# SUPERIOR COURT

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF MONTREAL

No: 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
500-36-007745-154
500-36-007746-152
500-36-007747-150
500-36-007748-158
500-36-007749-156
500-36-007750-154

DATE: April 12, 2016

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**PRESIDING: THE HONOURABLE CLAUDINE ROY J.S.C.**

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**156158 CANADA INC.**
**MUNDI CANADA INC.**
**SERVICE DE RÉPARATION DE CONTENEURS ET D'UNITÉ FRIGORIFIQUES DU CANADA LTÉE**
**ALLAN ANAWATI**
**ANALYSE NIRA INC.**
**176410 CANADA INC.**
**SHERIL-LIN INC.**
**STANLEY AND MURIEL REID**
**LES INDUSTRIES GARANTIES LTÉE**
**SCOTT LEMAY**
**3831426 CANADA INC.**
Appellants/Defendants

v.

JR1320

**ATTORNEY GENERAL OF QUÉBEC**
Respondent/Prosecutor

and

**DIRECTOR OF CRIMINAL AND PENAL PROSECUTIONS**
Respondant/Mis en cause

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JUDGMENT

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[1] This is an appeal of a Court of Québec judgment[1] finding the Appellants guilty of contravening one or more provisions of the Charter of the French Language[2] (**CFL**) because:

- public signs and commercial advertising did not make a markedly predominant use of French;
- publications, inscriptions on a product or Websites were written in English only whereas the legislation required them to be in French, with allowance for the use of another language as long as the French version was displayed at least as prominently as every other language.

[2] The relevant provisions of the CFL provide that:

> 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. [...]
>
> [...]
>
> 52. Catalogues, brochures, folders, commercial directories and any similar publications must be drawn up in French.
>
> [...]
>
> 58. Public signs and posters and commercial advertising must be in French.
>
> They may also be both in French and in another language provided that French is markedly predominant.

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1 *Quebec (Attorney General) c. 156158 Quebec inc. (Boulangerie Maxie's)*, 2015 QCCQ 354.
2 CQLR, c. C-11.

> 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 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.
>
> [...]
>
> 91. Where the Act authorizes the drafting of texts or documents both in French and in one or more other languages, the French version must be displayed at least as prominently as every other language.

[3] Originally, the case involved 23 defendants, 11 of whom appealed. The Appellants are all anglophone businesses operating in or around the Montreal area.

[4] At trial, the businesses raised a number of common law defences. 156158 Canada inc. (**Canada inc.**) is the only corporation raising two of these issues again in appeal, with regards to its public signs.

[5] The Appellants also argued that the relevant provisions of the CFL were unconstitutional as they violated their freedom of expression, their right to equality, their right to liberty and the right to the peaceful enjoyment of their private property. The constitutional arguments were raised again in appeal.

[6] In a detailed, clear and carefully drafted judgment, Mascia J. rejected the common law defences of Canada inc. and dismissed the constitutional challenge. Appellants raised 14 grounds of appeal. All of them are ill-founded. The appeals are therefore dismissed.

## 1. CANADA INC.'S COMMON LAW DEFENSE

[7] Canada inc. argued that the signage outside its premises, viewed as a whole, met the requirement of the "markedly predominant" use of French and that the trial judge erred in failing to acquit on that basis.

[8] Alternatively, Canada inc. argued that the trial judge should have applied the *de minimis non curat lex* principle[3] as a defence to the charges.

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[3] "The law does not concern itself with trifles".

## 1.1 THE MEANING OF "MARKEDLY PREDOMINANT"

[9] Commercial advertising must be either in French or, if more than one language is being used, French must be "markedly predominant"[4]. This expression is defined in the *Regulation defining the scope of the expression "markedly predominant" for the purposes of the Charter of the French language*[5] (**Regulation**). It requires the text in French to have a "much greater visual impact" than the text in the other language:

- the space allotted to the text in French must be at least twice as large as the space allotted to the text in the other language;
- the characters used in the text in French must be at least twice as large as the characters allotted to the text in the other language;
- the other characteristics of the sign or poster must not have the effect of reducing the visual impact of the text in French.

