POLLUTING THE LAW TO PROTECT THE ENVIRONMENT

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On September 18, 1997, in a close 5:4 decision, the Supreme Court of Canada ruled that the federal government had the constitutional authority to enact the *Canadian Environmental Protection Act* (C.E.P.A.) and, in particular, a complex and detailed set of regulations controlling the emission of toxic substances.[1] The instinct of most people on learning of the case is, not surprisingly, to applaud. A clean environment is near the top of almost everyone's political wish list.

On closer inspection, however, it is hard to regard the Court's championing the cause of environmental protection as an unambiguous good. Certainly those who care about the integrity of the law and its capacity to maintain an equilibrium in federal-provincial relations are likely to feel much more ambivalent, even depressed, by what they read. As compelling as the outcome of the case may be, the reasoning that supports it turns out to be shockingly inadequate.

The judgment of the majority, written by Gérard LaForest, (and concurred in by L'Heureux-Dubé, Gonthier, Cory and McLachlin) is constructed on an historically outmoded and highly subjective understanding of constitutional law that many will find objectionable. First, it is premised on the idea that a constitution is — as one Chief Justice of the U.S. Supreme Court once famously remarked — what the judges say it is and that each judge has a great deal of discretion in defining what the rules of a constitution will be. Second, and within such a highly personal and political understanding of the law, the judgment invokes a classical and much discredited image of constitutional law as a set of very discrete and separate categories or rules – "watertight compartments" has been the reigning metaphor – that dominated the thinking of the Privy Council more than half a century ago.

A SUBJECTIVE THEORY OF CONSTITUTIONAL LAW

To come to the conclusion that it was within Ottawa's jurisdiction to enact the *Canadian Environmental Protection Act*, LaForest and his supporters effectively assumed an unfettered authority to rewrite the rules of constitutional law according to their own personal views about what mix of environmental laws would work best for the country. LaForest's judgment broke new ground and redefined the rules of constitutional law in at least two different ways. First, grounding the federal government's control over the environment squarely in section 91(27) of the old *British North America Act* was quite unprecedented. The Court had never invoked the federal government's power over criminal law in this way before. In previous cases in which it had reflected on the powers of the federal government (and the provinces) over the environment, the Court had relied either on more directly related heads of power like fisheries and navigable rivers or on its residual power to make laws for "the peace, order and good government" of the country (POGG). Indeed, *Hydro-Québec* itself had been argued – both at the Supreme Court and in the lower courts – primarily on the basis of the federal government's POGG power.

Not only did the majority look to a new source of authority for the federal government's jurisdiction in the field of environmental protection, in the course of its judgment it also effectively redefined the scope of the federal government's power to enact criminal laws. The definition of the federal government's powers over criminal law had been settled by the case law for almost fifty years and consisted, in the words of Peter Hogg, of a "requirement of form as well as a typically criminal objective."[2] According to a long and unbroken line of cases, criminal laws characteristically took the shape of a prohibition and penalty. On this definition, public welfare offenses like those in C.E.P.A., that are part of complex regulatory regimes that rely on administrative rulings and discretionary powers, are not regarded as true crimes and cannot, therefore, be grounded in section 91(27).

LaForest did refer to the two part – formal and substantive – definition of the federal government's

[1] *R.* v. *Hydro-Québec*, (1997) 151 D.L.R. (4th) 32. The case concerned the Chlorobiphenyls Interim Order, P.C. 1989-296 made pursuant to the *Canadian Environmental Protection Act*, R.S.C. 1985, c.16 (4th supp.).

[2] P. Hogg, *Constitutional Law of Canada*, 4th ed. (Scarborough: Carswell, 1997) Chapter 18:10.

criminal law powers but then he simply ignored the first part.[3] Like a conjurer, LaForest and his supporters made the requirement that the law be drafted in the form of a prohibition backed by a penalty just disappear into thin air. For LaForest, there was only one limitation on the federal government's power to enact criminal laws which is that it cannot be used illicitly – that is, for an improper or 'colourable' purpose.[4] Without ever saying so explicitly, the majority simply turned its back on the Court's prior rulings and substituted a new, one dimensional, open-ended test of the public welfare that effectively imposed no restrictions on what the federal government could or could not do.

