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Watch for the next issue in your Inbox in September 2010.

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Investment Canada Act Penalties Upheld: FCA

The Federal Court of Canada upheld the constitutional validity of the review and enforcement provisions of [the Investment Canada Act](#) in [Canada \(Attorney General\) v. United States Steel Corporation](#), 2010 FC 642, released June 14, 2010. The Minister had imposed a \$10,000 per day penalty on U.S. Steel for breach of its employment and production level undertakings under the Act. The court rejected U.S. Steel's argument that s.40 of the Act violates s.11(d) of the *Charter* and s.2(e) of the *Bill of Rights*, finding that the section was not an offence under s.11(d) and did not offend the principles of fundamental justice. As noted in these articles, the ruling may cast a wider net than enforcement of foreign investment review, as administrative penalties are imposed in many other contexts (the *Competition Act*, the *Income Tax Act*, securities regulation):

- [The Investment Canada Act makes its First Court Appearance](#), by Allison MacIsaac, posted June 23, 2010 on The Court;
- [U.S. Steel Case Decision in Canada May Have Broader Implications](#), a Torys article posted June 21, 2010;
- [Foreign Investors Must Live up to Commitments - Sanctions Upheld Under Investment Canada Act](#), a Blakes bulletin posted June 17, 2010.

Exploiting an Unnoticed Legislative Gap Not Necessarily Abuse: FCA

In [*Lehigh Cement Limited v. Canada*](#), 2010 FCA 124 the Federal Court of Appeal overturned another Tax Court of Canada decision concerning the general anti-avoidance rule (GAAR), possibly signalling a judicial trend to combat inappropriate use of the GAAR as a means of filling perceived gaps in the *Income Tax Act* according to some legal commentators. As the taxpayer had conceded that its debt restructuring was an avoidance transaction that created a tax benefit, the court had only to decide the third part of the GAAR analysis, whether there was misuse or abuse of the exemption. On this point the court found:

...the fact that an exemption may be claimed in an unforeseen or novel manner, as may have occurred in this case, does not necessarily mean that the claim is a misuse of the exemption. It follows that the Crown cannot discharge the burden of establishing that a transaction results in the misuse of an exemption merely by asserting that the transaction was not foreseen or that it exploits a previously unnoticed legislative gap. As I read *Canada Trustco*, the Crown must establish by evidence and reasoned argument that the result of the impugned transaction is inconsistent with the purpose of the exemption, determined on the basis of a textual, contextual and purposive interpretation of the exemption. (para.37)

This analysis imposes a high evidentiary burden on the CRA in defending reassessments under GAAR. These articles comment on the decision:

- [*Lehigh Cement Limited v. Canada \(2010\): The Crown Fails to Prove the "Object, Spirit or Purpose" of S. 212\(1\)\(b\)\(vii\) of the Federal Income Tax Act*](#), by Cris Best, posted June 4, 2010 on The Court;
- [*Stripped Interest Coupon Planning Not Subject to GAAR*](#), BLG, May 2010;
- [*Lehigh Cement: more uncertainty surrounding GAAR*](#), Stikeman Elliott, June 2, 2010.

New Federal Securities Act Proposed

The Government of Canada released its [*proposed Canadian Securities Act*](#) on May 26, 2010, marking a key step towards a long-standing commitment to establish a Canadian securities regulator according to the Department of Finance [*news release*](#). The [*backgrounder*](#) provides an overview of the proposed Act and the new securities regulatory regime and sets out a timeline for implementation over the next three years. Fact sheets on the [*proposed legislation*](#) and the [*constitutional reference*](#) summarize the changes, and these articles discuss the implications of the proposed changes:

- [*Proposed federal Securities Act outlines framework for regulation of derivatives*](#), by Margaret Grottenthaler, Stikeman Elliott LLP;
- [*Canadian Government Releases Proposed Canadian Securities Act*](#), a June 2010 Blakes Bulletin;
- [*Revisiting the federal trade and commerce power: Will the federal Securities Act be held constitutional at the SCC?*](#) and [*Proposed Securities Act May Create a More Investor-Friendly and Efficient Canadian Securities Trade*](#), both by Allison MacIsaac, posted June 9 and 16, 2010 on The Court.

