

CONFIDENTIAL

July 16th, 1975

MEMORANDUM FOR MR. R.G. ROBERTSON

c.c. Mr. Carter
Mr. Gravelle
Mrs. Reed

The Second Approach:
The Language Options

1. The Language Option

At our last meeting, we discussed the Prime Minister's interest in a second approach based on the language rights contained in the Victoria Charter. Two approaches may be taken. If the Prime Minister's proposal were considered to be an "ou ... ou" proposition, one would have to substitute the language rights for Article 3 of the July 11th proposed Proclamation and rewrite the preamble, dropping the words "and the cultures based on them" and "and full development" from the second paragraph, and section (c) from the fourth paragraph. If the Prime Minister's proposal were considered to be an "et ... et" proposition, one would merely add the language rights to the July 11th proposed Proclamation. I am inclined to the latter interpretation because:

- (a) if one were to drop the guiding principle contained in Article 3, there would be nothing new for Mr. Bourassa and he would not gain the "garanties culturelles" of which he has spoken; and
- (b) the second approach does not conflict with or contradict Article 3, but rather it complements the guiding principle and introduces it in more logical fashion.

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2. Four Options

Four options based upon the Victoria Charter language rights are appended. They should be read in conjunction with the July 11th proposed Proclamation and should be inserted, conceptually, into the Proclamation after Article 2 (the Supreme Court) and before Article 3 (guiding principle). Article 3 would become the last Article of the language rights Part.

(a) The first option

The first option is Part II of the Victoria Charter as agreed upon by the eleven First Ministers in 1971.

Advantage: Since the eleven First Ministers accepted Part II at Victoria, it might be reasonable to assume that they would still be willing to adopt it now.

Disadvantage: Quebec has, in the intervening period, adopted the Official Language Act. The last clause of the fourth Article of the Language Rights Part, "... the English and French versions of the statutes of the Provinces of Quebec, New Brunswick and Newfoundland shall be authoritative", would contradict the official language legislation of Quebec and it would appear likely that Mr. Bourassa would reject it.

(b) The second option

The second option is Part II of the Victoria Charter with the last clause of the fourth Article removed to meet the objection to the first option.

Advantage: This would meet the probable objection of Quebec. Furthermore, it is by no means certain whether the new First Minister of Newfoundland would accept with such alacrity the far-reaching implications of such a provision as his predecessor.

Disadvantage: New Brunswick has made enormous ~~studies~~ ^{studies} towards the objective of completely bilingual jurisprudence and would probably wish this provision

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to remain. The alternative might be to retain the provision without reference to Quebec (and Newfoundland?), but this might appear invidious and be interpreted as a constitutional confirmation of the loss of former acquired rights by the anglophone population of Quebec.

(c) The third option

The third option is Part II of the Victoria Charter, less the last clause of the fourth Article (second option) and less the last Article: "Nothing in this Part shall be construed as derogating from or diminishing any legal or customary right or privilege acquired or enjoyed either before or after the coming into force of this Part with respect to any language that is not English or French".

Advantage: The Prime Minister has indicated a desire not to get involved in the languages and cultures of other groups at this time. Furthermore, it is by no means clear whether the First Ministers carefully studied the practical consequences of this provision when they adopted it at Victoria. Does it mean that private Chinese language schools in Vancouver will become constitutionally entrenched? This provision smacks of the Laurier-Greenway compromise which led to sixteen different languages of instruction in Manitoba schools by 1916, at which time all languages other than English were abolished as languages of instruction.

Disadvantage: Removing this Article might be construed as a rejection of the policy of multiculturalism and might prove politically embarrassing to several governments. An alternative, if some reference had to be made to other languages, might be to reformulate the Article to remove or restrict the extraordinary breadth of the present provision ("any legal or customary right or privilege acquired or enjoyed either before or after..."). If any reference is deemed inadvisable or potentially dangerous, the First Ministers may have to make their decision and bear the consequences.

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(d) The fourth option

The fourth option involves a radical revision of the Victoria Charter language rights in which all specific references to particular provinces have been dropped, although the permissive Article which would allow any province to declare itself bilingual in whole or in part by a constitutional resolution has been retained, and the last Article respecting languages other than French or English has also been dropped.

