



SUPREME COURT OF CANADA

CITATION: Reference re Genetic Non-Discrimination Act, 2020 SCC 17

APPEAL HEARD: October 10, 2019
JUDGMENT RENDERED: July 10, 2020
DOCKET: 38478

BETWEEN:

Canadian Coalition for Genetic Fairness
Appellant

and

Attorney General of Canada and Attorney General of Quebec
Respondents

- and -

**Attorney General of British Columbia, Attorney General of Saskatchewan,
Canadian**

**Life and Health Insurance Association, Canadian Human Rights Commission,
Privacy Commissioner of Canada and Canadian College of Medical Geneticists**
Interveners

CORAM: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe,
Martin and Kasirer JJ.

REASONS: Karakatsanis J. (Abella and Martin JJ. concurring)
(paras. 1 to 108)

CONCURRING REASONS: Moldaver J. (Côté J. concurring)
(paras. 109 to 151)

DISSENTING REASONS: Kasirer J. (Wagner C.J. and Brown and Rowe JJ.
concurring)
(paras. 152 to 275)

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REFERENCE RE GENETIC NON-DISCRIMINATION ACT

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

Canadian Coalition for Genetic Fairness

Appellant

v.

**Attorney General of Canada and
Attorney General of Quebec**

Respondents

and

**Attorney General of British Columbia,
Attorney General of Saskatchewan,
Canadian Life and Health Insurance Association,
Canadian Human Rights Commission,
Privacy Commissioner of Canada and
Canadian College of Medical Geneticists**

Interveners

Indexed as: Reference re Genetic Non-Discrimination Act

2020 SCC 17

File No.: 38478.

2019: October 10; 2020: July 10.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin and Kasirer JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Constitutional law — Division of powers — Criminal law — Genetic tests — Parliament enacting legislation criminalizing compulsory genetic testing and non-voluntary use or disclosure of genetic test results in context of wide range of activities — Whether ss. 1 to 7 of Genetic Non-Discrimination Act, S.C. 2017, c. 3, are ultra vires Parliament’s jurisdiction over criminal law — Constitution Act, 1867, s. 91(27).

In 2017, Parliament enacted the *Genetic Non-Discrimination Act*. Section 2 of the *Act* defines a genetic test as “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”. Sections 3, 4 and 5 establish prohibitions relating to genetic tests: individuals and corporations cannot force individuals to take genetic tests or disclose genetic test results as a condition of obtaining access to goods, services and contracts; cannot refuse an individual access to goods, services and contracts because they have refused to take a genetic test or refused to disclose the results of a genetic test; and cannot use individuals’ genetic test results without their written consent in the areas of contracting and the provision of goods and services. Section 6 provides that the prohibitions established by ss. 3 to 5 do not apply to a physician, pharmacist or other health care practitioner, or to a person conducting

research in certain respects. Section 7 provides that doing anything prohibited by ss. 3, 4 or 5 is an offence punishable on summary conviction or by indictment. Section 8 of the *Act* amended the *Canada Labour Code* to protect employees from forced genetic testing or disclosure of test results, and from disciplinary action on the basis of genetic test results, and ss. 9 to 11 of the *Act* amended the *Canadian Human Rights Act* to add genetic characteristics as a prohibited ground of discrimination and to create a deeming provision relating to refusal to undergo genetic testing or disclose test results.

The Government of Quebec referred the constitutionality of ss. 1 to 7 of the *Act* to the Quebec Court of Appeal, asking whether these provisions were *ultra vires* to the jurisdiction of Parliament over criminal law under s. 91(27) of the *Constitution Act, 1867*. The Court of Appeal answered the reference question in the affirmative, concluding that ss. 1 to 7 of the *Act* exceeded Parliament's authority over criminal law. The Canadian Coalition for Genetic Fairness, which had intervened in the Court of Appeal, appeals to the Court as of right.

Held (Wagner C.J. and Brown, Rowe and Kasirer JJ. dissenting): The appeal should be allowed and the reference question answered in the negative.

Per Abella, **Karakatsanis** and Martin JJ.: Parliament had the power to enact the *Genetic Non-Discrimination Act* under s. 91(27) of the *Constitution Act, 1867*. The pith and substance of the challenged provisions is to protect individuals' control over their detailed personal information disclosed by genetic tests, in the

broad areas of contracting and the provision of goods and services, in order to address Canadians' fears that their genetic test results will be used against them and to prevent discrimination based on that information. This matter is properly classified within Parliament's power over criminal law. The provisions are supported by a criminal law purpose because they respond to a threat of harm to several overlapping public interests traditionally protected by the criminal law — autonomy, privacy, equality and public health.

To determine whether a law falls within the authority of Parliament or a provincial legislature, a court must first characterize the law and then, based on that characterization, classify the law by reference to the federal and provincial heads of power under the Constitution.

At the characterization stage, a court must identify the law's pith and substance. The goal is to determine the law's true subject matter, even when it differs from its apparent or stated subject matter. The court will first look to characterize the specific provisions that are challenged, rather than the legislative scheme as a whole, to determine whether they are validly enacted. Identifying a law's pith and substance requires considering both the law's purpose and its legal and practical effects. Characterization plays a critical role in determining how a law can be classified, and thus the law's matter must be precisely defined. The focus is on the law itself and what it is really about.

To determine a law's purpose, a court looks to both intrinsic and extrinsic evidence. Intrinsic evidence includes the text of the law, and provisions that expressly set out the law's purpose, as well as the law's title and structure. Extrinsic evidence includes statements made during parliamentary proceedings and drawn from government publications. Both legal and practical effects are also relevant to identifying a law's pith and substance. Legal effects flow directly from the provisions of the statute itself, whereas practical effects flow from the application of the statute.

Here, the title of the *Act* and the text of the prohibitions provide strong evidence that ss. 1 to 7 have the purpose of combatting genetic discrimination and the fear of genetic discrimination based on the results of genetic tests by prohibiting conduct that makes individuals vulnerable to genetic discrimination in the areas of contracting and the provision of goods and services. The prohibitions created by ss. 3 to 5 apply to a wide range of circumstances in which individuals might be treated adversely based on their decision about whether to undergo genetic testing. They do not target a particular activity or industry, but instead target conduct that enables genetic discrimination. Section 2 of the *Act* defines a "genetic test" as an analysis of genetic material for a health-related purpose and therefore speaks to a health-related genetic test. Reading the definition this way supports the conclusion that the *Act* aims to combat discrimination based on genetic test results, as health-related genetic tests reveal highly personal information — details that individuals might not wish to know or share and that could be used against them.

The parliamentary debates provide strong evidence to support the view that the purpose of ss. 1 to 7 is to combat genetic discrimination. The debates make clear that the immediate mischief that the law was intended to address was the lack of legal protection for the results of genetic testing, which left individuals vulnerable to genetic discrimination and gave rise to fear of genetic discrimination. Those concerns correspond to the title of the *Act* and the text of the prohibitions. Parliament's amendments to the *Canada Labour Code* and the *Canadian Human Rights Act* enacted at the same time as ss. 1 to 7 of the *Act* suggest that Parliament was looking to take a coordinated approach to tackling genetic discrimination based on test results, using different tools.

Parliament's purpose in enacting the provisions in question is borne out in the provisions' effects. Starting with legal effects, ss. 3 to 5 of the *Act* prohibit genetic testing requirements and non-consensual uses of genetic test results in a broad range of circumstances. Section 7 imposes significant penalties for contravening these prohibitions. These prohibitions and penalties will also likely affect the operation of provincial and territorial legislation that requires the disclosure of genetic test results. The most direct and significant practical effect of the prohibitions is to give individuals control over the decision of whether to undergo genetic testing and over access to the results of genetic testing. The prohibitions do so by preventing genetic testing requirements from being imposed on individuals as a condition of access to goods, services and contracts, and by preventing individuals' genetic test results from

being used non-consensually when they seek to obtain goods and services and enter into contracts.

As to classification, s. 91(27) of the *Constitution Act, 1867*, gives Parliament the exclusive authority to make laws in relation to the criminal law. A law will be valid criminal law if, in pith and substance, (1) it consists of a prohibition (2) accompanied by a penalty and (3) backed by a criminal law purpose. Here, as there are undoubtedly prohibitions accompanied by penalties, the only issue is whether ss. 1 to 7 of the *Act* are supported by a criminal law purpose.

A law is backed by a criminal law purpose if the law, in pith and substance, represents Parliament's response to a threat of harm to a public interest traditionally protected by the criminal law, such as peace, order, security, health and morality, or to a threat of harm to another similar interest. As long as Parliament is addressing a reasoned apprehension of harm to one or more of these public interests, no degree of seriousness of harm need be proved before it can make criminal law.

The essential character of the prohibitions in the *Act* represents Parliament's response to the risk of harm that the prohibited conduct, genetic discrimination and the fear of genetic discrimination based on genetic test results pose to several public interests traditionally protected by the criminal law: autonomy, privacy, equality and public health.

Safeguarding autonomy and privacy are established uses of the criminal law power. The conduct prohibited by ss. 1 to 7 of the *Act* poses a risk of harm to two facets of autonomy and personal privacy because individuals have an interest in deciding whether or not to access the detailed genetic information revealed by genetic testing and whether or not to share their test results with others. The risk of harm to these dignity-related interests in the contexts of the provision of goods and services and the conclusion of contracts is significant: the dignity, autonomy and privacy interests in individuals' detailed genetic information were understood by Parliament to be unique and strong. The potential for genetic test results to reveal highly personal information about the individual tested and the potential for abuse of genetic test results and the information they reveal are immense. Protecting fundamental moral precepts or social values is also an established criminal law purpose. Genetic discrimination threatens the fundamental social value of equality by stigmatizing and imposing adverse treatment on individuals because of their inherited, immutable genetic characteristics. In pith and substance, ss. 1 to 7 of the *Act* are Parliament's response to the risk of harm that the prohibited conduct and discrimination based on genetic test results pose to autonomy, privacy and equality. Parliament has the power under s. 91(27) to protect people from emerging threats to these interests. This is especially so when Parliament reasonably views the information it is safeguarding as uniquely elemental to identity, and uniquely vulnerable to abuse. Protecting these core interests is an established, proper use of the criminal law power.

Parliament can also use its criminal law power to respond to a reasoned apprehension of harm to public health. Genetic discrimination and the fear of genetic discrimination are barriers to accessing suitable, maximally effective health care, to preventing the onset of health conditions and to participating in research. Here, in pith and substance, Parliament's action was a response to the harm that vulnerability to and fear of genetic discrimination posed to public health. Giving individuals control over access to their genetic information by prohibiting forced genetic testing and disclosure of test results and the non-consensual collection, use or disclosure of genetic test results in the areas of contracting and the provision of goods and services targets the harmful fear of genetic discrimination that poses a threat to health. The *Act* was intended to target that fear.

Per Moldaver and Côté JJ.: There is agreement in the result with Justice Karakatsanis that ss. 1 to 7 of the *Act* represent a valid exercise of Parliament's power over criminal law set out at s. 91(27) of the *Constitution Act, 1867*. However, there is disagreement as to the pith and substance of ss. 1 to 7: it is to protect health by prohibiting conduct that undermines individuals' control over the intimate information revealed by genetic testing. By giving people control over the decision to undergo genetic testing and over the collection, disclosure and use of the results of such testing, Parliament sought to mitigate their fears that their genetic test results could be used against them in a wide variety of contexts. Parliament had ample evidence before it that this fear was causing grave harm to the health of individuals and their families, and to the public healthcare system as a whole.

The pith and substance of the impugned provisions is borne out by their purpose and effects. By enacting ss. 1 to 7 of the *Act*, Parliament sought to prohibit conduct that was undermining individuals' control over the information revealed by genetic testing — conduct that was leading to health-related harms. This purpose can be discerned from the structure and content of the *Act*, and from the parliamentary debates.

The text of the impugned provisions is a key source of intrinsic evidence of purpose. Section 2 sets out the definition of “genetic test”, which is restricted to tests that are taken for health-related purposes. This limited definition is crucial in order to accurately identify the purpose of the prohibitions in ss. 3 to 5 of the *Act*, since the term “genetic test” lies at the heart of each of those sections. Sections 3 to 5 give individuals control over the profoundly personal information revealed by genetic testing.

An additional form of intrinsic evidence is the title of the *Act*. While the short and long titles of the *Act* do not mirror the pith and substance of ss. 1 to 7, they are nonetheless consistent with the purpose identified. This is because reducing the opportunities for genetic discrimination is one of the ways in which the provisions in issue reduce individuals' fears that their genetic information will be used against them — the barrier to pursuing genetic testing that Parliament identified and sought to remove. Thus, while preventing genetic discrimination is not the dominant purpose of the impugned provisions, it is still an important feature of the legislation.

Although the constitutionality of ss. 8 to 10 of the *Act* — which amended the *Canada Labour Code* and the *Canadian Human Rights Act* — is not in issue, considering ss. 1 to 7 of the *Act* alongside those sections reveals important distinctions that shed light on the purpose of the impugned provisions. Unlike ss. 1 to 7 of the *Act*, the amendments in ss. 8 to 10 of the *Act* prohibit genetic discrimination. This indicates that where Parliament's dominant objective was to prevent and prohibit genetic discrimination, it did so directly. This supports the conclusion that the dominant purpose of ss. 1 to 7 is not preventing and prohibiting genetic discrimination, but rather prohibiting conduct that deprives individuals of control over their genetic test results in order to protect health.

The parliamentary record bolsters the conclusion regarding the purpose of the provisions in question. The debates and testimony are directed at the devastating health consequences that were resulting from people foregoing genetic testing out of fear that the personal health information revealed by such testing could be used against them, including in discriminatory ways. To avoid these health consequences, Parliament targeted a disincentive to genetic testing: individuals' lack of control over the personal health information revealed by genetic testing. It sought to remove this barrier by prohibiting conduct that deprived individuals of that control.

There is agreement with Karakatsanis J. that the most significant practical effect of the *Act* is that it gives individuals control over the decision of whether to undergo genetic testing and over access to the results of any genetic testing they

choose to undergo. Sections 1 to 7 confer near complete control over the specific category of genetic information that Parliament was targeting (i.e. “genetic test” results). These sections give individuals the ability to dictate the manner and extent to which their genetic test results may be collected, disclosed, and used in a wide array of contexts. This control has cascading effects that ultimately result in the protection of health. By giving individuals control over the intimate health-related information revealed by genetic testing, the pertinent provisions have the effect of reducing their fears that this information will be used against them in myriad ways.

At the classification stage, ss. 1 to 7 of the *Act* are backed by a criminal law purpose because they are directed at suppressing a threat. Canadians choosing to forego genetic testing and thereby dying preventable deaths and suffering other preventable health-related harms for no reason other than the fear that their genetic test results could be used against them is a threat to health that Parliament was constitutionally entitled to address, pursuant to s. 91(27) of the *Constitution Act, 1867*. Beyond addressing the dangers of preventable disease, the impugned provisions also protect other significant facets of health, like privacy and autonomy. They accordingly represent a valid exercise of Parliament’s power to enact laws in relation to the criminal law.

Per Wagner C.J. and Brown, Rowe and **Kasirer JJ.** (dissenting): The appeal should be dismissed and the reference question answered affirmatively. Sections 1 to 7 of the *Act* were not enacted within the constitutional authority of

Parliament over the criminal law under s. 91(27) of the *Constitution Act, 1867*. Rather, they fall within provincial jurisdiction over property and civil rights conferred by s. 92(13).

The pith and substance of ss. 1 to 7 of the *Act* is to regulate contracts and the provision of goods and services, in particular contracts of insurance and employment, by prohibiting some perceived misuses of one category of genetic tests, the whole with a view to promoting the health of Canadians. Sections 1 to 7 do not satisfy the substantive component of criminal law — a valid criminal law purpose — as Parliament has neither articulated a well-defined threat that it intended to target, nor did it provide any evidentiary foundation of such a threat. Instead, ss. 1 to 7 substantially affect the substantive law of insurance as well as human rights and labour legislation in all provinces.

To determine whether ss. 1 to 7 of the *Act* are *ultra vires* Parliament's jurisdiction over criminal law under s. 91(27) of the *Constitution Act, 1867*, courts must first characterize the law, i.e. determine its pith and substance, and then classify the law and determine whether it comes within the jurisdiction of the level of government that enacted it.

The exercise of characterization of impugned legislation must be as precise as possible. The true character of legislation is one which reflects its dominant purpose and effect. While other incidental features of the law may be noted, they should not dictate characterization lest classification be sent down the wrong path.

The court's inquiry into pith and substance must be anchored in the text of the impugned legislation. The court must also be careful not to let form control the pith and substance inquiry; it should examine the substance of the legislation to determine what the legislature is really doing. In order to discern the purpose for which the impugned provisions were adopted, both intrinsic and extrinsic evidence must be considered.

Regarding intrinsic evidence, while a statute's title can be helpful to identify its pith and substance, legislatures sometimes use titles to other ends. Here, neither the long title nor the short title of the *Act* can be said to reflect clearly the impugned provisions' true purpose. They do not support a conclusion that ss. 1 to 7 seek to prohibit or prevent discrimination on genetic grounds. They also do not disclose Parliament's dominant purpose as focused on privacy and autonomy.

As no preamble or purpose section outlines the *raison d'être* of the law, the text of the provisions take particular significance in determining their pith and substance. The definition of "genetic test" in s. 2 is central to identifying the law's purpose, since the prohibitions in ss. 3 to 5, the exemption in s. 6, and the penalties in s. 7 all rely on this narrow, health-based definition. Taken together, ss. 1 to 7 aim to prohibit making the provision of goods and services or the making, continuing, or offering of specific terms or conditions of a contract conditional upon an individual undergoing or disclosing the results of genetic testing. The provisions do not prohibit the use of genetic information that may be disclosed voluntarily or obtained through

other means, and they do not prohibit genetic discrimination. Sections 1 to 7 are limited in compass to a category of certain health-based genetic tests.

With respect to extrinsic evidence, the amendments to the *Canadian Human Rights Act* and *Canada Labour Code* in ss. 8 to 10 of the *Act* plainly create prohibitions against genetic discrimination which are absent from ss. 1 to 7 of the *Act*. This demonstrates that the purpose of ss. 1 to 7 is not to prohibit discrimination based on genetic characteristics. While ss. 1 to 7 may offer, to some extent, limited control to individuals over their genetic information, they do not reduce their fears surrounding genetic testing in any real measure, since they do nothing to prohibit genetic discrimination.

Next, the legislative debates are an indicia of the legislature's intent, but they cannot stand for the *Act* and replace its provisions. With that said, in this case, the debates generally reveal that genetic tests were considered to be beneficial and viewed as a means of opening avenues to improved health treatment, as they allow Canadians to be aware of risks and change their behaviour. Parliament was focused on the promotion of health and on removing barriers in order to create incentives for genetic testing. The main sectors of focus in the parliamentary record were insurance and employment. On balance, the debates emphasize that ss. 1 to 7 of the *Act* were included as a way to encourage Canadians to undergo genetic tests, by mitigating their fears that they would be misused, in particular in respect of insurance and employment.

In light of the above, the purpose of ss. 1 to 7 is not to combat discrimination based on genetic characteristics, or to control the use of private information revealed by genetic testing. Rather, their true aim is to regulate contracts, particularly contracts of insurance and employment, in order to encourage Canadians to undergo genetic tests without fear that those tests will be misused so that their health can ultimately be improved.

Immediate effects, and not indirect or speculative effects, are relevant to the validity of a law in so far as they reveal its pith and substance. Here, the dominant effects of ss. 1 to 7 concern the regulation of insurance and the promotion of health rather than the protection of privacy and autonomy or the prevention of genetic discrimination. The provisions' focus is on controlling the exchange of information obtained through specific means in relation to contracts and the provision of goods and services, particularly in the insurance industry. Legally, the provisions represent a departure from the provincial law of insurance and human rights legislation in Canada; practically, the insurance market will be affected by the incomplete information insurers receive from some policy-holders.

The definition of "genetic test" in s. 2 of the *Act* and the conditions placed on contracts and the provision of services in ss. 3 to 5 also indicate plainly that health improvement is the dominant effect sought by ss. 1 to 7 of the *Act*. The contested provisions seek to improve the health of Canadians through the removal of a stumbling block: the fear that genetic tests will be misused. They also bear upon

privacy and autonomy. However, given the focus on a narrow category of testing and only on genetic information derived from genetic tests, and given that all information about one's health is considered private, the effects of the impugned provisions on privacy are incidental to the promotion of health.

The sole issue at the classification stage is whether Parliament was authorized to enact the impugned provisions under the criminal law power conferred by s. 91(27) of the *Constitution Act, 1867*. A law will be properly categorized as valid criminal law if three essential elements are satisfied: a prohibition, a penalty related to that prohibition, and a valid criminal law purpose. The first two elements are formal requirements while the third is substantive. This tripartite test ensures Parliament cannot use its authority improperly to invade upon provinces' areas of competence, thus ensuring the balance of federalism is respected. Here, the only issue concerns whether ss. 1 to 7 are supported by the third requirement, a valid criminal law purpose.

For the substantive criminal law purpose requirement to be met, the impugned legislation must be directed at an evil or injurious or undesirable effect upon the public. The concept of "evil" is necessary to remind Parliament that mere undesirable effects are not sufficient for legislation to have a criminal purpose. It remains conceptually useful for courts to search for an evil before the criminal law purpose requirement is satisfied. Three questions must be confronted when determining whether a law rests upon a valid criminal law purpose. First, does the

impugned legislation relate to a public purpose, such as public peace, order, security, health, or morality? Second, did Parliament articulate a well-defined threat to be suppressed or prevented by the impugned legislation (i.e. the evil or injurious or undesirable effect upon the public)? Third, is the threat “real”, in the sense that Parliament had a concrete basis and a reasoned apprehension of harm when enacting the impugned legislation?

Regarding the first question, there is agreement that the contested provisions can be said to relate to a public purpose: health. There is a clear dimension related to health in the dominant character of the legislation. The impugned provisions also have an impact on privacy and autonomy, but the scope of the definition of “genetic test” in s. 2 means that health is the primary character of the law and that privacy and autonomy are only derivatives thereof.

Regarding the second question, Parliament must clearly articulate and define the scope of the threat it seeks to suppress, i.e. it must articulate a precise threat with ascertainable contours. This requirement is particularly important in relation to matters that have provincial aspects, such as health, in order to preserve the balance of federal and provincial powers. It is not sufficient for the impugned provisions’ pith and substance to merely relate to health; it must also involve suppressing an evil or injurious or undesirable effect upon the public. Here, there is no defined public health evil or threat to be suppressed. The objective of the legislation is to foster or promote beneficial health practices — it seeks to encourage

Canadians to undergo genetic testing, which may then result in better health outcomes. This, in and of itself, will simply not suffice at this stage. The mere fact that genetic testing is a novel development does not, on its own, bring it within the purview of the criminal law. Moreover, a gap in provincial legislations across the country is not a well-defined threat that justifies recourse to the criminal law.

Regarding the third question, while Parliament undoubtedly has wide latitude to determine the nature and degree of harm to which it wishes to respond, it cannot act where there is no adequate evidentiary foundation of harm. Had there been a well-defined threat to health in this case, there still would have been no evidentiary foundation of harm. Rather, Parliament seeks to improve the health of Canadians by making them aware of underlying conditions they may have and does so by attempting to encourage the use of genetic tests. The contested provisions therefore do not satisfy the substantive component of criminal law.

Cases Cited

By Karakatsanis J.

Applied: *Reference re Validity of Section 5(a) of the Dairy Industry Act*, [1949] S.C.R. 1, aff'd [1951] A.C. 179; **referred to:** *OPSEU v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2; *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, 2002 SCC 31, [2002] 2 S.C.R. 146; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217; *Re Resolution to amend the Constitution*,

[1981] 1 S.C.R. 753; *Hodge v. The Queen* (1883), 9 App. Cas. 117; *Reference re pan-Canadian securities regulation*, 2018 SCC 48, [2018] 3 S.C.R. 189; *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3; *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, [2011] 3 S.C.R. 134; *Quebec (Attorney General) v. Canada (Attorney General)*, 2015 SCC 14, [2015] 1 S.C.R. 693; *Reference re Securities Act*, 2011 SCC 66, [2011] 3 S.C.R. 837; *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, 2015 SCC 53, [2015] 3 S.C.R. 419; *Smith v. The Queen*, [1960] S.C.R. 776; *Goodwin v. British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 46, [2015] 3 S.C.R. 250; *Chatterjee v. Ontario (Attorney General)*, 2009 SCC 19, [2009] 1 S.C.R. 624; *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161; *Reference re Firearms Act (Can.)*, 2000 SCC 31, [2000] 1 S.C.R. 783; *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641; *Reference re Assisted Human Reproduction Act*, 2010 SCC 61, [2010] 3 S.C.R. 457; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199; *R. v. Morgentaler*, [1993] 3 S.C.R. 463; *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3; *Desgagnés Transport Inc. v. Wärtsilä Canada Inc.*, 2019 SCC 58; *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486; *Canadian National Railway Co. v. Canada (Attorney General)*, 2014 SCC 40, [2014] 2 S.C.R. 135; *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213; *R. v. Malmö-Levine*, 2003 SCC 74, [2003] 3 S.C.R. 571; *Proprietary Articles Trade Association v. Attorney General for Canada*, [1931] A.C. 310; *Scowby v. Glendinning*, [1986] 2 S.C.R. 226; *R. v. Wetmore*, [1983] 2 S.C.R. 284; *Standard Sausage Co. v. Lee*, [1933] 4 D.L.R. 501; *R. v. Morgentaler*, [1988] 1 S.C.R. 30; *R. v. Jarvis*, 2019 SCC 10, [2019] 1 S.C.R. 488;

R. v. Dyment, [1988] 2 S.C.R. 417; *R. v. Tessling*, 2004 SCC 67, [2004] 3 S.C.R. 432; *R. v. Cole*, 2012 SCC 53, [2012] 3 S.C.R. 34; *Labatt Breweries of Canada Ltd. v. Attorney General of Canada*, [1980] 1 S.C.R. 914; *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331; *Association des parents de l'école Rose-des-vents v. British Columbia (Education)*, 2015 SCC 21, [2015] 2 S.C.R. 139.

