Constitutional Authority in Relation to Drugs and Drug Use

John B. Laskin

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CONSTITUTIONAL AUTHORITY IN RELATION TO DRUGS AND DRUG USE

By JOHN B. LASKIN*

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I am grateful for the helpful comments of Professors Robert Solomon and Katherine Swinton.
I. INTRODUCTION

While no area of constitutional law can ever truly be said to be settled, the law bearing on the ability of Parliament and the legislatures of the provinces to regulate the non-medical use of drugs is now in a particularly fluid state. Until very recently, the criminal law power was generally thought to be the principal, if not the only, source of federal authority to regulate the use of drugs. But in Regina v. Hauser,1 a four judge majority of the Supreme Court of Canada held that the Narcotic Control Act2 was to be regarded as enacted not under section 91(27) of the British North America Act3 but under the federal Parliament's residual power "to make laws for the peace, order and good government of Canada."4 Since the criminal law power and the p.o.g.g. power are powers of a very different nature, the decision in Hauser may have altered not only the source but also the scope of federal competence, and by implication may have affected as well the room which remains for provincial legislative initiatives.

However, as will be seen below, Hauser may not have finally determined the question of the source of federal power to legislate for the control of drug use. Therefore, and in order to be able to assess the case and its significance, the article begins with an outline of the federal criminal law power and its limitations. After a discussion of Hauser and other relevant federal powers, it proceeds to consider the sources of authority available to provincial legislatures.

II. THE FEDERAL CRIMINAL LAW POWER

A. Nature of the Power

The contours of federal authority under section 91(27) of the B.N.A. Act have resisted easy definition. There are, however, a few propositions concerning the scope of the criminal law power which can be stated with relative certainty.

The first is that Parliament is not confined to making criminal what was criminal at the time of Confederation. That proposition was once disputed;

3 1867, 30 & 31 Vict., c. 3, (U.K.) [hereinafter referred to as B.N.A. Act]. Section 91(27) confers authority in relation to matters coming within "the criminal law, except the constitution of courts of criminal jurisdiction, but including the procedure in criminal matters."
4 B.N.A. Act, s. 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. ... In accordance with conventional usage, this portion of s. 91 and the power which it confers are referred to hereinafter as the "p.o.g.g. clause" and "p.o.g.g. power" respectively.
in *Re Board of Commerce Act*, the Privy Council held that the power was co-extensive with the traditional "domain of criminal jurisprudence." But since a later decision of the Judicial Committee in which federal competition legislation was held valid, it is clear that section 91(27) will support "legislation to make new crimes."  

It is also clear that, to be valid as criminal law, a federal statute must possess certain formal characteristics; it must be largely prohibitory in form, and impose penalties on those who violate its prohibitions. In the *Proprietary Articles Trade Association* case, the Privy Council went so far as to suggest that the formula of prohibition and penalty was not merely a necessary but a sufficient condition for a law to come within section 91(27). If only because the provinces are expressly authorized to enact punitive laws, that position was untenable, and the Supreme Court of Canada has since emphasized that the purpose of the law, as well as its form, must be looked to in determining whether it is criminal law in the constitutional sense. There must be "some evil or injurious or undesirable effect upon the public against which the law is directed," and the prohibition must be "enacted with a view to a public purpose which can support it as being in relation to criminal law." The purpose might be "[p]ublic peace, order, security, health, morality: these are the ordinary though not exclusive ends served by that law. . ."  

As the breadth of these terms indicates, the criminal law power, even after the Supreme Court's rejection of the purely formal test of *P.A.T.A.*, can scarcely be regarded as a narrow one, particularly in view of the judicial tendency to defer to Parliament's assessment of what is "socially undesirable conduct" deserving of prohibition. Still, not all punitive legislation, even apart from that enacted by the provinces under the authority of section 92(15), is classifiable for constitutional purposes as criminal law. Offences contained in such statutes as the *Income Tax Act* and the *Railway Act* are more properly seen as enforcement provisions owing their validity to the same heads of power that underlie the statutes themselves.  

Beyond this point, just what are the boundaries of the criminal law

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7 Id.  
8 *B.N.A. Act*, s. 92(15), conferring authority in relation to "the imposition of punishment by fine, penalty, or imprisonment for enforcing any law of the province."  
power becomes a matter of much greater controversy. Three areas of dispute
are of particular concern if federal authority in relation to drug use is still to
be supported as stemming at least in part from section 91(27). These are the
ability of the criminal law power to support measures aimed more at treat-
ment than at punishment, that power’s status as a source of regulatory au-
thority, and the extent to which it precludes provinces from legislating on
matters traditionally within the purview of the criminal law.

B. Treatment Legislation as Criminal Law

Federal drug legislation has traditionally taken a punitive, rather than a
treatment-oriented approach. Whatever its merits as a policy towards drug
use, such an approach may be the only one permissible so long as Parliament
must rely on section 91(27). Ordinarily, treatment connotes concern with a
medical condition, and, as will be seen below,14 health is largely a provincial
responsibility under the B.N.A. Act division of powers. While, in 1961,
Parliament did enact Part II of the Narcotic Control Act,15 providing for
preventive detention and compulsory treatment of persons convicted under
the Act, the legislation has never been brought into force, for reasons which
may or may not have to do with anticipated constitutional difficulties.16
However, Parliament’s ability under section 91(27) to prescribe sanctions for
criminal offences may well provide a constitutional base for federal compul-
sory treatment legislation. If treatment could be characterized as a sentence
imposed on conviction of a criminal offence, such legislation would be justifi-
able as an exercise of the criminal law power. In Regina v. Zelensky,17 the
Supreme Court of Canada recently upheld on that ground the compensation
provision of the Criminal Code.

The constitutional issue arose in Zelensky after the accused had pleaded
guilty to theft from her employer of some $18,000 in money and some
$7,000 in goods. She was given a prison sentence, and in addition, on the
application of the employer, the convicting judge made an order for com-
pensation and for restitution of the stolen property. In appealing the sentence,
she argued that section 653 of the Code, which authorized the compensation
order, was ultra vires; it was not truly a criminal penalty but in the nature of
a civil remedy, open only to the provinces to enact under their power re-
specting property and civil rights.

Writing for the majority in a six to three decision, Laskin C.J.C. em-
phasized that section 91(27) was flexible enough to accommodate new
legislative responses to crime:

We cannot . . . approach the validity of s. 653 as if the fields of criminal law and
criminal procedure and the modes of sentencing have been frozen as of some
particular time. New appreciations thrown up by new social conditions, or re-
asessments of old appreciations which new or altered social conditions induce

14 See text accompanying notes 160-68, infra.
16 Can., Final Report of the Commission of Inquiry into the Non-Medical Use of
Drugs (LeDain Report) (Ottawa: Queen’s Printer, 1974) at 924.
make it appropriate for this Court to re-examine courses of decision on the scope of legislative power when fresh issues are presented to it.\textsuperscript{18}

The Chief Justice answered the contention that the provision exceeded Parliament's authority by fixing on the relationship between offender compensation of victims of crime and the accepted objects of sentencing. As "part and parcel of the sentencing process," section 653 was supportable as criminal law.\textsuperscript{19}

Can the same be said of legislation requiring drug offenders to undergo a course of treatment? Certainly the reform and rehabilitation of offenders has been a dominant theme in the Canadian law of sentencing, despite much current skepticism as to the likelihood of its achievement.\textsuperscript{20} Compulsory treatment legislation would presumably be directed toward that end; the unproclaimed Part II of the Narcotic Control Act was described by the then Minister of Justice as based on "the conclusion that what is needed is a concentrated effort to reform and rehabilitate rather than simply to incarcerate."\textsuperscript{21}

The LeDain Commission disputed the view that treatment shares the purposes of criminal law sentencing.\textsuperscript{22} It pointed out that in the regime contemplated by Part II, treatment would be imposed not as punishment for the offence of which the accused was convicted, but for the very condition of addiction. Moreover,

[In the case of imprisonment, it is rehabilitation of the offender qua criminal that is sought, not the cure of a medical condition. At the end of his term the offender must be released, whether he is actually rehabilitated or not. Confinement for an indeterminate period for the treatment of addiction implies that the addict will not be released until he is deemed to be cured. His criminal propensities are neither here nor there; it is his medical condition that is in issue.\textsuperscript{23}]

While at first glance telling, this criticism appears more aptly directed to the particular provisions of Part II than to the general problem of treatment as a criminal law disposition. If there is dissonance between sentence and offence, it can be rectified not only by ruling out the sentence but also by reconstituting the offence. As the Commission concedes,\textsuperscript{24} there is no constitutional objection in Canada to imposing punishment for a status or condition;\textsuperscript{25} the Supreme Court has upheld, for example, the Criminal Code provisions imposing indeterminate sentences on those found to be dangerous

