THE QUEEN *V.* HAUSER
A SAGA OF THE OLD FEDERAL COUGAR AND THE PROVINCIAL SHEEP

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The Supreme Court of Canada has let loose that old federal cougar, POGG, to stalk the provincial sheep again. If Parliament's general power to enact laws for the peace, order and good government[1] of Canada can be reasonably appreciated in a situation like that in *Reference re Anti-Inflation Act,*[2] the application of its general power in a situation like that in *The Queen* v. *Hauser*[3] is quite strained, if not obscure. Neither decision was unanimous and both minority reasons, although not authoritative, are just as instructive as those of the majority. What may strike some as bizarre in these supreme judicial unleashings of POGG is that in the *Anti-Inflation Act* case Mr. Justice Beetz expressed lucid reasons for containing the federal general power, and Mr. Justice Dickson concurred in the reasons for the majority, while in the *Hauser* case the exact reverse was true.

The Constitutional Issue

Of the two cases, it is *The Queen* v. *Hauser* which really lets POGG stalk at large. That case began in a very simple and, for these days, ordinary way. Patrick Arnold Hauser was charged by indictment on two counts of possession of *cannabis,* for the purpose of trafficking, contrary to Section 4(2) of the *Narcotic Control Act.*[4] The indictment having been signed by an agent of the Attorney-General of Canada, Hauser thereupon moved for prohibition challenging the constitutional validity of paragraph (b) of the definition of "Attorney General" in Section 2 of the *Criminal Code.* Having wended its way to the Supreme Court of Canada, the constitutional question was framed in these terms:

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

The essential parts of Section 2 of the *Criminal Code* provide:

> "Attorney General" means the Attorney General. . . .of a province in which proceedings to which this *Act* applies are taken and, with respect to. . . .
>
> (b) proceedings instituted at the instance of the Government of Canada and conducted by or on behalf of that Government in respect of a violation of or conspiracy to violate any Act of the Parliament of Canada or a regulation made thereunder other than this *Act,*
>
> means the Attorney General of Canada. . . .

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1. *British North America Act,* 1867, 30 & 31 Vict. c. 3, s. 91 (U.K.).
2. [1976] 2 S.C.R. 373; 68 D.L.R. (3d) 452.
3. [1979] 1 S.C.R. 984; 46 C.C.C. (2d) 481; 8 C.R. (3d) 89.
4. R.S. C. 1970, c. N-1.

In the *Hauser* case it was common ground that the Attorney-General of Canada had not obtained the written consent of the Attorney-General of Alberta to prefer the indictment against Patrick Arnold Hauser. It was, of course, the contention of Mr. Hauser and of the Attorneys-General of all provinces, except Manitoba, that paragraph (b) of Section 2(2) of the *Code* is invalid, in light of the constitutional constraints upon the powers of Parliament. According to that contention, the Attorney-General of Canada would have had no jurisdiction or right to prefer the indictment because, if paragraph (b) were invalid *the only* Attorney-General to act in the case would have been the Attorney-General of Alberta.

The constitutional powers and constraints, such as they are, find expression within the most litigated sections of *The B.N.A. Act.* Head 27 of Section 91 provides that Parliament may make laws in relation to:

> 27. The Ciminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.

Head 14 of Section 92, however, accords to provincial legislatures jurisdiction to make laws in relation to:

> 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.

Of course, it must be observed that Head 27 of Section 91 is only one example of a class of subject expressed "for greater certainty" in relation to matters about which Parliament may "make Laws for the Peace, Order and good Government of Canada." In the *Hauser* case, however, the contest was not basically one between the legislative authority of the Parliament of Canada and the provincial Legislatures — despite appearances, that question follows the outcome of the basic contest — but rather a contest between competing classifications of the *Narcotic Control Act* within the undoubted powers of Parliament to enact such legislation. The basic issue was to determine whether, in enacting the *Narcotic Control Act,* Parliament was exerting its power to make a law in relation to a matter of the peace, order and good government of Canada generally, or to make a law in relation to a matter of the criminal law specifically. In the context of the *Hauser* case, then, the resolution of that basic issue would determine whether the Attorney-General of Canada or the Attorney-General of Alberta only would be the proper authority to prefer an indictment under the *Narcotic Control Act.*

