

2010

## Canada Update-Highlights of Major Legal News and Significant Court Cases from August 2009 through December 2009

Andrew C. Brown

---

### Recommended Citation

Andrew C. Brown, *Canada Update-Highlights of Major Legal News and Significant Court Cases from August 2009 through December 2009*, 16 LAW & BUS. REV. AM. 349 (2010)  
<https://scholar.smu.edu/lbra/vol16/iss2/11>

This Update is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in Law and Business Review of the Americas by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

# CANADA UPDATE—HIGHLIGHTS OF MAJOR LEGAL NEWS AND SIGNIFICANT COURT CASES FROM AUGUST 2009 THROUGH DECEMBER 2009

Andrew C. Brown\*

## I. SUMMARY OF LEGAL NEWS

### A. AMENDMENTS TO CANADIAN BANKRUPTCY AND INSOLVENCY LAWS COME INTO FORCE

ON September 18, 2009, significant changes to Canadian bankruptcy and insolvency laws came into force. The amendments, which were passed in October 2007 as a part of House of Commons Bill C-12, were designed with three goals in mind: (1) the modernization of the Canadian insolvency system, (2) to increase fairness in the process and prevent past abuses of the system, and (3) to provide greater incentive for companies to choose restructuring as an alternative to bankruptcy.<sup>1</sup>

Bill C-12 amended the *Companies' Creditors Arrangement Act* (CCAA), the federal law that provides a mechanism by which companies can restructure their financial affairs (similar to Chapter 11 in the United States), as well as the *Bankruptcy and Insolvency Act* (BIA), the statute that governs all bankruptcies—corporate and personal—in Canada.<sup>2</sup> In addition, C-12 also amended the *Wage Earner Protection Program* (WEPP), a labor regime passed in 2005 designed to protect workers' wages and benefits in the event of their employer declaring bankruptcy.<sup>3</sup> These provisions, however, came into force in July 2008 and are, thus, beyond the scope of this update.

---

\* The author would like to thank Ms. Virginia Torrie for her invaluable assistance on the Bankruptcy and Asset-Backed Commercial Paper sections.

1. *Highlights of New Legislation*, OFFICE OF THE SUPERINTENDENT OF BANKRUPTCY CANADA (Oct. 7, 2009), <http://www.ic.gc.ca/eic/site/bsf-osb.nsf/eng/br02282.html>.

2. *See id.*; *see also What is CCAA?*, PRICEWATERHOUSECOOPERS CANADA, available at <http://www.pwc.com/ca/en/car/what-is-ccaa.jhtml>; *The Bankruptcy and Insolvency Act*, BANKRUPTCY CANADA, available at <http://www.bankruptcy-canada.ca/bankruptcy/bankruptcy-act.htm>.

3. *Wage Earner Protection Program*, LABOUR PROGRAM (Jan. 12, 2010), [http://www.hrsdc.gc.ca/eng/labour/employment\\_standards/wepp/about.shtml](http://www.hrsdc.gc.ca/eng/labour/employment_standards/wepp/about.shtml).

### 1. *Select Commercial-Related Amendments*

#### a. Protections for Unpaid Suppliers

Bill C-12 amended the BIA to allow for unpaid suppliers to recover any goods sold to, but not yet paid for by, an insolvent or bankrupt company. In order to take advantage of this protection, the supplier must submit a written demand to the purchaser or purchaser's agent within fifteen days after the purchaser has declared bankruptcy. Additionally, the goods that the supplier is seeking to repossess must have been delivered no later than thirty days before the target company declared bankruptcy.<sup>4</sup>

#### b. Interim Financing

Under the new amendments, insolvent businesses now have the option of seeking a court order to obtain new "interim financing" to help restructure the business. The purpose of interim financing is to allow insolvent businesses to obtain loans that can be used to help make the business financially healthy once more.<sup>5</sup> The amendment to Sec. 50.6 of the BIA clarifies that the court may grant a debtor's request for interim financing at its own discretion, but must consider such factors as the manner in which the debtors finances will be managed during the period of protection under the BIA, the level of confidence that the business' creditors have in the business' management, whether the loan would help the debtor become viable, and the time period that the debtor is expected to be under the protections of the BIA, among others.<sup>6</sup>

### 2. *Select Consumer-Related Amendments*

In keeping with the goal of improving the fairness of the Canadian insolvency system for the individual debtor, consumer-related amendments seem to provide more grace to individuals who declare bankruptcy.

