

COURT OF APPEAL FOR ONTARIO

CITATION: U.S. Steel Canada Inc. (Re), 2023 ONCA 569

DATE: 20230829

DOCKET: M54400 (COA-23-OM-0156)

Pepall J.A. (Motions Judge)

In the Matter of the *Companies' Creditors  
Arrangement Act*, R.S.C. 1985, C. C-35, as amended

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

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

Geoff R. Hall, James Gage, and Sanea Tanvir, for the responding party, Stelco  
Inc.

Richard B. Swan, Raj Sahni, Thomas Gray, Alex Morrison, and David Saldanha,  
for the Monitor and Land Restructuring Officer, Ernst & Young Inc.

Danielle Stampley, for the responding party, USW Local 1005 Employee Life  
Health Trust and the Pension Deficit Funding Trust

Lily Harmer, for the responding party, USW Local 8782 Employee Life Health Trust

Andrew Hatnay and Abir Shamim, for the responding party, Representative  
Counsel to Non-USW employees and retirees of Stelco Inc. and counsel to the  
Non-USW Employee Life Health Trust

Colette Koopman, for the responding party, LifeWorks (Canada) Limited

Heard: August 14, 2023

ENDORSEMENT

The Order Sought to be Stayed

[1] In September 2014, U.S. Steel Canada Inc., now Stelco Inc. (“Stelco”), was granted protection under the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-35, as amended (“CCAA”). Significant creditors consisted of Stelco’s retirees, employees, and pensioners. In this proceeding, their interests are represented by the respondents the United Steelworkers Local 1005 Employee Life Health Trust, United Steelworkers Local 8782 Employee Life Health Trust, the Non-USW Retiree Life and Health Trust, and the Pension Deficit Funding Trust (the “Stakeholders”). In June 2017, the court approved Stelco’s restructuring plan that provided for, among other things, Stelco’s transfer of industrial land to a group of special purpose entities designed to hold land (collectively, the “Land Vehicle”). The land in the Land Vehicle was then to be sold for the benefit of the Stakeholders. LandCo is a limited partner in the broader limited partnership collectively known as the Land Vehicle Stakeholders.

[2] Before me, the moving party, DGAP Investments Ltd. (“DGAP”), seeks a stay pending leave to appeal the May 5, 2023 order of the supervising judge, McEwen J. In that order, among other things, the supervising judge authorized Ernst & Young Inc., in its capacity as the court appointed interim Land Restructuring Officer of the Land Vehicle (“LRO”), to enter into a Securities Purchase Agreement (“SPA”) dated April 11, 2023 with the respondent, Stelco.

Under that Agreement, Stelco would acquire all the partnership units of the Land Vehicle.

[3] In his reasons, the supervising judge expressly addressed the issue of Stelco's good faith. He was not prepared to find that Stelco had failed to act in good faith.

[4] The supervising judge rejected DGAP's cross-motion seeking a timetable under which the following transactions would take place before the closing of the SPA:

- (i) The DGAP Sale Agreement between DGAP and LandCo for the sale of approximately 4,154.717 acres of unencumbered farmland that are adjacent to Stelco's Lake Erie Works steel plant. The lands consist of 18 parcels of land, one of which (the "Reconveyance Parcel") is at the centre of this dispute and described in the next paragraph. DGAP is wholly owned by Empire Communities Corp., a residential development company, that intends to use the lands for industrial and residential purposes. The residential component consists of approximately 40,000 residents and 15,000 homes. The DGAP Sale Agreement was approved by the court on March 4, 2021 but has not yet closed.
- (ii) The Reconveyance Agreement between Stelco and LandCo in which Stelco agreed to reconvey to LandCo's nominee, LandCo Vendor, a 1,963.714-

acre parcel of land (known as the Reconveyance Parcel), which in turn would permit LandCo Vendor to convey unencumbered title to that parcel to DGAP as part of the farmlands transaction that is the subject matter of the DGAP Agreement. For the purposes of this endorsement, I need not repeat the history relating to that parcel, which is detailed in the materials before me. Importantly, however, the supervising judge found that Stelco had breached the Reconveyance Agreement and, on December 19, 2022, ordered it to transfer the parcel to LandCo Vendor. This has not yet occurred.

[5] On May 5, 2023, the supervising judge made a second order discharging the LRO and authorizing the Monitor to carry out specified remaining incidental duties. He directed the Monitor to remain engaged as the eyes and ears of the court with respect to the completion of the SPA, but also with respect to the completion of the Reconveyance Agreement and the DGAP Sale Agreement. Once the SPA closed, Stelco and DGAP were to pay the Monitor and its counsel's fees equally. The order provided for the termination of the CCAA proceeding and release of the Monitor upon completion of those duties. DGAP is no longer seeking to appeal this order.

