Compromise of Long Term Disabled Claims In Bankruptcy Violate The Charter

Overview

Prime Minister Pierre Elliot Trudeau advocated for the 1982 Constitution Act, Canadian Charter of Rights and Freedoms in pursuit of his ideal of a "just society."
Prime Minister Pierre Trudeau's Speech at the Charter Signing Ceremony on Parliament Hill on April 17, 1982 , (Text of Speech) says: "We now have a Charter which defines the kind of country in which we wish to live, and guarantees the basic rights and freedoms which each of us shall enjoy as a citizen of Canada. It reinforces the protection offered to French-speaking Canadians outside Quebec, and to English-speaking Canadians in Quebec. It recognizes our multicultural character. It upholds the equality of women, and the rights of disabled persons."

Minister Navdeep Bains prescribing self-insured group long term disability benefit plans as an Eligible Financial Contract on a retroactive basis in the CCAA regulations fulfils the Federal Government's obligation for the CCAA to be compliant with the Charter in respect to disabled persons. ***In Nova Scotia (Workers Compensation Board)[1],*** Chief Justice McLachlin has expressed that "the Charter is not some holy grail which only judicial initiates of the superior courts may touch. The Charter belongs to the people. All law and law-makers that touch the people must conform to it." ***Vriend*** says that "the final word in our constitutional structure is in fact left to the legislature and not the courts." This theme was reiterated by former Prime Minister Jean Chretien in his TV Ontario interview of **The Three Amigos of the Constitution** in 2012 when he said "he disagreed with the view that the Charter gave absolute power to the judges who interpret the Charter. He said that in a democracy the people elected should have the ability to over-rule the abuses of judges, and the Charter gives them this."

The stated rationale for Minister Navdeep Bains not prescribing self-insured group long term disability benefit plans as an Eligible Financial Contract is **spillover effects** from other creditor groups. Firstly, the Nortel disabled group is experiencing the severe deleterious effects of their Charter S. 15(1) and S. 7 violations and the Federal Government has an obligation to correct the non-compliance with the Charter, without regard to spillover effects. Secondly, in respect to other creditor groups seeking Federal Government intervention on future bankruptcy court approved settlements, the Federal Government's response is clearly no to the creditor groups whose Charter rights have not been violated. It is yes to future creditor groups whose Charter rights are violated. Minister Navdeep Bains upholding Charter rights for the disabled will ensure that future CCAA judges cannot use discretion to compromise a disabled person's creditor claim in breach of the Charter.

Martha Jackman and Bruce Porter, Justiciability of Economic and Social Rights in Canada, Marilyn Pilkington, Damages as a Remedy for Infringement of the Canadian Charter of Rights and Freedoms and *Ravdahl* discuss the necessity of compensation and potentially punitive damages for persons whose Charter rights are violated. The Federal Government is responsible and vicariously liable for the CCAA being overly broad, by

1 The underlined words are cross-references to excerpts from SCC cases and reports by Charter experts later in this document. The cross-reference excerpts have a hyperlink to the full SCC cases and reports. After linking to the cross-reference excerpts, go back to the source cross-reference link by pressing ALT + Left Arrow Key.

permitting CCAA judges to use discretion to severely compromise disabled persons' bankruptcy claims in violation of the Charter, without meeting any of the Charter tests for acceptable limitation of Charter rights: reasonable limits demonstrably justified in a free and democratic society in S.1; in accordance with principles of fundamental justice in S. 7; or, due to a notwithstanding clause within the statute enabled in S. 33. There is no limitation period for Charter claims.

S. 15(1) and S. 7 Charter Violations for the Disabled at Bankrupt Corporations

It must first be determined that violations of S. 15(1) and S. 7 have occurred.

The interim settlement approved by the court on March 31, 2010 and the recent settlement on allocation of the lock-box cash on Oct. 12, 2016 result in the Nortel Canadian disabled being deprived of adequate disability income for basic housing, food and clothing, after payment of their medicines and other medical expenses necessary for life itself and the basic quality of life before death. The pending CCAA compromised settlement of estimated 25% of disability income actuarial liabilities (40% of the 62% deficit in the Health and Wealth Trust) and 40% of medical reimbursement actuarial liabilities does not provide for adequate disability income for basic living and medical expenses. The severity of the deleterious effects from compromise of the Nortel disabled claims was made catastrophic by the over 6 years delay between the first 38% HWT settlement of disability income actuarial liabilities and the pending CCAA settlement. The capital from the HWT was used up during the delay, because basic living and medical expenses far exceeded the maximum CPP disability income each year, now at $15,490 in 2016. Nortel disabled average medical expenses are Cdn$7,800 annually. Without any income contribution from the used up HWT settlement, the pending CCAA settlement capital will also be used up for basic living and medical expenses within just a few years. This leaves the Nortel disabled to live on only CPP disability income up to death or age 65.

The often cited identical treatment of the Nortel disabled to other Nortel unsecured creditors actually produces "substantive inequality" as defined in ***Eldridge***. The **Law Commission of Ontario - Charter of Rights and Freedoms** also says that "a law applying in a uniform way, which, in implementation, has a disproportionately negative impact on "enumerated" classes of persons will be in violation of section 15." The Charter cites the disabled as an "enumerated" class for specific protection.

The Nortel bankruptcy settlements create "discrimination" under S. 15(1) in the sense that they harm the Nortel disabled dignity and fail to respect their full and equal membership in society, as defined in ***Gosselin***. The CCAA judge's use of discretion to force poverty on the Nortel disabled results in their exclusion and marginalization described in ***Granovsky***, which is not within the values of our free and democratic society for the disabled that were specifically protected by the Charter.

