

Date: 20080129

Docket: A-396-06

Citation: 2008 FCA 35

**CORAM: NOËL J.A.
NADON J.A.
PELLETIER J.A.**

BETWEEN:

**CHARLES D. MACLENNAN and
QUADCO EQUIPMENT INC.**

Appellants

and

LES PRODUITS GILBERT INC.

Respondent

Hearing held at Montréal, Quebec, on November 21, 2007.

Judgment delivered at Ottawa, Ontario, on January 29, 2008.

REASONS FOR JUDGMENT BY:

NOËL J.A.

CONCURRED IN BY:

**NADON J.A.
PELLETIER J.A.**

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REASONS FOR JUDGMENT

NOËL J.A.

[1] This is an appeal from a decision by Mr. Justice Beaudry of the Federal Court who found that there had been no direct infringement by the users of the patented article sold by Quadco Equipment Inc. (“Quadco”) and that therefore the respondent, Les Produits Gilbert Inc. (“Produits Gilbert” or “the respondent”), could not be guilty of infringement by inducement.

[2] According to the appellants, the trial judge lost sight of the very essence of the patented invention when he determined that there had been no direct infringement. Since all the elements of infringement by inducement are present, the appellants are asking us to set aside the trial judgment and to find, based on the evidence at trial, that the respondent is guilty of infringement by inducement.

RELEVANT FACTS

[3] The inventor, Charles D. MacLennan, and Quadco (the “appellants”) are suing the respondent for contributory infringement of Canadian patent No. 2,011,788 (the “Quadco patent”).

[4] The claimed invention is used in circular saws for feller heads in the forest industry, particularly in rocky and snowy terrain like that found in northern Quebec. The invention covers two pieces: a repositionable saw tooth and a detachable tooth holder. This combination is designed to be attached to the periphery of the circular saw disc. The claims all start with the words “a saw tooth and tooth holder combination”, and thus the claims do not cover the tooth as such.

[5] To avoid losses and maximize the harvest, forestry operators must cut the trees as close as possible to the ground. Since logging is often done in rocky and snowy terrain, the saw can come into contact with rocks, and the teeth, teeth holder and disc are frequently damaged.

[6] The removable tooth is attached to the tooth holder and the tooth holder is attached to the periphery of the disc using the specific method described in the Quadco patent; when the tooth and the tooth holder come into contact with a rock, they break and shear from the disc, leaving the disc undamaged. The usefulness of the patent is based on the fact that the tooth and tooth holder can easily be replaced by new parts that are much less expensive than the disc. Forestry operators bring enough replacement parts with them into the forest to ensure uninterrupted logging.

[7] Produits Gilbert manufactures replicas of the Quadco teeth with the same configuration and the same dimensions; these teeth can only be installed on Quadco tooth holders. Produits Gilbert distributes a price list indicating the series number of the original Quadco tooth that its teeth are designed to replace. This is an example (appeal book, vol. 2, exhibit P-121):

GILBERT

	N° Pieces	DENTS GILBERT SCHEKREIBUNG DU QUADCO	Traite de scie	Filet mm	Largeur Dentille	Diámetro Dentille	Platplace Kochring Quadco	Prix
								CDN
	730025	Dent sans double	2"	1/2 UNF	-	-	Q101207a	14.70\$
	730030	Dent sans double	2 5/16"	5/8 UNF	-	-	Q101202T	15.70\$
	730031	Dent sans double	2 1/4"	1/2 UNF	-	-	Q101205T	16.70\$
	730055	Dent sans double	2 1/4"	1 UNF	-	-	Q102...3T	19.50\$
	730026	Dent sans double	2 3/8"	5/8 UNF	-	-	Q101205T	13.50\$
	730030	Dent sans double	2"	3/4 UNF	-	-	Q101203T	14.70\$
	730031	Dent sans double	2"	1/2 UNF	-	-	Q101207a	14.70\$

[8] Quadco and Produits Gilbert operate in the same market. They sell their products to forestry operators mainly through distributors and manufacturers of feller heads. The appellants chose not to sue the forestry operators who, according to their own theory, are guilty of direct infringement of their patent when they use the Gilbert tooth as a replacement. The appellants are pursuing the

respondent exclusively which, they say, encourages forestry operators to infringe their patent by inviting them to use the Gilbert tooth.

