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Ministère  
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MEMORANDUM/NOTE DE SERVICE

TO/A: Mr. Michael Kirby  
Secretary to the Cabinet  
Federal-Provincial Relations

FROM/DE: Deputy Minister of Justice

SUBJECT/OBJET: CHARTER OF RIGHTS - LANGUAGE RIGHTS

Comments/Remarques

I wish to attach two briefing notes on language rights which have been prepared at the request of André Burelle for the Prime Minister.

The first one deals with what Bill C-60 provided in respect of section 133 type language rights at the provincial level.

The second one attempts to respond to Professor Proulx's article which appeared in "Le Devoir" of last week contending that minority language education rights would not be enforceable.

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R. TASSE

Roger Tassé

Encl.

c.c.: The Minister

(Section 21)

CHARTER OF RIGHTS - PROVINCIAL LANGUAGE RIGHTS  
IN COURTS AND STATUTES

In Bill C-60 the Charter of Rights provided section 133 language rights (French and English in the statutes and courts) for Quebec, Ontario and New Brunswick. However, under C-60 these rights were not being imposed on Ontario and New Brunswick (Quebec was already bound) since provinces were permitted to opt in to all the Charter provisions in order for them to be constitutionally binding. Also under the Charter, it was left to Ontario to determine when the obligation to have its statutes in both languages would become effective.

These three provinces were selected for guaranteed language rights because of their large absolute numbers of minority language residents. In Quebec, there are nearly 800,000 English speaking residents. In New Brunswick there are 215,000 French speaking residents and in Ontario nearly 800,000. The next highest is Manitoba (60,000).

Manitoba was not included because of the smaller number of minority language residents. If it had been included then why not Alberta with 47,000, Nova Scotia with 40,000 and British Columbia with 38,000? In other words, where would one draw the line?

In addition, at that time the Forest case was still before the courts with some doubt as to its outcome. If, as the Supreme Court finally ruled in the autumn of 1979, Manitoba was bound by section 23 of the Manitoba Act, then the same language rights would also continue to apply in that province until such time as the constitutional provision was repealed. That would only have occurred if Manitoba decided to opt in to the C-60 Charter.

Under the new Charter provisions, no obligations are imposed on any province respecting languages in the statutes and courts. This is because the Charter rights are being made immediately applicable to the provinces; there is no opting in provision. Consequently all that is contemplated at this time is the maintenance of the status quo which means that the existing constitutional provisions for Quebec and Manitoba remain in force. Any other province, such as New Brunswick or Ontario, could become bound by the same or similar obligations through an amendment to section 133.

(Section 23)

CHARTER OF RIGHTS: MINORITY LANGUAGE EDUCATION RIGHTS  
- ENFORCEMENT OF RIGHTS -

In a recent article in Le Devoir Professor Daniel Proulx has contended that the minority language education rights of the Charter (section 23) will be essentially a hollow shell.

His argument rests on the thesis that unless there is a law in a province dealing with the language of educational instruction (as in Quebec) the courts will have nothing to adjudicate under section 23, and that the courts cannot compel the legislatures to enact laws giving effect to section 23. This proposition contains several faulty premises.

First, while it is true that the courts cannot order a legislature to enact a law, they can nevertheless issue a declaratory order that a person is being denied his constitutional rights. While such an order cannot force the enactment of a law, it is most unusual for anyone, including a legislature, to ignore a declaration by the courts. A case in point is the Forest case in Manitoba where the Supreme Court declared that there was a constitutional right in that province to have the statutes published in French as well as in English. While this has not led Manitoba to repeal its Official Language Act of 1890, the province is proceeding to prepare and print its statutes in both languages.

Second, in relation to section 23 it will not be so much a question of whether there is a provincial law governing the use of English and French in the schools, but rather whether a school board in administering the educational system is acting in compliance with section 23 which will be a law of the land. In other words, if the school board ignores the dictates of section 23 by refusing to make minority language educational facilities available, then the courts will be able to order the board to do so where numbers warrant (as the courts will decide if the legislatures or boards have failed to do so). These will be binding orders which can only be ignored on peril of being in contempt of court.

This was precisely the route taken in the United States when the courts ordered the school boards to implement school desegregation in a manner that complied with the "equal protection" provision of the Bill of Rights. It is also what Chief Justice Deschênes did in Joyal v. Air Canada in 1976 when he directed Air Canada to provide its airline manuals and other instruments of work in both languages to effect compliance with the Official Languages Act.

Third, many provinces now have legislation or regulations which specify the language of education in the schools or authorize the Minister of Education or the school boards to make determinations respecting the use of French as a language of instruction. For example, Ontario, Manitoba and New Brunswick legislation stipulates the conditions under which French language instruction is to be provided. Alberta empowers the Minister of Education to authorize educational instruction in French. All of these laws will become reviewable under section 23 to determine if they accord with the rights specified, in the same way as Quebec's Bill 101 will be reviewable.

In sum, Professor Proulx has made a number of faulty assumptions in his article by attempting to draw a distinction between rights that require positive action to give them effect and rights that may not require such action. If the constitution guarantees a right of whatever nature then the courts will always find a means by which to ensure the right is effected. Their power is not confined solely to striking down laws that contravene the constitutional rights. It extends to making declaratory orders and to issuing mandatory injunctions to require positive action by government officials where that is the appropriate remedy.

Obviously if governments deliberately decide to ignore rights (of whatever kind) then no court pronouncements are going to be of much assistance, because we will then have a dictatorship. However, the Charter is being proposed on the assumption that our governments will act in good faith to ensure that the Charter's provisions are going to be respected, and the necessary laws enacted to give effect to the rights.