SCC File No. 38478

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

BETWEEN:

CANADIAN COALITION FOR GENETIC FAIRNESS

Appellant
(Intervener)

-and-

ATTORNEY GENERAL OF QUÉBEC and
ATTORNEY GENERAL OF CANADA

Respondent
(Applicant/Intervener)

-and-

ATTORNEY GENERAL OF BRITISH COLUMBIA,
ATTORNEY GENERAL OF SASKATCHEWAN, CANADIAN LIFE AND HEALTH INSURANCE ASSOCIATION, CANADIAN HUMAN RIGHTS COMMISSION,
PRIVACY COMMISSIONER OF CANADA and
CANADIAN COLLEGE OF MEDICAL GENETICISTS

Interveners
(Interveners)

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PART I – THE FACTS

A. Overview

1. Federal laws are paramount when provincial laws are inconsistent with them. Unless there are clear and ascertainable limits on federal powers, the provinces will therefore only be sovereign to the extent Parliament decides they should be – which is to say, not sovereign at all. No head of power under section 91 of the *Constitution Act, 1867* poses greater challenges in this regard than the criminal law power.[1] Federal authority under s. 91(27) is not limited to a specific concrete list of activities or things, nor by their cross-border scope, nor by the principle of provincial inability. Any regulation can be framed as a prohibition with a penalty, and the policy areas of public peace, order, security, health and morality could plausibly encompass almost anything. The key insight of the plurality's decision in the *Assisted Human Reproduction Reference* was that, for the criminal law power to have meaningful limits that protect provincial jurisdiction, laws in relation to criminal law must be directed at suppressing a criminal "evil" (in French, <<*un mal au sens du droit criminel*>>), as opposed to a mere regulatory or civil harm.[2]

2. The *Genetic Non-Discrimination Act*, SC 2017, c. 3 (the "*Act*") is framed as a prohibition with a penalty. There is no dispute that it aims to promote health by removing the fear that taking genetic tests could interfere with insurance eligibility. The Attorney General of British Columbia ("AGBC") agrees that this is a genuine concern for public policy to address and weigh against other issues that might affect the availability of insurance and the promotion of health. The reason the *Act* is not in relation to criminal law is that its purpose and effect is not the suppression of a harm which is communally agreed upon to be reprehensible, and thus worthy of a sanction with the consequence and stigma that attends the criminal law. In other words, it does not aim to suppress an evil, but to address a harm of the sort traditionally dealt with by regulatory or civil law that depends on balancing of risks and rewards and values of efficiency and social justice.

3. The AGBC respectfully submits that this Court should use this occasion to bring greater analytic clarity to the line between criminal evils and civil/regulatory harms. We advance the

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[1] *Constitution Act*, 1867, 30 & 31 Vict, c 3, s 91 (27) ("The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters").

[2] *Reference re Assisted Human Reproduction Act*, [2010] 3 SCR 457, 2010 SCC 61 [*Human Reproduction Reference*] at para. 239.

following principles:

a. Since the line between criminal evil and civil harm arises out of the compromise between the operation of French and English law in the *Quebec Act*, as sustained in the bargain represented by the *Constitution Act, 1867*, it is relevant whether the activity or thing prohibited has traditionally been viewed as being in the domain of criminal law.

b. However, it is undeniable that social and technological change affect communal views of whether conduct is reprehensible. History therefore cannot be determinative. In some cases, new acts and omissions are brought within the criminal sphere (cybercrime, cloning of human embryos); in other instances, conduct once considered criminal becomes a matter of civil/regulatory control (strikes in the early 20th century as compared with the 19th, the recreational use of cannabis in the 21st as compared with the 20th century). To maintain the federal-provincial balance established at Confederation, it must be possible for the constitutional traffic between criminalization and regulation to go both ways – just as the social traffic does.

c. It would be inconsistent with federalism to leave the determination of whether a harm is an "evil" to the unilateral decision of Parliament. When Parliament decides that an activity or thing traditionally criminalized should continue to be viewed as a matter for denunciation and retribution, it should be given deference. But where Parliament purports to criminalize activity traditionally subject to civil and regulatory control, there must be a strong consensus – across religious, philosophical and ideological divisions – that the activity or thing is appropriately viewed as an evil.

4. The use of genetic information in the pricing and availability of insurance contracts is an inherently complex policy area requiring a balancing of interests and indirect impacts on public health and the availability of insurance. These are moral and health issues, but they involve balancing benefits and risks and conceptions of efficiency and equity. The harms the *Act* attempts to address are not matters of reprehensible conduct and, therefore, not in relation to the criminal law.

B. How Provincial Legislation Currently Addresses Genetic Discrimination and Testing

5. In British Columbia, discrimination based on the results of genetic testing is treated like

discrimination based on any other test that shows elevated risk of negative medical events in the future (for example, a test showing an individual carries the HIV or Hepatitis viruses, or has unusually high levels of cholesterol). Regardless of the scientific etiology of the risk, discrimination based on a statistical or probabilistic propensity to develop a medical condition in future is discrimination based on disability.[3] B.C's *Human Rights Code* bans discrimination based on mental or physical disability either in access to goods or services[4] or in employment, and genetic discrimination within the meaning of the *Act* is caught in this wider prohibition.[5]

6. The *Code*'s prohibition on discrimination is not absolute. If a service provider can establish a "bona fide and reasonable justification" for its actions, then the denial of a service is permitted. More specifically, s. 8(2) of the *Code* allows for physical or mental disability and age to be taken into account in the provision of life or health insurance. Similar provisions exist in relation to discrimination in insurance plans related to employment.[6]

7. Under s. 51(1) of the B.C. *Insurance Act*,[7] applicants for life insurance and persons whose life is to be insured must disclose facts within their knowledge "material to the insurance." Similar provisions exist for accident and sickness insurance (s. 111(1)).[8] This would include the results of a test that showed a materially higher likelihood of mortality, in the case of life insurance, or of the occurrence of a condition covered by the accident or sickness insurance.

