Matelot de la vieille marine

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La Cour suprême du Canada s'est fondée, dans les arrêts Ford *et* Devine, *sur la menace qui pèse sur la langue française au Québec pour justifier la prédominance de cette langue dans l'affichage commercial. L'état actuel de la réglementation a conduit au Québec à un modus vivendi en la matière, qui reste toutefois bien fragile et qui est périodiquement remis en question devant les tribunaux.*

I. INTRODUCTION

I am pleased to participate on this panel with Robert Leckey who, I am especially proud to say, is a fellow alumnus of the McGill Law Faculty. His chapter, "The Private Law of Language," written with Emmanuel Didier,[1] has been helpful to me in reviewing the subject which we are addressing this afternoon. It prompts the reflection, however, that we are really concerned with the "law of *private language*," rather than the *private law* of language, since most of it, though probably not all, is in truth *public law* consisting of administrative powers and of duties, both enforced largely by means of offences carrying penalties and sanctioned also by the civil consequences attached to the commission of offences.

Perhaps our hosts have included me on account of my participation as a soldier in the language wars of recent decades on such matters as public signs and the language of legislation. Since I do not share Yogi Berra's reputed view that "Nostalgia isn't what it used to be," I enjoy recalling important moments in these events. For example, in the landmark *Ford* (or *La Chaussure Brown's*) case,[2] the application to the

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1 Michel Bastarache, ed., *Language Rights in Canada*, 2d ed. (Cowansville, Qc: Yvon Blais, 2004).

2 *Ford v. Quebec (Attorney General)*, [1988] S.C.J. No. 88, [1988] 2 S.C.R. 712, 54 D.L.R. (4th) 577 [hereinafter "*Ford*"].

Superior Court for declaratory relief in respect of public signs and firm names was drafted in my Law Faculty office by a small team sustained and energized by smoked-meat sandwiches from Schwartz's Montreal Hebrew Delicatessen. Schwartz's is now dutifully announced on its sign as Charcuterie Hebraïque de Montréal, and in any tour d'horizon of Quebec culture must surely play a role equal to Wilensky's, the Montreal delicatessen made famous by author Mordecai Richler. I have not been able to prepare a broad paper for today's panel, but I will share a few of my thoughts on some private-sector issues. My remarks will address the position, in Quebec, on signs, posters, and advertising; on toys and games, and on the cinema.

II. Charting Unknown Waters

Last summer, signs appeared in Montreal announcing the arrival of the U.S. retailer Old Navy. Unlike, say, Schwartz's Delicatessen and notwithstanding the provisions on public signs, and posters and commercial advertising, as well as the names of enterprises and organizations in the *Charter of the French language*,[3] there was nowhere to be seen any sign announcing *La vieille marine*. What could explain so striking an absence of the French language? In exploring this and other questions, perhaps I can consider myself as a *matelot de la vieille marine*.

There is, of course, the matter of trade-marks and corporate names. I have not done any research to ascertain the status of the phrase "Old Navy" as one or the other, but it has long seemed obvious that the administrative authorities have avoided, in legislation and enforcement, confrontations which might result in judicial decisions adverse to the government of Quebec holding that the *Charter of the French language*'s provisions on "The Language of Commerce and Business" cannot constitutionally preclude the use of federally established trade-marks, or of English-language corporate names, or both (and very possibly could not do so *whether a French version does or does not exist*). Whether or not such applications of Quebec's language legislation would, as the law stands at present, either constitute *ultra vires* intrusions into federal jurisdiction or conflict with existing federal legislation, it seems to me that Parliament could, constitutionally, make

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3 R.S.Q., c. C-11, ss. 58-71.

explicit the unfettered right of businesses to use such names, regardless of conflicting provincial statutes.

The *Regulation respecting the language of commerce and business* (the "Regulation"),[4] enacted under the *Charter of the French language*, does make some accommodation for corporate and trade names or marks. Thus, section 7 provides *inter alia* that:

> The following inscriptions *on a product* may be exclusively in a language other than French:
>
> (1) the firm name of a firm *established exclusively outside Quebec*;
>
> ...
>
> (4) a recognized trade mark within the meaning of the *Trade Marks Act*,[5] *unless a French version has been registered.*
>
> (emphasis added)

Again, by section 25 of the same Regulation:

> On public signs and posters and in commercial advertising, the following may appear exclusively in a language other than French:
>
> (1) the firm name of a firm *established exclusively outside Québec*;
>
> ...
>
> (4) a recognized trade mark within the meaning of the *Trade Marks Act*, *unless a French version has been registered.*
>
> (emphasis added)

I am at a loss to know what is meant by a firm "established exclusively outside Québec;" or, in French, "*une entreprise établie exclusivement hors du Québec*." I doubt that this refers simply to incorporation outside Quebec. Perhaps it contemplates a business enterprise which, though it advertises within Quebec, has no place of business within the province. If so, Old Navy would, in order to establish compliance of its signs with the terms of the Quebec legislation, be obliged to show that "Old Navy" is a "recognized trade mark," *whether registered or not*, having no *registered* French version. It seems probable that it could do so.

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4 R.Q., c. C-11, r. 9.01, O.C. 1756-1993, 8 December 1993, G.O.Q. 1993.II.6919.

5 R.S.C. 1985, c. T-13.

In fact, as it stands, section 10(3) of the *Canada Business Corporations Act*,[6] provides more broadly:

> (3) Subject to subsection 12(1), the name of a corporation may be set out in its articles in an English form, a French form, an English form and a French form, or a combined English and French form, so long as the combined form meets the prescribed criteria. The corporation may use and may be legally designated by any such form.

