IN THE SUPREME COURT OF CANADA

(On Appeal from the Court of Appeal for Quebec)

B E T W E E N:

THE ATTORNEY GENERAL OF QUEBEC

APPELLANT

A N D:

LA CHASSURE BROWN'S INC.

- and -

VALÉRIE FORD

- and -

McKENNA INC.

- and -

NETTOYEUR ET TAILLEUR MASON INC.

- and -

LA COMPAGNIE DE FROMAGE NATIONAL LTÉE

RESPONDENTS

A N D:

THE ATTORNEY GENERAL OF CANADA,
THE ATTORNEY GENERAL OF ONTARIO, and
THE ATTORNEY GENERAL OF NEW BRUNSWICK

INTERVENERS

FACTUM OF THE ATTORNEY GENERAL OF NEW BRUNSWICK INTERVENER

(For a list of the Solicitors, please see inside front page)

Me Yves de Montigny
Me Jean-K. Samson
Procureurs de procureur général
du Québec
1200, route de l'Eglise, 5 étage
Sainte-Foy, P. Q.
Solicitor for the Appellant

NOEL, DÉCARY et ASSOCIES
111, Rue Champlain
Hull, P. Q.
J8X 3R1

Ottawa Agents

Harvey Yarosky
Yarosky, Fish, Zigman and Isaacs
800, boul. Dorchester Ouest
Suite 2436
Montreal, Québec
H3B 1X9

GOWLING & HENDERSON
160, rue Elgin
Ottawa, Ontario
K1N 8X3

Allan Hilton
Clarkson, Tétrault
1170 Peel Street
Suite 500
Montreal, Quebec
H3B 4S8
Solicitors for the Respondents

Ottawa Agents

Attorney General of Canada
Frank Iacobucci, Q.C.
c/o Me Andre Bluteau
Ottawa, Ontario
K1A 0H8

Solicitor for the Intervener,
The Attorney General of Canada

Ministry of the Attorney General
18 King Street East
Toronto, Ontario
M5C 1C5

SOLOWAY, WRIGHT, HOUSTON
& COMPANY
170, rue Metcalfe
Ottawa, Ontario
K2P 1P3

Solicitor for the Intervener
The Attorney General of Ontario

Ottawa Agents

Gordon F. Gregory, Q.C.
Deputy Attorney General
P. O. Box 6000
Centennial Building
Fredericton, N. B.
E3B 5H1

GOWLING & HENDERSON
160, rue Elgin
Ottawa, Ontario
K1N 8S3

Solicitor for the Intervener
The Attorney General of New Brunswick

Ottawa Agents

I N D E X

PART I

STATEMENT OF FACTS

1. The Attorney General for the Province of New Brunswick accepts the statement of facts contained in Part I of the Factum of the Attorney General of Quebec.

2. Notice of Intention to Intervene on behalf of the Attorney General for the Province of New Brunswick dated the 3rd day of July, 1987 was filed with the Court.

PART II

POINTS IN ISSUE - THIS INTERVENER'S POSITION

3. The Attorney General for the Province of New Brunswick submits that the answer to the constitutional questions stated by this Honourable Court are as follows:

1. This Intervener takes no position in respect of the question as to whether

> section 214 of the Charter of the French Language, R.S.Q. 1977, c.C-11, as enacted by S.Q. 1982, c. 21, s.1, and section 52 of An Act to Amend the Charter of the French Language, S.Q. 1983, c. 56, are inconsistent with section 33(1) of the Constitution Act, 1982 and therefore inoperative and of no force or effect under section 52(1) of the Act.

2. Yes.

> if the answer to question 1 is affirmative, to the extent that they require the exclusive use of the French language, sections 58 and 69, and sections 205 to 208 to the extent they apply thereto, of the Charter of the French Language, R.S.Q. 1977, c. C-11, as amended by S.Q. 1983, 56, are inconsistent with the guarantee of freedom of expression under section 2(b) of the Canadian Charter of Rights and Freedoms.

