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Government of Québec proposes stricter French language law

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On May 13, 2021, the Government of Québec presented *An Act Respecting French, the Official and Common Language of Québec* [PDF] (the Act), which proposes significant amendments to the *Charter of the French Language* (the Charter).

Some of these amendments, if adopted, would result in new requirements and present several material and novel legal risks for those who carry out business in Québec, as set out in further detail below.

Exercise of legal rights by corporations

Currently, corporations are entitled to exercise their legal rights before Québec Courts in French or in English. The proposed bill would remove this right by imposing upon corporations who choose to file pleadings in English to attach a certified French translation, at the corporation's expense. However, parties will be entitled to request an English translation of a judgment or adjudicative decision rendered in French, at the government's expense.

Communications with employees

Section 41 of the Charter already requires written communications with staff to be in French, although case law and administrative guidance has made it clear that this only covered communications that pertain to an employee's conditions of employment. The Act modifies the wording of this provision in a way that could suggest a broadening of the requirement to all written communications, but this is not clear. What is clear is that training documents, which are not currently always required to be in French (at least for employers with fewer than 50 employees in Québec) would going forward have to be made available to Québec employees in French.

Job offers

Currently, all job advertisements for Québec positions must be published in French, but employers have significant latitude on how to do this. The Act would restrict this latitude somewhat by requiring that where an advertisement for a job is published in English (for example on the employer's website or on a job search site), it must be simultaneously published in French "using transmission means of the same nature and reaching a target public of proportionally comparable size."

Stricter test for making knowledge of English a condition of employment

The Charter already prohibits making knowledge of English (or any language other than French) a condition of employment "unless the nature of the duties requires such knowledge." In other words, knowledge of English can be required where operationally necessary. The Act would not change this, but is more prescriptive in terms of what an employer must be able to demonstrate before making knowledge of English a condition of employment. Under the Act, an employer would be required to demonstrate that:

- an assessment of the actual language needs associated with the duties to be performed was carried out;
- other employees who are already required to be proficient in English could not carry out the duties of the position that require the knowledge of English; and
- the duties requiring English proficiency have been concentrated as much as possible within certain positions, so as to restrict as much as possible the number of positions that require such proficiency.

Communications with clients

The Charter currently provides in section 5 the right for "consumers of goods and services [...] to be informed and served in French." However, this right was deemed by jurisprudence and case law not to be enforceable – it was purely declaratory. In practice, the regulator charged with the enforcement of the Charter, the *Office Québécois de la langue française* (OQLF) would issue letters to businesses who did not serve clients in French when a complaint was made, but these letters would only urge corporations to comply, and would not lead to further enforcement action.

Under the Act, this would change, as it would become mandatory for businesses to respect a consumer's "right to be informed and served in French" and also to "inform and serve" non-consumer clients in French. This is particularly significant considering the new private rights of action in the Act, set out below.

Standard form contracts

The Charter already requires standard form contracts to be available in French, unless it is the express wish of the parties that the contract be in another language. A practice exists whereby certain businesses, rather than developing a French version of their standard form contracts, simply insert a clause stating that it is the express wish of the parties that the contract be in English. Under the Act, this practice would be curtailed by requiring a business to first present the standard form contract in French, and only if the client requires an English version can it then be provided and executed. Moreover, the new private rights of action, set out below, would render unenforceable standard form contracts entered into in English in violation of these new requirements, as well as giving rise to damages, including punitive damages.

Use of non-French trade marks and signage

The Charter currently allows the use of non-French trade marks, provided such trade marks are recognized under the federal *Trade Marks Act* and no French version has been registered.

The Act would limit this exemption somewhat by specifying that the non-French trade mark can only be used if it has been registered under the federal *Trade Marks Act*. This has been the OQLF's enforcement position for some time, without statutory backing, a situation the Act seeks to address.

In respect of signage, significant changes were adopted in 2016 that required businesses that used a non-French trade mark in their exterior signage to deploy additional signage that would ensure the presence of French in the same visual field as the trade mark, without a prescribed size requirement (other than in respect of legibility).

In the Act, and despite the fact that the 2016 changes fully came into force less than two years ago, the government indicates a willingness to force further changes to signage so that French text accompanying a non-French trade mark would now have to be "markedly predominant" in relation to the trade mark, which under the Charter is essentially defined as French text that is twice the size of the non-French text. As this is fundamentally different from the 2016 amendments that have now been implemented in the market, this could require businesses to once again implement changes to their signage.