The Supreme Court, in ***Eldridge***, ***Gosselin*** and ***Granovsky***, has already accepted that deprivation of economic rights to the extent of substantive inequality is a violation of S. 15(1) of the Charter. **Bruce Porter, 20 Years of Equality Rights- Reclaiming Expectations, 2002** says that Eldridge

is about as clear a statement in support of the positive vision of equality presented by equality seekers as one could hope for…"

The Supreme Court has also already decided in ***Baker*** and ***Slaight*** that its interpretation of S. 7 deprivation of rights to life, liberty and security needs to be consistent with international human rights documents ratified by the Federal Government, such as the **International Covenant on Economic, Social and Cultural Rights** (ICESC) and **United Nations Convention on the Rights of Persons with Disabilities** (UNRPD.) Both of these international human rights documents ratified by Canada state that States Parties must recognize the right of persons with disabilities to an adequate standard of living for themselves and their families, including adequate food, clothing and housing.

The Supreme Court decided in ***Irwin Toy*** that all commercial economic rights do not have the protection of the Charter. It has, however, specifically indicated in ***Irwin Toy*** that it is open to a case on depletion of personal economic rights being a S. 7 deprivation of rights to life, liberty and security.

The Nortel disabled having their S. 7 Charter rights violated is not founded on the Charter imposing a positive obligation on the government to provide for a minimum standard of living to enable life, liberty and security. It is based on the government not making laws (or judges not using discretion enabled within laws) that result in the deprivation of life, liberty and security, as distinguished in ***Gosselin***.

The **Law Commission of Ontario - Charter of Rights and Freedoms, 2016** provides S.7 interpretations for Liberty being the enjoyment of individual dignity and independence.

What are the Charter Tests for Acceptable Limitation of Disabled Charter Rights?

Federal Government CCAA law makers and CCAA judges have not met the Charter tests for acceptable limitation of the disabled Charter rights: reasonable limits demonstrably justified in a free and democratic society in S.1; in accordance with principles of fundamental justice in S. 7; or, due to a notwithstanding clause within the statute enabled in S. 33.

In order for the S. 15(1) and S. 7 violations for disabled persons to be acceptable according to ***Oakes***, Federal Government law makers and CCAA judges must show under S. 1 that:

- firstly, the statute's objective is of sufficient importance to warrant over-riding disabled persons' constitutionally protected rights;
- secondly, the means of over-riding disabled persons' rights chosen to obtain the objective are reasonable and demonstrably justified in a free and democratic society and rationally connected to the objective; and,
- thirdly, there must be proportionality between the costs of limiting disabled persons' Charter rights, and the benefits of the objective, which has been identified as of sufficient importance. ***Big M Drug Mart*** also spoke of the need for proportionality.

Oakes says even if a statute's objective is of sufficient importance, and the elements of the proportionality test are satisfied, it is still possible that, because of the severity of the deleterious

effects of a measure on individuals or groups, the measure will not be justified by the purposes it is intended to serve. The more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society.

The values and principles essential to a free and democratic society described in the Charter are broader than the majority rules of Parliament and the majority rules in the CCAA for approval of settlements. This is established in ***Vriend.*** The Charter is specifically intended to protect the rights of minorities and to be the supreme law of the people, especially for groups historically the target of prejudice and discrimination, such as minority French or English speaking persons, women and the disabled. **William Black, Vriend, Rights and Democracy, Constitutional Forum** also emphasizes the role of the Charter to protect minorities that do not have a proportionate share of political power.

Charter S. 1 Test for Acceptable Limitation of Disabled Charter Rights Is Not Met

Century confirms that the Federal Government does have an important objective for the CCAA to avoid the social and economic costs of liquidating a debtor's assets and paying its debts from the proceeds according to the BIA's priority rules. Restructuring or reorganization of the corporation with a court bound compromise of creditor claims is considered a way to avoid the social and economic costs of liquidation. This serves the public interest by facilitating the survival of companies supplying goods or services crucial to the health of the economy or saving large numbers of jobs.

Since actuarial tables show that long term disabled employees are a very small minority of about 1% of the workforce, payment in full of self-insured group long term disability benefit claims cannot reasonably and rationally be connected to a delay or frustration of a restructuring or reorganizing of a corporation, or have any significant impact on whether a corporation liquidates or not. Only large corporations can reasonably offer self-insured group long term disability benefits, as small corporations would knowingly be putting themselves at risk of bankruptcy by not purchasing group disability insurance to implement their promise of long term disability benefits to employees.

The Nortel CCAA proceeding itself did not achieve the purpose of the CCAA Act. Nortel was liquidating and not restructuring or reorganizing as a going concern. With the CCAA purpose not occurring, the benefits of the CCAA purpose are zero and cannot be higher than the costs to the Nortel disabled from the violation of their S. 15(1) and S. 7 rights.

The incremental Cdn$48 million amount for full payment of the Nortel LTD income and medical claims (assuming the CCAA cash settlement ratio is 40%) is 0.9% of the expected Nortel Canada estate of Cdn$5.6 billion. Violation of the Nortel disabled's Charter rights did not produce a benefit from quicker or higher sale prices on the sale of Nortel businesses, as the incremental amount owed need not have been paid immediately, but paid later from the sale proceeds. Full payment of the Nortel disabled out of the sale proceeds is necessary for compliance with their Charter rights, as no CCAA purpose was served by violating those rights. A disabled claim not being compromised has no effect on all other creditors negotiating to accept

a compromise of their claims, given the Charter protects the disabled and does not protect the other creditors as discussed in **spillover effects**.

Government laws and court actions that impoverish disabled persons who took responsible steps to protect themselves by taking jobs offering group disability insurance and purchasing additional group long term disability insurance from their employer are not reasonable and demonstrably justified in a free and democratic society. The Charter itself specifically protects disabled persons. Widespread media support for the Nortel disabled cause is a reflection of Canadians' values for support of the disabled and protection of them from theft and injustice perpetrated by powerful players at corporations and in the courts.

