

**Federal Court of Appeal**



**Cour d'appel fédérale**

**Date: 20240927**

**Dockets: A-105-22  
A-106-22**

**Citation: 2024 FCA 156**

**CORAM: GLEASON J.A.  
LOCKE J.A.  
WALKER J.A.**

**BETWEEN:**

**MUNCHKIN, INC. and  
MUNCHKIN BABY CANADA, LTD.**

**Appellants**

**and**

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

**Respondents**

**Docket: A-106-22**

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EDGEWELL PERSONAL CARE CANADA ULC and  
PLAYTEX PRODUCTS, LLC**

**Appellants**

**and**

**MUNCHKIN, INC. and  
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**Respondents**

Heard at Ottawa, Ontario, on June 4 and 5, 2024.

Judgment delivered at Ottawa, Ontario, on September 27, 2024.

REASONS FOR JUDGMENT BY:

LOCKE J.A.

CONCURRED IN BY:

GLEASON J.A.  
WALKER J.A.

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## REASONS FOR JUDGMENT

### LOCKE J.A.

#### I. Background

[1] This decision concerns two appeals of a single decision of the Federal Court (2022 FC 507, *per* Justice Yvan Roy, the Decision) that addressed allegations of patent infringement and patent validity in respect of several patents. The plaintiffs, Angelcare Canada Inc., Edgewell Personal Care Canada ULC and Playtex Products, LLC (collectively referred to hereinafter as Angelcare), alleged that the defendants, Munchkin, Inc. and Munchkin Baby Canada, Ltd. (collectively referred to hereinafter as Munchkin), had infringed and were infringing the following six Canadian patents: Nos. 2,686,128 (the 128 Patent), 2,640,384 (the 384 Patent), 2,855,159 (the 159 Patent), 2,936,421 (the 421 Patent), 2,936,415 (the 415 Patent), 2,937,312 (the 312 Patent). For its part, Munchkin denied infringement and alleged that all of the patents in suit were invalid on various grounds.

[2] The patents in issue concern diaper pails and cassettes to be placed therein. The cassettes in issue are annular in shape and contain flexible plastic tubing or film that is dispensed through the central opening of the annulus to receive used diapers. The diapers thus wrapped are then stored in the pails.

[3] Following 35 days of trial, the Federal Court issued its Decision running over 500 paragraphs. The Decision considered the various infringement allegations (in respect of several generations of Munchkin's products), as well as the various allegations of invalidity

(anticipation, obviousness, overbreadth, insufficiency, ambiguity and inutility). The Federal Court concluded that some of Munchkin's products infringed some of the patent claims in issue, and that most of the claims in issue were valid. Importantly, the Federal Court found that Munchkin's liability for infringement extended to Munchkin, Inc. (Munchkin Baby Canada, Ltd.'s U.S.-based parent company).

[4] In the first appeal (File No. A-105-22), Munchkin argues that the Federal Court erred in several respects relating to its conclusions on anticipation and obviousness, as well as the liability of Munchkin, Inc. for infringement. In the second appeal (File No. A-106-22), Angelcare argues that the Federal Court erred in some of its conclusions of non-infringement concerning Munchkin's Generation 4 product. Other conclusions by the Federal Court are not in dispute.

[5] For the reasons set out below, I have concluded that Munchkin's appeal should be dismissed, and that Angelcare's appeal should be allowed.

## II. The Patents in Suit

[6] The application for the 128 Patent was filed on May 2, 2008 claiming priority from a U.S. patent application that was filed on May 4, 2007. The application was published on November 13, 2008, and the 128 Patent issued on January 8, 2013. The application for the 128 Patent was filed by Playtex Products, Inc., but it is now owned by Angelcare Canada Inc. The 128 Patent comprises 23 claims, of which claims 1 and 11 are independent.

[7] The claims of the 128 Patent relate to features directed to (i) stackability of cassettes, and (ii) avoidance of upside down placement of a cassette in a diaper pail.

[8] All of the other patents in issue (which are referred to herein as the Angelcare Patents) are related to one another in that the application for the 384 Patent was the original application that served as the basis for all of the others, which were filed as divisional applications pursuant to section 36 of the *Patent Act*, R.S.C. 1985, c. P-4. By virtue of subsection 36(4), all of the Angelcare Patents have the same filing date: October 3, 2008. Likewise, all of the Angelcare Patents claim priority from a European patent application that was filed on October 5, 2007. Like the 128 Patent, all of the Angelcare Patents are now owned by Angelcare Canada Inc. The Angelcare Patents were issued on the following dates:

<b>Patent No.</b>	<b>Date</b>
2,640,384	September 9, 2014
2,855,159	November 8, 2016
2,936,421	April 11, 2017
2,936,415	April 4, 2017
2,937,312	April 11, 2017

[9] The 384 Patent comprises 11 claims of which claims 1 and 6 are independent. The 159 Patent comprises 61 claims of which claims 1, 21, 40, 51 and 52 are independent. The 421, 415 and 312 Patents comprise 19, 6 and 8 claims, respectively. The only independent claim of each is claim 1. It appears that the 415 and 312 Patent are no longer in issue.

[10] The claims of the Angelcare Patents that remain in issue all define a “clearance” in a bottom portion of the central opening of the cassette, which is intended to ensure proper orientation of the cassette in the diaper pail. Some of said claims also relate to a cover at a top portion of the cassette.

III. Issues and Standard of Review

[11] The issues that Munchkin raises in its appeal (File No. A-105-22) are as follows:

- A. Whether the Federal Court erred in defining and applying the common general knowledge;
- B. Whether the Federal Court applied the wrong legal test to assess whether a prior disclosure to a third party constituted an anticipation of the patents in issue;
- C. Whether the Federal Court erred by failing to conclude that the 128 Patent anticipated claims of the Angelcare Patents;
- D. Whether the Federal Court erred in its conclusions on obviousness; and
- E. Whether the Federal Court erred in finding Munchkin, Inc. liable for infringing activities in Canada.

[12] The issues that Angelcare raises in its appeal (File No. A-106-22) are as follows:

- A. Whether the Federal Court erred in its construction of claim 6 of the 384 Patent and claim 1 of the 159 Patent; and
- B. Whether the Federal Court erred in finding that Munchkin's Generation 4 cassette does not infringe any of claims 9 or 10 of the 384 Patent or claims 1, 16, 17, 18, 19 or 20 of the 159 Patent.

[13] There is no serious dispute on the question of the standard of review. It is as contemplated in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235: questions of law are reviewed on a standard of correctness, and questions of fact as well as of mixed fact and law, in which no question of law is extricable, are reviewed on a standard of palpable and overriding error. A palpable error is one that is obvious. An overriding error is one that goes to the very core of the outcome of the case.

