SCC File No.: 37524

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA)

BETWEEN:

HER MAJESTY THE QUEEN IN RIGHT OF BRITISH COLUMBIA
APPELLANT
(Applicant)

- and –

PHILIP MORRIS INTERNATIONAL, INC.
RESPONDENT
(Respondent)

FACTUM OF THE APPELLANT
(HER MAJESTY THE QUEEN IN RIGHT OF BRITISH COLUMBIA, APPELLANT)

(Pursuant to Rule 42 of the Rules of the *Supreme Court of Canada)*

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PART I - OVERVIEW & STATEMENT OF FACTS

A. Overview

1. This is an appeal from an Order of the British Columbia Court of Appeal[1] affirming an Order of a Chambers Judge of the British Columbia Supreme Court[2] compelling Her Majesty the Queen in Right of British Columbia to produce to Philip Morris International, Inc. electronic health care databases which contain health care information of every person in British Columbia who has received health care benefits. These databases include individual-level records of every hospital, medical and other health care attendance, diagnosis and treatment provided during the past 25 years to each insured person.

2. The decisions of the British Columbia Courts are contrary to the *Tobacco Damages and Health Care Costs Recovery Act*[3] (the *Act*), under which this statutory action is brought. They also are contrary to an earlier decision of this Court[4] which upheld the constitutional validity of the *Act*, and to a decision of the New Brunswick Court[5] under congruent legislation.

3. The primary issue is whether the health care databases are "the health care records and documents of particular individual insured persons or the documents relating to the provision of health care benefits for particular insured persons" which s. 2(5)(b) of the *Act* states are "not compellable" subject to two exceptions neither of which are applicable to this appeal.

4. The Chambers Judge ordered that "the individual-level data from the databases … as well as the Ministry of Health decision support systems, with names and other personally identifying information removed…" be produced "… in a way that allows linkage of the databases...." A

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[1] *HMTQ v. Philip Morris International, Inc*., 2017 BCCA 69 ("*BCCA Reasons*"). [*Appellant's Record ("AR") Vol I Tab 1C*]

[2] *HMTQ v. Imperial Tobacco Canada Limited,* 2015 BCSC 844 ("*BCSC Reasons*"). [*AR Vol I Tab 1A*]

[3] S.B.C. 2000 c. 30 (the "*Act*").

[4] *British Columbia v. Imperial Tobacco Canada Ltd*., 2005 SCC 49 ("*SCC Reasons"*).

[5] *Her Majesty the Queen in Right of the Province of New Brunswick v. Rothmans Inc*., 2016 NBQB 106 ("*Rothmans*") [BOA Tab 1], leave to appeal denied 2016 CanLII 50140 (NB CA); leave to appeal to S.C.C. denied 2017 CanLII 2715 (SCC).

secondary issue, therefore, is whether the health care databases can be rendered compellable by ordering the removal of names and other identifiers.

5. The final issue is whether, notwithstanding legislation that states that individual health care records and documents are not compellable, a court can compel production as a means to satisfy a defendant's, or the judiciary's view, of "trial fairness." Regardless, the provisions of the *Act* are fair, balancing the protection of privacy of individuals - not party to this litigation - with fairness to the litigants.

B. Statement of Facts

(i) The Statutory Aggregate Action

6. This is a statutory action pursuant to s. 2(1) and s. 2(4)(b) of the *Act* which gives the government the right to bring an action against tobacco manufacturers for recovery of the cost of health care benefits provided to treat tobacco related disease.

7. This is a direct and distinct statutory action (not a normal tort action) with specific rules of evidence and of civil procedure.[6]

8. Under the *Act* the government may either recover the cost of health care benefits for particular individual insured persons or on an aggregate basis for a population of insured persons. This action is brought pursuant to s. 2(1) and s. 2(4)(b) of the *Act* to recover the cost of health care benefits on an aggregate basis.

9. Section 2 of the *Act* states:

> 2(1) The government has a direct and distinct action against a manufacturer to recover the cost of health care benefits caused or contributed to by a tobacco related wrong.
>
> (2) An action under subsection (1) is brought by the government in its own right and not on the basis of a subrogated claim.
>
> (3) In an action under subsection (1), the government may recover the cost of health care benefits whether or not there has been any recovery by other persons

[6] *SCC Reasons* at paras 4-14, 55 and 76.

> who have suffered damage caused or contributed to by the tobacco related wrong committed by the defendant.
>
> (4) In an action under subsection (1), the government may recover the cost of health care benefits
>
> (a) for particular individual insured persons, or
>
> (b) on an aggregate basis, for a population of insured persons as a result of exposure to a type of tobacco product.

