

MEMORANDUM

To Frank Zinatelli
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Association

Date March 7, 2016

Re Constitutionality of Bill S-201

You have asked us to provide you with an opinion as to whether clauses 1 through 7 of Bill S-201, “An Act to prohibit genetic discrimination,” would, if enacted, be valid federal legislation under the federal-provincial division of powers.

In our view, the answer to this question is no. We set out below the reasoning that leads us to this conclusion. The following is a summary.

- In order to determine the constitutionality of a law from a division of powers perspective, its “pith and substance” or “main thrust” must be determined by examining both its purpose and its effects. The question is then whether the law is directed to a matter that falls within federal or provincial legislative authority under sections 91 and 92 of the *Constitution Act, 1867*.
- In our view, having regard to both their purpose and their effects, the pith and substance of clauses 1 through 7 of Bill S-201 is the regulation of the provision of goods and services and the terms of contracts (including in the insurance industry) to limit the use of genetic testing information so as to encourage individuals to undergo genetic testing.
- Under the property and civil rights head of power, the provinces have exclusive constitutional authority to legislate on matters of contracts and business regulation in general, as well as insurance contracts in particular. Clauses 1 through 7 of the Bill therefore fall squarely within exclusive provincial jurisdiction and are *ultra vires* the federal Parliament.
- Clauses 1 through 7 of the Bill likely cannot be supported by the federal criminal law power since, although they are drafted so as to contain prohibitions and penalties, they appear to lack a true criminal purpose. In particular, they are not directed to a “public health evil”; nor do they prohibit human conduct that has an injurious or undesirable effect on the health of members of the public.

Overview of Bill S-201

Bill S-201, “An Act to prohibit and prevent genetic discrimination,” is a Senate public bill introduced by Senator Cowan.

The Bill includes two types of provisions. Clauses 1 through 7, described by Senator Cowan as the “heart of the Bill,”¹ set out a number of prohibitions and penalties. Clauses 3 and 4 prohibit “any person” from requiring an individual to undergo genetic testing, or requiring an individual to disclose the results of any genetic test as a condition of providing goods or services, or entering into or continuing a contract or agreement. The Bill defines a “genetic test” to mean “a test that analyzes DNA, RNA or chromosomes for purposes such as the prediction of disease or vertical transmission risks, or monitoring, diagnosis or prognosis.” Clause 6 sets out exceptions for physicians, pharmacists or other health care practitioners, as well as medical, pharmaceutical or scientific researchers. Under clause 7, any person who contravenes any of these prohibitions is liable to pay a fine or to imprisonment.

Clauses 8 through 13 set out amendments to a number of federal acts, summarized below.

- The *Canada Labour Code* is amended to grant employees the right not to undergo a genetic test and not to disclose the results of any genetic test. The amendments also prohibit employers from, among other things, dismissing an employee or imposing a financial penalty on an employee as a result of the employee refusing to take, or disclose the results of, a genetic test. These amendments also set out a detailed complaint mechanism for an employee who alleges that an employer has contravened these prohibitions.
- The *Canadian Human Rights Act* is amended to expressly add “genetic characteristics” to the list of prohibited grounds of discrimination and to define “discrimination on the ground of genetic characteristics” to mean discrimination based on the results of a genetic test or the refusal to undergo a genetic test or to disclose the results.
- The *Privacy Act* and the *Personal Information Protection and Electronic Documents Act (PIPEDA)* are amended to include “information derived from genetic testing” to the definition of “personal information.”

History of Bill S-201

Bill S-201, or similar bills, have been introduced in the Senate on three different occasions. A bill was originally introduced in April 2013, and then reintroduced on October 17, 2013. Bill S-201 itself was introduced on December 8, 2015. It is currently before the Senate Standing Committee on Human Rights (the “Committee”).

While the Bill has undergone some changes since the first version was introduced, each version of the Bill has included provisions that prohibit anyone from requiring someone to take a genetic test, or to disclose the results of a genetic test, as a condition of providing goods or

¹ “Bill S-201, An Act to prohibit and prevent genetic discrimination,” Standing Senate Committee on Human Rights, *Transcripts (Evidence) of Proceedings*, 42nd Parl., 1st Sess., (17 February 2016)

services to that person, entering into or continuing a contract with that person, or offering or continuing particular terms or conditions in a contract with that person.