#### IV. Issues in the First Appeal (File No. A-105-22)

[14] As indicated above, Munchkin raises a number of issues in the first appeal. These are addressed under the sub-headings below.

##### A. *Whether the Federal Court erred in defining and applying the common general knowledge*

[15] Patents are to be read and construed from the point of view of the person of skill in the relevant art (POSITA), including all of the common general knowledge (CGK) that person has.



This knowledge is relevant to the construction of the patent claims in issue, as well as to whether those claims meet certain requirements for validity.

[16] Munchkin does not take issue with the Federal Court’s discussion of the POSITA, including the statement at paragraph 376 of the Decision that, even though they are not inventive, they are “reasonably diligent in keeping up to date with the diaper cassette market.” This description is consistent with the guidance of the Supreme Court of Canada in *Whirlpool Corp. v. Camco Inc.*, 2000 SCC 67, [2000] 2 S.C.R. 1067 at para. 74.

[17] Munchkin also does not take issue with the following definition of the CGK by the Federal Court at paragraph 86 of the Decision, with which I agree:

The [CGK] is the technical knowledge that was generally known by the POSITA, as defined, at the relevant time in the field of art or science to which the patent relates (*Apotex Inc v Sanofi-Synthelabo Canada*, 2008 SCC 61, [2008] 3 SCR 265 [*Sanofi*] at para 37). It is only a subset of the state of the art generally and does not include all the information in the public domain (*Ibid; Hospira [Healthcare Corporation v. Kennedy Trust for Rheumatology Research*, 2020 FCA 30], para 84). It is also defined in relation with the POSITA because it constitutes the knowledge of the skilled person at the time. *Fox on [the Canadian Law of Patents*, 5th ed. (Toronto: Thompson Reuters, 2019) (loose-leaf updated 2020-6)] describes it as including “what the person may reasonably be expected to know and to be able to find out. It is all the knowledge which is generally known and generally regarded as a good basis for further action by the bulk of those engaged in the field to which the invention relates” (#4:14 - (b)).

[18] Munchkin does, however, argue that the Federal Court erred in failing to include certain products on the diaper cassette market as part of the POSITA’s CGK, more particularly Angelcare’s product called Diaper Genie II. Munchkin acknowledges that the definition of the CGK is a question of mixed fact and law to which the standard of review of palpable and overriding error normally applies, but asserts that the exclusion of the Diaper Genie II raises an

extricable question of law reviewable for correctness. Munchkin also argues that the Federal Court erred by applying a different definition of the POSITA and their CGK for the purposes of claim construction as compared to the consideration of the prior art for the purposes of assessing patent validity issues. I will consider these arguments in turn.

(1) POSITA's knowledge of products on the diaper cassette market

[19] Despite acknowledging at paragraph 376 of the Decision that the POSITA is reasonably diligent in keeping up to date with the diaper cassette market, the Federal Court stated in the next paragraph that the POSITA "would not have specific knowledge about product line extensions and the legacy issues that accompany the development of such products, nor about the development of disposable or consumable products." The Federal Court went on to cite the following passage from this Court's decision in *Mylan Pharmaceuticals ULC v. Eli Lilly Canada Inc.*, 2016 FCA 119, [2017] 2 F.C.R. 280 at paragraph 24: "Unlike the prior art, which is a broad category encompassing all previously disclosed information in the field, a piece of information only migrates into the [CGK] if a skilled person would become aware of it and accept it as 'a good basis for further action'". The Federal Court concluded that the Diaper Genie products, including Diaper Genie II, had not achieved the required level of acceptance.

[20] In my view, this conclusion is flawed. The POSITA's ignorance of products on the diaper cassette market seems to have been based on the fact that the POSITA was defined in terms of industrial design generally, and not in relation to the diaper cassette market specifically. While I see no clear error in the definition of the POSITA, it is incongruous to omit from the CGK products that were on the market to which the patent in issue explicitly relates. The 128 Patent

even mentions Diaper Genie products by name. These products were certainly well known to those familiar with the diaper cassette market.

[21] By definition, the POSITA is aware of products on the market to which the patent relates; and the patent relates to diaper cassettes. The failure to include those products within the CGK was an error either in describing the CGK itself, or in describing the underlying POSITA. I conclude that the error is in the scope of the CGK. I further conclude that this error applies to all of the patents in issue.

[22] However, despite having concluded that the Federal Court erred in omitting the Diaper Genie II from the CGK, I find that this error would not have changed the result of any of the conclusions that are in issue in this appeal, and hence this error is insufficient to warrant allowing Munchkin's appeal. My reasons for this finding are explained later in these reasons as they arise in discussing the issues.

(2) Consistency of definition of CGK

[23] Munchkin argues that the Federal Court erred by imbuing the POSITA with sufficient CGK concerning spatial geometry and design elements to understand how to apply terms like "registration features" and "alignment features" in the 128 Patent and terms like "clearance" and "chamfer" in the Angelcare Patents for the purposes of claim construction, while denying the POSITA such knowledge when considering the prior art.

[24] I am not convinced that the Federal Court made any such error. It seems to have understood that the POSITA and the scope of their CGK should be the same for the purposes of construing the claims in issue as for the purposes of understanding the relevance of the prior art to issues like anticipation and obviousness. At paragraph 375 of the Decision, in discussion of obviousness, the Federal Court noted that it had already defined the POSITA in the context of the claim construction analysis, and that it was not necessary to repeat that definition. Similarly, with regard to CGK, and still in the context of obviousness, the Federal Court referred to its claim construction analysis: see paragraph 377 of the Decision.

[25] I am also not convinced that the Federal Court, despite acknowledging the need for consistency in the skills of the POSITA and the scope of the CGK, actually failed to follow this principle.

B. *Whether the Federal Court applied the wrong legal test to assess whether a prior disclosure to a third party constituted an anticipation of the patents in issue*

[26] This issue concerns a disclosure made by the named inventor of the Angelcare Patents, Michel Morand, (or his design firm) more than one year before the October 3, 2008 filing date thereof. Such a disclosure, if it made the subject matter of the Angelcare Patents available to the public, would constitute an anticipation and render said patents invalid pursuant to paragraph 28.2(1)(a) of the *Patent Act*. The key questions are whether the disclosure in question (hereinafter referred to as the Morand Disclosure) was both non-confidential and sufficient to enable a POSITA to make the invention. A negative answer to either of these questions leads to the conclusion that the Morand Disclosure was not anticipatory.

[27] The Morand Disclosure occurred on January 9, 2007 and was in the form of an email to a potential supplier, S.A. Initial (Initial), requesting a price quote for a prototype of the body of the diaper cassette that Mr. Morand was developing. The email included a CAD (computer-aided design) file that showed the body of the cassette from various angles in three-dimensional space. Initial provided the requested quote and, after being retained, produced the cassette body.

