HAZARDOUS WASTE? THE CRIMINAL LAW POWER, FEDERAL ENVIRONMENTAL JURISDICTION, AND OTTAWA'S POLICY SINCE *R.* v. *HYDRO-QUÉBEC*

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Environmentalists call it the most important judgment ever in their favour. The Supreme Court of Canada's decision in *R.* v. *Hydro-Québec* affirmed for the first time the jurisdiction of Canada's Federal Parliament to regulate toxic substances – and very likely, jurisdiction to regulate the environment generally.[1] The decision is also the high-water mark on the interpretation of s. 91(27) of the *Constitution Act, 1867*, the criminal law power. In both these respects, *Hydro-Québec* is an extraordinary judgment indeed: one which reaffirms the plenary nature of the criminal law power last articulated in the Court's 1995 *RJR-Macdonald* judgment,[2] and one which harnesses that power for the advancement of a new, contemporary public purpose -- the protection of the environment.

1. The Facts

New Years' Day 1990 did not begin propitiously for Hydro-Québec. On that and following days, according to the Crown's information, the company allegedly discharged an illegal quantity of chlorobiphenyls – also known as polychlorinated biphenyls or *PCBs* for short – from its high-voltage equipment into the St. Maurice

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[1] *R.* v. *Hydro-Québec*, [1997] 3 S.C.R. 213 [hereinafter *Hydro-Québec*].

[2] *RJR-MacDonald Inc.* v. *Canada (Attorney General)*, [1995] 3 S.C.R. 199 [hereinafter *RJR-MacDonald*].

River, a scenic tributary of the St. Lawrence. The company, it is further alleged, failed to take timely steps to report the discharge to the authorities.

The gravity of these discharges lies in the pernicious physical qualities of PCBs. They are, by universal reckoning, among the most dangerous environmental pollutants ever created. Dangerous and long-lived, PCBs can survive undegraded in the environment for a decade or more following their release. Air and water, by evaporation and precipitation, can transport PCBs over tremendous distances from their point of discharge, redepositing them at higher latitudes. There is literally no corner of the Earth so remote that PCBs cannot be found there. Worse still, PCBs have a tendency to accumulate in the fatty tissues of living things. When a predator nourishes itself on prey, it consumes the PCBs in that prey. The food chain is organized like Russian dolls, with each higher predator taking in the PCBs in creatures below it. Consequently, PCBs *biomagnify* as they ascend the food chain. There is not a human or higher animal alive that does not have measurable levels of PCBs in its flesh.[3]

The combination of a long half-life in the environment, long range atmospheric transport, and the ability to biomagnify makes PCBs some of the most pervasive pollutants. Even a jurisdiction that banned PCBs outright would not be able to stanch the atmospheric influx of PCBs from elsewhere. Even the Arctic, hardly a focus of industrial activity, is contaminated with PCBs.[4] Arctic people such as the Inuit, whose traditional diet includes a great deal of fatty, blubber-like foods, are among the most contaminated people on Earth.[5]

While this chronic environmental exposure to PCBs is less than the exposure one would receive from ingesting a large quantity of PCBs following an industrial accident, it is almost certainly still dangerous to one's health. Science has yet to

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[3] S. Dobson and G. van Esch, *Polychlorinated Biphenyls and Terphenyls* (2nd), Environmental Health Criteria series no. 140, World Health Organization (WHO, Geneva, 1993) [hereinafter *WHO PCB Report*].

[4] D. Thomas *et al.*, "Arctic terrestrial ecosystem contamination," *Science of the Total Environment* 1992;122(1-2):135-164. See also the chapter entitled "Persistent Organic Pollutants" in *Arctic Pollution Issues: A State of the Arctic Environment Report* (Oslo: AMAP, 1997).

[5] E. Dewailly *et al.*, "Inuit exposure to organochlorines through the aquatic food chain in Arctic Québec," (1993) 101 *Environmental Health Perspectives* 618; E. Dewailly *et al.*, "High levels of PCBs in breast milk of Inuit women from Arctic Québec," (1989) 43 *Bulletin of Environmental Contamination Toxicity* 641; P. Ayotte *et al.*, "PCBs and dioxin-like compounds in plasma of adult Inuit living in Nunavik (Arctic Québec)," (1997) 34 *Chemosphere* 1459.

elucidate all the effects of PCBs at lower doses, not least because the effects are sure to vary with the species and age of the organism, the duration of exposure, and the specific *mélange* of PCB isomers in question. The ethical barrier to human experimentation means that our knowledge must always be extrapolated from animal studies, and in that way is "imperfect." Such studies tell us that PCBs are toxic to laboratory mammals such as rodents or primates,[6] and that in wild animals ambient environmental exposure is associated with cancers and birth deformities, including in endangered species like beluga whales[7] -- all of which should be motivation enough for remedial action. Nevertheless, PCBs are one of a very few pollutants for which there is evidence of harm to human health resulting from environmental exposure. To take an example, epidemiological studies of women eating a diet enriched in Lake Michigan fish demonstrate that their offspring perform less well on tests of cognition, and this impairment is, to a high degree of confidence, because of PCBs transmitted prenatally across the placenta.[8] One can only suppose what the effects may be on people who subsist heavily on a diet of contaminated fish, such as the Inuit.

For these reasons, it is not surprising that nearly every jurisdiction, including Canada, has imposed legal controls on PCB handling and disposal. A measure of international consensus in this regard is that PCBs were the first substance to be regulated by Canada's *Environmental Contaminants Act* (since repealed), the United States' *Toxic Substance Control Act*; and the environmental side-agreement of the North American Free Trade Agreement.[9] A more recent development is the inclusion of PCBs on a short-list of twelve Persistent Organic Pollutants (POPs) that may be

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[6] *WHO PCB Report, supra* note 3.

[7] P. Beland *et al.*, "Toxic compounds and health and reproductive effects in St. Lawrence beluga whales," (1993) 19 *Journal of Great Lakes Research* 766.

[8] The Michigan studies are especially alarming because they clearly track cognitive impairment from prenatal PCB exposure in a single cohort of children; the latest results demonstrate statistically significant impairment of IQ scores, reading comprehension, and memory, persisting to at least the eleventh year. As the authors put it, "*In utero* exposure to polychlorinated biphenyls in concentrations slightly higher than those in the general population can have a long-term impact on intellectual function.": Jacobson JL and Jacobson SW, "Intellectual impairment in children exposed to polychlorinated biphenyls in utero," (1996) 335 *New England Journal of Medicine* 783. The Supreme Court cited one of the earlier Michican studies in *Hydro-Québec, supra* note 1 at para. 157. Related studies from elsewhere are reviewed in Jacobson J.L. and Jacobson S.W., "Evidence for PCBs as neurodevelopmental toxicants in humans," (1997) 18 *Neurotoxicology* 415.

[9] When *CEPA* was proclaimed in 1988, it repealed the *Environmental Contaminants Act*, R.S.C. 1985, c. E-12. *Toxic Substances Control Act*, 15 U.S.C. § 2605(e); CEC Council of Ministers Resolution 95-5, "Sound Management of Chemicals", October 1995.

banned outright by an international treaty now being negotiated under the auspices of UNEP.[10]

At the date of the alleged offence in *R. v. Hydro-Québec,* PCBs of all kinds were designated "toxic substances" by the *Chlorobiphenyls Interim Order* (the "Interim Order"), which is subordinate legislation under the *Canadian Environmental Protection Act*, or *CEPA*.[11] In particular, Hydro-Québec was charged with a violation of s. 6(a) of the Interim Order, which prohibited the discharge of PCBs from electrical equipment into the environment in excess of 1 gram per day.[12] Any violation of that section triggers s. 36 of *CEPA*, which requires the polluter to report the offending release promptly to the authorities. The discharge limit and the attendant reporting requirement are prosecuted as summary or indictable strict liability offences, punishable by a fine of up to $1 million or three years imprisonment.[13] Proceedings were brought against *Hydro-Québec* as a summary prosecution.

The merits hearing was pre-empted by Hydro-Québec's motion to dismiss, on the grounds that both the Interim Order, and its enabling sections under *CEPA*, were *ultra vires* federal jurisdiction. In particular, Hydro-Québec alleged the law was not valid as criminal law; law for the Peace, Order and Good Government (POGG) of Canada; or in respect of any other federal head of power. It succeeded with that argument at three levels of court below, each time eliciting nearly the same reasons from the bench: that *CEPA* was substantively too encompassing, and in the same breath, that its pith and substance was intolerably broad.

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[10] The First Intergovernmental Negotiating Committee (INC-1) for an International Legally Binding Instrument for Implementing International Action on Certain Persistent Organic Pollutants met in Montreal from 29 June to 3 July, 1998. At least four such further INCs are anticipated before settling the final text of a treaty, probably by the end of the year 2000. If successful, the treaty will likely be the first international agreement to ban the manufacture, use, sale and release of a pollutant. Possible substantive terms appear at *UNEP/POPS/INC.1/4* .

[11] *Canadian Environmental Protection Act*, R.S.C. 1985, c. 16 [hereinafter *CEPA*]; *Chlorobiphenyls Interim Order* , P.C. 1989-296, February 23, 1989 [hereinafter Interim Order].

[12] Section 6(a) of the Interim Order reads in part:

> The quantity of chlorobiphenyls that may be released into the environment shall not exceed 1 gram per day in respect of any item of equipment or any receptacle or material containing equipment in the course of operation, servicing, maintenance, decommissioning, transporting or storage of:
>
> (a) electrical capacitors and electrical transformers and associated electrical equipment manufactured in or imported into Canada before July 1, 1980...

[13] *CEPA*, *supra* note 11 at s. 113.

2. *CEPA*, the Interim Order, and the Judgments Below

CEPA, it must be conceded, is one of the most open-ended Acts ever written. It would be difficult for it to be otherwise, for the simple reason that it treats its eponymous purpose – "environmental protection" – quite in earnest. *CEPA*'s nine Parts deal, *inter alia*, with environmental codes of practice; aquatic nutrients; environmental control on federal lands; international air pollution; ocean dumping; and of course, toxic substances.[14] Tying all these Parts together into omnibus legislation – dealing with the terrestrial, aquatic and marine environments, in both their national and international dimensions – in practice means there must be some disconcertingly broad definitions in the Act. The most encompassing is the definition of the environment itself:

> "environment" means the components of the Earth and includes
> (a) air, land and water,
> (b) all layers of the atmosphere,
> (c) all organic and inorganic matter [*i.e.* all inanimate things] and living organisms, and
> (d) the interacting natural systems that include components referred to in paragraphs (a) to (c).[15]

It is difficult to conceive of a definition of "environment" that could, in principle, afford more latitude to impose on provincial jurisdiction. Much the same criticism may be levied at the terms that are the namesake of Part II of the Act, "Toxic Substances." A "substance" includes, *inter alia*, "any matter that is capable of being dispersed in the environment"; "any element or free radical"; and "any combination of elements of a particular molecular identity." Stripping those phrases of their chemistry jargon, it really does not go too far to say that if a thing is built of atoms, it may qualify as a *CEPA* "substance."

