

**COMPLIANCE WITH THE CHARTER OF HUMAN RIGHTS AND FREEDOMS
OF THE OBLIGATION TO REGISTER FOR DIRECT DEPOSIT
AS A CONDITION TO RECEIVE THE SOLIDARITY TAX CREDIT**

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PLEASE NOTE:

This document is a translation of "*Conformité à la Charte des droits et libertés de la personne de l'inscription obligatoire au dépôt direct comme condition du versement du crédit d'impôt pour la solidarité*" adopted at the 572th meeting of the Commission, held on October 14, 2011 under resolution COM-572-5.1.1.

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INTRODUCTION

The *Association coopérative d'économie familiale de l'Estrie* (ACEF-Estrie) has asked the Commission des droits de la personne et des droits de la jeunesse (hereinafter "the Commission") to examine the compliance of the obligation to register for direct deposit as a condition to receive the solidarity tax credit with the Charter of Human Rights and Freedoms¹ (hereinafter "the Charter").² This newly defined tax credit by Revenu Québec took effect on July 1, 2011, thereby replacing the QST credit, the property tax refund and the credit for individuals living in northern villages.

This analysis is the result of that request and falls within the Commission's mandate under section 71 of the Charter of Human Rights and Freedoms. The Commission must promote and uphold the principles enunciated in the Charter, in particular, with respect to legislative provisions which might prove to be discriminatory.³ It may also receive and examine requests concerning human rights and freedoms, and then publicly present its observations and⁴ make the appropriate recommendations.

First, we will recall what the new solidarity tax credit established by the Québec government in the 2011-2012 budget is, as well as the conditions for eligibility imposed to receive it, in particular, the obligation to register for direct deposit. Then, we will comment on this obligation to register for direct deposit considering section 10 of the Charter⁵ in relation to the right to equality. In conclusion, we will recall the importance of reinforcing the economic and social rights guaranteed by the Charter, and make the appropriate recommendations.

¹ *Charter of Human Rights and Freedoms*, R.S.Q., c. C-12, s. 71.

² A letter dated January 13, 2011 sent by ACEF-Estrie to the Commission's Protection and Defense of Rights Department, to which was attached a copy of a letter sent by the same association to the ministre des Finances Raymond Bachand, concerning this issue.

³ Charter, *supra* note 1, s. 71 (6).

⁴ *Id.*, s. 71 (7).

⁵ Section 10: "Every person has a right to full and equal recognition and exercise of his human rights and freedoms, without distinction, exclusion or preference based on race, colour, sex, pregnancy, sexual orientation, civil status, age except as provided by law, religion, political convictions, language, ethnic or national origin, social condition, a handicap or the use of any means to palliate a handicap. Discrimination exists where such a distinction, exclusion or preference has the effect of nullifying or impairing such right."

1 CONTEXT

1.1 The Solidarity Tax Credit

The solidarity tax credit (hereinafter "solidarity credit") was introduced under section 88 of the *Loi donnant suite au discours sur le budget du 30 mars 2010 et à certains autres énoncés budgétaires* (An Act giving effect to the Budget Speech delivered on March 30, 2010 and to certain other budget statements),⁶ adopted on February 16, 2011, and came into force the following day. This section modified sections 1029.8.116.12 and following of the *Taxation Act*,⁷ so the solidarity credit would replace three existing credits: the QST credit, the property tax refund and the tax credit for individuals living in northern villages.

This new tax credit, which falls within the *2010-2015 Government Action Plan for Solidarity and Social Inclusion*, more particularly under the third thrust, fostering the economic self-sufficiency of underprivileged individuals⁸, is "for low-income households or households of modest means". Its purpose is to maintain and increase their purchasing power, namely by mitigating the effect of tax hikes and user fee increases on their income.

The various objectives pursued by the government in establishing the solidarity credit can be identified by reading "*Additional Information on the Budgetary Measures*"⁹ the parliamentary debates concerning the budget speech of 2010-11¹⁰ and the clause-by-clause study of Bill-117, *Loi donnant suite au discours sur le budget du 30 mars 2010 et à certains autres énoncés*

⁶ *Loi donnant suite au discours sur le budget du 30 mars 2010 et à certains autres énoncés budgétaires*, S.Q. 2011, c. 1.

⁷ *Taxation Act*, R.S.Q., c. I-3.