PART II

POINTS IN ISSUE

---

3. This Intervener takes no position in respect of the question as to whether

> if the answer to question 2 is affirmative in whole or in part, sections 58 and 69, and sections 205 to 208 to the extent they apply thereto, of the Charter of the French Language, R.S.Q. 1977, c. C-11, as amended by S.Q. 1983, c. 56, are justified by the application of section 1 of the Canadian Charter of Rights and Freedoms and therefore not inconsistent with the Constitution Act, 1982.

PART III

ARGUMENT

QUESTION II

4. The second question raises the issue of what, if any, restraint is imposed on government by virtue of s.2(b) of the Charter in regard to prohibition of use of language.

Characterization of the Legislation for Charter Purposes

5. Sections 58 and 59 of the Charter of the French Language, to the extent that they require the exclusive use of the French language in commercial advertising and in corporate nomenclature, result in a prohibition of the use of any other language in this context. The dominant feature of the prohibition, both in purpose and effect, is in relation to the use of language.

6. Although , for division of power purposes, the legislation might be classified as local trade and commerce, an equally compelling case can be made for classification under s.92(16) of the Constitution Act, 1867 as a matter of local and private nature in the Province and under s.92(11), the incorporation of companies with provincial objects.

N. S. Bd. of Censors v. McNeil, [1978] 2 S.C.R. 662 at 699

Attorney General of Canada and Dupond v. Montreal, [1978] 2 S.C.R. 770 at 792

PART III

ARGUMENT

Schneider v. The Queen, [1982] 2 S.C.R. 112 at 141

The Boston Rubber Shoe Company v. The Boston Rubber Company of Montreal (1902), 32 S.C.R. 315 at 333.

7. It is the position of this Intervener that classification of legislation for division of powers purposes is not conclusive in respect of Charter analysis, especially where the subject matter, such as language, is not to be found as an enumerated head of power under either s.91 or s.92 of the Constitution Act, 1867.

Jones v. Attorney General of N. B. et al., [1975] 2 S.C.R. 182

8. Notwithstanding the aspect of the legislation that touches on commercial advertising, the impugned legislation does not fall within the scope of what has come to be known as the commercial speech doctrine as developed within the context of freedom of speech and expression. Commercial speech constitutes contractual or pre-contractual conduct. In this instance the prohibition on language use does not result in a similar prohibition of the commercial message either in advertising or in corporate nomenclature. The content of the message is retained in contrast to traditional restrictions on commercial speech found in cases such as Cowen v. Attorney General of B.C., [1941] S.C.R. 321 and Jabour v. Law Society of British Columbia, [1982] 2 S.C.R. 307.

PART III

ARGUMENT

---

9. The commercial speech doctrine is succinctly articulated in a recent article as follows:

> The American courts have said that there is a 'common sense' difference between commercial speech and other forms of expression. The judicial instinct rests on the perception that many forms of commercial speech are nothing more than market-place conduct, where regulation is subject only to minimal judicial review. Because the purpose of commercial speech is to promote an economic exchange rather than political change or artistic pleasure, restrictions on this form of expression seem less threatening to those basic values which find recognition in the Charter. To the extent that commercial speech, in the form of advertising, constitutes contractual or pre-contractual conduct, it fails to partake of the idea of expression. Laws which impose certain contractual terms and forbid others do not deal with expression in any meaningful constitutional sense.
>
> (emphasis added)
>
> Sharpe, R. "Commercial Expression and the Charter", (1987), 37 U. Toronto L.J. 229 at 230

10. This Intervener respectfully submits that the true purpose and effect of the impugned legislation is not in relation to regulation of economic exchange.

