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# R. v. Hydro-Québec: Federal Environmental Regulation as Criminal Law

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This case comment explores some of the doctrinal and policy implications of the Supreme Court of Canada's recent ruling in *R. v. Hydro-Québec*. The commentary seeks to place the decision in its doctrinal context, and discusses the consequences of holding regulatory powers in relation to toxic substances under the *Canadian Environmental Protection Act* ("CEPA") as criminal law. It argues that the majority's *ratio* has significantly expanded the ambit of the criminal law power, especially regarding the permissible form of criminal law. The importance of section 91(27) as an appropriate jurisdictional pillar for implementing the precautionary principle at the federal level is emphasized. While the ruling has confirmed the possibility for Parliament to play an important role in the protection of the environment, there are a number of countervailing tendencies that have the potential for restricting regulatory action at the federal level. In addition, the article examines the potential for *Charter*-based challenges to enforcement actions under the *CEPA* by juxtaposing the majority's reasoning in holding the relevant provisions criminal law with the test developed by the Court to dispose of vagueness claims under section 7 of the *Canadian Charter of Rights and Freedoms*. Finally, this case comment cautions against decentralization of environmental policy which leads to deregulation. It stresses the importance of effective regulation at all levels of government so as to afford — (re)distributively — all Canadians an acceptable environmental quality.

Ce commentaire d'arrêt explore certains aspects doctrinaux et politiques découlant de l'arrêt récent de la Cour suprême du Canada *R. c. Hydro-Québec*. Il place la décision dans son contexte doctrinal et discute des conséquences de la détermination que les pouvoirs réglementaires sur les substances toxiques en vertu de la *Loi canadienne sur la protection de l'environnement* («LCPE») relèvent de la compétence du Parlement fédéral en droit criminel. Selon l'auteur, le *ratio decidendi* de la majorité a significativement élargi le champ d'application du pouvoir de légiférer en matière de droit criminel, surtout en ce qui concerne la forme que peuvent prendre les dispositions de nature pénale. L'auteur met également en relief l'importance de l'alinéa 91(27) en tant que fondement d'une compétence législative dans la mise en œuvre du principe de précaution au niveau fédéral au Canada. Bien que l'arrêt ait confirmé le pouvoir du Parlement fédéral d'assumer un rôle important en matière de protection de l'environnement, ce commentaire fait l'analyse des tendances contraires restreignant potentiellement la capacité réglementaire fédérale. De plus, ce texte jette un regard sur la possibilité de recours basés sur la *Charte canadienne des droits et libertés* contre les mesures prises sous l'empire de la LCPE. Il juxtapose l'argumentation suivie par la Cour afin d'arriver à une détermination de «droit criminel» et les conditions qui ont été établies dans la jurisprudence pour disposer des recours basés sur la doctrine d'imprécision dans le contexte de l'article 7 de la *Charte canadienne des droits et libertés*. Enfin, ce commentaire met en garde contre une décentralisation menant à la déréglementation en matière de protection de l'environnement. Il met l'accent sur l'importance d'une réglementation efficace à tous les niveaux de gouvernement afin de pouvoir garantir à tous les Canadiens — d'une façon (re)distributive — une qualité de l'environnement acceptable.

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## Introduction

- I. ***R. v. Hydro-Québec: Environmental Protection as a Public Purpose Sufficient to Support a Criminal Prohibition***
  - A. *The Rulings in the Quebec Courts: Focussing on National Concerns*
  - B. *R. v. Hydro-Québec: Moving from National Concerns to Criminal Law*
- II. **Federal Environmental Jurisdiction under the Criminal Law Power**
  - A. *Penal Finality and Regulatory Form*
  - B. *Prohibition and Precaution*
  - C. *The Environment as a Cross-Cutting Subject Matter*
- III. **Sustainability and the Limits to Environmental Policy Based on Criminal Law**
  - A. *Penal Purposes in Regulatory Form and "Fair Notice" under Section 7: The CEPA on unChartered Ground?*
  - B. *Punishment and Sustainability*
  - C. *Internal Limits*
  - D. *External Limits*

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## Conclusion: The Rationale for (Federal) Environmental Regulation

## Introduction

On 18 September 1997, the Supreme Court of Canada handed down its long-awaited judgment in *R. v. Hydro-Québec*.<sup>1</sup> The ruling brought an end to a judicial saga which had lasted more than seven years<sup>2</sup> and which was widely believed to hold far-reaching implications for federal environmental jurisdiction.<sup>3</sup> In a narrow five-four decision, the Court upheld the authorization of the Executive to issue, pursuant to sections 34 and 35 of the *Canadian Environmental Protection Act*,<sup>4</sup> interim orders<sup>5</sup> banning the release of toxic substances into the environment in excess of specified quantities as a valid exercise of the criminal law power under section 91(27) of the *Constitution Act, 1867*.<sup>6</sup>

The majority thus confirmed a trend established by *R. v. Crown Zellerbach*<sup>7</sup> and *Friends of the Oldman River Society v. Canada (Minister of Transport)*<sup>8</sup> which suggests that Parliament disposes of sufficient jurisdictional authority to play a leading role in protecting the Canadian environment against hazards arising from industrial activities or major resource development projects. The ruling in *Hydro-Québec* also suggests that there is a wide area of environmental policy which is open to *de facto* concurrent operation of both federal and provincial environmental protection statutes.

Curiously, the confirmation of federal environmental jurisdiction comes at the very moment when the workings of Canadian executive federalism appear to have the counter effect of withdrawing the federal government from important sectors of environmental policy. For the declared objective of the *Canada-Wide Accord on Environ-*

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<sup>1</sup> [1997] 3 S.C.R. 213, 151 D.L.R. (4th) 32 [hereinafter *Hydro-Québec* cited to S.C.R.].

<sup>2</sup> The initial indictment was filed on 5 June 1990, the trial judge in the Court of Quebec's criminal division rendered his verdict on 12 August 1991 (see *R. v. Hydro-Québec*, [1991] R.J.Q. 2736 (C.Q.)). The Quebec Superior Court dismissed the appeal by the Attorney General on 6 August 1992 (see *Canada (A.G.) v. Hydro-Québec*, [1992] R.J.Q. 2159 (C.S.) [hereinafter *Hydro-Québec* (C.S.)]). The Quebec Court of Appeal again ruled in favour of the respondent on 14 February 1995 (see *Canada (A.G.) v. Hydro-Québec*, [1995] R.J.Q. 398, 67 Q.A.C. 161 [hereinafter *Hydro-Québec* (C.A.) cited to R.J.Q.]).

<sup>3</sup> See E.A. Fitzgerald, "The Constitutionality of Toxic Substances Regulation under the *Canadian Environmental Protection Act*" (1996) 30 U.B.C. L. Rev. 55 at 59; P. Curley, "CEPA under Attack: *Canada (Attorney General) v. Hydro-Québec*" (1995) 5 J.E.L.P. 88. See also A. Prévost, "L'environnement est-il un domaine de compétence provinciale?" in Service de la formation permanente du Barreau du Québec, *Développements récents en droit de l'environnement* 1996 (Cowansville, Qué.: Yvon Blais, 1996) 105 at 120; J. Piette, "Les faits marquants de la jurisprudence de la dernière année en droit de l'environnement" in Service de la formation permanente du Barreau du Québec, *ibid.*, 219 at 230-39.

<sup>4</sup> R.S.C. 1985 (4th Supp.), c. 16 [hereinafter the *CEPA*].

<sup>5</sup> The order in question was the *Chlorobiphenyls Interim Order*, P.C. 1989-296, 123 C. Gaz. 1989.I.1281 [hereinafter *Interim Order*].

<sup>6</sup> (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

<sup>7</sup> [1988] 1 S.C.R. 401, 49 D.L.R. (4th) 161 [hereinafter *Crown Zellerbach* cited to S.C.R.].

<sup>8</sup> [1992] 1 S.C.R. 3, 88 D.L.R. (4th) 1 [hereinafter *Friends of the Oldman River* cited to S.C.R.].

*mental Harmonization,*<sup>9</sup> a harmonization initiative sponsored by the Canadian Council of Ministers of the Environment (“CCME”) and signed by the federal government as well as eleven provincial and territorial governments (all except Quebec),<sup>10</sup> is *inter alia* to:

achieve greater effectiveness, efficiency, accountability, predictability and clarity of environmental management for issues of Canada-wide interest, by:

...

2. delineating the respective roles and responsibilities of the Federal, Provincial and Territorial governments within an environmental management partnership by ensuring that specific roles and responsibilities will generally be undertaken by *one* order of government *only*;

...

4. *preventing overlapping activities* and inter-jurisdictional disputes.<sup>11</sup>

Furthermore, various sub-agreements on such important aspects of environmental policy as standards, inspections and environmental assessment are to secure implementation of these objectives by “delineat[ing] specific roles and responsibilities to provide a *one-window approach* to the implementation of environmental measures.”<sup>12</sup> Accordingly, the *Canada-Wide Environmental Standards Sub-Agreement*<sup>13</sup> provides, under the heading of accountability, for both orders of government not to interfere with each others’ roles and responsibilities as they respectively accepted them under the agreement,<sup>14</sup> and under the heading of implementation, to “avoid overlap and duplication.”<sup>15</sup>

This case comment will argue that the nature of the regulatory problem at issue in *Hydro-Québec*<sup>16</sup> does indeed militate in favour of federal environmental jurisdiction, and of an important federal role in environmental policy that is complementary to and

<sup>9</sup> The *Accord* as well as drafts and final versions for some of the sub-agreements have been reproduced on the web site of the Canadian Council of Ministers of the Environment [hereinafter “CCME”]. See CCME, *A Canada-Wide Accord on Environmental Harmonization*, online: CCME <<http://www.mbneta.ca/ccme>> (last modified: October 19, 1998) [hereinafter *Accord*].

<sup>10</sup> See CCME, Communiqué “Environmental Harmonization Accord Approved by Twelve Jurisdictions” (29 January 1998), online: <<http://www.mbneta.ca/ccme>> (last modified: October 19, 1998). Ironically, the consequence of the Quebec government’s decision not so sign the *Accord* will be that of all the provinces, Quebec will be the province where federal agencies and inspectors will definitely continue to have to assume the full extent of their constitutional powers and duties. The author is grateful to Franklin Gertler for drawing his attention to this aspect of the Quebec government’s refusal to endorse the *Accord*.

<sup>11</sup> *Supra* note 9 at Objectives arts. 2, 4 [emphasis added].

<sup>12</sup> *Ibid.* at Sub-Agreement, art. 2 [emphasis added].

<sup>13</sup> CCME, *Canada-Wide Environmental Standards Sub-Agreement*, online: CCME, *supra* note 9.

