Federal Court Cour fédérale

Date: 20140724

Docket: T-1931-13

Citation: 2014 FC 737

Ottawa, Ontario, July 24, 2014

PRESENT: The Honourable Mr. Justice Rennie

BETWEEN:

JOHN DOE and SUZIE JONES

Plaintiffs

and

HER MAJESTY THE QUEEN

Defendant

ORDER AND REASONS

I. Background

[1] This appeal arises from a decision of Prothonotary Milczynski on February 25, 2014, granting a confidentiality order under Rule 151 of the *Federal Courts Rules* (SOR/98-106) that the plaintiffs in the proceeding may be referred to under the pseudonyms "John Doe" and "Suzie Jones".

[2] The motion for a confidentiality order was brought in the context of a proposed class proceeding. The pleadings allege that in November, 2013, correspondence was mailed by Health Canada to the class in an envelope that displayed a return address identifying Health Canada's Marihuana Medical Access Program. The claim alleges that the inclusion and display of this return address constituted a breach of contract, negligence, breach of confidence and privacy as well as infringement of the class's *Charter* rights. Approximately 40,000 individuals are said to have received this correspondence. In consequence, class actions were commenced in several jurisdictions including British Columbia, Nova Scotia, and the Federal Court. None of the actions have reached the stage of certification.

[3] For the following reasons, the appeal is dismissed.

II. Issues and Standard of Review

[4] The defendant contends that in granting the order the Prothonotary misapplied the "serious risk" aspect of the *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41 criteria. More specifically, the defendant argues that the Prothonotary misapprehended the facts relating to risk, erred in equating the facts with the threshold of serious risk articulated in *Sierra Club* and took irrelevant considerations into account. Further, the defendant argues that the Prothonotary failed to consider reasonable alternatives to confidentiality, also as required by *Sierra Club*, and thus proceeded on a wrong principle. Finally, the defendant argues that in finding that representative plaintiffs may litigate anonymously in a class proceeding, she again proceeded on a wrong principle.

[5] The parties agree that the decision to grant a confidentiality order is not vital to the final issue of the case. Accordingly, the Prothonotary's discretionary order will not be disturbed on appeal unless the order is clearly wrong, in the sense that the exercise of the Prothonotary's discretion was based upon a wrong principle or upon a misapprehension of the facts: *Merck & Co v Apotex Inc*, 2003 FCA 488 at para 19.

III. The Prothonotary's Order

[6] Given the standard of review governing appeals from the orders of Prothonotaries, it is important to review the findings made by the Prothonotary as well as the factors she considered to be relevant in the balancing of the competing interests.

A. *Serious Risk and Reasonable Alternatives*

[7] The Prothonotary identified a number of substantive areas which fell into the category of serious risk. She made findings in respect of three discrete areas of risk.

[8] The Prothonotary noted that identifying the plaintiffs personally "disclosed their personal health and medical information, and their treatment program as prescribed by their medical doctor." With respect to the information of the plaintiffs' that was sought to be protected (their identity and personal information), the Prothonotary observed that to require the plaintiffs to identify themselves as medical marihuana users went to the very issue in this case – whether the plaintiffs' identity and personal information was private and should be kept confidential.

[9] Importantly, the Prothonotary found that identifying the plaintiffs personally also disclosed information about their place of residence exposed them to the very risk to safety and security that was identified by Health Canada itself in the November, 2013 correspondence. More will be said about this consideration later.

[10] The Prothonotary also noted that John Doe "is concerned that wider knowledge of his use would have an impact on his employment, professional standing and security" and that Suzie Jones "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." The Prothonotary concluded her review of the factors urged in favour of the order by observing that "[n]either Mr. Doe nor Ms. Jones would be prepared to continue with this litigation if their identities are not protected."

[11] With respect to reasonable alternatives to an order for confidentiality in this matter, the defendant pointed to the existence of parallel proposed class actions where confidentiality orders were not sought. On this point, the Prothonotary held that the fact that other individuals had commenced proceedings in this or in provincial superior courts to be irrelevant, and that John Doe and Suzie Jones were "entitled at this stage to commence their own proposed class proceeding and seek certification."

[12] Finally, the Prothonotary dispensed with the argument that representative plaintiffs could not be anonymous in a class action on the basis that it was a question better suited for determination at the certification motion on a full record. Insofar as the *Federal Courts Rules* require disclosure of the representative plaintiffs, the Prothonotary observed that 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 were issues that should be deferred to a later date, at or following the certification motion.

B. *Balance*

[13] In considering the final aspect of the *Sierra Club* test, the balancing exercise, the Prothonotary observed that the litigation engages serious issues:

> 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.

