

Federal Court of Appeal



Cour d'appel fédérale

Date: 20241202

Docket: A-352-23

Citation: 2024 FCA 205

**CORAM: DE MONTIGNY C.J.
MACTAVISH J.A.
LEBLANC J.A.**

BETWEEN:

**SEISMOTECH IP HOLDINGS INC.
SEISMOTECH SAFETY SYSTEMS INC.**

Appellants

and

**ECOBEE TECHNOLOGIES ULC
APPLE CANADA INC.
APPLE INC.**

Respondents

Heard at Vancouver, British Columbia, on September 12, 2024.

Judgment delivered at Ottawa, Ontario, on December 2, 2024.

**REASONS FOR JUDGMENT BY:
CONCURRED IN BY:**

**LEBLANC J.A.
DE MONTIGNY C.J.
MACTAVISH J.A.**

Federal Court of Appeal



Cour d'appel fédérale

Date: 20241202

Docket: A-352-23

Citation: 2024 FCA 205

**CORAM: DE MONTIGNY C.J.
MACTAVISH J.A.
LEBLANC J.A.**

BETWEEN:

**SEISMOTECH IP HOLDINGS INC.
SEISMOTECH SAFETY SYSTEMS INC.**

Appellants

and

**ECOBEE TECHNOLOGIES ULC
APPLE CANADA INC.
APPLE INC.**

Respondents

REASONS FOR JUDGMENT

LEBLANC J.A.

I. Introduction

[1] Before the Court is an appeal of an order of Grammond J. of the Federal Court (the Motion Judge) dated December 7, 2023 (2023 FC 1649) dismissing the appellants' motion for a

Norwich order (the Motion). The Motion was brought in relation to two simplified actions launched by the appellants against as of yet unidentified consumers who bought and installed smart thermostats in their homes, which, the appellants claim, infringe certain patents they own. The appellants allege that more than 75 brands and models of smart thermostats, made by Canadian (Federal Court file T-1147-23) and foreign (Federal Court file T-1148-23) manufacturers, infringe their patents. One of the Canadian manufacturers, Ecobee Technologies ULC (Ecobee), was granted party status as a defendant on October 5, 2023. Our Court confirmed that order on September 12, 2024 (2024 FCA 144).

[2] If granted, the requested *Norwich* order would have forced Apple Inc. and Apple Canada Inc. (Apple), which are non-party respondents to the Motion, to disclose the names and addresses of consumers who downloaded the app from the App Store that allegedly controls these devices. The appellants estimate that there are hundreds of thousands of these consumers.

[3] The Motion Judge dismissed the Motion on the ground that the appellants had failed to show that they have a *bona fide* claim against the unknown consumer defendants. As well, he was satisfied that the public interest did not favour granting the Motion. He held, in this respect, that granting the Motion would unjustly deprive the consumer defendants of meaningful access to justice given the inherent complexity of a patent infringement action and the practical impossibility for each individual consumer defendant to defend such an action.

[4] The appellants contend that the Motion Judge erred by impermissibly elevating the *bona fide* threshold to a *prima facie* standard, and by improperly drawing, in his analysis of that

criterion, an adverse inference from their refusal to answer cross-examination questions about the inventor's belief that the patents at issue were infringed, thereby violating the rules of procedural fairness. They also claim that the Motion Judge impermissibly extended the public interest factor beyond balancing the interest of intellectual property owners in ensuring that their statutory rights can be enforced against the privacy interests of the alleged infringers.

II. Norwich Orders

[5] A *Norwich* order is “a type of pre-trial discovery which, *inter alia*, allows a rights holder to identify wrongdoers” (*Rogers Communications Inc. v. Voltage Pictures, LLC*, 2018 SCC 38 at para. 18 (*Rogers*), citing *Alberta Treasury Branches v. Leahy*, 2000 ABQB 575 at para. 59, *aff'd* 2002 ABCA 101 (*Leahy*)). As this Court stated in *Glaxo Wellcome PLC v. M.N.R. (C.A.)*, [1998] 4 F.C. 439 (*Glaxo*), it is an equitable remedy of “ancient origin” (also known as a bill of discovery) which received “renewed interest” by the House of Lords in *Norwich Pharmacal Co. v. Customs and Excise Comrs.*, [1974] A.C. 133 (H.L.) (*Norwich Pharmacal*) (*Glaxo* at paras. 20–21).

