

CITATION: 2010 TCC 140

2007-2759(IT)G

BETWEEN:

HESTY LEIBTAG,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

**EDITED VERSION OF TRANSCRIPT  
OF REASONS FOR ORDER**

Let the attached edited transcript of the Reasons for Order delivered orally from the Bench at Toronto, Ontario, on February 24, 2010, be filed. I have edited the transcript (certified by the Court Reporter) for style, clarity and to make minor corrections only. I did not make any substantive change.

Signed at Edmonton, Alberta, this 8<sup>th</sup> day of March 2010.

"Patrick Boyle"

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Boyle J.

Citation: 2010 TCC 140  
Date: 20100308  
Docket: 2007-2759(IT)G

BETWEEN:

HESTY LEIBTAG,

Appellant,

and

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**EDITED VERSION OF TRANSCRIPT**  
**OF REASONS FOR ORDER**

[delivered orally from the Bench at Toronto, Ontario, on February 24, 2010]

**Boyle J.**

[1] This is the second motion heard this week brought by the respondent in respect of next week's scheduled three-day trial. The respondent's motion of two days ago was for an order for substituted service of a subpoena on the appellant's husband, Mr. Verk. Appellant's counsel intended to call Mr. Verk, however, the Crown wished to subpoena him to ensure his attendance. The Crown had difficulty serving him personally at his business address. I granted the respondent's motion for substituted service.

[2] Today's motion again concerns a proposed witness, Mr. Leinwand, who is named on the appellant's witness list. The respondent decided earlier this month that it should also subpoena Mr. Leinwand to ensure his attendance. The respondent wrote last week asking of appellant's counsel Mr. Leinwand's address and telephone number so the respondent could communicate with him and asked that this be provided by mid-afternoon two days ago, that is, the day we all spent here on the motion regarding Mr. Verk.

[3] Yesterday the respondent wrote to the Court and copied appellant's counsel asking that an urgent motion be scheduled asking the Court to compel the appellant's

counsel to provide the requested confirmation. There was no indication in that letter whether respondent's counsel had ever tried to follow up her original letter of request with a phone call or in person at any point on Tuesday when we were all here for the Verk motion.

[4] I now understand that she did not. No satisfactory explanation was given for this. However, I must infer that relations between opposing counsel at this stage are strained, but I cannot guess which, if either, side may be more the cause of that.

[5] Following receipt of yesterday's letter regarding a motion to compel disclosure, the appellant wrote to respondent's counsel and copied the Court providing the phone number they had for Mr. Leinwand, indicating they did not have an address for him, and pointing out that given his phone number they assumed he lived outside Canada. I now understand that Mr. Leinwand lives in Miami.

[6] The respondent filed a different motion with the Court this morning. The motion is for an order under rule 119 for leave to examine Mr. Leinwand before the hearing and for an order under rule 121 that such testimony be given outside Canada by the issuance by the Court of a commission. There may have been some confusion in the notice of motion whether the respondent had also or instead intended to ask for an order allowing Mr. Leinwand to testify at the trial by teleconference. However, only rule 121 concerning testimony before the hearing is referred to and not rule 143.

[7] In hearing the motion I questioned whether the rules 119 to 122 contemplated the Court ordering and compelling a witness outside the jurisdiction to testify and whether there was any jurisprudence where these rules had been so used.

[8] It is not clear from the wording of these rules that this is one of their purposes. I was not referred to any case law on point.

[9] In Mr. Justice Miller's decision in *Ramnarine v. The Queen*, 2001 DTC 991, the person to testify via teleconference was the moving party's own witness who could be fully expected to testify if the Court's leave for an alternate method of testifying was granted. In the *R. v. Dix* decision, [1998] A.J. No. 486, a criminal case decided by the Alberta Court of Queen's Bench involving murder, sexual transactions and the KGB, the judge described the proposed witness in the first paragraph of his reasons as willing to give evidence by video conference.

[10] In this case, the moving party cannot tell me that Mr. Leinwand is willing to testify if I grant an order for alternate arrangements to him appearing at the trial in

Toronto. She did not ask him that question in their telephone conversation of a day or two ago. She might have asked him in the follow-up call she had scheduled with him for noon today, but she cancelled that call to prepare for this motion.

[11] In light of my concerns about whether I had the power under rule 119 to compel someone to give the alternate testimony for which leave may be granted, and given that appellant's counsel confirmed on the record to me that she had always intended to call Mr. Leinwand since she first told respondent's counsel that some time ago, that she still intended to call him as a witness, and that she had no intention of rethinking her decision to call him as a witness, the respondent withdrew its motion.

[12] I need therefore only deal with costs. Appellant's counsel has asked for solicitor-client costs. I am not satisfied that the facts today even approach warranting an order for solicitor-client costs. Such an order is, absent settlement offer considerations that do not apply today, an extraordinary remedy for particularly unpleasant behaviour.

[13] I am fixing costs for today's motion at \$1,000. It appears to have been brought because the respondent left worrying about the service of subpoenas to ensure attendance of key witnesses of the appellant until somewhat late in the day. The contact information might well have been provided just as readily following a follow-up phone call or a personal reminder two days ago during the Verk hearing, as by the surprise threat of a further motion.

[14] Respondent had not asked the proposed witness if he would testify, although they spoke recently and this, to my mind, significantly impaired the motion's prospects for success on the issue of whether the Court even had jurisdiction to order such a motion.

[15] Appellant's counsel has again had to spend the better part of a day responding to a motion when both sides' time might better be spent getting on with preparing for the substance of next week's trial.

[16] We are adjourned. Thank you, Ms. Bruce. Thank you Ms. Somerville Taylor and Mr. Court Reporter.

Signed at Edmonton, Alberta, this 8<sup>th</sup> day of March 2010.

"Patrick Boyle"

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Boyle J.

CITATION: 2010 TCC 140

COURT FILE NO.: 2007-2759(IT)G

STYLE OF CAUSE: HESTY LEIBTAG v. HER MAJESTY THE QUEEN

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: February 24, 2010

REASONS FOR ORDER BY: The Honourable Justice Patrick Boyle

DATE OF ORDER: March 8, 2010

APPEARANCES:

    Counsel for the appellant: Leigh Somerville Taylor

    Counsel for the respondent: Suzanne M. Bruce

ALSO PRESENT:

    Court Registrar: D. W. Burtnick

    Court Reporter: Catherine Keenan

COUNSEL OF RECORD:

    For the appellant:

        Name: Leigh Somerville Taylor

        Firm: Richler & Tari  
            Toronto, Ontario

    For the Respondent: John H. Sims, Q.C.  
                          Deputy Attorney General of Canada  
                          Ottawa, Canada