PROVINCIAL SUSPENSION OF LICENCES
Vs.
FEDERAL PROHIBITIONS FROM DRIVING

by

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I. INTRODUCTION

The purpose of this article is to examine the relationship between a suspension of a driver's licence[1] and a prohibition from driving; in view of the amendments to the Criminal Code contained in the 1972 Criminal Law Amendment Act,[2] and of the recent reference of the *Bell* and *Ross* cases to the Supreme Court of Canada from decisions[3] in their respective provinces.

It is intended to examine the various constitutional aspects of this matter, and then to consider the various provincial statutes, with comment on the manner in which the licence suspension is carried out. On the constitutional question the examination will centre around (1) the legitimacy of the respective federal and provincial statutes in this area — whether or not the constitution permits such legislation; (2) the doctrine of paramountcy — whether the "field has been occupied"; and (3) what the results are, since the legislation of both the federal and provincial governments is valid and not declared *ultra vires* of their respective legislatures. The other areas to be examined are (a) the provincial statutes currently in force, (b) the issue as to whether or not licence suspension should remain automatic, and (c) that the present automatic suspensions may be a denial of natural justice.

The problem arises in a typical situation illustrated by the following example.[4]

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1 Licence suspension here (and in all other cases throughout this work) is intended to include suspension, revocation, or cancellation of a license or a permit to drive or the right to secure such licence or permit to drive.

2 S.C. 1972, c. 13, s. 18.

3 *Bell* v. *A.G. of P.E.I.* (1973), 4 Nfld. & P.E.I. R.27; and *Ross* v. *Ont. Registrar of Motor Vehicles* (unreported).

4 Reference here is to the New Brunswick practice, especially to situations where conflict seems to arise most frequently: impaired driving and breathalyzer cases.

1. John Doe is stopped by police officers after they have seen him weaving down the street in his car. There is no question that he is impaired; strong odour of intoxicating liquor, bloodshot eyes, slurred speech, fumbling for driver's license, stumbling gait while walking, etc.
2. A demand is made for John Doe to give a breath sample pursuant to s.235 of the Criminal Code.[5] If he refuses there are reasonable and probable grounds upon which a conviction can be sustained for such refusal pursuant to s.235(2) of the Criminal Code. In any event, the result in court is the same whether the conviction is based on impaired driving,[6] breathalyzer reading in excess of 80 milligrams of alcohol,[7] or a refusal where the demand has been made because of reasonable and probable grounds to believe the accused was impaired.[8]
3. In New Brunswick, for any of these three offences, a a provincial court judge will normally impose a fine of $200.00 and a prohibition from driving for four months.[9]
4. Either at the request of John Doe or upon his own initiative the judge may vary the driving prohibition if he is satisfied that Doe needs to use his car during the course of, or to get to and from, his employment.[10]
5. The judge may note in his instructions to John Doe that he is prohibited from driving, for example, between the hours of 6:00 p.m. and 6:00 a.m., each night, and that he can only use his car or other motor vehicle between the hours of 6:00 a.m. and 6:00 p.m. to get to work or while working. This latter part of his comment is the area that causes the surprise to John Doe later on.

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5 *Criminal Code* R.S.C. 1970, C.34.

6 *Ibid.* S.234.

7 *Ibid.* S.236.

8 *Ibid.* S.235(2).

9 Per *Criminal Code* S.238, as amended by S.C. 1972 C.13, s.18.

10 *Supra*, note 9.

6. John Doe is ordered to turn in his driver's licence to the court pursuant to s.279 of the Motor Vehicle Act.[11]
7. The Court sends the surrendered licence with notations as to the penalties to the Registrar of Motor Vehicles, who is required to inform John Doe that his licence has been revoked for four months.[12]

In effect he is not allowed to drive at all whether it is in connection with his work or not, regardless of the fact that the prohibition of driving under the Criminal Code was for only half of each day and gave the impression that the rest of the time was unaffected by any penalties. His next step in New Brunswick is to make application to the Licence Suspension Appeal Board which may vary the licence suspension if satisfied that Doe requires the licence in the course of his work,[13] or that suspension will result in exceptional hardship, and that it is not contrary to the public interest to allow him to get the licence back.[14]

A more difficult problem arises for people from provinces which do not allow a review of the suspension, and those New Brunswickers who fail to meet the standards of the Board. They do not understand how the provincial legislation can seem to have a stronger effect than the Criminal Code. Partly it is the fault of the judges who frame their judgments in the manner that they do for ease of explanation; partly it is the fault of the practitioners who do not explain the differences between the provisions of the Criminal Code and the Motor Vehicle Act.[15] The greatest blame, however, lies with the various legislatures which have allowed this confusion to persist.

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11 *Motor Vehicle Act*, S.N.B. 1955. C.13, S.279 as amended by S.N.B. 1957 C.21, S.30.

12 *M.V.A.* S269(1)(b) and S.271(1)(b) as amended to 1972.

13 *M.V.A.* S.281B(6) as enacted by 1973 S.N.B. C.59 s.18.

14 *M.V.A.* S.281B(4) as enacted by 1967 S.N.B. C.54 s.25.

15 It is evident that some practitioners do not understand the subtleties themselves, when they direct enquiries to provincial authorities concerning applications for remission of Criminal Code prohibitions rather than to the National Parole Board in the same manner as applications for remission of prison sentences.

II. THE CONSTITUTIONAL ISSUES

At this point it is well to review the various principles found in the cases and the legislation out of which the problem arises. The problem can be phrased in the questions:

> Which legislature has authority to grant drivers' licences to permit people to drive?
>
> Which can take away a driver's licence?
>
> Which has authority to prohibit a person from driving?

The provinces answer by saying that these are matters dealing with local licencing, local highways, or civil rights within the provinces. The federal response is to regulate the matter by using the Criminal Law power.

The British North America Act[16] states in the opening paragraph to s. 91:

> It shall be lawful for the Queen, by and with the advice and consent of the Senate, and House of Commons, to make laws for the peace, order and good government of Canada in relation to all matters not coming within the classes of the subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater certainty, but not so as to restrict the generality of the foregoing terms of this section, it is hereby declared that (notwithstanding anything in this Act) the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next herein-after enumerated; that is to say, — . . .
> 27. The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the procedure in Criminal Matters.

and in the closing portion of s. 91:

> Any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the province.

The introductory test to s.92 of the B.N.A. Act[17] is as follows:

> In each province, the Legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated, that is to say, — . . .
> 13. Property and Civil Rights in the Province.
> 16. Generally all matters of a merely local or private Nature in the Province.

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16 *B.N.A. Act*, 1867, 30 & 31 Vict. C. 3.

17 *Ibid.*

A. THE PROVINCIAL LEGISLATION

Given the above statutory enactments, it is obvious that any provincial legislation has to be within the powers[18] given to the provinces by s. 92 of the B.N.A. Act. A 1941 interpretation of these principles permitted the Supreme Court of Canada to decide, in the *Egan*[19] case, substantially the same questions as those which were appealed to that Court in May, 1973. The only major legislative change, since 1941, is that now the Criminal Code allows for the prohibition from driving to be intermittent rather than for a full period of time.

