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U.S. Steel's Wanton Crippling of the Former Stelco

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Steelworkers from Hamilton and Nanticoke and their allies are gathering at the Appeals Court in Toronto on March 17, to object to the proceedings of the *Companies' Creditors Arrangement Act Court* (CCAA). U.S. Steel is using the CCAA process to railroad the disposal of the former Stelco's remaining assets in a sale procedure that will see all money paid for the facilities and land go to itself. If this legalized theft is allowed, no money would be left to secure the Stelco pension plans and post-retirement benefits or pay creditors, including local suppliers and the Ontario government who are owed millions of dollars. The loss of $2.2 billion to U.S. Steel's cynical manipulation of the process would also leave in doubt much of the continued existence of the two remaining mills of what was once a broad integrated Stelco steelmaking, mining and distribution operation covering much of the country.

Steelworkers and their allies object to a CCAA public authority that is highly prejudicial and suspect. The aim of the CCAA is not to defend the rights of Canadians but to defend the property rights of powerful monopolies such as U.S. Steel. In defending monopoly right, the CCAA tramples on public right and solves no problem facing Canada's economy or people. On the contrary, the CCAA makes the situation worse for the economy and Canadians' well-being. How can a public authority sanction such a thing? How can politicians and others in positions of public authority watch indifferently as a foreign monopoly exercises its monopoly right to crush the public right of Canadians?

The CCAA as a public authority has long lost the confidence of the people. It serves monopoly right to crush public right and as such should not exist as a public authority and should be abolished.

The problems in the Canadian steel industry are well known and must be addressed and not buried in this squalid CCAA sideshow. The problems are rooted in the fact that Canada and its five principal regions do not have a sovereign steel industry that serves the economy's need for steel for nation-building. The insanity of global free trade under the control of powerful monopolies has created a situation whereby international oligarchs dominate and control Canada's economy and importantly its basic sectors.

The oligarchs dictate what does and what does not exist in Canada such as in this case with U.S. Steel's wanton crippling of the former Stelco. The oligarchs clash with one another over who is to control this or that around the world including markets for steel and where steel is produced. They are empire-builders serving their own narrow private interests and insatiable thirst for wealth and power. They are not nation-builders serving the sovereign economy, the people, and the well-being and security of the actual producers, the working class.

This is the second time that Stelco has gone under the sword of the CCAA and third time for Algoma Steel in Sault Ste. Marie, as the oligarchs fight for control and the spoils. No problem has been solved either in particular for Stelco or Algoma, or in general in the Canadian steel sector. The same keeps repeating itself over and over again as the oligarchs fight to impose their monopoly right on Canada and the people, and the workers and their communities suffer. Nothing is built; the economy falls into recurring crises, and public right is crushed.

This is no way to build an economy. This is no way to build a country. Canadians demand a public authority that serves public right and the broad public interest and concerns itself with nation-building.

Down with the Anti-People CCAA and Its Nation-Wrecking!
Public Right Yes! Monopoly Right No!
Keep Algoma Steel Producing! Keep Stelco Producing!

Local 1005 and United Steelworkers Canada Object to Liquidation of Canadian Steel Industry

The United Steelworkers Canada and Local 1005 USW are appealing an August 13, 2015 decision of Judge Wilton-Siegel made during U.S. Steel's bankruptcy fraud under the *Companies' Creditors Arrangement Act* (CCAA). Wilton-Siegel chose not to use his discretion and apply the doctrine of "equitable subordination" regarding U.S. Steel's conduct to wreck its wholly-owned Canadian subsidiary, the former Stelco steelworks, and damage the interests of its employees and retirees.

The unions' factum in the appeal notes, "S. 11 of the CCAA gives a CCAA court a broad discretion to make 'any order that it considers appropriate in the circumstances,' subject only to 'the restrictions set out in' the CCAA; and the Act contains no such restriction on the court's authority."

Steelworkers know from experience with Judge Farley during the Stelco CCAA from 2004-06 that virtually anything goes without restrictions within the CCAA process. In fact, Wilton-Siegel's order not to apply the doctrine of equitable subordination and refusal to examine U.S. Steel's wrecking conduct is precisely an example of his discretionary powers as a CCAA judge. The scope of the discretion is so vague, broad and undefined that the decision-making process is open to partisan bias while it is shielded from any claim that it was done contrary to the rule of law.

