

Rely on 

Think before you spit: DNA testing and the new *Genetic Non-Discrimination Act* Insurance, Privacy, Human Rights and Labour Matters

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Genetic Non-Discrimination Act: Overview

- Multiple areas of the law:
- Human rights/Discrimination law.
- Labour law.
- Privacy law.
- Insurance law.
- Civil consequences.
- Criminal law sanctions.
- Constitutional/ Division of Powers issues.

The Genetic Non-Discrimination Act: History

- Unlikely legislative history.
- First introduced 2013 in the Senate, 3rd time was the Senate Bill that passed.
- Passed in the Senate.



Genetic Non-Discrimination Act: History

- Bill S-201, 1st Sess, 42nd Parliament.
- Brought forward by a Liberal backbench MP as a private member's bill.
- Vote 222/60. Yeas: Conservative, NDP, Green, 100 backbench Liberals. Nays: Cabinet and remaining backbench government MPs.
- Royal Assent May 4, 2017.

Bill S-201: Further background

- OPCC first identified genetic non-discrimination as a strategic priority in 2007.
- Coincided with explosion in genetic tests.
- 2003: 100
- 2013: 2000
- 2017: 53,987

(Source: Remarks of Senator James S. Cowan October 27, 2017)

Bill S-201: Further background

- Senator James S. Cowan's advocacy.
- Canada last member of G7 to pass legislation.



Insurance Law 101

- Duty of Good Faith
- Duty to Disclose - Section 160 of *The Insurance Act*, C.C.S.M. c. 140
- Obligation to disclose material issues, facts or events
- Materiality is to be considered only from the point of view of the reasonable insurer, not the insured.
- Innocent failure to disclose?
- *Badenhorst v. Great-West Life Assurance Co.*, 2013 MBCA 5

S-201: Insurance Industry Concerns

- Principle of equal information?
- Canadian Life and Health Insurance Association (“CLHIA”) committed (2016):
 - never ask an applicant to take a genetic test and
 - will not ask for or use genetic testing information for new applications up to \$250,000.
 - This covers more than 85% of all applications for new life insurance policies
- Canadian Institute of Actuaries (CIA) – higher premiums
 - 30% for men
 - 50% for women
 - group insurance
- People may decide not to buy insurance
- Critical illness insurance

Insurance Industry Begins to Respond

- Insurers are still entitled to ask for medical information and take medical tests – but not genetic tests.
- Physician forms need to make clear that not to disclose results of genetic testing.
- Applicants previous denied due to genetic test results may now be eligible.
- Critical illness coverage for certain illnesses may be withdrawn from coverage.

S201: Overview of provisions

1. Definitions
2. Prohibitions against:
 - a) requiring a person to take a test or disclose results;
 - b) taking certain steps on the grounds a person has refused to take a test or refused to disclose results;
 - c) collect, use or disclose test results without written consent.
3. Offences.
4. Canada Labour Code.
5. Canadian Human Rights Act.

Definitions

Definitions

2 The following definitions apply in this Act...

genetic test means a test that analyzes DNA, RNA or chromosomes for purposes such as the prediction of disease or vertical transmission risks, or monitoring, diagnosis or prognosis.

Prohibitions against requiring a test

Genetic test

3 (1) It is prohibited for any person to require an individual to undergo a genetic test as a condition of

(a) providing goods or services to that individual;

(b) entering into or continuing a contract or agreement with that individual; or

(c) offering or continuing specific terms or conditions in a contract or agreement with that individual.

Prohibitions when person refuses a test

Refusal to undergo genetic test

3 (2) It is prohibited for any person to refuse to engage in an activity described in any of paragraphs (1)(a) to (c) in respect of an individual on the grounds that the individual has refused to undergo a genetic test.

Prohibitions against requiring disclosure

Disclosure of results

4 (1) It is prohibited for any person to require an individual to disclose the results of a genetic test as a condition of engaging in an activity described in any of [paragraphs 3\(1\)\(a\) to \(c\)](#).

Refusal to disclose results

(2) It is prohibited for any person to refuse to engage in an activity described in any of [paragraphs 3\(1\)\(a\) to \(c\)](#) in respect of an individual on the grounds that the individual has refused to disclose the results of a genetic test.

Prohibitions against use of info without consent

Written consent

5 It is prohibited for any person who is engaged in an activity described in any of [paragraphs 3\(1\)](#)(a) to (c) in respect of an individual to collect, use or disclose the results of a genetic test of the individual without the individual's written consent.

Prohibitions: Exceptions

Exceptions: health care practitioners and researchers

6 Sections 3 to 5 do not apply to

(a) a physician, a pharmacist or any other health care practitioner in respect of an individual to whom they are providing health services; or

(b) a person who is conducting medical, pharmaceutical or scientific research in respect of an individual who is a participant in the research.

Offences and sanctions



Offences

Offences and Punishment

Contravention of [sections 3 to 5](#)

7 Every person who contravenes any of [sections 3](#) to [5](#) is guilty of an offence and is liable

(a) on conviction on indictment, to a fine not exceeding \$1,000,000 or to imprisonment for a term not exceeding five years, or to both; or

(b) on summary conviction, to a fine not exceeding \$300,000 or to imprisonment for a term not exceeding twelve months, or to both.

Canada Labour Code



Canada Labour Code: Division XV.3

247.98 (1), (2), (3):

Definition: “*genetic test*, in relation to an employee, means a test that analyzes the employee’s DNA, RNA or chromosomes for purposes such as the prediction of disease or vertical transmission risks, or monitoring, diagnosis or prognosis.”

Employee rights:

- Right of employee not to undergo a genetic test
- Right of employee to not disclose or be required to disclose the results of a genetic test.

Canada Labour Code: Division XV.3

247.98(4), (5), (6):

Employer prohibitions:

- 1.No discipline, lay off, demotion etc. on the basis of a test; or because an employee has refused a request to undergo a test or to disclose the results of a test.
- 2.No collection or use of the results the results of a genetic test without written consent of the employee who has undergone the test.

Prohibition on third parties:

- 1.No disclosure to employer without consent of employee that employee has undergone a genetic test or the results of a genetic test.

Canada Labour Code: Division XV.3

S. 247.99 (1) – (9):

Complaint and remedies:

- Employee can make written complaint to inspector.
- 90 day time limit (discoverability).
- Reference to adjudication if cannot be resolved.
- Powers of adjudicator *inter alia*: reinstate, order to pay compensation, rescind discipline, order employer to do “any other thing that is equitable.”

Canadian Human Rights Act

- s. 2 general purpose statement clarifies jurisdictional reach:
“... within the purview of matters coming within the legislative authority of Parliament ...”
- Adds “genetic characteristics” to s. 2 list of grounds applicable to the general purpose clause.
- Adds “genetic characteristics” to s. 3(1) list of prohibited grounds.

Canadian Human Rights Act

Note new s. 3 (3) of the CHRA:

Idem

(3) Where the ground of discrimination is refusal of a request to undergo a genetic test or to disclose, or authorize the disclosure of, the results of a genetic test, the discrimination shall be deemed to be on the ground of genetic characteristics.

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Questions?

