1997 CarswellQue 3705, (sub nom. R. v. Hydro-Québec) 118 C.C.C. (3d) 97, (sub nom. R. v. Hydro-Québec) 151 D.L.R. (4th) 32, 9 C.R. (5th) 157, (sub nom. R. v. Hydro-Québec) 217 N.R. 241, (sub nom. R. v. Hydro-Québec) [1997] 3 S.C.R. 213, 24 C.E.L.R. (N.S.) 167, 1997 CarswellQue 849, 3 S.C.R. 213

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Canada (Procureure générale) c. Hydro-Québec

Le Procureur général du Canada, agissant pour le compte de Sa Majesté la Reine, Appelant c. Hydro-Québec, Intimée et Le procureur général du Québec, Mis en cause et Le procureur général de la Saskatchewan, IPSCO Inc., Société pour vaincre la pollution inc. (« S.V.P. »), Pollution Probe, Great Lakes United (Canada), Association canadienne du droit de l'environnement et Sierra Legal Defence Fund, Intervenants

Supreme Court of Canada

Lamer, C.J.C., La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci, and Major JJ.

Heard: February 10, 1997
Judgment: September 18, 1997
Docket: 24652

Proceedings: reversing (1995), 17 C.E.L.R. (N.S.) 34 (Que. C.A.); reversing [1992] R.J.Q. 2159 (S.C.); reversing [1991] R.J.Q. 2763 (C.Q.)

Counsel: Claude Joyal, James Mabbutt, Q.C., Yves Leboeuf, and Jean Rhéaume, for the appellant.

François Fontaine, Sophie Perreault, and Jean Piette, for the respondent.

Alain Gingras, for the mis en cause.

Thomson Irvine, for the intervener the Attorney General of Saskatchewan.

Robert G. Richards, for the intervener IPSCO Inc.

Robert Astell, for the intervener the Société pour vaincre la pollution inc.

Stewart A. G. Elgie and Paul R. Muldoon, for the interveners Pollution Probe, Great Lakes United (Canada), Canadian Environmental Law Association and Sierra Legal Defence Fund.

Subject: Criminal; Environmental; Constitutional; Environmental

Environmental law --- Statutory protection of environment — Jurisdiction to enact environmental legislation — Constitutional authority — General

1997 CarswellQue 3705, (sub nom. R. v. Hydro-Québec) 118 C.C.C. (3d) 97, (sub nom. R. v. Hydro-Québec) 151 D.L.R. (4th) 32, 9 C.R. (5th) 157, (sub nom. R. v. Hydro-Québec) 217 N.R. 241, (sub nom. R. v. Hydro-Québec) [1997] 3 S.C.R. 213, 24 C.E.L.R. (N.S.) 167, 1997 CarswellQue 849, 3 S.C.R. 213

Provincial electric utility charged with unlawfully discharging polychlorinated biphenyls (PCBs) into river — Charges dismissed at trial on grounds that enabling statute giving rise to regulations under which charges were laid was ultra vires Parliament — Crown's appeal to Superior Court dismissed — Appeal to Court of Appeal also dismissed — Crown appealed further — Appeal allowed — Impugned provisions were valid under Parliament's criminal law power — Canadian Environmental Protection Act, R.SC. 1985, c. 16 (4th Supp.), ss. 34, 35 — Constitution Act, 1867, ss. 91 ¶2, 91 ¶27 — Chlorobibhenyls Interim Order, P.C. 1989-296, s. 6(a).

Droit de l'environnement --- Protection statutaire de l'environnement — Compétence législative en matière d'environnement — Compétence constitutionnelle — En général

Société d'État provinciale d'électricité a été accusée d'avoir déversé illégalement des biphényles polychlorés (BPC) dans une rivière — Au procès, les accusations ont été rejetées au motif que la loi habilitante et la réglementation qui en découlait, en vertu desquelles les accusations avaient été déposées, étaient ultra vires du Parlement — Appel du ministère public à la Cour supérieure a été rejeté — Pourvoi à la Cour d'appel a également été rejeté — Ministère public a formé un pourvoi à la Cour suprême du Canada — Pourvoi a été accueilli — Dispositions contestées étaient valides en vertu de la compétence législative du Parlement en matière de droit criminel — Loi canadienne sur la protection de l'environnement, L.R.C. 1985, ch. 16 (4^{e} suppl.), art. 34, 35 — Loi constitutionnelle de 1867, art. 91 ¶2, 91 ¶27 — Arrêté d'urgence sur les biphényles chlorés, C.P. 1989-296, art. 6a).

A provincial electric utility was charged under s. 6(a) of the federal Chlorobiphenyls Interim Order with discharging polychlorinated biphenyls ("PCBs") into a nearby river over a certain period of time. The Order had been passed as a regulation pursuant to s. 35 of the Canadian Environmental Protection Act (the "CEPA"), and was in the nature of a regulation which could have been made under s. 34 of the CEPA. The charges against the utility were dismissed in the Court of Quebec on the grounds that the legislation was excessively broad, and intruded upon provincial areas of responsibility under the Constitution Act, 1867 (the "CA"). The court also held that the enabling legislation, pursuant to which the Order had been enacted, could not be constitutionally supported under Parliament's criminal law power by virtue of s. 91 ¶27 of the CA. An appeal by the Crown to the Superior Court was dismissed on similar grounds, as was a further appeal to the Court of Appeal. The Crown appealed further. The Supreme Court put forth a constitutional question as to whether s. 6(a) of the Order, or ss. 34 and 35 of the CEPA, fell in whole or in part within Parliament's jurisdiction to make laws for the peace, order and good government of Canada pursuant to s. 91 of the CA, or its criminal law jurisdiction under s. 91 ¶27 of the CA, or otherwise fell within its jurisdiction.

Held: The appeal was allowed; the impugned legislation was intra vires Parliament under its criminal law power; the decision of the Court of Appeal was set aside, and the matter remitted to the summary convictions court to be dealt with according to the CEPA.

Per La Forest J. (L'Heureux-Dubé, Gonthier, Cory and McLachlin JJ. concurring): In determining whether the impugned legislative provisions are constitutionally valid, one must begin by examining each legislative head of power under s. 91 of the CA in order to determine under which of these heads the legislation could be brought. The criminal law power of Parliament under s. 91 ¶27 of the CA is broad and plenary, and subject, apart from the restrictions of s. 7 of the Canadian Charter of Rights and Freedoms, only to the qualification that the power cannot be employed colourably in order to invade areas of provincial legislative competence. The criminal law must adapt to emerging values of Canadian society, one of which is the stewardship and protection of the environment, which is a valid public purpose. Parliament may validly enact prohibitions under its criminal law power

against specific acts for the purpose of preventing pollution or causing the entry into the environment of certain toxic substances. The Order could be justified as a criminal prohibition for the protection of human life and health alone. The purpose of the impugned legislation was clearly to address the need to assess material which could be harmful to health and the environment before such material was already in use. The purpose of s. 34 is to prohibit the use of substances which appear on the list of toxic substances. This is a limited prohibition applicable to a restricted number of substances. The prohibitions are enforced by a penal sanction and underpinned by a valid criminal objective. Thus, it is valid criminal legislation. Section 35 deals with emergency situations. It comes into play when the designated Ministers believe a substance is not specified in the list of toxic substances in Schedule I of the CEPA, or is listed but not subject to control. In such case, an interim order may be made in respect of such substance if the Ministers believe that immediate action is required to deal with a significant danger to the environment or human health. Sections 34 and 35 are intra vires Parliament under its criminal law powers. The Order could be attacked only on the basis that PCBs did not pose a significant threat to human health, and hence the Order went beyond the authority granted by s. 35. There was ample evidence of the dangerous and toxic nature of PCBs such as to refute such a view. The Order was valid.

Per Lamer C.J.C. and Iacobucci J. (dissenting) (Sopinka and Major JJ. concurring): The dominant characteristic of the impugned legislation was apparent from its plain text. The sweeping definitions given in the act to "environment" and "toxic substance" were aimed not specifically at chemical substances, but rather purported to cover any distinguishable kind of organic or inorganic matter, whether animate or inanimate. It was clear from the wording of the legislation that "toxicity" is intended to be conditional on meeting the criteria set out in ss. 3 and 11 of the CEPA. The pith and substance of Part II of the CEPA is the wholesale regulation by federal agents of any and all substances which may harm any aspect of the environment or may present a danger to human life or health. The impugned provisions were more of an attempt to regulate environmental pollution than to prohibit or proscribe it. As such, they extended beyond the purview of the criminal law, and could not be justified under s. 91 ¶27 of the CA. The issue was not whether PCBs were truly toxic, but rather that the CEPA purported to grant federal regulatory power over substances which might not pose a danger to human life or the environment. Section 11 of the CEPA did not make it necessary that a substance constitute such a danger for it to be labelled "toxic" and brought under federal control. The legislation was not supportable as relating to health, although the protection of the environment was a legitimate criminal public purpose. The CEPA provisions failed to meet the prohibitory criteria of a legitimate criminal purpose in that they did not prohibit, but rather regulated, environmental pollution. They contained no blanket prohibitions from which certain circumscribed exemptions were carved, for example. They defined no offence at all until an administrative agency intervened to determine which substances should be placed on the list of toxic substances. The definitions contained in the CEPA were too broad to conclude that they were aimed at a distinct form of pollution. There are no clear distinctions between types of toxic substances. The CEPA had a regulatory scope which could encroach on several heads of provincial power. This demonstrated that the enabling provisions of ss. 34 and 35 of the CEPA lacked the necessary singleness, distinctiveness, and indivisibility required by the national dimensions doctrine which would categorize the CEPA as a valid exercise of Parliament's power under the peace, order and good government clause of s. 91 of the CA. Moreover, the Crown and intervenors had not discharged the heavy burden of demonstrating that the provinces would be incapable of regulating such toxic substances. The pith and substance of the legislation did not involve trade and commerce, and could not be upheld under Parliament's trade and commerce powers by virtue of s. 91 ¶2 of the CA. The provisions were, accordingly, ultra vires Parliament.

Une société d'État provinciale d'électricité a été accusée, en vertu de l'art. 6a) de l'Arrêté d'urgence sur les biphényles chlorés fédéral, d'avoir illégalement déversé pendant un certain temps des biphényles polychlorés

(les « BPC ») dans une rivière avoisinante. L'arrêté a été pris et mis à exécution conformément à l'art. 35 de la Loi canadienne sur la protection de l'environnement (la « LCPE ») et il s'apparentait, de par sa nature, à un règlement pouvant être adopté en vertu de l'art. 34 de la LCPE. La Cour du Québec a rejeté les accusations au motif que la loi avait une portée excessivement large et empiétait sur des champs de compétence provinciale tels qu'édictés dans la Loi constitutionnelle de 1867 (la « LC »). La Cour a également conclu que la loi habilitante en vertu de laquelle l'arrêté avait été adopté n'avait pas de fondement constitutionnel en vertu de l'art. 91 ¶27, soit la compétence du Parlement en matière de droit criminel. L'appel du ministère public à la Cour supérieure a été rejeté pour les mêmes motifs, tout comme le pourvoi à la Cour d'appel à l'encontre de ce jugement. La Cour suprême a formulé la question constitutionnelle de savoir si l'art. 6a) de l'arrêté ou l'art. 34 de la LCPE trouvaient leur fondement dans le pouvoir du Parlement de faire des lois pour la paix, l'ordre et le bon gouvernement du Canada aux termes de l'art. 91 de la LC, ou dans sa compétence en matière de droit criminel prévue à l'art. 91 ¶27 de la LC, ou en vertu d'un autre pouvoir.

Held: Le pourvoi a été accueilli; les dispositions législatives contestées étaient intra vires du Parlement en vertu de sa compétence en droit criminel; l'arrêt de la Cour d'appel a été annulé, et le dossier a été renvoyé à la Cour des poursuites sommaires pour adjudication conformément à la LCPE.

La Forest, J. (L'Heureux-Dubé, Gonthier, Cory et McLachlin, JJ., souscrivant) : Pour déterminer si les dispositions législatives contestées sont constitutionnellement valides, il faut d'abord examiner chacun des chefs de compétence législative énoncés à l'art. 91 de la LC afin de déterminer lequel de ces chefs serait susceptible d'autoriser la législation en question. La compétence du Parlement en matière de droit criminel est un sujet vaste et complet en soi, qui souffre néanmoins des restrictions imposées par l'art. 7 de la Charte canadienne des droits et libertés, lesquelles interdisent que cette compétence soit utilisée de manière détournée dans le but d'empiéter dans des champs de compétence législative réservés exclusivement aux provinces. Le droit criminel doit s'adapter aux nouvelles valeurs de la société canadienne, telles la promotion et la protection de l'environnement, objet public légitime. En vertu de sa compétence en matière criminelle, le Parlement a le pouvoir de promulguer des interdictions visant des actes spécifiques afin de prévenir la pollution ou l'introduction de certaines substances toxiques dans l'environnement. L'arrêté pouvait se justifier, à tout le moins, en tant qu'interdiction de nature criminelle pour la protection de la santé et de la vie humaine. L'objet de la législation contestée était, à n'en point douter, de s'attaquer au besoin d'évaluer des substances qui pourraient nuire à la santé et à l'environnement avant même que de telles substances ne soient utilisées. L'article 34 vise à interdire l'utilisation de substances qui figurent sur une liste de substances toxiques. Il s'agit d'une interdiction limitée et applicable à un nombre restreint de substances. Les interdictions sont sanctionnées par une peine et visent un objet public légitime. C'est donc une législation d'ordre criminelle valide. L'article 35 envisage des situations d'urgence. Il s'applique lorsque les ministres désignés croient qu'une substance ne figure pas à la liste des substances toxiques de l'annexe I de la LCPE ou y est inscrite mais n'est pas sujette à contrôle. Dans des cas semblables, un arrêté d'urgence peut être émis contre une telle substance si les ministres estiment qu'une action immédiate est requise pour prévenir un réel danger pour l'environnement ou la santé publique. Les articles 34 et 35 sont donc intra vires du Parlement en matière de droit criminel. L'arrêté était attaquable uniquement en faisant la démonstration que les BPC ne présentent pas un réel danger pour la santé publique, donc qu'il excédait les limites du pouvoir établi par l'art. 35. Or, une abondante preuve établissait le caractère dangereux et la toxicité des BPC, réfutant du coup l'argument contraire. L'arrêté était valide.

Lamer, J.C.C., et Iacobucci, J. (dissidents) (Sopinka et Major, JJ., souscrivant) : La principale caractéristique des dispositions contestées ressort clairement du texte de loi. Les définitions très larges que la loi donne aux mots « environnement » et « substance toxique » ne visaient pas simplement les produits chimiques, mais envis-

ageaient plutôt toute matière visible, organique ou inorganique, animée ou inanimée. Il ressortait clairement du libellé de la loi que la « toxicité » dépendait d'une série de critères énoncés aux art. 3 et 11 de la LCPE. L'objet véritable de la partie II de la LCPE tient dans la réglementation systématique, par des organismes fédéraux, de toute substance qui risquerait d'être nocive pour un aspect de l'environnement ou présenterait un danger pour la vie ou la santé des êtres humains. Les dispositions contestées visaient plus la réglementation de la pollution que son interdiction. Comme telles, elles sortaient du domaine du droit criminel et ne pouvaient être justifiées en vertu de l'art. 91 ¶27 de la LC. Il ne s'agissait pas de savoir si les BPC étaient véritablement toxiques, mais plutôt de savoir si la LCPE visait à créer des pouvoirs réglementaires fédéraux sur des substances qui pouvaient ne pas poser un danger pour la santé publique ou l'environnement. Selon l'art. 11 de la LCPE, il n'était pas nécessaire qu'une substance constitue un tel danger pour qu'elle soit qualifiée de « toxique » et, donc, qu'elle soit régie par l'autorité fédérale. Bien que la protection de l'environnement constitue un objet public légitime aux fins du droit criminel, la loi contestée ne pouvait être justifiée en prétendant qu'elle était reliée à la santé publique. Les dispositions de la LCPE ne rencontraient pas les critères d'un véritable objet de droit criminel, car elles réglementaient la pollution plutôt qu'elles ne l'interdisaient. À titre d'exemple, elles ne stipulaient aucune interdiction de principe admettant quelques exceptions restreintes. Elles n'établissaient pas d'infraction avant qu'une autorité réglementaire ne détermine quelles substances devaient être inscrites sur la liste des substances toxiques. Les définitions contenues dans la LCPE avaient une portée trop large pour conclure qu'elles visaient une forme de pollution en particulier. Les différentes sortes de substances toxiques n'y sont pas clairement distinguées. La LCPE était une loi réglementaire qui risquait d'empiéter dans plusieurs domaines de compétence provinciale. Cela montrait bien que les dispositions habilitantes n'avait pas l'unicité, la particularité et l'indivisibilité requises par la doctrine de la dimension nationale, qui aurait légitimer la LCPE en tant qu'exercice légitime du pouvoir du Parlement, selon l'art. 91 ¶27, de faire des lois pour la paix, l'ordre et le bon gouvernement. En outre, le ministère public et les intervenants ne s'étaient pas acquittés du lourd fardeau de prouver que les provinces seraient incapables de réglementer de telles substances. L'objet de la loi n'avait rien à voir avec les échanges et le commerce, et la loi ne pouvait être maintenue en tant qu'acte législatif relevant de la compétence fédérale en matière d'échanges et de commerce. Par conséquent, les dispositions visées étaient ultra vires du législateur fédéral.

Cases considered by / Jurisprudence citée par La Forest J. (L'Heureux-Dubé, Gonthier, Cory **and / et** McLachlin JJ. **concurring / souscrivant):**

British Columbia (Attorney General) v. Canada (Attorney General), [1937] 1 W.W.R. 317, [1937] 1 D.L.R. 688, [1937] A.C. 368, 67 C.C.C. 193 (Canada P.C.) — referred to

Friends of the Oldman River Society v. Canada (Minister of Transport), [1992] 2 W.W.R. 193, [1992] 1 S.C.R. 3, 3 Admin. L.R. (2d) 1, 7 C.E.L.R. (N.S.) 1, 84 Alta. L.R. (2d) 129, 88 D.L.R. (4th) 1, 132 N.R. 321 (S.C.C.) — considered

Lord's Day Alliance of Canada v. British Columbia (Attorney General), [1959] S.C.R. 497, 30 C.R. 193, 123 C.C.C. 81, 19 D.L.R. (2d) 97 (S.C.C.) — considered

McNeil v. Nova Scotia (Board of Censors), [1978] 2 S.C.R. 662, 84 D.L.R. (3d) 1, 19 N.R. 570, 25 N.S.R. (2d) 128, 44 C.C.C. (2d) 316, 36 A.P.R. 128 (S.C.C.) — referred to

Ontario (Attorney General) v. Hamilton Street Railway, [1903] A.C. 524, 2 O.W.R. 672, 7 C.C.C. 326, 72 L.J.P.C. 105 (Ontario P.C.) — considered

Proprietary Articles Trade Assn. v. Canada (Attorney General), [1931] A.C. 310, [1931] 2 D.L.R. 1, [1931] 1 W.W.R. 552, 55 C.C.C. 241 (Canada P.C.) — considered

R. v. Boggs, [1981] 1 S.C.R. 49, 120 D.L.R. (3d) 718, 34 N.R. 520, 58 C.C.C. (2d) 7, 19 C.R. (3d) 245, 8 M.V.R. 247 (Eng.), 10 M.V.R. 293 (Fr.) (S.C.C.) — referred to

R. v. Canadian Pacific Ltd., 41 C.R. (4th) 147, 17 C.E.L.R. (N.S.) 129, 99 C.C.C. (3d) 97, 125 D.L.R. (4th) 385, (sub nom. Ontario v. Canadian Pacific Ltd.) 183 N.R. 325, (sub nom. Ontario v. Canadian Pacific Ltd.) 24 O.R. (3d) 454 (note), (sub nom. Ontario v. Canadian Pacific Ltd.) 82 O.A.C. 243, (sub nom. Ontario v. Canadian Pacific Ltd.) 30 C.R.R. (2d) 252, (sub nom. Ontario v. Canadian Pacific Ltd.) [1995] 2 S.C.R. 1031 (S.C.C.) — considered

R. v. Cosman's Furniture (1972) Ltd., [1977] 1 W.W.R. 81, 32 C.C.C. (2d) 345, 30 C.P.R. (2d) 189, 73 D.L.R. (3d) 312 (Man. C.A.) — considered

R. v. Crown Zellerbach Canada Ltd., [1988] 1 S.C.R. 401, [1988] 3 W.W.R. 385, 49 D.L.R. (4th) 161, 84 N.R. 1, 25 B.C.L.R. (2d) 145, 40 C.C.C. (3d) 289, 3 C.E.L.R. (N.S.) 1 (S.C.C.) — considered

R. v. Fowler, 113 D.L.R. (3d) 513, 32 N.R. 230, 53 C.C.C. (2d) 97, 9 C.E.L.R. 115, [1980] 5 W.W.R. 511, [1980] 2 S.C.R. 213 (S.C.C.) — referred to

R. v. Furtney, 8 C.R. (4th) 121, 129 N.R. 241, 66 C.C.C. (3d) 498, [1991] 3 S.C.R. 89, 51 O.A.C. 299, 8 C.R.R. (2d) 160 (S.C.C.) — considered

R. v. Kripps Pharmacy Ltd., (sub nom. R. v. Wetmore) [1983] 2 S.C.R. 284, 2 D.L.R. (4th) 577, 49 N.R. 286, [1984] 1 W.W.R. 577, 7 C.C.C. (3d) 507, 38 C.R. (3d) 161 (S.C.C.) — considered

R. v. Morgentaler, 157 N.R. 97, 125 N.S.R. (2d) 81, 349 A.P.R. 81, [1993] 3 S.C.R. 463, 107 D.L.R. (4th) 537, 85 C.C.C. (3d) 118, 25 C.R. (4th) 179 (S.C.C.) — considered

R. v. Morgentaler (No. 5) (1975), [1976] 1 S.C.R. 616, 30 C.R.N.S. 209, 4 N.R. 277, 20 C.C.C. (2d) 449, 53 D.L.R. (3d) 161 (S.C.C.) — considered

R. v. Rube, 75 C.C.C. (3d) 575, [1992] 3 S.C.R. 159, 74 B.C.L.R. (2d) 1, 29 B.C.A.C. 41, 48 W.A.C. 41, 154 N.R. 241, [1993] 1 W.W.R. 385 (S.C.C.) — referred to

R. v. Wholesale Travel Group Inc., 67 C.C.C. (3d) 193, 130 N.R. 1, 38 C.P.R. (3d) 451, 8 C.R. (4th) 145, 49 O.A.C. 161, 7 C.R.R. (2d) 36, [1991] 3 S.C.R. 154, 84 D.L.R. (4th) 161, 4 O.R. (3d) 799 (note) (S.C.C.) — referred to

