

Case In Point

Supreme Court of Canada Finds Federal *Genetic Non-Discrimination Act* is Constitutional

Date: July 17, 2020

On July 10, 2020, the Supreme Court of Canada issued its decision in [Reference re Genetic Non-Discrimination Act](#), upholding the constitutionality of the impugned sections of the federal *Genetic Non-Discrimination Act* (Act) in a split decision. The constitutional question was raised in a reference by the Quebec government to the Quebec Court of Appeal, which initially ruled the impugned provisions of the Act unconstitutional for intruding upon provincial jurisdiction, before being overruled on appeal.

The central issue was language in the Act that made it an offence to require someone to undergo a genetic test, or to provide the results of a genetic test, as a condition to receiving goods or services or to entering into a contract. In a split decision, the majority held that this was a valid exercise of the federal government's jurisdiction over criminal law. The four dissenting justices held that the "pith and substance" of the law was a matter of provincial jurisdiction. The majority decision (Karakatsanis, Abella and Martin JJ., with Moldaver and Côté JJ. concurring in the result with separate reasons) affirms that it is appropriate for the federal government to legislate criminal sanctions for breaching individual privacy interests.

Not challenged in the appeal were the sections of the Act which amended the *Canada Labour Code* ("to protect federal employees from compulsory genetic testing, compulsory disclosure of genetic test results, and non-consensual collection, disclosure and use of genetic test results") and the *Canadian Human Rights Act* ("genetic characteristics" were introduced as a prohibited ground of discrimination and a deeming provision was added so that where "the ground of discrimination is refusal of a request to undergo a genetic test or to disclose, or authorize the disclosure, of the results of a genetic test, the discrimination shall be deemed to be on the ground of genetic characteristics").

Justice Karakatsanis wrote that the requirement to undergo genetic testing "poses a clear threat to autonomy and to an individual's privacy interest in not finding out what their genetic makeup reveals about them and their health prospects" and that the requirement to provide genetic information as consideration in a contract compromises "an individual's control over access to their detailed genetic information." Genetic information is at an individual's "biological core" of information, and the volume of information that genetic data can provide "will undoubtedly continue to evolve alongside technological abilities to interpret test results." She found that in pith and substance, "ss. 1 to 7 of the Act are Parliament's response to the risk of harm that the prohibited

conduct and discrimination based on genetic test results pose to autonomy, privacy and equality.” Justice Karakatsanis concluded:

[103] Parliament took action in response to its concern that individuals’ vulnerability to genetic discrimination posed a threat of harm to several public interests traditionally protected by the criminal law. Parliament enacted legislation that, in pith and substance, protects individuals’ control over their detailed personal information disclosed by genetic tests in the areas of contracting and the provision of goods and services in order to address Canadian’s fears that their genetic test results will be used against them and to prevent discrimination based on that information. It did so to safeguard autonomy, privacy and equality, along with public health. The challenged provisions fall within Parliament’s criminal law power because they consist of prohibitions accompanied by penalties, backed by a criminal law purpose.

Both Justice Karakatsanis and Justice Moldaver, who wrote the judgment concurring in the result, held that the Act could be upheld on the grounds of protecting public health. Justice Moldaver, however, differed on the pith and substance analysis. He upheld the federal government’s legislation on the grounds that it protected public health “by prohibiting conduct that undermines individuals’ control over the intimate information revealed by genetic testing.” Justice Moldaver stated:

[111] In my view, the pith and substance of ss. 1 to 7 of the Act is to protect health by prohibiting conduct that undermines individuals’ control over the intimate information revealed by genetic testing. By giving people control over the decision to undergo genetic testing and over the collection, disclosure and use of the results of such testing, Parliament sought to mitigate their fears that their genetic test results could be used against them in a wide variety of contexts. Parliament had ample evidence before it that this fear was causing grave harm to the health of individuals and their families, and to the public healthcare system as a whole.

The dissenting decision, penned by Justice Kasirer, finds the Act to be properly within provincial jurisdiction, as its pith and substance “is to regulate contracts and the provision of goods and services, in particular contracts of insurance and employment, by prohibiting some perceived misuses of one category of genetic tests, the whole with a view to promoting the health of Canadians.” He stated that the objective of the impugned provisions was “to foster or promote beneficial health practices”, which is not a threat attracting criminal sanctions. Justice Kasirer also disagreed that the pith and substance of the impugned provisions is to protect privacy or autonomy. He flagged the concern that “the mere fact that genetic testing is a novel development does not, on its own, bring its regulation within the purview of the criminal law. Such a holding would encourage the view that any new technology with implications bearing on public morality might form the basis for the criminal law power, and potentially, bring a wide range of scientific developments within federal jurisdiction on no principled constitutional basis.”

The decision highlights the evolving regulatory landscape relating to privacy and technology. Other



uses of technology, such as artificial intelligence and machine learning, may also be subject to further federal regulation to address an impact on privacy, autonomy and equality.