The fact the four dissenting judges (Lamer, Sopinka, Iacobucci and Major) devoted almost all of their judgment to a discussion of how C.E.P.A. failed the formal part of the test made no impression on LaForest and his colleagues. At no point did they challenge the minority's reading of the Court's earlier precedents or the standards and tests that section 91(27) required the federal government to meet. They simply declared that they did not share the minority's concern that the prohibitions originated in regulations and administrative rulings rather than in the substantive sections of the Act.[5] For them, the pressing nature of environmental protection was enough to validate the law.

A CATEGORICAL THEORY OF CONSTITUTIONAL LAW

Not only did LaForest's definition of the federal government's power over criminal law rewrite a test that had been accepted for almost half a century, it simultaneously resurrected the old and discredited conception of a constitution being made up of a number of very sharply defined categories or rules. On this "classical" view, each of the heads of powers listed in sections 91 and 92 are discrete and independent grants of law making authority, each with its own standards and tests. In *Hydro-Québec*, the majority played a variation on this theme by drawing a sharp distinction between the federal government's residual (POGG) and criminal law (section 91 (27)) powers and the principles or rules they contain, and then arguing that considerations of provincial autonomy and the balance between federal and provincial powers that were relevant under the former, were not germane to its analysis under the latter.[6] On their definition of section 91(27), the only concern of the Court is the legitimacy of the ends or purposes that the law seeks to achieve. Central to the Court's analysis in *Crown Zellerbach*[7] and *Oldman River,*[8] concerning the scope of the federal government's ability to enact environmental legislation under its residual (POGG) and other environmental heads of power, was consideration of the means chosen by government to pursue its goals. Working in the separate category of section 91(27), factors such as how deeply the legislation impinges on provincial jurisdiction, or how effectively provincial authorities might regulate the emission of toxic substances into the environment, simply drop out of sight.

Here again the four dissenting judges pressed the majority, to no avail, to address the impact this legislation would have on the principle that environmental protection was a matter of concurrent, overlapping, shared jurisdiction that earlier cases like Crown Zellerbach and *Oldman River* had articulated.[9] Their objections to the "striking breadth"[10] of the "wholesale regulation .... of any and all substances which may harm any aspect of the environment"[11] were said by the majority to be "overstated."[12] The minority were told that issues respecting the federal structure of the constitution "do not arise with anything like the same intensity in relation to the criminal law power"[13] as they do inside the residual (POGG) clause. Rather than having their arguments addressed directly on their merits, they were met with a judgment of dismissal and denial.

Building different tests of constitutional validity into the different heads of power in section 91 fits hand and glove with a subjective theory of law. Making each section a separate and distinct category gives each judge a discretion as to which part of constitution will govern a case and so effectively control which rules of constitutional law will apply. Without any obligation to explain or justify why a law like C.E.P.A. is evaluated under one head of power rather than another, each judge is able to choose the category and the constitutional test that will allow them to come to the conclusion that is most consistent with their own personal and political views about the case.

When one finishes reading the two lengthy judgments that were written in the case, it is hard not to experience the feeling that Canadian federalism law has returned to the same sorry state that it has been in for most of its existence. Generations of constitutional law teachers have

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3 *Hydro-Québec*, supra note 1 at par. 119.
4 *Ibid*. at pars. 121-122.
5 *Ibid*. at par. 147.
6 *Ibid*. at pars. 110, 117, 128.
7 *R.* v. *Crown Zellerbach Canada Ltd.* (1989) 49 D.L.R. (4th) 161 (SCC).
8 *Friends of the Oldman River Society* v. *Canada (Ministry of Transport)* (1992) 88 D.L.R. (4th) 1 (SCC).
9 *Hydro-Québec*, supra note 1 at pars. 59-60.
10 *Ibid*. at par. 56.
11 *Ibid*. at par. 33.
12 *Ibid*. at par. 131.
13 *Ibid*. at par. 110.

taught that artificial categories and rigid rules lead to arbitrary distinctions and inconsistent decisions[14] and yet here is the Court at it again. Although there was a brief moment during Brian Dickson's tenure as Chief Justice when an effort was made to find common principles and tests in the large grants of power to the federal government in POGG and section 91 (2) (trade & commerce),[15] that insight now seems to have been lost. It is as if we are back at the beginning: no lessons learned; no progress made; the "living tree" once again threatened with ossification.

