SENATE SÉNAT

CANADA

SENATE COMMITTEES DIRECTORATE DIRECTION DES COMITÉS DU SÉNAT

*REVISED

HUMAN RIGHTS

NOTICE OF MEETING

Monday, September 29, 2014
4 p.m.
Room 160-S, Centre Block

Televised
Webcast
http://senate-senat.ca/webcast-e.asp

*** AGENDA**

Bill S-201, An Act to prohibit and prevent genetic discrimination

WITNESSES

4 p.m.
The Honourable Senator James Cowan, Sponsor of the bill

Office of the Leader of the Opposition in the Senate
Barbara Kagedan, Senior Policy Advisor

5:30 p.m. - 6:00 p.m.
Break

WITNESSES

6 p.m.
Canadian Life and Health Insurance Association
Frank Swedlove, President

*RÉVISÉ

DROITS DE LA PERSONNE

AVIS DE CONVOCATION

Le lundi 29 septembre 2014
16 h
Pièce 160-S, édifice du Centre

Télévisée
Diffusion web
http://senate-senat.ca/webcast-f.asp

*** ORDRE DU JOUR**

Projet de loi S-201, Loi sur la non-discrimination génétique

TÉMOINS

16 h
L'honorable sénateur James Cowan, parrain du projet de loi

Bureau du Leader de l'Opposition au Sénat

Barbara Kagedan, conseillère principale en politiques

17 h 30 à 18 h
Pause

TÉMOINS

18 h
Association canadienne des compagnies d'assurances de personnes
Frank Swedlove, président

Frank Zinatelli, Vice President and General Counsel

Canadian Institute of Actuaries
Bob Howard, Past President

Jacques Y. Boudreau, Chair, Committee on Genetic Testing

Michel Simard, Executive Director

Canadian Association of Counsel to Employers
Karen Jensen, Partner, Norton Rose Fulbright

With reporting and interpretation.

Frequencies (MHz)
Floor 91.9
English 92.7
French 92.3

Frank Zinatelli, vice-président et avocat général

Institut canadien des actuaires
Bob Howard, président sortant

Jacques Y. Boudreau, président, Comité sur le dépistage génétique

Michel Simard, directeur exécutif

L'Association canadienne des avocats d'employeurs
Karen Jensen, associée, Norton Rose Fulbright

Avec transcription et interprétation.

Fréquences (MHz)
Parquet 91,9
Anglais 92,7
Français 92,3

Greffier du comité,
Adam Thompson (613) 990-6160
Clerk of the Committee

Canadian Association of Counsel to Employers

CACE

Association canadienne des avocats d'employeurs

Speaking Notes to The Canadian Standing Senate Committee on Human Rights

Karen Jensen, Norton Rose Fulbright Canada LLP, CACE Human Rights Committee Vice-Chair

9/29/2014

Good evening. It's a great honour to be invited to speak to you today about such an important topic. By way of background, I am the Vice-Chairperson of the Human Rights Committee of the Canadian Association of Counsel to Employers, or CACE as we are known. CACE is an association of management-side labour and employment lawyers across Canada. The organization promotes excellence in the specialized field of labour and employment law, and engages in legislation and law reform activities at the provincial and federal level. I am also a former full-time member of the Canadian Human Rights Tribunal where I adjudicated and mediated complex human rights disputes. I have been practicing labour, employment and human rights law for over 20 years.

First, let me say that CACE views this issue as an extremely important one. The advances that have been made in the area of genetic testing and genetic treatment for serious illnesses and conditions are nothing short of breathtaking. Clearly, it is in everyone's interest to ensure that people are able to take full advantage of these breakthroughs without fear of discrimination on the basis of genetic characteristics by employers or potential employers. However, the questions that CACE is asking are threefold. Firstly, given the current state of the law, is Bill S-201 necessary? Secondly, will it have unintended negative effects? And finally, will the Bill withstand constitutional scrutiny?

