TOP FIVE 2020

Each year at OJEN's Toronto Summer Law Institute, a leading jurist identifies five cases that are of significance in the educational setting. The 2020 cases were selected and discussed by Mr. Justice Lorne Sossin, then of the Ontario Superior Court of Justice and currently of the Court of Appeal for Ontario. This summary, based on these comments and observations, is appropriate for discussion and debate in the classroom setting.

REFERENCE RE GENETIC NON-DISCRIMINATION ACT, 2020 SCC 17

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Facts

Section 91(27) of the *Constitution Act*, 1867 gives Parliament power to make criminal law. In 2017, Parliament enacted the *Genetic Non-Discrimination Act* ("the Act"). Section 2 of the Act defines a genetic test as a test that analyzes genetic material for health-related purposes. Sections 3, 4, and 5 establish prohibitions relating to genetic tests, such that individuals cannot be forced to take genetic tests or disclose genetic test results as a condition of obtaining some advantages. Section 6 provides an exemption to certain health care providers and researchers. Section 7 establishes a punishment for contravening sections 3 to 5.

Procedural History

The Government of Quebec referred the constitutionality of ss. 1 to 7 of the Act to the Quebec Court of Appeal, asking whether the provisions were outside of Parliament's jurisdiction over criminal law under s. 91(27) of the *Constitution Act*, 1867. In simple terms, the government of Quebec asked the court if Parliament is constitutionally allowed to enact these provisions or if it is outside of their power.

The Quebec Court of Appeal concluded that the Act exceeded Parliament's criminal law authority given by the Constitution. The Canadian Coalition for Genetic Fairness, an intervener in the Court of Appeal, appealed the matter to the Supreme Court of Canada (SCC).

Issue

The only issue before the Court was whether Parliament had the power under s. 91(27) of the *Constitution Act*, 1867, to enact ss. 1 to 7 of the *Genetic Non-Discrimination Act*.

Decision

The majority of the SCC, in a 5-4 split, decided 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).

Ratio

Three of the majority justices (Abella, Karakatsanis and Martin JJ.) held that the pith and substance (which means the "essential character") of the provisions was to preserve individual 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. The remaining two majority justices (Moldaver and Côté JJ.) found that the pith and substance of ss. 1 to 7 was to protect health by prohibiting conduct that undermines individuals' control over the intimate information revealed by genetic testing.

Reasons

According to Abella, Karakatsanis, and Martin JJ. (Moldaver and Côté JJ. agreeing on this point), s. 91(27) 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 were undoubtedly prohibitions accompanied by penalties, the only issue was whether ss. 1 to 7 of the Act were 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 (or "reasonable") apprehension of harm to one or more of these public interests, no degree of seriousness of harm needs to be proved before it can make criminal law.

DISCUSSION

1. What is a "criminal law purpose"?

2. What is "pith and substance"?

3. Does this case give too much power to Parliament to create criminal law? Why or why not?

4. Do you agree with the majority of the SCC that the pith and substance of the Act served a criminal law purpose? If not, what alternative purpose does it serve?

5. The SCC said in this case that no specific degree of seriousness needs to be proven as long as the reasoned apprehension of harm exists. Is this a strong enough standard to determine what can and cannot become criminal law?