Federal Court  Cour fédérale

Date: 20260331

Docket: T-954-18

Citation: 2026 FC 125

Ottawa, Ontario, March 31, 2026

PRESENT: Madam Justice McDonald

BETWEEN:

DEEPROOT GREEN INFRASTRUCTURE, LLC AND DEEPROOT CANADA CORP.

Plaintiffs/ Defendants By Counterclaim

and

GREENBLUE URBAN NORTH AMERICA INC.

Defendant/ Plaintiff by Counterclaim

AMENDED PUBLIC SUPPLEMENTARY JUDGMENT AND REASONS

(AMENDED CONFIDENTIAL SUPPLEMENTARY JUDGMENT AND REASONS ISSUEDON MARCH 31, 2026)

[1] In *DeepRoot Green Infrastructure, LLC v GreenBlue Urban North America Inc*, 2021 FC 501 (*Trial Decision*), I allowed DeeptRoot's patent infringement claim and found that

GreenBlue's "RootSpace" product infringed various claims in DeepRoot's patents. As a remedy, I awarded DeepRoot a reasonable royalty rather than an accounting of profits.

[2] In *GreenBlue Urban North America Inc v DeepRoot Green Infrastructure, LLC*, 2023 FCA 184 (*Appeal Decision*), the Federal Court of Appeal (FCA) dismissed the appeal on patent infringement, but on cross-appeal remitted to this Court the issue of the appropriateness of an accounting of profits. On the remitted issue, the evidentiary record before the Court remains the same as at trial. As some trial evidence is confidential, Confidential Reasons were released to the parties, who provided necessary redactions included in these public reasons.

[3] The facts and background on this matter are outlined in the *Trial Decision* and the *Appeal Decision* and will not be repeated unless necessary.

I. Issue

[4] The *Appeal Decision* remitted the issue of the appropriateness of an accounting of profits for redetermination, in accordance with the *Appeal Decision* reasons. The remitted issue must also be assessed in light of the following concession made by GreenBlue on Appeal:

> [75] GreenBlue, in response, concedes that the costs it incurred in defence of the patent infringement action ought not have been included in the calculations. It also now admits that amounts it claimed for amortization and consulting fees likewise bore no causal connection to the infringing sales and accordingly should likewise be removed from the calculations. However, GreenBlue contends that the remaining deductions were appropriate and that the Federal Court did not err in allowing them. It asserts that, even when amounts for legal fees, amortization and consulting fees are disregarded, it still incurred no profit. It therefore says that the cross-appeal should be dismissed.

[5] In addressing the remitted issue, I will first review the findings made in the *Trial Decision* and then the direction from the FCA on the remitted issue. I will then consider the applicable legal principles, and finally I will address the evidence led at trial.

A. *Trial Decision – remedy*

[6] At trial, DeepRoot sought an accounting of GreenBlue's profits, or alternatively a royalty payment if GreenBlue's total profits between 2017 and 2020 were less than $145,000. At trial, the parties agreed that GreenBlue had [redacted] in gross sales revenue from the sale of infringing products.

[7] I found GreenBlue's profits were less than $145,000, based on deductions for GreenBlue's cost of goods (COGs) and overhead expenses. I relied upon the expert report of Mr. Blacker and awarded DeepRoot a royalty of 7% on a per unit basis of $0.94, amounting to $136,000.00. GreenBlue has since paid DeepRoot this sum.

B. *Appeal Decision - remitted issue*

[8] On appeal, DeepRoot cross-appealed the allowance of overhead deductions, arguing that the *Trial Decision* did not consider whether there was sufficient causation between GreenBlue's claimed deductions and infringing sales.

[9] In the *Appeal Decision* at paragraphs 71-102, the FCA held that proof of causation is required and that GreenBlue must establish some link between the claimed portion of the overhead expenses and the infringing sales (*Appeal Decision* at para 89). Specifically, this Court must determine whether GreenBlue can deduct overhead expenses from revenue generated

through infringing RootSpace sales, and to what extent has GreenBlue established an evidence-based causal connection between claimed overhead costs and the infringing activity.

II. Analysis

A. *Applicable legal principles*

[10] An accounting of profits is a discretionary equitable remedy where a defendant must pay the profits generated from its infringement to the plaintiff. Notably, "[i]ts purpose is not to punish the defendant" (*Lubrizol Corp v Imperial Oil Ltd*, 1996 CanLII 4095 (FCA)).