New Vistas for POGG

The majority of the Supreme Court of Canada (Messrs. Justices Dickson and Pratte dissenting) held that the *Narcotic Control Act* is to be classified as legislation enacted under the general federal power. Accordingly, the above-mentioned constitutional questions were both answered "Yes" by the Supreme Court. Considering the wide range accorded to the

5. *Supra* n. 3, at 996; 46 C.C.C. (2d), at 494; 8 C.R. (3d), at 105.

general power of Parliament by the Court in the *Anti-Inflation Act Case,* the wider range accorded in *Hauser* seems unfortunate. That old federal courgar now seems to be able to roam at will.

Mr. Justice Pigeon for the majority expressed the *Hauser* reasons thus:

> Whatever may be said as to the necessity of limiting the extent of the federal power over criminal procedure so as to preserve provincial jurisdiction over the administration of justice in criminal matters, it appears to me that one must accept, at least, what is conceded by three provinces: unrestricted federal legislative authority over prosecutions for violations or conspiracies for violations of federal enactments which do not depend for their constitutional validity on head 27 of s. 91 (*Criminal Law*). It appears to me that these provinces justly disclaim any constitutional power to subject the enforcement of federal statutes to their executive authority except in what may properly be considered as 'criminal law'.[5]

Further along in his reasons, Mr. Justice Pigeon, after recounting that "drug abuse did not become a problem in this country during the last century" and mentioning various international conventions aimed at the suppression of the abuse of narcotic drugs then makes a bounding leap to his conclusion:

> In my view, the most important consideration for classifying the *Narcotic Control Act* as legislation enacted under the general residual federal power, is that this is essentially legislation adopted to deal with a genuinely new problem which did not exist at the time of Confederation and clearly cannot be put in the class of 'Matters of a merely local or private nature'. The subject-matter of this legislation is thus properly to be dealt with on the same footing as such other new developments as aviation (*Re Aeronautics,* 1932 A.C. 54) and radio communications (*Re Radio Communication,* 1932 A.C. 304).[6]

This is a great leap, in that the easy extension of criminal law to other new developments, (such as computers as means of committing theft and fraud and electromagnetic, acoustic, mechanical or other devices capable of being used to intercept a private communication), was hurdled and ignored in arriving at the conclusion.

If there be anything certain in this world, it is that new developments and hence, new problems, will abound. According to the majority's reasoning in *Hauser* as expressed by Mr. Justice Pigeon, Parliament may, in effect, ignore or circumvent its own jurisdiction over criminal law and resort to peace, order, and good government as a basis for dealing with those problems so long as they be genuinely new problems which did not exist at the time of Confederation. Indeed, it is conceded that even at the time of Confederation there may have been some people who, for non-medical purposes, stupefied themselves by means of narcotic drugs. They did not present a problem. However, there were by 1908 "a few opium merchants in British Columbia."[7] Much significance is made by Mr. Justice Pigeon of the provisions of the *Narcotic Control Act* which not only prohibit but also control and license the sale and possession of narcotics. That these provisions are enacted to deal with new problems is asserted to be the basis for invoking the general residual federal power rather than the criminal law power.

6. *Id.*, at 1000; 46 C.C.C. (2d), at 498; 8 C.R. (3d), at 109.

7. *Id.*, at 998; 46 C.C.C. (2d), at 496; 8 C.R. (3d), at 107.

