File No. 38478

SUPREME COURT OF CANADA

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

BETWEEN:

CANADIAN COALITION FOR GENETIC FAIRNESS

APPELLANT
(Intervener)

- and -

ATTORNEY GENERAL OF CANADA
ATTORNEY GENERAL OF QUÉBEC

RESPONDENTS
(Applicants / Interveners)

- and -

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

INTERVENERS
(Interveners)

- and -

DOUGLAS MITCHELL

AMICUS CURIAE

ATTORNEY GENERAL OF CANADA'S REPLY TO THE INTERVENERS THE PRIVACY COMMISSIONER OF CANADA THE CANADIAN COLLEGE OF MEDICAL GENETICISTS AND THE CANADIAN HUMAN RIGHTS COMMISSION

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

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TABLE OF CONTENTS

Attorney General of Canada's Reply **Page**

ATTORNEY GENERAL OF CANADA'S REPLY

PART I – OVERVIEW

1. This reply addresses the submissions of three interveners: the Privacy Commissioner of Canada, the Canadian College of Medical Geneticists and the Canadian Human Rights Commission. They are addressed individually below, but a preliminary observation applies to all three.

2. It is clear that each of these interveners supports the policy objectives of the law, but this should not influence the constitutional analysis. The goal of the pith and substance analysis is to determine the *true* character of the legislation under review, that is, its main thrust, or the dominant purpose. The analysis is not conducted with an eye to the classification of the law; it is supposed to be an objective and neutral assessment of the law.

3. These interveners all take the position that the *Genetic Non-Discrimination Act* is a valid exercise of Parliament's criminal law power. However, they differ significantly at the first stage of the division of powers analysis as to the characterization of the *Genetic Non-Discrimination Act*. To varying degrees, they differ between themselves, and they differ from the appellant. Perhaps not surprisingly, each sees the *Genetic Non-Discrimination Act* through the lens of their own mandate. The Privacy Commissioner considers the dominant purpose to be the protection of privacy. The Canadian Human Rights Commission considers the dominant purpose to be the prohibition and prevention of discrimination. The Canadian College of Medical Geneticists considers the dominant purpose to be the protection of genetic information from "abuse and misuse". This diversity of competing dominant objectives suggests that the interveners are seeking to avoid the *Genetic Non-Discrimination Act*'s true purpose: the regulation of insurance.

4. Each of these proposed approaches is unfounded. While the *Genetic Non-Discrimination Act* no doubt addresses some of the problems raised by the interveners, their objectives are not the law's objectives.

PART II – STATEMENT OF ARGUMENT

A. Reply to the Privacy Commissioner of Canada

5. The Privacy Commissioner of Canada takes the position that the pith and substance of the *Genetic Non-Discrimination Act* is the protection of individuals' genetic privacy to safeguard dignity and bodily autonomy.[1] The Commissioner agrees with the Quebec Court of Appeal that the Act does not prohibit discrimination.[2]

6. As noted in the Attorney General of Canada's Respondent's Factum, if the pith and substance of the *Genetic Non-Discrimination Act* were safeguarding dignity and bodily autonomy, this would be a valid criminal law purpose.[3] But as the Privacy Commissioner himself testified with respect to a previous version of the law, the law is particularly concerned with the way the use of genetic information affects access to insurance:

> Bill S-201 recognizes the overriding societal benefits of protecting applicants' rights to privacy and of providing all persons with insurance coverage regardless of their genetic heritage.[4]

7. To counter the argument that the *Genetic Non-Discrimination Act*'s dominant purpose is to regulate the insurance industry, the Privacy Commissioner relies on references in the Hansard to the use or retention of genetic information by consumer testing organizations, such as 23andMe and governments in relation to immigration status and in adoption.[5]

8. The difficulty with this argument is that the criminal provisions of the *Genetic Non-Discrimination Act* were not intended to address such matters. Use and retention of genetic information by consumer testing organizations such as 23andMe are not regulated by the

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1 Factum of the Intervener, Privacy Commissioner of Canada, at para 5.
2 *Ibid,* at para 8.
3 Respondent Attorney General of Canada's Factum, at paras 77, 100, 105-108.
4 **Attorney General of Canada's Record (hereinafter "AGC Record"), vol 5, at p 152.**
5 Factum of the Intervener, Privacy Commissioner of Canada, at para 11.

