

STILL KICKING: QUEBEC COURT CONFIRMS THE CONSTITUTIONALITY OF THE CHARTER OF THE FRENCH LANGUAGE, CLARIFIES THE RULE OF “MARKED PREDOMINANCE” AND REITERATES THE EXEMPTIONS FOR UNREGISTERED TRADEMARKS

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In a recent decision,^[1] the Court of Quebec reiterated the requirement under Quebec's *Charter of the French Language* (the "Charter") that French language signage be "markedly predominant" and confirmed that both registered *and* unregistered trademarks may appear exclusively in another language in inscriptions on products, in catalogues, brochures, folders, commercial directories and similar publications (including websites), and in public signs and posters and commercial advertising.

Facts

A number of small businesses operating mostly in English in the Montreal area were charged with various violations of the Charter. More specifically, the Anglophone merchants were charged with having installed signs in a language other than French or on which French was not "markedly predominant", having sold products with non-French labelling and having advertised online exclusively in English.

Decision

All merchants were found guilty as charged, save for one, which used a trademark exempt slogan. The following are the most salient points that can be gleaned from the decision.

How Predominant is "Markedly Predominant"?

Section 58 of the Charter allows the use of a language other than French on commercial signs on the condition that French remains "markedly predominant". A number of defendants argued that placing the French inscription first on the sign ought to be sufficient to achieve "marked predominance".

The Court of Quebec rejected the argument that simple priority in the placement of French text on a sign

could satisfy the rule and confirmed the mathematical requirement set out in the Charter regulations. The Court found that "marked predominance refers to the greater visual impact of the French language when compared to the other language included on a sign". As the judge put it, "size does matter" for commercial signage; the 2:1 ratio between the size of the French inscription and the English inscription provided under the regulations satisfies the requirement of "marked predominance".

Protection of Unregistered Trademarks

Two of the defendants also invoked an exemption to the rule found under s. 58 of the Charter. Pursuant to s. 25(4) of the *Regulation respecting the language of commerce and business*, a trademark recognized as such under the federal *Trade Marks Act* used on a commercial sign avoids the requirement of "marked predominance", provided that no registered French version exists.

One of the defendants, "Meldrum the Mover", successfully argued that its slogan, "Everything inside packed with pride", was not merely a description of the services, but a distinctive and recognizable slogan. Considering that this slogan had been in use for a very long time (since 1930), the Court found that it qualified as a common law trademark. The judge held that such a trademark could be considered as "recognized" for the purposes of the exemption, notwithstanding the fact that it was not registered.

Signs out of Public View

Interestingly, the Court questioned the Attorney General's zeal, as the defendant's truck bearing the impugned slogan was no longer in service, parked out of public view and was kept for spare parts. On that point, the Court concluded that "linguistic landscape of the province cannot be affected by a slogan that appears on a truck that was rusting away on a yard that was inaccessible to the general public." The judge made the general observation that the s. 58 requirement does not encompass signs that are not intended for the public view.

Constitutional Issues

The defendants also challenged the offences on constitutional grounds. With respect to English-only websites, the defendants argued that the Province of Quebec did not have jurisdiction to regulate the internet, as it falls under exclusive federal jurisdiction by virtue of its residual power. This argument was set aside by the judge, who concluded that the purpose of the Charter and the regulation is to regulate commerce, which falls under provincial jurisdiction.

Finally, and perhaps most importantly, the argument was made, yet again and probably not for the last time, that the Charter violates fundamental rights contained in the *Canadian Charter of Human Rights and Freedoms*, namely the rights to equality and liberty and freedom of speech.

On this issue, the judge found no reason to deviate from the previous teachings of the Supreme Court^[2] that the preservation of the French language is an important objective that can justify some limits on these rights and freedoms, such as imposing that French be "markedly predominant" on commercial signage. The Court further concluded that there was no convincing demographic or sociologic evidence supporting the view that the French language has lost its vulnerability since the decision of the Supreme Court in 1988.

The issues raised in this decision are sure to remain a hot topic in the coming years, especially with the Quebec government's appeal of a recent decision^[3] rendered by the Quebec Superior Court going against the OQLF's policy to impose a French descriptor to store names, even where such names are trademarks.

by Pierre-Christian Collins Hoffman, Éric Vallières and Émile Catimel-Marchand, Student-at-Law

[1] *Quebec (Attorney General) v. 156158 Canada Inc. (Boulangerie Maxie's)*, 2015 QCCQ 354.

[2] *Ford v. Quebec (Attorney General)*, [1988] 2 SCR 712 and *Devine v. Quebec (Attorney General)*, [1988] 2 SCR 790..

[3] *Magasins Best Buy Itée v. Québec (Procureur général)*, 2014 QCCS 1427.

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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