

Dockets: 2013-954(IT)G
2015-3261(IT)G
2019-3239(IT)G
2019-4191(IT)G

BETWEEN:

JOHN DOE*,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

Before: The Honourable Justice Sylvain Ouimet

Appearances:

Counsel for the Appellant: The Appellant himself

Counsel for the Respondent: Nadine Taylor Pickering

AMENDED ORDER

In accordance with the attached reasons, the Court has concluded that it should, on its own motion, order that:

1. the entire Court files for file numbers 2013-954(IT)G, 2015-3261(IT)G, 2019-3239(IT)G and 2019-4191(IT)G shall be sealed, with the exception of the following two documents:
 - the redacted version of the May 31, 2023 Order; and
 - the redacted version of this Confidentiality Order.
2. the May 31, 2023 Order shall be redacted by the Court to protect the identity of John Doe;
3. this Confidentiality Order shall be redacted by the Court to protect the identity of John Doe;

4. the following exceptions are made to paragraph 1 above:
 - The parties, their counsel, anyone else acting on behalf of the parties, and the Court and its staff may have access to the Court file as needed;
 - The Public Guardian and Trustee may have access to the unredacted version of the May 31, 2023 Order and to the unredacted version of this Confidentiality Order;
5. the parties, their counsel, or anyone else acting on behalf of the parties are prohibited from making public any information that has the effect of identifying the Appellant;
6. any proceedings in these Appeals shall be heard in the absence of the public unless prior authorization of the Court is obtained; and
7. this Confidentiality Order shall continue to be in effect until the Court orders that it be revised or amended based on circumstances that may arise as the case progresses.

THIS COURT INSTRUCTS the Court Registrar and any official court reporter to take all appropriate measures to ensure compliance with this order.

Without costs.

This Amended Order is issued in substitution of the Order dated May 31, 2023.

Signed at Vancouver, British Columbia, this 21st day of June 2023.

“Sylvain Ouimet”

Ouimet J.

Citation: 2023 TCC 92
Date: 20230621
Dockets: 2013-954(IT)G
2015-3261(IT)G
2019-3239(IT)G
2019-4191(IT)G

BETWEEN:

JOHN DOE,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

REASONS FOR ORDER

Ouimet J.

I. INTRODUCTION

[1] Between 2013 and 2019, John Doe filed four appeals with respect to his 2005, 2006, 2009, 2010, 2011, 2014, 2015 and 2016 taxation years (the “Appeals”).

[2] Between January 2014 and September 2022, eight status hearings were held in Vancouver, British Columbia with respect to the Appeals. During the hearings, John Doe was always self-represented.

[3] Following the last of these hearings, this Court concluded that for John Doe’s Appeals to proceed, the Court had to determine whether John Doe is under a legal disability.

[4] By order dated May 31, 2023 (the “May 31, 2023 Order”), this Court ordered counsel for the Respondent to notify the Public Guardian and Trustee of British Columbia of this Court’s belief that John Doe might be under a legal disability.

II. THE ISSUE

[5] The issue is as follows:

- Should this Court issue a confidentiality order to keep John Doe’s medical information confidential?

III. ANALYSIS

A. Obtaining a Confidentiality Order in the Tax Court of Canada – Procedural Requirements

(1) A Request for a Confidentiality Order Must be Made with a Motion

[6] Pursuant to section 16.1 of the *Tax Court of Canada Rules (General Procedure)* (SOR/90-688a) (the “Rules”), this Court may, on motion by a party, order that part of a document be treated as confidential at the time of filing of the document. Section 16.1 of the Rules reads as follows:

Confidentiality Order

16.1 (1) On motion, the Court may order that a document or part of a document shall be treated as confidential at the time of filing of the document or part of the document and determines the conditions in relation to its reproduction, destruction and non-disclosure.

(2) Where the Court makes an order pursuant to subsection (1), a party or solicitor of record may have access to the confidential document or part of the confidential document only on conditions determined by the Court in relation to its reproduction, destruction and non-disclosure.

(3) The order remains in effect until the Court orders otherwise.

[7] Consequently, in order for a confidentiality order to be issued by this Court, a motion must be made by a party. In this case, neither John Doe nor counsel for the Respondent made such motion. Given the circumstances, more specifically because of the Court’s belief that John Doe might be under a legal disability and because medical information about John Doe has been disclosed in the proceedings, the Court has concluded that it should, on its own motion, determine whether a confidentiality order should be issued to keep John Doe’s medical information confidential.

[8] In my view, John Doe’s medical information should be kept confidential until this Court determines whether he is under a legal disability pursuant to the Rules.

