

GROUNDHOG DAY AT THE SUPREME COURT: THE FEDERAL CRIMINAL LAW POWER AUTHORIZES THE REGULATION OF TOXIC SUBSTANCES HARMFUL TO THE ENVIRONMENT

BY JEAN LECLAIR

Environmental protection is not a sufficiently specific subject matter to allow for its exclusive allocation to one level of government. Rather, it is a composite ensemble of widely heterogeneous fields of law. This explains the Supreme Court's refusal to qualify environmental protection as a matter of national interest falling under the exclusive jurisdiction of the Federal Parliament pursuant to the POGG.¹ Both

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levels of government are thus able to legislate on matters involving the protection of the environment. The distinct nature of the legislative fields enumerated in sections 91 and 92 of the *Constitution Act, 1867* will determine the type of environmental concerns which both levels of government are authorized to take into account in the exercise of their respective powers.

For the Federal Government, the approach adopted in *Friends of the Oldman River* constituted an obstacle to the adoption of an exhaustive regulatory regime of local and interprovincial activities likely to pollute the environment. Indeed, the "narrowness" of the Federal Parliament's powers (91(9), (10), (12), (13), and 92(10)a) to c), etc.) hampers its ability to establish such a regime.² Only the criminal law power—section 91(27) of the Constitution—would have enabled it to achieve this objective as long as it could be interpreted as permitting the regulation—and not simply the prohibition—of substances liable to harm human health or to deteriorate the environment. In a 5-4 majority decision, the Supreme Court has just recognized, in *Hydro-Québec*, that section 91(27) does authorize the Federal Parliament to adopt what comes very close to being qualified as a regulatory regime of toxic substances.

THE MAJORITY DECISION

In *Hydro-Québec*, the constitutional validity of sections 34 and 35 of the *Canadian Environmental Protection Act* and of an interim order adopted pursuant to it were challenged. These provisions established a mechanism enabling the identification of toxic substances. They also authorized the Minister of the Environment to make regulations concerning

any possible use of those substances. Failure to comply with the regulations constituted an offence.

La Forest J., speaking for the majority, concluded that the challenged provisions were validly enacted under section 91(27) of the Constitution because they prohibited, except in accordance with specified terms and conditions, the introduction of toxic substances into the environment. As such, they pursued a legitimate public objective, i.e., the protection of the environment. And, according to La Forest J., the "stewardship of the environment" is one of "the fundamental value[s] of our society", such as the protection of human life or health, which the criminal law power aims to protect (para. 43).

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In coming to this conclusion, La Forest J. insisted on the broad latitude conferred on the Federal Parliament by section 91(27) in the determination of the evils it wishes to suppress and on the extent of blameworthiness that it wishes to attach to a criminal prohibition. Essentially, as he bluntly puts it, "all one is concerned with is colourability" (para. 38). According to him, a

careful reading of the law proved that it was confined to matters within the criminal law power of Parliament (paras. 46 and 72).

The challenged provisions did not constitute an infringement of the regulatory powers allocated to the provinces by the Constitution. They dealt only with the control of toxic substances—allowing for their release into the environment under certain restricted circumstances—through "a series of prohibitions to which penal sanctions [were] attached" (para. 51). The *Act* did not bar the use or manufacture of all chemical products. Rather it was aimed at those substances that are dangerous to the environment, substances that are "toxic in a real sense" (para. 60). In short, the *Act* provided for "a limited prohibition applicable to a restricted number of substances" (para. 62).

As for the broad wording of the law, such was no obstacle to its constitutionality. This type of phraseology is characteristic of environmental protection legislation because of the breadth and complexity of such an amorphous subject. Requiring more precision could "frustrate the legislature in its attempt to protect the public against the dangers flowing from pollution" (para. 50).

