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Insurance

SCC to look at constitutionality of genetic discrimination ban nixed by ex-AG Canada but supported by new AG

By **Cristin Schmitz**

(January 24, 2019, 10:20 AM EST) -- Canada's new Attorney General David Lametti voted to create a federal ban on genetic discrimination two years ago that the then-Attorney General, Jody Wilson-Raybould, vigorously argued — and the Quebec Court of Appeal later agreed — is not a constitutionally valid exercise of Ottawa's criminal law power.

The Quebec government's reference of major provisions in the law recently landed at the Supreme Court of Canada where the apparently stark divergence between the constitutional views of Lametti, a McGill university law professor, and Wilson-Raybould, a former B.C. provincial prosecutor, is raising hopes in some quarters that the Trudeau government might switch directions in the litigation, and defend (rather than impugn) the 2017 law's constitutionality when the top court hears an appeal, possibly as early as the fall, brought by the intervener Canadian Coalition for Genetic Fairness from the Quebec Court of Appeal's unanimous advisory opinion that turned thumbs down on the law Dec. 21. (The federal *Genetic Non-Discrimination Act* has not actually been struck down and remains in force across Canada. But a constitutional pall hangs over it, especially in Quebec.)



Justice Minister David Lametti

The new justice minister, who took over from Wilson-Raybould Jan. 14, has already experienced pressure from MPs within the Liberal caucus for the federal government to reconsider its legal tack in the court below where a special five-judge panel last month witnessed the unusual spectacle of the attorney general of Canada (then Wilson-Raybould) joining forces with the attorney general of Quebec to impugn the constitutionality of a law duly enacted by Parliament.

That did not sit well with some MPs. Senate private member's bill (S-201) had been overwhelmingly approved in the Commons March 8, 2017 — notwithstanding repeated warnings

to MPs from Wilson-Raybould. The free vote saw most Liberals (except the cabinet and some parliamentary secretaries) join with the Conservatives and NDP to pass the law 222-60.

Presumably Lametti, known as a careful legal scholar, would not have voted for a bill that included jail and fines for the misuse of genetic testing information, including by insurers, employers and others, had he thought it was likely constitutionally defective.

A fellow Montreal lawyer who also considers the law to be constitutionally sound, Liberal MP Anthony Housefather, told *The Lawyer's Daily* he has asked the new attorney general to reconsider the government's constitutional stance.



Liberal MP Anthony Housefather

"I have asked him to take a new fresh look at this, and to consider revising the position the government of Canada took before the Court of Appeal — and I've asked him to defend the law in front of the Supreme Court," said Housefather, the influential chair of the Commons Justice Committee.

Some other Liberal MPs have asked Lametti the same thing, he noted. "Not speaking for him on any substantive issues, I do believe ... he will take a fresh look at it."

The federal government normally defends federal legislation in court and while this was a private member's bill put forward by now-retired Liberal Sen. James Cowan, Housefather argued the same rule should apply.

"There should be, I believe, some obligation on the part of the government of Canada before the court to defend the constitutionality of a bill that was passed by Parliament, unless new arguments have been advanced about the constitutionality that weren't available to parliamentarians at the time the vote occurred — and all the arguments made by the government of Canada with respect to constitutionality were given and available to parliamentarians at the time we voted on the *Genetic Non-Discrimination Act*, and parliamentarians didn't agree," he said. Moreover, "if the government doesn't have the ability or the votes in Parliament to repeal the law, because it was just adopted by the Parliament, and there are no new arguments about the constitutionality that weren't available to parliamentarians at the time of the vote, I think at that point the government should be arguing that the law is constitutional. And in the event the Supreme Court, following those arguments, decides one way or the other, we'll live with it and we'll follow it. But I think that the lack of federal argumentation at the Court of Appeal was indeed a problem and I'm hoping that our new Justice minister will re-look at that."

Lametti's spokesperson, Célia Canon, declined to say what the attorney general's current constitutional view is, or whether the government will defend the bill or otherwise modify its position.

"Preventing discrimination and other forms of misuse of genetic information is a duty of all governments, and we will investigate all options to further this goal," she said by e-mail. Canon added that the Quebec Court of Appeal's decision "is consistent with the position advanced by the attorney general of Canada. As this matter is before the Supreme Court of Canada, it would be inappropriate to comment further."

In Housefather's view, the Quebec Court of Appeal's ruling is not in line with Supreme Court of Canada division of powers precedents, and he worries that the attorney general of Canada put forward an unduly narrow view of the scope of Ottawa's criminal law power that could have negative effects on federal efforts to legislate other matters.

"I think that's one of the things that the government needs to look at," he advised. "Does the law [meet the test of having] a valid criminal purpose, a prohibition and a penalty. I think it's clear it has a prohibition and a penalty, so I don't think those are even at issue. The question is 'does the law have a valid criminal purpose?' And if the law was directed at righting an evil — and that could be a harm against health because that's right in Justice Rand's original decision in the *Margarine Reference*, then it's valid. And we've used that health objective on laws against advertising of tobacco, on sale of drugs prepared under unsanitary conditions, false and misleading advertisements on drugs, the use and sale of marijuana — I mean we've done it all the time," he noted. "So once the Quebec Court of Appeal has recognized that the objective was actually a public health one, I don't know how they went around it to say 'but the primary purpose was insurance.' I don't get that from having been part of the debate" in Parliament.

