S. 15: Equality

*Has a s. 15 equality right been breached?*

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability

**Analysis**

**S. 15(1): Framework of the *Law test*:**

* The first step of the analysis is concerned with whether the law causes differential treatment. The second and third steps are concerned with whether the differential treatment constitutes discrimination in the substantive sense intended by s. 15(1).

**Step 1: Is there differential treatment between the claimant and others?**

* + *Does the impugned law draw a formal distinction between the claimant and others on the basis of one or more personal characteristics; or fail to take into account the claimant’s already disadvantaged position in Canadian society resulting in substantively different treatment between the claimant and others on the basis of one or more personal characteristics?* (***Law***)
	+ **Differential treatment is triggered in two ways:**
		- **Formally:** It is clear there is differential treatment of people on the face of the law
			* *Andrews*: citizens can be lawyers, non-citizens cannot
			* *Law*: only people over the age of 35 may receive the benefit
			* Once formal differential treatment established, move right to the next step of the analysis
		- **Substantively (Adverse impact):** Facially neutral law that has no explicit distinction but discriminates in effect. Does the law fail to take into account someone’s disadvantaged situation and thus subject them to a burden or deny a benefit? (*Eldridge*, *Vriend, Symes*)
			* In adverse impact cases, the law treats everyone the same, but in reality the groups are differently situated. Where there is existing inequality, a neutral law applied to inequality exacerbates that inequality or continues it: (*Eldridge*, *Vriend*)
			* If there is an adverse impact, you will have to establish a comparator group.
		- **Test for adverse impact**:
			1. Alleged disadvantage (existing inequality)
			2. Effect of the law leaves inequality in place, or exacerbates it
			3. Direct link between the subject matter of the law and the pre-existing inequality
* *Eldridge*: facially neutral policy, absence of interpreters for deaf means inferior services compared to non-deaf 🡪 Extension remedy: bump up the benefit for the disadvantaged group
* *Weatherall*: formal equality has adverse impact on female prisoners b/c the reality of a male guard searching a female is different from a female guard searching a male prisoner (based on historic, social differences)
* *Vriend*: Formal equality in protection of *IRPA*, but consider social reality of discrimination against homosexuals 🡪 disproportionate impact of discrimination as opposed to heterosexuals
* *Symes*: no direct link. Alleged social reality: women put more time and effort into childcare, but law is about pocket expenses. There has to be evidence that women pay more out of pocket for childcare services.
* Identify the **comparator group**:
	+ Equality is a comparative concept, and to establish differential treatment on the basis of an enumerated or analogous ground necessarily requires a comparison of the treatment of the claimant under the impugned law with another person or group: *Law*.
	+ The claimant makes the initial choice of a comparator group, but where the differential treatment is between the claimant and a different group than the one they chose, it is the duty of the court to measure the claim to equality rights in the proper context and against the proper standard: *Hodge*.
	+ The groups must mirror each other in every respect except the aspect which engages some s.15 discrimination. If you hold all the issues constant, the only difference should be grounds of differentiation: *Hodge*, *Auton*.
	+ “The appropriate comparator group is the one which mirrors the characteristics of the claimant (or claimant group) relevant to the benefit or advantage sought except that the statutory definition includes a personal characteristic that is offensive to the Charter or omits a personal characteristic in a way that is offensive to the Charter”: *Hodge*.
	+ Comparators must be like the claimants in all ways save for characteristics relating to the alleged ground of discrimination: *Auton*.

**STEP 2: Is the claimant subject to differential treatment on one or more enumerated or analogous grounds?**

* *Is characteristic immutable or changeable only at unacceptable cost to personal identity and does it serve as basis for stereotypical decisions made on characteristic instead of merit?*
* **Enumerated grounds**: race, sex, age, disability, religion, disability
* **Analogous grounds:** personal characteristics “that we cannot change or that the government has no legitimate interest in expecting us to change to receive equal treatment under the law”: *Corbiere*.
	+ Actual or constructively immutable personal characteristics
	+ Bakan: Other constructively immutable analogous grounds:
		- Personal priorities, don’t take lightly, goes to the core of one’s personal identity, that can only be changed at great person cost, that the government could not reasonably expect you to chance
		- Marital status, sexuality, political ideology
		- Economic status
			* Court has not really come to grips with this: is being poor or on social assistance an analogous ground?
* **If Step 1 + Step 2 are established, there is prima facie discrimination. Then, determine if the discrimination is the type intended to be captured by s. 15.**

**STEP 3: Is this the type of discrimination intended to be captured by s. 15? Does the law demean the claimant’s dignity.**

