Federal Court  Cour fédérale

Date: 20110621

Docket: T-1162-09

Citation: 2011 FC 742

Ottawa, Ontario, June 21, 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] The Respondents, US Steel, seek an order under Rule 312 of the *Federal Court Rules* (SOR/98-106) for leave to file the following affidavit (collectively, the "Glass Response Affidavits"):

(a) The affidavit of Robert W. Crandall sworn March 25, 2011;

(b) The affidavit of John H. Goodish sworn March 24, 2011;

(c) The affidavit of Larry T. Brockway sworn March 25, 2011;

(d) The affidavit of Michael A. McQuade sworn March 24, 2011; and

(e) The affidavit of C. James Bond sworn March 25, 2011.

I. Background

[2] On July 17, 2009 the Attorney General of Canada (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 (*ICA*). 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 background of this application is well-known to the Court.

[3] The pertinent facts related to this particular motion are as follows.

[4] US Steel shut down steel production in Canada in spring 2009. In May 2009 the Minister issued a demand, asking US Steel to comply with its undertakings, or justify its non-compliance.

US Steel responded first arguing that the Minister's demand was premature, as the requirements were to be fulfilled over the term, which only ended October 31, 2010. Secondly, US Steel took the position that if it were unable to satisfy the undertakings over the term, it should not be held accountable due to the *force majeure* provision in the Minister's guidelines. US Steel referred to the global recession, asserting that it, as well as many of its customers had been significantly and severely affected.

[5] The referred to guideline is found in the *ICA* Administrative Procedures Guidelines and reads:

> Monitoring of Investments
>
> The following policies apply to the monitoring of investments that have been reviewed and implemented:
>
> - an evaluation of performance will ordinarily be made 18 months after the implementation of the investment;
>
> - investment performance will be judged in the context of the overall results;
>
> - if the evaluation discloses implementation substantially consistent with the original expectations and subsequent economic circumstances, and there are no major commitments yet to be fulfilled, no further monitoring will ordinarily take place;
>
> - if the evaluation discloses otherwise, the Government and the investor will together determine an appropriate time for future follow-up;
>
> - plans and undertakings are based to some extent on projected circumstances and the monitoring of an investor's performance will recognize this factor. Where inability to fulfill a commitment is clearly the result of factors beyond the control of the investor, the investor will not be held accountable.
>
> [Emphasis added]

[6] In support of its application, the AGC filed the affidavit of Richard Lajeunesse, Investment Review Manager at Industry Canada (the Lajeunesse Affidavit) in August 2009. US Steel submits that the issue of economic conditions affecting the Canadian Business were not addressed in the AGC's initial filing pursuant to Rule 306.

[7] In response, on August 13, 2010, US Steel served upon the AGC and subsequently filed the following affidavits (collectively, the Response Affidavits):

(a) The affidavit of Robert W. Crandall, sworn July 29, 2010, containing the expert report of Robert Crandall (the Crandall Report);

(b) The affidavit of Courtney Pratt, sworn July 29, 2010;

(c) The affidavit of John H. Goodish, sworn July 30, 2010;

(d) The affidavit of James D. Garraux, sworn July 30, 2010;

(e) The affidavit of Alex F. Morrison, sworn July 30, 2010 containing the expert report of Ernst & Young LLP (the E & Y Report);

(f) The affidavit of Edward M. Iacobucci, sworn July 29, 2010 and

(g) The affidavit of C. James Bond, sworn July 30, 2010.

[8] Evidence regarding US Steel's justification for non-compliance with the undertakings was addressed in the Goodish, Morrison and Crandall affidavits.

[9] The AGC submits that although US Steel sought to justify its non-compliance based on the "the dire circumstances faced by the entire industry worldwide" and argued that these were

precisely the types of factors expressly contemplated by the exculpatory provision of the Guidelines, US Steel provided little detail in its evidence regarding the alleged costs associated with producing the undertaking level of steel production.

[10] In reply to the Response Affidavits, the AGC filed the Affidavit of Susan Glass, sworn February 15, 2011, containing the expert report of KPMG LLP (the Glass Report). US Steel consented to the filing of the Glass Report at a case conference on February 14, 2011.

[11] At a case conference on April 5, 2011, the AGC indicated that he would not consent to US Steel's filing of affidavits in response to the Glass Report.

[12] In response, the Prothonotary first directed both parties to make motions pursuant to Rule 312 of the *Federal Court Rules* for the admission of their respective affidavits. However, following the AGC's submission, by way of letter dated April 6, 2011, that he should not be called upon to make a Rule 312 motion given that US Steel had already consented to the admission of the Glass Report, the Prothonotary reversed her earlier decision. At a case conference on April 8, 2011, the Prothonotary directed that only US Steel was required to make a Rule 312 motion for the admission of the Glass Response Affidavits.

[13] US Steel now submits that in attacking the Crandall Affidavit, the Glass Report raises a series of new issues that they could not have anticipated when filing the Response Affidavits. US Steel seeks leave to file five sur-reply affidavits.

