Federal Court of Appeal | Cour d'appel fédérale

Date: 20240411

Docket: A-210-22

Citation: 2024 FCA 67

CORAM: **DE MONTIGNY C.J.**
GOYETTE J.A.
HECKMAN J.A.

BETWEEN:

STEELHEAD LNG (ASLNG) LTD. and STEELHEAD LNG LIMITED PARTNERSHIP

Appellants

and

ARC RESOURCES LTD., ROCKIES LNG LIMITED PARTNERSHIP, ROCKIES LNG GP CORP. and BIRCHCLIFF ENERGY LTD.

Respondents

Heard at Montréal, Quebec, on November 16, 2023.

Judgment delivered at Ottawa, Ontario, on April 11, 2024.

PUBLIC REASONS FOR JUDGMENT BY: HECKMAN J.A.

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

Federal Court of Appeal | Cour d'appel fédérale

Date: 20240411

Docket: A-210-22

Citation: 2024 FCA 67

CORAM: **DE MONTIGNY C.J.**
GOYETTE J.A.
HECKMAN J.A.

BETWEEN:

STEELHEAD LNG (ASLNG) LTD. and STEELHEAD LNG LIMITED PARTNERSHIP

Appellants

and

ARC RESOURCES LTD., ROCKIES LNG LIMITED PARTNERSHIP, ROCKIES LNG GP CORP. and BIRCHCLIFF ENERGY LTD.

Respondents

PUBLIC REASONS FOR JUDGMENT

HECKMAN J.A.

[1] This appeal turns on what constitutes "use" of a patented invention for the purposes of proving infringement of a patent under section 42 of the *Patent Act*, R.S.C. 1985, c. P-4 [the Act].

[2] The appellants claim that the respondents "used" their invention and infringed their patent when, in order to enter into commercially valuable transactions, they disclosed to prospective business partners and stakeholders, as a proof of concept, drawings, specifications and cost estimates of a design which, if ever built, would comprise the essential elements of the patent.

[3] The novel and expansive reading of "use" proposed by the appellants to support their claim of infringement finds no basis in the language of the Act or the leading precedents that have interpreted it. Its adoption by this Court would undermine the accepted principles underlying Canada's regime of patent protection, including the patent bargain, and inject uncertainty into a well-settled area of law. For the reasons that follow, I would reject the appellants' proposed interpretation of section 42 and dismiss the appeal.

I. Background

[4] This is an appeal from a judgment of the Federal Court (*per* Justice Manson) on a motion for summary trial dismissing the appellants' action against the respondents for patent infringement: *Steelhead LNG (ASLNG) Ltd. v. ARC Resources Ltd.*, 2022 FC 998, [2022] F.C.J. No. 1012 [FC Decision].

[5] The motion judge outlined the relevant background in this case: FC Decision at paras. 2–16. I will nonetheless summarize the facts necessary to dispose of this appeal.

A. *Context*

[6] The appellants are Steelhead LNG Limited Partnership and its wholly owned subsidiary Steelhead LNG (ASLNG) Ltd. (collectively, Steelhead). Steelhead is pursuing the development of liquefied natural gas (LNG) projects in British Columbia. The subsidiary owns the patent at issue, Canadian Patent No. 3,027,085 (the 085 Patent) and licences it to its parent company.

[7] The 085 Patent relates to apparatus, methods, and systems in respect to the near-shore or at-shore liquefaction of natural gas. The invention it claims—a near-shore or at-shore floating LNG (FLNG) facility—comprises three key elements: 1) a floating modular design, 2) an air-cooled liquefaction process, and 3) electric-driven compressors.

[8] The 085 Patent was filed on December 10, 2018, became open to public inspection on February 8, 2019, and was issued on November 3, 2020. The patent is in full force and, subject to the payment of periodic maintenance fees, expires on December 10, 2038.

[9] There are four respondents. The first respondent is Rockies LNG Limited Partnership, a consortium of British Columbia and Alberta natural gas producers pursuing LNG export opportunities. The second respondent is Rockies LNG GP Corp., the general partner of the first respondent. The third and fourth respondents, ARC Resources Ltd. and Birchcliff Energy Ltd., are in the business of resource extraction, including natural gas. They are also two of the seven limited partners of the first respondent. All seven limited partners share one or more common directors with the first respondent.

[10] The relevant facts and the timeline of this case are not contested. Steelhead and 7G, the predecessor to ARC Resources, had a business relationship from 2014 to November 2018. They were in talks to further the appellants' development of their LNG facilities in British Columbia. In September 2018, the appellants disclosed confidential information to a group of natural gas producers (the Consortium) that included 7G and Birchcliff Energy and that would later be formalized as Rockies LNG Limited Partnership. This confidential information included the design for a proposed LNG facility. Two months later, the Consortium unilaterally ended discussions with the appellants.

[11] In the meantime, the Consortium hired a third party to prepare a preliminary Front End Engineering Design ("pre-FEED") study for an LNG facility. The pre-FEED study contained engineering drawings, specifications and cost estimates. It was considered to be in the conceptual stage of the FLNG facility project, with many options in the design left to be decided.

[12] From approximately February 2019 to May 2020, the Consortium showed a high-level summary of the pre-FEED study to potential investors, LNG off-takers (companies that use or re-sell LNG) and large-scale industry contractors, and allowed four of these third parties to see the pre-FEED study itself. None of the third parties participated further with the respondents in respect to its pre-FEED study or the FLNG facility design it contained.

[13] In April 2019, the Consortium began discussions with Western LNG, a Houston, Texas–based company engaged in the development of LNG export facilities, regarding the design and

development of a potential LNG facility. The Consortium did not share the pre-FEED study with Western LNG, which provided and relied on its own LNG facility design.

[14] In July 2021, Western LNG, the Consortium (now formalized as the respondent Rockies LNG Limited Partnership) and the Nisga'a First Nation entered into an agreement to develop the Ksi Lisims project, a different LNG project that is not the subject of this appeal.