The majority of the court in the *Egan* case prefaced their "obiter"[20] remarks on the constitutionality of the impugned provincial statute with the comment that the two enactments were not co-extensive and that the constitutionality of s. 285(7) of the Code was not in question.[21] The provincial statute, Rinfret, J., said is for the regulation of traffic and "deals purely and simply with certain civil rights in the Province of P.E.I."[22] and the authority to issue such licences, or permits, carries with it the authority to suspend or cancel them upon the happening of certain conditions.[23] Taschereau, J. referred to the provincial legislation as merely providing "for civil disability arising out of a conviction for a criminal offence."[24] It aims "at the suppression of a nuisance on highways."[25] Sir Lyman Duff, C.J.C., also recognized that the provincial legislation was *intra vires* of the provinces for the purpose of highway traffic regulation and licencing of drivers.[26]

In the years prior to the *Egan* decision the courts had often been called upon to delineate the power given to the provinces by the B.N.A. Act. The extent of the power of the Legislatures was thought by Sir Barnes Peacock in *Hodge* v. *The Queen*[27] to be the full "plenitude of its power" as the Imperial Parliament could bestow. "Within these limits of subjects" (as enumerated by s. 92 of the B.N.A. Act) "and area the local legislature is supreme . . . .[28]

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18 *Citizens Insurance Co.* v. *Parsons* (1881-2), 7 App. Cas., 96 (P.C.) (Ont.); and *Russell* v. *The Queen* (1882), 7 App. Cas. 829.

19 *Prov. Secretary of P.E.I.* v. *Egan*, [1941] S.C.R. 398.

20 *Ibid.* at 412, per Rinfret, J.

21 *Ibid.*

22 *Ibid.* at 414.

23 *Ibid.* at 416.

24 *Supra*, note 19 at 418.

25 *Ibid.*

26 *Supra* note 19 at 402.

27 (1883-4), 9 App. Cas. 115 (P.C.) (Ont.).

28 *Ibid.* at 132.

In order to determine the validity of a provincial (or federal) statute it is necessary to look at its "true nature and character"[29] or its "pith and substance".[30] The search is for the effect of the legislation rather than for its purported intent. Such directions are well-meaning, but their nebulous phraseology leaves considerable room for interpretation.

If the substance of the provincial legislation is within the enumerations of s. 92 of the B.N.A. Act it does not matter that a person might be left open to double liability.[31] This was recognized by the Supreme Court of Canada in *Bedard* v. *Dawson*[32] where the court cut a fine line between provincial powers and the federal criminal law in allowing a conviction under the federal code to be used as a basis for taking action under a provincial statute. Mr. Justice Idington went so far as to suggest that:

> Provincial legislatures have such absolute power over property and civil rights that unless they encroach on the powers assigned to the Dominion, it would be impossible to question their legislation except by veto of Parliament.[33]

The particular legislation, aimed at disorderly houses, was upheld primarily on the basis that its purpose was the suppression of a nuisance, or the prevention of crime rather than punishment of it. Mr. Justice Brodeur commented:

> Nos lois provinciales fourmillent d'exemples et des cas ou les lois criminelles sont invoguees pour determiner les droits et les obligations civiles des citoyens.[34]

Idington J's *caveat*[35] concerning provincial encroachment on the federal power had already been made by the Privy Council in the *Madden*[36] case. It was to the effect that provincial govern-

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29 *Russell* v. *The Queen* (1882-3), 7 App. Cas. 829 (P.C.) (N.B.) at 839; *A.-G. for Ont.* v. *Reciprocal Insurers,* [1924] A.C. 328 (P.C.)(Ont.) and *Lieberman* v. *R.*, [1963] S.C.R. 643 (N.B.).

30 *Union Colliery Co.* v. *Bryden,* [1889] A.C. 589 (P.C.)(B.C.) at 587; *Ladore* v. *Bennett,* [1939] A.C. 468 (P.C.) (Ont.) and *Esquimault & Nanaimo Ry.* v. *A.-G. of British Columbia,* [1950] A.C. 87 (P.C.)(B.C.).

31 *R.* v. *Stone,* (1893), 23 O.R. 46 (Ont. C.P.D.) at 49.

32 [1923] S.C.R. 681 (Que.).

33 *Ibid.* at 683.

34 *Supra* note 32 at 686, per Brodeur J.:
"Our provincial statutes furnish examples and cases where the criminal laws are invoked to determine the civil rights and obligations of the citizens" — (Rough translation).

35 *Supra,* note 33.

36 *Madden* v. *Nelson & Dox Sheppard Ry,* [1899] A.C. 626, (P.C.)(B.C.).

ments cannot use the all-embracing head s. 92 of the B.N.A. Act — property and civil rights — for what might otherwise be an *ultra vires* purpose. However, it is clear that valid provincial laws may be enforced against companies and similar institutions created by the use of federal statutes, since they are required to conform to the local, provincial laws — provided such laws apply to all without discrimination.[37]

Where the provinces use the Criminal Code to limit privileges that they grant, one could conclude that such use of the Code to determine the civil rights of their citizens is an abdication or delegation of their authority to the federal government. If this were the situation, it would contravene the Supreme Court's direction that neither a provincial legislature nor the Federal Parliament can effect such a delegation of power in those areas where it has been endowed with the exclusive power to legislate, since both levels of government are sovereign within their own spheres.[38] The response of the provinces to this submission may be seen by analogy with comments of Rand J., in the 1959 *Lord's Day Alliance* [39] — the provinces had only decided when their legislation will be effective: when a person has committed an offence under the Criminal Code.

In other situations, it is competent for the provinces to regulate securities dealers by imposing additional constraints on a dealer previously convicted of a Criminal Code offence;[40] they can, by statute, absolve an insurer from liability for idemnification of an insured who causes a car accident due to intoxication;[41] and they may legislate to seize and impound a car under a provincial Highway Traffic Act because of an offence committed under the Criminal Code, it being legislation "dealing simply with the civil consequences of conviction of a criminal offence".[42]

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37 *Canadian Pacific Ry. Co.* v. *Corp. of Notre Dame de Barsecours*, [1899] A.C. 367 (P.C.)(Que.); *Bank of Toronto* v. *Lambe* (1887), 12 App. Cas. 575, (P.C.) (Que.).

38 *A.-G. of N.S.* v. *A.-G. of Canada*, [1951] S.C.R. 31.

39 *Lord's Day Alliance* v. *A.-G. of B.C.*, [1959] S.C.R. 497.

40 *Lymburn* v. *Mayland*, [1932] A.C. 318 (P.C.)(Alta.).

41 *Home Insurance Co.* v. *Lindal & Beattie*, [1934 S.C.R. 33 (Alta.).

42 *McDonald* v. *Down*, [1939] 2 D.L.R. 177 (Ont. H.C.) at 181; aff'd [1941] 1 D.L.R 799 (Ont. C.A.).

Also, it does not matter that there has been a conviction under the Criminal Code. A plea of autrefois convict or acquit is not available to an accused for a charge under a provincial statute when the essential ingredients to a conviction for both "offences" are not the same.[43] In the *Ottenson* case,[44] although a provincial statute was rendered inoperative by the Criminal Code offence of driving under the influence of liquor, nevertheless, it was said:

> It can at once be pointed out that no objection can be taken to the use of provincial sanctions for the purpose of suspending or cancelling the licence of a person convicted of a breach of s. 42 [of Man. H.T.A.].
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> In this respect the legislation is clearly within the competence of the province and cannot be affected by the code.[45]

It is submitted that the provinces by the constitution have at least a *prima facie* right to legislate for safety on the highways and the licencing of drivers. The question of whether the federal government can take over and occupy the field to the exclusion of the provinces will be discussed after an examination is made of how the Parliament can legislate in this area.

B. THE FEDERAL LEGISLATION

The problem discussed in this paper derives from the 1972 amendments to ss. 238 of the Criminal Code, which, one may speculate were, in turn, made because of conflicting decisions of the Alberta Court of Appeal.[46] The latter court had allowed a prohibition under s. 255(1)(b) of the pre-1972 Criminal Code to be intermittent, whereas the former had rules against the principle of intermittent sentencing since the Code contained a provision that the prohibition was to be effective "during any period" up to three years.

The pertinent portion of s. 238(1) of the present Criminal Code[48] is as follows:

> Where an accused is convicted of an offence under section 203, 204, or 219 committed by means of a motor vehicle or of an offence under section 233, 234, 235, 236 or subsection (3) of this section, the court, judge, justice or magistrate, as the case may be, may, in addition to any other punishment that may be imposed for that offence make an order prohibiting him from driving a motor vehicle in Canada at all times or at such times and places as may be specified in that order . . . .