This can be construed as creating a statutory liberty which arguably avails against the *Charter of the French language*, and not only as against its provisions on signs, posters and commercial advertising, but also as against its provisions on the names of enterprises.[7]

By contrast, the *Trade-marks Act* is less explicit. Under section 2 of this Act, a trade name is "... the name under which any business is carried on, whether or not it is the name of a corporation, a partnership or an individual." As I understand the legislation, a trade-mark can exist before it is registered, and a trade name may be a trade-mark. The statute is addressed to defining rights in a trade-mark, and prohibiting their improper use, including use by anyone not entitled to use them. But the *Trade-mark Act* does not *ex facie*, at least not in positive terms, confer a right of use in respect of trade-marks in the manner that the *Canada Business Corporations Act,* quoted above, does in respect of corporate names established under that Act. Possibly, the *Trade-marks Act* has this effect nevertheless, whether through an implicit meaning, or through what amounts to exhaustion of the subject matter, or through exclusivity of federal legislative authority. If not, the only exemptions are those provided for by the Regulation quoted above.

III. Reading the Signs

There is perhaps at work, too, in matters of enforcement, a counsel of administrative prudence when it comes to dealing with foreign business enterprises as opposed, for example, to local delicatessens or

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6 R.S.C. 1985, c. C-44, as am. by S.C. 2001, c. 14, s. 5.

7 Sections 63-65 of the *Charter of the French language* read as follows:

63. The name of an enterprise must be in French.

64. To obtain juridical personality, it is necessary to have a name in French.

65. Every name that is not in French must be changed before 31 December 1980, unless the Act under which the enterprise is incorporated does not allow it.

antique shops. But no such principle would apply to the Pharmacie Jean Coutu, which, of course, is a paradigm of the successful francophone Quebec business. Perhaps you have seen some signs in their stores on racks of goods, promoting them as "Shopping trouvailles!" The interesting juridical issues raised by these signs are unlikely to make their way to the courts. Here the administration might possibly be constrained by another principle which I call: "Tremblay does not eat Tremblay." A good defence to a prosecution here, however, might be that "Shopping trouvailles!" is lawful as being in truth a unilingually French sign. How is this so?

The legal meaning of statutory terms such as "French language" or "*langue française*" is of course a question of law. On the other hand, the scope and content of the French language at any time is doubtless a matter of fact. So I should think that the question of the compliance or non-compliance of "Shopping trouvailles!" with the *Charter of the French language* is a mixed question of law and fact. "Trouvailles" clearly passes muster as good French. What, then, about "Shopping"? In *Le Petit Robert (nouvelle édition)* there is an entry for "shopping" (spelled alternatively with one or two p's), which is acknowledged as an anglicism, and which reads in part:

> ... Le fait d'aller de magasin en magasin pour regarder et acheter ⇨ chalandage, lèche-vitrine, RÉGION. 2. Magasinage. *Faire du shopping*.[8]

The courts can clearly take judicial notice of scope and content of the French language, a judicial notice, assisted and fortified as occasion may require, by *viva voce* and documentary evidence, expert or otherwise. A few hundred thousand dollars and two good teams of lexicographers could put to rest many troubling questions and offer a chastening example of useful spending to the federal ministers of the Crown and public servants, a half-mile away on Parliament Hill, whose wasteful expenditures have been scandalizing the nation. Here the issue, front and centre, would seem to be whether "shopping," even if it has penetrated France, can be considered part of the more carefully protected French language in Quebec, and therefore French within the meaning of

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[8] (Montréal: Dicorobert, 1996), at 2086.

the *Charter of the French language*.[9] At the same time, some attention might usefully be paid — perhaps at no extra expense — to the status in Quebec of *lèche-vitrine*. These questions seem unlikely to come for adjudication before *Le Grand Robert* and his brethren, and our law will be much the poorer for it.

IV. The Larger Picture

We are, however, fortunate that the courts have grappled with the *Lyon and the Wallrus* case, formally known as *R. c. Entreprises W. F. H. ltée.*[10] And not only our domestic courts, but the United Nations is presently considering the admissibility of a complaint to the Human Rights Committee submitted by Walter Hoffman and Gwen Simpson on October 4, 2003, under the *Optional Protocol* to the *International Covenant on Civil and Political Rights*.[11] Here, clearly, Quebec can indulge its ambition to appear on the world stage. But, despite this exceptional opportunity for its *épanouissement*, it is contesting the admissibility of the complaint, and not only its merits.

The corporate defendant, incorporated under the *Canada Business Corporations Act*, operated at all material times a shop in Knowlton in the Town of Lac Brome, Quebec, under the name, as shown incompletely in its sign, in English, "LYON and the WALLRUS" and in French, "La LIONNE et le MORSE."[12] The description of the allegedly illegal sign given in the reasons of Biron J.C.A. *ad hoc* for the Quebec Court of Appeal is slightly inaccurate, in that the sign's north side (essentially English-language, though it has the French "CADEAUX") offers two l's in "WALLRUS", rather than one. This, I was told by the corporation's counsel, Brent Tyler, is a play on the nickname "Wally" (one of the two directors and shareholders, Walter Hoffman, the other

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[9] And, indeed, would the Pharmacie Jean Coutu have a stronger case if it had spelled "shoping" with one p, which must surely be French, at least in France, since it is certainly not good English, not modern English at any rate?

[10] [2001] J.Q. no. 5021, [2001] R.J.Q. 2557 (C.A.) [hereinafter "*Lyon and the Wallrus*"]. The appeal was heard *coram* Rousseau-Houle J.C.A. and Robert J.C.A.; Biron J.C.A. *ad hoc*.

[11] (19 December 1966), 999 U.N.T.S. 171, 1976 Can. T.S., No. 47, 6 I.L.M. 368 (entered into force 23 March 1976, accession by Canada 19 May 1976). *Optional Protocol*, UN GA Res. 2200A (XXI) (16 December 1966) (*entry into force* 23 March 1976, in accordance with Article 9).