* The **purpose of s. 15(1)** is
	+ “to ensure equality in the formulation and application of the law. The promotion of equality entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect, and consideration. … [T]he promotion of equality under s.15 has a much more specific goal than the mere elimination of distinctions…”: ***Andrews.***
	+ “to prevent the violation of **essential human dignity** and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration”: ***Law***.
* **Human dignity** means that an individual or group feels self-respect and self-worth. It is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences. …The overriding concern with protecting and promoting human dignity in the sense just described infuses all elements of the discrimination analysis.: ***Law.***
	+ **Human dignity** is an essential value underlying the s.15 equality guarantee. It is an abstract and subjective notion that was intended to be a philosophical enhancement to the equality analysis: ***Kapp***.
* “…**discrimination** may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society.  Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed”: ***Andrews***.
* **Contextual factors to answer question as to whether the law demeans claimant’s dignity**
* *“The factors cited in* Law *should not be read literally as if they were legislative dispositions, but as a way of focusing on the central concern of s. 15 identified in* Andrews *– combating discrimination, defined in terms of perpetuating disadvantage and stereotyping*”: Kapp.
1. **Pre-existing disadvantage 🡪** perpetuation of disadvantage and prejudice
* Whether the group in question is a historically vulnerable group in Canadian society
* The effects of a law as they relate to the important purpose of s. 15(1) in protecting individuals or groups who are vulnerable, disadvantaged, or members of “discrete and insular minorities” should always be a central consideration.  Although the claimant’s association with a historically more advantaged or disadvantaged group or groups is not *per se* determinative of an infringement, the existence of these pre-existing factors will favour a finding that s. 15(1) has been infringed: *Law.*
* *M v H*: excl. same-sex couples from defn of “spouse” 🡪 group historically disadvantaged, law makes it worse
* *Law:* Older people are the vulnerable group, ability to overcome need is weakest
* *Weatherall*: Historical trend of violence perpetrated by men against women; women generally occupy a disadvantaged position in society in relation to men
1. **Relationship between grounds and the claimant’s characteristics or circumstances** 🡪 stereotyping
* Is the law arbitrary? Where the law is arbitrary, it is more likely to be discriminatory.
* Discriminatory if it deals with things that are irrelevant and unrelated to merits and reality of the people involved: *Andrews*.
* Although the mere fact that the impugned legislation takes into account the claimant’s traits or circumstances will not necessarily be sufficient to defeat a s. 15(1) claim, it will generally be more difficult to establish discrimination to the extent that the law takes into account the claimant’s actual situation in a manner that respects his or her value as a human being or member of Canadian society, and less difficult to do so where the law fails to take into account the claimant’s actual situation: *Law*.
* *M v H*: arbitrary because they have the same needs, only diff is same-sex
* *Law*: Those under 35 don’t receive benefits 🡪 not arbitrary to give benefits to people who need them and deny benefits to people who don’t need them (younger = better employment prospect)
1. **Nature of the interests affected 🡪** perpetuation of disadvantage and prejudice
* How badly does the law undermine equality?
* The more severe and localized the consequences of the legislation for the affected group, the more likely that the differential treatment responsible for these consequences is discriminatory within the meaning of s. 15(1): *Law*.
* *M v H*: Exclusion has both symbolic and material aspect

**NEXT: Determine if s. 15(2) is engaged.**

* S. 15(1): *prevent* gov’ts from making discriminatory distinctions
* S. 15(2): *enable* governments to proactively combat existing discrimination through affirmative measures
* **Test**: “A program does not violate the s. 15 equality guarantee if the gov’t can demonstrate that: (1) the program has an ameliorative or remedial purpose; and (2) the program targets a disadvantaged group identified by the enumerated or analogous grounds”: *Kapp*.
* Court recognizes that this is the starting point, and the test is open to refinement.

**Ameliorative purpose or effects**

* + The courts have made it clear that they will try to uphold laws that aim to ameliorate inequalities in society (in s.2(b) as in s.15)
	+ Is the person who was excluded from an ameliorative law in a more advantaged person than the person coming within the law (if yes, less likely to find violation).
	+ An ameliorative purpose or effect which accords with the purpose of s. 15(1) of the Charter will likely not violate the human dignity of more advantaged individuals where the exclusion of these more advantaged individuals largely corresponds to the greater need or the different circumstances experienced by the disadvantaged group being targeted by the legislation.  This factor is more relevant where the s. 15(1) claim is brought by a more advantaged member of society: *Law*.
		- **After *Kapp*: This contextual factor is analyzed in s. 15(2), NOT s. 15(1).**
* *Weatherall*: Alleged discrimination against male inmates b/c subject to x-gender searches 🡪 given historical, biological, and sociological differences, differential treatment may not be discrimination at all 🡪 social democratic view: gov’t should adjust things to be substantively equal
* *Kapp*: promote FN fishing rights, 24h excl. fishing 🡪 non-FN fishers complain, formal equality (gov’t shouldn’t make distinctions) 🡪 formal inequality, but it had an ameliorative/remedial purpose (self-sufficiency, social and economic disadvantage) and targeted disadvantaged group
* *Gosselin*:

S. 35: Aboriginal Rights

|  |  |
| --- | --- |
| **35.** | (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed. |
|  | (2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada. |
|  | (3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired. |
|  | (4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons. |

**Application and Interpretation:***Sparrow*

* Applies to existing Aboriginal treaty rights, not to extinguished rights
	+ Only rights that existed prior to 1982 are protected by s.35(1)
	+ The existing right is “far from being defined” (p. 506)
		- It doesn’t mean the scope of the right is defined by how it is regulated today or how it was exercised before contact
		- The right cannot be frozen in time from prior to contact, nor can it be totally restricted.
		- Courts will take a common sense approach: make a reasonable interpretation
* Extinguished rights are not revived by s.35(1)
* A right is only extinguished if the government has expressly extinguished it. Merely overriding the right with legislation is not sufficient to extinguish an Aboriginal right.
	+ **Note**: A province cannot extinguish a right, only the federal parliament has that power.
* “Rights are recognized and affirmed”
	+ Unlike s. 1, the rights are not guaranteed
	+ These are recognized and affirmed because they already existed before the creation of the Charter rights
	+ Consider: Is recognition and affirmation something less than a guarantee?
* Interpretation
	+ Must be broad and generous
	+ Should wherever and however possible incorporate the aboriginal perspective on matters that are at issue
	+ These issues implicate the honour of the Crown, as it has a fiduciary duty to aboriginal peoples: *Sparrow*.

