The Potential Effects of *Kripps*[1] and *C. N. Transportation*[2] on the Administration of the Criminal Justice System in Canada.

Introduction

The purpose of this paper is to examine the responsibility of the Attorneys General of the provinces within the criminal justice system in light of these two recent Supreme Court of Canada decisions. From a narrow point of view the Court deals only with the prosecutorial jurisdiction of the Attorney General of Canada in criminal offences found in federal legislation outside the *Criminal Code*. However, in reasoning and in statement the judgments seriously challenge the limits of provincial constitutional jurisdiction under section 92(14) of the *Constitution Act, 1867*[4] and put in issue the duty of the executive branch of provincial governments to act within the criminal justice system except as delegates of the federal government.

The broad constitutional issue under consideration, as Laskin C.J.C. notes in *C.N. Transportation* is the scope of provincial power under section 92(14) and its relation to the federal power under section 91(27)[5]. While the decisions may clarify the law concerning prosecutorial jurisdiction, other functions such as policing, corrections and other ancillary services (which under the traditional view were thought to be included in section 92(14) under administration of justice in the province) are now in dispute and are likely to be the object of continuous litigation unless clarified by means of a reference to the courts or by agreement between federal and provincial governments resulting in a constitutional amendment.

The Traditional Theory of Provincial Jurisdiction

It appears that the Attorneys General of the provinces can no longer rely on the frequently quoted statements of Dickson J. in *DiIorio*[6] and

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[1]*Regina and His Honour Judge Wetmore re Kripps Pharmacy and Steven Kripps et al.* (1983), 7 C.C.C. (3d) 507, 49 N.R. 241. Reasons for judgment by Laskin C.J.C. concurred in by Ritchie J., Estey J. and McIntyre J. reasons concurring in result by Beetz J. and Lamer J. Dissenting reasons by Dickson J.

[2]*A.G. Canada* v. *C.N. Transportation Ltd. and C.N. Railway Co. et. al.* (1983), 7 C.C.C. (3d) 449, 49 N.R. 241. Reasons for judgment by Laskin C.J.C. concurred in by Ritchie J., Estey J. and McIntyre reasons concurring in result by Dickson J. Also reasons concurring in result of Beetz J. and Lamer J.

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

[4]30-31 Vict., c.3 (U.K.) 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."

[5]*Ibid.*, section 91(27). "The criminal law, except the constitution of courts of criminal jurisdiction, but including the procedure in criminal matters."

[6]*DiIorio and Fontaine* v. *Warden of the Common Jail of Montreal and Brunet et al.* (1976), 33 C.C.C. (2d) 289.

Putnam[7] as defining the scope of provincial constitutional jurisdiction within the criminal justice system. In *Kripps*, Dickson J. reiterates the traditional theory (held by provincial Attorneys General) based on the inclusion of provincial constitutional jurisdiction within section 92(14):

> ". . . 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, prosecution 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 of the words "administration of justice" should be qualified in such manner that "justice" is meant to mean "civil justice". There is no need to reduce the legislation to futility by reading into section 92(14) a limitation not therein expressed."[8] (Emphasis added)

In both *Kripps* and *C.N. Transportation*, Dickson J. (following his reasoning in *Hauser*[9]) provides an exhaustive examination of the federal legislation under consideration for purposes of classification.[10] He then reiterates the traditional view of most provincial Attorneys General concerning the division of powers within sections 91 and 92 of the *Constitution Act, 1867*: that there is a valid distinction for prosecutorial purposes between federal criminal and non-criminal legislation; that section 92(14) includes the administration of criminal as well as civil justice in the province; and that the provinces have exclusive constitutional jurisdiction over the prosecution of all criminal offences found in federal legislation.[11]

The New Theory of Delegated Responsibility

Laskin C.J.C. enunciates the following propositions in the majority judgments: that there is no valid distinction for prosecutorial purposes between federal criminal and non-criminal legislation, as the federal government has exclusive constitutional jurisdiction to prosecute all federal legislation; that section 92(14) does not include the administration of criminal justice and cannot in any way diminish federal power under section

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[7] *A.G. Alberta* v. *Putnam et al.* (1981), 62 C.C.C. (2d) 51. Dissent by Dickson J. at 60.

[8] *Supra*, footnote 1, at 520.

[9] *R* v. *Hauser* (1979), 46 C.C.C. (2d) at 481.

[10] In *Kripps* the provisions of the *Food and Drug Act* (R.S.C. 1970, c. F-27), under consideration were categorized as criminal by Dickson J. In *C.N. Transportation*, considering the provisions of the *Combines Investigation Act* (R.S.C. 1970, c. C-23), Dickson J. categorized the legislation as criminal, but also as coming under the federal trade and commerce power. With an application of the doctrine of federal paramountcy in this situation (as opposed to *Kripps*, where he categorized the legislation as solely criminal), Dickson J. concurred in results with the judgment of Laskin C.J.C., although the difference in reasoning formed the basis for his lone dissent in *Kripps*.