The most significant difference between previous versions of the Bill and the current version is that the previous versions expressly referred to insurance contracts, in providing an exemption for insurance contracts over \$1 million. In contrast, as Senator Cowan has emphasized, the current version of the Bill makes no express mention of insurance.²

In our view, the fact that the Bill no longer mentions “insurance” does not change its purpose, and only broadens its practical effects on insurance contracts. Accordingly, for the purposes of this analysis, we have relied on information presented to the Senate and to the Committee in respect of all three versions of the Bill. We have particularly relied on the comments of Senator Cowan, the sponsor of the Bill, as these are particularly relevant for putting the Bill into context and for determining its purpose.

Framework for the constitutional analysis

Sections 91 and 92 of the *Constitution Act, 1867* divide legislative powers between Parliament and the provincial legislatures. For example, the federal Parliament has exclusive authority in relation to all matters that come within the regulation of trade and commerce (section 91(2)) and criminal law (section 91(27)). The federal Parliament also retains residual power to “make laws for the peace, order and good government of Canada.” The provincial legislatures have exclusive jurisdiction to make laws in relation to, among other things, property and civil rights in the province (section 92(13)).

As the Supreme Court of Canada recently reiterated in the *Reference re Securities Act*, the primary means used by Canadian courts to determine the constitutional validity of legislation from a division of powers perspective is the “pith and substance” doctrine.³ This involves, first, looking both at the “dominant purpose” of a law and its legal and practical effects in order to identify its “matter” or its “main thrust.”⁴

Once the “matter” of the law has been determined, the question is then whether that matter falls within the jurisdiction of the enacting legislature according to the division of powers set out in the *Constitution Act, 1867*. If in pith and substance the law relates to a matter that is outside the jurisdiction of the enacting legislature, then it is *ultra vires* and will be invalid.⁵

Pith and substance of clauses 1 through 7 of Bill S-201

The starting point for determining whether clauses 1 through 7 of Bill S-201 are valid federal enactments is therefore to determine their “pith and substance” by looking at both their dominant purpose and their legal and practical effects.

To identify the purpose of a statute, the court must seek to determine the true purpose of the legislation, as opposed to its stated or apparent purpose. In doing so, courts will look at the

² *Ibid.*

³ 2011 SCC 66 at ¶ 63 [*Securities Act Reference*]

⁴ *Ibid.*; *Canadian Western Bank v. Alberta*, 2007 SCC 22 at ¶ 25-28 [*Canadian Western Bank*]

⁵ *Canadian Western Bank* at ¶ 25-28

statute itself, as well as extrinsic evidence such as Hansard or other accounts of the legislative process such as the minutes of parliamentary committees.⁶ Courts will also look beyond the direct legal effects, to the social or economic purposes which the statute was enacted to achieve.⁷ The “effect” of the statute refers to how it “changes the rights and liabilities of those who are subject to it.”⁸ This includes both the direct legal effect of the statute, as well as its practical consequences (or “side” effects).⁹ In determining the pith and substance of legislation, it is also both appropriate and necessary to understand the context of the legislation, which informs both its purpose and its effect.¹⁰

The pith and substance analysis may concern the legislation as a whole, or only some of its provisions.¹¹ In this case, we have considered the pith and substance of clauses 1 through 7 of the Bill (i.e., the prohibition and penalty provisions) on their own, as well as in the context of the Bill as a whole. However, our opinion on constitutionality does not apply to the amendments to various existing federal statutes set out in clauses 8 through 13 of the Bill.