It is not indicated by the majority in the *Hauser* decision, whether Parliament could freely switch around the basis for dealing with "new problems," or whether a new problem once dealt with in the *Criminal Code* would be crystallized forever, or until the Supreme Court declared otherwise, as a matter of criminal law. One is led to wonder about the subject matter of Section 178.18 of the *Criminal Code,* for example. Parliament there deals with genuinely new problems relating to "any electromagnetic, acoustic mechanical or other device. . . .primarily useful for surreptitious interception of private communications." Section 178.18 provides that

> Every one who possesses, sells or purchases any electromagnetic, acoustic, mechanical or other device or any component thereof knowing that the design thereof renders it primarily useful for surreptitious interception of private communications is guilty of an indictable offence and liable to imprisonment for two years.

However, the second and third subsections of Section 178.18 go on to provide exemptions and "terms and conditions relating to the possession, sale or purchase of a device or component described in subsection (1) as the Solicitor-General of Canada may prescribe" in a licence issued by that Minister of the Crown. Then Section 178.19 provides for forfeiture of such a device where a person is convicted of the possession which constituted the offence.

Thus, it appears that Sections 178.18 and 178.19 of the *Criminal Code* deal in brief with the new problems relating to electromagnetic, acoustic, mechanical or other devices which can be primarily useful for the interception of private communications in essentially the same way in which the *Narcotic Control Act* deals at length with new problems relating to narcotics which can be put to non-medical purposes.

POGG v. Criminal Law

In *Hauser,* Mr. Justice Pigeon followed his "genuinely new problem" trajectory to peace, order and good government by ignoring the classical statement of the criminal law power expressed by Lord Atkin in *Proprietary Articles Trade Association* v. *Attorney-General for Canada.*[8] It bears repeating in brief:

> The definition is wide, and may cover activities which have not hitherto been considered to be criminal. . . .and if Parliament genuinely determines that commercial activities which can be so described are to be suppressed in the public interest, their Lordships see no reason why Parliament should not make them crimes. 'Criminal law' means 'the criminal law in its widest sense': *Attorney General for Ontario* v. *Hamilton Street Ry. Co.* [1903] A.C. 524. It certainly is not confined to what was criminal by the law of England or of any Province in 1867. The power must extend to legislation to make new crimes. Criminal law connotes only the quality of such acts or omissions as are prohibited under appropriate penal provisions by authority of the State.[9]

8. [1931] A.C. 310; [1931] All E.R. Rep. 277 (P.C.).

9. *Id.*, at 323-24; [1931] All E.R. Rep., at 283.

The passage is longer than that which is quoted above, and is most instructive in discerning the proper distinction to be drawn between "the general residual federal power" as a basis for legislation enacted by Parliament, and the criminal law power as a basis for such legislation. Obviously, "new problems" can be met by legislation to make new crimes.

Put another way: Is there some national concern or national dimension to the subject matter of the *Narcotic Control Act* which cannot be met by one of the enumerated heads of legislative power expressed in either Section 91 or Section 92 of *The B.N.A. Act?* Although the exercise of the power to make new crimes by legislation having effect throughout Canada may evince a national concern or national dimension, is not the criminal law power accorded to Parliament an adequate, neat, and logical basis for dealing with the subject matter of the *Narcotic Control Act?* Distinguishing the emergency doctrine from the national concern or national dimension doctrine, as Mr. Justice Beetz, dissenting, did in the *Anti-Inflation Act Case,*[10] is there then some emergency upon which the subject matter of the *Narcotic Control Act* is based? Although the majority in *Hauser* found that statute to be "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,' " there was no evidence of an emergency and no emergency was asserted or found by the Court.

There was no emergency. Therefore, POGG did not play its crisis role. It played its permanent, residual powers role. This is not the role defined and implemented in the *Anti-Inflation Act Case,* because the narcotics legislation was not enacted to cope with a national emergency and it was not intended to be of only temporary duration. The *Narcotic Control Act* has an enduring quality about it and, to bring it under "Peace, Order and Good Government," Mr. Justice Pigeon and the three other judges for whom he spoke, had to characterize it as meeting a genuinely new problem. It was so genuinely new that it missed the apparently closed book of criminal law. It failed to find a place in the criminal law lexicon. But although real criminal law apparently does not need hereafter to engage genuinely new problems, because they seem to belong to POGG now, criminal law legislation has an enduring quality, too. That being the case, the role POGG must play in order to claim the *Narcotic Control Act* for genuinely new problems which do not constitute national emergencies, is residual and permanent. That role is, of course, no less permanent than Parliament's criminal law power.

