



SUPREME COURT OF CANADA

CITATION: British Columbia v. Philip Morris
International, Inc., 2018 SCC 36

APPEAL HEARD: January 17, 2018
JUDGMENT RENDERED: July 13, 2018
DOCKET: 37524

BETWEEN:

Her Majesty The Queen in Right of British Columbia
Appellant

and

Philip Morris International, Inc.
Respondent

- and -

**Attorney General of Ontario, Samuelson-Glushko Canadian Internet Policy and
Public Interest Clinic and Information and Privacy Commissioner for British
Columbia**
Intervenors

CORAM: Abella, Moldaver, Karakatsanis, Gascon, Brown, Rowe and Martin JJ.

REASONS FOR JUDGMENT: Brown J. (Abella, Moldaver, Karakatsanis, Gascon, Rowe
(paras. 1 to 37) and Martin JJ. concurring)

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BRITISH COLUMBIA *v.* PHILIP MORRIS INTERNATIONAL, INC.

Her Majesty The Queen in Right of British Columbia

Appellant

v.

Philip Morris International, Inc.

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**Attorney General of Ontario,
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File No.: 37524.

2018: January 17; 2018: July 13.

Present: Abella, Moldaver, Karakatsanis, Gascon, Brown, Rowe and Martin JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Civil procedure — Production of documents — Health care databases — Province bringing action pursuant to provincial legislation against tobacco manufacturers to recover tobacco-related health care costs on aggregate basis — Legislation barring compellability in such action of “health care records and documents of particular individual insured persons” and of “documents relating to provision of health care benefits for particular individual insured persons” — Tobacco manufacturer seeking production of databases of health care information to be used by province to prove causation and damages in action — Whether databases, once anonymized, are compellable — Tobacco Damages and Health Care Costs Recovery Act, S.B.C. 2000, c. 30, s. 2(5)(b).

The province of British Columbia brought an action against P and other tobacco manufacturers to recover the cost of health care benefits related to disease caused or contributed to by exposure to a tobacco product, pursuant to the *Tobacco Damages and Health Care Costs Recovery Act*. Where, as here, the province sues to recover the cost of health care benefits on an aggregate basis, that is, for a population of insured persons, s. 2(5)(b) of the Act governs the compellability of health care documents and provides that “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”. P applied for production of a collection of health care databases containing coded health care information which the province intended to use to prove causation and damages in its action, on the basis that access to those databases was critical to its ability to defend

itself and that production was not barred by s. 2(5)(b). The application judge found that the databases were compellable, since, once the information contained in the databases was anonymized, s. 2(5)(b) did not apply. The Court of Appeal dismissed the province's appeal.

Held: The appeal should be allowed. The order of the application judge should be set aside and P's application for an order requiring production of the health care databases should be dismissed.

The databases at issue in this case constitute "health care records and documents of particular individual insured persons" or "documents relating to the provision of health care benefits for particular individual insured persons". As such, by operation of s. 2(5)(b) of the Act, the databases are not compellable. Neither their relevance to the pleadings in the province's action nor their anonymization insulate them from the text of s. 2(5)(b), read in its entire context and in its grammatical and ordinary sense, in harmony with the Act's scheme and object.

The databases at issue in this case are both "records" and "documents" within the meaning of the Act. They store the health care information of particular individual insured persons. And, while that information is stored on an aggregate rather than individual basis, each data entry in the databases is derived from particular individuals' clinical records. The mere alteration of the method by which that health care information is stored — that is, by compiling it from individual clinical records into aggregate databases — does not change the nature of the information itself. Even

in an aggregate form, the databases, to the extent that they contain information drawn from individuals' clinical records, remain "health care records and documents of particular individual insured persons". Further, even were it the case that the databases are not, in their entirety, "health care records and documents of particular individual insured persons", s. 2(5)(b) protects a second category of records and documents, that is, "documents relating to the provision of health care benefits". By using expansive language — relating to — in describing this second category, the Legislature broadened the scope of protection furnished under s. 2(5)(b) to include documents that are not health care records and documents themselves, such as billing records and records of drugs administered to a patient. Much of the information stored in the databases is precisely that.

