Just the Facts? Revisiting the Evidence in Court Rulings on the Language of Commercial Signs and its Impact on Admitting Legislative Facts

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Dans l'arrêt Ford, *la Cour suprême du Canada reconnaît implicitement que la prédominance du français dans l'affichage commercial est un facteur qui contribue à la protection de cette langue au Québec. Étant donné les critères rigoureux exigés en vertu de l'article premier de la* Charte canadienne des droits et libertés *pour justifier une restriction aux droits et libertés garantis, l'auteur s'interroge sur la fiabilité et les limites des données démographiques et sociolinguistiques utilisées devant les tribunaux pour promouvoir le visage linguistique du Québec.*

I. INTRODUCTION

On December 16, 1988, the Supreme Court of Canada rendered its much-anticipated ruling on the Quebec *Charter of the French language* [Bill 101][1] provisions requiring French-only public commercial signs.[2] The principal issue was whether sections 58[3] and 69[4] of the *Charter of the French language* infringe the freedom of expression guaranteed by

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1 S.Q. 1977, c. 5.

2 *Ford v. Quebec (Attorney General)*, [1988] S.C.J. No. 88, [1988] 2 S.C.R. 712 [hereinafter "*Ford*"].

3 Section 58 of the *Charter of the French language* provides: "Public signs and posters and commercial advertising must be in French."

4 Section 69 [now repealed] of the *Charter of the French language* provides: "Subject to section 68, only the French version of a firm name may be used in Québec."

section 2(b) of the *Canadian Charter of Rights and Freedoms*,[5] as well as sections 3 and 10 of the Quebec *Charter of human rights and freedoms*.[6] Ford claimed the right to use both English and French on her commercial signs while not denying the right of the National Assembly of Quebec to require French. The Supreme Court decided that the limit imposed on freedom of expression by sections 58 and 69 of the *Charter of the French language* was not justified under the freedom of expression provisions in both the Quebec and Canadian Charters.

However, in *Devine v. Quebec (Attorney General)*,[7] a case ruled upon simultaneously, the plaintiff, Singer, claimed the right to put signs up in English only. The Supreme Court dismissed the case, holding that the requirement to put French on signs in Quebec was a reasonable restriction of freedom of expression, given the Quebec reality and the worthwhile desire to protect the French language.[8]

These decisions are consistent with previous conclusions of the Quebec Superior Court and Quebec Court of Appeal, however, with an important difference. The Supreme Court added that requiring the predominant or even markedly dominant display of the French language on Quebec signs would be justified under the Quebec and Canadian Charters in order to promote and maintain a French "*visage linguistique*" in Quebec.[9]

Subsequent analyses of the judgment have focussed largely on the extent to which freedom of expression includes the right to express oneself in the language of one's choice or, put another way, whether the language of commercial expression is part of freedom of expression. There has been ongoing debate in this regard, and several observers have yet to be persuaded by the ruling of the courts. According to John Richards,[10] the Supreme Court's broad interpretation of Charter rights

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5 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter "Canadian Charter"].

6 R.S.Q., c. C-12 [hereinafter "Quebec Charter"]. The main issue is expressed in *Ford*, *supra*, note 2, at 721.

7 [1988] S.C.J. No. 89, [1988] 2 S.C.R. 790 [hereinafter "*Devine*"].

8 *Id.*, at 814*ff.*

9 *Devine*, *id.*, at 816; *Ford*, *supra*, note 2, at 777-78.

10 John Richards, "Language Matters: Ensuring that the Sugar Does not Dissolve in the Coffee" in David Cameron, ed., *The Referendum Papers: Essays on Secession and National Unity* (Toronto: University of Toronto Press, 1999), at 84.

has had a destructive effect on English-French relations.[11] Jean-Claude Galipeau,[12] for his part, views the decision of the courts as a consistent application of liberal, individualist values to Charter rights, including language rights.

