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
(APPELLANT)

AND:

PHILIP MORRIS INTERNATIONAL, INC.

RESPONDENT
(RESPONDENT)

AND

ATTORNEY GENERAL OF ONTARIO, SAMUELSON-GLUSHKO
CANADIAN INTERNET POLICY & PUBLIC INTEREST CLINIC, and
INFORMATION AND PRIVACY COMMISSIONER FOR BRITISH COLUMBIA

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PART I – OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. The appellant (the "Plaintiff") seeks to recover billions of dollars in health care costs without producing the aggregated, administrative data it possesses about those health care costs. The Plaintiff does not dispute that this data is highly relevant. Indeed, the Plaintiff intends to use much of the data to prove its case.

2. The trial judge ordered that the Plaintiff produce the data in anonymized form, without names or any personally identifying information (the "Anonymized Data"). He found as a fact that the Anonymized Data cannot be used to identify any individual and that its production in discovery poses no risk to privacy. He also found that the respondent ("PMI") and the other defendants will be denied a fair trial unless the data is produced.

3. The Plaintiff does not allege any palpable and overriding error in the trial judge's findings. It argues that, notwithstanding those findings, s. 2(5)(b) of the *Tobacco Damages and Health Care Costs Recovery Act*, S.B.C. 2000, c. 30 (the "*Act*") blocks discovery of the Anonymized Data. According to the Plaintiff, none of its data about smoking-related health care costs for the population is generally discoverable in its claim for smoking-related health care costs for the population, but the Plaintiff can use the data however it wishes.

4. As the British Columbia courts concluded, the Plaintiff's argument runs contrary to the text, context, and purpose of s. 2(5)(b). There is no indication that the Legislature intended such a drastic derogation from ordinary discovery rights. Production of the Anonymized Data is efficient. It poses no threat to privacy. Other provisions of the *Act* make sense only if the Anonymized Data is produced. And its production is consistent with the Plaintiff's repeated and considered representations, made to multiple levels of court over many years, that s. 2(5)(b) affects only records and documents that identify particular individuals, which the Anonymized Data does not.

5. In 1998, the Plaintiff was already "hard at work" analyzing its data in anticipation of this litigation. Some 20 years later, it is high time for PMI to be able to start doing the same. The *Act* imposes numerous and onerous restrictions on the defendants. But it does not go so far as to deny

discovery of data that is vital to the case and the defence—data to which the Plaintiff has long had totally unfettered use.

6. The British Columbia courts made no error in ordering the Anonymized Data's production. In an aggregate action such as this, to recover health care costs for a population, s. 2(5)(b) blocks discovery only of health care records and documents of and relating to particular individuals, just as it explicitly says. It does not block the Anonymized Data—the Plaintiff's own non-identifying statistical data about the costs for the very population about which the Plaintiff has sued. The appeal should be dismissed, with costs.

B. Statement of facts

7. The *Act* creates two types of actions: an individual action to recover the costs of health care for *particular individual* insured persons, and an aggregate action to recover costs for a *population* of insured persons. Section 2(4) provides as follows:

> **2** (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.

8. The Plaintiff commenced this action in 2001 as an aggregate action under s. 2(4)(b), claiming billions of dollars in damages for allegedly smoking-related health care costs incurred or projected to be incurred to treat the population of British Columbia over roughly a century.

9. In an aggregate action, certain essential elements of an individual action need not be proven. Section 2(5)(a) provides that, in an aggregate action, the Plaintiff need not prove the identity of, the cause of disease in, or damage to "*particular individual* insured persons". Correspondingly, s. 2(5)(b) provides that the documents about particular individuals that would otherwise be central to those issues are generally not discoverable:

> **2** (5) If the government seeks in an action under subsection (1) to recover the cost of health care benefits on an aggregate basis,
>
> …

> (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 … .

10. Instead, to prove causation and damage on an aggregate or population-wide basis, the *Act* invites the use of statistical evidence. Section 5 provides as follows:

> **5** 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 … .

11. The Anonymized Data is needed to produce the statistical evidence contemplated by s. 5.[1] The Anonymized Data comprises information in electronic form relating to the administration and costs of the Plaintiff's health care system. The information has been selected and extracted from a wide variety of sources across the province.[2] The Anonymized Data appears to be the *only* statistical data regarding the costs of smoking-related health care for the population of British Columbia.

12. The Plaintiff was well aware of the data's import: it always intended to use the data to prove its case.[3] Indeed, as of 1998, the Plaintiff had already been "hard at work" analyzing its data "for some time".[4] Accordingly, the Plaintiff never disputed the data's relevance.[5] Nevertheless, the Plaintiff refused to *produce* the Anonymized Data, arguing that it falls within the scope of s. 2(5)(b). Instead, the Plaintiff proposed to give PMI and the other defendants

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[1] *HMTQ v. Imperial Tobacco Canada Limited*, 2015 BCSC 844 at para. 55 ("BCSC Reasons"); *HMTQ v. Philip Morris International, Inc.*, 2017 BCCA 69 at paras. 7, 33 ("BCCA Reasons"). See also Affidavit #2 of Dr. William Wecker at paras. 7, 15, 36 [Respondent's Record ("R.R."), Tab 2].

[2] BCSC Reasons at paras. 12-16, 50.

[3] BCSC Reasons at paras. 1, 37.

[4] BCCA Reasons at para. 8; British Columbia, Legislative Assembly, *Debates of the Legislative Assembly*, 3d Sess., 36th Parl., Vol. 12, No. 13 (July 30, 1998) at 10766 [Respondent's Book of Authorities ("R.B.A."), Tab 3].

[5] BCCA Reasons at para. 12.

severely restricted access through a series of non-party intermediaries: first Statistics Canada,[6] then Population Data BC,[7] and then Statistics Canada again.[8] The Plaintiff's proposals were purportedly magnanimous, as the Plaintiff contended it was not obliged to give anything at all. Indeed, on the eve of the application giving rise to this appeal, PMI was told that the latest proposal would be revoked if PMI proceeded with its application.

13. The Plaintiff's current arrangement with Statistics Canada was accepted by only six of the fourteen defendants, and by each without prejudice to its discovery rights. Those who accepted it did so under threat of otherwise getting no data at all. It contains severe, unprecedented restrictions on access to the Plaintiff's data, and allows Statistics Canada—a non-party not subject to the trial court's oversight—to control what evidence can, and cannot, be presented to the court.[9]

14. Under the contract with Statistics Canada, *certain* of the Plaintiff's data is placed under the control of Statistics Canada, and all linking of and access to the data occurs only at Statistics Canada's discretion.[10] The data must be accessed through Statistics Canada's Research Data Centres ("RDCs"), access to which is conditioned on the defendants' experts becoming "deemed employees" of Statistics Canada.[11] To become deemed employees, the experts must swear an oath of office that makes them subject to fines and potential imprisonment under the *Statistics Act*, R.S.C. 1985, c. S-19.[12] Parties and lawyers cannot access the RDCs in any fashion, and deemed-employee experts cannot communicate with lawyers and parties about what they see in the RDCs.[13]

15. Furthermore, the arrangement requires litigation privilege to be abandoned. Before anything leaves an RDC, it must be vetted by Statistics Canada, and all programs and supporting

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[6] Affidavit #1 of Karen MacMillan, Exhibit "A" [Appellant's Record ("A.R.") Vol. III, pp. 10-11].

