Member's Quarterly Winter 2021 Edition

Feature

Genetic Discrimination – A New Frontier

Failure to comply brings heavy penalties

Dan Palayew
LL.B.
Partner, Borden Ladner Gervais LLP

On July 10, 2020, in a 5-4 split judgement, the Supreme Court of Canada released its decision upholding the *Genetic Non-Discrimination Act* ("*GNDA*" or the "*Act*"). The majority ruled the *Act* as valid criminal law enacted by Parliament.

This ruling has wide implications for employers, insurance companies and other various other industries as it establishes severe penalties if convicted of using information from genetic tests in concluding contracts.

Odessa O'Dell
J.D.
Associate, Borden Ladner Gervais LLP

Background to the *GNDA*

In 2015, Bill S-201, an *Act* to prohibit and prevent genetic discrimination, was introduced. Before that Bill was passed in May 2017, nothing protected Canadians from a third party, such as an employer, demanding access to their genetic testing and subsequently using that information against them.

The Purpose of the *GNDA*

The *GNDA*'s purpose is to combat a new form of discrimination. Genetic discrimination refers to the differential treatment that an individual would face based on their decision to undergo or forego genetic testing. A "genetic test" is defined in the *Act* as an analysis of DNA, RNA or chromosomes for the purpose of prediction, monitoring, diagnosis or prognosis of a disease.

The *Act* criminalizes compulsory genetic testing, compulsory disclosure and non-consensual use of test results. The prohibitions apply to a broad range of circumstances in which individuals might be treated adversely because of their decision to undergo genetic testing.

Notably, the Supreme Court of Canada emphasized that the most significant effect of the *Act* is that it gives control back to individuals who will now be able to make choices related to genetic testing without repercussions on their personal or professional lives.

Direct Impact on Federally-Regulated Employers

This *GNDA* has a particular impact on federally-regulated employers, as it also amends the *Canada Labour Code* and the *Canadian Human Rights Act* to incorporate new prohibitions. These amendments include:

Canada Labour Code – two new sections: ss. 247.98 and 247.99

- An employee is not required to undergo genetic testing, or to disclose genetic testing results to their employer;
- Employers are prohibited from engaging in retaliatory measures (such as dismissing, suspending, or imposing a penalty) due to an employee's refusal to undergo genetic testing or to disclose testing results; and
- Employers are not allowed to access the results of an employee's genetic tests without an employee's written consent.

Member's Quarterly Winter 2021 Edition

Feature continued

Employees are also able to make a complaint where it is alleged that an employer has violated these provisions. If the employer is found to have infringed on the rights recognized by this legislation, the employer may be subject to corrective action, which could be monetary or otherwise.

Canadian Human Rights Act — new prohibited ground of discrimination

Interestingly, Bill S-201 initially included a definition for "genetic discrimination," but it was dropped because the Canadian Human Rights Commission felt that the definition would limit its interpretation and evolution. As such, while this new ground of discrimination has been added to the *Canadian Human Rights Act*, its interpretation will be left entirely to the Canadian Human Rights Tribunal and Canadian Courts to determine.

Takeaways for Employers

While the impact of the above-referenced amendments will only directly apply to federally-regulated undertakings, it is important for all employers to be aware of them. The prohibitions set forth in the *GNDA* itself also creates criminal offences for genetic discrimination which may be applied universally. The penalties associated with these offences are a fine of up to $1 million or imprisonment for up to 5 years or both, demonstrating the significance of the matter.

It is also important to note that the effect of the Supreme Court's decision to uphold the *Act* renders any provincial legislation that allowed the compulsory disclosure of health information no longer operable, so as to require individuals to disclose genetic test results. As such, provincially-regulated employers may well see changes to provincial legislation coming in the near future to adapt to this new issue.

Generally, while employers are not strictly prohibited from asking employees if they have undergone genetic testing, they cannot under any circumstance require them or pressure them into undergoing tests or disclosing genetic test results. They also cannot access results without their employee's written consent. To do so would be an offence under the *GNDA*, regardless of whether the employer is federal or provincial.

All employers are also encouraged to consider how these changes could apply to their business and whether communication to employees or changes to business practices is required. If employees conduct themselves on behalf of an entity in a manner prohibited by the *GNDA*, the employer may be exposed to vicarious liability. For example, because of the *GNDA*, an employee cannot conclude contracts on behalf of the employer if a genetic test was a condition to the contract as this might trigger criminal offences under the *Act*, even though commercial contracts generally fall under provincial jurisdiction. The refusal of service based on genetic test results would also be prohibited.

Dan Palayew is Partner/Regional Leader, Labour & Employment Group with Borden Ladner Gervais LLP and can be reached at dpalayew@blg.com.

Odessa O'Dell is an Associate with Borden Ladner Gervais LLP and can be reached at oodell@blg.com.