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\textsuperscript{18} Id. at 951 (S.C.R.), 186 (D.L.R.), 104 (C.C.C.) \textit{per} Laskin C.J.C.
\textsuperscript{19} Id. at 960 (S.C.R.), 193 (D.L.R.), 111 (C.C.C.).
\textsuperscript{21} \textit{Can.: H. of C. Debates}, June 7, 1961, at 5983-84. In the United States, there have been efforts to characterize compulsory treatment as punishment for the purpose of subjecting it to judicial review under the "cruel and unusual punishments" clause of \textit{U.S. Const.}, amend. VIII; see Note, \textit{Aversion Therapy: Punishment as Treatment and Treatment as Cruel and Unusual Punishment} (1976), 49 S. Cal. L. Rev. 880 at 946-59.
\textsuperscript{22} Supra note 16, at 923-28.
\textsuperscript{23} Id. at 926.
\textsuperscript{24} Id. at 924.
\textsuperscript{25} The position is otherwise in the United States: \textit{Robinson v. California}, 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.(2d) 758 (1962).
\end{flushright}
offenders. If Parliament were forthrightly to declare addiction to be a criminal condition, compulsory treatment could more readily be characterized as a sentence appropriate to the "crime." The *Juvenile Delinquents Act*, whose constitutionality has also been expressly affirmed, already purports to deal with status or condition offenders through therapeutic means. And insanity, though strictly speaking vitiates the commission of an offence, is dealt with under the *Code* as a medical condition for which confinement must be ordered.

It would not, however, be necessary to go so far as to create a status offence of addiction for Parliament to rely on the preventive aspect of the criminal law power to support the validity of a treatment regime. Though Parliament may not legislate for crime prevention in the abstract, independent of the criminal process, both offences and sentences have been constitutionally validated on the basis that they would serve to prevent future crime. The Supreme Court has described the *Juvenile Delinquents Act*, for example, as "intended to prevent these juveniles to become prospective criminals and to assist them to be law-abiding citizens," and referred to those objectives as "clearly within the judicially defined field of criminal law." It has been suggested, however, that similar reasoning cannot apply to a program of compulsory treatment; that "while compulsory treatment may have the consequential effect of preventing or reducing crime it is directed to the elimination of a medical condition." But once the consequential relationship between addiction and crime is established—and there is little doubt both that it has been in general and that it can be in individual cases—that should be enough, particularly given the leeway which the courts have allowed Parliament under section 91(27), to justify legislation for treating addiction as a means of crime prevention. There is a possible model in section 236(2)

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27 The unproclaimed s. 17 of the *Narcotic Control Act*, R.S.C. 1970, c. N-1, which authorizes a finding "that the convicted person is a narcotic addict," comes very close to such a declaration.


30 There is technically an offence of "delinquency," but it encompasses behaviour that is not otherwise a violation of any law; a child found to have committed the offence is required to be dealt with "as one in a condition of delinquency and therefore requiring help and guidance and proper supervision": R.S.C. 1970, c. J-3, ss. 2(1), 3.


of the Criminal Code, which now authorizes a court, rather than convicting an accused of an alcohol-related driving offence, to discharge him on condition that he attend "for curative treatment in relation to his consumption of alcohol." In drug-related offences, treatment could be required either as the sentence itself or as a condition of probation or discharge.

It should perhaps be mentioned that constitutional validity is not the only legal hurdle which federal treatment legislation must confront. Also relevant is the Canadian Bill of Rights, which in section 2(b) provides that "no law of Canada shall be construed or applied so as to . . . impose or authorize the imposition of cruel and unusual treatment or punishment." In the United States, the Supreme Court has found violative of the similarly-worded Eighth Amendment a state statute under which addiction was a crime, though in doing so it indicated that a non-criminal compulsory treatment program for addicts would not offend constitutional safeguards even if it required involuntary confinement.

Experience with the Canadian Bill of Rights, however, suggests that it is unlikely that it would prevent the operation of a federal treatment scheme. Both generally, and in cases arising under section 2(b), the Supreme Court of Canada has shown extreme reluctance to overturn the judgment of Parliament that legislative measures are warranted. It has upheld the Criminal Code dangerous offender provisions without serious question, and even in its most expansive reading of section 2(b), would apply it only to penalties which demonstrably serve no social purpose.

C. Regulating Drug Use through the Criminal Law

There are many areas of activity in which simple prohibitions may be too blunt an instrument to achieve purposes otherwise associated with the criminal law. Increasingly, in the Criminal Code itself, Parliament has tempered prohibitions with regulated exceptions, and the Supreme Court has indicated that there exists some scope to do so while staying within the bounds of section 91(27). Though the criminal law power will not support legislative schemes whose primary purpose is regulatory, particularly where

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37 The validity of this provision does not appear to have been challenged since its enactment by S.C. 1974-75-76, c. 93, s. 17.
39 Supra note 25, at 665-66 (U.S.), 1419-20 (S.Ct.), 762-63 (L.Ed.).
42 Ex parte Matticks, id.
43 Miller, supra note 41, at 697 (S.C.R.), 337 (D.L.R.), 190 (C.C.C.) per Laskin C.J.C.
44 See, e.g., Criminal Code, R.S.C. 1970, c. C-34, ss. 186-90 (gambling), 251 (abortion).
they are to be implemented through a regulatory apparatus. "Parliament may determine what is not criminal as well as what is, and may hence introduce dispensations or exemptions in its criminal legislation." The Court has recently emphasized, however, that regulations themselves must have a criminal law purpose to be justified as criminal law; that their violation is made an offence is not enough to give them validity.

Federal drug law in Canada has never truly been a body of simple prohibitions; the first exemption was granted when the first statute was enacted in 1908. Today, the prohibitions of both the Narcotic Control Act and the controlled and restricted drugs provisions of the Food and Drugs Act are overlaid by elaborate regulations which establish terms under which drugs may be used and distributed for scientific or medical purposes. A long list of matters is exactly prescribed: licensing, packaging and labelling, dispensing and administering of drugs by pharmacists, medical practitioners and hospitals, record-keeping, reporting and inspection.

Yet the complexity of the regulations alone should not push them beyond the pale of the criminal law power so long as they are animated by the traditional concerns of the criminal law. That they are seems hardly open to question; the overriding consideration is an assessment of the drugs' potential for harm, an assessment which takes into account their utility or necessity for medical purposes. The regulations then qualify the prohibitions to the extent this assessment dictates, but in the end, the qualifications remain much more the exception than the rule.

However, any future attenuation of the regulations' focus on public harm would be likely to jeopardize their constitutionality so long as it is founded on the criminal law power. The Margarine Reference provides a notable example of a federal enactment, originally justified as the regulation of a harmful substance, losing its validity as criminal law when the substance was acknowledged to be harmless.

There now appears little probability of any similar acknowledgment with respect to drugs such as cannabis. But if Parliament attempted to establish a distribution system for drugs on the basis that they were completely innocu-

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45 Hogg, Constitutional Law of Canada (Toronto: Carswell, 1977) at 289.
46 Supra note 10.
48 An Act to prohibit the importation, manufacture and sale of opium for other than medicinal purposes, S.C. 1908, c. 50.
52 Labatt Breweries, supra note 47.
53 See, supra note 16, at 80.
54 Supra note 9.
55 Only a reduction in the severity of penalties for certain offences is now contemplated: The Globe and Mail (Toronto), April 15, 1980.
ous for recreational use, it would almost certainly go beyond the limits of section 91(27). If, however, the system maintained controls designed to prohibit drug use for purposes still considered to be harmful, different considerations would apply. A criminal law purpose would continue to be present, and would likely validate the system. Even a federal government monopoly of production and distribution could be justified as the regulation of a harmful substance, despite the courts' particular sensitivity to the use of the criminal law power as a means of trade regulation.

D. The Criminal Law Power and Provincial Jurisdiction

Since the powers conferred by the B.N.A. Act on Parliament and the provinces are mutually exclusive, the presence of section 91(27) among the federal heads of power in turn precludes the provincial legislatures from enacting criminal law. In practical terms, however, the exclusivity of federal criminal law authority has now all but disappeared. That it has may be due in large part to the expansive nature of the power—virtually all legislation can be said to be directed at "socially undesirable conduct" and to the inclusion in the provincial catalogue of powers of an explicit, though derivative, penal authority.

