

IN THE SUPREME COURT OF NORTHWEST TERRITORIES

BETWEEN:

INKIT LTD.

Plaintiff

- and -

POLAR PARKAS LTD.

Defendant




---

Claim by Inkit Ltd. for judgment of \$12,959 and interest and prejudgment interest based on an alleged failure by Polar Parkas Ltd. to fully pay for all the Arctic Winter Games promotional material it ordered from Inkit. Counter-claim by Polar Parkas Ltd. for loss of profit and loss of Goodwill.

Heard at Yellowknife on March 27 - 28, 1995

Judgment filed: October 2, 1995 (October 11, 1995) GAD.

REASONS FOR JUDGMENT OF THE HONOURABLE MADAM JUSTICE J.B. VEIT

Counsel for the Applicant: Ms. S.M. MacPherson

Counsel for the Respondent: R.C. Rehn, Esq

## Summary

The Arctic Winter Games (AWG) of 1990 are gone but not forgotten. Inkit was the official supplier of memorabilia for the Games. It published a brochure advertising the products it had for sale. Polar Parkas ordered approximately \$18,700 of these goods on January 8, 1990; there was no discussion between Inkit and Polar Parkas about delivery of the merchandise. The Games took place between March 11 and March 17, 1990. March 11, the opening day, was a Sunday. Polar Parkas was not open for business on that day. On March 12, Inkit delivered a large order to Polar Parkas.

In this trial, Inkit sues Polar Parkas for the remaining balance of the cost of the goods delivered to Polar Parkas. Polar Parkas sues Inkit for its loss of profit due to Inkit's failure to supply merchantable goods and for its failure to supply them in a timely manner.

Inkit's claim is allowed in part. Inkit has proved that Polar owes it a total of \$6,208.15 out of a total claim of \$13,012.

Polar Parka's claim is dismissed. It has not proved that Inkit's conduct resulted in a loss of profit; on the contrary, the evidence establishes that Polar over-

ordered AWG goods. Nor has Polar Parkas proved a loss of goodwill resulting from the sale to retail customers of defective merchandise.

**CASES AND AUTHORITY CITED**

**BY THE PLAINTIFF: Sale of Goods Act, R.S.N.W.T. 1988, c.S-2; Robin Line**

**Steamship Company and Canadian Stevedoring Company, [1928] S.C.R. 423;**

**Miller v Neely (1921) 19 O.W.N. 413 (H.C.); Apeco of Canada Ltd. v Windmill Place**

**(1978) 82 D.L.R. (3d) 1**

---

**INDEX**

Summary

Cases and Authority Cited

1. Background
  2. What quantity of goods was delivered?
  3. Merchantable quality: Were the delivered goods of merchantable quality?
  4. Reasonable delivery: Was the big order delivered in time?
  5. Consignment: Has Polar Parkas proved that it amended the agreement?
  6. Summary of the amount outstanding
  7. Mitigation: Should Polar Parkas have accepted Inkit's offer? Should Inkit have re-designed the goods returned by Polar?
  8. Interest: Should interest be added to this award, and if so, at what rate?
  9. Loss of Profit
  10. Loss of Goodwill
  11. Costs:
    - a) Entitlement to costs
    - b) Is interest included in the award for costs purposes?
    - c) What is the correct multiplier here?
    - d) Additional submissions on costs
-

1. **Background**

Inkit is a diversified company, doing both screen printing and communications work. It has no retail side to its operation. It was chosen as the official supplier of memorabilia for the 1990 Arctic Winter Games held in Yellowknife on March 11-17. Inkit prepared and distributed a flyer to advertise the Games merchandise it had available. Polar read that flyer. The flyer contained the following description of delivery terms:

**DELIVERY**

Items - 1 (T-Shirts), 2 (Fleece), 3 (Golf Shirts), 7 (Ball Caps), 8 (Toques), 9 (Decals), 10 (Lapel Pins) and 11 (Buttons)  
- 7-10 days from receipt of order. You may place your order now for delivery at a later date.