[10] On the interpretation of the legislation and regulation, the trial judge concluded that the "two-for-one" rule means that size does matter and it is not sufficient to place the French words before the English words to show a marked predominance[6]:

> [103] Considering all of the afore-mentioned definitions, marked predominance refers to the greater visual impact of the French language when compared to the other language included on a sign. The visual impact of the French language has to be clear and unequivocal. Such a clear and unequivocal impact is achieved by the two-for-one rule described in the *Regulation*. On the other hand, simple priority in the placement of the French language does not clearly establish the visual predominance of the French language. When it comes to the language of signs and the marked predominance of the French language, size does matter.

[11] The use of the French language in Canada inc.'s public signage is not "markedly predominant" and the French used on the signs does not have a "much greater visual impact", whether the signage is considered separately or as a whole:

- in "boulangerie Maxie's", the word "boulangerie" is smaller than the word "Maxie's" (and Maxie's, because of the "'s" is not a French word, as Canada inc. suggested);
- "service de traiteur disponible" is written smaller than "Catering service available";

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4 Section 58 of the CFL.
5 CQLR, c. C-11, r. 11.
6 *Supra*, note 1, par. 98-103.

- the "suger free-sans sucre" sign contains same-size letters in French and in English.

[12] The Court will grant an appeal if the judgment rendered at first instance is unreasonable considering the evidence, if an error in law has been made or if justice has not been rendered[7]. The Court, sitting in appeal, must show deference to the conclusion of the trial judge on factual issues[8].

[13] The trial judge made no error in fact or in law when he concluded Canada inc.'s signage does not meet the requirements of Section 58 and of the Regulation. This argument is dismissed.

## 1.2 THE *DE MINIMIS NON CURAT LEX* PRINCIPLE

[14] Alternatively, Canada inc. suggested that the non-compliance is so minimal that the principle *de minimis non curat lex* ought to have justified an acquittal.

[15] Again, the trial judge's summary of the case law regarding the possibility of using this principle as a defence was correct: the Supreme Court of Canada has not yet ruled specifically on this issue, but this principle has been accepted as a defence in many instances before lower courts[9].

[16] The trial judge also concluded that the objective of the CFL – the protection and promotion of the French language –, although important, did not automatically bar a defence based on the *de minimis* principle[10]. He gave examples where this principle could be applied. In fact, he even applied it to one of the signs[11].

[17] Factually, in the case before him, the trial judge concluded that a commercial sign in English only or where equally-sized bilingual lettering was used, in contravention of the legislation requiring "marked predominance", was not a violation so insignificant that it should be overlooked by application of the *de minimis* principle, nor was it an insignificant violation of the CFL's objective to assure a *visage linguistique* that reflects the predominance of the French language.

[18] This decision is not unreasonable; it is a sound decision that followed the criteria set forth by Vauclair J. in *R. v. Freedman*[12].

[19] This argument is dismissed.

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7 *Code of Penal Procedure*, CQLR, c. C-25.1, s. 286.
8 *R. c. Freedman*, 2006 QCCS 8022.
9 *Supra*, note 1, par. 87-90.
10 *Supra*, note 1, par. 90-94.
11 *Supra*, note 1, par. 113.
12 2006 QCCQ 1855 (appeal dismissed, 2006 QCCS 8022).

## 2. FREEDOM OF EXPRESSION

[20] At trial, the Appellants argued that Sections 51, 52 and 58 of the CFL infringed on their freedom of expression, as guaranteed by Section 2 b) of the *Canadian Charter of Rights and Freedoms*[13] (*Canadian Charter*) and Section 3 of the *Charter of Human Rights and Freedoms*[14] (*Québec Charter*).

### 2.1 THE COURT OF QUÉBEC JUDGMENT

[21] The trial judge followed the principles enunciated by the Supreme Court of Canada in the *Ford*[15] and *Devine*[16] cases, and of the Court of Appeal in the *Entreprises W.F.H.*[17] case.