<sup>14</sup> See *ibid.*, s. 4.4.

<sup>15</sup> See *ibid.*, s. 6.3.

<sup>16</sup> *Supra* note 1.

an appropriate supplement for regulatory action at the provincial level. At the same time, however, this comment will attempt to show possible limits to *Hydro-Québec* and to the criminal law power as the foundation for federal environmental policy. First, a brief overview of the case's history will be provided.

## I. *R. v. Hydro-Québec: Environmental Protection as a Public Purpose Sufficient to Support a Criminal Prohibition*

### A. *The Rulings in the Quebec Courts: Focussing on National Concerns*

The litigation arose out of charges brought against Hydro-Québec in the Court of Quebec for allowing polychlorinated biphenyls ("PCBs") to be released into the environment in quantities greater than allowed by section 6(a) of the *Interim Order*,<sup>17</sup> and for failing to report the spillage to a federal inspector,<sup>18</sup> contrary to section 36(1)(a) of the *CEPA*.<sup>19</sup> Hydro-Québec pleaded not guilty to the charges and brought a motion to have section 6(a) of the *Interim Order* as well as sections 33, 34, 35 and 36 of the *CEPA* declared *ultra vires*. Counsel for Hydro-Québec essentially argued that the provisions in question sought to regulate conduct that occurred exclusively within a province and which had no extra-provincial or international effects. It was argued that the matter squarely fell within exclusive provincial jurisdiction under sections 92(10) and 92(13) of the *Constitution Act, 1867*.<sup>20</sup> Moreover, counsel for Hydro-Québec submitted that the provisions in question qualified neither as criminal law nor as regulation under the national-concerns branch of Parliament's power to adopt laws for the "Peace, Order, and good Government of Canada."<sup>21</sup>

Counsel for the Attorney General of Canada sought to justify the provisions at issue as regulation of a matter of national concern under the test laid down by the Supreme Court of Canada in *Crown Zellerbach*.<sup>22</sup> It was argued that failure on the part of one province to regulate effectively the release of toxic substances into the environment could entail serious risks for human health and the environment beyond its borders. In addition, counsel for the Attorney General of Canada submitted that the *Interim Order* as well as the other provisions at issue qualified as criminal law within the meaning of section 91 (27) of the *Constitution Act, 1867*.<sup>23</sup>

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<sup>17</sup> *Supra* note 5.

<sup>18</sup> See the facts as reported by Trottier J. in *Hydro-Québec* (C.S.), *supra* note 2 at 2161 and LaForest J. in *Hydro-Québec*, *supra* note 1 at para. 88.

<sup>19</sup> *Supra* note 4.

<sup>20</sup> *Supra* note 6.

<sup>21</sup> *Ibid.* s. 91.

<sup>22</sup> *Supra* note 7.

<sup>23</sup> *Supra* note 6.

Hydro's position prevailed both before the trial judge and the provincial appellate court. Both Babin J. in the Court of Quebec and Trottier J. of the Quebec Superior Court granted the motion declaring section 6(a) of the *Interim Order ultra vires* parliament. Trottier J. first enquired into the ambit of the overall legislative scheme by examining how the *CEPA* defined key concepts such as "environment" or "toxic substance."<sup>24</sup> Holding the relevant definitions<sup>25</sup> to be comprehensive, the honourable Judge found the whole scheme purporting to apply, on its face, not only to spills having extra-provincial effects, but also to those with purely local impact.<sup>26</sup> Trottier J. then examined whether the subject matter of the impugned provisions so defined fell within Parliament's residuary power to pass laws for the "Peace, Order, and good Government of Canada" as regulation of a matter of national concern.<sup>27</sup>

The learned Judge found the provision to be running afoul of the requirement to have an "effet sur la compétence provinciale qui soit compatible avec le partage fondamental des pouvoirs législatifs effectué par la Constitution."<sup>28</sup> Given the breadth of the definition of the term "toxic" in section 11(a) of the *CEPA*,<sup>29</sup> Parliament had, according to Trottier J., arrogated itself an indefinite regulatory power that purported to catch all activity involving toxic substances and their effects. Hence, Parliament sought to regulate the environmental consequences of matters otherwise falling within the exclusive competence of the provinces<sup>30</sup> under sections 92(10) and 92(13) of the *Constitution Act, 1867*.<sup>31</sup> Allowing such a matter to fall within Parliament's residuary power as a matter of national concern would, in the opinion of the learned Judge, have amounted to vesting comprehensive jurisdiction with respect to the environment in Parliament. Thus, the provinces would have been completely excluded from what was generally recognized as being a matter of shared competence.<sup>32</sup> Finally, Trottier J. rejected the appellant's submission that the impugned provision qualified as criminal law within the meaning of section 91(27) of the *Constitution Act, 1867*. In this re-

<sup>24</sup> See *Hydro-Québec* (C.S.), *supra* note 2 at 2162ff.

<sup>25</sup> The *CEPA*, *supra* note 4, defines, in s. 3(1), "environment" as encompassing "the components of the Earth" and as including "(a) air, land and water, (b) all layers of the atmosphere, (c) all organic and inorganic matter and living organisms, and (d) the interacting natural systems that include components referred to in paragraphs (a) to (c)." A substance (within the meaning ascribed to that term by s. 3(1)) is defined in s. 11 as 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) constitution or that may constitute a danger in Canada to human life or health.

<sup>26</sup> See *Hydro-Québec* (C.S.), *supra* note 2 at 2163.

<sup>27</sup> See *ibid.* at 2164ff.

<sup>28</sup> *Ibid.* at 2165, citing *Crown Zellerbach*, *supra* note 7 at 432.

<sup>29</sup> *Supra* note 4.

<sup>30</sup> See *Hydro-Québec* (C.S.), *supra* note 2 at 2164ff.

<sup>31</sup> *Supra* note 6.

<sup>32</sup> See *Hydro-Québec* (C.S.), *supra* note 2 at 2165.

spect, the learned Judge found the whole scheme to be of a regulatory, rather than a prohibitory nature, thus precluding its characterization as criminal law.<sup>33</sup>

In the Court of Appeal, Tourigny J.A. essentially followed the line of reasoning adopted by Trottier J. in dismissing the appeal brought by the Attorney General for Canada. Tourigny J.A. first examined the pith and substance of the impugned provisions<sup>34</sup> and found it to be not just the protection of human life and health but protection of the environment writ large.<sup>35</sup> Not unlike Trottier J. in the Quebec Superior Court, Tourigny J.A. held that such a subject matter lacked the “singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern,” the requirements that would have to be met under the third prong of the test set forth by LeDain J. in *Crown Zellerbach*<sup>36</sup> to determine whether a matter qualifies as one of national concern.<sup>37</sup> Finally, Tourigny J.A. also held the criminal sanction attaching to violations of the legislative scheme at issue to be no more than a colourable attempt to invade areas within provincial jurisdiction, and thus rejected the appellant’s submission that the impugned provisions could be sustained as criminal law under section 91(27) of the *Constitution Act, 1867*.<sup>38</sup>

In refusing to characterize the *Interim Order*’s prohibition to release the substance in question into the environment in excess of the prescribed quantities as being criminal law, the Quebec courts appeared to have overturned *R. v. Canada Metal Co.*<sup>39</sup> In that case, prohibitions to release certain substances into the air in excess of quantities laid down in permits under the former federal *Clean Air Act*<sup>40</sup> and the regulations adopted thereunder were held to be criminal law within the meaning of section 91(27) (in addition to being a matter of national dimensions coming within the purview of Parliament’s POGG-power).

Moreover, all the judgments handed down by the Quebec courts seem to be premised on the view that the legislation at issue also applied to purely local spills. Indeed, the assumption is that the incident which led to Hydro-Québec being charged concerned a purely local spill that was wholly devoid of extra-provincial effects. As one commentator has observed,<sup>41</sup> it is highly debatable whether this factual assump-

<sup>33</sup> See *ibid.* at 2166.

<sup>34</sup> See *Hydro-Québec* (C.A.), *supra* note 2 at 403.

<sup>35</sup> See *ibid.* at 405.

<sup>36</sup> *Supra* note 7 at 431-32.

<sup>37</sup> See *Hydro-Québec* (C.A.), *supra* note 2 at 406.

<sup>38</sup> See *ibid.* at 408ff.

<sup>39</sup> (1982), 144 D.L.R. (3d) 124, 19 Man. R. (2d) 268 (Q.B.).

<sup>40</sup> S.C. 1970-71-72, c. 47. Some of the provisions of the *Clean Air Act* have since been incorporated into the *CEPA*, *supra* note 4. See in particular ss. 61ff. (Part V, *International Air Pollution*).

<sup>41</sup> See Curley, *supra* note 3 at 93. As Curley rightly points out, this assumption underlying Trottier J.’s ruling appears particularly questionable in light of the facts of this case. The St. Maurice River spills into the St. Lawrence River which, in turn, flows into the Atlantic. The substances spilled could thus quite easily have been transported across provincial boundaries into the Maritime Provinces and there led to contamination of fish.

tion (which directly contradicted one of Parliament's explicitly stated motives in the preamble of the *CEPA* for adopting the legislation)<sup>42</sup> stands up to scrutiny, given the well-known mobility of toxic substances not only across different environmental media, but also over huge distances due to their bio-accumulative effect and long-range atmospheric transport. As the House of Commons Standing Committee on Environment and Sustainable Development found:

Because many of these substances can travel long distances through air or water, can cross environmental media, are sometimes used widely, and in some cases originate from non-point sources, it is often difficult to control them at the local level. In other words, the threat they pose is broad and pervasive. As the Inuit Tapirisat and other aboriginal representatives testified, this is especially true in the Canadian Arctic, where industrial and agricultural pollutants originating from southern Canada and other countries have been found in the fatty tissues of some of the animals northerners eat.<sup>43</sup>

### **B. R. v. Hydro-Québec: Moving from National Concerns to Criminal Law**

Bearing in mind these rulings in the lower courts, it would have appeared that the principal issue facing the Supreme Court was whether the regulation of toxic substances satisfied the national concern test stated by LeDain J. in *Crown Zellerbach*.<sup>44</sup> The matter would then fall within Parliament's residuary power to pass laws for the "Peace, Order, and good Government of Canada" as stated in the introductory clause to section 91 of the *Constitution Act, 1867*. By the time the case reached the Court, other litigation concerning the constitutionality of the *Tobacco Products Control Act*<sup>45</sup> intervened. The ruling in *RJR-MacDonald v. Canada (A.G.)*<sup>46</sup> significantly shifted the focus for disposing of the jurisdictional issue in *Hydro-Québec* by re-directing much of the argument to the criminal law power in section 91(27) of the *Constitution Act, 1867*. As LaForest J. reminded the intervenors appearing before the Court:

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<sup>42</sup> See the *CEPA*, *supra* note 4, preamble: "Whereas toxic substances, once introduced into the environment, cannot always be contained within geographic boundaries."