8. Thus, provincial law in British Columbia is that genetic information that discloses actuarial risk of developing an adverse health condition – like all other medical information disclosing actuarial risk – cannot be disclosed without the consent of the person whose information it is, and cannot, in general, be the basis for discrimination. However, insurance companies can require disclosure of those existing test results known to the insured and can use that information to make decisions as to availability and premiums.

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3 *Québec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City); Québec (Commission des droits de la personne et des droits de la jeunesse) v. Boisbriand (City)*, [2000] 1 SCR 665, 2000 SCC 27.
4 *Human Rights Code*, R.S.B.C. 1996, c. 210, s. 8.
5 *Human Rights Code*, s. 13.
6 *Human Rights Code*, s. 13(3)(b).
7 *Insurance Act*, S.B.C. 2012, c. 37.
8 Affidavit of Heather Wood ("Wood Affidavit") at para. 12.

C. Health, Insurance, and Genetic Information Policy Challenges

9. The Government of British Columbia is currently considering the policy challenges stemming from the growth of genetic health information.[9]

10. An issue that complicates this area is the economics of adverse selection. That is, at any given premium, the greater the expectation that the insured condition will occur, the more likely persons are to purchase insurance. To take a straightforward example, if life insurers could not charge different premiums or provide different benefits based on age, few young adults would voluntarily purchase life insurance. This would obviously have negative consequences for them and their families. Moreover, by changing the risk pool, this would also increase premiums for everyone else. Middle-aged adults might in turn leave the pool, leading to higher premiums for older adults. Ultimately, the result might be that no one could obtain life insurance.[10]

11. This concern about adverse selection and concerns about information asymmetry (situations in which the risk is known to the insured but not the insurer[11]) have to be balanced against the problem of denying people insurance on the same terms as others based on immutable characteristics linked statistically to insured risks, and against individual rights to control personal information. The former dilemma has been recognized by this Court, which has upheld distinctions in auto insurance rates based on age and marital status if there is no practical alternative, while recognizing the obvious unfairness to good drivers who share demographic characteristics with bad ones.[12] The British Columbia government is studying the extent to which adverse selection would genuinely be a problem if genetic information in the possession of an insured were not subject to a disclosure obligation. [13]

12. One option is to continue to allow genetic discrimination to be controlled pursuant to the current regulatory framework that applies to medical information and medical conditions generally.[14] A second option would be to specifically add "genetic characteristics" as a prohibited ground of discrimination in the B.C. *Human Rights Code*. This would require further policy

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[9] Wood Affidavit at para. 24.
[10] Wood Affidavit at para. 10.
[11] Wood Affidavit at para. 13.
[12] *Zurich Insurance Co. v. Ontario (Human Rights Code)*, [1992] 2 SCR 321.
[13] Wood Affidavit at para. 32.
[14] Wood Affidavit at para. 33.

consideration of how "genetic characteristics" would or would not be treated as "physical or mental disability", in particular in relation to the determination of premiums and benefits in contracts of life or health insurance.[15] The use of genetic information could be permitted for some types of coverage, but not others. A monetary threshold for coverage for the different types of insurance could be developed, such that genetic information could be used in an application for insurance above the threshold but not below it.

13. For example, insurers could be required to issue life insurance policies under one million in coverage on the same terms to everyone regardless of genetic profile, while coverage over that amount could require disclosure of existing genetic tests. The use of some types of genetic testing (such as predictive testing) in the pricing of insurance could be permitted, but use of other types (such as diagnostic testing or results pursuant to research) forbidden. Requiring applicants to undergo genetic testing as a precondition of entering into an insurance contract could be prohibited, while requiring them to disclose some tests they have already taken could be permitted. This is current industry practice although not required by law in British Columbia. Controls respecting the use of one person's genetic testing results in the context of evaluating risk for their blood relations could be considered.[16] A regulatory body of experts and stakeholders could make recommendations and update them as the technology changes.[17]

PART II – ISSUE

14. The question put to the Québec Court of Appeal was as follows:

> Is the *Genetic Non-Discrimination Act* as enacted by sections 1 to 7 of *An 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*.

