COURT OF APPEAL

CANADA
PROVINCE OF QUEBEC
REGISTRY OF MONTREAL

No: 500-10-006153-165
(500-36-007519-153, 500-36-007739-157, 500-36-007740-155,
500-36-007741-153, 500-36-007742-151, 500-36-007743-159,
500-36-007744-157, 500-36-007445-154, 500-36-007746-152,
500-36-007747-150, 500-36-007748-158, 500-36-007749-156,
500-36-007750-154)

DATE: December 20, 2017

CORAM: THE HONOURABLE NICOLE DUVAL HESLER, C.J.Q.
GENEVIÈVE MARCOTTE, J.A.
MARK SCHRAGER, J.A.

No: 500-36-007519-153

156158 CANADA INC.
APPELLANT – Defendant
v.

ATTORNEY GENERAL OF QUEBEC
RESPONDENT - Prosecutor

No: 500-36-007739-157

156158 CANADA INC.
APPELLANT – Defendant
v.

ATTORNEY GENERAL OF QUEBEC
RESPONDENT - Prosecutor

No: 500-36-007740-155

MUNDI CANADA INC.
APPELLANT – Defendant
v.

ATTORNEY GENERAL OF QUEBEC
RESPONDENT - Prosecutor

No: 500-36-007741-153

MUNDI CANADA INC.
APPELLANT – Defendant
v.

ATTORNEY GENERAL OF QUEBEC
RESPONDENT - Prosecutor

No: 500-36-007742-151

SERVICE DE RÉPARATION DE CONTENEURS ET D'UNITÉS FRIGORIFIQUES DU CANADA LTÉE
APPELLANT – Defendant
v.

ATTORNEY GENERAL OF QUEBEC
RESPONDENT - Prosecutor

No: 500-36-007743-159

ALLAN ANAWATI
APPELLANT – Defendant
v.

ATTORNEY GENERAL OF QUEBEC
RESPONDENT - Prosecutor

No: 500-36-007744-157

ANALYSE NIRA INC.
APPELLANT – Defendant
v.

ATTORNEY GENERAL OF QUEBEC
RESPONDENT - Prosecutor

No: 500-36-007745-154

176410 CANADA INC.
APPELLANT – Defendant
v.

ATTORNEY GENERAL OF QUEBEC
RESPONDENT - Prosecutor

No: 500-36-007746-152

SHERIL-LIN INC.
APPELLANT – Defendant
v.

ATTORNEY GENERAL OF QUEBEC
RESPONDENT - Prosecutor

No: 500-36-007747-150

STANLEY AND MURIEL REID
APPELLANTS – Defendants
v.

ATTORNEY GENERAL OF QUEBEC
RESPONDENT - Prosecutor

No: 500-36-007748-158

LES INDUSTRIES GARANTIES LTÉE
APPELLANT – Defendant
v.

ATTORNEY GENERAL OF QUEBEC
RESPONDENT - Prosecutor

No: 500-36-007749-156

SCOTT LEMAY
APPELLANT – Defendant
v.

ATTORNEY GENERAL OF QUEBEC
RESPONDENT - Prosecutor

No: 500-36-007750-154

3831426 CANADA INC.
APPELLANT – Defendant
v.

DIRECTOR OF CRIMINAL AND PENAL PROSECUTIONS
ATTORNEY GENERAL OF QUEBEC
RESPONDENTS - Prosecutor

JUDGMENT

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[1] On appeal from a judgment rendered on April 12, 2016 by the Superior Court, District of Montreal (the Honourable Claudine Roy), dismissing an appeal from a judgment of the Court of Quebec, District of Montreal (the Honourable Salvatore Mascia). The latter found all the Appellants guilty of having violated one or more provisions of the *Charter of the French Language* ("*C.F.L.*") and the *Regulation defining the scope of the expression "markedly predominant" for the purposes of the Charter of the French language* ("*C.F.L. Rules*").

[2] For the reasons of Justice Schrager, with which Chief Justice Duval Hesler and Justice Marcotte concur, **THE COURT**:

[3] **DISMISSES** the appeal, without legal costs given the public interest nature of the debate.

NICOLE DUVAL HESLER, C.J.Q.

GENEVIÈVE MARCOTTE, J.A.

MARK SCHRAGER, J.A.

Mtre Charles O'Brien
For Appellants

Mtre Éric Cantin
Mtre Jean-Yves Bernard
Mtre Dominique A. Jobin
DIRECTEUR GÉNÉRAL DES AFFAIRES JURIDIQUES ET LÉGISLATIVES
For Attorney General of Quebec

Mtre Isabelle Lafrenière
DIRECTOR OF CRIMINAL AND PENAL PROSECUTIONS
For Director of Criminal and Penal Prosecutions

Date of hearing: November 7, 2017

REASONS OF SCHRAGER, J.A.

[4] The Appellants, 11 Anglophone businesses[1] operating in the Montreal area, appeal from a judgment rendered on April 12, 2016 by the Superior Court, District of Montreal[2] (the Honourable Claudine Roy), dismissing their appeal from a judgment of the Court of Quebec, District of Montreal[3] (the Honourable Salvatore Mascia). The latter found all the Appellants guilty of having violated one or more provisions of the *Charter of the French Language*[4] ("*C.F.L.*") and the *Regulation defining the scope of the expression "markedly predominant" for the purposes of the Charter of the French language*[5] ("*C.F.L. Rules*").

[5] The essential question raised on appeal is whether this Court should revisit the Supreme Court's conclusions in *Ford v. Quebec (Attorney General)*[6] and in *Devine v. Quebec (Attorney General),*[7] as well as its own decision in *Entreprises W.F.H. Ltée c. Québec (Procureure générale).*[8] In my view, the Appellants have failed to demonstrate why this Court should depart from these precedents.

THE FACTS

[6] The *Office québécois de la langue française* ("*O.Q.L.F.*") issued a formal notice to 11 businesses operating in or around the Montreal area for various offences, pursuant to ss. 51, 52 and 58 of the *C.F.L.* The Appellants were charged with the following offences:

a) Commercial advertising written solely in English or wherein the space allotted to the French text failed to respect the "markedly predominant" requirement, contrary to s. 58 of the *C.F.L.* and the *C.F.L. Rules*:

   - 156158 Canada inc. (Boulangeries Maxies Cavendish) #500-36-007519-153 #500-36-007739-157

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1 I have used the term Anglophone business as a shorthand for a business operated by or ultimately controlled by an individual whose primary language is English. Obviously, the "business" does not have a linguistic identity *per se*, particularly if operated by a corporation.

2 *156158 Canada inc. v. Québec (Attorney General)*, 2016 QCCS 1676, [Judgment of the Superior Court].

3 *Quebec (Attorney General) v. 156158 Canada Inc. (Boulangerie Maxie's)*, 2015 QCCQ 354 [Judgment of the Court of Quebec].

4 *Charter of the French Language*, CQLR, c. C-11.

5 *Regulation defining the scope of the expression "markedly predominant" for the purposes of the Charter of the French language*, CQLR, c. C-11, r. 11.

6 *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712 [*Ford*].

7 *Devine v. Quebec (Attorney General)*, [1988] 2 S.C.R. 790 [*Devine*].

8 *Entreprises W.F.H. Ltée v. Québec (Procureure générale)*, [2001] R.J.Q. 2557 [*Entreprises W.F.H.*].

- Mundi Canada inc. — #500-36-007740-155 #500-36-007741-153
- 176410 Canada inc. (Wakefield General Store) — #500-36-007745-154
- Les Industries Garanties ltée — #500-36-007748-158

b) Packaging with English writing and with no French equivalent, contrary to s. 51 of the *C.F.L.*:

- Analyse Nira inc. — #500-36-007744-157

c) Websites published solely in English or with no French equivalent, contrary to s. 52 of the *C.F.L.*:

- Service de réparation de conteneurs et d'unités frigorifiques du Canada ltée — #500-36-007742-151
- Allan Anawati (F.A.R.S. Medusa) — #500-36-007743-159
- Sheril-Lin inc. — #500-36-007746-152
- Stanley and Muriel Reid (Ferme Reidridge) — #500-36-007747-150
- Scott Lemay (WEPC.CA) — #500-36-007749-156
- 3831426 Canada inc. (Cargo 3000.com) — #500-36-007750-154

[7] The businesses failed to comply within the time prescribed by the formal notice. In accordance with s. 205 *C.F.L.*, the *O.Q.L.F.* issued a statement of offence (*constat d'infraction*) against each business. In response, the businesses each entered not-guilty pleas. The Attorney General and the Director of Criminal and Penal Prosecutions instituted penal proceedings. The businesses filed a Notice of Intent to Raise Constitutional Issues, as provided by ss. 35 of the *Code of Penal Procedure* and 95 of the former *Code of Civil Procedure*.

PROCEEDINGS BEFORE THE COURT OF QUÉBEC

[8] The trial took place before Judge Salvatore Mascia of the Court of Quebec over a seven-day period in May 2014. The case originally involved 23 defendants. On January 28, 2015, Mascia J. found all but one of the defendants guilty as charged.

[9] At trial, the defendants raised several common law defences, such as the failure to give adequate notice,[9] *de minimis non curat lex,*[10] the interpretation of the expression "markedly predominant"[11] and the exemption for a recognized trademark.[12] In addition, those who published a website in violation of s. 52 *C.F.L.* alleged that the federal Parliament alone had the power to regulate the internet, by virtue of ss. 91 and 92(10) of the *Constitution Act, 1867*.[13] The trial judge rejected all these arguments and the Appellants have abandoned them on appeal.

[10] The Appellants further argued that ss. 51, 52 and 58 *C.F.L.* infringed upon their fundamental rights and freedoms as guaranteed by both the *Canadian Charter* and the *Quebec Charter*. More specifically, they alleged violation of their freedom of expression,[14] as well as their right to equality[15] and liberty.[16]

[11] In response, the Attorney General argued that the Supreme Court of Canada already ruled in the *Ford*[17] and *Devine*[18] cases that the alleged infringement of freedom of expression and the right to equality were both justified under the *Canadian Charter* and the *Quebec Charter.* Indeed, the Attorney General argued that the Quebec government can legitimately require greater visibility or marked predominance of French on commercial signs. More recently, in *Entreprises W.F.H.*,[19] the Court of Appeal of Quebec confirmed that s. 58 *C.F.L.* was constitutional and consistent with *Ford* and *Devine.*

[12] Acknowledging these holdings, the Appellants attempted to justify their *Charter* challenges on the premise that the French language in Quebec is no longer in jeopardy. Hence, the factual underpinnings of *Ford* and *Devine* could no longer be used to justify the infringement of *Charter* rights.

