CASE COMMENTS AND NOTES

R. v. HAUSER

I. INTRODUCTION

Who is ultimately in charge of a criminal prosecution; the provincial Attorney General or the Attorney General of Canada? If a challenge is made, the matter is usually brought into issue at the time of the preferring of the indictment. This is so because the laying of an information is not restricted to specific persons as is the preferring of an indictment. Note also that the Attorney General is in a unique position in regard to the preferring of an indictment. Justice Dickson, in his dissenting judgment in the *Hauser*[1] case, states:

> There are four ways in which an indictment can be preferred: (i) by the attorney general or his agent; (ii) 'by anyone who has the written consent of the attorney general'; and then two ways without intervention of the attorney general: (iii) by anyone with the written consent of the judge, with or without grand jury; and (iv) by order of the court.

Though the issue, as alluded to at the outset, is crystallized at the preferring of the indictment, the matter is much more basic and can best be understood by immediate reference to the following pertinent provisions:

1. Sections of the B.N.A. Act—Section 91(27); Section 92(14)
2. Criminal Code—definition of "Attorney General"
3. The history of the Criminal Code definitions of "prosecutor" and "Attorney General".

II. DEFINITIONS

A. The B.N.A. Act

1. S. 91(27) of the B.N.A. Act

> 91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subject next hereinafter enumerated; that is to say,
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> 27. The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.

2. S. 92(14) of the B.N.A. Act

> 92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,
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> 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.

B. The Criminal Code

The definition of "Attorney General" as presently found in s. 2 of the Criminal Code reads:

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1. *R.* v. *Hauser* 8 C.R. 89 at 115.

"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 505(4) and 507(3), includes the lawful deputy of the Attorney General, Solicitor General and Attorney General of Canada.

This definition was enacted in 1968-69 and because of the importance to the assessment of the *Hauser* decision I have italicized the relevant portion of same.

C. The Historical Context

History of the Criminal Code definition of "Attorney General" and "Prosecutor".

The definition of "Attorney General" in the Criminal Code of 1927 reads:

(2) "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 Northwest Territories and the Yukon Territory, the Attorney General of Canada;

The 1955 Criminal Code definition of "Attorney General" reads:

(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 the Northwest Territories and the Yukon Territory, means the Attorney General of Canada;

"Prosecutor" was defined for the first time in the 1955 Criminal Code to read:

(33) "Prosecutor" means the Attorney General or, where the Attorney 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 purport of this new definition of "prosecutor" in 1955 was to provide a uniform expression to replace such terms as "Crown", "Prosecutor", "Attorney General", formerly used to refer to the person conducting a prosecution.

However, before further commenting on the present definition of "Attorney General" as found in the Criminal Code, I will refer to the views of some legislators as to the interplay of criminal law and administration of justice. The views are set out chronologically.

As to whether the prosecutorial role was under 92(14) or 91(27), on February 19, 1867, when introducing the B.N.A. Bill in British Parliament, the Earl of Carnarvon stated:

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 the 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 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.

A portion of this is quoted by Justice Dickson in the *DiIorio*[2] case.

On December 15, 1953, the Honourable Stuart S. Garson, then Minister of Justice, stated:[3]

> . . . the enactment of the criminal law is the responsibility of the national government and the Parliament of Canada; but—and I do not think this point can be emphasized too strongly—once Canadian criminal law has been enacted its enforcement with some minor exceptions, is the responsibility of provincial authorities which are constitutionally charged with the administration of justice. It is very important that we enact here law which the provincial authorities will wish to enforce without reluctance.

The Honourable John Turner, Minister of Justice at the time of the 1968-69 amendment to the Criminal Code, when debating the change to the definition of "Attorney General" (the purpose of which was to give the federal Attorney General a new status regarding initiating and conducting of prosecutions) made the following observations before the Standing Committee of Parliament regarding justice and legal affairs:[4]

> Mr. Hogarth: Mr. Turner, you have moved into the Criminal Code when you included conspiracy because that is an offence under the Criminal Code. Why could you not move in on theft?
>
> Mr. Turner (Ottawa-Carleton): We could. Your fundamental question is the Constitution. We take the position and the Government of Canada has always taken the position since the Criminal Code was enacted in 1892 that the legislative jurisdiction, in deciding by whom and under what circumstances proceedings for violations of the Criminal Code or criminal law are instituted and conducted and defended and terminated and appealed, is a matter purely relating to the criminal law and to criminal procedure—procedure in criminal matters as found within the meaning of Head 27 of Section 91 of the British North America Act.
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> In our opinion the role of the provincial attorneys general in enforcing the Criminal Code derives from the Criminal Code itself, a statute of Parliament and not from Head 14 of Section 92 of the British North America Act, which gives the provinces legislative jurisdiction to make laws in relation to the administration of justice in the provinces. In other words, Head 14 of Section 92 is legislative power to make laws for the administration of justice. It has nothing to do with the prosecution of criminal law and procedure under the heading in Section 91.

