

Canada: Long-awaited draft regulation under Québec's Bill 96 finally published – More questions than answers?

In brief

On 10 January 2024, the draft *Regulation to amend mainly the Regulation respecting the language of commerce and business* (the "**Draft Regulation**") to the *Charter of the French language* (the "**Charter**") was introduced by the Quebec legislature. The long-awaited Draft Regulation provides guidance on the sweeping amendments to the Charter introduced by Bill 96. Bill 96, *An Act respecting French, the official and common language of Québec*, was adopted by the Québec National Assembly in June 2022 to overhaul and strengthen French language requirements in Québec under the Charter. Once adopted, the Draft Regulation will further amend the *Regulation respecting the language of commerce and business* to clarify the rules surrounding the permitted use of non-French language trademarks, in particular on product packaging; revise French language prominence rules for trademarks used on public signs and posters; formally expand the definition of commercial documentation; and clarify how standard form contracts (i.e., boilerplate contracts) may be provided in French online and by telephone. The Draft Regulation is subject to a 45-day consultation period and is expected to pass by the summer of 2024. The Draft Regulation is a key next step in clarifying how the changes resulting from Bill 96 will apply in practice, and are of critical importance to companies operating in or selling into Quebec or contracting with Quebec counterparties, and they will therefore want to consider their compliance approach carefully in light of these changes.

Key Changes

Product Inscriptions (Packaging/Labeling)

- **Treatment of Pending Trademarks** – Prior to the passage of Bill 96, the Charter provided an express exemption for non-French trademarks as defined in Canada's *Trademarks Act* (including common law trademarks and trademarks subject to pending registration applications) to be used without translation into French on certain types of materials, which meant that trademarks found on most signage, posters, and commercial advertising, as well as product packaging and labelling, could be depicted in a language other than French.

Bill 96 limited this exemption to fully "registered" trademarks starting on June 1, 2025. However, the Draft Regulation now clarifies that registered trademarks include pending applications. This is a significant departure from the apparent intention of Bill 96, and also differs from the recent enforcement position of the Office québécois de la langue française ("**OQLF**", Quebec's French language regulator). It likely signals a win by industry, which had lobbied heavily for a more flexible definition given lengthy turnaround times to obtain formal trademark registrations from Canada's Canadian Intellectual Property Office.

- **"Product" Clarification** – As the revised trademark exemption under Bill 96 will apply to "products" and not product inscriptions more generally (which would have encompassed product packaging and labelling), the Draft Regulation clarifies that the word "product" includes its container or wrapping and any document or object supplied with it. This is a noteworthy development as it confirms that the trademark exemption does in fact apply to product packaging and documentation accompanying

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products, and not just the product itself, and appears to shut down prior suggestions that the amendments were more narrowly-focused.

- **Digital Product Inscriptions** – The Draft Regulation clarifies that digital product inscriptions (i.e., inscriptions displayed with “integrated software”, which could potentially include downloadable information or applications), will be subject to the same product inscription rules as traditional products.
- **Definition of “Generic Term” and “Description”** – Bill 96 introduced a controversial new provision, requiring any non-French generic term or product description contained within a trademark to be translated into French as of June 1, 2025. The Draft Regulation attempts to provide some further clarity on the application of this rule by defining “generic term” as one or more words describing the nature of a product, and “description” as one or more words describing the characteristics of a product. These literal definitions remain very broad, and, as they do not appear to place any limits on or address how the rule applies in practice, they will likely be a focus of the consultation discussions.

That said, the Government of Quebec has subsequently released an infographic which helpfully suggests that *primary* English-only trademarked brand names will not need to be translated, even if they contain generic terms or product descriptions. In the infographic example below, it is clear the brand name BestSoap, which is presumably a fictionalized trademark, can remain in English even though it could arguably be considered generic and descriptive. Although not binding, the infographic appears to confirm that primary brand names will not be subject to the generic term and description rules; however, questions remain with respect to the treatment of secondary brand names and variant names.



The infographic, released January 12, 2024 on X (Twitter) by Minister Jean-François Roberge, the Minister Responsible for the French Language, depicts examples of acceptable and non-acceptable trademarks on product packaging.

- **Prominence rules for generic terms and product descriptions** – The Draft Regulation introduces new prominence rules whereby generic terms and product descriptions found within non-French trademarks cannot be given greater prominence than the French translation or be available on more favourable terms. While this establishes that the minimum standard is equal prominence, what would be the acceptable placement of translated French term(s)/descriptions (e.g., front of pack vs back of pack) is less clear and may be a focus of the consultation discussions. It remains to be seen whether the OQLF will take the same position as under other provisions introduced by the Draft Regulation for different materials (e.g., public signs and posters), and require that any translations on packaging appear in the same visual field.
- **Grace Period** – Products that are non-compliant with the product inscriptions rules introduced by Bill 96 will be permitted to be distributed, retailed and offered for sale until June 1, 2027, provided the *products* (as opposed to the product packaging) were manufactured before June 1, 2025 and a French language version of the product’s trademark has not been registered. While a benefit for certain

industries, the grace period may be of less value for businesses operating within the fast moving consumer goods sector and in particular, industries that supply perishable or short shelf life goods.

