

IN THE COURT OF QUEEN'S BENCH OF NEW BRUNSWICK

TRIAL DIVISION

JUDICIAL DISTRICT OF FREDERICTON

Reference : 2016 NBQB 106

F/C/88/2008

Date : 20160603

B E T W E E N : HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE
OF NEW BRUNSWICK

PLAINTIFF

AND

ROTHMANS INC., ROTHMANS, BENSON & HEDGES INC.,
CARRERAS ROTHMANS LIMITED, ALTRIA GROUP, INC.,
PHILIP MORRIS U.S.A. INC., PHILIP MORRIS
INTERNATIONAL, INC., JTI- MACDONALD CORP., R.J.
REYNOLDS TOBACCO COMPANY, R.J. REYNOLDS
TOBACCO INTERNATIONAL INC., IMPERIAL TOBACCO
CANADA LIMITED, BRITISH AMERICAN TOBACCO P.L.C.,
B.A.T. INDUSTRIES P.L.C., BRITISH AMERICAN TOBACCO
(INVESTMENTS) LIMITED, and CANADIAN TOBACCO
MANUFACTURERS' COUNCIL

DEFENDANTS

**Reçu et Déposé
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*Cour du Banc de la Reine /
Court of Queen's Bench
Edmundston, N.B.*

BEFORE: The Honourable Mr. Justice Thomas E. Cyr

DATE OF HEARING: April 7, 2016

DATE OF DECISION: June 3, 2016

APPEARANCES:

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CYR J. :

I. INTRODUCTION

[1] The defendants, Rothmans Inc., Rothmans, Benson & Hedges Inc., Altria Group Inc., Philip Morris International Inc., and Philip Morris U.S.A. Inc. (hereinafter referred to as the “Moving Defendants”), seek an order requiring the plaintiff, Her Majesty the Queen in Right of the Province of New Brunswick (“Province of New Brunswick”), to produce anonymized population-based administrative data related to health care benefits provided to residents of New Brunswick.

[2] As well, this motion seeks an order precluding the Province of New Brunswick from using at trial, any evidence that is, in whole or in part, based on documents or data that have not been produced to the Moving Defendants.

[3] Moreover, the Moving Defendants request production of fully anonymized exemplars of 50 randomly selected individuals from eleven of the health information databases listed at Schedule “A” hereto attached (“Health Information Databases”).

II. OVERVIEW

[4] The Notice of Motion, as amended, reads as follows:

The Defendants Rothmans, Benson & Hedges Inc., Philip Morris International Inc., Philip Morris U.S.A. Inc. and Altria Group Inc. (the “Moving Defendants”) will apply (...) for:

- (1) An Order requiring the Plaintiff to produce fully anonymized exemplars of 50 randomly selected individuals from each of the Databases listed at Schedule “A” hereto (the “Health Information Databases”) with all personal identifiers removed, so that they are available for

consideration in connection with the determination of the relief sought herein;

(2) An Order pursuant to Rule 31.02(2) and 31.04(4) of the New Brunswick Rules of Court (the “Rules”) requiring the Plaintiff to produce all data, documents and records listed in the Health Information Databases at Schedule “A” hereto except for the names, health insurance numbers and street addresses of individuals whose information is contained in the Health Information Databases;

(3) An Order requiring that the Plaintiff “link” the Health Information Databases so that any single individual may be tracked across databases even though the records are anonymized (as is further described below);

(4) In the alternative to (3) above, an Order requiring production of the Health Information Databases in unlinked form, but with a unique identifier assigned to the data for each individual, so that experts retained by the Defendants can perform the linkages themselves;

(5) An Order precluding the Plaintiff or its experts from using, referring to or relying on at trial any documents that have not been produced to the Moving Defendants for inspection and copying;

(6) An Order precluding the Plaintiff from calling or relying at trial on the evidence of any expert or other witness, including but not limited to Dr. Glenn Harrison, who has had produced or made available to her/him documents that have not been produced to the Moving Defendants for inspection and copying;

(7) An Order that any database or other information created or assembled pursuant to a contractual agreement among the Plaintiff, Statistics Canada and/or certain Defendants (the “StatsCan Agreement”) constitute documents not produced to the Moving Defendants for inspection and copying;

(8) Their costs of this motion; and

(9) Such further and other relief as this Honourable Court deems just and reasonable.

A. THE HEALTH INFORMATION DATABASES

[5] The Moving Defendants are seeking direct production of the eleven Health Information Databases found at Schedule “A”. A summary of the sensitive information

contained in these databases is attached hereto at Schedule “B”, prepared with the help of the information contained in the Affidavit of John A. Boyne, sworn to on March 14, 2016, and found at pages 553-565 of the Record on Motion.

B. THE COMMUNITY CANADIAN HEALTH SURVEYS AND THE NEW BRUNSWICK DATASET

[6] The Community Canadian Health Surveys (“CCHS”) and the earlier national population health surveys had been developed and conducted by Statistics Canada to provide accurate information on a wide variety of health and health care related factors in the Canadian and New Brunswick populations, including smoking and health care utilization.

[7] The CCHS has collected information from a statistically representative sample of persons in New Brunswick since the year 2000. As of 2015, the New Brunswick sample has grown to approximately 41,000 individuals.

