

Federal Court



Cour fédérale

**Date: 20200828**

**Docket: T-767-18**

**Citation: 2020 FC 867**

**Toronto, Ontario, August 28, 2020**

**PRESENT: Justice A.D. Little**

**BETWEEN:**

**NUWAVE INDUSTRIES INC.**

**Applicant**

**and**

**TRENNEN INDUSTRIES LTD.**

**Respondent**

**ORDER AND REASONS**

**I. Overview**

[1] This is a patent case. On this motion, the plaintiff NuWave Industries Inc. (“NuWave”) seeks default judgment against the defendant under Rule 210 of the *Federal Courts Rules* (SOR/98-106).

[2] For the reasons that follow, the motion must be dismissed on the evidence in the current record.

## II. Events Leading to this Motion

[3] On April 25, 2018, NuWave filed a statement of claim alleging that the defendant, Trennen Industries (“Trennen”), infringed a patent owned by NuWave related to a device used to cut wellbores in the oil and gas industry. On June 15, 2018, Trennen filed a statement of defence and counterclaim. On August 16, 2019, NuWave filed a reply and defence to the counterclaim.

[4] The parties subsequently exchanged affidavits of documents and produced those documents.

[5] NuWave requested that Trennen select a corporate representative to enable NuWave to conduct an oral examination for discovery, as it is required to do under Rule 237 of the *Federal Courts Rules*. Trennen did not offer up a representative, so NuWave brought a motion to compel Trennen to do so. By Order dated September 5, 2019, the Court ordered Trennen to select its representative. That Order provided in part that “[i]n the event that the Defendant fails to select a corporate representative within 14 days of the date of this Order, the Plaintiff may bring a motion for an order striking out the Statement of Defence for non-compliance with Rule 237, and the terms of this Order”.

[6] Trennen did not comply with that Order. NuWave moved to strike out Trennen's defence and counterclaim. By Order dated October 28, 2019, my colleague Case Management Judge Ring struck out Trennen's defence and counterclaim under Rule 221(f).

### III. **The Motion for Default Judgment and the Supporting Affidavit**

[7] NuWave then commenced this motion for default judgment, *ex parte* and in writing under Rule 369 as it was entitled to do under subrule 210(2). NuWave seeks the following specific relief: a declaration that its patent is valid; a declaration that the defendant infringed that patent; an order enjoining the defendant from infringing the patent; an accounting for profits in an amount specified and costs.

[8] NuWave's motion was supported by an affidavit from Mr Troy Illingworth. He has been an owner of NuWave since 2010. He is also one of the three joint inventors of the patent at issue in this proceeding.

[9] Mr Illingworth's affidavit contained 17 paragraphs. It identified his role at NuWave, set out his experience in the oil and gas services industry as a journeyman welder since 1993 and noted his "extensive experience with the design and use of downhole tools". His sole focus as an owner of NuWave has been on the design and use of downhole tools used in that industry.

[10] Mr Illingworth testified that he was asked read the plaintiff's patent, to "explain any technical terms as they would be understood by a person of ordinary skill working in the field of the design of downhole tools in the oil and gas industry" and to comment on whether Trennen's

allegedly infringing device (which he defined as the “Trennen Device”) incorporated features in the claims of NuWave’s patent.

[11] Mr Illingworth’s affidavit attached a copy of the patent in question. The patent relates to a tool to cut a wellbore, before a well is abandoned. Whereas traditionally a wellbore was cut using a cutting torch, NuWave’s device relies on ultra-high pressure water. The device is inserted in the well and rotates 360 degrees while an L-shaped nozzle cuts the wellbore with the high-pressure water. When it is finished, the wellbore and the device are removed from the well.

[12] After setting out a summary of Claim 1 in the patent, Mt Illingworth testified (at paragraphs 10-11) that he did “not believe that there are any terms included in this [patent] claim [#1] that would not be readily understood by a person who is skilled in the art of designing and manufacturing oilfield cutting devices” and that “in [his] view, a person skilled in the art would be someone with at least five years’ experience working in the oil and gas industry and with either a journeyman designation or a degree in engineering or a related discipline”. He further testified that the “only claim using technical language” was a single term (“UHP hose connector”). He provided his view as to how that term “would be understood”, presumably by the person skilled in the art he had just described.