Items - 4 (Windbreakers), 5 (Windpants), 6 (Satin Jackets), 12 (Beer Steins) and 13 (Coffee Mugs) -

Please place order by December 15, 1989 for delivery during first week of February, 1990.

(Limited quantities will be available for orders received after December 15th.)

The brochure did not mention interest.

At the relevant time, the President of Inkit was one G. Pilon. Her brother, John Benson, was a screen printer employed by the company; he was the person primarily responsible for Polar's orders. He also made deliveries on behalf of Inkit. Mr. Benson was eventually fired by Inkit in 1990 for alcoholism and poor work performance. Ms. Hushagan, the current secretary-treasurer of Inkit and Inkit's main

On March 5, 1990, Polar Parkas placed a further order for 25 golf shirts and requested that these goods be delivered as soon as possible.

On March 12, 1990, after the Games had begun, a substantial quantity of the goods ordered were delivered to Polar Parkas by an employee of Inkit. The goods delivered on that date included 25 golf shirts, 200 windbreakers, 31 windpants, 40 satin jackets, 12 ball caps and 4 toques. There is a dispute between the parties about whether the goods delivered on March 12, 1990 were unconditionally accepted by Polar or whether Polar indicated that it would only accept the goods if they were to be sold on consignment. If there was any restriction on the acceptance of the goods, such restrictive acceptance was only effected orally.

On March 13, 1990, Inkit delivered 20 windpants to Polar.

Polar did not sell all of the goods ordered. In particular, it did not sell all of the goods that it ordered far in advance of the Games.

In mid-June of 1990, Polar returned to Inkit goods having a value of approximately \$7,000. These goods include all of the goods that Polar believed were defective or had been delivered late. Inkit would not accept these goods.

In June 1990, Polar paid Inkit \$5,688.65.

witness at trial, was not employed by Inkit at the material time. Inkit has no retail business.

At the time with which we are concerned, the President of Polar Parkas was Viv DeMelt. Her daughter, Linda Wood, who took over the presidency in November, 1990, was working in the business, with her mother, at the material time. Polar Parkas is a retail business in Yellowknife.

During the fall of 1989, Polar Parkas bought and paid for a variety of Games souvenir items from Inkit; these are not in dispute. Invoices sent for those goods contained a standard term that outstanding accounts would bear interest at the rate of 24% per annum.

On January 9, 1990, Polar Parkas placed an order for approximately \$18,700 of Games merchandise. This order included, among other items, 40 satin jackets, 200 windbreakers, 100 windpants, 12 beer steins, and 12 coffee mugs. There was no discussion about the delivery of these items.

Part of the January 9, 1990 order was delivered on January 26, January 31 and February 12, 1990.

Inkit admits that the windpants delivered to Polar were defective.

However, Inkit says that it only invoiced Polar a total of \$203.00 for seven pairs of windpants.

Inkit has twice offered to mitigate Polar's loss by re-designing goods alleged to have been delivered late. Polar has never accepted that offer.

**2. What quantity of goods was delivered?**

One of the disputes between the parties is about the difference between the quantity of goods delivered and the quantity which have been invoiced. Inkit claims that it billed Polar only for 7 windpants, even though it delivered many more windpants to Polar.

Before dealing with the specific issue, I will begin with a general comment about the way in which I have assessed the evidence of the various witnesses. In weighing the trial evidence, I have preferred the evidence given by Polar and its witnesses to the evidence given by Inkit and its employees because the witnesses for Polar were actually involved in the incidents with which we are concerned. Unfortunately for Inkit, its employees who were most immediately involved in Inkit's work during the Arctic Winter Games, Mr. Benson and Ms. Pilon, are no longer working for the company and did not give evidence. I have no doubt that Ms. Hushagan did her best to follow the paper trail and to provide us with a tally available

from that trail; however, given the stress on Inkit's resources during the period in question, I am not satisfied that Inkit's paper records adequately reflect all of its transactions with Polar.

