Federal Court of Appeal | Cour d'appel fédérale

Date: 20100723

Docket: A-242-10

Citation: 2010 FCA 200

Present: **LAYDEN-STEVENSON J.A.**

BETWEEN:

UNITED STATES STEEL CORPORATION and
U.S. STEEL CANADA

Appellants

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Ottawa, Ontario, on July 21, 2010.

Judgment delivered at Ottawa, Ontario, on July 23, 2010.

REASONS FOR JUDGMENT BY: **LAYDEN-STEVENSON J.A.**

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REASONS FOR JUDGMENT

LAYDEN-STEVENSON J.A.

[1] The Attorney General (the Crown) filed an application in the Federal Court (Court File No. T-1162-09) (the T-1162 application) under section 40 of the *Investment Canada Act*, R.S.C. 1985, c. 28 (1st Supp.) (ICA) alleging that United States Steel Corporation and U.S. Steel Canada Inc. (U.S.

Steel) had failed to comply with certain undertakings given to the Minister of Industry in connection with U.S. Steel's acquisition of Stelco Inc..

[2] U.S. Steel moved to challenge the validity of sections 39 and 40 of the ICA on the basis that they contravened section 11(d) of the *Canadian Charter of Rights and Freedoms* (the Charter) and paragraph 2(e) of the *Canadian Bill of Rights*, R.S.C. 1985 (the Bill of Rights). The T-1162 application was held in abeyance pending the disposition of U.S. Steel's motion.

[3] On June 14, 2010, the Federal Court dismissed U.S. Steel's motion (the validity order). On June 24, 2010, U.S. Steel filed a notice of appeal from the validity order. U.S. Steel now seeks to stay the T-1162 application in the Federal Court pending this Court's disposition of the appeal from the validity order. For the reasons that follow, I conclude that U.S. Steel's motion should be dismissed.

Stay of Proceeding

[4] To obtain a stay, U.S. Steel must satisfy all three components of the tri-partite test articulated in *RJR-MacDonald v. Canada* (*Attorney General*), [1994] 1 S.C.R. 311 (*RJR*). That is, U.S. Steel must demonstrate that:

(i) a serious issue exists;

(ii) it would suffer irreparable harm is the stay is not granted; and

(iii) the balance of convenience favours the granting of the stay.

Serious Issue

[5] The serious issue component imposes a low threshold. It requires only a preliminary assessment of the merits to ensure that the appeal is neither frivolous nor vexatious: *RJR*, pp. 337-338. The Crown conceded that U.S. Steel's appeal of the validity order is not frivolous or vexatious and therefore meets the low threshold. I agree that U.S. Steel's appeal cannot be characterized as frivolous or vexatious, therefore it meets the requisite threshold to establish the existence of a serious issue.

Irreparable Harm

[6] *RJR* described the central question regarding irreparable harm as "whether a refusal to grant relief could so adversely affect the applicants' own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application": para. 63. Irreparable harm refers to the nature of the harm, not the magnitude. The nature of the harm must be such that it cannot be quantified in monetary terms or cannot be cured: para. 64.

[7] The jurisprudence of this Court holds that the party seeking the stay must adduce clear and non-speculative evidence that irreparable harm will follow if the motion for a stay is denied. It is not sufficient to demonstrate that irreparable harm is "likely" to be suffered. The alleged irreparable harm may not be simply based on assertions: *Syntex Inc. v. Novopharm Ltd*. (1991), 36 C.P.R. (3d) 129; 126 N.R. 114 (F.C.A.), leave to appeal refused 39 C.P.R. (3d) v, 137 N.R. 391n; *Centre Ice Ltd. v. National Hockey League* (1994), 53 C.P.R. (3d) 34 (F.C.A.); *Canada* (*Attorney General*) *v. Canada* (*Information Commissioner*), 2001 FCA 25, 268 N.R. 328.

