

COURT OF APPEAL FOR ONTARIO

CITATION: U.S. Steel Canada Inc. (Re), 2023 ONCA 277

DATE: 20230424

DOCKET: COA-22-OM-0115

van Rensburg, Huscroft and George JJ.A.

In the Matter of the *Companies' Creditors Arrangement Act*,
R.S.C. 1985, c. C-36, as Amended

And in the Matter of a Plan of
Compromise or Arrangement with Respect to
U.S. Steel Canada Inc.

Geoff R. Hall, James D. Gage, and Brandon Kain, for the moving party Stelco Inc.

Richard B. Swan, Raj Sahni, and Danish Afroz, for responding party Ernst & Young Inc.

Robert B. Bell, Emily Y. Fan, Lucy Sun, Roger Jaipargas, and Xue Yan, for the responding party DGAP Investments Ltd.

Heard: in writing

Motion for leave to appeal from the order of Justice Thomas J. McEwen of the Superior Court of Justice, dated December 19, 2022, with reasons reported at 2022 ONSC 6993.

REASONS FOR DECISION

[1] Stelco Inc. (“Stelco”) seeks leave to appeal from an order requiring it to complete severance of a parcel of land (the “Reconveyance Parcel”) and to convey it to the nominee of Legacy Lands Limited Partnership (“LandCo”), in accordance with a 2018 reconveyance agreement between Stelco and LandCo.

[2] Ernst & Young Inc. (“E&Y”) opposes the motion in its capacity as the court-appointed Monitor of U.S. Steel Canada Inc. (now Stelco) in a proceeding under the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (“CCAA”). E&Y also acts in its capacity as the court-appointed interim Land Restructuring Officer of LandCo and related entities (the “Land Vehicle”) – an appointment made in the context of the CCAA proceeding.

[3] DGAP Investments Ltd. (“DGAP”) also opposes Stelco’s leave motion. DGAP, which is a wholly owned subsidiary of the residential developer Empire Communities Corp. (“Empire”), entered into an agreement with LandCo’s nominee to purchase a number of parcels of land in Haldimand County, including the Reconveyance Parcel.

[4] For the reasons that follow, Stelco’s motion for leave to appeal is dismissed.

BACKGROUND

[5] The facts are set out in the motion judge’s decision at paras. 8-38 and are summarized here.

[6] In 2014, U.S. Steel Canada Inc. (now Stelco) was granted protection under the CCAA. Nearly three years later, the court sanctioned the Second Amended Plan, which was implemented on June 30, 2017.

[7] One of the elements of the restructuring was that a significant amount of land was transferred from Stelco to the Land Vehicle so that it could be sold for the

benefit of Stelco employees, retirees, and pensioners. Under an interim Land Vehicle Governance Order issued on June 27, 2017, the Monitor was appointed as the interim Land Restructuring Officer to provide temporary administration of the Land Vehicle.

[8] In 2018, Stelco and LandCo entered into a transaction whereby Stelco reacquired some of the transferred land from LandCo. However, more land had to be conveyed to Stelco than Stelco intended to acquire, because consents necessary to sever the land parcels had not yet been obtained. To deal with that issue, Stelco and LandCo entered into the reconveyance agreement that is at issue on this leave motion.

[9] In broad terms, the reconveyance agreement provided that Stelco would apply for severance consents under the *Planning Act*, R.S.O. 1990, c. P.13, and, upon receiving consent, would reconvey the “Planning Act Lands” back to LandCo. These lands included the Reconveyance Parcel, which comprises 1,963.714 acres in Haldimand County near Stelco’s Lake Erie Works steel plant.

[10] The reconveyance agreement also contained a provision (article 4.1(h)) whereby the parties agreed to use “commercially reasonable efforts” to obtain consent from the Ministry of the Environment and Climate Change (“MOECC”)¹ to

¹ The name has since changed to the Ministry of the Environment, Conservation and Parks.

allow Stelco to assign an Environmental Framework Agreement to LandCo. And, under article 4.1(k)(iv), LandCo agreed to execute the assignment agreement.

[11] While the reconveyance agreement expressly recognized that “Stelco [did] not intend or desire to purchase the Planning Act Lands”, article 4.2 dealt with the possibility of “failed consent”, in which case Stelco was to pay an additional purchase price to acquire the Planning Act Lands.

[12] After the execution of the reconveyance agreement, Stelco began to take steps to obtain *Planning Act* consents.

[13] In February 2021, LandCo’s nominee agreed to sell to DGAP 14 parcels of land, including the Reconveyance Parcel, which had still yet to be reconveyed. DGAP purchased the land on behalf of Empire, which intends to build a new residential community of up to 15,000 homes.

[14] In March 2021, the Monitor sought and obtained approval for the DGAP sale agreement. Stelco did not oppose that motion and continued to take steps with respect to the severance of the Reconveyance Parcel.

[15] Difficulties began when Stelco learned in February 2022 that Empire intended to build a new development on the Reconveyance Parcel and other lands it purchased. Stelco sees the construction of a residential community next to its operations as an “existential threat” to the company. Its fears include that it may be forced to incur increased environmental remediation and mitigation costs.

[16] In May 2022, Stelco took the position for the first time that it no longer had an obligation to reconvey the Reconveyance Parcel. Instead, it took the position that it was entitled to purchase the Planning Act Lands, including the Reconveyance Parcel.

