

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *International Thermal Investments Ltd. v
Dometic Marine Canada Inc.*,
2026 BCSC 1875

Date: 20260911
Docket: S196310
Registry: Vancouver

Between:

**International Thermal Investments Ltd., and
International Thermal Research Ltd.**

Plaintiffs

And

**Dometic Marine Canada Inc.,
doing business as Seastar Solutions**

Defendant

Before: The Honourable Madam Justice Burke

Oral Reasons for Judgment Re Admissibility of Documents

Counsel for the Plaintiffs:

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Place and Date of Hearing:

Vancouver, B.C.
September 4 & 8, 2026

Place and Date of Judgment:

Vancouver, B.C.
September 11, 2026

[1] **THE COURT:** These are my oral reasons with respect to the admissibility of certain documents proffered by the plaintiffs in this matter. I will be brief but reserve the right to edit and/or add to these reasons in any final judgment in this matter. The parties have requested these reasons in advance of final argument. The court is therefore providing these reasons but they remain subject to the caveat set out as above.

[2] The plaintiffs have applied for the admission of a number of documents as evidence in this trial for their authenticity and the truth of their contents pursuant to the principled exception of the hearsay rule.

[3] The plaintiffs point out the underlying action relates to over a 25-year manufacturing relationship between the plaintiffs and the defendant. The plaintiffs allege a breach of contract and breach of confidence after the relationship broke down in 2019.

[4] The plaintiffs allege the defendant's sales of the MBU Burners and related parts continued after January 17, 2018, and royalties are due to their companies on such sales. The plaintiffs maintain, amongst other arguments, that the defendant's unilateral "retroactive", in effect, termination of the licence agreement in 2019 is not effective and the defendant's failure to pay such royalties is a breach of the licence agreement.

[5] In addition, the plaintiffs allege that the defendant's ongoing use of the technical information embodied in the MBU burners constitutes a breach of confidence.

[6] The defendant makes a number of arguments which the court will not set out in great detail at this time, but note the defendant maintains on a plain reading of the licence agreement, the contractual obligations between the parties terminated when the patents expired by July 14, 2015; alternatively, when the sale agreement expired on August 28, 2015; and in the further alternative, when the term of the licence agreement ended on December 31, 2016.

[7] The defendant also maintains while there was the delivery of some design information by International Thermal Research Ltd. ("ITR") to Teleflex, it was before March 7, 1997 and any such qualifying technical information was not embodied in MBU parts sold since January 2018. The defendant also says it has permission under s 22(a) to use the Technical Information that has since fallen into the public domain and individual parts of the MBUs sold by the defendant did not or do not embody any technical information of ITR.

[8] The plaintiffs seek to admit two categories of documents. The scope of their application has narrowed over the course of the trial as many of the asserted documents were entered as trial exhibits through the witnesses.

[9] The remaining documents at issue are the Tech Research Group Inc. ("TRG") documents on the basis of the hearsay and business records exception; Mr. Ohno's handwritten notes of the 2019 phone call with Mr. Curliss on the basis of the hearsay exception; and the Licence Agreement letters which the plaintiffs seek to be admitted on the basis they are business records and satisfy the exception to the hearsay rule.

[10] The plaintiffs say first that emails exchanged between Mr. Ohno and Mr. Curliss about the payment of royalty cheques and the prospective renewal of the licence agreement and ongoing payment of royalties are relevant to the plaintiffs' estoppel by convention defence, to the plaintiffs' counterclaim, and have now been authenticated through Mr. Curliss' testimony.

[11] The second category of documents, the TRG documents, the plaintiffs say are relevant to the issue of what technical information was transmitted to the defendant and eventually embodied in the MBU burner, which, in part, grounds the plaintiffs' breach of confidence allegations.

[12] The plaintiffs say the TRG documents and the Ohno handwritten notes clearly meet the principled exception to the hearsay rule as they are relevant, necessary, and reliable. The TRG documents are relevant because they show the development

work Mr. Robinson of the plaintiffs did on the PMB burner between 1994 to 1997, in the years prior to the plaintiffs' 1997 licence agreement with the defendant.

[13] Mr. Robinson, the individual critical to these events, has unfortunately, passed away, as well as his ITR counterpart and co-inventor Leonard Fleming. Mr. Robinson, however, kept records in his role in ITR of the development work conducted between TRG and ITR under the TRG subcontract, including the TRG subcontract itself, correspondence between himself and Mr. Bertsch and Mr. Codega of TRG, enclosures to the correspondence with US Army representatives and copies of test results from the US Army testing of the PMB burners.

