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The new act to prohibit and prevent genetic discrimination

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On May 4, 2017, the Senate passed the *Act to prohibit and prevent genetic discrimination (Genetic Non-Discrimination Act)*, which came into force on the same date. This Act also amended the *Canada Labour Code* and the *Canadian Human Rights Act*.

The new Act aims to regulate the use of genetic tests, namely, tests that analyze the DNA[1], RNA[2] or chromosomes of a person for predictive or monitoring purposes or for establishing a diagnosis or prognosis, mainly within a contractual framework. It prohibits anyone from requiring an individual to undergo a genetic test as a condition of providing goods or services to that individual and entering into or continuing a contract or agreement (section 3).

Furthermore, refusing to provide this individual with goods or services or enter into or continuing a contract with this person on the ground that he or she refused to undergo a genetic test or disclose the results thereof is prohibited (section 4).

Finally, the new Act prohibits any person who carries out the contractual activities referred to in the Act from collecting, using or disclosing the results of a genetic test without the consent of the person who underwent it (section 5).

These prohibitions do not apply to health care practitioners in respect of an individual undergoing the genetic test to whom they are providing health services or to persons who conduct medical, pharmaceutical or scientific research in respect of an individual who is a participant in the research.

The Act creates penal offences and provides that every person who violates the above-mentioned sections 3 to 5 is liable to fines not exceeding one million dollars and imprisonment for a term not exceeding five years, depending on the nature of the proceedings chosen by the prosecuting party (indictment or summary proceedings).

Amendments to the Canada Labour Code

In Québec, the *Canada Labour Code* only applies to businesses under federal jurisdiction pursuant to the *Constitution Act* (1867).

For businesses governed by this Code, the *Genetic Non-Discrimination Act* amends the *Canada Labour Code* to provide that no person may require an employee to undergo a genetic test or disclose the results of a genetic test he or she underwent, along with the corollary right of the employee to refuse to undergo a genetic test or to disclose the results thereof (sections 247.98(2) and (3) of the Code).

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The *Canada Labour Code* is further amended to prohibit an employer from dismissing, suspending, laying off or demoting an employee, imposing a financial penalty on him or her, or refusing to pay his or her remuneration in respect of any period that the employee would, but for the exercise of the employee's rights, have worked or taking any other disciplinary action against an employee or threaten to do so on the ground that he or she refused a request by the employer to undergo a genetic test, to disclose the results thereof or on the basis of the results of a genetic test undergone by the employee (section 247.98(4)).

The amendments made to the *Canada Labour Code* do not directly prohibit an employer from refusing to hire an applicant on the ground that the applicant refused to undergo a genetic test or disclose the results thereof: this is covered by the amendments made by the *Genetic Non-Discrimination Act* to the *Canadian Human Rights Act*, which is discussed below.

The amendments made to the *Canada Labour Code* further prohibit a third party from disclosing the existence or the results of genetic tests to the employer without the employee's consent, in addition to prohibiting employers from collecting or using the results of a genetic test without the written consent of the employee who underwent the test.

An employee can file a complaint with an inspector if he or she considers that his or her employer violated the new section 247.98 (4) of the *Canada Labour Code*. Following that, the inspector will convene a conciliation session to attempt to settle the complaint. If the conciliation fails, the complaint can be referred to an adjudicator, who then has jurisdiction to issue various orders of the same nature as those provided for under other provisions of the *Canada Labour Code* in the context of a dispute.

The amendments to the Canadian Human Rights Act

The *Genetic Non-Discrimination Act* adds "genetic characteristics" to the prohibited grounds of discrimination set out in section 3 of the *Canadian Human Rights Act*. Although this concept is not defined in the Act, the legislative summary regarding the passing of the *Genetic Non-Discrimination Act* indicates that "[g]enetic testing refers to the process of analyzing a person's genes to identify specific traits or markers. These traits have been referred to as a person's "genetic characteristics".

Furthermore, a provision is added to section 3 of the *Canadian Human Rights Act* whereby a distinction based on the refusal of a request to undergo a genetic test or to disclose, or authorize the disclosure of, the results of a genetic test, is deemed to constitute discrimination on the basis of one's genetic characteristics.

This addition to section 3 of the *Canadian Human Rights Act* will cover refusal to hire which, as noted above, is not specifically provided for in the amendments made to the *Canada Labour Code*.

Conclusion

The Act passed by the federal government aims to protect the public in light of the significant and increasingly rapid technological advances in the field of genomics.

However, its scope is somewhat restricted since the *Canada Labour Code* only applies to federal businesses, while the application of the *Canadian Human Rights Act* is restricted to activities falling under federal jurisdiction in accordance with the *Constitution Act* (1867).

The legislative summary mentions that the debates surrounding the passing of the *Genetic Non-Discrimination Act* raised many questions as to whether the legislation constituted a legitimate

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exercise of federal powers or whether the federal government was encroaching on the legislative authority of the provinces in respect of property and civil rights. Accordingly, it is possible that proceedings will be instituted, seeking to have portions or even the entirety of the *Genetic Non-Discrimination Act* declared unconstitutional.[3]

However, such debates should not affect the constitutionality of the amendments to the *Canada Labour Code* and the *Canadian Human Rights Act*, which only apply to businesses under federal jurisdiction.

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1. Deoxyribonucleic acid.
2. Ribonucleic acid.
3. A notice was published stated that “a reference to the Court of Appeal would provide the Court with an opinion on the constitutionality of the law on non-discrimination in genetics”.

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