

**Date: 20100614**

**Docket: T-1162-09**

**Citation: 2010 FC 642**

**Ottawa, Ontario, June 14, 2010**

**PRESENT: The Honourable Madam Justice Hansen**

**BETWEEN:**

**THE ATTORNEY GENERAL OF CANADA**

**Respondent (Applicant)**

**and**

**UNITED STATES STEEL CORPORATION AND  
U.S. STEEL CANADA INC.**

**Applicants (Respondents)**

**REASONS FOR ORDER AND ORDER**

**Introduction**

[1] The United States Steel Corporation and U.S. Steel Canada Inc. (U.S. Steel) challenge the validity of section 40 of the *Investment Canada Act*, R.S. 1985, c.28 (1st Supp.) (ICA or Act) as

being in violation of section 11(d) of the *Canadian Charter of Rights and Freedoms* and section 2(e) of the *Canadian Bill of Rights*, R.S.C. 1985.

## **Facts**

[2] For the purpose of this motion, only a brief review of the facts is necessary. In September 2007, U.S. Steel submitted an application for review under the Act to obtain ministerial approval of its proposed investment in and acquisition of control of Stelco Inc.'s Hamilton-based Canadian business. In support of the application, U.S. Steel provided 31 undertakings including two in relation to employment and production levels. On October 29, 2007, the Minister approved the acquisition.

[3] On May 5, 2009, the Minister sent a demand to U.S. Steel pursuant to section 39 of the Act advising U.S. Steel that it was in contravention of the employment and production undertakings and requested that U.S. Steel cease the contraventions, remedy the default, show cause why there were no contraventions or justify any non-compliance. Subsequent to U.S. Steel's response to the demand, the Minister informed U.S. Steel that he was not satisfied with the response. On July 17, 2009, the Attorney General of Canada filed an application under section 40 of the Act seeking an order directing U.S. Steel to comply with the two undertakings and a penalty of \$10,000 per day, per breach of the undertakings calculated from November 1, 2008 until compliance with the undertakings. U.S. Steel then filed the within motion.

## **Overview of the legislation, transactions subject to review and the relationship between the parties**

[4] Before turning to a consideration of the issues raised in this motion, an overview of the legislation together with some observations regarding the types of transactions that are subject to review under the Act and the relationship between the government and the non-Canadian investor are useful.

[5] The ICA came into force in 1985. It repealed and replaced the *Foreign Investment Review Act*, S.C. 1973 -1974, c. 46 (FIRA). The ICA provides that certain investments in Canada by non-Canadian investors may not be implemented unless the investment has been reviewed and approved by the Minister. To initiate the review process, the non-Canadian investor is required to submit an application containing the requisite information. In addition, the non-Canadian investor may give written undertakings in support of the application. Section 21 of the Act provides that if after taking into account the information, undertakings and representations received under section 19 and the factors set out in section 20 the Minister is satisfied that the proposed investment “is likely to be of net benefit to Canada”, the proposed investment will be given ministerial approval. Subsequent to the implementation of the investment, the Minister has the authority to monitor the investment to determine whether the investment is being carried out in accordance with the application and any representations and undertakings given by the non-Canadian investor in relation to the investment.

[6] Section 38 authorizes the Minister to issue guidelines and interpretation notes with respect to the application and administration of the Act. The current Guidelines issued by the Minister outline

the procedural aspects of the proposal and monitoring stages. The Guidelines contain information regarding the pre-filing meetings, undertakings, third party representations, feedback during the review process, the determination “is likely to be of net benefit to Canada”, and post-approval monitoring.

[7] With respect to undertakings, the Guidelines encourage investors to incorporate in their plans as much detail and precision as possible to reduce the likelihood that undertakings will be needed to supplement the plans. The Guidelines also note that undertakings may still be “helpful to provide greater assurances when issues, critical to the determination of net benefit, arise.” As to monitoring, the Guidelines state that an evaluation will usually be made 18 months after the implementation of the investments.

[8] Section 39 provides that where the Minister believes that the non-Canadian investor has failed, among other things, to comply with an undertaking given at the time of the approval, the Minister may send a demand to the non-Canadian investor requiring the investor within a specified period “to cease the contravention, to remedy the default, to show cause why there is no contravention of the Act or Regulations or, in the case of undertakings, to justify any non-compliance.”

[9] A section 40 proceeding arises from the ministerial demand made pursuant to section 39. It is initiated by an application in a superior court. If at the conclusion of the hearing, the court is satisfied that the Minister was justified in sending the demand and the non-Canadian investor has

failed to comply with the demand, the court may make any order or orders the court considers the circumstances require including any of the orders provided in subsection 40(2). In particular, for the purpose of this motion, the court may impose a monetary penalty not exceeding \$10,000 per breach for each day the non-Canadian investor is in contravention and may direct the disposition by the non-Canadian investor of any voting interests or assets acquired that are or were used in carrying on a Canadian business.

[10] Section 40(3) provides that a monetary penalty is a debt due to Her Majesty the Queen in right of Canada and is recoverable as such in a superior court. Under section 40(4), a person or entity that fails or refuses to comply with an order made under subsection (2), may be cited and punished by the court that made the order “as for other contempts of that court”.

[11] Lastly, under section 42, everyone who knowingly provides false or misleading information under the Act or the Regulations or contravenes section 36 of the Act is guilty of an offence punishable on summary conviction.

[12] For ease of reference, the relevant statutory provisions are included with these reasons in Annex “A”.

[13] Leaving aside for the moment reviews undertaken in relation to investments that could be injurious to national security, the Act applies to significant investments by non-Canadian investors. In 2007, at the time of the approval of the investment at issue in this proceeding, the financial

threshold for investments by non-Canadian investors from World Trade Organization countries was 281 million dollars. For non-World Trade Organization countries, the threshold was 5 million dollars. It is also important to note that the transactions that are subject to review are private transactions involving the acquisition of interests in Canadian businesses by non-Canadian investors.

[14] Undertakings play an important role within the legislative scheme. As Richard Lajeunesse, Investment Review Manager with Industry Canada explains in his affidavit, an application for approval under the Act must include a detailed description of the non-Canadian investor's plans for the business being acquired with specific reference to the section 20 factors that the Minister is required to take into account in reaching a decision. In the case of significant investments, non-Canadian investors will also often submit undertakings in relation to the investor's plans for the Canadian business directed at the section 20 factors that include maintaining the business operations in Canada, Canadian participation in the business and employment for Canadians. These undertakings are intended to demonstrate that the investment will be carried out in a manner that "is likely to be of net benefit to Canada".

[15] During the hearing, both parties characterized the relationship under the legislation between the non-Canadian investor and the government, particularly in relation to the undertakings, as being akin to a contractual relationship. It is not necessary for the purpose of this motion to make a determination regarding the legal nature of the relationship between the government and the non-Canadian investor. It is sufficient to note that there is no dispute between the parties that the

undertakings drafted by the non-Canadian investor and submitted to the government in support of the application for approval are binding commitments.

### **The Charter**

[16] The first issue is whether section 11(d) of the *Charter* applies to a proceeding under section 40 of the Act. Section 11(d) reads:

11. Any person charged with an offence has the right

d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

**11.** Tout inculpé a le droit :

*d)* d'être présumé innocent tant qu'il n'est pas déclaré coupable, conformément à la loi, par un tribunal indépendant et impartial à l'issue d'un procès public et équitable;

[17] As section 11(d) is limited in its application to “a person charged with an offence”, U.S. Steel must establish that a person or corporation against whom a section 40 proceeding is initiated “is a person charged with an offence”. To do so, the parties agree that U.S. Steel must demonstrate that it meets either of the two branches of the test articulated in *R. v. Wigglesworth*, [1987] 2 S.C.R. 541. In *Wigglesworth*, Justice Wilson stated that section 11(d) will apply if a matter by its very nature is a criminal proceeding or if it involves the imposition of true penal consequences.

