

A-106-22

ID#1

Court File No A- -22
(T-151-16)**FEDERAL COURT OF APPEAL**

BETWEEN:

FEDERAL COURT OF APPEAL		D E P O S E
COUR D'APPEL FÉDÉRALE		
F I L E D	9 mai, 2022	
	Justin de Sousa	
MONTRÉAL, QC		1

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

Appellants

- and -

MUNCHKIN, INC.
MUNCHKIN BABY CANADA, LTD.

Respondents

NOTICE OF APPEAL**TO THE RESPONDENTS:**

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the appellants. The relief claimed by the appellants 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 appellants. The appellants request that this appeal be heard at the Federal Court of Appeal, 30 McGill Street, Montreal, Quebec, H2Y 3Z7.

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 341 prescribed by the Federal Courts Rules and serve it on the appellants' solicitors, or where the appellants are self-represented, on the appellants, 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 341 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: _____
(Registry Officer)

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APPEAL

THE APPELLANTS APPEAL to the Federal Court of Appeal from the Judgment and Reasons of Mr. Justice Yvan Roy of the Federal Court (the “**Trial Judge**”) dated April 7, 2022 (the “**Judgment**”), by which he notably found that the Respondents’ “Fourth Generation cassettes” (as defined in the Judgment, also known as “Generation 4 cassettes”) do not infringe claims 9 and 10 of Canadian Patent 2,640,384 (“**384 Patent**”), and claims 1, 16, 17, 18, 19 and 20 of Canadian Patent No. 2,855,159 (“**159 Patent**”).

THE APPELLANTS ASK that the Judgment be set aside, in part, and that the Federal Court of Appeal grant the following relief:

- (a) Declare that the Respondents’ Generation 4 cassettes infringe claims 9 and 10 of the 384 Patent and claims 1, 16, 17, 18, 19 and 20 of the 159 Patent;
- (b) The Appellants’ costs here and in the Court below; and
- (c) Such further and other relief as counsel may advise or this Honourable Court may consider just.

THE GROUNDS OF APPEAL are as follows:

1. The Appellants (Plaintiffs in the Court below) are in the business of developing, manufacturing and selling products in the infant care segment, including under the well-known “Playtex” brand.
2. The Respondents Munchkin, Inc. and Munchkin Baby Canada, Ltd. are competitors of the Appellants and also develop and sell products in the infant care segment.
3. The present appeal pertains to diaper pail systems, which involve a reusable pail and a disposable “refill” or “cassette” containing a tube of plastic material

that acts as a bag in the pail. In use, consumers install a cassette in the pail and form a bag with the plastic tubing. Once the cassette is properly installed and a bag is formed, users can throw away soiled diapers in the pail through its closing mechanism. Once the pail is full, the bag is thrown away and a new one is formed using additional plastic tubing from the same cassette. Once the cassette is empty, it is discarded and replaced with a new cassette, and so on.

4. Since the late 1990s, the leading manufacturer of diaper pails in North America has been the Playtex group, whose first system was sold under the “Diaper Genie” brand.
5. In 2005, the predecessor of the Appellant Angelcare Canada Inc. licensed an improved version of the Diaper Genie system to the Playtex group, including the Appellants Edgewell Personal Care Canada ULC and Playtex Products, LLC and/or their predecessors and parents. The Playtex group then launched this system on the market under the “Diaper Genie II” brand.
6. The patents at issue in the Court below pertain to further improvements on the Diaper Genie II system, which solve usability and hygiene issues associated with users inadvertently installing their cassette upside down in the holder of their pail. The solution involves creating a clearance – or empty space – at the bottom of the cassette and adding a protrusion within the holder and/or on the closing mechanism of the pail, such that the protrusion and the clearance can mate when the cassette is installed right side up, but the cassette cannot sit properly in the pail (or the pail otherwise does not work properly) if installed upside down.
7. The Appellants launched the underlying action for patent infringement against the Respondents in 2016. The Appellants ultimately amended their pleadings to allege that four generations of the Respondents’ cassettes (“**Generation 1 cassettes**” to “**Generation 4 cassettes**”) that were specifically designed to be compatible with the Appellants’ Diaper Genie system infringe the asserted

patents, including the 384 and 159 Patents. The Appellants also alleged that two models of diaper pails later launched by the Respondents (the “PAIL” and “STEP” pails) and that are compatible with their Generation 1 to 4 cassettes infringe additional patents.

8. In response, the Respondents denied infringement and attacked the validity of every asserted claim of the Appellants’ patents on various grounds, including anticipation, obviousness, overbreadth, insufficiency, lack of utility and double patenting.
9. The trial in this action took place before the Trial Judge over 35 days from January to April 2021.
10. A bifurcation order is in place in the underlying action, such that the trial was limited to the issues of validity and infringement.
11. The majority of the trial time was dedicated to expert testimony. The parties’ respective experts, who are specialised in the fields of product development and industrial design, testified in chief and in cross-examination for a total of 22 days, or roughly 60% of the trial.
12. On April 7, 2022, the Trial Judge issued the Judgment, finding all claims of the asserted patents valid, save for two independent claims (1 and 6) and two dependent claims (3 and 8) of the 384 Patent, which he found to be anticipated by a patent owned by Playtex Products, LLC also asserted in the action. The Appellants do not appeal this finding.
13. The Trial Judge also found that the Respondents’ Generation 1, 2 and 3 cassettes infringe various claims of the asserted patents, including the 384 and 159 Patents, and that the combination of their Generation 4 cassettes with their PAIL and STEP diaper pails also infringes one of the asserted patents.

