# OCCUPYING THE FIELD: PARAMOUNTCY IN PENAL LEGISLATION

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## I

Among the time-honoured doctrines of Canadian constitutional law none has a more disarming simplicity and none is more question-begging than the last of the four propositions proclaimed by Lord Tomlin in the *Fish Canneries* case[1] and repeated on three subsequent occasions by the Privy Council.[2] It reads as follows: "There can be a domain in which Provincial and Dominion legislation may overlap, in which case neither legislation will be *ultra vires* if the field is clear, but if the field is not clear and the two legislations meet the Dominion legislation must prevail."[3] The issues raised by this pronouncement are concomitants of federalism, familiar in the United States and in Australia, and immanent in the constitutions of the new federal states that have come into being since the end of World War Two.[4]

Three fairly recent decisions of the Supreme Court of Canada, in each of which there were dissents, illustrate that court's appreciation of those issues as they emerged in provincial and federal penal legislation. The three cases are sufficiently different from one another in their facts and supporting legislation to provide adequate perspective for an examination of the doctrine of the "occupied field"—the paramountcy doctrine, to use an equivalent—as it pertains to penal enactments.

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[1] *A.-G. for Canada* v. *A.-G. for British Columbia*, [1930] A.C. 111, [1930] 1 D.L.R. 194, [1929] 3 W.W.R. 449.

[2] *In re Regulation and Control of Aeronautics in Canada*, [1932] A.C. 54, [1932] 1 D.L.R. 58, [1931] 3 W.W.R. 625; *In re Silver Bros. Ltd., A.-G. for Quebec* v. *A.-G. for Canada*, [1932] A.C. 514, [1932] 2 D.L.R. 673, [1932] 1 W.W.R. 764; *C.P.R.* v. *A.-G. for British Columbia*, [1950] A.C. 122, [1950] 1 D.L.R. 721, [1950] 1 W.W.R. 220.

[3] *Supra*, footnote 1, at pp. 118 (A.C.), 197 (D.L.R.), 453 (W.W.R.).

[4] In the United States, article VI, clause 2 of the constitution provides: "This Constitution and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land." An early,

*O'Grady* v. *Sparling* sustained the validity of a provincial penal proscription of careless driving, as part of a comprehensive statute regulating highway traffic, despite the valid presence of a federal enactment defining and punishing the offence of criminal negligence in the operation of a motor vehicle.[5] *Stephens* v. *The Queen* upheld the validity of another common provision in provincial highway traffic legislation, one punishing failure to remain at or immediately to return to the scene of an accident, and this in the face of a valid federal criminal enactment punishing failure to stop at the scene of an accident with intent to escape civil or criminal liability.[6] *Smith* v. *The Queen* supported a penal prohibition of the furnishing of false information in a prospectus, being part of a general provincial scheme of regulation of the securities business, although there was in existence a federal Criminal Code provision punishing the making or publishing of false statements in a prospectus with intent to induce persons to become shareholders of or advance money to, or enter into any security for the benefit of a company.[7]

leading application of this provision is *Gibbons* v. *Ogden* (1824), 22 U.S. 1, and it has had a variegated career since that time. In recent years, the principle of the article has had an extensive application in commerce clauses cases and has been resorted to in criminal matters, as, for example, in connection with anti-subversion legislation: see *San Diego Building Trades Council* v. *Garmon* (1959), 359 U.S. 326; *Hines* v. *Davidowitz* (1941), 312 U.S. 52; *Pennsylvania* v. *Nelson* (1956), 350 U.S. 497. For writings on the problem, see Note, Pre-emption by Federal Criminal Statutes (1955), 55 Col. L. Rev. 83; Hunt, Federal Supremacy and State Anti-Subversion Legislation (1955), 53 Mich. L. Rev. 407; Dunham, Congress, The States and Commerce (1959), 8 J. Pub. L. 47.

In Australia, s. 109 of the Commonwealth of Australia Constitution Act, 1900 reads: "When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency be invalid." For a discussion of the problems raised by this provision, see Zelling, Inconsistency Between Commonwealth and State Laws (1948), 22 Aust. L.J. 45.

Section 64(4) of the constitution of Nigeria (see The Nigerian (Constitution) Order in Council, 1960, Second Schedule, Stat. Inst. 1960, No. 1652) provides that "if any law enacted by the legislature of a Region is inconsistent with any law validly made by Parliament, the law made by Parliament shall prevail and the Regional law shall to the extent of the inconsistency be void". In similar vein, s. 52(3) of the constitution of Uganda (see The Uganda (Constitution) Order in Council, 1962, Second Schedule, Stat. Inst. 1962, No. 405) provides for the ascendancy of the legislation of the national Parliament in case of inconsistency of the legislation of Buganda. The now aborted Federation of the West Indies had a provision to the same effect in s. 45 of its constitution (see The West Indies (Federation) Order in Council, 1957, Annex, Stat. Inst. 1957, No. 1364).

The same is true of the older post World War Two federations; as to India, see Gledhill, The Republic of India (1951, Commonwealth Series), pp. 80, 81; as to Malaya, see Sheridan, Malaya and Singapore: The Borneo Territories (1961, Commonwealth Series), p. 53.

[5] [1960] S.C.R. 804, 25 D.L.R. (2d) 145, 33 W.W.R. 360.

[6] [1960] S.C.R. 823, 25 D.L.R. (2d) 296, 33 W.W.R. 379.

[7] [1960] S.C.R. 776, 25 D.L.R. (2d) 225.

The majority judgments in the three cases, delivered by Judson J. in the first of them and by Kerwin C.J.C. in the other two, stressed that there was no conflict (or, no repugnancy) between the impugned provincial prohibitions and the federal Criminal Code sections invoked against them. What was meant by this conclusion was explained in one sentence in Judson J.'s judgment in *O'Grady* v. *Sparling*. The Chief Justice relied generally on this case in giving reasons in the *Stephens* and *Smith* cases, but offered no elaboration. Judson J.'s sentence expresses therefore the Supreme Court's appreciation of the occupied field doctrine in a rather broad area of common legislative endeavour.

The learned judge put the matter succinctly as follows: "Both provisions can live together and operate concurrently."[8] It is, of course, necessary to give context for this summation, and this will be done below. Pragmatically, however, this formulation excludes any probable application of the paramountcy doctrine in any case where the challenge to provincial competence is based on measuring penal enactments in a provincial regulatory statute against the blunt prohibitions of the federal Criminal Code. In all three of the cases mentioned above the provincial enactment was, from the standpoint of the accused, stricter than the federal prohibition, covering situations that would not necessarily be federal violations. This is a possible stopping point in the court's rejection of paramountcy. The logic of the argument underlying its expression of principle would, however, equally involve rejection if there were measure for measure in the provincial and federal prohibitions. There is high precedent on both sides of the line drawn by the Supreme Court.[9] But precedent, pro or con, is no longer a conclusive test of the merit of a constitutional pronouncement of the Supreme Court of Canada.[10] It is better to think or speak in terms of accommodating federalism, or in terms of effective administration of regulatory schemes, and perhaps as a last resort, in terms of the purpose of the paramount legislature, a phrase which lends authority to statutory construction, and, as

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[8] *Supra*, footnote 5, at pp. 811 (S.C.R.), 160 (D.L.R.), 376 (W.W.R.).

[9] See, for example, *Home Insurance Co.* v. *Lindal and Beattie*, [1934] S.C.R. 33, [1934] 1 D.L.R. 497; *Prov. Sec. of Prince Edward Island* v. *Egan and A.-G. for Prince Edward Island*, [1941] S.C.R. 396, [1941] 3 D.L.R. 305; *Johnson* v. *A.-G. for Alberta*, [1954] S.C.R. 127, [1954] 2 D.L.R. 625.

[10] The movement away from strict *stare decisis* has begun: see *Drew* v. *The Queen*, [1961] S.C.R. 614, 29 D.L.R. (2d) 114. In *B.C. Power Corp. Ltd.* v. *B.C. Electric Co. Ltd. and A.-G. for British Columbia* (1962), 34 D.L.R. (2d) 196, at p. 274, in argument before the Supreme Court of Canada it was indicated that the court did not consider itself bound to

in Australia, has played an important role in the judicial approach to paramountcy.[11]

## II

Paramountcy (or the occupied field doctrine or the overlapping doctrine, call it what one will) has a twofold operation in Canada. It applies by express stipulation to the exercise of concurrent powers under section 95 of the British North America Act, and it applies by implicit recognition to the exercise of the mutually exclusive powers of Parliament and provincial legislatures under sections 91 and 92.[12] Section 95 declares that provincial legislation in the concurrent areas of agriculture and immigration shall have effect "as long and as far only as it is not repugnant to any Act of the Parliament of Canada". What "repugnant" means in this connection has not been clarified in any authoritative decision,[13] and it is worth passing mention that this term in section 95 has not been the basis on which the occupied field doctrine has been elaborated in the second field of its application. True, the term "repugnancy" has been used on occasion, as, indeed, it was used by Judson J. in his exposition in *O'Grady* v. *Sparling*, but without tying it to

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follow the Privy Council in *Lovibond* v. *G.T.R.*, [1936] 3 D.L.R. 449, [1936] 2 W.W.R. 298.