Last month's reference ruling from the Quebec Court of Appeal accepted the arguments of the Quebec and federal attorneys general that ss. 1 to 7 of the 2017 law are ultra vires to the jurisdiction of Parliament over criminal law under paragraph 91 (27) of the Constitution Act, 1867: *Reference of the Government of Quebec concerning the constitutionality of the Genetic Non-Discrimination Act enacted by Sections 1 to 7 of the Act to prohibit and prevent genetic discrimination* (S.C. 2017, c. 3): 2018 QCCA 2193.

Among other things, the statute prohibits requiring an individual to undergo a genetic test or requiring him or her to disclose the results of a genetic test as a condition of providing goods or services or maintaining a contract or any of its terms.

Any contravention of these prohibitions is an offence punishable, on indictment, by a fine up to \$1 million and prison up to five years or, on summary conviction, a fine not exceeding \$300,000 and up to a year in jail.

The Court of Appeal accepted that the law has a valid criminal law objective of protecting and promoting health, but further held that this "cannot constitute a primary criminal law object."

"There is no 'real public health evil' here that would justify the recourse to" the criminal law power, says the *per curiam* opinion of the Chief Justice of Quebec, Nicol Duval Hesler, and Justices Marie-France Bich, Dominique Bélanger, Manon Savard and Robert Mainville.

"The criminal law object advanced to justify the Act is to provide higher quality health care through the promotion of access to genetic tests by suppressing the fear that the results of these tests be used for insurance of employment purposes," the Appeal Court reasoned. "This is clearly not a criminal law object," the judges concluded. "The situation is completely distinguishable from the exercise of federal jurisdiction over criminal law regarding tobacco or illicit drugs, which intrinsically present a threat to public health. That is not the case for genetic tests."

Having won the case, neither Quebec's attorney general nor the federal government exercised the automatic right of appeal available for reference decisions by provincial courts of appeal pursuant to the *Supreme Court Act*.

The appeal was put before the top court, however, by the Canadian Coalition for Genetic Fairness, which intervened in support of the legislation at the Court of Appeal, and which is the only party to have filed an appeal notice before the 30-day appeal period expired Jan. 24.



Bruce Ryder, Osgoode Hall law school

Osgoode Hall law professor Bruce Ryder, who with William Colish of Montreal's Kugler Kandestin represented the coalition pro bono at the Court of Appeal, said its not unheard of for an intervener to propel a provincial reference decision to the Supreme Court, e.g. *Reference re Bill 30 (Funding of Ontario Catholic Schools)* where interveners against the respondent provincial government's expansion of full funding to Catholic high schools appealed an Ontario Court of Appeal reference ruling affirming the move's constitutionality: [1987] 1 S.C.R. 1148.

Ryder speculated that the federal government will rethink its approach as an intervener at the Supreme Court.

"It's possible that the minister of Justice could take a different position," he remarked. "I think if I was in the minister of Justice's position I'd be very worried about arguments against the validity of the challenged provisions as an exercise of the criminal law power, given that I need to rely on a broad interpretation of the criminal law power in other contexts," he explained. "I wouldn't want to collaborate [in], or contribute to, a precedent that might narrow the scope of Parliament's powers."

In Ryder's view, it would be "very difficult" for Ottawa to stand before the Supreme Court and say it changed its mind about the constitutional validity of the law. "I mean it makes them look almost a little bit silly."

Instead he suggested it would be helpful to the federal government "if the minister of Justice were to make submissions about the breadth of the criminal law power and limits on the criminal law power, without taking a position on the [constitutional] question before the court. ... They wouldn't necessarily need to make any submissions that could come back to bite them in other contexts."



Marie-Claude Landry, Canadian Human Rights Commission

Marie-Claude Landry, a lawyer and chief commissioner of the Canadian Human Rights Commission (CHRC), called on the federal government to protect people against genetic discrimination. “We strongly encourage the federal government to ensure more protection at the federal level, and to work with provincial and territorial counterparts to urge them to swiftly put in place their own protections,” she said in a prepared statement after the Court of Appeal’s judgment. “The opinion increases the risk of genetic discrimination and jeopardizes the legal protections in this rapidly developing area of technology that impacts us all,” she said.

Landry pointed out that “taking a DNA test puts anyone at risk when they try to get a job, adopt a child, travel, get insurance, or access health care. We risk being denied benefits or services because of our genetic information or because of our refusal to disclose it.”

She noted that after the *Genetic Non-Discrimination Act* was enacted in 2017, people who wanted to take genetic tests felt it was safer to do so. “This opinion by the Quebec Court of Appeal makes the choice to have a genetic test more difficult, and it leaves people in Canada more vulnerable to genetic discrimination,” Landry said.

“We have yet to fully understand the potential risks we all now face when taking a genetic test — whether with a doctor or a home testing kit.”

The CHRC, which intervened in support of the law at the Court of Appeal, also intends to intervene at the Supreme Court.

CHRC lawyer Fiona Keith, who represented the human rights watchdog in the Appeal Court, told *The Lawyer’s Daily* “if the Supreme Court of Canada agrees with the Quebec Court of Appeal that this law is unconstitutional, then we say that there will be a need to find a new way to bring about these kinds of protections for Canadians on a national basis” — i.e. beyond embedding protections in all provinces and territories. “There is a need for a national approach, which we felt is reflected in the *Genetic Non-Discrimination Act*,” Keith explained.