

CANADA / JUDGMENT

Peak Innovations Inc. v. Produits Pylex inc.

2006 FC 1555

COURT

Federal Court

DECIDED

27 December 2006

Source: decisions.fct-cf.gc.ca · Research copy typeset by Esheria. Not court-issued or certified.

Peak Innovations Inc. v. Produits Pylex inc. Court (s) Database Federal Court Decisions Date 2006-12-27 Neutral citation 2006 FC 1555 File numbers T-1521-04 Decision Content Date: 20061227 Docket: T-1521-04 Citation: 2006 FC 1555 BETWEEN: PEAK INNOVATIONS INC. Plaintiff and PRODUITS PYLEX INC. and PIERRE CHARETTE Defendants ASSESSMENT OF COSTS – REASONS Charles E. Stinson Assessment Officer

- [1] The Plaintiff's action alleging industrial design infringement and passing off relative to an adjustable post support is ongoing and in the discovery stage. I issued a timetable for written disposition of the assessment of the Plaintiff's bill of costs, presented under those portions of Rules 402 and 411 addressing abandoned motions and the associated entitlement to assessed costs forthwith.
402. Costs of discontinuance or abandonment – Unless otherwise ordered by the Court or agreed by the parties, a party against whom an action, application or appeal has been discontinued or against whom a motion has been abandoned is entitled to costs forthwith, which may be assessed and the payment of which may be enforced as if judgment for the amount of the costs had been given in favour of that party.
411. Costs of abandoned motion – The costs of a motion that is abandoned or deemed to be abandoned may be assessed on the filing of
- (a) the notice of motion, together with an affidavit stating the notice was not filed within the prescribed time or that the moving party did not appear at the hearing of the motion; or
 - (b) where a notice of abandonment was served, the notice of abandonment. I. The Plaintiff's Position
- [2] The Plaintiff argued that this sequence of events established its entitlement to costs forthwith:

- (a) After the Plaintiff failed to secure consent to the filing of an amended Statement of Claim, the Plaintiff served and filed a motion record for leave to amend. Coincidentally, the Defendants served and filed a motion record (the Defendants' cross-examination motion) seeking cross-examination on the Plaintiff's affidavit of documents and other relief.
- (b) Within a few days, the Defendants consented to an amended pleading on the condition that they could file an amended Statement of Defence. These pleadings were filed. When the Defendants, in response to the Plaintiff's query, confirmed that the Defendants' cross-examination motion would still proceed, the Plaintiff necessarily served and filed its responding motion record.
- (c) After some time, the Defendants filed a Notice of Abandonment of the Defendants' cross-examination motion. By letter dated January 13, 2006, the Plaintiff's solicitor requested payment of the costs associated with responding to the Defendants' cross-examination motion and noted that "the Defendants initially insisted on proceeding with the motion even in light of subsequent amendments to the pleadings and an invitation by the Plaintiff to withdraw the motion." By responding letter dated January 13, 2006, the Defendants' solicitor refused payment: ... In a letter dated August 29, 2005, you stated your position that in view of the delivery by the Defendants of an Amended Statement of Defence and Counterclaim and the fact that the deadline for the exchange of affidavits of documents had not yet been reached, a response from the Plaintiff was not required. On October 12, 2005, the Plaintiff served the Defendant a motion record for a motion returnable October 17, 2005 and later adjourned to October 31, 2005, for particulars to the Further Amended Statement of Defence and Counterclaim. During the further conversations that ensure [sic], and in particular during our telephone conversation of October 26, 2005, we agreed to withdraw the Defendants' motion for production of documents. You also agreed to adjourn your motion for particulars set for October 31, 2005 sine die, as confirmed by Mr. Chan's letter dated October 28, 2005, and to withdraw your motion as per Mr. Chan's letter dated October 31, 2005. On November 1, 2005, we filed a notice of abandonment for the Defendants' motion withdrawing the Defendants' motion for production of documents. First, it is our position that the motions were withdrawn upon consent by both parties, and accordingly, an award of cost [sic] to the Plaintiff for its motion under the circumstances is inappropriate. Second, we note that the amount proposed by the Bill of Costs appears rather excessive. In our estimate, and in light of the response prepared by the Plaintiff, an amount of \$450 would be a more realistic figure. Third, the documents requested by the Defendants have not been produced, and the issue of lack of document production by the Plaintiff still remains a live issue in this matter....
- [3] During the above time period, and subsequent to an order providing for filing of a Further Amended Statement of Defence and Counterclaim further to the Plaintiff's motion for relief associated with the Amended Statement of Defence and Counterclaim, the Plaintiff filed a motion (the Plaintiff's Further motion) (noted above as served on October 12, 2005) for an order striking certain paragraphs of the Further Amended Statement of Defence and

Counterclaim and for certain other relief associated with said pleading. The Defendants' solicitor then proposed certain amendments to address the Plaintiff's concerns and that the Plaintiff's Further motion therefore be withdrawn. The Plaintiff asserted that said motion was adjourned. The Defendants had not filed any responding motion materials.

