HOUSE OF COMMONS
CHAMBRE DES COMMUNES
CANADA

Standing Committee on Justice and Human Rights

JUST • NUMBER 036 • 1st SESSION • 42nd PARLIAMENT

EVIDENCE

Tuesday, November 22, 2016

Chair

Mr. Anthony Housefather

Standing Committee on Justice and Human Rights

Tuesday, November 22, 2016

● (1100)

[*English*]

The Chair (Mr. Anthony Housefather (Mount Royal, Lib.)): Good morning, ladies and gentlemen.

It is a pleasure to convene this session of the Standing Committee on Justice and Human Rights as we resume our study on Bill S-201, an act to prohibit and prevent genetic discrimination.

I'd like to welcome Mr. Lukiwski who is joining us this morning.

It's a pleasure to have such an esteemed panel of scholars here to share with us their views on constitutionality and policy on Bill S-201.

Professor Ryder, welcome.

Professor Bruce Ryder (Associate Professor, Osgoode Hall Law School, York University, As an Individual): Thank you.

The Chair: We have the eminent constitutionalist, Peter Hogg, welcome, and thank you so much for coming.

Mr. Peter Hogg (Scholar in Residence, Blake, Cassels & Graydon LLP, As an Individual): Thank you.

The Chair: We have Hugo Cyr, who is the dean of the faculty of political science and law at the Université du Québec.

[*Translation*]

Professor Cyr, we are very pleased to have you here with us today. Welcome.

Professor Hugo Cyr (Dean, Faculty of Political Science and Law, Université du Québec à Montréal, As an Individual): Thank you very much, Mr. Chair.

The Chair: We also welcome Mr. Pierre Thibault, from the University of Ottawa. We are also very pleased to have you here today.

Mr. Pierre Thibault (Assistant Dean and Counsel, Civil Law Section, University of Ottawa, As an Individual): Hello and thank you, Mr. Chair.

[*English*]

The Chair: We are going to follow the order that is set out on the agenda.

We are going to begin with Professor Ryder.

Prof. Bruce Ryder: Thank you very much, Mr. Chair, and thank you, honourable members.

It's a great privilege to have the opportunity to appear before you today to speak about the constitutionality of Bill S-201, which is a very important initiative. In my view, the doubts that have been expressed in some quarters about the constitutional validity of the bill are a mistake.

I believe it's a valid exercise of Parliament's power. In particular, the more controversial parts of the bill from a constitutional point of view—not from my perspective but from the perspective of some—sections 3 through 7, the part that's going to be a new free-standing genetic nondiscrimination act is a valid exercise of Parliament's power to enact laws in relation to criminal law because it consists of, in its dominant characteristic, putting in place prohibitions in sections 3 through 6, and a penalty provision in section 7 for the purpose of protecting the health of Canadians.

I'm going to say a few words about the scope of section 91(27), and a few words about the bill itself. I'd like to emphasize the importance of a constitutional doctrine in this context, which we refer to as the double aspect doctrine.

What we mean by that is that there are some subject matters, like genetic discrimination, that can be addressed by both levels of governments within their respective spheres of jurisdiction. This subject matter can be addressed by Parliament in part through it's criminal law power, and of course, it also falls within the jurisdiction of the provinces. I hope I can offer some clarity on that point as well.

First of all is the criminal law power, and you're going to hear from the other members of the panel about its scope. This is a very broad federal power that has been defined by the courts as allowing Parliament to enact laws that have, as their dominant characteristic, putting in place prohibitions coupled with penalties for a typically criminal public purpose, such as the protection of public peace, order, security, health, and morality.

I'm quoting the leading decision of the Supreme Court of Canada on the scope of the criminal law power, a decision known as the "margarine reference", which was decided by the Supreme Court in 1949 and has been the leading case that has been followed by the courts ever since.

The court has repeatedly emphasized that the criminal law power is a very broad power. It has served over the years to uphold, of course, many provisions of the Criminal Code, but many provisions of other statutes as well.

In my testimony to the Senate committee earlier this year, and in the brief that I've prepared for this committee as well, I've listed some examples of federal statutes that have been upheld pursuant to the criminal law power. They include provisions of the Food and Drugs Act, the Tobacco Act, the Firearms Act, the Youth Criminal Justice Act, the Controlled Drugs and Substances Act, provisions of the Criminal Code that relate to the securities trade, the prohibited activities provisions of the Assisted Human Reproduction Act, and part V of the Canadian Environmental Protection Act, which deals with toxic substances. Those are just some examples from the case law.

It's also true that the provinces have jurisdiction in relation to property and civil rights pursuant to section 92(13) of the Constitution Act 1867. This too has been a provision that the courts have interpreted broadly, and it includes regulation over most aspects of the regulation of the insurance industry. It includes regulation of the labour relations of most employers because most employers fall within provincial jurisdiction.

It's also true that the provisions of the genetic non-discrimination act, in sections 2 through 7 of this bill, have a significant impact on activities that fall within provincial jurisdiction, such as the insurance industry and activities of provincially regulated employers. That, however, is true of most provisions of the Criminal Code, or at least many provisions of the Criminal Code; that is, they deal with matters like theft, which is also in relation to property which is a provincial area of jurisdiction.

There are significant portions of the Criminal Code that deal with the solemnization of marriage, the conjugal offences, and the unlawful solemnization of marriage. Again, this is a provincial subject matter, pursuant to section 92(12).

● (1105)

In other words, we can say that much of the Criminal Code deals with matters that are double aspect matters, meaning they can be regulated by the federal Parliament pursuant to its criminal law power with regard to particularly harmful activities, and can be regulated from a provincial point of view pursuant to jurisdiction over property and civil rights. Therefore, I don't think we need to dispute whether or not this is a law that will have important impacts on provincial areas of jurisdiction. It will, but that's not determinative of its constitutional validity.

To determine its constitutional validity we have to ask if its dominant characteristic is to put in place prohibitions coupled with penalties in order to combat harmful conduct or to combat a social evil, or should we be worried that this is a kind of surreptitious attempt for Parliament to regulate the insurance industry, or to regulate provincial employers? I don't believe there is any reason to conclude that is the case. If that were the case, we would say this is colourable legislation, that its form is disguising its true purpose, which is to regulate provincial matters as opposed to suppressing harmful conduct or to suppress a social evil that we think is damaging to Canadians' health.

That's the key question, not whether this is a law that has an impact on provincial areas of jurisdiction. Of course it does, but that's true of most of the Criminal Code, for example.

The question we have to focus on is the pith and substance or dominant characteristic of the provisions of the bill. Is the dominant characteristic putting in place prohibitions coupled with penalties to protect the health of Canadians, or is it the regulation of a subject matter that falls within provincial jurisdiction? To determine pith and substance, the courts will examine the purpose of legislation as well as its effects, the title of the legislation as set out in clause 1 of the bill, the “Genetic Non-Discrimination Act” is important.

Clauses 3, 4, and 5 put in place prohibitions on requiring individuals to undergo genetic testing, on requiring them to disclose the results of a genetic test, and on the use of genetic test results without written consent. The aim of these provisions is to promote health and personal security and to protect privacy by protecting individuals' control over the decision of whether to undergo testing and over the uses of genetic test results. These prohibitions apply to any person. They do not mention any particular industry or type of actor.

Clause 6 provides exemptions from the prohibitions for health care practitioners and researchers, and clause 7 puts in place serious penalties for the violation of the prohibitions in clauses 3 through 5. In my view, it is evident that the dominant characteristic of these provisions is to put in place prohibitions coupled with penalties aimed at protecting individuals from threats to health and personal security posed by the use of genetic information without their consent.

The pith and substance of these provisions fall squarely within the definition of criminal law followed by Canadian courts ever since the margarine reference. They do not resemble the detailed and extensive regulation of assisted reproduction services, for example, of the type that were declared invalid by the Supreme Court of Canada in the Assisted Human Reproduction Act reference, or the detailed regulation of the insurance industry that was declared invalid in a series of cases decided in the first half of the 20th century, where the federal Parliament was seeking to assert jurisdiction over the insurance industry more generally.

Rather, clauses 3 through 7 of Bill S-201 are very similar in their nature and objectives to the prohibited activities provisions, including the prohibitions on the use of reproductive material without consent that were upheld by the Supreme Court of Canada in the Assisted Human Reproduction Act reference.

I'll be happy to go into further detail about the case law, or other aspects of jurisdiction of Parliament over human rights laws generally, or over discrimination generally, and how federal jurisdiction interacts with provincial jurisdiction in discussion with members of the committee.

Thank you very much.

● (1110)

The Chair: Thank you so much, Mr. Ryder. We really appreciate that.

Professor Hogg.

Mr. Peter Hogg: I am not going to say much that Bruce hasn't already said.

I want to start by saying that the great advantage of the criminal law is that it can apply right across the country. On the problem with leaving the provinces and territories to enact prohibitions on genetic discrimination on their own, I agree with Professor Ryder that they would certainly have the power to do that. I'm sure that no province wants to permit genetic discrimination.

However, each province has its own legislative priorities, and a prohibition of genetic discrimination may not make the cut. If we did leave this to the provinces, I think we could be absolutely certain that there would not be a nationwide rule. The beauty of exercising the criminal law power is that it does provide a nationwide rule.

If I could talk a little again about assisted human reproduction, I appeared in the Supreme Court case for the federal government, and I was extremely disappointed when the whole scheme was not upheld. They did uphold certain prohibitions, but they struck down the regulatory scheme that had been established, I thought, under the criminal law power. However, the majority of the court disagreed. It was interesting that the provinces said it was something that was within their bailiwick. The majority of the court—although it is a very confusing judgment and the judges were all over the place—essentially agreed.

Do we expect the provinces to step up and deal with assisted human reproduction? If we did, we would be very disappointed. The provinces thought that was too controversial, too complicated, and the result of the Supreme Court's decision is that apart from the bits that were upheld, assisted human reproduction remains unregulated in most of the country. I think that's a really unfortunate situation.

