Federal Court Cour fédérale

Date: 20140225

Docket: T-1931-13

Toronto, Ontario, February 25, 2014

PRESENT: Madam Prothonotary Milczynski

BETWEEN:

JOHN DOE AND SUZIE JONES

Plaintiffs

and

HER MAJESTY THE QUEEN

Defendant

ORDER

UPON MOTION in writing on behalf of the Plaintiffs filed December 19, 2013, pursuant to Rule 369 of the *Federal Courts Rules* for:

1. An Order of Confidentiality pursuant to Rule 151 of the Federal Courts Rules, providing that:

   a) the Plaintiffs be and are hereby permitted to use the pseudonyms "John Doe" and "Suzie Jones" rather than their real names throughout this action;

   b) if a party of their lawyer files a document containing any identifying information about the Plaintiffs or members to the Court; a version redacting all identifying

information, which would be accessible to the public and sealed version containing any identifying information about the Plaintiffs or members of the proposed class. In all cases, the parties and their lawyers shall use the pseudonyms "John Doe" and "Suzie Jones", and not the plaintiffs' real name, in any document filed with the court;

c) the Plainiffs shall be permitted to execute affidavits under their pseudonyms "John Doe" and "Suzie Jones";

d) the parties and their lawyers shall not disclose or publicize the real names or identities of the Plaintiffs, or any feature that may disclose the Plaintiffs' identities; and

e) there shall be a publication ban on all identifying information relating to the Plaintiffs.

2. Such other relief as counsel may advise and this Honourable court deems just.

AND UPON reviewing the motion records filed on behalf of the parties and hearing submissions of counsel at the hearing of the motion on February 20, 2014;

On or about November 18, 2013 Health Canada sent letters to the approximately 40,000 individuals who are authorized under the Marihuana Medical Access Program (the "Program") to have access to marihuana for medicinal use or who are licensed for its production. Prior to November 2013, all correspondence sent by Health Canada in relation to the Program was delivered by courier service, Canada Post Xpresspost or Lettermail without sender information

on the envelope that identified the Program or used the word "marihuana" . On this occasion, however, the envelope for each letter had the following information on the front of the envelope: "Health Canada - Marihuana Medical Access Program" or a similar French phrase. Inside, the letter to each Program participant stated as follows:

> ...Health Canada has heard many concerns that the Marihuana Medical Access Program (MMAP) was widely open to abuse. The current practice of allowing individuals to grow marijuana for medical purposes poses risks to the safety and security of Canadians. The high value of marijuana on the illegal market increases the risk of violent home invasion and diversion to the black market. In addition, these production operations present fire and toxic mould hazards. These risks are not only felt by the individuals licensed to grow, but potentially also by their neighbours and community members.

The within proposed class action has been commenced by "John Doe" and "Suzie Jones" seeking relief on their own behalf and on behalf of other members of the class (defined as all persons who were sent the November, 18 2013 letter) in respect of the breaches of the duty of care and resulting harm they say has been caused by the disclosure of the information that the sender was Health Canada – Marihuana Medical Access Program – the relief sought includes the following:

(i) a declaration that Health Canada breached the confidence of the Plaintiffs and the other Class Members;

(ii) a declaration that Health Canada committed the tort of intrusion upon seclusion;

(iii) a declaration that Health Canada committed the tort of publicity given to private life;

(iv) a declaration that Health Canada infringed the Plaintiffs' and other Class Members' right to information privacy pursuant to sections 7 and/or 8 of the *Canadian Charter of Rights and Freedoms*; and

(v) damages for breach of contract, breach of warranty, negligence, breach of privacy, breach of confidence, intrusion upon seclusion and publicity given to private life, including damages for:

a. costs incurred to prevent home invasion, theft, robbery and/or damage to personal property including marihuana plants and related paraphernalia;

b. costs incurred for personal security;

c. damage to reputation;

d. loss of employment;

e. reduced capacity for employment;

f. mental distress;

g. out of pocket expenses; and

h. inconvenience, frustration, and anxiety associated with taking precautionary steps to reduce the likelihood of home invasion, theft, robbery and/or damage to personal property and to obtain personal security.