[6] In the Federal Court, a *Norwich* order can be sought pursuant to that Court's equitable jurisdiction (*Glaxo* at para. 33), or pursuant to Rule 238 of the *Federal Courts Rules*, S.O.R./98-106 (the Rules) (*BMG Canada Inc. v. John Doe*, 2005 FCA 193 at para. 23 (*BMG*)). Whatever the source of the Federal Court's authority, the test for the issuance of such an order is the same (*BMG* at paras. 30–36). This test requires the plaintiff to show that:

- a) a *bona fide* claim exists against the alleged wrongdoer;
- b) the person from whom discovery is sought is: (i) more than an innocent bystander, meaning that that person is in some way involved in the matter in dispute; (ii) the only practical source of information available to the plaintiff; and (iii) reasonably compensated for the expenses, including legal costs, arising out of compliance with the disclosure order; and
- c) the balancing of the public interests for and against disclosure of the information sought from that person favours disclosure.

[7] Only the *bona fide* and public interest criteria are at issue in this appeal.

III. Standard of Review

[8] *Norwich* orders are discretionary orders (*Glaxo* at paras. 24, 34; *BMG* at para. 28; *Prandi v. Salisbury*, 2024 BCCA 57 at para. 26 (*Prandi*)). As such, they are entitled to a high degree of deference, meaning that the role of this Court on appeal is not to substitute its discretion for that of the Motion Judge (*Glaxo* at para. 34; *Prandi* at para. 26). Our role is rather to determine whether the Motion Judge correctly directed himself on the applicable law and if so, whether he made a palpable and overriding error in applying that law to the facts (*Housen v. Nikolaisen*, 2002 SCC 33 at paras. 8, 10 and 36 (*Housen*); *Hospira Healthcare Corporation v. Kennedy Institute of Rheumatology*, 2016 FCA 215 at para. 79; *Prandi* at para. 26).

IV. The Bona Fide Criterion

[9] As mentioned, the appellants' contention here is two-fold. First, they submit that the Motion Judge erred in law by applying the *prima facie* standard. This, they say, is wrong because this Court, in *BMG*, held that the *prima facie* standard asked too much of a plaintiff seeking to identify alleged wrongdoers. The appellants claim that the *bona fide* criterion requires no evidence of infringement, only evidence linking the alleged wrongdoers to the alleged infringement. In other words, they assert that this criterion is not a "merit-based" criterion.

[10] I cannot accept these submissions. First, it is clear that the Motion Judge correctly identified the *bona fide* standard as the applicable standard when he contrasted this "relatively low threshold" to the "higher bar of a likelihood of success", often illustrated, he said, by the Latin expression "*prima facie*" (Motion Judge's Reasons at para. 14). The Motion Judge, quoting from *BMG*, was fully aware that in order to obtain a *Norwich* order, a plaintiff "need not show that the claim is likely to succeed" (Motion Judge's Reasons at para. 14).

[11] The real issue here has to do with what exactly the low threshold associated with the *bona fide* criterion exactly means for a *Norwich* petitioner. The Motion Judge, relying on *Glaxo*, opined that this threshold was "intended to ensure that actions for a bill of discovery are not brought frivolously or without justification" (Motion Judge's Reasons at para. 14, citing *Glaxo* at para. 24). The appellants, relying on *BMG*, claim that to the extent this interpretation requires some merit-based analysis of the claim against the alleged wrongdoer, it is ill founded in law.

[12] With respect, I find the appellants' argument unpersuasive. Key to the actual scope of the *bona fide* criterion is, in my view, this Court's decision in *Glaxo*. *Glaxo* dealt with the "particularly novel issue" of whether the equitable remedy of a bill of discovery was available in the Federal Court (Trial Division at the time) (*Glaxo* at para. 20). In answering that question, the Court provided a detailed review of *Norwich Pharmacal*. As noted, it concluded that the *bona fide* criterion required the *Norwich* petitioner to show that the underlying action to the *Norwich* motion was neither frivolous nor brought without any justification (*Glaxo* at para. 24). Later in its reasons, the Court equated that criterion to the need to establish that a "legitimate claim" exists against the alleged wrongdoers (*Glaxo* at para. 44).

