

C A N A D A

PROVINCE DE QUÉBEC
DISTRICT DE MONTRÉAL

N° _____

C O U R S U P É R I E U R E

DOUG MITCHELL

- et -

MICHAEL SHORTT

- et -

SHANNON SNOW

- et -

FRÉDÉRIQUE LISSOIR

- et -

ADAM STERNTHAL

- et -

10096547 CANADA INC.

- et -

SOUHILA BABA

Demandeurs

c.

PROCUREUR GÉNÉRAL DU QUÉBEC

Défendeur

D E T A I L E D A F F I D A V I T

I, the undersigned, MICHAEL SHORTT, lawyer and trademark agent, practicing my profession at 800 Square Victoria, Suite 3500, in the City and District of Montréal, province of Québec, H4Z 1E9, solemnly affirm as follows:

1. I am one of the Plaintiffs in this matter and make this Affidavit in support of an Application to Stay sections 9 and 208.6 of *An Act respecting French, the official and common language of Québec*, SQ 2022, c. 14 ("**Bill 96**").
2. I was born in Kingston, Ontario, in 1985.
3. My parents always wanted me to be bilingual, and enrolled me in a French Immersion preschool program.
4. My parents inform me that I was expelled from this program for misbehaving, although I have no memory of this early period.
5. Undeterred, my parents enrolled me again in a French Immersion program at the earliest opportunity, which in my case was at grade 7.

6. I spent grades 7-12 in French Immersion programs and graduated high school with a certificate of bilingualism from the Ontario government.
7. I came to Québec for my undergraduate degree and studied political science and economics at McGill.
8. Thanks to high marks in political science and proficiency in French, I was offered one of four Guy Drummond Memorial Fellowships upon graduation. This is a scholarship which combines a master's degree at McGill and a one-year exchange at Sciences Po Paris in France.
9. During my exchange study year, I was able to perfect my French. I lived in the "Maison des étudiants canadiens", a foreign students' residence that hosted a great many students from Québec and elsewhere in Canada.
10. I then returned to Québec, completed a master's degree in political science at McGill and enrolled in McGill's Faculty of Law.
11. While studying at the McGill Faculty of Law, I took a large number of courses in French with the explicit aim of improving my French.
12. While at the McGill Faculty of Law, I was part of McGill's team for the 2012 Mignault civil law moot (*Concours de plaidoirie Pierre-Basile-Mignault*).
13. Our moot factum was drafted in English, and I made my oral submissions in English, while my moot partner made his submissions in French. My moot partner tied for first place in the competition with another McGill student, while I placed third.
14. He and I would later become co-coaches of the McGill Mignault moot team for 5 years. The Mignault moot accepts submissions in both French and English. My participation as a coach was in both English and French, and I encouraged each of our mooters to compete in their strongest official language.
15. After graduating, I completed my articles at Fasken Martineau's Montréal office, working in both French and English, depending on the nature of the case.
16. After completing my Québec articles, I articulated in Ontario by clerking at the Ontario Court of Appeal. There, I clerked for Justice Paul Rouleau during the time that he authored the Court's unanimous judgment in *R v Munkonda*, which is a leading case on bilingual criminal trials. This experience was one of the formative ones of my legal career and helped spark my appreciation for the importance of language rights.

The Role of Bilingualism in My Legal Practice

17. After articling at the Ontario Court of Appeal, I returned to Québec and began practicing law at Fasken's Montréal office, where I was named a partner on January 1st of this year.

18. While I have a broad commercial practice, the majority of my time is spent practicing intellectual property law in general and intellectual property litigation in particular.
19. With very few exceptions, intellectual property cases can be litigated before either federal or provincial courts.
20. The Federal Court and Federal Court of Appeal are both federal courts subject to section 133 of the *Constitution Act, 1867*. In those courts, I can choose to make submissions in either English or French, depending on the needs of the file and the instructions of my client.
21. While the majority of my Federal Court files are litigated in English, I also litigate in French. In fact, I am currently representing Société Radio-Canada in a lawsuit to put a stop to infringement of copyright in the beloved *Bobino* television program (Federal Court File No. T-1000-22).
22. I have also argued in both official languages before provincial courts. I have argued motions in French in a patent infringement case before the Superior Court of Québec (*Thermolec ltée c. Stelpro Design inc.*, 2020 QCCS 561), and various other motions before provincial courts in English (e.g. *A.B. c. Robillard*, 2022 QCCA 378). I also argued the evidentiary objections in English in *Merck Canada inc. c. Procureur général du Canada*, 2020 QCCS 4541.
23. The decision to file proceedings in one official language or the other is generally based on multiple considerations. These include, first and foremost, the client's preference, but can also include strategic and budgetary considerations. For example, Canadian patents can be filed in either English or French, so when litigating a French-language patent, it is generally logical to also plead in French. This ensures that all of the key documents are in a single language, which reduces costs and facilitates recruitment of scientific experts.
24. At present, the proudest moment of my legal career was appearing on behalf of Industrial Alliance in *Mazraani v. Industrial Alliance*, 2018 SCC 50. This was a language rights case involving section 133 of the *Constitution Act, 1867*, as well *Charter* language rights and the federal *Official Languages Act*.
25. In *Mazraani*, we successfully defended the right of Industrial Alliance, as well as its francophone witnesses and counsel, to use their official language of choice in the Tax Court of Canada. As the Supreme Court ruled in the opening paragraph of its reasons:

[1] In Canada, the right to speak in the official language of one's choice in certain courts is a fundamental and substantive right that is recognized in both constitutional and quasi-constitutional laws. Any person who appears in the courts in question must be able to exercise this right freely. When a person asks a judge of one of these

courts for permission to speak in the official language of his or her choice, the judge's answer must be yes.