15. British Columbia says the answer to this question is "yes".

PART III – SUBMISSIONS

D. Provincial-Federal Balance Requires Carefully Delimiting Criminal Law Power

16. In the *Secession Reference*,[18] this Court identified the principle of federalism as one of

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[15] Wood Affidavit at para. 34.
[16] Wood Affidavit at para. 35.
[17] Wood Affidavit at para. 37.
[18] *Reference re Secession of Québec*, [1998] 2 SCR 217 [*Secession Reference*].

four underlying Canada's constitutional order, along with the rule of law, democracy and the protection of minorities. The essence of the federal principle is that the two levels of government are co-ordinate sovereigns, neither of which is subordinate to the other.[19] The principle of federalism recognizes the "autonomy of provincial governments to develop their societies within their respective spheres of jurisdiction."[20] The tension between the centre and the regions is regulated by the concept of jurisdictional balance, which courts must take into account when considering different interpretations of constitutional texts.[21] Balance means that both federal and provincial powers must be respected, and one power must not be used in a manner that effectively eviscerates the other.[22]

17. The principles of co-ordinate sovereignty and balance require that the courts effectively scrutinize federal laws at the "pith and substance" stage of the analysis. This is because the other stages of Canadian division-of-powers analysis – interjurisdictional immunity and paramountcy – benefit only the central level of government (in practice, in the case of interjurisdictional immunity and in both theory and practice, in the case of paramountcy). The "double aspect" principle allows for substantial overlap in the powers of both levels of government. But unless there are meaningful limits to section 91 powers, the federal Parliament will be able to legislate about everything. In light of the paramountcy rule, this would make Canada a legislative union. Care must therefore "be taken to maintain the constitutional balance of powers at all stages of the constitutional analysis."[23]

18. In light of this need to preserve the balance between the central government and the provinces, defining the limits of the criminal law power under s. 91(27) "has always been a difficult task."[24] Unlike Parliament's authority over such things as the postal service (s. 91(5)), the census and statistics (s. 91(6)), bankruptcy and insolvency (s. 91(21)) or marriage and divorce (s. 91(26)), the criminal law is not, by its nature, limited to specific acts or omissions.

19. Nor is the criminal law power circumscribed by the intra-provincial or extra-provincial

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[19] *Secession Reference* at para. 56; *Human Reproduction Reference* at para. 182.
[20] *Secession Reference* at para. 58; *R. v. Comeau*, 2018 SCC 15 at para. 78 [*Comeau*].
[21] *Secession Reference* at paras. 56-59; *Comeau* at para. 78.
[22] *Reference re Securities Act*, [2011] 3 SCR 837, 2011 SCC 66 at para. 7 [*Securities Reference*].
[23] *Human Reproduction Reference* at para. 196.
[24] *Human Reproduction Reference* at para. 230.

nature of the subject matter, as with interprovincial transportation and communication undertakings (s. 92(10)(a)-(c)), or the interprovincial/international dimensions of trade and commerce. In the case of other broad federal powers, such as general regulation of trade and commerce (s. 91(2)) and peace, order and good government, the courts have developed the "provincial inability" test to provide reasonable and ascertainable limits to federal authority. So in determining whether a federal law can be upheld under the general trade and commerce power, the courts ask, among other things, whether the federal scheme is of such a nature that provinces, acting alone or in concert, would be constitutionally incapable of enacting it and whether the failure to include one or more provinces or localities in the scheme would jeopardize its successful operation in other parts of the country.[25] Similarly, under the "national concern" branch of the peace, order and good government power, the federal government must show "what would be the effect on extra-provincial interests of a provincial failure to deal effectively with the control or regulation of the intra-provincial aspects of the matter" and then consider whether the matter would upset the overall balance between the federal and provincial governments. [26]

20. These limits on federal power are consistent with the principle of subsidiarity that governance should, to the extent possible, be assigned to the level of government closest to the citizens affected.[27] Matters that intrinsically involve crossing provincial or international borders, or which are limited by the principle of provincial inability, by definition affect citizens beyond the bounds of any particular province. Other matters are generally matters of provincial concern. Subsidiarity maximizes the ability of public policy to adapt to differences in views and preferences in a diverse society. In an era in which rapid technological and social development is taking place, it allows each jurisdiction to innovate and learn from the innovations of others. Decentralized jurisdictions become the "laboratories of democracy." [28]

21. The criminal law power, however, does not require any demonstration of an extra-provincial effect or provincial inability. Rather, the criminal law applies to the most local,

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[25] *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 SCR 641 at pp. 661-62; *Securities Reference* at para. 80.

[26] *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 SCR 401 at p. 432.

[27] *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, 2001 SCC 40, [2001] 2 SCR 241 at para. 3; *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 SCR 3 at para. 45.

personal and intimate interactions, regardless of whether these could be effectively addressed at a provincial level. Nor is it limited to a specific sphere of social life. The stakes are therefore high. A *de facto* "limitless definition" [29] of the criminal law power would defeat the desire of the confederating provinces, referred to in the Preamble to the *Constitution Act, 1867* as the desire to be *federally* united.

E. Historic Context: Quebec Act to Constitution Act, 1867

22. To find *de facto* and *de jure* limits to the criminal law power we must look to history. Constitutional provisions must be "placed in [their] proper linguistic, philosophic and historical contexts."[30] The historical context is particularly important for the scope of the criminal law power. Canadian federalism is unusual among federations in giving plenary authority over criminal law to the central level of government. The United States of America and Australia, for example, both limit federal authority to crimes with a federal nexus, such as interstate trade. The decision to vest authority over "criminal law" in the federal Parliament therefore needs to be understood in terms of Canada's history.