[18] The first question to resolve is whether a section 40 proceeding is by its very nature a penal proceeding. In *Wigglesworth* at paragraph 23, Justice Wilson explained:

In my view, if a particular matter is of a public nature, intended to promote public order and welfare within a public sphere of activity, then that matter is the kind of matter which falls within s. 11. It falls within the section because of the kind of matter it is. This is to be distinguished from private, domestic or disciplinary matters which are regulatory, protective or corrective and which are primarily intended to maintain discipline, professional integrity and professional standards or to regulate conduct within a limited private sphere of activity”. . . . Proceedings of an administrative nature instituted for the protection of the public in accordance with the policy of a statute are also not the sort of “offence” proceedings to which s. 11 is applicable. . . . **[citations omitted]**

[19] In *Martineau v. M.N.R.* (2004), 192 C.C.C. (3d) 129 (S.C.C.), at paragraphs 21-22, Justice Fish echoed Justice Wilson’s earlier observation that “when a matter is of a public nature, intended to promote public order and welfare within a public sphere of activity, it falls, by its very nature within s. 11 of the *Charter*.” He also contrasted these types of proceedings with “proceedings of an administrative – private, internal or disciplinary – nature instituted for the protection of the public in accordance with the policy of a statute” that are not penal in nature. At paragraph 24, Justice Fish explained that the nature of a proceeding is to be determined on the basis of three criteria: 1) the objectives of the Act and the relevant provision; 2) the purpose of the sanction; and 3) the process leading to the imposition of the sanction.

[20] Although *U. S. Steel* acknowledges that it relies primarily on the second branch of the *Wigglesworth* test, it maintains that the first branch of the test is also met.

[21] U. S. Steel submits that the following five key factors bring section 40 squarely within the test in *Wigglesworth*: 1) the purpose of the legislation is public and not private; 2) the magnitude of the fine is significant; 3) the failure to pay the monetary penalty leads to contempt proceedings and exposure to a term of imprisonment; 4) the penalty goes to the Consolidated Revenue Fund and not to an internal body to maintain or regulate an internal or private sphere of activity; and 5) the penalties are imposed by a court and not by a regulator.

[22] In particular, with regard to the “by nature” branch of the test, U.S. Steel submits that the Act is of a public rather than of a private nature. The Act has the effect of creating the offence of failure to comply with a demand which if breached leads to a number of penalties including the imposition of a fine. U.S. Steel contends that having regard to the purpose of the legislation found in section 2, the factors in section 20 that the Minister must take into account and the test “is likely to be of net benefit to Canada”, the Act is not aimed at regulating a defined sphere of private activity. Rather, it is directed at promoting the public order and welfare within a public sphere of activity.

[23] U.S. Steel points out that the typical characterizations of matters as being “private, domestic or disciplinary which are regulatory, protective or corrective and which are intended to maintain discipline, professional integrity and professional standards or to regulate conduct within a limited private sphere of activity” do not apply to the ICA.

[24] U.S. Steel claims that the public nature of the legislation is also reflected in the 2009 amendment to the purpose of the Act which incorporated the recognition of “the importance of protecting national security”. U.S. Steel also points out that under the legislation a non-Canadian investor’s undertakings are given to the government and not to a regulator. U.S. Steel maintains that while the statutory scheme regulates private economic actors, these provisions illustrate the public nature of the legislation.

[25] U.S. Steel contends that a number of features of the ICA distinguish it from the typical legislation that regulates private activity. U.S. Steel points out that the activity being regulated by the Act is arbitrarily defined. That is, not all investments by non-Canadian investors are regulated by the Act. It is only applicable to investments in excess of 5 million dollars. In this respect, it is not the usual type of regulation of private activity where a defined sphere of conduct is regulated without limitations based on the magnitude of the activity or its volume. As well, the ICA is atypical in another respect in that it only provides a temporary monitoring period and not the ongoing regulation of the activity subject to the legislation.

[26] U.S. Steel also argues that other features of the ICA point to section 40 being penal in nature. U.S. Steel notes that although many pieces of legislation have both civil and criminal enforcement mechanisms, generally the penalties imposed in the criminal process are greater than those imposed in the administrative process. However, under the ICA, the penalties under section 40 far exceed those that may be imposed for a summary conviction offence. Further, unlike section 40, the penalties within an administrative process are capped and do not include a risk of

imprisonment. U.S. Steel adds that there is no “tribunal process” under section 40. Instead, the matter proceeds directly to a court. Lastly, U.S. Steel notes that none of the typical civil remedies such as damages, compensation or disgorgement are found in the legislation.

[27] U.S. Steel also submits that even if section 40 does not meet the first branch of the *Wigglesworth* test, the monetary penalty that may be imposed under section 40 is a true penal consequence attracting the protection of section 11(d). In particular, U.S. Steel maintains the magnitude alone of the monetary penalty available under section 40 is sufficient to bring it under the second branch of the *Wigglesworth* test. U.S. Steel disputes the Attorney General’s interpretation that a true penal consequence has two components and argues that it is at odds with Justice Wilson’s decision in *Wigglesworth*. In particular, U.S. Steel submits that Justice Wilson did not create a two part test that requires a fine of sufficient magnitude and that the fine is imposed for the purpose of redressing a wrong done to society at large. That is, at paragraph 24, Justice Wilson did not say a fine by its magnitude and is imposed for the purpose of redressing a wrong done to society. Rather, Justice Wilson stated that “a fine which by its magnitude would appear to be imposed”. It is the fine by its magnitude that leads to the conclusion it is being imposed for the purpose of redressing the wrong. U.S. Steel maintains that it is from the magnitude of the fine that the purpose of the fine must be drawn. For this reason, the magnitude of the fine is the critical issue.

[28] U.S. Steel submits that its interpretation finds further support in Justice Wilson’s observation “...that if a body or an official has an unlimited power to fine, and if it does not afford the rights enumerated under s. 11, it cannot impose fines designed to redress the harm done to

society at large.” U.S. Steel argues that this statement makes it clear that it may be inferred from the magnitude of the penalty that it is being imposed for the purpose of redressing a wrong done to society at large.

[29] U.S. Steel submits that when the legislation is viewed objectively, the potential monetary penalty under section 40 is so large that it cannot have any purpose other than to redress a wrong done to society at large. That is, the purpose of the penalty is to punish.

[30] U.S. Steel also submits that there are two main indicators of the purpose of a penalty. A key consideration is whether the penalty is in some manner connected to the regulated activity or has a mathematical connection to the regulated activity. U.S. Steel argues that if a monetary penalty, as in the present case, is not connected in some way to the extent of the breach and there is no relationship between the penalty and any actual damages or compensation, then the purpose of the penalty must be to redress the wrong done to society and to punish. The other key consideration is that under the ICA the penalty goes into the Consolidated Revenue Fund and is not used for some internal benefit.

[31] U.S. Steel submits that other indicators also show that the monetary penalty under section 40 is a true penal consequence. The penalty may be imposed for each breach of an undertaking and there is no provision in the legislation capping the total amount of the penalty irrespective of the number of contraventions. The fact that the monetary penalty may be imposed for each day of contravention reflects a general and specific deterrence purpose that is consistent with a penal

purpose. The consequences flowing from a finding of failure to comply with a ministerial demand are penal in nature and far more serious than the penalty that may be imposed for a contravention of the summary conviction offence under section 42 without any of the procedural and substantive *Charter* protections afforded to an investor charged with the summary conviction offence. In particular, the daily monetary penalty is double the total amount that may be imposed for a summary conviction offence under section 42 of the ICA and, under section 40, there is potential exposure to a term of imprisonment.

[32] U.S. Steel also claims it is significant that under section 40, it is a court imposing the monetary penalty and not a regulator. In U.S. Steel's view, the legislation is, in effect turning the court into a regulator. However, the court is always an adjudicator and never in the business of regulating. The only instance in which a court has jurisdiction to impose a fine is in the criminal or quasi-criminal setting. U.S. Steel argues that a penalty is an administrative penalty because it is imposed by an administrative tribunal. The fact that the monetary penalty under section 40 is imposed by a court and not a regulatory body also shows that it is a true penal consequence.

[33] U.S. Steel takes the position that as the cases relied on by the Attorney General, *Lavallee v. Alberta (Securities Commission)*, 2009 ABQB 17; *Commissioner of Competition v. Gestion Lebski Inc.*, 2006 Comp. Trib 32; and *Martineau v. M.N.R.* (2004), 192 C.C.C. (3d) 129 (S.C.C.), are all cases where the fines were imposed by a regulator, they are of no assistance for the purpose of this motion.

[34] For example, in *Lavallee* where the Securities Commission had imposed a fine of one million dollars, the Alberta Court of Queen's Bench concluded that *Charter* rights were not engaged because a true penal consequence could not be imposed by the Commission. In reaching this conclusion, the Court took into account the fact that the magnitude of the penalty was statutorily capped; the penalty was imposed by a tribunal and not a court; and the goal of the Securities Commission is to regulate economic activity.