I'm simply arguing for the great advantage once the federal Parliament makes some choices of enacting it through the criminal law, and where it will have a national effect.

A valid criminal law involves three elements. Professor Ryder has talked about them. There has to be a prohibition, there has to be a penalty, and there has to be a typically criminal purpose.

Limiting myself to the proposed genetic non-discrimination act—that piece of the bill—there is a prohibition of genetic discrimination. There is a penalty for breach of the prohibition. The only conceivable purpose of that is to prohibit and prevent what Parliament would regard as the evil of genetic discrimination. I agree completely with Professor Ryder's conclusion that the proposed law would be a valid exercise of Parliament's criminal law power.

I should add that I've read the Torys' opinion, which you have, which says that it's really about insurance, employment, etc. I don't agree with that. It seems to me that the act says nothing about those topics. I gather the topic of insurance was explicitly in the bill at an earlier stage. Professor Thibault took the view that the bill was unconstitutional for that reason. That's been eliminated, so this is not a prohibition that just applies to.... It's not singling out the insurance industry. It's not singling out employers. It's a perfectly general application.

● (1115)

So I do not agree with the Torys opinion, which was rendered on behalf of the insurance industry, that it's in pith and substance a matter of property and civil rights—i.e., insurance. Torys also said, and I disagree with them here as well, that we know there's a prohibition and a penalty, but it lacks a typically criminal purpose. In my opinion, the prohibition and prevention of the evil of genetic discrimination would clearly be accepted by the courts as a criminal law purpose.

Mr. Chair, let me stop there and await your questions.

The Chair: Thank you very much, Professor Hogg.

[*Translation*]

We will now move on to Professor Cyr's presentation.

Prof. Hugo Cyr: Thank you very much, Mr. Chair, for inviting me to be here today.

This is a topic that I have been thinking about for some time. Last night, I found in my archives a paper on genetic discrimination that I did in 1994 for a certain Professor Irwin Cotler. You will understand therefore that I am in agreement with the principle and objective of Bill S-201. I do however have a number of reservations, specifically as regards the constitutionality of clauses 3, 4, 5, 6, and 7.

I also agree with the letter published by the Minister of Justice regarding the validity of clauses 8, 9, and 10. In my opinion, these clauses are valid and do not pose any constitutional problems.

There are issues relating to legislative policy that have to be considered since there will be an overlap in jurisdiction, namely in labour law and the jurisdiction that will be given to human rights tribunals. This will create a conflict. I will talk in particular about clauses 3, 4, 5, 6, and 7.

In examining the substance of a provision, we have to look at the title, to be sure, but we must also look at what is in it and what exactly it does. Clause 3 prohibits any person from requiring an individual to undergo a test. It is possible to undergo a test to obtain services. The bill does not prohibit it, but it does prohibit requiring someone to take a test as a condition of obtaining services.

Nor do these same provisions prohibit the use of genetic information obtained with written consent for purposes of clarity. Clauses 3, 4, 5, 6, and 7 of the bill do not prevent discrimination on the basis of genetic information. It does, however, prohibit this in the two other parts. Under labour law, a person cannot be punished or have a benefit withdrawn based on test results.

The Canadian Human Rights Act prohibits discrimination based on genetic characteristics, but not in the first part, which simply prohibits requiring someone to provide information for the purpose of obtaining a service or a contract. The real legal effect is to prohibit requiring someone to take a test, to allow information to be disclosed voluntarily, and to allow information to be used if it is provided voluntarily.

The conditions under which a contract is formed or those affecting what in civil law are called personality rights traditionally fall under provincial jurisdiction, as stipulated in section 92.13 of the Constitution Act, 1867. Moreover, section 3 of the Civil Code of Quebec provides as follows: "Every person is the holder of personality rights, such as the right to life, the right to the inviolability and integrity of his person, and the right to the respect of his name, reputation and privacy." Section 3 is an integral part of the first book of the Civil Code of Quebec, entitled "Persons". There is also a separate chapter on respect of privacy, starting at section 35.

● (1120)

I will read you a passage from a key decision that elucidates what criminal law is and what can be done under it. This passage is from the Attorney General for Ontario v. Reciprocal Insurers.

[*English*]

> In accordance with the principle inherent in these decisions their Lordships think it is no longer open to dispute that the Parliament of Canada cannot, by purporting to create penal sanctions under s. 91, head 27, appropriate to itself exclusively a field of jurisdiction in which, apart from such a procedure, it could exert no legal authority, and that if, when examined as a whole, legislation in form criminal is found, in aspects and for purposes exclusively within the Provincial sphere, to deal with matters committed to the Provinces, it cannot be upheld as valid. And indeed, to hold otherwise would be incompatible with an essential principle of the Confederation scheme....

[*Translation*]

In this case, it was argued that selling insurance without obtaining a federal license was a crime. The court ruled that it was not. Selling insurance falls under provincial jurisdiction. It is not possible, simply by creating a prohibition and a sanction, to cause the matter to fall under federal jurisdiction under criminal law. In the present case, we cannot consider that requiring someone to give genetic information in order to obtain a service automatically falls under criminal law simply because a sanction is added to the prohibition. As my colleagues have pointed out, we must determine whether this prohibition is criminal in nature.

Allow me to digress for a moment on this subject. If, despite the term used, the subject of the bill is not the transfer of genetic information but rather rights and freedoms and the right to equality, we must remember that these rights do not fall under the jurisdiction assigned to one legislature or another, but instead they fall under a jurisdiction that is ancillary to another. We must therefore stipulate what this other jurisdiction is.

Traditionally, this would be a jurisdiction associated with private law, civil law, and contracts law. That is why the provinces are responsible for the general rules applicable to the right to equality. I would point out in passing that, even though it prohibits a series of discriminatory actions, section 20.1 of the Quebec Charter of Rights and Freedoms provides that in such contracts or plans, that is, insurance contracts or pension plans, "[...] the use of health as a risk determination factor does not constitute discrimination within the meaning of section 10."

Rightly or wrongly, a provision specifically provides that using health status to determine the extent of risk is not a discriminatory act. Professor Hogg told us earlier that, in his opinion, this is an issue that falls under criminal law. In his book, he states in fact that it may be possible to criminalize discrimination.

● (1125)

[*English*]

He said that under the criminal law power and in making that classification, the courts will look for the ingredients of criminal law —the prohibition, the penalty, and typically, criminal public purpose —and not primarily the law's impact on discrimination.

[*Translation*]

The criminal nature cannot be deduced simply from the fact of discrimination. Moreover, what constitutes criminal nature?

We have to fight against an evil. We saw the reference on firearms and we discussed that. We talked about the three criteria, which are prohibition, penalty and fighting against a criminal purpose. The courts have pointed out many times that this must not be interpreted too broadly so as not to deplete provincial jurisdiction.

In the Reference re Assisted Human Reproduction Act, the term "reprehensible conduct" is used. Although this decision is fairly complex since there was no consensus, there was agreement on the term "reprehensible conduct". The term "undesirable conduct" is used often. It is difficult to talk about reprehensible or undesirable conduct in this instance when the Assisted Human Reproduction Act itself recognizes the possibility of providing information voluntarily. It is hard to say that disclosing genetic information is undesirable or reprehensible conduct in itself when section 7 of the act allows it.

I can answer other questions, but, before I conclude, I would stress that in this reference, in examining whether elements are criminal in nature, the decision refers to "conduct that is reprehensible or represents a serious risk to morality, safety or public health". In this case, the rules on consent in civil law is emphasized. The Supreme Court ruled in this case that the provisions pertaining to information and patient consent are all unconstitutional.

The concern is that there could be a legislative gap. We must remember, however, that our laws prohibit discrimination on the basis of disability, which includes not only an actual disability, but also a potential or feared disability, and even the perception of such a disability. This is established in a Supreme Court decision.

Thank you very much.

The Chair: Thank you very much, Professor Cyr.

We will now move on the Professor Thibault.

Mr. Pierre Thibault: Thank you, Mr. Chair, for inviting me to appear before the committee today with regard to Bill S-201, which seeks to prohibit and prevent genetic discrimination.

The objective of the bill is in my opinion commendable and warrants consideration. As my colleagues have pointed out, however, we have to consider the legislative impact of this bill as regards the Constitution of Canada. I have examined the new version of Bill S-201 and consider it constitutionally valid.

As I stated when I appeared before the Standing Senate Committee on Human Rights on December 11, 2014, I do not see anything that prevents Parliament from amending the Canada Labour Code and the Canadian Human Rights Act—on the contrary, in fact—and adding provisions to prohibit genetic discrimination without encroaching unduly on provincial jurisdiction for insurance. That is what the new Bill S-201 does.

I also thought that there might be debate about the scope of Parliament's power with regard to criminal law. In my opinion, there are two other ways of justifying the constitutionality of Bill S-201. The first is based on the incidental effects doctrine and the second on the ancillary powers doctrine. Let me explain what these two doctrines entail.

Under the incidental effects doctrine, the constitutionality of a law can be justified based on its purely incidental effects on provincial jurisdiction. Here is what Chief Justice McLachlin said in the Lacombe decision:

> The incidental effects rule, by contrast, applies 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.

Under the ancillary powers doctrine, on the other hand, a law can be justified that encroaches on the jurisdiction of the other order of government to the extent that the provisions in question are ancillary and necessary to implement the law effectively and adequately. This means that the law is entirely valid.

This is how Chief Justice McLachlin explains it, once again in Lacombe:

> 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.

One could deduce from these explanations that the ancillary powers doctrine and the incidental effects doctrine of a law appear to contravene the exclusive areas of jurisdiction set out in sections 91 to 96 of the Constitution Act, 1867.

It should be noted that the Supreme Court is not in favour of a strict interpretation of this doctrine of exclusive areas of jurisdiction since this would run counter to the principle of cooperative federalism. In Bank of Montreal v. Marcotte, for instance, Justices Rothstein and Wagner state:

> A broad application of the doctrine is in tension with the modern cooperative approach to federalism which favours, where possible, the application of statutes enacted by both levels of government.