23. The division between "property and civil rights" and "criminal law" found in sections 91 and 92 of the *Constitution Act, 1867* harkens back to the same division in the 1774 *Quebec Act.*[31] Section 8 of the *Quebec Act* provided that in "all Matters of Controversy, relative to Property and Civil Rights, Resort Shall be had to the Laws of Canada as the Rule for Decision of the same" while section 11 provided that the "Criminal Law of England" would apply to the recently conquered colony. [32]

24. This was a politically necessary compromise in light of the confusion and dissatisfaction caused by the apparent imposition of English law on the people of Quebec by the 1763 Royal Proclamation. To understand the breadth of this compromise, it is important to note that offences like poaching contrary to the game laws or moving to a different parish without visible means of

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[28] *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932) at p. 311, Brandeis J.
[29] *Human Reproduction Reference* at para 43, McLachlin CJC, and at para. 239, LeBel and Deschamps JJ.
[30] *R. v. Big M Drug Mart Ltd.*, [1985] 1 SCR 295 at p. 344; *Comeau* at para. 52.
[31] *An Act for making more effectual Provision for the Government of the Province of Quebec in North America*, 14 Geo. Ill, c. 83 [*Quebec Act*].
[32] *Quebec Act*, s. 11.

support contrary to the poor laws were not offences in the new province, although they were a central part of the penal law in England itself.[33]

25. The plan for the *Quebec Act* was discussed at length in a 1774 report of Advocate General James Mariott. Mariott stated that "criminal law" did *not* refer to all conduct that was prohibited with a penalty ("*malum prohibitum*"), but only to what was considered intrinsically criminal by virtue of natural law ("*malum in se*").[34] In early modern legal thought, a *malum in se* offence was one that was contrary to natural law and would therefore be intuitively wrong to everyone. In civil society, a just sovereign *must* punish acts that are *mala in se*, and only had choice over the processes by which guilt would be determined and the appropriate punishment. The contrast was with a *malum prohibitum* offence, which is only wrong because the sovereign prohibits it.[35] This was the early modern equivalent of our contemporary distinction between true crimes and *quasi*-criminal regulatory offences.[36] This distinction appears to explain why common law treasons and felonies in Quebec were now governed by English law, but the game laws and poor laws were not.

26. The distinction between *mala in se* criminal prohibitions and "property and civil rights" became the basis for the legal system of Upper and Lower Canada between 1791 and 1841, and within the United Province of Canada between 1841 and 1867. As William Lederman remarked in explaining the meaning of s. 92(13), the "Fathers of Confederation knew all about this [distinction between property and civil rights and criminal law] – they lived it every day – and naturally they took the broad scope of the phrase [property and civil rights] for granted."[37]

27. In the negotiations leading up to Confederation, preserving its distinctive legal system was a matter of fundamental importance for Québec, along with language and religion.[38] George-

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[33] Fyson, Donald. *Magistrates, Police and People: Everyday Criminal Justice in Quebec and Lower Canada, 1764-1837*. Toronto: University of Toronto Press, 2006 at p. 20.
[34] Mariott, James. *Plan of a Code of Laws for the Province of Quebec*. London 1774 at p. 31.
[35] Blackstone, Sir William. *Commentaries on the Laws of England, Book IV, Of Public Wrongs*. Philadelphia: Rees Walsh and Company, 1887 at p. 1430.
[36] *R. v. Wholesale Travel Group Inc.*, [1991] 3 SCR 154 [*Wholesale Travel*] at p. 216.
[37] William R. Lederman, "Unity and Diversity in Canadian Federalism" (1975) 52 *Can. Bar. R.* 597 at p. 601.
[38] *Secession Reference* at paras. 79-82; *Reference re* Supreme Court Act, ss. 5, 6, [2014] 1 SCR 433, 2014 SCC 21 at para. 48.

Étienne Cartier, as the leading politician in Canada East promoting Confederation, was also the chief sponsor of the *Civil Code* as a means both of modernizing Québec's non-criminal legal system, but also of preserving it against the force of English-derived law.[39] Politicians from Canada West, such as John A. Macdonald, accepted that the legal order in relation to property and civil rights must be left to the provinces, but sought to have a unified criminal law, based on English law and subject to alteration by the federal Parliament.[40] This fundamental bargain would have been undone if criminal law could mean whatever the federal Parliament decided.

28. The 1867 Constitution left the "administration of justice" in provincial hands (s. 92(14)), including (explicitly) the organization of provincial criminal courts and (implicitly) policing and prosecution. This permitted local control over the enforcement and application priorities of the criminal law. Provinces were given authority to create *mala prohibita* offences under s. 92(15), so long as those did not involve capital or corporal punishment, but could not decide the punishment or process for *mala in se* crimes. The result was a uniquely Canadian compromise between subsidiarity and a common set of basic rights. So long as the content of criminal law was restricted to conduct in respect of which there was a cross-regional, cross-denominational consensus was worthy of serious punishment, the English law, as modified by the federal Parliament, would determine process rights, such as trial by jury, and maximum penalties. Local considerations would influence enforcement and application priorities in the criminal sphere and would determine the content of the private and regulatory law.