[8] The expert retained by the Province of New Brunswick, Dr. Glenn W. Harrison, analyzed the publicly available data from the CCHS (“Public CCHS”), for the period from 2000 to 2010, to estimate the health care expenditures attributable to smoking in New Brunswick. The Public CCHS data can be accessed by researchers, including experts for the defendants, in the form of public use microdata files (PUMF) available from Statistics Canada.

[9] To supplement the results derived from the Public CCHS data, Dr. Harrison also analyzed a dataset known as the New Brunswick Dataset (“NBD”). The NBD consists of a sample of approximately 21,000 individuals in New Brunswick who participated in the CCHS from 2000 to 2009 and for whom it was possible to link their CCHS information to information from three of the provincial databases; namely, the Vital Statistics Deaths Registry which

contains information on individuals who are deceased, the Discharge Abstract Database which contains information on hospital admissions, and the Medicare Delivered Services Database which contains information on physician visits.

[10] At no time did Dr. Harrison have access to the provincial databases used to create the NBD, nor has he had access to any provincial data or other data that has not been produced or is not available to experts retained by the defendants.

[11] The record discloses that the NBD is a representative sample of the New Brunswick population. The sample for the CCHS is constructed and collected by Statistics Canada in order to produce estimates, for example, of smoking or obesity rates. The record discloses that the NBD uses multiple years of the CCHS and includes many more individuals than in any single year of the survey. Moreover, it provides a robust and statistically reliable sample of the general population.

[12] The record further reveals that the NBD estimate can be compared to the actual published population statistics to assess how well the NBD sample represents the general population. Therefore, the representativeness of the NBD sample can be tested using standard statistical techniques without access to any additional provincial data.

C. THE STATISTICS CANADA AGREEMENT

[13] The Province of New Brunswick has agreed to provide access to all of the anonymized databases to the defendants who are prepared to enter into a restrictive agreement. The Province of New Brunswick, Statistics Canada, and the defendants other than the Moving Defendants, mainly the British American Tobacco defendants and the Reynolds Tobacco defendants, along with their Canadian subsidiaries, have entered into the Statistics Canada

Agreement (“StatsCan Agreement”) whereby Statistics Canada survey data will be linked to data from the Health Information Databases for analysis in a secured environment.

[14] The experts hired by all the defendants have access to the Health Information Databases, with identifiers removed and with appropriate restrictions to protect identifying information in a Statistics Canada Research Data Centre. All experts, including the one retained by the Province of New Brunswick, are provided the same access and are subject to the same restrictions.

[15] Moreover, the Province of New Brunswick and the signatory defendants have recognized expert privilege and have agreed not to seek disclosure of the identity or work product of any expert retained by another party.

[16] The evidentiary record discloses the following regarding the StatsCan Agreement (see paragraphs 48-56 of the Affidavit of John A. Boyne found at pages 571-572 of the Record on Motion):

- (i) Statistics Canada will link the provincial databases to the CCHS and potentially other surveys which contain smoking information in order to allow experts to conduct a statistical analysis on the relationship between smoking and health care utilization.
- (ii) The provincial databases do not contain smoking information.
- (iii) Smoking information is contained in the Statistics Canada Surveys. Those surveys allow for a meaningful statistical analysis of the relationship between smoking and health care utilization.

- (iv) All experts are provided access to linked and unlinked data from which identifiers have been removed.
- (v) The StatsCan Agreement recognizes and protects the confidentiality of identifying information.
- (vi) The experts are to perform their research in a secure research data center.
- (vii) The removal or release of identifying information is prohibited.
- (viii) The StatsCan Agreement has been undertaken to provide a mechanism whereby all experts can have access to the type and range of data contemplated by the Moving Defendants' proposal, but within a context that does not violate the *Personal Health Information Privacy and Access Act*, S.N.B. 2009, c. P-7.05, and which respects the Province of New Brunswick's obligation to ensure the security and confidentiality of individuals' personal health information.
- (ix) The StatsCan Agreement recognizes the reality that simply removing direct identifiers from personal health information does not yield de-identified data and does not afford protection to the "identifying information" that will remain in the Health Information Databases even after direct identifiers have been removed.
- (x) Under the StatsCan Agreement, Statistics Canada will receive the agreed upon provincial databases and make them available on a stand-alone basis to all parties within the secure Research Data Centres.

- (xi) Statistics Canada will link the provincial databases to the CCHS and potentially other surveys, thereby providing information about smoking status and history that is absent in the provincial databases.
- (xii) This permits the experts to conduct meaningful statistical analysis on the relationship between smoking and health care utilization using a broad array of provincial and Statistics Canada data.
- (xiii) Any relevant data that experts may require for analysis and statistical purposes can be accessed through the Statistics Canada Research Data Centres, where the removal or release of identifiable information is prohibited and the experts are subject to the same level of monitoring and sanction as a Statistics Canada employee.

D. INFORMATION ALREADY MADE AVAILABLE TO THE MOVING DEFENDANTS

[17] The Record discloses that the Province of New Brunswick has made available all the information its expert has had access to.

