

Date: 20080710

Docket: A-249-08

Citation: 2008 FCA 236

**CORAM: NOËL J.A.
SHARLOW J.A.
RYER J.A.**

BETWEEN:

SIMPSON STRONG-TIE COMPANY, INC.

**Appellant
(Applicant)**

and

PEAK INNOVATIONS INC.

**Respondent
(Respondent)**

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on July 10, 2008.

REASONS FOR ORDER BY:

NOËL J.A.

CONCURRED IN BY:

**SHARLOW J.A.
RYER J.A.**

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REASONS FOR ORDER

NOËL J.A.

[1] This is an application brought by the respondent for an order striking the appellant's Notice of Appeal dated May 29, 2008 on the ground that the order appealed from was interlocutory in nature, and that the Notice of Appeal was filed beyond the 10 day period set out in paragraph 27(2)(a) of the *Federal Courts Act*.

[2] The underlying proceeding in the Federal Court is an appeal (by way of application) from a decision by the Registrar of Trademarks involving an opposition brought by the appellant against a trademark application filed by the respondent. The application has not yet reached the hearing stage.

[3] The decision sought to be appealed is dated May 1, 2008. By this decision, Lemieux J. dismissed an application to set aside the order of Prothonotary Aalto whereby the appellant's motion seeking leave to amend the Statement of Opposition was originally denied. The amendment in question adds a specific plea of section 30(h) of the *Trade-marks Act* as a ground of opposition. After conducting a *de novo* review of the matter, Lemieux J. confirmed the earlier decision.

[4] In resisting the application to strike, the appellant relies on the statement made by the Applications Judge in the course of his judgment to the effect that the "new ground" sought to be added by the proposed amendment "was vital to the final resolution" of the matter. As such, the appellant maintains that the judgment "determines a final right" and is therefore a "final judgment" within the meaning of section 27(4) of the *Federal Courts Act*.

[5] With respect, Lemieux J.'s view that his decision denying leave was vital to the final resolution of the matter was relevant to his determination of the standard to be applied in reviewing

the Prothonotary's decision and nothing else. In particular, this statement has no bearing on whether Lemieux J's own decision was interlocutory or final in nature.

[6] The appropriate test in this regard is set out by the decision of this Court in *Reebok Canada v. Canada (Deputy Minister of National Revenue, Customs and Excise – M.N.R.)*, [1995] F.C.J. No. 220 (Q.L.) at paragraph 9:

... an "interlocutory judgment or order" is one that does not determine in whole or in part any substantive right of any of the parties ...

[7] Applying this test, the decision of Lemieux J. refusing to amend the Statement of Opposition, like the earlier decision of the Prothonotary to the same effect, is interlocutory in nature, since it does not determine the substantive rights of any of the parties. It follows that the appellant had to bring their appeal within 10 days from Lemieux J's pronouncement.

[8] At the conclusion of its written submission, the appellant seeks in the alternative an extension of time to file the Notice of Appeal. However, aside from making this request, the appellant has made no attempt to demonstrate that the applicable criteria for extending the time limit are present on the facts of this case (*Pharmascience Inc. v. Canada (Minister of Health)*, 2003 FCA 333, at para. 6). There is therefore no basis for granting an extension.

[9] The application to strike the Notice of Appeal on the ground that it was filed out of time will accordingly be allowed and the Notice of Appeal will be struck with costs in favour of the respondent.

“Marc Noël”

J.A.

“I agree,
K. Sharlow J.A.”

“I agree,
C. Michael Ryer J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-249-08

STYLE OF CAUSE: Simpson Strong-Tie Company, Inc.
and Peak Innovations Inc.

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY: NOËL J.A.

CONCURRED IN BY: SHARLOW J.A.
RYER J.A.

DATED: July 10, 2008

WRITTEN REPRESENTATIONS BY:

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Lawrence Chan

FOR THE RESPONDENT

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