Federal Court  Cour fédérale

**Date: 20110225**

**Docket: T-1162-09**

**Citation: 2011 FC 226**

**Ottawa, Ontario, February 25, 2011**

**PRESENT: The Honourable Mr. Justice Near**

**BETWEEN:**

**THE ATTORNEY GENERAL OF CANADA**

**Applicant**

**and**

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

**Respondents**

**and**

**LAKESIDE STEEL INC. AND LAKESIDE STEEL CORP.**

**Interveners**

**and**

**THE UNITED STEEL WORKERS AND LOCAL 1005 AND LOCAL 8782 AND JOHN PITTMAN AND GORD ROLLO**

**Interveners**

**REASONS FOR ORDER AND ORDER**

[1] This is a motion brought by the Respondents, United States Steel Corporation and U.S. Steel Canada Inc. (US Steel) appealing the Order of Prothonotary Martha Milczynski, issued November 15, 2010, (the Order) allowing the Applicant (the AGC) to amend the relief sought in the Notice of Application filed on July 17, 2009 (the Application). US Steel seeks an order setting aside the Order of Prothonotary Milczynski.

## I. Background

### A. *Factual Background*

[2] On July 17, 2009 the AGC commenced an application on behalf of the Minister of Industry (the Minister) pursuant to section 40 of the *Investment Canada Act*, RSC 1985 c 28 (the ICA).

[3] The AGC alleges that US Steel has failed to comply with two written undertakings (the Undertakings) made to the Minister in connection with US Steel's acquisition of certain assets of Stelco Inc. (the Canadian Business). The undertakings relate to the annual level of steel production in US Steel's Canadian Business (the Production Undertaking) and aggregate employment levels at the Canadian Business (the Employment Undertaking).

[4] The Undertakings, given to the Minister in October 2007 provided that:

> The Investor 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 in production due to capital investment projects) relative to the average of the last three completed calendar years.

> 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 equivalent basis if the bar mill is sold or closed.

[5] The term of the Production and Employment Undertakings was from November 1, 2007 to October 31, 2010 (the Term).

[6] Following US Steel's submission of a progress report to Industry Canada in March 2009 indicating that production had declined and lay-offs were occurring, on May 5, 2009 the Minister sent a demand to US Steel pursuant to section 39 of the ICA. Such a demand may require the investor to: cease the contravention, remedy the default, show cause why there is no contravention, or, in the case of undertakings, justify any non-compliance therewith. In the Demand the Minister required US Steel to provide a written commitment that, "it will increase production at Canadian facilities in 2009 and 2010 to achieve increased production over the term…" and "it will…comply with the undertaking to maintain average aggregate employment at the Canadian Business over the term…"

[7] Dissatisfied with US Steel's response to the Demand, the AGC filed the Application in the Federal Court on July 17, 2009. The AGC sought an order directing US Steel to comply with the relevant undertakings:

> a. By increasing steel production at the Canadian Business, as defined in this Application, such that:
>
> i. 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 tons (2 x 4,345,000); and

ii. 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

b. By 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.

[8] Due to several interlocutory motions, including a constitutional challenge, the lifespan of the litigation of the Application has now surpassed the Term of the Undertakings, which expired October 31, 2010. In order to account for the passage of time since the Application was commenced, the ACG decided to amend the relief sought in the Application, filing an amendment motion on October 15, 2010. This motion to amend is the subject of the present appeal.

[9] As amended, paragraph 3 of the Application now requests the Court to issue an order directing US Steel to:

a. produce X million tons of steel at the Canadian Business, as defined in this Application, at a rate of 4,345,000 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 the Application, where steel production equalled or exceeded 362,083 tons; and

b. 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.

B. *The Order*

[10] Prothonotary Milczynski granted the AGC's motion. The Prothonotary recognized that the proposed amendments created new obligations on the part of US Steel. The Prothonotary described how the proposed amendments would have the effect of lengthening the term until the Undertakings are fulfilled and in respect of the Production Undertaking, adding a new term that would require US Steel to have produced a monthly minimum target output. Similarly with the Employment Undertaking, US Steel would only be given credit for meeting the undertaking where a monthly minimum average employment target was met. However, the proposed amendment related exclusively to the relief sought, and the Prothonotary found that if the Application proceeded to the remedy stage, US Steel could make any arguments regarding the appropriateness of the relief sought at that time.