14. However, the Trial Judge found that:
- a) The Respondents' PAIL and STEP pails do not directly infringe some of the asserted patents. The Appellants do not appeal this finding.
 - b) The Respondents' Generation 4 cassette does not directly infringe any claim of the asserted patents, including the 384 and 159 Patents. This is the finding under appeal.
15. The Respondents' Generation 4 cassette includes four empty spaces or "slots" in its bottom portion. The holder of the PAIL and STEP pails include four projecting "tabs" or protrusions. When installed right side up, the four empty slots of the Generation 4 cassette mate with the four projecting tabs of the PAIL and STEP pails and the cassette can sit properly in the holder. If a user attempts to install the Generation 4 cassette upside down, the cassette will not sit properly in the pail.
16. In his Judgment, the Trial Judge correctly found that:
- a) The invention disclosed in the 384 and 159 Patents pertains to solving the improper orientation problem by adding an interfering member in the holder of the pail, in tandem with a clearance at the bottom of the cassette, which cooperates with the interfering member to position the cassette in the correct orientation.
 - b) The term "clearance" as claimed in the 384 and 159 Patents should be construed as an empty space at the bottom of the cassette that solves the orientation problem by engaging with a fixed or movable part of the pail.
 - c) Many of the Respondents' arguments to the effect that the slots of their Generation 4 cassettes are not "clearances" as claimed in the patents should be rejected, including that they are not located radially outward of a downward projection of the annular wall of the cassette, that they

would not allow the movement of a closing mechanism, and that the word “clearance” is used in the singular in the relevant claims whereas there are four slots at the bottom of the Generation 4 cassettes.

17. However, the Trial Judge found that the slots of the Respondents’ Generation 4 cassettes cannot be “clearances” as claimed in the 384 and 159 Patents because they lack a back wall and, as such, are not “formed integrally with the annular wall” of the cassette.

18. The limitation that the clearance be “formed integrally with the annular wall” is present in claim 1 of the 384 Patent. However, it is absent from independent claim 6 of the 384 Patent and from claim 1 of the 159 Patent:

384 Patent – Claim 1	384 Patent – Claim 6
<p>A cassette for packing at least one disposable object into an elongated tube of flexible material, comprising [...] the annular receptacle having a clearance in a bottom portion of the central opening, <u>the clearance extending from and being formed integrally with the annular wall,</u> the clearance being radially outward of a downward projection of the annular wall, the clearance delimiting a portion of the volume of reduced width relative to a portion of the volume above the clearance.</p>	<p>A cassette for packing at least one disposable object into an elongated tube of flexible material, comprising [...] the annular receptacle having a clearance at a bottom of the central opening, the clearance being located radially outward of a downward projection of the annular wall relative to the central opening, and opening into the central opening, at least a portion of the volume of the annular receptacle being located radially outward of and side by side with at least a portion of the clearance such that at least a portion of the elongated tube of flexible material is disposed in the</p>

	<p>accumulated condition in said portion of the annular receptacle, said clearance causing a reduced width of said portion of the volume relative to the volume above the clearance.</p>
384 Patent – Claim 1	159 Patent – Claim 1
<p>A cassette for packing at least one disposable object into an elongated tube of flexible material, comprising [...] the annular receptacle having a clearance in a bottom portion of the central opening, <u>the clearance extending from and being formed integrally with the annular wall,</u> the clearance being radially outward of a downward projection of the annular wall, the clearance delimiting a portion of the volume of reduced width relative to a portion of the volume above the clearance.</p>	<p>A cassette for packaging soiled diapers into an elongated tube of flexible material, the cassette comprising: [...] f) the receptacle defining a clearance in a bottom portion of the central opening, the clearance being located outwardly of an imaginary projection of the wall extending downwardly along the central axis; g) a first portion of the storage area that is located outwardly of the clearance and that vertically registers with the clearance having a reduced width relative a second portion of the storage area located above the first portion and above the clearance; h) the cassette configured for installation in a soiled diaper disposal device, the soiled diaper disposal device including a holder for receiving the cassette, the holder having a projection, the clearance being configured for receiving the projection when the cassette is seated in the holder.</p>

19. The Respondents' Generation 4 cassette practices every element of claim 6 of the 384 Patent and of claim 1 of the 159 Patent as construed by the Trial Judge, even if its clearance does not have a back wall and is therefore not "formed integrally with the annular wall."
20. However, the Trial Judge committed an error of law by importing the "formed integrally with the annular wall" limitation of claim 1 of the 384 Patent into claim 6 of the 384 Patent and claim 1 of the 159 Patent.
21. Had he not committed this error, he would have found that the Respondents' Generation 4 cassettes infringe these claims.
22. The Trial Judge did not perform an analysis as to whether the Respondents' Generation 4 cassettes infringe any of the claims that are dependent on claim 6 of the 384 Patent or claim 1 of the 159 Patent, for the sole reason that he found that these independent claims were not infringed.
23. Had he not committed the error of law summarised at paragraph 20 above and had he performed such an analysis, he would have concluded that the Respondents' Generation 4 cassettes infringe the following dependent claims:
 - a) Claims 9 and 10 of the 384 Patent.
 - b) Claims 16, 17, 18, 19 and 20 of the 159 Patent.
24. Because the Appellants are not appealing the finding that independent claim 6 of the 384 Patent is invalid for anticipation, their relief before this Court with respect to that patent is limited to a finding of infringement of dependent claims 9 and 10.
25. Such further and other grounds as counsel may advise and this Honourable Court may permit.

DATED AT Montreal, Canada, this 9th day of May, 2022.

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Solicitors for the Appellants

I HEREBY CERTIFY that the above document is a true copy of

the original issued of / filed in the Court on the _____

day of 05/09/2022 A.D. 20____

Dated this _____ day of 05/10/2022 20____