<sup>43</sup> House of Commons, Standing Committee on Environment and Sustainable Development, *It's About Our Health: Towards Pollution Prevention: CEPA Revisited* (Ottawa: Canada Communications Group, 1995) at 5.

<sup>44</sup> LeDain J. elaborated on the requirements Beetz J. had laid down in *Reference Re Anti-Inflation Act*, [1976] 2 S.C.R. 373, 68 D.L.R. (3d) 452 [hereinafter *Reference Re Anti-Inflation* cited to S.C.R.], by adding the so-called "provincial inability" test. Under the latter, a matter will be deemed to have the requisite "singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern" if a "provincial failure to deal effectively with the control or regulation of the intra-provincial aspects of the matter" can be shown to have adverse effects on extra-provincial interests (*Crown Zellerbach*, *supra* note 7 at 432).

<sup>45</sup> R.S.C. 1985 (4th Supp.), c. 14.

<sup>46</sup> [1995] 3 S.C.R. 199, 127 D.L.R. (4th) 1 [hereinafter *RJR-Macdonald* cited to S.C.R.].

There 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 that power as set down by this Court from a very early period and continually reiterated since, notably in specific pronouncements in the most recent cases on the subject.<sup>47</sup>

In *RJR-MacDonald*, Laforest J., writing for the majority on the jurisdictional question, reiterated the Court's expansive conception of Parliament's power to adopt laws in relation to the criminal law under section 91(27) of the *Constitution Act, 1867*: “[t]he criminal law power is plenary in nature and this Court has always defined its scope broadly.”<sup>48</sup> Moreover, his Lordship indicated that Parliament enjoys considerable discretion when singling out a public purpose to undergird substantively the form of penal laws under the definition of criminal law offered by Rand J. in the *Reference as to the Validity of Section 5(a) of the Dairy Industry Act*:

A crime is an act which the law, with appropriate penal sanctions, 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.<sup>49</sup>

Given the broad range of interests capable of lending a substantive element to the form of criminal law, it is perhaps not surprising that the focus of the argument with respect to jurisdictional authority in relation to toxic substances regulation should have shifted from national concern to criminal law power. This is the case especially after LaForest J.'s finding of a valid public purpose capable of containing provisions of a penal nature in *RJR-MacDonald* where the various prohibitions under the *Tobacco Products Control Act*<sup>50</sup> were not seen as addressing conduct that directly impinged on the identified underlying criminal wrong — the consumption, sale, or manufacture of tobacco products — but rather the motivation to engage in the directly harmful conduct.

The issues thus facing the Supreme Court following its ruling in *RJR-MacDonald* may be summarized as follows: first, does environmental protection qualify as a legitimate public purpose that can strengthen federally enacted penal sanctions, and save them from a verdict of colourability under the test set out by Rand J.; and second, if so, do the legislative tools employed by Parliament in sections 34 and 35 of the

<sup>47</sup> *Hydro-Québec*, *supra* note 1 at para. 117. See also para. 109.

<sup>48</sup> *RJR-MacDonald*, *supra* note 46 at para. 28.

<sup>49</sup> [1949] S.C.R. 1 at 49, [1949] 1 D.L.R. 433, aff'd [1951] A.C. 179, [1950] 4 D.L.R. 689 (P.C.) [hereinafter *Margarine Reference* cited to S.C.R.] cited in *RJR-MacDonald*, *ibid.* at para. 29ff., LaForest J.

<sup>50</sup> *Supra* note 45.

CEPA remain within the legislative means Parliament has at its disposal under the authority of section 91(27) of the *Constitution Act, 1867*.

Both the majority and minority had little difficulty finding environmental protection a valid public purpose which could legitimately result in prohibitory legislative measures of a criminal nature.<sup>51</sup> However, the majority and minority reached fundamentally different conclusions on the second question.

Against Hydro-Québec's attack of the provisions' regulatory nature, LaForest J., writing for the majority, relied on previous cases in which federal legislation with regulatory elements had been upheld as valid criminal law. Drawing a parallel with the federal *Food and Drugs Act*<sup>52</sup> and citing *RJR-MacDonald*, his Lordship analyzed the operation of section 34 of the CEPA in the following manner:

In short, s. 34 precisely defines situations where the use of a substance in the List of Toxic Substances in Schedule I is prohibited, and these prohibitions are made subject to penal consequences. This is similar to the techniques Parliament has employed in providing for and imposing highly detailed requirements and standards in relation to food and drugs, which control their import, sale, manufacturing, labelling, packaging, processing and storing ....

What Parliament is doing in s. 34 is making provision for carefully tailoring the prohibited action to specified substances used or dealt with in specific circumstances. This type of tailoring is obviously necessary in defining the scope of a criminal prohibition, and is, of course, within Parliament's power.<sup>53</sup>

As LaForest J.'s subsequent citation from *R. v. Furtney*<sup>54</sup> makes clear, in his judgment, the operation of section 34 of the CEPA is, for purposes of determining the criminal law nature of the provision, no different from the criminal code exemptions for provincially licensed lotteries.<sup>55</sup>

Although holding sections 34 and 35 of the CEPA valid criminal law, LaForest J. elaborated to explain that this result does not prevent the provinces from enacting and applying regulatory measures dealing with very similar issues:

[I]t is well at this point to recall that the use of the federal criminal law power in no way precludes the provinces from exercising their extensive powers under s.

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<sup>51</sup> See *Hydro-Québec*, *supra* note 1 at paras. 123-30, LaForest J. and at paras. 37-38, Lamer C.J.C., dissenting.

<sup>52</sup> R.S.C. 1985, c. F-27.

<sup>53</sup> *Hydro-Québec*, *supra* note 1 at paras. 150-51, LaForest J. [footnotes omitted]. See also at para. 135 where LaForest J. describes the overall content of Part II of the CEPA:

Part II does not deal with the protection of the environment generally. It deals simply with the control of toxic substances that may be released into the environment under certain restricted circumstances, and does so through a series of prohibitions to which penal sanctions are attached.

<sup>54</sup> [1991] 3 S.C.R. 89, 66 C.C.C. (3d) 498 [hereinafter *Furtney* cited to S.C.R.] .

<sup>55</sup> See *Hydro-Québec*, *supra* note 1 at paras. 151-52.

92 to regulate and control the pollution of the environment either independently or to supplement federal action.<sup>56</sup>

Thus, a finding of federal jurisdiction under one of the enumerated heads of power in section 91 allows for the concurrent operation of both federal and provincial legislation:

In truth, there is a broad area of concurrency between federal and provincial powers in areas subjected to criminal prohibitions, and the courts have been alert to the need to permit adequate breathing room for the exercise of jurisdiction by both levels of government.

This type of approach is essential in dealing with amorphous subjects like health and the environment.<sup>57</sup>

In fact, his Lordship furnishes what might be termed a policy reason for holding the provisions at issue criminal law, and thus obviating an enquiry into whether the regulation of toxic substances comes within the purview of Parliament's residuary power under the national concerns branch. Unlike jurisdiction under one of the enumerated heads of power, jurisdiction under Parliament's residuary power operates to the exclusion of provincial regulation:

In saying that Parliament may use its criminal law power in the interest of protecting the environment or preventing pollution, there again appears to have been confusion during the argument between the approach to the national concern doctrine and the criminal law power. The national concern doctrine operates by assigning full power to regulate an area to Parliament. Criminal law does not work that way. Rather it seeks by discrete prohibitions to prevent evils falling within a broad purpose, such as, for example, the protection of health.<sup>58</sup>

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<sup>56</sup> *Ibid.* at para. 131.

<sup>57</sup> *Ibid.* at para. 153, citing *Schneider v. R.*, [1982] 2 S.C.R. 112 at 134, 139 D.L.R. (3d) 417, Dickson J.

<sup>58</sup> *Hydro-Québec*, *ibid.* at para. 128. It is a matter of some argument, however, whether federal jurisdiction under the national concerns branch of Parliament's peace, order and good government power [hereinafter "POGG"] does so operate to the exclusion of provincial jurisdiction. See J.-Y Morin & J. Woehrling, *Les Constitutions du Canada et du Québec du régime français à nos jours*, vol. 1, 2d ed. (Montreal: Thémis, 1994) at 321, n. 608. While Beetz J. in *Reference Re Anti-Inflation*, *supra* note 44, attributed an exclusive nature to federal legislation under POGG, LeDain J.'s reasoning, in *Crown Zellerbach*, *supra* note 7 at 431, on the specific question of federal jurisdiction to regulate pollution of marine waters, leaves some room for ambiguity. See D. VanderZwaag, *Canada and Marine Environmental Protection: Charting a Legal Course Towards Sustainable Development* (London: Kluwer Law International, 1995) at 294; L. Willis, "The *Crown Zellerbach* Case on Marine Pollution: National and International Dimensions" (1988) 26 Can. Y.B. Int'l L. 235 at 244; K. Swinton, "Federalism under Fire: The Role of the Supreme Court of Canada" (1992) 55 L. & Contemp. Probs. 121 at 132. See also S.A. Kennett, *Managing Interjurisdictional Waters in Canada: A Constitutional Analysis* (Calgary: Canadian Institute of Resources Law, 1991) at 212-26. Kennett draws parallels with the Court's previous jurisprudence to argue that the ruling in *Crown Zellerbach* can hardly be taken as authority for the proposition that the provinces are to be excluded from the field of water pollution in its entirety.

This passage is preceded by an extensive quote from the 1987 report *Our Common Future* by the World Commission on Environment and Development which envisaged the following division of labour between national and subnational governmental units in the regulation of toxic substances:

*The regulations and standards should govern such matters as air and water pollution, waste management, occupations health and safety of workers, energy and resource efficiency of products or processes, and the manufacture, marketing, use, transport, and disposal of toxic substances. This should normally be done at the national level, with local governments being empowered to exceed, but not to lower, national norms.*<sup>59</sup>

Hence, it is, at least in part, the preferability of concurrency in a field such as the environment that tips the scales against federal jurisdiction on the basis of the national concerns branch. This idea had previously been expounded in scholarly writing,<sup>60</sup> but does not currently seem to be finding much favour with political actors who are keen to reduce the very potential for the concurrent operation of environmental protection statutes<sup>61</sup> that LaForest J. appears to have in mind:

In *Crown Zellerbach*, I expressed concern with the possibility of allocating legislative power respecting environmental pollution exclusively to Parliament. I would be equally concerned with an interpretation of the Constitution that effectively allocated to the provinces, under general powers such as property and civil rights, control over the environment in a manner that prevented Parliament from exercising the leadership role expected of it by the international community and its role in protecting the basic values of Canadians regarding the environment through the instrumentality of the criminal law power.<sup>62</sup>

## II. Federal Environmental Jurisdiction under the Criminal Law Power

The ruling in *Hydro-Québec* is the Supreme Court's latest pronouncement on the subject of jurisdiction in relation to environmental policy. As such it marks an important step in the doctrinal evolution of Parliament's criminal law power under section 91(27) of the *Constitution Act, 1867*.<sup>63</sup>

<sup>59</sup> *Hydro-Québec*, *ibid.* at para. 126 [emphasis added], citing World Commission on Environment and Development, *Our Common Future* (Oxford: Oxford University Press, 1987) at 219-20 [hereinafter *Our Common Future*].