[11] As such, an accounting is not to be punitive (*Nova Chemicals Corporation v The Dow Chemical Company, Dow Global Technologies Inc and Dow Chemical Canada ULC*, 2020 FCA 141 at para 29 [*Nova*]). However, the Court should not stray away from the doctrine and principles of an accounting merely because the disgorgement amount would be large. Rather, the Court should "apply causation principles properly and rigorously, to ensure that the gain earned by the infringer as a result of the infringement is reversed, no more, no less" (*Nova* at para 32).

[12] When conducting an accounting, the plaintiff must prove the revenue generated by the defendant from infringing sales (*Appeal Decision* at para 84). The defendant then bears the burden of establishing valid deductions through evidence and proving a causal link between the proposed deductions and infringing sales. Causation is to be approached with a "common sense view" (*Monsanto Canada Inc v Schmeiser*, 2004 SCC 34 at para 101).

[13] If the Defendant fails to provide sufficient evidence of expenses, or of causation, then those expenses cannot be deducted. For example, in *Monsanto Canada Inc v Janssens*, 2009 FC

318 at para 43 [*Monsanto*] (aff'd on this point in *Monsanto Canada Inc v Rivett*, 2010 FCA 207 at para 93), the Court refused the defendant's sought deductions, because the defendant provided over-generalized information that conflated expenses that could not be disentangled on the evidence before the Court.

[14] I note that "[a]ny doubts as to the computation of costs or profits is to be resolved in favour of the plaintiff" (*Diversified Products Corp v Tye-Sil Corp*, 1990 CanLII 13707 (FC) at p 390; cited approvingly in *Monsanto* at para 32). This is equitable, considering that the defendant: (1) was found to have infringed the plaintiff's patent; (2) was in the best position to provide evidence relating to their expenses and the causal connection to infringement; and (3) bore the legal burden of proving their expenses and causal connection.

B. *The evidence*

[15] On the remitted issue, GreenBlue provided financial records showing total annual overhead expenses for 2017-2020, along with a categorical breakdown for 2017 and 2018 as outlined below. The 2017 and 2018 totals exclude categories of expenses which GreenBlue included at trial but conceded were inappropriate in the *Appeal Decision* (para 75).

	Fiscal Year 2017			Fiscal Year 2018		
	Total Overhead	RootSpace Proportion	RootSpace Allocation	Total Overhead	RootSpace Proportion	RootSpace Allocation
Advertising and promotion	[redacted]					
Automotive						
Interest and bank charges						
Office and general						
Rent						
Repairs and mainenance						
Subcontract						
Subscriptions, permits and licenses						
Supplies						
Telecommunication						
Travel						
Utilities						
Wages and benefits						
Total for Year						
Total (May Onwards)						

Year	RootSpace Sales	COGS	RootSpace Overhead Allocation	Net Profit/Loss
2017	[redacted]			
2018				
2019				
2020				
Total				

[16] GreenBlue totalled annual overhead expenses for 2017-2020 and then allocated "RootSpace Overhead Allocation" for each year based on infringing RootSpace sales as a percentage of total sales. For "Advertising and promotion", "Automotive", and "Travel", a "conservative" allocation of 40% was made, based on the testimony of Mr. Jeremy Bailey, GreenBlue's General Manager, who testified at trial that roughly 80-85% of advertising and promotion was devoted to RootSpace. They argue that their approach provides "a factual foundation to establish the requisite causal connection" between the claimed portion of overhead expenses and infringing sales (*Appeal Decision* at para 92).

[17] GreenBlue urges the Court to make common sense inferences on the overhead expenses in relation to their Woodstock, Ontario office, as it provided customer service, project support, and sales infrastructure directly tied to RootSpace sales. They say the financial records include details on the Woodstock office operations, and that reasonable and proper inferences can be drawn from that information to support that GreenBlue incurred overhead expenses related to wages, rent, and office-related expenses at that location. They argue that given the importance of the Woodstock office to Canadian RootSpace operations, the Court can reasonably infer that overhead expenses incurred there are causally connected to the sales in question. GreenBlue argues that to reduce overhead expenses to zero, as DeepRoot seeks, would be unreasonable,

inequitable and contrary to the full costs approach. Based upon this, GreenBlue submits their net profit was $2,625.66.