[12] The definite article "The" does not appear on the sign for reasons explained below. See also, *infra*, note 32. See the photographs of the English and French versions of this two-sided bilingual sign at Appendix II.

being Gwen Simpson). Moreover, "Lyon" (I am told) is the maiden name of Gwen Simpson's mother. The south side of the sign is essentially in French, though the word "GIFTS" appears on this side rather than the other. "HOT TUBS & SAUNAS" appears on both sides. The court (speaking through Biron J.C.A. *ad hoc*), acknowledged that:

> L'enseigne est donc bilingue, sauf pour les mots « Hot Tubs » qui se retrouvent sur ses deux côtés. Il est admis que tous les autres mots occupent le même espace dans chaque langue et que leurs lettres sont d'égale grandeur.[13]

Any quarrel with respect to the unilingualism of the term "Hot Tubs" is not pursued. This is because the case is made to turn on the requirements in the present section 58 of the *Charter of the French language* that, save in the cases excepted in the Act or Regulations, in public signs and posters and commercial advertising, French be both present and also "markedly predominant" (*"figure de façon nettement prédominante"*).

I shall not today pursue the question whether "Lyon," spelled with a *y*, is on its face English (at any rate modern English) or French. The word, it appears, entered the English language from French about the year 1200. Again, whether "Wallrus," spelled with two l's, is an invented word (for which the Regulations contain some special provisions) is a matter on which we cannot now tarry. For even if "Lyon" and "Wallrus," because "Wallrus" is an invented word, are as French as "Lionne" and "Morse," it is clear that all the other English-language words are equal in prominence on the sign to the French, so that the sign, as a whole, is not in compliance with the Act.

At trial in the Court of Quebec[14] the defendant succeeded. On appeal, first before the Superior Court[15] and again in the Court of Appeal,[16] where the defendant was unsuccessful in both instances, the case turned essentially on the guarantees, in the *Canadian Charter of Rights and*

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[13] *Lyon and the Wallrus*, *supra*, note 10, at para. 6.

[14] *R. c. Entreprises W.F.H. ltée*, [1999] J.Q. no 4586, [1999] R.J.Q. 2794 (C.Q. crim. & pén.), Danielle Côté J.

[15] *R. c. Entreprises W.F.H. ltée*, [2000] J.Q. no 1165, [2000] R.J.Q. 1222 (C.S. crim.), Bellavance J.

[16] *Lyon and the Wallrus*, *supra*, note 10.

Freedoms,[17] and the *Quebec Charter of human rights and freedoms*,[18] of freedom of expression and equality. The Supreme Court of Canada, on December 12, 2002, refused leave to appeal from the decision of the Court of Appeal.[19]

In *Ford* and elsewhere, the Supreme Court of Canada has of course drawn the distinction between, on the one hand, fundamental rights and freedoms, such as freedom of expression (including expression in one's choice of language), and on the other, language rights in the narrower sense of rights and privileges in respect of particular languages, involving, in particular, special services or accommodation from state institutions. Some years ago, at a conference in England concerning themes similar to those we are addressing this weekend, I pointed out that the claims of members of Quebec's English-speaking minority were, to a significant extent (as with the language of signs) claims, not to language rights in the narrow sense, but to basic freedoms, notably freedom of expression.

In effect, *Lyon and the Wallrus* revisits the issues addressed in *Ford*, in particular as the earlier decision had dealt with the issue of "marked predominance." In *Lyon and the Wallrus*, the Quebec Court of Appeal considered at some length the matter of *stare decisis*. On the premise that the Supreme Court's observations in *Ford* accepting the legitimacy, in terms of fundamental rights and freedoms, of a requirement for marked predominance of French, were *obiter dicta*, the Court of Appeal sought in the recent case to define the situations where the High Court's *obiter dicta* are binding on lower courts. My own feeling is that the Supreme Court's observations on "marked predominance" were not *obiter dicta*, but rather part of its *ratio decidendi*. As can be seen most clearly where a court gives two independent grounds for its decision, each sufficient by itself to dispose of the case, a court's reasoning is not necessarily *obiter* even where the case could have been disposed of without the segment in question. Obviously the Supreme Court could have disposed of *Ford* simply by deciding that, in excluding the use of languages other than French, the legislature had violated the parties' fundamental freedoms, without the Court's indicating where the consti-

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

[18] R.S.Q., c. C-12.

[19] [2002] 4 S.C.R. vi.

tutional line was to be drawn. Instead it drew the line between what was, and what was not, constitutionally permissible. This, in my view, was part of its *ratio decidendi*.

And though defendants' counsel in *Lyon and the Wallrus*, Brent Tyler, did seek (unsuccessfully) to have new weight given to the principle of linguistic duality, and to the principles (articulated particularly in the *Reference re Secession of Quebec*),[20] of multiculturalism, federalism, democracy, constitutionalism and the rule of law, and the protection of minorities, very largely he proceeded, the Court's reasons seem to imply, not on the basis that *Ford* was wrongly decided in point of law, but rather that, if its reasoning were applied to contemporary facts, a statutory requirement of "marked predominance" was no longer required to protect the French language, whether or not it had been required earlier.

So the central issue in 2001 was not (it seems to me) whether *Ford* was right or wrong in *law*, but rather what were the *constitutional facts* applicable in the recent period relevant to the *Lyon and the Wallrus*, whatever they might have been at the time of *Ford*. Now if so-called "evidence" adduced to establish constitutional facts, including those connected with the application of section 1 of the Charter and section 9(1) of the Quebec *Charter of human rights and freedoms*, were in truth *evidence* in the *normal* sense of that term, the entire body of such "evidence" would have to be adduced again and again *in each and every proceeding* brought to enforce the sign provisions, and for that matter, also to enforce most, perhaps even all, of the other provisions of the *Charter of the French language*. A moment's reflection shows, then, that such material, whether *viva voce* or documentary, or, for that matter, real, though it is adduced and tested in the manner of ordinary evidence, is *not* in the ordinary sense "evidence" at all, but rather material adduced to assist judicial notice: here, to assist judicial notice of constitutional facts needed to apply the law. So it can be applied, through judicial notice, in other proceedings, without being formally put into each record.

