

## **Brief to the National Assembly**

### **Committee on Culture and Education**

# **Special consultations and public hearings on Bill 96, An Act respecting French, the official and common language of Québec**

September 28, 2021

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## Executive Summary

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### Context

The Quebec Community Groups Network (QCGN) is a not-for-profit organization that continues to serve and represent the English-speaking community of Quebec after 26 years in operation. The QCGN presents this brief to the National Assembly Committee on Culture and Education to articulate its views and deep concerns about Bill 96, *An Act respecting French, the official and common language of Québec*.

Bill 96 is nothing short of the greatest overhaul to Quebec's legal order since the Quiet Revolution. It is a constitutional project. It disrupts the two-decades-old social peace around language in Quebec. It fundamentally changes the structure of the Quebec state and legal order. It upends 40 years of human rights protection in Quebec. It will affect many areas of life for all Quebecers. Its policy basis is questionable. A change of this magnitude requires serious discussions and debate within Quebec society. It ought not to be pushed through the legislature during a pandemic when public attention is rightly focused on health and the economy.

Because the invitations to this Committee's proceedings were so limited, the QCGN carried out public consultations on Bill 96. The 26 briefs submitted through those consultations are appended to this brief.

### The QCGN's Concerns and Recommendations

In this brief, the QCGN articulates three sets of concerns: first, Bill 96 fundamentally alters the Quebec state, which is of concern to all Quebecers. Second, Bill 96 will make it harder to do business in Quebec, which is also of concern to all Quebecers. Third, Bill 96 will have adverse impacts on the 1.1 million Quebecers who belong to the English-speaking minority. The QCGN supports the policy goal of promoting the French language in Quebec, but suggests there are other ways to achieve this goal in an inclusive manner, to the benefit of all Quebecers.

The QCGN puts forth the following **recommendations**:

- A. **Withdraw the Bill in its entirety.** Because it raises such profound questions for public governance and Quebec society, the QCGN recommends that the Bill be withdrawn.
- B. **Carry out wide public consultations on how to protect and promote the French language, engaging all areas of Quebec society.** The QCGN supports the objective of protecting and promoting the French language, but Bill 96 is not the way to go about it. If protecting French is a policy priority, this government should undertake broad public consultations in order to identify the measures that Quebecers believe will best achieve this goal.
- C. **If the Bill is not withdrawn in its entirety, the Bill ought to be overhauled.** Throughout this brief, the QCGN makes a series of specific recommendations to withdraw or reform the most problematic parts of the Bill. These are summarized in the Conclusion. The most important are the following:
  - a. **Remove the human rights overrides (notwithstanding clause);**

- b. **A reference question on the constitutionality and meaning of the amendment to the *Constitution Act, 1867* should be sent without delay to the Court of Appeal of Quebec;**
- c. **The right to communication and services in English should never be based on eligibility for English instruction.**

The Brief sets out the QCGN's three main areas of concern as follows:

**First, Bill 96 fundamentally alters the Quebec state (Section 3 of this brief)**

Bill 96 alters the Quebec state through the combination of the following elements:

- a. Unprecedented de-entrenchment of human rights protection in Quebec;
- b. Unprecedented amendment to the *Constitution Act, 1867*;
- c. Decreased the role, independence and accessibility of the judicial branch;
- d. Creation of new and expanded executive powers;
- e. Increases in the control over language in the public sector;
- f. Creation of categories of citizen;
- g. Increase in language monitoring in private organizations.

By removing all rights-based constraints on the National Assembly's legislative power, Bill 96 fundamentally changes not only the substantive content of Quebec's legal order, but also the relationship and balance of power among the three branches of government (judiciary, legislature, and executive). The sweeping overrides of the Quebec and Canadian *Charters* profoundly alter Quebec's legal order, undermining human rights and limiting the role of the judiciary. There is no evidence that dismantling Quebec's human rights system is necessary to protect and nurture the French language.

**Second, Bill 96 will make it harder to do business in Quebec (Section 4 of this brief)**

Bill 96 will make it harder to do business in the following ways:

- a. Additional red tape for small and medium-sized businesses;
- b. Harder to make and enforce contracts in Quebec;
- c. Harder to attract talent from outside Quebec;
- d. New business risks.

**Third, Bill 96 will have adverse impacts on Quebec’s English-speaking minority (Section 5 of this brief)**

Bill 96 will have adverse impacts in the following areas:

- a. Restrictions on services in English, including health and social services;
- b. Decreased access to justice in English;
- c. Decreased access to primary and secondary education in English;
- d. Restrictions on admissions to English-language CEGEPs;
- e. Decreased municipal services in English.

The English-speaking community is proud of its contribution to Quebec society. However, the Bill sends the message to English-speaking Quebecers—and, indeed, to all Quebecers whose mother tongue is not French—that they are not truly welcome in the province.

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## 1. Introduction

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### A. Preliminary comments

Bill 96 is enormous and wide-ranging. It raises several constitutional questions. It fundamentally changes the structure of the Quebec state and legal order. It will affect many areas of Quebec life for all Quebecers. It requires serious discussions and debate within Quebec society. So far, the wide-ranging debate worthy of a Bill of this magnitude has not occurred.

It is unacceptable that this Committee has only been given 9 days for public consultations, and that the witness list has remained very restricted. Bill 96 is changing the way Quebecers govern themselves and stripping citizens of the right to seek remedy from the courts when their fundamental freedoms and legal rights are in jeopardy. Quebecers deserve better.

### B. Context

#### i. The Quebec Community Groups Network

The Quebec Community Groups Network (QCGN) is a not-for-profit organization that continues to serve the English-speaking Community of Quebec after 26 years in operation. The QCGN is the centre of evidence-based expertise and collective action for English-speaking Quebec, identifying, exploring, and advocating in support of the strategic issues affecting the development and vitality of our minority community. The QCGN is a non-partisan organization, which actively works with all levels of government.

The QCGN – like the community it serves – is proud to support the protection and promotion of the French language, and the unique cultures of Francophones in minority communities across Canada, and our home province of Quebec. English-speaking Quebecers are the most bilingual group of English-speaking Canadians, with an overall rate of French bilingualism of 66%. The rate of bilingualism amongst our young people is over 75%, a testament to our community's commitment to integrating into and supporting a French-speaking Quebec.

#### ii. Quebec's English-speaking minority

The drafting of the *Constitution Act, 1867* by Quebec and its partners was a delicate process of compromise between English and French settlers. Inherent in this compromise was the recognition of French and English minorities, and provisions for their protection. For example, ensuring representation for the English minority in Quebec was a factor in sections related to the appointment of Senators from Quebec, as were provisions dealing with denominational schools.<sup>1</sup> Quebec itself was established as a province in part to ensure the protection of French and its unique culture.

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<sup>1</sup> [Reference re Senate Reform](#), 2014 SCC 32 at para 92 [*Senate Reference*].

We raise these points to recognize that English-speaking Quebecers are a linguistic minority and have always been recognized as such. We are not an extension of the English majority in Canada. The National Assembly and the *Charter of the French Language* recognize the valuable contribution English-speaking Quebec continues to make to the development of Quebec. Quebec's English-speaking minority is proud of its contribution to Quebec society. And we recognize the ongoing work that this and previous governments are making to work with the English-speaking community to make sure we are fully integrated into Quebec society.

Too much emphasis is placed on the exodus of English-speakers from Quebec following the 1976 election, and not enough on those who remained. Quebec's English population was 958,250 people in 1971, and declined to 823,746 people in the 1981 census, a 10-year net loss of 14%.<sup>2</sup> However, by 2011, our community had rebounded to 1,058,250 citizens, and in the 2016 Census, we were over 1.1 million people—representing approximately 13.7% of Quebec's population.<sup>3</sup> English-speaking Quebecers did not abandon Quebec. We stayed, we learned French, and most importantly we ensured our children learned French and Quebec culture.

English-speaking Quebecers can be found across the province. While a great deal of our community lives in the Montreal metropolitan area, there are 212,000 English-speaking Quebecers outside this region, spread across Quebec. From the Lower-North Shore to the Magdalen Islands, English-speakers are present and are working for the betterment of Quebec society. Individual English-speaking communities have varying degrees of institutional support, and while most English-speaking Quebecers live in population centres greater than 10,000 people, many smaller communities are rural and isolated, making access to services a challenge.

The English-speaking community is geographically, ethnically and economically diverse. Around 75% of the Quebec Jewish population is English-speaking. 25% of the Quebec Muslim population is English-speaking and 72% of the Quebec Hindu population is English-speaking. Gone are the days of a more homogenous community predominantly comprised of Anglo-Saxons and Europeans. The largest cohort of immigrants to our community now comes from Asia. The different cultural communities within English-speaking Quebec have really made us a community of communities. This is especially true of Montreal and the other urban English-speaking communities. With this diversity comes a need to recognize that although English-speaking Quebec has shared strategic development goals, individual communities have specific needs.

Contrary to the stereotype of English-speaking Quebecers areas a privileged elite, some English-speaking communities have faced particular struggles in Quebec; for example, English-speaking Blacks and other peoples of colour, and the historic struggles and prejudices faced by the Irish community. The Jewish General Hospital was founded to permit Jewish doctors to practice and the Jewish community to receive health services in a time when they were not welcome in Catholic and Protestant-founded institutions. Quebec's elites have always included members of the English-speaking minority, but to impute this privilege to the entire English-speaking minority is inaccurate.

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<sup>2</sup> Jean-Pierre Corbeil, Brigitte Chavez and Daniel Pereira, *Portrait of Official-Language Minorities in Canada - Anglophones in Quebec*, Analytical Paper, Catalogue no. 89-642-X – No 002 (Ottawa: Statistics Canada, September 2010), (available online: <https://www150.statcan.gc.ca/n1/en/pub/89-642-x/89-642-x2010002-eng.pdf?st=lk2vaQrL>).

<sup>3</sup> 2011 and 2016 Census Community Profiles, Statistics Canada.

The institutions of English-speaking Quebec were built in an era of denominational segregation. Today, these institutions are open to all Quebecers, and provide services in French and English, to the benefit of all. These institutions are important to the vitality of the English-speaking community, and they also contribute to the vitality of Quebec society. Diversity creates a stronger, innovative, and more resilient society able to build and maintain worldwide networks. It is good for Quebec.

What is not good for Quebec are the higher unemployment rates amongst English-speaking Quebecers, and the prevalence of members of our community living in poverty; 18 per cent of English-speaking Quebecers fall below the Low-Income Cut Off according to data from Statistics Canada. That is 6 per cent higher than the Quebec francophone majority. English-speaking Quebec also has higher levels of unemployment (9 per cent) than the majority (7 per cent) and are effectively shut out from participation in the provincial civil service, where our community's employment has hovered around 1 per cent for decades. Such a staggering gap means that there are clearly *systemic* barriers preventing English-speaking Quebecers from working in the public service. This matters because a democratic government must reflect the society it serves.

As discussed below, Bill 96 attempts to limit government services to citizens who are otherwise eligible to attend English schools. This apparently is the government's attempt to identify an 'historic anglophone community.' Unfortunately, eligibility to attend school in English in Quebec is not in any way linked to the language of the student or the parent. Rather, it is linked to the language of instruction received by the parent or the educational pathway of the student. Thus, the English-speaking minority does not map onto the "English-eligible" category. This is discussed further in Sections 3(f) and 5(b) below.

The narrow vision of who is an English-speaking Quebecer presented in the Bill is baseless, inaccurate, and exclusive. Like many community organizations serving English-speaking Quebec, the Quebec Community Groups Network (QCGN) uses Statistic Canada's First Official Language Spoken (FOLS) variable to determine the size of our linguistic minority community. Our diverse community is more accurately reflected with this approach, because FOLS includes non-English mother-tongue speakers who use English as their main language at home. Because of this, FOLS most precisely reflects the population requiring services in English.

These numbers matter. There were 600,000 single-response mother tongue English Quebecers counted in the 2016 Census, but 1.1 million English FOLS citizens.

