Constitutional forum constitutionnel

Constitutionalism and the Genetic Non-Discrimination Act Reference

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I. Introduction

In the July 10, 2020 decision in *Reference re Genetic Non-Discrimination Act* (*GNDA Reference)*,[1] the Supreme Court of Canada arrived at a complex three-to-two-to-four outcome, with a slim five-justice majority in two separate judgments upholding challenged portions of the federal *Genetic Non-Discrimination Act (GNDA)*[2] as a valid exercise of Parliament's criminal law power. The legislation, which some thought fundamentally oriented to the goal of preventing genetic discrimination, seemed to have attractive policy objectives, though we will ultimately suggest that the form of the legislation was not entirely in keeping with these aims. While it may have appeared pragmatically attractive to uphold the legislation, we suggest that the majority's decision to do so comes at great cost to basic federalism principles, to legal predictability, and to prospects for well-informed intergovernmental cooperation. We argue that the courts must properly confine the effects of the *GNDA Reference* in accordance with established principles on the treatment of fragmented judicial opinions. We also argue that the courts must take significant steps to ensure that federalism jurisprudence remains well-grounded in legal principle, without the actual or apparent influence of extra-legal policy considerations.

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1 2020 SCC 17 [*GNDA Reference*].

2 SC 2017, c 3 [*GNDA*].

While our argument will ultimately deploy some deeper constitutional theory, we would suggest that some of its reasoning can be understood well through an analogy. A court considering appellate criminal law questions would never act rightly by allowing — or being seen as allowing — its approach to those legal questions to be affected by judges' personal views on the culpability of a particular offender. Since an appellate decision affects other cases through *stare decisis*, doing so would undermine the predictability of the law in future criminal law cases and would undermine the ability of all actors to apply that law. Just as a court ruling on questions of law must take care to ensure that its decisions on legal rules are not seen as having been affected by factual matters, such as where there is distaste for a particular accused or a belief about their guilt, so too a court ruling on questions of constitutionality must take care to ensure that its decision is not seen as having been affected by the allure of particular policies.

Judicial decisions often set out statements of their adherence to these sorts of principles, and the three-justice judgment of Karakatsanis J properly opens the case with a statement that the case is not about the wisdom of Parliament's decision, but its constitutionality.[3] With respect, though, those mere words are not enough. These words mean little if they are not supported by a full and predictable adherence to the established methods of federalism analysis, an adherence that is ultimately lacking in the judgment, as we will argue.

To make our argument, we first set out some basic background concerning the case in Part II. We turn in Part III to discuss why it is especially problematic that the case saw three different conclusions on the pith and substance of the law, and to show how the four-justice dissenting opinion of Kasirer J best respected established approaches to characterizing pith and substance. In Part IV, we examine the real effects of the legislation on the provincial insurance context. In Part V, we show how the decision has perpetuated ongoing legal unpredictability concerning the scope of the federal criminal law power, and we explain how such unpredictability undermines policy development and intergovernmental negotiation. To conclude, in Part VI, we suggest some ways that the courts can achieve a necessary course correction by properly confining the effects of the *GNDA Reference* decision and by taking specific steps to ensure that future federalism jurisprudence is not seen as being affected by extraneous policy considerations.

II. Background

The challenged portions of the *GNDA* in sections 1 to 7 revolved around a central prohibition contained in section 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."[4] Other challenged sections entrenched related rules regarding both a refusal to take a genetic test and the disclosure of genetic test results in the contractual contexts specified within section 3(1).[5]

3 *GNDA Reference, supra* note 1 at para 15.
4 *GNDA, supra* note 2, s 3(1).
5 *Ibid*, ss 1-7.

By contrast, sections 8 to 11 of the *GNDA* — the remaining sections of the Act — were not at issue. Obviously, nobody challenged the idea that the federal Parliament could include rules pertinent to genetic testing in the *Canada Labour Code*[6] or in the *Canadian Human Rights Act*[7] that would apply in the context of federally regulated industries. The federal government has a role in legislating concerning federally regulated industries arising from enumerated federal powers, even while the provinces generally carry out most regulation of industry under the broad provincial power over property and civil rights.

After the *GNDA* was adopted in 2017 — having arisen, somewhat unusually for such significant legislation, from a private member's bill that was opposed by the members of Cabinet, including by the federal Justice Minister who had said it was unconstitutional[8] — the Quebec government referred the constitutionality of sections 1 to 7 of the *GNDA* to the Quebec Court of Appeal. It held in 2018 that these portions of the *GNDA* were *ultra vires* the federal government's jurisdiction.[9] The Court was unanimous that the pith and substance of the impugned sections was to regulate access to information from genetic testing and thereby encourage health-oriented uses of genetic tests by alleviating the fear that such information could be used for discriminatory purposes when entering into contracts for goods and services, such as employment or insurance contracts.[10] In short, the provisions in question were not fundamentally or primarily concerned with the prevention of genetic discrimination.[11] The Court concluded that the object of the *GNDA* — "to provide higher quality health care through the promotion of access to genetic tests by suppressing the fear that [the test results would] be used for insurance [or] employment purposes" — was not a valid criminal law purpose.[12] As such, sections 1 to 7 of the *GNDA* constituted an invalid exercise of Parliament's criminal law power.

On appeal, the Supreme Court of Canada's analysis wrestled with whether the *GNDA* was a valid exercise of Parliament's criminal law power under section 91(27) of the *Constitution Act, 1867*[13] or properly rested with provincial jurisdiction over property and civil rights under section 92(13). The Court split three ways on this issue, with the decision reached by Karakatsanis J ultimately gaining the support of a larger bloc within the majority, while Kasirer J's four-justice dissent was actually the largest bloc on the Court.[14] Two

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6 RSC 1985, c L-2.