#### a. Increase in Maximum Debts Allowable

Key amongst the amendments made to the BIA is a provision that changes the definition of a "consumer debtor" to include those "whose aggregate debts, excluding any debts secured by the individual's principal residence, are not more than \$250,000 [ . . . ]."<sup>7</sup> The \$250,000 ceiling for maximum allowable debts represents an increase from the BIA's previ-

---

4. See *Highlights of New Legislation*, *supra* note 1; see also, *Repossession of Goods by Unpaid Suppliers*, OFFICE OF THE SUPERINTENDENT OF BANKRUPTCY CANADA (Oct. 21, 2009), <http://www.ic.gc.ca/eic/site/bsf-osb.nsf/eng/br01279.html>.

5. See Office of the Superintendent of Bankruptcy Canada, Bill C-12: Clause by Clause Analysis—Clauses 11-20 (Jan. 19, 2010), <http://www.ic.gc.ca/eic/site/bsf-osb.nsf/eng/br01980.html>.

6. Bankruptcy and Insolvency Act, R.S.C., § 50.6 (1985), amended by 2007 Bill C-12, Clause No. 18.

7. Bankruptcy and Insolvency Act at §66.11 (2010).

ous debt ceiling of only \$75,000.<sup>8</sup> By increasing the debt ceiling, the government of Canada hopes to allow more individuals to have access to the streamlined proposals process outlined in the BIA, thus facilitating greater and more efficient debt repayments.<sup>9</sup>

#### b. Discharge of First and Second Time Bankrupts

Another important provision amends the rules allowing the discharge of debts for both first and second-time bankrupts.<sup>10</sup> The BIA allows for the discharge of debts for first-time bankrupts without surplus income nine months after the individual declares bankruptcy.<sup>11</sup> Similarly, second-time bankrupts without surplus income are eligible for discharge after twenty-four months.<sup>12</sup> The amendments to BIA leave these provisions unchanged, but alter the rules relating to discharge for bankrupts who have surplus income.

With respect to individuals who have surplus income, the amendments to the BIA allow discharge of debts for first-time bankrupts after twenty-one months if the debtor has contributed part of their surplus to their estate during this time period.<sup>13</sup> Second-time bankrupts with surplus income are required to contribute to their estate for a thirty-six month period prior to being eligible for discharge.<sup>14</sup> Taken as a whole, these provisions provide the debtor with a way to get out from underneath the weight of their debts, while allowing the creditors to collect at least some of what they are owed.

### B. SETTLEMENT REACHED IN CONNECTION WITH ASSET-BACKED COMMERCIAL PAPER (ACBC) MARKET

In December 2009, a settlement was reached between Canadian securities regulators and market actors in connection with the collapse of the C\$35-billion Asset Backed Commercial Paper (ABCP) market.<sup>15</sup> The 2007 collapse of the ABCP market occurred when issuers of ABCP failed to inform their clients (or only informed certain clients) of liquidity

---

8. See *Highlights of New Legislation: Consumer Proposals*, *supra* note 1.

9. *Id.*

10. See *id.* at *More on Discharge from Bankruptcy*; See also, Bankruptcy and Insolvency Act, R.S.C. §168.1 (2010).

11. Bankruptcy and Insolvency Act at §168.1(1)(a)(i).

12. See *id.* at §168.1(1)(a)(ii).

13. See Bankruptcy and Insolvency Act at §168.1(1)(a)(ii) (Pursuant to §68(4) of the BIA, when the trustee determines that an individual declaring bankruptcy has surplus income, the trustee is required to fix an amount that the bankrupt is required to contribute to their estate as a set-aside for the bankrupt's creditors. The amount fixed is determined by taking into account the amount of income the bankrupt will need to maintain a reasonable standard of living.).

