Canadian Association of Counsel to Employers
CACE
Association canadienne des avocats d'employeurs

CACE Submissions On The Revised Bill S-201

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Thank you for providing an opportunity for the Canadian Association of Counsel to Employers to provide submissions on the revised Bill S-201. By way of background, CACE is an association of management-side labour and employment lawyers across Canada. CACE promotes excellence in the specialized field of labour and employment law, and engages in legislation and law reform activities at the provincial and federal levels. Created in 2004 by a Founders' Committee of labour lawyers across Canada, CACE now has over 950 members, including leading labour and employment counsel, corporate counsel and affiliate members from the United States.

As you may recall, CACE provided testimony to the Standing Senate Committee on Human Rights regarding the previous iteration of Bill-201. In those submissions, we explained that in our collective experience as labour and employment lawyers across Canada, we have not become aware of complaints by employees on the basis of genetic discrimination. While we have more recently been apprised of one such complaint, it is not an issue that has reached such significance as to warrant the proposed legislation, especially given the problems with it as outlined below. CACE also testified that the protections that are provided to employees under existing human rights, employment and privacy legislation are robust and do provide the necessary means to obtain redress for genetic discrimination. Indeed, in the one case that has been brought to our attention, the matter was addressed by the federal Human Rights Commission, who recognized that the *Canadian Human Rights Act* did apply. In our previous submissions, we stated that if it became law, Bill 201 might well have the unintended negative consequence of penalizing employers for protecting workers' health.

In our view, the risk of unintended adverse consequences continues to exist under the revised Bill. In addition, there is significant potential for conflicting decisions arising from multiple proceedings under the proposed criminal prohibitions, the *Canada Labour Code* provisions, and the amended *Canadian Human Rights Act* provisions. Finally, CACE is of the view that courts would likely see the use of the Federal criminal law powers in Bill S-201 as a colourable attempt to pass legislation in the area of property and civil rights, which is within provincial jurisdiction.

1. The Bill Provides for a Worrisome Multiplicity of Proceedings

In CACE's view, the existing human rights protection is sufficiently robust to ensure that employees or potential employees are not subjected to genetic discrimination. We will not repeat our previous submissions here. However, suffice it to say that currently employers are **not** permitted to solicit diagnoses from employees or applicants for positions, in most cases. Rather, in the case of pre-employment screening for example, employers are presently only permitted to ask job applicants to provide medical proof of fitness to do particular kinds of jobs that may put their health at risk, and this only after a conditional offer has been made to the applicant. The medical screening must be very closely related to the job risks, and applicants are not required to provide information about their diagnoses or the nature of their conditions. Furthermore, if the medical screening reveals that the applicant is not able to undertake the particular job for medical reasons, the employer is **not** permitted to automatically turn the applicant away. Rather, the employer is under a duty to accommodate the employee up to the point where undue hardship is created.

Furthermore, as it currently stands, an employer's refusal to hire an individual or to maintain that person's employment on the basis of a genetic characteristic would most certainly be seen as discrimination on the basis of perceived disability, which the Supreme Court of Canada has confirmed is prohibited under human rights legislation. Even if the employee is not currently suffering from any condition, but simply has a genetic

predisposition to that condition, the refusal to hire, or the termination of his/her employment would constitute discrimination, as the law currently stands. These are a few salient examples, others of which are provided in our previous submissions, of the robust and satisfactory nature of the protections that currently exist in Canadian human rights, employment and labour and privacy law against genetic discrimination.

Finally, it should be noted that employees may also file complaints under applicable privacy legislation (such as the *Personal Information Protection and Electronic Documents Act*, which covers all federal employers) if the genetic information were used for a purpose not consented to, such as being used to unlawfully discriminate against employees, contrary to applicable human rights legislation.

Because of the strong protection that is currently available to employees for improper use of their genetic information or requirements to provide genetic information or to participate in testing, CACE believes that additional legislation in the form of Bill S-201 is unnecessary. CACE is also concerned that this Bill will likely have unintended negative consequences. For example, the current iteration of Bill S-201 provides for multiple potential proceedings against employers on the basis of the same factual circumstances. This gives rise to the problematic phenomenon of forum shopping. Bill S-201 provides employees with at least three opportunities to seek redress against employers who request the results of genetic testing or who ask employees to undergo genetic testing: (1) given that the employment relationship is contractual, employees may proceed by way of laying a charge against their employer under sections 3(1)(b) or 4(1) or 5 of the *Genetic Non-Discrimination Act*; (2) they may also lay a complaint under sections 247.98(4) or (6); of the *Canada Labour Code* (as amended by Bill S-201); and, (3) they may file a complaint of genetic discrimination under the *Canadian Human Rights Act* (as amended by Bill S-201). In addition, because the criminal provisions would apply not only to federally regulated companies, but also to provincially regulated employers, a provincially regulated employer could face criminal law charges as well as charges under provincial human rights, labour and occupational health and safety laws. Each one of these avenues of redress would provide the employee with different options in terms of arguments that may be made and results that may obtain.