III. ANALYSIS

A. DECISION OF THE SUPREME COURT OF BRITISH COLUMBIA REGARDING A SIMILAR APPLICATION

[18] The Moving Defendants have brought to my attention the decision of the British Columbia Supreme Court in a similar Application where the production of BC Health Care databases was ordered. I am informed that the province of British Columbia was granted leave to appeal that decision. The Province of British Columbia's Appeal Book and *factum* has been

filed. However, a hearing date has not yet been scheduled. See *British Columbia v. Imperial Tobacco Canada Ltd.*, 2015 BCSC 844.

[19] Respectfully, for the reasons stated below, I am not prepared to follow that decision.

B. THE RULES OF COURT OF NEW BRUNSWICK AND THE DUTY TO DISCLOSE

[20] In most cases, parties have a duty to disclose all documents relating to the matter in issue. A party cannot unilaterally decide that a document relating to a matter in issue in the action is irrelevant and therefore need not be produced.

[21] A party's disclosure and production obligations are clearly set out in Rule 31.02(2) which reads as follows:

Every document which relates to a matter in issue in an action and which is in the possession or control of a party to the action, shall be produced for inspection if requested, as provided in this rule, unless privilege is claimed in respect of that document.

[Emphasis added.]

[22] In order to assure procedural fairness, all the relevant documents must be produced (see *Murphy v. Bank of Nova Scotia*, 2013 NBQB 316, at paragraph 15).

[23] Moreover, Rule 31.04(4) expressly provides that a court, at any time, may order production for inspection of documents for which no privilege is claimed.

[24] However, this is not an ordinary tort action.

C. THE STATUTORY CLAIM

[25] This matter arises out of an action by Her Majesty the Queen in Right of the Province of New Brunswick for the recovery of health care costs incurred by it pursuant to the *Tobacco Damages Health Care Costs Recovery Act*, S.N.B 2006, c. T-7.5 (the *Act*).

[26] The action is pursuant to subsection 2(1) and paragraph 2(4)(b) of the *Act*. The cause is a direct and distinct action for the recovery of health care benefits caused or contributed to by tobacco-related wrongs as defined under the *Act*. The claim is on an aggregate basis for a population of insured persons. The suit is brought by Her Majesty in Right of the Province of New Brunswick in its own right and not on the basis of a subrogated claim.

[27] The *Act* is congruous to British Columbia's *Tobacco Damages and Health Care Costs Recovery Act*, S.B.C. 2000, c. 30.

[28] The ordinary rules of practice have been substituted by rules of evidence and procedure expressly mandated by statute. The following sections of the *Act* deserve particular attention:

2(1) Her Majesty in right of the Province has a direct and distinct action against a manufacturer to recover the cost of health care benefits caused or contributed to by a tobacco-related wrong.

2(2) An action under subsection (1) is brought by Her Majesty in right of the Province in its own right and not on the basis of a subrogated claim.

2(3) In an action under subsection (1), Her Majesty in right of the Province may recover the cost of health care benefits whether or not there has been any recovery by other persons who have suffered damage caused or contributed to by the tobacco-related wrong committed by the defendant.

2(4) In an action under subsection (1), Her Majesty in right of the Province 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.

2(5) Where Her Majesty in right of the Province seeks in an action under subsection (1) to recover the cost of health care benefits on an aggregate basis,

- (a) it is not necessary
 - (i) to identify particular individual insured persons,
 - (ii) to prove the cause of tobacco-related disease in any particular individual insured person, or
 - (iii) to prove the cost of health care benefits for any particular individual insured person,
- (b) the health care records and documents of particular individual insured persons or the documents relating to the provision of health care benefits for particular individual insured persons are not compellable except as provided under a rule of law, practice or procedure that requires the production of documents relied on by an expert witness,
- (c) a person is not compellable to answer questions with respect to the health of, or the provision of health care benefits for, particular individual insured persons,
- (d) notwithstanding paragraphs (b) and (c), on application by a defendant, the court may order discovery of a statistically meaningful sample of the documents referred to in paragraph (b) and the order shall include directions concerning the nature, level of detail and type of information to be disclosed, and
- (e) if an order is made under paragraph (d), the identity of particular individual insured persons shall not be disclosed and all identifiers that disclose or may be used to trace the names or identities of any particular individual insured persons shall be deleted from any documents before the documents are disclosed.

[Emphasis added.]

[29] Moreover, section 5 of the *Act* states:

- 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 in an action brought

- (a) by Her Majesty in right of the Province under subsection 2(1), or
- (b) by or on behalf of a person in the person's own name.

[30] The *Act* expressly provides that in an aggregate action, it is not necessary to identify particular individual insured persons or to prove the cause of tobacco-related disease in any of those persons, as well it is not necessary to prove the cost of health care benefits paid for any of those persons.

[31] Moreover, the privacy of individual insured persons is protected by paragraph 2(5)(b) which expressly provides that neither health care records and documents, nor documents relating to their health care benefits are compellable.

[32] The statute does not provide a discretion to the court to order production of any documents which is, under the wording of paragraph 2(5)(b), not compellable.

[33] However, two exceptions are set out to this privacy protection provision. Documents relied upon by an expert witness remains compellable pursuant to paragraph 2(5)(b) and a statistically meaningful sample under prescribed conditions is provided for in paragraph 2(5)(d). Neither exceptions have been raised by the Moving Defendants in this motion.

[34] The Moving Defendants argue that subsection 2(5) limits the compellability of information that they say is relevant and therefore unfair. As previously mentioned, British Columbia's *Tobacco Damages and Health Care Costs Recovery Act*, contains identical wording which was upheld by the Supreme Court of Canada (see *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. No. 473).

