Federal Court		Cour fédérale

Date: 20101115

Docket: T-1162-09

Citation: 2010 FC 1142

Toronto, Ontario, November 15, 2010

PRESENT: Madam Prothonotary Milczynski

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Applicant

and

UNITED STATES STEEL CORPORATION
AND U.S. STEEL CANADA INC.

Respondents

REASONS FOR ORDER AND ORDER

[1] This motion was filed on October 15, 2010 by the Attorney General of Canada (the "AG of Canada") for an order granting leave to the AG of Canada, to amend paragraph 3 of the Notice of Application to seek different relief than that originally sought, to take into account the passage

of time since the application was originally commenced. For the reasons set out below, the AG of Canada's motion is granted.

[2] The application was commenced on July 17, 2009 by the AG of Canada pursuant to section 40 of the *Investment Canada Act* for, among other things, an order requiring the Respondents, United States Steel Corporation and U.S. Steel Canada Inc., (together "U.S. Steel") to comply with two of the undertakings given by U.S. Steel in relation to its acquisition of Stelco Inc., over the remainder of the term for which the undertakings were given. Those two undertakings (the "Production Undertaking" and "Employment Undertaking" respectively), were to be fulfilled over the three year term: November 1, 2007 to October 31, 2010 (the "Term"), and are as follows:

> "**Production Undertaking:** The Investor [U.S. Steel] will increase the annual level of production at the facilities of the Canadian business by at least 10% over the Term (excluding periods of interruption due to capital investment projects) relative to the average of the last three completed calendar years."

[3] As set out in the Notice of Application, according to the AG of Canada, the Production Undertaking required taking into account, Stelco Inc.'s average annual steel production for the three completed calendar years before U.S. Steel's acquisition, (which was 3,950,000 million tons), and setting an annual target volume of steel production for the Production Undertaking 10% higher, to at least 4,345,000 million tons of steel, and the total volume over the Term to at least 13,035,000 million tons (3 x 4,345,000).

> **"Employment Undertaking:** Over the Term, the Investor will maintain an average aggregate employment level at the Canadian business of not less than 3,105 employees on a full time equivalent basis if the bar mill continues to be operated, or 2,790 employees on a full time basis if the bar mill is sold or closed."

[4] At the time the application was commenced, only fifteen months remained in the Term. It was already rather optimistic to assume that the various steps in this application could be completed so that the application could be heard and decided, and the Undertakings satisfied in those fifteen months. The constitutional challenge filed by U.S. Steel to sections 39 and 40 of the *Investment Canada Act*, which the AG of Canada agreed was a "stand alone" or "freestanding" challenge and should be decided first as a preliminary matter, sealed the fate that this application could only be heard after the expiry of the Term. That motion was filed in October, 2009, heard in January, 2010 and dismissed on June 14, 2010. It is currently under appeal.

[5] Accordingly, as the Term for the completion of the Production and Employment Undertakings has now expired, the AG of Canada seeks to enforce the fulfillment of the Undertakings, through the following amendments, requesting the Court to issue an order directing U.S. Steel to:

(i) produce X million tons of steel at the Canadian Business as defined in this Application [the former Stelco], at a rate of 4,345000 million tons per year following the issuance of the Court's order in this matter where:

X = Y - Z

Y = 13,035,000 million tons

Z = total tons of steel produced by the Canadian Business in those months during the Term, as defined in this Application, where steel production equalled or exceeded 362,083 tons; and

(ii) maintain an average employment level of 3,105 employees on a full time equivalent basis over X months following the issuance of the Court's order in this matter, where:

X = Y - Z

Y = 36 months

Z = the number of months during the Term in which the Canadian Business' average employment level equalled or exceeded 3,105 employees on a full time equivalent basis.