The earlier definitions of "Attorney General" and the definition of "Prosecutor", though not patently relevant, do show in recent years a federal legislative intention to assert a constitutional jurisdiction, not only as to how a criminal action may be instituted, but more importantly for the purpose of this review, by whom it may be instituted. It will be noted the earlier definitions of "Attorney General" were restricted to the Attorney General of the province. The present definition of "Attorney General" includes the Attorney General of Canada for certain specified proceedings and was enacted, as mentioned several times already and I mention it again for emphasis, in the 1968-69 amendment to the Criminal Code.

It will be noted the Honourable Mr. Turner's views on the prosecutorial role are at variance with those of the earlier legislators.

If the Honourable Mr. Turner is right and Lord Carnarvon and the Honourable Stuart Garson were wrong, then Parliament could, by an amendment to the definition of "Attorney General", remove the Attorney General of the province and thereby remove his prosecutorial status.

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2. *DiIorio et al.* v. *Warden of Common Jail of Montreal and Brunet et al.* 35 C.R.N.S. 57 at 75.
3. House of Commons Debates—December 15, 1953, at 943.
4. Minutes of Proceedings of the Standing Committee on Justice and Legal Affairs at 155 and 156.

III. THE CASE

Now, against this background, what did the Supreme Court of Canada say in the *Hauser* case about the prosecutorial role? The questions the court was asked to answer were:

> Is it within the competence of the Parliament of Canada to enact legislation as in Section 2 of the Criminal Code to authorize the Attorney General of Canada or his Agent
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> (1) to prefer indictments for an offence under the Narcotic Control Act,
>
> (2) To have the conduct of proceedings instituted at the instance of the Government of Canada in respect of a violation or conspiracy to violate any Act of the Parliament of Canada or regulations made thereunder other than the Criminal Code?

Hauser had been charged with:

> Count #1
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> . . . on or about the 23rd day of June, A.D. 1976, at or near Red Deer in the Province of Alberta, in the Judicial District of Red Deer were unlawfully in possession of a Narcotic, to wit: Cannabis resin, for the purpose of trafficking, contrary to Section 4(2) of the Narcotic Control Act [R.S.C. 1970, c. N-1].
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> Count #2
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> . . . on or about the 23rd day of June, A.D. 1976, at or near Red Deer in the Province of Alberta, in the Judicial District of Red Deer were unlawfully in possession of a Narcotic, to wit: Cannabis (marihuana) for the purpose of trafficking, contrary to Section 4(2) of the Narcotic Control Act.

A. The Arguments

The provinces, in their arguments before the Supreme Court of Canada, did not assert any jurisdiction over regulatory offences. That is, they probably had not clearly thought out whether they could assert jurisdiction, but in any event they did not do so as it seemed to them to be, from an enforcement point of view, an acceptable dividing line. They were willing to allow the federal government to look after administration of regulatory offences found in revenue and similar statutes that were clearly not of a criminal essence. The regulatory offences were those non-defined offences that were necessary to the efficient and proper functioning of a federal regulatory statute, for example, the offence of failing to file an income tax return. This is basically different from working a fraud on a government by manipulation of the contents of a return in a deceitful manner, or conspiring with someone so to do.

Three provinces, Ontario, Quebec and British Columbia, according to the Supreme Court of Canada, conceded such jurisdiction over regulatory offences to the federal government. They thus asserted no jurisdiction where the offence was of a non-criminal nature (that is, enacted pursuant to a power other than section 91(27)).