[35] In upholding the validity of paragraph 2(5)(b), the Supreme Court of Canada states:

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

49 The rules in the Act with which the appellants take issue are not as unfair or illogical as the appellants submit. They appear to 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. That, however, is beside the point. The question is not whether the Act's rules are unfair or illogical, nor whether they differ from those governing common law tort actions, but whether they interfere with the courts' adjudicative role, and thus judicial independence.

55 No such fundamental alteration or interference was brought about by the legislature's enactment of the Act. A court called upon to try an action brought pursuant to the Act retains at all times its adjudicative role and the ability to exercise that role without interference. It must independently determine the applicability of the Act to the government's claim, independently assess the evidence led to support and defend that claim, independently assign that evidence weight, and then independently determine whether its assessment of the evidence supports a finding of liability. The fact that the Act shifts certain onuses of proof or limits the compellability of information that the appellants assert is relevant does not in any way interfere, in either appearance or fact, with the court's adjudicative role or any of the essential conditions of judicial independence. Judicial independence can abide unconventional rules of civil procedure and evidence.

[Emphasis added.]

[36] The Act's specific rules of evidence and procedure are different from other individualistic common law tort actions, however they have been found to be constitutionally valid by the Supreme Court of Canada.

D. A DATABASE IS A DOCUMENT

[37] Subsection 47.1(1) of the *Evidence Act*, R.S.N.B. 1973, c. E-11, defines “document” as follows.

47.1(1) In this section and in section 47.2:

“document” includes, unless the context requires otherwise, any record of information, however recorded or stored, whether in printed form, on film, by electronic means or otherwise; (document)

[38] Moreover, Rule 31.01 of the *Rules of Court of New Brunswick*, defines “document” as follows:

document includes a film, photograph, video tape, chart, graph, map, plan, survey, book of account, recording of sound, and information recorded or stored by means of any device;

[39] In the case of *Animal Welfare International Inc. v. W3 International Media Ltd.*, 2011 BCSC 299, [2011] B.C.J. No. 407, similar wording permitted the court to conclude that electronic material was considered a document:

31 Information in electronic form is producible as a document pursuant to the Supreme Court Civil Rules.

32 The definition of “document” pursuant to the Rules is broad. It states that a 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.

Any information recorded or stored by means of any device is consistent with case law that has identified electronic material as a document subject to production.

[40] Moreover, in the case of *Andersen v. St. Jude Medical Inc.*, [2008] O.J. No. 430, under the heading of “Production and discovery of electronic data”, the court concluded as follows:

23 Although data stored in electronic form is defined as a document under our rules, it is of course a document of a different kind than traditional paper documents. In the first place, it exists as electronic impulses which cannot be viewed directly so the only way to inspect the document is to read output from the database on a computer screen or by means of a paper printout. This output is obtained by querying the database. That is running a program which extracts certain information and organizes it as readable words or numbers. In the second place a database is a dynamic, almost organic, document which changes constantly whenever data is updated. Determining the appropriate material to be produced and the appropriate format therefore requires consideration of the purpose of the production and the technical limitations of the software and hardware.

[41] Databases have been held to be documents. I agree with the Province of New Brunswick’s contention that by deleting certain identifiers or even all identifiers will not alter the fact that the database is a document, nor will it alter the fact that the databases sought contain health records that relate to the provision of “health care benefits” defined under the *Act* to include hospital, medical, and other services.

[42] The Province argues that deleting certain identifiers or even all identifiers does not mean that the records and documents cease to be the records and documents of “particular individuals”. I agree.

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

E. THE STATISTICS CANADA AGREEMENT

[44] The Moving Defendants argue that the StatsCan Agreement would undermine their right to a level-playing field with the plaintiff, and to prepare their positions in private. Moreover, they add that they are not prepared to agree to the unjust terms set out in the agreement.

[45] I disagree for the evidentiary record before me discloses and permits me to conclude that the provincial health care databases as well as Statistics Canada data, with an appropriate level of protection and sanction, can be accessed and analyzed through the Statistics Canada Research Data Centres. In light of the very sensitive private information requested, I believe the StatsCan Agreement to be reasonable in the circumstances (see paragraphs 13-16 above). The record discloses that the restrictions which will be imposed on any expert accessing the data are standard and appropriate for such data, and do not impair rigorous statistical analysis. Moreover, access to data beyond the scope contemplated by the StatsCan Agreement is not necessary for rigorous research, to validate results, or to comment on the reliability of the data.

F. THE GENERAL INFORMATION REQUESTED BY THE MOVING DEFENDANTS

[46] As well, the evidentiary record permits me to make the following findings:

- (i) The Moving Defendants' proposal to remove direct personal identifiers (name and health insurance number) and their assertion that this will result in anonymized data is contrary to all established health information management practices and protection of privacy principles;

- (ii) The Moving Defendants' proposal is inadequate for the level of personal information detail contained in the health care databases;
- (iii) The Moving Defendants' proposal to link the health care databases exponentially increases the risk of re-identification even without direct identifiers;
- (iv) Production of the complete "administrative data" as sought by the Moving Defendants is unnecessary for analysis of the Province of New Brunswick's expert opinions;
- (v) The NBD can be analyzed for "data error" without recourse to the provincial health care databases in their entirety;
- (vi) Whether for research or litigation purposes, standard statistical analysis can be utilized on any of the data utilized by the expert retained by the Province of New Brunswick.

