

IN THE FEDERAL COURT OF CANADA
TRIAL DIVISION

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

APPEAL:

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

RESISTANCE TO MOTION

APPLICANTS (RESPONDENTS)

RESPONDENT'S MEMORANDUM OF FACT AND LAW
PURSUANT TO RULE 70 OF THE FEDERAL COURTS RULES
RE: APPLICATION FOR DECLARATION OF INVALIDITY OF
SECTIONS 19 AND 40 OF THE INVESTMENT CANADA ACT

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APPLICANTS (RESPONDENTS)

RESPONDENT'S MEMORANDUM OF FACT AND LAW
PURSUANT TO RULE 70 OF THE *FEDERAL COURTS RULES*

I. STATEMENT OF FACTS

A. Nature of Proceeding and Relief Sought

1. By Notice of Motion dated October 8, 2009 (the "Motion"), the United States Steel Corporation and U.S. Steel Canada Inc. ("U.S. Steel") challenge the validity of ss. 39 and 40 of the *Investment Canada Act* (the "ICA")¹ as being contrary to s. 11(d) of the *Canadian Charter of Rights and Freedoms* (the "Charter")² and s. 2(e) of the *Canadian Bill of Rights* (the "BOR").³

2. Specifically, U.S. Steel asserts that:

- (a) Sections 39 and 40 of the *ICA* violate the presumption of innocence and the right to a fair hearing, contrary to s. 11(d) of the *Charter*; and
- (b) Sections 39 and 40 of the *ICA* violate U.S. Steel's right to a fair hearing in accordance with the principles of fundamental justice, contrary to s. 2(e) of the *BOR*.

3. In the event that this Court concludes that the impugned provisions violate either the *Charter* or the *BOR* as alleged, U.S. Steel seeks the following relief:

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

² Schedule B to the *Canada Act 1982*, (U.K.) 1982, c. 11

- (a) An order dismissing the proceedings initiated against U.S. Steel by the Attorney General of Canada (the "AGC") on July 17, 2009 by way of the filing of a Notice of Application on behalf of the Minister of Industry (the "Minister") pursuant to s. 40 of the *ICA* (the "Application");

or

- (b) Alternatively, an order striking the Application and dismissing the proceedings.

B. Background Facts

4. The facts can be briefly summarized for the purposes of the Motion.

5. On October 10, 2007, U.S. Steel provided 31 undertakings in support of its application for approval by the Minister as required under the *ICA* to invest in and acquire control of Stelco Inc.'s Hamilton-based Canadian business ("Stelco").⁴

6. On October 29, 2007, the Minister approved the proposed investment as "likely to be of net benefit to Canada".⁵

7. On May 5, 2009, the Minister sent a demand to U.S. Steel pursuant to s. 39 of the *ICA* advising U.S. Steel that it was in contravention of certain of the undertakings, namely, the employment and production undertakings, and requesting that U.S. Steel cease the contraventions, remedy the default, show cause why there were no contraventions or justify any non-compliance.⁶

8. On May 20, 2009, U.S. Steel provided a detailed 88-page response to the Minister's demand.⁷

9. By letter dated July 15, 2009, the Minister advised U.S. Steel that he was not satisfied with U.S. Steel's response.⁸

10. On July 17, 2009, the AGC filed the Application under s. 40 of the *ICA* seeking an order from this Court directing U.S. Steel to comply with the employment and production undertakings

³ R.S.C. 1985, Appendix III

⁴ Affidavit of Richard Lajeunesse (the "Lajeunesse Affidavit") at para. 28

⁵ *Ibid.* at Exhibit G

⁶ *Ibid.* at para. 60 and Exhibit R

⁷ *Ibid.* at para. 62

⁸ *Ibid.* at para. 87

and imposing a monetary penalty of \$10,000 per breach for each day that U.S. Steel has been in contravention of the undertakings.

11. On October 2, 2009, U.S. Steel filed the within Motion challenging the validity of ss. 39 and 40 of the *ICA* as being contrary to s. 11(d) of the *Charter* and s. 2(e) of the *BOR*.

C. Relevant Statutory Provisions

12. Sections 39 and 40 of the *ICA* appear as Appendix "A" hereto. In short, the impugned provisions provide an enforcement mechanism for compliance with the *ICA*. Section 39 enables the Minister to make a demand of a non-Canadian investor to facilitate voluntary compliance with the *ICA*. Section 40 allows the AGC, on behalf of the Minister, to apply to a superior court to remedy non-compliance with the *ICA* and includes the possibility of court-imposed monetary penalties.

II. ISSUES AND POSITION OF THE RESPONDENT

13. The Motion raises four issues:

- (a) First, does s. 11(d) of the *Charter* apply to proceedings under ss. 39 and 40 of the *ICA*?
- (b) Second, if s. 11(d) of the *Charter* does apply, do proceedings under ss. 39 and 40 of the *ICA* comply with any fairness requirements imposed by s. 11(d)?
- (c) Third, does s. 2(e) of the *BOR* apply to proceedings under ss. 39 and 40 of the *ICA*?
- (d) Fourth, if s. 2(e) of the *BOR* does apply, do proceedings under ss. 39 and 40 of the *ICA* comply with any fairness requirements imposed by s. 2(e)?

14. The position of the AGC in response to the Motion is as follows:

- (a) First, s. 11(d) of the *Charter* does not apply to proceedings under ss. 39 and 40 of the *ICA*. These proceedings are not criminal or quasi-criminal in nature, nor do the orders available under s. 40 for non-compliance involve the imposition of true penal consequences. K
- (b) Second, because s. 11(d) of the *Charter* is not engaged by proceedings under ss. 39 and 40, it is unnecessary to consider whether these proceedings comply with any fairness requirements imposed by s. 11(d).
- (c) Third, s. 2(e) of the *BOR* applies to proceedings under the *ICA*.
- (d) Fourth, any fairness requirements imposed by s. 2(e) of the *BOR* only apply to the application stage under s. 40 where rights and obligations are adjudicated. Moreover, s. 40 amply complies with any such requirements which are only procedural in nature.

15. In the result, the AGC submits that the Motion should be dismissed with costs. K

III. ARGUMENT

A. Fairness Requirements Under the *Charter* and the *BOR* Are Separate and Distinct

16. Section 11(d) of the *Charter* and s. 2(e) of the *BOR* are, in reality, alternative arguments.

17. U.S. Steel contends that the *Charter* and the *BOR* afford separate and complementary protections in relation to enforcement proceedings under ss. 39 and 40 of the *ICA*. The AGC disagrees with this characterization.

18. While the *Charter* and the *BOR* "co-exist", in the context of fairness requirements, resort to s. 2(e) is only rendered necessary if s. 11(d) is found not to apply to the proceedings in question. The fairness requirements provided by s. 2(e) of the *BOR* fill the gap left by the fact that s. 11(d) of the *Charter* does not apply to all proceedings. As the Federal Court of Appeal has observed:

...in view of the limited application of paragraph 11(d) of the *Canadian Charter of Rights and Freedoms* [being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendice II, No. 44]], the *Canadian Bill of Rights* can play an important suppletive role with respect to the determination of rights and obligations by a civil or an administrative tribunal: see P. Hogg, "A Comparison of the Canadian Charter of Rights and Freedoms with the Canadian Bill of Rights", in Beaudoin, G. A. and Ratushny E., *The Canadian Charter of Rights and Freedoms*, 2nd ed., Toronto: Carswell, 1989, page 1. At page 14, he writes:

A civil proceeding before a court or administrative tribunal is not subject to the requirement of a "fair hearing" or of the application of "fundamental justice". This is a gap in the *Charter*, and is therefore an area where the continued existence of the *Bill* is important: an adjudication authorized by federal law of a person's rights and obligations will continue to be subject to the requirement of "a fair hearing in accordance with the principles of fundamental justice".⁹

19. In its submission, U.S. Steel has consistently and repeatedly conflated the requirements of fairness in the criminal law context with the requirements of fairness in the civil context. They are, in fact, separate and distinct and apply to mutually exclusive regimes.

20. Despite U.S. Steel's attempts to approximate the two, it is trite law that the fairness requirements imposed by s. 11(d) of the *Charter* are significantly broader in scope than those required by s. 2(e) of the *BOR*. For example, in the case of the former, liability is subject to the criminal law standard of proof beyond a reasonable doubt and disclosure rights and obligations are necessarily more expansive as the right to make full answer and defence and liberty interests are

⁹ *Northwest Territories v. Public Service Alliance of Canada*, [2001] 3 F.C. 566, 2001 FCA 162 at para. 54

engaged. With respect to the latter, fairness requirements are more circumscribed. As has been noted, "procedural fairness in a regulatory context does not entail all the guarantees offered in a criminal setting."¹⁰

21. Thus, the appropriate starting point in considering whether ss. 39 and 40 of the *ICA* comply with any fairness requirements is to first determine whether the content of these requirements is measured against the rights contained in s. 11(d) of the *Charter* or, alternatively, those found in s. 2(e) of the *BOR*.

22. It is the position of the AGC that s. 11(d) of the *Charter* does not apply to the instant case with the result that the assessment of whether the impugned provisions comply with any fairness requirements is confined to the procedural rights conferred by s. 2(e) of the *BOR*. Further, any fairness requirements to which U.S. Steel is entitled by operation of s. 2(e) are only applicable to the adjudicative hearing stage under s. 40 where rights and obligations are actually determined. Finally, proceedings under s. 40 satisfy any fairness requirements imposed by s. 2(e) of the *BOR*.

THE APPLICATION OF THE *CHARTER* TO THE *ICA*

B. Section 11(d) of the *Charter* Does Not Apply to Proceedings Under Sections 39 and 40

(i) Section 11(d) only applies to "persons charged with an offence"

23 Section 11 of the *Charter* is limited by its express wording to "persons charged with an offence." U.S. Steel properly recognizes that its ability to invoke the protections afforded by s. 11(d) requires that it have the status of "a person charged with an offence" by virtue of being subject to proceedings initiated under ss. 39 and 40 the *ICA*. U.S. Steel also accepts that this determination is dependent upon it satisfying the well-established test articulated by the Supreme Court of Canada in *R. v. Wigglesworth*¹¹ as refined by the Court in *Martineau v. M.N.R.*¹²

¹⁰ *Lavallee v. Alberta (Securities Commission)*, 2009 ABQB 17 at para. 199 (citing, *inter alia*, *L'Heureux-Dubé J.* in *British Columbia Securities Commission v. Branch* (1995), 97 C.C.C. (3d) 505 (S.C.C.) at para. 75), appeal dismissed on other grounds, 2009 ABCA 52

¹¹ *R. v. Wigglesworth* (1987), 37 C.C.C. (3d) 385 (S.C.C.)

¹² *Martineau v. M.N.R.* (2004), 192 C.C.C. (3d) 129 (S.C.C.)

24. The *Wigglesworth* test requires U.S. Steel to demonstrate one of two things: either that proceedings under ss. 39 and 40 of the *ICA* are criminal or quasi-criminal in nature or, failing that, that s. 40 involves the imposition of true penal consequences.¹³

25. U.S. Steel submits that proceedings under ss. 39 and 40 of the *ICA* meet both prongs of the *Wigglesworth* test. Thus, U.S. Steel characterizes these proceedings as “criminal or quasi-criminal” in nature and further contends that the impugned provisions allow for the “imposition of true penal consequences”. It is the position of the AGC that ss. 39 and 40 fail both branches of the *Wigglesworth* test. In these circumstances, it cannot be said that U.S. Steel has the status of “a person charged with an offence” within the meaning of s. 11 of the *Charter*. As a result, s. 11(d) does not apply to the proceedings in the case at bar.

(ii) *The Need for a Cautious and Incremental Approach*

26. At the outset, it is important to note that courts have urged the need for restraint in applying s. 11 of the *Charter*.

27. In *Wigglesworth*, in choosing between two divergent lines of authority, Wilson J. endorsed a narrow interpretation¹⁴ favouring a restrictive reading¹⁵ of “persons charged with an offence” over a broad and expansive approach to defining the ambit of s. 11 of the *Charter*. Wilson J. stated that “it is preferable to restrict s. 11 to the most serious offences known to our law, i.e., criminal and penal matters.”¹⁶ In *R. v. Shubley*, McLachlin J., as she then was, agreed with the need for a cautious approach and similarly warned against an overly broad application of s. 11.¹⁷ Professor Hogg has also noted in commenting on *Wigglesworth* that cases of regulatory or disciplinary statutes satisfying the *Wigglesworth* test will necessarily be “rare”.¹⁸

¹³ *Wigglesworth*, *supra*, at pp. 397 and 399-402; and *Martineau*, *supra*, at para. 19

¹⁴ *Wigglesworth*, *supra*, at pp. 397

¹⁵ *Ibid.* at pp. 399-400

¹⁶ *Ibid.* at pp. 400

¹⁷ *R. v. Shubley* (1990), 52 C.C.C. (3d) 481 (S.C.C.) at pp. 491-492

C. The First Branch of the *Wigglesworth* Test

(i) *Proceedings Under Sections 39 and 40 Are Not Criminal or Quasi-Criminal in Nature*

28. The first question under *Wigglesworth* is whether the proceedings in question are, by their very nature, criminal proceedings.¹⁹ As McLachlin J. instructed in *Shubley*, “[t]he question of whether proceedings are criminal in nature is concerned not with the nature of the act which gave rise to the proceedings, but the nature of the proceedings themselves.”²⁰

29. The distinction between criminal or quasi-criminal proceedings on the one hand and civil or regulatory proceedings on the other was articulated by Wilson J. in *Wigglesworth* as follows:

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. [Citations omitted and emphasis added.]²¹

30. Fish J. reiterated in *Martineau* that a matter of a public nature, intended to promote public order and welfare within a public sphere of activity, is by its very nature caught by s. 11 of the *Charter* while, by contrast, proceedings of an administrative nature instituted for the protection of the public in accordance with the policy of a statute are not penal in nature.²²

31. That is not to say that civil proceedings preclude a public interest component; it is simply the case that the protection of the public in the non-criminal context is inextricably tied to the regulation of conduct within the limited private sphere of activity as mandated by the governing legislation. This was made clear by Wilson J. in *Wigglesworth* where she stated: “[p]roceedings of an administrative nature instituted for the protection of the public in accordance with the policy of a statute are...not the sort of “offence” proceedings to which s. 11 is applicable.” [Emphasis added.]²³

¹⁸ Hogg P.W., *Constitutional Law of Canada*, vol. 2, loose-leaf ed., (Scarborough: Thomson Carswell, 2007) at p. 51(5) (“Hogg”).