7 RSC 1985, c H-6.

8 See Jean Paul Tasker, "Liberal backbenchers defy government wishes and vote to enact genetic discrimination law," *CBC News* (8 March, 2017), online: <https://www.cbc.ca/news/politics/genetic-testing-bill-vote-wednesday-1.4015863>.

9 *GNDA Reference*, *supra* note 1 at para 3. See *In the Matter of the: Reference of the Government of Quebec concerning the Constitutionality of the Genetic Non-Discrimination Act enacted by Sections 1 to 7 of the Act to prohibit and prevent genetic discrimination*, 2018 QCCA 2193 [*Reference of the Government of Quebec*].

10 *Reference of the Government of Quebec*, *supra* note 9 at paras 10-11.

11 *Ibid* at para 10.

12 *Ibid* at para 24.

13 *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No. 5, Canada Act 1982 (UK), c 1.

14 Karakatsanis J, joined by Abella and Martin JJ, concluded that the *GNDA* was a valid exercise of Parliament's criminal law power (*GNDA Reference*, *supra* note 1 at paras 63, 103). In concurring reasons, Moldaver J, joined by Côté J, agreed in the result, but for different reasons (*ibid* at para 110). Writing for the dissent, Kasirer J, joined by Wagner CJ, Brown and Rowe JJ, found that the *GNDA* was *ultra vires* federal jurisdiction

issues dominate the three sets of reasons: the characterization of the law according to its pith and substance and, on the basis of that characterization, the classification of the law under the applicable federal or provincial heads of power under sections 91 and 92 of the *Constitution Act, 1867*.[15]

III. Pith and Substance

One of the most troubling aspects of the *GNDA Reference* is the fact that, despite applying the same test, the three judgments reach three different outcomes on the pith and substance analysis, used to characterize the law for purposes of classification under a head of power. The characterization process is of long standing, going back to the very origins of Canadian constitutional jurisprudence. Pith and substance analysis is meant to offer a neutral, transparent, predictable starting point for validity analysis. Obviously, it is not an "exact science" because it involves the exercise of judgment.[16] But while pith and substance analysis is not straightforwardly determinative, accepting as a matter of course that every justice may reach a contradictory opinion creates unpredictability in the law, not least by lending credence to the view that the outcome will be judge-specific, which has particularly concerning effects when a case starts out at trial. Fractures on pith and substance analysis continue to persist at the Supreme Court of Canada, which suggests such splinters may become routine.[17] The *GNDA Reference* illustrates how this trend, if left unchecked, may jeopardize pith and substance analysis: its usefulness would be significantly undermined, potentially bringing down with it the entire idea of adjudicating division of powers disputes based on clear legal principles rather than the subjective predilections of judges.

In his opinion in the *GNDA Reference*, Kasirer J observes that "the wide range of characterization in this case suggests strongly … that not all of the interpretative efforts at this stage have followed the cardinal rule that it is the *dominant* purpose and effect of ss. 1 to 7 that should concern [the Court]."[18] The Court's divergent views raise the question of which purpose dominates; there cannot be more than one. And yet it seems that both Karakatsanis and Moldaver JJ anchor their analysis in a secondary, or even tertiary, purpose. Karakatsanis J concluded that the purpose of sections 1 to 7 of the *GNDA* is to "combat genetic discrimination and the fear of genetic discrimination based on genetic test results."[19] Moldaver J identified a different purpose: "to prohibit conduct that was undermining individuals' control over the information revealed by genetic testing — conduct that was leading to health-related harms."[20] In contrast, Kasirer J characterized the purpose of sections 1 to 7 as the regulation of "contracts and the provision of goods and services, in particular contracts of insurance and employment,

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and properly fell under the ambit of provincial jurisdiction over property and civil rights under s 92(13) of the *Constitution Act, 1867* (*ibid* at para 154).

15 *GNDA Reference*, *supra* note 1 at para 26.

16 *R v Morgentaler*, [1993] 3 SCR 463 at 481, 107 DLR (4th) 537, citing FR Scott, *Civil Liberties and Canadian Federalism* (Toronto: University of Toronto Press, 1959) at 26.

17 See e.g. *Rogers Communications v Châteauguay (City)*, 2016 SCC 23; *Quebec (Attorney General) v Canada (Attorney General)*, 2015 SCC 14; *Reference re Assisted Human Reproduction Act*, 2010 SCC 61.

18 *GNDA Reference*, *supra* note 1 at para 170 [emphasis in original].

19 *Ibid* at para 65.

20 *Ibid* at para 117.

by prohibiting some perceived misuses of one category of genetic tests, the whole with a view to promoting the health of Canadians."[21]

Pith and substance analysis must be tethered to a principled methodology because a law's characterization has critical implications for its subsequent classification under federal or provincial heads of power. Since government policy is developed based on understandings of the scope of available powers, a departure from principled methodology that creates unpredictability has effects down the road. For example, a government unsure of whether it has jurisdiction to enact a contested policy is less likely to expend political capital doing so when it cannot even calculate the prospects of the law later being struck down. We could offer a much larger account of the relationship between jurisdictional uncertainty and the incentives applying to political action, but suffice it to say that there are real parallels to the paralyzing effects of legal uncertainty in the private sector.