[13] In support of this argument, the Appellants relied upon the testimony of Professor Calvin Veldman, as well as numerous studies and statistics, all highlighting the following facts and conclusions as found by the trial judge:[20]

- Increase in the French share of linguistic transfers[21] among Allophones;

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9 Judgment of the Court of Quebec, *supra*, note 3, paras. 82-86.
10 *Id.*, paras. 87-97.
11 *Id.*, paras. 98-103.
12 *Id.*, paras. 104-113.
13 *Id.*, paras. 116-132.
14 *Canadian Charter of Rights and Freedoms*, *The Constitution Act, 1982*, Schedule B to the *Canada Act 1982 (UK)*, 1982, c. 11 [*Canadian Charter*], s. 2(*b*); *Charter of Human Rights and Freedoms*, CQLR, c. C-12, [*Quebec Charter*], s. 3.
15 *Canadian Charter*, s. 15; *Quebec Charter*, s. 10.
16 *Canadian Charter*, s. 7; *Quebec Charter*, s. 1.
17 *Ford*, *supra*, note 6.
18 *Devine*, *supra*, note 7.
19 *Entreprises W.F.H.*, *supra*, note 8.
20 Judgment of the Court of Quebec, *supra*, note 3, paras. 24-39.
21 i.e. the adoption of a language by non-native speakers.

- Stability in the French-speaking population of Quebec;
- Decline in the English-speaking population (both in terms of relative weight and in absolute numbers;
- Increase in the number of French speakers in Canada even if the percentage of French speakers had diminished;
- The Supreme Court judgments in *Ford* and *Devine* were based on incomplete data;
- The positive effects of Quebec's language legislation in the francization of Allophones;
- Overlapping jurisdictions of the federal government and the provinces in immigration matters;
- The shrinking portion of French speakers on the island of Montreal is no cause for alarm;
- No rational connection between the language of signs and the protection of the French language.

[14] In answer to this evidence, the Attorney General did not deny that the French language has made modest progress in recent decades. However, in his view, such progress would hardly be enough to say that the French language is no longer in jeopardy.[22] The Attorney General also relied upon the testimony of an expert witness, Professor Mark Termote, and referred to various studies and statistics that highlighted the following countervailing facts:[23]

- Modest numbers of linguistic transfers in favour of French;
- Disproportionate number of linguistic transfers in favour of English;
- Declining fertility rates among French speakers and the high fertility rate of third language groups;
- Declining proportion of French speakers on the island of Montreal;
- Critique of Professor Veldman's methodology who, unlike Professor Termote, diminishes the importance of third language groups in assessing the vulnerability of the French language.

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22 Judgment of the Court of Quebec, *supra*, note 3, para. 40.
23 *Id.*, paras. 41-52.

[15] With regard to the burden of proof required to revisit past precedents, the Attorney General submitted that "unless the petitioners present convincing and compelling evidence — accepted by experts in the field — that the status of the French language in Quebec has dramatically changed to the point that it is no longer vulnerable and that it no longer needs the protection of the law",[24] the conclusions in *Ford, Devine* and *Entreprises W.F.H.* are binding and cannot be disturbed. The trial judge accepted this proposition.[25]

[16] With regard to the *Charter* issues, the trial judge examined (i) the connection between the language of signs and the protection of the French language; (ii) the freedom of expression, pursuant to s. 2(*b*) of the *Canadian Charter* and s. 3 of the *Quebec Charter*; (iii) the right to equality set out at s. 15 of the *Canadian Charter* and s. 10 of the *Quebec Charter*; and (iv) the right to liberty set out at s. 7 of the *Canadian Charter* and s. 1 of the *Quebec Charter*.

(i) Connection between language of signs and protection of French

[17] After reviewing the evidence on this question,[26] the trial judge rejected the defendant's argument that there was no rational connection between the language of signs and the protection of the French language:[27]

> [145] Though not predicated upon exact science, the Court is of the view that the greater visibility of French in the linguistic landscape contributes to the perception that it is a vital and important language. This perception is all the more important when one considers that English is the predominant culture in North America and that no one is insulated by [sic] its economic and cultural influence.

[18] The judge added that the Supreme Court of Canada in *Ford* and *Devine* — two binding precedents — saw a rational connection between the language of signs and the protection and promotion of the French language.[28]

[19] The Appellants replied that the Supreme Court based its decision in *Ford* and *Devine* on outdated and incomplete data, referring to the work of Rejean Lachapelle and Jacques Henripin: *La situation démolinguistique au Canada : Évolution passée et perspective.*[29] Published in 1980, the study essentially posited that the French language was not in jeopardy. The trial judge answered that this argument constituted speculation

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[24] Judgment of the Court of Quebec, *supra*, note 3, para. 53.
[25] *Id.*, para. 177.
[26] *Id.*, paras. 133-144.
[27] *Id.*, para. 145.
[28] *Id.*, para. 148.
[29] D-8 *La situation démolinguistique au Canada : Évolution passée et perspective*, Réjean Lachapelle et Jacques Henripin, L'Institut de recherches politiques, 1980, A.F., vol. 5, p. 584.

and that at the time there was ample information before the Supreme Court to conclude that the French language in Quebec was in fact vulnerable.[30]

(ii) Freedom of Expression

[20] At this stage of the analysis, the trial judge thoroughly assessed the parties' conflicting evidence regarding the condition of the French language in Quebec.[31] He indicated that his decision on this issue would be based on the evidence as a whole, and not on the different demographic methods used by each of the expert witnesses.[32] The judge reiterated that it was the defendants (the Appellants now before us) who had the burden to establish the change in the status of the French language, eliminating the need for its protection. This could justify a departure from *Ford* and *Devine*.[33]

[21] The trial judge held that the defendants failed to meet their evidentiary burden.[34] Overall, the judge agreed with the views of the Attorney General's expert witness — Professor Termote.

[22] First, the trial judge held that progress in linguistic transfers in favour of French was too small to significantly change the vulnerable status of the French language.[35] Such linguistic transfers also take up to two generations to materialize.[36] Second, he found that the declining birth rate among French speakers coupled with the growing number of third-language speakers placed the French language at a disadvantage.[37] Third, he noted that Professor Veldman — the Appellants' expert witness — correctly pointed out that the analysis of the condition of the French language cannot be limited to the island of Montreal. However, the judge was also of the view that the court could not ignore that the majority of Allophones first settle and work in Montreal and that the linguistic environment plays a significant part in their assimilation. Finally, he accepted that even if English language speakers comprise less than 11% of the total population of Quebec, the language attracts almost 50% of the linguistic transfers.[38]

[23] Next, the trial judge assessed the evidence relating to the four causal factors identified by the Supreme Court in *Ford* as leading to the vulnerability of the French language. He concluded that the situation had not changed much since 1988:[39]

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30 Judgment of the Court of Quebec, *supra*, note 3, paras. 149-155.
31 *Id.*, paras. 159-173.
32 *Id.*, para. 176.
33 *Id.*, para. 177.
34 *Id.*, para. 184.
35 *Id.*, para. 185.
36 *Id.*, para. 195.
37 *Id.*, para. 186.
38 *Id.*, paras. 187-189.
39 *Id.*, paras. 190-196.

a) The birth rate among French-speaking women is still low. At 1.6 births per woman, the rate is well below the replacement mark of 2.1;

b) The Francophone population outside of Quebec is still declining as a result of assimilation. The Appellants' expert witness conceded this;

c) The modest progress made in linguistic transfers towards French does not significantly change the vulnerability of the French language;

d) The Appellants brought no evidence regarding a change in the continuing dominance of English at the higher end of the economic spectrum.

[24] The trial judge then agreed with the Appellants that the visual landscape in Quebec, since the decision of the Supreme Court in *Ford* and *Devine,* was now predominantly French, with the exception of trademarks. But, he noted that, of course, there would be an "obvious incongruity in using the success of the signs provisions of the *C.F.L.* as fodder for its dismantling. The *C.F.L.* cannot become a victim of its own success."[40]

[25] Concluding on this issue, the trial judge refused to go so far as to rule that he could take judicial notice of the vulnerability of the French language.[41] Relying on the evidence presented by the Appellants, he concluded that they had failed to convince him that the French language was no longer in jeopardy. Therefore, he held that he could not review the conclusions of the Supreme Court in *Ford* and *Devine.*[42]

(iii) Equality Rights

[26] Turning to the question of equality rights, the trial judge concluded that this issue had already been decided in *Devine.* Given that this issue also depended on a reassessment of the vulnerability of the French language in Quebec, the judge also dismissed the equality rights challenge presented by the defendants.[43]

[27] Nevertheless, the trial judge continued his analysis, for the purpose of determining whether or not ss. 51, 52 and 58 *C.F.L.* infringed the equality rights of the defendants who raised this issue.[44]

[28] The following witnesses were heard: (1) Danielle Besnos, a co-owner of *Mundi Canada inc.*; (2) Stanley and Muriel Reid, owners of *Ferme Reidridge*; (3) Thomas Filgiano, principal owner of *Meldrum, the Mover Inc.*; and (4) Gary Shapiro, a shareholder and administrator of *Les Industries Garanties/Guaranteed Industries.* Each witness

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[40] Judgment of the Court of Quebec, *supra*, note 3, para. 199.
[41] *Id.*, paras. 201-213.
[42] *Id.*, para. 214.
[43] *Id.*, para. 220.
[44] *Id.*, para. 221.

described how the application of the impugned sign law made them, as members of the English speaking community in Quebec, feel marginalized, ignored, and less worthy of self-respect and self-worth.[45]

[29] The trial judge stated that the witnesses' testimony was fundamentally similar to the evidence presented in *Entreprises W.F.H.* where both the Superior Court and the Court of Appeal had decided that the evidence was insufficient to establish loss of dignity on account of the application of the *C.F.L.*[46] On that basis alone, the trial judge concluded that there was no basis for an equality rights challenge in the case at bar.[47]

[30] However, he noted that since the *Entreprises W.F.H.* case was decided in 2001, the Supreme Court had reshaped the analytical framework for resolving equality issues in *R. v. Kapp*.[48] In particular, the Supreme Court had abandoned the criterion of "human dignity" in defining discrimination and refocused the analysis on two questions: (1) Does the law create a distinction based on a ground enumerated in s. 15 of the *Canadian Charter* (race, ethnicity, religion etc.) or a ground analogous thereto? (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping? Despite this change in the law, the trial judge arrived at the same conclusion. On the first issue, he concluded that language was an analogous ground and, on the second issue, he concluded that:

> [257] In the present matter, the retreat from the human dignity test does not alter the decision of the Court regarding equality. There is nothing in the stated purpose of the law—the protection and promotion of the French language—that perpetuates disadvantage and stereotyping. In promoting the French language via the signs legislation, the law does not promote prejudice or a negative image of the English community. The English merchant is allowed to advertise in his or her own language; the only constraint or obligation imposed by the law is to include in his or her commercial sign a French version that is markedly predominant—or, if we are talking about business forms, catalogues and brochures (s. 52), a French version which is at least equivalent to the English one. This added burden does not perpetuate a demeaning stereotype.[49]

[31] The trial judge also discussed more recent Supreme Court cases — *Ermineskin Indian Band and Nation v. Canada*,[50] *Withler v. Canada (Attorney General)*[51] and *Quebec (Attorney General) v. A*[52] —, only to conclude that the new developments did not exclude

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[45] Judgment of the Court of Quebec, *supra*, note 3, paras. 237-249.
[46] *Id.*, paras. 222-236.
[47] *Id.*, para. 250.
[48] *R. v. Kapp*, [2008] 2 S.C.R. 483, 2008 SCC 41 [*Kapp*].
[49] Judgment of the Court of Quebec, *supra*, note 3, para. 257.
[50] *Ermineskin Indian Band and Nation v. Canada*, [2009] 1 S.C.R. 222, 2009 SCC 9.
[51] *Withler v. Canada (Attorney General)*, [2011] 1 S.C.R. 396, 2011 SCC 12.
[52] *Quebec (Attorney General) v. A*, [2013] 1 S.C.R. 61, 2013 SCC 5 [*Quebec (A.G.) v. A*].

the "prejudice-stereotype" analysis reaffirmed in *Kapp*[53] and, accordingly, did not alter his ruling.[54]

(iv) Right to Liberty

[32] The trial judge summarily rejected the Appellants' liberty argument. He first explained that the right to liberty is not synonymous with the absence of restraint. Rather, it protects "the irreducible sphere of personal autonomy wherein individuals may make inherently private choices free from state interference."[55] The judge then concluded that the commercial constraints imposed by the impugned sections of the *C.F.L.* could not be classified as inherently or fundamentally personal.[56]

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[33] In his closing remarks, the trial judge reiterated that the evidence brought by the Appellants was not strong, persuasive, solid and convincing. It failed to show a significant change in the situation of the French language since the *Ford* and *Devine* cases. For that reason, the judge dismissed all the *Charter* challenges and found all 23 defendants, except the owner of *Meldrum, the Mover Inc.*,[57] guilty as charged.[58]

PROCEEDINGS BEFORE THE SUPERIOR COURT

[34] Eleven of the Appellants appealed to the Superior Court pursuant to s. 266 and ff. *C.P.P.* The hearing took place before the Honourable Claudine Roy over a three-day period in March 2016. On April 10, 2016, Roy J. (as she then was) dismissed all the appeals without legal costs.

