Court File No: A-_____-23

FEDERAL COURT OF APPEAL

BETWEEN:

SEISMOTECH IP HOLDINGS INC.
SEISMOTECH SAFETY SYSTEMS INC.

APPELLANTS

AND:

ECOBEE TECHNOLOGIES ULC
APPLE CANADA INC.
APPLE INC.

RESPONDENTS

NOTICE OF APPEAL

TO THE RESPONDENTS:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the appellants. The relief claimed by the appellants appears on the following page.

THIS APPEAL will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court directs otherwise, the place of hearing will be as requested by the appellants. The appellants request that this appeal be heard at **Vancouver, British Columbia**.

IF YOU WISH TO OPPOSE THIS APPEAL, to receive notice of any step in the appeal or to be served with any documents in the appeal, you or a solicitor acting for you must prepare a notice of appearance in Form 341 prescribed by the Federal Courts Rules and serve it on the appellants' solicitor, or where the appellant is self-represented, on the appellant, WITHIN 10 DAYS of being served with this notice of appeal.

IF YOU INTEND TO SEEK A DIFFERENT DISPOSITION of the orders appealed from, you must serve and file a notice of cross-appeal in Form 341 prescribed by the Federal Courts Rules instead of serving and filing a notice of appearance.

Copies of the Federal Courts Rules information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPEAL, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

Date: December 18, 2023

Issued by:_____
(Registry Officer)

Address of local office: Pacific Centre
P.O. Box 10065
701 West Georgia Street
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WITH NOTICE TO: **ECOBEE TECHNOLOGIES ULC**
Piasetzki Nenniger Kvas LLP
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WITH NOTICE TO: **APPLE CANADA INC. and APPLE INC.**
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APPEAL

THE APPELLANTS APPEAL to the Federal Court of Appeal from the Order of the Honourable Mr. Justice Grammond dated December 7, 2023, a single order applicable to both files T-1147-23 and T-1148-23 (the "**Order**"), by which the appellants' motions for disclosure of the identity of the unknown alleged wrongdoers in the two actions, commonly referred to as a *Norwich Pharmacal* motion (the "**Motions**"), were dismissed.

THE APPELLANTS ASK that:

1. The appeal be allowed and the appellants' Motions be granted on terms this Honourable Court deems just;

2. In the alternative, the appeal be allowed and:

    a. a finding from this Honourable Court that both of the concerned factors for the Motions were met (i.e., there is a *bona fide* claim against the unknown alleged wrongdoers, and the public interest favouring disclosure outweighs the legitimate privacy concerns of the unknown alleged wrongdoer);

    b. the Motions be remitted to a different judge of the Federal Court for determination of any of the remaining legal factors, in accordance with this Honourable Court's reasons; and

    c. parties bear their own costs for steps in the Federal Court before the appeal;

3. In the further alternative, the appeal be dismissed but without prejudice to the appellants' right to bring further motion(s) for a *Norwich Pharmacal* or similar order, taking into account this Honourable Court's reasons;

4. The appeal be allowed with respect to costs the Federal Court awarded for the Motions, along with substitution with an order that this Honourable Court deems just;

5. Costs of this appeal, if opposed; and

6. This Honourable Court grant such further orders and relief as it deems just.

THE GROUNDS OF APPEAL are as follows:

The Federal Court's Errors of Law

1. In regard to whether the appellants have a *bona fide* claim for patent infringement, the Federal Court erred in law in not adhering to this Court's guidance in *BMG Canada Inc. v. John Doe*, 2005 FCA 193 [***BMG FCA***] at para. 34 that, for an applicant to demonstrate a *bona fide* claim, it is sufficient to show "*that they really do intend to bring an action for infringement of [patents] based upon the information they obtain, and that there is no other improper purpose for seeking the identity of these persons*":

    a. The Federal Court did not adhere to this Court's guidance in *BMG FCA* at paras. 46-54 that the evidentiary requirement for a *Norwich Pharmacal* order is focused on evidence linking the unknown alleged wrongdoers to the alleged conduct, not evidence on the merits of the alleged infringement (see discussion of the different categories of evidence in *BMG Canada Inc. v. John Doe*, 2004 FC 488 in the headings at paras. 20-21, overturned by this Court);

    b. The Federal Court further erred in law in making prejudicial merits findings about the appellants' claim, contrary to this Court's guidance in *BMG FCA*, at paras. 47 that "*conclusions such as these should not have been made in the very preliminary stages of this action. They would require a consideration of the evidence as well as the law applicable to such evidence after it has been properly adduced. Such hard conclusions at a preliminary stage can be damaging to the parties if a trial takes place and should be avoided*";