By Moldaver J.

Applied: *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199; **referred to:** *Quebec (Attorney General) v. Canada (Attorney General)*, 2015 SCC 14, [2015] 1 S.C.R. 693; *Ward v. Canada (Attorney General)*, 2002 SCC 17, [2002] 1 S.C.R. 569; *Reference re Validity of Section 5(a) of the Dairy Industry Act*, [1949] S.C.R. 1; *RJR-MacDonald Inc. v. Canada (Attorney General)* (1991), 82 D.L.R. (4th) 449; *RJR-MacDonald Inc. v. Canada (Attorney General)* (1993), 102 D.L.R. (4th) 289; *Reference re Firearms Act (Can.)*, 2000 SCC 31, [2000] 1 S.C.R. 783.

By Kasirer J. (dissenting)

Reference re Validity of Section 5(a) of the Dairy Industry Act, [1949] S.C.R. 1; *Desgagnés Transport Inc. v. Wärtsilä Canada Inc.*, 2019 SCC 58; *Reference re Assisted Human Reproduction Act*, 2010 SCC 61, [2010] 3 S.C.R. 457; *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3; *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, [2011] 3

S.C.R. 134; *Reference re Environmental Management Act (British Columbia)*, 2019 BCCA 181, 25 B.C.L.R. (6th) 1, aff'd 2020 SCC 1; *R. v. Morgentaler*, [1993] 3 S.C.R. 463; *Reference re Firearms Act (Can.)*, 2000 SCC 31, [2000] 1 S.C.R. 783; *Quebec (Attorney General) v. Canada (Attorney General)*, 2015 SCC 14, [2015] 1 S.C.R. 693; *Global Securities Corp. v. British Columbia (Securities Commission)*, 2000 SCC 21, [2000] 1 S.C.R. 494; *Ward v. Canada (Attorney General)*, 2002 SCC 17, [2002] 1 S.C.R. 569; *Chatterjee v. Ontario (Attorney General)*, 2009 SCC 19, [2009] 1 S.C.R. 624; *R. v. Comeau*, 2018 SCC 15, [2018] 1 S.C.R. 342; *Canadian Federation of Agriculture v. Attorney-General for Quebec*, [1951] A.C. 179; *R. v. Marmo-Levine*, 2003 SCC 74, [2003] 3 S.C.R. 571; *Schneider v. The Queen*, [1982] 2 S.C.R. 112; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199; *R. v. Wetmore*, [1983] 2 S.C.R. 284; *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213; *Labatt Breweries of Canada Ltd. v. Attorney General of Canada*, [1980] 1 S.C.R. 914; *R. v. Hauser*, [1979] 1 S.C.R. 984; *R. v. Butler*, [1992] 1 S.C.R. 452; *Citizens Insurance Co. v. Parsons* (1881), 7 App. Cas. 96; *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331.

Statutes and Regulations Cited

An Act to amend the Canadian Human Rights Act and the Criminal Code, S.C. 2017, c. 13.

Bill S-201, *An Act to prohibit and prevent genetic discrimination*, 1st Sess., 42nd Parl., 2017.

Bill S-201, *An Act to prohibit and prevent genetic discrimination*, 2nd Sess., 41st Parl., 2015.

Bill S-218, *An Act to prohibit and prevent genetic discrimination*, 1st Sess., 41st Parl., 2013, s. 6.

Canada Labour Code, R.S.C. 1985, c. L-2, ss. 247.98, 247.99.

Canadian Charter of Rights and Freedoms, s. 8.

Canadian Human Rights Act, R.S.C. 1985, c. H-6, ss. 2, 3(1), (2), (3).

Charter of Human Rights and Freedoms, CQLR, c. C-12, ss. 10, 12, 13, 20.1 para. 2.

Civil Code of Québec, art. 2408.

Constitution Act, 1867, ss. 91, 92.

Constitution Act, 1982, s. 35.

Court of Appeal Reference Act, CQLR, c. R-23, s. 1.

Criminal Code, R.S.C. 1985, c. C-46, ss. 162(1), 184.

Genetic Non-Discrimination Act, S.C. 2017, c. 3, ss. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11.

Human Rights Code, R.S.O. 1990, c. H.19, s. 22.

Interpretation Act, R.S.C. 1985, c. I-21, s. 5(2).

Authors Cited

Boivin, Denis. *Insurance Law*, 2nd ed. Toronto: Irwin Law, 2015.

Canada. House of Commons. *House of Commons Debates*, vol. 148, No. 47, 1st Sess., 42nd Parl., May 3, 2016, p. 2736.

Canada. House of Commons. *House of Commons Debates*, vol. 148, No. 77, 1st Sess., 42nd Parl., September 20, 2016, pp. 4885-87, 4889-90, 4892-94.

Canada. House of Commons. *House of Commons Debates*, vol. 148, No. 97, 1st Sess., 42nd Parl., October 25, 2016, pp. 6125-28.

Canada. House of Commons. *House of Commons Debates*, vol. 148, No. 140, 1st Sess., 42nd Parl., February 14, 2017, p. 8955.

Canada. House of Commons. Standing Committee on Justice and Human Rights. *Evidence*, No. 34, 1st Sess., 42nd Parl., November 15, 2016, p. 2.

- Canada. House of Commons. Standing Committee on Justice and Human Rights. *Evidence*, No. 35, 1st Sess., 42nd Parl., November 17, 2016, p. 13.
- Canada. House of Commons. Standing Committee on Justice and Human Rights. *Evidence*, No. 36, 1st Sess., 42nd Parl., November 22, 2016, pp. 12-13.
- Canada. House of Commons. Standing Committee on Justice and Human Rights. *Evidence*, No. 37, 1st Sess., 42nd Parl., November 24, 2016, pp. 1-11.
- Canada. Office of the Privacy Commissioner of Canada. *The Potential Economic Impact of a Ban on the Use of Genetic Information for Life and Health Insurance*, by Michael Hoy and Maureen Durnin. Gatineau, 2012.
- Canada. Senate. *Debates of the Senate*, vol. 148, No. 154, 1st Sess., 41st Parl., April 23, 2013, pp. 3744-45.
- Canada. Senate. *Debates of the Senate*, vol. 149, No. 32, 2nd Sess., 41st Parl., February 5, 2014, p. 889.
- Canada. Senate. *Debates of the Senate*, vol. 149, No. 137, 2nd Sess., 41st Parl., May 5, 2015, pp. 3270-78, 3281.
- Canada. Senate. *Debates of the Senate*, vol. 150, No. 8, 1st Sess., 42nd Parl., January 27, 2016, pp. 146-51.
- Canada. Senate. *Debates of the Senate*, vol. 150, No. 22, 1st Sess., 42nd Parl., March 22, 2016, p. 381.
- Canada. Senate. *Debates of the Senate*, vol. 150, No. 26, 1st Sess., 42nd Parl., April 13, 2016, p. 459.
- Canada. Senate. Standing Senate Committee on Human Rights. *Proceedings of the Standing Senate Committee on Human Rights*, No. 2, 1st Sess., 42nd Parl., March 9, 2016, pp. 2:15, 2:28.
- Canada. Senate. Standing Senate Committee on Human Rights. *Proceedings of the Standing Senate Committee on Human Rights*, No. 11, 2nd Sess., 41st Parl., October 2, 2014, pp. 11:88-11:96.
- Canada. Senate. Standing Senate Committee on Human Rights. *Proceedings of the Standing Senate Committee on Human Rights*, No. 15, 2nd Sess., 41st Parl., February 19, 2015, p. 15:49.
- Grand Robert de la langue française*, 2^e éd. par Alain Rey, dir. Paris: Le Robert, 2001, “*diagnostic*”, “*pronostic*”.
- Hogg, Peter W. *Constitutional Law of Canada*, vol. 1, 5th ed. Supp. Scarborough, Ont.: Thomson/Carswell, 2007 (loose-leaf updated 2019, release 1).

- Lluelles, Didier. *Droit des assurances terrestres*, 6^e éd. Montréal: Thémis, 2017.
- Newman, Dwight. “Changing Division of Powers Doctrine and the Emergent Principle of Subsidiarity” (2011), 74 *Sask. L.R.* 21.
- Ogbogu, Ubaka. “The Assisted Human Reproduction Act Reference and the Thin Line Between Health and Crime” (2013), 22 *Constitutional Forum* 93.
- Oxford English Dictionary*, 2nd ed. Oxford: Clarendon Press, 1989, “diagnosis”, “prognosis”.
- Régimbald, Guy, and Dwight Newman. *The Law of the Canadian Constitution*, 2nd ed. Toronto: LexisNexis, 2017.
- Sullivan, Ruth. *Statutory Interpretation*, 3rd ed. Toronto: Irwin Law, 2016.
- Sullivan, Ruth. *Sullivan on the Construction of Statutes*, 6th ed. Markham, Ont.: LexisNexis, 2014.
- Sylvestre, Marie-Eve. « Droit criminel, droit pénal et droits individuels », dans *JurisClasseur Québec — Collection droit public — Droit constitutionnel*, par Pierre-Claude Lafond, dir. Montréal: LexisNexis, 2010, fascicule 14 (feuilles mobiles mises à jour novembre 2019, envoi n^o 16).

APPEAL from a judgment of the Quebec Court of Appeal (Duval Hesler C.J. and Bich, Bélanger, Savard and Mainville JJ.A.), 2018 QCCA 2193, 2019 CLLC ¶230-020, [2018] AZ-51556275, [2018] Q.J. No. 12399 (QL), 2018 CarswellQue 11522 (WL Can.), in the matter of a reference concerning the constitutionality of the *Genetic Non-Discrimination Act* enacted by ss. 1 to 7 of the *Act to prohibit and prevent genetic discrimination*. Appeal allowed, Wagner C.J. and Brown, Rowe and Kasirer JJ. dissenting.

Joseph J. Arvay, Q.C., Bruce B. Ryder, Michael Sobkin and William Colish, for the appellant.

Alexander Pless and Liliane Bantourakis, for the respondent the Attorney General of Canada.

Francis Demers and Samuel Chayer, for the respondent the Attorney General of Quebec.

J. Gareth Morley and Zachary Froese, for the intervener the Attorney General of British Columbia.

Dana J. Brûlé, for the intervener the Attorney General of Saskatchewan.

Christopher Richter and Nick Kennedy, for the intervener the Canadian Life and Health Insurance Association.

Fiona Keith and Daniel Poulin, for the intervener the Canadian Human Rights Commission.

Frank Addario and Samara Sectar, for the intervener the Privacy Commissioner of Canada.

Michael Bookman, for the intervener the Canadian College of Medical Geneticists.

Douglas Mitchell, as amicus curiae, and Olga Redko and Léa Charbonneau.

The reasons of Abella, Karakatsanis and Martin JJ. were delivered by

KARAKATSANIS J. —

[1] Parliament criminalized compulsory genetic testing and the non-voluntary use or disclosure of genetic test results in the context of a wide range of activities — activities that structure much of our participation in society. This Court must decide whether Parliament could validly use its broad criminal law power to do so.

[2] In particular, we must decide whether s. 91(27) of the *Constitution Act, 1867* empowers Parliament to prohibit forcing an individual to take a genetic test or to disclose genetic test results, or to prohibit using an individual's genetic test results without consent, by way of ss. 1 to 7 of the *Genetic Non-Discrimination Act, S.C. 2017, c. 3*. Answering that question turns on whether Parliament enacted the challenged prohibitions for a valid criminal law purpose. I find that it did.

[3] The Government of Quebec referred the constitutionality of ss. 1 to 7 of the *Act* to the Quebec Court of Appeal, which concluded that those provisions fell

outside Parliament's authority to make criminal law. The appellant, the Canadian Coalition for Genetic Fairness, appeals to this Court as of right.

[4] I would allow the appeal and conclude that Parliament had the power to enact ss. 1 to 7 of the *Genetic Non-Discrimination Act* under s. 91(27). As I explain below, the “matter” (or pith and substance) of the challenged provisions is to protect individuals’ control over their detailed personal information disclosed by genetic tests, in the broad areas of contracting and the provision of goods and services, in order to address Canadians’ fears that their genetic test results will be used against them and to prevent discrimination based on that information. This matter is properly classified within Parliament’s s. 91(27) power over criminal law. The provisions are supported by a criminal law purpose because they respond to a threat of harm to several overlapping public interests traditionally protected by the criminal law. The prohibitions in the *Act* protect autonomy, privacy, equality and public health, and therefore represent a valid exercise of Parliament’s criminal law power.

I. Genetic Non-Discrimination Act

[5] In December 2015, Senator James S. Cowan introduced Bill S-201, *An Act to prohibit and prevent genetic discrimination*, 1st Sess., 42nd Parl., 2017, which would eventually become the *Genetic Non-Discrimination Act*, in the Senate. The Senate passed the bill by unanimous vote. The House of Commons passed it with 222 members of Parliament voting in favour and 60 against. Although the government opposed the bill, it did not require its backbenchers to vote against it. The bill came

into force on royal assent as the *Genetic Non-Discrimination Act*: see *Interpretation Act*, R.S.C. 1985, c. I-21, s. 5(2).

[6] Section 2 of the *Act* defines a genetic test as “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”. Sections 3, 4 and 5 establish the following prohibitions relating to genetic tests:

3 (1) It is prohibited for any person to require an individual to undergo a genetic test as a condition of

- (a) providing goods or services to that individual;
- (b) entering into or continuing a contract or agreement with that individual; or
- (c) offering or continuing specific terms or conditions in a contract or agreement with that individual.

(2) It is prohibited for any person to refuse to engage in an activity described in any of paragraphs (1)(a) to (c) in respect of an individual on the grounds that the individual has refused to undergo a genetic test.

4 (1) It is prohibited for any person to require an individual to disclose the results of a genetic test as a condition of engaging in an activity described in any of paragraphs 3(1)(a) to (c).

(2) It is prohibited for any person to refuse to engage in an activity described in any of paragraphs 3(1)(a) to (c) in respect of an individual on the grounds that the individual has refused to disclose the results of a genetic test.

5 It is prohibited for any person who is engaged in an activity described in any of paragraphs 3(1)(a) to (c) in respect of an individual to collect, use or disclose the results of a genetic test of the individual without the individual’s written consent.

[7] Thus, individuals and corporations cannot force individuals to take genetic tests or disclose genetic test results and cannot use individuals' genetic test results without their written consent in the areas of contracting¹ and the provision of goods and services.

[8] Section 7 provides that doing anything prohibited by ss. 3, 4 or 5 is an offence punishable on summary conviction by a fine of up to \$300,000 or imprisonment of up to 12 months, or both, and on indictment by a fine of up to \$1 million or imprisonment of up to 5 years, or both.

[9] Section 6 provides that the prohibitions established by ss. 3 to 5 do not apply to a physician, pharmacist or other health care practitioner "in respect of an individual to whom they are providing health services" and also do not apply to "a person who is conducting medical, pharmaceutical or scientific research in respect of an individual who is participating in the research".

[10] Sections 8, 9 and 10 of the *Act* amended the *Canada Labour Code*, R.S.C. 1985, c. L-2, and the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6.² None of those amendments is at issue in this appeal, but, as I explain below, they may help illuminate the purpose of ss. 1 to 7 of the *Act*.

¹ The provisions refer to entering into and continuing both contracts and agreements. Although the notion of an agreement is broader than that of a contract in a private law sense, I will refer simply to "contracting" and "entering into contracts" throughout these reasons.

² Section 11 of the *Genetic Non-Discrimination Act*, which coordinated the amendments to the *Canadian Human Rights Act* made by ss. 9 and 10(1) of the *Genetic Non-Discrimination Act* with those made by *An Act to amend the Canadian Human Rights Act and the Criminal Code*, S.C. 2017, c. 13, came into force in June 2017.

II. Quebec Court of Appeal's Opinion, 2018 QCCA 2193, 2019 CLLC ¶230-020

[11] The Government of Quebec referred the following question to the Quebec Court of Appeal under the *Court of Appeal Reference Act*, CQLR, c. R-23, s.

1:

Is 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) *ultra vires* to the jurisdiction of the Parliament of Canada over criminal law under paragraph 91(27) of the *Constitution Act, 1867*? [para. 1]

[12] The Court of Appeal held that, in pith and substance, the *Act* aims to “encourage the use of genetic tests in order to improve the health of Canadians by suppressing the fear of some that this information could eventually serve discriminatory purposes in the entering of agreements o[r] in the provision of goods and services, particularly insurance and employment contracts”: para. 11. In the Court of Appeal’s view, despite its title, nothing in the challenged provisions of the *Act* prohibits or even addresses genetic discrimination. The only mention of genetic discrimination is found in the amendments to the *Canadian Human Rights Act*.

[13] With that characterization in mind, the Court of Appeal concluded that the provisions do not pursue a valid criminal law purpose. In the Court of Appeal’s view, the prohibitions created by ss. 3, 4 and 5 of the *Genetic Non-Discrimination Act* govern the type of information available for employment and insurance purposes, which is not a valid criminal law purpose. Moreover, the Court of Appeal reasoned

that merely promoting health by encouraging more people to take genetic tests is not a criminal purpose because it does not attack a “real public health evil”, in contrast to legislation that concerns tobacco and illegal drugs, both of which “intrinsically present a threat to public health”: para. 24.

[14] Accordingly, the Court of Appeal answered the reference question in the affirmative, concluding that ss. 1 to 7 of the *Act* exceed Parliament’s authority over criminal law.

III. Issue

[15] The only issue before this Court is whether Parliament had the power under s. 91(27) to enact ss. 1 to 7 of the *Genetic Non-Discrimination Act*. The wisdom of Parliament’s decision to criminalize the conduct the provisions prohibit is not in issue. Nor is it this Court’s task to consider whether the policy objectives advanced by the provisions could be better achieved by other means, such as provincial legislation. My conclusion that ss. 1 to 7 of the *Act* are valid criminal law does not preclude the provincial legislatures from addressing similar matters within their spheres of jurisdiction, subject to the doctrine of paramountcy.

IV. Parties’ Positions

[16] The appellant, the Canadian Coalition for Genetic Fairness, was an intervener before the Quebec Court of Appeal and appeals as of right to this Court. It

contends that the *Act* falls squarely within Parliament's authority over the criminal law. In the appellant's view, the *Act's* pith and substance is to protect and promote health by putting in place prohibitions that target compelled testing or the non-voluntary use or disclosure of genetic test results, practices that have serious consequences for health, privacy and equality. The appellant argues that the provisions pursue multiple criminal law objectives.

[17] The respondents, the Attorneys General of Canada and of Quebec, both take the position that the *Act* is beyond Parliament's authority. The Attorney General of Canada argues that the pith and substance of ss. 1 to 7 of the *Act* is to regulate contracts and the provision of goods and services with the aim of promoting health. The Attorney General of Quebec submits that, in pith and substance, the *Act* seeks to regulate the use of genetic information by insurance companies and employers under provincial jurisdiction. Accordingly, the Attorneys General submit that the challenged provisions in pith and substance relate primarily to matters properly classified as falling within the provinces' jurisdiction over property and civil rights under s. 92(13) of the *Constitution Act, 1867*.

[18] While the Court pays respectful attention to the submissions of attorneys general, they remain just that — submissions — even in the face of agreement between attorneys general. This Court's reference to agreement between federal and provincial attorneys general in the past has been in the context where they agree that the legislation at issue *is* constitutional: see, for example, *OPSEU v. Ontario*

(*Attorney General*), [1987] 2 S.C.R. 2, at pp. 19-20; *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, 2002 SCC 31, [2002] 2 S.C.R. 146, at paras. 72-73. More fundamentally, agreement of the attorneys general that legislation is unconstitutional is not, in itself, persuasive. Parliament enacted the challenged provisions. The sole issue before us is whether it had the power to do so.

[19] Given the positions taken by the Attorneys General of Canada and Quebec, the Quebec Court of Appeal appointed Douglas Mitchell as *amicus curiae* to argue that the *Act* is within Parliament's authority. Mr. Mitchell reprised his role before this Court. He submits that the provisions are, in pith and substance, directed at the protection of the physical and psychological security and the dignity of vulnerable persons, as well as the prevention of social outcomes that Parliament has deemed to be morally wrong. The *Act* aims to further criminal law purposes and was validly enacted under s. 91(27).

V. Analysis

[20] The Constitution of Canada is fundamentally defined by its federal structure; the organizing principle of federalism infuses and breathes life into it: *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at paras. 32 to 49. This Court has held that the principle of federalism runs through the political and legal systems of Canada, and that the division of powers effected mainly by ss. 91 and 92 of the *Constitution Act, 1867* is the "primary textual expression" of the federalism principle

in the Constitution: *Re Resolution to amend the Constitution*, [1981] 1 S.C.R. 753, at pp. 905-9; *Secession Reference*, at para. 47.

[21] The division of powers assigns spheres of jurisdiction to a central Parliament and to the provincial legislatures, distributing the whole of legislative authority in Canada. Within their respective spheres, the legislative authority of the Parliament and the provincial legislatures is supreme (subject to the constraints established by the Constitution, including the *Canadian Charter of Rights and Freedoms* and s. 35 of the *Constitution Act, 1982*): *Hodge v. The Queen* (1883), 9 App. Cas. 117 (P.C.), at p. 132; *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48, [2018] 3 S.C.R. 189, at paras. 56-57. The principle of federalism and the division of powers are aimed at reconciling diversity with unity: *Secession Reference*, at para. 43. They protect the autonomy of the provinces to pursue their own unique goals within their spheres of jurisdiction, while allowing the federal government to pursue common goals within its spheres.

[22] This Court's approach to the division of powers has evolved to embrace the possibility of intergovernmental cooperation and overlap between valid exercises of provincial and federal authority. In keeping with the movement of constitutional law towards a more flexible view of federalism that reflects the political and cultural realities of Canadian society, the fixed "watertight compartments" approach has long since been overtaken and the doctrine of interjurisdictional immunity has been limited: see *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3, at

paras. 23, 67 and 77; *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, [2011] 3 S.C.R. 134, at paras. 60-66. Indeed, the more flexible principle of “co-operative federalism” and the doctrines of double aspect and paramountcy have been developed in part to account for the increasing complexity of modern society: *Canadian Western Bank*, at paras. 24, 30 and 37; *Quebec (Attorney General) v. Canada (Attorney General)*, 2015 SCC 14, [2015] 1 S.C.R. 693, at para. 17; *Reference re Pan-Canadian Securities Regulation*, at para. 18. The modern view of federalism “accommodates overlapping jurisdiction and encourages intergovernmental cooperation”: *Reference re Securities Act*, 2011 SCC 66, [2011] 3 S.C.R. 837, at para. 57.

[23] The courts’ preference for accommodating cooperation and overlap between provincial and federal legislation has often played a role in upholding the validity or constitutional operability of provincial legislation, particularly when the legislature has acted in an area in which Parliament has also legislated or over which there is a federal aspect: see, for example, *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, 2015 SCC 53, [2015] 3 S.C.R. 419; *Smith v. The Queen*, [1960] S.C.R. 776; *Goodwin v. British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 46, [2015] 3 S.C.R. 250; *Chatterjee v. Ontario (Attorney General)*, 2009 SCC 19, [2009] 1 S.C.R. 624. This Court has described cooperative federalism as a principle used in part to “avoid unnecessary constraints on provincial legislative action”: *Quebec (Attorney General) v. Canada (Attorney General)*, at para. 17.

[24] However, cooperative federalism and the increased tolerance for overlap captured by the double aspect and paramountcy doctrines have also been invoked to support federal legislation and interlocking federal and provincial legislative schemes in some circumstances: see, for example, *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161; *Reference re Pan-Canadian Securities Regulation*, at para. 18.

[25] This Court has also emphasized that the principle of cooperative federalism does not override or modify the scope of the legislative authority conferred by the Constitution: *Quebec (Attorney General) v. Canada (Attorney General)*, at paras. 18-19. Where the Constitution empowers one level of government to take unilateral action, cooperative federalism will not stand in its way: para. 20.

[26] To determine whether a law falls within the authority of Parliament or a provincial legislature, a court must first characterize the law and then, based on that characterization, classify the law by reference to the federal and provincial heads of power under the Constitution: *Reference re Firearms Act (Can.)*, 2000 SCC 31, [2000] 1 S.C.R. 783, at para. 15; *Reference re Securities Act*, at para. 63; *Reference re Pan-Canadian Securities Regulation*, at para. 86.

[27] Accordingly, I begin by characterizing the provisions of the *Genetic Non-Discrimination Act*, then proceed to determine whether they are properly classified as coming within Parliament's criminal law power.

A. *Characterization*

[28] At the characterization stage, a court must identify the law's "pith and substance", or "*caractère véritable*". Since the Constitution gives Parliament and the provincial legislatures the authority to "make Laws in relation" to certain "Matters", the pith and substance analysis aims to "identif[y] the [law's] 'matter'": *Constitution Act, 1867*, ss. 91 and 92; see also *Canadian Western Bank*, at para. 26. As this Court recently described it in the *Reference re Pan-Canadian Securities Regulation*, at para. 86, the goal is to determine the law's "true subject matter", even when it differs from its apparent or stated subject matter: *Firearms Reference*, at para. 18. Generally, the court will first look to characterize the specific provisions that are challenged, rather than the legislative scheme as a whole, to determine whether they are validly enacted: *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641, at pp. 666-67.