[7] Affidavit #1 of Gordon Stodola [A.R. Vol. II, p. 229].

[8] Affidavit #1 of Brian Etheridge, Exhibit "A" [A.R. Vol IV, p. 178].

[9] Affidavit #1 of Brian Etheridge, Exhibit "A", p. 7, s. 6; p. 29, s. 9.3 [A.R. Vol. IV, pp. 186, 208].

[10] Affidavit #1 of Brian Etheridge, Exhibit "A", recital K; p. 5, ss. 2.1, 3.1; p. 6, s. 3.8; p. 26, s. 3.1 [A.R. Vol. IV, pp. 181, 184-185, 205].

[11] Affidavit #1 of Brian Etheridge, Exhibit "A", p. 6, s. 4 [A.R. Vol. IV, p. 185].

[12] Affidavit #1 of Brian Etheridge, Exhibit "A", pp. 27-28, s. 5 [A.R. Vol. IV, pp. 206-207].

[13] Affidavit #1 of Brian Etheridge, Exhibit "A", p. 27, s. 4.3 [A.R. Vol. IV, p. 206].

documentation must be handed over.[14] Anything that does leave the RDC is immediately subject to disclosure under the *Access to Information Act*, R.S.C. 1985, c. A-1, and to Statistics Canada's copyright.[15] And Statistics Canada will maintain an "audit trail" of the experts' access to information, a report on which the Plaintiff can obtain on demand.[16] Moreover, Statistics Canada can terminate the contract on 30 days' notice, for any reason.[17]

16. This arrangement with Statistics Canada was another attempt by the Plaintiff to sidestep its discovery obligations as to critical evidence in the case. Nothing in the *Supreme Court Civil Rules*[18] or the *Act* required PMI to accept such an arrangement.[19] It was and is inadequate and unfair as a substitute for discovery, and PMI would not agree to its terms. Instead, PMI applied for an order requiring the Plaintiff to produce its Anonymized Data pursuant to the usual discovery rules.

I. Chambers judgment: *HMTQ v. Imperial Tobacco Canada Limited,* 2015 BCSC 844

17. The long-standing case management judge and assigned trial judge, Smith J., granted PMI's application, concluding that s. 2(5)(b) applies only to health care records and documents of and relating to *particular individuals*, *not* to the Plaintiff's aggregated administrative data. Smith J. ordered the Plaintiff to produce its data, with names and similar personally identifying information removed, and subject to the stringent confidentiality orders that govern all discovery in this litigation.

18. In doing so, Smith J. made critical findings of fact, none of which the Plaintiff has ever challenged.

19. First, Smith J. found that the Plaintiff's administrative databases are entirely distinct from the records and documents of and relating to particular individuals to which s. 2(5)(b) applies.

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[14] Affidavit #1 of Brian Etheridge, Exhibit "A", pp. 29-30, ss. 9.3, 10.3 [A.R. Vol. IV, pp. 208-209].

[15] Affidavit #1 of Brian Etheridge, Exhibit "A", p. 6, s. 5.4; p. 28, s. 6.2 [A.R. Vol. IV, pp. 185, 207].

[16] Affidavit #1 of Brian Etheridge, Exhibit "A", p. 14, s. 5 [A.R. Vol. IV, p. 193].

[17] BCCA Reasons at para. 8; BCSC Reasons at paras. 23-26; Affidavit #1 of Brian Etheridge, Exhibit "A", p. 8, s. 10.2 [A.R. Vol. IV, p. 187].

[18] B.C. Reg. 168/2009.

[19] BCSC Reasons at para. 30.

He explained that particular individuals' records and documents are those created by medical professionals, "recording their clinical observations, test results and other information recorded at the time as a necessary part of medical treatment".[20] They are held across the province in places such as physicians' offices, clinics, labs, and hospitals. They are voluminous, difficult to assemble and transmit, and often in paper form. By contrast, the Plaintiff's administrative databases contain information that has been selected and extracted from a great variety of documents and records, objectively coded, stored in electronic form, and used for the Plaintiff's administrative purposes.[21]

20. Second, Smith J. found that producing the Anonymized Data poses no threat to privacy. He held that, if the Plaintiff were truly concerned about privacy, it would not have disclosed the data voluntarily to a non-party, Statistics Canada, and then through Statistics Canada to the other defendants' experts. Given the implied undertaking of confidentiality,[22] the data would be no less secure if disclosed to the defendants' experts directly, under the court's usual supervision of the discovery process. Moreover, even if it were possible to identify individuals from the data—of which there is no evidence—and even if the defendants wanted to attempt it—which the uncontroverted evidence establishes they do not—"the sheer volume of material would make that unlikely and unproductive".[23]

21. Smith J. concluded that s. 2(5)(b) does not apply to the Anonymized Data. He considered the text of s. 2(5)(b) and held that, while it blocks production of the medical records of "particular individuals"—tens of millions of otherwise relevant and discoverable documents dispersed throughout the province—it does not affect the Anonymized Data. He considered the scheme of the *Act* and held that s. 2(5)(b) tailors discovery in an aggregate action to the documents most relevant in such action.[24] It would make little sense to forbid discovery of the very documents needed to produce the statistical evidence invited in an aggregate action by s. 5

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[20] BCSC Reasons at para. 49.
[21] BCSC Reasons at paras. 12, 49-50.
[22] See *Juman v. Doucette*, 2008 SCC 8.
[23] BCSC Reasons at paras. 56-58.
[24] BCSC Reasons at paras. 45, 50.

of the *Act*.[25] Finally, he held that production of the Anonymized Data would engage neither of s. 2(5)(b)'s two purposes: protecting privacy and preventing an aggregate action from becoming bogged down in individual forms of discovery.[26]

22. Finally, Smith J. observed that the Plaintiff's interpretation of s. 2(5)(b) would result in unequal access to essential evidence and therefore an unfair trial.[27]

II. Appeal judgment: *HMTQ v. Philip Morris International, Inc.*, 2017 BCCA 69

23. The Plaintiff appealed to the Court of Appeal, and confined its appeal to a single legal question: the proper interpretation of s. 2(5)(b).[28] The Plaintiff did not challenge Smith J.'s findings that the Anonymized Data cannot be linked to any named individual and poses no threat to privacy. Nor did the Plaintiff contest his conclusion that production of the Anonymized Data is required for a fair trial.

24. Writing through Goepel J.A., the Court of Appeal dismissed the Plaintiff's appeal. The Court of Appeal quoted and applied this Court's established jurisprudence on statutory interpretation. After considering the text, context, and purpose of the provision, the Court of Appeal held that s. 2(5)(b) does not block production of the Anonymized Data.

25. First, the Court of Appeal held that the Plaintiff's interpretation of s. 2(5)(b) attempted to read out the words "particular individual".[29] Second, the Court of Appeal found that the Plaintiff's interpretation was inconsistent with the scheme of the *Act*, which contemplates the use of statistical studies for aggregate actions, and which tailors discovery to the documents that are most relevant in an aggregate action—namely, the Anonymized Data. There was nothing to support the Plaintiff's view that the Legislature had intended to forbid discovery of the very evidence needed to determine causation and damages.[30] Third, the Court of Appeal rejected the Plaintiff's assertion that the Legislature's paramount concern was privacy. Instead, the Court of

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[25] BCSC Reasons at para. 55.
[26] BCSC Reasons at para. 54.
[27] BCSC Reasons at paras. 36-38.
[28] BCCA Reasons at paras. 2, 23.
[29] BCCA Reasons at para. 37.
[30] BCCA Reasons at paras. 33, 37.

