Date: 20011219

Docket: T-1805-98

Neutral Citation: 2001 FCT 1412

Ottawa, Ontario, Wednesday the 19th day of December 2001

PRESENT: The Honourable Madam Justice Dawson

BETWEEN:

REVEREND BROTHER WALTER A. TUCKER
and REVEREND BROTHER MICHAEL J. BALDASARO

Plaintiffs

- and -

HER MAJESTY THE QUEEN

Defendant

REASONS FOR ORDER AND ORDER

DAWSON J.

[1] Before the Court is the defendant's motion filed November 26, 2001 for an order:

(i) excluding each of the plaintiffs from attending the examination for discovery of the other plaintiff; and

(ii) prohibiting the disclosure of the evidence given on such discovery by either plaintiff to the other before the discovery process is concluded.

[2] The defendant abandoned at hearing an earlier motion, filed November 15, 2001, which sought much of the same relief as well as an order requiring the plaintiffs to answer questions about their religious beliefs. It appears that the reason the earlier motion was replaced by the one now before the Court is because at the examination for discovery of the plaintiffs held to date no specific questions on religion were either asked or refused.

[3] Also before the Court is the plaintiffs' motion, filed October 25, 2001, that a further pre-trial conference be scheduled, or that the matter be set down for trial forthwith, or that directions be issued, or that the Court grant such further and other relief as advised and admitted.

[4] In the underlying action the plaintiffs seek a declaration that the *Controlled Drugs and Substances Act,* S.C. 1996, c. 19 is unconstitutional. Relevant for the purpose of these motions are the plaintiffs' allegations in the amended statement of claim that they are Ministers of The Assembly of the Church of the Universe who use cannabis on advice revealed in the Bible, and also their allegations that their freedom of association is being violated due to government attacks, and that they fear for their freedom and their lives because of their religious practices and beliefs.

[5] In its amended statement of defence, the Crown denies all of the allegations contained in the amended statement of claim, denies that rights protected by the *Canadian Charter of Rights and Freedoms, 1982* ("Charter") are infringed, and pleads in the alternative that any infringement constitutes a reasonable limit which is demonstrably justifiable in a free and democratic society under section 1 of the Charter.

[6] The parties advised that the action is ready for trial, except for completion of the defendant's oral examination for discovery of the plaintiffs.

[7] On May 3, 2001, the Crown purported to commence the oral discovery of the plaintiffs. The transcript of that proceeding was in evidence on these motions. The transcript discloses that:

(i) No witness was sworn or was asked to swear or affirm, and no steps were taken to commence the discovery by the asking of questions. Indeed, at one point the Crown noted "I haven't asked you any question" and the first named plaintiff responded that "[w]e're just making an effort to define the parameters".

(ii) The proceeding consisted of a discussion between the plaintiffs and counsel for the defendant as to whether the plaintiffs should be examined separately and in the absence of each other, and whether the plaintiffs would answer questions about their religious practices and beliefs, how they were formulated, and their origin. At page 9 of the transcript the first named plaintiff responded "we don't mind giving you general information like that, because it is on the Internet". He added later, at page 10, "I'm not saying you can't ask a question, I'm simply telling you that you’re

asking a question that is to denigrate what I believe, or how I believe it, or in any other regard to my beliefs that--you make one tiny move in that regard, I'm going to say, you're out of order".

(iii) Crown counsel stated that he did not want to examine the plaintiffs to show that their beliefs were not honestly held.

(iv) While both plaintiffs participated in discussion with Crown counsel, no objection was taken to that and there was no suggestion made to the plaintiffs that they were not entitled to participate in that fashion.

(v) The proceeding ended with Crown counsel advising he would "bring a Motion to have a Judge decide how to proceed".

[8] In support of the defendant’s motion, Crown counsel (who was not counsel at the purported discovery) submitted that the applicable legal principles were as follows.

[9] While a party has a *prima facie* right to be present when another party is being examined for discovery, exclusion orders can be made. The onus is on the party seeking exclusion to show why the order should be made, but the onus is not a heavy one and is lighter at the discovery stage than at trial.

[10] It is argued by the defendant in the present case that an exclusionary order should issue because of issues of credibility and disruptiveness.

