

BRIEF

SUBMITTED TO THE COMMITTEE ON HEALTH
AND SOCIAL SERVICES

March 31, 2022

Bill No. 28

An Act to terminate the public health emergency
Exiting the crisis under custodianship



fiq

FIQ | SECTEUR PRIVÉ

Foreword

The Fédération interprofessionnelle de la santé du Québec-FIQ and the Fédération interprofessionnelle de la santé du Québec | Secteur privé-FIQP represent 76,000 healthcare professionals in nursing and cardio-respiratory care, which includes the majority of nurses, licensed practical nurses, respiratory therapists and clinical perfusionists in Quebec health and social services institutions. The FIQ and FIQP's strong foundation in the health network enriches their expertise, which is valued and recognized by decision-makers from all backgrounds. The FIQ and FIQP represent healthcare professionals with diverse work experience who provide care across all areas of the health and social services network.

As first-hand witnesses of the healthcare system's daily operations, healthcare professionals see the effects of socioeconomic inequality on the population's health, as well as the sometimes-deplorable impacts of the decisions made at all levels of the political and hierarchical structure. The FIQ and FIQP are labour organizations with a nearly 90% female membership, composed of healthcare professionals, public and private network employees, and citizens who use these services. Through their orientations and decisions, the FIQ and FIQP strive to protect social gains and to achieve greater equality and social justice.

Driven by their mission, the FIQ and FIQP have always **actively participated in consultations** that are historically significant for Quebec's health and social services system. Whether it concerns bills that aim to modify its operations or any other relevant subject, the Federations have always worked to defend the interests and concerns of its members and the population.

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Introduction

The Federations recognize that the *Public Health Act* gives authorities exceptional powers to be used in the event of “a serious threat to the health of the population, whether real or imminent,” (section 118) which requires the immediate application of certain measures to protect the health of the population. The government may subsequently decree a public health emergency, but only in compliance with restrictive conditions. Its power to enforce any measure necessary to protect the health of the population must remain exceptional and be used cautiously.

Upon decreeing a public health emergency 106 times since March 13, 2020, the government gave itself every power and abused it by violating workers’ rights and bypassing their collective agreement. With this bill, the government wants to keep the sole right to decide which special measures to maintain until December 31, 2022, without having to justify its decisions to anyone. It is reminiscent of bill No. 61 tabled in June 2020, which was finally abandoned due to all of the opposition to it.

The government has used the pretext of the public health emergency for two years to unilaterally impose an incalculable number of orders and decrees on healthcare professionals. It even had the audacity to allocate 1 billion dollars in incentive measures for network staff, without negotiations, right after the collective agreement was signed and it had declared it could not spare any more funds. This way of doing things is unacceptable. The province of Quebec has constitutional foundations that involve respecting fundamental rights and liberties, such as the right to collective bargaining included in the freedom of association. That is why the FIQ and FIQP are legally contesting ministerial order 2021-071 for interference and negotiating in bad faith.

Bill No. 28 stipulates the end of the state of emergency (sect. 1), demonstrating recognition that there is no longer a serious threat to the health of the population, either real or imminent. The end of the public health emergency should normally lead to the end of the application of measures issued in ministerial orders that modify working conditions, unless the government and unions come to an agreement stating otherwise.

Nonetheless, the government wants to continue to unilaterally enforce measures on employees’ working conditions, which should be subject to agreement with the employees’ associations. By breaching the parameters outlining the special powers in the *Public Health Act*, the Coalition Avenir Québec (CAQ) is taking an authoritarian route. As labour organizations dedicated to defending their members and patients of the public health network, the FIQ and FIQP intend to fight this.

Nurses, licensed practical nurses, respiratory therapists and clinical perfusionists have been fighting since the beginning of the pandemic to uphold their rights and obtain the government’s respect. The time has come for the government to choose to recognize healthcare professionals and negotiate in good faith with their representatives.

Chapter 1 – The true objective of Bill No. 28 is not to end the public health emergency

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For months now, opposition parties and members of civil society have been criticizing the automatic renewal of the public health emergency every ten days since March 13, 2020. Governing by decrees has allowed the government to make decisions alone, without having to consult the elected officials of the National Assembly.¹ With Bill No. 28, instead of simply ceasing to renew the public health emergency, the CAQ decided to present a bill to instate a transitional period.