The identification of the pith and substance is a key element of the analysis. As Hogg notes, it “will often effectively settle the question of its validity, leaving the allocation of the matter to a class of subject little more than a formality.”¹² It is therefore important to identify the pith and substance of the impugned provisions as precisely as possible. Otherwise, if “vague characterizations of the pith and substance of provisions were accepted, this could lead not only to the dilution of and confusion with respect to the constitutional doctrines that have been developed over the years, but also to an erosion of the scope of provincial powers as a result of the federal paramountcy doctrine.”¹³

In this case, the provisions at issue can either be cast as being directed to the regulation of the provision of goods and services and the regulation of contracts, or they can be characterized as being more generally about health. Under the former (more precise) characterization, it is clear that they would fall under the provincial power to legislate in respect of property and civil rights. However, if they are more generally characterized as being about health, then they may fall under the broad and plenary federal criminal law power. Our analysis of the pith and substance of clauses 1 through 7 of the Bill is set out below.

Putting Bill S-201 in context

In this case, it is important to understand the role that genetic testing plays in various contexts, including healthcare, insurance and employment. These issues are briefly discussed below.

⁶ *Canadian Western Bank* at ¶ 27

⁷ Peter W. Hogg, *Constitutional Law of Canada*, 5th ed., looseleaf (Toronto: Carswell, 2007) at 15-14 [*Hogg*]

⁸ *Ibid.* at p. 15-16

⁹ *Securities Act Reference* at ¶ 64; *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, 2002 SCC 31 at ¶ 54 [*Kitkatla Band*]

¹⁰ *Reference re Assisted Human Reproduction Act*, 2010 SCC 61 at ¶ 202 [*Assisted Reproduction Act Reference*]

¹¹ *Canadian Western Bank* at ¶ 25; *Kitkatla Band* at ¶ 56-58

¹² *Hogg* at 15-8

¹³ *Assisted Reproduction Act Reference* at ¶ 190

Genetic testing: a healthcare benefit

Genetic testing can provide significant benefits in the healthcare field. For instance, it can be used to confirm or rule out a genetic condition that is suspected on the basis of a family history, determine a person's chance of passing on a particular genetic disorder to his or her children, allow individuals to take steps to mitigate the potential impact of a genetic condition, or personalize treatment to the needs of a particular patient. It can also be used for medical research purposes.

Concerns about the use of genetic testing information

However, there are individuals who choose not to take advantage of these benefits because they are concerned about how their genetic testing information will be used outside of the healthcare field. In other words, they are concerned about what is sometimes referred to as "genetic discrimination." According to Canadian Coalition for Genetic Fairness, genetic discrimination occurs "when people are treated unfairly because of actual or perceived differences in their genetic information that may cause or increase the risk to develop a disorder or disease."¹⁴

Senator Cowan has explained on numerous occasions that the concerns about the use of genetic testing information arise predominantly in the context of insurance and employment. For instance, he has stated in the Senate:

Genetic discrimination usually arises in two contexts: **insurability and employment**. There is no legislation in Canada that provides clear protection against either one. The result is that many Canadians who otherwise would be candidates for genetic testing are opting not to have those tests **for fear that the results will impact their insurability or their present or future employability**. That means that many Canadians who are at risk of developing certain diseases or disorders are not able to take the preventative steps that may be available to them to reduce the likelihood that they may in fact develop those diseases or disorders [emphasis added].¹⁵

Even more particularly, from the various Senate debates and evidence before the Committee it is apparent that the most important context for the concerns is in the insurance industry. For instance, Senator Cowan agreed that "while genetic discrimination is not exclusive to the

¹⁴ online at <<http://ccgf-cccg.ca/en/about-genetic-discrimination/>>

¹⁵ *Debates of the Senate*, 41st Parl., 2nd Sess., Vol. 149, No. 32 (5 February 2014) at 888; See also, "Bill S-201, An Act to prohibit and prevent genetic discrimination", Standing Senate Committee on Human Rights, *Transcript (Evidence) of Proceedings*, 41st Parl., 2nd Sess., No. 11 (2 October, 2014) at 36-37; *Debates of the Senate*, 41st Parl., 2nd Sess., Vol. 149, No. 137 (5 May 2015) at 3270; *Debates of the Senate*, 42nd Parl., 1st Sess., Vol. 150, No. 8 (27 January 2016) at 147; "Bill S-201, An Act to prohibit and prevent genetic discrimination", Standing Senate Committee on Human Rights, *Transcript (Evidence) of Proceedings*, 42nd Parl., 1st Sess. (17 February 2016)

insurance industry, it is in fact where most of it happens.”¹⁶ In addition, the majority of the anecdotal evidence that was discussed in the Senate and before the Committee related to individuals’ experiences in the insurance context. The manner in which insurance companies use genetic testing information is briefly set out below.