¹⁹ *Shubley*, *supra*, at pp. 493

²⁰ *Ibid.*

²¹ *Wigglesworth*, *supra*, at p. 401

²² *Martineau*, *supra*, at paras. 21-22

²³ *Wigglesworth*, *supra*, at pp. 401

32. In *Martineau*, Fish J. identified three criteria as being relevant to determining the nature of the proceedings under the first branch of the *Wigglesworth* test. Applied to ss. 39 and 40 of the *ICA*, these criteria require consideration of the following three questions:

- (a) What are the objectives of the *ICA* and ss. 39 and 40 thereof;
- (b) What is the purpose of the orders available under s. 40; and
- (c) What is the process leading to the making of an order under s. 40.²⁴

1. The Objectives of the *ICA* and Sections 39 and 40

33. Section 2 of the *ICA* defines its objectives as follows:

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.

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.

34. The objectives of the *ICA* and ss. 39 and 40 are straightforward. The *ICA* is intended to encourage foreign investment in Canada subject to the caveat that investments subject to review are to be approved by the Minister only if they are likely to be of net benefit to Canada.

35. Not all foreign investment in Canada is subject to review under the *ICA*. Rather, only "significant" investments by non-Canadian investors which involve the acquisition of "control" of Canadian businesses meeting a certain financial threshold²⁵ must be approved by the Minister under the *ICA* prior to implementation. The litmus test for the Minister to approve an investment requires that the Minister be satisfied under s. 21 that the investment is "likely to be of net benefit to Canada" based on the broad economic factors listed in s. 20. Satisfying this requirement may,

²⁴ *Martineau*, *supra*, at para. 24

as in the instant case, depend on the non-Canadian investor giving certain undertakings. Sections 21(1) and 23(3) expressly require the Minister to take into account undertakings in determining whether a proposed investment is likely to be of net benefit to Canada. In terms of enforcing undertakings, s. 39(1) authorizes the Minister to make a demand to comply with any undertakings upon the Minister forming the belief that there has been a failure to comply. Finally, s. 40 authorizes the Minister to apply to a superior court for an order requiring, *inter alia*, specific performance of undertakings and monetary penalties for non-compliance.

36. It is axiomatic that undertakings are only effective to the extent that they can be enforced. Hence, the impetus for the enforcement mechanism contained in ss. 39 and 40 of the *ICA*. Sections 39 and 40 are aimed, *inter alia*, at enforcing compliance with the regulatory regime by ensuring that any investments approved by the Minister are implemented in accordance with the *ICA*, including by enforcing any undertakings given by the non-Canadian investor upon which the Minister's approval was based. The responsible Minister emphasized this point before the Senate at the committee stage of Bill C-15 when he said:

...We are often faced with a situation where somebody has come to Canada, makes representations, sometimes signs various letters of undertaking, and then proposes to close something down. Certainly, as a government you are very disappointed....We believe that we should scream and try to ensure that under the new act if somebody wants to do something in Canada it will be of net benefit.²⁵

37. For the purposes of the first branch of the *Wigglesworth* test, as the foregoing illustrates, the *ICA*, including ss. 39 and 40, are aimed at regulating the otherwise private conduct of private actors occurring within a limited private sphere of activity. The process under ss. 39 and 40 for the enforcement, *inter alia*, of undertakings is by its very nature regulatory, protective and corrective and is primarily intended to regulate the private conduct of these private actors occurring within this limited private sphere of activity.

38. There is a public aspect to the *ICA* and ss. 39 and 40 but only to the limited extent that the overarching purpose of the *ICA* is to ensure that any foreign investment in Canada subject to the review process is to be approved provided that it is likely to be of net benefit to Canada. The

²⁵ In 2009, this "threshold" was \$312 million for non-Canadian investors from *World Trade Organization* countries

²⁶ Stevens, Sinclair M. "An Act respecting investment in Canada." In Canada, Standing Cmte. On Banking, Trade and Commerce. *Legislative Debates (Hansard)*. 33rd Parl., 1st Sess. (March 20, 1985) at p 4: 14-15.

enforcement mechanism available for non-compliance with the *ICA* is meant to encourage compliance while deterring contraventions and in this way ensure, *inter alia*, that where investments are approved on undertakings, the undertakings are honoured by the non-Canadian investor involved.

39. However, this does nothing to detract from the *ICA*'s non-criminal nature because, consistent with *Wigglesworth* and *Martineau*, any public dimension to proceedings instituted under ss. 39 and 40 is in accordance with the policy of the statute and not to redress a wrong done to society. In this sense, proceedings under ss. 39 and 40 of the *ICA* are comparable to enforcement proceedings under the *Competition Act* which similarly have been classified as non-criminal on the basis that any public aspect to these proceedings is in accordance with the policy of the *Competition Act*.²⁷ Or, likewise, enforcement proceedings under securities legislation which have also been found to be non-criminal on the basis that they are aimed at protecting investors in attainment of the objectives of the *Securities Act*.²⁸

40. Moreover, in endeavoring to characterize the *ICA* as "regulatory" or "criminal", regard must be had to the "nature and the purpose of the legislative scheme whose administration or enforcement is in question."²⁹ Central to this inquiry are "the values at stake in the particular context."³⁰

41. The *ICA* is clearly distinguishable from criminal or quasi-criminal proceedings which are aimed at protecting the public generally from harm owing to conduct which "by its very nature [is] morally or socially reprehensible", the domain of the criminal law, as distinct from legislation aimed at the regulation of the economy meant to discourage conduct detrimental to national economic interests.³¹ As the Supreme Court of Canada has stated in the securities context, "[t]he focus of regulatory law is on the protection of societal interests, not punishment of an individual's moral faults."³² The *ICA* clearly falls into the former category.

²⁷ *Commissioner of Competition v. Gestion Lebski inc.*, 2006 Comp. Trib. 42 at para. 51

²⁸ *Lavoie*, *supra*, at para. 163

²⁹ *Dei Zotto v. Canada*, [1997] F.C. 40 (C.A.) at paras. 12-13 *per* Strayer J.A. (although Strayer J.A. was in dissent, the Supreme Court of Canada adopted his dissent in reversing the majority on appeal: [1999] 1 S.C.R. 3)

³⁰ *R. v. Jarvis* (2002), 169 C.C.C. (3d) 1 (S.C.C.) at para. 61

³¹ *Thomson Newspapers Ltd. v. Canada (Director of Investigation & Research, Restrictive Trade Practices Commission)* (1990), 54 C.C.C. (3d) 417 (S.C.C.) at pp. 473-480

³² *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)* (2001), 191 D.L.R. (4th) 577 (S.C.C.) at para. 42

42. The *ICA* replaced the *Foreign Investment Review Act*³³ which, similar to the *ICA*, stated as its predominant purpose that of ensuring that foreign investment in Canada stood to be of "significant benefit" to Canada.³⁴ The Federal Court recognized that the underlying purpose of the *FIRA* was the implementation of national economic policy.³⁵ So too is the underlying purpose of the *ICA*. As the Federal Court of Appeal has held in interpreting the *ICA*, the Minister "implements social and economic policy by deciding whether the proposed investment 'is likely to be of net benefit to Canada'."³⁶

43. Proceedings under the *ICA* are to be contrasted with proceedings under criminal or quasi-criminal legislation which punish *morally* wrongful conduct in furtherance of both a legislative purpose and a larger public purpose. For example, the Supreme Court of Canada has held that a military court marshal proceeding was by its very nature criminal or quasi-criminal under the first branch of the *Wigglesworth* test where this proceeding "while concerned with maintaining discipline and integrity in the Canadian Armed Forces...does not serve merely to regulate conduct that undermines such discipline and integrity...[b]ut serves a public function as well by punishing specific conduct which threatens public order and welfare."³⁷ Another example is gun control legislation which has been characterized as criminal in nature on the basis that its prohibitions and penalties are not confined to ensuring regulatory compliance with the legislative scheme "but stand on their own, independently serving the purpose of public safety".³⁸

44. As McLachlin J. stressed in *Shubley*, the central question under the first branch of the *Wigglesworth* test is whether the proceedings in issue are by their very nature criminal. In that case, the Court concluded that internal disciplinary proceedings instituted against an inmate for misconduct contrary to corrections legislation were not criminal in nature. In holding that s. 11 of the *Charter* did not apply to these proceedings, the Court stated:

Was the prison disciplinary proceeding to which the appellant was subject, by its very nature, criminal? I conclude it was not. The appellant was not being called to account to society for a

³³ S.C. 1973-74, c. 46 ("FIRA")

³⁴ *FIRA*, s. 2(1)

³⁵ *Canada (Attorney General) v. Central Cartage Co.*, [1990] 2 F.C. 641 (C.A.) at p. 656

³⁶ *Serge Baril and Association des travailleurs du pétrole, section Raffinerie Gulf - Montréal Est v. Minister of Regional Industrial Expansion and Ultramar Canada Inc. and Gulf Canada Ltée*, [1986] 1 F.C. 328 (C.A.) at para. 7

³⁷ *R. v. Généreux* (1992), 70 C.C.C. (3d) 1 (S.C.C.) at pp. 16-17

³⁸ *Reference re: Firearms Act (Canada)* (2000), 144 C.C.C. (3d) 385 (S.C.C.) at para. 38

crime violating the public interest in the preliminary proceedings. Rather, he was being called to account to the prison officials for breach of his obligation as an inmate of the prison to conduct himself in accordance with prison rules. [Emphasis added.]³⁹

45. It is likewise the case that a Ministerial demand made pursuant to s. 39 of the *ICA* and the filing of an application under s. 40 are not by their nature criminal or quasi-criminal. As in *Shubley*, a non-Canadian investor in this situation is not being called to account to society for a crime violating the public interest. Rather, the investor is being called to account to the Minister for failing to live up to its commitments under the *ICA*, including by failing to honour any undertakings given by the investor which formed the basis for the Minister approving the investment.

2. The Purpose of the Orders Available Under Section 40

46. Section 40 of the *ICA* is chiefly concerned with remedying non-compliance with the *ICA*. Section 40 permits the making of orders to realize specific performance and also allows for certain penalties to be imposed owing to non-compliance.

47. The purpose of ss. 39 and 40 "is not to penalize criminal conduct but to enforce compliance with the *Act*".⁴⁰ As such, proceedings under the impugned provisions are neither criminal nor quasi-criminal in nature. The objective of these proceedings is "not to mete out criminal punishment but to maintain order"⁴¹ in the context of foreign investment in Canada subject to the *ICA*. Sections 39 and 40 are intended to provide the Minister with a "timely and effective" means of enforcing the legislation; this mechanism is not designed to "punish" the offside non-Canadian investor.⁴² These provisions are no different than enforcement provisions found in securities legislation which are similarly "designed to discourage detrimental forms of commercial behaviour...[and] to induce compliance with the *Act*".⁴³

48. There is nothing to indicate that the objective of the orders available under s. 40 of the *ICA* is to redress a wrong done to society.⁴⁴ U.S. Steel inexplicably contends that s. 40 is consistent

³⁹ *Shubley*, *supra*, at p. 494

⁴⁰ *E. v. McKinlay Transport Ltd.* (1990), 55 C.C.C. (3d) 530 (S.C.C.) at p. 540

⁴¹ *Shubley*, *supra*, at p. 494

⁴² *Martineau*, *supra*, at para. 36

⁴³ *Eranch*, *supra*, at para. 59

⁴⁴ *Martineau*, *supra*, at para. 39

with a "criminal model". To the contrary, as discussed further below, the *ICA* in no way takes into account the principles of criminal liability or sentencing as relevant criteria for the imposing of penalties under s. 40 owing to non-compliance.⁴⁵ Nor do proceedings under s. 40 bear *any* of the indicia of criminal or quasi-criminal proceedings.⁴⁶

3. The Process Leading to the Making of an Order Under Section 40

49. The process under ss. 39 and 40 of the *ICA* for enforcing compliance with undertakings involves a four-step process.

50. First, under s. 39, the Minister must *believe* that a non-Canadian investor has failed to comply with an undertaking.

51. Second, having formed this belief, the Minister *may* send a demand to the non-Canadian investor requiring the non-Canadian to: cease the contravention; remedy the default; show cause why there is no contravention; or justify non-compliance with the undertaking. In making this demand, s. 39(3) requires the Minister to put the non-Canadian investor on notice of the proceedings that could be instituted under s. 40 in response to a failure by the non-Canadian investor to comply with the demand.

52. Third, under s. 40, if the non-Canadian investor fails to comply with the Ministerial demand, the AGC, acting on behalf of the Minister, *may* apply to the Court to enforce compliance.

53. Fourth, the ability of the Court to make any order under s. 40 is subject to the Court first being satisfied that the Minister was both *justified* in sending a s. 39 demand to the non-Canadian investor and further that the non-Canadian investor failed to comply with the demand.