With regard to the first question – whether Bill S-201 is necessary – I think it is important to point out that there does not appear to be evidence of widespread discrimination in employment on the basis of genetic characteristics or requirements by employers to provide the results of genetic tests. Furthermore, it should be noted that every jurisdiction in Canada provides robust protection of both the privacy and human rights of employees and potential employees. In every province and territory and at the Federal level as well, employers are not permitted to discriminate against employees or candidates for employment on the ground of disability. In a decision rendered by the Supreme Court of Canada in 2000, the Court stated that a disability may be actual or perceived.[1] The case involved two job applicants who underwent pre-employment medical testing prior as a condition to being hired for jobs as a gardener-horticulturalist and a police officer with the City of Montreal. The medical tests revealed that the two applicants had anomalies of the spinal column. Despite the fact that the anomalies were asymptomatic and did not result in any physical problems or limitations of any sort, the two were not hired for the positions. The Supreme Court of Canada held that this constituted discrimination on the basis of disability, even though the applicants did not have any functional limitations and were totally asymptomatic. The Court held that the right to equality and protection against discrimination provided by human rights legislation throughout the country, cannot be achieved unless we recognize that discriminatory acts may be based as much on perception as on actual disability. The City of Montreal case on perceived disability has been applied by human rights tribunals and courts throughout the country despite the fact that it was based on Quebec's human rights legislation.

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[1] *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City); Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Boisbriand (City),* 2000 SCC 27, [2000] 1 SCR 665

As a result, an individual who has been denied a job on the basis of a genetic test that reveals a genetic abnormality which creates no functional limitations affecting the applicant's ability to safely do the job would have every right to complain under the applicable human rights legislation that he or she had been a victim of discrimination on the basis of perceived disability. Moreover, most employers are aware that they do not have the right to demand pre-employment medical screening unless two conditions are met: (1) the individual must have already been given a conditional offer of employment; and (2) the medical screening must be limited to tests for conditions that will prevent the worker from performing the requirements of the job safely.[2] Even then, employers do not have the right to ask for the diagnosis provided through the testing; they are permitted only to know whether the individual is fit to safely perform the requirements of the job, with or without accommodation.

In Canada, if a test reveals that someone has a functional limitation that will affect his or her ability to do the job, the employer cannot simply refuse to hire the candidate. Rather, according to a Supreme Court of Canada decision rendered in 1999, referred to as the Meiorin case[3], the employer must accommodate the individual's limitations unless to do so would cause the employer undue hardship. Thus, an individual with a genetic characteristic that has resulted in a physical or mental limitation could not be denied a job because of that limitation unless it was impossible for the employer to accommodate the individual for cost, safety or health reasons. The standard that employers are held to to justify a refusal to employ or to continue to employ people with disabilities is extremely high. Only when accommodation of the disabled individual will result in undue hardship will the employer be justified in refusing to hire or to continue to employ him/her.

With respect to individuals who currently hold a job and who fear that their employer may discriminate against them if the employer were to find out about the employee's genetic characteristics, the law is clear that employers do not have an unconditional right to full disclosure of the employee's medical situation. Generally speaking, medical information can only be required to establish an employee's fitness to work or to justify an absence for illness or disability related reasons.

For the most part, an employer is not entitled to the diagnosis but can ask about the expected length of disability and the prognosis for recovery; whether it is a temporary or permanent absence; and other information, such as work restrictions, to assist with accommodating a returning employee.

Recently, the Supreme Court of Canada has underscored the restricted right of employers to employees' medical information. In the Irving Pulp and Paper decision, rendered last year,[4] the Court indicated that random drug and alcohol testing of

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[2] *Milazzo v. Autocar Connaisseur Inc*., [2003] C.H.R.D. No. 24; see also: the Ontario Human Rights Commission's Policy on Pre-Employment Medical Testing at http://www.ohrc.on.ca/en/policy-drug-and-alcohol-testing/pre-employment-testing-drug-and-alcohol-use-part-employment-relatedmedical-examination, the Alberta Human Rights Commission's Policy at: http://www.albertahumanrights.ab.ca/employment/employer_info/hiring/pre-employment_medicals.asp and the Canadian Human Rights Commission's Policy at: http://www.chrc-ccdp.ca/sites/default/files/screen_1.pdf

[3] *British Columbia (Public Service Employee Relations Commission) v. BCGSEU,* [1999] 3 S.C.R. 3

[4] *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd*., 2013 SCC 34

employees in safety sensitive positions is not permitted unless there is clear evidence of widespread abuse of drugs and alcohol. The intrusion upon employees' private medical information was simply not justified by a categorical statement about the need for safety.

There are also legislated protections on how medical information can be collected, used and disseminated, including the Federal Protection of Personal Information and Electronic Documents Act, (PIPEDA) and provincial Privacy Acts that include special legislation for the use of medical information.