The focus of the long-established pith and substance analysis is on identifying the dominant nature of legislation — the "true subject matter" of the law, which may diverge from its stated purpose — by taking into account both the purpose of the law and the effects of the law, and by finding a characterization that fits fully with both of these elements.[22] Both intrinsic evidence, like "purpose clauses and the general structure of the statute," and extrinsic evidence, such as legislative history and parliamentary debates, assist with determining the law's purpose.[23] The consideration of effects must include the legal operation of the law, with attention to how the legislation affects legal rights and legal liabilities based on the terms of the legislation.[24]

In our view, Karakatsanis J's opinion unfortunately strays from the demands of the pith and substance analysis by allowing a purpose-driven approach, anchored in an apparently attractive policy goal, to overtake the inquiry. This deviation is evident in the way that the reasons import principles of statutory interpretation into the analysis, permit the title of the *GNDA* as well as its other provisions to colour the interpretation of the impugned provisions, and arguably privilege extrinsic evidence over intrinsic evidence to substantiate the dominant purpose identified.

By explaining that intrinsic evidence includes "the law's title," in addition to its text, structure, and purpose clause, Karakatsanis J appears to rely on principles of statutory construction in the inquiry on constitutional characterization — an exercise that engages entirely different principles.[25] The authorities Karakatsanis J relies on for this approach either are silent on the use of short or long titles as intrinsic evidence in pith and substance analysis or pertain to the principles of statutory interpretation.[26] The law's title may be a relevant consideration, but as

21 *Ibid* at para 154.

22 *Reference re Pan-Canadian Securities Regulations*, 2018 SCC 48 at para 86; *Reference re Firearms Act (Canada)*, [2000] 1 SCR 783 at para 18, 185 DLR (4th) 577 [*Firearms Reference*]. See generally Guy Régimbald & Dwight Newman, *The Law of the Canadian Constitution,* 2nd ed (Toronto: LexisNexis, 2017) at 179-190.

23 *Firearms Reference, supra* note 22 at para 17; *Reference re Securities Act*, 2011 SCC 66 at para 64; and *Morgentaler*, *supra* note 16 at 483-484.

24 See e.g. *Firearms Reference, supra* note 22 at para 18; and *Morgentaler*, *supra* note 16 at 482-483.

25 *GNDA Reference*, *supra* note 1 at para 34.

26 *Ibid* at paras 34-35, citing *Firearms Reference, supra* note 22 at para 17 and Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Markham, Ont: LexisNexis Canada, 2014) at 440-441.

Kasirer J cautions, the Court should not confer significant import on titles as "indicators of legislative intent," especially as short titles may "encapsulate, in a few short words, the essence of a statute that may not rest on a single idea."[27] In addition, the two interpretive techniques concern different aims: statutory interpretation assesses the application of a statute, whereas pith and substance analysis considers the constitutional characterization of a law, informing its classification under a respective federal or provincial head of power.[28]

The reliance on principles of statutory interpretation leads Karakatsanis J to place undue emphasis on the *GNDA*'s short and long titles, rather than focusing the engagement fully on the terms of the statute from the outset. This approach deviates from the Supreme Court of Canada's established guidance on the role of intrinsic evidence in this inquiry; the sources of intrinsic evidence include the structure of the law as well as its preamble or purpose clause.[29] Here, the challenge is that the *GNDA* does not contain a preamble or purpose clause.[30] On the basis of the Court's instruction, it does not appear that the law's title is interchangeable with its preamble or purpose clause. Yet, Karakatsanis J's judgment seems to treat the *GNDA*'s title[31] as being overly determinative of the analysis. After concluding that the *GNDA*'s twofold purpose is "to prohibit discrimination on genetic grounds and prevent such discrimination from occurring in the first place," Karakatsanis J proceeds to examine the impugned provisions and their effects as well as the *GNDA*'s other provisions and the parliamentary record through this purpose-driven lens.[32]

This approach is unfortunately not sufficiently nuanced and fails to fully take account of all that pith and substance analysis has long demanded. There are, as Moldaver J notes, real dangers in "placing undue emphasis on a statute's title in the characterization analysis," including the risk of anchoring the analysis in an improper characterization unsupported by the law's dominant purpose or effects.[33] One might add that such an approach could also set matters up for various forms of legislative chicanery based on developing creative and evocative legisla-

27 *GNDA Reference*, *supra* note 1 at para 173, citing Ruth Sullivan, *Statutory Interpretation*, 3rd ed (Toronto: Irwin Law, 2016) at 162.

28 See generally *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27 at paras 20-21, 154 DLR (4th) 193; *Morgentaler*, *supra* note 16 at 481-488; and *Firearms Reference*, *supra* note 22 at paras 16-18.

29 *Reference re Securities Act*, *supra* note 23 at para 64; *Morgentaler*, *supra* note 16 at 482-484; and *Canadian Western Bank v Alberta*, 2007 SCC 22 at para 27.

30 See *GNDA*, *supra* note 2.

31 *Genetic Non-Discrimination Act* (short title); *An Act to prohibit and prevent genetic discrimination* (long title).

32 *GNDA Reference*, *supra* note 1 at para 35. The *GNDA*'s title features in the conclusions Karakatsanis J's opinion draws with respect to the dominant purpose. See, for example, the discussion in Karakatsanis J's reasons on the text and structure of the *GNDA* in which she notes that "[r]eading the definition in this way would support — not detract from — the conclusion that the [*GNDA*] aims to combat discrimination based on genetic test results" (*GNDA Reference*, *supra* note 1 at para 39). Karakatsanis J's judgment ultimately finds that: "The title of the [*GNDA*] and the text of the prohibitions provide strong evidence that the prohibitions have the purpose of combatting genetic discrimination based on test results" (*ibid* at para 49).

