The *Genetic Non-Discrimination Act* Reference: Federal Criminal Law Powers Applied to Modern Science

The Supreme Court of Canada Weighs In: The *GNDA* is Constitutional

On July 10th, 2020, the Supreme Court of Canada (SCC) released its much-anticipated *Reference re Genetic Non-Discrimination Act* ("*GNDA Reference*") decision. In a remarkably close decision, a five to four majority of the Court found that the *Genetic Non-Discrimination Act* (*GNDA*) is constitutional.[1] This article will examine how the Court reached this conclusion by framing the *GNDA* as a valid exercise of the federal Parliament's criminal law power.

Background: What Does the *GNDA* Do?

In 2017, Parliament addressed concerns about the use of mandatory genetic tests and the potential for non-consensual use of genetic test results by passing the *GNDA*. Section 3 of the *GNDA* makes it illegal "to require an individual to undergo a genetic test as a condition of" the following: entering into or continuing contracts or agreements, the provision of goods or services, and offering or continuing to offer specific terms and conditions in a contact or agreement.[2] Section 5 requires an individual's consent if any genetic information is to be used, collected, or disclosed.[3] And section 7 outlines the penalties for violations, which range from fines to imprisonment for up to five years.[4] The *GNDA* also updated the *Canadian Human Rights Act* and the *Canada Labour Code* by explicitly outlawing discrimination based on genetic conditions.[5]

The *GNDA's* Path Through Parliament: Swirling Questions About its Constitutionality

The *GNDA* originated in the Senate as a private members bill.[6] It was proposed by Senator James Cowan, who wished to use the federal government's jurisdiction over criminal matters[7] to ensure that Canadians can freely access "the extraordinary advances taking place in medical science"[8] by undergoing genetic tests. Throughout the parliamentary discussions, many lawmakers agreed with the Bill, typically on the grounds that it would prevent insurance companies denying coverage[9] or increasing premiums based on pre-disposed genetic conditions.[10] Lawmakers also asserted that the Bill was necessary to update Canada's laws to address nuanced forms of discrimination.[11]

However, as the *GNDA* made its way through Parliament, concerns about its constitutionality arose. The main flashpoint centered around the division of powers, a

hallmark of Canadian federalism.[12] Section 91 of the *Constitution Act, 1867* grants the federal government jurisdiction over certain matters, while Section 92 outlines the powers of provincial governments.[13] Neither level of government can make laws that fall under the other's exclusive jurisdiction. With the *GNDA*, Parliament purported to exercise its jurisdiction over criminal law under section 91(27) by outlawing genetic discrimination and establishing stringent punishments for violations.

In contrast, the Government of Quebec argued that the *GNDA* was a veiled attempt to regulate the insurance industry and private commercial contracts, and that it thereby intruded on the provinces' jurisdiction over property and civil rights under section 92(13).[14] Insurance companies also raised concerns about the legislation, claiming that the federal government was unconstitutionally regulating their industry and making it more difficult for them to assess risk.[15] The Cabinet of Canada, on the advice of then-Attorney General Jody Wilson-Raybould, agreed with the Quebec government and opposed the *GNDA* in Parliament.[16] Nevertheless, a majority of parliamentarians voted to pass the *GNDA* and it was granted royal assent in May 2017.[17]

Immediately, Quebec's provincial government asked its Court of Appeal to determine whether sections 1 to 7 of the *GNDA* were a valid exercise of the federal Parliament's power to make criminal laws. The Quebec Court of Appeal ruled that sections 3, 5, and 7 of the *GNDA* were not criminal laws and were unconstitutional because they therefore exceeded federal jurisdiction.[18] Upon the Quebec Court's ruling, the Canadian Coalition of Genetic Fairness, an intervener[19] which heavily advocated for the *GNDA*, filed an appeal to the Supreme Court of Canada.[20] The SCC was tasked with determining whether the *GNDA* is a valid criminal law or a "colourable law" which presents itself as a criminal law but in fact attempts to covertly regulate matters within provincial jurisdiction (e.g. the insurance industry).