Reference re Anti-Inflation Act, 1975 (Canada), [1976] 2 S.C.R. 373, 9 N.R. 541, 68 D.L.R. (3d) 452 (S.C.C.) — considered

Reference re Farm Products Marketing Act (Ontario), [1957] S.C.R. 198, 7 D.L.R. (2d) 257 (S.C.C.) — referred to

Reference re Validity of s. 5(a) of Dairy Industry Act (Canada), (Margarine Case) (1948), [1949] S.C.R. 1, [1949] 1 D.L.R. 433 (S.C.C.) — considered

RJR-Macdonald Inc. c. Canada (Procureur général), (sub nom. RJR-MacDonald Inc. v. Canada (Attorney General)) 127 D.L.R. (4th) 1, (sub nom. RJR-MacDonald Inc. v. Canada (Attorney General)) [1995] 3 S.C.R. 199, (sub nom. RJR-MacDonald Inc. v. Canada (Attorney General)) 100 C.C.C. (3d) 449, (sub nom. RJR-MacDonald Inc. v. Canada (Attorney General)) 62 C.P.R. (3d) 417, (sub nom. RJR-MacDonald Inc. v. Canada (Attorney General)) 31 C.R.R. (2d) 189, (sub nom. RJR-MacDonald Inc. c. Canada (Procureur général)) 187 N.R. 1 (S.C.C.) — referred to

Schneider v. R., [1982] 2 S.C.R. 112, [1982] 6 W.W.R. 673, 139 D.L.R. (3d) 417, 43 N.R. 91, 39 B.C.L.R. 273, 68 C.C.C. (2d) 449 (S.C.C.) — considered

Scowby v. Saskatchewan (Board of Inquiry), (sub nom. Scowby v. Glendinning) [1986] 6 W.W.R. 481, [1986] 2 S.C.R. 226, 32 D.L.R. (4th) 161, 70 N.R. 241, 51 Sask. R. 208, 29 C.C.C. (3d) 1, 8 C.H.R.R. D/3677 (S.C.C.) — considered

Standard Sausage Co. v. Lee, [1934] 1 W.W.R. 81, 47 B.C.R. 411, 60 C.C.C. 265, [1933] 4 D.L.R. 501 (B.C. C.A.) — considered

Upper Churchill Water Rights Reversion Act, 1980, Re, [1984] 1 S.C.R. 297, 8 D.L.R. (4th) 1, 53 N.R. 268, 47 Nfld. & P.E.I.R. 125 (S.C.C.) — considered

Whitbread v. Walley, [1991] 2 W.W.R. 195, 77 D.L.R. (4th) 25, 120 N.R. 109, [1990] 3 S.C.R. 1273, 52 B.C.L.R. (2d) 187 (S.C.C.) — considered

Cases considered by / Jurisprudence citée par Lamer C.J.C. and / et Iacobucci J. **(dissenting / dissidents)** (Sopinka **and / et** Major JJ. **concurring / souscrivant):**

City National Leasing Ltd. v. General Motors of Canada Ltd., 93 N.R. 326, [1989] 1 S.C.R. 641, 58 D.L.R. (4th) 255, 32 O.A.C. 332, 43 B.L.R. 225, 24 C.P.R. (3d) 417, 68 O.R. (2d) 512 (note) (S.C.C.) — considered

Friends of the Oldman River Society v. Canada (Minister of Transport), [1992] 2 W.W.R. 193, [1992] 1 S.C.R. 3, 3 Admin. L.R. (2d) 1, 7 C.E.L.R. (N.S.) 1, 84 Alta. L.R. (2d) 129, 88 D.L.R. (4th) 1, 132 N.R. 321 (S.C.C.) — referred to

Knox Contracting Ltd. v. R., (sub nom. Knox Contracting Ltd. v. Canada) 110 N.R. 171, 106 N.B.R. (2d) 408, 265 A.P.R. 408, 90 D.T.C. 6447, [1990] 2 C.T.C. 262, [1990] 2 S.C.R. 338, 73 D.L.R. (4th) 110, 58 C.C.C. (3d) 65 (S.C.C.) — referred to

Labatt Breweries of Canada Ltd. v. Canada (Attorney General) (1979), [1980] 1 S.C.R. 914, 52 C.C.C. (2d) 433, 30 N.R. 496, 9 B.L.R. 181 (S.C.C.) — referred to

Lord's Day Alliance of Canada v. British Columbia (Attorney General), [1959] S.C.R. 497, 30 C.R. 193, 123 C.C.C. 81, 19 D.L.R. (2d) 97 (S.C.C.) — referred to

Nova Scotia (Attorney General) v. Canada (Attorney General), [1951] S.C.R. 31, [1950] 4 D.L.R. 369, 50 D.T.C. 838 (S.C.C.) — considered

R. v. Boggs, [1981] 1 S.C.R. 49, 120 D.L.R. (3d) 718, 34 N.R. 520, 58 C.C.C. (2d) 7, 19 C.R. (3d) 245, 8

M.V.R. 247 (Eng.), 10 M.V.R. 293 (Fr.) (S.C.C.) — referred to

R. v. Canadian Pacific Ltd., 41 C.R. (4th) 147, 17 C.E.L.R. (N.S.) 129, 99 C.C.C. (3d) 97, 125 D.L.R. (4th) 385, (sub nom. Ontario v. Canadian Pacific Ltd.) 183 N.R. 325, (sub nom. Ontario v. Canadian Pacific Ltd.) 24 O.R. (3d) 454 (note), (sub nom. Ontario v. Canadian Pacific Ltd.) 82 O.A.C. 243, (sub nom. Ontario v. Canadian Pacific Ltd.) 30 C.R.R. (2d) 252, (sub nom. Ontario v. Canadian Pacific Ltd.) [1995] 2 S.C.R. 1031 (S.C.C.) — considered

R. v. Crown Zellerbach Canada Ltd., [1988] 1 S.C.R. 401, [1988] 3 W.W.R. 385, 49 D.L.R. (4th) 161, 84 N.R. 1, 25 B.C.L.R. (2d) 145, 40 C.C.C. (3d) 289, 3 C.E.L.R. (N.S.) 1 (S.C.C.) — referred to

R. v. Furtney, 8 C.R. (4th) 121, 129 N.R. 241, 66 C.C.C. (3d) 498, [1991] 3 S.C.R. 89, 51 O.A.C. 299, 8 C.R.R. (2d) 160 (S.C.C.) — referred to

R. v. Hauser, [1979] 1 S.C.R. 984, 26 N.R. 541, [1979] 5 W.W.R. 1, 16 A.R. 91, 46 C.C.C. (2d) 481, 8 C.R. (3d) 89 (Eng.), 8 C.R. (3d) 281 (Fr.), 98 D.L.R. (3d) 193 (S.C.C.) — referred to

R. v. Kripps Pharmacy Ltd., (sub nom. R. v. Wetmore) [1983] 2 S.C.R. 284, 2 D.L.R. (4th) 577, 49 N.R. 286, [1984] 1 W.W.R. 577, 7 C.C.C. (3d) 507, 38 C.R. (3d) 161 (S.C.C.) — referred to

R. v. McKinlay Transport Ltd., [1990] 1 S.C.R. 627, 68 D.L.R. (4th) 568, 106 N.R. 385, 39 O.A.C. 385, 55 C.C.C. (3d) 530, 76 C.R. (3d) 283, 47 C.R.R. 151, (sub nom. Canada v. McKinlay Transport Ltd.) [1990] 2 C.T.C. 103, (sub nom. McKinlay Transport Ltd. v. R.) 90 D.T.C. 6243, 72 O.R. (2d) 798 (note) (S.C.C.) — considered

R. v. Morgentaler, 157 N.R. 97, 125 N.S.R. (2d) 81, 349 A.P.R. 81, [1993] 3 S.C.R. 463, 107 D.L.R. (4th) 537, 85 C.C.C. (3d) 118, 25 C.R. (4th) 179 (S.C.C.) — referred to

R. v. Sault Ste. Marie (City), [1978] 2 S.C.R. 1299, 85 D.L.R. (3d) 161, 21 N.R. 295, 7 C.E.L.R. 53, 3 C.R. (3d) 30, 40 C.C.C. (2d) 353 (S.C.C.) — referred to

R. v. Wholesale Travel Group Inc., 67 C.C.C. (3d) 193, 130 N.R. 1, 38 C.P.R. (3d) 451, 8 C.R. (4th) 145, 49 O.A.C. 161, 7 C.R.R. (2d) 36, [1991] 3 S.C.R. 154, 84 D.L.R. (4th) 161, 4 O.R. (3d) 799 (note) (S.C.C.) — referred to

Reference re Anti-Inflation Act, 1975 (Canada), [1976] 2 S.C.R. 373, 9 N.R. 541, 68 D.L.R. (3d) 452 (S.C.C.) — referred to

Reference re Validity of s. 5(a) of Dairy Industry Act (Canada), (Margarine Case) (1948), [1949] S.C.R. 1, [1949] 1 D.L.R. 433 (S.C.C.) — referred to

RJR-Macdonald Inc. c. Canada (Procureur général), (sub nom. RJR-MacDonald Inc. v. Canada (Attorney General)) 127 D.L.R. (4th) 1, (sub nom. RJR-MacDonald Inc. v. Canada (Attorney General)) [1995] 3 S.C.R. 199, (sub nom. RJR-MacDonald Inc. v. Canada (Attorney General)) 100 C.C.C. (3d) 449, (sub nom. RJR-MacDonald Inc. v. Canada (Attorney General)) 62 C.P.R. (3d) 417, (sub nom. RJR-MacDonald Inc. v. Canada (Attorney General)) 31 C.R.R. (2d) 189, (sub nom. RJR-MacDonald Inc. c. Canada (Procureur général)) 187 N.R. 1 (S.C.C.) — considered

Scowby v. Saskatchewan (Board of Inquiry), (sub nom. Scowby v. Glendinning) [1986] 6 W.W.R. 481, [1986] 2 S.C.R. 226, 32 D.L.R. (4th) 161, 70 N.R. 241, 51 Sask. R. 208, 29 C.C.C. (3d) 1, 8 C.H.R.R. D/3677 (S.C.C.) — referred to

Thomson Newspapers Ltd. v. Canada (Director of Investigation & Research), 76 C.R. (3d) 129, [1990] 1 S.C.R. 425, 67 D.L.R. (4th) 161, 106 N.R. 161, 39 O.A.C. 161, 54 C.C.C. (3d) 417, 29 C.P.R. (3d) 97, 47 C.R.R. 1, 72 O.R. (2d) 415 (note) (S.C.C.) — considered

Statutes considered by / Législation citée par La Forest J. (L'Heureux-Dubé, Gonthier, Cory **and / et** McLachlin JJ. **concurring / souscrivant):**

Canadian Charter of Rights and Freedoms/Charte canadienne des droits et libertés, Part I of the Constitution Act, 1982, being Schedule B of the Canada Act 1982 (U.K.), 1982, c. 11/Partie I de la Loi constitutionnelle de 1982, constituant l'annexe B de la Loi de 1982 sur le Canada (R.-U.), 1982, ch. 11

Generally/en général — referred to

s. 7 — considered

Canadian Environmental Protection Act/Protection de l'environnement, Loi canadienne sur la, R.S.C./L.R.C. 1985, c. 16 (4th Supp. / 4e suppl.)

Preamble/préambule — considered

Pt. II — considered

s. 2(j) — considered

s. 3(1) "air contaminant" — considered

s. 3(1) "air pollution" — considered

s. 3(1) "environment" — considered

s. 3(1) "environnement" — considered

s. 3(1) "polluant atmosphérique" ou "polluant" — considered

s. 3(1) "pollution atmosphérique" — considered

s. 3(1) "substance" — considered

s. 6 — considered

s. 11 "substance toxique" — considered

s. 11 "toxic substance" — considered

s. 11(a) — considered

s. 12 — considered

s. 12(1) — considered

s. 12(2) — referred to

s. 12(3) — referred to

s. 13 — considered

s. 15 [am./mod. 1992, c. 1, s. 35] — considered

s. 16 — considered

s. 18 — considered

s. 32 — referred to

s. 33 — considered

s. 34 [am./mod. 1989, c. 9, s. 2] — considered

s. 34(1) — referred to

s. 34(2) — referred to

s. 34(5) — considered

s. 34(6) — considered

s. 35 — considered

s. 35(3) — referred to

s. 35(8) — referred to

s. 113(f) — referred to

s. 113(o) — referred to

s. 113(p) — referred to

s. 125(1) — considered

Sched. I — considered

Competition Act/Enquêtes sur les coalitions, Loi relative aux, R.S.C./L.R.C. 1985, c. C-34

Generally/en général — referred to

Constitution Act, 1867/Loi constitutionnelle de 1867, (U.K.), 30 & 31 Vict., c. 3/(R.-U.), 30 & 31 Vict., c. 3

Generally/en général — considered

s. 91 — referred to

s. 91 ¶27 — referred to

s. 92 — referred to

Environmental Contaminants Act/Contaminants de l'environnement, Loi sur les, S.C./L.C. 1974-75-76, c. 72

Generally/en général — referred to

s. 4 — referred to

Environmental Contaminants Act/Contaminants de l'environnement, Loi sur les, R.S.C./L.R.C. 1985, c. E-12

Generally/en général — considered

Explosives Act/Explosifs, Loi sur les, R.S.C./L.R.C. 1985, c. E-17

Generally/en général — considered

Food and Drugs Act/Aliments et drogues, Loi sur les, R.S.C./L.R.C. 1985, c. F-27

Generally/en général — considered

Hazardous Products Act/Produits dangereux, Loi sur les, R.S.C./L.R.C. 1985, c. H-3

Generally/en général — considered

United States, Toxic Substances Control Act, 15 U.S.C.

s. 2605(c) — referred to

Statutes considered by / Législation citée par Lamer C.J.C. and / et Iacobucci J. **(dissenting / dissidents) (** Sopinka **and / et** Major JJ. **concurring / souscrivant):**

Canadian Charter of Rights and Freedoms/Charte canadienne des droits et libertés, Part I of the Constitution Act, 1982, being Schedule B of the Canada Act 1982 (U.K.), 1982, c. 11/Partie I de la Loi constitutionnelle de 1982, constituant l'annexe B de la Loi de 1982 sur le Canada (R.-U.), 1982, ch. 11

s. 8 — referred to

Canadian Environmental Protection Act/Protection de l'environnement, Loi canadienne sur la, R.S.C./L.R.C. 1985, c. 16 (4th Supp. / 4e suppl.)

Generally/en général — considered

Preamble/préambule — considered

Pt. II — considered

s. 3(1) "environment" — considered

s. 3(1) "environnement" — considered

s. 3(1) "substance" — considered

s. 3(1) "substance"(a)-(g) — considered

s. 3(1) "substance"(g) — considered

s. 6 — considered

s. 11 "toxic substance" — considered

s. 11 "substance toxique" — considered

s. 11(a) — considered

s. 11(a)-(c) — considered

s. 11(b) — considered

s. 12 — considered

s. 13 — considered

s. 15 [am./mod. 1992, c. 1, s. 35] — considered

s. 16 — considered

s. 18 — referred to

s. 26 — referred to

s. 34 [am./mod. 1989, c. 9, s. 2] — considered

s. 34(1) — considered

s. 34(1)(l) — considered

s. 34(1)(x) — considered

s. 34(2) — referred to

s. 34(6) — considered

s. 35 — considered

s. 35(4) — considered

s. 35(8) — considered

s. 113 — considered

s. 113(f) — considered

s. 113(i) — considered

s. 114 — considered

s. 115(1)(a) — considered

s. 115(1)(b) — considered

Competition Act/Enquêtes sur les coalitions, Loi relative aux, R.S.C./L.R.C. 1985, c. C-34

Generally/en général — referred to

Constitution Act, 1867/Loi constitutionnelle de 1867, (U.K.), 30 & 31 Vict., c. 3/(R.-U.), 30 & 31 Vict., c. 3

Generally/en général — considered

s. 91 — considered

s. 91 ¶2 — referred to

s. 91 ¶27 — considered

s. 92 — referred to

s. 92 ¶10 — considered

s. 92 ¶13 — considered

s. 92 ¶16 — considered

Food and Drugs Act/Aliments et drogues, Loi sur les, R.S.C./L.R.C. 1985, c. F-27

Generally/en général — considered

Pt. I — considered

Pt. III — considered

Pt. IV — considered

s. 3 — considered

s. 4 — considered

s. 5(1) — considered

s. 8 — considered

1997 CarswellQue 3705, (sub nom. R. v. Hydro-Québec) 118 C.C.C. (3d) 97, (sub nom. R. v. Hydro-Québec) 151 D.L.R. (4th) 32, 9 C.R. (5th) 157, (sub nom. R. v. Hydro-Québec) 217 N.R. 241, (sub nom. R. v. Hydro-Québec) [1997] 3 S.C.R. 213, 24 C.E.L.R. (N.S.) 167, 1997 CarswellQue 849, 3 S.C.R. 213

s. 9(1) — considered

s. 14 — considered

s. 16 — considered

s. 20(1) — considered

Income Tax Act/L'impôt sur le revenu, Loi de, R.S.C./L.R.C. 1985, c. 1 (5th Supp. / 5e suppl.)

Generally/en général — referred to

Ocean Dumping Control Act/L'immersion de déchets en mer, Loi sur, S.C./L.C. 1974-75-76, c. 55

Generally/en général — considered

Tobacco Products Control Act/Produits du tabac, Loi réglementant les, S.C./L.C. 1988, c. 20

Generally/en général — considered

s. 4 — considered

s. 9 — considered

Regulations considered by La Forest J. (L'Heureux-Dubé, Gonthier, Cory **and / et** McLachlin JJ. **concurring / souscrivant):**

Canadian Environmental Protection Act, R.S.C. 1985, c. 16 (4th Supp.)

Chlorobiphenyls Interim Order, P.C. 1989-296

s. 6(a)

Domestic Substances List/Liste intérieure des substances, SI/TR 91-148

Generally/en général

Domestic Substances List/Liste intérieure des substances, SOR/DORS 94-311 [am./mod. SOR/DORS 95-517]

Generally/en général

Priority Substances List/Liste intérieure des substances prioritaire, Canada Gazette, Part I, February 11, 1989, p. 543/Gazette du Canada, partie I, 11 février 1989, p. 543

Generally/en général

Pulp and Paper Mill Defoamer and Wood Chip Regulations/Réglement sur les additifs antimousse et les copeaux de bois utiliés dans les fabriques de pâet apapiers, SOR/DORS 92-268

Generally/en général

1997 CarswellQue 3705, (sub nom. R. v. Hydro-Québec) 118 C.C.C. (3d) 97, (sub nom. R. v. Hydro-Québec) 151 D.L.R. (4th) 32, 9 C.R. (5th) 157, (sub nom. R. v. Hydro-Québec) 217 N.R. 241, (sub nom. R. v. Hydro-Québec) [1997] 3 S.C.R. 213, 24 C.E.L.R. (N.S.) 167, 1997 CarswellQue 849, 3 S.C.R. 213

Pulp and Paper Mill Effluent Chlorinated Dioxins and Furons Regulations/Réglement sur les dioxines et les furannes chlorés dans les effluent des fabriques de pâtes et papiers, SOR/DORS 92-267

Generally/en général

Regulations considered by / Règles citées par Lamer C.J.C. and / et Iacobucci J. **(dissenting / dissidents)** (Sopinka **and / et** Major JJ. **concurring / souscrivant):**

Canadian Environmental Protection Act/Protection de l'environnement, Loi canadienne sur la, R.S.C./L.R.C. 1985, c. 16 (4th Supp. / 4e suppl.)

Chlorobiphenyls Interim Order/Arrêté d'urgence sur les biphénlyes chlorés, P.C. 1989-296/C.P. 1989-296

s. 6(a)

Words and phrases considered

pith and substance

Though pith and substance may be described in different ways, the expressions "dominant purpose" or "true character" used in R. v. Morgentaler, [1993] 3 S.C.R. 463, at pp. 481-82, or "the dominant or most important characteristic of the challenged law" used in Whitbread v. Walley, [1990] 3 S.C.R. 1273, at p. 1286, and in Oldman River, supra, at p. 62, appropriately convey the meaning to be attached to the term.

Termes et locutions cités

caractère véritable

Bien que le caractère véritable puisse être décrit de différentes façons, les expressions « objet principal » ou « idée maîtresse » utilisées dans l'arrêt R. c. Morgentaler, [1993] 3 S.C.R. 463, aux pp. 481 et 482, ou l'expression « la caractéristique principale ou la plus importante de la loi contestée », utilisée dans les arrêts Whitbread c. Walley, [1990] 3 S.C.R. 1273, à la p. 1286, et Oldman River, précité, à la p. 62, évoquent correctement le sens qu'il faut donner à cette notion.

APPEAL by Crown from judgment reported at 17 C.E.L.R. (N.S.) 34, [1995] R.J.Q. 398, (sub nom. R. c. Hydro-Québec) 67 Q.A.C. 161, dismissing appeal from judgment reported at [1992] R.J.Q. 2159 (C.S.), which dismissed appeal from judgment reported at [1991] R.J.Q. 2736 (C.Q.), allowing application by accused to have ss. 34 and 35 of Canadian Environmental Protection Act and s. 6(a) of Chlorobiphenyls Interim Order declared unconstitutional.

POURVOI du ministère public à l'encontre de l'arrêt publié à 17 C.E.L.R. (N.S.) 34, [1995] R.J.Q. 398, (sub nom. R. c. Hydro-Québec) 67 Q.A.C. 161, rejetant un pourvoi à l'encontre du jugement publié à [1992] R.J.Q. 2159 (C.S.), qui a rejeté un pourvoi à l'encontre du jugement publié à [1991] R.J.Q. 2736 (C.Q.), ayant accueilli une requête de l'accusée pour faire déclarer inconstitutionnels les art. 34 et 35 de la Loi canadienne sur la protection de l'environnement ainsi que l'art. 6a) de l'Arrêté d'urgence sur les biphényles chlorés.

Lamer C.J.C.and Iacobucci J. **(dissenting) (Sopinka and Major JJ. concurring):**

1 This appeal arose as a result of an interim order made in 1989 by the then Minister of the Environment of

Canada, the Honourable Lucien Bouchard. It restricted the emission of chlorobiphenyls ("PCBs") to 1 gram per day. The respondent, Hydro-Québec, was charged with breaching this Interim Order and challenged the charges by claiming that the Interim Order, as well as the underlying provisions supporting it, were ultra vires Parliament as invading provincial territory.

2 We have had the advantage of reading the lucid reasons of La Forest J. While we share his concern for the protection of the environment, we are of the view that the impugned provisions cannot be justified under s. 91 of the Constitution Act, 1867, and are therefore ultra vires the federal government. Because of our disagreement with our colleague's approach, we will set out the relevant factual and judicial background.