G. *ADDITIONAL INFORMATION REQUESTED IN THE AMENDED NOTICE OF MOTION*

[47] In its amended Notice of Motion, the Moving Defendants request the production of fully anonymized exemplars of 50 randomly selected individuals from eleven of the Health Information Databases for the purpose of assessing the accuracy of the Province of New Brunswick's characterization that the databases are digital versions of the clinical records of individual insured persons who have received insured health care.

[48] The Province of New Brunswick has already provided 21,225 exemplars of the Discharge Abstract Database, the Medicare Delivered Services Database, and the Vital Statistics Deaths Registry, in the form of the NBD, which it has had in its possession since June of 2015.

[49] The totality of the documentation, explanation and data already produced to the defendants provides ample information for the assessment of the Province of New Brunswick's characterization of the databases in question.

[50] Moreover, the defendants have been provided with or have access to the detailed data layout/dictionary for the Discharge Abstract Database which provides a comprehensive summary of the data elements collected.

[51] As well, the Discharge Abstract Database records of a randomly selected sample of 21,225 New Brunswick residents were provided to the Moving Defendants in June 2015 as part of the NBD.

[52] Based on the evidence before me, I conclude that simply removing direct identifiers from a patient record does not produce de-identified or anonymized data. This is especially true if that data can be linked to other records belonging to the same individual either within a single database or across several databases.

[53] The production of 50 "exemplars", in the manner demanded by the Moving Defendants is likely to involve the production of hundreds and possibly thousands of individual health records due to the fact that each of the 50 "exemplar" persons may have multiple records within each database.

[54] Consequently, I conclude that the records produced in the format desired by the Moving Defendants will certainly not meet the internationally recognized criteria for the “identifying information” as defined in the *Personal Health and Information Privacy and Access Act*, S.N.B. 2009, c. P-7.05. Therefore, while the production of a sample of 50 “exemplars” is on a smaller scale than full production of all the databases, it nonetheless constitutes a breach of privacy and confidentiality of 50 New Brunswickers who may be randomly selected.

[55] Finally, for the reasons previously given regarding the Moving Defendants’ general request for access to documents, the information sought is not compellable under the *Act*.

IV. CONCLUSIONS

[56] The disclosure of protected personal health information requested by the Moving Defendants greatly increases the risk of identification of particular individuals and exposure of very sensitive information; more specifically, personal health information.

[57] The information sought by the Moving Defendants are documents relating to the provision of health care benefits, which under paragraph 2(5)(b) of the *Act* are not compellable. They do not contain statistics or aggregated data. Neither of the two exceptions under subsection 2(5) have been raised by the Moving Defendants in support of their motion.

[58] The expert retained by the Moving Defendants has been provided with all the data on which the Province of New Brunswick’s expert relies.

[59] The Statistics Canada survey provides to all parties to this litigation access to statistically meaningful data on smoking and health care utilization. Moreover, the StatsCan Agreement allows for linkage of survey data with provincial data and for access to the databases

in a standard appropriate research environment with standard appropriate restrictions available to all parties to the within action. Removing the individuals' names and other identifying information as proposed by the Moving Defendants is, in my view, insufficient to avoid the potential harm that subsection 2(5) is intended to prevent. As well, it does not alter the character of the health records and documents which remain not compellable by virtue of subsection 2(5) of the *Act*.

[60] The Moving Defendants also seek an order precluding the plaintiff to utilize evidence based on databases or information created or assembled under the StatsCan Agreement. In light of the fact that the Moving Defendants have access to all the information made available to the plaintiff, I come to the conclusion that there is no valid reason to preclude the plaintiff to use evidence deriving from this agreement, for the StatsCan Agreement is available to all parties to this litigation.

V. DISPOSITION


[61] For the reasons outlined above, I find that the Moving Defendants, Rothmans Inc., Rothmans, Benson & Hedges Inc., Altria Group Inc., Philip Morris International Inc., and Philip Morris U.S.A. Inc., are not entitled to the information sought nor to the preclusion order requested.

[62] Consequently, the motion presented by Rothmans Inc., Rothmans, Benson & Hedges Inc., Altria Group Inc., Philip Morris International Inc., and Philip Morris U.S.A. Inc. is hereby dismissed.

VI. COSTS

[63] The plaintiff has requested costs and has been successful on all issues. One full day was required for the hearing of this motion. Extensive affidavits in response to the motion were filed by the Province. Moreover, comprehensive briefs were prepared by the parties. The plaintiff is entitled to costs, inclusive of disbursements, in the amount of \$6,000 from the Moving Defendants, Rothmans Inc., Rothmans, Benson & Hedges Inc., Altria Group Inc., Philip Morris International Inc., and Philip Morris U.S.A. Inc., to be paid forthwith.

DATED at Edmundston, New Brunswick, this 3rd day of June 2016.