B. *The Patent Infringement Action and the Motion for Summary Trial*

[15] The appellants commenced the underlying patent infringement action against the defendants (the respondents here) on December 9, 2020. The appellants claim the respondents infringed the 085 Patent through the design, development, and marketing to potential investors, LNG off-takers, First Nations, and large-scale industry contractors, among others, of an LNG project that included a design for an LNG facility that, if built, would comprise the essential elements of the invention claimed in the 085 Patent [the allegedly infringing activities]. The appellants seek monetary, declaratory and injunctive relief for the alleged infringement.

[16] In their Amended Statement of Claim, the appellants did not advance a *quia timet* cause of action, which patent-holders can bring to prevent a party from engaging, on an imminent basis, in activity that would raise a strong possibility of infringement: see e.g. *AstraZeneca Canada Inc. v. Novopharm Limited*, 2010 FCA 112, 405 N.R. 95 at paras. 6–7 and the cases cited therein. As such, the appellants' action alleges no forward-looking infringement or threat of infringement.

[17] The respondents brought a motion for summary trial pursuant to Rule 213 of the *Federal Courts Rules*, SOR/98-106. The appellants argued before the Federal Court and before this Court that summary trial was not appropriate.

[18] The appellants acknowledged that the respondents did not make, construct, or sell the invention claimed in the 085 Patent, and that the claimed system, method, or apparatus does not exist anywhere in Canada. They also acknowledged that the only question of fact and law is whether the respondents have "used" the invention claimed in the 085 Patent.

[19] For the purposes of the motion for summary trial only, the respondents conceded that the motion judge could presume that the 085 Patent was valid and that, had the FLNG facility described in the pre-FEED study been built, it would have included all the essential elements of the 085 Patent.

II. The Federal Court's Decision

[20] The motion judge considered two issues: whether the respondents had established that the matter was appropriate to be decided by way of summary trial; and, if summary trial was appropriate, whether the allegedly infringing activities constituted "use" of the 085 Patent.

[21] On the first issue, the motion judge agreed with the respondents that a summary trial was appropriate to decide the matter and that the Court could grant summary judgment, fairly and justly, on the evidence adduced and the law. In particular, he found that 1) the parties had

exercised their rights to documentary and oral discovery, 2) any issues concerning witness testimony had been addressed through *viva voce* testimony at the hearing, and 3) the appellants had not indicated what information they perceived to be missing or how it could influence the Court's decision of the matter before it.

[22] On the substantive issue, the motion judge found the allegedly infringing activities did not constitute "use" of the 085 Patent. As such, the respondents had not infringed the 085 Patent.

[23] The motion judge held that, to establish that the respondents had infringed the 085 Patent, the appellants had to prove that the respondents used each of the essential elements of one or more of the patent claims through making, constructing, using and/or selling the invention as claimed in the patent claims.

[24] The motion judge began by ascertaining the essential elements of the 085 Patent. He determined that, in each of the patent's four independent claims, there was a series of essential elements that comprise a claimed system for liquefying natural gas. These included a water-based apparatus that comprised a floating hull, an air-cooled electrically driven refrigeration (AER) system to convert the feed gas to LNG, and LNG storage tanks: FC Decision at para. 75. Significantly, the motion judge held that the 085 Patent did not claim "the conceptual design of the LNG facility invention": FC Decision at para. 79.

[25] The motion judge decided that, given that the claimed system did not exist in Canada and that the respondents' new Ksi Lisims project did not infringe the 085 Patent, the respondents

could not have made, constructed or sold the claimed system: FC Decision at para. 76. The only question was whether the respondents' marketing or promotional efforts, notably sharing with potential stakeholders, investors and industry participants a pre-FEED study for an FLNG facility which, if built, would comprise essential elements of the 085 Patent to demonstrate that they "were aware of and were addressing challenges and … advancing potential options for an FLNG facility," constituted use under section 42 of the Act and infringed the Patent: FC Decision at paras. 77, 82.

[26] The motion judge rejected the appellants' argument that the Supreme Court of Canada's purposive interpretation of what constitutes "use" in *Monsanto Canada Inc. v. Schmeiser*, 2004 SCC 34, [2004] 1 S.C.R. 902, supported a finding that, in engaging in the allegedly infringing activities, the respondents had used its invention by exploiting the invention's purpose or advantage for commercial benefit and thus infringed the 085 Patent.

[27] The motion judge observed that several passages in *Monsanto* indicated that infringement under section 42 of the Act required use of the patented invention—an actual, physical apparatus, system or method using such an apparatus—rather than a conceptual design or drawing of an invention. He concluded that, since no FLNG facility such as that claimed in the 085 Patent existed in Canada, it could not have been used by the respondents: FC Decision at paras. 78–80.

[28] The motion judge found that the respondents' promotional efforts did not constitute infringement in Canada and that the respondents, whose business is to supply natural gas to an

FLNG facility, "did not use a FLNG facility at all, and certainly not one within the claims of the 085 Patent": FC Decision at para. 84.

[29] While the motion judge's conclusion that the respondents had not used the appellants' invention was sufficient to dismiss the infringement action, the motion judge also determined that the appellants had failed to provide evidence that the defendants obtained a commercial benefit by sharing the pre-FEED study. The third parties who were shown the study had not engaged in a further business relationship with the respondents; the respondents developed their relationship with Indigenous stakeholders through a member of their team and did not include the pre-FEED study as part of discussions with First Nations; and Western LNG approached and entered into a relationship with the respondents with its own LNG facility design.

[30] In light of his findings on the question of "use", the motion judge dismissed the appellants' action in its entirety.

III. Issues before this Court

[31] The appellants have appealed the decision of the Federal Court on two grounds. First, they claim the motion judge erred in law by requiring that the patented invention be built as a pre-condition to infringement by "using" under section 42 of the Act. Instead, the motion judge should have asked whether the respondents had obtained a benefit from exploiting or relying on the claimed elements or advantages of the appellants' invention. Second, they argue that because the motion judge adopted the incorrect legal test for infringing use, he failed to appreciate that he

required additional evidence, including evidence about the purpose and benefit of the appellants' invention, to decide whether the respondents had infringed the 085 Patent. Accordingly, given the deficient evidentiary record, the motion judge erred in finding that the matter before him was appropriate for summary trial.

