

**Date: 20070413**

**Docket: T-1456-05  
T-1457-05**

**Citation: 2007 FC 390**

**Vancouver, British Columbia, April 13, 2007**

**PRESENT: The Honourable Madam Justice Simpson**

**BETWEEN:**

**THE MINISTER OF NATIONAL REVENUE**

**Applicant**

**and**

**WILLIAM ROBERT KERBY  
JACQUELINE JEANNE KERBY**

**Respondents**

**REASONS FOR ORDER AND ORDER**

I. Background

[1] This case involved two motions for contempt orders which were scheduled for a one-day hearing. To that end counsel for both parties, the Respondents and their witness, and one Crown witness were present. However, counsel for the Respondents made a surprise preliminary objection to the admissibility of affidavits showing personal service of Justice Snider's Compliance Orders of October 31, 2005, on the Respondents in Florida.

[2] These reasons deal with my conclusion that the objection was well-founded.

[3] Rule 470(1) of the *Federal Courts Rules*, SOR/98-106 (the Rules), provides as follows:

470. (1) Unless the Court directs otherwise, evidence on a motion for a contempt order, other than an order under subsection 467(1), shall be oral.

470. (1) Sauf directives contraires de la Cour, les témoignages dans le cadre d'une requête pour une ordonnance d'outrage au tribunal, sauf celle visée au paragraphe 467(1), sont donnés oralement.

[4] Jack Lippman is a process server in Florida and his affidavits indicate that on November 15, 2005, he personally served each Respondent with a copy of the Compliance Order which bore their name. However, instead of calling Mr. Lippman as a witness to give oral testimony and be cross-examined, counsel for the Minister of National Revenue (the Minister) introduced two affidavits sworn by him on November 16, 2005.

[5] The left side of the jurat on each affidavit reads as follows:

SWORN before me at the City of Fort Lauderdale, in the State of Florida, USA, this 16<sup>th</sup> day of November, 2005.

This statement is followed by the signature of Susan Rosenberg and a stamp which shows her commission number as a notary public, the expiry date of her appointment and the fact that she is bonded. Mr. Lippman's signature appears on the right in each affidavit.

[6] Against this background, counsel for the Respondent made the following submissions:

- (i) That inconvenience does not excuse the Minister from calling the process server as a witness to give oral testimony in compliance with Rule 470. In this regard, counsel relied on Justice Dawson's decision in *Canada (Minister of National Revenue – M.N.R.) v. Wigemyr*, 2004 FC 930, at para. 13. There, she said:

Counsel for the Minister attempted to prove that Mr. Wigemyr had been personally served with Mr. Justice Rouleau's order by filing an affidavit of service sworn by a process server, Mr. Houghton. As noted above Rule 470(1) provides that evidence is to be oral at a contempt hearing, unless the Court otherwise directs. No reasons were given by counsel for the Minister as to why Rule 470 should not be followed other than convenience and the fact that the Court generally accepts proof of service by affidavit. I declined to direct that service of Mr. Justice Rouleau's order upon Mr. Wigemyr could be proven by affidavit evidence for the following reasons....

- (ii) That notaries public in Florida are not judicial officials under section 52(e) of the *Canada Evidence Act*, R.S. 1985, c. C-5 (the Act), and therefore affidavits they take are not valid under section 53 of the Act and not admissible under section 54. The submission is based on provisions of Chapter 117 of the 2006 *Florida Statutes*. It is entitled Notaries Public and provides that they are appointed by the Governor for four-year terms (s. 117.01(1)) and that they can be suspended by the Governor for specific misdeeds (s. 117.01(4)). Further, notaries public must be bonded to cover any harm caused to individuals as a result of breaches of their duties.
- (iii) That the affidavits are facially deficient because subsection 117.05(4)(f) of the *Florida Statutes* provides that when notarizing a signature, a notary public shall complete a jurat or notarial certificate which indicates what type of identification the notary public relied on to identify the

deponent. The identification can be based on personal knowledge or satisfactory evidence of identity. However, the jurats on the affidavits of service sworn by Jack Lippman contain no description of how Mr. Lippman was identified by Ms. Rosenberg.

## II. Discussion

[7] On the basis of the third submission, I concluded that the affidavits were facially deficient and ruled them inadmissible. It was therefore not necessary to deal with the first two submissions. I should note, however, that arranging for a process server who is out of the jurisdiction to testify by video conference might be explored as a method of complying with Rule 470.

## III. Conclusions

[8] I accepted the Minister's counsel's submission that the matter should be adjourned so that he could reconsider proof of service, and counsel then agreed that the adjournment should be *sine die*.

[9] The Respondents have apparently incurred the following disbursements for today's hearing:

- a) the cost of their return flights between Fort Lauderdale and Vancouver.
- b) the cost of their witness' return flight between Calgary and Vancouver.
- c) the cost of Mr. Kerby's mother's return flight between Saskatoon and Fort Lauderdale. This was necessary so she could look after the Respondents' three children during the hearing.

[10] If the Respondents serve and file an affidavit establishing with exhibited ticket coupons that these expenses were incurred for this hearing day, the Crown, after having an opportunity to make submissions, may be ordered to pay those costs within 30 days of such an order.

**ORDER**

**THIS COURT ORDERS that:**

- i) The hearing of this matter is adjourned *sine die*.
- ii) The question of reimbursement for disbursements for today's hearing is reserved on the basis described in paragraph 10 of the Reasons.
- iii) There is otherwise no order as to costs.
- iv) On consent, files T-1456-05 and T-1457-05 are consolidated for hearing together pursuant to Rule 105 of the *Federal Courts Rules*.

"Sandra J. Simpson"

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-1456-05 & T-1457-05

**STYLE OF CAUSE:** MNR v. WILLIAM ROBERT KIRBY  
and JACQUELINE JEANNE KERBY

**PLACE OF HEARING:** Vancouver, BC

**DATE OF HEARING:** April 3, 2007

**REASONS FOR ORDER AND ORDER:** SIMPSON J.

**DATED:** April 13, 2007

**APPEARANCES:**

Mr. David Everett FOR THE APPLICANT

Mr. Terry Gill FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

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