Cassels

Genetic Non-Discrimination Act Upheld by the Supreme Court: Implications for Insurers

Bernice Karn, Gordon Goodman

August 25, 2020

On July 10, 2020, the Supreme Court of Canada (the Supreme Court) upheld a federal law preventing third parties, such as employers and insurance companies, from demanding genetic information from individuals. The ruling has implications for insurance companies and employers as both may face prosecution if convicted of using information from genetic tests for insurance or employment purposes.

In 2017, the Parliament of Canada (Parliament) passed the *Genetic Non-Discrimination Act* (the Act) which established various prohibitions on genetic testing related to diseases. Sections 1 to 7 of the Act (the Provisions) provide for certain prohibitions in respect of genetic testing, including making it a crime to: (i) force an individual to get genetic testing; and (ii) collect, use or disclose the results of genetic testing without the individual's written consent. Under 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 risk, or monitoring, diagnosis or prognosis." Anyone that is found to have contravened the Act can be fined up to $1 million, put in jail for up to five years, or both. As a result, it may be prudent for insurance companies and employers to update their internal policies and procedures to ensure that they do not violate the Act.

Decision

In Reference re Genetic Non-Discrimination Act[1] (the Decision), the Supreme Court was asked whether the Act fell within Parliament's jurisdiction over criminal law. The *Constitution Act*, 1897 (the Constitution) delineates powers that fall within the scope of the provinces and those granted to the federal government. For example, section 91(27) of the Constitution, gives Parliament the exclusive authority to make laws in relation to criminal law while section 92(13) of the Constitution gives provincial legislatures the exclusive authority to make laws in relation to property and civil rights. In the Decision, the government of Quebec argued that the Provisions were unconstitutional as they fell under the province's jurisdiction over property and civil rights.

In 2018, the Court of Appeal of Quebec (the Court of Appeal) unanimously held that the Provisions were unconstitutional as they lacked a valid criminal law purpose. The Decision was appealed to the Supreme Court which reversed the Court of Appeal's Decision in a 5-4 spilt decision. The Supreme Court held that the Act was constitutional, finding that it was a valid exercise of Parliament's criminal law power. The Decision also acknowledged the importance of autonomy and privacy over an individual's genetic

information.

Insurance Legislation

Insurance legislation in each jurisdiction requires prospective insureds to provide full disclosure of facts (such as medical history) material to the insurance when applying to life insurance companies for life insurance coverage. Failing to disclose or misrepresenting this information could render the contract voidable by the insurer. This ensures that the fundamental principal of equal information is adhered to. Following the Decision, the courts will now need to determine how the Act affects this fundamental principal at law.

Privacy Matters

The Act requires insurers to obtain an individual's written consent prior to the collection, use or disclosure of the individual's genetic test results. The Privacy Commissioner of Canada (the Privacy Commissioner) supports the Act, as the general prohibition on the collection of genetic test results and the requirement to obtain written consent to disclose such information provides Canadians with more control over their personal information.

Despite the fact that insurers are able to seek consent under the Act, the Privacy Commissioner has made several public comments with respect to the limitations of such consent, including the comments to the effect that: (i) insurers should only seek consent for explicitly specified and legitimate purposes; (ii) consent is only valid if it is reasonable to expect that customers will understand the nature, purpose and consequences of the collection, use or disclosure of their personal information; (iii) consent is not a one-time event and should instead be viewed as an ongoing process with the individual; and (iv) consent may no longer be valid where there is a material change to the subject matter of the consent (such as the use of information for a new purpose or the disclosure of information to a third party not contemplated in the initial consent).

Industry Concerns

The Canadian Life and Health Insurance Association (CLHIA), who intervened in the case, argued that the principle of equal information between insurer and insured is at the foundation of insurance, and that the ability to avoid disclosure of genetic test results undermines this principle as well as the spread of risk among a common ground of people.

The primary concern from insurance industry participants is that the Act creates a significant moral hazard,

as individuals with genetic test results that disclose a genetic disorder (higher risk individuals) may apply to obtain greater life insurance coverage. Previously, if an individual had undergone a genetic test, there was nothing that precluded an insurer from requesting disclosure of the test results, thus creating an equivalency of information and reducing the risk of moral hazard. The implications of the Decision have already been felt in the insurance industry, which previously warned that the general cost of insurance premiums would need to increase to fund the cost of the insurers being less able to predict claims with accuracy.

Conclusion

The Act aims to protect genetic information of Canadians who otherwise could be forced to take a genetic test and provide the results to employers in connection with their employment or life insurance companies as a condition of coverage. As a result, insurers are required to have permanent practices in place to ensure that they are compliant with the Act to ensure they are not collecting, using or disclosing genetic test results contrary to the Act. Insurers must also ensure that they have appropriate practices, policies and procedures in place to provide the opportunity for applicants to give meaningful consent. Apart from disclosure of genetic test results, applicants for insurance coverage are still expected to provide full disclosure of facts material to the coverage when applying for life insurance coverage. This may provide significant challenges going forward for insurance companies where they receive results from doctors that are solely based on genetic tests or a mixture of both genetic tests and other medical examinations.

---

[1] 2020 SCC 17
