THE SUPREME COURT, THE ENVIRONMENT, AND THE CONSTRUCTION OF A NATIONAL IDENTITY: *R.* v. *HYDRO-QUÉBEC*

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After a very brief analysis of the *Hydro-Québec*[1] decision (the only important decision rendered this past year by the Supreme Court on a division of powers issue), this paper will address the following three questions. First, from an internal perspective — that is, from a strictly legal point of view — is the decision reconcilable with the case law relating to the federal criminal law power? Second, will the extensive federal power recognized by the Court enhance the quality of environmental protection in Canada, in other words, what will be the practical effect of the decision? Third, from an external perspective — that is, from a social policy point of view — what purposes are served by the decision?

I. THE DECISION

In *Hydro-Québec*, the constitutional validity of sections 34 and 35 of the *Canadian Environmental Protection Act*[2] were at issue. These provisions established a mechanism to enable the identification of toxic substances. They also authorized the Minister of the Environment to make regulations concerning any possible use of those substances. Failure to comply with the regulations constituted an offence.

Justice La Forest, speaking for the majority,[3] concluded that the challenged provisions were validly enacted under section 91(27) of the Constitution because they *prohibited*, *except in accordance with specified terms and conditions*, the introduction of toxic substances into the environment. As such, they pursued a legitimate public objective, namely, the protection of the environment.

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

2 R.S.C. 1985 (4th Supp.) c. 16 (hereinafter "the Act").

3 For the majority: La Forest, L'Heureux-Dubé, Gonthier, Cory and McLachlin JJ. For the dissent: Lamer C.J.C., Iacobucci, Sopinka and Major JJ.

According to Justice La Forest, the "stewardship of the environment" is one of "the fundamental value[s] of our society,"[4] and it is the protection of human life and health which the criminal law power aims to protect.

According to La Forest J., the challenged provisions did not constitute an infringement on the legislative powers allocated to the provinces by the *Constitution Act, 1867*. They only dealt with the control of toxic substances — allowing for their release into the environment under certain restricted circumstances — through "a series of prohibitions to which penal sanctions [were] attached."[5] The Act did not bar the use or manufacture of all chemical products. Rather, it was aimed at those substances that are dangerous to the environment, substances that are "toxic in a real sense."[6] In short, the Act provided for "a limited prohibition applicable to a restricted number of substances."[7]

II. THE INTERNAL PERSPECTIVE

The majority decision is a welcome one because it will permit the federal Parliament to establish a comprehensive scheme for the regulation of toxic substances. A careful reading of La Forest J.'s opinion demonstrates that he is uncomfortable with the idea of authorizing true regulation under the criminal law power. He speaks repeatedly of the Act in terms of prohibitions and exemptions. Such hesitation is unwarranted.

As long as it is aimed at activities which are in the nature of "public evils," a legislative intervention based on the criminal law power is no longer confined to repression and stigmatization. In other words, regulation is possible under section 91(27), but only the regulation of a substance, an activity, or a person that *endangers* either the safety of the public or the integrity of the environment.[8] Indeed, so long as a legitimate public objective is pursued, a law based on section 91(27) need not be confined to traditional modes of sanctions.[9]

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[4] Supra note 1 at para. 43.

[5] *Ibid*. at para. 51.

[6] *Ibid*. at para. 60.

[7] *Ibid*. at para. 62.

[8] Legislation regulating the use of weapons (*Attorney General of Canada* v. *Pattison* (1981), 59 C.C.C. (2d) 138 (Alta.C.A.); *Martinoff* v. *Dawson* (1990), 57 C.C.C. (3th) 482 (B.C.C.A.), of alcohol (*Russell* v. *The Queen* (1881-1882), 7 App. Cas. 829) of food and drugs (*R.* v. *Wetmore*, [1983] 2 R.C.S. 284; *C.E. Jamieson & Co. (Dominion)* v. *Canada*, [1988] 1 C.F. 590 (F.C.)) and the promotion of tobacco (*RJR—MacDonald Inc.* v. *Canada,* [1995] 3 R.C.S. 199) was held to be valid under the criminal law power.

[9] *The Queen* v. *Zelensky*, [1978] 2 R.C.S. 940.

Such interventions need not provide for the infliction of a penalty. In *Swain*,[10] for instance, the Supreme Court held that a provision of the *Criminal Code* providing for the detention in a provincial mental institution of those acquitted by reason of insanity was validly enacted under section 91(27), even though no penalty was inflicted. According to the Court, a rational link existed between this preventive provision and the criminal law power, since it applied to persons who had perpetrated acts prohibited by the *Criminal Code*, and whose release could endanger the safety of the public. There certainly is a rational link between the regulation of dangerous substances and the criminal law.[11] As La Forest J. says, if the law is read as only applicable to substances that are "toxic in a real sense," it can fall within criminal law.

Such an approach does not preclude the possibility of shared environmental jurisdiction. The provinces can still intervene to protect the environment. Under the criminal law power, Parliament can only prevent evils which offend certain fundamental values, such as the protection of health and the protection of the environment. A province can regulate the very same activity or conduct, so long as it pursues an objective falling within its constitutional jurisdiction.[12] In so doing, it will not be enacting criminal legislation.