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43 *R.* v. *Nadan* (No. 1)(1924-25), 21 Alta. L.R. 193 (Alta C.A.).

44 *R.* v. *Ottenson* (1931), 40 Man. R. 95 (Man. C.A.).

45 *Ibid.* at 97.

46 *R.* v. *Adamoweiz* (1967), 56 W.W.R. 572 (Alta. C.A.). See also *R.* v. *Lloyd*, [1969] 1 C.C.C. 109 (N.B.C.A.), and *R.* v. *Hebert* (1970), 1 O.R. 782 (Ont. C.A.).

47 *R.* v. *Kazakoff* (1962), 52 W.W.R. 427 (B.C.C.A.).

48 *Supra*, note 5, S.238 as am. by *Criminal Law Amendment Act* S.C. 1972, C. 13 s. 18.

S. 238(3) authorizes the imposition of penalties to a person who drives while prohibited under subsection (1) or while his licence or right to secure a licence has been legally suspended or cancelled. And,

> Subsection (3) does not apply to a person who drives a motor vehicle in Canada while he is disqualified or prohibited from driving a motor vehicle by reason of the legal suspension or cancellation, in any province of his permit or licence or of his right to secure a permit or licence to drive a motor vehicle in the province, where that suspension or cancellation is inconsistent with an order made with respect to him under subsection (1)[49]

In the *Egan* case Sir Lyman Duff, C.J. was the only member of the court who expressed the opinion that the Criminal Code section similar to the above was *intra vires.*[50] The majority of the court said that the constitutionality of then s. 285(7) of the code was not in question.[51]

However, in interpreting the federal criminal law power, other courts have allowed the federal government wide scope in that "it is the criminal law in its widest sense that is reserved" to Parliament.[52] Nor is Parliament restricted to areas recognized as criminal at Confederation; the criminal law can be increased or decreased in its effect by this standard: "Is the act prohibited with penal consequences?[53] This may partially determine the legitimacy of a federal statute, but it does not limit penal consequences only to federal statutes.[54]

Although the federal criminal law power is wide in scope it is not unrestricted. Sir Montague Smith in the *Citizens Insurance*[55] case was of the opinion that, as a matter of general principle, to allow the exclusive powers assigned to the provinces to be absorbed into those given to the federal government would

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49 *Ibid.*

50 *Supra,* note 19 at 400.

51 *Supra,* note 21.

52 *A.-G. for Ont.* v. *Hamilton Street Ry.,* [1903] A.C. 524 (P.C.).

53 *Proprietary Articles Trade Association* v. A.-G. for Canada,[1931] A.C. 310 (P.C.)(Can.) at 324.

54 See *infra* note 128, and S. 92(15) of the B.N.A. Act which gives to the provinces authority to impose punishment to enforce their laws which have been validly made; and *A.-G. for B.C.* v. *A.-G. for Canada,* [1937] A.C. 368 (P.C.)(Can.) at 376.

55 *Citizens' Insurance Co.* v. *Parsons* (1881-2), 7 App. Cas 96 (P.C.)(Ont.) at 108.

not be in keeping with the intent of the B.N.A. Act. Some restriction on the federal government is necessary to give efficacy to the provincial power, otherwise Parliament could declare an act criminal or as involving trade and commerce or peace, order and good government, thereby overruling the provincial authority in the matter. Bearing this kind of statement in mind the Privy Council, in the *Local Prohibitions* case, was of the opinion that Parliament could not "trench" on any of the powers given to the provinces by s. 92 of the B.N.A. Act by using its general power to legislate for peace, order and good government.[56] The admonition of the Privy Council in the *Madden* case, that a government cannot pass legislation to do indirectly that which it is prohibited from doing directly,[57] has been extended to the federal criminal law power in the sense that the criminal law cannot be used as a guise to encroach on the enumerated provincial powers.[58] In *Ladore* v. *Bennett*, it is said that:

> the Courts will be careful to detect and invalidate any actual violation of constitutional restrictions under the pretence of keeping within the statutory field.[59]

Insofar as the federal government's general power of peace, order and good government is concerned, it is now clear that this can only be used if the real subject matter of the legislation "goes beyond local or provincial concern or interests that have grown to national importance",[61] or that may be taken over by the federal government in a national emergency situation,[62] is tempered by the comment of Viscount Simon, that "it is the nature of the legislation itself and not the existence of emergency that must determine whether it is valid or not."[63] Some thirty years earlier Viscount Haldane was of the opinion that the trenching principle could only be used by Parliament with respect to those matters that are specifically listed in s. 91 of the Act, and not in

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56 *A.-G. for Ontario* v. *A.-G. for the Dominion*, [1896] A.C. 348 (P.C.)(Ont.) at 108.

57 *Supra*, note 37 at 627-8.

58 *A.-G. for B.C.* v. *A.-G. for Canada*, [1937] A.C. 368 (P.C.)(Can.) at 375.

59 *Ladore* v. *Bennett*, [1939] A.C. 468 (P.C.)(Ont.) at 482.

61 As first proposed in *Local Prohibitions Case*, *supra*, note 55 at 361.

62 *Fort Frances Pulp & Power Co. Ltd.* v. *Manitoba Free Press Co. Ltd.*, [1923] A.C. 695 (P.C.)(Man.).

63 *Supra*, note 60 at 206.

respect to the federal general legislative power.[64] In the *Dairy Industry* case Rand J. reinforced this comment, and the remark in the *Montreal Street Railway*[65] case with respect to the federal trade and commerce power, by the proposition that it is not by the aggregate of local interests that an industry attains national importance so as to be the subject of federal intervention.[66]

Although one could argue that drunken driving, criminal negligence on the nation's highways, and similar acts involving the use of motor vehicles, have increased to such an extent that they constitute national problems of emergency proportions it would seem that the only way that Parliament can constitutionally legislate to attack this situation is by using its criminal law power. Criminal law is used here in the sense of connoting act or omissions to the extent that they are prohibited by the state and that those who go beyond the bounds permitted are punished.[67] It is conceded that it is still within the power of the federal government to apply "the criminal law generally to acts and omissions which so far are only covered by provincial enactments,"[68] although such action must not be exerted in an area "in which apart from such a procedure, it could exert no legal authority."[69] From this one can conclude that Parliament cannot cloak its legislation in "criminal robes" and thereby expect to escape judicial scrutiny. In using s. 238 of the Criminal Code to provide for punishment of infractions of certain of the Code's provisions, it would appear that the federal government has chosen the correct course of action. The next item to be considered is whether there is any conflict between the federal and provincial legislation.

C. THE PARAMOUNTCY ISSUE

This section will examine the principles of paramountcy and the reluctance of the courts to declare legislation *ultra vires* through the use of principles embodied in the aspect theory and the complementary theory.

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64 *A.-G. for Canada* v. *A.-G. for Alberta*, [1916] A.C. 588 (P.C.)(Can.).

65 *Montreal* v. *Montreal St. Railway*, [1912] A.C. 333 (P.C.)(Que.).

66 *Reference as to the Validity of Section 5A of the Dairy Industry Act*, [1949] S.C.R. 1 (Can.).

67 *Supra*, note 53 at 324.

68 *Supra*, note 58 at 376.

69 *A.-G. for Ontario* v. *Reciprocal Insurers*, [1924] A.C. 328 (P.C.)(Ont.) at 342.

The principle of paramountcy of federal legislation has been accepted by the Privy Council as being derived from both the opening paragraph of s. 91 of the B.N.A. Act[70] as well as the conclusion to s. 91[71] so long as the federal legislation falls strictly within its enumerated powers. An early test for the issue of paramountcy was formulated by Lord Dunedin in the *Grand Trunk Railway*[72] case as he paraphrased two earlier cases:[73]

> First 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, the Dominion legislation must prevail.[74]

This "meeting" of the respective pieces of legislation is used in the sense of a collision between the two.

