S.C.C. FILE NO. 38478

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF QUEBEC)

BETWEEN:

CANADIAN COALITION FOR GENETIC FAIRNESS

APPELLANT
(Intervener)

-and-

ATTORNEY GENERAL OF QUEBEC and ATTORNEY GENERAL OF CANADA

RESPONDENTS
(Applicants/Interveners)

-and-

ATTORNEY GENERAL OF BRITISH COLUMBIA, ATTORNEY GENERAL OF SASKATCHEWAN, CANADIAN LIFE AND HEALTH INSURANCE ASSOCIATION and CANADIAN HUMAN RIGHTS COMMISSION

INTERVENERS
(Interveners)

FACTUM OF THE INTERVENER, ATTORNEY GENERAL OF SASKATCHEWAN

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PART I: OVERVIEW OF POSITION AND FACTS

1. Since the discovery of the double helix building block of life, DNA has been the subject of much public interest from its use to solve cold criminal cases, determine ancestry links, or its ability to predict an individual's propensity to develop genetic conditions, cancers, heart disease or many other ailments. No longer relegated to the realm of science fiction, legislators and now the courts are called upon to determine who is responsible to regulate such information. The Attorney General of Saskatchewan ("Saskatchewan") submits that this subject matter falls under the provincial legislative authority.

2. However, Parliament chose to enact the *Genetic Non-Discrimination Act.*[1] The *GNDA* constitutes Parliament's encroachment on the provinces' ability to regulate and control property and civil rights. The protection and regulation of an individual's genetic information falls within the sphere of provincial jurisdiction and should be left to the respective legislatures to define the scope and necessary protections.

3. Saskatchewan expressly adopts the legislative history as set out in the Mémoire de l'Intimée Procureure Générale du Québec, specifically paragraphs 1 to 9, as well as the Respondent Attorney General of Canada's Factum at paragraphs 6 to 20.

4. Saskatchewan submits that Parliament has exceeded its jurisdiction in enacting the *GNDA*. Any attempts to justify the legislation under the federal criminal law power pursuant to s.91(27) of the *Constitution Act, 1867* ignore the express reasons given by parliamentarians to enact the provisions. Parliament sought uniformity across Canada in what was seen as potential policy differences between the provinces.

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[1] SC 2017, c.3 [the *GNDA*].

5. The core purpose and effects of the legislation are to control contractual relationships. The legislation predominantly targets the insurance industry's reliance on information that is highly relevant to the risks associated with the very service it provides. The legislation also targets more generally any contract for service; consequently, it also targets employment.

6. Tangentially linking a criminal purpose to include the promotion of an ancillary effect is insufficient to cloak the *GNDA* within the constrained constitutional heads of power conferred on Parliament. The contemplated restrictions in contract and employment law fall within exclusive provincial jurisdiction.

7. Ultimately an attempt to justify the *GNDA* under the criminal law power would upset the balance of power conferred at Confederation and effectively subordinate the provinces' policy decisions to the political will of Parliament.

PART II: STATEMENT OF ISSUES

8. This Court is tasked with answering the reference question as originally posed by the Quebec Attorney General:

> 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? [French version omitted]

9. Saskatchewan submits that this Court should answer the question in the affirmative. Sections 1 to 7 of the *GNDA*, properly interpreted, run afoul of the division of powers in sections 91 and 92 the *Constitution Act, 1867*. The *GNDA* does not fall within Parliament's jurisdiction

over criminal law[2] but more properly falls under the provincial Legislatures' jurisdiction over property and civil rights, and other local matters.[3]

10. Parliament cannot cloak itself with jurisdiction in areas of provincial competence merely because there is a perception of a legislative vacuum or inconsistencies between the provinces. Although the compartments granted under the division of powers are not watertight, an expansive interpretation of the criminal law power cannot justify such an encroachment.