1. Facts

3 The respondent Hydro-Québec was charged with two infractions under s. 6(a) of the Chlorobiphenyls Interim Order, P.C. 1989-296 (hereinafter "the Interim Order"), adopted and enforced pursuant to ss. 34 and 35 of the Canadian Environmental Protection Act, R.S.C. 1985, c.16 (4th Supp.). It was alleged that the respondent:

> [TRANSLATION]
>
> [1] From January 1 to January 3, 1990, did unlawfully release more than 1 gram per day of chlorobiphenyls into the environment contrary to s. 6(a) of the Chlorobiphenyls Interim Order, P.C. 1989-296 of February 23, 1989, thereby committing an offence under ss. 113(i) and (o) of the Canadian Environmental Protection Act, R.S.C., 1985, c. 16 (4th Supp.);
>
> [2] On or about January 8, 1990, following the release into the environment, in contravention of s. 6(a) of the Chlorobiphenyls Interim Order, P.C. 1989-296 of February 23, 1989, of a substance specified in Schedule I to the Canadian Environmental Protection Act, R.S.C., 1985, c. 16 (4th Supp.), to wit: chlorobiphenyls ... did fail to report the matter to an inspector as soon as possible in the circumstances contrary to s. 36(1)(a) of the said Act, thereby committing an offence under ss. 113(h) and (o) of the said Act.

4 On July 23, 1990, the respondent pleaded not guilty to both these charges. It brought a motion before the Court of Québec to have ss. 34 and 35 of the Act as well as s. 6(a) of the Interim Order declared unconstitutional as outside the federal government's sphere of competence. On August 12, 1991, the court granted this motion and struck down the provisions in question: [1991] R.J.Q. 2736 (C.Q.). An appeal to the Quebec Superior Court was dismissed on August 6, 1992 ([1992] R.J.Q. 2159 (Que. S.C.)), as was a further appeal to the Quebec Court of Appeal, on February 14, 1995 ([1995] R.J.Q. 398, 67 Q.A.C. 161, 17 C.E.L.R. (N.S.) 34, [1995] Q.J. No. 143 (Que. C.A.) (QL)). On October 12, 1995, this Court granted leave to appeal ([1995] 4 S.C.R. vii) and a constitutional question, set forth below, was stated.

2. Relevant Statutory and Constitutional Provisions

5 Chlorobiphenyls Interim Order, P.C. 1989-296, s. 6(a)

> 6. The quantity of chlorobiphenyls that may be released into the environment shall not exceed 1 gram per day in respect of any item of equipment or any receptacle or material containing equipment in the course of the operation, servicing, maintenance, decommissioning, transporting or storage of
>
> (a) electrical capacitors and electrical transformers and associated electrical equipment manufactured in or imported into Canada before July 1, 1980;

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Canadian Environmental Protection Act, R.S.C. 1985, c. 16 (4th Supp.)

It is hereby declared that the protection of the environment is essential to the well-being of Canada.

WHEREAS the presence of toxic substances in the environment is a matter of national concern;

WHEREAS toxic substances, once introduced into the environment, cannot always be contained within geographic boundaries;

WHEREAS the Government of Canada in demonstrating national leadership should establish national environmental quality objectives, guidelines and codes of practice;

WHEREAS it is necessary to control the dispersal of nutrients in Canadian waters;

WHEREAS some of the laws under which federal lands, works and undertakings are administered or regulated do not make provision for environmental protection in respect of federal lands, works and undertakings;

AND WHEREAS Canada must be able to fulfil its international obligations in respect of the environment;

3. (1) In this Act,

. . . . .

"environment" means the components of the Earth and includes

(a) air, land and water,

(b) all layers of the atmosphere,

(c) all organic and inorganic matter and living organisms, and

(d) the interacting natural systems that include components referred to in paragraphs (a) to (c):

. . . . .

"substance" means any distinguishable kind of organic or inorganic matter, whether animate or inanimate, and includes

(a) any matter that is capable of being dispersed in the environment or of being transformed in the environment into matter that is capable of being so dispersed or that is capable of causing such transformations in the environment,

(b) any element or free radical,

(c) any combination of elements of a particular molecular identity that occurs in nature or as a result of a chemical reaction, and

(d) complex combinations of different molecules that originate in nature or are the result of chemical reactions but that could not practicably be formed by simply combining individual constituents,

and, except for the purposes of sections 25 to 32, includes

(e) any mixture that is a combination of substances and does not itself produce a substance that is different from the substances that were combined,

(f) any manufactured item that is formed into a specific physical shape or design during manufacture and has, for its final use, a function or functions dependent in whole or in part on its shape or design, and

(g) any animate matter that is, or any complex mixtures of different molecules that are, contained in effluents, emissions or wastes that result from any work, undertaking or activity;

11. For the purposes of this Part, a substance is toxic if it is entering or may enter the environment in a quantity or concentration or under conditions

(a) having or that may have an immediate or long-term harmful effect on the environment;

(b) constituting or that may constitute a danger to the environment on which human life depends; or

(c) constituting or that may constitute a danger in Canada to human life or health.

15. For the purpose of assessing whether a substance is toxic or is capable of becoming toxic, or for the purpose of assessing whether to control, or the manner in which to control, a substance, either Minister may

(a) collect data and conduct investigations respecting

(i) the nature of the substance,

(ii) the presence of the substance in the environment and the effect of its presence on the environment or on human life or health,

(iii) the extent to which the substance can become dispersed and will persist in the environment,

(iv) the ability of the substance to become incorporated or accumulate in biological tissues or to interfere with biological processes,

(v) methods of controlling the presence of the substance in the environment,

(vi) methods for testing the effects of the presence of the substance in the environment,

(vii) development and use of alternatives to the substance,

(viii) quantities, uses and disposal of the substance, and

(ix) methods of reducing the amount of the substance used, produced or released into the environment;

(b) correlate and evaluate any data collected pursuant to paragraph (a) and publish results of any investigations carried out pursuant to that paragraph; and

(c) provide information and consultative services and make recommendations respecting measures to control the presence of the substance in the environment.

34. (1) Subject to subsection (3), the Governor in Council may, on the recommendation of the Ministers and after the federal-provincial advisory committee is given an opportunity to provide its advice under section 6, make regulations with respect to a substance specified on the List of Toxic Substances in Schedule I, including regulations providing for, or imposing requirements respecting,

(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;

(b) the places or areas where the substance may be released;

(c) the commercial, manufacturing or processing activity in the course of which the substance may be released;

(d) the manner in which and conditions under which the substance may be released into the environment, either alone or in combination with any other substance;

(e) the quantity of the substance that may be manufactured, processed, used, offered for sale or sold in Canada;

(f) the purposes for which the substance or a product containing the substance may be imported, manufactured processed, used, offered for sale or sold;

(g) the manner in which and conditions under which the substance or a product containing the substance may be imported, manufactured, processed or used;

(h) the quantities or concentrations in which the substance may be used;

(i) the quantities or concentrations of the substance that may be imported;

(j) the countries from or to which the substance may be imported or exported;

(k) the conditions under which, the manner in which and the purposes for which the substance may be imported or exported;

(l) the total, partial or conditional prohibition of the manufacture, use, processing, sale, offering for sale, import or export of the substance or a product containing the substance;

(m) the quantity or concentration of the substance that may be contained in any product manufactured, imported, exported or offered for sale in Canada;

(n) the manner in which and conditions under which and the purposes for which the substance or a product containing the substance may be advertised or offered for sale;

(o) the manner in which and conditions under which the substance or a product or material containing the substance may be stored, displayed, handled, transported or offered for transport;

(p) the packaging and labelling of the substance or a product or material containing the substance;

(q) the manner, conditions, places and method of disposal of the substance or a product or material containing the substance, including standards for the construction, maintenance and inspection of disposal sites;

(r) the submission to the Minister, on request or at such times as are prescribed, of information relating to the substance;

(s) the maintenance of books and records for the administration of any regulation made under this section;

(t) the conduct of sampling, analyses, tests, measurements or monitoring of the substance and the submission of the results to the Minister;

(u) the submission of samples of the substance to the Minister;

(v) the methods and procedures for conducting sampling, analyses, tests, measurements or monitoring of the substance;

(w) circumstances or conditions under which the Minister may, for the proper administration of this Act, modify

(i) any requirement for sampling, analyses, tests, measurements or monitoring, or

(ii) the methods and procedures for conducting any required sampling, analyses, tests, measurements or monitoring; and

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

(2) The Governor in Council may, on the recommendation of the Ministers, make regulations providing for the exemption of the following activities from the application of this Part and any regulations made under it, namely,

(a) the import, export, manufacture, use, processing, transport, offering for transport, handling, packaging, labelling, advertising, sale, offering for sale, displaying, storing, disposing or releasing into the environment of any substance or a product or material containing any substance; and

(b) the release of any substance into the environment, for a period specified in the regulations, from any source or type of source.

(3) The Governor in Council shall not make a regulation under subsection (1) in respect of any substance if, in the opinion of the Governor in Council, the regulation regulates an aspect of the substance that is regulated by or under any other Act of Parliament.

(4) A regulation made under subsection (1) with respect to a substance may amend the List of Toxic Substances in Schedule I so as to specify the type of regulation that applies with respect to the substance.

(5) Except with respect to Her Majesty in right of Canada, the provisions of a regulation made under subsec-

tion (1) do not apply in any province in respect of which there is in force an order, made under subsection (6), declaring that the provisions do not apply.

(6) Where the Minister and the government of a province agree in writing that there are in force by or under the laws of the province

(a) provisions that are equivalent to the provisions of a regulation made under subsection (1), and

(b) provisions that are similar to sections 108 to 110 for the investigation of alleged offences under provincial environmental legislation,

the Governor in Council may, on the recommendation of the Minister, make an order declaring that the provisions of the regulation do not apply in the province.

(7) The Minister shall make public any agreement referred to in subsection (6).

(8) An agreement referred to in subsection (6) may be terminated by either party giving to the other at least six months notice of termination.

(9) The Governor in Council may, on the recommendation of the Minister, revoke an order made under subsection (6) where the agreement referred to in that subsection is terminated.

(10) The Minister shall include in the annual report required by section 138 a report on the administration of subsections (5) to (9).

35. (1) Where

(a) a substance

(i) is not specified on the List of Toxic Substances in Schedule I and the Ministers believe that it is toxic, or

(ii) is specified on that List and the Ministers believe that it is not adequately regulated, and

(b) the Ministers believe that immediate action is required to deal with a significant danger to the environment or to human life or health,

the Minister may make an interim order in respect of the substance and the order may contain any provision that may be contained in a regulation made under subsection 34(1) or (2).

(2) Subject to subsection (3), an interim order has effect

(a) from the time it is made; and

(b) as if it were a regulation made under section 34.

(3) An interim order ceases to have effect unless it is approved by the Governor in Council within fourteen days after it is made.

(4) The Governor in Council shall not approve an interim order unless

(a) the Minister has, within twenty-four hours after making the order, offered to consult the governments of all the affected provinces to determine whether they are prepared to take sufficient action to deal with the significant danger; and

(b) the Minister has consulted with other ministers of the Crown in right of Canada to determine whether any action can be taken under any other Act of Parliament to deal with the significant danger.

(5) Where the Governor in Council approves an interim order, the Ministers shall, within ninety days after the approval, recommend to the Governor in Council

(a) that a regulation having the same effect as the order be made under section 34; and

(b) if the order was made in respect of a substance that was not specified on the List of Toxic Substances in Schedule I, that the substance be added to that List under section 33.

(6) An interim order

(a) is exempt from the application of sections 3, 5 and 11 of the Statutory Instruments Act; and

(b) shall be published in the Canada Gazette within twenty-three days after it is approved under subsection (3).

(7) No person shall be convicted of an offence consisting of a contravention of an interim order that, at the time of the alleged contravention, was not published in the Canada Gazette in both official languages unless it is proved that at the date of the alleged contravention reasonable steps had been taken to bring the purport of the order to the notice of those persons likely to be affected by it.

(8) An interim order ceases to have effect when a regulation referred to in subsection (5) is made or two years after the order was made, whichever is the earlier.

Constitution Act, 1867, s. 91

91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say, —

. . . . .

27. The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.

. . . . .

And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of

the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

3. Judicial History

A. Court of Québec

6 In Judge Babin's view, the fundamental question was whether Parliament had the power to regulate the emission of substances harmful to the environment when that environment was situated within a province. Applying the criteria set out by this Court in R. v. Crown Zellerbach Canada Ltd., [1988] 1 S.C.R. 401 (S.C.C.), to the Act, he held that the scope of the legislation was unacceptably broad, largely owing to the sweeping definitions given to "environment" and to "toxic". The subject matter of the Act did not exhibit the" singleness, distinctiveness and indivisibility" required by Crown Zellerbach. Since a substance could be labelled "toxic" without even necessarily having a harmful effect on human health, he held that the Act was too broad to be sustained under the peace, order and good government power.

7 For similar reasons, he held that it could not be upheld as criminal law either. Since risk to human health was not necessary for the federal government to move in and impose regulations, he ruled that Part II of the Act was legislation aimed primarily at protecting the environment, not at protecting health. Applying the Reference re Validity of s. 5(a) of Dairy Industry Act (Canada) (Margarine Case) (1948), [1949] S.C.R. 1 (S.C.C.) (hereinafter the" Margarine Reference"), he held that the impugned provisions were essentially regulatory, with some [translation]" provisions of a criminal nature", and that they entrenched on areas of jurisdiction reserved to the provinces. He declared s. 6(a) of the Interim Order ultra vires and struck it down.

B. Québec Superior Court

8 Trottier J. found that the definitions of" environment" and "toxic" in the Act made it clear that the legislation was aimed at regulating toxic substances generally, not just cases where there might be effects spreading beyond the borders of a single province. He examined Crown Zellerbach, supra, and Friends of the Oldman River Society v. Canada (Minister of Transport), [1992] 1 S.C.R. 3 (S.C.C.), and agreed with Judge Babin that the peace, order and good government power did not justify the Act. In order for the emission of toxic substances anywhere in the environment to qualify as a matter of" national concern" within Crown Zellerbach, he held that the provinces would have to be unable to deal with this matter themselves, that it would have to concern Canada as a whole, and that incapacity on the part of one province would have to have real consequences outside the borders of that province. He did not feel these criteria were met in this case, and so he could not support the Act under the peace, order and good government power.

9 He also agreed that the Act was not supportable as criminal law. Examining the provisions at issue, particularly s. 34, he concluded that their aim was truly to regulate, not to prohibit, and that they were accordingly not criminal law within the meaning of R. v. Sault Ste. Marie (City), [1978] 2 S.C.R. 1299 (S.C.C.). Since the Act could not be supported under either head of jurisdiction, he dismissed the appeal.

C. Quebec Court of Appeal

10 Tourigny J.A. (Nichols and Chamberland JJ.A. concurring) characterized the impugned provisions as being in pith and substance aimed at protecting the environment. Applying Crown Zellerbach, supra, she held that the broad provisions of the Act lacked the "singleness, distinctiveness and indivisibility" necessary for a matter of national concern. Nor could the Act be upheld under the emergency doctrine of the peace, order and good

government power. It was not a temporary measure, and the subject matter had not been proved to be "urgent" within the meaning of the Reference re Anti-Inflation Act, 1975 (Canada), [1976] 2 S.C.R. 373 (S.C.C.).

11 Tourigny J.A. also held that the provisions of the Act greatly exceeded the legitimate domain of criminal law, even though they took the form of a set of prohibitions backed by penalties. She could not uphold the legislation under peace, order and good government or under s. 91(27), and so she too dismissed the appeal.

4. Issues

12 On December 21, 1995, the following constitutional question was stated:

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

5. Analysis

13 While the constitutional question mentions the Interim Order and its enabling provisions separately, there can be no doubt that the question of the constitutional validity of the Interim Order will be raised only if its enabling provisions themselves are found to be constitutional. That is, if ss. 34 and 35 of the Act are found to be ultra vires Parliament, it will then become purely theoretical to analyse the constitutionality of the Interim Order. See P. W. Hogg, Constitutional Law of Canada (3rd ed. 1992 (loose-leaf)), vol. 1, at p. 14-7, and D.C. Holland and J.P. McGowan, Delegated Legislation in Canada (1989), at pp. 170-71. Accordingly, these reasons will focus on the constitutionality of the enabling provisions, ss. 34 and 35.

14 In order to address the issues raised by this appeal, it is necessary to understand the legislative context of the impugned provisions. We will therefore begin by briefly setting out this context.

A. The Legislative Structure of the Act

15 The Canadian Environmental Protection Act was adopted by Parliament in 1988. It consolidated and replaced several other laws dealing with various kinds of environmental protection. Part II of the Act, which contains ss. 34 and 35, is called "Toxic Substances" and deals with the identification and regulation of substances which could potentially pose a risk to the environment and/or to human health. According to s. 11 of the Act, a substance is toxic where "it is entering or may enter the environment" under conditions "having or that may have an immediate or long-term harmful effect on the environment"," constituting or that may constitute a danger to the environment on which human life depends", or" constituting or that may constitute a danger in Canada to human life or health". Section 3 broadly defines a "substance" as" any distinguishable kind of organic or inorganic matter, whether animate or inanimate" and the "environment" as "the components of the Earth". "Harmful effect" and" danger" are not defined.

16 The Act instructs the Ministers of the Environment and Health to compile and maintain four lists: the Domestic Substances List (DSL), the Non-Domestic Substances List (NDSL), the Priority Substances List (PSL) and the List of Toxic Substances List (LTS). The DSL includes all substances in use in Canada since 1986 (some 21,700 substances as of January 1991). The NDSL contains all other substances. At present, the NDSL

list includes over 41,000 substances. 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 p. 70. There is a blanket restriction on importing NDSL substances into Canada until they are approved (s. 26).

17 Sections 12 and 13 of the Act require the Ministers to compile a" Priority Substances List" specifying those substances to which priority should be given in determining whether or not they should be placed on the List of Toxic Substances. Under s. 15, either the Minister of the Environment or the Minister of Health may conduct investigations with a view to determining whether a given substance is toxic. The Ministers may examine, inter alia, the nature of the substance in question, its effects on natural biological processes, the extent to which the substance will persist in the environment, its ability to bio-accumulate, methods of controlling it, and methods of reducing the amount of it used. Section 16 provides that the Minister of the Environment can require private citizens to provide him or her with information about, or samples of, substances which the Minister suspects may be toxic and under s. 18, the Minister can order that persons with information about a substance which might be toxic provide that information to him or her.

18 Once a priority listed substance is found to be toxic within the meaning of s. 11, the Ministers may recommend adding it to the List of Toxic Substances. After a federal-provincial advisory committee (established under s. 6) has been given an opportunity to provide its advice, the Governor in Council may add the substance to the list and bring it under the regulatory control of s. 34.

19 Section 34 provides for the regulation of substances on the List of Toxic Substances. The Governor in Council is given extensive powers to prescribe regulations dealing with every conceivable aspect of the listed substance, including: the quantity or concentration in which it can be released; the commercial or manufacturing activity in the course of which it can be released; the quantity of that substance that can be manufactured, imported, owned, sold, or used — including total prohibitions on its manufacture, importation, ownership, use or sale — and likewise the manner in and purposes for which it can be manufactured, imported, processed, used, offered for sale or sold; the manner and conditions in which the substance may be advertised, stored, displayed, handled, transported or offered for transport; the manner, conditions, places and method of disposal of the substance; the maintenance of books and records in respect of the substance; and the extent to which reports must be made to the Minister regarding the monitoring of the substance. Section 34(1)(x) allows the Governor in Council to regulate "any other matter necessary to carry out the purposes of this Part".

20 Where a substance is not on the List of Toxic Substances (or where it is listed, but the Ministers believe that it is not adequately regulated), and where the Ministers believe that immediate action is necessary in respect of that substance, s. 35 allows for the making of" interim orders" without going through the usual procedure. These orders can contain any regulation which could have been made under s. 34, but they remain in effect for only 14 days unless they are approved by the Governor in Council. Approval can be given only if, inter alia, the Ministers have offered to consult with the governments of any affected provinces to see whether they are prepared to take sufficient action to deal with the threat posed by the substance (s. 35(4)). According to s. 35(8), interim orders expire after two years, even if such approval is granted.

21 As stated above, this appeal arose as a result of an interim order made in 1989 by the then Minister of the Environment, the Honourable Lucien Bouchard. It restricted the emission of chlorobiphenyls ("PCBs") to 1 gram per day. The respondent was charged with breaching this Interim Order and challenged the charges by claiming that the Interim Order, as well as the underlying provisions supporting it, were ultra vires Parliament.

22 Finally, the Act prescribes a number of civil and criminal penalties. Section 113(f), for example, creates an offence of contravening regulations made under s. 34. The punishment ranges from a maximum $300,000 fine or six months imprisonment (or both) on summary conviction to a maximum $1 million fine or three years imprisonment (or both) on indictment. A defence of due diligence is allowed for all offences under the Act except those under s. 114 (knowingly providing false or misleading information), s. 115(1)(a) (intentionally or recklessly causing an environmental disaster) or s. 115(1)(b) (showing wanton or reckless disregard for the lives or safety of other persons). These offences require a higher standard of moral culpability.

B. The Pith and Substance of the Legislation

23 The manner of analysing matters involving division of powers is well established: see Hogg, supra, at p. 15-6. The law in question must first be characterized in relation to its "pith and substance", that is, its dominant or most important characteristic. One must then see if the law, seen in this light, can be successfully assigned to one of the government's heads of legislative power.

24 In this case, the Quebec Court of Appeal held that, although one of the effects of Part II of the Act is to protect human life and health, its pith and substance lies in the protection of the environment (at p. 405):

> [TRANSLATION]
>
> It can be seen from a careful examination of the provisions at issue that Parliament has chosen to regulate the release of toxic substances into the environment, for the stated purpose of protecting human life and health. There is of course no question that one of the effects of the adopted measures is to promote the protection of human life and health. However, it is my view that the pith and substance of both the Chlorobiphenyls Interim Order and the enabling provisions pursuant to which it was made is the protection of the environment.

25 The respondent Hydro-Québec and the mis-en-cause the Attorney General of Québec agree with this characterization and suggest that the true goal of the legislation is the regulation of environmental protection, writ large. The appellant, on the other hand, argues that the true object of Part II of the Act is simply the control of pollution caused by toxic substances (like PCBs), which are capable of being dispersed into the environment and whose level of toxicity is such as to pose a serious risk of harm to the environment and to human health and life. Several interveners support this claim, submitting that the impugned provisions seek simply to create national standards for the control of toxic substances. They cite in this regard various government ministry and legislative committee reports: see, e.g., Environment Canada and Health and Welfare Canada, Final Report of the Environmental Contaminants Act Amendments Consultative Committee; Environment Canada, The Right to a Healthy Environment: An Overview of the Proposed Environmental Protection Act (1987).