Whatever the precise reasons, there has been an increasing tendency to validate provincial legislation which is both enacted for criminal law purposes and essentially prohibitory in character, so long as it can be linked up with an ostensible provincial purpose. The trend is best exemplified by two recent cases in the Supreme Court of Canada. In McNeil, the Court upheld a provincial film censorship law under which films could be prohibited on moral grounds, even though obscenity in films is dealt with under the Criminal Code. Its purpose, said the Court, was to regulate the film business and transactions in films, or in the alternative, to enforce local standards of morality, a matter of a "local and private nature in the province." In Dupond, the law sustained prohibited all demonstrations in city streets and parks for a specified period as a means of preserving public order. It too was held to be addressed to a matter of a local nature, and to derive validity as well from an assortment of other provincial powers.

The powers which are available to support provincial laws concerning drug use are considered in some detail below. What is important at this

56 See, supra note 16, at 920.
58 Supra note 10.
59 B.N.A. Act, s. 92(15), quoted, supra note 8.
61 Id. at 688, 699 (S.C.R.), 20, 28 (D.L.R.), 337, 346 (C.C.C.).
63 Id. at 792 (S.C.R.), 436 (D.L.R.), 28 (M.P.L.R.).
64 See text accompanying notes 179 ff., infra.
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III. *REGINA* v. *HAUSER*: FROM CRIMINAL LAW TO PEACE, ORDER AND GOOD GOVERNMENT

A. *The Decision in Hauser*

At issue in the *Hauser* case was the authority to prosecute offences under the *Narcotic Control Act*. An amendment to the federal *Criminal Code* in 1969 precipitated the dispute. Before the amendment, an arrangement had been in place under which prosecutions, while nominally brought by the provincial attorneys general as then required by the Code, were instituted in fact by agents of the federal attorney general, acting with provincial consent. The amendment was to the statutory definition of attorney general, and purported to confer the power to prosecute offences other than *Criminal Code* offences directly on the federal attorney general and his agents.

The case was largely argued—and decided in the lower courts—as a test of the limits of the federal criminal law power. The federal position was that section 91(27), which refers to “the procedure in criminal matters” as well as to “the criminal law itself, encompassed the authority to determine how criminal offences should be prosecuted. Nine provinces advanced the contrary view that prosecutions in criminal matters were an element of the administration of criminal justice, and were therefore solely for the provinces to prescribe. The Supreme Court had earlier held that section 92(14) of the *B.N.A. Act*, under which “the administration of justice in the province” is within exclusive provincial competence, includes not only civil but also criminal justice. As in virtually all constitutional cases, the competing textual arguments reflected strongly-held views as to the appropriate
federal-provincial balance. For the provinces, sustaining the federal amendment would subvert the compromise agreed to at Confederation, which combined the uniformity of a national criminal law with regional sensitivity in its administration. For the federal government, striking it down would jeopardize the enforcement of substantive rules which Parliament is clearly competent to enact.73

Rather than deciding the question of responsibility for prosecuting criminal offences, the majority of the Court chose in effect to finesse it. The Narcotic Control Act, the Court held, was not, for constitutional purposes, criminal law; Parliament derived the authority to enact it not from its criminal law power but from its residual authority to legislate "for the peace, order and good government of Canada."74 Since federal power other than under section 91(27) could not be limited by the provincial responsibility for the administration of criminal justice, there could be no constitutional obstacle to the substitution of a federal for a provincial prosecutor in narcotics offences.75

To say that this conclusion was surprising in light of previous authority may be the least of the criticisms that can be made of it. But that authority, which was marshalled compellingly by Dickson J. in dissent,76 had consistently treated the Narcotic Control Act and its predecessor legislation as an exercise of the power conferred by section 91(27). For example, in the 1953 case of Industrial Acceptance Corp. v. The Queen,77 the Supreme Court had held valid as criminal law the provision of the Opium and Narcotic Drug Act for forfeiture of property used in the commission of drug offences.78 It had earlier been held in a lower court that "[t]he primary object [of the Act] was to create a crime and afford punishment for its infraction."79

Certainly a criminal law characterization appears consistent with the overall prohibitory and public harm thrust of the policy which the statute embodies,80 and with the severity of the penalties which it prescribes. In the related context of adulteration legislation, the protection of the public against injurious substances—which requires more than straightforward prohibitions

73 Dickson J., who dissented, was attracted by the former position; Spence J., who wrote a concurring judgment, by the latter: supra note 1, at 1032, 1003-1004 (S.C.R.), 231, 200-201 (D.L.R.), 519, 488-89 (C.C.C.).
74 Id. at 1000 (S.C.R.), 210 (D.L.R.), 498 (C.C.C.) per Pigeon J.
75 Id. at 996 (S.C.R.), 206 (D.L.R.), 494 (C.C.C.).
76 Id. at 1954-59 (S.C.R.), 249-52 (D.L.R.), 537-40 (C.C.C.).
78 Because it involved a private claim and the characterization of the main provisions of the Act as criminal law was largely conceded, Pigeon J. was not prepared to regard the case as conclusive of the issue.
80 The preamble to the Single Convention on Narcotic Drugs, March 30, 1961, 52 U.N.T.S. 151, to which Canada is a party and whose objectives the Act carries out, refers to addiction to narcotics as "a serious evil for the individual and ... fraught with social and economic danger to mankind": quoted by Pigeon J. in Hauser, supra note 1, at 999 (S.C.R.), 209 (D.L.R.), 497 (C.C.C.). For an account of the concerns which gave rise to the first narcotic control legislation in Canada, see Green, A History of Canadian Narcotics Control: The Formative Years (1979), 37 U.T. Fac. L. Rev. 42.
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-has long been regarded as a criminal law matter. The maximum penalty under the Narcotic Control Act, life imprisonment, is not now exceeded by any under the Criminal Code itself. In light of these considerations, there seems no need to reach beyond the enumeration in section 91(27) to the residuary power to find the source of the Act's validity.

Pigeon J., however, writing for the majority in Hauser, found more persuasive a different characterization. He put forward two basic reasons for regarding the Act as an exercise of the p.o.g.g. power. First, it was primarily directed to the control, rather than the prohibition, of narcotic drugs. Second, and in his view more important, it was 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'."

In support of the first reason, Pigeon J. referred to the fact that the Act—as did the legislation which preceded it—contains provisions not only for prohibiting drugs but also for their distribution and sale under conditions prescribed by regulation. Though he did not say so specifically, the implication was clearly that the statute therefore lacked the essential formal attributes of criminal law. The parallel he drew was with federal temperance legislation. First in 1882 and again in 1946, the Canada Temperance Act, which establishes a local-option scheme of prohibition, had been held validly enacted under the p.o.g.g. clause.

In assessing the significance of the regulatory features of the Act, it must be remembered that while section 91(27) cannot be used to achieve primarily regulatory purposes, "Parliament may determine what is not criminal as well as what is, and may hence introduce dispensations or exemptions in its criminal legislation." But Pigeon J.'s reliance on the temperance cases is perhaps even more unsettling. When the Canada Temperance Act was held valid in Russell v. The Queen, Canadian constitutional jurisprudence was in an embryonic state. The Privy Council was not concerned in Russell with distin-

82 Under the Narcotic Control Act, life imprisonment is the maximum sentence for trafficking (s. 4(3)) and for importing or exporting (s. 5(2)). Life imprisonment has been the maximum penalty which may be levied under the Criminal Code since the abolition of the death penalty for murder and treason by Criminal Law Amendment Act (No. 2), 1974-75-76, c. 105.
83 Consistent with the p.o.g.g. power's residuary character, it has been the almost invariable practice not to resort to it until the potential of the enumerated powers has first been exhausted: supra note 45, at 244.
84 Supra note 1, at 998 (S.C.R.), 208 (D.L.R.), 496 (C.C.C.).
85 Id. at 1000 (S.C.R.), 210 (D.L.R.), 498 (C.C.C.).
89 Supra note 10.
90 Supra note 86.
guishing between the possible sources of federal power; few of the distinctions had been elaborated. Its basic conclusion, that the Act was not addressed to a matter within provincial competence, was sufficient: under section 91, Parliament can legislate "in relation to all matters not coming within the classes of subjects . . . assigned exclusively to the legislatures of the provinces." When the Board expressed the view that laws such as the Temperance Act "are of a nature which fall within the general authority of Parliament to make laws for the order and good government of Canada," it was therefore not using the phrase to describe a federal power separate from section 91(27). Instead, as does the constitutional text itself, it was referring copiously to the legislative powers not granted to the provinces, among which is found the power to enact criminal law. Indeed, the Board went on to say that such laws "have direct relation to criminal law, which is one of the enumerated classes of subjects assigned exclusively to Parliament," and in a case decided since Hauser, the Supreme Court of Canada has dealt with Russell as the "traditional root of discussions" of federal criminal law jurisdiction.

