Federal Court of Appeal | Cour d'appel fédérale

Date: 20110525

Docket: A-242-10

Citation: 2011 FCA 176

CORAM: **NADON J.A.**
DAWSON J.A.
TRUDEL J.A.

BETWEEN:

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

Appellants

and

THE ATTORNEY GENERAL OF CANADA

Respondents

Heard at Ottawa, Ontario, on December 7, 2010.

Judgment delivered at Ottawa, Ontario, on May 25, 2011.

REASONS FOR JUDGMENT BY: NADON J.A.

CONCURRED IN BY: DAWSON J.A.
TRUDEL J.A.

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REASONS FOR JUDGMENT

NADON J.A.

[1] The *Investment Canada Act*, R.S. 1985, c. 28 (1st Suppl.) (the "*Act*") allows the Minister of Industry (the "Minister") to review and approve applications from foreign investors who wish to obtain control of major Canadian corporations. Section 39 of the Act allows the Minister to demand that a foreign investor in control of a Canadian corporation comply with the *Act* and with any undertaking made during the application stage. If the Minister is not satisfied with the investor's actions or response, he can apply under section 40 to a superior court which can grant several forms of relief.

[2] On July 17, 2009, the Minister commenced an application in the Federal Court pursuant to section 40 of the *Act* with respect to two written undertakings, namely, the production and employment undertakings given by the respondents United States Steel Corporation and U.S. Steel Canada Inc. (collectively "U.S. Steel") in connection with the acquisition of Stelco Inc. ("Stelco").

[3] On October 8, 2009, U.S. Steel filed a Notice of Motion challenging the constitutional validity of sections 39 and 40 of the *Act*. More particularly, U.S. Steel says that the impugned provisions violate their right to a fair hearing in accordance with principles of fundamental justice, contrary to subsection 2*(e)* of the *Canadian Bill of Rights*, S.C. 1960, c.44 (the "*Bill of Rights*") and that they violate the principle of presumption of innocence and the right to a fair hearing, contrary to subsection 11*(d)* of the *Canadian Charter of Rights and Freedoms*, the *Constitution Act* being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c.11 (the "*Charter*").

[4] In a judgment dated June 14, 2010, 2010 FC 642, Hansen J. (the "Judge") of the Federal Court dismissed U.S. Steel's challenge in its entirety. This is an appeal from that decision.

Facts and Procedural History

[5] In September 2007, U.S. Steel intended to invest in and acquire control of Stelco's Hamilton-based business. To this end, it submitted an application for ministerial approval and provided 31 undertakings to the Minister, two of which related to employment and production levels. On October 29, 2007, the Minister approved the acquisition.

[6] On May 5, 2009, the Minister advised U.S. Steel that it was in contravention of the employment and production undertakings. As a result, the Minister demanded, under section 39 of the Act, that U.S. Steel cease the contraventions, remedy the default and either demonstrate there were no contraventions or justify the contraventions.

[7] U.S. Steel responded by sending a lengthy letter to the Minister which explained the difficulties it was facing due to the unexpected economic downturn.

[8] The Minister, being dissatisfied with U.S. Steel's response, informed it on July 15, 2009, that he would be bringing proceedings under section 40 of the *Act*, seeking an order directing compliance with the undertakings and imposing a penalty of $10,000 per day per breach, running from November 1, 2008, until such time as U.S. Steel had complied with the undertakings.

[9] As I indicated earlier, the Minister filed his Notice of Application on July 17, 2009. Paragraphs 3 and 4 of the application read as follows:

> 3. Directing the Respondents to forthwith comply with the relevant undertakings:
>
> a. by increasing steel production at the Canadian Business, as defined in this Application, such that:
>
> i. in the period from November 1, 2007 to October 31, 2009, steel production at the Canadian Business is greater than or equal to a total of 8,690,000 tons (2 x 4,345,000); and
>
> ii. in the period from November 1, 2009 to October 31, 2010, steel production at the Canadian Business is greater than or equal to 4,345,000 net tons; and
>
> b. by taking all such steps as are necessary to ensure that over the Term of the undertakings, as defined in this Application, the Respondents

> maintain an average level of employment at the Canadian Business of 3,105 employees on a full time equivalent.
>
> 4. Imposing on US Steel and US Steel Canada, jointly and severally, a penalty of $10,000 per day, per breach of the relevant undertakings, calculated from November 1, 2008 or from such other dates as this Court may determine, until the Respondents have complied with the relevant undertakings and such order as this Court may issue;

[10] In response to the Minister's Notice of Application, U.S. Steel filed an application with the Federal Court seeking to have sections 39 and 40 of the *Act* declared of no force or effect.