Appeal agreed with Smith J. that the purpose of s. 2(5)(b) is both to protect privacy and to prevent aggregate actions from becoming bogged down with individual discovery.[31] Production of the Anonymized Data does not engage these purposes.

26. The Court of Appeal considered and rejected the decision of the New Brunswick Court of Queen's Bench concerning an identical provision in the corresponding New Brunswick statute: the New Brunswick judge had isolated the provision at issue and failed to"attempt to read the provisions of the *New Brunswick Act* as a harmonious whole".[32]

27. The Court of Appeal also reiterated Smith J.'s unchallenged findings of fact. The Court of Appeal noted that the Plaintiff's administrative databases are of a "very different character" from the records and documents of particular individuals to which s. 2(5)(b) applies. The databases are generated in part on the basis of data drawn from particular individuals' health care records, but they are a far cry from the "voluminous" records of particular individuals to which s. 2(5)(b) applies.[33] And disclosure of the Anonymized Data would pose "no realistic threat to personal privacy", given especially the implied undertaking and the fact that the "identity of the individual insureds is of no import to the defendants".[34]

28. Finally, the Court of Appeal explained that the Plaintiff's interpretation of s. 2(5)(b) was "inherently unfair", as it would make "essentially no data about health care costs discoverable in its multi-billion dollar claim for health care costs". The Court of Appeal held that the Legislature did not intend such an unfair result,[35] and the Anonymized Data must be disclosed.

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[31] BCCA Reasons at paras. 31, 34.
[32] BCCA Reasons at para. 38.
[33] BCCA Reasons at paras. 34-35.
[34] BCCA Reasons at paras. 35-36.
[35] BCCA Reasons at paras. 37-39.

PART II – POSITION ON THE APPELLANT'S QUESTIONS

29. The only question on this appeal is whether s. 2(5)(b) of the *Act* precludes Smith J.'s order requiring the Plaintiff to produce the Anonymized Data in discovery. The question and sub-questions framed by the Plaintiff are improper: they take for granted the Plaintiff's erroneous interpretation of s. 2(5)(b) and do not arise from the decisions of the British Columbia courts.

30. Each of the British Columbia courts applied this Court's jurisprudence on statutory interpretation and concluded correctly that s. 2(5)(b) cannot be interpreted to block discovery of the Anonymized Data. To conclude otherwise would be irreconcilable with s. 2(5)(b)'s text, context, and purpose. And it would deny the defendants a fair trial.

31. The appeal should be dismissed, with costs.

PART III – STATEMENT OF ARGUMENT

32. Whether s. 2(5)(b) blocks discovery of the Anonymized Data must be decided against the backdrop of Smith J.'s unchallenged findings of fact about that data, all of which the Court of Appeal reiterated:

(a) the Anonymized Data is very different from the medical records and documents of and relating to particular individuals that are captured by s. 2(5)(b);[36]

(b) the Anonymized Data cannot be linked to any named individual;[37]

(c) production of the Anonymized Data in discovery will not risk individual privacy;[38] and

(d) the defendants would not attempt to identify anyone from the Anonymized Data anyway.[39]

33. The courts below quoted and applied this Court's established jurisprudence on statutory interpretation,[40] considering the text, context, and purpose of s. 2(5)(b), before concluding correctly that it does not block discovery of the Anonymized Data.

34. But the Plaintiff argues that the courts below ordered production of the databases by *disregarding* s. 2(5)(b). In doing so, the Plaintiff mischaracterizes the issue on appeal and misunderstands the careful reasons of the British Columbia courts.

35. It is the Plaintiff who wants to disregard s. 2(5)(b). The Plaintiff seeks to interpret s. 2(5)(b) so that *no data about health care costs* is discoverable in its claim *for health care costs*. The only data the defendants might eventually get is that on which the Plaintiff's testifying

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[36] BCSC Reasons at paras. 12, 50; BCCA Reasons at para. 35.
[37] BCSC Reasons at para. 56; BCCA Reasons at paras. 36-37.
[38] BCSC Reasons at para. 56; BCCA Reasons at para. 36.
[39] BCSC Reasons at para. 58; BCCA Reasons at para. 36.
[40] BCSC Reasons at paras. 42-43; BCCA Reasons at paras. 23-24.

experts choose to rely in their reports.[41] Not a single judge in the courts below found any support for this astonishing interpretation in the text, context, or purpose of the statute.

A. Section 2(5)(b) targets documents of or relating to "particular individual insured persons", *not* the Anonymized Data

36. The plain words of s. 2(5)(b) limit the compellability only of documents of and relating to *particular individual* insured persons—not health care information in general or in the anonymous, population-wide form in which it is found in the Anonymized Data.

37. Section 2(5)(b) reads:

> **2** (5) If the government seeks in an action under subsection (1) to recover the cost of health care benefits on an aggregate basis,
>
> …
>
> (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, … .
>
> [Emphasis added.]

38. The phrase "particular individual" modifies each reference to "insured persons". This phrase must be given meaning, as "[i]t is presumed that the legislature avoids superfluous or meaningless words, that it does not pointlessly repeat itself or speak in vain".[42] If the Legislature had intended to capture data in a generic, population-wide form, it would not have used the words "particular individual". They would be pure surplusage.

39. "Particular individual" means just what it says: an individual insured person who can be identified in particular. The Anonymized Data relates to the provision of health care and

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[41] According to the Plaintiff, the defendants could also seek an order under s. 2(5)(d) requiring production of a "statistically meaningful sample" of the Plaintiff's data. The Plaintiff's interpretation of s. 2(5)(d) is nonsensical, as addressed in paras. 66-70, below.

[42] Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (LexisNexis, 2014) at 211 [R.B.A., Tab 8]; *Heritage Capital Corp. v. Equitable Trust Co.*, 2016 SCC 19 at para. 40.

associated benefits to the unidentifiable mass of insured persons throughout the province, but not to any "particular individual". Data about health care provided to numbers of *anonymous* insured persons is not a record or document about the health care or the health care benefits provided to "*particular individual* insured persons".

40. But the Plaintiff wants to ignore the words "particular individual", so that even anonymous, population-level data can be captured by s. 2(5)(b). Indeed, the Plaintiff expressly contends that those words are redundant, because *all* health care records are, by the Plaintiff's definition, the records of "particular individuals".[43]

41. The Plaintiff's position is untenable. Its multi-billion dollar claim is all about "health care" and "the provision of health care benefits" to "insured persons". If the Plaintiff's position were correct—if s. 2(5)(b) blocked discovery of any document about health care for "insured persons" *even if the document could not actually be related to any "particular individual"*—then *no* documents regarding the quantum or cause of the Plaintiff's claimed health care costs would be discoverable. The Court of Appeal put it this way:

> The Province wants to read "particular individual" out of the provision, making essentially no data about health care costs discoverable in its multi-billion dollar claim for health care costs. The only data available to the defendants would be the data the Province offers up on restrictive terms, or the data the Province's testifying experts eventually choose to rely on in their reports.[44]

42. Indeed, the Plaintiff's reading of s. 2(5)(b) is even more outlandish than that: if the Plaintiff's position were accepted, *no questions* could be asked of anyone about the quantum or cause of the Plaintiff's claimed health care costs. This is because the text of s. 2(5)(c) mirrors s. 2(5)(b): "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". If s. 2(5)(b) were to forbid discovery of data that identifies no one simply because the data relates to health care for unidentified "insured persons", then s. 2(5)(c) would equally forbid questioning witnesses about health care for "insured persons" even if individual privacy were not at risk.