**Three Types of Aboriginal Rights**

1. Rights to particular kinds of practices: *Sparrow, Van der Peet, Gladstone*
2. Rights to self-government
3. Rights to land itself (title): *Delgamuukw*

**Aboriginal Rights Analysis**

1. **Is there an aboriginal right?**
	* Determine if there is a right, and what content of the right is 🡪 key difference from Charter
	* What is being claimed? – Characterize the claim
		+ The right has to be defined with a good deal of precision and exactitude – not a general kind of right.
		+ *Sparrow* – right to fish for spiritual and subsistence purposes
		+ *Van der Peet* – right to exchange fish for money
		+ Does the claim meet the criteria of being an Aboriginal right?
			- “Aboriginal rights lie in the practices, traditions, and customs integral to the distinctive cultures of the Aboriginal Peoples”: *Van der Peet.*
			- Practices, traditions & customs 🡪 things that particular first nation involved in
			- Integral 🡪 definitive, at the core, important (not ancillary) to what the nation or band is about
			- Integral to the distinctive cultures 🡪 something about the culture of that particular band or Aboriginal Peoples; w/e it is must be distinctive to FN band bringing the claim, a distinguishing characteristic
		+ Time frame
* Only activities linked to pre-contact activities can be Aboriginal rights: *Van der Peet*
	+ Anything developed after contact and in relation to contact is not an Aboriginal right
	+ **Note**: LHD dissent: this is contra *Sparrow*: essentially a frozen-rights approach
* *Van der Peet*: Sto:lo commercial fishing post contact only, can’t extend subsistence fishing to commercial, no aboriginal right
* *Gladstone*: harvesting for commercial purposes since pre-contact, yes aboriginal right
* **Has Aboriginal Title been made out?**
	+ **Temporal Analysis**
		- Land was occupied prior to sovereignty (not contact)
		- It is a burden on the Crown’s title because the Crown does not have full title to land
	+ **Continuous Occupation**
		- If present occupation is relied on as proof of pre-sovereignty occupation, then there must be continuity between present and pre-sovereignty occupation.
* Ex. The Musqueam have inhabited the Pt Grey area continuously since pre-sovereignty
	+ **Exclusive Occupation**
		- At the time of sovereignty, the occupation must have been exclusive and not contested amongst first nations.
	+ ***Note****: The evidentiary criteria are very difficult, but usually concern mainstream anthropological views and First Nations evidence. These are occasionally conflicting.*
1. **Is there a restriction of the right?**
* BOP: complainant
* Not all forms of regulation or legislation necessarily constitute a restriction; the court will consider a number of factors: *Sparrow*
	+ **Test**: Whether either the purpose or the effect of the restriction unnecessarily infringes the interests protected by the right: *Sparrow* (p.568).
		- Three factors determining “unnecessarily”:
			* Is the limitation unreasonable?
			* Does the regulation impose undue hardship?
			* Does the regulation deny the holders of the right their preferred means of exercising that right?
1. **Is the restriction justified?**

🡺 Justification test applies to Aboriginal title as well as other Aboriginal rights.

* Even if the limitation is unnecessary, still possible that the restriction can be justified.
* **Test**:
	+ Are the objectives of the regulation compelling and substantial?
		- If the objective of the restriction is “compelling and substantial” (similar to P+SO), the gov’t can limit the right
		- Examples of compelling and substantial objectives:
			* *Sparrow*: “It is aimed at preserving s. 35 rights by conserving and managing a natural resource.” 🡪 conservation type laws are almost always C+SO
			* Objectives aimed at promoting a significant interest of society at large, including environmental protection and economic development
				+ *Delgamuukw*: P. 608, ¶15
				+ *Gladstone*: P. 588, ¶75
			* The justification test encompasses just about any significant non-aboriginal interest, and if it is not applied carefully, it can really unravel the protections of s.35(1).
				+ *Van der Peet*, McLachlin concurring opinion: this extension of the compelling objective is a limitation on the basis of the economic demands of non-aboriginals: it extends the justification very far to the measure of the interests of the whole society.
	+ Does the regulation at issue compromise the honour of the Crown?
		- Similar to *Oakes*: are the means necessary for pursuing the objective?
		- Stems from Crown’s fiduciary duty to the Aboriginal people
		- *Sparrow*, p. 570:
			* As little infringement as possible in order to effect the desired result
			* Expropriation 🡪 fair compensation
			* Whether the aboriginal group in question has been consulted with respect to the measures being implemented
				+ Even when dealing with the first type of conservation justification designed to make exercise of Aboriginal right possible, the Aboriginal group must at least be informed, most likely consulted. Duty of consultation is even stronger for the second type of justification.
		- Priority Principle
			* In balancing the interests of competing stakeholders, the top priority should be given to Aboriginal interests: *Sparrow*.
			* *Sparrow*: First nations food fishery has priority over both aboriginal and non-aboriginal commercial fisheries
			* *Delgamuukw,* contra-*Sparrow*: Aboriginal interests sometimes receive priority, not always – “The fiduciary does not demand that Aboriginal rights always be given priority.”
* Under what circumstances should they get priority?
	+ - * There are rights with internal limits and rights with no limits. The doctrine of priority does not grant absolute priority, but rather that the government must take into account the existence and importance of aboriginal rights: *Gladstone* (P. 586 ¶61-63).
			* *Gladstone* – can only eat so much fish (subsistence); commercial, no limit to profit
			* Aboriginal title is considered to be a right without internal limitation. Broad right 🡪 not just a right to engage in subsistence practices. It includes right to commercial practice 🡪 no real internal limit.