<sup>60</sup> See J. Leclair, "Aperçu des virtualités de la compétence fédérale en droit criminel dans le contexte de la protection de l'environnement" (1996) 27 R.G.D. 137 at 140.

<sup>61</sup> See *supra* note 9 and accompanying text.

<sup>62</sup> *Hydro-Québec*, *supra* note 1 at para. 154.

<sup>63</sup> *Supra* note 6.

### A. Penal Finality and Regulatory Form

The ruling represents a significant expansion of the federal criminal law power, especially as regards the legislative tools and techniques which are available to Parliament under section 91(27) of the *Constitution Act, 1867*. Traditionally, it had always been thought that the criminal law power does not sustain regulatory schemes.<sup>64</sup> In the environmental field in particular, doubts had been expressed about whether the criminal law power could furnish sufficient jurisdictional authority for some of the more elaborate environmental management schemes.<sup>65</sup> Prior to *Hydro-Québec*, regulatory elements had been upheld as exemptions that could be appended to a criminal ban and its corresponding sanctions in order to define the precise ambit of a crime.<sup>66</sup>

In likening section 34 of the *CEPA* to such techniques, LaForest J. has substantially removed some of the fetters attaching to the form of criminal law under section 91(27) of the *Constitution Act, 1867*. The precise wording of the section bears repeating in this context:

34. (1) Subject to subsection (3),

where an order has been made to add a substance to the list of toxic substances in schedule 1, the Governor in Council may, on the recommendation of the Ministers and after the federal-provincial advisory committee is provided an opportunity to render its advice under section 6, make regulations with respect to the substance, including regulations providing for or imposing requirements respecting

(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<sup>67</sup>

As is readily apparent, the section contains no prohibition at all. On the contrary, rather than proscribing, the provision, on a literal interpretation, authorizes conduct, *i.e.* the making of regulations in relation to substances that have been added to the *List of Toxic Substances* in Schedule I of *CEPA*. The addressee of the section is not an individual citizen who, on pain of suffering a criminal sanction, is given a binding

<sup>64</sup> See P.W. Hogg, *Constitutional Law of Canada*, 4th ed. (Scarborough, Ont.: Carswell, 1996) c. 18.10; Fitzgerald, *supra* note 3 at 94.

<sup>65</sup> See R. Cotton & A.R. Lucas, *Canadian Environmental Law*, 2d ed. (Toronto: Butterworths, 1992) at para. 3.21.

<sup>66</sup> See *Furtney*, *supra* note 54. In addition, regulatory schemes in areas other than the environment had been upheld as preventive measures. See *Goodyear Tire & Rubber Co. of Canada v. R.*, [1956] S.C.R. 303, 2 D.L.R. (2d) 11; *R. v. Swain*, [1991] 1 S.C.R. 933, 5 C.R. (4th) 253. In the latter case, the relevant provision of the *Criminal Code*, R.S.C. 1985, c. C-46 was struck down as infringing the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

<sup>67</sup> *CEPA*, *supra* note 4.

command not to engage in a particular conduct, but rather the Governor in Council who is vested with comprehensive authority to regulate virtually every aspect of a substance appearing on the *List of Toxic Substances*.<sup>68</sup>

The wording and legislative technique which are manifest in section 34 of the *CEPA* thus stand in marked contrast to the provisions in the *Tobacco Products Control Act*<sup>69</sup> or the *Food and Drugs Act*,<sup>70</sup> legislation that his Lordship relied upon for his conclusion on the essential similarity between provisions in Part II of the *CEPA* and regulatory exemptions from penal provisions defining a criminal act. The relevant provisions in the *Tobacco Products Control Act*, for instance, read:

4. (1) No person shall advertise any tobacco product offered for sale in Canada.

...

17. The Governor in Council may make regulations

- (a) exempting a tobacco product from the application of sections 4 and 7 where, in the opinion of the Governor in Council, that product is likely to be used as a substitute for other tobacco products and poses less risk to the health of users than those other products;<sup>71</sup>

The *Food and Drugs Act* employs a similar technique:

5. (1) No person shall label, package, treat, process, sell or advertise any food in a manner that is false, misleading or deceptive or is likely to create an erroneous impression regarding its character, value, quantity, composition, merit or safety.

- (2) An article of food that is not labelled or packaged as required by, or is labelled or packaged contrary to, the regulations shall be deemed to be labelled or packaged contrary to subsection (1).

...

30. (1) The Governor in Council may make regulations for carrying the purposes and provisions of this Act into effect, and, in particular, but without restricting the generality of the foregoing, may make regulations ...

- (b) respecting

- (i) the labelling and packaging and the offering, exposing and advertising for sale of food, drugs, cosmetics and devices.<sup>72</sup>

<sup>68</sup> Something the Chief Justice was at pains to point out in his dissent (see *Hydro-Québec, supra* note 1 at para. 52). It may be questioned whether the regulatory authority vested in the Executive by virtue of s. 34(1)(a) of the *CEPA*, *ibid.*, in fact extends to banning a substance, *i.e.* prohibiting its release into the environment completely. Unlike paragraph (l), paragraph (a) does not mention the possibility of a prohibition but rather speaks of “the quantity or concentration” of a substance “that may be released into the environment,” a wording which suggests as a matter of abstract principle a presumption that generally substances may be emitted.

<sup>69</sup> *Supra* note 45.

<sup>70</sup> *Supra* note 52.

<sup>71</sup> *Supra* note 45, ss. 4(1), 17(a).

<sup>72</sup> *Supra* note 52, ss. 5, 30(1)(b)(i).

Here, whatever regulatory authority is vested with the Governor in Council is preceded by general clauses which are addressed not to the Governor in Council but to individual citizens who are, moreover, faced with a straightforward command: "Do not advertise tobacco products offered for sale in Canada!" In contrast, the *CEPA* does not enjoin the citizen from emitting or discharging toxic substances in a similar fashion. *CEPA*, unlike some of the provincial environmental protection statutes,<sup>73</sup> does not set out a broadly-worded general ban ("No person shall") on emitting or discharging toxic substances into the environment.<sup>74</sup>

In nevertheless holding section 34 of the *CEPA* criminal law, LaForest J. espouses a construction of the criminal law power which allows, for purposes of pith and substance analysis, a provision's penal finality or objective to prevail over its regulatory form.<sup>75</sup> The Court has thus dissipated any doubt as to whether the criminal law power can sustain what are, in form at least, complex regulatory schemes.

### **B. Prohibition and Precaution**

*Hydro-Québec* marks an important step in the doctrinal development of the criminal law power not only with respect to the forms and techniques of criminal law within the meaning of section 91(27) of the *Constitution Act, 1867*.<sup>76</sup> The ruling is also confirmation of Parliament's considerable latitude in identifying a valid public purpose that is required to undergird substantively the form of criminal law. *Hydro-Québec* recognizes Parliament's authority under the criminal law power to designate harm to the environment, irrespective of any tributary harm to human health, a valid object of penal prohibitions and corresponding sanctions.

The margin of appreciation that is incumbent upon Parliament when determining the object of penal provisions had previously found judicial confirmation in the context of food and drugs legislation and whether a particular substance poses a serious

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<sup>73</sup> Compare, for instance, s. 20 of the Quebec *Environmental Quality Act*, R.S.Q. c. Q-2:

No one may emit, deposit, issue or discharge or allow the emission, deposit, issuance or discharge into the environment of a contaminant in a greater quantity or concentration than that provided for by regulation of the Government.

<sup>74</sup> A notable exception is made in the *CEPA*, *supra* note 4, s. 26, for substances that are new to Canada within the meaning of the *Act*. These substances may not be manufactured or imported ("no person shall manufacture or import") unless the requirements in s. 26(1)(a) and (b) are complied with. See also L. Giroux, "Les nouvelles technologies et le régime de la protection de l'environnement au Canada: la nouvelle Loi canadienne sur la protection de l'environnement" (1989) 30 C. de D. 747 at 760, 766.

<sup>75</sup> See Leclair, *supra* note 60 at 156, who laid the doctrinal groundwork. In his opinion, LaForest J. expressly relies on Leclair's analysis of s. 91(27) in an environmental context as part of the basis for his judgment. See *Hydro-Québec*, *supra* note 1 at para. 118.

<sup>76</sup> *Supra* note 6.

risk of harm. Thus in *Standard Sausage Co. v. Lee*,<sup>77</sup> Macdonald J.A. held that this determination fell within Parliament's discretion:

The primary object of this legislation is the public safety — protecting it from threatened injury. If that is its main purpose — and not a mere pretence for the invasion of civil rights — it is none the less valid because it may be open to a criticism, from which few acts are free, that its purpose would be served equally well by accepting the opinion of others, *viz.*, that sulphur dioxide might with safety be added to the list of usable preservatives. Tampering with food by the introduction of foreign matter, however good the intentions, should properly be regarded as a public evil and it may properly be regarded as highly dangerous to lower the bars, or to remove restrictions which, rightly or wrongly, Parliament in its wisdom thought fit to prescribe.<sup>78</sup>

In light of *Hydro-Québec* and its jurisprudential precursors, the sole limit that continues to apply to the criminal law power arises in situations reverse to the one contemplated in *Standard Sausage*: situations not of scientific uncertainty regarding the possible harmfulness of a substance but rather of scientific certainty as to its innocuousness. Both the *Margarine Reference*<sup>79</sup> and *Labatt Breweries of Canada v. Canada (A.G.)*<sup>80</sup> stand for the proposition that Parliament may not have recourse to the criminal law power (on the pretext of invading areas under provincial jurisdiction) where, on production of appropriate extrinsic evidence, use of a substance is demonstrably without risk of harm.<sup>81</sup>

Parliament enjoys the discretion to identify real as well as potential evil, injurious or undesirable effects upon the public against which the law is directed. Thus, the criminal law power uniquely invests Parliament with appropriate constitutional authority to further a central element of modern, sustainability-oriented environmental policy, namely the precautionary principle. It is precisely the ability to regulate potentially harmful substances or conduct, while full scientific proof of harm is not yet

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<sup>77</sup> [1933] 4 D.L.R. 501, 60 C.C.C. 265 (B.C.C.A.) [hereinafter *Standard Sausage* cited to D.L.R.].