PART III: ARGUMENT

A. Balanced federalism

11. This appeal raises concerns about the appropriate balance between the federal and provincial heads of legislative power found in sections 91 and 92 of the *Constitution Act,* 1867. Should the constitutionality of the impugned provisions of the *GNDA* be confirmed, the balance in our federal system will be compromised.

12. Federalism is the bedrock of Canada's system of governance. Federalism respects the unique policy perspectives between jurisdictions and supports different approaches to protect and to foster the interests of the residents in the various provinces and territories. In *Reference re Secession of Quebec*, the Court identified federalism as a fundamental principle guiding constitutional interpretation and "the lodestar by which the courts have been guided."[4] This Court has recognized two key principles: that the provinces are not subordinate to the federal parliament and the existence of exclusive areas of jurisdiction.

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[2] *Constitution Act, 1867*, s 91(27).
[3] *Ibid.*, ss 92(13) and 92(16).
[4] *Reference re Secession of Quebec*, [1998] 2 SCR 217.

13. Regulation of the insurance industry falls within the domain of the provinces.[5] Parliament's previous attempts to legislate in the insurance industry have been found to be *ultra vires*.[6]

14. Furthermore, Saskatchewan submits that intervention by Parliament was in furtherance of legislating the perceived vacuum in protecting genetic information. Senator Cowan stated "[t]here 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."[7]

15. This identified purpose does not connote a criminal purpose nor does Saskatchewan concede that the evidentiary record establishes such a gap. Instead, it is indicative of an impermissible intrusion into the legislative authority of the provinces, notably the regulation of contracts and the privacy protections afforded under human rights and health privacy legislation.

16. Parliament may not legislate in an area of exclusive provincial jurisdiction on the basis of a perceived vacuum in the policy and legislative choices of the provinces.[8] Mere importance or novelty also does not give Parliament the authority to legislate within the provinces' heads of power.

B. Pith and Substance

17. To determine the constitutional validity of legislation, a court must undertake a "pith and substance" inquiry. Over the last 152 years, a large body of jurisprudence has molded this

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[5] *Citizens' and the Queen Insurance Cos. v Parsons*, 4 SCR 215.
[6] See, e.g., *Attorney General of Ontario v Reciprocal Insurers*, [1924] AC 328, [1924] 1 DLR 789 (JCPC).
[7] *Debates of the Senate*, 1st Sess, 42nd Parl, No 150, Issue 8 (27 January 2016) at 146 (Hon James Cowan).
[8] See generally *Commission du Salaire Minimum v Bell Telephone Company of Canada*, [1966] SCR 767.

analytical tool. This inquiry was reaffirmed by this Court in *Reference re Assisted Human Reproduction Act*.[9] The majority in that case held:

> There are two steps to determining whether a law is valid: characterization and classification. First the dominant "matter" or "pith and substance" of the law must be determined: *Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3, at para. 25. Once the "matter" is thus characterized, the second step is to determine if it falls under a head of power assigned to the enacting body: *Kitkatla Band*, at para. 52. In this case, the enacting body is federal, and the Attorney General of Canada has decided to limit his arguments on the validity of the Act to a single head of jurisdiction: the criminal law power in s.91(27) of the *Constitution Act, 1867*. If the scheme, properly characterized, falls within that power, it is valid, subject to a closer look at particular provisions. If not, it is invalid. [citations omitted][10]

18. Both steps require an approach that identifies the limits to the heads of power conferred on the respective levels of government. The use of the criminal law power, or any of the federal powers conferred by section 91 of the *Constitution Act, 1867,* must not eviscerate the scope of provincial powers.[11]

19. The English term "pith and substance", may be criticized as vague. The French equivalent "caractère véritable" (true character) is more reflective of the underlying analysis. A reviewing court must find the essential element(s) of the legislation while ensuring that it must be the true character of the legislation that is assessed. This ensures that form does not prevail over substance.