All provinces present were *ad idem* that their primary prosecutorial role sprang from 92(14), and not from any delegated right pursuant to federal legislation. The broad proposition asserted by the federal government was that it had complete legislative authority to arrogate unto itself the prosecutorial role over all offences, criminal and non-criminal, and the provinces were authorized to prosecute under the Criminal Code or other federal statutes as of *grace* and *not* as *of right*. In this connection I refer the reader to the observation of the Honourable Justice Minister Turner, quoted above, when he appeared before the Standing Committee. In my reading of the judgment, Justice Spence

agreed with the broad proposition advanced on behalf of the federal government. The majority judgment rendered by Justice Pigeon, concurred in by Justices Martland, Ritchie and Beetz, did not find it necessary to accept this broad proposition. Justice Dickson, in a careful and lengthy analysis, with which Justice Pratte concurred, by and large sets out, insofar as the prosecutorial role regarding criminal offences and characterization are concerned, the provincial position and concurs in the soundness of same.

B. The Judgments

I will now look more specifically at the three judgments and make some general remarks regarding the results of them.

1. Mr. Justice Pigeon (Martland, Ritchie and Beetz J.J. concurring)

Justice Pigeon finds that narcotic control legislation is a new problem which did not exist in 1867, and so it falls within the residual clause, on the same footing as aeronautics and radio communications. He stated:[5]

> In my view, the most important consideration for classifying the Narcotic Control Act as legislation enacted under the general residual federal power is that this is essentially legislation adopted to deal with a genuinely new problem which did not exist at the time of Confederation and clearly cannot be put in the class of 'Matters of a merely local or private Nature' [s. 92, head 16]. The subject matter of this legislation is thus properly to be dealt with on the same footing as such other new developments as aviation (*Re Aeronautics in Can. (Regulation and Control of)*, [1932] A.C. 54, [1931] 3 W.W.R. 625, [1932] 1 D.L.R. 58 (P.C.); and radio communications (*Re Radio Communication in Can. (Regulation and Control of)*, [1932] A.C. 304, [1931] 1 W.W.R. 563, 39 C.R.C. 49, [1932] 2 D.L.R. 81 (P.C.)).

I believe it is generally recognized that penalties for criminal violations fall under section 91(27). I believe it is also a generally held view that penalties for non-criminal offences fall within the subject matter pursuant to which the offence is enacted, that is, other than under section 91(27). This last observation is probably now clearly established by Justice Pigeon's judicial pronouncement when he states:[6]

> There is in s. 91 no counterpart of head 15 of s. 92:
>
> '15. The Imposition of Punishment by Fine, Penalty, or Imprisonment for enforcing any Law of the Province made in relation to any Matter coming within any of the Classes of Subjects enumerated in this Section.'
>
> However, as is made abundantly clear by head 29 of s. 91, there can be no doubt as to the existence of federal power to provide for the imposition of penalties for the violation of any federal legislation, entirely apart from the authority over criminal law.

More detailed comments will be made later regarding the ramifications of this majority decision.

Mr. Justice Spence, who also gave one of the majority decisions in that he also allowed the appeal, did so on a broader basis.

2. Mr. Justice Spence

Justice Spence takes the position that the federal government can establish the procedure to enforce federal Acts, the power being necessarily incidental to all enumerated heads of power under 91, including the prosecutorial role. He states, in part:[7]

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5. *R.* v. *Hauser, id.* at 109.
6. *Id.* at 105.
7. *Id.* at 97.

> If the legislative field is within the enumerated head in section 91, then the final decision as to the administrative policy on investigation and prosecution must be in federal hands.

Does this go so far as to say that since investigation encompasses the investigatory function, the federal government can legislatively decide, for example, which police force, or forces, can enforce the Criminal Code? By his observation Justice Spence has heightened another provincial concern. His view would reduce the historical and practised significance of s. 92(14). The administration of justice in a province could be confined to those matters found within s. 92; that is, the Attorney General of a province would be restricted to the investigation and enforcement of provincial offences, such as speeding on the highways and hunting without a license, provided the speeding or hunting violation was found in a provincial statute. The observations of Justice Spence appear to be at variance with such observations as found in the *DiIorio*[8] case *per* Pigeon J.:

> . . . jurisdiction over the 'Administration of Justice' in all matter civil and criminal, which has consistently been held to include the detection of criminal activities.

or the time honoured observation of Duff C.J. in the case of *Reference Re The Adoption Act* wherein he stated, in part:

> Moreover, while, as subject matter of legislation, the criminal law is entrusted to the Dominion Parliament, responsibility for the administration of justice and, broadly speaking, for the policing of the country, the execution of the criminal law, the suppression of crime and disorder, has from the beginning of Confederation been recognized as the responsibility of the provinces as has been discharged at great cost to the people.

