Canada might prosecute; and in Wetmore, he held that the Food and Drug Act was criminal law[336] and therefore the federal Attorney General could not prosecute.

The role of the federal Parliament was limited, in the view of Mr. Justice Dickson, to "the creation of uniform offences, uniform punishment and uniform procedures"[337]. This proposition completely disregards the fact that without uniform enforcement, uniform offences, punishments and procedures can be rendered meaningless. As long as the provincial attorney general has the ultimate supervisory role over the prosecutorial process, there could be up to ten different policies for enforcing the criminal law. This situation would be tantamount to having ten different criminal codes. If, for example, the Attorney General of Newfoundland were to determine that the offence of shoplifting was of such small importance that his prosecutors would no longer proceed with shoplifting charges, but if the Attorney General of Alberta were to decide that shoplifting was so rampant in Alberta that every charge, no matter how minor, would be proceeded with, then in Alberta shoplifting would be a crime, but in Newfoundland for all practical purposes it would not be. Such a policy decision by a provincial attorney general practically acts

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[336] Wetmore at 301.
[337] Id. at 599.

as a repeal of the section of the Criminal Code in question, at least for as long as the policy is in effect. A provincial officer would have 'neutralized' a federal statute. The federal Parliament would be powerless to alter this anomoly as long as the prosecutorial power rested exclusively within s. 92(14). It could not legislate to force the provincial attorney general to exercise his discretion in a different manner. Even though the provincial legislature could not and should not be able to influence the provincial attorney general to exercise his discretion in any particular manner, the provincial attorney general might be subject to loss of confidence of the members of the legislative assembly. The only control within the Canadian constitutional framework over the exercise of the attorney general's prosecutorial discretion is the consequential loss of confidence in the attorney general which the legislature may express. "[T]he manner in which the Attorney - General of the day exercises his statutory discretion may be questioned or censured by the legislative body to which he is answerable..."[338] Again, the federal Parliament would be powerless, since it has no role to play in expressing confidence, or lack thereof, by a provincial legislature in one of its members.

This interpretation of the Constitution Act, 1867 presupposes a limitation on the executive authority of the central Parliament, which seems inconsistent with the

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[338] Regina v. Smythe (1971) 3 C.C.C. 366 at 370 (S.C.C.).

expressed intentions of the Fathers of Confederation to provide for a strong central Parliament and to have a criminal law with "uniform offences, uniform punishments, and uniform procedures". Mr. Justice Dickson argued in Hauser that there was:

> "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 level".[339]

There is equally a "unity and cohesion" between the function of legislating for a uniform criminal law and the enforcement of a uniform criminal law which would be "imperilled" if legislation was passed by one legislative body and enforcement was controlled by another. In most provinces in Canada the investigation and policing of crime takes place at a variety of levels: some provinces have

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[339] (1979) 26 N.R. 541 at 585. See also Wetmore (1983) 49 N.R. 286 at 296 where Mr. Justice Dickson again emphasized this position:

> "The Attorney General is the chief law enforcement officer of the Crown in each province; he has broad responsibilities for most aspects of the administration of justice, including the court system, the police, criminal investigation, prosecutions and corrections. The provincial police are answerable only to the Attorney General, as are the provincial Crown Attorneys, who conduct the great majority of criminal prosecutions in Canada. There is no support in the Constitution nor in the decisions of this court for the notion that the words "administration of justice" should be qualified in such manner that "justice" is taken to mean merely "civil justice". There is no need to reduce the legislation to futility by reading into s. 92(14) a limitation not therein expressed."

provincial police forces; other police forces are municipal; the R.C.M.P. are often under contract to provide police services to a province[340]; the R.C.M.P. also act as a national police force (but not while investigating Criminal Code offences); and it is not unknown for international 'police' forces to become involved in the investigation and policing of certain types of crimes. Regardless of which police force has investigated a crime, when the time comes for prosecution of the offence, either the Attorney General of Canada, the Attorney General of the province or some other counsel (such as municipal law officers) assume the prosecutorial function. The key to the issue is not who actually carries out the prosecution but who ultimately supervises the process.

