File No. 38478

SUPREME COURT OF CANADA

(ON APPEAL FROM A JUDGMENT OF THE COURT OF APPEAL OF QUÉBEC)

BETWEEN:

CANADIAN COALITION FOR GENETIC FAIRNESS

APPELLANT
(Intervener)

- and -

ATTORNEY GENERAL OF CANADA
ATTORNEY GENERAL OF QUÉBEC

RESPONDENTS
(Applicants / Interveners)

- and –

ATTORNEY GENERAL OF BRITISH COLUMBIA
ATTORNEY GENERAL OF SASKATCHEWAN

INTERVENERS
(Interveners)

RESPONDENT ATTORNEY GENERAL OF CANADA'S FACTUM

(Rule 42 of the *Rules of the Supreme Court of Canada*)

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS

Page

ATTORNEY GENERAL OF CANADA'S FACTUM

PART I – OVERVIEW AND FACTS

1. When Parliament was considering the *Genetic Non-Discrimination Act,* the Government of Canada acknowledged that it was motivated by legitimate concerns, but took the position that it regulated contracts and the provisions of goods and services, which are subject matters that ordinarily fall within provincial legislative authority. Canada maintains that position on this appeal.

2. This is not to say that Parliament is precluded from legislating in respect of genetic discrimination. The traditional subjects of criminal law – condemning moral wrongs, protecting privacy, protecting public health – may all offer avenues to constitutional legislation. Parliament could, for example, criminalize contractual relations where its dominant purpose in doing so is to prevent infringements of human dignity or core privacy interests. This appeal, however, does not raise that issue because that is not the pith and substance of the *Genetic Non-Discrimination Act* in its current form. Despite the commendable motives for this law, neither the text of the Act nor the legislative context supports a characterization of the law that would bring it within federal jurisdiction.

3. The *Genetic Non-Discrimination Act* addresses a serious problem. People considering taking genetics tests worry that health information revealed by the tests will have a negative impact on their ability to enter into certain contracts, especially to purchase insurance. As a result, some people forgo testing - and the health benefits that genetic information may provide - so that they maintain access to health, life, or disability insurance.

4. Concerns about the impact of genetic testing on access to insurance are real. Every province in Canada regulates insurance on the basis of equality of information. Insurance is a contractual relationship that requires the utmost good faith of the parties. If a genetic test reveals material health information, provincial regulation requires that it be disclosed on pain of nullity of the contract.

5. Parliament criminalized the provincial requirement to disclose material health information to try to ensure that people had access to the health benefits of genetic medicine. This is a laudable policy objective, but it is not a criminal law objective. The dominant purpose of the *Genetic Non-Discrimination Act* is to regulate contracts of insurance in a manner that promotes and protects the health of consumers of insurance. Establishing the terms and conditions on which the insurance market operates in the public interest *is* the matter of insurance regulation, a matter of provincial jurisdiction.

A) Legislative history

6. Bill S-201, *An Act to Prohibit and Prevent Genetic Discrimination,* received Royal Assent May 4, 2017, after two previous versions of this bill died on the order paper. Each bill was introduced as a senate public bill by Senator James Cowan.

7. The first version of the bill, Bill S-218, prohibited any person from requiring an individual to undergo a genetic test or disclose the results of a genetic test as a condition of providing goods or services to, entering into or continuing a contract with, or offering specific conditions in a contract with, the individual. Exceptions were provided for medical practitioners and researchers, as well as for insurance providers in respect of high-value insurance contracts. Bill S-218 also proposed amendments to the *Canadian Human Rights Act* and the *Canada Labour Code.*[1]

8. The second version of the bill, Bill S-201 (hereafter "Bill S-201 (not adopted)")[2], contained the same provisions as Bill S-218.

9. The third, Bill S-201, which is at issue in this appeal, added what is now section 5 - a provision that prohibits the collection or use of genetic test results of an individual without

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1 Bill S-218, *An Act to prohibit and prevent genetic discrimination*, 41st Parliament, 1st Session, **Attorney General of Canada's Record (hereinafter "AGC Record"), vol 5, at pp 3-12.**

2 Bill S-201, *An Act to prohibit and prevent genetic discrimination*, 41st Parliament, 2nd Session, **AGC's Record, vol 5, at pp 38-47.**

their consent and did not include the exception for insurance providers in respect of high-value insurance contracts.[3]

10. During the study of Bill S-201 by the Standing Committee on Justice and Human Rights, the Minister of Justice (the "Minister") communicated the Government's position on its constitutionality.[4] The Minister acknowledged that Bill S-201 aimed to address legitimate concerns and understood the desire to impose a uniform, nationwide prohibition on the conduct identified in the bill. However, the Minister advised that the law was not within the authority of Parliament because its dominant purpose was the regulation of contracts and the provision of goods and services, subjects that fall within exclusive provincial legislative authority. In light of this, the Minister emphasized that any solution to the issue of genetic discrimination required cooperation with provinces and territories.[5]

11. In addition, the Minister noted that Canada does not generally use criminal prosecutions and penalties to address discrimination. Discrimination in Canada is ordinarily addressed through human rights legislation, which seeks to prevent and remedy the harm rather than punish discriminatory behaviour. She also questioned why genetic discrimination should be singled out for a different approach than that adopted in respect of discrimination based on other prohibited grounds, such as disability, race or sex.[6]

12. After being adopted by the Senate, Bill S-201 was adopted following a free vote in the House of Commons and received Royal Assent on May 4, 2017.

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3 Bill S-201, *An Act to prohibit and prevent genetic discrimination*, 42nd Parliament, 1st Session, **AGC's Record, vol 8, at pp 41-50.**

4 Government Position Regarding Bill S-201, *An Act to prohibit and prevent genetic discrimination*, Statement of the Minister of Justice, November 17, 2016, **AGC's Record, vol 12, at pp 105-109.**

5 *Ibid*, **AGC's Record, vol 12, pp 108-109.**

6 *Ibid*, **AGC's Record, vol 12, p 109.**

B) Reference to the Quebec Court of Appeal

13. On July 7, 2017, the Quebec Government filed a reference seeking the Quebec Court of Appeal's opinion as to whether sections 1 to 7 of the *Genetic Non-Discrimination Act* (the "Act") fell within Parliament's criminal law power.[7]

14. The Attorney General of Quebec, the Attorney General of Canada, the Attorney General of British Columbia and the Canadian Life and Health Insurance Association took the position that sections 1 to 7 of the *Genetic Non-Discrimination Act* are *ultra vires*.

15. The Canadian Coalition for Genetic Fairness, the Canadian Human Rights Commission, and Me Douglas Mitchell, named as *amicus curiae* by the Court, took the position that the Act is *intra vires*.

16. Though the bulk of the evidence before the Quebec Court of Appeal consisted of the record of the *Genetic Non-Discrimination Act*'s legislative history, including parliamentary debates and testimony before parliamentary committees, there was additional evidence before the Court addressing the concept of genetic discrimination, its impacts, legislative responses, and relevant policy considerations:

    a) The Attorney General of Canada filed an export report from Professor Yann Joly, Research Director of the Centre of Genomics and Policy. In his expert report, he traced a history of the evolution of concerns regarding genetic discrimination in Canada and elsewhere. Professor Joly notes that foremost among these concerns is access to insurance;[8]

    b) The *Amicus* filed an expert report by Dr. Yvonne Bombard regarding the self-reported experiences of genetic discrimination among people at risk of Huntington's

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7 *Concernant un renvoi à la Cour d'appel relatif à la* Loi sur la non-discrimination génétique édictée par les articles 1 à 7 de la Loi visant à interdire et à prévenir la discrimination génétique, D 522-2017, 31 May 2017, (2017) GOQ II, 2500.

8 Expert Report from Professor Yann Joly, **AGC's Record, vol 3 at pp 2-3.**

disease, noting that family history of Huntington's disease (rather than the genetic testing results) was the main reason given for experiences of genetic discrimination. That evidence also emphasized the psychological distress and potential for adverse health outcomes associated with perceptions of genetic discrimination;[9]

c) The Canadian Life and Health Insurance Association filed an affidavit from Karen Cutler, Vice President and Chief Underwriter, Retail and Affinity Markets at Manulife Financial Corporation, regarding the role that risk assessment plays in pricing insurance premiums as well as the risks posed by "anti-selection". [10] Anti-selection occurs when there is an imbalance of information between the insurer and the insured, possibly resulting in higher-risk individuals purchasing life or health insurance at the same price as lower risk individuals. If higher risk individuals are placed in lower risk pools, it increases the likelihood that overall premiums paid will be insufficient to pay all future claims. This would result in an increase in premiums for all insureds;[11] and

d) The Attorney General of British Columbia filed an affidavit from Heather Wood, Associate Deputy Minister of Finance for the province of British Columbia, setting out (1) the current policy and legislative framework for discrimination in British Columbia, which includes exemptions for information required to determine premiums or benefits for life and health insurance; (2) the requirement on an insured to disclose material facts; (3) a tentative statement of the competing policy considerations involved in maximizing the accessibility of life and health insurance while minimizing discrimination; and (4) a tentative statement of policy options for the province.[12]