26 In our view, the dominant characteristic of the impugned legislation is apparent from its plain text. Part II of the Act seeks, at first glance, to protect the environment, human health and life from harm owing to the release of toxic substances. As noted above, it seeks to do so through extensive — indeed, comprehensive — regulation of these substances and the ways in which they may come into contact with the environment. That being said, we believe it is also necessary to consider the sweeping definitions given by the Act to "environment" and" toxic substance". Section 3 defines the" environment" as follows:

> 3. (1) In this Act,

"environment" means the components of the Earth and includes

(a) air, land and water,

(b) all layers of the atmosphere,

(c) all organic and inorganic matter and living organisms, and

(d) the interacting natural systems that include components referred to in paragraphs (a) to (c);

27 Even broader is the definition given to "substance":

"substance" means any distinguishable kind of organic or inorganic matter, whether animate or inanimate, and includes

(a) any matter that is capable of being dispersed in the environment or of being transformed in the environment into matter that is capable of being so dispersed or that is capable of causing such transformations in the environment,

(b) any element or free radical,

(c) any combination of elements of a particular molecular identity that occurs in nature or as a result of a chemical reaction, and

(d) complex combinations of different molecules that originate in nature or are the result of chemical reactions but that could not practicably be formed by simply combining individual constituents, and, except for the purposes of sections 25 to 32, includes

(e) any mixture that is a combination of substances and does not itself produce a substance that is different from the substances that were combined,

(f) any manufactured item that is formed into a specific physical shape or design during manufacture and has, for its final use, a function or functions dependent in whole or in part on its shape or design, and

(g) any animate matter that is, or any complex mixtures of different molecules that are, contained in effluents, emissions or wastes that result from any work, undertaking or activity;

28 The Act is not, as was suggested by the appellant, aimed specifically at chemical substances; rather, it purports to cover "any distinguishable kind of organic or inorganic matter, whether animate or inanimate". Section 11 determines when a substance will be" toxic", and therefore subject to federal regulation:

11. For the purposes of this Part, a substance is toxic if it is entering or may enter the environment in a quantity or concentration or under conditions

(a) having or that may have an immediate or long-term harmful effect on the environment;

(b) constituting or that may constitute a danger to the environment on which human life depends; or

(c) constituting or that may constitute a danger in Canada to human life or health.

29 Paragraphs 11(a) through (c) are not cumulative. It will suffice to bring a substance under federal regulatory control that it pose a risk to human life or health, part of the environment upon which human life depends, or the environment itself.

30 In this regard, we note that we cannot, with respect, agree with our colleague, La Forest J., that the criteria found in s. 11 are simply a" drafting tool" or that to speak of s. 11 as a definition is" misleading". The purpose of this section is to delineate from the category of "substances" (as defined by s. 3) those particular substances which qualify for regulation under ss. 34 and 35. It does so by specifying that "toxic" substances are, for the purposes of Part II, those which are capable of posing one of the threats listed above. This seems to us a clear statement of Parliament's intentions in this area. As was held in R. v. Canadian Pacific Ltd., [1995] 2 S.C.R. 1031 (S.C.C.), at p. 1050:

> [T]he first task of a court construing a statutory provision is to consider the meaning of its words in the context of the statute as a whole. If the meaning of the words when they are considered in this context is clear, there is no need for further interpretation. The basis for this general rule is that when such a plain meaning can be identified this meaning can ordinarily be said to reflect the legislature's intention.

31 Nothing in the Act suggests that "toxic" is to be defined by any criteria other than those given in s. 11. Moreover, no special definition is given to the terms "harmful effect" and" danger". It is, in our view, accordingly clear from the wording of the legislation that "toxicity" is intended to be conditional upon meeting the criteria set out in ss. 3 and 11(a) to (c). If a substance (which can be essentially anything) poses or may pose a risk to human life or health, or to the environment upon which human life depends, or to any aspect of the environment itself, it qualifies as toxic according to the Act and may be made the subject of comprehensive federal regulation.

32 Nor are we convinced that the federal-provincial consultative process contemplated in s. 35(4) of the Act has the effect of changing the character of the impugned provisions. Although we understand why Parliament might wish to seek the opinion of provincial legislatures before enacting regulations which would affect areas under their supervision, nothing in the Act requires that this process be anything other than consultative. That is, once having consulted affected provincial governments, Parliament is left free to pass whatever regulations it sees fit in order to address the threat posed by substances qualifying as "toxic".

33 In light of these factors, we believe the pith and substance of Part II of the Act lies in the wholesale regulation by federal agents of any and all substances which may harm any aspect of the environment or which may present a danger to human life or health. That is, the impugned provisions are in pith and substance aimed at protecting the environment and human life and health from any and all harmful substances by regulating these substances. It remains to be seen whether this can be justified under any of the heads of power listed in s. 91 of the Constitution Act, 1867. In that connection, we will begin by considering s. 91(27), the criminal law power.

C. The Criminal Law Power

34 Parliament has been given broad and exclusive power to legislate in relation to criminal law by virtue of s. 91(27): RJR-Macdonald Inc. c. Canada (Procureur général), [1995] 3 S.C.R. 199 (S.C.C.); Scowby v. Saskatchewan (Board of Inquiry), [1986] 2 S.C.R. 226 (S.C.C.). This power has traditionally been construed generously. As La Forest J. noted in RJR-Macdonald, at p. 240, "[i]n developing a definition of the criminal law, this Court has been careful not to freeze the definition in time or confine it to a fixed domain of activity".

1997 CarswellQue 3705, (sub nom. R. v. Hydro-Québec) 118 C.C.C. (3d) 97, (sub nom. R. v. Hydro-Québec) 151 D.L.R. (4th) 32, 9 C.R. (5th) 157, (sub nom. R. v. Hydro-Québec) 217 N.R. 241, (sub nom. R. v. Hydro-Québec) [1997] 3 S.C.R. 213, 24 C.E.L.R. (N.S.) 167, 1997 CarswellQue 849, 3 S.C.R. 213

35 Nevertheless, the criminal law power has always been made subject to two requirements: laws purporting to be upheld under s. 91(27) must contain prohibitions backed by penalties; and they must be directed at a" legitimate public purpose" (Scowby, at p. 237). As Rand J. stated in the Margarine Reference, supra, at pp. 49-50:

> 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.
>
> . . . . .
>
> Is the prohibition then enacted with a view to a public purpose which can support it as being in relation to criminal law? Public peace, order, security, health, morality: these are the ordinary though not exclusive ends served by that law....

36 These two criteria have been consistently applied: see e.g. R. v. Boggs, [1981] 1 S.C.R. 49 (S.C.C.); Labatt Breweries of Canada Ltd. v. Canada (Attorney General) (1979), [1980] 1 S.C.R. 914 (S.C.C.); R. v. Kripps Pharmacy Ltd., [1983] 2 S.C.R. 284 (S.C.C.); Scowby; see also Knox Contracting Ltd. v. R., [1990] 2 S.C.R. 338 (S.C.C.), at p. 348. Criminal law under s. 91(27) must attempt to achieve a criminal public purpose through the imposition of prohibitions and penalties. Colourable attempts to invade areas of provincial jurisdiction under the guise of criminal legislation will be declared ultra vires. As La Forest J. wrote in RJR-Macdonald, supra, at p. 246:

> The scope of the federal power to create criminal legislation with respect to health matters is broad, and is circumscribed only by the requirements that the legislation must contain a prohibition accompanied by a penal sanction and must be directed at a legitimate public health evil. If a given piece of federal legislation contains these features, and if that legislation is not otherwise a" colourable" intrusion upon provincial jurisdiction, then it is valid as criminal law. ... [Emphasis added.]

37 These comments were made in the context of criminal legislation concerning health, but we see no reason why they should not be of general application as regards s. 91(27). See also R. v. Morgentaler, [1993] 3 S.C.R. 463 (S.C.C.); R. v. Hauser, [1979] 1 S.C.R. 984 (S.C.C.).

38 The next step is therefore to examine the impugned provisions and determine whether they meet these criteria. In our view, they fall short. While the protection of the environment is a legitimate public purpose which could support the enactment of criminal legislation, we believe the impugned provisions of the Act are more an attempt to regulate environmental pollution than to prohibit or proscribe it. As such, they extend beyond the purview of criminal law and cannot be justified under s. 91(27).

(i) A legitimate public purpose

39 The appellant and several interveners urged us to uphold the provisions as related to health, one of the criminal public purposes recognized in the Margarine Reference, supra. In this regard, they cited numerous studies outlining the hazardous effects of PCBs, which were the subject of the Interim Order that gave rise to this litigation. See e.g. Canadian Council of Resource and Environment Ministers, The PCB Story (1986); Health and Welfare Canada, A Review of the Toxicology and Human Health Aspects of PCB's (1978-1982) (1985). With

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

40 In our view, there is no question but that the Act does so. Section 11 provides as follows:

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

41 As noted above, these are not cumulative requirements. It is not necessary that a substance constitute a danger to human life or health for it to be labelled "toxic" and brought under federal control; under s. 11(a), it is enough that it may have a harmful effect on the environment. It is not even necessary to show that the aspect of the environment threatened be one upon which human life depends; this is made a separate category under s. 11(b), and should not, therefore, be read into s. 11(a). A substance which affected groundhogs, for example, but which had no effect on people could be labelled "toxic" under s. 11(a) and made subject to wholesale federal regulation.

42 By defining "toxic" in this way, Parliament has taken explicit steps to ensure that no risk to human life or health, direct or indirect, would have to be proven before regulatory control could be assumed over a given substance. As such, we cannot see how the provisions can be upheld as legislation relating to health. Their scope extends well beyond matters relating to human health into the realm of general ecological protection. Parliament's clear intention was to allow for federal intervention where the environment itself was at risk, whether or not the substances concerned posed a threat to human health and whether or not the aspect of the environment affected was one on which human life depended. Having specifically excluded both direct and indirect danger to human health as preconditions for the application of these provisions, Parliament cannot now say that they were enacted in order to guard against such dangers.

43 To the extent that La Forest J. suggests that this legislation is supportable as relating to health, therefore, we must respectfully disagree. We agree with him, however, that the protection of the environment is itself a legitimate criminal public purpose, analogous to those cited in the Margarine Reference, supra. We would not add to his lucid reasoning on this point, save to state explicitly that this purpose does not rely on any of the other traditional purposes of criminal law (health, security, public order, etc.). To the extent that Parliament wishes to deter environmental pollution specifically by punishing it with appropriate penal sanctions, it is free to do so, without having to show that these sanctions are ultimately aimed at achieving one of the" traditional" aims of criminal law. The protection of the environment is itself a legitimate basis for criminal legislation.

44 However, we still do not feel that the impugned provisions qualify as criminal law under s. 91(27). While they have a legitimate criminal purpose, they fail to meet the other half of the Maragarine Reference test. The structure of Part II of the Act indicates that they are not intended to prohibit environmental pollution, but

simply to regulate it. As we will now explain in further detail, they are not, therefore, criminal law: see Hauser, supra, at p. 999.

(ii) Prohibitions backed by penalties

45 Ascertaining whether a particular statute is prohibitive or regulatory in nature is often more of an art than a science. As Cory J. acknowledged in Knox Contracting, supra, what constitutes criminal law is often "easier to recognize than define" (p. 347). Some guidelines have, however, emerged from previous jurisprudence.

46 The fact that a statute contains a prohibition and a penalty does not necessarily mean that statute is criminal in nature. Regulatory statutes commonly prohibit violations of their provisions or regulations promulgated under them and provide penal sanctions to be applied if violations do, in fact, occur. Any regulatory statute that lacked such prohibitions and penalties would be meaningless. However, as La Forest J. himself recognized in Thomson Newspapers Ltd. v. Canada (Director of Investigation & Research), [1990] 1 S.C.R. 425 (S.C.C.), at pp. 508-17 and in R. v. McKinlay Transport Ltd., [1990] 1 S.C.R. 627 (S.C.C.), at p. 650, the penalties that are provided in a regulatory context serve a "pragmatic" or" instrumental" purpose and do not transform the legislation into criminal law. (Also see Kripps Pharmacy Ltd..) In environmental law, as in competition law or income tax law, compliance cannot always be ensured by the usual regulatory enforcement techniques, such as periodic or unannounced inspections. Hence, in order to ensure that legal standards are being met, a strong deterrent, the threat of penal sanctions, is necessary. La Forest J. relied on this rationale in concluding that the penal sanctions contained in the Competition Act (in Thomson Newspapers) and the Income Tax Act (in McKinlay Transport) did not affect the characterization of those statutes as regulatory in nature for purposes of s. 8 of the Canadian Charter of Rights and Freedoms.

47 At the same time, however, a criminal law does not have to consist solely of blanket prohibitions. It may, as La Forest J. noted in RJR-Macdonald, supra, at pp. 263-64, "validly contain exemptions for certain conduct without losing its status as criminal law.". See also Lord's Day Alliance of Canada v. British Columbia (Attorney General), [1959] S.C.R. 497 (S.C.C.); Morgentaler, supra; R. v. Furtney, [1991] 3 S.C.R. 89 (S.C.C.). These exemptions may have the effect of establishing "regulatory" schemes which confer a measure of discretionary authority without changing the character of the law, as was the case in RJR-Macdonald, supra.

48 Determining when a piece of legislation has crossed the line from criminal to regulatory involves, in our view, considering the nature and extent of the regulation it creates, as well as the context within which it purports to apply. A scheme which is fundamentally regulatory, for example, will not be saved by calling it an "exemption". As Professor Hogg suggests, supra, at p. 18-26, "the more elaborate [a] regulatory scheme, the more likely it is that the Court will classify the dispensation or exemption as being regulatory rather than criminal." At the same time, the subject matter of the impugned law may indicate the appropriate approach to take in characterizing the law as criminal or regulatory.

49 Having examined the legislation at issue in this case, we have no doubt that it is essentially regulatory in nature, and therefore outside the scope of s. 91(27). In order to have an "exemption", there must first be a prohibition in the legislation from which that exemption is derived. Thus, the Tobacco Products Control Act, S.C. 1988, c. 20, at issue in RJR-Macdonald, supra, contained broad prohibitions against the advertising and promotion of tobacco products in Canada. Section 4 of that Act provided that "[n]o person shall advertise any tobacco product offered for sale in Canada". It also provided a labelling requirement in the form of a prohibition, stating in s. 9 that it was illegal to sell tobacco products without printed health warnings. Any exemptions from these

general prohibitions were just that — exceptions to a general rule.

50 Similarly, the Food and Drugs Act, R.S.C. 1985, c. F-27, upheld in Kripps Pharmacy Ltd., supra, contains several prohibitions at the beginning of its Part I. It prohibits, inter alia, the advertising of any food, drug, cosmetic or device with respect to a prescribed list of diseases, disorders or abnormal physical states (s. 3); the selling of food or drug that is adulterated or prepared under unsanitary conditions (ss. 4 and 8); the labelling, packaging, selling or advertising of any food, drug or device in a manner that is false, misleading or deceptive (ss. 5(1), 9(1) and 20(1)); the distribution of any drug as a sample (s. 14); and the selling of any cosmetic that may cause injury to the health of the user or was prepared under unsanitary conditions (s. 16). There are also a number of prohibitions with respect to controlled drugs in Part III of the Act and restricted drugs in Part IV.

51 In the legislation at issue in this appeal, on the other hand, no such prohibitions appear. Section 34(1) of the Canadian Environmental Protection Act reads as follows:

> 34. (1) Subject to subsection (3), the Governor in Council may, on the recommendation of the Ministers and after the federal-provincial advisory committee is given an opportunity to provide its advice under section 6, make regulations with respect to a substance specified on the List of Toxic Substances in Schedule I, including regulations providing for, or imposing requirements respecting,
>
> (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;
>
> (b) the places or areas where the substance may be released;
>
> (c) the commercial, manufacturing or processing activity in the course of which the substance may be released;
>
> (d) the manner in which and conditions under which the substance may be released into the environment, either alone or in combination with any other substance;
>
> (e) the quantity of the substance that may be manufactured, processed, used, offered for sale or sold in Canada;
>
> (f) the purposes for which the substance or a product containing the substance may be imported, manufactured, processed, used, offered for sale or sold;
>
> (g) the manner in which and conditions under which the substance or a product containing the substance may be imported, manufactured, processed or used;
>
> (h) the quantities or concentrations in which the substance may be used;
>
> (i) the quantities or concentrations of the substance that may be imported;
>
> (j) the countries from or to which the substance may be imported or exported;
>
> (k) the conditions under which, the manner in which and the purposes for which the substance may be imported or exported;
>
> (l) the total, partial or conditional prohibition of the manufacture, use, processing, sale, offering for

sale, import or export of the substance or a product containing the substance;

(m) the quantity or concentration of the substance that may be contained in any product manufactured, imported, exported or offered for sale in Canada;

(n) the manner in which and conditions under which and the purposes for which the substance or a product containing the substance may be advertised or offered for sale;

(o) the manner in which and conditions under which the substance or a product or material containing the substance may be stored, displayed, handled, transported or offered for transport;

(p) the packaging and labelling of the substance or a product or material containing the substance;

(q) the manner, conditions, places and method of disposal of the substance or a product or material containing the substance, including standards for the construction, maintenance and inspection of disposal sites;

(r) the submission to the Minister, on request or at such times as are prescribed, of information relating to the substance;

(s) the maintenance of books and records for the administration of any regulation made under this section;

(t) the conduct of sampling, analyses, tests, measurements or monitoring of the substance and the submission of the results to the Minister;

(u) the submission of samples of the substance to the Minister;

(v) the methods and procedures for conducting sampling, analyses, tests, measurements or monitoring of the substance;

(w) circumstances or conditions under which the Minister may, for the proper administration of this Act, modify

(i) any requirement for sampling, analyses, tests, measurements or monitoring, or

(ii) the methods and procedures for conducting any required sampling, analyses, tests, measurements or monitoring; and

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

52 This section is not ancillary to existing prohibitions found elsewhere in the Act or to exemptions to such prohibitions. It is not itself prohibitory in nature. In fact, the only time the word" prohibition" appears in s. 34(1) is in s. 34(1)(l), which provides that the Governor in Council may, at his or her discretion, prohibit the manufacture, import, use or sale of a given substance. Clearly, this is not analogous to the broad general prohibitions found in the statutes cited above.

53 The only other mentions of prohibition in relation to the impugned provisions are in ss. 113(f) and 113(i) of the Act, which provide that failure to comply with a regulation made under ss. 34 or 35 is an offence. The

prohibitions, such as they are, are ancillary to the regulatory scheme, not the other way around. This strongly suggests that the focus of the legislation is regulation rather than prohibition.

54 Moreover, as Professor Hogg notes, supra, at p. 18-24:

> A criminal law ordinarily consists of a prohibition which is to be selfapplied by the persons to whom it is addressed. There is not normally any intervention by an administrative agency or official prior to the application of the law. The law is "administered" by law enforcement officials and courts of criminal jurisdiction only in the sense that they can bring to bear the machinery of punishment after the prohibited conduct has occurred.

55 In this case, there is no offence until an administrative agency" intervenes". Sections 34 and 35 do not define an offence at all: which, if any, substances will be placed on the List of Toxic Substances, as well as the norms of conduct regarding these substances, are to be defined on an on-going basis by the Ministers of Health and the Environment. It would be an odd crime whose definition was made entirely dependent on the discretion of the Executive. This further suggests that the Act's true nature is regulatory, not criminal, and that the offences created by s. 113 are regulatory offences, not" true crimes": see R. v. Wholesale Travel Group Inc., [1991] 3 S.C.R. 154 (S.C.C.), per Cory J. Our colleague, La Forest J., would hold that the scheme of the impugned act is an effective means of avoiding unnecessarily broad prohibitions and carefully targeting specific toxic substances. The regulatory mechanism allows the schemes to be changed flexibly, as the need arises. Of course, simply because a scheme is effective and flexible does not mean it is intra vires the federal Parliament.

56 This is particularly true in light of the striking breadth of the impugned provisions. The 24 listed heads of authority in s. 34 allow for the regulation of every conceivable aspect of toxic substances; in fact, in case anything was left out, s. 34(1)(x) provides for regulations concerning "any other matter necessary to carry out the purposes of this Part". It is highly unlikely, in our opinion, that Parliament intended to leave the criminalization of such a sweeping area of behaviour to the discretion of the Ministers of Health and the Environment.

57 Moreover, this process is further complicated by the equivalency provisions in s. 34(6) of the Act. Under this provision, the Governor in Council may exempt a province from the application of regulations made under ss. 34 or 35 if that province already has equivalent regulations in force there. This would be a very unusual provision for a criminal law. Provinces do not have the jurisdiction to enact criminal legislation, nor can the federal government delegate such jurisdiction to them: Nova Scotia (Attorney General) v. Canada (Attorney General), [1951] S.C.R. 31 (S.C.C.). Any environmental legislation enacted by the provinces must, therefore, be of a regulatory nature. Deferring to provincial regulatory schemes on the basis that they are "equivalent" to federal regulations made under s. 34(1) creates a strong presumption that the federal regulations are themselves also of a regulatory, not criminal, nature.

58 The appellant relies on this Court's decision in RJR-Macdonald, supra, arguing that the statutory regime in this case is analogous to that upheld (on division of powers grounds) in RJR-Macdonald. We believe this reliance is, with respect, misplaced. As noted above, the legislation at issue in RJR-Macdonald contained broad prohibitions, tempered by certain exemptions. The impugned provisions in this case, on the other hand, involve no such general prohibition. In our view, they can only be characterized as a broad delegation of regulatory authority to the Governor in Council. The aim of these provisions is not to prohibit toxic substances or any aspect of their use, but simply to control the manner in which these substances will be allowed to interact with the environment.

59 RJR-Macdonald, supra, may be further distinguished, in our view. The Tobacco Products Control Act addressed a narrow field of activity: the advertising and promotion of tobacco products. The impugned provisions here deal with a much broader area of concern: the release of substances into the environment. This Court has unanimously held that the environment is a subject matter of shared jurisdiction, that is, that the Constitution does not assign it exclusively to either the provinces or Parliament: Oldman River, supra, at p. 63; see also Crown Zellerbach, supra, at pp. 455-56, per La Forest J. A decision by the framers of the Constitution not to give one level of government exclusive control over a subject matter should, in our opinion, act as a signal that the two levels of government are meant to operate in tandem with regard to that subject matter. One level should not be allowed to take over the field so as to completely dwarf the presence of the other. This does not mean that no regulation will be permissible, but wholesale regulatory authority of the type envisaged by the Act is, in our view, inconsistent with the shared nature of jurisdiction over the environment. As La Forest J. noted in his dissenting reasons in Crown Zellerbach, supra, at p. 455, "environmental pollution alone [i.e. as a subject matter of legislative authority] is itself all-pervasive. It is a by-product of everything we do. In man's relationship with his environment, waste is unavoidable."

