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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?

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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

powers cases in matters specifically related to criminal law shows an even more consistent centralist trend, most visible in the field of health, dating back before the turn of the century. Having already defined crime broadly in the *Margarine Reference* as an act which a law, directed against an injurious or undesirable effect against the public, forbids with appropriate penal sanctions, the Court has now proceeded to describe federal power over criminal law as "plenary" in *Macdonald*. In the meantime, in *Kripps*, Laskin had even included in this power jurisdiction over "provisions in the *Food and Drug Act* . . . that are aimed at marketing and [which] certainly invites the application of the trade and commerce power".

Given these precedents among others, it is not surprising that the Court would characterize the regulation of PCB emissions as "an evil that Parliament can legitimately seek to suppress". Nor is it surprising that such suppression was said to be a "legitimate public purpose" within the criminal law power, since Parliament has discretion to determine what evil it wishes to suppress by penal prohibition, especially given the importance of the environment as a paramount value.

Indeed, the values affirmed in this decision also have been featured in past decisions of the Court. As mentioned, the "environment" is perhaps most sacred among them, as one can notice in cases such as *Canadian Pacific* and *Oldman River*. But the protection of the public against evils, or society against dangers, is another value affirmed in *Hydro-Québec* which has been present in criminal law cases decided not only in the divi-

sion of powers context, but under the *Charter* as well, at least since the neo-liberal 1990s.

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How predictable, therefore, that the Court would ground its decision in values such as protection against evil, and would go so far as to describe the safeguarding of the environment as "a public purpose of superordinate importance". Currently, such assertions are even more acceptable, given that *Hydro-Québec* bashing is unlikely to meet with much opposition. What is new here is not that the Court would rely on these values. It is, rather, that it has not only done so explicitly, but affirmed that "[t]he purpose of criminal law is to underline and protect our constitutional values" (at 127), and stated that it is "[t]he all important duty of Parliament and the provincial legislatures to make full use of the legislative powers assigned to them in protecting the environment" (at 86). Could this possibly be an allusion to some nostalgic legal naturalism, mandating a prescriptive effect of values on Parliament?

#### A POTENTIALLY DISQUIETING DECISION IN TERMS OF DIVISION OF POWERS

However much the environmentalists are right to be pleased with the outcome of this decision, I still think it has the potential to disrupt the division of powers and federalism. Maybe it is not the worst possible one, as the Court itself points out, referring to the fact that it could have validated the impugned legislation and order-in-council on grounds of the "national dimensions" doctrine. This would have had a much more serious effect on provincial jurisdiction on the environment, to the point of its elimination (at 115).

Yet I say a "potentially" disquieting decision because it introduces in our constitutional law a new kind of concurrent jurisdiction: the "Constitution should be interpreted as to afford both levels of government ample means to protect the environment" (at 116), a revival of Lesage's cooperative federalism and the Québec provincial liberals "Livre Beige", allowing for a "wide measure of cooperation between the federal and provincial authorities to effect common or complementary ends" (at 131). Needless to say, the only concurrent jurisdictions set out in the Constitution are listed in section 95 (immigration and agriculture). Given the doctrine of paramountcy, introducing others can only bring us back to the "occupied field" theory, to which we long ago said good riddance.

But this is not the only problem: the decision appears reasonable because the Chlorobiphenyls Interim Order seems an appropriate use of the powers conferred by sections 34 and 35 of the *Environmental Protection Act*. Yet other usages will not necessar-

ily be so reasonable. I tend to agree, on this point at least, with the minority: a completely open-ended concept of "criminal law" and no other will do,

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since unless one is an essentialist, one has to admit that a crime is what the society in which it occurs says it is, coupled with equally open-ended definitions of whatever evils Parliament wants to protect us from in the future, constitute themselves evils against

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which provincial legislative jurisdiction should be protected.


