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May 3, 1978

To: David S. Silsby, Director, Legislative Research

From: S. Kirk Studstrup, Assistant Attorney General

Re: Severability Clauses

I am responding to your memorandum of April 28, 1978, concerning severability clauses. In that memorandum you asked two questions which will be set forth individually with their answers below.

Question 1: "Under the rules of construction, 1 M.R.S.A. § 71, do the provisions of subsection 8, relating to severability, apply to all state statutes and session laws?"

The statutory provision in question reads as follows:

> "The provisions of the statutes are severable. The provisions of any session law are severable. If any provision of the statutes or of a session law is invalid, or if the application of either to any person or circumstance is invalid, such invalidity shall not affect other provisions or applications which can be given effect without the invalid provision or application."

This statutorily recognized rule of construction on its face applies to all state statutes and session laws. Furthermore, there is no legislative history to indicate any exceptions to the application of this provision. Subsection 8 was enacted by P.L. 1959, Chapter 363, § 4, as part of an errors and inconsistency bill and there is no stated legislative intent of record. Therefore, in light of the unambiguous wording of the provision and the lack of any recorded legislative intent to the contrary, it is our opinion that the answer to your first question is affirmative.

Question 2: "If question 1 is answered in the affirmative, can similar severability provisions, other than 1 M.R.S.A. § 71, subsection 8, be repealed with no legal consequences?"

In order to answer this second question, it is necessary to examine briefly the more general topic of severability and severability clauses. As you know, the term "severability" connotes a theory of statutory construction which may be applied when a part of a statute is found to be unconstitutional. The idea is to give effect to remaining provisions of the law insofar as they are able to be separated from the invalid provision. This doctrine or rule is designed to give effect to as much of a statute as possible, it being presumed that it was the legislative intent to do so. (See generally: 2 Sutherland, Statutory Construction, 4th Ed. §§ 44.01, et seq.). This principle has long been judicially recognized in Maine, and perhaps was best set forth in State v. Webber, 125 Me. 319, 133 A. 738 (1926), in a quotation from Commonwealth v. Petranich, 183 Mass. 217, adopted therein.[1/] This quotation reads:

> "It is an established principle that where a statutory provision is unconstitutional, if it is in its nature separable from the other parts of the statute, so that they may well stand independently of it, and if there is no such connection between the valid and the invalid parts that the Legislature would not be expected to enact the valid part without the other, the statute will be held good, except in that part which is in conflict with the Constitution. But if the objectionable part is so connected with the rest that they are dependent on each other and cannot well be separated, or that the valid part, if left alone, would so change the character of the original statute that the Legislature would not be presumed to have enacted it without the other, the whole must be set aside."

There have been no Maine cases in which the relationship between the judicially recognized doctrine of severability and the parallel legislatively enacted rule of construction found in § 71, sub-§ 8 has been discussed. However, one noted authority on statutory construction indicates that general severability statutes like § 71 have been interpreted as codifications of the general rules rather than a fixed rule of law. (Sutherland, supra, § 44.11). While no Maine court has specifically stated this interpretation, it might be inferred from the fact that the two cases in which the doctrine was applied subsequent to enactment of § 71, sub-§ 8 were decided without even footnote reference to the statute.[2/]

1/ A selection of other Maine cases and opinions in which severability of statutes is considered includes: In Re Spring Valley Development, 300 A.3d 736, 751 (Me., 1973); Ross v. Hanson, 227 A.2d 606 (Me., 1967); Opinion of the Justices, 132 Me. 502, 167 A. 174 (1933); McKenney v. Farnsworth, 121 Me. 450, 118 A. 237 (1922); and Hamilton v. Portland State Pier Site Dist., 120 Me. 15, 112 A. 836 (1921).

2/ The two cases were In Re Spring Valley Development, supra, and Ross v. Hanson, supra.

There are, therefore, three ways in which the rule or principle of severability has been stated in Maine - case law, general statute (§ 71) and express severability clauses found in individual enactments. In light of this multiplicity of recognition, a strong argument can be made that the specific severability clauses found in some legislation are mere surplusage and that severability would be recognized under either of the other two sources for the doctrine. It is very likely that these express severability clauses might be omitted from future legislation and be appropriately repealed from existing legislation without necessarily endangering the entire legislation if a part thereof is found unconstitutional in the future. However, since severability is always a question of construction for judicial decision, it is impossible for us to say that repeal of the existing specific severability clauses would have no legal consequences. In other words, although the court could base severability either upon existing precedent or upon 1 M.R.S.A. § 71, sub-§ 8, the existence of a separate severability clause with regard to the legislation in question may strengthen the case for severability. (See Sutherland, supra, § 44.11).

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