[11] Unless, as in *C.N. Transportation*, federal paramountcy prevails. It is interesting to note that Dickson J. concurred in the judgment of the court delivered by Martland J. in *R* v. *Aziz* (1981), 57 C.C.C. (2d) 97 where it was decided that the federal government had constitutional jurisdiction to prosecute a charge of conspiracy under the *Criminal Code* relating to the importation of narcotics contrary to the *Narcotic Control Act*, R.S.C. 1970, c. N-1.

91(27) (which includes the prosecutorial function) and that the Attorneys General of the provinces are involved in the prosecution of criminal and other federal legislation[12] only because of a delegation by the federal government as found in the definition of Attorney General in section 2 of the *Criminal Code*.[13]

It is difficult, however, (if not impossible) to find a precedent within the Canadian experience with which the delegation of prosecutorial responsibility can be compared.[14] As there is no elaboration by Laskin C.J.C. as to the nature of the delegation, one must assume that he contemplates a delegation similar in nature to his dissenting analysis in *DiIorio* concerning police functions:

> In fact, it is open to the Federal Parliament to invest provincial functionaries or courts with federal functions under federal legislation, regardless of whether they are endowed with capacity by provincial legislation . . .[15]

It is submitted that the delegation of prosecutorial authority to the Attorneys General of the provinces under the new theory is not analogous to the investment of provincial functionaries or courts with federal functions as it does not recognize the role of the Attorney General of the province as chief law enforcement officer, nor does it deal with the question

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[12]See *R* v. *Sacobie and Paul* (1983), 1 C.C.C. (3d) 446 argued after *Kripps* and *C.N. Transportation*, with judgment pronounced by the Court on February 9, 1983, to the effect that no constitutional questions were raised on a prosecution by the provincial authorities of an offence under the *Fisheries Act*, R.S.C. 1970, c. F-14.

[13]It is clear that Laskin C.J.C., in his judgments has categorized the issue as one involving delegation of prosecutorial authority. He uses the following terminology in *C.N. Transportation*: (at 455) ". . . section 2 of "Attorney General . . . embraces the Attorney General . . . of a province . . . it was the federal parliaments' decision to give general prosecuting authority . . . to the provincial Attorneys General"; (at 461) ". . . federal legislation embraced the provincial Attorney General . . . within the scope of its criminal enactments . . ." and (at 463) ". . . it cannot be argued that parliament confers prosecutorial authority only with the consent of the provinces, for this would involve an unconstitutional delegation of legislative power . . ." In *Kripps* (at 510) Laskin C.J.C. refers to ". . . prescriptions . . . that assign prosecutorial authority to the provincial Attorney General." Dickson J. in *Kripps* (at 519) summarizes the federal argument as follows: "The Attorney General of Canada takes the position that the designation of the provincial Attorney General as *the* "Attorney General" for the purposes of the *Criminal Code* is not constitutional but statutory, the result of the federal parliament exercising its legislative competence to delegate prosecutorial authority to a provincial official. If the federal parliament has the authority to enact this legislation, then it will have the same authority at any time to terminate it." Although the delegation approach is called the new theory, in this paper, it was the federal explanation for the 1969 amendment to the definition of Attorney General in the *Criminal Code*: See, "Minutes of Proceedings of the Standing Committee on Justice and Legal Affairs" (March 4, 1969) at 155, where the then Minister of Justice, John Turner, stated that the prosecutorial responsibility of the provincial Attorney General was only that conceded by Parliament. See also LaForest G., "Delegation of Legislative Power in Canada", (1975) 21 *McGill L.J.* 131 at 133 ". . . federal Parliament can, in the exercise of its paramount power over criminal law, vest the administration of criminal law in persons other than provincial authorities".

[14]For example, the provinces have constitutional jurisdiction under Section 92(14) for the constitution, maintenance and organization of provincial courts, both of civil and criminal jurisdiction . . . while the federal government has constitutional jurisdiction under section 96 for appointment of judges for the superior, district and county courts. Thus, while the actions of a provincial government may have cost consequences on the federal government, or *vice versa*, both are acting within their respective areas of constitutional responsibility, and there is no delegation of legislative or administrative functions. In contrast, the delegation of prosecutorial authority to the provincial Attorneys General imposes a financial burden on provincial governments in an area where they have no constitutional jurisdiction.