[6] The AG of Canada submits that these amendments are consistent with the relief originally sought, in that they seek to ensure U.S. Steel lives up to the undertakings it gave, only push out the time by which U.S. Steel must satisfy the original Undertakings and only require U.S. Steel to make up the shortfall. Originally, the AG of Canada had sought in the application

that the Court issue an order directing U.S. Steel to forthwith comply with the Production and Employment Undertakings by:

(i) increasing steel production at the Canadian Business, as defined in this Application, such that:

(a) in the period from November 1, 2007 to October 31, 2009, steel production at the Canadian Business is greater than or equal to a total of 8,690,000 tins (2 x 4,345,000); and

(b) in the period from November 1, 2009 to October 31, 2010, steel production at the Canadian Business is greater than or equal to 4,345,000 net tons; and

(ii) taking all such steps as are necessary to ensure that over the Term of the undertakings, as defined in this Application, the Respondents maintain an average level of employment at the Canadian Business of 3,105 employees on a full time equivalent basis.

[7] The proposed amendments, however, do create new obligations in that the original term is extended, and appears to continue until the Undertakings are fulfilled. Further, as they relate to production, the AG of Canada has added a new term that did not exist in the original Production Undertaking. Assuming for the purposes of this motion, as the AG of Canada asserts, that the Production Undertaking required annual production of at least 4,345,000 million tons of steel, and over the Term, total output of at least 13,035,000 million tons of steel, the AG of Canada proposes to only give credit for production during the Term that, on a monthly basis, exceeded 362,083 tons (i.e. the minimum annual target of 4,345,000 million tons divided by

twelve months). Any amount produced less than this monthly target level, regardless of actual amount produced or how close to the monthly target, is not credited toward making up the shortfall to produce the 13,035,000 million tons that was originally undertaken. In other words, under the proposed amendments, and the calculation of "X", U.S. Steel may be required to produce more than the shortfall or more than 13,035,000 million tons of steel, as "Z" has circumscribed what credit or offset U.S. Steel will be given for actual production over the Term that has now expired. To the extent the monthly target amount identified by the AG of Canada in this application was not produced at any time during the Term, the entire Production Undertaking would start afresh. A similar approach is taken to the Employment Undertaking.

[8] Not surprisingly, U.S. Steel vigorously opposes the proposed amendments, and states that they:

- re-write the original undertakings and impose new obligations and terms that were neither originally sought nor agreed to by the parties;
- are asserted without the jurisdiction of the Court to grant the relief sought;
- require a new Demand to be issued under section 39 of the *Investment Canada Act*, as the first (and only) Demand was, according to U.S. Steel, solely in respect of the first year of the Term;
- deprive U.S. Steel of the opportunity to respond in respect of the second and third years of the Term regarding whether U.S. Steel was in compliance with the Undertakings or could justify non-compliance; and
- impose new monthly performance standards or requirements for production and employment levels for a period of time that has already passed and cannot be

> changed by U.S. Steel, but which under the proposed amendments, have retrospective effect.

[9] Upon review of the motion record, the original Demand issued under the *Investment Canada Act*, and original Notice of Application clearly refer to the entire Term and seek remedial action or an order covering the entire Term to ensure the Production and Employment Undertakings are satisfied in their entirety. Whether the Demand was premature, valid only for year one of the Term and whether a fresh Demand for years two and three are required are already matters in issue under the application as originally drafted, and do not arise solely by virtue of the proposed amendments. They are also matters that should be left to the judge hearing the application. It also appears from this motion that the parties may not share a common understanding of what the Production and Employment Undertakings mean and what actually was required of U.S. Steel over the Term to satisfy them. This matter too must be left for the hearing of the application on its merits.

[10] As for the proposed amendments to the Notice of Application, they seek an order to give effect to the Undertakings after the time for their satisfaction under the original agreement has expired and in so doing, seek to prescribe or limit what offset or credit is available to U.S. Steel for employment levels and for the steel that was actually produced during the currency of the Undertakings in a manner that may not have been contemplated by the parties at the time the Undertakings were given.

[11] Whether leave should be granted for the amendments to be made is governed by the *Federal Courts Rules* and well settled jurisprudence. Rule 75 of the *Rules* provides:

> 75(1) Subject to subsection (2) and Rule 76, the Court may, at any time, allow a party to amend a document, on such terms as will protect the rights of all parties.
> (2) No amendment shall be allowed under subsection (1) during or after hearing unless
> (a) the purpose is to make the document accord with the issues at the hearing;
> (b) a new hearing is ordered; or (c) the other parties are given opportunity for any preparation necessary to meet any new or amended allegations.