10. This action is not brought on behalf of particular individual insured persons. It is not for the recovery of health care costs at an individual level. It is for the recovery by the government of the "cost of health care benefits" being the total expenditure by the government resulting from tobacco related disease on an aggregate basis for the population.[7]

11. In this statutory aggregate action specific privacy protection is mandated by the *Act*. Subsection 2(5) provides:

> (5) If the government seeks in an action under subsection (1) to recover the cost of health care benefits on an aggregate basis,
>
> (a) it is not necessary
>
> (i) to identify particular individual insured persons,
>
> (ii) to prove the cause of tobacco related disease in any particular individual insured person, or
>
> (iii) to prove the cost of health care benefits for any particular individual insured person,
>
> (b) the health care records and documents of particular individual insured persons or the documents relating to the provision of health care benefits for particular individual insured persons are not compellable except as provided under a rule of law, practice or procedure that requires the production of documents relied on by an expert witness,
>
> (c) a person is not compellable to answer questions with respect to the health of, or the provision of health care benefits for, particular individual insured persons,
>
> (d) despite paragraphs (b) and (c), on application by a defendant, the court may order discovery of a statistically meaningful sample of the documents

[7] See *Act*, s. 2(1), s. 2(4)(b) and s. 1(1) "cost of health care benefits."

> referred to in paragraph (b) and the order must include directions concerning the nature, level of detail and type of information to be disclosed, and
>
> (e) if an order is made under paragraph (d), the identity of particular individual insured persons must not be disclosed and all identifiers that disclose or may be used to trace the names or identities of any particular individual insured persons must be deleted from any documents before the documents are disclosed.

12. The *Act* contemplates the use of statistical evidence. Section 5 states:

> Statistical information and information derived from epidemiological, sociological and other relevant studies, including information derived from sampling, is admissible as evidence for the purposes of establishing causation and quantifying damages or the cost of health care benefits respecting a tobacco related wrong in an action brought
>
> …
>
> (b) by the government under section 2(1).

(ii) The *Act*'s Privacy Protection

13. Under s. 2(5)(b) the health care information of particular individual insured persons is protected by rendering their health care records and documents not compellable:

> (b) the health care records and documents of particular individual insured persons or the documents relating to the provision of health care benefits for particular individual insured persons are not compellable… .

14. Two categories of documents are not compellable: (i) records and documents of particular individual insured persons; as well as (ii) documents relating to the provision of health care benefits for particular individual insured persons.

15. The *Act* provides only two exceptions to the privacy protection of s. 2(5)(b). The first is contained in s. 2(5)(b) itself and provides that the health care records and documents are not compellable "except as provided under a rule of law, practice or procedure that requires the production of documents relied upon by an expert witness." The second exception is contained in s. 2(5)(d) and permits, on application by a defendant, the Court to order discovery of a statistically meaningful sample of the documents referred to in s. 2(5)(b).

16. If an order is granted in an application for a statistically meaningful sample of the documents, "the identity of particular individual insured persons must not be disclosed and all identifiers that disclose or may be used to trace the names or identities of any particular individual insured person must be deleted from any documents before the documents are disclosed." Thus, an order made pursuant to s. 2(5)(d) for a statistically meaningful sample of documents shall require that identifiers and potentially identifiable information not be disclosed.

(iii) Legislative History

17. The original *Tobacco Damages and Health Care Costs Recovery Act*,[8] contained no equivalent privacy protection but when it was replaced by the *Tobacco Damages Recovery Amendment Act*,[9] it included in s. 13(1) a nearly identical provision to the current s. 2(5)(b). Then Minister of Health, Penny Priddy, in a speech to the Legislative Assembly stated:

> Examination and production of documents relating to individuals will be limited to a statistically meaningful sample of those documents. Fairness is ensured by giving the court the discretion to determine what is statistically meaningful. So it will be at the discretion of the court to know what is a meaningful sample of documents. At trial, all documents relied on by any expert witness called by either the government or a defendant must be produced. Privacy of individuals will be protected by requiring the government to delete any personal identification from all information which is disclosed.[10]

(iv) Constitutional Challenge

18. The defendants previously attacked the *Act* on constitutional grounds. In that dispute Holmes J. of the British Columbia Supreme Court endorsed a privacy-focused view of s. 2(5)(b)'s purpose, finding that "the reason for the blocking provisions is the public interest in protection of confidentiality of sensitive personal information and respect of an individual's privacy."