⁸ MINISTÈRE DE L'EMPLOI ET DE LA SOLIDARITÉ SOCIALE, *2010-2015 Government Action Plan for Solidarity and Social Inclusion*, Québec, Gouvernement du Québec, 2010, pp. 7, 15 and 31.

⁹ MINISTÈRE DES FINANCES, *Additional Information on the Budgetary Measures 2010-2011*, Québec, Gouvernement du Québec, 2010, p. A.9.

QUÉBEC, NATIONAL ASSEMBLY, *Journal des débats de la Commission des finances publiques*, (1st session, 39th legislature, April 15, 2010, "Poursuite du débat sur le discours du budget", 6 p.m. (Mr. Bachand); Québec, *National Assembly, Journal des débats de la Commission des finances publiques*, 1st session, 39th legislature, April 20, 2010, "Poursuite du débat sur le discours du budget", 10:10 a.m. (Mr. Bachand).

budgetaires.¹¹ Among these objectives, the following are particularly emphasized: "To better meet the needs of low-and-middle-income households"¹², and provide them with "more assistance to reduce QST and housing-related costs, while acknowledging that inhabitants of northern villages must bear a higher cost of living than their counterparts elsewhere."¹³ and "considerably simplify the tax assistance for low-and middle-income households"¹⁴.

The solidarity credit is paid monthly and each payment will be made within the first five days of the month,¹⁵ taking into account the changes occurring over the course of a year, such as births, unions, separations,¹⁶ etc. The first payment was made in July 2011.

The amount of the solidarity credit is determined by adding the amounts granted under each of its components (the QST component, the housing component, and the living in a northern village component). However, it is not necessary to be entitled to the three components to be eligible.¹⁷ The full amount of the credit is granted to individuals whose family income is of \$30,875 or less. The amount granted will then gradually be reduced in order to total \$0 when the net family income reaches \$47,625 for a single person and \$55,406 for a couple with two children.

It should be noted that, since the different components of the solidarity credit were incorporated in July 2011, the calculation of the amounts granted will differ somewhat for the coming year. As of January 2012, the amounts granted on an annual basis may be summarized as follows:

QUÉBEC, NATIONAL ASSEMBLY, *Journal des débats de la Commission des finances publiques* 1st session, 39th legislature, February 8, 2011, "Clause-by-clause study of Bill-117, Lois donnant suite au discours sur le budget du 30 mars et à certains autres énoncés budgétaires", 3:30 p.m. (Mr. Bachand).

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ MINISTÈRE DES FINANCES, *supra* note 9, p. A.21.

¹⁶ *Id.*, p. A.22.

¹⁷ REVENU QUÉBEC, "Solidarity Tax Credit", *Programs and Credits*, [online].
http://www.revenuquebec.ca/en/citoyen/credits/credits/credit_remb/solidarite/default.aspx
(consulted on June 10, 2011).

- Between \$265 and \$530 for the QST component;
- Between \$515 and \$625 for the housing component, to which an additional amount of \$110 per child is added;
- And, between \$790 and \$1,580 for the individuals living in a northern village component, to which an additional amount of \$339 per child is added.

An applicable reduction rate determined according to the family income is then added to these sums. Moreover, the government specifies that the solidarity credit will be automatically indexed each year in accordance with the percentage change in the overall average Québec consumer price index without alcoholic beverages and tobacco products (QCPI-WAT).¹⁸

The Commission believes that the purpose of the solidarity credit, the objectives set out by the government when it instituted it, and the amounts involved allow it to conclude that this new tax credit is a financial assistance measure susceptible of ensuring an acceptable standard of living within the meaning of section 45 of the Charter. We will return to this in the second part of this opinion.

1.2 Individuals targeted by the Solidarity Tax Credit

Revenu Québec reports that the new solidarity credit could affect 2.7 million households monthly.¹⁹ These households include, in particular, last resort financial assistance recipients, the elderly and low-income workers.

Since the primary focus of this opinion is on the requirement to register for direct deposit associated with the solidarity credit, it should be noted that according to the most recent data on the subject, at least 3% of Canadians do not have a bank account. This percentage stands at approximately 8% among individuals living in a household whose revenue is \$25,000 or less.²⁰

¹⁸ MINISTÈRE DES FINANCES, *supra* note 9, p. A.20

¹⁹ REVENU QUÉBEC, *supra*, note 17.