Federalism

**Introduction**

* Division of powers: under federalism, national authority is not allowed to interfere w/ jurisdiction of provincial authority, and vice versa
* The *Constitution Act, 1867* entrenches federalism by setting out federal and provincial HOP
	+ S. 91 – POGG, federal powers
	+ S. 92 – Provincial powers
* Royal Proclamation 1763
	+ Create legislative assembly 🡪 make laws, statutes, and ordinances for the Public Peace, Welfare and good Government of our said Colonies.
		- King lost prerogative to legislate for the colony by means of proclamation, prerogative divested to Parliament
	+ British imperial law provided that the laws of a conquered colony were to continue until altered by the conqueror
	+ Number of provisions concerning Aboriginal peoples
		- Aboriginal lands reserved, could not be purchased, settled, or taken by British subjects without the Crown’s consent and prior issuance of a licence
* French Canada
* Anything close to legislative union would not be accepted by FC population
* Autonomy of a FC Lower Canada was chief thing to be sought in any new constitution
* For the protection and promotion of their national interest and institutions, they would have their own province with their own parliament and gov’t
* Quebec was to be FC country, working together with others on common projects, but always autonomous in promotion and embodiment of the FC nationality
* Bakan: Quebec has always had a lot of autonomy, relative to other provinces, particularly in terms of issues of benefits and social services
* **Simeon, Criteria for Choice in Federal Systems, p. 200**
* Federalism, from perspective of **community**
	+ What implications do different forms of federalism have for different images of the ideal or preferred community with which people identify and to which they feel loyal?
	+ Defend and maintain balance b/t regional and national political communities
	+ Three drives: country-building, province-building, Quebec nation-building
	+ Criterion: Concerning which set of people do we assert a common citizenship, maintain a common loyalty, maintain a common set of obligations one to another, or maximize values such as equity, growth or wealth?
		- Who is entitled to share, as of right, in the resources of the group?
		- What set of people do we regard as “us”?
		- How do you see yourself in terms of the groupings that exist in the country? (regional, racial, cultural, national)
	+ Focus on nation and province b/c institutionalized communities, and which have gov’ts with the capacity to define and articulate community interests
	+ Critique
		- Simeon neglects perspective of First Nation builders: Canada was not *terra nullius* when first contact was made. If you accept that First Nation self government is grounded in this and the constitutional protection of s. 35, then why are First Nation governments subordinate to, rather than coordinate with, provincial and federal government
		- P. 654: If you strip away the prejudices of the time (that FN were uncivilized), impose somewhat of a modern sensibility, perhaps the nations that should be at the table are English, French, and FN.
* Federalism from perspective of **democracy**
	+ **Argument:** Protect citizens from governments. Preserve liberty and minority rights against oppression by majority
		- Critique: excessive faith in capacity of institutions to prevent tyranny, federalism associated with *too much* gov’t
	+ **Argument:** Things are more democratic at the local level
		- You, as a citizen, have more powers *qua* citizen if the governing structures are closer to you
		- Advantages of smaller units in terms of gov’tal responsiveness and citizen participation
			* Democracy should be about local citizens being able to make decisions about local issues
				+ Critique: Democracy works better at the federal level because the power of the people is greater in larger numbers
			* Clear majority interest more likely to emerge
			* Political leaders more sensitive to public opinion with small constituencies
			* Maximize opportunity for effective citizen participation
				+ Critique: Units need to be great deal smaller than provinces
	+ **Most prominent argument**: executive federalism (relations b/t gov’ts primarily conducted through negotiations of political executives) limits citizen participation and effectiveness in many ways
		- Confusion about which level of gov’t is responsible for what makes rational intervention difficult
		- Mixing of responsibilities reduces accountability and allows gov’ts to pass the buck
		- Strengthens the role of bureaucrats as against politicians
		- Citizen interests lost in gov’tal competition for status and power
	+ **Another critique**: federalism frustrates majority rule
		- Deny level of gov’t the jurisdiction or resources to achieve certain ends, or by providing inadequate mechanisms for joint decision-making
	+ **Another critique**: federal structure fragments groups and institutionalizes territorial dimension of politics, thus inhibiting the emergence of national majorities or of majorities and minorities based on non-regional cleavages such as class
		- Argues for more centralization
* Federalism from perspective of **functional effectiveness**
	+ **Basic argument**: Economy of scale argument, business argument, not having arbitrary boundaries argument
	+ Basis of division of powers: which level can most efficiently and effectively carry out any given responsibility
		- No provincial barriers to trade; centralism: more efficient than 10 different regulatory jurisdictions
	+ How to allocate powers and erect machinery that maximizes capacity of govt’s collectively to satisfy citizen needs
	+ Arguments about f(x)al ineffectiveness of fed system:
		- Provinces: provincial regulations recognize distinctions between provinces; competition amongst provinces leads to efficient result
		- Too decentralized: different provincial regulations, etc.
		- Too centralized: no remote central gov’t can adequately take into account the interests of all sectors and regions
		- Costs of sharing and overlapping of responsibilities among gov’ts 🡪 imposes unacceptably high decision costs
		- Sharing of powers, and process of fed-prov bargaining freezes out interest groups, contributes to overgovernment of Canadian society
		- Not all interests are defined in territorial terms. Must consider underlying nature of political, economic and cultural cleavages, and the territorial distribution of interests

**The Nature of Federalism, p.119**

* Dicey
	+ Ordinary powers of sovereignty elaborately divided b/t common or national gov’t and the separate states
		- Whatever concerns nation as whole should be under control of the nat’l gov’t
		- All matters not primarily of common interest should remain in hands of the several States
	+ Three leading characteristics of completely developed federalism:
		- Supremacy of the Constitution
		- Distribution among bodies w/ limited and coordinate authority of the different powers of gov’t
		- Authority of Courts to act as interpreters of the constitution
	+ The Bench must determine limits to authority of both gov’t and of legislature
* O’Sullivan
	+ Federal union: two perfectly independent co-ordinate powers in the same state
	+ Powers of each are equally sovereign and neither are derived from the other
	+ Each is independent in its own work; incomplete and dependent on the other for the complete work of gov’t
* Contrasting:
	+ O’Sullivan emphasizes autonomy of each level: mutually exclusive spheres of power, separated by sharp boundaries

