S.C.C. FILE NO. 38478

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

IN THE MATTER OF a Reference by the Government of Quebec to the Court of Appeal 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)

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, PRIVACY COMMISSIONER OF CANADA, THE CANADIAN HUMAN RIGHTS COMMISSION, THE CANADIAN COLLEGE OF MEDICAL GENETICISTS and THE CANADIAN LIFE AND HEALTH INSURANCE ASSOCIATION

INTERVENERS

- and -

DOUGLAS MITCHELL

AMICUS CURIAE

REPLY FACTUM OF THE APPELLANT TO THE INTERVENTIONS
(Canadian Coalition for Genetic Fairness)

(Pursuant to Order of the Chief Justice revised June 27, 2019)

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REPLY FACTUM OF THE APPELLANT TO THE INTERVENTIONS

A. Pith and Substance of the *Genetic Non-Discrimination Act,* S.C. 2017, c. 3 [*GNDA* or "the *Act*"]

1. Despite the differences in emphasis, the appellant, the Canadian College of Medical Geneticists (CCMG), the Canadian Human Rights Commission (CHRC) and the Privacy Commissioner of Canada (PCC) all agree that the pith and substance of the *GNDA* is to put in place prohibitions that target compelled testing or the non-voluntary use or disclosure of genetic test results, practices that have serious negative consequences for health, privacy and equality.

2. The Canadian Life and Health Insurance Association (CLHIA), on the other hand, takes the view that the dominant purpose of the *GNDA* is to target the insurance industry, and in particular, to regulate the industry's practices of risk-based underwriting [CLHIA Factum, ¶¶3, 17 and 19]. The *GNDA* does prohibit "any person", including insurance companies, from requiring genetic testing or requiring the disclosure of genetic test results as a condition of entering into a contract. These effects, however, are not the dominant characteristic of the *Act*. The CLHIA makes the mistake of confusing incidental effects of the *GNDA* with its pith and substance. The dominant concern of the sponsors and supporters of the *GNDA* was to target practices engaged in by "any person" that were having negative consequences on health, privacy and equality. The identity of the actors engaging in the negative practices prohibited by the *Act* is simply not relevant. The prohibitions apply to everyone - apart from health professionals and researchers exempted by s. 6 in furtherance of the health objectives of the *Act*.

3. The CLHIA's factum describes disclosure requirements in insurance law and how they are altered by the *GNDA*. The CLHIA seems to suggest that the fact that the *GNDA* alters long-standing principles of insurance law is enough to show that it is not a valid criminal law. This is reminiscent of the argument made by tobacco manufacturers in *RJR-Macdonald* that since tobacco advertising had always been legal, it could hardly be a proper subject for criminal prohibition.[1] In rejecting this argument, La Forest J. noted that as the state of knowledge about the dangers of tobacco consumption evolved, it became clear that it was "a *sui generis* problem that

[1] *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199 [*RJR-MacDonald*], at 259-61

can only be properly addressed with an array of innovative and multifaceted legislative responses" (¶48). The same is true of the extraordinary growth in information yielded by genetic testing and the profound impact genetic information is having on all areas of medical practice. The expert evidence on these developments led Parliament to adopt the *GNDA*'s innovative measures prohibiting any person from requiring genetic testing or requiring disclosure of test results as a condition of entering into a contract. The CLHIA questions the wisdom of Parliament's legislation, describing it, for example, as "wholly arbitrary" [CLHIA Factum, ¶10]. As argued at paragraphs 27 and 28 of the appellant's factum, an analysis of constitutional validity should not stray into second-guessing the wisdom of the policy choices or legal means adopted by Parliament. The task before this Court is to determine whether Parliament acted on the basis of a reasoned apprehension that the practices targeted by the *GNDA* cause harm to health, privacy or equality.

B. The Criminal Law Purposes of the Challenged Provisions

4. The CHRC, the CCMG and the PCC each emphasize different aspects of the purposes underlying the challenged provisions. The CCMG, like the appellant, emphasizes that the primary purpose of the *GNDA* is to protect health. In the CCMG's helpful formulation, the *GNDA*'s prohibitions "protect Canadians from harm that flows from a public health evil: discrimination, abuse or misuse associated with medical genetic testing and results, all of which may cause Canadians to forgo this diagnostic treatment" [CCMG Factum, ¶2]. In the CHRC's view, the primary purpose of the *GNDA* is to prevent genetic discrimination [CHRC Factum, ¶11]. In taking this view, the CHRC emphasizes the title of the *GNDA*, and the close connections between the *GNDA* and the amendments to the *Canada Labour Code* and the *Canadian Human Rights Act* enacted by Bill S-201 that also address genetic discrimination. The PCC emphasizes the role of the *GNDA* in protecting genetic privacy: "the impugned provisions protect an individual's ability to control their own genetic information and in so doing ensure privacy, dignity and bodily autonomy" [PCC Factum, ¶6].

5. While the emphasis in these interveners' submissions is different, they each, like the appellant, recognize that the goals of protecting privacy and health, and preventing genetic discrimination, are bound up together. The appellant and CCMG emphasize that the *GNDA* protects privacy, or the security of genetic information, and seeks to prevent genetic discrimination, in order to protect and promote health. The CHRC views the *GNDA*'s purpose as preventing genetic discrimination

and protecting interests related to health, security of the person, human dignity and privacy [CHRC Factum, ¶24]. The PCC's submissions make clear that the *GNDA* protects privacy in its own right, and also demonstrate that concerns about privacy, health and discrimination were bound up in the legislative debates [PCC Factum, ¶13].