Far less attention has been directed at the extent to which the "visibility" of French on commercial signs significantly contributes to the protection of the French language, based on the demographic analysis submitted to the Supreme Court. However, the two matters are intertwined in many ways with the language cases at hand. Constitutionalist José Woehrling[13] writes:

> ... les tribunaux se sont fondés sur une interprétation très large, et peut-être contestable du point de vue sociologique, de la liberté d'expression pour en étendre le bénéfice aux messages commerciaux et en faire découler le droit des commerçants et des consommateurs de s'exprimer et d'être renseignés dans la langue de leur choix. Ce faisant les juges ont accordé la primauté à un droit individuel d'une portée somme toute secondaire sur le droit collectif des Québécois francophones de protéger et de promouvoir leur langue, menacée parce qu'elle est minoritaire partout en Amérique du Nord.[14]

C. Michael MacMillan, in his book on language rights in Canada,[15] notes: "... while the case for viewing commercial signs as a component of freedom of expression may be less than air-tight, the case for the restriction of other languages is decidedly shaky."[16]

Both Woehrling and MacMillan agree that the main justification for the restriction is the perceived importance of the legislation for the survival and development of French in Quebec. If they are correct, then the

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11 *Id.*, at 114.

12 Jean-Claude Galipeau, "National Minorities, Rights and Signs: The Supreme Court and Language Legislation in Quebec" in Alain G. Gagnon and A. Brian Tanguay, eds., *Democracy and Justice: Essays in Honour of Khayyam Zev Paltiel/La juste démocratie: mélanges en l'honneur de Khayyam Zev Paltiel* (Ottawa: Carleton University Press, 1992), at 66.

13 José Woehrling, *La conformité de certaines modifications projetées au régime linguistique de l'affichage public et de la publicité commerciale découlant de la* Charte de la langue française *avec les chartes des droits et libertés : annexe à l'Avis sur d'éventuelles modifications à la* Charte de la langue française (Québec: Gouvernement du Québec, Conseil de la langue française, 1993).

14 *Id.*

15 C. Michael MacMillan, *The Practice of Language Rights in Canada* (Toronto: University of Toronto Press, 1998).

16 *Id.*, at 112.

Supreme Court should establish, on the one hand, the nature and degree of the threat to the French language, and on the other, the extent to which the challenged Quebec Charter provisions diminish this threat. This would require some demonstration of the impact of language use on commercial signs on language-related attitudes and behaviours.

In *Ford*,[17] demographic and sociolinguistic materials were included in the factum of the Attorney General of Quebec. The admission of such materials is a matter of significant importance for legal and social science scholars. Determining the merits of such materials is relevant in the cases at hand, but could also have a bearing on how courts will treat demographic and sociological evidence in the future. It is common practice to include in factums various authorities on a wide range of scholarly topics that can provide background and facilitate the analysis of social, economic and other policies related to the legislative issues at hand. Although the Supreme Court did take judicial notice of the demographic and other materials, it did not expose them to any scrutiny in determining the application of section 1 of the Canadian Charter and section 9.1 of the Quebec Charter.

This paper examines how demographic evidence, either in support or against the threat to the French language, has influenced the Court's decision in *Ford*. It will attempt to clarify whether the Supreme Court gave sufficient consideration of the limits of demographic evidence in establishing causality regarding the extent to which the visibility of languages on commercial signs can have a meaningful impact on language attitudes and behaviours. Language sociologists, at the time, had yet to effectively show a causal relationship between the use of English or French on commercial signs and language behaviour modification in Quebec. Our intention is not to demonstrate such linkage but rather to argue that in the case law examined here, greater attention should have been directed at demographic evidence to the extent that courts purported these connections to exist. A more thorough analysis or testing of the merits of such materials would have been useful, even warranted, in *Ford*.

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17 *Supra*, note 2.

II. EVIDENTIARY TESTING?

While it is rather common to admit demographic or sociological evidence in judicial proceedings regarding the application of sections 1 and 9.1, respectively, of the Canadian and Quebec Charters, the burden is on the parties to prove controversial facts.[18] Commenting on evidentiary considerations in constitutional litigation, Raj Anand[19] examines admissibility issues such as legislative versus adjudicative facts, legislative goals and objectives, and expert evidence. He notes that legislative facts are of considerable importance in constitutional challenges. In *Danson v. Ontario (Attorney General)*,[20] Sopinka J. described legislative facts as "... those that establish the purpose and background of legislation, including its social, economic and cultural context. Such facts are of a more general nature, and are subject to less stringent admissibility requirements."[21]

In *RJR-MacDonald Inc. v. Canada (Attorney General)*,[22] La Forest J. points out that legislative fact by their nature are not necessarily "true" or provable in the traditional sense.[23] As Anand rightly observes, this illustrates the nature of the problem in determining the admissibility of legislative facts in any given challenge.[24]

Justice Binnie, in *Public School Boards' Assn. of Alberta v. Alberta (Attorney General)*,[25] accepts that legislative facts could be received by judicial notice without formal proof, but sets a very high test to determine their admissibility. [26] Indeed, Binnie J. states that the legislative facts must be so notorious or uncontroversial that evidence of their existence is unnecessary.[27] Others have contended that where legislative facts are concerned, a less stringent test should be required.