Extending the requirement to hold a certificate of francization to businesses having only 25 employees in Québec

The Charter contains basic obligations applicable to all businesses, regardless of size, pertaining among other things to hiring practices, advertising, signage and contracting with standard form contracts, including the matters described above. In addition, businesses with more than 50 employees in Québec have been required to go through a "francization program" leading the issuance of a "francization certificate", which seeks to ensure that the use of French is generalized in the workplace. These processes typically examine internal communication practices, proportion of non-French speaking employees, the availability of language training, the use of IT in French and other operational aspects depending on the nature of the business.

In the Act, it is proposed that this process will be broadened to apply as soon as a business employs 25 people in Québec over a sustained period of six months. Moreover, the Act proposes to reduce by half (from six months to three months) the time provided to businesses to undertake certain steps of the process, namely the linguistic self-audit and the francization program proposal.

It also proposes that where a business has at least 100 employees in Québec, it must be represented before the OQLF by a management designated person and a worker representative, whereas previously only a management designated person represented the business. Finally, the Act would also require annual reporting on the implementation of a francization program, whereas currently annual reporting is only required for businesses with at least 100 employees (and biennially for businesses with fewer).

The Act would also make explicit an existing administrative practice whereby businesses that are required to go through the francization program and that fail to do so in accordance with the applicable requirements are ineligible for public contracts or government grants and subsidies.

New order-making powers for the OQLF

Currently, the OQLF has no jurisdiction to directly enforce the Charter. Where it wishes to see a fine imposed, it must refer the file to the Director of Criminal and Penal Prosecutions for

the filing of proceedings leading to the potential imposition of a fine by the criminal division of the Court of Québec. Similarly, if it wishes to see an injunction issued in respect of non-compliant advertising, it must refer the matter to the Attorney General, who can seek such relief from the Superior Court of Québec.

The Act would change this by giving the OQLF the right to issue orders, as well as the right to directly seek the enforcement of those orders before the Superior Court of Québec. Moreover, where the Charter only provided for injunctions in respect of advertising, the Act would extend the possibility of seeking an injunction in respect of most violations of the Charter, including in respect of product packaging and communications with clients.

Finally, the OQLF could even apply to the new Minister of the French Language to have the Minister suspend or revoke any government-issued permit or authorization provided to a business in cases of repeated contravention of the Charter.

Private rights of action

Currently, the Charter does not provide for any private rights of action in respect of its provisions – a complaint to the OQLF is the only recourse for an individual, and an employee has the right to bring a certain workplace violations to a specialized labour standards tribunal. This was a major source of comfort for business considering the fact that there are in Québec many language activists who are very active in filing complaints under the Charter. These issues could be addressed directly with the OQLF, without facing the risk of private litigation. Contracts entered into in English could be found not to comply with the Charter, but they were nevertheless enforceable.

With the Act, that comfort would disappear. Individuals could seek injunctive relief in respect of a failure to have been served in French, or a failure by an employer to honour their right to work in French. It would also be open to individuals and even businesses to seek the annulment of standard form contracts entered into in English, or damages, at their election. Similarly, standard form contracts or any document that does not comply with the Charter, as amended by the Act, would be deemed unenforceable by the business that prepared them, but could at the same time be enforced as against that business . English standard form contracts would be deemed “incomprehensible” and null as a result.

Finally, the Act would inscribe in the Québec *Charter of Human Rights and Freedoms* a new “right to live in French to the extent provided for in the Charter of the French Language”, opening the door to Charter claims, which can give rise to injunctive relief, damages and punitive damages, based on provisions of the Charter, as amended.

If adopted, the Act is sure to provoke a wave of private language rights litigation, including class action litigation.

Suspension of fundamental freedoms and rights, political rights, legal/judicial rights and equality rights

To shield the Charter, as amended by the Act, from legal challenges, the government proposes invoking the notwithstanding clause provided for in section 33 of *The Constitution Act, 1982* to shield the Charter from challenges based on the provisions of the Constitution guaranteeing fundamental freedoms, legal rights and equality rights, as well as those based on provisions of the Québec *Charter of Human Rights and Freedoms* that guarantee fundamental freedoms and rights, right to equal recognition and exercise of rights and freedoms, political rights and judicial rights.