Obviously, this apparent breadth needs to be tempered in some way. This is done by s. 11 of Part II, which lays down a test whereby a "substance" may be qualified as "toxic." Section 11 is the threshold of Part II, and deserves careful consideration for that reason:

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[14] Two of *CEPA*'s Parts – Part V (International Air Pollution) and Part VI (Ocean Dumping) – replace statutes that were formerly upheld under the POGG power: See *R. v. Crown Zellerbach*, [1988] 1 S.C.R. 401 [hereinafter *Crown Zellerbach*]; *Re Canada Metal Co.* (1982), 144 D.L.R. (3d) 124 (Man. Q.B.).

[15] *CEPA*, *supra* note 11 at s. 3.

11. For the purposes of this Part, a substance is toxic if it is entering or may enter the environment in a quantity or concentration or under conditions
(a) having or that may have an immediate or long-term harmful effect on the environment;
(b) constituting or that may constitute a danger to the environment on which human life depends; or
(c) constituting or that may constitute a danger in Canada to human life or health.

A substance is "toxic", and therefore susceptible to regulation under Part II, if it is *injurious* or *potentially injurious* in a limited number of ways. These can essentially be distilled down into two rules of thumb. Rule one is paraphrased by the so-called "three E's of *CEPA* toxicity": that a toxic substance must *enter* (or possibly enter) the environment, such that the resulting *exposure* is of such a quantity or concentration that some harmful *effect* will (or possibly will) occur. Rule two is simply that the harmful effect in question must result to either the environment *per se*; the environment upon which human life depends; or human life *per se*.

A few extreme, hypothetical examples illustrate how s. 11 may operate. At the most "green" extreme, the disjunctive subparagraphs of s. 11 allow a substance to be regulated as "toxic" if exposure to it is possibly inimical to the environment, even if exposure does no harm to humans.[16] An example of such a substance is DDT, which ravages ecosystems but is harmless to humans in ordinary exposures.[17] At the opposite, "brown" extreme, the requirement to satisfy the "three E's" can place a limit on what is toxic. For instance, a notional substance that billows liberally out of Canadian smokestacks and is uniquely lethal to Saurus Cranes (a species found only in Vietnam) may not enter their distant habitat at concentrations sufficient to cause harmful effects, and may therefore not be "toxic" under Part II. Seen in this

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[16] The use of the English word "or" concluding subparagraph (b) signals that the subparagraphs are disjunctive. It is likely an artifact of sloppy drafting that there is not a corresponding "ou" in the French version of that subparagraph.

[17] It is widely accepted that DDT is acutely toxic to insects and chronically toxic to certain higher-order carnivores such as birds of prey. It is equally accepted that ordinary exposures are not acutely toxic to humans (*e.g.* occupational exposure in the course of spraying). Having said that, people who subsist on a diet rich in marine mammals, such as the Inuit, are thought to risk chronic DDT toxicity through this extraordinary exposure. Whether this exposure, which results largely from long-range transport of DDT from outside Canada, should figure in assessing whether DDT is "toxic" for the purposes of *CEPA* is a tantalizing question. On the other side of that coin, query whether the fact that people in the tropics use DDT to stave off lethal epidemics of malaria – thus obtaining a health *benefit* – should matter to the toxicity assessment. In sum, should effects resulting from global causes be comparably weighed as effects resulting from national causes, and can health benefits of using a substance be traded off against attendant health costs, in arriving at a finding of toxicity?

light, *CEPA*'s definition of toxicity is actually *narrower* than the scientific meaning of the word, which focuses simply on the substance's ability to cause mortality or morbidity on any species, at any concentration, quite apart from its potential to do so in the course of ordinary or foreseeable exposure.[18]

In practice, the application of s. 11 falls to the discretion of the Ministers of Environment and Health, who adopt meticulous, science-led toxicity assessment that lists substances according to their real or suspected toxicity under *CEPA*. The net effect is to impose a strict *procedural* bottleneck at the threshold of *CEPA* which mitigates the Act's substantive broadness and ensures a tolerable degree of infringement of provincial jurisdiction. This procedure involves managing several lists of substances, corresponding to the stages of a toxicity assessment. A general "Domestic Substances List" (the DSL) contains the common and chemical names of all substances in use in Canada since 1984 – over 21,000 substances at the time of the Supreme Court hearing.[19] Of these substances, a tiny subset (44) were designated by the Ministers for inclusion on the "Priority Substances List" because they are suspected to be toxic.[20] Designating a substance to this list triggers a requirement that the Ministers gather information on the substance for a comprehensive scientific assessment, taking up to five years. This assessment leads

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[18] "In scientific parlance, toxicity is the inherent capability of a substance to cause harm, which does not take into account exposure. However, the definition under section 11 of the Act is a legal one which may be equated with risk since it embodies the concept that harm to the environment or to human health is a function of both intrinsic toxicity (i.e. toxicity in the traditional sense) and the extent of exposure...": Canada, Health Canada, *Canadian Environmental Protection Act - Human Health Risk Assessment for Priority Substances* (Ottawa:, Health Canada, 1994), p. 2. The crude, "traditional sense" of toxicity is what scientists report by statistics such as LD^{50} (96 h), which is the concentration of a toxin at which 50% of a population of a certain experimental animal will die in the course of a 96 hour exposure. By imposing the further criteria of entry, or possible entry, to the environment; and lowering the regulatory threshold from exposure at which there is actual danger or harm to a level at which exposure "may constitute a danger" or "may have" harmful effects; a finding of *CEPA* toxicity comprises both a scientific determination, usually from experimental studies, and a considered judgment, erring in all cases on the side of precaution, as to the probability of entry into the environment and the probability of resulting effects. To reiterate in part, the severity of these effects is appropriately not a consideration, and a *de minimis* effect – *i.e.* one that may be, but is not positively a danger – is sufficient to bring a substance within the definition of *CEPA* toxicity.

[19] *CEPA*, *supra* note 11 at s. 25(1). At the time of the Supreme Court hearing, the Domestic Substances Lists in force were SI/91-148, *Canada Gazette*, Part I Supp., January 26, 1991; and SOR/94-311, as amended SOR/95-517. A "Non-Domestic Substances List" comprises another 45,000 substances known but not used in Canada: *CEPA*, s. 25(2).

[20] *CEPA*, *supra* note 11 ats. 12. At the time of the Supreme Court hearing, a single Priority Substances List was in force: *Canada Gazette*, Part I, February 11, 1989 at 543.

to a recommendation or refusal to designate the substance as toxic.[21] The recommendation is finally subject to the discretion of the Governor in Council, who may order a that a substance found to be toxic be added to the "List of Toxic Substances" in Schedule I of the Act. Only then is a substance able to be regulated.[22]

The procedural steps of the toxicity assessment that take a substance from the DSL to the List of Toxic Substances can happen at the sole behest of the federal government, but the next step – enacting a regulation – cannot take place until the Governor in Council consults a federal-provincial advisory committee. This requirement is somewhat relaxed in the case of an interim order, which is a temporary regulation lasting up to two years, exercisable in case of emergency or as a stopgap measure where a substance is believed toxic but is not yet listed as such. The Ministers may make the interim order, subject to the requirement that the provinces are invited to consult within twenty-four hours thereafter.[23] There is thus no way to regulate a substance, even in case of emergency, without at some point consulting the provinces.

It should be plain that the procedural barriers to regulation, both in toxicity assessment and provincial consultation, place a formidable brake on how *CEPA* is used. Proof of this lies in the fact that at the time of the Supreme Court hearing, only *two* substances – just 0.01% of those on the DSL – had run this gauntlet and been made the subject of a *CEPA* regulation. Another small number were the subject of interim orders. The tiny number of substances controlled under *CEPA* hardly spoke in aid of what might be termed "the Chicken Little argument": that the substantive breadth of *CEPA* would cause the sky to fall on provincial jurisdiction.

It was just this argument that, in the judgments of the courts below, was fatal to the criminal law argument. The first instance judgment of Babin J. is the best reasoned, and is broadly concurred in by the other Québec courts. The gravamen of Babin J.'s decision is that the substantive broadness of *CEPA*, marked by the wide definitions of the "environment" and "toxic" substances, support a generous characterization of the pith and substance of the Act and Interim Order. All the

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[21] *CEPA*, *supra* note 11 at ss. 14-16, 89(5). For an example of the scientific review, which is very thorough, see Canada, Environment Canada and Health and Welfare Canada, *CEPA Priority Substances List Assessment Report for Toluene* (Ottawa: Environment Canada, 1992), and the subsequent report of the results in the *Canada Gazette*, Part I (January 30, 1993) at 264.

[22] *CEPA*, *supra* note 11 at ss. 33, 34 and Schedule I.

[23] *Ibid.* at s. 35.

courts noted that the Act contemplated regulation not only to protect human health, but also to protect the environment in its own right.[24] The effect of this liberal inclusion would be to take the Act outside the classic formulation of the criminal law power, given famously by Justice Rand in the 1949 *Margarine Reference*:

> A crime is an act which the law, with appropriate penal sanction forbids; but as prohibitions are not enacted in a vacuum, we can properly look for some evil or injurious or undesirable effect upon the public against which the law is directed. That effect may be in relation to social, economic or political interests; and the legislature has had in mind to suppress the evil or to safeguard the interest threatened... [Thus when is] the prohibition then enacted with a view to a public purpose which can support it as being in relation to criminal law? Public peace, order, security, health, morality: these are the ordinary though not exclusive ends served by [the criminal law].[25]

The omission of environmental protection from this list is a conspicuous absence. Suffice it to say that in characterizing the pith and substance as protection of the environment, and not more narrowly as the protection of health, the lower courts went seriously outside the facts of the case. While it is correct that s. 11(a) contemplates the regulation of a substance toxic to the environment in its own right, the fact is that PCBs are not such a substance, and the Interim Order does not present such a case. Quite apart from the scientific merits underlying this view, the preamble to the Interim Order itself states that:

> [The] Minister of the Environment and the Minister of National Health and Welfare believe that chlorobiphenyls [*i.e.* PCBs] are not adequately regulated and that immediate action is required to deal with a significant danger to the environment and to human life and health.[26]

That preamble, signed by then-federal Environment Minister Lucien Bouchard (that is, the same Mr. Bouchard whose provincial Attorney General attacked the

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[24] "Je ne suis pas d'accord avec la prétention de la substitut de la Procureure Générale du Canada que le but [de l'Arrêté d'urgence et les dispositions habilitantes dans l'Acte] est la protection de la santé publique. Le but me semble plus large que cela. Il vise aussi la protection de l'environnement. Et la protection de l'environnement n'a pas nécessairement de conséquence directe sur la santé publique.": [1991] R.J.Q. 2736 at 2743, per Babin J.; and in the same vein, [1992] R.J.Q. 2159 at 2163, per Trotier J.; [1995] R.J.Q. 398 at 405, per Tourigny J.A.

