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# Here's how opponents will use the courts to try to thwart Quebec's Bill 96

*New language law "has the potential to fundamentally change the constitutional order in Quebec — it sets French above fundamental rights and freedoms."*

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People gather at Dawson College for a rally to oppose Bill 96 in Montreal on Saturday, May 14, 2022. PHOTO BY JOHN MAHONEY /Montreal Gazette

See you in court.

Opponents are expected to file several legal challenges against [Bill 96](#), the controversial, wide-ranging legislation passed in May that could touch many aspects of daily life, from medical care to how businesses operate to the workings of the court system.

The law further restricts the use of English in Quebec in a bid to boost the French language, with Premier François Legault arguing [French is in decline in Quebec](#), both in workplaces and in homes.

An English Montreal School Board (EMSB) [lawsuit filed last week](#) is the first attempt to quash parts of the law.

The Montreal Gazette spoke to legal experts and people working on possible legal action.

## Legal issues

[Packed into Bill 96's 201 articles](#) spread over 100 pages are the biggest changes to Quebec language rules since the advent of Bill 101, the Charter of the French Language, in 1977.

“Bill 96 does so many things and has the potential to fundamentally change the constitutional order in Quebec — it sets French above fundamental rights and freedoms,” said Robert Leckey, the dean of McGill University’s law faculty.

“It grants the civil administration through the Office québécois de la langue française (OQLF) potentially extraordinary powers. (The law) interferes potentially quite deeply with our understanding of the separation of powers and the constitutional order of the province.”

Julius Grey, a prominent human rights lawyer who has spoken out against the law, said he is in discussions with “three or four groups” considering legal challenges.

He has vowed to take the fight to the Supreme Court and the United Nations. Indigenous groups are also expected to join the legal battle.

These are some avenues opponents are exploring:

## Notwithstanding clause

The [Canadian Charter of Rights and Freedoms](#) “is there to protect the unpopular, the weak and minority views and minority positions,” Grey said. “Majority positions don’t need a charter because they have the majority in parliament.”

However, governments can override some fundamental rights in the charter by invoking its notwithstanding clause.

Legault's Coalition Avenir Québec government pre-emptively invoked that clause to shield Bill 96.

But the notwithstanding clause only covers some sections of the new law.

For example, the charter says "everyone has the right to be secure against unreasonable search or seizure." But that section can be overridden by the notwithstanding clause. That allowed Quebec to include in Bill 96 a provision granting the OQLF powers of search and seizure without needing a warrant to inspect businesses and ensure they are complying with the law.

However, other parts of Bill 96 are not shielded by the notwithstanding clause.

Some legal experts say Legault's decision to use the clause pre-emptively goes against the spirit of the charter. That issue came up in the challenge to the CAQ's [Bill 21](#), which bars people who wear religious symbols such as the Muslim hijab from some government jobs. Bill 21 is still winding its way through the courts and should reach the Supreme Court, which is expected to weigh in on the issue of pre-emptive use of the clause. That means Canada's top court could pronounce itself long before Bill 96 reaches that stage.

Federal Justice Minister David Lametti recently argued the notwithstanding clause was never intended to be used in a pre-emptive manner. He said Ottawa may intervene in any legal challenge against Bill 96 when it reaches the Supreme Court.

Opponents could also argue that courts have the power to declare how a law shielded by the notwithstanding clause violates rights, Leckey said.

"At the moment, a widespread view is that the courts can't even look at charter issues as long as the notwithstanding clause operates," he said. "One possibility is the court could declare how the law impacts rights, even if the law is enforceable. That would mean the public would at least have a better sense of what its elected leaders were doing in its name."

Leckey said Legault's "approach — using a vast, sweeping notwithstanding clause pre-emptively — is trying in a sense to make sure the public never knows the impact of the law on fundamental rights."

## The courts

Opponents are targeting sections of Bill 96 that deal with the legal system, arguing they contravene [Section 133](#) of the Constitution Act, 1867, which guarantees the right to use the courts in English or French.

Under Bill 96, court pleadings must be in French or accompanied by a translation. In most cases, judges need not be proficient in any language other than French. Any English-language judgment must immediately be accompanied by a French translation.

Leckey said a challenge could focus on "the way that the law interferes with the bilingual operation of the courts. The obligation that a legal person litigating has to provide a French translation of judgments may offend the constitutional rights to use English and French in the courts."

Opponents may argue changes to the appointment process could affect the naming of bilingual judges, thereby undermining the constitutional guarantee of courts operating in English and French, Leckey said. Some might argue the law infringes on the constitutional principle of judicial independence, he added.

Eric Maldoff, a lawyer who has acted as a constitutional adviser to the federal government, said Bill 96 “creates a whole bunch of bureaucratic, administrative and other kinds of costs and impediments to being able to use English in the courts.”

## Indigenous rights

Indigenous leaders may fight Bill 96 in court, arguing the law will weaken Indigenous languages and that the imposition of more French courses for CEGEP students will hurt success rates for Indigenous youth.

Kahnawake Grand Chief Kahsennenhawe Sky-Deer has said the law amounts to “cultural genocide” and an attempt to “pull our futures out from under us.” Ghislain Picard, chief of the Assembly of First Nations Quebec-Labrador, accused Legault of imposing “major linguistic injustices ... in the name of narrow and divisive nationalism.”

The next steps are being weighed as the Mohawk Council of Kahnawake consults with community members about possible political and legal actions, Chief Mike Delisle said in an interview. Options include joining non-Indigenous lawsuits; contesting the law based on [Section 35](#) of the Constitution Act, 1982, which affirms the rights of Indigenous peoples; and taking the issue to the United Nations. More Kahnawake protests are possible, following recent demonstrations that interrupted traffic on the Mercier Bridge and Route 132.

