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
APPELLENT
(Appellant)

AND

PHILIP MORRIS INTERNATIONAL, INC.
RESPONDENT
(Respondent)

AND

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

INTERVENERS

FACTUM OF THE INTERVENER INFORMATION AND PRIVACY COMMISSIONER FOR BRITISH COLUMBIA

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

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PARTS I and II – OVERVIEW AND POSITION

1. The question on this appeal - whether the non-compellability privacy protection in s. 2(5)(b) of the *Tobacco Damages and Health Care Costs Recovery Act*, S.B.C. 2000, c. 30 (the "Act") excludes individual-level medical and health care information electronically stored in Ministry of Health databases - is one that has profound privacy implications for millions of citizens of British Columbia who are not litigants in the government's aggregate action for recovery of tobacco-related health care costs.

2. The interpretation of s. 2(5)(b) adopted by the Court below failed to give effect to the clear legislative intent of that provision which is to protect the privacy of sensitive individual-level medical and health care information by rendering it non-compellable in an aggregate action. Instead, the Court focused on trial fairness, a factor addressed elsewhere in the Act, but which is not the focus of s. 2(5)(b).

3. The Information and Privacy Commissioner for British Columbia (the "Commissioner") submits that a proper interpretation of s. 2(5)(b) must reflect judicial recognition of protection of individual privacy as a quasi-constitutional right in Canada. This means that laws enacted to protect individual privacy must be interpreted generously to achieve their purpose.

4. More particularly, the Commissioner submits that s. 2(5)(b) must be interpreted consistently with the principles that animate personal information protection laws such as the *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165 ("FIPPA"). This is particularly so given that FIPPA contains a qualified statutory override over other legislation.

5. One of the fundamental principles underlying personal information protection laws is that privacy protection does not depend on the manner in which information is recorded. FIPPA and other privacy protection laws take an expansive approach to what constitutes a "record". The definition of "record" in FIPPA includes information stored by electronic and other means. The same principle should govern the interpretation of s. 2(5)(b) of the Act, both by virtue of the plain language of that section and the statutory override in s. 79 of FIPPA.

6. Personal information protection laws also recognize as "personal information" anonymized information that when combined with other information, can be used to identify an

individual. The simple removal of identifying information does not necessarily protect individual privacy. The Commissioner urges the Court to consider this principle when determining the scope of privacy protection contemplated by s. 2(5)(b).

PART III – ARGUMENT

The quasi-constitutional right to protection of informational privacy

7. Section 2(5)(b) protects "informational privacy" related to individual-level information contained in or relating to medical and health care documents and records.

8. The concept of informational privacy derives from the assumption that "all information about a person is in a fundamental way his own, for him to communicate or retain for himself as he sees fit".[1] The right to informational privacy is a vital component of individual dignity and autonomy, and essential to the exercise of our fundamental freedoms. Respect for individual privacy "is an essential component of what it means to be 'free'".[2]

9. As a consequence, the interpretation of s. 2(5)(b) must be based on an appreciation of the importance of protection of personal privacy as a fundamental value in Canadian society, including judicial recognition of individual privacy protection as a quasi-constitutional right.

10. Countries around the world have acted to protect individual informational privacy in both public and private spheres. They do so through measures such as FIPPA and the *Personal Information Protection Act*, S.B.C. 2003, c. 63 ("PIPA") which strictly regulate the manner in which public bodies (under FIPPA) and private sector organizations (under PIPA) collect, use, store and disclose individual personal information. This Court has characterized such laws as quasi-constitutional because of the critical role that they play in the preservation of a free and

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[1] *R. v. Dyment*, [1988] 2 S.C.R. 417 at para. 22

[2] *Dyment, supra,* para. 17. See also: *R. v. O'Connor,* [1995] 4 S.C.R. 411 at para. 113; *Edmonton Journal v. Alberta (Attorney General),* [1989] 2 S.C.R. 1326 at para. 65; *Dagg v. Canada (Minister of Finance),* [1997] 2 S.C.R. 403 at para. 69 (LaForest J. in dissent but speaking for the Court on this point); *Autosurvey Inc. v. Prevost,* [2005] O.J. No. 4291 (Ont. C.A.) at para. 47

democratic society.[3]

11. The recent observations of this Court in *British Columbia Human Rights Tribunal v. Schrenk*[4] regarding the proper approach to interpreting quasi-constitutional legislation are therefore apposite:

> [31] … The protections afforded by human rights legislation are fundamental to our society. For this reason, human rights laws are given broad and liberal interpretations so as better to achieve their goals… As this Court has affirmed, "[t]he Code is **quasi-constitutional legislation that attracts a generous interpretation to permit the achievement of its broad purposes**" (*McCormick*, at para. 17). In light of this, **courts must favour interpretations that align with the purposes of human rights laws like the Code rather than adopt narrow or technical constructions that would frustrate those purposes** (R. Sullivan, *Sullivan on the Construction of Statutes* (6th ed. 2014)… (Emphasis added)

12. The British Columbia Courts did not interpret s. 2(5)(b) of the Act generously to align with the purposes of personal information protection; instead, they read the section narrowly, frustrating its privacy protection purpose.