THE DISSENTING OPINION

In dissent, Lamer C.J.C. and Iacobucci J. declared that two requirements had to be fulfilled for a law to be valid under section 91(27).³ First, it must be directed at a legitimate public purpose. The dissenting judges, agreeing on this issue with the majority, concluded that the protection of the environment was such an objective (para. 119). Second, the law must contain prohibi-

tions backed by penalties (paras. 112-13). The *Act* failed to satisfy this requirement, since it aimed at protecting the environment by regulating "every conceivable aspect" (para. 96) of "any and all substances which may have a harmful effect on the environment" (para. 110). The *Act* did not provide for prohibitions backed by penalties as in *Morgentaler*⁴ and *Furtney*.⁵ In those cases, the exemptions were truly exceptions to general prohibitions. Section 34(1) of the *Act* authorized the Minister to regulate every aspect of a toxic substance, and a failure to comply with such a regulation constituted an offence. In other words, "[t]he prohibitions [were] ancillary to the regulatory scheme, not the other way around" (para. 130). Section 34(6) of the *Act* also prescribed that the Governor-in-Council could exempt a province from the application of regulations adopted under sections 34-35 if that province had adopted and implemented equivalent regulations. The dissenting judges argued that such a provision could not be enacted under section 91(27) since provinces do not have any criminal jurisdiction, nor can the federal government delegate such jurisdiction to them (para. 134).

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Lamer C.J.C. and Iacobucci J. concluded that the regulating power conferred by the

Act was so broad that it "would not only inescapably preclude the possibility of shared environmental jurisdiction; it would also infringe severely on other heads of power assigned to the provinces" (para. 137). And since the Supreme Court has already unanimously held that the environment was a subject matter of shared jurisdiction, "[o]ne level should not be allowed to take over the field so as to completely dwarf the presence of the other" (para. 136).

COMMENTARY

The majority decision is a welcome one in that it will permit the Federal Parliament to establish a comprehensive scheme for the regulation of toxic substances. La Forest J. seems uncomfortable with the idea of authorizing true regulation under the criminal law power. He constantly speaks of the *Act* in terms of prohibitions and exemptions, and such hesitation is unwarranted.


As long as it is aimed at activities which are in the nature of "public evils", a legislative intervention based on the criminal law power is no longer confined to repression and stigmatization. In other words, regulation is possible under section 91(27), but only the regulation of a substance, an activity, or a person that *endangers* either the safety of the public or the integrity of the environment.⁶ Indeed, if it pursues a legitimate public objective, a law based on section 91(27) need not be confined to traditional modes of sanctions.⁷ Such interventions need not provide for the infliction of a penalty. For instance, in *Swain*,⁸ the Supreme Court held that the section of the *Criminal Code* providing for the detention in a provincial

mental institution of those acquitted for reason of insanity was validly enacted under section 91(27), even though no penalty was inflicted. According to the Court, a rational link existed between this preventive provision and the criminal law power, since it applied to persons who had perpetrated acts prohibited by the *Criminal Code*, and whose release could endanger the safety of the public. There is certainly a rational link between the regulation of dangerous substances and the criminal law.⁹ As La Forest J. says, if the law is read as only applicable to substances that are "toxic in a real sense", it can come within criminal law.

Under the criminal law power... Parliament can only prevent evils which go against certain fundamental values, such as the protection of health and the protection of the environment (La Forest J., para. 48). As such, if it pursues an objective falling within its constitutional jurisdiction, a province can regulate the very same activities or conduct. In so doing, it is not enacting criminal legislation.

Lamer C.J.C. and Iacobucci J. seem to have fallen prey to the confusion—underlined by

La Forest J. (paras. 33 and 44)—that appeared during the argument between the approach to the national concern doctrine and the criminal law power. The dissenting judges are wrong in assuming that the majority's approach precludes the possibility of shared environmental jurisdiction. The national concern doctrine does result in the exclusive conferral of an all-encompassing power over a particular subject to the central Parliament, excluding any provincial interventions over the same issue.¹⁰ Under the criminal law power, however, Parliament can only prevent evils which go against certain fundamental values, such as the protection of health and the protection of the environment (La Forest J., para. 48). As such, if it pursues an objective falling within its constitutional jurisdiction, a province can regulate the very same activities or conduct.¹¹ In so doing, it is not enacting criminal legislation. Thus, "the use of the federal criminal law power in no way precludes the provinces from exercising their extensive powers under s. 92 to regulate and control the pollution of the environment either independently or to supplement federal action" (La Forest J., para. 47).

The double aspect doctrine thus enables Parliament to establish minimal standards of environmental protection that can be exceeded by the provinces in the exercise of their own powers.¹² 

NOTES

1. *Friends of the Oldman River v. Canada*, [1992] 1 S.C.R. 3 at 64.
2. J. Leclair, "L'étendue du pouvoir constitutionnel des provinces et de l'État central

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en matière d'évaluation des incidences environnementales au Canada", (1995) 21 Queen's L.J. 37.

