

Date: 20080115

Docket: T-2245-07

Citation: 2008 FC 52

Vancouver, British Columbia, January 15, 2008

**PRESENT: Roger R. Lafrenière, Esquire
Prothonotary**

BETWEEN:

SIMPSON STRONG-TIE COMPANY, INC.

Applicant

and

PEAK INNOVATIONS INC.

Respondent

REASONS FOR ORDER AND ORDER

[1] The Respondent seeks an order to strike the Notice of Application on the grounds that the pleading is not in the form required by the *Federal Courts Rules (Rules)*, and more particularly Rule 301(f).

[2] By way of brief background, the Applicant commenced an appeal pursuant to section 56 of the *Trade-marks Act* by filing a Notice of Application on December 27, 2007. The Applicant is

seeking various relief, including an order setting aside the decision of the Registrar of Trade-marks dated October 23, 2007 rejecting the Opposition of the Applicant to application No. 1,185,743.

[3] At paragraph 11 of the Notice of Application, the Applicant indicates that the application will be supported by the following documents:

- (a) a certified copy of the file history of the Trade-mark Application 1,185,743 including the materials relevant to the underlying Opposition proceedings;
- (b) the affidavits of the Applicant to be filed;
- (c) such other affidavit and other material as counsel shall advise and this Honourable Court shall permit

[4] The Respondent submits that there is a radical defect in the pleading in that it does not contain “a list of the documentary evidence to be used at the hearing of the application”, as required by Rule 301(f). The Respondent maintains that the list provided must be complete and comprehensive or should, at the very least, identify the affidavits that will be used at the hearing. In support of its position, the Respondent relies on the instructions for completing Form 301, which require an applicant to “list the supporting affidavits, including documentary exhibits, and the portions of transcripts to be used.”

[5] In theory, Rule 301(f) could be viewed as requiring an applicant to list each and every document that will be relied upon at the hearing of the appeal, including the names of the deponents who will be providing affidavit evidence. However, in practice, such specificity is neither mandated, nor required, by the *Rules*.

[6] Part 5 of the *Rules*, which governs proceedings brought by way of application, sets out the order as well as the deadlines for taking procedural steps. Rule 306 provides that an applicant has 30 days from the date of issuance of the notice of application to serve and file its supporting affidavits and documentary material. If the Respondent's interpretation of Rule 301(f) were to be adopted, an applicant would be required to identify all of its deponents and documents before even instituting the proceeding. Presumably, an applicant would also be precluded from adducing additional evidence beyond the evidence listed, without leave of the Court. Such a result would be at odds with the general scheme of Part 5, which affords an applicant 30 days to marshal its evidence and to finalize its affidavit evidence.

[7] The Applicant has failed to establish that there is any deficiency in the Notice of Application that would justify striking the pleading. In light of the general description of the documents listed in the Notice of Application, I am satisfied that the Applicant has substantially complied with Rule 301(f).

[8] Finally, I adopt the conclusion reached by Mr. Justice Roger Hughes in *Aventis Pharma Inc. v. Minister of Health et al.*, 2005 FC 1396, that a Notice of Application "is not to be viewed with the same rigour" as a Statement of Claim. It serves no useful purpose to move strike a pleading when no serious prejudice is established, and the irregularity could be challenged by less drastic means, such as a motion under Rule 58.

ORDER

THIS COURT ORDERS that

1. The motion is dismissed.
2. Costs of the motions in Court File Nos. T-2245-07, T-2246-07, T-2247-07, T-2248-07, T-2249-07 and T-2250-07, hereby fixed in the global amount of \$750.00, shall be paid by the Respondent to the Applicant in any event of the cause.

“Roger R. Lafrenière”

Prothonotary

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-2245-07

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

PLACE OF HEARING: Vancouver, British Columbia

DATE OF HEARING: January 14, 2008

REASONS FOR ORDER: LAFRENIÈRE P.

DATED: January 15, 2008

APPEARANCES:

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