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CONFIDENTIAL
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November 19, 1981

MEMORANDUM/NOTE DE SERVICE

TO/A: MINISTER  
FROM/DE: DEPUTY MINISTER  
SUBJECT/OBJET: VERRIDE CLAUSE IN RELATION TO SECTION 28 OF CHARTER

Comments/Remarques

It is being alleged by women's groups that the provision in section 33 of the Charter of Rights which allows for a limited override of section 28 (equality of rights and freedoms between men and women) as it relates to non-discrimination based on sex in section 15 destroys the concept of equality of rights between males and females in the Charter.

This is simply not the case. The override in section 33 with respect to section 28 is strictly confined to discriminatory laws enacted in relation to section 15 as, for example, a law providing for different rates for motor vehicle insurance as between young men and women. This does not undermine the equality guarantee in section 28 with respect to all other rights guaranteed by or referred to in the Charter. Thus, all fundamental freedoms, democratic rights, legal rights, mobility rights, language rights, or other rights which may flow from the construction rules (Section 25, 26, 27) respecting aboriginal people and multicultural heritages remain guaranteed equally to men and women and cannot be overridden on the basis of sex.

It is our opinion that the ability to override equality rights in section 15 of the Charter, including sex, would have been the same as it is under the present wording of section 33, even if there had been no reference in that section to 28. In other words,

...2

CONFIDENTIAL

- 2 -

once section 15 equality rights were included in the section 33 override clause (as agreed to by First Ministers on November 5), this specific reference to section 15 enables legislatures to override non-discrimination based on sex, since otherwise the reference to an override of section 15 would have been meaningless. Whether there is a specific reference or not to section 28 in section 33 (the override clause) section 28 can only operate to prevent a right in the Charter from being denied equally to males and females if that particular right is not specifically subject to the override clause.

In the light of the foregoing, the specific reference in section 33 to 28 as it applies to discrimination based on sex in section 15 simply makes crystal clear - places beyond any possible doubt - what is already implied, i.e. that section 15, including sex, may be overridden under section 33. It removes the doubts that some provinces had that, without the reference in section 33 to section 28, the paramountcy provision in section 28 might have prevented an override of section 15, on basis of sex, contrary to the First Ministers' agreement.

The difficulty that we faced, after the November 5, 1981 meeting of officials, was that most provinces were insisting that it should be possible to override section 28 in its application to all of the rights guaranteed by the Charter and not only the equality rights of section 15 in respect of sex.

What we have succeeded to do yesterday in the resolution that was tabled in the House, is to restrict severely the scope of override in respect of section 28 by specifically limiting it to sex in section 15. As a result, there can be no doubt that an override can be placed on section 15 in respect of sex, but on no other rights guaranteed in the Charter. This, we understand is consistent with the First Ministers' agreement.

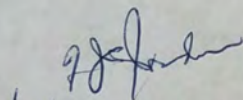
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- 3 -

Our preference was to leave section 28 alone without specifically referring to it in section 33 (the override section). In our view, the same end result would have been obtained. In other words, an override could have been placed on section 15 in respect of sex. However, some provinces were worried that, if this question were to be tested in Court, that because of the paramountcy clause in section 28, the Court might have concluded that it was not legally permissible to have an override on section 15 in respect of sex.

In the result, the difference between what we now have in the resolution and our preferred position which was shared by the majority of the provinces yesterday afternoon pertains more to "presentation" (textual awkwardness and negative perception by women groups) than to legal substance.

In light of the foregoing, while we would have preferred to see the clearer and simpler text (no specific mention of section 28 in the override clause), any changes at this time to implement our preferred position, would not alter the legal substance of the authority to override section 15 in respect of sex but might seriously threaten the First Ministers' agreement.