²⁰ Association coopérative d'économie familiale (ACEF) du Centre de Montréal, *The highs and lows of access to banking services in Canada*, a report prepared for Industry Canada, Montréal, June 26, 1996, pp.17 to 23; it should be noted that, given the biased nature of telephone surveys, people living in poverty are probably under-represented in the cited study, which suggests that the estimate of 8% is conservative. These data are mentioned in: Jerry Buckland, Ph.D., *Strengthening Banking in Inner-cities: Practices & Policies to Promote Financial Inclusion for Low-Income Canadians*, Manitoba, Canadian Centre for Policy Alternatives, March 2008, p. 3;

According to the figures made public by the ministère des Finances, approximately 10% of social assistance recipients are in this situation,²¹ which represents approximately 50,000 people. Moreover, 30% of recipients had not registered for direct deposit in March 2011.²² The Québec Ombudsman's conservative estimates suggest that "at least 20,000 other households covered by this credit do not have a bank account."²³

We use here to the expression "financial exclusion" which "describes individuals who do not receive bank services – those who do not have any relationship at all with a mainstream financial institution."²⁴ As detailed below, this type of exclusion is likely to concern individuals for whom the solidarity credit was intended:

"Consequences of financial exclusion include higher costs for basic banking transactions and short term credit, increased exposure to unregulated and predatory practices, a vulnerability to uninsured risks, and reduced take-up, use, and benefit from government services and benefits."²⁵

[Emphasis added]

We will return to this in the second part of this opinion.

Union des consommateurs, *Lettre au ministre des Finances, M. Raymond Bachand*, Montreal, December 20, 2010.

²¹ Cited in LE PROTECTEUR DU CITOYEN, *Lettre au ministre des Finances, M. Raymond Bachand*, Québec, February 23, 2011, p.1; On this issue, see also: GRANT, Michael, *Canada's Social Payment Disbursement System and the Financial Services Sector. Moving to a Mandatory Direct Deposit Scheme: The Case of Alberta*, Ottawa, Task Force on the Future of the Canadian Financial Services Sector, September 1998, p.13.

²² CABINET DU MINISTRE DES FINANCES, *Lettre à M^{me} France Latreille, Directrice de l'Union des consommateurs*, Québec, March 2, 2011, p. 3.

²³ LE PROTECTEUR DU CITOYEN, *supra* note 21, p. 2.

²⁴ GOVERNMENT OF CANADA, FINANCIAL CONSUMER AGENCY OF CANADA and SOCIAL AND ENTERPRISE DEVELOPMENT INNOVATIONS (SEDI), *Why Financial Capability Matters: Synthesis Report on Canadians and Their Money: A National Symposium on Financial Capability held on June 9-10, 2005 in Ottawa*, Ottawa, 2005, p. 8.

²⁵ *Id.*

1.3 Eligibility requirements

Four general eligibility requirements must be met to qualify for the solidarity credit, namely to be at least 18 years of age, be a resident of Québec, hold a recognized status (citizen, permanent or temporary resident, or hold a temporary resident permit²⁶ or refugee) and not be imprisoned. However, persons in regard to whom another individual received for the given month an amount in respect of the refundable tax credit for child assistance are excluded.²⁷

Moreover, under sections 1029.8.116.16 and 1029.8.116.18 of the Taxation Act,²⁸ any individual eligible for the solidarity credit for a given month must file his application no later than 11 months after the end of the particular month with respect to his fiscal declaration or by means of the form prescribed for that purpose.

Therefore, it is mandatory to file an income tax return and to fill out Schedule D to obtain the solidarity credit. The same eligibility requirements applied with respect to the repayment of the QST credit,²⁹ the credit for individuals living in northern villages,³⁰ and the property tax refund.³¹ However, if filling an income tax return may seem obvious to most people, many people living in poverty do not have the required living conditions to perform such an exercise. Until recently, the government of Québec proved flexible in this regard, allowing social assistance recipients to receive the QST credit with their social benefit cheque, without having to file an income tax return. According to the information obtained, this option would no longer be available for the solidarity credit. It should be noted however, that, in all cases, an income tax return had to be filed to receive the federal government's property tax refund and GST credit.

²⁶ Within the meaning of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27.

²⁷ MINISTÈRE DES FINANCES, *supra*, note 9, p. A.10.