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[9] 2010 SCC 61, [2010] 3 SCR 457 [*Assisted Human Reproduction*].
[10] *Ibid.* at para 19.
[11] See generally *Reference re: Securities Act,* 2011 SCC 66, [2011] 3 SCR 837 at para 58; *Parsons, supra* note 5. See also the minority decision in *Assisted Human Reproduction, supra* note 9 at para 196.

20. This analysis requires a review of the legislation as a whole to provide context for the impugned provisions. This approach was confirmed by the majority in *Assisted Human Reproduction*.[12]

C. The Purpose and Effect of the Law

21. Saskatchewan submits that the purpose of the *GNDA* relates to two general areas:

> 1) the penalty and prohibition sections against the use of or requesting genetic testing and the use of corresponding information generated from said tests (sections 1 to 7); and
>
> 2) amendments to include genetic discrimination in the provisions of the *Canadian Human Rights Act*.[13]

22. The latter portion of the *GNDA* is clearly not targeted at criminal considerations but, rather, the prevention of discriminatory practices within the defined and limited Federal jurisdiction covered by the *Canadian Human Rights Act*. Although this latter portion of the *GNDA* is not challenged in the present appeal, the protection against perceived genetic discrimination does factor into the legislative context of the challenged provisions.

23. Sections 1 to 7 of the *GNDA* do not, however, address *discriminatory* use of genetic information. *All* requests for such information in commercial contexts are prohibited, regardless of the purpose for which the information will be used. The sections govern individuals and companies who would compel or seek out genetic information. This clearly targets the insurance

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[12] *Supra* note 9.
[13] RSC 1985, c H-6.

industry and/or employers. This intended focus was clearly on the minds of the legislators when they were discussing adoption of the *GNDA.*[14]

24. Saskatchewan concurs and adopts the Attorney General of Canada's noted practical effects on the insurance industry as described in its factum at paragraphs 50 to 52. In Saskatchewan, the legislature has specifically incorporated the principle of utmost good faith into sections 145 and 242 of *The Saskatchewan Insurance Act.*[15]

25. As a consequence, the *GNDA* criminalizes the province's policy choice to require honesty and disclosure of material facts which historically have been seen as foundational to the nature of insurance contracts.[16] This is a law that potentially encourages dishonesty in contract law and creates an environment for anti-selection in insurance which does not serve a criminal purpose.

26. The obligations, rights and protections afforded to the insured and insurer are fundamentally a legislative and policy choice that should fall squarely within the exclusive jurisdiction of the provinces.

27. Furthermore, Saskatchewan has also enacted protections for health-related information of its residents.[17] As such, there is no legislative gap in Saskatchewan. It is, therefore, an affront to the autonomy of the province for Parliament to legislate in a sphere which this province of Saskatchewan has already occupied.

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[14] As was noted and cited emanating from the Parliamentary debates set out in paragraph 38 of the Respondent Attorney General of Canada's Factum.

[15] RSS 1978, c S-26.

[16] A review of the historic nature of the concept of utmost good faith in insurance law was canvassed in *Saskatchewan Crop Insurance Corporation v Deck*, 2008 SKCA 21, [2008] WWR 501.

[17] *The Health Information Protection Act*, SS 1999, c H-0.021.

28. After carefully considering the legislative history of the *GNDA* and its practical effects, the Quebec Court of Appeal correctly and succinctly identified the true legislative purpose of the Act:

> The analysis of the language of the *Act* and of the parliamentary debates surrounding its adoption clearly establishes that the pith and substance of sections 1 to 7 is to prohibit the use of genetic tests or of their results in order to allow Canadians to access these tests without their results being used without their consent when they enter into agreements with third parties or when they seek the provision of goods and services. The record also reveals that the effect of these provisions impact especially insurance contracts and, to a lesser extent, employment contracts. The parliamentary debates reveal that it was indeed these types of contracts (insurance and employment) that were at the heart of the concerns of parliamentarians.[18]

29. Saskatchewan generally concurs with the Quebec Court of Appeal's characterization of purpose, noting, however, that the promotion of health is at best an ancillary benefit of the prohibitions in the *GNDA*. The primary legislative purpose was to alleviate public concern over insurance and employment contracts due to a perceived lack of protection offered by provincial legislation.