[11] US Steel identified several issues with respect to whether or not the section 39 Demand covered the entire Term. The Prothonotary found that the original Notice of Application referred to the entire Term and sought remedial action covering the entire Term to ensure that the Production and Employment Undertakings were satisfied in their entirety. Whether the Demand was premature and valid only for year one of the Term were already issues in dispute under the original Application and did not arise solely by virtue of the proposed amendments. The Prothonotary concluded that these matters were best left to the judge hearing the application and that US Steel was not foreclosed from raising any argument regarding alleged defects of the Demand at that time.

[12] The Prothonotary referred to rule 75 of the *Federal Courts Rules* and the test laid out in *Canderel Ltd. v Canada*, [1994] 1 FC 3, [1993] FCJ No 777 (QL) (CA), and *Varco Canada Limited v Pason Systems Corp.*, 2009 FC 555, [2009] FCJ No 687 (QL). She decided that, in accordance with the test laid out by the Federal Court, the proposed amendments, had they been included in the original notice, would survive a motion to strike. Furthermore, while the Prothonotary noted that the relief requested might be ambitious, it was not plain and obvious or a certainty that it would be impossible for the Court to grant. The Prothonotary was also not satisfied that any prejudice visited upon US Steel could not be compensated by an award of costs.

## II. Issues

[13] The issues raised in this appeal are:

(a) What is the applicable standard of review of the Prothonotary's decision?

(b) Is there any basis upon which this Court can set aside the Prothonotary's decision?

## III. Argument and Analysis

### A. *Standard of Review*

[14] As set out in *Canada v Aqua-Gem Investments Ltd*., [1993] 2 FC 425 (CA), [1993] FCJ No 103 and restated in *Merck & Co. v. Apotex Inc*., 2003 FCA 488, [2004] 2 F.C.R. 459, at

para 19, discretionary orders of Prothonotaries ought not to be disturbed on appeal to a judge unless:

> a) the questions raised in the motion are vital to the final issue of the case, or
>
> b) the orders are clearly wrong in the sense that the exercise of discretion by the prothonotary was based upon a wrong principle or upon a misapprehension of the facts.

[15] If the question is determined to be vital to the final issue, under the first branch of the test, a de novo review is conducted and no deference is shown to the prothonotary. However, the second branch requires the Court to determine that the order was clearly wrong before disturbing it. This is a deferential standard.

[16] The first question then, is whether, as US Steel submits, the Order is vital to the final issue of the case.

[17] US Steel submits that allowing the AGC to seek the relief contained in the amended notice of motion is an issue vital to the outcome of the entire Application because it changes the definition of compliance from one that was negotiated between the Investor and the Minister to one that is unilaterally imposed by the Minister. Moreover, the amendment attempts to impose upon US Steel the duty to answer for conduct that was never the subject of the requisite statutory Demand, that being the conduct in years two and three of the Term.

[18] The AGC submits that the amendment does not re-define or fundamentally alter the course of this proceeding because: the length of the Term for which the Demand was valid was already at issue; the amendment only relates to the relief sought in the Application; given the delays in this

proceeding the amendment of necessity contemplates a remedial Court order which would take place after the end of the Term; and under section 40 of the ICA the Court retains the power to make any order as it considers the circumstances to require.

[19] The test to determine if a question is "vital" is stringent. As Justice Robert Décary explained in *Merck*, above, at paras 22 and 23,

> The use of the word "vital" is significant. It gives effect to the intention of Parliament […]
>
> > […] that the office of prothonotary is intended to promote "the efficient performance of the work of the Court".
>
> […]
>
> One should not, therefore, come too hastily to the conclusion that a question, however important it might be, is a vital one. Yet one should remain alert that a vital question not be reviewed de novo merely because of a natural propensity to defer to prothonotaries in procedural matters.

