

CANADA / JUDGMENT

Doe v. Canada (Attorney General)

2003 FCT 117

COURT
Federal CourtDECIDED
3 February 2003

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Doe v. Canada (Attorney General) Court (s) Database Federal Court Decisions Date 2003-02-03
Neutral citation 2003 FCT 117 File numbers T-2030-02 Decision Content Date: 20030203 Docket:
T-2030-02 Neutral citation: 2003 FCT 117 BETWEEN: JOHN DOE Applicant and ATTORNEY
GENERAL OF CANADA Respondent REASONS FOR ORDER HARGRAVE P.

- [1] The Applicant has had a number of confidentiality Orders in several matters. The Orders have been in various terms, but have not been blanket orders.
- [2] The Applicant, by the present motion, seeks to protect his identity to a further degree. The Applicant wishes to omit, from all medical records all names, including his own and all, places, dates and duties which might identify the Applicant in any order arising out of these proceedings. The Applicant wishes to be allowed to use a pseudonym in swearing affidavits. The Applicant also requests that the complete Federal Court file be sealed so as to prevent public access.
- [3] To grant such a blanket confidentiality order would be to create a setting unique since the 17th century secrecy of the Court of Star Chamber. The result of the order sought by the Applicant would be to create a procedure so potentially oppressive to the Respondent as to be akin to the oppression of the Court of Star Chamber. Such complete concealment is not about to occur in this proceeding, for the Federal Court does not, unless particular exceptions or circumstances are involved, act in secret. Mr Justice Rothstein, as he then was, pointed out in *Sulco Industry Ltd. v. Jim Scharf Holdings Ltd.* (1997), 69 C.P.R. (3d) 71 at 73: The Court does not operate in secret. There will be particular exceptions involving, for example, trade secrets and other types of confidential information that may require a sealing order, but the Court must be restrained in its willingness to grant such orders.
- [4] I would also add that the fact that a document is said to contain sensitive, damaging or embarrassing material neither constitutes an exception or a circumstance requiring a sealing order, nor does it necessarily follow that it ought to be kept from public inspection, or that medical histories ought to be edited thus putting the Respondent at a disadvantage. There should be more than such a generalization for there to be a reason for secrecy. There must be some real indication why disclosure would be harmful. It is up to a party seeking confidentiality to provide such evidence. The evidence can then be balanced against the

rights of the other side and the interest of the public.

- [5] In this instance the Applicant's affidavit in support of the request for overall confidentiality in this proceeding is, almost entirely, a chronology of the Applicant's numerous health problems, the treatments he has undergone, past court actions, procedures and orders, the Applicant's dealings with the Federal Court Registry and his past experience with tribunals. The only paragraph in the affidavit which has any bearing at all on the harmfulness of disclosure is paragraph 53: THAT the Appellant fears that publication of his identity and medical history, which was caused by service related stress in the R.C.M.P., has and will seriously jeopardize the Appellant's chances of securing employment relative to the Appellant's background, knowledge, education and experience.
- [6] There are no specifics either in this paragraph or elsewhere in the material which shed any light on either the Applicant's employment aspirations or his background, knowledge, education and experience or factual material, thus demonstrating either how relatively low-key disclosure might be detrimental on how there might be particular circumstances giving rise to a sealing order.
- [7] The Respondent submits that to circumscribe what may be contained in a Court Order would be to fetter the exercise of discretion of the Court in crafting orders. For that matter there is a valid similar objection to be made in the case of fettering discretion in reasons.
- [8] Mr Justice Pelletier, as he then was, dealt with this area in *Sierra Club of Canada v. Canada (Minister of Finance)*, [2000] 2 F.C. 423 at 425. He pointed out that confidentiality orders are to protect the confidential information of the parties, but that if reasons contain no confidential information, there is no reason why the reasons of the Court ought not to be placed in the public file. In this instance I declined to make an order that the Orders of the Court and the Reasons for the Court in this matter not be placed in the public file. It should be up to each judge and each prothonotary dealing with this file to be as circumspect as he or she believes the situation may require, in drafting orders and reasons. To come to any other conclusion would not only be presumptuous, but also would be to fetter the discretion of the Court.
- [9] As to having this file sealed generally, again I refer to Mr Justice Rothstein's view, set out above in *Sulco* that the Court does not operate in secret. Sealing of a file may have a place, for example where juvenile criminal records are involved, but such an order in a judicial review file ought to be exceedingly rare. The Applicant has not convinced me that this is a situation in which there ought to be a particular exception to the general concept that the Federal Court proceedings are public proceedings.
- [10] The Applicant says, in written material, but not by way of affidavit, that to use his real name in this litigation will jeopardise his employment and physical and mental health. That is always a possibility in any litigation. The Applicant also says that the medical information which will be involved in this file would otherwise be regarded as private medical information, yet it is the Applicant who has chosen to make it an issue. Stress and, to a

degree, embarrassment and their impact on a litigant's life and employment, can be common in much litigation. Against this must be balanced the rights of the other side and of the Court to appropriate procedure, including full disclosure. As I say, the Applicant's material, long on narrative but short on sworn particulars, does not establish a need for confidentiality.

- [11] Finally, in order to maintain the integrity of the legal process in this Court, the Applicant will not be allowed to swear affidavits using a pseudonym. While the concept is not canvassed in the motion or material, it may be that the parties could work out a procedure in which the Applicant would provide a properly sworn affidavit to be served and filed by the Court in a confidential annex, with a separate copy of the affidavit, with a typed signature "John Doe" being kept by the Court in the public file. Any procedure involving a second separate parallel but confidential file for affidavits bearing the Applicant's real name would require Court approval. However, to order such a procedure goes beyond what is sought on this motion.
- [12] The alternative relief, that the Applicant's real name be removed from affidavits at the end of the proceeding, is premature. If at the conclusion of the proceeding and after any appeals the Applicant is uncomfortable about the affidavits filed with the Court, being affidavits bearing the Applicant's real name or otherwise identifying the Applicant, he may then apply, including to remove documents pursuant to Rule 26(2). (Sgd.) "John A. Hargrave"
- Prothonotary Vancouver, British Columbia 3 February 2003 FEDERAL COURT OF CANADA TRIAL DIVISION NAMES OF COUNSEL AND SOLICITORS OF RECORD MOTION DEALT WITH IN WRITING WITHOUT THE APPEARANCE OF PARTIES DOCKET: T-2030-02 STYLE OF CAUSE: John Doe v. Attorney General of Canada REASONS FOR ORDER OF: Hargrave P. DATED: 3 February 2003 WRITTEN REPRESENTATIONS BY: John Doe APPLICANT on his own behalf Camille N Audain FOR RESPONDENT SOLICITORS ON THE RECORD: John Doe APPLICANT on his own behalf Edmonton, Alberta Morris A. Rosenberg FOR RESPONDENT Deputy Attorney General of Canada Department of Justice Edmonton, Alberta

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Prepared on 26 October 2026 · Esheria