[22] The existence of an infringement based upon the freedom of expression was not debated *per se* by the parties because of the precedents. The evidence and arguments focused on the justification of the infringement under Sections 1 of the *Canadian Charter* and 9.1 of the *Québec Charter*:

> ***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.
>
> ***Québec Charter***
>
> 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.
>
> [...]

and the application of the *Oakes* test[18]:

- the objective to be served by the limitation must be sufficiently important to warrant overriding a constitutionally protected right or freedom;

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13 Schedule B to the *Canada Act 1982*, 1982, c.11 (U.K.): 2. Everyone has the following fundamental freedoms: [...] (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication; [...].

14 CQLR, c. C-12: 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.

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

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

17 *Québec (Procureur générale) v. Entreprises W.F.H. ltée* , [2000] R.J.Q. 1222 (C.S.), (appeal dismissed, [2001] R.J.Q. 2557) (leave to appeal to the Supreme Court of Canada refused).

18 *R. v. Oakes*, [1986] 1 SCR 103.

- the means used must be reasonable and demonstrably justified, i.e.:
  - the measures must be carefully designed to achieve the objective in question and rationally connected to that objective;
  - the means should impair the right in question as little as possible;
  - there must be a proportionality between the effects of the limiting measure and the objective.

[23] In 1988, Section 58 of the CFL required public signs and commercial advertising to be solely in French. In the *Ford* decision, the Supreme Court of Canada decided that freedom of expression includes the freedom to express oneself in the language of one's choice and concluded, consequently, that Section 58 of the CFL infringed on the guaranteed freedom of expression.

[24] The Supreme Court then concluded that the limitation was not demonstrably justified. Applying the principles developed in the *Oakes* decision, the Supreme Court concluded that the evidence did not justify the limit imposed on freedom of expression:

- the evidence established the importance of the legislative purpose: the enhancement of the status of the French language;
- the legislation was a response to a pressing and substantial concern: the survival of the French language;
- therefore, the government was justified to take steps to ensure that the *visage linguistique* of Québec would reflect the predominance of the French language;
- there was a rational connection between the purpose and the measure adopted;
- but, the evidence did not establish that the requirement of the use of French only was either necessary for the achievement of the legislative purpose or proportionate to it.

[25] The Supreme Court of Canada went on to say that requiring a predominant display of French would however be proportional to the goal and justified under Section 1 of the *Canadian Charter*.

[26] The legislator replaced then Section 58 of the CFL to require that French be markedly predominant on public signs, following the suggestion of the Supreme Court of Canada.

[27] The same day the judgment was rendered in *Ford*, the Supreme Court of Canada released the *Devine* decision. The combination of Sections 52 and 89 of the CFL allows for inscriptions on a product, catalogues, brochures and similar publications to be in French and in another language. The Supreme Court of Canada decided that the provision infringed on the freedom of expression but that the limitation was justified under Section 1 of the Canadian Charter as it allowed for the use of French together with another language.

[28] In 2001, in *Entreprises W.F.H.*[19], the Court of Appeal examined the constitutionality of the new Section 58. The Court concluded that the "marked predominance" requirement was justified under Section 1 of the Canadian Charter, underlining that the Supreme Court itself had suggested it would in the *Ford* case.

[29] The Court considered that the burden of proving a change in the situation rested with the appellant and it had not presented the necessary evidence:

> [60] Tenant pour acquis que l'art. 58 restreint la liberté d'expression, le juge de la Cour supérieure a conclu qu'il appartenait à l'appelante de démontrer, par sa propre preuve, que les principes de *Ford* ne s'appliquaient plus. Je suis d'avis qu'il a raison. L'arrêt *Ford* a établi des lignes directrices et le législateur les a pour ainsi dire codifiées en 1993, satisfaisant ainsi au fardeau de preuve imposé par l'article premier de la *Charte canadienne* et par l'art. 9 de la *Charte québécoise*.
>
> [61] L'appelante avait donc le fardeau d'établir que la situation révélée par les documents considérés par la Cour suprême en 1988 était modifiée au point que la mesure ne pouvait plus se justifier en 1999. [...]
>
> [...]
>
> [65] L'appelante ayant le fardeau de la preuve en l'espèce, elle devait établir que la mesure ne se justifiait plus au sens de l'article premier de la *charte canadienne* et de l'art. 9.1 de la *Charte québécoise*.
>
> [...]
>
> [67] La Cour suprême a reconnu expressément que les documents produits établissaient la vulnérabilité de la langue française au Québec et que sa défense et son amélioration, l'objectif visé par la *Charte de la langue française*, constituaient un objectif important et légitime.
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> [...]