14. See Bankruptcy and Insolvency Act at §168.1(1)(b)(ii).

15. Press Release, Ontario Securities Commission, et. al., ABCP: Settlements Reached Following Joint Investigations (Dec. 21, 2009).

problems facing the market.<sup>16</sup> Thus, the banks and brokerage firms named in the settlement were “accused of failing to take appropriate steps to protect the interests of their clients.”<sup>17</sup> Under the terms of the settlement, seven brokerage firms will pay a total of C\$138.8 million (US\$131 million) in penalties and investigative costs related to the collapse of the ABCP market.<sup>18</sup> National Bank Financial, Inc. is the hardest hit of the firms named in the settlement, having been ordered to pay C\$75 million.<sup>19</sup>

Although the settlement brings a measure of justice in holding the major lenders responsible for their irresponsible practices, many in Canada see the settlement as merely a slap on the wrist in comparison to the damage that the firms did to the market.<sup>20</sup> In an op-ed published in the *Financial Post* in the days following the announcement of the settlement, Jim Middlemiss, a Canadian business correspondent and investor, compared the settlement to “grounding your kid for coming home late.”<sup>21</sup>

### C. CANADA-PERU FREE TRADE AGREEMENT

On August 1, 2009, the Canada-Peru Free Trade Agreement (FTA) entered into force.<sup>22</sup> Along with the FTA, a Labour Cooperation Agreement (LCA) and Agreement on the Environment (AE) between the two countries also entered into force.<sup>23</sup> The FTA between Canada and Peru had been in the works since August 2002.<sup>24</sup> Under the terms of the agreement, which was officially signed on May 28, 2008, both countries agree to provide greater market access to one another’s products as well as to provide certain protections for investors.<sup>25</sup> With the addition of the LCA and AE, each country also committed itself to strengthening protections for workers in industries connected to trade between the nations as well as pursuing high levels of environmental protection.<sup>26</sup>

Canada’s primary imports from Peru include resources such as gold, zinc, copper ores, and oil, as well as animal feed and agricultural products. Additionally, Peru is a “strategic destination for Canadian direct

---

16. Pav Jordan and Jennifer Kwan, *UPDATE 1—Canadian Banks to Pay C\$139 Mln in ABCP Settlement*, REUTERS, Dec. 21, 2009, available at <http://www.reuters.com/article/idUSN2125853120091222>.

17. *Id.*

18. See Ontario Securities Commission, *supra* note 7.

19. *Id.*

20. Jim Middlemiss, *ABCP Settlement a Stain on Our Market*, FINANCIAL POST, Dec. 22, 2009, available at <http://www.financialpost.com/story.html?id=2371360>.

21. *Id.*

22. *Canada-Peru Free Trade Agreement*, FOREIGN AFFAIRS AND INTERNATIONAL TRADE CANADA (Oct. 10, 2009), <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/andean-andin/can-peru-perou.aspx>.

23. *Id.*

24. *Id.*

25. *Canada Signs Free Trade, Labour Cooperation and Environment Agreements with Peru*, FOREIGN AFFAIRS AND INTERNATIONAL TRADE CANADA (May 29, 2008), [http://international.gc.ca/media/state\\_sec\\_etat/news-communiques/2008/386239.aspx?lang=eng](http://international.gc.ca/media/state_sec_etat/news-communiques/2008/386239.aspx?lang=eng).