<sup>78</sup> *Ibid.* at 507. See also *Berry Canning Co. v. R.*, [1974] F.C. 590 (T.D.).

<sup>79</sup> *Supra* note 49.

<sup>80</sup> [1980] 1 S.C.R. 914, 110 D.L.R. (3d) 594 (holding *ultra vires* Parliament's prescription of product categories such as "lite" beer as "legal recipes" for products that in and of themselves are not dangerous).

<sup>81</sup> In that the extent of federal environmental jurisdiction under the criminal law power resembles the preconditions for exercising federal environmental jurisdiction under other heads of power, see *R. v. Fowler*, [1980] 2 S.C.R. 213, 113 D.L.R. (3d) 513. In *Crown Zellerbach*, *supra* note 7, recourse to the national concerns branch of Parliament's residuary power in s. 91 became necessary because the comprehensive ban in the *Ocean Dumping Control Act*, S.C. 1974-75-76, c. 55, now the *CEPA*, *supra* note 4, Part VI, of the dumping of any substance into marine waters, including those lying within the boundaries of a province — whether deleterious to marine life or not — could not be sustained either under s. 91(12) or s. 91(27) of the *Constitution Act, 1867*, *supra* note 6. See *Crown Zellerbach*, *ibid.* at 420-23 *per* LeDain J. and 441-43 *per* LaForest J., dissenting.

available, that is at the heart of the precautionary principle.<sup>82</sup> In addition, attributing to democratically legitimated decision-makers the ultimate decision as to whether a substance requires regulation — and hence the decision whether a substance poses a serious risk that warrants such intervention — acknowledges the inherent limitations of scientific methods and judgments. Science can produce vastly differing computations of risk, and hence lend itself to diametrically opposed conclusions on the necessity to take action.<sup>83</sup>

Moreover, constitutional authority for informing environmental policy with the precautionary principle would appear to be of increasing relevance as Canadian environmental law is in the process of moving into new areas to respond to hitherto unknown risks arising from novel production methods and products such as biotechnology, seedlings or food stuffs containing genetically modified organisms or ingredients.<sup>84</sup> Consistent with the precautionary principle and the peculiar risk posed by biotechnology, Bill C-32 proposes to insert enabling clauses into the *CEPA* which would allow the Executive to regulate substances or activities pertaining to the use of animate products of biotechnology irrespective of the Governor in Council being satisfied as to a substance's toxicity.<sup>85</sup>

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<sup>82</sup> See the proposed legislative definition in the preamble to Bill C-32, *An Act respecting pollution prevention and the protection of the environment and human health in order to contribute to sustainable development*, 1st Sess., 36th Parl., 1997-98 [hereinafter Bill C-32]:

Whereas the Government of Canada is committed to implementing the precautionary principle that, where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

<sup>83</sup> See W.E. Wagner, "The Science Charade in Toxic Risk Regulation" (1995) 95 Col. L. Rev. 1613. This is so because scientific assessments of risk, as Wagner rightly points out, can rarely be justified solely by reference to empirical observation. They are frequently enmeshed with normatively-guided policy judgments (e.g. regarding the precise risk assessment technique to apply or the choice of an extrapolatory model with which to interpret results obtained through animal testing). See *ibid.* at 1618-27.

<sup>84</sup> The special risks associated with the use of biotechnology and appropriate regulatory (and other policy) responses have recently been examined by the German Council of Environmental Advisors ("SRU"), an expert advisory body to the German Federal Government. The Council noted the scarcity of reliable empirical data on the possible long-term ecological consequences of wide-spread uses of transgenic plants in agriculture and called for continuous supplementary monitoring where transgenic seedlings are used. It also recommended appropriate regulatory measures to take into account hypothetical risks, *i.e.* risks that can be assumed to exist not on the basis of empirical data but solely on the basis of theoretical calculations and hypotheses. Only purely speculative risks cannot, in the eyes of the Council, justify measures directed against effects flowing from transgenic plants. See SRU, *Environmental Report 1998. Environmental Protection: Securing Achievements — Breaking New Ground* (Bonn: Federal Environmental Agency, 1998), online: <<http://www.umweltrat.de>> (date accessed: October 19, 1998) at paras. 69-97.

<sup>85</sup> See Bill C-32, *supra* note 82, s. 114. Currently, regulatory authority under s. 33 of the *CEPA*, *supra* note 4, in respect of toxic substances is tied to the Governor in Council being satisfied as to a substance's toxicity. A suspicion of toxicity, however, can entail interim regulatory measures under s. 29

Unfortunately, developments in international fora may frustrate efforts to make full use of Parliament's powers under section 91(27) of the *Constitution Act, 1867*, especially in their precautionary dimensions.<sup>86</sup>

### C. The Environment as a Cross-Cutting Subject Matter

In basing federal environmental jurisdiction in relation to the regulation of toxic substances on the criminal law power, LaForest J. also reinforces the Court's overall approach related to the appropriate allocation of powers with respect to the environment. As a matter of principle, the Court views the environment as a subject matter that should best not be allocated exclusively to either level of government:

It must be recognized that the environment is not an independent matter of legislation under the *Constitution Act, 1867* and that it is a constitutionally abstruse matter which does not comfortably fit within the existing division of powers without considerable overlap and uncertainty.

It will be seen that in exercising their respective legislative powers, both levels of government may affect the environment, either by acting or not acting.<sup>87</sup>

Regarding the environment, in this fashion, as a subject matter of *de facto*<sup>88</sup> concurrency also accords well with another central element of sustainability, *i.e.* the idea that environmental or ecological considerations should as much as possible be integrated into wider socio-economic concerns and decision-making.<sup>89</sup> Since important parameters for Canada's socio-economic development are set at both levels of government, *de facto* concurrency in respect of the environment would seem to be the most appropriate jurisprudential policy choice that allows both levels of government to play an important role in environmental policy.<sup>90</sup>

Concurrency of jurisdiction also mirrors the inherent tension that exists between the potentially all-encompassing nature of the environment as a subject matter and the territoriality of law in federal systems.<sup>91</sup> The environment, due to the interconnectedness of eco-systems, seemingly pushes towards greater central decision-making — and this in a comprehensive fashion to take account of the holistic nature

of the *Act* in respect of substances that do not appear on the *Domestic Substances List*. See also Giroux, *supra* note 74 at 761.

<sup>86</sup> See Part 3.D., below.

<sup>87</sup> *Friends of the Oldman River*, *supra* note 8 at 64–65, LaForest J.

<sup>88</sup> Of course, *de jure*, the Canadian division of powers under ss. 91 and 92 of the *Constitution Act, 1867*, *supra* note 6, remains one of exclusive jurisdiction. See also *Scowby v. Glendinning*, [1986] 2 S.C.R. 226 at 236ff, 32 D.L.R. (4th) 161, Estey J., holding a provincial human rights code which provides for provincial inquiry into allegations of arbitrary arrest and detention contrary to the code *ultra vires* the province as an invasion of the federal criminal law power.

<sup>89</sup> See *Our Common Future*, *supra* note 59 at 62–65.

<sup>90</sup> See M. Walters, "Ecological Unity and Political Fragmentation: The Implications of the Brundtland Report for the Canadian Constitutional Order" (1991) 29 Alta. L. Rev. 421 at 425ff.

<sup>91</sup> See *ibid*. See also S.A. Kennett, "Federal Environmental Jurisdiction After *Oldman*" (1993) 38 McGill L.J. 180 at 195.

of ecological issues. In contrast, a system of government which acts precisely on the premise that public affairs should not be decided in such a broad manner by one level of government alone militates in favour of greater differentiation and abstraction from a holistic approach to environmental policy.<sup>92</sup>

Similarly, concurrency of powers reflects two seemingly contradictory strains in the concept of sustainability. Sustainable development calls for greater centralization to facilitate global and comprehensive approaches, not least of all to frustrate strategic behaviour on the part of governments and economic actors to circumvent regulatory policies established at a local or regional level. However, the importance of local involvement in environmentally relevant decision-making has also been stressed.<sup>93</sup> The latter presupposes that a sufficient number of issues remain susceptible to local or regional influence, and that communities are appropriately empowered to pursue sustainable practices within their confines.<sup>94</sup>

### **III. Sustainability and the Limits to Environmental Policy Based on Criminal Law**

While *Hydro-Québec* has thus significantly expanded the potential for environmental policy under the criminal law power in section 91(27) of the *Constitution Act, 1867*, the ruling also raises a number of doctrinal and policy issues that point to the limits of the criminal law power in an environmental policy context.

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<sup>92</sup> See D. Gibson, "Constitutional Jurisdiction Over Environmental Management in Canada" (1973) 23 U.T. L.J. 85. Espousing an approach that prefers *de facto* operation of federal and provincial environmental protection statutes also avoids the delicate task of deciding whether particular instances of environmental policy satisfy the provincial inability test. This test was set forth by LeDain J. in *Crown Zellerbach*, *supra* note 7, to determine whether a subject matter features the requisite "singleness" and "indivisibility" to qualify as a matter of national concern under Parliament's residuary power. The provincial inability test, while resembling the concept of subsidiarity in European Community law, has come under criticism for involving the judiciary in policy decisions by requiring them to assess the effectiveness of provincial regulations. See P.W. Hogg, "Subsidiarity and the Division of Powers in Canada" (1993) 3 N.J.C.L. 341; R. Howse, "Subsidiarity in All But Name: Evolving Concepts of Federalism in Canadian Constitutional Law" in Canadian Comparative Law Association *et al.*, eds., *Contemporary Law 1994: Canadian Reports to the 1994 International Congress of Comparative Law, Athens, 1994* (Cowansville, Que.: Yvon Blais, 1995) 701; A. Tremblay, *Droit constitutionnel: Principes* (Montreal: Thémis, 1993) 244; K. Swinton, *The Supreme Court and Canadian Federalism: The Laskin-Dickson Years* (Toronto: Carswell, 1990) 167-69.

<sup>93</sup> See P. Elder, "Sustainability" (1991) 36 McGill L.J. 831 at 837, 841.

<sup>94</sup> See J. Moffet & F. Bregha, "The Role of Law Reform in the Promotion of Sustainable Development" (1996) 6 J.E.L.P. 1 at 11ff.