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9 Expert Report from Dr. Yvonne Bombard, **AGC's Record, vol 4 at pp 103-104.**

10 Affidavit of Karen Cutler, **AGC's Record, vol 1 at pp 39-42 at paras 28-30**; see also Affidavit of Robert Howard, **AGC's Record, vol 2 at pp 6-9 at paras 18-33.**

11 *Ibid*, **AGC's Record vol 1, at pp 41-42 at paras 27-30.**

12 Affidavit from Heather Wood, **AGC's Record, vol 1 at p 22 at para 5.**

17. The Quebec Court of Appeal, in a unanimous five-member panel decision, concluded that sections 1 to 7 of the Act are not within Parliament's criminal law power.[13]

18. First, the Court considered the pith and substance of those sections. In light of the wording of the Act itself and the Hansard evidence, the Court found that the purpose of sections 1 to 7 is to protect and promote health by encouraging Canadians' access to genetic tests for medical purposes. The Court observed that the Act primarily aims to address situations where Canadians refrain from undergoing genetic tests for medical purposes for fear that the results may be used in the context of a contract or service, notably for insurance or employment purposes.[14] Further, the Court found that despite the Act's title, sections 1 to 7 do not pertain to genetic discrimination and do not prohibit it.[15]

19. Second, the Court considered whether, in light of the pith and substance identified, the relevant sections of the Act fell within Parliament's criminal law power. It concluded that it did not. The Court determined that the law did not address a "public health evil" in the sense required for a valid exercise of the criminal law power, observing that "provid[ing] higher quality health care through the promotion of access to genetic tests by suppressing the fear that the results of these tests [will] be used for insurance or employment purposes" was not a valid criminal law object.[16]

20. The Court also noted that the identification of factors that insurers may use to appraise the risk that they cover and the kind of information they require for that purpose have never been the object of criminal law and the record in this case did not support the conclusion that the prohibitions had a criminal law purpose.[17] The Court came to the same conclusion

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13 *In the matter of the: Reference of the Government of Quebec concerning the constitutionality of the Genetic Non-Discrimination Act enacted by Sections 1 to 7 of the Act to prohibit and prevent genetic discrimination* (S.C. 2017, c. 3), 2018 QCCA 2193.

14 *Ibid* at paras 9, 11.

15 *Ibid* at paras 10, 20.

16 *Ibid* at para 24.

17 *Ibid* at paras 21, 24.

concerning conditions of employment and information required for employment purposes.[18]

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[18] *Ibid* at para 22.

PART II – STATEMENT OF ISSUES

The reference question

21. The issue in this appeal is set out by the reference question posed by the Quebec government to the Quebec Court of Appeal:

> Is the *Genetic Non-Discrimination Act* enacted by sections 1 to 7 of the Act to prohibit and prevent genetic discrimination (S.C. 2017, c. 3) *ultra vires* to the jurisdiction of the Parliament of Canada over criminal law under paragraph 91 (27) of the *Constitution Act, 1867*?
>
> La *Loi sur la non-discrimination génétique* édictée par les articles 1 à 7 de la Loi visant à interdire et à prévenir la discrimination génétique (L.C. 2017, ch. 3) est-elle *ultra vires* de la compétence du Parlement du Canada en matière de droit criminel selon le paragraphe 91(27) de la *Loi constitutionnelle de 1867*?

22. The Attorney General of Canada proposes that the answer to the question is yes, the *Genetic Non-Discrimination Act* exceeds the legislative authority of the Parliament of Canada over the criminal law.

PART III – STATEMENT OF ARGUMENT

23. The dominant purpose of sections 1 to 7 of the *Genetic Non-Discrimination Act* is to regulate contracts, goods and services in order to promote access to the potential health benefits of genetic medicine. It does so by allowing people to contract for insurance without any obligation to provide the health information acquired through genetic testing, even though provincial legislation requires that material health information must be provided to counterparties. In the Appellant's words: "[t]he theory of the *GNDA* is that with [the] confidence [that they will not be required to disclose genetic test results] Canadians will be willing to undergo genetic testing in greater numbers, which will in turn result in the protection and promotion of health".[19] This is a laudable public policy objective, but the record does not support the conclusion that it was adopted for a criminal law purpose.

24. There are several purposes for which Parliament might validly have adopted legislation aiming to protect genetic information. The protection of core privacy interests, morality and protecting human health and safety, for example, are all purposes that could validly underpin federal jurisdiction in this area. However, the mere fact that valid purposes may be conceived does not determine the outcome of the constitutional analysis, because the record in this case suggests that sections 1 to 7 of the *Genetic Non-Discrimination Act*, in their current form, are not animated by a criminal law purpose.

25. Assessing the constitutionality of a law from a division of powers perspective requires a two-step analysis. First, it is necessary to characterize the law to determine its pith and substance. Determining the pith and substance of legislation requires a careful consideration of the purpose and effects of a law. The goal is to determine the law's

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[19] Appellant's Factum, at para 36.

"dominant purpose" or, put another way, to explain "what the law does, and why".[20] In constitutional terms, the goal is to determine what "matter" the law addresses.

26. The second step requires the matter to be classified within one of the "classes of subjects" listed in ss. 91 and 92 of the *Constitution Act, 1867*. In this case, the question is whether, given its purpose and effects, the *Genetic Non-Discrimination Act*, is in pith and substance a criminal law (91(27)), or a law with respect to property and civil rights (92(13)).

27. The double aspect doctrine recognizes that it is possible that the same matter be regulated by Parliament and provincial legislature. As a result, the classification exercise is particularly concerned with the reason why legislation is adopted. Two different aspects of the same matter can be regulated by both levels of government. Understanding why legislation is adopted and why it is drafted the way it is plays an important role in classifying the law.

28. Modern flexible federalism favours an interpretation of the division of powers that allows, as much as possible, concurrent operation of statutes enacted at both levels, but the division of powers and the overall balance of federalism must be respected.[21]

29. A rigorous analysis of the purpose of the law and its effects on provincial jurisdiction support the conclusion that the *Genetic Non-Discrimination Act*, in its current form, is in pith and substance a provincial matter. Sections 1 to 7 of the *Genetic Non-Discrimination Act* do not have a valid criminal law purpose, and accordingly do not fall within Parliament's competence under s. 91(27).

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20 *Reference re Firearms Act (Can.)*, [2000] 1 SCR 783, 2000 SCC 31 at paras 15-18 [*Firearms Reference*]; *Reference re Assisted Human Reproduction Act*, [2010] 3 SCR 457, 2010 SCC 61 at para 22 [*AHRA Reference*], citing D. W. Mundell, "Tests for Validity of Legislation under the British North America Act: A Reply to Professor Laskin" (1955) 33 Can Bar Rev 915 at p 928.

21 *Reference re Securities Act*, [2011] 3 SCR 837, 2011 SCC 66 at para 62; *Rogers Communications Inc. v Châteauguay (City)*, [2016] 1 SCR 467, 2016 SCC 23 at para 36; *Firearms Reference*, *supra* note 20 at para 48.

A) Characterization: sections 1 to 7 of the *Genetic Non-Discrimination Act*, in pith and substance, regulate contracts, goods and services to promote access to the potential health benefits of genetic medicine

30. Determining the pith and substance of legislation requires consideration of a number of factors. Both the purpose and effect of the legislation must be examined. To this end, both intrinsic and extrinsic evidence are useful. The analysis begins with the text of the legislation itself, but it will also often be necessary to consider the context in which legislation is adopted, including the legislative history and the mischief sought to be addressed.[22]

i. Intrinsic evidence

31. The *Genetic Non-Discrimination Act* contains no preamble or purpose clause. Further, while the title of the Act suggests that it concerns genetic non-discrimination, aside from the consequential amendments to other statutes, the Act itself does not prohibit discrimination.

32. Based on the wording of the Act, its purpose is to regulate the provision of goods and services and contract, by prohibiting making the provisions of goods and services or the making, continuing or offering of specific terms or conditions of contract conditional upon an individual undergoing or disclosing the results of genetic testing. All of the prohibitions established by sections 3, 4, and 5 relate exclusively to those matters listed in paragraphs 3(a) to (c).

33. Because the Act, in its current form, creates prohibitions attached to penalties it suggests that Parliament sought to punish insurers for seeking genetic information from their clients when, as will be discussed below, this is an effect of the law, but not its purpose.

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[22] *Firearms Reference*, *supra* note 20 at para 17; *R. v Morgentaler*, [1993] 3 SCR 463 at pp 483-84 [*Morgentaler (1993)*].

34. Accordingly, in order to properly assess the *Genetic Non-Discrimination Act*'s pith and substance extrinsic evidence must also be considered.

ii. Extrinsic evidence

Parliamentary Debates

35. While not determinative, this Court has held that in constitutional cases, extrinsic evidence, notably parliamentary debate concerning the adoption of the bill, is relevant to assessing a statute's dominant purpose.[23] The debates assist in assessing the context in which the legislation was adopted and the mischief the legislation aimed to address.

36. The debates relating to the three bills that led to the adoption of the *Genetic Non-Discrimination Act* reflect a strong consensus among parliamentarians on three points. The three bills are very similar and the debate over the three relatively constant. Looking at the debate over the three bills offers the most complete perspective.