[14] Secondly, as part of her analysis of the balance of interests, the Prothonotary observed that the scope of the confidentiality order sought was limited. The plaintiffs had requested only that their personal identies be protected,. They had not requested *in camera* hearings or that documents filed be sealed from public access. All issues, submissions, and evidence, would be fully and publicly aired, with the exception of the plaintiffs' names and personal information that would identify them.

[15] Having regard to these factors, the Prothonotary was satisfied that the confidentiality order was a minimal instrusion on the public 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 in turn would be contrary to the public interest."

[16] To conclude, the Prothonotary applied the *Sierra Club* framework. Accordingly, the issue before me is whether or not the considerations which she identified in that exercise, and her assessment of the balance of the public interest considerations, reflect an error in principle.

IV. Law

[17] Rule 151 of the *Federal Courts Rules* and the decision of the Supreme Court of Canada in *Sierra Club* at paras 53-56 provide the legal framework governing confidentiality orders. In *Sierra Club*, the Court wrote:

> **53** Applying the rights and interests engaged in this case to the analytical framework of Dagenais and subsequent cases discussed above, the test for whether a confidentiality order ought to be granted in a case such as this one should be framed as follows:
>
> A confidentiality order under Rule 151 should only be granted when:
>
>> (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
>>
>> (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 to free expression, which in this context includes the public interest in open and accessible court proceedings.
>
> **54** As in Mentuck, I would add that three important elements are subsumed under the first branch of this test. 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.
>
> **55** In addition, the phrase "important commercial interest" is in need of some clarification. In order to qualify as an "important commercial interest", 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. Or, in the words of Binnie J. in F.N. (Re), [2000] 1 S.C.R. 880, 2000 SCC 35, at para. 10, *the open court rule only yields "where the public interest in confidentiality outweighs the public interest in openness"* (emphasis added).
>
> **56** 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. See generally Muldoon J. in *Eli Lilly and Co. v. Novopharm Ltd.* (1994), 56 C.P.R. (3d) 437 (F.C.T.D.), at p. 439.

[18] Rephrased, *Sierra Club* outlines a conjunctive two-part test regarding confidentiality orders:

a) Necessity: is the confidentiality order "necessary in order to prevent a serious risk to an important interest [...] in the context of litigation because reasonably alternative measures will not prevent the risk"?

b) Balance: do the "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 to free expression, which in this context includes the public interest in open and accessible court proceedings."

[19] Further, the first step – necessity – has a threshold issue of whether or not a "serious risk to an important interest" is at stake. This criterion is directed at whether or not the

confidentiality order is necessary to prevent a *serious* risk to an *important* interest. Accordingly, if no serious risk to an important interest is engaged on the facts, the Court need not consider whether or not the *minor* risk or interest at issue can only be prevented through the use of a confidentiality order.

[20] Two cases provide further insight on the *Sierra Club* test.

[21] In *AB v Bragg Communications Inc*, 2012 SCC 46, the Supreme Court addressed sexualized cyber bullying of minors, the inherent vulnerability of which was demonstrated through "reason and logic" with reference to case law, statutes, and international treaties. In the within case, the Prothonotary's finding of serious risk should not be reversed, even though the risks faced by the respondents were, like in *Bragg*, not demonstrated by expert testimony. Admittedly, the harms faced by these respondents are not equivalent with the harms addressed in *Bragg*. Nevertheless, because of the unique facts in this case, I do not consider the Prothonotary's conclusion assessment of the evidence before her in respect of necessity and risk to be "clearly wrong" or to reflect an error in principle.

[22] Additionally, in *MEH v Williams*, 2012 ONCA 35, where the Ontario Court of Appeal overturned an anonymity order, the spouse of a notorious sex offender failed to meet the serious risk criterion even though she had provided expert testimony regarding personal harms from public litigation. However, the court's reasoning was based, in part, on the spouse's exclusive reliance on expert testimony rather than coupling that expert testimony with a personal affidavit substantiating the harms she would allegedly experience. In particular, the court viewed the

expert testimony as speculative and rooted in unfounded assumptions without an affidavit from the party seeking to establish personal harms flowing from a lack of confidentiality. Here, in constrast, the Prothonotary had before her the personal affidavits of the plaintiffs and made findings that had a reasonable foundation in the evidence.

A. *Serious Risk*

[23] I do not think the Prothonotary's findings with respect to whether the serious risk criteria had been met can be challenged. I say this for three reasons.

[24] First, the Prothonotary found risk arising from three discrete areas – risk to privacy, risk to personal safety and risk to employment. She further observed that to deny the confidentiality order would, in fact, exacerbate the very harms which are alleged to underlie the proposed proceeding and in respect of which they seek a remedy.