In contrast to Mr. Justice Dickson's position that the prosecution of criminal law offences is only within the competence of the provincial attorneys general, the late Chief Justice Laskin found:

> "... 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. If exclusive provincial authority rests in the latter, it must equally rest in the former." [341]

If prosecutions, as a subject matter, are contained within the "administration of justice" then there is no logical

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[340] For example Alberta.
[341] Canadian National Transport 49 A.R. 39 at 45.

reason why the Attorney General of Canada should be able to prosecute offences under non-criminal federal legislation. This argument is strengthened if the characterization in Yuhasz[342] is correct and proceedings under other federal legislation, such as the Customs Act, are characterized as being in the nature of civil proceedings. There can be little doubt that the administration of justice in s. 92(14) includes civil justice. Accordingly, why should any prosecution, any administering of justice, be excluded from its definition.

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[342] (1960) 128 C.C.C. 172.

IV. CONCLUSION

The constitutional basis for the prosecutorial power in Canada has been obscured partly by the evolution from a system of private prosecutions as existed in England and the British America colonies in the early nineteenth century, to a system of public prosecutions as now exists in Canada; and partly because of problems inherent in the drafting of the Constitution Act, 1867. At common law, everyone was responsible for enforcing the King's peace. Each member of the community, no matter how connected to the crime, might bring a prosecution as long as the grand jury found a true bill. This system of prosecutions was very decentralized, with the concerns of the community being a major factor in every prosecution. Once recognition was given to the principle that criminal prosecutions transcended a private right of action, the community became involved in the financing of the cost of successful prosecutions. In England, this major change took place in 1752 but the date of the first such legislation in the British America colonies was probably not until at least 1825. In England, even to this day, these costs are assumed by the county in which the prosecution actually occurs.

Within this system of private prosecutions, the Attorney General alone had the constitutional authority to supervise these private prosecutions. By the use of his writ of nolle prosequi he was able to put an end to any prosecution which was not in the public's interest. The

Attorney General's discretion in issuing a nolle prosequi was not reviewable by the courts but was instead subject to parliamentary control by the House of Commons in Great Britain, this control coming through the doctrine of ministerial responsibility: when the House of Commons lost confidence in the Attorney General, he would have to account for his performance before the House. The Attorney General of England was not a member of the Cabinet precisely because of this discretionary, quasi-judicial role in the prosecutorial process. Political considerations were not to enter into his decision when exercising his discretion to put an end to a prosecution. Over time, the role of the Attorney General increased in importance because of statutory provisions requiring his approval before a prosecution could be initiated. In England, as in Canada, all executive authority rests with the Queen. In England, the Queen's representative for enforcing the laws of Parliament is Her Attorney General. The control of the prosecution process is the constitutional responsibility of Her Attorney General but, barring statutory restrictions, every citizen may initiate and through counsel, conduct a prosecution.

Early in the nineteenth century, certain corrupt practices in this system of prosecutions led to an examination of other means of enforcing the criminal law in England. At this time, police forces and county councils were becoming established entities within the community.

'Official' prosecutors such as Treasury Counsel and counsel retained to act for police forces gradually took over the role of prosecutor during the latter half of the nineteenth century. The office of the Director of Public Prosecutions was also created during this time period. The D.P.P.'s primary role in the prosecution process was advisory. Although there is strictly speaking only one public prosecutor - the Attorney General - the English system has been altered to reflect changes in public policy. There has been a move away from a system dependent on true private prosecutions to one where 'official' prosecutors now fulfill the primary prosecutorial role. Today, less than 4% of the total number of prosecutions are conducted by private persons in the United Kingdom. Throughout all of these changes, the Attorney General has maintained his supervisory role over the process by use of his discretion to prefer indictments and to put an end to indictments.