Legislation

[11] Before turning to the Judge's decision, I will set out the relevant legislation. Section 39 of the *Act* allows the Minister to send a demand to a non-Canadian investor requiring compliance with the *Act* or the investor's undertakings, or else a justification for non-compliance:

39. (1) Where the Minister believes that a non-Canadian, contrary to this Act,	**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 :
(*a*) has failed to give a notice under section 12 or file an application under section 17,	*a*) fait défaut de déposer l'avis mentionné à l'article 12 ou la demande d'examen mentionnée à l'article 17;
(*a.1*) has failed to provide any prescribed information or any information that has been requested by the Minister or Director,	*a.1*) omis de fournir les renseignements prévus par règlement ou ceux exigés par le ministre ou le directeur;
(*b*) has implemented an investment the implementation of which is prohibited by section 16, 24, 25.2 or 25.3,	*b*) effectué un investissement en contravention avec les articles 16, 24, 25.2 ou 25.3;
(*c*) has implemented an investment on terms and conditions that vary materially from those contained in an application filed under section 17 or	*c*) effectué un investissement selon des modalités qui sont substantiellement différentes de celles que contenait la demande d'examen déposée en

from any information or evidence provided under this Act in relation to the investment,

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;

(*d*) has failed to divest himself of control of a Canadian business as required by section 24,

d) fait défaut de se départir du contrôle d'une entreprise canadienne comme l'exige l'article 24;

(*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,

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;

(*d.2*) has failed to comply with an order made under section 25.4,

d.2) omis de se conformer au décret pris en vertu de l'article 25.4;

(*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,

e) fait défaut de se conformer à l'engagement écrit envers Sa Majesté du chef du Canada qu'il a pris à l'égard de l'investissement au sujet duquel le ministre est d'avis ou est réputé être d'avis qu'il sera vraisemblablement à l'avantage net du Canada;

(*f*) has failed to comply with any other provision of this Act or with the regulations, or

f) fait défaut de se conformer à une autre disposition de la présente loi ou des règlements;

(*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.

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

(2) If the Minister believes that a person or an entity has, contrary to this Act, failed to comply with a requirement to provide information

(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

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.	vertu des paragraphes 25.2(3) ou 25.3(5), soit au paragraphe 25.4(3), le ministre peut envoyer une mise en demeure exigeant de la personne ou de l'unité que, sans délai ou dans le délai imparti, elle mette fin à la contravention, elle se conforme à la présente loi ou elle démontre que celle-ci n'a pas été violée.
(3) 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.	(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.
[Emphasis added]	[Non souligné dans l'original]

[12] Section 40 of the Act allows the Minister to bring an application to a superior court if a section 39 demand is not complied with:

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).	**40.** (1) Une demande d'ordonnance judiciaire peut être présentée au nom du ministre à une cour supérieure si le non-Canadien, la personne ou l'unité ne se conforme pas à la mise en demeure reçue en application de l'article 39.
(2) 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	(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 :

require, including, without limiting the generality of the foregoing, an order

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

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

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

(*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;

(*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;

(*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;

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

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

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

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

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

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

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

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

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

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

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

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

(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.

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

(4) 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.

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

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

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

[Emphasis added]

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

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

[Non souligné dans l'original]

[13] Subsection 11*(d)* of the Charter reads as follows:

11. Any person charged with an offence has the right:

…

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

11. Tout inculpé a le droit:

…

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

[14] Subsection 2*(e)* of the Bill of Rights reads 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

…

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*) 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;	… *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;

Decision of the Federal Court

[15] After an overview of the facts, the relevant statutory provisions and the appellants' submissions, the Judge turned to the question of whether subsection 11*(d)* of the *Charter* applied to section 40 of the *Act*.

[16] The Judge proceeded to apply the two-category test set out by the Supreme Court of Canada in *R. v. Wigglesworth*, [1987] 2 S.C.R. 541 [*Wigglesworth*], to the effect that if a matter falls within one of two categories, subsection 11*(d)* applies. The first category asks whether a matter is by its very nature a criminal proceeding, whereas the second asks whether the provision in question allows the imposition of true penal consequences.

[17] Turning to the first category, the Judge looked at the purpose of section 40, the purpose of the sanction and the process leading to the sanction, which led her to write at paragraph 40 of her Reasons:

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

adding at paragraph 41:

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

[18] With regard to the purpose of the sanction found in section 40, the Judge was of the view that its purpose was "… to encourage and promote timely compliance and to enforce compliance with any undertakings and provisions of the legislation" (Judge's Reasons, para. 42).

[19] The Judge went on to say that despite the public aspect of section 40, its subject matter was largely private since it related to private business transactions in that the provision allowed the government to call to account private entities that had breached their commitments. In her view, legislative history reinforced the idea that section 40 was not criminal in nature.

[20] Consequently, on the first *Wigglesworth* category, the Judge concluded that a section 40 proceeding was not a criminal proceeding.

[21] The Judge then turned to the question of whether section 40 could be fitted into the second *Wigglesworth* category, that is, whether it imposed true penal consequences.