60 We agree completely with this statement. Almost everything we do involves" polluting" the environment in some way. The impugned provisions purport to grant regulatory authority over all aspects of any substance whose release into the environment "ha[s] or ... may have an immediate or long-term harmful effect on the environment" (s. 11(a)). One wonders just what, if any, role will be left for the provinces in dealing with environmental pollution if the federal government is given such total control over the release of these substances. Moreover, the countless spheres of human activity, both collective and individual, which could potentially fall under the ambit of the Act are apparent. Many of them fall within areas of jurisdiction granted to the provinces under s. 92. Granting Parliament the authority to regulate so completely the release of substances into the environment by determining whether or not they are "toxic" would not only inescapably preclude the possibility of shared environmental jurisdiction; it would also infringe severely on other heads of power assigned to the provinces. In this respect, we can do no better than to quote Professor Gibson, who wrote as follows in his article "Constitutional Jurisdiction over Environmental Management in Canada" (1973), 23 U.T.L.J. 54, at p. 85:

> [I]t is ... obvious that "environmental management" could never be treated as a constitutional unit under one order of government in any constitution that claimed to be federal, because no system in which one government was so powerful would be federal.

61 For all of the above reasons, we are unable to uphold the impugned provisions of the Act under the federal criminal law power. That being said, we wish to add that none of this should be read as foredooming future attempts by Parliament to create an effective national — or, indeed, international — strategy for the protection of the environment. We agree with La Forest J. that achieving such a strategy is a public purpose of extreme importance and one of the major challenges of our time. There are, in this regard, many measures open to Parliament which will not offend the division of powers set out by the Constitution, notably the creation of environmental crimes. Nothing, in our view, prevents Parliament from outlawing certain kinds of behaviour on the basis that they are harmful to the environment. But such legislation must actually seek to outlaw this behaviour, not merely regulate it.

62 Other potential avenues include the power to address interprovincial or international environmental concerns under the peace, order and good government power, which is discussed below. Parliament is not without power to act in pursuit of national policies on environmental protection. But it must do so pursuant to the balance of powers assigned by ss. 91 and 92. Environmental protection must be achieved in accordance with the

Constitution, not in spite of it. As Professor Bowden concludes in her case comment on Oldman River, supra (1992), 56 Sask. L. Rev. 209, at pp. 219-20, "it is only through legislative and policy initiatives at and between both levels of government that satisfactory solutions may be attainable".

63 The impugned provisions are not justified under s. 91(27) of the Constitution Act, 1867. We will now consider the appellant's second argument, namely that the provisions may be upheld under the peace, order and good government power.

D. Peace, Order and Good Government

64 The appellant argues that ss. 34 and 35 of the Act fall within the residual jurisdiction of Parliament under the peace, order and good government (POGG) power to legislate respecting matters of national concern, as provided for in the introductory paragraph of s. 91 of the Constitution Act, 1867. No argument is made with respect to the national emergency branch of POGG, and therefore only the national concern doctrine is at issue.

65 The jurisprudence of this Court with respect to the peace, order and good government provision of the Constitution was thoroughly reviewed by Le Dain J. for the majority in Crown Zellerbach, supra. Relying on Beetz J.'s comments in Reference re Anti-Inflation Act, 1975 (Canada), supra, Le Dain J. adopted the following criteria in order to determine whether a matter constitutes a" national concern", at pp. 431-32:

> 1. The national concern doctrine is separate and distinct from the national emergency doctrine of the peace, order and good government power, which is chiefly distinguishable by the fact that it provides a constitutional basis for what is necessarily legislation of a temporary nature;
>
> 2. The national concern doctrine applies to both new matters which did not exist at Confederation and to matters which, although originally matters of a local or private nature in a province, have since, in the absence of national emergency, become matters of national concern;
>
> 3. For a matter to qualify as a matter of national concern in either sense it must have a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern and a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution;
>
> 4. In determining whether a matter has attained the required degree of singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern it is relevant to consider what would be the effect on extra-provincial interests of a provincial failure to deal effectively with the control or regulation or the intra-provincial aspects of the matter.

66 Assuming that the protection of the environment and of human life and health against any and all potentially harmful substances could be a" new matter" which would fall under the POGG power, we must then determine whether that matter has the required "singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern" and whether its "impact on provincial jurisdiction ... is reconcilable with the fundamental distribution of legislative power under the Constitution". Only if these criteria are satisfied will the matter be one of national concern.

(i) Singleness, distinctiveness and indivisibility

67 The test for singleness, distinctiveness and indivisibility is a demanding one. Because of the high poten-

tial risk to the Constitution's division of powers presented by the broad notion of "national concern", it is crucial that one be able to specify precisely what it is over which the law purports to claim jurisdiction. Otherwise," national concern" could rapidly expand to absorb all areas of provincial authority. As Le Dain J. noted in Crown Zellerbach, supra, at p. 433, once a subject matter is qualified of national concern," Parliament has an exclusive jurisdiction of a plenary nature to legislate in relation to that matter, including its intra-provincial aspects".

68 The appellant submits that the object of Part II of the Act is limited in scope m that there is a clear distinction between chemical substances whose pollutant effects are diffuse and persist in the environment and other types of pollution whose effects are temporary and more local in nature. Therefore, being a single, distinct and indivisible form of pollution which can cross provincial boundaries, chemical pollution requires particular national measures for its proper control. However, as we have shown above, Part II of the Act applies to a wide army of substances, not only to chemical polluants. Moreover, the impugned legislation is not limited to substances having interprovincial effects.

69 The definition of "toxic substances" in s. 11, combined with the definition of "substance" found in s. 3, is an all-encompassing definition with no clear limits. Many human activities could involve the use of materials falling within the meaning of "toxic substances" as defined by the impugned legislation. As noted earlier, the definition of "substance" includes "organic or inorganic matter, whether animate or inanimate". Paragraphs (a) through (g) of the definition in s. 3(1) do little to narrow this initial broad scope. Paragraph (g), which refers to "any animate matters ... contained in effluents, emissions or wastes that result from any work, undertaking or activity" could, on its plain wording, conceivably include any effluent containing human or animal waste, garbage containing food remnants, or similar items commonly dealt with by municipal waste disposal services.

70 Furthermore, by virtue of s. 11(a), a "toxic substance" may be any form of distinguishable matter which has or even simply may have "an immediate or long-term harmful effect on the environment". Section 11(a) equates "toxic" with" harmful effect". In our opinion, this is a very broad definition of" toxic". While it would be difficult to disagree that" toxic" necessarily implies a "harmful effect", the converse, "that which has a harmful effect is toxic" is more questionable and quite exceeds the plain and ordinary meaning of" toxic". "Toxic" is more narrowly defined in The Concise Oxford Dictionary (9th ed. 1995), at p. 1475, as "of or relating to poison (toxic symptoms); poisonous (toxic gas); caused by poison (toxic anaemia)". A more circumscribed definition of "toxic substances" would be required in ss. 11 and 3 of the Act in order to give substance to the appellant's submission that this legislation is aimed at a distinct form of pollution, namely chemical pollution.

71 Section 15 does specify some criteria to refine the notion of" toxic substance". However, it does not narrow the broad definition of that notion. Section 15 only offers investigatory guidelines. The Minister of the Environment and the 6Governor in Council are not legally bound by any of the investigatory reports prepared pursuant to s. 15. The scope of the Minister's power to regulate in ss. 34 and 35 is limited only by the broad definition of "toxic substance" and" environment" in ss. 11 and 3. Moreover, the investigatory process provided for in s. 15 can be totally bypassed with respect to the issuing of an interim order pursuant to s. 35. Under the powers conferred by s. 35(1), the Minister of the Environment may issue an interim order, which has the same regulatory scope and effect as a regulation under s. 34(1) or (2), whenever satisfied that "immediate action is required to deal with a significant danger to the environment or to human life or health".

72 In sum, the investigatory guidelines contemplated by s. 15 do not effectively narrow the broad definitions given to "toxic substances" in ss. 11 and 3; that is, they do not guarantee that only the most serious, diffuse and persistent toxic substances will be caught by the regulatory power conferred by ss. 34 and 35.

1997 CarswellQue 3705, (sub nom. R. v. Hydro-Québec) 118 C.C.C. (3d) 97, (sub nom. R. v. Hydro-Québec) 151 D.L.R. (4th) 32, 9 C.R. (5th) 157, (sub nom. R. v. Hydro-Québec) 217 N.R. 241, (sub nom. R. v. Hydro-Québec) [1997] 3 S.C.R. 213, 24 C.E.L.R. (N.S.) 167, 1997 CarswellQue 849, 3 S.C.R. 213

73 Nor are we convinced by the argument of the interveners Pollution Probe et al. that federal practice demonstrates that the impugned legislation is specifically targeted to address only those toxic substances that pose the greatest harm to human health or to the environment. It is true, as the interveners note, that out of the over 21,000 substances on the Domestic Substances List, relatively few, i.e. 44, were placed on the Priority Substances List by the federal government by 1989. Of these 44 substances, just 25 were determined to be toxic, and only a subset of these 25 have been subject to regulations. However, the constitutional validity of a statute cannot depend on the ebb and flow of existing government practice or the manner in which discretionary powers appear thus far to be exercised. It is the boundaries to the exercise of that discretion and the scope of the regulatory power created by the impugned legislation that are at issue here. It is no answer to a charge that a law is unconstitutional to say that it is only used sparingly. If it is unconstitutional, it cannot be used at all.

74 With respect to geographical limits, although the preamble of the Act suggests that its ambit is restricted to those substances that" cannot always be contained within geographic boundaries", nowhere in Part II or the enabling provisions at issue is there any actual limitation based on territorial considerations. The notion of" environment" as defined in s. 3 includes all conceivable environments without regard to provincial boundaries. Thus, Part II applies with equal force to "toxic substances" that are wholly situated within a province or whose effects are localized or entirely intraprovincial and to those which move across interprovincial or international borders.

75 The majority of this Court in Crown Zellerbach, supra, at pp. 436-37, found marine pollution to constitute a single, distinct, and indivisible subject-matter, on the basis that the Ocean Dumping Control Act, S.C. 1974-75-76, c. 55, distinguished between the pollution of salt water and the pollution of fresh water, both types of waters having different compositions and characteristics. In Part II of the Canadian Environmental Protection Act, there is no analogous clear distinction between types of toxic substances, either on the basis of degree of persistence and diffusion into the environment and the severity of their harmful effect or on the basis of their extraprovincial aspects. The lack of any distinctions similar to those in the legislation upheld in Crown Zellerbach means that the Act has a regulatory scope which can encroach widely upon several provincial heads of power, notably, s. 92(13)" property and civil rights", s. 92(16) "matters of a merely local or private nature", and s. 92(10) "local works and undertakings". In our view, this failure to circumscribe the ambit of the Act demonstrates that the enabling provisions lack the necessary singleness, distinctiveness and indivisibility.

76 Another criterion that can be used to determine whether the subject matter sought to be regulated can be sufficiently distinguished from matters of provincial interest is to consider whether the failure of one province to enact effective regulation would have adverse effects on interests exterior to the province. This indicator has also been named the" provincial inability" test (see Crown Zellerbach, supra, at pp. 432-34). If the impugned provisions of the Act were indeed restricted to chemical substances, like PCBs, whose effects are diffuse, persistent and serious, then a prima facie case could be made out as to the grave consequences of any one province failing to regulate effectively their emissions into the environment. However, the s. 11(a) threshold of "immediate or long-term harmful effect on the environment" also encompasses substances whose effects may only be temporary or local. Therefore, the notion of "toxic substances" as defined in the Act is inherently divisible. Those substances whose harmful effects are only temporary and localized would appear to be well within provincial ability to regulate. To the extent that Part II of the Act includes the regulation of" toxic substances" that may only affect the particular province within which they originate, the appellant bears a heavy burden to demonstrate that provinces themselves would be incapable of regulating such toxic emissions. It has not discharged this burden before this Court.

77 The s. 34(6) equivalency provision also implicitly undermines the appellant's submission that the provinces are incapable of regulating toxic substances. If the provinces were unable to regulate, there would be even more reason for the federal government not to agree to withdraw from the field. Section 34(6) demonstrates that the broad subject matter of regulating toxic substances, as defined by the Act, is inherently or potentially divisible.

78 These reasons confirm that the subject matter does not fulfill the characteristics of singleness, distinctiveness and indivisibility required to qualify as a national concern matter.

(ii) Impact on provincial jurisdiction

79 Having concluded that the requirement of singleness, distinctiveness and indivisibility was not satisfied, it is unnecessary to examine the second criterion of the national concern test. The subject matter at issue does not qualify as a national concern matter and, since it was not suggested that it could be upheld as a matter of national emergency, it is therefore not justified by the peace, order and good government power.

E. The Trade and Commerce Power

80 The interveners, Pollution Probe et al. submit, in the alternative, that ss. 34 and 35 of the Act as well as the Interim Order can be sustained as an exercise of the federal trade and commerce power under s. 91(2) of the Constitution Act, 1867. More specifically, they argue that the "general trade and commerce power" recognized in City National Leasing Ltd. v. General Motors of Canada Ltd., [1989] 1 S.C.R. 641 (S.C.C.), can justify the federal regulations, which are aimed at controlling the use and release of toxic substances in the course of commercial activities.

81 Pollution Probe et al. refer to Laskin C.J.'s comments in Kripps Pharmacy Ltd., supra, at p. 288, that the part of the Food and Drugs Act that regulated the labelling, packaging and manufacture of food and drug products "invites the application of the trade and commerce power". These comments, they argue, should similarly apply to those parts of the Interim Order and s. 34(1) that address the manufacture, sale and commercial use of PCBs and other toxic substances.

82 We reject these submissions for two main reasons. First, it is clear that the "pith and substance" of the impugned legislation does not concern trade and commerce, even if trade and commerce may be affected by the application of these provisions. The interveners Pollution Probe et al. seem to recognize this insofar as they submit that the trade and commerce power merely provides "supplemental authority" for upholding the Interim Order and the enabling provisions.

83 Secondly, even if it could be assumed that certain parts of s. 34(1) of the Act were aimed at the regulation of trade and commerce (e.g. those paragraphs dealing with importing and exporting), the remainder of s. 34(1) would, based on the arguments adduced above, be ultra vires Parliament and would have to be struck down. Assuming that the "trade and commerce" elements could be saved, therefore, they would have to be" severed" from the paragraphs of s. 34(1) that would be struck down. It is not altogether clear that this could be done, particularly since the portion of the statute remaining after severance must be capable of standing independently of the severed portion. In this case, the paragraphs are too" inextricably bound" to be able to survive independently (see Hogg, supra, at p. 15-21). For these reasons, we cannot agree with the interveners' submission that the impugned legislation can be justified as an exercise of the federal trade and commerce power.

1997 CarswellQue 3705, (sub nom. R. v. Hydro-Québec) 118 C.C.C. (3d) 97, (sub nom. R. v. Hydro-Québec) 151 D.L.R. (4th) 32, 9 C.R. (5th) 157, (sub nom. R. v. Hydro-Québec) 217 N.R. 241, (sub nom. R. v. Hydro-Québec) [1997] 3 S.C.R. 213, 24 C.E.L.R. (N.S.) 167, 1997 CarswellQue 849, 3 S.C.R. 213

6. Conclusions and Disposition

84 For the above reasons, we find that the impugned provisions are not justified under any of the heads of power granted to Parliament by s. 91. We would therefore declare them ultra vires and dismiss the appellant's appeal with costs. We would answer the constitutional question as follows:

> Do s. 6(a) of the Chlorobiphenyls Interim Oder, PC 1989-296, and the enabling legislative provisions, ss. 34 and 35 of the Canadian Environmental Protection Act, R.S.C., 1985, c. 16 (4th Supp.), fall in whole or in part within the jurisdiction of the Parliament of Canada to make laws for the peace, order and good government of Canada pursuant to s. 91 of the Constitution Act, 1867 or its criminal law jurisdiction under s. 91(27) of the Constitution Act, 1867 or otherwise fall within its jurisdiction?
>
> Answer: No.

La Forest J. **(L'Heureux-Dubé, Gonthier, Cory and McLachlin JJ. concurring):**

85 This Court has in recent years been increasingly called upon to consider the interplay between federal and provincial legislative powers as they relate to environmental protection. Whether viewed positively as strategies for maintaining a clean environment, or negatively as measures to combat the evils of pollution, there can be no doubt that these measures relate to a public purpose of superordinate importance, and one in which all levels of government and numerous organs of the international community have become increasingly engaged. In the opening passage of this Court's reasons in what is perhaps the leading case, Friends of the Oldman Friends of the Oldman River Society v. Canada (Minister of Transport), [1992] 1 S.C.R. 3 (S.C.C.), at pp. 16-17, the matter is succinctly put this way:

> The protection of the environment has become one of the major challenges of our time. To respond to this challenge, governments and international organizations have been engaged in the creation of a wide variety of legislative schemes and administrative structures.

86 The all-important duty of Parliament and the provincial legislatures to make full use of the legislative powers respectively assigned to them in protecting the environment has inevitably placed upon the courts the burden of progressively defining the extent to which these powers may be used to that end. In performing this task, it is incumbent on the courts to secure the basic balance between the two levels of government envisioned by the Constitution. However, in doing so, they must be mindful that the Constitution must be interpreted in a manner that is fully responsive to emerging realities and to the nature of the subject matter sought to be regulated. Given the pervasive and diffuse nature of the environment, this reality poses particular difficulties in this context.

87 This latest case in which this Court is required to define the nature of legislative powers over the environment is of major significance. The narrow issue raised is the extent to and manner in which the federal Parliament may control the amount of and conditions under which Chlorobiphenyls (PCBs) — substances well known to pose great dangers to humans and the environment generally — may enter into the environment. However, the attack on the federal power to secure this end is not really aimed at the specific provisions respecting PCBs. Rather, it puts into question the constitutional validity of its enabling statutory provisions. What is really at stake is whether Part II ("Toxic Substances") of the Canadian Environmental Protection Act, R.S.C. 1985, c. 16 (4th

Supp.), which empowers the federal Ministers of Health and of the Environment to determine what substances are toxic and to prohibit the introduction of such substances into the environment except in accordance with specified terms and conditions, falls within the constitutional power of Parliament.

Facts

88 The case arose in this way. The respondent Hydro-Québec allegedly dumped polychlorinated biphenyls (PCBs) into the St. Maurice River in Quebec in early 1990. On June 5, 1990, it was charged with the following two infractions under s. 6(a) of the Chlorobiphenyls Interim Order, P.C. 1989-296 (hereafter "Interim Order"), which was adopted and enforced pursuant to ss. 34 and 35 of the Canadian Environmental Protection Act:

> [TRANSLATION]
>
> [1] From January 1 to January 3, 1990, did unlawfully release more than 1 gram per day of chlorobiphenyls into the environment contrary to s. 6(a) of the Chlorobiphenyls Interim Order, P.C. 1989-296 of February 23, 1989, thereby committing an offence under ss. 113(i) and (o) of the Canadian Environmental Protection Act, R.S.C., 1988, c. 16 (4th Supp.);
>
> [2] On or about January 8, 1990, following the release into the environment, in contravention of s. 6(a) of the Chlorobiphenyls Interim Order, P.C. 1989-296 of February 23, 1989, of a substance specified in Schedule I to the Canadian Environmental Protection Act, R.S.C., 1988, c. 16 (4th Supp.), to wit: chlorobiphenyls ... did fail to report the matter to an inspector as soon as possible in the circumstances contrary to s. 36(1)(a) of the said Act, thereby committing an offence under ss. 113(h) and (o) of the said Act.

On July 23, 1990, the respondent pleaded not guilty to both charges before the Court of Québec.

89 On March 4, 1991, the respondent Hydro-Québec brought a motion before Judge Michel Babin seeking to have ss. 34 and 35 of the Act as well as s. 6(a) of the Interim Order itself declared ultra vires the Parliament of Canada on the ground that they do not fall within the ambit of any federal head of power set out in s. 91 of the Constitution Act, 1867. The Attorney General of Quebec intervened in support of the respondent's position. Judge Babin granted the motion on August 12, 1991 ([1991] R.J.Q. 2736 (C.Q.)), and an appeal to the Quebec Superior Court was dismissed by Trottier J. on August 6, 1992 ([1992] R.J.Q. 2159 (Que. S.C.)). A further appeal to the Court of Appeal of Quebec was dismissed on February 14, 1995: [1995] R.J.Q. 398, 67 Q.A.C. 161, 17 C.E.L.R. (N.S.) 34, [1995] Q.J. No. 143 (Que. C.A.) (QL). Leave to appeal to this Court was granted on October 12, 1995: [1995] 4 S.C.R. vii.

Judicial History

A. Court of Québec

90 The principal submission of the respondent before Judge Babin was that s. 6(a) of the Interim Order as well as the enabling provisions of the Canadian Environmental Protection Act pursuant to which it was adopted are ultra vires Parliament on the ground that they cannot be justified as a matter of" national concern" under the "Peace, Order and Good Government" clause of s. 91 or the criminal law power (s. 91(27)) or under any other federal head of power under s. 91 of the Constitution Act, 1867. The appellant argued that the provisions in question could be justified as a matter of national concern as well as under the criminal law power. Judge Babin considered that the main issue in the dispute as regards either head of power was whether Parliament has the

power to enact provisions dealing with disposal of toxic substances into the environment when the "environment" in question lies exclusively within the borders of a single province.

91 Beginning with the question of whether or not the provisions at issue fall within the "national concern" doctrine under the peace, order and good government clause, Judge Babin applied the criteria enunciated by this Court in R. v. Crown Zellerbach Canada Ltd., [1988] 1 S.C.R. 401 (S.C.C.), for determining when a matter may properly be considered as falling within this power. He found that particularly in view of the wide definitions given to the terms "environment" and" toxic" under ss. 3 and 11 of the Canadian Environmental Protection Act, the provisions in question were unacceptably broad in that they could not be said to be limited in scope to a subject matter having the" singleness, distinctiveness and indivisibility" required under the Crown Zellerbach test. For much the same reasons, he found that to attribute exclusively to Parliament the subject matter at which the provisions are aimed would be to infringe significantly upon various areas of provincial competence and disturb the federal-provincial distribution of powers to an unacceptable degree.

92 Judge Babin also found that the provisions in question did not fall within the ambit of the criminal law power. Specifically, he held that while the provisions at issue are clearly directed at protecting human life and health, they are also directed at protecting the environment in general and that while the former aim constitutes a" criminal public purpose" in the sense set out in Reference re Validity of s. 5(a) of Dairy Industry Act (Canada), (Margarine Case) (1948), [1949] S.C.R. 1 (S.C.C.) (the Margarine Reference), at p. 50, the latter does not. Similarly, he found that the mere fact that the Act in question here contains provisions setting out penalties for violations of its terms does not, in and of itself, affect the Act's "regulatory nature". Having found that the provisions at issue did not fall within either the "national concern" doctrine of the peace, order and good government clause or the criminal law power (or within any other head of federal competence), Judge Babin held s. 6(a) of the Interim Order ultra vires Parliament.

