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PATENT INFRINGEMENT – WHAT CONSTITUTES "USE" OF A PATENTED INVENTION?

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Canada's *Patent Act* gives patent-holders the exclusive right of "*making, constructing and using*" their inventions for the life of the patent (20 years)[1]. But what is the meaning of "using" a patented invention? Does it require use of the actual, physical invention, or can someone infringe a patent by exploiting the idea behind the invention? This was a question before the Federal Court of Appeal last year in *Steelhead LNG (ASLNG) Ltd. v. Arc Resources Ltd.*[2]

The plaintiff, Steelhead, was pursuing the development of liquefied natural gas projects in British Columbia. It owned a patent for a floating liquefied natural gas (LNG) facility. From 2014 to 2018, Steelhead had a relationship with a consortium of BC and Alberta natural gas producers pursuing LNG export opportunities. In the course of that relationship, Steelhead disclosed confidential information to the consortium, including the design for a proposed LNG facility.

After the consortium had ended its relationship with Steelhead, it prepared a preliminary study for an LNG facility which contained engineering drawings, specifications, and cost estimates. It shared the study with potential investors and industry players, allowing some of them to see the study itself. None of them participated further with the consortium with respect to its floating LNG facility design.

The consortium also entered into discussions with a Texas-based company, which provided and relied on its own LNG facility design. The consortium ultimately entered into an agreement with the Texas company and the Nisga'a First Nation to develop a different LNG project. It did not make, construct, or sell the LNG facility that was the subject of Steelhead's patent.

Steelhead sued members of the consortium for patent infringement. It claimed that the defendants had infringed their patent through the design, development, and marketing to potential investors and industry players of an LNG project that included a design for an LNG facility that, *if it had been built*, would have comprised the essential elements of its protected invention. The Federal Court dismissed Steelhead's claim on the basis that there had been no infringement because what the defendants had done did not constitute "use" of Steelhead's invention. Steelhead appealed.

The Federal Court of Appeal agreed with the lower court's finding and dismissed the appeal.

Steelhead's essential argument was that, by sharing their study with third parties as part of the promotional efforts for their own project, the consortium had "used" Steelhead's invention because they had obtained a commercial advantage or benefit that belonged to Steelhead. In particular, the consortium's study allowed them to approach third parties in a credible fashion and demonstrate that their project was economically and technically feasible. This was the case even though they abandoned their study and started a new development with a new design.

The Federal Court of Appeal rejected Steelhead's "*novel and expansive interpretation of 'use'*" under the *Patent Act*. In particular, it agreed with the lower court's finding that the Patent Act requires that an invention be built in order to find infringement of a patent through use. The prohibited use extended to the invention claimed by the patent, and not the invention's goal, purpose, or advantage. The Court of Appeal found that this interpretation was consistent with the Supreme Court of Canada's leading decision in *Monsanto Canada Inc. v. Schmeiser*[3], and a contextual interpretation of s. 42 of the *Patent Act*. The Federal Court of Appeal also rejected Steelhead's argument that the lower court's interpretation of the Patent Act would frustrate the "patent bargain", whereby an inventor discloses their useful invention to the public in exchange for a time-limited monopoly on that invention. That monopoly extended to the claimed invention, but not its goal, purpose or advantage.

The Federal Court of Appeal's decision is important to the extent that it defines the limits of a patent owner's exclusive right to use a patented invention. Steelhead has sought leave to appeal the decision to the Supreme Court of Canada. If Steelhead obtains leave, we can expect the top court to provide further guidance regarding the scope of the rights granted to patent owners.

[1] Patent Act, R.S.C. 1985, c. P-4, ss. 42 and 44.

[2] 2024 FCA 67.

[3] 2004 SCC 34.