In the *Egan* case Duff C.J. considered the following test in examining the impugned statutes:

> . . . 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[75] [of the B.N.A. Act].

The High Court of Australia in the *Clyde Engineering* case[76] formulated the following tests:

> If a competent legislature expressly or inpliedly 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.[77]

and

> 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.[78]

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70 *Tenant* v. *Union Bank of Canada*, [1894] A.C. 31 (P.C.)(Ont.) at 45.

71 *Supra*, note 56 at 359.

72 *Grand Trunk Ry.* v. *A.-G. for Canada*, [1907] A.C. 65 (P.C.)(Can.).

73 *A.-G. for Ontario* v. *A.-G. for Canada*, [1894] A.C.189 (P.C.)(Ont.) and *Tenant* v. *Union Bank of Canada*, [1894] A.C. 31 (P.C.)(Ont.).

74 *Supra*, note 72 at 68.

75 *Supra*, note 19 at 402.

76 *Clyde Engineering Co. Ltd.* v. *Cowburn* (1925-26), 37 C.L.R. 466.

77 *Supra*, note 76 at 489.

78 *Supra*, note 76 at 490.

Prof. Laskin, as he then was, has indicated that the first of these tests has not been accepted in interpretation of the Canadian constitution.[79] The second test appears to be valid in Canada so long as both legislatures have enacted laws. To declare otherwise would be cause for overruling a large number of decisions which have allowed the Provinces to remain in fields in which Parliament has chosen not to legislate or to cover only partially.

Certainly a federal or provincial statute will not be invalid because it incidentally affects a matter falling within the other's jurisdiction if the legislation is otherwise valid: e.g. (1) provincial legislation affecting the amount of interest charges by a lender;[80] and (2) incidental federal interference with property rights[81] or provincial revenues.[82] The court in the *Russell* case indicated that:

> it could not have been intended, when assuring to the provinces exclusive legislative authority on the subject of property and civil rights, to exclude the Parliament from the exercise of this general power whenever such incidental interference would result from it.[83]

Also related to the ancillary question is the double aspect theory, to which the *Belisle* case[84] had earlier pointed the way, formulated by Sir Barnes Peacock in the *Hodge* case:

> The *Russell* and *Citizens Insurance Co.* cases illustrate that subjects which in one aspect and for one purpose fall within sect. 92 may in another purpose fall within sect. 91.[85]

Such a formula made easier the natural tendency to uphold federal or provincial legislation as valid.[86] Although the Criminal Code[87] and the *Shaw* case in Manitoba indicate that it is not valid to "render an offender liable to be punished twice for the same offence,"[88] this has not prevented the courts from neatly defining the provincial punishments "civil" in nature, rather than "criminal". Accordingly, "civil" punishments can be substituted with virtually the same consequences as they would be in the criminal law.[89] It

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79 Laskin, *Canadian Constitutional Law*, 3rd Ed. (Carswell, Toronto) at 108.

80 *A.-G. for Ontario* v. *Barfield Enterprises*, [1963] S.C.R. 570 (Ont.).

81 *Cushing* v. *Dupuy* (1879-80) 5 App. Cas. 409 (P.C.)(Que.).

82 *Russell* v. *The Queen* (1881-2) 7 App. Cas. 829 (P.C.)(N.B.) at 838.

83 *Supra*, note 82 at 839.

84 *L'Union St. Jacques de Montreal* v. *Belisle* (1874-5), L.R. 6 P.C. 31 (Que.).

85 *Supra*, note 27 at 130.'

86 *R.* v. *Wason* (1889-90), 17 O.A.R. 221 (C.A.) at 236.

87 *Supra*, note 4 S.5(1).

88 *E.* v. *Shaw* (1890-91), 7 Man. R. 518 (C.A.) at 528.

89 *Toronto Ry. Co.* v. *City of Toronto*, [1920] A.C. 446 (P.C.)(Ont.).

has long been accepted that in spite of the fact that Parliament can legislate as to the criminal law, it "cannot interfere with or exclude the powers of the Province of dealing with the same thing in its civil aspect."[90] This attribute of the aspect doctrine in our federal system of government gives rise to *de facto* if not *de jure* double jeopardy. This is precisely the situation that is the subject of this article — that both the federal government and the provinces can effectively revoke a driving privilege on the happening of a single event. The provinces here legislate for safety on the highways, while the federal government legislates criminal punishments. Each aspect, purpose or point of view is proper to the respective legislature and Parliament.[91]

In practical terms these theories are of little comfort to the person who may be convicted twice for committing a single act or omission. It is disconcerting to note that but for the fact that the administration of justice is the responsibility of the provinces[92] it is possible to be charged and convicted of two offences arising out of the same incident, because "each law was passed by its enacting authority for its own purpose within its own field."[93]

Statutory interpretation using the double aspect approach, plus the general tendency to "compartmentalize"[94] topics of a constitutional nature with resulting inflexibility in this area of judicial interpretation have given rise to the ascendency of the complementary theory. This holds that the provincial legislation not repugnant to federal legislation "in the sense that compliance with one law involves breach of the other"[95] is *intra vires*. Accordingly, provincial legislation, imposing penalties for a lesser "degree" of *mens rea* than is caught by the Criminal Code, has been accepted by the Supreme Court of Canada for careless driving,[96] failure to

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90 *Supra*, note 31 at 49 accepting argument of counsel in *R.* v. *Wason* (1889-90), 17 O.A.R. 221.

91 *Supra*, note 19 at 400 and 401 per Duff, C.J. in accepting a passage from *A.-G. Canada* v. *A.-G. for Alta.*, [1916] 1 A.C. 588 at 596.

92 This fact does not preclude the possibility of two charges; it renders it unlikely.

93 *R.* v. *Kissick* (1942), 50 Man. R. 194 (Man. C.A.) per Robson J.A. at 203.

94 Carr, "Division of Legislative Powers under the British North America Act — The Case for Fully Concurrent Powers" (1970-71), 4 Man. L.J. 297.

95 *Smith* v. *The Queen*, [1960] S.C.R. 776 (Ont.) per Martland J. at 800.

96 *O'Grady* v. *Sparling*, [1960] S.C.R. 804, whereas the court was of the opinion that "inadvertent" negligence was a difference in kind and not in degree than advertent negligence; and *Mann* v. *The Queen*, [1966] S.C.R. 238.

stop at the scene of an accident[97] and issuance of false information to deceive purchasers of securities.[98]

This occurred despite the statement by Lord Watson in the *Union Colliery* case that:

> The abstinence of the Dominion Parliament from legislating to the full limit of its powers, could not have the effect of transferring to the provincial legislature the legislative power which had been assigned to the Dominion by S. 91 of the Act of 1867.[99]

On this basis it could be argued that a prohibition from driving on an intermittent basis removed from the provinces any power on their part to legislate for the period of time that was not covered by the prohibition since the intermittent prohibition, though not in explicit terms permitting one to drive in those time periods for which there is no prohibition, at least gives an implicit permission to do so.[100]

However, at first glance, Lord Watson's statement overlooks the fact that the provinces do not have to be transferred the power to legislate over highway safely and the like; they only lose that power by virtue of the federal occupation of the field.[101] In addition, an examination of the *Saskatchewan Breath Specimen* case gives credence to the view that a prohibition by the federal criminal law for one aspect does not mean that the Provinces are restricted in the action they may take. Accordingly, a prohibition against compulsory breath samples was restricted to the Criminal Code provisions and did not apply to a provincial statute for highway control.[102] In the *O'Grady* v. *Sparling* case the majority of the court refrained from accepting Cartwright J.'s remarks to the effect that a prohibition implies permission to do that which is not prohibited.[103] It would appear then that the provinces are restricted only when the federal government actually occupies the field;

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97 *Stephen* v. *The Queen*, [1960] S.C.R. 823, whereas tne *Criminal Code* referred to intent to escape civil or criminal liability.