37. First, parliamentarians in the House of Commons and in the Senate were of the view that the purpose of the Act was to enable individuals to take advantage of advances in medical science made through genetic testing, without having to worry that they may be asked for the results of their genetic tests as a condition of entering into or continuing a contract.[24]

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23 *RJR-MacDonald Inc. v Canada (Attorney General)*, [1995] 3 SCR 199 at para 30 [*RJR-MacDonald*]; *Reference re Residential Tenancies Act, 1979*, [1981] 1 SCR 714 at p 722; *Morgentaler (1993)*, *supra* note 22 at pp 483-485.

24 The Hon. James Cowan, Senator, **AGC's Record, vol 8 at p 151, vol 9 at p 191**; Mr. Robert Oliphant, M.P. (Lib), **AGC's Record, vol 10 at pp 73, 87-89**; Mr. Garnett Genuis, M.P. (CPC), **AGC's Record, vol 10 at p 94**; Mr. Don Davies, M.P. (NDP), **AGC's Record, vol 10 pp 90, 92**; Ms. Sheila Malcolmson, M.P. (NDP), **AGC's Record, vol 10 p 95**; Mr. Peter Schiefke, M.P. (Lib), **AGC's Record, vol 10 at p 110**; Mr. Rob Nicholson, M.P. (CPC), **AGC's Record, vol 11 at p 102**; Ms. Jennifer O'Connell, M.P. (Lib), **AGC's Record, vol 11 at p 119**; Bruce Ryder, Professor, Osgoode Hall Law School, **AGC's Record, vol 8 at pp 198-199**; Richard Marceau (General Counsel and Senior Government Advisor, Centre for Israel and Jewish Affairs), **AGC's Record, vol 10 at p 176**; Clare Gibbons (Genetic Counsellor and Past President, Canadian Association of Genetic

38. Second, parliamentarians were primarily concerned with access to insurance and, to a lesser extent, employment.[25] The first two bills provided for an exception that specifically exempted insurance contracts exceeding a certain value from its application. The exception was removed from the bill that was enacted because it was considered an indication that Parliament intended to govern the insurance field.[26] Despite the removal of an explicit reference to insurance contracts, the content of the enactment remains focused on insurance and employment contract. As evidence of this, the only witnesses who testified in committee hearings on the bills that were directly involved in the conclusion of contracts or the provision of goods or services came from the insurance and employment fields.[27]

39. Third, for parliamentarians, "genetic discrimination" meant simply that a person is treated differently from others because of the information disclosed by genetic tests.[28] As will be discussed more fully below, this kind of differential treatment is not necessarily discrimination in Canadian law.

Counsellors), **AGC's Record, vol 10 at p 177**; Dre Cindy Forbes (Past-President, Canadian Medical Association), **AGC's Record, vol 11 at p 56**; Mr. Alistair MacGregor, M.P. (NDP), **AGC's Record, vol 11, at p 104.**

25 The Hon. James Cowan, Senator, **AGC's Record, vol 5 at pp 25-26, 63-64, 113-114, 177, vol 9 at pp 186-187, vol 10 at p 143**; The Hon. Linda Frum, Senator, **AGC's Record, vol 7 at p 50, 96**; Mr. Don Davies, M.P. (NDP), **AGC's Record, vol 10 at p 91**; Mr. Peter Schiefke, M.P. (Lib), **AGC's Record, vol 10 at p 110**; Clare Gibbons (Genetic Counsellor and Past President, Canadian Association of Genetic Counsellors), **AGC's Record, vol 10 at p 179**; Mr. Rob Nicholson, M.P. (CPC), **AGC's Record, vol 11 at p 102.**

26 The Hon. James Cowan, Senator, **AGC's Record, vol 7 at p 49, 117-118, vol 8 at pp 123-124, 156, vol 10 at p 143**; Opinion on Bill S-201, Assistant Dean Pierre Thibault, February 29, 2016, **AGC's Record, vol 12 at p 44.**

27 Including the Canadian Life and Health Insurance Association, the Canadian Association of Counsel to Employers and the Canadian Association of Labour Lawyers.

28 The Hon. James Cowan, Senator, **AGC's Record vol 7, at p 112, vol 9 at p 186**; Stephen W. Scherer, Director, The Centre for Applied Genomics, Hospital for Sick Children and University of Toronto McLaughlin Centre, as an individual, **AGC's Record, vol 8 at p 192**; The Hon. Linda Frum, Senator, **AGC's Record, vol 8 at p 202**; Mr. Don Davies, M.P. (NDP), **AGC's Record, vol 10 at p 91**; Mr. Garnett Genuis, M.P. (CPC), **AGC's Record, vol 10 at p 94.**

40. Other topics were debated, the main ones being whether the Act is constitutionally valid[29]; whether the Act would lead to anti-selection in the insurance context[30]; why genetic information should be treated differently from other health information[31]; and whether it is necessary to exempt health care practitioners and researchers from the application of the Act.[32]

41. Before this court and the Quebec Court of Appeal, several of the parties and proposed interveners suggest markedly different interpretations of the pith and substance of the legislation. To varying degrees each point to statements made in the debates to support their view. It is true that other purposes, like preventing discrimination or protecting privacy were mentioned or discussed, but taken as a whole, the Hansard evidence suggests a broad consensus as to the purpose of the *Genetic Non-Discrimination Act*: to regulate contracts, goods and services in order to promote access to the potential health benefits of genetic medicine. On this point, the Attorney General and the Appellant agree and it is the

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29 Karen Jensen, Partner, Norton Rose Fulbright, Canadian Association of Counsel to Employers: **AGC's Record, vol 5 at p 135**; The Hon. Linda Frum, Senator, **AGC's Record, vol 6 at p 191**; Pierre Thibault, Assistant Dean and Secretary, Civil Law Section, University of Ottawa, as an individual: **AGC's Record, vol 6 at pp 213-214**; Opinion on Bill S-201, Assistant Dean Pierre Thibault, February 29, 2016, **AGC's Record, vol 12, at pp 44-46**; CACE submissions on the Revised Bill S-201, March 2, 2016, **AGC's Record, vol 12 at pp 58**; Tory's Memorandum on the Constitutionality of Bill S-201, March 7, 2016, **AGC's Record, vol 12 at pp 76-88**; Bill S-201, An act to prohibit and prevent genetic discrimination, House of Commons, Standing Committee on Justice and Human Rights, Evidence, 42nd Parl., 1st Sess., n°36, November 22, 2016, **AGC's Record, vol 11 at pp 22-31** (Testimonies of Peter Hogg, Hugo Cyr, Pierre Thibault and Bruce Ryder).

30 The Hon. James Cowan, Senator, **AGC's Record, vol 5 at pp 26-27**; Bob Howard, Past President, Canadian Institute of Actuaries, **AGC's Record, vol 5 at p 128**; Frank Swedlove, President, Canadian Life and Health Insurance Association, **AGC's Record, vol 5 at pp 129-130**; Jacques Y. Boudreau, Chair, Committee on Genetic Testing, Canadian Institute of Actuaries, **AGC's Record, vol 8 at pp 172-173**; Bernard Naumann, Vice-chair, Committee on Genetic Testing, Canadian Institute of Actuaries, **AGC's Record, vol 8 at pp 173-174.**

31 The Hon. James Cowan, Senator, **AGC's Record, vol 5 at pp 26-27, 116**; The Hon. Raynell Andreychuk, Senator, **AGC's Record, vol 5 at p 124**; Canadian Institute of Actuaries' Proposed Amendments to Bill S-201, *An Act to prohibit and prevent genetic discrimination*, November 21, 2016, **AGC's Record, vol 12 at pp 116-117.**

32 Mr. Ted Falk, M.P. (CPC), **AGC's Record, vol 11 at pp 57, 62, 65.**

proper approach to interpreting extrinsic evidence. The overarching health objective was consistently tied to the need to regulate insurance contracts. Neither preventing discrimination nor protecting personal information were the avowed goals.

iii. Legal Effects

42. Sections 1 to 7 of the *Genetic Non-Discrimination Act* have two important legal effects. First, they create prohibitions associated with penalties. Second, section 4 overrides obligations under provincial law that require a person contracting in good faith to disclose material information.

43. The *Genetic Non-Discrimination Act* creates a number of offences that can be committed in a variety of ways. Section 3 prohibits requiring a person to undergo a genetic test as a condition of providing goods and services to that individual, entering into or continuing a contract, or offering or continuing specific terms or conditions in a contract. Section 4 prohibits requiring a person to disclose the results of a genetic test they have undergone as a condition to these same activities. Section 5 prohibits conducting a genetic test or using a person's genetic test information without their consent.

44. These offences are punishable on indictment of a term of imprisonment of not exceeding five years, a fine of up to $1,000,000, or both.

45. The offences created by sections 3 and 5 differ from that in section 4. Sections 3 and 5 protect a person's right not to know genetic information about themselves. By making it an offence to require a person to undergo a genetic test (section 3) or testing a person without their consent (section 5), the *Genetic Non-Discrimination Act* allows a person to control their genetic material.