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[19] *Entreprises W.F.H. Ltée c. Québec (Procureure générale)*, [2001] R.J.Q. 2557 (C.A.) (leave to appeal to the Supreme Court of Canada refused).

> [73] [...] La mesure prévue par l'article 58 a pour but d'améliorer le visage français du Québec. Je ne crois pas qu'une telle mesure qui se justifiait en 1988 en regard de l'article premier et de l'article 9.1 ne se justifie plus aujourd'hui à cause du passage du temps.

[30] The Supreme Court of Canada dismissed a motion for permission to appeal this judgment.

[31] Here, Appellants produced evidence, trying to prove that the situation of the French language had changed and that the "marked predominance" did not meet the *Oakes* test anymore.

[32] The trial judge heard expert testimonies and concluded that[20]:

- although the French language had made some progress in recent decades, especially regarding linguistic transfers in favour of French among allophones, the transfers were too small to significantly change the vulnerable status of the French language;
- a linguistic transfer from the allophone group to the French language could take up to two generations;
- the English language, though comprising less than 11% of the total population of the province attracted almost half of the linguistic transfers;
- the declining birth rate among French-speakers coupled with the growing number of third language speakers placed the French language at a disadvantage;
- the analysis should not be limited to the island of Montreal;
- the relative weight (%) of French speakers in the country, outside of Québec, had declined;
- with the exception of protected trade-marks, the visual landscape was predominantly French: the CFL could not become a victim of its own success.

[33] The trial judge decided that the protection of the French language was still an important objective and that the measures adopted met the *Oakes* test. He concluded Appellants had not met their burden of proving that the situation of the French language had changed significantly since the decisions in the *Ford* and *Devine* cases.

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[20] *Supra*, note 1, par. 184-200.

## 2.2 GROUNDS OF APPEAL

[34] The Appellants argued that the trial judge incorrectly interpreted:

- the *obiter dictum* of the Supreme Court in the *Ford*[21] case;
- the judgments in *Entreprises W.F.H.*;
- the principle of *stare decisis* and applied it incorrectly;
- the notion of the *visage linguistique* of Québec referred to in the Ford case;
- the phrase "the vulnerability of the French language".

## 2.3 THE *OBITER DICTUM* OF THE SUPREME COURT IN THE *FORD* CASE

[35] The Appellants argued that Mascia J. did not properly understand the *Ford obiter*. They asserted he assumed that only a "markedly predominant" use could be considered a valid limitation of the freedom of expression. Rather, the Supreme Court held that both a "joint use" provision and a "markedly predominant" use provision could constitute a reasonable limit to freedom of expression.

[36] Mascia J. understood the difference between a markedly predominant use provision and a joint use provision and understood the fact that they might both constitute valid provisions, as demonstrated by extracts of his judgment:

> [15] [...] In *Ford*, the Supreme Court declared sections 58 and 69 of the *CFL* unconstitutional on the grounds that they constituted an unreasonable limitation on freedom of expression protected under s. 2 (b) of the Canadian *Charter* and s. 3 of the Quebec *Charter*. While the Supreme Court agreed that the signs legislation had a legitimate purpose – the protection of the French language – it held that the total ban of signs in a language other than French went too far. In short, the impugned sections of the law failed to meet the minimal impairment test set out in the Court's seminal decision in *Oakes*.
>
> [16] No doubt sensitive to the importance of the language issue in Quebec, the Supreme Court proposed, *in obiter*, an alternative measure that would satisfy the goal of protecting the French language and meet the minimal impairment test of *Oakes*. The Court suggested that the Quebec government could legitimately require that French have a greater visibility or «marked predominance» on commercial signs; however, it could not ban the use of a language other than French on the said signs.

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[21] *Supra*, note 15.

