

Doe v. Canada (Attorney General), 2003 FC 1014 (CanLII)

Date: 2003-08-29

Docket: T-1114-02

URL: <http://www.canlii.org/en/ca/fct/doc/2003/2003fc1014/2003fc1014.html>

[Reflex Record](#) (noteup and cited decisions)

Date: 20030829

Docket: T-1114-02

Citation: 2003 FC 1014

OTTAWA, ONTARIO, AUGUST 29, 2003

Present: THE HONOURABLE MR. JUSTICE LEMIEUX

BETWEEN:

MARK DOE

Plaintiff

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

Defendant

REASONS FOR ORDER AND ORDER

[1] These reasons relate to an appeal by the plaintiff, Mark Doe, from a decision of Prothonotary Hargrave dated January 16, 2003, an appeal which had been adjourned *sine die* but recently came on for hearing in Vancouver, B.C.

[2] The plaintiff, a self-represented litigant, sought an order from Prothonotary Hargrave, pursuant to Rule 229 of the *Federal Court Rules, 1998*, (the "Rules") and section 37 of the *Canada Evidence Act*, R.C. c. 5 (before that provision was amended by the *Anti-terrorist Act*, being [S.C. 2001, c. 41](#)), by the addition of the section 38 series (the "Act") that the defendant, Her Majesty the Queen, ("HMQ") be required, without further proceedings being engaged, to produce documents over which She claimed privilege in Her affidavit of documents. However, the plaintiff did not challenge the validity, constitutionally or otherwise, of the new procedure provided for in the new section 38 series.

[3] On September 13, 2002, the plaintiff issued a statement of claim seeking damages from HMQ amounting to several million dollars based on his allegations that, since 1990, HMQ through various agencies and agents committed illegal, unlawful, fraudulent, negligent and conspiratorial acts against himself and a company which he controlled which was also named as a co-plaintiff whose status as such is in abeyance pending the resolution of issues related to representation.

[4] After filing a statement of defence, HMQ filed an affidavit of documents claiming privilege over nine documents "the particulars and contents of which are sensitive information, the disclosure of which could injure international relations or national security".

[5] Pursuant to section 38.03 of the Act, the Attorney General of Canada authorized the disclosure of the following facts:

- (1) that notice had been provided to him pursuant to section 38.01 of the Act;
- (2) pursuant to section 38.03 of the Act, he did not authorize the disclosure of the nine documents; and
- (3) he would be making an application to the Federal Court pursuant to section 38.04.

[6] Prothonotary Hargrave's order dismissing the plaintiff's motion reads:

The plaintiffs' motion is dismissed, but without prejudice to any further application by the plaintiffs arising out of the procedure under section 38 of the *Canada Evidence Act*, as invoked by the defendant.

[7] Prothonotary Hargrave provided written reasons in support of his order. He was of the view that neither Rule 229 nor section 37 of the Act assisted the plaintiff in attempting to force the production of documents essentially because the privilege claimed "reflects the wording of the definition of « sensitive information » that appears in section 38 of the current amended *Canada Evidence Act*" defined as follows:

<p>"sensitive information" means information relating to international relations or national defence or national security that is in the possession of the Government of Canada, whether originating from inside Canada, and is of a type that the Government of Canada is taking measures to safeguard.</p>	<p>« renseignements sensibles » Les renseignements, en provenance du Canada ou de l'étranger, qui concernent les affaires internationales ou la défense ou la sécurité nationales, qui se trouvent en la possession du gouvernement du Canada et qui sont du type des renseignements à l'égard desquels celui-ci prend des mesures de protection.</p>
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[8] The Prothonotary pointed to the fact that notice had been given to the Attorney General under section 38.01(1) of the Act which he said "requires that a participant in a proceeding, who is required to disclose or expects to have to disclose sensitive information, notify the Attorney General of Canada of the possibility of disclosure" and he pointed to the respondent's affidavit evidence that the procedure set out in the section 38 series of the Act was engaged.

[9] Prothonotary Hargrave concluded at paragraph 8 of his reasons as follows:

[8] Section 38 of the Act provides a specific and detailed code of practice and procedure for the determination of privilege of sensitive information. The Plaintiffs may not like the section 38 procedure, however not only does it govern in this instance, but also the hearing of the present motion, as drafted, does not present an opportunity either to challenge section 38 of the Act, or to determine its scope.

[10] I agree with counsel for the respondent Prothonotary Hargrave's decision, in this instance, is not a discretionary decision to which the standard of review set out in *Canada v. Aqua-Gem Investments Ltd.*, 1993 CanLII 2939 (F.C.A.), [1993] 2 F.C. 425 (C.A.) applies. Rather, the nature of the Prothonotary's decision involves questions of law in respect of which he had to render a correct decision.

[11] The Prothonotary rendered clear and cogent reasons on the statutory scheme provided for in section 38 of the *Canada Evidence Act*, as amended by the *Anti-terrorist Act*. That section repealed former sections 37 and 38 of the *Canada Evidence Act* upon which the plaintiff appellant relies.

[12] Clearly, the Prothonotary's decision is correct in law and there is no substance in the plaintiff appellant's submission that the scope of new section 38 is limited to privilege claims involving terrorism.

ORDER

THIS COURT ORDERS that:

1. This appeal is dismissed with costs.

J U D G E

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: T-1114-02

STYLE OF CAUSE: Mark Doe v. AGC

PLACE OF HEARING: Vancouver, BC

DATE OF HEARING: August 18, 2003

REASONS FOR Order : Lemieux, J.

DATED: August 29, 2003

APPEARANCES:

Mr. Mark Doe

on his own behalf FOR PLAINTIFF

Mr. Glenn Rosenfeld


Mr. Jan Brongers FOR DEFENDANT

SOLICITORS OF RECORD:

ON HIS OWN BEHALF FOR PLAINTIFF

Dept. of Justice FOR DEFENDANT

Ottawa, ON

by  for the  Federation of Law Societies of Canada