(i) Freedom of Expression

[35] Before the Superior Court, the Appellants raised five grounds of appeal relating to the trial judge's analysis under s. 2(*b*) of the *Canadian Charter* and s. 3 of the *Quebec Charter*.[59] Before assessing these arguments, Roy J. reviewed *Ford*, *Devine* and *Entreprises W.F.H.*,[60] and outlined the trial judge's findings of fact.[61] She then rejected all five of the Appellants' arguments.

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53 Judgment of the Court of Quebec, *supra*, note 3, paras. 275-276; *Kapp*, *supra*, note 48.
54 *Id.*, para. 282.
55 *Id.*, para. 285.
56 *Id.*, para. 288.
57 In essence, the advertisement in violation of s. 58 *C.F.L.* was located on a vehicle that had been out of commission for three years and that was parked in the back yard of the place of business.
58 Judgment of the Court of Quebec, *supra*, note 3, paras. 294-295.
59 *Id.*, para. 34.
60 *Id.*, paras. 23-30.
61 *Id.*, paras. 31-33.

[36] First, the Appellants asserted that the trial judge had misinterpreted the *obiter dictum* of the Supreme Court in *Ford*. The Superior Court judge rejected this argument. She referred to the reasons of the trial judge where he clearly explained that the Supreme Court in *Ford* found that both the concurrent and "markedly predominant" use of French were reasonable and proportionate limitations in accordance with *R. v. Oakes* (the *Oakes* test).[62]

[37] Second, the Appellants argued that *Entreprises W.F.H.* judgment was irrelevant as a precedent since no evidence regarding the vulnerability of the French language had been submitted in that case. The Superior Court judge rejected this argument, holding that *Entreprises W.F.H.* was relevant with respect to *stare decisis.* If a litigant wanted to contest the constitutionality of provisions already analyzed by the Supreme Court, it would need to provide new evidence or identify new questions of law.[63]

[38] Third, the Appellants argued that, respecting *stare decisis*, an "equal size" provision ought to satisfy the *Oakes* test. The Superior Court judge rejected this argument. It was up to the legislature, not the Appellants, to decide which of the two constitutionally valid options — concurrent or "markedly predominant" use — to enact. The judge also rejected the Appellants' argument that *stare decisis* did not apply to the Supreme Court's *obiter dictum* in *Ford*.[64]

[39] Fourth, the Appellants alleged that the concept of "*visage linguistic*" explained in *Ford* referred only to "those outside signs visible from a public thoroughfare". Roy J. rejected this argument. The Supreme Court did not limit the concept of "*visage linguistic*" to exterior signs in *Ford* and *Devine*. Indeed, the legislation made no distinction based on the visibility of the writing from a public thoroughfare.[65] The judge also rejected the idea that the "*visage linguistic*" of Quebec ought to reflect the multilingual image of Montreal.[66]

[40] Fifth, the Appellants attempted to demonstrate that the French language was no longer vulnerable in Quebec. The Superior Court judge rejected this argument, finding no error in the trial judge's assessment of the evidence presented at trial. In her view, the causal factors identified in *Ford* as threatening the French language were still present.[67]

(ii) Equality Rights

[41] The Appellants also contended that the trial judge erred by concluding that ss. 51, 52 and 58 *C.F.L.* did not infringe their equality rights. If Francophones could advertise in

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[62] Judgment of the Court of Quebec, *supra*, note 3, paras. 35-37; *R. v. Oakes*, [1986] 1 S. C.R. 103 [*Oakes*].
[63] *Id.*, paras. 38-42.
[64] *Id.*, paras. 43-49.
[65] *Id.*, paras. 50-53.
[66] *Id.*, paras. 54-56.
[67] *Id.*, paras. 57-64.

French only, the argument went, then Anglophones should be allowed to advertise in English only.

[42] The Superior Court judge rejected this argument, having found no error in "the trial judge's extensive analysis of the law and in the application of the legal principles to the facts of the case".[68] Nothing in the impugned legislation demeaned the human dignity of the English-speaking population.

[43] In any case, the judge added that a violation of equality rights would be justified under s. 1 of the *Canadian Charter* and s. 9.1 of the *Quebec Charter*, as already decided in the freedom of expression discussion.

(iii) Right to Liberty

[44] The Appellants alleged that the impugned provisions of the *C.F.L.* infringed their right to liberty. The Superior Court judge rejected this argument, finding that the trial judge did not err in asserting that the constraints imposed by the *C.F.L.* on the manner in which the Appellants conducted their business could not be classified as inherently or fundamentally personal. The judge added that the right to liberty protects human beings and not corporations.[69] All of the defendants charged with signage offences were corporate bodies.

(iv) Right to the Peaceful Enjoyment of Private Property

[45] Finally, the Appellants contended that ss. 51, 52 and 58 *C.F.L.* violated their right to peaceful enjoyment of private property, pursuant to s. 6 of the *Quebec Charter*. The Superior Court judge rejected this new argument, as the legislation did not affect this right. Moreover, this protection applies "to the extent provided by the law"[70] so that such limitation as may be contained in the *C.F.L.* — a law — is permissible.

JUDGMENT ON LEAVE TO APPEAL

[46] The same 11 parties who appealed to the Superior Court sought leave to appeal to this Court, pursuant to s. 291 and ff. *C.P.P.* On June 3, 2016, a judge of the Court granted leave to appeal in the following terms[71]:

> [5] Ils identifient 10 moyens d'appel dont certains semblent plutôt soulever des questions mixtes de fait et de droit.
>
> [6] La question centrale au pourvoi est toutefois la constitutionnalité des articles 51, 52 et 58 de la *Charte de la langue française*. Il s'agit là d'une question

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68 Judgment of the Court of Quebec, *supra*, note 3, para. 77.
69 *Id.*, paras. 80-84.
70 *Id.*, para. 86.
71 *156158 Canada inc. c. Québec (Procureure générale)*, 2016 QCCA 1014, paras. 5-7.

de droit au sens où l'entend l'article 291 *C.p.p.* Les requérants ayant manifestement l'intérêt requis, il est ainsi opportun que la permission d'appeler soit accordée.

[7] La formation qui entendra le pourvoi sera possiblement d'avis que certains des moyens soulevés par les requérants ne rencontrent pas l'exigence de l'article 291 puisqu'ils soulèvent des questions mixtes de droit et de fait. Si tel est le cas, elle pourra les écarter.

ISSUES IN APPEAL

[47] The Appellants submit eleven issues roughly corresponding to those raised before the Superior Court. The Respondents submit that the only real question raised by the Appellants is whether or not the Superior Court judge erred by confirming the trial judge's conclusions regarding the absence of a significant change in the vulnerability of the French language in Québec. Nevertheless, the Respondent addresses each of the issues submitted by Appellants, albeit, in a reformulated manner.

[48] With a view to responding to each of the issues raised, I propose to regroup and restate them as follows:

1) Are the issues raised by the Appellants' questions of law alone, in terms of s. 291 *C.P.P.*?

2) Do the limitations set out in ss. 51, 52 and 58 *C.F.L.* violate freedom of expression as guaranteed by s. 2(*b*) of the *Canadian Charter* and s. 3 of the *Quebec Charter*?

3) Do the limitations set out in ss. 51, 52 and 58 *C.F.L.* violate the right to equality guaranteed by s. 15 of the *Canadian Charter* and s. 10 of the *Quebec Charter*?

4) Do the limitations set out in ss. 51, 52 and 58 *C.F.L.* violate the right to liberty guaranteed by s. 7 of the *Canadian Charter* and s. 1 of the *Quebec Charter*?

5) Do the limitations set out in ss. 51, 52 and 58 *C.F.L.* violate the right to peaceful enjoyment of private property guaranteed by s. 6 of the *Quebec Charter*?

[49] Before discussing these issues, it is necessary to take cognizance of the applicable legislative provisions which, for convenience, I have reproduced in the schedule to these reasons. It is also necessary to review the fundamental case law.

[50] The Supreme Court of Canada in *Ford*[72] and in *Devine*,[73] as well as the Quebec Court of Appeal in *Entreprises W.F.H. Ltée*,[74] ruled that legislation requiring joint or "markedly predominant" use of French survived *Charter* scrutiny. Before further discussion of the judgments in the lower courts, it is necessary to outline the rulings in these cases regarding freedom of expression and equality rights.

THE CASE LAW

(i) *Ford*

[51] In the 1988 *Ford* case, five businesses displayed commercial advertising signs with both French and English texts. At the time, s. 58 *C.F.L.* required that public signs, posters and commercial advertising be solely in French. In order to assert their freedom of expression and their right to equality pursuant to ss. 2(*b*) and 15 of the *Canadian Charter* and ss. 3 and 10 of the *Quebec Charter*, the businesses filed a motion for declaratory judgment to have s. 58 *C.F.L.* declared inoperative and of no force and effect.

[52] The Supreme Court held that a valid override provision (i.e. the "notwithstanding clause") protected s. 58 *C.F.L.* from ss. 2 and 7 to 15 of the *Canadian Charter*,[75] but nothing prevented the application of ss. 3 and 10 of the *Quebec Charter*.[76] Nonetheless, the Court undertook its analysis of the freedom of expression issue as if both *Charters* applied. Indeed, the Court noted that "the words "freedom of expression" in s. 2(*b*) of the *Canadian Charter* and s. 3 of the *Quebec Charter* should be given the same meaning."[77] As for the right to equality, the Court limited its analysis to s. 10 of the *Quebec Charter.*

[53] On the issue of freedom of expression, the Supreme Court decided that the right guaranteed by s. 2(*b*) of the *Canadian Charter* and s. 3 of the *Quebec Charter* included the freedom to express oneself in the language of one's choice.[78] The Supreme Court further decided that a large and liberal interpretation of freedom of expression included commercial expression.[79] By prohibiting the use of languages other than French in commercial advertising, it followed that s. 58 *C.F.L.* clearly infringed upon the businesses' freedom of expression.