3. Mr. Justice Dickson

Mr. Justice Dickson rejects, insofar as the relationship between 91(27) and 92(14), the aspect of necessarily incidental doctrine clause, as federal paramountcy would denude 92(14). Mr. Justice Dickson observes that 92(14) has no application to any non-criminal federal legislation, and he recognizes the unique relationship between 91(27) and 92(14). That is, the administration of criminal justice falls to the province. The administration of justice is related to criminal matters only and not to regulatory processes as found in federal legislation other than 91(27). Then Mr. Justice Dickson, in a careful analysis, characterizes the Narcotic Control Act as criminal law as it has been characterized in prior years by the courts.

IV. FROM CHARACTERIZATION TO CHAOS?

As mentioned earlier, three provinces asserted no jurisdiction where the offence was not of a criminal nature. I am sure in doing so the three provinces never anticipated that trafficking in drugs would be characterized as non-criminal. Thus, the case differentiates between those offences passed under the criminal law power, namely, 91(27) and non-criminal offences passed under other than 91(27), legislative power. That is, the dividing line, now, is not drawn between criminal and regulatory offences, but rather it differentiates between those offences passed under the 91(27) criminal law power and those which are not.

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8. *DiIorio, supra* at 59.
9. *Reference Re The Adoption Act* [1938] S.C.R. 398 at 403.

It will be noted that in the *Hauser* case Justice Beetz concurred in the majority decision, although in the *Anti-Inflation Act*[10] case he indicated that curtailment and reduction of inflation does not pass muster as a new subject matter. Because of the *Hauser* decision many offences may now pass muster as a new subject, in spite of the court's comments intended to limit the decision's application.

Will there be a rash of new characterizations? Chief Justice Laskin made the following observation in the case of *Capital Cities*:[11]

> Although this court is not bound by judgments of the Privy Council any more than it is bound by its own judgments, I hold the view that the *Radio* case was correctly decided under the terms of ss. 91 and 92(10)(a).

Will crimes, which because of modern mobility know neither provincial nor international boundaries (e.g. international or interprovincial theft rings), lose their local characteristics? Will crimes which take on new characteristics result in new characterizations? In this regard I refer to the reasons for judgment of Chief Justice Laskin in the *Zelensky* case:[12]

> Certainly, as has been often said, time does not validate a statute which is unconstitutional, but I point out that there is an instance in our law where time has invalidated a statute which was generally regarded as constitutional. That was the result of the Margarine Reference, *Reference re Validity of s. 5(a) of Dairy Industry Act (Margarine Case* [1949] 1 D.L.R. 433, [1949] S.C.R. 1; affirmed [1950] 4 D.L.R. 689, [1951] A.C. 179 sub nom. *Canadian Federation of Agriculture* v. *A.G. Que.* holding that federal legislation prohibiting the manufacture, possession and sale of margarine (first enacted in 1896 when there was concern about the nutritional quality of the product and its danger to health), could not be sustained as an exercise, *inter alia*, of the federal criminal law power because in the intervening years, changes in methods of manufacture and of ingredients had removed any danger to health. Correlatively, it seems to me, the passage of time has resulted in new approaches to criminal law administration so as to confirm the propriety of the long standing provisions of the Criminal Code for compensation and restitution.

This last quotation, taken in conjunction with the Chief Justice's observation in the *Capital Cities*[13] case quoted above that the Supreme Court of Canada is not bound by Privy Council or its own decisions, along with the surprising characterization in the *Hauser* case, could lead one to conclude that there may be a radical shift from past constitutional characterizations.

A wholesale recharacterization is unlikely because of the court's cautiousness in the interest of constitutional stability and predictability, as well as the majority decision in *Hauser*, which treats the characterization as though it had not been conclusively characterized before. As Justice Pigeon in the *Hauser* case stated, there was no binding decision characterizing narcotic control legislation as criminal law and hence there was no new characterization. He stated:[14]

> I will therefore proceed to consider whether the Narcotic Control Act is to be classified as legislation enacted under the criminal law power. I cannot accept as conclusive on this point the statements made in the judgment of this court in *Indust. Accept. Corpn. Ltd.* v. *R.*, [1953] 2 S.C.R. 273, 107 C.C.C. 1, [1953] 4 D.L.R. 369. This was a private claim, and it appears from what Locke J. (dissenting in part) said at p. 28, that it was:
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> . . . conceded on behalf of the appellant that The Opium and Narcotic Drug Act,

10. *Reference Re The Anti-Inflation Act* 68 D.L.R. (3d) 452.
11. *Capital Cities Communications Inc. et al.* v. *Canadian Radio-Television Commission et al.* 81 D.L.R. (3d) 609 at 622.
12. *R.* v. *Zelensky* 86 D.L.R. (3d) 179 at 187.
13. *Capital Cities, supra* n. 11.
14. *Hauser, supra* at 106.