In support of this assessment of the evidence I point to two small incidents: a packing slip prepared by Inkit indicated that it shipped goods to Polar on March 11, 1990; however, this is now acknowledged by the parties to be an error since March 11, 1990 was a Sunday and Polar was not open on Sundays. Second, the March 29, 1990 invoice from Inkit to Polar was for \$18,700.15; it included items already invoiced on January 31, 1990, and was approximately \$5,000 over the total that Inkit itself now claims. Although these are small examples, they demonstrate the problems that Inkit has in proving that the work performed by John Benson was done as and when indicated.

In the specific matter of the windpants, I am satisfied that Inkit only invoiced Polar for 7 windpants, even though it delivered many more windpants to Polar. I accept Inkit's explanation that it realized early on that there were problems with the windpants and that it allowed Polar to return them. This explanation, however, does not explain why Polar was charged with any amount for windpants. It is clear from the evidence that the March 29, 1990 invoice must be corrected by deducting from it the amount of \$203.00 representing 7 windpants.

**3. Were the delivered goods of merchantable quality?**

I accept the evidence from Polar that some of the clothing goods were not of merchantable quality. Inkit has acknowledged that the windpants were not of merchantable quality. However, Polar states that similar problems occurred with the sweatpants and were anticipated with the wind jackets. I am prepared to accept Polar's evidence as it relates to windjackets because it appears reasonable, in the absence of evidence to the contrary, that the same inadequate process that attached lettering to windpants would also have been used to attach lettering to windjackets. In the circumstances, it was therefore reasonable for Polar to return the windjackets as well as the windpants even if Polar was only anticipating problems with the nylon jackets rather than observing problems with them.

Because the material in the sweatpants is not the same as the material in the windpants, I do not draw the same conclusion in relation to the sweatpants as I do in relation to the windjackets. Moreover, although Polar complains about the quality of the creasing on the sweatshirts - it is difficult, at trial, to remember with clarity events that happened so many years before. In assessing all of the evidence, I think that it is reasonable to conclude that there was no more than an incidental problem with the creasing on the sweatpants and sweatshirts.

I am, however, satisfied that Polar returned to Inkit all of the goods that were not of merchantable quality. Some of those goods had been accepted on a



consignment basis. But, consignment basis or not, when Polar found goods that were defective, they returned them to Inkit. In other words, the total value of the goods returned by Polar to Inkit included all of the defective goods. There is only one minor exception to that statement, and that is the fact that, in addition to the roughly \$7,000 worth of goods returned, Polar also returned 8 windpants in a separate delivery. A further deduction of \$216 should be given to Polar in relation to those windpants.

**4. Was the big order delivered in time?**

Inkit says that Polar knew or should have known, from reading the flyer, that there could be substantial delays in the delivery of goods ordered on January 1990. I cannot accept this argument for two reasons. First, with respect to some of the items in the flyer, no delay of any kind should have been anticipated: the flyer warns only of a possible 7 to 10 day delay. When goods were ordered in early January, 1990, Polar could have expected delivery of those items by the end of January, 1990. Second, as to some of the items ordered, the windbreakers, windpants, satin jackets, beer steins and coffee mugs, the flyer states that limited quantities of the goods will be available for delivery after December 15th. Since it is agreed between the parties that nothing was said about delivery when the order was placed, Polar was entitled to conclude that Inkit could deliver most of the order within a week or so, and that it had sufficient quantities of the other materials ordered to

either supply those within a week or two, or at least within a reasonable time in relation to the holding of the Games.

In the absence of a specific term relating to delivery, the court presumes that delivery will be made within a reasonable time.

To deliver goods intended for the Winter Games when those games are being held in Yellowknife and are scheduled to last for a 6 day period **after** the Games have started is unreasonable. In a larger centre, or if the Games were to take place during a longer period of time, it may not have been crucial to get the goods before the Games started. In the particular circumstances of this case, it was crucial to have the goods before the Games started so that Polar could make a decent effort at marketing those items before the Games started.