[13] *Glaxo* has been described in the case law as the first judgment to provide footing in Canadian law for the equitable remedy of a bill of discovery (*Leahy* at para. 97; see also: *Prandi* at para. 27). In *Leahy*, the *bona fide* requirement was understood, based on a review of the relevant case law, including *Glaxo*, as requiring the *Norwich* petitioner to "provide evidence sufficient to raise a valid, bona fide or reasonable claim" (*Leahy* at para. 106).

[14] *Leahy* was affirmed on appeal (2002 ABCA 101; leave to appeal to the Supreme Court of Canada denied, [2002] S.C.C.A. No. 235). *Leahy* was then followed by the Court of Appeal of Ontario in *GEA Group AG v. Flex-N-Gate*, 2009 ONCA 619 (at paras. 53–55, 62, 73) (*GEA Group*) and *1654776 Ontario Limited v. Stewart*, 2013 ONCA 184 (at paras. 50–52; leave to appeal to the Supreme Court of Canada denied, [2013] S.C.C.A. 225) (*Stewart*). Recently, the principles set out in both *GEA Group* and *Stewart* were reaffirmed in *Bluemoon Capital Ltd. v. Ceridian Holding Inc.*, 2022 ONCA 868 (at paras. 6–7) (*Bluemoon Capital*).

[15] Therefore, according to *Glaxo* and other appellate authority on *Norwich* orders, which considers *Glaxo* to be a foundational decision, I see no basis to the appellants' contention that the *bona fide* criterion somehow excludes any form or degree of assessment of the merits of the claim made against the alleged wrongdoers. Quite the contrary, it does, albeit to the limited extent of ensuring that the claim is neither frivolous nor without justification.

[16] In my view, *BMG* has not changed the legal landscape in this area. In that case, the Court quoted extensively from *Glaxo* and adopted the *bona fide* test enunciated therein (*BMG* at para. 33).

[17] The appellants rely more specifically on paragraph 34 of *BMG* in support of their contention that the *bona fide* criterion is not merit-based. After stating, just as in *Glaxo*, that imposing the burden of showing a *prima facie* case on *Norwich* petitioners would have effectively stripped them of a remedy, the Court in *BMG* went on to say:

It is sufficient if they show a *bona fide* claim, i.e. that they really do intend to bring an action for infringement of copyright based upon the information they obtain, and that there is no other improper purpose for seeking the identity of th[e] persons [they wish to sue]”.

[18] However, this quote cannot be read in isolation. First, there is no indication in *BMG*, express or implied, that the Court distanced itself from *Glaxo* which requires *Norwich* petitioners to establish a “legitimate claim” against the alleged wrongdoers, that is a claim that is neither frivolous nor without justification. It is to be recalled that in the interests of certainty, consistency and predictability of the law, the Court normally follows its prior decisions (*Miller v.*

Canada (Attorney General), 2002 FCA 370 at para. 9 (*Miller*); *Feeney v. Canada*, 2022 FCA 190 at para. 16). When it does not, which would only happen in “exceptional circumstances” (*Miller* at para. 10), the Court will normally explain why.

[19] Second, as noted by the Motion Judge and the respondents, there was evidence filed in support of the *Norwich* motion in *BMG*. Applying the *prima facie* threshold, the Federal Court dismissed the *Norwich* motion because of deficiencies in that evidence (*BMG* at para. 15). Even though it found the Federal Court to have erred by “embark[ing] upon a consideration of whether there had been an infringement of copyright” (*BMG* at para. 15), this Court nevertheless dismissed the appeal, as it saw no reason to interfere with the Federal Court’s evidentiary finding even in light of the lesser *bona fide* threshold.

[20] The appellants argue that the evidence filed in *BMG* was not merit-based and only served to establish a connection between the alleged infringers and the alleged infringement, as opposed to actual infringement.

[21] I disagree. The *BMG* evidence consisted of: (i) details of the investigation conducted by the copyright owners; (ii) screenshots of the files being offered by the impugned IP addresses; (iii) copies of the files requested and received from the non-party respondents; and (iv) confirmation from the copyright owners that the files correspond to the copyrighted songs. It went, at least in part, to the merits of the claim against the alleged copyright infringers. As the Motion Judge put it, it provided a “plausible basis for assuming that there was a copyright

infringement” (Motion Judge’s Reasons at para. 36), which is entirely consistent with the requirement that a legitimate claim against the alleged infringers be shown to exist.