²⁸ *Taxation Act*, *supra*, note 7, s. 1029.8.116.16 and 1029.8.116.18.

²⁹ *Id.*, s. 1029.8.105 and *Individual and Family Assistance Regulation*, R.R.Q., c. A-13.1.1, s. 66.

³⁰ *Taxation Act*, *supra*, note 7, 1029.8.114.

³¹ *Act respecting Property tax refund*, R.S.Q., c. R-20.1, ss. 15 and 17.

Finally, any individual wishing to receive the solidarity credit must file a document "in which the individual agrees that the payment of the amount be made by direct deposit in a bank account held at a financial institution having an establishment situated in Québec."³² We will look more closely at mandatory registration for direct deposit, as it is the main subject of this opinion, in the following pages.

1.4 Requirement of registration for direct deposit as a condition of receiving the solidarity tax credit

As mentioned above, section 1029.8.116.16 of the Taxation Act³³ provides that any individual wishing to receive the solidarity credit is obliged to register for direct deposit. The 2010-11 Income Tax Guide defines this requirement as follows:

"To receive this tax credit, you must be registered for direct deposit. If you have not already registered, you can do so:

- online on our website at www.revenu.gouv.qc.ca;
- by enclosing with your return a blank cheque marked "VOID" on the front and bearing your name and social insurance number (the cheque must be from a Québec branch of a financial institution);
- by completing a Request for Direct Deposit (form LM-3-V) and enclosing it with your return."³⁴

Similar information is available on Revenu Québec's website under "Solidarity Tax Credit".³⁵

Revenu Québec first explains this requirement by pointing out the benefits of direct deposit. Under this heading, it cites that it eliminates the risk of cheques being lost or stolen, and guarantees that, even in the case of a postal strike, illness, absence from home, or moving, the amounts in question will be deposited in your account.³⁶ Moreover, this measure will produce

³² *Taxation Act*, *supra*, note 7, s.1029.8.116.16.

³³ *Id.*

³⁴ GOUVERNEMENT DU QUÉBEC, *Guide. Income Tax Return 2010*, Québec, gouvernement du Québec, 2010, p. 13-14.

³⁵ REVENU QUÉBEC, *supra*, note 17.

³⁶ REVENU QUÉBEC, "Register for Direct Deposit or Make Changes to Direct Deposit Information", *Information Centre*, [Online]. http://www.revenuquebec.ca/en/centre-information/depot_direct.aspx (consulted on June 10, 2011).

savings for the State. The ministre des Finances Raymond Bachand believes this will generate an annual reduction of administrative costs of about \$20 million per year.³⁷

It should be noted that such a requirement for registration for direct deposit already exists: since 2007 to receive advance payments of the tax credit for home-support services for seniors, and since 2008, for advance payments of tax credits respecting the work premium (work premium, adapted work premium, supplement to the work premium) and, since 2009 for advance payments of the tax credit for childcare expenses. There is however a significant difference: the required registration for direct deposit to receive the advance payment of a benefit does not, in any way, prevent an individual who refuses to comply with this requirement from receiving the benefit to which he or she is entitled. In the case of the solidarity credit, the very payment of the amounts in question is dependent upon the requirement to register for direct deposit, not only that the amounts are paid in advance.

1.5 A measure raising questions from several organizations

The requirement to have an account at a financial institution and to register for direct deposit to receive the solidarity credit has been criticized by many human rights and consumer protection organizations such as the Québec Ombudsman,³⁸ *the Union des consommateurs*³⁹ and the *Ordre des travailleurs sociaux et des thérapeutes conjugaux et familiaux du Québec*,⁴⁰ as well as many anti-poverty organizations such as the *Collectif pour un Québec sans pauvreté*,⁴¹ the

³⁷ NATIONAL ASSEMBLY, *supra*, note 11. SALVET, Jean-Marc, "Nouveau crédit d'impôt pour la solidarité : le dépôt direct pose problème", *Le Soleil*, March 2, 2011.

³⁸ The Québec Ombudsman is appointed and accountable before the National Assembly. Its purpose is to prevent and correct errors or injustices committed against any individual or group of individuals in connection with a Québec government ministry or agency, or an establishment in the health and social services network, namely by making recommendations to the ministry, agency, or establishment concerned.