> [17] In *Devine* – the companion case to *Ford* – the principle issue concerned whether or not the government could impose the joint use of French in commercial advertising – such as catalogues, brochures, invoices and employment forms – in addition to the language of choice of the merchant. As was the case in *Ford*, the Supreme Court ruled that the impugned sections of the legislation violated freedom of expression as guaranteed by both the Canadian *Charter* and the Quebec *Charter*. Unlike *Ford*, however, the impugned sections of the *CFL* in *Devine* did not prohibit the use of a language other than French but permitted the concurrent use of another language along with French. The distinction was crucial: To demand exclusive usage – as was the case in Ford, was unconstitutional. But to require (or to allow) joint use passes the scrutiny required by s. 1 of the Canadian *Charter* and s. 9.1 of the Quebec *Charter*, as such a measure is proportional and rational in light of the governmental objective to protect the French language.
>
> [...]
>
> [148] In sum, the Supreme Court back in 1988 saw a rational connection between the language of signs (in which French is markedly predominant or in situations requiring concurrent use) and the protection and promotion of the French language. Though Mr. Tyler may disagree with the conclusions of the Supreme Court, the precedent it established in *Ford* and *Devine* is binding on this Court.
>
> (emphasis added)

[37] The trial judge did not err in law and did not consider the *obiter* of the Supreme Court of Canada to mean that only a "markedly predominant" requirement would satisfy the minimum impairment test.

### 2.4 THE JUDGMENT IN *ENTREPRISES W.F.H.*

[38] Appellants argued the irrelevancy of the *Entreprises W.F.H.* judgment as a precedent because, in that case, *Entreprises W.H.F.* had not submitted new evidence regarding the vulnerability of the French language in the province whereas they have done so here[22].

[39] The interest of *Entreprises W.F.H.* concerning the present case resides in the application of the *stare decisis* principle. The Court of Appeal felt bound by the *obiter dictum* of the Supreme Court of Canada in *Ford* – that a markedly predominant legislation would meet the *Oakes* test – and followed the precedent, especially since no new evidence had been introduced[23].

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[22] Memorandum of Appellants, par. 17-23.
[23] *Supra*, note 17, par. 58-61.

[40] Appellants may disagree with the Court of Appeal judgment in *Entreprises W.F.H.*, but the Court of Québec, in the present case, was bound by the precedents of higher courts, including the Court of Appeal judgment.

[41] What the Court of Appeal decided in that case is simply that if a litigant wanted to ask a court to revisit the constitutionality of provisions already analyzed by the Supreme Court of Canada, it had to provide new evidence or argue new questions of law to convince the Court that the situation had changed. And this is exactly what the Appellants did here.

[42] The trial judge did not err in his use of the *Entreprises W.F.H.* precedent.

### 2.5 THE PRINCIPLE OF *STARE DECISIS* AND ITS APPLICATION

[43] The Appellants then argued that the trial judge erred "when he failed to presumptively follow the entire *obiter dictum* of the Supreme Court in *Ford*", the entire *obiter dictum* being that outside signs in French and another language – markedly predominant or of equal size – would satisfy the *Oakes* test.

[44] Appellants suggested that an "equal size" provision rather than a "markedly predominant size" provision would satisfy the minimum impairment test of Section 1 of the Canadian Charter.

[45] The Supreme Court of Canada said in *Ford* and *Devine* that both types of provisions satisfy the *Oakes* test. It is up to the legislator, not the Appellants, to decide between two solutions that are equally constitutional. For commercial advertising, the legislator chose the "markedly predominant" criteria (Section 58 of the CFL); for inscriptions on a product, catalogues and other documentation, he chose to allow for the use of two languages, not requiring that one be more important than the other (Sections 51, 52 and 89 of the CFL).

[46] The Appellants also argued that *stare decisis* did not apply to an *obiter dictum*. The answer to this argument is found in the *Entreprises W.F.H.* judgment: the *stare decisis* principle applies to some *obiter dicta* and, in particular, to the *obiter* in *Ford*[24]:

> [48] Le juge de la Cour supérieure a décidé, correctement à mon avis, que le principe du *stare decisis* en vertu duquel les tribunaux conforment leurs décisions à celles qu'ils ont eux-mêmes rendues et à celles rendues par un tribunal supérieur s'applique à l'*obiter* de la Cour suprême.
>
> [49] Le juge a appuyé sa décision sur plusieurs arrêts de la Cour suprême [...]
>
> [...]