(1) Whether the Morand Disclosure was non-confidential

[28] The confidentiality (or not) of the Morand Disclosure is relevant because a confidential disclosure does not make the disclosure “available to the public” as contemplated in paragraph 28.2(1)(a) of the *Patent Act*, and hence is not anticipatory.

[29] Munchkin notes that Initial was at arm’s length from Mr. Morand, his design firm and Angelcare at the time of the disclosure. Munchkin also notes that the January 9, 2007 email was one of his first dealings with Initial, and no non-disclosure agreement was signed. Munchkin argues that Initial received the Morand Disclosure without any obligation to keep it confidential, and hence it was made available to the public.

[30] The Federal Court properly acknowledged that “an invention communicated to a single member of the public who is free to use it as they please will make the invention available to the public for the purposes of anticipation under paragraph 28.2(1)(a) of the *Patent Act*”: see paragraph 336 of the Decision. However, the Federal Court concluded that Initial was not free to use the information disclosed to it in the January 9, 2007 email as it pleased, and therefore the Morand Disclosure did not meet the criteria for anticipation.

[31] In its analysis, the Federal Court relied on this Court's decision in *Corlac Inc. v. Weatherford Canada Inc.*, 2011 FCA 228, [2011] F.C.J. No. 1090 (*Corlac*), and the discussion in that decision of the "reasonable person test" described in *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, 61 D.L.R. (4<sup>th</sup>) 14 (*Lac Minerals*). At paragraph 48 of *Corlac*, this Court stated:

Information will be considered to have been exchanged in a confidential relationship where "any reasonable man standing in the shoes of the recipient of the information would have realised that upon reasonable grounds the information was being given to him in confidence": *Coco [v. A.N. (Engineers) Ltd.]*, [1969] R.P.C. 41 (Ch.), pp. 47, 48. The following passage from *Coco* (p. 51) was also referred to by Sopinka J. in *LAC Minerals* and cited by the judge in this case:

In particular, where information of commercial or industrial value is given on a business-like basis and with some avowed common object in mind, such as a joint venture or the manufacture of articles by one party for the other, I would regard the recipient as carrying a heavy burden if he seeks to repel a contention that he was bound by an obligation of confidence.  
[emphasis added]

[32] Munchkin does not take issue with this statement of the law. However, Munchkin does take issue with the Federal Court's statements (i) at paragraph 339 of the Decision that the manufacture of articles by a party for another would *prima facie* satisfy the reasonable person test, and (ii) at paragraph 348 of the Decision that Initial being in the business of making prototypes inherently suggests that it had an obligation to treat the Morand Disclosure as confidential. Munchkin argues that these statements extend an obligation of confidentiality to all manufacturers, even those who receive unsolicited information.

[33] With regard to the Federal Court's statement at paragraph 339, I see no error. The presumption of an obligation of confidence owed by a manufacturer of articles to its client is fully supported by the passage quoted above from *Coco* that was referred to in *Lac Minerals*.

[34] With regard to paragraph 348 of the Decision, Munchkin cites authority for distinguishing the obligation of confidentiality based on whether or not the information in question was received further to a solicitation, and argues that the Morand Disclosure was not solicited by Initial. I am not convinced that the Morand Disclosure was unsolicited in reality. Initial, as a manufacturer of prototypes, apparently exists, at least in part, for the purpose of receiving disclosures of confidential information. In this sense, Initial implicitly solicits confidential information. This is so even if such solicitation is to the broader public rather than to a particular person. The Federal Court found as a fact that part of Initial's business model is the confidential treatment of information it receives in the context of a request for a price quote for the manufacture of a prototype: see paragraph 349 of the Decision. Based on this, I see no reviewable error in the Federal Court's conclusion that a reasonable person in Initial's position would have understood that the Morand Disclosure was made in confidence. This was a factually-suffused conclusion, and I am not convinced that the Federal Court made any palpable and overriding error in this regard.

[35] Munchkin also argues that the Federal Court erred by determining the confidential nature of the Morand Disclosure from the perspective of Mr. Morand rather than the perspective of the recipient, Initial. Munchkin cites paragraphs 349 and 350 of the Decision that discuss Mr. Morand's expectation of confidentiality.

[36] The reasonable person test, as described in *Corlac* and *Lac Minerals*, does indeed focus on the understanding of the recipient of the information. However, it is clear that the Federal Court understood this and never lost sight of it. In addition to citing the discussion of the

reasonable person test in *Corlac* and in *Lac Minerals* at paragraph 337 of the Decision, the Federal Court repeatedly acknowledged that the focus is on the perspective of the recipient of the information: see paragraphs 338, 339, 349, 351, 353 and 358 of the Decision. The Federal Court's references to Mr. Morand's expectations were in the context of the discussion of the nature of Initial's business as a prototype manufacturer, and were not erroneous.

[37] I see no reviewable errors in the Federal Court's application of the law to the facts as they relate to the Morand Disclosure. In my view, it was open to the Federal Court to find that the disclosure requirement for anticipation was not met.

- (2) Whether the Morand Disclosure was sufficient to enable a POSITA to make the invention

[38] The Federal Court found that the Morand Disclosure was not sufficient to be enabling. This was an additional basis for dismissing Munchkin's allegation that the Morand Disclosure was anticipatory.

[39] Munchkin argues that the Federal Court erred in its assessment of enablement. However, its failure to convince me that the Federal Court erred concerning the confidential nature of the Morand Disclosure makes it unnecessary to consider Munchkin's argument on enablement.

[40] This is one issue on which Munchkin raises the Federal Court's erroneous finding that the Diaper Genie II was not part of the CGK. However, since enablement of the Morand Disclosure need not be determined, the scope of the CGK is not determinative on this issue.



C. *Whether the Federal Court erred by failing to conclude that the 128 Patent anticipated claims of the Angelcare Patents*

[41] There is no dispute that the 128 Patent is citable against the Angelcare Patents for assessing anticipation. Even though the 128 Patent was not made available to the public (published) until after the filing and priority dates of the Angelcare Patents, it is citable as a co-pending application with a priority date (claim date) before the claim date of the Angelcare Patents: see paragraph 28.2(1)(d) of the *Patent Act*. The Federal Court recognized this.

[42] Munchkin argues that the Federal Court erred by conflating the concepts of anticipation and double patenting. Munchkin also argues that the Federal Court erred by applying a narrower definition of CGK for assessing anticipation that it did for construing the claims in issue.