In a recent case involving PIPEDA,[5] the Assistant Privacy Commissioner of Canada considered a complaint brought by a former employee of a telecommunications company. In this case, the former employee alleged that that the employer was unnecessarily collecting personal medical information. To assist in the administration its long term disability program, the company required employees to file claim forms and medical reports with the employer's Human Resources office. The Assistant Privacy Commissioner concluded that the company was in violation of Privacy principles because the collection of employee medical information was not reasonably necessary. The disability plan was managed by a third-party insurance company and employees should have been able to submit their information directly to the insurer, without disclosing the information to the employer.

Finally, the Canada Labour Code prohibits "unjust dismissals" in Part III. This would, in most cases, extend to dismissals on the basis of genetic tests, unless a legitimate reason for such a decision existed. The reason would have to meet the requirements I've just reviewed under the Canadian Human Rights Act since that Act applies to all decisions made under the Canada Labour Code.

Based on this kind of analysis, CACE is of the view that the current legislation in Canada is sufficient to provide protection against intrusion on employee privacy, unjust dismissal and discrimination in employment and on the basis of genetic characteristics.

Furthermore, CACE worries that there are unintended negative consequences that may flow from the introduction of legislation like Bill S-201. The strict prohibition contemplated by the Bill against "genetic testing" or discrimination for genetic characteristics includes criminal penalties that go far beyond the penalties contemplated for other types of discrimination, including discrimination on the basis of disability. As such, genetic discrimination will be placed in a special category above other types of discrimination should this Bill be implemented. It sets up a hierarchy of rights, something that the Supreme Court of Canada has specifically rejected.

Another thing that worries employers is the lack of definition for the term "genetic characteristics". The term genetic characteristics is so broad it encompasses almost every human trait imaginable. Would traits like stubbornness, insubordination, insolence or other traits that formerly were the responsibility of the individual be considered

[5] PIPEDA Case Summary #2003-226, found at: https://www.priv.gc.ca/cf-dc/2003/cf-dc_031031_e.asp

"genetic characteristics" that cannot be helped and in relation to which employers would be forbidden from making any workplace decisions? We have had experience in Canada with the introduction of poorly defined terms in the CHRA such as "family status" which resulted in decades of costly litigation yielding contradictory results until clarity was finally achieved. In the interim, employers were uncertain how to deal with complaints of discrimination based on the ill or undefined term. It is absolutely critical that any prohibited ground of discrimination be clearly defined and understood. Vague definitions will lead to uncertainty, unnecessary disputes and endless litigation.

Finally, the revisions to the Canada Labour Code include a blanket prohibition on the use of genetic testing without the written permission of the employee. This may go beyond what is really needed to ensure privacy and freedom of choice. Currently, employees can refuse to undergo tests that are not relevant to job requirements and safety. Furthermore, if the tests reveal a need for accommodation, they cannot be fired unless the accommodation creates undue hardship. There may be circumstances in which a genetic test will assist in accommodating the employee and will ensure that he or she can safely perform the requirements of the job. Prohibiting employers from asking for those tests to be performed may be unnecessary and unhelpful. Recently, an arbitrator upheld an employer's right to ask employees to undergo a stress test for jobs that made heavy cardiovascular demands on workers.[6] The union argued that requiring a stress test was discriminatory and employees should not be required to submit to the test, but the arbitrator disagreed. He found the test was helpful to avoid cardiac arrest and death in the workplace. The same may well be true of some genetic tests. The requirements under the CHRA would prevent employers from demanding such tests when they are not justified.

Our last concern is that the Bill might not pass constitutional muster as it would appear to trench heavily on the provinces' jurisdiction under s. 92(13) of the Constitution Act, 1867. That provision grants the provinces the right to legislate on matters of property and civil rights. Contracts, insurance and employment in provincially regulated companies fall within provincial jurisdiction, generally speaking.

The issue of genetic testing and discrimination on the basis of genetic characteristics is an important one that is certainly garnering much attention of late. However, if there are to be modifications of complex legislation such as the Canada Labour Code and the Canadian Human Rights Act that have a profound impact on labour and employment relations in Canada, stakeholders should first be consulted. We must be careful not to import legal restrictions and systems from places like the United States, where access to basic health care is very much related to employment. Such is not the case in Canada. Furthermore, we have legal protections in place in Canada that may obviate the need for legislation like this that has the potential to do more harm than good.

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[6] *Resource Development Trades Council of Newfoundland and Labrador v Long Harbour Employers Association Inc*., 2013 CanLII 62193 (NL LA).