33 *GNDA Reference*, *supra* note 1 at para 122. Kasirer J expands on this point, observing that the long title "speaks to the entirety of the [*GNDA*]" and cautioning that a disproportionate emphasis on the *GNDA*'s title could lead to an improper characterization by "stressing what may have been an aspiration of parliamentarians … that does not find expression in the statute's leading purpose or effects" (*ibid* at paras 170, 175).

tive titles. Of course, a legislative title can have some value, but the purpose cannot properly be inferred from the title alone.[34]

It seems that Karakatsanis J's reasons also privileged extrinsic evidence over the text of the impugned provisions to substantiate the conclusion that the law's dominant purpose is to prevent genetic discrimination. Extrinsic evidence may assist with deciphering the dominant purpose, provided "it is relevant and reliable and is not assigned undue weight."[35] Both legislative history and parliamentary debates are involved in this task, although they have limited value in conveying legislative intent since Parliament is an "incorporeal body."[36] While Karakatsanis J acknowledged the appropriate use and limitations of extrinsic evidence, her reasoning does not appear to heed this caution.

The gaps in the analysis are evident when compared with the approach adopted in Kasirer J's opinion. Before delving into the analysis, Kasirer J offers a frank assessment of the parliamentary record, noting that it is difficult to glean "a single message from the legislative debates," which encompass comments of a "general character" on a range of considerations, including "discrimination, insurability, employability, health and privacy."[37] In contrast, Karakatsanis J does not mention insurance until she discusses the law's effects, when she dismisses these considerations as being secondary to the general application of the prohibitions that give individuals greater control over genetic testing.[38] Following her brief assessment of the parliamentary record, Karakatsanis J concludes that the "mischief" Parliament targeted was preventing genetic discrimination, anchoring that finding in "the title of the [*GNDA*] and the text of the prohibitions," the purpose of which was coloured by the conclusions drawn from the *GNDA*'s title.[39]

The policy objective of preventing genetic discrimination appears to overtake Karakatsanis J's analysis in weighing both the intrinsic and extrinsic evidence, bringing her approach closer to the characterization of a law's purpose under the section 1 justification stage of *Charter* analysis than to the characterization of the jurisdictional subject matter of a law.[40] Karakatsanis J's misplaced focus on the *GNDA*'s title, the parliamentary record, and the amendments to the *Canadian Human Rights Act*, rather than on the text of the impugned provisions,

34 Moldaver J, for example, observes that preventing genetic discrimination (language found in the *GNDA*'s titles) "is an important feature of the legislation" and is consistent with the purpose he identified (*GNDA Reference*, *supra* note 1 at para 122).

35 *Firearms Reference*, *supra* note 22 at para 17.

36 *Morgentaler*, *supra* note 16 at 484-485, citing Peter W Hogg, *Constitutional Law of Canada*, vol 1, 3rd ed (Scarborough, Ont: Carswell, 1992) (loose-leaf) at 15-14, 15-15.

37 *GNDA Reference*, *supra* note 1 at para 195.

38 *Ibid* at paras 59-62. At the effects stage of the analysis, Karakatsanis J acknowledges that the legislation may impact the insurance industry and result in higher insurance premiums. However, she characterizes the impugned provisions as being of general application and observes that despite the possible disproportionate impact on insurers and employers, that consideration "does not overtake the prohibitions' direct legal and practical effects in the pith and substance analysis" (*ibid* at para 59). This conclusion demonstrates the unfortunate side effects of a flawed methodology: the disproportionate emphasis placed on the *GNDA*'s title and the purpose of its other provisions resulted in the identification of a legal effect that arguably is not the dominant effect of the impugned provisions.

39 *Ibid* at paras 45, 49.

40 See e.g. *R v Oakes*, [1986] 1 SCR 103 at para 69, 26 DLR (4th) 200; *R v KRJ*, 2016 SCC 31 at para 61; and *Harper v Canada (Attorney General)*, 2004 SCC 3 at paras 25-26.

entrenched her view that the purpose of sections 1 to 7 was to prevent genetic discrimination.[41] In this respect, Karakatsanis J appears to assign greater weight to secondary considerations, rather than anchoring her analysis in the text of the impugned provisions themselves as long required by pith and substance analysis. Moreover, her seeming suggestion of the "coordinated approach," permitting federal legislation in provincial spheres once there is similar federal legislation in federal arenas, would enable excessive centralization of power in Canada in a manner ultimately inconsistent with the agreed constitutional order and with what pragmatically works within the complexities of Canada's federal structure.[42]

The conclusions drawn at the purpose stage of the analysis colour Karakatsanis J's subsequent consideration of the impugned provisions' legal effect — an inquiry that assists with identifying the law's subject matter.[43] The legal effect concerns "how the legislation as a whole affects the rights and liabilities of those subject to its terms," or, simply put, "how the law will operate and how it will affect Canadians."[44] Karakatsanis J's analysis seems more focused on how the impugned provisions affect Canadians than on how the impugned provisions operate. In part, one reason for this approach may be that Karakatsanis J appears to assess the legal effect using the criteria for determining the practical effect. The legal effect is the "effect [that] flows directly from the provisions of the statute itself," whereas the practical effect concerns "what 'side' effects flow from the application of the statute."[45] One would expect a legal effect that "flows directly from the provisions" to at least engage the text of those provisions. For example, the conduct and consequences captured under sections 1 to 7 of the *GNDA* turn on the activities identified in sections 3(1)(a) to (c): namely, providing goods and services or contracting with an individual. Yet, Karakatsanis J identifies a more general legal effect: "prohibit[ing] genetic testing requirements and non-consensual uses of genetic test results in a broad range of circumstances," which ultimately has the practical effects of "giv[ing] individuals control over their genetic testing results" and protecting them from genetic discrimination.[46] This conclusion appears more purpose-driven, with an emphasis on genetic testing and genetic discrimination, rather than accounting for the specific circumstances in which forced testing and disclosure, or the unauthorized use of test results, are prohibited.