[54] The Supreme Court then addressed the test established in *R. v. Oakes*[80] as restated in *R. v. Edwards*,[81] as follows:

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72 *Ford*, *supra*, note 6.
73 *Devine*, *supra*, note 7.
74 *Entreprises W.F.H.*, *supra*, note 8.
75 *Ford*, *supra*, note 6, p. 734-745.
76 *Id.*, p. 745-747.
77 *Id.*, p. 748.
78 *Ford*, *supra*, note 6, p. 754.
79 *Id.*, p. 766-767.
80 *R. v. Oakes*, [1986] 1 S.C.R. 103 [*Oakes*].
81 *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713 [*Edwards Books*].

> Two requirements must be satisfied to establish that a limit is reasonable and demonstrably justified in a free and democratic society. First, the legislative objective which the limitation is designed to promote must be of sufficient importance to warrant overriding a constitutional right. It must bear on a "pressing and substantial concern". Second, the means chosen to attain those objectives must be proportional or appropriate to the ends. The proportionality requirement, in turn, normally has three aspects: the limiting measures must be carefully designed, or rationally connected, to the objective; they must impair the right as little as possible; and their effects must not so severely trench on individual or group rights that the legislative objective, albeit important, is nevertheless outweighed by the abridgment of rights. The Court stated that the nature of the proportionality test would vary depending on the circumstances. Both in articulating the standard of proof and in describing the criteria comprising the proportionality requirement the Court has been careful to avoid rigid and inflexible standards. [82]

[55] The Court noted that s. 1 of the *Canadian Charter* and s. 9.1 of the *Quebec Charter* were equivalent and both are subject to the *Oakes* test.

[56] The Court concluded that the evidence presented by the Attorney General failed to justify the limitations imposed by s. 58 *C.F.L.*[83] Because the Appellants dispute the interpretation of the Supreme Court's reasons on this issue, it is relevant to reproduce the Supreme Court's reasoning in *Ford* at length to which I have added spacing for ease of comprehension:

> The section 1 and s. 9.1 materials consist of some fourteen items ranging in nature from the general theory of language policy and planning to statistical analysis of the position of the French language in Quebec and Canada. The material deals with two matters of particular relevance to the issue in the appeal: (a) the vulnerable position of the French language in Quebec and Canada, which is the reason for the language policy reflected in the Charter of the French Language; and (b) the importance attached by language planning theory to the role of language in the public domain, including the communication or expression by language contemplated by the challenged provisions of the *Charter of the French Language*.
>
> As to the first, the material amply establishes the importance of the legislative purpose reflected in the *Charter of the French Language* and that it is a response to a substantial and pressing need. Indeed, this was conceded by the respondents both in the Court of Appeal and in this Court.

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[82] *Ford*, *supra*, note 6, p. 769.
[83] *Id.*, p. 777-780.

The causal factors for the threatened position of the French language that have generally been identified are: (a) the declining birth rate of Quebec Francophones resulting in a decline in the Quebec francophone proportion of the Canadian population as a whole; (b) the decline of the francophone population outside Quebec as a result of assimilation; (c) the greater rate of assimilation of immigrants to Quebec by the anglophone community of Quebec; and (d) the continuing dominance of English at the higher levels of the economic sector. These factors have favoured the use of the English language despite the predominance in Quebec of a francophone population.

Thus, in the period prior to the enactment of the legislation at issue, the "visage linguistique" of Quebec often gave the impression that English had become as significant as French. This "visage linguistique" reinforced the concern among Francophones that English was gaining in importance, that the French language was threatened and that it would ultimately disappear. It strongly suggested to young and ambitious Francophones that the language of success was almost exclusively English. It confirmed to Anglophones that there was no great need to learn the majority language. And it suggested to immigrants that the prudent course lay in joining the anglophone community. The aim of such provisions as ss. 58 and 69 of the *Charter of the French Language* was, in the words of its preamble, "to see the quality and influence of the French language assured". The threat to the French language demonstrated to the government that it should, in particular, take steps to assure that the "visage linguistique" of Quebec would reflect the predominance of the French language.

The section 1 and s. 9.1 materials establish that the aim of the language policy underlying the *Charter of the French Language* was a serious and legitimate one. They indicate the concern about the survival of the French language and the perceived need for an adequate legislative response to the problem. Moreover, they indicate a rational connection between protecting the French language and assuring that the reality of Quebec society is communicated through the "visage linguistique".

The section 1 and s. 9.1 materials do not, however, demonstrate that the requirement of the use of French only is either necessary for the achievement of the legislative objective or proportionate to it. That specific question is simply not addressed by the materials.

In the opinion of this Court it has not been demonstrated that the prohibition of the use of any language other than French in ss. 58 and 69 of the *Charter of the French Language* is necessary to the defence and enhancement of the status of the

> French language in Quebec or that it is proportionate to that legislative purpose. Since the evidence put to us by the government showed that the predominance of the French language was not reflected in the "visage linguistique" of Quebec, the governmental response could well have been tailored to meet that specific problem and to impair freedom of expression minimally.[84]

[57] In essence, the Supreme Court held that requiring the exclusive use of French in commercial advertising was not minimally impairing and was not justified under s. 1 of the *Canadian Charter* or s. 9.1 of the *Quebec Charter*. Consequently, the Court declared s. 58 *C.F.L.* inoperative and of no force and effect.

[58] However, the Supreme Court went on to say that requiring the predominant or concurrent display of French would be a minimally impairing and proportionate measure:

> Thus, whereas requiring the predominant display of the French language, even its marked predominance, would be proportional to the goal of promoting and maintaining a French "visage linguistique" in Quebec and therefore justified under the Quebec Charter and the Canadian Charter, requiring the exclusive use of French has not been so justified. French could be required in addition to any other language or it could be required to have greater visibility than that accorded to other languages. Such measures would ensure that the "visage linguistique" reflected the demography of Quebec: the predominant language is French.[85]

[59] Thus, the Supreme Court concluded that it was unnecessary to address the right to equality under s. 10 of the *Quebec Charter* to decide the appeal. But, since this issue was addressed by the lower Court in *Devine*, the Court nevertheless addressed the issue in *Ford*.

[60] Following its ruling in *Forget v. Quebec (Attorney General),*[86] the Supreme Court considered (1) whether s. 58 *C.F.L.* created a distinction based on a prohibited ground and (2) whether this distinction had "the effect of nullifying or impairing the right to full and equal recognition and exercise of a human right or freedom, meaning a human right or freedom recognized by the *Quebec Charter of Human Rights and Freedoms.*"[87] The Court concluded that s. 58 *C.F.L.* violated s. 10 of the *Quebec Charter*.

[61] In the first part of the test, the Court ruled that s. 58 *C.F.L.* created a distinction based on language. Requiring public signs, posters and commercial advertising to be

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[84] *Ford*, *supra*, note 6, p. 777-780.
[85] *Id.*, p. 780.
[86] *Forget v. Quebec (Attorney General)*, [1988] 2 S.C.R. 90.
[87] *Ford*, *supra*, note 6, p. 787.

solely in French allowed Francophones to use their language of choice, while Anglophones and Allophones were prohibited from doing so.[88]

[62] In the second part of the test, the Supreme Court decided that this distinction was discriminatory. The Supreme Court developed the idea that the right to equality under the *Quebec Charter* had to be linked to another right or freedom provided in the *Quebec Charter*; here, freedom of expression. Since the Supreme Court had previously decided that the impugned provision violated freedom of expression, it followed that the distinction based on language created by s. 58 *C.F.L.* had the effect of nullifying the right to full and equal recognition of freedom of expression.[89]

(ii) *Devine*

[63] In 1988, the Supreme Court issued its decision in *Ford*'s companion case, *Devine*. In *Devine*, a printing business displayed a commercial sign with English text only, and serviced its clientele in English. The business challenged ss. 52, 57, 58, 59, 60 and 61 *C.F.L.*, by an action in nullity contending that these provisions violated freedom of expression and the right to equality pursuant to ss. 2(*b*) and 15 of the *Canadian Charter* and ss. 3 and 10 of the *Quebec Charter.*

[64] Regarding the applicability of both *Charters*, the Supreme Court referred to its reasons in *Ford*, ruling, however, that the *Canadian Charter* applied to ss. 57, 59, 60 and 61 *C.F.L.* The Court also referred to its reasons in *Ford* regarding to the constitutionality of s. 58 *C.F.L.*

[65] Sections 52 and 57 *C.F.L.*, (which remain essentially the same today) both permit the joint use of French and another language. Together, ss. 52 and 89 allow businesses to draw up catalogues, brochures and any similar publications in French and in another language while ss. 57 and 89 does the same for employment application forms, order forms, invoices and receipts.

[66] Referring to its reasons in *Ford,* the Supreme Court concluded that by compelling the use of French, ss. 52 and 57 *C.F.L.* infringed the parties' freedom of expression.[90] But, as expressed in *obiter* in *Ford*, the Court held that requiring joint use was justified under s. 1 of the *Canadian Charter* and s. 9.1 of the *Quebec Charter*:

> It remains to be considered whether the limit imposed on freedom of expression by the challenged provisions of the *Charter of the French Language*, which require the use of French while at the same time permitting the use of another language, is justified under s. 1 of the *Canadian Charter of Rights and Freedoms* and s. 9.1 of the *Quebec Charter*. The section 1 and s. 9.1 materials submitted by the

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88 *Ford*, *supra*, note 6, p. 787.
89 *Ibid.*
90 *Devine*, *supra*, note 7, p. 813.

> Attorney General of Quebec in justification of the challenged provisions were considered in *Ford*. For the reasons there stated, legislation requiring the exclusive as opposed to the predominant use of French is not justified under s. 1 or s. 9.1. Section 58 of the *Charter of the French Language*, as was shown in *Ford*, does require exclusive use of French and therefore does not survive s. 9.1 scrutiny. For the reasons given in that case, the requirement of either joint or predominant use is justified under s. 9.1 and s. 1.[91]

[67] On the question of equality, the plaintiff invoked both s. 10 of the *Quebec Charter* and s. 15 of the *Canadian Charter.* The Supreme Court dealt with each argument separately.

[68] Regarding the *Quebec Charter*, the Supreme Court followed its reasoning in *Ford* and held that ss. 52 and 57 *C.F.L.* did not infringe upon the right to equality. In the first part of the test, the Court ruled that the impugned provisions created a distinction based on language, by requiring that Anglophones use another language when expressing themselves, while not requiring the same of Francophones.[92]

[69] In the second part of the test, the Court decided that this distinction was not discriminatory. The Court applied the idea that the right to equality under the *Quebec Charter* had to be linked to another right or freedom; here, again, freedom of expression. Since the Court previously ruled that the impugned provisions did not violate freedom of expression, it followed that there could be no violation of the right to an equal recognition of freedom of expression.[93]

[70] With regard to the *Canadian Charter,* the Supreme Court did not discuss whether s. 57 *C.F.L.* infringed s. 15. Instead, the Court ruled that its conclusion with respect to the operation of s. 1 applied equally to s. 15. In other words, if the legislation imposed a reasonable limit on freedom of expression, the same was true with respect to equality.[94]

(iii) *Entreprises W.F.H.*

[71] In 2001, in the *Entreprises W.F.H.* case, an Anglophone business displayed a commercial sign with its name written in French and in English. The text was of equal size. This violated the new and current version of s. 58 *C.F.L.*, providing that French be "markedly predominant" when used with another language. The business was fined, pursuant to s. 205 *C.F.L.* In response, the business entered a not-guilty plea and contended that these provisions violated its freedom of expression and right to equality, pursuant to ss. 2(*b*) and 15 of the *Canadian Charter* and ss. 3 and 10 of the *Quebec Charter.* This Court dismissed both *Charter* challenges.