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[43] Plaintiff's factum at para. 54.

[44] BCCA Reasons at para. 37.

43. There is no evidence the Legislature intended such a dramatic departure from the usual rules of discovery and cross-examination.

44. Indeed, the Plaintiff's position today is contradicted by its own prior representations to the courts made over many years of constitutional litigation centering on the interpretation of the *Act*. These considered and repeated submissions by government as to its own understanding of the legislation governing its lawsuit are relevant context in interpreting that legislation.[45]

45. In 2002, the Plaintiff explicitly represented to the Supreme Court of British Columbia that s. 2(5)(b) is *not* concerned with anonymized information, and that anonymized information escapes s. 2(5)(b) *even if it pertains to an unidentified individual*:

> Paragraph 2(5)(b) to (e) of the Act seek to balance the public interest in protecting the privacy of personally identifiable health information and the public interest in allowing the defendants in an aggregate action to defend against the government's claim. *And the term "personally identifiable health information", My Lord, as I have described yesterday, is not information about individuals that is anonymous even though it pertains to a particular individual; it is information which identifies the person.*[46]

46. In 2006, the Plaintiff confirmed to the Court of Appeal that the *Act* blocks only information that is linked to a *particular individual*—that is, an individual who can be identified in particular:

> [The *Act*] protect[s] personally identifiable information, that is, information that lets you know you're talking about me as opposed to somebody who is simply a middle-aged male who perhaps lives in Vancouver. You still get an awful lot of information; you just don't know that it happens to be me.[47]

47. As Smith J. found, the Anonymized Data cannot be linked to any named individual.[48] As the Plaintiff itself represented for years, s. 2(5)(b) does not by its terms capture the Anonymized Data.

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[45] *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53 at para. 53.

[46] *HMTQ v. Imperial Tobacco Canada Limited et al.*, 2003 BCSC 877 (Oral Submissions by Mr. Webster, November 21, 2002, Transcript p. 3, ln. 34-45) (emphasis added) [R.B.A., Tab 7].

[47] *British Columbia v. Imperial Tobacco Canada Ltd.*, 2006 BCCA 398 (Oral Submissions by Mr. Webster, February 2, 2006, Transcript p. 68, ln. 43-47; p. 69, ln. 1-5) [R.B.A., Tab 6].

[48] BCSC Reasons at para. 56.

B. The idea that s. 2(5)(b) blocks production of the Anonymized Data contradicts the scheme of the *Act*

48. The scheme of the *Act* confirms that the Anonymized Data is not captured by s. 2(5)(b). In an aggregate action in respect of a population, the *Act* tailors discovery to the documents that are most relevant to that kind of action: the Plaintiff's aggregated statistical data for the population. And it permits the defendants to obtain redacted samples of the documents that are otherwise non-compellable: medical records and documents of and relating to particular individuals, a statistically meaningful sample of which is needed to validate the data.

I. The *Act* tailors discovery to the unique nature of an aggregate action

49. The *Act* allows the Plaintiff to bring two types of action: an individual action to recover health care costs for a *particular individual*, and an aggregate action to recover costs for an entire *population* of insured persons. The *Act* distinguishes between the documents that are most relevant and compellable in each type of action.

50. As noted above, in an aggregate action respecting a population of insured persons, certain elements that would be central in an individual action need *not* be proven for each "particular individual insured person":

> **2** (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, … .

51. Accordingly, in an aggregate action, s. 2(5)(b) generally precludes discovery of the documents that would ordinarily be required to make those proofs—*i.e.*, documents of and relating to "particular individual insured persons". They are of limited relevance given the statute.

52. Conversely, in an individual action to recover health care costs respecting a "particular individual", the documents of and relating to that particular individual are indisputably relevant and must be produced. Having been sued for the health care costs of a particular individual insured person, there would be a right to obtain production of a substantial number of documents of and relating to that particular individual that had been generated in the course of his or her health care. Smith J. explained:

> The documents admissible in an ordinary proceeding, or a proceeding under s. 2(4)(a) of the *Act*, would be documents created by medical professionals, recording their clinical observations, test results and other information recorded at the time as a necessary part of medical treatment.[49]

53. Those documents would often be paper-based and possessed by various non-party hospitals, practitioners, laboratories, and clinics scattered throughout the province. They would also be voluminous. They would include, for example, hospital admission documentation; notes made by physicians, nurses, social workers, and other clinicians; cumulative patient profiles; operative reports; care orders; progress reports; meal plans; prescriptions; family history summaries; surgical and other treatment protocols; immunization records; radiology imaging; growth charts; biopsy results; mental health forms; blood test results; informed consent forms; EKG tracings; outputs from pacemakers and other medical devices; correspondence; and invoices.[50]

54. None of those documents are producible in an aggregate action, which is brought in respect of a *population*. The defendants are entitled to receive only the Anonymized Data maintained by the Plaintiff itself at the population level: the population-wide documents that are most relevant in this population-wide action. Indeed, the Anonymized Data appears to be the *only* data of the "cost of health care benefits" that the Plaintiff claims as damages.

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[49] BCSC Reasons at para. 49.

[50] See, *e.g.*, *Hospital Act Regulation*, B.C. Reg. 121/97, s. 13; College of Physicians and Surgeons of British Columbia, *Professional Standards and Guidelines*, "Medical Records", online: https://www.cpsbc.ca/files/pdf/PSG-Medical-Records.pdf; *Medical and Health Care Services Regulation*, B.C. Reg. 426/97, ss. 31, 37.

55. Thus, s. 2(5)(b) tailors discovery to the documents that are most relevant in each type of action. As Smith J. put it:

> Section 2(5)(b) relates only to an action under s. 2(4)(b) and is clearly intended to draw a distinction between what is compellable in an aggregate action and what would be compellable in an action under s. 2(4)(a).
>
> …
>
> The 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.[51]

56. In its factum, the Plaintiff asserts that the Anonymized Data comprises merely electronic versions of the documents blocked by s. 2(5)(b).[52] This is false. While some of the same information may be found in both particular individuals' medical records and the Anonymized Data, the information in the databases has been selected, extracted, summarized, and transformed by the Plaintiff through objective coding.

57. Smith J.'s finding of fact on this point is unchallenged:

> The material at issue here is of a very different character. Certain facts have been extracted from the medical records and documents and have been converted into data points, but there is no evidence of when the database entries were made in relation to the medical treatments they describe and no evidence that those who made the entries had any knowledge of the facts recorded.[53]

58. The Court of Appeal reiterated this:

> 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 care records and documents. Section 2(5)(b) is intended to protect the privacy of and block discovery of documents of particular individuals. The provision is not intended to block the discovery of the cumulative

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[51] BCSC Reasons at paras. 45, 50.