On these grounds and in view of the state of Canadian constitutional law, it appears to me that Bill S-201, as revised and amended, is constitutionally valid.

● (1130)

Thank you for your attention. I will be pleased to try to answer your questions.

The Chair: Thank you very much, Professor Thibault.

I would also like to thank all the witnesses for their presentations.

[*English*]

We're going to go to question period and we're going to start with Mr. Cooper.

● (1135)

Mr. Michael Cooper (St. Albert—Edmonton, CPC): Thank you, Mr. Chair.

I'll direct my first question to Professor Cyr. Criminal laws for the protection of health must address a legitimate public health evil. That's been affirmed by the Supreme Court, including in RJR-MacDonald Inc., at paragraph 32.

Is it your opinion that genetic discrimination constitutes a legitimate public health evil?

[*Translation*]

Prof. Hugo Cyr: The health issues covered can not all necessarily be the subject of criminalization. This is precisely what is discussed in the Reference re the Assisted Reproduction Act. Not all public policy measures to promote health can be the subject of a criminal provision.

The court hopes of course that all the provisions that are adopted will, in general, seek to promote sound public policy. Be that as it may, it is not enough to say that, in the case of certain decisions and actions that could promote health, the specific issue in question raises an issue in criminal law.

[*English*]

Mr. Michael Cooper: I'm a little unclear from your answer to my question whether you consider genetic discrimination to be a legitimate public health evil. You made the comment, or I thought I heard you say, that in terms of the criminal law power, as it relates to health, it must not be interpreted too broadly and I think that is a fair characterization.

I would note that at paragraph 56 of the assisted human reproduction reference, the Supreme Court stated that criminal law power may validly be used to safeguard the public from any injurious or undesirable effect and that, “The scope of the federal power to create criminal legislation with respect to health matters is broad, and is circumscribed only by the requirements that the legislation must contain a prohibition accompanied by a penal sanction and must be directed at a legitimate public health evil”.

Hence, my effort to press you on whether you would acknowledge that this constitutes a public health evil.

Prof. Hugo Cyr: Paragraph 56 is actually from Justice McLachlin, who's position on the validity of those sections was in dissent.

[*Translation*]

Paragraph 232 of the majority decision of Justices LeBel and Deschamps states:

> Health, which Rand J. mentioned, cannot always justify action by Parliament in relation to the criminal law. This passage must therefore also be considered in the context of Rand J.’s definition of the criminal law.

Later in the same paragraph it states:

> In our view, therefore, it is not enough to identify a public purpose that would have justified Parliament's action. Indeed, it might be hoped that Parliament does not act unless there is a public purpose that justifies its doing so. Where its action is grounded in the criminal law, the public purpose must involve suppressing an evil or safeguarding a threatened interest.

With regard to suppressing an evil, the provisions in question pertain only to requiring the disclosure of genetic information and do not in any way prohibit the use of this information for discriminatory purposes. Clauses 3 to 7 do not in any way prohibit the use of this information for discriminatory purposes.

Is it an evil to require the disclosure of genetic information for the purpose of forming a contract? In my opinion, the answer is no. It is a question of public policy, but that is not the same thing.

● (1140)

[*English*]

Mr. Michael Cooper: Thank you, Professor Cyr.

I would ask a question of all of the witnesses. When we talk about a public health evil, which was noted for example in the Torys' opinion.... In the Torys' opinion, the dissenting opinion of Chief Justice McLachlin was cited at paragraph 38, wherein Chief Justice McLachlin stated that the criminal law power cannot be employed to "promote beneficial medical practices". It is the argument in the Torys' opinion that when you unpack the purpose of this legislation, it really goes toward promoting a good public health practice as opposed a health evil.

Perhaps you could comment on that opinion.

Prof. Bruce Ryder: Thank you, Mr. Cooper.

As a point of clarification, I don't think the chief justice's opinion in the Assisted Human Reproduction Act reference is correctly described as a dissent on some aspects of the decision. There were three separate opinions. I think the most important conclusion the court reached in the case was upholding the prohibited activities provisions of the act, but striking down the regulatory provisions of the act, the licensing scheme, what the court referred to as the detailed or minute regulation of the delivery of assisted reproductive services.

That's the key distinction in the case. The court upheld the prohibited activities provisions. It struck down the detailed regulation through licensing scheme, and other measures.

I think it's important to refer to her opinion, as you have it. It is not a dissent in all aspects. Together with Justice Cromwell's decision, it made up the majority for upholding the prohibited activities sections.

I don't understand the objection, frankly, to sections 3 through 7 on the grounds that they're not seeking to promote public health, which is one of the legitimate purposes of the criminal law power. It seems clear that the ultimate objective is to encourage people to undergo genetic testing because it has great value from the point of view of their health and our health care system as a whole. It also seems clear that we're concerned they will be discouraged from doing so if they don't have control over when to undergo genetic testing and what happens with their results.

The arguments against it remind me very much of some of the arguments that were made by the tobacco industry in the RJR-MacDonald case. The Tobacco Act prohibits advertising and other marketing practices related to the sale of tobacco products. The argument was made, "That's not targeting a social evil. What's evil about advertising? It's a lawful product. We're just seeking to promote it, and therefore, it falls outside the criminal law power."

What the court said was that it's legitimate for Parliament to consider the various ways of promoting public health, and that given the addictive nature of tobacco products, it's very difficult to target consumption itself, so it would instead prohibit advertising and other marketing practices in an effort to deter the consumption of tobacco in the interest of promoting health.

I think what's going on with sections 3 through 7 is something very similar. Regarding the practices that can deter people from undergoing genetic testing and benefiting from the amazing amount of information one can obtain through genetic testing, which is related to taking preventative measures regarding health care and other health benefits, we believe we have to deter those practices in order to promote public health, just as we had to prohibit tobacco advertising for similar reasons.

The Chair: Thank you very much, Professor Ryder. We're at nine minutes on this question. We have to move to our next questioner.

Mr. Fraser.

[*Translation*]

Mr. Colin Fraser (West Nova, Lib.): Thank you very much, Mr. Chair.

I would like to thank all the witnesses for being here with us today and for their testimony. It helps us a great deal in our work.

[*English*]

I would like to ask a question, starting with Professor Ryder, regarding the social evil and the criminal purpose. In my opinion, this is really the crux of this whole issue. I'd like your help in understanding how a court might do an analysis regarding the pith and substance of this bill if it were to arrive in court.

I believe that you're saying the criminal purpose would be to combat genetic discrimination. Would a court look at the genetic discrimination element and say that since it's not targeting discrimination in general but specifically looking at genetic discrimination, that has implications for the insurance industry, for example, and that therefore the pith and substance of this would not be to combat discrimination and it would not be a proper use of the criminal law power? Would you comment on that please.

● (1145)

Prof. Bruce Ryder: Thanks, Mr. Fraser.

I think it's an interesting question. Professor Hogg has taken a position that the federal Parliament can pass laws prohibiting discrimination pursuant to the criminal law power. We haven't had a lot of opportunity to consider the limits of such a power, because Parliament has chosen not to address discrimination primarily through the vehicle of the criminal law power, and that's true at the provincial level as well, where most of our approach is remedial and focuses on civil penalties as opposed to offences.

Discrimination as a legal term, of course, covers a very broad array of conduct. Some of it is very serious in its impact on individuals and groups, and some can be relatively less serious. For example, in the context of employment discrimination, people can lose their jobs as a result of discrimination, a very serious consequence, or they may have to endure one single discriminatory comment at work that does create a negative environment and has impact, but is that a kind of evil that would amount to something that could be covered by the criminal law power? It's definitely arguable that this would be going too far.

I think it is very significant that the prohibitions set out in clauses 3 through 6 of the bill are very targeted. They don't deal with all aspects of discrimination. They're focused on giving individuals control over their genetic information, giving them control over the decision of whether or not to undergo genetic testing, and giving them confidence that, if they do decide to undergo genetic testing, they will be able to maintain control over the results of that test and it won't be able to be used by others to impose negative consequences on them.

I think those are very serious kinds of discrimination, which are being addressed by the bill, and certainly not the full array of potential discriminatory consequences that could be imposed on the basis of genetic characteristics.

Mr. Colin Fraser: Thank you very much, professor.

[*Translation*]

Professor Cyr, could you comment on this please?

Prof. Hugo Cyr: Certainly.

There is one thing that surprises me. It is difficult to say that the objective is necessarily to obtain health information when clause 3 itself seeks to protect the person from having to take a test. Clause 3 seeks only to authorize a person to refuse to take a genetic test.

The idea of protecting patients so they can voluntarily take a test and not be required to disclose the results is reflected in clause 4. Clause 3, on the other hand, does not pertain to this health objective. It pertains to the person's autonomy, that is, their free choice to take a test or not and to obtain information or not on their propensity to develop an illness. Clause 4 also seeks to protect the patient from the potential consequences. Retaining this ability, that is, the autonomy to choose, traditionally falls under private law.

People from certain communities know that they have a greater propensity to develop an illness. Some of these people do not want to know if they have the illness because it would change their life, while others want to know in order to plan.

To the extent that the provision seeks to protect autonomy, that is no longer the objective of protecting health.

Mr. Colin Fraser: Okay. Thank you very much.

[*English*]

Professor Hogg, could I ask you, regarding the double aspect doctrine, how that applies to constitutional issues in Canada with particular regard to this bill? Are there other areas of discrimination where double aspect has been utilized and the criminal law power has been used to combat some form of discrimination that you can think of?

● (1150)

Mr. Peter Hogg: No, I can't think of any examples where the criminal law power has been used against discrimination, so that the double aspect doctrine would be relevant. But the double aspect doctrine would be relevant here because there are so many other areas where the criminal law power has been exercised. A good example is highway traffic. There are federal prohibitions, criminal law. There are provincial prohibitions, property and civil rights. Exactly the same doctrine would apply here, so that it's not as if Parliament would be absorbing the whole area of genetic discrimination. It would simply be making it an offence to discriminate on the basis of genetic characteristics.