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[8] S.B.C. 1997 c. 41.[BOA Tab 4]

[9] *Tobacco Damages Recovery Amendment Act*, 1998, Bill 30-1998[BOA Tab 5]

[10] British Columbia, Legislative Assembly, *Debates* vol. 12, No. 11, 3rd Sess., 36th Parl., July 29, 1998, at pp 10712-10713 [BOA Tab 2], at p 10713. A Minister's comments in the legislature can be considered as evidence of legislative intent: *Re. Rizzo & Rizzo Shoes*, [1998] 1 SCR 27 at paras 34 and 35; Ruth Sullivan, Sullivan on the Construction of Statutes, 6th ed (Markham, ON: LexisNexis Canada Inc., 2014) ("Sullivan") at p 691.[BOA Tab 3]

> [80] I do not accept the manufacturers view that the intent of the blocking provisions is to keep from them relevant and necessary information to their defence, and to unfairly increase the government's prospect of success. I prefer the view that the reason for the blocking provisions is the public interest in protection of confidentiality of sensitive personal information and respect of an individual's privacy. That purpose must be a matter of concern and weigh in the balancing of interests. The Attorney General notes examples of other statutory protection of privacy rights are present in the Evidence Act, R.S.B.C. 1996, c.124 regarding information developed by a hospital inquiry committee [s. 51], and the Statistics Act, R.S.B.C. 1996 c.439 with respect to probability of disclosure of identifiable individual information [ss. 9 and 10].
>
> [81] The common law has also evolved to afford greater concern to individual privacy rights in the context of civil litigation. The issue in similar context to that presented here has been the subject in several cases in the United States in which judicial crafting occurred to provide maximum protection of individual confidentiality and privacy but to also provide where required, a method of limited access to persons or information.[11]

19. Specifically, the defendants attacked the constitutionality of s. 2(5) and s. 3(2) of the *Act*. In a unanimous decision this Court stated:

> 48. The appellants submit that the Act violates judicial independence, both in reality and appearance, because it contains rules of civil procedure that fundamentally interfere with the adjudicative role of the court hearing an action brought pursuant to the Act. They point to s. 3(2), which they say forces the court to make irrational presumptions, and to ss. 2(5)(a), 2(5)(b) and 2(5)(c), which they say subvert the court's ability to discover relevant facts. They say that these rules impinge on the court's fact-finding function, and virtually guarantee the government's success in an action brought pursuant to the Act.[12]

20. Philip Morris International's arguments on this appeal were made previously on the constitutional appeal. The arguments that the *Act*'s privacy protection provisions subvert "the court's ability to discover relevant facts" and that the *Act* is "unfair" were rejected. This Court concluded:

> …. The fact that the Act shifts certain onuses of proof or limits the compellability of information that the appellants assert is relevant does not in any way interfere, in either appearance or fact, with the court's adjudicative role or any of the

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[11] *HMTQ v. Imperial Tobacco Canada Limited et al.*, 2003 BCSC 877 at paras 80 and 81.
[12] *SCC Reasons* at para 48.

essential conditions of judicial independence. Judicial independence can abide unconventional rules of civil procedure and evidence.[13]

(v) The Health Care Databases

21. The heath care databases ordered produced to Philip Morris International contain records of particular individual insured persons for each health care service they each receive. The databases are not statistical aggregates of data. They are individual entries with individual level personal data. The data is organized in rows and columns. Each row (or record) contains information about a particular individual insured person. The columns (or fields) contain specific information about a particular characteristic. The databases are electronic versions of hospital admissions, physician visits, prescriptions, and other health records and documents for every insured person in the province. These databases: (a) record and document attendances, diagnoses and treatment of every hospital admission and physician visit for each insured person during the years that the databases have been maintained, as well as other health care encounters; (b) contain personal health information on every person in the province who has been provided health care benefits; and (c) are comprised of documents relating to the health care of, and to the provision of health care benefits for, each particular individual insured person.[14]

22. The Discharge Abstract Database contains an electronic entry of the records of each patient who has attended at a hospital in British Columbia during the past three decades. It contains numerous entries from the hospital for each patient for each attendance. It includes fields that specify diagnostic and treatment information. It includes demographic and hospitalization information for each particular individual insured person, such as the person's personal health number, birthdate, education, employment status, admission date, length of stay, investigations, diagnoses, treatment, discharge date and disposition. It also can include health history information, such as previous pre-term deliveries, spontaneous abortions, live births, and suicide attempts or previous psychiatric admissions. The database includes other personal health

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[13] *SCC Reasons* at para 55.

[14] Affidavit #1 of Gordon Stodola, made October 4, 2011 ("Stodola #1") at para 8 [*AR Vol II Tab 3C, p 230*]; Affidavit #1 of Kelly Moran, made March 18, 2015 ("Moran #1") at paras 4-16 [*AR Vol IV Tab 3G, pp 173-174*]; Affidavit #1 of Dr. Jonathan Berkowitz, made September 2, 2011 ("Berkowitz #1") at Exhibit "A" pp 8 and 9 [*AR Vol II Tab 3A, pp 10 - 11*]; Affidavit #1 of Karen MacMillan, made October 5, 2011 ("MacMillan #1") at Exhibits "C", "D" and "E". [*AR Vol III Tab 3D, pp 14-47*]

information of each particular individual insured person, and information on the medical professionals who provided health care during the hospital attendance.[15]

23. The Medical Services Plan database includes information regarding all payments made for professional medical services, including physician, laboratory and diagnostic services. It contains records of patients who have had medical services provided by a covered practitioner and includes fields that provide particular information on those services (e.g. service provided, fees paid and disease classification) and administrative information. It also contains identifying information on the service provider as well as the personal health information of the particular individual insured persons.[16]