[20] Specifically regarding amendments, decisions of this Court support the conclusion that amendments that advance additional claims, or causes of action or defences are likely to be "vital" (*Bristol-Myers Squibb Co. v Apotex Inc*, 2008 FC 1196, 173 ACWS (3d) 249 at para 6; *Merck*, above, at para 25).

[21] In the present matter I am not convinced by US Steel's arguments that the amendment is "vital". It does not advance additional causes of action or defences. The issues US Steel identifies as problematic in regards to the amendment, were, as found by Prothonotary Milczynski, already at play in the original notice of application and ought to be determined by the Applications Judge.

Furthermore, the amendment does not change the character of the Application: it does not impose a new performance standard on US Steel, or determine whether the Minister was justified in sending the Demand, or affect in any way the determination of whether or not US Steel complied with the Demand; rather the amendment only changes the formulation by which the AGC seeks relief to be calculated. In essence, the AGC still seeks an order directing US Steel to comply with the Undertakings. The reality that time has passed, making the relief sought in the original notice of no practical effect is unequivocal. Perhaps, as noted by Prothonotary Milczynski, the AGC ought to have accounted for this unsurprising outcome at the outset, but, in any case, the fact remains that the appropriateness of the methodology suggested by the AGC in the amendment will be up for debate during the hearing. As such, I cannot find that the amendment is a vital one. Accordingly, the decision of the Prothonotary can only be overturned if it is shown to be clearly wrong.

### B. *The Amendment Order Is Not Clearly Wrong: It Is Not Based On a Wrong Principle of Law, Or Upon a Misapprehension of the Facts*

[22] As stated by Prothonotary Milczynski, whether leave should be granted for the amendments to be made is governed by Rule 75 of the *Federal Courts Rules*, and well-settled jurisprudence. Rule 75 provides:

| Amendments with leave | Modifications avec autorisation |
|---|---|
| 75. (1) Subject to subsection (2) and rule 76, the Court may, on motion, at any time, allow a party to amend a document, on such terms as will protect the rights of all parties. | 75. (1) Sous réserve du paragraphe (2) et de la règle 76, la Cour peut à tout moment, sur requête, autoriser une partie à modifier un document, aux conditions qui permettent de protéger les droits de toutes les parties. |

| Limitation | Conditions |
| --- | --- |
| (2) No amendment shall be allowed under subsection (1) during or after a hearing unless | (2) L'autorisation visée au paragraphe (1) ne peut être accordée pendant ou après une audience que si, selon le cas : |
| (a) the purpose is to make the document accord with the issues at the hearing; | a) l'objet de la modification est de faire concorder le document avec les questions en litige à l'audience; |
| (b) a new hearing is ordered; or | b) une nouvelle audience est ordonnée; |
| (c) the other parties are given an opportunity for any preparation necessary to meet any new or amended allegations. | c) les autres parties se voient accorder l'occasion de prendre les mesures préparatoires nécessaires pour donner suite aux prétentions nouvelles ou révisées. |

[23] The test for when an amendment to a pleading should be permitted is set out in the Federal Court of Appeal decision, *Canderel*, above, at para 9:

> With respect to amendments, […], that while it is impossible to enumerate all the factors that a judge must take into consideration in determining whether it is just, in a given case, to authorize an amendment, the 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.

[24] Prothonotary Milczynski also cited the "plain and obvious" test from *Varco Canada Limited v Parson Systems Corp.*, above, at para 26:

> 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 in very clear that the Court should only "deny amendments in plain and obvious cases" where the matter is "beyond doubt".