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18 See *R. v. Powley*, [2001] O.J. No. 607, 53 O.R. (3d) 35, at para. 61 (C.A.).

19 Raj Anand, "Some Evidentiary Considerations in Constitutional Litigation," The Advocates' Soc. J. (13 May 2004).

20 [1990] S.C.J. No. 92, [1990] 2 S.C.R. 1086 [hereinafter "*Danson*"].

21 *Id.*, at 1088.

22 [1995] S.C.J. No. 68, [1995] 3 S.C.R. 199.

23 *Id.*, at para. 79.

24 Anand, *supra*, note 19.

25 [2000] S.C.J. No. 2, [2000] 1 S.C.R. 44.

26 *Id.*, at para. 5.

27 *Id.*, at para 5*ff*.

When the *Ford* case was heard by the Quebec Court of Appeal,[28] Bisson J.A. referred to the criteria for application of section 1 of the Canadian Charter laid out by Dickson C.J.C. in *R. v. Oakes*.[29] In this 1986 decision, the Supreme Court of Canada first established a systematic test for identifying what constitutes a reasonable limit to a guaranteed right or freedom that "can be demonstrably justified in a free and democratic society" under section 1 of the Canadian Charter.[30]

Chief Justice Dickson insisted on two main criteria in *R. v. Edwards Books and Art Ltd.*[31] First, he stressed the need to ensure that the objective served by measures limiting a Canadian Charter right be sufficiently important to warrant overriding a constitutionally protected right or freedom. He called for a high standard so that objectives of a trivial nature or inconsistent with the principle of a free and democratic society do not secure protection. Minimally, the objective must relate to societal concerns that are pressing and substantial in a free and democratic society in order to be characterized as sufficiently important. Second, the party invoking section 1 must demonstrate that the means used is reasonable and justified.

A proportionality test is required to determine whether the measures are fair and not arbitrary, whether they are carefully designed to achieve the objectives that have motivated them and whether they are rationally connected to this objective. Moreover, the chosen means should impair the guaranteed right or freedom as little as possible. Finally, Dickson C.J.C. concludes that "there must be proportionality between the effects of the limiting measure and the objective — the more severe the deleterious effects of a measure, the more important the objective must be."[32]

Based on the criteria established by Dickson C.J.C. in *Oakes*, Bisson J.A. contended that even if the objective of the law was of sufficient importance to justify a legislative intervention, it was still necessary to demonstrate that the means employed in attaining the identified end was sufficiently reasonable.[33]

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28 *Quebec (Attorney General) v. La Chaussure Brown's Inc.* (1987), 36 D.L.R. (4th) 374, at 397 (Que. C.A.) [hereinafter "*Ford* (C.A.)"].

29 [1986] S.C.J. No. 7, [1986] 1 S.C.R. 103 [hereinafter "*Oakes*"].

30 *Id.*, at para. 69*ff*.

31 [1986] S.C.J. No. 70, [1986] 2 S.C.R. 713, at 768-69, cited in *Oakes*, *supra*, note 29, at para. 63.

32 *Id.*, summary of decision.

33 *Ford* (C.A.), *supra*, note 28.

III. Admitting the Demographic Evidence

Clearly, the criteria established by Dickson C.J.C. necessitate some demonstration of the effects of the measure in question. The submission of evidence in the form of demographic or sociological studies was not, therefore, inappropriate. However, one would expect a careful appreciation of the merits of these materials based on some universally established criteria. When the matter of commercial signs was heard by the Quebec Superior Court,[34] "the Attorney General of Quebec did not offer material in justification under s. 1 of the Canadian *Charter* or s. 9.1 of the Quebec *Charter*, presumably on the assumption that s. 2(*b*) did not apply by reason of the override provision in s. 214 of the *Charter of the French Language* and that s. 3 of the Quebec *Charter* ... did not yet take precedence over s. 58 of the *Charter of the French Language*."[35] Justice Boudreault acknowledged the possible legitimacy of the objective pursued by section 58 of the *Charter of the French language*, namely, to contribute to the survival of the French language and culture.[36] He added that such a measure might be justifiable within the framework of section 9.1 of the Quebec Charter. However, since the Attorney General did not bring forth any testimony or documentary evidence to this effect nor argued that the challenged article could be saved by section 9.1 of the Quebec Charter, Boudreault J. held that the said article was inoperative. Moreover, when the case was heard by the Superior Court, the Supreme Court had yet provided no indication as to the nature of the onus on government under section 1 of the Canadian Charter.