[52] Plaintiff's factum at para. 45.

[53] BCSC Reasons at para. 50.

data contained in the databases, which data is essential to prove causation and damages.[54]

II. The *Act* ensures that only relevant data is produced

59. Smith J.'s order requires the Plaintiff to produce its databases, but without the fields that contain names and similar identifiers. The *Act* establishes that particular individuals' identities are of no relevance or use in an aggregate action. Accordingly, only the relevant data—the Anonymized Data—need be produced.

60. The Plaintiff suggests that the databases are each single, indivisible documents, which cannot be disclosed in part.[55] Not so. A database is an electronic, potentially ever-changing collection of data points. The courts below correctly ordered production of only the *relevant* data from those collections:[56] a party is *never* entitled to discovery of *irrelevant* data or other documents. But relevant information is not out of reach simply because it is held in a database along with other privileged, sensitive, or irrelevant information.

61. In this "technological age", information is increasingly held in databases[57] and it is common that only the relevant information from those databases is disclosed. For instance, if an individual's cellular phone records are relevant, the cellular phone provider need not disclose its entire database.[58] And in a personal injury action, a plaintiff may be ordered to obtain and disclose relevant portions of his or her Medical Services Plan data—not the entire Medical Services Plan Database or even all data referable to him or her.[59]

62. Indeed, the flexibility of a database is an advantage to the trial process, as the data may be re-organized to meet the needs of the case:

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[54] BCCA Reasons at para. 35.

[55] Plaintiff's factum at paras. 49, 59.

[56] BCSC Reasons at paras. 50, 55.

[57] *R. v. Oland*, [2015] N.B.J. No. 313 (Q.B.T.D.) at para. 44 [R.B.A., Tab 2]. See also *Kon Construction Ltd. v. Terranova Developments Ltd.*, 2015 ABCA 249 at para. 13.

[58] *Amexon Property Management Inc. v. Paramedical Rehab Solutions Inc.*, 2011 ONSC 4783 at para. 16.

[59] *Balderston v. Aspin*, 2011 BCSC 730 at paras. 32-39; *Wieler v. Bercier*, 2004 BCSC 752 at para. 43.

> The issues that emerge in litigation will no doubt suggest the need for different configurations of data. To my mind it would shackle the litigation process to restrict parties to only those forms or organizations of data that had been created during the course of the business relationship. I do not believe that trial fairness requires such a restriction and to my mind it would potentially inhibit the search for truth in the trial process.[60]

63. Databases may also be disclosed in part to remove unnecessary information but preserve the organization of the data:

> The process of redaction must not leave the data less meaningful or useful. While the exact birthdates and initials of the patients may not be necessary to analysis of data, it will for example be critical that data attributable to specific patients can still be tracked and where there are associated slides or tissue samples or other medical records produced in the litigation this can be matched to the data in the same way as previous to the redaction.[61]

64. While the Plaintiff now contends that the inclusion of any non-compellable data puts the entire database beyond reach, the Plaintiff has represented otherwise throughout the course of this discovery process. The Plaintiff's position has been that only "personally identifiable health care information" is non-compellable:

> In delivering these documents, it is not the intention of the plaintiff to disclose personally identifiable health care information. If any such information is contained in the documents disclosed on the CD, the disclosure has been inadvertent and the plaintiff will rely upon the claw back agreement to have the information returned.[62]

65. The Plaintiff's suggestion—that the inclusion of names in an administrative database makes the entire database non-compellable—is inconsistent with Smith J.'s findings and reflects a flawed understanding of electronic discovery. It would make no sense to treat millions of disparate entries about different things compiled at various points over a lengthy period of time and held in a massive database as though they were a single, immutable document.

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[60] *Animal Welfare International Inc. v. W3 International Media Ltd.*, 2013 BCSC 2193 at para. 55. See also *R. v. Hall*, [1998] B.C.J. No. 2515 (S.C.) at para. 41 [R.B.A., Tab 1].

[61] *Andersen v. St. Jude Medical, Inc.*, 2008 CanLII 29591 (Ont. S.C.) at para. 31.

[62] See, *e.g.*, Affidavit #1 of Monique Sever, Exhibit "D" [A.R. Vol. II, p. 118].

III. Section 2(5)(d) permits sampling of particular individuals' voluminous health care records

66. Production of the Anonymized Data is consistent with s. 2(5)(d) of the *Act*, which permits production of a "statistically meaningful sample" of the records and documents referred to in s. 2(5)(b). The courts below correctly held that, as s. 2(5)(b) blocks only the documents of particular individuals that would be relevant in an *individual* action, s. 2(5)(d) permits a sample of those voluminous documents in an *aggregate* action.[63] The Plaintiff's contention that the lower courts ignored s. 2(5)(d) does a disservice to their careful reasons.

67. There are many reasons why such a sample may be sought. For instance, it would make perfect sense to sample particular individuals' medical documents to evaluate the Anonymized Data's accuracy and reliability.[64] As Smith J. noted, the provenance of the Anonymized Data is uncertain,[65] and its value as evidence (or as a basis for calculations sought to be put into evidence) depends on whether it accords with the contemporaneously created health care records that s. 2(5)(b) targets.

68. The Plaintiff's position impermissibly strains the meaning of s. 2(5)(d). The Plaintiff contends that its *databases* are blocked by s. 2(5)(b), and that they can only be "sample[d]" under s. 2(5)(d). But it is nonsensical to speak of sampling existing population-wide data.

69. Sampling involves obtaining a representative selection so as to draw inferences about the whole. Sampling is performed when useful inferences can be drawn from the selection and when it would be overly cumbersome to collect the whole. But here, the relevant content of the databases cannot be inferred from an excerpt.[66] And where, as here, the data has already been

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[63] BCSC Reasons at para. 54; BCCA Reasons at para. 32.

[64] See, *e.g.*, *Animal Welfare International Inc. v. W3 International Media Ltd.*, 2013 BCSC 2193 at para. 65, which required the producing party to provide an "opportunity to check the accuracy of the information in the Database against invoices, price lists, the Sales Reports and other documents".

[65] BCSC Reasons at para. 50.

[66] See, *e.g.*, Affidavit #1 of Dr. William Wecker at paras. 12-14 [R.R., Tab 1]; Affidavit #2 of Dr. William Wecker at paras. 25-36 [R.R., Tab 2]; Affidavit #3 of Dr. William Wecker at paras. 21-22 [R.R., Tab 3].

collected and is in easily producible form, sampling is a pointless, uncertainty-introducing make-work project.[67]

70. Moreover, if an order is made under s. 2(5)(d), all identifiers that disclose or may be used to trace the names or identities of particular individual insured persons must be deleted before the documents are disclosed (s. 2(5)(e)). Redaction of this information from particular individuals' voluminous health care records and documents—many of which would be paper-based and in narrative, not objectively-coded, form—would be a laborious process, and is another reason why such documents may only be sampled.

IV. Section 5 invites statistical evidence that cannot be generated without the Anonymized Data

71. Finally, production of the Anonymized Data is necessary to give meaning to s. 5 of the *Act*. Section 5 explicitly contemplates the use of statistical and epidemiological proofs in an aggregate action, which will be generated from the Anonymized Data.[68] Section 5 reads as follows:

> **5** 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 … .