[13] Mr Illingworth’s affidavit included two photographs of the device Trennen allegedly used to cut a wellbore. The photographs came from Trennen’s document productions. Mr Illingworth annotated specific images in the photographs that, in his opinion, corresponded to the components of claim 1 in NuWave’s patent. Based on his review of the photographs, Mr Illingworth testified

that the Trennen Device is “nearly indistinguishable” from NuWave’s patented device and that “in my understanding [it] is used for exactly the same purposes” as the patented device.

[14] At paragraphs 15 to 17 of his affidavit, Mr Illingworth provided evidence about certain invoices produced by Trennen showing, in Mr Illingworth’s words, “income it generated using the Trennen Device”. These invoices (which were attached as a composite exhibit) totaled approximately \$900,000 between July 22, 2015 and July 23, 2018 for “work done using” that device. Mr Illingworth advised that he is “not aware of any non-infringing products in the marketplace during the relevant period”. He then testified that, based on his experience, “the revenue Trennen generated here would have been captured by NuWave” and that throughout the period, NuWave “had the capacity to undertake all the work that NuWave [sic: Trennen] generated with its infringing product”. Again based on his experience, Mr Illingworth testified that he “would expect that Trennen would have a profit margin similar to our own”, which he conservatively estimated at a specified percentage.

[15] Based on NuWave’s percentage profit margin, Mr Illingworth made a “conservative estimate” of the profit NuWave lost due to the presence of Trennen’s device in the market. On this motion for default judgment, NuWave requests default judgment in that amount as an accounting of Trennen’s profits.

#### IV. Analysis

##### A. *Legal Principles: Default Judgment*

[16] As NuWave submitted, on a motion for default judgment, all of the allegations in its statement of claim are to be taken as denied. Unlike in some provincial superior court regimes, in the Federal Court the plaintiff bears the onus, and must lead evidence that establishes, on a balance of probabilities, the claims set out in its statement of claim and its entitlement to the relief it requests: *BBC Chartering Carriers GMBH & CO. KG v Openhydro Technology Canada Limited*, 2018 FC 1098 (McDonald, J.), at para 15; *Canada (Citizenship and Immigration) v Rubuga*, 2015 FC 1073 (Gleason, J.), at para 77; *Teavana Corp. v Teayama Inc.*, 2014 FC 372 (Bédard, J.), at para 4; *Aquasmart Technologies Inc. v Klassen*, 2011 FC 212 (Shore, J.), at para 45; *Louis Vuitton Malletier S.A. v Yang*, 2007 FC 1179 (Snider, J.), at para 4.

[17] To determine whether the plaintiff has met its burden on this motion for judgment, I am guided by the principles established in *FH v McDougall*, 2008 SCC 53, [2008] 3 SCR 41. Speaking for a unanimous Court, Justice Rothstein stated that in all civil cases, the “evidence must be scrutinized with care by the trial judge” and that “evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test”: *McDougall*, at paras 45 and 46. The Supreme Court reiterated this standard in *Canada (Attorney General) v Fairmont Hotels Inc.*, 2016 SCC 56, [2016] 2 SCR 720, at paras 35-36, and in *Nelson (City) v Mowatt*, 2017 SCC 8, [2017] 1 SCR 138, at para 40.

[18] The requirement of "sufficiently clear, convincing and cogent" evidence has been recognized by this Court in patent matters: *Bombardier Recreational Products Inc. v Arctic Cat Inc.*, 2017 FC 207 (Roy, J.), at para 368, rev'd in part on other grounds 2018 FCA 172, leave to appeal dismissed, SCC File No. 38416 (May 16, 2019); *Bombardier Recreational Products Inc. v Arctic Cat, Inc.*, 2020 FC 691 (Roy, J.), at para 40.

[19] I have been unable to locate a default judgment case from this Court in which the principles from *McDougall* have been expressly applied. However, one can see the principles in *McDougall* in default judgment decisions. Justice Bédard declined to give effect to certain submissions of the moving party in *Teavana Corporation*, citing at various points, insufficient evidence, "bald assertions", no convincing evidence, or no evidence at all (at paras 24-26, 30 and 36). In addition, it is clear from the reasons of Justice Snider in *Louis Vuitton Malletier S.A.* (decided before *McDougall*) that judgment was only granted on the basis of significant direct evidence and careful review by the Court (see e.g. paras 9-11, 30, 35 ("[i]n spite of careful and detailed analysis by the affiants, I have some difficulties with the calculations"), 38 and following).