The double aspect doctrine, therefore, enables Parliament to establish minimal standards of environmental protection which can be exceeded by the provinces in the exercise of their own powers.[13] From a strictly legal point of view, then, the decision is a good one. But will it make any significant difference to environmental protection in Canada?

III. THE PRACTICAL EFFECT

It seems doubtful that this decision will improve the quality of environmental protection in Canada. But it is a welcome decision in view of the absolute lack of interest shown by the provinces in the protection of the environment. In the last five years, environmental budgets have been reduced by 43 per cent in Ontario, by 50 per cent in Quebec, 60 per cent in Newfoundland, 25 per cent in Alberta, and 33 per cent in New Brunswick.

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[10] *R.* v. *Swain*, [1991] 1 R.C.S. 933.

[11] For a particularly enlightening opinion on the question of the possible regulation of toxic substances under the criminal law power, see Justice Muldoon's reasons in *C.E. Jamieson & Co. (Dominion)* v. *Canada*, 621-22.

[12] For example, see *Rio Hotel* v. *New-Brunswick*, [1987] 2 R.C.S. 59.

[13] There is no conflict between a valid provincial law and a less severe, but valid, federal law, because it is possible to obey both in respecting the more severe of the two: *Ross* v. *Registrar of Motor Vehicles*, [1975] 1 R.C.S. 5.

Even Quebec environmentalists strongly encourage federal involvement in environmental matters,[14] because the attitude of the present government in Quebec is just plain astonishing. Recently, the newspaper *Le Devoir* revealed that in a confidential report written last August, the Bouchard government was considering dismantling the environmental assessment mechanism now in place (le BAPE: Bureau d'audiences publiques sur l'environnement) and replacing it with a discretionary process in which developers would be called upon to assess the social and environmental impacts of their particular projects.[15]

But will the extensive federal power recognized by the Court change anything? True, the liberal government recently has tabled Bill C-32 (12 March 1998) which provides for extensive mechanisms to protect the environment. But the purpose of tabling such legislation might be more political than anything else. The courage to implement the legislation might be lacking. For example, following the *Oldman River*[16] decision in 1992, which recognized that the Parliament had the power to provide for environmental impact assessment of any project that has an effect on any matter within federal jurisdiction, the required federal assessment was in fact completed. As the final report was unfavourable to the project, the federal Minister lost no time in rejecting it completely and approving the Oldman River dam project.[17]

Furthermore, in a recent report tabled in the House of Commons on 4 December 1997, concerning the Canada-wide Accord on Environmental Harmonization which was adopted by the Canadian Council of Ministers of the Environment, the Standing Committee on Environment and Sustainable Development concluded that "one of the predominant characteristics of the Accord ... is that [it] would rationalize Canada's environmental protection regime, rather than harmonize it. Instead of promoting cooperation and complementary action, the Accord ... would define exclusive areas of jurisdiction for each level of government, and prevent the other from playing any role in that field." It also concluded that the approach adopted in the Accord "would leave the Federal government with only a limited set of responsibilities of considerably less importance than its current environmental protection role."[18]

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[14] *Le Devoir* (29 December 1997).

[15] *Le Devoir* (17 March 1998).

[16] *Friends of the Oldman River* v. *Canada*, [1992] 1 R.C.S. 3.

[17] P. W. Hogg, *Constitutional Law of Canada*, 3rd ed., loose-leaf edition, (Toronto: Carswell, 1997) sect. 29.7(b), note 113.

[18] Canada, House of Commons, Report of the Standing Committee on the Environment and Sustainable Development, "Harmonization and Environmental Protection: An Analysis of the Harmonization Initiative of the Canadian Council of Ministers of the Environment" (December

So we cannot expect too much from a central government so willing to abandon its responsibilities over environmental protection.

IV. THE EXTERNAL PERSPECTIVE

Even if it fails to accomplish anything for the environment, the *Hydro-Québec* decision is an important one from a nation-building and national identity point of view. Indeed, this decision is interesting as it shows how the courts can contribute efficiently to the construction of a national identity.

Charles Taylor defines identity as "the commitments and identifications which provide the frame or horizon within which ... [a person] is capable of taking a stand."[19] Canada, as we know, is a state in which the regional identities are very strong. This serves to explain the difficulties encountered by those who try to govern it. But what about national identity? Recognition of diversity is not a substitute for national identity. What is needed is the creation of a sense of belonging, of a common political consciousness; in short, the belief in a common destiny. Only common objectives can bring us together.[20]

There being no unanimity around what a Canadian identity really entails, it has to be defined through discussions, through an intermingling of different "moral" visions.[21] In view of its dialogical nature, the construction of a common identity usually takes place in the political arena.[22] Unfortunately, in Canada, at the political level, our constitutional conversations have failed to provide this sense of belonging. The consequence of this is a legitimation crisis. Indeed, the political institutions of a society will appear legitimate to its members, that is, they will freely submit to its dictates, as long as these institutions pursue the shared values of the members of the community.[23]

1997). The Report can be found in its entirety at "http://interparl.parl.gc.ca /InfocomDoc/ENSU/Studies/Reports/ENSURP01-E.htm."