Use of genetic testing information by the insurance industry

In making an insurance contract, the insurer will typically seek a wide variety of information on the insured’s health. This may include information about the insured’s family history, as well as information relating to cholesterol, hypertension, heart disease, cancer, diabetes and other aspects of the insured’s health. This information will affect the insurer’s underwriting decisions, such as whether to provide the insurance and the determination of the appropriate premiums. In other words, it is used to assess the risk associated with the insurance contract. The obligation to disclose this information is set out in insurance legislation in each of the provinces and territories, which requires the applicant for insurance and a person whose life is to be insured to disclose “every material fact within the person’s knowledge that is material to the insurance.”¹⁷

Thus, if there is genetic testing information relating to the insured that is available at the time of the formation of the insurance contract, then the insurer may request access to it (along with other relevant medical information). However, in compliance with the CLHIA Industry Code, insurers will not require an applicant for insurance to undergo any genetic testing.¹⁸

Purpose of clauses 1 through 7 of Bill S-201: to encourage genetic testing by regulating contracts

With the context of Bill S-201 in mind, we now turn to the determination of the pith and substance of clauses 1 through 7 of the Bill, beginning with their purpose.

On its face, the purpose of Bill S-201 is to “prohibit and prevent genetic discrimination.” In keeping with this general purpose, Senator Cowan has attempted to cast the Bill as targeting certain behaviour, regardless of the context. For instance, on May 5, 2015 in speaking in the Senate, Senator Cowan stated that “the bill is about prohibiting and preventing genetic discrimination wherever it arises.”¹⁹ Similarly, on January 27, 2016, Senator Cowan explained that the Bill “is not targeting any particular industry or any particular transaction, but it is intended to target behavior that is prohibited.”²⁰

¹⁶ “Bill S-201, An Act to prohibit and prevent genetic discrimination”, Standing Senate Committee on Human Rights, *Transcript (Evidence) of Proceedings*, 42nd Parl., 1st Sess. (17 February 2016)

¹⁷ See for example, Ontario’s *Insurance Act*, R.S.O. 1990, c. I.8, s. 183(1), Alberta’s *Insurance Act*, R.S.A., c. I-3, s. 652(1) and British Columbia’s *Insurance Act*, R.S.B.C. 2012, c. 1, s. 51.

¹⁸ *CLHIA Industry Code: Genetic Testing Information for Insurance Underwriting*, online at <[https://www.clhia.ca/domino/html/clhia/CLHIA_LP4W_LND_Webstation.nsf/resources/Guidelines/\\$file/Industry_Code_Genetic_Testing.pdf](https://www.clhia.ca/domino/html/clhia/CLHIA_LP4W_LND_Webstation.nsf/resources/Guidelines/$file/Industry_Code_Genetic_Testing.pdf)>

¹⁹ *Debates of the Senate*, 41st Parl., 2nd Sess., Vol. 149, No. 137 (5 May 2015) at 3276

²⁰ *Debates of the Senate*, 42nd Parl., 1st Sess., Vol. 150, No. 8 (27 January 2016) at 151

However, taking into account the context described above, it becomes evident that the true purpose of clauses 1 through 7 of the Bill is actually more specific. Their true purpose is to address the use of genetic testing information in a manner that may prevent individuals from undergoing genetic testing in the first place. As Senator Cowan has explained, the “purpose of Bill S-201 is to address **specific issues** that are preventing many Canadians from **benefiting from** extraordinary advances in medical research” [emphasis added].²¹

It is clear from the many speeches in the Senate and in Committee that those “specific issues” relate to fears about how genetic testing information may be used in the provision of goods and services outside the healthcare context (including by the insurance industry). As Senator Cowan has explained, the barriers that are preventing individuals from undergoing genetic testing are the “fears about not being able to obtain affordable insurance for oneself or one’s family or not being able to find or hold a job.”²²

Therefore, although the Bill purports to have general application, the true purpose of clauses 1 through 7 of the Bill is to encourage individuals to take advantage of the medical benefits that genetic testing may offer by regulating contracts, including in the insurance industry, so as to limit the use of genetic testing information.