At the Court of Appeal, the Attorney General of Quebec did attach to his factum materials of a justificatory nature, which Bisson J.A. qualified as demographic, linguistic and sociological studies from Quebec and elsewhere. Ford moved to have the materials struck from the record since these documents had not been filed at trial. The Court of Appeal reserved its judgment on the motion, but never ruled on it. Justice Bisson held that even if the materials were considered, this would not jus-

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34 *Ford v. Quebec (Attorney General)* (1984), 18 D.L.R. (4th) 711 (Que. Sup. Ct.).

35 *Ford v. Quebec (Attorney General)*, [1988] S.C.J. No. 88, [1988] 2 S.C.R. 712, at 774.

36 *Id.*

tify a violation of the freedom of expression protection by prohibiting the use of any language other than French on commercial signs.[37]

Under the circumstances, it is not surprising that there was much debate at the Supreme Court over the admissibility of demographic and sociolinguistic materials in conjunction with deliberations.[38] Such apprehension was reasonable, given the limits of demographic and sociological evidence in providing strong insights into the relationship between language use and visibility of languages on commercial signs. Moreover, it appears that additional materials, including general studies on sociolinguistics and language planning, articles, reports and statistics on the position of the French language in Quebec and Canada were attached to the Supreme Court factum. These materials were needed to justify the language planning policy reflected in the *Charter of the French language* and earlier Quebec legislation of this nature. The Attorney General of Quebec did not make an application for admission of these materials as evidence; he was of the view that these did not constitute "evidence in the strict sense" but rather "legislative facts" of which the Court should take judicial notice.

In the *Devine* appeal,[39] the appellant Allan Singer Ltd. objected strenuously to the suggestion that the court should take judicial notice of the statistical material concerning the relative position of the French and English languages and the francophone and anglophone communities in Quebec, particularly in recent years. It submitted that some of the statistical material was biased or misleading and referred to other statistical analysis which, in his submission, conveyed a more accurate picture.

However, it was noted by the Supreme Court in *Ford* that the respondents came equipped with their own submissions concerning the effect of the materials and did not stridently object to its consideration. Clearly, this placed the respondents in somewhat of a quandary. Although they objected to the admissibility of the materials on technical grounds, with data in hand they implied that demographic information might be appropriate under sections 1 and 9.1, respectively, of the Canadian Charter and Quebec Charter. The Supreme Court contended that the parties did not appear to be taken by surprise or placed at an unfair

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37 *Ford* (C.A.), *supra*, note 28, at 394-95.

38 *Ford v. Québec (Attorney General)*, *supra*, note 35, at 774*ff*.

39 *Devine v. Quebec (Attorney General)* (1986), 36 D.L.R. (4th) 321 (Que. C.A.) [hereinafter "*Devine* (C.A.)"].

disadvantage by the submission of the materials and demonstrated that they were fully prepared to argue its merits. The Court therefore agreed that the materials should be considered. It added, however, that due regard would be given to the submissions of the appellant concerning some of the statistical material.[40]

IV. Demographic Materials and Freedom of Expression

Little focus was given to the important relationship between language and identity. Underlying the freedom of expression provisions were issues of linguistic identity deemed relevant for the affected language communities. The Supreme Court noted in *Ford* that:

> Language is so intimately related to the form and content of expression that there cannot be true freedom of expression by means of language if one is prohibited from using the language of one's choice. Language is not merely a means or medium of expression; it colors the content and meaning of expression. It is, as the preamble of the *Charter of the French language* itself indicates, a means by which the individual expresses his or her personal identity and sense of individuality.[41]

One of the authorities on language questions quoted by the appellant Singer in *Devine* (C.A.) Joshua Fishman, *The Sociology of Language*,[42] points out that:

> ... language is not merely a *means* of interpersonal communication and influence. It is not merely a *carrier* of content, whether latent or manifest. Language itself *is* content, a reference for loyalties and animosities, an indicator of social statuses and personal relationships, marker of situations and topics as well as of the societal goals and the large-scale value-laden arenas of interaction that typify every speech community.[43]

However in regards to identity, the affected language communities could stake similar claim to the importance of language. The Supreme

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40 *Ford v. Quebec (Attorney General)*, [1988] S.C.J. No. 88, *supra*, note 35, at 776-77.