26. *Id.*

investment” related to mining and financial services.<sup>27</sup> Peru’s primary imports from Canada include food and agricultural products as well as technical instruments and industrial machinery.<sup>28</sup> In 2008, trade between the two nations totaled approximately C\$2.8 billion.<sup>29</sup>

#### D. PROPOSED CHANGES TO ONTARIO FAMILY LAW

In December 2009, Ontario announced proposed changes to its family law that would make divorce proceedings faster, less expensive, and less combative. Proponents of the changes hope that they will help ease the intense emotion and bitterness of the divorce situation and make the whole process easier on the parties involved—especially on the children caught in the middle.<sup>30</sup>

Among the changes included in the proposed overhaul, known as Bill 133, are provisions that encourage the use of alternative dispute resolution procedures in order to cut down on the number of cases that go to trial.<sup>31</sup> In addition to streamlining the divorce process through ADR, the changes also reduce the number of procedural steps that the parties will have to go through in order to get before a judge, as well as reduce the amount of paperwork required to dispose of those cases that actually do go to trial.<sup>32</sup>

A final significant change proposed by the reform bill relates to the calculation of child support payments. The proposed amendment to the *Family Law Act (FLA)* would require parents ordered to pay child support to make annual financial disclosures to the payee parent.<sup>33</sup> In some cases, the recipient parent would also have to make certain disclosures to the obliged parent. Although the overall response to the changes has been one of support, some family law practitioners express disappointment that the financial disclosure amendment does not include an automatic recalculation provision.<sup>34</sup> Automatic recalculation, which has been passed in other provinces, requires the court to recalculate the obligor’s child support obligations each time that the obligor makes his required annual, financial disclosures.<sup>35</sup> Thus, child support obligations could increase or decrease each year depending on the obligor’s income for that year. As of the time of this writing, Bill 133 has not yet received final passage.

---

27. See *Canada-Peru Free Trade Agreement*, *supra* note 14.

28. *Id.*

29. *Id.*

30. *Proposed Changes to Family Law in Ontario Applauded*, CBC NEWS, Dec. 17, 2009, <http://www.cbc.ca/canada/toronto/story/2009/12/17/ontario-divorce.html>.

31. *Id.*; see also Cristin Schmitz, *Ontario Bar Welcomes Family Law Overhaul*, THE LAWYERS WEEKLY, Dec. 5, 2009, <http://www.lawyersweekly.ca/index.php?section=article&articleid=816>.

32. See *Proposed Changes*, *supra* note 30.

33. See Cristin Schmitz, *supra* note 31.

34. *Id.*

35. *Id.*

### E. ONTARIO TAX HARMONIZATION BILL PASSES

In early 2009, Ontario proposed a new tax bill that would combine federal and provincial sales taxes on products and services. The so-called Tax Harmonization Bill drew critics from throughout the economy, including the legal community, which argued that the harmonization would raise the cost of legal fees. Under the previous system, legal fees were exempt from the provincial sales tax (PST) and only subject to the federal General Sales Tax (GST). The new harmonized sales tax, however, would have the effect of subjecting legal fees to both the GST and PST.<sup>36</sup>

Despite the strong opposition, on December 9, 2009, the Tax Harmonization Bill passed its final reading before the Ontario legislature.<sup>37</sup> The new thirteen percent harmonized tax, which supporters claim will decrease the overall cost of doing business and create more than 600,000 jobs in Ontario over the next decade, will go into effect on July 1, 2010.<sup>38</sup>

## II. RECENT SIGNIFICANT COURT DECISIONS

### A. SCC RECOGNIZES NEW DEFAMATION DEFENSE

In *Grant v. Torstar Corp.*, the Supreme Court of Canada recognized a new defense to a charge of defamation: “responsible communication on matters of public interest.”<sup>39</sup> The same day, the SCC applied its ruling in *Grant* to another case, *Quan v. Cusson*.

#### 1. *Grant v. Torstar Corp.*<sup>40</sup>

Grant, a real estate developer, and his company brought a libel suit against a reporter who published a story containing statements made by residents critical of a proposed golf course development spearheaded by Grant’s company. The article expressed the belief of several residents the reporter had interviewed that the golf course was a “done deal” because of Grant’s considerable political influence, which the residents quoted believed he was exercising behind the scenes to secure government approval for the development.

