Federal Court of Appeal	 CANADA	Cour d'appel fédérale

Date: 20101020

Dockets: A-512-09
A-513-09

Citation: 2010 FCA 277

CORAM: **NOËL J.A.**
SHARLOW J.A.
LAYDEN-STEVENSON J.A.

A-512-09

BETWEEN:

SIMPSON STRONG-TIE COMPANY, INC.

Appellant

and

PEAK INNOVATIONS INC.

Respondent

A-513-09

BETWEEN:

SIMPSON STRONG-TIE COMPANY, INC.

Appellant

and

PEAK INNOVATIONS INC.

Respondent

Heard at Vancouver, British Columbia, on October 20, 2010.

Judgment delivered from the Bench at Vancouver, British Columbia, on October 20, 2010.

REASONS FOR JUDGMENT OF THE COURT BY: LAYDEN-STEVENSON J.A.

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Vancouver, British Columbia, on October 20, 2010)

LAYDEN-STEVENSON J.A.

[1] These reasons address the appeals in Court File Number A-513-09 and Court File Number A-512-09 and will be filed as reasons for judgment in both files.

[2] The appellant, Simpson Strong-Tie Company, Inc. (Strong-Tie) appeals the judgment of Justice Snider (the judge) in 2009 FC 1200 wherein she dismissed Strong-Tie's appeals from a decision of the Trade-Mark Opposition Board (the Board). The Board rejected Strong-Tie's opposition regarding two trade-mark applications of the respondent Peak Innovations Inc. (Peak) in relation to fastener brackets for attaching deck boards for the colours green and greyish green. For the reasons that follow, we are of the view that the appeals must be dismissed.

[3] Justice Snider correctly stated the standard of review from a decision of the Board (reasons for judgment at paras. 13-15) as well as the applicable evidentiary burdens (reasons for judgment at para. 29). Strong-Tie does not allege any error with respect to the judge's identification of the appropriate legal tests to be applied.

[4] Strong-Tie's arguments are largely founded on the basis that the "new" evidence it adduced in the Federal Court is more than sufficient to meet its evidential burden so as to shift the legal burden on the issues to Peak (appellant's memorandum of fact and law at paras. 8, 23, 37, 42, 44 and 49). Basically, this constitutes an attack on the judge's appreciation and weighing of the

evidence. The intervention of this Court is therefore limited to palpable and overriding error on the part of the judge. We are not persuaded any such error has been established.

[5] The judge examined and assessed Strong-Tie's purported new evidence. Where she found it to be material, she considered the relevant ground of opposition afresh, as she was bound to do. Strong-Tie makes the same arguments before us that were made to the judge and rejected by her. It would have this Court conduct a *de novo* hearing. That is not our function. Only three of Strong-Tie's arguments require further comment.

[6] With respect to its submission that the judge misdirected herself in concluding that the allegation of non-distinctiveness was not raised in its statements of opposition, we agree with Peak that Strong Tie explicitly challenged distinctiveness of the Peak Colour Mark on the basis of alleged confusion with various other trade-marks. This ground of opposition was rejected by the Board and by the judge. The reference to the ground of opposition upon which Strong-Tie relies to justify its general attack of non-distinctiveness related to subject matter (use and functionality) rather than what the judge characterized as the "inherent nature of the mark" (reasons for judgment at para. 30). In any event, there is no evidence to demonstrate that the Peak Colour Mark does not distinguish Peak's fastener brackets.

[7] Next, even if Strong-Tie were correct that the judge placed too high an onus on it with respect to the evidence of non-use (and we make no finding in this respect), it is immaterial to the result because she also found that Strong-Tie's new evidence did not relate to the colour green and

there was no evidence that a green coating had any particular advantage over a coating of another colour.

[8] Finally, we are not persuaded that the judge erred in concluding that the issue of the back view was not raised in the statement of opposition. The licensing argument was not pursued.

[9] Since Strong-Tie has failed to demonstrate any error that warrants the intervention of this Court, the appeals will be dismissed with a single set of costs.

"Carolyn Layden-Stevenson"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKETS:	A-512-09 A-513-09
STYLE OF CAUSE:	SIMPSON STRONG-TIE COMPANY, INC. v. PEAK INNOVATIONS INC.
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	October 20, 2010
REASONS FOR JUDGMENT OF THE COURT BY:	NOËL J.A. SHARLOW J.A. LAYDEN-STEVENSON J.A.
DELIVERED FROM THE BENCH BY:	LAYDEN-STEVENSON J.A.

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