Why then must one strain — or leap — to POGG for a basis of enacting the *Narcotic Control Act* when, as Mr. Justice Dickson demonstrates in his comprehensive dissent in *Hauser;* "The decided cases that have been concerned with the constitutional validity of the *Narcotic Control Act* and its predecessors have, without fail, upheld the *Act* as being criminal law and, therefore, within the federal power of s. 91(27)."[11]? Indeed, on what other basis could Canada have become a signatory to the *Single Convention on Narcotic Drugs, 1961?* Surely not peace, order and good government,

10. *Supra* n. 2, at 460; 68 D.L.R. (3d), at 526.

11. *Supra* n. 3, at 1057; 46 C.C.C. (2d), at 538-39; 8 C.R. (3d), at 155.

for that would have hardly supported that action in 1961. Let loose the old federal cougar, POGG, and it may well swallow up any concern for a federal state clause in Canada's future treaties because it has an appetite to swallow everything in avoidance of the enumerated heads of power in both Section 91 and Section 92 of *The B.N.A. Act.*

In truth, Mr.Justice Spence who concurred in the result in *Hauser,* did not purport to let the old federal cougar loose. Mr. Justice Spence in effect held that it was within the competence of Parliament to authorize the Attorney-General of Canada to prefer indictments under the *Narcotic Control Act,* because in his view, the enacting of such authority is necessarily incidental to Parliament's criminal law power in Head 27 of Section 91.[12] There is no stalking of all the provincial sheep at large here, just the pouncing on only one of them, Head 14 of Section 92! By this reasoning provincial Attorneys-General really receive and exercise their powers only by virtue of federal legislation enacted under Head 27 of Section 91 of *The B.N.A. Act,* whatever may be the import of Head 14 of Section 92. The reasons of Mr. Justice Spence seem to be tautly and cautiously expressed but come finally to this: that Parliament having made accommodation for the provincial Attorneys-General in the administration of criminal justice can equally evict them by means of Section 2(2) of the *Criminal Code.* To this reasoning which was that urged by the Attorney-General of Canada, Mr. Justice Dickson conceded that in the absence of Section 92(14) he would agree.[13] However, he went no further in such concession, but said:

> The enactment of s. 2(2) of the *Criminal Code* may be viewed as not only an attempt to intrude into matters traditionally reserved for the provincial Attorneys General, but also as a breach of the bargain struck at the time of Confederation. . . .It has not been suggested that authority to pass s. 2(2) is requisite to prevent the scheme of the *Criminal Code,* or of non-*Code* 'criminal' statutes from being frustrated or defeated.[14]

It might not be only in terms of prosecution of criminal charges that *Hauser* diminishes the provincial flocks. There are other provincial powers in the fold of Head 14 of Section 92 of *The B.N.A. Act.* Since the *Hauser* case holds that the *Narcotic Control Act* did and does not engage the criminal law power of Parliament, then why should prosecutions thereunder continue to engage the jurisdiction of *provincial* courts of criminal jurisdiction which are constituted, maintained and organized pursuant to Head 14 of Section 92? Could not Parliament, if so minded, now find the way constitutionally clear to confer that jurisdiction on the Federal Court, Trial Division? Who could now object to that?

It will be remembered that Section 91 declares that Parliament's exclusive legislative authority extends, under Head 27, to "the criminal law, *except the constitution of courts of criminal jurisdiction,* but including the procedure in criminal matters. In cognate apposition to that provision, Head 14 of Section 92 confers on provincial legislatures the exclusive authority to make laws in relation to "the administration of justice in the

12. Id., at 1005; 46 C.C.C. (2d), at 489; 8 C.R. (3d), at 98.

13. *Id.,* at 1017; 46 C.C.C. (2d), at 507; 8 C.R. (3d), at 119.

