

Federal Court



Cour fédérale

Date: 20181228

Docket: T-1556-12

Citation: 2018 FC 1304

Ottawa, Ontario, December 28, 2018

PRESENT: The Honourable Madam Justice Elliott

BETWEEN:

HUMAN CARE CANADA INC.

Plaintiff/Defendant by Counterclaim

and

EVOLUTION TECHNOLOGIES INC.

Defendant/Plaintiff by Counterclaim

SUPPLEMENTARY JUDGMENT AND REASONS

[1] On December 21, 2018 Public Judgment and Reasons were issued in this matter under citation number 2018 FC 1302. Subsequently counsel jointly requested by letter dated December 21, 2018 that additional relief be provided which relief I consider to be appropriate to allow.

[2] Accordingly the original Public Judgment and Reasons in this matter is amended and, for ease of future reference, it is entirely replaced by the following judgment.

JUDGMENT IN T-1556-12

THIS COURT ADJUDGES AND DECLARES as follows:

1. Canadian Patent No. 2,492,392 (392 Patent) and each of its claims are valid;
2. The Defendant has infringed Claims 16 and 18 of the 392 Patent by its manufacture, use, offer for sale, sale, import and export in Canada of Xpresso Rollators (wherein ‘Xpresso Rollators’ is defined as set out in the Agreed Statement of Facts dated August 15, 2017 and as referred to in paragraph 14 of the Reasons);
3. A permanent injunction shall issue restraining the Defendant and its respective directors, officers, servants, agents, employees and all those acting by, through or with the direction and control of the Defendant, from infringing the 392 Patent by manufacturing, using, selling, offering for sale, distributing, importing, exporting or otherwise dealing in Xpresso Rollators in Canada;
4. For greater certainty, the injunction contemplated by paragraph 3 does not preclude the Defendant from making repairs limited only to handles, wheels, brakes, brake pads, seat pads, back rests, baskets/soft bags and accessories (specifically, cane holders, cup holders, curb climbers, flower vases, oxygen tank holders, and phone holders) on Xpresso Rollators that were sold on or before December 10, 2018 and are under warranty in the normal course of business through the Defendant’s customary and existing distribution channels and dealers;
5. By January 18, 2019, all Xpresso Rollators that are in the power, possession, or control of the Defendant in Canada shall be treated in the manner provided by one of (a) or (b), at the Plaintiff’s election:
 - a. The Xpresso Rollators shall be destroyed and the Plaintiff may arrange for an independent third party to observe the destruction and to provide an appropriate affidavit to that effect at the Plaintiff’s sole discretion; or

- b. The Xpresso Rollators shall be delivered up to the Plaintiff at a place and manner as the Plaintiff may direct provided that, if such delivery is to take place outside of British Columbia or Ontario, it shall be at the Plaintiff's expense;
6. By January 18, 2019, the Defendant shall pay to the Plaintiff reasonable compensation for the period from July 1, 2008 to November 30, 2010 in the amount of \$241,022;
7. By January 18, 2019, the Defendant shall pay to the Plaintiff an accounting and disgorgement of profits for the period from December 1, 2010 to June 30, 2016 in the amount of \$12,156,745;
8. The award of profits payable by the Defendant to the Plaintiff is to be updated to account for the period from July 1, 2016 to the date of this Public Judgment. The process for updating is as follows:
 - a. By January 15, 2019, the Defendant shall provide the Plaintiff with updated versions of EVO 48, 49, 52, 55, 56, 64, 65, 66, 67, 76, 78 and 79 for the period from July 1, 2016 to the date of this Public Judgment and this information shall be updated monthly as required.
 - b. By February 15, 2019, the Plaintiff shall provide the Defendant with a calculation of the Defendant's profits earned in relation to its manufacturing, using, offering for sale, selling, importing and exporting of its Xpresso Rollators from July 1, 2016 to the date of this Public Judgment. The Plaintiff's calculation shall follow Ms. Roger's methodology in her scenario 4(a) as described at paragraph 486 of the Reasons, and the inventory cost is to be set as described at paragraph 68 of the Reasons. Pre- and post-judgment interest shall be provided on this amount in accordance with paragraphs 9 and 10 below.
 - c. In the event that the parties cannot agree on a quantum by March 1, 2019, the Plaintiff shall be entitled to apply to the Court for determination of any matters that may arise in the course of calculating the profits and interest that are owed by the Defendant to the Plaintiff.

9. By January 18, 2019, the Defendant shall pay to the Plaintiff pre-judgment interest on the amounts contemplated by paragraphs 6 and 7, calculated on a simple basis using the annual average bank rate published by the Bank of Canada plus 1%;
10. The Plaintiff is awarded post-judgment interest at the rate of 5.0% per annum on the amounts contemplated by paragraphs 6, 7, 8 and 9, calculated on a simple basis, from the date of this Public Judgment until payment;
11. The Defendant's Counterclaim is hereby dismissed; and
12. The Plaintiff is awarded costs assessed pursuant to Column IV of Tariff B and the parties shall advise the Court on a jointly agreed amount within 14 days from the date of this Public Judgment; if parties cannot agree on a costs disposition, they are referred to an Assessment Officer.

"E. Susan Elliott"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1556-12

STYLE OF CAUSE: HUMAN CARE CANADA INC. v EVOLUTION TECHNOLOGIES INC.

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: SEPTEMBER 5, 6, 7, 8, 11, 12, 13, 14, 15, 18, 19, 25, 2017

SUPPLEMENTARY JUDGMENT AND REASONS: ELLIOTT J.

DATED: DECEMBER 28, 2018

APPEARANCES:

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