29. Contemporaneous writing suggests that Mariott's understanding survived Confederation. A. H. F. Lefroy, the first treatise writer on the federal division of power under the *British North America Act*, wrote that s. 91(27) only encompassed *mala in se* offences.[41]

30. This history shows that a distinction between a criminal evil and a civil wrong was a fundamental part of the historic context of s. 91(27), critical to the balance that sections 91 and 92

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[39] Young, Brian. *The Politics of Codification: The Lower Canadian Civil Code of 1866.* Montreal: McGill-Queens University Press, 1994 at p. 64.
[40] Hon. John A. Macdonald, Attorney General for Canada West, Debates of the Legislative Assembly of the Province of Canada (February 6, 1865), ed. Waite, P.B. *The Confederation Debates in the Province of Canada, 1866.* Toronto: McLelland & Stewart Limited, 1963 at p. 46.
[41] Lefroy, A.H.F. *The Law of Legislative Power in Canada.* Toronto: Toronto Law Book, 1897-8 at pp. 36-7.

struck. It is also consistent with the "linguistic" context: an ordinary understanding of "criminal" law is of law that goes to reprehensible behavior. It is also consistent with the "philosophic context" of the distinction between criminal and civil law, since the former, but not the latter, is tied fundamentally to concepts of retribution and denunciation.[42] The need for some determinate limits is further required by the foundational principle of federalism, which cannot allow one level of government to define the limits of its own jurisdiction for itself.

F. Post-Confederation Case Law

31. For the most part, the distinction between criminal evils and civil or regulatory harms has been the golden thread in the case law about the scope of the criminal law power since Confederation. A candid reading shows some missteps. In two important cases, the Privy Council[43] and a majority of this Court[44] employed a "positivist" approach, suggesting the only limit on Parliament's power to deem conduct criminal is the doctrine of colourability. While the results in these cases are not in issue, the positivist rationale underlying them is absent from the bulk of the influential jurisprudence on point, and after both of cases, Canada's final court of appeal returned to the substantive interpretation that has historically driven such analyses, holding that criminal laws must target criminal *evils* and that there are substantive limits on what Parliament can so designate.

32. The first case before the Judicial Committee where a serious argument was made in defence of a federal regulatory statute based on s. 91(27) occurred in 1922.[45] The impugned pieces of legislation were the *Board of Commerce Act*, which created a federal board with the power to set price controls and the *Combines and Fair Prices Act*, which combined price control and anti-monopoly provisions. Viscount Haldane's brief reasons rejecting the federal argument under s. 91(27) reiterated the *malum in se* theory found in Mariott's memo to King George and Lefroy's nineteenth-century treatise, stating that the criminal law power was limited to such

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[42] *R. v. M. (C.A.)*, [1996] 1 SCR 500 at paras. 77-81; *Wholesale Travel* at pp. 216-220.
[43] *Proprietary Articles Trade Association v. Canada (Attorney General)*, [1931] A.C. 310 (JCPC) [*Proprietary Articles Trade Association*].
[44] *R. v. Hydro-Québec*, [1997] 3 SCR 213.
[45] *Canada (A.G.) v. Alberta (A.G.)*, [1922] 1 A.C. 191 (JCPC) [*Board of Commerce Act Reference*].

subject matter as "by its very nature belongs to the domain of criminal jurisprudence." [46] Acts regarded by society as intrinsically wrong, such as incest, could be addressed by federal criminal law. The lawfulness of voluntary transactions whose fairness was dependent on determining issues such as market power and production cost were matters of property and civil rights, regardless of legal form.

33. The *Board of Commerce Act Reference* was applied in *Reciprocal Insurers*, striking down the federal *Insurance Act*, which created a scheme for licensing insurers, along with an amendment to the *Criminal Code* purporting to make it a crime to engage in insurance unless licensed under the federal scheme. Justice Duff established the principle that the criminal law power can address conduct in provincially-regulated spheres, but only if the conduct is intrinsically wrong, for example by reaching a standard of *mens rea*. [47]

34. The third case from this era, *Toronto Electric Commissioners v. Snider*,[48] shows that the "domain of criminal jurisprudence" was not considered historically invariant. That case involved the *Industrial Disputes Investigation Act*, a 1907 federal statute intended to regulate strikes and lockouts. The Attorney General of Canada argued that the common law had criminalized strikes as conspiracies and therefore that the legislation was valid under s. 91(27). However, the Judicial Committee held that the subsequent evolution of law and society rendered this argument a "non sequitur." What ultimately mattered was not whether strikes were treated as criminal historically, but whether this treatment continued in the different social and technological circumstances of the present. The Judicial Committee pointed to the fact that the legislation treated strikes and lock-outs symmetrically as evidence of this social change, stating "[i]t is not necessary to investigate or determine whether a strike is per se a crime according to the law of England in 1792."[49]

35. In *Proprietary Articles Trade Association*, the Judicial Committee upheld the constitutionality of the 1927 *Combines Investigation Act* and s. 498 of the 1927 *Criminal Code*, provisions that, in essence, made it an offence to combine or to "conspire, combine or agree" in a

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[46] *Board of Commerce Act Reference* at pp. 198-199.
[47] *Re Reciprocal Insurance Legislation*, [1924] A.C. 328 (JCPC) at p. 800.
[48] *Toronto Electric Commissioners v. Snider* [1925] A.C. 396 (JCPC) [*Snider*].
[49] *Snider* at p. 409.

manner that restrained trade. This was essentially a price-fixing offence. Lord Atkin emphasized that the criminal law "is not confined to what was criminal by the law of England or of any Province in 1867" and criticized Viscount Haldane's reference to acts that of their very nature belong to the "domain of criminal jurisprudence." Instead, Lord Atkin proposed a purely positivist definition of criminal law, a test that looked solely at whether the acts or omissions "are prohibited by the State and that those who commit them are punished". Lord Atkin attempted to explain the *Board of Commerce Act Reference* using the colourability doctrine.[50] However, it is difficult to see what would be colourable about the earlier legislation, as that doctrine was not part of the decision, and its applicability is not evident from the circumstances surrounding the case.