54. What is noteworthy is that much like the ascertained forfeiture process under the *Customs Act* at issue in *Martineau* and the proceedings under the *Competition Act* at issue in *Lebski*, the enforcement process for non-compliance provided for by s. 40 of the *ICA* similarly bears none of the hallmarks of a criminal proceeding in that:

⁴⁵ *ibid.*

- (a) No one is charged;
- (b) No information is laid;
- (c) No one is arrested;
- (d) No one is summoned to appear before a court of criminal jurisdiction;
- (e) The Court must decide the issues before it according to a civil standard;
- (f) There is no *mens rea* intent requirement for liability and hence no moral blameworthiness is ascribed to the offending conduct;
- (g) The offending conduct is not "prohibited" or illegal *per se* as offensive to society as compared to conduct that the law recognizes as criminal;
- (h) There is no finding of guilt or innocence or the imposition of a punishment for an offence; and
- (i) There is no criminal stigma - no criminal conviction or criminal record will result from the proceeding.⁴⁷

55. It is significant in this respect that, unlike the situation under the *FIRA*, the *ICA* does not sanction non-compliance *per se*. To the contrary, proceedings under the *ICA* provide for a discretionary, gradual and voluntary approach to enforcement for non-compliance. A non-Canadian investor is only exposed to civil consequences for non-compliance in the event that there has been a failure to comply with a Ministerial demand under s. 39 and the Minister elects to apply to the Court for an order under s. 40. Only then do the sanctions contained in s. 40 potentially arise. Moreover, the Minister's decisions to make a demand and authorize an application under ss. 39 and 40 respectively can hardly be seen as arbitrary as U.S. Steel contends. The *ICA* expressly vests the Minister with responsibility for administering the *ICA* and assigns to him alone the duty to ensure that investments are carried out in accordance with the legislation.⁴⁸

56. Conversely, if the subject of the demand ceases the contravention, remedies the default, shows cause why there is no contravention or justifies non-compliance with any undertakings to the Minister's satisfaction then there is no prospect of exposure to civil consequences.⁴⁹ The criminal law does not afford this flexibility. If a thief steals something only to have a change of heart and return it to its rightful owner they do not escape criminal prosecution. The crime is

⁴⁶ *Martineau, supra*, at para. 45

⁴⁷ *Martineau, supra*, at para. 45; and *Lebski, supra*, at para. 53

⁴⁸ *ICA*, ss. 2, 4 & 5

⁴⁹ *Martineau, supra*, at para. 37

complete upon the intentional stealing of the item. Remedying the wrong would only be relevant to sentencing. Under the *ICA*, civil consequences for non-compliance can be avoided altogether despite there having been non-compliance with the undertakings by voluntary compliance with the Minister's demand under s. 39.

(ii) *Legislative History and Academic Commentary Support the View that Enforcement Proceedings Under the ICA Are Non-Criminal in Nature*

57. Legislative history and related academic commentary buttress the conclusion that proceedings under ss. 39 and 40 of the *ICA* are non-criminal in nature. In applying the first branch of the *Wigglesworth* test, Parliament's intent in enacting the impugned provisions is a relevant consideration in determining whether the proceedings are criminal or quasi-criminal.⁵⁰

58. A significant change as between the *FIRA* and the *ICA* was a deliberate legislative choice signalling a movement away from a criminal model for non-compliance. In introducing Bill C-15, the responsible Minister explained that, save s. 36, the enforcement provisions contained in the *ICA* contemplate a civil mechanism designed to encourage compliance with the statutory regime:

In order to ensure compliance with the proposed act, clauses 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.⁵¹

59. Academic commentary supports the view that Parliament's intent in enacting ss. 39 and 40 of the *ICA* represented a conscious shift away from a criminal model. As one early commentary observed:

The enforcement provisions of the *ICA* reflect a different attitude than those of the *FIR Act*. Under the latter, failure to give notice of a proposed investment led, in the first instance, to a summary conviction offence punishable by a fine not exceeding 5,000 dollars. Refusal to file a notice after having been served with a demand to do so by the Minister under s-s. 8(3) of the *FIR Act* could give rise to a fine not exceeding 10,000 dollars or imprisonment for a term not exceeding six months or both.

By contrast, where a non-Canadian fails to file a required notice or application, or implements an investment contrary to the *ICA*, the Minister may send him a demand to cease the contravention, to remedy the default and so forth. Where the non-Canadian fails to comply with such demand, the Minister may apply to a Superior Court for an order providing a civil remedy. Such remedy

⁵⁰ *Lebski, supra*, at para. 52

⁵¹ Stevens, Sinclair M. "Proceedings of the Standing Committee on Regional Development." In Canada, House of Commons, *Legislative Debates (Hansard)*, 33rd Parl., 1st Sess. (February 5, 1985) at p. 2

could include a penalty not exceeding 10,000 dollars *for each day* of contravention of the ICA. Nevertheless, it is a civil penalty, not a fine for an offence. [Emphasis added.]⁵²

60. In a like manner, the author of *Investing In Canada: The Pursuit and Regulation of Foreign Investment* has remarked in describing the remedies and penalties available under the ICA that the legislature intended for these provisions to be civil in nature:

An investor who has committed...a *faux pas* will be pleased to learn that no criminal penalties can be imposed.

Why are there virtually no criminal sanctions in the statute? Civil remedies, Parliament decided, would be sufficient. The Conservative government also wanted to improve Canada's image abroad. Removing the aura of criminality from the country's foreign investment review legislation was one way of doing this.⁵³

61. While certainly not determinative, the foregoing legislative and academic commentary lends itself to the conclusion that enforcement proceedings under ss. 39 and 40 of the ICA are non-criminal in nature and the penalties available for non-compliance are equally non-criminal.

62. In seeking to characterize proceedings under ss. 39 and 40 of the ICA as criminal or quasi-criminal in nature (and in portraying the orders available under s. 40 for non-compliance as supporting true penal consequences), U.S. Steel relies on a number of features of the ICA as justifying the conclusion that a non-Canadian investor subject to the enforcement process has the status of a "person charged with an offence" within the meaning of s. 11 of the *Charter*. Specifically, U.S. Steel points to the following in support of its position:

- (a) First, the fact that s. 40 of the ICA authorizes penalties for non-compliance;
- (b) Second, the fact that these penalties can be seen as advancing the objectives of deterrence;
- (c) Third, the fact that the ICA contains in s. 36 a criminal enforcement provision;
- (d) Fourth, its assessment that the penalties available under s. 36 are less severe than those available under s. 40; and
- (e) Fifth, the fact that s. 40(4) of the ICA permits contempt proceedings for failures or refusals to comply with s. 40 orders.

⁵² J. James Arnett, "From FIRA to Investment Canada" (1985) 24 *Alta. L.R.* 1 at p. 32

⁵³ Russell Deigan, *Investing In Canada: The Pursuit and Regulation of Foreign Investment* (Scarborough: De Boo, 1991) at pp. 271-273

63. None of these factors, either individually or cumulatively, are capable of satisfying either branch of the *Wigglesworth* test.

(a) **Regulatory Legislation Permits Penalties for Non-Compliance Without Altering Its Essential Character as Non-Criminal**

64. To the extent that U.S. Steel would have this Court conclude that proceedings under ss. 39 and 40 of the *ICA* are criminal or quasi-criminal in nature because s. 40 permits penalties for non-compliance, this overshoots the purpose of s. 11 of the *Charter*. The logical extension of this argument is that enforcement proceedings under any regulatory legislation which authorize penalties for non-compliance are criminal or quasi-criminal in nature. This cannot be the case. Indeed, to accede to this argument, "would be to conclude that the state cannot impose a penalty other than through the criminal process. This is an extravagant conversion of s. 11, sweeping into it and criminalizing all state imposed penalties."⁵⁴

(b) **Deterrence is a Valid Objective of Administrative Penalties and Does Not Render These Penalties Penal in Nature**

65. U.S. Steel's reliance on the deterrence aspect of s. 40 of the *ICA* as somehow satisfying the *Wigglesworth* test is also misplaced. The AGC readily concedes that the orders available under s. 40 to remedy non-compliance include monetary penalties which are intended to have, *inter alia*, a deterrent effect. However, U.S. Steel wrongly equates the objectives of deterrence as being exclusive to the criminal law so as to bring proceedings under s. 40 within the criminal or quasi-criminal realm. This argument rests on an overly expansive view of criminal or quasi-criminal proceedings and an unduly narrow understanding of non-criminal proceedings.

66. It is well-established that deterrence is a relevant factor in fashioning administrative penalties, including monetary sanctions, and this characteristic does not transform these penalties into criminal forms of punishment. Simply put, administrative penalties which possess a deterrent dimension are not punitive in nature.

⁵⁴ *R. v. Yes Holdings Ltd.* (1987), 40 C.C.C. (3d) 30 (Alta. C.A.) at pp. 37, application for leave to appeal dismissed, [1988] S.C.C.A. No. 97

67. This is placed beyond dispute by the decision of the Supreme Court of Canada in *Martineau* where Fish J. stated in describing the deterrent purpose of ascertained forfeiture proceedings under the *Customs Act*:

...it is true that ascertained forfeiture is intended to produce a deterrent effect. This is completely understandable in a self-reporting system. Fraud must be discouraged, and offences punished severely, for the system to be viable. However, actions in civil liability and disciplinary proceedings, which are also aimed at deterring potential offenders, nevertheless do not constitute criminal proceedings. [Emphasis added.]⁵⁵

68. To similar effect is the holding in *Cartaway Resources Corp. (Re)*⁵⁶ in which the Court concluded that deterrence is a relevant factor for provincial securities regulators to take into account in imposing civil penalties for non-compliance and, specifically, an administrative monetary penalty of up to \$100,000 for contravening securities legislation. The Court stated:

...it is reasonable to view general deterrence as an appropriate, and perhaps necessary, consideration in making orders that are both protective and preventative. Ryan J.A. recognized this in her dissent: "The notion of general deterrence is neither punitive nor remedial. A penalty that is meant to generally deter is a penalty designed to discourage or hinder like behaviour in others." [Emphasis added.]⁵⁷

69. In reaching this conclusion, the Court in *Cartaway* noted that deterrence has a key role to play in the policing of capital markets in which participants are presumed to be rational actors. LeBel J. explained that for the regulation of market behaviour to work effectively, securities commissions should be able to impose financial sanctions for non-compliance capable of deterring forward-looking market participants from engaging in similar acts of non-compliance. The underlying rationale being that rational actors will only adjust their conduct according to the economic disincentives of deterrent penalties.⁵⁸ In other words, to secure compliance with the rules, on a cost-benefit analysis, the possible costs of non-compliance have to outweigh the costs of compliance.

70. In *Lavallee*, the Alberta Court of Queens Bench, after considering *Cartaway*, held that the impugned provisions in that case which authorized the provincial securities commission to impose administrative monetary penalties of up to \$1,000,000 for each contravention or failure to comply

⁵⁵ *Ibid.* at para. 38

⁵⁶ *Cartaway Resources Corp. (Re)* (2004), 238 D.L.R. (4th) 193 (S.C.C.)

⁵⁷ *Ibid.* at para. 60. See also *Asbestos*, *supra*, at para. 42

⁵⁸ *Ibid.* at paras. 52-62

did not satisfy the *Wigglesworth* test, with the result that the *Securities Act* did not engage s. 11 of the *Charter*. The Court stated in reaching this conclusion:

...the potential imposition of administrative penalties of a certain magnitude reflects the legislative intent to ensure that penalties are not simply considered as another cost of doing business.⁵⁹

71. This reasoning is apposite to the case at bar. Non-Canadian investors are also assumed to be rational actors. As such, in order to encourage compliance with the *ICA*, the potential monetary penalties available for non-compliance must be sufficient in amount to deter contraventions. In the context of regulating economic activity, the other side of the “coin” of encouraging compliance are economic disincentives deterring non-compliance. The costs of non-compliance cannot simply be viewed as another cost of doing business, otherwise they would have no deterrent value.

(c) **Regulatory Legislation Can Include Civil and Criminal Enforcement Mechanisms**

72. U.S. Steel contends that because the *ICA* includes a criminal offence provision in s. 42, which makes it a summary conviction offence to communicate or allow to be communicated privileged information contrary to s. 36 or to knowingly provide false or misleading information, that this has some bearing on the characterization of enforcement proceedings under ss. 39 and 40 as criminal or non-criminal.

73. That the *ICA* contains civil and criminal mechanisms for enforcing its provisions does not mean that all proceedings under the *ICA* are criminal or quasi-criminal in nature. As the Court held in *Lavallee*, the fact that one section of the *Securities Act* engaged s. 11 because of the possibility of imprisonment was not a determinant factor in qualifying the nature of administrative penalties found in the impugned sections.⁶⁰ The same is true of the relationship between s. 36 and ss. 39 and 40 of the *ICA*. As the Supreme Court of Canada held in *Thomson Newspapers*, the inclusion of imprisonment as a possible sanction for non-compliance does not alter the essential character of legislation as regulatory.⁶¹ The same conclusion was reached by the Court in *Martineau* in which Fish J. recognized that it is irrelevant to the characterization of proceedings as

⁵⁹ *Lavallee*, *supra*, at para. 164

⁶⁰ *Lavallee*, *supra*, at para. 149

penal or non-penal that the conduct in issue could give rise to both a civil enforcement proceeding and a criminal prosecution.⁶²

74. It should also be noted that, unlike the situation which exists under the *Customs Act*, the *Securities Act* and the *Competition Act*, the conduct criminalized under s. 36 of the *ICA* cannot be the subject of enforcement proceedings under ss. 39 and 40 and vice-versa.

(d) Any Perceived Disparity Between Criminal Penalties and Civil Penalties For Non-Compliance Does Not Suffice to Render the Civil Penalties Penal in Nature

75. Nor is it of any consequence that, in U.S. Steel's assessment at least, the consequences of a summary conviction offence under s. 36 of the *ICA* are relatively minor as compared to the penalties for non-compliance available under s. 40. This same argument was rejected in *Martineau* as a basis for declaring the ascertained forfeiture provisions of the *Customs Act* criminal in nature. Fish J. stated that even though the monetary penalty of the ascertained forfeiture was a greater sanction than that available for a summary conviction prosecution, the two proceedings remained completely independent of each other, involved distinct consequences and, most importantly, the latter was penal in nature while the former was civil in character.⁶³ The same is true of proceedings under ss. 36 and 40 of the *ICA*.

76. Moreover, as Wilson J. stated in *Wigglesworth*, "[t]here are many examples of offences which are criminal in nature but which carry relatively minor consequences following conviction."⁶⁴ The point is that these offences fall within s. 11 of the *Charter*, not because of the severity of the penalties that can be imposed upon conviction, but because they are offences which by their very nature involve criminal or quasi-criminal proceedings.⁶⁵

⁶¹ *Thomson Newspapers*, *supra*, at pp. 477-478

⁶² *Martineau*, *supra*, at para. 31

⁶³ *ibid.* at para. 62

⁶⁴ *Wigglesworth*, *supra*, at p. 400

⁶⁵ *ibid.*

(e) **That the ICA Permits Contempt Proceedings for Failures or Refusals to Comply with Section 40 Orders Is Incapable of Making Enforcement Proceedings Penal in Nature**

77. Finally, contrary to U.S. Steel's submission, it is of no moment that s. 40(4) of the *ICA* authorizes contempt proceedings for a failure or refusal to comply with an order made under ss. 40(2) or 40(2.1).