### Background

[6] By way of factual background, Stelco learned of Empire's residential development plans in February 2022. Stelco became concerned about its viability

as a company in light of the proposed new development and residential community, which its CEO described as an “existential threat”. As the supervising judge described in his December 2022 reasons, Stelco was concerned that the construction of the residential housing in close proximity would adversely affect its operations. Stelco was also concerned that having residential housing so close to its emissions would result in evaluations of human health safety, which could result in Stelco’s operations being deemed unsafe. Finally, Stelco complained that the construction would result in increased environmental remediation and mitigation costs which it had not previously incurred.

[7] In January 2023, Stelco unsuccessfully offered to purchase the Reconveyance Parcel from LandCo. In February 2023, Stelco offered to purchase the partnership units in the Land Vehicle. At that time, on notice to DGAP, the court directed the Monitor in its capacity as LRO to pursue negotiations. The SPA was the outcome.

[8] Under s. 4.1(m) of the Reconveyance Agreement, Stelco and LandCo were to agree on shared facilities and reciprocal easements and those agreements were to “be settled prior to the Reconveyance Date.” Negotiations have been taking place with DGAP (given that it is acquiring the subject parcel under the DGAP Agreement). Agreement on the issues of shared facilities and reciprocal easement has not been reached. On July 6, 2023, the supervising judge dismissed DGAP’s motion for a declaration that the shared facilities and reciprocal easements

agreements provision in the Reconveyance Agreement had been satisfied or that those agreements were unnecessary for the completion of the reconveyance. He also dismissed DGAP's alternative request that the easement agreement attached to its motion record be approved. A motion to determine the easements under article 4.1(m) of the Reconveyance Agreement has been set for November 6, 2023.

[9] The SPA also prevented the LRO from amending the DGAP Sale Agreement including by extending the "Outside Date". The Outside Date is the date on which LandCo must satisfy certain conditions, including obtaining title to the Reconveyance Parcel from Stelco. Failure to satisfy that date would lead to the termination of the DGAP Sale Agreement. On July 6, 2023, the supervising judge stayed the Outside Date, thus avoiding that eventuality.

[10] At a case conference before the supervising judge on June 21, 2023, Stelco and the Stakeholders advised that notwithstanding the leave to appeal motion brought by DGAP on May 26, 2023, they intended to close the SPA.

[11] DGAP then brought its motion for a stay and also asked that the motion for leave to appeal be expedited. The Monitor, the LRO, Stelco and the Stakeholders all opposed the motion for a stay. Lifeworks (Canada) Limited, the pension administrator, took no position. All parties agreed that the motion for leave to appeal be expedited.

[12] In brief, DGAP's concern is that the effect of the supervising judge's decision is that Stelco is now on both sides of the Reconveyance Agreement and also is an adverse counter-party under the DGAP Sale Agreement. In its new clothes, Stelco will take steps to avoid completion of the Reconveyance Agreement and will ensure that the DGAP Sale Agreement does not close. DGAP maintains that Stelco's CEO has repeatedly stated that Stelco vehemently opposes potential residential development on adjacent property. DGAP argued before the supervising judge that the SPA was a bad-faith ruse to obstruct the completion of the Reconveyance Agreement and to scuttle the DGAP Sale Agreement. Stelco could then keep the Reconveyance Parcel for itself and eliminate the existential threat posed by the proposed residential development.

[13] In addition, DGAP complains that the order approving the SPA in essence approves a sale of the same beneficial interest in land that has already been sold to DGAP. Its counsel argues that there was no integrity to the process and that Stelco's concerns should be addressed through a public planning process.

#### Test for a Stay

[14] The test for staying an order pending appeal or leave to appeal requires the court to: (i) make a preliminary assessment of the merits of the case to ensure that there is a serious issue to be tried; (ii) determine whether the moving party would suffer irreparable harm if the motion were refused; and (iii) assess the balance of

convenience as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits: *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, at p. 334. The overarching consideration is whether the interests of justice call for a stay: *Longley v. Canada (Attorney General)*, 2007 ONCA 149, 223 O.A.C. 102, at para. 15.

[15] The moving party bears the burden of proof in demonstrating that the stay should be granted: *International Corona Resources Ltd. v. Lac Minerals* (1986), 21 C.P.C. (2d) 252 (Ont. C.A.), at p. 255.

### Discussion

[16] The first issue to consider is the preliminary assessment of the merits of the case to ensure that there is a serious issue to be determined. The threshold is a low one.

[17] The merits to consider are those relating to the granting of leave to appeal under the CCAA. This requires consideration of whether: (i) the proposed appeal is *prima facie* meritorious or frivolous; (ii) the proposed appeal is of significance to the practice; (iii) the proposed appeal is of significance to the proceeding; and (iv) the proposed appeal will unduly hinder the progress of the action.