At trial, the reporter raised a “qualified privilege defence [*sic*] based on a concept of public interest responsible journalism.”<sup>41</sup> The trial judge rejected this expanded qualified privilege defense and submitted the question to the jury only on the defenses of truth and fair comment. The jury rejected these defenses and found the reporter guilty of libel. Grant and

36. See, e.g., Andrew C. Brown, *Highlights of Major News and Significant Court Cases from February 2009 through April 2009*, 15 LAW AND BUS. REV. OF THE AMERICAS 935 (2009).

37. See *Controversial HST Bill Passes in Ontario*, CBC News, Dec. 9, 2009, <http://www.cbc.ca/canada/toronto/story/2009/12/09/ont-hst.html>.

38. Keith Leslie, *Ontario Joins National HST Club in Passing Bill to Harmonize Tax with Ottawa*, THE CANADIAN PRESS, Dec. 9, 2009, available at [http://ca.news.yahoo.com/s/capress/091209/national/ont\\_hst\\_passes](http://ca.news.yahoo.com/s/capress/091209/national/ont_hst_passes).

39. *Grant v. Torstar Corp.*, [2009] SCC 61 (Can.).

40. *Id.*

41. *Id.* at ¶ 1.

his company were awarded general, aggravated, and punitive damages. On appeal, the Court reversed the jury verdict, finding that the trial judge had erred by not submitting the responsible journalism defense to the jury. Grant and his company subsequently appealed to the Supreme Court of Canada (SCC) asking the Court to reinstate the jury's award, while the reporter cross-appealed asking the Court to apply the new responsible journalism defense.

The SCC rejected Grant's appeal and found that "the law of defamation should be modified to provide greater protection for communications on matters of public interest."<sup>42</sup> The Court relied on s. 2(b) of the *Canadian Charter of Rights and Freedoms* (hereinafter "Charter of Rights"), which it stated applied to all communications on matters of public interest, including those that "contain false imputations." According to the majority, "freewheeling debate on matters of public is to be encouraged," and its recognition of the new public interest defense would serve to provide this encouragement by protecting the ability of the media to provide a "vehicle for such debate."<sup>43</sup>

The Court was careful to point out that the public interest defense should be regarded as a new defense, distinct from the traditional defense of qualified privilege, which the reporter had argued contained the public interest defense. Accordingly, the majority outlined a two-part test for the application of the public interest defense. In order to be afforded the protection of the new defense, a publication must, first, contain information concerning a matter of public interest.<sup>44</sup> Second, the person raising the defense must show that "he or she was diligent in trying to verify the allegation(s), having regard to all the relevant circumstances."<sup>45</sup> The Court, in applying the test to the case at bar, found that the construction of the golf course was in the public's interest because of its effect on the residents who lived near the proposed site as well as its potential environmental impact. Additionally, the Court found that the reporter had exercised due diligence in attempting to verify the allegations that Grant was using his influence in order to secure government approval for the project, including contacting Grant himself for a comment.<sup>46</sup> Based on the facts, the Court found that the trial judge's errors had resulted in a "substantial wrong or miscarriage of justice" and, thus, ordered a new trial applying the public interest defense as required by s. 134(6) of the Onta-

---

42. *Id.* at ¶ 2.

43. *Id.*

44. Whether a matter is to be considered in the public interest is a question of law for the judge to decide. In order to be considered within the public interest, the Court held that a judge "must consider the subject matter of the publication as a whole," rather than simply examine the statement at issue in isolation. If the judge, in examining the subject matter as a whole, finds the matter "to be one inviting public attention, or about which the public, or a segment of the public has some substantial concern because of it affects the welfare of citizens, or one to which considerable public notoriety or controversy has attached," then she must find the matter to be one of public interest. *Id.* at ¶ 4.

45. *Id.* at ¶ 3.