98 *Smith* v. *The Queen*, [1960] S.C.R. 776, whereas the *Criminal Code* in this case imposed penalties for issuing a false prospectus.

99 *Union Colliery Co.* v. *Bryden*, [1899] A.C. 580 (P.C.(B.C.) at 588.

100 See *R.* v. *Thorburn* (1917-18), 41 O.L.R. 39 (Ont. H.C.).

101 See note 56 at 369.

102 *Re Validity of Section 92(4) of the Vehicles Act 1957 (Sask.)*, [1958] S.C.R. 608.

103 *Supra*, note 96 at 821.

for example, provincial laws declared inoperative with respect to driving while one's licence is suspended,[104] or the keeping of slot machines in the face of federal legislation on the same subject.[105] The British Columbia Court of Appeal carried the paramountcy principle to the extent of declaring that the Federal Indian Act, prohibiting the sale of liquor to Indians, takes precedence over the provincial Liquor Act which prohibited liquor sales to anyone, Indian or white.[106]

While more recent courts would tend to distinguish the last-mentioned *Cooper* case so as to give effect to the provincial legislation, the courts of Ontario, with the introduction of the intermittent driving feature for prohibitions in the Criminal Code, have taken a stand against the automatic suspension feature of the provincial statutes. In the *Caravaggio* case[107] Haines J. imposed a sentence which included an intermittent prohibition from driving and added the directive that "the operator's licence of the accused shall not be suspended under provisions of s. 21 of the Highway Traffic Act."[108] Since s. 21[109] makes a statutory declaration that the licence is suspended as from the conviction, the validity of such a directive is doubtful.[110]

Most recently in the *Lamoureux* case[111] the Ontario High Court was of the opinion that

> by enacting the amended section which provides for no suspension, intermittent suspension or full-time suspension as the convicting officer deems appropriate, Parliament has not occupied the field even more fully than it had when the *Egan* case, supra, fell to be decided.[112]

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104 *R.* v. *Dickie*, [1955] 2 D.L.R. 757 (Alta. S.C.), and *R.* v. *Munro* (1959), 2 D.L.R. (2d) 443 (Man. C.A.).

105 *Johnson* v. *A.-G. of Alberta*, [1954] S.C.R. 127 (Alta.).

106 *R.* v. *Cooper* (1921-25), 35 B.C.R. 457 (B.C.C.A.).

107 *R.* v. *Caravaggio* (1972), 19 C.R.N.S. 390 (Ont. S.C.).

108 *Supra*, note 107 at 392-3.

109 *Ont. H.T.A.* R.S.D. 1970, C. 202 s. 21.

110 See *Re Lamoureux and the Registrar of Motor Vehicles*, [1973] 2 O.R. 28 (Ont. C.A.).

111 *Re Lamoureux and the Registrar of Motor Vehicles*, [1973] 1 O.R. 573 (Ont. H.C. Div. Ct.).

112 *Supra*, note 111 at 578.

The court concluded that the dicta in *Egan* had been unnecessary to the decision in that case. However, the same Ontario Court earlier in the same month was quick to use the dicta of Sir Lyman Duff in the *Egan* case to declare that legislation by Ontario in respect of persons convicted as keepers of disorderly houses "provides for a civil disability arising out of the conviction."[113] The Court of Appeal distinguished the Ontario legislation as giving the landlord a right to repossess the leased premises in question while the Criminal Code imposed penalties on a landlord who, if a second offence occurred under the Code's disorderly house provisions in respect of the same tenancy, failed to exercise his right of re-entry, whether contractual or legal.[114]

In similar circumstances the courts of Prince Edward Island have held valid a provision of that Province's Highway Traffic Act which dictates mandatory suspension of the licence of a driver convicted under various sections of the Criminal Code. In the *Bell* case the Appeal Court felt that

> In enacting the present Section 238(1) of the *Criminal Code* the Parliament of Canada in our opinion cannot be said to have enacted legislation which would have the effect of excluding or detracting from the legislative authority of the provinces under a subject matter long recognized to be a matter of provincial jurisdiction.[115] [citing the *Egan* case].

In the *Hunter* case, on a charge of refusing to take a breathalyzer test, the Supreme Court judge, in a trial *de novo*, was adamant in refusing to make an order of intermittent prohibition from driving under the Criminal Code lest such an order have the effect of "circumventing valid provincial legislation",[116] which required automatic suspension of the convicted person's licence.

This then was the situation prior to the reference to the Supreme Court of Canada of the *Bell* case from P.E.I. and the *Ross* case from Ontario. The P.E.I. courts were of the uniform opinion that the provincial automatic suspension legislation remained operative despite the recent Code amendments. However, the On-

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113 *Re D. & G. Barclay and St. Jane Plaza Ltd.*, [1973] 1 O.R. 479 at 585 (Ont. H.C. Div. Ct.).

114 *Re D. & G. Barclay Builders Ltd. and St. Jane Plaza Ltd.*, [1973] 3 O.R. 373 (Ont. C.A.).

115 *Bell* v. *A.-G. of P.E.I.* (1973), 4 Nfld. & P.E.I. 27 at 37.

116 *R.* v. *Hunter* (1973), 4 Nfld. & P.E.I.R. 190 (P.E.I. S.C.).

tario lower courts were more inclined to view that the *Egan* case has been superseded by these amendments, and the Ontario Court of Appeal refrained from comment on the constitutional issue in resolving the *Lamoureux* case[117] on the grounds that the Ontario Divisional Court exceeded its jurisdiction in negating the automatic suspension feature of s. 21 of the Highway Traffic Act.[118] The frequency across Canada of convictions giving rise to automatic suspensions gave urgency to the need to have the issues of the conflicting judgements settled by the Supreme Court of Canada.

Before these references are examined a review of some of the constitutional writers is in order. The range of views of ten writers on the subject of paramountcy generally and the specific topic of this paper varies widely. The "compartmentalization", spoken of earlier,[119] seems to have restricted passage of "good" legislation. Carr suggests that both the provinces and the federal governments be given concurrent jurisdiction with primary and secondary responsibilities alloted to the respective government.[120] Of course such a solution would not entirely eliminate the problem of jurisdiction since there are bound to be questions of interpretation as to whether the field had been occupied by either level.

Lederman[121] examines the areas of seeming conflict and suggests that if the provincial legislation merely supplements or adds to federal legislation without contradicting it, the provincial legislation may be valid. He cites the example of the Lord's Day Alliance Act,[122] where the federal prohibition has been withdrawn to permit provincial legislation in respect of Sunday observance. However, he accepts Cartwright J.'s proposition in the *O'Grady* case that a federal statute may by implication as well as by express terms, preclude concurrent legislation in the field by the province.[123]

Laskin feels that once we recognize the initial validity of a pro-

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117 *Supra*, note 110.

118 *Supra*, note 110 at 30.

119 *Supra*, note 94 at 301.

120 *Supra*, note 94.

121 Lederman, "The Concurrent Operation of Federal and Provincial Laws in Canada" (1963), 9 McGill L.J. 185.

122 *Lord's Day Alliance Act*, R.S.C. 1952, C. 171, s.6(1).

123 *Supra*, note at 191. Also, *supra* note 103 for comments on the position of Cartwright J.; and *infra* note 154.

vincial licencing 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.[124]

He cautioned this statement with the proviso that extension by a province with the object of imposing a personal penalty on the convicted person would not be favoured by the Courts.[125] Presumably such a penal or monetary penalty may be seen as extending the civil consequences or disabilities of an act into penalties of a criminal nature.