[15]*Supra*, footnote 6, at 304.

of political accountability for the administration of the criminal justice system in the province.[16]

Section 92(14) As Limited By The New Theory

Laskin C.J.C., in *C.N. Transportation*, states that the clear language of section 92(14) narrows the scope of the federal criminal law power only with respect to what is included in the constitution, maintenance and organization of provincial courts or criminal jurisdiction. He categorically rejects (as being unsupported by history, logic, or grammar) the traditional theory that section 92(14) includes criminal, as well as civil, justice.

i) Prosecutions

Under the new theory the prosecutorial function is included within the scope of criminal procedure. The judgments clearly indicate that the provinces have no independent constitutional jurisdiction with respect to the prosecution of criminal offences and only have authority to act in this field because of the delegation by the federal government of prosecutorial responsibility to the Attorneys General of the provinces as found in the *Criminal Code*.[17]

ii) Policing

Although there is no specific reference to other areas within the ambit of the criminal justice system that might be affected by the limitations of section 92(14) under the new theory, support for the proposition that the policing function must follow the prosecutorial function is based on reliance by Laskin C.J.C. on the following portions of the judgments of Spence J. in *Hauser*, and of Martin J.A. in *Hoffman—LaRoche*[18], which include statements linking the two functions on a constitutional basis. As noted by Spence J.:

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[16]As noted by Rand J., in *A.G. Nova Scotia* v. *A.G. Canada* [1951] S.C.R. 31 the theory of delegation implies subordination—quoting from *Hodge* v. *The Queen* (1883), 9 App. Cas. 117 at 132: ". . . it retains the powers intact, and can, whenever it pleases, destroy the agency it has created and set up another, or take the matter directly into his own hands . . ." Assuming the delegation in the *Criminal Code* is broad enough to include all the traditional supervisory functions of the Attorney General in relation to the criminal justice system the ultimate political responsibility for the administration must remain with the federal Attorney General answerable to Parliament under the theory of responsible government. J.L.J. Edwards in "Ministerial Responsibility for National Security", 1980, in chapter 3 examines the problem and notes the consistent denials of responsibility from successive federal Attorneys General when questioned concerning incidents of alleged mismanagement of the administration of criminal justice in the province.

[17]In retrospect, the delegation of prosecutorial authority to the Attorneys General of the provinces has resulted in significant expenditures by the provinces within the field of criminal prosecutions. Would a similar delegation by a provincial legislature of prosecutorial authority for provincial legislation to the Attorney General of Canada result in a duty on the federal government to expend funds to achieve the purpose of the delegation? The answer, of course, comes in the area of policing, where, under the new theory of delegated responsibilities (as implied by Laskin C.J.C.), numerous examples of an analogous delegation in legislation of provincial and municipal enforcement duties to the R.C.M.P. by contract provinces can be cited. The federal government has always taken the position that services of the R.C.M.P. can be withdrawn if payment is not forthcoming for this enforcement service. The implication is that, as a delegate, there is no positive duty to act without payment.

[18]*R* v. *Hoffman—LaRoche Ltd.* (1981), 24 C.R. (3d) 193.

> If the legislative field is within the enumerated heads of section 91, then the final decision as to administrative policy, investigation and prosecution must be in federal hands.[19];

and by Martin J.A.:

> Since the investigative function is validly vested in federal officers, the authority of Parliament to empower the Attorney General of Canada to initiate the conduct prosecution under the Act is necessarily incidental or ancillary to the scheme of the legislation, or to use the language of Laskin J.A. (as he then was) in *Papp* v. *Papp* . . . "there is a rational, functional connection" between the investigative procedures provided for in the Act and the vesting of prosecutorial power in the Attorney General of Canada . . .
>
> In my view the vesting of prosecutorial powers in the Attorney General of Canada in respect of violations of the *Combines Investigation Act* does not offend any constitutional principle or any understanding that may have existed at the time of Confederation with respect to the enforcement of the criminal law.[20]

One must also seriously consider the dissenting statements of Laskin C.J.C., in *DiIorio*, which appear to affirm that delegation also applies to the policing function under the new theory:

> The power of a Province, or of a municipality by delegation from a Province, to establish provincial or local police forces is unquestioned . . . The mere establishment of a police force, and even the endowment of the police officers with statutory powers under provincial legislation, does not, *ipso facto*, give them authority to exercise those powers if such exercise would taken them into the field of criminal law enforcement as contrasted with the enforcement of municipal by-laws or provincial penal laws . . . *In my opinion, the suggestion that there is some independent authority in provincial or municipal police forces, independent that is of federal legislation, to enforce the criminal law, and that this independent authority is fed by section 92(14) is simply untenable* . . . To the extent to which enforcement of the criminal law is left with provincial or municipal police forces, it is there by virtue of federal law or by the continuation of pre-Confederation powers left untouched by federal law.[21] (Emphasis added)

iii) Corrections

It is difficult to determine the effect of the judgments on the correctional aspects of the criminal justice system,[22] although there might be a broader basis from which to argue provincial constitutional jurisdiction. As noted in the *Ouiment Report, 1969*:

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[19]As quoted by Laskin C.J.C. in *C.N. Transportation Supra*, footnote 2, at 477.