³⁹ A non-profit organization composed of the Associations coopératives d'économie familiale (ACEF), the Association des consommateurs pour la qualité dans la construction (ACQC) and individual members. Its purpose is to promote and defend consumers' rights, by specifically considering the interests of households of modest means.

⁴⁰ A professional body concerned with individuals in need of social services, which promotes principles of social justice, namely by recommending social and economic policies on behalf of the disadvantaged and in need of protection.

⁴¹ A group of Québec organizations and regional groups fighting poverty on a cross-sectoral basis, based on the right to equality, as well as economic, social and cultural rights advocacy.

*Front commun des personnes assistées sociales du Québec (FCPASQ)*⁴² and the *Front d'action populaire en réaménagement urbain (FRAPRU)*.⁴³

In December 2010, the *Union des consommateurs* wrote to the Québec ministre des Finances saying that it was [TRANSLATION] "unacceptable, even unlawful, to force taxpayers to register for direct deposit in order to receive sums to which they are entitled".⁴⁴ The *Union* pointed out that approximately 8% of low-income individuals do not have an account in a bank or a *caisse populaire* (credit union), either because they do not have access to one, or because they refuse to have one. Moreover, [TRANSLATION] "some individuals with a bank account may not want to register for direct deposit for all sorts of reasons,"⁴⁵ namely because of the costs incurred, for security reasons, or to avoid compensation payments.

In February 2011, the *Ordre des travailleurs sociaux et des thérapeutes conjugaux et familiaux du Québec* also asked the ministre des Finances to review [TRANSLATION] "its decision to proceed with the payment of the solidarity tax credit solely by direct deposit." It also requested that [TRANSLATION] "the credit be paid by cheque, as is the case with the QST credit."⁴⁶ According to the *Ordre*, this measure is "a major injustice" and [TRANSLATION] "will entail negative consequences for several thousands of individuals who are entitled to the credit based on the eligibility requirements, but who will be deprived because they do not hold a bank account."⁴⁷ In addition, the *Ordre* pointed out that:

[TRANSLATION]

"[...] social workers regularly witness individuals on social assistance being denied the chance to open a bank account in financial institutions across Québec. Because of the coming into force of this measure by Revenu Québec, thousands of individuals living in

⁴² A non-profit organization whose purpose is to advocate for the economic, social and cultural rights of persons excluded from the labour market and living in poverty.

⁴³ A social-housing advocacy group, which is also involved in urban development issues, and the fight against poverty as well as social rights advocacy.

⁴⁴ UNION DES CONSOMMATEURS, *supra*, note 20.

⁴⁵ *Id.*

⁴⁶ ORDRE DES TRAVAILLEURS SOCIAUX ET DES THÉRAPEUTES CONJUGAUX ET FAMILIAUX DU QUÉBEC, *Lettre au ministre des Finances, M. Raymond Bachand*, Montréal, February 21, 2011.

⁴⁷ *Id.*

poverty will not be able to receive the tax credit they would normally be entitled to on the grounds of their low income."⁴⁸

The position of the Québec Ombudsman is the same. On February 23, 2011, the institution also reacted to the establishment of the new solidarity credit. Even though the tax credit was not scheduled to come into force before July 2011, the Québec Ombudsman received some 264 complaints about it by February 18, 2011, which increased to 404 by March 1st. In a letter to the ministre des Finances, the Québec Ombudsman, Ms. Raymonde Saint-Germain, indicated that she subscribed to "the principle of encouraging citizens to register for direct deposit to receive the solidarity tax credit." She said: "this safe solution is advantageous to the public and also reduces the government's administrative costs, which is in the collective interest."⁴⁹ However, this did not prevent her from expressing concerns about the requirement to register for direct deposit to obtain the solidarity credit.

"I am concerned, however, about the difficulties arising from the fact that registration for direct deposit will be a criterion for eligibility, when we know that many people have no bank accounts and that it can be very difficult or even impossible to open an account, especially for people whose credit file has already been rejected."⁵⁰

The Québec Ombudsman indicated that households eligible for the solidarity credit, will inevitably include Québec's least privileged citizens, often with little education or even functionally illiterate, subject to reduced mobility, and many of whom are socially isolated.⁵¹

Based on these considerations, the Québec Ombudsman made the following three recommendations to the ministre des Finances:

1. Establish a mechanism that will ensure that the least privileged citizens, including social assistance beneficiaries, who do not have an account with a financial institution can claim the solidarity tax credit on a monthly basis;
2. Allow citizens to retroactively obtain this tax credit when they file their income tax return;

⁴⁸ *Id.*

⁴⁹ QUÉBEC OMBUDSMAN, *supra*, note 21, p. 1.