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[24] *Supra*, note 17.

> [58] Je conclus qu'en l'espèce l'*obiter dictum* de la Cour suprême dans *Ford* a le même poids que s'il faisait partie de la *ratio decidendi* et lie la Cour d'appel. En effet, il apparaît clairement de l'analyse des arrêts *Ford* et *Devine* que la Cour suprême mesurait la portée de ses conclusions sur le délicat contentieux de la langue d'affichage au Québec et souhaitait régler la question. La formulation de la règle de la nette prédominance n'est certes pas une phrase isolée dont on n'aurait pas prévu la répercussion.

[47] The trial judge followed the decision of the Court of Appeal in *Entreprises W.F.H.*[25]. He did not make any mistake in this regard.

[48] As mentioned more recently by the Supreme Court of Canada, in *Canada (Attorney General) v. Bedford*[26], a trial judge can consider new legal issues, new developments in the law or new evidence to revisit an issue previously decided by a higher court in a *Charter* case and the threshold for revisiting a matter is not an easy one to reach:

> [42] [...] 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.
>
> [...]
>
> [44] [...] a lower court is not entitled to ignore binding precedent, and the threshold for revisiting a matter is not an easy one to reach. [...] This balances the need for finality and stability with the recognition that when an appropriate case arises for revisiting precedent, a lower court must be able to perform its full role.

[49] The trial judge correctly applied the principle of *stare decisis*. The real question at issue here was whether the evidence presented at trial was sufficient to depart from the precedents. It was not.

### 2.6 THE *VISAGE LINGUISTIQUE* DU QUÉBEC REFERRED TO IN THE FORD CASE

[50] Appellants argued that, in the *Ford* case, the Supreme Court of Canada did not provide a precise definition of what it meant by the notion of *visage linguistique* and that the notion would only apply to outside signs as the case only dealt with such signs. Therefore, they suggest that the proper definition of *visage linguistique* would be "those outside signs visible from a public thoroughfare".

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[25] *Supra*, note 1, par. 53-60 and 156.

[26] 2013 SCC 72, par. 42; see also *Carter v. Canada (Attorney General)*, 2015 SCC 5, par. 44.

[51] In their argument, Appellants suggested that a minimum impairment of the freedom of expression meant:

- French and another language, of equal visual impact, for outside signs visible from a public thoroughfare;
- publications and packaging found inside the commercial premises would not have to contain French language.

[52] Nowhere in the *Ford* judgment did the Supreme Court limit the concept of *visage linguistique* to outside signs. On the contrary, the case concerned inside and outside signage as shown[27]: "1. La Chaussure Brown's Inc. [...] has used and displayed within and on its premises [...]". Furthermore, the Supreme Court applied the same reasoning in *Devine* which concerned, amongst others, catalogues, brochures, folders, commercial directories and any similar publications, all being documents found inside commercial premises.

[53] The legislation does not make a distinction based on the visibility of the writing from a public thoroughfare. The trial judge had no reason to do so either.

[54] Appellants also argued that the current legislation requiring markedly predominant public signs did not reflect accurately the demography of the Montreal area. The legislation should allow the multilingual metropolis reality to be reflected.

[55] The CFL is not concerned with the promotion of a multilingual image of the Montreal area; it is a legislative response to the vulnerability of the French language in Québec. Historically, a number of different factors favoured the use of the English language in Québec, despite the predominance of a francophone population. It was in this context that the Supreme Court wrote about the *visage linguistique* of Québec prior to the enactment of the CFL. It gave the impression that English had become as significant as French. It was this impression that the CFL aimed to modify.

[56] The trial judge made no error in his analysis of the visual landscape in Québec.

### 2.7 THE "THE VULNERABILITY OF THE FRENCH LANGUAGE"

[57] In *Ford*, the Supreme Court of Canada, in its analysis of whether the objective to be served by the limitation was sufficiently important to warrant overriding a constitutionally protected right or freedom, identified causal factors threatening the position of the French language:

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[27] *Supra*, note 15, p. 722.

- the declining birth rate of Québec francophones resulting in a decline in the Québec francophone proportion of the Canadian population as a whole,
- the decline of the francophone population outside Québec,
- the greater rate of assimilation of immigrants to Québec by the anglophone community of Québec,
- the continuing dominance of English at the higher levels of the economic sector.