41 *Id.*, at 748-49.

42 Joshua A. Fishman, *The Sociology of Language: An Interdisciplinary Social Science Approach to Language in Society* (Rowley, Mass.: Newbury House, 1972).

43 *Id.*, at 4, cited in *Ford v. Quebec (Attorney General)*, *supra*, note 35, at 750.

Court "noted that this quality or characteristic of language" as described above "is acknowledged by the *Charter of the French language* itself where, in the first paragraph of its preamble, it states: 'Whereas the French language, the distinctive language of a people that is in the majority French-speaking, is the instrument by which that people has articulated its identity.' "[44]

The Court went on to note: "The distinction between the message and the medium was applied by Dugas J. of the Superior Court in *Devine*[45] in holding that freedom of expression does not include freedom to express oneself in the language of one's choice."[46] However, the judges refuted the distinction arguing its inappropriateness "as applied to language as a means of expression because of the intimate relationship between language and meaning."[47]

The fact that language is an important marker of identity does not imply that the language of commercial signs reinforces a sense of belonging. It may do so, but some empirical testing of the relationship would be required. The *Ford* case is certainly complex. In reading the relevant judgments, it appears obvious that the demographic evidence submitted to the Supreme Court by the Attorney General of Quebec did have some weight on the decision.

The materials regarding section 1 of the Canadian Charter and section 9.1 of the Quebec Charter submitted by the Attorney General consisted "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."[48] They were regarded as dealing with two issues of particular relevance to the case. First, "the vulnerable position of the French language in Quebec and Canada," which was considered the principal rationale for the language policy reflected in the *Charter of the French language*; and "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*

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44 *Ford v. Quebec (Attorney General)*, *id.*, at 750.

45 *Devine c. Quebec (Procureur général)*, [1982] C.S. 355 (Que. Sup. Ct.).

46 *Ford v. Quebec (Attorney General)*, *supra*, note 35, at 750.

47 *Id.*

48 *Id.*, at 777.

language."[49] On the first issue, the Supreme Court is of the view that "the material amply establishes the importance of the legislative purpose reflected in the *Charter of the French language* as reflecting a response to a substantial and pressing need."[50]

Further, the Court stated: "The vulnerable position of the French language in Quebec and Canada was described in a series of reports by commissions of inquiry beginning with the Report of the Royal Commission on Bilingualism and Biculturalism in 1969[51] and continuing with the Parent Commission[52] and the Gendron Commission.[53] It is reflected in statistics referred to in these reports and in later studies forming part of the materials."[54] Indeed, the concerns over the position of the French language were conceded by the respondents both before the Court of Appeal and the Supreme Court. It bears mentioning that although the Gendron Commission readily understood that public signs must include French, it added that the need to exclude other languages was not apparent. The Commission recommended the obligatory inclusion of French on signs in the public and parapublic sectors, with the French language taking precedence. The Commission did not extend this proposal to the private sector nor did it suggest the exclusion of languages from signs.

The Supreme Court undoubtedly attached significant importance to what it describes as "causal factors" for the threatened position of the French language. It states:

> (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

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49 *Id.*

50 *Id.*

51 Canada, Royal Commission on Bilingualism and Biculturalism, *Report of the Royal Commission on Bilingualism and Biculturalism* (Ottawa: The Commission, 1967) (Presidents: André Laurendeau, A. Davidson Dunton & Jean-Louis Gagnon).

52 Quebec, Royal Commission of Inquiry on Education in the Province of Quebec, *Report of the Royal Commission of Inquiry on Education in the Province of Quebec* (Quebec: The Commission, 1963) (President: Alphonse-Marie Parent).

53 Quebec, Commission of Inquiry on the Situation of the French Language and Linguistic Rights in Quebec, *Report of the Commission of Inquiry on the Situation of the French Language and Linguistic Rights in Quebec* (Quebec: Publications du Québec, 1972) (President: Jean-Denis Gendron).

54 *Ford v. Quebec (Attorney General)*, *supra*, note 35, at 777.

