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**
(APPELLANT)

AND

**PHILIP MORRIS INTERNATIONAL, INC.**

**RESPONDENT**
(RESPONDENT)

AND

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

**INTERVENERS**

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(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. The central question on this appeal is whether s. 2(5)(b) of British Columbia's *Tobacco Damages and Health Care Costs Recovery Act* (the "*Act*")[1] prohibits the compellability of the provincial health care databases sought by the Respondent, Philip Morris International, Inc. (the "health care databases"). The Attorney General of Ontario (the "Attorney General") submits that the answer to this question is "yes."

2. On this appeal, the Attorney General will make three submissions. First, the dominant purpose of s. 2(5)(b) is to protect the privacy of insured persons' highly sensitive individual-level health care utilization information. Interpreting s. 2(5)(b) in a manner consistent with this purpose requires that the health care databases, which include individual-level health care utilization information, be protected from discovery obligations. Interpreting s. 2(5)(b) narrowly such that only those documents deemed irrelevant in an aggregate action are protected elevates relevance over the protection of privacy. Such a narrow interpretation should be rejected.

3. Second, s. 2(5)(b) prohibits the compellability of two categories of documents: (i) "health care records and documents of particular individual insured persons" and (ii) "documents relating to the provision of health care benefits for particular individual insured persons" (collectively, "health care records and documents"). On a plain and ordinary reading of s. 2(5)(b), the health care databases are captured by the broad language of the second category: "documents relating to the provision of health care benefits." Limiting the prohibitions set out in s. 2(5)(b) to only "the original medical documents and records" renders the second category superfluous.

4. Finally, the use of the phrase "particular individual insured persons" in s. 2(5)(b) demonstrates the Legislature's intention to include the health care databases within the scope of the provision. Throughout the *Act*, the phrase "particular individual insured person(s)" appears in both a singular form to mean a single, insured person, and a plural form to mean multiple insured persons. The use of the plural form in s. 2(5)(b) signals the Legislature's desire to expand the

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[1] S.B.C. 2000, c. 30. ["*B.C. Act*"]

5. protection of health care records and documents of or relating to insured persons to *multiple* insured persons – that being the very nature of the health care databases at issue on this appeal.

6. By enacting unique evidentiary and procedural rules for aggregate actions, the Legislature has deliberately chosen to balance the privacy interests of insured persons' individual-level health care information against issues of relevance and fairness to the litigants. The Attorney General's interpretation of s. 2(5)(b) best accords with this intention. Where the health care databases are not relied upon by the province's expert, the Legislature has chosen to weigh the scale in favour of the protection of privacy by prohibiting the compellability of the health care databases. Instead, defendants may access a "statistically meaningful sample" of the databases subject to strict privacy protections.[2] Conversely, where the health care databases are relied upon by the province's expert, the Legislature has balanced the scale in favour of litigation fairness by granting access to the databases.[3] This Honourable Court should respect this legislated balance.

**B. Statement of Facts**

7. The Attorney General adopts the Appellant's statement of facts[4] and relies on the following additional facts.

8. On September 29, 2009, Her Majesty the Queen in right of Ontario commenced a health care costs recovery action (the "Ontario Action") against, *inter alia*, the Respondent to this appeal.[5] The Ontario Action was commenced pursuant to the province's *Tobacco Damages and Health Care Costs Recovery Act* (the "*Ontario Act*").[6] The *Ontario Act* is virtually identical to the *Act*.

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[2] *B.C. Act*, ss. 2(5)(d), 2(5)(e).
[3] *B.C. Act*, s. 2(5)(b).
[4] Appellant's factum at paras. 6-37.
[5] *Her Majesty the Queen in right of Ontario v Rothmans Inc. et al.*, 2016 ONSC 59 at para. 1.
[6] S.O. 2009, c. 13. ["*Ontario Act*"]

9. Most notably, the *Ontario Act* contains a provision (i.e., s. 2(5)2) that is nearly identical to s. 2(5)(b) of the *Act*.[7] As with the *Act*, s. 2(5)2 of the *Ontario Act* prohibits the compellability of both "health care records and documents of particular individual insured persons" and "documents relating to the provision of health care benefits for particular individual insured persons."[8]

## PART II – INTERVENER'S POSITION ON THE QUESTIONS IN ISSUE

10. The Attorney General submits that s. 2(5)(b) of the *Act* prohibits the compellability of the health care databases, subject only to the exceptions provided by the provision and the statute.