[9] In a first decision dated December 6, 2004 (2004 FC 1700), Beaudry J. found that Produits Gilbert was not guilty of infringement by inducement. That decision was appealed.

[10] In a judgment dated May 31, 2006 (2006 FCA 204), our Court allowed the appellants' appeal in part and set aside the first decision of Beaudry J. with respect to the issue of infringement by inducement on the ground that he had not applied the correct test. The matter was returned to him for redetermination in accordance with the applicable legal test.

[11] By judgment dated September 1, 2006 (2006 FC 1038), Beaudry J. found that the appellants had failed to demonstrate the existence of the first element required to establish that Produits Gilbert was guilty of infringement by inducement, that is, direct infringement by the forestry operators who used the Gilbert tooth.

[12] That is the decision under appeal.

FEDERAL COURT DECISION

[13] In a short judgment, Beaudry J. noted at the outset that a three-pronged test must be applied to establish contributory infringement. First, there must be an act of infringement by the direct infringer. Second, this act must be influenced by the seller to the point where, without this influence, infringement by the buyer would not otherwise take place. Last, the influence must be knowingly exercised by the seller, i.e., the seller knows that this influence will result in the completion of the act of infringement (see *Dableh v. Ontario Hydro* (1996), 68 C.P.R. (3rd) 129 at pp. 148 and 149 (F.C.A.) as well as *Halford v. Seed Hawk Inc.* (2004), 31 C.P.R. (4th) 434 at pp. 559 and 560 (F.C.T.D.); and *AB Hassle v. Canada (Minister of National Health and Welfare)* (2001), 16 C.P.R. (4th) 21 at p. 42 (F.C.T.D.); aff. (2002), 22 C.P.R. (4th) 1 at para. 17 (F.C.A.) (“*AB Hassle*”).

[14] Beaudry J. ended his analysis at the first factor. In his view, the appellants failed to prove direct infringement since, by replacing Quadco teeth with Gilbert teeth, the forestry operators were simply repairing the patented combination. It is well established that the purchaser of a patented article may repair the components without infringing the patent. This right is based on the fact that the patent holder is presumed to permit this type of activity (Harold G. Fox, *Canadian Patent Law and Practice*, 4th ed., Toronto, Carswell, 1969 at p. 301).

[15] According to this theory, a component of a patented article may be replaced without infringing the patent as long as the replacement has become necessary as a result of ordinary use (*idem*, at p. 391). In this case, Beaudry J. determined that it became necessary for the forestry operators to replace the teeth as a result of the normal wear and tear of the patented combination

and, accordingly, the forestry operators were permitted to replace them without regard to their source (Reasons, at paras. 13, 14 and 15).

POSITION OF THE PARTIES

[16] The appellants are not disputing the premise that forestry operators may repair the patented combination where the fault results from normal wear and tear. However, they contend that that was not the question before Beaudry J. He should have considered whether, given the nature of the patented invention, the combination of a replacement Gilbert tooth with a Quadco tooth holder constituted a repair.

[17] The very essence of the patented invention is based on the fact that the tooth and the tooth holder detach from the disc during normal use, thus saving the disc. According to the appellants, every time that forestry operators replace the teeth, they are completely remaking the patented invention. The theory of implied licence to repair does not apply in this context.

[18] According to the appellants, Beaudry J. did not take into account the nature of the patented invention when he determined that replacing the teeth amounted to a simple repair under this theory. If he had considered the nature of the patented invention, he could only have concluded that the forestry operators were guilty of infringement every time they replaced a Quadco tooth with a Gilbert tooth. Since all the elements of infringement by inducement are present, the appellants ask us to find the respondent guilty of infringement by inducement.