Mr. Colin Fraser: Yes.

Professor Ryder, do you have a quick comment?

Prof. Bruce Ryder: I agree with Professor Hogg.

I suppose the closest equivalent would be in the context of hate speech, in that Parliament has acted to prohibit the willful promotion of hatred through the passage of subsection 319(2) of the Criminal Code. That is hate speech directed at identifiable groups. The Canadian Human Rights Act used to have a provision addressing hate speech as well. A number of provincial human rights codes have provisions dealing with the civil consequences of hate speech. For example, in the Saskatchewan human rights code, there's a prohibition on hate speech in section 14.

There's an example of the Supreme Court of Canada upholding those various provisions, most recently in the Whatcott v. Saskatchewan decision from a few years ago. The court described hate speech as discriminatory speech or speech that has discriminatory effects. We can think of hate speech as a branch of discrimination law in that sense. They've upheld the provincial provision and of course they've upheld subsection 319(2) of the Criminal Code in the Keegstra case and other decisions. That's an example of an area where there's room for an overlap between criminal prohibitions passed by Parliament and prohibitions in provincial human rights codes.

The Chair: Thank you very much.

Mr. MacGregor, you're next.

Mr. Alistair MacGregor (Cowichan—Malahat—Langford, NDP): Thank you, Mr. Chair.

Professor Thibault, can you say a little more about how the pith and substance of Bill S-201 relates to how the ancillary powers doctrine might also apply? We know when there's a potential encroachment on provincial powers we have to make a decision on the proper standard for such a relationship.

[*Translation*]

Mr. Pierre Thibault: Yes, okay.

I do not consider it abnormal for there to be overlaps in jurisdiction in a federation. Consider health. Consider criminal law. I will refer to the decision in Canada Western Bank v. Alberta. Since banks sell insurance, there is an overlap when they promote insurance. The same thing applies to regulation, whether federal or municipal, as regards the environment. There will be overlaps.

In my opinion, the effects of Bill S-201 are purely incidental to provincial jurisdiction. If the provinces want to legislate, we can say that they have the jurisdiction to do so under the double aspect doctrine. All I am saying is that the incidental effects doctrine can apply. If we conclude that jurisdiction over criminal acts is not sufficient, we can use the ancillary powers doctrine initially to validate Bill S-201. If we conclude that the jurisdiction in criminal law is sufficient, we can say that it has incidental effects on provincial jurisdiction as regards private law. Once again, this justifies the constitutional validity of Bill S-201.

● (1155)

[*English*]

Mr. Alistair MacGregor: For example, there have been some cases where the federal powers over trade and commerce have been used as a part of that doctrine. Correct?

[*Translation*]

Mr. Pierre Thibault: Yes.

[*English*]

Mr. Alistair MacGregor: I'll move on to Professor Ryder and Professor Hogg. I specifically wanted to talk about the public health evil that this bill is trying to address. We've gotten a letter from the University of Toronto that's been signed by a host of genetic scientists, medical doctors, genetic counsellors, and innovators from this university. They have stated:

> ...in the absence of any protections against genetic discrimination, there is evidence of such discrimination that demonstrates that these fears are well founded....
>
> We believe fears about genetic discrimination should not be a factor influencing a person's decision whether or not to take a genetic test, particularly when their very lives could be at stake.

When previous Supreme Court decisions have looked at federal criminal law power, they've been reluctant to freeze the law in time and also to look at future cases. We now know very well that we are on the steps of a gigantic leap forward in what genetic testing can provide. Indeed the number of tests coming out every year is following a logarithmic pattern.

I would like to have your comments with respect to what the professors' fears have outlined and the way genetic testing is going forward and just how federal criminal law in this bill is designed to promote defence against a public evil, not just with respect to the insurance industry here and now, but also with respect to how these genetic tests could potentially be used by future employers and future contracts in a whole host of industries we may not even know about right now.

Prof. Bruce Ryder: Thanks very much. I think it's an excellent point, and it brings up one of the dominant principles of Canadian constitutional interpretation, the idea that the Constitution needs to be interpreted as a "living tree" capable of evolving over time and capable of addressing new social problems and challenges.

With all due respect for my colleague, Professor Cyr's quote from the Attorney General for Ontario v. Reciprocal Insurers decision from 1924 is a little dangerous from that point of view, because it predates the articulation of the living tree principle in 1930 in the Persons Case by the Privy Council, and also predates the evolution of a modern understanding of the criminal law power that started with the margarine reference in 1949. It was a time when there was a much more restrictive interpretation of the criminal law. In any case, the Reciprocal Insurers case from 1924 dealt with an attempt by the federal Parliament to assert jurisdiction over the insurance industry, writ large, and the comments from that case have to be thought of in their historical context and the legal context of the time. I'm not sure they're very helpful in thinking through this issue.

I agree with you, however, that this is a fast-moving area of science with huge implications for our health and for our health care system. I think there's a growing consensus, which we see reflected in the debates throughout the parliamentary process, that we need to take steps to protect people's genetic information and to give them a firm basis for believing that their genetic information will be within their control.

Mr. Alistair MacGregor: Professor Hogg.

Mr. Peter Hogg: I think the living tree concept that the courts adopt is always true of Parliament. It will be open to Parliament to review this law—assuming it's passed—as developments warrant a change. I would expect that there are enough groups with an intense interest in this that you will be invited to do so. I think you are safe to legislate on the basis of what we know now, bearing in mind that if things look entirely different in 10 years' time Parliament can always look at it again.

[*Translation*]

The Chair: Your time is up, Mr. MacGregor. I cannot give you any more time as we have gone over the six minutes allotted.

● (1200)

[*English*]

We're going to move to Ms. Khalid.

Ms. Iqra Khalid (Mississauga—Erin Mills, Lib.): Thank you, Chair.

Thank you, gentlemen, for coming in today. It was fascinating to listen to all of your perspectives.

With respect to making law, I find that we can never look at anything in a vacuum and we always have to look at the global and the throughout-the-country impact, not just for that specific group but also how it impacts other groups.

Professor Hogg, if I may, I'll take you through a bit of a scenario. Suppose that Bill S-201 has become law, and a father and a son both apply for a job. The father has a medical test disclosing that he has Huntington's disease, and the son has a genetic test disclosing that he has a predisposition to Huntington's disease. As part of the employment conditions, they are both required to disclose their results. Let's say that they both don't get the job based on their medical results and on their genetic results. One would have remedy in the Canadian Human Rights Tribunal and the other would have remedy in the courts. Can you comment on that, please?

Mr. Peter Hogg: You're concerned about two different approaches.

Ms. Iqra Khalid: Yes, and to clarify, with respect to discrimination, why select one specific area of discrimination as opposed to other identifiable groups as well?

Mr. Peter Hogg: I think that's a perfectly legitimate question and it's one of the issues that the Minister of Justice talked about. I think it's an issue of policy for Parliament to consider, but we do have a definite indication that genetic discrimination is an issue. It's not properly dealt with in the law right now, and I think that the enactment of a criminal law to govern it is a perfectly sensible response, bearing in mind that there may be other approaches that eventually should supplant the criminal approach.

Ms. Iqra Khalid: Mr. Cyr, do you have a comment on that?

Prof. Hugo Cyr: The jurisprudence is replete with tensions between labour law and human rights regimes, and by adopting this statute, which will modify both at the same time, there are possibilities that there will be tensions between those two regimes, and there will be questions as to which is the best path to follow for a claimant. Should that person go through the labour system and arbitration and so on? Or should that person go through the human rights system? Oftentimes, the different systems come up with completely different types of jurisprudence. Right? And the standards will be different.

Mind you, the first part, if it's criminal law, the standard will be proof beyond a reasonable doubt, which is quite something if you're actually looking to eradicate some...if you're thinking in terms of civil rights issues. So I agree with the minister. I think that there is a problem or a political issue to think about in terms of how that will work in practice. I'm not sure it's wise to keep both tracks at the same time.

Ms. Iqra Khalid: Thank you.

Professor Ryder, in your testimony before the Senate committee, you noted that the pith and substance of Bill S-201 is to prohibit genetic discrimination. Now, my understanding is that the prohibition of discrimination falls to whichever order of government has jurisdiction to regulate that area in which the discrimination occurs. In this case then, wouldn't we be talking about discrimination in the area of contracts in the provision of goods and services, which would be under provincial jurisdiction?

That's the question. Do you think that this falls within provincial jurisdiction, by way of discrimination being controlled by the area of that law that falls before that jurisdiction?

Prof. Bruce Ryder: Sorry, I wasn't sure I understood.

Jurisdiction over discrimination is, of course, divided between the federal Parliament and the provincial and territorial legislatures. As you know, pursuant to the Canadian Human Rights Act, federal jurisdiction applies only within certain areas, such as, for example, federally regulated workplaces. Provincial jurisdiction under human rights codes will apply to other workplaces.

On this issue, when we think of the amendments to the Canadian Human Rights Act, for example, they're not going to apply. A prohibition on genetic characteristics in the Canadian Human Rights Act is not going to apply to most employers in the country. The provinces would have to amend their human rights legislation to accomplish that objective, as Ontario is doing with Bill 30, which is currently before the Ontario legislature and is going to amend the Ontario human rights code to add a prohibition on discrimination on the basis of genetic characteristics. It has passed second reading and is now on its way to the justice committee at Queen's Park.

The criminal law power—and this comes back to what Professor Hogg was saying earlier—enables Parliament to pass a law that will apply in all spheres. Of course the advantage of that is that when we believe that something is seriously wrong and amounts to a social evil, then it's not enough to leave it to the human rights complaints process, which is episodic and may deal with a very small part of the issue, and may lead to remedies that are tailored primarily to the individual complainant. It could possibly have an impact in a more systemic sense, but it's not particularly reliable in that regard, whereas the criminal law, especially when you have prohibitions coupled with serious penalties, is, one would hope, going to have a more systemic impact on all service providers caught by the prohibitions, and all those engaging in contracts caught by the provisions.

