**SUPREME COURT OF NOVA SCOTIA**
**Citation:** *John Doe v. Jane Roe*, 2018 NSSC 174

**Date:** 20180705
**Docket:** Hfx No. 477441
**Registry:** Halifax

**Between:**

John Doe

Applicant

v.

Jane Roe

Respondent

**And:**

**Docket:** Hfx No. 477551
**Registry:** Halifax

*Ex Parte* Application by Jim Doe (pseudonym), Applicant, for directions and a confidentiality order for an intended Application in Chambers on Notice

**Decision**

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| **Judge:** | The Honourable Justice Denise M. Boudreau |
| **Heard:** | July 3, 2018, in Halifax, Nova Scotia |
| **Oral Decision:** | July 5, 2018 |
| **Written Release of Oral Decision:** | July 19, 2018 |
| **Counsel:** | Michael P. Scott, for the Applicant John Doe<br>Jane O'Neil, Q.C, and Aileen Furey, for the Applicant Jim Doe (pseudonym)<br>Tara Miller and Alix Digout, for the Respondent Jane Roe |

**By the Court (Orally):**

[1] The applicants seek an order of confidentiality. Specifically the applicants indicate that they are anticipating that Actions may soon be filed naming one or both of them as defendants, with a person they identify as Jane Roe as the plaintiff. Their application seeks for the court to order in advance of that filing that the plaintiff use pseudonyms when referring to them in pleadings before the court and in documents filed with the court. That application is made pursuant to Rule 85 of our Rules of Court.

[2] The applicants also seek an order that if the plaintiff speaks to the media about this particular matter, the plaintiff would not name the applicants/defendants but would also use pseudonyms in those interviews.

[3] The factual basis for the two applications are contained in two affidavits that have been filed, one for each of the applicants. Those documents were filed June 27, 2018. In support of John Doe's application, I have the affidavit of Michael Scott. From Jim Doe, in support of his application, is the affidavit of Aileen Furey.

[4] With respect to John Doe, in the affidavit of Mr. Scott, he indicates:

> 4. The Applicant is a high-profile business person in the Halifax Regional Municipality, Nova Scotia.

> 5. The Respondent is a person known to the Applicant. I am advised and do verily believe that the parties initially met in the context of a client/representative business relationship that subsequently developed into a personal relationship.
>
> 6. The Applicant has advised me, and I do verily believe, that the Respondent contacted him by Facebook, several years after the relationship had ended. A copy of the ensuing Facebook text exchange is attached as Exhibit "1", which has been redacted to protect the identities of the parties.
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> 7. Nearly four years later, the Applicant received a demand letter from the Respondent's counsel, alleging damages in relation to sexual "misconduct" and "harassment" arising out of the client/representative business relationship. A redacted copy of the demand letter is attached as Exhibit "2".

[5] Mr. Scott indicates that a letter was sent to the respondent's counsel seeking clarification. A redacted copy of that letter is also attached. Mr. Scott also attaches a psychological assessment relating to the respondent Jane Roe, again redacted, which has been received from her counsel.

[6] Mr. Scott's affidavit concludes:

> The Applicant has advised me, and I do verily believe, that he has a genuine concern that the public filing of pleadings would harm his reputation in the community and cause damage to his business.

[7] From Mr. Jim Roe, I have an affidavit of Aileen Furey. The factual basis for his application is contained therein. I will quote a few important passages from that affidavit.

> 4. The Applicant is a business person in the Halifax Regional Municipality, Nova Scotia.

> 5. In a media report issued late on June 19, 2018, we learned of a motion being brought by John Doe in Hfx. No. 477441. On June 20, 2018, our client instructed McInnes Cooper to bring a similar application in Chambers on June 21, 2018.
>
> 6. The "Potential Plaintiff" is a person known to the Applicant. I am advised and do believe that the parties met in the context of a business relationship.
>
> 7. The Applicant received a demand letter dated April 25, 2018, from the Potential Plaintiff's counsel. It alleged damages in relation to sexual "misconduct" and "harassment" arising out of the business relationship and is attached as "Exhibit A" to this Affidavit.
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> 8. The demand letter offers an opportunity to discuss a resolution, specifically for the purpose of not making the matter public by the filing a civil action.