[14] While Mr. Bertsch is alive, he is unavailable to act as a witness at trial. He is 88 years old, has a health condition affecting his memory, and currently resides in an assisted living facility in Norwood, Massachusetts. He is unable to travel by plane. He has, however, been able to provide an affidavit confirming his former role of vice president of TRG, his recognition of a TRG letterhead and logo, his recognition of his own signature, handwriting, email address, and his relationship with Mr. Robinson.

[15] The plaintiffs say they have made extensive efforts to contact the other individuals named in the category two documents: namely, Michael Codega, Joe Mackoul, and Glenn Doucet, all without success.

[16] The plaintiffs rely on the principled approach and exception to the hearsay rule founded on the premise that a statement may be admitted as hearsay where it is established as, first, being necessary to the hearing and, second, reliable. The plaintiffs point out the standard of necessity is determined by the reasonableness of the parties' efforts to present the evidence by other means, with consideration of the opposing party's interests.

[17] The necessity criterion must be interpreted as "reasonably necessary," as set out in *R v Bradshaw*, 2017 SCC 35 [*Bradshaw*]. A witness who is shown to have

refused to testify is sufficient evidence to establish necessity. A “declarant’s death “is almost always conclusive of the necessity issue.”

[18] With respect to reliability, a judge at the admissibility stage must only consider whether the hearsay meets the threshold reliability requirements. Threshold reliability requires hearsay to be sufficiently reliable to overcome the dangers arising from the difficulty of testing it, as per *R v Wilder*, 2002 BCSC 133, at para 181.

[19] In assessing this matter, after considering the parties’ submissions and a review of the documents, the Court concludes the necessity requirement is met for each of the categories of documents. Mr. Ohno’s inability to recall the events of the documents in question, his unwillingness to testify as a witness, and the fact he is seeking medical assistance with respect to potential cognitive issues confirms this requirement.

[20] With respect to the other more technical requirements, two of the critical witnesses are deceased, being Ed Robinson and Len Fleming. Another potential witness, Mr. Bertsch, is elderly, resides in an assisted living facility, and has a health condition that affects his memory and ability to travel. Furthermore, the Court is satisfied based on the material provided that the plaintiffs have employed sufficient efforts to attempt to locate other named individuals with respect to these events.

[21] With respect to the reliability of Mr. Ohno’s notes, Mr. Ohno attests to the fact he recognizes his ITR email address, he recognizes his own handwriting in the 2019 phone call, and these statements were recorded in the ordinary course of business. Mr. Ohno’s affidavit confirms that he recalls Brian Curliss, that he was in contact with him from time to time, and believes he wrote those handwritten notes in relation to the 2019 call.

[22] With respect to the reliability of the more technical documents, these documents were created contemporaneously with the events described in the ordinary course of an active contractual relationship and business relationship between ITR and TRG. They consist of technical correspondence, status reports,

design documents, and other documents reflecting the business relationship between these parties.

[23] These documents corroborate each other and were authored by individuals with personal knowledge of the matters, including Ed Robinson and Mr. Bertsch. Mr. Bertsch's affidavit confirms his former role as vice president of TRG, identifies TRG's letterhead and logo, and identifies his own signature. He confirms his email address and his business relationship with Ed Robinson. Further, the documents have gained a share of reliability, including corroboration, and, in particular, contemporaneity. No motive to lie has been demonstrated or even alluded to.

[24] While the defendant says there is no basis to say the content of these documents are true, the weight and effect of these documents can still be raised in final argument. The documents are relevant and their indicia of both reliability and contemporaneity along with the affidavits of the individuals set out above, leads to the conclusion these documents can be admitted as exhibits in this trial.

[25] In view of all these reasons, the Court has concluded these documents are admitted as evidence under the principled exception to the hearsay rule.

[26] The plaintiffs also seek the licence agreement letters to be admitted as evidence under the business records exception to the hearsay rule and under s 42 of the *Evidence Act*, RSBC 1996, c 124 [*Evidence Act*]. These include letters on Teleflex letterhead from 1996, 1997, and 1998, and include a February letter of 1996 to Ed Robinson from Karcher and December 1997 from Hunter Manufacturing Company concerning the manufacture of the multi-fuel burner test and production contract.

[27] Under s 42 of the *Evidence Act*, a statement of fact in a document is admissible as evidence of the fact if that document was made contemporaneously by someone having personal knowledge of the matters being recorded; by someone who has a duty to record or communicate the document; and the matters being recorded are of the kind ordinarily recorded in the course of that business.

