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Foreign Investors Cannot Use Statutory Privilege to Avoid Disclosure of *Investment Canada Act* Undertakings

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On January 26, 2016, the Court of Appeal for Ontario ruled that confidential written undertakings given by a foreign investor to the government of Canada to settle enforcement action under the *Investment Canada Act* (ICA) were not barred by the ICA from disclosure in unrelated legal proceedings. In particular, the Court held that the foreign investor who gave the undertakings cannot rely on the statutory privilege under the ICA to refuse disclosure of the undertakings. This is the case even when the Minister of Industry[1] successfully invokes that privilege to resist disclosing undertakings on the basis that disclosure is not necessary for any purpose related to the administration or enforcement of the ICA and would be prejudicial to the foreign investor. Instead, disclosure of potentially sensitive undertakings given to secure foreign investment approval under the ICA can still be sought directly from the investor on other grounds that may be available to a requester.

The Court's decision is the first to consider and clarify the privilege provisions in the ICA and their scope for protecting undertakings from disclosure to interested third parties. While the Court's decision in many respects interprets the privilege provisions in section 36 of the ICA to give them a relatively broad and generous application, it also serves as a reminder that highly confidential information about how a foreign investor has committed to operate its Canadian business may be vulnerable to disclosure in certain rare circumstances. Foreign investors should therefore continue to exercise heightened care with respect to information and undertakings provided to the Minister to secure foreign investment approval so that all possible claims of privilege, whether under the ICA or at common law, are preserved.

Background

Acquisition of Stelco and Enforcement Proceedings Under the ICA

As part of its 2007 acquisition of Canadian-based Stelco Inc. (now U.S. Steel Canada Inc. (USSC)), United States Steel Corporation (USS) provided undertakings to the Minister to secure approval of the transaction as likely to be of "net benefit" to Canada under the ICA. USS subsequently faced financial difficulties and, in 2009, the Minister sent a demand to USS under the ICA claiming that USS was in breach of its undertakings with respect to maintaining certain employment and production levels in Canada. The Minister's demand requested that USS remedy its alleged default, show that it was not in default or justify any non-compliance. USS took the position that any non-compliance with its undertakings was the result of factors beyond its control and for which it could not be held responsible.

In July 2009, the Attorney General of Canada (AGC) filed an application against USS seeking an order directing USS to comply with the undertakings and pay certain penalties. The litigation – the first of its kind under the ICA – was subsequently settled in 2011 without any judicial finding on the merits when USS, USSC and the AGC entered into a settlement agreement. The settlement agreement contained new written undertakings, some of which were announced publicly, including commitments to continue producing steel in Canada and to maintain certain operations in Ontario until the end of 2015. The settlement agreement requires that the balance of its terms be kept confidential.

CCAA Proceedings

As a result of continued financial difficulties, in September 2014, USSC applied for and was granted protection under the Canadian *Companies' Creditors Arrangement Act* (CCAA). In an affidavit filed with its application, USSC referred to the settlement agreement and asserted that its confidentiality was protected by the terms of the agreement itself and the privilege provisions in section 36 of the ICA. In April 2015, certain stakeholders (Stakeholders) in the CCAA proceeding, including the City of Hamilton and unions representing current

and retired employees of USSC, brought a motion seeking an order to compel Industry Canada, USS and/or USSC to disclose the settlement agreement, arguing that it was relevant to assessing the restructuring proposal and would allow them to better understand and participate in the restructuring process. In particular, if USS failed to fulfil (or breached) its obligations under the settlement agreement, the Stakeholders would use these breaches to challenge claims made by USS against USSC in the CCAA proceedings, which claims competed with and could otherwise subordinate claims made by the Stakeholders.

Privilege Regime Under the ICA

Subsections 36(1) and (2) of the ICA provide that, subject to certain exceptions, all information obtained with respect to a foreign investor or target Canadian business by the Minister or an officer or employee of the Crown in the course of the administration and enforcement of the ICA is privileged, and "no one shall knowingly communicate or allow to be communicated any such information or allow anyone to inspect or have access to such information"; nor is the Minister or any officer or employee of the federal or provincial governments required, in connection with any legal proceedings, to give evidence relating to any such privileged information or to produce any statement or document containing such information.