### C. The QCGN’s analysis and public consultations

In May and June 2021, the QCGN carried out a full legal analysis of Bill 96 and published this preliminary analysis online.<sup>4</sup>

September 9 to 17, the Quebec Community Groups Network (QCGN) brought together representatives of different elements of English-speaking Quebec to provide them with a forum to share their views on Bill 96: *An Act respecting French, the official and common language of Québec*.

The QCGN felt moved to action to mobilize Quebecers from all walks of life from diverse regions of Quebec because the National Assembly had only invited a handful of English-speaking groups to speak to the harmful consequences of the Bill.

As anticipated, the public interest in the community-led public hearings demonstrated a strong appetite by individuals and organizations to be heard, especially from those who felt that they had been shut out of the discussion by the government. In fact, due to an overwhelming response, an additional day of hearings had to be added to ensure all perspectives were heard.

The virtual public hearings heard from a wide range of Quebecers spanning from stakeholders in the health and social services field, representatives from the arts and culture community, entrepreneurship and business leaders, those active in the education sector, jurists and academics, women’s rights groups, and other underrepresented communities.

The major themes from the QCGN-led public hearings are as follows:

**We are all committed to supporting the use of the French language.**

As stated by one of our presenters, Bill 96 “is counterproductive in targeting English-speaking Quebecers who have proven themselves allies in learning, speaking and promoting French. English-speaking Quebecers invented French-immersion programs, now attended by half a million students across Canada. We share with them not only a love for the French language, but also a personal investment in assuring its survival.”

But we need a better and unifying path forward than offered by Bill 96.

**We stand against the preemptive use of the Notwithstanding clause.** As Royal Orr pointed out in his presentation, “The Quebec Charte des droits et libertés de la personne was, arguably, a crowning jewel of the Quiet Revolution. Our greatest legal minds of that era – Morin, Scott, Crépeau – along with successive Liberal and Parti Québécois governments crafted, adopted, strengthened, and implemented a human rights charter that was recognized as one of the most innovative, comprehensive, and progressive in the world. Premier René Lévesque was so proud of the strengthened 1983 version of the Charter that he mailed a copy to every household in Quebec”.

With both Bill 21 and 96, the Legault government has turned its back on our deep, proud traditions of human rights promotion and protection. As many have pointed out that one of the worst aspects of Bill 96 is that it would be difficult — if not impossible — to challenge any infringements on rights due to the

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<sup>4</sup> See: QCGN, “ Quebec Community Groups Network Preliminary Analysis of Bill 96, An Act respecting French, the official and common language of Québec” (May 31, 2021), (available online: <https://qcgcn.ca/wp-content/uploads/2021/06/Bill-96-QCGN-Prelim-Analysis-2021.05.31.pdf>).

preemptive use of the Notwithstanding clause. As human rights lawyer Julius Grey puts it, *it's not an identity question, it's a question of rights and freedoms.*

**We are concerned about the impact on the business climate.**

If passed, Bill 96 will play a significant role in closing the tap on international talent coming to Quebec to work due to the proposed cap on the number of years children of foreign workers can attend school in English. Michael Murray, Chair of the Eastern Townships School Board noted at our hearings, “While people are attracted to Montreal and Quebec for many reasons, the quality of our education system is a determining factor. Universities occasionally recruit professors and researchers here for a temporary period. The same is true of professionals in multi-national companies and in highly specialized industries such as aeronautics and artificial intelligence. If their children can’t attend English schools, it will make it that much harder to attract the world-class talent we need.”

Christopher Shannon of the Quebec Association of Independent School Boards added, “The government’s proposal will make it more difficult for us to compete in a global marketplace, and we are calling on a Quebecers from different sectors –business, academia and international organizations, to name a few – to join us in calling for keeping the existing regulations in place.”

Moreover, as stated by John Buck, President of CEDEC, “the additional red tape imposed on businesses such as more bureaucratic reporting requirements will only add to the administrative burdens already being carried by small business owners and restrict the time and energy they can dedicate to the success of their enterprises.” And of course, the increased powers of the Office de la langue française and their right to conduct searches without a warrant and based on an anonymous tip is not conducive to a positive business climate.

**We agree this Bill is harmful to the English-speaking community of Quebec.**

As many pointed out, Bill 96 creates tiers of citizenship, which is decidedly un-Canadian. The Bill essentially “others” English speakers, newcomers and immigrants that have contributed to the province that they chose to call home. We must ask, why does the protection of the French-language require new measures which will restrict access to justice, health and social services, education and government services.

**We fundamentally disagree with Bill 96’s definition of who is an English-speaking Quebecer.** Let me cite the brief of the QCGN’s Health and Social Services Committee. *Under s.15 of the Health and Social Services Act (HSSA), “English-speaking persons”* have the right to service in English. This choice of words was deliberate and debated by the National Assembly and ultimately adopted in law. It recognized the importance of communication to safety and outcomes and acknowledges that some people are not capable of or are uncomfortable dealing with health matters in the French language. This principle has been used consistently and is clearly set out in the Guide for the Development of Access Programs published by the Ministry of Health and Social Services (MSSS). The right benefits over 1M Quebecers who are English speaking. Bill 96 proposes to narrow the right to those persons who are eligible for English language instruction as set out in the Education Act. Such a definition would remove the right to access services in English for between 300,000 and 500,000 English-speaking Quebecers.”

**We believe that diversity is a strength.**

As stated in the brief by the Quebec Writer's Federation, English Language Arts Network (ELAN), and the Quebec Drama Federation (QDF): "Bill 96, like Bill 21 before it, promotes a "chilling effect" on cultural and linguistic diversity. By explicitly denying the existence of an English-language community and its language rights, and denying this community the possibility of invoking the Charter to defend these rights, it promotes a homogeneity in Quebec that will make the province less attractive to minorities, and less free, while also risking diminishment of the diversity that enriches communities and the lives of all people through cross-cultural encounters."

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## 2. What is the Policy Objective of Bill 96?

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### A. The promotion of the French language is vital

We wish to be clear on this point. As affirmed in the QCGN's Statement of Principles, French is the official language of Quebec.<sup>5</sup> Our organization is firmly committed to advancing the official language rights of all Canadians, and we will continue to vigorously defend our community's rights, and those of Francophones living in minority communities in other parts of Canada.

The QCGN supports the objective of ensuring that the vitality and influence of the French language is assured, and that French is the language of Government and the Law, and the normal and everyday language of work, instruction, communication, commerce and business. However, we object to the punitive approach that Bill 96 takes to achieve these objectives. As Quebecers, we are deeply concerned with the government's reflex to vacate the fundamental freedoms, equality, and legal rights of its citizens.

Liberal democracies are based on the principle of the rule of law, and the ability of citizens to check the power of the legislative and executive branches of government through the courts. It is most certainly the role of the legislature to balance competing interests in the formulation of law, but it is for the courts to determine what the law is, to provide remedy when it has violated the rights of a citizen, and to determine when the law itself is unconstitutional. *Ubi jus, ibi remedium* is a Latin maxim that translates to 'where there is a right, there is a remedy.' The corollary is that where there is no remedy, there is no right. And where there are no rights, there is no democracy.

### B. The French language remains strong in Quebec

Our society is changing. In 1951, the mother tongue Francophone population of Quebec was 82.5%, and English mother tongue population 13.8% of the total.<sup>6</sup> Between 1951 and 2016, the population with a mother tongue other than French or English increased from 3.7% to 13.8% of the total population of Quebec.<sup>7</sup> Population growth – critical to our economic success – is reliant on immigration. This is true of most advanced western economies, and it certainly true of Quebec.

It is important to distinguish between the demographic changes happening in Quebec and the vitality of the French language itself. The two reports of the Office québécois de la langue française (OQLF) that garnered so much attention in the current discussion - *Scénarios de projection de certaines caractéristiques linguistiques de la population du Québec (2011-2036)* and *Langues utilisées dans*

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<sup>5</sup> QCGN Statement of Principles: <https://qcgnc.ca/wp-content/uploads/2015/10/Statement-of-Principles-Website.pdf>.

<sup>6</sup> Jean-Pierre Corbeil, Brigitte Chavez & Daniel Pereira, *Portrait of Official-Language Minorities in Canada - Anglophones in Quebec*, Analytical Paper, Catalogue no. 89-642-X – No 002 (Ottawa: Statistics Canada, September 2010), at Table 2.1.1, p 11 (available online: <https://www150.statcan.gc.ca/n1/en/pub/89-642-x/89-642-x2010002-eng.pdf?st=lk2vaQrL>).

<sup>7</sup> *Ibid.* See also: Statistics Canada, *Quebec [Province] and Canada [Country] (table)*, 2016 Census Catalogue no. 98-316-X2016001, (Ottawa: Statistics Canada, 2017), (accessed July 26, 2021 online: <https://www12.statcan.gc.ca/census-recensement/2016/dp-pd/prof/index.cfm?Lang=E>).

*diverses situations de travail au Québec en 2018* – noted an increase in the use of other languages in Quebec, but not a decline in the use of French in the public space. These reports also demonstrate that in terms of language migration, French is the winner for the children of newcomers to Quebec. This is good news and should be celebrated.

There is also considerable thought that English is influencing the language of work a great deal in Quebec. While there has been a slight decline in those declaring using only French most often at work, this is due to people declaring using English and French, together, most often at work. Among those who declare using English most often at work, they have also noted an increase in their use of French, along with English, over the last 20 years.<sup>8</sup> In a globalized workforce, the use of multiple languages is necessary. Furthermore, immigrants in Quebec are more likely to use French (56%) compared to English (23%) and this number increases for more recent immigrants, after 2006, as compared to immigrants arriving prior to 1981.<sup>9</sup>

### C. Bill 96 does little to promote or protect the French language, and has many other negative consequences

Aside from the creation of new rights to be served in French and the universal availability of French instruction, the Bill does little to promote or protect the French language. The Bill takes a “zero-sum” approach to language. Rather than creating positive measures to promote the vitality of the French language, it largely imposes a rules-based and punitive approach to restricting the use of all other languages in the province. It also restricts the language of public services. On its face, it is not at all clear how this approach promotes the French language itself. What is the policy objective of these measures? What problem do they aim to solve? Are they the best measures to ensure the vitality of the French language and culture in Quebec? No evidence has yet been presented on how the specific measures in this Bill will improve the situation of French in Quebec.

More fundamentally, the measures chosen in Bill 96 will have many other negative consequences for Quebecers in the medium and long term. It will upset the social peace around language that has endured in Quebec for several decades. Why is this Bill necessary? What aspects of the current *Charter of the French Language* are inadequate to protect the French language, and how does Bill 96 address these aspects?

Why is the *Charter of the French Language* being overhauled now—during a pandemic, when public attention is on health and the economy?

The government has yet to answer these questions in any meaningful way.

While the Bill’s effectiveness at protecting French has yet to be understood, the Bill will have several fundamental and negative consequences for Quebec in general, making it less attractive to newcomers and to investors, and for the English-speaking minority in particular. The QCGN has identified three main

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<sup>8</sup> Office Québécoise de la langue française (OQLF), *Rapport sur l’évolution de la situation linguistique au Québec*, (Quebec : Direction de la recherche, d’évaluation et de la vérification interne, 2019) at p 80.

<sup>9</sup> *Ibid* at p 78.

groups of consequences. First, Bill 96 fundamentally alters Quebec's governance structure and moves Quebec away from liberal democracy—a change that will affect all of Quebec society (Section 3 below). Second, Bill 96 will make it harder to do business in Quebec (Section 4 below). Third, Bill 96 will have adverse effects on Quebec's English-speaking minority (Section 5 below).

### 3. Bill 96 Fundamentally Alters the Quebec State

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With Bill 96, Quebec re-orientes itself away from a constitutional democracy with entrenched human rights protections, toward a state where the incumbent government has vastly expanded powers over the everyday lives of Quebecers. This is a fundamental change.

The QCGN has identified the following structural changes brought in by Bill 96. These changes are of serious and major concern for democratic governance in Quebec, and should be troubling to all Quebecers. First, the Bill de-entrenches the protection of human rights in Quebec in an unprecedented fashion. Second, it amends the *Constitution Act, 1867* in an unprecedented manner. Third, it decreases the role, independence and accessibility of the judicial branch. Fourth, it creates new and expanded executive powers. Fifth, it increases the control over language in the public sector. Sixth, it creates categories of citizen. Seventh, it increases language monitoring in private organizations.

