

C A N A D A

PROVINCE OF QUÉBEC
DISTRICT OF MONTREAL

N° 500-17-

S U P E R I O R C O U R T

DOUG MITCHELL

-and-

MICHAEL SHORTT

-and-

SHANNON SNOW

-and-

FRÉDÉRIQUE LISSOR

-and-

ADAM STERNTHAL

-and-

10096547 CANADA INC.

-and-

SOUHILA BABA

Plaintiffs

v.

ATTORNEY GENERAL OF QUEBEC

Defendant

DETAILED AFFIDAVIT OF DOUGLAS MITCHELL

I, the undersigned, DOUGLAS MITCHELL, attorney, practicing my profession at 3500 de Maisonneuve Boulevard West, Tower 2, Suite 1400, in the City and District of Montréal, province of Québec, H3Z 3C1, do hereby depose and say:

My Background and Legal Practice

1. I am one of the Plaintiffs in this matter and make this Affidavit in support of an Application for a Stay of the application of sections 9 and 208.6 of *An Act respecting French, the official and common language of Québec*, SQ 2022, c. 14 ("**Bill 96**").
2. My family has always been proudly based in Québec and I consider myself as much a Québécois as any other Québec resident, whether francophone, anglophone, or allophone.
3. I also support reasonable measures to promote and protect the French language in Québec.
4. While English is my mother tongue, I have always made a conscious effort to learn, develop, and maintain my ability to communicate in French.
5. I attended elementary school in one of Canada's first French immersion programs until grade 4, and then in an exclusively French school for the remainder of my elementary education.
6. My high school and undergraduate education (Queen's University) were in English, but I always hoped to come back to Montreal and live and practice in a bilingual environment. I attended law school at McGill University, where I made it a practice to take courses in French when available.
7. I was admitted as a member of the Barreau du Québec in November 1989. I am one of the founding partners of the firm known today as IMK LLP, a firm specialising in litigation principally in the Province of Québec.
8. Throughout my career, I have specialized in the areas of civil, commercial, and public law litigation. I have appeared at all levels of Canadian courts, including numerous times at the Supreme Court of Canada, and argued in both French and English in all those courts.
9. I would estimate that approximately 60% to 65% of my clientele is English-speaking and about approximately 40% of the oral hearings in which I engage take place in English. I represent both physical and legal persons, but I would estimate that 70% of my clients are companies, organizations, or other legal entities.
10. I have a general rule of practice (which I also apply in my personal relations) that I will attempt to speak to all participants in the judicial process in the language of their choice or in their first language if it is English or French. (Regrettably I do not speak any other languages.) I believe it is a mark of respect to others.
11. I regularly draft proceedings in English, confident that they will be received properly and understood by the judges to whom they are presented and by the other parties. I have never had occasion to have that confidence shaken.

12. In that light, I will generally try to make arguments in the language of the judge hearing the matter, except when my client speaks English and does not speak French, at which point in my view, the obligation to the client trumps that of the obligation to the judge in the Québec judicial context, where bilingualism is a significant asset, particularly in Montreal.
13. In my experience, it is extremely important and beneficial for clients to be able to understand and follow the proceedings filed on their behalf and to contribute their own perspectives and knowledge to the drafting of proceedings at all stages of a court process.

The Impact of Bill 96 on Access to the Courts

14. Based on my experience, sections 9 and 213.1 of Bill 96, particularly in their current form, are unnecessary. There was no problem to fix. French and English have had equal access to the Courts of Québec for over 150 years.
15. In fact, over the course of my practice, many observers of the Québec judicial process have expressed their admiration to me of how well the process functions in a completely bilingual environment.
16. The adoption of sections 9 and 208.6 will clearly result in a denial of the rights guaranteed under section 133 of the *Constitution Act 1867* to both lawyers and litigants. It runs directly counter to the explicit ruling of the Supreme Court of Canada in *Blaikie v AG Québec* from 1979 on the issue of pleadings in the Courts of Québec, and to the approach to linguistic rights set out by the Supreme Court of Canada in *Beaulac v R.*
17. Furthermore, the prohibition on filing a proceeding in English in cases involving legal persons if that proceeding is not accompanied by a certified French translation (it is not clear if the prohibition would apply in a case where I was representing both an individual and a legal person, but to mitigate risk, I could not take the chance of the filing of my proceeding being refused) will also result in a meaningful additional impediment to access to justice for many of my clients.
18. In many cases, if a legal person wishes to file proceedings in English, the time required to obtain a certified translation will result in a practical denial of access to the courts because it will be impossible to file the proceeding within the mandatory time frame or in sufficient time to obtain the needed relief.
19. For example, in much of my practice, I am operating under tight timelines: the standard deadline to file proceedings in judicial review is thirty days, as is the regular deadline for filing a notice of appeal or an application for leave to appeal (although sometimes it can be even shorter).