[32] As the appellants conceded at the hearing of this appeal, their success on the second ground of appeal is contingent on their success on the first ground. If this Court does not accept the appellants' proposed interpretation of "use" and upholds the motion judge's decision in this respect, it follows that the matter was appropriate for summary trial.

[33] The appellants also brought a motion seeking leave to file new evidence on the appeal. This new evidence, they submit, would establish that the respondents derived a commercial benefit from their "use" of the appellants' invention. In their view, this evidence is "central" to their second ground of appeal because it would establish that the record before the motion judge was unsuitable for a summary adjudication of the matter of infringement.

[34] For the reasons that follow, I have concluded that the motion judge did not err in rejecting the appellants' novel and expansive interpretation of "use" under section 42 of the Act and finding that the respondents did not use the invention claimed by the 085 Patent. It follows that the appellants have not presented this Court with any reason to disturb the motion judge's decision that the matter of infringement was appropriate for summary trial. The motion to file new evidence should also be dismissed, since the appellants seek to bring that evidence before

this Court solely to establish "use" based on their erroneous interpretation of section 42 of the Act.

IV. Analysis

A. *Overview*

[35] Section 42 of the Act defines the exclusive rights granted to the patent holder:

Grant of Patents	**Octroi des brevets**
Contents of patent	**Contenu du brevet**
42 Every patent granted under this Act shall contain the title or name of the invention, with a reference to the specification, and shall, subject to this Act, grant to the patentee and the patentee's legal representatives for the term of the patent, from the granting of the patent, the exclusive right, privilege and liberty of making, constructing and using the invention and selling it to others to be used, subject to adjudication in respect thereof before any court of competent jurisdiction.	**42** Tout brevet accordé en vertu de la présente loi contient le titre ou le nom de l'invention avec renvoi au mémoire descriptif et accorde, sous réserve des autres dispositions de la présente loi, au breveté et à ses représentants légaux, pour la durée du brevet à compter de la date où il a été accordé, le droit, la faculté et le privilège exclusif de fabriquer, construire, exploiter et vendre à d'autres, pour qu'ils l'exploitent, l'objet de l'invention, sauf jugement en l'espèce par un tribunal compétent.

[36] The appellants claim that the respondents included in their pre-FEED study a validated set of engineering drawings, specifications, and cost estimates for an FLNG facility design, which, if ever built, would comprise the essential elements of the claims in the 085 Patent. They argue that, by sharing the pre-FEED study with third parties as part of their efforts to

promote their FLNG project, the respondents "used" the appellants' invention by obtaining a commercial advantage or benefit that belonged to the appellants by virtue of the monopoly granted by the Patent. In their submission, the pre-FEED study allowed the respondents to approach vital stakeholders and potential commercial counterparts in a credible fashion and, using the study as a proof of concept, demonstrate that their project was economically and technically feasible. In particular, the appellants claim that, even though the respondents abandoned the pre-FEED study and started a new development (the Ksi Lisims project) with a new design, the respondents were able to conclude a commercially valuable [redacted] and advance their FLNG project to such a state that it became attractive to Western LNG, resulting in a commercially valuable transaction with that company. In argument, the appellants observed that the respondents used the pre-FEED study to effectively "scoop" them by securing one of the few viable sites for an FLNG development on British Columbia's coast.

[37] The appellants claim that, in requiring that an invention be built in order to establish infringement through use, the motion judge erred in three ways. First, he failed to interpret section 42 of the *Patent Act* in a manner consistent with the purposive approach adopted by the Supreme Court in *Monsanto* and sufficiently attentive to the statutory context. Second, he erred in distinguishing the decision of the Federal Court in *Eurocopter v. Bell Helicopter Textron Canada Limitée*, 2012 FC 113, [2012] 404 F.T.R. 193, aff'd 2013 FCA 219, which, the appellants claim, recognized that infringement may result where a person relies on a patentee's valuable and marketable technology to credibly promote and solicit pre-orders for their own product. Third, his interpretation deprived the appellants of the time-limited monopoly to build

market share for the FLNG facility claimed by the 085 Patent to which they were entitled, under the patent bargain, in return for publishing the 085 Patent and disclosing their useful invention.

[38] In my opinion, the appellants' claim that the respondents' promotional activities of sharing the pre-FEED study with stakeholders, potential investors and commercial partners fall within the patentees' "exclusive right, privilege and liberty of … using the invention" under section 42 of the Act must fail. I address each of the three errors alleged by the appellants below.

B. *The motion judge did not err in interpreting section 42 of the Act*

[39] The appellants argue that, by interpreting section 42 of the *Patent Act* as requiring that an invention be built in order to establish infringement through use, the motion judge erred for three reasons: 1) he failed to apply the Supreme Court's purposive interpretation of "use" set out in *Monsanto*; 2) he paid insufficient attention to the statutory context; and 3) he failed to consider the benefit allegedly derived by the respondents from the appellants' invention, a factor identified in *Monsanto* as indicating infringing use.

[40] In my view, the appellants' proposed interpretation of section 42 must be rejected because it is inconsistent with a proper analysis of the Supreme Court's interpretation of "use" in *Monsanto*, of how the terms "*objet*" and "*objet de l'invention*" are used in the Act and of the role of commercial benefit in determining whether an invention has been used.

(1) The meaning of "using the invention" ("*exploiter l'objet de l'invention*") according to *Monsanto*

[41] The appellants claim that the motion judge applied a "literal English meaning of 'using' to require a physical object," rather than considering the Supreme Court's view, in *Monsanto*, that the words "using" and "*exploiter*", when taken together, "connote utilization with a view to production or advantage." According to the appellants, the motion judge "mistakenly conflated the word 'object' with a *physical* object" [emphasis in original] when the Supreme Court in *Monsanto* uses the word "to mean 'goal' or 'purpose', a decidedly non-physical concept." While the word "object" does not appear in the English version of section 42, the word "*objet*" appears in the French version and both "object" and "*objet de l'invention*" are used by the Supreme Court in *Monsanto* to connote "the purpose and subject matter of the invention."

[42] In sum, the appellants argue that the Supreme Court's treatment of the meaning of "use" in *Monsanto* stands for the proposition that section 42 of the *Patent Act* grants a patentee the exclusive right, privilege and liberty of using the goal, purpose or advantage of an invention for commercial benefit. In my view, *Monsanto* says no such thing.