#### A. *Penal Purposes in Regulatory Form and “Fair Notice” under Section 7: The CEPA on unChartered Ground?*

The language LaForest J. employs in his reasoning to conclude that the pith and substance of section 34 of the *CEPA* is criminal law does not accord well with some of the arguments that the Court has advanced in other contexts for disposing of vagueness claims brought under section 7 of the *Charter*.<sup>95</sup> Undoubtedly, under the Court’s contextual approach to *Charter* claims under section 7,<sup>96</sup> the legislation at issue in *Hydro-Québec* would qualify — being criminal law with considerable regulatory elements — for the relaxed standard of review the Court has developed for regulatory offences. Yet, Justice LaForest’s description of the legislative technique manifest in section 34 is not readily compatible with the standard of review applied by the Court to adjudicate vagueness claims in relation to regulatory offences.

At first glance, the threat of polluters challenging the *CEPA*-based prosecutions on *Charter* grounds may seem more theoretical than real. The Canadian constitutional order does not seem to share the concern of many continental European legal systems with a statutory form of criminal law as a further safeguard against arbitrary definitions of criminal conduct. However, in his dissent, the Chief Justice did note the oddity of a crime whose definition remained entirely at the discretion of the Executive.<sup>97</sup> *United Nurses of Alberta v. Alberta*<sup>98</sup> stands for the proposition that section 7 of the *Charter* does not require the definition of a crime to be made exclusively by way of statutory legislation. Thus, the fact that without the exercise of executive discretion pursuant to section 34 no offence is even defined by the *Act*, as the Chief Justice observed in his dissent,<sup>99</sup> does not in and of itself render the provision incompatible with the principles of fundamental justice.

In a similar vein, the Court has rejected challenges to provincial regulatory offences in the environmental field based on section 7 of the *Charter*. In *Ontario v. Canadian Pacific Ltd.*,<sup>100</sup> Gonthier J. rejected the appellant corporation’s claim that section 13(1)(a) of the *Ontario Environmental Protection Act*<sup>101</sup> violated section 7 of the *Charter* for being unconstitutionally vague and overbroad. In upholding the legislation, Gonthier J. stressed the importance of a contextual approach when adjudicating vagueness claims in relation to regulatory offences. His Lordship indicated the

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<sup>95</sup> *Supra* note 66.

<sup>96</sup> See especially *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154, 84 D.L.R. (4th) 161 [hereinafter *Wholesale Travel Group* cited to S.C.R.].

<sup>97</sup> See *Hydro-Québec*, *supra* note 1 at para. 55.

<sup>98</sup> [1992] 1 S.C.R. 901, 89 D.L.R. (4th) 609.

<sup>99</sup> See *Hydro-Québec*, *supra* note 1 at para. 55.

<sup>100</sup> [1995] 2 S.C.R. 1031, 17 C.E.L.R. (N.S.) 129 (1995) [hereinafter *Canadian Pacific* cited to S.C.R.].

<sup>101</sup> R.S.O. 1980, c. 141, now s. 14 (1) of the *Environmental Protection Act*, R.S.O. 1990, c. E. 19.

Court's willingness to exercise considerable judicial restraint when reviewing legislation that seeks to further legitimate social objectives:

In particular, a deferential approach should be taken in relation to legislative enactments with legitimate social policy objectives, in order to avoid impeding the state's ability to pursue and promote those objectives . ... The s. 7 doctrine of vagueness must not be used to straitjacket the state in social policy fields.<sup>102</sup>

Moreover, applying the test for vagueness elaborated in *R. v. Nova Scotia Pharmaceutical Society*,<sup>103</sup> his Lordship placed considerable reliance on the very breadth and scope of the impugned provision that in the appellant's submission rendered it imprecise and unconstitutionally vague. Under the vagueness test developed in *Nova Scotia Pharmaceutical Society*, a law will be vague only where it is so "lack[ing] in precision as not to give sufficient guidance for legal debate," a requirement predicated upon the need to give fair notice to citizens as to what conduct is prohibited and the corresponding need to proscribe enforcement discretion.<sup>104</sup> It was in particular with respect to the notice function that Gonthier J. found the impugned provision's generality innocuous:

Moreover, the precise codification of environmental hazards in environmental protection legislation may hinder, rather than promote, public understanding of what conduct is prohibited, and may fuel uncertainty about the "area of risk" created by the legislation.<sup>105</sup>

Indeed, in the peculiar environmental protection context, his Lordship found detailed proscriptions not necessarily conducive to providing citizens with fair notice of prohibited conduct:

Is a very detailed enactment preferable? In my view, in the field of environmental protection, detail is not necessarily the best means of notifying citizens of prohibited conduct. If a citizen requires a chemistry degree to figure out whether an activity releases a particular contaminant in sufficient quantities to trigger a statutory prohibition, then that prohibition provides no better fair notice than a more general enactment.<sup>106</sup>

Yet, in the light of *Canadian Pacific*, sections 34 and 35 of the *CEPA* would likely run afoul of the requirement under section 7 of the *Charter* to prohibit by way of a "general indictment". For in holding these provisions criminal law, LaForest J. attributed to the criminal law the characteristic of seeking "by discrete prohibitions to prevent evils falling within a broad purpose, such as, for example, the protection of health."<sup>107</sup> In a

<sup>102</sup> *Canadian Pacific*, *supra* note 100 at 1071-72 (citing *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606 at 642, 93 D.L.R. (4th) 36 [hereinafter *Nova Scotia Pharmaceutical Society* cited to S.C.R.]).

<sup>103</sup> *Ibid.*

<sup>104</sup> See *Canadian Pacific*, *supra* note 100 at 1069, citing *Nova Scotia Pharmaceutical Society*, *ibid.* at 643.

<sup>105</sup> *Canadian Pacific*, *ibid.* at 1073.

<sup>106</sup> *Ibid.* at 1074.

<sup>107</sup> *Hydro-Québec*, *supra* note 1 at para. 128 [emphasis added].

like manner, his Lordship held that the provisions were not broad and general pollution bans but rather provisions

*for carefully tailoring the prohibited action* to specified substances used or dealt with in specific circumstances. This type of tailoring is obviously necessary in defining the scope of a criminal prohibiton.<sup>108</sup>

If the standard set forth in *Nova Scotia Pharmaceutical Society* were applied for determining whether a law violates the principles of fundamental justice by being impermissibly vague, could it be concluded that section 34 of the *CEPA* provides "sufficient guidance for legal debate," especially as regards "the scope of prohibited conduct?"<sup>109</sup> Since the provision is not preceded by any general command *not* to engage in releasing a substance classified as "toxic" under the *Act*, it would appear that no such guidance can be derived from the provision in and of itself.<sup>110</sup> Only a combined reading of section 34, the regulations that have been adopted under its authority and section I13(f) of the *CEPA* can provide a basis for determining the specific conduct that is prohibited and thus subject to criminal sanctions.<sup>111</sup>

### B. Punishment and Sustainability

Apart from raising further constitutional issues as to its *Charter* compatibility, environmental law as criminal law begs policy-related questions which concern the appropriateness and usefulness of the criminal law for achieving sustainability. While *Hydro-Québec* has freed the federal criminal law power from much of the rigidity of conventional penal legislation, *i.e.* a prohibition coupled with a sanction in the form of fines or imprisonment, it is dubious<sup>112</sup> whether the newly-found flexibility in pursuing a public purpose under section 91(27) alone will be sufficient in achieving sustainability at the federal level.

Even under the expansive concept of criminal law espoused by LaForest J., legislation adopted under the authority of the criminal law power still needs to be tied to a penal objective. In other words, while Parliament may employ various regulatory

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<sup>108</sup> *Ibid.* at para. 151 [emphasis added].

<sup>109</sup> *Canadian Pacific*, *supra* note 100 at 1070.

<sup>110</sup> See also Giroux, *supra* note 74 at 766 who notes that, while the *Act* imposes certain obligations consequential to a spill directly, the precise circumstances in which the relevant provisions apply are attendant upon the Executive having made use of its regulatory authority.

<sup>111</sup> That the *Charter*'s procedural guarantees can give rise to a number of complex constitutional issues in a regulatory context was also noted by Professor Leclair as the doctrinal proponent of the "regulatory" construction of the criminal law power. See Leclair, *supra* note 60 at 170, n. 176.

<sup>112</sup> This doubt, of course, arises only on the presupposition that the challenge of achieving sustainable development requires appropriate policy responses at the federal level, and should not be left in its entirety to programmes at the provincial level. The latter alternative is apparently what Professor Leclair prefers lest any attempt on the part of Parliament to implement a policy of sustainability at the federal level will invade areas traditionally under provincial jurisdiction and, indeed, consume provincial legislative powers. See Leclair, *ibid.* at 169, n. 171.

techniques to prevent injury to the environment, the ulterior motive behind such legislation must still be retribution (or at least the threat of retribution) should injury occur and preventive regulatory measures fail. There can be no doubt that certain forms of behaviour which show wanton disregard for the environment as an essential and indispensable public collective good merit this type of approach. Similarly, where the economic differentials are such as to furnish an overwhelming incentive to circumvent whatever norms and standards might be established in a non-penal fashion, the deterrent of the criminal law may be needed to give teeth to environmental norms and standards.<sup>113</sup>

Achieving sustainability, however, will require more subtle policy approaches than the logic of prohibition and punishment.<sup>114</sup> In addition to proscribing particularly egregious forms of environmental misbehaviour, sustainability — understood as economic development that meets the needs of the present without compromising the ability of future generations to meet their own needs<sup>115</sup> — requires anticipating future needs. Hence there is a need to identify policy responses to economic or social practices that may not pose any serious risk of environmental harm today, but that may do so in the longterm. This is an ongoing process that takes account of evolving scientific knowledge.<sup>116</sup> Whether legislation which may have been freed from the bounds of the conventional form of penal legislation but that in substance continues to be tied to the notion of punishment will be of much use in meeting this challenge must be a matter of some debate.<sup>117</sup> Significantly, in a number of jurisdictions outside Canada,<sup>118</sup> the response to the challenge of sustainability has focussed on policy measures that do not

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<sup>113</sup> Waste disposal may be one area of environmental law where the economics render recourse to tough regulatory and indeed criminal legislation indispensable. Here any attempt at implementing fully the “polluter pays” principle by charging producers of waste the full (social and environmental) cost of waste disposal immediately creates an incentive for illegal waste disposal. See S. Rose-Ackerman, *Controlling Environmental Policy. The Limits of Public Law in Germany and the United States* (New Haven: Yale University Press, 1995) c. 3B.

<sup>114</sup> See, for instance, P. Elder, *supra* note 93 at 847ff.

<sup>115</sup> See *Our Common Future*, *supra* note 59 at 8. See also the definition in s. 3 of Bill C-32, *supra* note 82.