On the evidence presented here, the goods delivered on March 12, 1990, were not delivered in time.

In this context, however, I am satisfied that Polar returned to Inkit all of the goods that were not delivered on time as well as all of the goods that were defective.

**5. Consignment: Has Polar proved that it amended the agreement?**

Polar has established that it amended the agreement.

Inkit says that it was not reasonable for Polar to have expected to have amended the contract with a mere delivery person rather than with a true representative of Inkit.

Polar says that occurred in Yellowknife and not New York and that the delivery man was not a mere employee of Inkit, but was a designer and the brother of the president. Polar might not have known whether John Benson was a director or officer of Inkit, but Polar did know that Benson had a responsible position at Inkit.

I agree with Polar. If a delivery service delivers goods, it is unreasonable to consider the delivery service to be an agent of the vendor with authority to amend the sale agreement. However, on the facts of this case, the person who delivered the goods could reasonably be assumed by Polar to have been enough of an agent to have relayed the message to Inkit about the changed terms of delivery. On the facts of this case, it was enough that Ms. Benoit, an employee of Polar, knew that she was dealing with John Benson, a senior employee of Inkit. It does not matter that neither the current president of Polar, nor the current president of Polar, knew with whom Ms. Benoit was dealing. Ms. Benoit had the authority to deal on their behalf, in much the same way that Benson had the ostensible authority to deal on behalf of Inkit.

In summary on this item, I am satisfied from the evidence that Polar amended its contract with Inkit through a person who had ostensible authority on behalf of Inkit to make that arrangement.

I also conclude that Polar returned the consigned goods in a timely way. The evidence from both parties establishes that negotiations were going on between Inkit and Polar with respect to the re-design of the goods. It was reasonable for Polar to hold onto the consignment goods until the issue of the potential re-design of those goods was resolved.

The goods returned by Inkit included some goods that had been accepted on a consignment basis. Some goods that Polar had accepted on consignment were sold; Polar must pay for those goods.

**6. Summary of the amount outstanding**

In determining how much Polar still owes Inkit, I have started from the March 29, 1990 invoice set out at tab 15 of the exhibit book. First, it is conceded by Inkit that the invoice in question must be corrected to remove the goods previously invoiced and paid for. Those goods total \$5,006.85. This leaves a total potential claim by Inkit of \$13,693.30.



For the reasons set out above, I also deduct from the potential total claim the amount of \$203.00 billed for 7 windpants.

From the adjusted amount of \$13,490.30, for the reasons set out above, I deduct the value of the returned goods or \$7,006.15. This leaves a total potential claim of \$6,424.15.

From that amount, I deduct a further amount of \$216 for the windpants returned by Polar separately from the other defective goods. This leaves a total of \$6,208.15

I conclude that Polar owes Inkit \$6,208.15. I am satisfied that, because of its hands-on management at the relevant times, Polar returned to Inkit all defective goods and all goods, accepted on consignment, that Polar had not been able to sell. Polar sold goods during the Games. It must pay Inkit for those goods. It is easy to come up with an amount of \$4,265.80 as being a minimum amount that Polar owes: this is the total of the Inkit claim for golf shirts, long-sleeved t-shirts, satin jackets and ball caps and toques. The difference of \$2,000, approximately, between that total and the remaining adjusted claim of \$6,424.15 can readily be explained, but not readily quantified, as representing the sale of some adult and youth sweatpants and some kangaroo jackets.

7. **Mitigation: Should Polar Parkas have accepted Inkit's offer? Should Inkit have re-designed the goods returned by Polar?**

The whole issue of the re-designing of the goods goes both ways. If Inkit claims that Polar should have accepted its offer to re-design the goods so that Polar could have sold them into a more general market, then Polar surely has a similarly valid claim that Inkit could have re-designed the goods and re-sold them to other retailers. Neither party pursued the re-design potential; I can only conclude that neither party considered that re-design was a valid alternative in the circumstances. Therefore, I dismiss the potential for re-design in my consideration of the issues here.