30. Saskatchewan submits that the purpose of the *GNDA* is primarily the regulation of contracts, an inherently non-criminal purpose and one that is not within the legislative authority of the Parliament of Canada.

D. The Criminal Law Power

31. Even if this Court were to disagree with the Quebec Court of Appeal and find that the pith and substance of the *GNDA* is not the regulation of contracts, the analysis then requires

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[18] *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*, 2018 QCCA 2193 at para 8.

consideration of the second branch of the test: does the purpose fall under the s. 91(27) criminal law power?

32. Defining the limits of the criminal law is more an art than a science. As Estey J. stated for the majority in *Scowby v. Glendinning*: "Criminal law is easier to recognize than to define. It is easier to say what is not criminal law than what is."[19]

33. This issue figured prominently in the *Margarine Reference*. There this Court held that a prohibition on the manufacture and importation of margarine was beyond the federal criminal law power, even though the law was cast as a prohibition coupled with a penalty which had long been the hallmark of the exercise of the criminal law power. Rand J. crafted a broader definition of the criminal law power where the court focuses upon the formal structure of the impugned law and its purpose when determining if it is authorized by section 91(27). Rand J. explained that:

> … we can properly look for some evil or injurious or undesirable effect upon the public against which the law is directed. That effect may be in relation to social, economic or political interests; and the legislature has had in mind to suppress the evil or to safeguard the interest threatened.[20]

34. This Court in *Assisted Human Reproduction* reaffirmed its jurisprudence that for a law to be valid criminal legislation it must meet three criteria:

> In order to answer this question, we must consider whether the matter satisfies the three requirements of valid criminal law: (1) a prohibition; (2) backed by a penalty; (3) with a criminal law purpose: *Reference re Firearms Act (Can.)*, 2000 SCC 31 (CanLII), [2000] 1 S.C.R. 783 ("*Firearms Reference*"), at para. 27. [21]

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[19] *Scowby v Glendinning*, [1985] 2 SCR 226, at p. 236.
[20] *Reference re Validity of Section 5(a) of the Dairy Industry Act*, [1949] SCR 1 at pp. 49; appeal dismissed, *sub nom. Canadian Federation of Agriculture v Attorney General for Quebec*, [1951] AC 179 (PC) [*Margarine Reference*].
[21] *Assisted Human Reproduction*, *supra* note 9, at para. 35.

35. Modern interpretation of the criminal law power has consistently required a link to a *significant* harm: tobacco consumption (*RJR-MacDonald*), the emission of toxic substances into the environment (*Hydro-Québec*), and the improper use of firearms (*Reference re Firearms Act*). [22] These were all subject matters that threatened public health and safety and legitimized a criminal law response. By contrast, the subject matter in section 1 to 7 of the *GNDA* is materially different and distinguishable from the matters this Court has previously found to be a valid exercise of the criminal law power.

36. The federal legislation at issue in *RJR-MacDonald*, the *Tobacco Products Control Act*, prohibited tobacco advertising in Canada with limited exemptions. The objective behind this prohibition was a concerted effort to curb tobacco smoking particularly among young Canadians. Although this Court declared this legislation unconstitutional under the *Canadian Charter of Rights and Freedoms,* it ruled (Sopinka and Major JJ. dissenting) that the impugned legislation was valid criminal law. La Forest J., who spoke for the majority on this issue, noted that in last half of the twentieth century irrefutable medical evidence emerged about the "truly devastating health consequences of tobacco consumption". Consequently, because tobacco consumption can kill, it was appropriate to qualify tobacco advertising as an "evil" to be prohibited under the criminal law power.[23]