[8] Ms. Furey also notes that they have received the same psychological assessment as was referred to in the John Doe matter. And also:

> 10. The Applicant has advised us, and I do believe, that they have genuine concerns that the public filing of pleadings would harm their reputation in the community and cause damage to their business.

[9] I have received written submissions from both counsel for both applicants. I heard oral submissions this past Tuesday as to their request. I also heard on Tuesday from counsel for the respondent or intended plaintiff (identified as Jane Roe) who indicated that the possible or intended plaintiff was consenting to the requests of the applicants due to the "sensitive nature" of this matter.

[10] I also note that during the hearing on Tuesday I heard no objections or submissions from the media. The media have received formal notice that these applications were being made.

[11] One last thing I want to highlight from the factual, or background perspective, although it should be apparent from my comments so far. I have no Statement of Claim before me. I do not have a filed Statement of Claim, nor do I have a draft Statement of Claim. I do not know the precise allegations that might be made by Jane Roe, if they are ever made. I do not know the precise cause of action, or causes of action, or tort, that might be advanced in this particular matter at this point.

[12] I start by discussing Rule 85, which is the rule pursuant to which this matter comes before me. That rule addresses the issue of confidentiality in court matters and, within that rule, talks about the use of pseudonyms, specifically at Rule 85.04(2)(d). An application for such an order, as everyone has acknowledged during our discussions, brings into play the open court principle. The rule specifically refers, in fact, to the open court principle.

[13] Any application of the nature of which is before me today must start with the presumption that any and all proceedings that are brought before a court engage the open court process. They engage a process that is open and transparent, and accessible to the public. That includes among other things the court filings, the court proceedings, the court decisions, and includes, of course, the identity of the parties.

[14] The onus is therefore on an applicant when such an applicant seeks an order that limits the open court principle in any way to show that the principle should be somehow limited in their particular case. The test in such applications has come to be known as the *Dagenais/Mentuck* test. That has been referred to in many cases over the past number of years and is quite well known.

[15] I refer to the description of the *Dagenais/Mentuck* test as was referred to by our Court of Appeal in *Canadian Financial Wellness Group v. Resolve Business Outsourcing*, 2014 NSCA 98. The Court of Appeal has confirmed that the test has two branches:

> [26] To summarize the test's two branches, the judge determines whether (1) the confidentiality order is necessary to prevent a serious risk to an important public interest, because reasonable alternative measures would not alleviate the risk, and (2) the salutary effects of the confidentiality order, that may include the promotion of a fair trial, outweigh its deleterious effects, that include a limitation on constitutionally protected freedom of expression and public access to the courts. For the first branch, the important interest must (a) be real, substantial and well-grounded in the evidence, and (b) involve a general principle of public significance, rather than be merely personal to the parties, while (c) the judge's consideration of reasonable alternative measures must restrict the confidentiality order as much as possible while preserving the important public interest that requires confidentiality.

[16] The first branch of the test talks about the fact that an applicant must show there is an important public interest at play here. In their submissions before me, the applicants here have indicated that, in their view, there are two important

public interests that should be considered and should result in my granting their application.

[17] Firstly, they submit that the Order they seek is necessary to ensure the proper administration of justice. That is to say, this Order would prevent what they see as an extortion being attempted or perpetrated by the intended plaintiff Jane Roe. The second important public interest that they have put forward is, in their words, to "protect the innocent". Specifically in cases where the allegation is of a sexual nature or of sexual misconduct, they submit that anonymity is appropriate.

[18] I would note that from John Roe, in his written submissions, there was a third public interest identified, which was not really referred to in oral submissions; that being the public interest in confidentiality. That is to say, the public interest in the enforcement of obligations of confidence between parties, within relationships of trust. That was not expanded upon in oral submissions before me in the context of the open court issue. That third submission I am rejecting out of hand. It is not a valid consideration in my view.

[19] I start with the arguments that have been put before me in relation to the extortion issue raised by the applicants. They say that what is happening here is an attempt at extortion.

[20] I would note that although Jane Roe, the intended plaintiff, has consented to the order that the applicants are seeking, she disputes the allegation that this particular matter involves extortion or any attempt at extortion.

