

Québec Court of Appeal confirms application of French language requirements for websites

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Court recognizes exemptions from language requirements may be justified where they impose disproportionate economic burdens

On December 20, 2017, in *156158 Canada inc. v. Attorney General of Québec*, 2017 QCCA 2055, the Québec Court of Appeal confirmed the constitutional validity of the provisions of the Québec *Charter of the French Language* (the CFL) that require the joint or predominant use of French in commercial advertising, packaging and publications, including websites.

Background

The Appellants are 11 businesses controlled or operated by individuals whose primary language is English. The Office Québécois de la langue française charged each business with an offence for having used (i) English-only packaging contrary to Section 51 CFL, (ii) English-only websites contrary to Section 52 CFL or (iii) English-only or bilingual advertising with the French text not being markedly predominant, contrary to Section 58 CFL.

The Court of Québec found the Appellants guilty as charged. The judgment was upheld by the Superior Court, and later again by the Court of Appeal.

Reasons and conclusions

The main question on appeal was to decide whether the provisions of the CFL at issue violated the Appellants' freedom of expression and rights to equality and liberty, as guaranteed by the Québec *Charter of Human Rights and Freedoms* (the Québec Charter) and the *Canadian Charter of Rights and Freedoms* (collectively, with the Québec Charter, the Charter). The Appellants argued before the Court of Appeal that Sections 51, 52 and 58 of the CFL violated these rights, in addition to infringing upon the right to the peaceful enjoyment of private property, as guaranteed by the Québec Charter.

Dismissing the appeal, the Court mainly applied the two following precedents from the Supreme Court of Canada: *Ford v. Quebec (Attorney General)*, [1988] 2 RCS 712 (*Ford*) and *Devine v. Quebec (Attorney General)*, [1988] 2 SCR 790, as well as one precedent from the Court of Appeal, *Entreprises W.F.H. Ltée v. Québec (Procureure générale du)*, 2001 CanLII 17598. In those cases, it was decided that requiring the joint or predominant use of French infringed upon freedom of expression in a way that was justified and, therefore, constitutionally valid under the Charter.

The Court of Appeal dismissed the Appellants' argument that it should revisit those

precedents on the premise that, since said precedents, the situation had evolved in such a way that French was no longer in jeopardy. The Court concluded that the Appellants failed to prove a change important enough that it would fundamentally change the parameters of the debate that occurred previously before the Supreme Court. There was no error in the conclusion of the trial judge that the birth rate among Francophones remained lower, that the Francophone population outside Québec kept declining as a result of assimilation and that English was still dominant at the higher end of the economic spectrum. Any modest progress made in linguistic transfers towards French was not sufficient to conclude that the language of Molière was no longer vulnerable.

In *Ford*, the Supreme Court proposed two constitutionally valid solutions for the legislator to preserve the linguistic landscape in Québec: requiring the joint use of French and English and making French the predominant language. With the provisions at issue, the legislator chose to implement each of these solutions to various contexts (e.g., commercial advertising, packaging, etc.), a choice which courts are ill-equipped to review.

The Court of Appeal also rejected the Appellants' argument that requiring the joint or predominant use of French violated their right to equality, that is, the right to express themselves in their first language as any Francophone would. Instead, the Court agreed with the lower courts that any violation of the right to equality was constitutionally justified under the Charter.

As to the Appellants' right to liberty, the Court recalled that this right does not apply to corporations. As for the individuals concerned, the Charter only protects their basic human freedom to make inherently private choices free from state interference. It does not give them an unconstrained right to conduct business in any manner they wish. The requirement of the joint or predominant use of French is only one of numerous constraints imposed upon businesses for the common good that do not offend the right to liberty.

Finally, the Court of Appeal dismissed the Appellants' contention that the CFL infringed their right to the peaceful enjoyment of private property, since this right in the Québec Charter is expressly subject to any limitations provided by law, such as the limitations provided for in the CFL.

Commentary

The Court of Appeal reaffirmed the jurisprudence as to the constitutional validity of provisions requiring the joint or predominant use of French in Québec in respect of commercial advertising, packaging and publications, including websites. In doing so, it confirmed that websites are subject to the same requirements as any other commercial publications. Pursuant to Sections 52 and 89, websites must be available in French.

That being said, the Court of Appeal also recognized that, in some cases, language requirements may lead to an economic burden due, for instance, to the required translation of content. In the case of smaller businesses, an economic burden of this nature may be disproportionate and, if so, may result in discrimination. There was no evidence of such disproportionate burden in this case, but the Court of Appeal opened the door to businesses adducing such evidence in future cases.