46. Grant refused to comment when contacted by the reporter.



rio *Courts of Justice Act*.<sup>47</sup>

## 2. *Quan v. Cusson*<sup>48</sup>

The same day that it reached its decision in *Grant*, the SCC applied the ruling to another case involving a charge of libel raised by an Ontario police constable (hereinafter “C”) against a newspaper reporter who had published a story alleging that the constable had misrepresented himself to New York City authorities in order to assist with the rescue operations following the September 11 terrorist attacks, and that this misrepresentation possibly interfered with the rescue effort.

In the days following September 11, 2001, C traveled to New York City without the permission of his employer for the purpose of assisting in rescue operations at the World Trade Center site. A newspaper reporter in Ontario subsequently reported the story and the allegations of misrepresentation and interference with the rescue operations. C filed suit against the reporter and the newspaper for libel. At trial, the defendant reporter and newspaper raised the defenses of qualified privilege and truth. The trial judge rejected the qualified privilege defense, but submitted the defense of truth to the jury, which awarded C damages because finding that some, but not all of the allegations had been proven true. Interesting, the Court of Appeal recognized the existence of the responsible journalism defense in Ontario law, but upheld the trial court’s decision stating that the defendants were not entitled to a new trial under the defense because they had not raised it at the original trial.

Citing the Court’s decision in *Grant* and writing for the majority, Chief Justice McLachlin (who also wrote the majority opinion for that case) found that “the defence of responsible communication on matters of public interest” was applicable in this case.<sup>49</sup> According to the majority opinion, the test outlined in *Grant* was met in this case, primarily because “the Canadian public has a vital interest in knowing about the professional misdeeds of those who are entrusted by the state with protecting public safety.”<sup>50</sup> Accordingly, the SCC upheld the appeal and ordered a new trial on the facts.

## B. SCC OVERTURNS CONVICTION OF CROWN PROSECUTOR FOR MALICIOUS PROSECUTION<sup>51</sup>

Miazga, a crown prosecutor, had been convicted of malicious prosecution stemming from the overturned convictions of three Canadians related to charges of sexual abuse against three children. The SCC found that there was not sufficient evidence to indicate that Miazga had the required malicious intent to sustain the charge.

---

47. *Id.* at ¶ 7.

48. *Quan v. Cusson*, [2009] SCC 62 (Can.).

49. *Id.* at ¶ 2.

50. *Id.*

51. *Miazga v. Kvello Estate*, [2009] SCC 51 (Can.).

The original prosecution involved three children who made allegations of sexual assault against their biological parents, their mother's boyfriend, and their foster parents as well as another relative. Miazga prosecuted the case against the biological parents and the mother's boyfriend on behalf of the Crown, and obtained convictions. Later, the SCC overturned the convictions, but found that sufficient evidence existed to bring a new trial. Eventually, one of the accused accepted a plea bargain and charges against the respondents were stayed. Years later, however, the children recanted and the respondents commenced a civil suit against Miazga for malicious prosecution. Miazga was found liable and appealed.

In Canada, the standard for proving a charge of malicious prosecution is whether objectively reasonable grounds existed upon which the prosecutor could have believed that the accused were probably guilty of the alleged crime. The trial judge found that such grounds did not exist, and found that the lack of reasonable and probable cause raised the presumption of malicious prosecution. The Court of Appeals rejected the trial judge's "indicators of malice," but upheld the conviction finding that "M did not have a subjective belief in the probable guilt of the respondents."<sup>52</sup>

The SCC overruled the lower courts' decisions and dismissed the action against Miazga. In order for a plaintiff to successfully bring a suit for malicious prosecution, they must show that the alleged malicious prosecution was: "(1) initiated by the defendant; (2) terminated in favour of the plaintiff; (3) undertaken without reasonable and probable cause; and (4) motivated by malice or a primary purpose other than that of carrying the law into effect."<sup>53</sup> The Court focused solely on the third and fourth elements of the tort. In finding that the third element had not been met, the Court noted that the personal beliefs of the prosecutor are irrelevant in a prosecution. Rather, what matters is whether "the prosecutor believes, based on the existing state of circumstances, that proof beyond a reasonable doubt *could* be made out in a court of law" [*emphasis added*].<sup>54</sup> The court found that sufficient evidence existed to allow Miazga to develop an objectively reasonable belief in the probable guilt of the plaintiffs and, thus, a charge of malicious prosecution could not be supported.