Taken separately, each of these changes are troubling on their own. Taken together, Bill 96 creates a vastly altered governance structure for Quebec, and a less tolerant and inclusive society.

#### A. Unprecedented De-Entrenchment of Fundamental Human Rights in Quebec

The Quebec *Charter of Human Rights and Freedoms* and the Canadian *Charter of Rights and Freedoms* guarantee fundamental rights, including freedom of expression, the right to equality before the law, privacy rights, fair process rights, and the right to life, liberty and security of the person. These rights are universal. They are also enforceable, both before the courts and administrative tribunals.

Quebecers are rightly proud of the robust protection given to human rights in Quebec. The Quebec *Charter*—which was first adopted in 1975 and predates the Canadian *Charter*—reflects Quebec’s assertion of responsibility for the protection of fundamental rights and freedoms following the Quiet Revolution.<sup>10</sup> In 1983, it was strengthened by the National Assembly and René Lévesque ensured that a copy was sent to every home in Quebec.

The Quebec *Charter* is the cornerstone and the pinnacle of Quebec’s legal order: all other laws must respect the Quebec *Charter*. The Quebec *Charter*’s primacy, which constrains legislative, state and private actions that would violate the rights it protects, is fundamental to its quasi-constitutional character. This character reflects the *Charter*’s function as the embodiment of the values of Quebec society,<sup>11</sup> and its broad purpose of guaranteeing respect for human beings.<sup>12</sup>

Bill 96 breaks with these shared values, and reduces the reach and force of human rights in Quebec, by invoking the most sweeping override of human rights in Canadian history. Bill 96 uses the

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<sup>10</sup> Michèle Rivet, “[La Charte québécoise des droits et libertés hier, aujourd’hui et demain. Entretien avec Jacques-Yvan Morin](#)” (2015) *Revue québécoise de droit international* (Hors-série juin) 13 at 14-16.

<sup>11</sup> Benoît Pelletier, *Une Certaine idée du Québec : parcours d’un fédéraliste : de la réflexion à l’action* (Québec : Presses de l’Université Laval, 2010) at 166 [Pelletier]; Pierre Bosset & Michel Coutu, “[Acte fondateur ou loi ordinaire? La Charte des droits et libertés de la personne dans l’ordre juridique québécois](#)” (2015) *Revue québécoise de droit international* (Hors-série juin) 37 at 40.

<sup>12</sup> [Chaoulli v Quebec \(Attorney General\)](#), 2005 SCC 35 at para 25.

notwithstanding clauses of both the Quebec and Canadian *Charters* pre-emptively, before any rights-infringing aspects of the Bill can be challenged in Court. Bill 96 ousts the application of both the Quebec and Canadian *Charters* to the maximum extent possible, in two respects:

1. The entire *Charter of the French Language* will apply notwithstanding the Canadian and Quebec *Charters*,<sup>13</sup> and
2. The remainder of the Bill (all the amendments to other provincial statutes, regulation, and the *Constitution Act 1867*), will also apply notwithstanding the Canadian and Quebec *Charters*.<sup>14</sup>

This override of federal and provincial human rights legislation effectively immunizes both the statutes created or amended by Bill 96, and any state and private action taken under those statutes, from the need to comply with human rights law. In so doing, Quebec is poised to depart both from its proud tradition of protecting human rights, and from the international human rights standards to which Quebec has bound itself.

Bill 96 follows the path of Bill 21 (the *Act Respecting Laicity of the State*).<sup>15</sup> Bill 21 was the first time in Quebec's history that the notwithstanding clauses were used pre-emptively to suspend all provisions in both the Canadian and Quebec *Charters*.<sup>16</sup> Bill 96 is the second.

Because of the sheer size and reach of the *Charter of the French Language* (as further expanded under Bill 96), the legal effects of the overrides in Bill 96 are even more far-reaching than those of Bill 21. The *Charter of the French Language* affects many aspects of life within Quebec, such as commerce, employment, education, access to public services, expression, and the operation of the legal system. For example, Bill 96 also adds a number of new executive powers to the *Charter of the French Language*, including new search and monitoring powers that will not be subject to the prohibition on unreasonable search and seizure found in both the Canadian and Quebec *Charters*.<sup>17</sup> Bill 96 adds new disclosure protections that will not be subject to protections of personal privacy and professional secret.<sup>18</sup> And Bill 96 also adds new sanctions and penalties that will not be subject to the prohibition against cruel and unusual punishment.<sup>19</sup>

It is difficult to overstate the impact of this ousting of the Canada and Quebec *Charters*. Because this is done in such wide-ranging and omnibus legislation, and in the *Charter of the French Language* as a paramount statute (discussed below), it effectively creates a Charter-free zone with respect to a wide range of interactions between individuals and the state in Quebec.

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<sup>13</sup> [Bill 96, An Act respecting French, the official and common language of Québec](#), s 118 [Bill]; Modified *Charter of the French Language*, ss 213.1, 214 [MCFL].

<sup>14</sup> *Bill*, ss 199,200.

<sup>15</sup> [CQLR c L-0.3](#), ss 33-34 [Bill 21].

<sup>16</sup> [QCCS 1466 at paras 753-780](#) [Hak].

<sup>17</sup> [Canadian Charter of Rights and Freedoms](#), s 8, Part I of the *Constitution Act, 1982*, Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 [Canadian Charter]; [Charter of Human Rights and Freedoms](#), CQLR c C-12, s 24.1 [Quebec Charter].

<sup>18</sup> *Quebec Charter*, ss 5, 9.

<sup>19</sup> *Canadian Charter*, s 12.

French-language rights and human rights are not mutually exclusive, and maintaining Quebec's human rights protections does not preclude the National Assembly from supporting the vitality of the French language. Indeed, both the Quebec and Canadian *Charters* recognize that no rights are absolute, and that rights can be reasonably limited where justified.<sup>20</sup> The courts have also repeatedly held that “[a] hierarchical approach to rights, which places some over others, must be avoided.”<sup>21</sup> Instead, the courts have developed a robust analytical framework that respects the importance of all rights, even when those rights may come into conflict.

The wholesale override of human rights in Bill 96 completely displaces this approach, accepted as part of Canada and Quebec's constitution for over 40 years. Instead, Bill 96 adopts the blunt tool of a wholesale override to entirely oust human rights protections across a vast swath of Quebec's legal order. These overrides obviate the need for the National Assembly or the provincial government to justify rights violations as they arise, and profoundly limit the ability of those experiencing rights violations to seek redress.

### ***A New Constitutional Order in Quebec?***

Bill 96 and Bill 21 combine to fundamentally reshape the legal order in Quebec. Through a series of amendments to provincial statutes, Bill 96 enshrines the *Charter of the French Language* as Quebec's paramount statute.<sup>22</sup> The pre-emptive override of the Quebec *Charter* in both bills effectively displaces the Quebec *Charter* from its status as Quebec's fundamental and paramount law, demoting it from first to third place in Quebec's legal order.

Under Bill 96, the *Charter of the French Language* becomes the supreme statute in Quebec, followed by Bill 21. Bill 96 subordinates human rights, such that “laicity” and French language rights take legal and moral precedence over human rights. With these overrides in place, any future amendments to the *Charter of the French Language* will also be immune from human rights guarantees.

Bill 96's severe curtailment of human rights protections is a rupture with Quebec's proud legacy of human rights. This demotion of human rights marks the most important shift in Quebec's legal order since the Quebec *Charter's* adoption in 1975. Yet this aspect of Bill 96 has been the subject of little public debate. The extent of the proposed transformation of Quebec's legal order, and of the values it reflects, requires both careful examination by the National Assembly and broad, transparent public consultations that have not occurred to date.

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<sup>20</sup> *Canadian Charter*, s 1; *Quebec Charter*, s 9.1.

<sup>21</sup> [Daigle v Canadian Broadcasting Corp](#), [1994] 3 SCR 835 at 877; [R v Mills](#), [1999] 3 SCR 668 at paras 17, 61; [Reference re Same-Sex Marriage](#), 2004 SCC 79 at para 50. See also: [Droit de la famille — 191850](#), 2019 QCCA 1484 at paras 198-199.

<sup>22</sup> See especially: the new paramountcy clause in the *Charter of the French Language* (*Bill*, s 63; MCFL, s 88.15), amendments to the *Quebec Charter* (*Bill*, ss 133-136); [Civil Code of Quebec](#), RLRQ c CCQ-1991 (*Bill*, s 120); [Code of Civil Procedure](#), RLRQ c C-25.01 (*Bill*, s 138); [Interpretation Act](#), CQLR c I-16 (*Bill*, s 146).

### ***A diminished role for the judiciary***

The effect of the two human rights overrides is that, where rights that would otherwise be protected are infringed, either by operation of the *Charter of the French Language* or the other amendments found in the Bill, the courts will not be able to review and remedy the rights-violating conduct under either the Canadian or Quebec *Charters*.

Overall, the override increases the power of the National Assembly and of the executive and diminishes the ability of the judiciary to review legislation and state action for compliance with the Quebec and Canadian *Charters*. The overrides remove, to the greatest extent possible, any constraints on the National Assembly of Quebec to legislate as it sees fit, even at the expense of members of Quebec society. In this new legal order, the National Assembly effectively replaces the courts as the arbiter of rights. Legislative bodies on their own are not well suited to arbitrate rights, particularly minority rights, because they reflect the will of the majority, which may not give due weight to the rights of minorities.

By circumscribing the courts' jurisdiction to determine when human rights are violated and to grant remedies in response, Bill 96 subverts a basic premise of our constitutional order: that legislative assemblies, federal and provincial, are constrained by the constitution. As the Supreme Court of Canada observed in the *Secession Reference*, "the Constitution binds all governments, both federal and provincial, including the executive branch [...]. They may not transgress its provisions".<sup>23</sup> Ours is a constitutional democracy in which constraints on legislative action – primarily arising from federalism and the Canadian *Charter* – are part of the fabric of our system of governance.<sup>24</sup>

One of Canada's constitutional principles is the protection of minorities.<sup>25</sup> This is embodied in a number of constitutional instruments including the Canadian *Charter*. Removing human rights protection completely subverts this principle, which is a cornerstone of our liberal democracy.

### **QCGN's View**

By removing all rights-based constraints on the National Assembly's legislative power, Bill 96 fundamentally changes not only the substantive content of Quebec's legal order, but also the relationship and balance of power among the three branches of government (judiciary, legislature, and executive). The sweeping overrides of the Quebec and Canadian *Charters* profoundly alter Quebec's legal order, undermining human rights and limiting the role of the judiciary. Such a sweeping change requires broad public consultations, which have not occurred, and a compelling basis in policy, which does not exist. There is no evidence that effectively dismantling Quebec's human rights system is necessary to protect and nurture the French language.

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<sup>23</sup> [Reference re Secession of Quebec](#), [1998] 2 SCR 217 at para 72 [*Secession Reference*].

<sup>24</sup> [Reference re Supreme Court Act, ss. 5 and 6](#), 2014 SCC 21 at para 89.

<sup>25</sup> *Secession Reference*, *supra* note 2323 at 79-82.

The QCGN supports the continued entrenchment of human rights in Quebec and Canada. The QCGN calls for the removal of the human rights overrides (notwithstanding clause) in Bill 96.

#### RECOMMENDATION 1

Remove the human rights overrides (*Bill 96*, ss 118, 199, 200).

### B. Unprecedented Amendment to *Constitution Act, 1867*

In an unprecedented legislative move, Bill 96 purports to amend the *Constitution Act, 1867*.<sup>26</sup>

The Bill purports to amend the *Constitution Act, 1867* by adding the following after section 90:

#### FUNDAMENTAL CHARACTERISTICS OF QUEBEC

90Q.1. Quebecers form a nation.

90Q.2. French shall be the only official language of Quebec. It is also the common language of the Quebec nation.

Never before has a province attempted to unilaterally amend the *Constitution Act, 1867*.