In the British North American colonies, the same pressures were being exerted to establish a system of public prosecutions. Police forces did not become as quickly and firmly established in the pre-Confederation colonies and therefore other officers, court appointed counsel in Nova Scotia and county attorneys in Upper Canada, assumed the statutorily created role of 'official' prosecutor. These 'official' prosecutors did not possess any controlling or supervisory role over the prosecutorial process. There is some evidence that police forces were assuming an active

role in prosecutions in some of the pre-Confederation colonies, particularly Newfoundland. The prosecution process prior to Confederation was almost entirely governed by the common law although there were some statutory enactments relating to prosecutions.[343]

When negotiations were first initiated with a view to uniting the British American colonies, most of the delegates were in favour of a legislative union, but because of the special position of Lower Canada, this legislative union was not possible. In order to accomodate a different language, cultural values and legal system, certain concessions were made. The hoped for legislative union was reworked as a scheme for Confederation. The intention of the Fathers of Confederation still was to create a strong central government with provincial legislatures that would eventually decrease in significance until they were more like municipalities. This intention that the provinces should not be equal to the federal Parliament meant that the framers of the Constitution were not creating a federation similar to that in the United States but rather were creating a different form of government - a confederation. Macdonald's statement to the Provincial Parliament of Canada summarized this intention:

> "Here we have adopted a different system [than the United States]. We have strengthened the General Government. We have given the General Legislature

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[343] See chapter "A Historical Review of Prosecutions at Common Law: Canada".

> all the great subjects of legislation. We have conferred on them, not only specially and in great detail, all the powers which are incidental to sovereignty but we have expressly declared that all subjects of general interest not distinctly and exclusively conferred upon the local legislatures, shall be conferred upon the General Government and Legislature. We ave thus avoided that great source of weakness which was the cause of the disruption of the United States. ... we have in fact, as I said before, all the advantages of a legislative union under one administration, with, at the same time the guarantees for local institutions and for local laws ..."[344]

The delegates recognized that the union of the British America colonies presented certain difficulties of a practical nature. The population was small and because of poor methods of transportation and communication the Fathers of the Confederation knew that pre-Confederation practices would have to continue during a transition period until the Central Parliament was able to assume its full constitutional authority. In this regard, the delegates had created a scheme where local officers would perform functions for both levels of government and when they enforced the rights and privileges of the general Parliament, they would be deemed to be officers of the

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[344] Supra n. 27. (Emphasis is mine).

central Parliament. This was Sir John A. Macdonald's vision of "one administration". One uniform statutory criminal law and one administration were seen by the members of the Provincial Parliament of Canada to be uniting factors for the colonies: something that would weld them into a nation. However, this provision was not carried into the final draft of the Constitution Act, 1867 by the British draftsmen.

It was the intention of the delegates and the British draftsmen that the Parliament of Canada be a sovereign body. The status of the local legislatures would appear to have been intended to be something less. Three fundamental features of a sovereign body are legislative, executive and judicial powers. To argue that the Constitution Act, 1867 did not provide the general Parliament with the executive authority necessary to enforce its criminal law is inconsistent with the notion of sovereignty that the Fathers of Confederation had clearly expressed[345].

In regard to the criminal law power, several conclusions can be noted. First and foremost, the delegates at the pre-Confederation Conferences and the members of the British Parliament intended to create a system of criminal law which bore no relation to the state-based system in the United States. Criminal law was to be one uniform statutory law throughout Canada and it was to operate equally between jurisdictions. The potential for a different criminal law within each American state was a perceived disadvantage that

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[345] See for example John A. Macdonald's statement to the Provincial Parliament, supra n. 27.

the Canadian Confederation was to avoid. Every citizen of the united provinces was to know exactly what was and was not a crime, and what penalty attached to the commission of that crime. The criminal law was to operate equally throughout the union. Criminal law and procedure were exclusively within the legislative jurisdiction of the Parliament of Canada from the very first moment that discussions on the division of powers began at the Charlottetown Conference. This position did not change through any of the Resolutions of the Conferences or drafts of the Bill in Great Britain.

The head of power that was to become section 92(14), "the administration of justice" was added to the enumerated list of subjects within provincial legislative competence primarily to ensure that Lower Canada maintained its system of civil law. Delegates from Lower Canada wanted to ensure that the courts within that province would continue to apply the civil law and not the common law in force in the other provinces. In this regard it was very important that the "Constitution, Maintenance and Organization of Provincial Courts ... and ... Procedure in Civil Matters in those Courts" remain within the legislative competence of the provinces. Section 98 of the Constitution Act, 1867 ensured that "the Judges of the Courts of Quebec", would be selected from the members of the Bar of that Province even though the appointment was to be made by the Governor General.