So yes, there is an overlap with provincial areas of jurisdiction, but that's so common with federal criminal laws.

● (1205)

Ms. Iqra Khalid: I have a very short question.

The Chair: It can be very short.

Ms. Iqra Khalid: My knowledge of the law is a little limited. I can't even compare with the wealth of knowledge that we have sitting here.

Do provincial human rights codes regulate contracts for goods and services?

Prof. Hugo Cyr: Yes. They all include disability as a prohibited ground for discrimination.

The Chair: All right. Now, unfortunately, we have another panel that's coming in. I think we have wanted to hear from this esteemed panel for a very long time. Does anybody have an incredibly short question that could be answered within a minute that they need to ask before we let the panel go?

Mr. Falk.

Mr. Ted Falk (Provencher, CPC): To any of you, you've studied the legislation. Is there any glaring hole that needs to be fixed?

Prof. Hugo Cyr: Let's say that I'm wrong in my analysis. The first part does not prohibit discrimination.

You asked about the future. Instead of requiring information, let's say that you're in Canada in 2016 and you have Pokémon Go. No one is forced to use Pokémon. No one is required to do it, but people do it voluntarily. This does not cover it at all. You create a benefit for exchanging information; it's not covered. Basically, anyone who wants to get that information, if that's valid, will just create a benefit, will offer it to consumers, and they will take it and give away that information. That's why it's not a discrimination bill.

The Chair: Thank you.

I have one short question, if it's okay with the committee.

The actuaries' association is coming before us, and they're recommending to reinsert clauses in Bill S-201 that were removed from previous iterations, which would have specifically governed the insurance industry, in order to say that it does not apply to insurance contracts over a specific value.

As I understand it from your testimony, Professor Thibault,

[*Translation*]

I imagine you believe that, if we do this, it will make certain parts of the law unconstitutional.

Mr. Pierre Thibault: Exactly. That is what I said before the Standing Senate Committee on Human Rights.

The Chair: That is what I understood.

Mr. Pierre Thibault: That is what was done. I have not changed my opinion since I appeared before the Senate committee.

The Chair: I imagine, Professor Cyr, that you agree with what Mr. Thibault said.

Prof. Hugo Cyr: Absolutely.

[*English*]

The Chair: I imagine you gentlemen believe that it still might be constitutional, but it would increase the risk. Is that what you would both look at?

Mr. Peter Hogg: That's exactly what I would say. It still might be upheld, but I think it would be unwise, because it would increase the risk of characterizing the laws in relation to insurance.

● (1210)

Prof. Bruce Ryder: I agree.

The Chair: That's all I had.

Thank you so much, gentlemen. Your testimony was fascinating and incredibly helpful to the committee. I want to thank you so much.

We'll take a brief recess for the next panel to come set up.

● (1210)

(Pause)

● (1215)

The Chair: All right. I would like to call this meeting back into session.

I would like to welcome our next panel. Thank you so much, gentlemen, all of you, for coming.

We are welcoming, from the Canadian Institute of Actuaries, Robert Howard, who is the past president; and Jacques Boudreau, who is the chair of the genetic testing committee. Welcome, gentlemen.

As an individual, we have Dr. Ronald Cohn, who is the pediatrician-in-chief for the Hospital For Sick Children in Toronto. Welcome, Dr. Cohn.

Dr. Ronald Cohn (Paediatrician-in-Chief, Hospital For Sick Children, As an Individual): Thank you.

The Chair: From the Canadian Life and Health Insurance Association, we have Stephen Frank, who is the senior vice-president of policy. Welcome, Mr. Frank.

Mr. Stephen Frank (Senior Vice-President, Policy, Canadian Life and Health Insurance Association): Thank you.

The Chair: We also have Frank Zinatelli, who is vice-president and general counsel. Welcome, Mr. Zinatelli.

● (1220)

Mr. Frank Zinatelli (Vice-President and General Counsel, Canadian Life and Health Insurance Association): Thank you.

The Chair: We're going to go in the order of the agenda that I presented to you for your statements. You have about eight minutes in terms of each of the groups.

Let's go with the Canadian Institute of Actuaries.

Mr. Jacques Boudreau (Chair, Genetic Testing Committee, Canadian Institute of Actuaries): Thank you, and thank you for this opportunity.

The Canadian Institute of Actuaries is dedicated to serving the public interest through the provision of actuarial services and advice of the highest quality. The institute specifically holds the duty of the profession to the public above the needs of the profession and its members.

The CIA has applied actuaries' unique skill set to genetic testing and its potential impacts on the Canadian public. I stress that we are not here to speak on behalf of the insurance industry.

The first problem with the bill is that it facilitates anti-selection. There are many components to a robust insurance system and one of them is the ability of the insurer to evaluate an individual's risk based on many inputs, including a variety of medical tests, and placing those with similar risk profiles in a distinct pool. This is a process based on actuarial and medical science that can be best described as differentiation, a foundational insurance concept used for centuries. It insures that for fairness considerations people facing similar risks pay similar premiums. This bill would undermine this time-tested process and introduce the likelihood of pervasive anti-selection, which is the ability of one party to a contract to take advantage of information that is not available to the other party.

The second problem with the bill is that it is discriminatory. When purchasing insurance, Canadians facing a reduced life expectancy discovered through non-genetic medical means such as an EKG or an X-ray must disclose the information they have been asked, and may be declined for insurance. However, under this bill, those with similarly reduced life expectancy discovered through genetic tests may withhold the results and get the insurance they applied for. This distinction is not based on sound actuarial and medical principles. It is completely arbitrary and as such represents the worst form of discrimination.

Let me discuss briefly the experience of the Affordable Care Act in the United States, also known as the ACA or Obamacare, because it's very relevant to this bill. One of its key elements is that insurers are legally required to provide coverage to all applicants regardless of medical history. The premiums basically reflect the age of the insured and the experience within a region, but sex and pre-existing conditions are ignored. This is a textbook condition to encourage anti-selection, which led me and many actuaries and economists to predict the following: one, large spikes in premiums for many people; and two, many people refusing to participate in the ACA and instead paying the fine for doing so, and large losses for insurers. That is exactly what has happened.

Increases of as high at 65% have taken place. An insurance death spiral resulted as the people remaining in the ACA required so much medical care that many insurers lost money no matter how much they raised premiums. Eventually insurers had no choice but to pull out of the program. Aetna and UnitedHealth and many other insurers have done so after massive losses.

The ACA experience is very relevant because its key element is similar to the condition that Bill S-201 would create. In fact, under the bill, the ACA's key element could be rewritten as “insurers are legally required to provide coverage to all applicants regardless of the results of genetic tests, and must set premiums based on age, sex, and smoking status”, rather than “age, sex, smoking status, and relevant genetic information”.

As you can see, the two wordings are close, and it would be remarkable if the bill didn't have similar impacts on the people of Canada who buy individual life insurance. American lawmakers ignored expert advice with the negative results I just mentioned. We can only hope that the proper lesson has been learned so as to avoid a similar debacle in Canada.

Thank you.

The Chair: Thank you very much for your testimony.

Dr. Cohn.

Mr. Robert Howard (Past President, Canadian Institute of Actuaries): Excuse me, Mr. Chair. There are some further comments from the Canadian Institute of Actuaries.

The Chair: Sorry, I wasn't aware that you were sharing your time, but that's fine.

Mr. Howard, if you want to go ahead, please go ahead.

Mr. Robert Howard: Thank you very much, Mr. Chair.

You may not have intended it, but the anti-selection that Bill S-201 would allow confers a benefit on those who test positive for certain genes. They know that they will be able to buy insurance priced to cover a risk much lower than their own risk. Suppose Bill S-201 is enacted as is, and then you learn that, say, your son-in-law carries a gene for a serious, often fatal, heart condition. Wouldn't you recommend that he buy life insurance, and a lot of it? If you answered yes, you are agreeing that anti-selection is real and that the law confers a benefit on those who test positive.

How big will the impact be? I created a model on behalf of the Canadian Institute of Actuaries, and I wrote two papers on it just to answer that very question. My model suggests that premiums for life insurance are likely to go up by 30% for males and 50% for females because of the prohibition in Bill S-201. That's a lot. That's what most of your constituents will be facing soon after the passing of Bill S-201. We believe that you didn't intend to do something that would result in a big jump in costs for your constituents. We don't think that it's in the public interest to do so.

If you're familiar with the paper written by Angus Macdonald, in 2011, the size of the impact may surprise you. I can explain why my numbers are appropriate for Canada, if you wish.

It's possible to amend the bill to avoid the unintended consequence of large increases in what Canadians will pay for insurance. Our proposed amendment is in our brief, and it's shown on the slides here. There's a table, as well, that gives the amounts that we're suggesting. The amendment sets a limit for the prohibition on requesting to see the results of a genetic test. Because the limit in our proposal is based on the average weekly earnings as published by StatsCan, it requires no recurring action from Parliament to keep it up to date. A company could use a genetic test if the amount is over the limit and if the mortality impact of the gene is found to be well supported by data. That's what's meant by “reasonable and bona fide grounds”. This chart shows the limits for the various types of insurance.

The amendment directly addresses two concerns. First, there is no restriction on buying insurance after a positive test up to the amount that the average Canadian is now buying. Second, by not applying the prohibition on larger amounts, we won't have the serious anti-selection that would result in large premiums for those who have not been tested or have tested negative.

By the way, even today, Canadians with a positive test can get a significant amount of life insurance. Group insurance is not restricted at all. Mortgage life insurance is not restricted, as opposed to what CMHC offers. There are insurance products sold with no medical questions at all; these aren't restricted. If an individual previously bought guaranteed insurability insurance, then more life insurance can be purchased with no medical evidence. Any insurance that's already owned cannot be terminated by the insurance company because of a positive test. So, fears about access to insurance are not well founded.

