

Update

Corporate Securities Law

May 14, 2009

Minister Clement's Letter to US Steel

Last week, Industry Minister Tony Clement sent a demand letter to United States Steel Corp. ("US Steel") insisting that it fulfill the undertakings given to the Canadian government in its 2007 takeover of Stelco Inc. ("Stelco"). Given the combination of the political sensitivity of foreign acquisitions of Canadian businesses, and an economic climate marked by increasing governmental involvement in business and concern about maintaining and supporting business activity in the country, the delivery of the letter and its consequences are being – and will be – carefully scrutinized.

The focal point for analysis of governmental involvement in foreign acquisitions of Canadian businesses is the *Investment Canada Act* (the "Act"). Under that Act, if a proposed acquisition by a non-Canadian of a Canadian business meets or exceeds certain size thresholds, the transaction is subject to review by the Industry Minister (and/or, in the case of certain cultural acquisitions, the Minister of Canadian Heritage). The relevant Minister(s) must be "satisfied that the investment is likely to be of net benefit to Canada." In most cases, the acquiror will propose binding undertakings to address governmental concerns and which support the "benefits" of the transaction. This was the context for the undertakings given by US Steel; US Steel's acquisition of Stelco

met the threshold for review, and its undertakings were given in order to satisfy the Industry Minister that the acquisition was of net benefit to Canada. Those undertakings were oriented to provide comfort concerning, among other things, the protection of Canadian jobs and continued investment in Stelco's operations in Hamilton.

The Act provides the government with the power to impose fines or even seize assets if a foreign owner does not comply with its undertakings. The government has now demonstrated that it has an interest in communicating that undertakings must have some teeth. However, enforcement may present challenges, in light of the fact that undertakings are often conditional on factors beyond the acquiror's control. The current state of the economy may provide support for foreign acquirors taking the position that they are unable to comply with their commitments. A potential middle ground would involve re-negotiation of the undertakings taking into account changed circumstances.

The issuance of the Minister's letter is the first time the government has formally commenced enforcement proceedings for non-compliance by a foreign owner of its undertakings. Whether Minister Clement's letter is reflective of a new approach to the enforcement of Investment Canada undertakings or whether it is intended to achieve other objectives such as results at the bargaining table may become clearer as the process unfolds, the fact of the letter is in itself likely to cause acquirors to consider even more carefully the Investment Canada implications to proposed M&A transactions.