13. This Court has observed that "situations abound" where the reasonable expectation of individuals that their information shall remain confidential must be protected.[5] This is such a situation. As Holmes J. observed in *HMTQ v. Imperial Tobacco Canada Limited et al*, the purpose of s. 2(5)(b) of the Act is the public interest in the protection of confidentiality of sensitive personal information and respect for individual privacy.[6]

14. Section 2(5)(b) gives effect to the quasi-constitutional right to informational privacy and assures the citizens of British Columbia that their personal level medical and health care information will remain confidential and not be disclosed in an aggregate action under the Act.

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[3] *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53; *Dagg, supra; Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401*, 2013 SCC 62 at paras. 19 to 24
[4] 2017 SCC 62
[5] *Dyment, supra*, para. 22 per Laforest J.
[6] 2003 BCSC 877 at par. 80

FIPPA is part of the broader interpretative context

15. Courts must approach statutory language in the manner that best reflects the underlying aims of the statute.[7] They must consider the "entire context" of a provision. The broader context extends to other legislation that may cast light on the meaning or effect of the words that are used.

16. Where a provision is contained in a statute that is "a component of a larger statutory scheme, the surroundings that colour the words and the scheme of the Act are more expansive". The provisions of each statute are then read in the context of the others and consideration is given to their role in the overall statutory scheme.[8]

17. Section 2(5)(b) is a component of a larger statutory scheme which is designed to protect the privacy of personal information in the custody or, or under the control of, public bodies. FIPPA is the primary legislation that regulates the protection of privacy in public body records containing personal information.

18. Where the same terms are used in the Act and FIPPA, they should be interpreted consistently. To the extent of any inconsistency, the override clause in s. 79 of FIPPA requires the interpretation under FIPPA to prevail.[9] Section 79 states that if a provision of FIPPA is inconsistent or in conflict with a provision of another Act, FIPPA prevails unless the other Act expressly provides that it, or a provision of it, applies despite FIPPA.

19. The Court of Appeal concluded, without elaboration, that FIPPA was not relevant because s. 3(2) provides that FIPPA "does not limit information available by law to a party to a proceeding".

20. However, s. 2(5)(b) is not a provision that makes "information available by law to a party to a proceeding". Indeed, it has quite the opposite effect: it makes individual-level information *non-compellable* in an aggregate action. Since s. 3(2) of FIPPA does not apply to a non-

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[7] *Schrenk, supra*, para. 50
[8] *Bell ExpressVu Limited Partnership v. Rex,* 2002 SCC 42 at para. 27
[9] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner),* 2014 SCC 31

compellability provision, the Commissioner submits that the definitions of "record" and "personal information" in FIPPA are relevant to the interpretation of s. 2(5)(b).

Interpreting s. 2(5)(b) in light of FIPPA

21. The Commissioner adopts the Appellant's submissions regarding the textual interpretation and purpose of s. 2(5)(b).

22. The statutory override in s. 79 of FIPPA militates in favour of a generous interpretation of s. 2(5)(b). A restrictive interpretation of s. 2(5)(b) is inconsistent with the expansive definition of "record" in FIPPA.

23. "Record" is broadly defined in FIPPA to include documents "*and any other thing on which information is recorded or stored by* graphic, *electronic,* mechanical or other means… " (Emphasis added). The Court of Appeal should have considered this definition when interpreting the scope of s. 2(5)(b).

24. The Court of Appeal's interpretation also failed to consider the extent to which computers are used to store personal information. In *Toronto (City) Police Services Board v. Ontario (Information and Privacy Commissioner,* the Ontario Court of Appeal observed that a contextual and purposive analysis of s. 2(1)(b) of the *Municipal Freedom of Information and Protection of Privacy Act,* R.S.O. 1990, c. M.56 required consideration of "the prevalence of computers in our society and their use by government institutions as the primary means by which records are kept and information is stored. [10]

25. Interpreting "record" in s. 2(5)(b) restrictively renders personal privacy protection illusory because it leads to a situation where, although medical or health care information contained in a clinical record created by a medical professional is non-compellable, the very same *individual-level information entered into a Ministry database* is compellable. Unlike the British Columbia Courts' interpretation of s. 2(5)(b), FIPPA ensures the privacy of individual-level information regardless of the form in which it is recorded or stored.

[10] [2009] O.J. No. 90, 2009 ONCA 20 at paras. 48 and 50

26. Properly interpreted, the language of s. 2(5)(b) indicates a legislative intention to protect individual-level medical and health care information from compellability and disclosure regardless of the form in which it is recorded or stored. It does not exempt electronically stored individual level data from the ambit of non-compellability. On the contrary, it protects both: (a) health care records and documents of individual insured persons; and (b) documents *relating to* the provision of health care benefits for particular insured persons.

