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LITIGATION - CANADA

Buyer beware: Investment Canada Act does not prohibit disclosure of written undertakings by foreign investor

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AUTHOR

Chloe Snider

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Introduction

In *US Steel Canada Inc (Re)*, 2016 ONCA 68, the Court of Appeal for Ontario recently addressed whether Section 36 of the Investment Canada Act, RSC 1985, c 28 (1st Supp) protects a foreign investor that has entered into a settlement agreement with the minister of innovation, science and economic development (formerly Industry Canada) from having to produce written undertakings contained in the settlement agreement in subsequent litigation. The court's answer – that Section 36 does not so protect the foreign investor (even though it protects the minister) – makes this an important decision for foreign investors which are subject to enforcement proceedings commenced by the minister.

The appeal concerned the scope of privilege under Section 36 of the Investment Canada Act over information obtained by the minister in the course of the administration and enforcement of the Investment Canada Act, which provides for the review of significant investments in Canada by non-Canadians. The issue arose in the context of proceedings under the Companies' Creditors Arrangement Act, RSC, 1985, c C-36, in which stakeholders brought a motion for disclosure of the contents of a settlement agreement dated December 8 2011 entered into by US Steel Canada Inc (USSC), its US parent United States Steel Corporation (USS) and the attorney general of Canada (on behalf of the minister) in the course of litigation to enforce the Investment Canada Act. The settlement agreement contained written undertakings that were provided by USS to the minister.

The Companies' Creditors Arrangement Act judge concluded that the settlement agreement was privileged in its entirety under Section 36 of the Investment Canada Act, and that USS was protected from disclosing the written undertakings contained therein. Although the court agreed with the Companies' Creditors Arrangement Act judge's reasoning on a majority of the issues raised on appeal, the court concluded that Section 36(4)(b) did not prohibit USSC and USS from disclosing the settlement agreement. The court returned the issue of whether disclosure of the settlement agreement was barred by settlement privilege – which was an issue on the underlying motion, but which the motion judge did not address – and directed the monitor to disclose the settlement agreement to the Companies' Creditors Arrangement Act judge.

Facts

USS is a publicly traded Delaware corporation that purchased Stelco Inc, a Canadian steel company, in 2007. The acquisition was subject to review and approval of the minister under the Investment Canada Act, which aims to ensure that a proposed investment by a non-Canadian company is likely to be of net benefit to Canada. USS was given permission to purchase Stelco, but was required to give

certain undertakings to the minister, including commitments relating to production and employment levels in Canada.

In early 2009 the minister sent a demand to USS under Section 39 of the Investment Canada Act, claiming that USS was in contravention of its undertakings. USS denied any non-compliance for which it could be held accountable. On July 17 2009 the attorney general filed an application under Section 40 of the Investment Canada Act, seeking an order directing USS to comply with its undertakings and to pay certain penalties. This litigation was settled by way of the settlement agreement dated December 8 2011. Some details of the settlement agreement were publicly disclosed, including the fact that the settlement agreement contained new written undertakings provided by USS. The settlement agreement required that the remaining details be kept confidential.

USSC subsequently applied for and was granted Companies' Creditors Arrangement Act protection on September 16 2014. In the Companies' Creditors Arrangement Act proceeding, USSC asserted that the settlement agreement was confidential and protected both by the terms of the agreement and by Section 36 of the Investment Canada Act. On January 7 2015 counsel for certain stakeholders requested disclosure of the settlement agreement from the monitor, which had a copy of the agreement. However, no agreement was reached with respect to its disclosure. Accordingly, a motion was brought for production of the settlement agreement.

On the motion, the stakeholders argued that the information in the settlement agreement was relevant to their assessment of the restructuring proposals and would allow participation in the restructuring process on a fully informed basis, as it would disclose existing undertakings that would need to be addressed as well as breaches of the written undertakings. This would be relevant to USS's claims against USSC in the Companies' Creditors Arrangement Act proceeding.

By letter dated April 17 2015, the director general of the Investment Review Division of Industry Canada advised the parties that the minister's delegate had reviewed the settlement agreement and concluded that disclosure of the settlement agreement was not necessary for any purpose relating to the administration or enforcement of the Investment Canada Act, and that such disclosure would prejudicially affect the conduct of USS's business affairs. This determination is contemplated by the privilege regime under Section 36 of the Investment Canada Act.