[9] In *Canada v Dow Chemical Canada ULC*,¹ the Federal Court of Appeal of Canada described the source of the Tax Court of Canada’s authority to control its process as follows:

In *Windsor (City) v. Canadian Transit Co.*, 2016 SCC 54, at paragraph 33, the Supreme Court of Canada found that the Federal Court does not have any inherent jurisdiction, but rather only the jurisdiction conferred on it by statute. Since the Tax Court is also a statutory court, this finding applies equally to the Tax Court. ...

Although the Tax Court does not have any inherent jurisdiction, it does have an implied jurisdiction by necessary implication. In *R. v. Cunningham*, 2010 SCC 10, at paragraph 19, the Supreme Court of Canada confirmed that statutory courts have an implied jurisdiction by necessary implication to carry out the functions of a court. Since the Tax Court is a statutory court, it also has this implied jurisdiction. Therefore, “... the powers conferred by an enabling statute are construed to include not only those expressly granted but also, by implication, all powers which are practically necessary for the accomplishment of the object intended to be secured by the statutory regime ...” (*ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4, at paragraph 51).²

[Emphasis added.]

[10] On the basis of this decision, my view is that I have the authority to issue a confidentiality order on my own initiative when it is in the interests of justice to do so in the circumstances. I am also of the view that such circumstances include situations where a taxpayer is self-represented and the Court believes that the taxpayer might be under a legal disability. In such a situation, the Court cannot expect that the taxpayer is able to request a confidentiality order on their own. Furthermore, section 9 of the Rules states that the Court may, where and as necessary in the interests of justice, dispense with compliance with any rule at any time. It is necessary in this case.

¹ *Canada v Dow Chemical Canada ULC*, 2022 FCA 70 [*Dow Chemical*].

² *Dow Chemical* at paras 79–80.

[11] Consequently, this Court must take action to determine whether John Doe's medical information should be kept confidential until it can be determined whether he is under a legal disability pursuant to the Rules.³

(2) When the Motion Should be Made

[12] Pursuant to Section 16.1 the Rules, if a motion is made and granted, this Court may order that a document or part of a document be treated as confidential at the time of filing of the document. The expression "at the time of filing of the document" and common sense dictate that, in principle, such motion must be made at the time of filing of documents and not after the documents are already part of the Court's file. Applying this reasoning to the trial transcripts, a motion to keep part of a trial transcript confidential should be made at the beginning of a proceeding or right before the confidential information is discussed at trial.

[13] As previously stated, section 9 of the Rules allows the Court to dispense with compliance with any rule at any time where and as necessary in the interests of justice. Again, I am of the view that given the circumstances, it is in the interests of justice to allow the Court to determine whether John Doe's medical information, which has already been disclosed, should be made confidential at this time.

(3) Another Requirement

[14] In *Atomic Energy of Canada Limited v Sierra Club of Canada*,⁴ the Supreme Court of Canada stated that in order to obtain a confidentiality order, an applicant must demonstrate that the information that is requested to be kept confidential has been treated at all relevant times as confidential. The Court stated the following at paragraph 60 of the decision:

... Such an order requires the applicant to demonstrate that the information in question has been treated at all relevant times as confidential and that on a balance of probabilities its proprietary, commercial and scientific interests could reasonably be harmed by the disclosure of the information: *AB Hassle v. Canada (Minister of National Health & Welfare)* (1998), 83 C.P.R. (3d) 428 (F.C. T.D.), at p. 434. To this I would add the requirement proposed by Robertson J.A. that the information

³ Practice Note No. 16 of the Tax Court states that the Court may on its own initiative redact from pleadings personal and confidential information. The Court may also order that certain documents be treated as confidential and, in these cases, those documents would be sealed and not available to the public.

⁴ *Atomic Energy of Canada Limited v Sierra Club of Canada*, 2002 SCC 41 [*Sierra Club*].

in question must be of a “confidential nature” in that it has been “accumulated with a reasonable expectation of it being kept confidential” as opposed to “facts which a litigant would like to keep confidential by having the courtroom doors closed” (para.14).

[15] In this case, the information that this Court believes should be kept as confidential is medical information. This information is of a “confidential nature”. In *Osif v College of Physicians & Surgeons (Nova Scotia)*, the Nova Scotia Court of Appeal stated that confidentiality is a hallmark of the relationship between health care professionals and their patients; that there is no question that the public considers that their medical records are confidential and expects that, except in limited circumstances, they will remain confidential; and that the confidentiality of such records is an important public interest.⁵ I agree.

[16] The Court believes that John Doe’s medical information was collected by his doctor(s) with the expectation that it would be kept confidential. The information was only disclosed to the Court to support adjournment requests, including because John Doe was or had been hospitalized and/or was under the influence of medication.

[17] For these reasons, this Court has concluded that John Doe’s medical information has been treated at all relevant times as confidential.