78. Section 40(4) of the *ICA* is permissive, not adjudicative. It is only at the adjudicative stage of contempt proceedings that true penal consequences are involved.⁶⁶ Section 40(4) does not engage s. 11 of the *Charter* by authorizing contempt proceedings as a consequence of a failure or refusal to comply with the Court's order. It is the contempt proceedings themselves where the Court makes a finding of contempt and imposes a punishment that engage s. 11.

79. The statutory authority contained in s. 40(4) of the *ICA* merely enables contempt proceedings. Section 40(4) does not confer upon the Court the power to adjudicate contempt proceedings, including imposing sanctions in response to a finding of contempt. Rather, s. 40(4) only extends as far as a *prima facie* determination that there has been a failure or refusal to comply so as to permit contempt proceedings. Contempt proceedings themselves are governed by Rule 47.1 of the *Federal Courts Rules*.

80. In short, contempt proceedings which could result in penal consequences do not occur under the *ICA*.

D. The Second Branch of the *Wigglesworth* Test

(i) ***Section 40 of the ICA Does Not Involve the Imposition of True Penal Consequences***

81. Under the second branch of the *Wigglesworth* test, a proceeding that is not criminal or quasi-criminal in nature but attracts a "true penal consequence" will be equated to a criminal or quasi-criminal proceeding for s. 11 *Charter* purposes.⁶⁷ In *Wigglesworth*, Wilson J. defined "true penal consequences" as those involving "imprisonment or a fine which by its magnitude would

⁶⁶ *McNaught v. Toronto Transit Commission* (2005), 249 D.L.R. (4th) 334 (Ont. C.A.) at paras. 42-49, application for leave to appeal denied, [2005] S.C.C.A. No. 133

⁶⁷ *R v. Jackpine* (2006), 207 C.C.C. (3d) 225 (S.C.C.) at para. 61

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.”⁶⁸

82. Section 40 of the *ICA* does not include imprisonment as a potential penalty for non-compliance. The question is whether the monetary penalties of up to \$10,000 per day of contravention authorized by ss. 40(2)(d) and 40(2.1) amount to the imposition of true penal consequences.

(ii) *A Monetary Penalty Standing Alone is Not a True Penal Consequence*

83. The Court in *Wigglesworth* was careful to point out that the mere ability to impose an administrative monetary penalty for non-compliance is not to be equated with a true penal consequence. To the contrary, as Wilson J. stated, “the possibility of a fine may be fully consonant with the maintenance of discipline and order within a limited sphere of activity and thus may not attract the application of s. 11.”⁶⁹

84. A recurring theme of U.S. Steel’s argument that proceedings under ss. 39 and 40 of the *ICA* should attract the application of s. 11(d) of the *Charter* is a preoccupation with the potential amount of the monetary penalties theoretically permitted by ss. 40(2)(d) and 40(2.1). U.S. Steel variously refers to the possible financial penalties as: “significant”; “multi-million dollar”; and “King Kong fines”. What U.S. Steel fails to address is how these amounts can fairly be characterized as having as their purpose “redressing a wrong to society” as distinct from maintaining internal discipline within the limited sphere of foreign investment in Canada by non-Canadian investors in accordance with the *ICA*. This lacuna is necessarily fatal to U.S. Steel’s reliance on the second branch of the *Wigglesworth* test.

85. In *Wigglesworth*, Wilson J. was clear that it is neither the ability to impose a monetary penalty nor the potential magnitude of a monetary penalty that renders the monetary penalty penal in nature. Rather, it is the magnitude of the fine *combined* with the finding that the fine is being imposed for the purpose of “redressing a wrong to society” and not the “maintenance of internal

⁶⁸ *Wigglesworth*, *supra*, at p. 402

⁶⁹ *ibid.*

discipline within the limited sphere of activity" that is required to meet the second branch of the *Wigglesworth* test.⁷⁰

86. The distinction under the second branch of the *Wigglesworth* test lies in the magnitude of monetary penalties aimed at achieving a legislative purpose on the one hand and those that exceed this purpose and seek to redress a wrong done to society at large. It is only the latter that are truly penal in nature and attract the application of s. 11. As Wilson J. recognized in *Wigglesworth*:

...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. Instead, it is restricted to the power to impose fines in order to achieve the particular private purpose. [Emphasis added.]⁷¹

87. The Court in *Lavallee* expressly rejected the argument that the potential amount of an administrative monetary penalty is sufficient to render the penalty a true penal consequence. The Court emphasized that the determination required under the second branch of the *Wigglesworth* test necessarily requires that the magnitude of the fine be considered in relation to its underlying purpose:

...the size of an available administrative penalty does not demonstrate, in itself, that a proceeding threatens true penal consequences...in light of *Wigglesworth*, if the fine imposed is aimed at maintaining discipline and order within a limited private sphere of activity, then it does not constitute a true penal consequence.

...
...the dollar amount of the administrative penalty or its magnitude is not determinant, 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.]⁷²

88. Thus, in *Martineau*, Fish J., in answering the question of whether an ascertained forfeiture in the amount of \$314,458 imposed under the *Customs Act* was a "true penal consequence", framed the issue as whether this amount could be seen as "redressing a wrong done to society at large, as opposed to the purpose of maintaining the effectiveness of customs requirements."⁷³

⁷⁰ *Wigglesworth*, *supra*, at p. 402

⁷¹ *Wigglesworth*, *supra*, at p. 361

⁷² *Lavallee*, *supra*, at para. 142

⁷³ *Martineau*, *supra*, at para. 60

89. The financial consequences of non-compliance under s. 40 of the *ICA* are not aimed at "redressing a wrong done to society at large" but rather are intended to maintain internal discipline within the limited private sphere of foreign investment in Canada by providing a timely and effective mechanism for enforcing compliance with the regulatory regime under the *ICA* governing investments subject to its application. In this sense, they are no different in character than ascertained forfeiture proceedings which were found by the Court in *Martineau* to be aimed at ensuring compliance with the requirements of the *Customs Act*.⁷⁴

90. Consistent with *Wigglesworth*, the monetary penalties available under s. 40 of the *ICA* are "fully consonant with the maintenance of discipline and order within a limited private sphere of activity."⁷⁵ The magnitude of possible monetary penalties permitted by s. 40 of the *ICA* are intended to be sufficiently significant in order to deter non-Canadian investors from failing to comply with the regulatory regime while at the same time providing an incentive for diligence on the part of non-Canadian investors in living up to their commitments, including by honouring any undertakings.⁷⁶

91. Another critical distinction in considering U.S. Steel's contention that the monetary penalties available under s. 40 of the *ICA* involve "true penal consequences" is the intended purpose of these penalties as compared to their perceived effect. That a monetary penalty may have the perceived effect of "punishing" does not support a true penal consequence provided that is not its purpose.⁷⁷ As has been noted in the discussion of monetary penalties in the securities context:

...any penalty may well be regarded, from the perspective of the person on whom it is imposed, as "punitive". This is understandable. However, simply because sanctions may have a punitive effect on the wrongdoer does not mean that they do not also serve a valid regulatory or administrative purpose.⁷⁸

92. Again, the potential amount of the monetary penalties cannot be considered in the abstract divorced from the overall context. The *ICA* seeks to regulate the behaviour of private economic entities. These sophisticated actors are presumed to act rationally in conducting their business

⁷⁴ *Ibid.*

⁷⁵ *Wigglesworth*, *supra*, at p. 401

⁷⁶ *Lavers v. British Columbia (Minister of Finance)* (1989), 64 D.L.R. (4th) 193 (B.C.C.A.) at p. 223

⁷⁷ *Martineau*, *supra*, at paras. 36-39

affairs. The monetary penalties allowed by s. 40 must therefore be of a sufficient magnitude to ensure that these penalties are not simply written off as another cost of doing business. Rather, the financial sanctions available for non-compliance must contemplate amounts capable of deterring forward-looking market participants from engaging in similar contraventions by creating clear economic disincentives for doing so.⁷⁹ As in *Martineau*, contraventions must carry the potential for significant penalties in order for the system to be viable – this is the very essence of deterrence.⁸⁰

93. U.S. Steel's reliance on the application of the *Wigglesworth* test in the human rights context is, with respect, not helpful. The decision of the Canadian Human Rights Tribunal in *Warman v. Lemire* does not deal with the regulation of private economic activity by sophisticated commercial actors but rather with remedying the societal harm caused by hate messages.⁸¹ The economic contexts found in the *Lavallee* and *Lebski* decisions are far more analogous to the present case.

94. More significantly, *Warman* is of *no* assistance because it does not involve the application of the *Wigglesworth* test as a basis for determining the application of s. 11 of the *Charter*, but rather as part of a s. 2(b) *Charter* analysis. Indeed, the Tribunal in *Warman* expressly left open the s. 11 question.⁸² Parenthetically, it is doubtful to say the least that *Warman* could be read as holding that s. 11 applies to human rights proceedings in view of the fact that the Supreme Court of Canada has concluded otherwise.⁸³

95. As well, the fact that under s. 40(3) of the *ICA* any monetary penalties imposed under ss. 40(2)(d) or 40(2.1) are recoverable in superior court as civil debts rather than through criminal

⁷⁸ *Lavallee*, *supra*, at para. 90

⁷⁹ *Lavallee*, *supra*; and *Cartaway*, *supra*

⁸⁰ *Martineau*, *supra*, at para. 38

⁸¹ *Warman v. Lemire*, 2009 CHRT 26, application for judicial review filed October 1, 2009 (Federal Court Docket No. T-1640-09)

⁸² *Ibid.* at para. 279

⁸³ *Blencoe v. British Columbia (Human Rights Commission)* (2000), 190 D.L.R. (4th) 513 (S.C.C.) at para. 92

prosecution further supports the conclusion that the monetary penalties authorized by the *ICA* do not give rise to true penal consequences.⁸⁴

96. It also matters not that any monetary penalties imposed under the *ICA* are payable to Her Majesty in Right of Canada. Admittedly, where fines are applied to a specific purpose related to the legislation in question, this will bolster the finding that the fines do not involve true penal consequences.⁸⁵ However, the fact that monetary penalties become part of the consolidated revenue fund does nothing to detract from the finding that the penalties do not involve true penal consequences.⁸⁶

(iii) *A Statutory Discretion to Impose a Maximum Monetary Penalty Does Not Presumptively Violate the Charter*

97. At its highest, U.S. Steel's argument is that the sheer magnitude of the possible monetary penalty that *could* be imposed under ss. 40(2)(d) and 40(2.1) of the *ICA* necessarily means that these provisions involve the imposition of true penal consequences. Even if it could be said, contrary to *Wigglesworth*, that the amount of the maximum allowable monetary penalty by itself could be determinative of the "true penal consequences" question, there are three fundamental flaws inherent in this argument.

98. First, U.S. Steel is effectively saying that if the Court decides to impose a monetary penalty, whether under ss. 40(2)(d) or 40(2.1) of the *ICA*, the Court cannot be trusted to exercise its discretionary authority in a manner consistent with the *Charter* in fixing the amount of any monetary penalty. This argument assumes a prospective breach of the *Charter* in the exercise of discretion occasioned by ss. 40(2)(d) and 40(2.1). However, the law is well-settled that where a statute confers a discretion it is to be presumed that this discretion will be exercised in accordance with the *Charter*.⁸⁷ Accordingly, it is to be presumed that if the Court ultimately imposes a monetary penalty, whether in the instant case or any case, the amount imposed will not be constitutionally infirm.

⁸⁴ *Lebski, supra*, at para. 54

⁸⁵ *Wigglesworth, supra*, at p. 402

⁸⁶ *Lavers, supra*, at pp. 223

⁸⁷ *R. v. Shoker* (2006), 212 C.C.C. (3d) 417 (S.C.C.) at para. 39

99 Second, simply because an order under a statute *could* be contrary to the *Charter* does not render the statute itself unconstitutional, unless the statute mandates such an order. Section 40 does not mandate the imposition of the maximum monetary penalty, or any monetary penalty for that matter. Whether a monetary penalty will be imposed and the amount of any such penalty is entirely within the Court's discretion. The Court could decide to impose a nominal penalty, the maximum allowable penalty or no penalty at all. If a penalty in a given case amounted to a true penal consequence then the order authorizing the penalty might be constitutionally infirm, but this would not affect the constitutionality of the *ICA* itself.⁸⁸

100. Third, s. 40 of the *ICA* must afford flexibility in the amount of any monetary penalty that can be imposed for non-compliance given the breadth of investments covered by the legislation. If the financial consequences of non-compliance are to be effective in deterring contraventions then any monetary penalty must be capable of amounting to more than simply a cost of doing business. It is entirely possible that the maximum allowable monetary penalty will be appropriate in a given case. True penal consequences are not tied to an arbitrary cap above which monetary penalties will take on a criminal character.

101. The reasoning of the Alberta Court of Appeal in describing the ability of provincial securities regulators to impose administrative monetary penalties of up to \$1,000,000 for contraventions of the *Securities Act* amply illustrates this point:

...the Commission's power to determine the quantum of sanction should not be fettered by a court-made rule limiting the Commission's scope of sanction on the basis that the penalties that might be imposed are perceived to be punitive. The Legislature has conferred on the Commission jurisdiction for administrative penalties up to \$1,000,000.00....the maximum amount of administrative penalty reflects a legislative intent that these penalties ought not to be so low that they amount to nothing more than another cost of doing business. It also signals the Legislature's intent that the Commission should fit the sanction to the circumstances, including the magnitude of the illegality and the need to encourage lawful conduct by those involved with securities. [Emphasis added.]⁸⁹

(iv) *The Possibility of Forced Divestiture*

102. Finally, U.S. Steel also takes issue with the Court's ability to order forced divestiture under s. 40(2)(a) of the *ICA* as a remedy for non-compliance. U.S. Steel's articulation of this possibility

⁸⁸ *Slaight Communications Inc. v. Davidson* (1989), 59 D.L.R. (4th) 416 (S.C.C.) at p. 444

⁸⁹ *Alberta Securities Commission v. Brost*, 2008 ABCA 326 at para. 54

as amounting to a "true penal consequence" is not clearly defined and is therefore difficult to discern. U.S. Steel seemingly creates the false impression that such an order is tantamount to expropriation of U.S. Steel's property without compensation. This is simply not the case.

