Bill 96: Summary of Mitchell v. Procureur général du Québec, 2022 QCCS 2983

September 13, 2022

In August 2022, the Superior Court of Québec suspended sections 5 and 119 of Bill 96 pending a final judgment on their validity. Until then, legal persons may continue to file English-language pleadings in Québec without having to attach a certified translation.

Overview

On June 21, 2022, a group of lawyers filed an application for judicial review to invalidate sections 5 and 119 of *An Act respecting French, the official and common language of Québec* (Bill 96), which were slated to come into force on September 1, 2022. These sections provide that in order to be filed with a court, all English-language pleadings emanating from legal persons must be accompanied by a certified French translation.

The plaintiffs also asked that sections 5 and 119 be suspended until the case is heard on its merits.

On August 12, 2022, the Superior Court suspended sections 5 and 119 during the proceedings.

Background

The Bill, which received royal assent on June 1, 2022, imposes new language requirements with respect to workplaces, commerce and business, contracts, signs and posters, communications between the government and businesses, educational institutions, and the courts. It also opens the door to major amendments to the Québec *Charter of the French language* (the CFL) and other Québec statutes, including the *Civil* Code of Québec.

Sections 5 and 119 amend CFL sections 9 and 208.6 respectively as follows:

> **9.** A French translation certified by a certified translator shall be attached to any pleading drawn up in English that emanates from a legal person.
>
> The legal person shall bear the translation costs.

[…]

208.6. A pleading to which, in contravention of section 9, no translation certified by a certified translator is attached cannot be filed at a court office or at the secretariat of an agency of the civil administration that exercises an adjudicative function or within which a person appointed by the Government or by a minister exercises such a function.

The court clerk or the secretary shall notify the legal person concerned without delay of the reason for which the pleading cannot be filed.

The plaintiffs argued that these provisions violate section 133 of the *Constitution Act, 1867* and that the added cost and time of having pleadings translated into French by a certified translator creates a barrier to access to justice for legal persons represented by English speakers.

Decision

Applicable principles

To determine whether it should exercise its discretion to suspend the provisions at issue, the Superior Court applied the three-part test laid out in RJR-MacDonald, whereunder:

1. a preliminary assessment of the merits of the case must show that there is a serious question to be tried;
2. the plaintiffs or the persons for whom they purport to act must stand to suffer irreparable harm should relief be denied;
3. the balance of convenience must favour the plaintiffs.

Details of the decision

The Superior Court concluded that in questioning whether the contested provisions comply with section 133 of the *Constitution Act, 1867*, which allows any person to file English- or French-language pleadings and procedural documents with Québec courts, the plaintiffs raised a sufficiently serious issue to satisfy the first part of the test.

The plaintiffs argued that the provisions at issue impose a translation requirement that blatantly contradicts section 133 of the *Constitution Act, 1867*, jeopardizing equal access to the courts and undermining the substantive equality of the two official languages which section 133 seeks to protect. Though the contested provisions differ from those invalidated in *Blaikie*, the Court held that the plaintiffs' questions were sufficiently serious to satisfy the interlocutory injunction test.

As to the second part of the test, after examining both sides' evidence on how the provisions might affect access to justice if they came into force in the course of the proceedings, the Court held that the plaintiffs had succeeded in establishing the likelihood of irreparable harm in the case of:

- urgent or expedited proceedings;

- legal persons lacking the means to pay for certified translations.

According to the Court, while quick intervention is often required to avert irreparable harm in urgent proceedings such as safeguard orders, provisional and interlocutory injunctions, seizures before judgment and Anton Piller applications, the plaintiffs' evidence cast doubt on the availability of qualified translators in Québec capable of translating pleadings quickly and efficiently.

The Attorney General of Québec's contention that a party need simply seek accommodation from a judge to safeguard its rights was dismissed. The Court held that Bill 96 as drafted allows no accommodation and reminded that if section 208.6 of the CFL comes into force, all English-language pleadings filed without a certified French translation will be met with automatic rejection.

The plaintiffs also submitted evidence that the additional translation costs imposed on all legal persons bringing or defending an action in court could have major consequences. Legal persons with insufficient means would find themselves unable to assert their rights in a timely manner, or would be forced to do so in an official language that is not their own and which they and their counsel are not proficient in. This latter issue could, in the Court's view, pose added challenges for parties attesting to the truth of the statements in the pleading.

As to the third part of the test, the Court found that the balance of convenience tips in favour of the plaintiffs, this in spite of the presumption that Bill 96 serves the public interest.

After recalling the principles applicable to the suspension of legislative provisions, the Court turned its attention to the balance of convenience.

It first emphasized that section 6.2 of the CFL establishes the right to justice in French, and that the plaintiffs did not seek to dispute the validity of this provision in their application.

Nevertheless, the Court held that sections 5 and 119 as drafted impede legal persons seeking to exercise their right of action from accessing the courts. Since these provisions, if enacted, could lead to a denial of justice in urgent proceedings, the Court found that the plaintiffs had succeeded in reversing the presumption that these provisions serve the public interest. In the Court's view, the lack of measures to mitigate the provisions' implications for urgent proceedings and their impact on litigants with limited means tips the balance of convenience in favour of the plaintiffs.

Moreover, since the Bill's provisions are set to come into force at different times, the Court determined that a temporary suspension of sections 5 and 119 would be appropriate.

It also took account of the fact that the plaintiffs challenged an alleged breach of the *Constitution Act, 1867*, which Québec legislators may not derogate from.

Lastly, the Superior Court held that public interest warrants suspending the contested provisions given the collective dimension of the language rights section 133 of the

Constitution Act, 1867 protects and the harm the provisions cause to an identified group, namely English speakers in Québec.

Accordingly, the Superior Court granted the requested suspension of sections 5 and 119 of Bill 96, which amend the CFL by adding sections 9 and 208.6, notwithstanding appeal.

Key takeaways

- Since sections 5 and 119 of Bill 96 were suspended in the course of the proceedings, legal persons may continue to file pleadings in English without a certified translation pending final judgment on the validity of these provisions.
- Plaintiffs seeking to suspend the coming into force of a statute in the course of the proceedings have the burden of showing that there is a clear case for the suspension.
- It is easier to rebut a presumption that the contested provisions are being adopted in the public interest if an infringement on the constitutional rights of identifiable groups is imminent.

For more information about this decision or if you need help adapting your business strategies to the requirements imposed by Bill 96, don't hesitate to reach out to one of the contacts below.

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