THE HONOURABLE MR. JUSTICE THOMAS E. CYR
Judge of the Court of Queen's Bench of New Brunswick

SCHEDULE "A"
LIST OF HEALTH INFORMATION DATABASES

1. **Discharge Abstract Database**
2. **Medicare Decision Support System**
3. **Nursing Home Database**
4. **Vital Statistics Births and Deaths Database**
5. **Prescription Drugs Database**
6. **New Brunswick Cancer Registry**
7. **Cancer Screening Registries**
8. **Workers' Compensation Database**
9. **Addictions and Mental Health Services Database (and its predecessor
Regional Addiction Services System)**
10. **Canadian Chronic Disease Surveillance System**
11. **NB Extra-Mural Program**

SCHEDULE “B”
SUMMARY OF THE HEALTH INFORMATION DATABASES

- 1.*****THE DISCHARGE ABSTRACT DATABASE***
(see paragraph 16 of the Affidavit of John A. Boyne)
- (i) The Discharge Abstract Database (“DAD”) is comprised of records of every admission to hospital by a New Brunswick resident during the 26-year period from 1989 to 2014. The 26-year compilation of DAD files include detailed information on roughly 4.3 million admissions of 1.9 individual New Brunswick residents.
 - (ii) The scope of the information in each DAD record is very extensive. Depending on the year, each record includes from 484 to 1270 separate pieces of information.
 - (iii) Each individual is identified by a health insurance number, as well as demographic information such as their date of birth, gender, and postal code. The DAD records include coded information which describes the patients’ reasons for admission, their mode of admission, their diagnosis, the treatment received and the procedures they underwent during the admission.
 - (iv) The coded information can include very personal and sensitive information, such as whether a woman had an abortion, whether someone has been diagnosed with HIV, or whether someone has attempted suicide.
 - (v) This diagnostic and treatment information is recorded using a standard international coding system which is easily accessible on the internet.

- (vi) The DAD record also documents the date of admission and discharge, including the name and geographic location of the hospital as well as the patient's discharge disposition.
- (vii) DAD records include information on the medical professionals who provided care, including their individual identification numbers, medical specialties and their role in the patient's care.
- (viii) The DAD does not include information on patients' smoking status or history. Therefore, as a stand-alone database, the DAD has limited utility for analysis of differences in the health or health care utilization of smokers and non-smokers. Only when linked to a source of information on smoking status and history does the DAD become a useful resource for analysis of the impact of smoking on health and health care utilization.

2. ***THE MEDICARE DECISION SUPPORT SYSTEM***
(see paragraphs 17-21 of the Affidavit of John A. Boyne)

- (i) The Medicare Decision Support System database ("MDSS") holds detailed information on the medical services provided by fee for service physicians, including nurse practitioners, in New Brunswick. The MDSS has three major sub-components: the Service Provider component, the Individual component, and the Delivered Service component.

(1) **The Service Provider component**

- (ii) The Service Provider component consists of information about the medical professionals who provide medical services in New Brunswick.
- (iii) The information contained in the Service Provider component includes the service provider's name, identification number and billing account numbers; their medical specialty; their date of birth, language and gender; the location of their practice and their registration status.

(2) **The Individual component**

- (iv) The Individual component of the MDSS consists of information about every New Brunswick resident who received "fee for service" medical services during the operational time span of the MDSS.
- (v) For each individual it includes their health insurance number, date of birth, gender, and geographic location.

(3) **The Delivered Service component**

- (vi) The Delivered Service component records are available in electronic format from the year 2000 to present and available in microfiche format from 1976 to 1999.
- (vii) It is estimated that as of 2015, the digital component of the delivered services database contains approximately 75 million records for 1.2 million individual insured residents of the Province of New Brunswick.

- (viii) The Delivered Service component contains information on every “fee for service” event provided to New Brunswick residents during the operational time span of the MDSS and also includes services delivered in other Provinces.
- (ix) The Delivered Service component consists of individual records of each fee for service event involving an eligible insured person.
- (x) Each delivered service or “billing” record contains the patient’s health insurance number and information on the date of service delivery, the type of service provided, the service provider’s specialty and role, the location where the service was provided, the diagnosis associated with the service, and the payment made for the service, including cost components such as cancer and emergency care premiums paid.
- (xi) The diagnostic information in the delivered service record can contain very sensitive information about why someone has sought medical attention. This information is recorded in simple text format and can be easily read by anyone with access to the file.
- (xii) The Service Provider and Individual components of the MDSS consist exclusively of personal information about service providers and insured NB residents, respectively.
- (xiii) These two components contain no information on health care services or expenditures and thus have no direct utility in terms of analyzing the Province of New Brunswick’s claim. The Delivered Services component does not include information on patients’ smoking status or history.

- (xiv) As a stand-alone database, it has limited utility for analysis of differences in the health or health care utilization of smokers and non-smokers.

3. ***THE NURSING HOME DATABASE***

(see paragraph 22 of the Affidavit of John A. Boyne)

- (i) The Nursing Home Database consists of information about individuals who have been admitted to a nursing home in the Province of New Brunswick.
- (ii) The nursing home database spans the period from 1993 to present and contains 44,428 records (one record per person).
- (iii) The information collected about these individuals includes: demographic information such as their name, Medicare number, date of birth, gender, marital status; the location of the nursing home and transfers to and from other nursing homes, the resident's admission date, and information on their income and the amount of subsidy provided by the Province of New Brunswick for their care.
- (iv) The nursing home database contains no information on resident's health status or health conditions and no information on their smoking status or history.
- (v) Without being linked to another data source that can provide information on the individuals smoking status, smoking history or health conditions, this database is of no value for analysis of differences in the health or health care utilization of smokers and non-smokers.