Note that the amendment that we will propose will not benefit the insurance companies. The companies are able to adjust their premium rates to protect their own profits.

● (1225)

I don't expect that their profits will, in the long run, be materially different if Bill S-201 is defeated, if it passes as is, or if it's amended as we propose. It's the public that will be hurt, but only if Bill S-201 passes as is. Our proposed amendment would protect.

Thank you, Mr. Chair.

● (1230)

The Chair: Thank you very much.

Dr. Cohn.

Dr. Ronald Cohn: Thank you very much, Mr. Chair, and thanks to the committee for providing me the opportunity to speak to you.

I would like over the next few minutes to try to bring to life some of the discussions you have been having over the last few weeks, and to provide you with evidence that genetic discrimination is real. It's a frequent problem in this country that's affecting thousands and thousands of individuals.

I'm here today speaking not only on behalf of the 197 colleagues around the country who have sent a letter to all of you, but also on behalf of health care providers all over Canada, and maybe most importantly, I'm here to speak on behalf of every individual in Canada who is potentially at risk of being faced with genetic discrimination at some time in their lives.

I will provide you with three examples that address the issue that we are facing in the health care community.

I will give you an example of how genetic discrimination interferes with our ability to provide high-quality, safe, and best-standard clinical care to our patients, something that, in part, can be paralyzing for us as health care providers.

I will provide you with an example of how fear of genetic discrimination can interfere with our ability to perform the kind of research we need to actually move forward our standard of clinical care and continue to improve it, and at the same time think about the health care cost and try to keep it down.

Last but not least I will give you an example of the preventative aspect that the fear of genetic discrimination has, where without genetic testing, individuals cannot act upon certain knowledge and put measures into place that will provide protection or help to avoid a life-limiting or a life-threatening disorder.

Let me start with the first example—and it's sad for me to say that I've been in Canada for four and a half years now, and there are too many examples that I could choose from since I've moved here. I chose the example of a young girl who came to my clinic because she was thought to have a connective tissue disorder. The issue with that disorder was that she would be put at risk of her big blood vessel, coming out of her heart, the aorta, being torn, which would be a life-threatening problem.

Once I examined her, I discussed with the family the offer of genetic testing to find out whether she has a more severe or a milder form of this disorder. When I went through the consent process and we had to discuss the issue of genetic discrimination, both parents were very agitated about it. The mother was looking for a new job, and she said she was afraid that this might interfere with her ability to get that job. The parents did not have life insurance, and they said they did not want to go forward with the genetic tests. As a result, this child has to come to the hospital every three months to get an ultrasound of her heart, and is living with the fear of having the more severe form of the disease, but taking this fear over the fear of genetic discrimination.

I would like each one of you to put yourself for one minute into my shoes, knowing that I am not able to provide the right standard, best practice of care because the family declined to go forward with genetic testing. It has been paralyzing at times to me and to other health care providers to simply not do the job I learned and was trained how to do.

The second example is of a research study in which we were trying to answer the question of whether whole genome sequencing —the sequencing of your entire genome—would be a much better test to diagnose a medical condition, and also a much cheaper test for the health care system.

● (1235)

We approached about 200 families. I would like you to think for a moment about families who have had children for many years, most of them with very severe medical conditions, who are trying to look for an answer as to why this is happening to their child. When we offered them the chance to participate in the study, telling them, “There's a really high likelihood that we'll find an answer for you”, they were elated, excited, as you can imagine. Yet again, when it came to the consent process, over 35% of families elected not to participate because of a fear of genetic discrimination.

What that shows you is that, despite being on a search, a journey, to try to find an answer for “what is wrong with my child?”, parents elected not to go after that because of the fear that they would have issues with genetic discrimination. At the same time, it corroborated, somehow, that our study made it much more difficult to do this kind of research to actually prove that this is a better test, it's a cheaper test, and that's the test that we should offer the Canadian public if you are in a situation like this.

The last example I'm going to give you is about a young adult woman who has a family history of colon cancer. Her mom had colon cancer. She elected to do genetic testing, in order to find out whether she has a genetic form that predisposes her to this cancer.

When she went through the consent process, I don't want to repeat myself too much, again she was faced with the fact, “I can't get life insurance. What I will do is I will get yearly colonoscopies to screen myself so, in case something happens, I know that I can protect myself.”

The issue is, if you are young, you don't get yearly colonoscopies covered by OHIP if you don't have genetic evidence in order to actually be allowed to get that covered. In the end, she decided her health was more important than insurance issues. She did the genetic tests and was found positive and is in now in a situation to do yearly colonoscopies and is actually going to be able to prevent any kind of medical complication from happening.

While I'm not here to talk about industry or insurance issues, I would like everyone to consider that the preventative aspect and the preventative power of genetic knowledge gives many individuals the opportunity to take action to actually stay alive, healthy, as long as possible, and as a bi-effect, obviously, pay your insurance premium.

I hope I was able to bring to light some of the issues and, based on this, I'm going to go out on a limb and urge all of you to accept Bill S-201 without any amendments, in full, as it is, so every Canadian can have a better life, free of genetic discrimination for everyone.

Thank you.

The Chair: Thank you very much, Dr. Cohn.

Mr. Frank, Mr. Zinatelli, the floor is yours.

Mr. Frank Zinatelli: Actually, it will be my colleague who will be speaking.

Mr. Stephen Frank: Thank you, Chair.

I'm Stephen Frank, senior vice-president of policy for the Canadian Life and Health Insurance Association. I am accompanied by my colleague, Frank Zinatelli, who is vice-president and general counsel at the CLHIA.

The CLHIA represents life and health insurance companies that account for 99% of the life and health insurance in force across Canada. The industry protects 28 million Canadians and makes benefit payments of $84 billion a year.

We appreciate this opportunity to appear before the committee as it reviews Bill S-201. As drafted, we do not support Bill S-201. Our central issue is that, over time, it would likely result in an increase in the number of Canadians who do not have insurance. In addition, we do not believe that clauses 1 to 7 of the bill are constitutional.

Let me elaborate on these issues and also highlight what the industry is doing to address concerns over the protection of individuals' genetic information, while ensuring that insurance remains affordable for Canadians.

[*Translation*]

Insurance is a good faith agreement. At the time of application, parties disclose any information that may be material to the contract so that the contract can be entered into on an equal information basis. This ensures that the applicant knows what benefits are being provided and that the insurer can properly understand the risk in order to make an informed decision about whether to provide life insurance to that individual and at what price.

This principle is protected in insurance legislation in every province and territory. Under this principle, and with the express consent of the applicant, insurers use family history, lifestyle and medical information to set prices that fairly reflect the level of risk of insurance applicants. Using genetic test results already in the hands of the applicant is a logical application of this principle. This helps ensure that the costs of insurance reflect each individual's risk and that some individuals are not inappropriately paying for or subsidizing the cost of insurance for others.

● (1240)

[*English*]

Experience tells us that if an individual gets a genetic test result that confirms that they're more likely to develop an illness or other condition earlier in life than the general public, they will seek out insurance and they will seek out more of it than they otherwise would have.

Ultimately, this will result in higher premiums for other consumers as insurers will need to increase premiums for everyone to cover these unanticipated higher costs. As you've heard already, the Canadian Institute of Actuaries has concluded that not allowing insurers to have such relevant information would over time lead to increases in term life insurance of 30% for men and 50% for women.

We know that Canadians are price-sensitive. As prices rise, many thousands of them will likely decide not to purchase insurance due to cost considerations. Therefore, a likely result of any prohibition on insurers having equal information when assessing an application for insurance, is that fewer Canadians will have protection from unfortunate events than otherwise would have.

We also do not believe that section 1 through 7 of the bill fall within the constitutional jurisdiction of Parliament. The predominant effect of those sections would be to regulate the provisions of goods and services and the terms of contracts including in the insurance industry. Sections 1 through 7 of the bill, therefore, fall clearly under the property and civil rights head of power, for which the provinces have exclusive constitutional authority.

There have been previous testimony on this bill that it could be considered constitutional based on the federal criminal power. The federal Parliament has broad and plenary power in relation to criminal matters. However, the federal Parliament cannot legislate within an area of exclusive provincial jurisdiction, simply by casting the legislation as criminal. The Supreme Court of Canada has indicated that Parliament's ability to pass criminal law that addresses health is limited. Genetic testing information does not fall under this category.

As well, please note that sections 1 through 7 of Bill S-201 target a specific category in specific contexts, including insurance and employment, and do not have a criminal law purpose. They're not aimed at prohibiting genetic discrimination generally and cannot be supported under the federal criminal law power.

Our comments are supported by the views of the Torys law firm, in an opinion that we have obtained. We have provided copies of the legal opinion to the clerk to distribute to members of this committee.

[*Translation*]

As an industry, we understand that genetic testing information is sensitive medical information. This is why the industry already has in place an Industry Code, in which all life and health insurers commit to a variety of obligations, including that no Canadian will be asked to take a genetic test as a condition of obtaining insurance.

Beyond this, however, we are committed to proactively finding a solution that balances the concerns of Canadians regarding the use of genetic testing results with the need for fair and reasonably priced insurance.

[*English*]

As such we've been actively working on this for many months and recently initiated discussions with the provinces on an approach where insurers in Canada would commit to not asking for or using any genetic test results for applications for life insurance policies up to $250,000. At this level more than 85% of applications for life insurance would not require any disclosure of genetic test results, and therefore, will address the concerns around this issue for the large majority of Canadians.

This approach would also keep the cost of life insurance affordable for the average middle-class family. We hope to be in a position to make an announcement with respect to this initiative shortly.

In conclusion, Bill S-201 would undermine the critical principle of equal information and would likely result in an increase in the number of Canadians who do not have insurance over time. In addition, we do not believe that the sections of the bill dealing with insurance are within federal powers. However, we understand that genetic information is sensitive to Canadians. We've started discussions with the provinces about finding a balanced solution that will appropriately protect Canadians' genetic information while also maintaining fair and reasonably priced insurance.