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91 *Devine*, *supra*, note 7, p. 814.
92 *Id.*, p. 817.
93 *Id.*, p. 818-819.
94 *Id.*, p. 819-820.

[72] Justice Biron, speaking for the Court held that s. 58 *C.F.L.* did not violate freedom of expression because the provision simply implemented the guidelines stated in an *obiter dictum* by the Supreme Court in *Ford* and *Devine*:

> [44] La disposition qui prescrivait que l'affichage public et la publicité commerciale devaient se faire exclusivement en français a été déclarée inopérante en 1988. À l'évidence, une telle disposition le serait encore aujourd'hui.
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> [45] La Cour suprême a déclaré en 1988, *en obiter*, c'est-à-dire sans que cela soit nécessaire pour appuyer sa décision, qu'exiger que la langue française prédomine, même nettement, sur les affiches et les enseignes serait proportionnel à l'objectif de promotion et préservation d'un «visage linguistique» français au Québec et serait en conséquence justifié en vertu des *Chartes québécoise et canadienne*. La Cour suprême est allée jusqu'à dire spécifiquement, à la p. 780 de l'arrêt *Ford*, qu'on pourrait exiger que le français accompagne toute autre langue ou qu'on pourrait exiger qu'il soit plus en évidence que d'autres langues.
>
> [46] Je suis d'avis que l'art. 58 ne fait rien d'autre, dans sa forme actuelle, que de reproduire les lignes directrices formulées par la Cour suprême. Je suis également d'opinion qu'à la lumière de la preuve soumise à la Cour suprême en 1988 une disposition telle que l'art. 58 actuel aurait résisté à une attaque fondée sur le droit à la liberté d'expression et sur le droit à l'égalité, et n'aurait pas été déclarée inopérante.[95]

[73] Justice Biron also applied the Supreme Court's ruling on equality rights in *Devine*. Following the reasoning in that case, an infringement on s. 15 of the *Canadian Charter* and s. 10 of the *Quebec Charter* would nonetheless be justified by virtue of ss. 1 and 9.1.[96]

[74] Even so, the Court examined whether s. 58 *C.F.L.* infringed on s. 15 of the *Canadian Charter*. The Court applied *Law v. Canada (Minister of Employment and Immigration)*[97] — the applicable legal framework at the time — and concluded that the legislation did not infringe on the right to equality. First, the Court held that the legislation created a distinction based on language. Indeed, Francophones could advertise solely in their first language, while non-Francophones could not.[98] Second, the Court saw no discrimination in the legislation. Non-Francophone business owners could still advertise in the form and with the content of their choice, so long as they included a "markedly predominant" French version.[99]

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95 *Entreprises W.F.H.*, *supra*, note 8, paras. 45-46.
96 *Id.*, para. 88.
97 *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497.
98 *Entreprises W.F.H.*, *supra*, note 8, para. 91.
99 *Entreprises W.F.H.*, *supra*, note 8, paras. 91-93.

ANALYSIS

1) Are the issues raised by the Appellants questions of law alone in terms of s. 291 *C.P.P.*

[75] The Appellants submit that the assessment by the trial judge of the "social and legislative facts" raises a question of law because it relates to evidence presented in the context of a constitutional challenge and not a purely penal case. Prohibiting the dispute of this sort of fact in penal proceedings would prevent a party from making a complete case at the appeal level.

[76] When Hogue J.A. granted leave to appeal, she pointed out that some of the issues raised by the Appellants were not questions of law alone as required for leave to appeal to be granted under s. 291 *C.P.P.* She left the question open for the panel hearing the case on the merits.[100]

[77] Section 291 *C.P.P.* reads:

> **291.** The appellant or respondent in Superior Court and, even if they were not parties to the proceedings, the Attorney General and the Director of Criminal and Penal Prosecutions may, if they show sufficient interest in a question of law alone, bring an appeal before the Court of Appeal, with leave of a judge of that court, from a judgment
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> (1) rendered in appeal by a judge of the Superior Court;
>
> (2) granting or dismissing an application for habeas corpus or application for judicial review.

> **291**. L'appelant ou l'intimé en Cour supérieure et, même s'ils n'étaient pas partie à l'instance, le procureur général ou le directeur des poursuites criminelles et pénales peuvent, s'ils démontrent un intérêt suffisant pour faire décider d'une question de droit seulement, interjeter appel devant la Cour d'appel, avec la permission d'un juge de cette cour, d'un jugement
>
> 1° rendu en appel par un juge de la Cour supérieure;
>
> 2° qui accueille ou rejette une demande d'habeas corpus ou de pourvoi en contrôle judiciaire.

[78] In *R. v. Morin*,[101] the Supreme Court of Canada illustrated the meaning of a "question of law alone" with three examples. An error of law will arise when: (1) the trial judge erred in applying the law to undisputed facts; (2) the trial judge failed to assess certain evidence based on legal misdirection; or (3) the trial judge failed to consider all of the evidence in relation to the ultimate issue.[102]

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[100] *156158 Canada inc. v. Québec (Procureure générale), supra*, note 71, paras. 6-7.
[101] *R. v. Morin*, [1992] 3 S.C.R. 286.
[102] *R. v. Morin*, p. 294-296.

[79] More broadly, Professor Frédéric Bachand (as he then was) explains that a question of law concerns the elaboration or the interpretation of the applicable law in a given case.[103]

[80] The Appellants aim to revisit the conclusions of the Supreme Court in *Ford* and *Devine* by demonstrating that the French language in Quebec is no longer vulnerable and questioning the trial judge's findings of fact in this respect.

[81] In *Canada (Attorney General) v. Bedford*,[104] the Supreme Court of Canada was called to decide whether or not it would revisit its decision in the *Prostitution Reference*.[105] Chief Justice McLachlin, writing for the Court, explained that "the law requires that courts follow and apply authoritative precedents"[106] — a foundational principle of the common law. As such, lower courts are "not entitled to ignore binding precedent, and the threshold for revisiting a matter is not an easy one to reach".[107] This threshold may be met in two ways:

> [42] In my view, a trial judge can consider and decide arguments based on *Charter* provisions that were not raised in the earlier case; this constitutes a new legal issue. Similarly, the matter may be revisited if new legal issues are raised as a consequence of significant developments in the law, or if there is a change in the circumstances or evidence that fundamentally shifts the parameters of the debate.[108]

[82] The Chief Justice further explained that when considering attempts to demonstrate "a change in the circumstances or evidence that fundamentally shifts the parameters of the debate" in constitutional matters, an appellate court should not interfere with the trial judge's findings on social and legislative facts, absent a palpable and overriding error:

> [48] The Court of Appeal held that the application judge's findings on social and legislative facts — that is, facts about society at large, established by complex social science evidence — were not entitled to deference. With respect, I cannot agree. As this Court stated in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, appellate courts should not interfere with a trial judge's findings of fact, absent a palpable and overriding error.

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[103] Frédéric Bachand, "Le traitement en appel des questions de fait, questions de droit et questions mixtes" (2007) 86 *Rev. Du B. can.* 97, 107: "Dans le contexte d'un appel, on peut donc définir la question de droit comme celle contestant le bien-fondé d'une conclusion qu'a tirée le juge de première instance en décrivant le cadre juridique qu'il a appliqué aux faits du litige"; See also Tristan Desjardins, *L'appel en droit criminel et pénal*, 2nd ed., Montreal, LexisNexis, 2012, No. 889-899.

[104] *Canada (Attorney General) v. Bedford*, [2013] 3 S.C.R. 1101, 2013 SCC 72 [*Bedford*].

[105] *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123.

[106] *Bedford*, *supra*, note 104, para. 38.

[107] *Id.*, para. 44.

[108] *Id.*, para. 42.

> [49] When social and legislative evidence is put before a judge of first instance, the judge's duty is to evaluate and weigh that evidence in order to arrive at the conclusions of fact necessary to decide the case. The trial judge is charged with the responsibility of establishing the record on which subsequent appeals are founded. Absent reviewable error in the trial judge's appreciation of the evidence, a court of appeal should not interfere with the trial judge's conclusions on social and legislative facts. This division of labour is basic to our court system. The first instance judge determines the facts; appeal courts review the decision for correctness in law or palpable and overriding error in fact. This applies to social and legislative facts as much as to findings of fact as to what happened in a particular case.[109]

[83] The Supreme Court offered two practical justifications for the use of palpable and overriding error as a standard of review. First, this standard avoids duplication of the "time-consuming and tedious work of the first instance judge in reviewing all the material and reconciling differences between the expert testimonies, studies and research results."[110] Second, it avoids the difficult task of applying a different standard of review to social and legislative facts that are often intertwined with adjudicative facts.[111]

[84] The Supreme Court recently applied and reaffirmed these principles in *Carter v. Canada (Attorney General)*,[112] in deciding whether to revisit its decision in *Rodriguez v. British Columbia (Attorney General).*[113] Reviewing the trial judge's findings on social and legislative facts — albeit in the context of the *Oakes* analysis — the Court added that merely pointing to conflicting evidence was not sufficient to establish a palpable and overriding error:

> [109] We cannot accede to Canada's submission. In *Bedford*, this Court affirmed that a trial judge's findings on social and legislative facts are entitled to the same degree of deference as any other factual findings (para. 48). In our view, Canada has not established that the trial judge's conclusion on this point is unsupported, arbitrary, insufficiently precise or otherwise in error. At most, Canada's criticisms amount to "pointing out conflicting evidence", which is not sufficient to establish a palpable and overriding error (*Tsilhqot'in Nation*, at para. 60). We see no reason to reject the conclusions drawn by the trial judge. They were reasonable and open to her on the record.[114]

[85] Accordingly, when considering whether to depart from past precedent, a trial judge's findings on social and legislative facts constitute findings of fact and in appeal

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[109] *Bedford*, *supra*, note 104, para. 49.
[110] *Id.*, para. 51.
[111] *Id.*, para. 52.
[112] *Carter v. Canada (Attorney General)*, [2015] 1 S.C.R. 331, 2015 SCC 5 [*Carter*].
[113] *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519 [*Rodriguez*].
[114] *Rodriguez*, para. 109.

should be treated like any other adjudicative fact. Appellate courts should not interfere with these findings absent a palpable and overriding error. That the findings of fact are made in the context of a challenge of the constitutional validity of a legal provision does not change this.