## PART III – STATEMENT OF ARGUMENT

### A. Section 2(5)(b) Must be Interpreted in a Manner Consistent with its Purpose – to Protect the Privacy of Insured Persons in an Aggregate Action

11. The Chambers Judge and the British Columbia Court of Appeal ("BCCA") both held that the purpose of s. 2(5)(b) was to limit compellability to records and documents relevant in an aggregate action and to exclude only the records and documents relevant in an individual claim.[9] The lower courts found that "original medical documents and records" were included within the scope of s. 2(5)(b) because they are irrelevant to an aggregate action.[10] This interpretation relies

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[7] The prohibition under s. 2(5)2 of the *Ontario Act* is subject to two exceptions. The first exception requires production of those prohibited records and documents that have been relied upon by the province's expert (i.e., s. 2(5)2). This exemption ensures litigation fairness as the province is precluded from relying on prohibited records or documents without providing the same to the defendants (i.e., s. 2(5)3). The second exception permits the defendants to seek an order requiring the province to produce a "statistically meaningful sample" of those records or documents that are subject to the prohibition (i.e., s. 2(5)4).

[8] *Ontario Act*, s. 2(5)2.

[9] *HMTQ v Philip Morris International, Inc.*, 2015 BCSC 844 at paras. 50,54. ["*BCSC Reasons*"]; *HMTQ v Philip Morris International, Inc.*, 2017 BCCA 69 at paras. 32-34. ["*BCCA Reasons*"]

[10] *BCSC Reasons* at paras. 50,54; *BCCA Reasons* at paras. 32-34.

on relevance as the basis for limiting the scope of documents or records that are protected by s. 2(5)(b). Respectfully, this interpretation is too narrow.

12. Where an aggregate action is commenced, s. 2(5)(a) states that the province is not required to identify any insured persons, prove the cause of tobacco related disease in any insured persons or prove the cost of health care benefits for any insured persons (collectively, the "causation evidence").[11] Conversely, where an individual action is commenced, the province is required to establish the causation evidence.

13. The legal consequence of s. 2(5)(a) is that the "original medical documents and records" relevant in an individual action to prove the causation evidence are rendered irrelevant in an aggregate action and, as a result, are not compellable.[12] If s. 2(5)(b) applies only to these same records and documents, then the provision would be redundant to the legal consequence of s. 2(5)(a). To give meaning to the provision, s. 2(5)(b) must be interpreted as having a separate and distinct purpose from the legal consequences of s. 2(5)(a). This distinct purpose can be ascertained from the plain and ordinary meaning of s. 2(5)(b) and a review of the unique evidentiary and procedural rules detailed more generally in s. 2(5).

14. On a plain and ordinary meaning, s. 2(5)(b) does not prohibit the compellability of health care records and documents based on their *relevancy* (i.e., whether the document will be used for a relevant purpose in the aggregate action). Rather, the prohibition is determined by the *type* of records and documents sought. Where the Legislature seeks to prohibit the compellability of evidence for a particular use, it does so explicitly. For instance, s. 2(5)(c) prohibits a party from compelling any person to answer questions relating to the health of, or the provision of health care benefits for, particular individual insured persons.[13]

15. If s. 2(5)(b) was intended to apply solely to documents relevant and admissible in an individual action, then it would be worded in a manner that only prohibits the *use* of health care records and documents for the purpose of establishing the causation evidence. This is not the

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[11] *B.C. Act*, s. 2(5)(a).
[12] *Rules of Civil Procedure*, R.R.O. 1990, Reg 194, r. 30.02(1); *Supreme Court Civil Rules*, B.C. Reg 168/2009, r. 7-2(16).
[13] *B.C. Act*, s. 2(5)(c).

case. Section 2(5)(b) prohibits compellability for any purpose as long as the health care records and documents sought fall within the scope of the provision.

16. In fact, the *Act* presumes that the documents protected by s. 2(5)(b) can be relevant to an aggregate action. Pursuant to s. 2(5)(d), where a defendant establishes a relevant use for the documents protected by s. 2(5)(b),[14] they can move to obtain a "statistically meaningful sample" of these documents.[15] The mere fact that there is a relevant use for the documents does not place them outside the scope of s. 2(5)(b). As such, the relevant use of a document is not the controlling feature of whether the documents sought fall within the scope of s. 2(5)(b). In prohibiting the compellability of documents based on their *type*, as opposed to their *use*, the Legislature has intentionally expanded the scope of the protection afforded by the section. This expanded scope is consistent with the Legislature's intention to protect the privacy of insured persons' individual-level health care information irrespective of the relevance of the health care records and documents to an aggregate action.

17. This interpretation of s. 2(5)(b) is consistent with the application of s. 2(5)(e) to documents protected by the provision. Where a "statically meaningful sample" is ordered producible, s. 2(5)(e) requires that the sample to be stripped of all identifiable information.[16] In limiting the defendants' access to relevant documents protected by s. 2(5)(b) to a "statistically meaningful sample" stripped of all identifiable information, the *Act* demonstrates that in an aggregate action the protection of privacy trumps relevancy.