The Supreme Court's Analysis: A Two Step Process

Writing for the majority of the Supreme Court, Justice Karakatsanis outlined the division of powers test to determine whether the impugned provisions of the *GNDA* fell within federal jurisdiction. First, the Court "characterized" the *GNDA* by determining its "pith and substance" (or essential character). Then, based on that characterization, the Court asked whether the federal government has the power to enact the *GNDA* under section 91(27) of the *Constitution Act, 1867* (the criminal law power).***[21]***

Step 1- Pith and Substance: Determining the Essential Character of the *GNDA*

The first step the SCC took in the *GNDA Reference* was a "pith and substance" analysis. This analysis determines the "essential character" of the law — "what it is really about"[22] — regardless of its stated intention.[23] This characterization process "requires considering both the law's purpose and its effects."[24] To do this, the Court first examined the *intrinsic* evidence of the law's purpose, which included the text of the *GNDA*, its structure, and its title.[25] Then, the Court considered *extrinsic* evidence of the law's purpose, which included parliamentary debates, committee testimony, and other government publications.[26]

Finally, the legal and practical effects of the law were considered.[27]

In its survey of the intrinsic evidence of the law's purpose, the SCC held that the text of the *GNDA*, its preamble, and its title were strong evidence that the purpose of the law was to "combat discrimination based on information disclosed by genetic tests by criminalizing compulsory genetic testing, compulsory disclosure of test results, and non-consensual use of test results in a broadly defined context."[28] The Court noted that genetic tests "reveal highly personal information — details that individuals might not wish to know or share and that could be used against them."[29] The Court found that the intrinsic evidence suggested that the *GNDA*'s dominant purpose was to protect this information from being used against individuals without their full and free consent.[30]

Next, the SCC examined extrinsic evidence of the law's purpose, which included parliamentary debates and committee testimonies concerning the *GNDA* as it worked its way through the legislative process. Time and time again, members of parliament and senators spoke about the lack of legal protections that "left individuals vulnerable to genetic discrimination and grounded the fear of … [said] discrimination."[31] Additionally, the Court referenced committee testimony by experts,[32] many of whom focused on the "devastating health consequences" stemming from the "foregoing of genetic testing" out of fear that personal health information revealed by that testing might be used against those being tested.[33]

After examining the evidence of the law's purpose, the SCC determined that the main legal effects of the *GNDA* were that it "prohibit[ed] genetic testing requirements and non-consensual uses of genetic test results."[34] Effectively, the Court found that the *GNDA* protected individuals from genetic discrimination in a wide variety of circumstances while imposing substantial penalties for violations.[35] In terms of practical effects, the Court determined that the *GNDA* enables individuals to choose freely, without fear, to undergo genetic testing.[36] Thus, the Court concluded that the *GNDA*'s provisions give individuals greater control over their private health information, and "encourage individuals to undergo genetic testing …. [that] may in turn produce health benefits, including by enabling earlier detection of health problems."[37]

In light of this analysis of the law's purpose and effects, the SCC concluded that the pith and substance of the *GNDA* was to "protect individuals' control over their detailed personal information disclosed by genetic tests in the areas of contracting and the provision of goods and services in order to address fears that … test results will be used against them and to prevent discrimination based on that information."[38] This was somewhat different from the Quebec Court of Appeal's ruling that the law's essential character was not to prohibit genetic discrimination in a general sense, but to regulate "agreements … particularly insurance and employment contracts."[39] For the SCC though, the law's impact on the insurance industry, while significant, is relatively indirect. In this regard, although the Court acknowledged that Parliament was concerned about potential genetic discrimination in the specific context of the insurance industry, it ultimately concluded that the provisions of the *GNDA* were not limited to regulating any one specific industry or activity.[40]

However, within the majority of the five Justices, there were two differing opinions on the exact pith and substance of the *GNDA*, with some Justices reaching a slightly different conclusion than Justice Karakatsanis.[41] Two other Justices found that the pith and substance of the *GNDA* was not merely to prevent genetic discrimination, but more broadly "to protect [public] health by prohibiting conduct that undermines individuals' control over the intimate information revealed by genetic testing."[42] Regardless of this difference, both majority interpretations of the pith and substance of the *GNDA* lead to the same result in step two of the Court's analysis.[43]

Step 2- Classification: The *GNDA* Fits Under Federal Parliament's Section 91(27) Criminal Law Power

After determining that the essential character of the *GNDA* was to combat genetic discrimination and the fear of genetic discrimination, the SCC had to "classify" the law under a head of power.[44] More specifically, the Court asked whether the *GNDA* constitutes a valid exercise of the federal Parliament's power to make criminal laws, per section 91(27) of the *Constitution Act, 1867*.[45] In addressing this question, the SCC cited the *Margarine Reference*, which established that for federal legislation to be characterized as a criminal law, it must fulfill three criteria:[46]

- It is in the form of a prohibition;
- It is accompanied by penalties; and
- It is for a criminal law purpose.