24. The Pharmacare Database contains information on prescriptions for eligible insured persons. It includes information each time a prescription is filled. It includes demographic information on the insured person, information on the prescription, including the drug number, date and quantity dispensed, number of days of treatment, and identifies the prescribing practitioner.[17]

25. The Home and Community Care Database is comprised of information on each particular individual insured person who is in a publicly-funded long-term care facility, in an assisted living facility, in a family care home or a group home, or is in adult daycare programs, or is receiving home care and home support services. It includes the individual's demographic and financial information, as well as information on the care recommended and approved, and the

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[15] Berkowitz #1, at Exhibit "A" p 8 [*AR Vol II Tab 3A, p 10*]; Stodola #1 at para 8, [*AR Vol II Tab 3C, p 230*]; MacMillan #1, Exhibit "C" pp 13-19, [*AR Vol III Tab 3D pp 21-27*]; Affidavit #1 of Monique Sever, made September 2, 2011 ("Sever #1") at Exhibit "E" - CIHI DAD Master File Layout (2007).xls [*AR Vol II Tab 3B, pp 120-155*] and Sever #1 at Exhibit "D". [*AR Vol II Tab 3B, pp 117-118*]

[16] Berkowitz #1 at Exhibit "A" p 8 [*AR Vol II Tab 3A, p 10*]; Stodola #1 at para 8 [*AR Vol II Tab 3C p 230*]; MacMillan #1, Exhibit "C" pp 9-12 [*AR Vol III Tab 3D, pp 17-20*]; Sever #1 at Exhibit "E" - MSP Genesis data dictionary [*AR Vol II Tab 3B, pp 156-172*] and Sever #1 at Exhibit "D". [*AR Vol II Tab 3B, pp 117-118*]

[17] MacMillan #1, Exhibit "C" at pp 23-25. [*AR Vol III Tab 3D, pp 31-33*]

insured person's outcome. It also includes information on the facility and level of care provided.[18]

26. The other databases cover a spectrum of health care and personal health information, including mental health information.[19]

27. The "decision support systems" are data warehouses that incorporate the various databases.[20]

28. None of the databases or "decision support systems" is comprised of aggregated data. They each contain particular information for each person for each health care encounter and disposition during the years the data is stored electronically.

29. The government is the plaintiff in this action and, as required under the British Columbia Rules of Court, has produced hundreds of thousands of government documents to the defendants.[21] Included in these productions are documents which include population based reports. In contrast, the databases contain each person's individual-level personal health information. They are not litigants and their personal health information must be protected.

30. The government has entered into an agreement with Statistics Canada and defendants other than the Philip Morris defendants whereby the health care databases are linked to Statistics Canada survey data which includes information on smoking. The data is available for analysis in Statistics Canada Research Data Centres with required protections. The experts for the government and for the signatory defendants have the same access and are subject to the same restrictions.[22]

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[18] MacMillan #1, Exhibit "C" at pp 26-30. [*AR Vol III Tab 3D, pp 34-38*]
[19] Moran #1 at paras 5-16. [*AR Vol IV Tab 3G, pp 173-174*]
[20] Moran #1 at paras 5-7. [*AR Vol IV Tab 3G, p 173*]
[21] Affidavit of Scott Riddell sworn December 16, 2011 at paras 2-3. [*AR Vol IV Tab 3F, p 165*]
[22] Affidavit #1 of Brian Etheridge sworn March 27 2015 ("Etheridge #1") at Exhibit "A" - Statistics Canada Agreement. [*AR Vol IV Tab 3H, pp 180-234*] In *Rothmans* the Court found at para 45 that the Statistics Canada Agreement was "reasonable in the circumstances…The

(vi) The Decisions of the British Columbia Courts

31. The Chambers Judge held that the privacy protection of s. 2(5)(b) extends only to the original records and documents created by medical professionals but not to the electronic databases into which the information from those records and documents has been entered. The Chambers Judge stated:

> "[t]he purpose of s. 2(5)(b), therefore is to limit compellability to the material that is relevant and admissible in the aggregate claim and exclude only the original medical documents and records that would be admissible in an individual claim."[23]

32. The Court of Appeal stated:

> …while the databases may well contain information drawn from the health care records of particular individual insured persons, they are of a very different character from particular individual health records and documents….[24]

33. The Court of Appeal, in upholding the decision of the Chambers Judge, made clear its intention to level the litigation playing field in order to ensure its view of trial fairness:

> [37] …. Trial fairness requires the production of the databases.
>
> [39] The Act establishes the playing field on which this litigation is to be contested. It cannot have been the intention of the Legislature for the playing field to be tipped unfairly in the Province's favour….[25]

(vii) The Decisions of the New Brunswick Courts

34. In interpreting the identical provisions in the New Brunswick legislation, the New Brunswick Court of Queen's Bench held that the health care databases are documents relating to the provision of health care benefits and are not compellable. This Court denied leave to appeal from the New Brunswick Court of Appeal's denial of leave. The New Brunswick Court held:

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record discloses that the restrictions which will be imposed on any expert accessing the data are standard and appropriate for such data, and do not impair rigorous statistical analysis."