[11] See Wynes, Legislative, Executive and Judicial Powers in Australia (2nd ed., 1956), pp. 126-141; and see *Ex parte McLean* (1930), 43 C.L.R. 472, at p. 483; approved in *O'Sullivan* v. *Noarlunga Meat Ltd.*, [1957] A.C. 1, at p. 28, [1956] 3 All E.R. 177, at p. 183. In the exposition of principle in *Ex parte McLean*, Dixon J. said: "The inconsistency does not lie in the mere coexistence of two laws which are susceptible of simultaneous obedience. It depends upon the intention of the paramount Legislature to express by its enactment, completely, exhaustively or exclusively, what shall be the law governing the particular conduct or matter to which its attention is directed. When a federal statute discloses such an intention, it is inconsistent with it for the law of a State to govern the same conduct or matter." In the *O'Sullivan* case, the Privy Council added that in applying the foregoing principle "it is important to bear in mind that the relevant field or subject is that covered by the law said to be invalid". As to the same approach in the United States, see *Johnson* v. *Maryland* (1920), 254 U.S. 51; *Southern Pacific Co.* v. *Arizona* (1945), 325 U.S. 761, 65 Sup. Ct. 1515.

[12] See Strong C.J. in *Huson* v. *South Norwich* (1895), 24 S.C.R. 143, at p. 149; ". . . although the British North America Act contains no provisions declaring that the legislation of the Dominion shall be supreme as is the case in the constitution of the United States the same principle is necessarily implied in our constitutional Act, and is to be applied whenever, in the many cases which may arise, the federal and provincial legislatures adopt the same means to carry into effect distinct powers."

[13] The cases have been few. It is accepted that federal immigration legislation has precluded provincial legislation of that kind: see *In re Narain Singh* (1908), 13 B.C.R. 477. The "agriculture" power has been, by and large, a neglected child of the constitution: see Laskin, Canadian Constitutional Law (2nd ed., 1960), p. 354.

section 95 and without any suggestion that its meaning under section 95 is controlling.

The most celebrated resort to the language of "repugnancy" is that of Lord Watson in the *Local Prohibition* case which may also be regarded as the first general statement by the Privy Council on the doctrine of paramountcy.[14] Some advertence to the issue was made in earlier cases, as for example, in *L'Union St. Jacques de Montreal* v. *Belisle*[15] and *Citizens Insurance Co.* v. *Parsons*[16] but it was not until the *Local Prohibition* case that the Judicial Committee propounded it in terms of principle. In considering there the validity of provincial liquor licence legislation in the face of the Canada Temperance Act, sustained more than a decade before,[17] the Privy Council used expressions which have since become common currency, such as "occupying the field", "collision" of provincial and federal legislation, "conflict", and "abeyance" or "supersession" of provincial legislation. In the course of its exposition it said:[18]

> It has been frequently recognized by this Board, and it may now be regarded as settled law, that according to the scheme of the British North America Act the enactments of the Parliament of Canada, in so far as these are within its competency, must override provincial legislation. But the Dominion Parliament has no authority conferred upon it by the Act to repeal directly any provincial statute, whether it does or does not come within the limits of jurisdiction prescribed by s. 92. The repeal of a provincial Act by the Parliament of Canada can only be effected by repugnancy between its provisions and the enactments of the Dominion; and if the existence of such repugnancy should become matter of dispute, the controversy cannot be settled by the action either of the Dominion or of the provincial legislature but must be submitted to the judicial tribunals of the country.

Ten years later the Judicial Committee clothed the paramountcy doctrine in new language without even any mention of the *Local Prohibition* case.

In the well-known case of *Grand Trunk Railway Company of Canada* v. *A.-G. Canada*, the Judicial Committee had to consider the validity of federal railway legislation prohibiting railways within federal jurisdiction from contracting out from liability to pay damages to their servants for personal injuries.[19] The judgment of the Privy Council made no mention of any issue of competing

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[14] *A.-G. for Ontario* v. *A.-G. for Canada*, [1896] A.C. 348.
[15] (1874), L.R. 6 P.C. 31, at p. 36-37.
[16] (1881), 7 App. Cas. 96, at p. 114.
[17] In *Russell* v. *The Queen* (1882), 7 App. Cas. 829, and earlier by the Supreme Court in *Fredericton* v. *The Queen* (1878), 3 S.C.R. 505.
[18] *Supra*, footnote 14, at p. 366. [19] [1907] A.C. 65.

federal and provincial legislation, but Lord Dunedin nonetheless proceeded to propound principles of decision which were relevant only if such a competition existed.[20] He spoke as follows:[21]

> The construction of the provisions of the British North America Act has been frequently before their Lordships. It does not seem necessary to recapitulate the decisions. But a comparison of two cases decided in the year 1894 — *viz. Attorney-General of Ontario* v. *Attorney-General of Canada* and *Tennant* v. *Union Bank of Canada* — seems to establish two propositions: First, that there can be a domain in which provincial and Dominion legislation may overlap, in which case neither legislation will be *ultra vires* if the field is clear; and secondly, that if the field is not clear, and in such a domain the two legislations meet, then the Dominion legislation must prevail.

Save as to the words "in such a domain", this statement of principle, and not that set out in the *Local Prohibition* case, was adopted by Lord Tomlin when he came to summarize the course of constitutional interpretation in the four (now somewhat badly battered) propositions set out in the *Fish Canneries* case.[22] In using the language that he did, Lord Tomlin overlooked the affirmation of the *Local Prohibition* case asserted in *Montreal* v. *Montreal Street Railway* (decided after the *Grand Trunk Railway* case) in which the Privy Council declared that "where the legislation of the Dominion Parliament comes into conflict with that of a provincial Legislature over a field of jurisdiction common to both the former must prevail".[23]

How far the two different formulations of the same principle have yielded different results in their respective applications will be discussed below. Whether, indeed, they should, yield different results depends on more than verbal distinctions and meanings; these are easy enough to make and draw out of the words "repugnancy" and "conflict" on the one hand and the words "overlap" and "meet" on the other. There is involved here not only the formal question whether the federal and provincial statutes are

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[20] The factums filed in the appeal to the Privy Council did not expressly raise any question of paramountcy but were concerned rather with the existence of federal power to enact the challenged legislation.

[21] *Supra*, footnote 19, at pp. 67-68.

[22] *Supra*, footnote 1. Apart from the criticisms of the summation made by writers (as to which, see Laskin, *op. cit.*, footnote 13, pp. 28-30, 88-94), members of the Supreme Court have recently begun to rework some of the propositions: see, for example, Rand J. in *A.-G. for Canada* v. *C.P.R. and C.N.R.*, [1958] S.C.R. 285, at p. 290, 12 D.L.R. (2d) 625, at p. 628 (on the so-called "trenching doctrine") and Judson J. in *A.-G. for Canada* v. *Nykorak* (1962), 33 D.L.R. (2d) 373, at p. 378, where in supporting federal legislation under the defence power he rejected any need of reliance on the so-called "necessarily incidental" power.

[23] [1912] A.C. 333, at p. 343.

inconsistent in the terms in which they are respectively expressed, but whether there is what might be called administrative incompatibility in the application of the enactments. Beyond these issues, however, is penal policy which, from a constitutional standpoint, raises the inquiry whether the federal authorities should have their way not only in what is prohibited but (and here lies the important factor) in what is permitted. In the field of penal legislation, this inquiry has been put on a formulary basis: Is the province seeking to complement or supplement the federal criminal law? An affirmative answer means invalidation of the provincial enactment, as much on grounds of initial incompetence of the provincial legislature as on grounds of paramountcy.[24]

## III

To deal with the "occupied field" doctrine as it arises in the exercise of the mutually exclusive powers of Parliament and provincial legislatures under sections 91 and 92, it is necessary to dispel a recurring confusion between the scope of provincial legislative power and the validity of provincial legislation.[25] Both questions are always involved when a constitutional challenge to provincial legislation is made in the light of existing federal legislation. Affirmation or denial of provincial legislative authority may very well be conditioned by the absence or presence of federal legislation, but from the standpoint of paramountcy the question of legislative power *vel non* must be judged in the assumed absence of federal legislation, even where such legislation is in fact present. There have been cases where, absent federal legislation, the courts have been inclined to a wider view of provincial legislative authority than might otherwise have been the case. The *Voluntary Assignments* case, one of the two cases mentioned by Lord Dunedin in the *Grand Trunk Railway Company* decision is illustrative.[26] There

[24] *Cf. Johnson* v. *A.-G. for Alberta*, *supra*, footnote 9; *St. Leonard* v. *Fournier* (1956), 3 D.L.R. (2d) 315, 115 Can. C.C. 366; *Rex.* v. *Lamontagne*, [1945] O.R. 606, [1945] 4 D.L.R. 161; *Regina ex rel. Barrie* v. *Stelzer* (1957), 15 D.L.R. (2d) 280, 24 W.W.R. (N.S.) 130, 119 Can. C.C. 305.

[25] Some of the confusion results from speaking of overlapping "powers" of Dominion and provinces, as if this raises the paramountcy problem. See, for example, Varcoe, Legislative Power in Canada (1954), pp. 47, 77. Even assuming that this kind of talk is admissible for purposes of preliminary appraisal of the relation of mutually exclusive powers, it has no necessary connection with paramountcy. Completely disparate powers would equally raise the issue. Marshall C.J. put the matter succinctly in *Gibbons* v. *Ogden*, *supra*, footnote 4, at p. 90, where he said that "all experience shows that the same measures, or measures scarcely distinguishable from each other, may flow from distinct powers; but this does not prove that the powers themselves are identical".