(1) Conflating anticipation and double patenting

[43] The Federal Court found that the 128 Patent did not anticipate the 159 Patent based on the absence of disclosure in the former patent of a cover of the cassette that extends from the tubular wall toward the outer boundary of the cassette, which is an essential element of each of the independent claims of the 159 Patent: see paragraph 323 of the Decision. Munchkin cites paragraph 324 of the Decision in support of its argument that the Federal Court erred on this issue:

In my view, whether the independent claims speak of the cover engaging the interior or tubular wall and extending outwardly toward the outer boundary of the cassette, or speak of the tube that overlies the cover, these features are not disclosed by the 128 Patent. The cover of the 128 Patent engages the outside wall of the cassette, not the tubular wall as clearly defined in its Claim 1: "...said cover defining an interior peripheral edge which is spaced away from the tubular portion

thereby defining a gap there between...”. The Defendants have the burden of showing, on a balance of probabilities, that the 128 Patent disclosed the 159 Patent such that it anticipates Patent 159. That burden was not discharged. It follows that all dependent claims are equally not anticipated in view of the absence of disclosure of elements of the independent claims. [emphasis added]

[44] Munchkin argues that the Federal Court’s focus on claim 1 of the 128 Patent in the second sentence quoted above indicates that the Federal Court improperly limited itself to comparing the claims of the 128 Patent to the claims of the 159 Patent, which is the approach to be followed in assessing double patenting rather than anticipation. It argues that the 128 Patent was not limited by claim 1, and the location of the cover was not relevant to other features of the cassette described therein.

[45] I see no indication that the Federal Court misapplied the test for anticipation. It stated repeatedly in relation to the 159 Patent that it was concerned with what was disclosed in the 128 Patent, not only what was defined in its claims: see paragraphs 320, 322, 323 and 324 of the Decision. The Federal Court properly noted that Munchkin bore the burden of proof on anticipation. Earlier in its reasons (paragraph 288), the Federal Court noted that “the test to satisfy anticipation is a difficult one to meet”, and quoted *Free World Trust v. Électro Santé Inc.*, 2000 SCC 66, [2000] 2 S.C.R. 1024 at paragraph 26, which in turn quoted *Beloit Canada Ltd. v. Valmet OY* (1986), 8 C.P.R. (3d) 289 (F.C.A.) at p. 297:

One must, in effect, be able to look at a prior, single publication and find in it all the information which, for practical purposes, is needed to produce the claimed invention without the exercise of any inventive skill. The prior publication must contain so clear a direction that a skilled person reading and following it would in every case and without possibility of error be led to the claimed invention.

[46] Clearly, the Federal Court was not convinced, after hearing Munchkin's argument, that the 128 Patent had reached this high bar. In that, I can see no error. Munchkin's argument amounts to no more than the 128 Patent could encompass a cover as defined in the 159 Patent. Munchkin does not, in my view, point to anything in the 128 Patent that would lead a skilled person "in every case and without possibility of error" to the cover claimed in the 159 Patent.

[47] In my view, the Federal Court's reference to claim 1 of the 128 Patent was illustrative, and not limiting.

(2) Consistency of definition of CGK

[48] This issue concerns Munchkin's allegation that the claims in issue of the 384 Patent were anticipated by the 128 Patent. Munchkin argues that the Federal Court would have found anticipation if it had applied a definition of the CGK that was as broad as that applied in construing the terms "chamfer" and "taper" in the 384 Patent. In that event, Munchkin argues, the Federal Court "would have concluded that the 128 Patent disclosed recesses (clearances) in the form of a chamfer because this shape was known to the Skilled Person."

[49] I disagree that the Federal Court erred in this regard. As noted under the previous heading, the test to satisfy anticipation is a difficult one to meet. The fact that chamfers were known to the POSITA was insufficient to require the Federal Court to find that such a person would be led by the disclosure of the 128 Patent, in every case and without possibility of error, to the invention claimed in the 384 Patent. The Federal Court carefully considered whether the 128 Patent disclosed the chamfer defined in the claims of the 384 Patent, and found that it did not.

[50] I reach the same conclusion with regard to the term “taper” in the 384 Patent.

[51] My view on this issue is unaffected by the question of whether or not the Diaper Genie II formed part of the CGK.

D. *Whether the Federal Court erred in its conclusions on obviousness*

[52] Munchkin takes issue with the Federal Court’s conclusion that the claims that remain in issue were inventive. Munchkin argues that the Federal Court erred in defining the inventive concepts of the 128, 421 and 159 Patents. Munchkin also argues that errors by the Federal Court relating to the CGK and the state of the art had an overriding impact on its obviousness analysis.

(1) Inventive concepts of the 128, 421 and 159 Patents

[53] Munchkin agrees with the Federal Court’s statement, at paragraph 369 of the Decision, that an inventive concept is the solution taught by the patent to the problem that motivated the invention (see *Apotex Inc. v. Shire LLC*, 2021 FCA 52, [2021] 3 F.C.R. 46 at para. 84 (*Shire*) citing *Bristol-Myers Squibb Canada Co. v. Teva Canada Limited*, 2017 FCA 76, 146 C.P.R. (4<sup>th</sup>) 216 at para. 75). Munchkin also acknowledges the statement at paragraph 86 of *Shire* that “[a]lthough a claim by claim analysis of each claim’s inventive concept is to be conducted, it is important to remember that a single, overarching inventive concept connects every claim of a patent, with its genesis usually in the independent claim(s).”

[54] Regarding the 128 Patent, Munchkin criticizes the Federal Court's inclusion of the placement of the gap on the cassette cover as part of the inventive concept. It notes that the claims of the 128 Patent that were asserted at trial to be infringed, claims 11, 12, 13, 16, 18, 22 and 23, do not include this feature as an element.

[55] While it is true that those claims do not define the placement of the gap on the cassette cover, it is important to note that other claims of the 128 Patent (claims 1 to 10, 20 and 21) do. Moreover, all of the claims of the 128 Patent were in issue before the Federal Court on the question of validity. Accordingly, the Federal Court did not err by noting this feature as part of the inventive concept of some of the claims in issue at trial, so long as it bore in mind that the inventive concept is to be determined claim by claim. This it clearly did, as indicated at paragraph 395 of the Decision.

[56] Regarding the 421 and 159 Patents, Munchkin argues again that the Federal Court erred by including in the inventive concept features that, though they are included in the claims in issue, they allegedly do not contribute to the inventive result.

[57] I see no error in defining the inventive concept in terms of the wording of the claim in question. Whether or not a feature of a patent claim contributes to the inventive result, there is no error in including it as an essential element of the claim for the purposes of assessing inventiveness, so long as a proper claim construction shows that feature indeed to be an essential element.

(2) Scope of common general knowledge and state of the art

[58] Munchkin argues that the Federal Court erred in several ways in its application of the CGK and the state of the art to its obviousness analysis.

[59] Munchkin argues that the Federal Court made a palpable error in assessing the obviousness of claims of the 128 Patent when it stated at paragraph 410 of the Decision that “the placement of the gap [between the cassette cover and the cassette body] is indeed a difference between the state of the art and the inventive concept of the 128 Patent...”. Munchkin notes that the Twistaway product, which was on the market prior to the Diaper Genie II (and was therefore part of the state of the art), had a gap located at the inside edge of the cover, as defined in certain claims of the 128 Patent.

