

# Torys on Mergers and Acquisitions

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## U.S. Steel Case Decision in Canada May Have Broader Ramifications

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On June 14, in *The Attorney General of Canada v. United States Steel Corporation and U.S. Steel Canada Inc.*, the Federal Court of Canada upheld the constitutional validity of the process and penalties for enforcing Canada's foreign investment review statute, the *Investment Canada Act* (ICA).

In July 2009, the Attorney General of Canada filed an application seeking an order directing U.S. Steel to comply with undertakings it gave when it obtained approval to acquire Stelco Inc. in 2007. The Attorney General also sought an "administrative monetary penalty" (AMP) of \$10,000 per day for breach of the undertakings (see our July 20, 2009 [M&A Bulletin](#) for further details). U.S. Steel responded to the application by claiming that the enforcement proceedings violated its rights under the *Canadian Charter of Rights and Freedoms* and the *Canadian Bill of Rights*.

In last week's decision, the Federal Court rejected U.S. Steel's arguments. The *Charter's* "presumption of innocence" applies only when a person has been charged with an "offence." The ICA proceedings are not penal by nature; nor do they lead to true penal consequences. The purpose of AMPs in the ICA, despite their potentially high amount, is not to penalize. Rather, it is to promote and ensure attainment of the ICA's objectives by enforcing compliance with ICA's provisions and any undertakings given to support of an application for approval. Having regard to the context and potential consequences to the foreign investor, the Court also concluded that the procedure satisfies the right to a fair hearing in accordance with the principles of fundamental justice, in particular U.S. Steel's right to know the case it must meet.

The decision is significant for two reasons. First, it serves as a reminder that the government considers Canada's foreign investment review regime to be important and will enforce undertakings in cases involving material non-compliance. Second, and perhaps more important, the conclusion in this case that high AMPs are not, in and of themselves, unconstitutional could have implications outside the foreign investment review context.

AMPs are now part of the enforcement framework of a variety of federal and provincial statutes. Some commentators have praised the use of AMPs as offering a less expensive, more efficient means to enforce regulatory legislation; others have been more skeptical and have raised constitutional concerns similar to those raised in the U.S. Steel case.

Although in other contexts – including competition, income tax and securities regulation – some tribunals and courts have held that AMPs do not contravene the *Charter*, these cases do not apply to AMPs generally. The legal characterization of a particular AMP scheme must depend on, among other things, the nature of the scheme and the penalties imposed.

To discuss these issues, please contact the author.

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In the 2009 case, *Doyon v. Canada (Attorney General)*, for example, the Federal Court of Appeal described the system of AMPs in a federal agriculture statute as “draconian” and concluded that it “imported the most punitive elements of penal law while taking care to exclude useful defences and reduce the prosecutor’s burden of proof.” In the U.S. Steel case, the Court concluded that *Doyon* was critical not of the use of AMPs in general but of the particular system established by the legislation at issue in that case. The Court also concluded that the amount of an AMP cannot be assessed in isolation. To be effective in the context of the ICA, an AMP must be flexible enough to address the wide financial range of reviewable investments and of a sufficient magnitude to deter non-compliance, rather than to be seen merely as a cost of doing business.

Although the appropriateness of AMPs will continue to be assessed on a case-by-case basis, the Court’s decision in U.S. Steel lends clear support to the position that the high amount of an AMP alone will not render it unconstitutional. 