> 1929 is in pith and substance criminal law, within the meaning of that expression in sub s. 27 of s. 91.
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> That concession was effective towards the appellant who made it in that case, and the court could decide accordingly, but it would not result in a binding precedent on the point. Furthermore, it really made little difference in the case whether the Act was 'criminal law' or not.

However, though I have observed that courts are cautious in recharacterization and though I have emphasized Justice Pigeon's care in restricting his characterization of narcotic control legislation from that of a crime to a non-crime, I think that reluctance *may not* apply to recharacterization of offences. Thus in prosecution cases there may arise, in relation to offences, a characterization problem before assigning the prosecutorial role. For example, are there offences in the Criminal Code that may be non-criminal in that the only criminal attribute they possess is the fact that they are anchored in the Criminal Code? What about dual characterizations, i.e. though narcotic control legislation is a new subject, may it also be characterized as criminal? An example of this arose in the recent case of *Schneider* v. *Her Majesty The Queen in the Right of the Province of British Columbia* (unreported) where British Columbia legislation, The Heroin Treatment Act, was under review. The court observed by way of *obiter* comment that narcotic control legislation could also fall under the criminal law power.

V. THE HAUSER HOROSCOPE

It will be appreciated not all aspects of the prosecutorial role problem arise solely out of the *Hauser* decision. The problems in part arose from the meaning of s. 2 of the Criminal Code, defining "Attorney General", and are intertwined with the interpretation of same. The decision brought into focus some problems that, until the decision, lay temporarily dormant, although occasionally erupting in challenges at various places in various ways.

Assuming that there are offences, under federal statutes other than the Criminal Code, which exist pursuant to federal legislative power under s. 91(27), it would seem that we are back generally to pre-*Hauser* days, when both Attorneys General could institute and conduct proceedings. This seems to be so in that Justice Pigeon, who gave the majority judgment, does not disagree with the Quebec Court of Appeal in the case of *Miller* v. *The Queen*.[15] That is, there is concurrency until the federal Attorney General institutes the proceedings, which results in the exclusion of the

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15. *Regina* v. *Miller* 27 C.C.C. (2d) 438 at 444.

> Read in connection with ss. 496, 507 and others of the Criminal Code where Parliament uses the word "Attorney General", s. 2 seems to set forth a clear rule:
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> (a) When proceedings are instituted in a Province pursuant to the Criminal Code, the bill of indictment must be preferred and the proceedings conducted by the Attorney General of the Province;
>
> (b) when proceedings are instituted in the Northwest Territories or in the Yukon Territory, "Attorney General" means the Attorney General of Canada;
>
> (c) when proceedings are instituted in a Province in respect of a violation of an Act of the Parliament of Canada other than the Criminal Code, the bill of indictment can be preferred, and the proceedings conducted by the Attorney General of the Province or by the Attorney General of Canada;
>
> (d) except for cases provided in s-s. 505(4) and 507(3), Attorney General or Attorney General of Canada includes their respective legitimate Deputies.
>
> The grammatical and logical analysis of the text and a scrutiny of the intention of Parliament cannot lead to any other conclusion.

Attorney General of the province from any authority in respect of any proceedings so instituted. What will happen if the provincial Attorney General is first in instituting proceedings? Would the federal Attorney General be barred? It would appear that the Attorney General of the province would have a right if he pursued the matter first: "to the swift is the race".

Perhaps we could approach the *Hauser* decision as being limited to the Narcotic Control Act because narcotics are more global than local and a recent phenomenon, etc. Thus the Act was passed under the peace, order and good government clause, and is in effect a new enumeration under 91. Pigeon J. insisted and persisted throughout his reasons that he was delivering a narrow judgment, restricted to the Narcotic Control Act. This, to some, seems unlikely.

