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Subject: Supremacy of Parliament Over Courts, Except Where New Law in Violation of the Charter

Navdeep Bains
Minister of Innovation Science and Economic Development

Mark Schaan and Paul Morrison, Ministry of Innovation, Science and Economic Development

On August 12, 2016 we wrote to you about the Federal Government having the legal right to make retroactive legislation and that the Nortel disabled were a deserving case for retroactive legislative or regulatory change on the premise of injustice, humanity and compassion.

[Email to Mark Schaan, Ministry of Innovation, Science and Economic Development August 12, 2016](#)

This communication addresses the right of Parliament to make retroactive legislation or regulations that are intended to supersede a court decision that Parliament finds to be wrong based on injustice, humanity and compassion.

According to multiple legal experts in the reports below, Parliament does have supremacy over the court, except where it makes laws that are in violation of the Charter of Rights and Freedoms. Judges only have supremacy over Parliament when they decide a new law is in violation of the Charter.

The requested Eligible Financial Contract regulation change for the Nortel disabled is under exclusive Federal legislative jurisdiction. Parliament supremacy applies since the requested EFC regulation change meets the requirement of S. 7 in the Charter.

Life, liberty and security of person

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

No judge could ignore or overturn the new EFC regulation's effect of the Nortel Canada estate paying the Nortel disabled in full, provided its retroactive clause is written clearly for the new regulation to be in effect retroactively to Jan. 13, 2009 and to supersede and to be notwithstanding the March 31, 2010 court approved settlement and the Oct. 12, 2016 settlement.

One could argue that the CCAA judge had no right to deprive the Nortel disabled of the right to life, liberty and security that is protected under the Charter. CCAA judges are expected to administer the Federal bankruptcy laws, but are not entitled to ignore the Charter in respect to the principles of fundamental justice, especially when there are disabled persons losing their disability income and funding for essential medicines.

Rule 7.08(4) in Rules of Civil Procedure under the Ontario Courts of Justice Act protects Charter rights for the disabled. The CCAA does not oblige the CCAA judge to deny the discovery of evidence, to deny a trial on wrongdoings in a trust account administered by the debtor and to force a pari passu settlement without considering fairness and the deprivation of the right to life, liberty and security for disabled persons.

It is also important to consider that the Federal Parliament has adopted the United Nations Convention On The Rights Of Persons With Disabilities. The purpose of the present Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity. Self-Insured Group Long Term Disability Benefit Plans becoming EFC's implements both the Charter of Rights and Freedoms and United Nations Convention On The Rights Of Persons With Disabilities.

We can discuss further the Parliament authorities for new laws being both retroactive and with supremacy over the courts at our teleconference on Friday, Oct. 27, 2016.

Sincerely

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Supremacy of Parliament and the Canadian Charter of Rights and Freedoms - Studies on the Canadian Constitution and Canadian Federalism - Quebec History
<http://faculty.marianopolis.edu/c.belanger/quebechistory/federal/parl.htm>

In effect, this established Supremacy of Parliament as one of the cornerstones of the constitution of Canada. In a system of Supremacy of Parliament, Parliament is deemed to have sovereign and uncontrollable authority in the making, amending and repealing of laws. Nothing is beyond its capacity to legislate upon. Parliament is the place where absolute legislative power resides. It is said to be able to do anything except for that which is naturally impossible. Strictly speaking, in a country of supremacy of Parliament, Parliament cannot issue an unconstitutional law since there are no bounds to its authority.

The full extent of the supremacy, save for the part that touched upon the amendment to the constitution - a restriction that was only removed by the Constitution Act, 1982 -, was transferred to Canada by the [Statute of Westminster](#) in 1931.

Evidently, the [courts](#) would strike down legislation that was beyond the legislative powers of the federal Parliament, if it invaded provincial jurisdiction, or of the provincial legislatures, if it invaded federal jurisdiction.

With the Constitutional Act, 1982, Canada diverted from a strict regime of Supremacy of Parliament. By including a *Charter of Rights and Freedoms* in the Constitution Act, 1982, Canada appeared to end Supremacy of Parliament. The Charter is clear on this point : it is stated in s. 32 (1) that it applies, or binds, the federal Parliament and the Legislatures of the provinces. Thus, legislation not conforming to the Charter is unconstitutional. Supremacy has been shifted, or so it would appear, from Parliament to the Constitution, and thus to the people.

As the November 1981 constitutional conference between the provinces and the [Trudeau](#) government made it clear, the latter had either to accept concessions and maintain a measure of supremacy in the legislatures or else there would be no Charter of Rights. These factors explain why some restrictions were written into the Charter.

Centre for Constitutional Studies: Supremacy of Parliament

<https://ualawccsprod.srv.ualberta.ca/ccs/index.php/sz/548-supremacy-of-parliament>

Prior to 1982, Parliamentary supremacy reigned in Canada. The British North America Act set the division of powers between Parliament and the provincial legislatures where each legislature was supreme such that, within its jurisdiction, no other institution had the power to declare its laws unconstitutional. This situation changed in 1982 with the adoption of the Canadian Charter of Rights and Freedoms as part of the Constitution Act, 1982. This Act prescribes that “the Constitution of Canada is the supreme law of Canada” (s.52). Thus constitutional supremacy replaced Parliamentary supremacy in Canada. Consequently, if Parliament or any provincial legislatures now enact a law which violates a section of the Charter, a court has the power to strike this legislation down.

Some commentators argue however, that since s. 33 of the *Charter*, the notwithstanding clause, allows Parliament and the provincial legislatures to override certain provisions of the *Charter*, Canadian legislatures are still partially supreme.

Canadian Parliamentary Review: Parliament and the Courts – Who’s Legislating Whom?

<http://www.revparl.ca/english/issue.asp?art=112¶m=68>

In a similar vein, Justice Cory said that

Quite simply, it is not the courts which limit the legislatures. Rather, it is the Constitution, which must be interpreted by the courts, that limits the legislatures.⁷

In *Vriend* Justice Iacobucci referred to the role of the courts to protect “democratic values”. He remarked that although the invalidation of legislation by the courts usually involved negating the will of the majority, the concept of democracy was broader than the notion of majority rule.¹⁰ As stated in another case, courts had to be guided by the values and principles essential to a free and democratic society (e.g. respect for the inherent dignity of the human person).¹¹ They had to stand ready to intervene to protect democratic values as appropriate.

These views of democracy required legislators to take into account the interests of majorities and minorities alike. Where the interests of a minority were denied consideration, especially where that group had historically been the target of prejudice and discrimination, judicial intervention was warranted “to correct a democratic process that has acted improperly.”¹²

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