[22] In the Judge's view, that enquiry had "…to proceed beyond the magnitude of the fine to determine whether it is being imposed for the purpose of redressing the harm done to society or for a particular private purpose" (Judge's Reasons, para. 54). For this view, the Judge relied on the

Supreme Court's decision in *Martineau v. M.N.R.*, [2004] 3 S.C.R. 737, 192 C.C.C. (3d) 129 [*Martineau*] and that of the Queen's Bench of Alberta in *Lavallee v. Alberta (Securities Commission)*, 2009 ABQB 17, affirmed 2010 ABCA 48 [*Lavallée*].

[23] The Judge found no merit in U.S. Steel's argument that magnitude of the fine alone could indicate true penal consequences. In her view, magnitude of the fine could not be assessed in isolation. At paragraph 58 of her Reasons, she stated that "[w]ithout context, it cannot be said that a dollar value alone, can lead to no other inference but that the penalty is being imposed to punish", adding that it was important to bear in mind that the provision gave the court discretion to determine the magnitude of the penalty (Judge's Reasons, para. 59).

[24] In the Judge's view, it was crucial that a legislated monetary penalty be of sufficient scope and magnitude so as to address the full range of reviewable instruments and to deter non-compliance, adding that the penalty should not simply constitute a cost of doing business (Judge's Reasons, para. 58).

[25] The Judge then indicated that she was satisfied that the purpose of the fine imposed by section 40 was not to redress harm caused to society. The mere fact that the fine was payable to Her Majesty in Right of Canada did not point to a public purpose, nor did the fact that the penalty did not aim to compensate for any particular harm. On the second *Wigglesworth* category, the Judge concluded as follows at paragraph 67:

> [67] In the absence of any of the usual indicia, on what basis can it be determined whether the monetary penalty by its magnitude is being imposed for the purpose of redressing the

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

[26] The Judge then turned to U.S. Steel's arguments directed at subsection 2*(e)* of the *Bill of Rights*. In her view, the key question was "… whether section 40 violates the right to a fair hearing in accordance with the principles of fundamental justice" (Judge's Reasons, para. 69).

[27] U.S. Steel's argument was that the *Act* improperly allowed for the divesture of property without affording the right to know the case one had to meet and that it did not properly set out either the requested elements of a failure to comply or the available defences. In making this argument, U.S. Steel relied on its submission that the words "principles of fundamental justice" found in subsection 2*(e)* of the *Bill of Rights* covered more than the common law principles of natural justice.

[28] After a careful review of the relevant case law, the Judge rejected U.S. Steel's argument. At paragraph 79, she wrote as follows:

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

[29] The Judge then turned to the identification of the relevant principles of natural justice. She was of the opinion that U.S. Steel's expansive view of subsection 2*(e)* rights focused unduly on the magnitude of the financial penalty, adding that the requirements of natural justice were not as stringent as argued by U.S. Steel. At paragraph 84 of her Reasons, she wrote as follows:

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

[30] With regard to U.S. Steel's main argument that it did not and could not adequately determine the case that it had to meet, the Judge was of the view that that concern was not justified in that the *Federal Court Rules*, SOR/98-106, which dealt with the conduct of applications, clearly allowed U.S. Steel to know the case it had to meet. At paragraphs 87 to 90 of her Reasons, she explained in clear terms why she was of that view.

[31] Finally, the Judge declined to deal with U.S. Steel's argument that section 40 was void for vagueness because of her view that that concept did not apply where only procedural rights were at

issue, adding that U.S. Steel had abandoned its argument that subsection 2*(e)* provided protection of substantive rights.

[32] For those reasons, the Judge concluded that section 40 of the *Act* did not infringe subsection 11*(d)* of the *Charter* or subsection 2*(e)* of the *Bill of Rights* and, as a result, she dismissed U.S. Steel's motion.

U.S. Steel's Position

[33] U.S. Steel submits that the Minister has not given it any explanation for the rejection of its May 20, 2009 response in which it sought to justify its failure to fulfill the two undertakings at issue on the grounds of the prevailing severe economic situation. U.S. Steel argues that sections 39 and 40 of the *Act* create a punitive regime to which subsection 11*(d)* of the *Charter* applies because the statutory regime "fails to accord an Investor disclosure of the case to meet, fails to provide fair notice of the prescribed conduct and allows guilt to be found on a mere balance of probability" (U.S. Steel Memorandum of Fact and Law, para. 19).

[34] U.S. Steel further argues that the availability of contempt proceedings to enforce section 40 sanctions demonstrates that those sanctions have a penal character: the monetary penalty is a fine. The fact that a contempt power is rarely included in other administrative regimes indicates that the statutory regime is of a different character. Moreover, the regime is directed to public ends and is enforced in superior courts which can impose retributive penalties, rather than in regulatory tribunals which can only impose penalties aimed at inducing compliance. Furthermore, U.S. Steel

argues that the fines imposed under section 40 do not relate to any loss or extent of the breach involved. Thus, the fines do not aim to promote compliance, but rather to punish. Consequently, in U.S. Steel's submission, subsection 11*(d)* of the *Charter* is engaged.

