Can one infringe an apparatus patent with mere plans or drawings? The SCC's denial of leave confirms that the answer is no

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On July 3, 2025, the Supreme Court of Canada (SCC) refused leave to appeal in a dispute between Steelhead LNG and Arc Resources. Thus, it remains settled law that plans or a drawing do not infringe claims to an apparatus, system, or method.

At the Federal Court of Appeal (FCA), and in the Federal Court (FC) below, Steelhead argued that Arc had "used" their invention, thereby infringing their patent by showing to prospective business partners and stakeholders drawings, specifications, and cost estimates of a design. The patent at issue claims apparatus and systems or methods for the liquefaction of natural gas.

The Federal Court Decision on summary trial

The FC dealt with this novel argument through a summary trial. For the purposes of the summary trial, Arc agreed that the FC could assume the patent was valid, and that if the factory in the drawings was made, constructed, used, or sold, then at that time an act of infringement would have occurred. Consequently, the FC held that the issue to be determined was whether Arc's "conceptual design for purposes of potential future development of an LNG facility (as set out in KBR pre-FEED study) and presentation of the same to third-party stakeholders" during the relevant time frame constituted use of the 085 Patent, contrary to section 42 of the *Patent Act*. (para 39)

The onus was on Steelhead to prove, on a balance of probabilities, that Arc used all the essential elements of one of the claims of the patent. Steelhead argued that s. 42 of the *Patent Act* should be given a purposive interpretation rather than a literal reading, arguing that any activity with a commercial benefit to an alleged infringer is an act of infringement. In this case, the presentation of the pre-FEED study was alleged to allow Arc to gain credibility in the field, resulting in a business relationship, and therefore, this was use, resulting in a commercial benefit, and contrary to s. 42.

The FC considered the SCC's decision in *Monsanto*, which contains a purposive and contextual examination of the meaning of "use" in s. 42. The FC then held that Steelhead's argument, while using the principles articulated in *Monsanto*, does not

account for the fact that the patented invention (apparatus, system, or method) did not exist during the relevant time frame. Thus, it could not be used. (para 79)The FC held that the claimed invention was “an actual, physical apparatus, system, or method using such an apparatus, not a drawing of one.” (para 80) The FC further confirmed that this was not a *quia timet* action, and as such it was premature, as even if an intent to infringe is proven, infringement is not established.

The Federal Court of Appeal decision on summary trial

The FCA dismissed Steelhead’s appeal, holding that the “novel and expansive reading of ‘use’ proposed to support their claim of infringement finds no basis in the language of the *Patent Act* or the leading precedents that have interpreted it.” (para 3) The FCA also held that adopting this proposed reading would undermine the patent bargain and bring uncertainty into a well-settled area of law.

The FCA held that the motion Judge did not err in interpreting s. 42 of the *Patent Act*. It is the claimed invention that must be used for infringement to occur. In coming to this conclusion, the FCA also considered *Monsanto* and the cases it discusses in relation to use.

The FCA discussed the use of “invention” vs. “objet de l’invention” in the English and French versions of s. 42. Steelhead argued that objet de l’invention is intended to convey a goal or purpose, or advantage, rather than a physical good. The FCA held that Steelhead’s interpretation is not consistent with the manner in which the term is used in other provisions of the *Patent Act*.

The FCA wrote that 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” (para 67; emphasis in original). The patented object designates the subject matter of the invention or the invention itself as defined in the patent claims. Thus, as the apparatus does not exist in Canada, there was “no commercial benefit in the context of commercial activities involving the patented object.” (para 67) Furthermore, in cases like this where it can take a decade to design and build the claimed facility, prohibiting competitors from starting the preliminary work on such a facility would effectively extend the patent’s monopoly, which is not desirable.

The FCA held that the argument that the invention’s goal, purpose, or advantage falls under the exclusive rights in the patent would prevent inventors from designing around the patent, or finding a non-infringing alternative. The protection of the patent is not about the identification of a desirable result, but rather in teaching a particular means to achieve that result.

Decision on the merits

The SCC also denied leave to appeal from the FCA decision on the merits of the patent, finding all but five claims invalid as obvious or anticipated, or both. This decision could become relevant if the factory in the plans is ever built.

Key takeaways

The novel interpretation of s. 42 urged by the plaintiffs in this proceeding sought to expand the concept of use. The FCA's decision on summary trial confirms that where the patent claims an apparatus, system, or method, that apparatus, system, or method must exist for there to be infringement. Mere drawings or plans are not sufficient.

Contact us

If you have any questions regarding this decision or about patent infringement and validity in general, please reach out to the key contacts below.

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