Subsection 36(4) of the ICA sets out a number of exceptions to this privilege. Notable among these exceptions is that the privilege will not apply to protect the following from communication or disclosure:

- information for the purposes of legal proceedings relating to the administration or enforcement of the ICA;
- information, the disclosure of which, has already been authorized in writing by the foreign investor or target Canadian business; or
- information contained in any written undertaking given to the government of Canada to satisfy the net benefit test under the ICA.

However, with respect to information contained in an investor's undertakings, the Minister may nonetheless refuse to communicate or disclose such information if, in the Minister's opinion, the communication or disclosure of that information is not necessary for the administration and enforcement of the ICA and would prejudicially affect the investor who gave the undertakings.

Ministerial Refusal to Disclose Undertakings

Indeed, in response to the Stakeholders' motion to compel disclosure of the settlement agreement, the Minister's delegate advised the Stakeholders of her opinion that disclosure of the settlement agreement was not necessary for any purpose related to the administration or enforcement of the ICA and that such disclosure would prejudicially affect the conduct of USSC's business affairs. This stance is consistent with long-standing government policy that information submitted under the ICA will be treated as confidential and, subject to certain exceptions, will not be disclosed to the public without investor consent.

Trial Decision

Before the trial court, the Stakeholders argued that section 36 of the ICA did not protect the settlement agreement from disclosure principally on the following alternative grounds:

- The privilege did not apply because disclosure was sought in the context of CCAA proceedings, which the Stakeholders argued fell within the statutory exception relating to information disclosed for the purpose of "legal proceedings relating to the administration or enforcement of [the ICA]".
- The undertakings contained in the settlement agreement were not "information" protected by section 36 of the ICA, which distinguishes between "undertakings" and "information" and protects only the latter. In this way, the Minister's refusal to disclose "information contained in the written undertakings" could not extend to the bare promises (i.e., the undertakings) made by USS, which must be disclosed.

On May 19, 2015, the trial court ruled that the settlement agreement was covered by the privilege in section 36 of the ICA and that none of the statutory exceptions to that privilege were applicable. Specifically, the trial court determined that the CCAA proceedings were not "legal proceedings relating to the administration and enforcement of [the ICA]", and USS and USSC had not expressly or impliedly

authorized disclosure of the settlement agreement for the purposes of the ICA by referring to it in USSC's affidavit filed in the CCAA proceedings.[2]

The trial court also rejected the Stakeholders' distinction between "undertakings" and "information", finding that undertakings were simply a form of information protected under the ICA or a place where such information could be found. Accordingly, the ministerial refusal to disclose the settlement agreement properly covered the undertakings given by USS, and since the Stakeholders had not sought to judicially review the Minister's opinion behind the refusal to disclose the undertakings, the effect of the refusal was final.

The trial court further concluded that it did not have the authority under the CCAA to order any of the parties to disclose the settlement agreement. Given its finding that section 36 barred disclosure of the settlement agreement, the trial court did not go on to consider whether there were other grounds, such as common law settlement privilege, to resist disclosure of the settlement agreement.

Court of Appeal Decision

The Stakeholders appealed the trial court's decision, and the Court of Appeal issued its appeal judgment on January 26, 2016. The Court agreed with the trial court on virtually all issues that were argued at trial. However, the Court reversed the trial court on the basis of an issue raised by the Stakeholders for the first time on appeal – namely, whether the Minister's refusal to disclose undertakings could also be relied upon by USS or USSC to resist disclosure. The Court held that because the appeal dealt with the proper legal interpretation of the ICA, and section 36 in particular, it was appropriate to address this new issue even though it had not been argued before the trial court.