This is purportedly a change to Quebec's provincial constitution by way of the provincial unilateral amendment procedure provided under s. 45 of the *Constitution Act, 1982*. Section 45 provides that a province can unilaterally amend the "constitution of the province", subject to the other provisions of the amendment formula. Indeed, Quebec can create, amend and rearrange its own provincial constitution, all within the bounds of the Constitution of Canada.<sup>27</sup> The Quebec *Charter of Human Rights and Freedoms* is one example of the pieces of Quebec's provincial constitution that Quebec can amend through this procedure.<sup>28</sup> However, "[n]either level of government acting alone can alter the fundamental nature and role of the institutions provided for in the Constitution."<sup>29</sup> No province has ever relied upon the s. 45 amendment procedure (or its predecessor, s 92(1) of the *Constitution Act, 1867*) to amend the *Constitution Act, 1867* itself.

This attempt to unilaterally amend the *Constitution Act, 1867* raises many questions. Is this amendment constitutionally valid? Can Quebec make this amendment unilaterally? Is it an amendment to the Constitution of Canada, or an amendment to the constitution of Quebec? What principles will apply to the interpretation of this text? How does it relate to the other provisions in the *Constitution Act, 1867*, and *Constitution Act, 1982*? Does clause 90Q.2 ("French shall be only official language of Quebec") modify the scope of s. 133 of the *Constitution Act, 1867*, which states that French and English can be

<sup>26</sup> *Bill*, s 159, purporting to amend [Constitution Act, 1867](#), (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5 [*Constitution Act, 1867*].

<sup>27</sup> See: Pelletier, *supra* note 11 at 166-172; *Senate Reference*, *supra* note 1 at paras 47-48.

<sup>28</sup> *Hak*, *supra* note 16 at para 436.

<sup>29</sup> *Senate Reference*, *supra* note 1 at para 48.

used in the legislature and courts of Quebec? Does the amendment affect the interpretation of other provisions of the *Constitution Act, 1867* or of the *Canadian Charter of Rights and Freedoms*? Could the amendment be used to defend other constitutionally dubious provisions in Bill 96, such as the attempt to apply the *Charter of the French Language* to “any enterprise or employer carrying on its activities in Québec”<sup>30</sup> and the new limits on the use of English in the courts?<sup>31</sup>

Further, what might the amendment mean for public governance in Quebec? Clause 90Q.1 states that “Quebecers form a nation”. This statement has been recognized socially and politically,<sup>32</sup> but as of yet, not constitutionally. Its addition to the *Constitution Act, 1867* may introduce a novel collective entity, distinct from the provincial and federal governments, into the Constitution of Canada (or the constitution of the province). Based on the wording of the new clauses, the makeup of this nation may not be coextensive with residency in the province of Quebec. Clause 90Q.1 recognizes that “Quebecers” (“les Québécoises et Québécois”) form a nation but does not say who falls within this category. The inference is that the nation may be only a subset of the provincial population. This inference is strengthened by clause 90Q.2, which suggests membership is defined, at least in part, by the commonality of the French language. Constitutionally entrenching recognition of a sub-provincial, rights-holding nation within Quebec is a significant change. This change might fundamentally alter the character of Quebec as a province served by a public government, accountable to the entire electorate of the province. Would constitutionally entrenching the existence of a nation, whose membership may not include all residents of Quebec, alter the character of the Quebec government into one that is responsible both to the electorate and to the “nation”?

This is particularly concerning given the Bill’s invocation of the human rights overrides, discussed above, to oust protection of individual rights. This lays the groundwork for future unchecked violations of individual rights, particularly the rights of those who are not considered “Quebecers”, for the good of the nation, with judicial oversight of such violations entirely removed.

### QCGN’s View

This amendment raises many novel constitutional questions. It has not received the public debate it warrants. Its validity and scope ought to be determined by a court without delay. Under the *Court of Appeal Reference Act*, the Quebec government has the power to send proposed legislation as a reference question to the Court of Appeal of Quebec.<sup>33</sup>

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<sup>30</sup> *Bill*, s 65, adding MCFL s 89.1.

<sup>31</sup> See Section 3(c) and 5(d) below.

<sup>32</sup> See: Pelletier, *supra* note 11 at 22-23. See also: House of Commons motion, November 22, 2006. The resolution reads as follows: “That this House recognize that the Québécois form a nation within a united Canada.” [House of Commons Debates](#), 39-1, vol 141, no 84 (November 22, 2006) at 5197 (Right Hon Stephen Harper (Prime Minister)).

<sup>33</sup> [CQLR](#) c R-23, s 1.

Because the meaning of this amendment needs to be clarified, the QCGN calls for a reference to the Court of Appeal of Quebec.

**RECOMMENDATION 2**

A reference question on the constitutionality and meaning *Bill 96*, s 159 should be sent without delay to the Court of Appeal of Quebec.

### C. Decreased role, independence and accessibility of the judiciary

Bill 96 decreases access to justice and the courts in several ways. First, it creates language barriers. Second, it potentially curtails judicial independence. Third, it creates a realm that is free from judicial scrutiny through the human rights overrides. Each of these on their own is problematic. More problematic still is that the combined effect of these modifications is a general decrease in the judicial role and an imbalance between the Ministers' executive powers and the judiciary.

#### i. New language barriers for access to courts

Section 133 of the *Constitution Act, 1867* guarantees that "either" English or French may be used in the courts in Quebec.

Bill 96 erodes this constitutional right by distinguishing English- and French-speakers who need to access courts in Quebec. It creates a series of asymmetrical requirements that make it more difficult for English to be used in the courts. For example, it adds a requirement that certified French translations must be attached to pleadings drawn up in English that emanate from a legal person (corporation).<sup>34</sup> This will add expense for English-speaking litigants. Further barriers to access to justice in English are detailed in Section 5(d) below. Hence, the Bill raises new barriers for English-speakers within the justice system.

#### ii. Executive interference in selection of judges

Bill 96 potentially curtails judicial independence by shifting decision-making regarding the language qualification of judges from the Chief Justice to the Minister of Justice and Minister of the French Language.

Bill 96 prohibits the requirement that judges and adjudicators have knowledge of a language other than French.<sup>35</sup> While the Minister of Justice and the Minister of the French Language may grant exceptions to this rule in certain circumstances, this provision raises concerns about judicial independence. Indeed, the purpose of judicial independence is to ensure public confidence in courts and uphold the rule of law

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<sup>34</sup> *Bill*, s 5; MCFL, s 9.

<sup>35</sup> *Bill*, s 5; MCFL, ss 12-13.

and the constitutional order.<sup>36</sup> By placing the power to determine the language qualifications of judges in the hands of the Minister of Justice and Minister of the French Language, Bill 96 infringes judicial independence. This has the potential to undermine public confidence in the justice system. The discretion conferred to the Minister of Justice and Minister of the French Language could be perceived as an inappropriate political interference in judicial appointments.

### iii. Human rights overrides

As set out above, the overrides to the Quebec and Canadian *Charters* remove from judicial scrutiny a plethora of rights and interests. The overrides diminish the ability of human rights to be adjudicated by the courts—this is inconsistent with the values of a democratic and diverse society. This sweeping use of human rights overrides means that the National Assembly becomes the sole arbiter of balancing individual rights against collective interests.

#### QCGN's View

Taken together, these changes to the justice provisions, combined with the human rights overrides, seriously undermines the role, access and independence of the judiciary in Quebec.

In addition to the removal of the human rights overrides (Recommendation 1 above), the QCGN calls for the removal of all changes to the justice provisions.

#### **RECOMMENDATION 3**

In addition to the human rights overrides (*Bill 96*, ss 118, 199, 200), remove all changes to provisions of Title I, Chapter III, Language of the Legislature and the Courts (*Bill 96*, s 5).

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<sup>36</sup> *Ell v. Alberta*, 2003 SCC 35, at 861.

## D. New and expanded executive powers

### i. The Minister of the French Language

Another way in which Bill 96 significantly alters the balance of power among the three branches of government is by creating and empowering a new Minister of the French Language (“Minister”). The mission of the Minister is to “promote, assert the value of and protect the French language and its status [...]”.<sup>37</sup> Importantly, the Minister is responsible for the administration of the *Charter of the French Language*, the paramount statute in Quebec.<sup>38</sup>

The Minister’s powers under the Bill include:

- Developing the Language Policy of the State.<sup>39</sup>
- Broad coordination and oversight responsibilities across the civil administration, exercised on the Minister’s own initiative.<sup>40</sup> This includes the power to approve or impose the language directives of each civil administration body.<sup>41</sup>
- Broad and strong powers to intervene and obtain information across the civil administration.<sup>42</sup>
- Power to require the OQLF to inspect or verify compliance in the bodies to which the Language Policy of the State applies.<sup>43</sup>
- Power to make regulations to “restrict” the option to use a language other than French in certain circumstances.<sup>44</sup>
- Power to intervene in court proceedings that “could impact the status or use of French in Québec”.<sup>45</sup>
- Power to approve language criteria for judges and administrative adjudicators.<sup>46</sup>
- Power to revoke the permit or authorization of an enterprise that “repeatedly” contravenes the law, after an opinion from the OQLF.<sup>47</sup>

These are broad and strong powers, touching on the entire civil administration – indeed, the entire *Charter of the French Language*. Under the new Preamble, the status of French is given “paramountcy” in “Quebec’s legal order”.<sup>48</sup> This paramountcy, in combination with the above powers, lead to the conclusion that the Minister of the French Language becomes the most important Minister in Cabinet. Not only are these powers expansive, but the Bill’s pre-emptive use of the notwithstanding clauses means these new powers are not subject to *Charter* oversight. This means that Quebecers will be unable

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<sup>37</sup> *Bill*, s 94; MCFL, s 155.

<sup>38</sup> *Bill*, s 117; MCFL, s 212. The Minister has responsibility for the entire CFL, except for Francisation Quebec.

<sup>39</sup> *Bill*, s 19, creating MCFL, s 29.9.

<sup>40</sup> *Bill*, s 94; MCFL, s 156.

<sup>41</sup> *Bill*, s 19; MCFL, ss 29.16, 29.17.

<sup>42</sup> *Bill*, s 94; MCFL, s 156.3.

<sup>43</sup> *Bill*, s 94; MCFL, s 156.7.

<sup>44</sup> *Bill*, s 19; MCFL, s 29.22.

<sup>45</sup> *Bill*, s 94; MCFL, s 156.3(6).

<sup>46</sup> *Bill*, s 5; MCFL, ss 12 and 13.

<sup>47</sup> *Bill*, s 114; MCFL, s 204.27.

<sup>48</sup> *Bill*, s 1.

to challenge the Minister's new powers, nor any action taken under those powers, under either the Quebec or Canadian *Charters*. This effectively means that the Minister operates in a Charter-free zone in which the Minister can act free from any human rights oversight. This could have profound implications for the respect of fundamental rights within the province.

## ii. Office Québécois de la Langue Française (OQLF)

Under Bill 96, the OQLF, a semi-autonomous entity whose leadership is appointed by government, has been granted an expanded mandate to monitor compliance in the private sector.<sup>49</sup> In the case of the civil administration, this monitoring role is carried out in collaboration with the Minister.<sup>50</sup> Notably, the Deputy Minister of the French Language is made a permanent non-voting member of the office.<sup>51</sup>

The Bill expands the OQLF's power in two ways: first, through new search powers and disclosure protection; second, through new sanction powers.

### ***New search powers and disclosure protections***

Under the Bill, the OQLF is given seemingly unfettered ability to investigate, access, and inspect nearly anything it deems relevant to an investigation. These new provisions are also profound. Two clauses warrant mentioning. In the course of an investigation, an OQLF inspector may enter a premises and:

(3) cause any person present who has access to any computer, equipment or other thing that is on the premises to use it to access data contained in an electronic device, computer system or other medium or to verify, examine, process, copy or print out such data; and

(4) require any information relating to the application of this Act or the regulations as well as the communication, for examination or reproduction, of any related document.

Any person who has custody, possession or control of documents referred to in this section must communicate them to the person making an inspection and facilitate their examination by that person.<sup>52</sup>

Just as with the powers of the Minister, the OQLF has considerable discretion in carrying out its investigations. Indeed, there is no requirement for the OQLF to gain judicial pre-authorization before carrying out its inspection. Nor is there anything built into the provisions to temper this discretion – no 'reasonable grounds' the OQLF must demonstrate before inspection. This gives the OQLF significant latitude in carrying out its investigation and a very broad and intrusive search power – all without *Charter* scrutiny.