Here the Court of Appeal was, indeed, prepared to allow it to be established that circumstances respecting the situation of the French language in Quebec, and its need of protection, had changed since the *Ford* case, and that a requirement for "marked predominance" was no longer

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[20] [1998] S.C.J. No. 61, [1998] 2 S.C.R. 217, 161 D.L.R. (4th) 385.

warranted. However, it held that the "evidentiary" burden[21] had passed to whoever now wished to disturb the earlier finding; that is, the finding of constitutional fact that compulsory "marked predominance" of French was warranted. The Court of Appeal held that counsel for Lyon and the Wallrus had, in the Superior Court, declined to accept that the burden was his, but had (the Court thought) instead mistakenly proceeded on the basis that it continued to lie on the prosecution. Consequently he had (in its view) neglected to discharge his evidentiary burden as to the condition of the French language and the lesser extent to which (he had argued) it needed protection. The Court of Appeal therefore applied the earlier finding. I am, however, advised by counsel that the Superior Court misunderstood his position, and that the transcript of the hearing shows him as having merely expressed a preference for adducing new evidence *in the Superior Court* (if evidence were to be required) rather than in a *new trial in the Court of Quebec*.

In truth, of the various "justifying" factors invoked in *Ford* and reiterated in *Lyon and the Wallrus*, defendants' counsel (the Court of Appeal said) did not contest the continued applicability of two factors: (a) the decline in the francophone birthrate in Quebec (which tends to diminish the proportion which the Quebec francophone population bears to the population of Canada), and (b) the decline of the francophone population outside Quebec in consequence of assimilation. Rather, counsel's argument was that circumstances had changed in regard to the other two factors: (c) the greater rate of assimilation of immigrants by the Quebec anglophone community, and (d) the historic domination by anglophones of the highest levels of economic life.[22]

As to these, the Court responded:

> Je ne puis suivre l'appelante sur ce terrain. Même si l'on acceptait l'hypothèse que la situation s'est améliorée quant aux facteurs c) et d), il n'en demeure pas moins que la langue française au Québec est toujours vulnérable. 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.

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21 The author has put "evidentiary" in quotation marks for reasons discussed above.

22 *Supra*, note 10, at para. 69 [translated by author].

> L'appelante reproche également au juge de ne pas avoir tenu compte des propos du ministre Ryan qui a déclaré, au moment du dépôt du projet de loi modifiant la Charte de la langue française en 1993, que « le français a fait des progrès substantiels dans les domaines de l'enseignement, de l'administration publique, de l'activité économique, de la vie sociale et culturelle. » Compte tenu de ce que j'ai dit dans les paragraphes précédents, j'estime qu'une telle déclaration n'a pas la portée que l'appelante veut lui prêter et qu'elle ne peut avoir pour effet de faire échec au constat de la Cour suprême quant à la menace qui pèse sur le français au Québec.[23]

What conclusions might be drawn from new, thorough and updated demographic and socio-economic studies pertinent to these issues it is not easy to predict. For most private litigants, the cost of such research is a serious, and for many an insurmountable, deterrent. It may be conjectured, too, that the courts will, at least in the absence of truly compelling facts, be at least reluctant to disturb what is widely assumed to have become a stable *modus vivendi*, or even to re-open the whole question. The Supreme Court's refusal of leave in *Lyon and the Wallrus*[24] can be interpreted as pointing in this direction, though in truth it simply leaves the earlier assumptions of constitutional fact intact until revisited with new "evidentiary" material. New and interesting, even convincing, material[25] is in fact to be brought before the courts in several cases (there are at least 69) now pending in the Court of Quebec (Criminal and Penal Division),[26] which are to be heard together on the constitutional questions.[27]

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[23] *Id.*, at paras. 73-74.

[24] *Supra*, note 19.

[25] See especially Jacques Henripin, "La population anglophone au Québec et à Montréal : évolution passée et prospective" (avril 2004), and Calvin Veltman, "Vitalité du français, léthargie de l'anglais: un paradoxe de la situation linguistique au Québec en 2001".

[26] *Quebec (Attorney General) v. Clifford Oswald*, No. 500-61-119584-001 and other cases listed in Appendix I.

[27] In *Oswald*, *id.*, and the other cases *id.*, the Attorney General of Quebec, pursuant to arts. 34 and 95 of the *Code of Civil Procedure* R.S.Q., c. C-25, was given notice on November 2, 2004 in the following terms:

> **TAKE NOTICE** that the Defendants have been charged with offences pursuant to ss. 51, 52, 57 and 58 of the *Charter of the French Language*, R.S.Q. c. C-11 ("CFL") contained in Chapter VII entitled *The Language of Commerce and Business*.
>
> **TAKE FURTHER NOTICE** that the Defendants will raise the following arguments:
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> I) Sections 51, 52, 57 and 58 CFL are constitutionally inapplicable, invalid, inoperative and of no force or effect under the Canadian *Charter of Rights and Freedoms*, Schedule B, *The Constitution Act, 1982* (the "Canadian *Charter*") and the Quebec *Charter of Human Rights and Freedoms*, R.S.Q. c. C-12 (the "Quebec *Charter*");

These questions include the permissibility, in terms of fundamental rights and freedoms, of imposing obligatory use of French, and not only of requiring its "marked predominance." Legislative *vires* is also in issue in regard to the application of the *Charter of the French language* to the Internet. It will be noted that the new litigation puts in issue the constitutional facts, on the situation of the French language, as they were found in *Ford*, and the reliability of the evidence on which those findings were based and not merely the situation as it exists today. The cases concern several sections of the *Charter of the French language*.