Section 2(5)(b) of the Act conditions the compellability of the records and documents it describes not upon their relevance, but upon their nature. The relevance of those records and documents to a claim brought on an aggregate basis does not alter that nature. Therefore, irrespective of their relevance, such records and documents that fall within the scope of s. 2(5)(b) are not compellable. The courts below erred by allowing what they saw as the relevance of the aggregate databases to supplant the meaning of, and the legislative intent behind, s. 2(5)(b).

The phrase "particular individual insured persons" in s. 2(5)(b) is not synonymous with "identifiable individual insured persons". The ordinary meaning of the word "particular" is "distinct" or "specific". Based on this definition, the

databases fall within s. 2(5)(b)'s scope as comprising the "health care records and documents of" and the "documents relating to the provision of health care benefits for" each distinct and specific individual in British Columbia, even if, once anonymized, the information contained within the databases is no longer capable of identifying an individual insured person. In addition, equating "particular" with "identifiable" would be inconsistent with the Act's scheme and would render other provisions in the Act redundant or nonsensical.

Cases Cited

Referred to: *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473; *New Brunswick v. Rothmans Inc.*, 2016 NBQB 106; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *R. v. Proulx*, 2000 SCC 5, [2000] 1 S.C.R. 61; *R. v. Zeolkowski*, [1989] 1 S.C.R. 1378.

Statutes and Regulations Cited

Interpretation Act, R.S.B.C. 1996, c. 238, ss. 2(1), 29 "record".

Supreme Court Civil Rules, B.C. Reg. 168/2009, r. 1-1(1).

Tobacco Damages and Health Care Costs Recovery Act, S.B.C. 2000, c. 30, ss. 1 "tobacco related disease", 2(1), (4), (5), 5.

Authors Cited

Oxford English Dictionary (online: <http://www.oed.com>), “particular” (archived version: https://www.scc-csc.ca/cso-dce/2018SCC-CSC36_1_eng.pdf).

APPEAL from a judgment of the British Columbia Court of Appeal (Newbury, Willcock and Goepel JJ.A.), 2017 BCCA 69, 95 B.C.L.R. (5th) 116, 412 D.L.R. (4th) 310, [2017] 7 W.W.R. 451, [2017] B.C.J. No. 257 (QL), 2017 CarswellBC 369 (WL Can.), affirming a decision of Smith J., 2015 BCSC 844, [2015] B.C.J. No. 1026 (QL), 2015 CarswellBC 1361 (WL Can.). Appeal allowed.

Jeffrey S. Leon, James D. Virtue, André I. G. Michael, James Duvall and Peter Lawless, for the appellant.

Michael A. Feder, Emily MacKinnon and Robyn Gifford, for the respondent.

Sunil S. Mathai, Farzin Yousefian and Antonin I. Pribetic, for the intervener the Attorney General of Ontario.

David Fewer, for the intervener the Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic.

Written submissions only by *Angela R. Westmacott, Q.C.*, for the intervener the Information and Privacy Commissioner for British Columbia.

The judgment of the Court was delivered by

BROWN J. —

I. Introduction

[1] In 2000, the British Columbia Legislature enacted the *Tobacco Damages and Health Care Costs Recovery Act*, S.B.C. 2000, c. 30. The Act, whose constitutionality was upheld by this Court in *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473, creates a right of action allowing the Province to sue tobacco manufacturers, as it has in this case, “to recover the cost of health care benefits” related to “disease caused or contributed to by exposure to a tobacco product”: ss. 1 “tobacco related disease” and 2(1).

[2] The Act also sets out procedures governing this statutory action. This appeal requires the Court to interpret one of those procedural provisions — specifically, s. 2(5)(b), which governs the compellability of health care documents where the Province has sued to recover the cost of health care benefits “on an aggregate basis” (that is, for a population of insured persons, as opposed to for particular individual insured persons). Section 2(5)(b) provides, generally, that “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”.

[3] But does s. 2(5)(b) go so far as to bar the compellability of various databases, collected by the Province, containing coded health care information? The respondent, Philip Morris International, Inc., says it does not, and applied for an order requiring production. The appellant, Her Majesty the Queen in Right of British Columbia, resisted, arguing that such databases contained private health care information about British Columbia residents, and are as such not compellable by operation of s. 2(5)(b). Both the application judge and the Court of Appeal of British Columbia agreed with Philip Morris, finding that the databases, once anonymized, fell outside of the scope of s. 2(5)(b) and were therefore compellable.

