Action No. 140273616W

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISTRICT OF CALGARY

BETWEEN:

FRANÇOIS PAQUETTE, XAVIER Mc GUIRE, SONIA POORAN, HUGUETTE BEAULIEU and SIMON MORIN

Applicants

-and-

HER MAJESTY THE QUEEN IN RIGHT OF ALBERTA

Respondent

SUMMARY ARGUMENT OF THE RESPONDENT, HER MAJESTY THE QUEEN IN RIGHT OF ALBERTA

ON ISSUE OF FIAT REGARDING FILING OF DOCUMENTS IN FRENCH

Hearing date: May 15, 2015 @ 10:00 a.m.

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1. The Respondent, Her Majesty the Queen in Right of Alberta ("Alberta"), was provided the Applicant's 25 page argument Thursday at 10:40 am. This is our summary of argument that we intend to supplement verbally at the hearing.

Introduction

2. The *Languages Act* states in s. 4 "Any person may use English or French in oral communication in proceedings before the following courts." It impliedly does not permit French for written documents and the legislature can be presumed to have intended not to permit French for written documents. As the Applicants mention in their paragraph 28, statutory interpretation suggests the mention of one is the exclusion of the other. Consequently, the mention of oral excludes written communications.

3. The implication of the *Languages Act* and the Court of Appeal decision in *Caron*, is that the Government of Alberta constitutionally and legally operates in English. This Honourable Court may also take judicial notice of this fact.

Rule of Court 13.23(4) permitting filing in other languages with a translation

4. Rule 13.23 is entitled "understanding affidavit" and provides for situations where the person swearing an affidavit does not understand the language it has been prepared in (subsections 1-3); and, lastly, where an affidavit has been prepared and sworn in a language other than English (4).

5. It would appear that the Rule is very rarely contested and likely very rarely used even for the granting an exception in subrule 4. We located no judicial consideration of the rule.

6. The intent of the Rule is to facilitate written evidence only by affiants who might need to swear an affidavit in their primary language if they are not capable of understanding an affidavit enough to swear to its contents. Even then, the normal rule is that a translation is provided and that the party relying on the affidavit would pay for that translation. Without a translation provided in this way, other parties would have to obtain their own to enable their chosen counsel and instructing clients to be informed.

7. With this intent in mind, the exception, "unless the Court orders otherwise", should be construed narrowly and any exception should be based on evidence. Even with the rule, affiants can provide their affidavits in another language but the party relying on them would need to provide a certified translation. This is an appropriate and minor burden that may encourage affiants to provide an affidavit in English if they can do so, which is to the benefit of the courts and all parties.

8. The Court could consider ordering "otherwise" when the parties consent and the Court and its staff can easily operate in the language sought to be submitted in the affidavit.

9. An exception should require evidence to be properly grounded. Stevenson and Cote states "A fiat requires evidence as much as any other order" (Civil Procedure Encylopedia, vol. 3, at 44-2).

10. The Alberta government has its choice of counsel and should be able to choose counsel who is not necessarily fully or partly fluent in French. Most importantly when documents are filed in French, it would be much harder for client representatives to understand, at least not without translation that can be provided by the Applicants.

11. There is no legal obligation for a civil court documents to be accepted for filing if not in English (apart from the narrow exception of (4) when a translation is required).

Binding decision in SCC in *Conseil scolaire francophone de la C-B v. B.C.* (2013)

12. The Supreme Court of Canada affirmed the conclusion that a judge does not have the discretion to admit non-English documentary evidence without a certified translation, as required by the BC Rules. The BC Rules state what is already implied in Alberta. BC Supreme Court Civil Rule states in 22.3(2) "Unless the nature of the document renders it impracticable, every document prepared for use in the court must be in the English language…"

13. The Court held this properly limited the court's discretion to admit non-English documents, specifically French in that case. It rejected an argument of inherent jurisdiction in the Superior Court to permit non-English documents despite the rule. The Court said inherent jurisdiction and discretion, as noted in *Caron* (2011 1 SCR 78 at para 32) "are subject to the requirement that the court exercise them without contravening any statutory provision" (2013 SCC 42 at para 63).

14. The Court stated in the headnote:

    The legislature of British Columbia, correctly or incorrectly, declined to act to change the law on the language of court proceedings. The failure of the legislature to act in the face of repeated endorsements of the rule reflected an acceptance of the current state of the law. The Charter did not require any province, except for New Brunswick, to provide for court proceedings in both official languages.