The Fathers of Confederation and the draftsmen of the Bill must have been unsure of future interpretations of this head of power because its wording was altered and restricted by the addition of the phrases "in the province" and "provincial courts". It is clear that these phrases were added so that they would have a limiting effect on the connotations normally given to the phrase "the administration of justice". There is no clear indication in section 92(14), "the administration of justice in the province", that the Fathers of Confederation intended to include the prosecution of criminal offences within its purview. It is clear that legislative authority in relation to provincial courts was being assigned to the provinces specifically at the request of the delegates from Lower Canada[346]

The British draftsmen destroyed the symmetry created by the delegates from the colonies between the provisions now included in section 101 and section 92(14) of the Constitution Act, 1867. Until the fourth draft, these parallel provisions were contained within the respective sections dealing with the legislative authority of the Parliament of Canada and of the Local Legislatures. Once the section dealing with the authority of the general Parliament to create a General Court of Appeal and "additional Courts for the better Administration of the Laws of Canada" was removed to that part of the Constitution

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[346] See Chapter "Debate in the Provincial Parliament of Canada", supra.

which deals with Judicature provisions[347], this careful balance was undone. Comparison between "the criminal law except the Constitution of Courts of Criminal Jurisdiction" and the administration of justice "including ... Provincial Courts ... of Criminal Jurisdiction" became very attractive. The apparent assumption that there was a special nexus between section 91(27) and section 92(14) led to considerable litigation to determine how the "administration of justice in the province" limited the scope of the criminal law power. The express exclusion from section 91(27) of the "constitution of courts of criminal jurisdiction" was overlooked in favour of an interpretation which the words do not appear to support.

Certain issues can never be resolved conclusively. Section 92(14), a section which obviously deals with Judicature inter alia, was not included in Part VII of the Constitution Act, 1867. This may have been because the draftsmen did not want to confuse federal powers over the judiciary and 'federal' courts with those powers of the provinces over 'provincial' courts. This may have been because the draftsmen, more familiar with the British Constitution than a federal constitution, perceived this head of power as providing the provincial government with executive and judicial powers to accompany their legislative power; or this head of power may have remained within section 92 merely because of an oversight of the draftsmen.

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[347] Constitution Act, 1867 ss. 96 to 101.

Without the inclusion of section 92(14), it seems that Lower Canada could have retained its system of civil law by virtue of section 92(13), Property and Civil Rights; therefore it is more likely that section 92(14) was included in the Constitution because of its provisions relating to the 'provincial' courts - a power demanded by Lower Canada to ensure continued protection of its system of civil law.

The legislative history since Confederation illustrates that the Parliament of Canada has gradually brought about changes to the system of prosecutions in Canada. Since the statutory creation of his office, the Minister of Justice, ex officio the Attorney General of Canada, has assumed control of the prosecution of federal offences. The passage of the Criminal Code in 1892 altered the preceding prosecution practices only slightly. Potential for great change to the character of 'official prosecutions' was provided by codifying the nolle prosequi in section 732 of the Criminal Code, 1892. The authority to enter a stay of proceedings could be delegated to counsel nominated by the Attorney General. Other amendments to the Criminal Code have restricted the role of private prosecutions so that only the informant (or counsel acting on his behalf) may now prosecute. A private prosecutor may still prosecute in summary trials or trials of indictable offences before a judge and jury with leave of the court. Costs can no longer be obtained even for a successful prosecution. No objection has ever been taken to the legislative authority of the

Parliament of Canada to enact these statutory changes to the prosecution process in Canada. Without constitutional jurisdiction over the prosecutorial power, this legislation would be ultra vires even if the provinces had not legislated at all. These changes to the definition of "prosecutor" concern the issue of who prosecutes as much as the definition of "Attorney General" does. No matter how minor the changes were, they still altered the common law which was in force in the provinces prior to passage of the amendment to section 2 of the Criminal Code. Only when the legislative change had the potential for excluding the provincial attorneys general from the prosecution of federal non-Code offences were objections raised. These objections did not stem from a broad interpretation of the legislative authority provided by section 92(14), the administration of justice, because the provinces did not seek to legislate positively regarding the prosecution process. Rather, what was at issue was the particular definition of attorney general which appeared to exclude provincial attorneys general. Without legislation by the federal Parliament to delegate this function to the provincial attorneys general, it is illogical that an executive function in relation to an area of exclusive federal legislative jurisdiction should belong to the provincial attorneys general.