Injustice for the Nortel disabled includes the Court's failure to implement Rule 7.08(4) of the Rules of Civil Procedure for the Ontario Courts on settlements with disabled persons: (i) intentional denial of evidence **by the Court Monitor** and **Court** on all the material issues affecting disabled persons in respect to the 2010 interim settlement, (ii) improper assessment by the Court on wrongdoings of misrepresentations, breach of trust, constructive trust, constructive fraud or fraud harming the disabled persons, and (iii) disclosure of the legal fees of lawyers representing the disabled persons.

Even if the CCAA's objective is decided to be of sufficient importance, and the elements of the proportionality test are satisfied, the severity of the deleterious effects on the Nortel disabled are so high, that the violation of their Charter rights is not justified by the purposes it is intended to serve.

Heywood defines CCAA to be overly broad when the deprivation of Charter rights of persons is going beyond what is needed to accomplish the governmental objectives of the CCAA.

No Principles of Fundamental Justice to Limit Disabled's S. 7 Charter Rights

As defined in ***Rodriquez*** there are no principles of fundamental justice to warrant the deprivation of disabled person Charter S. 7 rights in the CCAA process.

Parliament Has Supremacy to Make Any Law that is Compliant with the Charter

Parliament has supremacy to make any law it wishes, subject to the law being in compliance with the Charter of Rights and Freedoms. Parliament, the Cabinet or Ministers with authorities to amend any law or regulation should exercise their authority to make the amendments necessary for compliance with the Charter, once careful study of the law's application shows it to be non-compliant with the Charter.

Phillip Kaye, Canadian Parliamentary Review, 1998 quotes from Peter W. Hogg and Allison A. Bushell, "The Charter Dialogue between Courts and Legislatures..:" "Where a judicial decision is open to legislative reversal, modification, or avoidance, then it is meaningful to regard the relationship between the Court and the competent legislative body as a dialogue."

The CCAA judges and appeal court judges have not applied any tests for determination of whether the compromise of a disabled person's economic rights result in violation of their S. 7 and S. 15(1) Charter rights, and whether this is necessary to meet the CCAA's purpose. There has not been a Supreme Court review on this important public interest matter.

Martha Jackman, Protecting Rights and Promoting Democracy - Judicial Review Under Section 1 of the Charter says "Only by abandoning their current legalistic and potentially anti-democratic vision of our Parliamentary democracy, and by applying section 1 in a contextualized and rigorous way, will the courts ensure that the Charter fulfils its "immeasurably richer role" of protecting rights and of promoting democracy."

Spillover Effects Do Not Have Violations of Charter Rights

Other creditors in a CCAA proceeding do not have their Charter rights violated. In ***Irwin Toy***, the Supreme Court has decided that economic rights of commercial and government creditors do not have the protection of the Charter. Pensioners are not a minority in Canada and they are not a minority group specifically protected in the Charter.

The Supreme Court, in ***Sun Indalex Finance***, has also decided that compromise of pensioners' economic rights may be necessary to achieve the CCAA's objectives; these persons are substantially less impacted in respect to the Charter rights not to be deprived of substantive equality and of life, liberty and security due to their safety net of both CPP and OAS and generally substantial pension plan under government regulation of defined benefit pension plans; and, the benefits of not paying in full multi-billion dollar pension plan deficits are significant to the CCAA objectives for restructuring, reorganizing and not liquidating the corporation. All employees are covered by the defined benefit pension plans offered, whereas long term disabled employees are a defined minority of persons who are unfortunately struck by illnesses or accidents, and are vulnerable because they cannot work to pay for basic living and medical expenses. Severed employees are not a minority and they are able to find new jobs.

Conclusion

Based on the criteria that numerous Supreme Court cases have set and the facts applicable to self-insured group long term disability benefit plans in general and in the Nortel plan in particular, the Supreme Court will be lead to the decision that the CCAA's flexibility is unnecessarily broad in respect to disabled persons. It is so because judges use discretion to force the compromise of disabled persons' claims, in violation of their Charter S. 15(1) right to substantive equality and S. 7 rights not to be deprived of life, liberty and security. The facts applicable to these self-insured group long term disability benefit plans do not support the Charter's limitation of rights, be it S. 1 limitation reasonably and demonstrably justified in a free and democratic society, or an exception in S. 7 in accordance with the principles of fundamental justice.

Minister Navdeep Bains prescribing self-insured group long term disability benefit plans as an Eligible Financial Contract on a retroactive basis in the CCAA regulations fulfils the Federal Government's obligation for the CCAA to be compliant with the Charter in respect to disabled

persons. He, as a Minister, and the Cabinet have an obligation to act now so that the Nortel Canada estate rightfully pays for the damages of the Charter breach, rather than the Federal Government paying for it later after successful Charter litigation. Canadian disabled should be spared the need for Charter litigation given the poverty imposed upon them by an unconstitutional law and bankruptcy court practices.

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Statutes

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International Covenant on Economic, Social and Cultural Rights
United Nations Convention on the Rights of Persons with Disabilities

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Granovsky v. Canada (Minister of Employment and Immigration), [2000] 1 S.C.R. 703, 2000 SCC 28
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Marilyn Pilkington, Damages as a Remedy for Infringement of the Canadian Charter of Rights and Freedoms, 1984

Excerpts from Charter and CCAA Case Law and Reports Written by Charter Experts

Compromised Economic Rights Depriving Substantive Equality (S. 15(1))

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Eldridge v. British Columbia (Attorney General), [1997] 3 SCR 624, 1997 CanLII 327 (SCC)

61 This Court has consistently held that s. 15(1) of the *Charter* protects against this type of discrimination. In *Andrews*, *supra*, McIntyre J. found that facially neutral laws may be discriminatory. "It must be recognized at once", he commented, at p. 164, ". . . that every difference in treatment between individuals under the law will not necessarily result in inequality and, as well, that identical treatment may frequently produce serious inequality"; see also *Big M Drug Mart Ltd.*, *supra*, at p. 347. Section 15(1), the Court held, was intended to ensure a measure of substantive, and not merely formal equality.