46. The offence created by section 4 is different in kind. The immediate consequence of section 4 is to allow individuals who have undergone genetic tests and know the results to enter into a contract and to obtain goods or services without disclosing the results of genetic tests, even where disclosure would ordinarily be required.

47. The offence established by section 4 is intended to, and does, impact contractual relations between providers of goods and services and their clients. In all Canadian provinces there is an obligation to contract in good faith, which generally includes the obligation to disclose material facts to counterparties in contract.[33]

48. In defining the legal effects of the law, it is also useful to note what the law does not prohibit. The *Genetic Non-Discrimination Act* does not prohibit genetic discrimination. It does not prevent a person from requiring genetic information to be disclosed by any means other than by a genetic test as defined in the Act. If genetic information is obtained through other means, like family history or a medical record, an insurance company would be free to use the information in the same manner that it uses all health information. Therefore, and despite its title, the *Genetic Non-Discrimination Act* does not prohibit genetic discrimination at all. Its focus is exclusively on controlling the exchange of information obtained through specific means in relation to contracts and goods and services. What is more, the Act does not prohibit an insurer from requiring the disclosure of family history or blood tests, which could provide information akin to what would be disclosed in a genetic test.

iv. Practical Effects

49. Practical effects are also relevant in characterizing a law for the purposes of the division of powers analysis. In this case, the *Genetic Non-Discrimination Act* has practical effects on both the insurance industry and human rights legislation.

Effects on Insurance Contracts and the Insurance Market

50. The prohibitions in the *Genetic Non-Discrimination Act,* in its current form, produce important practical effects on insurance contracts and the insurance market. The

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[33] *Bhasin v Hrynew*, [2014] 3 SCR 494, 2014 SCC 71 at para 86 [*Bhasin*]; *Civil Code of Québec*, CQLR c CCQ-1991, s 1375 [*CcQ*].

prohibitions open the door to anti-selection in insurance contracts and eliminate the provinces' ability to regulate the use of genetic information.

51. Persons at high risk of disease based on testable genetic factors will be able to purchase insurance at a price much lower than they would pay if they disclosed the risk. They can even purchase insurance that would not be available to them at all. Although the evidence in this matter was divided on whether this would have an immediate impact on the cost of insurance premiums[34], provincial regulators impose an obligation to disclose material health information in insurance contracts[35] to ensure that all consumers pay premiums based on their risk.[36]

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34 Affidavit of Robert Howard, **AGC's Record, vol 2 at pp 6-9 at paras 18-33** (concludes the impact of not allowing underwriters to have access to the results of genetic tests known to insurance applicants is likely to substantially increase premiums); Office of the Privacy Commissioner of Canada, *Genetic Information, the Life and Health Insurance Industry and the Protection of Personal Information: Framing the Debate,* **AGC's Record, vol 12 at pp 150-151** (concludes that, at the present time and in the near future, the impact of a ban on the use of genetic information by the life and health insurance industry would not have a significant impact on insurers and the efficient operation of insurance markets, but this position could evolve with the evolution of medical sciences, on this last point, see Privacy Commissioner Daniel Therrien's testimony, **AGC's Record, vol 8 at pp 218-219.**

35 *Insurance Act*, RSO, 1990 c I.8, ss 183, 308; *Insurance Act*, RSBC 2012, c 1, ss 51, 111; *Insurance Act*, RSA 2000, c I-3, ss 652, 719; *The Saskatchewan Insurance Act*, RSS, c S-26, ss 145, 242; *The Insurance Act*, CCSM c I40, ss 160, 219; *CcQ, supra* note 33 s 2408; *Insurance Act*, RSNS 1989, c 231, ss 82, 185; *Insurance Act*, RSNB 1973, c I 12, ss 144, 202; *Insurance Act*, RSPEI 1988, c I-4, ss 131, 191; *Life Insurance Act*, RSNL 1990, c L-14, s 14; *Accident and Sickness Insurance Act*, RSNL 1990, c A-2, s 20; *Insurance Act*, RSY 2002, c 119, ss 88, 192; *Insurance Act*, RSNWT 1988, c I-4, ss 81, 185; *Insurance Act*, RSNWT (Nu) 1988, c I-4, ss 81, 185; Affidavit of Karen Cutler, **AGC's Record, vol 1 at p 40 at paras 20-22.**

36 Affidavit of Heather Wood, **AGC's Record, vol 1 at pp 24-25 at paras 12-13.**

52. Premiums for insurance contracts are based on the evaluation of risk in order to ensure that there are sufficient funds available to pay all future claims. The cost associated with inaccurate premiums must be borne by consumers in the rest of the pool. If premiums do not accurately reflect the risk, it creates a danger that overall premiums paid to the insurer will be insufficient to pay all future claims, requiring insurers to raise premiums for all insureds to ensure that they have sufficient resources on hand to pay all potential future claims. To ensure an accessible insurance market, every province requires disclosure to prevent the effects of anti-selection.[37] Thus, the practical effect on provincial jurisdiction is significant.

Effects on the Application of Human Rights Codes

53. In addition to the obligation to disclose material health information in an insurance contract, provinces also regulate the use of genetic information through their human rights codes in the fields of insurance and employment. Such codes are clearly aimed at the prevention of unacceptable types of discrimination.

54. While the Act aims to prevent discrimination in the federally regulated sphere through amendments to the *Canadian Human Rights Act* and the *Canada Labour Code*, sections 1 to 7 have an important and negative impact: they remove the provinces' ability to legislate on the use of genetic information to prevent discriminatory practices.

55. The differential treatment that the Act targets is not discriminatory in the legal sense. Discrimination is not simply differential treatment on the basis of an immutable

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37 *Supra* note 35; Affidavit of Heather Wood, **AGC's Record, vol 1 at p 24 at paras 9-10**; Affidavit of Karen Cutler, **AGC's Record, vol 1 at pp 41-42 at paras 27-30**; *The actuarial relevance of Genetic Information in the Life and Health Insurance Context*, Angus MacDonald, Office of the Privacy Commissioner of Canada, July 2011, **AGC's Record, vol 13 at pp 28-30**; Frank Swedlove, president of the Canadian Health and Life Insurance Association, **AGC's Record, vol 5 at p 129.**

characteristic.[38] To be discriminatory, differential treatment must perpetuate arbitrary disadvantage.[39] For example, differential treatment can perpetuate arbitrary disadvantage if it is based on a stereotype.[40] The requirements imposed by provinces to disclose relevant information and to allow for differential treatment are not discriminatory in the human rights sense.

56. The Act does not prohibit an insurer from imposing higher insurance premiums on a person whose parents had Huntington's disease or certain types of breast cancer for which family history is highly predictive of risk. While denial of insurance coverage or placement in a higher risk category on the basis of genetic information would likely constitute *prima facie* discrimination, almost all Canadian human rights codes create explicit exceptions for differential treatment by insurers on the basis of personal characteristics such as age, sex and disability.[41] These exceptions recognize that the economic stability of many insurance programs depends on the ability of insurers to differentiate risks according to specific criteria.

57. For example, within federal jurisdiction, the *Canadian Human Rights Benefits Regulations* allow federally regulated employers (in certain circumstances) to exclude employees from, or to differentiate among employees in, disability income insurance plans, health insurance

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38 *Withler v Canada (Attorney General)*, [2011] 1 SCR 396, 2011 SCC 12 at para 34 [*Withler*]; *Ermineskin Indian Band and Nation v Canada*, [2009] 1 SCR 222, 2009 SCC 9 at para 188.

39 *Kahkewistahaw First Nation v Taypotat*, [2015] 2 SCR 548, 2015 SCC 30 at paras 18, 20; *Quebec (Attorney General) v A*, [2013] 1 SCR 61, 2013 SCC 5 at para 331.

40 *Withler*, *supra* note 38 at paras 36-40.

41 *Human Rights Code*, RSBC 1996, c 210, s 8(2) (British Columbia); *Alberta Human Rights Act*, RSA 2000, c A-25.5, s 7 (Alberta); *The Saskatchewan Human Rights Code*, *2018*, SS 2018, c S-24.2, s 15(3); *Saskatchewan Human Rights Regulations, 2018*, RRS c S-24.2 Reg 1, s 18; *Human Rights Code*, RSO 1990, c H.19, s 22 (Ontario); *Charter of Human Rights and Freedoms*, CQLR c C-12, s 20.1 (Quebec); *Human Rights Act*, RSNB 2011, c 171, s 4 (New Brunswick); *Human Rights Act*, RSNS 1989, c 214, s 6(g) (Nova Scotia); *Human Rights Act*, RSPEI 1988, c H-12, s 11 (Prince Edward Island); *Human Rights Act*, 2010, SNL 2010, c H-13.1, s 21(3) (Newfoundland Labrador); *Human Rights Act*, SNWT 2002, c 18, s 7 (Northwest Territories); *Human Rights Act*, SNu 2003, c 12, s 12(3) (Nunavut).

plans, or life insurance plans, if an employee does not meet the plan's health requirements. In addition, employers in certain circumstances may adjust their contributions to a life insurance plan for employees with disabilities.[42]

58. Relying on these types of exemptions, courts have generally found differential treatment in the context of actuarial underwriting to be justified.[43]

59. The requirement to disclose health information is reasonable because provincial legislatures have chosen to regulate the insurance industry on the basis of equality of information. As described in the affidavit of Heather Wood, other policy choices are available.[44] For example, provincial regulators may choose to require that insurance companies offer some products regardless of risk. That would presumably produce a different insurance market in terms of price and accessibility of insurance. Insurance products are useful tools for managing and mitigating risks which may have strong negative financial impacts for individuals.[45] The policy choices made in this regard may therefore affect the role that private insurance would play in the overall social safety-net.