[25] Second, the Prothonotary found that the position taken by the defendant with respect to risk was inconsistent with its position on risk set forth in the correspondence sent to the class. In that correspondence, the defendant articulated the rationale behind the forthcoming amendments to the *Medical Marihuana Regulations*. The Crown justified changes to the *Medical Marihuana Regulations*, in part, because of risks such as home invasion faced by medical marihuana recipients and growers. Yet, with respect to this confidentiality order, the Crown took the opposite position, arguing that the disclosure of a medical marihuana recipients' identity posed no serious risk to personal safety. The Prothonotary's observation of this inconsistency was appropriate . Indeed, to have overlooked such an inconsistency would have been problematic.

[26] The above observations about the defendant's inconsistent positions (between its correspondence to the class and its argument before the Prothonotary) are sufficient to dismiss this particular argument. However, I further note that this contradiction in the defendant's position extends beyond its correspondence to the class members. As the plaintiffs raised in argument before me, the defendant's argument on appeal was also inconsistent with its argument before the Federal Court in a closely related matter. In *Allard v Canada*, 2014 FC 280 the defendant, in resisting an injunction to restrain the coming into forces of the new *Medical Marihuana Regulations,* argued and led evidence in respect of the proposition that publicly identified medical marihuana users faced a serious risk to personal safety. Before the Prothonotary, and on appeal, the defendant argued that there is no risk to publicly identified medical marihuana users (to justify the defendant's opposition to this confidentiality order).

[27] The defendant cannot advance inconsistent factual positions, founded on the same factual matrix at its convenience. The contradiction between the defendant's position in *Allard* and its position before the Prothonotary reinforces the validity of the Prothonotary's decision to dismiss this argument by the defendant in respect of whether there was a serious risk. .

[28] Third, the Prothonotary applied the correct standard when assessing serious risk. The defendant argues that confidentiality orders are exceptional and that the risks asserted by the plaintiffs are insufficient because they are merely speculative. In this regard, the plaintiffs testified that they knew of no circumstances where harm flowed from disclosure of medical marihuana use. Further, one of the plaintiffs (Suzie) admitted that her employer and support group already know about her use of medical marihuana. However, I do not believe that these

admissions are fatal to the defendant's ability to substantiate serious risk. *Sierra Club* does not require applicants for a confidentiality order to have demonstrated harm already experienced to satisfy serious risk. To the same effect, the court "can find harm by applying reason and logic" when there is no scientific or empirical evidence of harm (*Bragg*, at para 16). In any event, the defendant has previously contended, in this Court, that users of medical marihuana face serious risks to personal safety sufficient to motivate an overhaul of its regulatory regime regarding medical marihuana.

[29] I indicated at the outset that I believe the Prothonotary erred in respect of one of the considerations taken into account in her assessment of whether there was a serious risk. In particular, I think she erred in considering harm to employment when assessing serious risk.

[30] The weight of the jurisprudence considers impacts on reputation and employment to be inadequate to warrant a confidentiality order: *Williams*, at para 25; *John Doe v Canada (Justice)*, 2008 FC 916 at para 16; *John Doe v Canada*, 2003 FCT 117 at para 10; *Adult Entertainment Assn. of Canada v Ottawa (City)*, 2005 Carswell Ont 1955 (SCJ) at para 16). For that reason, the Prothonotary was incorrect in accepting an impact on employment as a consideration. .

[31] Further, even if risk to employment were valid, such a risk rested on a weak evidentiary foundation in this case. In respect of Suzie Jones, the Prothonotary noted that her status as a medical marihuana user was already known by her employer, and with respect to John Doe, his concern was speculative.

[32] That being said, the Prothonotary's decision should not be reversed because of this single error. While the Prothonotary erred in considering injury to employment in her assessment of serious risk, I do not read it as determinative to her decision. In my assessment, it was at most a consideration secondary to the risk to personal safety. This error, in my view, cannot trump the findings she made with respect to personal risk and for which there is a sufficient evidentiary foundation.

[33] In reaching this conclusion, I am cognizant of how the risk at stake must have a "public component" (*Williams*, at para 25). In this regard, three observations are critical. First, the risk at stake in this case – risk to personal safety – is more serious than the risk of "embarrassment" or "emotional distress" flowing from public litigation which the court dismissed in *Williams*, at para 25. Indeed, the "public" nature of this risk is evidenced in the extent to which the risk to personal safety was the motivation, as admitted by the government in its own correspondence, for amending the regulatory regime governing medical marihuana. Second, I am hesitant to overturn the Prothonotary's findings on serious risk because of the unique nature of this case; one in which to litigate in public would necessarily repeat the harm said to have already experienced by the plaintiffs from the original privacy breach. The fact that the underlying cause of action relates to a breach of privacy contributes to a unique factual scenario distinguishable from previous cases in which the harms of publication were tangential, rather than parallel to, the underlying legal issues. Third, a public dimension is arguably engaged in this case because of the intended role of the plaintiffs as representatives in class proceedings. In that sense, their ability to proceed as representatives impacts not only their personal lives, but the lives of many thousands of Canadians whose privacy was potentially breached by the government's conduct.