[29] This Court has articulated the concept of the law's matter or pith and substance in a number of other ways, including by describing it as the law's "dominant purpose", "leading feature or true character", "dominant or most important characteristic": *Reference re Assisted Human Reproduction Act*, 2010 SCC 61, [2010] 3 S.C.R. 457, at para. 184 (*Reference re AHRA*), citing *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 29; *R. v. Morgentaler*, [1993] 3 S.C.R. 463, at p. 481 (*Morgentaler* (1993)); *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, at p. 62, and the "essence of what the law does and how it does it": *Reference re AHRA*, at para. 284, citing *Chatterjee*, at para. 16; see also *Reference re AHRA*, at paras. 20 and 23.

[30] Identifying a law's pith and substance requires considering both the law's purpose and its effects: *Firearms Reference*, at para. 16. Both Parliament's or the provincial legislature's purpose and the legal and practical effects of the law will assist the court in determining the law's essential character.

[31] Characterizing a law can be a challenging exercise, especially when the challenged law has multiple features, and the court must determine which of those features is most important. Characterization plays a critical role in determining how a law can be classified, and thus the law's matter must be precisely defined: see *Desgagnés Transport Inc. v. Wärtsilä Canada Inc.*, 2019 SCC 58, at para. 35; see also *Reference re AHRA*, at paras. 190-91, per LeBel and Deschamps JJ. Identifying the pith and substance of the challenged law as precisely as possible encourages courts to take a close look at the evidence of the law's purpose and effects, and discourages characterization that is overly influenced by classification. The focus is on the law itself and what it is really about.

[32] Identifying the law's matter with precision also discourages courts from characterizing the law in question too broadly, which may result in it being superficially related to both federal and provincial heads of power, or may exaggerate the extent to which the law extends into the other level of government's sphere of jurisdiction: *Desgagnés Transport*, at para. 35; *Reference re AHRA*, at para. 190. Precisely defining the impugned law's matter therefore facilitates classification. But

precision should not be confused with narrowness. Pith and substance should capture the law's essential character in terms that are as precise as the law will allow.

[33] I now turn to characterizing ss. 1 to 7 of the *Act*, considering first the provisions' purpose before turning to their effects.

(1) Purpose

[34] To determine a law's purpose, a court looks to both intrinsic and extrinsic evidence. Intrinsic evidence includes the text of the law, and provisions that expressly set out the law's purpose, as well as the law's title and structure. Extrinsic evidence includes statements made during parliamentary proceedings and drawn from government publications: *Firearms Reference*, at para. 17.

[35] A law's title, especially its long title, is an important form of intrinsic evidence, as both titles are an integral part of the law: R. Sullivan, *Sullivan on the Construction of Statutes* (6th ed. 2014), at pp. 440-41. Here, both the short title — the *Genetic Non-Discrimination Act* — and the long title — *An Act to prohibit and prevent genetic discrimination* — suggest that the *Act's* purpose is twofold. They suggest that the *Act* seeks to prohibit discrimination on genetic grounds and prevent such discrimination from occurring in the first place.

[36] Turning to the *Act's* text and structure, the prohibitions created by ss. 3 to 5 apply to a wide range of circumstances (obtaining goods and services and entering

into contracts) in which individuals might be treated adversely based on their decision whether to undergo genetic testing and based on test results. The prohibitions are of general application, as they do not target a particular activity or industry. Instead, they target specific behaviour related to genetic testing, namely forcing individuals to undergo testing and disclose test results, and using test results without consent. The prohibitions target conduct that enables genetic discrimination.

[37] The definition of “genetic test” in s. 2 of the *Act* is broad and captures analyses of DNA, RNA or chromosomes performed with a wide range of ends in mind. Section 2 defines a genetic test as “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”.

[38] This definition identifies a test that conducts analysis of genetic material and provides examples of the types of purposes for which such analysis may be undertaken. Each example speaks to “disease”: its “prediction”, “diagnosis”, “prognosis” and “monitoring” and the “prediction” of the “risk” of its “vertical transmission” from a gestational parent to a child.³ On their face, these words appear to be illustrative examples. But, when read in context, they serve to delineate the scope of the definition. After all, analysis is always conducted for a purpose, so Parliament’s choice to refer to analysis for certain types of purposes must be given meaning. The use of these medical terms relating to disease in association with one

³ See *The Oxford English Dictionary* (2nd ed. 1989), vol. IV, “diagnosis”, at p. 596, and vol. XII, “prognosis”, at p. 587; *Le Grand Robert de la langue française* (2nd ed. 2001), vol. 2, “*diagnostic*”, at p. 1466, and vol. 5, “*pronostic*”, at p. 1288.

another indicates that the purpose for which the analysis is undertaken must be health-related. Since a genetic test is defined as an analysis of genetic material for a health-related purpose, I think it fair to say that the definition speaks to a health-related genetic test. Indeed, Parliament's particular concern for protecting individuals' control over the results of health-related genetic tests pervades the debates, as I explain below.

[39] Reading the definition this way would support — not detract from — the conclusion that the *Act* aims to combat discrimination based on genetic test results. Health-related genetic tests reveal highly personal information — details that individuals might not wish to know or share and that could be used against them. The prohibitions target a broad range of conduct that creates the opportunity for genetic discrimination based on intimate personal information revealed by health-related tests. Parliament saw genetic test results relating to health as particularly vulnerable to abuse and discrimination. The intrinsic evidence suggests that the purpose of the provisions is 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 (the areas of contracting and the provision of goods and services). The extrinsic evidence points largely in the same direction.

[40] The main source of extrinsic evidence of purpose is the parliamentary debates on the bill that became the *Genetic Non-Discrimination Act*. I would note that

this Court has historically urged caution in relying too heavily on statements made in the course of parliamentary debates: *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at pp. 508-9; *Morgentaler* (1993), at p. 484; *Canadian National Railway Co. v. Canada (Attorney General)*, 2014 SCC 40, [2014] 2 S.C.R. 135, at para. 47. As well, because the bill was introduced as a Senate public bill, the Court does not have the benefit of statements made by or on behalf of the minister sponsoring the bill.

[41] With that caution in mind, I proceed to examining statements suggestive of purpose made in the course of parliamentary debate as additional evidence of purpose. Senator Cowan, the bill’s sponsor, described the mischief the *Act* aims to address, along with the negative effects that genetic discrimination and the fear of genetic discrimination were having on the public:

The problem, colleagues, is that the law in Canada has not kept pace with the science. In particular, in Canada, unlike in most other Western nations, if one has genetic testing and discovers that one carries a gene associated with a particular condition or disease, there is no law at either the federal or provincial level that provides protection against what is called “genetic discrimination.” That is the problem that Bill S-201 is designed to address.

Right now in Canada, a third party such as an insurance company, an employer or someone else can demand access to your genetic test results and then use that information against you. There is no law in place to protect against that.

...

. . . the ripple effect of these instances of actual discrimination⁴ is very significant. Fear of genetic discrimination is causing many Canadians, far

⁴ Senator Cowan cited several examples of discrimination based on genetic test results, drawing on testimony given by experts before the Standing Senate Committee on Human Rights. For instance,

too many Canadians, to choose not to have genetic testing that their doctors believe would help them.

...

The decision whether or not to take a genetic test is a deeply personal one. There are many factors that a person weighs in making the decision. There are some illnesses for which, at present, there is no treatment or cure. One, understandably, may prefer not to know There are many very serious issues to be considered. But, colleagues, genetic discrimination should not be such an issue. That kind of worry should simply not enter into the discussion. [Emphasis added; footnote added.]

(*Debates of the Senate*, vol. 150, No. 8, 1st Sess., 42nd Parl., January 27, 2016, at pp. 147-48 and 150)

[42] Robert Oliphant, Member of Parliament, the bill's sponsor in the House of Commons, shared many of Senator Cowan's concerns:

In Canada, unlike most western countries, if one has a genetic test, there is no protection from a third party using that information, those test results, perhaps to one's detriment. This is the problem of genetic discrimination and that is what Bill S-201 seeks to address.

...

[Bill S-201] states clearly and unequivocally that society condemns genetic discrimination. It is unacceptable behaviour, and it will not be tolerated. [Emphasis added.]

(*House of Commons Debates*, vol. 148, No. 77, 1st Sess., 42nd Parl., September 20, 2016, at pp. 4886-87)

[43] The concerns raised by senators and members of Parliament in debate found support in the testimony given before Senate and House of Commons

he referred to the testimony of Dr. Yvonne Bombard and Dr. Ronald Cohn: see *Debates of the Senate*, vol. 150, No. 8, 1st Sess., 42nd Parl., January 27, 2016, at p. 148.

committees. Some of the experts who appeared spoke to situations in which Canadians have been discriminated against on genetic grounds and explained that Canadians fear that their genetic test results might come to be used against them.⁵ The experts explained that fear of genetic discrimination has led many Canadians to forego testing that might help them improve their health and contribute to improving public health.

[44] For its part, the Court of Appeal relied on the parliamentary debates to conclude that ss. 1 to 7 of the *Act* do not have the purpose of prohibiting genetic discrimination, but instead aim to improve health. The Court of Appeal concluded that even though the provisions make access to and use of the information obtained through genetic testing more difficult, they do not prohibit genetic discrimination itself. This is so despite the title of the *Act*, and in contrast to the amendments to the *Canadian Human Rights Act*.

[45] In my view, the Court of Appeal privileged statements made by parliamentarians in the course of debates about the positive effect they hoped the prohibitions would eventually have over statements about the immediate mischief that the law is intended to address. The mischief in parliamentarians' minds was the "gap" in the laws, which left individuals vulnerable to genetic discrimination and grounded

⁵ See, for example, Y. Bombard, *Written testimony to the Standing Senate Committee on Human Rights regarding Bill S-201, An Act to Prohibit and Prevent Genetic Discrimination*, February 29, 2016, reproduced in R.R. (AGC), vol. XII, at p. 25; House of Commons, Standing Committee on Justice and Human Rights, *Evidence*, No. 36, 1st Sess., 42nd Parl., November 22, 2016, at pp. 12-13.

the fear of genetic discrimination. Those concerns correspond to the title of the *Act* and the text of the prohibitions.

[46] In addition to enacting substantive provisions, the *Act* also amended the *Canada Labour Code* to protect employees from forced genetic testing or disclosure of test results, and from disciplinary action on the basis of genetic test results, and amended the *Canadian Human Rights Act* to add “genetic characteristics” as a prohibited ground of discrimination and to create a deeming provision relating to refusal to undergo genetic testing or disclose test results: see *Canada Labour Code*, ss. 247.98 and 247.99, as amended by s. 8 of the *Act*; *Canadian Human Rights Act*, s. 3(1) and (3), as amended by ss. 9 to 11 of the *Act*.

[47] Parliament’s decision to make these amendments to the *Canada Labour Code* and the *Canadian Human Rights Act* in conjunction with its enactment of the *Act*’s substantive provisions suggests that Parliament was looking to take a coordinated approach to tackling genetic discrimination based on test results, using different tools. It was not only targeting genetic discrimination directly through human rights and labour legislation, but was also targeting precursors to such discrimination, namely forced genetic testing and disclosure of the results of such testing. The fact that Parliament did not criminalize genetic discrimination does not belie Parliament’s purpose of combatting genetic discrimination in this context. The relative breadth, directness or efficacy of the means Parliament chooses to address a problem is not the court’s concern in its pith and substance inquiry.

[48] I would reject any suggestion that Parliament's purpose in enacting the challenged provisions was to change *all* employment and human rights law, rather than just that properly within its jurisdiction. Parliament appears to have chosen a multi-pronged approach to combatting genetic discrimination. That two of those prongs are federal labour and human rights legislation does not suggest that its objective in enacting prohibitions supported by penalties as a third prong is to circumvent constitutional constraints. The challenged provisions take a different and broader approach to tackling the problem presented by this form of genetic discrimination.

[49] The title of the *Act* and the text of the prohibitions provide strong evidence that the prohibitions have the purpose of combatting genetic discrimination based on test results, and that the more precise mischief they are intended to address is the lack of legal protection for the results of genetic testing. The *Act* does what its title says it does: it prevents genetic discrimination by directly targeting that mischief. The parliamentary debates also provide strong evidence to support this. I find that the purpose of the challenged provisions is to combat genetic discrimination and the fear of genetic discrimination based on the results of genetic tests by prohibiting conduct that makes individuals vulnerable to genetic discrimination in the areas of contracting and the provision of goods and services.

[50] As I will explain, the effects of ss. 1 to 7 of the *Act* are consistent with their purpose.

(2) Effects

[51] Both legal and practical effects are relevant to identifying a law's pith and substance. Legal effects "flow[] directly from the provisions of the statute itself", whereas practical effects "flow from the application of the statute [but] are not direct effects of the provisions of the statute itself": *Kitkatla*, at para. 54, citing *Morgentaler* (1993), at pp. 482-83.

[52] Starting with legal effects, ss. 3 to 5 of the *Genetic Non-Discrimination Act* prohibit genetic testing requirements and non-consensual uses of genetic test results in a broad range of circumstances. Section 7 imposes significant penalties for contravening these prohibitions.

[53] These prohibitions and penalties will likely affect the operation of provincial and territorial legislation that requires the disclosure of genetic test results. The *Genetic Non-Discrimination Act* provisions would be paramount over provincial provisions to the extent of any conflict in operation: *Lemare Lake Logging*, at para. 18. For instance, provincial legislation that requires an individual seeking health or life insurance to disclose all material health information could not operate so as to require the individual to disclose genetic test results: see, for example, art. 2408 of the *Civil Code of Québec*.

[54] The most significant practical effect of the *Act* is that it gives individuals control over the decision of whether to undergo genetic testing and over access to the

results of any genetic testing they choose to undergo. The *Act* does so by preventing genetic testing requirements from being imposed on individuals as a condition of access to goods, services and contracts, and by preventing individuals' genetic test results from being used non-consensually when they seek to obtain goods and services and enter into contracts. Even if an individual voluntarily discloses the results of a genetic test in such circumstances, the *Act* prevents the recipient of the information from using the information in any manner that has not been consented to in writing or from further disclosing the information. The activities to which the *Act* applies are broad and fundamentally structure Canadians' interactions with the world around them. The control that ss. 1 to 7 of the *Act* gives to individuals over genetic testing and genetic test results is equally significant and broad in scope.

[55] Choices about genetic testing are deeply personal in nature and the reasons for making them vary widely from one individual to another. Just as one individual may wish to be aware of every possible predisposition or risk that a genetic test might reveal, another may prefer not to know. And the individual who wants to know may not want others to know. The *Act* protects those choices.

[56] By protecting choices about who has access to such information, the legislation reduces the risk of genetic discrimination. And by removing the fear of some of the negative consequences that could flow from genetic testing, the *Act* may encourage individuals to undergo genetic testing. Additional testing may in turn produce health benefits, including by enabling earlier detection of health problems or

predispositions, providing for more accurate and sometimes life-saving diagnoses and improving the health care system's ability to provide maximally beneficial care.⁶

[57] The legislation may also affect the insurance industry and, potentially, insurance premiums. By preventing insurers from using genetic test results without an individual's consent in making decisions about what policies to underwrite, the provisions at issue may result in increased insurance premiums. Since insurers will not be able to adjust individual premiums (or decline to insure an individual) based on genetic test results without written consent, they may be more likely to insure individuals who may be at risk of future health problems, or to insure those individuals at lower premiums than they would otherwise charge. Individuals who know they are at higher risk of future health problems may also be more likely to purchase insurance. This may in turn increase the amounts the insurer will be required to pay out. To make sure that they will be able to meet those potential increased future liabilities, insurers may need to raise premiums overall.

[58] The Attorneys General and several interveners opposed to the law's constitutionality emphasize the *Act's* potential impact on the insurance industry as indicative of pith and substance. They also point to parts of the parliamentary debates and a previous version of the bill, which exempted insurance providers from the prohibitions in respect of high-value insurance policies: see Bill S-218, *An Act to prohibit and prevent genetic discrimination*, 1st Sess., 41st Parl., 2013, s. 6 (not

⁶ See House of Commons, Standing Committee on Justice and Human Rights, *Evidence*, No. 37, 1st Sess., 42nd Parl., November 24, 2016, at p. 2 (Dr. Gail Graham).

passed). They argue that the previously proposed exception supports their view that Parliament was primarily concerned with access to insurance in enacting the prohibitions. Despite the removal of that exception, they say that ss. 1 to 7 of the *Act* are still focused on insurance contracts.

[59] I disagree. Insurance is undoubtedly an example of a context in which Parliament was concerned about individuals' exposure to genetic discrimination. Indeed, the appellant acknowledges that the prohibitions may have the heaviest impact on insurers and employers. However, the potential impact on these industries, especially the insurance industry, does not overtake the prohibitions' direct legal and practical effects in the pith and substance analysis. This is particularly so because those effects align with Parliament's purpose in enacting the prohibitions.

[60] The prohibitions in question are of general application, and do much more than prevent insurance companies from requiring individuals to disclose genetic test results when they contain relevant medical information. They give individuals control over their genetic testing results, allowing them to protect themselves against genetic discrimination. They respond to the mischief that is the lack of legal protection of genetic testing information in Canada across all sectors in which the specified activities take place — both private and public. They apply to a broad and growing array of circumstances. They may well apply, for instance, when a person is seeking to adopt a child, to use consumer genetic testing services, to access

government services, to purchase any kind of good or service, or to obtain housing, insurance or employment.

[61] As for the removal of the exception for high-value insurance contracts from a prior version of the bill, it underlines the importance of the *general* prohibitions — now without any exception for insurance contracts. The former high-value exception was understood by Senator Cowan to represent a reasonable concession made in favour of insurance companies as a response to concerns they expressed about the proposed bill's impact on the insurance industry: *Proceedings of the Standing Senate Committee on Human Rights*, No. 15, 2nd Sess., 41st Parl., February 19, 2015, at p. 15:49.

[62] Though there is no doubt that parliamentarians were concerned about genetic discrimination in the insurance context, it does not follow that the prohibitions are essentially about insurance. A characterization narrowly focused on insurance reflects an impoverished view of the *Act* and fails to capture the broad purpose and effects of the legislation.

(3) Conclusion

[63] In enacting the *Genetic Non-Discrimination Act*, Parliament acted to combat genetic discrimination and the fear of genetic discrimination based on genetic test results. It sought to do so by filling the gap in Canada's laws that made individuals vulnerable to genetic discrimination in the areas of contracting and the

provision of goods and services. Parliament's purpose is reflected clearly by the title and text of the *Act*. It is supported by the legislative debates and the concurrent amendments to the *Canadian Human Rights Act* and *Canada Labour Code* made by the *Act*.

[64] Crucially, Parliament's purpose in enacting the provisions in question is borne out in the provisions' effects. The most direct and significant practical effect of the prohibitions is to give individuals control over the decision of whether to undergo genetic testing and over access to the results of genetic testing. This practical effect is a direct result of the prohibitions' legal effects.

[65] I accordingly conclude that, in pith and substance, ss. 1 to 7 of the *Act* 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 individuals' genetic test results will be used against them and to prevent discrimination based on that information.

B. *Classification*

[66] The parties disagree about whether the impugned provisions relate to a matter that comes within Parliament's s. 91(27) power over criminal law or primarily within the provincial legislatures' s. 92(13) power over property and civil rights. Both heads of power are broad and plenary, and may overlap when a given subject is approached from two different perspectives, one supporting the exercise of federal

authority and the other supporting the exercise of provincial authority, i.e. when the subject has a double aspect: see *Firearms Reference*, at para. 52; *Chatterjee*, at para. 13. Given the reference question posed by the Government of Quebec, the only question the Court must answer in this part of the division of powers analysis is whether the provisions at issue come within Parliament's s. 91(27) criminal law power.

(1) The Criminal Law Power

[67] Section 91(27) of the *Constitution Act, 1867* gives Parliament the exclusive authority to make laws in relation to “[t]he Criminal Law”. Sections 1 to 7 of the *Genetic Non-Discrimination Act* will be valid criminal law if, in pith and substance: (1) it consists of a prohibition (2) accompanied by a penalty and (3) backed by a criminal law purpose: *Firearms Reference*, at para. 27; *Reference re Validity of Section 5(a) of the Dairy Industry Act*, [1949] S.C.R. 1, at pp. 49-50 (*Margarine Reference*), aff'd [1951] A.C. 179 (P.C.).

[68] There is no dispute that the challenged provisions meet the first two requirements. They prohibit specific conduct and impose penalties for violating those prohibitions. The only issue is whether the matter of ss. 1 to 7 of the *Act* is supported by a criminal law purpose. As I will explain, a law is backed by a criminal law purpose if the law, in pith and substance, represents Parliament's response to a threat of harm to a public interest traditionally protected by the criminal law, such as peace, order, security, health and morality, or to another similar interest. I conclude that the

prohibitions established by ss. 1 to 7 of the *Act* have a criminal law purpose, protecting several public interests traditionally safeguarded by the criminal law.

[69] Parliament's criminal law power is broad and plenary: see *RJR-MacDonald*, at para. 28; *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213, at para. 34; *R. v. Malmö-Levine*, 2003 SCC 74, [2003] 3 S.C.R. 571, at para. 73. The criminal law must be able to respond to new and emerging matters, and the Court "has been careful not to freeze the definition [of the criminal law power] in time or confine it to a fixed domain of activity": *RJR-MacDonald*, at para. 28; see also *Proprietary Articles Trade Association v. Attorney General for Canada*, [1931] A.C. 310 (P.C.), at p. 324.

[70] But the use of the criminal law power to respond to those new and emerging matters must also be limited. This Court has rejected a purely formal approach that would have allowed Parliament to bring virtually any matter within s. 91(27), so long as it used prohibition and penalty as its vehicle: *Margarine Reference*; *Scowby v. Glendinning*, [1986] 2 S.C.R. 226, at p. 237.

[71] To that end, the Court in the *Margarine Reference* established the substantive criminal law purpose requirement. Rand J. famously stated that a criminal law prohibition must be "enacted with a view to a public purpose which can support it as being in relation to criminal law" and identified "[p]ublic peace, order, security, health, morality" as the typical but not exclusive "ends" served by the criminal law: p. 50. Rand J. also stated that criminal prohibitions are properly directed at "some evil

or injurious or undesirable effect upon the public”, and represent Parliament’s attempt “to suppress the evil or to safeguard the interest threatened”: p. 49.

[72] Rand J.’s statements in the *Margarine Reference* demonstrate that a law with a valid criminal law purpose has two features. First, it should be directed at some evil, injurious or undesirable effect on the public. Second, it should serve one or more of the “public purpose[s]” or “ends” Rand J. enumerated, or another similar purpose. Rand J.’s notion of public purpose refers to the public interests traditionally safeguarded by the criminal law, and other similar interests.

[73] Many of this Court’s decisions illustrate how the criminal law purpose test operates. A law directed at protecting a public interest like public safety, health or morality will usually be a response to something that Parliament sees as posing a threat to that public interest. For example, prohibitions aimed at combatting tobacco consumption and protecting the public from adulterated foods and drugs were upheld because they protect public health from threats to it: see *RJR-MacDonald*, at paras. 30 and 32; *R. v. Wetmore*, [1983] 2 S.C.R. 284, at pp. 288-89, per Laskin C.J., and 292-93, per Dickson J.; *Standard Sausage Co. v. Lee*, [1933] 4 D.L.R. 501 (B.C.C.A.), at pp. 505-7; *Malmo-Levine*, at paras. 73 and 77-78, per Gonthier and Binnie JJ., and para. 208, per Arbour J. In *Reference re AHRA*, McLachlin C.J. referred to laws that “target conduct that Parliament reasonably apprehends as a threat to our central moral precepts” as valid criminal law grounded in morality: para. 50.

Targeting conduct that merely implicates central moral precepts will not suffice as a criminal law purpose; the conduct must threaten those precepts.

[74] As these examples demonstrate, the *Margarine Reference*'s first criminal law purpose requirement (that the law target an evil, injurious or undesirable effect) is linked to the second (that the law protect a public interest that can properly ground criminal law). A law will have a criminal law purpose if it addresses an evil, injurious or undesirable effect on a public interest traditionally protected by the criminal law, or another similar public interest.

[75] In *Reference re AHRA*, a majority of the members of this Court, though divided on the merits, employed the helpful notion of harm to capture the *Margarine Reference*'s first criminal law purpose requirement. They accepted that laws responding to a "reasoned" or "reasonable apprehension of harm" would be supported by a criminal law purpose (so long as they are properly linked to the second requirement): paras. 50 and 55-56, per McLachlin C.J., and paras. 236-43, per LeBel and Deschamps JJ. Referring to the notion of harm is a useful way of understanding Rand J.'s requirement that a criminal law target an "evil or injurious or undesirable effect". Indeed, the notion of harm helpfully encapsulates the breadth of that phrase. I accept, as did eight judges in *Reference re AHRA*, that asking whether Parliament has acted in response to a "reasoned apprehension of harm" to a public interest traditionally protected by the criminal law or a similar public interest is an appropriate standard to ensure that Parliament has acted with a criminal law purpose.

[76] I would highlight that Parliament is not, and has never been, restricted to responding to a so-called “evil” or “real evil” when relying on its criminal law power. Rand J. did not require the presence of an evil or of evil effects in the *Margarine Reference*. He also referred to “injurious” or “undesirable” effects: p. 49. The notion of “evil” cannot serve to effectively limit Parliament to using the criminal law power to respond to moral threats. That would sweep away the other firmly established public interests protected by the criminal law and stymie the criminal law’s evolution. The criminal law is not confined to prohibiting immoral conduct: *Firearms Reference*, at para. 55.