[20] Having said that, I am also mindful that a plaintiff's burden is to prove a claim on a balance of probabilities, not a higher standard. In addition, as the Supreme Court noted in *McDougall*, there is no objective standard to measure the "sufficiency" of evidence (at para 46).

[21] In *Johnson v Royal Canadian Mounted Police*, 2002 FCT 917, Justice Dawson held that default judgment is never automatic; it is a discretionary order (at para 20).

## B. *Patent Construction*

[22] On the present motion, the plaintiff submitted that the first step in a patent infringement analysis is to construe the claims in the patent. It relied on the following passage from Justice Gauthier in *Eli Lilly and Co. v Apotex Inc.*, 2009 FC 991, at para 87, as adopted in *Bauer Hockey Corp. v Easton Sports Canada Inc.*, 2010 FC 361, at para 110:

Before considering the allegations of infringement and invalidity, the Court must construe the claims at issue in this proceeding. The principles of construction are well-established. They are set out in *Free World Trust v. Electro Santé Inc.* 2000 SCC 66, [2000] 2 S.C.R. 1024 (*Free World Trust*), and *Whirlpool Corp. v. Camco Inc.* 2000 SCC 67, [2000] 2 S.C.R. 1067 (*Whirlpool*). Since those decisions were issued, much has been written by this Court on this topic. Be it sufficient to say that "[t]he key to purposive construction is therefore the identification by the court, with the assistance of the skilled reader, of the particular words and phrases in the claims that describe what the inventor considered to be the "essential" elements of his invention."

[23] Patent claims construction is antecedent to both validity and infringement issues: *Free World Trust*, at para 19; *Whirlpool*, at para 43; *Pfizer Canada Inc. v Canada (Minister of Health)*, 2005 FC 1725 (Hughes, J.), at para 48; *Bauer Hockey Ltd v Sport Maska Inc.*, 2020 FC 624 (Grammond, J.) ("*Bauer v Sport Maska*"), at para 31. The court takes a purposive construction of the claims in the patent. One objective is the identification by the court of the particular words or phrases in the claims that describe what the inventor considered the "essential elements" of the invention and to give the legal protection to which the holder of a valid patent is entitled only to the essential elements: *Whirlpool*, at paras 45 and 48; *Tearlab Corporation v I-MED Pharma Inc.*, 2019 FCA 179 (de Montigny, JA), at para 31.

[24] The court's construction of the patent claim should be fair to both patentee and the public: *Consolboard Inc. v MacMillan Bloedel (Sask.) Ltd.*, [1980] 1 SCR 504, per Dickson, J., at p. 520.



[25] Claims construction is a question of law: *Whirlpool*, at paras 61 and 74; *Bombardier Recreational Products Inc. v Arctic Cat, Inc.*, 2018 FCA 172 (Gauthier, J.A.), at para 16 (“*Bombardier FCA*”). However, the court does not engage in the analysis using just its own expertise. The court construes the patent claim with the assistance and through the eyes of a person ordinarily skilled in the art – a so-called POSITA: *Bombardier FCA*, at para 11. A patent specification is directed to those persons who are sufficiently versed in the art to which the patent relates and who possess the “common general knowledge” and the ordinary skills of people engaged in the field: *Whirlpool*, at paras 53 and 70-71; *Viiv Healthcare Company v Gilead Sciences Canada, Inc.*, 2020 FC 486, at paras 26, 45-66. The patent specification should enable the POSITA, on a technical level, to appreciate the nature and description of the invention (*Whirlpool*, at para 53) and to be able to construct or use the invention when the statutory period of monopoly has expired (*Whirlpool*, at para 42). It is that kind of person, in hypothetical form, who assists the court to construe the claim, including to distinguish the essential from the non-essential: *Whirlpool*, at paras 45-48.

[26] As Justice Hughes observed in *Pfizer*, in interpreting the words in the patent claim, the court does not embark on a subjective examination of what was in the mind of the inventor; the exercise is an objective one – what a POSITA would have understood the inventor to mean in the claims made in the patent: at paras 38-39.