[21] The applicants submit that, in the context of the proper administration of justice, a court should seek to prevent abuses of process. That is to say, to prevent lawsuits that might constitute extortion and to limit any situation that might result in such. They also note that in the criminal context, alleged victims of extortion would, according to the Criminal Code, have their identity protected.

[22] In considering this issue, I start with a comment that I have already made, but I think is very relevant to this topic. I have not seen a filed action; I have not even seen a draft filed action. I do not know what the allegations are at this point. I have no way of knowing the truth of this matter at this point. What I have before me, as I have already indicated, is a letter from counsel for the person identified as Jane Roe. The letter seems to indicate giving the applicants a choice, to face an action or to settle the matter with her.

[23] In the case of John Doe, there are also messages that he has provided in his evidence where there are requests for money. There are reminders of the relationship. There are comments about not staying quiet as to these topics. The

applicants seem to believe that these facts constitute strong evidence of extortion. Clearly that is their view, but it remains an allegation and a simple allegation that they are making. That allegation may or may not be as clearly made out as they believe.

[24] In a more fundamental sense, the issue of extortion is not before me. It is not before any court at this point. The applicants have not brought forward any formal allegations of extortion. There is no criminal allegation of extortion, nor is there any civil action for extortion. That issue is not the issue being litigated here and it is not my job to decide that today. The applicants have merely raised this as a belief on their part. It is their belief that there is some improper motive behind this possible action. Quite simply that is not something I can assess based on what is before me so far.

[25] It is impossible and inappropriate for me to judge a claim as being somehow improper when I do not even know what the claim will be. In my view, it does not justify a limitation on the open court principle at this early stage, and I have not been shown any authority that would allow me to conclude that the open court principle should be limited for that particular reason.

[26] The second submission that has been put forward as an important public interest, as I have already indicated, is the "protection of the innocent". That is to say, the protection of a person's reputation while the allegations are not proven. The applicants have argued that the allegations are, they believe, going to be sexual in nature. They submit these somehow are a special category of allegations that should engage limitations on an open court. The applicants say that sexual allegations are particularly damaging to reputation, particularly "salacious". It is their view that to allow the intended plaintiff to file her Action and use their actual names would be harmful to their reputations, even if those allegations are later proven untrue.

[27] It is trite to say that all persons who are facing civil actions or, in fact, criminal prosecutions are innocent at the start of the process. When allegations are put forward they are merely allegations; they are unproven when a matter starts. Certainly all defendants might feel as these applicants do when they face, for example, a civil action. It is perfectly legitimate for a defendant to say that he or she is innocent, that he/she is facing unfair allegations that they say are untrue. Such a defendant might also feel that their reputation was being affected until the time that the matter is resolved one way or the other.

[28] I can think, for example, of a case of a business person who would be accused in a pleading of a fraud or a theft. That person would likely have concerns about those allegations, the effect on their reputation, the effect on their future employment, even if the allegations are later proven to be untrue. The caselaw is quite clear that those types of concerns in and of themselves are not sufficient reason to allow a restriction on our open courts. Nor, in fact, is the concern that a defendant might suffer personal embarrassment at the filing of certain allegations.

[29] It might, in fact, be suggested reasonably that all defendants to a greater or lesser extent might wish to keep allegations made against them out of the public eye. That is not how our system works. Our judicial system is based on the principle of openness and transparency.

[30] I point out again that we do not have a statement of claim. I do not know what the allegations are going to be. I do not know what the cause of action will be, I do not know what tort will be brought forward, I do not know what facts will be alleged.

[31] I do note, as I have read from the affidavits, that it would appear that the applicants are acknowledging at least some facts. For example, they knew the intended plaintiff, and they had a business relationship that later developed into

something different. Are those facts going to be the basis of her claim, or will there be other facts? We simply do not know at this point.

[32] In short, the applicants are putting forward the concept of innocence to allegations that have not yet been made, certainly not before the court. The applicants would likely respond that you could infer that the allegations will at least be sexual in nature. That is not an unfair inference to make. However, what will be the allegation? We simply do not know.

[33] I have been provided with the decision of Arnold, J. of this court, *M.H.B. v. A.B.*, 2016 NSSC 137. In that particular case an Order for the use of pseudonyms was granted. The allegation in that case was of the sexual abuse of a child over a period of time, which is obviously a very, very serious allegation. The applicant/defendant in that case sought to use initials which was granted. I do note that clearly the reason it was ordered is because the time period, during which the offence was alleged to have occurred, included a time period for which the defendant could have been a youth.