[77] In *Reference re AHRA*, McLachlin C.J. said that she would not have courts rely on their view of what is good and bad to question “the wisdom of Parliament” in enacting criminal law: para. 76. By contrast, LeBel and Deschamps JJ. would appear to have courts ask whether the targeted activity is bad enough that it *needs* to be suppressed, and assess whether Parliament has identified and established conduct or facts that support the apprehended harm to which it has responded: paras. 236 and 251. Because Cromwell J. did not adopt either McLachlin C.J.’s or LeBel and Deschamps JJ.’s approach to assessing criminal law purpose in *Reference re AHRA*, neither approach won the support of a majority of the Court.

[78] I agree with McLachlin C.J.’s deferential posture. As she rightly noted, because the issue in a division of powers analysis is not whether the law infringes the *Charter*, “the language of justification has no place”: para. 45; see also para. 50. So

long as Parliament's apprehension of harm is reasoned and its legislative action is, in pith and substance, a response to that apprehended harm, it has wide latitude to determine the nature and degree of harm to which it wishes to respond by way of the criminal law power, and the means by which it chooses to respond to that harm: *Malmo-Levine*, at para. 213, per Arbour J.; *RJR-MacDonald*, at para. 44; *Firearms Reference*, at para. 39.

[79] Taken together, the requirements established in the *Margarine Reference* and subsequently applied in this Court's jurisprudence mean that a law will have a criminal law purpose if its matter represents Parliament's response to a threat of harm to public order, safety, health or morality or fundamental social values, or to a similar public interest. As long as Parliament is addressing a reasoned apprehension of harm to one or more of these public interests, no degree of seriousness of harm need be proved before it can make criminal law. The court does not determine whether Parliament's criminal law response is appropriate or wise. The focus is solely on whether recourse to criminal law is *available* under the circumstances.

(2) Application

[80] As stated above, the only classification issue concerning ss. 1 to 7 of the *Act* is whether the provisions are supported by a criminal law purpose. In my view, the essential character of the prohibitions represents Parliament's response to the risk of harm that the prohibited conduct, genetic discrimination and the fear of genetic discrimination based on genetic test results pose to several public interests

traditionally protected by the criminal law: autonomy, privacy and the fundamental social value of equality, as well as public health.

[81] Indeed, the Attorney General of Canada accepts that the “traditional subjects of criminal law”, including “condemning moral wrongs, protecting privacy, protecting public health”, could offer avenues to Parliament legislating in respect of genetic discrimination: R.F., at para. 2. In my view, all three of those established public interests support the *Act*’s prohibitions and penalties. I explain why below, first addressing autonomy, privacy and equality, and then public health.

(a) *Autonomy, Privacy and Equality*

[82] This Court has consistently recognized that individuals have powerful interests in autonomy and privacy, and in dignity more generally, protected by various *Charter* guarantees: see, for example, *R. v. Morgentaler*, [1988] 1 S.C.R. 30, at p. 166, per Wilson J. It has specifically recognized individuals’ clear and pressing interest in safeguarding information about themselves — the ability to do so is “closely tied to the dignity and integrity of the individual, [and] is of paramount importance in modern society”: *R. v. Jarvis*, 2019 SCC 10, [2019] 1 S.C.R. 488, at para. 66; *R. v. Dymnt*, [1988] 2 S.C.R. 417, at p. 429.

[83] Parliament has often used its criminal law power to protect these vital interests, acting to protect human dignity by safeguarding autonomy and privacy. The prohibitions on voyeurism in s. 162(1) of the *Criminal Code*, R.S.C. 1985, c. C-46,

and on wilfully intercepting private communications in s. 184, for example, both protect individuals' well-established interests in privacy and autonomy, while the prohibition on voyeurism also protects sexual integrity: *Jarvis*, at paras. 48 and 113. Safeguarding autonomy and privacy are established uses of the criminal law power.

[84] The conduct prohibited by ss. 1 to 7 of the *Act* poses a risk of harm to two facets of autonomy and personal privacy because individuals have an interest in deciding whether or not to access the detailed genetic information revealed by genetic testing and whether or not to share their test results with others.

[85] In particular, forced genetic testing (prohibited in s. 3 of the *Act*) poses a clear threat to autonomy and to an individual's privacy interest in not finding out what their genetic makeup reveals about them and their health prospects. People may not want to learn about their "genetic destiny", or risk the psychological harm that can result from obtaining unfavourable genetic test results: Office of the Privacy Commissioner of Canada, *The Potential Economic Impact of a Ban on the Use of Genetic Information for Life and Health Insurance*, by M. Hoy and M. Durnin (2012), at p. 11 (Hoy and Durnin). Forced disclosure of genetic test results (prohibited in s. 4) and the collection, use or disclosure of genetic test results without written consent (prohibited in s. 5) threaten autonomy and privacy by compromising an individual's control over access to their detailed genetic information. Such threats to autonomy and personal privacy are threats to human dignity.

[86] The prohibitions target this autonomy- and privacy-threatening conduct in the contexts of the provision of goods and services and the conclusion of contracts. The risk of harm to dignity-related interests in these contexts is neither narrow nor trivial: individuals meaningfully participate in society by way of goods, services and contracts. The prohibitions in the *Act* target a wide swath of conduct.

[87] Further, Parliamentary debates, and the extensive testimony and research referred to throughout the debates, demonstrate that many parliamentarians reasonably viewed genetic information disclosed by genetic testing to be uniquely personal and fundamental to identity.⁷ In a very real sense, an individual's genetic makeup *is* their “biographical core”: on this concept in the s. 8 *Charter* context, see, for example, *R. v. Tessling*, 2004 SCC 67, [2004] 3 S.C.R. 432, at para. 25; *R. v. Cole*, 2012 SCC 53, [2012] 3 S.C.R. 34, at paras. 46, 48 and 58. It provides the foundation for who an individual is as a human being and is, “in an important way, one's very identity”: Hoy and Durnin, at p. 10. The dignity, autonomy and privacy interests in individuals' detailed genetic information were understood by Parliament to be unique and strong.

[88] As the intervener the Privacy Commissioner of Canada points out, the number of inferences that may be drawn from genetic testing information is unknown. Between the early 2000s and 2016, the number of recognized genetic tests

⁷ See, for example, *House of Commons Debates*, vol. 148, No. 77, at p. 4885 (Mr. Oliphant); *House of Commons Debates*, vol. 148, No. 97, 1st Sess., 42nd Parl., October 25, 2016, at p. 6125 (Peter Schiefke); *Proceedings of the Standing Senate Committee on Human Rights*, No. 2, 1st Sess., 42nd Parl., March 9, 2016, at p. 2:28 (Bev Heim-Myers); *Debates of the Senate*, vol. 150, No. 26, 1st Sess., 42nd Parl., April 13, 2016, at p. 459 (Linda Frum).

increased exponentially, from 100 to well over 30,000. Just over 15 years after the complete human genome was first sequenced, 5,000 of the estimated 20,000 genes have already been linked to genetic diseases, and thousands of other gene variants that affect predispositions to more common health conditions are known.⁸ The potential for genetic test results to reveal highly personal information about the individual tested and their relatives is immense and will undoubtedly continue to evolve alongside technological abilities to interpret test results.

[89] Similarly, the potential for abuse of genetic test results and the information they reveal (including by way of genetic discrimination and other possible equality-threatening treatment) is of an unknowable scope and degree. As one Member of Parliament saw it, Parliament's role was to "pay attention to science and make sure that laws designed to protect us evolve in step with technology": *House of Commons Debates*, vol. 148, No. 97, at p. 6127 (Peter Schiefke). Parliament's criminal law power allows it to take proactive steps to protect the public from risks of an unknown nature or degree, even if on some points "the jury is still out": *Malmo-Levine*, at para. 78; *Reference re AHRA*, at para. 50.

[90] Protecting fundamental moral precepts or social values is an established criminal law purpose: *Margarine Reference*, at p. 50; *Labatt Breweries of Canada Ltd. v. Attorney General of Canada*, [1980] 1 S.C.R. 914, at pp. 932-33; *Reference re AHRA*, at paras. 49-51 and 250. Parliamentarians considered discrimination on the

⁸ See *Debates of the Senate*, vol. 150, No. 8, at p. 147 (Senator Cowan); *House of Commons Debates*, vol. 148, No. 77, at p. 4885 (Mr. Oliphant); Standing Committee on Justice and Human Rights, *Evidence*, No. 37, at p. 2 (Dr. Gail Graham).

basis of health-related genetic test results to be morally wrong. They viewed such genetic discrimination to be antithetical to the values of equality and human dignity. It is easy to see why. Such genetic discrimination threatens the fundamental social value of equality by stigmatizing and imposing adverse treatment on individuals because of their inherited, immutable genetic characteristics, and, in particular, the characteristics that may help to predict disease or disability. In acting to suppress a threat of that nature, Parliament acted with a criminal law purpose.

[91] Further, the fact that, in protecting individuals' control over their genetic test results, the prohibitions target a precursor to genetic discrimination rather than genetic discrimination itself does not mean that they are not a valid criminal law response to the threat posed by discrimination based on genetic test results. Once Parliament is found to be legislating in response to a reasoned apprehension of harm to one of the public interests that may be protected by the criminal law, "Parliament's choice of method cannot be determinative with respect to Parliament's power to legislate": *RJR-MacDonald*, at para. 44.

[92] In pith and substance, ss. 1 to 7 of the *Act* are Parliament's response to the risk of harm that the prohibited conduct and discrimination based on genetic test results pose to autonomy, privacy and equality. For the reasons set out above, Parliament has the power under s. 91(27) to protect people from emerging threats to privacy, autonomy and equality. This is especially so when Parliament reasonably views the information it is safeguarding as uniquely elemental to identity, and

uniquely vulnerable to abuse. Protecting these core interests is an established, proper use of the criminal law power.

(b) *Public Health*

[93] Health is an “amorphous” field of jurisdiction, featuring overlap between valid exercises of the provinces’ general power to regulate health and Parliament’s criminal law power to respond to threats to health: see *RJR-MacDonald*, at para. 32; *PHS*, at para. 60. The criminal law authority that Parliament exercises in the area of health does not prevent the provinces from regulating extensively in relation to health: *Hydro-Québec*, at para. 131. Indeed, the two levels of government “frequently work together to meet common concerns”: para. 131.

[94] Because of these overlapping exercises of jurisdiction, and the doctrine of paramountcy, the Court has expressed concern that the criminal law power must not “be used to eviscerate the provincial power to regulate health”: *Reference re AHRA*, at para. 77, see also para. 52, per McLachlin C.J. Though the criminal law power must be appropriately circumscribed as a result, its plenary nature does not change when it is exercised to respond to threats to health. The usual requirements that it be exercised by way of prohibition and penalty and be supported by a criminal law purpose suffice to limit it: *RJR-MacDonald*, at para. 32.

[95] In the *Margarine Reference*, Rand J. made clear that protecting health is one of the “ordinary ends” served by the criminal law, and that the criminal law

power may be properly used to safeguard the public from any “injurious or undesirable effect”: pp. 49-50. This Court has often referred to injurious or undesirable effects that relate to health as “public health evils”: *RJR-MacDonald*, at para. 32, quoted in *Reference re AHRA*, at para. 52, see also para. 62, per McLachlin C.J.; *Malmo-Levine*, at paras. 209 and 212, per Arbour J. Nothing in this Court’s jurisprudence suggests that the term “public health evil” means anything other than a threat to public health. As McLachlin C.J. confirmed in *Reference re AHRA*, “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”: para. 62. Tobacco products, dangerous medical treatments, illicit drugs, adulterated food products and toxic chemicals all represent threats to health: see *RJR-MacDonald*; *Morgentaler* (1993); *Malmo-Levine*; *Wetmore*; *Hydro-Québec*. In *Labatt Breweries*, standards for the production and content of beer were not upheld under the criminal law power because they did not address a hazard to health, not because they failed to target something “evil”: pp. 934-35.

[96] Parliament is entitled to use its criminal law power to respond to a reasoned apprehension of harm, including a threat to public health.

[97] Genetic discrimination and the fear of genetic discrimination are not merely theoretical concerns. Testimony before Parliament demonstrated that fear of genetic discrimination leads patients to forego beneficial testing, results in wasted health care dollars and may deter patients from participating in research that could

advance medical understanding of their conditions.⁹ Genetic discrimination is a barrier to accessing suitable, maximally effective health care, to preventing the onset of certain health conditions and to participating in research and other initiatives serving public health. Parliament accordingly apprehended individuals' vulnerability to and fear of genetic discrimination based on test results as a threat to public health.

[98] Individuals' vulnerability to genetic discrimination due to a lack of control over their genetic testing information imposed what Senator Cowan described as a "terrible dilemma" on some people: *Debates of the Senate*, vol. 150, No. 8, at p. 148; see also pp. 146-47. Those people were made to choose between two unenviable options. They could seek potentially beneficial genetic testing but be exposed to the risk of having to disclose results to a third party, who could use those results against them. Or they could forego genetic testing and expose themselves to potentially avoidable and serious health risks, but keep genetic testing information private.

[99] This choice effectively pitted individuals' interests in health against their interests in dignity, privacy, autonomy and equal treatment, and their access to goods, services and contracts. It was described as a choice that "no Canadian should have to

⁹ See Standing Committee on Justice and Human Rights, *Evidence*, No. 37, at p. 2 (Dr. Gail Graham); see also p. 1 (Dr. Cindy Forbes). Dr. Ronald Cohn, of the Hospital for Sick Children in Toronto, testified that more than a third of families he approached to participate in a genetic study refused for fear of genetic discrimination, in spite of the opportunity the study would have provided to find an explanation for the children's severe medical conditions: Standing Committee on Justice and Human Rights, *Evidence*, No. 36, at p. 12.

face”: *House of Commons Debates*, vol. 148, No. 140, 1st Sess., 42nd Parl., February 14, 2017, at p. 8955 (Michael Cooper). Parliament acted to eliminate it.

[100] Both the Court of Appeal and parties opposed to the constitutionality of ss. 1 to 7 of the *Act* rely on a distinction between the protection of health (a purpose traditionally within the realm of the criminal law) and the promotion of health (said to lie only within provincial jurisdiction and not to be a purpose validly advanced by the criminal law). They contend that the challenged provisions are aimed at promoting health, rather than responding to a threat to health.

[101] At this stage of the analysis, once the pith and substance of the challenged law has been determined, the distinction between protection and promotion of health can be more a matter of semantics than substance; it rests in part on the “artificial dichotomy” between prohibiting conduct that poses a risk of harm to health and generating health benefits by way of criminal prohibition, which McLachlin C.J. rightly warned against in *Reference re AHRA*, at para. 30. The relevant question is whether the law meets the criminal law purpose test — whether, in pith and substance, it responds to a risk of harm to health. If it does, the possibility that the law will also produce beneficial health effects does not negate that conclusion.

[102] Here, in pith and substance, Parliament’s action was a response to the harm that vulnerability to and fear of genetic discrimination posed to public health. Giving individuals control over access to their genetic test results by prohibiting

forced genetic testing and disclosure of test results and the non-consensual collection, use or disclosure of genetic test results in the areas of contracting and the provision of goods and services targets the harmful fear of genetic discrimination that poses a threat to health. The *Act* was intended to target that fear.

(3) Conclusion

[103] Parliament took action in response to its concern that individuals' vulnerability to genetic discrimination posed a threat of harm to several public interests traditionally protected by the criminal law. Parliament enacted legislation that, in pith and substance, protects 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 Canadian's fears that their genetic test results will be used against them and to prevent discrimination based on that information. It did so to safeguard autonomy, privacy and equality, along with public health. The challenged provisions fall within Parliament's criminal law power because they consist of prohibitions accompanied by penalties, backed by a criminal law purpose.

VI. Costs

[104] The appellant seeks special costs in this Court no matter the outcome of this appeal.

[105] Given the appellant's success on the merits of this appeal, the Court must determine whether it should exercise its discretion to award special costs.

[106] In my view, this is not an appropriate case for this Court to award special costs. Ordinary costs suffice. Although, as the appellant points out, it is unusual that no attorney general appealed from the Quebec Court of Appeal's opinion in this reference, that alone does not make this an "exceptional" case justifying the award of special costs: *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331, at para. 140; *Association des parents de l'école Rose-des-vents v. British Columbia (Education)*, 2015 SCC 21, [2015] 2 S.C.R. 139, at para. 84.

[107] Moreover, I am not convinced that the appellant has demonstrated that it was impossible for it to pursue this litigation with private funding: *Carter*, at para. 140; *École Rose-des-vents*, at para. 84. In contrast with the significant costs borne by the parties in both *Carter* and *École Rose-des-vents*, where the appeals came after costly and lengthy trials needed to develop the full factual records required to deal with the complex constitutional questions raised in those cases, the appellant did not bear such costs. This appeal arose on a reference, and there was no such need. Indeed, the appellant participated as an intervener, rather than as a full party, at the Quebec Court of Appeal.

VII. Disposition

[108] I would allow the appeal with costs on a party-and-party basis and answer the reference question posed by the Government of Quebec in the negative.

The reasons of Moldaver and Côté JJ. were delivered by

MOLDAVER J. —

I. Overview

[109] The decision to undergo or forego genetic testing is one of the most intimate personal health decisions that individuals now face. Some people decide that they would rather not know what their genetic makeup reveals. Others decide that they want to know so that they can take steps to protect their own health and the health of their families. Parliament recognized that individuals should have the autonomy to make this profoundly personal choice without having to fear how the information revealed by genetic testing will be used. However, there was ample evidence before Parliament that many did not feel free to make this choice. The parliamentary record demonstrated that people were choosing to “stay in the dark” about their genetic makeup — to the detriment of their health, the health of their families, and the greater public health system — due to their concerns that they would not be able to control the uses to which the information revealed by genetic testing would be put. Sections 1 to 7 of the *Genetic Non-Discrimination Act*, S.C. 2017, c. 3 (“*Act*”), represent Parliament’s attempt to address this serious threat to health.

[110] In the result, I agree with my colleague Justice Karakatsanis that ss. 1 to 7 of the *Act* represent a valid exercise of Parliament's power over criminal law set out at s. 91(27) of the *Constitution Act, 1867*. However, and with respect, I arrive at this result in a different manner because I see the pith and substance of the impugned provisions differently from her, as well as from my colleague Justice Kasirer.

[111] In my view, the pith and substance of ss. 1 to 7 of the *Act* is to protect health by prohibiting conduct that undermines individuals' control over the intimate information revealed by genetic testing. By giving people control over the decision to undergo genetic testing and over the collection, disclosure and use of the results of such testing, Parliament sought to mitigate their fears that their genetic test results could be used against them in a wide variety of contexts. Parliament had ample evidence before it that this fear was causing grave harm to the health of individuals and their families, and to the public healthcare system as a whole.

[112] The provisions in issue represent a valid exercise of Parliament's power over the criminal law because they contain prohibitions accompanied by penalties, and are backed by the criminal law purpose of suppressing a threat to health. In particular, they target the detrimental health effects occasioned by people foregoing genetic testing out of fear as to how the information revealed by such testing could be used.

[113] My colleagues have provided an extensive review of the legal principles that guide my analysis. It is accordingly unnecessary to engage in a detailed review of the jurisprudence. I will, however, highlight key legal principles as needed.

II. Analysis

A. *Characterization*

[114] As indicated, I take the view that the pith and substance of ss. 1 to 7 of the *Act* is to protect health by prohibiting conduct that undermines individuals' control over the intimate information revealed by genetic testing. This is borne out by the purpose and effects of these provisions.

[115] As I will explain, I do not agree with Justice Karakatsanis that preventing discrimination forms part of the pith and substance of the challenged provisions. While I accept that ss. 1 to 7 of the *Act* reduce the opportunities for discrimination based on one's genetic test results, thereby mitigating individuals' fear of genetic discrimination, they do so by giving people control over the information revealed by genetic tests in furtherance of the purpose of protecting health. With respect, preventing or combating genetic discrimination is not the "dominant purpose or true character" of these provisions (see *Quebec (Attorney General) v. Canada (Attorney General)*, 2015 SCC 14, [2015] 1 S.C.R. 693, at para. 29, quoting *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 29).

[116] Nor can I agree with Justice Kasirer that the pith and substance of the provisions is “to regulate contracts and the provision of goods and services, in particular contracts of insurance and employment, by prohibiting some perceived misuses of one category of genetic tests, the whole with a view to promoting the health of Canadians” (para. 154). As I see it, what is at stake here is not the *promotion* of beneficial health practices but the *protection* of individuals from a serious threat to health. Further, I have no doubt that the impugned provisions affect contracting and the provision of goods and services. However, with respect, I believe that the manner in which my colleague characterizes them “confuse[s] the law’s purpose with ‘the means chosen to achieve it’” (*Quebec v. Canada*, at para. 29, quoting *Ward v. Canada (Attorney General)*, 2002 SCC 17, [2002] 1 S.C.R. 569, at para. 25). Although the means chosen by Parliament engage aspects of contracting and the provision of goods and services, as I see it, “the regulation of contracts and the provision of goods and services” is, at best, peripheral to the dominant purpose or true character of the legislation. Indeed, as Justice Kasirer himself recognizes, “health dominates the discussion” (para. 221).

(1) Purpose

[117] By enacting ss. 1 to 7 of the *Act*, Parliament sought to prohibit conduct that was undermining individuals’ control over the information revealed by genetic testing — conduct that was leading to health-related harms. This purpose can be

discerned from the structure and content of the *Act*, and from the parliamentary debates.

(a) *The Structure and Content of the Act*

[118] The text of the provisions in question is a key source of intrinsic evidence. Here, the purpose I have identified is borne out by the text of ss. 2 to 6 of the *Act*.

[119] Section 2 of the *Act* sets out the definitions of “disclose”, “genetic test”, and “health care practitioner”. While I disagree with his conclusion regarding what exactly the definition reveals about the impugned provisions’ purpose, I agree with Justice Kasirer that the definition of “genetic test” is crucial to recognizing that the pertinent provisions are grounded in a health-related purpose. For the purposes of the *Act*, “genetic test” is defined as “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”. The definition of “genetic test” is accordingly restricted to tests that are taken for health-related purposes such as predicting, preventing and diagnosing hereditary diseases, and guiding treatment options for a wide variety of diseases and conditions. This demonstrates that Parliament was squarely focused on protecting health.

[120] Understanding that the definition of “genetic test” is limited to health-related testing is crucial in order to accurately identify the purpose of the

prohibitions in ss. 3 to 5 of the *Act*, since the term “genetic test” lies at the heart of each of those sections. Sections 3 and 4 prohibit “any person” 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 that individual; (b) entering into or continuing a contract or agreement with that individual; or (c) offering or continuing to offer specific terms or conditions in a contract or agreement with that individual. These sections also prohibit any person from refusing to engage in any of the foregoing activities on the grounds that an individual has refused to take or disclose the results of a genetic test. Section 5 prohibits “any person” engaged in any of the activities described in (a) to (c) from collecting, using, or disclosing the results of an individual’s genetic test without the individual’s written consent. Together, these prohibitions give individuals control over the profoundly personal information revealed by genetic testing. As I will elaborate, giving people this control has the effect of reducing their fears that their genetic test results may be used against them — fears that were causing them to forego genetic testing that they otherwise wished to pursue in order to protect their own health and the health of their families.

[121] The prohibitions in ss. 3 to 5 of the *Act* are subject only to the targeted exemptions in s. 6. Section 6 provides that ss. 3 to 5 do not apply to “a physician, a pharmacist or any other health care practitioner in respect of an individual to whom they are providing health services”. Section 6 also exempts persons “conducting medical, pharmaceutical or scientific research in respect of an individual who is a participant in the research” from the prohibitions in ss. 3 to 5. In this way, s. 6

explicitly carves out conduct that is beneficial — rather than harmful — to health from the ambit of the prohibitions, further demonstrating that Parliament’s focus was squarely on protecting health.

[122] An additional form of intrinsic evidence is the title of the *Act*. I would echo the cautionary note sounded by Justice Kasirer, at para. 173, about placing undue emphasis on a statute’s title in the characterization analysis. Titles are not determinative of pith and substance. Here, in my view, the short title of the *Act* (the *Genetic Non-Discrimination Act*) and the long title of the *Act* (*An Act to prohibit and prevent genetic discrimination*) do not mirror the pith and substance of ss. 1 to 7 of the *Act*. That said, these titles are nonetheless consistent with the purpose I have identified insofar as reducing the opportunities for genetic discrimination is one of the ways in which the provisions in issue reduce individuals’ fears that their genetic information will be used against them — the barrier to pursuing genetic testing that Parliament identified and sought to remove. More specifically, by giving people control over whether to undergo genetic testing, and over the persons to whom their genetic test results are disclosed and the uses to which their genetic information may be put, these provisions reduce the opportunities for such information to be used in discriminatory ways. Thus, while preventing genetic discrimination is not, in my view, the dominant purpose of the impugned provisions, it is still an important feature of the legislation.

[123] The constitutionality of ss. 8 to 10 of the *Act* — which amended the *Canada Labour Code*, R.S.C. 1985, c. L-2, and the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 — is not in issue. Nonetheless, the jurisprudence instructs that “[w]here the challenge concerns a particular provision which forms part of a larger scheme . . . the ‘matter’ of the provision must be considered in the context of the larger scheme, as its relationship to that scheme may be an important consideration in determining its pith and substance” (*Quebec v. Canada*, at para. 30). Here, in my view, considering ss. 1 to 7 of the *Act* alongside ss. 8 to 10 of the *Act* reveals important distinctions that shed light on the precise purpose of the provisions at issue.