27. Restricting non-compellability to hard copy health care clinical records and documents would render the second category of documents *relating to* the provision of

health care benefits redundant contrary to the well-established principle that every word in a statute is presumed to have a meaning and a function.[11]

28. The use of the phrase "relating to" in relation to the second category of documents in s. 2(5)(b) provides further support for a broad interpretation of the non-compellability protection. In *Canada (Information Commissioner), supra,* this Court considered the scope of an exemption from disclosure of "personal information" under s. 19(1) of the *Access to Information Act.* Section 3 of the *Privacy Act* (which applied to s. 19(1) defined "personal information as "information about an identifiable individual… relating to the education or the medical, criminal or employment history of the individual… ". The Court held that information "relating to" a subject is broader in scope than the information comprising the subject itself, and that a broad interpretation was consistent with the objectives of the *Privacy Act.*[12]

29. The Court observed in that case that the concept of "personal information" in personal information protection legislation is exceptionally broad. The Commissioner submits that the concept of what constitutes "personal information" is equally broad in the context of s. 2(5)(b) of the Act.

30. Significantly, in this respect, the Chambers Judge did not disagree with the Province's argument that, even with names and identifying information removed, cross-referencing of the data from all of the Ministry databases would allow the defendants to put together a fairly

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[11] *R. v. Proux,* 2000 SCC 5 at para. 28
[12] *Canada (Information Commissioner), supra,* paras. 25 - 26

detailed picture of an individual's medical history.[13] Smith J. read in a requirement to sever names and other identifying information prior to disclosure notwithstanding that the language of s. 2(5)(b) does not authorize disclosure of "anonymized" health care records and documents containing individual-level data nor does it contemplate redaction of personal information. It does not do so because the Legislature did not contemplate that records containing such information would be compellable.

31. Another Court has interpreted s. 2(5)(b) generously, in light of the quasi-constitutional value of personal privacy protection. In *Her Majesty the Queen in Right of the Province of New Brunswick v. Rothmans Inc.,*[14] the Court adopted a "generous interpretation" of the equivalent provision to s. 2(5)(b) in the *Tobacco Damages Health Care Costs Recovery Act,* S.N.B. 2006, c. T-7-5 to give effect to its underlying privacy objectives.

32. In *Rothmans Inc.,* the Court concluded that deleting certain or even all identifiers from Ministry of Health databases would not alter the fact that a database is a document containing information "relating to" to the provision of health care benefits of "particular individuals".[15] The Court rejected the argument that removing direct personal identifiers (names and health insurance numbers) would result in anonymized data, noting correctly that such a position was "contrary to all established health information management practices and protection of privacy principles". The Court also concluded that the proposal to remove direct identifiers was "inadequate for the level of personal information contained in the health care databases".[16]

33. The analytical approach in *Rothmans. Inc.* is entirely consistent with the concept of "personal information" in FIPPA which includes "any recorded information <u>about an</u> identifiable individual" (emphasis added). This definition is deliberately broad and "entirely consistent with the great pains that have been taken to safeguard individual identity".[17]

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[13] AR, p. 194, para. 56
[14] 2016 NBQB 106, leave to appeal denied 2016 CanLII 50140 (N.B.C.A.)
[15] Paras. 41 - 42
[16] Paras. 46(i) and (ii)
[17] *Dagg, supra,* para. 69, citing Jerome A.C.J. in *Canada (Information Commissioner) v. Canada (Solicitor General),* [1988] 3 F.C. 551.

34. *Rothmans Inc.* recognizes that individual-level information that does not directly identity an individual (because names and other identifying information have been removed) may still constitute "personal information" if such information is capable of being used, in combination with other information, to identify a particular individual.

35. That was the basis upon which the Alberta Court of Appeal concluded that a driver licence number constitutes personal information in *Leon's Furniture Limited v. Alberta (Information and Privacy Commissioner)*. The Court recognized that a driver's licence number can, with access to the proper database, be used to identify a particular individual.[18]

36. A proper interpretive approach s. 2(5)(b) of the Act requires an understanding of what constitutes "personal information" to give effect to the underlying privacy protection purpose of that provision.

37. For these reasons, the Commissioner respectfully submits that the British Columbia Courts' interpretation of s. 2(5)(b) was not accordance with the language of that provision, its broader context which includes FIPPA, or the underlying privacy protection aim of the legislation.

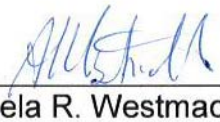
PART IV – COSTS

38. The Commissioner seeks no costs and asks that no costs be ordered against him.

PART V – ORDER SOUGHT

39. The Commissioner takes no position on the disposition of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 19th day of December 2017



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[18] *Leon's Furniture Limited v. Alberta (Information and Privacy Commissioner)*, 2011 ABCA 94, leave to appeal ref'd [2011] SCCA ANo. 260. See also: *Dagg, supra*, paras. 68 – 69; *Edmonton (City) v. Alta (Information and Privacy Commissioner)*, 2016 ABCA 110; Order No. P12-01, [2012] B.C.I.P.C.D. No. 25 at para. 49.

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Tobacco Damages Health Care Costs Recovery Act, S.N.B. 2006, c. T-7-5	2(5)(b)