In contrast, the attention that Kasirer J directs to the legal effect of the impugned provisions is that properly necessary to carry out pith and substance analysis. Anchoring the inquiry in the text of the impugned provisions ultimately leads Kasirer J to conclude that the legal effect of sections 1 to 7 is to regulate various aspects of contracts in contexts that are usually subject to provincial regulation, and to effectively add layers of federal regulation to

41 *GNDA Reference*, *supra* note 1 at para 44.

42 *Ibid* at para 47. There are, we note, broader issues of relationships between so-called cooperative federalism and dualist approaches with ongoing protection for provincial spheres than we can discuss fully here. For one interesting recent discussion, see Noura Kourazivan, "Cooperative Federalism in Canada and Quebec's Changing Attitudes" in Richard Albert, Paul Daly & Vanessa MacDonnell, eds, *The Canadian Constitution in Transition* (Toronto: University of Toronto Press, 2018) at 136.

43 *Global Securities Corp v British Columbia (Securities Commission)*, 2000 SCC 21 at para 23; *Morgentaler*, *supra* note 16 at 482.

44 *Morgentaler*, *supra* note 16 at 482; *Firearms Reference*, *supra* note 22 at para 18.

45 *Kitkatla Band v British Columbia (Minister of Small Business, Tourism & Culture)*, 2002 SCC 31 at para 54.

46 *GNDA Reference*, *supra* note 1 at paras 52, 60.

provincially regulated insurance industries.[47] The other provisions of the law — sections 8 to 10 — concern aspects of contracting or providing goods and services at the federal level.[48] By investigating what sections 1 to 7 purport to do and what they do not prohibit, both in terms of the impugned provisions themselves and with reference to the other provisions, Kasirer J remains focused on how the impugned provisions operate — in this case with respect to contracts and the provision of goods and services — and accounts for the material differences between the impugned provisions and the other provisions of the *GNDA*. This level of detailed engagement is necessary to identify what the legislation actually does, and to avoid selecting a legal effect that simply corroborates the legislation's purported purpose. Only in this way will a court glean a truer picture of how the impugned provisions endeavour to "achieve [their] purpose in order to better understand [their] 'total meaning.'"[49]

IV. Interference with Provincial Insurance Schemes

The majority outcome has some particularly complex results that help to illustrate why it is problematic to reach federalism decisions not closely in keeping with the constitutional limits of the division of powers and the applicable modes of analysis under it. Indeed, although this point does not appear to have received attention in the proceedings, in view of the impugned provisions' real orientation, it would even be possible to argue that this case is one of the rare occasions when the colourability doctrine applies to invalidate Parliament's exercise of its criminal law power.[50] A foremost consequence is its significant impact in the provincial insurance context. Prior to enacting the legislation, several parliamentarians expressed concern that the fear that insurers would deny insurance or increase premiums for insureds with genetic predispositions would dissuade Canadians from genetic testing, thereby depriving them of vital health information.[51] Although Karakatsanis J identified other individuals possibly affected by the *GNDA* — those seeking "to adopt a child, to use consumer genetic testing services, to access government services, to purchase any kind of good or service, or to obtain housing, insurance or employment" — it is difficult to conceive of a dominant effect other than indirectly regulating the insurance industry.[52] Indeed, Karakatsanis J's longer list of areas purportedly at issue went beyond the appellant counsel's own submission that: "The evidence before Parliament also established that concern about violations of genetic informational security arise primarily, although not exclusively, in the fields of insurance and employment."[53]

Notably, the majority outcome creates competing regimes that subject Canadians to unequal treatment: sections 1 to 7 of the *GNDA* prohibit forced testing, disclosure of test results, and the unauthorized use of those results for specific health-related genetic tests in

47 *Ibid* at para 202.
48 *Ibid* at paras 188-193.
49 *Firearms Reference*, *supra* note 22 at para 18.
50 See *R v Hydro-Québec*, [1997] 3 SCR 213 at para 121, 151 DLR (4th) 32 [*Hydro-Québec*].
51 *GNDA Reference*, *supra* note 1 at paras 196-197, 200-202.
52 *Ibid* at para 60.
53 *Reference re Genetic Non-Discrimination Act*, 2020 SCC 17 (Factum of the Appellant at para 38). The appellant's counsel went on to submit that "[t]he effect of the law therefore may impact on insurers and employers most heavily" (*ibid*). But the appellant's counsel discounted the relevance of these effects to constitutional characterization by framing them as "incidental to the dominant public health purpose and effects of the *GNDA*" (*ibid*).

relation to the provision of goods and services or contracts. However, they do not prohibit individuals from voluntarily disclosing those test results. Nor do they prohibit a requirement that individuals undergo testing or disclose test results from other types of genetic tests.[54] The majority outcome displaces existing provincial legislation that arguably affords some protection against genetic discrimination and disrupts the complex matrix of provincial insurance schemes[55] — any differing policy choices within the provincial schemes are subject to being declared inoperable based on the doctrine of paramountcy, and the potential prospect of their inoperability casts an ongoing shadow of doubt over the legislative situation for those attempting to work with the law.

Since sections 1 to 7 of the *GNDA* now have priority over provincial legislation, including exemptions in provincial human rights legislation that exclude insurance contracts from equal treatment obligations in the provision of goods and services or contracts, the real effect of the legislation on provincial insurance schemes cannot be understated. Possibly the most notable effect on the insurance industry is that the *GNDA* undermines "the principle of equal information," a central feature of insurance contracts, by leading to unequal outcomes related to "insurability, risk appraisal, or [the] amount of premium charged."[56] This result negatively impacts both insurers and insureds, and arguably contradicts the *GNDA*'s objective as articulated by the majority.