**Compact Theory, p. 121**

* Colonies made compact ratifying the Dominion and conferring powers and property and, after Confederation, they continued to exist as the new provinces
* Elements:
	+ Provinces did to intend to and never did renounce autonomy
		- Federal association; formed a central gov’t only for interprovincial objects
		- Federal gov’t arose from provincial powers: provinces ceded portion of rights, property, and revenue
	+ Federal compact did not create new single power: taken from jurisdiction of the provinces
* Provincial rights advocates used compact as support for wide range of their claims
* Compact theory foundered b/c it was at odds with the dominant CL thought

**The Power of Disallowance, p.122**

* Did not sit well with compact theory of federalism
* Expressed in ss.59 and 90 of the *CA, 1867:* GG, on advice of federal cabinet, can reserve for up to 1 yr and then disallow any enactment of provincial legislatures
* Subordination of provincial power to federal did not fit well with understanding of Canadian federalism premised on equality of federal and provincial authority
* Kennedy: Power of disallowance was inserted in the BNA Act to cover, in general terms, unjust, confiscatory, or *ex post facto* legislation, against which there are express safeguards in the constitution of the United States
* Certain consistency of purpose in dealing with provincial legislation which appeared to hurt private property, to invalidate contracts, or to be contrary to what were known as “sound principles of legislation”
* Federal power of disallowance fell into disuse by mid-twentieth century

Interpretive structure:

=> *Overriding idea of a purposive approach*

* + - Is the law ***ultra vires***?
			* Has the federal gov’t or provincial gov’t acted outside its jurisdiction in passing a law?
	+ If a law relates to a MATTER that is within one of the CLASSES belonging to the CORRECT GOV’T => *intra vires*, valid.
		- * Questions about validity are about deciding who has jurisdiction over the **matter**
			* Matter: **“pith and substance”** of the law => what the law’s purpose is at a general level (discussed in *Morgentaler, Anti-Inflation, Westendorp*)

**Division of Powers**

Federal (Section 91)

* S.91(2) – Trade and Commerce
* S.91(27) – Criminal Law
* S.91(29) – Residual Clause

Provincial (Section 92)

* S.92(13) – Property and Civil Rights
* S.92(7) – Health
* S.92(16) – Residual Clause (gives authority over matters of a local nature)

Pith and Substance Analysis

* *What is the law’s dominant purpose / true character / dominant aim?*
* *What is the higher level of abstraction that describes what the law is doing?*
* *Describes middle “matter” between Class (very broad) and Field (legislation – very specific)*
* *Approach must be flexible (technical, formalistic approach is to be avoided)*
* **1)** Object and purpose of STATUTE => what is the legislature trying to do?
	+ Four corners of the legislation (legal effect)
* **2)** EFFECT => social + economic effect
	+ How does the law affect the people it applies to?
		- Evidence: practical effects, expert testimony
		- Timing of the law?
		- Legislative history, Hansard debates
		- Scope of the legislation
* **3)** What is the motive? COLOURABILITY
	+ Law is constitutional on its face, but may still be unconstitutional if its P&S is addressed to a matter that falls within the classes of subjects assigned to other level of gov’t: *Morgenthaler, Westendorp*
	+ Easily sways courts => if it is colourable, it is VERY DIFFICULT to argue *intra vires*
* Do the object/purpose and the legal effect match? => *intra vires*: should match up
	+ - * Identify the **“class”** of the legislation: ss. 91 and 92
				+ Consider what HOP it falls under
				+ If it falls under neither, it is INVALID. Powers are exhaustively distributed.
			* Identify the **“field”** of the legislation
				+ Describes the particular legislation at issue: what is the law aimed at doing?
			* Is the law impacted by any of the following?
	+ **Incidental Effects Doctrine**:
* Inevitable that legislation of each level of government will impact on the sphere of power of the other government (*GM*); overlap is to be expected and accommodated (modern approach)
	+ - Ensure that the possibility of a law having some incidental effect on opposing jurisdiction will NOT be struck down.
		- Similar fields can be legislated by both the federal and provincial gov’ts. P&S is about choosing the most important or dominant purpose of the legislation, as opposed to the *incidental effects* on matters falling within classes of other jurisdiction. Thus, where otherwise provincial/federal valid legislation *incidentally effects* an aspect of the other HOP, it is permissible.
	+ **Necessarily Incidental / Ancillary Power**
		- Deals with the relationship between a particular provision in a statute and the statute as a whole.
		- Where a law is found valid, but a provision within the law affects matters within the other level of government’s jurisdiction
		- Where the provision in its BROADER context is necessarily incidental or ancillary to the broader AIMS and PURPOSES and EFFECTS of the legislative regime, then it will be valid.
		- In some cases, the Court will require some degree of a logical connection, between the effects of an otherwise validly enacted law on matters within the other level of government’s jurisdiction, and that law’s purposes.
		- *Courts will consider* (*GM v Canadian National Leasing*):

How badly does the provision offend the opposing jurisdiction? How substantially *ultra vires* is it?

Very significant => is it truly necessary to achieving valid objective? Is it a necessary part of the regime? Is it truly necessary for the efficacy of the regime?

Not very significant => is there a functional connection b/t the infringing provision and the valid objective?

How tight is the connection between the provision and the entire act?

