

Court File No. A- 105 -22  
(T-151-16)

**FEDERAL COURT OF APPEAL**

B E T W E E N:

MUNCHKIN, INC. and  
MUNCHKIN BABY CANADA, LTD.

<b>FEDERAL COURT OF APPEAL COUR D'APPEL FÉDÉRALE</b>	
F I L E D	May 9, 2022 I Lavolette-Duval
<b>OTTAWA, ON</b>	1

Appellants

- and -

ANGELCARE CANADA INC. and  
EDGEWELL PERSONAL CARE CANADA ULC and  
PLAYTEX PRODUCTS, LLC

Respondents

**NOTICE OF APPEAL**

**TO THE RESPONDENT:**

**A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU** by the appellant. The relief claimed by the appellant appears on the following pages.

THIS APPEAL will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court directs otherwise, the place of hearing will be as requested by the appellant. The appellant requests that this appeal be heard at Ottawa.

**IF YOU WISH TO OPPOSE THIS APPEAL**, to receive notice of any step in the appeal or to be served with any documents in the appeal, you or a solicitor acting for you must prepare a notice of appearance in Form 341A prescribed by the *Federal Courts Rules* and serve it on the appellant's solicitor, or where the appellant is self-represented, on the appellant, **WITHIN 10 DAYS** of being served with this notice of appeal.

**IF YOU INTEND TO SEEK A DIFFERENT DISPOSITION** of the order appealed from, you must serve and file a notice of cross-appeal in Form 341B prescribed by the *Federal Courts Rules* instead of serving and filing a notice of appearance.

Copies of the *Federal Courts Rules* information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

**IF YOU FAIL TO OPPOSE THIS APPEAL, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.**

May 9, 2022

Issued by:

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**APPEAL**

**THE APPELLANT APPEALS** to the Federal Court of Appeal from the Judgment and Reasons of Mr. Justice Roy of the Federal Court (the “**Trial Judge**”), dated April 7, 2022 in Federal Court File No. T-151-16 (the “**Liability Judgment**”), by which the Trial Judge held that the Appellants infringed four patents at issue.

**THE APPELLANT ASKS** that this Court:

- (a) Allow this appeal, set aside the Liability Judgment, dismiss the action and issue the Order that should have issued, namely:
  - (i) declare that Munchkin Inc. is not liable for any patent infringement in Canada;
  - (ii) declare that the 128 Patent anticipates Claims 1, 2, 20 and 21 of the 128 Patent, and that all 128 Patent claims are uninventive and obvious;
  - (iii) declare that all claims in the 384, 159 and 421 Patents are anticipated by the 128 Patent, obvious in light of the state of the art, and invalid for obviousness-type double patenting having regard to the 128 Patent claims;
  - (iv) declare that all claims in the 384 Patent, 159 Patent (with the exception of claim 51) and 421 Patent are anticipated by the inventor’s disclosure to potential suppliers of technical drawings of

the invention, without requiring them to enter into a non-disclosure agreement;

- (v) declare that the 415 and 312 Patent claims are invalid for overbreadth and insufficiency and, in any event, not infringed;
- (b) Alternatively, set aside the Liability Judgment and return the matter to the Trial Judge for further consideration in accordance with this Court’s Reasons;
- (c) Grant Munchkin its costs in this Court of Appeal and in the Court below;
- (d) Order such further and other relief as this Honourable Court may find just.

**THE GROUNDS OF APPEAL** are as follows:

**A. Background**

1. This appeal arises from an action for patent infringement brought by Angelcare Canada Inc., Edgewell Personal Care Canada ULC and Playtex Products, LLC (collectively, “**Angelcare**” or the “**Respondents**”) against Munchkin, Inc. and Munchkin Baby Canada, Ltd. (collectively “**Munchkin**” or the “**Appellants**”) relating to Munchkin’s development and sale of diaper pails and refill cassettes, and their assembly together and with Angelcare’s own *Diaper Genie*-branded pails.

2. On January 22, 2016, Angelcare initiated this action whereby it eventually alleged that Munchkin infringed over 100 claims in Canadian Patent Nos. 2,686,128 (“**128 Patent**”), 2,640,384 (“**384 Patent**”), 2,855,159 (“**159 Patent**”), 2,936,421 (“**421**

**Patent**”), 2,936,415 (“**415 Patent**”), and 2,937,312 (“**312 Patent**”) (collectively, the “**Patents at Issue**”).

3. The 384, 159, 421, 415 and 312 Patents are all related, divided out of a single Canadian application and they name the same inventor, Michel Morand. They are referred below as the “**Angelcare Patents**”. The 128 Patent was originally filed by the Respondent Playtex Products, LLC but was acquired by the Respondent Angelcare Canada Inc. shortly before the trial of this action.

