

Insurance

Genetic Non-Discrimination Act creates fundamental change for insurance industry

By **Amanda Jerome**

(May 11, 2017, 8:23 AM EDT) -- Genetic discrimination is now banned in Canada. As of May 4, the *Genetic Non-Discrimination Act* bars anyone from requiring a person to take a genetic test or to reveal the results of one for the purpose of providing goods, services or entering into a contract.

"Unfortunately, the collection of personal information, including sensitive genetic information, can result in discrimination down the road," said Privacy Commissioner Daniel Therrien in a statement. "In a time of unprecedented demand for personal data, this new law adopted by Parliament is a critically important development for privacy protection."

According to Tobi Cohen, spokeswoman for the Office of the Privacy Commissioner, identifying "the body" as information became a key strategic privacy priority for the commissioner's office a couple of years ago.

"The term is used to describe privacy concerns surrounding the increased use of highly sensitive health, genetic and biometric information," she explained. "As the connections between information technology, geolocation technology and the human body become integrated through smart devices and the Internet of Things, personal information has become more intimately sensitive than ever and the potential privacy incursions may become greatly amplified. The exploitation of this information for commercial profit-making motives or to assist government surveillance efforts, may adversely affect not only our right to privacy in respect of our personal information, but our bodily integrity and our very dignity as human beings."

The act also amends the *Canada Labour Code* in order to protect employees from having to undergo or disclose the results of a genetic test, as well as the *Canadian Human Rights Act* to "prohibit discrimination on the ground of genetic characteristics."



Brent Mizzen, Canadian Life and Health Insurance Association Inc.

Brent Mizzen, assistant vice-president of underwriting and policy at the Canadian Life and Health Insurance Association Inc., said lawyers who practise in the area of life and health insurance will

need to be aware of this new law, both in relation to underwriting and in the context of claims, so they can advise their clients accordingly.

"The law is inconsistent with the principle of 'equal information' which ensures that a person applying for insurance and the insurer have equal information about the benefits being promised and the risks being assessed," he said. "As this is a fundamental change for the industry, insurers will have to make significant changes to business practices, procedures and operations as a result of the new act. The industry will need to also provide education to its employees and advisers to ensure they are aware of the new law and its requirements."

Mizzen said the legislation is not really necessary to protect an individual's privacy.

"Private sector privacy legislation in British Columbia, Alberta and Quebec as well as the federal *Personal Information Protection and Electronic Documents Act*, which applies in the remaining provinces and territories, already provide for protection of any personal information of individuals — including genetic testing information — when insurers collect, use or disclose such information."

Marie-Claude Landry, chief commissioner of the Canadian Human Rights Commission, as well as the Privacy Commissioner have acknowledged that the government may refer the new law to the Supreme Court of Canada to see if the act is constitutional. Until that time, the act will remain in place as current law.

"The minister of Justice and the prime minister, along with several provinces have expressed the view that the law is unconstitutional," said Mizzen. "We agree with this view. Given the concerns with the law's constitutionality, the minister of Justice has indicated that the law will be referred to the Supreme Court of Canada to obtain its views. The Supreme Court's views would bring important clarity regarding the validity of the act."



Nicole Mangan, Richard Buell Sutton LLP

Nicole Mangan, a partner at Richards Buell Sutton LLP with experience in insurance law, thinks the act will affect the work insurance lawyers do in the sense that the wide language used in the act has the potential to impact all types of clients.

"We have to be ready to advise our clients on this law, its impact and the potentially significant consequences for failing to comply," she said.

Mangan said that effectively assessing risk is critical for the insurance industry and that genetic testing is one way to assess the risk of insuring an individual who is applying for health insurance or life insurance.

"Insurers would argue that they often ask those applying for such insurance to undergo a range of tests and to disclose information about their medical history, therefore, requiring genetic testing, or receiving the results of any testing that has occurred, is simply part of how they conduct their business," she said, adding that some might argue that denying insurers the right to receive genetic test information will mean higher premiums spread across all customers instead of those premiums being paid by those who pose the greatest risk.

"Insurance law, generally speaking, requires applicants for an insurance policy to honestly provide all required information so the insurer can fairly assess the risk and the appropriate premium. However, this act creates the risk a person will know they are predisposed to a particular condition and be able to go buy insurance without ever disclosing the information they know to the insurer," explained Mangan.

"Critics of the insurance industry's arguments suggest that a person aware they are predisposed to a certain condition might take a range of preventative measures and actually pose less risk of eventually suffering from a potential condition than might otherwise have been the case. They also say that a person who would otherwise choose not to undergo genetic testing should not be forced to do so."

Mangan also thinks there is a constitutional issue with the law.

"The reason the Liberal government is concerned about the constitutionality of this act is that some industries are regulated by the provinces and some by the federal government," she said. "The act prohibits requiring testing for the provision of any goods or services regardless of whether that industry is provincially regulated. Insurance is a good example of a provincially regulated industry.

"That said, the penalties for violating this act are significant and the federal government has, at times, been able to justify legislation that imposes on an area that is typically under provincial jurisdiction relying on the argument that their power in the area of criminal law can be used to regulate things like food," she added.

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