[124] Among other things, the amendments to the *Canada Labour Code* and the *Canadian Human Rights Act* prohibit differential treatment based on the information revealed by genetic testing. The amendments to the *Canada Labour Code*, which introduced similar prohibitions to those in ss. 3 to 5 of the *Act*, protect federal employees from compulsory genetic testing, compulsory disclosure of genetic test results, and non-consensual collection, disclosure and use of genetic test results (see *Canada Labour Code*, s. 247.98(2) to (4)(b) and (5) to (6)). In addition, however, these amendments prohibit employers from taking disciplinary action against employees “on the basis of the results of a genetic test undergone by the employee” (*Canada Labour Code*, s. 247.98(4)(c)). Similarly, the amendments to the *Canadian Human Rights Act* introduced “genetic characteristics” as a prohibited ground of discrimination (at s. 2), and added a deeming provision, which provides that where “the ground of discrimination is refusal of a request to undergo a genetic test or to

disclose, or authorize the disclosure, of the results of a genetic test, the discrimination shall be deemed to be on the ground of genetic characteristics” (at s. 3(3)).

[125] Unlike the changes to the *Canada Labour Code* and the *Canadian Human Rights Act*, the provisions in issue do not prohibit genetic discrimination — that is, differential treatment “on the basis of the results of a genetic test” or based on one’s “genetic characteristics”. Sections 1 to 7 could have included such a prohibition, but they do not. In my view, the different approach taken by Parliament in the amendments to the *Canada Labour Code* and the *Canadian Human Rights Act* as compared to the impugned provisions indicates that where Parliament’s dominant objective was to prevent and prohibit genetic discrimination, it did so directly. This supports my conclusion that the dominant purpose of ss. 1 to 7 is not preventing and prohibiting genetic discrimination, but rather prohibiting conduct that deprives individuals of control over their genetic test results in order to protect health. It follows that I am unable to agree with Justice Karakatsanis’s conclusion that the three parts of the *Act* are all part of “a multi-pronged approach to combatting genetic discrimination” (para. 48). With respect, that conclusion is too broad and fails to place adequate weight on the important differences between ss. 1 to 7 and ss. 8 to 10.

(b) *The Parliamentary Record*

[126] The parliamentary record bolsters my conclusion regarding the purpose of the provisions in question. On my reading of the debates and the testimony heard by the Senate and House of Commons committees tasked with reviewing Bill S-201, *An*

Act to prohibit and prevent genetic discrimination, 1st Sess., 42nd Parl., 2017, the focus was clearly directed at the devastating health consequences that were resulting from people foregoing genetic testing out of fear that the personal health information revealed by such testing could be used against them, including in discriminatory ways. By enacting ss. 1 to 7 of the *Act*, Parliament sought to prohibit conduct that was causing individuals who wished to undergo genetic testing to instead forego such testing, to the detriment of their health.

[127] The debates and committee testimony are replete with discussions that attest to this purpose. Although the purpose becomes most clear by reading the debates and committee testimony in their full context, I will highlight a few excerpts that emphatically make the point. I begin with statements made by Senator Cowan, the sponsor of Bill S-201:

The science of medical genetics is developing at a truly astonishing speed. When I first spoke to my bill on April 23, 2013, I described how a decade earlier there were some 100 genetic tests available for genes identified for particular diseases. I noted that this had grown by that time — that's April 23, 2013 — to 2,000 tests, which I thought was pretty impressive. Colleagues, today, less than three years later, there are over 32,600 genetic tests registered with the United States National Institutes of Health's Genetic Testing Registry.

This is a staggering pace. There are tests for genes associated with various heart diseases, prostate cancer, colon cancer, kidney disease, ALS, cystic fibrosis, and early-onset Alzheimer's. There are rare diseases and there are very common ones. These are just a few examples, and the list keeps growing.

...

. . . nothing in [Bill S-201] requires anyone to take a genetic test. Indeed, one of the fundamental points is to protect against that. The decision whether or not to take a genetic test is a deeply personal one. There are many factors that a person weighs in making the decision. There are some illnesses for which, at present, there is no treatment or cure. One, understandably, may prefer not to know. There may be concerns for the impact on one's family members, who may be worried about their own genetic makeup. There are many very serious issues to be considered. But, colleagues, genetic discrimination should not be such an issue. That kind of worry should simply not enter into the discussion.

. . .

It isn't often that an issue arises where a simple bill — and Bill S-201 is very short — can address a problem and clear the way for many Canadians to live healthier lives. Scientists are doing their part, advancing the knowledge of genetic medicine — doctors are ready and eager to be able to offer these technologies to Canadians — and Canadians are very eager to take advantage of these medical advances. Now, it's up to us to do our part, to clear away this legal hurdle that is causing real harm to so many of our fellow Canadians. [Emphasis added.]

(Debates of the Senate, vol. 150, No. 8, 1st Sess., 42nd Parl., January 27, 2016, at pp. 147-51)

[128] Robert Oliphant, Member of Parliament, also made comments which support the view that Parliament was acting to protect health by prohibiting conduct that was causing people to make deleterious health choices:

This bill is inspired by the belief that all Canadians should profit from the advances in genetic science. To achieve this goal, the genetic non-discrimination act seeks to ensure that the knowledge that we have through genetic research is protected from potential abuse and that there are as few impediments as possible to getting tested.

In Canada, unlike most western countries, if one has a genetic test, there is no protection from a third party using that information, those test results, perhaps to one's detriment. This is the problem of genetic

discrimination and that is what Bill S-201 seeks to address. [Emphasis added.]

(*House of Commons Debates*, vol. 148, No. 77, 1st Sess., 42nd Parl., September 20, 2016, at p. 4886)

This House has the opportunity to act and to act strongly and clearly. We should give the provinces the opportunity to comment on the bill and act with them and on behalf of all Canadians to ensure that this Act has the kind of teeth it needs to protect them in the most vulnerable place: their health, their existence.

. . . We have a moment in this House, with this Act, to make a change that can actually change the lives of millions of Canadians, who can, with trust and confidence, go to their physicians and get the tests they need so that their clinicians, the practitioners who help them, can have the very best tools. [Emphasis added.]

(*House of Commons Debates*, vol. 148, No. 97, 1st Sess., 42nd Parl., October 25, 2016, at p. 6128)

[129] I recognize, as Justice Karakatsanis does, that discussions of genetic discrimination figure prominently in the parliamentary record. However, I believe that when the parliamentary record is considered together with what ss. 1 to 7 of the *Act* actually do, it is clear that in enacting these provisions Parliament sought to address individuals' fears that their information would be subject to compulsory disclosure and used without their consent — including, potentially, in discriminatory ways — because of the deleterious effects those fears had on health. Therefore, while reducing the opportunities for discrimination is an important feature of the legislation, I am of the view that preventing discrimination is not the dominant purpose of the provisions in issue.

[130] On my reading of the parliamentary record, there is no support for the view that Parliament's purpose was to regulate contracts and the provision of goods and services, or to regulate particular industries. I acknowledge that the record contains references to contracts such as insurance contracts and employment agreements, and the provision of goods and services. While these references demonstrate that Parliament was aware of the incidental effects the impugned provisions may have on certain areas, that was not its focus. Rather, those references served to explain and give examples of the contexts in which individuals' fears regarding control over their genetic test results were leading them to make harmful health decisions.

[131] Additionally, I must respectfully disagree with Justice Kasirer's assertion that the debates and committee testimony support the view that ss. 1 to 7 of the *Act* represent an attempt by Parliament to encourage or promote genetic testing (paras. 196-200). To the contrary, these sources demonstrate that Parliament was focused on the health-related harms that were being suffered by those who wished to protect themselves and their families by undergoing genetic testing, but whose concerns about relinquishing control over their genetic information were acting as a barrier (or disincentive) that prevented them from doing so. That is, the discussions in the debates and the committees centered on people who, of their own volition and without any encouragement by the government, wished to undergo genetic testing, but who were refraining from exercising that free choice out of fear that the

information revealed by such testing would be used against them. Simply put, Parliament was focused on removing this disincentive, not creating incentives.

[132] My colleague Justice Kasirer’s assertion that “Parliament was focused on removing barriers in order to create incentives for genetic testing: i.e. in order to promote the well-being of Canadians” (para. 200) misreads this aspect of my reasons and fails to account for the distinction between disincentives and incentives, whether non-financial or financial in nature. Let me be clear: in enacting ss. 1 to 7 of the *Act*, Parliament was not incentivizing — that is, motivating or encouraging — genetic testing. Parliament could easily have created such an incentive. To give but one example, Parliament could have offered financial compensation in the form of tax credits to people who underwent genetic testing. But that was not the approach it chose. Instead, Parliament targeted a *disincentive* to genetic testing: individuals’ lack of control over the personal health information revealed by genetic testing. It sought to remove this barrier by prohibiting conduct that deprived individuals of that control. This is borne out in the very excerpts of the debates to which Justice Kasirer refers: Senator Cowan speaks of “removing roadblocks to people’s being able to access genetic testing, if they choose” and stresses that genetic testing “is a matter of choice, and that choice should be the individual’s to make”; Mr. Oliphant observes how people’s fears about the uses to which their genetic test results could be put was standing in the way of their desire to undergo genetic testing (see Kasirer J.’s reasons, at paras. 197-99 (emphasis in original deleted, emphasis added), citing *Debates of the Senate*, vol. 148, No. 154, 1st Sess., 41st Parl., April 23, 2013, at pp. 3744-45

(Senator Cowan); *Debates of the Senate*, vol. 149, No. 137, 2nd Sess., 41st Parl., May 5, 2015, at pp. 3270-78 (Senator Cowan); *House of Commons Debates*, vol. 148, No. 47, 1st Sess., 42nd Parl., May 3, 2016, at p. 2736 (Mr. Oliphant)).

(2) Effects

[133] I substantially agree with how Justice Karakatsanis has characterized the effects of the challenged provisions. In particular, I agree with her observation that, while the challenged provisions reduce the opportunities for genetic discrimination, “[t]he most significant practical effect of the *Act* is that it gives individuals control over the decision of whether to undergo genetic testing and over access to the results of any genetic testing they choose to undergo” (para. 54; see also paras. 55-56). The challenged provisions do not, as Justice Kasirer suggests, “grant individuals limited control over a narrow class of genetic information” (para. 158; see also para. 193). To the contrary, ss. 1 to 7 confer near complete control over the specific category of genetic information that Parliament was targeting (i.e. “genetic test” results). These sections give individuals the ability to dictate the manner and extent to which their genetic test results may be collected, disclosed, and used in a wide array of contexts. I am hard-pressed to see how Parliament could have given people any more control over their genetic test results.

[134] This control has cascading effects that ultimately result in the protection of health. By giving individuals control over the intimate health-related information revealed by genetic testing, the pertinent provisions have the effect of reducing their

fears that this information will be used against them in myriad ways. Such fears, Parliament heard, were leading many Canadians to forego genetic testing that they otherwise wished to pursue, which in turn was having deleterious effects on health. Accordingly, by mitigating individuals' fears, ss. 1 to 7 may reasonably be expected to have the further effect of preventing significant health-related harms.

[135] I also substantially agree with Justice Karakatsanis's explanation, at paras. 57-62, as to why regulating insurance contracts forms no part of the pith and substance of the provisions in issue notwithstanding the incidental effects they may have on the insurance industry. As indicated, however, I respectfully disagree with her description of the pith and substance of the provisions.

(3) Conclusion

[136] For these reasons, I conclude that the pith and substance of ss. 1 to 7 of the *Act* is to protect health by prohibiting conduct that undermines individuals' control over the intimate information revealed by genetic testing. These provisions prohibit compulsory genetic testing, compulsory disclosure of genetic test results, and the non-consensual collection, disclosure and use of those results in a wide array of contexts that govern how people interact with society. By giving people control over this information, ss. 1 to 7 of the *Act* mitigate their fears that it will be used against them. Such fears lead many to forego genetic testing, to the detriment of their own health, the health of their families, and the public healthcare system as a whole.

B. *Classification*

[137] As my colleagues have noted, the classification stage of this appeal turns on whether ss. 1 to 7 of the *Act* are backed by a criminal law purpose. Justice Karakatsanis has reviewed the essential aspects of this Court’s jurisprudence on the criminal law power at paras. 67-79 of her reasons, and I see no need to replicate her work; I agree with the legal principles she has set out. As she observes, “[a] law will have a criminal law purpose if it addresses an evil, injurious or undesirable effect on a public interest traditionally protected by the criminal law, or another similar public interest” (para. 74). In *Reference re Validity of Section 5(a) of the Dairy Industry Act*, [1949] S.C.R. 1 (“*Margarine Reference*”), Rand J. identified “[p]ublic peace, order, security, health, [and] morality” as the “ordinary though not exclusive ends served by [the criminal] law” (p. 50).

[138] As I understand it, my colleagues disagree with each other as to what Parliament must establish about the targeted harm in order for the Court to find that the criminal law purpose requirement is met. Justice Karakatsanis would hold that “[a]s long as Parliament is addressing a reasoned apprehension of harm to one or more of [the public interests protected by the criminal law], no degree of seriousness of harm need be proved before it can make criminal law” (para. 79). By contrast, Justice Kasirer would require something more — he would hold that Parliament must be responding to a “threat [that is] ‘real’, in the sense that Parliament had a concrete basis and a reasoned apprehension of harm” (para. 234 (emphasis added)). I would

respectfully decline to weigh in on this question, since I am of the view that the criminal law purpose requirement is met under either of my colleagues' approaches.

[139] Sections 1 to 7 of the *Act* are backed by a criminal law purpose because they are directed at suppressing a threat to health. People were choosing to put themselves at risk of preventable death and disease because they were concerned that they would not have control over the information revealed by genetic tests in a wide variety of contexts that govern how they interact with and in society. Parliament sought to mitigate these concerns by prohibiting conduct — namely, compulsory genetic testing, and compulsory disclosure and non-consensual collection, disclosure, and use of genetic test results — that undermined individuals' control over the information revealed by genetic testing. By giving people control over that information, Parliament sought to mitigate their fears that it would be used against them, thereby curbing the injurious effect on health.

[140] The threat to health that Parliament targeted by enacting ss. 1 to 7 of the *Act* was real — in every sense of the word. Parliament had ample evidence before it that people were refraining from undergoing genetic testing out of fear as to how their genetic test results could be used, thereby suffering significant harm or putting themselves at risk of significant and avoidable harm. The debates and committee testimony are saturated with examples of the life-saving, life-extending, and life-enhancing potential of genetic testing — all of which individuals felt they had to

forego because they could not control the ways in which the results of such testing would be used in various contexts.

[141] In her testimony before the House of Commons Standing Committee on Justice and Human Rights, Ms. Bev Heim-Myers, Chair of the Canadian Coalition for Genetic Fairness, gave a succinct example that throws the life and death consequences of the choice to forego genetic testing out of fear for how the results of such testing may be used into stark relief:

I'll give you an example. Two brothers in a family in their early twenties have long QT syndrome, a genetic heart disease, which means they could die very young from a heart attack. One brother is job hunting and the other brother isn't. One is tested for long QT and knows it is in his family. He has the gene, and he'll be on beta blockers for the rest of his life, and he'll be fine. The other brother decides not to get tested, because he's job hunting, and he doesn't want anybody to find out that this is in his family. Who wins when he's 35 years old and dies, leaving a family behind, when it could have been managed his whole life? Prevention is huge in saving health care dollars, but it's really about saving lives.

(House of Commons, Standing Committee on Justice and Human Rights, *Evidence*, No. 35, 1st Sess., 42nd Parl., November 17, 2016, at p. 13)

[142] The debates and committee testimony are also replete with discussions of genes that can indicate a predisposition to breast and/or ovarian cancer (the BRCA1

and BRCA2 genes), and the impact that testing for these genes has on women's health care choices.¹⁰ Mr. Oliphant, describing Bill S-201 at Second Reading, stated:

. . . knowledge is power and this opens up the possibility of taking concrete steps to reduce the possibility or the chance that a disease or a condition will develop in the first place.

Perhaps the most famous example of this is actor Angelina Jolie. People will probably know that her mother died of cancer. When she looked at that, she decided to undergo the test and determined that indeed she was a carrier for the BRCA1 gene. Women with this genetic mutation have as high as 87% chance of developing breast cancer and as high as 60% chance of developing ovarian cancer. Ms. Jolie opted to have preventative surgery and reduced her chance of getting breast cancer from 87% down to 5% and reduced her chance of getting ovarian cancer by some 98%. She wrote in *The New York Times*, "I can tell my children that they don't need to fear they will lose me to breast cancer".

The benefits of genetic knowledge should be not limited though to celebrities. Every one of us in the House may want to undertake a genetic test at some point. Famous or not, none of us should be denied access to a genetic test and none of us should be afraid of having a genetic test for fear of discrimination.

(*House of Commons Debates*, vol. 148, No. 77, at p. 4886)

And as Don Davies, Member of Parliament, observed:

Ovarian cancer is the most fatal women's cancer. In Canada every year it claims approximately 1,800 lives, and nearly 2,800 Canadian women will be newly diagnosed with the disease every year. Because it is often caught in its late stages, 55% of women diagnosed with ovarian cancer will die within five years. Although existing research has confirmed a strong link between genetics and ovarian cancer, women may fear testing and some do not get testing because their genetic privacy remains unprotected.

¹⁰ See, e.g., *Debates of the Senate*, vol. 150, No. 8, at pp. 146-47 and 149-50; *House of Commons Debates*, vol. 148, No. 77, at pp. 4889-90 and 4892-94; *House of Commons Debates*, vol. 148, No. 97, at pp. 6126-27.

According to Elisabeth Baugh, the CEO of Ovarian Cancer Canada:

While all women are at risk for ovarian cancer, women with specific gene mutations are at greater risk than others. Knowing about your genetic makeup enables informed decisions about preventive action.

(*House of Commons Debates*, vol. 148, No. 77, at p. 4890)

The BRCA example was also highlighted by several of the witnesses who appeared before the Standing Committee on Justice and Human Rights, including Dr. Cindy Forbes, Past President of the Canadian Medical Association, who gave the following testimony:

I think that mainly what I've seen as a family physician is the fear of discrimination, with patients not being tested for genetic abnormalities because they're fearful that they won't be insurable or they won't be eligible for employment in a certain field. That fear is very real, and they act on that fear.

I can give you some examples. We have patients in our practice who are twins. One was diagnosed with breast cancer at the age of 43, and the other twin at the age of 44. There likely could be a genetic cause, but neither of them is willing to be tested because of the fear of uninsurability and the implications for their children as well

If these women were tested because of the nature of the gene they have and if they were positive for the nature of the cancer they have, they would be offered treatments—surgical treatments, perhaps removal of their ovaries, or mastectomies and other treatments—that would not be available to them if they were not [tested]. . .

Those are the kinds of examples that I would see of people refusing.

(House of Commons, Standing Committee on Justice and Human Rights, *Evidence*, No. 37, 1st Sess., 42nd Parl., November 24, 2016, at p. 4)

[143] In light of this evidence, I cannot agree with Justice Kasirer’s conclusion that the impugned provisions do not target a “‘public health evil’ or threat”, but rather seek “to foster or promote beneficial health practices” (para. 239). While my colleague agrees that the provisions in question relate to a public purpose that is properly the subject of criminal law — health — he contends that “there is no defined ‘public health evil’ or threat to be suppressed” (para. 239). As I see it, by contrast, ss. 1 to 7 are not directed at the mere “promotion of beneficial health services or practices” (Kasirer J.’s reasons, at para. 240), but rather at protecting people from severe harms to their health caused by foregoing genetic testing out of fear that their information will be used against them (e.g., by way of non-consensual collection, disclosure, or use of genetic test results). While it is no doubt true that not dying of a preventable disease is a “better health outcom[e]” than dying from that disease (Kasirer J.’s reasons, at para. 239), I believe it makes more sense to describe measures directed at preventing such outcomes as being protective of health.

[144] Beyond addressing the dangers of preventable disease, the impugned provisions also protect other significant facets of health, like privacy and autonomy. Parliament recognized that the decision of whether to undergo a genetic test is “a deeply personal one” (*Debates of the Senate*, vol. 150, No. 8, at p. 150). This is especially so given that the types of diseases and conditions for which Parliament heard genetically-informed medicine holds particular promise are ones that many consider to be deeply private and central to personal identity. Parliament accordingly sought to empower individuals to make the best choice for their own health and the

health of their families by removing barriers that were preventing them from making that choice. In so doing, contrary to Justice Kasirer's assertion, Parliament eliminated the choice between entering into agreements and undergoing genetic testing that people were facing and that was posing a threat to health (para. 246).

[145] Further, I must also respectfully disagree with Justice Kasirer's contention that *RJR-MacDonald* is distinguishable from this case. To the contrary, I believe that *RJR-MacDonald* provides a full answer to this case. In *RJR-MacDonald*, the Court examined, among other things, the constitutionality of federally-enacted legislation that prohibited the advertising and promotion of tobacco products, and the sale of tobacco products that did not come in packaging that set out prescribed health warnings and information (para. 2). Much like the opposing views in this case, there was disagreement between the levels of court in *RJR-MacDonald* about both the characterization and classification of the legislation at issue. At first instance, the Quebec Superior Court "characterized [the impugned legislation] as legislation that is, in pith and substance, in relation to the regulation of advertising and promotion carried on by a particular industry" (*RJR-MacDonald*, at para. 13, citing *RJR-MacDonald Inc. v. Canada (Attorney General)* (1991), 82 D.L.R. (4th) 449 (Que. Sup. Ct.), at pp. 467-68). The Superior Court then determined that the legislation was not a valid exercise of Parliament's criminal law power. That decision was overturned by the Quebec Court of Appeal, which notably disagreed with the trial judge's characterization of the legislation, holding instead that it was "legislation, in pith and substance, in relation to the protection of public health"

(para. 19, citing *RJR-MacDonald Inc. v. Canada (Attorney General)* (1993), 102 D.L.R. (4th) 289 (Que. C.A.), at pp. 338-39). The Court of Appeal's determination that the legislation was within the legislative competence of Parliament was subsequently upheld by this Court. The Court concluded that "the pith and substance of the Act is criminal law for the purpose of protecting public health" (para. 45), with "the evil targeted by Parliament [being] the detrimental health effects caused by tobacco" (para. 30).

[146] As I see it, the criminal law purpose that buttressed the legislation at issue in *RJR-MacDonald* is analogous to the criminal law purpose that backs ss. 1 to 7 of the *Act* in this case. In *RJR-MacDonald*, Parliament had determined, based on the evidence before it, that choosing to use tobacco constituted a threat to individuals' health due to the significant negative health consequences that could result from that choice. Similarly here, Parliament identified a clear threat to health: people choosing to forego genetic testing for no reason other than their fear that they would not retain control over the information revealed by genetic testing in a wide variety of contexts. Parliament had ample evidence before it that by refraining from testing, people were suffering harm and/or putting themselves and their families at risk of avoidable harm. Parliament also had evidence that this was causing harm to the public healthcare system as a whole. Accordingly, Parliament recognized that this choice, like the choice to use tobacco, constitutes a threat to health. Both of these choices can lead to significant health-related harms.

[147] Additionally, *RJR-MacDonald* instructs that once Parliament has identified a valid criminal law purpose, it has the flexibility to use indirect means in pursuit of that purpose. Indeed, the Court in *RJR-MacDonald* observed that distinctions “with respect to the form employed by Parliament to combat the ‘evil’” targeted by the legislation are — unless accompanied by evidence of colourability — “not constitutionally significant” (para. 44; see also *Reference re Firearms Act (Can.)*, 2000 SCC 31, [2000] 1 S.C.R. 783, at para. 39). I note that there is no suggestion that the legislation at issue represents a colourable intrusion into provincial jurisdiction.

[148] Here, like in *RJR-MacDonald*, Parliament employed indirect means to suppress the threat to health it identified. As in *RJR-MacDonald*, it was constitutionally entitled to do so. In both cases, Parliament enacted legislation which prohibited conduct that was influencing people to make a choice that could lead to significant health-related harms. In *RJR-MacDonald*, Parliament recognized that advertising tobacco products was influencing people’s choice to use tobacco, to the potential detriment of their health (para. 32). Instead of prohibiting tobacco consumption — a direct approach that would have mitigated the detrimental health effects but raised other issues — Parliament prohibited certain conduct that was influencing individuals’ choice of whether to use tobacco. Similarly here, Parliament determined that the disquieting possibility of compulsory genetic testing, and compulsory disclosure and non-consensual collection, disclosure, and use of genetic test results were influencing people’s choice to forego genetic testing, to the potential

detriment of their health. Rather than forcing individuals to take genetic tests — a direct approach that would have mitigated the detrimental health effects but raised other issues — Parliament saw fit to prohibit the influential conduct.

[149] I would add that, contrary to Justice Kasirer's suggestion, prohibiting discrimination based on genetic characteristics would not have been a direct approach to addressing the threat to health that Parliament was targeting (para. 250). As I have explained, that threat was the threat of individuals foregoing genetic testing out of fear as to how the information revealed by such testing might be used, which in turn was resulting in detrimental health effects. Because genetic discrimination is just one use giving rise to that fear — with compulsory disclosure and non-consensual use being examples of others — prohibiting genetic discrimination would in all likelihood have fallen short of achieving Parliament's purpose. Relatedly, this is why I point out that forcing people to take genetic tests would have been a direct approach to addressing the identified threat to health — though I recognize that this was likely not a viable option, given the health-related privacy and autonomy concerns it would have raised. In any event, as indicated earlier, there is no real need to inquire into what else Parliament might or could have done since this Court has stated that, absent evidence of colourability, Parliament has wide latitude in determining the means by which it addresses the evil or injurious or undesirable effect it is targeting (see *RJR-MacDonald*, at para. 44; *Reference re Firearms Act*, at para. 39).