6. The Court does not need to choose between the different criminal law purposes identified in these submissions; they are all important goals frequently mentioned by the sponsors and supporters of Bill S-201 in debates in the House, the Senate and their legislative committees. It is not unusual for valid criminal laws to pursue multiple objectives. For example, in *Malmo-Levine*, the Court found that the prohibition of possession of marihuana "always had more than one rationale", including protecting health and public safety, protecting morality and protecting vulnerable groups.[2] Similarly, McLachlin C.J. characterized the provisions of the *AHRA Reference* as pursing three valid criminal law objectives – morality, health and security.[3] She noted that criminal law objectives "do not occupy separate watertight compartments"; they often overlap and complement each other (¶46). In the appellant's submission, this is the case with the *GNDA*: it is concerned with the overlapping and intertwined objectives of protecting health and privacy and preventing discrimination.

C. The Challenged Provisions Prohibit Harmful Practices

7. In her opinion in the *AHRA Reference*, McLachlin C.J. emphasized the distinction between legislation that prohibits harmful conduct and legislation that promotes beneficial medical practices. As she stated, a valid criminal law has as its dominant characteristic the prohibition of harmful practices; the criminal law power cannot be employed to promote beneficial medical practices (¶38). The joint opinion of LeBel and Deschamps JJ. made a similar distinction between valid criminal laws that target activities that have injurious or undesirable effects, and legislation that regulates the beneficial activities related to the delivery of assisted human reproduction services (¶¶250-51). Cromwell J. likewise followed a similar line of reasoning in upholding the validity of provisions that "in purpose and effect prohibit negative practices associated with assisted human reproduction" (¶291).

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[2] *R. v. Malmo-Levine; R. v. Caine*, 2003 SCC 74 [*Malmo-Levine*], ¶¶65, 76, 78 and 208
[3] *Reference re Assisted Human Reproduction Act*, 2010 SCC 61 [*AHRA Reference*], ¶¶48-63

8. The appellant does not dispute the validity of the distinction between the prohibition of harmful conduct and the promotion of beneficial practices. The distinction flows from the substantive component of a valid criminal law first formulated in the *Reference re the Validity of Section 5(a) of the Dairy Industry Act*, [1949] S.C.R. 1: a valid criminal law must be grounded in the suppression of an evil or the safeguarding against "an injurious or undesirable effect upon the public" (at 49). However, the appellant disagrees with the use made of this distinction by the CLHIA.

9. The CLHIA argues that ss. 1 to 7 of the *GNDA* "do not prohibit harmful conduct". Rather, the CLHIA asserts, the provisions "promote beneficial health practices" and therefore are beyond the scope of Parliament's criminal law power [CLHIA Factum, ¶27]. The CLHIA has mischaracterized the nature of the provisions at issue. The challenged provisions put in place prohibitions on compelled genetic testing and the non-voluntary use or disclosure of genetic test results. Parliament prohibited these activities because it believed they were harmful to privacy, and health, and could lead to discrimination. To argue that compelled testing or non-voluntary use or disclosure of such highly personal information is not harmful is to substitute the CLHIA's view for that taken by Parliament.

10. The opinions in the *AHRA Reference* must be read in the context of the legislation at issue. The *AHRA*, LeBel and Deschamps JJ. emphasized, sought to regulate all aspects of assisted human reproduction as a health service (¶¶227 and 250). Cromwell J. found that the Act amounts to "regulation of virtually every aspect of research and clinical practice in relation to assisted human reproduction" (¶285). In this context, the difficult question that divided this Court was whether the *AHRA*'s comprehensive scheme of regulation amounted in pith and substance to the prohibition of harmful practices or the regulation of beneficial aspects of assisted human reproduction.

11. Unlike the *AHRA*, nothing in the *GNDA* regulates "health practices", beneficial or otherwise. Unlike the *AHRA*, the *GNDA* contains no regulatory scheme. It consists only of simple prohibitions, backed up by serious penalties, targeting conduct Parliament found harmful to health, privacy and equality.

12. While the *GNDA* does not regulate health *practices* in any way, it does seek to prohibit negative practices, and thus to promote positive *outcomes* for health, privacy and equality. As

McLachlin C.J. remarked in the *AHRA Reference*, we should be careful not to rely on an "artificial dichotomy" between negative conduct and positive effects (¶30). As she elaborated:

> Prohibiting or regulating bad conduct may in fact produce benefits. This is a common consequence of many criminal laws. What matters for purposes of constitutionality is not whether a criminal law has beneficial consequences, but whether its dominant purpose is criminal.[4]

13. Prohibitions on negative practices and promotion of positive effects are two sides of the same criminal law coin. For example, are the provisions of the *Tobacco and Vaping Products Act*, S.C. 1997, c. 13 prohibiting harmful marketing practices or promoting positive health outcomes? One hopes it is doing both. From the perspective of s. 91(27) of the *Constitution Act, 1867*, the key question is whether the pith and substance of a challenged law is the prohibition of negative practices. If so, such a law hopefully will also promote positive outcomes, but that should not be a hindrance to its validity as a criminal law.

14. One must be especially careful not to rely on an artificial dichotomy between the prohibition of negative practices and the promotion of positive outcomes in the context of health. The expert evidence before Parliament demonstrated that genetic information can be essential to diagnosing and treating disease or the risk of disease. As the CCMG submits [CCMG Factum, ¶33], medical genetic testing saves lives. If, because of Parliament's enactment of the *GNDA*, a previously unwilling patient agrees to undergo genetic testing, and as a result receives a life-saving diagnosis or treatment, would we say that the *GNDA* has prohibited negative conduct or has promoted a beneficial health outcome? In the appellant's submission, in these circumstances we would say that the *GNDA*, like many valid criminal laws, has done both.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated: July 18, 2019

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[4] *AHRA Reference*, ¶30

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