Genetic Non-Discrimination Act where consumers consent to have their genetic information tested. Use of genetic information in the context of services provided by a government (for example, to establish conditions for adoption or immigration) would already be subject to existing privacy and human rights legislation protections. In any event, this was clearly not a dominant concern in enacting this legislation, occupying only a few lines amongst hundreds of pages of parliamentary record on the matter.

B. Reply to the Canadian Human Rights Commission

9. The Canadian Human Rights Commission takes the position that the pith and substance of the *Genetic Non-Discrimination Act* is to prohibit and prevent genetic discrimination.[6] The Commission argues that this Court must "determine the dominant purpose of the *GNDA* using a human rights lens."[7]

10. Far from establishing a criminal law purpose, the Commission's approach suggests that the true character of the *Genetic Non-Discrimination Act* is to regulate contractual relations in the same manner that provinces do through their human rights legislation. Provincial legislatures have, however, chosen a different approach to the policy problem. The Commission emphasizes that "[u]nlike the *GNDA* that applies across Canada, the amendments to the *CHRA* and Labour Code apply only to matters within federal jurisdiction."[8] For the Commission, the purpose of the *Genetic Non-Discrimination Act* and the amendments to the *Canadian Human Rights Act* are the same.[9] On this view, the reason that severe sanctions are attached to the prohibitions is simply to allow the prohibitions to reach into provincial jurisdiction.

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6 Factum of the Intervener, Canadian Human Rights Commission, at para 10.
7 *Ibid,* at para 13.
8 *Ibid,* at para 2.
9 *Ibid,* at para 12.

11. Notably, in her testimony before Parliament, the Canadian Human Rights Commission's Chief Commissioner, Marie-Claude Landry, did not address the prohibitions of the Act. She spoke in support of extending the definition of discrimination under the *Canadian Human Rights Act* to include "genetic characteristics". She viewed this addition as important, but insufficient to fully address the problem. She testified that to completely address the problem would require a "concerted national approach".[10] This could be accomplished, in her view, by meeting with provincial governments and human rights commissions across Canada to determine how best to implement nationwide protections.

12. The approach advocated by the Chief Commissioner in her testimony is cooperative federalism. Re-casting the objective of the legislation to give it a criminal law purpose is not a substitute for cooperative solutions that respect jurisdictional boundaries.

C. Reply to the Canadian College of Medical Geneticists

13. The Canadian College of Medical Geneticists argues that the pith and substance of the *Genetic Non-Discrimination Act* is to protect Canadians from the "abuse and misuse of medical genetic testing and results".[11] They consider that the absence of protection against abuse discourages people from taking genetic tests that may improve their health by improving diagnosis and treatment.

14. The Medical Geneticists' characterization of the *Genetic Non-Discrimination Act* is not accurate. The prohibitions in sections 3 and 4 of the *Act* do not address an "abuse or misuse of medical genetic testing and results".[12] Rather, they address disclosure in the context of a voluntary contractual relationship. As discussed in the Attorney General's Respondent's

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10 **AGC Record, vol 10, at p 141**.

11 Factum of the Intervener, Canadian College of Medical Geneticists, at paras 2, 5, 13, 24, 26, 30, 32.

12 *Ibid.*

Factum[13], under existing provincial legislation the *only* information that a person is required to disclose to an insurance company is information that is material to the contract.

15. Only section 5 of the *Genetic Non-Discrimination Act*, which addresses the use of genetic information without consent, might be characterized as targeting abuse or misuse of genetic testing results. As discussed in the Attorney General of Canada's Respondent's Factum, this provision could be validly enacted under Parliament's criminal law power if its true purpose were the protection of personal private information.[14] The issue is that neither the text of the law nor the parliamentary record support that characterization. Section 5 only applies to persons engaged in an activity described in sections 3(1)(a) to (c). If Parliament's intention were to protect the private information itself, it would not have limited those protections to the contractual sphere, it would have protected them absolutely.

Montréal, July 17, 2019

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13 Respondent Attorney General of Canada's Factum, at paras 64-68.
14 *Ibid.*, at paras 2, 24, 77-79, 106-108.