* + **Double Aspect Doctrine**
		- Some subject matters (fields of regulation) have double aspects: the legislative area will have an aspect falling w/i federal jurisdiction, and another falling w/i provincial jurisdiction. If both fields of regulation are of roughly equal importance, you cannot ignore one or the other as incidental.
		- So long as the laws do not conflict, they may operate concurrently.
		- If they conflict, apply the **doctrine of Federal Paramountcy**.
			* *Argue that a particular piece of* legislation *fits into an existing* matter *that fits into an existing* class
		- Is the law **applicable**?
			* A law may be *VALID*, but inapplicable
			* Often, the legislation will be a valid exercise of provincial power, but is inapplicable because the legislation is about a matter falling within a FEDERAL JURISDICTION => **Doctrine of Interjurisdictional Immunity (IJI)**
				+ Application limited to

Federal undertakings: communication, transportation where it runs across the country (s. 92(10)(a)(b)(c))

First Nations reserves

* + - * + TEST:

Applies to cases where a valid provincial statute encroaches in a way that impairs a vital or essential part of a federal enclave, particularly its natural area of operation where Parliament exercises power over federal things, people, work and undertakings.

Except for matters for which the courts have precedent to apply IJI, relegated to the third step of the division of powers analysis (after validity => operability)

* + - * + It does not mean the legislation is invalid, but rather that the law will be read down such that it only applies within the jurisdiction of its enactor: it has NO effect on opposing jurisdiction: *Bell # 1, Bell #2, Canadian Western Bank*
		- Is the law **operable**?
			* A law may be *VALID*, but inoperable => provincial law conflicting with federal law
				+ Roughly the same legislation doing roughly the same thing, but relating to DIFFERENT matters that fall within each of the respective legislature’s powers => In this scenario, the provincial law will NOT operate: **Doctrine of Federal Paramountcy**
				+ **Requires**

**1)** The law is valid.

**2)** There is conflict.

* + - * + In this event, the provincial legislation remains constitutionally valid but is rendered *inoperative to the extent of the inconsistency*. It is suspended as long as the federal law is still in effect.
				+ Most difficult aspect of this is understanding what a conflict is:

Broad approach

More power to federal gov’t

Provincial law will be inoperative EVEN IF individuals can comply with BOTH if the provincial law undermines the policy of the federal law

*Bank of Montreal v Hall*: inconsistency with Parliamentary intent

Narrow approach

Allows for more overlap and more concurring operation of federal and provincial legislation

UNLESS it is absolutely impossible for the subject of the law (entity or individual) to comply with BOTH federal and provincial legislation, there will not be a conflict.

*Multiple Access v McCutcheon*: operational conflict

* + - Frustration of purpose test: *Rothmans*

Can a person simultaneously comply with BOTH sets of legislation?

Does the provincial legislation frustrate the purpose of the federal legislation?

Peace, Order, and Good Government (POGG)

* **S.91 of the Constitution:** *“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 …” [emphasis added]*
	+ Broad enough to give substantial jurisdiction to Parliament, or quite narrow one
* Historically, courts have varied in their interpretation of POGG
* Think about POGG as “class” with two different matters falling within it:
1. **Matters of national concern (*Crown Zellerbach*)**
	* + The NCD requires the matter to
			- 1) be significant, indivisible and distinct,
			- 2) have extra-provincial effects resulting from a provincial inability to deal with it intra-provincially
			- 3) such that power to the federal gov’t won’t upset the fundamental constitutional balance of powers
		+ NCD cannot stand on its own: it must be rooted in a valid exercise of federal power: *Oldman River*
			- Really stands for limitation of POGG
		+ **Application**:
			- **Permanence**: the NED requires a temporal dimension, but no temporal aspect to NCD
			- **Subject matter**:
				* ***Gap Theory***: Limited instances of things that could not have been contemplated when the Constitution was created, and which have a **national dimension** (ex. aeronautics, radio communications), **or** matters that were initially local, but have become a national concern
			- The NCD applies to things the Constitution’s framers forgot and new matters
		+ It doesn’t have to be a new concern, just a growing concern
			- **1) Singleness, Indivisibility, Distinctiveness TEST:**
		+ Does the matter have some singleness, distinctiveness, and indivisibility?
		+ There is something about the subject matter that doesn’t allow it to be split into parts => distinguishes it from matter of provincial concern
			- **2) Provincial Inability TEST**
		+ Is the province not dealing w/ the problem b/c it cannot or will not?
		+ Are the effects of the prov’s failure to deal w/ matter intra-provincially significant to extra-provincial interests?
			- If province didn’t deal w/ control and regulation effectively => NCD
			- **3) Effect on balance of powers b/t provincial and federal gov’t**
		+ If you grant jurisdiction to the federal gov’t, would it be irreconcilable with the fundamental distribution of powers from the Constitution?
		+ Does the matter have ascertainable and reasonable limits?
		+ SCC (in *Crown Zellerbach*) is willing to permit pretty broad regulatory approaches under this provision so long as it can meet the three requirements => DEFERENTIAL
		+ Creative characterization is extremely important in this are (see: *AIA, Crown Zellerbach*)
			- It must be big enough to be a national concern, but small enough to be distinct and divisible
2. **Matters that constitute national emergency (*AIA*)**
	* + **TEST (*AIA*)**
			- **1)** Federal intervention is necessary
			- **2)** There are “critical conditions”
			- **3)** Legislation is temporary
		+ **Narrow approach**: Parliament can only legislate in relation to POGG where issue constitutes national emergency
		+ **Form is critical**: must declare emergency and set *limitation period (temporary):* *AIA*
			- The temporal aspect is what separates NED from NCD
		+ **Onus of Proof**: Parl. only needs rat’l belief that emergency exists => prove a link between the emergency and the legislation on a rational basis: *AIA*
		+ Heavy burden on other party to prove NO emergency or ended => req. clear evidence: *AIA,* maj.
		+ Extrinsic evidence is both admissible and necessary for existence and continuation of an emergency: *AIA*
			- If the matter concerns social and economic policy, and hence governmental and legislative judgment, then the extrinsic material need only go so far as to persuade the Court that there is a rational basis for the legislation which it is attributing to the HOP invoked in this case in support of its validity: *AIA* => ESSENTIALLY: social and economic policy judgments should be left to gov’t, Court will be deferential
		+ Emergency legislation is judicially reviewable – both existence & continuation (*AIA*)
		+ 4 categories: Public worker emergency, war, public warfare, other emergencies (fires, flooding, disease, accidents, pollution)
		+ Parliament has passed the *Emergency Act* to restrict use of NED