60. The concerns that motivated the *Genetic Non-Discrimination Act* in its current form are part of the ordinary considerations that provincial governments must balance in determining their preferred policy approach to regulating insurance contracts. The *Genetic Non-Discrimination Act* is essentially a particular policy choice that insurance products should be available to a certain class of persons regardless of the risk they pose to the group.

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42 *Canadian Human Rights Benefit Regulations*, SOR/80-68.

43 *Zurich Insurance Co. v Ontario (Human Rights Commission)*, [1992] 2 SCR 321 at pp 338, 342-343; *Nova Scotia (Human Rights Commission) v Canada Life Assurance Co* (1992), 88 DLR (4th) 100 at 108 (NSSC) at paras 27-29; *Co-operators General Insurance Company v Alberta Human Rights Commission*, 1993 ABCA 305.

44 Affidavit of Heather Wood, **AGC's Record, vol 1 at pp 29-20 at paras 33-37.**

45 *Ibid* **AGC's Record, vol 1 at p 27 at paras 23-25**. See also *The actuarial relevance of Genetic Information in the Life and Health Insurance Context*, Angus MacDonald, Office of the Privacy Commissioner of Canada, July 2011, **AGC's Record, vol 13 at pp 28-30.**

While this policy choice may be readily defensible, it is a choice that belongs to the provinces.

v. The mischief sought to be addressed

61. The pith and substance of legislation are also informed with a view to the mischief the law seeks to address, or put another way, "[what is] the problem which Parliament sought to remedy?"[46]

62. For the *Genetic Non-Discrimination Act* as it currently stands, the answer is that the law aims to ensure that people will not be required to disclose the information obtained through genetic testing to insurance companies. This privileged access to insurance aims to ensure that people do not refuse genetic testing because insurance will be more expensive or even unavailable to them if the results are negative. Proponents of the law consider that this protection encourages genetic testing and leads to improved health outcomes that may be associated with treatments based on genetic information.[47]

63. It is useful to consider the way in which the Appellant characterizes the matter. They argue that "[t]he legal mischief the *GNDA* seeks to address is the absence of legal protections sufficient to give Canadians confidence that they will maintain control over their genetic information if they undergo testing."[48] They cite the law's sponsor, Senator Cowan: "The problem can be stated quite simply" […] "There is a gap in our laws, and that gap is preventing many Canadians from accessing the extraordinary advances taking place in medical science. My bill is designed to fill that gap."[49]

64. With respect, there is no gap in the law respecting contracts and the provision of goods and services. To the extent that the *Genetic Non-Discrimination Act* provides "protection," it is

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46 *Firearms Reference*, *supra* note 20 at para 17.
47 *Supra* note 24.
48 Appellant's Factum para 37.
49 *Ibid* at para 8.

protection from provincial regulation of contractual relations that requires disclosure by a person choosing to enter into a particular kind of contract – usually an insurance contract.

65. The "gap in protection" is in fact a policy decision by provincial regulators to treat genetic test results like any other health information. This information is robustly protected and cannot be disclosed without consent. However, an insurer can require that a person consent to disclosure as a condition of entering into a contract for health, life, or disability insurance.

66. Genetic information, like all personal information, is protected in every Canadian province, either by means of legislation regulating private sector collection, use, disclosure, and retention of personal information generally, or by means of personal information health information legislation.[50] In Quebec, for example, the collection, retention, and disclosure of personal information are carefully regulated. Health information, whether in public or private hands is protected and cannot be collected, retained, or disclosed without the consent of the person concerned.[51]

67. Moreover, Quebec specifically prohibits refusing to provide a good or a service to a person who refuses to provide personal information unless that information is necessary for the

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50 *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5 (Canada); *Personal Information Protection Act*, SBC 2003, c 63 (British Columbia); *Personal Information Protection Act*, SA 2003, c P-6.5 (Alberta); *Act respecting the protection of personal information in the private sector*, CQLR c P-39.1 (Quebec); *Personal Health Information Protection Act*, 2004, SO 2004, c 3, Sch A (Ontario); *Personal Health Information Privacy and Access Act*, SNB 2009, c P-7.05 (New Brunswick); *Personal Health Information Act*, SNL 2008, c P-7.01 (Newfoundland and Labrador); *Personal Health Information Act*, SNS 2010, c 41 (Nova Scotia).

51 *Act respecting the protection of personal information in the private sector*, CQLR c P-39.1, ss 2, 5, 6, 9, 12-15; *Professional Code*, CQLR c C-26, s 108.2*; Act respecting Access to documents held by public bodies and the Protection of personal information*, CQLR c A-2.1, s 53.

formation of the contract.[52] Quebec requires individuals seeking to purchase insurance to disclose material health information as an essential requirement of an insurance contract.[53]

68. In provinces that have not enacted privacy legislation, the federal *Personal Information and Protection of Electronic Documents Act* (*PIPEDA*) applies.[54] Under *PIPEDA*, a body subject to that Act can collect and use personal information only when reasonable and when that information will be effective in achieving a legitimate business purpose.[55]

69. The Privacy Commissioner testified that a privacy concern arises where genetic tests are not reliable, and where collection and use would neither be reasonable nor effective in achieving the legitimate business purpose. But because this would be prohibited under *PIPEDA*, he was not prepared to say there was a gap in the law. [56]

70. The *Genetic Non-Discrimination Act* bars collection of genetic testing information in all cases, regardless of reliability. It makes the provincial requirement to disclose reliable and relevant information a crime. Indeed, it is the only thing covered by the *Genetic Non-Discrimination Act* that is not covered by *PIPEDA*. In other words, the Act goes further than *PIPEDA*, which permits the collection of personal information where it can be demonstrated that its collection is effective in achieving a legitimate business purpose. If a company were to seek irrelevant personal information, a complaint may be filed with the federal Privacy Commissioner.[57]

71. Notably, in answer to a question concerning the need for federal legislation, Senator Cowan explained that while he recognized that the regulation of insurance falls within provincial

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52 *Act respecting the protection of personal information in the private sector*, CQLR c P-39.1, s 9(1).

53 *CcQ*, *supra* note 33 s 2408.

54 *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5, s 26(2)(b).

55 *Ibid*, s 5(3). See also Privacy Commissioner's view that genetic information is included in the definition of personal information, **AGC's Record, vol 8 at p 215.**

56 Privacy Commissioner Daniel Therrien, **AGC's Record, vol 5 at pp 153, 163.**

57 Privacy Commissioner Daniel Therrien, **AGC's Record, vol 5 at p 161**; *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5, s 11.

jurisdiction, it was important to "make a national statement"[58] and that it was a subject matter that warranted uniform legislation across Canada.

> We're a very mobile population, and I think that if we're going to get involved in this area, or many other similar areas, it's important that people have assurance that, as they move from one part of the country to another, they're not going to have to deal with different situations.[59]

72. These statements suggest another perspective on the problem the legislation seeks to address. In many policy areas, some will argue that uniformity is preferable to diversity. But it is well established that in areas that are otherwise within provincial jurisdiction, the simple advantages of uniformity do not give rise to federal authority.[60] Federal authority may be triggered by provincial inaction where one province's choices affect the ability of others to effectively regulate a matter, among other considerations.[61] That is simply not the case here.

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58 The Hon. James Cowan, Senator, **AGC's Record, vol 5 at pp 118-119, 177, vol 6 at pp 220-221, vol 7 at p 56, vol 8 at pp 157-158, vol 10 at p 139**; Bev Heim-Myers, Chair of the Canadian Coalition for Genetic Fairness and CEO of the Huntington Society of Canada, **AGC's Record, vol 6 at pp 187-188, 191-192, vol 8 at pp 176-177, vol 10 at pp 175, 178**; Bruce Ryder, Professor, Osgoode Hall Law School, **AGC's Record, vol 8 at pp 202, 210-211**; Marie-Claude Landry (Chief Commissioner, Canadian Human Rights Commission), **AGC's Record, vol 10 at p 141**; Ms. Karen Vecchio, M.P. (CPC), **AGC's Record, vol 10 at p 90**; Cécile Bensimon (Director, Ethics, Canadian Medical Association), **AGC's Record, vol 11 at p 59**; Dr Cindy Forbes (Past-President, Canadian Medical Association), **AGC's Record, vol 11 at p 60**.

59 *Ibid*, **AGC's Record, vol 5 at p 119.**

60 *Canadian Western Bank v Alberta*, [2007] 2 SCR 3, 2007 SCC 22 at para 22 [*Canadian Western Bank*]; *Canada (Attorney General) v Alberta (Attorney General)*, [1922] 1 AC 191 at pp 519-520.