B. Analytical Framework for the Exercise of the Judge’s Discretion to Issue a Confidentiality Order

[18] Generally, the public can attend hearings and consult court files and the press is left free to inquire and comment on the workings of the courts.⁶ The Supreme Court of Canada has recognized on numerous occasions that the open court principle is protected by the constitutionally entrenched right of freedom of expression.⁷

[19] A person can seek an exception to the open court principle and ask a court to keep information confidential. In *Sherman Estate v Donovan*, the Supreme Court of Canada revisited the test that it established in *Sierra Club* for the exercise of a court’s discretion to keep information confidential. The Court stated that in order to succeed

⁵ *Osif v College of Physicians & Surgeons (Nova Scotia)*, 2008 NSCA 113 [*Osif*] at para 22.

⁶ *Sherman Estate v Donovan*, 2021 SCC 25 [*Sherman Estate*] at para 1.

⁷ *Sherman Estate* at para 1.

and obtain a confidentiality order, the person asking a court to exercise its discretion must establish the following:

- Court openness poses a serious risk to an important public interest;
- The order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and
- As a matter of proportionality, the benefits of the order outweigh its negative effects.⁸

(1) Court Openness Poses a Serious Risk to an Important Public Interest

[20] The Court must determine whether the disclosure of John Doe’s medical information would pose a serious risk to a “public interest”. Consequently, to answer this question, the Court must determine whether a person’s medical information is of “public interest”.

[21] A person’s medical information is private by nature. In *Sherman Estate*, the Supreme Court of Canada stated that the right to privacy is an important public interest only in certain circumstances. This is because the recognition of a public interest in privacy could threaten the strong presumption of openness if privacy is cast too broadly without a view to its public character.⁹ The Court stated that in order to establish a serious risk to an important public interest for the purposes of the test, it is not sufficient to simply demonstrate the existence of any impact on individual privacy.¹⁰

[22] A person’s dignity is a dimension of a person’s privacy. The protection of dignity is an important public interest that can be threatened by open courts.¹¹ The Supreme Court of Canada explained that in order to preserve the integrity of the open court principle, an important public interest concerned with the protection of dignity should be understood to be seriously at risk only in limited cases.¹²

⁸ *Sherman Estate* at para 38.

⁹ *Sherman Estate* at para 56.

¹⁰ *Sherman Estate* at para 59.

¹¹ *Sherman Estate* at para 61.

¹² *Sherman Estate* at para 63.

[23] The Supreme Court of Canada stated that “protecting individuals from the threat to their dignity that arises when information revealing core aspects of their private lives is disseminated through open court proceedings is an important public interest for the purposes of the test”.¹³ For the Supreme Court, the interest is ultimately about safeguarding a person’s dignity, and that interest will be undermined when the information reveals something sensitive about them as an individual, as opposed to generic information that reveals little if anything about who they are as a person.¹⁴ Therefore, information can be kept confidential if it consists of intimate or personal details about an individual.¹⁵ In my view, this applies to a person’s medical information, especially medical information of the nature of John Doe’s.

[24] Furthermore, in *Canadian Broadcasting Corp v The Queen*, the Supreme Court of Canada recognized that situations requiring the protection of vulnerable individuals justify limiting court openness.¹⁶ In my view, John Doe is a vulnerable individual and limiting court openness in order to protect his medical information is justified. John Doe’s right to privacy includes the right to keep his medical information private because it reveals personal, sensitive information about him. Furthermore, as stated in *Osif*,¹⁷ confidentiality is a hallmark of the relationship between health care professionals and their patients and there is no question that the public considers that their medical records are confidential and expects that they will remain confidential.

[25] In this case, in my view, John Doe’s medical information is sufficiently sensitive that court openness would pose a serious risk to an important public interest since the information is about a mental illness. Sensitive personal information that, if exposed, could give rise to a serious risk includes information related to stigmatized medical conditions.¹⁸

¹³ *Sherman Estate* at para 73.

¹⁴ *Sherman Estate* at para 75.

¹⁵ *Sherman Estate* at para 75.

¹⁶ *Canadian Broadcasting Corp v The Queen*, 2011 SCC 3 at para 19.

¹⁷ *Osif* at para 22.

¹⁸ *Sherman Estate* at para 77.

[26] Consequently, the Court has concluded that court openness poses a serious risk to an important public interest, that is, to John Doe's privacy and more specifically to his dignity.

(2) The Order Sought is Necessary to Prevent this Serious Risk to the Identified Interest Because Reasonably Alternative Measures Will not Prevent this Risk

[27] The Court has to consider whether alternative measures to the confidentiality order can be taken, as well as determine what the scope of the order should be to ensure that it is not overly broad.¹⁹

[28] In this case, there is no alternative to a confidentiality order. The submission into evidence of John Doe's medical information was and is necessary to ensure the proper conduct of the Appeals since the information that should be kept confidential had to be disclosed to support adjournment requests. Furthermore, the same information has been used by this Court to conclude that John Doe might be under a legal disability and is included in the May 31, 2023 Order. Given that the information is necessary to John Doe's case, it had to be disclosed.