[11] With respect to the issue of credibility, given Crown counsel's statement on discovery that he did not intend to show that the plaintiffs' beliefs were not honestly held, I am not satisfied that the credibility of either plaintiff is at issue. This is not a case where the plaintiffs have a version of events which is to be directly and factually contradicted by the defendant's witnesses. The credibility issue is more accurately characterized as the credibility or plausibility of the plaintiffs' claim that their religious beliefs must include the use of cannabis in their daily lives.

[12] As Anderson J. noted in *ICC International Computer Consulting & Leasing Ltd. v. ICC Internationale Computer and*

Consulting GmbH (1988), 66 O.R. (2d) 187 (H.C.J.) at page 191, on a motion of this nature it is necessary to show more than a possibility that evidence will be tailored in order to justify exclusion. See also *Changoo v. Changoo*, [1999] O.J. No. 865 at para 16, and *Pejkovic v. Die-Tech Inc.*, [1993] O.J. No. 1783. I agree.

[13] While in every case there is the possibility that a witness may tailor his or her testimony, no evidence has been put before the Court of circumstances which suggest that there is any greater likelihood in this case that one plaintiff will tailor his evidence in light of the other's evidence.

[14] As for the issue of disruption, the Crown fears that if present at one another's discovery the plaintiffs will intervene inappropriately in the conduct of the examination. I note that at the original attendance no witness was sworn to give evidence and no objection was made to both plaintiffs debating the ground rules to govern the discovery. Therefore, support for exclusion on the ground of disruption cannot, in my view, be found in that

proceeding. At the hearing of these motions, the plaintiffs presented their positions in an orderly and respectful fashion.

[15] I therefore conclude that no basis for exclusion has been established before me.

[16] All of this is not to say that I do not see that substantial difficulties may well arise during the plaintiffs' discovery. As for those potential difficulties, I particularly see that issues will arise as a result of the Crown's stated intent to examine on religious beliefs, and as a result of the plaintiffs' position that they are "counsel" to one another. I also acknowledge that it is possible that in the absence of a presiding officer there will be disruption.

[17] These factors, while not justifying exclusion, raise concern at the ability of the parties to ready this matter for trial on a timely basis. This is a concern relevant to the plaintiffs' motion before me. Specifically, further interlocutory motions flowing from the plaintiffs' discovery may well entail significant delay. I note that

the present motions flow from a purported discovery which took place some 7 1/2 months ago.

[18] Therefore, in the circumstances of the particular facts before me I am persuaded that the interests of the parties in the timely adjudication of this action and the Court's interest in conserving scarce judicial resources will both be best served by ordering that the examination for discovery of the plaintiffs take place before a Prothonotary of this Court in Toronto who will be able to rule immediately on issues which may arise. Crown counsel anticipates that one day should suffice for the discovery of both plaintiffs.

[19] Therefore such discoveries are to take place over a period of one day before the end of February, 2002, before a Prothonotary in Toronto.

[20] This is dispositive of the substance of both motions before me as it deals not only with the Crown's concerns at the conduct of the discovery of the plaintiffs but also with the plaintiffs' concern at further delay.

[21] In my view each party should bear their own costs for these motions. Therefore no costs are ordered in respect of these motions. Because the discovery is to be in Toronto and not in Hamilton where the first purported discovery was held and where the plaintiffs reside, and because no questions were put to the plaintiffs notwithstanding their first attendance, each plaintiff shall be served with conduct money in the amount of $25.00, together with any Order or Direction which compels their attendance at the discovery.

ORDER

[22] For the reasons set out above, it is ordered that:

1. The defendant's motion for an order excluding each of the plaintiffs from attending the examination for discovery of the other is dismissed.

2. The plaintiffs' motion for an order that a further pre-trial conference be scheduled or that the matter be set down for trial is dismissed.

3. The examination for discovery of the plaintiffs by the defendant shall take place before a Prothonotary of this Court in Toronto, before the end of February, 2002. One day shall be reserved for such discovery.

4. Each plaintiff shall be served with conduct money in the amount of $25.00 in respect of their attendance in Toronto to be examined for discovery.

5. No costs are awarded to any party in respect of these motions.

"Elean

or R. Dawson"

Judge