[25] There is no disagreement between the parties as to the applicable tests, however, US Steel, in its written submissions offers the "not reasonably realizable" test from *Mushkegowuk Council v Canada (Attorney General)*, 2008 FC 1041, 170 ACWS (3d) 224 quoting para 12 in which the Court appears to hold that a motion to amend should be denied where the relief it provides for is not reasonably realizable or cannot reasonably be awarded:

> Amendments are always within the discretion of the Court as the party pleading is expected to define the issues and specify the relief requested in the first instance. Occasionally facts are discovered or the characterization of the *lis* between the parties changes such that an amendment is in the interests of justice. I would be hard pressed to be convinced that permitting an amendment to raise a claim for relief that cannot reasonably be awarded by the Court is ever in the interest of justice.
>
> (Emphasis added)

[26] In that case, like in the present matter, the prothonotary considered whether the relief sought in the proposed amendment was something that the court could award if the applicants were successful. On the facts of that the case the prothonotary found that the alternative relief was not available because it would have the court making specific policy decisions regarding the disposal of nuclear fuel waste. On appeal, Justice Russel Zinn found that the availability of the proposed amendment was not an improper consideration when deciding whether or not to exercise discretion to permit an amendment. In the present matter Prothonotary Milczynski considered whether the relief sought would be available, and concluded that while it may be ambitious, based on section 40

of the ICA which allows the Court to make any order or orders as, in its opinion, the circumstances require, it was not plain and obvious that the relief sought through the amendment would be impossible for the Court to grant.

[27] Nevertheless, US Steel submits that Prothonotary Milczynski committed three reviewable errors:

1) Prothonotary Milczynski failed to recognize that there was no jurisdiction in the Court to grant the amendment because it is premised on an alleged breach for which no section 39 demand has been made and no opportunity to respond has been given. Therefore it was plain and obvious that the relief sought would fail;

2) Prothonotary Milczynski correctly recognized that the amendment created "new obligations" and sought to define non-compliance in a manner "that may not have been contemplated by the parties at the time that Undertakings were given." However, the Prothonotary failed to recognize that the imposition of such new obligations was not authorized by the ICA; and

3) Prothonotary Milczynski failed to recognize that the amendment was not in the interests of justice having regard to the legislative intent as expressed in the ICA.

[28] I prefer the AGC's analysis which neatly summarizes the above issues into two core arguments which deal with the bulk of US Steel's allegations:

1) The Court has no jurisdiction to grant the amendment because it is premised on an alleged breach for which there has been no section 39 demand; and

2) That the amendment wrongly results in the imposition of a new metric for the determination of whether US Steel abided by the Output and Employment undertakings.

(1) No Jurisdiction Argument Unfounded

[29] US Steel submits that the Prothonotary had no jurisdiction to grant the amendment because it was premised on an alleged breach for which no section 39 demand had been made and no opportunity to respond had been given. Pursuant to the ICA, each section 40 application must be preceded by a section 39 demand. Therefore, it was plain and obvious that the relief sought would fail.

[30] Despite US Steel's arguments regarding the structure of the ICA, and its belief that a section 39 demand can only relate to non-compliance which has already occurred, this narrow grammatical interpretation of the statute does not convince me that it is plainly obvious that the Court would not be able to grant the relief sought by the AGC.

[31] The AGC sent the section 39 Demand with only 15 months left in the Term. As I read the Demand, it seems clear, or at least arguable, that the Minister intended to require US Steel to meet the Undertakings for the entire Term. US Steel contends that the AGC has conceded that no demand has been issued for years two and three of the Term. I find no such concession in the AGC's submissions. As the Prothonotary stated, the validity of the Demand and the time period it covered remains an issue to be examined as part of the hearing on the merits of the Application. US Steel's reasoning is specious - surely, Parliament could not have intended for the Minister to be required to repeatedly issue demands on non-compliant investors or wait until the end of the Term to issue a demand. The AGC's position on this point is much more lucid. As the AGC submits, US Steel's argument results in an untenable paradox in which the Minister must wait until the end

of the term to issue a demand, but undertakings can only be enforced during the term, for US Steel also presents as a problem the fact that the new relief requires the undertakings to be fulfilled after the expiry of the Term.