37. In *Hydro-Québec*, this Court sustained Part II of the *Canadian Environmental Protection Act* under the criminal law power. This Part prohibited toxic substances and environmental pollution. Justice La Forest, again speaking for the majority on this issue, ruled that controlling

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[22] *RJR-MacDonald Inc. v Canada (Attorney General)*, [1995] 3 SCR 199. See also *R v Hydro-Quebec*, [1997] 3 SCR 213; *R v Morgentaler*, [1993] 3 SCR 463; and *Assisted Human Reproduction*, *supra* note 9.
[23] *RJR-MacDonald*, *supra*, note 21, at 261.

environmental pollution was a "public purpose of superordinate importance" and qualified as "an 'evil' that Parliament can legitimately seek to suppress" through the criminal law power. He observed that prohibiting the emission of toxic substances into the environment under section 91(27) of the *Constitution Act, 1867* ensured Parliament is able to "exercis[e] the leadership role expected of it by the international community" in environmental matters. [24]

38. In *Morgentaler*, Sopinka J. for this Court declared unconstitutional Nova Scotia's *Medical Services Act* and the regulation made under it, which prohibited the performance of an abortion outside a hospital. The Court concluded that the law's true purpose was to suppress "the perceived public harm or evil of abortion clinics", and, accordingly it was an attempt by the province to enact a criminal law. In the course of his judgment, Sopinka J. highlighted the reality that for more than a century in both Canada and the United Kingdom "the prohibition of abortion with penal consequences has long been considered a subject of the criminal law".[25]

39. In *Reference re Firearms Act*, this Court upheld an extensive regulatory regime as a valid exercise of the criminal law power. At issue was the licensing and registration requirements for all firearms, including rifles and shotguns, created by the *Firearms Act*. This Court ruled that "[g]un control has traditionally been considered valid criminal law because guns are dangerous and pose a risk to public safety". Clearly then, the *Firearms Act* fulfilled a valid criminal law purpose, namely, the "regulation of guns as dangerous products". Despite its extensive regulatory nature, the *Firearms Act* could be classified as valid criminal law because its public purpose was connected to a prohibition coupled with a penalty related to inherently dangerous goods.[26]

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[24] *Hydro-Québec*, *supra* note 21, at para 123 and 154.
[25] *Morgentaler*, *supra* note 21, at 512 and 491.
[26] *Reference re Firearms Act*, 2000 SCC 31 at para 33, [2000] 1 SCR 783.

40. The subject matters of the *GNDA*, the prohibition on discrimination and the regulation of contracts, share none of these indicia. The activities prohibited by the impugned provisions in the *GNDA* do not present imminent risk or danger to public health or security. The purpose of the impugned provisions of the *GNDA* is to regulate contract law in the provinces because of the fear that one party may use genetic information in the provision of services. The concern is over the *potential* for discrimination, rather than addressing an actual harm or "evil" necessary to support a law enacted under the criminal law power.

41. The Appellant at para 37 of its factum purports to identify the "legal mischief" upon which the *GNDA* could be sustained as criminal law as being "the absence of legal protections sufficient to give Canadians confidence that they will maintain control over their genetic information if they undergo testing." This characterization trivializes the comparable social concerns that this Court has previously found would qualify as the "evil" necessary to constitute valid criminal law.

