Federal Court of Appeal | Cour d'appel fédérale

Date: 20111006

Docket: A-108-11

Citation: 2011 FCA 277

CORAM: **EVANS J.A.**
LAYDEN-STEVENSON J.A.
STRATAS J.A.

BETWEEN:

UNITED STATES STEEL CORPORATION and U.S. STEEL CANADA INC.

Appellants

and

THE ATTORNEY GENERAL OF CANADA

Respondent

Heard at Toronto, Ontario, on October 6, 2011.

Judgment delivered from the Bench at Toronto, Ontario, on October 6, 2011.

REASONS FOR JUDGMENT OF THE COURT BY: STRATAS J.A.

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Toronto, Ontario, on October 6, 2011)

STRATAS J.A.

[1] The appellant appeals from an order of the Federal Court (per Justice Near): 2010 FC 1142.

The Federal Court dismissed the appeal from Prothonotary Milczynski: 2010 FC 1142.

[2] This appeal arises from an interlocutory motion brought by the respondent within an application under section 40 of the *Investment Canada Act*, R.S.C. 1985, c. 28. The respondent sought leave of the Prothonotary under rule 75 to amend its notice of application. Through this proposed amendment, it wishes to place the appellant on notice of certain new relief it will be seeking in the application.

[3] Before the Prothonotary, in the Federal Court, and now in this Court, the appellant says that there was no jurisdiction to grant the amendment. In its memorandum of fact and law, it says that the relief the respondent seeks under the amendment is premised on an alleged breach for which no demand under section 39 of the *Investment Canada Act* had been made, and no opportunity to respond had been given to the appellant. This submission is necessarily founded upon the appellant's view of how the relevant sections of the Act should be interpreted. The appellant also submitted, both orally and in writing, that the proposed amendment raises entirely new commitments, and extends them beyond the term of the original undertakings given under the Act. Whether this ultimately has merit depends on several matters: the factual circumstances that may ultimately be found to exist; the Court's construction of the terms of both the original undertakings and the new remedy the respondent now seeks; and whether, as a matter of statutory interpretation, the new remedy is permitted under the Act.

[4] The Prothonotary held that she could deny the proposed amendment only if it were plain and obvious that the request for that relief set out in that amendment would fail. In other words, she

had to be convinced that the appellant's view of how the relevant sections of the Act should be interpreted is the only one that could succeed on the facts of this case, and that all other contrary interpretations have no merit. The Prothonotary was not so convinced. In her view, the issues raised by the appellant are debatable and can and should be fully explored and considered with the benefit of full argument and an evidentiary record at the hearing of the merits of the application.

[5] In granting the amendment, the Prothonotary instructed herself properly concerning Rule 75, the relevant factors to be considered under that rule, the leading cases, and the relevant facts. Her decision was a discretionary one based on the facts before her and the well-established tests under Rule 75.

[6] On appeal to the Federal Court, it was incumbent on the appellant to show that the Prothonotary's discretionary order granting the amendment was "clearly wrong": *Z.I. Pompey Industrie v. ECU-Line N.V.*, 2003 SCC 27 at paragraph 18, [2003] 1 S.C.R. 450. It is evident from the Federal Court's reasons that the appellant fell very short of that mark.

[7] Nevertheless, the appellant proceeds on further appeal to this Court – a third-level of adjudication that is conducted on the basis of a very difficult standard of review. While aware of the difficult standard of review in this Court, in our view the appellant is essentially reasserting its interpretation of the Act, an interpretation that both the Prothonotary and the Federal Court found worthy of full debate.

[8] Our task is to assess whether the Federal Court erred in a fundamental way when it found that the Prothonotary was not “clearly wrong” in granting the amendment. Before us, the appellant has fallen well short of that standard. Therefore, we shall dismiss this appeal.

[9] At the conclusion of argument in this Court, we invited submissions on whether an enhanced award of costs against the appellant is warranted. We agree that such an award is warranted and shall award the respondent costs at the level requested by the respondent, namely the top end of column IV of Tariff B, in any event of the cause.

"David Stratas"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-108-11
APPEAL FROM AN ORDER OF THE HONOURABLE JUSTICE NEAR DATED FEBRUARY 25, 2011 DOCKET NO. T-1162-09	
STYLE OF CAUSE:	*UNITED STATES STEEL CORPORATION AND U.S. STEEL CANADA INC. V. THE ATTORNEY GENERAL OF CANADA*
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	OCTOBER 6, 2011
REASONS FOR JUDGMENT OF THE COURT BY:	EVANS, LAYDEN-STEVENSON AND STRATAS JJ.A.
DELIVERED FROM THE BENCH BY:	STRATAS J.A.

APPEARANCES:

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