Investment Canada Act

Sections 36(1) and (2) of the Investment Canada Act provide as follows:

> "*36(1) Subject to subsections (3) to (4), all information obtained with respect to a Canadian, a non-Canadian, a business or an entity referred to in paragraph 25.1(c) by the Minister or an officer or employee of Her Majesty in the course of the administration or enforcement of this Act is privileged and no one shall knowingly communicate or allow to be communicated any such information or allow anyone to inspect or to have access to any such information.*
>
> *(2) Notwithstanding any other Act or law but subject to subsections (3) and (4), no minister of the Crown and no officer or employee of Her Majesty in right of Canada or a province shall be required, in connection with any legal proceedings, to give evidence relating to any information that is privileged under subsection (1) or to produce any statement or other writing containing such information.*
>
> *Exceptions to the statutory privilege created by s. 36(1) are then set out in ss. 36(3) to (4), and the exception in s. 36(4)(b) is qualified by s. 36(5). The stakeholders/appellants relied on three exceptions contained is sections 36(4)(a), (b) and (d) of the ICA to argue that the Settlement Agreement was exempt from privilege. Those sections provide as follows:*
>
> *(4) Nothing in this section prohibits the communication or disclosure of*
>
> *(a) information for the purposes of legal proceedings relating to the administration or enforcement of this Act;*
>
> *(b) information contained in any written undertaking given to Her Majesty in right of Canada*

relating to an investment that the Minister is satisfied or is deemed to be satisfied is likely to be of net benefit to Canada...

(d) information the communication or disclosure of which has been authorized in writing by the Canadian or the non-Canadian to which the information relates."

USS argued that the exceptions set out in Sections 34(a) and (d) did not apply to the settlement agreement; and that because, as set out above, the minister had invoked Section 36(5), USS was not required to disclose the new undertakings under Section 36(4)(b). Section 36(5) provides the following "exception to the exception" continued in Section 36(4)(b):

"*(5) No minister of the Crown and no officer or employee of Her Majesty in right of Canada or a province may be required, in connection with any legal proceedings or otherwise, to give evidence relating to or otherwise to communicate or disclose any information referred to in paragraph (4)(b) where, in the opinion of the Minister or a person designated by the Minister, the communication or disclosure of that information is not necessary for any purpose relating to the administration or enforcement of this Act and would prejudicially affect the non-Canadian that gave the written undertaking referred to in that paragraph in the conduct of the business affairs of that non-Canadian.*"

Importantly, Section 36 is a listed exception to the right of access to information in records provided for under the Access to Information Act, RSC 1985, c A-1, and is listed in Schedule II to the act. (Section 24 of the Access to Information Act provides that where a record contains information whose disclosure is restricted by or pursuant to any provision set out in Schedule II, the head of a government institution shall refuse to disclose it.) Accordingly, as the court noted:

"*if a record contains information the disclosure of which is prohibited by section 36, the Minister shall not disclose it in response to a request made under the [Access to Information Act]. The statutory privilege provided for in section 36 is therefore absolute, subject to the exceptions set out therein, and cannot be circumvented by resort to the [Access to Information Act]*" (para 28).

Court's reasoning

The Companies' Creditors Arrangement Act judge found that the privilege exceptions contained in Section 36 did not apply in this case:

- The exception in Section 36(4)(a) did not apply because the legal proceedings were under the Companies' Creditors Arrangement Act and not under the Investment Canada Act;
- The exception in Section 36(4)(b) did not apply because the minister's delegate's opinion was unfavourable to disclosure; and
- The exception in Section 36(4)(d) did not apply because USSC's reference to the settlement agreement in its application for Companies' Creditors Arrangement Act protection did not constitute express or implied authorisation by USSC or USS to disclosure of the information.

The Court of Appeal for Ontario considered the following three issues on appeal:

- Did the Companies' Creditors Arrangement Act judge err in concluding that 'information' in Section 36 of the Investment Canada Act includes 'undertakings' given in enforcement proceedings?
- Did the Companies' Creditors Arrangement Act judge err in concluding that none of the exceptions to the privilege regime in the Investment Canada Act applied?
- If the Companies' Creditors Arrangement Act judge erred in concluding that the settlement agreement was privileged under the Investment Canada Act, should the court determine whether disclosure of all or part of the settlement agreement was barred by common law settlement privilege?