The Federations believe that this bill's true objective is not to end the public health emergency (section 1), but to give the government the power to extend or modify all of the measures issued in decrees and ministerial orders once the state of emergency is lifted (sections 2 and 3). Furthermore, the objective of the bill is also not to allow the return of certain measures in the event of a sixth wave, since the *Public Health Act* already gives the government the power to declare a new state of emergency in the event of "a serious threat to the health of the population, whether real or imminent."²

The government claims that the bill aims to allow "a gradual easing of the measures" (section 3), but it doesn't specify which measures will be maintained or could be amended after the health emergency is over. This discretionary power is not subject to any rules. While the Minister of Health and Social Services publicly promised that only three or four decrees will remain in force,³ this promise is not included in the bill. This gives the government disproportionate power as long as the decrees and orders are not officially repealed.

Moreover, one week after the bill was presented, the government renewed the state of emergency and unilaterally renewed the measures set out in a dozen decrees and over a hundred ministerial orders.⁴ Consequently, the FIQ and FIQP are concerned that the bill will continue to authorize the use of various orders, in particular order 2020-007, which suspends several provisions in collective agreements and allows employers to cancel, postpone, or refuse days off and to transfer staff according to their needs, without taking their professional expertise into account.

While a targeted bill could theoretically be useful to maintain, for example, special authorizations granted by professional orders to retirees, students or

¹ RADIO-CANADA. *La CAQ appelée à mettre fin à l'état d'urgence sanitaire*, [Online], 2022, updated on Sept. 8, 2021, [ici.radio-canada.ca/nouvelle/1822532/gouvernement-decrets-apprendre-vivre-virus-caq-legault-pq] (Consulted on March 25, 2022).

² Public Health Act, CQLR c S-2.2, s. 118.

³ LÉVESQUE, Fanny. « "Trois, quatre" décrets resteront en vigueur, promet Dubé », *La Presse*, [Online], March 17, 2022, [<https://www.lapresse.ca/covid-19/2022-03-17/fin-de-l-urgence-sanitaire/trois-quatre-decrets-resteront-en-vigueur-promet-dube.php>] (Consulted on March 25, 2022).

⁴ Decree number 341-2022 from March 23, 2022, [Online], [cdn-contenu.quebec.ca/cdn-contenu/adm/min/sante-services-sociaux/publications-adm/lois-reglements/decret-341-2022-anglais.pdf?1648124442] (Consulted on March 25, 2022).

foreign graduates to perform reserved activities;⁵ or measures to discourage the use of employment agencies; instead, the government chose to indiscriminately extend all of its emergency powers, out of simple administrative commodity.

Lastly, the FIQ and FIQP question the judicial immunity given to the government (section 2, paragraph 2). Similar immunity is set out in the *Public Health Act* during a public health emergency (section 123). However, democracy implies that citizens may make their case without hindrance before the court to defend their rights, all the more so if the public health emergency is over.

The Federations will leave it to other groups to comment on the articles related to communicating information to the minister (sect. 4), extending contracts (sect. 5), and extending a set of fines initially stipulated in the *Public Health Act* (sect. 6).

⁵ Note that the Professional Code already permits orders to grant special authorizations to people from abroad to practice in Quebec (art. 42.4). A targeted modification to the Professional Code would be enough to expand the orders' power to grant special authorizations to students or retirees.

Chapter 2 – Maintaining measures set out in decrees and orders is a violation of workers’ right to collective bargaining

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Bill No. 28 (sections 2 and 3) gives the government unjustified power by allowing it to maintain and modify measures enforced during the public health emergency, despite the end of this period, as provided under the *Public Health Act*. Carrying these exceptional measures forward will likely violate the rights of employees represented by the FIQ and FIQP, who did not choose the measures that were imposed upon them and will not have a say on maintaining them.

To prolong imposed, non-negotiated working conditions on health network staff infringes on their fundamental right to the freedom of association, as provided in the Quebec Charter of Human Rights and Freedoms, by attacking their right to collective bargaining. Freedom of association implies that the government recognizes the employees have a certain power to help them determine more equitable working conditions. It is an instrument of progress for the fundamental freedoms of our democratic society.

The constitutional right to collective bargaining supports the dignity, freedom and autonomy of employees by allowing them to exercise control over an important aspect of their life: their work. It provides a form of democracy and ensures the prevalence of the rule of law in the workplace.