[26] *A.-G. for Ontario* v. *A.-G. for Canada*, *supra*, footnote 14.

the Judicial Committee upheld provincial voluntary assignments legislation, but recently in *Reference re Validity of the Orderly Payment of Debts Act (Alberta)*, Chief Justice Kerwin remarked in a reference to that case that "in my view it is doubtful whether in view of later pronouncements of the Judicial Committee it would at this date be decided in the same sense, even in the absence of Dominion legislation upon the subject of bankruptcy and insolvency".[27] On the other hand, in many cases the courts have been influenced in taking a narrower view of provincial legislative authority by reason of the exercise of federal power.[28] These not very remarkable (and in fact, quite expectable) results have produced an association of the paramountcy doctrine with two other constitutional principles, the ancillary (or necessarily incidental) doctrine and the trenching doctrine.[29] The former is a projection of the *Voluntary Assignments* case and looks to probable overriding federal legislation if and when enacted; the latter is a projection of the *Tennant* case and looks to the preclusion of provincial legislation when Parliament has legislated under its enumerated powers. Both of these principles seem to be heading for eclipse and deservedly so.[30] Their influence on paramountcy, however, is seen in the way they were blended to produce the statement on overlapping "domain" and "clear field" enunciated in the *Grand Trunk Railway Company* case.

More basic to the application of the Canadian "occupied field" or pre-emption principle has been the way in which the courts have excluded it where, to use Judson J.'s language in *O'Grady* v. *Sparling*, the competing provincial and federal enactments "deal with different subject-matters and are for different purposes". Similar utterances were made by Kerwin C.J.C. in the *Stephens* and *Smith* cases; they abound in judgments of the lower courts in these and other cases.[31] What is the significance of a

[27] [1960] S.C.R. 571, at p. 576, 23 D.L.R. (2d) 449, at p. 453.

[28] For example, *Johnson* v. *A.-G. for Alberta*, supra, footnote 9; *A.-G. Ont.* v. *Koynok*, [1941] 1 D.L.R. 548, [1940] O.W.N. 555, rev'd on other grounds [1941] 1 D.L.R. 554n, 75 Can. C.C. 105n.

[29] See Laskin, *op. cit.*, footnote 13, p. 83 *et seq.*

[30] *Ibid.*, and see the cases in footnote 22, *supra*.

[31] For example, see the judgment of the Ontario Court of Appeal in the *Smith* case: *Regina* v. *Prentice ex parte Smith*, [1959] O.R. 365, 21 D.L.R. (2d) 254; *Regina* v. *Wason* (1890), 17 O.A.R. 221; *Regina* v. *Stone* (1892), 23 O.R. 46. See also *McColl* v. *C.P.R.*, [1923] A.C. 126, 69 D.L.R. 593, [1922] 3 W.W.R. 859, relied on by Judson J. in *O'Grady* v. *Sparling*, *supra*, footnote 5. It was held in that case that a fatal accidents action in respect of the death of a federal railway employee, and brought under the combined effect of federal railway legislation and a provincial fatal accidents statute was barred by the provincial workmen's compensation statute. The Judicial Committee refused to read the provincial compensa-

judicial conclusion that federal and provincial enactments have different objects or different purposes? If this is merely an expression of the "aspect" principle, then such a conclusion has no necessary relation to paramountcy; the court may truly decide that there is no supersession or preclusion of provincial legislation but the reason must lie elsewhere.[32] There is cause to believe that the language of "different purposes" is descended from the early grappling with sections 91 and 92 when the Privy Council formulated the "aspect" doctrine as an answer to the dilemma of "overlapping powers", itself an inadmissible proposition in view of the mutually exclusive character of sections 91 and 92.[33] To assume or propound that paramountcy is avoided where different purposes or different objects are expressed by competing federal and provincial legislation, as if the avoidance of an overlap of powers is conclusive, is to confuse the issue of initial validity with the issue of the occupied field or operative validity in the face of federal legislation. To put the issue in those terms is to beg the very question for which it is offered as an answer.

Object or purpose may, of course, have a policy significance unrelated to any test of provincial or federal legislative power. When a province prohibits and penalizes careless driving, is it doing this for any different object or purpose than that actuating the Dominion when it prohibits and penalizes criminal negligence in the operation of a motor vehicle? Looking at all three cases under review here from this standpoint, how can it reasonably be said that different objects or different subject-matters are embraced by the federal and provincial statutes? Different purposes in the sense now being considered may be seen in *Rex* v. *Pee-Kay Smallwares Ltd.* where provincial liquor control legislation which defined denatured alcohol in more stringent terms than a federal revenue measure was none the less sustained.[34] The reason was that the federal measure related to the imposition of and the exemption

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tion statute as inapplicable to accidents giving rise to actions under the federal railway legislation, holding that the respective enactments "deal with different subject-matter", and that there was no conflict in a case where the Dominion Act (which itself was construed not to give dependents a right of action) did not apply. There is doubt today whether a province may properly cover federal railway employees by its workmen's compensation legislation; see Laskin, *op. cit.*, footnote 13, p. 475.

[32] *Cf. Hodge* v. *The Queen* (1883), 9 App. Cas. 117; *Gold Seal Ltd.* v. *Dominion Express Co. and A.-G. for Alberta* (1921), 62 S.C.R. 424, 62 D.L.R. 62, [1921] 3 W.W.R. 710.

[33] See, for a leading example, *Citizens Insurance Co.* v. *Parsons, supra,* footnote 16, at pp. 107-108; *Montreal* v. *Montreal Street Railway, supra,* footnote 23, at p. 343.

[34] [1947] O.R. 1019, [1948] 1 D.L.R. 235.

from excise duty on the manufacture of denatured alcohol, and was not concerned with regulation or prohibition of sale or consumption.[35] Unfortunately, the court spoke in traditional constitutional terms of purpose or object, but this did not conceal the difference in the policies of the two enactments. The court might none the less have applied a rather broad preclusion or preemption doctrine by deciding that it would not permit provincial regulatory legislation to interfere with sources of federal revenue; the province should not be permitted to forbid sale or consumption or use of substances from whose manufacture the federal government would derive revenue.[36] Understandably, the court refused to expand paramountcy to such a degree, and this was a determination which it was called upon to make only after being satisfied of the initial validity, in terms of constitutional purpose or object, of both the provincial and federal enactments. The paramountcy question was merely introduced by the decision that both pieces of legislation were competent; it was not determined by that decision.

## IV

Given legislation of a province and legislation of Canada which, independently considered, is valid, why should there be any occasion to speak of supersession or preclusion except in the case of conflict in their actual operation, as where the province purports to permit what Canada categorically prohibits? The *Local Prohibition* case made it clear that even potentiality of conflict was not enough to oust provincial legislation; there must be an operating incompatibility in the particular situation.[37] Once, however, one leaves the simple, or better, safe, haven of inconsistent operation, the test of paramountcy, if it is to have a wider ambit, becomes one of favouring or containing federal legislative policies.[38] To

[35] If the federal measure had any direct regulatory purpose, its validity would have been doubtful, to say the least: See *Canadian Federation of Agriculture* v. *A.-G. for Quebec*, [1951] A.C. 179, [1950] 4 D.L.R. 689.

[36] It had been held quite early that neither federal nor provincial legislative power was to be denied merely because its exercise might or would result in interfering with the sources of revenue of the other legislating authority: see *Russell* v. *The Queen, supra*, footnote 17, at p. 837; *A.-G. for Manitoba* v. *Manitoba Licence Holders' Association*, [1902] A.C. 73, at p. 79.

[37] *Supra*, footnote 14, at pp. 369-370. See also *Crown Grain Co.* v. *Day*, [1908] A.C. 504; *In re Silver Bros. Ltd., A.-G. for Quebec* v. *A.-G. for Canada, supra*, footnote 2.

[38] The cases have been far from articulate on this question, nor have the early text writers who, fairly mechanically, have been content to paraphrase the leading cases. Indeed, they have been unanimous in supporting the strict view of paramountcy expressed in the *Local Prohibition* case; their views are reproduced in Laskin, *op. cit.*, footnote 13, p. 97.

embark on such a sea is to be uncertain sometimes of one's destination, and it is hence easy to understand why even a final court should decide to fix the rule of paramountcy at its most manageable and demonstrable point, that of operating incompatibility. This may be the explanation of Judson J.'s terse proposition that where concurrent operation is possible there is no call to say that the field is occupied and thus suspend or set aside provincial legislation.

The simplicity of this principle is underlined in Canada in the fact that there is no constitutional protection against plural liability under provincial and federal legislation for the same act.[39] I do not speak only of civil liability and criminal liability, but of plural penal liability. It is not suggested that this is the basis of the rigid repugnancy doctrine expounded by Judson J. nor that it is itself a consequence of that doctrine. The British North America Act does not explicitly confer such constitutional protection, and certainly it would not be an invariable fruit of a more comprehensive application of paramountcy than the Supreme Court of Canada

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This view was also adopted by the Privy Council in respect of the concurrent exercise of their independent taxing powers by Dominion and province; it said in *Forbes* v. *A.-G. for Manitoba*, [1937] A.C. 260, [1937] 1 D.L.R. 289, [1937] 1 W.W.R. 167, that "the doctrine of the 'occupied field' applies only where there is a clash between Dominion legislation and provincial legislation within an area common to both". So far as it goes this proposition in its context is unexceptionable but there could, conceivably, be occasion for asserting federal paramountcy in case of competing claims to priority in tax collection.

