Federal Court of Appeal | Cour d'appel fédérale

**Date: 20241211**

**Docket: A-361-23**

**Citation: 2024 FCA 212**

**CORAM:** **DE MONTIGNY C.J.**
**STRATAS J.A.**
**MACTAVISH 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 Ottawa, Ontario, on December 11, 2024.

Judgment delivered from the Bench at Ottawa, Ontario, on December 11, 2024.

REASONS FOR JUDGMENT OF THE COURT BY: STRATAS J.A.

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**REASONS FOR JUDGMENT OF THE COURT**

**(Delivered from the Bench at Ottawa, Ontario, on December 11, 2024).**

**STRATAS J.A.**

[1] The Federal Court (*per* Manson J.) concluded that all but five of the claims in Canadian Patent No. 3,027,085 were invalid—79 of 84 claims were obvious and 34 of 84 were anticipated

by each of four pieces of prior art known as the Talib Papers and the Sullivan Presentations: 2023 FC 1684.

[2] The Federal Court's conclusion very much turned on its findings about the credibility of the expert witnesses, its findings of fact and its factually suffused findings of mixed fact and law, just about all of which were in the respondents' favour. The appellants can reverse these findings only by satisfying the hard-to-meet standard of palpable and overriding error. This they have not done.

[3] The appellants allege that the Federal Court erred in law in a number of ways. But some of these are dressed up as legal error when they are nothing of the sort: they are really just invitations to us to reweigh the evidence and substitute our views for those of the Federal Court. Under the standard of palpable and overriding error, that we cannot do.

[4] The appellants say that by equating disclosure of separate essential elements with that of the whole subject matter of a claim, the Federal Court incorrectly lowered the bar for disclosure. We disagree. Based on a firm and correct understanding of the law (*e.g.*, *Free World Trust v. Électro Santé Inc.*, 2000 SCC 66, [2002] 2 S.C.R. 1024 at paras. 25, 31(f) and 55), the Federal Court explicitly and repeatedly stated that the subject matter of the claims was disclosed and enabled. In no way did the Federal Court lower the bar for disclosure.

[5] The appellants also say that the Federal Court erred in law in effect by breaking down the claims of the patent into their essential elements and then finding those elements in a "list of

options" in the earlier works, the Talib Papers and the Sullivan Presentations. Here, the Federal Court did not err. If a piece of prior art discloses a limited number of options for a thing, each of those options is disclosed for the purpose of novelty. See, *e.g.*, *Smith Kline Beecham v. Apotex Inc.*, 2001 FCT 770, aff'd 2002 FCA 216, [2003] 1 F.C. 118 at paras. 3-5 and 19-20.

[6] The appellants say that the Federal Court erred by introducing a new precondition for anticipation, namely that the '085 Patent "disclose a new or enhanced benefit to the combination that was not previously known" (appellants' memorandum at para. 62). The Federal Court did no such thing. First, it found as a fact that the claimed combination was known because it was one of a limited number of combinations disclosed and enabled in the Talib Papers and the Sullivan Presentations. Then the Federal Court accurately added that if the inventors had discovered and claimed a previously known combination that had some new or enhanced benefit, the claimed combination would be novel (at paras. 95-96). But then the Federal Court found on the facts that the inventors had not done so (at para. 98). Here, there is no reversible error.

[7] The appellants also target the Federal Court's finding that the Sullivan Presentations disclosed electric motors by "process of elimination". From there, the appellants leap to the conclusion that the Federal Court erred in law because there can be no trial and error or experimentation at the disclosure stage (appellants' memorandum at para. 68). Here, the appellants misunderstand what the Federal Court did. The Federal Court was making only a factually suffused finding—not a legal finding—about how the skilled person, with a mind willing to understand, would understand the Sullivan Presentations.

[8] The appellants say that the Federal Court failed in its obviousness analysis to consider motivation, the climate of the relevant field, and the time and effort involved in the invention. Here again, the Federal Court did not err in law. The Supreme Court has stated that there is no single or mandatory approach in the obviousness inquiry: see also *Novopharm Limited v. Janssen-Ortho Inc. et al.*, 2007 FCA 217, 59 C.P.R (4th) 116 at para. 25. Thus, factors such as the climate of the relevant field can be but are not necessarily relevant considerations. See *Apotex Inc. v. Sanofi-Synthelabo Canada Inc.*, 2008 SCC 61, [2008] 3 S.C.R. 265 at para. 63; *Wenzel Downhole Tools Ltd. v. National-Oilwell Canada Ltd.*, 2012 FCA 333, [2014] 2 F.C.R. 459 at paras. 104-105. Overall, the Federal Court instructed itself correctly on the law of obviousness.

[9] The appellants also attack the Federal Court's reasoning concerning a "transit bridge" and point us to evidence that could have led to a different result. True, on this point, the Federal Court could well have made different factual findings. But under the palpable and overriding standard, that misses the mark: *Teva Canada Limited v. Janssen Inc.*, 2023 FCA 68 at para. 67. Under that tough standard, the appellants must persuade us that the Federal Court erred in an obvious way that could have changed the result of the case: *Benhaim v. St-Germain*, 2016 SCC 48, [2016] 2 S.C.R. 352 at para. 38, citing *Canada v. South Yukon Forest Corporation*, 2012 FCA 165, 4 B.L.R. (5th) 31 at para. 46; and for more on the meaning of the standard of palpable and overriding error, see *Mahjoub v. Canada (Citizenship and Immigration)*, 2017 FCA 157, [2018] 2 F.C.R. 344 at paras. 56-75. Here, on this issue—and, for that matter, in this whole appeal—the appellants have not shown us palpable and overriding error, let alone legal error.

[10] At the highest level of generality, the Federal Court found nothing inventive in the impugned claims of the ’085 Patent based on the state of the prior art and the facts of this case. Given the standard of palpable and overriding error and the appellants’ failure to overcome it, this conclusion cannot be displaced.

[11] Therefore, we will dismiss the appeal with costs. At the conclusion of the appeal hearing, the respondents orally sought an elevated level of costs. It is appropriate that the appellants be able to prepare a considered response. Therefore, the Court directs that the parties file written submissions of no more than five pages each. The written submissions shall be addressed to the Judicial Administrator and filed with the Registry on December 16, 2024 (appellants in chief), December 19, 2024 (respondents) and December 23, 2024 (appellants in reply).

“David Stratas”

J.A.

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

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