[14] The AGC takes the position that the sur-reply affidavits relate to US Steel's *force majeure* defence and seek to bolster deficiencies in evidence already led. As such, granting US Steel leave to file the sur-reply affidavits would allow US Steel to split its case.

II. Issue

[15] The sole issue before the Court is whether US Steel ought to be granted leave to file additional affidavits pursuant to Rule 312.

III. Argument and Analysis

[16] Rule 312 allows a party to file supplementary affidavits with leave of the Court. However, case law is clear. A party must always put its best case forward at the first opportunity. A party will be granted leave pursuant to Rule 312 where the evidence to be adduced will serve the interests of justice, assist the Court, not cause substantial or serious prejudice to the other side, and was not available prior to the cross-examination of the opponent's affidavits (*Atlantic Engraving Ltd v Lapointe Rosenstein*, 2002 FCA 503, 299 NR 244 at paras 8 and 9). Additionally, the party seeking to introduce new evidence must show that its introduction will not unduly delay the proceeding (*Janssen-Ortho Inc v Apotex Inc*, 2010 FC 81 at para 33).

[17] Sur-reply evidence cannot merely contradict the conclusion of the reply evidence. Rather, it must contradict, qualify or directly impeach specific analysis or argument made in the reply affidavit. The party seeking to introduce the affidavits must identify with clarity and precision the

exact statements, or paragraphs of the reply to which it responds (*Eli Lilly Canada Inc v Apotex Inc*, 2006 FC 953, 298 FTR 70 at para 10).

[18] The AGC submits that US Steel has split its case. The AGC points out that US Steel's proposed sur-reply addresses precisely the same issues that US Steel raised in its August 2010 evidence, and seeks to substantially supplement the evidence provided at that time. The AGC cites Justice Denis Pelletier in *Halford v Seed Hawk Inc*, 2003 FCT 141, 24 CPR (4th) 220 at paras 14 and 15, in which he stated:

> [14] […] evidence which simply confirms or repeats evidence given in chief is not to be allowed as reply evidence. It must add something new. But since the plaintiff is not allowed to split its case, that something new must be evidence which was not part of its case in chief. That can only leave evidence relating to matters arising in defence which were not raised in the plaintiff's case in chief. But even this is subject to a limitation […]
>
> [15] […]
>
> 3 - Evidence which is simply a rebuttal of evidence led as part of the defence case and which could have been led in chief is not be be admitted.

[19] The AGC submits that this motion ought to be dismissed because none of the evidence in US Steel's proposed sur-reply is based on new facts which arose after August 2010. All of the evidence was available to US Steel in August 2010 and could have been adduced as part of the August 2010 evidence. The AGC is of the view that US Steel has filed no evidence on this motion other than the bare assertion that the Glass Report raises a series of new issues. The AGC strongly disagrees and characterizes the within application as an abuse of the Court's process which will unnecessarily delay the resolution of the underlying application.

[20] For its part, US Steel claims that although the evidence might have been available when the initial affidavits were filed, its relevance could not have been anticipated. For this proposition, US Steel relies on Justice Luc Martineau's decision in *Callaghan v Canada (Chief Electoral Officer)*, 2008 FC 1080, 172 ACWS (3d) 262 at para 24.

[21] US Steel lists 11 allegedly new issues raised by the Glass Report. However, US Steel does not explain why these issues could not have been anticipated when US Steel knew if it wished to rely on the guidelines to argue that it was unable to fulfill its undertakings, the onus would be on US Steel to lead evidence which proves this inability. US Steel merely argues that the issues raised in the Glass Report are either new, or more troublingly, analyzed from a cardinally different perspective which requires the introduction of additional evidence. Nor does US Steel explain why this information could not be reasonably dealt with on cross-examination. For instance, in *Axia Inc v Northstar Tool Corp*, 2005 FC 526, 138 ACWS (3d) 926 the Court refused leave to introduce a supplemental affidavit where the party could have, but had not, cross-examined the other party. Without the cross-examination, the Court was not convinced the evidence sought to be adduced was not available at an earlier date (see para 5).

[22] US Steel does list in the written submissions precisely which statements the Glass Response Affidavits purport to respond to.

[23] Additionally, US Steel asserts that the Glass Response Affidavits will assist the Court. US Steel lists the important issues addressed by the sur-reply affidavits that it claims are essential for the adjudication of the case:

1) The reasonableness of US Steel's management's responses to the unprecedented world economic crisis;
2) The magnitude of the losses US Steel would have suffered had it maintained production and employment at the requisite level throughout the period in which the undertakings were in force; and
3) The impact of such losses upon US Steel.

[24] US Steel argues that without this evidence, the Court will have an incomplete picture. US Steel does not explain how this evidence was either not available, or not previously known to be relevant. It appears as though this kind of evidence is necessary in order to mount a *force majeure* defence.

[25] US Steel submits that allowing the sur-reply will not prejudice the AGC since the evidence does not expand the scope of the application, but only responds in a targeted fashion. Additionally, US Steel takes the position that filing the sur-reply evidence will not delay the proceedings.