It also makes impossible and oxymoronic any definition of "colourable". Furthermore, I cannot be convinced that the devolution of so much power to the executive under sections 34 and 35 does not bring the doctrine of vagueness into play. Nor can I imagine that a decision that even Chief Justice Lamer finds too centralizing could be any good for the provinces.

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**LEGITIMACY—THE ONLY EFFECTIVE LIMITATION ON DISCRETION**

However, it might not be by chance that the Interim Order has proven to be a particularly reasonable and acceptable use of the powers conferred: the often quoted definition of criminal prohibition in the *Margarine Reference* reads, in part: "enacted with a view to public purpose which can support it as being in relation to criminal law". If hermeneuticians and rhetoricians alike are right, the Court's discretion can only extend as far as it meets the expectations of its "audiences" and keeps public support.

Such is the basis of its legitimacy which, in a post-modern society, depends on the reception its decisions get from the specialized legal community, but even more on the coincidence of the values that the Court embodies in its decisions and those of the general public.

As long as it gives to "criminal law", "environment", and other assorted open-ended concepts a meaning that a majority of Canadians can support, the Court will keep its credibility and maintain the legitimacy of its decisions. A problem might arise when a broad consensus dissolves, or if, as might happen in other fields where constitutional questions are up for decision, a Canadian minority happens to form a provincial majority. 

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**THE CHARTER OF RIGHTS AS A MURDERER'S BEST FRIEND**

BY ALAN YOUNG

For the past two years I have been writing an obituary for the *Charter of Rights* on the basis that the Supreme Court of Canada has in recent years taken a rather parsimonious approach to providing remedies for constitutional violations. In 1995, I wrote that "to date, the Court has mastered the rhetoric of rights-adjudication, but more work is needed with respect to the practical exercise of creating or prompting necessary institutional adjustment" for the provision of effective remedies. In 1996, I suggested that the "living tree" we call the *Charter* is a unique tree which is capable of shrinking, but not necessarily dying, in the face of lack of nourishment: "The past year [1996] will not go down in history as an exciting one for *Charter* jurisprudence. In fact, 1996 was probably the most boring and pedestrian year of *Charter* jurisprudence since the enactment of the *Charter* in 1982. It appears that the love affair with the *Charter* is over and courts are beginning to take a sober, second thought with respect to the application of *Charter* rights in the criminal process".

The Court's performance in the 1997 term clearly indicates that my report of the death of the *Charter* is both premature and unfounded. Despite the fact that the 1995 decision in *O'Connor* (1995), 103 C.C.C. (3d) 1, left the distinct impression that a stay of proceedings would rarely be granted for prosecutorial non-disclosure, in 1997 the Court stayed two proceedings on the basis of

non-disclosure or lost disclosure (see *Carosella* (1997), 112 C.C.C. (3d) 289; *MacDonnell* (1997), 114 C.C.C. (3d) 145). In addition, the Court ordered new trials for two convicted murderers on the basis that probative evidence should have been excluded at trial (*Stillman* (1997), 113 C.C.C. (3d) 321; *Feeney* (1997) 115 C.C.C. (3d) 129).

This brief comment will focus on the windfall opportunity gained by these two murderers with a view to determining whether these rulings should be celebrated as due process triumphs or whether these two decisions are merely a reflection of a Court which is adrift in a sea of confusion.

In 1991, Pamela Bischoff was brutally raped and murdered by William Stillman. In the same year Frank Boyle was brutally beaten to death by Michael Feeney. Both accused were convicted at trial but, in 1997, the Supreme Court of Canada ordered new trials for both men; however, both new trials will likely result in acquittals as a result of the Court ordering the exclusion of critical pieces of evidence. In a nutshell, William Stillman received a new trial on the basis that bodily samples were seized from him for DNA testing in the absence of valid authority. The bodily samples constituted non-discoverable, conscriptive evidence and as such were excluded on the basis that the admission of the evidence would affect or impair the fair trial rights of the accused. Michael Feeney received a new trial on the basis