Gosselin v. Québec (Attorney General), [2002] 4 SCR 429, 2002 SCC 84

18 …We agree that a claimant bears the burden under s. 15(1) of showing on a civil standard of proof that a challenged distinction is discriminatory, in the sense that it harms her dignity and fails to respect her as a full and equal member of society. We agree that, if a claimant meets this burden, the burden shifts to the government to justify the distinction under s. 1.

Granovsky v. Canada (Minister of Employment and Immigration), [2000] 1 S.C.R. 703, 2000 SCC 28

30 …Exclusion and marginalization are generally not created by the individual with disabilities but are created by the economic and social environment and, unfortunately, by the state itself.

Law Commission of Ontario - Charter of Rights and Freedoms

b) Substantive equality

The equality rights guaranteed by section 15 have been interpreted as substantive, rather than formal rights. This means that a law applying in a uniform way which, in implementation, has a disproportionately negative effect on "enumerated" classes of persons will be in violation of section 15.

Bruce Porter, 20 Years of Equality Rights- Reclaiming Expectations, 2002

In the area of disability rights, as Yvonne Peters has described in a recent paper[93], significant advances have been made, with the *Eldridge*[94] decision representing a high water mark in the recognition of the requirement of positive measures to ensure substantive equality. As with *Vriend*, the Supreme Court's decision in *Eldridge* places Canadian equality jurisprudence at the forefront of developments in equality rights internationally. The unanimous court's rejection of governments' arguments that section 15 "does not oblige governments to implement programs to alleviate disadvantages that exist independently of state action" as a "thin and impoverished vision of s. 15(1)" [95] was about as clear a statement in support of the positive vision of equality presented by equality seekers in 1985 as one could hope for in the case.

93Yvonne Peters, *Twenty Years of Litigating for Disability Rights. Has it Made a Difference? supra.*
94*Eldridge v. British Columbia (Attorney General),* [1997] 3 S.C.R. 624
95 *Ibid*, at para.73

Compromised Economic Rights Depriving Right to Life, Liberty and Security (S. 7)

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.

Gosselin v. Québec (Attorney General), [2002] 4 SCR 429, 2002 SCC 84

81 Even if s. 7 could be read to encompass economic rights, a further hurdle emerges. Section 7 speaks of the right not to be deprived of life, liberty and security of the person, except in accordance with the principles of fundamental justice. Nothing in the jurisprudence thus far suggests that s. 7 places a positive obligation on the state to ensure that each person enjoys life, liberty or security of the person. Rather, s. 7 has been interpreted as restricting the state's ability to deprive people of these. Such a deprivation does not exist in the case at bar.

Law Commission of Ontario - Charter of Rights and Freedoms, 2016

Liberty

Liberty includes the right to an irreducible sphere of personal autonomy regarding matters that "can properly be characterized as fundamentally or inherently personal such that, by their very nature, they might implicate basic choices going to the core of what it means to enjoy individual dignity and independence."[44]
[44] Godbout v. Longueuil (City), [1997] 3 S.C.R. 844; see also B. (R.) v. Children's Aid Society of Metropolitan Toronto, [1995] 1 S.C.R. 315.

Dignity
Section 7 has been interpreted as not including "a generalized right to dignity", although "respect for the inherent dignity of persons is… an essential value in our free and democratic society which must guide the courts in interpreting the Charter."[52]
[52] Blencoe v. British Columbia (Human Rights Commission), [2000] 2 S.C.R. 307, 2000 SCC 44.

The Charter's Interpretive Presumption is Consistency with International Human Rights Documents Ratified by Canada

Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 SCR 817, 1999 699 (SCC)

69 Another indicator of the importance of considering the interests of children when making a compassionate and humanitarian decision is the ratification by Canada of the *Convention on the Rights of the Child*, and the recognition of the importance of children's rights and the best interests of children in other international instruments ratified by Canada. International treaties and conventions are not part of Canadian law unless they have been implemented by statute: *Francis v. The Queen*, 1956 CanLII 79 (SCC), [1956] S.C.R. 618, at p. 621; *Capital Cities Communications Inc. v. Canadian Radio-Television Commission*, 1977 CanLII 12 (SCC), [1978] 2 S.C.R. 141, at pp. 172-73. I agree with the respondent and the Court of Appeal that the Convention has not been implemented by Parliament. Its provisions therefore have no direct application within Canadian law.

70 Nevertheless, the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review. As stated in R. Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994), at p. 330:

> [T]he legislature is presumed to respect the values and principles enshrined in international law, both customary and conventional. These constitute a part of the legal context in which legislation is enacted and read. In so far as possible, therefore, interpretations that reflect these values and principles are preferred. [Emphasis added.]
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> The important role of international human rights law as an aid in interpreting domestic law has also been emphasized in other common law countries: see, for example, *Tavita v. Minister of Immigration*, [1994] 2 N.Z.L.R. 257 (C.A.), at p. 266; *Vishaka v. Rajasthan*, [1997] 3 L.R.C. 361 (S.C. India), at p. 367. It is also a critical influence on the interpretation of the scope of the rights included in the *Charter*: *Slaight Communications*, *supra*; *R. v. Keegstra*, 1990 CanLII 24 (SCC), [1990] 3 S.C.R. 697.