[19] C. Taylor, *The Sources of the Self: The Making of the Modern Identity* (Cambridge: Harvard University Press, 1989) at 27. This frame enables one to "determine from case to case what is good, or valuable, or what ought to be done, or what [one] endorse[s] or oppose[s]" (ibid.). The commitment in question can be a moral or religious one. It can be a nationalistic or traditional one.

[20] C. Taylor, *Reconciling the Solitudes: Essays on Canadian Federalism and Nationalism* (Montreal: McGill-Queen's University Press, 1993) at 26-27, 115.

[21] S.V. LaSelva, *The Moral Foundations of Canadian Federalism: Paradoxes, Achieve-ments and Tragedies of Nationhood* (Montreal: McGill-Queen's University Press, 1996).

[22] C. Taylor, *supra* note 20 at 97, 130-131.

[23] *Ibid.* at 64-66.

But if politicians are unable to provide a "*référence identitaire*,"[24] an ideological expression of our shared civil allegiance,[25] other institutions such as the courts can intervene. Indeed, the courts, as much as the political institutions, can play a great part in the definition of a national identity; this is what Charles Taylor calls the "identificatory function"[26] of the state institutions; although when he uses the term, Taylor does not have the courts in mind. I believe that this is precisely what the Supreme Court has been doing lately, albeit maybe unconsciously, through its interpretation of the federal criminal law power. It gives Parliament the opportunity to identify and define what it believes to be the fundamental values of our society.

In recognizing very extensive powers to Parliament in matters such as the protection of health (*Imperial Tobacco*) and the protection of the environment (*Hydro-Québec*), two highly sensitive issues for *all* Canadians, the Court participates in a process of legitimation of the Canadian state and in the construction of national identity. Not only do protection of health and the environment represent two values perceived by many as traditionally and typically "Canadian" values, but they also have the singular quality of enabling us to transcend the issues which constantly divide us (language, ethnic origin, etc.). In other words, they are values about which we can all agree. Thus, they operate as symbols of what being a Canadian really means.

Recognizing an extensive legislative responsibility over such matters vested in the central government reinforces its legitimacy, because by legislating over matters which are important to the average Canadian, the central government brings itself closer to the people and gains more visibility.[27] Furthermore, the Court itself strengthens its own legitimacy in upholding legislative initiatives which meet with popular approval.

Finally this judicial nation-building process also is apparent in the recent decision concerning the remuneration of provincial judges rendered last year by

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[24] G. Bourque and J. Duchastel, *L'identité fragmentée* (Montréal: Fides, 1996) at 16.

[25] How do we conceive space (state, country), communities (Canadian nation, nation québécoise, indigenous nations), and social interactions (men-women, cultural diversities), etc? See *ibid.* at 34.

[26] C. Taylor, supra note 20 at 127; see also 125-126.

[27] In *Du Contract Social ou, Principes du droit politique* (Paris: Gallimard, 1964) at 169-292, 209 (Livre II; Chap. IX), Jean-Jacques Rousseau declares that in a big state, "le peuple a moins d'affection pour ses chefs qu'il ne voit jamais, pour la patrie qui est à ses yeux comme le monde, et pour ses concitoyens dont la plus-part (sic) lui sont étrangers."

the Court.[28] In a very long *dicta*, Chief Justice Lamer presents a mythified version of the *Constitution Act, 1867* in which we are told that this document is a testimony to all the great philosophical principles of the enlightenment. The Constitution's preamble is said to "serve as the grand entrance hall to the castle of the Constitution."[29] He goes on to say that "the express provisions of the Constitution should be understood as elaborations of the underlying, unwritten, and organizing principles found in the preamble to the *Constitution Act, 1867*."[30] This reconstruction of Canadian constitutional history will certainly be of service in some future cases such as the Secession Reference.[31]

In conclusion, I think the importance of the Hydro decision does not lie in the fact that it gives a very broad interpretation to the federal criminal law power. Rather, it lies in the fact that the Court reinforces the legitimacy of the central government by authorizing it to encroach extensively on provincial jurisdictions for the sake of protecting matters which are considered vitally important to all Canadians wherever they live, whatever language they speak. In other words, these encroachments are justified because they are aimed at protection of the "fundamental values of our society." In identifying and defining those fundamental values, the Court actively participates in the construction of a "Canadian identity."

[28] *Reference re: Public Sector Pay Reduction Act (PEI)*, s.10; *Reference re: Provincial Court Act (PEI)*; *R.* v. *Campbell; R.* v. *Ekmeic*; *R.* v. *Wickman*; *Manitoba Provincial Judges Assn.* v. *Manitoba (Minister of Justice)*, [1997] 3 S.C.R. 3.

[29] *Ibid*. at para. 109.

[30] *Ibid*. at para. 107.

[31] Reference re: Secession of Quebec from Canada, [1996] S.C.C.A. No. 421 (Q.L.); Décret C.P. 1996-1497.