18. Section 2(5)(b) does not prohibit the defendants from accessing relevant individual-level health care information for the purposes of conducting statistical analysis as contemplated by s. 5 of the *Act*. As noted above, s. 2(5)(d) allows the defendants to obtain a "statistically meaningful sample" of any health care record and document protected by s. 2(5)(b) (including the health care databases). When access to the health care databases is sought under s. 2(5)(d), a "statistically meaningful sample" will be defined by a number of factors, including the number

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[14] In the context of s. 2(5)(d), a relevant use of the documents would not include use for the purposes of establishing the causation evidence.

[15] *B.C. Act*, s. 2(5)(d).

[16] *B.C. Act*, s. 2(5)(e).

of insured persons in the province and the relevant use for which the database is requested. In this regard, "statistical population-based evidence"[17] can be obtained by accessing a "statistically meaningful sample" of the health care databases.[18] This is precisely what is contemplated by s. 5 of the *Act*.[19]

19. In crafting a legislative scheme that balances the privacy of insured persons against issues of relevance and litigation fairness, the Legislature deliberately chose to favour privacy. When read as a whole, s. 2(5) demonstrates that the protection of sensitive individual-level health care information trumps relevancy and can, in certain prescribed circumstances, be displaced by litigation fairness.

20. When read in its entire context and harmoniously in its grammatical and ordinary sense within the scheme of the *Act*, the object of the *Act*, and the intention of the Legislature[20], it is clear that the dominant purpose of s. 2(5)(b) is to protect the privacy of insured persons' individual-level heath care information by prohibiting the compellability of the health care records and documents. Including the health care databases within the scope of s. 2(5)(b) best accords with the dominate purpose of the section.

### B. The Privacy Purpose of s. 2(5)(b) is Reflected in the Categories of Documents Included within its Scope

21. The scope of s. 2(5)(b) should not be limited to the "original medical record and documents" required to establish the causation evidence in an individual action. Such an interpretation fails to give full meaning and effect to the two distinct categories of health care records and documents protected by s. 2(5)(b).

22. As detailed above, s. 2(5)(b) prohibits the compellability of two distinct categories of documents: (i) "health care records and documents of particular individual insured persons" (the

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[17] *BCCA Reasons* at para. 33.
[18] *Her Majesty the Queen in right of the Province of New Brunswick v. Rothmans Inc. et al.*, 2016 NBQB 106 at paras. 7, 48-49 **Book of Authorities ("BOA") Tab 1**, leave to appeal denied 2016 CanLII 50140 (NBCA); leave to appeal to S.C.C. denied 2017 CanLII 2715 (SCC).
[19] *B.C. Act*, s. 5.
[20] *Montréal (City) v. Dorval*, 2017 SCC 48 at para. 32.

"first category"); and, (ii) "documents relating to the provision of health care benefits for particular individual insured persons" (the "second category").[21]

23. The Legislature's use of the words "documents relating to…insured persons" in the second category, as compared to "documents of…insured persons" used in the first category, signals that the protections imposed by the second category are intended to apply to a broader scope of documents than those identified in the first category.

24. Restricting the scope of the provision to the "original medical documents and records" admissible in an individual action[22] only gives effect to the first category of documents and fails to recognize or provide any guidance regarding the types of documents protected by the second category. Such an interpretation contravenes the presumption against tautology, as the entire second half of the provision would be redundant of the first category. The presumption against tautology requires that each category have a distinct meaning.[23]

25. The BCCA's description of the health care databases demonstrates that the individual - level health care information contained in the databases are protected by the second category:

> "The [health care databases] are compilations of particular individual health care records with data values organized in rows and columns. Each row (or record) contains information about a particular individual, while the columns (or field) contain specific information about a particular characteristic or item of information, such as the medical services provided."[24]

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[21] *B.C. Act*, s. 2(5)(b).
[22] *BCSC Reasons* at paras. 50.
[23] The presumption against tautology presumes that the Legislature intends to avoid superfluous or meaningless words and that the Legislature does not pointlessly repeat itself or speak in vain. It also presumes that every word in a statute has a specific role to play in advancing the legislative purpose: *Sullivan on the Construction of Statutes*, 6th ed. (Markham: LexisNexis Canada Inc., 2014) at p. 211**[BOA Tab 2]**; see also: *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2011 SCC 53 at para. 38.
[24] *BCCA Reasons* at para. 7.