***Slaight Communications Inc. v. Davidson*, [1989] 1 SCR 1038, 1989 CanLII 92 (SCC)**

> There are many diverse values that deserve protection in a free and democratic society such as that of Canada, only some of which are expressly provided for in the *Charter*. The underlying values of a free and democratic society both guarantee the rights in the *Charter* and, in appropriate circumstances, justify limitations upon those rights. As was said in *Oakes*, *supra*, at p. 136, among the underlying values essential to our free and democratic society are "the inherent dignity of the human person" and "commitment to social justice and equality". Especially in light of Canada's ratification of the *International Covenant on Economic, Social and Cultural Rights*, G.A. Res. 2200 A (XXI), 21 U.N. GAOR, Supp. (No. 16) 49, U.N. Doc. A/6316 (1966),…
>
> The content of Canada's international human rights obligations is, in my view, an important indicia of the meaning of the "full benefit of the *Charter*'s protection". I believe that the *Charter* should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified.

International Covenant on Economic, Social and Cultural Rights

Ratified on January 3, 1976

> ***Article 11***
> 1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.
> ***Article 12***
> 1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.
> ***Article 4***
> The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.

United Nations Convention on the Rights of Persons with Disabilities

Ratified on March 11, 2010

> The UN convention protects life (Article 10), liberty and the security of persons with disabilities (Article 14).
> **Article 10 - Right to life**
> States Parties reaffirm that every human being has the inherent right to life and shall take all necessary measures to ensure its effective enjoyment by persons with disabilities on an equal basis with others.
> **Article 14 - Liberty and security of the person**
> 1. States Parties shall ensure that persons with disabilities, on an equal basis with others:

a. Enjoy the right to liberty and security of person;
b. Are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty.
2. States Parties shall ensure that if persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principles of this Convention, including by provision of reasonable accommodation.

Article 28 - Adequate standard of living and social protection

1. States Parties recognize the right of persons with disabilities to an adequate standard of living for themselves and their families, including adequate food, clothing and housing, and to the continuous improvement of living conditions, and shall take appropriate steps to safeguard and promote the realization of this right without discrimination on the basis of disability.

Supreme Court Open to Case on Economic Rights of Persons Covered in the Charter S. 7

Irwin Toy Ltd. v. Quebec (Attorney General), [1989] 1 SCR 927

282 …What is immediately striking about this section is the inclusion of "security of the person" as opposed to "property". This stands in contrast to the classic liberal formulation, adopted, for example, in the Fifth and Fourteenth Amendments in the American Bill of Rights, which provide that no person shall be deprived "of life, liberty or property, without due process of law". The intentional exclusion of property from s. 7, and the substitution therefor of "security of the person" has, in our estimation, a dual effect. First, it leads to a general inference that economic rights as generally encompassed by the term "property" are not within the perimeters of the s. 7 guarantee. This is not to declare, however, that no right with an economic component can fall within "security of the person". Lower courts have found that the rubric of "economic rights" embraces a broad spectrum of interests, ranging from such rights, included in various international covenants, as rights to social security, equal pay for equal work, adequate food, clothing and shelter, to traditional property -- contract rights. To exclude all of these at this early moment in the history of *Charter* interpretation seems to us to be precipitous. We do not, at this moment, choose to pronounce upon whether those economic rights fundamental to human life or survival are to be treated as though they are of the same ilk as corporate-commercial economic rights. In so stating, we find the second effect of the inclusion of "security of the person" to be that a corporation's economic rights find no constitutional protection in that section.

No Principles of Fundamental Justice Support this Deprivation (S. 7)

Rodriguez v. British Columbia (Attorney General), [1993] 3 SCR 519, 1993 CanLII 75 (SCC)

The expression "principles of fundamental justice" in s. 7 of the *Charter* implies that there is some consensus that these principles are vital or fundamental to our societal notion of justice. They must be capable of being identified with some precision and applied to situations in a manner which yields an understandable result. They must also be legal principles.

No Reasonable Limits Demonstrably Justified for this Deprivation (S. 1)

Rights and freedoms in Canada

1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

***R. v. Oakes*, [1986] 1 SCR 103, 1986 CanLII 46 (SCC)**

The onus of proving that a limitation on any *Charter* right is reasonable and demonstrably justified in a free and democratic society rests upon the party seeking to uphold the limitation. Limits on constitutionally guaranteed rights are clearly exceptions to the general guarantee. The presumption is that *Charter* rights are guaranteed unless the party invoking s. 1 can bring itself within the exceptional criteria justifying their being limited.

64. A second contextual element of interpretation of s. 1 is provided by the words "free and democratic society". Inclusion of these words as the final standard of justification for limits on rights and freedoms refers the Court to the very purpose for which the Charter was originally entrenched in the Constitution: Canadian society is to be free and democratic. The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society. The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the Charter and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified.

69. To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objective, which the measures responsible for a limit on a *Charter* right or freedom are designed to serve, must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom": *R. v. Big M Drug Mart Ltd.*, *supra*, at p. 352. The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain s. 1 protection. It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.

70. Second, once a sufficiently significant objective is recognized, then the party invoking s. 1 must show that the means chosen are reasonable and demonstrably justified. This involves "a form of proportionality test": *R. v. Big M Drug Mart Ltd.*, *supra*, at p. 352. Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups. There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question: *R. v. Big M Drug Mart Ltd.*, *supra*, at p. 352. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the *Charter* right or freedom, and the objective which has been identified as of "sufficient importance".

71. With respect to the third component, it is clear that the general effect of any measure impugned under s. 1 will be the infringement of a right or freedom guaranteed by the *Charter*; this is the reason why resort to s. 1 is necessary. The inquiry into effects must, however, go further. A wide range of rights and freedoms are guaranteed by the *Charter*, and an almost infinite number of factual situations may arise in respect of these. Some limits on rights and freedoms protected by the *Charter* will be more serious than others in terms of the nature of the right or freedom violated, the extent of the violation, and the degree to which the measures which impose the limit trench upon the integral principles of a free and democratic society. Even if an objective is of sufficient importance, and the first two elements of the proportionality test are satisfied, it is still possible that, because of the severity of the deleterious effects of a measure on individuals or groups, the measure will not be justified by the purposes it is intended to serve. The more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society.