36. In the *Margarine Reference*, Justice Rand in turn criticized Lord Atkin's approach. A *federal* constitution requires a definition of criminal law that goes beyond what Parliament chooses to criminalize. While "under a unitary legislature, all prohibitions may be viewed indifferently as criminal law," such a purely formal classification is "inappropriate to the distribution of legislative power in Canada."[51]

37. While accepting Lord Atkin's view that the acts against which criminal law is directed need not "carry some moral taint", Justice Rand stated, "we can properly look for some evil or injurious or undesirable effect upon the public against which the law is directed."[52] If the prohibition is "used legislatively as a device to effect a positive result", such as trade protection, it is not criminal law.[53] In context, this was not an (easily manipulated) *formal* distinction between effecting a positive result and preventing a negative one, but a *substantive* distinction between evils suppressed as reprehensible and undesirable conduct being disincentivized.

38. Justice Rand's list of "public peace, order, security, health, morality" as "criminal law purposes" was clearly not intended to be either a necessary or sufficient list of a "purpose which can support it as being in relation to criminal law." Economic purposes underlie not only the offence of combination in restraint of trade upheld in *Proprietary Articles,* but the common-law

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[50] *Proprietary Articles Trade Association* at p. 10.
[51] *Margarine Reference* at p. 50.
[52] *Margarine Reference* at p. 49.
[53] *Ibid*.

crimes of fraud, robbery and theft. Conversely, Parliament surely could reasonably conclude that public peace, order, health and morality would be promoted by assisting dairy producers. Bad economic conditions for farmers could have led to bad health outcomes or social unrest, and are appropriate issues for moral or ethical concern.

39. The key to Justice Rand's judgment lies in a more specific notion of a purpose that can support a law as being in relation to criminal law, namely, the concept of an "evil or injurious effect." Justice Rand could not be taken as asserting that harms to the dairy industry were not "injurious" or "harmful" in some sense, since that would amount to second-guessing Parliament's policy decisions. Rather, he was pointing out that harms of this nature would inevitably have to be balanced against the interests of consumers and producers of margarine, and that this sort of balancing was not the domain of the criminal law, either historically or in the mid-twentieth century. The *Margarine Reference* can best be understood as continuing the principle that offences against morality must be in the tradition of "*malum in se*", while recognizing that a traditional "moral taint" might not be necessary.

40. Subsequent cases fleshed out where this line would be drawn. In the 1976 *Morgentaler* decision, Chief Justice Laskin (dissenting on the case as a whole, but speaking for the Court on the division-of-powers issue) considered an argument that improvements in the medical techniques of abortion since it was first criminalized had removed it from the criminal sphere, on the logic of the *Margarine Reference*. He distinguished the *Margarine Reference* partly on the evidentiary record, but mostly on the grounds that the prohibition of abortion was based on a moral judgment by Parliament that interference "with the ordinary course of conception is socially undesirable conduct *subject to punishment*."[54] In context, "punishment" clearly referred to retributive or denunciatory punishment on the grounds the conduct was reprehensible. Chief Justice Laskin was of course aware that this was a matter of profound disagreement within Canadian society in 1976. But disagreement as to whether criminal stigma should continue to attach to acts traditionally the subject of criminal law is within the exclusive competence of the federal Parliament to resolve. As this Court's 1993 *Morgentaler* decision determined, provincial laws with the purpose of preventing free-standing abortion clinics impermissibly imposed penal

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[54] *Morgentaler v. The Queen*, [1976] 1 SCR 616 at p. 627, Laskin CJC, dissenting on other grounds.

consequences in a subject "traditionally regarded as part of criminal law."[55]

41. In *Boggs,* by contrast, the Supreme Court of Canada struck down a provision purporting to make it a federal crime to drive while disqualified under provincial legislation.[56] Many reasons for disqualification would not involve inherently reprehensible conduct or imminent perils to health and safety. In *Wetmore,* this Court upheld federal laws on the adulteration of foods and drugs and on prohibition of controlled substances under the criminal law power, while holding laws governing marketing of foods and drugs – a potentially harmful, but not "reprehensible" activity – were considered not to fall within the criminal law power under s. 91(27).[57] Similarly, in *Labatt Breweries,* this Court held that laws determining the maximum alcohol content that can be in a product marketed as "light beer" were outside the criminal law domain, although such laws obviously have public peace, order and health implications.[58] *RJR-Macdonald*[59] extended this logic to the "evil" of tobacco.

42. In *Hydro-Québec* Justice La Forest, for the majority, claimed that apart from the *Charter*, the *only* limit on federal authority under the criminal law power is colourability, thereby returning to the position in *Proprietary Articles*.[60] He also stated that the distinction between regulatory and true crimes used in the *Charter* context had no relevance to division-of-powers analysis. On both these subjects this decision was not followed in the subsequent case law.