B. Quebec Superior Court

93 On the appeal to the Superior Court, Trottier J. began by explaining that, pursuant to this Court's reasons in Oldman River, supra, the environment per se does not constitute a specific domain of legislative competence under ss. 91 and 92 of the Constitution Act, 1867. Holding in much the same manner as Judge Babin that the definitions of "toxic" and "environment" are extremely broad, Trottier J. held that the provisions in question could not be upheld as intra vires under the national concern doctrine. Similarly, he found the provisions could not be justified under the criminal law power on the basis that their true purpose was not to prohibit activity but to regulate it. Finding no other head of power to be applicable, he dismissed the appeal.

C. Quebec Court of Appeal

94 On the appeal to the Quebec Court of Appeal, Tourigny J.A., writing for the court, began her reasons by holding that even though one of the effects of the Act in question is to protect human life and health, the true "pith and substance" both of s. 6(a) of the Interim Order and of the enabling provisions of the Act under which it was adopted is "the protection of the environment". Following this Court's decision in Oldman River, supra, Tourigny J.A. recognized that neither Parliament nor the provinces are vested with legislative competence regarding the environment per se and that environmental legislation will therefore only fall within the jurisdiction of either level of government if it is ancillary to a head of power listed in ss. 91 or 92 of the Constitution Act, 1867.

95 Applying this principle to the matter at hand, Tourigny J.A. first examined whether the provisions in

question can be said to fall within federal competence under the national concern doctrine. In light of this Court's decision in Crown Zellerbach, supra, she found the provisions could not be intra vires on this ground. She then examined the appellant's submission that the provisions could be justified under the" national emergency" doctrine under the peace, order and good government clause. She rejected this argument as well, holding both that there exists no "emergency" justifying the adoption of the provisions, and that, in any case, the provisions are not sufficiently temporary in nature as to satisfy the strict requirements of the national emergency doctrine.

96 Finally, Tourigny J.A. analysed the appellant's submission that the impugned provisions fall within Parliament's jurisdiction over criminal law. While she recognized that this power has historically been given a relatively broad reading, she found that these provisions greatly exceed the ambit of what may properly be considered criminal law. She, therefore, held that the provisions in question do not fall within this federal power even though the Act does prohibit certain conduct and provides for the enforcement of such prohibitions through penalties.

D. Constitutional Questions

97 On December 21, 1995, Lamer C.J. framed the following constitutional question:

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

98 As can be seen, the constitutional question first raises the constitutionality of s. 6(a) of the Interim Order, which reads as follows:

> 6. The quantity of chlorobiphenyls that may be released into the environment shall not exceed 1 gram per day in respect of any item of equipment or any receptacle or material containing equipment in the course of the operation, servicing, maintenance, decommissioning, transporting or storage of
>
> > (a) electrical capacitors and electrical transformers and associated electrical equipment manufactured in or imported into Canada before July 1, 1980; ...

However, it also raises the validity of the enabling provisions of the Act, specifically ss. 34 and 35. While it is possible to challenge the constitutional validity of the Interim Order directly, the real issue, as is evident from the reasons of the courts appealed from, is the validity of the enabling provisions, cited infra, and the main thrust of these reasons will be concerned with that issue. It is clear that the Interim Order will be of no force or effect if the enabling provisions pursuant to which it was adopted are themselves found to be ultra vires. As stated by Professor Hogg: "The invalidity of a statute which is ultra vires the enacting legislative body will of course destroy any powers which the statute purported to delegate to the government" (P. W. Hogg, Constitutional Law of Canada (3rd ed. 1992 (loose-leaf)), vol. 1, at p. 14-7); see also D.C. Holland and J. P. McGowan, Delegated Legislation in Canada (1989), at pp. 170-71.

Overview of the Legislative Structure of the Canadian Environmental Protection Act

1997 CarswellQue 3705, (sub nom. R. v. Hydro-Québec) 118 C.C.C. (3d) 97, (sub nom. R. v. Hydro-Québec) 151 D.L.R. (4th) 32, 9 C.R. (5th) 157, (sub nom. R. v. Hydro-Québec) 217 N.R. 241, (sub nom. R. v. Hydro-Québec) [1997] 3 S.C.R. 213, 24 C.E.L.R. (N.S.) 167, 1997 CarswellQue 849, 3 S.C.R. 213

99 The Canadian Environmental Protection Act was adopted by Parliament in 1988 with a view to consolidating and replacing several other laws dealing with different types of environmental protection. Sections 34 and 35 appear in Part II, entitled "Toxic Substances". This Part is, in large measure, an adaptation of the Environmental Contaminants Act, R.S.C. 1985, c. E-12 (which was abrogated when the present Act came into force). It should not be overlooked, however, that other parts of the Act are relevant to toxic substances. The subject of toxic substances is introduced in the preamble, which after declaring that the protection of the environment is essential to the well-being of Canada sets forth the following clauses that are of direct relevance in this case:

> WHEREAS the presence of toxic substances in the environment is a matter of national concern;
>
> WHEREAS toxic substances, once introduced into the environment, cannot always be contained within geographic boundaries;
>
> WHEREAS the Government of Canada in demonstrating national leadership should establish national environmental quality objectives, guidelines and codes of practice;
>
> . . . . .
>
> AND WHEREAS Canada must be able to fulfil its international obligations in respect of the environment;

As well, the first substantive provision of the Act, s. 2, in para. 2(j) imposes the following duty on the Canadian government:

> 2. In the administration of this Act, the Government of Canada shall, having regard to the Constitution and laws of Canada,
>
> . . . . .
>
> (j) endeavour to act expeditiously to assess whether substances in use in Canada are toxic or capable of becoming toxic.

100 Moreover, Schedule I of the Act under the heading "List of Toxic Substances" originally set forth nine such substances with the type of regulations applicable to them.

101 Part II of the Act deals first with the identification of other substances that could pose a risk either to the environment or to human life and health, and then provides a procedure for adding them to the List of Toxic Substances in Schedule I and for imposing by regulations requirements respecting the terms and conditions under which substances so listed may be released into the environment.

102 Part II begins with s. 11, which reads:

> 11. For the purposes of this Part, a substance is toxic if it is entering or may enter the enviromnent 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 enviroment on which human life depends; or

(c) constituting or that may constitute a danger in Canada to human life or health.

Two things should be noted about this provision. First, it is confined in its application to Part II. Secondly, while the provision was in the course of argument described as a "definition", it is by no means a true definition, a matter about which I shall comment more extensively later. Before one can know if a substance can give rise to the real or possible harmful effects or dangers spelled out in paras. (a) to (c), some assessment or test must be made to determine whether the quantity or concentration or conditions under which a substance enters the environment is sufficient to make it toxic. This is made clear by s. 12(1) which, in providing for the creation of a Priority Substances List, authorizes the Ministers of Health and of the Environment to "specify substances in respect of which the Ministers are satisfied priority should be given in assessing whether they are toxic or capable of becoming toxic" (emphasis added). This expression, I observe, is repeated throughout Part II in the provisions regarding assessments.

103 The manner in which the Ministers may conduct investigations to determine whether or not a given "substance" is" toxic" are set forth in s. 15. They may examine, inter alia, the nature of the substance in question, its effects on natural biological processes, the extent to which the substance will persist in the environment, methods of controlling it, and methods of reducing the amount used. Section 15 reads:

15. For the purpose of assessing whether a substance is toxic or is capable of becoming toxic, or for the purpose of assessing the need for measures to control a substance, either Minister may

(a) collect data and conduct investigations respecting

(i) the nature of the substance,

(ii) the presence of the substance in the environment and the effect of its presence on the environment or on human life or health,

(iii) the extent to which the substance can become dispersed and will persist in the environment,

(iv) the ability of the substance to become incorporated or accumulate in biological tissues or to interfere with biological processes,

(v) methods of controlling the presence of the substance in the environment,

(vi) methods for testing the effects of the presence of the substance in the environment,

(vii) development and use of alternatives to the substances,

(viii) quantities, uses and disposal of the substance, and

(ix) methods of reducing the amount of the substance used, produced or released into the environment;

(b) correlate and evaluate any data collected pursuant to paragraph (a) and publish results of any investigations carried out pursuant to that paragraph; and

(c) provide information and consultative services and make recommendations respecting measures to control the presence of the substance in the environment.

Under s. 16, the Minister of the Environment may require that private citizens provide him or her with information about, or samples of, substances they suspect may be toxic, and under s. 18, the Minister can order that persons with information about a substance that may be toxic provide that information.

104 Sections 12 and 13 of the Act require the Ministers of the Environment and Health to compile a "Priority Substances List" specifying those substances in respect of which priority should be given in determining whether or not they are toxic. Once the Ministers have assessed a priority listed substance, they may decide either to recommend or not to recommend that the substance be added to the List of Toxic Substances in Schedule I. Where the Ministers so recommend, the Governor in Council by virtue of s. 33 may, after a federal-provincial advisory committee (established under s. 6) has been given an opportunity to provide its advice, make an order adding the substance to the List of Toxic Substances. When that is done, the Governor in Council is empowered under s. 34 to make detailed regulations imposing requirements respecting the manner of dealing with any substance listed in Schedule I. Failure to comply with these regulations is punishable by a fine or imprisonment (s. 113(f), (o) and (p)). Since s. 34 (of which s. 34(1) is of prime importance) is under attack in this case, I cite it at length:

> **34**.(1) Subject to subsection (3), the Governor in Council may, on the recommendation of the Ministers and after the federal-provincial advisory committee is given an opportunity to provide its advice under section 6, make regulations with respect to a substance specified on the List of Toxic Substances in Schedule I, including regulations providing for, or imposing requirements respecting,
>
> (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;
>
> (b) the places or areas where the substance may be released;
>
> (c) the commercial, manufacturing or processing activity in the course of which the substance may be released;
>
> (d) the manner in which and conditions under which the substance may be released into the environment, either alone or in combination with any other substance;
>
> (e) the quantity of the substance that may be manufactured, processed, used, offered for sale or sold in Canada;
>
> (f) the purposes for which the substance or a product containing the substance may be imported, manufactured, processed, used, offered for sale or sold;
>
> (g) the manner in which and conditions under which the substance or a product containing the substance may be imported, manufactured, processed or used;
>
> (h) the quantities or concentrations in which the substance may be used;
>
> (i) the quantities or concentrations of the substance that may be imported;
>
> (j) the countries from or to which the substance may be imported or exported;
>
> (k) the conditions under which, the manner in which and the purposes for which the substance may be

imported or exported;

(l) the total, partial or conditional prohibition of the manufacture, use, processing, sale, offering for sale, import or export of the substance or a product containing the substance;

(m) the quantity or concentration of the substance that may be contained in any product manufactured, imported, exported or offered for sale in Canada;

(n) the manner in which and conditions under which and the purposes for which the substance or a product containing the substance may be advertised or offered for sale;

(o) the manner in which and conditions under which the substance or a product or material containing the substance may be stored, displayed, handled, transported or offered for transport;

(p) the packaging and labelling of the substance or a product or material containing the substance;

(q) the manner, conditions, places and method of disposal of the substance or a product containing the substance, including standards for the construction, maintenance and inspection of disposal sites;

(r) the submission to the Minister, on request or at such times as are prescribed, of information relating to the substance;

(s) the maintenance of books and records for the administration of any regulation made under this section;

(t) the conduct of sampling, analyses, tests, measurements or monitoring of the substance and the submission of the results to the Minister;

(u) the submission of samples of the substance to the Minister;

(v) the methods and procedures for conducting, sampling, analyses, tests, measurements or monitoring of the substance;

(w) circumstances or conditions under which the Minister may, for the proper administration of this Act, modify

(i) any requirement for sampling, analyses, tests, measurements or monitoring, or

(ii) the methods and procedures for conducting any required sampling, analyses, tests, measurements or monitoring; and

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

(2) The Governor General in Council may, on the recommendation of the Ministers, make regulations providing for the exemption of the following activities from the application of this Part and any regulations made under it, namely,

(a) the import, export, manufacture, use, processing, transport, offering for transport, handling, packaging, labelling, advertising, sale, offering for sale, displaying, storing, disposing or releasing into the

environment of any substance or a product or material containing any substance; and

(b) the release of any substance into the environment, for a period specified in the regulations, from any source or type of source.

(3) The Governor in Council shall not make a regulation under subsection (1) in respect of any substance if, in the opinion of the Governor in Council, the regulation regulates an aspect of the substance that is regulated by or under any other Act of Parliament.

(4) A regulation made under subsection (1) with respect to a substance may amend the list of Toxic Substances in Schedule I so as to specify the type of regulation that applies with respect to that substance.

(5) Except with respect to Her Majesty in right of Canada, the provisions of a regulation made under subsection (1) do not apply in any province in respect of which there is in force an order, made under subsection (6), declaring that the provisions do not apply.

(6) Where the Minister and the government of a province agree in writing that there are in force by or under the laws of the province

(a) provisions that are equivalent to the provisions of a regulation made under subsection (1), and

(b) provisions that are similar to sections 108 to 110 for the investigation of alleged offences under provincial environmental legislation,

the Governor in Council may, on the recommendation of the Minister, make an order declaring that the provisions of the regulation do not apply in the province.

(7) The Minister shall make public any agreement referred to in subsection (6).

(8) An agreement referred to in subsection (6) may be terminated by either party giving to the other at least six months notice of termination.

(9) The Governor in Council may, on the recommendation of the Minister, revoke an order made under subsection (6) where the agreement referred to in that subsection is terminated.

(10) The Minister shall include in the annual report required by section 138 a report on the administration of subsections (5) to (9).

105 Section 35 is ancillary to s. 34. It provides that where a substance is not listed in Schedule I (or where it is listed but the Ministers believe it is not adequately regulated) and the Ministers believe that immediate action is required in respect of that substance, the Minister of the Environment may make an "interim order" in respect of the substance and make any provision that may be made in a regulation made under ss. 34(1) and (2). Such provisions may include setting limits on the quantity and concentration of emissions of the substance, controlling the areas where the substance may be released, controlling the commercial manufacturing or processing activity in the course of which the substance is released, stipulating the manner and conditions in which the substance may be advertised or offered for sale and regulating the packaging and labelling of the substance or of a material containing the substance. An interim order ceases to have effect within 14 days unless it is approved by the Governor in Council (s. 35(3)), and such approval is not to be given unless, within 24 hours of making the

order, the Minister has consulted with the affected provincial governments to determine whether they are prepared to take sufficient action to deal with the significant danger and has also consulted other federal Ministers to determine whether the matter can be dealt with under another Act of Parliament. The interim order ceases to have effect at the latest two years after it is made (s. 35(8)). Section 35 reads:

35.(1) Where

(a) a substance

(i) is not specified on the List of Toxic Substances in Schedule I and the Ministers believe that it is toxic or

(ii) is specified on that List and the Ministers believe that it is not adequately regulated, and

(b) the Ministers believe that immediate action is required to deal with a significant danger to the environment or to human life or health,

the Minister may make an interim order in respect of the substance and the order may contain any provision that may be contained in a regulation made under subsection 34(1) or (2).

(2) Subject to subsection (3), an interim order has effect

(a) from the time it is made; and

(b) as if it were a regulation made under section 34.

(3) An interim order ceases to have effect unless it is approved by the Governor in Council within fourteen days after it is made.

(4) The Governor in Council shall not approve an interim order unless

(a) the Minister has, within 24 hours after making the order, offered to consult the governments of all the affected provinces to determine whether they are prepared to take sufficient action to deal with the significant danger; and

(b) the Minister has consulted with other ministers of the Crown in right of Canada to determine whether any action can be taken under any other Act of Parliament to deal with the significant danger.

(5) Where the Governor in Council approves an interim order, the Ministers shall, within ninety days after the approval, recommend to the Governor in Council

(a) that a regulation having the same effect as the order be made under section 34; and

(b) if the order was made in respect of a substance that was not specified on the List of Toxic Substances in Schedule I, that the substance be added to that list under section 33.

(6) An interim order

(a) is exempt from the application of sections 3, 5 and 11 of the Statutory Instruments Act; and

(b) shall be published in the Canada Gazette within twenty-three days after it is approved under subsection (3).

(7) No person shall be convicted of an offence consisting of a contravention of an interim order that, at the time of the alleged contravention, was not published in the Canada Gazette in both official languages unless it is proved that at the date of the alleged contravention reasonable steps had been taken to bring the purport of the order to the notice of those persons likely to be affected by it.

(8) An interim order ceases to have effect when a regulation referred to in subsection (5) is made or two years after the order was made, whichever is the earlier.

106 It is the interplay between ss. 34 and 35 that gave rise to the Interim Order that ultimately led to this litigation. In 1989, the then Environment Minister, the Honourable Lucien Bouchard, became concerned that regulations governing PCBs made under previous legislation might not continue in force once the previous legislation had been repealed. Exercising his powers under s. 35, he adopted the Interim Order, cited supra, providing for the regulation of PCBs in accordance with the provisions of s. 34. The respondent challenges the charges brought against it under the Interim Order by alleging that both the order and ss. 34 and 35 are ultra vires Parliament.

107 But the nub of its case is not fully apparent from a reading of ss. 34 and 35 alone. These provisions must also be read in light of the broad definitions of "environment" and "substance" which read:

3.(1) In this Act,

"environment" means the components of the Earth and includes

(a) air, land and water;

(b) all layers of the atmosphere;

(c) all organic and inorganic matter and living organisms; and

(d) the interacting natural systems that include components referred to in paragraphs (a) to (c);

. . . . .

"substance" means any distinguishable kind of organic or inorganic matter, whether animate or inanimate, and includes

(a) any matter that is capable of being dispersed in the environment or of being transformed in the environment into matter that is capable of being so dispersed or that is capable of causing such transformations in the environment,

(b) any element or free radical,

(c) any combination of elements of a particular molecular identity that occurs in nature or as a result of a chemical reaction, and

> (d) complex combinations of different molecules that originate in nature or are the result of chemical reactions but that could not practicably be formed by simply combining individual constituents,
>
> and, except for the purposes of sections 25 to 32, includes
>
> (e) any mixture that is a combination of substances and does not itself produce a substance that is different from the substances that were combined,
>
> (f) any manufactured item that is formed into a specific physical shape or design during manufacture and has, for its final use, a function or functions dependent in whole or in part on its shape or design, and
>
> (g) any animate matter that is, or any complex mixtures of different molecules that are, contained in effluents, emissions or wastes that result from any work, undertaking or activity;

Above all, the respondent is concerned with the term "toxic" as it is used in s. 11, which, together with the definitions just quoted, it contends, constitute an impermissibly broad interference with provincial legislative powers.

The Issues

108 In this Court, the appellant Attorney General of Canada seeks to support the impugned provisions of the Act on the basis of the national concern doctrine under the peace, order and good government clause of s. 91 or under the criminal law power under s. 91(27) of the Constitution Act, 1867. The respondent Hydro-Québec and the mis en cause Attorney General of Quebec dispute this. In broad terms, they say that the provisions are so invasive of provincial powers that they cannot be justified either under the national dimensions doctrine or under the criminal law power. The attack on the validity of the provisions under the latter power is also supported, most explicitly by the intervener the Attorney General for Saskatchewan, on the ground that they are, in essence, of a regulatory and not of a prohibitory character. Finally, I repeat that while the Interim Order precipitated the litigation, there is no doubt that the respondent and mis en cause as well as their supporting interveners are after bigger game — the enabling provisions.

109 While both the national concern doctrine and the criminal law power received attention in the course of the argument, it is right to say that the principal focus in this Court was on the national concern issue. This may in fact be owing to the fact that this Court's most recent decision dealing extensively with the criminal law power, RJR-Macdonald Inc. c. Canada (Procureur général), [1995] 3 S.C.R. 199 (S.C.C.), had not been decided when this case came before the courts whose judgments are under review in this case. Whatever the reason, many of the arguments and concerns seemed at times to be addressed at both legislative powers, and the general effect was to colour and I think at times to distort the approach that, in my view, should properly be taken to the criminal law power. Thus I found much of the discussion relating to the pith and substance of the legislation, as well as other matters to which I shall later refer, not altogether apt to a consideration of the criminal law power.

110 I make these remarks because, in my view, the impugned provisions are valid legislation under the criminal law power — s. 91(27) of the Constitution Act, 1867. It thus becomes unnecessary to deal with the national concern doctrine, which inevitably raises profound issues respecting the federal structure of our Constitution which do not arise with anything like the same intensity in relation to the criminal law power.

111 In analysing the issues as they relate to the criminal law power, I propose to proceed in the following

manner. I shall begin with introductory remarks reviewing the manner in which this Court has approached environmental issues arising under the division of powers under the Constitution Act, 1867. I shall then turn to a discussion of the federal criminal law power under s. 91(27) of that Act. This will be followed by a closer examination of Part II, Toxic Substances, of the Act. This will open the way to a discussion of whether ss. 34 and 35, as well as the Interim Order, are valid exercises of the criminal law power.

Analysis

Introduction

112 In considering how the question of the constitutional validity of a legislative enactment relating to the environment should be approached, this Court in Oldman River, supra, made it clear that the environment is not, as such, a subject matter of legislation under the Constitution Act, 1867. As it was put there, "the Constitution Act, 1867 has not assigned the matter of 'environment' sui generis to either the provinces or Parliament" (p. 63). Rather, it is a diffuse subject that cuts across many different areas of constitutional responsibility, some federal, some provincial (pp. 63-64). Thus Parliament or a provincial legislature can, in advancing the scheme or purpose of a statute, enact provisions minimizing or preventing the detrimental impact that statute may have on the environment, prohibit pollution, and the like. In assessing the constitutional validity of a provision relating to the environment, therefore, what must first be done is to look at the catalogue of legislative powers listed in the Constitution Act, 1867 to see if the provision falls within one or more of the powers assigned to the body (whether Parliament or a provincial legislature) that enacted the legislation (ibid. at p. 65). If the provision in essence, in pith and substance, falls within the parameters of any such power, then it is constitutionally valid.

113 Though pith and substance may be described in different ways, the expressions " dominant purpose" or "true character" used in R. v. Morgentaler, [1993] 3 S.C.R. 463 (S.C.C.), at pp. 481-82, or" the dominant or most important characteristic of the challenged law" used in Whitbread v. Walley, [1990] 3 S.C.R. 1273 (S.C.C.), at p. 1286, and in Oldman River, supra, at p. 62, appropriately convey the meaning to be attached to the term. If a provision dealing with the environment is really aimed at promoting the dominant purpose of the statute or at addressing the impact of a statutory scheme, and the scheme itself is valid, then so is the provision.