[35] Similarly, in *Lebski*, a Competition Tribunal decision, the penalty was imposed by an administrative tribunal and not a court. U.S. Steel rhetorically asks, "is a fine when it is imposed by a court of law ever anything other than a true penal consequence".

## **Analysis**

[36] Turning to the first branch of the *Wigglesworth* test, in particular, the objectives of the Act and section 40, the purpose of the legislation is found in section 2. It reads:

Recognizing that increased capital and technology benefits Canada, and recognizing the importance of protecting national security, the purposes of this *Act* are to provide for the review of significant investments in Canada by non-Canadians in a manner that encourages investment, economic growth and employment opportunities in Canada and to provide for the review of investments in Canada by non-Canadians that could be injurious to national security.

[37] The stated purposes are two-fold. The first is to establish a process to review significant investments in Canada by non-Canadian investors that encourages foreign investment and fosters economic growth and employment opportunities in Canada. The second purpose is to provide a mechanism to review investments in Canada by non-Canadian investors that could be injurious to

national security. The ultimate objective of the legislation in relation to the first purpose is to ensure that the proposed investment “is likely to be of net benefit to Canada”. As to the second, the objective is self-evident.

[38] As to the objective of the proceeding at issue, a section 40 proceeding is the second of a two stage process. As set out above, at the first stage under section 39, the ministerial demand gives the non-Canadian investor an opportunity to show cause why there has been no contravention, to remedy a default and to justify any non-compliance with undertakings. The ministerial demand also gives notice to the non-Canadian investor of the consequences flowing from a failure to comply with the demand. Additionally, although section 39.1 only came into force in March 2009, it provides that if the Minister believes a non-Canadian investor has failed to comply with an undertaking, the Minister may, after the implementation of the investment accept a new undertaking from the investor.

[39] In the event that the investor allegedly fails to comply with a ministerial demand, the Minister may initiate a section 40 proceeding. The range of orders that may be imposed if the court is satisfied that the Minister was justified in sending the demand and there has been a failure to comply with the demand include various degrees and forms of divestiture, directions to the investor to comply with any undertakings and to provide information requested by the Minister or the Director and the imposition of a penalty not exceeding ten thousand dollars per breach for each day the investor is in contravention of the Act.

[40] The central feature of the legislation is the determination that the proposed investment “is likely to be of net benefit to Canada”. This determination is based on the strength of the investor’s information, representations and undertakings in relation to the broad economic factors found in section 20. If the investment is not carried out in accordance with the basis upon which it was approved, in particular, if the undertakings are not honoured, there is a risk that the ultimate objective of the legislation will be undermined.

[41] Read in the context of sections 39 and 39.1, and having regard to the legislative objectives and the types of orders available under section 40, the objective of a section 40 proceeding is to enforce compliance with the provisions of the Act and any undertakings that may have been given in support of the application for approval.

[42] The second criterion in *Martineau* concerns the purpose of the sanction. Although there are a number of sanctions that may be imposed under section 40, the focus for the purpose of this motion is on the monetary penalty. Having regard to the purpose and the objectives of the legislation, the critical role that undertakings play in the approval process and in ensuring the attainment of the legislative objectives, the opportunity for voluntary compliance prior to the initiation of a section 40 proceeding, the “for each day ... in contravention” structuring of the monetary penalty, I find that the purpose of the monetary penalty is to encourage and promote timely compliance and to enforce compliance with any undertakings and provisions of the legislation.

[43] As to the third criterion, the process leading to the imposition of the sanction, under the Act is an application brought on behalf of the Minister in a superior court, a civil proceeding. This reflects Parliament's deliberate choice to enforce compliance with undertakings and the provisions of the Act through a civil and not a criminal proceeding.

[44] U.S. Steel stresses the public nature of the legislation and that it is aimed at promoting the public order and welfare within a public sphere of activity. There is no doubt that the legislation has a public aspect in that it is aimed at encouraging investment, economic growth and employment opportunities for the benefit of Canadians. However, it does not necessarily follow from the broad public aspect of the legislation alone that the legislation and, in particular, a section 40 proceeding is aimed at regulating a public sphere of activity. In my view, a section 40 proceeding is not concerned with a public sphere of activity. As stated above, a section 40 proceeding arises in the context of a private transaction involving the acquisition of interests in Canadian businesses by private investors. A section 40 proceeding concerns the information, representations and undertakings given by a non-Canadian investor to the government to obtain ministerial approval of a private investment. In a section 40 proceeding, the investor is not being called to account to the public. The investor is being called to account to the government for a failure to honour commitments made to the government.

[45] Further, apart from the assertion that a section 40 proceeding is intended to promote public order and welfare, U.S. Steel did not explain the basis upon which the regulated activity implicates or threatens the public order and welfare. While I accept that a section 40 proceeding serves a

public purpose, in my opinion it does not serve the broader public service of promoting the public order and welfare within a public sphere of activity.

[46] The legislative history also supports the conclusion that a section 40 proceeding is non-criminal in nature. Under the *FIRA*, the predecessor legislation, the enforcement proceedings for non-compliance were criminal in nature. At the February 5, 1985 meeting of the Standing Committee on Regional Development, the responsible Minister, the Hon. Sinclair Stevens explained:

In order to ensure compliance with the proposed act, sections 39 to 43 of the bill provide for certain penalties but, contrary to the current legislation, Bill C-15 prescribes civil, as opposed to criminal penalties for non-compliance. There is only one exception. There is a criminal penalty for breach of confidentiality or the provision of false information. ...

De façon à assurer le respect de la loi, les articles 39 à 43 du projet de loi prévoient certaines sanctions. À l'encontre de la loi actuelle, le projet de loi C-15 prévoit des sanctions d'ordre civil, plutôt que criminel, pur le défaut de se conformer à la loi. Il n'y a qu'une exception : des sanctions criminelles sont prévues pour bris de confidentialité ou faux renseignements. ...

Accordingly, it can be seen that in implementing the ICA Parliament intended a civil enforcement mechanism and civil penalties to deal with non-compliance.

[47] It is convenient at this point to touch briefly on the second purpose of the legislation, namely, to ensure that proposed investments will not be injurious to national security. U.S. Steel relies on the recognition of the importance of national security to show the public nature of the Act.

Clearly, national security is a matter of public interest. However, as stated above, it does not necessarily follow from this broad public interest component that the legislation and a section 40 proceeding are penal in nature. In my view, the provisions of the Act regarding national security are aimed at preventing investments that may compromise national security and, in this sense, further the legislative purpose.

[48] U.S. Steel also submits that the penal nature of a section 40 proceeding is also reflected in the fact that section 40 is in part VII of the Act under the heading “Remedies, Offences and Punishment”. I am not persuaded that this assists U.S. Steel’s position given that the heading includes “remedies” and not just “offences and punishment” and section 42 in the same part of the Act creates two offences punishable on summary conviction.

[49] In the course of its argument, U.S. Steel compared and contrasted the ICA with other legislation in an attempt to demonstrate that this legislation is unlike other regulatory legislation or legislation focused on private, internal or disciplinary matters that are not penal in nature. In my view, given the unique character of this legislation this approach is not particularly helpful. As Chief Justice McLachlin stated in *R. v. Shubley*, [1990] 1 S.C.R. 3 at page 18, “the logic of *R v. Wigglesworth* is to proceed not by a category approach, but by application of the general principles” articulated in that case.

[50] Based on the above considerations, I conclude that a section 40 proceeding is not “by nature” a penal proceeding.

[51] Even though, in my opinion, this is not the type of matter that was intended to come within section 11 of the *Charter*, section 11 may still be engaged if it involves the imposition of a true penal consequence. In *Wigglesworth*, at paragraph 24, Justice Wilson described a true penal consequence in the following terms:

This is not to say that if a person is charged with a private, domestic or disciplinary matter which is primarily intended to maintain discipline, integrity or to regulate conduct within a limited private sphere of activity, he or she can never possess the rights guaranteed under s. 11. Some of these matters may well fall within s. 11, not because they are the classic kind of matters intended to fall within the section, but because they involve the imposition of true penal consequences. In my opinion, a true penal consequence which would attract the application of s. 11 is imprisonment or a fine which by its magnitude would appear to be imposed for the purpose of redressing the wrong done to society at large rather than to the maintenance of internal discipline within the limited sphere of activity.

