Federal Court		Cour fédérale

Date: 20090623

Docket: T-1268-08

Citation: 2009 FC 661

Vancouver, British Columbia, June 23, 2009

PRESENT: The Honourable Madam Justice Tremblay-Lamer

BETWEEN:

PEAK INNOVATIONS INC.

Applicant

and

MEADOWLAND FLOWERS LTD.

Respondent

REASONS FOR ORDER AND ORDER

[1] The Plaintiff appeals Prothonotary Lafrenière's June 2, 2009 Order, in which he struck paragraphs 3-11, 35, 36, and 38 from the Plaintiff's Amended Statement of Claim, on the basis that a declaration of non-infringement of an industrial design registration is not a cause of action within the jurisdiction of the Federal Court.

[2] The Plaintiff, by Statement of Claim dated August 29, 2008 and Amended Statement of Claim dated October 24, 2008, began this action. The Plaintiff identifies the genesis of this action as a letter written by counsel for the Defendant where counsel for the Defendant alleges infringement

of industrial designs and copyright. The Amended Statement of Claim seeks, *inter alia*, declarations that certain of the Plaintiff's products do not infringe certain of the Defendant's industrial design registrations.

[3] The Defendant submits that the Plaintiff has based this action on an unreasonable and untenable interpretation of two letters, which have never alleged infringement of the industrial designs at issue in this action. To clarify the matter, Smart and Bigger confirmed that the Defendant has not previously or at that time alleged infringement of any of the industrial design registrations impugned in the Statement of Claim and Amended Statement of Claim. It is against this backdrop that Prothonotary Lafrenière rendered his Order of June 2, 2009.

[4] The sole issue on this appeal is whether the Federal Court has jurisdiction to entertain a proceeding brought by a party for determinations and declarations of whether that party's products infringe industrial design registrations of another party, in the absence of an action for infringement.

[5] The jurisdiction of the Federal Court is statutory and exceptional, and must be positively shown (*R.W. Blacktop Ltd. v. Artec Equipment Co*. (1991), 39 C.P.R. (3d) 432 (F.C.T.D.) at page 435), and in order to support a finding of jurisdiction, the following three elements must exist (*Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626 at paragraph 8):

> 1) There must be an express statutory grant of jurisdiction by the federal Parliament;
> 2) There must be an existing body of federal law which is essential to the disposition of the case and which nourishes the statutory grant of jurisdiction; and

> 3) The law on which the case is based must be a "law of Canada" as the phrase is used in section 101 of the *Constitution Act*, 1867.

[6] Therefore, without a statutory grant of jurisdiction for a cause of action seeking a declaration of non-infringement, it is plain and obvious that the Federal Court lacks jurisdiction to entertain such as proceeding, and the portions of the Amended Statement of Claim seeking such relief must be struck.

[7] The provisions of the *Industrial Design Act*, R.S.C. 1985, c. I-9 that do establish causes of action are s. 15, s. 15.1, s. 15.2, s. 22, and s. 23. None establishes a cause of action for non-infringement.

[8] The Plaintiff relies on s. 20(2) of the *Federal Courts Act*, R.S.C. 1985, c. F-7 to argue the Federal Court has jurisdiction over declaratory relief in the form of a declaration of non-infringement, since it has jurisdiction to address "any remedy" – the Federal Court has broad jurisdiction to address any remedy relating to industrial designs, and the jurisdiction extends to any remedy sought under the overall law of industrial designs. I disagree.

[9] Section 20(2) of the *Federal Courts Act* only establishes jurisdiction for remedies where jurisdiction for the underlying cause of action is established elsewhere in a statute. This is supported by the analysis used in *Radio Corporation of America v. Philco Corporation (Delaware)*, [1966] S.C.R. 296 (S.C.C.); and *Cellcor Corp. of Canada Ltd. v. Kotacka* (1976), 27 C.P.R. (2d) 68 (F.C.A.).

[10] It is plain and obvious that s. 20(2) of the *Federal Courts Act* by itself cannot establish jurisdiction for a cause of action of non-infringement of an industrial design.

[11] The Plaintiff further relies on Rule 64 of the *Federal Court Rules*, SOR/98-106 to show the Federal Court has jurisdiction to grant any declaratory relief. Rule 64, however, will not confer jurisdiction for a cause of action on its own. *Pieters v. Canada (Attorney General)*, F.T.R. 227, 2004 FC 27 (F.C.), at paragraph 17, confirms that Rule 64 speaks to remedy and does not establish jurisdiction for a cause of action that is not otherwise established:

> [17] In my view, Rule 64 does not assist the Applicant. This Rule states that this Court cannot refuse to hear a claim solely because a party seeks a declaration. However, the Rule cannot operate in the absence of an underlying application. Rule 64 speaks to relief and not to the proceedings. In other words, there must be some basis on which the application is brought and not merely some abstract desire to obtain clarification or a hammer with which to negotiate further. The Court functions and provides judicial oversight in the face of some alleged actions. Absent a factual foundation within the jurisdiction of the Court, remedies are meaningless. In this case, the Court is declining to judicially review a decision because its jurisdiction is ousted by the operation of the Collective Agreement and PSSRA. The nature of the remedy sought by Mr. Pieters is a secondary issue and need only be considered if this Court first satisfies itself that it has the jurisdiction to review Ms. Brouillette's conduct.

[12] The legislative provisions submitted by the Plaintiff are therefore not able to support the Plaintiff's jurisdictional argument. It is therefore plain and obvious that the Federal Court does not have jurisdiction over a cause of action for non-infringement of an industrial design.

CONCLUSION

[13] For the above reasons, this appeal from Prothonotary Lafrenière's June 2, 2009 Order, in which Prothonotary Lafrenière struck paragraphs 3-11, 35, 36, and 38 from the Plaintiff's Amended Statement of Claim, is dismissed with costs to the Defendant forthwith and in any event of the cause.

JUDGMENT

THIS COURT ORDERS that the appeal is dismissed with costs to the Defendant forthwith and in any event of the cause.

"Danièle Tremblay-Lamer"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1268-08
STYLE OF CAUSE:	PEAK INNOVATIONS INC. v. MEADOWLAND FLOWERS LTD.
PLACE OF HEARING:	Vancouver, BC
DATE OF HEARING:	June 22, 2009
REASONS FOR ORDER AND ORDER:	TREMBLAY-LAMER J.
DATED:	June 23, 2009

APPEARANCES:

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Ms. Karen MacDonald Mr. Jonas Gifford	FOR THE RESPONDENT

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