[23] *BCSC Reasons* at para 50. [*AR Vol I Tab 1A, p 15*]
[24] *BCCA Reasons* at para 35. [*AR Vol I Tab 1C, pp 37-38*]
[25] *BCCA Reasons* at paras 37 and 39. [*AR Vol I Tab 1C, p 38*]

> [30] The *Act* expressly provides that in an aggregate action, it is not necessary to identify particular individual insured persons or to prove the cause of tobacco-related disease in any of those persons, as well it is not necessary to prove the cost of health care benefits paid for any of those persons.
>
> [31] Moreover, the privacy of individual insured persons is protected by paragraph 2(5)(b) which expressly provides that neither health care records and documents, nor documents relating to their health care benefits are compellable.
>
> [32] The statute does not provide a discretion to the court to order production of any documents which is, under the wording of paragraph 2(5)(b), not compellable.[26]

35. The Court held that the databases are documents and that "… deleting certain identifiers or even all identifiers will not alter the fact that the database is a document, nor will it alter the fact that the databases sought contain health records that relate to the provision of 'health care benefits' defined under the *Act* to include hospital, medical and other services."[27] Nor does it mean that the records and documents cease to be records and documents of particular individual insured persons.[28]

36. The Court further held:

> [43] The order sought by the Moving Defendants would render paragraphs 2(5)(d) and (e) of the *Act* and the privacy protection provisions meaningless and redundant. Moreover, to do so would render paragraph 2(5)(d) meaningless for there would never be a need to request a statistically meaningful sample.[29]

37. Leave to appeal was denied by the New Brunswick Court of Appeal and by this Court.[30]

PART II – ISSUE FOR APPEAL

38. This appeal raises the following issue:

> Did the British Columbia Courts err in ordering, notwithstanding the privacy protections of the *Act*, production of the databases containing personal health care information of the residents of British Columbia? In particular:

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[26] *Rothmans* at paras 30-32.
[27] *Rothmans* at para 41.
[28] *Rothmans* at para 42.
[29] *Rothmans* at para 43.
[30] *Rothmans*, leave to appeal to N.B. C.A. denied 2016 CanLII 50140; leave to appeal to S.C.C. denied 2017 CanLII 2715.

A. Are the health care databases either "health care records and documents of particular individual insured persons" or "documents relating to the provision of health care benefits for particular individual insured persons" and therefore not compellable under the *Act*?

B. Does an order removing the names or other identifiers from the databases mean that they are no longer either "health care records and documents of particular individual insured persons" or "documents relating to the provision of health care benefits for particular individual insured persons"?

C. Does a court have an overriding discretion, notwithstanding the privacy protections of the *Act*, to order production of the health care databases on the basis of "trial fairness"?

PART III - STATEMENT OF ARGUMENT

A. Health care databases are either "health care records and documents of particular individual insured persons" or "documents relating to the provision of health care benefits for particular individual insured persons" and therefore are not compellable under the *Act*.

39. A health care database is a document. A health care database is also a "record" and contains "records."

40. The British Columbia *Interpretation Act* applies to every enactment unless there is a contrary intention.[31] The *Interpretation Act* states that "record" includes "books, documents, maps, drawings, photographs, letters, vouchers, papers **and any other thing on which information is recorded or stored by any means whether** graphic, **electronic**, mechanical or otherwise".[32] There is no evidence of a contrary intention. As such, the directly applicable definition of "record" explicitly states that information stored by electronic means, i.e. the databases, are a record.

41. In addition, the British Columbia Rules of Court state in R. 1-1 (1) that "document" "has an extended meaning and includes a photograph, film, recording of sound, any record of a

[31] R.S.B.C. 1996, c. 238, s. 2 (the "*Interpretation Act*").
[32] The *Interpretation Act*, s. 29.

permanent or semi-permanent character and **any information recorded or stored by means of any device**".[33]

42. Therefore, pursuant to s. 2(5)(b) of the *Act*, health care databases are not compellable if they are either (i) of particular individual insured persons, or (ii) relating to the provision of health care benefits for particular individual insured persons.

43. The health care databases in issue are comprised of individual-level data and contain both health care information, including health care history, diagnoses and treatment, as well as information relating to the provision of health care benefits, for particular individual insured persons.

44. The British Columbia Courts limited the privacy protection of s. 2(5)(b) to only original hard copy health care records and documents, notwithstanding that the data entries in the health care databases are from hospital, medical, pharmacy and other health care records and providers.

