Introduction Section 91 of the Constitution Act, 1867 states that "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..." The power conferred to the Parliament is not a sweeping power to legislate in relation to peace, order and good government. The power contained in the opening paragraph of s. 91 is only to legislate for the peace, order, and good government of Canada in matters not exclusively assigned to the provinces. In Fort Francis Pulp & Power Co. v. Man. Free Press Co., [1923] A.C. 965, the Privy Council explained that s. 91 contemplates emergency situations which change the nature of the power being exercised. When such situations occur, "s. 92 is not in any way repealed... but a new aspect of the business of Government is recognized as emerging" [Ibid. at 390]. What sort of situations constitute emergencies? "Highly exceptional" or "abnormal" circumstances are required to constitute an emergency: Board of Commerce, Toronto Electric Commissioners v. Snider. If such an emergency does in fact exist, the federal power under the emergency branch is limited by the extent of the emergency. In other words, the existence of an emergency does not automatically confer unfettered powers to the federal government; the legislation must be "necessary" to address the emergency [Reference Re Anti-Inflation Act, [1976] 2 S.C.R. 373 at 391].

The second branch of p.o.g.g. is what is known as the "national concern" branch.

Matters of National Concern

The national concern doctrine, as developed in the Local Prohibitions and Canada Temperance cases, has been applied by the Supreme Court of Canada to provide a basis for legislation under the introductory clause of section 91 of the Constitution.

In Johannesson v. West St. Paul, [1952] 1 S.C.R. 292, [1951] 4 D.L.R. 609 the Court held that aeronautics satisfied the national concern test. Locke J. discussed the characteristics which made the field of aeronautics one which concerned the country as a whole. He cited the increasing volume of passenger and freight traffic, the use of aircraft in the carriage of mail, and the importance of air traffic, particularly to remote northern areas, to the opening up of the country and the development of national resources. Locke J. then stated, at p. 327:

It is an activity, which to adopt the language of Lord Simon in the Attorney General for Ontario v. Canada Temperance Federation, must from its inherent nature be a concern of the Dominion as a whole. The field of legislation is not, in my opinion, capable of division in any practical way.

In Munro v. National Capital Commission, [1966] S.C.R. 663, 57 D.L.R. (3d) 753 the Court held that the development of a legislatively designated area surrounding Ottawa was of sufficient national concern to be encompassed by the federal residuary power. Cartwright J. stated, at p. 671:

I find it difficult to suggest a subject-matter of legislation which more clearly [...] is the concern of Canada as a whole than the development, conservation and improvement of the National Capital Region in accordance with a coherent plan in order that the nature and character of the seat of the Government of Canada may be in accordance with its national significance. Adopting the words of the learned trial judge, it is my view that the Act deals with a single matter of national concern.

The Future of the National Concern Doctrine

The Anti-Inflation Act Reference [1976] 2 S.C.R. 373 gave new definition to the national concern branch of the p.o.g.g. clause. R. v. Crown Zellerbach Can. Ltd., [1988] 1 S.C.R. 401] appeared to solidify that definition, although the Court divided deeply about how to apply the reworked doctrine to the analysis of challenged legislation.

Some commentators contended that the Supreme Court's development of the national concern doctrine in Crown Zellerbach would threaten provincial jurisdiction. The Supreme Court has been sensitive to this particular criticism and has been careful in later cases to avoid any complaint that the Court will use the national concern branch of the p.o.g.g. clause to threaten provincial jurisdiction. Perhaps for that reason, application of the doctrine continues to split the Court.

In Ontario Hydro v. Ontario (Labour Relations Board), [1993] 3 S.C.R. 327, the Court held that labour relations in Ontario Hydro's nuclear generating stations was sustainable, inter alia, on the federal government's p.o.g.g. power. Speaking for the majority, La Forest J. stated:

There can surely be no doubt that the production, use and application of atomic energy

constitute a matter of national concern. It is predominantly extra-provincial and international in character and implications, and possesses sufficiently distinct and separate characteristics to make it subject to Parliament's residual power.

Mr. Justice Iacobucci [Sopinka and Cory JJ. concurring] disagreed, focusing on Le Dain J.'s third conclusion on the p.o.g.g. power from Crown Zellerbach: it must have a singleness, distinctiveness and indivisibility. While Iacobucci J. agreed that the federal government generally had jurisdiction over atomic energy under the p.o.g.g. power,

[...] that jurisdiction does not extend to the labour relations between Ontario Hydro and those of its employees employed in the nuclear electrical generating stations. The federal government does not require control over labour relations at Ontario Hydro's nuclear facilities for the exercise of jurisdiction over atomic energy. In other words, the labour relations at issue in this case are not part of the single, distinctive and indivisible matter identified as atomic energy.

In A.G. Canada v. Hydro Quebec et. al., [1997] 3 S.C.R. 213 Hydro Quebec, which had been charged under s. 6(a) of the Chlorobiphenyls Interim Order, challenged s. 6(a) and ss. 34 and 35 of the Canadian Environmental Protection Act pursuant to which s. 6(a) was made. One basis of the attack was that the provision did not fall within the national concern branch of the peace, order and good government clause of s. 91 of the Constitution Act, 1867; another was that the provisions did not fall within Parliaments criminal law power at. s. 91:27. A majority of the Court found the provisions were justified by s. 91:27 and thus found it unnecessary to consider the national concern branch of the p.o.g.g. power. However, Justice La Forest, for the majority did say in passing:

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 (cites omitted), 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).

[...]

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, [1976] 2 S.C.R. 373, and thus set forth in Crown Zellerbach, supra, at p. :

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.) 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.

The minority position on this point (which was not addressed by the majority) was subsequently accepted by the whole Court in Oldman River at p. 64 (cites omitted). 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.

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 Fowler v. The Queen, [1980] 2 S.C.R. 213) 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.

[...]

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.

Lamer, C.J.C. and Iacobucci, J. for the minority wrote joint reasons which concluded that the challenged provisions could not be justified by s. 91:27. Accordingly they went on to consider whether the national concern branch of the p.o.g.g. clause could support the challenged provisions. After reciting the four enumerated points by which Justice LeDain summarized the national concern doctrine in Crown Zellerbach, [1988] 1 S.C.R. 401 at 431-2, Lamer C.J.C. and Iacobucci, J. continued:

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 P.O.G.G.

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

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

The appellant submits that the object of Part II of the Act is limited in scope in 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 array of substances, not only to chemical pollutants. Moreover, the impugned legislation is not limited to substances having interprovincial effects.

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. [...]

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. [...]

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. [...]

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.

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.

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, 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.

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.

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

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.