[4] I would respectfully disagree. The databases constitute “health care records and documents of particular individual insured persons or . . . documents relating to the provision of health care benefits for particular individual insured persons” and are therefore not compellable. Neither their relevance to the pleadings in the Province’s action nor their anonymization insulate them from the text of s. 2(5)(b), read in its entire context and in its grammatical and ordinary sense, in harmony with the Act’s scheme and object. I would therefore allow the appeal.

II. Statutory Provisions

[5] Section 2(4) of the Act authorizes the Province to claim for recovery of two kinds of health care costs: (a) the cost of health care benefits for “particular individual insured persons”, and (b) the cost of health care benefits “on an aggregate basis”, being “for a population of insured persons”.

[6] Where, as here, the Province sues to recover on an aggregate basis, certain procedural rules contained in s. 2(5) apply. Section 2(5)(a) provides that the Province need not identify, prove the cause of the tobacco related disease in, or prove the cost of health care benefits for, any particular individual insured person. Nor is any person “compellable to answer questions with respect to the health of, or the provision of health care benefits for, particular individual insured persons” in an aggregate action: s. 2(5)(c). And, as I have already noted, s. 2(5)(b), the provision whose interpretation is at issue in this appeal, governs the compellability of documents. Its full text reads:

- (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,

Notwithstanding ss. 2(5)(b) and 2(5)(c), on an application by a defendant in an aggregate action, a court may order discovery of a “statistically meaningful sample” of the protected documents, although where such an order is made “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 [prior to discovery]”: ss. 2(5)(d) and 2(5)(e).

[7] In addition, and irrespective of whether the Province sues to recover for the cost of health care benefits for particular individual insured persons, or on an aggregate basis, s. 5 provides that certain statistical information, including information derived from sampling, is admissible for the purposes of establishing causation and quantifying damages.

III. Procedural History

[8] On January 24, 2001, the Province sued Philip Morris and other tobacco manufacturers to recover the cost of health care benefits on an aggregate basis. Immediately, certain defendants including Philip Morris challenged the constitutionality of the Act, arguing that it (1) exceeds territorial limits on provincial legislative jurisdiction; (2) violates the principle of judicial independence; and (3) infringes the rule of law. As already recounted, this Court rejected those arguments in *Imperial Tobacco* and affirmed the Act's constitutionality.

[9] Philip Morris then applied for production of a collection of health care databases containing coded health care information which the Province says it intends to use for the purpose of proving causation and damages in this action. Philip Morris insisted that access to those databases was critical to its ability to defend itself. The databases sought in this application include the following:

- The Discharge Abstract Database which contains data on hospital discharges, transfers and deaths of in-patients and day surgery

patients in the province and includes clinical, administrative and demographic data;

- The Medical Services Plan Database which contains data on all payments made under the province's Medical Services Plan for professional medical services, including physician, laboratory and diagnostic services;
- The PharmaCare Database which contains data on prescriptions for insured persons, including the date upon which each prescription is filled, the drug number and quantity dispensed, the days of treatment, and the identity of the prescribing practitioner;
- The Client Registry which is the central administrative repository for individuals who have used a service provided by the Ministry of Health in the province and is the control point for issuing new personal health numbers; and
- The Registration and Premium Billing file which contains data on the eligibility for coverage for persons under the Medical Services Plan.

The Province countered that the data contained within the databases sought was derived from, or formed part of, the "health care records and documents of particular

individual insured persons” and the “documents relating to the provision of health care benefits for particular individual insured persons” within the meaning of s. 2(5)(b) and were, as such, not compellable.

[10] As an alternative, the Province offered Philip Morris and the other defendants access to the information stored within the databases through an agreement with Statistics Canada. That agreement would have permitted Philip Morris’s experts to view the databases while at a Statistics Canada Research Data Centre. While other defendants accepted this arrangement, Philip Morris declined because it would not allow for unfettered access to the databases and would also require the waiver of litigation privilege.

[11] Throughout, Philip Morris has maintained that the Province must produce the databases, and that such production is not barred by s. 2(5)(b).

IV. Decisions Below

A. *Supreme Court of British Columbia, 2015 BCSC 844 — Smith J.*

[12] The application judge held that, once the information contained in the databases was anonymized, s. 2(5)(b) did not apply. He therefore found that the databases were compellable.