[150] In sum, as I see it, by enacting ss. 1 to 7 of the *Act*, Parliament targeted conduct that was having an injurious effect on health. Canadians choosing to forego genetic testing and thereby dying preventable deaths and suffering other preventable health-related harms for no reason other than the fear that their genetic test results could be used against them is a threat to health that Parliament was constitutionally entitled to address, pursuant to s. 91(27) of the *Constitution Act, 1867*. Sections 1 to 7 of the *Act*, which prohibit conduct that undermines individuals' control over the information revealed by genetic testing in a wide variety of contexts that govern how people interact with and in society, accordingly represent a valid exercise of Parliament's power to enact laws in relation to the criminal law.

III. Conclusion

[151] For these reasons, I would dispose of the appeal in the manner proposed by Justice Karakatsanis (see para. 108).

The reasons of Wagner C.J. and Brown, Rowe and Kasirer JJ. were delivered by

KASIRER J. —

I. Introduction

[152] I begin these reasons by noting that I find the explanations of the method for determining the constitutionality of ss. 1 to 7 of the *Genetic Non-Discrimination Act*, S.C. 2017, c. 3 (“*Act*”), offered by my colleagues Justice Moldaver and Justice Karakatsanis most helpful. With great respect, however, I do not share their view that the impugned provisions were enacted within the constitutional authority of the Parliament of Canada over the criminal law pursuant to s. 91(27) of the *Constitution Act, 1867*.

[153] We disagree on the characterization — the pith and substance, in constitutional terms — of ss. 1 to 7 of the *Act* and, at the end of the day, how these provisions should be classified within the heads of power enumerated in ss. 91 and 92 of the *Constitution Act, 1867*.

[154] On my understanding, the pith and substance of ss. 1 to 7 is to regulate contracts and the provision of goods and services, in particular contracts of insurance and employment, by prohibiting some perceived misuses of one category of genetic tests, the whole with a view to promoting the health of Canadians. The *Act* has certain incidental purposes and effects, but when the dominant character of the impugned provisions is identified, they cannot be classified as a valid exercise of Parliament’s constitutional power over criminal law. These provisions do not prohibit what is often styled, in language archaic but telling, an “evil” associated with the criminal law. Instead, ss. 1 to 7 fall within the provinces’ constitutional authority over property and

civil rights conferred by s. 92(13) of the *Constitution Act, 1867*. In the main, I find myself in broad agreement with the report of the Court of Appeal in the reference.

[155] Many of the spirited submissions made in support of the impugned legislation's constitutionality stressed what might be understood, in some circles, as noble public policy: to encourage government action that would combat genetic discrimination so that Canadians can, without fear, undergo genetic testing if they so desire. Whether or not this Court feels it is appropriate to recognize what the appellant referred to as the deeply personal character of the decision to undertake a genetic test is not the question before us. The task of the courts — perforce in a constitutional reference such as this one — is not to measure the suitability of public policy but to determine the validity of legislation pursuant to the division of powers under the Constitution. The urgings in favour of what counsel supporting the law see as sound policy would be best done before the appropriate legislative powers that be, acting within their right spheres of constitutional jurisdiction.

[156] Moreover, whatever my own views may be on the merits of prohibiting discrimination on the basis of genetic characteristics — the objective championed by many proponents of this initiative — and notwithstanding the title of the *Act*, ss. 1 to 7 do *not* prohibit genetic discrimination. The Court of Appeal saw this plainly and characterized the pith and substance of the impugned provisions accordingly. I hasten to note, as I will seek to explain below, that ss. 9 and 10 of the *Act* — not at issue in this appeal — do prohibit such discrimination, in respect of certain matters

unquestionably falling within the purview of the legislative authority of the Parliament of Canada, by amending the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (“*CHRA*”). In addition, s. 8 of the *Act* — again not before us — has been enacted to a comparable end in respect of the *Canada Labour Code*, R.S.C. 1985, c. L-2 (“*CLC*”).

[157] Sections 1 to 7 cut a different and broader swath through the regulation of contract and the provision of good and services. While parliamentarians voiced special concern for discriminatory use of genetic testing in contracts of insurance, none of these provisions prohibits genetic discrimination. Instead, in connection with contracts and the provision of good and services, they prohibit only one class of genetic tests from being required and ensure that the results of such tests already taken not be forcibly disclosed, all as a means of promoting health.

[158] The contested provisions do grant individuals limited control over a narrow class of genetic information, thus achieving two distinct, but interrelated, incidental effects: preventing circumstances from arising that would otherwise have the consequential effect of allowing some forms of discrimination based on genetic characteristics, and protecting individuals’ privacy and autonomy related to the decision to undergo genetic testing. But if either of these were the *Act*’s dominant aim, Parliament would have broadened the scope of its provisions beyond forced testing and forced disclosure and not limited ss. 1 to 7 to a narrow category of genetic tests. In other words, the fact that Parliament did not directly target genetic

discrimination — the alleged reason behind Canadians’ fear of undergoing genetic testing and for which their personal information must be protected — is fatal to the appellant’s and *amicus curiae*’s positions.

[159] When classifying the law, the Court of Appeal also rightly relied on authority that I consider to reflect settled law. The court reported that, when properly characterized, ss. 1 to 7 cannot be classified as criminal law given the absence of what is known in constitutional circles as an evil or injurious or undesirable effect upon the public to which the *Act* is directed (drawing on the *Reference re Validity of Section 5(a) of the Dairy Industry Act*, [1949] S.C.R. 1, at p. 49 (“*Margarine Reference*”). Genetic discrimination may well be evil, injurious, or undesirable and, as such, worthy of prohibition but, as I say, the *Act* does not place this question before us. Despite its confounding short title, the *Genetic Non-Discrimination Act*, in ss. 1 to 7, does not prohibit reprehensible behaviour or an inherent danger like violent crime or smoking. Similarly, while I do not dispute the importance of privacy and autonomy as it pertains to genetic information, the scope of the prohibitions means that these concerns are incidental in this case.

[160] Moreover, I respectfully resist the interpretation of recent jurisprudence, advanced in particular by the *amicus curiae*, that it is enough for Parliament to say it perceives a risk of harm as a basis for enacting legislation under the criminal law power. According to this approach, the judiciary owes deference to Parliament’s view such that, when tested constitutionally before the courts, the legislation will be valid

criminal law. I note that the respondent Attorney General of Canada is more circumspect in his understanding of the scope of Parliament's criminal law power.

[161] A further point should be made by way of introduction. Sections 1 to 7 were enacted against the advice of the then federal Minister of Justice who was concerned that the proposed law went beyond Parliament's jurisdiction and noted that it had "significant potential to upset the constitutional balance between federal and provincial powers".¹¹ I agree. The respondent Attorney General of Canada makes the same argument before this Court and he is joined, in his invitation that we declare the law *ultra vires*, by the respondent Attorney General of Quebec. Such an unusual congruence of views between federal and provincial attorneys general in division of powers litigation encourages the exercise of caution. That said, it is not determinative and of course judges of this Court come to their own views of such matters.

II. Analysis

[162] Like my colleagues, I propose to answer the question as to whether ss. 1 to 7 of the *Act* are *ultra vires* Parliament's jurisdiction over criminal law under s. 91(27) of the *Constitution Act, 1867*, according to the method employed by the Court of Appeal. First, courts must characterize the law. That is, they must determine its pith and substance. Second, courts must classify the law and determine whether it comes within the jurisdiction of the level of government that enacted it.

¹¹ Statement by the Minister of Justice, *Government Position Regarding Bill S-201, An Act to prohibit and prevent genetic discrimination*, November 17, 2016, reproduced in R.R. (AGC), vol. XII, at pp. 108-9.

A. *Characterization: What is the Pith and Substance of Sections 1 to 7 of the Act?*

[163] It is often said that the exercise of characterization of impugned legislation must be as precise as possible and “spelled out sufficiently to inform anyone asking, ‘What’s it all about?’” (A. S. Abel, “The Neglected Logic of 91 and 92” (1969), 19 *U.T.L.J.* 487, at p. 490, cited in *Desgagnés Transport Inc. v. Wärtsilä Canada Inc.*, 2019 SCC 58, at para. 35). I note that the true character of legislation is one which reflects its “dominant purpose and effect” (*Reference re Assisted Human Reproduction Act*, 2010 SCC 61, [2010] 3 S.C.R. 457, at para. 20, per McLachlin C.J.; see also para. 184, per LeBel and Deschamps JJ. (“*AHRA Reference*”)).

[164] Accordingly, in cases such as this, where the impugned legislation potentially relates to several different topics, the leading feature of the statute will be its pith and substance, meaning that the secondary purposes and effects effectively stand outside a precise characterization of the law’s true character. That is, while other incidental features of the law may be noted, they should not dictate characterization lest the second step — classification — be sent down the wrong path (see G. Régimbald and D. Newman, *The Law of the Canadian Constitution* (2nd ed. 2017), at pp. 177-78, citing *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3, at para. 28; *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, [2011] 3 S.C.R. 134). Indeed, where the characterization of pith and substance lacks precision, the consequential exercise of classification among the constitutional heads of powers may well become difficult if not wrong-headed.

[165] I agree with the view that “[t]he focus is on the law itself and what it is really about” (Karakatsanis J.’s reasons, at para. 31). In order to rise to this degree of precision, and because it is the constitutionality of enactment that is at issue, the court’s inquiry into pith and substance must be anchored in the text of the impugned legislation. In the final analysis, it is the substance of the legislation that needs to be characterized, not speeches in Parliament or utterances in the press by well-meaning sponsors or opponents of the law.

[166] Moreover, in the identification of the pith and substance of a law, legislative form cannot trump the substance of the law. Again, as my colleague Justice Karakatsanis helpfully notes, it is right to be mindful that the goal of this characterization exercise is to identify the law’s true subject matter, even when “it differs from its apparent or stated subject matter” (para. 28). Indeed, the apparent purpose or formal indicia of purpose can occasionally be what Newbury J.A. called a “smokescreen” for a matter lying outside the enacting government’s jurisdiction (see *Reference re Environmental Management Act (British Columbia)*, 2019 BCCA 181, 25 B.C.L.R. (6th) 1, at para. 13, aff’d 2020 SCC 1). Courts must therefore be careful not to let form control the inquiry; they should examine the substance of the legislation “to determine what the legislature is really doing” (*R. v. Morgentaler*, [1993] 3 S.C.R. 463, at p. 496). At this stage, extrinsic evidence may also be considered in order to ascertain whether the true purpose of the legislation differs from its stated purpose (see *Reference re Firearms Act (Can.)*, 2000 SCC 31, [2000] 1 S.C.R. 783, at para. 18).

[167] In this case, the submissions of the parties, *amicus curiae*, and interveners contain a wide array of different characterizations of the impugned provisions, including the protection and promotion of health; the protection of privacy, physical and psychological security, and dignity of vulnerable persons; the prohibition and prevention of genetic discrimination; and the regulation of contracts, particularly insurance contracts, in order to promote health.

[168] My colleague Justice Karakatsanis has concluded that the purpose of the legislation is to combat genetic discrimination and the fear of genetic discrimination based on the results of genetic tests. She notes that this purpose is borne out in the provisions' effects, the most important of which is to give individuals control over the decision whether to undergo genetic testing and access to the results thereof. She writes that, accordingly, the pith and substance of ss. 1 to 7 is 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 individuals' genetic test results will be used against them and to prevent discrimination based on that information" (para. 65).

[169] As I understand it, my colleague Justice Moldaver generally agrees that Parliament sought to mitigate Canadians' fears about the use of genetic test results by giving them a measure of control over some of their personal information. In his view, the pith and substance of the impugned provisions is "to protect health by

prohibiting conduct that undermines individuals' control over the intimate information revealed by genetic testing" (para. 111).

[170] The wide range of characterization in this case suggests strongly to me that not all of the interpretative efforts at this stage have followed the cardinal rule that it is the *dominant* purpose and effect of ss. 1 to 7 that should concern us. In fairness, part of the mischief comes from Parliament's choice for the *Act's* short title (*Genetic Non-Discrimination Act*). This title may have put some readers of the impugned provisions on the wrong path by stressing what may have been an aspiration of parliamentarians — legitimate or not, be that as it may — that does not find expression in the statute's leading purpose or effects. Moreover, another part of the mischief appears to come from the wide-ranging and disparate character of the legislative debates, which offer a number of often conflicting accounts of the purposes and effects of the *Act*. This makes the identification of pith and substance difficult, especially given the absence of a statutory preamble or clearly-stated objective in the contested portion of the *Act* itself.

[171] The Court of Appeal, for its part, made no such mistake. It concluded that ss. 1 to 7 aim "to prohibit the use of genetic tests or of their results in order to allow Canadians to access these tests without their results being used without their consent when they enter into agreements with third parties or when they seek the provision of goods and services" (2018 QCCA 2193, 2019 CLLC ¶230-020, at para. 8). While the court accepted that the provisions have some impact on privacy, autonomy, and the

prevention of discrimination, it nonetheless recognized that these effects were both limited and incomplete, as the use of genetic information that may be disclosed voluntarily or that may be obtained through means other than genetic tests was not prohibited (para. 10). The objective of the provisions, in its view, was rather to encourage the use of genetic tests in order to improve the health of Canadians by suppressing the fear of some that this information could eventually serve discriminatory purposes (para. 11). As will be apparent from the following discussion, I am in general agreement with the Court of Appeal.

(1) The Purpose of the Impugned Provisions

[172] In order to discern the purpose for which the impugned provisions were adopted, I will consider both intrinsic and extrinsic evidence. As will become apparent, however, the most illuminating window into the purpose of ss. 1 to 7 is found within the *Act* itself (see, e.g., *Quebec (Attorney General) v. Canada (Attorney General)*, 2015 SCC 14, [2015] 1 S.C.R. 693, at para. 30).

(a) *Intrinsic Evidence*

[173] Before this Court, it was argued that the importance of the *Act*'s title is indicative of its pith and substance, and my colleague Justice Karakatsanis notes that Parliament's twofold purpose is suggested by both its long and short titles (para. 35). I agree that a statute's title can be helpful to identify its pith and substance, but note that legislatures sometime use titles to other ends. As Professor Sullivan has written:

Titles have more recently attracted political interest, and they are now commonly used to draw attention to a piece of legislation and highlight its purported benefits. It remains to be seen how these titles will affect the interpretation of legislation, but it is difficult to imagine they will have a significant impact as indicators of legislative intent. [Footnotes omitted.]

(*Statutory Interpretation* (3rd ed. 2016), at p. 162)

This observation, made in connection with the law on statutory interpretation, is a welcome warning, too, for the exercise of determining a law's pith and substance. The idea that a title may be the source of mischief in discerning purpose is especially true of short titles that seek to encapsulate, in a few short words, the essence of a statute that may not rest on a single idea.

[174] In my view, neither the long title of this statute — *An Act to prohibit and prevent genetic discrimination* — nor its short title — *Genetic Non-Discrimination Act* — can be said to reflect clearly the impugned provisions' true purpose. With respect, I disagree that these titles reveal that the provisions' purpose is to prohibit discrimination on genetic grounds and prevent such discrimination from occurring in the first place. To my mind, genetic non-discrimination cannot be said to be the primary objective of the impugned provisions.

[175] Like the Court of Appeal, I am of the view that the title does not support a conclusion that ss. 1 to 7 seek to *prohibit* discrimination on genetic grounds because, as I will explain, the provisions stop well short of directing that (C.A. reasons, at para. 10). While the long title explicitly refers to the prohibition of genetic discrimination, it must be borne in mind that this long title speaks to the entirety of

the *Act*, which includes amendments to the *CLC* and the *CHRA*. As I will note below, the amendments to the *CLC* and the *CHRA* purport to prohibit genetic discrimination directly whereas the prohibitions in ss. 1 to 7 do not. As a result, the long title does not support the conclusion that the impugned provisions — the focus of the pith and substance inquiry — seek to prohibit genetic discrimination, as the “prohibition” in the long title could easily be referring to the *CLC* and *CHRA* amendments, but not to ss. 1 to 7. Indeed, the appellant and the *amicus curiae* themselves have conceded that ss. 1 to 7 do not *prohibit* genetic discrimination; at best, they seek to indirectly *prevent* genetic discrimination from occurring in the first place.

[176] This then brings us to the prevention of discrimination on genetic grounds, which is also explicitly referred to in the long title. While I accept that ss. 1 to 7 do seek to curtail circumstances in which genetic discrimination can occur, and thus prevent such circumstances from arising in connection with contracts and the provision of goods and services, the provisions leave open the possibility that genetic information may be legitimately used — thereby not precluding use for drawing distinctions based on genetic characteristics — when it has been disclosed voluntarily or obtained through other means than a genetic test. In that sense, even “preventing genetic discrimination” cannot be properly understood to be the main objective of the contested provisions. At most, preventing some circumstances from arising that could facilitate genetic discrimination is one of the many consequences of ss. 1 to 7, but an unconvincing way to describe its dominant purpose.

[177] Similarly, given the possibility that genetic information may be misused notwithstanding the prohibitions in the *Act*, I must also disagree with the view that the titles disclose Parliament's dominant purpose as focused on privacy and autonomy. As I note below, the protection of individuals' control over their genetic information by the impugned provisions is narrow in scope, far from comprehensive in its compass, and stands second to the provisions' health-related purpose. Giving individuals control over genetic information therefore cannot be seen as their overarching objective. The much broader scope of amendments to the *CHRA*, as compared to the protections offered by the impugned provisions, supports this conclusion.

[178] No preamble or purpose section outlines the *raison d'être* of the law. Accordingly, the text of the provisions takes particular significance in determining their pith and substance.

[179] Turning, then, to the "Interpretation" section of the *Act*, s. 2 sets out three "definitions": "disclose", "genetic test", and "health care practitioner".

[180] The definition of "genetic test" is central to identifying the law's purpose as relating to the promotion of health. A genetic test, for the purposes of ss. 1 to 7, refers to "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". This definition is thus limited to genetic tests that seek to gather health information on an individual with a view to predicting disease or treating medical

problems. Even noting that Parliament uses the expression “such as”, and recognizing that its list of purposes set out in s. 2 is not closed, the statutory turn of phrase plainly indicates that Parliament is pointing to purposes *ejusdem generis* (i.e. “of the same kind”) as the ones listed, all of which are health-related.

[181] Sections 3 to 5 of the *Act* outline “Prohibitions”. Sections 3 and 4 prohibit persons from requiring an individual to undergo a “genetic test” or to disclose the results of such test as a condition of providing goods and services to that individual, or of entering into or maintaining a contract or any of its terms. They also prohibit persons from refusing to engage in any of these activities on the grounds that an individual has refused to undergo a genetic test or to disclose the results of such a test. Section 5 prohibits the collection, use, or disclosure of the results of an individual’s genetic test without that person’s written consent. The provisions say nothing about genetic tests that do not fall within the narrow health-related definition in s. 2, but could nonetheless be used as a condition for a contract, for example. Moreover, they say nothing about the use of a genetic test outside the — albeit broad — purview of contracts and the provision of good and services.

[182] Section 6 exempts health care practitioners (as defined in s. 2) and researchers from the application of ss. 3 to 5 of the *Act* in respect of an individual to whom they are providing “health care services” or who is participating in health-related “research”. Notably, where a health care practitioner or a researcher undertakes a genetic test for a non-health-related reason, the *Act* does not apply. This

supports the view that the impugned provisions target health. Moreover, through this provision, Parliament offered a common-sense exception for situations in which genetic tests may be required as part of providing treatment or undergoing research. The goal, simply stated, is to protect those professionals that may require access to genetic tests to provide appropriate health care or to conduct important research.¹² As a result, and with respect for differing views, I would not draw an inference that Parliament “explicitly carve[d] out conduct that is beneficial”, which then demonstrates that its “focus was squarely on protecting health” (Moldaver J.’s reasons, at para. 121). Rather, Parliament sought to ensure, among other things, that health care practitioners could continue to discuss genetic tests with their patients, prescribe such tests, and use their results when this would be to the patient’s benefit. To my mind, this supports the view that Parliament viewed genetic tests as beneficial and therefore something to be encouraged, with a view to improving the health of Canadians.

[183] Finally, s. 7 provides substantial penalties for violating the prohibitions outlined in ss. 3 to 5. On indictment, a person who contravenes one of these provisions is liable to a fine of a maximum of \$1,000,000, imprisonment for a maximum of five years, or both. On summary conviction, a person is liable to a fine of a maximum of \$300,000, imprisonment for a maximum of twelve months, or both.

¹² See, e.g., *Proceedings of the Standing Senate Committee on Human Rights*, No. 2, 1st Sess., 42nd Parl., March 9, 2016, at p. 2:15; House of Commons, Standing Committee on Justice and Human Rights, *Evidence*, No. 34, 1st Sess., 42nd Parl., November 15, 2016, at p. 2; House of Commons, Standing Committee on Justice and Human Rights, *Evidence*, No. 37, 1st Sess., 42nd Parl., November 24, 2016, at pp. 3-11.

[184] As the Court of Appeal explained in its reasons, taken together, ss. 1 to 7 aim to prohibit making the provision of goods and services or the making, continuing, or offering of specific terms or conditions of a contract conditional upon an individual undergoing or disclosing the results of genetic testing (paras. 8 and 10). The provisions do not prohibit the use of genetic information that may be disclosed voluntarily or that may be required or obtained through other means, such as family history or other medical tests, and they do not prohibit genetic discrimination. It is clear that the purpose of ss. 1 to 7 is different from the veritable prohibitions against discrimination based on genetic characteristics set forth in the amendments made to the *CHRA* and to the *CLC* in ss. 8 to 10 of the *Act*, which are extrinsic to the impugned provisions, to which I turn in the next section.

[185] Moreover, I stress that the prohibitions in ss. 3 to 5, the exemption in s. 6, and the penalties in s. 7 all rely on the narrow, health-based definition of “genetic test” found in s. 2. The scope of this definition excludes genetic tests done for other reasons, for example, to reveal a person’s ancestry or for forensic purposes, or to determine parental lineage or non-disease traits. Genetic tests can obviously indicate other human physical characteristics unrelated to predicting disease and treating medical problems. Some of these characteristics — aspects of physical appearance, for example, or ancestry — might be used as grounds for discrimination or misused in some other manner, but they are not spoken to in the *Act* because they are excluded from the definition of a “genetic test”. Sections 1 to 7 of the *Act* simply do not speak to genetic tests undertaken for other purposes. Any privacy or autonomy concerns

related to tests undertaken in pursuit of these different ends are therefore not addressed by the *Act*. While the provisions grant individuals some control over their genetic information, this protection is limited to health-related information. Similarly, the protection granted by the provisions is incomplete, as genetic information revealed by means other than a genetic test receives no protection.

[186] This is important: whatever discrimination may or may not be prevented by these sections of the *Act*, and whatever safeguards to privacy and autonomy may or may not be granted, they are limited in compass to a category of certain health-based genetic tests and exclude protection for genetic information obtained by other means — contrary to the amendments to the *CHRA*.

(b) *Extrinsic Evidence*

(i) Amendments to the *CHRA* and to the *CLC* in Sections 8 to 10 of the *Act*

[187] While only the constitutionality of ss. 1 to 7 of the *Act* is at issue, it is useful to consider the whole of the *Act* — including the amendments to the *CLC* and the *CHRA* — in order to discern, more precisely, the purpose for which the impugned provisions were adopted. I recognize that a wrong focus can subvert pith and substance analysis. My sense is that examining what Parliament sought to do in parts of the *Act* that are not contested here is helpful in understanding the true character of what was done and not done, and the effects thereof, in ss. 1 to 7. In other words,

what is absent from the impugned legislation but present elsewhere in the *Act* provides a clue on the true aim of the contested provisions.

[188] When it enacted amendments to the *CHRA* and to the *CLC* in ss. 8 to 10 of the *Act*, Parliament plainly created prohibitions against genetic discrimination. By comparing the impugned provisions with the *Act*'s amendments to federal human rights and labour legislation, however, it is plain that the purpose of ss. 1 to 7 is not to prohibit discrimination based on genetic characteristics.

[189] Sections 9 and 10 of the *Act* amend the *CHRA* in three ways in order to directly combat genetic discrimination “within the purview of matters coming within the legislative authority of Parliament” (*CHRA*, s. 2). First, an injunction against discriminatory practices based on “genetic characteristics” is added to the purpose section of the *CHRA*. Second, “genetic characteristics” are included as an enumerated ground of prohibited discrimination. Third, a new deeming provision is added to assist those alleging genetic discrimination.¹³ This provision indicates that where the ground of discrimination is refusal of a request to undergo a genetic test or to disclose, or authorize the disclosure of, the results of a genetic test, “the discrimination shall be deemed to be on the ground of genetic characteristics” (*CHRA*, s. 3(3)). The amendments set out at ss. 9 and 10 of the *Act* are applicable only to the *CHRA* and not to ss. 1 to 7, contested here.

¹³ Compare the existing s. 3(2) of the *CHRA*, which provides that discrimination on the ground of pregnancy or child-birth is “deemed” to be on the ground of sex.

[190] While ss. 3 to 5 of the *Act* contain prohibitions relating to refusal to undergo a genetic test or to disclose its results, Parliament does not say, in contrast to ss. 9 and 10, that there is a right to equality, free from genetic discrimination, in respect of contracts and the provision of good and services. While the impugned provisions provide that forced testing and forced disclosure is prohibited as a condition to contract or to provide goods and services, discrimination on the basis of genetic characteristics is not directly or even indirectly prohibited if the genetic testing or disclosure of the results thereof were made lawfully. Parliament could have attempted to mirror the amendments to the *CHRA* with a broad prohibition against discrimination based on genetic characteristics in ss. 1 to 7 but did not do so.