> 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.[55]

Serious consideration was directed at "causal factors" that "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 [*Charter of the French language*], the "*visage linguistique*" of Quebec often gave the impression that English had become as significant as French."[56] The Supreme Court reiterated the view that the

> "*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.[57]

While it is entirely possible to make a persuasive demographic case for the concerns raised here, their relationship to the "*visage linguistique*" is much harder to demonstrate in empirical terms. Indeed, the demographic and sociolinguistic evidence submitted offered no such proof. In fact, any affirmation regarding the impact of the language of commercial signs is clearly beyond the scope of the evidence before the Supreme Court. This by no means suggests that concerns of the Quebec francophone population should be dismissed, but rather that further elaboration is needed to indicate how the Quebec Charter provisions on commercial signs can improve the position of the French language.

In the absence of research on integration theories and connected methodologies, there is a real risk that the impact of language predominance — whether English or French — on commercial signs may not be properly understood, nor its related effect on language behaviours. In the 1988 judgments of *Ford* and *Devine*, the relationship between the predominance of French on commercial signs and the reduced threat to the French language is more or less assumed or even directly accepted.

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55 *Id.*, at 778.
56 *Id.*
57 *Id.*

It is worth noting that neither in its written nor oral arguments did the Attorney General of Quebec attempt "to justify the requirement of the exclusive use of French." The emphasis was on "reasons for the adoption of the *Charter of the French language* and the earlier language legislation, which, as was noted above, were conceded by the respondents."[58] During the hearings, however, various commentaries on the necessity of unilingual French signs pointed to its relevance to the survival of the French language, especially its role in assuaging francophone psychological insecurities on language matters.

While the respondents acknowledged the fragility of the French language, they did not concede that commercial signs were vital to the defense of the French language. Nor did they focus on the impact of French predominance on commercial signs in enhancing the use of the French language. The courts noted the absence of evidence in the government's brief documenting the necessity for a provision excluding other languages from commercial signs. As pointed out by Michael MacMillan,[59] the government fails to document any real impact whatsoever of the "visage linguistique" on the population. Although the government raised the rationale and importance of doing so, no substantive evidence was provided on the anticipated impact or negative effects on the francophone population in Quebec of unilingual English or bilingual signs. The Attorney General of Quebec stressed the general democratic legitimacy of Quebec's language policy, but made no express reference to the exclusive use of French on commercial signs.

The Supreme Court concurred that section 1 of the Canadian Charter and section 9.1 of the Quebec Charter materials establish "that the aim of the language policy underlying the *Charter of the French language* was a serious and legitimate one."[60] It added that the materials indicate a "concern about the survival of the French language and the perceived need for an adequate legislative response to the problem."[61] In its view, the demographic and sociolinguistic materials indicate

> ... a rational connection between protecting the French language and assuring that the reality of Quebec society is communicated through

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58 *Id.*, at 779.

59 C. Michael MacMillan, *The Practice of Language Rights in Canada* (Toronto: University of Toronto Press, 1998).

60 *Ford v. Quebec (Attorney General)*, [1988] S.C.J. No. 88, [1988] 2 S.C.R. 712, at 778.

61 *Id.*

> the "*visage linguistique*." The section 1 and section 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.[62]

According to MacMillan,[63] as suggested by the Supreme Court in its above remarks, that specific question was simply not addressed.

In other words, the Attorney General successfully demonstrated "that the predominance of the French language was not reflected in the '*visage linguistique*' of Quebec."[64] The Court suggested that this objective could have been met with minimal impairment on freedom of expression. It states:

> ... whereas requiring the predominant display of the French language, even its marked predominance, would be proportional to the goal of promoting and maintaining the French "*visage linguistique*" in Quebec and therefore justified under the Québec Charter and the Canadian Charter, requiring the exclusive use of French has not been so justified.[65]

The Court suggests that marked predominance of French in the "*visage linguistique*" would reflect the demography of Quebec and thus serve to communicate this reality to all citizens and non-citizens alike, irrespective of their mother tongue. The underlying rationale here is that the relative size of a language on commercial signs is perceived by citizens as an indicator of language significance, a notion that had yet to be conclusively substantiated by demographers or other social science experts. Causality in this regard was assumed but not demonstrated in the section 1 and section 9.1 materials submitted to the courts.

V. Studies on the Impact of the Language of Commercial Signs

Shortly after the Supreme Court decision, the Quebec government introduced Bill 178.[66] This Bill requires that most commercial signs be

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62 *Id.*, at 779.

63 C. Michael MacMillan, *supra*, note 59.

64 *Ford v. Quebec (Attorney General)*, *supra*, note 60, at 780.