[25] *Re: Validity of Section 5(a) of the Dairy Industry Act*, [1949] S.C.R. 1, at 49-50 [hereinafter the *Margarine Reference*; emphasis added].

[26] Interim Order, *supra* note 11 [emphasis added].

constitutional validity of the Interim Order at the Supreme Court[27]), is further buttressed by an "Explanatory Note" appended to the Interim Order:

> The purpose of the attached interim order is to clarify an uncertainty in law...[and] to eliminate any possible doubt about the validity of regulations continued [from the repealed Environmental Contaminants Act] under the Act, and to avoid any threat to the environment or human life or health posed by the substance named below.[28]

Thus, despite legislative evidence as to the purpose of the Interim Order, and the fact that PCBs are readily appreciated as "toxic" to human health, the courts below declined to uphold the Interim Order as *intra vires* the criminal law power.

But even if one supposes that the Interim Order is valid criminal law and that procedural hurdles limit the number of *CEPA* regulations, a final objection may lie on the very considerable *degree or extent* to which *CEPA* and its regulations can intrude on provincial affairs. To put it another way, once a Minister is free to regulate, the concern is that he or she has too much power to do so. This objection is, at bottom, a corollary of the *Federal Principle*: the typically Canadian subtext that urges the law to reflect a pragmatic balance of powers between the federal and provincial poles. The Federal Principle signifies the proposition that a law which is formally and technically *intra vires* may nonetheless be suspect constitutionally if it disturbs the existing balance unacceptably. Wrong-footing this Principle proved to be *CEPA*'s undoing, in two different ways.

The first misstep had to do with the combination of *CEPA*'s substantive breadth and the lower court's narrow interpretation of the federal criminal law power. It

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[27] It is hard to overstate the Machiavellian perfidy of Mr. Bouchard in this respect. As Environment Minister, he addressed Parliament's Standing Committee on Environment, warning that PCBs are "a very dangerous and toxic substance," and talking of his "department's policy...to establish and request national standards," which he supported because "it does not make sense to accept...that we would have a patchwork of [provincial] regulations...". Even after leaving the federal government and taking leadership of the Bloc Québécois, Bouchard preached that, "for the time being, Ottawa has powers and jurisdictions in the environment, and it might be that even some nationalists in Québec must thank God for that, because Québec is not taking care of its environment now." What a change a few years, a referendum, and a taste of governance wreak on a politician! See A. Attaran, "Lucien Bouchard's environmental flip", *The Globe and Mail* (October 3, 1996), A21; Canada, House of Commons Standing Committee on the Environment, *Minutes of Proceedings and Evidence respecting Bill C-22: An Act to amend the Canadian Environmental Protection Act*, issue 13 p. 12 (June 26, 1989) and issue 16 at p. 18 (October 5, 1989); G. Hamilton, "Québec Lax on Environment: Bouchard", *Montreal Gazette* (October 30, 1990), p. A1.

[28] Interim Order, *supra* note 11.

cannot be doubted that s. 34 of *CEPA*, one of the so-called "enabling" provisions of the Act, gives vast discretion to the Ministers in deciding how to regulate a toxic substance. This opens the door to regulating matters that ordinarily would be viewed as local and private, or affecting civil rights in the province. Indeed, it would be accurate to say that to the extent a regulation does *not* trench on areas of provincial competence, it because of an act of Ministerial restraint in applying s. 34. Some examples drawn from the twenty-four subparagraphs of s. 34 illustrate the tremendous regulatory latitude available to the Ministers in this regard:

> 34.(1) Subject to subsection (3), the Governor in Council may, on the recommendation of the Ministers and after the federal-provincial advisory committee is given an opportunity to provide its advice under section 6, make regulations with respect to a substance specified on the List of Toxic Substances in Schedule I, including regulations providing for, or imposing requirements respecting,
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> (a) the quantity or concentration of the substance that may be released into the environment either alone or in combination with any other substance from any source or type of source;
> ...
> (c) the commercial, manufacturing or processing activity in the course of which the substance may be released;
> ...
> (e) the quantity of the substance that may be manufactured, processed, used, offered for sale or sold in Canada;
> (f) the purposes for which the substance or a product containing the substance may be imported, manufactured, processed, used, offered for sale or sold;
> (h) the quantities or concentrations in which the substance may be used;
> ...
> (l) the total, partial or conditional prohibition of the manufacture, use, processing, sale, offering for sale, import or export of the substance or a product containing the substance;
> ...
> (n) the manner in which and conditions under which and the purposes for which the substance or a product containing the substance may be advertised or offered for sale;
> (o) the manner in which and conditions under which the substance or a product or material containing the substance may be stored, displayed, handled, transported or offered for transport;
> (p) the packaging and labeling of the substance or a product or material containing the substance;
> (q) the manner, conditions, places and method of disposal of the substance or a product or material containing the substance, including standards for the construction, maintenance and inspection of disposal sites;
> ...

(x) any other matter necessary to carry out the purposes of this Part.[29]

Certainly, the regulatory modalities of *CEPA* are wide-ranging. Some, as in subparagraphs (a), (h), and (p), are intimately connected with the control of toxics – indeed, it is hard to imagine how such legislation could be effective if it did not make provision for rules that limit quantities and concentrations of a toxin, or rules for safe labeling. Others subparagraphs, such as (c) through (f) and (l), are perhaps sustainable under the federal trade and commerce power. But these subparagraphs aside, much of the rest of s. 34 appears to be less apposite to the purpose of controlling toxics, than to property and civil rights, or matters of a local and private nature in the province. Subparagraphs (o) and (q) stand out as the constitutionally sore thumbs of *CEPA*, for they do not prohibit acts involving toxics so much as qualify or *regulate* how toxics are locally marketed or handled. Finally, subparagraph (x) seems designed for nothing other than catching aspects of marketing or handling that, for whatever reason, prove desirable but were missed in drafting the Act.

All the lower courts took umbrage at the sweeping regulatory jurisdiction conferred by s. 34, finding it irreconcilable with their conception of the federal criminal law power. A digression is necessary here to explain why. Though the *Margarine Reference* provides for a *formulaic* definition of the criminal law – a prohibition, plus a penalty, plus a public purpose – such a definition can appear distressingly simplistic because it leaves an open door to excesses of federal jurisdiction. Those who dislike the *Margarine Reference* would argue that a rule of form or construction is an impoverished basis on which to allocate legislative power within the scheme of the Constitution, and that a different, more principled consideration befits the division of powers. One solution can be to classify laws into those that are prohibitory in earnest and therefore truly "criminal", and those that are merely "regulatory"; and the latter, which can intrude multifariously on provincial power, offend the Federal Principle and should be *ultra vires*. This is the logic the lower courts seem to have applied in deciding that s. 34 was more "regulatory" than "criminal", and therefore outside the criminal law power.[30]

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[29] The particular examples chosen are among those singled out as offensive to the Federal Principle in the submission of the Attorney-General of Québec. See that intervenor's Supreme Court factum at 5-10.

[30] "J'estime qu'en l'espèce l'*Arrêté d'urgence sur les biphényles chlorés* excède largement le cadre du droit criminel; il empiète sur plusieurs champs de compétences législatives exclusives provinciales. Par conséquent, je suis d'avis que cet *Arrêté d'urgence* ne peut se justifier par le pouvoir du Parlement de légiférer en matière de droit criminel, même s'il interdit une conduite et assortit cette interdiction de sanctions pénales.": [1995] R.J.Q. 398 at 409, per Tourigny J.A.; and in the same vein [1991] R.J.Q.

The second way in which the Federal Principle proved decisive was in the lower courts' refusal to uphold *CEPA* and the Interim Order under the national concern doctrine of POGG.[31] Recall that the penultimate test articulated by Mr. Justice Le Dain in *Crown Zellerbach* is that a matter seeking to qualify under the national concern doctrine must have "a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution." This requirement is, by any other name, a restatement of the Federal Principle.[32] It is unsurprising then that the substantive breadth of s. 34 proved fatal to the POGG argument, just as it had to the criminal law argument.[33]

What is more, the wide definitions given the terms "environment" and "toxic", and the scope for application these conferred on the Interim Order was, in the opinion of the trial judge, incompatible with the "degree of singleness, distinctiveness and indivisibility" that a measure requires under the national concern doctrine.[34] The way this conclusion was reached is interesting. Rather than duly characterizing the pith and substance of *CEPA* and the Interim Order, which is the usual first step in constitutional inquiry, the trial judge turned to *CEPA*'s definitions and *theorized* about the potential excesses to which *CEPA* could be put. Noting that the "environment" comprised earth, air and water, he concluded:

> Le libellé de l'article 6(a) de l'Arrêté d'urgence (i.e. the Interim Order) ne nuance pas entre les rejets dans l'environnement qui peuvent avoir des conséquences extra-provinciales et ceux qui n'en ont pas. Et il y a certainement des rejets de substances toxiques qui sont bien localisés, à l'intérieur d'une province et qui le demeurent...

2736 at 2743-4, per Babin J. More to the point, at the Cour Supérieur de Québec, the objection was made that "les pouvoirs du governeur en conseil à l'égard des substances considérées comme toxiques au sens de l'article 11(a) [ont] pour véritable objet de *réglementer* et *non de prohiber*.": [1992] R.J.Q. 2159 at 2166, per Trotier J. [emphasis in original].

[31] Canada generally relied on the national concern branch of POGG, save for a spurious attempt to rely on the emergency branch at the Court of Appeal. While the Interim Order, which is temporary in nature, possibly could be sustained under the emergency branch, its enabling provisions in *CEPA* are enduring and could not: *Reference re Anti-Inflation Act*, [1976] 2 S.C.R. 373. Had the argument succeeded, it would have done so with the odd result that the *vires* of the Interim Order would, of necessity, differ from that of the enabling statute! Interestingly, Canada never argued the somewhat moribund "gap" branch of POGG last used in *R.* v. *Hauser*, [1979] 1 S.C.R. 984, although it is arguable that industrial scale toxic pollution, and PCB contamination, are matters arising only since confederation.

[32] *Crown Zellerbach*, *supra* note 14 at 431-2. Or as Babin J. of the Court of Québec paraphrased this part of Justice Le Dain's test, "Quel serait l'effet de cette attribution au Parlement sur le partage des pouvoirs?" *supra* note 30 at 2742.

[33] See, for instance, [1992] R.J.Q. 2159 at 2164-5, per Trotier J. (Qué S.C.).

[34] *Crown Zellerbach*, *supra* note 14 at 431-2.