[52] As stated above, U.S. Steel contends that the magnitude of the monetary penalty alone is sufficient to engage section 11(d) of the *Charter*. U.S. Steel characterizes the potential monetary penalty under section 40 as being a “King Kong fine” and submits that the magnitude is of such significance that it can only be regarded as a true penal consequence. This assertion raises a number of questions. The first is whether U.S. Steel’s interpretation of the second branch of the test is correct. As set out earlier, U.S. Steel’s interpretation is that it is the fine by its magnitude that leads to the conclusion it is being imposed for the purpose of redressing the harm done to society.

[53] U.S. Steel claims that its interpretation is supported by Justice Wilson’s observation “... that if a body or an official has an unlimited power to fine, and if it does not afford the rights

enumerated under s. 11, it cannot impose fines designed to redress the harm done to society at large”. I note, however, that Justice Wilson added “[i]nstead, it is restricted to the power to impose fines in order to achieve the particular private purpose.” I interpret Justice Wilson’s observation to mean that a body can have an unlimited power to fine, however, to determine whether the penalty is a true penal consequence the analysis has to proceed beyond the magnitude of the fine to determine whether it is being imposed for the purpose of redressing the harm done to society or for a particular private purpose.

[54] I note, as well, that U. S. Steel’s interpretation of the test does not find support in the jurisprudence. In *Martineau*, the appellant argued that the magnitude of the amount claimed under the *Customs Act*, R.S.C. 1985 c.1 (2<sup>nd</sup> Supp.) made it a true penal consequence. In rejecting the argument, Justice Fish observed that the argument was falsely premised on magnitude alone and continued his analysis to determine whether the payment claimed under the *Customs Act* constituted a fine that by its magnitude was being imposed for the purpose of redressing a wrong done to society.

[55] More recently, in *Lavallee*, a case concerning the Alberta securities legislation, Chief Justice Wittmann, at paragraph 142, stated:

My reading of *Wigglesworth* is that, on one hand, the fact that the *Securities Act* is regulatory legislation is obviously not sufficient to determine whether the consequences of the application of s. 29 leads to true penal consequences. **On the other hand, the dollar amount of the administrative penalty or its magnitude is not determinative, in itself, to qualify as a true penal consequence.** In fact, it is the magnitude of the administrative penalty combined with the purpose for which it can be imposed that will determine whether it entails true penal consequences. **[Emphasis added]**

[56] Subsequent to the hearing of this motion, the Alberta Court of Appeal dismissed the appeal from this decision: *Lavallee v. Alberta (Securities Commission)*, [2010] A.J. No. 144. On the question as to whether the magnitude of a penalty alone was sufficient to engage the protections of section 11, of the *Charter*, the Court observed at paragraph 23:

... The chambers judge rejected that argument, emphasizing the need to consider the purpose of the sanction, and not just its magnitude, in assessing whether it amounts to a true penal consequence. Moreover, when considering the purpose of the sanction it is necessary to consider the overarching purposes of the *Securities Act*, which include the protection of investors and the public, the efficiency of the capital markets, and ensuring public confidence in the system. In the end, the chambers judge agreed with this Court's conclusion, at para. 54 of *Brost*, that the increase in the magnitude of administrative penalties reflects a legislative intent to ensure that the penalties are not simply considered another cost of doing business. He therefore concluded that no true penal consequences arise under ss. 198 and 199 of the *Securities Act* and that s. 11 of the *Charter* is, accordingly, not engaged here. I agree.

[57] Having regard to Justice Wilson's observation and the jurisprudence it is clear that the magnitude of a monetary penalty alone is not a sufficient basis upon which to conclude that the penalty is a true penal consequence. However, this does not fully respond to U.S. Steel's argument. U.S. Steel contends that there is a point at which the penalty is so large that the only conclusion that can be drawn is that it is a true penal consequence. U. S. Steel submits that the characterization of a penalty as an administrative monetary penalty cannot immunize it from *Charter* scrutiny and notes the following recent statement of the Federal Court of Appeal in *Doyon v. Canada (Attorney General)*, 2009 FCA 152, at paragraph 27:

In short, the Administrative Monetary Penalty System has imported the most punitive elements of penal law while taking care to exclude useful defences and reduce the prosecutor's burden of proof. Absolute liability, arising from an *actus reus* which the

prosecutor does not have to prove beyond a reasonable doubt, leaves the person who commits a violation very few means of exculpating him- or herself.

[58] The difficulty with this argument is that the enormity of a monetary penalty cannot be assessed in isolation. On the one hand, in the context of the financial threshold of the investments subject to review under the ICA, 281 million dollars at the time of the approval in this case, a monetary penalty of \$10,000 per breach for each day the investor is in contravention may be less significant. On the other hand, in the context of the five million dollar financial threshold for investors from non-World Trade Organization countries the potential penalty is enormous. Without context, it cannot be said that a dollar value alone, can lead to no other inference but that the penalty is being imposed to punish. To be effective, the legislated monetary penalty has to be of a sufficient scope to address the financial range of the reviewable investments. It also has to be of a sufficient magnitude to deter non-compliance and to not be seen as simply a cost of doing business.

[59] As part of the response to U.S. Steel's assertion that the magnitude of the monetary penalty alone is sufficient to make it a true penal consequence, the Attorney General notes that the determination of the amount of the penalty is a matter of judicial discretion to which U.S. Steel counters that the exercise of judicial discretion cannot save an otherwise unconstitutional provision. This argument is rejected for two reasons. First, the argument is premised on the assertion that the magnitude of the maximum monetary penalty available under the legislation alone is sufficient to render the provision unconstitutional. Section 40 does not require the imposition of the maximum monetary penalty or any monetary penalty. The court may make

any order or orders the court considers the circumstances require. Second, as the Attorney General submits, this argument assumes a prospective breach of the *Charter* in the exercise of the discretion under the monetary penalty provision of the Act. As Justice Lebel reaffirmed in *R. v. Shoker*, [2006] 2 S.C.R. 399, at para. 39, Parliament is entitled to assume that its legislation will be applied in a manner consistent with the constitution.

[60] As to U.S. Steel's reference to the *Doyon* decision, on my reading of the decision the reference to the "Administrative Monetary Penalty System" is not to the use of administrative monetary penalties generally but to the particular system established by the *Agriculture and Agri-Food Administrative Monetary Penalties Act*, S.C. 1995, c. 40 and *Regulations*. Further, the decision does not deal with the question as to what constitutes a true penal consequence.

[61] The fact that the upper limit of the monetary penalty is \$10,000 per breach for each day the non-Canadian investor is in contravention alone does not render the provision unconstitutional.

[62] The next question is whether the imposition of the monetary penalty under the Act is to redress the harm done to society. U.S. steel argues that a number of indicators show that it is. As Justice Wilson stated in *Wigglesworth*, one indicator of the purpose of a fine is the manner in which the recipient entity disposes of the fine. In particular, "if the fines are not to form part of the Consolidated Revenue Fund but are to be used for the benefit of the [body], it is more likely that the fines are purely an internal or private matter of discipline". Under the IAC, the monetary

penalty is a debt to her Majesty the Queen in right of Canada that ultimately forms part of the Consolidated Revenue Fund. Although in the context of legislation concerning professional disciplinary matters the fact that the monetary penalty is used for some internal benefit is a useful indicator of the purpose of the sanction, it is not a useful or relevant indicator given that the legislation at issue does not concern these internal types of matters. As well, the fact that the monetary penalty ultimately forms part of the Consolidated Revenue Fund is at best neutral in light of the fact that there is no internal body to which the penalty could be paid and there is no other fund to which the penalty could be paid. I note, as well, that administrative monetary penalties under other legislation, such as, income tax, competition, and customs legislation all become part of the Consolidated Revenue Fund.

[63] U.S. Steel also points out that unlike other administrative penalties the monetary penalty under the ICA is unconnected to the extent of the breach and it has no mathematical connection with the regulated activity or the loss. In the same vein, U.S. Steel notes that the monetary penalty is unlimited, it does not serve some compensatory purpose, it is unrelated to the monetary implications flowing from non-compliance and the Act does not provide any criteria for the determination of the amount of the monetary penalty. U.S. Steel takes the position that in these circumstances the only reasonable inference that can be drawn is that the amount of the penalty is being determined on some other basis, namely, to redress the harm done to society at large.