[18] The inferences GreenBlue asks the Court to draw are problematic, because GreenBlue's financial information combines expenses relating to both Canadian and American sales. The Defendant's General Manager, Mr. Bailey, was asked about the financial statements on cross-examination:

> Q. And so just to confirm, this document, this financial statement concerns activities in what geographical area?
>
> A. This financial document is concerning activities in North America.
>
> Q. Okay. And so, for example, advertising and promotion, do all of these -- well, do all of these line items down below for expenses also pertain to both Canada and the U.S.?
>
> A. Yes, absolutely this is a North American report, yes.
>
> Q. And so, for example, advertising and promotion it seems to be one of the larger ticket items?
>
> A. Yes.
>
> Q. That would pertain to both countries?
>
> A. That's correct. That advertising and promotion would include all of literature and promotional goods and such for the Canadian and U.S. sales and area of activity.

[19] Mr. Bailey also explicitly confirmed that expenses under "Travel" and "Subcontracting" combine Canadian and American expenses. When asked about "Travel", Mr. Bailey stated:

> Q. Yeah. Okay. "Travel" is a line item on this document under expenses so what travel does that pertain to?
>
> A. So travel includes all of North America, again. So that would be our flights, our hotels, meals, entertainment for the sales team mostly on getting out to meet and educate the landscape

> architects, municipalities, engineers, foresters, so on throughout North America. The sales team here very, very heavy on travel prior to COVID, of course.

And when asked about "Subcontracting", Mr. Bailey stated:

> Q. …Subcontracting went up considerably [between 2017 and 2018]. Is there a reason for that?
>
> A. Yeah, that would I believe include our representative from the United States as a subcontractor. So our agent or rep as we called it.
>
> […]
>
> Q. Do all of that -- all the amount here [redacted] pertain to him?
>
> A. No.

[20] The financial records lack sufficient detail for the Court to determine what fraction or portion of the categories of expenses relate only to the Canadian infringing sales. While GreenBlue's principal place of business is in Woodstock, Ontario, they also have United States [US] offices in Knoxville, Tennessee and Los Angeles, California. The challenge is that the financial information, which covers all of North America, does not indicate how much of their expenses for categories such as "Rent", "Utilities", "Office and general", and "Wages and benefits" relate solely to the Canadian office.

[21] The difficulty with providing North American expenses is that causation requires "some link between the claimed portion of the overhead and the infringing sales" (*Appeal Decision* at para 89). "Infringing sales" are Canadian sales, because it was the Canadian patent that was infringed. The Defendant's claimed portion of overhead expenses includes expenses related to US sales, with no evidence supporting a causal connection to infringing Canadian sales, and the record lacks sufficient evidence to disentangle these US expenses from Canadian expenses.

[22] This is similar to *Monsanto*, where the Court denied deductions because it could not disentangle relevant expenses from inappropriate ones. As I cannot find a sufficient link or causation for GreenBlue's claimed deductions for 2017 and 2018, those deductions must be denied.

[23] The financial information for 2019 and 2020 is even more problematic. For these years, GreenBlue only provided total overhead amounts. They provided no categorical breakdown of expenses and conceded that the total overhead expenses included inappropriate expenses, such as legal fees and amortization. The inclusion of these inappropriate expenses challenges the overall reliability of GreenBlue's proposed deductions.

[24] GreenBlue proposes that the Court estimate the inappropriate expenses for 2019 and 2020, by extrapolating the trend between 2017 and 2018 to 2019 and 2020. GreenBlue essentially asks the Court to speculate on the expenses that should be allowed. They have not provided any evidence justifying their proposed estimations and simply rely upon the trend between 2017 and 2018. Having elected not to provide more detailed financial evidence, or expert accounting evidence, on its expenses, GreenBlue is effectively asking the Court to compensate for their failure to do so.

[25] GreenBlue relies on cases where estimates were used in an accounting of profits (*Group III International Ltd v Travelway Group International Ltd*, 2024 FC 1195 at para 147 and *IFP Technologies (Canada) Inc v EnCana Midstream and Marketing*, 2022 ABKB 807 at paras 54-56). However, these cases are of little assistance, because those cases used estimates provided by accounting expert witnesses in accordance with accounting principles and practices. I accept that

expert evidence may not be necessary in all cases. However, in this case, there is no evidence justifying the Defendant's estimates, which were provided by counsel. Even if the Court were to accept the estimates, the remaining overhead total would still be for all North America, like the 2017 and 2018 totals. In my view, GreenBlue has not provided reliable evidence on which the Court can allow the claimed deductions for 2019 and 2020.