Legislative history without objection will not, of itself, provide constitutional validity:

"Both the Act and the section have a legislative

history which is relevant to the discussion. Their Lordships entertain no doubt that time alone will not validate an Act which when challenged is found to be ultra vires: nor will a history of a gradual series of advance till this boundary is finally crossed avail to protect the ultimate encroachment. But one of the questions to be considered is always whether in substance the legislation falls within an enumerated class of subject, or whether on the contrary in the guise of an enumerated class it is an encroachment on an excluded class. On this issue the legislative history may have evidential value."[348]

The gradual legislative encroachment, without objection from the provinces, by the federal Parliament over the prosecutorial process can not provide constitutional validity for that encroachment. What must be characterized is the subject matter of prosecutions. Throughout the case law there has never been any serious doubt that the Attorney General of Canada was the proper officer to enforce federal laws other than those passed pursuant to the criminal law power.

Nor is there any ground for suggesting that the Dominion may not employ its own executive officers for the purpose of carrying out legislation which is within its constitutional authority ..."[349]

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[348] Proprietary Articles Trade Ass'n [1931] A.C. 310 at 317.
[349] Id. at 327.

Every sovereign government possesses the executive authority to carry out its legislative pronouncements. Barring any express provision to the contrary, the Parliament of Canada has the authority to execute its laws.

If there were no limitations placed upon the phrase, "administration of justice" in section 92(14), every statutory enactment regarding the administration of justice would be encompassed and therefore within exclusive provincial legislative jurisdiction. But this phrase in section 92(14) is not without limits. First, it is limited to local interests due to the addition of the words "in the Province" and second, criminal procedure is expressly excluded from the scope of the administration of justice. Finally, there is no indication that jurisdiction over the execution of federal laws is intended to be included.

An examination of the case law is not particularly helpful since courts, such as the Quebec Superior Court in R. v. St. Louis,[350] have repeatedly confused the interpretation of statutory provisions with the question of the constitutional validity of the provisions in the first place. The inconsistency of the courts' approach in cases like R. v. Yuhasz[351] where federal prosecutions were characterized as being civil in nature led to the distinction between criminal prosecutions and the prosecution of other federal offences. If the administration of justice includes the enforcement of

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[350] (1897) 1 C.C.C. 141.
[351] (1960) 128 C.C.C. 172.

criminal offences, it is illogical to single out the "civil" offences as the ones that the Attorney General of Canada can prosecute without argument. There can be no doubt that "civil" matters are exclusively within the jurisdiction of the provinces by virtue of section 92(13), Property and Civil Rights, - and section 92(14), ... Civil Procedure. On the other hand, criminal law and criminal procedure are exclusively a federal head of power. If the administration of justice should include any type of prosecution, logically it should be prosecutions of non-criminal offences; especially when these prosecutions are carried out in provincial courts. However, these are precisely the kinds of prosecutions which have always been found to be within the jurisdiction of the federal Attorney General.

Mr. Justice Dickson, as he then was, suggested the following propositions regarding the characterization of the subject matter of prosecutions:

> "(1) If nothing is stated in the British North America Act, 1867 [the Constitution Act, 1867] to modify the matter, the authority to legislate under a particular head of power includes the authority to provide for the enforcement of such legislation.
>
> (2) This principle must, however, be modified when two heads of power are in conflict and, in that event, the language of one must be modified by that of the other.

(3) Thus, section 92(14) modifies section 91(27) as the Provinces have exclusive authority in respect of the "the administration of justice." The exclusive power of the federal government with respect to criminal law and procedure is, therefore, limited.