Did *Hauser* decide that the provincial Attorney General can only conduct and supervise the prosecution if the offence is one which was enacted pursuant to s. 91(27)? A formidable argument can be made that this is what the majority decided. On the other hand, it may well have left open, based on the questions posed, the provincial Attorney General's constitutional right to prosecute those offences that are non-criminal. The court did not decide whether the general right of the Attorney General of a province to prosecute any offence was based on a delegated power given to him under the Criminal Code or whether, as the provinces argued, it is more basic and flows from 92(14)—that is, from the Constitution.

With these general remarks I will now attempt to apply the decision to several different broad categories of offences.

VI. THE APPLICATION OF *HAUSER*

A. That Which is Criminal

Let me refer to combines legislation. An offence under the combines legislation may be prosecuted by the Attorney General of the province only if the federal Attorney General does not first institute the proceedings. This may, of course, be dependent upon combines offences being characterized as being criminal law. This example is used because such legislation, or aspects thereof, were at one time found in the Criminal Code; because the common law was cognizant of monopolies (not a recent phenomenon) and also because they, at an early date, were recognized as having criminal attributes. These remarks, of course, are subject to abrupt constitutional recharacterization, which could break with past constitutional understanding as appears to have happened in the *Hauser* decision.

B. That Which is Non-Criminal

The Migratory Birds Convention Act offences would probably be characterized as "non-criminal" because these certainly have less of the attributes of a crime than does, for instance, trafficking in drugs. Even here there is doubt as to whether a province could have a prosecutorial role as a constitutional right, as Justice Pigeon pointed out; subject to my earlier caveat that the federal government can completely provide for prosecutions by a federal official of those offences not enacted under the criminal law power. Justice Pigeon added that it was so conceded by three provinces.

C. That Which is Imposed

If the province has no constitutional right, does it *have* to prosecute when a duty is imposed by the delegated right pursuant to s. 2 of the Criminal Code? That is, by virtue of s. 2 of the Criminal Code does the Attorney General of a province have a right to prosecute an offence found in federal statutes other than the Criminal Code? The answer to these questions is "yes" because the procedural provisions of the Criminal Code relating to indictable offences and summary conviction offences apply to most other federal statutes by reason of s. 27 of the Canada Interpretation Act.[16] The next question is, has the federal legislation imposed an obligation upon the provincial Attorney General? Quoting from Justice Spence's reasons for judgment, we have the following:[17]

> Acting upon such a power Parliament has, throughout the Criminal Code, granted jurisdiction to various provincial courts and has imposed duties and has conferred powers on various provincial officials including of course the Attorneys General of the provinces.

The questions posed in this context are: "Has the federal government imposed upon the provincial Attorney General and his agents a duty to prosecute non-criminal offences like the Migratory Birds Convention Act offences or the Indian Act offences, etc.?" and "What is the significance of such sections as 176(4) and 177(1)[18] of the federal Bankruptcy Act, which appear much more specific in apparently imposing an obligation on provincial officials?".

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16. Interpretation Act, 1970, R.S.C., c. I-23, s. 27 which reads:

> 27. (1) Where an enactment creates an offence,
>
> (a) the offence shall be deemed to be an indictable offence if the enactment provides that the offender may be prosecuted for the offence by indictment;
>
> (b) the offence shall be deemed to be one for which the offender is punishable on summary conviction if there is nothing in the context to indicate that the offence is an indictable offence; and
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> (c) if the offence is one for which the offender may be prosecuted by indictment or for which he is punishable on summary conviction, no person shall be considered to have been convicted of an indictable offence by reason only of having been convicted of the offence on summary conviction.
>
> (2) All the provisions of the Criminal Code relating to indictable offences apply to indictable offences created by an enactment, and all the provisions of the Criminal Code relating to summary conviction offences apply to all other offences created by an enactment, except to the extent that the enactment otherwise provides.
>
> (3) In a commission, proclamation, warrant or other document relating to criminal law or procedure in criminal matters
>
> (a) a reference to an offence for which the offender may be prosecuted by indictment shall be construed as a reference to an indictable offence; and
>
> (b) a reference to any other offence shall be construed as a reference to an offence for which the offender is punishable on summary conviction. 1967-68, c. 7, s. 27.

17. *Id.* at 3.