These issues are addressed in turn below, with particular emphasis on the court's finding that – contrary to the findings of the Companies' Creditors Arrangement Act judge – Sections 36(4)(b) and 36(5) of the Investment Canada Act do not prohibit disclosure of the settlement agreement by USSC

or USS in the Companies' Creditors Arrangement Act proceeding.

Does 'information' in Investment Canada Act include 'undertakings' in enforcement proceedings?

The appellants argued that the undertakings in the settlement agreement were not privileged, as Section 36(1) of the Investment Canada Act protects only information obtained by the minister for the purpose of determining whether to approve the proposed investment. It did not protect the settlement agreement, which arose out of a settlement of post-acquisition litigation. They also argued that the Companies' Creditors Arrangement Act judge erred in conflating 'information' with 'undertakings' for the purposes of Section 36, since they are discrete terms.

The court rejected both arguments. It held that:

> "*the CCAA judge did not err in concluding that the privilege in section 36(1) attaches to information obtained by the Minister in connection with the enforcement of the ICA and that undertakings contained in the Settlement Agreement are 'information' for the purposes of section 36.*" (Para 42)

In particular, the court held that the observation of Prothonotary Milczynski in *Canada (Attorney General) v United States Steel Corp*, 2009 CarswellNat 5932 (Fed TD) that "[i]nformation is provided to the Minister of Industry and Investment Canada under various provisions of the [ICA] for the purposes of allowing the Minister to determine whether or not a proposed investment is 'likely to be of net benefit to Canada'" did not "purport to be a comprehensive legal determination of the scope of section 36(1) of the ICA" (para 43). The court also pointed to the fact that Section 36(1) refers to information "in the course of the... enforcement of the Act", and therefore 'information' is not limited to information obtained by the minister for the purpose of determining whether to approve an investment (para 43).

The court also agreed with the Companies' Creditors Arrangement Act judge that the term 'information' includes undertakings set out in a document given to the minister. The court cited *Hamilton v Canada (Attorney General)* (1984), 28 BLR 92 (Fed TD), in which the Federal Court determined that undertakings provided by a non-Canadian constituted 'information' for the purpose of Section 14(1) of the Foreign Investment Review Act, SC 1973-74, c 46, as amended, which was the predecessor to the Investment Canada Act. Section 14 of the Foreign Investment Review Act – the equivalent of Section 36 of the Investment Canada Act – provided that "all information with respect to a person, business or proposed business obtained by the Minister ... in the course of the administration of this Act is privileged". Like the Investment Canada Act, in other sections of the Foreign Investment Review Act, 'information' and 'undertakings' were used as discrete terms. The Investment Canada Act was drafted following *Hamilton*, but no change was made in connection with this language. Accordingly, the court concluded: "In the face of Hamilton, Parliament did not adopt different language in enacting the ICA or amend the ICA to make clear that undertakings are not subject to the privilege regime in s. 36" (para 45).

Did any exceptions to Investment Canada Act privilege regime apply?

The court held that the Companies' Creditors Arrangement Act judge correctly concluded that the privilege exceptions in Sections 36(4)(a) and (d) did not apply, but agreed with the appellants that Section 36(4)(b) of the Investment Canada Act did not preclude USSC and USS from disclosing the settlement agreement in the Companies' Creditors Arrangement Act proceeding.

Section 36(4)(a) of Investment Canada Act

As set out above, Section 36(4)(a) provides that disclosure of "information for the purposes of legal proceedings relating to the administration or enforcement of" the Investment Canada Act is not prohibited by Section 36. The appellants submitted that the current Companies' Creditors Arrangement Act proceeding and the earlier Investment Canada Act enforcement proceeding were related, and that accordingly the disclosure of the settlement agreement for the purposes of the Companies' Creditors Arrangement Act proceeding constituted disclosure of "information for the purposes of legal proceedings relating to the administration or enforcement of" the Investment Canada Act. The court rejected this argument. In this case, the disclosure of information was for the purposes of the Companies' Creditors Arrangement Act proceedings and not for legal proceedings relating to the enforcement of the Investment Canada Act; nor was it sought by the minister, who was

charged with the administration and enforcement (para 54).

Section 36(4)(b) of Investment Canada Act
As set out above, Section 36(4)(b) provides that Section 36 does not prohibit disclosure of "information contained in any written undertaking given to her Majesty in right of Canada relating to an investment that the Minister is satisfied or is deemed to be satisfied is likely to be of net benefit to Canada". The court held that because the attorney general had invoked the exception provided to Section 36(4)(b) under Section 36(5) (through the April 2015 letter), he could not be required to disclose the settlement agreement under Section 36 (para. 61).