[20]*Ibid.*

[21]*Supra*, footnote 6, at 304-305.

[22]Under the *Constitution Act, 1867* the province in section 92(6) is responsible for the establishment, maintenance and management of public and reformatory prisons in and for the province while the federal government in section 91(28) is responsible for the establishment, maintenance and management of penitentiaries. In accordance with federal legislation and provincial-federal agreements the provinces have assumed all functional and financial responsibility for persons sentenced to less than two years and have extensive services dealing with all aspects of probation in criminal matters.

> The *British North America Act* places responsibility for all services that have a treatment connotation with the provinces. Involved are medical services (including mental health), welfare and education. This may explain what prompted the present division of responsibility between the levels of government. Those prisoners who received a sentence of less than two years were probably regarded as ordinary people who needed a lesson while those who received longer sentences were seen as criminals whom it was necessary to separate from ordinary people. This assumption is supported by the terminology used in the *British North America Act* where the federal institutions are called "penitentiaries" while the provincial institutions are called "reformatory prisons".[23]

However the most obvious justification (before *Kripps* and *C.N. Transportation*) to account for the significant expenditure of provincial funds in the area of corrections was the traditional theory (as noted by Dickson J.) that the provinces had constitutional jurisdiction under section 92(14) which was reflected in the division of responsibilities found in federal legislation.

With the limitation of section 92(14), it is more logical to assume that the federal criminal procedure power, combined with section 91(28), limits provincial constitutional jurisdiction under section 92(6) to persons incarcerated under provincial legislation and that the provinces act within the field of corrections only as a delegate of the federal government.

iv) Ancillary Services

Other ancillary services[24] have been established by the provinces to discharge what have been perceived to be ancillary obligations under section 92(14). It follows that with proclamation of the federal *Young Offenders Act*,[25] expenditures in this area will be significantly increased. Analogous to the submission dealing with policing and corrections, the logical effect of the judgments is to put in question provincial constitutional jurisdiction and the duty to act in this area of the criminal justice system except as a delegate of the federal government.

The Potential Effects On The Administration Of The Criminal Justice System In Canada

It is submitted that the major effects of the judgments are as follows: 1) the nature and scope of the delegation will become the object of continuous litigation[26]; 2) the traditional theory of the political accountability

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[23]"Report of the Canadian Committee on Corrections", 1969, at 297.

[24]Such as criminal legal aid and the transportation of individuals sentenced for criminal offences to mention two obvious examples.

[25]S.C. 1980-81-82, c. 110.

[26]For example it is now open to challenge the prosecution of a *Criminal Code* offence by the Attorney General of the province on the basis that the delegation as found in the *Code* goes so far that it results in complete abdication, abandonment or surrender of power by the federal government. (Also as noted in Hogg, Constitutional Law of Canada, at 217: there is always the danger that an exceptionally broad and vague delegation might be classified as a delegation of legislative power.) If unsuccessful, an alternative approach might be that the delegation is so narrow that many of the functions now performed by the Attorneys General of the provinces in the criminal justice field are outside the scope of the delegation.

of the Attorney General of the province to the legislature for the administration of the criminal justice system will be seriously challenged[27]; and 3) the provincial governments will become increasingly reluctant to incur expenditures as a delegate of the federal government under existing or proposed legislation, notwithstanding the traditional role of the Attorney General of the province within the criminal justice system.[28]

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[27]It is submitted that this will follow the normal route through the political process but will be directed to the Attorney General of Canada in Parliament. Is it now open for the federal government to avoid political accountability respecting the prosecution of criminal offences in the provinces?

[28]While provincial governments may be reluctant to disrupt the system of justice by challenging existing arrangements which have worked reasonably well since Confederation there has been a recent proliferation of legislative proposals from the federal government which directly affect the criminal justice system and which will prove costly for the provinces to implement. The *Young Offenders Act* is a classic example. As this *Act* includes all aspects of the criminal justice system under consideration above, provincial constitutional jurisdiction and the ensuing duty of the executive branch of the provincial governments to expend funds to implement provisions of the *Act* are now seriously an issue. In a period of severe economic restraint it is unlikely that provincial governments will be willing to incur large expenditures as delegates of the federal government. Legal opinion and logic support the view that Parliament cannot use a specific delegation of authority to an executive officer of provincial government as a means of transferring to the provinces, against their will, responsibilities for funding federal programs.

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