[19] For its part, the respondent maintains that Beaudry J. simply determined the repair issue based on the evidence before him and that nothing in the record warrants the intervention of the Court of Appeal on this specific issue (respondent's memorandum, at paras. 26 and 27).

[20] In any event, the evidence failed to establish the other elements of infringement by inducement. The respondent points out that Canadian law differs from American and British law on this issue. In Canada, the mere fact of selling a replacement part, even if its only use is working the patented invention, is not sufficient in itself to establish infringement by inducement. The respondent relies mainly on the decision of President Jockett in *Slater Steel Industries Ltd. et al. v. R. Payer Co. Ltd. et al.* (1968), 55 C.P.R. 61 (Ex. Ct.) (*Slater Steel*).

[21] According to the respondent, in order to establish infringement by inducement, the appellants must prove a type of conspiracy (respondent's memorandum at para. 44):

[TRANSLATION]

Normally, it must be demonstrated that the replacement or the repair constitutes in itself the whole invention, i.e., this invention covered by a claim, that there was a type of conspiracy between a number of people who contributed various components of a combination or that the supplier of the article has exerted real influence and control over those who had already purchased the other components of the combination. That is not the case here and, in short, this is a simple case of selling replacement parts.

[Underlining in the original]

ANALYSIS AND DECISION

[22] As the Supreme Court explained in *Whirlpool Corp. v. Camco Inc.*, [2000] 2 S.C.R. 1067 at para. 43, “The first step in a patent suit is therefore to construe the claims”. In this case, the patent claims cover various combinations of saw teeth and tooth holder at the periphery of the disc. The very essence of the invention is that by attaching the removable teeth to the tooth holder and attaching the tooth holder to the periphery of the disc, the tooth and the tooth holder can separate from the disc more easily in case of a violent impact, thus preserving the disc. The description of the invention leaves no doubt on this point:

An advantage of the present construction is that the teeth and holders are mounted on the exterior of the disc. In the event that a tooth or several teeth should strike an immovable object, individual teeth and holders may be sheared from the disc or otherwise damaged, without transmitting damaging loads to the saw disc, and thus the remainder of the circular saw remains usable. The damaged teeth and holders can be replaced.

[23] With respect, the trial judge misunderstood the nature of the patented invention and failed to consider the claims when he determined that replacing the Quadco tooth with the Gilbert tooth constituted a simple repair. Since the very essence of the patent is that the tooth is attached to the tooth holder in such a way that it can separate from it in the course of normal wear and tear before the disc is damaged, it is clear that forestry operators remake the patented invention every time they use a Gilbert tooth to replace a Quadco tooth. Accordingly, Beaudry J. was incorrect when he concluded that there had been no direct infringement on the ground that the forestry operators were repairing the patented article.

[24] The matter could be returned to him again for a more thorough analysis, but counsel for both parties insisted that the Court of Appeal dispose of the dispute even if this requires that we address

certain aspects of the evidence that the trial judge did not consider and that we make findings of fact.

[25] Approaching the dispute as it was presented to the trial judge, the evidence must first establish direct infringement. On that issue, the only combinations that Beaudry J. had to rule on were combinations 3, 4 and 5, according to the nomenclature used in the trial record (the combinations in question are illustrated at paragraph 2 of the decision under appeal). In his reasons, Beaudry J. stated that the teeth sold by Produits Gilbert have different characteristics than the teeth sold by the appellants (Reasons, at para. 16). According to the evidence, the Gilbert teeth that are the subject of combinations 3, 4 and 5 are completely identical to the Quadco teeth. Having said that, Beaudry J. was probably referring to another combination (combination 2), which was no longer at issue when the Court of Appeal returned the case (see the Court of Appeal decision at para. 18).

[26] With respect to combination 3 (variant No. 1 of the invention), Produits Gilbert conceded at trial that it comprised all the elements of claims 1, 4 and 5 of the Quadco patent (trial transcript, vol. 2, at pp. 260 to 264; appeal book, vol. 6, tab P-169, at pp. 1957 to 1959, at para. 85). Accordingly, direct infringement of claims 1, 4 and 5 by the users when carrying out this combination is established.