[12] In *Canderel Ltd. v. Canada* [1994] 1 FCA 211, the Federal Court of Appeal stated that:

> [T]he general rule is that an amendment should be allowed at any stage of an action for the purpose of determining the real questions in controversy between the parties, provided, notably, that the allowance would not result in an injustice to the other party not capable of being compensated by an award of costs and that it would serve the interests of justice.

[13] In *Varco Canada Limited v. Pason Systems Corp.* 2009 FC 555, the Federal Court stated:

> The test to amend a pleading must be applied consistently with the test to strike a pleading. Amendments will be denied, and pleadings will be struck only when it is plain and obvious that the claim discloses no reasonable cause of action. In *Enoch Band of Stony Plain Indians v. Canada* [1993] F.C.J. No.1254, the Federal Court of Appeal made it very clear that the Court should only "deny amendments in plain and obvious cases" where the matter is "beyond doubt".

[14] I am satisfied that the proposed amendments, had they been included in the original notice, would survive a motion to strike. This is a case of first impression with significant

ramifications. It is the first application brought by the AG of Canada under sections 39 and 40 of the *Investment Canada Act,* and the power of the Court under section 40 of the *Act* has never been exercised. That power is broad - the *Act* states that where at the conclusion of the hearing of the application, the Court decides that the Minister was justified in sending a demand under section 39 of the *Act*, the Court may make any order or orders as, in its opinion, the circumstances require and is not limited by the options set out in subsections 40(a) through (g) of the *Act*. In that regard, while perhaps ambitious, it is not plain and obvious or a certainty that the relief sought by the AG of Canada through the amendments is impossible for the Court to grant.

[15] Moreover, in granting leave to amend the notice of application in the manner sought by the AG of Canada, U.S. Steel is not foreclosed from raising any argument as to whether the Demand is premature, valid, or justified and, if the application proceeds to a remedy stage, U.S. Steel may make whatever arguments it wishes regarding the propriety or legality of the relief sought by the AG of Canada and/or what order, if any, the Court ought to grant. Thus, I am not satisfied that any prejudice is visited upon U.S. Steel that cannot be compensated by an award of costs.

[16] Unfortunately, the timing of this motion will further delay this application proceeding to a hearing. This motion should have been brought sooner or the relief sought set out in the original application from the outset. As noted above, it ought to have been clear that even if this application was heard and decided quickly, it was doubtful that any order requiring compliance, as originally sought, could be meaningful or be implemented in the mere months that would have remained in the Term. This became obvious after the constitutional challenge to the legislation

was brought a year ago. In the meantime, the parties have filed their affidavit evidence pursuant to Rules 306 and 307 of the *Federal Courts Rules* under the application as originally drafted. The AG of Canada is already proceeding with a motion for leave to file additional evidence in response to the affidavits filed by U.S. Steel, in response to which, U.S. Steel may seek leave to file further evidence of its own. U.S. Steel also indicated at the hearing of this present motion that it will likely seek leave to file further evidence in the event this motion is granted in response to the new relief sought. It would not be surprising, that the AG of Canada would seek further leave to respond to that material. While both parties have expressed their commitment to having the application heard in an expeditious fashion, the application is at risk of becoming mired in these interlocutory procedural steps regarding the exchange of evidence.

[17] Accordingly, this motion being granted, the parties must take stock of the appropriate process for the orderly and timely exchange of evidence, any agreement as to production of documents, cross-examinations and any motions that may arise from the cross-examinations. The AG of Canada and U.S. Steel must consider a reasonable and workable schedule and provide a proposal for the Court to review.

ORDER

THIS COURT ORDERS that:

1. The motion be and is hereby granted.

2. Any party wishing to make submissions regarding costs of this motion shall file written submissions no longer than three (3) pages in length within ten (10) days of the date of this motion.

3. The Attorney General of Canada and U.S. Steel shall, within ten (10) days of the date of this Order, submit a joint proposal for the steps and timetable for the orderly exchange of evidence, and shall include dates of their mutual availability and that of the Interveners for a case management teleconference.

"Martha Milczynski"
Prothonotary

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1162-09
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REASONS FOR ORDER AND ORDER:	MILCZYNSKI P.
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APPEARANCES:

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