The Court also found that the malice requirement had also not been satisfied to warrant a charge of malicious prosecution. In order for malice to exist, the judge must look to the totality of the circumstances to determine whether the prosecutor intended to deliberately subvert or abuse the power of his office. In the case of Miazga, the Court could find no evidence that would support the "indicators of malice" cited by the trial judge. Accordingly, it rejected the charge of malicious prosecution.

---

52. *Id.* at ¶ 2.

53. *Id.* at ¶ 3.

54. *Id.* at ¶ 4.

C. SCC FINDS THAT NON-CANADIAN SUPPLIERS DO NOT HAVE  
STANDING BEFORE THE CANADIAN

1. *International Trade Tribunal ("CITT")*<sup>55</sup>

Northrop Grumman Overseas Services Corp., an American company with its corporate offices in Delaware, filed a complaint with the Canadian International Trade Tribunal (hereinafter "CITT") when it was not awarded a valuable contract that the company had bid on. The SCC found that Northrop did not have standing to file the complaint with the CITT because it was not a Canadian-based company, nor did it have any offices in Canada.

According to the facts, Public Works and Government Services Canada (hereinafter "PW") requested proposals for the manufacture and installation of "Fire Control Systems" for the Department of National Defence's [*sic*] CF-18 fighter aircraft. Northrop Grumman, along with Lockheed Martin and Raytheon Corp. submitted bids for the nearly US\$140 million project.<sup>56</sup> Lockheed Martin was eventually awarded the contract and Northrop filed a complaint with the CITT, alleging that PW failed to evaluate bids in accordance with the requirements of the Evaluation Plan. Specifically, Northrop alleged that it was not awarded points that it should have been under the procedures outlined in the Evaluation Plan and, conversely, that Lockheed was awarded points it should not have been awarded. The complaint further alleged that PW, by not following the procedures outlined in the Evaluation Plan, failed to clearly identify the criteria used to evaluate bids as required by Article 506(6) of the Agreement on Internal Trade (hereinafter "AIT"). CITT agreed to hear the complaint, but PW challenged Northrop's standing to bring the complaint before a hearing on the merits could take place. PW's primary argument was that since Northrop was a U.S. company with no offices in Canada, it did not meet the definition of a "Canadian supplier" and, thus, could not gain access to the CITT under the terms of AIT. The CITT rejected the challenge and ruled that Northrop did, in fact, have standing to bring the complaint.

The Federal Court of Appeal, on judicial review, quashed the CITT ruling and found that the CITT only had the authority to hear complaints under the AIT brought by Canadian suppliers. The Federal Court of Appeal, however, did not rule on whether Northrop had standing as a Canadian supplier to bring the complaint before the CITT, instead remitting that determination to the CITT. Northrop appealed to the SCC to have the CITT's original finding of standing reinstated.

In interpreting relevant portions of the *Canadian International Trade Tribunal Act* and of the AIT, the SCC found that access to the CITT was limited solely to Canadian suppliers, which the Court stated were defined

---

55. *Northrop Grumman Overseas Services Corp. v. Canada* (Attorney General), [2009] SCC 50 (Can.).

56. This figure includes the manufacture and service contracts.

under the terms of the agreements as entities with offices in Canada. The Court reasoned that since that the AIT is a domestic free trade agreement governing trade within Canada and granting equal access expressly to all “Canadian suppliers,” that any company must have an office in Canada in order to qualify for its protections. Since Northrop Grumman is based in Delaware and had no Canadian office, it could not seek recourse through the CITT. According to the Court, if Northrop Grumman was granted access under the AIT even though the U.S. government is not a party to the agreement, the entire purpose of the agreement would be undercut. Accordingly, the Court dismissed Northrop’s appeal.