103. As with the imposition of monetary penalties, a divestiture order is discretionary and not mandatory. Moreover, if the Court decides to make such an order, s. 40(2)(a) makes the exercise of this discretion subject to the ability to impose "any terms and conditions that the court considers just and reasonable". In light of this express language, it cannot be said that a divestiture order is intended to "punish". It should also be noted that a non-Canadian investor could be made to give up control while still retaining a minority ownership interest. As one commentator has pointed out:

...a divestiture order may not be as fearsome as it sounds. To begin with, courts are instructed to be just and reasonable when making such an order. This suggests that they may listen to heart-string arguments. One result may be creative or unusual orders, or at least an order that affords the investor ample time to divest.

...

...even if an order is made, the non-Canadian can retain a sizeable minority interest. Indeed, although control would have to be given up, it might not have to be transferred to a third party.⁹⁰

104. Moreover, as with U.S. Steel's constitutional attack on the judicial discretion to impose and fix the amount of monetary penalties, its challenge to the forced divestiture provision is similarly flawed. This argument also assumes a prospective breach of the *Charter* in the exercise of this discretion and wrongly supposes that s. 40(2)(a) of the *ICA* mandates an unconstitutional result which, as explained above, do not accord with well-established legal principles.

E. Enforcement Proceedings Under Sections 39 and 40 of the *ICA* Do Not Satisfy Either Branch of the *Wigglesworth* Test

105. For all of these reasons, U.S. Steel has failed to demonstrate that proceedings under ss. 39 and 40 of the *ICA* are criminal or quasi-criminal in nature or, alternatively, that the range of orders available for non-compliance under s. 40 support the imposition of true penal consequences.

106. In these circumstances, U.S. Steel cannot be viewed as a "person charged with an offence" within the meaning of s. 11 of the *Charter*. As a result, s. 11(d) does not apply to the proceedings

in the case at bar. It is therefore unnecessary to consider whether the impugned provisions comply with any procedural or substantive fairness requirements imposed by s. 11(d).

107. Any fairness requirements in the instant case are left to be determined with reference to s. 2(e) of the *BOR*, which, as more fully explained below, are only procedural in scope and only apply to the application stage under s. 40 of the *ICA* where rights and obligations are actually adjudicated.

THE APPLICATION OF THE *BILL OF RIGHTS* TO THE *ICA*

F. The *BOR* and the Duty of Fairness

(i) Introduction

108. The process for applications made under s. 40 of the *ICA* is fair.

109. Section 40 requires that applications under that section be made to a superior court, but does not prescribe a procedure for such applications. The procedure in any s. 40 application is governed by the rules of the court to which the application is made. As such, s. 40 of the *ICA* cannot, on its face, be inconsistent with s. 2(e) of the *BOR*, which protects only procedural rights.

110. Fairness requires three things: that a person know the case they have to meet; have an opportunity to answer that case; and have the case decided by an impartial decision-maker. The *Federal Courts Act* and the process provided for applications under the *Federal Courts Rules* meet that standard.

111. U.S. Steel alleges that ss. 39 and 40 of the *ICA* violate its right to a fair hearing contrary to s. 2(e) of the *BOR* and are therefore inoperative. It also alleges that ss. 39 and 40 of the *ICA* are inconsistent with the principles of natural justice and the duty of fairness.

112. The AGC submits that U.S. Steel may rely on s. 2(e) of the *BOR* only as it relates to the application process under s. 40 of the *ICA*. Moreover, s. 2(e) of the *BOR* only protects procedural rights.

113. This part of the AGC's argument addresses the following four issues:

⁷⁰ Deigan, *supra*, at p. 275

- (i) The status of the *BOR* as a quasi-constitutional document;
- (ii) The application of ss. 1(a) and 2(e) of the *BOR* in this case;
- (iii) The application of s. 2(e) of the *BOR* to s. 39 of the *ICA*; and
- (iv) The application of s. 2(e) of the *BOR* to s. 40 of the *ICA*.

(ii) *The BOR is Quasi-Constitutional Legislation*

114. The *BOR* lacks the constitutional force and status of a true constitutional instrument like the *Charter*. Absent a clear inconsistency between the impugned provisions of the *ICA* and the *BOR*, this Court should decline to declare that any provision of the *ICA* is inconsistent with the *BOR* and therefore inoperative.

115. In *Curr v. the Queen*, the Supreme Court of Canada commented on the interplay between the *BOR* and certain provisions of the *Criminal Code*. The Court stated where a party asks the Court to declare provisions of a statute to be inconsistent with the *BOR*:

...compelling reasons ought to be advanced to justify the Court...to employ a statutory (as contrasted with a constitutional) jurisdiction to deny operative effect to a substantive measure duly enacted by a Parliament constitutionally competent to do so, and exercising its powers in accordance with the tenets of responsible government, which underlie the discharge of legislative authority under the *British North America Act*.⁹¹

116. In *Hogan v. The Queen*, Laskin C.J., in dissent, stated that the *BOR* is "a half-way house between a purely common law regime and a constitutional one; it may aptly be described as a quasi-constitutional instrument."⁹²

117. In *Reference re B.C. Motor Vehicle Act*, the Court referred with approval to the following passage from the minority reasons of Le Dain J. in *R. v. Therens*, which the Court stated had the "implicit support" of the majority:

In considering the relationship of a decision under the *Canadian Bill of Rights* to an issue arising under the *Charter*, a court cannot, in my respectful opinion, avoid bearing in mind an evident fact of Canadian judicial history, which must be squarely and frankly faced: that on the whole, with some notable exceptions, the courts have felt some uncertainty or ambivalence in the application of the *Canadian Bill of Rights* because it did not reflect a clear constitutional mandate to make

⁹¹ *Curr v. the Queen*, [1972] S.C.R. 889 at pp. 899-900

⁹² *Hogan v. The Queen*, [1975] 2 S.C.R. 574 at p. 597

judicial decisions having the effect of limiting or qualifying the traditional sovereignty of Parliament.⁹³

118. Notwithstanding the foregoing, courts have been prepared to apply the *BOR* and declare provisions in federal legislation to be inoperative in a limited number of cases where the inconsistency between the impugned provision and the *BOR* was clear and unambiguous.⁹⁴

119. U.S. Steel bears the burden of establishing an inconsistency between the impugned provisions of the *ICA* and s. 2(e) of the *BOR*. The AGC submits, for the reasons set out below, that U.S. Steel has failed to discharge that burden.

(iii) *U.S. Steel Can Only Rely On Section 2(e) of the BOR*

120. U.S. Steel relies on ss. 1(a) and 2(e) of the *BOR*.

(a) *Section 1(a) of the BOR*

121. Section 1(a) of the *BOR* protects certain rights of "individuals".⁹⁵

122. In *Canada v. Central Cartage Co.*, the Federal Court of Appeal summarily rejected Central Cartage's attempt to rely on s. 1(a) of the *BOR*, stating that section "applies only to individuals which does not include bodies corporate."⁹⁶

123. U.S. Steel is also a corporation and, therefore, it cannot rely on s. 1(a) of the *BOR*. To the extent that U.S. Steel's argument is founded on s. 1(a) of the *BOR*, it must fail.

⁹³ Reference re *B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486 at p. 510; *R. v. Therens*, [1985] 1 S.C.R. 613 at pp. 638-639.

⁹⁴ See for example: *R. v. Drybones*, [1970] S.C.R. 282; *Singh v. Canada* [1985] 1 S.C.R. 177; *McBain v. Canada* [1985] 1 F.C. 856; *Air Canada v. Canada (Procureure Générale)*, 23 C.P.R. (4th) 129 (Que. C.A.)

⁹⁵ 1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely, (a) the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law;

(b) Section 2(e) of the *BOR*

124. Section 2(e) of the *BOR* provides as follows:

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 determination of his rights and obligations;

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 définition de ses droits et obligations;

125. Corporations are "persons" under s. 2(e) of the *BOR* and therefore U.S. Steel may rely on that section.⁹⁷

126. The "chapeau" to s. 2 of the *BOR* provides that the right to a fair hearing applies in relation to "any of the rights or freedoms *herein recognized*" (i.e., recognized within the *BOR*). The right to the "enjoyment of property" is recognized in s. 1(a) of the *BOR*. However, it is important to remember that s. 2(e) of the *BOR* protects *only* procedural rights.

127. As the Federal Court of Appeal said in *Central Cartage*:

... the words "principles of fundamental justice" qualify the "right to a fair hearing" and operate differently from section 7 of the Charter because in that section they qualify much more fundamental rights, namely, the "right to life, liberty and security of the person". Consequently paragraph 2(e) is much narrower in scope than section 7 of the Charter in that the former deals solely with procedural fairness. [Emphasis added.]⁹⁸

⁹⁶ *Central Cartage*, *supra*, at p. 660; *New Brunswick Broadcasting Co., Limited v. Canadian Radio-television and Telecommunications Commission*, [1984] 2 F.C. 410 (C.A.) at pp. 427-428.

⁹⁷ *Sam Lévy & Associés Inc. v. Mayrand*, 2005 FC 702, [2006] 2 F.C.R. 543 at para. 51.

⁹⁸ *Central Cartage*, *supra*, at p. 664. See also *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486 at p. 511; *Hogg*, *supra*, at pp. 47-19 to 47-20.1.

128. Similarly, in *Sam Lévy & Associés Inc. v. Mayrand*, the Supreme Court of Canada stated:

The phrase “principles of fundamental justice” in paragraph 2(e) of the Bill is expressly associated with the right to a “fair hearing”, while section 7 of the Canadian Charter does not create the same connection. In the latter case, the words “principles of fundamental justice” are associated with a much more fundamental right, i.e. the right to “life, liberty and security of the person.”⁹⁹

129. In view of the foregoing, a person *may not* be deprived of a right or freedom “recognized” in the *BOR* without a fair hearing. However, a corporation, which cannot rely on the substantive right to the enjoyment of property provided for in s. 1(a) of the *BOR*, *may* be deprived of its property rights without running afoul of the *BOR*, provided that the procedure followed in bringing about that result is fair within the meaning of s. 2(e) of the *BOR*.

(iv) Section 2(e) of the BOR Does Not Apply to Section 39

130. U.S. Steel alleges that ss. 39 and 40 of the *ICA* are inconsistent with s. 2(e) of the *BOR*. The AGC submits that the *BOR* does not apply to the process under s. 39 of the *ICA*.

(a) The Minister Is Not Empowered to Determine Rights and Obligations

131. Section 2(e) of the *BOR* does not apply to s. 39 of the *ICA* because that section does not provide the Minister with power to determine “rights and obligations”.

132. Section 2(e) of the *BOR* provides that the laws of Canada are to be construed and applied so as not to “deprive a person of the right to a fair hearing for the determination of his rights and obligations”. In *Authorson v. Canada*, the Supreme Court stated:

What procedural protections for property rights are guaranteed by due process? In my opinion, the *Bill of Rights* guarantees notice and some opportunity to contest a governmental deprivation of property rights only in the context of an adjudication of that person's rights and obligations before a court or tribunal. [Emphasis added.]¹⁰⁰

133. Section 39 of the *ICA* does not provide for an adjudication of a non-Canadian investor's rights and obligations.

134. Section 39(1) of the *ICA* provides that where the Minister believes that a non-Canadian investor has taken action contrary to the *ICA*, the Minister may send a demand to the investor

⁹⁹ *Sam Lévy & Associés Inc. v. Mayrand*, *supra*, at para. 46

¹⁰⁰ *Authorson v. Canada (Attorney General)*, 2003 SCC 39, [2003] 2 S.C.R. 40 at para. 42

requiring it to cease the contravention, remedy the default, show cause why there is no contravention or, in the case of undertakings, justify any non-compliance.

135. Pursuant to s. 39(3) of the *ICA*, the Minister's demand must indicate the "nature of the proceedings that may be taken under this Act against the non-Canadian investor to whom it is sent in the event that the non-Canadian investor fails to comply therewith." However, neither the Minister's demand, nor the Minister's view regarding whether or not the demand has been complied with, are determinative of any person's rights or obligations.

136. If the Minister is of the view that an investor's response fails to comply with a demand, an application on behalf of the Minister may be made to superior court pursuant to s. 40 of the *ICA*.

137. It is only where, pursuant to an application under s. 40, a superior court concludes that: (1) the Minister was justified in sending a demand; and, (2) the non-Canadian investor or other person has failed to comply with the demand, that the superior court may determine the rights and obligations of a party to whom a demand has been made and issue an order that may have an impact on, among other things, the right to the enjoyment of property.

138. In short, s. 2(e) of the *BOR* is incapable of applying to s. 39 of the *ICA* because nothing that occurs under that section amounts to an adjudication of U.S. Steel's rights and obligations by a court or tribunal. There is equally no deprivation to U.S. Steel occasioned by the Minister's making of a demand under s. 39. By including s. 39 in the *ICA*, Parliament has given investors a first opportunity to be made aware of an issue and address it, before resort is had, if necessary, to an adjudicative process under s. 40 of the *ICA*.

139. The process under s. 39 is simply a statutory prerequisite to the Minister's ability to make an application under s. 40; that process does not lead to a legal determination of rights and obligations by the Minister. This is readily apparent from the fact that s. 40 is not a judicial review of a Ministerial decision made under s. 39. Rather, it is a *de novo* proceeding. This Court, and not the Minister, is vested with sole jurisdiction for adjudicating matters of alleged non-compliance and ordering remedies where appropriate.

140. In *Commissioner of Competition v. Air Canada*¹⁰¹, the Quebec Court of Appeal considered whether s. 104.1 of the *Competition Act* should be declared inoperative because it was contrary to s. 2(e) of the *BOR*. Section 104.1 allowed the Commissioner to issue an order prohibiting certain persons from engaging in anti-competitive conduct. Orders under s. 104.1 had an initial term of 20 days and were renewable for two 30-day periods.