[64] As to the monetary penalty being limitless, although, in my view, this characterization is inaccurate in that there are both temporal and monetary limits, even if it is correct, as Justice Wilson stated an unlimited power to fine is permissible provided that it is being imposed to achieve a particular private purpose. While it may be true that the existence of some connection between the penalty and the conduct at issue is a useful indicator, it does not necessarily follow that redressing the harm done to society is the only possible purpose of the penalty.

[65] Additionally, the absence of any criteria in the Act on which to determine the amount of the monetary penalty is of no consequence. Should the circumstance arise, part of the court's task will be to identify those factors that are relevant to the determination of the amount of the monetary penalty.

[66] U.S. Steel also argues that the potential exposure to a term of imprisonment as a result of a contempt proceeding makes the penalty a true penal consequence. I reject this argument. The contempt proceeding is not brought under the ICA. Rather, it is a separate proceeding brought pursuant to the *Federal Courts Rules*, SOR/98-106 where the alleged contemnor will be accorded all of the section 11(d) *Charter* protections and, if found guilty, will be subject to the penalties provided in the *Rules*.

[67] In the absence of any of the usual indicia, on what basis can it be determined whether the monetary penalty by its magnitude is being imposed for the purpose of redressing the harm done to society. In the context of ICA, the court should have regard to the objectives of the

legislation, the legislative scheme including the nature of the monitoring process and the availability of the opportunity to voluntarily comply or remedy a default, the critical role the investor's undertakings play in the attainment of the legislative objectives, the nature of the transaction subject to review, the relationship between the investor and the government, the conduct being sanctioned is not morally blameworthy conduct and the structuring of the monetary penalty. Having regard to these factors, I conclude that the monetary penalty is not a true penal consequence. Instead, the purpose of the monetary penalty is to promote and ensure the attainment of the legislative objectives.

### **The *Bill of Rights***

[68] Section 2(e) of the *Bill of Rights* reads:

2. Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the *Canadian Bill of Rights*, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to

(e) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the

2. Toute loi du Canada, à moins qu'une loi du Parlement du Canada ne déclare expressément qu'elle s'appliquera nonobstant la *Déclaration canadienne des droits*, doit s'interpréter et s'appliquer de manière à ne pas supprimer, restreindre ou enfreindre l'un quelconque des droits ou des libertés reconnus et déclarés aux présentes, ni à en autoriser la suppression, la diminution ou la transgression, et en particulier, nulle loi du Canada ne doit s'interpréter ni s'appliquer comme

e) privant une personne du droit à une audition impartiale de sa cause, selon les principes de justice fondamentale, pour la

determination of his rights and obligations;      définition de ses droits et obligations;

[69] It is not disputed that the *Bill of Rights* applies to the ICA. As well, it is not disputed that the *Bill of Rights* section 2(e) protections extend to corporations. The question is whether section 40 violates the right to a fair hearing in accordance with the principles of fundamental justice. U.S. Steel takes the position that it does.

[70] U.S. Steel submits that the meaning of the phrase “the principles of fundamental justice” is context-specific having regard to the nature of the rights and the extent of the jeopardy at issue. In summary, U.S. Steel asserts that the factual and legal context in the present case is one in which it is exposed to extreme sanctions, including a multimillion dollar penalty, and the most serious interference with the enjoyment of property, forced divestiture, through a summary civil application process without the most basic procedural protections of fundamental justice. In particular, it does not give the non-Canadian investor a right of full disclosure, a right to know the case to meet, or a right to hear the applicant’s case before being called upon to answer. Additionally, the Act does not state the applicable burden of proof, the requisite elements of a failure to comply and justification are not defined, and the available defenses are not delineated. This results in vagueness and leaves the judiciary to decide the matter in a vacuum.

[71] U.S. Steel maintains that “given the severity of the consequences in the adjudication of the rights at issue in the instant legislation, . . . the principles of fundamental justice must provide the investor with the full range of procedural and substantive protections available pursuant to the *Bill*

*of Rights*, including the right to know the case to meet, the right to full disclosure and the right to fair notice of the proscribed conduct and the available defences.” At this point, it should be noted that U.S. Steel initially argued that the *Bill of Rights* guarantees both substantive and procedural rights, however, U.S. Steel abandoned its position in relation to substantive rights.

[72] U.S. Steel acknowledges that the term “the principles of fundamental justice” in section 7 of the *Charter* does not have the same meaning as it does in section 2(e) of the *Bill of Rights*.

However, relying on the Supreme Court of Canada decision in *Reference re Motor Vehicles Act (British Columbia) section 94(2)*, [1985] 2 S.C.R. 486, paras. 31-33, U.S. Steel argues that the procedural protections provided by section 2(e) are much broader than those provided under the common law principles of natural justice and that the term “the principles of fundamental justice” under section 2(e) is not synonymous with the term “the principles of natural justice”. Therefore, *Charter* jurisprudence is relevant and informs the meaning of “the principles of fundamental justice” in the *Bill of Rights*.

[73] U.S. Steel submits that the right to make full answer and defence is the bedrock of the principles of fundamental justice. In *R. v. Rose*, [1998] 3 S.C.R. 262, at paras. 98 and 103, the Supreme Court of Canada stressed the importance of this right and explained the breadth of the right and the manner in which this right is implicated in other rights and principles. The Court stated:

98 The right to make full answer and defence is protected under s. 7 of the Charter. It is one of the principles of fundamental justice. In *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, at p. 336, Sopinka J., writing for the Court, described this right as “one of the pillars of criminal justice on which we heavily depend to ensure that the innocent are not convicted”. The right to make full answer and defence manifests itself in several more specific rights and principles, such as the right to full and timely disclosure, the right to know the case to be

met before opening one's defence, the principles governing the re-opening of the Crown's case, as well as various rights of cross-examination, among others. The right is integrally linked to other principles of fundamental justice, such as the presumption of innocence, the right to a fair trial, and the principle against self-incrimination.

...

103 A second and broader aspect of the right to make full answer and defence, which might be understood as encompassing the first aspect, is the right of an accused person to defend himself or herself against all of the state's efforts to achieve a conviction. The Crown is not entitled to engage in activities aimed at convicting an accused unless that accused is permitted to defend against those state acts. ...

[74] As well, U.S. Steel submits that in *R. v. Duke*, [1972] 1 O.R. 61-77 at para. 10 (OHCJ), rev'd, Justice Galligan held that the right to make full answer and defence is an integral component of a fair hearing in accordance with the principles of fundamental justice under section 2(e) of the *Bill of Rights*. He stated:

... One of the essential elements of a fair hearing in accordance with the principles of fundamental justice is the right to make full answer and defence. In the event that it is sought to apply any provision of an Act of the Parliament of Canada in such a fashion that this right is denied and an accused then, in my opinion, there is a clear contravention of the provisions of s. 2(e) of the *Bill of Rights*. ...

APPEAL by the Crown from an order of Galligan, J., *infra*, 15 C.R.N.S. 51, prohibiting a Provincial Court Judge from proceeding on an information [1972] S.C.R. 917; [1972] R.C.S. 917;

[75] It is well established that the meaning of the term “the principles of fundamental justice” as it is used in section 2(e) will vary according to the context. In *Canada (Attorney General) v. Central Cartage Co.*, [1990] F.C.J. No. 407, at para. 13 (F.C.A.), the Federal Court of Appeal recognized that the concept of a fair hearing under section 2(e) of the *Bill of Rights* is not static. The Court of Appeal instructed that a court interpreting the concept should not lose sight of “its origin

and evolution and the specific context in which it is raised.” That is, “the guarantee of a fair hearing in paragraph 2(e) should be given a meaning that recognizes not only the interpretation and evolution of the term over time but also the particular circumstances involved.”

[76] U.S. Steel’s submission that the term “principles of fundament justice” under section 2(e) is broader than and not synonymous with the term “principles of natural justice” has been the subject of comment in a number of cases. In the pre-*Charter* Supreme Court of Canada decision in *Duke v. The Queen*, [1972] S.C.R. 917 at 923, Chief Justice Fauteux stated:

... Under s. 2(e) of the *Bill of Rights* no law of Canada shall be construed or applied so as to deprive him of "a fair hearing in accordance with the principles of fundament justice." Without attempting to formulate any final definition of those words, I would take them to mean, generally, that the tribunal which adjudicates upon his rights just act fairly, in good faith, without bias and in a judicial temper, and must give to him the opportunity adequately to state his case.