The proliferation of provincial legislation involving acts of a lesser degree of *mens rea* than is signified in the Criminal Code has caused Professor Friedland to express the hope that we would not see a return to the distinction between felonies and misdemeanors "through the back door".[126] He suggests that general principles of criminal law rather than constitutional law favour a policy that bars proceedings under both provincial and federal statutes for substantially the same offence.[127]

It is submitted that such a change in the law would eliminate any tendency for provincial authorities to continue vexatious prosecutions of an accused for what are, in effect, included charges. No one can deny the right of the provinces (or the federal government) to enforce their legitimate laws by imposing punishments[128] as long as the punishments meted out follow the ancient requirements that they be declared by an accused's peers or by the law of the land,[129] and that the punishments are inflicted by neither excessive fines nor cruel and unusual punishments.[130] Notwithstanding articles to the contrary,[131] it is submitted that automatic suspension is a proper exercise of provincial power to legislate for

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124 Laskin, "Occupying the Field: Paramountcy in Penal Legislation" (1963), 41 C.B.R. 234 at 255.

125 *Supra*, note 125 at 255-6.

126 Friedland, "Double Jeopardy and the Division of Legislative Authority in Canada" (1967), 17 U. of Toronto L.J. 66 at 72-3.

127 *Supra*, note 126 at 75-76, and at 80.

128 *R.* v. *Wason* (1889-90), 17 O.A.R. 221 (Ont. C.A.) at 238 where Burton J. indicates that a power to make law implies a power also to enforce it.

129 *Magna Carta* (1297), 25 Edward I. C.29. We are reminded by *Gale J.* in *Re Toronto Newspaper Guild & Globe Printing Co.*, [1951] O.R. 435 at 473 that Magna Carta is still law in Canada. However, the effects of the Magna Carta can be amended, viz: *R.* v. *Ganaplathi* (1973), 34 D.L.R. (3d) 495 (B.C.S.C.).

130 Bill of Rights (1688), 1 Will & Mary sess. 2 C. 2, s.1.

131 Nosanchuk, "To Drive or Not to Drive?" The Oyez Vol. 4, No. 4 Feb. 1973 at 9.

safety on the highways. It may seem to be a harsh example of a statute derogating from the common law principle of *audi alteram partem*, by not permitting a hearing before the suspension becomes effective.[132]

Any implication that an intermittent prohibition to drive implies permission to drive the remainder of the time, appears to this writer to be an invasion, under the guise of the criminal law, of an exclusive provincial licencing prerogative to determine the conditions under which a person is to be permitted to hold a valid licence.

> That the provinces have undisputed authority to issue licences or permits for the right to drive motor vehicles on their highways and that this authority carries with it the authority to suspend or cancel them upon the happening of certain conditions are undoubted principles — *Egan* Case.[133]

And it should not matter that these conditions result in a longer or harsher suspension than any driving prohibition.[134] The fact that the driving prohibitions may now be intermittent should not make any difference.

From the point of view of the federal government, it cannot be questioned that the Criminal Code can prescribe punishments involving driving prohibitions and can "affect" provincial suspensions of drivers' licences.[135] It is apparent that Parliament in its 1972 amendments to s. 238 (1) and 238 (3.1) of the Criminal Code did so with the intention of taking over areas "which so far are only covered by provincial enactments."[136] Even though provincial governments would prefer to have the federal government vacate the field of driving prohibitions, and leave it to them to deal with in the form tailored to the situation in each province,[137] Ottawa officials seem to be of the opinion that Parliament alone should

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132 See *infra* Part III for a fuller discussion of this point.

133 *Supra*, note 102 at 616 — the *Sask. Breath Specimen* case, along with similar principles in: the *Egan* case, *supra* note 19; *Fairbairn* v. *Highway Traffic Board of Sask.* (1958), 11 D.L.R. (2d) 709 (Q.B.D.) and *Zahara* v. *Minister of Highways for Alta.* (1965), 51 W.W.R. 289 (S.C.).

134 *Supra*, note 19.

135 One should not go as far as Trueman J. in the *Ottenson* case to the effect that suspensions "cannot be affected by the *Code*."
Supra, note 44.

136 *Supra*, note 58 at 376.

137 See *Minutes of the Proceedings of the 54th Annual Meeting of The Conference of Commissioners on Uniformity of Legislation in Canada* (1972), at 52-3.

determine in what Criminal Code circumstances and for how long a convicted driver should be kept off the roads across Canada.[138]

Such an impasse, if not resolved by the courts, will require a political solution which, presumably, the federal government would be willing to make only if a greater measure of uniformity in the provincial legislation were achieved.

Any affirmation at the present time that both the federal prohibition from driving, intermittent or total, and the provincial automatic suspension or revocation of licence, as the result of a Criminal Code conviction, are to be considered *intra vires* leaves open to question the effect of s. 238 (3.1) of the Criminal Code.[139] It has been said that this section only withdraws the criminal consequences of a provincial licence suspension that is inconsistent with an order prohibiting driving.[140] However, the Criminal Code makes no distinction as to what may have caused the suspension of a person's right to drive, whether it was a civil or criminal disability or penalty. Any attempt by the provinces to evade the effect of s. 238 (3.1) so as to define civil consequences of driving while suspended will have to overcome the difficulties apparent in the *Munro* and *Dickie*[141] cases. There the courts said that what is now s. 238 (3) of the Criminal Code has occupied the field, and they declared provincial law inoperative with respect to driving while suspended. Whether a court will be able to distinguish these decisions to allow the provinces to legislate in the area of "civil" consequences of disabilities of driving while suspended remains to be seen. It is now appropriate to examine the *Bell*[142] and *Ross*[143] cases.

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138 See *Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs*, May 11, 1972, (Queen's Printer, Ottawa), at 7:11 to 7:18.

139 *Supra*, note 49.

140 *Supra*, note 138.

141 *Supra*, note 104.

142 *Bell* v. *A.-G. for P.E.I.* (unreported) S.C.C.; references here are to the advance report of the case as received from the Supreme Court of Canada.

143 *Ross* v. *The Registrar of Motor Vehicles* (unreported) S.C.C. references to the Ross case are with respect to the advance report of the case as received from the Supreme Court of Canada.

D. THE DECISION ON THE RECENT REFERENCES TO THE SUPREME COURT OF CANADA

In the *Bell* case the appellant had been convicted of a "breathalyzer" offence under s. 236 of the Criminal Code. No order prohibiting him from driving was added to the $100 fine that was imposed, but he was notified by provincial authorities that his licence was suspended[144] automatically for 6 months by operation of s. 247(1) of the Highway Traffic Act.[145] As mentioned earlier,[146] the P.E.I. Supreme Court *en banco* denied his contention that the H.T.A. section is *ultra vires.* The *Bell* case was heard together with the *Ross* case by the Supreme Court of Canada. The reasons for judgment of the majority in the *Ross* case also apply to the *Bell*[147] case, even though the lower court in the *Ross* case did make on order of prohibition from driving whereas the magistrate in the *Bell* case refrained from doing so.[148] This was the distinction of the two cases for the dissenting judges in the Supreme Court of Canada; they agreed in the disposition of the *Bell* case[149] but not in the *Ross* case.

Spence J. thought that an intermittent prohibition for certain times had the effect of permitting driving at other times.[150] However, he correctly points out that the sentence passed by the lower court "did not prohibit driving at those other times for employment purposes."[151]

Pigeon J., for the majority, says that there is no repugnancy since the "Code merely provides for the making of prohibitory orders limited as to time and place,"[152] and it does not matter that he may get in reality no benefit from any indulgence granted under the Code.[153] Referring to the *O'Grady* v. *Sparling* case, he considered that only the dissenting judges found necessary implica-

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144 *Supra,* note 142 per Pigion J. at 2.

145 S.P.E.I. 1964 C. 14, as am. by 1970 C. 26, S. 10.

146 *Supra,* test at note 115.