[58] The Appellants attempted to demonstrate that the situation of the French language in Québec was not in a vulnerable position anymore.

[59] On the contrary, the evidence showed that the factors threatening the position of the French language were still present. The trial judge analysed the expert evidence in detail[28].

[60] The declining birth rate among French-speakers coupled with the growing number of third language speakers places the French language at a disadvantage. Indeed, even Appellants admitted this factor was still true today. The French-speaking population declined in relative terms in Canada (from 29% to 22.9%) [29].

[61] Even if the English-speaking population in the province declined slightly in relative terms (13.8% to 13.1%) and comprised less than 11% of the total population of the province, English attracted almost half of the linguistic transfers. Meanwhile, the French-speaking population remained stable (approximately 81%)[30].

[62] Although the French language has made some progress in recent decades, especially regarding linguistic transfers in favour of French among allophones, the transfers are too small to significantly change the vulnerable status of the French language, especially considering a transfer could take up to two generations[31]. The environment for the new immigrant on the island of Montreal is less and less French[32].

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28 *Supra*, note 1, par. 184-200.

29 D-15, p. 5; PGQ-2, p. 2; testimony of Mr. Termote, May 15, 2014, p. 73, 139-142; May 16, 2014, p. 138-139.

30 D-15, p. 13; PGQ-2, p. 10; testimony of Mr. Termote, May 15, 2014, p. 74, 149.

31 D-15, p. 14; PGQ-1, p. 41; PGQ-2, p. 8; testimony of Mr. Termote, May 15, 2014, p. 30-31, 130-131; May 16, 2014, p. 130-139.

32 Testimony of Mr. Veltman, May 15, 2014, p. 65; testimony of Mr. Termote, May 15, 2014, p. 168; May 16, 2014, p. 133.

[63] Appellants have not introduced evidence to show that the Supreme Court's affirmation that English dominates at the higher levels of the economic sector would not still be accurate today.

[64] The Court cannot find a mistake in the trial judge's analysis. The protection of the French language is still an important objective and the measures adopted still meet the *Oakes* test. Appellants have not shown that the situation of the French language changed significantly since the decisions in *Ford* and *Devine*.

## 3. THE RIGHT TO EQUALITY

[65] The Appellants also contended that the legislation infringed on their right to equality contrary to Section 15 of the *Canadian Charter* and Section 10 of the *Québec Charter*:

> ***Canadian Charter***
>
> 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.
>
> [...]
>
> ***Québec Charter***
>
> 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, pregnancy, 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.
>
> [...]

### 3.1 THE COURT OF QUÉBEC JUDGMENT

[66] The trial judge first summarized the Supreme Court of Canada's analysis concerning equality rights in the *Ford* and *Devine* decisions.

[67] In *Ford*, the Supreme Court, having decided the legislation constituted a violation of freedom of expression, did not need to address the equality issue.

[68] In *Devine*, on the contrary, having concluded the legislation constituted a reasonable limit to freedom of expression, the Supreme Court had to address the equality issue. It held that the Section 1 analysis was equally applicable to Section 15 of the *Canadian Charter*, i.e. if the legislation was a reasonable limit to the freedom of

expression, it was also a reasonable limit to the equality provisions. As for Section 10 of the *Québec Charter*, the Supreme Court decided that the equality right had to be linked to another right or freedom, in this case, the freedom of expression. Since the Supreme Court had already concluded the limitation of the freedom of expression was justifiable, the same conclusion followed, regarding the right to equality.

[69] In the present case, applying the same principle and after having concluded that the violation of the freedom of expression was justifiable under Section 1 of the *Canadian Charter* and under Sections 3 and 9.1 of the *Québec Charter*, the trial judge dismissed the equality challenge.

[70] Nonetheless, Mascia J., proceeded to examine the possible infringement on the equality rights, as did the the Court of Appeal in *Entreprises W.H.F.*

[71] *Entreprises W.H.F.* was rendered in 2001, using the Supreme Court analysis of equality rights developed in *Law v. Canada (Minister of Employment and Immigration)*[33].