> [Donc] l'application de l'article 6(a) est trop large, mais une partie de la matière n'a certainement pas attient cette dimension d'intérêt national.[35]

The judge commented similarly on the definition of toxic:

> Il est à noter...qu'une substance peut être "listée" toxique sans qu'elle ait d'incidence sur la santé.[36]

With respect, the trial judge's reasoning rests on certain suppositions, rather than the facts of the case. It does not follow that because a law's definitions afford it a great sphere of influence – *e.g.* over all "toxics" in the total "environment" – that the pith and substance of the law must necessarily be inappropriate to single, distinct and indivisible legislative treatment. Rather, the correct threshold of singleness, distinctness and indivisibility is, as Justice Le Dain noted, whether the *effect* of a province failing to address the matter has consequences that are felt outside that province's jurisdictional, territorial boundaries (the so-called "provincial inability" test). The possibility that a notional pollutant remains localized within a province, or is harmless to health, should be beside the point. *This case* is about PCB – a substance that is known to disperse to the most distant corners of the Earth, and that certainly does harm human health. Simply put, those are the adjudicative facts germane to the constitutional question; and it is inappropriate to substitute in their stead imprecise musings about how pollutants disperse and do damage. The same error, to greater or lesser extents, was made by the Québec Superior Court and the Court of Appeal.

In conclusion, the passage of the case through the lower courts foundered for two fundamental reasons, although these were permuted in a handful of ways: first, the courts found *CEPA* was too substantively broad and therefore offensive to the Federal Principle, in the context of the criminal law power and POGG both; second, the courts decided the case not on the facts of the PCB Interim Order, but on the speculative excesses to which *CEPA* could be put. Why dwell on this history? Only for the reason that it sets the stage for some of the more egregious mistakes to be made again at the Supreme Court of Canada.

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[35] [1991] R.J.Q. 2736 at 2742 and following.

[36] *Ibid.* at 2743.

3. The Supreme Court of Canada

Vindicating *CEPA* did not come easy. All in all, it took more than seven years to settle the constitutional questions, and 2 ½ years just to get the matter through the Québec Court of Appeal. The Attorney-General of Québec, who was *mis en cause* for the accused corporation at first instance, was later joined by two more intervenors attacking the legislation at the Supreme Court. On the other side, five intervenors joined the respondent Attorney-General of Canada. It is of some interest that the Attorney-General of Canada, which had lost in all the lower courts, never appeared to change tack. Its argument at the Supreme Court was little altered from its arguments below; and in oral submissions, it appeared to irritate the bench by conflating its arguments on the criminal law and peace, order and good government.[37]

In the end, a narrow majority (5-4) decided to uphold the validity of *CEPA* and the Interim Order under the criminal law power, with Justice LaForest writing for the majority, and Justices Lamer and Iacobucci penning the dissent. By that decision, the Court created a power that environmentalists had theorized anticipated for at least three decades: a paramount, federal power to legislate, unlimited by the features of its objects, over matters injurious to either human- or non-human environmental values.

The ironic thing about *Hydro-Québec* is that although it is a landmark federalism case, the momentousness of its result does not leave this impression. In the criminal law power, there are neither finely-tuned tests, nor historical rehashings of the kind that give shape and limit to the other constitutional powers. The results in the courts below illustrate the resistance toward accommodating a subject as contiguous and broad as the environment within a federal paradigm. It is little surprise that judges feel unease at forcing the square peg of the environment – "a constitutionally abstruse matter which does not comfortably fit within the existing division of powers without considerable overlap and uncertainty" – into the round holes that are the federal heads of power of the Constitution.[38]

Up to now, the only solution has been to turn federal jurisdiction over the environment out of the subject-specific heads of power. Hence, legislative

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[37] The comments of Justice La Forest at paras. 117 and 109 reflect this.

[38] Justice La Forest in *Friends of the Oldman River* v. *Canada*, [1992] 1 S.C.R. 3 at 64 [hereinafter *Oldman River*].

competence over fisheries encompasses jurisdiction to protect an aquatic milieu healthy for fish[39]; or that a permitting discretion over structures affecting navigation may be exercised with a view to the environmental impacts resulting from those structures.[40] While this subject-specific mode of legislation confers a considerable degree of environmental jurisdiction, the subject remains the limitation. The Fathers of Confederation did not assign the heads of federal power because of their convenience as toeholds for environmental jurisdiction. Even where such a toehold exists, the nexus that is required between an environmental measure and the federal subject can be a stringent one. If an environmental measure is not "necessarily incidental" to legislation within the federal head of power,[41] or if the motives behind it are colourable, it will not stand.

From an ecological point of view, the subject-specific mode turns the continuity, fluidity and holism of environmental problems into legal caricatures. Unlike tax or corporate lawyers, who deal with subjects that are themselves creatures of the law, environmental lawyers must master the habit of transposing and dissecting magnificent natural facts into desiccated, piecemeal causes of action. Viewed through the lens of federalism, a forested coastal watershed that is home to bears and birds is a disarticulated assemblage of navigable waters, territorial waters, fish, and migratory birds (all of which are federal[42]); plus water rights, surface and subsurface resource rights, and wildlife (all of which are provincial[43]).

Since the law prohibits the delegation of legislative competence to the provinces (sometimes called "interdelegation"), the only way the federal government may cross these lines is by resort to a plenary, non-subject based jurisdiction. Now, the criminal law and POGG, in contrast to the subject-specific modes of jurisdiction, can apply to whatever subject; but as the experience in the lower courts shows, judges tend to constrain them by the Federal Principle. The real advance of *Hydro-Québec*, it will be seen, is that it both frees federal environmental jurisdiction from the subject-specific heads of power, and exorcizes the ghost of the Federal Principle

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[39] *Northwest Falling Contractors Ltd.* v. *The Queen*, [1980] 2 S.C.R. 292.

[40] *Oldman River*, *supra* note 38.

[41] *Fowler* v. *The Queen*, [1980] 2 S.C.R. 213 (wherein a blanket prohibition against polluting a fish stream was *ultra vires* because there was no nexus between the pollutant in question and harm to fish; *i.e.* the prohibition was not "necessarily incidental" to protecting fisheries).

[42] ss. 91(10), 91(12); *Crown Zellerbach*, *supra* note 14; *Migratory Birds Convention Act*, R.S.C., c. M-7.01.

[43] ss. 92(5), 92(13), 92(16), 92A(1).

from the criminal law power. This sounds revolutionary, but as revolutions go it was a somewhat predictable one. The majority judgment is quite faithful to criminal law precedent, and the step of creating a plenary federal environmental jurisdiction is actually logically inaudacious once those precedents are recognized. If some would call *Hydro-Québec* a politically bold judgment, it is only because the judicial history of the criminal law power escapes them, and they are moved by scaremongering about how the judgment upsets the existing balance of powers. This captures the essence of the minority judgment, which rests on an interpretation of the criminal law that, in truth, never really existed.

3(a). The Constitutional Question and the Pith and Substance

It is a truism of federalism litigation that characterizing an impugned act, and urging the "right" pith and substance on the Court, is the soft battle that often proves dispositive of the result. Contrasting the pith and substance of the majority and minority in *Hydro-Québec* confirms this truth. A theme that runs throughout the judgments is whether to characterize and adjudicate narrowly or broadly, that is to say, to characterize by having regard to the facts of the PCB Interim Order, or to characterize on the whole of Part II of *CEPA*. This bears careful explanation.

In litigating the constitutionality of subordinate legislation such as a regulation, an interesting question can arise as to the appropriate plane of constitutional scrutiny. Assuming that the regulation is validly enacted under a regulation-making power of the parent Act, then to what degree should a constitutional challenge against the regulation also inhere against the parent Act? If the regulation is unconstitutional on its face, then it seems the parent Act may be suspect too, because it is the authority under which the unconstitutional regulation was enacted. In that case, it seems entirely appropriate that the challenger should be entitled to impugn the parent Act, and to bring this challenge by reference to the facts in which the unconsitutional regulation was promulgated. That is surely uncontroversial. Considerably more difficult is the case where the regulation appears constitutional on its face. Here again, it seems fair that the challenger be allowed to probe the constitutionality of the parent Act, to ensure that it is itself *intra vires* the Constitution and thus able to support the regulation. But on what facts should this probe be allowed? Imagine that the parent Act confers a very wide discretion over the instance and content of a regulation. It may be that by keeping the inquiry to the *factual plane*, being the facts arising in the *particular* case impugning the regulation, that the Act's discretion is being exercised constitutionally. Yet while this is so, it may also be that the Act could, on a *hypothetical plane* involving certain imaginary facts, be exercised unconstitutionally (for a colourable purpose, say). Where, then,

is the true pith and substance of the Act to be found: on the factual or the hypothetical plane? To put it another way, should a court characterize and try the case on its particular adjudicative facts; or should it have regard to the more general construction of the statute, as it does in a constitutional reference?

This dilemma is vexing because neither approach is obviously correct. The vibrancy of a *lis inter partes* belongs to the factual plane alone; but the hypothetical plane lends itself to a more general approach that, in the long run, may better serve judicial economy by keeping challenges of the same Act out of the courts. Where the dilemma arises, the function of the Chief Justice in stating a constitutional question assumes great importance in signaling counsel at which plane the Court wishes arguments to be directed. The constitutional question may be stated either narrowly, to hew closely to the facts at bar; or it may, in the style of a reference question, probe more deeply and generally into the Act's prospective validity. The constitutional question in *Hydro-Québec* was written quite narrowly:

> Do s. 6(a) of the *Chlorobiphenyls Interim Order*, PC 1989-296, and the enabling legislative provisions, ss. 34 and 35 of the *Canadian Environmental Protection Act*, R.S.C., 1985, c. 16 (4th Supp.) fall in whole or in part within the jurisdiction of the Parliament of Canada to make laws for the peace, order and good government of Canada pursuant to s. 91 of the *Constitution Act, 1867* or its criminal law jurisdiction under s. 91(27) of the *Constitution Act, 1867* or otherwise fall within its jurisdiction?

This question impugns solely s. 6(a) of the Interim Order (the PCB emissions limit that Hydro-Québec allegedly breached), and the barest sliver of *CEPA*, sections 34 and 35 (the enabling provisions for interim orders). The narrowness of the question would seem to confine the appeal to the factual plane, for it hardly invites scrutiny of the *vires* of Part II as a whole, much less the full chapter and verse of *CEPA*. Perhaps this is an artifact of the way constitutional questions are prepared: though the Chief Justice states questions, it is the *appellant* who nominates questions to him. It seems certain the Crown took full advantage of this and nominated a narrow constitutional question -- which is all the better since it suits a narrow characterization later.[44]

It is hardly surprising that the parties could not agree on characterization: Hydro-Québec sought to characterize the pith and substance of matters generally, as relating

[44] The question submitted by the Crown was adopted by the Chief Justice verbatim in this case.

to "the protection of the environment"; but the Crown took a much narrower view, characterizing matters as "the control of chemical pollution".[45]

The Court, too, was vexed by characterization. Consider first the dissenting reasons of Justices Lamer and Iacobucci, who adopt a wide characterization of matters:

> We believe the pith and substance of Part II of the Act lies in the wholesale regulation by federal agents of any and all substances which may harm any aspect of the environment or which may present a danger to human life or health. That is, the impugned provisions are in pith and substance aimed at protecting the environment and human life and health from any and all harmful substances by regulating these substances.[46]

This is a curious passage, because it actually characterizes *two* different things: 'Part II of the Act,' and the 'impugned provisions.' Stranger still, these two different things are characterized in nearly the same words. This is illogical. It makes no sense to speak of the impugned provisions (*i.e.* s. 6(a) of the Interim Order and ss. 34 and 35 of *CEPA*) as being equally broad as Part II of the *Act*. The Interim Order, and the exercise of ss. 34 and 35 to enact it, represent a *special* invocation of the general powers conferred by Part II; and this special invocation is not "aimed at...any and all harmful substances", as the minority claims. Rather, the Interim Order is on its face aimed at only one harmful substance: PCB. Thus, the conclusion that the impugned provisions may have a purpose or character as wide as that of Part II -- which *does* concern any and all substances -- is simply wrong.