42. Moreover, this Court noted in *Assisted Human Reproduction* that the contemplated harm must not merely be speculative in order to qualify for a valid criminal law purpose:

> No constitutional threshold level of harm, as such, constrains Parliament's ability to target conduct causing these evils. It is not apparent that the criminal law may only regulate the severest risks to individual's health and safety, and not also prohibit less severe harms that are of public concern. In *RJR-MacDonald*, La Forest J. emphasized that the harm of tobacco consumption was "dramatic and substantial" (para. 32). However, this observation does not constrain the test he applied for whether Parliament may regulate a risk to health: ". . . the criminal law power may validly be used to safeguard the public from <u>any</u> injurious or undesirable effect. The scope of the federal power to create criminal legislation with respect to health matters is broad, and is circumscribed only by the requirements that the legislation must contain a prohibition accompanied by a penal sanction and must be directed at a legitimate public health evil" (para. 32 (emphasis added; internal quotation marks omitted)). This said, <u>the need to establish a reasonable apprehension of harm means that conduct with little or no threat of harm is unlikely</u>

> to qualify as a "public health evil": *Malmo-Levine*, at para. 212, *per* Arbour J., dissenting, but not on this point.[27] [emphasis added]

43. Saskatchewan submits that nothing in the evidentiary record supports a reasonable apprehension of harm. Rather, within the insurance industry there is a pressing reason that health information be shared from the insured to the insurer – and, in Saskatchewan, it is legislatively mandated. The requirement of honest dealings in insurance contracts cannot be framed as a threat to health or safety, far less a dangerous activity requiring a criminal law response.

44. The suggestion that the *GNDA* will encourage Canadians to seek genetic testing, thereby protecting health and security is, similarly, not a valid criminal law purpose. A prohibition designed specifically to encourage a particular medical practice is not consistent with the scope of the federal criminal law power. In *Assisted Human Reproduction*, the Chief Justice stated this position twice in her decision: "The federal criminal law power may only be used to prohibit conduct, and may not be employed to promote beneficial medical practices"[28] and repeated the proposition that health promotion was not in and of itself a criminal law purpose.[29]

45. Therefore, for the reasons set out above the *GNDA* is *ultra vires* of Parliament as it is not valid legislation pursuant to the criminal law power.

PART IV: COSTS

46. Saskatchewan does not seek costs and asks that no costs be awarded against it.

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[27] *Assisted Human Reproduction, supra* note 9 at para 56.
[28] *Ibid.* at para 38.
[29] *Ibid.* at para 64.

PART V: REQUEST FOR ORDER

47. Saskatchewan submits that the Constitutional Question asked in this appeal should be answered "yes". 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) is *ultra vires* to the jurisdiction of the Parliament of Canada over criminal law under paragraph 91(27) of the Constitution Act, 1867.

ALL OF WHICH is respectfully submitted.

DATED at Regina, Saskatchewan, this 4th day of June, 2019.

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PART VI: AUTHORITIES, STATUTES AND REGULATIONS

CASES

Tab	Citation	Paragraph(s)
	Attorney General of Ontario v Reciprocal Insurers, [1924] AC 328, [1924] 1 DLR 789 (JCPC).	13
	Citizens' and the Queen Insurance Cos. v Parsons, 4 SCR 215.	13, 18
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	R v Hydro-Quebec, [1997] 3 SCR 213.	35, 37
	R v Morgentaler, [1993] 3 SCR 463.	35, 38
	Reference re Assisted Human Reproduction Act, 2010 SCC 61, [2010] 3 SCR 457.	17, 18, 20, 34, 35, 42, 44
	Reference re Firearm Act, 2000 SCC 31, [2000] 1 SCR 783.	35, 39
	Reference re Secession of Quebec, [1998] 2 SCR 217.	12
	Reference re Securities Act, 2011 SCC 66, [2011] 3 SCR 837.	18
	Reference re Validity of Section 5(a) of the Dairy Industry Act, [1949] SCR 1.	33
	RJR-MacDonald Inc. v Canada (Attorney General), [1995] 3 SCR 199.	35, 36
	Saskatchewan Crop Insurance Corporation v Deck, 2008 SKCA 21, [2008] 8 WWR 501.	25
	Scowby v Glendinning, [1986] 2 SCR 226.	32

STATUTES, REGULATIONS, ETC.

Tab	Citation	Paragraph(s)
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