    c. The Federal Court's approach to the *Norwich Pharmacal* orders practically and procedurally forecloses IP owners from pursuing infringement by unknown alleged wrongdoers, except for large institutional infringers that demonstrably have substantial legal resources to defend a court action, undermining the substantive rights Parliament granted to patentees under s. 42 of the *Patent Act*;

d. The Federal Court further erred in law in embarking on, or diverging to, a motion to strike analysis when considering if the appellants have *bona fide* intent to advance their action, when there was no motion to strike before the court; and/or

e. The Federal Court also erroneously relied on a case on motions to strike that was decided *per incuriam* (*Mostar Directional Technologies Inc v Drill-Tek Corporation*, 2017 FC 575, per Aylen, P., as she then was, at para. 33),[1] and was directly at odds with *Reliable Electric Co. v. Northern Telecom Ltd.*, 1984 CarswellNat 858, 1 C.P.R. (3d) 339 (per Pinard J.) at paras. 9-10; *Reliance Electric Co. v. Northern Telecom Ltd.*, 1984 CarswellNat 598, 1 C.P.R. (3d) 480 (per Walsh J.); *Northern Telecom Ltd. v. Reliable Electric Co.*, 1986 CanLII 6850 (FCA), [1986] 1 FC 211 at p. 212;

2. In regard to the weighing between the public interest in favour of disclosure and the privacy interest of the unknown alleged wrongdoers, the Federal Court erred in law in not adhering to this Court's guidance in *BMG FCA* at paras. 36-45:

a. The Federal Court erred in adding a novel consideration in the weighing exercise that the unknown alleged wrongdoers "be able to defend the action";

b. The Federal Court failed to apply this Honourable Court's guidance from two IP appeal cases, both of which directly answered the weighing exercise, that:

i. There is a strong public interest in ensuring IP owners can enforce their IP rights, which outweighs the public interest in maintaining the confidentiality of the unknown alleged wrongdoers' contact information (*Glaxo Wellcome PLC v. M.N.R.*, 1998 CanLII 9071 (FCA) at para. 62 that "*the public interest in ensuring that the appellant is able to pursue in the courts those who have allegedly violated its patent rights outweighs the public interest in maintaining the confidentiality of the importers' names*" [emphasis added]); and

[1] Although *Mostar Directional Technologies Inc v Drill-Tek Corporation* was a reported decision with neutral citation, it has since been removed from CanLii and all other commercial law reporting services.

ii. IP owners alleging infringement have *a right* to disclosure of the contact information of the unknown alleged wrongdoers (*BMG FCA* at para. 42 stating that "*in cases where plaintiffs show that they have a bona fide claim that unknown persons are infringing their copyright, they have a right to have the identity revealed for the purpose of bringing action*" [emphasis added]);

c. The Federal Court failed to appreciate that the Motions were only procedural motions to ensure that the relevant parties can be properly identified and brought before the court to answer the claim on their merits, however the Federal Court seems to have incorrectly considered the Motions as a form of "leave application" to commence a court action;

d. The Federal Court did not appreciate that the information sought in the Motions was not highly sensitive information, but rather was limited to contact details (i.e., name, email address, and address) as well as information confirming the recency of those contact details, and that any confidentiality concerns can be addressed through the confidentiality order that the appellants had proposed; and/or

e. The Federal Court's concerns about unknown alleged wrongdoers being "able to defend the action" is a not proper consideration at the preliminary stage of whether or not to reveal the identities of those individuals:

i. The Federal Court's concerns for fairness to the unknown alleged wrongdoers were addressed at length in *Voltage Pictures LLC v. John Doe*, 2014 FC 161, which the Federal Court did not follow without providing any reason or sound basis (*R. v. Sullivan*, 2022 SCC 19 at paras. 73-75);

ii. The Federal Court's concerns on whether the unknown alleged wrongdoers would be able to defend the action were also premature and should be raised by the unknown alleged wrongdoer(s), on a proper evidentiary record, after they have been identified and are before the court; and/or

iii. The Federal Court has numerous tools in its arsenal to address the concern about unknown alleged wrongdoer(s) being "able to defend the action" including: (A) those individuals can informally pool their resources; (B) they can formally advance a joint defense (Rule 114 or 334.14(2)); (C) seek advance costs; and/or (D) case management, which is already in place;