It is widely recognized that providing employees with multiple forums within which to seek a remedy for the same set of factual circumstances can be highly problematic. Addressing the principle of judicial efficiency and the dangers that can result from duplicative litigation, the Supreme Court of Canada in the 2011 decision of *British Columbia v Malik*[1] stated that there is "a public interest in the avoidance of duplicative litigation, potential inconsistent results, undue costs and inconclusive proceedings".

It is particularly problematic that employees may intentionally first try to obtain a judgment in the civil context (via either a *Canada Labour Code* or a human rights complaint) where the standard of proof (i.e., balance of probabilities) is lower than the criminal standard of proof (i.e., beyond a reasonable doubt). They may then ask the criminal courts to apply the findings made in the civil context to the facts, with the result that the burden of proof in the criminal context is effectively lightened. Although courts are on guard against such practices, the very real possibility of forum shopping and the concomitant expense and risk of inconsistent findings provide ample reason to reduce the number of options for obtaining redress for alleged genetic discrimination.

2. Criminalizing Genetic Discrimination is Highly Problematic

The courts have recognized that there should not be a hierarchy of human rights.[2] That is, one right should not be given more importance than another, and should not be either more difficult to prove or result in more stringent consequences than another in the event of a violation. The criminalizing of genetic discrimination sends a message that the protection of freedom from racial discrimination or discrimination on the basis of mental illness,

[1] 2011 SCC 18, at para 40.

[2] *Canada (Attorney General) v Johnstone*, 2014 FCA 110, at para 81.

for example, is less important than the use of genetic information by an employer. This is because only genetic discrimination would rise to the level of criminal conduct, punishable by means of a hefty fine or imprisonment. Other forms of discrimination are dealt with by means of corrective action and remedies to make the victim whole, rather than to punish the employer – a remedial framework that has widely been seen as more conducive to creating a culture of respect for human rights. Criminalizing one form of discrimination, especially when protection against this form of discrimination currently exists, is not only unnecessary, it is contrary to the human rights philosophy established by human rights tribunals and commissions across Canada.

Furthermore, the criminalization of genetic discrimination under sections 1 – 7 of Bill S-201 removes the defence that exists under human rights law of *bona fide* occupational requirement ("BFOR"). Under human rights law, employers may defend themselves against accusations of violating an employee's human rights by establishing that: the alleged discriminatory conduct did not happen; there is a non-discriminatory explanation for the impugned conduct; or, the workplace rule, conduct or requirement is a BFOR. In the now famous decision involving a BC firefighter by the name of Tawney Meiorin, the Supreme Court of Canada, outlined the elements of the BFOR defence.[3]

To avail itself of the BFOR defence, the employer must first show that it adopted the requirement (to provide the results of genetic testing, for example) for a purpose rationally connected to the performance of the job, that it adopted the particular requirement in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose, and finally, that the requirement is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the requirement is reasonably necessary, it must be demonstrated that individual employees who do not meet the requirement cannot be accommodated without undue hardship.

As CACE stated in our previous submissions, there are and will undoubtedly continue to be situations in which employers need to protect their employees from occupational diseases and conditions that may be triggered by the combination of genetic and workplace factors. Indeed, as the American Centers for Disease Control and Prevention stated in an article on "Genetics in the Workplace", "genetic information will play an increasing role in preventing occupational disease".[4] Research to date has identified about 50 genetic disorders thought to increase a person's susceptibility to the toxic or carcinogenic effects of environmental agents. For example, exposure to lead or benzene can be especially hazardous to the health of people with the thalassemia gene.[5]

Employers are required, under Canadian occupational health and safety legislation, to take all reasonable precautions to prevent injuries and illnesses in the workplace. This duty overrides an employee's willingness to "take the risk", for example, of not wearing a safety belt when working at heights. Introducing genetic testing in environments known to have elevated risks or specific causation of serious illnesses to employees with certain genetic predisposition is consistent with fulfilling this duty. Therefore, employers who decide to monitor current employees' health through genetic testing to determine if genetic damage is being done by a particular set of work conditions, or who require medical clearance based on genetic tests to perform certain kinds of roles within the company, might be able to establish that such a requirement is a BFOR for the following reasons: the requirement for testing was adopted in the good faith belief that it was necessary to protect employees' health; genetic testing is necessary to determine if employees' health is or will be compromised by the particular work conditions; and finally, that the employer accommodates employees who either refuse to undergo genetic testing for valid reasons, or whose tests reveal that genetic factors predispose them to occupational disease in that work environment. Accommodating current employees who do not meet the requirement of genetic testing could mean