In another instance under CCAA, if it served the private interests of a powerful monopoly, a judge could rule that the equitable subordination doctrine does apply. In fact, Judge Farley ruled against the owners of equity when Stelco was under CCAA, handing control and ownership to the U.S. CEO and wealth management parasites who made a killing when they sold Stelco to U.S. Steel. Such is the way with CCAA; whatever serves the assumed end and those in control of the process dictates the seemingly arbitrary decisions. In this way, CCAA can serve monopoly right to crush public right under all circumstances and dismiss the most reasonable and precise arguments supporting public right. Such is the state of affairs, which renders this CCAA public authority in contradiction with the people and the public interest.

The union appellants make the issue of arbitrariness clear in their factum where they write, "The motion judge erred in his interpretation of s. 11 of the CCAA. The Act gives judges a broad discretion to make such orders as are necessary for a debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets."

When faced with such a broad discretion, the issue becomes not justice and the common good but finding a judge who will err on the side of angels.

Equitable Subordination

The unions' factum states:

"The doctrine of equitable subordination has developed in the United States to ensure that injustice or unfairness is not done in the administration of the bankrupt estate. The development of the doctrine culminated in the seminal ruling of the United States Court of Appeals for the Fifth Circuit in *Re Mobile Steel* (1977). In that case, the Court reviewed the jurisprudence on equitable subordination and articulated a three-part test, which the Supreme Court of Canada cited in *Canada Deposit Insurance Corp. v. Canadian Commercial Bank*:

"(1) the claimant must have engaged in some type of inequitable conduct; (2) the misconduct must have resulted in injury to the creditors of the bankrupt or conferred an unfair advantage on the claimant; and (3) equitable subordination of the claim must not be inconsistent with the provisions of the *Bankruptcy Act* [the predecessor to the *Bankruptcy Code*]."

Definition of equitable subordination from Cornel University Law School:

"Decision by a court to subordinate a controlling shareholder's claims upon debt owed her by her own firm, to those of other 'outside' (i.e., bona fide third party) creditors in bankruptcy. Equitable subordination protects unaffiliated creditors by giving them rights to corporate assets superior to those of creditors who happen to also be significant shareholders of the firm. For this doctrine to apply, the creditor to be subordinated must be an equity holder and an insider at the company, typically an officer, and must have in some manner behaved unfairly or wrongly toward the corporation and its outside creditors."

A further definition appears in a ruling of the U.S. Seventh Circuit Court of Appeals in *re Kreisler*:

"Equitable subordination allows the bankruptcy court to reprioritize a claim if it determines that the claimant is guilty of misconduct that injures other creditors and confers an unfair advantage on the claimant. The result is usually that the claimant receives less money than it otherwise would (or none at all), but that is not the goal. Equitable subordination is remedial, not punitive, and is meant to minimize the effect that the misconduct has on other creditors. The courts have developed various standards or 'tests' to determine whether or not the conduct (or misconduct) of a particular creditor should result in equitable subordination of the creditor's claim. The Fifth Circuit Court of Appeals, in In *re Mobile Steel Co.*, set forth the standard three-part test for equitable subordination. (cited above)"

Wilton-Siegel's arbitrary order to use his discretion and **not** apply the doctrine of equitable subordination seems to be borne out of a desire **not** to investigate and judge the reckless conduct of U.S. Steel towards its wholly-owned subsidiary now known as USSC and towards those employees and retirees who rely on the former Stelco's continued production for their livelihoods and standard of living in retirement.

The wide discretion given to a CCAA judge makes it a weapon for monopoly right and a double-edged sword for those who call for its discretionary powers to be used in support of their interests. The absence of a clear law makes the CCAA open to arbitrariness in favour of monopoly right. That is the great weakness of the CCAA process from the viewpoint of the people and public right and interest, and its great strength from the viewpoint of monopoly right and the narrow private interest of the rich and powerful. If Wilton-Siegel does not want to expose U.S. Steel's conduct, then according to his discretionary powers under the CCAA, he has the right to refuse, which negates any discussion and application of the doctrine of equitable subordination.