114 In examining the validity of legislation in this way, it must be underlined that the nature of the relevant legislative powers must be examined. Different types of legislative powers may support different types of environmental provisions. The manner in which such provisions must be related to a legislative scheme was, by way of example, discussed in Oldman River in respect of railways, navigable waters and fisheries. An environmental provision may be validly aimed at curbing environmental damage, but in some cases the environmental damage may be directly related to the power itself. There is a considerable difference between regulating works and activities, like railways, and a resource like fisheries, and consequently the environmental provisions relating to each of these. Environmental provisions must be tied to the appropriate constitutional source.

115 Some heads of legislation may support a wholly different type of environmental provision than others. Notably under the general power to legislate for the peace, order and good government, Parliament may enact a wide variety of environmental legislation in dealing with an emergency of sufficient magnitude to warrant resort to the power. But the emergency would, of course, have to be established. So too with the "national concern" doctrine, which formed the major focus of the present case. A discrete area of environmental legislative power can fall within that doctrine, provided it meets the criteria first developed in Reference re Anti-Inflation Act, 1975 (Canada), [1976] 2 S.C.R. 373 (S.C.C.), and thus set forth in Crown Zellerbach, supra, at p. 432:

> 3. For a matter to qualify as a matter of national concern in either sense it must have a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern and a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution.

Thus in the latter case, this Court held that marine pollution met those criteria and so fell within the exclusive legislative power of Parliament under the peace, order and good government clause. While the constitutional necessity of characterizing certain activities as beyond the scope of provincial legislation and falling within the national domain was accepted by all the members of the Court, the danger of too readily adopting this course was not lost on the minority. Determining that a particular subject matter is a matter of national concern involves the consequence that the matter falls within the exclusive and paramount power of Parliament and has obvious impact on the balance of Canadian federalism. In Crown Zellerbach, the minority (at p. 453) expressed the view that the subject of environmental protection was all-pervasive, and if accepted as falling within the general legislative domain of Parliament under the national concern doctrine, could radically alter the division of legislative power in Canada.

116 The minority position on this point (which was not addressed by the majority) was subsequently accepted by the whole Court in Oldman River, supra, at p. 64. The general thrust of that case is that the Constitution should be so interpreted as to afford both levels of government ample means to protect the environment while maintaining the general structure of the Constitution. This is hardly consistent with an enthusiastic adoption of the" national dimensions" doctrine. That doctrine can, it is true, be adopted where the criteria set forth in Crown Zellerbach are met so that the subject can appropriately be separated from areas of provincial competence.

117 I have gone on at this length to demonstrate the simple proposition that the validity of a legislative provision (including one relating to environmental protection) must be tested against the specific characteristics of the head of power under which it is proposed to justify it. For each constitutional head of power has its own particular characteristics and raises concerns peculiar to itself in assessing it in the balance of Canadian federalism. This may seem obvious, perhaps even trite, but it is all too easy (see R. v. Fowler, [1980] 2 S.C.R. 213 (S.C.C.)) to overlook the characteristics of a particular power and overshoot the mark or, again, in assessing the applicability of one head of power to give effect to concerns appropriate to another head of power when this is neither appropriate nor consistent with the law laid down by this Court respecting the ambit and contours of that other power. In the present case, it seems to me, this was the case of certain propositions placed before us regarding the breadth and application of the criminal law power. 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.

The Criminal Law Power

118 Section 91(27) of the Constitution Act, 1867 confers the exclusive power to legislate in relation to criminal law on Parliament. The nature and ambit of this power has recently been the subject of a detailed analytical and historical examination in RJR-Macdonald, supra, where it was again described (p. 240), as it has for many years, as being" plenary in nature" (emphasis added). I shall not attempt to repeat the analysis so recently set forth at length by this Court, or attempt to refer extensively to all of the many authorities there cited, but will

confine myself to underlining the findings in that case that are most salient to the issues raised her. I add that Professor Jean Leclair in an excellent article, "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, has very recently analysed all the relevant cases and has come to the same conclusion about the general scope of the criminal law power and its application to the environment, and in particular the Act here in question.

119 What appears from the analysis in RJR-Macdonald is that as early as 1903, the Privy Council, in Ontario (Attorney General) v. Hamilton Street Railway, [1903] A.C. 524 (Ontario P.C.), at pp. 528-29, had made it clear that the power conferred on Parliament by s. 91(27) is" the criminal law in its widest sense" (emphasis added). Consistently with this approach, the Privy Council in Proprietary Articles Trade Assn. v. Canada (Attorney General), [1931] A.C. 310 (Canada P.C.) (hereafter PATA), at p. 324, defined the criminal law power as including any prohibited act with penal consequences. As it put it, at p. 324:" The criminal quality of an act cannot be discerned ... by reference to any standard but one: Is the act prohibited with penal consequences?" This approach has been consistently followed ever since and, as RJR-Macdonald relates, it has been applied by the courts in a wide variety of settings. Accordingly, it is entirely within the discretion of Parliament to determine what evil it wishes by penal prohibition to suppress and what threatened interest it thereby wishes to safeguard, to adopt the terminology of Rand J. in the Margarine Reference, supra, at p. 49, cited infra.

120 Contrary to the respondent's submission, under s. 91(27) of the Constitution Act, 1867, it is also within the discretion of Parliament to determine the extent of blameworthiness that it wishes to attach to a criminal prohibition. So it may determine the nature of the mental element pertaining to different crimes, such as a defence of due diligence like that which appears in s. 125(1) of the Act in issue. This flows from the fact that Parliament has been accorded plenary power to make criminal law in the widest sense. This power is, of course, subject to the "fundamental justice" requirements of s. 7 of the Canadian Charter of Rights and Freedoms, which may dictate a higher level of mens rea for serious or "true" crimes; cf. R. v. Wholesale Travel Group Inc., [1991] 3 S.C.R. 154 (S.C.C.), and R. v. Rube, [1992] 3 S.C.R. 159 (S.C.C.), but that is not an issue here.

121 The Charter apart, only one qualification has been attached to Parliament's plenary power over criminal law. The power cannot be employed colourably. Like other legislative powers, it cannot, as Estey J. put it in Scowby v. Saskatchewan (Board of Inquiry), [1986] 2 S.C.R. 226 (S.C.C.), at p. 237, "permit Parliament, simply by legislating in the proper form, to colourably invade areas of exclusively provincial legislative competence". To determine whether such an attempt is being made, it is, of course, appropriate to enquire into Parliament's purpose in enacting the legislation. As Estey J. noted in Scowby, at p. 237, since the Margarine Reference, it has been "accepted that some legitimate public purpose must underlie the prohibition". Estey J. then cited Rand J.'s words in the Margarine Reference (at p. 49) as follows:

> 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.

I simply add that the analysis in Scowby and the Margarine Reference was most recently applied by this Court in RJR-Macdonald, supra, at pp. 240-41.

122 In the Margarine Reference, supra, at p. 50, Rand J. helpfully set forth the more usual purposes of a criminal prohibition in the following passage:

> Is the prohibition ... enacted with a view to a public purpose which can support it as being in relation to criminal law? Public peace, order, security, health, morality: these are the ordinary though not exclusive ends served by that law .... [Emphasis added.]

See also Morgentaler, supra, at p. 489; RJR-Macdonald, supra, at p. 241. As the final clause in the passage just cited indicates, the listed purposes by no means exhaust the purposes that may legitimately support valid criminal legislation. Not only is this clear from this passage, but subsequent to the Margarine Reference, it is obvious from Rand J.'s remarks in Lord's Day Alliance of Canada v. British Columbia (Attorney General), [1959] S.C.R. 497 (S.C.C.), at pp. 508-9, that he was in no way departing from Lord Atkin's statement in the PATA case, supra (he cited the relevant passage with approval). His concern in the Margarine Reference, as he indicates in the Lord's Day case (at p. 509), was that "in a federal system distinctions must be made arising from the true object, purpose, nature or character of each particular enactment". In short, in a case like the present, all one is concerned with is colourability. Otherwise, one would, in effect, be reviving the discarded notion that there is a "domain" of criminal law, something Rand J., like Lord Atkin before him, was not prepared to do. All of this is, of course, consistent with the view, most recently reiterated in RJR-Macdonald, at pp. 259-61, that criminal law is not frozen in time.

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

124 This approach is entirely consistent with the recent pronouncement of this Court in R. v. Canadian Pacific Ltd., [1995] 2 S.C.R. 1031 (S.C.C.), where Gonthier J., speaking for the majority, had this to say, at para. 55:

> It is clear that over the past two decades, citizens have become acutely aware of the importance of environmental protection, and of the fact that penal consequences may flow from conduct which harms the environment. ... Everyone is aware that individually and collectively, we are responsible for preserving the natural environment. I would agree with the Law Reform Commission of Canada, Crimes Against the Environment, supra, which concluded at p. 8 that:
>
> > ... a fundamental and widely shared value is indeed seriously contravened by some environmental pollution, a value which we will refer to as the right to a safe environment.
> >
> > To some extent, this right and value appears to be new and emerging, but in part because it is an extension of existing and very traditional rights and values already protected by criminal law, its presence and shape even now are largely discernible. Among the new strands of this fundamental value are, it may be argued, those such as quality of life, and stewardship of the natural environment. At the same

> time, traditional values as well have simply expanded and evolved to include the environment now as an area and interest of direct and primary concern. Among these values fundamental to the purposes and protections of criminal law are the sanctity of life, the inviolability and integrity of persons, and the protection of human life and health. It is increasingly understood that certain forms and degrees of environmental pollution can directly or indirectly, sooner or later, seriously harm or endanger human life and human health.
>
> Not only has environmental protection emerged as a fundamental value in Canadian society, but this has also been recognized in legislative provisions such as s. 13(1)(a) EPA. [Italics in original; underlining added.]

125 It is worthy of note that following Working Paper 44 (1985), from which Gonthier J. cites, the Law Reform Commission of Canada in a subsequent report to Parliament (Recodifying Criminal Law, Report 31 (1987)), noted its view of the desirability of using the criminal law to underline the value of respect for the environment itself. It stated, at p. 93:

> ... in Working Paper 44 we proposed a new and distinct crime against the environment on the ground that certain behaviour so threatens fundamental values as to warrant criminal sanctions. That crime was to consist of conduct damaging the environment and thereby seriously harming or endangering human life or health.
>
> Since then, however, we revised our opinion. First, we concluded that since environmental damage harming or endangering life and safety is covered by crimes of negligence against the person and by the newly proposed crime of endangering (clause 10(1)), there was no need for an environmental crime like that proposed. Second, our consultations on Working Paper 44 together with a series of environmental disasters since its publication convinced the majority of the Commissioners of the need to use criminal law to underline the value of respect for the environment itself and stigmatize behaviour causing disastrous damage with long-term loss of natural resources. [Emphasis added.]

126 This is, of course, in line with the thinking of various international organisms. The World Commission on Environment and Development (the Brundtland Commission) in its report Our Common Future (1987) (see at pp. 219-20, and pp. 224-25) long ago recommended the adoption of appropriate legislation to protect the environment against toxic and chemical substances, including the creation of national standards that could be supplemented by local legislation. At p. 211, it stated:

> It is becoming increasingly clear that the sources and causes of pollution are far more diffuse, complex, and interrelated — and the effects of pollution more widespread, cumulative, and chronic — than hitherto believed. Pollution problems that were once local are now regional or even global in scale. Contamination of soils, ground-water, and people by agrochemicals is widening and chemical pollution has spread to every corner of the planet. The incidence of major accidents involving toxic chemicals has grown. Discoveries of hazardous waste disposal sites — at Love Canal in the United States, for example, and at Lekkerkek in the Netherlands, Vac in Hungary, and Georgswerder in the Federal Republic of Germany — have drawn attention to another serious problem.
>
> In the light of this and the growth trends projected through the next century, it is evident that measures to reduce, control, and prevent industrial pollution will need to be greatly strengthened. If they are not, pollution damage to human health could become intolerable in certain cities and threats to property and ecosys-

> tems will continue to grow.

Later, at pp. 219-20, it added:

> In dealing with industrial pollution and resource degradation, it is essential that industry, government, and the public have clear benchmarks. Where the workforce and financial resources permit, national governments should establish clear environmental goals and enforce environmental laws, regulations, incentives, and standards on industrial enterprises. In formulating such policies, they should give priority to public health problems associated with industrial pollution and hazardous wastes. And they must improve their environmental statistics and data base relating to industrial activities.
>
> The regulations and standards should govern such matters as air and water pollution, waste management, occupational 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. [Emphasis added.]

See also United Nations Environment Programme, Global Environmental Issues, at pp. 55-60.

127 What the foregoing underlines is what I referred to at the outset, that the protection of the environment is a major challenge of our time. It is an international problem, one that requires action by governments at all levels. And, as is stated in the preamble to the Act under review," Canada must be able to fulfil its international obligations in respect of the environment". I am confident that Canada can fulfil its international obligations, in so far as the toxic substances sought to be prohibited from entering into the environment under the Act are concerned, by use of the criminal law power. The purpose of the criminal law is to underline and protect our fundamental values. While many environmental issues could be criminally sanctioned in terms of protection of human life or health, I cannot accept that the criminal law is limited to that because" certain forms and degrees of environmental pollution can directly or indirectly, sooner or later, seriously harm or endanger human life and human health", as the paper approvingly cited by Gonthier J. in R. v. Canadian Pacific Ltd., supra, observes. But the stage at which this may be discovered is not easy to discern, and I agree with that paper that the stewardship of the environment is a fundamental value of our society and that Parliament may use its criminal law power to underline that value. The criminal law must be able to keep pace with and protect our emerging values.

128 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. In the criminal law area, reference to such broad policy objectives is simply a means of ensuring that the prohibition is legitimately aimed at some public evil Parliament wishes to suppress and so is not a colourable attempt to deal with a matter falling exclusively within an area of provincial legislative jurisdiction.

129 The legitimate use of the criminal law I have just described in no way constitutes an encroachment on provincial legislative power, though it may affect matters falling within the latter's ambit. This is made clear from the following passage from Standard Sausage Co. v. Lee, [1933] 4 D.L.R. 501 (B.C. C.A.), at pp. 506-7, cited with approval in RJR-Macdonald, supra, pp. 254-55:

> ... if the Federal Parliament, to protect the public health against actual or threatened danger, places restrictions on, and limits the number of preservatives that may be used, it may do so under s. 91(27) of the B.N.A. Act. This is not in essence an interference with property and civil rights. That may follow as an incident but the real purpose (not colourable and not merely to aid what in substance is an encroachment) is to prevent actual, or threatened injury or the likelihood of injury of the most serious kind to all inhabitants of the Dominion.
>
> . . . . .
>
> 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 ....

I shall have more to say about this later.

130 I conclude that Parliament may validly enact prohibitions under its criminal law power against specific acts for the purpose of preventing pollution or, to put it in other terms, causing the entry into the environment of certain toxic substances. I quite understand that a particular prohibition could be so broad or all-encompassing as to be found to be, in pith and substance, really aimed at regulating an area falling within the provincial domain and not exclusively at protecting the environment. A sweeping prohibition like this (and this would be equally true of one aimed generally at the protection of health) would, in any case, probably be unworkable. But the attack here ultimately is that the impugned provisions grant such a broad discretion to the Governor in Council as to permit orders that go beyond federal power. I can imagine very nice issues being raised concerning this matter under certain types of legislation, though in such a case one would tend to interpret the legislation narrowly if only to keep it within constitutional bounds. But one need not go so far here. For, it seems to me, as we shall see, when one carefully peruses the legislation, it becomes clear enough that Parliament has stayed well within its power.

131 Though I shall deal with this issue in more detail once I come to consider the legislation, it 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. 92 to regulate and control the pollution of the environment either independently or to supplement federal action. The situation is really no different from the situation regarding the protection of health where Parliament has for long exercised extensive control over such matters as food and drugs by prohibitions grounded in the criminal law power. This has not prevented the provinces from extensively regulating and prohibiting many activities relating to health. The two levels of government frequently work together to meet common concerns. The cooperative measures relating to the use of tobacco are fully related in RJR-Macdonald, supra. Nor, though it arises under a different technical basis, is the situation, in substance, different as regards federal prohibitions against polluting water for the purposes of protecting the fisheries. Here again there is a wide measure of cooperation between the federal and provincial authorities to effect common or complementary ends. It is also the case in many other areas. The fear that the legislation impugned here would distort the federal-provincial balance seems to me to be overstated.

132 One last matter requires comment. The specific provision impugned in this case, the Interim Order, would seem to me to be justified as a criminal prohibition for the protection of human life and health alone (a purpose upheld most recently in RJR-Macdonald). That would also at first sight appear to be true of many of the prohibited uses of the substances in the List of Toxic Substances in Schedule I. So if the protection of the environment does not amount to a valid public purpose to justify criminal sanctions, it would be simply a question of

severing those portions of s. 11 of the Act that deal solely with the environment to ensure the validity of the Interim Order and the rest of the enabling provisions. After all, the protection of the environment, as we earlier saw, is closely integrated, directly or indirectly, with the protection of health. But for my part, I find this exercise wholly unnecessary. The protection of the environment, through prohibitions against toxic substances, seems to me to constitute a wholly legitimate public objective in the exercise of the criminal law power. Humanity's interest in the environment surely extends beyond its own life and health.

The Provisions Respecting Toxic Substances

133 The respondent, the mis en cause and their supporting interveners primarily attack ss. 34 and 35 of the Act as constituting an infringement on provincial regulatory powers conferred by the Constitution. This they do by submitting that the power to regulate a substance is so broad as to encroach upon provincial legislative jurisdiction. That is because of what they call the broad "definition" given to toxic substances under s. 11, and particularly para. (a), thereof which, it will be remembered, provides that

> 11. For the purposes of this Part, a substance is toxic if it is entering or may enter the environment in a quantity or concentration or under conditions
>
> (a) having or that may have an immediate or long-term harmful effect on the environment;

This, along with the expansive definitions of "substance" and" environment" in s. 3(1), makes it possible, they say, in effect to regulate any substance that can in any way prove harmful to the environment.

134 I cannot agree with this submission. As I see it, the argument focusses too narrowly on a specific provision of the Act and for that matter only on certain aspects of it, and then applies that provision in a manner that I do not think is warranted by a consideration of the provisions of the Act as a whole and in light of its background and purpose. I shall deal with the latter first. Before doing so, however, I shall comment briefly on the concern expressed about the breadth of the phraseology of the Act. As Gonthier J. observed in R. v. Canadian Pacific Ltd., supra, this broad wording is unavoidable in environmental protection legislation because of the breadth and complexity of the subject and has to be kept in mind in interpreting the relevant legislation. At para. 43, he stated:

> What is clear from this brief review of Canadian pollution prohibitions is that our legislators have preferred to take a broad and general approach, and have avoided an exhaustive codification of every circumstance in which pollution is prohibited. Such an approach is hardly surprising in the field of environmental protection, given that the nature of the environment (its complexity, and the wide range of activities which might cause harm to it) is not conducive to precise codification. Environmental protection legislation has, as a result, been framed in a manner capable of responding to a wide variety of environmentally harmful scenarios, including ones which might not have been foreseen by the drafters of the legislation.

In light of this, he went on to hold that environmental protection legislation should not be approached with the same rigour as statutes dealing with less complex issues in applying the doctrine of vagueness developed under s. 7 of the Charter. The effect of requiring greater precision would be to frustrate the legislature in its attempt to protect the public against the dangers flowing from pollution. He thus summarized his view, at para. 58:

> In the environmental context, each one of us is vulnerable to the health and property damage caused by pollution. Where the legislature provides protection through regulatory statutes such as the EPA, it is appropri-

> ate for courts to take a more deferential approach to the Charter review of the offences contained in such statutes.

On this basis, Gonthier J. then turned to an examination of terms similar to those in the Act under review. He was there dealing with a provincial regulatory statute, but the same underlying need to protect the vulnerable and the public generally is inherent in criminal offences of the type in question here. This was recognized by Cory J. in R. v. Wholesale Travel Group Inc., supra. That case concerned offences under the Competition Act (formerly the Combines Investigation Act), long held to be constitutionally supportable under Parliament's criminal law power. Cory J. carefully distinguished between the type of offences there in question, which he described as regulatory offences, and "true crimes" such as murder. In a passage, at p. 233, relied upon by Gonthier J. (at para. 57), he had this to say:

> The realities and complexities of a modern industrial society coupled with the 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. The protection provided by such measures constitutes a second justification for the differential treatment, for Charter purposes, of regulatory and criminal offences.

135 I turn then to the background and purpose of the provisions under review. 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. It replaces the Environmental Contaminants Act, first enacted in 1975 (S.C. 1974-75-76, c. 72), which was intended to control substances entering or capable of entering into the environment in a quantity or concentration sufficient to constitute a danger to health or the environment; see s. 4. The continuity of policy is evident from the fact that the toxic substances controlled under the earlier legislation including PCBs were automatically included as Schedule I of the present legislation, entitled "List of Toxic Substances".

136 The underlying purpose for the enactment of the present Act, so far as toxic substances are concerned, is evident from a series of reports of studies made in the mid-1980s; see Environment Canada, From Cradle to Grave: A Management Approach to Chemicals (1986); Environment Canada and Health and Welfare Canada, Final Report of the Environmental Contaminants Act Amendments Consultative Committee (1986). What these reveal is that the earlier Act was clearly deficient in identifying substances that could be toxic and that what was really needed was a regime whereby the government could assess material that could be harmful to health and the environment before the substance was already in use.

137 This comes out more clearly in a document published by Environment Canada in 1987 which outlines the reasons why a new Act dealing with the environment was necessary; see Environment Canada, The Right to a Healthy Environment: An Overview of the Proposed Environmental Protection Act. The publication made clear that existing measures had not been adequate and that because of the negligent use of chemical products, the following had resulted:" Chemical residues are everywhere: in our homes, offices and factories; in cities, on farms, in wilderness areas far removed from the sources of contamination" (p. 1). It continued (at p. 1):

> The fact that most human beings have detectable levels of synthetic chemicals in their bodies is evidence of our collective carelessness in using them. In his Report Card on the environment in 1986, Environment Minister Tom McMillan gave Canada an "F" for its ability to handle toxic substances.

1997 CarswellQue 3705, (sub nom. R. v. Hydro-Québec) 118 C.C.C. (3d) 97, (sub nom. R. v. Hydro-Québec) 151 D.L.R. (4th) 32, 9 C.R. (5th) 157, (sub nom. R. v. Hydro-Québec) 217 N.R. 241, (sub nom. R. v. Hydro-Québec) [1997] 3 S.C.R. 213, 24 C.E.L.R. (N.S.) 167, 1997 CarswellQue 849, 3 S.C.R. 213

138 There was no intention that the Act should bar the use, importation or manufacture of all chemical products, but rather that it should affect only those substances that are dangerous to the environment, and then only if they are not regulated by law. The report recognized that" [a] great deal of our industrial strength and economic progress is based upon the use of chemicals" (p. 2), and that only a fraction of these were" believed to be hazardous but few have been assessed to make sure" (p. 2).