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[3] *British Columbia (Public Service Employee Relations Commission) v BCGSEU*, [1999] 3 SCR 3 (*"Meiorin"*)

[4] Found at: http://www.cdc.gov/niosh/topics/genetics/

[5] Claire Andre and Manuel Velasquez "Read My Genes" Markula Center for Applied Ethics at: https://www.scu.edu/ethics/focus-areas/bioethics/resources/read-my-genes-genetic-screening-in-the-workplace/

finding other work for employees that will not put their health at risk because of their genetic predisposition or their refusal to participate in the testing.

Permitting employers to require genetic testing only under limited circumstances when they meet the BFOR test is a reasonable approach to dealing with the risks involved in this activity. It requires that employers undertake a case-by-case analysis and not make decisions based on a blanket requirement or rule. It also requires employers to provide concrete evidence, often in the form of empirical data, to justify the requirement; conjecture and hypothetical examples will not convince a human rights tribunal that genetic testing is justified. Finally, it requires that employers accommodate employees, up to the point of undue hardship, who do not meet the requirement. This approach to defending a workplace requirement like genetic testing already exists under current human rights legislation. Therefore, Bill S-201 is not needed.

The criminal provisions found in sections 1 – 7 of Bill S-201 do not permit the BFOR defence to be raised. Thus, employers may well find themselves facing criminal liability for having implemented a testing requirement to protect their employees' health. The only defence provided in the Bill is for health care practitioners and researchers. Otherwise, if the elements of the offence, as set out in the Bill are met – requiring an employee to disclose the results of a genetic test as a condition of remaining employed – then the employer would be convicted, with draconian consequences. This is yet another reason for CACE's recommendation that the criminal provisions be eliminated from the Bill.

Similarly, if the amendments to the *Canada Labour Code* are to remain in the Bill, CACE would recommend that they be further amended to clarify that the BFOR defence is available to employers under the amended provisions of the *Canada Labour Code*, just as it is under the *Canadian Human Rights Act*.

3. The Bill Still Trenches on Provincial Constitutional Authority

Although the Federal government's jurisdiction over criminal law is broad, it is not limitless. The courts are careful "not to endorse a 'colourable' statute, that is, one that in form appears to relate to a matter within the legislative competence of the enacting order of government, but in substance addresses a matter falling outside its competence".[6] Thus, while it may appear that the Bill is addressing the public "evil" of genetic discrimination, there is nothing to take this phenomenon out of the provincial jurisdiction any more than racial discrimination or discrimination against disabled people, for example. Moreover, to CACE's knowledge, there is little evidence of a particularly pronounced problem with genetic discrimination such that use of the Federal power under the residual clause of "peace, order and good government" would be justified. Rather, the issue of genetic discrimination is one that can and should be addressed under provincial legislation under the Provincial power over "Property and Civil Rights".

While the Federal government has full authority to amend the *Canadian Human Rights Act* to add genetic characteristics as a prohibited ground of discrimination and to modify the *Canada Labour Code*, the criminal provisions set out in sections 1 – 7 of the Bill would likely be struck down, in CACE's view.

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[6] P. W. Hogg, Constitutional Law of Canada (5th ed Supp), at pp 15-19; Reference re *Upper Churchill Water Rights Reversion Act*, [1984] 1 SCR 297.

Conclusion

CACE applauds Senator Cowan for his initiative in addressing an issue of grave concern to some Canadians. However, in CACE's view, his efforts would be better directed towards working with the Canadian Human Rights Commission to educate Canadians about the existing robust protections against genetic discrimination that currently exist in Canadian law. In our view, no changes are needed to existing legislation.

Given the link between certain genetic disorders and susceptibility to environmental agents found in some workplaces, it is imperative that employers be able to make limited use of genetic testing to prevent employees from suffering devastating occupational diseases. The BFOR defence ensures that employers cannot require genetic testing as a condition of employment unless certain conditions are met, most importantly the requirement that accommodation be provided to those who refuse or fail the test. Firing someone who fails or refuses a genetic test without first trying to accommodate him or her is not an option under the BFOR defence.

CACE would like to thank the Standing Senate Committee on Human Rights for the opportunity to make these submissions.

Submitted by,

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On behalf of CACE