Criminal Law

Division of Powers:

* **Federal, s. 91(27):** “The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters”
* **Provincial**
	+ S. 92(14): defines jurisdiction of provincial courts which are set up by legislation => subordinate role to Supreme Courts, no Constitutional basis of power like Provincial Supreme Courts
	+ S. 92(15): Province may impose punishment by fine, penalty, or imprisonment
		- Penalization of behaviour can NOT be the matter => must be parasitic upon province pursuing some other matter
		- Can only punish behaviour relating to something within provincial jurisdiction
		- Pith and substance cannot be punishment b/c the defining aspect of the federal criminal law is the punishment of socially undesirable behaviour and the prohibition of that behaviour
	+ S. 92(9): Power to license certain activities
		- Licensing is a form of prohibiting behaviour, but P&S is regulation, not punishment
	+ S. 92(13): Property and civil rights in the province
	+ S. 92(16): Generally all matters of a merely local or private nature in the province => residual powers for local matters
* Federal laws tend to prohibit, punish, penalize, or fall within public property or public interest
	+ Has more to do with the concept of the state as a singular antagonist of the individual
* Provincial laws tend to regulate, prevent, license, and relate to private property
	+ Has more to do with the concept of balancing competing interests
* Courts prefer to approve legislation under criminal law rather than POGG b/c POGG is too broad and cannot be removed once it is there. The criminal law is more precise in a federalism sense: *Hydro-Quebec*.
	+ This is a very reliable HOP for the federal gov’t
		- What gets challenged is most is provincial legislation that looks like it is criminal
		- Province challenges federal legislation for regulating issue falling under provincial HOP, but federal gov’t argues they are regulating under criminal law HOP

**Federal Criminal Law Power: s. 91(27)**

* Criminal law is plenary in nature: its only limit is colourability (*Hydro-Quebec*)
* Seeks by specific prohibitions to prevent evils falling within a **broad purpose** such as protection of health
* **Federal Criminal Law Power Test**
	+ **Purpose**: address a “significant, grave, or serious risk to” peace, order, security, safety, health, and morality (*Margarine Ref*), environmental danger (*Hydro-Quebec*)
		- **ASK:** Why does it do what it does? What are the effects of legislation?
		- There must be some sort of evil or injurious or undesirable effect*.*
		- Narrow meaning: subject matter is one by which its very nature belongs to the domain of criminal jurisprudence
		- Wide meaning: no actual criminal law purpose required. *This is the CURRENT view*. (*RJR, Hydro-Quebec, Firearms*)
	+ **Prohibition:** prohibitive or regulatory? Does it stop you from doing something or does it just control the conditions under which you can do it?
		- Loosened by *RJR MacDonald*: exemptions to prohibition were bigger than rule itself
		- Further loosened by *Hydro Quebec*: arguably a regulatory regime upheld by criminal law purpose
	+ **Penalty:** Is it a penalty (more than value of transgression), or merely compensatory (pay back what you have gained)
		- Federal laws must be punitive, but provincial laws cannot be: *Morgentaler, Westendorp*
* **Arguments for the federal gov’t**
	+ CLP is plenary => make it obvious and it is hard to strike down: *Hydro Quebec*
	+ CLP is not frozen in time, it can change to address new situations: *RJR*
	+ **Purpose:**
		- It can take a circuitous route to achieve valid end. It can prohibit things that aren’t illegal if they have evil effects:*RJR*
		- Where there is an evil or injurious mischief: *Margarine Ref*
		- There is a significant, grave, or serious risk to peace, order, security, safety, health and morality (not an exhaustive list): *Margarine Ref, Hydro Quebec*
			* Health: *RJR*
			* Environment:*Hydro Quebec*
		- Protection of public safety is a valid purpose: *Firearms*
	+ **Prohibition**
		- Exemption can be larger than prohibition, and STILL be valid. You can prohibit ancillary activities without prohibiting the act itself: *RJR MacDonald*
		- Arguably, you don’t even need a prohibition: *Firearms, Hydro-Quebec*
	+ **Penalty**
		- Can include some regulatory aspects, but should be general (*Hydro*: “no person shall…”), and P&S should be criminal (*RJR*)
	+ Argue that it is necessarily incidental to effective legislation
	+ It is less invasive structurally: enact specific provisions: *Hydro Quebec, Rothmans*
	+ Most effective, cost-benefit way to do this: *RJR*
* **Arguments against the federal gov’t => NOT CRIMINAL**
	+ Colourability: attempt to invade an area of provincial jurisdiction
		- Regulating industry => s. 92(13) => dissent in *RJR, Hydro Quebec*
	+ Not a significant criminal purpose
		- Does not address significant, grave, or serious risk to peace, order, security, safety, health and morality (not an exhaustive list): *Margarine Ref*
		- Not evil or injurious or undesirable: *Margarine Ref* (protection of trade), *RJR* dissent (advertising bans)
	+ Not a significant prohibition
		- Regulatory, not prohibitive => Controls what can be done, then lists what can’t be done (*Hydro Quebec* dissent)
	+ Not significant penalties => compensatory, not prohibitive
	+ Needs to target a specific area, not an otherwise legal industry itself (*Margarine Ref*)

**Provincial Ancillary Criminal Power: s. 92(15)**

=> Is the province trying to create a prohibitory, penal restriction to stop some social evil? CANNOT.