[27] With respect to combination 4 (variant No. 2 of the invention), Produits Gilbert admitted at trial that it comprises all the elements of claims 2, 4 and 5 of the Quadco patent apart from the fact

that the shank attached to the tooth used in that combination must be fixed to the tooth and not attached to it by a bolt as the combination indicates (trial transcript, vol. 2, at pp. 265 to 270; appeal book, vol. 6, tab P-169, at pp. 1960 to 1962, at para. 87).

[28] However, the word “fixed” does not appear anywhere in the claim in question, and it was admitted that the bolt constitutes a means of attachment (see, respectively, the trial transcript, vol. 5, at pp. 206, 213 and 214 and vol. 4, at p. 11). That is what apparently led Beaudry J. to conclude in his first decision (2004 FC 1700 at para. 16) that the shank did not have to be permanently attached to the tooth. Accordingly, there is direct infringement by users of claims 2, 4 and 5 when they put this combination into effect.

[29] For the same reasons , this finding applies to combination 5 (variant No. 3 of the invention) (trial transcript, vol. 2, at p. 281; appeal book, vol. 6, tab P-169, at pp. 1963 to 1965, at para. 89). There is also evidence of a breach of claim 3, which specifically provides that the shank is in the form of a bolt; that is the case in combination 5.

[30] Thus, on the evidence before the trial judge and taking into account the findings that he made, there was direct infringement of the Quadco patent by the users when they combined the Gilbert tooth with the Quadco tooth holder in the manner envisaged by combinations 3, 4 and 5. We will now turn our attention to the two other elements of infringement by inducement.

[31] It is useful to note, as a preliminary matter, that the American and British law on this issue differs from Canadian law. In both those jurisdictions, the legislation provides – since 1952 and 1978, respectively – that supplying an essential element intended to be incorporated in a combination or a patented process, when this element has no other purpose and the infringer knows that it will be used for the purpose of infringement, constitutes infringement, without requiring further evidence.

[32] The relevant provisions of the American and British statutes read as follows:

Section 271(c) of the *Code of the Laws of the United States of America*, 35 U.S.C. § 271 (1952)

§ 271. Infringement of patent

(c) Whoever offers to sell or sells within the United States or imports into the United States a component of a patented machine, manufacture, combination or composition, or a material or apparatus for use in practicing a patented process, constituting a material part of the invention, knowing the same to be especially made or especially adapted for use in an infringement of such patent, and not a staple article or commodity of commerce suitable for substantial noninfringing use, shall be liable as a contributory infringer.

Patent Act 1977 (R.-U.), 1977, c.37

Meaning of infringement

60.-(2) Subject to the following provisions of this section, a person (other than the proprietor of the patent) also infringes a patent for an invention if, while the patent is in force and without the consent of the proprietor, he supplies or offers to supply in the United Kingdom a person other than a licensee or other person entitled to work the invention with any of the means, relating to an essential element of the invention, for putting the invention into effect when he knows, or it is obvious to a reasonable person in the circumstances, that those means are suitable for putting, and are intended to put, the invention into effect in the United Kingdom.

[33] In Canada, the courts have consistently held that selling a component intended to be incorporated in a patented combination (or process) without anything further, does not constitute an

inducement to infringement, even where this component cannot be used for any other purpose; *Copeland-Chatterson Company Limited v. Hatton* (1906), 10 Ex. C.R. 224, aff. 1906, 37 S.C.R. 651 (“*Copeland-Chatterson*”) was the first Canadian decision on this issue, and it adopted the British jurisprudence that was the source of this rule; in *Slater Steel, supra*, there is a complete history of the evolution of the jurisprudence until 1964; François Grenier’s article “*Contributory and/or Induced Patent Infringement*” (1987) 4 C.I.P.R. 26 provides an overview of the decisions rendered until the date it was published; among the more recent decisions, the following should be noted: *Valmet Oy et al. v. Beloit Canada Ltd.*, (1988) 20 C.P.R. (3d) 1 (F.C.A.) at p. 15; *Permacon Quebec Inc. et al. v. Les Entreprises Arsenault & Freres Inc. et al.*, (1987) 19 C.P.R. (3d) 378 (F.C.) at pp. 384 and 385; *AB Hassle et al. v. Minister of National Health and Welfare et al.*, (2002) 22 C.P.R. (4th) 1 (F.C.A.) at para. 18).