[191] The amendments to the *CHRA* also encompass a broader range of genetic information than ss. 1 to 7. First, since no definition is provided for “genetic characteristics”, the protection is not limited to a narrow health-based definition of genetic tests. Second, by protecting “genetic characteristics” rather than information disclosed by genetic tests, the amendments to the *CHRA* include genetic information obtained through other means. The deeming provision supports this interpretation: the *CHRA* specifically ensures that one cannot be forced to undergo a genetic test and that results of a genetic test cannot be forcibly disclosed, which does not preclude the fact that a broader range of genetic information is protected. The broad purview of the *CHRA* goes to show, in my respectful view, that ss. 1 to 7 also cannot be characterized in pith and substance as protecting individuals’ control over private information.

[192] The impugned provisions should also be contrasted with s. 8 of the *Act*, which amends the *CLC*, the basic instrument of labour law applicable in the federal sphere of jurisdiction. While the amendments to the *CLC* echo some of ss. 3 to 5 of the *Act*, they contain an additional provision: s. 247.98(4)(c) of the *CLC* provides that an employer cannot dismiss, suspend, lay off, or demote an employee, impose a penalty on an employee, or take disciplinary actions against an employee “on the basis of the results of a genetic test undergone by the employee”. This provision, which directly prohibits employers from sanctioning their employees “on the basis” of genetic information, is absent from ss. 1 to 7 of the *Act*, even if the latter purports to apply to contracts of employment not subject to the *CLC*.

[193] The contrast between the amendments to the *CHRA* and the *CLC*, which create prohibitions against discrimination, and the impugned provisions, which do not, shows that the purpose of ss. 1 to 7 is different from that of these amendments. If Parliament had attempted to take a coordinated approach to genetic discrimination in the *Act*, discrimination on the basis of genetic characteristics would have been directly prohibited in the impugned provisions, and not only in the *CHRA* and *CLC*. So, as the Court of Appeal recognized, while the impugned provisions may offer, to some extent, limited control to individuals over their genetic information, they do not reduce their fears surrounding genetic testing in any real measure, since the impugned provisions do nothing to prohibit genetic discrimination.

(ii) Legislative Debates

[194] There is a general consensus that legislative debates are useful in the determination of pith and substance because they give context to the statute, explain its provisions, and articulate the policy of the government that proposed it (see P. W. Hogg, *Constitutional Law of Canada* (5th ed. Supp. (loose-leaf)), vol. 1, at pp. 15-14 to 15-15). However, courts must remain mindful of the fact that legislative debates “cannot represent the ‘intent’ of the legislature, an incorporeal body” (*Morgentaler*, at p. 484). There is a risk, courted here by the appellant and the *amicus curiae* who give very broad importance to the purpose of the law stated in the House of Commons and the Senate, of substituting commentary on the *Act* for the *Act* itself. While the debates are an indicia of the legislature’s intent, they cannot stand for the *Act* and replace its provisions.

[195] In this case, the legislative debates were wide-ranging in their reference to legislative purpose; it is possible to discern some emphasis, to differing degrees, placed on discrimination, insurability, employability, health, and privacy. Moreover, the usefulness of this part of the record is limited by the often general character of comments on the various iterations of the *Act*, which usually did not explicitly state whether they referred to the *Act* in its entirety or only to certain portions thereof. Any attempt to take away a single message from the legislative debates is consequently difficult.

[196] With that said, in my view, the debates generally reveal that genetic tests were considered to be beneficial and viewed as a means of opening avenues to improved health treatment, as they allow Canadians to be aware of risks and change their behaviour. The choice to take a genetic test should not be influenced by a person's fear over the potential impact taking such a test may have on their prospects of obtaining or maintaining insurance or employment. Both Senator Cowan, the principal sponsor of the bill, and Mr. Oliphant, who moved for the bill to be read for the first time at the House of Commons, made comments to this effect on multiple occasions.¹⁴

[197] For instance, at the second reading of Bill S-218, *An Act to prohibit and prevent genetic discrimination*, 1st Sess., 41st Parl., 2013 (not passed), the first iteration of the *Act*, Senator Cowan explained it as follows:

. . . [T]here might be steps that a person could take to reduce the likelihood that they will develop the disease if they know they carry a gene associated with it.

...

As a matter of public policy, I believe we should be removing roadblocks to people's being able to access genetic testing, if they choose. It is a matter of choice, and that choice should be the individual's to make. Someone recognizing that they may be at risk of developing a genetic disease already has so many concerns to balance. Fear about

¹⁴ See, e.g., *Debates of the Senate*, vol. 150, No. 22, 1st Sess., 42nd Parl., March 22, 2016, at p. 381 (Senator Cowan); *Debates of the Senate*, vol. 150, No. 8, 1st Sess., 42nd Parl., January 27, 2016, at p. 147; *Debates of the Senate*, vol. 148, No. 154, 1st Sess., 41st Parl., April 23, 2013, at p. 3744 (Senator Cowan); *Debates of the Senate*, vol. 149, No. 137, 2nd Sess., 41st Parl., May 5, 2015, at p. 3281 (Senator Cowan); *House of Commons Debates*, vol. 148, No. 47, 1st Sess., 42nd Parl., May 3, 2016, at p. 2736 (Mr. Robert Oliphant).

insurability for themselves or their children or about how their employer will react simply should not be among them.

...

. . . Genetic testing offers the possibility that someone can obtain information that then can very concretely become informed about choices that may be able to give them a better chance at a healthy life. Of course, preventative steps can also yield significant savings in health care costs for taxpayers. These are good things, honourable senators. We know that fear of genetic discrimination, particularly in insurance, is actively working to discourage people from having testing that they should otherwise have in order to better manage their personal health. As I said before, there are many factors and concerns that weigh upon a person in deciding whether or not to take a genetic test. Insurability should not be one of them. [Emphasis added.]

(*Debates of the Senate*, vol. 148, No. 154, at pp. 3744-45)

[198] Similarly, in the debates about Bill S-201, *An Act to prohibit and prevent genetic discrimination*, 2nd Sess., 41st Parl., 2015 (not passed), the second iteration of the *Act*, Senator Cowan reiterated these points when he asked the senators to defeat the report of the Standing Senate Committee on Human Rights. Specifically, he spoke of the fact that genetic testing could help Canadians “lead healthier, longer lives” and that “[k]nowing that you have a particular genetic predisposition can open up steps that you can take to reduce the chance that you will develop the disease or condition”. He was focused on how genetic testing could help Canadians improve their health (*Debates of the Senate*, vol. 149, No. 137, at pp. 3270-78).

[199] When Mr. Oliphant moved for Bill S-201, *An Act to prohibit and prevent genetic discrimination*, 1st Sess., 42nd Parl., 2017, the third iteration of the *Act*, to be read for the first time at the House of Commons, he explained that “[t]he protections

in the bill would enable Canadians to access medical advances in genetic testing without the fear of negative consequences or repercussions on them and their families” and that “[i]t would empower Canadians to have better health” (*House of Commons Debates*, vol. 148, No. 47, 1st Sess., 42nd Parl., May 3, 2016, at p. 2736). At the second reading of this bill, which eventually became law, he added: “[t]his is our chance, as legislators, to bring better health to Canadians and ensure that Canadians have access to genetic tests” (*House of Commons Debates*, vol. 148, No. 77, 1st Sess., 42nd Parl., September 20, 2016, at p. 4887).

[200] In my respectful view, it is plain, from the foregoing, that Parliament was focused on removing barriers in order to create incentives for genetic testing: i.e. in order to promote the well-being of Canadians. The parliamentary record is replete with references indicating that Parliament was focused on the promotion of health when it enacted the impugned legislation. Providing encouragement for genetic testing may be achieved otherwise than by offering financial incentives; we have, in this case, an example of a non-financial incentive to genetic testing. While Parliament recognized that the choice to undergo genetic testing was a personal one, it sought to encourage individuals to make that choice by removing barriers, such as fears in respect of insurability, and thereby improve Canadians’ long-term health outcomes. The removal of a stumbling block and the creation of incentives for genetic testing go hand-in-hand — rather than being in opposition to one another — and work together to improve the health of Canadians.

[201] Moreover, on my reading of the record, and as can be seen in the excerpt at para. 197, the main sectors of focus were insurance and employment. According to Senator Cowan, “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 should not be the barriers that prevent Canadians from accessing the extraordinary medical advances of the genetics revolution and the hope that it carries for better health and a better quality of life”. He added that “[f]ear of repercussions for insurability is probability [*sic*] the single biggest concern that people have about genetic testing” (*Debates of the Senate*, vol. 149, No. 32, 2nd Sess., 41st Parl., February 5, 2014, at p. 889). Furthermore, although the testimony of Dr. Bombard, to which my colleague Justice Karakatsanis refers in her reasons, briefly mentioned discrimination in legal proceedings and in adoption, it focused on the insurability and employability of persons following genetic tests.¹⁵ Moreover, Dr. Cohn’s testimony, to which my colleague also refers, also focused on insurance and employment issues.¹⁶ Yet neither insurance nor employment is mentioned a single time within the appellant’s account of the statute’s purpose.

[202] On balance, these debates emphasize that while the amendments to the *CLC* and *CHRA* prohibit genetic discrimination, ss. 1 to 7 of the *Act* were included as

¹⁵ See *Proceedings of the Standing Senate Committee on Human Rights*, No. 11, 2nd Sess., 41st Parl., October 2, 2014, at pp. 11:91 to 11:96; Y. Bombard, *Written testimony to the Standing Senate Committee on Human Rights regarding Bill S-201, An Act to Prohibit and Prevent Genetic Discrimination*, February 29, 2016, reproduced in R.R. (AGC), vol. XII, at p. 25; *Debates of the Senate*, vol. 150, No. 8, at p. 148.

¹⁶ See *Proceedings of the Standing Senate Committee on Human Rights*, No. 11, at pp. 11:88 to 11:91; House of Commons, Standing Committee on Justice and Human Rights, *Evidence*, No. 36, 1st Sess., 42nd Parl., November 22, 2016, at pp. 12-13.

a way to encourage Canadians to undergo genetic tests, by mitigating their fears that they would be misused, in particular in respect of insurance and employment.

(c) *Conclusion*

[203] When considering the whole of the record, and giving appropriate weight to intrinsic and extrinsic evidence of purpose, it is plain that the main goal of ss. 1 to 7 is not to combat discrimination based on genetic characteristics. Genetic discrimination may have been on the mind of parliamentarians, but it is not prohibited in the impugned provisions. Nor is their objective to control the use of private information revealed by genetic testing, which is secondary to the true purpose of the provisions. Rather, the true aim of the provisions is to regulate contracts, particularly contracts of insurance and employment, in order to encourage Canadians to undergo genetic tests without fear that those tests will be misused so that their health can ultimately be improved.

(2) The Effects of the Impugned Provisions

[204] Effects are relevant to the validity of a law “in so far as they reveal its pith and substance” (*Global Securities Corp. v. British Columbia (Securities Commission)*, 2000 SCC 21, [2000] 1 S.C.R. 494, at para. 23). While all the intended effects of a law are relevant at this stage of the analysis, one should not lose sight of the fact that the point of the pith and substance inquiry is to measure the dominant

characteristics of ss. 1 to 7 of the *Act*. As such, the immediate effects of the provisions are relevant, not the indirect or speculative effects.

[205] In my view, the dominant effects of the impugned provisions concern the regulation of insurance and the promotion of health rather than the protection of privacy and autonomy or the prevention of genetic discrimination.

(a) *Health, Privacy, and Autonomy*

[206] Both the definition of “genetic test” in s. 2 and the health-related character of the prohibitions in ss. 3 to 5 support the view, constantly referred to in the parliamentary record, that a dominant intended effect of the *Act* is an anticipated positive impact on the health of Canadians. Put simply, the contested provisions seek to improve the health of Canadians through the removal of a stumbling block: the fear that genetic tests will be misused.

[207] To be sure, the provisions do bear upon privacy and autonomy. As explained by the Court of Appeal, ss. 1 to 7 “render more difficult access to and use of [genetic] information” (para. 10). Indeed, ss. 4 and 5 of the *Act* undoubtedly grant individuals more control over their genetic information and thereby ensure, to some extent, that they can protect their informational privacy. Allowing people to maintain control over their genetic information promotes a sense of security and autonomy and, at the same time, protects their dignity and psychological security.

[208] The impugned provisions do not, however, prevent the misuse of the results of a genetic test if they are obtained lawfully, nor do they protect genetic information coming from other sources. As a result, while I do not dispute that the impugned provisions provide a measure of control to individuals over the results of health-related genetic tests, the focus on this narrow category of testing and only on genetic information derived from such tests affords incomplete protection to Canadians regarding their privacy and autonomy.

[209] Indeed, the definition of “genetic test” and the conditions placed on contracts and the provision of services indicate plainly that health improvement is the dominant effect sought by ss. 1 to 7 of the *Act*. The privacy interest, say, relevant in respect of a genetic test undertaken to determine one’s ancestry is not engaged by the health-linked definition of “genetic test”. The autonomy concern engaged by a non-medical genetic test undertaken to determine parental lineage, for example, is left outside the purview of the *Act*. The effects on privacy spoken to in ss. 1 to 7 only exist to the extent they promote health by removing the fear, for contracts and the provision of goods and services, that health-linked genetic tests may be misused in that context.

[210] All information about one’s health — whether it is gathered from a blood test, a physical examination, or family history — is considered private. To protect the privacy of health information gathered from genetic tests is a necessary corollary of the promotion of these tests to improve health. Here, the protection of privacy does

not extend beyond what is necessary to promote health: the protection from forced disclosure of genetic information is limited to information pertaining to health, and deliberately excludes other genetic information. This supports the conclusion that the effects of the impugned provisions on privacy are incidental to the promotion of health. On balance, they stand second to the effects on health.

(b) *Genetic Discrimination*

[211] In defining the effects of the law, it is useful to note what the law does not prohibit. As explained above, a thorough analysis of the *Act* reveals that ss. 1 to 7 do not prohibit genetic discrimination. However, the *Act* does make access to genetic information more difficult when that information is sought in connection with a contract or the provision of goods and services. In that sense, the *Act* inhibits certain opportunities to discriminate based on genetic characteristics and, as such, could be said to prevent genetic discrimination. But discrimination based on genetic characteristics, explicitly prohibited in s. 9 of the *Act* through an amendment to the *CHRA*, is not spoken to in ss. 1 to 7.

[212] By prohibiting anyone from requiring another to undergo genetic testing and to disclose the results of a genetic test as preconditions to entering into contracts or providing goods and services, ss. 1 to 7 only have the indirect effect of preventing circumstances from arising that could later expose individuals to the threat of discrimination. Quite simply, if genetic information is not disclosed to a person, this

person has no opportunity to discriminate on its basis, as explained by my colleague Justice Karakatsanis at para. 56.

[213] However, while ss. 1 to 7 purport to prevent discrimination, the prohibitions allow discrimination to persist in numerous respects. Should the results of a genetic test be obtained lawfully, either because they are part of medical records or because an individual consents to their disclosure, there is no prohibition on discrimination on this basis. Moreover, genetic information that comes from sources other than a genetic test, such as family histories, blood tests, or voluntary disclosure, could lawfully be used for discriminatory purposes. The impugned provisions do *nothing* to prevent discrimination based on genetic information from such sources.

[214] I therefore conclude, first, that the impugned provisions do not directly prohibit discrimination and, second, that while ss. 1 to 7 may have an incidental effect of granting individuals some control over their genetic information and thus preventing some discriminatory behaviour from occurring, neither of these effects can be said to be the primary effect of the legislation. Rather, as the Attorney General of Canada asserts, the provisions' focus is on controlling the exchange of information obtained through specific means in relation to contracts and the provision of goods and services.

(c) *Insurance Contracts*

[215] While ss. 1 to 7 speak to all contracts and provision of goods and services generally, I agree with the Court of Appeal that the dominant effects of the contested provisions — both legally and practically — bear on the insurance industry (para. 8). Legally, they represent a departure from the provincial law of insurance and human rights legislation in Canada; practically, the insurance market will be affected by the incomplete information insurers receive from some policy-holders. Indeed, as explained above, this is bolstered by the fact that parliamentarians were deeply concerned that Canadians were making poor choices about their health because of insurance-related concerns.

[216] Insurance contracts, in both the common law and the civil law, require utmost good faith from both parties (see D. Boivin, *Insurance Law* (2nd ed. 2015), at p. 129; and D. Lluelles, *Droit des assurances terrestres* (6th ed. 2017), at pp. 31-35). As a result, the principle of equal information, according to which material information must be disclosed, is central to insurance contracts.

[217] Section 4 of the *Act* — which allows individuals who have undergone genetic tests to enter into contracts without having to disclose the results of those tests — represents a departure from this well-established principle. It allows individuals to choose to provide favourable genetic test results to insurers while allowing others to retain unfavourable ones, thus permitting some people to take advantage of the provisions to enter into an insurance contract even though they are aware of a

material risk that has not been divulged to the insurer. This could have significant impacts on premiums across the pool of policy-holders, as insurers attempt to transfer the risk of non-disclosure to other policy-holders.

[218] Moreover, the impugned provisions affect the applicability of human rights legislation across the country. Quebec's *Charter of Human Rights and Freedoms*, CQLR, c. C-12, offers one example. The *Quebec Charter* protects against discrimination based on handicap in the realm of contracts (ss. 10, 12 and 13). However, it also specifies that, in insurance contracts, "the use of health as a risk determination factor does not constitute discrimination" (s. 20.1 para. 2). Consequently, the *Quebec Charter* exempts the use of certain health information which could materially influence insurers' decisions, even though such use might be found discriminatory in other realms. It bears recalling that the impugned provisions do not prohibit an insurer from using the results of a genetic test if they are obtained lawfully. Nonetheless, the *Act's* provisions counter the purpose behind the exception for the use of health as risk determination factor found in s. 20.1 para. 2 of the *Quebec Charter*.

[219] Similar exceptions for discrimination in the insurance context exist in human rights legislation across the country (see, e.g., Ontario *Human Rights Code*, R.S.O. 1990, c. H.19, s. 22).

[220] In my view, the impugned provisions upset the balance struck by provincial law concerning the respective obligations of insurers and insured persons

in relation to disclosure of information. Indeed, these provisions mean that insured persons can circumvent certain exemptions in human rights legislation, and do not have to disclose any results of a genetic test, even if this information is relevant to insurability, risk appraisal, or amount of premium charged (see, e.g., *Civil Code of Québec*, art. 2408).

(3) Conclusion

[221] I agree with the Court of Appeal that the aim of the impugned provisions is to remove the fear that information from genetic tests could serve discriminatory purposes in the provision of goods and services, in particular in insurance contracts, in order to encourage Canadians to avail themselves of those tests, should they so wish. This is done with a view to improve health by making people aware of their pre-existing medical conditions and hoping that they take precautionary steps. On my reading of her opinion, my colleague Justice Karakatsanis appears to agree that health dominates the discussion, given that health is at the heart of her analysis on the classification of the impugned provisions. Similarly, my colleague Justice Moldaver also considers health to be central to this case.

[222] In terms of whether the pith and substance is to combat discrimination based on the results of genetic tests, I must respectfully disagree with my colleague Justice Karakatsanis. While Parliament could have chosen to directly target discrimination in ss. 1 to 7 of the *Act*, those provisions instead tolerate discrimination on the basis of genetic characteristics so long as the genetic testing and disclosure of

the results thereof were made lawfully or so long as tests are undertaken for non-health reasons. This is particularly obvious when ss. 1 to 7 are contrasted with the amendments to the *CLC* and to the *CHRA*. Genetic discrimination therefore cannot be at the centre of ss. 1 to 7's pith and substance.

[223] I must also respectfully disagree with Justice Moldaver that the pith and substance is focused on the control that individuals have over the information revealed by genetic tests. The protection of privacy and autonomy granted in the impugned provisions is only present as a necessary corollary of the promotion of health, since they apply only to a narrow health-based definition of genetic tests. As such, the control granted to individuals over the information revealed by genetic testing stands second — both in terms of purpose and effects — to Parliament's overarching objective of encouraging the well-being of Canadians. As a result, and recalling that genetic information revealed through other means is not protected, it also cannot form part of the pith and substance of the impugned provisions.

[224] Finally, the regulation of contracts and the provision of goods and services appropriately forms part of the pith and substance. The impugned prohibitions focus solely on situations concerning a “contract or agreement” or “providing goods or services”: indeed, ss. 3(1) and (2), 4(1) and (2), and 5 all refer explicitly to these concepts. As such, the regulation of contracts and the provision of goods and services is an integral part of the legislation in that it is the heart of what the impugned provisions do.

[225] I would add that even if the regulation of contracts and of the provision of goods and services was merely the “means” used by Parliament, those means would be so intimately tied to the objective to improve health that they would rightly form part of the pith and substance (Moldaver J.’s reasons, at para. 116). While courts must of course be careful not to confuse the law’s purpose with the means chosen to achieve it, this caution does not lead to the conclusion that any reference to “means” is problematic (see *Ward v. Canada (Attorney General)*, 2002 SCC 17, [2002] 1 S.C.R. 569, at para. 25). In *Ward*, the Court found that the challenged provision’s purpose was to prevent the harvesting of seals (para. 20). The respondent’s argument that the provision was directed at “regulat[ing] the property and processing of a harvested seal product” confused purpose and means because, “[v]iewed in the context of the legislation as a whole and the legislative history, there [was] nothing to suggest that Parliament was trying to regulate the local market for trade of seals and seal products” (para. 25).

[226] As a result, understood in its proper context, I do not read *Ward* as standing for the proposition that “means” cannot be important to the legislative objective in some cases. The pith and substance of a law, after all, is also conceptualized as “[w]hat is the essence of what the law does and how does it do it?” (*Chatterjee v. Ontario (Attorney General)*, 2009 SCC 19, [2009] 1 S.C.R. 624, at para. 16). It is therefore possible that its dominant characteristic is closely tied-up in means; indeed, a clear distinction between means and ends will often not be apparent. As such, even the “prohibit[ion] [of] conduct that undermines individuals’ control

over the intimate information revealed by genetic testing” could be understood as the mere means used by Parliament to “protect health” (Moldaver J.’s reasons, at para. 111). In this case, the regulation of contracts and the provision of goods and services was at the forefront of parliamentarians’ minds, are central to the impugned provisions, and are caught up in the expression of legislative purpose.

[227] As a result of the foregoing, in my view, the pith and substance of ss. 1 to 7 of the *Act* is to regulate contracts and the provision of goods and services, in particular contracts of insurance and employment, by prohibiting some perceived misuses of one category of genetic tests, the whole with a view to promoting the health of Canadians.

B. *Classification: Does the Pith and Substance of the Impugned Provisions Fall Under the Section 91(27) Criminal Law Power?*

[228] I agree with my colleagues that the sole issue at the classification stage is whether Parliament was authorized to enact the impugned provisions under the criminal law power conferred by s. 91(27) of the *Constitution Act, 1867*. As I will explain, Parliament exceeded its jurisdiction, as the impugned provisions, in pith and substance, fall squarely within provincial jurisdiction over property and civil rights under s. 92(13).

(1) Scope of the Criminal Law Power

[229] A law will be properly categorized as valid criminal law if three essential elements are satisfied: a prohibition, a penalty related to that prohibition, and a valid criminal law purpose (see *Margarine Reference*, at pp. 49-50). The first two elements are formal requirements while the third is substantive. This tripartite test ensures Parliament cannot use its authority improperly to invade upon provinces' areas of competence, thus ensuring the balance of federalism is respected (see *R. v. Comeau*, 2018 SCC 15, [2018] 1 S.C.R. 342, at para. 78; *Canadian Western Bank*, at para. 24; *Firearms Reference*, at paras. 26 and 53). As McLachlin C.J. explained in the *AHRA Reference*, “a limitless definition [of the criminal law power] has the potential to upset the constitutional balance of federal-provincial powers” and thus “extensions that have the potential to undermine the constitutional division of powers should be rejected” (para. 43).

[230] As the parties all agree, the impugned provisions satisfy the formal requirements of a criminal law. The only issue concerns whether they are supported by the third requirement, a valid criminal law purpose. My colleague Justice Karakatsanis and I have different views of this requirement, and we accordingly reach different conclusions on whether it is satisfied. Our respective views of the matter — which find echo in the disagreement at the heart of the *AHRA Reference* — cannot be said to have no impact on the result of this case.

(2) Criminal Law Purpose

[231] In the *Margarine Reference*, Rand J., whose reasoning was adopted by the Privy Council in *Canadian Federation of Agriculture v. Attorney-General for Quebec*, [1951] A.C. 179, explained the substantive “criminal law purpose” requirement:

A crime is an act which the law, with appropriate penal sanctions, forbids; but as prohibitions are not enacted in a vacuum, we can properly look for some evil or injurious or undesirable effect upon the public against which the law is directed. That effect may be in relation to social, economic or political interests; and the legislature has had in mind to suppress the evil or to safeguard the interest threatened.

...

Is the prohibition then enacted with a view to a public purpose which can support it as being in relation to criminal law? Public peace, order, security, health, morality: these are the ordinary though not exclusive ends served by that law . . . [Emphasis added; pp. 49-50.]

Accordingly, it is not sufficient that Parliament merely wishes to legislate with respect to some public purpose. Rather, the impugned legislation must also be directed at an “evil or injurious or undesirable effect upon the public”.