[26] The AGC sharply disagrees and argues that the motion would cause serious prejudice to the public interest in further lengthening the journey of this application to its hearing date, resulting in unnecessary delay and expense. Furthermore, the AGC submits that the repetition of previous allegations cannot possibly be of assistance to the Court.

[27] In terms of the law on 312 motions, Justice Martineau neatly described the full discretion afforded to the judge hearing the motion, at para 26 of *Callaghan*, above:

> [26] To sum up, the Court possesses vast discretion to allow a party to file additional material. Such discretion is incompatible with a mechanical application of any set test or formula, whether threefold or fourfold. The factors mentioned above are not exhaustive and the jurisprudence does not prescribe how they are to be weighed by the judge or the prothonotary. Further, because each decision is discretionary and will be fact-specific, there may be other factors in any given case.

[28] US Steel submits in closing, that it would be fundamentally unfair to permit the AGC to raise a series of questions concerning the US Steel's evidence, while prohibiting US Steel from answering those questions. I am cognizant of such an argument, but would remind US Steel that they consented to the introduction of the Glass Report.

IV. Conclusion

[29] In my view, it is important to recognize that this is a case of first impression and that the relevant provisions of the *ICA* have not been considered by the Court. I agree that the proper interpretation of the relevant provisions of the *ICA* is a matter of public importance and as such conclude that it would be in the interests of justice to allow the filing of the Glass Response Affidavits.

[30] I also find that the Glass Response Affidavits would be of assistance to the Court in understanding the complexities of this particular case. I do not agree that the material set out in the

Glass Response Affidavits merely repeat previous allegations, though I should add that there is considerable overlap.

[31] Further, I find that the AGC will not be unduly prejudiced. Cross examinations have not yet taken place and the AGC will be able to consider the evidence in the Glass Response Affidavits prior to cross-examination. The AGC may seek to file further evidence in order to rebut some of the material contained in the Glass Response Affidavits, but I do not find that this possibility would cause serious prejudice or undue delay.

[32] Finally, US Steel has conceded that all of the information contained in the Glass Response Affidavits was available prior to the filing of US Steel evidence in August 2010. I am concerned that this material was available to US Steel at that time but was not included in the US Steel filing in August 2010. Further, the only evidence tendered by US Steel that the Glass Response Affidavits constitutes new evidence not contained in the US Steel filing in August 2010 is an affidavit from an articling student for counsel to US Steel. Such evidence has little tangible value. In addition, I find it difficult to accept that US Steel would not have anticipated some questioning of the basis for their claim that an unprecedented economic downturn prevented them from fulfilling their written undertakings, and as such, been more forthcoming in their filing of August 2010 as to the evidence supporting their conclusions. Thus, it is difficult for me to conclude that the relevance of the material "could not have been anticipated at that time," as set out in *Callaghan*, above, at para 24.

[33] However, despite these misgivings, after reviewing the Glass Response Affidavits and the August 2010 US Steel Affidavits I have somewhat reluctantly come to the conclusion that the Glass

Response Affidavits do address issues that could not have been in their entirety anticipated by the August 2010 US Steel Affidavits and that they are sufficiently targeted so as to "address, impeach or qualify the specific analysis or argument" made in the Glass Affidavit and do not merely disagree with its conclusion (*Eli Lilly Canada Inc*, above at para 24).

> [10] Good practice would dictate that a party, whose right to file additional evidence by way of sur-reply is defined solely by the criteria that it be "proper sur-reply", would identify with clarity and precision the exact statements or paragraphs of the reply to which it purports to sur-reply. […]
>
> […]
>
> [24] […]
>
> - Evidence should address directly what is in fact said in the reply evidence.
>
> - For evidence to be responsive, it must contradict, qualify or impeach what is stated in the reply evidence.
>
> - It is not enough that the sur-reply be on the same subject-matter, related or relevant to the reply evidence.
>
> - It is not a proper sur-reply to attack the conclusion reached by one expert in his reply affidavit on the basis of an argument different from that which forms the basis of the reply affidavit. In other words, the sur-reply must address, impeach or qualify the specific analysis or argument made in the reply affidavit, not merely its conclusion.

It is fair to say that I have exercised the discretion provided to me in Rule 312 in a flexible manner. In so doing, I agree with the approach taken by Justice Martineau who said in *Callaghan*, above, at para 27:

> […] the Court must always have in mind the general principle
>
> mentioned at rule 3 of the Rules that "[t]hese Rules shall be

interpreted and applied so as to secure the just, most expeditious and least expensive determination of every proceeding on its merits".

ORDER

THIS COURT ORDERS that:

1. Leave is granted to US Steel to serve and file, within 10 days of the present order the Glass Response Affidavits.
2. Leave is granted to the AGC to serve and file any responding affidavits as it may deem appropriate within 30 days from the filing of the Glass Response Affidavits.
3. This motion is granted with no costs.

" D. G. Near "
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	**T-1162-09**
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