[86] In the case at bar, the Court of Quebec judge, after a thorough review[115] and analysis[116] of the evidence presented by both parties, held that no fundamental change in the condition of the French language had occurred in Quebec since *Ford* and *Devine*.[117]

[87] In their submissions, the Appellants attempt to refute the Court of Quebec's assessment of the social and legislative facts presented at trial by proposing a different interpretation of the evidence. According to this interpretation, and based on the expert evidence they adduced at trial to the effect that the French language is no longer in the precarious situation of 1988, the Appellants maintain that they have satisfied their burden of proof.

[88] However, the Appellants' assertions point out conflicting expert evidence, raising questions of fact or, at best, mixed questions of fact and law. Depending on how one construes their arguments, they challenge either the findings of fact or the application of the law to disputed facts. In any case, they do not raise a "question of law alone" within the meaning of s. 291 *C.P.P.*

[89] Despite the foregoing, a question of law is raised as follows. The trial judge, in assessing the evidence adduced before him and laying out Appellants' burden of proof stated the following:

> [177] Also, in assessing the weight of the evidence, the Court must be mindful of the fact that the burden of proof lies with the petitioners-defendants. Moreover, the burden imposed upon the petitioners-defendants goes beyond a simple balance of probabilities. Instead they must clearly establish that the situation of the French language has radically changed since the decision of the Supreme Court in Ford and Devine. In other words, the evidence has to show that the French language is no longer in danger and in need of the protection of special legislation designed to give it greater visibility in the linguistic landscape.

[Emphasis added]

[90] In order to succeed, Appellants must prove a change in the circumstances or evidence that "fundamentally shifts the parameters of the debate",[118] since the decision of the Supreme Court of Canada in *Ford*. In practical terms, the Appellants must

[115] Judgment of the Court of Quebec, *supra*, note 3, paras. 24-52.
[116] *Id.*, paras. 159-173, 184-200.
[117] *Id.*, para. 214.
[118] *Carter*, *supra*, note 112, para. 44.

demonstrate that unlike the circumstances existing at the time of *Ford*, the French language is currently not vulnerable.

[91] The trial judge was examining this question and weighing the competing expert evidence when he wrote the foregoing passage. While the burden is on Appellants to demonstrate such a "fundamental shift", such burden is to be satisfied on a balance of probability. Absent specified exceptions (e.g. *prima facie* standard of proof) this is the standard of proof applicable in civil cases.[119] Where an accused has any burden in a penal case, the applicable standard is also a balance of probabilities if not that of raising a reasonable doubt. There is no third standard.[120]

[92] While the judge of the Court of Quebec could be said to have committed an error of law by imposing a burden higher than tipping the balance, such error is not overriding here given the findings of fact based on the evidence presented.

[93] Any error of law arising from para. [177] of the Court of Quebec judgment is not raised in the Superior Court judgment.

[94] Moreover, it appears that the trial judge's reference to "beyond a simple balance of probability" is not a reference to a higher standard of proof but rather the quality of the evidence required. The judge correctly underlined the requirement that the proof necessary to depart from precedent be "solid, compelling and unequivocal"[121] that French is no longer vulnerable. To adapt Lord Hoffman's[122] example, more cogent evidence might be required to convince me that a witness had seen a lion rather than a dog walking through Mount Royal Park. Nevertheless, the burden of proof would ultimately be satisfied on a balance of probability.

[95] The judge of the Court of Quebec reviewed the evidence and the judge of the Superior Court scrutinized that assessment. In the latter's opinion, there was more than ample evidence on balance to agree with the judge of the Court of Quebec that the factors threatening the French language considered by the Supreme Court in *Ford* were still present, notwithstanding that the French language had made progress. The expert evidence was contradictory. The presentation by Appellants did not fundamentally shift the parameters of the debate. No significant change justifying a departure from *Ford* and *Devine* was demonstrated.

[96] I find no error in that conclusion which is essentially factual. Moreover, even if the judge thought that the Appellants' burden was higher than tipping the balance such error

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[119] *Secretary of State for the Home Department v Rehman,* [2001] U.K.H.L. 47, para. 55; see also *Re C.D.,* [2008] U.K.H.L 33, para. 26, 2008 SCC 53; *F.H. v. McDougall*, [2008] 3 S.C.R. 41, paras. 32-38; Sidney N. Lederman, Alan W. Bryant and Michelle K. Fuerst, *The Law of Evidence in Canada,* 4th ed., Markham, LexisNexis, 2014, para. 5.67.

[120] S. Lederman, A. Bryant and M. Fuerst, The Law of Evidence in Canada, *supra*, note 119, para. 5.105.

[121] Judgment of the Court of Quebec, *supra*, note 3, para. 181.

[122] *Secretary of State for the Home Department v Rehman*, *supra*, note 119, para. 55.

does not affect the outcome. The assessment of the evidence and the factual conclusions of the Quebec Court judge[123] were reasonable and open to him on a balance of probabilities.

[97] The other issues raised by Appellants do raise questions of law.

2) Do the limitations set out in ss. 51, 52 and 58 *C.F.L.* violate freedom of expression as guaranteed by s. 2(b) of the *Canadian Charter* and s. 3 of the *Quebec Charter*?

[98] The Appellants assert that both the Court of Quebec judge and the Superior Court judge misinterpreted the *obiter dictum* in *Ford* and *Devine*. In their view, the "markedly predominant" or joint use of French are two alternative measures that are only "theoretically" justified under the saving provision of the *Canadian Charter* and the *Quebec Charter*. As such, the legislature must justify the reasons why it chose one alternative over the other.

[99] Based on that premise, the Appellants argue that *Entreprises W.F.H.* is not a relevant precedent, since the petitioners in that case submitted no evidence regarding the vulnerability of the French language, so that they did not meet their burden under s. 1 or s. 9.1. Consequently, this case should not be interpreted as having any bearing on the vulnerability of the French language.

[100] The Appellants continue by submitting that the choice between a "markedly predominant" or "equal size" provision raises a new legal issue, thus satisfying *Bedford* and *Carter*. Consequently, it falls on the Attorney General to establish that "markedly predominant" legislation is justified under the *Oakes* test. In this respect, the Court of Quebec judge and the Superior Court judge in the case at bar, as well as all the judges in the *Entreprises W.F.H.* case, erred in law according to the Appellants.

[101] The Appellants add that the "markedly predominant" standard does not maintain the true "*visage linguistique*" of Montreal, which ought to reflect the multilingual demographic that exists on the ground. Furthermore, the concept of "*visage linguistic*" explained in *Ford* only refers to "those outside signs visible from a public thoroughfare". Following this definition, everything found inside a place of business, such as signs, publications, packaging and websites, are not part of the "*visage linguistique*" and need not contain French.

[102] Appellants are incorrect.

[103] In 1988, the Supreme Court of Canada in *Ford* declared, in *obiter dictum*, that "requiring the predominant display of the French language, even its marked predominance", would be justified under s. 1 of the *Canadian Charter* and s. 10 of the

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[123] Judgment of the Court of Quebec, *supra*, note 3, paras. 184-200.

Quebec Charter. The Court proposed two constitutionally valid alternatives to requiring the exclusive use of French. First, "French could be required in addition to any other language". Second, French "could be required to have greater visibility than that accorded to other languages."[124]

[104] The Supreme Court in *Ford* decided that each alternative — the joint display of French or the predominant display of French — satisfied the *Oakes* test under both the *Canadian Charter* and the *Quebec Charter.*

[105] Moreover, there is nothing "theoretical" about the *obiter dictum* in *Ford*. When the Supreme Court invalidates an unconstitutional rule, it often proposes constitutionally valid alternatives or guidelines for the legislature.[125] In this case, the Supreme Court left the legislator a choice between two constitutionally valid options. It is not for the courts to now question that choice.

[106] The impugned provisions fall squarely within the ambit of the Court's *obiter dictum* in *Ford*. On the one hand, ss. 51 and 52 *C.F.L.*, when read with s. 89, allow the concurrent use of French and English on product packaging, as well as in catalogues, brochures, folders, commercial directories and similar publications. This complies with the first alternative proposed by the Supreme Court in *Ford*. The Supreme Court in *Devine* expressly said so regarding s. 52 *C.F.L.*[126]

[107] On the other hand, the post *Ford* version of s. 58 *C.F.L.* provides that French be markedly predominant when used with another language in commercial advertising and public signs, which the *C.F.L. Rules* stipulate to mean that French text must be twice as large as the text of any other language. This accords with the second alternative proposed by the Supreme Court in *Ford*. This Court so decided in *Entreprises W.F.H.* In that case, the Court held that s. 58 *C.F.L.* implemented the *obiter dictum* expressed by the Supreme Court in *Ford*. The Court felt bound by the Supreme Court proposition that a markedly predominant requirement would satisfy the *Oakes* test. In such regard, *Entreprises W.F.H.* is a relevant and binding precedent, contrary to Appellants contention.

[108] The infringement of freedom of expression is provided by law and thus permitted by s. 1 of the *Canadian Charter* and s. 9.1 of the *Quebec Charter*.

[109] Given the decisions of the Supreme Court in *Bedford* and *Carter*, the Appellants must establish one of the conditions allowing the Court to revisit a previous ruling. In the context of the present case, the Appellants attempted to establish a significant change in

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124 *Ford*, *supra*, note 6, p. 780.

125 See *Reference re Securities Act*, [2011] 3 S.C.R. 837, 2011 SCC 66, paras. 128-133 [2011 Security Law Reference]; *R. v. Darrach*, [2000] 2 S.C.R. 443, 2000 SCC 46, paras. 30-31; *Entreprises W.F.H.*, *supra*, note 8, para. 54.

126 *Devine*, *supra*, note 7, p. 816.

the condition of the French language which would allow this Court to depart from *Ford*, *Devine* and *Entreprises W.F.H.*

[110] The legislature's choice of how to require the joint or "markedly predominant" display of French does not raise a new legal issue in the sense of *Bedford* and *Carter*. The Court in *Ford* clearly indicated that both alternatives satisfied s. 1 of the *Canadian Charter* and s. 9.1 of the *Quebec Charter*. There have been no significant developments in the law on this issue since *Ford*. Also, and as addressed above, the judge of the Court of Quebec found on the facts that no fundamental change in the status of the French language had occurred in Quebec since *Ford* and *Devine* and on review, the judge of the Superior Court found no error in such determination. In turn, I find no error in the opinion of the judge of the Superior Court.

[111] The Appellants have argued that the evidence they adduced should at least justify striking down provisions requiring predominant use of French in favour of joint use or shift the burden to Respondent to justify its choice away from the less intrusive alternative suggested by the Supreme Court in *Ford*. This, say Appellants, would still maintain the "*visage linguistique*" while minimally intruding on minority rights. Such an argument may well have merit in a policy discussion at the Quebec legislature. However, it is not for the courts to enter into a debate on policy options adopted by the legislature in complying with the Supreme Court's directive, as the Superior Court judge correctly stated.[127] Markedly predominant use of French was one option put forward by the Supreme Court. It is not for this Court to review the legislature's choice in the present circumstances.