Consider the following scenarios. An individual who withholds health-related genetic test results, unfavourable or otherwise, may enter into an insurance contract likely at a lower premium than had the individual disclosed the material risk to an insurer. However, the insurer will have insured a higher-risk individual, possibly resulting in a higher payout to that individual. In turn, the insurer may attempt to "transfer the risk of non-disclosure to the other policy holders" by increasing premiums across the board because the insurer will no longer know with certainty whether and when it is insuring high-risk individuals.[57] In contrast, an individual who undergoes health-related genetic testing and voluntarily discloses that information

54 *GNDA*, *supra* note 2, s 2; *GNDA Reference*, *supra* note 1 at para 158.

55 The Attorney General for British Columbia, an intervener in the appeal, put forward this argument in its factum and explained that British Columbia is considering appropriate legislative and policy responses to genetic discrimination and adverse selection concerns in the absence of non-disclosure obligations regarding genetic health information (*Reference re Genetic Non-Discrimination Act*, 2020 SCC 17 (Factum of the Intervener, Attorney General of British Columbia) at paras 9-13 [Factum of the Intervener]). Some provinces have introduced amendments to their respective human rights legislation to include genetic characteristics as a protected ground: see *Bill 40, An Act to amend the Human Rights Code with respect to genetic characteristics*, 1st sess, 42nd leg, Ontario, 2018. Provincial human rights legislation prohibits discrimination on the basis of mental or physical disability in the provision of goods and services as well as employment (Factum of the Intervener, at paras 5-8). Most statutes carve out exceptions for *bona fide* and reasonable justifications or material disclosure related to insurance (*GNDA Reference*, *supra* note 1 at paras 218-219; see *Human Rights Code*, RSBC 1996, c 210, ss 8, 13; *Alberta Human Rights Act*, RSA 2000, c A-25.5, ss 4, 7; *The Saskatchewan Human Rights Code*, SS 1979, c S-24.1, ss 15, 16; *The Human Rights Code*, CCSM, c H175, ss 13, 14 and 15; *Human Rights Code*, RSO 1990, c H.19, ss 1, 3, 5 and 22; *Charter of Human Rights and Freedoms*, CQLR c C-12, ss 10, 12, 13 and 20.1; *Human Rights Act*, RSNB 1973, c H-11, ss 3, 4 and 5; *Human Rights Act*, RSNS 1989, c 214, ss 5, 6; *Human Rights Act*, RSPEI 1988, c H-12, ss 2, 6 and 11; and *Human Rights Code*, RSNL 1990, c H-14, ss 6, 9).

56 *GNDA Reference*, *supra* note 1 at paras 216, 220.

57 *Ibid* at para 217.

to an insurer, or undergoes other genetic testing not captured by the *GNDA*'s definition of a "genetic test," may pay higher insurance premiums than the individual who undergoes health-related genetic testing and does not disclose the results, or may even be denied coverage outright.[58] Federal and provincial human rights legislation sanctions this treatment — accounting for health risks in insurance contracts is not discrimination.[59] The impugned provisions also permit insurers to use genetic information in this manner provided it is voluntarily disclosed. Yet, an outcome that permits unequal treatment of individuals in the insurance context, based on the type of genetic test at issue or the circumstances of disclosure, seems contradictory to the overarching goal of preventing genetic discrimination, assuming that preventing such discrimination actually is the dominant purpose of the impugned provisions.

These examples illustrate a further complexity of the majority outcome: the impugned provisions intrude upon provincial human rights legislation by creating an exception for a narrow subset of individuals from an otherwise lawful exemption for health risk-based disclosure related to insurance contracts. Now, a patchwork of legislation applies to this issue, with federal dominance over a narrow tranche of health-related genetic tests, which risks complicating provincial jurisdiction over the categories of testing exempt under sections 1 to 7 of the *GNDA*. While these sorts of consequences are not the central matter at issue, they do highlight that surprise decisions like this one can throw existing regulatory schemes (developed based on established understandings of federalism) into considerable confusion.

V. Criminal Law Power

The *GNDA Reference* perpetuates an ongoing division on the scope of the federal criminal law power. As a result, it generates ongoing legal unpredictability that we suggest carries a real risk of undermining policy development and intergovernmental negotiation. Some understanding of the context behind this dispute is necessary to fully grasp the nature of the problem that existed and that continues to exist. In 2010, the Supreme Court of Canada's decision in the *Reference re Assisted Human Reproduction Act (RAHRA)*[60] case ended in a complex four-to-four-to-one division in which the opinion of McLachlin CJC and the joint opinion of LeBel and Deschamps JJ each garnered a total of four votes and each depended upon a different conception of the legal test for the federal section 91(27) criminal law power. That test has often been described since the *Margarine Reference* as requiring (1) a prohibition, (2) backed by a penalty, (3) in furtherance of a criminal law public purpose,[61] and McLachlin CJC's judgment relied on this test. The judgment of LeBel and Deschamps JJ highlighted a further element of the jurisprudence that required that the furtherance of the criminal law public purpose must

58 *GNDA*, *supra* note 2, s 2.

59 *GNDA Reference*, *supra* note 1 at paras 218, 219.

60 *Reference re Assisted Human Reproduction Act*, 2010 SCC 61 [*RAHRA*].