[18] DGAP raises three arguments in its motion for leave to appeal. It submits that the supervising judge erred: (i) by exercising his discretion unreasonably in approving the SPA before Stelco had completed its reconveyance undertaking and



before the closing of the DGAP Sale Agreement; (ii) by failing to apply s. 36 of the CCAA and the principles in *Royal Bank of Canada v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (C.A.); and (iii) in finding that Stelco's conduct did not amount to bad faith.

[19] The following comments reflect my preliminary assessment of the merits of the leave to appeal motion.

[20] Leave to appeal is granted sparingly in CCAA proceedings. That does not mean that it is never granted. That said, the supervising judge's decision in approving the SPA in the absence of a sequencing order was discretionary in nature and largely fact based. He concluded that the SPA, which dealt with partnership units in the Land Vehicle, stood separate and apart from the DGAP Sale Agreement, which dealt with the acquisition of parcels of land. The DGAP Sale Agreement, which was approved by the court on March 4, 2021, was unaffected by the SPA. This conclusion strikes me as unassailable.

[21] Similarly, the supervising judge's conclusion that he was not prepared to find that Stelco had failed to act in good faith was open to him based on the record before him. He was clearly alive to DGAP's argument that the SPA subverted DGAP's transaction. Recall, however, that he has been case managing these issues for some time and has heard many motions and conducted numerous case

conferences. Deference is owed to his factual findings absent palpable and overriding error.

[22] Lastly, s. 36 of the CCAA applies to a sale of assets by a debtor company and would not appear to be applicable. The sale is by the Stakeholders who are selling their partnership units. They are not debtors. Moreover, the supervising judge made a finding that the SPA was the result of arms-length negotiations between Stelco and the Stakeholders. As for *Soundair*, *quaere* whether it is applicable. That said, it is not for me to decide the merits of the leave to appeal motion; that will be for the panel to decide.

[23] Although I consider the moving party's case for leave to appeal to be weak on the merits, I am not prepared to conclude that it is frivolous or vexatious. Having said that, this factor weighs in favour of a dismissal of the stay motion.

[24] I turn now to the other factors relevant to my preliminary assessment of the case. I consider the subject matter of the leave to appeal to be *sui generis* or unique to the particular facts of this case, with no real significance to the practice more broadly. I agree with the supervising judge's comments on the usefulness of Mr. Sherman's report as it relates to the factual matrix. Leave to appeal in a CCAA proceeding by its nature often is of some significance to the proceeding. This would be no exception particularly given that the order assists in drawing the CCAA proceeding to a close. Lastly, the order granted by the supervising judge advances

rather than hinders the progress of the proceeding and the progress of the CCAA proceeding would be unduly hindered were leave to appeal to be granted.

[25] In this regard, it is important to review the supervising judge's analysis. As mentioned, the Stakeholders are in essence comprised of the employees, retirees and pensioners. The supervising judge found that the SPA would benefit the Stakeholders, was consistent with the objectives of the CCAA Plan that was approved, would monetize the Land Vehicle, and would permit the Stakeholders to be paid. His order would also permit the Stakeholders to extricate themselves from the CCAA proceedings which have been ongoing since 2014. This includes the lengthy, expensive, and acrimonious litigation between Stelco and DGAP. Moreover, the Monitor would be discharged from its role as LRO, an important step in the path leading to the ultimate discharge of the Monitor.

[26] In sum, although I recognize that the serious issue to be determined threshold is a low one, I conclude that the moving party has not met it insofar as it relates to leave to appeal in a CCAA proceeding. Having said that, even if it were met, the other elements of the *RJR-MacDonald* test are also not met, either individually or taken as a whole in conjunction with the other elements of the test to which I will now turn.

[27] Irreparable harm is harm which cannot be quantified in monetary terms: *RJR-MacDonald*, at para. 341; *Urbancorp Toronto Management Inc. (Re)*, 2021

ONCA 613, 335 A.C.W.S. (3d) 239, at para. 15. The evidence demonstrating harm must be clear and not speculative.

[28] If the SPA closes before the DGAP Sale Agreement and the reconveyance, DGAP's concern is that Stelco will use the SPA to upend the DGAP Sale Agreement and avoid its obligation to reconvey. This in turn will prevent DGAP from obtaining the lands which the supervising judge found to be unique, a holding upheld by this court. DGAP maintains that the planned development is a once-in-a-generation opportunity that cannot be compensated through damages. It argues that where an appeal could be rendered moot without the granting of a stay, there is a presumption that irreparable harm is inevitable. It argues that if the SPA closes, this court may be hesitant to reverse the intricacies of that agreement, which will have already closed. It also invites me to reach an adverse conclusion from the refusal by Stelco and the Stakeholders to preserve the status quo.