14. *Id.,* at 1032-33; 46 C.C.C. (2d), at 519-20; 8 C.R. (3d), at 133.

province, *including the constitution, maintenance and organization of provincial courts* both of civil and *of criminal jurisdiction. . . .*" This scheme of things would seem to be perfectly clear and unqualified were it not for the "sleeper" in Section 101 of *The B.N.A. Act* which provides that Parliament may "notwithstanding anything in this Act, from time to time, provide for. . . .the establishment of any additional courts for the better administration of the laws of Canada." The *Narcotic Control Act* is a law of Canada, but not criminal law, now. Did the majority of the Court (excluding Mr. Justice Spence) intend to open a new avenue of development in taking the legislative authority to enact the *Narcotic Control Act* out of the criminal law?

Even though there are double negative imperatives expressed in Sections 91 and 92 of *The B.N.A. Act* (perhaps modified by Section 101) against Parliament's making laws to constitute courts of criminal jurisdiction, the reasoning of the majority in the *Hauser* case could provide Parliament with a charter to obviate those imperatives. Here, in truth, would be a means of reducing and simplifying the operation not only of the criminal law, but also of the criminal courts of the country. How often in the future will the Supreme Court of Canada be persuaded to declare that a permanent statute of Parliament which creates indictable offences punishable by severe penalties is beyond the purview of criminal law? And maybe even beyond that of criminal courts?

An Alternative Approach

For all of the force and clarity of Mr. Justice Dickson's dissent, and the flawed reasoning of the majority, as well as Mr. Justice Beetz' surprisingly silent inclusion in that majority, *The Queen* v. *Hauser* is striking for yet another reason. That is, there may be a more cogent approach to the issue, which was not argued by the parties to the appeal and, therefore, not considered by the court.

Even as framed, the constitutional question to be answered could have been given a different focus from that of criminal law v. peace, order and good government. Again, as Mr. Justice Dickson observed in *Hauser:* "The neat '*Code*/non-*Code*' dichotomy found in s. 2(2) (b) may not serve when one comes to constitutional analysis."[15] Indeed, the watershed division between criminal law whether or not enacted in the *Criminal Code,* on the one side, and all other Acts of Parliament enacted under any head of power in Section 91 of *The British North America Act,* other than Head 27 relating to the criminal law power, on the other side, may not serve either.

For a federal state whose Constitution contains those related, but disparately distributed, powers expressed in Section 91(27) and Section 92(14) of *The B.N.A. Act,* Canada might be better served by a different basis of distribution of prosecutorial powers. One would first have to give real meaning to the "administration-of-justice" power granted to the provinces by Head 14 of Section 92 by rigourously carving it out of the criminal law power of Parliament. This would require the Supreme Court of Canada

15. Id., at 1010; 46 C.C.C. (2d), at 502; 8 C.R. (3d), at 113.

to give the historical and plain meaning to the constitutional expression of that power, along the line indicated by Mr. Justice Dickson and even further. The Attorney-General of a province would be *the paramount* Attorney-General for prosecutions under the federal and provincial laws of Canada.

Thus, the relationship of Section 91(27) and Section 92(14) would be recognized for what it truly seems to have been intended to be, without slinging the provincial power into the federal maw as a regular nutritional need. That is, the criminal law power should be interpreted as its expression indicates: the power to make laws in relation to all matters within the criminal law (except the constitution of courts of criminal jurisdiction) and the procedure in criminal matters *but always subject to* the actual administration of criminal justice being carried out in each province under the authority of the provincial Attorney-General. Under this rubric, the *Narcotic Control Act* along with other federal statutes creating most of the other offences would be subject to administration by the provincial prosecutorial authorities, including responsibility for the commencement and conduct of prosecutions.