II) Sections 52 and 57 CFL are *ultra vires* the legislature of Quebec under the *The Constitution Act, 1867*, as regards charges relating to the Internet;

I) *Under the Canadian Charter and the Quebec Charter*

Violation of right of commercial free speech

1. Sections 51, 52, 57 and 58 CFL infringe the Defendants' right to freedom of commercial expression as guaranteed by s. 2(b) of the Canadian *Charter* and s. 3 of the Quebec *Charter*;

Violation of the equality provisions

2. Sections 51, 52, 57 and 58 CFL infringe the Defendants' right to equality before and under the law and the right to equal protection and equal benefit of the law and the right not to be discriminated against on the basis of language under s. 15 of the Canadian *Charter* and s. 10 of the Quebec *Charter*;

Impugned provisions not saved by s. 1 or s. 9.1

3. The impugned provisions are not saved by operation of s. 1 of the Canadian *Charter* or s. 9.1 of the Quebec *Charter* (s. 9.1 does not apply to s. 10, in any event);
4. The evidence before the Supreme Court of Canada in *Ford v. Quebec (Attorney General)* [1988] 2 S.C.R. 712 and *Devine v. Quebec (Attorney General)* [1988] 2 S.C.R. 790 relating to the vulnerability of the French language was out-dated, incomplete and erroneous, such that these judgments cannot be invoked to dispense the Attorney General of Quebec from the full burden imposed by the saving provisions;
5. The evidence that the Defendants will adduce before this Court will demonstrate that the situation of the French language does not justify the infringement of their *Charter* rights;

II) *Under the The Constitution Act, 1867*

4. The legislature of Quebec does not have the jurisdiction to regulate the content of the Internet and in particular, it does not have the jurisdiction to impose the use of French on private commercial Web Sites;
5. Such jurisdiction is exclusively federal under the *The Constitution Act, 1867*;
6. Sections 52 and 57 CFL are *ultra vires* the legislature of Quebec as regards charges relating to the Internet;
7. Lastly, s. 205 CFL is constitutionally inapplicable, invalid, inoperative and of no force or effect to the extent that it refers to offences under ss. 51, 52, 57 and 58 CFL[.]

The indication by the Supreme Court in *Ford* that a requirement for marked predominance of French in public signs and commercial advertising would be legitimate in terms of guaranteed rights and freedoms proved sufficiently acceptable to most francophones, even (it seems) to most nationalist francophones, that it led to the abandonment of most of the statutory exclusion of languages other than French, and abandonment too of the use of statutory clauses overriding the constitutional guarantees in defence of such exclusion. By and large, the requirement of marked predominance has also proved to be a *modus vivendi* that, broadly speaking, most members of the linguistic minority have shown (at least in terms of their political behaviour and perhaps also in the limited scale of their litigation in the intervening years) that they can live with, although many of them would nevertheless regard it — not altogether without reason — as a compulsory gesture acknowledging subservience, and thus distasteful. Many seem unreconciled to any compulsion in matters of language, even though its history is longer in Quebec than many realize. Thus, articles 1682c and 1682d of the *Civil Code of Lower Canada*, added by a Quebec statute of 1910,[28] required the use of both English and French in various forms, contracts, notices, regulations and other instruments and documents by public utilities in certain categories, especially those engaged in transportation and communications. Here, of course, both languages were on an equal footing.

I would note that even the *Charter of the French language*'s surviving requirements for the *exclusive* use of French do not appear to have been the subject of litigation, although they are by no means insignificant, and might or might not survive constitutional scrutiny. By section 15 of the *Regulation respecting the language of commerce and business*:[29]

> A firm's commercial advertising, displayed on billboards, on signs or posters or on any other medium having an area of 16 square metres or more and visible from any public highway within the meaning of section 4 of the *Highway Safety Code*,[30] must be exclusively in French unless the advertising is displayed on the very premises of an establishment of the firm.

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28 *An Act to amend the Civil Code, respecting contracts made with public utility companies*, 1 Geo. V, S.Q. 1910, c. 40.

29 R.Q., c. C-11, r. 9.01, O.C. 1756-1993, 8 December 1993, G.O.C. 1993.II.6915.

30 R.S.Q., c. C-24.2.

And by section 16:

> A firm's commercial advertising on or in any public means of transportation and on or in the accesses thereto, including bus shelters, must be exclusively in French.[31]

Modus vivendi or not, the facts in *Lyon and the Wallrus* do seem to me to have made it a good test case for the defendants and a poor one for the government of Quebec. For one thing, given the scale of the enterprise, the prosecution looks petty. The government might do well to add to the regulations a carefully drafted small-business exception, as is found elsewhere in the *Charter of the French language*.

For another thing, the sign, when I first saw it, seemed to me to be pleasing aesthetically and in good taste; it was not obvious how one would replace it with something equally satisfactory but in conformity with the *Charter of the French language*. I have since learned that it was indeed designed by a noted sign-maker of the Eastern Townships, now in retirement in the Laurentians, who, at least judging from his name, is a *pure laine* francophone. When the sign was first designed, it appears that the designer was asked by Mr. Hoffman whether there would be any problem with the sign law and responded, "Of course not. You're in Knowlton." The offending sign (still not disposed of, though substantial cash offers have been made for it) was in due course replaced by a smaller version, with only the business names on it and none of the additional information, but again without any marked predominance for the French language. This sign is now outside the new premises of the enterprise, located in Sutton, Quebec.

Even without invoking constitutional grounds, the enterprise can indeed (it seems to me) keep on its new sign the appearance of the business name either substantially or precisely as it appeared on the sign which was the subject of the litigation. This could be done on the basis that, registered or not, the full business name *The Lyon and the Wallrus* is a trade-mark under the *Trade-marks Act*, and so protected by the regulations under the *Charter of the French language*, provided at any rate, that no corresponding trade-mark in French is registered. For addi-

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[31] However, an exception is made by s. 17 for vehicles regularly used to transport passengers or merchandise both in Quebec and outside Quebec. Here, signs and posters may be both in French and another language, provided that French appears at least as prominently. It may be questioned, however, what is the extent of the control that a province can constitutionally exert on physical means of interprovincial transportation.

tional security, one might also change the corporate name to The Lyon and the Wallrus Inc.[32] For the rest, one might, for example, choose to add a second sign on which the French version was "markedly predominant" by placing both language-versions of the remaining words on both sides of the sign, with larger and bolder French lettering situated above the English.