[8] U.S. Steel's written memorandum of fact and law focussed on the serious nature of the remedies at issue in the T-1162 application as the basis for the irreparable harm. It submitted that it will be deprived of its right of appeal from the validity order if the stay is not granted. More specifically, it asserted that if the stay is not granted, the validity appeal will be moot because the hearing of the T-1162 application will have proceeded on the basis of a provision and process that is unconstitutional and inconsistent with the Bill of Rights. It also alleged that it will incur significant pecuniary loss and waste considerable legal resources. The last assertion was not pursued at the hearing and I will say no more about it.

[9] At the hearing of the motion, U.S. Steel centered its argument on the process, arguing that if it has to proceed on the T-1162 application and produce evidence (which will be required within seven days of the denial of the stay), its constitutional rights will be irreparably harmed. It relies, by analogy, on cases where the production of documents was held to constitute irreparable harm because the right to be accorded protection was one of privacy or confidentiality: *Bisaillon v. R.* (1999), 251 N.R. 225; 990 D.T.C. 5517 (F.C.A.) (*Bisaillon*) and *Bining v. R.*, 2003 FCA 286, 4 C.T.C. 165 (*Bining*).

[10] More particularly, U.S. Steel claims that the process under section 40 of the ICA violates the right to know the case it has to meet and to make full answer and defence. It must respond to the Crown's case without having had any opportunity to cross-examine the Crown's witnesses. As U.S. Steel's counsel put it, if a stay of the T-1162 application is not granted, the egg will have already been scrambled.

[11] Turning to the evidence, U.S. Steel relied upon the affidavit of its Executive Vice President and Chief Operating Officer, John H. Goodish, sworn June 29, 2010. In addressing the issue of irreparable harm at paragraphs 18 and 19 of his affidavit, Mr. Goodish attested as follows:

> If the relief sought in the pending appeal is granted in whole or in part, it will either dispose of this Application or fundamentally alter the manner in which it proceeds. However, in the absence of a stay, by the time the pending appeal of the [validity] order is decided, the substantive hearing will be nearly, or fully completed. The pending appeal will then be moot. Accordingly, in the absence of a stay, [U.S. Steel] will be effectively deprived of its right to appeal the [validity] order, thus suffering irreparable harm through the loss of an appeal granted as of right under the *Rules*.
>
> In light of the expected deadlines under which the present application will proceed in the absence of a stay, by the time the appeal of the [validity] order is resolved, the issues at its core will become moot.

[12] These paragraphs, in my view, constitute a combination of opinion and argument. There is no factual foundation to support the bare and conclusive assertions. There is no specificity regarding the application process, no disclosure as to known or anticipated timelines and no information regarding any expedited deadline. There are no facts contained within the affidavit as it pertains to irreparable harm.

[13] Absent evidence of irreparable harm, the second component of *RJR* is not met. Even accepting the submissions of U.S. Steel's counsel (which are not evidence) as to the application process prescribed by the *Federal Courts Rules*, S.O.R/98-106, (the Rules), there is no basis for a finding of irreparable harm. Counsel complained that U.S. Steel does not know the case it has to meet and cannot cross-examine the Crown's witnesses before it has to respond. The Crown's application (filed July 17, 2009) must be supported by an affidavit. U.S. Steel advanced neither

evidence nor argument that the Crown's documentation was deficient to the extent that U.S. Steel did not know the case it had to meet, or at all. If such deficiency exists, U.S. Steel ought to have addressed it on this motion.

[14] As to cross-examination, it is correct that, under the Rules, in matters proceeding as applications, cross-examination is conducted after the affidavit evidence has been served. Again, there was neither evidence nor argument regarding the nature of the irreparable harm that would result because of this process. Even if this were a situation where irreparable harm was self-evident (and it is not), it must be stated as such.

[15] In relation to the allegation of mootness, U.S. Steel's position is that, if the very procedure that is the subject of the appeal is implemented (in the T-1162 application), the appeal as to process is rendered moot. This, it is said, renders any remedy this Court could grant nugatory and accordingly, constitutes irreparable harm.

[16] The first difficulty in this respect is, as discussed above, U.S. Steel's failure to explain on this motion what deficiencies exist with respect to the procedure. While counsel spoke of a right to full answer and defence and a right of full disclosure, there was no disclosure of the perceived frailties of the impugned procedure.