[22] Read in its proper context, *BMG* merely cautions against adjudicating the actual merits of a claim at the early stage of a *Norwich* motion (see also: *Bluemoon Capital* at para. 7). This was perfectly understood by the Motion Judge both in identifying the applicable test and in applying it to the facts of the case.

[23] I am therefore satisfied that the Motion Judge correctly directed himself on the law. Although the *bona fide* standard is not as demanding as the *prima facie* case standard, it nevertheless requires some minimal analysis of the merits of the claim, as evidenced by the case law, including *BMG*.

[24] The issue then is whether the Motion Judge committed a reviewable error in applying the *bona fide* test to the facts of the case. It is not disputed that this issue must be reviewed against the deferential standard of palpable and overriding error.

[25] The Motion Judge first reviewed the pleadings and concluded that the appellants’ infringement claim against the consumer defendants was purely speculative. The Motion Judge noted that the statement of claim merely named infringing devices and asserted, without explanation, that these devices infringed certain patent claims or that their use by these defendants infringed those claims. According to the Motion Judge, the consumer defendants

were “left to guess how the claims are construed and which of the devices’ components infringe them” (Motion Judge’s Reasons at para. 34).

[26] The Motion Judge then considered the evidence filed in support of the Motion and found that it did not remedy the deficiencies in the pleadings as it failed to provide any particulars of the infringement allegations. The Motion Judge noted, in this regard, that the appellants had been aware for some time prior to the hearing of the Motion that the *bona fide* criterion was an issue but had done nothing to provide any additional basis to support their infringement allegations (Motion Judge’s Reasons at para. 27).

[27] The Motion Judge concluded from all of this that the *bona fide* requirement had not been made out by the appellants.

[28] The appellants essentially claim that the Motion Judge erred by:

- a) drawing an analogy between the *bona fide* criteria and the “plain and obvious” test applicable to motions to strike;
- b) relying on *Mostar Directional Technologies Inc. v. Drill-Tek Corp.*, 2017 FC 575 (*Mostar*), an unreported decision of the Federal Court dealing with the issue of sufficiency of pleadings in a patent case; and
- c) failing to recognize that contrary to other types of cases, the burden for seeking a *Norwich* order in intellectual property matters is light, as these matters, especially

patent cases, involve rights that are clearly set out in a legal instrument that can be compared against the physical device allegedly infringed.

[29] These submissions are unpersuasive. First, the analogy to the test applicable on motions to strike is of no moment. The Motion Judge had already concluded that the appellants' pleadings provided no detail of the alleged infringement and that the evidence filed in support of the Motion did very little to fill the gap necessary for demonstrating a *bona fide* claim (Motion Judge's Reasons at paras. 22–28). Assuming, without deciding, that this analogy was misplaced, this does not amount, in the present circumstances, to an error justifying the Court's intervention.

[30] Second, relying on unpublished decisions is not an error. I note that *Mostar* was relied upon in *Canadian National Railway Company v. BNSF Railway Company*, 2018 FC 614 at paragraph 11 (*BNSF Railway*). It was relied upon for the basic proposition that pleadings will be held to be frivolous when they are “so deficient in factual material that the defendant cannot know how to answer, and a court will be unable to regulate the proceedings” (*BNSF Railway* at para. 11).

[31] *Mostar* sets out trite principles on proper pleadings in the Federal Courts. These principles can be summarized as follows:

- a) Every pleading must contain “a concise statement of the material facts on which the party relies” as well as “particulars of every allegation contained therein” (Rules 174 and 181(1) of the Rules);