8. **Interest: Should interest be added to this award, and if so, at what rate?**

Inkit cannot claim interest at the rate of 24%; that rate was not contained in the flyer.

Inkit is, however, entitled to pre-judgment interest at the rate set out in the legislation. As to when that interest should begin to run, I establish the commencement date as July 1, 1990. The evidence establishes that Inkit was negotiating with Polar over the amount that Polar owed to Inkit. For a time, these discussions were in the hands of a Mr. Rusnak, who arrived at Inkit after the school year. It is not reasonable to require Polar to pay interest for the period during which these negotiations were going on since the amount of the obligation was in some doubt. The evidence is not, of course, precise about the closing dates of the

negotiations. In assessing all of the evidence, I conclude that Polar should start to pay interest as of July 1, 1990.

**9. Loss of Profit**

Polar claims that it has lost profit because Inkit failed to provide Polar with merchantable AWG goods in a timely way.

Polar has not proved this claim. Indeed, the evidence establishes that Polar over-ordered for the Games, that it erred in assessing the potential market for the goods produced by Inkit. Polar cannot now try to hold Inkit responsible for Polar's management error.

**10. Loss of Goodwill**

Polar claims that it has lost goodwill with some of its customers because of the defective goods.

However, Polar has not proved this claim. Indeed, the evidence is that Polar's customers have been satisfied with the compensation provided by Polar in relation to defective goods.

**11. Costs:**

**a) Entitlement to costs**

Subject to any special issues that arise out of consideration of factors alluded to in paragraph (d) below, general comments can be made about the entitlement to costs. First, although the court has discretion in the matter of costs, that discretion must be exercised judicially. It would only be in exceptional circumstances that the court would deprive a successful plaintiff of costs. Second, I accept the contention of Polar Parkas that any allegation by Inkit that Polar failed to defend expeditiously should not be taken into account. Polar's contention that "It is the Plaintiff's burden to move litigation along, and the Defendant should not be held responsible for costs on this basis except in very clear cases" is correct.

**b) Is interest included in the award for costs purposes?**

Interest is included in a total award for the purposes of determining what column of costs is appropriate. The loss of the use of the money owed for the goods delivered is part of the damage that the supplier of goods must bear when the purchaser of goods does not pay for them. The right to interest, which may become a significant part of any recovery, is a material component of the dispute between the parties. The awarding of costs is designed to promote the reasonable settlement of law suits; interest is a factor to take into account in that policy objective.

In summary, the award for the price of goods delivered and the award of <sup>INTEREST</sup> ~~costs~~ are added together to determine the appropriate column for costs.

**c) What is the correct multiplier here?**

Both Inkit and Polar Parkas say that the current costs tariff is antiquated. I accept their submissions that it is a usual practice to multiply the tariff in order to approximate current conditions.

Inkit says the total award, that is the award for the sale of goods and the award for interest, is the basis choosing the correct column on which costs should be awarded. Polar Parkas says that the interest should not be considered.

Taking into account both the age of the current tariff on the one hand (which argues in favour of a considerable increase in the tariff) and current Canadian costs policy on the other (in which there appears to be a widening gap between party and party costs and an indemnity of costs on the other - which argues in favour of a limited increase in the tariff), I have concluded that, once the correct column is decided, the costs on that column should be tripled.

**d) Further submissions on costs**

During argument there was incidental reference made to efforts by the parties to settle this dispute without a trial. It would, of course, have been totally

inappropriate to unveil any settlement negotiations before the court issued a judgment in this matter. Now that the judgment has issued, if there are further submissions relating to costs, I may be spoken to within 30 days of the release of these reasons.

  
J.S.C.

Yellowknife, Northwest Territories

Action No: CV 25 25

---

IN THE SUPREME COURT OF  
NORTHWEST TERRITORIES

---

BETWEEN:

INKIT LTD.

Plaintiff

- and -

POLAR PARKAS LTD.

Defendant

---

REASONS FOR DECISION  
of the  
HONOURABLE MADAM JUSTICE J.B. VEIT

---