[17] Second, even if, for the purposes of this motion, I were to accept U.S. Steel's position as correct, it assumes that an appeal rendered moot automatically gives rise to a finding of irreparable

harm. That is not so. As Rothstein J.A. (as he then was) explained in *El Quardi v. Canada (Solicitor General)*, 2005 FCA 42, 332 N.R. 76, if such a proposition were adopted, it would apply to virtually all circumstances in which a stay is sought and would essentially deprive the court of the discretion to decide questions of irreparable harm on the facts of each case.

[18] Third, I am not persuaded, if the T-1162 application continues and the application is determined before the disposition of the appeal from the validity order (which is speculative at this point) that this Court could not fashion an appropriate remedy. It is not insignificant that U.S. Steel sought declaratory relief in the Federal Court. Specifically, as noted earlier, with respect to section 40 of the ICA, it sought a declaration of invalidity on the basis that it contravened section 11(d) of the Charter and paragraph 2(e) of the Bill of Rights. If U.S. Steel were to succeed on appeal (which is speculative at this point), it would be open to this Court to grant a declaration of invalidity. If that were to occur, and U.S. Steel had been unsuccessful in the T-1162 application (which is speculative at this point), the declaration of invalidity would constitute grounds upon which to set aside the judgment in the T-1162 application.

[19] Further, the Crown's point that U.S. Steel's validity attack is premised on only two of the seven options enumerated in paragraph 40(2)(a) of the ICA is well-taken. The prospect exists, if U.S. Steel's appeal were successful (which is speculative at this point) that this Court would sever the offensive elements in which case the Federal Court could still utilize the remaining options, if U.S. Steel were unsuccessful in the T-1162 application (which is speculative at this point).

[20] All of which is to say, the only remedy that would be unavailable to this Court would be to retroactively alter the process in the T-1162 application. However, it does not necessarily follow that an appeal from the validity order would be moot. In my view, sufficient options would remain available to this Court to remedy any harm sustained by U.S. Steel. That was not the situation in *Bisaillon* and *Bining* where private information would become public and the breach would be irreversible.

[21] U.S. Steel has not established that it would suffer irreparable harm.

Balance of Convenience

[22] U.S. Steel argued that the balance of convenience favours it because the constitutional issues are of significant importance and widespread impact and there is no prejudice to the Crown. It claimed that it is in the public interest to have the issues determined with finality and it would be expedient and efficient to do so. Last, it asserted that the violations of the Charter and the Bill of Rights would be perpetrated if a stay is not granted.

[23] At the hearing, there was debate as to whether the ICA is a public interest statute. I need not make a determination as to whether it is or is not. It is apparent, on its face, that it has a public interest dimension because it is aimed at encouraging investment, economic growth and employment opportunities for the benefit of Canadians. Additionally, it is aimed at ensuring that proposed investments will not be injurious to national security. This is sufficient, in my view, to bring it within the purview of the comments of the Chief Justice in *Harper v. Canada* (*Attorney*

General), [2000] 2 S.C.R. 764 (*Harper*) that the motions judge must proceed on the basis that the law is directed to the public good and serves a valid public purpose. The assumption of the public interest in enforcing the law weighs heavily in the balance. The statement at paragraph 9 of *Harper*, reproduced below, is apt.

> The assumption of the public interest in enforcing the law weighs heavily in the balance. Courts will not lightly order that laws that Parliament or a legislature has duly enacted for the public good are inoperable in advance of complete constitutional review, which is always a complex and difficult matter. It follows that only in clear cases will interlocutory injunctions against the enforcement of a law on ground of alleged unconstitutionality succeed.

[24] To delay the commencement of the T-1162 application would effectively suspend the application of the legislation. U.S. Steel has not persuaded me that such an approach would itself provide a public benefit. The balance of convenience favours the Crown.

[25] The motion will be dismissed with costs.

Postscript

[26] Counsel for the parties indicated at the hearing that they have agreed to an abridged schedule in relation to the appeal from the validity order. Counsel for U.S. Steel undertook to file a formal motion to expedite the hearing of the appeal. I am confident that the motion will be filed, on consent, forthwith.

"Carolyn Layden-Stevenson"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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