R. v. Big M Drug Mart Ltd., [1985] 1 SCR 295, 1985 CanLII 69 (SCC)

139. At the outset, it should be noted that not every government interest or policy objective is entitled to s. 1 consideration. Principles will have to be developed for recognizing which government objectives are of sufficient importance to warrant overriding a constitutionally protected right or freedom. Once a sufficiently significant government interest is recognized then it must be decided if the means chosen to achieve this interest are reasonable--a form of proportionality test. The court may wish to ask whether the means adopted to achieve the end sought do so by impairing as little as possible the right or freedom in question.

163. Although the *Charter* is, as indicated above, an effects-oriented document in the first instance, the analysis required under s. 1 of the *Charter* will entail an evaluation of the purpose underlying the impugned legislation. I agree with Dickson J. when he states in his reasons that s. 1 demands an assessment of the "government interest or policy objective" at stake, followed by a determination as to whether this interest is of sufficient importance to override a *Charter* right and whether the means chosen to achieve the objective are reasonable. …

CCAA Flexibility for Use of Judge's Discretion in Respect to the Disabled is Overly Broad

R. v. Heywood, [1994] 3 SCR 761, 1994 CanLII 34 (SCC)

Section 7 of the *Charter* has a wide scope. An enactment, before it can be found to be so broad that it infringes s. 7 of the *Charter*, must clearly infringe life, liberty or security of the person in a manner that is unnecessarily broad, going beyond what is needed to accomplish the governmental objective. In determining whether a provision is overly broad and not in accordance with the principles of fundamental justice, it must be determined whether the means chosen to accomplish the provision's objectives are reasonably tailored to effect its purpose. Where legislation limits the liberty of an individual in order to protect the public, that limitation should not go beyond what is necessary to accomplish that goal.

Values and Principles Essential to A Free and Democratic Society are Broader than Majority Rule

Vriend v. Alberta, [1998] 1 SCR 493, 1998 CanLII 816 (SCC)

140 There is also another aspect of judicial review that promotes democratic values. Although a court's invalidation of legislation usually involves negating the will of the majority, we must remember that the concept of democracy is broader than the notion of majority rule, fundamental as that may be. In this respect, we would do well to heed the words of Dickson C.J. in *Oakes*, *supra*, at p. 136:

> The Court must be guided by the values and principles essential to a free and democratic society which I believe to embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.

176 As I have already discussed, the concept of democracy means more than majority rule as Dickson C.J. so ably reminded us in *Oakes*, *supra*. In my view, a democracy requires that legislators take into account the interests of majorities and minorities alike, all of whom will be affected by the decisions they make. Where the interests of a minority have been denied consideration, especially where that group has historically been the target of prejudice and discrimination, I believe that judicial intervention is

warranted to correct a democratic process that has acted improperly (see Black, *supra*; Jackman, *supra*, at p. 680).

William Black, Vriend, Rights and Democracy, Constitutional Forum, Vol 7, No 104, 1995

This theory is consistent with the language of section 15 and of other sections of the Charter. Section 15 sets our certain grounds of discrimination – grounds associated with groups that have often been denied their proportionate share of political power. In addition, the multicultural and language rights provisions of the Charter demonstrate that the protection of minorities and the valuing of difference is a part of our constitutional system. Therefore the idea that democracy is different from the majority rule and that section 15 protects the rights of all, including minorities, to participate meaningfully in the political process helps to reconcile the principle of democracy with the scheme of the Constitution.

Martha, Jackman, Protecting Rights and Promoting Democracy - Judicial Review Under Section 1 of the Charter, 1996

On closer inspection, however, judges are often deferring to decision makers' decisions, and decision-making processes what are "legislative" only in the most formalistic sense. I pointed to Egan and Eldbridge as examples of cases where, in the name of deference to the legislature, judicial failure to subject government action to proper section 1 scrutiny produced a democratically deficient outcome.

Only by abandoning their current legalistic and potentially anti-democratic vision of our Parliamentary democracy, and by applying section 1 in a contextualized and rigorous way, will the courts ensure that the Charter fulfils its "immeasurably richer role" of protecting rights and of promoting democracy."

Parliament Has Supremacy and Not the Courts to Make Any Law that is Compliant with the Charter

Primacy of Constitution of Canada

52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

Application of Charter

32. (1) This Charter applies

(a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

(b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

Claude Belanger, Supremacy of Parliament and the Canadian Charter of Rights and Freedoms

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.

Charter Interpretation Not Sole Preserve of the Judiciary, But a Dialogue Between Parliament and the Court

Phillip Kaye, Canadian Parliamentary Review, 1998

The notion of a *Charter* dialogue between courts and legislatures is raised in an article by Professor Peter Hogg and Allison Bushell who surveyed 65 cases where legislation was invalidated for a breach of the *Charter*, including all of the decisions of the Supreme Court of Canada in which a law was struck down on this basis.[15] They found that 52 (80 percent) of the decisions generated a legislative response, whether it be the amendment, repeal, or overriding of the impugned law. They consider this situation as representing a "dialogue", defined as follows:

Where a judicial decision is open to legislative reversal, modification, or avoidance, then it is meaningful to regard the relationship between the Court and the competent legislative body as a dialogue.[16]

15. Peter W. Hogg and Allison A. Bushell, "The Charter Dialogue between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such A Bad Thing After All)", *Osgoode Hall Law Journal*, 35:1 (Spring 1997), 75-124.
16. *Ibid*., p. 79.