[13] To interpret s. 2(5)(b), the application judge contrasted the two types of claims — individual and aggregate — which the Act authorizes the Province to advance. He found that, where the Province seeks to recover in respect of particular individual insured persons, 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” would be relevant, admissible and compellable in the same way as an action for personal injury: para. 49 (CanLII). Those clinical records, he found, were the same “health care records and documents” which are protected under s. 2(5)(b) where the Province claims on an aggregate basis. In his view, it followed that, where the Province proceeds on an aggregate basis, s. 2(5)(b) renders those clinical records irrelevant and not compellable. He reasoned, therefore, that the purpose of s. 2(5)(b) is to “draw a distinction” between what is compellable, admissible and relevant in an individual action and in an aggregate action (para. 45) and to limit compellability in an aggregate action to only those documents that are relevant and admissible in light of s. 2(5)(b).

[14] The application judge then considered the databases. He found that the databases contain information taken from individuals’ clinical records. However, he also found that the databases are of a “very different character” than clinical records (which are protected by s. 2(5)(b)), since the databases and the statistical data contained within them would be admissible under s. 5 where the Province proceeds on an aggregate basis: para. 50. While, therefore, s. 2(5)(b) operates to protect the privacy of individuals and prevent discovery of individuals’ clinical records, it could

not be interpreted so as to deny Philip Morris access to the “very information necessary to produce the statistical evidence contemplated by s. 5”: para. 55. Provided, then, that names and other information that would identify “particular individuals” were removed, the databases did not constitute the “health care records and documents” within the meaning of s. 2(5)(b) (para. 55), and he consequently ordered their production.

B. *Court of Appeal of British Columbia, 2017 BCCA 69, 412 D.L.R. (4th) 310 — Newbury, Willcock and Goepel J.J.A.*

[15] The Court of Appeal dismissed the Province’s appeal. In so doing, it expressly declined to follow *New Brunswick v. Rothmans Inc.*, 2016 NBQB 106, in which similar databases were held to be not compellable under the identical provision to s. 2(5)(b) contained in New Brunswick’s *Tobacco Damages and Health Care Costs Recovery Act*, S.N.B 2006, c. T-7.5, s. 2(5)(b).

[16] The Court of Appeal explained that one of the main objects of the Act was to establish the “playing field” for tobacco litigation and that it “cannot have been the intention of the Legislature for the playing field to be tipped unfairly in the Province’s favour”: para. 39. Like the application judge, it found that, by operation of s. 2(5)(b), the clinical records of particular individual insured persons are not relevant where the Province proceeds on an aggregate basis. While the information contained in the databases may be drawn from clinical records, the Court of Appeal agreed that the databases are of a “very different character”: para. 35. The databases, unlike

individual clinical records, are “highly relevant” where the Province proceeds on an aggregate basis, and restricting their compellability would therefore be “inherently unfair”: para. 37. The Court of Appeal likened the Province’s interpretation, which would protect the databases under s. 2(5)(b), to a reading-out of the phrase “particular individual”, effectively making “no data about health care costs discoverable in its multi-billion dollar claim for health care costs”: para. 37. It held that once the databases are anonymized as ordered by the application judge, the production of the anonymized databases “poses no realistic threat to personal privacy”: para. 36. Trial fairness therefore required the databases to be produced.

V. Analysis

A. *The Interpretation of Section 2(5)(b) of the Act*

[17] Statutory interpretation entails discerning legislative intent by examining the words of a statute in their entire context and in their grammatical and ordinary sense, in harmony with the statute’s scheme and object: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21.

[18] As to the statute’s object, the purpose of the Act is to grant the Province a civil cause of action through which it may recover the cost of health care benefits arising from tobacco related disease: see also *Imperial Tobacco*, at para. 32. To achieve this purpose, the Act prescribes various procedural rules, including that

contained in s. 2(5)(b) which governs the compellability of certain evidence where the Province proceeds on an aggregate basis.