61 *R v Crown Zellerbach Canada Ltd.*, [1988] 1 SCR 401 at pp 432-433; *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48 at paras 103, 115.

vi. The presumption of constitutionality plays no role in identifying the dominant purpose of an act

73. The Appellant argues that the presumption of constitutionality supports the conclusion that the *Genetic Non-Discrimination Act* is *intra vires.* With respect, the presumption of constitutionality does not influence the pith and substance analysis. The presumption of constitutionality operates to favour an *interpretation* of a law that preserves its constitutionality. This case is not about competing interpretations of the *Genetic Non-Discrimination Act*. It is about identifying the dominant purpose of the Act. It is not open to the Court to redefine what would otherwise be the purpose of the Act. The Court's role is to classify the true purpose of the Act.

74. Applying the presumption of constitutionality in the manner suggested by the Appellant would considerably undermine the aims of the division of powers analysis to preserve a balance of federal and provincial powers. Given that one of Parliament's most generous jurisdictional bases is the criminal law power, the argument advanced by the Appellant would invite a court to posit a moral basis for any prohibition and penalty, even if the intrinsic and extrinsic evidence support a non-criminal purpose for an Act of Parliament.

75. Indeed, this point was clearly made by this Court in *Ward*. In that case, which dealt with the constitutionality of regulations prohibiting the sale, trade, or barter of young harp seals, the impugned law might well have fallen within Parliament's criminal power had its aim been to prevent the inhumane treatment of young seals. However, that was not the law's true purpose. The wording of the legislation, along with the legislative history, suggested that the legislation was enacted to preserve fisheries as an economic resource. This was not a valid criminal law purpose.[62]

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62 *Ward v Canada (Attorney General)*, [2002] 1 SCR 569, 2002 SCC 17 at paras 52-56 [*Ward*].

76. Accordingly, the mere fact that a constitutionally valid purpose may be discernible *in theory* cannot be determinative of the law's dominant purpose *in fact*, and the presumption of constitutionality plays no role in identifying that purpose.

77. As a result, it is not possible to accept the Privacy Commissioner's characterization of the law merely to support its constitutionality. In his proposed intervention, the Privacy Commissioner argues that the pith and substance of the *Genetic Non-Discrimination Act* is "protection of Canadians' privacy, dignity and bodily autonomy". As will be discussed more fully below, if this were the dominant purpose of the Act, it may well fall within the criminal law power. However, the reality, as in *Ward*, is that this is not the reason the law was enacted.

78. No doubt sections 3 and 5 read on their own could be ascribed this purpose. However, such an interpretation is inconsistent with a fair reading of the whole of the legislative record. The overarching concern expressed by parliamentarians, and the main thrust of the *Genetic Non-Discrimination Act* is reflected in section 4 – criminalizing the requirement that a person disclose genetic information of which they are aware. The extracts cited by the Privacy Commissioner that suggest the aim of protecting privacy or bodily autonomy do not reflect the dominant themes of the Parliamentary debate.

79. Read in context and in light of the legislative history, sections 3 and 5 aim to support section 4's purpose. Both ss. 3 and 5 prohibit doing indirectly what section 4 prohibits directly. The moral dimensions of the protection of privacy, dignity, and bodily autonomy are of profound importance in the modern age, but the legislative record does not support the conclusion that these offences were enacted for such a purpose.

B) Classification: regulating contracts, goods and services to promote access to potential health benefits does not fall within Parliament's criminal law power

80. All of the above suggests that, at the first stage of the division of powers analysis, the pith and substance of sections 1 to 7 of the *Genetic Non-Discrimination Act* are to regulate contracts and the provision of goods and services with the aim of promoting health. That

objective is squarely within provincial, not federal, jurisdiction. This conclusion is effectively dispositive of the constitutional issue.

81. The goals of striking a balance between consumers of health insurance and the insurance industry in the public interest falls squarely within provincial authority to regulate insurance. In this case, insurance regulation is the "matter". All provinces have chosen to require insured persons to disclose facts that are material to the insurance contract and every province provides that a failure to make a good faith disclosure renders the contract voidable.[63] The *Genetic Non-Discrimination Act*, in its current form, addresses the exact same matter, but makes the opposite policy choice.

i. Scope of criminal law power

82. The Appellant argues that the goal of "protecting and promoting health" is a valid criminal law purpose. There is no doubt that protecting health is a valid criminal law purpose. Parliament can rely on its criminal law power to enact laws with the aim of protecting human health and safety. But as discussed in detail below, a bare claim that the law is health-related is not enough. An assessment of whether a health-related law is within the proper exercise of the criminal law power requires, in this case, consideration of a number of factors. While no one factor is determinative, the fact that the *Genetic Non-Discrimination Act* does not address a traditional subject matter of the criminal law and the fact that it does not prohibit dangerous, immoral, or reprehensible conduct, suggest that the matter addressed is more in the nature of a public health problem rather than a matter that falls within the scope of Parliament's power to enact criminal laws.

83. It is well-established that Parliament's criminal law power is both broad and plenary in nature, and should not be interpreted restrictively.[64]However, it is not unlimited.[65] Accordingly, the following requirements must be met in order for an exercise of the

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63 *Supra* note 35.
64 *RJR-MacDonald*, *supra* note 23 at para 28.
65 *Firearms Reference*, *supra* note 20 at para 30.

criminal law power to be valid: (i) a prohibition; (ii) a penalty; and (iii) a valid criminal purpose.[66] The *Genetic Non-Discrimination Act* respects the first two requirements. The issue is whether it respects the third requirement.

84. The third requirement is aimed at ensuring that the criminal law power develops in a manner that is consistent with the principle of federalism. As this Court explained in the *Margarine Reference*, "[u]nder a unitary legislature, all prohibitions may be viewed indifferently as of criminal law; but as the cases cited demonstrate, such a classification is inappropriate to the distribution of legislative power in Canada."[67]

85. Overlap between the federal criminal law power and provincial authority to regulate property and civil rights is not suspect. Indeed, it is inevitable that many valid exercises of the criminal law power will be concerned with property or civil rights. But a realistic and practical consideration of whether the matter is genuinely susceptible to be regulated from different perspectives – or to use constitutional language – whether there is genuinely a double aspect, is required. It is not enough to observe, as the Appellant does, that federalism favours concurrent powers. Without a valid federal purpose, there can be no genuine double aspect.

86. The range of valid criminal law purposes is broad and this Court has resisted attempts to comprehensively enumerate and thereby limit them.[68] That remains the proper approach. However, in order to validly engage a criminal law purpose, there must be something in the nature of the conduct, activity or matter in issue that makes it "belong to the subject of public wrongs, rather than to that of civil rights."[69]

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66 *Ibid* at para 27.

67 *Reference re Validity of Section 5 (a) Dairy Industry Act*, [1949] SCR 1 at p 50 (per Rand J.) [*Margarine Reference*].

68 *Ibid* at pp 49-50; *RJR-MacDonald*, *supra* note 23 at para 28.

69 *Russell v R*, (1881-82) LR 7 App Cas 829, 1882 CarswellNB 70 at p 839, **Respondent Attorney General of Canada's Book of Authorities (hereinafter"AGCBOA"), tab 1.**

87. Although there is no bright line test, a common feature of much of the jurisprudence is that to rise to the level of a public wrong, there must be, for example, reprehensible conduct[70], inherent danger[71], or socially undesirable behaviour involved.[72] Language like "public evil" or "violation of the public rights and duties to the whole community"[73] is used in the jurisprudence to distinguish undesirable conduct that has a dangerous or immoral character from private wrongs.

88. In *Boggs*, for example, this Court found the criminal prohibition against driving with a driver's license suspended to be *ultra vires* Parliament's criminal law power because some licenses were suspended for administrative reasons – like non-payment of a fuel tax. The fact that the underlying conduct did not deserve punishment and bore no "necessary relationship" to a penal consequence put it beyond the reach of a legitimate criminal law purpose.[74]

89. Similarly, in *Morgentaler (1993)*, the fact that the provincial legislation targeted a "public harm or evil" as a "moral issue", rather than seeking to address the quality of medical services, militated in favour of concluding that the legislation was animated by a criminal law purpose and so was *ultra vires* the province.[75]

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70 *AHRA Reference*, *supra* note 20 at para 30 (Chief Justice McLachlin) and 217 (per Lebel and Deschamps JJ).

71 *Labatt Breweries of Canada Ltd. v Attorney General of Canada*, [1980] 1 SCR 914 at pp 953-954; *RJR-MacDonald*, *supra* note 23 at para 32; *Firearms Reference, supra* note 20 at para 33.

72 *Margarine Reference, supra* note 67 at pp 49-50 (per Rand J.); *Morgentaler (1993), supra* note 22 at p 488; *Canada (Attorney General) v PHS Community Services Society*, [2011] 3 SCR 134, 2011 SCC 44 at para 68 [*PHS Community Services Society*].