The Bill also adds very strong protections for confidential disclosures to the OQLF. Any person who wants to make a disclosure to the OQLF may do so by communicating "any information [...] that the person believes could show that a failure to comply with this Act has occurred or is about to occur".<sup>53</sup> A person can make this disclosure despite a number of privacy statutes, contractual provisions, and any

<sup>49</sup> *Bill*, s 101; MCFL, s 165.

<sup>50</sup> *Bill*, s 97; MCFL, s 161.

<sup>51</sup> *Bill*, s 101; MCFL, s 165.

<sup>52</sup> *Bill*, s 111; MCFL, s 174.

<sup>53</sup> *Bill*, s 107; MCFL, s 165.22.

duties of loyalty, or confidentiality or professional secrecy, except solicitor-client secrecy.<sup>54</sup> The OQLF must take “all measures necessary” to protect the identify of the person who makes the disclosure.<sup>55</sup> This disclosure system could lead to serious breaches of personal privacy and the unchecked disclosure of confidential commercial information.

### ***New Sanctions***

The Bill includes a number of new penalties and sanctions. As they relate to executive powers, two are worth noting.

First, the Minister can revoke the permit or authorization of an enterprise that “repeatedly” contravenes the law, after an opinion from the OQLF.<sup>56</sup> This gives the Minister and the OQLF considerable power. As noted above, this power is without Charter scrutiny.

Second, the OQLF’s remedial powers have been expanded:

- Under the current law, the OQLF has the power to issue “formal notice to comply” to remedy a contravention of the law.<sup>57</sup> Under the Bill, the OQLF can issue an “order” to comply regarding any contravention of the Act within the time the OQLF specifies.<sup>58</sup>
- Under the current law, where a person fails to comply after a “notice to comply,” the OQLF can refer the matter to the Director of Criminal and Penal Prosecutions for penal proceedings.<sup>59</sup> In Bill 96, rather than referring to the matter for Penal Prosecution, the OQLF is given new powers to seek injunctions and court orders itself.<sup>60</sup>

By permitting the OQLF to seek injunctions and court orders, the Bill shifts the decision-making power from the Director of Criminal and Penal Prosecutions to the OQLF.

### **QCGN’s View**

The creation of the new Minister and the expanded powers of the OQLF demonstrate the immense growth and concentration of executive power occurring under Bill 96.

The QCGN calls for the tempering of these powers through the removal of the human rights overrides, as well as the removal of the most egregious new powers.

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<sup>54</sup> *Bill*, s 107; MCFL, s 165.22

<sup>55</sup> *Bill*, s 107; MCFL, s 165.23.

<sup>56</sup> *Bill*, s 114; MCFL, s 204.27.

<sup>57</sup> [Charter of the French Language](#), CQLR c C-11, s 177 [*Current CFL*].

<sup>58</sup> *Bill*, s 113; MCFL, ss 177-179.

<sup>59</sup> *Current CFL*, s 177.

<sup>60</sup> *Bill*, s 113; MCFL, ss 183-184.

**RECOMMENDATION 4**

These powers would be tempered if the human rights overrides were removed (*Bill 96*, ss 118, 199, 200).

In addition, remove the most egregious search & disclosure powers (*Bill 96*, ss 107, 111).

**E. Increased language control in the public sector**

Bill 96 also centralizes control over the use of language in the civil administration—and thus, it centralizes control of the civil administration itself. It does so by way of the expanded obligation to use French in an exemplary manner and the Language Policy of the State.

The Bill mandates a comprehensive Language Policy of the State, which the Minister of the French Language develops.<sup>61</sup> The Bill gives the Minister broad discretion in identifying measures that can be taken to meet an agency’s obligations under the Act.<sup>62</sup> Each agency of the civil administration must develop directives under this policy. These directives must be approved or imposed by the Minister.<sup>63</sup> Thus, the Minister has the power to compel the use of language in certain ways throughout the civil administration.

The Bill sets out a long list of requirements for the content of this Language Policy. Some required content includes:

- Rules to govern when an agency can use a language other than French (which might narrow the permitted use of English).<sup>64</sup>
- Provisions concerning “the implementation of a French-language environment, in particular with regard to vocal music”.<sup>65</sup>
- Provisions concerning “the implementation of means to control the quality of the French used within an agency.”<sup>66</sup>

This level of granularity in the Language Policy creates a high level of control over the everyday working environment of the entire civil administration. The Minister’s control over the implementation of the Language Policy further cements his role as the most important Minister in Cabinet and his control over the entire civil administration.

Further, the Bill adds disciplinary measures for public servants who contravene the law.<sup>67</sup>

**QCGN’s View**

The overall effect is to centralize control over the use of language within the entire civil administration with the Minister of the French Language. This may represent a major change in the hierarchy and

<sup>61</sup> *Bill*, s 19, creating MCFL, s 29.9.

<sup>62</sup> See: MCFL, s 29.10(1).

<sup>63</sup> *Bill*, s 19; MCFL ss 29.14, 29.16.

<sup>64</sup> See: MCFL, s 29.10(1)(a).

<sup>65</sup> See: MCFL, s 29.10(1)(f).

<sup>66</sup> See: MCFL, s 29.10(1)(c).

<sup>67</sup> *Bill*, s 114; MCFL, s 204.30.

culture of the civil administration. In a liberal democracy, the combined effect of increased and unrestricted executive powers with centralized control over the civil administration is troubling indeed.

The QCGN calls for a tempering of the new Minister's power.

#### **RECOMMENDATION 5**

The Minister of the French Language should not have centralized control over the use of language in every agency of the civil administration. The Minister's power to make government-wide Policy, Regulations, and Directives should be pared back.

### F. Creation of categories of citizen

Bill 96 attempts to define who is a member of a minority—in this case, who is an English-speaker. It uses an outdated and narrow definition based on eligibility for English instruction. It attempts to tie this definition to access to services and to priority for CEGEP admissions. This is deeply problematic—as a practical matter and as a matter of principle.

Bill 96 creates a new obligation for the civil service to use French in an exemplary manner, which essentially entails the exclusive use of French wherever possible. The Bill then creates a series of exceptions to this rule. One of the new exceptions is that civil administration agencies may communicate in writing in English *only* with a person who is declared eligible for English education.<sup>68</sup> In so doing, the Bill imports the concept of eligibility for English instruction and makes it a criterion for services.

As a practical matter, it is unclear how this framework would work in practice. Would English-eligible individuals need to prove their credentials before the civil administration could communicate with them in English?

More problematic, however, is the principle. This appears to be the government's attempt to identify an 'historic anglophone community' in Quebec. As discussed above, eligibility to attend school in English in Quebec is not in any way linked to the language of the student or the parent. It is completely divorced from community members' self-identification. More fundamentally, it is not the role of government to define minority communities. The freedom to associate and self-identify is a fundamental feature of liberal democracies. Cohesion to a particular identity or community is for individuals to decide—not the state. This category is highly symbolic and sends a signal about who is and is not a member of the linguistic minority community. It is wrong-headed.

The use of this category in the Bill sets up its future use in Regulations, the Language Policy of the State, and ministerial Directives. It is the wrong path.

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<sup>68</sup> *Bill*, s 15; MCFL, s 22.2.

## QCGN's View

The use of the “English-eligible” category in Bill 96 is deeply problematic. It is grossly under-inclusive and divorced from the community’s self-identification. More broadly, the attempt to create categories of citizens who are eligible for certain services is deeply troublesome from a public governance perspective. Minorities define themselves; they are not defined by the state. The English-speaking minority of Quebec does not define itself based on this category, and the expanded use of this category is offensive.

### RECOMMENDATION 6

The right to communication and services in English should never be based on eligibility for English instruction.

## G. Increased language monitoring in private organizations

Overall, Bill 96 increases the burden on smaller businesses through stricter and more comprehensive francization requirements. Non-compliance with these requirements could result in significant adverse consequences for small businesses.

### i. Lower thresholds: business with 25 or more employees

Under the Bill, the francization requirements are broadened and expanded. The Bill significantly strengthens the requirements of francization programs. At the same time, it lowers the threshold of firm size (from 50 employees to 25), thereby imposing these heightened requirements on smaller sized businesses.<sup>69</sup> This will create new and heightened compliance burdens on small and medium-sized businesses (further discussed in Section 4 below). These changes also create new vulnerabilities for businesses of a smaller size (25-50 employees) by opening up these businesses to OQLF monitoring.

### ii. Expanded role of the OQLF in monitoring francization

Bill 96 also expands the role of the OQLF, since it takes on an increased role in monitoring francization in the private sector. For example:

- The OQLF can order the creation of a francization committee for enterprises with 25 or more employees.<sup>70</sup>
- Francization committees must meet at least every 6 months, and the minutes must be sent to the OQLF.<sup>71</sup>

<sup>69</sup> See: *Bill*, ss 81; MCFL s, 139.

<sup>70</sup> *Bill*, s 76; MCFL, s 136.

<sup>71</sup> *Bill*, s 80; MCFL, s 138.3.

- An OQLF staff member may attend any francization committee meeting and may communicate with the committee “to obtain information it considers necessary.” It may also investigate “the reasons for which members of the committee have not signed a document.”<sup>72</sup> The committee is required to cooperate with the OQLF.<sup>73</sup>

There are no limits or constraints around these monitoring powers. For example, the OQLF does not need to give notice to attend a francization committee meeting. Suppose the OQLF considers French is no longer generalized at all levels of the enterprise. In that case, it shall order an “action plan” to be implemented by the business, which must be submitted to the OQLF within two months of receiving notice.<sup>74</sup>

Further, the Bill includes new and powerful protections for confidential disclosures to the OQLF. These are discussed in Section 3(d) above.

The Bill introduces new penalties for non-compliance. For example, the OQLF is required to publish a list of non-compliant businesses and the civil administration is not permitted to contract with such businesses, nor can these businesses receive public grants or subsidies.<sup>75</sup> This could lead the public, government departments, or the OQLF to treat such businesses adversely. Finally, upon an opinion of the OQLF, the Minister can revoke a business permit or authorization of a business that repeatedly contravenes the law.<sup>76</sup>

#### **QCGN’s View**

The new powers of the OQLF raise serious privacy issues for organizations and individuals. They may create distrust within organizations. They also raise significant risk for businesses who fall under the scrutiny of the OQLF. They ought to be removed.

In addition to removing human rights overrides (*Bill 96*, ss 118, 199, 200), the QCGN makes the following recommendations:

#### **RECOMMENDATION 7**

Remove the modifications to the Francization provisions (*Bill 96*, ss 75-88).

#### **RECOMMENDATION 8**

Remove the Ministerial and OQLF sanction powers (*Bill 96*, ss 113 (MCFL, ss 177-184), 114).

<sup>72</sup> MCFL, s 138.4.

<sup>73</sup> MCFL, s 138.4.

<sup>74</sup> *Bill*, s 88; MCFL, s 146.2.

<sup>75</sup> *Bill*, s 93; MCFL, s 152.1.

<sup>76</sup> *Bill*, s 114; MCFL, s 204.27.

## H. Conclusion

The features described above, on their own, are problematic. However, viewed together, they re-make the Quebec state into something wholly different. This issue transcends language, culture, and ethnicity. It is about the re-orientation away from a liberal democratic state. It is the abandonment of Quebec's liberal democracy fashioned during the Quiet Revolution. It enables denunciation of one's colleagues or competitors, uninhibited searches by the state, unchecked scrutiny by state bodies, and devastating sanctions by those same state bodies.

The Quebec created by Bill 96 is inconsistent with Quebec's values. This is not our Quebec. This change concerns every Quebecer and indeed every Canadian.

## 4. Bill 96 Will Make it Harder to do Business in Quebec

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Bill 96 does not merely re-shape the Quebec state. It will also have a tangible effect on Quebec society. It will make it harder to do business in Quebec. Like the changes to the Quebec state, these changes ought to be of concern to all Quebecers.