(4) If the legislation creating a federal offence is in pith and substance criminal law - as, for example, the Criminal Code, then the provinces have the exclusive supervisory authority for the prosecution of offences under that legislation.

(5) Parliament has exclusive authority in relation to prosecution of all other federal offences."[352]

This analysis of the process of determining the pith and substance of prosecutions starts from a correct statement of the division of executive authority as provided by the Constitution Act, 1867. Executive competence follows legislative jurisdiction. This fundamental principle of constitutional law would only be altered by any express provision to the contrary in the Constitution Act, 1867. The question that is key is whether section 91(27) and section 92(14) are in conflict, and if so, are they in conflict in the manner described by Mr. Justice Dickson. To what extent does the "administration of justice in the province" limit the "criminal law power"? The obvious

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[352] Hauser (1979) 26 N.R. 541 at 604.

restriction that section 92(14) places on section 91(27) is that the constitution of courts of criminal jurisdiction are exclusively within the legislative competence of the provinces. The late Chief Justice Laskin's interpretation in the majority judgment in Canadian National Transport[353] is in direct opposition to that of Mr. Justice Dickson, as he then was,:

> "As a matter of language, there is nothing in section 92(14) which embraces prosecutorial authority in respect of federal criminal matters ... Moreover, as a matter of conjunctive assessment of the two constitutional provisions, the express inclusion of procedure in civil matters in provincial courts points to an express provincial exclusion of procedure in criminal matters specified in section 91(27)."[354]

The intention of the Fathers of Confederation to safeguard the civil law of Quebec (Lower Canada) does not require any intrusion into federal jurisdiction to enforce federal laws The ambiguous and general phrase "administration of justice in the province" does not clearly illustrate an intention on the part of the Fathers of Confederation to separate the executive power of the Parliament of Canada from its legislative jurisdiction in regard to the criminal law and procedure. Nor is the conflict between section 92(14) and section 91(27) so obvious as to exclude the

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[353] (1983) 49 N.R. 241, 49 A.R. 39.
[354] Id. at 49.

execution of criminal justice in Canada from section 91(27). Criminal law is exclusively a federal head of power and accordingly the enforcement of it is also exclusively federal. The present division of prosecutorial authority in Canada is as follows:

1. As a matter of constitutional law, the Attorney General of Canada is the proper officer to prosecute all federal offences. The prosecutorial power in relation to all federal legislation is exclusively within the jurisdiction of the Parliament of Canada.

2. As a matter of statutory interpretation of section 2 of the Criminal Code, the Attorney General of the province is the proper officer to prosecute all offences in the Criminal Code which do not rely on any other federal enactment for their substance.

3. As a matter of statutory interpretation of section 2 of the Criminal Code, the Attorney General of Canada is the proper officer to prosecute all other offences which depend on federal legislation other than the Criminal Code for their substance, as long as the proceedings are "instituted at the instance of the Government of Canada".

4. Where no statutory provisions apply, the common law provides that any one may prosecute any offence.

Implications for the Future

It is entirely within the constitutional authority of the Parliament of Canada to amend section 2 of the Criminal Code to exclude the provincial attorneys general from prosecuting any criminal offence.

> "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."[355]

The continued role of the provincial attorneys general in the prosecution of criminal offences is a political question to be determined by the Parliament of Canada. Practical considerations, in the sense that today communication and transportation between all parts of the country take place with ease, are not of the same magnitude that they once were. Local considerations will still influence the prosecutorial process since prosecutors generally will be members of the community in which they prosecute whether they are appointed by the Attorney General of Canada or of the province. However, with the recognition that the Attorney General of Canada has the ultimate supervision of the prosecutorial process, a uniform policy for prosecutions which would apply to all of Canada could develop. The goal

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[355] Id. at 56.

of one criminal law that operated equally throughout Canada might be achieved. Other pertinent personal factors would continue to be reflected in the sentencing process whether the Attorney General of Canada or of the province conducts the prosecution.

It is unlikely that the Parliament of Canada will legislate to assume jurisdiction over all prosecutions of Criminal Code offences but the Minister of Justice at the time, The Honourable Mark MacGuigan has indicated a willingness to assume control of prosecutions where "provincial enforcement" has been "unenthusiastic"[356].