In contrast, this bill tramples employees’ right to collectively present demands and to participate in discussions in order to achieve workplace-related objectives. It exacerbates inequalities that shape relationships between the employer and employees, which were already weakened by the pandemic and the employees’ vulnerabilities, given the circumstances. Moreover, this parliamentary consultation is not a valid substitute for collective bargaining in good faith.

The International Labour Organization (ILO) sums up this principle as follows, (applicable as much internationally as in Canada and Quebec):

H. The principle of good faith in collective bargaining implies recognizing representative organizations, endeavouring to reach an agreement, engaging in genuine and constructive negotiations, avoiding unjustified delays in negotiation and mutually respecting the commitments entered into, taking into account the results of negotiations in good faith.

[...] K. Interventions by the legislative or administrative authorities which have the effect of annulling or modifying the content of freely concluded collective agreements, including wage clauses, are contrary to the principle of voluntary collective bargaining. [...]⁶

⁶ B. Gernigon, A. Otero and H. Guido, “ILO principles concerning collective bargaining” (2000), 139 *Intern’l Lab. Rev.* 33., p. 55-57, cited in *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27. 77.

The Federations denounce the fact that no real process to facilitate dialogue was set up to meet and come to an agreement with employee representatives on the best way to use the funds allocated by the government during the pandemic to attract and retain employees in the health network.

Working conditions modified by ministerial orders that are connected to particularly important collective bargaining matters will inevitably disrupt the balance of power between employees and their employer (in this case, the government).

Furthermore, the FIQ and FIQP had no choice but to go before the courts to contest the abusive use of ministerial order 2020-007, in particular regarding the management of problems that existed well before the pandemic, as well as granting premiums under restrictive conditions after the last collective agreement was signed. The government acted as if there were no unions in the health network.

Given the announcement to end the public health emergency, there is no justifiable reason to maintain the modified working conditions imposed by ministerial orders without negotiating in good faith with the employees' representatives.

The impact on the next collective negotiations

It must be said that a new period of collective negotiations will begin in fall of 2022. If this bill were adopted, the next collective negotiations could begin while the government still has the power (or pressure tactic) to unilaterally modify the working conditions of FIQ and FIQP members.

Were that to happen, it could create a profound imbalance at the bargaining table, discourage employees from collectively defending their rights, and discredit the bargaining process. The balance would be skewed, and scales tipped in favour of the employer party.

As long as the working conditions, including the premiums introduced during the pandemic, are not negotiated and integrated into a collective agreement, the government can do away with them at whim. As such, the bill creates a climate of uncertainty and dangles the blade of a guillotine over the care staff.

The government's use of these exceptional powers since 2020 to impose working conditions was worrying enough already. The fact that it is looking to extend the use of these powers in the health network as we approach the next period of collective negotiations seems like authoritarian drift.

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Given the denial of collective rights and that the government wants to continue managing by decree, the Federations have no choice but to oppose this bill.

Recommendation 1

The FIQ and FIQP recommend that section two be removed from the bill, which seeks to maintain the measures issued by decree or ministerial order as provided under the *Public Health Act*.

Recommendation 2

The FIQ and FIQP recommend that section three be removed from the bill, which allows the government to amend a decree or order.

Chapter 3 – The end of the public health emergency... Except for health network staff

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“This bill does not contain any measures that restrict the lives of Quebecers. [...] at this very moment, in fact, the only measure left for the population is mask wearing. It’s the only public measure left.”⁷ That is what the Health and Social Services Minister said at the time Bill No. 28 was tabled. However, the end of the public health emergency extends far beyond imposing mask wearing and the vaccine passport. The crisis that Quebec society just went through has had major repercussions on the health network and it is the population that is paying the price.

The Health and Welfare Commissioner,⁸ like the Ombudsperson,⁹ each confirmed in their respective reports that the government was ill prepared to face the crisis, that safe healthcare professional-to-patient ratios could have saved lives, especially in CHSLDs and that the lack of staff diminished the network’s capacity to handle the COVID-19 pandemic.

The health network was already in a deplorable state well before the pandemic, which in the end brought to light the vulnerability of the Quebec health and social services system. Healthcare professionals saw their rights violated. They had to fight to make institutions fulfil their obligations in terms of prevention and occupational health and safety, both for personal protective equipment (PPE) and safe organization of work. They were transferred to sectors where they were not trained to work, their annual vacations were cancelled, and they were offered premiums that were not negotiated and were subject to such restrictive conditions that they were largely inaccessible.