[19] The text of s. 2(5)(b) states that 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 required by a rule of law, practice or procedure when such documents are relied upon by an expert witness. There is no suggestion that these proceedings have reached the point at which production would be required as a consequence of expert reliance. The central question to be decided in this appeal is, therefore, whether the courts below were correct to find that the databases, once anonymized, did *not* qualify as “health care records and documents of particular individual insured persons” or “documents relating to the provision of health care benefits for particular individual insured persons” and were therefore compellable.

[20] This brings me to what is, at root, my point of departure from the courts below. Their finding that the databases were not protected by s. 2(5)(b) is, in my respectful view, marked by three errors. First, they failed to examine the full scope of the documents and records that are protected by s. 2(5)(b). Secondly, they permitted the *relevance* of the databases, where the Province proceeds on an aggregate basis, to supplant the text of s. 2(5)(b). And finally, they treated the phrase “particular individual insured persons” as synonymous with “*identifiable* individual insured persons”.

(a) *Full Scope of the “Records” and “Documents” Protected by Section 2(5)(b)*

[21] While neither “records” nor “documents” are defined in the Act, British Columbia’s *Interpretation Act*, R.S.B.C. 1996, c. 238, s. 29 — which, by operation of s. 2(1) of the *Interpretation Act*, applies here — defines the word “record” as including:

... books, documents, maps, drawings, photographs, letters, vouchers, papers and any other thing on which information is recorded or stored by any means whether graphic, electronic, mechanical or otherwise;

This definition is notably similar to the meaning given to the word “document” by the general rule governing discovery of documents in the *Supreme Court Civil Rules*, B.C. Reg. 168/2009, r. 1-1(1):

“document” has an extended meaning and includes a photograph, film, recording of sound, any record of a permanent or semi-permanent character and any information recorded or stored by means of any device;

[22] So understood, both “records” and “documents” are means of storing information. And, from these definitions, it is readily apparent that the databases (including the Discharge Abstract Database, the Medical Services Plan Database, the PharmaCare Database, the Client Registry and the Registration and Premium Billing file) are both “records” and “documents” within the meaning of the Act. Each database is a collection of health care information derived from original records or

documents which relate to particular individual insured persons. That information is stored in the databases by being sorted into rows (each of which pertains to a particular individual) and columns (each of which contains information about the field or characteristic that is being recorded, such as the type of medical service provided).

[23] Further, careful examination of s. 2(5)(b) confirms that the databases fall within its scope. Section 2(5)(b) protects two types of records and documents. First, it protects the “health care records and documents of particular individual insured persons”. This is the category of records and documents which the courts below found were comprised of individual clinical records prepared at the time of treatment. I agree. Much of the information stored within the databases — for example, the type of medical service provided, the level of patient care provided while in hospital, and the length of hospital stay — appears to have been drawn directly from individuals’ clinical records. The databases are therefore, at least in part, collections of health care information taken from individuals’ clinical records and stored in an aggregate form alongside the same information drawn from the records of others.

[24] Unlike the courts below, however, I would reject Philip Morris’s submission that simply because the databases, due to their aggregate nature, may be of a “very different character” than original clinical records, they must therefore fall outside of the protective scope of s. 2(5)(b). As already shown, the databases are both “records” and “documents” within the meaning of the Act. They store the health care

information of particular individual insured persons. And, while that information is stored on an aggregate rather than individual basis, each data entry in the databases is derived from particular individuals' clinical records. The mere alteration of the method by which that health care information is stored — that is, by compiling it from individual clinical records into aggregate databases — does not change the nature of the information itself. Even in an aggregate form, the databases, to the extent that they contain information drawn from individuals' clinical records, remain “health care records and documents of particular individual insured persons”.

[25] Further, even were it the case that the databases are not, in their entirety, “health care records and documents of particular individual insured persons”, the second category of records and documents protected by s. 2(5)(b) ought to be considered — being, “documents relating to the provision of health care benefits for particular individual insured persons”. Neither the application judge nor the Court of Appeal considered whether the databases fell within this second category, with the result that the full scope of s. 2(5)(b)'s protections was not accounted for.