73 *Morgentaler (1993), supra* note 22 at p 503; *Reference Re Alberta Statutes - The Bank Taxation Act*; *The Credit of Alberta Regulation Act; and the Accurate News and Information Act*, [1938] SCR 100 at p 144; cited with approval in *Morgentaler (1993), supra* note 22 at p 513.

74 *Boggs v R*, [1981] 1 SCR 49 at pp 64-65.

75 *Morgentaler (1993), supra* note 22 at pp 504-512.

ii. Health as a valid criminal law purpose

90. The protection of health can be and is a valid criminal law purpose in appropriate circumstances. Laws that aim to prohibit conduct that poses a risk to health or to prohibit dangers to human safety pursue valid criminal law purposes.[76] But the Court has never accepted that it is sufficient for constitutional classification that the dominant purpose of a law merely relate to health.[77]

91. This Court's reasons in *Schneider* provide a useful distinction between laws that engage health as a valid criminal law purpose, and those that do not. In that case, where the Court found that the dominant purpose of the legislation was not to punish conduct but to treat an illness, the law was found to be in pith and substance a provincial matter.[78] Conversely, in *Morgentaler*, where the Court determined that the dominant purpose of the legislation was to restrict access to abortions on moral grounds and *not* to protect the health, safety, and security of pregnant women, the law was classified as criminal.[79]

92. In *PHS*, in considering Parliament's power to legislate in respect of health pursuant to its criminal law power, this Court offered the following examples of valid health-related criminal law purposes: (1) the prohibition of medical treatments that are "dangerous"; and (2) the prohibition of "socially undesirable" behaviour.[80]

93. *Schneider*, *Morgentaler (1993)*, and *PHS* all suggest that mere reference to "health" will not, in itself, be sufficient to ground a finding that a valid criminal law purpose is made out. More is required.

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76 *Margarine Reference*, *supra* note 67 at pp 49-50 (per Rand J.); *Morgentaler (1993)*, *supra* note 22 at pp 490-491; *RJR-MacDonald*, *supra* note 23 at paras 30-33; *Firearms Reference*, *supra* note 20 at para 31; *AHRA Reference*, *supra* note 20 at para 52 (per McLachlin CJ).

77 *AHRA Reference*, *supra* note 20 at paras 52 (McLachlin CJ) and 190, 255 (LeBel and Deschamps).

78 *Schneider v The Queen*, [1982] 2 SCR 112 at p 138.

79 *Morgentaler (1993)*, *supra* note 22 at pp 490-491, 512-513.

80 *PHS Community Services Society*, *supra* note 72 at para 68.

94. The same is true of the *Assisted Human Reproduction Reference.* In that case, all members of the Court considered that promotion of beneficial health practices alone was not a valid criminal law objective[81], agreeing, in some way, that the valid use of the criminal law power requires that the law be aimed, directly or indirectly at suppressing reprehensible conduct, danger, or socially undesirable practices. As noted by Chief Justice McLachlin, insofar as Parliament's criminal law power is concerned, there is a critical distinction to be made between a "public health problem" and a "public health evil".[82]

95. A majority of the Court upheld sections 5 to 9 and 12 of the *Assisted Human Reproduction Act*. These provisions all prohibit conduct with a significant moral component, ordinarily considered reprehensible or inherently criminal. Sections 5 to 7 dealt with human cloning, human genetic modification, the commercialization of reproductive material and functions. The Attorney General of Quebec conceded that they were the valid object of criminal prohibition.

96. The constitutionality of sections 8, 9 and 12 divided the Court. Chief Justice McLachlin writing for herself and three others found that these sections were "not aimed at promoting the beneficial aspects of assisted reproduction. While they distinguish the beneficial from the reprehensible, it is only for the purpose of carving out the latter".[83] She was joined in the result by Justice Cromwell, who found that sections 8, 9 and 12 "prohibited negative practices […] that fall within the traditional ambit of the criminal law power".[84] Justices Lebel and Deschamps writing for two others would have found sections 8 to 12 *ultra vires* because the prohibited conduct while reprehensible did not rise to the level of a public health evil.

97. While the prohibitions in sections 8 and 9 of the *Assisted Human Reproduction Act* against using a person's reproductive material without their informed consent involve moral issues,

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81 *AHRA Reference*, *supra* note 20 at paras 24, 26, 30, 33, 75-76, 101, 250-251.
82 *Ibid* at para 55.
83 *Ibid* at para 26.
84 *Ibid* at para 291.

this is not the *Genetic Non-Discrimination Act*'s purpose. Indeed, the Appellant in this case recognizes that the prohibitions in the *Genetic Non-Discrimination Act* are not aimed at a moral purpose.[85]

98. The *Genetic Non-Discrimination Act* in its current form primarily involves the promotion of health by the regulation of a voluntary contractual relationship. No one is obliged to reveal the results of genetic tests under existing provincial regulation unless they choose to purchase insurance. Any such disclosure is then regulated by applicable privacy and human rights legislation.

99. Parliament does criminalize certain aspects of contract, for example: no person shall enter into an agreement the consideration of which is to commit murder[86]; nor shall any person break a contract knowing that the consequence would be to endanger human life, cause serious bodily injury or expose valuable property to destruction or serious injury[87]; no person shall obtain sexual services for consideration[88]; no person shall pay consideration to another person to be a surrogate mother.[89] But all such prohibitions relate to matters generally considered as being morally wrong.

100. To be clear, if sections 3 and 5 of the *Genetic Non-Discrimination Act* were adopted for a moral purpose, they would likely fall within the criminal law power. The moral case against requiring a genetic test or conducting a test without consent is not difficult to imagine. The problem is that the dominant purpose of the Act is ultimately reflected in section 4 – to allow people to not disclose health information where they would otherwise be required to do so.

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85 Appellant's Factum, at para 52.
86 *Criminal Code*, RSC 1985, c C-46, s 231(3).
87 *Ibid* s 422(1).
88 *Ibid* s 286.1.
89 *Assisted Human Reproduction Act*, SC 2004, c 2, s 6(1).

101. The *Genetic Non-Discrimination Act* does not aim to prohibit reprehensible conduct, inherent danger or to prevent socially undesirable behaviour. The law does not seek to punish culpable conduct. None of the proponents of the law believe that insurance companies selling health insurance act immorally, reprehensibly or even unfairly by seeking health information from their clients.[90] Results of genetic tests are health information which can be material to parties in an insurance contract like other types of health information.[91] Far from being improper, the prohibited conduct reflects one of the fundamental requirements of contract – that consent be based on the equality of information.

102. If Parliament were of the view that the insurance industry's practice of seeking health information in the provision of health insurance was reprehensible or morally objectionable, or that it produced a public health evil rather than preferable health policy, it could criminalize the practice. In *Ward*, this Court recognized that the prohibition against selling seal pelts might be justified under the criminal law power if the prohibition had been aimed at prohibiting a cruel practice. The Court observed, however, looking at Hansard and the text of the legislation itself, that the true purpose of the legislation was not to prohibit the slaughter of seals as an inhumane practice. In so doing, the Court noted that if Parliament wanted to prevent a practice it considered inhumane, one would expect it to be directly prohibited.[92]

103. Likewise, if Parliament considered that the practice of differentiating among consumers of health insurance based on their health condition was improper or immoral, it ought to have

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90 Bill S-218 and Bill S-201 (not adopted) contained an exception for insurance providers in respect of high-value insurance contracts; The Hon. James Cowan, Senator, **AGC's Record, vol 5 at p 65, vol 8 at p 178, vol 9 at p 189**; Dr. Ronald Cohn, Co-Director, Centre for Genetic Medicine, Sr. Scientist, The Hospital for Sick Children, Department of Pediatrics and Molecular Genetics, University of Toronto, as an individual: **AGC's Record, vol 5 at pp 177-178**; Patricia Kosseim, Senior General Counsel and Director General, Office of the Privacy Commissioner, **AGC's Record, vol 8 at p 220.**

91 Affidavit of Heather Wood, **AGC's Record, vol 1 at p 27 at para 24.**

92 *Ward*, *supra* note 62 at para 55.

been direct in creating a prohibition of the practice in all of its forms: genetic tests, family history, blood test results, etc. Instead, the *Genetic Non-Discrimination Act* only prohibits seeking that information if it was acquired from a particular kind of test. There is no prohibition against seeking the information through other means – like family history – and there is no prohibition against differential treatment on the basis of genetic information, so long as that information is obtained other than through genetic tests as defined by the Act. Notably, no act of discrimination itself is prohibited.

104. This is not to say that Parliament cannot use indirect means in the exercise of its criminal law power. This Court was clear in that regard in *RJR-MacDonald*.[93] However, where Parliament chooses to address the matter indirectly, that choice must be a justifiable one.[94] Thus, in *RJR-MacDonald*, it was clear that Parliament had employed indirect means because an outright prohibition was wholly impractical.[95] The reality in this case, however, is that Parliament did not criminalize the practice of seeking health information directly, not because it would be impractical, but because parliamentarians do not consider this practice to be wrong.

