

COMPANY CONVICTED FOR FAILURE TO ADVERTISE IN FRENCH ON THE INTERNET

Marcel Naud*
LEGER ROBIC RICHARD, Lawyers,
ROBIC, Patent & Trademark Agents
Centre CDP Capital
1001 Square-Victoria - Bloc E – 8th Floor
Montreal, Quebec, Canada H2Z 2B7
Tel.: (514) 987 6242 - Fax: (514) 845 7874
info@robic.com – www.robic.ca

In the Province of Québec (Canada), since the state considers the French language to be a distinctive attribute of the majority of its citizens, its quality and significance is deemed worthy of legislative protection. French-protective measures can be found in the legislation of that province as far back as 1910, even though the main principles now entrenched in the *Charter of the French language* (hereinafter the "Charter"; see also <http://www.olf.gouv.qc.ca>) to fulfill that goal were enacted around 1969, still long before the internet became a popular mean to advertise and sell products and services. The rationale behind such legislation is that in Québec, consumers have a right to be informed and served in French.

Charter's Provisions

Section 52 of the Charter provides that "(c)atalogues, brochures, folders, commercial directories and any similar publications must be drawn up in French." Obviously, this does not prevent a business from creating, distributing or making those publications available to the public in other languages as well; there are also several exceptions to section 52 in the *Regulation respecting the language of commerce and business* (hereinafter "the Regulation"). In principle, though, the *Office de la langue française*, which is the agency responsible for the application of the Charter, considers that commercial advertising posted on a Web site, as well as advertising material sent by fax or electronic mail by businesses located in Quebec, fall under section 52.

Section 205 of the Charter provides that a person who contravenes a provision of the Charter or the regulations adopted thereunder commits an offence and is liable, for each offence, to a fine between \$250 to \$7,000 CAD,

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* Lawyer with the lawfirm LEGER ROBIC RICHARD, g.p. and with the patent and trademark agency firm ROBIC, g.p. Publication 274.06.

the amount of which depends on whether the fine is for a first conviction or not and whether the person convicted is a natural or a legal person.

The decision rendered in the *Québec (A.G.) v. Hyperinfo Canada Inc.* ((2001-11-01) QCCQ 550-61-000887-014 at <http://www.canlii.org/qc/jug/qccq/2001/2001qccq12076.html>) case constitutes a clear illustration of the application of Quebec's Charter to web sites of commercial nature.

Facts

The defendant in this case, a corporation with its headquarter and business place in the Province of Québec, operates a web site (<http://www.hyperinfo.ca>) to sell documentation on numerous topics. On September 10, 1999, further to a complaint and an investigation, a commissioner sends a notice informing the defendant that all the commercial advertising on its web site should be in French. On September 16, 1999, the Defendant responded to the notice, stating that corrections had been made. However, a subsequent verification showed that a large part of the commercial advertising was still in English only. The Commission sent a cease and desist letter enjoining the Defendant to comply with section 52 of the Charter and that failure to do so would lead to penal sanctions.

The Defendant then closed its web site and reopened it shortly thereafter, with a warning added on its home page stating that the products and services on the web site were not available to the residents of Québec. A filter mechanism was also added to prevent people with a ".qc" in the domain name of their email address from using the site. However, the index of the products offered had remained in English only. Hence, the Commission referred the case to the Attorney General of Quebec to institute penal proceedings.

Contentions and findings

1. Defendant's first argument was that the Charter was not applicable to the commercial activities of Quebec-located corporations that were conducted online, because the internet has no boundaries and because imposing such burden to businesses located in Quebec would hamper their competitiveness.

The court rejected this argument on the basis that there was a real and substantial connection between the jurisdiction of the court and the facts of

the case because the company's head office and business place was in Quebec. In the opinion of the Court, this made it competent to deal with the case. However, taking into account the notion of comity of nations, the Court added that the mere fact that the information was partially or entirely aimed at the Quebec market could suffice to find a real and substantial connection that may theoretically subject foreign publishers to the Charter even if they do not have a business place in Quebec.

2. Defendant's second argument was that the Charter was an illegitimate legislative mean, which improperly limited information access by requiring business entities to offer a french translation of their web site's content.

The court rejected this argument on the basis that it was without merit since the power to determine whether a measure is likely to achieve its intended purpose is vested in the Parliament, and not the Court.

3. Defendant's third argument was that the exception found in section 11 of the Charter's Regulation providing that catalogues, brochures, folders, commercial directories concerning a cultural or educational product may be exclusively in a language other than French provided that the content of the cultural or educational product is in that other language was applicable.

The court rejected this argument on the basis the defendant failed to show that its catalogues, brochures, folders or commercial directories concerned cultural or educational products.

4. Defendant's fourth argument was that the exception found in section 3(5) of the Regulation, providing that an inscription on a product may be exclusively in a language other than French if the product is from outside Québec and is in limited use in Québec and no equivalent substitute presented in French is available in Québec was applicable.

The court rejected this argument on the basis that the exception only concerned the labelling of products and not advertisement.

5. Defendant's last argument was that the warning on the web site's home page stating that the products and services found on the web site were not available to the residents of Québec and the filter mechanism made the Charter inapplicable to the site, adding that he could not be held liable if Quebec residents choose to ignore the warning or circumvent the filter.

The court rejected this last argument on the basis that the Charter was a matter of public order; it is meant to protect public interests. Therefore, a person cannot exclude itself from its application. As such, the warning on

defendant's web site and imperfect filter mechanism had no legal impact on defendant's obligations and liability.

Conclusion

The interest of this case lies in the fact that had there been a technical mean to effectively exclude Quebec residents from viewing the site—in other words a way for the defendant to allow or refuse visitors based on an objective attribute—the judge could have found that the Charter's provision was not infringed.

These kind of decisions tend to convey the idea that for e-commerce to flourish, businesses should find ways of complying with local and regional laws despite their apparent global scope. This may entice businesses to develop, adopt, and eventually impose, authentication systems for clients who are surfing their sites, in order to certify their status, either based on age, country of residence or any other conceivable attribute.

To a lesser extent, this decision is also interesting because it shows the judicial, legislative and executive branches governments may not be ready, at least not yet, to acknowledge that actions in cyberspace may eventually be subject to a jurisdiction "layer" of its own, pretty much in the same manner as the same actions of a citizen in United States or an individual in the European Community today may be simultaneously subject to several "layers" of laws, including state laws and federal or EU laws.