In *Rex* v. *Thorburn* (1917), 41 O.L.R. 39, 39 D.L.R. 300, 29 Can. C.C. 329, where on the construction given by the court, there was incompatible operation of the competing federal and provincial liquor statutes, Masten J. prefaced his discussion of the particular issues by declaring that "the Court ought not to examine the field of legislation with a microscope to find out whether every particular corner of the field has been fully occupied by the Dominion statute but rather should hold that if the Dominion has legitimately entered the field, it should be deemed to have occupied it generally".

In *Clyde Engineering Co. Ltd.* v. *Cowburn* (1926), 37 C.L.R. 466, at p. 489, Isaacs J. was of opinion that the *Grand Trunk Railway Company* case, *supra*, footnote 19, was in line with the following Australian view of "inconsistency": "If a competent legislature expressly or impliedly evinces its intention to cover the whole field, that is a conclusive test of inconsistency where another legislature assumes to enter to any extent upon the same field." This is a reading which has not been borne out by the course of decision in the higher Canadian courts.

[39] See, for example, *Rex* v. *Kissick*, [1942] 3 D.L.R. 431, [1942] 2 W.W.R. 418, 78 Can. C.C. 34 (acquittal on charge under federal Excise Act no bar to conviction under provincial liquor control statute). In *Rex* v. *Cooper*, [1925] 2 W.W.R. 778, 35 B.C.R. 457, it was held to be contrary to "the accepted principles of our law and contrary to the B.N.A. Act" to make the same act an offence under federal and provincial statutes and expose a person to double liability, but this was pushed not so much for its own sake as to support a conclusion of federal paramountcy. The assertion that exposure to double liability for the same act under federal and provincial legislation is contrary to the British North America Act was a flat, undocumented statement.

seems presently disposed to permit. Even in a unitary state, leaving to one side questions of *autrefois acquit* or *autrefois convict*, a particular act may give rise to multiple charges under separate penal statutes.[40] This is contemplated at the level of federal legislation by section 11 of the Canadian Criminal Code which, subject to a contrary intention in the applicable enactments, limits liability to punishment to one offence.[41]

*O'Grady* v. *Sparling* in fact invites concurrent federal and provincial charges for the same act. Judson J. agreed that "the circumstances of a particular case may be within the scope of both [federal and provincial] provisions and in that sense there may be an overlapping". But he went on to say "that does not mean that there is conflict so that the court must conclude that the provincial enactment is suspended or inoperative".[42] What it does mean, however, is that, premising separate provincial and federal administration of their respective penal enactments, one authority would have to yield to the other in competing claims to try the accused at a particular time. True enough, this danger of an administrative impasse or struggle for priority over the body of the accused is generally unlikely in Canada where the police and local Crown Attorney are charged with enforcement of federal criminal law as well as provincial penal law.[43] It is not uncommon for separate charges of criminal negligence and careless driving to be

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[40] See, for example, *The King* v. *Hogan*, [1960] 3 All E.R. 149.

[41] The section reads: "Where an act or omission is an offence under more than one Act of the Parliament of Canada, whether punishable by indictment or on summary conviction, a person who does the act or makes the omission is, unless a contrary intention appears, subject to proceedings under any of those Acts but is not liable to be punished twice for the same offence." For an application of this provision, see *Rex* v. *Quon*, [1948] S.C.R. 508, [1949] 1 D.L.R. 135; *Regina* v. *Siggins*, [1960] O.R. 284, 127 Can. C.C. 409.

In the United States, although the Fifth Amendment double jeopardy clause prohibits successive federal prosecutions for the same offence and, indeed, for the same act, and although the Fourteenth Amendment and state constitutional provisions similarly proscribe successive state prosecutions, it has been held that acquittal of an accused on a federal charge did not bar a subsequent state trial based on the same acts (*Bartkus* v. *Illinois* (1959), 359 U.S. 121, 79 Sup. Ct. 676; rehearing denied, 360 U.S. 907, 79 Sup. Ct. 1283) and that a prior state conviction did not bar a subsequent federal prosecution for the same acts (*Abbate* v. *U.S.* (1959), 359 U.S. 187, 79 Sup. Ct. 666). Justice Black dissenting in each case (with Chief Justice Warren and Justice Douglas concurring) suggested a pre-emption doctrine by which Congress could protect the paramount federal interest: see Note, The Supreme Court: 1958 Term, (1959), 73 Harv. L. Rev. 84, at pp. 157-159. See, generally, Grant, Successive Prosecutions by State and Nation (1956), 4 U.C.L.A. L. Rev. 1.

[42] *Supra*, footnote 5, at pp. 811 (S.C.R.), 160 (D.L.R.),376 (W.W.R.).

[43] See, for example, The Police Act, R.S.O., 1960, c. 298, s. 47; Crim. Code, s. 2(30); The Crown Attorneys Act, R.S.O., 1960, c. 82, s. 14.

laid against an accused as a result of the one incident or accident, with the Crown electing to proceed, as a rule, on the more serious charge. The magistracy before which such cases are tried is also the same for the federal as for the provincial charges, and this because Parliament has invested the provincially-appointed magistrates with adjudicative powers under the federal Criminal Code.[44] If a conviction is registered on the more serious federal charge, or if there is an acquittal, there is no obstacle to prosecution on the lesser provincial charge because, being a provincial infraction, it is not an included offence within the Criminal Code provisions in that respect, and it is not caught by section 11 of the Criminal Code.[45] Only the constitutional principle of paramountcy could preclude such a sequential proceeding. In practice, it is not customary to proceed with the provincial offence after trial on the federal charge, probably because Crown prosecutors as well as the defence bar regard careless driving and criminal negligence in the operation of a motor vehicle as involving alternative rather than cumulative penal sanctions, though of varying degrees of gravity.

Looking at the matter from the standpoint of law enforcement, or administration of penal policy respecting motor vehicle operation, *O'Grady* v. *Sparling* may be said to yield a practical result. The federal policy having been established for all of Canada at a certain level of "wickedness", the provinces are left to decide how much stricter the control on drivers should be. The argument that because the federal standard has been fixed at a certain height it would be a meddling in federal policy to lower the level of culpability (that is, impose stricter liability) can only be convincing (apart from its constitutional implications) if it could be shown that confusion in administration would result. In fact, there is none where the provincial offence begins at the point where the federal offence stops. The same analysis and observation may be made in respect of the issue in the *Stephens* case respecting failure to remain at or to return to the scene of an accident; there too, the federal standard, fixed at the point of "intent", leaves play for the operation of a stricter provincial policy in which intent is immaterial.

The position is different, however, under the competing enactments involved in *Smith* v. *The Queen*. The provincial Securities Act provision stipulated an "intent" element as an ingredient of

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[44] See Crim. Code, s. 2(22), defining "magistrate".

[45] Crim. Code, ss. 518 and 569; and see *Rex* v. *Louie Yee*, [1929] 2 D.L.R. 452, [1929] 1 W.W.R. 882, 24 Alta. L.R. 16.

the offence as did the Criminal Code section which was interposed as a constitutional bar. The Supreme Court of Canada had more difficulty with this case than with either *O'Grady* v. *Sparling* or *Stephens* v. *The Queen*, but in the end only one other member of the court joined the two who had dissented in both the latter cases.[46] Kerwin C.J.C. who spoke for the majority in the *Smith* case added, however, another confusing element to the paramountcy story by fastening on to the express provincial power under section 92(15) of the British North America Act to impose penal sanctions. In his view, "since the Provincial Legislature has power to prescribe certain information to be supplied to the [Securities] Commission and since the Legislature has power to provide for punishment of infractions, the enactments of the Legislature and of Parliament may co-exist".[47] Two questions arise for further exploration. First, to what degree may a province create offences in fields (using this term broadly) where federal legislation has been enacted; and, second, is the validity of the provincial legislation affected by the nature or severity of the penalty imposed as a provincial sanction?

The expansive scope of the federal criminal law power has forced Canadian courts to refine (or "constitutionalize") their conception of penal legislation lest the mere existence of the federal authority choke the enforcement of provincial regulatory schemes.[48] This became particularly true once the Privy Council permitted federal invocation of the criminal law as a means of enforcing desirable economic policies. In the *P.A.T.A.* case in which this was done, the Privy Council went to an untenable extreme in defining the scope of the criminal law power:[49]

> Criminal law connotes only the quality of such acts or omissions as are prohibited under appropriate penal provisions by authority of the State. The criminal quality of an act cannot be discerned by intuition; nor can it be discovered by reference to any standard but one: Is the act prohibited with penal consequences?

[46] This was Ritchie J. who distinguished *O'Grady* v. *Sparling* because "the impugned provisions of the Ontario Securities Act . . . have the combined effect when read in the context of the statute as a whole of creating an offence which is substantially the same as that for which provision is made by s. 343 of the Criminal Code and to that extent they are inoperative". His test is thus a different one from that expressed by Martland J. in the same case.

[47] *Supra*, footnote 7, at pp. 781 (S.C.R.), 229-230 (D.L.R.).

[48] The earliest leading case declaring the wide scope of the criminal law power was *A.-G. for Ontario* v. *Hamilton Street Railway*, [1903] A.C. 524, 7 Can. C.C. 326; and see also *Prov.-Sec. of P.E.I.* v. *Egan*, *supra*, footnote 9, at pp. 401 (S.C.R.), 308 (D.L.R.).