Impact of Sections 9 and 208.6 of Bill 96 on My Legal Practice

26. Sections 9 and 208.6 would negatively affect both myself and my clients, the vast majority of whom are legal persons.
27. I have obtained time estimates for certified translation of three publicly-available legal documents:
 - a. A "**Motion to Institute Proceedings**" that I had filed in the Superior Court of Québec for a simple breach of contract claim (6 pages, 35 paragraphs).
 - b. An "**Application of the Plaintiff for Case Management Measures**" that I had filed in the Superior Court of Québec in a high-conflict civil litigation file (11 pages, 86 paragraphs). This excludes the 50-odd pages of exhibits.
 - c. The **Appellant's Factum in *Mazraani*** (44 pages, of which 35 pages are submissions and there are 131 paragraphs of submissions). I used the appellant's factum here, since our factum in *Mazraani* was filed in French, and I have yet to file an English factum in the Québec Court of Appeal.
28. I received the following time estimates from my firm's internal legal translation department:
 - a. **For the Motion to Institute Proceeding:** Preparing a certified translation would take 2 business days.
 - b. **For the Application for Case Management Measures:** Preparing a certified translation would take 4 business days.
 - c. **For the Appellant's Factum:** Preparing a certified translation would take 12 business days. I note that 12 business days is just over 2 weeks, which represents an important portion of the time allowed for preparing appeal briefs in the Court of Appeal of Québec (typically 2 or 3 months, depending on the circumstances: art 373 CCP). Indeed, 2 weeks represents roughly 25% of the 2-month period allocated to respondents to prepare their factum.
29. I received the following time estimates from an external translation firm that I have often used in my practice:
 - a. **For the Motion to Institute Proceeding:** Preparing a certified translation would take 1-5 business days.
 - b. **For the Application for Case Management Measures:** Preparing a certified translation would take 5-6 business days.

- c. **For the Appellant's Factum:** Preparing a certified translation would take 12-13 business days (just over 2 weeks). Once again, the 12-13 business day translation delay represents an important part of the appeal period.
30. At the risk of stating the obvious, whether I used internal or external translation, there would also be additional costs due to the translation.
 31. As a native speaker of English, I work more quickly in English than in French. Sections 9 and 208.6 force me to either work in French (at a slower pace and thus higher cost to my clients) or to order certified translations of the pleadings that I draft in English (again, adding cost and delay). Either way, I am no longer able to deliver the same quantity of legal services for the same cost, thereby reducing access to justice.
 32. In the past, clients have approached me for Superior Court litigation just before prescription deadlines. I was only able to file my pleadings on time because I was able to work quickly in English. I would not have been able to meet those deadlines if I had to draft the pleadings in French or wait for a certified French translation to be prepared.
 33. I have recently been approached to file a proceeding in which my clients would be an individual and a corporation. Given the uncertainty about how section 9 would apply in this situation, I will discourage them from using English, even if that would be their first choice, and even though the defendant in that file would be an anglophone.
 34. Most of my intellectual property litigation files involve corporate plaintiffs, who previously had the option of suing in English in either the federal or provincial courts. After section 9 comes into force, the additional costs of using English in Québec's courts means that their only practical option will be to file litigation in the Federal Court.
 35. In many cases this will deprive them of legitimate juridical advantages that would otherwise have been available to them. For example, in my experience, the Federal Court is often less willing to grant interlocutory injunctions (especially in patent matters), when compared to the Superior Court of Québec.
 36. Similarly, the limited statutory jurisdiction of the Federal Court means that clients suing in the Federal Court cannot join provincial-law causes of action (such as breach of contract or misappropriation of trade secrets) to their intellectual property claims. This would have been possible in the Superior Court of Québec, and so for reasons of strategy or economy, I have advised anglophone clients to sue in provincial courts in the past. That option will be closed to them now in Québec.
 37. In addition to my litigation practice, I am co-chair of Fasken's videogame industry group. In that capacity, I do quite a lot of work for "indie" videogame studios based

here in Québec. These are small businesses with limited budgets for legal work or litigation.

38. Prior to the adoption of Bill 96, I generally drafted contracts for my videogame clients which included choice-of-forum clauses that conferred exclusive jurisdiction on Québec courts.
39. As a result of the adoption and imminent coming into force of sections 9 and 208.6, I am now choosing arbitration or using foreign choice of law/forum in my contracts, since going to court in English in Québec will become prohibitively expensive for many clients.
40. As a lawyer, the use of English is central to my cultural identity. There are many times where I choose to use French (e.g. at the client's request, or when examining French-speaking witnesses), but in many other cases, I do my best work in English.
41. I take particular pride in the quality of my legal writing in English.
42. Whether before the Federal Court or the provincial courts of Québec, I feel most like myself when I am free to speak English if that is my choice.

Conclusion

43. Bilingualism is extraordinarily important to me. My wife is a French-speaking member of the Abenaki nation, and when our son was given his Abenaki name earlier this year, everyone present made a wish on his behalf. My wish was that our son speak English as well as his father, French as well as his mother, and Abenaki as well as his grandfather.
44. All the facts recited in this Detailed Affidavit are true.

AND I HAVE SIGNED this 20th day of June 2022

DocuSigned by:

Michael Shortt

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MICHAEL SHORTT

Solemnly affirmed via videoconference, in
Montréal, this 20th day of June 2022



Commissioner of Oaths for Québec