A PRINCIPLED THEORY OF CONSTITUTIONAL LAW

The sense of frustration and disappointment that many will feel when they reflect on the reasoning the majority gave for its conclusion that Canada's *Environmental Protection Act* is constitutional will be heightened when they think about other ways the Court might have validated such an important piece of social policy. It turns out that not only did the Court not have to turn the clock back and repeat the mistakes of the past, it missed an opportunity to clarify and refine the principles it had used to reconcile federal/provincial powers over the environment in its earlier, landmark rulings in *Crown Zellerbach* and *Oldman River*. Had the Court respected its earlier precedents and assessed the constitutionality of C.E.P.A. under POGG, not only could it have validated the federal government's objective of establishing minimum national standards against toxic pollution, it could have demonstrated and elaborated how the principle of provincial inability (or subsidarity as it is known in other parts of the world),[16] that the federal government is required to meet when it acts under the authority of the residual clause, establishes an objective and normatively attractive standard for coordinating federal and provincial initiatives on this or indeed any other matter of common concern.

Although the four dissenting judges did consider whether the Act and the regulations could be justified as a valid exercise of the federal government's powers under POGG and, in particular, the 'national concern' doctrine that it had elaborated in *Crown Zellerbach*,[17] they never turned their minds to the "provincial inability" test and considered whether it could be satisfied in this case. They said C.E.P.A. could not meet the test of 'singleness and indivisibility' that the Court had established in *Crown Zellerbach* and so it was unnecessary for them to consider whether the provinces could effectively deal with the emission of toxic substances into the environment.[18] Had they treated the question of provincial ability as part of the singleness and indivisibility test – as the Court had defined it in *Crown Zellerbach* – it is hard to imagine that the four dissenting judges would not have seen the logic of minimum national standards governing the emission of toxic substances into the environment and the corresponding risk of allowing each province to establish its own floor.

There was a lot of evidence before the Court to support a finding of provincial inability to effectively control the spread of toxic substances. First, there was an extensive body of scientific evidence that showed that toxic substances are generally very mobile and that their polluting effects are highly diffuse and extend beyond provincial borders.[19] The "extra" or "inter" provincial character of toxic pollution, means that only the federal government has the capacity to deal effectively with the problem. Moreover, the Court has long recognized that, in circumstances of this kind, the federal government can also regulate related matters of purely internal or "intra" provincial concern where it is necessary to ensure the integrity of its regulation of the "extra" provincial aspect of the matter. That was the position the Court implicitly adopted in its endorsement of federal regulation of Canada's wheat trade[20] and explicitly embraced in *General Motors*[21] where it held that federal regulation of competition rules included purely local, intraprovincial trade.

In addition to the scientific evidence which the Court could have relied on to satisfy the provincial inability (or subsidiarity) test, there also was evidence that suggested that even if the provinces were constitutionally authorized to control the emissions of toxic substances, in this case they had demonstrated they lacked the political will to do so. The idea that "unwillingness" could constitute "inability" had some recognition in the cases[22] and in the

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[14] See e.g. P. Weiler, "The Supreme Court and the Law of Canadian Federalism" (1973) 23 UTLJ 307; P. Monahan "At Doctrine's Twilight: The Structure of Canadian Federalism" (1984) 34 UTLJ 47.

[15] See e.g. *R.* v. *Crown Zellerbach Canada Ltd.*, supra note 7 and *General Motors of Canada Ltd.* v. *City National Leasing* (1989) 58 D.L.R. (4th) 255 (SCC) and D. Beatty, *Constitutional Law in Theory and Practice* (Toronto: University of Toronto Press, 1995) at 34-35.

[16] See e.g. P. Hogg, "Subsidiarity and the Division of Powers in Canada" (1993) National Journal of Constitutional Law 341; R. Howse, "Subsidiarity in all but name: Evolving Concepts of Federalism in Canadian Constitutional Law" in P. Glenn, ed., *Droit Contemporain* (Cownasville: Les Éditions Yvon Blais, 1994).

[17] *Crown Zellerbach*, supra note 7.