45. The information contained in the databases is derived from health care records and documents. Merely converting the personal medical information contained in the hard copy records and documents into electronic form and storing the information in a medical database does not either change the information or make it any less personal.[34] The British Columbia Courts made their decision on the basis of form (electronic databases versus hard copies), not substance (the information contained within those databases).

46. To hold that s. 2(5)(b) only applies to original health care records, which would be compellable in an individual's personal injury tort action, is contrary to the words and structure of the *Act*. Both health care records and documents are not compellable. Documents relating to the provision of health care benefits are also not compellable.

47. Health care benefits, necessarily, are provided by the government. While practitioners render health care, it is the government that provides health care benefits.

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[33] See also *Animal Welfare International Inc. v. W3 International Media Ltd*., 2011 BCSC 299 at para 32; and *Andersen v. St. Jude Medical, Inc*., 2008 CanLII 29591 (Ont SC) at paras 15 and 23.

[34] *Rothmans* at paras 52- 54. See also the discussion above under the heading "Health Care Databases" in Part B Statement of Facts.

48. The British Columbia Courts failed to consider that the health care databases relate to the provision of health care benefits. They are documents stating, albeit in electronic form, the hospital, medical and other services provided to particular individual insured persons, and providing information on the service provider.

49. The government's interpretation is consistent with the scheme of the section, the purpose and object of the *Act*, and the intention of the legislature.[35] The section states that in an aggregate action such as this one, it is not necessary to identify particular insured persons nor to prove the cause of tobacco related disease in any particular individual insured person.[36] Therefore, it is consistent that health care databases containing such information are not compellable.

50. In addition, the *Act* expressly contemplates the compelled disclosure of a statistical sample of documents;[37] there would be no need to provide for such information to be disclosed if the databases at issue were able to be disclosed. As set out further below, the interpretation of the British Columbia Courts would render this provision, and the other express exception set out in the *Act*, meaningless. It is a well-accepted principle of statutory interpretation that courts should avoid adopting interpretations that render any part of a statute meaningless, pointless or redundant.[38]

51. The intention of the legislature is also clear from a plain reading of the *Act*: health care records or documents (the definitions of which include the databases) are not compellable unless they fall within one of the exceptions of the *Act.* This is supported by the comments of the Minister of Health, set out above, which can be admissible as evidence of legislative intent.[39]

52. On a plain reading of s. 2(5)(b), read in its grammatical and ordinary sense harmoniously with the scheme of the section, with the object of the *Act*, and with the intention of the legislature, the government health care databases are records or documents relating to the

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[35] *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42 ("*Bell*") at paras 26-29.
[36] The *Act*, s. 2(5)(a).
[37] The *Act*, s. 2(5)(d).
[38] *R. v. Proulx*, [2000] 1 SCR 61 at para 28; *Winters v. Legal Services Society*, [1999] 3 SCR 160 at para 48: "…all words in a statute must be given meaning".
[39] *Supra* note 10.

provision of health care benefits for particular individual insured persons and are not compellable.[40] The only circumstances in which they are compellable are the two expressly set out in the *Act*, neither of which are applicable to this appeal.

B. An Order removing the names or other identifiers from the databases does not mean that they are no longer "health care records and documents of particular individual insured persons" or "documents relating to the provision of health care benefits for particular individual insured persons."

53. In ordering that the health care databases be produced the British Columbia Courts distinguished them from the original hard copy health care records and documents from which the databases are derived.

54. The Chambers Judge held that the "individual level statistical entries contained in the databases at issue, provided that names and other information that would identify 'particular individuals' are removed, are not the 'records and documents' referred to in s. 2(5)(b) and must be discoverable."[41] In so doing, the Chambers Judge conflates the concept of "identifiable" with "particular." The Chambers Judge reasoned that if a database does not refer to an identified person, it does not refer to a particular person. This reasoning does not take into account the fact that health care benefits are provided to particular persons whether identifiable or not. This flawed reasoning also permitted the Chambers Judge to by-pass the privacy protection of s. 2(5)(b).

55. The word "particular" is used throughout the *Act* and is distinguishable from "aggregate" which forms the basis of the government's claim in this action.[42] The databases are not an aggregation of data from the population or even a group of individuals. They are comprised of electronic entries of the particular individual insured person's health care records and other information relating to the services and benefits received by that person. They are documents and

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[40] *Bell* at para 40.
[41] *BCSC Reasons* at para 55. [*AR Vol I Tab 1A, pp 16-17*]
[42] It is a principle of statutory interpretation that one must attribute meaning to all the words in a statute and that different words have different meanings: *R. v. Barnier,* [1980] 1 SCR 1124 at para 11.

records in electronic form of that person's health care (diagnosis and treatment) and the provision of health care benefits to that person at the individual level.