The QCGN has identified four ways in which Bill 96 will make it harder to do business in Quebec. First, Bill 96 places additional restrictions on the use of languages other than French and additional compliance requirements for businesses. Second, it makes it harder to form and enforce contracts. Third, it makes it harder to attract talent from outside the province. Fourth, it creates new business risks.

### A. Additional red tape for small and medium-sized businesses

- a. **Strengthened francization requirements:** The Bill significantly strengthens the requirements of francization programs. At the same time, it lowers the threshold of firm size (from 50 employees to 25), thereby imposing these heightened requirements on businesses of smaller size.<sup>77</sup> This will create new and heightened compliance burdens on small and medium-sized businesses.
- b. **New requirements to justify hiring practices:** The Bill further limits the ability of employers to require knowledge of a language other than French for hiring and promotion. Employers are prohibited from requiring knowledge of a language other than French, except where “nature of the duties” requires such knowledge, and even then, the employer must “take all reasonable means to avoid imposing such a requirement”.<sup>78</sup> The employer must perform a series of steps to justify such a requirement. This will place additional burden on businesses to justify their practices.

#### **Example**

*A business in the Beauce has 30 employees. The business exports to Ontario and the United States. The owner is looking to hire sales staff and is facing a labour shortage. Her employees—all francophone—are stretched thin, but they now have to put aside work on expanding the business in order to carry out a new compliance process for the francization program. In addition, she must document and justify why she will require some of these sales staff to be proficient in English. She may decide to forego hiring additional sales staff and growing her business in order to avoid attracting unwanted scrutiny from the regulator.*

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<sup>77</sup> See Bill, ss 76-88.

<sup>78</sup> Bill, s 35-36.

## B. Harder to make and enforce contracts

- a. **Harder to form contracts in languages other than French:** The Bill adds categories of contracts that must now be drawn up in French.<sup>79</sup> For contracts of adhesion (standard-form contracts), which must be drawn up in French unless the parties expressly agree otherwise, the Bill adds an additional requirement that both parties may agree to do so only after examining the French version.<sup>80</sup> If any business does not have a French version of its contracts of adhesion, the Bill now requires one.
- b. **Harder to access courts:** The Bill creates new barriers for corporations (legal persons) to access Quebec courts in English; for example, by requiring a certified French translation of English pleadings at the party's expense.<sup>81</sup> Further, if a corporation wishes to have a foreign judgment or arbitration award from another jurisdiction recognized in Quebec, it must provide a French translation.<sup>82</sup>
- c. **Contract instability:** The new civil sanctions include the broad power for a court to "make any order it sees fit", and specifically include the ability for a Court to invalidate provisions of a contract that do not comply with the *Charter of the French Language*.<sup>83</sup> This may create commercial uncertainty.

### **Example**

*A multi-national company with offices in Amsterdam, New York, and Toronto has a satellite office in Montreal. To avoid the cost of translating contracts and court pleadings and the risk of having contracts invalidated in Quebec, the company decides to house most of its contracts at the Toronto office. As it will move more legal and business work to the Toronto office, the company has less need for business professionals and legal counsel in the Montreal office.*

## C. Harder to attract talent from outside Quebec

- a. **New restrictions on primary/secondary education in English:** Access to education in English is currently restricted; however, there are exemptions for children temporarily in Quebec. Bill 96 limits these temporary exemptions to three years, with no possibility of renewal. This will make it harder to attract talented professionals from outside Quebec who wish to have their children educated in English.

<sup>79</sup> Such as contracts for the sale of certain types of properties and promises to enter into same: see *Bill*, s 45. Parties can "expressly" agree for these contracts to be drawn up in another language.

<sup>80</sup> *Bill*, s 44; MCFL, s 55.

<sup>81</sup> *Bill*, s 5; MCFL, s 9.

<sup>82</sup> *Bill*, ss 140-141, modifying articles 508 and 652 of the *Code of Civil Procedure*, respectively.

<sup>83</sup> *Bill*, s 114; MCFL, ss 204.17-204.21.

- b. New requirements to practice a profession:** The Bill creates new requirements for knowledge of French in order to hold a professional permit in Quebec.<sup>84</sup> For example, the Bill would open the possibility of professional discipline for those that do not maintain an “appropriate” knowledge of French.<sup>85</sup> This could create new vulnerabilities among professionals, who could be subject to OQLF scrutiny after an anonymous complaint. The Bill also creates new requirements and restrictions for temporary and restricted professional permits.<sup>86</sup> This may hamper the ability of newcomers and temporary workers to practice their professions in Quebec.

**Example**

*A pharmaceutical company wants to offer a 5-year contract to a particular medical specialist. This specialist holds a PhD from a top American university, and is the world leader in his particular field. He speaks English and Italian. He has two children in primary school. The company wants to bring him to the Montreal office to build and lead a new research team, which will create several high-paying jobs in Montreal. However, he turns down the opportunity because he is concerned that his children will not be able to continue their studies in English for the entire duration of the assignment. The company offers him the same assignment in its San Diego office, and the research team is assembled in San Diego instead of in Montreal.*

#### D. New business risks

- a. Strengthened and unsupervised search powers:** The Bill greatly enhances the powers of the Office Québécois de la Langue Française to investigate and inspect businesses. For example, the hours the OQLF can enter premises, the range of places they can enter, the ability to access electronic devices and “any related document” for an investigation, are all enhanced.<sup>87</sup> There is no reasonable grounds or warrant requirement. Because of the Bill’s pre-emptive override of the entire *Canadian Charter of Rights and Freedoms*,<sup>88</sup> these powers will not be subject to guarantees (and judicial oversight) against unreasonable search and seizure. This leaves businesses vulnerable to broad searches and privacy breaches.

<sup>84</sup> *Bill*, s 23; MCFL, ss 35.1, 35.2.

<sup>85</sup> *Bill*, s 23; MCFL, s 35.1-35.2; *Bill*, s 142, amending [Professional Code](#), CQLR c C-26, s 59.

<sup>86</sup> *Bill*, s 24-27.

<sup>87</sup> See *Bill*, s 111, MCFL s 174.

<sup>88</sup> See *Bill*, ss 118, 199, 200.

- b. **New and strengthened penalties:** In addition to the broad civil remedy described above, the Bill also increases the fine amounts: there are escalating fines for subsequent offences; and each day the offence continues constitutes a new offence.<sup>89</sup> Further, the Minister of the French Language can revoke the permit of an enterprise that repeatedly contravenes the law.<sup>90</sup>

**Example**

*A Swedish technology company is considering opening an office in Lévis. The company houses servers with private financial information. The company carries out a risk analysis, and discovers that in Quebec, inspectors have very broad search powers, including the unsupervised power to access and copy this private financial information. This puts the information at risk. The company decides to open its office in another province with stronger privacy protections.*

**QCGN's View**

Taken together, these provisions will make it harder to do business in Quebec. It will be harder for existing businesses to carry on, innovate and expand. Further, it will make Quebec a less attractive destination for international investment.

**RECOMMENDATION 9**

The following provisions with the most egregious impact on business ought to be withdrawn:

- a. Francization requirements (Bill 96, ss 76-78)
- b. Justification of hiring practices (Bill 96, ss 35-36)
- c. Language of contracts (Bill 96, ss 44-45)
- d. Justice provisions (Bill 96, s 5, 140, 141)
- e. Education permit restrictions (Bill 96, ss 56, 160)
- f. Professional orders (Bill 96, ss 23-27, 142)
- g. OQLF powers (Bill 96, s 111)
- h. Sanctions (Bill 96, s 114)

<sup>89</sup> Bill, s 114; MCFL ss 205-208.

<sup>90</sup> Bill, s 114; MCFL, s 204.27 (after an opinion of the OQLF).

## 5. Bill 96 Will Have Adverse Impacts on Quebec’s English-speaking Minority

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This section sets out the ways in which the QCGN expects Bill 96 will adversely affect the English-speaking minority in Quebec.

The QCGN expects that the Bill will have adverse effects in the provision of health and social services, access to justice, education, and municipal services.

### A. French instruction: a positive development

Before setting out the adverse effects, the QCGN wishes to express its pleasure with the Bill’s creation of a universal right to French instruction.<sup>91</sup> This is a welcome development that the English-speaking community has been requesting for many years. It will assist many English-speakers to more fully participate in Quebec society. The QCGN is pleased to see this right created for all Quebecers.

### B. “English-eligible” category

Bill 96 attempts to define who is a member of the English-speaking minority. This appears to be the government’s attempt to identify an ‘historic anglophone community’ in Quebec. Bill 96 uses the category of eligibility for English instruction (“English-eligible”), and imports it into two other areas:

- 1) **Communication in writing:** For the “exemplary obligation” (obligation to use French exclusively in the civil administration), one of the new exceptions is that civil administration agencies may communicate in writing in English *only* with a person who is declared eligible for English education.<sup>92</sup>

In their brief, the QCGN Health and Social Services Committee explains the principled and practical problems with any use of the category in the health and social services realm. In particular, they state:

Such a definition of eligibility to service in English would be totally inappropriate. Whether a person was eligible for English-language instruction would have no reasonable correlation to their health and social service status or needs. Those denied service by this criterion would be denied access to effective and safe services. Further, such a definition would also be inoperable. A substantial number of those eligible would not have official documents in their possession to prove eligibility. Service providers would not have a way of determining who is eligible and who is not. Measures to remedy this would be odious in a democratic, liberal society and reminiscent of societies in which measures imposing differential, less beneficial treatment were or are accompanied by documentation requirements for a minority.<sup>93</sup>

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<sup>91</sup> *Bill*, s 4; MCFL, s 6.1. See also: *Bill*, s 62; MCFL, s 88.12.

<sup>92</sup> *Bill*, s 15; MCFL, s 22.2.

<sup>93</sup> QCGN Health and Social Services Committee brief to QCGN public hearings, September 17, 2021, p 2, Appendix B.20.

- 2) **Priority for CEGEP admissions:** As discussed in Section 5(f) below, Bill 96 introduces an enrollment cap for English-language institutions. English-eligible students to be given “priority” in CEGEP admissions policies.<sup>94</sup>

The practical problems with this proposal are discussed in Section 5(f) below.

Moreover, the use of this category might well be taken up in the other instruments yet to be developed (Regulations, Language Policy of the State, and Directives). The QCGN firmly opposes the use of this category in any context outside primary and secondary education.

### QCGN’s View

The importation of the “English-eligible” category for services is deeply problematic. It is grossly under-inclusive and divorced from the community’s self-identification. More broadly, the attempt to create categories of citizens who are eligible for certain services is deeply troublesome from a public governance perspective.

#### **RECOMMENDATION 6 (above)**

The right to communication and services in English should never be based on eligibility for English instruction.

### C. Services in English

According to Premier Lucien Bouchard, “when you go to the hospital and you’re in pain, you may need a blood test, but you certainly don’t need a language test.”<sup>95</sup>

Public services, especially health and social services, ought to be available in the minority language—the English-speaking community has fought for these rights for decades. Legislated constraints or prohibitions on the provision of public services in English are misguided, unbecoming, and harmful. And they do nothing to protect or promote the French language itself.

Who should be entitled to services in English? The QCGN contends that services should be available in English to those who request such services, to the extent feasible. There should be no legislated constraints on who can request services in English. Bill 96 introduces such constraints, and this is wrong-headed.

The discussion below focuses on health and social services, but the principles apply equally to all services.

<sup>94</sup> Bill ss 58, 62.

<sup>95</sup> Statement by Premier Loucien Bouchard, March 11, 1996, quoted in “Editorial: Ensuring access to health care in English”, *Montreal Gazette* (January 28, 2021), online: <<https://montrealgazette.com/opinion/editorials/editorial-ensuring-access-to-health-care-in-english>>.

## Health and Social Services

The QCGN’s Health and Social Services Committee presented a brief to the QCGN public hearings. This brief sets out the Committee’s concerns regarding new constraints on health and social services in English imposed by Bill 96. The full brief can be found at **Appendix B.20**.