- b) It is so because pleadings play “an important role in providing notice and in defining the issues to be tried”, which means that material facts must be pleaded “in sufficient detail to support the claim and the relief sought” (*Mancuso v. Canada (National Health and Welfare)*, 2015 FCA 227, at para. 16; leave to appeal to the Supreme Court of Canada denied: [2016] S.C.C.A. No. 36889 (S.C.C.) (*Mancuso*));
- c) Proper pleadings serve at establishing “the parameters of relevancy of evidence at discovery and trial” and at allowing counsel “to advise their clients, to prepare their case and to map a trial strategy” (*Mancuso* at para. 17); at a minimum, the opposing party—and the Court—“should thus not be left to speculate as to how the facts might be arranged to support various causes of action” (*Brink v. Canada*, 2024 FCA 43 at para. 54 (*Brink*));
- d) Bald assertions of facts or mere conclusory statements of law do not meet the proper pleadings test (*Mancuso* at para. 17); improper pleadings cannot be remedied by relying on defendants to seek particulars (*Mancuso* at para. 20) and in assessing the sufficiency of the pleadings in any given case, the Court must look at the claim as it is drafted, not at how it may be drafted (*Brink* at para. 72; *Merchant Law Group v. Canada Revenue Agency*, 2010 FCA 184, at para. 40); and
- e) Complying with the rules of proper pleadings is mandatory, not optional (*Brink* at para. 60);

[32] Having already noted that the appellants’ pleadings failed to provide any detail of the alleged infringement, the Motion Judge, in applying these principles, concluded that the

consumer defendants were “left to guess how the [patent] claims are construed and which of the devices’ components infringe them” (Motion Judge’s Reasons at para. 34). In other words, the pleadings did not allow them to know how to answer the claim.

[33] To the extent that the Motion Judge’s task was to determine whether the appellants’ claim was neither frivolous nor without justification, this finding was open to him.

[34] Finally, I am satisfied that the Motion Judge, relying on *Glaxo*, a patent case, applied the proper burden on the appellants when he concluded that:

- a) in order to meet the *bona fide* criterion, it was not enough “to merely name[] infringing devices and assert [...], without any explanation, that these devices infringe certain patent claims, or that the use of these devices by the defendants infringes those claims”; and
- b) the evidence filed in support of the Motion, which consisted mainly of a summary of Internet searches, did not provide any particulars of infringement (Motion Judge’s Reasons at paras. 34–35).

[35] Whichever differences may exist, burden wise, between patent cases and non-intellectual property cases, it was open to the Motion Judge to conclude, based on the pleadings, the evidence and the applicable law, that the appellants had not raised a *bona fide* claim against the consumer defendants. I see no palpable and overriding error in that conclusion.

[36] The appellants insist on the importance for the Court to rely on the inventor's belief that the consumer defendants have infringed the patents at issue. As Ecobee put it, there is little value in convincing the Court of the plaintiff's beliefs, as it generally believes in the merits of its case. Rather, it is for the Court to be convinced that the claim is *bona fide* based on the record before it. For the reasons set out above, I see no basis, based on the record he had before him, to interfere with the Motion Judge's conclusion that the appellants have failed to establish a *bona fide* claim against the consumer defendants.

[37] The appellants insist as well on the role of case management in curing whatever defects might affect the sufficiency of the pleadings. However, as indicated above, the rules of proper pleadings are mandatory. I therefore see no merit in that proposition, which, if accepted, would defeat the whole purpose of these rules. Insofar as improper pleadings cannot be remedied by relying on defendants to seek particulars, they cannot be remedied, in my view, by relying on a case management judge to come up with a cure for the deficiencies. Again, the sufficiency of pleadings is to be assessed by looking at the claim as drafted, not at how it might have been drafted (*Brink* at para. 72).

[38] Finally, I see no merit in the appellants' argument that the adverse inference drawn by the Motion Judge from their refusal to answer cross-examination questions about the inventor's belief that the patents at issue were infringed, was procedurally unfair. In particular, the appellants claim that this inference could not be drawn: (i) in the absence of a refusal motion brought under Rule 97 of the Rules; (ii) without dealing with their objections based on privilege;

and (iii) without having provided the inventor with an opportunity to answer the questions at issue after ruling on the objections.

[39] When faced with procedural fairness issues, this Court must be satisfied that the procedure was fair having regard to all of the circumstances (*Canadian Pacific Railway v. Canada (Attorney General)*, 2018 FCA 69 at para. 54; *Lipskaia v. Canada (Attorney General)*, 2019 FCA 267 at para. 14).

[40] Here, the difficulty with the appellants' procedural fairness argument is that it is premised on the view that the adverse inference drawn by the Motion Judge "formed the very basis of his entire decision" (Appellants' Memorandum of Fact and Law at para. 77). However, when the Motion Judge' Reasons are read as a whole, that premise is incorrect. I agree here with the respondents that the impugned inference was immaterial to the Motion Judge's decision. Indeed, the Decision was mainly grounded on: (i) the bare allegations in the claim; (ii) the absence of particulars in the inventor's affidavit; (iii) the appellants' failure to amend their claim to plead additional particulars; and (iv) the absence of any indication that the inventor or anyone else had obtained or examined the impugned devices.

