

MEMORANDUM FOR MINISTERS

1. The Problem

If one were to impose on Quebec provisions respecting mobility rights (section 6) and minority language education rights (section 23), the Parti québécois will play upon the fears of francophone Quebecers by claiming that the linguistic majority of Quebec could be swamped in the future by a substantial increase of non-francophone school children or workers without Quebec being able to take the necessary measures to redress the situation.

2. The Options for Solution

The options presented below are designed to undermine this argument through one of four alternative amendments to the constitutional resolution. Each possible amendment has essentially two parts: the first part is a test which determines when the linguistic majority is in danger of being swamped. The second part states what action the government may take to redress the situation if the "swamp test" has been met.

All options are designed to permit Quebec to cope with any significant change in linguistic balance in the future without derogating from the rights already acquired by individuals living in Quebec prior to the time when a decision is made (or a test has been met establishing) that the majority linguistic population is in danger of being swamped: derogation would only apply to citizens who come to Quebec more than three months after adoption of a law derogating from the education rights and/or mobility rights in the Charter.

Although the fear of being "swamped" is of particular concern to Quebec, all options are designed to apply to all provinces equally. Furthermore, all options treat all citizens the same way (e.g., the options do not distinguish between citizens educated in Canada and those educated abroad).

All derogation options have a sunset clause: unless a renewal of the derogation meets the "swamp test", it will cease at a given point in time.

Quebec's law respecting the language of work will continue in effect and may well have a significant impact on the migration of workers to that province, perhaps reducing the need to ever use any of the derogation provisions contained in the four options outlined below.

3. Options: Summary

- (1) Both mobility rights and minority language education rights come in force immediately in all provinces in the form in which they are set out in the Resolution as amended following the federal-provincial Agreement of November 5.

(2) The options presented below are designed to give a province ways and means of taking corrective action should there be a massive migration into a province which would substantially alter the equilibrium between the French and English population in the province which exists at the time of proclamation of the constitutional resolution.

(3) OPTION 1

- An objective test to decide if there is "massive migration" into the province from other provinces based on a drop (e.g. 5%) in the percent of the population of the linguistic majority of the province, with 1981 as the base year.
- In case of such a drop, a province can "non-obstante" mobility rights and/or language education rights.
- 5 year renewable sunset provision on any such "non-obstante".
- It affects only citizens that move into the province after a date that is set out in provincial legislation and which comes into force no earlier than 3 months after passing of the Act containing then "non-obstante" clause.

(4) OPTION 2

- One objective test for the mobility right: same as under option 1.
- A different objective test for the minority education right: a drop (e.g. 5%) in school enrolment of linguistic majority as compared to total school enrolment.
- Base: School enrolment as of January 1, 1982.
- In case of such a drop, a province can enact "non-obstante" legislation related to mobility or minority language education rights.
- It affects only citizens that move into province, as in option 1.

(5) OPTION 3

- A subjective test like "substantial alteration of the equilibrium between the English and French population of the province", with ultimate control in the hands of the court to determine if a "substantial alteration" has actually taken place.
- The "non-obstante" clause would otherwise work as in Options 1 and 2.

(6) OPTION 4

- The simplest of all four options provides that a "non-obstante", with 5 year sunset, etc., can

be passed by a provincial legislature but only when 2/3 of its members assent to it. That is, the legislature by 2/3 vote determines that the linguistic majority is in danger of being swamped and this determination is not subject to a factual test (as in options 1 and 2) or to an appeal to the courts (as in option 3). It applies to both mobility rights and minority language education rights.

Option I - Population Percentage

Exception
where
express
declaration

34. (1) The legislature of a province may expressly declare in an Act of the legislature that the Act or a provision thereof shall operate notwithstanding subsections 6(2) and (3), subsection 23(1) or subsection 23(2) of this Charter, or all those subsections, where

(a) the percentage that the population of the province whose first language learned and still understood is that of the English or French linguistic majority, as determined by the most recent general census, is of the total population of the province, as determined by that census,

has decreased by at least five per cent from

(b) the percentage that the linguistic majority population of the province, as determined by the general census of the population of Canada required to be taken in 1981, was of the total population of the province, as determined by that census.