72. The Legislature cannot sensibly be understood both to have given the Plaintiff the right to sue for the health care costs of British Columbians based on statistics and to have blocked discovery of the only statistical data about those costs. This is particularly so as, under s. 3, the *Act* shifts the burden to the *defendants* to *disprove* causation and damages.[69] The defendants cannot realistically do so without data about the Plaintiff's claimed health care costs.

73. The Court of Appeal put it this way:

> In an aggregate action statistical population-based evidence becomes the means by which the Province establishes causation and quantifies damages. Those statistics

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[67] Affidavit #1 of Dr. William Wecker at para. 24 [R.R., Tab 1].

[68] Affidavit #4 of Dr. William Wecker at para. 5 [R.R., Tab 4].

[69] *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49 at paras. 10-11.

> will be largely generated from the databases at issue on this application. The Province will prove its case in reliance on the collective information contained in the databases.[70]

74. It would be nonsensical for s. 2(5)(b) to block discovery of the very data required for the analyses that s. 5 invites.

C. Production of the Anonymized Data accords with the dual purposes of s. 2(5)(b)

75. The purposes of s. 2(5)(b)—to protect privacy and ensure efficiency in an aggregate action[71]—are not engaged by production of the Anonymized Data. Interpreting s. 2(5)(b) to block production of the Anonymized Data would result in its operating arbitrarily: its effect would be divorced from its purpose.

I. Section 2(5)(b) protects particular individuals' privacy and the aggregate action's efficiency

76. Section 2(5)(b) serves two purposes: it protects the privacy of particular individual insured persons, and it protects the efficiency of an aggregate action. Smith J. held:

> I find that the purpose of s. 2(5)(b) is to protect the privacy of individuals and to prevent the aggregate action from becoming bogged down with "individual forms of discovery," in which the defendants could demand voluminous records, including narrative reports, for thousands or millions of people.[72]

77. The Court of Appeal agreed:

> I agree with the chambers judge that the purpose of s. 2(5)(b) is to protect the personal privacy of individuals and to prevent the aggregate action from becoming bogged down with "individual forms of discovery" in which the defendants could demand voluminous records of thousands or millions of people. Section 2(5)(b) aims to protect individual privacy, by blocking discovery of documents of and about "particular individual insured persons" — not merely "insured persons".[73]

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[70] BCCA Reasons at para. 33. See also BCSC Reasons at para. 7.

[71] BCSC Reasons at para. 54; BCCA Reasons at para. 34.

[72] BCSC Reasons at para. 54.

[73] BCCA Reasons at para. 34.

78. This is not new. There is no dispute that s. 2(5)(b) aims, in part, to protect privacy. And the efficiency purpose permeates the legislative debates, previous court decisions, and the Plaintiff's own representations over years of litigation about the *Act*. The Minister of Health, speaking in the Legislature in 1998, commented as follows:

> In that regard, the amendments also establish that *in an aggregate claim it is not necessary to identify specific individuals or to present evidence on an individual basis.* Proof of such an aggregate claim will rely on statistical and epidemiological evidence which is derived from the population as a whole.
>
> …
>
> *In view of the special nature of an aggregate action, it's essential to introduce some procedural modifications*.[74]

79. In 2000, R. Holmes J. similarly observed that in an aggregate action, where statistical and epidemiological evidence is central, the evidence of individuals loses its "individual relevance" but assumes "a statistical relevance". He found that the blocking provision avoids the aggregate action degenerating into millions of individual actions with millions of individual discoveries:

> *As the individual records of members of the aggregate group have only statistical relevance the shielding of the identification of individuals prevents the action reverting to an individualized action permitting individual forms of discovery*. The information in respect of the individuals subsumed in the aggregate group has statistical relevance; their personal identification does not. In this case, there is sufficient reason for names being protected from disclosure.[75]

80. The Minister and Holmes J. were speaking in relation to s. 13(6)(b) of the *Act*'s predecessor (the "1997 *Act*").[76] After the 1997 *Act* was struck down as unconstitutional,[77] the current *Act* was enacted to avoid the constitutional infirmities of the previous one. The

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[74] British Columbia, Legislative Assembly, *Debates of the Legislative Assembly*, 3d Sess., 36th Parl., Vol. 12, No. 11 (July 29, 1998) at 10712-10713 (emphasis added) [Appellant's Book of Authorities ("A.B.A."), Tab 2].

[75] *JTI-Macdonald Corp. v. B.C. (A.G.)*, 2000 BCSC 312 at para. 82.

[76] *Tobacco Damages Recovery Act*, S.B.C. 1997, c. 41, as am.

[77] *JTI-Macdonald Corp. v. B.C. (A.G.)*, 2000 BCSC 312.

Legislature considered itself to be merely re-enacting a modified version of the 1997 *Act*,[78] and accordingly, s. 2(5)(b) of the current *Act* duplicates s. 13(6)(b) of the 1997 *Act*.

81. The Plaintiff itself has argued over many years to various courts that the current *Act* protects efficiency. In 2005, the Plaintiff argued in this Court that the procedural rules in an aggregate action would relieve the necessity of adjudicating claims on an individual, one-by-one basis:

> Modes of procedure and evidence that require proof and assessment on a particularistic, individual-by-individual basis do not easily accommodate claims based on [alleged large-scale torts]. Such claims may be adjudicated more fairly, and more efficiently, on an aggregate basis, utilizing evidence based on statistical and epidemiological studies and sociological and other relevant studies, *rather than on the basis of analyzing the cumulative claims relating to thousands of individuals one-by-one*.[79]

82. In 2006, the Plaintiff reiterated to the Court of Appeal that the *Act* is aimed at ensuring that an aggregate action proceeds efficiently:

> [A]n aggregate action is different than just a bunch of individuals. *It is a population in which the evidence is not determined one smoker at a time*, and that's the whole purpose of this statutory cause of action: *to get away from the attrition of one-smoker-at-a-time lawsuits that can never be tried ...* .[80]

83. Now, however, the Plaintiff ignores the efficiency purpose recognized by the courts below and focuses solely on privacy, going so far as to label s. 2(5)(b) a "privacy protection provision" enacted in fulfilment of a legislative duty to protect privacy.[81] But the *Act* itself belies the Plaintiff's contention. If privacy had been the Legislature's sole or even primary concern, it would never have given the Plaintiff the right to bring an individual action under s. 2(4)(a). In such an action, the Plaintiff would be required to name the particular individual and there would

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[78] British Columbia, Legislative Assembly, *Debates of the Legislative Assembly*, 4th Sess., 36th Parl., Vol. 20, No. 6 (June 7, 2000) at 16314 [R.B.A., Tab 4].

[79] *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49 (Factum of the Respondents at para. 65) (emphasis added) [R.B.A., Tab 5].

[80] *British Columbia v. Imperial Tobacco Canada Ltd.*, 2006 BCCA 398 (Oral Submissions by Mr. Webster, February 2, 2006, Transcript p. 81, ln. 2-9) [R.B.A., Tab 6].

[81] Plaintiff's factum at para. 20.

be discovery of his or her medical records and documents.[82] Those documents would reveal extremely detailed information about not only the particular individual's health and health care, but also, for example, his or her sexual orientation and habits; diet; exercise regime; familial relationships and supports; religious beliefs and practices; significant life events; social history; allergies; and history of narcotics use. The particular individual would not be a party to the action, yet the defendants would know exactly to whom all that intimate information pertained.