[35] Moreover, U.S. Steel submits that, in the circumstances of this case, subsection 11*(d)* is infringed. The *Act* imposes no duty on the Minister to disclose relevant information and is also impermissibly vague on what can constitute a "justification" for violations. Furthermore, proceedings that can impose punitive fines of the size provided for in the *Act* should be subject to proof beyond a reasonable doubt, but they are not.

[36] U.S. Steel further argues that these subsection 11*(d)* violations fail the test enunciated by the Supreme Court of Canada in *R. v. Oakes*, [1986] 1 S.C.R. 103, because the removal of procedural rights is not rationally connected to the objectives of the *Act* and does not minimally impair the infringements of the subsection 11*(d)* interests at issue.

[37] U.S. Steel also submits that sections 39 and 40 of the *Act* violate subsection 2*(e)* of the *Bill of Rights*. It argues that the principles of fundamental justice under subsection 2*(e)* are not coterminous with the rules of natural justice and procedural fairness because these rules are not freestanding. Their aim is to reflect legislative intent and they can be circumscribed by statute, whereas the *Bill of Rights* principles of fundamental justice are not subject to Parliamentary will and so they should be interpreted more expansively than the rules of natural justice and procedural fairness. Moreover, they should apply robustly to property rights.

[38] U.S. Steel further argues that in the present matter, the principles of fundamental justice are infringed because section 40 does not adequately afford an investor a right to disclosure. Moreover, "the legislature's failure to clearly delineate the boundaries of the offence, or of any offence that an Investor may have, result in a provision that is so vague as to effectively deprive an Investor of the right to fair notice of the case it has to meet" (U.S. Steel's Memorandum of Fact and Law, para. 97).

Issues

[39] The issues for determination in this appeal are the following:

1. What is the applicable standard of review?

2. Do sections 39 and 40 of the *Act* violate subsection 11*(d)* of the *Charter*?

3. Do sections 39 and 40 of the *Act* violate subsection 2*(e)* of the *Bill of Rights*?

Analysis

1. Standard of review:

[40] In my view, there can be no doubt that the standard of review applicable to the issues raised by the appeal is that of correctness (see: *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, para. 8).

2. Are sections 39 and 40 of the Act in violation of subsection 11(d) of the Charter?

[41] Section 11*(d)* of the *Charter* guarantees that an accused natural or legal person will benefit from a panoply of protections. However, for an accused natural or legal person to enjoy these protections, that person must be "charged with an offence". In *Wigglesworth*, Wilson J. explained

the meaning of that expression, stating that a matter might fall within section 11 in two ways. At page 559 of her Reasons, she wrote:

> … a matter could fall within s. 11 either because by its very nature it is a criminal proceeding or because a conviction in respect of the offence may lead to a true penal consequence. I believe that a matter could fall within s. 11 under either branch.

[42] Thus, proceedings that can result in imprisonment can fall within section 11, as can proceedings that lead to lesser penalties such as monetary penalties (*Wigglesworth*, page 559).

[43] As I have already indicated, the Judge found that sections 39 and 40 of the *Act* did not fit within either of the two categories. In my view, the Judge made no error in concluding as she did. My reasons for this view are as follows.

a. Are proceedings under sections 39 and 40 by their very nature criminal?

[44] In *Wigglesworth*, Wilson J. explained at page 560 what she meant by the words "by its very nature a criminal proceeding":

> 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:…

[45] Pursuing her explanation, Wilson J. added at page 560 that "[p]roceedings of an administrative nature instituted for the protection of the public in accordance with the policy of a

statute are also not the sort of 'offence' proceedings to which s. 11 is applicable" (see also *Lavallée* at para. 21 for a recent expression of the same idea).

[46] In writing for the Supreme Court in *Martineau*, Fish J. enunciated at paragraph 24 of his Reasons three factors which ought to be considered when determining whether a proceeding is criminal by its very nature:

> [24] To determine the nature of the proceeding, the case law must be reviewed in light of the following criteria: (1) the objectives of the [statute and relevant provisions]… thereof; (2) the purpose of the sanction; and (3) the process leading to imposition of the sanction.

[47] With respect to the first *Martineau* factor, U.S. Steel argues that the *Act* "… is manifestly concerned with promoting the public good in the realm of foreign investment and punishing contraventions accordingly" (U.S. Steel Memorandum of Fact and Law, para. 40). While it is true that both Wilson J. in *Wigglesworth* (page 560) and Fish J. in *Martineau* (para. 21) made the point that proceedings which are criminal by their very nature will have public purposes, it cannot be automatically concluded that a public purpose necessarily leads to a criminal proceeding. This is made clear by Fish J., at paragraph 22 of his Reasons in *Martineau*, where he states that administrative proceedings "… instituted for the protection of the public in accordance with the policy of a statute are not penal in nature".

[48] Consequently, proceedings having a public purpose can be penal or not. Hence, certain proceedings with publicly beneficial purposes will automatically fall within section 11, such as proceedings brought under the *Criminal Code* (*Wigglesworth*, page 560) Other proceedings,

however, with publicly beneficial purposes will almost always fall outside the realm of section 11, such as proceedings brought under provincial securities acts (*Lavallée*, para.21).