[29] Stelco's CEO denies that the purpose of the SPA is to upend the DGAP Sale Agreement. Rather, he maintains that it is to end an outstanding aspect of Stelco's CCAA restructuring and extract the Stakeholders from the litigation between Stelco and DGAP.

[30] I do not accept DGAP's arguments. If the SPA closes absent DGAP's requested sequencing order, Stelco will still be bound by its agreements and undertaking. Moreover, the supervising judge took considerable measures to

address DGAP's concerns. He noted that the CCAA proceeding continues to be closely case-managed. He directed that the Reconveyance Agreement be completed as soon as possible. He directed the Monitor to remain engaged in the completion of the Reconveyance Agreement and the DGAP Sale Agreement and to serve as the court's eyes and ears. In addition, he subsequently stayed the Outside Date in the DGAP Sale Agreement thereby preventing the Agreement from lapsing absent further court order. He offered to develop a schedule with the parties to ensure the completion of the Reconveyance Agreement, a schedule that was then developed by Justice Penny, the new supervising judge, when McEwan J. retired from the court. In that regard, I note that the issue of the easements, that is part of the Reconveyance Agreement, is scheduled to be determined in early November. Lastly, as the supervising judge observed, Stelco gave an undertaking that allows DGAP (Empire) to assert any positions that LandCo or the Land Vehicle could raise with respect to compliance with the Reconveyance Agreement, and Stelco would not take the position that DGAP (Empire) did not have standing to do so. As such, DGAP may be directly involved in the completion of that Agreement. In addition, both Stelco and DGAP conceded that the agreements contemplated in Article 4.1(m) of the Reconveyance Agreement could be determined by the Commercial List judge if the parties could not reach agreement.

[31] These provisions are designed to mitigate DGAP's speculative concerns. I conclude that consideration of irreparable harm also favours a dismissal of the motion for a stay.

[32] Turning to the balance of convenience, it too favours a dismissal. At para. 49 of his reasons, the supervising judge wrote:

In my view, the ongoing Court involvement, with the assistance of the Monitor and Stelco's undertaking, will properly address DGAP's concerns with respect to ongoing negotiations concerning the DGAP Sale Agreement now with Stelco. ...I do not believe that it is appropriate that the Stakeholders remain in limbo while these negotiations take place.

[33] David McBride is a retiree who was Stelco's Financial Controller until March of 2014. He is one of the volunteer trustees on the Board of Trustees of the Stelco Non-USW Retiree Life and Health Trust ("ELHT"). This ELHT was the vehicle created to restart retiree health and other benefits as part of the sanctioned Plan. These benefits had been suspended in September 2015 during the restructuring. He describes in his affidavit how a stay would be highly prejudicial for the Stelco retirees. As he states:

The eligible Stelco retirees are now very elderly. Their average age is now 79. Many live on low fixed incomes, in nursing homes, and have on-going healthcare costs. It would be a great benefit to be able to distribute the sale proceeds of the SPA to these retirees now so they could derive a benefit from these payments while they are still living.

[34] In addition, a stay would require the retirees to remain in the crossfire of the bitter litigation between Stelco and DGAP. It would increase the costs of the LRO that are paid from the same source of funds that are destined to be paid to the Stakeholders on the closing of the SPA. In addition, an additional DIP loan which entails additional interest costs and fees will be required at the end of August. These payments also would have to come out of funds destined for the Stakeholders. Moreover, the DIP loan would be secured against the Land Vehicle's remaining land assets. The on-going and significant costs of the LRO will erode future payments to the Stakeholders. Furthermore, a stay would increase the litigation-related costs of the employee, retiree and pensioners' trustees, costs which would also have to be borne by this group.

[35] In a nutshell, the sooner the SPA closes, the sooner the fruits of that agreement will be paid to the aging population of beneficiaries that comprise the Stakeholders. They will be able to exit this protracted and expensive litigation. Monetizing the Land Vehicle's assets was a key objective of the CCAA Plan. The longer this CCAA proceeding drags on, the greater the professional fees which are born by the Land Vehicle, a construct designed to benefit these aging individuals. As stated by the supervising judge, there is no allegation that the Stakeholders have failed to act in good faith or were in any conflict of interest. Nor is there any evidence that they have acted dishonestly or unreasonably in negotiating the SPA.

[36] The balance of convenience also favours a dismissal of the stay motion. The interests of justice do not call for a stay.

[37] In conclusion, I dismiss the motion for a stay. In the interests of accelerating the conclusion of this lengthy CCAA proceeding, as requested by the parties, I am ordering that the listing of the leave to appeal motion be expedited.

“S.E. Pepall J.A.”