It was later decisions, and not Russell itself, which saw the case as establishing an independent federal p.o.g.g power. Its history in that capacity has aptly been described as "chequered," "extraordinary, and troubled", and when it was expressly reaffirmed by the Privy Council in the Canada Temperance Federation case, it was on the strength more of its longevity than of its holding. But in relying on Russell, Pigeon J. has apparently resuscitated it, and its significance for the scope of federal authority to regulate drug use is considered further below.

The second basis of the majority characterization of the Narcotic Control Act, the newness of the problem which the legislation addresses, is also open to question. The criterion itself derives from the judgment of Beetz J. in the Anti-Inflation Reference where, supported by a majority of the

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91 Id. at 839 (App. Cas.), 23 (Cart.).
92 A literal reading of s. 91 suggests that the p.o.g.g. clause confers the totality of federal legislative power, and that the enumerations, referred to in the section as included "for greater certainty, but not so as to restrict the generality of the foregoing terms of this section," merely illustrate its scope. That view has now largely been abandoned, for reasons discussed in Lysyk, Constitutional Reform and the Introductory Clause of Section 91: Residual and Emergency Law-Making Authority (1979), 57 Can. B. Rev. 531 at 539-43.
93 Supra note 86, at 839 (App. Cas.), 23 (Cart.).
95 That understanding of the case was first put forward in A.G. Ont. v. A.G. Can., [1896] A.C. 348, 74 L.T. 533, 5 Cart. 295 (P.C.) [hereinafter Local Prohibition case].
97 Supra note 92, at 560.
98 Supra note 87.
99 Supra note 92, at 559.
100 See text accompanying notes 125-34, infra.
101 Supra note 96.
Supreme Court on the issue, he advanced a new synthesis of the cases which have considered the scope of the p.o.g.g clause. The view accepted by the majority was that the opening words of section 91 confer on Parliament two separate powers: a national emergency power, exercisable only on a temporary basis, and permanent power to deal with "new matters or new classes of matters." To come within federal authority, these new matters must have certain additional characteristics; they must be "distinct subject-matters which do not fall within the enumerated heads of s. 92 and which, by nature, are of national concern."102 By implication, new matters of primarily local concern come within the general provincial authority under section 92(16) in relation to "matters of a merely local or private nature."

Taking the newness standard at face value, it is not altogether clear that the problem of drug abuse passes the test. In the Anti-Inflation Reference, inflation did not; it was characterized by Beetz J. as "a very ancient phenomenon,"103 one of which the Fathers of Confederation were certain to have been aware. The premise seems to be that the Fathers devised enumerated powers sufficient to treat all social problems that could be anticipated in 1867, leaving to the residuary powers those which they could not then foresee.

Was drug abuse a foreseeable problem in the Canada of 1867? Apparently drug use was not unknown, nor even addiction to narcotic drugs.104 But the social attitudes which regarded the possession and sale of drugs as harmful and deserving of punishment do not appear to have been formed until later,105 and as Pigeon J. pointed out in Hauser,106 the first narcotic control legislation was passed by Parliament only in 1908.107 It may be, therefore, that despite the observation of Dickson J. that drug abuse, like inflation, is "a very ancient phenomenon,"108 its characterization as a "genuinely new problem" in Canada is a plausible one.

But even to answer the question in this way assumes that it is asked at the relevant level of generality. It assumes, that is, that section 91(27) was not a grant of the plenary power to control "socially undesirable conduct"109—that was hardly a new phenomenon—but only of the limited authority to deal with the specific activities which, from the perspective of 1867, were, or were potential, public evils. That assumption is impossible to square with the accepted position that under its criminal law power, Parliament "can make new crimes" of activities which were innocent or unknown at Con-

102 Id. at 457-60 (S.C.R.), 523-27 (D.L.R.).
103 Id. 458 (S.C.R.), 524 (D.L.R.).
105 Supra note 80, at 43-47.
106 Supra note 1, at 998 (S.C.R.), 208 (D.L.R.), 496 (C.C.C.).
107 An Act to prohibit the importation, manufacture and sale of opium for other than medicinal purposes, S.C. 1908, c. 50.
109 Supra note 10.
federation; it also calls into question the constitutional underpinnings of many provisions of the present Criminal Code.

More generally, Pigeon J.'s focus on the newness of the particular problem seems, as does any consideration of newness as a classifying factor, at odds with the essential nature of the federal division of powers. The allocative formula of sections 91 and 92 does not distinguish between pre- and post-Confederation phenomena; instead it assigns jurisdiction "in relation to matters coming within . . . classes of subjects" either predominantly national or predominantly local in character, and then supplements the enumerated classes with competing national and local residual powers. A new matter such as air transportation may not readily come within an enumerated class, and may therefore be appropriate for allocation to a residuary power. It is not its newness, however, which dictates this conclusion. Just as in any other decision as to classification, it is a qualitative assessment whether it comes within the possibly applicable classes. All of the enumerations, including section 91(27), exhibit the capacity to encompass new matters similar qualitatively to those of 1867.

This preoccupation with the reasons in Hauser may seem by the way; after all, the Supreme Court has decided, if only by a four to three majority, that the Narcotic Control Act—and presumably, by implication, the controlled and restricted drugs provisions of the Food and Drugs Act—is p.o.g.g. legislation. But the vulnerability of the majority's conclusion is significant, because it raises the possibility that like Russell, Hauser may eventually be relegated to the status of a somewhat suspect authority.

There is already some indication that the Narcotic Control Act will still be considered as deriving at least part of its validity from the federal criminal law power. In Schneider v. The Queen, a constitutional challenge was brought to the British Columbia Heroin Treatment Act on the ground that it trespassed on federal authority to control narcotic drugs. When the British Columbia Court of Appeal overturned the trial judgment in which the Act had been struck down, it did so having accepted "that the Narcotic Control Act was enacted for the peace, order and good government of Canada and

110 Supra note 6.
112 Supra note 92, at 564.
115 See also, supra note 92, at 564-66, discussing the matter of nuclear energy.
116 See the discussion of progressive interpretation of the B.N.A. Act, supra note 45, at 96-98.
118 R.S.B.C. 1979, c. 166.
that it may or may not also be supported as enacted in relation to the criminal
law..."\(^{110}\)

Undoubtedly the Supreme Court will eventually have to decide the issue
which it was able to evade in Hauser: whether Parliament can constitutionally
provide for federal prosecution of truly criminal offences. It will then have
to confront both Spence J.'s opinion, concurring in the result in Hauser, that
Parliament has authority over the enforcement of its laws whatever their
source in the B.N.A. Act,\(^{120}\) and the considerations of policy which buttress
that position.\(^{121}\) Should Spence J.'s views attract majority support, the im-
petus for the characterization of the Narcotic Control Act as p.o.g.g. legisla-
tion will disappear. In the interim, however, the implications of Hauser for
the scope of federal authority remain to be considered.

B. Implications of Hauser: The Present Scope of Federal Authority

The finding that a legislative matter comes within the p.o.g.g. clause
adds to the range of purposes for which the federal Parliament may legislate.
Federal legislation "in relation to" the matter so held will be valid legislation,
even though it touches upon matters otherwise committed to the provinces.\(^{122}\)
Nor are laws attributable to the p.o.g.g. clause subject to the formal or sub-
stantive constraints which limit the compass of the criminal law power. They
need not be prohibitory and punitive, but may be primarily regulatory in
character.\(^{123}\) While they will presumably reflect a public purpose, that pur-
pose need not be grounded, as it must under section 91(27), on the perception
of some public evil.\(^{124}\)

It appears to follow that since the decision in Hauser, federal authority
to legislate concerning drug use is significantly broader than it was formerly
thought to be. But whether that is so may depend on just what was the
holding in Hauser. The majority judgment was much less explicit than it
might have been as to the identity of the matter which comes within the
opening words of section 91 so as to justify the Narcotic Control Act as legis-
lation for the peace, order and good government of Canada. Pigeon J. used
a variety of terms, each of which may signify a different ambit of authority:
"drug abuse", "drug control" and simply "[t]he subject matter of this legisla-

\(^{110}\) Supra note 117, at 640 (D.L.R.), 329 (C.C.C.). That the Act is attributable to
both powers is suggested by Pigeon J.'s reference to statutes "which do not depend for
their validity on head 27 of s. 91," Hauser, supra note 1, at 996 (S.C.R.), 206 (D.L.R.),
494 (C.C.C.). But it is difficult to see how an enactment can come within both an
everified power and a residuary clause, since the latter serves only where the effect
of the former has been exhausted.

\(^{120}\) Supra note 1, at 1004 (S.C.R.), 200 (D.L.R.), 488 (C.C.C.).