11. Nor does the prohibition on the use of language in this instance touch upon the constitutional protection afforded by s.133 of the Constitution Act, 1867 to the use of the English and French language in certain well-defined circumstances. The legislation is not, as suggested by the Appellant, immune from

PART III

ARGUMENT

Charter review on the basis that it is in accordance with a fundamental term or condition of the Confederation compromise (as are certain aspects of education touched by s.93 of the Constitution Act, 1867).

Paragraph 47, p.22 - Appellant's Factum

MacDonald v. City of Montreal, [1986] 1 S.C.R. 460 at 496 and 500-501

Société Des Acadiens v. Association of Parents, [1986] 1 S.C.R. 549 at 576-578

Reference re Bill 30, An Act to Amend the Education Act, (unreported judgment of the S.C.C. dated June 25, 1987)

Freedom of Expression: Charter Interpretation

12. Section 2 of the Charter provides as follows:

> 2. Everyone has the following fundamental freedom:
>
> (a) freedom of conscience and religion;
>
> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
>
> (c) freedom of peaceful assembly;
>
> (d) freedom of association.
>
> (emphasis added)

13. It is necessary first to determine the scope of the particular freedom alleged to be violated - freedom of expression

PART III

ARGUMENT

- keeping in mind the admonition of Dickson, C.J.C. in Hunter et al. v. Southam Inc., [1984] 2 S.C.R. 145 at 156 that the proper approach to the definition of rights and freedoms guaranteed by the Charter is a purposive one: "[I]ts purpose is to guarantee and to protect within the limits of reason, the enjoyment of the rights and freedoms it enshrines".

14. An elaboration on the purposive approach to Charter interpretation by Dickson, C.J.C. is found in R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295 at 344:

> In my view, this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter. The interpretation should be, as the judgment in Southam emphasizes, a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the Charter's protection. At the same time it is important not to overshoot the actual purpose of the right or freedom in question, but to recall that the Charter was not enacted in a vacuum, and must therefore, as this Court's decision in Law Society of Upper Canada v. Skapinker (1984), 11 C.C.C. (3d) 481, 9 D.L.R. (4th) 161, [1984] 1 S.C.R. 357, illustrates, be placed in its proper linguistic, philosophic and historical contexts.
>
> (emphasis added)

PART III

ARGUMENT

---

15. Retail, Wholesale and Department Store Union v. Dolphin Delivery Ltd., [1986] 2 S.C.R. 573 indicates that matters other than political speech or expression will be considered eligible for inclusion within the scope of the freedom. As noted in the judgment, the term expression is wider than speech and obviously takes in conduct as well as speech. McIntyre, J. states at 588 that:

> There is, as I have earlier said, always some element of expression in picketing. The union is making a statement to the general public that it is involved in a dispute, that it is seeking to impose its will on the object of the picketing, and that it solicits the assistance of the public in honouring the picket line. Action on the part of the picketers will, of course, always accompany the expression, but not every action on the part of the picketers will be such as to alter the nature of the whole transaction and remove it from Charter protection for freedom of expression. That freedom, of course, would not extend to protect threats of violence or acts of violence. It would not protect the destruction of property, or assaults, or other clearly unlawful conduct. We need not, however, be concerned with such matters here because the picketing would have been peaceful. I am therefore of the view that the picketing sought to be restrained would have involved the exercise of the right of freedom and expression.

16. It is also equally clear that not every aspect of speech or act of conduct will be included within the freedom. As noted by McIntyre, J. in Re Public Service Employee Relations

PART III

ARGUMENT

Act (Alta.), [1987] 1 S.C.R. 313 at 394 in respect of a companion freedom (association) "...the Charter should not be regarded as an empty vessel to be filled with whatever meaning we might wish from time to time."

17. It is evident that the Court will have to determine each category of activity which might fall within the scope of the freedom on its own merits. To illustrate, as absolutely no tension exists between freedom of expression and the pre-Charter freedom of political speech doctrine, it is obvious that the former includes the latter. However, an examination of pre-Charter jurisprudence indicates clearly the philosophical incompatibility which exists between freedom of expression and commercial speech. Where such incompatilility exists there should be a close examination of the activity before it is included within the scope of the freedom.