We appreciate this opportunity to participate in the committee's review. We would be pleased to answer any questions you may have.

Thank you.

● (1245)

The Chair: Thank you very much.

We'll now go to the question period.

Mr. Nicholson.

Hon. Rob Nicholson (Niagara Falls, CPC): Thank you very much, Mr. Chairman.

Gentleman, thank you very much for taking time to be with us here this morning.

My first questions are directed to Mr. Boudreau and Mr. Howard. You talked in your presentation about what pervasive anti-selection would mean. You gave an example of the United States Affordable Care Act, better known as Obamacare. You said the predictions were that there would be large losses for insurers, and this is exactly what has happened. I think you gave us some details. You said that for Aetna and other companies this has been a disaster.

As you went on in your presentation you came up with an amendment and suggested that we adopt the amendment, but at the final bulletin you put up here, you said if we pass this amendment, this is not going to protect insurance companies. I'm wondering if you could reconcile that? You said without this was a disaster in the United States, as an example. You proposed an amendment but you said it's not going to help insurance companies. I'm a little bit confused.

Mr. Robert Howard: There are two main differences. In the U.S. the costs between those who have very serious illnesses and those who are generally healthy can be very sizable. The incentive is for only those who are the most ill to get the insurance. That's why in the U.S. the losses are astronomical.

No one is suggesting that the losses would be as large as that in Canada, because we're talking about genetic conditions that are relatively rare. My model includes 13 genes—that's all, just 13—out of well over 5,000 that have been identified. Those are the ones for which there is good evidence. We're talking about only around 1% of the population that might have one of these genes and would have a good incentive for anti-selection. The extent to which the premiums could rise would be less in this situation than is the case with Obamacare.

The reason I said—

Hon. Rob Nicholson: You said already that it's going to go up 50% for women and 30% for men. That's a big jump.

Mr. Robert Howard: Yes, but you see if the insurance companies increase their rates by that amount, their profit is going to end up being the same. This is not about protecting the profits of the insurance companies. They're going to get the same profits either way, because they can adjust their premium rates. However, the public can't adjust. If they don't have that gene but there are some out there who have that gene and who can buy a millions dollars' worth of insurance, that's going to push the price up for everybody.

Hon. Rob Nicholson: You gave the example of Obamacare, and you talked about what that is doing. Have you looked at any other examples? We had testimony here, I think about a week ago, that, for instance in Great Britain, things have gone well. The insurance companies have done well, despite the fact that there are now prohibitions against genetic discrimination or genetic testing. Have you looked at other countries besides that, or is the focus pretty well on the United States?

Mr. Jacques Boudreau: Can I just come back for a minute? The one big distinction is that in the U.S. the insurers are not allowed to increase premiums. They cannot put caps on the benefits they pay out. That's just to clarify that's one reason why they lose money, and insurers in Canada would not.

As for other places, the impact on life insurance will be measured over an extended period of time. I'll give you an example. Somebody takes out a life insurance policy after finding out that they are a carrier for Huntington's, for example, at the age of 30, and they will not die until age 45 approximately. You could do mortality studies year after year and you would find no distinction at all between those people and the rest of the population. It would take more than a decade before the impact would be felt. To my knowledge—

Hon. Rob Nicholson: Is that happening in Great Britain? Do you think that's what's happening there? They just haven't waited long enough to see what the impact of this will be?

Mr. Jacques Boudreau: That's my opinion.

Mr. Robert Howard: Actually, I just received some information from the U.K. this morning. I haven't really had time to digest it, but they're very concerned that the frequency of genetic tests has gone up so much since their moratorium was accepted that they think there's a shift in the balance so that the consumers are in a much stronger position now.

Before, because of the lower frequency, it wasn't as serious an issue. There are certainly expectations that we could see some quite significant increases in the U.K. as well over time.

● (1250)

Hon. Rob Nicholson: Okay, fair enough.

Mr. Stephen Frank: I just want to make a couple of points. Be careful with comparisons with the U.K. The U.K. prohibition applies to predictive genetic tests only and not diagnostic. There's a big difference. The predictive ones will materialize over time. The bill proposed today would cover both of those, so it's a much broader prohibition and would get into the kinds of diagnostic scenarios that Dr. Cohn was referring to.

The second thing I would note is that in Canada we issue very long-term insurance. You might have 30- or 40-year terms on that. The U.K. tends to have much shorter terms than that. One way you could keep premiums down, frankly, is to shorten the term of your insurance, so you would make people renew it every five years or every 10 years, and you'd be capturing that new information each time you did it.

Different jurisdictions, particularly in Europe, have a completely different market. They've narrowed their prohibitions in ways not contemplated by this bill. There are similar things in the States. Be careful with some statements that say that Canada is an outlier in this regard. We don't believe that's accurate in most scenarios when you look around the world.

Hon. Rob Nicholson: Dr. Cohn, did you have a comment on this?

Dr. Ronald Cohn: I have a comment, a British comment I guess, that genetic testing is increasing. I think it's important to put this in the context that it doesn't have a negative impact on the health of anybody. The health and life expectancy of people doesn't change with the amount of genetic testing.

It is going to improve somewhat to the extent that preventative measures are now able to be in place for a number of different disorders. There are not just 13. There are currently 56 genetic disorders out there. If you know about them, then you can stay healthy and prevent catastrophes from happening. I want to put that into context.

Mr. Robert Howard: Just to put his context in a better context, if people were allowed to buy fire insurance when the smoke detector starts to beep, and not just beep, but give the full alarm, then that would push up the cost of fire insurance an awful lot, because people wouldn't buy until the fire started.

The issue isn't around the total cost of insurance, because group insurance is not going to go up in price. It's the same people who are going to be insured.

The Chair: I'm sorry, we're way over the time on this question, and we have three other questioners that we need to get to within the time, so I have to cut you off there.

Mr. Hussen.

Mr. Ahmed Hussen (York South—Weston, Lib.): Thank you, Chair.

Thank you, gentlemen, for coming in to speak to this committee about Bill S-201.

My first question goes to Mr. Boudreau and Mr. Howard. You mentioned in your paper to us that, according to your research, premiums could go up by 30% for males and by 50% for females, regardless of their genes or whether they have been tested or not.

According to the testimony of Senator Cowan, one of the sponsors of the bill before our committee, he indicated that for the countries that have instituted a ban on genetic discrimination there was no significant increase in premiums, certainly not 30% to 50%. Do you care to comment on that?

Mr. Robert Howard: Yes. There are several reasons why this is going to be an issue. If you compare with the U.K., there was a paper written by Professor Angus Macdonald, and I believe he also did a report for Senator Cowan. He found a negligible increase in premium rates because of the ban, as it was constituted in the U.K.

There are some problems with his research. One thing is that he used only six genes, and the genes that I've used include several for heart conditions. He had nothing for heart conditions. The ones that I have included are about five times as serious as the ones that he included. That's a very significant factor.

The second thing is that he assumed that there would be no anti-selection. In other words, the people who test positive for one of these genes would be no more likely to buy insurance than others, and they would buy no more insurance than others who were untested. That seems to me to be very unlikely when you take into account anti-selection. That pushes up the cost quite dramatically.

Mr. Boudreau has already commented that the genes that are involved are not ones that have an impact within the next few months or even the next few years after buying insurance, but they're delayed for several years. The full effect in the experience in the U.K. and other countries is yet to be seen.

● (1255)

Mr. Ahmed Hussen: Thank you.

In the current situation, individuals are reasonably discouraged from getting genetically tested because of fears about coverage and because of fears about their future. Don't you think this bill would encourage more individuals to feel confident to get genetically tested for genetic conditions, and isn't that a social good and something that you could support?

Mr. Robert Howard: Personally, I consider the fear to be an irrational one. Genetic discrimination, as it's being presented, is totally unlike something like racial discrimination. There are people who have been ill-treated in our society for decades, for centuries, because they belong to a certain group. Hundreds of people have been killed for that. People's fear of being mistreated because of discrimination, of not being able to do the things that ordinary people can do, is a very real fear.

Genetic discrimination isn't like that at all. The concern is that people are failing to do things that could be for their own good. It's not that they think there are people out there who hate them and want them harmed, but that they might have a financial disadvantage because of it.

Furthermore, the insurance is available. Even today, people can buy a considerable amount of life insurance. If the concern is that you won't be able to buy insurance in the future, I would first ask you this. How much insurance do you need now, and how much have you bought now, before your test? If your answer is that you haven't bought any because you think you're healthy, then that goes back to the fire insurance example. The fact is that people can get the insurance now that they need.

Mr. Ahmed Hussen: I'd just like Mr. Cohn to respond.

Dr. Ronald Cohn: Thank you for the opportunity.

I have to respectfully disagree with you on this. I would like to maybe step back for a second and make this a bit independent of the insurance issue. The statement that genetic discrimination is not like any other discrimination is simply wrong. It's an insult to the community of patients and the families I deal with who have children with medical disabilities and who are afraid of discrimination independent of any financial aspects.

I'm glad I have an opportunity to talk about it. I chose not to, but with the number of times I have had families in my office talking about how it is to have a child with a disability and dealing with this in a normal social circumstance, I cannot sit here and accept from you that this is not discrimination.

Thank you.

The Chair: Mr. MacGregor.

Mr. Alistair MacGregor: Thank you, Mr. Chair. How much time do I have?

The Chair: Fortunately, nobody is taking this room at one o'clock. I'd like to get you and Mr. Bittle through your questions, and then we'll see. We'll go maybe 10 minutes long.

Ms. Iqra Khalid: Sorry, Mr. Chair, I have another committee meeting at one o'clock. I'd like to excuse myself, if I may.

The Chair: You absolutely may.

Ms. Iqra Khalid: Thank you, gentlemen.

The Chair: Mr. MacGregor, you have six minutes.

Mr. Alistair MacGregor: Thank you.

Mr. Frank, I want to direct my first question to you.