Federal Court did not Adhere to the Federal Courts Rules or Procedural Fairness

3. The Federal Court erred in not adhering to the *Federal Courts Rules* for ruling on unresolved objections made to questions at an out-of-court cross-examination on an affidavit (the "**Disputed Questions**"), and then based on that ruling granted Apple Canada Inc. and Apple Inc. (collectively "**Apple**") an adverse inference:

   a. In the absence of a proper objections motion for the Disputed Questions,[2] the Federal Court should not have embarked on a determination of the unresolved objections to the Disputed Questions (Rules 47(2) and 95(2); *Energizer Brands, LLC v. The Gillette Company*, 2020 FCA 49 at paras. 38-39; *Indigenous Police Chiefs of Ontario v. Canada (Public Safety)*, 2023 FC 916 at para. 63; *McCain Foods Limited v. J.R. Simplot Company*, 2021 FC 890 at paras. 37-39);

   b. The Federal Court further erred in law in drawing an adverse inference, which is not an enumerated remedy under Rule 97 for overruled objections at an out-of-court cross-examination; and/or

   c. The Federal Court did not appreciate that the *Federal Courts Rules* sections on examinations were intended to be a "complete code" without gaps (*Sierra Club of Canada v. Canada*, 1999 CanLII 7756 (FC) at paras. 14-19);

4. The Federal Court also failed to afford the appellants the requisite procedural fairness in before rendering a ruling on the Disputed Questions, or granting an

[2] Apple had brought an "objections motion" relating to other questions, but not for the Disputed Questions that the Federal Court granted a remedy for. Apple's "objections motion" was dismissed as moot.

adverse inference based on an overruled objection:

a. The Federal Court did not afford the appellants any reasonable opportunity to provide an answer to the Disputed Questions, after the Federal Court overruled the objections to the Disputed Questions; and/or

b. The Federal Court did not afford the appellants' affiant the necessary fairness under the common law rule in *Browne v Dunn,* before the Federal Court drew any adverse inference or adverse findings of fact against that witness;

The Federal Court's Palpable and Overriding Errors or Errors in Principle

5. In regard to whether the appellants have a *bona fide* claim for patent infringement, the Federal Court made palpable and overriding(s) error, or errors in principle, in its rulings on the objections for the Disputed Questions:

a. The Federal Court erred in finding that the Disputed Questions were relevant to the Motions, or within the scope of cross-examination on an affidavit;

b. The Federal Court failed to rule on the other grounds of objection the appellants recorded for the Disputed Questions in addition to relevance, namely objections for litigation privilege, solicitor-client privilege, and/or solicitor-work product; and/or

c. The Federal Court erred in principle or made a palpable and overriding error in failing to find that the appellants had a strong basis for their belief that the underlying patents had been infringed, which was based on the inventor's personal and direct experience and the inventor's familiarity with the invention covered by those patents;

6. In regard to the weighing of the public interest in favour of disclosure and the privacy interest of the unknown alleged wrongdoers, the Federal Court made palpable and

overriding(s) error, or errors in principle:

a. That the unknown alleged wrongdoers would be unable to defend the claims, in the absence of any evidence to that effect; and/or

b. The judge overlooked that he had previously found that the manufacturers of the allegedly infringing devices may have a commercial interest in protecting their customers (i.e., the unknown alleged wrongdoers), an answer to the judge's concern of those unknown alleged wrongdoers being defenseless;[3]

Federal Court's Order for Two Sets of Elevated Costs against the Appellants

7. The Federal Court's reasons for imposing two sets of elevated cost against the appellants lack factually and legally sufficient reasons to permit appellate review (*Salna v. Voltage Pictures, LLC*, 2021 FCA 176 at paras. 135-137);

8. The Federal Court erred in law or principle, took irrelevant factors into consideration, or failed to consider factors that should have been considered, in awarding costs that were substantially beyond the scale under Rule 407 (*A. Lassonde Inc. v. Island Oasis Canada Inc.*, 2000 CanLII 16812 (FCA) at paras. 27-28; *Hospira Healthcare Corporation v. Kennedy Institute of Rheamatology*, 2018 FC 992 at para. 37; *Vidéotron Ltd. v. Technologies Konek Inc.*, 2022 FC 733[4] at para. 4);

9. The Federal Court made a palpable and overriding error in finding that the Motions were complex due to the scope of the appellants' submissions, when the appellants were simply responding to Apple's conduct including, in particular, allegations against the appellants that were serious but unsupported, on the basis of numerous Federal Court cases (including a case rendered by the motions judge) that were rejected by this Honourable Court;

[3] *Seismotech IP Holdings Inc. v. John Does*, 2023 FC 1335 at paras. 15 and 22-23 (per Grammond J.), appeal pending in A-277-23.

[4] The underlying summary judgment motion was overturned without comments regarding the costs.

Other and Further Grounds of Appeal

10. Such further grounds as counsel may advise and this Honourable Court may permit.

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