Coming into
force

(2) An Act or a provision of an Act in respect of which a declaration is made under subsection (1) shall come into force no earlier than three months after the Act has been assented to.

Operation
of exception

(3) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration, but only in respect of individuals who have become residents of the province after the Act or provision thereof comes into force.

Limitation (4) A declaration made under subsection (1) shall cease to have effect six months after the publication of the results of the next general census, taken no earlier than five years after the previous general census, or on such earlier date as may be specified in the declaration.

Re-enactment (5) The legislature of a province may re-enact a declaration made under subsection (1) where the condition set out in that subsection is met.

Limitation (6) Subsection (4) applies in respect of a re-enactment made under subsection (5).

November 12, 1981

Option II - School Population Percentage

Exception
where
express
declaration

34. (1) The legislature of a province may expressly declare in an Act of the legislature that the Act or a provision thereof shall operate notwithstanding subsections 6(2) and (3), subsection 23(1) or subsection 23(2) of this Charter, or all those subsections, where

(a) the percentage that the primary and secondary school population of the province that receives its instruction in the language of the English or French linguistic majority is of the total primary and secondary school population of the province

has decreased by at least five per cent from

(b) the percentage that the primary and secondary school population of the province that received its instruction in the language of the English or French majority on January 1, 1982 was of the total primary and secondary school population of the province on that day.

Coming into
force

(2) An Act or a provision of an Act in respect of which a declaration is made under subsection (1) shall come into force no earlier than three months after the Act has been assented to.

Operation
of exception

(3) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration, but only in respect of individuals who have become residents of the province after the Act or provision thereof comes into force.

Limitation

(4) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier day as may be specified in the declaration.

Re-enactment

(5) The legislature of a province may re-enact a declaration made under subsection (1) where the condition set out in that subsection is met.

Limitation

(6) Subsection (4) applies in respect of a re-enactment made under subsection (5).

November 12, 1981

Option III - Majority Substantially Altered

Exception
where
express
declaration

34. (1) The legislature of a province may expressly declare in an Act of the legislature that the Act or a provision thereof shall operate notwithstanding subsections 6(2) and (3), subsection 23(1) or subsection 23(2) of this Charter, or all those subsections, where the exercise of any of the rights referred to in those subsections would substantially alter the linguistic equilibrium of the English and French linguistic populations in that province.

Coming into
force

(2) An Act or a provision of an Act in respect of which a declaration is made under subsection (1) shall come into force no earlier than three months after the Act has been assented to.

Operation
of exception

(3) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration, but only in respect of individuals who have become residents of the province after the Act or provision thereof comes into force.

Limitation

(4) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier day as may be specified in the declaration.

Re-enactment

(5) The legislature of a province may re-enact a declaration made under subsection (1) where the condition set out in that subsection is met.

Limitation

(6) Subsection (4) applies in respect of a re-enactment made under subsection (5).

November 12, 1981

Option IV - Majority Declared by Legislature to be Altered

Exception
where
express
declaration

34. (1) The legislature of a province may expressly declare in an Act of the legislature that the Act or a provision thereof shall operate notwithstanding subsections 6(2) and (3), subsection 23(1) or subsection 23(2) of this Charter, or all those subsections.

Limitation

(2) A legislature may make a declaration under subsection (1) only if the declaration is approved by the votes of two thirds of its members.

Coming into
force

(3) An Act or a provision of an Act in respect of which a declaration is made under subsection (1) shall come into force no earlier than three months after the Act has been assented to.

Operation
of exception

(4) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration, but only in respect of individuals who have become residents of the province after the Act or provision thereof comes into force.

Limitation

(5) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier day as may be specified in the declaration.

Re-enactment

(6) The legislature of a province may re-enact a declaration made under subsection (1) where the condition set out in that subsection is met.

Limitations

(7) Subsections (2) and (5) apply in respect of a re-enactment made under subsection (6).