43. In the *Firearms Reference,* this Court distinguished between weapons and other dangerous equipment: "Cars are used mainly as means of transportation. Danger to the public is ordinarily unintended and incidental to that use. Guns, by contrast, pose a pressing safety risk in many if not all of their functions." [61] At bottom, the Court held that firearms and motor vehicles are viewed differently by Canadian society, regardless of statistical risk. As a result, the legislation was aimed at a "moral evil".[62] In *Ward,*[63] this Court distinguished between the

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[55] *R. v. Morgentaler*, [1993] 3 SCR 463 at p. 495.
[56] *R. v. Boggs*, [1981] 1 SCR 49.
[57] *R. v. Wetmore*, [1983] 2 SCR 284 at p. 288.
[58] *Labatt Breweries of Canada Ltd. v. Canada (Attorney General)*, [1980] 1 SCR 914.
[59] *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 SCR 199.
[60] *R. v. Hydro-Québec*, [1997] 3 SCR 213 at para. 121.
[61] *Reference re* Firearms Act, [2000] 1 SCR 783, 2000 SCC 31 [*Firearms Reference*] at para. 43.
[62] *Firearms Reference* at para. 54.

prohibition of the killing of certain animals for humanitarian reasons (which could be upheld under the criminal law power) and the prohibition on the *sale* of those animals (which could not).[64] Prohibitions on sales disincentivize the same activity that outright bans do, but they do so indirectly and do not assert the intrinsic wrongness of the activity.

G. Human Reproduction Reference

44. The most recent case in which the limits of the federal criminal law power are thoroughly canvassed is the 2010 *Human Reproduction Reference*. In that case, the impugned legislation distinguished between "prohibited activities" and "controlled activities". "Prohibited activities" were banned on more or less unconditional terms and on the basis that the activities were considered intrinsically wrong. They included human cloning, creation of animal-human hybrids, creation of *in vitro* embryos for purposes other than reproduction, determination of sex for non-medical reasons, heritable alterations of the genome, commercialization of reproduction, use of reproductive material without informed consent and use of gametes of persons under 18, except for the purposes of preservation or of creating a human being where it is reasonable to believe it would be raised by the donor. By contrast, "controlled activities" were activities used in the ordinary course of *in vitro* reproduction and were restricted to being done by licensed persons in licensed facilities in accordance with detailed regulations.[65]

45. The central feature of Justices LeBel and Deschamps' analysis for the majority is an insistence that the *Margarine Reference* be interpreted to require the presence of a "substantive component" of a "justifiable criminal law purpose" in the form of the "prohibition of a real or apprehended evil and the concomitant protection of legitimate societal interests."[66] Parliament can deal with "new realities," including the development of genetic science, but it must do so by prohibiting conduct it reasonably considers "reprehensible."[67] The existence of a real evil, in this sense, is an essential, substantive element of the definition of criminal law.[68] The *Human Reproduction Reference* unified the true crime/regulatory offence distinction in *Charter*

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63 *Ward v. Canada (Attorney General)*, [2002] 1 SCR 569, 2002 SCC 17 [*Ward*].
64 *Ward* at paras. 50-56.
65 *Human Reproduction Reference* at paras. 11-12.
66 *Human Reproduction Reference* at para. 234.
67 *Human Reproduction Reference* at para. 235.
68 *Human Reproduction Reference* at para. 240.

jurisprudence with the criterion in the *Margarine Reference* that a valid criminal law must be aimed at an "evil," with that concept being illustrated by the previous case law.[69]

46. Specifically in the area of prohibiting conduct for moral reasons, it is not enough that the legislation address a moral concern of fundamental importance.[70] Criminal matters are not distinguished from civil ones because the former are moral and the latter are not. Justices LeBel and Deschamps gave the example of international assistance as involving indisputably moral issues. It is an impoverished view of morality that excludes entirely from its domain such matters as the clear communication of conditions of fire insurance, the well-being of striking workers, discrimination in housing and employment, assistance for the poor and disabled, the competing concerns of dairy farmers and purchasers of basic groceries, or the livelihoods of the fishers of Newfoundland and Labrador. But social, economic and scientific issues are not "moral" issues in the relevant sense.[71]

47. Public health harms must be distinguished from public health "evils" that are appropriately the subject matter of the criminal law. Justices LeBel and Deschamps gave the example of "heart surgery", which can obviously cause enormous harm if performed negligently or by unqualified persons, without rendering the practice of cardiology within the domain of the criminal law.[72] Parliament must not only have a reasonable apprehension of *harm* to health, but a reasonable apprehension that the harm is sufficiently *reprehensible* to constitute an *evil* and therefore justify criminal prohibition. The majority notes that there is less deference to Parliament in relation to public health justifications for criminal law than for moral justifications.[73]

48. Justice Cromwell substantively adopted Justices LeBel and Deschamps' approach and specifically agreed with Justices LeBel and Deschamps that questions of "efficiency" (i.e., the balance between costs and benefits) and "consistency" (i.e., equal or equitable treatment across society) are not themselves matters for criminal law.[74] He differed primarily in saying that violations of free and informed consent over the use of products of an individual's body are also

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[69] *Human Reproduction Reference* at para. 239.
[70] *Human Reproduction Reference* at para. 238.
[71] *Human Reproduction Reference* at para. 239.
[72] *Human Reproduction Reference* at para. 255.
[73] *Human Reproduction Reference* at para. 241.
[74] *Human Reproduction Reference* at para. 287, Cromwell J.