Vriend v. Alberta, [1998] 1 SCR 493, 1998 CanLII 816 (SCC)

137 This mutual respect is in some ways expressed in the provisions of our constitution as shown by the wording of certain of the constitutional rights themselves. For example, s. 7 of the *Charter* speaks of no denial of the rights therein except in accordance with the principles of fundamental justice, which include the process of law and legislative action. Section 1 and the jurisprudence under it are also important to ensure respect for legislative action and the collective or societal interests represented by legislation. In addition, as will be discussed below, in fashioning a remedy with regard to a *Charter* violation, a court must be mindful of the role of the legislature. Moreover, s. 33, the notwithstanding clause, establishes that the final word in our constitutional structure is in fact left to the legislature and not the courts (see P. Hogg and A. Bushell, "The *Charter* Dialogue Between Courts and Legislatures" (1997), 35 *Osgoode Hall L.J.* 75).

Nova Scotia (Workers' CompensationBoard) v. Laseur, [2003] 2 SCR 504, para. 29

The Supreme Court has emphasised that the Charter is not the sole preserve of the judiciary. As Chief Justice McLachlin has expressed it:

The *Charter* is not some holy grail which only judicial initiates of the superior courts may touch. The *Charter* belongs to the people. All law and law-makers that touch the people must conform to it. Tribunals and commissions charged with deciding legal issues are no exception. Many more citizens have their rights determined by these tribunals than by the courts. If the *Charter* is to be meaningful to ordinary people, then it must find its expression in the decisions of these tribunals.50

TV Ontario - The Three Amigos of the Constitution, April 18, 2012

4:25: Jean Chretien said he disagreed with the view that the Charter gave absolute power to the judges who interpret the Charter. He said that in a democracy the people elected should have the ability to over-rule the abuses of judges, and the Charter gives them this.
39:41 Power of people
40:49 Rights of handicapped
53:37 Equality for men, women and handicapped. These are the values of Canada.

No Limitation Period

Alberta Civil Liberties Research Centre – Striking Down an Unconstitutional Law?

> If you are seeking to have an unconstitutional law struck down, there is no limitation period. You can bring the action so long as the law is in force. The *Canadian Charter of Rights and Freedoms* came into force on 17 April 1982

Ravndahl v. Saskatchewan, [2009] 1 SCR 181, 2009 SCC 7 (CanLII)

> Personal claims for constitutional relief are claims brought as an individual *qua* individual for a personal remedy and must be distinguished from claims enuring to affected members generally under an action for a declaration that a law is unconstitutional. [16]
>
> *The Limitation of Actions Act* applies to personal claims. Here, the cause of action arose on April 17, 1985 when s. 15 of the *Charter* came into effect. Before that date, the appellant had no cognizable legal right upon which to base her claim. Subsequent attempts to lessen the discriminatory effects of the 1978 Act did not create a new cause of action in her favour. There is also no renewing cause of action arising with each pension payment not received in this case because it cannot be assumed that the benefits which had been terminated would have otherwise been paid. Since the appellant's cause of action arose on April 17, 1985 and the six-year limitation period is applicable, the personal claims were statute-barred. [17-18] [20-22] [24]
>
> The claim for a declaration of constitutional invalidity and, if granted, what remedies are to issue, is for the trial judge to determine. Any remedies flowing from s. 52 of the *Constitution Act, 1982*, would not be personal remedies but rather remedies from which the appellant, as an affected person, might benefit. [26]

Remedies as an Affected Person in a Group Harmed by a Law Violating S. 7 & S. 15(1)

Enforcement of guaranteed rights and freedoms

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

Martha Jackman and Bruce Porter, Justiciability of Economic and Social Rights in Canada, 2008

> Section 24(1) of the Charter provides that courts can grant whatever remedy is 'appropriate and just in the circumstances' for a violation of a Charter right. Section 52(1) of the Constitution Act, 1982 states that laws are of no force and effect to the extent of their inconsistency with the Constitution. There is thus a wide range of remedies available for violations of Charter rights, and Canadian courts have made use of this remedial flexibility in dealing with socio-economic rights claims.
>
> In assessing the proper role of the judiciary in relation to legislatures, an over-riding principle linked to the rule of law is that rights must have effective remedies.

Marilyn Pilkington, Damages as a Remedy for Infringement of the Canadian Charter of Rights and Freedoms, 1984

> Accordingly, the Canadian Charter of Rights and Freedoms entrenches both the right to apply to a court for a remedy and the court's discretion to fashion the appropriate remedy. One consequence is that, if Parliament or a

legislature decided to establish a compensation scheme for victims of constitutional wrongs, it could not make it an exclusive remedy .[85]

Section 24 should not discourage legislative initiative, but it does provide protection against legislative attempts to undermine the effectiveness of guaranteed rights and freedoms by limiting remedies for their infringement.

Under the Canadian Charter of Rights and Freedoms, it is clear that the courts have the final say on remedies.

Accordingly, section 24 of the Charter, which enables courts to remedy constitutional infringements, is enforceable against governments. Since the purpose of a bill of rights is to protect guaranteed rights and freedoms from government action, it is important that courts be able to order the full range of remedies against governments. Claimants in Canada will not be limited to suing government officials when it is really the government itself which is responsible for a constitutional infringement.

There is a need for a remedy in damages under section 24(1) of the Charter, in addition to or instead of common law remedies, to vindicate constitutional rights. As others have argued, the primary role of a court in constitutional litigation is different from its role in conventional litigation. The emphasis shifts from dispute resolution to the articulation and enforcement of constitutional values. In any event, constitutional wrongs may be qualitatively different from ordinary civil wrongs. One acting in the name of the government has potential ability to bring about substantially greater harm than the ordinary person, and the victim of his wrongful act has fewer avenues of redress.

Where a wrongful act gives rise both to an action at common law and an application for damages under section 24(1) of the Charter it is not appropriate to apply the principle, often cited but not always applied in cases involving legislative jurisdiction that a court should seek to decide a case on other than constitutional grounds.