[26] Significantly, the Legislature used expansive language — “relating to” — in describing the second category. In doing so, it broadened the scope of protection furnished under s. 2(5)(b) well beyond “health care records and documents of particular individual insured persons”. In other words, s. 2(5)(b) protects documents that *relate to* the provision of health care benefits, even if such documents are not “health care records and documents” themselves. I accept Philip Morris's submission

at the hearing of this appeal that “documents relating to the provision of health care benefits” are distinct from clinical records and may include documents such as “billing records” and records of “drugs administered to a patient”: transcript, at p. 50. Contrary to Philip Morris’s argument that the databases are distinct from such documents, however, it appears that much of the information stored in the databases is precisely that. For example, the Medical Services Plan Database documents all the payments made by the Province to health care practitioners, the number of payments made, the amount of each payment, and the date of each payment. Similarly, the PharmaCare Database contains the total amount paid by the PharmaCare plan for each eligible prescription, divided into amounts paid for ingredients and professional fees, and the amount which was charged to each individual insured person per prescription. Stored separately — that is, not in an aggregate form within a database — such information would clearly qualify as being “documents relating to the provision of health care benefits for particular individual insured persons”. And, as I have explained, merely transferring this information from the documents within which it was originally stored, to databases (which are, after all, nothing more than documents designed to store the same information in an aggregate manner), does not change the quality of the information so as to exclude it or the databases in which it is stored from the protective scope of s. 2(5)(b).

(b) *Relevance of the Databases as a Consideration Under Section 2(5)(b)*

[27] The courts below also found that, because the databases were (as the Court of Appeal, described them) “highly relevant” to an aggregate action, it would be *unfair* to prohibit their discovery. Section 2(5)(b), they explained, could not have been intended to protect the “highly relevant” databases. But s. 2(5)(b) conditions the compellability of the records and documents it describes *not* upon their relevance, but upon their nature — being, whether or not such records and documents are “health care records and documents” or “documents relating to the provision of health care benefits”. And, the relevance of those records and documents to a claim brought on an aggregate basis does not alter that nature. The Legislature could have easily conditioned the non-compellability of records and documents upon their relevance, but it did not. Irrespective, therefore, of their relevance, such records and documents that fall within the scope of s. 2(5)(b) are not compellable. It follows that I am of the respectful view that the courts below erred by allowing what they saw as the relevance of the aggregate databases to supplant the meaning of, and the legislative intent behind, s. 2(5)(b).

(c) *“Identifiable Individual Insured Persons”*

[28] Before this Court, Philip Morris also argued that, even if the databases constitute “health care records and documents” or “documents relating to the provision of health care benefits”, they still fall outside the scope of s. 2(5)(b) as they are neither “health care records and documents of particular individual insured persons”, nor “documents relating to the provision of health care benefits for

particular individual insured persons”. The argument is that a “particular individual” must mean an “*identifiable* individual”: transcript, at p. 46. And (the argument continues) once the information contained within the databases is anonymized (as the application judge ordered), the databases must fall outside of the scope of s. 2(5)(b) since the anonymized information is no longer capable of *identifying* an individual insured person. This was also the conclusion of the courts below.

[29] Such an interpretation would, however, be inconsistent with the Act’s scheme. For example, equating “particular” with “identifiable” would render ss. 2(5)(d) and 2(5)(e) redundant. Section 2(5)(d) allows for a defendant to apply to court to obtain discovery of a statistically meaningful sample of the documents otherwise protected by s. 2(5)(b). Section 2(5)(e) provides that, where a production order is made under s. 2(5)(d), the sample documents must be anonymized. But were it possible, as Philip Morris posits, to compel the production of records and documents that would otherwise be caught by s. 2(5)(b) by simply anonymizing them, no party would ever have to resort to applying under ss. 2(5)(d) and 2(5)(e) for discovery of a statistically meaningful sample of such records or documents. Bearing in mind that those provisions apply only where the Province is claiming “on an aggregate basis, for a population of insured persons” (s. 2(4)(b)), those provisions would be meaningless. And yet, it is a “well-accepted principle of statutory interpretation that no legislative provision should be interpreted so as to render it mere surplusage”: *R. v. Proulx*, 2000 SCC 5, [2000] 1 S.C.R. 61, at para. 28.

