SCC Court File No.: 37967

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF QUEBEC)

B E T W E E N:

156158 CANADA INC., MUNDI CANADA INC, SERVICE DE RÉPARATION DE CONTENEURS ET D'UNITÉS 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

APPLICANTS
(Appellants)

A N D

THE ATTORNEY GENERAL OF QUEBEC

RESPONDENTS
(Respondents)

A N D B E T W E E N

3831426 CANADA INC.

APPLICANT
(Appellant)

A N D

DIRECTOR OF CRIMINAL AND PENAL PROSECUTIONS, THE ATTORNEY GENERAL OF QUEBEC

RESPONDENTS
(Respondents)

REPLY TO RESPONSE TO APPLICATION FOR LEAVE TO APPEAL
(156158 CANADA INC. ET AL., APPLICANTS)
*(*Pursuant to Rule 28 of the *Rules of the Supreme Court of Canada*)

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Public importance & novelty

1. The Applicants submit that the following issues, by reason of their public importance and/or novelty, ought to be decided by this Honourable Court:

1) In circumstances where 1) an *obiter dictum* of this Honourable Court contains two equally valid constitutional options, 2) the legislator adopts the option which more severely infringes *Charter* rights and 3) the option is challenged on the grounds that the less severe option should be preferred, does the principle of *stare decisis* operate in such a way as to immunize the option from judicial review in future litigation, or are the courts required to entertain the facts and arguments made in the future litigation on their own merits?

2) In circumstances where 1) there are serious and compelling arguments made by the Applicants on the issue of whether the vulnerability of the French language is such that it justifies the infringement of *Charter* rights and 2) these arguments were simply ignored by the courts below and by the Attorney General of Quebec in her Response, is it not incumbent on this Honourable Court, based on the maxim of *audi alteram partem*, to grant leave in order that the Applicants arguments may finally be heard?

3) The argument invoked by the Applicants regarding the legal consequences of a proper definition of the notion of the *"visage linguistique"* of Quebec is entirely new.

4) The argument invoked by the Applicants regarding the application of the *Charter* to the Internet is entirely new.

The *obiter dictum* in *Ford*[1]

2. The trial judge in this case and the Superior Court[2] and the Court of Appeal[3] in *Les Entreprises W.F.H.* did not address the legal consequences of the disjunctive in the *obiter dictum* in

[1] *Ford v. Quebec (Attorney General)* [1988] 2 S.C.R. 712, at para. 73
[2] *Québec (Procureure générale) c. Entreprises W.F.H. Ltée,* [2000] R.J.Q. 1222 (S.C.)
[3] *Entreprises W.F.H. Ltée c. Québec (Procureure générale),* [2001] R.J.Q. 2557 (C.A.)

Ford. They simply assumed that the Supreme Court in *Ford* had blessed the notion of the markedly predominant use of French to the exclusion of its joint or equal use.

3. In this case, the Superior Court and the Court of Appeal both acknowledged the disjunctive, but concluded that it was not up to the courts to question the option chosen by the legislator. In the words of the Court of Appeal: "[I]t was not for the courts to now question that choice." [4] and "[I]t is not for this Court to review the legislator's choice in the present circumstances." [5]

4. No authority was provided by the Superior Court and the Court of Appeal in support of their conclusion that the option which more severely infringes *Charter* rights should be preferred, because none exists, which is precisely why leave should be granted to allow this Honourable Court to address the issue.

The situation of the French language

5. Since the outset, the Applicants invoked the following arguments regarding the situation of the French language in Quebec, as set out in paragraphs 24 to 33 of their Application for leave:

> 24. **Firstly**, the trial judge simply ignored the argument expressly pleaded by the Applicants on the meaning of the phrase "the vulnerability of the French language".
>
> 25. In *Ford v. Quebec (Attorney General)*, the Supreme Court characterized what it meant by the word "vulnerability":
>
> > 72. . . .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. . . .
> >
> > 73. 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. (Emphasis added)[6]
>
> 26. In *Solski (Tutor of) v. Quebec (Attorney General)*, the Court repeated this characterization:

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[4] Judgment of Court of Appeal Below at para. 105 **[Tab 2D]**
[5] Judgment of Court of Appeal Below at para. 111 **[Tab 2D]**
[6] *Ford v. Quebec (Attorney General)* [1988] 2 S.C.R. 712, at paras. 72, 73

> 9. Finally, the anxiety of a significant segment of Quebec Francophones about the future of their language was a known fact, if only because of the upheavals it had caused in Canadian politics, and even more so in Quebec politics. This Court in fact acknowledged the existence of this fear among Quebec Francophones that their mother tongue would disappear when, in a case involving the legislation regarding the language of signs, it analysed, under s. 1 of the *Canadian Charter*, the evidence submitted by the parties to demonstrate that the legislation had a serious and legitimate purpose (*Ford*, at p. 778). (Emphasis added)[7]

27. It is clear that the vulnerability contemplated by the Court in *Ford* and subsequently reiterated, was a situation of serious precarity as matter of fact. Mere sentiment, however widely held, cannot justify the infringement of *Charter* rights.