139 The manner of assessment traditionally employed — related as it was to the concern for "pollution that could be seen, touched, smelled or tasted" and "cleaning up a mess after it occurred" (p. 3) — was no longer adequate. As the report put it (at p. 3):

> Toxic chemical contamination cannot be handled in this way. Ordinary sense perception cannot identify chemical contamination because it is usually invisible until the damage, sometimes irreparable damage, has been done. Since chemical pollution exists at the molecular level, it cannot usually be treated, contained or recovered from the environment. And since its effects are pervasive and long term, rather than local or immediate, quick-fix measures are not practical. [Emphasis added.]

140 Not surprisingly, the report emphasized the need to improve the procedures for assessing whether chemical substances were hazardous; see e.g. pp. 10-11. The Act would operate through the listing of chemicals, including "a schedule of dangerous chemicals which are subject to regulation under the [Act]" (p. 15).

141 The impugned Act appears to me to respond closely to these objectives. The subject of toxic substances is dealt with principally in Part II of the Act. It begins, we saw, with s. 11, which has been described as a" definition" in argument. While the provision has some properties of a definition, to speak of it in this way is misleading and does not do full justice to its purpose and function. It should be observed that it does not purport to define a "toxic substance" in the manner in which s. 3 defines various concepts, e.g. "air contaminant", "air pollution", etc. which describes with finality what the defined concept means. Rather, it sets forth that a substance can only be toxic, for the purposes of Part II, if it is entering or may enter the environment in a quantity or concentration or under conditions that result in the detrimental effects on the environment, human life and human health described in paras. (a) to (c). In other words, one cannot look at a phrase like" having or that may have an immediate or long-term harmful effect on the environment" in a manner divorced from the term "toxic" (i.e." poisonous"; see the Oxford English Dictionary (2nd ed. 1989)). As well, the provision underlines that toxic as used in the Act includes substances that are not per se, toxic, but that may, when released into the environment in a certain quantity, concentration or condition, become toxic. Lead, for example, which appears in Schedule I, entitled "List of Toxic Substances", is not per se toxic but it can be so when it enters the environment in the course of its use. (This approach is strongly fortified by the nature of Schedule I, which I shall examine later.) The phrase, in other words, describes the nature of toxicity in respect of which substances are to be tested or assessed.

142 I add that the determination of whether the various components of s. 11 are satisfied in respect of particular substances is by no means an easy task. Whether substances enter or may enter the environment in a quantity, concentration or conditions sufficient to have the effects set forth in that provision are not matters that are generally known. Rather these are matters that must be ascertained by assessments or tests set forth in s. 15, and in accordance with a procedure that requires consultation with the provinces, the informed community and the general public with a view to determining whether certain substances "are toxic or capable of becoming toxic", to use the expression employed in the provisions of Part II dealing with testing, beginning with the Ministers' weeding out most substances by establishing a priority list of substances to be tested. I note here that a sim-

ilar expression is used in s. 2(j), which falls outside Part II, where in describing the administrative duties of the Government under the Act, it is provided that it shall, consistently with the Constitution, act expeditiously in assessing" whether substances in use in Canada are toxic or capable of becoming toxic". It is also evident from the portion of the preamble of the Act earlier cited that the toxic substances intended to be dealt with by the Act are toxic substances in their normal sense that may result in polluting the environment in a significant degree. In light of this, it is difficult to believe" toxic" is not given its ordinary meaning in the Act, and that s. 11 is, therefore, simply a drafting tool for the demarcation of those aspects of toxicity that are to be considered in the tests required in the sections that follow.

143 What the assessments described in Part II are aimed at is the selection of new items to add to the List of Toxic Substances set forth in Schedule I. Thus s. 11 is the first of a series of provisions respecting testing or assessment for toxicity. The first step in the process of assessment is s. 12, which requires the Ministers to compile a Priority Substances List in respect of substances to which the Ministers are satisfied priority should be given in assessing whether they are toxic or capable of becoming toxic; this list and any amendments to it are published in the Canada Gazette, and the provinces and other interested parties are informed (ss. 12(2) and (3)). The process of testing is a detailed one and includes informing the provinces and other interested groups and the public at all stages; see, for example, s. 13. In performing their duties, the Ministers are given broad powers to collect data, conduct investigations and correlate and evaluate any data so obtained (see, for example, s. 15). The testing process culminates in a decision of the Ministers to recommend or not to recommend that a substance be added to the List of Toxic Substances in Schedule I of the Act, and, if a recommendation is made, what regulations should be made in respect of the substance under s. 34.

144 The recommendation of the Ministers marks the end of the testing phase and the beginning of a new phase in the process, i.e. the regulatory phase. From this point, as the terminology of the Act makes clear, Part II is concerned with substances in the List of Toxic Substances in Schedule I only. This begins with s. 33, under which the Governor in Council may, if satisfied that a substance is toxic, on the recommendation of the Ministers, make an order adding to the List of Toxic Substances in Schedule I. It is important to underline that what Part II of the Act provides for is a procedure to control toxic substances generally by subjecting the many chemical substances in use in Canada to testing. That is in furtherance of the duty imposed on the Government, by s. 2(j), to make such assessments consistently with the Constitution. If any such substance is found to be toxic, it may be added to the List of Toxic Substances in Schedule I of the Act. Since that list (like s. 2(j)) is outside Part II, one must assume" toxic" here refers to toxic in a real sense, which as I stated earlier buttresses the argument that the description given in s. 11 does the same, since one would think the substances authorized to be added to a statute by the Governor in Council would be of the same general character. I add that Driedger's statement that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" bears repetition here; see E. A. Driedger, Construction of Statutes (2nd ed. 1983), at p. 87.

145 More needs to be said about this. When one examines the original Schedule, as it appeared in the statute, it is evident that it comprises a very restricted number of substances, nine, and it is also apparent that they set forth asbestos, lead and mercury, substances that even to the uninitiated are well known to be toxic in certain circumstances when they enter into the environment. As well, as I noted earlier, the items in the statute were taken from previous legislation, notably the Environmental Contaminants Act, under which they were selected because the Ministers believed "on reasonable grounds" that they" constitute or will constitute a significant danger to human life or the environment". I have earlier referred more generally to the continuation of policy when the new legislation was enacted, and noted that the change particularly aimed at by the new legislation was

the strengthening of the method of controlling toxic substances by improving the means for identifying them. For all these reasons, I conclude that when the Governor in Council makes an order adding to the List of Toxic Substances in Schedule I, it involves a determination that the substances added are of a kind akin to those already listed in Schedule I.

146 In summary, as I see it, the broad purpose and effect of Part II is to provide a procedure for assessing whether out of the many substances that may conceivably fall within the ambit of s. 11, some should be added to the List of Toxic Substances in Schedule I and, when an order to this effect is made, whether to prohibit the use of the substance so added in the manner provided in the regulations made under s. 34(1) subject to a penalty. These listed substances, toxic in the ordinary sense, are those whose use in a manner contrary to the regulations the Act ultimately prohibits. This is a limited prohibition applicable to a restricted number of substances. The prohibition is enforced by a penal sanction and is undergirded by a valid criminal objective, and so is valid criminal legislation.

147 This, in my mind, is consistent with the terms of the statute, its purpose, and indeed common sense. It is precisely what one would expect of an environmental statute — a procedure to weed out from the vast number of substances potentially harmful to the environment or human life those only that pose significant risks of that type of harm. Specific targeting of toxic substances based on individual assessment avoids resort to unnecessarily broad prohibitions and their impact on the exercise of provincial powers. Having regard to the particular nature and requirements of effective environmental protection legislation, I do not share my colleagues' concern that the prohibition originates in a regulation, the breach of which gives rise to criminal sanction. The careful targeting of toxic substances is borne out by practice. Counsel for the intervener, Pollution Probe et al., informed us that of the over 21,000 registered substances in commercial use in Canada (see Domestic Substances List, SI/91-148, Canada Gazette, Part I Supp.; Domestic Substances List, SOR/94-311, am. SOR/95-517), only 44 have been placed on the Priority Substances List and scientifically assessed under the Act (Priority Substances List, Canada Gazette, Part I (Feb. 11, 1989), p. 543). Of these, only 25 were found to be toxic within the meaning of s. 11 (It's About Our Health!: Towards Pollution Prevention, Report of the House of Commons Standing Committee on the Environment and Sustainable Development, at pp. 63-64), and of these only a few have been the subject of a regulation under s. 34; see Pulp and Paper Mill Effluent Chlorinated Dioxins and Furons Regulations, SOR/92-267; Pulp and Paper Mill Defoamer and Wood Chip Regulations, SOR/92-268.

148 I should perhaps note here that it is wholly appropriate to have recourse to extrinsic material of the kind just referred to as well as of the type already referred to in considering the constitutional validity of legislation, especially when one is dealing with colourability, as is the case here. I refer to Re Upper Churchill Water Rights Reversion Act, 1980, [1984] 1 S.C.R. 297 (S.C.C.), where McIntyre J., referring to earlier authorities, had this to say, at p. 318:

> I agree with the Court of Appeal in the present case that extrinsic evidence is admissible to show the background against which the legislation was enacted. I also agree that such evidence is not receivable as an aid to construction of the statute. However, I am also of the view that in constitutional cases, particularly where there are allegations of colourability, extrinsic evidence may be considered to ascertain not only the operation and effect of the impugned legislation but its true object and purpose as well. This was also the view of Dickson J. in the Reference re Residential Tenancies Act, 1979, supra, at p. 721,... [Emphasis in third sentence added.]

149 I turn now to a more detailed examination of the provisions of the Act impugned in the present case, i.e.

ss. 34 and 35. I mentioned earlier that the testing phase provided for under Part II ends with s. 32. Up to that point, Part II deals with the testing of substances that may be toxic when released into the environment as described in s. 11. The remainder of Part II, beginning with s. 33, however, is no longer addressed at substances that may be toxic in that broad sense. Rather it is more narrowly addressed at substances specifically listed in the List of Toxic Substances in Schedule I of the Act. In particular, s. 34 authorizes the Governor in Council to make regulations setting forth the restrictions imposed on those using or dealing with such substances. Failure to comply with any such restriction constitutes an offence and is punishable on summary conviction by a fine not exceeding three hundred thousand dollars or a term of imprisonment not exceeding six months, or both; or, on indictment, by a fine not exceeding one million dollars or a term of imprisonment not exceeding three years, or both (s. 113(f), (o) and (p)).

150 Without attempting to regurgitate the whole of s. 34, I shall simply give some flavour of the nature of the prohibitions created by the regulations made thereunder. Generally, s. 34 includes regulations providing for or imposing requirements respecting the quantity or concentration of a substance listed in Schedule I that may be released into the environment either alone or in combination with others from any source, the places where such substances may be released, the manufacturing or processing activities in the course of which the substance may be released, the manner and conditions of release, and so on. 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 (see Food and Drugs Act, R.S.C. 1985, c. F-27). These techniques have, in a number of cases including several in this Court, been upheld as valid criminal law; see Standard Sausage, supra, esp. at pp. 506-7; R. v. Kripps Pharmacy Ltd., [1983] 2 S.C.R. 284 (S.C.C.), at p. 289; RJR-Macdonald, supra. Other statutes providing for extensive control of hazardous products that are justifiable in whole or in part under the criminal law power include the Hazardous Products Act, R.S.C. 1985, c. H-3 (see R. v. Cosman's Furniture (1972) Ltd. (1976), 32 C.C.C. (2d) 345 (Man. C.A.)), and the Explosives Act, R.S.C. 1985, c. E-17.

151 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. As Laskin J. noted in R. v. Morgentaler (No. 5) (1975), [1976] 1 S.C.R. 616 (S.C.C.), at p. 627: "I need cite no authority for the proposition that Parliament may determine what is not criminal as well as what is". More recently, Stevenson J. in R. v. Furtney, [1991] 3 S.C.R. 89 (S.C.C.), at pp. 106-7, speaking of decriminalization of lotteries in certain circumstances, had this to say:

> It constitutes a definition of the crime, defining the reach of the offence, a constitutionally permissive exercise of the criminal law power, reducing the area subject to criminal law prohibition where certain conditions exist. I cannot characterize it as an invasion of provincial powers any more than the appellants were themselves able to do.

152 As Stevenson J. notes, this kind of legislation does not constitute an invasion of provincial regulatory power; see also British Columbia (Attorney General) v. Canada (Attorney General), [1937] A.C. 368 (Canada P.C.), at pp. 375-6; R. v. Boggs, [1981] 1 S.C.R. 49 (S.C.C.), at pp. 60-61. This is true as well in the case of detailed legislation such as that in question here, as can be seen from the statement of Macdonald J.A. in Standard Sausage, cited supra, at pp. 506-7 (affirmed in Kripps Pharmacy Ltd., supra, and specifically relied on in RJR-

Macdonald, supra). This is based on even more fundamental principles. As noted earlier, we are dealing with prohibitions accompanied by penal sanctions, so that we are really not concerned with whether these may incidentally affect property and civil rights but whether the prohibitions are directed at a public evil. The matter was thus put in RJR-Macdonald, at pp. 241-42:

> These prohibitions are accompanied by penal sanctions under s. 18 of the Act, which, as Lord Atkin noted in PATA, supra, at p. 324, creates at least a prima facie indication that the Act is criminal law. However, the crucial further question is whether the Act also has an underlying criminal public purpose in the sense described by Rand J. in the Margarine Reference, supra. The question, as Rand J. framed it, is whether the prohibition with penal consequences is directed at an" evil" or injurious effect upon the public.

153 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. Dickson J. put it this way in Schneider v. R., [1982] 2 S.C.R. 112 (S.C.C.), at p. 134:

> The interface between criminal law and provincial legislation which might be seen as impinging upon the federal jurisdiction in the field of criminal law has not been closely drawn. As Professor Hogg notes in Chapter 15 of his work, Constitutional Law of Canada, the dominant tendency of the case law has been to uphold provincial penal legislation; recent cases have been generous to provincial power, and "The result is that over much of the field which may loosely be thought of as criminal law legislative power is concurrent" (at p. 292).

This type of approach is essential in dealing with amorphous subjects like health and the environment. In my reasons for the minority in Crown Zellerbach, supra, (addressing an issue which the majority did not discuss), I had this to say about the matter as it relates to environmental pollution (at p. 455):

> ... environmental pollution ... is ... all-pervasive. It is a by-product of everything we do. In man's relationship with his environment, waste is unavoidable. The problem is thus not new, although it is only recently that the vast amount of waste products emitted into the atmosphere or dumped in water has begun to exceed the ability of the atmosphere and water to absorb and assimilate it on a global scale. There is thus cause for concern and governments at every level have begun to deal with the many activities giving rise to problems of pollution. In Canada, both federal and provincial levels of government have extensive powers to deal with these matters. Both have enacted comprehensive and specific schemes for the control of pollution and the protection of the environment. Some environmental pollution problems are of more direct concern to the federal government, some to the provincial government. But a vast number are interrelated, and all levels of government actively co-operate to deal with problems of mutual concern; for an example of this, see the Great Lakes study in I.J.C. Report, op. cit.

I observe that in enacting the legislation in issue here, Parliament was alive to the need for cooperation and coordination between the federal and provincial authorities. This is evident throughout the Act. In particular, under ss. 34(2), (5) and (6), Parliament has made it clear that the provisions of this Part are not to apply where a matter is otherwise regulated under other equivalent federal or provincial legislation.

154 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. Great sensitivity is required in this area since, as Professor Lederman has rightly observed, environmental pollution "is no limited subject or theme, [it] is a sweeping subject or theme virtually all-pervasive in its legislative implication"; see W. R. Lederman, "Unity and Diversity in Canadian Federalism: Ideals and Methods of Moderation" (1975), 53 Can. Bar Rev. 597, at p. 610.

155 Turning then to s. 35, I mentioned that it is ancillary to s. 34. It deals with emergency situations. The provision, it seems to me, indicates even more clearly a criminal purpose, and throws further light on the intention of s. 34 and of the Act generally. It can only be brought into play when the Ministers believe a substance is not specified in the List in Schedule I or is listed but is not subjected to control under s. 34. In such a case, they may make an interim order in respect of the substance if they believe "immediate action is required to deal with a significant danger to the environment or to human life or health".

156 In sum, then, I am of the view that Part II of the Act, properly construed, simply provides a means to assess substances with a view to determining whether the substances are sufficiently toxic to be added to Schedule I of the Act (which contains a list of dangerous substances carried over from pre-existing legislation), and provides by regulations under s. 34 the terms and conditions under which they can be used, with provisions under s. 35 for by-passing the ordinary provisions for testing and regulation under Part II in cases where immediate action is required. I have reached this position independently of the legal presumption that a legislature intends to confine itself to matters within its competence; see Reference re Farm Products Marketing Act (Ontario), [1957] S.C.R. 198 (S.C.C.), at p. 255; McNeil v. Nova Scotia (Board of Censors), [1978] 2 S.C.R. 662 (S.C.C.), at p. 688. However, it follows that the position I have taken would by virtue of the presumption displace a possible reading of the Act that would render it unconstitutional.

157 Since I have found the empowering provisions, ss. 34 and 35, to be intra vires, the only attack that could be brought against any action taken under them would be that such action went beyond the authority granted by those provisions; in the present case, for example, such an attack might consist in the allegation that PCBs did not pose "a significant danger to the environment or to human life or health" justifying the making of the Interim Order. This would seem to me to be a tall order. The fact that PCBs are highly toxic substances should require no demonstration. This has become well known to the general public and is supported by an impressive array of scientific studies at both the national and international levels. I list here merely a sample of those cited to us: World Health Organization, U.N. Environment Programme, and International Labour Organization (joint report), Polychlorinated Biphenyls (PCBs) and Polychlorinated Terphenyls (PCTs) Health and Safety Guide (1992); S. Dobson and G. J. van Esch, Polychlorinated Biphenyls and Terphenyls (2nd ed. 1993), Environmental Health Criteria 140, World Health Organization; R. J. Norstrom (Environment Canada) and D. C. G. Muir (Department of Fisheries and Oceans), "Chlorinated Hydrocarbon Contaminants in Arctic Marine Mammals", The Science of the Total Environment 154 (1994) 107-128; U.N. Environment Programme, Global Environmental Issues, supra; Environment Canada, Department of Fisheries and Oceans, Health and Welfare Canada, Toxic Chemicals in the Great Lakes and Associated Effects (1991); J. L. and S. W. Jacobson," A 4-Year Followup Study of Children Born to Consumers of Lake Michigan Fish", Journal of Great Lakes Research, 19(4) (1993): 776-783; M. Gilbertson et al., "Great Lakes Embryo Mortality, Edema, and Deformities Syndrome (GLEMEDS) in Colonial Fish-eating Birds: Similarity to Chick-Edema Disease", Journal of Toxicology and Environmental Health, 33 (1991): 455-520; Canadian Council of Resource and Environment Ministers, The PCB Story (1986); Environment Canada and Health and Welfare Canada, Background to the Regulation of Polychlorinated Biphenyls (PCB) in Canada: A Report of the Task Force on PCB, April 1, 1976, to the Environmental

Contaminants Committee of Environment Canada and Health and Welfare Canada; Health and Welfare Canada, A Review of the Toxicology and Human Health Aspects of PCBs (1978-1982) (1985); OECD, Protection of the Environment by Control of Polychlorinated Biphenyls (1973).

158 From what appears in these studies, one can conclude that PCBs are not only highly toxic but long lasting and very slow to break down in water, air or soil. They do dissolve readily in fat tissues and other organic compounds, however, with the result that they move up the food chain through birds and other animals and eventually to humans. They pose significant risks of serious harm to both animals and humans. As well they are extremely mobile. They evaporate from soil and water and are transported great distances through the atmosphere. High levels of PCBs have been found in a variety of arctic animals living thousands of kilometres from any major source of PCBs. The extent of the dangers they pose is reflected in the fact that they were the first substance sought to be controlled in Canada under the Environmental Contaminants Act, supra, the predecessor of the present legislation. They were also the first substance regulated in the United States under the Toxic Substances Control Act, 15 U.S.C. § 2605(c). And because of the trans-boundary nature of the threat, they were the first substances targeted for joint action by Canada, the United States and Mexico through the Commission for Environmental Cooperation established under the North American Free Trade Agreement; see C.E.C. Council of Ministers, Resolution # 95-5 "Sound Management of Chemicals", Oct, 1995; C.E.C. Secretariat Bulletin, vol. 2, No. 3, Winter/Spring 1996.

159 I should say that the respondent and mis en cause do not contest the toxicity of PCBs but simply argue that their control should not fall exclusively within federal competence. They also note that there is one study (G. J. Farquhar and S. Sykes, PCB Behaviour in Soils (1978), at pp. 7, 8, 22, 23, 26, 33 and 34) that indicates that PCBs are absorbed, remain stable and are not mobile. I have already discussed the issue of concurrency. So far as mobility is concerned, whatever weight may be attached to the report in relation to the national concern issue, it has no relevance in considering federal jurisdiction under the criminal law power.

160 I conclude, therefore, that the Interim Order is also valid under s. 91(27) of the Constitution Act, 1867.

Disposition

161 I would allow the appeal with costs, set aside the judgment of the Court of Appeal of Quebec and order that the matter be returned to the Court of summary convictions to be dealt with in accordance with the Act. I would answer the constitutional question as follows:

> Q. Do s. 6(a) of the Chlorobiphenyls Interim Order, P.C. 1989-296, and the enabling legislative provisions, ss. 34 and 35 of the Canadian Environmental Protection Act, R.S.C., 1985, c. 16 (4th Supp.), fall in whole or in part within the jurisdiction of the Parliament of Canada to make laws for the peace, order and good government of Canada pursuant to s. 91 of the Constitution Act, 1867 or its criminal law jurisdiction under s. 91(27) of the Constitution Act, 1867 or otherwise fall within its jurisdiction?
>
> A. Yes. They fall wholly within Parliament's power to enact laws under s. 91(27) of the Constitution Act, 1867. It is not necessary to consider the first issue.

Appeal allowed.

Pourvoi accueilli.

1997 CarswellQue 3705, (sub nom. R. v. Hydro-Québec) 118 C.C.C. (3d) 97, (sub nom. R. v. Hydro-Québec) 151 D.L.R. (4th) 32, 9 C.R. (5th) 157, (sub nom. R. v. Hydro-Québec) 217 N.R. 241, (sub nom. R. v. Hydro-Québec) [1997] 3 S.C.R. 213, 24 C.E.L.R. (N.S.) 167, 1997 CarswellQue 849, 3 S.C.R. 213

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