Bill S-201 – Revised Version (December 8, 2015)

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I have reviewed the new version of Bill S-201 sponsored by the Honourable Senator Cowan.[1] I believe that this bill, as amended by removing the provision pertaining to insurance contracts, is constitutionally valid.

As I mentioned when I appeared before the Standing Senate Committee on Human Rights on December 11, 2014:

> … there is nothing stopping the Parliament of Canada from amending the *Canada Labour Code* and the *Canadian Human Rights Act* — quite the opposite — by introducing provisions to prohibit genetic discrimination, without encroaching unduly on the provinces' jurisdiction over matters of insurance. As long as Bill S-201 does not stray from that, its constitutional validity should not be called into question.

That is what the new version of Bill S-201 does, in addition to amending the *Personal Information Protection and Electronic Documents Act*. Deleting clause 6, which exempted high-value insurance contracts, makes Bill S-201 constitutionally valid.

It is also important to note that federal legislation can encroach upon areas of exclusive provincial jurisdiction as long as the provisions in question are ancillary and required for the implementation of the Act. This theory of constitutional interpretation is based on the ancillary powers doctrine: if the portion of the legislation that intrudes into the jurisdictional territory of the other order of government is intricately linked to the key provisions of the Act in question and it is required for the adequate and effective implementation of the Act, then the Act is entirely valid.[2]

The Supreme Court of Canada also ruled on the ancillary powers theory or doctrine in *Lacombe*.[3] In that matter, the Supreme Court invalidated a municipal zoning bylaw on the grounds that it did not, in pith and substance, relate to zoning, but rather to aeronautics, which falls under

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[1] *An Act to prohibit and prevent genetic discrimination*, Bill S-201, Senate of Canada, First Session, Forty-second Parliament, 64 Elizabeth II, 2015, (First Reading, December 8, 2015

[2] See: G.-A. Beaudoin (avec la collaboration de P. Thibault), *La constitution du Canada*, 3e édition, Montréal, Wilson & Lafleur, 2004, pp. 359-362; H. Brun, G. Tremblay and E. Brouillet, *Droit constitutionnel*, 6th ed., Cowansville, Éditions Yvon Blais, 2014, pp. 467-472

[3] Quebec (Attorney General) *v*. Lacombe, 2010, 2 S.C.R. 453

exclusive federal jurisdiction. In her ruling on the matter, Chief Justice McLachlin, for the majority,[4] wrote the following regarding the ancillary powers doctrine:

> [32] The ancillary powers doctrine may be briefly described. Recognizing that a degree of jurisdictional overlap is inevitable in our constitutional order, the law accepts the validity of measures that lie outside a legislature's competence, if these measures constitute an integral part of a legislative scheme that comes within provincial jurisdiction: *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641, at pp. 668-70.
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> [34] However, it is now well established that both Parliament and the legislatures may avail themselves of ancillary legislative powers: *Attorney-General of Ontario v. Attorney-General for the Dominion of Canada*, [1894] A.C. 189 (P.C.) (the "*Insolvency Reference*"), at pp. 200-201; *Grand Trunk Railway Company of Canada v. Attorney-General of Canada*, [1907] A.C. 65 (P.C.); *Attorney-General for Canada v. Attorney-General for British Columbia*, [1930] A.C. 111 (P.C.), at p. 118; *Attorney-General for Canada v. Attorney-General for the Province of Quebec*, [1947] A.C. 33 (P.C.), at p. 43; *Fowler v. The Queen*, [1980] 2 S.C.R. 213, at p. 226; *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161, at p. 183.
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> [35] The ancillary powers doctrine permits one level of government to trench on the jurisdiction of the other in order to enact a comprehensive regulatory scheme. In pith and substance, provisions enacted pursuant to the ancillary powers doctrine fall outside the enumerated powers of their enacting body: *General Motors*, at pp. 667-70. Consequently, the invocation of ancillary powers runs contrary to the notion that Parliament and the legislatures have sole authority to legislate within the jurisdiction allocated to them by the *Constitution Act, 1867*. Because of this, the availability of ancillary powers is limited to situations in which the intrusion on the powers of the other level of government is justified by the important role that the extrajurisdictional provision plays in a valid legislative scheme. The relation cannot be insubstantial: *Nykorak v. Attorney General of Canada*, [1962] S.C.R. 331, at p. 335; *Gold Seal Ltd. v. Attorney-General for the Province of Alberta* (1921), 62 S.C.R. 424, at p. 460; *Global Securities*, at para. 23.
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> [36] The ancillary powers doctrine is not to be confused with the incidental effects rule. The ancillary powers doctrine applies where, as here, a provision is, in pith and substance, outside the competence of its enacting body. The potentially invalid provision will be saved where it is an important part of a broader legislative scheme that is within the competence of the enacting body. The incidental effects rule, by contrast, applies

[4] In addition to Chief Justice McLachlin, the majority included Justices Binnie, Fish, Abella, Charron, Rothstein and Cromwell. Justice LeBel provided separate reasons, with Justice Deschamps dissenting.

> when a provision, in pith and substance, lies within the competence of the enacting body but touches on a subject assigned to the other level of government. It holds that such a provision will not be invalid merely because it has an incidental effect on a legislative competence that falls beyond the jurisdiction of its enacting body. Mere incidental effects will not warrant the invocation of ancillary powers.

Accordingly, in light of the grounds given and considering current constitutional law in Canada, it is my opinion that Bill S-201, as revised and amended,[5] is constitutionally valid.

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Pierre Thibault

February 29, 2016

[5] *An Act to prohibit and prevent genetic discrimination*, supra note 1