Jabour v. Law Society of British Columbia, (supra)

Gay Alliance Toward Equality v. Vancouver Sun, [1979] 2 S.C.R. 435 at 469

18. To illustrate, in Rio Hotel Ltd. v. New Brunswick Liquor Licensing Board, (unreported judgment of the S.C.C. dated June 29, 1987) the characterization of the activity (nude dancing) in premises engaged in the business of selling alcoholic beverages as being a natural "marketing tool" (Estey, J. at 16) would bring the dancing closer to the category of commercial speech as far as the Appellant Rio Hotel was concerned. The reluctance of this Honourable Court to rule on the issue of whether nude dancing prima facie falls within the scope of the

PART III

ARGUMENT

---

freedom without benefit of an adequate record is an indication that in appropriate circumstances limits on the freedom itself will be considered. This approach is in contrast with that of the Quebec Court of Appeal in Irwin Toy Ltd. v. A.G. Que., 32 D.L.R. (4th) 641 at 652 per Jacques, J.A.

19. However, as noted above in paragraphs 7 to 10, it is the position of this Intervener that the prohibition on use of langauge in this instance does not, for purposes of Charter analysis, bear the categorization of commercial speech and therefore avoids the philosophical incompatibility mentioned above.

20. The compelling arguments which exist for exclusion of commercial speech from constitutional protection within freedom of expression do not exist in respect of artistic and cultural expression. Unlike commercial speech, there has traditionally been minimal governmental regulation of cultural expression.

Language as Cultural Expression

21. That the use of language as a mode of communication bears the characteristics of cultural expression is self-evident. As noted by the Court in Re Manitoba Language Rights, [1985] 1 S.C.R. 721 at 744 and quoted with approval in MacDonald v. City of Montreal, supra, by Wilson, J.:

> ...The importance of language rights is grounded in the essential role that language plays in human existence, development and dignity. It is through language that we are

PART III

ARGUMENT

> able to form concepts; to structure and order the world around us. Language bridges the gap between isolation and community, allowing humans to delineate the rights and duties they hold in respect of one another, and thus to live in society.

22. Inclusion of cultural expression within the scope of freedom of expression is consistent with pre-Charter jurisprudence in respect of the fundamental freedoms. As noted by Rand, J. in Saumer v. City of Quebec, [1953] 2 S.C.R. 299 at 329:

> ...freedom of speech, religion and the inviolability of the person, are original freedoms which are at once the necessary attributes and modes of self-expression of human beings and the primary conditions of their community life within a legal order...

23. The notion of individual self-fulfillment through free expression has often been advanced in conjunction with political speech as legitimate premises for protection of freedom of speech. In addition to the freedom to think, believe and to form opinions is the freedom to express these beliefs and opinions. This notion is fully supported by the placement of expression within the context of s.2(b). As stated by Professor Emerson in "Toward a General Theory of the First Amendment", (1963), 72 Yale L.J. 877, at 879:

> ...expression is an integral part of the development of ideas, of mental exploration and the affirmation of self....
>
> See also McIntyre, J. at p.584 to 586 in Dolphin Delivery, (supra)

PART III

ARGUMENT

Multicultural Heritage

24. It is respectfully submitted that cultural expression deserves similar treatment to political speech within the scope of s.2(b) of the Charter if individual self-fulfillment is to be realized in a nation as diverse in culture as Canada.

25. The prohibition of use of a language, which is the dominant characteristic of the legislation under review, does infringe the fundamental freedom of expression found in s.2(b) of the Charter. In marked contrast is the situation under consideration in the companion case of Allan Singer v. The Attorney General of Quebec (in respect of features of the legislation there under review) where joint use of the French language is required but the use of other language is not prohibited.