<sup>116</sup> See Elder, *supra* note 93 at 849.

<sup>117</sup> The Canadian legislator, at any rate, seems to perceive a growing need to pursue environmental policy goals using, on the enforcement side, policy tools other than the punitive imposition of fines or other criminal sanctions. See Bill C-32, *supra* note 82, Part 10, ss. 295ff. which provides for the possibility of Environmental Protection Alternative Measures as a response in lieu of prosecution for certain contraventions under the *CEPA*, *supra* note 4.

<sup>118</sup> See M. Phillipson, “Implementing Sustainable Development in New Zealand: *The Resource Management Act 1991*” (1994) 4 J.E.L.P. 222. Some European jurisdictions have sought to spell out consensus-based environmental policy plans that lay down binding policy goals and targets for the implementation of sustainability. See e.g. Luxembourg, Ministère de l’Environnement, *Avant Projet de Plan National pour un Développement Durable* (Luxemburg: Ministère de l’Environnement, 1997), online: Ministère de l’Environnement du Luxembourg <<http://www.mev.etat.lu/devdur10.html>> (date accessed: 19 October 1998) which is inspired by the Netherlands’ *National Environmental Policy Plan*, online: Resource Renewal Institute <<http://www.rri.org/>> (date accessed: 19 October 1998).

revolve around the pursuit of penal objectives but rather encompass policy tools oriented more towards persuasion and consensus.<sup>119</sup>

### C. Internal Limits

*Hydro-Québec's* judicial reinforcement of Parliament's regulatory capacities coincides with deregulatory trends which may be developing in other fora and contexts.

The propensity for the *Accord*<sup>120</sup> to undo, through the mechanisms of Canadian executive federalism, what has been finely crafted at the judicial level has already been noted. It should be remarked, of course, that harmonization in and of itself is not necessarily an impediment to further developing environmental policy in a federal system. Indeed, acknowledging the co-existent responsibility of vertically differentiated actors in a system of multi-layered government inevitably gives rise to issues of co-ordination and co-operation. What is crucial in such a context, however, is that, as the European experience demonstrates,<sup>121</sup> harmonization does not inhibit the ability of one of the participants to engage in environmental unilateralism, and to create a dynamic for upward harmonization by adopting more stringent rules and addressing new concerns.<sup>122</sup> Whether the *Accord* is paying more than mere lip-service<sup>123</sup> to this

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<sup>119</sup> It would seem though that the Canadian response in this respect has been to provide fora for the elaboration of more consensus-based goals. See e.g. *National Round Table on the Environment and the Economy Act*, S.C. 1993, c. 31.

<sup>120</sup> *Supra* note 9.

<sup>121</sup> See E. Rehbinder & R. Stewart, "Legal Integration in Federal Systems: European Community Environmental Law" (1985) 33 Am. J. Comp. L. 371

<sup>122</sup> It is precisely this possibility for upward harmonization and environmental unilateralism that is enshrined in the concept of *de facto* concurrency of federal and provincial environmental protection statutes under ss. 91 and 92 of the *Constitution Act, 1867*. Under the paramountcy doctrine, the existence of federal standards, based on the criminal law power for instance, does not preclude the operation of more stringent provincial standards, since compliance with the latter standard does not automatically entail violation of the former. See Leclair, *supra* note 60 at 140, n. 10 (citing *O'Grady v. Sparling*, [1960] S.C.R. 804, 25 D.L.R. (2d) I45 and *Ross v. Registrar of Motor Vehicles*, [1975] 1 S.C.R. 5, 42 D.L.R. (3d) 68). For the concept of environmental unilateralism see H. Ward, "Environmental Unilateralism in the European Union" [1996] 1 ELNI Newsletter 2. For the difficulties that harmonization of standards in a context of divergent economic and ecological conditions can pose see P.M. Johnson & A. Beaulieu, *The Environment and NAFTA. Understanding and Implementing the New Continental Law* (Washington, D.C.: Island Press, 1996) at 47-51.

<sup>123</sup> The main *Accord*, *supra* note 9, does contain a qualified assurance that "the environmental measures established and implemented in accordance with this Accord will not prevent a government from introducing more stringent environmental measures to reflect specific circumstances or to protect environments or environmental values located within its jurisdiction" (*ibid.*, Principle 11 [emphasis added]). The *Standards Sub-Agreement*, in contrast, is replete with language stressing a clear demarcation of roles and responsibilities (see *supra* note 13 and accompanying text).

principle may again be a matter of debate, given that the factual assumptions underlying its conceptual starting-point have been questioned.<sup>124</sup>

#### D. External Limits

More significant still may be developments under international trade law. It is perplexing to note in this context that the Canadian government has been most actively involved in efforts to impose trade disciplines on itself as well as other WTO members that would, for all practical purposes, render nugatory the very powers (especially in their precautionary dimension) to regulate that have been attributed to Parliament by the Supreme Court of Canada by virtue of section 91(27) of the *Constitution Act, 1867*.

Canada, in 1997, joined the United States in an action before the WTO that sought to challenge under the Uruguay Round's *Agreement on the Application of Sanitary and Phytosanitary Measures*<sup>125</sup> the ability of the European Community (EC) to ban the use of synthetic or specifically administered natural growth hormones in bovine meat production and to prohibit imports of meat coming from treated animals.<sup>126</sup> Following a series of scandals involving the illicit use of oestrogens in the 1980s, the Community authorities had introduced a comprehensive ban in reaction to growing consumer concerns.<sup>127</sup>

In the face of criticism from the United States and Canada — and ultimately a legal challenge based on the obligation to base sanitary and phytosanitary measures on

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<sup>124</sup> For a summary of some of the criticism see Canada, Standing Committee on Environment and Sustainable Development, *Harmonization and Environmental Protection: An Analysis of the Harmonization Initiatives of the Canadian Council of Ministers of the Environment* (Ottawa: The Committee, 1997) [hereinafter *Harmonization and Environment*]. It is indeed difficult to see how there can be "physical" overlap after a decade of government downsizing and deregulation that — in the case of some provincial ministries of environment — has led to budgets being slashed by almost one half. See S. Fine, "Environmental Protection Thinning" *The Globe and Mail* (19 August 1997) A1, A8.

<sup>125</sup> *Agreement Establishing the World Trade Organization*, (1994), Annex 1A, online, WTO <<http://www.wto.org/wto/legal/finalact.htm>> (last modified: 19 October 1998) [hereinafter *SPS Agreement*].

<sup>126</sup> It is submitted that the decision to join in an action which strikes at the heart of the precautionary principle constitutes a prime example of a "lack of co-ordination and integration among federal entities and across jurisdiction" that the Commissioner of the Environment and Sustainable Development recently reiterated in his 1998 report as one of the key "weaknesses in the federal government's management of environmental and sustainable development issues" (Canada, Commissioner of the Environment and Sustainable Development, *1998 Report of the Commissioner of the Environment and Sustainable Development* (Ottawa: Office of the Auditor General, 1998) c. 3, at para. 3.67, online: Office of the Auditor General of Canada and the Commissioner of the Environment and Sustainable Development <<http://www.oag-bvg.gc.ca>> (date accessed: 19 October 1998).

<sup>127</sup> See EC, *Council Directive 81/602/EEC of 7 August 1981*, [1981] O.J. L. 222 at 32ff.; EC, *Council Directive 88/146/EEC of 16 March 1988*, [1988] O.J. L. 70 at 16ff.; EC, *Council Directive 88/229/EEC of 21 May 1988*, [1988] O.J. L. 128 at 36ff.; the ban was re-enacted and legislatively consolidated by EC, *Council Directive 96/22/EC of 23 May 1991*, [1996] O.J. L. 125 at 3ff.

an assessment of risks under article 5.1 of the *SPS Agreement*<sup>128</sup> — the EC sought to justify its measure by reference to the precautionary principle and the views of a minority of scientists. In particular, the EC cited a 1987 study by the International Agency for Research on Cancer (“IARC”) which had concluded an appreciable health risk existed in relation to a group of substances to which one of the growth hormones at issue was said to belong.<sup>129</sup>

The original Dispute Settlement Panel dismissed the Community authorities’ defence and held that the EC had failed to demonstrate that its more stringent measures were based on a risk assessment within the meaning of article 5.1 of the *SPS Agreement*.<sup>130</sup> In addition, the Panel found the EC measures to run afoul of another provision of the *SPS Agreement* that requires WTO members to be consistent in their level of protection and not to engage in discrimination against other WTO members nor disguised restrictions to international trade.<sup>131</sup> The EC had violated the latter obligation not only because under the relevant EC legislation it continued to be legal to use potentially cancerogenic substances in the comparable situation of pig-farming, but also because the EC had failed to regulate *naturally* occurring levels of growth hormones not only in beef but in *any* product.<sup>132</sup>

Although the WTO’s Appellate Body reversed the original Panel on this as well as on a number of other points,<sup>133</sup> it confirmed the Panel’s ruling with respect to the limited applicability of the precautionary principle within the ambit of the *SPS*

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<sup>128</sup> *Supra* note 125.

<sup>129</sup> EC — *Measures Concerning Meat and Meat Products (Hormones) (Complaint by the United States)* (1997), WTO Doc. WT/DS26/R/USA at paras. 4.109-4.239, (Panel Report) [hereinafter *Hormones (U.S.)*], online: WTO <<http://www.wto.org/wto/dispute/distab.htm>> (date accessed: 19 October 1998). Essentially identical arguments were made in the proceedings brought by Canada, see *EC Measures Concerning Meat and Meat Products (Hormones) (Complaint by Canada)* (1997), WTO Doc. WT/DS48/R/CAN, (Panel Report), online: WTO <<http://www.wto.org/wto/dispute/distab.htm>> (date accessed: 19 October 1998).

<sup>130</sup> *Hormones (U.S.)*, *ibid.* at paras. 8.91-8.159.

<sup>131</sup> See art. 5.5 of the *SPS Agreement*, *supra* note 125:

With the objective of achieving consistency in the application of the concept of appropriate level of sanitary or phytosanitary protection against risks to human life or health, or to animal and plant life or health, each Member shall avoid arbitrary or unjustifiable distinctions in the levels it considers to be appropriate in different situations, if such distinctions result in discrimination or a disguised restriction on international trade.

<sup>132</sup> *Hormones (U.S.)*, *supra* note 129 at paras. 8.167-8.245.