Effects of clauses 1 through 7 of Bill S-201: to regulate insurance and employment contracts

Determining the effects of clauses 1 through 7 of the Bill involves an examination of (1) their direct effects on the rights and liabilities of those who are subject to them; and (2) any follow-through effects, such as their practical consequences.²³

The key provisions in clauses 1 through 7 of the Bill are those in clauses 3 and 4, which prohibit anyone from requiring an individual to undergo a genetic test or to disclose the results of a genetic test as a condition of (a) providing goods or services to an individual; (b) entering into or continuing a contract with an individual; or (c) offering or continuing specific terms or conditions in a contract with an individual.

Thus, the legal effect of these provisions is to regulate the conditions for the provision of goods and services and the terms of a contract in general. However, the practical consequences of these provisions are more specific. Since it is primarily insurance companies and employers that may ask someone to provide the results of a genetic test, the predominant effects of clauses 1 through 7 of the Bill would be to regulate the provision of goods and services and the terms of contracts in the insurance industry and in the employment context.

Pith and substance of clauses 1 through 7: to regulate the provision of goods and services and the terms of contracts to encourage genetic testing

Considering both their purpose and effects, the pith and substance of clauses 1 through 7 of the Bill can be characterized as the regulation of the provision of goods and services and terms of contracts, including in the insurance industry, to limit the use of genetic testing information so as to encourage individuals to undergo genetic testing.

²¹ *Debates of the Senate*, 41st Parl., 2nd Sess., Vol. 149, No. 32 (5 February 2014) at 887

²² *Ibid.* at 889

²³ *Hogg* at p. 15-16; *Securities Act Reference* at ¶ 98

This characterization is reinforced by looking at the Bill as a whole. The amendments to various federal statutes set out in clauses 8 through 13 are directed to the same purpose as that of clauses 1 through 7: to encourage individuals to undergo genetic testing. They also have similar effects, primarily the regulation of the provision of goods and services and the terms of contracts.

However, since these provisions set out amendments to existing federal statutes that largely apply only to federally regulated companies, their effects would mainly be confined to regulating employment, accommodation and service contracts in the federal public sector and in federally regulated industries (such as banking, interprovincial transportation and telecommunications). They would have limited effect on provincially regulated employers and other companies (such as insurance companies). The division of powers in the specific contexts of employment and human rights is discussed in further detail below.

The regulation of contracts is a matter that falls within exclusive provincial jurisdiction

As a general matter, the regulation of business in a province, including contracts, is a matter that is within exclusive provincial jurisdiction under the property and civil rights head of power (section 92(13)).²⁴ On this basis alone, based on our analysis of their pith and substance, clauses 1 through 7 of the Bill relate to matters that are within exclusive provincial jurisdiction and are *ultra vires* the federal Parliament.

Moreover, to the extent that clauses 1 through 7 are directed to insurance and employment contracts, they are similarly *ultra vires*. As set out below, there is no dispute that the regulation of insurance contracts falls within the exclusive authority of the provincial legislature as a matter of property and civil rights. With some exceptions, this is also the result for employment contracts.

Insurance contracts: a matter of exclusive provincial jurisdiction

Provincial jurisdiction to regulate insurance contracts can be traced back to *Citizens Insurance Co v. Parsons* wherein the Privy Council held that the provincial power over property and civil rights includes the exclusive jurisdiction to legislate with respect to insurance contracts.²⁵ It was also more recently confirmed by the Supreme Court, which explained that the “business of insurance in general falls within the authority of the provinces as a matter of property and civil rights.”²⁶ As Hogg explains, “it is settled by precedent that the regulation of insurance is a matter coming with ‘property and civil rights in the province,’ which is a provincial class of subject.”²⁷

Although there are some areas of insurance that are regulated at the federal level, federal regulation of insurance is generally limited to issues that relate to the incorporation of federally incorporated insurance companies and to foreign insurance companies and legislation in the