If this is as logically plain as it seems, why then did the minority reach its conclusion? The only way to arrive at such an erroneous characterization of the impugned provisions is to turn one's back on the constitutional question and the facts of the case -- to shun the factual plane. This is exactly what the minority did, as evidenced by this passage:

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[45] Respondent's factum, para. 61. Appellant's factum, para. 82: "La partie II de la LCPE [*CEPA*] vise essentiellement le contrôle de la pollution causée par les produits chimiques". Interestingly, neither of the litigants considered there could be two different pith and substance questions, one corresponding to the enabling sections or Part II generally, and another corresponding to the Interim Order. This was the argument of the joint factum of Pollution Probe, Great Lakes United, Canadian Environmental Law Association and Sierra Legal Defence Fund, para. 19: "Part II of *CEPA* is not directed at the protection of the environment in general. Rather, its true purpose is much more limited: *to set national standards for the control of toxic substances*. Similarly, the purpose of the Interim Order is limited to setting standards for *the control of PCBs*."

[46] *Hydro-Québec*, *supra* note 1 at para. 33 [emphasis added].

> With respect, the toxicity of PCBs, while clearly important to the environment itself, is not directly relevant to this appeal, since what is at issue is not simply the Interim Order, but the enabling provisions under which that order was enacted. That is, the question is not whether PCBs pose a danger to human health, which it appears they clearly do, but whether the Act purports to grant federal regulatory power over substances which may not pose such a danger.[47]

The minority, by its admission, chose to abnegate the facts of the case. It decided the case on the hypothetical plane, and focused not on the constitutional validity of the enabling provisions as they were actually used to enact the Interim Order, but on their validity in light of all the conceivable uses to which they could be put, including the notional case where the enabling provisions would be used to regulate a substance that posed no danger to health. Whatever the merits of this choice, it cannot be said to comport with the scope of the constitutional question. Plainly, this is a *faux pas* the Court should avoid.

In contrast, the majority's characterization of the pith and substance is not controversial – if only for the reason that there hardly is one. Justice La Forest breaks with the venerable rule that characterization of the impugned provisions must be the first step in constitutional adjudication. In fact, his characterization arises only near the end of the judgment, where it is not decisive in any case.[48] He first treats the law, invoking the criminal law power and then expanding it to encompass environmental protection. Second, he shows how the impugned provisions fit with this expanded definition. Last, and by resort to the factual plane, he shows how the dangers inherent in PCBs are consistent with the legitimate, and not colourable, use of that power in enacting the Interim Order. That being settled, so is the case. Characterization hardly enters into it; the facts of the case certainly do.

Justice La Forest's reasoning, while perhaps not an orthodox model of constitutional adjudication, is a cogent lesson in the contours of the criminal law power. If the touchstone of the minority's approach is a breezy characterization and a willful disregard of the facts, the majority's approach is explained by a principled analysis of the criminal law power.

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[47] *Ibid.* at para. 39 [emphasis added].

[48] *Ibid.* at paras. 146, 149, 155, 156.

3(b).The Criminal Law Power

In understanding the expansion that *Hydro-Québec* introduces to the criminal law power, it is necessary to recall that power's earlier development.

In the era of Canadian Dominion, the Judicial Committee of the Privy Council took a consistently liberal view of the criminal law power, making this perhaps the only federal power that it did not diminish over the years. The cases from that time affirm two simple propositions about that power. One, that the scope of federal power is accurately conveyed by the plain and generous words of the Constitution: "The Criminal Law...including the Procedure in Criminal Matters".[49] Two, that the hallmark of the criminal law is simply the pairing of a prohibition with a penalty. In the year of the Statute of Westminster, Lord Atkin put these propositions thus:

> "Criminal law" means "the criminal law in its widest sense..." The power must extend to legislation to make new crimes. Criminal law connotes only the quality of such acts or omissions as are prohibited under appropriate penal provisions by authority of the State. The criminal quality of an act cannot be discerned by intuition nor can it be discovered by reference to any standard but one: Is the act prohibited with penal consequences?[50]

It was not long before this definition revealed a fatal flaw, namely, that the federal government could trench limitlessly on provincial power by the mere adoption of the criminal law form. That deficiency was remedied by the further requirement of a public purpose, introduced by Justice Rand in the *Margarine Reference* and quoted earlier.

With that addition, the criminal law power became the most robust and straightforward jurisdiction in the federal catalogue – a status that has been reaffirmed and heightened by a variety of challenges, not one of which has diminished federal competence.[51] The culmination of this law is deceptively simple to state: invoking the criminal law power necessitates *only* the criminal law form and a valid public purpose; exceeding the criminal law power occurs *only* in cases of

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[49] *Constitution Act, 1867*, s. 91(27). In particular, see *A-G Ontario* v. *Hamilton Street Railway Co.*, [1903] A.C. 524 (P.C.) at 528-9.

[50] *Proprietary Articles Trade Association* v. *A.G. Canada*, [1931] A.C. 310 (P.C.) at 324 [hereinafter *PATA*].

[51] These cases are reviewed in *RJR-MacDonald*, *supra* note 2.

colourability[52] or violation of the *Charter of Rights and Freedoms*.[53] If legislation satisfies these requirements, that is the end of the matter, and it is valid as criminal law.[54] It is fruitless to argue that the purported "criminal" legislation is really a regulatory exercise[55]; that it is not an absolute prohibition, but contains exceptions or makes provision to be displaced by equivalent provincial legislation[56]; or that it criminalizes activity collateral to a different activity that is itself legal.[57] The criminal law power is "plenary in nature" and therefore blind to these considerations – a status that would seem to be beyond dispute since the 7-2 judgment affirming these propositions in *RJR-Macdonald* in 1995.[58]

But despite the foregoing jurisprudence, there remained uncharted lacunae in the criminal law power which would demand attention in *Hydro-Québec*. Foremost among these, neither *RJR-Macdonald* nor its predecessors explicitly visited the question of whether the criminal law power can be exceeded simply because its use trenches excessively on provincial jurisdiction. In other words, no case has ever forcefully rebutted the proposition that the criminal law power may be subordinated to the Federal Principle. That possibility would seem to be incompatible with calling the criminal law power "plenary", but only so much meaning can be wrung from one word. It is a matter of some gravity to the balance of powers if the criminal law power is, to draw on a few synonyms, "entire, unqualified, or absolute."[59]

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[52] *R.* v. *Morgentaler*, [1993] 3 S.C.R. 463, at 487: "Only when the effects of the legislation so directly impinge on some other subject matter as to reflect some alternative or ulterior purpose do the effects themselves take on analytic significance", per Sopinka J.; *Re Upper Churchill Water Rights Reversion Act*, [1984] 1 S.C.R. 297; *A.G. Ontario* v. *Reciprocal Insurers*, [1924] A.C. 328 (P.C.).

[53] *RJR-MacDonald, supra* note 2; *R.* v. *Butler*, [1992] 1 S.C.R. 452; *R.* v. *Wholesale Travel*, [1991] 3 S.C.R. 154; *R.* v. *Keegstra*, [1990] 3 S.C.R. 697.

[54] The converse, however, is not true. A law can still be valid as criminal law even if it does not adopt the criminal law form. This is true of the sections of the *Criminal Code* that apply to criminal procedure; and it may be true of civil remedies that attach to the criminal process: *R.* v. *Zelensky*, [1978] 2 S.C.R. 940.

[55] *R.* v. *Wetmore*, [1983] 2 S.C.R. 284 at 288-9 per Laskin C.J.; *R.* v. *Wholesale Travel, supra* note 53.

[56] *R.* v. *Furtney*, [1991] 3 S.C.R. 89; *Lord's Day Alliance of Canada* v. *Attorney General of British Columbia*, [1959] S.C.R. 497.

[57] *Rodriguez* v. *British Columbia (Attorney General)*, [1993] 3 S.C.R. 519; *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123 [*Prostitution Reference*].

[58] *RJR-MacDonald, supra* note 2 at paras. 28, 32, per Lamer C.J. and La Forest J., L'Heureux-Dubé, Gonthier, Cory, McLachlin and Iacobucci JJ. (Sopinka and Major JJ. dissenting).

[59] *Concise Oxford Dictionary*, 8th ed. (1990).

What is more, the jurisprudence is also silent on a crucial threshold question in *Hydro-Québec*: whether environmental protection is a public purpose consonant with the exercise of the criminal law power. Although Justice Rand took care to note in the *Margarine Reference* that his list of public purposes was not exhaustive, five decades of incantation tends to ossify any such usage, to the point that the categories of "public peace, order, security, health, [and] morality" are seen as the "ordinary" – and perhaps inelastic – ends of the criminal law power. That is a natural conclusion to draw where not a single case since 1949 has expanded on Justice Rand's list.[60]

3(b)(i). The Plenary Nature of the Criminal Law and the Ghost of the *Charter*

In prefacing his judgment on the criminal law power, Justice La Forest does a curious thing: he raises, and then speedily rejects, the potential application of Peace, Order and Good Government. He does this because he wishes to avoid "profound issues respecting the federal structure of our Constitution which do not arise with anything like the same intensity in relation to the criminal law power."[61] What exactly does this statement mean?

As I mentioned already, the Constitution is parsimonious toward the environment as a subject matter. Both *Crown Zellerbach* and *Oldman River* affirm the proposition that environmental jurisdiction is not the preserve of any one level of government, but concurrent to federal and provincial (and since *Delgamuukw*, aboriginal) competence.[62] Consequently, federal environmental protection laws must "shop around" for support under a head of s. 91. Each of these heads is unique, and possesses particular jurisdictional boundaries.[63] The subject-specific heads of power, such as navigation (s. 91(10)) or fisheries (s. 91(12)), are, within their domain, exercisable without regard to the Federal Principle, save in the case of

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[60] The nearest the Court has come to expansion is perhaps Laskin C.J.'s dissent in *Morgentaler*, *supra* note 52.