The *Act respecting health services and social services*<sup>96</sup> (“*AHSSS*”) provides that “English-speaking persons” are entitled to receive health services and social services in English in accordance with prescribed access programs.<sup>97</sup> This is an important right that the English-speaking community has fought to establish and protect over decades. Bill 96 does not purport to amend or modify this guarantee.

However, Bill 96 introduces complicated constraints on use of English across the civil service, which may directly or indirectly affect the provision of health and social services in English. Some new constraints in Bill 96 include the following:

- 1) **Exemplary obligation:** The Bill creates a new overriding obligation for agencies of the civil administration to use French in an “exemplary manner”.<sup>98</sup> This essentially entails the exclusive use of French in written and oral communications within the civil administration and with the public, except in defined/permitted situations. This will markedly narrow the ability of service providers to communicate with the public in English, particularly in non-recognized institutions.
- 2) **Importation of “English-eligible” category:** One of the new exceptions is that civil administration agencies may communicate in writing in English *only* with a person who is declared eligible for English education.<sup>99</sup> This importation of the “English-eligible” category for services is wrong-headed, odious and deeply problematic. It is grossly under-inclusive, as it does not capture all those who are “English-speaking” and eligible to receive services in English under the *AHSSS*.<sup>100</sup> Further, the approach of using narrow “categories” of citizen to restrict services in the minority language is odious on its own. It also runs directly counter to the principle that language rights should be interpreted in a broad and remedial manner.<sup>101</sup>
- 3) **Restrictions on services to newcomers:** The Bill restricts the provision of certain services in English to newcomers to the first six months after their arrival.<sup>102</sup> Again, this runs counter to the guarantee under the *AHSSS*.

<sup>96</sup> [CQLR](#) c S-4.2 [*AHSSS*].

<sup>97</sup> *AHSSS*, s 15.

<sup>98</sup> *Bill*, s 6; MCFL ss 13.1-13.2.

<sup>99</sup> *Bill*, s 15; MCFL, s 22.2.

<sup>100</sup> As defined in the 2018 *Guide pour les programmes d’accès aux services de santé et aux services sociaux en langue anglaise*, « La personne d’expression anglaise est celle qui, dans ses relations avec un établissement qui dispense des services de santé ou des services sociaux, se sent plus à l’aise d’exprimer ses besoins en langue anglaise et de recevoir les services dans cette langue », Québec, Ministère de la Santé et des Services sociaux, [Guide pour les programmes d’accès aux services de santé et aux services sociaux en langue anglaise](#) (2018) at 11, 33.

<sup>101</sup> *R v Beaulac*, [1999] 1 SCR 768 at para 25 [*Beaulac*]; Julius Grey, “Bilingual Institutions in the Public Sector in Quebec”, paper for conference on language law, Fribourg Switzerland, 1994.

<sup>102</sup> *Bill*, s 15; MCFL, s 22.3(2)(c). With respect to immigrants, see also MCFL, s 22.4, which states that where an agency uses English or another language to provide welcome services to immigrants, they must implement measures to ensure that communications with immigrants will be exclusively in French at the end of 6 months.

- 4) **Paramountcy of *Charter of the French Language*:** Given that Bill 96 will give the *Charter of the French Language* paramountcy over all other statutes, the new constraints in Bill 96 outlined above threaten to overtake and override the *AHSS* guarantee of services in English.
- 5) **Exclusive use of French in the performance of obligations under every law:** Bill 96 modifies the *Interpretation Act* to add the following: every act is presumed to allow “using only French in the performance of the obligations it prescribes.”<sup>103</sup> This may change the scope for service delivery in English under the *AHSS* and other legislation.
- 6) **Further constraints possible:** New constraints on the use of English by service providers could be introduced in the form of Regulations, the Language Policy of the State, and Ministry-level Directives.<sup>104</sup>
- 7) **Chill factor from constrained hiring practices:** All agencies must justify the requirement to hire anyone with knowledge of a language other than French.<sup>105</sup> Further, agencies that must file annual reports must report the number of positions within its organization that require knowledge of another language to obtain the position.<sup>106</sup> This may create a disincentive for agencies to hire the staff required to serve the public in English.

From the above, it is clear that Bill 96 creates a host of new constraints on the delivery of services in English, despite the existing practices and legislative guarantees for services in English.

English-speaking persons ought to continue to have the right to services in English guaranteed under s. 15 of the *AHSS*, including the right to access their health information in English, and to make complaints in English.

### QCGN’s View

Access to services in English—particularly health and social services—is critical for the English-speaking community. This community is not defined by English school eligibility. There should be no legislated constraints on who can receive services in English, and certainly no restraints tying service eligibility to English school eligibility.

In addition to Recommendation 6 above (*The right to communication and services in English should never be based on eligibility for English instruction*), the QCGN recommends the following:

#### **RECOMMENDATION 10**

Bill 96 should not in any way interfere with the right to receive health and social services in English as guaranteed in the *Act respecting health services and social services*. Bill 96 should include an explicit carve-out for this right.

<sup>103</sup> *Bill*, s 146; MCFL, s 40.2.

<sup>104</sup> *Bill*, s 19; MCFL, s 29.9.

<sup>105</sup> *Bill*, ss 35-36; MCFL, ss 46,46.1.

<sup>106</sup> *Bill*, s 12; MCFL, s 20.1.

## D. Access to Justice in English

Access to justice is a particularly sensitive issue for minorities. Access to justice barriers are often not recognized as such. Precisely because they are not acknowledged, they perpetuate systemic inequalities. Bill 96 creates new access to justice barriers for English-speaking litigants. It imposes additional language barriers in court proceedings and administrative tribunals.

Some new barriers include the following:

- **Pleadings must be in French:** The Bill adds a requirement that certified French translations shall be attached to any pleadings drawn up in English that emanates from a legal person (corporation).<sup>107</sup> Pleadings cannot be filed without such a certified translation.<sup>108</sup> This requirement is particularly troublesome for small businesses, NGOs, small associations, and cooperatives seeking to plead in English. They will be disproportionately affected by this requirement.
- **Certain judgments must be translated into French before they can be issued:** The Bill adds a new requirement for certain judgments rendered in English to be immediately accompanied by a French version.<sup>109</sup> This could create delays in cases heard in English, as the decision would need to be translated into French before the final judgement is rendered.
- **Unequal access to translation of judgments:** Under the current law, any decision can be translated into English or French at the request of one of the parties.<sup>110</sup> Under Bill 96, any person – not only a party – may request a French translation of a judgment rendered in English. However, only a party will be allowed to request a French judgment to be translated into English. Once again, the Bill creates an inequality between French and English speakers.

These new barriers run afoul of s. 133 of the *Constitution Act, 1867*. Section 133 states that persons may use “either” English or French in the courts in Quebec. According to s. 133, parties are allowed to choose between these two languages, which should be equally admissible.<sup>111</sup> These language rights ensure access to justice for minority groups, regardless of where they are situated, based on the principle of linguistic equality.

**Bilingual judges:** Also, under Bill 96, judges or adjudicators need not know a language other than French. This rule has some exceptions depending on the ministerial decision. Nonetheless, if judges or adjudicators do not speak English, this creates barriers for English-speaking litigants. They must either provide French translations to their pleadings, wait longer for an available judge, or proceed in French.

<sup>107</sup> *Bill*, s 5; MCFL, s 9.

<sup>108</sup> *Bill*, s 116; MCFL, s 208.6.

<sup>109</sup> *Bill*, s 5; MCFL, ss 10-11.

<sup>110</sup> *CFL*, s 9.

<sup>111</sup> In *Mazraani c Industrielle Alliance, Assurance et Services Financiers inc*, 2018 SCC 50, the SCC recently affirmed that anyone before a court must be able to exercise their language rights recognized by the Constitution by speaking either of the official languages of their preferred choice (at paras 1, 20 and 42).

In any scenario, this will directly impair access to justice for litigants, mainly in family, criminal, and employment cases. It impedes the exercise of the right to use English the courts guaranteed under s. 133 of the *Constitution Act, 1867* and the right to a criminal trial in English, as guaranteed by s. 530 of the Criminal Code.<sup>112</sup> This is particularly troublesome considering the state of affairs as pointed out by the Quebec Court of Appeal in *Dhinga*, where it acknowledged that there already are many bottlenecks in the system for English-speaking litigants.<sup>113</sup>

Lastly, the Bill also amends the *Code of Civil Procedure*.<sup>114</sup> According to these amendments, if legal persons wish to seek recognition and enforcement of foreign judicial decisions or arbitration awards made outside of Quebec, they must provide a French translation of the decision or award. This increases the cost of parties seeking to access the justice system in Quebec.

### QCGN's View

Bill 96 creates new and unnecessary language barriers for parties seeking access to justice. These barriers ought to be removed.

#### **RECOMMENDATION 11**

Remove the barriers to access to justice in English (*Bill 96*, s. 5, 116, 139-141).

<sup>112</sup> *Criminal Code*, RSC, 1985, c C-46. See also: *Beaulac*, *supra* note 101.

<sup>113</sup> *Dhingra c. R.*, 2021 QCCA 22 at 51. Despite mainly addressing the issue of delays on criminal prosecution regarding English-speakers, it also refers to the system as a whole.

<sup>114</sup> *Bill*, ss 138-141.

## E. Primary and Secondary Education

The *Charter of the French Language* currently restricts access to education in English; however, there are exemptions for children temporarily in Quebec. Bill 96 limits these temporary exemptions to three years, with no possibility of renewal.<sup>115</sup> Previously, there was no renewal limitation, and the three-year limit applied only to the children of Canadian citizens temporarily in Quebec.

These new restrictions may contribute to declining enrollment in certain English schools and declining community vitality in certain regions. Additionally, it may dissuade international skilled workers from coming to Quebec on temporary assignments if they cannot send their children to English schools for the entire duration of their stay.

### QCGN's View

These new restrictions will have adverse effects on English schools and will restrict Quebec's ability to attract international talent. They ought to be removed.

#### RECOMMENDATION 12

Remove temporary permit restrictions in education (*Bill 96*, ss 56, 160).

## F. CEGEPs

CEGEPs bring together young Quebecers of all backgrounds and help build bridges between Quebecers. Bill 96 imposes new restrictions at the CEGEP level from admissions to the issuance of diplomas.

CEGEPs will be designated as either French-language or English-language institutions. The total number of students in English language institutions will be capped and determined annually by the Minister of Higher Education, Research, Science and Technology.<sup>116</sup>

Under Bill 96, English-language institutions are to prioritize students declared eligible to receive instruction in English ("English eligible students").<sup>117</sup> However, the Bill does not detail how this provision will be implemented. Odd admissions policies may result because the category of "English eligible" is not synonymous with either "English-speaking" or "graduate of an English-language secondary school".

These changes in access to English CEGEPs create a high degree of uncertainty on the ability of English-speaking youth to access these institutions. Admission to English CEGEPs is currently very competitive,

<sup>115</sup> *Bill*, ss 56, 160.

<sup>116</sup> *Bill*, s 58; MCFL, s 88.0.4.

<sup>117</sup> *Bill*, s 62, replacing MCFL, s 88.3. Note the language of "declared eligible" rather than a requirement of actual attendance at English secondary school – thus, it may be possible for an English-eligible student who has attended French secondary school to be captured in this priority category.

and the admission caps will likely increase competitiveness to enter such CEGEPs. The overall effect may well be to decrease access to higher education for English-speaking youth in the province.

Not only do these changes impact youth individually, but there is also an overall social impact in hindering access to higher education. Depriving individuals of the opportunity to study in English CEGEPs, by placing more rigorous admission caps, will not necessarily fulfill the purpose of promoting the French language. There is no rational relation between this provision and the overall purpose of the Bill to promote a more widespread use of the French language.

Lastly, there are also changes in the diploma requirements. Students must pass a French competency test in order to obtain a college diploma. However, English-eligible students studying in English-language institutions are exempt from this requirement.<sup>118</sup> As a consequence, this generates a two-tiered diploma requirement: some students in English-language CEGEPs will need to pass a French competency test while others will not.

### QCGN's view

The restrictions on English-language CEGEP enrollment may adversely affect English-speaking youth's access to post-secondary education. They restrict the choices of all Quebec youth, and they do nothing to promote the French language. They ought to be removed.