[49] *P.A.T.A.* v. *A.-G. for Canada*, [1931] A.C. 310, at p. 324, [1931] 2 D.L.R. 1, at p. 9, [1931] 1 W.W.R. 552, at p. 560.

This definition obviously posed a serious question of the survival possibilities of section 92(15) of the British North America Act, authorizing the provinces to legislate in relation to "the imposition of punishment by fine, penalty or imprisonment for enforcing any law of the Province made in relation to any matter coming within any of the classes of subjects enumerated in [section 92]". When the Privy Council returned to the issue a few years later, it recognized the dilemma and relaxed its approach to the criminal law power to make room for exercise of provincial competence under section 92(15). But even so, it limited its yielding by asserting that "there seems to be nothing to prevent the Dominion, if it thinks fit in the public interest, from applying the criminal law generally to acts and omissions which so far are only covered by provincial enactments".[50]

Was the Judicial Committee giving another version of the paramountcy doctrine specially geared to penal legislation? It is difficult to say, but even if it did, it left the application unexplored as well as undefined. Small wonder, however, that even so knowledgeable and sophisticated a judge on constitutional matters as Chief Justice Duff exhibited his perplexity in *Provincial Secretary of P.E.I.* v. *Egan*.[51] This he did in two consecutive utterances which, give a test of paramountcy at once more favourable to federal ascendancy than even the proposition in the *Grand Trunk Railway* case and less favourable to provincial competence than that adumbrated in *O'Grady* v. *Sparling*. Referring to the federal criminal law power, he remarked that "to the extent, at least, to which matters *prima facie* provincial are regulated by Dominion legislation in the exercise of this authority, such matters are excepted from those committed to the provincial legislatures by section 92; and, accordingly, the legislative authority of the provinces in relation to these matters is suspended".[52] He then went on in the following vein:[53]

> In every case where a dispute arises, the precise question must be whether or not the matter of the provincial legislation that is challenged is so related to the substance of the Dominion criminal legislation as to be brought within the scope of criminal law in the sense of section 91. If there is repugnancy between the provincial enactment and the Dominion enactment, the provincial enactment is, of course, inoperative. It would be most unwise, I think, to attempt to lay down any

[50] *A.-G. for British Columbia* v. *A.-G. for Canada*, [1937] A.C. 368, at p. 376, [1937] 1 D.L.R. 688, at p. 690, [1937] 1 W.W.R. 317, at p. 319.
[51] *Supra*, footnote 9.
[52] *Ibid.*, at pp. 402 (S.C.R.), 309 (D.L.R.).
[53] *Ibid.*

rules for determining repugnancy in this sense. The task of applying the general principles is not made less difficult by reason of the jurisdiction of the provincial legislatures under the fifteenth paragraph of section 92 to create penal offences which may be truly criminal in their essential character.

This acknowledgment of the supremacy of the criminal law power when translated into legislation has influenced the development of a line of cases in which provincial legislation has been struck down on the well-known principle of exclusiveness without reaching the question of paramountcy.[54] *Regina* v. *Yolles*, involving similar legislation and the same questions as those that confronted the courts in *O'Grady* v. *Sparling* is strikingly illustrative in the strong judgment of Chief Justice McRuer in the Ontario High Court.[55] The Supreme Court of Canada in *O'Grady* v. *Sparling* doubted the historical foundation of the conclusion of McRuer C.J.H.C. that what the province purported to do in its highway traffic legislation was to revive, in modified form, an old common-law offence of causing death by mere negligence; modified because it was extended to all cases of careless driving, whether death ensued or not. Judson J. in the *O'Grady* case preferred the historical conclusion of English text writers that the common law knew no crime whose only ingredient was inadvertence causing harm;[56] and he proceeded to adopt, for purposes of construction of the competing provincial and federal legislation before him, the suggested distinction of those writers between inadvertent and advertent negligence; and he applied for constitutional purposes the conclusion that this was a distinction in kind and not merely in degree.[57]

This constitutional conclusion only carried the matter to the point of support for the initial validity of the provincial enactment.

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[54] *Re Morrison and Kingston*, [1938] O.R. 21, at p. 27; *A.-G. for Ontario* v. *Koynok*, *supra*, footnote 28; *St. Leonard* v. *Fournier*, *supra*, footnote 24.

[55] [1958] O.R. 786, 16 D.L.R. (2d) 97, rev'd [1959] O.R. 206, 19 D.L.R. (2d) 19.

[56] See Kenny, Outlines of Criminal Law (17th ed. by J. W. C. Turner, 1958), p. 34; Glanville Williams, The Criminal Law (2nd ed., 1961), Chap. 3, p. 100 *et seq.*

[57] The competing legislation in *O'Grady* v. *Sparling* (*supra*, footnote 5) was as follows: Section 55(1) of the Highway Traffic Act, R.S.M., 1954, c. 112, provides that "every person who drives a motor vehicle or a trolley bus on a highway without due care and attention or without reasonable consideration for other persons using the highway is guilty of an offence". Criminal Code, ss. 191(1) and 221(1) provide respectively that "everyone is criminally negligent who (a) in doing anything, or (b) in omitting anything that it is his duty to do, shows wanton or reckless disregard for the lives or safety of other persons"; and "everyone who is criminally negligent in the operation of a motor vehicle is guilty of (a) an indictable offence . . . or (b) an offence punishable on summary conviction".

It merely set the stage for the paramountcy or repugnancy or overlapping argument; it could not (although some of the language of the majority in the *O'Grady* case suggested that it did) resolve that argument in provincial favour. Indeed, the dissents of Roach and Schroeder JJ.A. in the Ontario Court of Appeal in the *Yolles* case[58] and the matching dissent of Cartwright J. (Locke J. concurring) in the *O'Grady* case show how close the provincial legislation came to encroachment on the federal criminal law power; and, the very reasons that Cartwright J. gave for holding the provincial legislation to be invalid as an initial question assume even more formidable proportions when related to the application of the occupied field doctrine. He said, *inter alia:*[59]

> In my opinion, while the types of negligence dealt with differ, the true nature and character of the legislation contained in s. 55(1) of the Manitoba Act does not differ in kind from that of the legislation contained in sections 191(1) and 221(1) of the Criminal Code. Each seeks to suppress in the public interest and with penal consequences negligence in the operation of vehicles, each is designed for the promotion of public safety, each seeks to prevent substantially the same public evil, each belongs to the subject of public wrongs rather than to that of civil rights, each makes negligence a crime although one deals with inadvertent negligence and the other with advertent negligence.

This analysis requires an affirmative answer to the question asked by Duff C.J.C. in the *Egan* case, namely, "whether . . . the matter of the provincial legislation that is challenged is so related to the substance of the Dominion criminal legislation as to be brought within the scope of criminal law in the sense of section 91". The issue is carried further by Cartwright J. in two supporting propositions: first, "by necessary implication the [federal enactment] says not only what kinds or degrees of negligence shall be punishable but also what kinds or degrees shall not"; and, second, "it is not within the power of the provincial legislature to remedy what it regards as defects or to supply what it regards as unwise omissions in the criminal law as enacted by Parliament".[60]

These two propositions presuppose that it would have been open to the Parliament of Canada to make its criminal negligence prohibition strict enough to cover the broader liability imposed under the provincial enactment. The majority in *O'Grady* v. *Sparling* concede this, but their conclusion was that there may be two complementary policies operative in the field of protection

[58] [1959] O.R. 206, at p. 230 *et seq.*, 19 D.L.R. (2d) 19, at p. 36 *et seq.*
[59] *Supra*, footnote 5, at pp. 818 (S.C.R.), 152 (D.L.R.), 367 (W.W.R.).
[60] *Ibid.*, at pp. 821 (S.C.R.), 154 (D.L.R.), 369-370 (W.W.R.).

of the public from the irresponsible driver.[61] In policy terms, the federal penal standard could not be interpreted as immunizing all driving which did not reach it. A homelier illustration of the same approach was given by Porter C.J.O. in *Regina* v. *Yolles*, as follows:[62]

> If for instance the Parliament were to create a crime, which it could do, of driving beyond the speed of 80 m.p.h. this would have the effect of suspending all provincial speed limits, on the ground that Parliament had entered the field of speed limits, and a speed in excess of the provincial limit of 50 m.p.h. was inclusive of the greater limit. There is no authority for a construction that would lead to such a result.

Laying aside any doubt (and it is not idle) whether the federal criminal law power extends to the mere fixing of speed limits,[63] there is no absurdity in the rejected construction if the court could satisfy itself that a single policy was desirable in this matter and that consequently the province could not tighten the limit fixed by Parliament. On the illustration given by Porter C.J.O., could the province fix the speed limit at eighty miles per hour if Parliament had validly fixed it at fifty miles per hour? The same kind of question may be posed in respect of negligent driving: if Parliament had competently made inadvertent negligence a crime, would it be open to the province to make advertent negligence a penal offence

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[61] The logic of Judson J.'s view in *O'Grady* v. *Sparling* would equally support the conclusion that careless driving could be concurrently both a federal and a provincial offence. This view would overturn many earlier lower court cases which in comparable situations involving other legislation had given effect to federal paramountcy: see *In re Churchill*, [1919] 2 W.W.R. 541 (Man.); *Rex* v. *Magee*, [1923] 3 W.W.R. 55, 17 Sask. L.R. 501; *Rex* v. *Forhan* (1927), 1 W.W.R. 689, 48 Can. C.C. 86 (Alta.); *Rex* v. *Gallant*, [1929] 1 D.L.R. 671 (P.E.I.); *Rex* v. *Ottenson*, [1932] 2 D.L.R. 449, [1932] 1 W.W.R. 36 (Man.).