²⁴ Hogg at p. 21-6; *Citizens Insurance Co v. Parsons*, (1881), 7 A.C. 96 at 110 (J.C.P.C) [Parsons]; *Bank of Montreal v. Marcotte*, 2014 SCC 55 at ¶ 79

²⁵ *Parsons*; See also *Canadian Pioneer Management Ltd. et al. v. Labour Relations Board of Saskatchewan et al.*, [1980] 1 SCR 433 at 439, 443-444

²⁶ *Canadian Western Bank* at ¶ 80

²⁷ Hogg at p. 15-8

area of marine insurance. By contrast, regulation of the *business* of insurance falls within provincial jurisdiction.²⁸

Employee relations: primarily within provincial jurisdiction

Similarly, to the extent that the pith and substance of clauses 1 through 7 of the Bill is also concerned with employment contracts, it would also be a matter that is largely within provincial jurisdiction under property and civil rights in the province.²⁹

Although federal laws do govern employment contracts within the federal public sector and industries within federal jurisdiction (such as banking, interprovincial transportation and telecommunications), the dominant characteristic of clauses 1 through 7 of the Bill is not to regulate employee relations for employers within federal jurisdiction. Indeed, as explained above, this is accomplished by clause 8, which sets out amendments to the *Canada Labour Code* that provide a detailed scheme to regulate the use of genetic testing in the employment context that would apply to federal employees. The main purpose and effect of clauses 1 through 7 is to capture provincially regulated employers within a similar scheme. Therefore, like the regulation of insurance contracts, the regulation by these provisions of the Bill of provincially regulated employment contracts is also *ultra vires* the federal Parliament.

In sum, based on our characterization of the pith and substance of clauses 1 through 7 of the Bill, they fall within the exclusive legislative authority of the provincial legislatures, and are *ultra vires* the federal Parliament. On that basis alone, no further analysis is necessary. However, since it has been argued that the Bill is supportable under the federal criminal law power, we have also considered its application.

Characterization of the clauses 1 through 7 of the Bill as a criminal law matter

On February 24, 2016 Professor Bruce Ryder, a constitutional law expert, spoke to the Standing Senate Committee on Human Rights about the constitutionality of the Bill and provided his opinion that the prohibition and penalty provisions of the Bill could be upheld under the federal criminal law power.

The criminal law power

The federal Parliament has broad and plenary power in relation to criminal law matters. Although the Supreme Court has developed a test to determine whether legislation is valid under the criminal law power, it has been careful “not to freeze the definition in time, or confine it to a fixed domain of activity.”³⁰

The Supreme Court has held that a valid criminal law requires (1) a prohibition; (2) a penalty; and (3) a criminal law purpose, such as peace, order, security, morality and health (although this

²⁸ Barbara Billingsley, *General Principles of Canadian Insurance Law*, 2nd ed. (Canada: LexisNexis, 2014) at 7; *Hogg* at 21-7

²⁹ *Toronto Electric Commissioners v. Snider*, [1925] A.C. 396; *Oil, Chemical and Atomic Workers, International Union, Local 16-601 v. Imperial Oil Limited*, [1963] S.C.R. 584 at 593

³⁰ *RJR-Macdonald v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 28 [*RJR-Macdonald*]

list is not exclusive).³¹ As the Supreme Court explained in the *Margarine Reference*, there must be some “evil or injurious or undesirable effect upon the public against which the law is directed ... and the legislature has had in mind to suppress the evil or to safeguard the interest threatened.”³²

In this case, clauses 1 through 7 of the Bill include both prohibitions and penalties. Thus the question of whether these provisions of the Bill would be upheld under the federal criminal law power depends on whether they can be characterized as having a criminal purpose.

Do clauses 1 through 7 of Bill S-201 have a criminal law purpose?