I think it was Sir Ivor Jennings who remarked that lawyers should toast any man who writes the word "reasonable" into a constitution. Some drink should be left over to toast those who make it necessary to take the opinion of counsel on the legality of the most mundane business signs and posters. The meaning of "markedly predominant" is itself the subject of the *Regulation defining the scope of the expression "markedly predominant" for the purposes of the Charter of the French language*,[33] enacted under authority conferred by section 93 of the *Charter of the French language*. Quebec business people would do well to keep its detailed terms[34] ready at hand.

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[32] As a matter of historical interest, counsel informs me that the sign which was the subject of the prosecution originally read "The Lyon and the Wallrus". In an effort to accommodate the inspectors, the words "The" and "and the" were covered up, but the covering fell off "and the".

[33] R.Q., c. C-11, r. 10.2, O.C. 1756-1993, 8 December 1993, G.O.C. 1993.II.6918.

[34] It provides as follows:

1. In signs and posters of the civil administration, public signs and posters and posted commercial advertising that are both in French and in another language, French is markedly predominant where the text in French has a much greater visual impact than the text in the other language.
2. Where texts both in French and in another language appear on the same sign or poster, the text in French is deemed to have a much greater visual impact if the following conditions are met:
   (1) the space allotted to the text in French is at least twice as large as the space allotted to the text in the other language;
   (2) the characters used in the text in French are at least twice as large as those used in the text in the other language; and
   (3) the other characteristics of the sign or poster do not have the effect of reducing the visual impact of the text in French.
3. Where texts both in French and in another language appear on separate signs or posters of the same size, the text in French is deemed to have a much greater visual impact if the following conditions are met:
   (1) the signs and posters bearing the text in French are at least twice as numerous as those bearing the text in the other language;
   (2) the characters used in the text in French are at least as large as those used in the text in the other language; and
   (3) the other characteristics of the signs or posters do not have the effect of reducing the visual impact of the text in French.

V. The Cinema and Other Forms of Expression

Even without any requirement for "marked predominance," compulsory use of French could not in all circumstances respect basic constitutional guarantees, not even in a commercial context. It is surely unthinkable to suppose that the freedom of expression, however circumscribed, would be respected by, say, legislation which required that books or newspapers in languages other than French, even ones selected administratively in limited numbers, must either be published in French versions also, or not distributed at all. I once, informally, asked a francophone confrère who regularly acted for the Quebec government how hypothetical legislation prohibiting distribution in Quebec of the *New York Times* unless a French-language version were made available would differ in principle from the *Charter of the French language*'s provisions on toys and games (section 54, now read with section 52.1 concerning computer software) and the comparable provisions of the Quebec *Cinema Act*.[35]

For those not familiar with it, the *Cinema Act*, in particular section 83, imposes severe restrictions on the public exhibition of a film in a language other than French which is neither subtitled in French nor available in a French-dubbed version. Our confrère's response was that there was no difference in principle. Now this was an off-the-cuff reaction, one given informally, and there are distinctions which he could have drawn. But, even so, his response underscores the sensitivity of the matter.

As to toys and games, section 54 of the *Charter of the French language* reads as follows:

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4. Where texts both in French and in another language appear on separate signs or posters of a different size, the text in French is deemed to have a much greater visual impact if the following conditions are met:
   (1) the signs and posters bearing the text in French are at least as numerous as those bearing the text in the other language;
   (2) the signs or posters bearing the text in French are at least twice as large as those bearing the text in the other language;
   (3) the characters used in the text in French are at least twice as large as those used in the text in the other language; and
   (4) the other characteristics of the signs or posters do not have the effect of reducing the visual impact of the text in French.

35 R.S.Q., c. C-18.1.

> Toys and games, except those referred to in section 52.1, which require the use of a non-French vocabulary for their operation are prohibited on the Québec market, unless a French version of the toy or game is available on the Québec market on no less favourable terms.

In many instances, certainly, toys[36] games and crossword puzzles as possible examples, approximate in intellectual value and character to publications such as books. At least in such applications, section 54 seems to me constitutionally flawed. Quite some years ago a major English-language educational organization wished to bring section 54 and various other enactments before the courts for review. They applied for financing under one of the federal programs, but were refused. A rumour was afoot (a rumour which I considered highly plausible) that another major English-language rights lobby, bearing (and cultivating) a less hard-line image but which nevertheless was demonized by many francophone Quebec radio talk show hosts,[37] was opposed to this litigation and to its funding and was working against the grant. Opinion within the linguistic minority in Quebec has never been monolithic.

The provisions relating to film exhibition are found in the *Cinema Act* under the heading "Classification", sections 76*ff*. I am very grateful to one of the officers of the Régie du cinéma who has been most helpful to me in explaining their application, which a casual reader might not understand. Section 76 reads:

> No person may exhibit a film to the public, or possess, on premises where films are exhibited to the public, a print of a film unless a stamp showing the class of the film has been issued by the Régie for its exhibition to the public in accordance with this Act and affixed to the print in the manner prescribed by regulation of the Régie, except in the case of a film exempt from classification under section 77.[38]

The substance of section 83 is that, in regard to print of a film in a language other than French, which at the time of application for a stamp is neither subtitled in French nor available in a French-dubbed version, a provisional — in other words, temporary — stamp (in French, "*visa*") is

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[36] It can be debated whether these are "games" within the meaning of the legislation. One can easily think of games with very particular historical, geographical or literary contexts.

[37] On one occasion, when I was introduced on such a radio program, the host made much of my own work for that organization in an unmistakable attempt to "warn" his listeners to be wary of anything I might say.

[38] *Supra*, note 35.

issued for the print. Arrangements may be made in accordance with stated rules for dubbing in Quebec. Section 83 continues in part:

> The provisional stamp shall be issued for 45 days starting on the date of the first exhibition of the film to the public for commercial purposes, and the stamp may be issued for as many prints as requested unless the Government, by regulation, fixes a lesser period or determines the maximum number of prints for which the stamp may be issued.
>
> . . . . .
>
> After the expiration of a provisional stamp, a stamp, unless obtained under subparagraph 1 or 2 of the first paragraph, may be issued for only one print of the film.[39]

These two subparagraphs concern films available with French subtitles or with French dubbing.