\(^{121}\) See text accompanying note 73, supra.

\(^{122}\) Supra note 45, at 244.

\(^{123}\) See, e.g., Aeronautics Act, R.S.C. 1970, c. A-3, regulating a matter held to come
within the p.o.g.g. clause in Johannesson, supra note 114.

holding valid on the basis of the p.o.g.g. power a law for the development, regulation
and improvement of the national capital region.
In *Schneider*, the trial judge saw the case as holding more generally that “narcotics” was now to be regarded as a new federal class of subject; that characterization, which might be expanded to encompass other categories of drugs, suggests an authority of virtually unlimited dimensions.

What may, however, help determine the breadth of federal power is the analogy drawn in *Hauser* between drug control and temperance legislation. Notwithstanding *Russell*, subsequent cases held federal control over alcohol to be subject to important restrictions, and focussed on sections 92(13) and (16) in recognizing the provinces as the primary regulators of the “liquor traffic.” In the *Local Prohibition* case, the Privy Council upheld a provincial law establishing a local-option temperance scheme almost identical, apart from its territorial limitation to the province, to the federal scheme which it had held valid in *Russell*. Earlier, in *Hodge v. The Queen*, the Judicial Committee had sustained a provincial licensing system for regulating liquor sales. Soon after *Hodge*, a comprehensive federal licensing statute known as the McCarthy Act was struck down. Though the Privy Council gave no reasons for the decision, it was later explained that the Act was invalid because it purported to regulate a local trade, a matter within exclusive provincial authority. The purpose of the regulations—the Act’s preamble referred, among other things, to “the better preservation of peace and order”—does not appear to have been a relevant consideration; nor does there appear to have been any exploration of the regulatory potential of the criminal law power.

This pattern of decisions suggests that federal authority to control liquor through legislation pursuant to the p.o.g.g. clause is little different from what it would be if Parliament had to rely on the criminal law power as its source of legislative competence; it may in fact be narrower, once account is taken of the flexibility now acknowledged to inhere in section 91(27). The *McCarthy Act* case, for example, would seem to rule out a federal legislative scheme that is substantially regulatory in character, and to provide support for the conclusion that “Parliament does not have a truly general power with respect to liquor legislation.”

But the legislative scheme held in *Hauser* to owe its validity to the p.o.g.g. clause does contain a substantial regulatory and licensing component; that was one of the two major reasons for Pigeon J.’s holding as he did. Even though the federal-provincial division of powers was not directly

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125 Supra note 1, at 997, 998, 1000 (S.C.R.), 207, 208, 210 (D.L.R.), 495, 496, 498 (C.C.C.).
128 Supra note 117, at 61 (D.L.R.) (lower court decision).
129 Supra note 95.
130 Supra note 65.
131 Supra note 95.
132 Supra note 65.
133 See text accompanying notes 48 and 51, supra.
in issue, it is unlikely that these provisions of the *Narcotic Control Act* and regulations would have escaped adverse comment had the *McCarthy Act* case been considered as controlling; they would certainly have seemed susceptible to attack as regulating local trades or professions. It thus appears that *Hauser* recognizes a federal competence in relation to drugs which goes beyond that which the temperance analogy would indicate. On balance, given the emphases in the majority judgment, "the control of drugs" seems the most apt description of this newly-identified authority.

The initial impression stated above therefore appears to be correct. Though it was very probably unnecessary to resort to the p.o.g.g. power to support the validity of the *Narcotic Control Act*, the Supreme Court of Canada, having done so, has now likely authorized the enactment of federal measures related to drugs which need not adhere to the criminal law model. The formula of public purpose, prohibition and penalty should no longer be the test of jurisdiction; what should govern instead is whether the law can be characterized as directed to the control of drugs.

A federal treatment program, for example, should now be permissible as a means of controlling future drug use, whether or not conviction of an offence is a precondition for entry. That Parliament may relax the restrictions against certain drugs while maintaining regulation of their distribution, through licensing or otherwise, should no longer be open to doubt. A federal monopoly of drug production and distribution should equally be easier to sustain as a control technique, absent the tension between criminal law and regulation of trade. Though the Supreme Court has disapproved of the contention that "a federal agency may lawfully be authorized to purchase in any market and to dispose of its purchases as an ordinary trader," it did so in a context in which federal power was restricted to the interprovincial market, a restriction which does not apply to the p.o.g.g. power.

C. Exclusivity of Federal Authority

There is also the possibility that *Hauser* has not only enhanced the authority of Parliament, but limited that of the provinces on the basis of federal exclusivity. By definition, a decision that the matter of the control of drugs comes within the p.o.g.g. clause would seem to preclude provincial legislation by adding drug control to the list of "distinct subject-matters which do not fall within any of the enumerated heads of section 92 and which, by nature, are of national concern." Concluding his judgment in *Hauser*, Pigeon J. specifically stated that "the subject-matter of this legislation is thus

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133 But see, *supra* note 92, at 562, suggesting the temperance cases as still controlling the scope of the p.o.g.g. power.

134 In this respect, however, the position may not be much different from what it would be if only s. 91(27) could be brought to bear, since distribution on the premise that no real control was necessary would presumably undercut the validity of the system.


136 *Anti-Inflation Reference, supra* note 96, at 457 (S.C.R.), 524 (D.L.R.) *per* Beetz J.
properly to be dealt with on the same footing as such other new developments as aviation ... and radio communications. ...”\textsuperscript{137} Both the Privy Council and the Supreme Court of Canada have indicated that “the whole field of legislation in regard to aerial navigation belongs to the Dominion,”\textsuperscript{138} and the Supreme Court has on two recent occasions emphasized that broadcasting is not a matter which can be separated out into national and local components so as to permit partial provincial regulation.\textsuperscript{139} It might therefore be concluded that the provinces now lack authority to legislate concerning the control of drugs whether or not Parliament has legislated to the full extent of its competence.

Strictly speaking, that conclusion is probably correct, just as it was correct to say that provinces may not enact statutes that come within the class criminal law. But it is doubtful that the holding that federal drug control legislation comes within the p.o.g.g. clause now precludes the provinces from exercising their own powers in a manner that may touch upon the control of drugs, or in other words, that it has ousted the application of the aspect doctrine. In the \textit{Anti-Inflation Reference}, Beetz J. described the practical effect of the p.o.g.g. power (in situations other than emergency) as one of adding new classes of subjects to section 91.\textsuperscript{140} Assuming that to be the case, the aspect doctrine should apply to the new class drug control as it does to any other.

Where provincial legislation has been foreclosed, there have invariably been functional considerations which have precluded divided control.\textsuperscript{141} Provincial restrictions on airport location, for example, could not be tolerated because of their impact on the national air transportation network.\textsuperscript{142} Provincial licensing of cable television operators, similarly, would be inconsistent with “what is functionally an interrelated system of transmitting and receiving television signals.”\textsuperscript{143} In each case, it was an integral element of federal competence that the provinces were purporting to regulate,\textsuperscript{144} and to characterize the regulations as “in relation to” aeronautics and broadcasting would not have been out of place.

Despite the concluding direction in \textit{Hauser}, the parallel with drug control does not appear to be obvious; it is difficult, particularly in the absence of any explanation by Pigeon J. as to why the matter should be considered

\textsuperscript{137} Supra note 1, at 1000-1001 (S.C.R.), 210 (D.L.R.), 498 (C.C.C.).
\textsuperscript{140} Supra note 96, at 458 (S.C.R.), 514 (D.L.R.).
\textsuperscript{141} Supra note 113, at 432.
\textsuperscript{142} Johannesson, supra note 114.
\textsuperscript{143} Dionne, supra note 139, at 197 (S.C.R.), 181 (D.L.R.), 9 (C.P.R.) per Laskin C.J.C.
Drug Use Jurisdiction

one of national concern, to identify an inviolable core of federal competence in relation to the control of drugs. As a criterion for the allocation of power, “national concern” means more than a nation-wide awareness of a problem giving rise to demands for a response. Normally, a decision that a matter comes within the p.o.g.g. clause has been accompanied by reference to considerations making provincial jurisdiction either impractical or dangerous. Such considerations might have been put forward in Hauser; for example, the international and interprovincial scale of drug distribution. But they do not appear to be considerations of the sort which should preclude legislation aimed at aspects of the problem within provincial competence.

Perhaps a better comparison is with the authority of Parliament to develop, conserve and improve the national capital region. That, too, has been held to be an exclusive federal matter coming within the p.o.g.g. clause in its non-emergency capacity, but the effect of so holding has been more to validate federal legislation than to suppress that of the provinces. Provincial municipal and planning legislation continues to apply to the region as an ordinary exercise of provincial authority under section 92(8) and (13), even though it includes among its aims the enhancement of the amenity of the region.