(i) It is important to note that the authorization under the Program to possess marihuana for personal medicinal use ("Possession Authorization"), or the license to produce marihuana for personal use or for the medicinal use by an individual holding a Possession Authorization ("Designated-Person Production License") necessarily relates to an underlying medical/health condition or symptom of that

condition that a licensed medical practitioner (medical doctor) is treating. To obtain a Possession Authorization under the Program, an applicant's symptoms and/or conditions must fall within either "Category 1" or "Category 2" under the Program's regulations, as determined by a medical doctor.

Category 1 includes:

(ii) any symptom treated within the context of compassionate end-of-life care, or;

(iii) symptoms related to specific medical conditions of the treatment of such medical conditions, namely: severe pain and/or persistent muscle spasms from multiple sclerosis, a spinal cord injury, or spinal cord disease; severe pain, cachexia, anorexia, weight loss, and/or severe nausea from cancer or HIV/AIDS infection; severe pain from severe forms of arthritis; or seizures from epilepsy.

Category 2 includes a debilitating symptom that is associated with a medical condition or with the medical treatment of that condition, other than those described in Category 1. Thus it is not just the course of treatment that is disclosed when an individual is known to be a participant in the Program, but also that they are suffering from serious health and medical conditions.

Health Canada issues Designated-Person Production Licenses for the production of marihuana that is to be provided to those with a Possession Authorization. These production licenses may be issued to a person for production for another person who has received a Possession Authorization. Persons with a Possession Authorization may also receive a personal-use production license. It is thus reasonable to assume that knowledge of anyone with a

Possession Authorization and/or a production license (Designated-Person or personal use) is information that marihuana is likely to be on that person's premises.

At this juncture, the proposed representative Plaintiffs seek a confidentiality order to protect their identities and any personal information that would identify them. They state that to deny this relief would disclose the very information they seek to protect and exacerbate the damage and/or risk of harm that has already been caused by Health Canada's mailing that identified them as a participant in the Program. Identifying them personally discloses their personal health and medical information, and their treatment program as prescribed by their medical doctor. Identifying them personally also discloses information about their place of residence and/or employment and exposes them to the very risk to safety and security that was identified by Health Canada itself in the November, 2013 correspondence.

John Doe resides in a small community, works as a health care professional and has a Possession Authorization for use of medical marihuana to alleviate pain due to spinal cord disease and arthritis. Mr. Doe keeps his marihuana in a locked room in his home. He is concerned that wider knowledge of his use would have an impact on his employment, professional standing and security. Suzie Jones resides in Ottawa and is a legal professional and has a Possession Authorization for medicinal marihuana to treat pain caused by endometriosis and related chronic issues. Ms. Jones keeps her marihuana hidden in her home. She is also concerned that wider knowledge of her use would have an impact on her professional life, on her family and the security of her home. Neither Mr. Doe nor Ms. Jones would be prepared to continue with this litigation if their identities are not protected.

Rule 151 of the *Federal Courts Rules* provides:

> 151(1) On motion, the Court may order that material to be filed shall be treated as confidential.
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> (2) Before making an order under subsection (1), the Court must be satisfied that he materials should be treated as confidential, notwithstanding the public interest in open and accessible court proceedings.

The test for a confidentiality order under Rule 151 was set out by the Supreme Court of Canada in *Sierra Club of Canada v. (Minister of Finance)* 2002 SCC 41 as follows:

> A confidentiality order under Rule 151 should only be granted when:
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> (a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and
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> (b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right of free expression, which in this context includes the public interest in open and accessible court proceedings.
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> ...First, the risk in question must be real and substantial, in that the risk is well grounded in the evidence, and poses a serious threat to the commercial interest in question.....In addition, the phrase "important commercial interest" is in need if some clarification...the interest in question cannot merely be specific to the party requesting the order; the interest must be one which can be expressed in terms of a public interest in confidentiality... Simply put, if there is no general principle at stake, there can be no "important commercial interest" for the purposes of this test....the open court rule yield "where the public interest in confidentiality outweighs the public interest in openness.
>
> In addition to the above requirement, courts must be cautious in determining what constitutes an "important commercial interest". It must be remembered that a confidentiality order involves an infringement on freedom of expression. Although the balancing of the commercial interest with freedom of expression takes place under the second branch of the test, courts must be alive to the fundamental importance of the open court rule.

> Finally, the phrase "reasonably alternative measures" requires the judge to consider not only whether reasonable alternatives to a confidentiality order are available, but also to restrict the order as much as is reasonably possible while preserving the commercial interest in question. In the absence of the relief sought, the Plaintiff would disclose the very information he seeks to protect through the public filings associated with this action. Such disclosure would effectively render his action moot.