[43] To properly understand the Supreme Court's decision in *Monsanto*, this Court must place it in its proper factual context. Mr. Schmeiser, a farmer, collected, saved and planted canola seed containing genes and cells patented by Monsanto, which made the canola plants resistant to Roundup, a commercial herbicide, thereby facilitating weed spraying. The question before the Supreme Court was whether the farmer's activities constituted use within the meaning of section 42 of the Act. The Court found that, on a common sense view, saving and planting seed, then harvesting and selling the resultant plants containing the patented genes and cells appeared to constitute "utilization" of the patented material for production and advantage, within the

meaning of section 42: *Monsanto* at para. 69. Significantly, *Monsanto* unquestionably involved the use of a physical object, since the patented genes and cells were present in the canola plants. Accordingly, the Supreme Court was not called upon to decide whether the terms "*invention*" or "*objet de l'invention*," in the French-language version of the Act, include the invention's goal or purpose. Rather, it elaborated on the meaning of "use" under section 42 to address Mr. Schmeiser's two arguments that his activities did not constitute infringement by use.

[44] First, Mr. Schmeiser had claimed that, since the patent was for genes and cells, infringement by use could occur only where a defendant used these in their isolated, laboratory form: cultivating plants containing the genes and cells could not result in infringement by use. The Supreme Court rejected this argument based on "century-old patent law" that holds that "where a defendant's commercial or business activity involves a thing of which a patented part is a significant or important component, infringement is established": *Monsanto* at para. 78.

[45] Second, Mr. Schmeiser had claimed that he had not used the patented invention because, since he had never used Roundup herbicide as an aid to cultivation, he had never taken commercial advantage of the special utility the invention offered: resistance to Roundup. The Supreme Court held that this argument did not rebut the presumption of use that flows from possession because it failed to account for the "stand-by or insurance utility" of the properties of the patented genes and cells. Mr. Schmeiser benefited from that advantage from the outset, since if there were a reason to spray in the future, he could do so: *Monsanto* at para. 84. Moreover, Mr. Schmeiser had actively cultivated the Roundup-ready canola as part of his business operations and could therefore not rebut the presumption of use flowing from possession by

claiming that he had never intended to cultivate plants containing the patented genes and cells, and that their presence on his land was accidental and unwelcome.

[46] In order to address Mr. Schmeiser's two arguments, the Supreme Court examined the plain meaning of "use" and engaged in a purposive and contextual inquiry, looking at its meaning in light of the reasons for according patent protection and of the other words present in section 42.

[47] It held that "use" or "*exploiter*", in their plain meaning, denote utilization with a view to production or advantage: *Monsanto* at paras. 31, 58. Then, it observed, at paragraph 35, that the purpose of section 42 is to define the exclusive rights granted to the patent holder—the rights to full enjoyment of the monopoly granted by the patent: "Applied to 'use', the question becomes: did the defendant's activity deprive the inventor in whole or in part, directly or indirectly, of full enjoyment of the monopoly conferred by law?" [Emphasis in original.] Finally, it found that a contextual examination of section 42 revealed that a patentee's monopoly generally protects its business interests and that "a defendant's commercial activities involving the patented object [*l'objet breveté*] will be particularly likely to constitute an infringing use" because "if there is a commercial benefit to be derived from the invention, a contextual analysis of s. 42 indicates that it belongs to the patent holder": *Monsanto* at para. 38.

[48] This discussion of the meaning of "use" does not support the appellants' novel and expansive construction of section 42. While the Supreme Court confirms in *Monsanto* that section 42 defines the rights to full enjoyment of the monopoly granted by the patent, it explains

in *Free World Trust v. Électro Santé Inc.*, 2000 SCC 66, [2000] 2 S.C.R. 1024 at para. 33, that the scope of this monopoly is defined by the patent claims:

> The *Patent Act* requires the letters patent granting a patent monopoly to include a specification which sets out a correct and full "disclosure" of the invention, i.e., "correctly and fully describe[s] the invention and its operation or use as contemplated by the inventor". The disclosure is followed by "a claim or claims stating distinctly and in explicit terms the things or combinations that the applicant regards as new and in which he claims an exclusive property or privilege". It is the invention thus claimed to which the patentee receives the "exclusive right, privilege and liberty" of exploitation.
>
> [Citations omitted; emphasis added.]

[49] That the right to "use" attaches to the invention described in the patent claims is confirmed by the terms used by the Supreme Court to describe what is "used" under section 42: "uses the invention" ("*exploite l'invention*"), "activities involving the patented object" ("*activités … qui mettent en cause l'objet breveté*") and "used the patented invention" ("*exploité l'invention brevetée*"): *Monsanto* at paras. 37–38, 45. Contrary to the appellants' claims, these terms do not connote the goal, purpose or advantage of the invention.

[50] Accordingly, the Supreme Court's purposive inquiry in *Monsanto* indicates that what is "used" under section 42 is the claimed invention. In the case of a patent for an apparatus, the claimed invention is the apparatus described in the claims, not its goal, purpose or advantage, however these might be defined.

[51] The case law examined by the Supreme Court to guide its interpretation of "use" does not assist the appellants either. These cases fall broadly into two categories, each relevant to one of

the defences to infringement put forward by Mr. Schmeiser. Neither of these defences argued in favour of an interpretation of "invention" or "*objet de l'invention*" that included the goal, purpose or advantage of the invention.

[52] The first category of cases related to whether patent protection extends to situations where the patented invention is contained within something else used by the defendant and addressed Mr. Schmeiser's claim that growing plants did not amount to "using" their patented genes and cells. The Court noted that the rule, established in case law, that infringement through use was possible "even where the patented invention [*l'invention brevetée*] is part of, or composes, a broader unpatented structure or process," was rooted in the principle that the main purpose of patent protection is to prevent others from depriving the inventor of the full enjoyment of the monopoly to which he is entitled "by virtue of the patent and as a matter of law": *Monsanto* at para. 43.