See also *Rex* v. *Garvin* (1908), 7 W.L.R. 783 (B.C.), giving paramountcy to federal purity and adulteration legislation; it should be compared with *Regina* v. *Stone*, *supra*, footnote 31 and *Regina* v. *Wason*, *supra*, footnote 31.

In *Rex* v. *Lichtman* (1923), 54 O.L.R. 502, 42 Can. C.C. 1, it was held that provincial legislation prohibiting, without an intent element, an act prohibited by the federal Criminal Code, where intent was an ingredient, was invalid as an attempt to amend the federal criminal law.

[62] [1959] O.R. 206, at p. 224, 19 D.L.R. (2d) 19, at p. 35.

[63] Certainly speed limits could not be prescribed federally as a means of traffic control; and the courts have been quite sensitive to the colourable use of the criminal law power: see *A.-G. for Ontario* v. *Reciprocal Insurers*, [1924] A.C. 328, [1924] 1 D.L.R. 789, [1924] 2 W.W.R. 397. As exhaustive a definition of the scope of the criminal law power as there is was given by Rand J. in the *Margarine* case, [1949] S.C.R. 1, at p. 50, [1949] 1 D.L.R. 433, at p. 473, where he promulgated the following test: "Is the prohibition . . . enacted with a view to a public purpose which can support it as being in relation to criminal law? Public peace, order, security, health, morality: these are the ordinary though not exclusive ends served by that law . . . ."

under its highway traffic legislation? Would these be cases in which, as the majority said in *O'Grady* v. *Sparling*, "both provisions can live together and operate concurrently"? Surely, even the narrow principle of the occupied field espoused by the Supreme Court in the three cases under review would embrace the suggested situations on the ground that the paramount legislature had made it clear, by fixing a strict standard of liability, that a looser standard was undesirable! And yet there is the possible formal position that multiple penal liability for the same conduct under separate federal and provincial enactments is not prohibited; indeed, the case may be susceptible only of federal prosecution because the facts do not meet the test of the (hypothetical) less stringent (that is more serious) provincial statute. On this view, it should make no difference if the federal enactment prohibited the more serious as well as the less serious misconduct of a driver, measuring the different offences by the severity of the penalties. But how can this be a tenable position? It is one thing to say (as in *O'Grady* v. *Sparling*) that a province should be allowed to reach conduct which is not caught by the federal standard; it is a far different thing to permit a province to impose liability where less serious misconduct is already caught by Parliament so that the more serious misconduct under the provincial enactment would *à fortiori* be so caught.

To return to the issue as presented in *O'Grady* v. *Sparling*, is there anything in the contention of Cartwright J. that a province may not fill the gaps left in the federal criminal law? The authorities that come to mind in this connection are the slot machine cases, and especially the judgment of the Supreme Court of Canada in *Johnson* v. *A.-G. Alberta* where the court split four to three against the validity of a provincial enactment which, purporting to be an exercise of authority in relation to "property and civil rights in the province", provided for the confiscation (without personal penalty) of slot machines which were defined, *inter alia*, to include contrivances for playing games of chance already covered by the Criminal Code.[64] The minority, very archly, held that the legislation was not aimed at gambling and emphasized that no offence was created. The history of provincial slot machine legislation was itself an adequate reply;[65] and the minority's choice of mechanical constitutional formulae to buttress its view that the provinces had a stake in bolstering federal gambling legislation

[64] [1954] S.C.R. 127, [1954] 2 D.L.R. 625.

[65] The legislative history is set out in the judgment of Locke J. in the *Johnson* case; and see also *Rex* v. *Lamontagne*, [1945] O.R. 606, [1945] 4 D.L.R. 161, invalidating the Ontario Gaming and Betting Act, 1942.

was dictated by the fact that it could not fall back on any regulatory base, such as highway control on which *O'Grady* v. *Sparling* was rested.

There were seizure provisions in the Criminal Code applicable to gambling machines, and while these suggested that the provincial statute duplicated the federal sanctions, three of the majority judges were of the opinion that the province had encroached on the federal criminal law power, apart from any question of occupation of the field. But it was clear that in addition to the moral aspect of gambling which made it submissive only to federal power, the very existence of federal legislation was a compelling factor in the denial of provincial power. Rand J. alone of the majority put the case in the perspective of policy and principle which have a relevance for the cases under examination. He said:[66]

> . . . the Code has dealt comprehensively with the subject matter of the provincial statute. An additional process of forfeiture by the Province would both duplicate the sanctions of the Code and introduce an interference with the administration of its provisions. Criminality is primarily personal and sanctions are intended not only to serve as deterrents but to mark a personal delinquency. The enforcement of criminal law is vital to the peace and order of the community. The obvious conflict of administrative action in prosecutions under the Code and proceedings under the statute, considering the more direct and less complicated action of the latter, could lend itself to a virtual nullification of enforcement under the Code and in effect displace the Code so far by the statute. But the criminal law has been enacted to be carried into effect against violations, and any local legislation of a supplementary nature that would tend to weaken or confuse that enforcement would be an interference with the exclusive power of Parliament.
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> The penalty of the [provincial] Act, in duplicating foreiture, is supplementing punishment. That is not legislating either "in relation to" property or to a local object.

In his reference to administrative dualism and supplementary punishment, Rand J. raises issues which are of direct import for the problem raised in *O'Grady* v. *Sparling*, as well as in *Stephens* v. *The Queen* and *Smith* v. *The Queen*. There are, however, distinctions —whether of substance or not is the crucial question—between the case before him and the first two of the three cases aforementioned; and the distinctions are pointed up by his conclusion in the *Johnson* case that "since the machines or devices struck at by the [provincial] statute are the same as those dealt with in

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[66] *Supra*, footnote 9, at pp. 130 (S.C.R.), 635 (D.L.R.).

similar manner by the Code, it is sufficient to say that the statute is inoperative".[67]

Similarity in terms of substance and penalty, or at least in terms of substance alone, was not before the Supreme Court majority in *O'Grady* v. *Sparling* and *Stephens* v. *The Queen* since, as a matter of construction, they concluded that the provincial and federal offences were different in kind. Similarity for that majority would probably mean that the enactments must be identical. It had a broader meaning for the minority in those cases which viewed the matter from the standpoint of the legislative problem involved and not the legislative treatment of the problem. Application of the paramountcy doctrine to a case of identical provincial and federal enactments came before the Supreme Court of Canada in *Home Insurance Co.* v. *Lindal and Beattie* where it was held that provincial motor vehicle legislation making it an offence for an intoxicated person to drive was superseded by a subsequently-enacted federal Criminal Code provision which made it an offence for a person to drive while intoxicated.[68] The provincial enactment became inoperative because it was "legislation in the same field". Does this mean that the court was applying a test of paramountcy based on the concurrence of legislation on the same problem, for instance drunk driving, or was its expression of principle geared only to the identity of treatment? If the latter there is no necessary inconsistency with the actual situation in *O'Grady* v. *Sparling*. However, even this position of federal paramountcy only in case of identical enactments goes too far for Martland J. who, although a member of the majority in *O'Grady* v. *Sparling*, wrote a separate concurring judgment in *Smith* v. *The Queen* where he gave the paramountcy doctrine its narrowest possible operation by making the test whether there is "conflict in the sense that compliance with one law involves breach of the other".[69]

Provincial legislation can never be supported by reference only to its penal character.[70] True enough, federal legislation does not justify itself merely because a penalty is attached to a forbidden

[67] *Ibid.*, at pp. 139 (S.C.R.), 636 (D.L.R.).
[68] *Supra*, footnote 9.
[69] *Supra*, footnote 7, at pp. 800 (S.C.R.), 246 (D.L.R.).
[70] See *Rex* v. *Nat Bell Liquors Ltd.*, [1922] 2 A.C. 128, at p. 138, 65 D.L.R. 1, at p. 8, [1922] 2 W.W.R. 30, at p. 39; *Regina* v. *Lawrence* (1878), 43 U.C.Q.B. 164, at pp. 174-175. It was suggested in *Regina* v. *Frawley* (1882), 7 O.A.R. 263, at p. 269, that even if section 92(15) of the British North America Act (respecting "the imposition of punishment by fine, penalty or imprisonment for enforcing any [competent] law of the Province . . .") were not spelled out, such a power would necessarily exist.

act, but the penal prohibitory quality of a federal enactment of itself goes a long way to provide a basis for its claim to be an exercise of the federal criminal law power.[71] This is not so in the case of a provincial statute. It is this at least which marks the difference between the invocation of section 92(15) and section 91(27) of the British North America Act. The penalty or other enforcement provisions of a provincial enactment can only be related to an object to which the province may otherwise competently address itself; and although the sanctions will not add anything by way of support of validity, they may conceivably provide support for a charge of invalidity. There has been no case, however, in which the sanctions of a provincial statute have been of such a nature as to render it invalid without the invalidity being also (and, indeed, mainly) a consequence of its unauthorized object. Yet, this having been said, it is not difficult to appreciate that the very existence of a provincial power to enforce otherwise valid legislation by appropriate penalties could have its reaction in a broad view of paramountcy in the general field of penal legislation. This, however, has not been the case, nor have provincial penal provisions been regarded as alone pointing up the colourable nature of the enactments of which they are part.[72]

This issue has a particular relation to provincial regulatory statutes which are founded on a licensing system, as is the case with highway traffic legislation and securities regulation. In the *Egan* case, for example, it was the withdrawal of a licence that was the sanction to which constitutional objection was taken unsuccessfully. Premising (as one must for present purposes) the initial validity of a provincial licensing Act, it is difficult to see how any question of occupation of the field or pre-emption could arise by reason only of conditioning the retention or renewal of a licence on certain acts or abstentions.[73] Where, however, the prov-

[71] See footnotes 48, 49 and 50, *supra*. The *Reciprocal Insurers* case, *supra*, footnote 63, illustrates the proposition that something more than a penalty attached to a forbidden act is required to support federal legislation under the criminal law power.