4. ***VITAL STATISTICS BIRTHS AND DEATHS DATABASE***

(see paragraphs 23-25 of the Affidavit of John A. Boyne)

- (i) The Vital Statistics Births and Deaths database consists of two separate registries. The births registry records information on all birth events and the deaths registry records information on all death events of New Brunswick residents.

(1) **The Births Registry**

- (ii) The births registry consists of individual records of each birth that occurs to a mother who is a New Brunswick resident.
- (iii) The births registry contains complete records for all births from 1980 to present and records with a more limited set of data elements from 1916 to 1979. In total the registry contains 1.15 million birth records.
- (iv) The births registry records information such as the date of birth, name and gender of the child, the mother's name, date and place of birth, the father's name, date and place of birth, the kind of birth, birth order of the birth, the duration of the pregnancy, the baby's weight and the marital relationship of the parents.
- (v) The births registry does not include information on the smoking status or history of the mother or any information on health care costs or expenditures.
- (vi) The information in this registry has no utility in terms of understanding the potential impact of smoking history on birth outcomes and associated health care costs.

(2) **The Deaths Registry**

- (vii) The deaths registry consists of individual records of each death event that occurs to a New Brunswick resident.

- (viii) The current digital deaths registry contains records from 1980 to present. It is estimated that this registry contains approximately 180,000 death records.
- (ix) The deaths registry records contain information such as the name of the deceased, their Medicare number, gender, occupation, marital status, date of birth, date of death, address, cause of death, establishment where death occurred, nature, and place of disposition, mother and father's name and place of birth, who attended the death and whether or not an autopsy was performed.
- (x) The cause of death can contain sensitive information (e.g. suicide, homicide, etc.) and is recorded in a standard international coding format that is easily accessible on the internet.
- (xi) The deaths registry contains no information on smoking status or history and no information on health care costs.

5.

PRESCRIPTION DRUG PROGRAMS DATABASE

(see paragraphs 26-27 of the Affidavit of John A. Boyne)

- (i) The Prescription Drug Programs database ("PDP") consists of records for each prescription filled by an individual beneficiary of one of the Province of New Brunswick's government funded prescription drug plans.
- (ii) The province currently has twelve government funded prescription drug plans each of which serves a different beneficiary group.
- (iii) The information in the PDP database represents approximately 15 % of the prescription drug utilization of the general population.

- (iv) The PDP database covers the period from 1994 to present and is estimated to contain approximately 70 million records for 420,000 individuals.
- (v) The information recorded in the PDP database includes: the beneficiary's Medicare number, gender, date of birth, and geographic location; the geographic location of the pharmacy which filled the prescription; a code for the drug plan; the amount paid for the prescription including the "co-pay" amount from the beneficiary; the quantity of the drug supplied; the date the prescription was filled; and codes which specify the name/nature of the drug supplied.
- (vi) The codes used to identify the prescribed drugs are standard national and international classification codes which are easily accessible on the internet; as is information on what these drugs are used to treat.
- (vii) The PDP database contains no information on beneficiaries smoking status or history, without which the PDP database has very little utility for analysis of smoking related health outcomes and health care costs.

6. ***THE NEW BRUNSWICK CANCER REGISTRY***
(see paragraph 28 of the Affidavit of John A. Boyne)

- (i) The New Brunswick Cancer Registry consists of information about all diagnosed cases of cancer. When an individual is diagnosed with a cancer, a record is created in the registry which contains information about the individual and information about the cancerous tumor.
- (ii) The current electronic Cancer Registry contains records from 1972 to present. It contains approximately 211,000 records for 173,000 individuals.

- (iii) The individual information collected includes the patient's Medicare number, name, address, gender, and date of birth, their age at diagnosis, survival time and cause of death (if deceased).
- (iv) The information collected about the tumor includes the date and method of diagnosis, the type of cancer and various descriptors of the size, location structure, stage and behavior of the tumor.
- (v) A single individual can have multiple tumor records within the Registry.
- (vi) The Cancer Registry does not contain information on smoking status or history nor does it contain information on treatment costs or expenditures.

7. ***THE CANCER SCREENING REGISTRIES***
(see paragraphs 29-30 of the Affidavit of John A. Boyne)

- (i) The Province of New Brunswick has three cancer screening registries: the Breast Cancer Screening Registry; the Colon Cancer Screening Registry, and the Cervical Cancer Screening Registry.

(1) **The Colon Cancer Screening Registry**

- (ii) The Colon Cancer Screening Registry is a relatively new (2014) initiative and contains very little data.

(2) **The Cervical Cancer Screening Registry**

- (iii) The Cervical Cancer Screening Registry is also under development, but contains a limited selection of demographic information on women who have had PAP tests and the results of those tests from 2011 to present.