[60] Angelcare acknowledges that the Twistaway product did indeed have such a gap placement. However, it argues that this fact is insufficient to establish that any claims of the 128 Patent were obvious as a result.

[61] I agree. The claims of the 128 Patent define several elements that were not present in the Twistaway product. Moreover, Munchkin’s expert evidence before the Federal Court did not assert obviousness based on the location of the gap in the Twistaway product. Accordingly, even if the Federal Court erred palpably regarding the state of the art as regards the gap placement, I am not convinced that such an error was overriding. On this question of mixed fact and law, this conclusion is fatal to Munchkin’s argument.

[62] I add here that the Federal Court's incorrect exclusion of the Diaper Genie II from the CGK appears to have had no effect on the result of its obviousness analysis. The Federal Court treated the Diaper Genie II as part of the state of the art and took it into account in its obviousness analysis. I do not believe that the Federal Court's conclusions on obviousness would have been different if the Diaper Genie II had been considered part of the CGK rather than just part of the state of the art.

[63] Munchkin also argues that the 128 Patent should have been found obvious in view of the Morand Disclosure. This argument must fail, as discussed in paragraph 28 and following above in respect of Munchkin's anticipation argument, on the basis that the Morand Disclosure was confidential. It therefore was not available to the public, and did not form part of the state of the art.

[64] Munchkin further argues that the Federal Court erred in concluding that the problem of improper orientation of the cassette, which is addressed by the patents in issue, was unknown or hard to detect. Munchkin bases this argument on various points of evidence of which the Federal Court was apparently aware.

[65] I find that this argument amounts to little more than a disagreement with the Federal Court's weighing of the evidence. In my view, it was open to the Federal Court to reach the conclusions it did concerning the public knowledge of the orientation problem. I am not convinced that the Federal Court made a palpable and overriding error on this question of mixed fact and law, nor that it made an extricable error of law thereon.

[66] Finally, Munchkin criticizes the Federal Court for basing its conclusions of non-obviousness in part on the fact that several solutions were available to the orientation problem. It argues that, “[i]f a particular solution is an obvious one to choose or try, it is not any less so from a technical point of view merely because there are a number, and perhaps a large number, of other obvious solutions as well.”

[67] If I understand this argument correctly, it appears to contradict the guidance on assessing obviousness to try offered by the Supreme Court of Canada in *Apotex Inc. v. Sanofi-Synthelabo Canada Inc.*, 2008 SCC 61, [2008] 3 S.C.R. 265 (*Sanofi*). One of the relevant factors to be considered is whether there are a finite number of identified predictable solutions known to persons skilled in the art: see *Sanofi* at para. 69. I see no error in the Federal Court noting that several other solutions were available to solve the problem addressed in the patent in issue.

E. *Whether the Federal Court erred in finding Munchkin, Inc. liable for infringing activities in Canada*

[68] As indicated at paragraph 3 above, the Federal Court found the appellant, U.S.-based Munchkin, Inc., was liable for patent infringement along with its wholly owned subsidiary, the other appellant, Munchkin Baby Canada, Ltd. (Munchkin Canada). In finding Munchkin, Inc. liable for infringement, the Federal Court relied on evidence that Munchkin Canada had never had any designers, and that all of the products they distributed in Canada were designed by Munchkin, Inc. The Federal Court also noted that Munchkin Canada had only seven employees, whose roles were limited to sales, marketing and warehousing, and that Munchkin, Inc. made no distinction between decisions undertaken for the U.S. market and the Canadian market. The



Federal Court found Munchkin, Inc. liable for infringement in Canada on the basis that its design and marketing decisions (though made outside Canada) “had a direct impact on the resulting infringing activities in Canada”: see paragraph 282 of the Decision.

[69] Munchkin argues that the Federal Court erred in finding Munchkin, Inc. liable. Firstly, it notes that Angelcare did not plead before the Federal Court (as it now argues) that Munchkin, Inc. was in “common cause” with Munchkin Canada or that it should be held jointly and severally liable for Munchkin Canada’s infringing activities. Munchkin argues that these issues should not be considered in the present appeal, as they were raised for the first time on appeal in Angelcare’s responding memorandum of fact and law.

[70] In my view, Munchkin’s argument based on insufficiency of pleading cannot take the question of common cause and joint and several liability off the table. Angelcare is not raising a new argument for Munchkin Inc.’s liability. The Federal Court already found Munchkin, Inc. liable. Angelcare is instead putting labels on the basis for the Federal Court’s conclusion. Munchkin’s argument is effectively that the Federal Court was not permitted to consider questions of common cause and joint and several liability because they had not been properly pleaded and argued. I disagree. Angelcare’s pleading before the Federal Court alleged that Munchkin, Inc. was liable for patent infringement. Munchkin, Inc.’s liability was clearly in issue. In addition, the Federal Court heard and considered evidence regarding Munchkin, Inc.’s liability, apparently without objection from Munchkin. No question as to the sufficiency of Angelcare’s pleading was raised before the Federal Court. The Federal Court was entitled to

consider this issue. The real question is whether it erred in its consideration of the law and the facts in that regard.

[71] Munchkin notes that Munchkin, Inc. (i) had no role in the manufacture, use or sale of the infringing products (these are the activities enumerated in section 42 of the *Patent Act* as being exclusive to the patentee and its legal representatives), (ii) had no office or employees in Canada, (iii) made design and marketing decisions, and (iv) did nothing in Canada. Munchkin cites authorities of this Court to the effect that, for activities to infringe a Canadian patent, they must take place in Canada: *Domco Industries Ltd. v. Mannington Mills, Inc.* (1990), 29 C.P.R. (3d) 481, [1990] F.C.J. No. 269 at p. 495; *Hospira Healthcare Corporation v. Kennedy Trust for Rheumatology Research*, 2020 FCA 30, [2020] F.C.J. No. 179 at para. 37.

[72] In my view, these authorities do not assist Munchkin on this issue. It is true that, to infringe a Canadian patent, infringing activities must take place in Canada. However, a person cannot avoid liability for infringement by setting itself up outside Canada, and then making arrangements from there that result in infringement of a patent in Canada. The key is whether the infringing activities took place (they did in this case), and whether the person located outside Canada (here, Munchkin, Inc.) made itself liable therefor, either by having common cause with a Canadian actor (Munchkin Canada) or otherwise being a party to the infringement.

[73] The evidence cited by the Federal Court was sufficient, in my view, to permit it to conclude that Munchkin, Inc. had participated in the infringing activities sufficiently to be liable

for infringement. This was a question of mixed fact and law, and I see no palpable and overriding error nor any extricable error of law in the Federal Court's analysis.