[61] *Hydro-Québec*, *supra* note 1 at para. 110.

[62] *Delgamuukw* v. *British Columbia*, [1997] 3 S.C.R. 1010 at para. 165.

[63] "[E]ach constitutional head of power has its own particular characteristics and raises concerns peculiar to itself in assessing it in the balance of Canadian federalism...In the present case, it seems to me...[t]here was a marked attempt to raise concerns appropriate to the national concern doctrine under the peace, order and good government clause to the criminal law power in a manner that, in my view, is wholly inconsistent with the nature and ambit of [the criminal law power] as set down by this Court from a very early period and continually reiterated since..." *ibid.* at para. 117.

colourability.[64] In other words, these are *plenary* powers. In contrast, the national concern branch of POGG is infinitely flexible because it is aimed at no single subject or jurisdictional domain, although it is very much subject to the Federal Principle.[65]

What is evidently missing in these permutations is a hybrid head of power: one that combines plenary power with flexible, non-subject based jurisdiction, able to encompass many aspects of the environment. If it existed, this power would be less a fortification of federal environmental competence than a paradigmatic revolution. It would, in precedential value, exceed any number of cases tending toward an environmentally-sympathetic interpretation of POGG, or any amount of judicial deference tending against finding environmental evocations of the subject-specific heads of power colourable. Best of all, such a power would put a lid on Ottawa's jurisdictional excuses for agnosticism over the environment – a practiced habit of the Chrétien government.[66] If environmentalists ever dreamt of a model constitutional power, this would be it. Which is exactly what the Court gave them.

It is easy to be surprised at how sanguine Justice La Forest seems about this result. His approach heralds less a revolution, than an *evolution* of the criminal law power, traceable to precepts laid down at the turn of the century. La Forest's reasons are forceful, and bear repeating here:

> What appears from the analysis in *RJR-MacDonald* is that as early as 1903, the Privy Council, in *Attorney-General for Ontario v. Hamilton Street Railway Co.* had made it clear that the power conferred on Parliament by s. 91(27) is "the criminal law in its widest sense." Consistently with this approach, the Privy Council in *Proprietary Articles Trade Association v. Attorney-General for Canada* defined the criminal law power as including any prohibited act with penal consequences. As it put it, "The criminal quality of an act cannot be discerned...by reference to any standard but one: Is the act prohibited with penal consequences?" This approach has been consistently followed ever since and, as *RJR-MacDonald* relates, it has been applied by the courts in a wide variety of settings. Accordingly, it is entirely within

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[64] *Oldman River, supra* note 38 at para. 92; for a case of colourability, see *Fowler v. The Queen*, [1980] 2 S.C.R. 213.

[65] *Crown Zellerbach, supra* note 14.

[66] To take an example, the Chrétien government has been so slow to recognize its jurisdiction to legislate for the protection of endangered species throughout Canada that it has earned a remedial lesson in constitutional law from no less than the Canadian Bar Association: Letter from G. Proudfoot and J. Marshall Burgess of the CBA, to Canadian Ministers of Environment and Justice, 4 June, 1996. Ottawa is so calculatedly aloof to its own powers that even *Globe and Mail's* editorialists feel the need to point out, "Ottawa has the power. It should use it." See lead editorial of 5 November, and also 2 October, 1996.

> the discretion of Parliament to determine what evil it wishes by penal prohibition to suppress and what threatened interest it thereby wishes to safeguard...
>
> The *Charter* apart, only one qualification has been attached to Parliament's plenary power over criminal law. The power cannot be employed colourably.... To determine whether such an attempt is being made, it is, of course, appropriate to enquire into Parliament's purpose in enacting the legislation. As Estey J. noted in [*Scowby* v. *Glendinning*], since the *Margarine Reference*, it has been "accepted that some legitimate public purpose must underlie the prohibition"...
>
> In short, in a case like the present, all one is concerned with is colourability. Otherwise, one would, in effect, be reviving the discarded notion that there is a "domain" of criminal law, something Rand J., like Lord Atkin before him, was not prepared to do.[67]

Whatever uncertainty lingered over the plenary nature of the criminal law power after *RJR-Macdonald* must now be dispelled by this passage. The criminal law power is an *incomparable* power, invoked merely by the criminal law form, qualified solely by the rule against colourability, the test of which is that a law must pursue a valid public purpose. Incidental effects on provincial jurisdiction are emphatically not a consideration. The Federal Principle is entirely irrelevant. As La Forest points out, this conclusion is not an advance on *RJR-Macdonald,* so much as a fresh enunciation of what was already affirmed by seven judges of the Court in that and other cases stretching back to the start of the century.

But what of the proposition that the criminal law power may intrude too much on provincial jurisdiction? In Justice La Forest's view, the criminal law need not lead to intrusions *at all.* This is not as unreal as it seems. In his words:

> The legitimate use of the criminal law...in no way constitutes an encroachment on provincial legislative power, though it may affect matters falling within the latter's ambit... [T]he 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.[68]

All this says is that the double aspect doctrine is alive and well. Exercises of the criminal law power do not preempt provincial jurisdiction, but merely coexist with

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[67] *Hydro-Québec, supra* note 1 at paras. 119-122 [Citations omitted; emphasis added].

[68] *Ibid.* at paras. 129 and 131.

it, subject of course to federal paramountcy. Provincial wings are clipped only in so far as necessary to avoid preclusive, irreconcilable conflict with federal law.[69] As such, the objection that federal environmental jurisdiction will usurp provincial power is without merit.

Needless to say, the minority in *Hydro-Québec* share almost no part of this view, even though the authors of that opinion (Justices Lamer and Iacobucci) number among the majority on the criminal law issue in *RJR-Macdonald*. Their dissent, as in the lower courts, rests on there being a dichotomy between laws that are truly "criminal" and *intra vires* Parliament, and laws that are merely "regulatory" and *ultra vires*. By this reasoning Parliament is free to take the extreme step of criminalizing PCBs outright, but cannot take the moderate step of regulating certain aspects of them.[70] The trouble with this dichotomy, as the minority admits, is that the difference between regulations and crimes is unprincipled and elusive:

> Ascertaining whether a particular statute is prohibitive or regulatory in nature is often more of an art than a science. As Cory J. acknowledged in *Knox Contracting*, *supra*, what constitutes criminal law is often "easier to recognize than define" (p. 347). Some guidelines have, however, emerged from previous jurisprudence.
>
> The fact that a statute contains a prohibition and a penalty does not necessarily mean that statute is criminal in nature. Regulatory statutes commonly prohibit violations of their provisions or regulations promulgated under them and provide penal sanctions to be applied if violations do, in fact, occur. [As] La Forest J. himself recognized in *Thomson Newspapers v. Canada* and in *R. v. McKinlay Transport*, the penalties that are provided in a regulatory context serve a "pragmatic" or "instrumental" purpose and do not transform the legislation into criminal law. (Also see *Wetmore*, *supra*, *Scowby*, *supra*; *Knox Contracting*, *supra*).[71]

The minority cites cases that supposedly draw a distinction between crimes and regulations, but do not quote one supportive passage among them.[72] The distinction separating criminal law from mere regulation turns on the "context" and the "nature and extent of...regulation", but the minority offers up no test or normative guidance

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[69] *Multiple Access* v. *McCutcheon*, [1982] 2 S.C.R. 161.

[70] "Nothing, in our view, prevents Parliament from outlawing certain kinds of behaviour on the basis that they are harmful to the environment. But such legislation must actually seek to outlaw this behaviour, not merely regulate it.": *Hydro-Québec*, *supra* note 1 at para. 61[emphasis in original].

[71] *Ibid.* at paras. 45-46 [citations omitted].

[72] *Ibid.* at paras. 46-47.

to assist in demarcating the frontier.[73] Justices Lamer and Iacobucci are correct to call this "more of an art than a science."

When judgments are tendentious as this, they deserve scrutiny. When one examines the cases the minority cites for the ostensible criminal-regulatory dichotomy, it is striking how these actually *undermine* its reasoning.

Wetmore is probably the most glaring example.[74] In this challenge to the federal *Food and Drugs Act*, the impugned provisions prohibited manufacturing drugs under unsanitary conditions and engaging in deceptive advertising. Writing for the majority on the constitutional question, Chief Justice Laskin considered that "the various provisions of the *Food and Drugs Act* [go] beyond mere prohibition to bring it solely within s. 91(27) but...also involve a prescription of standards, including labeling and packaging as well as control of manufacture." For that reason, he opined that the provision governing deceptive advertising, unlike the rest of the Act, "certainly invites the application of the trade and commerce power."[75] Now, lest this comment be interpreted as taking the advertising provisions outside the criminal law power, Laskin continues:

> However, it is unnecessary to pursue [the trade and commerce] issue and it has been well understood over many years that protection of food and other products against adulteration and to enforce standards of purity are properly assigned to the criminal law.[76]

To the extent that *Wetmore* supports a criminal-regulatory dichotomy, it does so in *obiter dicta* that is contradicted by the holding of the case, which is that *all* the provisions of the *Food And Drugs Act* – "regulatory" or not – are criminal.[77]

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[73] *Ibid.* at para. 48.

[74] *R.v. Wetmore*, *supra* note 55.

[75] *Ibid.* at 288-9.

[76] *Ibid.* at 289.

[77] I think it is fair to conclude that *Wetmore* exemplifies an established proposition of the criminal law: that federal legislation in the criminal law form which prohibits or regulates dangerous or unhealthful things is *intra vires* the criminal law power. See the challenges to: *Hazardous Substances Act* in *R. v. Cosman's Furniture* (1976), 32 C.C.C. (2d) 345 (Man. C.A.); and the predecessor to the *Food and Drugs Act* in *Standard Sausage v. Lee*, [1934] 1 D.L.R. 706 (B.C.C.A.), where Martin J.A. writes at 718 that "It is beyond question that, in the due exercise of National powers over criminal law, Provincial civil rights may be interfered with and drastically curtailed." This proposition is only negatived if the thing is not actually dangerous or unhealthful, in which case the law is *ultra vires* because it is colourable. See the challenges to: *Dairy Industry Act* in the *Margarine Reference*; and a case involving

So if the idea of a criminal-regulatory dichotomy does not hail from the criminal law jurisprudence, what exactly is its origin? I believe The minority uprooted a shoot of *Charter* law, and sought to transplant it in the soil of federalism. This is apparent by the cases the minority cites, particularly *Thomson Newspapers*.[78] Justice La Forest in that case drew a distinction between "real crimes" and "public welfare" offences for the purpose of deciding whether s. 8 of the *Charter* is violated by compelling a corporation under subpoena to disclose documents for an investigation under the *Combines Investigation Act*.[79] The pivotal issue was whether the corporation had a reasonable expectation of privacy protected by s. 8. Strikingly, Justice La Forest's begins his judgment on this question by distancing it from federalism:

> I think the initial question can be stated in the following form: what degree of privacy can those subject to investigation under the *Combines Investigation Act* reasonably expect in respect of the activities and matters with which such investigation may be concerned? In approaching this question, I would first of all point out that I do not regard the fact that the *Act* and its predecessors were characterized as criminal law for the purposes of division-of-powers analysis as at all determinative.[80]

In the result, La Forest observes that "public welfare" offences attract a lesser moral and social stigma than do "true crimes", and for this reason merit a lesser expectation of privacy that lies outside the protection of s. 8 of the *Charter*. This dichotomy is based in social opprobrium, and no more.