[34] This rule, which may seem questionable at first glance, is explained by the fact that in all the decisions that have applied it, only a combination (or process) was protected by the patent in question; the constituent parts (in particular, the tooth, in the case before us) were not. At the very least, it would be incongruous if the sale of an article, which in itself is not protected and which is therefore legal, becomes illegal without any other action being taken by the seller. That explains why the courts have traditionally refused to recognize that infringement by inducement can be founded on the mere characteristics of the article sold.

[35] Thus, in *Innes v. Short and Beal* (1898), 15 R.P.C. 449 (“*Innes*”) (cited at page 74 of *Slater Steel, supra*), a case involving the use of metallic zinc (a non-patented component) in an

anticorrosive process (patented), the Court refused to make a finding of infringement by inducement on the basis that (at p. 451):

It would be nonsense to say that a person is to be restrained from perfectly legitimate trade, namely, selling an article of commerce because he happens to know ... that the buyer intends to put it to some improper use.

...

There is no reasons whatever why [the seller] should not sell powdered zinc, and he will not be in the wrong, though he may know or expect that the people who buy it from him are going to use it in such a way as will amount to an infringement of Mr. Innes' patent rights. But he must not ask the people to use it in that way, and he must not ask the people to use it in that way in order to induce them to buy his powdered zinc from him.

[36] In *Townsend v. Haworth* (1875), 12 Ch.D. 831 (“*Townsend*”), the issue was whether a patent claiming the particular use of a chemical compound to protect cloth from mildew meant that the person who sold the compound, without making any suggestion as to its use, was guilty of infringement by inducement. The following excerpt from the decision of Jessel, M.R. is cited in *Slater Steel, supra*, at page 71:

The chief of those chemical substances are substances which are perfectly well known, and most of them are common substances; they are all old chemical compounds, and there is no claim in the patent at all except for the peculiar use of these chemical compounds for the purpose of preserving the cloth from mildew. No Judge has ever said that the seller of an ordinary ingredient does a wrong if the purchaser coming to him says, “I want your compound, because I want to preserve my cloth from mildew. I wish to try the question with the patentee”. No one would doubt that that sale would be perfectly legal.

...

You cannot make out the proposition that any person selling any article, either organic or inorganic, either produced by nature or produced by art, which could in any way be used in the making of a patented article can be sued as an infringer, because he knows that the purchaser intends to make use of it for that purpose. ‘What is every person prohibited from doing? He is prohibited from making, using, or vending the prohibited articles, and that, of course, includes in the case of machinery the product, if I may say so, of the machinery

which is the subject of the patent. It is that which is [protected] by the patent. But has any one ever dreamt before this case that that extends to the component articles which enter into the patent? So far from that being the law, it has been decided that in cases of what they call combination patents it is only the combinations claimed that may not be used; the other elementary combinations may be used. No doubt there has been a good deal of litigation as to what were the combination claims, that is, whether in claiming the entire combination you claim the subsidiary combinations or not ... But you cannot even complain of the use of subsidiary combinations unless they are within the purview of your claim. The line of cases seems to me to show conclusively that the mere making, using, or vending of the elements, if I may say so, which afterwards enter into the combination is not prohibited by the patent'.