[41] Therefore, even assuming that the Motion Judge improperly made the impugned inference, this would not be enough, in these circumstances, to justify the Court's intervention (*Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 S.C.R. 202 at p. 228).

V. The Public Interest Criterion

[42] As stated at the outset of these reasons, the Motion Judge found that it would be against the public interest to issue a *Norwich* order in this case, because this would unjustly deprive the consumer defendants of meaningful access to justice. This was so given the inherent complexity of a patent infringement action and the practical impossibility for these defendants to defend such an action individually.

[43] The Motion Judge reasoned that the main goal of *Norwich* orders, which is to facilitate access to justice for right holders unaware of the identity of alleged wrongdoers, was equally important for defendants in cases where meaningfully defending an action would be out of reach, potentially resulting in unfair settlements or unopposed default judgments (Motion Judge's Reasons at paras. 41–42, 46–47). In this case, “special considerations” were given to the fact that: (i) patent litigation is costly and requires expert evidence; and (ii) the action is directed at a large number of individuals, each having modest amounts at stake and lacking in technical skills (Motion Judge's Reasons at para. 44).

[44] The Motion Judge, referring to *Voltage Pictures LLC v. John Doe*, 2014 FC 161 (*Voltage*), noted that concerns about defendants having meaningful access to justice had been “front and centre” in setting the terms of previous *Norwich* orders “in cases where the defendants were individuals or consumers” (Motion Judge's Reasons at para. 43).

[45] The appellants contend that in the intellectual property context, the public interest criterion consists of balancing only two factors: (i) the public interest in ensuring that intellectual property owners can enforce their statutory legal rights; and (ii) the privacy interest of the alleged infringers. They say that the Motion Judge’s “novel approach” finds no support in the case law, either within or outside the intellectual property context.

[46] The determination of the appropriate test when applying the law to a set of facts is an extricable question of law (*Pfizer Canada Inc. v. Amgen Inc.*, 2019 FCA 249 at para. 38). Here, I see no error of law in the Motion Judge’s approach to the public interest criterion.

[47] As noted by the Motion Judge, privacy is often the main concern in the context of *Norwich* motions. I note, in this regard, that in most of these instances, there were tensions between the public interest in ensuring that intellectual property owners can enforce their statutory legal rights and statutory provisions preserving the confidentiality of the alleged wrongdoers’ identity. This was the case in *Norwich Pharmacal* and in *Glaxo*, where the identity of importers of goods was sought from government entities governed by laws that protected their identity.

[48] In *BMG*, the *Norwich* motion was directed at a number of Internet Service Providers (ISPs) and the tension at issue resulted from provisions of the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5 prohibiting ISPs from voluntarily disclosing personal information, including the identity of alleged online copyright infringers at issue in that case. As the Court noted in *BMG*, the “delicate balance between privacy interests and public

interest has always been a concern of the Court where confidential information is sought to be revealed” (*BMG* at para. 39) (my emphasis). There is no indication in the record of the present case that confidentiality is a concern.

[49] In *Rogers*, although the Supreme Court framed the public interest criterion as requiring that the public interest in disclosure outweigh “the legitimate privacy concerns” of the alleged wrongdoers (*Rogers* at para. 18), that criterion was not at issue. The only issue in that case had to do with the implications of the “notice and notice” regime enacted as part of the *Copyright Modernization Act*, S.C. 2012, c. 20, on the ability of copyright owners to recover their reasonable costs of compliance with a *Norwich* order (*Rogers* at para. 4). That regime, which was designed to deter online copyright infringement while at the same time providing for its own balancing of the rights of interested parties (*Rogers* at para. 22), imposed a number of obligations on ISPs and prohibited them from charging a fee for complying with these obligations. Therefore, the tension to be resolved in *Rogers* concerned the costs ISPs could recover for complying with a *Norwich* order given the potential overlap between their obligations under the “notice and notice” regime and those under such an order. Again, the public interest criterion was not at issue in that case.