4. Generally, the asserted claims in the Patents at Issue all relate to a design for a cassette refill for use in a diaper pail, the cassette having “registration features” or a “clearance” or a “chamfer” in their bottom part. When combined with a suitable diaper pail having “alignment features” or a “projection” or a “projecting member” or a “projecting portion”, these cassette features resolve the so-called “improper orientation problem”: that users may inadvertently insert the cassette upside down in a diaper pail.

5. In its amended statement of claim, Angelcare alleged that Munchkin’s four successive generations of cassettes (“**Generations 1-4**”) infringe claims in the 128, 384, 159 and 421 Patents, and that Munchkin’s diaper pails (branded “PAIL” and “STEP”) infringed the claims of the 415 and 312 Patents. Angelcare also alleged that the combination of Munchkin’s Generations 1-4 cassettes with Munchkin’s diaper pails, as well as certain of Angelcare’s own Diaper Genie pails, infringe the assembly claims in the 128 and 159 Patents. Angelcare pleaded that each Munchkin defendant was liable for direct patent infringement and inducing consumers to infringe the assembly claims in the Patents at Issue.

6. Munchkin defended and counterclaimed that the Patents at Issue were invalid, including on the following grounds:

- (a) having regard to the 128 Patent,
  - (i) the cassette claims in the 128 Patent were anticipated by Angelcare's own, commercially available Captiva/Diaper Genie II cassettes;
  - (ii) the 128 Patent claims were obvious in light of the state of the art;
- (b) having regard to the 384 Patent,
  - (i) the 384 Patent claims were anticipated by the 128 Patent;
  - (ii) the 384 Patent claims were anticipated by the inventor's disclosure to potential suppliers of technical drawings of the invention, without requiring them to enter into a non-disclosure agreement;
  - (iii) the 384 Patent claims were obvious in light of the state of the art;
- (c) and, having regard to the 159 and 421 Patents,
  - (i) all claims in the 159 and 421 Patent were anticipated by the 128 Patent;
  - (ii) all claims in the 159 Patent (with the exception of claim 51) and 421 Patent were anticipated by the inventor's disclosure to potential suppliers of technical drawings of the invention, without requiring them to enter into a non-disclosure agreement;

- (iii) the 159 and 421 Patents claims were obvious in light of the state of the art.

7. Munchkin also counterclaimed that claims in the Patents at Issue were invalid for overbreadth, insufficiency and double patenting. With respect to the 415 and 312 Patents, Munchkin pleaded that their claims, which are directed to diaper pails rather than cassettes, extended to embodiments not invented by the inventor Michel Morand, and which a POSITA could not have made reading only these patents' disclosure.

8. The action was bifurcated into liability and quantification phases, and proceeded to trial on patent liability issues only, with an additional hearing (still to be scheduled) to address entitlement to remedies.

## **B. The Liability Judgment**

9. On April 7, 2022, following a thirty-five-day trial, the Trial Judge issued the lengthy, 245-page Liability Judgment. The Trial Judge concluded that Munchkin's Generations 1-4 cassettes, as well as their assembly in Munchkin and Diaper Genie pails, infringed some or all the asserted claims in the 128, 384, 159 and 421 Patents. However, the Trial Judge concluded that Munchkin did not infringe any claim in the 415 and 312 Patents.

10. The Trial Judge agreed that the 128 Patent anticipated four claims in the 384 Patent but he otherwise rejected all invalidity defences and counterclaims.

11. In addition to finding that Munchkin Baby Canada, Ltd. had infringed the Patents at Issue, the Trial Judge concluded that Munchkin Inc., its U.S. parent corporation,

was also liable for patent infringement in Canada because it designed the infringing products and designed the cassette labels stating that Munchkin’s cassettes were compatible with Diaper Genie pails.

**C. Claim Construction**

12. In respect of all Patents at Issue, the Trial Judge erred in defining, or in applying his own definition of, the skill and experience of the person of ordinary skill in the art (“**POSITA**”), leading him to err in his construction of the 128, 384, 159 and 421 Patent claims, as well as in his conclusion that the claims of the 128, 384, 159 and 421 Patents were inventive.

13. The Trial Judge erred in construing the claims of the 128 Patent, specifically the terms “alignment features”, “matingly engage” and “complementary/complimentary shapes” (and related expressions), and whether the placement of the “gap” is an essential element in claim 1 and dependent claims of the 128 Patent.