In determining whether clauses 1 through 7 of the Bill have a criminal law purpose, it is useful to have in mind the Privy Council’s guidance in another case dealing with the federal Parliament’s attempt to legislate insurance contracts under the criminal law power. In finding the statute at issue to be invalid, the Privy Council explained that

... their Lordships think that it is no longer open to dispute that the Parliament of Canada cannot, by purporting to create penal sanctions under sec. 91(27), appropriate to itself, exclusively, a field of jurisdiction in which, apart from such a procedure, it could exert no legal authority, and that if, when examined as a whole, legislation in form criminal is found, in aspects and for purposes exclusively within the provincial sphere, to deal with matters committed to the provinces, it cannot be upheld as valid.³³

In other words, the federal Parliament cannot legislate within an area of exclusive provincial jurisdiction simply by casting the legislation as criminal in form (in that it consists of prohibitions and penalties). Rather, the legislation must be *in pith and substance* directed to a criminal purpose.

In this case, as explained above, the purpose of clauses 1 through 7 of the Bill is to encourage individuals to take advantage of the medical benefits that genetic testing may offer, by regulating contracts so as to limit the use of genetic testing information. The question is whether this satisfies the requirement of a criminal purpose, bringing these provisions of the Bill within federal jurisdiction under the criminal law power.

Health is a valid criminal law purpose as long as the legislation is directed to a public health evil

In this case, the argument in favour of federal jurisdiction appears to be related to the public health aspect of the criminal law power. As Professor Ryder explained,

... the pith and substance [of the Bill] is to prohibit genetic discrimination. The motivation is that we have a problem, from the point of view, as we’ve heard, of the best interests of Canadians

³¹ *Reference re Firearms Act (Can.)*, 2000 SCC 31, at para. 27

³² *Reference re Validity of Section 5(a) of the Dairy Industry Act*, [1949] S.C.R. 1 at 49 [*Margarine Reference*]

³³ *In re Reciprocal Insurance Legislation*, [1924] A.C. 328 at ¶ 19

from a health perspective, and prohibiting genetic discrimination will encourage people to undergo genetic testing, which will have enormous health benefits.³⁴

However, it is important to appreciate that the fact that legislation addresses “health” is insufficient in and of itself to bring it within the federal criminal law power. Rather, the federal Parliament’s ability to pass criminal law on the basis of health is limited to where the law addresses “legitimate public health evils.”³⁵ As the Supreme Court explained in *RJR-Macdonald*, the question is whether “the prohibition with penal consequences is directed at an “evil” or injurious effect upon the public.”³⁶ As a result, the federal criminal power can only be used to prohibit conduct, and “may not be employed to promote beneficial medical practices.”³⁷

As a general matter, the “legitimate public health evils” that have been regarded as supporting the exercise of the federal criminal law power have been things that are inherently harmful or dangerous, such as tobacco (*RJR-Macdonald*) or adulterated foods and drugs (*R. v. Wetmore*³⁸) or toxic substances (*R. v. Hydro-Quebec*³⁹). As McLachlin C.J. explained in the *Assisted Reproduction Act Reference*, while courts have relied on the criminal law power to uphold a variety of federal statutes on the basis of “public health evils,” in each of the cases the criminal law power has been directed at (1) human conduct (2) that has an injurious or undesirable effect (3) on the health of members of the public.⁴⁰ The Chief Justice went on to state in that case that “acts or conduct that have an injurious or undesirable effect on public health constitute public health evils that may properly be targeted by the criminal law.”⁴¹

Clauses 1 through 7 of Bill S-201 do not address a public health evil

For the reasons set out below, it is our view that clauses 1 through 7 of the Bill are not truly directed at any legitimate public health evil, and therefore do not fall within the criminal law power.

As explained above, the true purpose of clauses 1 through 7 of the Bill is to encourage individuals to take advantage of the medical benefits that genetic testing may offer by regulating contracts (including in the insurance industry) so as to limit the use of genetic testing information. There is no dispute that genetic testing is not something that is inherently evil – to the contrary, the Bill is designed to *encourage* individuals to undergo genetic testing and share results with their health care practitioners (who are exempt from the prohibition provisions). However, since the criminal law power cannot be used to promote medical practices, encouraging genetic testing does not satisfy the requirement of a criminal law purpose.

