CITATION: U.S. Steel Canada Inc. (Re), 2016 ONSC 3012
COURT FILE NO.: CV-14-10695-00CL
DATE: 20160504

SUPERIOR COURT OF JUSTICE - ONTARIO

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, as amended

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT WITH RESPECT TO U.S. STEEL CANADA INC.

BEFORE: Mr. Justice H. Wilton-Siegel

COUNSEL: *Andrew Hatnay, James Sayce* and *Barbara Walancik,* Representative Counsel for the non-unionized active employees and retirees

Kris Borg-Olivier and *Lily Harmer,* for USW, Local 1005 and Local 8782

Mike Kovacevic, for the City of Hamilton

Michael E. Barrack, Jeff Galway, Kiran Patel and *Max Shapiro,* for United States Steel Corporation

Paul Steep and Stephen Fulton, for the Applicant U.S. Steel Canada Inc.

Alan Mark and *Gale Rubenstein,* for the Province of Ontario

Patrick Riesterer, for Brookfield Partners

Robert Staley, for the Monitor Ernst & Young Inc.

HEARD: April 29, 2016

ENDORSEMENT

[1] The applicants, Representative Counsel, the United Steelworkers Union and Locals 1005 and 8782, and the City of Hamilton, seek production of a complete copy of a settlement agreement dated December 8, 2011 among United States Steel Corporation ("USS"), U.S. Steel Canada Inc. ("USSC") and the Government of Canada (the "Agreement") on a "for counsel's eyes only" basis. The background to the Agreement and to this motion is more fully set out in an earlier decision in these proceedings reported in *U.S. Steel Canada Inc. (Re),* 2016 ONCA 68. The applicants seek disclosure of the Agreement preparatory to a further motion scheduled in which they will seek unrestricted disclosure of the Agreement, based on an exemption from the application of the doctrine of settlement privilege which the parties agree otherwise applies. The

applicants frame the present motion as a request for an additional minor exemption from the application of the doctrine of settlement privilege.

[2] In the forthcoming motion, the parties seek disclosure of the Agreement for differing purposes. The Union seeks disclosure to further its claims against USS based on the conduct of USS during the period from 2006 to 2014, which it says constituted breaches of fiduciary duty to its members and retired members, as well as oppression for the purposes of applicable corporate legislation. Representative Counsel for the non-union employees and retirees says it seeks disclosure in order to be better informed in negotiations and legal proceedings in these proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA").

[3] The applicants have already received certain information regarding the content of the Agreement and the status of the undertakings contained therein. The subject-matter of the Agreement, including a description of the undertakings given by USS to the Government of Canada, was previously disclosed at the time of the Agreement. In addition, the Monitor in these CCAA proceedings has provided: (1) a redacted copy of the Agreement, which omits the undertakings given by USS; and (2) a letter in which it advises that, after a review of the undertakings and certain procedures performed by way of a review of USSC's records, "the Monitor is of the view that it would appear that the undertaking parties have fulfilled the undertakings, with the exception of one undertaking ... which is anticipated to be fulfilled in early May, 2016."

[4] However, the applicants say that they will be at a disadvantage in arguing the forthcoming motion relative to USS and USSC, who will be able to speak more knowledgably about the contents of the Agreement, given that both these parties and the Court will know the contents. The applicants say that procedural fairness requires that they be granted disclosure on a "for counsel's eyes only" basis to rectify this disparity in knowledge.

[5] The parties are agreed that the principles governing the application of the doctrine of settlement privilege are set out in *Sable Offshore Energy Inc. v. Ameron International Corp.*, [2013] S.C.J. No. 37. In particular, I note that settlement privilege is a class privilege for which there are limited exemptions based on a balancing of competing public interests, namely the public interest of encouraging settlement balanced against a competing public interest proposed by an applicant. I also note that the judicial exercise of balancing such competing public interests does not engage any judicial discretion.

[6] The motion is dismissed for two principal reasons.

[7] First, while the parties say that such disclosure is necessary in order to put all of the parties on the forthcoming motion on an equal footing, they are unable to demonstrate how they would be prejudiced on the forthcoming motion by not having had access to the undertakings in the Agreement.

[8] I accept that a disparity in knowledge could give rise to an unfairness on the forthcoming motion that would call for limited disclosure, but only if the disparity related to material information. In this case, as mentioned, the subject matter of the undertakings is public. The information sought in the disclosure is the specific detail regarding such undertakings. It is

incumbent on a party seeking to obtain an exemption from the operation of settlement privilege to identify potential circumstances in which knowledge of the specific information sought could be relevant given the available public information. In this case, the applicants have not demonstrated how knowledge of the specific details of the undertakings in the Agreement is necessary in order to frame their arguments on the forthcoming motion or would otherwise be material to their respective positions on that motion.