evils that can be addressed by the criminal law.[75]

H. Principles for Drawing Line Between Suppression of an Evil and Control of Harm

49. The first principle that can be derived from the case law is thus that the distinction between criminal evils and civil harms must maintain the balance between criminal law and property and civil rights that existed at Confederation, while updating the elements that go on each side of that balance in light of social and technological change. Canadian society today – like Canadian society in 1867 – distinguishes between truly reprehensible behaviour that must be addressed by criminal law and other harms that are the subject of civil law, but puts different behaviours in each category. Thus, it is relevant, but not determinative, whether a matter was traditionally dealt with by the criminal or the civil law. [76]

50. When considering a proposal that activities traditionally addressed through regulation be criminalized, Parliament must not only have a reasonable apprehension of *harm* if the activity is left unregulated, but a reasonable belief that there is a widespread consensus that the conduct is an *evil*; that is to say, inherently reprehensible and thus worthy of retribution and denunciation. Criminal law does not apply to the moral or ethical balancing of costs and benefits or how they may be equitably distributed. Conversely, Parliament is the appropriate forum for democratically resolving the question of whether conduct traditionally viewed as reprehensible should, in light of changing social mores, now be subject to civil regulation. But Parliament cannot take a matter that has not traditionally been criminalized, and render it an "evil" merely by saying so.

51. These principles apply as much to criminal law based on public health as to any other criminal law purpose. Indirect effects on people's preferences and incentives that might lead to public health effects should be left to the provinces, or regulated under some other federal head of power. If, as the AGBC advocates, the general trade and commerce power and the national concern/national dimensions branch of the peace, order and good government power are interpreted robustly, this will not mean the federal government is deprived of complex regulatory jurisdiction over matters such as public health or the environment, but that those matters will generally be limited to situations where failure of a province to act has significant extra-

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[75] *Human Reproduction Reference* at para. 289.
[76] *Ward* at para. 51.

provincial consequences. This is as it should be in a federation based on jurisdictional balance and subsidiarity.[77]

I. Act Aims to Control Generally Beneficial Activity, Not Suppress an Evil

52. The *Act* addresses matters that have traditionally been addressed civilly, not criminally. In pith and substance, it is aimed at promoting the availability of insurance and avoiding disincentivizing potentially health-promoting tests. While it arguably fails to achieve these goals because it does not take into account the complexity of insurance markets, it is not this arguable inefficacy that makes it unconstitutional, but its complexity. Insurance availability has always been interrelated with public health. This was true in 1867 and is true now. The implications of the disclosure of information in the insurance process for health, safety and insurance availability has been an area of core provincial responsibility since at least the 1881 *Parsons* decision.[78]

53. At the time of Confederation anti-discrimination law did not exist in the modern sense. The first such laws were enacted by provinces, starting with Ontario's 1944 *Racial Discrimination Act*[79] and the *Saskatchewan Bill of Rights Act, 1947*.[80] The first federal anti-discrimination law was not enacted until 1977, and applied only to federally-regulated industries and the federal public sector.[81] The punitive and due process-oriented criminal law approach has been restricted to clearly reprehensible behaviour such as violence and hate speech. A criminal-law approach would make it impossible to have more nuanced concepts, such as adverse effects discrimination,[82] bona fide qualifications,[83] or the duty to accommodate.[84]

54. As a health measure, the *Act* does not address reprehensible evils, such as selling or dumping poisons. Rather, it addresses the important, but non-criminal, concern that individuals

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[77] David M. Beatty, "Polluting the Law to Protect the Environment" (1998) 9 *Constitutional Forum* 55.
[78] *Citizens' Insurance Co. v. Parsons*, [1881] UKPC 49, 7 App Cas 96, (1881-82).
[79] *Racial Discrimination Act*, S.O. 1944, c. 51.
[80] *Saskatchewan Bill of Rights Act, 1947*, S.S. 1947, c.35.
[81] Tarnopolsky, Walter. *Discrimination and The Law in Canada*. Toronto: Richard de Boo Limited at p. 26.
[82] *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 SCR 3.
[83] *Bhinder v. CN*, [1985] 2 SCR 561.
[84] *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 SCR 970.

will choose not to get potentially beneficial genetic tests out of fear of losing insurance coverage. This Court should not try to determine whether that concern is pressing or whether the *Act* is effective in addressing it. Rather, the point is that it is *indirect* and *nuanced* – more so than the prospect of negligent health surgery, which this Court in the *Human Reproduction Reference* used as an example of something clearly within exclusive provincial jurisdiction.

55. The framers of the Constitution could not have anticipated the threats and opportunities created by the twenty-first century revolution in genetic technology: even today we see them through a glass darkly. But they did have the foresight to give each province the ability to regulate the ownership of new forms of property (including genetic information) and new contractual relationships, while leaving to the centre the decision on how to punish what everyone agreed was reprehensible behavior. The learning process initiated a century and a half ago has allowed Canadians to innovate in the face of ever-changing social and technological realities, better than a one-size-fits-all system of uniformity would have. There is no reason to think that finding solutions to the new problems set by the genetic revolution will be different.

PART IV – SUBMISSION CONCERNING COSTS

56. The AGBC does not seek costs and asks that no costs be awarded against him.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated: June 3, 2019

J. Gareth Morley
Zachary Froese
Counsel for the Intervener,
Attorney General of British Columbia

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