56. These databases are not the sum of the parts for a population, or even for a group of individuals within a population. They are recorded and stored on a particular individual, and not on an aggregate, basis. As found by the British Columbia Court of Appeal: "Each row (or record) contains information about a particular individual…".[43]

57. "Particular" is not synonymous or interchangeable with "identified" or "identifiable." It means specific or distinct.[44] This ordinary meaning is consistent with the Legislature's intent for s. 2(5)(b) to apply to individual-level information.

58. If the defendants have access to all of the private medical information contained in the databases, there would never be any need to seek an order for production of a statistically meaningful sample as provided in s. 2(5)(d).[45] It could not have been the intention of the legislature to insert sections in the *Act* that have no meaning or use, and there is a presumption against any interpretation that effects such a result.[46]

59. Moreover, if all it takes to render the health care databases compellable is to remove the names and other identifiers there would be no need for the *Act* to stipulate in paragraph 2(5)(e) that if an Order is made for a statistically meaningful sample under s. 2(5)(d) "the identity of particular individual persons must not be disclosed and all identifiers that disclose or could be used to trace the names or identities of any particular individual insured person must be deleted."

60. Interpreting the provision so that the exceptions are rendered meaningless violates the statutory principle that each legislative component is there for a reason. It is an accepted principle of statutory interpretation that:

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[43] *BCCA Reasons* at para 7. [*AR Vol I Tab 1C, p 28*]

[44] Oxford Online Dictionary: Particular: "Used to single out an individual member of a specified group or class. Synonyms: specific, certain, distinct, separate, isolated, single, individual, peculiar, discrete, definite, express, precise.

[45] *Rothmans* at para 43.

[46] *Supra* note 38.

> …each Act, each part or division, each provision, each legislative component is there for a reason, which may relate to the primary goals of the legislation, to secondary policies or principles, or to the coherent operation of the legislative scheme. Sophisticated purposive analysis takes these multiple and shifting perspectives into account. [47]

61. If "particular" were interpreted as synonymous with "identified," s. 2(5)(a)(i) would absurdly read as "it is not necessary to identify [identified] individual insured persons." The identification of a particular person is not the defining feature; rather the defining feature is that the records or document are those of, or relating to, particular (specific, distinct) individual insured persons.

62. Even in the case of a statistically meaningful sample (which is all that can be produced under the *Act*), it is not sufficient to merely remove names or other identifiers. Identifiable information[48] must be deleted. In contravention of the explicit wording of the *Act*, the Chambers Judge ordered that the databases in their entirety be linked, or that "unique identifiers" be provided to permit linkage, such that any individual could be traced across the various databases.

63. The Chambers Judge found that if "personally identifying information" were removed from health care databases which contain individual-level records, then there was no possibility of an invasion of privacy. This finding ignores the fact that individual level health records are intrinsically personal (even with identifiers removed) and require rigorous protection.[49]

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[47] Sullivan at p. 269. [BOA Tab 3]

[48] See *Act* s. 2(5)(e) "all identifiers that… may be used to trace the names or identities of any particular individual insured persons…" See also federal *Statistics Act*, R.S.C., 1985, c. S-19 at s. 17(1)(b) "…no person … shall disclose… …in such a manner that it is **possible** from the disclosure to relate the particulars … to any identifiable individual person…" [emphasis added]; Etheridge #1, Exhibit "A" - Statistics Canada Agreement at s. 1.1 ""Identifiable Information" means identifiable Microdata and Statistical Aggregates thereof that could directly or indirectly identify a Person, and is therefore protected under subsection 17(1) of the Act." [*AR Vol IV Tab 3H, p 182*]

[49] See for e.g. Affidavit #1 of Rosemary Bender, made October 14, 2011 ("Bender #1") at paras 19-25 and 38-46 [*AR Vol IV Tab 3E, pp 5-7 and 9-11*]; and Etheridge #1 at Exhibit "A" - Statistics Canada Agreement [*AR Vol IV Tab 3H*] at sections 4-6 [*pp 185-186*], Appendix "A"

64. The degree of privacy required under the *Statistics Act*[50] is reflected in the Statistics Canada Agreement[51] which allows for analysis of the data in the health care databases and of Statistics Canada data, without disclosure of identifiable information, in an environment that protects privacy and personal health care information.

65. For the privacy protection in s. 2(5)(b) to be effective, for there to be harmony among the subsections to s. 2(5), and to uphold the intention of the legislature, health care documents or records (which include the databases at issue) cannot be taken outside the ambit of s. 2(5) by an Order removing the names or identifiers. They are, *a priori*, not compellable and remain not compellable.