[49] Thus, it seems clear that the mere existence of a public purpose cannot *per se* be determinant. Courts must go further and ask what sort of public purpose is the legislation addressing? There will not be much doubt that a public purpose pertaining to dishonesty, fraud or immorality will usually lead to a penal characterization by the court. However, a public purpose that pertains to financial regulations will generally fall on the administrative/non-penal side of the spectrum.

[50] The purpose of the *Act* at issue in this appeal is found at section 2 thereof which reads:

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.

[51] There is no suggestion that national security is an issue in this case, thus leaving as the relevant purpose that of encouraging economic growth and employment opportunities in Canada.

This purpose drives the *Act*'s application process for foreign investors, and informs the factors which the Minister must consider when approving or rejecting an application (the *Act*, s. 20).

[52] As the Judge correctly points out at paragraph 41 of her Reasons, sections 39 and 40 aim to maintain compliance with the *Act* and with undertakings made under it. It therefore follows that the proceedings by the Minister under the provisions at issue have the ultimate aim of stimulating economic development and employment opportunities, much like the *Act* as a whole. Thus, in my view, the first *Martineau* factor points away from the proceedings being of a penal nature.

[53] Moreover, as the respondent points out, section 40 proceedings are never entirely public in their aim or purpose. When they relate to undertakings that a foreign investor has made to the Minister, they take on, at least in part, the character of enforcement of a private agreement. Of course, the underlying undertakings are themselves related to public economic purposes, but this partially private nature of section 40 proceedings further suggests against section 11 applicability.

[54] The second *Martineau* factor looks at the purpose of the sanction. Subsection 40(2) of the *Act* gives various powers to a court hearing a section 40 application. One of them – the one mostly at issue in this appeal – is found in paragraph 40(2)*(d)* which imposes a penalty not exceeding $10,000 against a non-Canadian for each day that the non-Canadian's actions or omissions contravene the *Act* or any provision thereof. In the Judge's view, the purpose of this sanction was "to encourage and promote timely compliance with any undertakings and provisions of the legislation" (Judge's Reasons, para. 42).

[55] I can find no fault with the Judge's view. The fact that the penalty is imposed for each day of non-compliance suggests that the goal of the penalty is to enforce compliance. A foreign investor knows that it will continue to incur penalties unless it complies with the Minister's demands.

[56] The monetary penalty's context also suggests that it is aimed at a public purpose. It is embedded among other powers that a court has after having heard a section 40 application. These powers include ordering a foreign investor to divest itself of the enterprise (para. 40(2)*(a)* of the *Act*); ordering the compliance with an undertaking "in relation to an investment that the Minister is satisfied or is deemed to be satisfied is likely to be of net benefit to Canada" (para. 40(2)*(c)*); and revoking voting rights in the corporation (para. 40(2)*(f)*. These powers are not directed to retributive aims. Rather, they are directed at preventing harm to Canadian economic interests by forcing compliance or taking away the power of a foreign investor whose actions or omissions jeopardize the goals of the *Act*.

[57] In my view, the determination of the purpose of the paragraph 40(2)*(d)* sanction should be ascertained by situating the sanction in the wider remedial scheme of which it forms a part. The purpose of the sanction is, as the Judge found, "…to encourage and promote timely compliance and to enforce compliance with any undertakings and provisions of the legislation" (Judge's Reasons, para. 42). In *Martineau*, Fish J. dealt with a sanction that did not aim to "redress a wrong done to society", but rather to "produce a deterrent effect" in order to preserve the viability of an administrative scheme (*Martineau*, paras. 33 to 39). In Fish J.'s view, this suggested against section

11 applicability and, in my respectful view, this same view should apply to the sanction at issue in this appeal.

[58] The third *Martineau* factor looks at the "process leading to imposition of the sanction". U.S. Steel argues that the fact that a section 40 application is brought before a court rather than before a tribunal gives the application a penal character. While it is true that courts have the power to impose penal sanctions, I see no basis to conclude that courts cannot impose sanctions of an administrative nature. Consequently, this factor should not weigh much in the balance.

[59] Of greater significance, however, is the fact that section 40 sanctions lack the indicia of penal proceedings. In this, they resemble more the sanction that Fish J. dealt with in *Martineau* and which he described as follows at paragraph 45:

> [45] This process thus has little in common with penal proceedings. No one is charged in the context of an ascertained forfeiture. No information is laid against anyone. No one is arrested. No one is summoned to appear before a court of criminal jurisdiction. No criminal record will result from the proceedings. At worst, once the administrative proceeding is complete and all appeals are exhausted, if the notice of ascertained forfeiture is upheld and the person liable to pay still refuses to do so, he or she risks being forced to pay by way of a civil action.

[60] Like the sanction in *Martineau*, the section 40 sanction herein does not involve the laying of charges, arrest powers, courts of criminal jurisdiction or a criminal record. Consequently, this suggests against the applicability of subsection 11*(d)*.