15. The rule in that case limited the Court's discretion to admit documents in other languages. Similarly, the Rules in Alberta limit discretion to admit documents in French. The law of Alberta leads to the same conclusion as in *Conseil Scolaire* so that discretion cannot permit documents to be filed in French other than an affidavit solely as permitted by R. 13.23(4).

16. The Supreme Court took no issue with the Rule in *Conseil* requiring court documents to be filed in English. Clearly then, provinces are entitled to limit the languages used in their civil courts to English and, even where discretion is allowed, Judges may do the same.

17. The Court clearly stated that the *Charter* did not require the opposite conclusion:

> 55 Finally, the appellants urge this Court to adopt an approach to these issues based on *Charter* values and constitutional principles. The appellants argue that the *Charter* requires that legislation, including received legislation, be interpreted in a manner consistent with *Charter* values. The Court has of course repeatedly noted the role that *Charter* values play in the evolution of the common law and in statutory interpretation: *Dolphin Delivery Ltd. v. R.W.D.S.U., Local 580*, [1986] 2 S.C.R. 573 (S.C.C.); *R. v. Zundel*, [1992] 2 S.C.R. 731 (S.C.C.); *R. v. National Post*, 2010 SCC 16, [2010] 1 S.C.R. 477 (S.C.C.). The *Charter* explicitly provides that English and French are the official languages of Canada: s. 16. The Court has also recognized the important role of linguistic minorities in Canada: *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 (S.C.C.), at para. 79.
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> 56 However, the *Charter* also reflects a recognition that Canada is a federation and that each province has a role to play in the protection and advancement of the country's official languages. This is evident from ss. 16 to 20, which require bilingualism in the federal government, in Parliament, in courts established by Parliament, and in the province of New Brunswick. The *Charter* does not require any province other than New Brunswick to provide for court proceedings in both official languages. In addition, s. 16(3) provides that the legislatures may act to advance the use of English and French. In my view, therefore, while it is true that the *Charter* reflects the importance of language rights, it also reflects the importance of respect for the constitutional powers of the provinces. Federalism is one of Canada's underlying constitutional principles: *Reference re Secession of Quebec*, at paras. 55-60. Thus, it is not inconsistent with *Charter* values for the British Columbia legislature to restrict the language of court proceedings in the province to English.

Fiats generally and discretion

18. A fiat is a Court Order like any other and a Justice is constrained by the same limits on the issuance of any Order.

19. The Applicant seeks a fiat or Order under 13.23(4) regarding affidavits. Rule 13.23 only applies to affidavits and broadening it to cover the notice of constitutional question or other documents would be improper and beyond a "liberal" interpretation.

20. The other rules cited by the Applicant do not permit the filing of documents in another language at all and that would be an improper interpretation of the words and intent of Rules 13.16 and 13.38.

21. Rule 13.23 should not be applied to documents beyond affidavits as it was intended not to apply to such documents. The law of Alberta implies that Alberta's legal system is based on written English (with defined exceptions provided in the *Charter of Rights* for certain matters) so the Courts should not easily stray from this language requirement.

22. The Fiat rule cited by the Applicant, 13.38, was considered *in TD v. Beaton*, 2012 ABQB 125, where a defendant applied to waive fees for transcripts for his appeal due to a limited income. The Court decided that R. 13.38 could not be used to avoid the intent of 13.32 that clearly applied to waiving court fees. This implies a Justice is constrained from using a fiat to avoid the intent of another rule

23. Where there are statutes and rules requiring the use of English in documents filed, or even a statutory priority for English, a Fiat should not issue to otherwise permit other languages.

<u>Laws are presumed constitutional, interim relief of challenge should be denied</u>

24. In addition, laws are presumed constitutional, so relief sought in a constitutional challenge, namely to be able to file all or most documents in French, without permission or consent, should not be provided in advance. The burden of proving a violation of a *Charter* right, just like the burden of proving an exception to a normal rule of Court, is on the proponent.

25. Seeking interim relief is partly akin to seeking an injunction, so the court could consider the balance of convenience. The intent and spirit of the law and binding case law is that the Government of Alberta operates in English. If the Applicants are presumptively more bilingual than the respondent and its counsel, convenience suggests that the Applicants provide documents in English, or at least an official translation. They will remain fully apprised of what they are doing without imposing the burden and delay of translation on the Respondent. They may be able to provide a translation at no cost but their time.

<u>Alberta Court of Appeal in *Lefebvre* decision</u>

26. The Applicant states in para 34 of his argument that the applicant Lefebvre obtained recognition of the right to file French written documents in Court. Rather, the Court of Appeal noted "no authority" was offered for this relief suggested by the Court of Queen's Bench that the Legislature should amend the Languages Act to support this (*Alberta v. Lefebvre* 1993 ABCA 61 at para 5 and 18 (below)).