C. A Court does not have discretion to compel production of the health care databases on the basis of "trial fairness."

66. Section 2(5)(b) of the *Act* is a mandated statutory privacy protection. This Court has held that a court has no discretion to order disclosure of information when such disclosure by legislation is expressly not compellable.[52] Rather, if legislation provides that certain documents are not compellable, the only exceptions can be those found in the legislation.[53]

67. The Chambers Judge found that whereas the purpose of s. 2(5)(b) is to protect the privacy of individuals it could not be intended to deny access to the very information necessary to produce the statistical evidence contemplated by s. 2(5).[54] The Court of Appeal, in upholding this decision of the Chambers Judge, agreed that to restrict production would be "inherently

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at sections 2, 4 and 6, [*pp 192-193*] and in Appendices "B" and "C" at sections 4, 5, and 11.6. [*pp 195-196, 201 and 206-207, 212*]

[50] R.S.C., 1985, c. S-19 at s. 17. See also Bender #1 at paras 11-15. [*AR Vol IV Tab 3E, pp 3-4*]

[51] Etheridge #1 at Exhibit "A" - Statistics Canada Agreement. [*AR Vol IV Tab 3H, pp 180-234*]

[52] *Glover v. Minister of National Revenue*, [1981] 2 S.C.R. 561 at para 2; see also *Beale v. Nagra*, 1998 CanLII 5078 (BC CA) at para 23.

[53] *Glover v. Minister of National Revenue*, [1980] OJ No 3676 (Ont CA) at para 20. See e.g. *Canadian Private Copying Collective v Canadian Storage Media Alliance*, 2004 FCA 424 at para 96: "…if a statute specifies one exception (or more) to a general rule, other exceptions are not to be read in. The rationale is that the legislator has turned its mind to the issue and provided for the exemptions which were intended."

[54] *BCSC Reasons* at para 55. [*AR Vol I Tab 1A, pp 16-17*]

unfair" and that "trial fairness requires the production of the databases."[55] This interpretation ignores the trial fairness exceptions already contained in s. 2(5)(b) and (d):

> (i) Section 2(5)(b) requires production of records and documents relied upon by an expert witness; and
>
> (ii) Section 2(5)(d) permits a Court to order discovery of a statistically meaningful sample of the documents otherwise protected by s. 2(5)(b) but with the restrictions mandated under s. 2(5)(e).

68. Through s. 2(5)(b) and s. 2(5)(d) and (e) the legislature struck a balance between protecting the privacy of a population of insured persons and procedural fairness among the litigants. In ascribing a narrow definition to s. 2(5)(b) of the *Act* without consideration of its intended purpose, and in determining that the databases are compellable out of concern for trial fairness, the British Columbia Courts engaged in the very role that this Court cautioned against in the constitutional challenge:

> It follows that the judiciary's role is not, as the appellants seem to submit, to apply only the law of which it approves. Nor is it to decide cases with a view simply to what the judiciary (rather than the law) deems fair or pertinent. Nor is it to second-guess the law reform undertaken by legislators, whether that reform consists of a new cause of action or procedural rules to govern it. Within the boundaries of the Constitution, legislatures can set the law as they see fit.[56]

69. The *Act* provides the rules under which this statutory aggregate action is to proceed. Fairness is inherent in the *Act*. Any documents on which an expert relies are subject to production. Further, beyond the documents on which the plaintiff's expert may rely, a defendant may seek a statistically meaningful sample of health care documents.

70. The legislature has spoken on this issue and has struck a balance between the protection of privacy of individuals not party to this litigation and fairness to the litigants.

71. A plain reading of s. 2(5)(b) reveals the intention to restrict access to the private medical records and documents of British Columbia residents – who are not litigants to this action – regardless of whether their names appear on those records and documents. By compelling production of the health care databases to accord with the notion of trial fairness of the British

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[55] *BCCA Reasons* at para 37. [*AR Vol I Tab 1C, p 38*]
[56] *SCC Reasons* at para 52.

Columbia Courts below, the Order under appeal abrogates not only the privacy protection afforded British Columbia residents but the right (and the duty) of the legislature to protect that privacy.

D. Conclusion

72. The British Columbia Courts erred in ordering, notwithstanding the privacy protections of the *Act*, production of the databases containing personal health care information of the residents of British Columbia. The databases contain health care records and are health care documents relating to the provision of health care benefits for particular insured persons. Removing their names and other identifiers in the production of the individual-level data as ordered cannot change the character of the documents or the fact that they are personal health care information. Regardless of whether a defendant or the judiciary view these documents as relevant, the legislation prevails – they are not compellable. Trial fairness is provided by the specific production provisions – the two exceptions under the *Act* – which should be upheld by the Court.

PART IV – SUBMISSIONS ON COSTS

73. The Appellant requests its costs in this Court and throughout.

PART V – ORDER SOUGHT

74. The Appellant requests this Court to allow the appeal, set aside the order of Smith J. made October 22, 2015, and dismiss the Respondent's application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 17 day of October, 2017.

James D. Virtue | Andre I. G. Michael | Jeffrey S. Leon

Counsel for the Appellant

PART VI – TABLE OF AUTHORITIES

AUTHORITY	Paragraph(s) Referenced in Memorandum of Argument	BOA Tab
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PART VII – STATUTORY PROVISIONS

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