- [4] The Plaintiff argued that Rule 402 does not contemplate, for unrelated motions, the intermingling of entitlements to costs, such as between the Defendants' cross-examination motion (abandoned) and the Plaintiff's Further motion (adjourned), the latter having been filed and having had an effect, i.e. further amendment of the Defendants' pleading, some three and one-half months after service of the former and not somehow precluding the Plaintiff's Rule 402 entitlement to costs relative to the Defendants' cross-examination motion. The claimed costs, i.e. mid-range Column III counsel fees and disbursements, are reasonable given that a motion addressed via written representations requires more preparation of materials because oral argument will not be available to supplement them.
- II. The Defendants' Position
- [5] The Defendants argued that this evidence, adding several other occurrences to the Plaintiff's recitation of events, precludes any entitlement by the Plaintiff to costs both as a function of Rules 402 and 411 and of the conduct of both sides in addressing amendments to the pleadings and associated applications for relief arising therefrom:
- (a) Subsequent to the filing of the Amended Statement of Defence and Counterclaim, the Plaintiff, in response to the Defendants' request for disclosure of various categories of documents, asserted by letter that, given amended pleadings and outstanding exchanges of further affidavits of documents on the amended pleadings, the Defendants' request was premature because the disposition of the issue of the sufficiency of document disclosure by the Plaintiff was pending, i.e. the Defendants' cross-examination motion.
- (b) Several letters and telephone conversations ensued addressing both the Defendants' cross-examination motion and the Plaintiff's Further motion. These included an offer to adjourn the Plaintiff's Further motion sine die if not withdrawn the day before its returnable date. The day before, it was adjourned by letter from the Plaintiff's counsel indicating that the "parties have agreed to adjourn the motion sine die." A few days later by letter, the Plaintiff consented to the filing of a further amended pleading by the Defendants and requested service thereof so that the Plaintiff's Further motion could be withdrawn. The Defendants subsequently effected service and filing on consent of their amended pleading and the Notice of Abandonment of the Defendants' cross-examination motion.
- [6] The Defendants argued that, given the Plaintiff's initial position on sufficiency of document disclosure, ensuing discussions between counsel and successive amendments by consent of the subject pleadings, the parties effectively agreed to withdraw their respective motions. The Defendants' Notice of Abandonment effected this agreement, which fits the exception in Rule 402, i.e. abandonment without costs payable. It is disingenuous for the Plaintiff to claim assessed costs on the Defendants' cross-examination motion which was discontinued as

opposed to having been adjourned sine die, as was the contemporaneous Plaintiff's Further motion. The Defendants argued alternatively that the low end of Column III counsel fees is appropriate in the circumstances. The Defendants conceded the \$175.00 claimed for photocopies, but argued that the \$32.03 and \$16.00 claimed respectively for binding and couriers appear excessive and are not substantiated by invoices, as is the usual practice. III. Assessment