³⁴ “Bill S-201, An Act to prohibit and prevent genetic discrimination”, Standing Senate Committee on Human Rights, *Transcript (Evidence) of Proceedings*, 42nd Parl., 1st Sess. (24 February 2016)

³⁵ *RJR-Macdonald* at ¶ 32; *Assisted Reproduction Act Reference* at ¶ 52

³⁶ *RJR-Macdonald* at ¶ 29

³⁷ *Assisted Reproduction Act Reference* at ¶ 38

³⁸ [1983] 2 S.C.R. 284

³⁹ [1997] 3 S.C.R. 213

⁴⁰ *Assisted Reproduction Act Reference* at ¶ 54

⁴¹ *Assisted Reproduction Act Reference* at ¶ 62

Put differently, in this case the “act or conduct” that is being targeted is the act of requiring someone to undergo a genetic test or provide the result of a genetic test. However, as a general matter this is not conduct that has an “injurious or undesirable effect on public health.” Rather, in the medical or health context, asking someone to undergo genetic testing or provide the results of genetic testing is a public health good, not a “public health evil.”

Similarly, while there may be an argument that clauses 1 through 7 of the Bill are directed to the “public health evil” of “genetic discrimination,” this argument does not withstand scrutiny. Once unpacked, it is evident that what is meant by the term “genetic discrimination” is that as a result of a requirement to undergo or provide results of genetic testing outside the health care field, individuals may not be eligible for insurance, may have to pay higher rates for insurance or may suffer consequences in their employment.⁴² These effects cannot be classified as “public health evils.” Rather, they relate to contracts (and particularly insurance and employment contracts). Thus the “injurious or undesirable effect” to which clauses 1 through 7 of the Bill are directed is not an effect on the health of members of the public – it is an effect on their insurance rates and employment contracts.

Discrimination is typically not legislated against under the criminal law power

Insofar as clauses 1 through 7 of the Bill might be characterized as prohibiting and preventing so-called “genetic discrimination,” our conclusion is further supported by the manner in which the federal and provincial governments legislate in the area of discrimination.

As Hogg explains, the authority to enact human rights legislation is distributed between the federal Parliament and the provincial legislatures according to which level of government has jurisdiction over the field at issue; i.e., employment, accommodation, restaurants and other businesses or activities where discrimination is forbidden.⁴³ “[M]ost of the field is accordingly provincial under property and civil rights in the province.”⁴⁴ In keeping with this division of powers, the *Canadian Human Rights Act* applies only to federally regulated activities, and each province and territory has its own human rights code that applies to activities that are typically regulated by the provinces (including insurance contracts).⁴⁵

Although Hogg notes that “there is little doubt that the federal Parliament could if it chose exercise its criminal law power to outlaw discriminatory practices generally,” that is certainly not the pith and substance of clauses 1 through 7 of Bill S-201. These provisions are not aimed at prohibiting discrimination generally – rather they target a specific category of conduct in specific contexts (including insurance and employment). They therefore fall squarely within the provincial property and civil rights power.

⁴² As explained above, in compliance with the CLHIA Industry Code, insurers will not require an applicant for insurance to undergo any genetic testing.

⁴³ *Hogg* at pp. 34-10 and 55-3

⁴⁴ *Ibid.* at 55-3

⁴⁵ “Bill S-201, An Act to prohibit and prevent genetic discrimination”, Standing Senate Committee on Human Rights, *Transcript (Evidence) of Proceedings*, 41st Parl., 2nd Sess., No. 14 (11 December 2014) at 230, 235, (Mr. David Langtry, Acting Chief Commissioner, Canadian Human Rights Commission)

Moreover, Hogg’s view must be understood in the context of how discrimination law is typically legislated. As Pentney explains in “Discrimination and the Law,”

... it has never been asserted that discrimination is a public “evil” of sufficient magnitude to warrant federal legislation under the criminal law power. Considering the minimal efficacy of a criminal law approach in overcoming discrimination and possibly even its retrograde effect, it is extremely unlikely that the federal criminal law power will ever be resorted to for this purpose.⁴⁶

In sum, in our view, clauses 1 through 7 of Bill S-201 do not have a criminal law purpose, and therefore cannot be supported under the federal criminal law power.

We would be pleased to discuss any questions that you might have arising from this memorandum.

⁴⁶ Pentney, William F. *Discrimination and the Law*, Supp. Toronto: Carswell, 1985 (updated 2014, release 9)