The minority's error, therefore, is to suppose that a "public welfare" character for *Charter* purposes is concurrent with a "regulatory" pith and substance for federalism purposes, when there is no principled reason why this should be. The *Charter*, after all, only enters into a case like *Thomson Newspapers* because we are concerned with a personal right of a witness. Is there a counterpart to this personal right in the *Constitution Act, 1867* that gives the "public welfare - true crime" dichotomy relevance here? Concurrencies between different areas of the law only make sense where there is a common essence; for example, liability in tort and

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compositional standards under the *Food and Drugs Act*, *Labatt Breweries v. Canada*, [1980] 1 S.C.R. 914.

[78] *Thomson Newspapers Ltd.* v. *Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425. See also *Wholesale Travel Group*, *supra* note 53.

[79] *Thomson Newspapers*, *supra* note 78 at 510.

[80] *Ibid.* at 508.

contract can merge because both concern obligations between parties and their breach. It would be an eerie coincidence indeed if a dichotomy that were drawn for the purpose of judging a witness' personal right to resist a subpoena for documentary evidence were also meaningful in delimiting the frontiers of federal legislative competence -- particularly when that competence has been shaped by a juridical history of its own that predates the *Charter* by a century! This is a classic apples-and-oranges error, but the minority makes it more than once. Indeed, it is the gravamen of their judgment.[81]

At bottom, I believe the judges on the *Hydro-Québec* court were split by their readiness or reluctance to create a plenary environmental jurisdiction. That is, the minority was more wedded to the Federal Principle than the majority. But having said this, there can be no doubt that the jurisprudence recognized the plenary nature of criminal law long before *Hydro-Québec* came around – and this fact cannot have been lost on Justices Lamer and Iacobucci, who cheerfully endorsed plenary power in *RJR-Macdonald* by siding with the majority on the criminal law question. So why the switch? Consider this passage from their dissent:

> Almost everything we do involves "polluting" the environment in some way. The impugned provisions purport to grant regulatory authority over all aspects of any substance whose release into the environment "ha[s] or ... may have an immediate or long-term harmful effect on the environment" (s. 11(a)). One wonders just what, if any, role will be left for the provinces in dealing with environmental pollution if the federal government is given such total control over the release of these substances. Moreover, the countless spheres of human activity, both collective and individual, which could potentially fall under the ambit of the Act are apparent. Many of them fall within areas of jurisdiction granted to the provinces under s. 92. Granting Parliament the authority to regulate so completely the release of substances into the environment by determining whether or not they are "toxic" would not only

[81] Consider this passage, at para. 55, where the minority disapproved of the fact that *CEPA* regulations (and thus, criminal prohibitions) are made at the discretion of the Ministers of Health and the Environment: "It would be an odd crime whose definition was made entirely dependent on the discretion of the Executive. This further suggests that [*CEPA*'s] true nature is regulatory, not criminal and that the offences created by s. 113 are regulatory offences, not 'true crimes': see *Wholesale Travel*, *supra* note 53, per Cory J. In *Wholesale Travel*, Cory J. resorts to a pre-*Charter* distinction between "true crimes" and "regulatory offences" in deciding what degree of culpability or *mens rea* these different types of offences demand under s. 7 of the *Charter*. As with *Thomson Newspapers*, the *Wholesale Travel* judgment is not the least bit concerned with federalism – only the *Charter*. It accordingly has no place in the analysis of federalism issues in *Hydro-Québec*.

> inescapably preclude the possibility of shared environmental jurisdiction; it would also infringe severely on other heads of power assigned to the provinces.[82]

This dissent is motivated by fear. The spectre of the Federal Principle caving in to unilateral, federal "environmental imperialism" cried out, I believe, to the dissenting justices to throw up a bulwark in whatever plausible form. In the event, their bulwark was a chip off *Charter* law; and it was sufficiently plausible to split the Court 5-4. But consider this deep irony: had the dissenting justices carried a majority and incorporated the Federal Principle into the criminal law power, the end result would have shattered a century of criminal law jurisprudence and upset the balance of powers incalculably *more* than the very environmental legislation they perceived as threatening. Even the most thoughtful judicial conservatism, it would seem, can backfire dangerously.

3(b)(ii). The Public Purpose of Environmental Protection

Criminal law must be supported by a public purpose, or it is colourable. That means that if a law's pith and substance is not rationally connected to the attainment of a public purpose, the law will fail. The lack of connection may exist either because extrinsic evidence demonstrates the law was passed for an ulterior motive; or if the motive is proper, because the law is flawed in a way that one cannot conceive how it advances a public purpose.[83]

The second of these pitfalls arose in *Hydro-Québec*. Recall that the minority entertained the case on the hypothetical plane and equated the pith and substance of the impugned provisions with the pith and substance of Part II, being "the wholesale regulation by federal agents of any and all substances which may harm any aspect of the environment or which may present a danger to human life or health". Leaving aside whether this is the "correct" characterization, if it is accepted it creates a formidable problem: namely, that "wholesale regulation...of the environment" lies well outside of the public purposes in the *Margarine Reference*.

There are two ways to resolve this problem. The easy way, of course, is to treat the case on the factual plane. Since there can be no doubt that PCBs endanger health, and that the Interim Order was enacted for this legitimate reason, that alone

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[82] *Hydro-Québec, supra* note 1 at para. 60 [emphasis added].

[83] *Re Upper Churchill Water Rights Reversion Act* [ulterior motive], *supra* note 52; and *Margarine Reference* [irrationality], *supra* note 25.

suffices to bring the impugned provisions within the *Margarine Reference* and dispel the suggestion of colourability.

The majority recognized that the impugned provisions were valid criminal law in relation to the protection of health, and had they wished, they could have settled the case on this finding alone.[84] Thankfully, it did not. Surprising even those who argued in *CEPA*'s defence, Justice La Forest revisited the elderly *Margarine Reference* and, for the first time since 1949, added to it a new and breathtaking public purpose:

> During the argument in the present case...one sensed, at times, a tendency, even by the appellant and the supporting interveners, to seek justification solely for the purpose of the protection of health specifically identified by Rand J. Now I have no doubt that that purpose obviously will support a considerable measure of environmental legislation, as perhaps also the ground of security. But I entertain no doubt that the protection of a clean environment is a public purpose within Rand J.'s formulation in the *Margarine Reference*, cited *supra*, sufficient to support a criminal prohibition. It is surely an "interest threatened" which Parliament can legitimately "safeguard", or to put it another way, pollution is an "evil" that Parliament can legitimately seek to suppress. Indeed...it is a public purpose of superordinate importance; it constitutes one of the major challenges of our time. It would be surprising indeed if Parliament could not exercise its plenary power over criminal law to protect this interest and to suppress the evils associated with it by appropriate penal prohibitions.[85]

This is arguably the most important paragraph ever written in Canadian environmental law. Not only does it catapult pollution prevention onto a generous, plenary constitutional footing, but it does so with the *unanimous* voice of the court: even the dissenting Justices agreed with this expansion of the criminal law power.[86] It is therefore surely a point of settled law that "the protection of a clean environment" – in its own right and wholly apart from anthropocentric values – is a legitimate public purpose within the competence of Parliament.

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[84] "The specific provision impugned in this case, the Interim Order, would seem to me to be justified as a criminal prohibition for the protection of human life and health alone.": per La Forest J. at para. 132.

[85] *Hydro-Québec, supra* note 1 at para. 123 [emphasis added].

[86] "To the extent that La Forest J. suggests that this legislation is supportable as relating to health, therefore, we must respectfully disagree. We agree with him, however, that the protection of the environment is itself a legitimate criminal public purpose, analogous to those cited in the *Margarine Reference*, *supra* note 25 *per* Lamer C.J. and Iacobucci J. at para. 43.

3(c). Consequences for the Future Development of Environmental and Criminal Law

However, the above passage leaves one very important question unanswered: are other insults to the environment, apart from pollution, also "evils" within Parliament's jurisdiction to suppress by the criminal law? That is to say, is the new public purpose created by the Court in *Hydro-Québec* sufficiently flexible to accommodate environmental laws other than those aimed at pollution prevention (what I will refer to as the "wide" interpretation), or should *Hydro-Québec* be taken to mean that federal competence now extends pollution prevention but no farther (the "narrow" interpretation)?

This question must be resolved in favor of the wide interpretation. Justice La Forest articulates the general principle that, "the stewardship of the environment is a fundamental value of our society and that Parliament may use [the] criminal law power to underline that value."[87] The logical inference is that the criminal law power is appropriate to all matters implicating environmental stewardship, and is not qualified or limited to those cases concerning pollution. This would also seem to be the view of Justices Lamer and Iacobucci, who write that "the protection of the environment is itself a legitimate criminal public purpose."[88]

These passages, and support they lend the wide interpretation, are reinforced by the teleology underlying *Hydro-Québec*. "The major challenge of our time" to which Justice La Forest refers certainly does not end with the struggle against pollution, for environmental harm is a many-headed monster. A polluting PCB spill is an "evil" that attracts societal disapprobation, but the same could be said of the wanton ravaging of a forest, or the extinction of an endangered species. If Parliament decides to criminalize these other "evils" at some later date, it logically should be within its jurisdiction to do so. Encompassing other environmental matters in this way comports with the "living tree" approach to constitutional interpretation, and respects the basic teleology of *Hydro-Québec* that the criminal law power should "keep pace with and protect our emerging values."[89] The narrow alternative – that

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[87] *Ibid.* at para. 127.

[88] *Ibid.* at para. 43.

[89] *Ibid.* at para. 127.

the criminal law be ossified and frozen in the values of a past time – is by comparison logically impoverished.[90]

4. AFTERWARD - Whither (or wither) Federal Constitutional Power?

So, in the end, is *Hydro-Québec* is a revolution after all? And if so, whose revolution is it, anyway?