28. **Second**, the trial judge simply ignored the argument expressly pleaded by the Applicants on the evolution of the jurisprudence relating to the vulnerability of the French language.

29. There have been two cases since *Ford* in 1988 in which the Attorney General of Quebec invoked the vulnerability of the French language as the sole justification for the infringement of *Charter* rights. Both involved s. 23 and the right to minority language instruction: *Solski* and *Nguyen v. Quebec (Education, Recreation and Sports)*[8].

30. Abundant statistical and demographic evidence was filed by the parties, almost identical to the evidence adduced in this case, except for expertise.

31. In both cases, the evidence of the alleged vulnerability of the French language did not prevent this Court from finding that the impugned provisions were constitutionally suspect, giving rise to the remedy of "reading down" in *Solski* and a declaration of invalidity in *Nguyen*.

32. The situation of the French language is a matter of fact that should not be viewed differently depending on the nature of the right involved, such that these cases should be interpreted as attenuating the finding of vulnerability in *Ford*.

33. **Lastly**, the evidence adduced at trial amply demonstrated that there is only one long-standing trend (*tendance lourde*) that is unfavourable to the French language in Quebec and that is the decline in the relative weight (percentage) of the French-speaking population on the island of Montreal.[9]

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[7] *Solski (Tutor of) v. Quebec (Attorney General)* [2005] 1 S.C.R. 201, at para. 9
[8] *Nguyen v. Quebec (Education, Recreation and Sports)*, [2009] 3 S.C.R. 208
[9] Termote, Exhibit PGQ-1, Tableau 10 **[Tab 4D]** Appellants' Factum, Schedule 3, Vol. 10, p. 1471-1472

> 34. All other trends, the relative weight of the French-speaking population in all other areas, including Quebec as a whole, the absolute numbers of the French-speaking population in all areas, birth and death rates, migration and immigration, and linguistic transfers, are either stable or favourable to the French language.[10]

6. The Applicants submit that these three arguments when considered as a whole are sufficient to conclude that the situation of the French language is such that it does not justify the infringement of *Charter* rights.

7. The courts below committed a serious and palpable error by simply ignoring these three arguments. In her Response, the Attorney General of Quebec does not deign to even mention them. Why? Because, she has no response. In these circumstances, leave should be granted in order that these arguments may finally be addressed.

The *"visage linguistique"* of Quebec

8. No attempt was made by the courts below in this case or the courts in *Entreprises W.F.H.* to define what is meant by the phrase *"visage linguistique"*.

9. The Applicants submit that the appropriate definition of the phrase *"visage linguistique"* is "those outside signs visible from a public thoroughfare". Inside signs, packaging, catalogues, Web sites, etc., are not visible from a public thoroughfare and therefore, do not form part of the *"visage linguistique"*.

10. The argument that the Applicants raise at paragraphs 45 to 68 of their Application for leave regarding the conclusions to be drawn from the proper definition of the *"visage linguistique"* is entirely new and meets the threshold in *Canada (Attorney General) v. Bedford*,[11] and *Carter v.*

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[10] *Les langues du Canada, Recensement 1996*, Exhibit D-10, Table A.1 **[Tab 4E]** Appellants' Factum, Schedule 3, Vol. 7, p. 1107-1111; *Languages in Canada: 1996 Census*, Exhibit D-11, Table A.1 **[Tab 4F]** Appellants' Factum, Schedule 3, Vol. 7, p. 1215-1219; *Recensement de 2001: série « analyses »*, Exhibit D-12, Tables **[Tab 4G]** Appellants' Factum, Schedule 3, Vol. 8, p. 1260-1262; *2001 Census: analysis series*, Exhibit D-13, Tables **[Tab 4H]** Appellants' Factum, Schedule 3, Vol. 8, pp. 1299-1301

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

Canada (Attorney General),[12], allowing for a departure from the finding in *Devine* that a joint-use provision satisfies the requirements of the saving provisions.

The Internet

11. In addition to the argument to the effect that the contents of a Web site do not form part of the *"visage linguistique"* and therefore, the imposition of French on Web sites cannot be justified for considerations relating to the *"visage linguistique"*, the Applicants submit that the nature of the medium is such that limitations on the freedom to express oneself using that medium should only be interfered with in the rarest of circumstances. This argument is entirely new.

12. The Applicants respectfully request that leave to appeal be granted, with costs in the cause.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 6th day of April, 2018.

Charles O'Brien
Counsel for the Applicants

[12] *Carter v. Canada (Attorney General)*, [2015] 1 S.C.R. 331

TABLE OF AUTHORITIES

Cases **Paragraph(s)**