Even in the area of broadcasting, the aspect doctrine has recently been permitted to operate. Having upheld federal programme content regulations as “inseparable from regulating the undertaking through which programmes are received and sent on,” the Supreme Court nonetheless held in Kellogg’s that a provincial consumer protection law could apply so as to prohibit forms of advertising on television. Among the factors which the Court pointed to in coming to this conclusion was that the prohibition was directed at the advertiser rather than the broadcaster. Of course, the distinction’s functional significance is minimal; but it demonstrates the Court’s reluctance to give federal authority preclusive effect where to do so can be avoided.

Finally, there is the example provided by the liquor cases. As has already been indicated, the decision in Russell by no means precluded the provinces from enacting their own liquor laws for “the abatement or prevention of a local evil.” Nor has it prevented them from using their other

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145 He addressed the point by saying only that the problem dealt with by the Narcotic Control Act “clearly cannot be put in the class of ‘matters of a merely local or private nature’”: supra note 1, at 1000 (S.C.R.), 210 (D.L.R.), 498 (C.C.C).
146 Supra note 113, at 432.
148 Munro, supra note 124.
149 “Municipal institutions in the Province.”
150 “Property and civil rights in the province.”
151 Capital Cities Communications Inc., supra note 139, at 162 (S.C.R.), 623 (D.L.R.), 16 (C.P.R.) per Laskin C.J.C.
powers for purposes related to the control of liquor. Though these cases may share Russell's taint, they must be considered to be relevant since Pigeon J.'s reliance on the liquor analogy in Hauser.

There is therefore some justification for concluding that Hauser has not significantly restricted the room which remains for provincial laws relating to drugs. As will be seen below, that was also, in effect, the conclusion of the British Columbia Court of Appeal in Schneider v. The Queen.

D. "Decriminalization"?

It should not be thought that the Hauser decision has somehow had the effect of "decriminalizing" federal drug offences. There is increasing recognition that an offence need not be criminal in the constitutional law sense of coming within section 91(27) to be criminal in any other meaningful sense; that is, to be criminal in respect of the principles of liability, the severity of the penalties or the stigma of conviction.

Much of the discussion of the term's two meanings has focussed on the criminal (in the second sense) character of offences enacted by the provinces. But the Supreme Court has also suggested a distinction between Criminal Code and other federal offences from the point of view of criminal responsibility: for Code offences, proof of mens rea or guilty knowledge will ordinarily be required, while for other offences, it may not. For drug offences, however, the issue of the applicability of mens rea was decided in 1957 in Beaver v. The Queen. There the Supreme Court held that offences under the Opium and Narcotic Drug Act—the predecessor of the Narcotic Control Act—were in fact true criminal offences, so that proof of mens rea was essential to a conviction.

The decision in Hauser should not disturb that conclusion, based as it was on the quality of the offences rather than their constitutional categorization. Obviously, Hauser did nothing to affect the severity of the penalties under either the Narcotic Control Act or the Food and Drugs Act. And as the Le Dain Commission rightly observed, "the general approach of the legislation and law enforcement towards a particular offence, and especially the relative seriousness of the penalties imposed, will, together with public atti-

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154 See, e.g., Brewers and Malsters' Ass'n of Ontario v. A.G. Ont., [1897] A.C. 231 (P.C.), upholding a provincial statute for the licensing of brewers and distillers on the basis of the provincial taxation (s. 92(2)) and licensing (s. 92(9)) powers. In view of the breadth of provincial authority to combat liquor as a local evil, it has rarely been necessary to rely on other powers for liquor-related legislation. See, e.g., Benson and Hedges (Canada) Ltd. v. A.G.B.C. (1972), 27 D.L.R.(3d) 257, [1972] 5 W.W.R. 32 (B.C.S.C.), holding valid restrictions against liquor advertising.

155 Supra note 117.


Drug Use Jurisdiction

IV. OTHER FEDERAL POWERS

A. Health

Though health is one of the public purposes which will support federal legislation as criminal law, it has occasionally been suggested that Parliament possesses, in addition, an independent general health jurisdiction. The suggestion was made most recently in the Labatt Breweries case, where Estey J., without reference to authority, stated that “Parliament may make laws in relation to health for the peace, order and good government of Canada. . .”

Certainly there is little basis for such a power in the federal enumerated classes. Only section 91(11) touches on matters of health; it confers authority in relation to “quarantine and the establishment and maintenance of marine hospitals.” What little judicial discussion there has been of this provision, together with the context in which it appears, points to the conclusion that the only kind of quarantine which it authorizes is “the detention of ships and immigrants arriving at Canadian ports from other countries.”

Though the issue has never been squarely addressed in a considered judgment of the Supreme Court of Canada, jurisdiction otherwise in relation to health has, with few exceptions, been held or assumed to fall to the provinces. Under the B.N.A. Act, there is specific provincial authority in relation to “the establishment, maintenance, and management of hospitals, asylums, charities and eleemosynary institutions in and for the province, other than marine hospitals.” But when the question of health jurisdiction was first judicially considered in a series of cases arising out of the outbreak of smallpox, the courts looked beyond the institutional emphasis of section 92(7); reliance was largely placed on section 92(16), and a broad provincial authority supported on the ground that health was a matter of “a merely local or private nature in the province.” That allocation seems in harmony with the understanding of the Fathers of Confederation, particularly since health

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159 Supra note 16, at 916. A conviction under the Narcotic Control Act or Food and Drug Act is still subject to the pardon provisions of the Criminal Records Act, R.S.C. 1970 (1st Supp.), c. 12.

160 Supra note 47, at 934 (S.C.R.), 619 (D.L.R.).


162 Its formal resolution seems to have been preempted by the federal spending power and by intergovernmental agreements: Lajoie and Molinari, supra note 161, at 590.

163 See, e.g., Municipalité du Village Saint-Louis du Mile End v. La cité de Montréal (1886), 2 M.L.R. 218 (S.C.); Re George Bowack (1892), 2 B.C.R. 216. The exceptions, apart from the Labatt case, supra note 47, are listed, Lajoie and Molinari, supra note 161, at 600-601.

164 B.N.A. Act, s. 92(7).

165 See, e.g., La Municipalité du Village Saint-Louis du Mile End, supra note 163.
was then assumed to be primarily of private concern, and state involvement, to the extent it existed, was administered through local government.106

It is difficult to appreciate how there can at the same time be a general federal health power attributable to the p.o.g.g. clause. Section 92(16) is that clause's provincial counterpart as a source of unenumerated authority, and is equally a source of general authority in relation to matters coming within it. A matter which is primarily local in nature so as to come within section 92(16) cannot subsequently be separated out into local and national components for the purpose of dividing jurisdiction.167 Federal power to respond to a national emergency which threatens health stands on a different footing; an "epidemic of pestilence" has been judicially referred to as instance when the emergency side of the p.o.g.g. power could justifiably be invoked.108 But apart from situations of emergency, it is very doubtful that there is a federal health power other than under section 91(27) that is available to sustain legislation relating to drugs.

B. Trade and Commerce

The federal trade and commerce power109 is primarily a power to regulate interprovincial and international trade; local markets are in general preserved for provincial jurisdiction.110

If necessary, Parliament's international trade authority could be called on to validate legislation prohibiting the import of drugs into Canada, as it was in respect of the import of margarine when the criminal law justification for the prohibition disappeared.171 Similarly, its authority in relation to interprovincial trade could probably be relied on as a constitutional basis for regulating or prohibiting the flow of drugs between provinces, as it was, together with the p.o.g.g. power, in the case of liquor.172

Otherwise, section 91(2) appears to offer little or no assistance to federal legislative competence relating to drugs. It will not support national product standards which cannot be justified on criminal law grounds;173 nor, as indicated above, will it authorize a federal presence in local markets as a drug supplier or distributor.174

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107 Supra note 161, at 592, 601.
109 B.N.A. Act, s. 91(2).
111 Supra note 9.
113 Labatt Breweries, supra note 47.
114 Reference re Agricultural Products Marketing Act, supra note 135.
C. The Treaty Power

Canada has been a party to a series of international agreements on drug control, most recently the Single Convention on Narcotic Drugs, 1961.\textsuperscript{175} Though it is the federal government which is the signatory to these agreements, and they impose obligations in respect of the control of drugs on states which adhere to them, the agreements are of no significance in determining the distribution of legislative authority within Canada. The federal treaty power is a treaty-making power only; and while treaty provisions may be referred to, as they were in both Hauser\textsuperscript{176} and Schneider,\textsuperscript{177} in ascertaining a law's true purpose, the implementation of Canada's international obligations is left to the level of government which, in the absence of the agreement, would have authority over the matters governed by it.\textsuperscript{178}