F. *Conclusion on the first appeal (File No. A-105-22)*

[74] I would dismiss the first appeal. Despite the Federal Court's improper exclusion of the Diaper Genie II from the CGK, I have concluded that the result on the issues raised in this appeal would have been the same if the Diaper Genie II had been included in the CGK.

[75] As agreed by the parties, I would award the costs of this appeal to Angelcare in the amount of \$7,500, all-inclusive.

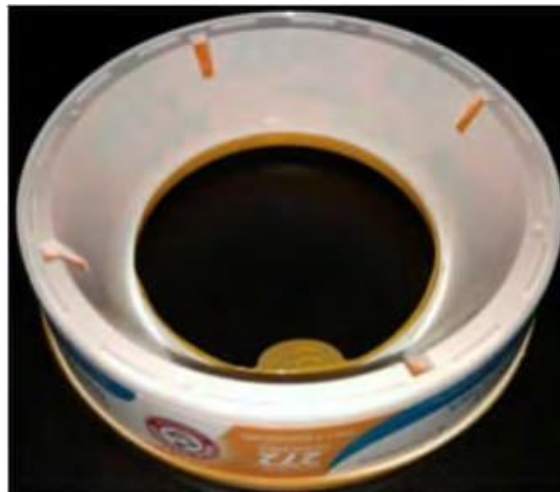
V. Issues in the Second Appeal (File No. A-106-22)

[76] As indicated earlier, Angelcare raises two issues in the second appeal. These are addressed under the sub-headings below.

A. *Whether the Federal Court erred in its construction of claim 6 of the 384 Patent and claim 1 of the 159 Patent*

[77] This issue concerns the term "formed integrally" to qualify a "clearance" in an annular receptacle of a cassette. Angelcare does not take issue with the Federal Court's construction of the term "formed integrally". Rather, it objects to the Court reading this term into claims whose text does not include it.

[78] Claim 1 of the 384 Patent includes this term. Before the Federal Court, Angelcare argued that the four slots at the bottom of the central opening in Munchkin's Generation 4 product (shown upside down below) constituted clearances "formed integrally", as defined in that claim.



[79] The Federal Court disagreed with Angelcare's argument, finding that the slots in Munchkin's Generation 4 product were not clearances "formed integrally" because they did not have a back wall: see paragraph 192 of the Decision. Instead, they were open at the back, communicating directly with the interior of the annular receptacle containing the flexible tubing. This was the basis on which the Federal Court concluded that Munchkin's Generation 4 product did not infringe claim 1 of the 384 Patent. The Federal Court extended this conclusion to the other independent claim of the 384 Patent (claim 6), based on the parties' experts' testimony that the two claims were "effectively the same". The Federal Court further extended this conclusion to claims 1, 21 and 51 of the 159 Patent based on the parties' reliance, for the purposes of that patent, on their arguments in relation to the 384 Patent: see paragraph 207 of the Decision.

[80] Angelcare does not take issue with the Federal Court's conclusion that Munchkin's Generation 4 product lacks a clearance that is "formed integrally" because its slots do not have a back wall. It accepts that this product does not infringe claim 1 of the 384 Patent. However, Angelcare notes that none of the other claims mentioned in the previous paragraph defines the clearance as "formed integrally". Angelcare argues that it did not agree before the Federal Court that the term "formed integrally" should be read into these other claims that omit the term. On this basis, Angelcare argues that the Federal Court erred in its findings of non-infringement of claim 6 of the 384 Patent and claim 1 of the 159 Patent.

[81] Munchkin argues that the Federal Court did not read the term "formed integrally" into claims that do not include these words. Rather, Munchkin argues, the Federal Court concluded that the slots of Munchkin's Generation 4 product did not constitute a "clearance", whether formed integrally or not. Munchkin makes several submissions in support of this argument, but I am not convinced that these submissions are supported by the Federal Court's reasons. Its conclusion of non-infringement of claim 1 of the 384 Patent is based only on the term "formed integrally", and its conclusions on the other claims are based on an understanding that those other claims are similar to claim 1 of the 384 Patent. The Federal Court does not acknowledge the absence of the term "formed integrally" in those other claims. It appears likely that the Federal Court simply did not notice that claim 6 of the 384 Patent and claim 1 of the 159 Patent do not explicitly define the clearance as "formed integrally".

[82] Munchkin also argues that it was open to the Federal Court to find that the other claims were similar to claim 1 of the 384 Patent (since Angelcare admitted as much), and the principle

of claim differentiation (whereby meaning should be given to differences in wording between one claim and another) is no more than a rebuttable presumption.

[83] Quite aside from whether Angelcare actually admitted that claim 6 of the 384 Patent was effectively the same as claim 1 (Angelcare denies this), I remain concerned that the Federal Court does not seem to have turned its mind to the key difference in text between these two claims. That was an error of claim construction, and hence an error of law. The same applies to the Federal Court's consideration of infringement of claim 1 of the 159 Patent. Neither of these claims defines the clearance as being formed integrally.

B. *Whether the Federal Court erred in finding that Munchkin's Generation 4 cassette does not infringe any of claims 9 or 10 of the 384 Patent or claims 1, 16, 17, 18, 19 or 20 of the 159 Patent*

[84] Based on the dependence, either directly or indirectly, of claims 9 and 10 of the 384 Patent on claim 6, the question of infringement of these claims by Munchkin's Generation 4 product is in issue. Likewise, in addition to claim 1 of the 159 Patent, the question of infringement of claims 16, 17, 18, 19 and 20 by Munchkin's Generation 4 product arises based on dependence of these claims, either directly or indirectly, on claim 1. Claim 6 itself of the 384 Patent is not in issue on the question of infringement because the Federal Court found this claim to be invalid, and that conclusion is not disputed.

[85] Angelcare argues that this Court has all the necessary information to decide the outstanding infringement issues, and should do so instead of remitting these questions to the Federal Court for reconsideration. It argues that the delays since it commenced its infringement

action, together with expected additional delays going forward if the matter is remitted, favour this Court making a decision now. Angelcare also argues that the specific question of infringement of the claims identified in the previous paragraph by Munchkin's Generation 4 product is simple and requires no weighing of evidence. Angelcare points to the similarity of Generation 4 to previous generations of Munchkin's products that the Federal Court already found to be infringing. Angelcare urges this Court to conclude that Munchkin's Generation 4 product infringes each of claims 9 and 10 of the 384 Patent and claims 1, 16, 17, 18, 19 and 20 of the 159 Patent.

[86] For its part, Munchkin argues on various grounds that its Generation 4 product does not infringe these claims. It cites differences between the various generations of Munchkin's products in issue. It also cites other elements of the claims in issue that it argues are missing from Generation 4. In the alternative, Munchkin argues that this Court should not decide the matter, and should instead remit the outstanding infringement issues to the Federal Court on the basis that they remain complex. It refers to the complexity of some aspects of the issues that the Federal Court did not comment on in its Decision. It also refers to the depth of the Federal Court's familiarity with the issues following the lengthy trial.