> "MacGuigan said Parliament likely won't want to take over prosecution of all criminal justice cases, although it has the constitutional authority.
>
> But he pledged that federal jurisdiction would be asserted where Parliament was unhappy with provincial enforcement. He cited, as an example of unenthusiastice policing and prosecutions by some provinces of federal back-to-work legislation."
>
> "This is going to lead over the years to a very considerable expansion in the federal role in criminal justice," MacGuigan said."[357]

The Minister of Justice at the time also appeared to be willing to undertake a more active role in policing. No obvious steps have been taken to implement this policy but on February 7, 1984, Bill C-19, the Criminal Law Reform Act,

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[356] Edmonton Journal December 5, 1983.
[357] Ibid.

1984 was introduced in the House of Commons. This Bill provided for the repeal of section 2 of the Criminal Code and its replacement with the following definition of Attorney General:

"Attorney General"

(a) with respect to proceedings to which this Act applies, means the Attorney General or Solicitor General of the province in which such proceedings are taken and includes his lawful deputy, and

(b) with respect to

(i) the Northwest Territories and the Yukon Territory, or

(ii) proceedings commenced at the instance of the Government of Canada and conducted by or on behalf of that Government in respect of a contravention of or conspiracy to contravene any Act of Parliament other than this Act or any regulation made there under,

means the Attorney General of Canada and includes his lawful deputy;"[358]

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[358] The present provisions of section 2 read:
2(2)"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 (a) the Northwest Territories and the Yukon Territory, and (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,
means the Attorney General of Canada and, except for the purposes of subsection (4) of section 487 and subsection (3) of section 489, includes the lawful deputy of said Attorney General, Solicitor General and Attorney General of Canada;"

This amendment must be intended to clarify the position of the Attorney General of Canada in regard to the prosecution of offences such as conspiracy, where the charge is under the Criminal Code section but may be in substance an offence under another Act.

As long as the present delegation of prosecutorial power to provincial attorneys general under the Criminal Code continues, provincial governments may wish to obtain funding for their services. Since the prosecution of criminal law is exclusively an area of federal constitutional jurisdiction, the federal Government should be responsible for the costs of prosecuting federal laws. In fact, cost sharing may also be requested to assist with budgets for law enforcement by police forces. In the past, municipalities and provinces have assumed nearly all of these costs but it may be, that in these difficult economic times, funding assistance will be requested. Provinces may threaten to withdraw prosecutorial services entirely now that it is clear that they do not possess the constitutional jurisdiction over the prosecutorial power in relation to federal offences. Alternatively, provincial governments may be willing to continue to bear the costs of policing and public prosecutors as long as they retain their present level of autonomy from the federal Attorney General.

Canadian National Transport[359] and Wetmore[360] appear to have finally determined the extent of federal prosecutorial

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[359] (1983) 49 N.R. 241, 49 A.R. 39.
[360] (1983) 49 N.R. 286.

authority as being exclusive. It is important to note that the strongest proponent of this view was the late Chief Justice Laskin. It is impossible to speculate what effect the present Chief Justice Dickson, the strongest advocate of the province's jurisdiction to prosecute based on section 92(14), will have on the Supreme Court of Canada's future decisions in this area. Possibly, the insinuation of a transprovincial factor will open the door to future litigation and controversy. Furthermore, some provincial attorneys general are not happy with the implications of these two decisions and may attempt to have a constitutional amendment passed. Such an effort would seem to be doomed to failure in the House of Commons. Political conditions do change, however, and the possibility of provincial pressure for an amendment might be so great that its passage can not be discounted. Other than providing for concurrency of jurisdiction, any constitutional amendment which limited the prosecutorial authority of the federal Attorney General could lead to serious consequences for Parliament when it attempted to enforce its laws.

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VI. APPENDICES

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*NOTE: Pages 183 to 260 have been removed from this copy because of the poor quality of photocopying. These documents are available in Sir Joseph Pope, "Confederation Documents Hitherto Unpublished Documents Bearing on the British North America Act." Toronto: Carswell, 1895.