That would indeed be a different basis of distribution of prosecutorial powers from that which the Supreme Court of Canada pronounced in the *Hauser* case but it would not exclude some certain federal prosecutorial power which, in turn, and by *necessary implication* must be carved out of the provincial power over the administration of justice. What would that necessary implication be? It would, to give a situational meaning to an imported term, reside in *federal organic law.* Here is the conceptual basis for a better distribution of prosecutorial powers in our federal state whose Constitution distributes the criminal law power to Parliament and the administration of justice power to the provinces.

Organic Law

"Organic law" is a term which has been expressed in U.S. constitutional law,[16] but rarely in Canadian constitutional law. *Black's Law Dictionary* defines organic law as:

> The fundamental law, or constitution, of a state or nation, written or unwritten; that law or system of laws or principles which defines and establishes the organization of its government.[17]

For the purposes of this discussion the term "federal organic law" should be defined in the Canadian situation as:

> Those laws of Canada which define or establish, or are formulated for the purpose of directly maintaining or protecting the organization and organs of the Government of Canada.

"Laws of Canada" here bears the same meaning, as the same expression in Section 101 of *The B.N.A. Act:* Parliament's proper domain of legislative jurisdiction. Insofar as prosecutorial power is protective, it must surely be a

16. *City of St. Louis* v. *Dorr* (1898), 145 Mo. 466; 46 S.W. 976 (S.C.).

17. (4th ed. 1968) 1251.

necessary implication of sovereignty that the state is entitled, if not duty-bound, to prosecute in order to protect its own organs, organization, and existence. That protection is no less significant in a federal state than in a unitary state.

The only exception which constitutional interpretation should impose on the clear and simple intendment of Section 92(14) of *The B.N.A. Act,* then, is that necessary implication for each order of government to protect its own organs, organization, and existence by means of prosecutorial powers in regard to its own organic law. Such an exception would do less violence to the provincial power than was done by the Supreme Court of Canada in *Hauser,* but would still leave a very large field of prosecutorial power to the Attorney-General of Canada. Indeed, such an exception really would do no conceptual violence whatever to the clearly granted and almost plenary power over the administration of justice (excepting procedure in criminal matters) which the provinces were intended to exercise. Of course, the prosecutorial power in matters of provincial organic law would, irrespective even of Section 92(14), by necessary implication remain with the provinces.

The notion of federal power of prosecution in matters of federal organic law intensifies Mr. Justice Dickson's observation in *Hauser* to the effect that the *Code*/non-*Code* dichotomy is not particularly serviceable in constitutional analysis. This is so, because it is clear that some provisions of the *Criminal Code,* as well as of other statutes of Parliament, would equally qualify as federal organic law. Thus, even though high treason and treason are offences pursuant to Section 46 of the *Criminal Code,* it is clear upon perusing that Section that those offences are created by provisions which qualify as federal organic law. So also are offences under the *Income Tax Act,*[18] the *Canada Elections Act,*[19] the *Dominion Controverted Elections Act,*[20] the *National Defence Act,*[21] the *Senate and House of Commons Act,*[22] the *Official Secrets Act,*[23] the *War Measures Act*[24] and indeed any federal law for the establishment, maintenance and protection of the organization and organs of the Government of Canada.

As noted in relation to the offence of treason, such federal organic laws might well be enacted within the *Criminal Code* and would not be restricted only to non-*Code* offences. For example, Section 51 of the *Criminal Code* making it an indictable offence to do "an act of violence to intimidate the Parliament of Canada or the legislature of a province" would be clearly severable, so long as it remains so comprehensively formulated, into federal organic law, and less significantly, provincial organic law. These examples are abundantly clear in illustrating the meaning, here, of federal organic law.