* Gives recognition to local interests in criminal law matters

1. S.92(14) – gives provincial legislatures jurisdiction over administration of justice in the province and delegation of power to prosecute criminal offences.

2. Federal Parliament has drafted its criminal laws in ways that allow them to be shaped by the provinces to respond to local conditions.

3. Judicial recognition of concurrent provincial jurisdiction in matters that may also be the subject of criminal law

* + S.92(15) allows the provinces to enact penal sanctions, but the power is understood as an “ancillary” one, authorizing the use of penal sanctions to enforce provincial regulatory schemes that are validly anchored elsewhere in the S.92 list of provincial powers.
* Provinces have the power to pass legislation that can prevent people from engaging in behaviour that would be a crime: *McNeil*
* Provinces have some jurisdiction to regulate things about morality that go on within businesses: *McNeil*
	+ LIMIT: Provinces cannot legislate within areas that typically fall within the criminal law basket of issues and it is in the form of a criminal law (purpose+prohibition+punishment): *Westendorp, Morgenthaler*
	+ Same form as criminal law is ok as long as the issue is not part of crim or criminal morality
* Provincial Ancillary power test:
	+ Guiding principle for distinguishing b/t valid exercise of ancillary power and invasion of CLP is the purpose or concern of the law
	+ **1)** What is the relevant provincial HOP?
	+ **2)** Is the regime regulatory or prohibitory?
		- Consider the pith and substance
		- What is this law designed to do?
			* “Duplicate, stiffen, or replace CLP” => INVALID exercise of provincial power: *Morgentaler*
* **Arguments FOR province => NOT criminal law**
	+ Legislation is mainly regulatory, only incidentally prohibitory
		- Ex. regulates local trade, s. 92(13): *McNeil*
	+ Valid extension of provincial HOP
		- Ex. s. 92(13) is the regulation of local industry – movie theatres (*McNeil*)
	+ Morality can be regulated at the local level: *McNeil*
	+ Preventative, not penal legislation is in provincial authority: *McNeil*
	+ Language, effects are substantially different than the relevant CC provisions => Just because something is prohibited, doesn’t mean it is criminal law: *McNeil*, compared to *Westendorp*
	+ Complements, rather than supplements, the criminal law
	+ Look at the act instead of the specific provision
* **Arguments AGAINST province => criminal law**
	+ Colourable => attempt to invade an area of federal jurisdiction
		- Response to pressure to react to public concern: *Morgentaler, Westendorp*
	+ Not grounded in valid provincial HOP
		- *Morgentaler*: clearly 91(27), references to 92(7), (13), and (16) were merely ancillary
	+ Attempt to stiffen, supplement, or replace the criminal law. Consider social, political “beyond four corners” reasons:
		- Prostitution in *Westendorp*
		- Abortion in *Morgenthaler*
		- Censorship board in *McNeil* (dissent)
	+ Regime is clearly prohibitive, not regulatory
		- Imprisonment: *Westendorp*
		- Language virtually indistinguishable from CC: *Morgentaler*
	+ Aimed at one specific activity that does not fit into the rest of the legislation: *Westendorp*
		- Look at specific provision instead of act

Trade & Commerce

**Concerns s. 6 of the Charter: mobility rights**

* Most important things here are to understand how court thinks in terms of national and local economies
* P. 354, S. 121 *Constitution Act, 1867* => free flow of goods domestically
* S. 6 of the charter is the analog for people
	+ (1) Every citizen of Canada has the right to enter, remain in and leave Canada.
	+ (2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right
		- a) to move to and take up residence in any province; and
		- b) to pursue the gaining of a livelihood in any province.
	+ (3) The rights specified in subsection (2) are subject to
		- a) any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence; and
		- b) any laws providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services.
	+ (4) Subsections (2) and (3) do not preclude any law, program or activity that has as its object the amelioration in a province of conditions of individuals in that province who are socially or economically disadvantaged if the rate of employment in that province is below the rate of employment in Canada.
* *Black*, p. 352: By prohibiting barriers to people moving around, you help foster a national economy => this is a fundamental purpose of the CA 1867
* *Black,* p. 350: Interprets trade and commerce literally, so that it would include just about everything that provinces try to regulate
	+ Difficulty of 91(2), especially combined with the general ideology of Ottawa that Canada is a national economy => end up with a clause that leaves provinces with very little to regulate
	+ Courts have restricted the meaning of T&C to include only certain matters:
		- Regulation of international and inter-provincial trade
		- Regulation of intra-provincial trade and commerce only if it is a vital part of an international or inter-provincial trade regime: *Caloil*
		- Trade that affects the country as a whole, as opposed to regulation of a particular industry: *City National Leasing*
			* Can involve various regulations that aren’t necessarily included in international or interprovincial trade
* Provincial economic legislation that is grounded in a valid provincial HOP can infringe on federal legislation as long as the effects are ancillary to the valid legislation: *Carnation*
* There is very little possibility for provincial regulation that aims to affect extra-provincial matters.
	+ If there is any indication that the regulation will impinge on inter-provincial regulation, the law will be struck down: *Manitoba Egg and Poultry*
	+ The Court will be tolerant of restrictions that affect what takes place IN the province, but no tolerance for restrictions that might affect the relations between business entitites in other provinces or countries: *Canadian Oil and Gas*