3. The dissenting judges also concluded that the *Act* could not be validly enacted by Parliament under the national dimension doctrine nor under its trade and commerce power.

4. *R. v. Morgentaler*, [1976] 1 S.C.R. 616.

5. *R. v. Furtney*, [1991] 3 S.C.R. 89.

6. Legislation regulating the use of weapons (*Attorney General of Canada v. Pattison* (1981), 59 C.C.C. (2d) 138 (Alta. C.A.); *Martinoff v. Dawson* (1990), 57 C.C.C. (3th) 482 (B.C.C.A.); of alcohol (*Russell v. The Queen* (1881-82), 7 App. Cas. 829); of food and drugs (*R. v. Wetmore*, [1983] 2 S.C.R. 284; *C.E. Jamieson & Co. (Dominion) v. Canada*, [1988] 1 F.C. 590); and the promotion of tobacco (*RJR—MacDonald Inc. v. Canada*, [1995] 3 S.C.R. 199), was held to be valid under the criminal law power.

7. *The Queen v. Zelensky*, [1978] 2 S.C.R. 940.

8. *R. v. Swain*, [1991] 1 S.C.R. 933.

9. For a particularly enlightening opinion on the question of the possible regulation of toxic substances under the criminal law power, see Muldoon J.'s reasons in *C.E. Jamieson & Co. (Dominion)*, *supra* note 11 at 621-22.

10. Such a doctrine excludes any possibility of invoking the double aspect doctrine: *Johannesson v. West Saint-Paul*, [1952] 1 S.C.R. 292 at 311-12; *Re Anti-Inflation Act*, [1976] 2 S.C.R. 373 at 444 and 461.

11. For example, see *Rio Hotel v. New-Brunswick*, [1987] 2 S.C.R. 59.

12. There is no conflict be-

tween a—valid—provincial law and a less severe—valid—federal law, because it is possible to obey both in respecting the more severe of the two: *Ross v. Registrar of Motor Vehicles*, [1975] 1 S.C.R. 5.

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HOW FAR CAN THE COURT GO TOO FAR?

BY ANDRÉE LAJOIE

1997 seems to have been a lean year for the "division of powers" cases, as only two came to the Supreme Court: *Germain v. Montréal*, a (small) gain for Québec, and *R. v. Hydro-Québec*, an (important) victory for Ottawa. Quantitativists would no doubt conclude that such a record shows how fair the Court is, 50 percent of the cases having been decided in favour of provincial authorities and 50 percent in favour of their federal opponents. But *Germain* seems to have been such a clear and, I submit, not very significant case, that Mr. Justice La Forest decided it in three paragraphs, and the organizers of this panel asked us to concentrate on *Hydro-Québec*: does this reflect a long overdue qualitativist orientation?

Since 1982, the Court's work on the division of powers has lost its pre-eminence to the Charter. Yet, unnoticed by many, centralization continues and indeed increases, propelled this time by continentalism and the

NAFTA.

I am no determinist, and under no circumstances will I predict the outcome of a case. But I must admit I was not surprised by the Supreme Court

decision in *Hydro-Québec*. This was a predictable case if ever there was one and, I will try to show, a potentially disquieting one in terms of the division of powers, if not of the environment. Despite such reservations, I find this decision interesting, because it proves some of my pet theories.

A MOST PREDICTABLE CASE

Whether you analyze it in light of the Court's centralist record on federalism, or from within the narrower context of its criminal law jurisprudence, or even as a reflection of the values it has been writing in the Constitution, the case fits so well that it could hardly surprise anyone. To start with, given the Court's track record on division of powers issues, *Hydro-Québec* is the epitome of normality. Indeed, in a study co-authored for the MacDonald Commission, I recorded the Court's unrelenting centralist tendencies between World War II and the *Charter*. In each of the three periods we distinguished in this era, the Court confirmed a majority of federal interventions, at least in cases emerging from Québec, save for a very short period between 1976 and 1979 when, for balance, it transferred its centralizing urge to cases arising from the rest of Canada. Since 1982, the Court's work on the division of powers has lost its pre-eminence to the *Charter*. Yet, unnoticed by many, centralization continues and indeed increases, propelled this time by continentalism and the NAFTA.

A look at the division of