

5a. Section 23 - Minority Language Education Rights

Several issues have arisen in relation to this section both in the Committee proceedings and in discussions within the Quebec caucus, and on some issues the positions advocated are diametrically opposite.

The principal issues relate to (1) the linguistic qualifications for entitlement to minority language education, (2) the national status of persons entitled to minority language education, (3) the continuity of education in the minority language, (4) the use of a "numbers warrant" test for minority language education and (5) the administration of minority language schools.

(1) Linguistic Qualifications for Minority Language Education

Section 23(1) now provides a single test for eligibility for minority language education: that one parent has as his "mother tongue" (first language learned and still understood) that of the English or French minority of the province where he resides.

While most witnesses before the Committee have not questioned this qualification (the Franco-manitoban Society favors a free choice for all), a number of members of the Quebec caucus strongly oppose it both because it creates a non-factually objective test and, more importantly, because it would exclude a large number of allophones in Québec (and perhaps elsewhere) who have received their education in Canada in the minority language from sending their children to school in that same language. This is an important problem in Quebec since Bill 101 permits a parent who has been educated at the primary school level in English in Quebec to have his children educated in English regardless of the parent's mother tongue.

It has thus been suggested that the "mother tongue" qualification be replaced with an objective test based upon the language in which the parent has been educated in Canada (ie. if one of the parents has received his primary or secondary education in Canada in the minority language of the province in which he resides, his children would be entitled to be educated in that language).

While this approach would be suitable for the English language minority in Quebec, it would not meet the needs of the francophone minorities in other provinces. In most other provinces the availability of French language education is a fairly recent development. Consequently, many parents whose mother tongue is French will (of necessity, not choice) have received their education in English, and would not have the right to send their children to French language schools.

In light of the foregoing, it is likely necessary to consider modifying section 23(1) to incorporate two qualifications for the right to minority language education. The primary qualification would be where a parent has received his primary or secondary education in Canada in the minority language of the

province of residence. The secondary qualification would be where the mother tongue of the parent is that of the minority population of the province of residence and that parent had been unable to receive his education in Canada in the minority language due to lack of educational facilities in that language.

(Whether these two tests have to be primary and secondary and whether the secondary test must include the lack of educational facilities in Canada will depend on the question -- to be discussed later -- of whether the right to minority language education is to exclude immigrants who become citizens. If this latter proposal is rejected then the two qualifications would become equal alternatives: either education (in Canada?) of a parent in the minority language or the minority language mother tongue of a parent.)

One problem which must be noted with respect to the proposed secondary qualification is that it may be very difficult in some cases for a parent to establish that there were no minority language educational facilities available in the area in which he received his education. For example, would the fact that the nearest minority language school was four or fifty miles away be sufficient? Or would the fact that there was a private minority school next door but which he could not afford to attend suffice?

(2) National Status for Minority Language Education

Section 23 now limits minority language education rights to parents who are Canadian citizens. This has been attacked as being either too restrictive or too broad.

The Commissioner for Official Languages, the Canadian Jewish Congress, the Positive Action Committee, the French Canadian Association of Ontario, the Council of Quebec Minorities and the Franco-manitoban Society have all contended that right should extend to all persons in Canada regardless of national status, pointing out that only Quebec (through its "educated in English in Quebec" clause) limits the right of minority education so as to effectively exclude not only immigrants but also citizens who do not meet that test.

On the other hand, there is considerable concern in Quebec and among members of the Quebec caucus that extension of the right to citizens will endanger the efforts to establish French as the principal language in that province by permitting English speaking immigrants, upon becoming citizens, to send their children to English schools. This, coupled with the fact that English speaking citizens moving to Quebec from other parts of Canada will be able to send their children to English schools, has generated a genuine concern about the impact of section 23 on the protection of the French language in Quebec. There is also a concern that the more section 23 deviates from the provisions of Bill 101, the more difficult it will be to gain acceptance for it in Quebec, since it will upset an educational regime now working well and generally accepted in that province.

