

Québec's French Language Requirements Still in Force for Business Publications — Including Websites

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The Québec *Charter of the French Language* (the "French Charter") received a constitutional win following the recent decision in *156158 Canada inc. v. Attorney General of Québec*, 2017 QCCA 2055, where the Québec Court of Appeal upheld the validity of several provisions relating to product packaging, publications (including websites), posters and commercial advertising.

Background

Eleven businesses in Montréal operated or controlled by individuals whose primary language is English were fined for: (i) having product packaging solely in English contrary to s. 51 of the French Charter; (ii) having websites solely in English contrary to s. 52 of the French Charter; or (iii) advertising solely in English or where the French text was not markedly predominant contrary to s. 58 of the French Charter. The trial judge found all businesses guilty and the Superior Court of Québec as well as the Court of Appeal (the "Court") upheld the judgement.

Court of Appeal Decision

The issue on appeal before the Court was whether sections 51, 52 and 58 of the French Charter violated the businesses' freedom of expression, right to equality and liberty and right to peaceful enjoyment of private property, all as guaranteed by the *Canadian Charter of Rights and Freedoms* and the Québec *Charter of Human Rights and Freedoms* (together, the "Charter").

Prior to its decision, the Court underwent an analysis of the prior fundamental case law on the constitutionality of several French Charter provisions.

In *Ford v. Quebec (Attorney General)*¹, the Supreme Court of Canada (the "SCC") held that requiring public signs, posters and commercial advertising to be exclusively in French, as was required by the old s. 58 of the French Charter, infringed upon the businesses' freedom of expression. However, requiring the predominant or concurrent display of French would be justified. Following *Ford*, the Québec legislature chose to implement these suggestions, which were upheld by the Québec Court of Appeal in *Entreprises W.F.H. Ltée v. Québec (Procureure générale du)*². In *Devine v. Quebec (Attorney General)*³, the SCC held that requiring the use of French in addition to another language for catalogues, brochures and other publications was justified under the Charter and therefore did not violate freedom of expression or right to equality.

The businesses argued that the linguistic landscape in Québec has changed since *Ford* and *Devine* were decided such that the French language is no longer

vulnerable and this justifies a departure from the conclusions of these precedents. The Court of Appeal acknowledged an improvement in the use of French in Québec, but highlighted that several prevailing factors continued to sustain the vulnerability of the language: the low birth rate among Francophones; the declining Francophone population outside of Québec; and, the dominance of the English language at the top of the economic spectrum. In the Court's view, the fact of the modest progress made in linguistic transfers towards French isn't sufficient to conclude that the vulnerability of the French language has diminished. Ultimately, the businesses failed to prove a fundamental change warranting the re-opening of the debate regarding the French language.

The Court of Appeal, agreeing with the lower courts, rejected the businesses' argument that requiring the markedly predominant or joint use of French violated their freedom of expression and right to equality, and underlined that that any claimed violation was justified under the Charter. In response to their claim of right to liberty, the Court highlighted that corporations do not benefit from such a right, which only protects basic human freedom to make inherently private choices free from state interference, and that it does not support an unconstrained right to transact business in any manner they wish. Finally, the impugned provisions of the French Charter did not affect the businesses' right to peaceful enjoyment of private property as they were permitted to advertise their desired content in the language of their choice, so long as it is accompanied by a concurrent or markedly predominant French version.

Takeaways

With this decision, the Court of Appeal confirmed once again the constitutional validity of provisions of the French Charter requiring predominant or joint use of French in Québec for product packaging, public signs, posters and commercial advertising and publications, including websites. In its determination, the Court specifically confirmed that websites aimed at conducting or promoting business in the territory of Québec are subject to the French language requirement of the French Charter.

While the Court of Appeal upheld the SCC's landmark rulings in *Ford* and *Devine*, if evidence demonstrated that the French language situation in Québec had fundamentally changed since the adoption of the French Charter, the Court would have been justified in re-opening the constitutional debate of the provisions in question.

The Court, however, did leave the door open to new legal challenges when it recognized that the language requirements could lead to a disadvantage in the form of an additional economic burden for having to translate all signs and publications into French. In this case the businesses did not bring forth any proof, but the Court mentioned that such evidence could have been presented.

1 [1988] 2 RCS 712.

2 2001 CanLII 17598.

3 [1988] 2 SCR 790.

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