[34] I refer to Arnold, J.'s decision at para. 38:

> [38] I am satisfied that the salutary effects of an order that will temporarily allow A.B. to use a pseudonym in relation to untested claims alleging sexual abuse of a child, possibly when A.B. was a young person, are significant and outweigh the deleterious effects on the right to free expression. There is a

> proportionality between the positive and negative effects of a time-limited allowance for a pseudonym. If there was no possibility of a result at trial where A.B. is found to have been a young person during the time frames alleged by M.H.B. I would not be so persuaded. (emphasis in mine)

[35] It is clear from this decision that if the applicant had not possibly been a youth, the court would not have granted the order.

[36] The applicants have pointed out, and they are correct, that that same decision includes a discussion about cases where in situations of sexual assault, these types of applications were granted. At para. 23:

> [23] A number of cases stand for the proposition that the *Degenais/Mentuck* requirements are met where the defendant in a civil case is accused of sexual assault.

[37] I would first point out that these cases relate specifically to sexual assault. I do not know if that is the allegation that will be made in the case before me. I also note that the cases listed contain very different scenarios than what we have before us today. For example, in the case of *John Doe v. Joe Smith*, 2001 ABQB 277, 2001 CarswellAlta 443, that particular case was an application for anonymity made by the plaintiff, i.e. the alleged victim of the sexual assault. The application was made to protect her privacy as an alleged victim of a sexual assault, and the defendant was also granted the use of a pseudonym because it would identify her.

[38] The case of *G.(B.) v. British Columbia*, 2004 BCCA 345, 2004 CarswellBC 1359, involved allegations of, as described by the court, "heinous sexual assaults of children" at a school by staff members.

[39] The case of *H.(T.) v. G.(C.D.)*, (1997) 120 Man. R. (2d) 11, 1997 CarswellMan 224 (Man.Q.B.), again involved an application by a plaintiff in a similar situation. The allegation was of sexual assault by the defendant, a member of the clergy, while the plaintiff was a child.

[40] All of those decisions are obviously very specific to their facts and, in my view, quite distinguishable to the case before me. In particular, some involve the situation where the plaintiff, or alleged victim, brought forward the application for anonymity.

[41] These cases, in my view, do not support the proposition that merely because an allegation is likely to involve some sexual misconduct, that that is enough to provide protection of the identity of these defendants that is, frankly, not given to others.

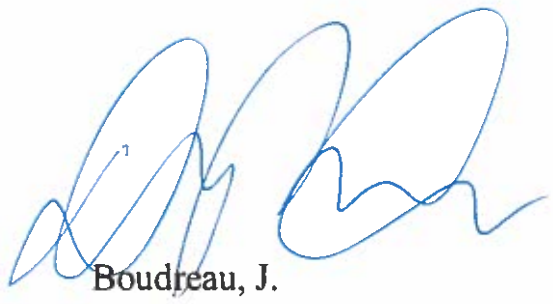
[42] In the final analysis, the applicants should know that I have heard and fully understand their concerns. However, I do not find that these concerns trump the greater principle here that is to be protected, that is to say the open court principle.

With what is before me within this particular application, I am not persuaded that in this case, at this time, that the disclosure of the names of the defendants in the potential action of Jane Roe would represent a risk to an important public interest.

[43] In my view, the applicants, therefore, have not met the first branch of the *Degenais/Mentuck* test. Having concluded that, I see no need to consider the second branch. I have concluded that the confidentiality order that is sought by the applicants should not issue at this time.

[44] The second request that was made related to the restraining of Jane Roe from identifying the applicants in discussions she might have with the media. I would note, as I have already indicated, that this is a request that Jane Roe has consented to, which is her decision and entirely her decision at this point.

[45] I decline to grant that order as well. I have two reasons for this. Firstly, given my findings with respect to the first issue, I conclude that this second request would be inappropriate. Secondly, it is my view that in this context, and in matters of this nature, that it is not the court's role to police media interviews. Therefore, both applications are dismissed.



Boudreau, J.