[72] Thus, it has been held that it is competent to a province to impose imprisonment with hard labour (*Hodge* v. *The Queen*, *supra*, footnote 32); to provide for forfeiture of property (*Rex* v. *Nat Bell Liquors Ltd.*, *supra*, footnote 70); to apply a closing order to property (*Bedard* v. *Dawson and A.-G. for Quebec*, [1923] S.C.R. 681, [1923] 4 D.L.R. 293); to impose both a fine and imprisonment (*Rex* v. *Shaw*, [1920] 3 W.W.R. 611, 54 D.L.R. 577); to impose a fine for non-compliance with a valid administrative order (*Toronto Railway Co.* v. *Toronto*, [1920] A.C. 446, 51 D.L.R. 69, [1920] 1 W.W.R. 755); and even to provide for a minimum term of imprisonment without specifying a maximum (*Rex* v. *Plant* (1906), 37 N.B.R. 500).

[73] Even if the conditioning event be non-violation of the federal

ince is not content to rest its sanctions on the withholding or cancellation of licences but imposes only or, additionally, a personal penalty (apart from the case where a penalty is prescribed for operating or acting without a required licence), the existence of related or parallel federal legislation whose sanction is generally a personal penalty must be put into the scales of judgment on the question under review.

In exercising judgment, it is worth noting that the federal criminal law power has occasionally been relied on to support by its stark prohibitions a desirable policy, whose full development can only be realized under a regulatory scheme which has been considered to fall within provincial competence. This has been true in the field of labour relations, and also in connection with protection of investors against false prospectuses. In 1939, a few years before compulsory collective bargaining legislation began to take shape in the provinces, Parliament enacted what is now section 367 of the Criminal Code, making it a punishable offence for an employer to engage in the ordinary unfair practices directed against union organization or membership.[74] With the advent of provincial collective bargaining legislation the same unfair practices have been covered and enforced through various sanctions, one of which is prosecution as summary conviction offences.[75] Accepting that the federal prohibition was a valid exercise of the criminal law power, the situation is one of similar treatment of a similar problem. Are we to say that the provincial legislation is precluded in so far as it makes offenders liable to prosecution? Is it a sufficient justification for an affirmative answer to say that the provinces should limit their concern with unfair practices to administrative remedies, as, for example, cease and desist orders or by taking such practices into account in certification or decertification proceedings? It has been held that there is no constitutional objection to provincial labour relations legislation which covers the same ground as section 367 of the Criminal Code, and that exposure of an employer to double liability does not bring in the principle of paramountcy.[76] It is, however, a fair conclusion that Parliament

Criminal Code: see *Lymburn* v. *Mayland*, [1932] A.C. 318, [1932] 2 D.L.R. 6, [1932] 1 W.W.R. 578. This assumes, of course, that the substantive criminal act is prescribed and litigated under the Criminal Code. The provinces cannot use their licensing powers as a means of defining and punishing offences which are criminal in the constitutional sense. *Cf. Re Schepull and Bekeschus*, [1954] O.R. 67, [1954] 2 D.L.R. 5.

[74] Originally enacted as Crim. Code, s. 502A by S.C., 1939, c. 30, s. 11.

[75] *E.g.*, Labour Relations Act, R.S.O., 1960, c. 202, ss. 50 and 60.

[76] *Couture* v. *Lauzon School Commrs.*, [1950] Que. S.C. 201, 97 Can. C.C. 218.

covered the field of unfair labour practices from a penal standpoint and, short of a repeal of the federal enactment, only a narrow conception of paramountcy could save the comparable provincial penal provisions.

The same questions and conclusions apply to truthful disclosure requirements in respect of prospectuses or financial statements. Federal control in this area through the criminal law power goes back almost to Confederation, while provincial securities legislation embracing it as an offence is much more recent.[77] It is clear from *Smith* v. *The Queen* that at the level of personal penalty through prosecution the prohibitions of the Criminal Code, section 343, covered the same ground as sections 38(1)(a) and 63(1)(d) and (e) of the then Ontario Securities Act. One tenuous distinction could be and was seized on: although both federal and provincial enactments required proof of a knowing responsibility for falsity, the Criminal Code additionally specified that it must be "with intent to induce persons [*inter alia*] to become shareholders of a company". This, in the light of the provincial stipulation that a purchaser of securities shall be deemed to have relied on the representations in a filed prospectus, is hardly a basis for finding an accord with the rulings in *O'Grady* v. *Sparling* and *Stephens* v. *The Queen*. The dissenting judges in the *Smith* case are surely correct in their implicit conclusion that the Supreme Court majority was applying a narrower test of paramountcy (as Martland J. in effect conceded) than that which could be drawn from the former two cases. On the basis of this test, the Supreme Court's position in *Home Insurance Co.* v. *Lindal and Beattie* must be considered as overruled.

## V

From the time that the paramountcy principle was expounded in the *Local Prohibition* case, and restated in different terms in the *Grand Trunk Railway Company* case, there has been no general examination of it in any Privy Council or Supreme Court of Canada judgment.[78] The approach has been particularist, with no discernible concern for ramifications. In the lower courts in Canada,

[77] See Larceny Act, S.C., 1869, c. 21, s. 85. For the history of Canadian securities legislation, see Williamson, Securities Regulation in Canada (1960), ch. 1.

[78] What one gets in the cases are such unhelpful generalities as that of Newcombe J. in *Reference re Fisheries Act, 1914*, [1928] S.C.R. 457, at p. 471: "There is not infrequently a margin within which either legislation may operate . . . so long as the field is clear. But the Dominion authority when exercised is paramount." It was in this case, on appeal, that Lord Tomlin delivered his four summary propositions.

the most extensive surveys have been by the late Egbert J. in *Re Regina* v. *Dickie*, *Re Regina* v. *Pomerleau*[79] and by Porter C.J.O. in *Regina* v. *Yolles*,[80] and it is evident that for the former the doctrine of the occupied field is a wider one than for the latter. So it was for the Ontario Court of Appeal (differently constituted than in the *Yolles* case) in *Re Regina* v. *Dodd*,[81] now overruled in *O'Grady* v. *Sparling*. In the *Dickie* and *Pomerleau* cases, the court brought the "conflict" and "similarity" tests into accord by making similarity or substantial identity of provincial and federal legislation an instance of conflict. Neither conflict in its strict sense nor identity in reference to legislation go as far in favour of federal supremacy as would be the case if the test were "occupation of the field" in the sense of dealing with the same problem, although not in an inconsistent or identical way.

The case law does not support this last-stated view of paramountcy. This is not "overlapping" nor is this a case where "the two legislations meet", within the meaning of Lord Tomlin's fourth proposition in the *Fish Canneries* case. If the origins of a proposition have anything to do with its meaning, it is a fact that *Tennant* v. *Union Bank of Canada*, which undergirded that proposition, is an illustration of incompatible federal and provincial legislation[82]; it is in this context that Lord Dunedin in the *Grand Trunk Railway Company* case asserted federal supremacy when federal and provincial legislation "meet". Lord Dunedin's (and Lord Tomlin's adopted) principle was invoked in the same context of inconsistent operation when the courts were called upon to consider competing schemes of priority of creditors in a bankruptcy in *A.-G. Quebec and Royal Bank of Canada* v. *Larue and A.-G. Canada*.[83] Even if the schemes were substantially or exactly similar, or, if what was involved were competing provincial and federal preference provisions of an identical character, federal distribution and administration would have to prevail because it would be impossible to deal twice with the same set of creditors' claims. In this case there would be administrative inconsistency or

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[79] [1955] 2 D.L.R. 757, 13 W.W.R. 545.

[80] *Supra*, footnote 55.

[81] [1957] O.R. 5, 7 D.L.R. (2d) 436. This case concerned the validity of provincial "remain at or return to the scene of the accident" legislation which was held to be inoperative in view of Crim. Code, s. 221(2). The *Stephens* case (*supra*, footnote 6) now governs in this area.

[82] [1894] A.C. 31. In this case, on the facts, provincial legislation did not give a negotiable character to warehouse receipts held by a bank as security but this quality was accorded to a holding bank under federal legislation.