141. The Commissioner argued that the principles of natural justice had no application to s. 104.1 because orders under that section were temporary and did not result in a final determination of rights and obligations.

142. The Court rejected that argument. It held that procedural guarantees apply only in respect of "final decisions", which are decisions that have "an immediate and direct effect on a party".¹⁰² However, the Court found that orders under s. 104.1 *were* final decisions given that, under s. 104.1, the Commissioner could "prohibit" a person from engaging in anti-competitive conduct or "require" a person to take steps to prevent injury to competition. It held that a person subject to a s. 104.1 order would be required to alter their conduct upon the issuance of the order.¹⁰³

143. The same is not true under s. 39 of the *ICA*. That provision does not authorize the Minister to issue orders. Moreover, as noted above, only a superior court hearing an application under s. 40 of the *ICA* can determine a non-Canadian investor's rights and obligations and issue an order requiring it to take some action.

144. In the result, the AGC submits that s. 39 of the *ICA* is not subject to s. 2(e) of the *BOR*.

(v) *The Process for the Adjudication of Rights and Obligations Under Section 40 is Fair*

(a) "fair hearing in accordance with the principles of fundamental justice"

145. Section 2(e) of the *BOR* guarantees a person "the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations".

¹⁰¹ *Air Canada*, *supra*

145. In *Duke v. The Queen*, the Supreme Court stated as follows:

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 fundamental 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 must act fairly, in good faith, without bias and in a judicial temper, and must give to him the opportunity adequately to state his case.¹⁰⁴

147. The term "fundamental justice" in s. 2(e) of the *BOR* is equivalent to natural justice and procedural fairness.¹⁰⁵

148. At its heart, fairness requires that a person know the case against them; be provided with an opportunity to answer that case; and have that case decided by an impartial decision-maker.¹⁰⁶

149. However, the content of fairness is variable. The *Baker* factors animate and give meaning to the fairness standard in various contexts.¹⁰⁷

150. In two recent cases, courts have applied the *Baker* factors in determining the content of procedural fairness under s. 2(e) of the *BOR*.¹⁰⁸

151. Before embarking on a *Baker* analysis, it bears noting that applications under s. 40 of the *ICA* must be made to a superior court. While s. 40 provides that proceedings under that section are to be initiated by way of an application, it does not prescribe the procedure for such applications. The procedure for s. 40 applications is governed by the rules of the superior court to which the application is made.

152. Superior courts represent the "gold standard" with respect to fairness, in terms of the impartiality requirement, as well as the requirement that persons subject to state action know the case they have to meet and be provided with an opportunity to meet that case. Indeed, as the

¹⁰² *Ibid.* at para. 78

¹⁰³ *Ibid.* at para. 80

¹⁰⁴ *Duke v. The Queen*, [1972] S.C.R. 917 at p. 923

¹⁰⁵ *Bell Canada v. Canadian Telephone Employees Association*, 2003 SCC 36, [2003] 1 S.C.R. 884; Hogg, *supra*, at p. 47-20

¹⁰⁶ *Duke v. The Queen*, [1972] S.C.R. 917 at p. 923

¹⁰⁷ *Baker v. Canada (Min of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paras. 21-28

¹⁰⁸ *Lavallee, supra*, at para. 200 (Alberta Bill of Rights); *C.N.R. v. Western Canadian Coal Corporation* (2007) F.C.T.R. 371 at para. 33. See also, *Commission of Competition v. Canada Pipe Company Ltd.*, 2003 Comp. Trib. 15 at paras. 52-53

Supreme Court of Canada has stated, "principles of procedural fairness...govern all judicial proceedings in this country."¹⁰⁹

153. Reliance on *Baker* in the case at bar is therefore somewhat anomalous in the sense that *Baker* is concerned with fairness requirements in the administrative hearing context and not the judicial hearing context which is presumed to comply with procedural fairness.¹¹⁰ Indeed, the level of fairness afforded by judicial proceedings exceeds any fairness requirements imposed by *Baker*. That said, as the application of the *Baker* factors demonstrates, the process provided in the *Federal Courts Rules* for applications under s. 40 of the *ICA* more than satisfies any fairness requirements required on a *Baker* analysis, assuming that a *Baker* analysis is even appropriate in the context of judicial proceedings.

(b) **Application of the *Baker* Factors**

154. Having regard to the *Baker* factors, the content of the duty of fairness in an application under s. 40 of the *ICA* is in the medium range.

Factor 1 - nature of the decision made and the procedures followed in making it

155. A decision under s. 40 of the *ICA* would be made by a superior court based on its findings of fact and law, following the hearing of an application. Such a decision would result in a determination of an investor's legal rights and obligations. The procedure followed by the court would be as set out in its rules relating to applications, which are typically summary proceedings, with fewer procedural rights than, for example, matters that proceed by way of an action. This factor suggests a significant level of procedural fairness.

Factor 2 - the role of the particular decision within the statutory scheme

156. With respect to the second factor, the Supreme Court in *Baker* said:

The role of the particular decision within the statutory scheme and other surrounding indications in the statute help determine the content of the duty of fairness owed when a particular administrative decision is made. Greater procedural protections, for example, will be required when no appeal procedure is provided within the statute, or when the decision is determinative of the issue and further requests cannot be submitted.¹¹¹

¹⁰⁹ *United States of America v. Cobb* (2001), 152 C.C.C. (3d) 270 (S.C.C.) at para. 32

¹¹⁰ *Baker*, *supra*, at para. 23

¹¹¹ *Ibid.* at para. 24

157. Decisions of the Federal Court are not protected by a privative clause. They may be appealed to the Federal Court of Appeal, where the standard of review on questions of law is correctness and for all other questions is palpable and overriding error.¹¹²

158. In the present case, the Minister concluded that U.S. Steel's acquisition of Stelco was likely to be of net benefit to Canada and gave his approval for the acquisition to proceed. The Minister considered the undertakings given by U.S. Steel, among other things, in reaching that conclusion.

159. With the Application under s. 40 of the *ICA*, the Minister seeks to enforce two of these undertakings. The Court's "decision within the statutory scheme" will be to further the Minister's goal of enforcing the undertakings.

Factor 3 - the importance of the decision to the individual affected

160. The Court in *Baker* indicated that the importance of the decision to the individual affected is "a significant factor affecting the content of the duty of procedural fairness".¹¹³ Similarly, the Supreme Court has stated that "the stringency of procedural protection is directly proportional to the importance of the decision to the lives of those affected and the nature of its impact on them."¹¹⁴

161. Corporations facing potential economic consequences as a result of a decision, particularly in the context of regulatory regimes, are *not* entitled to the same level of procedural fairness as individuals who face a decision which may have an impact on their reputation, standing in the community or ability to earn a livelihood.

162. In *Ciba-Geigy Canada v. Patented Medicines Prices Review Board*, Ciba-Geigy sought judicial review of the Board's decision not to provide it with certain disclosure. The Federal Court described the issue before it on judicial review in the following terms:

Both parties agree that the doctrines of fairness and natural justice apply here. The question is whether, in the circumstances of this case, CIBA is only entitled to the documents which the Board intends to rely on at the hearing, or whether CIBA is entitled to all "the fruits of the

¹¹² *Canada v. Stantec Inc.*, 2009 FCA 285 at para. 6

¹¹³ *Baker*, *supra*, at para. 25

¹¹⁴ *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)*, 2004 SCC 48 at para. 9

investigation" of Board staff, as provided in *R. v. Stinchcombe*, [cite omitted].¹¹⁵

163. In dismissing Ciba-Geigy's application, the Federal Court distinguished the situation before the Board from that before the Ontario Human Rights Board in *Ontario (Human Rights Commission) v. Ontario (Northwestern General Hospital) ("House")*¹¹⁶, a case in which *Stinchcombe* was applied in a civil context. The Court found that one of the reasons that broad-ranging disclosure was ordered in *House* was the seriousness of the allegations of racism in issue – those allegations having the “potential, if made out, to ruin reputations, and cast a pall over the future career prospects of anyone found to have so discriminated.”¹¹⁷

164. The Court contrasted this with the impact for Ciba-Geigy if the Board found that it had charged excessive prices. It held that such a finding could cost Ciba-Geigy approximately \$20 million and have an impact on the public and commercial reputation of the company and the personal reputations and careers of its officers, directors and employees. However, the Court found that “this is always a potential result of economic regulation.”¹¹⁸ The Court also noted that “[t]ribunals charged with regulating economic activity have not had placed on them the same high standards as tribunals dealing with personal individual rights”.¹¹⁹

165. In upholding the Federal Court's decision, the Court of Appeal stated:

There are admittedly serious economic consequences for an unsuccessful patentee at a s. 83 hearing, and a possible effect on a corporation's reputation in the marketplace. But as McKeown J. found, the administrative tribunal here has economic regulatory functions and has no power to affect human rights in a way akin to criminal proceedings.”¹²⁰

165. In *Sheriff v. Canada*, the Federal Court of Appeal considered the extent of disclosure required in the context of a disciplinary proceeding relating to the conduct of certain trustees in bankruptcy. The trustees faced the possibility of having their licences suspended and injury to their professional reputations. In distinguishing between cases involving consequences of that sort and economic or regulatory cases, the Court stated:

¹¹⁵ *Ciba-Geigy Canada v. Patented Medicines Prices Review Board*, [1994] 3 F.C. 425

¹¹⁶ *(Human Rights Commission) v. Ontario (Board of Inquiry into Northwestern General Hospital)* (1993), 115 D.T.R. (4th) 279 (Ont. C.J. (Div. Ct.))

¹¹⁷ *CIBA-Geigy, supra*, at para. 21

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid.* at para. 23

¹²⁰ *Ciba-Geigy Canada v. Patented Medicines Prices Review Board*, (2003), 56 C.P.R. (3d) 377 (F.C.A.) at para. 5

While both *CIBA* and *D & B* involve potential economic hardship for the appellant companies, neither case involves the individual's right to work or professional reputation. The interests of the appellants in these cases do not parallel those of the accused in a criminal proceeding; therefore, a lower level of disclosure was appropriate.¹²¹

167. A decision under s. 40 of the *ICA* involves potential economic hardship on a non-Canadian investor's economic interests. However, it does not give rise to the sort of dire consequences as, for example, an adverse decision by a professional disciplinary committee or a human rights tribunal, which may ruin reputations, cast a pall over future career prospects or impair an individual's ability to earn a livelihood.

168. Moreover, in considering the "importance of the decision" under s. 40 of the *ICA*, it is important to bear the notion of proportionality in mind. In that regard, it is noteworthy that for investors from World Trade Organization countries such as the United States, only investments involving the acquisition of assets valued at \$312,000,000 or more are reviewable under the *ICA*.¹²² As a consequence, applications under s. 40 of the *ICA* will always involve very substantial entities. That fact is important to bear in mind in considering the importance to an investor of the possibility that it may be ordered to pay a monetary penalty under s. 40 of the *ICA*.

169. In view of all of the foregoing, it is submitted that this factor – the importance of the decision to the individual affected – suggests a less content-rich level of procedural fairness.

Factors 4 and 5

170. *Baker* factor 4 (the legitimate expectations of the person challenging the decision) and factor 5 (the choice of procedure made by the agency itself) do not apply in this context.

¹²¹ *Sheriff v. Canada*, [2007] 1 F.C.R. 3 (F.C.A.) at para. 30

¹²² The threshold of \$312 million for WTO investors applies in 2009. It changes each year according to a formula in subsection 14.1(2) of the *ICA*. In addition, lower thresholds apply to investments by non-WTO investors and to investments in the cultural sector. For non-WTO investors and investments in the cultural sector the threshold is \$5 million for direct investments and \$50 million for indirect investments (subsections 14 (3) and (4) and 14.1(5) of the *ICA*). For investments in the cultural sector a review can also be ordered by the Governor in Council regardless of the value of the assets. (*ICA*, section 15).

(c) Conclusion Re: *Baker* Factors

171. It is submitted that the content of the duty of fairness in an *ICA* s. 40 application is in the medium range. However, translating a level of fairness in a way which is meaningful requires consideration of the demands of a party seeking fairness. In simple terms, what do they say is required in order for the process to be fair?

172. In that regard, in *Commissioner of Competition v. Canada Pipe Company Ltd.*, after canvassing the *Baker* factors and concluding that the content of the duty of fairness in that case was "significant", Blanchard J. stated:

It serves no useful purpose to further define the "content of the duty of fairness". It is rather more useful to apply the "right to a fair process" as expressed above to the various issues raised by the parties to determine whether Canada Pipe's right to procedural fairness has been violated.¹²³

173. U.S. Steel submits that:

(a) The *ICA* does not allow it to make full answer and defence or allow it to know the case it has to meet;¹²⁴ and

(b) That ss. 39 and 40 are contrary to s. 2(e) of the *BOR* in that they are vague and fail to provide investors with any legal guidance regarding the conduct that is proscribed and the conduct which gives rise to the defence of justification.¹²⁵

174. U.S. Steel asserts that "the right to make a full answer and defence has been explicitly recognized in the context of the section 2(e) of the *Bill of Rights*". In support of that position, U.S. Steel cites the trial decision in *R. v. Duke*,¹²⁶ a criminal case which was overturned by the Ontario Court of Appeal.¹²⁷ The other cases cited by U.S. Steel in support of its "full answer and defence" argument are also criminal cases, involving murder, sexual assault, impaired driving, and breach of theft, trust and fraud.

¹²³ 2003 Comp. Trib. 15 at para. 53

¹²⁴ U.S. Steel's Memorandum of Fact and Law ("U.S. Steel's Memorandum") at paras. 66-88

¹²⁵ U.S. Steel's Memorandum, paras. 89-96

¹²⁶ U.S. Steel's Memorandum at para. 75

¹²⁷ *R. v. Duke*, (1971), 4 C.C.C. (2d) 504 (Ont. C.A.), aff'd, [1972] S.C.R. 917

175. The AGC submits that the right to make “full answer and defence” is unique to criminal proceedings and is not engaged by proceedings under the *ICA*. U.S. Steel’s “know the case to meet” argument is addressed below.