[37] In the same vein, Vaughan Williams, L.J., in the famous case *Dunlop Pneumatic Tyre Co. v. David Mosely & Sons Ltd.* (1904), 15 R.P.C. 974 (*Dunlop*) stated the following regarding the sale of one of the constituent parts of a combination patent (*Slater Steel, supra*, at p. 76):

It is quite plain that what the Plaintiffs allege here is that there has been an infringement by one or other of these Defendants, and that infringement has been constituted by the sale of these covers which are constituent parts of one or other of the methods patented in the combination Patents known as the *Welch Patent*, and the *Bartlett Patent*. I am of opinion that the sale of these covers cannot be said to amount to or be evidence proving an infringement of one or other of these Letters Patent. In truth, and in fact, veil it how you like, the Plaintiffs do not complain of any infringement of this Patent in which they say that the Defendants, one or other of them have taken part as actors. All that they complain of is the sale of these covers, which sale, it is said, must have been known to be a sale to a person intending to commit an infringement of one or other of these Patents.

In my judgment the authorities show conclusively that on those facts there would be no infringement by the Defendants of these Letters Patent.
(see also *Sykes v. Haworth* (1879), 12 Ch.D. 826, at p. 833).

[38] As stated above, British law was followed in Canada beginning in 1906 (see *Copeland-Chatterson, supra*). Thus, in Canada, where the *Patent Act* has remained unchanged, the sale of a constituent part of a patented combination, even if this part cannot be used for anything other than infringing the invention, is not sufficient to establish the element of inducement. Apart from the existence of direct infringement, the evidence must establish that the influence of the alleged

inducer constitutes a *sine qua non* of the direct infringement, and this influence must be exercised knowingly, i.e., in circumstances where the alleged inducer knew that his or her influence would result in the act of infringement (*AB Hassle, supra*, at par. 17).

[39] In the case before us, the evidence indicates that the Gilbert teeth have no other use other than working the patented invention, which is not sufficient in itself to establish infringement by inducement. However, there is also evidence that Produits Gilbert gave its clients a price list that identified by number the Quadco teeth that corresponded to the Gilbert teeth and that were intended to be replaced by the Gilbert teeth.

[40] While, for the reasons given above, it is true that the sale of a component of a patented combination, even if the component has no use other than working the patented combination, is not sufficient to establish infringement by inducement, this state of affairs becomes inculpatory when the seller indicates to its clients the use that should be made of the component. We are no longer talking here about the mere fact that the seller knows or ought to know, by the type of article sold, that it will be used to infringe a patented combination (see *Innes, supra*, *Townsend, supra* and *Dunlop, supra*). The seller is making its clients aware of the fact that its product is intended to work the patented invention, which is the only reason they are buying it.

[41] As evidenced by its price list, Produits Gilbert believed it was necessary to indicate the intended use of its teeth in order to sell them. The fact that forestry operators were then able to

assemble the combinations without any further explanation, alleviates nothing (examination on discovery of Gilbert's representative, read in at trial, appeal book, vol. 6, at pp. 1893, 1894).

[42] In these circumstances, I must find that Produits Gilbert, through its influence, caused the infringement of the Quadco patent. I also must conclude that Produits Gilbert knew that, without this influence, there would have been no infringement.

[43] With respect to the behaviour targeted by exercising this influence, it is not necessary for Produits Gilbert to have had direct contact with the forestry operators. As Addy J. stated in *Procter & Gamble Co. v. Bristol-Myers Canada Ltd.* (1978), 39 C.P.R. (2nd), at p. 167:

Where the defendant has induced or procured an infringement, I do not feel that it is at all necessary in such cases for the supplier to have had any personal contact with the infringing consumer, to even know his or her identity or to have sold the article directly to that person. It is sufficient in such cases, if it is also established, that the article in fact has been sold by the defendant for the purpose of putting it on the market for sale to the ultimate infringer, regardless of whether the final sale is made by an agent of the defendant or by independent distributors or retailers.

[44] According to counsel for Produits Gilbert, a finding that there was infringement by inducement on the ground that Produits Gilbert ostensibly invited its clients to buy its products for the purpose of working the patented invention, is directly contrary to the decision of President Jackett of the Exchequer Court in *Slater Steel, supra*. This significant decision, given the reputation of its writer and the meticulous analysis that he conducted, warrants closer examination.