In light of the foregoing, it is necessary to consider whether section 23 should be amended to take account of the concerns of Quebeckers. This could be done either by adopting the qualification tests set out under (1) above with the "educated in Canada" clauses or by spelling out in section 23 that a province is not obliged to extend minority language education rights to persons who acquire Canadian citizenship through naturalization except to the extent that such persons had acquired these rights under provincial law prior to the coming into force of the Charter.

Of the two alternatives, the former is likely the more desirable since it directs itself to "education in Canada" rather than singling out persons on the basis of their national status at a particular point in time. However, whichever approach may be adopted, it is bound to attract opposition as yet a further restriction on minority education rights.

(3) Continuity of Minority Language Education

Under section 23(2) provision is made for children of the same family to be educated in the same language when a family moves from one province to another even though such children might not qualify for minority language education either under the "mother tongue" or "language of education" of the parents test.

While this provision has not been criticized as such, it has been noted that it is not broad enough to encompass the same situation where there is no interprovincial movement of a family. In other words, it does not provide for a case where, for example, English mother tongue parents, educated in English and resident in Ontario have one of their children enrolled in a French language school. In order to ensure that these parents would have a right to have all their children educated in French in Ontario, section 23(2) should be drawn more broadly to cover any situation involving continuity of education within a family in the same language.

(4) Minority Language Education "Where Numbers Warrant"

Section 23 now assures the right to minority language education only where the number of minority language students in any area of the province is sufficient to warrant provision of educational facilities out of public funds.

Most of the witnesses before the Committee have argued against the desirability and necessity of this qualification. It is contended that the provision imposes a limit on the minority not imposed on the majority, regardless of how few majority language students there may be in a given area. (This, of course, ignores the point that section 23 guarantees no rights for the majority.) In addition, it is argued that with the ability to bus or board children, or to provide education by correspondence or closed-circuit television, there is really no situation in which any minority language student need be denied education in the minority language. This is perhaps a better argument.

In any case the qualification of "where numbers warrant" will cause problems of interpretation and will enable provinces to continue to limit access of minority language students to educational facilities. It has been demonstrated by Quebec and New Brunswick that the necessary means can be found for providing minority language education to all who qualify for it. Thus, it would likely be desirable to consider dropping the "numbers warrant" provision, closing off a loophole which could take many years for the courts to resolve.

Militating against this modification is the fact that the government has justified including minority language education rights in the Charter on the basis of the 1978 "Premiers Agreement" that such rights should be provided "where numbers warrant". To eliminate this qualification would undermine the legitimacy of the government's position, and would likely bring criticism from those provinces that do specify minimum numbers for allowing minority language instruction.

Rather than taking the initiative on this issue, it might be better for the government to rely on Premier Hatfield to propose deletion of the qualification, with the government indicating that it would be amenable to such a change by the Committee.

(5) Administration of Minority Language Schools

Section 23 as presently drafted does not provide for minority language schools to be administered by school boards composed of members of the minority language community.

Many witnesses before the Committee have urged that such a provision must be included if the right to minority language education is to be made effective.

While there is validity to this argument, to place such a provision in section 23 would be viewed by the provinces as a further unwarranted invasion into a field of clear provincial jurisdiction. It is thus considered unwise to contemplate a provision of this nature. What the Charter is guaranteeing is simply the right to minority language education. It cannot spell out the details of the manner in which the right is to be implemented.

Recommendation: That the government consider proposing amendments to section 23 that would

- (a) provide two qualifications for the right to minority language education: the primary qualification would be that one of the parents had received his primary or secondary education in Canada in the minority language; the secondary qualification would be that the "mother tongue" of one of the parents was that of the minority population of the province in which he resides and that he had not been able to receive his primary or secondary education in Canada in his mother tongue due to the lack of educational facilities;

- (b) provide for all children of any family to receive their education in the minority language in which any one of the children has commenced his education, even though the parents did not qualify under the tests set out in (a) above.

That the government not propose any amendment enabling minority language school boards to administer minority language schools, and that the government be sympathetic to but not propose an amendment to delete the provision of section 23 respecting the qualification of "where numbers warrant".