61 What is regularly called the *Margarine Reference* is, more formally, the *Reference re Validity of Section 5(a) Dairy Industry Act,* [1949] SCR 1, 1 DLR 433. For discussion, see Guy Régimbald & Dwight Newman, *The Law of the Canadian Constitution,* 2nd ed (Toronto: LexisNexis, 2017) at 274ff. It is worth adding that the test ought not to be thought of in purely mechanical terms but as offering a test oriented to trying to maintain a balance of powers within the federation by sufficiently constraining a federal power that could be read in overly broad ways. See the judgment of Kasirer J in *GNDA Reference, supra* note 1 at para 229.

consist in the suppression of an evil rather than the promotion of a good.[62] The solo opinion of Cromwell J spoke only to factual matters and did not say anything specifically on this dispute over the law. However, because Cromwell J struck down some of the same provisions as LeBel and Deschamps JJ and would not have had any rationale to do so on McLachlin CJC's view of the law, the logical conclusion would have been that the approach of LeBel and Deschamps JJ had carried a majority of the Court on the legal questions involved.[63] We would have hoped for later cases to make this explicit, in line with our call for clarity, but matters have gone otherwise.[64]

Today, the opinion of Karakatsanis J rejects that view without explaining why, simply reiterating that Cromwell J did not explicitly state an opinion on the legal test (and not making any effort to explain how he reached an outcome in line with LeBel and Deschamps JJ). Her judgment thus indicates alignment with the approach to the section 91(27) legal test taken by McLachlin CJC in *RAHRA*.[65] By contrast, the four-justice bloc supporting the Kasirer J opinion are committed to the legal test set out by LeBel and Deschamps JJ in *RAHRA* as the established legal test coming from the majority of the Court in *RAHRA*.[66] The Moldaver J opinion (also signed by Côté J) takes an approach to pith and substance that Moldaver J suggests meets either test, thus genuinely avoiding the need to take a position on the point of law at issue. The result is that amongst those justices who pronounced on it, there is a four-to-three view in favour of the LeBel–Deschamps JJ position from *RAHRA*. While we would maintain the view that the LeBel–Deschamps JJ opinion was properly the precedent from *RAHRA*,[67] and while it received more support in the *GNDA Reference* than the alternative, the reality remains that the *GNDA Reference*'s outcome leaves less certainty on the point than would have been desirable.

The lingering uncertainties attaching to this incomplete vote within the Court have the result that governments cannot sensibly plan based on a predictable sense of the constitutional parameters of the criminal law power. That state of affairs undermines policy development, which must grapple with a lingering legal uncertainty. Contrary to the purported aspirations

62 *RAHRA, supra* note 60 at paras 233, 237, 245-246. They root this element in various past cases that they enumerate. It also has a strong scholarly account in Jean Leclair, « Aperçu des virtualités de la compétence fédérale en droit criminel dans le contexte de la protection de l'environnement » (1996) 27 RGD 137. In *Hydro-Québec*, *supra* note 50 at para 118, LaForest J referred to this piece specifically as "an excellent article." Leclair actually captures beautifully some of the complex balance involved in permitting Parliament appropriate scope under the criminal law power while sufficiently defining and confining the criminal law power so as not to interfere with the provinces, with the requirement of suppression of an evil being an important dimension to which he refers in *ibid* at 152: "En droit constitutionnel canadien, la portée de la compétence fédérale en matière de droit criminel est indissociablement liée au concept de « mal public »."

63 See Dwight Newman, "Changing Division of Powers Doctrine and the Emerging Principle of Subsidiarity" (2011) 74 Sask L Rev 21 at 22-26.

64 For example, in *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44 at para 52, McLachlin CJC went ahead with applying her preferred test as in *RAHRA, supra* note 60, with no indication of there having been a division on it just several months prior. The decision of Rennie JA in *Syncrude Canada v Canada (Attorney General)*, 2016 FCA 160 refers to the test in a manner that is not entirely clear and is subject to criticism.

65 *GNDA Reference, supra* note 1 at paras 77-78.

66 See *ibid* at paras 261-263, with Kasirer J stating at para 261 that "[i]n my respectful view, LeBel and Deschamps JJ's reasons in the *AHRA Reference* should guide this Court."

67 *RAHRA*, *supra* note 60.

of the Karakatsanis J opinion, the resulting lack of clarity also undermines intergovernmental cooperation. Such cooperation functions best in an environment where the rules are clear rather than one in which governments can simply assert themselves into more power. Moreover, any broader application of the criminal law power, carrying paramountcy with it, permits an override of various areas of provincial law of fundamental social value to the provinces in their varying circumstances and thus threatens the provincial distinctiveness that federalism is meant to protect in the context of a federation that is always subject to certain fragilities arising from regional alienation.

There have been significant judicial recognitions of an account of federalism fitting with these claims. The principle of federalism has an important role in constitutional interpretation, as the Supreme Court of Canada has previously made clear. Notably, the Court has emphasized that the principle of federalism assists "in the interpretation of the text and the delineation of spheres of jurisdiction, the scope of rights and obligations, and the role of our political institutions," while allowing for "the ongoing process of constitutional development."[68] To preserve federalism in any meaningful sense, the Court must respect provinces' autonomy "to develop their societies within their respective spheres of jurisdiction" and must "consider how different [constitutional] interpretations impact the balance between federal and provincial interests."[69]

The Supreme Court of Canada's past constitutional jurisprudence has also emphasized that the courts must be careful to avoid prioritizing "policy desirability" over "constitutional compliance" when federalism is at issue.[70] Instead, the Court must strike an appropriate balance that respects both provincial autonomy and federal jurisdiction and, crucially, must avoid interpreting each of the enumerated federal and provincial heads of power under sections 91 and 92 of the *Constitution Act, 1867* "in a manner that effectively eviscerates another."[71]

It is particularly concerning to see the criminal law power left as a looming spectre to be asserted by power-seeking federal governments who can thereby erode provincial jurisdiction over property and civil rights, which the Supreme Court of Canada has affirmed as being "a significant power and one that is not lightly encroached upon."[72] A jurisprudence that does not set out clear limits on the criminal law power — or on other federal powers that have the potential to promote creeping centralization — is one that is of concern, which actually risks hamstringing policy development, generating further costly litigation, undermining intergovernmental cooperation, and ultimately undercutting some of the very bases of the federation.