The severity of this restriction is mitigated in important ways by the provisions which create exemptions from classification, and therefore create exemption also from the language-restriction. Section 77 reads as follows:

> The following films are exempt from classification:
>
> 1) films made for industrial or commercial promotion, with the exception of trailers for films not exempt from classification and vidéo-clips;
>
> 2) films made for educational or pedagogical purposes, provided that they are used in an educational, health care, social services or scientific research institution, in a public library or in a museum;
>
> 3) films made for vocational training purposes provided that they are used within the scope of a course, a conference or other activity of a similar nature;
>
> 4) instructional films on a language, sport, physical exercise program or a similar skill, provided they do not include scenes of violence or explicit sexual activity;
>
> 5) films on sporting events;
>
> 6) films exhibited at a diplomatic event, a film festival or any other similar event recognized by the Régie.

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[39] *Supra*, note 35.

A most important fact, drawn to my attention by my interlocutor at the Régie du cinéma, is that the Régie has recognized various repertory cinemas as permanent film festivals. Without such accommodation, the language restriction in the cinema legislation would surely represent nothing less than a steamroller running over intellectual and artistic freedom in Quebec. Indeed, the various statutory and administrative exemptions might well be necessary to save the legislation from successful constitutional challenge for violation of freedom of expression. For instance, a special application form is available for recognition of a festival.

On the other hand, the Régie appears to take a wide view of what is an exhibition "to the public" within the meaning of the *Cinema Act*. Thus, a film exhibited to a university class or to meetings such as ours at this weekend's conference, though accessible only by invitation or by permission and not open to the public at large, would (it seems, though I would gladly be mistaken) be considered by the Régie to be a film exhibited "to the public," and so subject to classification and therefore to the language restriction; unless of course it were otherwise exempt, as having been made, for example, "for educational and pedagogical purposes" within the meaning of section 77, paragraph 2. Some further widening of the exemptions is desirable, and may be constitutionally necessary.[40]

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[40] I would suggest that s. 77, para. 2, be broadened to read, "films made *or exhibited* ...", and that the statute be amended also to empower the government (by regulation) and the Régie (by administrative decision) each to deem certain exhibitions to be non-public (but not, conversely, to deem them to be public; this determination being left to the courts of law). The statute itself should (without prejudice to other exemptions) expressly and conclusively deem not to be public all exhibitions where there is no right of access by, and no invitation to, the general public, at *least* where no charge is made specifically for attendance at the exhibition of the film. (A film exhibited at our conference would thus be exempt, even though there are conference registration fees.) Making this particular exemption dependent on there being no charge might seem odd, but some such qualification might be demanded to prevent evasion of the whole classification scheme by disguised commercial exhibitors. A more difficult question is how to treat films not destined for the general commercial market, when they are exhibited outside the circumstances where the existing exemptions apply and also outside the additional exemptions proposed above. I have in mind here particularly films of the sort usually seen only in festivals and repertory cinemas (as opposed to those of current interest to the mass market) but which may be exhibited, say, at a student film series, where a charge may be made, but where the film is not exhibited for educational or pedagogical purposes in the narrow sense. Essentially, I would argue that the rationale for treating repertory cinemas as permanent film festivals, and so exempting them from review and from the language requirements, applies also to various other situations. As much as possible, these exemptions should not depend on administrative discretion. If it is desired to require administrative review, a permit should be a matter of right at least when stated criteria are met.

VI. Conclusion

Legislative arrangements on use of language in Quebec aim to accommodate many imperatives: the fundamental demands of a free society; the needs of a market economy; the demands of the French-speaking, ethnolinguistic majority for recognition of its identity through institutional and social establishment of French as the *lingua franca* of Quebec and as its primary language of government; the sensibilities of other parts of a demographically heterogeneous population; the division of powers in a federal state; and opinion outside Quebec. For every part principle, one can detect in these arrangements an equal part pragmatism. The resulting enactments must be able to survive judicial review. Yet that very judicial review itself has reflected pragmatism as well as principle, and, of course, is itself limited by the legislative power to override many constitutional guarantees — a power which itself encourages judicial caution.

Though far from perfect as to either principle or practice, the current legislative arrangements, at any rate those governing the private sector, appear to have produced at least a fairly stable *modus vivendi*; stable, at least, from the perspective of the political process in Quebec. But it is periodically retested in the courts. Pending litigation may once again place language legislation prominently, and controversially, on the Quebec public agenda.

APPENDIX I — CASES PENDING CHARGING OFFENCES UNDER THE *CHARTER OF THE FRENCH LANGUAGE* ("CFL")

LIST OF CASES IN ORDER OF COURT FILE NUMBER

	Court file number	Name of accused	Section of CFL
1)	C.Q.M. #500-61-079274-982	Tapis Carnaval Inc.	58
2)	C.Q.M. #500-61-085282-987	Couture Carlyle Inc.	58
3)	C.Q.M. #500-61-090188-989	156158 Canada Inc.	58
4)	C.Q.M. #500-61-090189-987	156158 Canada Inc.	58
5)	C.Q.M. #500-61-092567-982	Mundi Canada Inc.	58
6)	C.Q.M. #500-61-092568-980	Mundi Canada Inc.	58
7)	C.Q.M. #500-61-094542-983	Hans Jorg Hagen	58
8)	C.Q.M. #500-61-094543-981	Hans Jorg Hagen	58
9)	C.Q.M. #500-61-106703-995	Literie Primo Inc.	58
10)	C.Q.M. #500-61-106704-993	Literie Primo Inc.	58
11)	C.Q.M. #500-61-112616-009	9051-1221 Quebec Inc.	58
12)	C.Q.M. #500-61-112617-007	9051-1221 Quebec Inc.	58
13)	C.Q.M. #500-61-113019-005	Corporation des Gestions Colonial	58
14)	C.Q.M. #500-61-115037-005	André Dubois	58
15)	C.Q.M. #500-61-119090-000	2969-6499 Quebec Inc.	57 (Invoice)
16)	C.Q.M. #500-61-119095-009	Les Industries Garanties Ltée	58
17)	C.Q.M. #500-61-119594-001	Clifford Oswald	58
18)	C.Q.M. #500-61-124203-010	Serv. De réparation de conteneurs et d'unité	52 (Web Site) (58 on roll)