Constitutional conservatives and pro-industry "browns" will likely share a dim view of *Hydro-Québec*. One commentator, writing in a waste industry magazine, accuses the Court of "twisting established legal principles" in glossing over the distinction between criminal and regulatory law.[91] Others, more alarmist, predict that *Hydro-Québec* may be federal Canada's Waterloo. One eminent constitutional law scholar foretells a "serious threat both to the integrity of the country's federal structure and to the rule of law." because the Court has left the federal government free "to dictate to the provinces what their environmental protection policies would be." The practical effect, we are told, is to "reverse the Court's earlier rulings on the environment and give the federal government exclusive jurisdiction in the field.[92]

These complaints cannot be taken seriously. The only legal principle that *Hydro-Québec* "twisted" is, thankfully, to relieve us of the mistaken notion that the criminal law power is subject to a criminal-regulatory dichotomy, when in fact the cases that consider this dichotomy (such as *Wetmore*) expressly state that regulations are *intra vires* that power. As to the threat of Ottawa usurping provincial power, the very essence of the double aspect doctrine is that jurisdiction is never 'exclusive,' but shared between the provincial and federal levels. These rules are established law, not new inventions, and there is no logical reason to fear that the majority of the Court has done anything the least bit radical in *Hydro-Québec*. The 'living tree' of the Constitution and federal power remains exactly that, and it is not becoming a 'creeping vine,' whatever is said about it.

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[90] There was at one time the belief that the criminal law power was bound to a"domain of criminal jurisprudence": *Board of Commerce case*, [1922] 1 A.C. 191 at 198-99. This idea was subsequently rejected in *PATA*, *supra* note 50.

[91]Dianne Saxe, "The Environment and the Constitution: Who Won?" (1997) 9 *Hazardous Materials Management Magazine* 62.

[92] David Beatty, "Canadian Constitutional Law in a Nutshell" (1998) 36 Alta. L. R. 605, at 611-12.

But if these critics are wrong, so too may be the smug 'greens' who regard *Hydro-Québec* as a revolutionary legal victory. Victory it may be, but victory and revolution are two remarkably different things.

Politics often show us that formal interpretations of the Constitution have little bearing on reality. The irony of *Hydro-Québec* and the creation of a plenary federal jurisdiction over the environment is that such a power has perhaps never been so *passé*. Ottawa is avoiding and devolving environmental jurisdictions faster than the Supreme Court can declare them. The Court is filling a leaky cup.

Take the case of endangered species protection. The federal first government introduced a bill for this purpose in 1996, where it died on the Order Paper.[93] Throughout the legislative process, provinces, resource industries and, incredibly, the Canadian Wildlife Service insisted that federal jurisdiction to protect endangered species' habitat was limited to federal lands only, and could on no account extend to private or provincial lands, this being a local and private matter in the province.[94] Were this argument accepted, the law would be limited to protecting habitat on only 5% of Canada's land area south of sixty degrees – feeble protection for most of Canada's species. The bill, thankfully, died on the Order Paper.

Now, with *Hydro-Québec* behind it, environmentalists might reasonably expect Ottawa to take a more robust approach to endangered species, but this is not so. In March 2000 the Chrétien government introduced a new bill, the *Species at Risk Act* (SARA), which is scarcely less timid than its predecessor.[95] The new bill is a bundle of contradictions: true to the criminal law form, it invokes prohibitions and penalties to forbid, *inter alia*, destroying an endangered species' critical habitat, but again the law hesitates at crossing on to provincial lands. The Governor in Council *may* extend the prohibition to certain, limited provincial lands, but only if the province has asked for this, or if the province has declined to take measures (possibly falling far short of a prohibition) on its own. Even then, the federal prohibition expires after five years unless the Governor in Council renews it.[96]

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[93] *Canadian Endangered Species Protection Act*, Bill C-65, 35th Parliament.

[94] With the exception of migratory birds and aquatic species, which are already subjects of federal law.

[95] *Species at Risk Act*, Bill C-33, 36th Parliament.

[96] See ss. 61, 97 of SARA (first reading).

This kid gloves treatment makes no sense, except as an act of a federal government reluctant to govern. The legislative scheme is more easily explained as an attempt to impose no federal mandate on provinces, rather than a scheme to reduce overlap in jurisdiction over wildlife (more will be said about the "problem" of overlapping jurisdiction later). The automatic loss of the prohibition after five years is even more curious, unless one supposes that "evil" the criminal prohibition cures (habitat destruction that is ignored by a province) automatically loses its repugnancy after five years too. SARA is an *intra vires*, if incredibly cynical, invocation of the criminal law power, because as the Canadian public sees it endangering rare life forms to the edge of extinction is an "evil" that truly ought to be suppressed. Indeed, how else to explain the fact that fully 97% of Canadians polled by Environment Canada in 1996 believe that it is "important" to protect species' habitat?[97]

If SARA illustrates the studious avoidance of the potency of the criminal law power, even worse is the case where the Chrétien government essentially devolves that power. Only months after *Hydro-Québec,* federal and provincial environment ministers signed the *Canada-Wide Accord on Environmental Harmonization* (the "Harmonization Accord"), and three sub-agreements thereunder respecting environmental assessment, enforcement of environmental laws, and the setting of pollution standards under laws such as *CEPA* -- *all* areas formally within federal jurisdiction.[98] This event has triggered an unprecedented shift in the exercise of jurisdiction. The essence of the Harmonization Accord is that the "order of government best situated" to a particular environmental matter will have conduct of that matter for *both* levels of government; and that consequently, "the other order of government shall not act...for the period of time as determined by the relevant sub-agreement", *regardless of what its formal jurisdiction in law may be.*[99] Under the

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[97] *A National Public Opinion Survey of Current Environmental Issues*, Draft Final Report Prepared for Environment Canada (obtained under the *Access to Information Act*), November 1996. Of the respondents, 74% said it was "very important", and 23% said it was "somewhat important" to protect species' habitats.

[98] See the Canadian Council of Ministers of the Environment at *http://www.mbnet.mb.ca/ccme* (no period). In particular see the *Canada-Wide Accord on Environmental Harmonization*, and the three sub-agreements on Environmental Assessment, Environmental Inspections, and Environmental Standards. Future harmonization sub-agreements are contemplated in areas such as monitoring and reporting, environmental emergencies, and research and development: see *Guide to the Canada Wide Accord on Environmental Harmonization,* at: http://www.ccme.ca/3e_priorities/3ea_harmonization/3ea1_accord/3ea1a.html (no period).

[99] See Items 3 and 6 under the heading "Sub-Agreements" in the *Canada-Wide Accord on Environmental Harmonization.*

Harmonization Accord, the "other order of government" must simply *decline* to exercise its jurisdiction.

Since the "order of government best situated" in respect of an environmental matter will doubtless turn predominantly on territorial grounds, the practical effect of the Harmonization Accord and its sub-agreements is that on provincial lands (95% of Canada's land base south of sixty degrees), provincial authorities alone will enforce federal environmental laws, set federal toxics standards, and carry out federal environmental assessments. This sort of co-operative federalism, while attractive in theory, has been shown to fail the law and the environment before.[100] What is more, it bears more than passing resemblance to a constitutionally forbidden scheme: interdelegation. As it stands, the law rightly forbids Parliament to empty its hands of a jurisdiction in favor of a provincial Legislature[101]; but it seems that a cabal of Environment Ministers can, by a Harmonization Accord that was not voted by Parliament and is not easily susceptible to judicial review, achieve more or less the same result.

One may ask why harmonization is being done. The leading rationale is to "prevent overlapping activities and inter-jurisdictional disputes" in matters

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[100] A recent lawsuit against the Minister of Fisheries and Oceans is illustrative. Section 42.1 of the federal *Fisheries Act*, R.S.C. 1985, c. F-14, requires the Minister to lay before Parliament an annual "report on the administration and enforcement of the provisions of [the] *Act* relating to fish habitat protection and pollution prevention." The Minister failed to do this in 1995, 1996 and 1997. By the Minister's own admission, this was because the *Act's* administration had been so thoroughly devolved to the provinces that it became impossible for DFO to tabulate the data required for the report! The Minister ultimately consented to the relief sought by the lawsuit. See *The Friends of the Oldman River and the United Fishermen and Allied Workers' Union v. Minister of Fisheries and Oceans*, Federal Court (Trial Division) file no. T-284-98 (February 19, 1998).

In the context of endangered species protection, the federal government and the provinces have signed the *National Accord for the Protection of Species at Risk*, which abandons plenary federal jurisdiction over endangered species protection in favor of "complementary federal and provincial/territorial legislation, regulations, policies, and programs". While complementary action could, in principle, create a seamless fabric of species protection throughout Canada, the prospect that it will is laughable. For instance, just months before signing the Accord, the BC Minister of Environment wrote in a confidential letter to the International Woodworkers of America that "this government does not intend to introduce endangered species legislation...because I have recognized the points you make as a trade union". The BC government has since "taken the position that it does not need 'stand alone' endangered species protection to deliver" its obligations under the Accord. See *Betraying Our Trust*, Sierra Legal Defence Fund (1998), at 14; *National Accord for the Protection of Species at Risk*, available at *http://www.ec.gc.ca/press/wild_b_e.htm* (no period).

[101] *Re Nova Scotia Interdelegation*, [1951] S.C.R. 31; W. R. Lederman, "Some Forms and Limitations of Cooperative Federalism" (1967) 45 Can. Bar. Rev. 409.

concerning the environment. Few who have examined harmonization are persuaded by this, including, notably, the Liberal MPs who sit on the Parliamentary Standing Committee on Environment and Sustainable Development. A recent report of that Committee concluded that "there is insufficient evidence of overlap and duplication of environmental regulations or activities of the federal and provincial/territorial governments", and that as a result, "it seems doubtful...that the [Harmonization] Accord and Sub-Agreements will be successful in achieving greater administrative efficiency or cost savings."[102] Other critics have put it more curtly: "[t]he Harmonization Accord is a solution in search of a problem."[103]

If it is to be seen for what it is, the rationale behind harmonization is something more foul. Harmonization is the abnegation of formal constitutional authority and federal stewardship over the environment, as the price of comity in a federal system. It is the offering-up of the environment as sacrificial lamb, so that Ottawa is free to expend political capital in struggling with other balance of power issues. Harmonization is a crass offence against the environment, and taken to its fulfillment, it will also become a hazardous waste upon the constitutional landscape pronounced by the Court in *Hydro-Québec*. It is presently being litigated before the Federal Court.[104] That Court will do well to consider the fundamental, traditional principles of federalism that undergird *Hydro-Québec* and its antecedents -- *RJR-MacDonald*, the *Margarine Reference*, *PATA* and other cases -- and ask what place, if any, harmonization has in the bedrock scheme of the Constitution and Canadian federation.

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[102] "Harmonization and Environmental Protection: An Analysis of the Harmonization Initiative of the Canadian Council of Ministers of the Environment", a report of the Standing Committee on Environment and Sustainable Development, December 1997, at *http://www.parl.gc.ca/36/1/parlbus/commbus/house/ensu/reports/ensurp01-e.htm* (no period). See in particular Recommendation Number 1.

[103] S. Elgie, "The Harmonization Accord: A Solution in Search of a Problem", (1997) 6 *Canada Watch* 10, at 11.

[104] *Canadian Environmental Law Association* v. *The Minister of the Environment*, Federal Court file no. T-337-98. An appeal is underway, though as already noted an agreement signed between ministers, and not in the execution of any disclosed statutory power, is not easily susceptible to judicial review.