[61] The principal difference between the sanction in *Martineau* and the sanction herein is the one that goes to the heart of U.S. Steel's submissions, i.e. the availability of contempt proceedings

under subsection 40(4). U.S. Steel points to the general unavailability of contempt orders to enforce civil judgments, which can be enforced only under rule 425 of the *Federal Courts Rules*. In its view, the availability of contempt orders shows that section 40 monetary penalties are penal fines.

[62] U.S. Steel commences its argument by noting that paragraph 40(2)*(d)* of the *Act* allows the court deciding a section 40 proceeding to impose a monetary penalty and that subsection 40(4) allows the court to punish non-compliance of its orders through contempt of court proceedings. Contempt of court proceedings, of course, can result in imprisonment. Together these provisions suggest, in U.S. Steel's view, that the *Act* allows a court to punish non-payment of a fine with imprisonment. Thus, the use of contempt proceedings suggests that the penalties imposed under the *Act* are criminal rather than civil in nature.

[63] I cannot subscribe to this argument. While U.S. Steel is correct to say that a person cannot be imprisoned for a civil debt for, as Justice Binnie held in *R. v. Wu*, [2003] 3 S.C.R. 530 at paragraph 2, "[d]ebtors' prison for impoverished people is a Dickensian concept that in civilized countries has largely been abolished", the *Act* does not provide for the possibility of U.S. Steel or any of its executives being sent to debtors' prison for the failure to pay a penalty imposed upon it. A person who is ordered by a court to pay money to another cannot be imprisoned for contempt if he or she is unable to pay the debt because imprisonment for debt has been abolished: *Vidéotron Ltée v. Industries Microlec Produits Électroniques*, [1992] 2 S.C.R. 1065 at 1078. However, a person who is ordered by a court to pay money can be imprisoned for contempt if he or she shows "a

certain degree of intention to evade his or her obligations": *Ibid.* That is, if he or she is unwilling to pay the debt despite having the ability to pay.

[64] Thus, U.S. Steel would only face the possibility of contempt proceedings if it is able but unwilling to pay the penalty imposed upon it under the *Act*. Such a proceeding does not undermine the abolishment of debtors' prison because in that case, U.S. Steel would not be subject to imprisonment for its debt *per se*, but rather for refusing to pay the debt in spite of its ability to pay it.

[65] Moreover, as the Judge says at paragraph 66 of her Reasons, any contempt proceedings brought against U.S. Steel would be separate proceedings subject to the *Federal Court Rules* and, in those circumstances, U.S. Steel would benefit from full *Charter* protection.

[66] In response to this point of view, U.S. Steel argues that the mere availability of punishment by contempt for an unpaid penalty gives the section 40 proceedings a criminal nature. I cannot agree. As the Judge found at paragraph 66 of her Reasons, contempt proceedings are separate from section 40 proceedings. Thus, while contempt proceedings may have a criminal nature, section 40 proceedings remain civil in nature.

[67] Accepting U.S. Steel's argument would lead to a perverse result. Any civil trial can produce a monetary judgment which may be enforceable by way of court order to pay. Any court order which is not complied with may result in contempt proceedings. Any contempt proceedings can result in imprisonment. Thus, in U.S. Steel's logic, the availability of contempt would make of

every civil trial a proceeding which is criminal in nature *per Wigglesworth* and thus entitle every civil defendant to full *Charter* protection. Such a conclusion is, in my respectful opinion, entirely contrary to the wording of subsection 11*(d)* of the *Charter* which gives its protection only to those "charged with an offence".

[68] Furthermore, all contempt proceedings attract *Charter* protection: *Pro Swing Inc. v. Elta Golf Inc.* [2006] 2 S.C.R. 612 at paragraphs 34 and 35. As a result, there is no possibility of U.S. Steel being cited for contempt without it being afforded *Charter* protection.

[69] U.S. Steel's argument is also inconsistent with the text of the *Act*. Subsection 40(4) reads: "[e]veryone 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" [emphasis added]. Subsection 40(3) reads: "[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" [emphasis added].

[70] The *Act*'s language is notable for three reasons. First, section 40(4) refers to both subsection 40(2) and subsection 40(2.1), so that it covers a broad variety of orders. Second, as a result of this broadness, the language of the *Act* is more general than it might otherwise be. Subsection 40(4) suggests that a person can breach a court order in two different ways: "failing" and "refusing". The language of "refusing" includes an element of intention, while the language of "failing" does not require proof of intention to disobey, merely the act of disobeying. Third, the language of the *Act*

does not suggest that each and every order listed in subsections 40(2) and 40(2.1) must be punishable both for intentional and unintentional non-compliance. Subsection 40(3) suggests that any money resulting from a penalty imposed under paragraph 40(2)*(d)* or subsection 40(2.1) is a debt recoverable as such in a superior court. The language of "debt" suggests the penalty has a civil as opposed to a criminal nature.