147 *Supra,* note 144 at 2 & 3.

148 *Supra,* note 143 per Judson J. at 5.

149 *Supra,* note 143 per Judson J. at 5, and per Spence J. at 1 and 5.

150 *Supra,* note 143 at 2.

151 *Ibid.*

152 *Supra,* note 144 at 7.

153 *Ibid.*

tions of what kinds or degrees of conduct was not to be punished, and continued:

> In other words, the majority decided that Parliament did not implicitly permit conduct which did not come within the description of the *Criminal Code* offence.[154]

Taking this to the context of the case he said:

> Parliament did not by the amendments to S. 238 of the *Criminal Code* purport to deal generally with the right to drive a motor vehicle after a conviction for certain offences.[155]

He was of the opinion that the order of the lower court with respect to the provincial automatic suspension provisions was made without jurisdiction.[156]

Without indicating how the provinces will be able to impose fines on persons who drive within the constraints of a prohibition order under the Code but in violation of a provincial statute, he says that s. 238 (3.1) of the Code

> goes no further than to provide that in such case, the penalty provided under the *Criminal Code* for driving while under suspension shall not apply.[157]

It would appear then that provincial legislation carefully worded to be confined to the "civil" consequences of driving while suspended would be in order.[158]

In effect the Supreme Court of Canada has reaffirmed the judgement of Duff C.J. in the *Egan* case on the validity of the provincial and federal statutes with respect to licence suspensions and driving prohibitions.[159] There is no indication of what the decision might be if Parliament were to decide to deal with the right to drive after a conviction rather than just a prohibition from driving. This writer believes that such an attempt by the federal government would be labelled as a colourable device — an encroachment on a local provincial matter, and *ultra vires* of Parliament's powers.[160]

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154 *Supra*, note 144 at 9.

155 *Ibid.*

156 *Supra*, note 144 at 10.

157 *Supra*, note 144 at 7.

158 See text *supra*, at note 141.

159 *Supra*, note 144 at 3 and 4.

160 See text *supra*, at note 57, 58 and 59.

Our attention now turns to an examination of the principles of natural justice in this context, a survey of the current provincial legislation relating to automatic suspensions, and suggestions for elimination of the double jeopardy aspect of natural justice.

III. SUGGESTIONS FOR REFORM IN THE PROVINCIAL STATUTES CONCERNING AUTOMATIC SUSPENSIONS

A. SHOULD THE SUSPENSIONS BE AUTOMATIC?

The questions to be answered here are: Should the licence suspension, revocation, cancellation or whatever remain automatic on the happening of certain events? Do not the principles of natural justice tend to develop an attitude or moral suasion towards the idea that rights and privileges once granted should not be subject to automatic suspension or cancellation without the opportunity of the aggrieved person being heard prior to such action? One can easily dismiss such a question as being so much poppycock and of little value when it is seen by the judgements of the Privy Council that in the areas of exclusive provincial concern the provinces are sovereign and supreme.[161] It can be assumed that such a provincial power carries with it the right to determine civil rights and privileges by statute on the happening of an event rather than to require a hearing to be held. The reluctance to grant pre-suspension hearings may be predicted on the idea that it is a great deal easier to refuse to grant a privilege than it is to set up legislation and administrative machinery to take away an already existing one:

> You prove to me why you need this privilege; I don't want to have to give you sufficient reasons for taking it from you!

The above may be too simplistic but it does convey the nature of the reluctance.

The courts have made no substantial enquiry into the prerogatives of the provinces to legislate on automatic, or even discretionary suspensions which at the same time withdraw any rights the person may have had to a hearing. Most accept this without comment unless there has been an unusual use of the discretionary power. A County Court Judge in British Columbia has referred to unchallengeable discretion of the British Columbia Superintend-

161 *Hodge* v. *The Queen* (1883-4), 9 App. Cas 115 (P.C.)(Ont.) at 132, and *Bedard* v. *Dawson*, [1923] S.C.R. 681 (Que.).

ent of Motor Vehicles to suspend summarily without the necessity of a hearing as a breach of the basic principle that one should have the right to face his accuser and answer any charge.[162] Where, however, the discretion to suspend a driver's licence is permitted and the statute does not negate the requirement of a hearing, it has been accepted in the *Fairbairn* case that the person involved must be given a chance to give his side of the case as to mitigating factors.[163]

The principle of *audi alteram partem* has been accepted in the Common Law for some time. It can be seen in the phrase:

> that no man is to be deprived of his property without having an opportunity of being heard

and this extends both to judicial and administrative tribunals in the exercise of their judicial discretion.[164]

> That rule is of universal application and founded upon the plainest principles of Justice.[165]

It extends to cases where the civil rights of persons are affected.[166] In ascertaining the law and the facts of a case where there is no express statutory provision to the contrary[167] a board

> must act in good faith and fairly listen to both sides, for that is a duty lying upon every one who decides anything.[168]

Lord Loreburn noted that the mechanics of such a hearing need not be too rigid or standardized as long as it is done with a view to

> giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudiced to their view.[169]

It is within such a spirit that a convicted driver can point to various factors which may militate against the imposition of a suspension in his particular case. Suggestions on how the provinces should alter their legislation will follow a review of provincial legislation on the subject of automatic suspensions.

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162 *R.* v. *Peebles* (1963), 42 W.W.R. 161 (B.C. Co. Ct.).

163 *Fairbairn* v. *Highway Traffic Board of Sask.* (1958), D.L.R. (2d) 709 (Q.B.D.).

164 *Cooper* v. *Wandsworth Bd of Works,* 143 E.R. 414 at 418 per Erle C.J.

165 *Supra,* note 164 per Willes J.

166 *R.* v. *Tribunal of Appeal under the Housing Act,* [1920] 3 K.B. 334 as expanded by McNiven J.A. in *Lee Wing* v. *Peter Don Chang,* [1954] 4 D.L.R. 821 Sask. C.A. at 825-6.

167 See *Lee Wing* v. *Peter Don Chang,* [1954] 4 D.L.R. 821 (Sask. C A.).

168 *Local Government Board* v. *Arlidge,*[1915] A.C. 120 (H.L.) at 132-3 and *Randolf* v. *The Queen,* [1966] Ex. C.R. 157 at 164; *Board of Education* v. *Rice,* [1911] A.C. 179 (H.L.) at 182, per Lord Loreburn.

169 *Supra,* note 168.

B. THE PROVINCIAL LEGISLATION

A cursory survey[170] indicates that nine provinces have provisions for automatic suspension, cancellation, or revocation of a driver's licence following conviction under numerous sections of the Criminal Code. Only Quebec does not have provision for such automatic suspension. Even in Quebec, however, s. 91 of the Highway Code[171] allows the province to suspend the licence of a driver "convicted" in a civil, penal or criminal suit, where the driver was impaired, or intoxicated, drove dangerously or did not stop at the scene of an accident.[172]

The automatic suspension of a driver's licence varies in intensity of the number of sections of the Criminal Code which give effect to it, from three sections, in British Columbia[173] to any section in which the Criminal Code offence involves the use of a motor vehicle, in New Brunswick.[174] The period of the suspension varies from one month[175] to one year for a first conviction, and to five years for a third conviction.[176] It will also increase if the person, who has been convicted, has been involved, at the same time, in an accident causing property damage or bodily injury.[177] Presumably a person so convicted will be fervently hoping that a human or computer error will overlook such things as a second conviction or property damage having occurred. The provinces tend to impose stiffer suspension for convictions arising out of the use of a motor vehicle under the Criminal Code s.203 (Criminal Negligence causing death), s. 204 (Criminal Negligence causing bodily harm), s. 219 (manslaughter) and s. 233 (1) (dangerous driving).

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170 Except where noted the provincial legislation is that in effect to December 31, 1972.