26. Section 27 of the Charter states:

> This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

It is submitted that the approach taken in paragraph 25 above, is consistent with that taken by this Honourable Court in giving meaning to s.27 of the Charter in matters of freedom and religion.

R. v. Edwards Books, [1986] 2 S.C.R. 713

R. v. Big M Drug Mart Ltd., supra

PART III

ARGUMENT

Conclusion

27. In summary, the position of this Intervener is that

(i) for Charter purposes the impugned legislation is to be characterized as having language (and not commercial speech) as its dominant feature;

(ii) the prohibited activity is not immune from Charter review as a subject matter protected by the Confederation compromise;

(iii) language falls within the scope of cultural expression.

(iv) given the Charter context in which the freedom is found, given the use of the word expression (rather than speech) in the definition of the freedom, and given the philosophical compatibility of cultural expression with the fundamental freedom, there does not appear to be any legitimate reason for not granting constitutional protection in this instance;

(v) the prohibition of the use of language results in an infringement of the freedom of expression;

(vi) the principle of interpretation found in s.27 of the Charter in respect of multicultural heritage advances the submission of the Intervener in this instance.

PART IV

ORDER DESIRED

28. The Attorney General of New Brunswick submits that the constitutional questions should be answered as follows:

1. The Intervener takes no position in respect of this question.

2. Should be answered in the affirmative.

3. The Intervener takes no position in respect of this question.

ALL OF WHICH is respectfully submitted this 30th day of September, 1987.

Grant S. Garneau

Grant S. Garneau
Of Counsel for the Attorney General of New Brunswick, Intervener

LIST OF AUTHORITIES

APPENDIX "A"

CHARTE DE LA LANGUE FRANÇAISE

«58. L'affichage public et la publicité commerciale se font uniquement dans la langue officielle.

Toutefois, dans les cas et suivant les conditions ou les circonstances prévus par règlement de l'Office de la langue française, l'affichage public et la publicité commerciale peuvent être faits à la fois en français et dans une autre langue ou uniquement dans une autre langue.».

68. Les raisons sociales peuvent être assorties d'une version dans une autre langue pour utilisation hors du territoire du Québec. Elles peuvent être utilisées en même temps que la raison sociale en langue française dans les inscriptions visées à l'article 51 s'il s'agit de produits offerts à la fois au Québec et hors du Québec.

69. Sous réserve de l'article 68, seule la raison sociale en langue française peut être utilisée au Québec.

205. Quiconque contrevient à une disposition de la présente loi autre que l'article 136 ou des règlements adoptés en vertu de la présente loi par le gouvernement ou par l'Office de la langue française est coupable d'une infraction et passible, en plus du paiement des frais,

a) pour chaque infraction, d'une amende de $25 à $500 dans le cas d'une personne physique et de $50 à $1,000 dans le cas d'une personne morale;

b) pour toute récidive dans les deux ans suivant une infraction, d'une amende de $50 à $1,000 dans le cas d'une personne physique, et de $500 à $5,000 dans le cas d'une personne morale.

206. Une entreprise qui commet une infraction visée à l'article 136 est passible, en plus du paiement des frais, d'une amende de $100 à $2,000 pour chaque jour où elle poursuit ses activités sans certificat.

207. Le procureur général ou la personne qu'il autorise intente, par voie sommaire, les poursuites prévues à la présente loi et exerce les recours nécessaires à son application.

208. Un tribunal de juridiction civile peut, à la requête du procureur général, ordonner que soient enlevés ou détruits, dans un délai de huit jours à compter du jugement, les affiches, les annonces, les panneaux-réclame et les enseignes lumineuses qui contreviennent aux dispositions de la présente loi, et ce, aux frais des intimés.

La requête peut être dirigée contre le propriétaire du matériel publicitaire ou contre quiconque a placé ou fait placer l'affiche, l'annonce, le panneau-réclame ou l'enseigne lumineuse.