27. While the Applicant here claims the Crown did not appeal a decision to permit the filing in French (para 38 of his argument), the Court of Appeal referred to the request of the Crown to vacate such a term in the Order and stated no authority was offered for it. The Court of Appeal stated

> [17] We thank Mr. Lefebvre and Alberta for their mutual forbearance in the proceedings before this Court. The problem was that, if Mr. Lefebvre was right, he might have had a right to have this appeal heard in French in whole or in part. Conversely, if he was wrong his rights may have been more limited. In order not to put the cart before the horse, both accepted an accommodation: Mr. Lefebvre filed written argument in French, but offered us a translation. And he chose, at the oral hearing, to, as he said, "listen in English and speak in French." The Crown in turn did not protest this, despite his obvious fluency in both official languages, and supplied an interpreter, who for the benefit of any person who wished to rely on it, translated Mr. Lefebvre's oral submissions, as he made them, from French to English. Although he urged the Court to "listen in French", he proceeded subject to the translation. The Court, however, refused his request to provide a record of his oral submissions. But this was on the ground that it is not our practice to do so whatever the language used.
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> [18] We turn to the request by the Crown to vacate the quoted term in the order of the learned chambers judge. He offered no authority for this, and Mr. Lefebvre insisted he did not request this relief. It may be that the learned chambers judge merely intended to urge a change in the Languages Act. In any event, we vacate the term as not sought. We do not thereby intend to foreclose any similar order if found to be justified in law and sought in a properly advanced cause, although we are bound to add that we are hard put to think of any authority in any circumstance to make this remarkable order.[underlining added]
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> [19] Accordingly, we dismiss the appeal and grant the motion to vary.

Language rights in the Constitution Acts

28. As implied by the Supreme Court of Canada in *Conseil Scolaire* in 2013, the only governments and legislatures that are bilingual in the *Constitution Act* 1982 are the Federal government and New Brunswick, not Alberta and not Quebec (s. 16, 16.1 to 20). Section 20 specifically says a member of the public may communicate with the Federal and New Brunswick governments in English or French but no such provision is made for Alberta or the other provinces. In addition, the Province is responsible for the administration of justice in s. 92 of the Constitution Act 1867.

29. These are the primary language rights in Canada, along with the right to a criminal trial in one’s official language. Such rights are not constitutionalized with regard to civil matters

in Alberta and s. 4 of the *Language Act* only accords a statutory ability to communicate orally with the Court, but writing was deliberately excluded.

30. Even in Ontario, which is more bilingual, the right to submit documents in French exists only within prescribed localities within Ontario; in other localities, the party seeking to file French documents must have the consent of the other party (s. 126, *Courts of Justice Act*, RSO 1990, c. C-43 (COJA)). In one case regarding that provision, an Ontario Court held there was no express jurisdiction to grant relief to the respondent to file in French. The Court rejected the argument that the permissive language of the COJA implicitly gave rise to jurisdiction to grant such relief. It stated "there is a difference between making a broad interpretation and finding jurisdiction where none apparently exits" (*Tremblay v. Picquet*, 2010 ONSC 1776 at para 5).

Notice of Constitutional Question

31. The notice of constitutional question is to be submitted in English to the Minister of Justice and Solicitor General for Alberta under s. 24 of the *Judicature Act*. The Alberta Court of Appeal found in the *Caron* decision that Alberta has constitutionally passed its laws in English. By implication and as a practical and factual matter, the Government of Alberta operates in English and receives notice under its statues in English.

32. Nothing permits the notice of constitutional question to be submitted in French to the Minister of Justice and Solicitor General for Alberta. Even if the Court were to permit the filing in Court of the notice in French, the only official notice needs to be submitted in English to the Ministry as specified by s. 24 of the *Judicature Act*.

Conclusion

33. The fiat sought by the Applicants would be contrary to the Supreme Court of Canada's conclusion with regard to similar court rules in B.C (*Conseil Scolaire*).

34. The open court principle and transparency of public interest litigation is enhanced when nearly all Albertans can read and understand the Court record.

35. The practical result of a fiat would not just be to impose translation costs and delay on Alberta but to serve as interim relief the Applicant is seeking and a precedent against Alberta and other parties in litigation. It would also impede the ability of Alberta to understand this constitutional challenge in a timely fashion.

36. Alberta asks that the fiat be refused. Affidavits may be submitted with a certified translation under R. 13.23(4).