The Plaintiffs argue that their case and the evidence filed on this motion establish the proper basis for the confidentiality sought, namely their interest to protect their anonymity for privacy, health and security reasons. To the extent these are the issues at the heart of the action, they argue that to expose their personal information and identity would render the issues in this action effectively moot. They also argue that the determination of the issues in this action raise issues important to the public interest regarding the propriety of government action, individual privacy and the confidentiality of health and medical information.

The Defendant argues that the Plaintiffs are not entitled to anonymity on the grounds that:

- the *Federal Court Rules* relating to class actions require the names and addresses of the representative plaintiffs to be included in the certification notice;
- the open court principle outweighs the Plaintiffs' privacy interests, in respect of which the Defendant argues no evidence of serious risk or harm has been filed beyond the Plaintiffs' evidence that they simply fear being embarrassed and speculate about employment consequences; and
- other individuals who received the November 18, 2013 letter have commenced actions using their own names and have not sought confidentiality orders.

With respect to whether or not John Doe and Suzie Jones are appropriate representative plaintiffs I agree with the Plaintiffs that this is a matter better suited for determination at the certification motion on a full record. With respect to the mandatory content of any notice, I note that under the Rules, notice may be dispensed with and that in any event, the specific content of any notice and the practical considerations of how best to inform and communicate with members of the class are issues should be left to a later date, at or following the certification motion. The fact that other individuals have commenced proceedings in this or in provincial superior courts is also not particularly relevant for today. John Doe and Suzie Jones are entitled at this stage to commence their own proposed class proceeding and seek certification.

With respect to the information of the Plaintiffs that is sought to be protected, namely their identity and personal information – to say that these individuals must identify themselves as medical marihuana users goes to the very issue in this case, namely whether that information is private and should be kept confidential.

The Defendant, relying on newspaper articles and internet research, argued on this motion that public opinion about marihuana use has changed to be more accepting, that in Canada public opinion polls show that decriminalization is gaining favour and that marihuana use no longer generates stigma to or embarrassment for its users.

As noted above, however, what the Plaintiffs' marihuana use discloses is their medical and health information. The Plaintiffs are patients, not simply "users". Disclosing their identities discloses that a course of treatment has been prescribed for them by a medical doctor,

and that they suffer from serious health conditions and symptoms. Identifying the Plaintiffs by name or information that discloses their personal identity also discloses that they have or are likely to have medical marihuana in their homes – something that Health Canada itself saw as a serious safety and security risk.

Accordingly, I am satisfied that in the within case of John Doe and Suzy Jones, without the protection they seek on this motion, the important issues they raise in their Amended Statement of Claim may not be determined in this forum, and that the issues they raise regarding patient rights, privacy and whether Health Canada owes a duty of care and has breached that duty and is liable are issues that are in the public interest to be determined. The Plaintiffs have requested only that their personal identity be protected and with minimum intrusion on the open court process. They have not requested *in camera* hearings or that all documents filed be sealed from public access. All issues, submissions and evidence will be fully and publicly aired, with the exception of the Plaintiffs' names and personal information that would identify them. I am satisfied that this will have minimum, if any, impact on the public's interest in the open court principle and that to deny the relief sought could effectively foreclose any determination of the important issues raised by the Plaintiffs' claims, which would be contrary to the public interest. Accordingly, the motion will be granted on the terms set out below.

THIS COURT ORDERS that:

1. The Plaintiffs shall be identified as "John Doe" and "Suzy Jones" rather than their real names for all purposes throughout this action, including the style of cause, and for the

execution of affidavits by the Plaintiffs using the pseudonyms "John Doe" and "Suzy Jones".

2. "Confidential Information" means the names and identifying information of the Plaintiffs or any members of the proposed class.

3. Documents containing Confidential Information shall be filed under seal, together with a public version of such document which shall be filed redacting only the Confidential Information contained therein.

4. None of the parties, their lawyers or other person shall disclose or publicize the real names or identities of the Plaintiffs or any feature that may disclose the Plaintiffs' identities or that of any members of the proposed class.

5. In the event the parties cannot agree on the costs of this motion, each party may file written submissions no longer than 3 pages in length within 10 days of the date of this Order.

"Martha Milczynski"
Case Management Judge