[53] While the Supreme Court relied, at paragraph 44 of *Monsanto*, on *Saccharin Corp. v. Anglo-Continental Chemical Works, Ld.* (1900), 17 R.P.C. 307 (H.C.J.), to confirm that whether a defendant, by his acts or conduct, had deprived the inventor, in whole or in part, directly or indirectly, of the advantage of the patented invention was central to a finding of infringement, this decision did not involve "use" of an invention's goal, purpose or advantage. The High Court of Justice held that by procuring saccharin manufactured abroad through the use of a patented process for sale in England, the defendant had indirectly used that invention, depriving the patentee of the advantage of the invention. The defendant indirectly employed the claimed invention—the patented process—not its goal, purpose or advantage.

[54] The appellants argue that the Supreme Court's treatment of *Betts v. Neilson* (1868), L.R. 3 Ch. App. 429, aff'd (1871), L.R. 5 H.L. 1, offers a "striking example" of its use of the words "object" and "*objet*" to refer to the "purpose" of the invention. Their claim does not withstand scrutiny. Mr. Betts owned a patent for making metallic capsules of lead and tin compressed together, which were used to cover the corks of bottles. He claimed that the defendants, who had purchased bottled beer from Scottish brewers for export abroad through English ports, had infringed his patent, since the beer bottles bore metallic capsules falling within the patent claims. In arguing that there had been no infringement, the defendants distinguished between the "active" and "passive" use of the invention. They argued that the capsules were placed on the bottles in Scotland, where the bottled beer was sold, and that while the bottles transited through England for purposes of exportation, there was no "active use of the capsules" which could constitute an infringement. Lord Chelmsford rejected this distinction between the active and passive use of a thing. He defined "active use" as follows:

> It is the employment of the machine or the article for the purpose for which it was designed which constitutes its active use; and whether the capsules were intended for ornament, or for protection of the contents of the bottles upon which they were placed, the whole time they were in *England* they may be correctly said to be in active use for the very objects for which they were placed upon the bottles by the vendors.
>
> [*Betts* at p. 439.]

He found that there was an active use of the capsules "by those who first placed them upon the bottles, and by those who had them in their possession afterwards with the power of either continuing or removing them": *Betts* at p. 440.

[55] Contrary to the appellants' claim, the Supreme Court does not, in its treatment of *Betts*, equate "object of the patent" ("*objet du brevet*") with "purpose of the invention" when, at paragraph 45 of *Monsanto*, it states that "[i]n determining whether the defendant 'used' the patented invention, one compares the object of the patent with what the defendant did and asks whether the defendant's actions involved that object." This is made abundantly clear in paragraph 46, where the Court uses "purpose" and "object" in the same sentence: "the patented invention need not be deployed precisely for its intended purpose in order for its object to be involved in the defendant's activity". The Court intends these different words to convey different meanings: "purpose" designates the purpose of the invention and "object" designates the invention claimed in the patent ("*l'objet de l'invention*").

[56] This distinction between "object" or "*objet de l'invention*" and the invention's purpose is supported by the Supreme Court's reliance in *Monsanto*, at paragraph 46, on *Dunlop Pneumatic Tyre Co. v. British and Colonial Motor Car Co.* (1901), 18 R.P.C. 313 (H.C.J.). The defendants displayed at a tradeshow a car with patented tires which they had intended to remove prior to sale, substituting other tires. The tires were placed on the car for the purpose of display, and arguably not for their intended purpose (including carrying the load resulting from the car's weight, guiding the car along a chosen trajectory and transmitting a braking or acceleration force). As Lord Alverstone observed, for the duration of the tradeshow, the cars were supported by the fully inflated tires and "presented to the possible customer or spectator who came to the Show the appearance of a motor car as it would appear with pneumatic tyres upon it, the weight being taken off by the pressure of the air acting upon the rubber": *Dunlop* at p. 315. In his view, this qualified as use:

> … if a person uses an invention to present his goods for sale, and intending the thing exhibited to represent what he is going to sell, and if part of that thing is an article which is an infringement and is serving a useful purpose during that time by being exhibited as part of the machine, I think it is user of the invention.
>
> [*Dunlop* at p. 315; emphasis added.]

[57] As noted by the Supreme Court, the defendants in *Dunlop* "employed the invention to their advantage, depriving the inventor of the full enjoyment of the monopoly" [emphasis added]: *Monsanto* at para. 46. They did not employ the invention's goal, purpose or advantage. Like *Betts*, *Dunlop* involves the utilization of the invention claimed in the patent. In both cases, these were physical apparatuses—a cork capsule and a pneumatic tire—not a goal, purpose or advantage.

[58] The second category of cases reviewed by the Court in *Monsanto* related to Mr. Schmeiser's defence that, while he had been in possession of seed and plants containing the patented cells and genes, he had not used them or sought to use them for their intended purpose. These cases stood for the proposition that, while a defendant's intention is generally irrelevant to a finding of infringement, in cases where "use" could be argued to consist of the defendant's exploitation of an invention's stand-by utility, courts would consider as relevant the defendant's intention to exploit the invention, should the need arise. All of the cases cited by the Supreme Court in this second category, like those in the first category, allege use of the invention claimed by the patent—whether apparatus or process—not the invention's goal, purpose or advantage. They do not assist the appellants.

(2) Contextual interpretation of section 42 of the Act

[59] Section 42 defines the monopoly conferred to the patentee and the patentee's legal representatives as "the exclusive right, privilege and liberty of making, constructing and using the invention and selling it to others to be used" ("*le droit, la faculté et le privilège exclusif de fabriquer, construire, exploiter et vendre à d'autres, pour qu'ils l'exploitent, l'objet de l'invention*") [emphasis added]. In the French version, "*objet de l'invention*" stands for "invention".

[60] The appellants argue that a contextual interpretation of section 42 supports their claim that the word "*objet*" in the term "*objet de l'invention*" in section 42 is intended to convey the meaning of "goal", "purpose" or "advantage" of the invention. They point out that the Act uses words other than "*objet de l'invention*" to denote a physical good ("article" in subsections 56(3), (6), (8) and 60(2)) or where physical existence is contemplated ("use … the patented invention" (*invention brevetée*) in subsection 55.2(1)). In my view, the appellants' proposed interpretation is not consistent with how the terms "*objet de l'invention*" and "*objet*" are used in other provisions of the Act.