[77] More recently, in *Bell Canada v. Canadian Telephone Employees Association*, [2003] 1 S.C.R. 884, at paragraph 28, the Supreme Court of Canada noted with approval that “Canadian courts have held that the content of s. 2(e) is established by reference to common law principles of natural justice”. The Court also noted that as the parties in that case had not suggested that the guarantees of independence and impartiality under section 2(e) would differ from the common law requirements of procedural fairness, a further consideration of this issue was unnecessary. In the present case, U.S. Steel acknowledges that the issues of independence and impartiality do not arise in the present case.

[78] As to U.S. Steel's reliance on the *B.C. Motor Vehicles* case, on my reading of the passage referenced, when Chief Justice Lamer stated that "to replace "fundamental justice" with the term "natural justice" misses the mark entirely" he was referring to the meaning of "fundamental justice" as it is used in the *Charter* and not the *Bill of Rights*. Similarly, in the reference to "the degree of synonymy between the two expressions in the past", the Chief Justice was referring to the synonymy of the term "fundamental justice" and the term "natural justice"

[79] Accordingly, it can be seen that a fair hearing in accordance with the principles of fundamental justice in the context of section 2(e) of the *Bill of Rights* is synonymous with the concept of natural justice and procedural fairness. It remains to be determined what the requirements of natural justice are in these circumstances.

[80] As Justice L'Heureux-Dubé stated in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at paragraph 22, "the duty of fairness is flexible and variable, and depends on an appreciation of the context of the particular statute and the rights affected, ...". Justice L'Heureux-Dubé explained that a number of factors are relevant to the determination of the requirements of the duty of fairness are in a particular context.

[81] However, as the Attorney General points out, the *Baker* analysis is somewhat anomalous in the present case as it is directed at the requirements of fairness in the context of administrative hearings and not judicial hearings. I agree with this observation. The *Baker* analysis is generally retrospective in application and aimed at helping a court "determine whether the procedures that

were followed respected the duty of fairness.” While the structure of the analysis may not be helpful, this does not undermine the importance and the relevance of the principles that may be drawn from *Baker*.

[82] As Justice L’Heureux-Dubé stated at paragraph 28, “[t]he values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decisions affecting their rights, interests, or privileges made using a fair, impartial, and open process, appropriate to the statutory, institutional, and social context of the decision.” That is, the underlying values and all of the circumstances must be considered to determine the content of the duty of fairness in a given situation.

[83] It is evident from U.S. Steel’s oral and written submissions that while it recognizes the context-specific nature of the analysis in principle, their assertion as to the requirements of the duty of fairness is grounded on the magnitude of the monetary penalty and the possibility of forced divestiture. It is from this premise that U.S. Steel maintains that an investor facing a section 40 proceeding should, in effect, be accorded the same right to make full answer and defence together with the related rights including *Stinchcombe* disclosure that would be accorded to a defendant in a criminal proceeding. In my opinion, this position stems from a narrow focus on the penalties at issue and fails to take into account the broader context and circumstances within which a section 40 proceeding arises. Even if the focus of the inquiry was limited to the nature of the penalties, it would not give rise to the expansive rights U.S. Steel submits section 2(e) requires.

[84] There is no doubt that the importance of the decision to the affected party is a significant factor. However, a distinction must be drawn between those decisions that implicate the life, liberty, and security of the person involved and those, as in the present case, having only an economic impact. As well, the magnitude of the penalty and the forced divestiture have to be viewed in the context of the legislative scheme. Although when viewed in isolation the monetary penalty may appear to be very large, as stated earlier, having regard to the financial thresholds that trigger ministerial review and approval, the penalties under the ICA have to be sufficiently significant to be effective given the size of the investments under the Act. Further, although the possibility of forced divestiture appears to be ominous and a serious intrusion on the right to the enjoyment of property, having regard to the objectives of the legislation and the broad discretion a court has in structuring a divestiture, it does not rise to the level of those decisions in which the life, liberty and security of the person are at stake. It is purely an economic outcome. It is also important to note that a section 40 proceeding arises in a regulatory context. As well, the parties seeking ministerial approval are sophisticated, well represented, economic actors who are given an opportunity of voluntary compliance before the application at issue is undertaken.

[85] For this reason, U.S. Steel's reliance on *R v. Rose*, above, is misplaced. That decision established a broad right to "make full answer and defence" in a criminal context. For example, the Supreme Court of Canada noted, at paragraphs 98 to 100, that this right was "one of the pillars of criminal justice," was linked to the presumption of innocence and the principle against self-incrimination, and included "the right of an accused person to defend himself or herself against all

of the state's efforts to achieve a conviction." Similarly, most of the cases upon which U.S. Steel relies in support of its assertion of the procedural rights are from the criminal and are not helpful in the context of the legislation at issue.

[86] Turning to the application process contemplated in section 40 of the Act, U.S. Steel does not seriously contend that it will be denied the opportunity to be heard through both written and oral submissions or, as stated earlier, to have its case decided by an independent and impartial decision-maker. Rather, U.S. Steel argues that it will not be given an adequate opportunity to know the case it has to meet. In summary, U.S. Steel says that it does not know why the Minister thinks its undertakings were breached since the undertakings were subject to the Guidelines with which U.S. Steel maintains it complied. Furthermore, U.S. Steel also says it does not know the reason for the Minister's assertion that it failed to comply with the demand to justify its breach of the undertakings and believes it has provided adequate justification.

[87] In my view, there are adequate procedural protections in the *Federal Courts Rules*, SOR/98-106 relating to the conduct of applications to permit U.S. Steel to know the case it has to meet. First, a notice of application must, among other things, state the grounds intended to be argued, including any reliance on statutory or regulatory provisions and must include a list of the documentary evidence to be used at the hearing.

[88] Second, the Attorney General must file his affidavits and documentary exhibits well in advance of the hearing. Prior to submitting any legal argument, U.S. Steel will have an opportunity

to conduct cross-examinations on the Attorney General's affidavits. Thus, U.S. Steel will have all of the evidence upon which the Attorney General intends to rely.

[89] Third, before the matter comes on for hearing, the Attorney General, as the applicant, will have had to serve and file the applicant's record containing all affidavit and documentary evidence, descriptions of any physical evidence together with its memorandum of fact and law. Thus, U.S. Steel will know the basis for the Minister's belief that there has been a breach of an undertaking and the Minister's reason for rejecting its justification. Further, the Attorney General is, without leave of the court, precluded from raising any new allegations or arguments.

[90] Fourth, U.S. Steel points out that it must serve and file its affidavit and documentary evidence before fully knowing the Attorney General's case, that is, before cross-examining the Attorney General's affiants and before receiving the Attorney General's memorandum of fact and law. However, U.S. Steel may apply for leave to file additional affidavits, conduct additional cross-examinations or file a supplementary record after the parties have exchanged records.

[91] Based on the above review of the applications procedure, I am satisfied that having regard to the context and the potential consequences to U.S. Steel, it satisfies the right to a fair hearing in accordance with the principles of fundamental justice, in particular, its right to know the case to meet.

[92] As noted earlier, U.S. Steel abandoned its position that section 2(e) also provides substantive rights. In its argument on the substantive rights, U.S. Steel claimed that section 40 is void for vagueness under section 2(e) of the *Bill of Rights*. However, in reply, U.S. Steel attempted to bring the vagueness argument within the procedural right to know the case to meet. It argued that the Minister is not given sufficient legislative guidance regarding the circumstances that should require the issuance of a ministerial demand and the “parameters governing the enforcement” of the Act. In *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606, the Supreme Court of Canada made it clear that the principle of vagueness is intended to ensure a citizen understands that “certain conduct is the subject of legal restrictions” and is, therefore, a substantive right. Accordingly, the vagueness argument will not be considered.

### **Conclusion**

[93] For the above reasons, I conclude that section 40 of the ICA does not violate section 11(d) of the *Charter* or section 2(e) of the *Bill of Rights*. The motion will be dismissed with costs to the Attorney General.

### **ORDER**

**THIS COURT ORDERS that** the motion is dismissed with costs to the Attorney General of Canada.

“Dolores M. Hansen”

---

Judge

## ANNEX “A”

*Investment Canada Act*, R.S. 1985, c.28 (1st Supp.)

**2.** Recognizing that increased capital and technology benefits Canada, and recognizing the importance of protecting national security, the purposes of this Act are to provide for the review of significant investments in Canada by non-Canadians in a manner that encourages investment, economic growth and employment opportunities in Canada and to provide for the review of investments in Canada by non-Canadians that could be injurious to national security.

