

CANADA / JUDGMENT

Tucker v. Canada

2004 FC 1600

COURT

Federal Court

DECIDED

15 November 2004

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Tucker v. Canada Court (s) Database Federal Court Decisions Date 2004-11-15 Neutral citation 2004 FC 1600 File numbers T-1805-98 Decision Content Date: 20041115 Docket: T-1805-98 Citation: 2004 FC 1600 Ottawa, Ontario this 15th day of November 2004 Present: The Honourable Madam Justice Heneghan BETWEEN: REVEREND BROTHER WALTER A. TUCKER and REVEREND BROTHER MICHAEL J. BALDASARO Plaintiffs and HER MAJESTY THE QUEEN Defendant REASONS FOR ORDER AND ORDER

INTRODUCTION

- [1] Reverend Brother Walter A. Tucker ("Plaintiff") is one of the Plaintiffs in this action. He seeks an adjournment of the trial which is scheduled to begin in Hamilton, Ontario on Monday, November 29, 2004.

SUBMISSIONS

- [2] The Plaintiff argues that he requires an adjournment on the grounds that he needs to wait for the decision of the Federal Court of Appeal respecting an outstanding matter in that Court for an extension of time to file a Notice of Appeal relative to the Order of Justice Gibson made on April 29, 2003, which dismissed the Plaintiff's claim against the constitutional validity of the prohibitions against trafficking in marijuana, as provided for in the Controlled Drugs and Substances Act, S.C. 1996, c. 19, as amended.
- [3] Her Majesty the Queen (the "Defendant") opposes this motion for an adjournment. She argues that the motion is premature since the Federal Court of Appeal has not yet ruled upon the request to extend the time for filing an appeal from the Order of Justice Gibson. Next, she submits that the affidavit evidence in support of this "adjournment" motion is not properly before the Court since there is no proof that the affidavit was commissioned before a person authorized to commission affidavits in Ontario. As well, the Defendant argues that she is prepared to proceed to trial and will be prejudiced if the trial is adjourned. There is no evidence of prejudice to the Plaintiffs if the trial proceeds as scheduled. DISCUSSION

- [4] Rule 36 of the Federal Court Rules, 1998, SOR/98-106, as amended (the "Rules") governs adjournments and provides as follows:
36. (1) A hearing may be adjourned by the Court from time to time on such terms as the Court considers just.
- (2) Where a hearing is adjourned to a fixed day, a party who appeared at the hearing is deemed to have had notice of the adjournment.
- (3) Where a party has failed to appear at a hearing, that party need not be served with notice of an adjournment of the hearing.
36. (1) La Cour peut ajourner une audience selon les modalités qu'elle juge équitables.
- (2) Lorsqu'une audience est ajournée pour reprendre à une date déterminée, toutes les parties qui ont comparu à l'audience sont réputées en avoir été avisées.
- (3) Nul n'est tenu de donner avis de l'ajournement d'une audience à une partie qui n'a pas comparu à celle-ci.
- [5] A couple of factors come into consideration when the Court is considering a request for an adjournment. One is the question of prejudice to one or more of the parties; see *Martin v. Minister of Employment and Immigration* (1999), 162 F.T.R. 127 (T.D.). A second factor is the question of prejudice to the Court of losing time that has been assigned for the hearing; see *Ismail v. Canada (Attorney General)* (1999), 177 F.T.R. 156 (Fed. T.D.). A third factor is the public interest in the timely conclusion of litigation and use of the facilities provided for trials; see *Markestyn v. Canada*, [2001] 1 F.C. 345.
- [6] As well, the matter of granting an adjournment for a fixed date hearing was addressed by former Associate Chief Justice Jerome in a practice direction dated February 17, 1993. According to that direction, a fixed date hearing will be adjourned only in exceptional circumstances.
- [7] I am not persuaded that the Plaintiff has demonstrated that there are such "exceptional circumstances" to adjourn the trial in the present case. It is not necessary for me to rule upon the propriety of his affidavit and the status of Brother Michael J. Baldasaro as a Commissioner for Oaths, or otherwise, in the Province of Ontario. The issue for trial has nothing to do with that status and the evidence at trial will be introduced through witnesses in the witness box, not by affidavits.
- [8] The motion outstanding before the Federal Court of Appeal is not crucial to the issue raised in this motion for an adjournment. In the event that the Federal Court of Appeal grants the extension of time sought by the Plaintiff to appeal from the Order of Justice Gibson dated August 29, 2003, the Plaintiff can pursue that appeal if he so wishes.

- [9] I note, as well, that the Plaintiff is at liberty to challenge the constitutionality of the Controlled Drugs and Substances Act, *supra*, in any criminal proceedings that he may be subject to under that Act. However, since he has chosen to bring a constitutional challenge to certain provisions of that Act by commencing an action in this Court, he must be prepared to carry through with that challenge at the time and place assigned by this Court, for the purpose of a trial.
- [10] This Court operates on a fixed trial date system. This action was commenced on September 16, 1998 when the statement of claim was issued and it is time that the matter proceed to trial on the issue remaining, following the Defendant's motion for summary judgment.
- [11] Having regard to the evidence before me and the submissions of both the Plaintiff and the Defendant, I am dismissing the Plaintiff's motion for an adjournment.
- [12] The trial will begin in Hamilton, Ontario on Monday, November 29, 2004 at 9:30 a.m. If the Plaintiff wishes to settle the action, he is free to discuss that with counsel for the Defendant.
- [13] The Defendant has requested her costs on this motion, payable forthwith, on the grounds that she has been required to respond to this motion at a time when she is engaged in preparing for the trial. In my opinion, this is a valid reason for seeking costs.
- [14] In the exercise of my discretion pursuant to the Rules, I award costs in the amount of \$1,000.00 to the Defendant, inclusive of GST and disbursements, payable in any event of the cause. However, these costs are not payable forthwith. ORDER The Plaintiff's motion to adjourn the trial scheduled to commence at Hamilton, Ontario on Monday, November 29, 2004, is dismissed with costs to the Defendant in the amount of \$1,000.00, inclusive of GST and disbursements, payable in any event of the cause. "E. Heneghan" J.F.C. FEDERAL COURT NAMES OF COUNSEL AND SOLICITORS OF RECORD DOCKET: T-1805-98 STYLE OF CAUSE: Reverend Brother Walter A. Tucker et al v. Her Majesty the Queen PLACE OF HEARING: Ottawa, Ontario DATE OF HEARING: November 12, 2004 REASONS FOR Order : The Honourable Madam Justice Heneghan DATED: November 15, 2004 APPEARANCES: Reverend Brother Walter Tucker Reverend Brother Michael Baldasaro FOR PLAINTIFF / APPLICANT Mr. James Gorham FOR DEFENDANT/ RESPONDENT SOLICITORS OF RECORD: Hamilton, Ontario FOR PLAINTIFF/APPLICANT Deputy Attorney General for Canada Ottawa, Ontario FOR DEFENDANT/ RESPONDENT

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