(a) "Objet de l'invention"

[61] In section 27 of the Act, which addresses the requirements for the issuance of a patent, subsection 4 states that "[t]he specification must end with a claim or claims defining distinctly and in explicit terms the subject-matter of the invention for which an exclusive privilege or

property is claimed." In the French version, the term "*objet de l'invention*" stands for "subject-matter of the invention". According to subsection 27(4), the "subject-matter of the invention," over which the patent monopoly is conferred, is defined distinctly and in explicit terms *in the claims of the patent*. It refers to the claimed invention, not its goal, purpose or advantage. The same language is used in subsection 27(5) of the Act.

[62] Similarly, section 32 of the Act provides that a person who obtains a patent for an improvement on a patented invention does not thereby obtain the right of making, vending or using the original invention. In the French version of the Act, "*objet de l'invention*" stands for "original invention", not for the goal, purpose or advantage of the invention.

(b) *"*Objet*"*

[63] Section 28.2 of the Act provides that the "subject-matter defined by a claim" in a pending application for a patent must not have previously been disclosed. In the French version of section 28.2, "*objet que définit la revendication*" stands for "subject-matter defined by a claim" [emphasis added]. Similarly, section 28.3 of the Act prescribes that the "subject-matter defined by a claim" in an application for a patent in Canada must be subject-matter that would not have been obvious on the claim date to a person skilled in the art or science to which it pertains. In the French version of section 28.3, "*objet que définit la revendication*" stands for "subject-matter defined by a claim" [emphasis added].

(c) *Conclusion on the contextual analysis*

[64] A contextual analysis of the meaning of "*objet*" and "*objet de l'invention*" demonstrates that these terms are not used in section 42 of the Act to connote the goal, purpose, or advantage of an invention. Rather, they designate the "subject-matter of the invention" or the "invention" itself as defined in the patent claims, a meaning fully consistent with the Supreme Court's view that "[i]t is the invention thus claimed to which the patentee receives the 'exclusive right, privilege and liberty' of exploitation": *Free World Trust* at para. 33.

(3) The relevance of commercial benefit to infringement by "use"

[65] According to the appellants, when section 42 of the Act is interpreted purposively, as required by the Supreme Court in *Monsanto*, a court seeking to determine whether an alleged infringer has used a patented invention under section 42 must ask whether the purpose or advantage of the invention were commercially exploited. To ascertain the purpose of the invention, the court must look at the patent disclosure, which sets out the advantages of the invention disclosed. In the case at bar, these advantages include the claimed system's cost-effectiveness and low environmental impact. The respondents used the pre-FEED study to promote their FLNG plant specifically because of these advantages, thus commercially exploiting the purpose or advantages of the appellants' invention and infringing the Patent.

[66] The appellants argue that in deciding, at paragraph 62, that testimony related to the purported advantages of the 085 Patent's design was "irrelevant", the motion judge erred by

effectively holding, contrary to *Monsanto*, that whether the respondents had derived a commercial benefit from their activities was not relevant to proof of infringement. It is true that the Supreme Court stated in *Monsanto* that "using" under section 42 denotes "utilization with a view to production or advantage" and that "if there is a commercial benefit to be derived from the invention, a contextual analysis of s. 42 indicates that it belongs to the patent holder": *Monsanto* at paras. 31, 38. However, the appellants ignore the sentences that precede the latter passage and provide key context to understanding its meaning:

> Even in the absence of commercial exploitation, the patent holder is entitled to protection. However, a defendant's commercial activities involving the patented object will be particularly likely to constitute infringing use.
>
> [*Monsanto* at para. 38; emphasis added.]

[67] The question is not whether commercial benefit is relevant to the analysis. The question is whether a commercial benefit is realized in the context of a defendant's commercial activities involving the patented object. The term "patented object" does not designate the purpose, goal or advantage of an invention. It designates the "subject-matter of the invention" or the "invention" itself as defined in the patent claims. Since these include, as an essential element, a water-based apparatus comprising a hull, an AER system and storage tanks, and because this apparatus did not and does not exist in Canada, the respondents realized no commercial benefit in the context of commercial activities involving the patented object.

(4) Conclusion on the motion judge's interpretation of section 42

[68] The appellants note that, at paragraph 69 of *Monsanto*, the Supreme Court interpreted the words "use" and "*exploiter*" as connoting "utilization with a view to production or advantage". They argue that the motion judge overlooked this interpretation and erroneously applied a literal English meaning of "using" to require a physical object.

[69] Contrary to the appellants' arguments, the motion judge did not overlook the Supreme Court's interpretation of "use" in *Monsanto*. He focused on the terms "invention", "patented object" and "patented invention" because he recognized that the primordial question under section 42 remains what must be "utilized": FC Decision at para. 78. This is confirmed in paragraph 69 of *Monsanto*, where, having interpreted "use" and "*exploiter*" as connoting "utilization with a view to production and advantage," the Supreme Court applied this definition to the facts:

> Saving and planting seed, then harvesting and selling the resultant plants containing the patented cells and genes appears, on a common sense view, to constitute "utilization" <u>of the patented material</u> for production and advantage, within the meaning of s. 42.
>
> [*Monsanto* at para. 69; emphasis added.]

Mr. Schmeiser utilized the "claimed invention"—the patented genes and cells contained in the plants he harvested and sold—not the goal, purpose or advantage of this invention.

[70] The appellants claim that, by finding that infringement could be proven only if the appellants establish that the defendants had used the physical object (the LNG plant), the motion

judge relied on a mistaken reading of the word "object" in *Monsanto*, conflating it with a physical object rather than the "goal" or "purpose" of the invention.

[71] As the foregoing analysis lays bare, the appellants' novel and expansive interpretation of the terms "*objet de l'invention*" and "*objet*" as connoting the invention's goal, purpose or advantage is without foundation. These terms designate the invention claimed by the patent.

[72] The motion judge found that the 085 Patent does not claim "the conceptual design of the LNG facility invention". Rather, it includes four independent claims that include "an apparatus, either independently or used in a system or method, for the liquefaction of natural gas". One of the essential elements of the claimed invention is a water-based apparatus comprising a hull, an AER system and storage tanks. To prove infringement, the appellants had to show that this essential element of the claimed invention was "utilized with a view to production or advantage". The motion judge did not err in finding that they had failed to do so.