[232] I disagree with the appellant that the word “evil” — the traditional measure of the criminal law in this context — is unhelpful in the classification analysis. Rather, the concept of “evil” is necessary to remind Parliament that mere undesirable effects are not sufficient for legislation to have a criminal purpose, contrary to my colleague’s suggestion (see Karakatsanis J.’s reasons, at para. 76). In

my view, discarding this concept from the core of the criminal law purpose inquiry would be a dramatic change of course from this Court's past jurisprudence. While the word "evil" may echo language drawn from another time, it has been used frequently in the modern law and it remains conceptually useful for courts to search for an evil before the criminal law purpose requirement is satisfied. Furthermore, to my ear, the French equivalent "*mal*" is perfectly current as a choice of word and I observe that other equivalent words such as "*fléau*" are also used for "evil" in the decided cases (see, e.g., *R. v. Malmö-Levine*, 2003 SCC 74, [2003] 3 S.C.R. 571, at para. 33).

[233] The words "some evil or injurious or undesirable effect upon the public against which the law is directed" point to a more precise idea than the protection of central moral precepts, in a broad sense: Parliament cannot act unless it seeks to suppress some threat. This threat itself must be well-defined and have ascertainable contours to constitute the valid subject-matter of criminal law pursuant to s. 91(27) of the *Constitution Act, 1867*. It must also be real, in the sense that Parliament has a concrete basis and a reasoned apprehension of harm. To suggest otherwise would be to render the substantive requirement so vague as to be impractical as a measure of what amounts to criminal law for constitutional purposes.

[234] I draw from the *Margarine Reference* and LeBel and Deschamps JJ.'s reasons in the *AHRA Reference* that three questions must be confronted when determining whether a law rests upon a valid criminal law purpose. First, does the impugned legislation relate to a "public purpose", such as public peace, order,

security, health, or morality? Second, did Parliament articulate a well-defined threat to be suppressed or prevented by the impugned legislation (i.e. the “evil or injurious or undesirable effect upon the public”)? Third, is the threat “real”, in the sense that Parliament had a concrete basis and a reasoned apprehension of harm when enacting the impugned legislation? I will discuss each question in turn.

(3) Application

(a) *Do the Impugned Provisions Relate to a Public Purpose?*

[235] The first question courts must consider when determining whether impugned legislation has a valid criminal law purpose is whether the prohibition is in relation to a public purpose, such as public peace, order, security, health, or morality (see *Margarine Reference*, at p. 50). Notably, this is a non-exhaustive and broad list, and this first question is thus a relatively low bar to meet.

[236] My colleagues and I agree that the contested provisions can be said to relate to a public purpose: health. As I have concluded, the pith and substance of ss. 1 to 7 of the *Act* is to regulate contracts and the provision of goods and services, in particular contracts of insurance and employment, by prohibiting some perceived misuses of one category of genetic tests, the whole with a view to promoting the health of Canadians. Thus, there is a clear dimension related to health in the dominant character of the legislation. I recognize that the impugned provisions have an impact on privacy and autonomy but, as I have said, the scope of the definition of “genetic

test” means that health is the primary character of the law and that privacy and autonomy are only derivatives thereof.

(b) *Has Parliament Articulated a Well-Defined Threat to Be Suppressed or Prevented By the Impugned Legislation?*

[237] Parliament cannot use the criminal law power to address a vague threat. Rather, the legislation must be directed against “some evil or injurious or undesirable effect upon the public” and the legislature must have in mind “to suppress the evil or to safeguard the interest threatened”. As a result, Parliament must clearly articulate and define the scope of the threat it seeks to suppress. That is, it must articulate a precise threat with ascertainable contours. This requirement ensures that the scope of Parliament’s actions is limited to a specific problem, and it is particularly important in relation to matters that have provincial aspects, such as health, in order to preserve the balance of federal and provincial powers.

(i) Health

[238] The appellant argues that, in this case, the protection and promotion of health is a valid criminal law purpose. This Court has certainly confirmed numerous times that laws aiming to prohibit conduct posing a threat to health satisfy the substantive component of the criminal law. However, this Court has never accepted that it is sufficient for the impugned provisions’ pith and substance to merely relate to

health. To invoke Rand J.'s words once again, the impugned legislation must also involve suppressing an "evil or injurious or undesirable effect upon the public".

[239] Consequently, I must respectfully disagree with the appellant on this point, substantially for the reasons of the Court of Appeal, at paras. 20 to 24. In short, there is no defined "public health evil" or threat to be suppressed. The objective of the impugned provisions is to foster or promote beneficial health practices. That is, the legislation seeks to encourage Canadians to undergo genetic testing, which may then result in better health outcomes.

[240] Yet, as the Court of Appeal explained at para. 21 of its reasons, the promotion of beneficial health services or practices is not a threat attracting criminal sanctions. In *Schneider v. The Queen*, [1982] 2 S.C.R. 112, for example, the Court found that the dominant purpose of the relevant statute was not to punish conduct but to treat an illness such that, the legislation could not be said to be suppressing a threat (p. 138). Similarly, in *PHS*, this Court offered examples of valid health-related criminal law purposes: the prohibition of medical treatments that are "dangerous" or "socially undesirable" (para. 68). Encouraging the use of health-related genetic tests relates to neither of these categories.

[241] In the *AHRA Reference*, the Court divided, with McLachlin C.J. writing for herself and three judges; LeBel and Deschamps JJ., writing for themselves and two others; and Cromwell J., writing for himself. The majority of judges did agree on at least one point: the promotion of beneficial health practices alone is not sufficient

for classification as criminal law (paras. 24, 26, 30, 33, 38 and 75-76, per McLachlin C.J., paras. 250-51, per LeBel and Deschamps JJ.). As explained by McLachlin C.J., there is a critical difference between a “public health problem” and a “public health evil”, and only the latter is subject to the criminal law (para. 55). I therefore agree with the submission of the Attorney General of Canada on this point: “mere reference to ‘health’ will not, in itself, be sufficient to ground a finding that a valid criminal law purpose is made out. More is required” (R.F., at para. 93).

[242] Consequently, the “promotion of health” in and of itself will simply not suffice at this stage. This no doubt explains why the Court of Appeal wrote that, whether one adopted the views of McLachlin C.J. or LeBel and Deschamps JJ., in the *AHRA Reference*, ss. 1 to 7 of the *Act* are *ultra vires* Parliament’s jurisdiction (see C.A. reasons, at para. 19). The record must reveal a well-defined threat (i.e. the “evil or injurious or undesirable effect upon the public”) to be suppressed or prevented by the impugned legislation. As my colleague Justice Karakatsanis notes, such threats may be as diverse as tobacco (*RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199); dangerous food products (*R. v. Wetmore*, [1983] 2 S.C.R. 284); illicit drugs (*Malmö-Levine*); firearms (*Firearms Reference*); and toxic substances (*R. v. Hydro-Québec*, [1997] 3 S.C.R. 213).

[243] My colleague Justice Moldaver writes that the impugned provisions are directed not at the promotion of health, but at the protection of individuals from health-related harms. In his view, the impugned provisions protect against deleterious

effects on health that have resulted from Canadians foregoing genetic testing (paras. 116 and 140-43). In the circumstances of this case, however, any protection from health-related harms is present solely because it is a consequence of another objective: the promotion of better health outcomes for all Canadians. Contrary to McLachlin C.J.'s conclusion in the *AHRA Reference*, beneficial practices in our case are not “incidentally” permitted; rather, they are at the very core of the impugned legislation (para. 30). In other words, Parliament viewed genetic tests as beneficial, and therefore sought to remove barriers so Canadians could access them.

[244] I would highlight that the distinction between the promotion and protection of health is exactly why the substantive criterion of the criminal law is so important. Approaches where Parliament must merely respond “to a risk of harm to health” or an “injurious or undesirable effect” when enacting criminal law have the potential to upset the constitutional balance of powers in this field by greatly expanding Parliament’s ability to enact legislation over health practices (see Karakatsanis J.’s reasons, at paras. 95 and 101). After all, such a requirement could be satisfied in nearly all cases, since many beneficial health services may also involve injurious or undesirable effects (see U. Ogbogu, “The Assisted Human Reproduction Act Reference and the Thin Line Between Health and Crime” (2013), 22 *Constitutional Forum* 93, at pp. 95-96). LeBel and Deschamps JJ.’s conceptualization of the criminal law power in the *AHRA Reference* — which my colleague Justice Karakatsanis has rejected — is, in my view, the appropriate approach for courts to take because it helps guard against this possibility.

[245] In this sense, respectfully stated, Justice Karakatsanis' approach is incompatible with LeBel and Deschamps JJ.'s opinion in the *AHRA Reference*.

[246] The question therefore remains: does the legislation in this case aim to suppress or prevent a well-defined threat to health? The appellant submits that the specific threat is the threat to health posed by the current lack of legal guarantees of genetic informational security. This leads to, it is said, some individuals making an unenviable choice between two options: undergoing a genetic test or entering into contracts. I do not dispute there is testimony before Parliament to that effect. This may indeed, as one observer said in the House of Commons, be a choice that no Canadian should have to make (*House of Commons Debates*, vol. 148, No. 140, 1st Sess., 42nd Parl., February 14, 2017, at. p. 8955 (Michael Cooper)). Yet, even if I were to accept this argument, I do not see how it helps the appellant given the lack of connection between the pith and substance of the impugned provisions and this alleged threat. Quite simply, Parliament did not eliminate that choice with the impugned provisions.

[247] As explained above, ss. 1 to 7 do not prohibit genetic discrimination. While they may be said to have an indirect effect of preventing genetic discrimination from occurring in the first place, the primary objective of the provisions is not to prohibit or even to prevent genetic discrimination. Rather, the impugned provisions prohibit requiring a genetic test or the disclosure or use of the results in the conclusion of a contract or in the provision of goods and services, except where

consent is given. Nothing in the record suggests that these prohibited activities should be regarded as conduct that is a threat to health.

[248] As the Attorney General of Canada argues, while the information obtained from a genetic test may be broader in scope, it is not qualitatively different from other medical information, such as information revealed from biopsies, family history, or blood tests, all of which can be obtained and used lawfully under the impugned provisions. Simply because genetic information is relatively novel does not mean that its collection, use, or disclosure constitutes a threat to health. Quite frankly, the collection, use, or disclosure of genetic information is not a threat to Canadians' health by its very nature, unlike tobacco, illicit drugs, or firearms.

[249] Of course, Parliament can use indirect means in the exercise of its criminal law power, as was the case in *RJR-MacDonald*. Yet, contrary to the *amicus curiae*'s suggestion, *RJR-MacDonald* is of little assistance in this case. In that case, the threat targeted by Parliament was the detrimental effects caused by tobacco, which was supported by a copious body of evidence demonstrating that tobacco poses a serious threat to Canadians' health. As La Forest J. noted, "the detrimental health effects of tobacco consumption are both dramatic and substantial. Put bluntly, tobacco kills" (para. 32; see also paras. 30 and 31). Consequently, Parliament had a valid criminal law purpose when it enacted the legislation — the "reduction of tobacco consumption and the protection of public health" — and the measures relating to advertising were undertaken to combat the public health evil represented

by tobacco use (para. 33). As such, the legislation was a proper exercise of the criminal law power. In this case, the impugned provisions are designed to encourage the use of genetic tests, which is a beneficial health practice as opposed to an inherently harmful substance, in an attempt to improve Canadians' health. Since Parliament did not target a threat to health, there is simply no public health evil present here.

[250] I also wish to briefly address my colleague Justice Moldaver's statement that "[r]ather than forcing individuals to take genetic tests . . . Parliament saw fit to prohibit the influential conduct" (para. 148). With respect, there is no suggestion, either in the record or before this Court, that individuals should be forced to take genetic tests. Again, if it truly targeted a threat to health, Parliament could have prohibited, for example, discrimination based on genetic characteristics.

(ii) Privacy and Autonomy

[251] I agree with my colleagues that privacy and autonomy interests are of utmost importance to Canadians. I recognize that the Attorney General of Canada conceded that Parliament could enact legislation targeting a threat to privacy and autonomy that might well constitute a valid criminal law purpose. I make no comment on this point except to say that, in this case, the pith and substance of the impugned provisions is not to protect privacy or autonomy. Indeed, the effects of the impugned provisions on privacy and autonomy are secondary to its true purpose: to promote beneficial health practices by removing some of the fear surrounding the

misuse of genetic tests. For this reason, the impugned provisions fail at this stage of the analysis: Parliament did not target a threat to privacy and autonomy when it enacted them.

[252] My colleague Justice Karakatsanis notes that the Privacy Commissioner emphasizes the unknown number of inferences that may be drawn from genetic testing information as well as the unknown scope and degree of the potential for abuse of such genetic information (paras. 88-89). In a related manner, my colleague Justice Moldaver emphasizes that the impugned provisions ensure individuals maintain control over this deeply personal information (para. 120). Yet ss. 1 to 7 do not bear on “genetic testing information” in a broad sense, but instead on a narrower definition of “genetic test” in the *Act*, pertaining only to health-related matters. Genetic information bearing on non-health related matters, and the serious privacy concerns it might raise, are left unregulated. Privacy is a concern for Parliament, but only as it relates to its dominant preoccupation, reflected in the terms of the *Act*, which is health.

[253] Moreover, as noted above, genetic information is not qualitatively different from other medical information. In my respectful view, the mere fact that genetic testing is a novel development does not, on its own, bring its regulation within the purview of the criminal law. Such a holding would encourage the view that any new technology with implications bearing on public morality might form the basis for

the criminal law power, and potentially, bring a wide range of scientific developments within federal jurisdiction on no principled constitutional basis.

(iii) Conclusion

[254] In my view, Parliament did not target a threat within the purview of the criminal law through the impugned provisions. Quite simply, the prohibitions target certain practices related to contracts and the provision of goods and services, and more specifically, to insurance and employment. There is nothing on the record suggesting that the prohibited conduct is a threat to Canadians.

[255] Before I move on to the third stage of analysis, I wish to briefly comment on my colleague Justice Karakatsanis' statement that "Parliament acted to combat genetic discrimination and the fear of genetic discrimination based on genetic test results . . . by filling the gap in Canada's laws that made individuals vulnerable to genetic discrimination in the areas of contracting and the provision of goods and services" (para. 63). This echoes the ambition of Senator Cowan and his sense that a gap in the law was reason enough to fill it.

[256] In my respectful view, a gap in provincial legislations across the country is not a well-defined threat that justifies recourse to the criminal law. Moreover, given Parliament's choice not to prohibit genetic discrimination except in connection with its own human rights and labour legislation, one is hard pressed to see ss. 1 to 7 as filling a gap. In any event, Parliament's dissatisfaction with the state of the law in

matters of provincial jurisdiction does not allow it to use the blunt tool of the criminal law to occupy a field to which it has no proper claim.

[257] Moreover, I respectfully disagree with the view that just because the impugned law “target[s] conduct that Parliament reasonably apprehends as a threat to our central moral precepts”, this means that the impugned provisions are validly backed by a criminal law purpose (Karakatsanis J.’s reasons, at para. 73, citing with approval *AHRA Reference*, at para. 50, per McLachlin C.J.). It bears emphasizing that McLachlin C.J. went on to state that “[t]he role of the courts is to ensure that such a criminal law in pith and substance relates to conduct that Parliament views as contrary to our central moral precepts” and upheld the legislation because “[i]t targets conduct that Parliament has found to be reprehensible” (para. 51; see also para. 30 (emphasis added)). Yet, as LeBel and Deschamps JJ. explained, while “the criminal law often expresses aspects of social morality or, in broader terms, the fundamental values of society care must be taken not to view every social, economic or scientific issue as a moral problem” (*AHRA Reference*, at para. 239). In other words, “Parliament’s wisdom” cannot trump the requirement to identify a real evil, even from the standpoint of morality (paras. 76 and 250). To do otherwise has the potential to amplify the scope of s. 91(27) beyond any constitutional precedent (paras. 43 and 239).

- (c) *Is the Threat Real, in the Sense That Parliament Had a Concrete Basis and a Reasoned Apprehension of Harm When Enacting the Impugned Legislation?*

[258] Finally, in addition to a well-defined threat being identified, the threat must also be real. I wish to briefly comment on the *amicus curiae*'s proposed approach to this stage of analysis, as adopted by my colleague Justice Karakatsanis.

[259] The *amicus curiae* urges this Court to embrace McLachlin C.J.'s approach in the *AHRA Reference*. McLachlin C.J. accepted that "the need to establish a reasonable apprehension of harm means that conduct with little or no threat of harm is unlikely to qualify as a 'public health evil'" (para. 56). However, while McLachlin C.J. used the phrase "reasonable apprehension of harm", she also categorically rejected any constitutional threshold level of harm. She noted that LeBel and Deschamps JJ.'s view "substitutes a judicial view of what is good and what is bad for the wisdom of Parliament" (para. 76).

[260] I understand this to be an important point of disagreement between McLachlin C.J. and LeBel and Deschamps JJ. As the *amicus curiae* argued, while McLachlin C.J. "accepted that actual proof that conduct was clearly injurious was not necessary", LeBel and Deschamps JJ. "advocate[d] for a more stringent standard" (factum of the *amicus curiae*, at paras. 30-31; see also M.-E. Sylvestre, "Droit criminel, droit pénal et droits individuels", in *JurisClasseur Québec — Collection droit public — Droit constitutionnel* (loose-leaf), by P.-C. Lafond, ed., fasc. 14, at No. 42). Essentially, what is urged upon us is that where Parliament perceives a risk of

harm, that is sufficient for the criminal law power to exist. According to this view, if this Court were to conclude that a certain threshold of harm must be met before Parliament could adopt criminal prohibitions, this would amount to courts second-guessing Parliament.

[261] I respectfully disagree with this point because the approach advocated for is overly deferential to Parliament on division of powers disputes and, if left unchecked, could undermine the federal-provincial balance of powers as set by the Constitution. Whether behaviour constitutes a risk of harm, such that it should be prohibited, is a question of public policy, rather than a basis for constitutional authority. In my respectful view, LeBel and Deschamps JJ.'s reasons in the *AHRA Reference* should guide this Court, although I reiterate that, as explained above, McLachlin C.J.'s own requirement of a "public health evil" (para. 56) would, on its own, suffice to dismiss the argument of the *amicus curiae* and the appellant in this case.

[262] In respect of the "harm" argument, LeBel and Deschamps JJ. would require Parliament to describe the apprehended harm "precisely enough that a connection can be established between the apprehended harm and the evil in question" (para. 237). Ensuring Parliament can clearly identify the harm it seeks to suppress and how the impugned legislation is rationally connected to that harm is not onerous, and it does not amount to courts "second-guessing" Parliament (see *A.F.*, at para. 28; *factum* of the *amicus curiae*, at paras. 4 and 41). Rather, it merely prevents

Parliament from invoking vague terms such as “morality”, “safety”, or even “evil” to justify laws that in reality have little connection to the criminal law.

[263] Without this requirement, the federal criminal law power would risk becoming “unlimited and uncontrollable”, permitting Parliament “to make laws in respect of any matter, provided that it cited its criminal law power and that it gave part of its legislation the form of a prohibition with criminal sanctions” (*AHRA Reference*, at para. 240, per LeBel and Deschamps JJ.).

[264] Applying these principles, LeBel and Deschamps JJ. would have struck down all the impugned provisions of the *Assisted Human Reproduction Act*, S.C. 2004, c. 2, because there was no adequate evidentiary foundation of harm. Rather, the record revealed that Parliament viewed assisted reproductive technologies as beneficial to Canadians, and thus there was no real threat to be suppressed (para. 251). While Parliament undoubtedly has wide latitude to determine the nature and degree of harm to which it wishes to respond, it cannot act where no reasoned apprehension of harm has been established.

[265] Requiring a reasoned apprehension of harm, as defined by LeBel and Deschamps JJ., also accords with the bulk of jurisprudence in this country (see D. Newman, “Changing Division of Powers Doctrine and the Emergent Principle of Subsidiarity” (2011), 74 *Sask. L.R.* 21, at pp. 22-26). In the *Margarine Reference*, Rand J. inserted a substantive requirement in addition to a prohibition and a penalty into the analysis of the criminal law power to restrain the federal government. In that

case, the impugned legislation included a preamble asserting that margarine was “injurious to health”, yet Parliament eventually conceded that this was not so. This concession, which was made in light of medical facts, ultimately supported the conclusion that the legislation was not in pith and substance aimed at suppressing an “evil or injurious or undesirable effect upon the public”. Similarly, in *Labatt Breweries of Canada Ltd. v. Attorney General of Canada*, [1980] 1 S.C.R. 914, Estey J. explained that the failure to demonstrate that a risk was associated with the consumption of malt liquors meant that the law did not protect health and therefore could not fall within the criminal law power (pp. 934-35).

[266] Moreover, the concept of “harm” is evident throughout much of this Court’s jurisprudence (see *Sylvestre*, at No. 42). In *R. v. Hauser*, [1979] 1 S.C.R. 984, Dickson J., as he then was (dissenting, but not on this point), stated that the criminal law power allowed Parliament to prohibit “acts or omissions considered to be harmful to the State, or to persons or property within the State” (p. 1026). Indeed, in many cases, the Court upheld criminal legislation because it was concerned about harmful effects. This harm can take many forms: it could relate to the dangerous effects of tobacco consumption on health (*RJR-MacDonald*, at paras. 31 and 41), the harm caused by misuse of firearms (*Firearms Reference*, at paras. 21 and 24), the harmful effects of toxic substances on the environment, human life, and health (*Hydro-Quebec*, at para. 33), or the harmful psychoactive and health effects of marihuana use (*Malmo-Levine*, at paras. 61 and 78, citing *R. v. Butler*, [1992] 1 S.C.R. 452, at p. 504).

[267] In my view, the threat Parliament seeks to suppress must be real, in the sense that Parliament has a concrete basis and a reasoned apprehension of harm.

[268] This conclusion applies with equal force where the legislative action is based on morality. In the *AHRA Reference*, LeBel and Deschamps JJ. explained how an approach anchored in Parliament's perception of a threat, like the one urged for here by the *amicus curiae*, would render the substantive requirement of the criminal law meaningless:

The issue would simply be whether a moral concern is addressed and whether there is a consensus that the concern is of fundamental importance (para. 51). This approach in effect totally excludes the substantive component that serves to delimit the criminal law. Not only does it go far beyond morality, which as a result serves only as a formal component, but it inevitably encompasses innumerable aspects of very diverse matters or conduct, such as participation in a religious service, the cohabitation of unmarried persons or even international assistance, which, although they involve moral concerns in respect of which there is a consensus that they are important, cannot all be considered to fall within the criminal law sphere. [para. 238]

I agree. Such "limitless definitions" cannot be accepted by this Court. At the end of the day, "legislative action by Parliament on this basis presupposes the existence of a real and important moral problem" (*AHRA Reference*, at para. 239, per LeBel and Deschamps JJ.).

[269] I also agree with LeBel and Deschamps JJ.'s comments at para. 240, apposite here:

In this context, absent an intention to change the law and give the federal criminal law power an unlimited and uncontrollable scope, the requirement of a real evil and a reasonable apprehension of harm constitutes an essential element of the substantive component of the definition of criminal law. Without it, the federal criminal law power would in reality have no limits. The federal government would have the authority under the Constitution to make laws in respect of any matter, provided that it cited its criminal law power and that it gave part of its legislation the form of a prohibition with criminal sanctions. This is what Rand J. wanted to prevent in the *Margarine Reference*.

[270] In this case, had I concluded there is a well-defined threat, I would also conclude that there is no evidentiary foundation of harm. Rather, Parliament seeks to improve the health of Canadians by making them aware of underlying conditions they may have and does so by attempting to encourage the use of genetic tests. Just as in the *AHRA Reference*, this advance in technology and health services is beneficial to Canadians, and has always been perceived as such.

(d) *Conclusion*

[271] From the foregoing, I conclude that the contested provisions do not satisfy the substantive component of criminal law. While they do relate to a public purpose, Parliament has neither articulated a well-defined threat that it intended to target, nor did it provide any evidentiary foundation of such a threat. It matters little to the present task whether the impugned provisions constitute good policy: they are *ultra vires* Parliament's criminal law power.

[272] In my view, ss. 1 to 7 of the *Act* rather fall within provincial jurisdiction over property and civil rights conferred by s. 92(13) of the *Constitution Act, 1867*. As explained above, the impugned provisions substantially affect the substantive law of insurance as well as human rights and labour legislation in all provinces. There is no question that the provinces could enact the impugned provisions in their own jurisdiction, if they so desired (see *Citizens Insurance Co. v. Parsons* (1881), 7 App. Cas. 96 (P.C.)).

III. Costs

[273] With respect of the appellant's request for an order for special costs on a full indemnity basis whether the appeal is allowed or dismissed, as explained in *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331, special costs are available only if the case involves "matters of public interest that are truly exceptional" (para. 140). In my view, this case does not reach this high standard. The determination of whether a law is *ultra vires* of the level of government that adopted it is fairly routine. While it is unusual that the Attorney General of Canada decided not to defend the legality of federal legislation, this situation is not sufficient to render the circumstances of the case "exceptional". Given my conclusion on the first criteria, it is unnecessary to address the second requirement for special costs.

IV. Disposition

[274] In my respectful view, the reference question should be answered affirmatively. The *Genetic Non-Discrimination Act* enacted by ss. 1 to 7 of the *Act to prohibit and prevent genetic discrimination*, S.C. 2017, c. 3, is *ultra vires* to Parliament's jurisdiction over criminal law under s. 91(27) of the *Constitution Act, 1867*.

[275] For these reasons, I would dismiss the appeal without costs.

Appeal allowed with costs, WAGNER C.J. and BROWN, ROWE and KASIRER JJ. dissenting.

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