[87] I have concluded that we have enough information, including relevant evidence and conclusions of the Federal Court, to reach our own conclusions on the outstanding infringement issues. As detailed below, I would find that Munchkin's Generation 4 products infringe all of the claims of the 384 and 159 Patents identified in paragraph 85 above.

(1) Whether to decide the outstanding infringement issues

[88] Both parties refer to this Court's decision in *Sandhu Singh Hamdard Trust v. Navsun Holdings Ltd.*, 2019 FCA 295, 169 C.P.R. (4<sup>th</sup>) 325 at para. 60 (*Sandhu Singh Hamdard Trust*), for the criteria to consider in determining whether this Court should decide the outstanding infringement issues:

The factors relevant in determining whether to decide rather than remit include whether the case is factually voluminous and factually complex, whether the case involves documentary evidence or live evidence and assessments of credibility, whether the result is uncertain and factually suffused, whether the parties have made specific submissions on the issues that remain to be decided, and whether the further delay associated with remitting the matter would be contrary to the interests of justice: *Pfizer Canada Inc. v. Teva Canada Limited*, 2016 FCA 161 at para. 157, 400 D.L.R. (4<sup>th</sup>) 723, leave to appeal refused, [2017] 1 S.C.R. xviii; *Canada v. Piot*, 2019 FCA 53 at paras. 113-115, 124-128; *Wells v. Newfoundland*, [1999] 3 S.C.R. 199 at paras. 67-68, 177 D.L.R. (4<sup>th</sup>) 73.

[89] Though this case is “factually voluminous and factually complex”, such that the first of these factors favours remitting to the Federal Court, I find that the other factors favour deciding now. There is no need to weigh evidence or assess credibility. The parties have had an opportunity to address the outstanding infringement issues and, based on the Federal Court's conclusions provided in the Decision, the result is not uncertain. Moreover, the further delay associated with remitting these issues to the Federal Court would, in my view, be unnecessary and contrary to the interests of justice.

[90] I conclude that the result on the outstanding infringement issues is not uncertain based in part on the Federal Court's conclusions that Munchkin's Generation 2 and 3 products infringe all of the claims that remain in issue, which conclusions are not in dispute. Accordingly, a



reasonable approach to determining infringement by Generation 4 is to ask whether any of the differences between these generations of Munchkin's products could lead to a conclusion that an essential element of any of said claims is missing.

(2) Analysis of the outstanding infringement issues

[91] Munchkin identifies the key differences between its Generation 4 product and the Generation 2 and 3 products. For convenience, a photograph of a Generation 3 product upside down is reproduced here:



[92] A photograph of the Generation 4 product, also upside down, is reproduced at paragraph 78 above.

[93] Munchkin notes that the Generation 3 product had a vertical annular or tubular inside wall and a narrow ring-shaped bottom, with an angled, chamfered wall connecting the two. By

comparison, the Generation 4 product has a conical inside wall that replaces the tubular and chamfered walls.

[94] Munchkin also notes that the Generation 3 product had 12 slots rather than the four in the Generation 4 product. In addition, I note that the slots of the Generation 4 product have side walls extending into the internal volume of the cassette, which are not present in Generation 3.

(a) *The 384 Patent*

[95] At paragraph 189 of the Decision, the Federal Court summarized Munchkin's arguments that its Generation 4 product does not include a "clearance" as defined in claims 1 and 6 of the 384 Patent. Munchkin acknowledges that some of those arguments were expressly rejected by the Federal Court. Munchkin does not take issue with those rejections.

[96] On the other hand, Munchkin notes that the Federal Court expressly accepted its argument that the Generation 4 product does not include a "clearance" because its slots are not "formed integrally with the annular wall" because they lack back walls. I have discussed above at paragraphs 77 and following, why I conclude that that finding is erroneous to the extent that it relates to claim 6 of the 384 Patent and claim 1 of the 159 Patent.

[97] Finally, Munchkin notes that the Federal Court did not expressly address three further arguments as to why the slots of the Generation 4 product are not clearances:

A. They are not empty spaces;

- B. The absence of a back wall means they lack an internal volume; and
- C. They cannot delimit a portion of the volume of reduced width or cause a reduced width of the internal volume of the cassette.

[98] In my view, these arguments could not have assisted Munchkin before the Federal Court. None of the claims that remain in issue requires that the clearance be an empty space. Similarly, none of said claims requires that the clearance have an internal volume. The clearance described in the Angelcare Patents receives a corresponding surface in the diaper pail to ensure proper orientation of the cassette. The slots of the Generation 4 product perform a similar function.

[99] Regarding the third of the arguments enumerated above, claim 6 of the 384 Patent does define the clearance as “causing a reduced width of said portion of the volume relative to the volume above the clearance.” The term “said portion of the volume” in claim 6 refers to

...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 dispensed in the accumulated condition in said portion of the annular receptacle...

[100] I cannot conceive, and Munchkin does not argue, that the slots of the Generation 4 product could fail to meet the requirements of this element. Though they lack back walls, they clearly have side walls, which necessarily cause a reduced volume of the annular receptacle located outward of and side by side with them.

[101] Munchkin argues that its Generation 4 product does not infringe claim 6 of the 384 Patent in that the conical wall of the cassette is not an “annular wall” as defined therein. Munchkin cites

the Federal Court's conclusion that the conical wall of the Generation 4 product is not a "tubular wall" as defined in claim 2 of the 159 Patent, see paragraphs 147 and following of the Decision, and argues that the terms "annular wall" and "tubular wall" have the same meaning in the claims of the Angelcare Patents. Munchkin cites the testimony at trial of its expert to this effect, and argues that the Federal Court used the terms interchangeably.

[102] I do not accept Munchkin's argument, and I find it improbable that the Federal Court concluded, or would have concluded, that the terms "annular wall" and "tubular wall" mean the same thing. I see no indication in the Decision that the Federal Court intended such an interpretation. Paragraph 130 of the Decision twice uses the phrase "annular or tubular wall", but this appears to be simply a recognition that some of the claims in the patents in suit define an annular wall whereas others define a tubular wall.

[103] The Federal Court's reasons for concluding that the Generation 4 product lacks a tubular wall are specific to the word "tubular". They do not extend to the word "annular". At paragraph 152 of the Decision, the Federal Court distinguished the word "tubular" (which indicates a cylindrical shape) from words such as "conical" and "frusto-conical" (which does not). Similarly, nothing in the word "annular" necessarily indicates a cylindrical shape. Moreover, any conclusion that "tubular" and "annular" have the same meaning would lead one to question why two different words were used.