[112] The expression "*visage linguistique*" used in *Ford* refers to the language used in the visual landscape of commerce in Quebec. The *C.F.L.* regulates this "*visage linguistique*", to ensure that the social reality of Quebec is portrayed in its "*visage linguistique*" and, ultimately, to protect the French language.[128]

[113] The Appellants' submissions on this issue must be rejected for the following reasons. First, when the Quebec government adopted the *C.F.L.* in 1977, it did so in response to its assessment of the vulnerable state of the French language in Quebec. This legislation does not aim to promote the multilingual image of Montreal, or, for that matter, "the multicultural heritage of Canadians", as does s. 27 of the *Canadian Charter*. Rather, it aims "to see the quality and influence of the French language assured"[129] in Quebec. The fact that the "*visage linguistique*" of Quebec now accurately reflects the predominance of French in Quebec indicates that the *C.F.L.* has met this objective.

[114] The Supreme Court did not limit the expression "*visage linguistique*" to outside signs. Indeed, the Appellants proposition that the concept of "*visage linguistic*" explained in *Ford* only refers to "those outside signs visible from a public thoroughfare" does not

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[127] Judgment of the Superior Court, *supra*, note 2, para. 45.
[128] *Ford*, *supra*, note 6, p. 779.
[129] *Id.*, p. 778.

withstand scrutiny. The distinction between outside and indoor signs appears nowhere in *Ford* or *Devine.* In fact, one of the plaintiffs in *Ford* used and displayed (commercial signs) within and on the exterior of its premises[130] in violation of s. 58 *C.F.L.* In *Devine,* the impugned provision, s. 51 *C.F.L.*, related to writings on products, which are generally located indoors.

[115] Unilingual English websites, which are the object of certain of the offences charged, were not discussed in *Ford* or *Devine* as they did not arise from the facts. However, I do not see any valid differentiation for present purposes in 2017 between a commercial brochure printed on paper and one existing in electronic form. If the publications on a website aim to conduct or promote business in the territory of Quebec,[131] then they are part of the "*visage linguistique*" of Quebec and thus subject to s. 52 *C.F.L.*

3) Do the limitations set out in ss. 51, 52 and 58 *C.F.L.* violate the right to equality guaranteed by s. 15 of the *Canadian Charter* and s. 10 of the *Quebec Charter*?

[116] The Appellants did not submit arguments regarding s. 10 of the *Quebec Charter* because, in their view, it achieves the same result as s. 15 of the *Canadian Charter*. To justify a departure from the Supreme Court's ruling in *Devine*, on the *Bedford* and *Carter* test, they propose a new legal argument and to demonstrate a significant evolution in the jurisprudence.

[117] Referring to *Quebec (Attorney General) v. A*[132] the Appellants submit that the impact of requiring the joint use of French restricts Anglophones' right to express themselves on the same basis as Francophones — i.e. in their first language. In addition, this requirement imposes economic and psychological burdens, as Quebec Anglophones are the only group in Canada to be treated in this way.

[118] In my view, the Appellants do not raise a new legal issue or a change in circumstance, which opens the door to this Court revisiting the Supreme Court ruling in *Devine*.

[119] The Superior Court judge confirmed the trial judge's s. 15 analysis. As for the violation under the *Quebec Charter* — which the trial judge did not address —, the Superior Court judge followed the reasoning in *Devine*. In the absence of a violation of the freedom of expression, it follows that there is no violation of the equal recognition of

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130 *Ford*, *supra*, note 6, p. 722.

131 *R. v. Waldie-Reid*, [2002] J.Q. No 1167 (QCCQ); confirmed in *Reid v. Court of Québec*, 2003 CanLII 17980 (QCCS).

132 *Quebec (A.G.) v. A*, *supra*, note 52.

this right. In any case, the judge reiterated that an infringement of the right to equality would be justified under the *Oakes* test.[133]

[120] The Appellants have failed to demonstrate that the provisions of ss. 51, 52 and 58 *C.F.L.* create a disadvantage, even when considering the more flexible test affirmed in *Quebec (Attorney General) v. A.* The challenged legislation does not prevent the Appellants from advertising with their desired form and content; it merely requires them to add a concurrent or "markedly predominant" French version should they wish to advertise in English. In addition, the Appellants did not provide any evidence of an additional economic burden that would result from this requirement. A disadvantage could potentially arise in the form of an additional economic burden placed on an Anglophone business required to advertise in two languages rather than one. If the business is thus obliged to incur additional expense for translation, website construction or printing, there might be in some cases, an additional burden created. Such burden might constitute discrimination for a small enterprise where the total revenue is such as to make the additional costs disproportionate and overly burdensome. Nevertheless, and as indicated above, no evidence of this nature was adduced by the Appellants before the trial court so that such an analysis of equality rights cannot be undertaken in this case.

4) Do the limitations set out in ss. 51, 52 and 58 *C.F.L.* violate the right to liberty guaranteed by s. 7 of the *Canadian Charter* and s. 1 of the *Quebec Charter*?

[121] Given that language is at the core of human identity, the Appellants claim that imposing a language-based restriction interferes with the sphere of personal autonomy protected by s. 7 of the *Canadian Charter.* In addition, they suggest that the right to liberty bolsters their previous argument regarding the distinction between outside/inside signs and visibility from a public thoroughfare in the context of freedom of expression.

[122] It is clear that corporations are not protected by s. 7.[134] With respect to individuals, in *B. (R.) v. Children's Aid Society of Metropolitan Toronto*,[135] La Forest J. explained that in any organized society, the liberty of individuals must be subject to some constraints for the common good:[136]

> The above-cited cases give us an important indication of the meaning of the concept of liberty. On the one hand, liberty does not mean unconstrained freedom [...]. Freedom of the individual to do what he or she wishes must, in any organized society, be subjected to numerous constraints for the common good. The state undoubtedly has the right to impose many types of restraints on individual behaviour, and not all limitations will attract Charter scrutiny. [...]

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133 Judgment of the Superior Court, *supra*, note 2, paras. 76-79.

134 *Irwin Toy Ltd. v. Quebec (Attorney General),* [1989] 1 S.C.R. 927, p. 1004: "That is, read as a whole, it appears to us that [s. 7] was intended to confer protection on a singularly human level."

135 *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315.

136 *Id.*, p. 368-369.

[123] The right to liberty is limited to protecting the basic human freedom to make inherently private choices free from state interference. As Justice La Forest stated in *Godbout v. Longueuil (City)*:

> 66 The foregoing discussion serves simply to reiterate my general view that the right to liberty enshrined in s. 7 of the Charter protects within its ambit the right to an irreducible sphere of personal autonomy wherein individuals may make inherently private choices free from state interference. I must emphasize here that, as the tenor of my comments in *B. (R.)* should indicate, I do not by any means regard this sphere of autonomy as being so wide as to encompass any and all decisions that individuals might make in conducting their affairs. Indeed, such a view would run contrary to the basic idea, expressed both at the outset of these reasons and in my reasons in *B. (R.),* that individuals cannot, in any organized society, be guaranteed an unbridled freedom to do whatever they please. Moreover, I do not even consider that the sphere of autonomy includes within its scope every matter that might, however vaguely, be described as "private". Rather, as I see it, the autonomy protected by the s. 7 right to liberty encompasses only those matters that can properly be characterized as fundamentally or inherently personal such that, by their very nature, they implicate basic choices going to the core of what it means to enjoy individual dignity and independence. As I have already explained, I took the view in *B. (R.)* that parental decisions respecting the medical care provided to their children fall within this narrow class of inherently personal matters. In my view, choosing where to establish one's home is, likewise, a quintessentially private decision going to the very heart of personal or individual autonomy.[137]

[124] Such reasoning has led the Supreme Court in reviewing the regulation of retail opening hours to decide that the right to liberty does not extend to "an unconstrained right to transact business whenever one wishes".[138] There exists a myriad of constraints on the manner in which business is conducted which are imposed by the legislature in its discretion in pursuit of what it considers the common good. For example, consumer protection laws regulate the conduct of business in various ways. One could extend the reasoning of the Supreme Court pertaining to store opening hours to conclude that the right to liberty does not extend to an unconstrained right to transact business in any manner one wishes. As such, the requirement that merchants publicize their business in French in addition to English is not a constraint on their liberty protected by the *Canadian Charter*.

[125] In view of the foregoing, ss. 51, 52 and 58 *C.F.L.* create no such restraint on the right to liberty of the individuals concerned. They may continue to use English to announce their wares and services.

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[137] *Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844, 1997, para. 66.
[138] *Edwards Books*, *supra*, note 81, p. 786.

5) Do the limitations set out in ss. 51, 52 and 58 *C.F.L.* violate the right to peaceful enjoyment of private property guaranteed by s. 6 of the *Quebec Charter*?

[126] The Appellants argue that the exception provided in s. 6 of the *Quebec Charter* — "except to the extent provided by law" — does not remedy the infringement of their right to the peaceful enjoyment of private property; otherwise the provision would be meaningless. This right would also bolster their previous argument regarding the distinction between outside/inside signs and public visibility in the context of freedom of expression.

[127] The wording of s. 6 of the *Charter of Quebec* is clear:

6. Every person has a right to the peaceful enjoyment and free disposition of his property, <u>except to the extent provided by law.</u>	**6.** Toute personne a droit à la jouissance paisible et à la libre disposition de ses biens, <u>sauf dans la mesure prévue par la loi.</u>

[128] I agree with the Respondent and the Superior Court judge. The impugned provisions do not affect the Appellants' right to peaceful enjoyment of private property. The Appellants may still advertise their desired content in the language of their choice, so long as this is accompanied by a concurrent or "markedly predominant" French version.

[129] In any event, the right guaranteed by s. 6 of the *Quebec Charter* only applies to the extent provided by the law.[139] The limitations on the language of commerce and business contained in the *C.F.L.* consist in prohibitions of a public nature which in the opinion of the legislature better the common good. As such, they fall within the ambit of the exception set out at s. 6 of the *Quebec Charter.*

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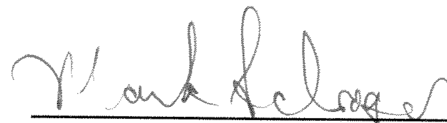
[130] For all the above reasons, I propose that the appeals be dismissed, without legal costs given the public interest nature of the debate.



MARK SCHRAGER, J.A.

139 *Abitibi (Municipalité régionale de comté d') v. Ibitiba Ltée*, (1993) R.J.Q. 1061 (C.A.), p. 13-14; *Veilleux v. Quebec (Commission de protection du territoire agricole)*, [1989] 1 S.C.R. 839, p. 851-852; *Commission de protection du territoire agricole du Québec v. Rhéaume*, [1984] C.A. 542, p. 547.

SCHEDULE TO THE REASONS OF SCHRAGER, J.A.