(d) The Federal Court’s Application Process is Fair

176. Fairness requires that a person know the case against them; have an opportunity to answer that case; and have that case decided by an impartial decision-maker.

1. The Federal Court is an impartial decision maker

177. The independence and impartiality of Federal Court judges is constitutionally entrenched and beyond question. As the Supreme Court has noted, “[S]uperior courts, by virtue of their role as courts of inherent jurisdiction, are constitutionally required to possess objective guarantees of both individual and institutional independence.”¹²⁸

2. U.S. Steel knows the case it must meet

The Federal Court Act and Rules

178. The jurisdiction, powers and procedures of the Court are set out in the *Federal Courts Act*,¹²⁹ and the *Federal Courts Rules*,¹³⁰ which apply to all Federal Court proceedings.

179. Part 5 of the *Rules* governs proceedings brought by way of application.

180. *Rule 301* requires, among other things, that applications include: a precise statement of the relief sought; a complete and concise statement of the grounds intended to be argued, including a reference to any statutory provision or rule to be relied on; and, a list of the documentary evidence to be used at the hearing of the application. On July 17, 2009, the AGC filed the Application in accordance with *Rules*.

181. *Rule 306* provides within 30 days after issuance of a notice of application, an applicant shall serve and file its supporting affidavits and documentary exhibits. On August 13, 2009, the AGC served the Affidavit of Richard Lajeunesse on U.S. Steel.

¹²⁸ *Ocean Port Hotel Ltd. v. British Columbia*, [2001] 2 S.C.R. 781 at paras. 22-23

¹²⁹ *Federal Courts Act*, R.S.C. 1985, c. F-7

¹³⁰ *Federal Courts Rules*, SOR/98-106 (“*Rules*”)

182. Going forward, U.S. Steel will have an opportunity to file evidence,¹³¹ including expert evidence if it wishes and to cross-examine Mr. Lajeunesse.¹³²

183. Pursuant to *Rule 309*, applicants are required to serve respondents with their application record which must include their memorandum of fact and law. The AGC will provide U.S. Steel with its application record in due course. U.S. Steel will then file its application record and ultimately will have an opportunity to make oral argument.

184. For the reasons set out above, the process prescribed for applications under the *Rules*, enables respondents to applications, like U.S. Steel, to know the case they have to meet.

U.S. Steel Does not Require Additional Disclosure to "Know the Case it has to Meet"

185. U.S. Steel suggests that it will not know the case it has to meet unless it is given *Stinchcombe*-level disclosure. U.S. Steel canvasses a number of authorities from the human rights and disciplinary contexts in support of its "right to know the case to meet" argument. These cases are not relevant in this context. As noted above, in denying *Stinchcombe*-level disclosure in economic/regulatory cases, courts have distinguished those cases from human rights and disciplinary cases.

186. In *Commissioner of Competition v. Canada Pipe Company Ltd.*, Canada Pipe, relying on s. 2(e) of the *BOR*, brought a motion seeking to have the Competition Tribunal's rules declared inconsistent with paragraph 2(e) of the *BOR*. Canada Pipe alleged that those rules "violate[d] the *audi alteram partem* rule that protects the right to know the case one has to meet."¹³³ In rejecting that argument, the judicial member of the Tribunal, Blanchard J. stated:

The case that Canada Pipe must meet is set out in the Application and is supported by the documents listed in the disclosure statement. Canada Pipe is asking for additional documents that may serve to bolster its own case, which has little to do with the case it must meet. The Commissioner's case must be based on documents included in the disclosure statement, and no others. [emphasis added.]¹³⁴

187. To similar effect, in *Ciba-Geigy*, the Federal Court concluded that:

¹³¹ *Rule 307*

¹³² *Rule 308*

¹³³ *Canada Pipe, supra*, at para. 56

¹³⁴ *Ibid.* at para. 58.

The obligations concerning disclosure imposed by the doctrine of fairness and natural justice are met if the subject of the inquiry is advised of the case it has to meet and is provided with all the documents that will be relied on.¹³⁵

188. In a case under s. 40 of the *ICA*, the case an investor must meet is the case brought forward by the AGC on behalf of the Minister.

189. In *Central Cartage*, the Federal Court of Appeal addressed the argument that the denial of full disclosure in an enforcement proceeding under *FIRA* was inconsistent with s. 2(e) of the *BOR*, albeit under a different legislative scheme.¹³⁶ In *Central Cartage*, the company had been refused access to Cabinet documents which were subject to s. 36.3 of the *Canada Evidence Act*. *Central Cartage* alleged that s. 36.3 violated its *BOR* s. 2(e) rights.

190. The Court held that that Crown privilege against discovery of Cabinet confidences was not ousted by s. 2(e) of the *BOR*.¹³⁷ The Court also stated that:

I fail to see how, given the limited scope and purpose of the section 20 proceeding, the operation of a section 36.3 certificate infringes the respondents' guarantee of a fair hearing under paragraph 2(e). Especially so, when, at the main hearing under section 20, respondents will be able to advance any argument they think relevant including asking the Court to draw any inference which arises from the lack of documents requested by the respondents and protected by the section 36.3 certificate. [Emphasis added.]¹³⁸

191. Mindful of the difference between the *FIRA* and the *ICA*, the AGC submits that the Court's statements regarding the application of s. 2(e) to *FIRA* proceedings apply in this case.

3. U.S. Steel has not shown how the process under the *Rules* is deficient

192. Other than a general allegation regarding the right to know the case they have to meet, U.S. Steel provides no indication as to how or in what manner the process provided for under the *Rules* is deficient in allowing it to know the case it must meet.

193. In *Commissioner of Competition v. Sears Canada Inc.*, a case before the Competition Tribunal in which the Commissioner alleged that Sears had engaged in misleading advertising. Sears sought broad-ranging discovery claiming it was necessary to enable it to know the case it

¹³⁵ *Ciba-Geigy, supra*, at para. 32, aff'd (2003), 56 C.P.R. (3d) 377 (F.C.A.)

¹³⁶ *Central Cartage, supra*

¹³⁷ *Ibid.* at para. 43

¹³⁸ *Ibid.* at para. 44

had to meet. In dismissing Sears' motion, Dawson J., a judicial member of the Tribunal, as she then was, stated:

The disclosure provided by the Commissioner in his pleadings and disclosure statement and in the documents and will-say statements to be provided has not been shown to fall short of disclosing to Sears the case it has to meet. The affidavit filed in support of Sears' motion for discovery was sworn by a lawyer with the firm of solicitors representing Sears in this matter. It was confined to describing the procedural steps in the investigation which led to this application and in this application. The affidavit did not focus on specific information or documents said to be necessary for the defence of the application, did not state that Sears is unable to obtain this information without discovery, did not allege any actual unfairness if Sears has to proceed to hearing without specific evidence, and did not deal with the delay or expense which would flow from granting the requested discovery. These are things which in my view are relevant considerations when assessing whether discovery is warranted by the circumstances.¹³⁹

194. In *Canada Pipe*, the company brought a second motion, in which it sought discovery of the Commissioner of Competition. In dismissing the motion, after stating that the test articulated by Dawson J. in *Sears* was helpful in deciding whether further discovery should be ordered, Blanchard J. stated:

The onus is on Canada Pipe, however, to establish the evidentiary basis for the order sought. The evidence must not only focus on specific information or documents said to be necessary for the defence of the Application, but also establish any actual unfairness in having to proceed without the information.¹⁴⁰

195. In dismissing the appeal of that decision, writing for the Federal Court of Appeal, Rothstein J., as he then was, stated:

The appellant argues that denial of production in this case results in fairness being sacrificed for expediency. However we have not been shown that any actual unfairness results from the decision of Blanchard J. to deny the further production sought by the appellant.¹⁴¹

196. In the present case, U.S. Steel has provided no clear indication, let alone evidence, as to how the process provided for under the *Rules* is deficient in enabling it to know the case it must meet.

197. It is important to recall that the issues in this case revolve around two undertakings which U.S. Steel drafted in the first instance.¹⁴² In essence, the AGC has alleged that U.S. Steel has failed to abide by these undertakings because it failed to produce the required amount of steel in a

¹³⁹ *Commissioner of Competition v. Sears Canada Inc.*, (2003), 24 C.P.R. (4th) 534 (Comp. Trib.) at para. 19

¹⁴⁰ 2004 Comp. Trib 2 at para. 53

¹⁴¹ 2004 FCA 76 at para. 5

¹⁴² LaJeunesse Affidavit at para. 28

specified time frame and because it has failed to maintain the requisite level of employment. These undertakings, relating as they do to the business operations of U.S. Steel, concern matters about which U.S. Steel has a much greater knowledge than the AGC.¹⁴³

198. In view of all of the foregoing, the proposition that U.S. Steel does not know the case it has to meet is simply untenable.

4. U.S. Steel will have a meaningful opportunity to make its case

199. The process under the *Rules* for applications provides respondents with a meaningful opportunity to make their case.

200. Under the *Rules*, respondents have an opportunity to file affidavit evidence, to cross-examine the applicant's affiant, to file written submissions and to make oral argument.

201. Moreover, under the *Rules*, the Court has the ability to add elements to the application process if it considers it appropriate. For example, the Court can order the trial of an issue¹⁴⁴ and has the power, in special circumstances, to authorize a witness to testify in court in relation to an issue of fact raised in an application.¹⁴⁵

202. In view of the foregoing, the AGC submits that U.S. Steel will (and does) have an opportunity to make their case.

(vi) *No Void for Vagueness Under Section 2(e) of the BOR*

203. U.S. Steel contends that ss. 39 and 40 of the *ICA* are void for vagueness contrary to s. 2(e) of the *BOR*. However, that argument fails both at law and on the facts.

204. It fails at law because void for vagueness is a substantive protection afforded by s. 7 of the *Charter* which has no application to corporations. Accordingly, the Applicants cannot avail themselves of this argument.¹⁴⁶ Furthermore, s. 2(e) of the *BOR* is limited to procedural

¹⁴³ *C.N.R. v. Western Canadian Coal Corporation*, *supra*, at para. 42

¹⁴⁴ *Rule* 107

¹⁴⁵ *Rule* 316

¹⁴⁶ *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927

guarantees of a fair hearing; it does not extend to substantive protections that limit the content of what Parliament may enact.

205. In the alternative, if it is determined that a void for vagueness claim may be supported under s. 2(e) of the *BOR*, it is submitted that ss. 39 and 40 of the *ICA* are not vague; rather those provisions are clear and unambiguous.

(vii) *No Substantive Protections Under Section 2(e) of the BOR*

206. The guarantee of the "principles of fundamental justice" under s. 2(e) of the *BOR* does not have a substantive component, unlike s. 7 of the *Charter*.¹⁴⁷ Indeed, U.S. Steel acknowledges that courts have interpreted the principles of fundamental justice in s. 2(e) as being limited to procedural rights exclusively.¹⁴⁸ However, it then argues that "[i]t would be incongruous to conclude that the 'principles of fundamental justice' under the *Charter* protect Canadians...from vague and arbitrary laws whereas...the same phrase in the *Bill of Rights* offers no such protection".¹⁴⁹ In *Reference Re. B.C. Motor Vehicles Act*¹⁵⁰, Lamer J., as he then was, explained that the basis for this difference is that the words "principles of fundamental justice" in s. 2(e) are qualified by the words "a fair hearing", which limit their application:

In section 2(e) of the *Canadian Bill of Rights*, the words "principles of fundamental justice" were placed explicitly in the context of, and qualify a "right to a fair hearing". Section 7 of the *Charter* does not create the same context. In section 7, the words "principles of fundamental justice" are placed in the context of, and qualify much more fundamental rights, the "right to life, liberty and security of the person". The distinction is important.

207. Given those limiting words, it is clear that Parliament did not intend the protections offered by s. 2(e) to extend to substantive limitations on the content of federal legislation. That s. 2(e) is limited to the procedural protections encompassed by natural justice and the duty of fairness has been the consistent position of the Supreme Court of Canada both before and after the enactment of the *Charter*.¹⁵¹

¹⁴⁷ *Canada (Attorney General) v. Central Cartage Co.*, [1990] 2 F.C. 641 at p. 664

¹⁴⁸ U.S. Steel's Memorandum at para. 90

¹⁴⁹ U.S. Steel's Memorandum at para. 92

¹⁵⁰ [1985] 2 S.C.R. 486

¹⁵¹ *Bell Canada v. Canadian Telephone Employees Association*, [2003] 1 S.C.R. 884 at para. 28; *Duke, supra*; *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177 at para. 57; *Pearlman v. Manitoba Law Society*

(viii) *Section 40 of the ICA is Clear and Unambiguous*

208. U.S. Steel contends that it is unable to determine whether its conduct falls within the scope of s. 40 of the *ICA* and in particular: (1) what constitutes failure to comply with a Ministerial demand; (2) what constitutes non-compliance with an undertaking; and (3) what constitutes a justification for non-compliance with an undertaking.

209. The Supreme Court of Canada has explained that the vagueness doctrine does not require that legislative language be perfectly certain and precise.¹⁵² The constitutional standard of legislative precision is whether the impugned provision provides "an adequate basis for legal debate".¹⁵³ This means that there must be a manner of "reaching a conclusion as to [the provision's] meaning by reasoned analysis applying legal criteria."¹⁵⁴

210. The AGC submits that s. 40 of the *ICA* meets this standard.

211. The *ICA* provides three ways that an investor can demonstrate that it did comply with a demand: (1) by showing that it remedied the default; (2) by showing that there is no contravention; or (3) in the case of undertakings, by justifying any non-compliance therewith.

212. None of the three bases for complying with the demand listed above is vague. The first two can be determined by simply applying the facts to the undertakings and the response. The Court must determine whether on their wording, in light of the facts pleaded, U.S. Steel complied with its undertakings. The Court will make its determination on an objective basis, based on the civil standard of proof. No vagueness arises.