Accepting that the term “document” or “record” includes electronic databases[25], then the health care databases that contain information about “the medical services provided” to insured persons are plainly “documents relating to the provision of health care benefits for particular individual insured persons” and therefore fall within the scope of s. 2(5)(b).[26]

### C. Section 2(5)(b) Applies to the Health Care Documents of Multiple Users, Not Just Single, Individual Users

26. The BCCA held that the words “particular individual”, as used in s. 2(5)(b), limits the scope of the protection to health care records and documents belonging to a single insured person. The Court ruled that if the wording of the phrase had simply been “insured persons”, without the preceding words “particular individual”, then the pluralized reference to insured persons would have supported the prohibition of the health care databases.[27] This analysis does not take into account that the *Act* uses both a singular and plural iteration of the phrase “particular individual insured person(s)” (the “phrase”). The use of the plural iteration of the phrase in s. 2(5)(b) is consistent with the inclusion of the health care databases within the scope of the provision.

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[25] Appellant’s factum at paras. 39-41; *Interpretation Act*, R.S.B.C. 1996, c.238, ss. 2, 29; *Supreme Court Civil Rules*, B.C. Reg 168/2009, r. 1-1(1).

[26] In the *B.C. Act*, "health care benefits" is defined in s. 1(1) as:

> (a) benefits as defined under the *Hospital Insurance Act*,
>
> (b) benefits as defined under the *Medicare Protection Act*,
>
> (c) payments made by the government under the *Continuing Care Act*, and
>
> (d) other expenditures, made directly or through one or more agents or other intermediate bodies, by the government for programs, services, benefits or similar matters associated with disease;

[27] *BCCA Reasons* at para. 34.

27. The singular form of the phrase is, "any particular individual insured person", and the plural form is "particular individual insured persons". In contrast to other sections of the *Act*, s. 2(5)(b) uses the phrase exclusively in its plural form.[28]

28. To accord with the rules of statutory interpretation, the variation in the singular and plural forms of the phrase must be assigned meaning that is consistent with the overall scheme of the *Act*. Read in context, the singular form can be said to refer to a 'certain' or 'specific' insured person, whereas the plural form refers to 'multiple' insured persons. Therefore, the plural form of the phrase in s. 2(5)(b) means that the protections apply to the individual-level health information of multiple insured persons contained in the health care databases.

29. The sole exception to the above is the use of the phrase "any particular individual insured persons" in s. 2(5)(e) of the *Act*:

> [I]f 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. (emphasis added) [29]

This does not create any inconsistency. The term "any particular individual insured persons" must be read in the entire context of the section. Specifically, all nouns used in this subsection are plural: identifiers, names, identities, and documents. In this context, the word "any" cannot detract from the plain and ordinary meaning of the term "particular individual insured persons" as referring to multiple persons. If it were intended to denote the singular use, then s. 2(5)(e) would not make grammatical sense as it would be intended to only apply to those individuals with multiple "names" or "identities."[30]

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[28] For example, see *B.C. Act*, ss. 2(5)(a)(ii) and (iii), where the statute uses the singular form of the phrase: "any particular individual insured"; see also: *Ontario Act*, 2(5)2.
[29] *B.C. Act*, s. 2(5)(e); *Ontario Act*, s. 2(5)5.
[30] The French version of the *Ontario Act* supports this interpretation. For example, see: *Ontario Act*, 2(5)2. The French version uses the word "des" to refer to the plural iteration of the term "particular individual insured persons" (i.e., "des assurés en particulier") and "un" for the singular iteration of the term (i.e. "un assurés en particulier"). Unlike the English version, the

30. In light of the above, the Attorney General's proposed interpretation assigns meaning to the words "particular individual" in a manner that is consistent with both the legislative scheme and the dominant purpose of s. 2(5)(b) – the protection of insured persons' individual-level health information.

### D. Conclusion

31. The Attorney General submits that s. 2(5)(b) of the *Act* prohibits the compellability of the health care databases. The databases qualify as "documents relating to the provision of health care benefits for particular individual insured persons" and, therefore, are not compellable under the *Act*. This interpretation, which focuses on the dominant purpose of s. 2(5)(b), is consistent with the overall statutory framework and supports the Legislature's aim of safeguarding the privacy of insured persons' highly sensitive health care utilization information.

## PART IV – SUBMISSIONS ON COSTS

32. The Attorney General does not seek its costs and asks that no costs be awarded against it.

## PART V – ORDER SOUGHT

33. The Attorney General takes no position on the disposition of the appeal.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**

Date: December 20, 2017

**Sunil S. Mathai / Farzin Yousefian / Antonin I. Pribetic**

**Counsel for the Intervenor,**
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French translation contains no ambiguity and uses the word "des" consistently throughout ss. 2(5)(b) and 2(5)(e).

**PART VI – TABLE OF AUTHORITIES**

| **Case law** | **Paragraph(s) in factum** |
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