Advantage: Political conditions have changed since 1971. The Prime Minister has indicated that nothing should be proposed that would involve extensive negotiation. The First Minister of British Columbia might be more favourably disposed towards certain provisions than his predecessor, the First Minister of Newfoundland less so. Mr. Bourassa will be concerned about the interpretation of certain provisions in the wake of Bill 22. Restricting explicit provisions to the federal government might shorten the negotiation period. Under other provisions of the patriated constitution, anglophones in Quebec would be assured of the right to participate in the Assembly in English and to have court proceedings conducted in English.

Disadvantage: By restricting language rights to the federal domain, one would lose the broader recognition of French in other provinces, although this recognition is largely moral rather than practical since language rights in education are not specified. Nonetheless, it would be a significant moral advance to recognize the right of legislators to debate in English or French in the legislatures of Ontario, Quebec, Nova Scotia, New Brunswick, Prince Edward Island and Newfoundland, even if simultaneous translation renders this impractical; having all provincial statutes available in both languages would also be a significant moral advance; the provision of an interpreter before the courts is a practical measure, although as it now stands the provision could be interpreted as entitling any person of any language to an interpreter; provision for communications between an individual and the central offices of every department or agency of the governments of Ontario, Quebec, New Brunswick, Prince Edward Island and Newfoundland in the official

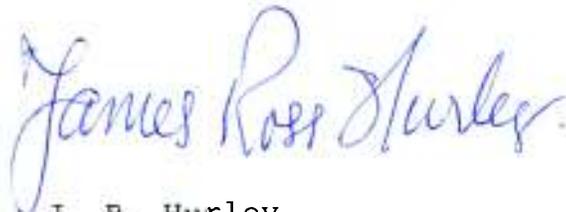
The lack of

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language of his choice could have significant results. It would be unfortunate to lose these provisions.

3. Recommendation

One should strive for inclusion of the third option in the Proclamation. In the event that it is not possible to secure agreement on the removal of the provision for languages other than French and English, one could fall back on option two.



J. R. Hurley

LANGUAGE RIGHTS

Art. 1 English and French are the official languages of Canada having the status and protection set forth in this Part.

Art. 2 A person has the right to use English and French in the debates of the Parliament of Canada and of the Legislatures of Ontario, Quebec, Nova Scotia, New Brunswick, Manitoba, Prince Edward Island and Newfoundland.

Art. 3 The statutes and the records and journals of the Parliament of Canada shall be printed and published in English and French; and both versions of such statutes shall be authoritative.

Art. 4 The statutes of each Province shall be printed and published in English and French, and where the Government of a Province prints and publishes its statutes in one only of the official languages, the Government of Canada shall print and publish them in the other official language.

Art. 5 A person has the right to use English and French in giving evidence before, or in any pleading or process in the Supreme Court of Canada, any courts established by the Parliament of Canada or any court of the Provinces of Quebec, New Brunswick and Newfoundland, and to require that all documents and judgments issuing from such courts be in English or French, and when necessary a person is entitled to the services of an interpreter before the courts of the other Provinces.

Art. 6 An individual has the right to the use of the official language of his choice in communications between him and the head or central office of every department and agency of the Government of Canada and of the Governments of the Provinces of Ontario, Quebec, New Brunswick, Prince Edward Island and Newfoundland.

Art. 7 A Provincial Legislative Assembly may, by resolution, declare that any part of Articles 4, 5 and 6 that do not expressly apply to that Province shall apply to the Legislative Assembly, and to any of the provincial courts and offices of the provincial departments and agencies according to the terms of the resolution, and thereafter such parts shall apply to the Legislative Assembly, courts and offices specified according to the terms of the resolution; and any right conferred under this Article may be abrogated or diminished only in accordance with the procedure prescribed in Article 50.

Art. 8 A person has the right to the use of the official language of his choice in communications between him and every principal office of the departments and agencies of the Government of Canada that are located in an area where a substantial proportion of the population has the official language of his choice as its mother tongue, but the Parliament of Canada may define the limits of such areas and what constitutes a substantial proportion of the population for the purposes of this Article.

Art. 9 In addition to the rights provided by this Part, the Parliament of Canada and the Legislatures of the Provinces may, within their respective legislative jurisdictions, provide for more extensive use of English and French.

Art. 10 Nothing in this Part shall be construed as derogating from or diminishing any legal or customary right or privilege acquired or enjoyed either before or after the coming into force of this Part with respect to any language that is not English or French.

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