<sup>133</sup> EC — *Measures Concerning Meat and Meat Products (Hormones)* (1998), WTO Doc. WT/DS26,48/AB/R at para. 221 (Appellate Body Report), online: WTO <<http://www.wto.org/wto/dispute/distab.htm>> (date accessed: 19 October 1998). The most salient point on which the Appellate Body reversed the Panel concerned the nature and status of international norms and guidelines. Under the Panel’s construction of the *SPS Agreement*, *supra* note 125, hitherto non-binding guidelines by international bodies such as the Codex Alimentarius Commission (which function with little if any democratic oversight or accountability) would have acquired the status of binding norms.

*Agreement.*<sup>134</sup> In particular, the Appellate Body upheld the Panel's conclusion that the EC had failed to demonstrate that its measures had been based on a risk assessment within the meaning of article 5.1 of the *SPS Agreement*, and that the 1987 study by the IARC was not relevant to the case because it considered the toxicity of substances *in abstracto* and not in their concrete application as growth hormones in cattle rearing.<sup>135</sup>

In other words, while as a matter of Canadian constitutional law,<sup>136</sup> it is incumbent upon Parliament to pass policy judgments in the face of nonexistent or inconclusive scientific evidence, such legislative responses are, as a matter of WTO law, subject to review in the WTO's dispute settlement fora and possibly to far-reaching trade disciplines. WTO law thus seeks to impose fetters on democratically legitimated decision-makers where Canadian constitutional law stresses the privileged position of Parliament to decide — on the side of precaution if it so wishes — matters of policy.<sup>137</sup>

### Conclusion: The Rationale for (Federal) Environmental Regulation

The ruling in *Hydro-Québec* amounts to a welcome confirmation of the federal role in environmental policy-making. *Hydro-Québec* is a useful reminder that all lev-

<sup>134</sup> *Ibid.* at para. 124. The Appellate Body's ruling on this point remained ambiguous. On the one hand, it agreed with the EC's submission that the provisions of the *SPS Agreement*, *supra* note 125, could not, contrary to the Panel's assertion, be taken to exhaust the precautionary principle. On the other, the Appellate Body ultimately held that regardless of the principle's status in international environmental law it could not override the text of the provisions of the *SPS Agreement*, and hence was of limited application to measures falling within the ambit of the *SPS Agreement*.

<sup>135</sup> *Ibid.* at paras. 192-209. Presumably this means that the EC can only come to a conclusion as to the existence of an appreciable health risk on the same basis the Codex Alimentarius Commission (and in its wake the United States and Canada) had reached the opposite conclusion (administering the substances in question to castrated rhesus macaque monkeys and ovariectomized cynomolgus monkeys to test their cancerogenicity). It should be pointed out that a consequential dispute has arisen between Canada and the United States on the one hand and the EC on the other as to the precise import of the Appellate Body's ruling. On 29 May 1998, in an arbitration procedure requested by all the parties pursuant to article 21.3(c) of the *Understanding on Rules and Procedures Governing the Settlement of Disputes, Agreement Establishing the World Trade Organization* (1994), Annex 2, 33 I.L.M. 1226, online: WTO <<http://www.wto.org/wto/legal.htm>>, an arbitrator held that, contrary to the EC submission (and the view expressed here), the Appellate Body had found the EC measures not to be based on a deficient risk assessment but rather as bearing no reasonable relation to whatever risk assessment had been performed by the Community authorities in addition to the IARC studies. See EC—Measures Concerning Meat and Meat Products (Hormones) (1998), WTO Doc. WT/DS25/15-WT/DS48/13 (98-2227) (Award of the Arbitrator), online: WTO <<http://www.wto.org/wto/dispute/distab.htm>> (date accessed: 19 October 1998) at para. 37.

<sup>136</sup> See *supra* note 70 and accompanying text.

<sup>137</sup> The recent report on the *Accord*, *supra* note 9, by the House of Commons Standing Committee on Environment and Sustainable Development also observed the apparent conflict between central elements of modern environmental policy and recent developments in WTO law, see *Harmonization and Environment*, *supra* note 124 at conclusion no. 9.

els of government need to shape their respective policies with a view to accomplishing environmental quality goals, given the cross-cutting nature of the problem that does not stop at provincial boundaries, and that has all the potential — because of its real or perceived implications for competitiveness<sup>138</sup> — for dragging governments into strategic behaviour.

It is unfortunate in this respect, however, that what has been recognized at the judicial level should be undone at the executive level or through the disciplines of international trade law. While harmonization projects such as the *Canada-Wide Accord* can make an important contribution towards developing further environmental policy across different jurisdictions — provided they do not inhibit lead jurisdictions from forwarding stricter standards — the mutual reinforcement of standards or the race to the top does not necessarily appear to be the principal aim of the CCME-sponsored initiative. Similarly, international trade law should not undermine the ability of governments to err on the side of caution in favour of the environment, especially not if the power to review democratically legitimated decisions is based on the spurious notion of science being capable of providing a definitive answer to the question of whether regulation is appropriate in particular circumstances.<sup>139</sup>

As an American commentator has shown, arguments for *decentralization*, inspired by an economic analysis of environmental policy and federalism,<sup>140</sup> frequently

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<sup>138</sup> See Johnson & Beaulieu, *supra* note 122 at 44–47.

<sup>139</sup> See *supra* note 77. In other words, WTO law (with its emphasis on science as the predominant, if not exclusive, justification for environmental regulation) ignores what Canadian constitutional jurisprudence wisely recognized — the potential for science to be instrumentalized. See J. Atik, “Science and International Regulatory Convergence” (1997) 17 Nw. J. of Int’l L. & Bus. 736. As Atik indicates, the relevant provisions in the *SPS Agreement* raise the spectre of WTO members targeting economically and scientifically weak WTO members to obtain the repeal of regulatory measures that have also been enacted by stronger WTO members and that may have adverse effects on trade relations and the volume of trade, in particular on exports by the WTO member seeking to challenge a particular instance of regulation (see *ibid.* at 755, n. 67). Rephrased, WTO provisions — unlike Canadian constitutional law — require members to “outscience” one another when wishing to engage in regulation. What the necessity to outscience can mean in terms of delay for appropriate and necessary anti-pollution measures was vividly demonstrated by Canadian efforts to combat acid rain, efforts that required active collaboration on the part of the United States authorities which was forthcoming only once Canadian regulators had managed to outscience their American counterparts. See G.B. Doern & T. Conway, *The Greening of Canada: Federal Institutions and Decisions* (Toronto: University of Toronto Press, 1994) at 124ff.

<sup>140</sup> An influential article in the American debate on the appropriate role of federal and state regulators in environmental policy proved to be W.E. Oates & R. M. Schwab, “Economic Competition Among Jurisdictions: Efficiency Enhancing or Distortion Inducing?” (1988) 34 J. of Publ. Economics 333. The arguments advanced in this article for decentralized environmental policy-making are taken up by R.L. Revesz, “Rehabilitating Interstate Competition: Rethinking the ‘Race to the Bottom’ Rationale for Federal Environmental Regulation” (1992) 67 N.Y.U. L. Rev. 1210. For a convincing rebuttal, especially as regards the underlying factual assumptions behind the Oates-Schwab model, see D.G. Esty, “Revitalizing Environmental Federalism” (1996) 95 Mich. L. Rev. 570; P. P. Swire, “The Race to Laxity and the Race to Undesirability: Explaining Failures in Competition Among Jurisdic-

coincide with arguments for *deregulation*.<sup>141</sup> Against the precepts of neo-classical economic theory — its narrow focus on allocative resource efficiency<sup>142</sup> at the expense of an equitable distribution of benefits and burdens, including environmental endowments<sup>143</sup> — it is imperative to bear in mind the underlying rationale for economic regulation, including environmental regulation. This has been stated with exceptional clarity by Cory J.:

The realities and complexities of a modern industrial society coupled with a very real need to protect all of society and particularly its vulnerable members, emphasize the critical importance of regulatory offences in Canada today. Our country simply could not function without extensive regulatory legislation.

...

Regulatory legislation is essential to the operation of our complex industrial society; it plays a legitimate and vital role in protecting those who are most vulnerable and least able to protect themselves. The extent and importance of that role has increased continuously since the onset of the Industrial Revolution. Before effective workplace legislation was enacted, labourers — including children — worked unconscionably long hours in dangerous and unhealthy surroundings that evoke visions of Dante's *Inferno*. It was regulatory legislation with its enforcement provisions which brought to an end the shameful situation that existed in mines, factories and workshops in the nineteenth century.<sup>144</sup>

tions in Environmental Law" (1996) 13 Yale J. of Regulation 67. Swire provides an equally inspiring criticism of regulatory "competition" in environmental policy. Economics-inspired analyses are also rapidly gaining ground in the interpretation of the subsidiarity clause in article 3b of the EC-Treaty, *Treaty of Rome*, thus raising the concrete spectre of deregulation through decentralization of environmental policy in Europe. See Centre for Economic Policy Research, ed., *Making Sense of Subsidiarity: How Much Centralization for Europe?* (London, U.K.: CERP, 1993), c. 3, 7; R. van den Bergh, M. Faure & J. Lefevere, "The Subsidiarity Principle in European Environmental Law: An Economic Analysis" in E. Eide & R. van den Bergh, eds., *Law and Economics of the Environment* (Oslo: Juridisk Forlag, 1996) 121.

<sup>141</sup> See J.P. Trachtman, "International Regulatory Competition, Externalization, and Jurisdiction" (1993) 34 Harv. Int'l L. J. 47 at 65, n. 79.

<sup>142</sup> See M.S. Common, *Sustainability and Policy: Limits to Economics* (Cambridge: Cambridge University Press, 1995), c. 6, 7. For the mindset of some of the economic analysis of law and public policy, including environmental policy, see also S. Rose-Ackerman, "Economics, Public Policy, and Law" (1996) 26 Victoria Univ. of Wellington L. Rev. 1. Rose-Ackerman also furnishes an alternative economic perspective on federalism issues in environmental policy that lends considerable support to a lead role of centralized decision-makers in order to avoid strategic behaviour — the trap posed by the game-theoretical category of the prisoners' dilemma — on the part of decentralized decision-makers. See S. Rose-Ackerman, *supra* note 113, c. 3.

<sup>143</sup> For an important attempt to recover the (re-)distributional element in environmental policy from a narrow focus on allocative efficiency see R.J. Lazarus, "Pursuing 'Environmental Justice': The Distributional Effects of Environmental Protection" (1993) 87 Nw. U. L. Rev. 787 at 809ff. For a very similar analysis in the international context, see E. Brown-Weiss, "The Imperative for the Twenty-First Century" in W. Lang, ed., *Sustainable Development and International Law* (London: Graham & Trotman, 1995) 17 at 22ff.

<sup>144</sup> *Wholesale Travel Group*, *supra* note 96 at 233, 234.

There can be no doubt that the environment too constitutes a vulnerable element that is worthy of nation-wide protection through appropriate regulation at all levels of government.

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