#### RECOMMENDATION 13

Remove the legislated caps on English CEGEP enrollment (*Bill 96*, s 58).

## G. Municipal Services in English

The Bill creates a new process for the withdrawal of a municipality's recognition. When a municipality is "recognized", it is permitted to communicate and provide services in a language other than French (often referred to as a "bilingual municipality"). The Bill creates a process for a Minister-led withdrawal of a municipality's ability to communicate and provide services in English.

Under the existing law, if a municipality no longer meets the demographic criteria for recognized status (i.e. more than half its residents speak English as their mother tongue), it will still maintain its status unless it requests the status to be removed. Under Bill 96, the OQLF could send a notice to a recognized municipality that it does not meet the demographic criteria.<sup>119</sup> The recognition would automatically expire 120 days after the municipality receives the notice, unless the municipality adopts a resolution to maintain its status.

<sup>118</sup> *Bill*, s 58; MCFL, s 88.0.12.

<sup>119</sup> *Bill*, s 19; MCFL, s 29.2.

Essentially, this provision puts the onus on a municipality to seek to maintain its recognition where it no longer meets the demographic requirement. If some municipalities do not adopt a resolution, or decide to let their recognition be withdrawn, this will mean fewer recognized municipalities in Quebec overall.

If a municipality loses its recognized status, it is not permitted to provide services or send out materials in English. English-speaking Quebecers who live in these municipalities will be unable to access municipal services in English. It is unclear how the removal of these English services would promote the French language in Quebec.

#### **QCGN's view**

These provisions effectively put pressure on recognized municipalities to give up their ability to serve the public in English. This does not promote the French language, but will adversely affect English-speaking members of the public. This change ought to be removed from Bill 96.

#### **RECOMMENDATION 14**

Remove the change to the process for withdrawal of municipal recognized status (*Bill 96, s 19*).

## Conclusion and List of Recommendations

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The vitality of the French language in Quebec makes Quebec special in North America, and indeed, makes Quebec a unique place on the world stage. English-speaking Quebecers are proud members of this unique and dynamic society. The French language can and should be protected in Quebec. This is uncontroversial. However, Bill 96 is not the way to go about it.

Bill 96 is deeply problematic. Its measures are based on outdated and odious approaches to enforcing the use of the French language. It will create barriers and mistrust. It upsets a social and linguistic peace that has lasted for decades. And it sends a signal to speakers of other languages: no matter how integrated into Quebec society or how willing to speak French in the public space, speakers of other languages are not fully “members” of Quebec society. Like Bill 21, it re-shapes Quebec law and society to create clear ‘insiders’ and ‘outsiders’. And at the same time, it withdraws fundamental human rights protection from everyone.

More fundamentally, it is aimed at an entirely different objective: the refashioning of the Quebec state, and the move away from liberal constitutional democracy. The use of the human rights overrides (notwithstanding clauses) effectively dismantles human rights protections that have been in place for 45 years. It expands the power of the National Assembly—and the government in power—and removes the role of the judiciary in reviewing laws for compliance with the Constitution. It increases and centralizes executive power and control over both the public and private sectors. These changes are of serious and major concern for democratic governance in Quebec, and should be troubling to all Quebecers.

Bill 96 will change Quebec, and not for the better.

The QCGN makes the following **recommendations**:

**A. Withdraw the Bill in its entirety.**

**B. Carry out wide public consultations on how to protect and promote the French language, engaging all areas of Quebec society.**

**C. If the Bill is not withdrawn in its entirety, the Bill ought to be overhauled and the following changes be made:**

***Bill 96 Fundamentally Alters the Quebec State***

1. Remove the human rights overrides (*Bill 96*, ss. 118, 199, 200).
2. A reference question on the constitutionality and meaning *Bill 96*, s. 159 should be sent without delay to the Court of Appeal of Quebec.
3. In addition to the human rights overrides (*Bill 96*, ss. 118, 199, 200), remove all changes to provisions of Title I, Chapter III, Language of the Legislature and the Courts (*Bill 96*, s. 5).
4. The OQLF powers would be tempered if the human rights overrides were removed (*Bill 96*, ss. 118, 199, 200). In addition, remove the most egregious search & disclosure powers (*Bill 96*, ss 107, 111).
5. The Minister of the French Language should not have centralized control over the use of language in every agency of the civil administration. The Minister's power to make government-wide Policy, Regulations, and Directives should be pared back.
6. The right to communication and services in English should never be based on eligibility for English instruction.
7. Remove the modifications to the Francization provisions (*Bill 96*, ss 75-88).
8. Remove the Ministerial and OQLF sanction powers (*Bill 96*, ss 113 (MCFL, ss 177-184), 114).

**Bill 96 Will Make it Harder to do Business in Quebec**

9. Remove the following provisions, which have the most egregious impact on business:
  - a. Francization requirements (*Bill 96*, ss 76-78)
  - b. Justification of hiring practices (*Bill 96*, ss 35-36)
  - c. Language of contracts (*Bill 96*, ss 44-45)
  - d. Justice provisions (*Bill 96*, ss 5, 140, 141)
  - e. Education permit restrictions (*Bill 96*, ss 56, 160)
  - f. Professional orders (*Bill 96*, ss 23-27, 142)
  - g. OQLF powers (*Bill 96*, s 111)
  - h. Sanctions (*Bill 96*, s 114)

**Bill 96 Will have Adverse Impacts on Quebec's English-speaking Minority**

10. Bill 96 should not in any way interfere with the right to receive health and social services in English as guaranteed in the *Act respecting health services and social services*. Bill 96 should include an explicit carve-out for this right.
11. Remove the barriers to access to justice in English (*Bill 96*, ss 5, 116, 139-141).
12. Remove temporary permit restrictions in education (*Bill 96*, ss 56, 160).
13. Remove the legislated caps on English CEGEP enrollment (*Bill 96*, s 58).
14. Remove the change to the process for withdrawal of municipal recognized status (*Bill 96*, s 19).

## Appendix A: List of Witnesses in QCGN Public Consultation

<b>Organization</b>	<b>Organization</b>	<b>Name(s)</b>
Lawyer	Avocat	Michael Bergman
Former MNP & MP		Clifford Lincoln
English Speaking Catholic Council		Anna Farrow
Lawyer	Avocat	Anne-France Goldwater
Former QCGN President		Geoffrey Chambers
Greater Quebec Movement		Richard Smith Deepak Jalandhari Giuliano D'Andrea
Former MNA		Robert Libman
Quebec Federation of Home School Association		Carol Meindl Brian Rock Rosemary Murphy
English Parents' Committee Association	Association de parents pour les écoles anglophones du Québec	Katherine Korakakis
Quebec Association of Independent Schools	Association des écoles privées du Québec	Christopher Shannon
Eastern Townships School Board		Michael Murray
Media personality		Royal Orr
Community Advocate for the Deaf		Natasha Luttrell
McGill Faculty of Law	McGill Faculté de droits	Robert Leckey
Quebec Writers Federation English Language Arts Network Quebec Drama Federation		Chris Neal Guy Rodgers Julie Barlow Nick Maturo
Native Women's Shelter	Le foyer pour femmes Autochtones de Montréal	Nakuset
Francophone Community Member	Membre de la communauté francophone	Marc Robic
Language Taskforce		Colin Standish Andrew Caddell
Lawyer	Avocat	Pearl Eliadis
Regional Association West Quebecers	Association régionale des West-Québecers	Arthur Ayers
Lawyer	Avocat	Julius Grey
Filipino Heritage of Montreal		Jeanette Pérignon

Canadian Council of Muslim Women	Le conseil canadien des femmes musulmanes	Shaheen Ashraf
Seniors Action Quebec	Ainés action Québec	Vanessa Herrick Walter Duszara
YES Employment + Entrepreneurship		Aki Tchitacov
World Sikh Organization		Amrit Kaur
Community Economic Development and Employability Corporation	Corporation d'employabilité et de développement économique communautaire	John Buck
Lord Reading Law Society	Association de droit Lord Reading	Doree Levine Robert Steinman Frank M. Schlesinger
QCGN Health and Social Services Committee	Comité de Santé et Service Sociaux du QCGN	Eric Maldoff Marilyn Kaplow
Montreal Council of Women	Conseil Montréalais des femmes du Québec	Maria Peluso
Black Community Resource Centre Quebec Board of Black Educators		Alix Adrien Clarence S Bayne
2021 Bishop's forum participants	Participant au Bishops Forum	Song Yang
Former President of the Dawson Student Union		Kevin Contant-Holowatyj
Coalition Inclusion Quebec	Coalition Inclusion Québec	Greg Borden
Hellenic Congress		Dr. Theodore Halatsis
Provincial Council of Women Quebec	Conseil provincial des femmes du Québec	Jane Cowell Poitras

## Appendix B: List of Briefs Submitted in QCGN Public Consultation

Appendix	Organization EN	Organization FR	Name(s)	Language
B1	Lawyer	Avocat	Michael Bergman	ENG
B2	English Speaking Catholic Council		Anna Farrow	ENG
B3	Quebec Federation of Home School Association		Carol Meindl Brian Rock Rosemary Murphy	ENG
B4	English Parents' Committee Association	Association de parents pour les écoles anglophones du Québec	Katherine Korakakis	ENG
B5.a	Quebec Association of Independent Schools	Association des écoles privées du Québec	Christopher Shannon	ENG
B5.b	Quebec Association of Independent Schools	Association des écoles privées du Québec	Christopher Shannon	FR
B6	Community Advocate for the Deaf		Natasha Luttrell	ENG
B7.a	Quebec Writers Federation English Language Arts Network Quebec Drama Federation		Chris Neal Guy Rodgers Julie Barlow Nick Maturo	ENG
B7.b	Quebec Writers Federation English Language Arts Network Quebec Drama Federation		Chris Neal Guy Rodgers Julie Barlow Nick Maturo	FR
B8	Native Women's Shelter	Le foyer pour femmes Autochtones de Montréal	Nakuset	ENG
B9	Francophone Community Member	Membre de la communauté francophone	Marc Robic	FRE
B10	Lawyer	Avocat	Pearl Eliadis	ENG
B11	Regional Association West Quebecers	Association régionale des West-Québecers	Arthur Ayers	ENG
B12	Lawyer	Avocat	Julius Grey	FR
B13	Filipino Heritage of Montreal		Jeanette Pérignon	ENG
B14	Canadian Council of Muslim Women	Le conseil canadien des femmes musulmanes	Shaheen Ashraf	ENG
B15	Seniors Action Quebec	Ainés action Québec	Vanessa Herrick	ENG

			Walter Duszara	
B16	YES Employment + Entrepreneurship		Aki Tchitacov	ENG
B17	World Sikh Organization		Amrit Kaur	ENG
B18	Community Economic Development and Employability Corporation	Corporation d'employabilité et de développement économique communautaire	John Buck	ENG
B19.a	Lord Reading Law Society	Association de droit Lord Reading	Doree Levine Robert Steinman Frank M. Schlesinger	ENG
B19.b	Lord Reading Law Society	Association de droit Lord Reading	Doree Levine Robert Steinman Frank M. Schlesinger	FR
B20.a	QCGN Health and Social Services Committee	Comité de Santé et Service Sociaux du QCGN	Eric Maldoff Marilyn Kaplow	ENG
B20.b	QCGN Health and Social Services Committee	Comité de Santé et Service Sociaux du QCGN	Eric Maldoff Marilyn Kaplow	FR
B21	Montreal Council of Women		Maria Peluso	ENG
B22	Coalition Inclusion Quebec	Coalition Inclusion Québec	Greg Borden	FR
B23	Hellenic Congress		Dr. Theodore Halatsis	ENG
B24.a	Provincial Council of Women Quebec	Conseil provincial des femmes du Québec	Jane Cowell Poitras	ENG
B24.b	Provincial Council of Women Quebec	Conseil provincial des femmes du Québec	Jane Cowell Poitras	FR
B25	Greater Quebec Movement (GQM)		Richard Smith Deepak Jalandhari Giuliano D'Andrea	ENG
B26.a	Royal Orr	Royal Orr		EN
B26.b	Royal Orr	Royal Orr		FR