New Copyright Legislation Introduced

The government introduced [*Bill C-32*](#), the *Copyright Modernization Act* on June 2, 2010. The changes, designed to update the rights and protections of copyright owners while permitting certain uses, are significant. The [*Balanced Copyright*](#) site contains a [*backgrounder*](#) to the legislation, [*fact sheets*](#), [*frequently asked questions*](#) and a list of [*consultations*](#). For legal commentary about the bill see:

- [*The Canadian Copyright Bill: Flawed But Fixable*](#) by Michael Geist;
- [*Amendments to the Copyright Act: Is Your Business Ready?*](#), a Blakes Bulletin from June 7, 2010;
- [*Bill C-32 - The Copyright Modernization Act*](#), Lang Michener, June 2010.

Other Legislative Initiatives

The federal government has introduced or re-introduced several other bills in the last month, including:

- [Bill C-28](#), the *Fighting Internet and Wireless Spam Act* (anti-spam legislation) and [Bill C-29](#), the *Safeguarding Canadians' Personal Information Act*, which proposes changes to the *Personal Information Protection and Electronic Documents Act* (PIPEDA), were both introduced May 25, 2010. They have received mixed reviews, according to the *Law Times* article [New federal privacy, anti-spam bills get mixed reviews](#). The PIPEDA changes are summarized in the article [Changes to Canada's Personal Information Regime](#), the anti spyware rules and other internet safety issues are discussed in the article [Anti-Spyware Rules to Cover Malicious Software and Much More](#), and [New Anti-Spam Legislation Casts a Wide Net](#) discusses the proposed new rules for sending commercial electronic messages;
- [Bill C-36](#), the *Canada Consumer Product Safety Act*, introduced (for the third time) on June 9, 2010, modernizes the regulatory regime for consumer products in Canada. Notable changes are described in the Blakes Bulletin [Third Time Lucky? Canadian Consumer Product Safety Bill Reintroduced](#).

Recommended Reading

The following publications may be of interest to business lawyers:

- [McCarthy Tétrault Co-Counsel: Business Law Quarterly](#), published June 4, 2010, contains articles on [Recent Developments in Insider Trading](#), [Social Networks and Corporate Disclosure](#), [New Guidelines for Building High Performance Boards](#), [Key Considerations When Doing Business in Canada](#), [Demand Obligations - Divergences in Provincial Limitation and Prescription Periods](#), and [2010 Federal Budget Commentary: Employee Stock Options and Section 116 Relief](#);
- The CBA's National Intellectual Property Section [Quarterly Case Summaries](#) reviews 35 intellectual property judgments of the Federal Court and Federal Court of Appeal from January 1 to March 31, 2010;
- The June 2010 [Business and Corporate Edition](#) contains articles on business culled from the *National* magazine and CBA Practice Link.

Fall Conferences

Planning for fall conferences is already underway. Mark your calendar for the following CBA section conferences taking place in September:

- [The 2010 Annual Competition Law Fall Conference](#) presented by the National Competition section of the Canadian Bar Association will take place September 30 - October 1, 2010 in Gatineau, Québec. The conference will explore the current and future state of Canadian competition law, including new rules for agreements between competitors, a new merger review process, recent court decisions involving *Competition Act* based class actions, and changes to the *Investment Canada Act*;
- The [Sixth Annual Pan-Canadian Insolvency and Restructuring Conference](#) takes place on September 13, 2010 at Le Westin Montréal. Topics to be addressed at this year's conference include: cross border issues, a cross country check-up; stress testing a business and an annual trustees update.

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