Kahnawake has suspended all “political, administrative and technical discussions” with the Quebec government over the law, Delisle said. The community wants a meeting between Sky-Deer and Legault to discuss “accommodations” from the law.

“We don’t understand the rationale” behind Bill 96, Delisle added. “There are over 7 million French-speaking people in Quebec. How is (the French language) in danger?”

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In my latest [@mtlgazette](#) story, I look at how Bill 96 opponents plan to use the courts to try to thwart Quebec’s sweeping language law reform that aims to boost the French language [#thread](#)



## Amending the constitution

Bill 96 seeks to change part of the Canadian Constitution to affirm Quebec is a nation and that its official language is French.

In its lawsuit, the EMSB contends that Quebec lacks the jurisdiction to unilaterally amend the constitution.

“Regardless of anybody’s feelings on those points, legally and constitutionally, Quebec cannot unilaterally amend the Canadian Constitution,” Joe Ortona, a lawyer who is chair of the EMSB, said in an interview.

## Education

The EMSB says Bill 96 contravenes Section 23 of the charter, which covers minority language education rights and cannot be overridden by the notwithstanding clause.

In its lawsuit, the EMSB said the charter guarantees exclusive right to “management and control by the representatives chosen by the minority language community over aspects of minority language education.”

Ortona said Bill 96’s “obligation for an English language school board to communicate in French and to work in French with other English school boards and to work in French among ourselves and in our communications goes beyond our management and control rights.”

The EMSB is already fighting the CAQ government in court over Bill 21 and Bill 40, the latter of which aims to turn school boards into government service centres.

## Health care

Bill 96 mandates all members of Quebec’s civil administration to be “exemplary” and only use French when communicating with clients, with some exceptions. Legault and his justice minister, Simon Jolin-Barrette, insist the anglophone community’s access to health care in English will not be affected.

But legal experts, health services advocates and patients’ rights groups say the bill does not clearly guarantee continued rights to service in English.

And the Collège des médecins, the professional order of Quebec doctors, says Bill 96 “gives cause for concern about the future ability of patients to converse in the language of their choice with the person providing them with care.”

Leckey said “people may be looking very closely to see the impact on health services, and it may be that people are looking to see whether the Canada Health Act guarantees are being respected. If a provincial law comes into conflict with a federal law, the federal law prevails.”

Maldoff, chair of the Coalition for Quality Health and Social Services, said Bill 96 provisions that “try to obstruct communication in the health sector have a good chance of drawing unfavourable attention from courts.”

Ethical obligations are also at stake, he added. “How do you reconcile (health and social service professionals’) duty to provide the best possible care when the law forbids them from being able to use, at their choice, the language they wish to use with the patient?”

The Coalition is setting up a bureau to monitor the “quality of health care” now that Bill 96 is law, Maldoff said.

“We have to gather facts, gather information and see what it looks like, and then decide. It may be the best course is publicity or persuasion or meetings or mobilizing. I don’t rule out the possibility that there will be cases that make sense to go to court, but we’ll see what comes out.”

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## Key questions

### Why is Bill 96 controversial?

From Indigenous communities to anglophone rights groups to human rights activists, opponents accuse the Legault government of trampling minority rights as it did with Bill 40 and Bill 21. Unmoved by growing criticism, Legault has lashed out at the anglophone media and opponents of the law, accusing them of spreading disinformation.

### What about an injunction?

Opponents of Bill 21 were unsuccessful in their bid for an injunction in 2019. Judges agreed the law was causing certain people irreparable harm, but ruled their hands were tied by Quebec’s use of the notwithstanding clause. A year later, English school boards succeeded in obtaining a temporary injunction against Bill 40, allowing English boards to continue to exist for now.

Leckey said someone may seek an injunction against parts of Bill 96: “You’ve got to persuade the court that the harms of enforcing the law outweigh the harms of interfering with carrying out Parliament’s will.”

### How long will court battles take?

Years. Bill 21, which became law in 2019, is still before the courts. Quebec’s Court of Appeal is expected to hear the case this fall, with a decision in 2023.

The law could reach the Supreme Court in 2024.

## Could the CAQ soften Bill 96?

Highly unlikely. With polls suggesting the francophone majority is worried about the state of French, Legault is expected to trumpet the law as a major accomplishment in the election campaign ahead of October's election. The premier's tone is increasingly nationalistic and his two latest election recruits have been sovereignists and hardliners on identity and language issues.

But Maldoff said some precedents provide hope.

They include a landmark Supreme Court ruling highlighting the abuses of power by all-powerful Premier Maurice Duplessis. Incensed that Frank Roncarelli had paid the bail for hundreds of Jehovah's Witnesses arrested for distributing pamphlets, Duplessis revoked the restaurateur's liquor licence in 1946, driving him out of business. In 1959, the Supreme Court ruled Duplessis overstepped his power, levying damages against the premier personally.

Maldoff also pointed to Premier Robert Bourassa's decision in 1993 not to renew the notwithstanding clause on a Bill 101 provision banning English on commercial signs. The Supreme Court had declared the restriction unconstitutional, ruling it violated the right to freedom of expression. The Human Rights Committee of the United Nations had also weighed in, finding that section of Bill 101 violated individuals' basic right to free speech.

"Why did bilingual signs again become legal? Because public opinion mattered," Maldoff said. Bill 96, too, "will definitely go to the UN and Quebec will be shamed internationally, nationally and across North America."

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