20. Similarly, a significant portion of my practice involves expedited proceedings, such as injunctions or commercial disputes in Commercial Court, where proceedings can be exchanged within weeks or less.
21. Other members of my firm have conducted seizures before judgment or other preservation orders on behalf of legal entities, where proceedings had to be drafted in a matter of days so that the client could obtain a court order before assets were moved out of the jurisdiction.
22. In all such cases, when working on tight timelines and where significant sums of money or important rights are at stake, every day available to prepare a proceeding counts. Often proceedings are only completed and ready for filing on the eve of the filing deadline. In such a context, there would simply be no time to obtain the certified translation while meeting the filing deadline.
23. Practically speaking, this means that the **only** option for my legal person clients in such cases will be to file proceedings in French, even in cases where all the parties would be English-speaking (I note that sections 9 and 208.6 of Bill 96 do not permit parties to consent to filing proceedings in English).
24. What is more, we do not have internal translators at our office, so in practice, our clients' ability to file a proceeding in English will also depend on the availability on the market at any given time of certified translators available to translate legal proceedings.
25. In that light, based on a search I performed on the website of the *Ordre des Traducteurs, Terminologues et Interprètes Agréés du Québec*, I understand that there are currently only 412 members of this Order who are listed as being qualified to translate official documents from English to French, the whole as appears from a printout of the OTTIAQ's repertoire of members, **Exhibit DM-1**. Of these, **only 46** translators have "Law/Droit Civil" as an area of specialization, as appears from a second printout of the repertoire of members, **Exhibit DM-2**.
26. Given the rapidly improved and increasing quality of translation software, I would not expect that this number to increase appreciably over the next few years, while the need to translate proceedings resulting from the adoption of sections 9 and 208.6 will likely increase.
27. Again, the practical consequence is that in most cases where there is any importance in filing proceedings within a specified time, or with any urgency, the only option will be to file proceedings in French. The right to file proceedings in English will become theoretical or illusory.
28. Even where still possible, this "right" will now come with significant additional costs which may themselves impede access to the courts in English. My firm has at times represented public interest organizations with limited litigation budgets. Even in cases where time is not an issue, the cost of translating an English proceeding may

be prohibitive for such entities and may in and of itself force them to have proceedings drafted in French.

29. Meanwhile, the practical requirement to draft proceedings in French will in many cases exclude clients from the process of contributing to the proceedings that will ultimately affect their business or operations.
30. Modern drafting of legal proceedings is often an iterative process with extensive client input, resulting in a higher quality product and one that is more reflective of the client's positions and views.
31. Many of my clients are from outside Québec and do not speak French. If proceedings practically have to be filed in French, the client representatives will largely be excluded from the drafting process.
32. Based on my experience, I believe the likely consequence of a requirement that, for all intents and purposes, obliges legal persons to file proceedings in French, is that many sophisticated parties will avoid the Québec public justice system and seek alternative forums to adjudicate their disputes with Québec parties, whether it be arbitration or courts in other jurisdictions.

The Availability of Alternative Solutions

33. I was part of a task force that looked at whether The Advocates' Society (La Société des plaideurs) should make representations on dealing with sections 9 and 208.6. I also participated actively in the drafting of the submissions that ultimately were made to the National Assembly, which are attached to this affidavit as **Exhibit DM-3**.
34. In those submissions, we proposed what I felt was a very fair suggestion, which would have protected the right to file proceedings in English while ensuring that francophones receiving the proceedings could also receive a high-quality translation.
35. We suggested that proceedings filed in English be accompanied by a translation performed by a recognized translation software program designated by regulation.
36. There are several products now on the market that provide an extremely high-quality translation that could easily serve the purposes presumably meant to be addressed by sections 9 and 208.6.
37. In addition, attached to this affidavit as **Exhibit DM-4** is the submission of the Barreau du Québec which also had serious concerns regarding the legality of and problems with access to justice resulting from section 9.
38. Finally, also attached **Exhibit DM-5** are the submissions of the Canadian Bar Association, whose concerns also apply to the protections of francophones in the rest of Canada.

39. In my view, sections 9 and 208.6 amount to an affront to the rule of law.

40. All the facts alleged in this Affidavit are true.

AND I HAVE SIGNED this 21st day of June
2022


Doug Mitchell (Jun 21, 2022 10:45 EDT)

DOUG MITCHELL

Solemnly affirmed via videoconference, in
Montreal, this 21st day of June 2022

 

Commissioner of Oaths for Québec and
outside of Québec

Detailed Affidavit of Me Doug Mitchell - June 21st 2022(931835.1)

Final Audit Report

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