[71] Similarly, subsection 40(4) says a court may punish a person "as for other contempts of that court". I read this phrase to mean that contempts found under subsection 40(4) may be punished in the same way as other contempts are punished in the court hearing the proceedings. What is the way in which a person may be punished for contempt in Federal Court? The aforementioned jurisprudence shows that the non-payment of a civil debt cannot be punished by imprisonment, unless it is shown that the debtor had the means of paying the debt and intentionally refused to do so.

[72] Thus, a monetary penalty imposed under either paragraph 40(2)*(d)* or subsection 40(2.1) may be punished through contempt of court, but only if the penalized person "refuses" to pay the penalty – that is, if the person is able to pay, but intentionally decides not to. A monetary penalty under those sections cannot be punished through contempt if the penalized person "fails" to pay the penalty – that is, the person is simply unable to pay. Thus, the language of the *Act* supports the conclusion that section 40 proceedings are not criminal.

[73] I must therefore conclude that the third *Martineau* factor also points away from section 40 proceedings being penal and away from subsection 11*(d)* applicability. Consequently, section 40 proceedings are not criminal by their very nature and as a result, do not fit within the first *Wigglesworth* category.

b. Do proceedings brought under section 40 lead to true penal consequences?

[74] As I have already made clear, even if section 40 proceedings are not criminal by their very nature, section 11 of the *Charter* will still apply to them if they lead to "true penal consequences" (*Wigglesworth* at p. 559). With respect to monetary penalties, sheer magnitude is not determinative. The case law has consistently drawn a distinction between penalties that aim to punish or denounce (penal) and penalties that aim to deter (non-penal). *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, [2001] 2 S.C.R. 132 [*Asbestos Minority Shareholders*] and *Cartaway Resources Corp. (Re)*, [2004] 1 S.C.R. 672 [*Cartaway*], establish that, in general, administrative penalties do not aim to punish. Rather, they aim to deter. Summarizing these authorities, Groberman J.A. of the British Columbia Court of Appeal wrote in *Thow v. B.C. (Securities Commission)*, [2009] B.C.J. No. 211 (Q.L.) at paragraph 30, that these cases establish that "[a]dministrative sanctions and penalties, in contradiction to criminal ones, are, as Iacobucci J. went on to observe at paragraph 45 of [*Asbestos Minority Shareholders*], 'preventive in nature and prospective in orientation'".

[75] On the relationship between magnitude and purpose, Fish J. wrote in *Martineau* at paragraph 60:

> 60. It remains to be determined whether the payment of $315,458 demanded pursuant to s. 124 of the *CA* [*Customs Act*] constitutes a fine that, by its magnitude, is imposed for the purpose of redressing a wrong done to society at large, as opposed to the purpose of maintaining the effectiveness of customs requirements.
>
> [Emphasis in original]

[76] The important thing is purpose. Magnitude might be an indicator of purpose, but there are other indicators as well. One of these is the final destination of the fine. The fact that a fine is being paid into the Consolidated Revenue Fund points towards a penal sanction (*Wigglesworth*, p. 561). This is the case with a paragraph 42(2)*(d)* fine.

[77] However, other indicators point in the opposite direction. First, no stigma attaches to a regulatory penalty such as is provided for in the *Act* (*Martineau*, para. 64). Second, the large potential size of the fine does not necessarily point to a punitive character. As the Judge pointed out in her Reasons at paragraph 58, large penalties are required to deter major corporations. Recently, in *Lavallée*, the Alberta Court of Appeal remarked at paragraph 23 that a large pecuniary penalty "reflects a legislative intent to ensure that the penalties are not simply considered another cost of doing business". That the financial penalty is intended to deter is demonstrated by the fact that it rises with each passing day of non-compliance. When the contravention stops, the fine stops accumulating, so foreign investors have every incentive to comply with the Act and their undertakings.

[78] Moreover, that the fine can be imposed retrospectively to account for past contraventions is not necessarily an indicator of penal purpose (*Lavallée*, para. 25). *Cartaway* was not a case about section 11, but it did clarify that "it is reasonable to view general deterrence as an appropriate, and perhaps necessary, consideration in making orders on a both protective and preventative basis (para. 61). Imposing fines retrospectively is an attempt to meet the goal of general deterrence. If foreign investors know that they will face penalties for contraventions after those contraventions have taken place, they will think twice about not complying. If retrospective fines were not available, investors could act however they pleased until faced with a court-ordered prospective penalty. The *Act* would have no "teeth" and the administrative scheme would be weak. The penalty's potential size is therefore not indicative of penal purpose.