RELEVANT LEGISLATIVE AND CONSTITUTIONAL PROVISIONS

Charter of the French Language[140] (*"C.F.L."*)

51. Every inscription on a product, on its container or on its wrapping, or on a document or object supplied with it, including the directions for use and the warranty certificates, must be drafted in French. This rule also applies to menus and wine lists.	**51**. Toute inscription sur un produit, sur son contenant ou sur son emballage, sur un document ou objet accompagnant ce produit, y compris le mode d'emploi et les certificats de garantie, doit être rédigée en français. Cette règle s'applique également aux menus et aux cartes des vins.
The French inscription may be accompanied with a translation or translations, but no inscription in another language may be given greater prominence than that in French.	Le texte français peut être assorti d'une ou plusieurs traductions, mais aucune inscription rédigée dans une autre langue ne doit l'emporter sur celle qui est rédigée en français.
52. Catalogues, brochures, folders, commercial directories and any similar publications must be drawn up in French.	**52**. Les catalogues, les brochures, les dépliants, les annuaires commerciaux et toute autre publication de même nature doivent être rédigés en français.
58. Public signs and posters and commercial advertising must be in French.	**58**. L'affichage public et la publicité commerciale doivent se faire en français.
They may also be both in French and in another language provided that French is markedly predominant.	Ils peuvent également être faits à la fois en français et dans une autre langue pourvu que le français y figure de façon nettement prédominante.
However, the Government may determine, by regulation, the places, cases, conditions or circumstances where public signs and posters and commercial advertising must be in French only, where French need not	Toutefois, le gouvernement peut déterminer, par règlement, les lieux, les cas, les conditions ou les circonstances où l'affichage public et la publicité commerciale doivent se faire uniquement en français ou

[140] CQLR, c. C-11.

be predominant or where such signs, posters and advertising may be in another language only.

89. Where this Act does not require the use of the official language exclusively, the official language and another language may be used together.

205. Every person who contravenes a provision of this Act or the regulations adopted by the Government thereunder commits an offence and is liable

(a) to a fine of $600 to $6,000 in the case of a natural person;

(b) to a fine of $1,500 to $20,000 in the case of a legal person.

The fines are doubled for a subsequent offence.

In determining the amount of a fine, the judge takes into account, among other things, the revenues and other benefits the offender derived from the offence and any damages and socio-economic consequences that resulted from the offence.

Moreover, if a person is convicted of an offence under this Act, a judge may, on an application made by the prosecutor and submitted with the statement of offence, impose on the offender, in addition to any other penalty, a further fine equal to the financial gain the offender realized or derived from the offence, even if the maximum fine has also been imposed.

peuvent se faire sans prédominance du français ou uniquement dans une autre langue.

89. Dans les cas où la présente loi n'exige pas l'usage exclusif de la langue officielle, on peut continuer à employer à la fois la langue officielle et une autre langue.

205. Quiconque contrevient à une disposition de la présente loi ou des règlements adoptés par le gouvernement en vertu de celle-ci commet une infraction et est passible

a) dans le cas d'une personne physique, d'une amende d'au moins 600 $ et d'au plus 6 000 $;

b) dans le cas d'une personne morale, d'une amende d'au moins 1 500 $ et d'au plus 20 000 $.

En cas de récidive, les amendes applicables sont portées au double.

Dans la détermination du montant de l'amende, le juge tient compte notamment des revenus et des autres avantages que le contrevenant a retirés de la perpétration de l'infraction ainsi que du préjudice et des conséquences socioéconomiques qui en résultent.

De plus, lorsqu'une personne est déclarée coupable d'une infraction à une disposition de la présente loi, un juge peut, sur demande du poursuivant jointe au constat d'infraction, en plus d'imposer toute autre peine, imposer une amende additionnelle d'un montant équivalant au montant de l'avantage pécuniaire que la personne a acquis ou retiré de la perpétration de l'infraction, et ce, même si l'amende maximale lui a été imposée.

***Regulation Defining the Scope of the Expression "Markedly Predominant" for the Purposes of the Charter of the French Language*[141] ("*C.F.L. Rules*")**

1. In signs and posters of the civil administration, public signs and posters and posted commercial advertising that are both in French and in another language, French is markedly predominant where the text in French has a much greater visual impact than the text in the other language.

In assessing the visual impact, a family name, a place name, a trade mark or other terms in a language other than French are not considered where their presence is specifically allowed under an exception provided for in the Charter of the French language (chapter C-11) or its regulations.

2. Where texts both in French and in another language appear on the same sign or poster, the text in French is deemed to have a much greater visual impact if the following conditions are met:

(1) the space allotted to the text in French is at least twice as large as the space allotted to the text in the other language;

(2) the characters used in the text in French are at least twice as large as those used in the text in the other language; and

(3) the other characteristics of the sign or poster do not have the effect of reducing the visual impact of the text in French.

1. Dans l'affichage de l'Administration et dans l'affichage public et la publicité commerciale affichée faits à la fois en français et dans une autre langue, le français figure de façon nettement prédominante lorsque le texte rédigé en français a un impact visuel beaucoup plus important que le texte rédigé dans l'autre langue.

Dans l'appréciation de l'impact visuel, il est fait abstraction d'un patronyme, d'un toponyme, d'une marque de commerce ou d'autres termes dans une langue autre que le français lorsque leur présence est spécifiquement permise dans le cadre d'une exception prévue par la Charte de la langue française (chapitre C-11) ou par sa réglementation.

2. Lorsque les textes rédigés à la fois en français et dans une autre langue sont sur une même affiche, le texte rédigé en français est réputé avoir un impact visuel beaucoup plus important si les conditions suivantes sont réunies:

1° l'espace consacré au texte rédigé en français est au moins 2 fois plus grand que celui consacré au texte rédigé dans l'autre langue;

2° les caractères utilisés dans le texte rédigé en français sont au moins 2 fois plus grands que ceux utilisés dans le texte rédigé dans l'autre langue;

3° les autres caractéristiques de cet affichage n'ont pas pour effet de réduire l'impact visuel du texte rédigé en français.

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[141] CQLR, c. C-11, r. 11.

3. Where texts both in French and in another language appear on separate signs or posters of the same size, the text in French is deemed to have a much greater visual impact if the following conditions are met:

(1) the signs and posters bearing the text in French are at least twice as numerous as those bearing the text in the other language;

(2) the characters used in the text in French are at least as large as those used in the text in the other language; and

(3) the other characteristics of the signs or posters do not have the effect of reducing the visual impact of the text in French.

4. Where texts both in French and in another language appear on separate signs or posters of a different size, the text in French is deemed to have a much greater visual impact if the following conditions are met:

(1) the signs and posters bearing the text in French are at least as numerous as those bearing the text in the other language;

(2) the signs or posters bearing the text in French are at least twice as large as those bearing the text in the other language;

(3) the characters used in the text in French are at least twice as large as those used in the text in the other language; and

3. Lorsque les textes rédigés à la fois en français et dans une autre langue sont sur des affiches distinctes et de même dimension, le texte rédigé en français est réputé avoir un impact visuel beaucoup plus important si les conditions suivantes sont réunies:

1° les affiches sur lesquelles figure le texte rédigé en français sont au moins 2 fois plus nombreuses que celles sur lesquelles figure le texte rédigé dans l'autre langue;

2° les caractères utilisés dans le texte rédigé en français sont au moins aussi grands que ceux utilisés dans le texte rédigé dans l'autre langue;

3° les autres caractéristiques de cet affichage n'ont pas pour effet de réduire l'impact visuel du texte rédigé en français.

4. Lorsque les textes rédigés à la fois en français et dans une autre langue sont sur des affiches distinctes de dimensions différentes, le texte rédigé en français est réputé avoir un impact visuel beaucoup plus important si les conditions suivantes sont réunies:

1° les affiches sur lesquelles figure le texte rédigé en français sont au moins aussi nombreuses que celles sur lesquelles figure le texte rédigé dans l'autre langue;

2° les affiches sur lesquelles figure le texte rédigé en français sont au moins 2 fois plus grandes que celles sur lesquelles figure le texte rédigé dans l'autre langue;

3° les caractères utilisés dans le texte rédigé en français sont au moins 2 fois plus grands que ceux utilisés dans le texte rédigé dans l'autre langue;

(4) the other characteristics of the signs or posters do not have the effect of reducing the visual impact of the text in French.

4° les autres caractéristiques de cet affichage n'ont pas pour effet de réduire l'impact visuel du texte rédigé en français.

Canadian Charter of Rights and Freedoms[142] (*"Canadian Charter"*)

1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

1. La Charte canadienne des droits et libertés garantit les droits et libertés qui y sont énoncés. Ils ne peuvent être restreints que par une règle de droit, dans des limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique.

2. Everyone has the following fundamental freedoms: [...]

2. Chacun a les libertés fondamentales suivantes : [...]

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

b) liberté de pensée, de croyance, d'opinion et d'expression, y compris la liberté de la presse et des autres moyens de communication;

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

7. Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

15. (1) La loi ne fait acception de personne et s'applique également à tous, et tous ont droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination, notamment des discriminations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'âge ou les déficiences mentales ou physiques.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of

(2) Le paragraphe (1) n'a pas pour effet d'interdire les lois, programmes ou activités destinés à améliorer la

[142] *Canadian Charter of Rights and Freedoms*, Part 1 of Schedule B to the Canada Act 1982, c. 11 (U.K.).

conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

situation d'individus ou de groupes défavorisés, notamment du fait de leur race, de leur origine nationale ou ethnique, de leur couleur, de leur religion, de leur sexe, de leur âge ou de leurs déficiences mentales ou physiques.

Charter of Human Rights and Freedoms[143] ("*Quebec Charter*")

1. Every human being has a right to life, and to personal security, inviolability and freedom.

He also possesses juridical personality.

3. Every person is the possessor of the fundamental freedoms, including freedom of conscience, freedom of religion, freedom of opinion, freedom of expression, freedom of peaceful assembly and freedom of association.

6. Every person has a right to the peaceful enjoyment and free disposition of his property, except to the extent provided by law.

9.1. In exercising his fundamental freedoms and rights, a person shall maintain a proper regard for democratic values, public order and the general well-being of the citizens of Québec.

In this respect, the scope of the freedoms and rights, and limits to their exercise, may be fixed by law.

10. Every person has a right to full and equal recognition and exercise of his human rights and freedoms, without distinction, exclusion or preference based on race, colour, sex, gender identity or expression, pregnancy,

1. Tout être humain a droit à la vie, ainsi qu'à la sûreté, à l'intégrité et à la liberté de sa personne.

Il possède également la personnalité juridique.

3. Toute personne est titulaire des libertés fondamentales telles la liberté de conscience, la liberté de religion, la liberté d'opinion, la liberté d'expression, la liberté de réunion pacifique et la liberté d'association.

6. Toute personne a droit à la jouissance paisible et à la libre disposition de ses biens, sauf dans la mesure prévue par la loi.

9.1. Les libertés et droits fondamentaux s'exercent dans le respect des valeurs démocratiques, de l'ordre public et du bien-être général des citoyens du Québec.

La loi peut, à cet égard, en fixer la portée et en aménager l'exercice.

10. Toute personne a droit à la reconnaissance et à l'exercice, en pleine égalité, des droits et libertés de la personne, sans distinction, exclusion ou préférence fondée sur la race, la couleur, le sexe, l'identité ou

[143] CQLR, c. C-12.

sexual orientation, civil status, age except as provided by law, religion, political convictions, language, ethnic or national origin, social condition, a handicap or the use of any means to palliate a handicap.	l'expression de genre, la grossesse, l'orientation sexuelle, l'état civil, l'âge sauf dans la mesure prévue par la loi, la religion, les convictions politiques, la langue, l'origine ethnique ou nationale, la condition sociale, le handicap ou l'utilisation d'un moyen pour pallier ce handicap.
Discrimination exists where such a distinction, exclusion or preference has the effect of nullifying or impairing such right.	Il y a discrimination lorsqu'une telle distinction, exclusion ou préférence a pour effet de détruire ou de compromettre ce droit.