[18] *Hydro-Québec*, supra note 1 at par. 79.

[19] *Ibid.* at pars. 157-158.

[20] *The Queen* v. *Klassen* (1960) 20 D.L.R. (4th) 406 (Man C.A.), leave to appeal to S.C.C. denied.

[21] *General Motors of Canada Ltd.* v. *City National Leasing*, supra note 15.

[22] See e.g. *Munro* v. *National Capital Commission* [1966] S.C.R. 663.

reflections of commentators[23] and was suggested in this case by the fact that Quebec had not taken advantage of the provisions in C.E.P.A. that allowed it to enact its own "equivalent" regulations controlling the emission of toxic substances. On this definition, unless and until the Quebec government took some initiative to protect its own environment from the polluting effects of toxic substances, the federal government legitimately could argue that it was necessary and therefore justified in enforcing its own regulations.

THE FUTURE OF CONSTITUTIONAL LAW

Because the outcome of the case is so congenial with most people's political instincts, it is easy to overlook or forgive the fact that, jurisprudentially, *Hydro-Québec* poses a serious threat to the integrity of the country's federal structure and to the rule of law. The decision of the majority puts at risk the federal principle and the idea that both levels of government have a role to play protecting the environment. If Parliament can justify everything it does under its power to make criminal law, provincial authority over even local aspects of the environment will depend on the sufferance of federal officials. Such a sweeping authorization of law making authority, combined with a paramountcy rule which gives precedence to federal enactments whenever they conflict with parallel provincial laws,[24] effectively would allow the federal government to dictate to the provinces what their environmental protection policies would be. As a practical matter it would reverse the Court's earlier rulings on the environment and give the federal government exclusive jurisdiction in the field.

In addition to the damage it inflicts on the federal structure of the constitution, LaForest's judgment strips law of the objectivity and determinacy on which its integrity depends. Premised on the idea that constitutional law consists of a series of separate categories and rules, each with its own standards and tests that the judges are free to choose from in evaluating the laws they are asked to review, the majority's opinion defines law in terms of the politics and personal predictions of each judge. We know from the huge swings in the jurisprudence of the Privy Council that this highly subjective, categorical conception of judicial review leads to a jurisprudential wasteland. It generates a body of case law in which the principles and doctrines 'march in pairs' to recall Paul Weiler's characterization of the Court's work twenty five years ago.[25] Conceiving of constitutional review as judges choosing which categories and rules to apply in any particular case leads to a jurisprudence with deep fault lines that produce very arbitrary and inconsistent results.

Even though it is hard not to think of *Hydro-Québec* as the jurisprudential equivalent of a serious spill of toxic waste, it is possible that its polluting effects may only be temporary and will not endure for long. With the early retirement of Gérard LaForest and the untimely death of John Sopinka, it is possible that the two new justices — Michel Bastarache and Ian Binnie — will reject the classical, categorical approach to the law that the majority embraced and lead the Court back to the understanding of constitutional law as consisting of broad rules of rationality (subsidiarity) and proportionality (scale of impact) that the Dickson Court had started to develop in *Crown Zellerbach* and *General Motors*.

Regrettably, because of the way we select judges to sit on the Court, we do not know and had no say in whether that will be the case. If we had had the right to question Bastarache and Binnie about their views on the classical approach to the law, we could have made certain the precedential impact of *Hydro-Québec* was short lived. Candidates who favoured the reasoning of the majority would jeopardize their chances for confirmation. Anyone who would defend the analysis offered by LaForest and his supporters would have to show such little respect for the Court's own prior rulings and the integrity of law as to raise serious doubts about their qualifications to sit on the country's highest court.❑

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[23] See e.g. K. Swinton, "Federalism Under Fire: The Role of the Supreme Court of Canada" (1992) 55 Law and Contemp Problems 121, 131-37. See also H. Brun & G. Tremblay, *Droit Constitutionnel*, 2e. éd. (Cowansville: Les Éditions Yvon Blais, 1990) at pars. 490-494.

[24] P. Hogg, *Constitutional Law of Canada*, supra note 2 at Chapter 16.

[25] P. Weiler, "The Supreme Court and the Law of Canadian Federalism," supra note 14 at 364.