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GUN CONTROL AND THE CRIMINAL-LAW POWER

Peter W. Hogg*

I. INTRODUCTION

The federal power over criminal law has no counterpart in the United States or Australia, where criminal law is a state responsibility. This power has enabled the Parliament of Canada to enact a national *Criminal Code*¹ as well as some other statutes that criminalize dangerous or deceptive behaviour. Early attempts to use the power as a tool to regulate the insurance industry² or prices generally³ were rebuffed by the Privy Council, although their Lordships did use the power to uphold a primitive form of federal competition law in which the sole mode of enforcement was the criminal prosecution.⁴

Those who dream of an increased regulatory presence for the Parliament of Canada have not in the past usually nominated the criminal-law power as a likely source of that presence — outside the conventional domain of criminal law. The difficulty was that the cases established that a valid criminal law had to take the form of a prohibition coupled with a penalty in support of a “typically criminal” purpose.⁵ These three requirements severely limited the topics upon which criminal law could be enacted, and the legislative techniques that could be employed. In the last six years, however, three decisions of the Supreme Court of Canada have upheld rather bold uses of the criminal-law power in such diverse areas as tobacco advertising, environmental protection and gun control.

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¹ R.S.C. 1985, c. C-46.

² *Ontario (Attorney General) v. Reciprocal Insurers*, [1924] A.C. 328 (P.C.).

³ *Reference re Board of Commerce Act, 1919 (Canada)*, [1922] 1 A.C. 1910 (P.C.).

⁴ *Proprietary Articles Trade Assn. v. Canada (Attorney General)*, [1931] A.C. 310 (P.C.).

⁵ *Canadian Federation of Agriculture v. Quebec (Attorney General)*, [1951] A.C. 179 (P.C.).

II. TOBACCO

The first decision is *RJR-MacDonald Inc. v. Canada (Attorney General)*,⁶ in which the Supreme Court of Canada had to review the validity of the federal *Tobacco Products Control Act*,⁷ which prohibited the advertising of cigarettes and other tobacco products. It was clear that the criminal-law power permitted Parliament to prohibit the manufacture, sale or possession of dangerous products. But Parliament had not done that: the manufacture, sale and possession of tobacco remained lawful and all that was prohibited was the advertising of tobacco products. Advertising itself was not a dangerous act, and the advertising of consumer goods was normally within the jurisdiction of the provinces under their power over property and civil rights.⁸ In the Supreme Court of Canada, Major J.'s dissenting view was that the prohibition of the advertising of a legal product lacked a typically criminal purpose and was outside the criminal-law power. La Forest J. for the majority disagreed. In his view, the power to prohibit the use of tobacco on account of its harmful effects on health also encompassed the power to take the lesser step of prohibiting the advertising of tobacco products. Although it was impracticable to ban the product itself in view of the large number of Canadians who were smokers, the ban on advertising still pursued the same underlying public purpose of protecting the public from a dangerous product. The majority of the Court therefore held that the Act was within the criminal-law power of Parliament. (The Act was actually struck down by a majority of the Court under the *Canadian Charter of Rights and Freedoms*,⁹ because of the impact of the advertising ban on freedom of expression.)

III. ENVIRONMENT

The second of the three cases is *R. v. Hydro-Québec*,¹⁰ in which the Supreme Court of Canada upheld the *Canadian Environmental Protection Act*,¹¹ which is a federal law that establishes a scheme for the regulation of toxic substances. The Ministers of Environment and Health have authority to examine the effects of any substance and to recommend to the Governor in Council that the substance be classified as "toxic," which involves a finding that the substance is harmful to the

⁶ [1995] 3 S.C.R. 199. On the criminal-law power, La Forest J. wrote the majority opinion with the support of six other members of the Court; Major J. dissented on this issue with the support of Sopinka J.

⁷ R.S.C. 1985, c. 14 (4th Supp.) [rep. S.C. 1997, c. 13, s. 64].

⁸ *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927.