The Court determined that, on a plain reading of section 36 of the ICA, the ability to refuse to disclose undertakings, which are otherwise statutorily excepted from the privilege in section 36, is reserved to the "Minister of the Crown" or an "officer or employee of Her Majesty in right of Canada or a province". It was not Parliament's intention to extend to investors like USS this power to refuse to disclose information, including undertakings, that they supply to the Minister in the course of his or her review of their proposed transactions under the ICA. Rather, investors would need to rely on other grounds to refuse disclosure of undertakings – for example, common law settlement privilege. The Court remanded the matter to the trial court for a determination of any other available arguments to resist disclosure of the settlement agreement.

What It Means

As long as the Canadian government's policy is to maintain the "secrecy" of negotiations under the ICA approval process, investors may be relatively confident that the government will not disclose confidential information, including commitments and undertakings, outside of the normal channels (i.e., proceedings relating to the administration or enforcement of the ICA) without investor consent. However, this does not mean that interested third parties cannot seek disclosure of undertakings directly from the foreign investor or the Canadian-based acquired business. In these circumstances, investors may wish to consider taking all available precautions in the course of foreign investment reviews under the ICA to ensure that possible claims of privilege over information (including undertakings) provided to the Minister are preserved, whether such claims arise under the ICA or at common law.

On remand in this case, it will be up to the trial court to determine whether disclosure of the settlement agreement is barred by common law settlement privilege. If settlement privilege arises, the Stakeholders will need to establish that an exception applies, which generally requires proof that, on balance, a competing public interest outweighs the public interest in encouraging settlement. On the basis of materials filed by the parties, the Stakeholders are likely to argue that disclosure is justified given the probity of the settlement agreement to the CCAA proceedings and the public interest in avoiding injustice generally and preventing overcompensation to USS as a creditor of USSC in particular. However, given the importance that courts have placed on the public interest in promoting settlement, which contributes to the effective administration of justice, it may be difficult for the Stakeholders to succeed in their position that common law settlement privilege does not apply to the settlement agreement. Further, even if a settlement privilege applies in the context of the U.S. Steel case, it may not apply in the context of undertakings given in the more usual circumstances of an ICA review of a proposed acquisition of control of a Canadian business that is not accompanied by any litigation between the investor and the Minister.

If the settlement agreement is not protected by common law settlement privilege, it may be open to USS and/or USSC to seek a sealing order to protect the confidentiality of the settlement agreement. Such orders may be granted if they are necessary to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not

prevent the risk, and the beneficial effects of the order outweigh its detrimental effects. Courts have increasingly required moving parties to express the risk to a commercial interest in terms that go beyond private economic harm and engage a broader public interest. It remains to be seen whether, in the context of a request to seal undertakings given to secure approval of an acquisition under the ICA, parties like USS and USSC could invoke the public interest underlying the ICA of attracting foreign investment that is likely to be of net benefit to Canada. In this connection, it might be argued that disclosure of undertakings could undermine confidence in the ICA regime and discourage foreign investors from pursuing otherwise beneficial investments in Canadian businesses.

Finally, it is worth noting that a ministerial opinion expressed in support of a decision under section 36 to resist disclosure of undertakings may be subject to challenge by way of judicial review in Federal Court. In this case, the Stakeholders did not challenge the Minister's decision but only the effect of that decision; however, it is open for parties to pursue such challenges in future cases. That said, however, courts generally accord a high degree of deference to discretionary ministerial decisions of this kind.

Read the Court's decision.

[1] The Minister of Industry is now the Minister of Innovation, Science and Economic Development.

[2] While the Stakeholders did not specifically argue at trial that this exception to privilege at section 36(4)(d) applied, the trial court nonetheless ruled on its applicability. On appeal, however, the Stakeholders challenged the trial court's decision that the exemption to confidentiality under section 36(4)(d) did not apply. In particular, the Stakeholders argued that any statutory privilege over the settlement agreement was waived when it was mentioned in the affidavit supporting USSC's application under the CCAA, which the Stakeholders argued was a form of authorized disclosure that negated section 36 privilege.

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