The conduct of U.S. Steel is well known, such as its defiance and repudiation of the federal *Investment Canada Act*, which in this case includes signed agreements on employment and production levels upon its takeover of Stelco. The injurious conduct includes almost continuous disruption of production through lockouts and even the absconding of lucrative supply contracts to be filled in its U.S. plants. The bad conduct of U.S. Steel reveals a pattern of destruction of Stelco ensuring that it would never be able to pay any dividends to its new U.S. owners except for the first year of operation before the damaging conduct began.

U.S. Steel's harmful conduct towards its employees, retirees and others is already infamous in Canada, including its removal of pension benefit indexation, the stopping of post-retirement benefits and payment of municipal taxes, its refusal to repay a $150 million loan from the Ontario government due last year, and denial of its social responsibility to uphold its public and private pledges to make the pension plans whole by the end of 2015.

The absence of any binding orientation in the law guiding the exercise of discretion by the CCAA court creates a barrier to any discussion and assessment of actual conduct, if the judge in charge so rules. The unions' factum states, "This Court has aptly described the CCAA as a 'skeletal' statute which enables judges to exercise a broad discretion to make the orders which are necessary to avoid liquidation and further the CCAA's purpose: [t]he CCAA ... does not contain a comprehensive code that lays out all that is permitted or barred. Judges must therefore play a role in fleshing out the details of the statutory scheme.... The CCAA is remedial legislation to be liberally construed in accordance with the modern purposive approach to statutory interpretation. It is designed to be a flexible instrument and it is that very flexibility which gives the Act its efficacy. As Farley J. noted in Dylex Ltd. (Re), '[t]he history of CCAA law has been an evolution of judicial interpretation.'"

The unions' factum argues that any limitation of the CCAA court's broad discretionary power is "inconsistent with the statutory scheme":

"As this Court has recognized, '[t]he Section 11 discretion is the engine that drives this broad and flexible statutory scheme.' [...] S. 11 ensures that there are no gaps in a court's power to make any order necessary to facilitate the CCAA's remedial purposes in 'the hothouse of real-time litigation.' Inferring limitations to the court's broad discretionary power is inconsistent with the statutory scheme.

"48. Indeed, in this case, the motion judge concluded that the broad jurisdiction granted under s. 11 permitted the court to exercise its discretion and determine intercreditor claims within the CCAA process."

The factum demanding the use of discretion in favour of workers rather than U.S. Steel reminds a reader of the idiom, "Be careful what you wish for," as there may be unforeseen and unpleasant consequences. The root of the problem with U.S. Steel is its use of monopoly right and the absence of a public authority with the power to curtail that use.

U.S. Steel's Claims

The unions' factum reveals:

"The bulk of the USS Claims represent amounts which USS either: (a) paid to acquire USSC's predecessor Stelco; (b) notionally advanced to conduct a reorganization of Stelco/USSC two months after its acquisition of Stelco; or (c) notionally advanced to USSC to fund working capital and cash needs. [...]

"The Union's objections to the USS Claims can be classified as follows: (a) an objection to the

granting of security interests on the assets of USSC (the 'Security Objection'); (b) an objection to the characterization of much of USS's claim as 'debt' when it is properly characterized as equity (the 'Debt/Equity Objection'); (c) an objection grounded in USS's conduct in relation to its Canadian plants, unionized pensioners, pension plan members, and beneficiaries, which gives rise to claims of oppression and breaches of fiduciary duty (collectively, the 'Conduct Objections). [...]

"The CCAA defines an 'equity claim' as follows: 'equity claim' means a claim that is in respect of an equity interest, including a claim for, among others, (a) a dividend or similar payment, (b) a return of capital, (c) a redemption or retraction obligation, (d) a monetary loss resulting from the ownership, purchase or sale of an equity interest or from the rescission, or, in Quebec, the annulment, of a purchase or sale of an equity interest, or (e) contribution or indemnity in respect of a claim referred to in any of paragraphs (a) to (d); 'equity interest' means (a) in the case of a company other than an income trust, a share in the company -- or a warrant or option or another right to acquire a share in the company -- other than one that is derived from a convertible debt, and (b) in the case of an income trust, a unit in the income trust -- or a warrant or option or another right to acquire a unit in the income trust -- other than one that is derived from a convertible debt;"

*(The unions' factum is available **here**.)*

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