18. S.C. 1970-71-72, c. 63.
19. R.S.C. 1970, 1st Supp., c. 14.
20. R.S.C. 1970, c. C-28.
21. R.S.C. 1970, c. N-4.
22. R.S.C. 1970, c. S-8.
23. R.S.C. 1970, c. O-3.
24. R.S.C. 1970, c. W-2.

No doubt there would be more subtle and difficult distinctions of classification to determine whether other particular offences be in pith and substance federal organic law, or not. Those problems, if the rubric of federal organic law were adopted, would have to be determined by the judiciary just as the judiciary now determines the resolution of constitutional issues.

The strict application of the division of prosecutorial powers according to the classification of federal organic law, or not, would accord most closely with the "broad proposition" maintained by Mr. Hauser and six of the provinces, to the effect that all federal offences are "crimes," but with this one proposed salient exception of those which would qualify as federal organic law, as that term is herein defined.

That proposition would mean, in its strictest application, that offences under the *Canada Labour Code*[25] or the *Migratory Birds Convention Act,*[26] or the *Unemployment Insurance Act,*[27] for example, would not qualify as federal organic law. They would not qualify simply because they are not strictly speaking enacted to define or establish, or for the purpose of directly maintaining or protecting, the organization and organs of the Government of Canada. While it is true that two of those statutes relate to the operation of federal administrative boards or tribunals and the third relates to a treaty, the offences therein are more in the nature of crimes. Or are they?

Without an agreed or perhaps entrenched list of laws and offences which would be classified as federal organic law, some tightly-reasoned judicial determinations would be needed if this concept were introduced into Canadian constitutional law, in order to determine which would be the appropriate Attorney-General in certain prosecutions. Still, the concept would most faithfully accommodate the historical basis and special relationship of Section 91(27) and Section 92(14) of *The B.N.A. Act* which were amply demonstrated by Mr. Justice Dickson in the *Hauser* case. In one sense it is a loss to our constitutional development that the "federal organic law" concept was not advanced in argument in *Hauser,* since that case seems to have been the best, if not the last, occasion upon which it could have been fully and cogently canvassed.

In an age when many Canadians — politicians, lawyers, political scientists and other members of the public, alike — are discussing the creaking of the constitutional basis of Confederation, perhaps the notion of federal organic law as a watershed proposition for distributing prosecutorial powers might yet be canvassed in another forum. It appears to do no violence in logic to the spirit or letter of the respective jurisdictions. The Attorney-General of Canada has by necessary implication a right and interest in protecting the vital organs of the central government. He has no such interest in the administration of justice in the provinces.

25. R.S.C. 1970, c. L-1.

26. R.S.C. 1970, c. M-12.

27. S.C. 1970-71-72, c. 48.

Nevertheless, this approach may not be seen to be flexible enough or convenient to the respective jurisdictions. Surely, at least, the criminal law/non-criminal law watershed in federal statutes propounded by Mr. Justice Dickson in his well-reasoned dissent, and "accepted" by the majority, in the *Hauser* case would commend itself to constitutional reformers. However, after *Hauser,* one may be less surprised, even though equally astounded, at what is *not* straight-away classified as criminal law.

Conclusion

Now that the Supreme Court of Canada, by its majority decision in *Hauser,* has given new range and vitality to the old federal cougar POGG one may expect to see a continuing diminution of the role of the provinces in the administration of criminal justice in Canada. Unless the Parliament and successive Attorneys-General of Canada will exercise great restraint in roaming these newly opened vistas, the role of the provincial Attorneys-General will be only the first meal for the old cougar. The diminished role of the provinces in the administration of criminal justice which the *Hauser* decision may portend, could provide some solace to provincial taxpayers (who are also, however, in large part federal taxpayers, too) but it will do little, if any, good for the delicate balances of Canadian federalism.

There may yet be some whimsical solace in the situation. In recent years there has been some consideration in rank-and-file political as well as Parliamentary circles of the de-criminalization of the simple possession of marijuana. In light of the *Hauser* decision, will one now have to consider "dispeacing, disordering and de-good-governmenting" it?