**20.** For the purposes of section 21, the factors to be taken into account, where relevant, are

(a) the effect of the investment on the level and nature of economic activity in Canada, including, without limiting the generality of the foregoing, the effect on employment, on resource processing, on the utilization of parts, components and services produced in Canada and on exports from Canada;

(b) the degree and significance of participation by Canadians in the Canadian business or new Canadian business and in any industry or industries in Canada of which the Canadian business or new Canadian business forms or would form a part;

(c) the effect of the investment on productivity, industrial efficiency, technological development, product

*Loi sur investissement Canada*, L.R., 1985, ch. 28 (1er suppl.)

**2.** Étant donné les avantages que retire le Canada d'une augmentation du capital et de l'essor de la technologie et compte tenu de l'importance de préserver la sécurité nationale, la présente loi vise à instituer un mécanisme d'examen des investissements importants effectués au Canada par des non-Canadiens de manière à encourager les investissements au Canada et à contribuer à la croissance de l'économie et à la création d'emplois, de même qu'un mécanisme d'examen des investissements effectués au Canada par des non-Canadiens et susceptibles de porter atteinte à la sécurité nationale.

**20.** Pour l'application de l'article 21, il est tenu compte de ceux des facteurs suivants quis'appliquent :

a) l'effet de l'investissement sur le niveau et la nature de l'activité économique au Canada, notamment sur l'emploi, la transformation des ressources, l'utilisation de pièces et d'éléments produits et de services rendus au Canada et sur les exportations canadiennes;

b) l'étendue et l'importance de la participation de Canadiens dans l'entreprise canadienne ou la nouvelle entreprise canadienne en question et dans le secteur industriel canadien dont cette entreprise ou cette nouvelle entreprise fait ou ferait partie;

c) l'effet de l'investissement sur la productivité, le rendement industriel, le progrès technologique, la création de produits nouveaux et la diversité des

innovation and product variety in Canada;

(d) the effect of the investment on competition within any industry or industries in Canada;

(e) the compatibility of the investment with national industrial, economic and cultural policies, taking into consideration industrial, economic and cultural policy objectives enunciated by the government or legislature of any province likely to be significantly affected by the investment; and

(f) the contribution of the investment to Canada's ability to compete in world markets.

**21.** (1) Subject to subsections (2) to (8) and sections 22 and 23, the Minister shall, within 45 days after the certified date referred to in subsection 18(1), send a notice to the applicant that the Minister, having taken into account any information, undertakings and representations referred to the Minister by the Director under section 19 and the relevant factors set out in section 20, is satisfied that the investment is likely to be of net benefit to Canada.

**38.** The Minister may issue and publish, in such manner as the Minister deems appropriate, guidelines and interpretation notes with respect to the application and administration of any provision of this Act or the regulations.

**39.** (1) Where the Minister believes that a non-Canadian, contrary to this Act,

produits au Canada;

d) l'effet de l'investissement sur la concurrence dans un ou plusieurs secteurs industriels au Canada;

e) la compatibilité de l'investissement avec les politiques nationales en matière industrielle, économique et culturelle, compte tenu des objectifs de politique industrielle, économique et culturelle qu'ont énoncés le gouvernement ou la législature d'une province sur laquelle l'investissement aura vraisemblablement des répercussions appréciables;

f) la contribution de l'investissement à la compétitivité canadienne sur les marchés mondiaux.

**21.** (1) Sous réserve des paragraphes (2) à (8) et des articles 22 et 23, dans les quarante cinq jours suivant la date de réception visée au paragraphe 18(1), le ministre envoie au demandeur un avis l'informant que, après avoir pris en considération les renseignements, engagements et observations qui lui ont été remis par le directeur en conformité avec l'article 19 et les facteurs énumérés à l'article 20 qui s'appliquent, il est d'avis que l'investissement sera vraisemblablement à l'avantage net du Canada.

**38.** Le ministre peut établir et publier, de la façon qu'il estime indiquée, des principes directeurs et des notes explicatives sur l'application et l'administration d'une disposition de la présente loi ou des règlements.

**39.** (1) Le ministre peut faire émettre une mise en demeure à l'intention d'un non-

Canadien qui, selon lui, a, contrairement à la présente loi, selon le cas :

- |  |  |
|--|--|
| <p>(a) has failed to give a notice under section 12 or file an application under section 17, (a.1) has failed to provide any prescribed information or any information that has been requested by the Minister or Director,</p>                | <p>a) fait défaut de déposer l'avis mentionné à l'article 12 ou la demande d'examen mentionnée à l'article 17;<br/>a.1) omis de fournir les renseignements prévus par règlement ou ceux exigés par le ministre ou le directeur;</p>  |
| <p>(b) has implemented an investment the implementation of which is prohibited by section 16, 24, 25.2 or 25.3,</p>  | <p>b) effectué un investissement en contravention avec les articles 16, 24, 25.2 ou 25.3;</p>  |
| <p>(c) has implemented an investment on terms and conditions that vary materially from those contained in an application filed under section 17 or from any information or evidence provided under this Act in relation to the investment,</p> | <p>c) effectué un investissement selon des modalités qui sont substantiellement différentes de celles que contenait la demande d'examen déposée en conformité avec l'article 17 ou des autres renseignements ou éléments de preuve fournis en conformité avec la présente loi à l'égard de l'investissement;</p> |
| <p>(d) has failed to divest himself of control of a Canadian business as required by section 24,</p>   | <p>d) fait défaut de se départir du contrôle d'une entreprise canadienne comme l'exige l'article 24;</p>   |
| <p>(d.1) has failed to comply with an undertaking given to Her Majesty in right of Canada in accordance with an order made under section 25.4,</p>   | <p>d.1) omis de se conformer à tout engagement pris envers Sa Majesté du chef du Canada conformément au décret pris en vertu de l'article 25.4;</p>  |
| <p>(d.2) has failed to comply with an order made under section 25.4,</p>   | <p>d.2) omis de se conformer au décret pris en vertu de l'article 25.4;</p>  |
| <p>(e) has failed to comply with a written undertaking given to Her Majesty in right of Canada relating to an investment that the Minister is satisfied or is deemed to be satisfied is likely to be of net benefit to Canada,</p>             | <p>e) fait défaut de se conformer à l'engagement écrit envers Sa Majesté du chef du Canada qu'il a pris à l'égard de l'investissement au sujet duquel le ministre est d'avis ou est réputé être d'avis qu'il sera vraisemblablement à l'avantage net du Canada;</p>  |
| <p>(f) has failed to comply with any other</p>   | <p>f) fait défaut de se conformer à une autre</p>  |

provision of this Act or with the regulations, or

(g) has entered into any transaction or arrangement primarily for a purpose related to this Act, the Minister may send a demand to the non-Canadian, requiring the non-Canadian, forthwith or within such period as is specified in the demand, to cease the contravention, to remedy the default, to show cause why there is no contravention of the Act or regulations or, in the case of undertakings, to justify any non-compliance therewith.

(2) If the Minister believes that a person or an entity has, contrary to this Act, failed to comply with a requirement to provide information under subsection 25.2(3) or 25.3(5) or failed to comply with subsection 25.4(3), the Minister may send a demand to the person or entity requiring that they immediately, or within any period that may be specified in the demand, cease the contravention, remedy the default or show cause why there is no contravention of the Act.

(3) A demand under subsection (1) or (2) shall indicate the nature of the proceedings that may be taken under this Act against the non-Canadian or other person or entity to which it is sent in the event that the non-Canadian, person or entity fails to comply with the demand.

**39.1** If the Minister believes that a non-Canadian has failed to comply with a written undertaking given to Her Majesty in right of Canada relating to an investment that the Minister is satisfied or is deemed to be satisfied is likely to be of net benefit to Canada, the Minister may, after the investment has been implemented, accept a

disposition de la présente loi ou des règlements;

g) procédé à une opération ou à un arrangement dans un but lié à la présente loi. La mise en demeure exige du non-Canadien, de mettre fin, immédiatement ou à l'intérieur du délai qu'elle précise, à la contravention, de se conformer à la loi ou aux règlements, ou de démontrer qu'ils n'ont pas été violés ou, dans le cas d'un engagement, de justifier le défaut.

(2) S'il estime qu'une personne ou une unité a, contrairement à la présente loi, omis de se conformer soit à une demande de renseignements faite en vertu des paragraphes 25.2(3) ou 25.3(5), soit au paragraphe 25.4(3), le ministre peut envoyer une mise en demeure exigeant de la personne ou de l'unité que, sans délai ou dans le délai imparti, elle mette fin à la contravention, elle se conforme à la présente loi ou elle démontre que celle-ci n'a pas été violée.

