Department of Justice Canada
Ministère de la Justice Canada
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Memorandum to all members of Caucus

From: The Honourable Jean Chrétien

The Charter of Rights and the Non Obstante Clause

The purpose of this paper is to explain the effect of the non obstante (over-ride) clause which will be part of the Canadian Charter of Rights and Freedoms.

It is important at the outset to understand that the entire Charter of Rights will be entrenched in the constitution and that no province will be able to opt-out of any provision of the Charter. The agreement signed by the Prime Minister and nine Premiers does not emasculate the Charter. Democratic rights, fundamental freedoms, mobility rights, legal rights, equality rights, and language rights are all enshrined in the Constitution and apply across the country.

What the Premiers and the Prime Minister agreed to is a safety valve which is unlikely ever to be used except in non controversial circumstances by Parliament or legislatures to over-ride certain sections of the Charter. The purpose of an over-ride clause is to provide the flexibility that is required to ensure that legislatures rather than judges have the final say on important matters of public policy.

The over-ride clause in the Charter of Rights will require that a law state specifically that part or all of it applies notwithstanding a particular section of the Charter.

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Such a law automatically expires after five years unless specifically renewed by a legislature. The effect of this provision is first that it will be politically very difficult for a government without very good reason to introduce a measure which applies notwithstanding the Charter of Rights. Second, a sunset provision of five years provides a degree of control on the use of an over-ride clause and allows public debate on the desirability of continuing the derogation further.

It is important to remember that the concept of an over-ride clause is not new in Canada. Experience has demonstrated that such a clause is rarely used, and, when used, is usually non controversial. The Alberta Bill of Rights was enacted in 1972 and includes an over-ride clause. The Saskatchewan Human Rights Code of 1979 also has an over-ride provision. Neither has ever been used.

The Canadian Bill of Rights enacted in 1960 by Mr. Diefenbaker also contains an over-ride provision. In twenty years, the only time it has ever been used was in the Public Order Temporary Measures Act enacted in November 1970 after the October Crisis of that year. But the regulations under that Act which derogated from the Canadian Bill of Rights expired less than six months later on April 30, 1971.

The Quebec Charter of Rights and Freedoms adopted in 1975 contains an over-ride clause which has been used several times. However, its use has been non controversial and is instructive in looking at how the over-ride may be applied in terms of the new constitutional Charter.

For example, despite the provision in the Quebec Charter guaranteeing that everyone is equal before the law, the Juries Act states that a lawyer cannot be a member of a jury. Despite the guarantee of open trials in the Quebec Charter, the Youth Protection Act provides for circumstances where Juvenile Court may hold closed sessions. Despite the protection in the Quebec Charter for the privileged doctor-patient relationship, the Highway Safety Act requires a doctor to inform the License Bureau of the name of a patient who is medically incapable of driving a motor vehicule.

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These examples demonstrate the utility of an over-ride clause where strict application of a Charter would otherwise lead to absurd results. What is interesting as well in the Quebec experience is that the first draft of Bill 101 would have made its provisions applicable notwithstanding the Quebec Charter of Rights and Freedoms. In this controversial area, public pressure forced the Quebec government to delete the clause from the Bill.

It is because of the history of the use of the over-ride clause and because of the need for a safety valve to correct absurd situations without going through the difficulty of obtaining constitutional amendments that three leading civil libertarians have welcomed its inclusion in the Charter of Rights.

Allan Borovoy, general counsel to the Canadian Civil Liberties Association was quoted in the Montreal Gazette of November 7, as saying "Our reaction is one of great relief. They did not emasculate the Charter." He went to say that:

> "The process is a rather ingenious marriage of a bill of rights notion and a parliamentary democracy. The result is a strong Charter with an escape valve for the legislatures. The 'notwithstanding' clause will be a red flag for opposition parties and the press. That will make it politically difficult for a government to over-ride the Charter. Political difficulty is a reasonable safeguard for the Charter."

According to Gordon Fairweather, Chief Commissioner of the Canadian Human Rights Commission, "I'm in no mood for nit-picking today. I'm feeling tremendously upbeat." (Montreal Gazette, November 7, 1981). Mr. Fairweather said that the over-ride clause will become as dead from lack of use as a clause in the British North America Act that --

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at least in theory -- still enables Ottawa to disallow provincial legislation. Referring to longstanding provincial opposition to entrenched rights, Mr. Fairweather said, "the gang of no has become the gang of yes!"

Professor Walter Tarnopolsky is a past president of the Canadian Civil Liberties Association and an international expert on bills of rights. His view is that the over-ride clause "is really not such a bad idea, and could have a great many advantages." (Globe and Mail, Nov. 9, 1981).

It should be clear, in conclusion, that the compromise reached by the Prime Minister with the nine Premiers maintains the principle of a full, complete and effective constitutional Charter of Rights. It does not exclude rights which had previously been guaranteed. In fact, the Charter has been improved because unforeseen situations will be able to be corrected without the need to seek constitutional amendments.