Because they felt abandoned by the government and their employer, many of them fled to private independent labour agencies in search of better working conditions.

Ending the state of emergency without holding a dialogue with the organizations that represent these workers only perpetuates, even worsens, the already dire state of healthcare professionals’ working conditions and the quality and safety of patient care. The Federations believe that the money

⁷National Assembly of Quebec. *Conférence de presse de M. Christian Dubé, ministre de la Santé et des Services sociaux — Annonce concernant l’état d’urgence de santé publique en Québec*, [Online], 2022, updated on March 16, 2022, [www.assnat.qc.ca/fr/actualites-salle-presse/conferences-points-presse/ConferencePointPresse-81849.html] (Consulted on March 25, 2022). (In French only)

⁸ Health and Welfare Commissioner. *The Duty to Do Things Differently - Executive Summary* [Online], January 2022. [https://www.csbe.gouv.qc.ca/fileadmin/www/2022/Rapportfinal_Mandat/CSBE-Resume_Exec_rapport_final_EN.pdf] (Viewed on March 15, 2022).

⁹ Protecteur du Citoyen. *Ombudsperson’s Special Report COVID-19 in CHSLDs during the first wave of the pandemic. Identify the causes of the crisis, act, remember*, [Online], November 23, 2021, [<https://protecteurducitoyen.qc.ca/sites/default/files/2021-11/final-report-first-wave-covid-19-chslds.pdf>] (Viewed on March 15, 2022).

invested to apply exceptional measures during the pandemic should from now on be used to rebuild the public health network over the long term.

While the public health emergency may be over for most of the population, for the health network staff, the pressure inherent to the resumption of activities, such as surgeries, is far from a thing of the past. The government will have to be proactive to prevent further burnout for healthcare professionals and their exodus to private employment agencies. It will also have to pro-actively promote full-time positions for nurses, licensed practical nurses, respiratory therapists and clinical perfusionists in the network. Retaining healthcare professionals through decrees and orders will no longer suffice. If they tolerated these injustices during the pandemic, it was out of solidarity for the population. But now that the emergency measures are lifted, the injustices they suffered and continue to suffer must be corrected immediately.

Instead of continuing to decree working conditions, the government would do better to use the powers its status bestows upon it to conduct a proper labour planning operation, to implement the safe ratios healthcare professionals and the population are asking for, and to put a permanent end to the disloyal competition of independent labour agencies. These measures are key to promoting the attraction and retention of healthcare professionals in the public network.

Recommendation 3

The Federations request that, in parallel with the end of the health emergency, the government:

- Draw up a proper labour plan for class 1 job titles;
- Implement safe healthcare professional-to-patient ratios;
- Put an end to using independent labour agencies in order to attract and retain healthcare professionals in the public health network.

Conclusion

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It's the end of the health emergency in Quebec but the government wants to extend its powers until the end of the year. If adopted as is, the bill would enable the Quebec government to keep its exceptional powers and to maintain all orders and decrees currently in force. At the National Assembly and to journalists, the government boasts that it has ended the state of emergency and that the only remaining measure is to wear a mask.

However, the government conveniently doesn't tell citizens that there is no solid plan to respond to the devastating effects of management during the pandemic. The health network is in a lamentable state, citizens do not have access to care within a reasonable timeline and the labour shortage, which the government worsened with the abusive use of mandatory overtime, is diminishing care quality.

For healthcare professionals, the ongoing anti-democratic way of managing with orders and decrees violates fundamental rights, including the right to collective bargaining. Certain decisions that bypassed employee associations, in particular in order 2021-071, are unjustifiable, even during a health emergency. Giving itself the power to maintain them without an agreement, when the pandemic no longer justifies the absence of negotiations, leads to a risk of going off track. This insidious tendency dangerously resembles an authoritarian drift.

The consequences of this type of governance will not stop on December 31, 2022. There will be long term effects on the already weak trust between healthcare professionals and their employer, the government. Recognition for the need for employee associations to participate in determining working conditions so they can count on support to rebuild the network is long overdue.

As labour organizations that defend the rights and interests of nurses, licensed practical nurses, respiratory therapists and clinical perfusionists, it is the FIQ and FIQP's duty to oppose sections 2 and 3 of Bill No. 28.

Recommendations

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