[30] Additionally, Philip Morris’s interpretation is caught by the “basic principle of statutory interpretation” that “words [should be given] the same meaning throughout a statute”: *R. v. Zeolkowski*, [1989] 1 S.C.R. 1378, at p. 1387. Equating “particular” in s. 2(5)(b) with “identifiable” would render nonsensical s. 2(5)(a)(i) of the Act, which also refers to “particular individual insured persons”. Specifically, s. 2(5)(a)(i) provides that, where the Province is claiming on an aggregate basis, it need not identify “particular individual insured persons”. By applying Philip Morris’s interpretation of “particular” in s. 2(5)(b) to the same text in s. 2(5)(a)(i), the latter would read: “it is not necessary to identify *identifiable* individual insured persons”. It seems unlikely that the Legislature intended to say this.

[31] The ordinary meaning of the word “particular” is *distinct* or *specific*. This is consistent with the *Oxford English Dictionary* (online) which defines “particular” as meaning “one among a number . . . single; distinct, individual, specific” (emphasis added). This definition supports the view that the databases — even once anonymized — fall within s. 2(5)(b)’s scope as comprising the “health care records and documents of”, and the “documents relating to the provision of health care benefits for”, each *distinct* and *specific* individual in British Columbia.

B. *Trial Fairness*

[32] As I have recounted, the Court of Appeal ordered production of the databases to ensure “trial fairness”. Before us, Philip Morris similarly argued that if the defendants “do not get discovery of this data the trial will be unfair”: transcript, at

p. 44. In my view, such concerns were addressed in 2005 by this Court in *Imperial Tobacco* (that is, in deciding the Act's constitutionality) and, in any event, are premature. In the constitutional litigation, the defendant tobacco manufacturers argued that the rules contained within ss. 2(5)(a), 2(5)(b) and 2(5)(c) "subvert the court's ability to discover relevant facts" and "impinge on the court's fact-finding function, and virtually guarantee the government's success in an action": para. 48.

[33] This Court rejected these submissions. It found that the Act's processes and procedures were "not as unfair or illogical" as the defendants submitted and that they "reflect legitimate policy concerns of the British Columbia legislature regarding the systemic advantages tobacco manufacturers enjoy when claims for tobacco-related harm are litigated through individualistic common law tort actions": para. 49. Legislatures are entitled to enact "unconventional rules of civil procedure and evidence" that shift "certain onuses of proof or limi[t] the compellability of information that [a party] assert[s] is relevant": *Imperial Tobacco*, at para. 55. While this Court did not, in the constitutional litigation, elaborate upon the precise operation of s. 2(5)(b), it indicated that s. 2(5)(b) did not upend the trial process so vigorously as to encroach upon the independence of the judiciary: para. 55. In my view, Philip Morris's submission — that trial fairness requires an interpretation of s. 2(5)(b) which is inconsistent with the language of the provision itself — effectively seeks to relitigate this Court's earlier conclusion in relation to the Act that it is not a court's role to "apply only the law of which it approves", or to "decide cases with a view simply to what the judiciary (rather than the law) deems fair or pertinent", or to "second-guess the

law reform undertaken by legislators, whether that reform consists of a new cause of action or procedural rules to govern it”: *Imperial Tobacco*, at para. 52.

[34] In any event, the concern of “trial fairness” is, at best, premature. Within the Act, the Legislature has provided a number of mechanisms through which trial fairness may be preserved. Specifically, s. 2(5)(b) itself requires that any document relied upon by an expert witness be produced. As already noted, this litigation has not yet reached the point at which production would be required as a consequence of reliance by the Province’s expert.

[35] Additionally, and as I have also explained, s. 2(5)(d) permits a court, on application, to order discovery of a “statistically meaningful sample” of any of the records and documents that are otherwise protected by s. 2(5)(b). No defendant has yet made such an application and thus no court has yet had reason to consider what would constitute a “statistically meaningful sample” of the protected documents.

VI. Conclusion

[36] It follows from the foregoing that I agree with the Province that the databases constitute “health care records and documents of particular individual insured persons or . . . documents relating to the provision of health care benefits for particular individual insured persons”. As such, by operation of s. 2(5)(b) the databases are not compellable. To be clear, the databases will be compellable once “relied on by an expert witness”: s. 2(5)(b). A “statistically meaningful sample” of the

databases, once anonymized, may also be compelled on a successful application under ss. 2(5)(d) and 2(5)(e).

[37] I would therefore allow the appeal, with costs in this Court and in the courts below, set aside the order of the application judge, and dismiss the application of Philip Morris for an order requiring production of the health care databases.

Appeal allowed with costs throughout.

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