C. *The motion judge did not err in distinguishing the* Eurocopter *decision*

[73] The appellants argue that the respondents' activities are indistinguishable in principle from those undertaken by the defendant in *Eurocopter*. In *Eurocopter*, the defendant had produced 21 "Legacy gears", landing gears designed for its new Bell 429 helicopter. The plaintiffs alleged that these infringed their patent for an innovative skid-type landing gear for light helicopters. As a defence to the allegations of infringement, the defendant argued that it had sold none of the Legacy gears to customers. Rather, it had used 20 of the gears for various tests

related to obtaining certification of the Bell 429 helicopter and its activities thus fell within the "regulatory or experimentation" exception described by subsection 55.2(1) of the Act:

Exception	**Exception**
55.2 (1) It is not an infringement of a patent for any person to make, construct, use or sell the patented invention solely for uses reasonably related to the development and submission of information required under any law of Canada, a province or a country other than Canada that regulates the manufacture, construction, use or sale of any product.	**55.2 (1)** Il n'y a pas contrefaçon de brevet lorsque l'utilisation, la fabrication, la construction ou la vente d'une invention brevetée se justifie dans la seule mesure nécessaire à la préparation et à la production du dossier d'information qu'oblige à fournir une loi fédérale, provinciale ou étrangère réglementant la fabrication, la construction, l'utilisation ou la vente d'un produit.

[74] The Federal Court held that the defendant's activities involving the Legacy gear did not fit within the regulatory or experimentation exception:

> At least one of the twenty-one gears was used on a non-test aircraft (57704) and was used for a static display at a trade show. Moreover, soliciting advanced orders, signing agreements with clients and promoting a new model of helicopter with a landing gear at trade shows clearly go beyond what both the Act and the common law intended by the above exceptions. During Mr. Kohler's testimony, it was revealed that each purchase agreement for the Bell 429 involved a deposit of $25,000, and that in October 2007, Bell had approximately $6 million in deposits.
>
> After an examination of the totality of the evidence, the Court finds that Bell did not construct, used or sold the Legacy gear solely for uses reasonably related to the development and submission of information required by law. This is sufficient to render Bell ineligible for the regulatory or common law experimental exception.
>
> [*Eurocopter* at paras. 267–68; emphasis in original.]

[75] The appellants claim that the motion judge erred in distinguishing the respondents' activities from those of the defendant in *Eurocopter* on the basis that "the patented object was made, in the alleged infringer's possession, and was exposed for sale": FC Decision at para. 86. In their view, "[i]t was not the physical existence of the infringing landing gear that led the court to find infringing 'use'," but the fact that "the defendant gained a commercial benefit from regulatory approval and the ability to credibly promote and solicit pre-orders with a valuable and marketable technology" [emphasis added].

[76] This claim must also fail. In *Eurocopter*, the Federal Court decided that the regulatory or experimentation exception did not apply; it did not pronounce itself on whether the defendant's use of the Legacy gear was infringing or on the question of what constituted infringing use. The Court had already determined that the Legacy gear fell within the scope of the claims of the plaintiff's patent, and that the defendant had chosen the Legacy gear for its Bell 429 helicopter, had manufactured 21 Legacy gears, and was waiting for certification of the Bell 429 to sell its new helicopters with the Legacy gear. It did not have to decide whether the defendant's promotional activities constituted infringing use to dispose of the defendant's defence to infringement under subsection 55.2(1). It merely found that the uses to which the defendant had put the Legacy gear were not solely uses related to the development and submission of information as required by the Act. Accordingly, the *Eurocopter* decision does not support the appellants' novel and expansive interpretation of "use".

[77] If anything, as noted by the motion judge, the facts in *Eurocopter* more closely resemble *Dunlop*. There, the defendant used an invention (the pneumatic tires) to present its goods (its

automobiles) for sale, intending the thing exhibited to represent what it was going to sell. The court held that there was "user" of the invention since part of the thing exhibited was an infringing article and the article was serving a useful purpose during that time by being exhibited as part of the automobile. Unlike the case at bar, both *Dunlop* and *Eurocopter* involved the display of the physical infringing article for promotional purposes.

D. *The motion judge's interpretation of section 42 does not frustrate the patent bargain*

[78] The appellants claim that the motion judge's interpretation of section 42 as requiring the appellants to demonstrate that the respondents had utilized the invention claimed by the patent (in this case an LNG facility) should be rejected because it fails to consider the patent bargain.

[79] The patent bargain was described by the Supreme Court in *Nova Chemicals Corp. v. Dow Chemical Co.*, 2022 SCC 43, [2022] S.C.J. No. 43 at para. 43:

> The *Patent Act* is designed to encourage research and development. It does this through the "patent bargain": an inventor discloses their useful invention to the public in exchange for a time-limited market monopoly on that invention. This bargain mutually benefits the public and the inventor. The public benefits by receiving innovations in science and technology. The inventor benefits because they receive a time-limited market monopoly. The inventor can use the monopoly to generate profits and compensate themselves for the time, effort and risk associated with making the invention.
>
> [Citations omitted.]

[80] The appellants claim that they met their end of the bargain when they published their patent, disclosing the fruits of their labour in developing and validating, over several years and at great cost, their solution for a cost-effective FLNG facility suitable for conditions in coastal British Columbia, incurring the necessary time, effort and risk of invention.

[81] In the appellants' view, the respondents used Steelhead's FLNG design to establish credibility with stakeholders and potential partners, allowing them to conclude a commercially valuable [redacted] and to advance their project enough to entice Western LNG to enter into a commercially valuable transaction. As a result, the appellants claim, without even constructing an infringing FLNG facility, the respondents derived a commercial benefit from the appellants' labour, thus interfering with the appellants' time-limited monopoly to build market share without competition.