[27] Justice Gauthier recently expanded on that point in *Bombardier*:

[23] The Supreme Court of Canada was clear that although purposive interpretation can be viewed as an attempt to determine the intention of the inventor, one does not seek to establish the subjective intention of the inventor. Rather, one must seek to

determine the objective intention as it was expressed in the patent itself, and as would be understood by the person to whom it is addressed (*Free World Trust* at paras. 58-67; *Whirlpool* at para. 49).

[24] Thus, apart from the specification itself, the only evidence that should be considered to inform a court's analysis of a claim is proper evidence as to how the POSITA would understand it in light of his or her relevant common general knowledge in the context of the specification as a whole.

[Emphasis added]

See also *Viiv*, at para 66.

[28] Expert evidence may be submitted to assist or enable the court to construe the patent in a knowledgeable way: *Whirlpool*, at para 57; *Pfizer*, at para 34; *Bauer v Sport Maska*, at para 62. However, certain other kinds of evidence cannot inform the construction of patent claims, including other patents, patent applications or the testimony of the inventors: *Bombardier FCA*, at paras 22, 24 and 51; *Bauer v Sport Maska*, at para 61. There is case authority before *Bombardier FCA* supporting the use of inventor evidence for some purposes, such as understanding the meaning of terms used in a patent to a person skilled in the art. However, even for those purposes, a court must be cautious in its use of inventor evidence for claims construction and validity because it is “almost impossible” for a person to be wholly objective about his or her own work: see *Pfizer Canada Inc. v. Canada (Health)*, 2009 FC 1294, at para 15; Donald H. MacOdrum, *Fox on the Canadian Law of Patents, 5th ed* (Toronto: Thomson Reuters, 2020.4), at 8.10. To rely on evidence of the inventor's (subjective) intentions runs the risk of overextending the statutory monopoly granted to the patent holder by enlarging the “field” protected by the patent, which would in turn be inconsistent with the court's role in upholding the essential patent bargain made between the inventor and the public.

[29] In *Whirlpool*, both parties called experts to provide advice to the trial judge on the construction of the patent claims. Whirlpool called two of its own employees as experts, one of whom was named Pielemeier. At paragraph 70 of his reasons, Justice Binnie stated for the Supreme Court as follows:

Mr. Pielemeier was an engineer who had been employed by the respondent Whirlpool Corporation for 15 to 20 years at the material time. He had laboured in the respondent's product development department, and had “worked with the inventors of the patents before this Court” (trial judgment, at p. 158). Someone with Mr. Pielemeier's connection to the respondents, burdened as he is with inside information, is not a very satisfactory proxy for the “ordinary worker”. He is a skilled addressee but he is not operating on the basis of common knowledge in the trade. The patent claims were not addressed by Whirlpool's research engineers to their colleagues in Whirlpool's product development group. The patent claims were necessarily addressed to the wider world of individuals with ordinary skills in the technology of clothes washing machines.

[Emphasis added.]

[30] Justice Binnie continued, at paragraph 71:

“Ordinariness” will, of course, vary with the subject matter of the patent. Rocket science patents may only be comprehensible to rocket scientists. The problem with Mr. Pielemeier is that he could not be a good guide to the common knowledge of “ordinary workers” in the industry because his opinions were predicated on Whirlpool's in-house knowledge, and he made no bones about that fact.

[Emphasis added.]

[31] Justice Binnie held at paragraph 74 that “the trial judge was wrong to have accepted the evidence of a long-time employee of the respondent Whirlpool Corporation as a proxy” for the “ordinary worker”. Justice Gauthier observed in *Bombardier FCA* that the Supreme Court arrived

at this conclusion because of “the extent of [Mr Pielemeier’s] knowledge which was different than that of the POSITA” (at para 31).

[32] Given the Supreme Court’s decision in *Whirlpool* (at paras 70-71 and 74) and the Federal Court of Appeal’s decision in *Bombardier* (at paras 22, 24 and 51), I must, at minimum, be cautious in using an inventor’s evidence to assist in understanding and construing patent claims. To do so could result in a mistake very similar to the one made by the trial judge in *Whirlpool* and go against Justice Gauthier’s admonitions in *Bombardier* on the use of an inventor’s evidence.