213. With respect to that third basis - justifying non-compliance - the Court is not given unlettered discretion in determining what will constitute an acceptable justification; on the contrary, it is obliged to assess whether the non-compliance was: (1) justified in accordance with

Judicial Committee, [1991] 2 S.C.R. 869 at pp. 882-883; and *Idziak v. Canada (Minister of Justice)*, [1992] 3 S.C.R. 631 at p.656.

¹⁵² *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606 at pp. 635-636 and 638-650

¹⁵³ *Ibid.*

¹⁵⁴ *Ibid.*

the guidelines issued by the Minister¹⁵⁵ on the basis that it was "clearly the result of factors beyond the control of the investor"; or (2) justified having regard to the purpose and scheme of the ICA.¹⁵⁶ In either case, there is ample basis for arriving at the meaning of an acceptable justification based on reasoned analysis applying legal criteria.

IV. ORDER SOUGHT

214. That the Motion be dismissed with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at the City of Ottawa, in the Province of Ontario, this 4th day of December, 2009.


John L. Syme


Jeffrey G. Johnston


Jessica DiZazzo


Max Binnie

Counsel for the Attorney General of Canada

¹⁵⁵ Section 38 of the ICA authorizes the Minister to issue guidelines "with respect to the application and administration of any provision of [the] Act or the regulations". In 1985 the Minister issued a guideline that provides in part:

- plans and undertakings are based to some extent on projected circumstances and the monitoring of an investor's performance will recognize this factor. Where inability to fulfill a commitment is clearly the result of factors beyond the control of the investor, the investor will not be held accountable.

¹⁵⁶ *Nova-Scotia Pharmaceutical, supra*, at pp. 647-648

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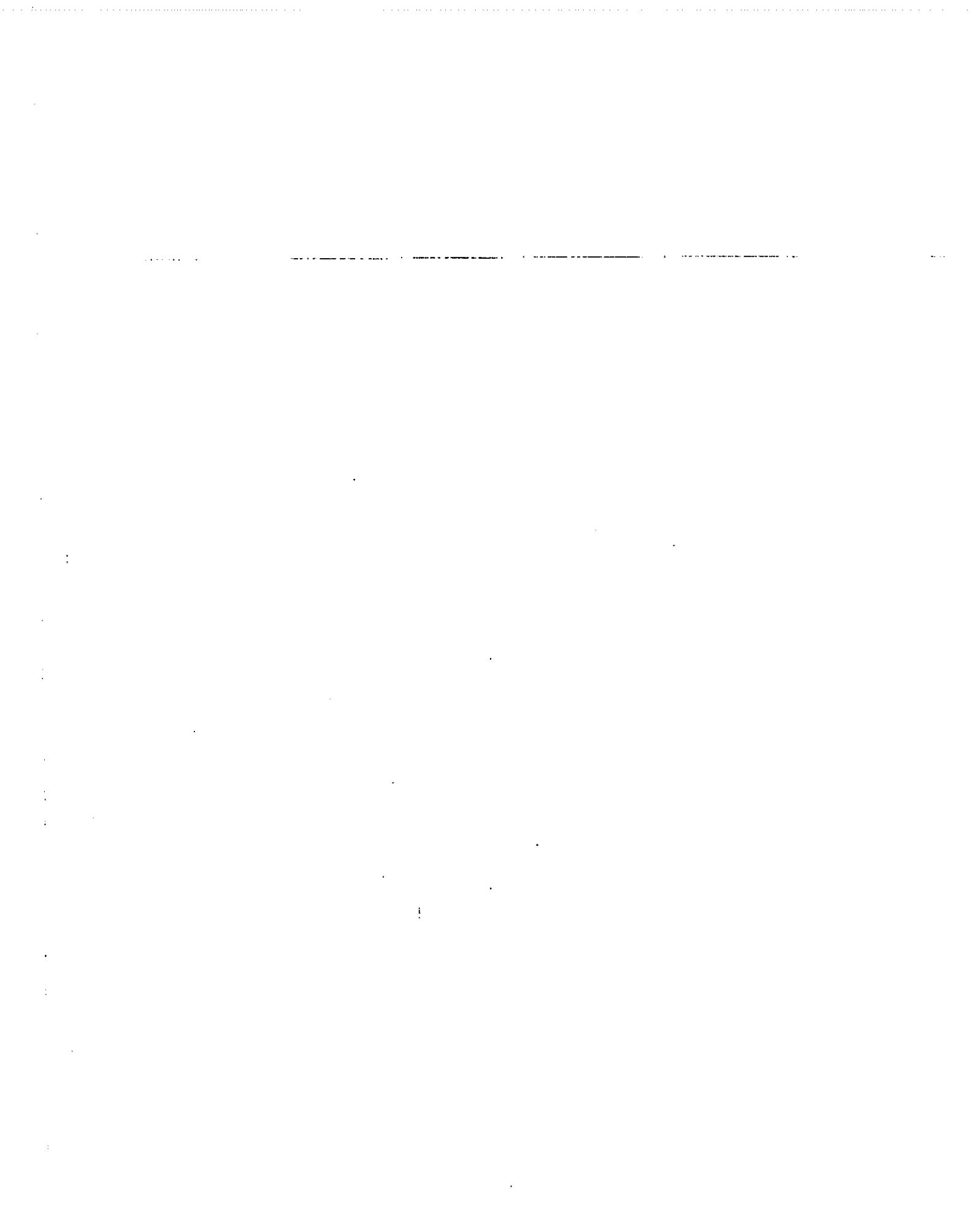
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APPENDIX "A"

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| <p>PART VII</p> <p>REMEDIES, OFFENCES AND PUNISHMENT</p> <p>Ministerial demand</p> <p>39. (1) Where the Minister believes that a non-Canadian, contrary to this Act,</p> <p>(a) has failed to give a notice under section 12 or file an application under section 17,</p> <p>(a.1) has failed to provide any prescribed information or any information that has been requested by the Minister or Director,</p> <p>(b) has implemented an investment the implementation of which is prohibited by section 16, 24, 25.2 or 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>(d) has failed to divest himself of control of a Canadian business as required by section 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.2) has failed to comply with an order made under section 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>PARTIE VII</p> <p>SANCTIONS, INFRACTIONS ET PEINES</p> <p>Mise en demeure du ministre</p> <p>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> <p>a) fait défaut de déposer l'avis mentionné à l'article 12 ou la demande d'examen mentionnée à l'article 17;</p> <p>a.1) omis de fournir les renseignements prévus par règlement ou ceux exigés par le ministre ou le directeur;</p> <p>b) effectué un investissement en contravention avec les articles 16, 24, 25.2 ou 25.3;</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) fait défaut de se départir du contrôle d'une entreprise canadienne comme l'exige l'article 24;</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) omis de se conformer au décret pris en vertu de l'article 25.4;</p> <p>e) fait défaut de se conformer à l'engagement</p> |
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(f) has failed to comply with any other 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.

Ministerial demand

(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.

Contents of demand

(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.

R.S., 1985, c. 28 (1st Supp.), s. 39; 2009, c. 2, s. 460.

New undertaking

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

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;

f) fait défaut de se conformer à une autre 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.

Mise en demeure

(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.

Contenu de la mise en demeure

(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.

L.R. (1985), ch. 28 (1^{er} suppl.), art. 39; 2009, ch. 2, art. 460.

Nouvel engagement

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 new undertaking from the non-Canadian.

2009, c. 2, s. 461.

Application for court order

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).

Court orders

(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

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 engagement du non-Canadien.

2009, ch. 2; art. 461.

Demande d'ordonnance judiciaire

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.

Ordonnance judiciaire

(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;

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| <p>the Minister is satisfied or is deemed to be satisfied is likely to be of net benefit to Canada;</p> <p>(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;</p> <p>(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;</p> <p>(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;</p> <p>(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</p> <p>(g) directing the non-Canadian or other person or entity to provide information requested by the Minister or Director.</p> | <p>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;</p> <p>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;</p> <p>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;</p> <p>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;</p> <p>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;</p> <p>g) ordonnance enjoignant au non-Canadien, à la personne ou à l'unité de fournir les renseignements exigés par le ministre ou le directeur.</p> |
| <p>Court orders — person or entity</p> <p>(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 this Act or any of its provisions.</p> <p><u>Penalties recoverable as debts</u></p> | <p>Ordonnance judiciaire — personne ou unité</p> <p>(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</p> |

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| <p>(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.</p> | <p>commet ou se continue la contravention.</p> <p>Créance de Sa Majesté</p> <p>(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.</p> |
| <p>Contempt of court</p> <p>(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.</p> | <p>Outrage</p> <p>(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.</p> |
| <p>Rights of appeal</p> <p>(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.</p> <p>Definition of "superior court"</p> <p>(6) In this section, "superior court" has the same meaning as in subsection 35(1) of the <i>Interpretation Act</i> but does not include the Supreme Court of Canada, the Federal Court of Appeal or the Tax Court of Canada.</p> <p>R.S., 1985, c. 28 (1st Supp.), s. 40; 2002, c. 8, s. 152; 2009, c. 2, s. 462.</p> | <p>Appel</p> <p>(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.</p> <p>Définition de « cour supérieure »</p> <p>(6) Au présent article, « cour supérieure » a le sens que lui donne le paragraphe 35(1) de la <i>Loi d'interprétation</i> mais ne vise pas la Cour suprême du Canada, la Cour d'appel fédérale et la Cour canadienne de l'impôt.</p> <p>L.R. (1985), ch. 28 (1^{er} suppl.), art. 40; 2002, ch. 8, art. 152; 2009, ch. 2, art. 462.</p> |

Lanteigne, Danielle

From: Michael Barrack [MBarrack@tgf.ca]

Sent: November 25, 2009 11:59 AM

To: Lanteigne, Danielle

Cc: Sharonlee Gorgichuk

Subject: The Attorney General of Canada v. U. S. Steel Corporation Court File No. T-1162-09

Ms. Lanteigne,

You have requested that we advise you of appropriate dates for the hearing of the appeal of the order of Prothonotary Martha Milczynski dated September 23, by which Lakeside Steel Inc. and Lakeside Steel and United Steel, Paper and Forestry, Rubber, Manufacturing Energy, Allied Industrial and Service Workers International Union, Local 1005 of the USW, Local 8782 of the USW, John Pittman on behalf of himself and all affected members, and Gord Rollo on behalf of himself and all affected members were granted limited intervenor status in this proceeding.

As we discussed a motion has been scheduled in this proceeding for January 11 and 12 in Toronto, in which the constitutionality of the proceedings is being challenged. There are no further steps being taken in the proceeding until this motion has been disposed of. The intervenors do not, by virtue of the order of Prothonotary Milczynski, have standing on this motion. The outcome of the motion to be heard on January 11 and 12 may have a significant impact on the issues raised in the appeal of the limited intervention order. There is currently no stay of the limited intervention order, therefore any prejudice to the matter not proceeding in the interim is to U. S. Steel in the event it is ultimately successful on its appeal. As a result of all of these factors, we are requesting that the scheduling of the appeal occur after the constitutional motion has been determined.

If you have any questions about this request please do not hesitate to contact me.

Regards,

Michael Barrack

Direct Line: (416) 304-1109

Cell: (416) 624-0772

Email: mbarrack@tgf.ca

ThorntonGroutFinnigan LLP | The Restructuring & Litigation Boutique | Suite 3200, Canadian Pacific Tower, 100 Wellington Street West, P.O. Box 329, Toronto-Dominion Centre, Toronto, Ontario M5K 1K7 | 416-304-1616 | Fax: 416-304-1313 | www.tgf.ca

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25/11/2009

Lanteigne, Danielle

From: Michael Barrack [MBarrack@tgf.ca]

Sent: November 29, 2009 7:58 PM

To: Lanteigne, Danielle

Subject: RE: The Attorney General of Canada v. U. S. Steel Corporation Court File No. T-1162-09

Ms. Lanteigne,

We have now done so.

Regards

Michael Barrack.

From: Lanteigne, Danielle [mailto:Danielle.Lanteigne@cas-satj.gc.ca]

Sent: November 26, 2009 9:30 AM

To: Michael Barrack

Subject: RE: The Attorney General of Canada v. U. S. Steel Corporation Court File No. T-1162-09

Good morning,

Yes, please do.

Thank you,

Danielle Lanteigne

Acting Hearings Coordinator,

Office of Chief Justice Lutfy

Coordonnatrice des audiences,

Bureau du juge en chef Lutfy

Tel: (613) 996-3447 Fax: (613) 943-0354

From: Michael Barrack [mailto:MBarrack@tgf.ca]

Sent: November 25, 2009 10:36 PM

To: Lanteigne, Danielle

Cc: Sharonlee Gorgichuk

Subject: RE: The Attorney General of Canada v. U. S. Steel Corporation Court File No. T-1162-09

Ms Lanteigne,

We did not forward to the other parties but would be pleased to do so.

Michael

Michael Barrack

Direct Line: (416) 304-1109

Cell: (416) 624-0772

Email: mbarrack@tgf.ca

ThorntonGroutFinnigan LLP | The Restructuring & Litigation Boutique | Suite 3200, Canadian Pacific Tower, 100 Wellington Street West, P.O. Box 329, Toronto-Dominion Centre, Toronto, Ontario M5K 1K7 | 416-304-1616 | Fax: 416-304-1313 | www.tgf.ca

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30/11/2009

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From: Lanteigne, Danielle [mailto:Danielle.Lanteigne@cas-satj.gc.ca]
Sent: November 25, 2009 2:26 PM
To: Michael Barrack
Subject: RE: The Attorney General of Canada v. U. S. Steel Corporation Court File No. T-1162-09

Received, thank you.

Were the other parties provided with a copy of this email as well?

Danielle Lanteigne
Acting Hearings Coordinator,
Office of Chief Justice Lutfy
Coordonnatrice des audiences,
Bureau du juge en chef Lutfy
Tel: (613) 996-3447 Fax: (613) 943-0354

From: Michael Barrack [mailto:MBarrack@tgf.ca]
Sent: November 25, 2009 11:59 AM
To: Lanteigne, Danielle
Cc: Sharonlee Gorgichuk
Subject: The Attorney General of Canada v. U. S. Steel Corporation Court File No. T-1162-09

Ms. Lanteigne,

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If you have any questions about this request please do not hesitate to contact me.

Regards,

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30/11/2009

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