[29] With respect to the scope of the order, the Court has to ensure that it is not overly broad. The Court has considered four options. The first is to seal the entire file. The second is to redact all medical information from all of the documents in the Court file. The third option is to replace John Doe's name with a pseudonym in the entire file. The fourth option is to seal most of the file and replace John Doe's name with a pseudonym in the documents that are not sealed.

[30] Sealing the entire file is not the option chosen by the Court as other more targeted options are available that will allow the Court to achieve the ultimate goal, that is, to keep John Doe's medical information private.

[31] It is difficult to redact the documents because some of them include practically only medical information. They had to be filed in their entirety to ensure a better understanding of the issues and while they could be redacted, they would have to be almost entirely redacted. Furthermore, redacting all of John Doe's medical information from all documents filed with the Court, and especially from the

¹⁹ *Sierra Club* at para 62.

hundreds of pages of the trial transcripts, would be impractical. This would put an unreasonable burden on the Court and would not be a good use of judicial resources.

[32] For the same reasons, redacting John Doe's name from all documents filed with the Court is not the option chosen by the Court.

[33] The fourth option is the one that has been chosen by the Court. The entire file should be sealed, with the exception of two documents, until it is determined whether John Doe is under a legal disability. The issue should be revisited once this matter is resolved and the documents and trial transcripts can be redacted if necessary by John Doe or by his counsel. Only the May 31, 2023 Order and this Confidentiality Order will not be sealed, but they will be redacted by the Court to replace the Appellant's name with the pseudonym "John Doe". Other information will have to be redacted by the Court in order to keep John Doe's identity confidential. This information can be easily identified and redacted. This will ensure that John Doe's identity is kept confidential and therefore his right to privacy and his dignity will be respected. This will also keep the hearing as public as possible.

(3) As a Matter of Proportionality, the Benefits of the Order Outweigh its Negative Effects

[34] At this stage, the Court must determine whether the salutary effects of the confidentiality order outweigh the negative effects of the confidentiality order, including the effects on the principle of open and accessible court proceedings.²⁰

[35] In this case, the Court is of the view that the salutary effects of the confidentiality order outweigh its negative effects because the right to privacy will be protected while the relevant facts on the substantive issue will be kept part of the public record. John Doe risks being subject to serious harm if his identity is not kept confidential and the harm to the public interest and to the open court principle is minimal because the information on the issue of whether he is under a legal disability is still available to the public while the information on his tax issues will be disclosed later, after the legal disability issue is resolved.

THIS COURT ORDERS THAT:

²⁰ *Sierra Club* at para 69.

1. the entire Court files for file numbers 2013-954(IT)G, 2015-3261(IT)G, 2019-3239(IT)G and 2019-4191(IT)G shall be sealed, with the exception of the following two documents:
 - the redacted version of the May 31, 2023 Order; and
 - the redacted version of this Confidentiality Order.
2. the May 31, 2023 Order shall be redacted by the Court to protect the identity of John Doe;
3. this Confidentiality Order shall be redacted by the Court to protect the identity of John Doe;
4. the following exceptions are made to paragraph 1 above:
 - The parties, their counsel, anyone else acting on behalf of the parties, and the Court and its staff may have access to the Court file as needed;
 - The Public Guardian and Trustee may have access to the unredacted version of the May 31, 2023 Order and to the unredacted version of this Confidentiality Order;
5. the parties, their counsel, or anyone else acting on behalf of the parties are prohibited from making public any information that has the effect of identifying the Appellant;
6. any proceedings in these Appeals shall be heard in the absence of the public unless prior authorization of the Court is obtained; and
7. this Confidentiality Order shall continue to be in effect until the Court orders that it be revised or amended based on circumstances that may arise as the case progresses.

THIS COURT INSTRUCTS the Court Registrar and any official court reporter to take all appropriate measures to ensure compliance with this order.

Without costs.

Signed at Vancouver, British Columbia, this 21st day of June 2023.

Ouimet J.

CITATION: 2023 TCC 92

COURT FILE NO.: 2013-954(IT)G, 2015-3261(IT)G,
2019-3239(IT)G, 2019-4191(IT)G

STYLE OF CAUSE: JOHN DOE AND
HIS MAJESTY THE KING

REASONS FOR ORDER BY: The Honourable Justice Sylvain Ouimet

DATE OF ORDER: June 21, 2023

APPEARANCES:

 Counsel for the Appellant: The Appellant himself
 Counsel for the Respondent: Nadine Taylor Pickering

COUNSEL OF RECORD:

 For the Appellant:

 Name:

 Firm:

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