[50] Interestingly, the Supreme Court, in laying out the *Norwich* order test in *Rogers*, which was not in dispute, explicitly endorsed the formulation of the test in *Leahy*. However, in *Leahy*, the public interest criterion was formulated in much broader terms as “[w]hether the interests of justice favour the obtaining of the disclosure” (*Leahy* at para. 106). The *Rogers* formulation was made in the very specific context, similar to *BMG*, of anonymous online copyright infringers.

[51] This discrepancy in the formulation of the public interest criterion—and the case law generally—suggest, in my view, that certain factors may be more prominent under some circumstances and that a broader approach may be warranted in others.

[52] In *Norwich Pharmacal*, for instance, the public interest criterion was formulated in the broadest terms by the House of Lords, which stated that disclosure was required when otherwise warranted “unless there is some consideration of public policy which prevents that” (cited in *Glaxo* at para. 26). As we have seen, in the particular circumstances of that case, the balancing analysis opposed the public interest in favour of disclosure to the statutory protection from disclosure of the alleged infringers’ identity. This broad terminology was echoed in *Glaxo* (*Glaxo* at para. 65).

[53] Besides privacy and confidentiality, other public interest concerns have been considered by the courts in *Norwich* motions, such as:

- a) the nature and apparent strength of the plaintiff’s case (*Stewart* at paras. 59, 75, 145);
- b) whether denying the motion would leave the plaintiff without a remedy (*Stewart* at para. 142; *Bluemoon Capital* at para. 16);
- c) freedoms of expression, association and peaceful assembly under the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (the *Charter*) (*Olsen*

v. Facebook Inc., 2016 NSSC 155 at para. 11; *Cooper Creek Cedar Ltd. v. Ogden*, 2023 BCSC 465 at paras. 83–84 (*Cooper Creek*));

- d) the administration of justice, free press and compliance with securities legislation (*Stewart* at paras. 77, 99, 103);
- e) the chilling effect resulting from disclosure (*Cooper Creek* at para. 84); and
- f) the interests of alleged wrongdoers and the public (*Harrington Global Opportunities Fund S.A.R.L. v. Investment Industry Regulatory Organization of Canada*, 2018 ONSC 7739 at paras. 93, 111; *ME2 Productions, Inc. v. Doe*, 2019 FC 214 at para. 106; and *Voltage* at paras. 25-27, 40–41).

[54] These cases show that non-privacy concerns are well within the ambit of public policy and interests of justice considerations inherent to the extraordinary, discretionary, and equitable nature of *Norwich* proceedings.

[55] In sum, I do not see much support in the case law for the restricted view advanced by the appellants, regarding the scope of the public interest criterion in intellectual property law matters. It seems to me that the broader view is preferable as it provides the necessary flexibility to conduct the public interest analysis in light of the particular circumstances of each case, including the context of the litigation.

[56] Therefore, it was open to the Motion Judge, in the particular circumstances of this case, to focus on the public interest in access to justice when considering the public interest criterion.

[57] The issue now is whether, on the record before him, the Motion Judge committed a palpable and overriding error in finding that the public interest in access to justice outweighed the public interest in disclosure. Considerable deference is owed to the Motion Judge in this respect (*Housen* at para. 24; *Canada v. South Yukon Forest Corporation*, 2012 FCA 165 at para. 46).

[58] I agree with the respondents that the Motion Judge's analysis was restricted to the highly unusual facts of this case. As indicated above, the Motion Judge found that meaningfully defending the appellants' action would be out of reach for individual consumers given the inherent complexity of patent infringement actions compared to, for example, copyright infringement actions, the cost of defending such actions for individual consumers who only have modest amounts at stake, as well as their lack of technical skills. He was concerned that in such context, the appellants' action could result in unfair settlements or default judgments, something which, on a mass scale, as here, would not be in the interest of justice.

[59] The appellants claim that instead of dismissing the Motion based on access to justice concerns, assuming this was a valid public interest consideration, the Motion Judge should have come up with solutions to solve these concerns on behalf of the consumer defendants. They say that the Motion Judge overlooked "judicial tools" that were available to him, such as appointing an *amicus curiae* to represent the interest of the consumer defendants, imposing ongoing court oversight of communications with the defendants, or making use of the Federal Court's case management authority to manage the action in a manner that would alleviate these concerns.