It seems clear that prosecutors in the courts and government officials exercising adjudicative or prosecutorial functions are obliged to comply with the Charter, and it also appears that courts are subject to the Charter. [219] However, even if prosecutors and judges are bound by the Charter in the exercise of their duties, a court acting under section 24(1) must determine whether it is appropriate and just to afford any claim in damages against them for infringement of guaranteed rights, and, if so, in what circumstances.

At common law and by statute judges are protected from liability for all acts done in the exercise of their jurisdiction. The immunity is intended to preserve the integrity and independence of judicial decision making: a judge's errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption . Imposing such a burden on judges would contribute not to principled and fearless decision-making but to intimidation .[219]
219 Hogg, op. cit., footnote 81, at p. 76. See R. v. Begley (1982), 380.R . (2d) 549, at p. 554 (Ont . H.C .) .

First, a victim of unconstitutional action by a prosecutor or judge is denied any redress, even though he may have suffered egregious wrong at the hands of people who should be held to the highest standards of conduct in exercising a public trust. Second, the wrongdoer cannot be held accountable by the victim through legal process. The fact that most unconstitutional conduct will be deterred is not a sufficient reason for denying redress in those instances where it does take place. If it can be established that a judge or prosecutor has abused his powers, acting with malicious intention to deprive a person of his rights, or that he has infringed settled, indisputable constitutional rights, he like other officials should be accountable to the victim. The fact that the prospect of such accountability may affect his decisions is surely all to the good- judges and prosecutors should act in good faith and respect constitutional rights. If other officials are deemed to know and obliged to comply with well-settled constitutional law, surely the same can reasonably be expected of judges and prosecutors. To the extent that it is desirable to protect judges and prosecutors from litigation designed to harass and intimidate them in the exercise of their duties, this purpose could be met by requiring that a plaintiff obtain leave to institute such an action. Under section 24(1) of the Charter, a court must consider what remedy is just and appropriate in all the circumstances. In doing so, it should reconsider the

appropriateness and justness of even the most well-established common law principles and statutory protections .[229]

Accordingly, it is open to courts to find governments vicariously liable for constitutional wrongs committed by their servants and agents in the purported exercise of their duties. If, however, that official is protected by absolute immunity, it may be appropriate and just to order government to pay damages: the immunity may protect the public interest in effective performance of the official's function, but government should be held responsible to the victim for any constitutional infringements committed in the course of carrying out that public function [242]

Century Services Inc. v. Canada (Attorney General), [2010] 3 SCR 379, 2010 SCC 60

The history of the *CCAA* distinguishes it from the *BIA* because although these statutes share the same remedial purpose of avoiding the social and economic costs of liquidating a debtor's assets, the *CCAA* offers more flexibility and greater judicial discretion than the rules-based mechanism under the *BIA*, making the former more responsive to complex reorganizations.

The requirements of appropriateness, good faith and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority. The question is whether the order will usefully further efforts to avoid the social and economic losses resulting from liquidation of an insolvent company, which extends to both the purpose of the order and the means it employs.

[12] Insolvency is the factual situation that arises when a debtor is unable to pay creditors (see generally, R. J. Wood, Bankruptcy and Insolvency Law (2009), at p. 16). Certain legal proceedings become available upon insolvency, which typically allow a debtor to obtain a court order staying its creditors' enforcement actions and attempt to obtain a binding compromise with creditors to adjust the payment conditions to something more realistic. Alternatively, the debtor's assets may be liquidated and debts paid from the proceeds according to statutory priority rules. The former is usually referred to as reorganization or restructuring while the latter is termed liquidation.

[17] Parliament understood when adopting the CCAA that liquidation of an insolvent company was harmful for most of those it affected — notably creditors and employees — and that a workout which allowed the company to survive was optimal (Sarra, Creditor Rights, at pp. 13-15).

[18] … Reorganization serves the public interest by facilitating the survival of companies supplying goods or services crucial to the health of the economy or saving large numbers of jobs (ibid., at p. 593). Insolvency could be so widely felt as to impact stakeholders other than creditors and employees. Variants of these views resonate today, with reorganization justified in terms of rehabilitating companies that are key elements in a complex web of interdependent economic relationships in order to avoid the negative consequences of liquidation.

The "flexibility of the CCAA [was seen as] a great benefit, allowing for creative and effective decisions" (Industry Canada, Marketplace Framework Policy Branch, Report on the Operation and Administration of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act (2002), at p. 41). Over the past three decades, resurrection of the CCAA has thus been the mainspring of a process through which, one author concludes, "the legal setting for Canadian insolvency restructuring has evolved from a rather blunt instrument to one of the most sophisticated systems in the developed world" (R. B. Jones, "The Evolution of

Canadian Restructuring: Challenges for the Rule of Law", in J. P. Sarra, ed., Annual Review of Insolvency Law 2005 (2006), 481, at p. 481).

***Sun Indalex Finance, LLC v. United Steelworkers*, [2013] 1 SCR 271, 2013 SCC 6**

(2) *Priority Ranking*

Per Deschamps and Moldaver JJ.: A statutory deemed trust under provincial legislation such as the *PBA* continues to apply in federally-regulated *CCAA* proceedings, subject to the doctrine of federal paramountcy. In this case, granting priority to the DIP lenders subordinates the claims of other stakeholders, including the plan members. This court-ordered priority based on the *CCAA* has the same effect as a statutory priority. The federal and provincial laws are inconsistent, as they give rise to different, and conflicting, orders of priority. As a result of the application of the doctrine of federal paramountcy, the DIP charge supersedes the deemed trust.

Per McLachlin C.J. and Rothstein and Cromwell JJ.: Although there is disagreement with Deschamps J. in connection with the scope of the s. 57(4) deemed trust, it is agreed that if there was a deemed trust in this case, it would be superseded by the DIP loan because of the operation of the doctrine of federal paramountcy.

Per LeBel and Abella JJ.: There is agreement with the reasons of Deschamps J. on the priority ranking issue as determined by operation of the doctrine of federal paramountcy.