Constitutionalism and the Genetic Non-Discrimination Act Reference

Introduction

In the July 10, 2020 decision in Reference re Genetic Non-Discrimination Act (GNDA Reference),[1] the Supreme Court of Canada arrived at a complex three-to-two-to-four outcome, with a slim five-justice majority in two separate judgments upholding challenged portions of the federal Genetic Non-Discrimination Act (GNDA)[2] as a valid exercise of Parliament's criminal law power. The legislation, which some thought fundamentally oriented to the goal of preventing genetic discrimination, seemed to have attractive policy objectives, though we will ultimately suggest that the form of the legislation was not entirely in keeping with these aims. While it may have appeared pragmatically attractive to uphold the legislation, we suggest that the majority's decision to do so comes at great cost to basic federalism principles, to legal predict-ability, and to prospects for well-informed intergovernmental cooperation. We argue that the courts must properly confine the effects of the GNDA Reference in accordance with established principles on the treatment of fragmented judicial opinions. We also argue that the courts must take significant steps to ensure that federalism jurisprudence remains well-grounded in legal principle, without the actual or apparent influence of extra-legal policy considerations.

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[1] 2020 SCC 17 [GNDA Reference].
[2] SC 2017, c 3 [GNDA].