171 Highway Code R.S.Q. 1964 C.231, S.91 as am. by *Transport Act* S.Q. 1972 C.55, S.94.

172 Although no direct reference is made to the *Criminal Code* in the *Quebec Highway Code*, as amended, the situations referred to are found in Sections 234, 223(4) and 233(2) of the *Criminal Code*.

173 *M.V.A.* R.S.B.C. 1960 S.253, S86D, as am. by 1972 S.B.C. C.35, S.24.

174 *M.V.A.* S.N.B. 1955 C.13, S.271 as am. by S.N.B. 1970 C34, S.19.

175 *M.V.A.* B.C., S.86D.

176 For a third conviction within 5 years *Sask. Vehicles Act* R.S.S. 1965 C.377 S.87 as am. S.S. 1970 C.79, and S.S. 1972 C.144.

177 *Ont. H.T.A.* R.S.O. 1970 C.202, Ss. 20 & 21, and Man. H.T.A. R.S.M. 1970 C.H.-60, S.238.

Some provinces allow for some judicial discretion; P.E.I. gives the courts the discretion to suspend drivers' licences up to five years for certain Criminal Code convictions.[178]

In Alberta the convicting court may reduce the period of disqualification or suspension to not less than three months, where the conviction involves breathalyzer-related, and impairment sections.[179]

The Act in Nova Scotia permits the Registrar of Motor Vehicles to suspend a driver's licence until a hearing is held, with the driver present to present his case, at which time he may confirm or vary the suspension for a further period or revoke the licence. This type of suspension does not require formal notice of a conviction from the court. This writer can only surmise that a suspension might be handled with the same discretion as a charge under the Criminal Code where the prosecutor has a choice as to whether to proceed by indictment or summary conviction. It is not clear whether the discretionary suspension by the Registrar takes precedence over the automatic suspension if the time limit for the latter is greater.[180]

Only four provinces have any procedure by which a driver may seek to have his automatic suspension varied or dispensed. In Saskatchewan this involves petitioning the Lieutenant-Governor-in-Council.[181] In Newfoundland a licence may be restored if any order of prohibition from driving under the Criminal Code s.238(1) has been cancelled, or the driver may apply at any time to a District Court Judge who may direct the Registrar to restore a driving licence unconditionally or for such times and places as may be specified in the latter court order.[182] Only in Manitoba[183]

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178 *Code* Ss. 203, 204, 233, 234, 235(2), 236, 238, 239, 295 per *H.T.A.* S.P.E.I. 1964 S.14, S.248, as am. by S.P.E.I. 1970.

179 *Alta H.T.A.* R.S.A. 1970 C.169, S.206, as am. by S.A. 1972 C.89, S.8.

180 *M.V.A.* R.S.N.S. 1967 S.191, Ss. 250 and 60 as am. by S.N.S. 1972 C.45, S.12 and 5A respectively.

181 *Sask V.A.* S.103, as am. by Ss. 1967 C.82.

182 *Nfld. H.T.A.* S.N. 1962 C.82, S.67 as am. by S.N. 1966-67 C.68 S.10; S.N. 1970 C.25, S.5; S.N. 1972 C.45, S.2. The restoration of a licence by a D.C.J. is subject to any order or prohibition from driving under S.238(1) of the *Code.*

183 *H.T.A.* R.S.M. 1970 C.H-60, Ss.252, 253 as am. by
S.M. 1970 C. 70, Ss. 78, 79, 80, 81, 82
S.M. 1971 C.71, Ss. 126,127,128,219
S.M. 1972 C. 79, Ss. 57, 58.

and in New Brunswick[184] are there administrative boards which are permitted to vary, rescind or confirm automatic suspensions as the result of Criminal Code convictions. In both jurisdictions there is a Licence Suspension Appeal Board which, on hearing the party, may rescind or vary the suspension on such conditions, terms and restrictions as it deems required, provided that it is satisfied that exceptional hardship would result if the suspension were to remain in effect, and that such a step is not contrary to the public interest.

With a couple of exceptions, decisions of the L.S.A.B. are reviewable by a county court judge if application is made to him within thirty days. In Manitoba[185] such review is by trial *de novo*, while in New Brunswick[186] the judge is limited to the evidence and proceedings before the Board.

It is interesting to note that New Brunswick in its 1973 Spring Session has amended the Motor Vehicle Act by enacting s.268A[187] which has the effect of not compelling the Registrar of Motor Vehicles to suspend a licence where it would be inconsistent with an order made under s.238(3) of the Criminal Code. However, this particular section has not yet been proclaimed.

C. SUGGESTIONS FOR CHANGES IN THE PROVINCIAL LEGISLATION & CONCLUSION

From the foregoing analysis of the provincial legislation in the area of automatic suspension it can be seen that conformity among the provinces is at best sporadic. Perhaps this is not all bad for, viewed from a local perspective, there may be different hazards and different degrees of incidence from province to province which require lesser or more stringent action by the legislature. It is submitted that the provincial legislatures are closest to and most concerned with local traffic safety and conditions. They should be the ones who determine what conditions and what circumstances will result in loss of driving privileges. It is up to them to determine when a person may be allowed to drive; it should be up to the provinces to determine when that permission should be withdrawn.

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184 *M.V.A.* S.N.B. 1955 C.13, Ss. 281A, 281B, 281C, 283 and 284, as en. by S.N.B. 1967 C.54, S.25 & 26, and as amended by S.N.B. 1972 C.48, S.59 & 60 and S.N.B. 1973 C.59, S.16 & 17.

185 *Man. H.T.A.* S.253(10).

186 *N.B. M.V.A.* S.283.

187 S.N.B. 1973, C.59, S.14.

Accordingly, Parliament should vacate the field in deference to the provinces. It is not suggested that the present federal legislation of prohibitions is *ultra vires.* Rather the suggestion is made in the interests of administrative efficacy.

Release of this area of the criminal law in deference to provincial "civil" legislation should be made only as a trade-off for greater uniformity on the part of the provincial legislatures, while, nevertheless, permitting individual provinces to retain some degree of flexibility in their legislation. One point that should be examined by all provinces is the return to some form of natural justice[188] in their licence suspension procedure so as to eliminate the finality of an automatic procedure.

Whether a pre-suspension hearing would be made by a board or by a court may be of some consequence to the person involved. One could surmise that a board, unencumbered by all the trappings of a court, would tend to more informal. On the other hand, the courts may be bound to follow precedent in given situations, and they would tend to overlook individual mitigating factors. Of course the discretion given to any board of this nature would be subject to review by the courts.[189] With the position of overseer, the courts would tend to keep a board from acting arbitrarily and without cause, while maintaining a degree of flexibility that a particular situation may require.

There are drawbacks in setting up such a system whether that system be a judicial, administrative or executive function which makes "decisions as to individual rights arrived at by ascertaining facts and applying some rule or principle of law to them".[190] Not only should there be a requirement of notice and a hearing of both sides, but also, one should be made aware of what penalties may arise out of the hearing.[191]

It is submitted that such a change in procedure would be feasible in any event. A prerequisite still could be that the onus would be on the driver to show cause why his licence should not be suspended, revoked or cancelled. Politically, it would be up to the provincial or federal governments to balance their indi-

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188 See *Supra,* Part III Section A.

189 A trial *de novo* on the Manitoba scale is suggested (see *supra* Note 185) rather than a simple review of the Board's action as in N.B. See *supra* note 186.

190 *Randolph* v. *The Queen,* [1966] Ex. C.R. 157 at 164.

191 *R.* v. *Ontario Racing Commission, ex parte Taylor,* [1970]O.R. 509 (H.C.) at 516.

vidual interests by giving the agency concerned, full discretionary power of keeping people off the roads, conditionally or unconditionally. And, unless it were to operate so that a convicted person in any province could get conditional permission to drive for employment, or other worthwhile purposes, there would be little value in changing the present system.