  
for Roger Tassé

Deputy Minister of Justice

c.c. The Hon. J. Erola  
c.c. Mr. Michael Kirby

	strued as denying the existence of any other rights or freedoms that exist in Canada.	une négation des autres droits ou libertés qui existent au Canada.	
Multicultural heritage	27. This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.	27. Toute interprétation de la présente charte doit concorder avec l'objectif de promouvoir le maintien et la valorisation du patrimoine multiculturel des Canadiens.	Maintien du patrimoine culturel
Rights guaranteed equally to both sexes	28. Notwithstanding anything in this Charter, except section 33, the rights and freedoms referred to in it are guaranteed equally to male and female persons.	28. Indépendamment des autres dispositions de la présente charte, exception faite de l'article 33, les droits et libertés qui y sont mentionnés sont garantis également aux personnes des deux sexes.	Égalité de garantie des droits pour les deux sexes
Rights respecting certain schools preserved	29. Nothing in this Charter abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools.	29. Les dispositions de la présente charte ne portent pas atteinte aux droits ou privilèges garantis en vertu de la Constitution du Canada concernant les écoles séparées et 15 autres écoles confessionnelles.	Maintien des droits relatifs à certaines écoles
Application to territorial authorities	30. A reference in this Charter to a province or to the legislative assembly or legislature of a province shall be deemed to include a reference to the Yukon Territory and the Northwest Territories, or to the appropriate legislative authority thereof, as the case may be.	30. Dans la présente charte, les dispositions qui visent les provinces, leur législature ou leur assemblée législative visent également le territoire du Yukon, les territoires du Nord-Ouest ou leurs autorités législatives compétentes.	Application aux territoires
Legislative powers not extended	31. Nothing in this Charter extends the legislative powers of any body or authority.	31. La présente charte n'élargit pas les compétences législatives de quelque organisme ou autorité que ce soit.	Non-élargissement des compétences législatives
	<i>Application of Charter</i>	<i>Application de la charte</i>	
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.	32. (1) La présente charte s'applique : a) au Parlement et au gouvernement du Canada, pour tous les domaines relevant du Parlement, y compris ceux qui concernent le territoire du Yukon et les territoires du Nord-Ouest; b) à la législature et au gouvernement de chaque province, pour tous les domaines relevant de cette législature.	Application de la charte
Exception	(2) Notwithstanding subsection (1), section 15 shall not have effect until three years after this section comes into force.	(2) Par dérogation au paragraphe (1), l'article 15 n'a d'effet que trois ans après l'entrée en vigueur du présent article.	Restriction
Exception where express declaration	33. (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of	33. (1) Le Parlement ou la législature d'une province peut adopter une loi où il est expressément déclaré que celle-ci ou une de ses dispositions a effet indépendamment d'une disposition donnée de l'article 2 ou des articles 7 à 15 de la présente charte, ou de	Dérogation par déclaration expresse

this Charter, or section 28 of this Charter in its application to discrimination based on sex referred to in section 15.

l'article 28 de cette charte dans son application à la discrimination fondée sur le sexe et mentionnée à l'article 15.

Operation of exception

(2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.

(2) La loi ou la disposition qui fait l'objet d'une déclaration conforme au présent article et en vigueur a l'effet qu'elle aurait sauf la disposition, en cause de la charte.

Effet de la dérogation

Five year limitation

(3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.

(3) La déclaration visée au paragraphe (1) cesse d'avoir effet à la date qui y est précisée ou, au plus tard, cinq ans après son entrée en vigueur.

Durée de validité

Re-enactment

(4) Parliament or a legislature of a province may re-enact a declaration made under subsection (1).

(4) Le Parlement ou une législature peut adopter de nouveau une déclaration visée au paragraphe (1).

Nouvelle adoption

Five year limitation

(5) Subsection (3) applies in respect of a re-enactment made under subsection (4).

(5) Le paragraphe (3) s'applique à toute déclaration adoptée sous le régime du paragraphe (4).

Durée de validité

Citation

Citation

34. This Part may be cited as the *Canadian Charter of Rights and Freedoms*.

Titre

34. Titre de la présente partie: *Charte canadienne des droits et libertés*.

PART II

PARTIE II

EQUALIZATION AND REGIONAL DISPARITIES

PÉREQUATION ET INÉGALITÉS RÉGIONALES

Commitment to promote equal opportunities

35. (1) Without altering the legislative authority of Parliament or of the provincial legislatures, or the rights of any of them with respect to the exercise of their legislative authority, Parliament and the legislatures, together with the government of Canada and the provincial governments, are committed to (a) promoting equal opportunities for the well-being of Canadians; (b) furthering economic development to reduce disparity in opportunities; and (c) providing essential public services of reasonable quality to all Canadians

35. (1) Sous réserve des compétences législatives du Parlement et des législatures et de leur droit de les exercer, le Parlement et les législatures, ainsi que les gouvernements fédéral et provinciaux, s'engagent à : a) promouvoir l'égalité des chances de tous les Canadiens dans la recherche de leur bien-être; b) favoriser le développement économique pour réduire l'inégalité des chances; c) fournir à tous les Canadiens, à un niveau de qualité acceptable, les services publics essentiels.

Engagements relatifs à l'égalité des chances

Commitment respecting public services

(2) Parliament and the government of Canada are committed to the principle of making equalization payments to ensure that provincial governments have sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation.

(2) Le Parlement et le gouvernement du Canada prennent l'engagement de principe de faire des paiements de péréquation propres à donner aux gouvernements provinciaux des revenus suffisants pour les mettre en mesure d'assurer les services publics à un niveau de qualité et de fiscalité sensiblement comparables.

Engagement relatif aux services publics