V. THE PROVINCIAL HEALTH POWER

A. Treatment Legislation: Schneider v. The Queen

The authority of a province to establish a compulsory treatment program for drug users was considered recently in Schneider v. The Queen,\textsuperscript{179} in which a class action was brought to challenge the constitutionality of the British Columbia Heroin Treatment Act.\textsuperscript{180} The Act was passed in 1978, following the submission to the provincial Minister of Health of a report, prepared by the British Columbia Alcohol and Drug Commission, entitled A Plan for the Treatment and Rehabilitation of Heroin Users in British Columbia.\textsuperscript{181}

The report reviewed in some detail the incidence of heroin addiction in the province, emphasizing that British Columbia has consistently had the most serious heroin use problem in Canada.\textsuperscript{182} It catalogued the consequences, including substantial drug-related crime\textsuperscript{183} and the overloading of the criminal justice system,\textsuperscript{184} and attempted to itemize the associated costs.\textsuperscript{185} Existing voluntary treatment programs, it concluded, were largely unsuccessful; they were reaching no more than a small proportion of heroin users.\textsuperscript{186} After men-

\textsuperscript{175} March 30, 1961, 520 U.N.T.S. 151.
\textsuperscript{176} Supra note 1, at 999 (S.C.R.), 209 (D.L.R.), 497 (C.C.C.) per Pigeon J. and 1056 (S.C.R.), 250 (D.L.R.), 538 (C.C.C.) per Dickson J.
\textsuperscript{177} Supra note 117, at 640 (D.L.R.), 328 (C.C.C.).
\textsuperscript{178} Supra note 117.
\textsuperscript{180} R.S.B.C. 1979, c. 166. The action was brought on behalf of "all persons in the Province of British Columbia who are or may be psychologically or physically dependent on a narcotic."
\textsuperscript{181} (Victoria: Queen's Printer, 1977).
\textsuperscript{182} Id. at 28.
\textsuperscript{183} Id. at 18.
\textsuperscript{184} Id. at 17.
\textsuperscript{185} Id. at 23-24. The monetary costs were those of the criminal justice system and research, treatment and rehabilitation. It referred as well to the "immeasurable" costs of social services, business losses and "the loss of a sense of personal security."
\textsuperscript{186} Id. at 26.
tioning a number of possible governmental responses to the problem, the report outlined and recommended the implementation of "a Health Entry Plan which, through Health legislation, will require any heroin user so identified to undergo treatment and community support and supervision for a stated period of time." 187

There are several compulsory features to the plan of treatment which the Heroin Treatment Act authorizes. The duration of individual treatment programmes is fixed at three consecutive years. 188 While the elements of a programme are otherwise left to the discretion of a director appointed for the purpose of the Act, there is specific authority to require detention in a treatment centre for up to six months and attendance at a treatment clinic for up to one year, and both periods can be extended on the order of a board of review. 189

As for entry into treatment, the Act provides that it occur at the instance of a peace officer. 190 Where a peace officer believes on reasonable grounds that a person has a dependency on a narcotic—defined as "a state of psychological or physical dependence, or both, on a narcotic following its use on a periodic or continuous basis" 191—he may require the person to submit to medical and psychological examination, under detention if necessary, by an evaluation panel comprising at least two medical practitioners and one other person. 192 If the panel unanimously concludes that the person is in need of treatment for narcotic dependency, and the person does not consent to be treated, an application must be made to the Supreme Court, which, if it is satisfied that the person is in fact in need of treatment, must commit him for treatment. 193 The Act also contains provisions making it an offence, among other things, to resist, evade or escape detention, to fail to submit to an examination or provide blood or urine samples when required, and to fail to comply with a requirement or direction made in connection with a programme of treatment. 194

The action was tried before McEachern C.J. who, in an exhaustive judgment, held the Act to be beyond the power of the province. His principal ground of decision was that properly construed, Hauser had allocated "the larger field of narcotics"—"not the control or prohibition or restriction or limitation of the distribution of narcotics for its own sake ... but also the protection of the public, including addicts, from the consequences of drug use or abuse"—to the exclusive authority of Parliament. 195

187 Id. at 75.
188 R.S.B.C. 1979, c. 166, s. 5(2).
189 Id., ss. 5(2), 7.
190 Id., s. 13. Such provisions are common in provincial mental health statutes. See, e.g., The Mental Health Act, R.S.O. 1970, c. 269, 510, as am. by S.O. 1978, c. 50, s. 5.
191 Id., s. 1.
192 Id., ss. 3, 4.
193 Id., s. 4.
194 Id., s. 16.
195 Schneider, supra note 117, at 59, 61 (D.L.R.) (lower court decision).
field by attempting to employ a different technique." The true matter of the
Heroin Treatment Act, just as of the Narcotic Control Act, was "narcotics," a matter which subsumed the treatment of addicts.

The Chief Justice went on to hold that the Act could also be characterized as an invalid attempt to enact criminal law. Since it insisted on a fixed period of treatment, and possibly detention, whether or not it proved necessary, it could not be said to be health legislation. Rather, the province was seeking to create a new crime, the crime of narcotic dependency.

Neither of these two characterizations of the Act—as "narcotics" or as criminal legislation—prevailed in the British Columbia Court of Appeal. Unanimously, the Court allowed the province's appeal and held the Heroin Treatment Act to have been validly enacted.

The Court's reasons were succinctly stated by McFarlane J.A. The true subject matter of the statute was "the establishment, management and administration of facilities and institutions for the purpose of terminating or diminishing use of or dependency on narcotics." Its compulsory features, seen in context, were not intended to be punitive: "[a]lthough there may be occasions when a person will be detained or treated contrary to that person's desire, the object is nevertheless to treat and assist, not to punish." It was in no way required that persons being treated be detained, and treatment in a drug-free hospital setting has been recognized as an effective method for the treatment of addiction. As for the Hauser case, it could not be regarded as preventing the province from exercising the powers vested in it under section 92. The Act was valid as coming within the authority conferred by sections 92(7), (13) and (16).

Some greater elaboration would have been helpful of the content of the B.N.A. Act provisions which McFarlane J.A. relied on; but should the case be appealed to the Supreme Court of Canada, a reversal of the decision would be surprising. It seems almost self-evident that authority in relation to health should extend to treatment, and there is little doubt that in general, this is so. In Fawcett v. Attorney-General for Ontario, the Supreme Court held valid without serious question, on the basis of section 92(7), provincial legislation providing for involuntary commitment to a mental institution. Given the statute's institutional focus, there was no need for the Supreme

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106 Id. at 61 (D.L.R.).
107 Id. at 60 (D.L.R.).
108 Id. at 69 (D.L.R.).
109 Id. at 641 (D.L.R.), 330 (C.C.C.) (B.C.C.A.).
110 Id.
112 Id. at 637 (D.L.R.), 326 (C.C.C.).
113 Id. at 641 (D.L.R.), 330 (C.C.C.).
114 The Supreme Court granted leave to appeal on Nov. 17, 1980, after this article had been prepared.
Court to look beyond the specific provincial hospital power, but the more
general health authority under section 92(16) should also be available, if
necessary, to support provincial programmes of treatment.\textsuperscript{206}

The appropriateness of limiting \textit{Hauser's} preclusive effect has already
been suggested. In some respects, there is a parallel between the provincial
regulation held valid in \textit{Kellogg's}\textsuperscript{207} and the scheme of the \textit{Heroin Treatment
Act}: rather than being directed at the control of drugs \textit{per se}, it is directed
at those who use them. But there is an additional reason, alluded to in
McFarlane J.A.'s observation that "[j]udges of this Province are surely aware
of the great amount of human suffering and degradation directly and in-
directly related to the abuse of heroin and other derivatives of opium. . . ."
\textsuperscript{208} \textit{Hauser} has held, of course, that drug control is a matter of national concern,
and it may therefore be—the issue is considered below\textsuperscript{209}—that it cannot also
constitute a "local evil" so as to support provincial legislation on that basis
alone. But it is another thing to say that where the impact of a problem is
uniquely felt at the level of a provincial community, the province is disabled
from pursuing objects such as treatment which are "themselves . . . anchored
in the provincial catalogue of powers."\textsuperscript{210}