Just to put it on the committee record, I'll read from an article in yesterday's *The Globe and Mail* that's entitled “Sun Life overhauling life insurance application process in Canada”. It announced that Sun Life Financial, arguably one of the largest businesses in Canada, is “overhauling its life-insurance application process in Canada, cutting down on intrusive tests as part of an industry-wide push to make getting coverage easier for customers.” They feel that the life insurance industry is “increasingly looking to technology to simplify its processes” and is catering to “consumers' desire for less invasive and time-consuming tests”.

Now, if Sun Life is going down this road because they see a future in this, I would presume that if it feels it doesn't need medical tests about an applicant's actual health, it probably doesn't need to have access to an applicant's genetic test results. I'd like you to comment on that particular aspect.

● (1300)

Mr. Stephen Frank: Thank you for the question.

Sun Life did not say that they will not be collecting medical information from applicants anymore. They've shortened the list and types of information that they will be gathering. They will continue to gather all kinds of medical information, including family history and other things that would be relevant to the risk. I think that's the key point here. We're very aware, and the industry understands clearly, that not all genetic tests are relevant to underwriting and understanding an actual risk. We only use those that are relevant. In Mr. Howard's scenario, we picked 13 genes out of about 50,000. We're very selective in how we use this.

The issue for us is a fundamental one, and I think it's been illustrated well, that when you're entering into a contract of good faith, both parties need to understand what the basis is for that agreement. We're very concerned that if one party can come and not disclose relevant information, you're no longer in a good-faith agreement, and that will have profound implications for the business.

I do want to reiterate that we understand that this is a serious concern for Canadians. We do want to find a balanced approach for it. That's why we've announced today that we are in discussions with the provinces on an approach that would see us not use or ask for genetic information for any application for life insurance under $250,000. That will address the issue for the vast majority of Canadians; 85% of people will no longer be asked for any genetic test information that they require. We think that's the right way forward here, and we'll be making an announcement on that issue very shortly.

Mr. Alistair MacGregor: Thank you. I'm going to move on to Dr. Cohn.

Dr. Cohn, earlier today, and of course before today's committee hearing, we received the submission from the Torys law firm, which outlined why they oppose Bill S-201. Specifically they state that clauses 1 through 7 of Bill S-201 do not address a public health evil. That is their position. They feel that criminal law power cannot be used to promote medical practices.

I would argue that, yes, it's not up to federal criminal law power to promote medical practices. That's your job. That's the job of provincial health ministries. However, given your testimony and your direct experience, would you not say that this law is trying to create the conditions in which you can operate freely to promote health, to protect your patients' fears of a legitimate concern over discrimination?

I would like you to go into a little more detail on that particular aspect.

Dr. Ronald Cohn: Thank you. I'm obviously not in a position to comment on the law per se, but when you talk about the issue of how we can freely operate and provide the type of medical care that we feel is necessary, then I think this bill is going to provide us with this opportunity.

I would like to come back to the third point that I made, that genetic information, as we are going to continue to gain more and more knowledge, is going to be power to improve the life of every individual.

Right now there is a somewhat limited effort towards patients who have very severe medical conditions, some of whom never make it to a life insurance age anyway. The knowledge we are gathering that is now able to have us put measures into place that keep us healthy and alive is only going to continue to increase. Having that ability to offer this.... What do you really want as a physician? Yes, you would like to treat your patients, if they're sick. However, in an ideal world, we would like to prevent them from getting sick. That's exactly what we could do.

Mr. Alistair MacGregor: Looking at the way health care costs are going and the strains on provincial budgets, if you had this tool at your disposal, without any patient fears.... I realize we're only on the doorstep of what's potentially available to us as we progress through the 21st century. Do you feel that savings in the medical system could result, vast savings of money not only for our public health dollars but maybe for the insurance industry as a whole?

If you can confidently tell your patients, because they have a certain marker for things, that you could probably direct them towards a certain lifestyle, that may end up not resulting in a massive insurance payout at the end.

Dr. Ronald Cohn: Absolutely. There is the case of this woman with colon cancer. If you take her and the cost of yearly colonoscopies into consideration, which are about $700, maybe $1,000, and compare it to the fact that she would be diagnosed at age 40 with metastatic colon cancer, that's hundreds of thousands of dollars of treatment that is necessary and potentially necessary for the insurance company to pay out, because she probably wouldn't survive it past the age of 50.

The condition she's in right now, honestly, we have very good evidence, since it's a fairly common cancer, that she's most likely going to survive without any significant health care costs, and for sure, with no costs to the insurance industry. This knowledge, the amount of knowledge we're going to gain over time, is just going to increase.

● (1305)

The Chair: Thank you, Dr.

We have to go to Mr. Bittle. By the way, when the questioner has the questions, it's in their capacity if they ask you or not. I can't recognize you when it's Mr. MacGregor's time.

Mr. Bittle.

Mr. Chris Bittle (St. Catharines, Lib.): Thank you so much. We heard from the actuaries that this bill, you believe, in and of itself is discriminatory. Mr. Boudreau commented that this is the worst form of discrimination. With respect to that, I believe that's out of touch. We're hearing from Dr. Cohn that there are people who are affected by this. There are children who are being hurt, children who are sick, people who aren't becoming part of clinical trials, lives that are being shortened because of policies by the insurance industry. There are real effects outside of your actuarial tables that I don't believe you're taking into account.

How can you listen to this and still say that this is discriminatory legislation not worthy of government involvement?

Mr. Jacques Boudreau: Let me give you an example. There's a disease called polycystic kidney disease that used to be determined or diagnosed through an ultrasound. It can now be identified through a genetic test.

Under this law, if it's found through the ultrasound, it would have to be disclosed to the insurance company. If it's obtained through a genetic test, it wouldn't have to. That's what I mean by a form of discrimination.

Mr. Chris Bittle: Sir, one is actual. One is an ultrasound; you can see it. One is predictive. So few of these tests are predictive, as it stands right now.

I'll move on to the insurance industry. Though I do appreciate your attempt to, sometime in the near future, maybe, possibly, come up with an agreement with the provinces, you have known about this for years. You have known about the consequences it's having on people's health in Canada, and yet you wait until we're on the verge of passing a bill. That's inexcusable, sir.

This reminds me of individuals from the tobacco industry coming before Congress years ago. Why should we believe, now, on the verge of passing this legislation to protect Canadians, that you are going to do right by Canadians and work for their health and best interests?

That's to be answered by the insurance industry.

Mr. Frank Zinatelli: I'm not sure I understand the question.

Mr. Chris Bittle: Why should we believe you? Why wait until the last minute? Why not do this years ago when we knew people's lives were being impacted by decisions made by the insurance industry?

Mr. Stephen Frank: This is a very complicated area. We've been spending many months, if not years, thinking about an approach that could allow us to balance an appropriate protection of genetic information while protecting the premiums for the vast majority of Canadians.

It requires significant analysis and understanding of the implications before you would commit to that kind of approach. The reality is that we're approaching that time when we're prepared to be moving forward on that, after very careful consideration. This is not something we've pulled out in the last couple of weeks.

I will quickly respond. Everybody wants the appropriate use of genetic information. We understand very clearly as an industry that understanding genetic information will allow us to provide better treatments. It provides better outcomes for people. There are advantages to everyone from being able to access that information.

Cutting that off from us precludes not only the underwriting use of that information, but the diagnostic and treatment information as well. We think it's a very broad and problematic approach to this issue.

Mr. Chris Bittle: I would like to follow up with the memo from Torys. I do appreciate your having footnotes. Not everyone provides us footnotes or where they got their information.

It seems your argument is significantly buttressed by the works of Peter Hogg, who testified here today and completely disagrees with you. He said this bill is, in fact, constitutional and a valid use of the criminal law power.

Doesn't that render this opinion moot at this point, if you're basing it on one particular scholar who fundamentally disagrees with you?

● (1310)

Mr. Frank Zinatelli: Mr. Hogg, of course, everybody involved in constitutional law does read his textbook.

Let me give you an analogy. In the life and health insurance industry, for anybody that has practised in that area, there is a book, the Bible as it were, by Mr. David Norwood, who unfortunately passed away five or six years ago.

I recall very clearly that Mr. Norwood, who was the all-knowing person on the topic, lost many cases before the courts and before the Supreme Court of Canada, so I think everybody has an opinion of how different laws should be interpreted, but just because somebody has written a text on it does not mean they are always on the right side of the law.

Mr. Chris Bittle: Not that he has written a text, but you have used his information as to how to determine the pith and substance of this legislation. You have referenced him multiple times, and the best way to determine it is to use his test and use that information.

Then he appears before this committee, and you're giving him a great deal of props, for lack of a better word. Now you're saying don't listen to him.

Mr. Frank Zinatelli: I'm not saying don't listen to him. I would also note that a number of the folks who presented before you before this session actually cited some of the same tests that Professor Hogg has presented at different points from his textbooks.

As I recall hearing those folks, not all of them were in agreement, and we respectfully disagree with his conclusions on this matter.

The Chair: Excellent. Thank you so much.

Are there any short snappers from anyone?

I just have one. The actuarial organization has presented proposed amendments to the legislation. The insurance industry is arguing that the law is already unconstitutional. Of the four constitutional experts we just had, two of them said that adding these amendments would render the law unconstitutional. Two said it would enhance the chances that the law would be rendered unconstitutional. Does the insurance industry support the amendments proposed by the actuarial industry?

Mr. Stephen Frank: No. We continue to believe this bill is unconstitutional. We continue to believe that we need to carve out the insurance section. I think what we're signalling is that this is a provincial area of responsibility, and we're working actively with the provinces on an approach.

The Chair: I understand. So essentially, what you would propose, they don't want, and they would use it to argue the law's even more unconstitutional than their current position. I just want you to understand that I am taking seriously what you said. It was in the British agreement. There's multiple jurisdictions that have such a proposal, but the effect would be difficult here.

Gentlemen, thank you so much for your testimony. It was really appreciated, and it was fascinating in some cases.

This meeting is adjourned.