The *GNDA* fulfilled the first two criteria easily, being prohibitive of genetic discrimination, and containing fines and/or jail time as the penalties for violation.[47] The success of the *GNDA*'s classification as a criminal law under section 91(27) then hinged on whether the prevention of genetic discrimination constitutes a valid criminal law purpose under the *Margarine Reference* test.[48] Broadly speaking, a valid criminal purpose has two features. Firstly, "it should be directed at some evil, injurious, or undesirable effect on the public."[49] Secondly, it "should serve one or more of the 'public purposes' or 'ends'"[50] mentioned in the *Margarine Reference*, which included "public peace, order, security, health, [and] morality."[51]

In the *GNDA Reference*, the SCC held that the *GNDA* safeguards "autonomy, privacy and the fundamental social value of equality, as well as public health."[52] The Court recognized the potential, before the *GNDA* was enacted, for sensitive personal information to be abused and disseminated without an individual's permission. Furthermore, the Court referenced the broad nature of criminal law powers, citing *RJR-MacDonald*, which held that Parliament's criminal law powers are broad, plenary, and must be able to respond to new and emerging matters.[53] The Court noted that genetic mapping and the pace of modern science open up the potential for new threats to personal privacy,[54] and held that it is within Parliament's power under section 91(27) to protect people from such "emerging threats to [their] privacy, autonomy and equality."[55]

The SCC also noted that genetic discrimination poses a threat to public health that Parliament is empowered to address via its criminal law powers.[56] It recognized that genetic discrimination and the fear of genetic discrimination can be barriers to an optimized healthcare system.[57] For example, the Court reasoned that if there were no protections in place, individuals may choose to avoid potentially lifesaving genetic testing out of fear that their information could be used against them in the future.[58] The Court concluded that the law directly targets this fear, and ensures necessary protections that can positively impact the public healthcare system as a whole.[59]

In summary, the SCC held that since the *GNDA* targeted potential harms to privacy, autonomy, equality, and public health,[60] it has a valid criminal purpose and therefore constitutes a valid exercise of the federal Parliament's exclusive power to make criminal laws.[61]

Conclusion: A Split Decision, But the *GNDA* Remains in Effect

The *GNDA Reference* was a difficult case for the Court, with a single vote making the difference. Five of the nine Supreme Court Justices found the *GNDA* constitutional, while the remaining four Justices argued in dissent that the *GNDA* unconstitutionally intrudes into the provinces' jurisdiction over property and civil rights.[62] It was the narrowest of decisions, but it ensures that the *GNDA* remains a valid law, and will remain in force unless a future parliament repeals it.

According to its proponents, the *GNDA* was purported to respond to advances in modern science and, in particular, to ensure that individuals can benefit from these advances without suffering discrimination. Given the rapid pace of scientific innovation today, this will not be the last time that governments and courts in Canada grapple with the constitutional implications of regulatory issues that could not have been known when the *Constitution Act, 1867* was enacted.

[1] *Reference re Genetic Non-Discrimination Act*, 2020 SCC 17 at paras 1-4 .

[2] *Genetic Non-Discrimination Act,* SC 2017, c 3, s 3 .

[3] *Ibid* at s 5.

[4] *Ibid* at s 7.

[5] *Ibid* at ss 8-10.

[6] Olivia Stefanovich "Supreme Court of Canada Upholds Genetic Non-Discrimination Law" (10 July 2020), online: *CBC News* <https://www.cbc.ca/news/politics/stefanovich-supreme-court-of-canada-genetic-information-1.5643245> [Stefanovich].

[7] Senate, Debates of the Senate, *Orders of the Day*, 42-1, No 150 (27 January 2016) at 14:50 (Hon James Cowan).

[8] *Ibid* at 14:30.