The crucial question in \textit{Schneider}, therefore, was whether the \textit{Heroin
Treatment Act} was in fact \textit{bona fide} health legislation. By itself, the statute's
overall compulsory orientation is not enough to require a negative conclusion;
as \textit{Fawcett} indicates, provinces are free to resort to compulsion to achieve
ends that are otherwise valid. The mandatory three year duration of a treat-
ment program is a stronger reason to doubt the genuineness of the statute's
concern for health, but in the final analysis it too does not undermine it. If
it could be said that treatment efforts are necessarily doomed to failure, then
the three year period could fairly be regarded as little other than a prison
sentence or (since detention is not mandatory) probation for the "crime" of
narcotic dependency. But even though there is good ground for pessimism as
to the outcome of any treatment programme for opiate dependence,\textsuperscript{211}
treatment has by no means been universally rejected as an appropriate response to
addiction.\textsuperscript{212} In view of the incidence of recidivism, nor can requiring a fixed
period of treatment be considered indefensible, particularly since the nature
of an individual's program can be adjusted during the period to take account
of his circumstances. It must be remembered that an inquiry into the validity
of a law is not the same as an inquiry into its wisdom, and that there is in

\textsuperscript{206} It has also been suggested that civil commitment can be justified on the basis of
\textsuperscript{207} \textit{Supra} note 152.
\textsuperscript{208} \textit{Supra} note 117, at 635 (D.L.R.), 324 (C.C.C.) (B.C.A.).
\textsuperscript{209} See text accompanying notes 221-31, \textit{infra}.
\textsuperscript{210} \textit{McNeil, supra} note 60, at 683 (S.C.R.), 16 (D.L.R.), 333 (C.C.C.) \textit{per} Laskin
C.J.C. (dissenting).
\textsuperscript{211} See, \textit{e.g.}, \textit{supra} note 16, at 147-49.
\textsuperscript{212} \textit{Id}.
general no constitutional barrier to what might be regarded as unfair or oppressive legislation.\textsuperscript{213}

B. Prohibitions

A provincial legislature may validly enact prohibitions and punish those who violate them, so long as the purpose of the prohibition comes within section 92.\textsuperscript{214} As has already been mentioned, the Supreme Court has in two recent decisions expressly reaffirmed that provinces may invoke their penal authority even against activities also governed to some degree by federal prohibitory legislation.\textsuperscript{215}

Provincial laws prohibiting the possession of LSD have twice come before appellate courts, with conflicting results;\textsuperscript{216} both cases anteceded Hauser, and dealt with the issue as a clash between provincial health and federal criminal law jurisdiction. Notwithstanding Hauser, there still seems no reason in principle why provinces should be incompetent to deal with the health consequences of drug use by means of prohibitions, providing that is their genuine purpose.\textsuperscript{217}

Of course, so long as existing federal laws remain in effect, there is little incentive for provinces to enact a duplicate set of prohibitions, particularly since they would be prevented from coming into operation by the doctrine of federal paramountcy, which provides that provincial laws must give way to federal in the event of conflict between them.\textsuperscript{218} However, should federal prohibitions be withdrawn, the ability of the provinces to replace them would be a matter of much greater relevance.

C. The Health Professions

The regulation of professions, including the health professions, comes within the jurisdiction of the provinces.\textsuperscript{219} In the exercise of that jurisdiction,


\textsuperscript{214} McNeil, supra note 60, at 697 (S.C.R.) per Ritchie J.

\textsuperscript{215} Id.; Dupond, supra note 62.


\textsuperscript{217} Determining whether there is in truth a health purpose would present a typical problem of constitutional characterization. The liquor cases are not relevant to this issue since the purpose of liquor statutes has generally been held to be not health but the "local [moral] evil" of liquor; see text accompanying notes 221-31, infra. However, provincial liquor prohibitions have been regularly sustained; see, e.g., \textit{R. v. Osform} (1927), 22 Alta. L.R. 582, [1927] 3 D.L.R. 1018, 49 C.C.C. 1 (C.A.).

\textsuperscript{218} The question of conflict only arises when both laws are independently valid. For a recent example of a provincial prohibition ceasing to operate where it duplicated a federal prohibition, see \textit{McNeil}, supra note 60, at 698-99 (S.C.R.), 27-28 (D.L.R.), 345 (C.C.C.) where the separate questions of validity and conflict were, however, confused.

\textsuperscript{219} \textit{Re Levkoe and the Queen} (1977), 18 O.R.(2d) 265, 37 C.C.C.(2d) 356 (Div. Ct.). The authority derives from s. 92(13) ("property and civil rights") under which
it is open to the provinces to regulate the manner in which medical practitioners and pharmacists may prescribe, dispense and administer drugs.\textsuperscript{220} This is yet another illustration of the aspect doctrine; as was mentioned above, the regulations under both the \textit{Narcotic Control Act} and the \textit{Food and Drugs Act} also contain stipulations concerning the medical use of drugs. In the event of conflict between the federal and provincial regulations, the former of course prevail by virtue of federal paramountcy.

VI. DRUG USE AS A "LOCAL EVIL"

The proposition was first put forward in the temperance cases that the provinces have an independent general authority, apart from their other, more specific heads of jurisdiction, to legislate for "the abatement or prevention of a local evil."\textsuperscript{221} Attributed to section 92(16), this was the authority ultimately relied on to support provincial legislation for regulating, and even prohibiting outright, the liquor traffic.\textsuperscript{222} Although the Privy Council never really elaborated on the nature of the local evil, it seems fairly clear that it was a moral evil which the legislation was enacted to combat.\textsuperscript{223}

In somewhat different terms, the Supreme Court sanctioned the use of provincial legislation for similar ends in \textit{Bédard v. Dawson}.\textsuperscript{224} There it upheld a Quebec statute providing for the closing of houses used as "disorderly houses," proof of which was a conviction under the \textit{Criminal Code}, on the basis that provinces could validly legislate for "suppressing conditions calculated to favour the development of crime."\textsuperscript{225}

Neither of these powers, as independent bases of authority rather than merely considerations impelling the exercise of authority otherwise specifically conferred, is easy to reconcile with the \textit{B.N.A. Act}'s scheme for dividing legislative competence. It does not use "localness" in a geographic but in a qualitative sense,\textsuperscript{226} and assigns both the power to suppress moral evils and the power to prevent them to Parliament in section 91(27). The existence of both powers was therefore apparently disavowed by the Supreme Court of Canada in a series of cases in the 1950's.\textsuperscript{227}

However, both have now been revived in the decisions in \textit{McNeil}\textsuperscript{228} and \textit{Dupond},\textsuperscript{229} and though the provincial health power should afford an ade-
quate ground from which to legislate concerning drug use, both may now be available as additional sources of authority. Given the correlation between drug use and crime, crime prevention seems a goal which could be readily invoked in connection with treatment or prohibitory legislation.

Whether drug use can now, in light of Hauser, be regarded as a local evil may be more contentious. It is true that the temperance cases proceeded on that basis despite the fact that the Privy Council had earlier cited the national proportions of the evil posed by alcohol as justification for its decision in Russell. But what Russell represents is an application of the now discredited geographic criterion for federal legislative power. The decision in Hauser, unarticulated as it was on the issue of national versus local concern, is not analogous: Pigeon J.'s choice of the p.o.g.g. clause over section 92(16) as the locus of the new problem of drug abuse can be regarded as a conclusion that the constitutional significance of the problem is more than merely local. Though Hauser does not preclude the provinces from exercising powers which do not depend on such a characterization, it therefore does appear to prevent the description of the drug problem as a local evil per se.

VII. CONCLUSION

What emerges from an examination of the competence to legislate concerning drug use is a pattern of authority which permits both Parliament and the provinces to prohibit, to regulate and to treat. There will be a temptation—amply justified, unfortunately, by unhappy experience—to see in such a state of affairs yet another opportunity for costly, inefficient duplication. But the presence of both levels of government in a single area of activity can yield benefits as well: the benefits to be gained from approaching a problem from a variety of perspectives and with a variety of legislative responses. When it comes to the problem of drug abuse, there is certainly no monopoly on solutions.

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230 Supra note 86, at 841 (App. Cas.), 25 (Cart.).
231 MacDonald, supra note 32, at 156 (S.C.R.), 19 (D.L.R.), 21 (C.P.R.) per Laskin C.J.C.
232 Where actual duplication exists, it should be resolved by the paramountcy doctrine in favour of the federal legislation: Multiple Access Ltd. v. McCutcheon (1977), 16 O.R.(2d) 593 (Div. Ct.), aff'd (1978), 19 O.R.(2d) 516 (C.A.); McNeil, supra note 60, at 698-99 (S.C.R.), 27-28 (D.L.R.), 345 (C.C.C.). The Supreme Court has, however, been remarkably restrained in its application of paramountcy: supra note 45, at 103-11. For an indication that federal and provincial treatment regimes can co-exist, see Fawcett, supra note 205.