65 *Id.*

66 *An Act to Amend the Charter of the French Language*, S.Q. 1988, c. 54 [hereinafter "Bill 178"].

in French only, but permits the use of languages other than French on signs within commercial establishment, provided the latter language is predominant. The government invoked the notwithstanding clause in order to protect the proposed bill from the freedom of expression provisions of the Canadian and Quebec Charters. Since this clause requires a revision every five years, the government can expect a new debate around the issue in the years ahead.

In the early 1990s, the government of Quebec therefore asked its advisory body on language issues — the Conseil de la langue française ("CLF") — to examine the impact of French language on commercial signs on language use by the population. The CLF commissioned a survey conducted by CROP, a market research company, in January 1993 to measure the extent to which Quebeckers feel that various legislative measures influence French language use by the population. The collected data may be helpful in determining the causal relationship between use of French on commercial signs and use of the French language generally. However, it should be noted that the findings are based on people's perception of the impact of French unilingual commercial signs and not on the actual use of that language as correlated with the visibility of that language.

According to the January 1993 CROP survey, 28 per cent of francophone respondents felt that unilingual commercial signs constituted the most significant factor in giving Quebec a French face ("*un visage français*"). Though 18 per cent of non-francophones shared this view, they were more inclined to believe that the language in which merchants greet you had a greater bearing on the *visage français*.[67] If several francophones agreed with the importance of unilingual commercial signs as a factor contributing to Quebec's French face, few agreed that it had an impact on use of the French language. According to the survey, 5 per cent of francophones and 2 per cent of non-francophones reported that unilingual commercial signs incited them to use French. As to the perceived impact on various groups, 5 per cent of francophones and 1 per cent of non-francophones believed that unilingual French signs encouraged immigrants to use the French language. As to Quebec anglo-

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[67] Richard Y. Bourhis & Rodrigue Landry, "La Loi 101 et l'aménagement du paysage linguistique au Québec," Revue d'aménagement linguistique, special issue entitled *L'aménagement linguistique au Québec: 25 ans d'application de la Charte de la langue française* (fall 2002), at 107 [hereinafter "Bourhis & Landry (2002)"].

phones, 10 per cent of francophones and 3 per cent of non-francophones believed that unilingual signs prompted use of the French language.

Based on the CROP findings, two respected sociologists contend that unilingual French commercial signs were not seen by Quebeckers as an important factor in encouraging French language use. On this issue, analysts Richard Bourhis and Rodrigue Landry note: "... l'affichage externe uniquement en français tel que présenté par la loi et la loi 178 est perçu par l'ensemble des répondants comme ayant peu d'impact sur l'usage du français dans leur vie quotidienne."[68]

Analyzing the language landscape, the same experts Bourhis and Landry argue elsewhere that language of commercial signs may indeed be critical to the ongoing vitality of minority language communities.[69] In their empirical testing of language landscape components, they found an interrelationship between various measures connected to the "visibility" of the French language (in public signs and media) and the "perceived" vitality of the francophone community. They do not, however, establish a clear unidirectional causality between the means and the effects. This may be due in part to the uncertainty as to whether language landscape is a function of vitality or vice versa. Landry and Bourhis do not suggest clearly a causal relationship running from language landscape to language groups' vitality.

Bourhis and Landry state: "the linguistic landscape, at least in the Canadian context, may indeed constitute the most visible and most salient marker of perceived in-group versus out-group ethno-linguistic vitality."[70] They focus on the perceived group vitality and the perceived use of French in a particular environment. The actual language landscape is not assessed. No relationship can be established, therefore, between the degree of French in a given environment and the extent to which respondents perceive the landscape as French. Nor can we conclude that more French signs will foster a greater sense of vitality. We can say that the belief that there is more French in the public domain is associated with a sense of vitality. While the former relationship would be more meaningful in support of legislative measures, the latter does

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68 *Id.*, at 114.

69 Richard Y. Bourhis & Rodrigue Landry, "Linguistic Landscape and Ethnolinguistic Vitality: An Empirical Study" (1997) 16:1 Journal of Language and Social Psychology [hereinafter "Bourhis & Landry (1997)"].

70 *Id.*, at 45.

offer interesting psychological insights on ethno-linguistic vitality. How the exclusivity or predominance of French on commercial signs has an impact on language behaviour therefore remains unclear.