105. To be clear, on the authority of *Re Assisted Human Reproduction*, Parliament has the authority to criminalize the collection or use of genetic information without a person's consent where, in doing so, it is animated by a valid criminal law purpose. However, that is not the case here. As in *Ward*, the record here shows that Parliament was not motivated by "ethical considerations" or the need to prohibit a "public wrong." If it had been, the outcome of the constitutional analysis might well be different.[96]

106. It is also quite clear that Parliament can criminalize invasions of privacy. Such prohibitions form part of the traditional subject matter of the criminal law. Infractions like voyeurism

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93 *RJR MacDonald*, *supra* note 23 at para 50.
94 *Ibid* at para 34.
95 *Ibid* at paras 34-36.
96 *Ward*, *supra* note 62 at para 55; *Morgentaler (1993)*, *supra* note 22 at pp 490-491.

and wiretapping have been criminal offences for decades.[97] Similarly, in *Re Assisted Human Reproduction*, a majority of this Court upheld the criminalization of the non-consensual use of reproductive material.

107. If this Court accepts the Privacy Commissioner's proposed position that the pith and substance of the *Genetic Non-Discrimination Act* is "protection of Canadians' privacy, dignity and bodily autonomy", this would no doubt constitute a valid criminal purpose. In that event, the law ought to be found *intra vires* Parliament.

108. Indeed, there should be no doubt that Parliament can use the criminal law power to protect the privacy and dignity of Canadians – it already does. Moreover, there should be no doubt that Parliament could criminalize contractual relations that would have the effect of infringing privacy and dignity. This appeal, however, does not raise that issue because that is not the pith and substance of the *Genetic Non-Discrimination Act*.

iii. Criminal law *form* does not diminish the requirement of a criminal law *purpose*

109. The Appellant argues at some length that the fact that the *Genetic Non-Discrimination Act* is comprised only of a prohibition coupled with a penalty suggests that the requirement of a criminal law purpose is diminished.[98] This approach misconstrues the case law.

110. To accept the Appellant's approach, this Court would have to depart from well-established principles. The criminal law form – a prohibition and a penalty – is important, but it is far from determinative.[99] Indeed, in a case like this one, where the purpose of the legislation is neither to prohibit and punish reprehensible conduct nor to protect public health in one of the ways the case law has permitted, disproportionate focus on form adds nothing to the constitutional analysis. To ensure that the penalty and punishment are not employed as

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97 *Criminal Code*, *supra* note 86, ss 162, 184.

98 Appellant's Factum, at paras 41-45.

99 *Scowby v Glendenning*, [1986] 2 SCR 226 at pp 237-238 [*Scowby*]; *RJR-MacDonald*, *supra* note 23 at para 28; *Margarine Reference*, *supra* note 67 at pp 49-50 (per Rand J.).

means to address provincial matters, the dominant purpose of the legislation must be considered. The requirement of a valid criminal law purpose is central to the analysis, regardless of the form.

iv. The *Genetic Non-Discrimination Act*, in pith and substance, relates to provincial jurisdiction over civil rights

111. The matter addressed by sections 1 to 7 of the *Genetic Non-Discrimination Act* in their current form, namely the regulation of contracts and the provision of goods and services with the aim of promoting health, relates fundamentally to provincial jurisdiction over property and civil rights.

112. Sections 1 to 7 of the *Genetic Non-Discrimination Act* regulate contractual relationships. Specifically, they affect the obligation to inform. In Quebec, under the civil law, a breach of the obligation to inform vitiates consent and may lead to the nullity the contract.[100] In common law jurisdictions, the obligation to inform in insurance contracts is part of the obligation of good faith. This Court has referred to an insurance contract as a paradigmatic example of a contract of utmost good faith (*uberrimae fidei*) which requires the parties to disclose material facts.[101]

113. Insurance policy, that is, the legislative choices concerning the terms that an insurer must include in its contracts, conditions and formalities of insurance contracts and accessibility

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100 Jean-Louis Baudouin, Pierre-Gabriel Jobin & Nathalie Vézina, *Les obligations*, 7th ed (Cowansville: Yvon Blais, 2013), at No. 313, **AGCBOA, tab 2**; *Bank of Montreal v Bail Ltée*, [1992] 2 SCR 554; *CcQ*, *supra* note 33 ss 1375, 1401, 2408, 2410.

101 *Bhasin*, *supra* note 33 at para 86; see also *Whiten v Pilot Insurance Co.*, 2002 SCC 18, [2002] 1 SCR 595 at para 83.

requirements, falls within provincial jurisdiction[102] over property and civil rights and matters of a merely local or private nature in the province.[103]

114. The affidavit of Heather Wood, Assistant Deputy Minister of the Department of Finance of British Columbia, demonstrates that a number of policy options are open to provincial regulators to address the use of genetic testing by the insurance industry.[104] Her affidavit reflects a policy issue that is complex and requires the balancing of a variety of considerations that go to the heart of regulating the insurance industry. It is striking to note that all the options that Ms. Wood discusses in her affidavit are entirely precluded by the *Genetic Non-Discrimination Act*. Because the prohibition of sections 1 to 7 is complete, the doctrine of paramountcy will operate such that a province cannot develop an approach that requires disclosure of genetic tests under any circumstances.

115. Further, discrimination is traditionally addressed through human rights legislation. Discrimination in areas of provincial jurisdiction is the subject of provincial regulation.[105] Every province has enacted human rights legislation that regulates relations in areas of provincial jurisdiction and prohibits discrimination. Federal human rights legislation prohibits discrimination in areas of federal jurisdiction.[106]

116. As discussed above in relation to the practical effects of the *Genetic Non-Discrimination Act*, no province considers that using health information to inform *bona fide* contractual practices is discriminatory.

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102 *Citizens' Insurance Company of Canada v Parsons* (1881), 7 App Cas 96*; Attorney-General for Canada v Attorney-General for Alberta (Insurance Reference),* [1916] 1 AC 588*; Canadian Pioneer Management Ltd. and al v Labour Relations Board of Saskatchewan and al.*, [1980] 1 SCR 433 at pp 443-444*; Canadian Western Bank*, *supra* note 60 at para 80; *Chaoulli v Quebec (Attorney General),* [2005] 1 SCR 791, 2005 SCC 35 at para 24.

103 *The Constitution Act*, 1867, 30 & 31 Vict, c 3, ss 92(13), 92(16).

104 Affidavit of Heather Wood, **AGC's Record, vol 1 at pp 29-30 at paras 33-37.**

105 *Scowby*, *supra* note 99 at p 233-234.

106 *Canadian Human Rights Act*, RSC 1985, c H-6, s 2.

117. Several provincial legislatures specifically allow the differential treatment of a person based on grounds otherwise prohibited in certain circumstances.[107] For example, section 20.1 of Quebec's *Charter of human rights and freedoms*[108] provides the following:

> In an insurance or pension contract, a social benefits plan, a retirement, pension or insurance plan, or a public pension or public insurance plan, a distinction, exclusion or preference based on age, sex or civil status is deemed non-discriminatory where the use thereof is warranted and the basis therefore is a risk determination factor based on actuarial data.

118. The federal *Canadian Human Rights Act* also allows for a distinction based on a prohibited ground if it can be shown that the distinction is a *bona fide* requirement.[109]

119. The effect of the criminal prohibition established by sections 3 and 4 of the *Genetic Non-Discrimination Act* is to remove that defense in the provincial sphere. The provincial regime protections against discrimination are essentially obviated by the *Genetic Non-Discrimination Act* and replaced with an absolute prohibition in areas that would otherwise be regulated by the provinces.

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107 *Supra* note 41.
108 CQLR c C-12.
109 *Canadian Human Rights Act, supra* note 106 s 15(1).

PART IV – SUBMISSION CONCERNING COSTS

120. The Appellant seeks an order for special costs on a full indemnity basis. The record before this Court does not support such an award. In *Carter v Canada (Attorney General)*, this Court cautioned that special costs are only available in rare and exceptional circumstances.[110] *Carter* sets out a test to guide the exercise the Court's discretion to grant or not special costs.

121. First, the case must involve matters of public interest that are truly exceptional and have a significant and widespread societal impact. The AGC does not question that this appeal raises a question of public interest.

122. Second, the Appellant must show that it would not have been possible to effectively pursue the litigation in question with private funding.[111] The Appellant has not led any evidence nor even made any representations to demonstrate that this appeal could not have been effectively pursued with private funding that could justify the payment of special costs.

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110 *Carter v Canada (Attorney General)*, 2015 SCC 5 at paras 137, 139.
111 *Ibid* at para 140.

PART V – ORDER SOUGHT

123. The Attorney General of Canada requests that the appeal be dismissed without costs.

PART VI – SUBMISSIONS ON CASE SENSITIVITY, IF APPLICABLE

Not applicable

Montréal, May 7, 2019

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Me Liliane Bantourakis
Me Andréane Joanette-Laflamme
Department of Justice Canada
Counsel for Respondent
Attorney General of Canada

PART VII –TABLE OF AUTHORITIES

Legislation ***(cont'd)*** **Paragraph(s)**

Legislation ***(cont'd)*** **Paragraph(s)**

Legislation ***(cont'd)*** **Paragraph(s)**

Jurisprudence

Jurisprudence ***(cont'd)*** **Paragraph(s)**

Jurisprudence ***(cont'd)*** **Paragraph(s)**

Doctrine