[60] I agree with the respondents that the Motion Judge was not required to design a plan on the appellants' behalf aimed at solving the access to justice issues the Motion raised, especially in a mass litigation context directed at hundreds of thousands of consumers, according to the appellants' own estimation. Some of these alleged alleviating measures (releasing the information sought to be disclosed in small manageable batches, sending out cover letters protecting the proposed consumer defendants from being intimidated into settlement, considering the intervention of a public interest organization, appointment of a lawyer by the manufacturers, and providing advance costs) were not put before the Motion Judge. It is trite that this Court will normally not entertain issues that were not raised in the court below (*Quan v. Cusson*, 2009 SCC 62, [2009] 3 S.C.R. 712 at paras. 36–39; *Rouet v. Canada (Justice)*, 2023 FCA 50; see also: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at paras. 51–52).

[61] As for the proposed alleviating measures put before the Motion Judge (permitting the consumer defendants to seek joint representation or to bring a motion to certify the action as a reverse class action, or allowing manufacturers to seek intervener status), the Motion Judge found that they were either:

- a) Out of touch with reality, given the number of individuals involved and the amount at stake for each of them; or
- b) Disingenuous given that the appellants had explicitly declined to seek certification of their action as a reverse class action and had opposed Ecobee's motion to be added as a party or intervener to said action.

[62] I see no palpable and overriding error in the Motion Judge's findings in this regard. Again, it was open to him, based on the record before him, to conclude the way he did. In the end, the appellants are asking this Court to reassess the record in the hope of reaching different conclusions. However, this is not our role.

[63] Ecobee contends that even when the public interest favoring disclosure is assessed against privacy concerns, disclosure is not warranted. It claims that the appellants have made no effort to minimize the invasion of privacy by seeking to capture as many people as possible, regardless of whether they are even defendants in the action. Ecobee asserts in this regard that the requested disclosure would reveal the personal information of individuals that have merely downloaded an app to operate or control non-impugned devices.

[64] Since the Motion Judge did not conduct a privacy analysis, it would not be appropriate for this Court to consider Ecobee's privacy argument, although it is not without raising some legitimate concerns.

[65] In sum, I am of the view that the Motion Judge committed no reviewable error on the law or on the facts, in concluding that the public interest in access to justice outweighed the public interest in favour of disclosure in the particular circumstances of this case.

[66] For all these reasons, I would dismiss the appeal. Both respondents seek costs. Apple seeks theirs on the highest possible scale, but not Ecobee, which seeks an order "for costs of the appeal". As I am not satisfied that an award of costs in favor of Apple on the highest possible

scale is warranted in the circumstances of this case, I would award costs in this appeal to both respondents to be calculated in accordance with column III of the table to Tariff B of the Rules.

“René LeBlanc”

J.A.

“I agree.

Yves de Montigny C.J.”

“I agree.

Anne L. Mactavish J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-352-23

STYLE OF CAUSE: SEISMOTECH IP HOLDINGS INC., SEISMOTECH SAFETY SYSTEMS INC. v. ECOBEE TECHNOLOGIES ULC, APPLE CANADA INC., APPLE INC.

PLACE OF HEARING: VANCOUVER, BRITISH COLUMBIA

DATE OF HEARING: SEPTEMBER 12, 2024

REASONS FOR JUDGMENT BY: LEBLANC J.A.

CONCURRED IN BY: DE MONTIGNY C.J.
MACTAVISH J.A.

DATED: DECEMBER 2, 2024

APPEARANCES:

Simon Lin
Sébastien A. Paquette

FOR THE APPELLANTS

William Regan
Evan Reinblatt

FOR THE RESPONDENT
ECOBEE TECHNOLOGIES ULC

Richard Lizius
Kendra Levasseur

FOR THE RESPONDENTS
APPLE CANADA INC.
APPLE INC.

SOLICITORS OF RECORD:

EVOLINK LAW GROUP
(Simon Lin)
Burnaby, British Columbia
SERVICES JURIDIQUES SP INC.
(Sébastien A. Paquette)
Montréal, Québec

PIASETZKI NENNIGER KVAS LLP
Toronto, Ontario

McCARTHY TÉTRAULT LLP
Toronto, Ontario

FOR THE APPELLANTS

FOR THE RESPONDENT
ECOBEE TECHNOLOGIES ULC

FOR THE RESPONDENTS
APPLE CANADA INC.
APPLE INC.