Numerous Quebec policy-makers have assumed that the language of commercial signs represents an important factor in the evolving attitudes of the population with respect to the French language. The 2001 Estates General on the Situation and Future of the French Language in Quebec Report states: "... les onze années de 1977 a 1988 pendant laquelle la règle de l'unilinguisme français a été appliquée, ont contribué à franciser l'affichage commercial, à changer les mentalités de la population et des commerçants ... "[71] Again, little proof is offered to substantiate this claim.

VI. Conclusion: Laws of Cause and Effect in Legislative Facts on Language

In a 1993 review of the *Ford* decision for the Conseil de la langue française, Woehrling contends that the criteria for establishing a reasonable limit on freedom of expression was unjustifiably high because the issue at stake was commercial expression. At that time, Woehrling expressed the hope that the Supreme Court might in the future reconsider the case, on the basis of a redefined legislative objective where the "*visage linguistique*" of Quebec contributes to change non-francophones' psychology regarding the French language and to persuade them of the necessity to learn and use the language.[72]

Woehrling contends that the Court would then have to recognize that: (1) the objective is what the legislator wished to attain in adopting the relevant provisions; (2) that the objective is important; and (3) that it is not inconsistent with Charter values.[73] It is on this second point that Woehrling feels that it will be necessary to establish whether the means

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[71] Quebec, Commission des États généraux sur la situation et l'avenir de la langue française au Québec, *Le français, une langue pour tout le monde, une nouvelle approche stratégique et citoyenne* (Quebec: Publications du Québec, 2001).

[72] José Woehrling, *La conformité de certaines modifications projetées au régime linguistique de l'affichage public et de la publicité commerciale découlant de la* Charte de la langue française *avec les chartes des droits et libertés : annexe à l'Avis sur d'éventuelles modifications à la* Charte de la langue française (Québec: Gouvernement du Québec, Conseil de la langue française, 1993).

[73] *Id.*

chosen are causally related to the objective and constitute the least restrictive means in order to achieve the stated objective. Even if the Court were prepared to reconsider the case on this basis, some demonstration would remain necessary as to the effect of French exclusivity on commercial signs on use of the French language by non-francophones.

Woehrling maintains that if it is scientifically impossible to prove that by giving Quebec a French face through requiring French-only commercial signs, non-francophones are incited to learn and use the French language, it is equally difficult to demonstrate conclusively that bilingualism (even with net predominance of French) is sufficient to obtain the goal of integration. Regardless of this assumption, the burden of proving whether the measure is warranted most certainly lies with the legislator. In *R. v. Oakes*, Dickson C.J.C. insisted that "... the onus of proving that a limit on a right or freedom guaranteed by the Charter is reasonable and demonstrably justified in a free and democratic society rests upon the party seeking to uphold the limitation."[74]

Demographer Victor Piché argues that whereas the notion of integration in sociology focuses on independent theory, in demography it is intimately linked with the idea of balance between ethnic and language groups that, he contends, are often defined arbitrarily.[75] This means that demographers define integration in quantitative terms. Factors underlying language choices are based on a subjective target established by analysts or policy-makers. Piché adds that other considerations contribute to integration, but these have attracted less attention from demographers. When it comes to issues related to integration, it has been relatively common for demographers and analysts of linguistic realities to accuse each other of political and ideological bias in generating evidence to defend their views, notably in regard to the vulnerability of the French language in Quebec.

While courts apply the less stringent requirements in admitting legislative facts, they should nevertheless proceed cautiously when they take judicial notice of "facts" that may be reasonably open to dispute. This is especially true where facts can determine a judicial decision. As Dickson C.J.C. concludes, the standard of proof under section 1 of the Canadian Charter is a preponderance of probabilities. Proof beyond a

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74 [1986] S.C.J. No. 7, [1986] S.C.R. 103 at 136-37.

75 Victor Piché, "Le discours démo-politique au Québec : inclusion ou exclusion?" (1992) 24:2 Sociologie et société 143.

reasonable doubt would be unduly onerous on the party seeking to limit the right, because concepts such as "reasonableness," "justifiability" and "free and democratic society" are not amenable to such a standard. Nevertheless, the preponderance of probability test must be applied rigorously. Given the need to set the bar high when it comes to Canadian Charter rights, the less conjectural and more definitive an evidenced-based conclusion, the more likely it is to generate meaningful discussion over whether exceptions are warranted. It is the view here that in *Ford*, demographic and sociological materials did not establish the necessary causal relationships. Acknowledging otherwise may have risked lowering the threshold in the future for admission of often relevant documentation for informing judicial decisions.