	Court file number	Name of accused	Section of CFL
19)	C.Q.M. #500-61-129307-014	Rui Royal International Corp.	52 (Web Site) (58 on roll)
20)	C.Q.M. #500-61-130330-013	Patisserie Suisse Viennoise Inc.	58
21)	C.Q.M. #500-61-130337-018	Scale-Tron Inc.	52 (Web Site) (58 on roll)
22)	C.Q.M. #500-61-130338-016	Udisco Ltée	52 (Web Site) (58 on roll)
23)	C.Q.M. #500-61-132286-015	Allan Anawati	52 (Web Site)
24)	C.Q.M. #500-61-132315-012	Superchute Ltée	52 (Web Site) (58 on roll)
25)	C.Q.M. #500-61-132738-015	Ivan & Co. Lighting Inc.	58
26)	C.Q.M. #500-61-132739-013	Ivan & Co. Lighting Inc.	58
27)	C.Q.M. #500-61-135713-023	Benjamin Trossman Janet Shahbazian	52 (Web Site) (58 on roll)
28)	C.Q.M. #500-61-136209-021	M.O.T. Intermodal Shipping Inc.	52 (Web-Site)
29)	C.Q.M. #500-61-136210-029	Frank Rode	58
30)	C.Q.M. #500-61-138006-029	Jungle Casse-Tête International Inc.	52
31)	C.Q.M. #500-61-138664-025	2527-4390 Quebec Inc.	51 (Packaging)
32)	C.Q.M. #500-61-138736-021	2527-4390 Quebec Inc.	51 (Packaging)
33)	C.Q.M. #500-61-138720-025	2527-4390 Quebec Inc.	51 (Packaging)
34)	C.Q.M. #500-61-142142-026	Centre de Stomie Premier Inc.	58
35)	C.Q.M. #500-61-144289-023	2527-4390 Quebec Inc.	51 (Packaging)
36)	C.Q.M. #500-61-144292-027	2527-4390 Quebec Inc.	51 (Packaging)
37)	C.Q.M. #500-61-145377-025	170803 Canada Inc.	57

	Court file number	Name of accused	Section of CFL
38)	C.Q.M. #500-61-149108-020	Produits du bureau Gold-Tech du Canada Ltée	57
39)	C.Q.M. #500-61-149109-028	Produits du bureau Gold-Tech du Canada Ltée	52 (Web Site)
40)	C.Q.M. #500-61-149120-025	Stereo d'auto J.D. Inc.	52 (Web Site)
41)	C.Q.M. #500-61-150668-029	Antiquités Rowntree Inc.	52 (Web Site)
42)	C.Q.M. #500-61-151683-027	Cordia Forsythe	52 (Web Site)
43)	C.Q.M. #500-61-152133-022	Les Services de Transport du Cocher Inc.	58
44)	C.Q.M. #500-61-152348-026	Vu Nguyen	52 (Web Site)
45)	C.Q.M. #500-61-159097-022	170803 Canada Inc.	52 (Web Site)
46)	C.Q.M. #500-61-159098-020	170803 Canada Inc.	57
47)	C.Q.M. #500-61-159099-028	Financial Models Company Inc.	52 (Web Site)
48)	C.Q.M. #500-61-161278-032	Les Industries Maxter Ltée	52 (Web Site)
49)	C.Q.M. #500-61-162204-037	Systèmes Voix et Données Inc.	52 (Web Site)
50)	C.Q.M. #500-61-162549-035	Caméras Simon Inc.	57
51)	C.Q.M. #500-61-162550-033	Caméras Simon Inc.	52 (Web Site)
52)	C.Q.M. #500-61-169233-039	Mike Calomiris	52 (Web Site)
53)	C.Q.M. #500-61-169495-034	La Boutique de Fleurs Vaudry Inc.	58
54)	C.Q.M. #500-61-169496-032	Analyse Nira Inc.	51 (Packaging)
55)	C.Q.M. #500-61-169497-030	Pièces D'Automobiles Importées Foreign 1972 Inc.	58
56)	C.Q.M. #500-61-169498-038	David S Hague	58

	Court file number	Name of accused	Section of CFL
57)	C.Q.M. #500-61-169499-036	Simaudio Ltée	52 (Web Site) (58 on roll)
58)	C.Q.M. #500-61-172585-037	9100-5801 Quebec Inc.	58
59)	C.Q.M. #500-61-175850-032	Lynn Wilson	58
60)	C.Q.M. #500-61-175851-030	Les Entrerises C.B.L. Pirie Inc.	58
61)	C.Q.M. #500-61-175896-035	Rosanda Bellar-Spruyt Philip Cohen Kevin Cartwright Linda Montford	51 (Menu)
62)	C.Q.M. #500-61-175897-033	Susan Trudeau	58
63)	C.Q.M. #500-61-175898-031	176410 Canada Inc.	58
64)	C.Q.M. #500-61-175899-039	176410 Canada Inc.	57
65)	C.Q.M. #500-61-175900-035	176410 Canada Inc.	58
66)	C.Q.M. #500-61-176069-038	Instruments Régent Inc.	52 (Web Site)
67)	C.Q.M. #500-61-185324-044	9059-4938 Quebec Inc.	58
68)	C.Q.M. #500-61-185178-044	Emballages Fancy-Pak Ltée	52 (Web Site)
69)	C.Q.M. #500-61-185179-042	Emballages Fancy-Pak Ltée	57

APPENDIX II — *Lyon and the Wallrus* case