[83] [1928] A.C. 187, [1928] 1 D.L.R. 945, [1928] 1 W.W.R. 534.

conflict. The result surely could not depend on whether proceedings were initiated first under the provincial or the federal enactment. Obedience could be yielded to only one of the enactments, and this would result in removing the subject-matter from the grasp of the other; hence, the rule of federal paramountcy must necessarily apply.[84]

Is this view applicable to the area of penal legislation? It is worth notice that in none of the three principal cases under study here was there any discussion of the administration and penalty aspects of the concurrence of federal and provincial legislation. Indeed, discussion of these matters has been singularly absent in the Canadian cases. Yet they have played a role in the Australian constitutional conception of "inconsistency", a conception which goes beyond the narrow Canadian view of strict conflict and even beyond the view that there must at least be substantial identity of legislative subject-matter. This is not to say that there has been uniformity in the Australian approach, any more than there has been here.[85] But there has been a greater concern (as shown in the wide-ranging discussions in the cases) and a greater disposition to examine and promote federal legislative policy. In a leading Australian case, Isaacs J., dealing with the "covering the field" test, as it is known there, said:[86]

> If one enactment makes or acts upon as lawful that which the other makes unlawful, or if one enactment makes unlawful that which the other makes or acts upon as lawful, the two are to that extent inconsistent. It is plain that it may be quite possible to obey both simply by not doing what is declared by either to be unlawful and yet there is palpable inconsistency.

Under this doctrine the three Supreme Court cases under consideration here would have been decided the other way. Even making allowance for the fact that in Australia the supremacy or paramountcy doctrine operates largely in connection with the exercise of concurrent powers, while in Canada it has its widest application in connection with the exercise of mutually exclusive powers, there does not appear to be any rational explanation of their divergent treatment of the same problem other than to say, perhaps, lamely, that they express different conceptions of federalism. The same thing may be said, by and large, with respect to the position in the United States.[87]

[84] See *In re Bozanich*, [1942] S.C.R. 130, [1942] 2 D.L.R. 145.
[85] See Wynes, *op. cit.*, footnote 11.
[86] *Clyde Engineering Co. Ltd.* v. *Cowburn, supra*, footnote 38, at p. 490.
[87] *Cf.* Note, "Occupation of the Field" in Commerce Clause Cases, 1936-1946: Ten Years of Federalism (1946), 60 Harv. L. Rev. 262. For a

If one looks at *O'Grady* v. *Sparling* from this standpoint, there is the interesting fact (of unknown weight) that the federal government appeared at the hearing before the Supreme Court and argued in support of the challenged provincial enactment. The same thing was true in respect of *Smith* v. *The Queen.*[88] So to argue was not, of course, to admit to any attenuation or subordination of federal legislative power, but it was to reject (especially in respect of *Smith* v. *The Queen*) any effective doctrine of federal legislative supremacy. It does not appear that such a doctrine would have been recognized even if in *O'Grady* v. *Sparling* Parliament had gone on to say that inadvertent negligence should not be an offence. That would go no farther than to determine the actual reach of the offence in the particular case. This is evident from the judgment of the Supreme Court of Canada in *Reference re Section 92(4) of the Vehicles Act, 1957 (Sask.), C. 93,* which holds in effect that the very thing for which Parliament grants a dispensation (as it relates to federal penal legislation) may be compelled by the province if tied to a valid provincial object.[89] The conclusion of initial competence of the provincial enactment in that case really carried the day on the question of federal paramountcy. In this state of the authorities, the operation of a principle of paramountcy in Canada in the field of penal legislation becomes really a matter of legally uncontrollable administrative discretion as to whether to proceed against an accused for federal as well as provincial offences for the same acts. It is ruled out in law save in the obvious situation of incompatible operation, a situation which does not raise any special dilemma of federalism. Indeed, the conclusion is apt that paramountcy in the penal field is largely a matter of establishing federal exclusiveness.

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recent illustration of reconciliation of a state motor vehicle safety responsibility law with federal bankruptcy law, see *Kesler* v. *Department of Public Safety of Utah* (1962), 82 Sup. Ct. 809.

[88] In the *Stephens* case, *supra*, footnote 6, the court decided the issue on factums filed with the court; counsel did not appear.

[89] [1958] S.C.R. 608, 15 D.L.R. (2d) 255. The question in this case concerned the validity of a provincial enactment which provides for suspension and revocation of the driving licence of a person suspected of driving while intoxicated who refuses to submit to a breath test. Under Crim. Code, ss. 222 and 223, it is an offence to drive while intoxicated or while impaired, and by s. 224(3) a breath test is admissible in evidence in prosecutions for those offences but by s. 224(4) no one is "required" to give a breath test and evidence may not be given nor comment made if there is refusal. By five to three the Supreme Court upheld the validity of the provincial enactment and also decided that a breath test given under the provincial provision was not "required" within Crim. Code, s. 224(4) and was hence admissible in prosecutions under ss. 222 and 223. The majority result may be said to evince a preference for the provincial policy in dealing with drunk driving rather than for the federal policy.

It is not a touchstone of exclusiveness that *mens rea* is made an element of an offence; the province may validly introduce it into its legislation.[90] Logically too, it should make no difference if the province purports to make its offences triable on indictment; it should be entitled to fashion the procedure by which it enforces its penal legislation.[91] However, it is probable that this would be regarded as turning the offences into criminal law in the constitutional sense, not only because of exclusive federal power in relation to procedure in criminal matters (expressly included in the criminal law power) but because this could be regarded as changing the object or purpose of the provincial penal legislation. The same conclusion is probable if the provinces were to make offences punishable by length of imprisonment or other punishment which in practice has meant incarceration in a federal penitentiary, especially if punishment of this character were joined to indictable procedure.[92] There have been no clear decisions on these questions of procedure and punishment, and, indeed, the provincial statute books do not appear to offer challengeable instances. It is unlikely, for example, that section 80 of the Ontario Child Welfare Act would be struck down merely because it provides for a prison term up to three years when the offence thereunder is a summary conviction one.[93] In fine, in present circumstances provincial encroachment on the federal criminal law power falls to be tested on substantive considerations.

Four situations have been distinguished in the foregoing survey as inviting the application of a paramountcy or supremacy doctrine for federal penal legislation. The term "occupation of the field" applies to all of them in a descending order of literalness. The first

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[90] *Smith* v. *The Queen*, *supra*, footnote 7, is illustrative.

[91] See *Rex* v. *Covert*, [1917] 1 W.W.R. 919, 34 D.L.R. 662, 10 Alta. L.R. 349, reviewing earlier cases and holding that the province is competent to determine the procedure through which to enforce a valid provincial penal statute. The context in which the issue was discussed was, however, summary conviction procedure. Nothing was said about the extent to which a province might go.

[92] The Penitentiary Act, R.S.C., 1952, c. 206, s. 46, provides that "every one who is sentenced to imprisonment for life, or for a term of years, not less than two, shall be sentenced to imprisonment in the penitentiary for the province in which the conviction takes place". Among federal enumerated powers in s. 91 of the British North America Act is No. 28, "the establishment, maintenance and management of penitentiaries". *Quaere*, as to the extent to which the exercise of this power, joined to federal authority in relation to criminal law and procedure, limits the range of provincial penalties under s. 92(15) of the British North America Act?

[93] R.S.O., 1960, c. 53. For another Ontario statute which permits more than a two year term of imprisonment, see The Election Act, R.S.O., 1960, c. 118, s. 178.

carries its own logic: where there is incompatible operation of the provincial and federal legislation, as where the observance of one involves breach of the other. The second is where the federal penal statute is more restrictive and embracing than the provincial enactment which purports to establish offences at a level more liberal to an accused. Here, too, logic should dictate federal preclusion or supersession of the provincial enactment because the federal statute has gone beyond it. Third, there is the case of similar or identical legislation (so determined as a matter of construction), a similarity or identity regardless of the difference of object or purpose in the constitutional sense. If the two enactments apply the same yardstick and cover the same acts (whether or not the punishments vary), policy as much as, or perhaps rather than, logic must give the answer. Literally, "the two legislations meet" in their substantive operation, and if they are directed to the same social problem, there should be compelling reasons for exposure of persons to double liability and penalty. Fourth, there is the case where the federal penal statute establishes a standard of culpability which does not exclude the possibility of stricter control of the conduct aimed at, and provincial penal legislation addresses itself to that stricter (and hence more embracive) control. Although the two legislations do not coincide, it should be a relevant inquiry whether the federal enactment was pitched to its particular standard as an assertion of exclusive control in the field or whether it was not designed to be preclusive. Of course, if the courts conclude, as appears to be the case, that such an inquiry is immaterial, the constitutional conclusion is simple; paramountcy is ruled out once the provincial enactment is found not to be an invasion of the federal criminal law power.

The difficult problems are those raised by the third and fourth situations above-noted. Federal intent or purpose to pre-empt a field is hardly ever explicit, and the terse legislative form of the Criminal Code makes it unlikely that a court could find guidance in the terms in which it is couched. The court is driven back then to reliance on external sources of information, something which is not encouraged in Canadian constitutional law.[94] What it will give us then is its philosophy of federalism in general and its evaluation, in that connection, of the immediate problem; or, simply, and far more likely if experience is our guide, a decision on the particular case which will only implicitly reflect any theory

[94] See *A.-G. for Canada* v. *Reader's Digest Association (Canada) Ltd.*, [1961] S.C.R. 775, 30 D.L.R. (2d) 296.

of federalism. It may be the better part of wisdom, in the interests of a flexible federalism, to require the federal Parliament to speak clearly if it seeks, as it constitutionally can demand, paramountcy for its policies.