[104] The word "annular" is used to describe several features in the 384 and 159 Patents, and not all are cylindrical in shape. For example, the annular receptacle 38 described in both patents

is shown in the figures with an outside wall that is not cylindrical. As another example, the annular opening at an upper end of the annular receptacle (as defined in claim 6 of the 384 Patent) is oriented radially, not axially, and hence is not cylindrical in shape.

[105] Finally, and perhaps most importantly, the Federal Court's analysis at paragraphs 191 and 192 of the Decision implicitly accepts that the Generation 4 product does have an annular wall as defined in claim 6 of the 384 Patent. For example, at paragraph 191, the Federal Court accepts that the slots of Generation 4 are located "radially outward of a downward projection of the annular wall" (emphasis added), even though said wall is conical.

(b) *The 159 Patent*

[106] Turning to the 159 Patent, Munchkin argues that the absence of a tubular wall in the Generation 4 product leads to the conclusion that claim 2 is not infringed, and neither are claims 16, 17, 18, 19 and 20 by virtue of their dependence on claim 2. It is true that claim 2 defines a tubular wall as an essential element, and the absence of this element means that the Generation 4 product does not infringe that claim. However, claims 16, 17, 18, 19 and 20 are also dependent on claim 1, and so the absence of a tubular wall is insufficient to avoid infringement of these claims if all of the essential elements of claim 1 are present.

[107] Munchkin also argues that its Generation 4 product does not infringe the 159 Patent because the slots thereon are not "located outwardly of an imaginary projection of the wall extending downwardly along the central axis" as defined in claim 1 thereof. This is difficult to accept in view of the Federal Court's finding at paragraph 191 of the Decision (as noted at

paragraphs 105 above, and not disputed by Munchkin) that its Generation 4 product does have slots that are “located radially outward of a downward projection of the annular wall”, as defined in claim 6 of the 384 Patent. Munchkin attempts to distinguish these two clauses on the basis that the imaginary projection of the wall in claim 1 of the 159 Patent is “along a central axis” whereas claim 6 of the 384 Patent refers to a downward projection of the annular wall. Munchkin argues that the wall in question on the Generation 4 product is conical and therefore an imaginary projection of the wall extending downwardly would not be “along a central axis”.

[108] I disagree with this distinction. Claim 1 of the 159 Patent defines “a receptacle including a wall delimiting a central opening, the central opening extending along a generally vertical central axis”. Therefore, the central axis in the passage at issue quoted in the previous paragraph is that of the annular wall of the receptacle. However, that annular wall need not be cylindrical to have a central axis. A cone has a central axis. Also, the projection in question is imaginary; it need not follow the surface of the annular wall or any other actual part of the cassette.

[109] Further, whether the imaginary projection of the wall is along the central axis or along the surface of the annular wall is unimportant. Either way, there is no doubt that the slots of the Generation 4 product are located outwardly thereof.

(3) Conclusion on outstanding infringement issues

[110] Having considered (i) the Federal Court’s findings of infringement of claims 9 and 10 of the 384 Patent and claims 1, 16, 17, 18, 19 and 20 of the 159 Patent by Generations 2 and 3 of Munchkin’s products, (ii) the differences between those generations and the Generation 4

product, and (iii) Munchkin's non-infringement arguments, I have concluded that there is no need to remit to the Federal Court the question of infringement of these claims by the Generation 4 product. I am confident that, if the matter were remitted, the Federal Court would find that all of the claims in question are infringed thereby.

C. *Conclusion on the second appeal (File No. A-106-22)*

[111] I would allow the second appeal. I would amend the judgment that accompanied the Decision to set aside the Federal Court's conclusions of non-infringement of claims 9 and 10 of the 384 Patent and claim 1 of the 159 Patent (as well as claims 16, 17, 18, 19 and 20 dependent thereon) by Munchkin's Generation 4 product, and substitute findings of infringement. I would also issue a permanent injunction in the form proposed by Angelcare in its memorandum of fact and law.

[112] I would order that the costs of this appeal be paid to Angelcare by Munchkin in the agreed amount of \$7,500, all-inclusive, as agreed by the parties.

VI. Conclusions

[113] As indicated above, I would dismiss Munchkin's appeal in File No. A-105-22, and I would allow Angelcare's appeal in File No. A-106-22. I would amend the Federal Court's judgment to state that claims 9 and 10 of the 384 Patent and claims 1, 16, 17, 18, 19 and 20 of the 159 Patent are infringed by Munchkin's Generation 4 product, and I would issue a corresponding injunction.

[114] In respect of the two appeals, I would award Angelcare its costs in the all-inclusive amount of \$15,000.

"George R. Locke"

---

J.A.

"I agree.

Mary J.L. Gleason J.A."

"I agree.

Elizabeth Walker J.A."



**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-105-22 (lead file)

**STYLE OF CAUSE:** MUNCHKIN, INC. and  
MUNCHKIN BABY CANADA,  
LTD. v. ANGELCARE CANADA.  
and EDGEWELL PERSONAL  
CARE CANADA ULC and  
PLAYTEX PRODUCT, LLC

**AND DOCKET:** A-106-22

**STYLE OF CAUSE:** ANGELCARE CANADA INC. and  
EDGEWELL PERSONAL CARE  
CANADA ULC and PLAYTEX  
PRODUCTS, LLC v.  
MUNCHKIN, INC. and  
MUNCHKIN BABY CANADA,  
LTD.

**PLACE OF HEARING:** OTTAWA, ONTARIO

**DATE OF HEARING:** JUNE 4 AND 5, 2024

**REASONS FOR JUDGMENT BY:** LOCKE J.A.

**CONCURRED IN BY:** GLEASON J.A.  
WALKER J.A.

**DATED:** SEPTEMBER 27, 2024

**APPEARANCES:**

Vincent M. de Grandpré  
Benjamin K. Reingold  
Thomas Laur

FOR THE APPELLANTS/  
RESPONDENTS  
MUNCHKIN, INC. and  
MUNCHKIN BABY CANADA,  
LTD.

François Guay  
Guillaume Lavoie Ste-Marie  
Denise Felsztyna

FOR THE RESPONDENTS/  
APPELLANTS  
ANGELCARE CANADA INC. and  
EDGEWELL PERSONAL CARE  
CANADA ULC and PLAYTEX  
PRODUCTS, LLC

**SOLICITORS OF RECORD:**

Bennett Jones LLP  
Toronto, Ontario

FOR THE APPELLANTS/  
RESPONDENTS  
MUNCHKIN, INC. and  
MUNCHKIN BABY CANADA,  
LTD.

Smart & Biggar LLP  
Montreal, Quebec

FOR THE RESPONDENTS/  
APPELLANTS  
ANGELCARE CANADA INC. and  
EDGEWELL PERSONAL CARE  
CANADA ULC and PLAYTEX  
PRODUCTS, LLC