[72] The trial judge, in the present case, analysed the case law developments on the equality rights since 2001 and applied it to the evidence heard. Specifically, he used the test later developed in *R. v. Kapp*[34]:

- Does the law create a distinction based on an enumerated or analogous ground?
- Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?

[73] The trial judge answered the first question in the affirmative: language is not an enumerated ground of prohibited discrimination in Section 15 of the *Canadian Charter* but can be considered an analogous ground, particularly since it is an enumerated ground in Section 10 of the *Québec Charter*.

[74] The trial judge answered the second question in the negative. He concluded the legislation did not violate the rights to equality because the distinction did not create a disadvantage by perpetuating prejudice or stereotyping[35]:

> [257] [...] 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

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33 [1999] 1 SCR 497.

34 2008 CSC 41; he referred also to *Hodge v. Canada (Minister of Human Resources Development)* 2004 SCC 65, *Ermineskin Indian Band and Nation v. Canada*, 2009 SCC 9, *Withler v. Canada (Attorney General)*, 2011 SCC 12 and *Quebec (Attorney General) v. A*, 2013 SCC5.

35 *Supra*, note 1.

> 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.

[75] The trial judge felt the evidence did not justify a departure from the precedent in *Entreprises W.H.F.*, even applying the more recent case law.

### 3.2 THE GROUND OF APPEAL

[76] The Appellants disagree with the trial judge because they consider the CFL demeans their human dignity by demanding the use of French in a joint or markedly predominant manner in commercial advertising, packaging or other publications. If the francophone population can advertise in French only, the anglophone population should be allowed to advertise in English only.

[77] This Court found no error in the trial judge's extensive analysis of the law and in the application of the principles of law to the facts of the case. There is nothing in the CFL, whether one analyses the purpose or the effect of the provisions – that demeans the human dignity of the English speaking population. In any case, even if there was a violation of the equality rights, it would be justified under Section 1 of the *Canadian Charter* as already decided in the freedom of expression discussion.

[78] As for the violation of the *Québec Charter*, the right to equality must be linked to another right or freedom, in this case the freedom of expression, and the Court already concluded the limitation imposed in the CFL is a justifiable limitation on the freedom of expression.

[79] This ground of appeal is dismissed.

## 4. RIGHT TO LIBERTY

[80] Appellants argued that the CFL provisions also infringed on their right to liberty, as guaranteed by Section 7 of the *Canadian Charter* and Section 1 of the *Québec Charter*:

> ***Canadian Charter***
>
> 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.

***Québec Charter***

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

[...]

[81] The trial judge did not err in deciding that the decision to conduct business in the language of one's choice could not be qualified as inherently or fundamentally personal and, therefore, was protected by the right to liberty.

[82] As stated by the trial judge, the right to liberty protected by the Québec and Canadian Charters is not synonymous with the absence of restraint; it is limited to protecting the irreducible sphere of personal autonomy wherein individuals may make inherently private choices free from state interference[36].

[83] The trial judge made no mistake when he asserted that the constraints imposed by the CFL on the manner in which Appellants conduct their business cannot be classified as inherently or fundamentally personal. Furthermore, this right protects human beings, not corporations.

[84] This ground of appeal is dismissed.

## 5. RIGHT TO THE PEACEFUL ENJOYMENT OF PRIVATE PROPERTY

[85] Finally, Appellants argued that Sections 51, 52 and 58 of the CFL would violate their right to the peaceful enjoyment of private property, as provided for in Section 6 of the *Québec Charter*:

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

[86] The CFL does not affect the right to the peaceful enjoyment of the Appellants' property. Even if it did, the protection is limited by the last proposition: "except to the extent provided by law"[37]. The CFL is a law covered by this proposition.

**FOR THESE REASONS, THE COURT:**

[87] **DISMISSES** all appeals without costs.

Claudine Roy, J.S.C.

CLAUDINE ROY, J.S.C.

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[36] *Godbout v. Longueuil (City)*, [1997] 3 SCR 844, par. 66.

[37] *Veilleux v. Quebec (Commission de protection du territoire agricole)*, [1989] 1 SCR 839.

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Dates of hearing: March 9, 10 and 11, 2016