(3) **The Breast Cancer Screening Registry**

- (iv) The Breast Cancer Screening has been in operation since 1995 and collects information on eligible women's participation in organized breast cancer screening as well as the results of those screening events.
- (v) From 1995 to 2015, there are 173,667 participants with 753,194 screening episodes in the database.
- (vi) For each woman who attends a screening clinic, the following types of information are recorded in the Breast Cancer Screening Registry: Individual demographics and history, including Medicare number, date and place of birth, education, ethnic origin, number of births (parity), age at first full-term pregnancy, family history of breast cancer, menopausal state, use of hormone replacement therapy, height, weight, and date of death (if deceased); Screening event information, including date of exam, screening method, screening result, referral status (if abnormalities detected) and final diagnosis for screen-detected abnormalities.
- (vii) Cancer variables (if cancer detected on follow-up), including date of definitive diagnosis, type of cancer, and various descriptors of the size, location, structure, stage and behavior of the tumor is recorded.

- (viii) None of the cancer screening registries include information on smoking status or history or any information on health care costs.

8. ***THE WORKERS' COMPENSATION DATABASE***
(see paragraph 31 of the Affidavit of John A. Boyne)

- (i) The Workers' Compensation Database is not held or administered by the Department of Health of the Province of New Brunswick. WorkSafe New Brunswick is a crown corporation administered by a Board of Directors, comprised of representatives of workers and employers, appointed by the Lieutenant-Governor in Council, and is an independent organization that has care and control of Workers' Compensation records and documents.
- (ii) When a workplace injury results in hospitalization, information about that hospitalization is captured in the Discharge Abstract Database (described above) and the "responsibility for payment" field on the DAD record will indicate that the cost of the admission was charged to WorkSafe New Brunswick.
- (iii) Information about physician and other health care provider services for treatment of workplace injuries is not captured in the Department of Health's Medicare Decision Support System (described above).
- (iv) Neither hospital nor any other health care costs associated with health care expenditures by WorkSafe New Brunswick for workplace injuries form any part of the Province of New Brunswick's claim for recovery of health care expenditures attributable to smoking.

9. ***THE ADDICTIONS AND MENTAL HEALTH SERVICES DATABASES***
(see paragraphs 32-33 of the Affidavit of John A. Boyne)

- (i) The Addictions and Mental Health Services databases are two components of a larger operational system known as the Client Services Delivery System (“CSDS”).
- (ii) The CSDS system contains Addictions and Mental Health records from 1995 to present. It is estimated that the system contains approximately 740,000 records pertaining to 193,000 individuals.
- (iii) The Addictions component consists of records which capture details about individuals who seek treatment for alcohol and drug addiction and the provincially funded services they receive.
- (iv) The Mental Health component consists of records which capture details about individuals who seek community based mental health services and the services they receive.
- (v) The information recorded in the Addictions and Mental Health databases includes: client demographics such as Medicare number, date of birth, gender, language, address, income source(s) and living arrangements; Service delivery information such as date of initial screening, identification number of service provider(s), location of service delivery, action taken as a result of screening, and date(s) of follow-up activities; Treatment information such as the major presenting problem and/or diagnosis, type of intervention service(s) provided, start and end dates of treatment or case plan, intervention objectives, and service provider(s) identification number and professional designation.

- (vi) The Addictions and Mental Health data does not include information on smoking status or history, nor is there any cost or expenditure information associated with these records.

10.***THE CANADIAN CHRONIC DISEASE SURVEILLANCE SYSTEM***
(see paragraphs 34-35 of the Affidavit of John A. Boyne)

- (i) The Canadian Chronic Disease Surveillance System (“CCDSS”) is a national initiative through which a process has been developed to enable Provinces to identify individuals in their populations who are likely to have one or more of several common chronic conditions such as diabetes, heart disease and chronic obstructive pulmonary disease (COPD).
- (ii) New Brunswick’s four CCDSS registries span the period from 1995 to 2012. There are approximately 4.9 million records in the registries associated with roughly 320,000 individuals.
- (iii) In New Brunswick, the CCDSS process is used to maintain four chronic condition registries: Diabetes, Hypertension, COPD and Asthma. Each of these registries consists of a record containing the following information: The source of information used to flag the individual as having the target condition (i.e. DAD or Medicare or both), the date of case identification or diagnosis, the individuals Medicare number (in encrypted format), gender, date of birth and death status (alive or deceased).
- (iv) A separate record is created for each year that an individual is in the registry and individuals can be represented in more than one registry.

- (v) The CCDSS registries contain no information on smoking status or history and no information on health care costs.

11. NEW BRUNSWICK EXTRA-MURAL PROGRAM
(see paragraph 36 of the Affidavit of John A. Boyne)

- (i) The New Brunswick Extra-Mural program is a service that provides home based health care services to individuals who have been discharged from hospital and require follow-up care or who have health conditions that can be treated in the patient's home environment.
- (ii) The extra mural program offers a wide variety of professional services including nursing, physiotherapy, dietetics, occupational therapy, respiratory therapy, and rehabilitation services.
- (iii) The extra-mural database exists for the period from 2000 to 2005 and contains approximately 13.6 million records for roughly 600,000 individuals (the majority of whom are now deceased).
- (iv) The type of information recorded in the database includes: the patient's Medicare number, gender, date of birth and address; the start and end date of service provision, the primary diagnosis; and for each service provider, the date of each visit/contact, the location of the visit, the number of minutes spent on assessment, therapeutic intervention and/or consultation during each visit, and the professional designation of the provider.
- (v) There is no information on smoking status or history or service costs in the extra-mural database.