[26] GreenBlue asserts that it would be "unreasonable, inequitable and contrary to the full costs approach" to deny their claimed deductions. In *Nova*, the Court of Appeal emphasized that causation principles should be applied properly and rigorously (*Nova* at para 32). Furthermore, "the approach to quantifying overhead costs for purposes of establishing profits earned through infringement is highly fact-dependent" (*Appeal Decision* at para 95). On the facts and evidence of this case, I cannot find GreenBlue's claimed overhead deductions are causally connected to their infringing Canadian sales.

[27] While I have no doubt that some of the claimed costs do, in fact, relate to infringing Canadian sales, there is no evidence in the record that would allow the Court to distinguish valid expenses related to infringing Canadian sales, from irrelevant expenses related to US sales. GreenBlue bore the burden of proving its expenses and their relation to infringing sales and was in the best position to provide this information. It failed to do so. An accounting is an equitable remedy and "equity must be done to both parties" (*Monsanto* at para 32). The alternatives, to either allow deductions that include irrelevant US expenses or deny the Plaintiffs an accounting, would be unfair to the Plaintiffs.

[28] At trial, the parties agreed on the gross sales revenues of GreenBlue. The deductions for the COGS were upheld in the *Appeal Decision*. Accordingly, in not allowing deductions for the claimed overhead expenses for 2017, 2018, 2019 and 2020, GreenBlue made a profit of $593,362.61 from infringing RootSpace sales in Canada.

[29] I therefore award DeepRoot an accounting of profits in the amount of $593,362.21, plus interest.

[30] Interest is recoverable in an accounting of profits (*Dow Chemical Company v Nova Chemicals Corporation*, 2017 FC 350 at para 169). It is not a discretionary matter, as the interest is deemed to reflect the earnings from the reinvestment of profits disgorged through the accounting (*Reading & Bates Construction Co v Baker Energy Resources Corp*, 1994 CanLII 3524 (FCA)). As such, this interest is compounding interest (*ADIR v Apotex Inc*, 2015 FC 721 at para 146 [*ADIR*]).

[31] DeepRoot requests interest from the date of infringement. However, the law governing interest is provided by section 36 of the *Federal Courts Act*, RSC 1985, c F-7, and depends on where the cause(s) of action arose. In this case, infringement occurred in multiple provinces, therefore the governing law is sections 36(2)-(5) of the *Federal Courts Act* (*Apotex Inc v Wellcome Foundation Ltd*, 2000 CanLII 16270 (FCA) at para 115).

[32] Under section 36(2)(b) of the *Federal Courts Act*, pre-judgment interest on unliquidated claims is awarded from the date the Defendant was given notice of the claim until the date of this Judgment. DeepRoot served their Statement of Claim on GreenBlue on May 23, 2018.

[33] The applicable interest rate is "any rate that the…Federal Court considers reasonable in the circumstances" (*Federal Courts Act*, s 36). Neither party made submissions on the applicable rate. The Court's usual practice has been to award interest based on the prime lending rate plus 1 or 2% (*ADIR* at para 147). I thus award pre-judgment interest, calculated from May 23, 2018 to the date of this Judgment, to be compounded annually using the average prime lending rate, over that period of time, plus 1%. In the *Trial Decision*, the Defendant was ordered to pay the Plaintiffs $136,000 in damages. GreenBlue has since paid DeepRoot this sum. The $136,000 already paid, plus interest, based on the prime lending rate plus 1% since the date of payment, will be credited towards the new total award.

III. Costs

[34] The Plaintiffs are entitled to their costs on the remitted issue, to be calculated in accordance with the mid-range of Column 2 of Tariff B.

JUDGMENT IN T-954-18

THIS COURT'S JUDGMENT is that:

1. the Plaintiffs are awarded an accounting of profits in the amount of $593,362.21 less the $136,000.00 royalty payment previously made;
2. the Plaintiffs are entitled to pre-judgment interest, calculated from May 23, 2018 to the date of this Judgment, compounded annually using the average prime lending rate, over that period of time, plus 1%. Interest on the royalty payment is at the same rate and to be credited towards the new total awarded; and
3. the Plaintiffs are entitled to costs on the remitted issue, to be calculated in accordance with the mid-range of Column 2 of Tariff B.

"Ann Marie McDonald"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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