[33] That brings us back to the present case. Mr Illingworth was the sole affiant for the plaintiff in support of its motion for default judgment. He has been a journeyman welder for 27 years, has been an owner of NuWave since 2010 and is one of the three joint inventors of the patent at issue in this proceeding. Mr Illingworth does not have only the common knowledge of an ordinary worker in the field – he also has his own insider and subjective knowledge as an inventor of the device. In addition, in this case Mr Illingworth also has a personal interest as an owner of the plaintiff company, which also renders him less able to provide the kind of independent advice that assists the Court to construe a patent claim.

[34] Mr Illingworth’s affidavit describes claim 1 in NuWave’s patent in detail. His evidence was proffered to explain to the Court any technical terms (in his words) “as they would be understood by a person of ordinary skill working in the field of the design of downhole tools in the oil and gas industry”. He described a notional person he considered to be a POSITA and on his own evidence, he matched that description. He testified that all terms in claim 1 of the patent would

be readily understood by such a POSITA save for one term, and he provided his understanding of that term. He further provided an opinion on whether the Trennen Device incorporated features of NuWave's patent claims.

[35] In the circumstances, I conclude that it is inappropriate to use the evidence in Mr Illingworth's affidavit to construe the claims in the patent. In any event, however, I do not find his affidavit to be of much assistance, given that its main contribution to understanding and construing the claim was to advise that a POSITA would understand the terms in the patent, without actually explaining the terms to the court (with one exception). While his annotations of the two Trennen Device photographs might assist in understanding and construing claim 1 of the patent, to do so would cross the line into an inappropriate use of an inventor's evidence.

[36] The plaintiff recognized in written submissions that the first step in the infringement analysis was to construe the patent, but also seemed to suggest that claim 1 of the patent does not need to be construed with the assistance of a POSITA. I surmise this position from the plaintiff's submission that there is no need to determine which elements of claim 1 are essential and which are not, because every element of claim 1 appears in the Trennen Device and all elements have been infringed. I am unable to accept this argument, however, as it is not consistent with the affidavit evidence about Mr Illingworth's own experience and position (which tracks his description of a POSITA), the purpose of his evidence as stated in the affidavit and the view he provided concerning what a POSITA would understand about claim 1.

[37] As a practical matter on this motion, I have also considered whether I should construe the claims without regard to the affidavit evidence and then proceed to consider validity and infringement based on Mr Illingworth's affidavit. I do not believe I should do so in this case, given the nature of Mr Illingworth's evidence already described and because I would essentially have to ignore material aspects of the only affidavit in the record.

[38] Given that claims construction is antecedent to both patent validity and infringement, this determination leads to the result that I am unable to draw conclusions about the validity and infringement of the patent.

C. *Accounting of Profits*

[39] Even if I had reached conclusions on infringement of the patent, I would not have granted the plaintiff's request for an accounting of profits. I have reviewed the record in detail with an eye to whether the evidence for this remedy is sufficiently clear, convincing and cogent as set out in *McDougall*, recognizing that this is a motion for default judgment. I have two concerns about the evidence.

[40] The plaintiff requested default judgment for a specified quantum based on an accounting of profits, an equitable remedy. It did not seek damages, or nominal damages. NuWave proposed a quantum of profits using a "differential profit" methodology, which has been characterized as the preferred way to calculate an accounting of profits: *Monsanto Canada Inc. v Schmeiser*, 2004 SCC 34, [2004] 1 SCR 902, at para 102. A comparison is made between the defendant's profit

attributable to the invention and its profit had it used the best non-infringing option: *Schmeiser*, at para 102.

[41] The plaintiff's position was straightforward. It proposed the disgorgement of profits made by Trennen by infringing the patent (which it characterized as the profits NuWave lost as a consequence of the infringement), calculated as a percentage of Trennen's revenue generated during a specified period of alleged infringement. NuWave used invoices produced by Trennen during discovery as evidence of the revenue it generated during that period and multiplied the total of that invoice revenue by its own estimated profit margin, which it proposed as a proxy for Trennen's margin.

[42] NuWave thus made its claim on the basis that there was (according to Mr Illingworth's affidavit) no "non-infringing option" in the marketplace in the relevant period in which Trennen generated certain income or revenue. In that scenario, NuWave submitted, the outcome is simple: Trennen's gross profits of infringement should be paid over to the patentee, citing *Monsanto Canada Inc. v. Rivett*, 2009 FC 317, [2010] 2 FCR 93 (Zinn, J.), at para 29.