[28] In the court's view, there is no doubt these documents are of the kind that are ordinarily recorded in the usual and ordinary course of business. The defendant's argument that only letters written by someone who has a duty to or is in charge of keeping track of facts as they occur and producing a record of them, is far too narrow. Contemporaneity is established along with the authenticity of the timing of the letters, all of which leads to the conclusion these documents can be admitted as evidence in this trial under s 42 of the *Evidence Act*.

[29] This Court concludes, therefore, each of the two binders in issue proffered by the plaintiffs can be marked as exhibits proper in the matter.

[30] I am going to pause there just to let madam registrar know that we will be done subsequent to what I am just about to deal with now.

[31] As it is important to have these applications determined before final argument in this matter, this Court turns very briefly to the defendant's application regarding particulars and its request that any evidence directed to any technical features of the plaintiffs' or the defendant's burners that were not particularized in the amended reply to the demand for further particulars dated May 16, 2024, including as to the configuration and sizing of burner holes, is not within the scope of the pleadings in this action.

[32] Alternatively, the defendant asks that the Court deny leave if the plaintiff seeks leave to allow the particulars delivered on August 12, 2026 or August 25, 2026.

[33] The Court is unable to provide detailed reasons in these latter matters and will do so in any final judgment rendered.

[34] The Court concludes, however, that the defendant's request for a determination that any evidence associated with particulars subsequent to the amended reply to a demand for further particulars dated May 16, 2024, is not within the scope of the pleadings, is denied.

[35] In brief, Rule 3-7(2) of the *Supreme Court Civil Rules* provides that a party may provide further particulars as they become known. The Court is satisfied that these particulars were provided when they became known. Some of these arose from examinations for discovery held quite late in this matter and some of those from the location of certain physical file folders in June 2026, also late in this matter.

[36] The plaintiffs' second particular amendment dated August 25, 2026 following the receipt of the defendant's answers to undertakings provided August 21, 2026, followed the second examination for discovery of Mr. Curliss held in July of 2026. This, the plaintiffs say, provided critical information previously unknown to the plaintiffs which they then followed up.

[37] These particulars arose from the defendant's documents which the defendant would have been aware of. The timing of these particulars is therefore adequately explained in this instance. The Court agrees that the plaintiffs have provided additional specificity by these particulars, refining the pleadings rather than adding to the pleadings.

[38] The Court is also of the view, in the alternative, if necessary, the pleadings could be amended to be consistent with the position taken by the plaintiffs in this proceeding. These allegations have already been advanced by the plaintiffs in the proceeding. In accordance with the test in *Cambie Surgeries Corporation v British Columbia (Attorney General)*, 2018 BCSC 1141, the Court concludes that the proposed amendment, is not inconsistent with the plaintiffs' pleadings; nor does it raise new issues. Rather, it narrows the pleadings and is consistent with the plaintiffs' earlier allegations.

[39] The defendant had notice of the plaintiffs' intention to amend the particulars and elected not to call the witness, Mr. Bruce Wilnechenko, the only other person besides Mr. Swartz, who could speak to these events- despite the fact that Mr. Wilnechenko was originally listed on the defendant's list of witnesses.

[40] The defendant had the opportunity to cross-examine the witnesses on this point, and the particulars follow directly from the defendant's own documents with the timing of the delivery explained once the defendant made its response to discovery answers.

[41] Furthermore, the evidence has demonstrated that the matters referenced in the plaintiffs' particulars, are necessary and go to the key issues and live matters between the parties. The Court agrees it is in the interests of justice that the matters be completely and finally determined in the present proceeding. With respect to any argument on limitation periods, the Court notes in the jurisprudence courts will, at most, consider this but do not bar the pleadings necessarily on the basis of a limitation period.

[42] As in *Lovelock v 045978 B.C. Ltd.*, 2025 BCSC 361 [*Lovelock*], and *Cun v Bateman*, 2021 BCSC 1512 [*Bateman*], I do not accept that the proposed amendments change the complexion of the case. They are part of and refine the earlier particulars in this matter. The onus is on the defendant to show actual prejudice and I am not persuaded that it has. Even if some prejudice is shown, the Court must, as noted in *Lovelock*, balance prejudice to both parties, keeping in mind the plaintiffs will suffer more harm in losing the ability to prosecute a claim rather than the defendant who may well lose a windfall opportunity to avoid the issue altogether, as set out in para 9 of *Bateman*.

[43] In view of all the above, the defendant's application to preclude evidence directed to any technical feature of the plaintiffs' or the defendant's burners that were not particularized on May 16, 2024, including the configuration and sizing of burner holes, is dismissed. Alternatively, if necessary, this Court would grant the plaintiffs' amendment as requested on the basis set out above.

"Burke J."