[17] E&Y, in its capacity as Monitor and Land Restructuring Officer, brought a motion seeking an order directing Stelco to complete the land severance and conveyance contemplated by the reconveyance agreement. DGAP supported the Monitor's motion.

[18] Stelco opposed the motion and brought a cross-motion claiming that it was entitled to purchase the land rather than reconvey it.

The motion judge's decision

[19] The motion judge granted the Monitor's motion and dismissed Stelco's cross-motion. He concluded that: (1) the CCAA continued to apply even though Stelco emerged from CCAA protection prior to entering into the reconveyance agreement; (2) Stelco breached the reconveyance agreement (Stelco does not seek to challenge this finding); and (3) LandCo could waive the requirement for MOECC consent to assign the Environmental Framework Agreement.

[20] The motion judge concluded that specific performance was an appropriate remedy. He noted that the court had broad remedial jurisdiction pursuant to s. 11 of the CCAA, and it was appropriate to use it to oversee the completion of the

severance and reconveyance of the Reconveyance Parcel. Furthermore, if he was wrong that the CCAA applied, he was “also of the view that the principles of equity support a finding of specific performance.”

THE TEST FOR GRANTING LEAVE IS NOT MET

[21] Stelco submits that this is an ordinary contract dispute rather than a CCAA matter, and that it has an appeal as of right under s. 6(1)(b) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. Consequently, a modified leave test should be applied (an “interests of justice” test).

[22] In our view, it is not arguable that the motion judge erred in concluding that the CCAA applied. Accordingly, the usual test for granting leave under the CCAA applies.

[23] Under this test, the court will consider whether:

- the proposed appeal is *prima facie* meritorious or frivolous;
- the points on the proposed appeal are of significance to the practice;
- the points on the proposed appeal are of significance to the action; and
- whether the proposed appeal will unduly hinder the progress of the action.

See *Nortel Networks Corporation (Re)*, 2016 ONCA 332, 130 O.R. (3d) 481, at para. 34; *Urbancorp Toronto Management Inc. (Re)*, 2022 ONCA 181, at para. 3.

[24] We conclude that leave is not warranted. We are not satisfied that the proposed appeal is *prima facie* meritorious, nor does it raise issues of significance to the insolvency practice. Granting leave will cause further delay. Even if the issues raised were of significance to the action, that would not be a sufficient basis to grant leave.

(1) Merit and significance to the practice

(a) Specific performance

[25] Stelco has not made an arguable case for interfering with the motion judge's discretionary decision to grant specific performance in the circumstances of this case. Nor are we persuaded that there is an arguable basis to interfere with the motion judge's finding that "the uniqueness of the Reconveyance Parcel justifies the remedy of specific performance", as it "has a quality that cannot be readily duplicated elsewhere and ... there is no readily available substitute property."

[26] It is well established that "[w]hether specific performance is to be awarded or not is ... a question that is rooted firmly in the facts of an individual case": *Lucas v. 1858793 Ontario Inc. (Howard Park)*, 2021 ONCA 52, 25 R.P.R. (6th) 177, at paras. 71, 75. Moreover, "[w]hether a property is unique, either by virtue of its nature or the features of the contract for its purchase and sale, operates as only one of several factors a court must consider when determining entitlement to specific performance": para. 71.

[27] The motion judge's decision was rooted firmly in the facts of this case. He noted features of the particular property and was alive to the contractual context: if Stelco failed to reconvey the property, as it had contracted to do, LandCo would be prevented from maintaining its contractual obligations with DGAP, and the rights of employees, retirees, and pensioners, who were important stakeholders in the CCAA proceeding, could be affected. Furthermore, we are not satisfied that these issues have significance to the practice of insolvency law.

(b) Waiver

[28] Stelco also contends that it is arguable that the motion judge erred in concluding that LandCo could waive performance of the MOECC consent. Its key argument is that the motion judge's conclusion is "legally questionable", as there appears to be no authority that a party to a contract can waive its own performance obligations under a contract.

[29] The motion judge's decision on waiver rested on his finding that the covenants, which were to be performed by both LandCo and Stelco, were solely for the benefit of LandCo. He also found that waiver of the MOECC consent to assign the Environmental Framework Agreement would cause no prejudice to Stelco.

[30] In our view, this is not the case to resolve any questions there may be about the waiver doctrine, given the motion judge's unchallenged findings that the

covenants were solely for the benefit of LandCo and waiver would cause no prejudice to Stelco. Whether waiver is permitted under the terms of this particular reconveyance agreement is not of significance to the insolvency bar.

(2) Significance to the action

[31] Although the matter in dispute is of significance to the action, that factor is insufficient to warrant granting leave.

(3) Delay

[32] Given that the proposed appeal is not *prima facie* meritorious and not of significance to the practice, there is no reason to delay the discharge of E&Y as Monitor and Land Restructuring Officer, the termination of the CCAA proceeding, or the transaction between LandCo's nominee and DGAP.

CONCLUSION

[33] The motion for leave to appeal is dismissed.

[34] Stelco shall pay costs to E&Y in the amount of \$5,000, and costs to DGAP in the amount of \$5,000.

"K. van Rensburg J.A."
"Grant Huscroft J.A."
"J. George J.A."