[32] The Demand was indeed issued prior to the expiration of the Term, but whether or not the Undertakings were fulfilled or the Demand was complied with subsequent to the date it was issued is a knowable fact, that the Applications Judge will be able to determine when determining firstly whether the Minister was justified in sending the Demand, and secondly, whether the investor failed to comply with the demand. The Court's determination of appropriate remedial measures will only be an issue after the merits of the Application are determined.

(2) The Proposed Amendment Does Not Impose New Undertakings

[33] US Steel argues that the amendment seeks to have the Court order the performance of entirely new commitments, and to extend those obligations beyond the Term of the undertakings.

[34] It is true that the amendment seeks relief on the basis of a monthly measurement of compliance with the Production and Employment Undertakings whereas the Undertakings themselves were designed to be measured based on yearly performance targets. The Prothonotary recognized as much in her reasons.

[35] However, having reviewed US Steel's submissions, I am in complete agreement with the AGC in that it appears as though US Steel has conflated liability with remedy. The amendment

deals solely with the remedy sought by the AGC, and has no effect on how the Court will determine whether the Minister was justified in making the Demand or whether US Steel complied with it, which is the heart of the Application. As noted by the Prothonotary at para 9:

> 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 US Steel over the Term to satisfy them. This matter too must be left for the hearing of the application on its merits.

[36] While there might already be disagreement between the parties regarding how the Undertakings were to be measured and what they entailed, the amendment certainly does not amount to a retrospective rewriting of them.

[37] When it comes time to discuss remedies, as the Prothonotary noted and the AGC submits, US Steel will be able to make arguments to the Applications Judge regarding the appropriateness of the AGC's proposed remedy and any other remedies that the Court might be tempted to order. Prothonotary Milczynski characterized the amendment as ambitious, but noted that it was not impossible. I concur with this sentiment, and note again that under the ICA, remedial orders are left to the discretion of the Court.

[38] There is no merit in US Steel's argument that the AGC, in issuing the motion to amend, is circumventing the legislation.

[39] The Prothonotary's Amendment Order was not clearly wrong; it was not based on a misapprehension of the facts or a wrong principle of law. This appeal is accordingly dismissed.

## IV. Conclusion

[40] In consideration of the above conclusions, this appeal is dismissed and costs are awarded to the Applicant, the AGC.

## ORDER

**THIS COURT ORDERS that**:

1. This appeal is dismissed.

2. Costs are awarded to the Applicant, the Attorney General of Canada.

" D. G. Near "

Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

| | |
|---|---|
| **DOCKET:** | **T-1162-09** |
| **STYLE OF CAUSE:** | **THE ATTORNEY GENERAL OF CANADA v. UNITED STATES STEEL CORPORATION ET AL.** |
| **PLACE OF HEARING:** | **OTTAWA** |
| **DATE OF HEARING:** | **JANUARY 24, 2011** |
| **REASONS FOR ORDER AND ORDER BY:** | **NEAR J.** |
| **DATED:** | **FEBRUARY 25, 2011** |

**APPEARANCES:**

| | |
|---|---|
| Craig Collins-Williams / John Syme | FOR THE APPLICANT |
| Michael E. Barrack/ Marie Henein | FOR THE RESPONDENTS |
| David K. Wilson | FOR THE INTERVENERS (LAKESIDE) |

**SOLICITORS OF RECORD:**

| | |
|---|---|
| John L. Syme<br>Department of Justice<br>Ottawa, Ontario | FOR THE APPLICANT |
| Michael E. Barrack and Ronald Podolny<br>Thornton Grout Finnigan LLP<br>Toronto, Ontario | FOR THE RESPONDENTS |

| | |
|---|---|
| Marie Henein<br>Henein & Associates<br>Toronto, Ontario | FOR THE RESPONDENTS |
| Paula Turtle and Rob Champagne<br>United Steel Workers<br>Toronto, Ontario | FOR THE INTERVENERS<br>(UNION) |
| David K. Wilson<br>Cavanagh Williams Conway Baxter LLP<br>Ottawa, Ontario | FOR THE INTERVENERS<br>(LAKESIDE) |
| Jeffery Kaufman<br>Fasken Martineau DuMoulin LLP<br>Toronto, Ontario | |