[9] In the case of the Union, it asserts claims against USS based on publicly available information. It has not demonstrated how knowledge of the undertakings would be relevant to such claims, given that the undertakings were given to the Government of Canada.

[10] In the case of Representative Counsel, it seeks disclosure for purposes of negotiations respecting a restructuring and to inform any legal proceedings in these CCAA proceedings. However, Representative Counsel has not demonstrated how knowledge of the details of the undertakings could be relevant in any negotiations for a restructuring of USSC. With respect to any legal proceedings in these CCAA proceedings, USSC has not relied on the undertakings, or the state of compliance of such undertakings, in any proceedings involving the parties. In particular, while there is a reference to these undertakings in the McQuade affidavit filed at the time of the Initial Order, it was not relied upon in any meaningful way in obtaining the Initial Order or in any subsequent proceeding. It is also relevant that the Government of Canada is not participating in these CCAA proceedings and has not commenced any other proceeding to enforce the undertakings.

[11] In addition, even assuming the applicants do not accept the Monitor's letter regarding apparent compliance for the purposes of the forthcoming motion, I do not see how any of the applicants would be prejudiced in arguing the significance of any alleged default by USS of its obligations under the undertakings, given the public disclosure to date. For example, I do not see any difference for present purposes between knowledge that an undertaking was given to continue to produce steel in Canada and knowledge of the specific terms of that commitment.

[12] Ultimately, the applicants' argument is that they cannot demonstrate potential prejudice without having reviewed the undertakings. They say they can't know what they don't know until they see the Agreement. In the present circumstances, I think this argument is insufficient to outweigh the public interest in encouraging settlement in two respects. First, this is not a situation in which the parties do not know what they do not know – rather, given the aforementioned disclosure and letter from the Monitor, they do know what they do not know, being the specific details of the undertakings. In these circumstances, as mentioned above, the applicants have an onus to demonstrate how the information sought could be relevant to their positions on the forthcoming motion. In addition, in framing the argument in terms of an absolute inability to demonstrate the relevance of the disclosure sought, the applicants fail to articulate a public interest that is sufficiently compelling to override the public interest in furthering settlement of litigation. Similarly, the submission of the City of Hamilton that the non-participation of the Government of Canada in the present motion is a relevant consideration also fails to associate this fact with a public interest that justifies an exemption from the operation of settlement privilege.

[13] Second, in effect, the applicants seek an exemption from the class privilege for the purpose of reviewing the undertakings in the Agreement to determine if there is any public

interest that would displace the public interest in furthering the settlement of litigation that is the principal basis of the doctrine of settlement privilege. As a legal matter, I do not think there is any exemption from settlement privilege of the nature proposed by the applicants. In this regard, I note that one of the applicants candidly admitted that it is possible that disclosure of the Agreement could have the result that the applicants would withdraw their forthcoming motion. The possibility of such an outcome is a compelling illustration of why an exemption from the application of settlement privilege is not available in the present circumstances. It would be perverse to order disclosure – even restricted disclosure – of a privileged document for the purposes of establishing that the contents were not material to a proceeding being brought by the recipient. Moreover, the applicants' position would appear to provide for automatic disclosure prior to an actual determination as to whether a valid exemption from the operation of settlement privilege existed. Instead, until such a determination is made, the policy underlying settlement privilege requires that parties to the protected document retain the authority to decide whether or not to allow disclosure.

[14] Consistent with the foregoing analysis, I note that there is no case law that supports an exemption from the operation of settlement privilege in the present circumstances. The cases relied upon by the applicants address production of confidential information in which disclosure on a "for counsel's eyes only" basis makes practical sense. There is, however, no case law in which such disclosure has been made for the purposes of permitting counsel to determine whether a public interest exists that would support an exemption from settlement privilege in a future motion.

[15] The fact that the Agreement has been kept confidential by the parties to it has been a source of understandable frustration for the applicants. The reason or reasons for this position are not clear to the Court. As is often the case in such situations, there is a suspicion that the actions of USS and USSC are prompted by a desire to prevent the applicants from obtaining information that would be of advantage to the applicants in these CCAA proceedings, rather than for reasons extraneous to these CCAA proceedings. From the perspective of these CCAA proceedings, disclosure would serve the practical purpose of dispelling such suspicion and allowing the parties to focus on the more immediate issues of reaching a viable restructuring agreement. However, as set out above, the Court does not have discretionary authority to order disclosure of the Agreement. The onus rests with the applicants to establish a basis for an exemption from the application of settlement privilege.

[16] Based upon the considerations set out above, the applicants have not satisfied that onus. The applicants' motion for disclosure of the Agreement on a "for counsel's eyes only" basis is therefore dismissed.

Wilton-Siegel J.

Date: May 4, 2016