Commercial Documentation

- **Websites and Social Media** – The Draft Regulation formalizes OQLF guidance and enforcement policy, confirming that information published on websites or posted on social media constitutes commercial documentation subject to French language requirements.

Public Signs and Commercial Advertising

- **Revised Definition of “Markedly Predominant”** – The *Regulation defining the scope of the expression “markedly predominant” for the purposes of the Charter of the French language* (“**Markedly Predominant Regulation**”) has been repealed and a less prescriptive definition for “markedly predominant” has been introduced in the Draft Regulation which provides that the French text on a public sign and poster will be considered to be markedly predominant where it has a much greater visual impact within the same visual field than the non-French text.
 - **Visual Impact:** Whereas the Markedly Predominant Regulation defines a greater visual impact as requiring (i) the space allotted to the French text being at least twice as large; (ii) the characters used in the French text being at least twice the size; and (iii) all other characteristics of the sign or poster not having the effect of reducing the visual impact of the French text, the Draft Regulation defines a greater visual impact within the same visual field to mean that (i) the French text is at least twice as large as the text in another language; and (ii) the French text’s legibility and permanent visibility are equivalent to those of the text in another language. Although a small change, it provides a more practical, flexible and achievable standard that will still result in greater prominence of French text.
 - **Visual Field:** The Draft Regulation introduces the concept of “same visual field”, which refers to an overall view where all the components of the public sign or poster are visible and legible at the same time without the viewer having to move.

Taken together with the requirement that requiring non-French trademarks and business names on public signs and posters to be accompanied by a presence of French as defined in the Draft Regulation, the presence of French will now be required to appear markedly predominant to the trademark, as depicted in the below infographic released by the Quebec government (“VETEMENTS” (i.e., apparel) is the markedly predominant presence of French).



The infographic, released January 12, 2024 on X (Twitter) by Minister Roberge, depicts examples of acceptable and non-acceptable trademarks on public storefront signage.

- **Clarification of “Public” Signs and Posters:** The Draft Regulation also clarifies when signs and posters will be considered public, including if they are visible from outside premises and the treatment of signs and posters on an immovable, a group of immovables or inside a shopping centre, or on a bollard or other independent structure, including a pylon sign, subject to certain exceptions. While detailed, these changes delineate the application of the rules much more clearly.

Contracts of Adhesion

- **Related Documents** – Bill 96 introduced significant restrictions on the use of non-French contracts of adhesion (i.e., standard form contracts where terms are imposed by one party and are typically non-negotiable), which took effect on June 1, 2023. While non-French contracts of adhesion are still permitted, the party seeking to impose the contract of adhesion must first provide the other party with a French version. Only then can it attempt to rely on a so-called English language clause to bind the other party to the English version of the agreement.

While it is common for English language clauses to refer not just to the language of the agreement itself, but also to provide that any documents related to the contract may similarly be in English only, the Draft Regulation now clarifies what constitutes a document “related” to a contract of adhesion. A related document is limited to documents (i) that attest to the existence of the contract; (ii) whose attachment to the contract is required by law; or (iii) which otherwise constitute an ancillary document. As the latter definition is broad and not qualified, it remains to be seen whether it will provide the same level of flexibility to avoid translation requirements, even where parties agree to contract in English.

- **Contract Medium:** While the new rules pertaining to contracts of adhesion are generally straightforward with respect to paper and digital agreements, the amendments introduced by Bill 96 are less clear as to the application of the rules to online agreements, such as those found on a website (e.g., terms of use) and agreements entered into by telephone. The Draft Regulation attempts to address these gaps, providing, for example, that contracts of adhesion that are concluded online will be deemed to have been provided in French first by “giving” the adhering party the standard clauses in French, and requiring that the adhering party in a telephone agreement have first had an opportunity to consult the relevant clauses using a “technological means”). However, these arguably raise more questions than answers, and the related provisions may be a significant focus of the consultation discussions.

Looking Forward

The Draft Regulation is subject to a 45-day consultation period that will end on February 24, 2024. However, as it is expected that it will take some time for the Quebec government to address the feedback, the Draft Regulation is not likely to be finalized until the summer of 2024, and potentially later if there is significant lobbying or a large number of submissions are received during the consultation period.

Once finalized, the majority of the provisions will come into force on June 1, 2025, the same day as the new trademark provisions of Bill 96, with the exception of those related to adhesion contracts, which will come into force 15 days after the final version of the Draft Regulation is published.

The Draft Regulation will impact many companies' compliance with the Charter, as strategies which have been used historically may no longer be sufficient to avoid risk. Even companies that have thought through the implications of Bill 96 may now need to revisit their approach in light of the Draft Regulation once it is finalized. The availability of significant fines under the Charter and likelihood of strict enforcement by the OQLF will ensure the Bill 96 amendments remain a significant compliance focus for businesses that access the Quebec market.

Keywords

Bill 96, Québec, Charter of the French Language, Trademarks