The remaining question was whether it followed from the attorney general's invocation of Section 36 (5) that USSC and USS also could not be required to disclose any information contained in the settlement agreement (para 67). The appellants argued that this result did not follow because Section 36(5) protects only the person's name in that section, the minister or other government employees or officers from being required to disclose information.

The court agreed. It held that:

> "*the exception to the exception in section 36(4)(b), created by section 36(5), does not apply to USSC and USS. Therefore, if not protected by common law settlement privilege, and absent a sealing order, USSC and USS can be required to disclose information contained in the Settlement Agreement*" (para 68).

The court relied on the narrow wording of Section 36(5), in contrast with Section 36(1), which provides that "no one shall knowingly communicate". The court explained: "If Parliament had intended to extend the exception to the exception in section 36(5) to a broader category of persons than those listed, it could have used broad language, similar to that employed in section 36(1)" (para 69).

The court rejected USS's argument that restricting Section 36(5) to the persons specifically named in the provision would render the section meaningless. The court held:

> *"Doing so provides an 'exception to the exception' for the persons named therein. It also ensures that the information cannot be obtained from the Minister under the [Access to Information Act]. As the appellants have argued, it was (and is still) open to USS to seek a sealing order to protect the confidentiality of the Settlement Agreement in the [Companies' Creditors Arrangement Act] proceeding in accordance with the test in Sierra Club of Canada v. Canada (Minister of Finance), 2002 SCC 41 (CanLII), [2002] 2 S.C.R. 522, as was done in Canada (Attorney General) v. United States Steel Corp.*" (Para 72)

Section 36(4)(d) of Investment Canada Act
Section 36(4)(d) states that disclosure of information whose communication or disclosure has been authorised in writing by the Canadian or non-Canadian to which the information relates is not prohibited under that section. The court agreed with the Companies' Creditors Arrangement Act judge that, by referring to the settlement agreement in the affidavit it filed in support of its Companies' Creditors Arrangement Act application, USSC did not authorise in writing the disclosure of the settlement agreement. USSC had specifically asserted that the confidentiality of the settlement agreement was protected both by the terms of the agreement and by Section 36 of the Investment Canada Act.

Was disclosure of settlement agreement barred by common law settlement privilege?
Given that the settlement agreement was not precluded from being disclosed under Section 36 of the Investment Canada Act, the question as to whether it would be protected by settlement privileged remained in issue. The court emphasised the importance of settlement privilege as set out by the Supreme Court in *Sable Offshore Energy Inc v Ameron International Corp*, 2013 SCC 37 (CanLII), [2013] 2 SCR 623. However, the Court of Appeal for Ontario agreed with the respondents' submission that the court should return the issue of whether production of the settlement agreement and its contents was barred by common law settlement privilege to the Companies' Creditors Arrangement Act judge for determination. Neither the court nor the Companies' Creditors Arrangement Act judge was provided with a copy of the settlement agreement, which could be necessary to review in order

to evaluate the appellants' argument. Accordingly, the court returned the issue of settlement privilege to the Companies' Creditors Arrangement Act judge for determination in the exercise of his discretion in the Companies' Creditors Arrangement Act proceeding, and directed the monitor to disclose the settlement agreement to the Companies' Creditors Arrangement Act judge to review it and, if advisable, entertain further submissions by the parties before determining this issue (paras 81 and 82).

Comment

The court's conclusion that Section 36 of the Investment Canada Act did not prohibit USSC and USS from disclosing the settlement is important for foreign investors which are engaged in administrative or enforcement proceedings commenced by the minister under the Investment Canada Act, particularly if they are looking to enter into minutes of settlement with the minister. Although the minister is protected by Section 36(4)(b) of the Investment Canada Act from having to disclose the terms of any such settlement, this section does not prohibit disclosure by a foreign investor in subsequent legal proceedings of written undertakings contained in a settlement agreement with the minister. It remains to be seen whether the Companies' Creditors Arrangement Act judge (and perhaps an appellant court) determines that the settlement agreement is protected by settlement privilege. This would alleviate the concern to foreign investors raised by the prospect of having to disclose written undertakings that are contained in a confidential settlement with the minister.

For further information on this topic please contact Chloe Snider at Dentons by telephone (+1 416 863 4511) or email (chloe.snider@dentons.com). The Dentons website can be accessed at www.dentons.com.

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