B. *Reasonable Alternatives*

[34] The Prothonotary's assessment of reasonable alternatives was also sound. If other plaintiffs are willing to pursue remedies with respect to the underlying facts, allowing these two plaintiffs the benefit of a confidentiality order is not technically *necessary* to advance the class action. That being said, if John Doe and Suzie Jones are the best representative plaintiffs, precluding them from acting as such indirectly by not granting a confidentiality order – a prerequisite to their willingness to proceed with litigation – has a significant impact on their ability to advance their legal interests and, arguably, the legal interests of their fellow class members. Further, not granting confidentiality over their identity as medical marihuana users when the underlying action relates to the disclosure of that very same identity would, having regard to the limited nature of the order sought, be a disproportionate consequence. In this regard, the consequence of the defendant's position – forcing the representative plaintiffs to exacerbate the harm alleged to have already been caused by the disclosure of their use of medical marihuana – seems like an *unreasonable* alternative.

[35] To be clear, the plaintiffs' unwillingness to proceed with litigation without a confidentiality order is not, in itself, determinative of the absence of reasonable alternatives. Naturally, if it were sufficient, than a strategy of always demanding confidentiality prior to proceeding with litigation would guarantee anonymous litigation in all cases – a result antithetical to the virtues of open court. Rather, the unique facts in this case, in which the underlying dispute relates to a breach of privacy, provides a sufficient basis of support for the Prothonotary's findings given the standard of review.

[36] I see no error in principle in the Prothonotary's consideration of these issues. Rather, to hold to the contrary, namely, that the existence of parallel proceedings precludes a plaintiff from seeking a confidentiality order in other proceedings, would be an error in principle.

C. *Anonymous Representative Plaintiff*

[37] A further argument advanced by the defendant was that a confidentiality order cannot be granted because the plaintiffs ultimately intend to be representative plaintiffs in a class proceeding – a role that cannot be fulfilled anonymously because, in class actions, the representative plaintiffs' names and addresses *must* be included in the Notice to the class: Rule 334.32, *Federal Courts Rules*. Additionally, at the level of legal policy, the defendant asserts that anonymous representative plaintiffs are an exceptional and extensive intrusion on the open court principles in the context of class proceedings where the class relies on the effective representation of the representative plaintiff. As the court observed in *Fairview Donut Inc v TDL Group Corp*, 2010 ONSC 789 at para 51: "It is particularly important [...] that the open court principle should be observed in [class] proceedings and a request for a sealing order in a class action should be approached with caution.". However, I note that *Fairview Donut* addressed a sealing order arising *during* a class action and in respect of evidence. Accordingly, the case is of limited guidance in this case before me.

[38] In essence, these particular objections by the defendant to granting the plaintiffs' anonymity are, when unpacked, objections to the appropriateness of anonymous plaintiffs as representative plaintiffs. The Prothonotary rejected these objections as premature, holding that they were more properly considered at the certification stage. I agree. Whatever reservations

there may be about anonymous representative plaintiffs in a class action, that issue is best determined on a full record and the jurisprudence relevant to the obligations of representative plaintiffs.

D. *Balance*

[39] The open court rule only yields "where the public interest in confidentiality outweighs the public interest in openness." The error noted earlier aside (about risk to employment), I find no error in principle in the Prothonotary's identification of either the factors relevant to defining the public interest involved, or in the facts which underlie them. There is a complicated analysis of balance in the unusual circumstances of this case. Importantly, the plaintiffs merely ask that their identity not be disclosed, a fairly narrow limitation on free expression and open court principles. Every other aspect of the proceedings remains open. The *Sierra Club* requirement that the order be tailored as narrowly as possible as not to intrude on the public interest in open court has been met.

[40] Privacy has been recognized as an important personal interest, in which there is a public interest in preservation. Privacy regarding use of medical marihuana is the central issue in the class proceedings. Identification as a plaintiff necessarily results in identification of the plaintiff as both a user of medical marihuana and as suffering from a serious illness. Analogies to medical malpractice cases where a plaintiff is, of necessity, required to forgo privacy to pursue an action are not instructive here, where the very cause of action is breach of privacy. As noted in *A v Canada (Attorney General)*, 2008 FC 1115 at para 16:

> [P]eople's names, in isolation, do not generally incite privacy concerns; it is when these names are associated with or related to other information or circumstances that privacy issues arise.

[41] It is important to be clear that in making these observations, the Court, at this stage of the proceedings, does so in the context of an appeal from a Prothonotary's decision on the question of whether the plaintiffs face a serious risk so as to warrant a limited confidentiality order and whether that interest outweighs the public interest in open court. These matters remain fully open, of course, for the determination by the trial judge on the evidence.

ORDER

THIS COURT ORDERS that the motion is dismissed.

"Donald J. Rennie"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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