[82] Under section 42 of the Act, in return for disclosing their invention, the appellants acquired "a limited monopoly for a limited time": *Apotex Inc. v. Wellcome Foundation Ltd.*, 2002 SCC 77, [2002] 4 S.C.R. 153 at para. 37. As established in the foregoing analysis, the "exclusive right, privilege and liberty of making, constructing and using the invention and selling it to others to be used" extends to the claimed invention—the subject matter of the invention defined by the patent claims—not the invention's goal, purpose or advantage. The patent does not claim the conceptual design of the appellants' LNG facility. It claims, among other things, a water-based apparatus for the liquefaction of natural gas, comprising a hull, an AER system and storage tanks. The motion judge did not err in finding that the respondents did not use the claimed invention.

[83] By arguing that patent protection should extend to an invention's goal, purpose or advantage, the appellants seek to prevent competitors from using the idea or concept underlying their invention for commercial advantage. Under their proposed interpretation, section 42 would prevent competitors from relying on the inventive solutions laid out in a patent disclosure as a proof of concept to show that their own particular product idea or project plan is achievable in order to generate business interest or secure financial support to develop, by designing around the patent, a non-infringing alternative. Finding a different way to accomplish the benefit of an invention by designing around a patent does not constitute infringement since the protection of the patent "lies not in the identification of a desirable result but in teaching one particular means to achieve it": *Free World Trust* at para. 32; *Deeproot Green Infrastructure, LLC v. Greenblue Urban North America Inc.*, 2023 FCA 185, [2023] F.C.J. No. 1312 at para. 42, citing *Illinois Tool Works v. Cobra Fixations Cie*, 2002 FCT 829, 221 F.T.R. 161 at paras. 14–17, aff'd 2003 FCA 358, [2003] F.C.J. No. 1477. The interpretive outcome sought by the appellants would frustrate, not enforce, the patent bargain.

[84] In a related argument, the appellants claim that the motion judge's view that protection against infringement by use can only be afforded once a person has assembled the physical apparatus claimed by the patent would give rise to two-tiered patent protection, where the effective length of the monopoly conferred on the patentee would depend on the size, complexity and construction cost of the patented invention. For a large and complex FLNG facility that takes a decade to construct, no patent protection would effectively be afforded until year 10 of the 20-year monopoly period, when the infringing facility would be complete, effectively reducing the duration of patent protection for large, complex or hard-to-build inventions. The appellants

argue that, for the purpose of deciding whether a person has infringed the patent by using the invention, there is no principled distinction between 1) that person showing prospective buyers or investors, to its commercial benefit, a helicopter outfitted with an "easy-to-make" patented landing gear and 2) that person showing to stakeholders and investors the conceptual design of an FLNG facility that includes all the essential characteristics described in the patent's claims. In the appellants' view, both scenarios disclose infringement by use. The motion judge's insistence that infringement can only be found where a physical prototype is built leaves inventions too large, complex or expensive to prototype without the protection afforded by patent law to smaller, easy-to-prototype inventions.

[85] Patent law does not discriminate between various categories of inventions. The Act grants to all patentees, for a limited time, the exclusive right, privilege and liberty of making, constructing and using the invention claimed in the patent and selling it to others to be used. Should anyone seek to use, during the 20-year term of the 085 Patent, an infringing FLNG plant, the appellants could initiate a *quia timet* proceeding or, following such use, sue for infringement. If successful, they could seek to recover the portion of the infringer's profits which are causally attributable to the invention, including "springboard profits" arising post-patent-expiry that the infringers would not have earned but for the infringing activity that occurred during the life of the patent: *Nova Chemicals* at paras. 46, 80, 82.

[86] Under the appellants' proposed construction of "use", patentees could bring claims of infringement against competitors carrying out design or conceptual work involving a design disclosed by a patent. If, as the appellants claim, it takes a decade to complete the work involved

in building an FLNG facility, including establishing the necessary relationships and partnerships with investors and stakeholders and arriving at a feasible design for the facility, competitors would be precluded from starting this preliminary work during the term of the patent and would only be in a position to offer a competing facility a decade later, effectively extending the appellants' patent monopoly from 20 to 30 years.

[87] In *Kirkbi AG v. Ritvik Holdings Inc.*, 2005 SCC 65, [2005] 3 S.C.R. 302 at para. 37, the Supreme Court observed that:

> The economic value of intellectual property rights arouses the imagination and litigiousness of rights holders in their search for continuing protection of what they view as their rightful property. Such a search carries with it the risk of discarding basic and necessary distinctions between different forms of intellectual property and their legal and economic functions.

[88] The subject matter and time-limited monopoly granted by the Act does not offer the protection that the appellants are seeking. Recourse may lie elsewhere, in the protection of other forms of intellectual property including copyright and moral rights, or in the enforcement of any non-disclosure agreements between the parties respecting the treatment and use of confidential information acquired by the parties in the course of their business dealings. The appellants have in fact commenced proceedings against the respondents to pursue such claims before the Supreme Court of British Columbia.

V. Conclusion

[89] For the foregoing reasons, I am of the view that this appeal should be dismissed, with costs to the respondents.

[90] Since I have found that the motion judge did not err in rejecting the appellants' novel and expansive interpretation of "use" under section 42 of the Act, it follows that the appellants' motion to file new evidence to establish "use" based on this erroneous interpretation should also be dismissed, with costs to the respondents.

"Gerald Heckman"
J.A.

"I agree.
Yves de Montigny C.J."

"I agree.
Nathalie Goyette J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-210-22
STYLE OF CAUSE:	STEELHEAD LNG (ASLNG) LTD. *et al.* v. ARC RESOURCES LTD. *et al.*
PLACE OF HEARING:	MONTRÉAL, QUEBEC
DATE OF HEARING:	NOVEMBER 16, 2023
PUBLIC REASONS FOR JUDGMENT BY:	HECKMAN J.A.
CONCURRED IN BY:	DE MONTIGNY C.J. GOYETTE J.A.
DATED:	APRIL 11, 2024

APPEARANCES:

Tim Gilbert Vik Tenekjian Kevin Siu Andrea Rico Wolf	FOR THE APPELLANTS
Andrew R. Brodkin Daniel Cappe	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

Gilbert's LLP Toronto, Ontario	FOR THE APPELLANTS
Goodmans LLP Toronto, Ontario	FOR THE RESPONDENTS