VI. The Path Forward After the *GNDA Reference*

The *GNDA Reference* ends up in an awkward stalemate. There is no majority opinion on the pith and substance of the challenged provisions. There is no majority view on the proper test for the section 91(27) federal criminal law power. The uncertainties left by the case complicate

68 *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 52, 161 DLR (4th) 385.
69 *R v Comeau*, 2018 SCC 15 at para 78; see also *Reference re Secession of Quebec*, *supra* note 68 at para 58.
70 *R v Comeau*, *supra* note 69 at para 83.
71 *Ibid* at paras 79, 82.
72 *General Motors of Canada Ltd v City National Leasing*, [1989] 1 SCR 641 at 672-673, 58 DLR (4th) 255.

prospects for governmental policy development and intergovernmental cooperation, both of which depend fundamentally on having predictable rules of federalism jurisprudence. While some might note that there are other areas of unpredictability in federalism, the existence of other problems provides no justification for perpetuating the specific unpredictability at issue.

The problematic situation that arises in the wake of the *GNDA Reference* has several specific consequences in terms of the path forward. First, since there is no actual majority judgment in the case, there are specific consequences for its precedential status, consequences that flow from established rules on *stare decisis* in such situations.[73] Notably, where there is no majority opinion in a case, it is most proper to consider it to have been decided based on the narrowest set of reasons that reach the majority's outcome. That is a basic corollary of the idea of recognizing the binding force of the specific rule of law necessary to reach the outcome in a case.[74]

As a result, where the judgment of Karakatsanis J reaches certain sweeping determinations on the law that go beyond those to which Moldaver J's opinion agreed, those aspects of her decision stand properly to be set aside as not stating the law. Moldaver J's opinion explicitly declines to make any decision on the contested issue of the full requirements for the use of the section 91(27) criminal law power: "I would respectfully decline to weigh in on this question, since I am of the view that the criminal law purpose requirement is met under either of my colleagues' approaches."[75] Thus, even though the Karakatsanis J's opinion reaches the majority outcome, its reasoning on the criminal law power is properly to be set aside. That point has further significance. Any use of underlying *dicta* within her reasons — such as her overly expansive claims to a preference for overlapping powers,[76] which are ultimately inconsistent with the clarity necessary for federalism to function well — should be avoided. Basic principles of *stare decisis* would properly confine the precedential value of the majority outcome to a very narrow conclusion in the context of the very specific issues in the *GNDA Reference*.

Second, the courts must approach future federalism jurisprudence in a manner that avoids any impression that the perceived attractiveness of particular policy outcomes has affected the reasoning in any way. Quite simply, in division of powers cases, the Court must resist the seemingly pragmatic temptation to classify a law under a federal head of power in situations where it may be more cumbersome for provinces to legislate, and it must also ensure that it steers clear of creating any impression of doing so. To avoid creating such impressions, mere statements are not enough. They must be coupled with the application of well-established legal tests in ways that demonstrate the Court's definitive removal from extra-legal policy debates. We might add, as well, that the Court should not comment on so-called "gaps" in legislation in ways that risk appearing as if it favours any particular form of legislation, and its judgments should focus simply on analyzing constitutional status based on established legal tests.[77]

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73 For explanation of these rules and engagement with various related cases, see Michelle Biddulph & Dwight Newman, "Equality Rights, Ratio Identification, and the Un/Predictable Judicial Path Not Taken" (2015) 48 UBC L Rev 1.

74 See *ibid.*

75 *GNDA Reference, supra* note 1 at para 138.

76 *Ibid* at paras 22-23.

77 The concept of "gaps" in legislation is often deeply confused. It is concerning that Karakatsanis J rests her conclusion, that the *GNDA* constitutes a valid exercise of Parliament's criminal law power, on the "'gap' in

This means that pith and substance analysis, for example, must pay immensely close attention to the specific effects of statutory text, such as in situations where the federal government asserts some broad-reaching purpose but the actual legislative text is oriented to determinations within the large realm of provincial powers over property and civil rights. Quick conclusions about pith and substance in favour of what look like attractive laws will serve only to destabilize federalism jurisprudence and, if not checked, will tend to erode the future institutional legitimacy of the courts to adjudicate federalism disputes.

The risk that legislatures or Parliament will not legislate appropriately, or the fear that the Court could expose itself to public criticism, should not dissuade the Court from adhering to a methodology that withstands scrutiny in the long term. Failing that, the Court merely pays lip service to Canada's federal structure and reneges on the political compromises underlying Canada's constitutional framework.[78] It also risks undermining the legitimacy of its decisions by exposing itself to accusations of ends-based reasoning and to perceptions that it is recalibrating principles of constitutional interpretation to achieve policy aims at the expense of the established constitutional limits of federal and provincial power that structure our complex shared lives.

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the laws, which left individuals vulnerable to genetic discrimination" (*GNDA Reference, supra* note 1 at para 45). There are several reasons why provincial legislatures may choose to legislate or refrain from so doing. By sanctioning federal intervention in a provincial sphere of jurisdiction simply because no law exists, the Court runs the risk of creating a perverse incentive whereby the respective levels of government race to legislate to win jurisdiction over an issue. Rushed legislation will not necessarily embody good policy. There are also spheres of human conduct within the legislative authority of particular governments where an appropriate policy response will not always involve legislation. Moreover, there is past scholarship pointing to how aspects of some tests having similarities to this gap-based approach have ended up opening the door "to results that have more to do with ideological convictions than with … empirical reality," and that can end up "morphing" normative statements into then-presumed empirical truths. On this point, see Jean Leclair, "'Please, Draw Me a Field of Jurisdiction': Regulating Securities, Securing Federalism" (2010) 51 SCLR (2d) 555 at 556, 595.

78 *Reference re Secession of Quebec*, *supra* note 68 at paras 55-60.