[9] House of Commons, Private Members Business, *House of Commons Debates*, 42-1, No 149 (7 March 2017) at 17:40 (Don Davies).

[10] House of Commons, Private Members Business, *House of Commons Debates*, 42-1, No 149 (7 March 2017) at 17:25 (Jennifer O'Connell).

[11] House of Commons, Private Members Business, *House of Commons Debates*, 42-1, No 149 (7 March 2017) at 18:00 (Garnett Genuis).

[12] Peter W Hogg, Constitutional Law of Canada, 5th ed (Toronto: Thomson Reuters, 2007) at chapter 5 at 2.

[13] *Constitution Act, 1867* (UK), 30 & 31 Vict, c3, ss 91-92, reprinted in RSC 1985, Appendix II, No 5.

[14] Alanna Crouse, "Falling Between the Jurisdictions: Genetic Discrimination & the Law" (31 March 2020), online (blog): *McGill Journal of Law and Health* <*https://mjlh.mcgill.ca/2020/03/31/falling-between-the-jurisdictions-genetic-discrimination-the-law/*>.

[15] Elizabeth Adjin-Tettey, "Striking the Right Balance: Does the Genetic Non Discrimination Act Promote Access to Insurance?" (2021) 14:1 McGill JL & Health 145 at 158.

[16] John Paul Tasker, "Liberal backbenchers Defy Cabinet Wishes and Vote to Enact Genetic Discrimination Law" (8 March 2017), online: *CBC News* <https://www.cbc.ca/news/politics/genetic-testing-bill-vote-wednesday-1.4015863>.

[17] *Ibid.*

[18] *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 paras 23-26 .

[19] An intervener is a third party the court allows to make arguments about a law or case. See also, "Intervener," online: *Thomson Reuters* < https://ca.practicallaw.thomsonreuters.com/8-507-2484?transitionType=Default&contextData=(sc.Default)#:~:text=A%20party%20in%20a%20litigation%20that%3A&text=Has%20been%20granted%20standing%20by,or%20part%20of%20the%20litigation>

[20] Stefanovic, *supra* note 6.

[21] *GNDA Reference*, *supra* note 1 at para 103.

[22] *Ibid* at para 29.

[23] *Ibid* at para 28.

[24] *Ibid* at para 30.

[25] *Ibid* at para 35.

[26] *Ibid* at para 40.

[27] *Ibid* at para 51.

[28] *Ibid* at para 39.

[29] *Ibid* at para 39.

[30] *Ibid* at paras 38-39.

[31] *Ibid* at para 45.

[32] *Ibid* at para 43.

[33] *Ibid* at para 126.

[34] *Ibid* at para 52.

[35] *Ibid* at paras 52-53.

[36] *Ibid* at para 54.

[37] *Ibid* at paras 54-56.

[38] *Ibid* at para 65.

[39] *QC GNDA Reference*, *supra* note 18 at paras 10-11.

[40] *GNDA Reference*, *supra* note 1 at paras 57-62.

[41] *Ibid* at paras 111-114.

[42] *Ibid* at para 136.

[43] *Ibid* at paras 150-151.

[44] *Ibid* at para 26.

[45] *Ibid* at para 66.

[46] *Reference re Validity of Section 5(a) Dairy Industry Act*, [1949] SCR 1 at 49-50, 1 DLR 433 .

[47] *GNDA Reference*, *supra* note 1 at para 68.

[48] *Ibid* at para 147.

[49] *Margarine Reference*, *supra* note 46 at 49.

[50] *GNDA Reference*, *supra* note 1 at para 72.

[51] *Margarine Reference*, *supra* note 46 at 50.

[52] *GNDA Reference*, *supra* note 1 at para 80.

[53] *RJR MacDonald Inc v Canada (Attorney General)*, [1995] 3 SCR 199 at para 28, 111 DLR (4th) 385 .

[54] *GNDA Reference*, *supra* note 1 at para 89.

[55] *Ibid* at para 92.

[56] *Ibid* at para 73.

[57] *Ibid* at para 93.

[58] *Ibid* at paras 97-98.

[59] *Ibid* at paras 97,102.

[60] *Ibid* at paras 93,96.

[61] *Ibid* at para 4.

[62] *Ibid* at para 272.