⁹ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

¹⁰ [1997] 3 S.C.R. 213. The majority opinion was written by La Forest J. with the agreement of L'Heureux-Dubé, Gonthier, Cory and McLachlin JJ. The dissenting opinion was written by Lamer C.J.C. and Iacobucci J. with the agreement of Sopinka and Major JJ.

¹¹ R.S.C. 1985, c. 16 (4th Supp.) [repealed and replaced by S.C. 1999, c. 33].

environment or a danger to human health. Once classified as toxic, the substance comes under the regulatory authority of the Governor in Council, which may make regulations governing its release into the environment, and the manner and conditions under which it can be manufactured, imported, processed, transported, stored, sold, used and discarded. Hydro-Québec was prosecuted for violating an “interim order” authorized by the Act. The corporation argued that the Act, and therefore the interim order, was outside the criminal-law power of the federal Parliament.

The corporation’s argument was accepted by Lamer C.J.C. and Iacobucci J., who wrote for the four dissenting judges. In their view, although the protection of the environment was a legitimate purpose for a criminal law, this Act lacked the prohibitory character of a criminal law. There was no prohibition until the administrative process to classify the substance (or to make an interim order) had been completed, and “[i]t would be an odd crime whose definition was made entirely dependent on the discretion of the Executive.”¹² The dissenters were also troubled by a provision of the Act that exempted a province from a regulation if that province already had an equivalent law in place; that, said Lamer C.J.C. and Iacobucci J., “would be a very unusual provision for a criminal law.”¹³ But La Forest J., writing for the majority, upheld the Act as a criminal law. In his view, because the administrative procedure for assessing the toxicity of substances culminated in a prohibition enforced by a penal sanction, the scheme was sufficiently prohibitory. He characterized the exemption for provinces with equivalent provincial laws as recognizing the reality that much of the field of environmental protection is effectively concurrent. In the end, then, the Act was upheld as a criminal law.

IV. GUN CONTROL

The third of the three cases is *Reference re Firearms Act (Canada)*,¹⁴ in which a challenge was mounted to Canada’s gun control legislation, which is part of the *Criminal Code*. The main techniques of control consist of requirements to register all firearms and to license all firearms owners. The Supreme Court of Canada held that the purpose of gun control was public safety, which was a typically criminal purpose. The purpose was ultimately effected by a prohibition of unregistered guns and unlicensed holders, and the prohibition was backed by penalties. The opponents of gun control argued that the Act was regulatory rather than criminal legislation, because of the complexity of the regime and the discretionary powers

¹² *R. v. Hydro-Québec*, *supra*, note 10, at para. 55.

¹³ *Id.*, at para. 57.

¹⁴ [2000] 1 S.C.R. 783. The unanimous opinion was the opinion of “the Court.”

vested in the licensing and registration authorities. Only an outright prohibition of guns, it was argued, would be a valid criminal law. The Court relied on its prior decision in *Hydro-Québec* for the proposition that the criminal-law power authorizes complex legislation, including discretionary administrative authority. And the Court relied on its prior decision in *RJR-MacDonald* for the proposition that a criminal purpose may be pursued by indirect means. Just as the health risks of tobacco did not require the outright banning of cigarettes, the safety risks of guns did not require the outright banning of guns. Measures that would indirectly advance the legislative purpose, such as the advertising ban in *RJR-MacDonald* or the licensing and registration requirements of the gun control legislation, were authorized by the criminal-law power.

V. CONCLUSION

These three decisions take the criminal-law power well beyond the conventional limits of criminal law. The first case (*RJR-MacDonald*) shows that even a harmless activity (advertising in that case) can be regulated, provided it is in the ultimate service of preventing a harmful activity. The second case (*Hydro-Québec*) shows that harm to the environment, not necessarily harm to persons or property, can serve as a sufficient purpose to justify criminal law, and leaves the door open to other kinds of harms as well. The second and third cases (*Hydro-Québec* and *Firearms*) show that regimes of regulation with elaborate regulatory structures and official decision-making can be upheld as criminal law, although they are a far cry from the model of a law that is self-applied by the individuals to whom it applies and is enforced only by police, prosecutors and the criminal courts. The conclusion is that much more can be done with the criminal-law power than we imagined 50 years ago, or even 10 years ago.