(3) La mise en demeure fait état de la nature des poursuites judiciaires qui peuvent être instituées en vertu de la présente loi contre le non-Canadien, la personne ou l'unité à qui elle est adressée s'il omet de s'y conformer.

**39.1** S'il est d'avis que le non-Canadien a omis de se conformer à l'engagement écrit pris envers Sa Majesté du chef du Canada à l'égard de l'investissement au sujet duquel il est d'avis ou est réputé être d'avis qu'il sera vraisemblablement à l'avantage net du Canada, le ministre peut, une fois l'investissement effectué, accepter un nouvel

new undertaking from the non-Canadian.

**40.** (1) If a non-Canadian or any other person or entity fails to comply with a demand under section 39, an application on behalf of the Minister may be made to a superior court for an order under subsection (2) or (2.1).

(2) If, at the conclusion of the hearing on an application referred to in subsection (1), the superior court decides that the Minister was justified in sending a demand to the non-Canadian or other person or entity under section 39 and that the non-Canadian or other person or entity has failed to comply with the demand, the court may make any order or orders as, in its opinion, the circumstances require, including, without limiting the generality of the foregoing, an order

(a) directing the non-Canadian to divest themselves of control of the Canadian business, or to divest themselves of their investment in the entity, on any terms and conditions that the court considers just and reasonable;

(b) enjoining the non-Canadian from taking any action specified in the order in relation to the investment that might prejudice the ability of a superior court, on a subsequent application for an order under paragraph (a), to effectively accomplish the end of such an order;

(c) directing the non-Canadian to comply with a written undertaking given to Her Majesty in right of Canada in relation to an investment that the Minister is satisfied or is deemed to be satisfied is likely to be of net benefit to Canada;

engagement du non-Canadien.

**40.** (1) Une demande d'ordonnance judiciaire peut être présentée au nom du ministre à une cour supérieure si le non-Canadien, la personne ou l'unité ne se conforme pas à la mise en demeure reçue en application de l'article 39.

(2) Après audition de la demande visée au paragraphe (1), la cour supérieure qui décide que le ministre a agi à bon droit et constate le défaut du non-Canadien, de la personne ou de l'unité peut rendre l'ordonnance que justifient les circonstances; elle peut notamment rendre une ou plusieurs des ordonnances suivantes :

a) ordonnance enjoignant au non-Canadien de se départir soit du contrôle de l'entreprise canadienne, soit de son investissement dans l'unité, selon les modalités que la cour estime justes et raisonnables;

b) ordonnance enjoignant au non-Canadien de ne pas prendre les mesures mentionnées dans l'ordonnance à l'égard de l'investissement qui pourraient empêcher une cour supérieure, dans le cadre d'une autre demande pour une ordonnance visée à l'alinéa a), de rendre une ordonnance efficace;

c) ordonnance enjoignant au non-Canadien de se conformer à l'engagement écrit envers Sa Majesté du chef du Canada pris à l'égard d'un investissement au sujet duquel le ministre est d'avis ou est réputé être d'avis qu'il sera vraisemblablement à l'avantage

net du Canada;

(c.1) directing the non-Canadian to comply with a written undertaking given to Her Majesty in right of Canada in accordance with an order made under section 25.4;

c.1) ordonnance enjoignant au non-Canadien de se conformer à l'engagement écrit pris envers Sa Majesté du chef du Canada conformément au décret pris en vertu de l'article 25.4;

(d) against the non-Canadian imposing a penalty not exceeding ten thousand dollars for each day the non-Canadian is in contravention of this Act or any provision thereof;

d) ordonnance infligeant au non-Canadien une pénalité maximale de dix mille dollars pour chacun des jours au cours desquels se commet ou se continue la contravention;

(e) directing the revocation, or suspension for any period specified in the order, of any rights attached to any voting interests acquired by the non-Canadian or of any right to control any such rights;

e) ordonnance de révocation ou de suspension, pour une période qu'elle précise, des droits afférents aux intérêts avec droit de vote qu'a acquis le non-Canadien ou du droit de contrôle de ces droits;

(f) directing the disposition by any non-Canadian of any voting interests acquired by the non-Canadian or of any assets acquired by the non-Canadian that are or were used in carrying on a Canadian business; or

f) ordonnance enjoignant au non-Canadien de se départir des intérêts avec droit de vote qu'il a acquis ou des actifs qu'il a acquis et qui sont ou ont été utilisés dans l'exploitation de l'entreprise canadienne;

(g) directing the non-Canadian or other person or entity to provide information requested by the Minister or Director.

g) ordonnance enjoignant au non-Canadien, à la personne ou à l'unité de fournir les renseignements exigés par le ministre ou le directeur.

(2.1) If, at the conclusion of the hearing on an application referred to in subsection (1), the superior court decides that the Minister was justified in sending a demand to a person or an entity under section 39 and that the person or entity has failed to comply with it, the court may make any order or orders that, in its opinion, the circumstances require, including, without limiting the generality of the foregoing, an order against the person or entity imposing a penalty not exceeding \$10,000 for each day on which the person or entity is in contravention of

(2.1) Après audition de la demande visée au paragraphe (1), la cour supérieure qui décide que le ministre a agi à bon droit et constate le défaut de conformité peut rendre l'ordonnance que justifient, à son avis, les circonstances, et notamment infliger à la personne ou à l'unité en défaut une pénalité maximale de 10 000 \$ pour chacun des jours au cours desquels se commet ou se continue la contravention.

this Act or any of its provisions.

(3) A penalty imposed by an order made under paragraph (2)(d) or subsection (2.1) is a debt due to Her Majesty in right of Canada and is recoverable as such in a superior court.

(4) Everyone who fails or refuses to comply with an order made by a superior court under subsection (2) or (2.1) that is directed to them may be cited and punished by the court that made the order, as for other contempts of that court.

(5) For greater certainty, all rights of appeal provided by law apply in the case of any decision or order made by a superior court under this section, as in the case of other decisions or orders made by that court.

(6) In this section, “superior court” has the same meaning as in subsection 35(1) of the Interpretation Act but does not include the Supreme Court of Canada, the Federal Court of Appeal or the Tax Court of Canada.

**42.** Every one who contravenes section 36 or who knowingly provides false or misleading information under this Act or the regulations is guilty of an offence punishable on summary conviction.

(3) Les pénalités infligées en vertu de l’alinéa (2)d) ou du paragraphe (2.1) sont des créances de Sa Majesté du chef du Canada dont le recouvrement peut être poursuivi à ce titre devant une cour supérieure.

(4) Quiconque refuse ou omet de se conformer aux ordonnances visées aux paragraphes (2) ou (2.1) peut être puni pour outrage au tribunal par la cour qui a rendu l’ordonnance.

(5) Il demeure entendu que tous les droits d’appel que prévoit la loi s’appliquent aux ordonnances visées au présent article comme s’il s’agissait d’une ordonnance ordinaire rendue par la cour.

(6) Au présent article, « cour supérieure » a le sens que lui donne le paragraphe 35(1) de la Loi d’interprétation mais ne vise pas la Cour suprême du Canada, la Cour d’appel fédérale et la Cour canadienne de l’impôt.

**42.** Quiconque contrevient à l’article 36 ou fournit sciemment des renseignements faux ou trompeurs dans le cadre de la présente loi ou de ses règlements est coupable d’une infraction punissable sur déclaration de culpabilité par procédure sommaire.

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-1162-09

**STYLE OF CAUSE:** THE ATTORNEY GENERAL OF CANADA  
v. UNITED STATES STEEL CORPORATION AND  
U.S. STEEL CANADA INC.

**PLACE OF HEARING:** Toronto, Ontario

**DATE OF HEARING:** January 12, 13 14, 2010

**REASONS FOR ORDER:** HANSEN J.

**DATED:** June 14, 2010

**APPEARANCES:**

John L. Syme  
Jeffrey G. Johnston

FOR THE RESPONDENT  
(APPLICANT)

Michael E. Barrack  
Marie Henein  
Ronald Podolny  
Elme Schmid

FOR THE APPLICANT  
(RESPONDENT)

**SOLICITORS OF RECORD:**

Thornton Grout Finnigan LLP  
Barrister and Solicitor

Union Steel Workers  
Toronto, Ontario  
Faskin Martineau Dumoulin  
Toronto, Ontario