84. As the Court of Appeal held:

> Section 2(4)(a) makes clear that the privacy of individuals was not the paramount concern. That section allows the Province to bring an action to recover the costs of health care benefits for particular individualized persons. In such a case, all of the individualized persons' health care records would be subject to discovery and disclosure notwithstanding any privacy concerns that such disclosure might raise.[83]

85. The Plaintiff's disregard of the efficiency purpose in its current submissions is at odds with the legislative history, the scheme of the *Act*, previous court decisions, and the Plaintiff's own representations over many years of constitutional litigation centering on the *Act*'s proper interpretation.

II. Producing the Anonymized Data does not threaten privacy

86. PMI agrees with the Plaintiff that s. 2(5)(b) aims, in part, to protect privacy. But Smith J. found as a fact that production of the Anonymized Data will not risk individual privacy.[84] This finding was not challenged on appeal, and the Court of Appeal reiterated it:

> Once stripped of personal identifiers, disclosure of the anonymized data poses no realistic threat to personal privacy. The defendants who receive the information will be bound by the implied undertaking which applies in all litigation not to improperly disclose the information. The identity of the individual insureds is of no import to the defendants.[85]

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[82] BCCA Reasons at para. 31.

[83] BCCA Reasons at para. 31.

[84] BCSC Reasons at paras. 56, 58.

[85] BCCA Reasons at para. 36.

87. The Plaintiff disregards this finding of fact. It suggests repeatedly that production of the Anonymized Data threatens individual privacy,[86] and asserts baldly that the Anonymized Data is "intrinsically personal".[87] But the Plaintiff adduced not one iota of evidence to show that a particular individual could realistically be re-identified from the Anonymized Data, given its exclusion of names and other personally identifying information. This is so despite the Plaintiff's having had every incentive and opportunity—a period of at least three years[88]—to adduce such evidence, and the extensive record assembled for the application: 24 affidavits, including 8 from expert witnesses. Given the Plaintiff's vast sophistication and resources and this lawsuit's exceptional stakes, the only reasonable inference is that no credible evidence of a privacy risk could be found.

88. Furthermore, Smith J. held that even if it *were* possible to re-identify someone from the Anonymized Data, the defendants would attempt no such thing. PMI has no interest in particular individuals' identities: they are irrelevant in an aggregate action. PMI and its expert, Dr. Wecker, will be operating under the auspices of the court and bound by the implied undertaking of confidentiality, which requires discovery evidence to be used only for the litigation in which it is obtained. A breach of the rule is punishable by contempt.[89] In addition, PMI and its expert are bound by two stringent confidentiality orders, which have been in place since 2004. Breach of these orders is also punishable by contempt.

89. Finally, the evidence is uncontradicted that PMI and its expert can and will robustly protect the data against external attacks. Dr. Wecker's firm, William E. Wecker Associates Inc., has sophisticated data storage tools and systems for handling sensitive information. The firm's

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[86] Plaintiff's factum at paras. 29, 63-64.

[87] Plaintiff's factum at para. 63.

[88] The Plaintiff knew no later than April 2012 that PMI was seeking only the Anonymized Data. PMI's application was not heard until March 2015, with many affidavits filed by both parties in the interim.

[89] *Juman v. Doucette*, 2008 SCC 8 at paras. 27, 29.

computer network has *never* been breached.[90] Indeed, the *only* evidence of any confidentiality breach is of a breach *on the Plaintiff's part*.[91]

90. As Smith J. held, if the Plaintiff were truly concerned that the Anonymized Data could not be disclosed without endangering particular individuals' privacy, it could not have arranged for other of the defendants to access the data through Statistics Canada.[92] Moreover, in the related New Brunswick action, the same counsel who act for the Plaintiff have already provided the defendants with individual-level, linked administrative data from New Brunswick's provincial databases. The data relates to *tens of thousands of New Brunswickers*, and the defendants' experts have been working with this data for years.[93] There has been no suggestion of a privacy breach or even the slightest impropriety in respect of that data.

91. As the courts below held, there is no basis on which to find that disclosure of the Anonymized Data even engages the privacy concern against which s. 2(5)(b) is meant, in part, to guard. The Plaintiff simply wishes to reserve to itself the ability to dictate the extent and terms of discovery.

92. There is *no* indication in the legislative history that the purpose of s. 2(5)(b) is to block discovery of *population-wide* data that identifies *no one*.

III. Producing the Anonymized Data does not threaten efficiency

93. Production of the Anonymized Data also would not engage s. 2(5)(b)'s second purpose: to protect the action's efficiency. The *Act* aims to achieve this purpose by tailoring discovery in an aggregate action to the documents most relevant in such an action.

94. The *Act* does so with good reason. Without s. 2(5)(b), an aggregate action would entrain the same discovery process as millions of individual actions. Analyzing the cumulative claims of millions of individuals one-by-one would involve a massive volume of paper-based health care records. Many would be in the possession or control of tens of thousands of third-party

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[90] Affidavit #2 of Dr. William Wecker at para. 8 [R.R., Tab 2]; Affidavit #4 of Dr. William Wecker at paras. 12-15 [R.R., Tab 4].

[91] Affidavit #2 of Kelly Moran at para. 4 [R.R., Tab 5].

[92] BCSC Reasons at para. 57.

[93] *New Brunswick v. Rothmans Inc. et al*, 2016 NBQB 106 at para. 48 [A.B.A., Tab 1].

physicians, diagnostic facilities, and hospitals across the province. A severe bogging-down would be inevitable.

95. The Anonymized Data does not engage the efficiency concern that s. 2(5)(b) is meant to address. The Anonymized Data is already in electronic, population-level form. Its production will not threaten the efficiency of the action: indeed, the Plaintiff has already provided this data to third parties *outside* the auspices of the court process, including Statistics Canada[94] and Population Data BC.[95] No additional time or burden is required to produce it to PMI's experts.

96. The Plaintiff's interpretation would extend s. 2(5)(b) well beyond its purpose. Blocking the Anonymized Data from production would do nothing to further the efficiency of the action: rather, it would result in s. 2(5)(b)'s arbitrary operation. Such an interpretation would be contrary to this Court's common-sense admonition that legislation must not be pushed beyond its purpose.[96]

D. The courts below correctly interpreted s. 2(5)(b) in a manner consistent with trial fairness

97. The Plaintiff argues that the courts below disregarded the plain words of the statute and ordered production of the Anonymized Data *notwithstanding* s. 2(5)(b), with a view to achieving trial fairness. Not so.

98. Smith J. and the Court of Appeal each quoted and applied this Court's jurisprudence on statutory interpretation.[97] They each considered the text, context, and purpose of the provision. As part of this analysis, they each noted that the Plaintiff's interpretation would produce an unfair trial, and saw no indication the Legislature had intended such a result. Their careful analyses follow the established method of statutory interpretation.