[43] This position leads to my first evidentiary concern. Mr Illingworth's affidavit advised that traditionally, the wellbore was cut using a cutting torch (at paragraph 7). Neither the evidence nor the plaintiff's written submissions addressed the natural question that arises: Is the traditional way to cut a wellbore a "non-infringing option" the defendant might have used to generate some of the profits NuWave seeks by way of accounting? If it were a non-infringing option, it would alter the simple method advanced by NuWave to quantify Trennen's profits and quantification of the profit

to be disgorged. The calculation would have to account for Trennen's gross profits of non-infringement: see the discussion in *Monsanto*, at paras 54-58 and *Dow Chemical Company v Nova Chemicals Corporation*, 2017 FC 350, [2018] 2 FCR 154 (Fothergill, J.), at para 164.

[44] The second concern relates to the causal connection between the invention and the defendant's profits. This is an important issue in determining whether to grant an accounting remedy and in determining its quantification: see *Monsanto*, at paras 47-50; *Bristol-Myers Squibb Company v Canada (Attorney General)*, 2005 SCC 26, [2005] 1 SCR 533, at para 52. In my view, additional evidence on oil and gas services practices would have been necessary to be able to use the Trennen invoices as the basis of an accounting of profits.

[45] To explain, the record contained several forms of invoice. In the main, the invoices showed that Trennen did work to cut and cap wells. The invoices often contained an express statement that the well(s) were to be abandoned. Some invoices stated that the customer requested a cut with an "abrasive water jet cutting system". Some referred to the use of a "high pressure" abrasive water jet system or to "abrasive cut/cap". Thus there was a connection to the two parties' devices on the face of some invoices.

[46] However, other invoices were ambiguous on their face as to whether Trennen performed wellbore cutting services using a high-pressure water-cutting device. Those invoices did not refer to the method of cutting, but simply referred to Trennen performing cut and cap services to remove a wellhead.



[47] Further, many invoices also contained charges for services other than the cutting of the wellhead, including the provision of equipment such as trucks and backhoes, as well as charges to plug and cut/cap pipeline risers (2", 3", 4" and 1 3/4"), perform site cleanup and return the wellhead and other equipment. The evidence on this motion did not describe those services, explain how they related to cutting a wellbore or advise whether, in practical terms, the revenue generated for all these services is dependent on or causally related to the service of cutting the wellhead.

[48] A few paragraphs of additional explanatory evidence would likely have clarified matters as they concern the proposed use of these invoices for an account of profits or damages, and issues related to the causal connection between the items of revenue in the invoices and the alleged infringement. These were not matters for judicial notice or factual inference.

[49] In passing, I also note that there was a small number of invoices containing charges that did not appear necessarily to relate to wellbore cutting, at pages 86, 221, 222, 239, 284, possibly 337, 339 and 354 of the motion record. Again, some additional evidence may clarify.

[50] Without additional evidence to address these two concerns, I am not able to determine a satisfactory quantum for an accounting of profits.

[51] Finally, I do not believe that the issues I have identified could have been resolved through legal submissions from counsel at an oral hearing held under subrule 369(4) of the *Federal Courts Rules*, nor do I believe this is an instance to invoke Rule 60.

V. **Conclusion and Disposition**

[52] For these reasons, the motion for default judgment is dismissed. Under subrule 210(4)(c), the action will proceed forward towards a trial, without prejudice to the plaintiff's ability to seek default judgment again or to move for summary judgment or a summary trial if so advised. There will be no order as to costs.

**ORDER in T-767-18:**

**THE COURT ORDERS AS FOLLOWS:**

1. The plaintiff's motion for default judgment is dismissed.
2. The action will proceed forward towards a trial under subrule 210(4)(c).
3. Despite paragraph 2, this Order does not preclude the plaintiff from commencing a further motion for default judgment or a motion for summary judgment or a summary trial.
4. No order as to costs of this motion.

“Andrew D. Little”

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-767-18

**STYLE OF CAUSE:** NUWAVE INDUSTRIES INC. and TRENNEN INDUSTRIES LTD.

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** AUGUST 17, 2020 (IN WRITING)

**REASONS FOR JUDGMENT AND JUDGMENT:** A.D. LITTLE J.

**DATED:** AUGUST 28, 2020

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