- [7] The exceptions to the operation of Rule 402, i.e. order or agreement, are framed in the active tense. However, I think that I may, in the spirit of Rule 3 requiring interpretation and application of the Rules to secure "the just, most expeditious and least expensive determination of every proceeding on its merits", determine whether an implied agreement existed here for costs. If I conclude that one did, the corollary implication or conclusion is that the Plaintiff has reneged on said agreement. Unfortunately for the Defendants, I cannot conclude on the evidence that such an implied agreement was in place. The letter dated October 28, 2005, from the Plaintiff's solicitor, confirmed the adjournment sine die of the Plaintiff's Further motion. The letter dated October 31, 2005, set out conditions for withdrawal of said motion. These letters were preceded by a letter dated October 26, 2005, confirming the understanding by the Plaintiff's counsel of his telephone conversation with the Defendants' counsel of their agreement to advise the Court on October 28, 2005, of the adjournment sine die of the Plaintiff's Further motion (returnable at the time for October 31, 2005) if his client had not instructed him by October 28, 2005, to withdraw the motion. These three letters, dated over a few days, indicate to me that the Plaintiff's counsel understood clearly the difference between an adjourned motion as opposed to a withdrawn motion. Although there is no evidence as to counsel's understanding of the differing consequences associated with adjournment versus withdrawal, I think it likely that he understood the difference between the two. I will not surmise whether he had costs in mind at that point as I think it irrelevant for the Rule 402 issue framed for my resolution. He adjourned the motion sine die, but did not withdraw it. In so doing, he did not accede to express or implied conditions from the Defendants for a waiver of costs associated with the Defendants' cross-examination motion. The motions, although occurring in proximity, were discrete interlocutory events. One (the Plaintiff's Further motion) was adjourned sine die: Rule 402 does not apply to it. One (the Defendants' cross-examination motion) was withdrawn: Rule 402 applies to it in the absence of an order or agreement otherwise.
- [8] My view, often expressed further to my approach in *Carlile v. Her Majesty the Queen* (1997), 97 D.T.C. 5284 (T.O.) and the sentiment of Lord Justice Russell in *Re Eastwood* (deceased) (1974), 3 All. E.R. 603 at 608, that assessment of costs is "rough justice, in the sense of being compounded of much sensible approximation", is that discretion may be applied to sort out a reasonable result for costs equitable for both sides. I think that my view is reinforced by the editorial comments (see: *The Honourable James J. Carthy, W.A. Derry Millar & Jeffrey G. Gowan, Ontario Annual Practice 2005-2006* (Aurora, Ont: Canada Law Book, 2005)) for Rules 57 and 58 to the effect that an assessment of costs is more of an art form than an application of rules and principles as a function of the general weight and feel of the file and issues, and

of the judgment and experience of the assessment officer faced with the difficult task of balancing the effect of what could be several subjective and objective factors. In *Almecon Industries Ltd. v. Anchortek Ltd.*, [2003] F.C.J. No. 1649 (A.O.) at para. [31], I found certain comments in the evidence, although self-serving, nonetheless to be pragmatic and sensible concerning the reality of a myriad of essential disbursements for which the costs of proof might or would exceed their amount. However, that is not to suggest that litigants can get by without any evidence by relying on the discretion and experience of the assessment officer. The proof here is less than absolute, i.e. the absence of invoices. The paucity of evidence for the circumstances underlying each expenditure makes it difficult for the respondent on the assessment of costs and the assessment officer to be satisfied that each expenditure was incurred as a function of reasonable necessity. The less that evidence is available, the more that the assessing party is bound up in the assessment officer's discretion, the exercise of which should be conservative, with a view to a sense of austerity which should pervade costs, to preclude prejudice to the payer of costs. However, real expenditures are needed to advance litigation, a result of zero dollars at assessment would be absurd.

- [9] I will apply Rules 409 and 400(3)(o) (any other matter considered relevant). Although these were discrete interlocutory proceedings, there was a linkage subjective, not technical, in nature as a function of the Defendants' efforts to move things along regardless of whose conduct was responsible for creating the issues between these litigants. Those efforts should be rewarded in the circumstances here by the imposition on the Defendants of only a minimal burden of costs: I allow the minimum Column III counsel fees. I find the binding (2 copies for filing, 1 copy for service and 1 copy for counsel) and courier charges for the motion record reasonable and allow them as presented. The Plaintiff's bill of costs for the Defendants' motion record dated June 27, 2005, presented at \$1,250.23, is assessed and allowed at \$865.03. "Charles E. Stinson" Assessment Officer FEDERAL COURT SOLICITORS OF RECORD DOCKET: T-1521-04 STYLE OF CAUSE: PEAK INNOVATIONS INC. v. PRODUITS PYLEX INC. et al. ASSESSMENT OF COSTS IN WRITING WITHOUT PERSONAL APPEARANCE OF THE PARTIES REASONS FOR ASSESSMENT OF COSTS: CHARLES E. STINSON DATED: December 27, 2006 WRITTEN REPRESENTATIONS BY: Paul Smith FOR THE PLAINTIFF Taylor Jordan Chafetz FOR THE DEFENDANTS SOLICITORS OF RECORD: Pal Smith Intellectual Property Law Vancouver, BC FOR THE PLAINTIFF Taylor Jordan Chafetz Vancouver, BC FOR THE DEFENDANTS

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://decisions.fct-cf.gc.ca/fc-cf/decisions/en/item/53370/index.do>

CASE PAGE <https://chat.esheria.ai/case-law/canada/peak-innovations-inc-v-produits-pylex-inc-2006>

Prepared on 28 October 2026 · Esheria