99. The Plaintiff asserts that the lower courts' interpretation is erroneous, but the Plaintiff fails to deal at all with the courts' careful reasoning. Moreover, the Plaintiff's position rings

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[94] Affidavit #1 of Brian Etheridge, Exhibit "A" [A.R. Vol. IV, p. 180].
[95] Affidavit #1 of Karen MacMillan, Exhibit "C" [A.R. Vol. III, p. 15].
[96] *Bristol-Myers Squibb Co. v. Canada (Attorney General)*, 2005 SCC 26 at paras. 65-66.
[97] BCSC Reasons at para. 42; BCCA Reasons at paras. 23-24.

hollow: as noted above, the Plaintiff's position today flatly contradicts what it has repeatedly represented to different courts over many years.

100. As part of their statutory interpretation analysis, it was entirely appropriate for the courts below to note that their interpretation of s. 2(5)(b) accorded with trial fairness. This Court has held repeatedly that legislators must be presumed not to have intended unfair results.[98] Discovery rights are essential to a fair trial, and can be limited only by unambiguous statutory language. As Cromwell J.A. (as he then was) explained for a unanimous Nova Scotia Court of Appeal:

> [A]ny limitation on the authority of a superior court to order production must be clearly expressed in the statute: *Glover v. Glover et al.* (No. 1) (1980), 113 D.L.R. (3d) 161 (Ont. C.A.), aff'd [1981] 2 S.C.R. 561; *R. v. Snider*, [1954] S.C.R. 479; *Cook v. Ip* (1986), 52 O.R. (2d) 289 (C.A.). As Cory, J.A. (as he then was) put it in the latter case at p. 293: "There is an inherent jurisdiction in the court to ensure that all relevant documents are before it ... On the other hand, it is quite clear that the Legislature may by statute prohibit [potential witnesses] from giving testimony [or an agency from] producing its records at trial ... If the Legislature is to achieve that result, it must specify the restriction in clear and unambiguous terms."[99]

101. Courts are guardians of the litigation process, and judges are properly concerned with fairness. Indeed, in upholding the *Act*, this Court specifically noted that the defendants would receive a fair trial.[100] And in 2006, the Plaintiff agreed that the defendants "sued pursuant to the *Act* will receive a fair trial".[101]

102. But in the courts below, the Plaintiff went so far as to suggest that "fair or not is not the issue",[102] asserting that fairness plays no role in statutory interpretation. Smith J. properly rejected this assertion:

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[98] See, *e.g.*, *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 27; *Ontario v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031 at para. 65.

[99] *Potter v. Nova Scotia (Securities Commission)*, 2006 NSCA 45 at para. 45 (emphasis added by Cromwell J.A.).

[100] *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49 at para. 76.

[101] *British Columbia v. Imperial Tobacco Canada Ltd.*, 2006 BCCA 398 (Oral Submissions by Mr. Webster, February 2, 2006, Transcript p. 69, ln. 28-29) [R.B.A., Tab 6].

[102] Transcript of Proceedings in the Supreme Court of British Columbia, March 31, 2015, p. 63, ln. 13-14 [R.R., Tab 6].

> THE COURT: Well, what the Supreme Court of Canada said [in upholding the *Act*] is there's not necessarily a constitutional guarantee of fairness. Presumably it's still open to this court to look at the fairness of the litigation and then consider to the extent to which fairness or unfairness is made inevitable by the act. In other words, it may be unfair that if the act requires it, so be it --
>
> MR. MICHAEL: Right.
>
> THE COURT: -- but obviously if the act is interpreted in a way that -- can be legitimately interpreted in a way that eliminates unfairness, then it can -- that can be done.[103]

103. The Plaintiff's interpretation of s. 2(5)(b) would deny the defendants a fair trial.

104. While the Plaintiff now asserts that its interpretation of the *Act* is somehow fair, it fails entirely to answer the concern identified by Smith J. and echoed by the Court of Appeal: the Plaintiff has been enjoying unfettered use of its data *for decades*. As of 1998, it had already been "hard at work" analysing its data "for some time".[104] As Smith J. explained:

> If the Province's interpretation of the *Act* is correct, it can prove its case using statistical evidence that it has in its possession, while denying the defendants access to the same evidence.
>
> The Province argues that the defendants will ultimately have access to much of the data because s. 2(5)(b) remains subject to "a rule of law, practice or procedure that requires the production of documents relied on by an expert witness." That will allow the defendants' access to any material from the databases that the Provinces' experts extract and rely on.
>
> In my view, that is far from a complete answer. It will limit the defendants' experts' ability to come to different conclusions, perhaps by finding other information in the same databases that the Province's experts did not consider. It will also put the defendants in the position of merely replying to the plaintiff's experts after those expert opinions are received rather than independently developing their own expert evidence.[105]

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[103] Transcript of Proceedings in the Supreme Court of British Columbia, April 1, 2015, p. 17, ln. 25-37 [R.R., Tab 7].

[104] British Columbia, Legislative Assembly, *Debates of the Legislative Assembly*, 3rd Sess., 36th Parl., Vol. 12, No. 13 (July 30, 1998) at 10766 [R.B.A., Tab 3].

[105] BCSC Reasons at paras. 36-38.

105. Under our adversarial process, if there is to be a just determination on the merits, then parties must have *equal* access to relevant evidence in discovery.[106] Limiting the defendants to the evidence the Plaintiff picks and chooses would be manifestly unfair. It would prevent PMI's expert, Dr. Wecker, from evaluating and responding to the Plaintiff's evidence and from conducting his own analyses. Dr. Wecker would be unable to identify errors in the Plaintiff's analyses—errors that could be significant, given the volume of data and the difficulty of the task.[107]

106. Indeed, the Plaintiff's own analyses have produced vastly different results. On July 30, 1998, the Minister of Health asserted in the Legislature that the government spends about $400 million per year treating tobacco-related diseases.[108] But just one day earlier, the Minister of Health had asserted that the health care cost of "tobacco-related illness" is "in excess of $1.3 billion per year".[109] The Plaintiff's analyses must be tested, evaluated, and challenged, and that is not possible without production of the Anonymized Data.

107. The courts below were correct to observe that the Plaintiff's interpretation of s. 2(5)(b)—in addition to being contrary to its text, context, and purpose—would deny PMI a fair trial, contrary to this Court's assurance. While the *Act* may tilt the playing field in the Plaintiff's favour, it does not make it perpendicular in the way the Plaintiff contends.

108. This appeal must be dismissed.

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[106] *R. v. Gruenke*, [1991] 3 S.C.R. 263 at 295; BCSC Reasons at para. 35.

[107] Affidavit #2 of Dr. William Wecker at paras. 22-38 [R.R., Tab 2].

[108] British Columbia, Legislative Assembly, *Debates of the Legislative Assembly*, 3d Sess., 36th Parl., Vol. 12, No. 13 (July 30, 1998) at 10766 [R.B.A., Tab 3].

[109] British Columbia, Legislative Assembly, *Debates of the Legislative Assembly*, 3d Sess., 36th Parl., Vol. 12, No. 11 (July 29, 1998) at 10710 [A.B.A., Tab 2].

PART IV – SUBMISSIONS ON COSTS

109. This Court should follow its usual practice and award costs in the cause.

PART V – ORDER REQUESTED

110. PMI seeks an order dismissing the Plaintiff's appeal, with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 5th day of December, 2017.

MICHAEL A. FEDER **EMILY MacKINNON** **ROBYN GIFFORD**

as Agent for Counsel

PART VI – TABLE OF AUTHORITIES

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