Investment Canada Act: "privilege" has its limits in US Steel case

26 février 2016

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On January 26, 2016 the Ontario Court of Appeal held that the confidentiality and privilege protections in section 36 of the***Investment CanadaAct*** do not prevent courts from ordering companies to disclose the undertakings they are required to make to the Canadian government in order to obtain *ICA* approval for foreign acquisitions.

Pre-closing *ICA* approval is often required for direct foreign acquisitions of large Canadian companies. Foreign investors are typically required to make binding commitments (undertakings) to the Canadian government in order to obtain approval. While these undertakings are usually kept confidential, the Court of Appeal's decision suggests that courts can order companies to disclose the undertakings in some circumstances (*e.g.*, insolvency proceedings), even when the terms of the ICA may prevent government officials from doing so. Businesses should be mindful of this risk when negotiating and agreeing to undertakings.

Background

In September, 2007, United States Steel Corporation (US Steel) sought to acquire Stelco (now called U.S. Steel Canada Inc. or USSC), and submitted the required application for ministerial review and approval under the *ICA*. On October 29, 2007 the Minister approved the transaction, subject to 31 binding undertakings from US Steel, regarding the operation of USSC. It is relatively common for investors to provide undertakings in order to secure approval for transactions under the *ICA*.

On May 5, 2009, in light of the global economic downturn, USSC laid off employees and closed its production in Canada. The Minister notified US Steel that it had not complied with two of its undertakings, namely the obligation to ensure steady employment levels and continued production at the two Canadian plants. Consequently, the Minister demanded that US Steel comply with its undertakings and remedy its default.

Eventually, the Minister commenced enforcement proceedings against US Steel pursuant to section 40 of the *ICA*, seeking an order directing compliance with the undertakings and a penalty for non-compliance of C$10,000 for each day of the breach. In late 2011, US Steel approached the Minister with a proposal for

new undertakings, which formed the basis for a settlement agreement. The full text of the new undertakings was not disclosed.

Three years later, in 2014, USSC filed for creditor protection under the ***Companies Creditors' Arrangement Act*** (CCAA). In the context of the restructuring, the United Steelworkers Union brought a motion requesting that the Canadian government and/or US Steel disclose the settlement agreement that contained the revised undertakings. The union felt that the undertakings would shed light on USSC's pension obligations, and other aspects of the restructuring proposal.

The federal government refused to disclose the undertakings, despite a statutory provision allowing it to do so, taking the view that the disclosure of the undertakings would prejudice US Steel and was not necessary for the administration or enforcement of the *ICA* and that it therefore could not be compelled to disclose the undertakings. The *CCAA* judge concluded that the undertakings were privileged under section 36 of the *ICA* and that neither US Steel nor the Canadian government could therefore be compelled to disclose them.

Confidentiality Provisions of the *ICA*

Statutory privilege is governed by section 36 of the *ICA*. The provision includes:

- **Statutory privilege:** Information collected by the government for the purposes of the *ICA* is privileged, and no government official can be required to disclose the information in court or otherwise (ss. 36(1) & (2)).

- **Exceptions:** The following three types of information are *not* protected by statutory privilege: (a) information disclosed for the purposes of *ICA*-relatedlegal proceedings (ss. 36(4)(a)); (b) information included in written *ICA* undertakings (ss. 36(4)(b)); and (c) information that has been authorized for release by the person who provided the information (ss. 36(4)(d)).

- **Exception to the exception:** With respect to item (b) above, a government official may still refuse to disclose written undertakings if the disclosure is not required for the administration or enforcement of the *ICA* and if disclosure would be prejudicial to the business affairs of the investor (ss. 36(5)).

The Court of Appeal's Decision

There were two principal issues before the court on this appeal. First, whether the *CCAA* judge correctly concluded that the "information" that is protected by statutory privilege in section 36 of the *ICA* includes "undertakings". The Court of Appeal affirmed that it does. Second, whether the *CCAA* judge correctly concluded that none of the exceptions (described above) applies.

The Court of Appeal affirmed that the exception in ss. 36(4)(a) permitting the disclosure of information in the context of *ICA* enforcement proceedings did not apply because the union (and not the Minister) had requested the release of the information and, in any event, the purpose of the request was to support ongoing *CCAA* proceedings and not *ICA* enforcement proceedings. The Court further held that because the investor had not consented to the disclosure of the settlement agreement, the union could not rely on the exception for authorized release contained in ss. 36(4)(c).

This left the exception providing that written undertakings are not privileged (ss. 36(4)(b)). The Court of Appeal agreed that this exception would apply, unless the "exception to the exception" in ss. 36(5) permitted *both* the government and US Steel to refuse to disclose the undertakings.

The Court of Appeal agreed with the *CCAA* judge that if a government official believes that the terms of the written undertakings should not be released, that official may invoke ss. 36(5) and refuse to disclose the terms of the undertakings.

However, the Court of Appeal concluded that this “exception to the exception” can only be used by persons explicitly named in ss. 36(5): *government officials*. Private parties (including US Steel) are not protected from orders requiring them to disclose undertakings on the grounds of ss. 36(5) and could therefore – if ordered – be compelled to release the terms of the undertakings.

Importantly, the Court of Appeal has not ordered that the settlement agreement be disclosed to the union – it decided only that the confidentiality provisions of the *ICA* do not *prohibit* the *CCAA* judge from so ordering. USSC has argued that another, different form of privilege – common law settlement privilege – applies to the undertakings, and the Court of Appeal has sent the case back to the *CCAA* judge to determine whether this settlement privilege applies, and whether to order USSC to disclose the undertakings.