[45] The facts underlying President Jackett's decision are, at first glance, very similar to ours. That case, like ours, involved a patented combination used by hydro-electric companies; one of the

components was pre-formed metal rods. The defendants had admitted at trial that these rods had been sold (at p. 67):

. . . knowing that they were intended for use, and would be used, by British Columbia Hydro Authority in the construction of hydro transmission cables that constituted the said inventions or either of them and could be used by Hydro so as to infringe the patents in suit.

[46] It was also established that the rods could only be used to work the patented combination and that the defendants distributed a catalogue to the users (B.C. Hydro and other hydro companies) containing directions for working the patented combination.

[47] Despite this evidence, President Jackett refused to find the sellers of the pre-formed metal rods guilty of infringement by inducement. However, I must note that this decision is easily distinguished when regard is had to President Jackett's reason for dismissing the lawsuit.

[48] Indeed, the reasons show that President Jackett, relying on his own experience in the business world (it is well known that he was the head of the legal department at Canadian Pacific for several years after being the Deputy Minister of Justice and before becoming President of the Exchequer Court), determined that it was inconceivable that major companies like B.C. Hydro could have been influenced to commit wrongful acts by mere sellers of pre-formed rods (at pp. 89 and 90):

I cannot conceive that, assuming these entities knew of the existence of the patents, any one of them was induced or procured by the defendant to do something knowing it was illegal. Any one of them is a giant compared with the defendant. Judicial knowledge can be taken in this modern world that they are all well serviced by lawyers and engineers. I am prepared from my experience with such organizations to say that the balance of probability is that none of them would decide knowingly to do something that it regarded as illegal. It is even

less probable that they could be “induced” or “procured” against their own judgment to do something illegal by a “one man show” such as that operated by the defendants. The other alternative is that these entities did not know of the patents in suit and were moved to “innocent” infringement by misrepresentations made to them by the defendants. Having regard to the plaintiffs’ position as competitors with the defendants in supplying these entities, I find it impossible to believe, in the absence of clear evidence, that they did not, in some manner, bring the existence of their patent rights to the attention of their potential customers. No matter what hypothesis one adopts as to the facts, I find it incongruous to think of the defendants as being a party to a decision by one of these power entities to “infringe” the patents in suit. I find it most improbable that the plaintiffs failed to make their patent rights known and I find it equally improbable that the defendants could induce or procure a big power company or Government agency to embark on a course of wrongdoing.

[49] But for this conclusion, which is totally particular to that case, I have difficulty in seeing how President Jackett could have done anything other than conclude that infringement by inducement had been established in accordance with the state of the law that he described. Incidentally, this is not the first time that this decision has been distinguished in light of its particular context (see *Windsurfing International Inc. et al. v. Trilantic Corporation (Now Bic Sports Inc.)* (1985), 8 C.P.R. (3rd) 241 at p. 267).

[50] For these reasons, I would allow the appeal, set aside the trial judgment and, rendering the judgment that should have been rendered, I would allow the infringement action with respect to infringement by inducement of claims 1, 4 and 5 of the Quadco patent vis-à-vis the tooth/tooth holder 3 combination (as this combination is defined in the trial record); infringement by inducement of claims 2, 4 and 5 of the Quadco patent vis-à-vis the tooth/tooth holder 4 combination (as this combination is defined in the trial record); infringement by inducement of claims 2, 3, 4 and 5 of the Quadco patent vis-à-vis the tooth/tooth holder 5 combination (as this combination is defined in the trial record), and I would refer the issue of the determination of damages suffered by

the appellants and the profits earned by the respondent for the purpose of making an inquiry and report under section 153 of the Rules, with costs in favour of the appellants, both at trial and on appeal.

“Marc Noël”

J.A.

“I concur.
M. Nadon, J.A.”

“I concur.
J.D. Denis Pelletier, J.A.”

Certified true translation
Mary Jo Egan, LLB

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

DOCKET: A-396-06

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and QUADCO EQUIPMENT
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