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MEMORANDUM/NOTE DE SERVICE

TO/A: MR. MICHAEL KIRBY

FROM/DE: Deputy Minister of Justice

SUBJECT/OBJET: Non obstante clause

Comments/Remarques

Further to our earlier discussions concerning the possible inclusion of a non obstante clause in the Canadian Charter of Rights and Freedoms, set forth below are some observations and comments respecting the four Canadian jurisdictions having such clauses in their human rights legislation.

The Canadian Bill of Rights (1960)

The opening clause of section 2 of the Canadian Bill of Rights provides that every federal law shall be so construed and applied as not to abrogate or infringe on the rights recognized in the Bill unless such law expressly declares that it shall operate "notwithstanding the Canadian Bill of Rights".

At the time of the enactment of the Canadian Bill of Rights, section 6(5) of the War Measures Act was amended so as to provide that any action taken pursuant to the War Measures Act is not in contravention of the Canadian Bill of Rights. As a result of this amendment, the regulations issued during the October crisis of 1970 pursuant to the War Measures Act were exempted from the application of the Canadian Bill of Rights.

These regulations were later replaced by the Public Order (Temporary Measures) Act, 1970 which expired on April 30, 1971. It was necessary to include in this Act the non obstante clause required by section 2 of the Canadian Bill of Rights. This was accomplished by section 12(1) of the Act. However, section 12(2) restricted the non obstante clause by providing that it did not override

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section 2, paragraphs (a) to (g) of the Canadian Bill of Rights except those provisions dealing with arbitrary detention or imprisonment and denial of bail without just cause.

The non obstante clause has never been included in another federal law.

Alberta (1972)

Section 2 of the Alberta Bill of Rights contains provisions similar to those of the Canadian Bill of Rights. Their effect is that any law of Alberta can override the Alberta Bill of Rights by expressly providing that it shall operate "notwithstanding the Alberta Bill of Rights".

Alberta has never enacted laws with a non obstante clause.

Saskatchewan (1979)

Section 44 of the Saskatchewan Human Rights Code provides that every law of the province is inoperative to the extent that it authorizes or requires the doing of anything prohibited by that Act "unless it is expressly declared by an Act of the Legislature to operate notwithstanding this Act".

Hence, Saskatchewan laws can, by a non obstante clause, override the provisions of the Human Rights Code which protect fundamental liberties or prohibit discriminatory practices.

No laws containing the non obstante clause have been enacted by Saskatchewan.

Quebec

The Quebec Charter of Rights and Freedoms, adopted in 1975, protects a broad range of rights including fundamental freedoms, political rights, legal rights, equality rights and economic and social rights. However, the Quebec Charter rights can be denied by an ordinary act of the National Assembly which "expressly states that it applies despite the Charter" (see Article 52). In addition, the rights in the Charter apply only to laws which have been enacted since the adoption of the Charter in 1975 (see Article 52). Consequently, if a pre-1975 law denies protection against discrimination

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or the right to a fair trial, it is not rendered invalid by the Charter.

In 1977, the Quebec Government included a non obstante clause in the early version of Bill 101. Due to public outcry, the clause was deleted from the Bill before its enactment. Further, there are seven Quebec laws which expressly state that they apply despite the Charter of Rights and Freedoms or some of its provisions. A brief description of these laws is attached.

An examination of the attached list suggests a number of comments.

First, some of the rights the Quebec legislation sought to derogate from are not guaranteed in the Canadian Charter (v.g. #5, 6, 7).

Second, the Quebec Charter does have a reasonable limitable cause like Section 1 of the Canadian Charter. We do not have much doubt that that Section would have permitted the kind of limits that are found in the attached list without any need for an override. Except with respect to the derogation (#5) relating to the right of parties to be represented by lawyers in small claims courts, none of these derogations seem, in any event, to raise much problem as they seem to be reasonable, and thus one wonders why an override clause was necessary. Indeed, none of these other override has aroused much public controversy. This is in contrast with the derogation that the Quebec government had wanted to impose in respect of Bill 101 and which the government was forced to withdraw by public opinion in the province.

Third, the Quebec Charter permits an override to continue indefinitely without subsequent review by the legislature. A sunset provision would on the other hand provide a degree of control on the use of an override clause and allow public debate on the desirability of continuing the derogation further. This would allow those who feel aggrieved by the derogation to come forward and make their case.

Roger Tassé

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