[79] U.S. Steel's principal submission with regard to the second *Wigglesworth* category is that the *Act* provides no criteria by which to assess monetary penalties. These penalties will not be directly related to the consequences of breach, unlike the penalties discussed for example in *Martineau*. Essentially, U.S. Steel assumes that the lack of criteria for setting fines means that "a monetary penalty assessed under the *Act* will inevitably be punitive" (U.S. Steel Memorandum of Fact and Law, paras. 55-60 / Emphasis added). With respect, I fail to see why this should be the case. Indeed, *Wigglesworth* implies that it should be the opposite. At page 561 of her Reasons in *Wigglesworth*, Wilson wrote as follows:

> It is my view that if a body or an official has an unlimited power to fine, and if it does not afford the rights enumerated under s. 11, it cannot impose fines designed to redress the harm done to society at large. Instead, it is restricted to the power to impose fines in order to achieve the particular private purpose…

[80] A statutory power to impose fines that comes along with little statutory guidance will not be subject to section 11 as long as it is exercised in a way so as to achieve proper administrative aims. If, as U.S. Steel contends, the procedure provided for in section 40 does not meet the standard of subsection 11*(d)* of the *Charter*, this simply means that the Court is limited in the goals it can consider in imposing monetary fines. It can only consider goals that are constitutionally appropriate for the sanctioning regime. This, in my view, accords with the principle that we should not assume before the fact that judges will exercise their discretion in an unconstitutional way (see: *R. v. Shoker*, [2006] 3 S.C.R. 399, para. 39). The deterrence goals of the *Act* will necessarily be front and centre. The fact that such an approach to setting penalties accords well with the goals of the *Act* and of the sanction further suggests that an approach to setting penalties that is focused on deterrence is appropriate.

[81] I therefore conclude that the penalties provided for under paragraph 20(2)*(d)* of the *Act* are best understood, and will necessarily be exercised, as being part of "… proceedings of an administrative – private, internal or disciplinary – nature instituted for the protection of the public in accordance with the policy of a statute…" (*Martineau*, para. 22). These penalties do not lead to true penal consequences and, thus, subsection 11*(d)* of the *Charter* is not engaged.

3. Do sections 39 and 40 violate subsection 2(e) of the Bill of Rights?

[82] The subject of the subsection 2*(e)* analysis is the hearing under section 40 and not the Minister's actions under section 39. The latter do not constitute a hearing under subsection 2*(e)* and

they do not make any determination of rights or obligations as that section requires. The parties are agreed on that, but there the agreement ends.

[83] U.S. Steel submits that the principles of fundamental justice differ from the rules of natural justice or procedural fairness, pointing out that unlike the rules of natural justice, subsection 2*(e)* works *ex ante* to determine whether federal laws set out adequate procedures. Moreover, subsection 2*(e)* allows a court to override or not apply such laws. This assertion is, of course, correct, but the argument says nothing about content. U.S. Steel is vague about what subsection 2*(e)* adds to the general common law principle that a party should know the case he or she has to meet. I have considered *R. v. Duke*, [1972] S.C.R. 917 [*Duke*], and *Bell Canada v. Canadian Telephone Employees Association*, [2003] 1 S.C.R. 884, and agree entirely with the Judge's view that these cases suggest "or at least assume without deciding" that subsection 2*(e)*'s principles of fundamental justice do not go any further than demanding that "the tribunal which adjudicates upon a party's rights just act fairly, in good faith, without bias and in a judicial temper, and must give to him the opportunity adequately to state his case" (*Duke*, p. 923).

[84] Nor does U.S. Steel present any argument that would suggest that the *Federal Court Rules*, which deal with the conduct of applications, would be inadequate to satisfy the requirements of subsection 2*(e)*. In its arguments on right to disclosure, U.S. Steel focuses on the fact that section 40 does not provide for any – or for any procedural protections for that matter. But this ignores the fact that providing procedural protections is not the purpose of the *Act*. It is, instead, the purpose of the *Federal Courts Rules* which the Judge correctly points out provide for a notice of application, list of

documentary evidence to be used at a hearing, the filing of affidavits and documentary exhibits, pre-hearing cross-examinations and the disclosure of evidence (Judge's Reasons, paras. 87 to 89).

[85] With respect for the contrary view, I cannot see how these *Rules* can be found to be inadequate to satisfy an investor's right to understand the Minister's case. I would add that, in any event, the record provides little assistance to U.S. Steel's argument that it will be unable to understand the Minister's case.

[86] U.S. Steel also asserts that sections 39 and 40 are so vague that they do not allow an investor to know what constitutes complying with any demands or justifying non-compliance. The Judge dismissed this "void for vagueness" argument as going not to procedural due process, but to substantive due process. The argument, therefore, fell outside the ambit of subsection 2*(e)*.

[87] It seems to me that the notion of vagueness cannot be totally dissociated from procedural rights, since knowing the case one has to meet must entail understanding what one has to prove to win. However, the Judge was correct to cite in support of her view *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606, as considering vagueness to be a substantive doctrine. In that case, Gonthier J. called the right to know the scope of the law "a substantive aspect to fair notice" (para. 46). In my view, this is sufficient to dispose of this aspect of U.S. Steel's subsection 2*(e)* arguments.

Disposition

[88] I therefore conclude that the Judge made no reviewable error which would allow us to intervene. For these reasons, I would dismiss the appeal with costs.

"M. Nadon"

J.A.

"I agree.
Eleanor R. Dawson J.A."

"I agree.
Johanne Trudel J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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