14. With respect to the 384, 159 and 421 Patents, the Trial Judge erred in law in his construction of the terms “clearance” and “clearance means” in the claims of the Angelcare Patents.

**D. Infringement**

15. The Trial judge erred in concluding that the assembly of Munchkin’s Generations 1 to 3 cassettes in Angelcare’s Diaper Genie pails infringe the asserted claims in the 128 Patent.



16. In addition, the Trial Judge erred in concluding that the assembly of Munchkin's Generations 1-3 cassettes with Munchkin's diaper pails infringe the asserted claims in the 128 Patent.

17. Moreover, the Trial judge erred in concluding that the assembly of Munchkin's Generations 1-3 cassettes in Angelcare's Diaper Genie pails infringed the asserted claims in the 159 Patent.

18. With respect to all Patents at Issue, the Trial Judge erred in concluding that Munchkin Inc. was liable for patent infringement in Canada, even as it has no presence or activity in Canada.

**E. Invalidity of the 128 Patent**

19. The Trial Judge erred in failing to declare invalid the claims of the 128 Patent. The Trial Judge erred in concluding that the Captiva/Diaper Genie II did not disclose and enable, and therefore anticipate, claim 1 and dependent claims of the 128 Patent.

20. The Trial Judge erred in failing to accurately describe and correctly apply the common general knowledge of the POSITA of the 128 Patent.

21. The Trial Judge erred in failing to consider, accurately describe and correctly apply the state of art of the 128 Patent.

22. The Trial Judge erred in characterizing the inventive concept of the 128 Patent claims as comprising the placement of the gap on the cover of the cassette when none of the asserted claims in the 128 Patent include this claim element.

23. The Trial Judge erred in concluding that the invention in each of the asserted claims of the 128 Patent was inventive, and not obvious.

**F. Invalidity of the Angelcare Patents**

24. The Trial Judge erred in failing to declare the claims of the 384, 159 and 421 Patents to be invalid. The Trial Judge erred in failing to conclude that the 128 Patent disclosed and enabled, and therefore anticipated, the subject-matter in the claims of the 384, 159 and 421 Patents.

25. With respect to each of the 384, 159 and 421 Patents, the Trial Judge erred in concluding that the disclosure of a cassette with a “clearance” in the 128 Patent did not also disclose a cassette having a clearance in the shape of the chamfer. In any event, the Trial Judge erred in failing to conclude that the 128 Patent disclosed and enabled the making of a diaper cassette with a chamfer.

26. With respect to the 384, 421 and 159 Patents, the Trial Judge erred in failing to conclude that the inventor’s disclosure of technical drawings of his cassette design anticipated the claimed invention. The Trial Judge erred in focusing his analysis on what the inventor’s expectations of confidentiality were, rather than considering the expectations and understanding of the third-party recipient of the confidential information. The Trial Judge also erred in concluding that Mr. Morand’s disclosure was not enabling of the subject-matter in the cassette claims of the 384, 421 and 159 Patents.

27. The Trial Judge erred in failing to consider, accurately describe and apply the state of art of the Angelcare Patents.

28. The Trial Judge erred in failing to accurately describe and correctly apply the common general knowledge of the POSITA of the Angelcare Patents.

29. The Trial Judge erred in characterizing the inventive concepts in the 421 and 159 Patents, notably to include a collection of prior art elements, such as the cover elements in the prior art Captiva/Diaper Genie II cassette.

30. The Trial Judge erred in concluding that the invention in the asserted claims of each of the 384, 159 and 421 Patents was inventive, and not obvious.

31. The Trial Judge erred in concluding that each claim in the 384, 159 and 421 Patents was not invalid for obviousness-type double patenting having regard to the fact that the invention in these claims is not patentably distinct from the invention claimed in the 128 Patent.

32. With respect to the 415 and 312 Patents, the Trial Judge erred in not concluding that their claims were invalid for insufficiency and overbreadth having regard to the fact that they extended to diaper pails the inventor did not conceive or make, and which a POSITA would not have been able to make.

#### **G. Further Grounds**

33. Munchkin, Inc. and Munchkin Baby Canada, Ltd. also relies upon:

- (a) the *Federal Courts Act* R.S.C., 1985, c. F-7, as amended,
- (b) the *Federal Courts Rules*, SOR/98-106, as amended;

- (c) such further and other grounds as counsel may advise and this Honourable Court may permit.

34. The Appellant proposes that this appeal be heard at Ottawa.

May 9, 2022



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