18. Bankruptcy Act, 1970, R.S.C., c. B-3, ss. 176(4) and 177(1).

> 176. (4) Where a trustee is authorized or directed by the creditors, the inspectors or the court to initiate proceedings against any person believed to have committed an offence, the trustee shall institute such proceedings and shall send or cause to be sent a copy of the resolution or order, duly certified as a true copy thereof, together with a copy of all reports or statements of the facts on which such order or resolution was based, to the Crown Attorney or the agent of the Crown duly authorized to represent the Crown in the prosecution of criminal offences in the district where the alleged offence was committed. R.S., c. 14, s. 163.
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> 177. (1) Where the official receiver or the trustee has reason to believe that an offence under this Act or the Criminal Code relating to the property of the bankrupt was committed either before or after the bankruptcy by the bankrupt or any other person, the official receiver or trustee shall make a report thereon to the Deputy Attorney General or other appropriate legal officer of the province concerned or to such person as is duly designated purpose.

In light of the specificity of the Bankruptcy Act, which may or may not have within its ambit criminal offences, it could well be that a province, statutorily, may have an obligation under that Act to prosecute. However, if s. 2 of the Criminal Code is the only authority on which to base the argument that a province must prosecute, it would seem doubtful. The concurrency aspect which gives the federal government authority to prosecute should mean that federal statutes need not be left unenforced if the province does not prosecute. This, in conjunction with the fact that the province is shut out when the federal Attorney General institutes proceedings, should be grounds enough to argue that the authorization of the provincial Attorney General to prosecute is not a compulsory obligation. Also important in this context is the fact that where a federal statute has within its ambit complete procedural provisions which prevent s. 2 of the Criminal Code from taking effect pursuant to the provisions of s. 27 of the Canada Interpretation Act,[19] the province in such a case does not have a capacity to prosecute pursuant to s. 2 of the Criminal Code.

D. That Which is Incorporated

When provincial laws are inferentially incorporated into federal law, such laws would be non-criminal in nature, which should automatically shut out the provincial prosecutorial role. This surely should be the case when the provincial laws have provided for both the substantive offences and procedure. In such a case s. 27 of the Interpretation Act of Canada[20] would not apply. Thus, the Attorney General of a province would have no prosecutorial role to perform where the provincial laws become federal laws by inferential incorporation for example, the Indian Act, which incorporates some provincial traffic laws.

VII. THE *HAUSER* POSTSCRIPT

1. The most surprising aspect of the *Hauser* decision was, of course, the characterization of the narcotic control legislation as being legislation enacted pursuant to the peace, order and good government power.
2. It said nothing as to whether the narcotic control legislation could also be characterized as falling within some other legislative subject matter.
3. Will an offence embedded in a rather comprehensive federal regulatory scheme always be non-criminal in character?
4. It did not clarify the meaning of s. 2 of the Criminal Code as to the meaning of "a conspiracy to violate a federal statute" other than the Criminal Code, when the conspiracy charge is in fact laid under a section of the Criminal Code.
5. The court was not asked to decide and did not decide whether a conspiracy is a crime *per se* or whether it takes on the characterization from the statute violated, thus resulting in a conspiracy which is not a crime.
6. In future, when the prosecutorial role is put in issue, the first requirement may be a prior characterizing of the offence as to whether it is criminal or non-criminal.

19. *Supra.*
20. *Id.*

7. Does a person, whose record is only for violation of the Narcotic Control Act, have a criminal record? A criminal record was, up until now, understood to be a serious record in anti-social context; however, a criminal record may now not necessarily be the only serious record. In any event, the Identification of Criminal Act refers to indictable offences and not criminal offences.
8. Justice Dickson observed that there was a very unique relationship between 92(14) and 91(27). This may be the resolution of the inconsistency of the provincial position of insisting on a constitutional right to enforce federal offences within the province but never claiming a right to pursue the civil administration of justice under federal statutes.
9. It gives the Attorney General of Canada a prosecutorial right regarding those offences not enacted pursuant to the criminal law power.
10. It left undecided whether the Attorney General of Canada has a constitutional right to prosecute those offences passed pursuant to the criminal law power.
11. It does not deny the Attorney General of the province the primary right to prosecute all criminal offences, whether found in the Criminal Code or other federal statutes.
12. The *Hauser* case is probably still binding in Alberta regarding criminal offences, regardless of the federal statute under which they are found. The Supreme Court allowed the appeal from the Appeal Court of Alberta on the ground that the narcotic offences with which *Hauser* had been charged were not criminal offences. Thus, the Attorney General of Alberta probably has the primary prosecutorial role regarding all offences enacted pursuant to the criminal law power.

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