⁵⁰ *Id.*, p. 2.

⁵¹ *Id.*

3. Allow direct deposit of the solidarity tax credit to any account in a recognized financial institution, even if it is not a Canadian charter bank or a *caisse populaire* located in Québec.

The following describes the ministerial reaction to the requests of these organizations to date.

1.6 Possible exceptions to the rule for individuals with no bank account?

Faced with objections to the requirement to register for direct deposit to receive the solidarity credit led the ministère des Finances responded to several letters which it had received, and undertook a series of meetings with financial institutions and "social groups"⁵² namely, the *Collectif pour un Québec sans pauvreté*, the *Front commun des personnes assistées sociales*, the *Front d'action populaire en réaménagement urbain*, the *Réseau d'aide aux personnes seules et itinérantes* de Montréal and the *Union des consommateurs*.

In a letter dated March 2, 2011, the office of the ministère des Finances wrote the following to the *Union des consommateurs*:

[TRANSLATION]

"[...] although the formalities to meet in order to open an account at a financial institution are simple, the government is aware that some people, for reasons beyond their control, will not be able to meet them.

That is why Revenu Québec will take all necessary measures to ensure that individuals in this situation can benefit from the solidarity tax credit. It goes without saying that last resort financial assistance recipients will receive special attention.

However, individuals who, by choice, refuse to open an account in a financial institution, or to register for direct deposit, will not benefit from any exceptional measure."⁵³

The ministre des Finances also made this distinction between individuals who do not have a bank account by choice, and those who are unable to open one, in the parliamentary debates about the clause-by-clause study of Bill-117.⁵⁴ At that time, he had committed himself to arranging for social assistance recipients who could not open an account in a bank recognized

⁵² NATIONAL ASSEMBLY, *supra*, note 11.

⁵³ OFFICE OF THE MINISTER OF FINANCE, *supra*, note 22, p. 4.

⁵⁴ NATIONAL ASSEMBLY, *supra*, note 11

in Québec to be able to benefit from the solidarity credit, namely under section 36.1 of the Tax Administration Act. The provision reads as follows:

"36.1 The Minister may, on the conditions he determines, waive the filing of a prescribed form, prescribed information, supporting document or any other document the filing of which would otherwise be required.

However, the Minister retains the right to revoke his waiver and to require the filing of any information or document referred to in the first paragraph within such time as he may determine."⁵⁵

However, this section does not create any obligation for the Minister. It is rather a discretionary power concerning a decision that he may review at any time.

It should be noted that the registration for direct deposit requirement to receive the solidarity credit was discussed in April 2011 during the ministère de l'Emploi et de la Solidarité sociale's study of the appropriations for 2011-2012, community action component. When questioned on this measure, the ministre de l'Emploi et de la Solidarité sociale, Julie Boulet, did not make the distinction made by her Finance colleague between individuals who could not open a bank account and those who did not want to do so. She rather explained that the government's strategy is twofold. First, the government wishes to inform and to make as many people as possible aware of the new solidarity credit and the requirement to register for direct deposit in order to receive it, so that as many people as possible can register. However, she admitted that a portion of the individuals concerned by the solidarity credit could not benefit from direct deposit "for all sorts of reasons, which are often personal."⁵⁶ Ms. Boulet pointed out that:

[TRANSLATION]

"[...] those who will not be able to register for direct deposit, whether by choice, by taste or for any other reason [...] will also be entitled to the solidarity tax credit and they may receive a cheque by mail, as was the case with social insurance benefits."⁵⁷

⁵⁵ *Tax Administration Act*, R.S.Q., c. A-6.002, s. 36.1.

⁵⁶ QUÉBEC, NATIONAL ASSEMBLY, *Journal des débats de la Commission des finances publiques*^{2nd} session, 39th legislature, April 19, 2011, "Étude des crédits budgétaires 2011-2012 du ministère de l'Emploi et de la Solidarité sociale, volet Action communautaire", 10:30 (Ms. Boulet).

⁵⁷ *Id.*

She also specified that Revenu Québec was "working" with such agencies as *Accueil Bonneau* and *Action-Réinsertion Sac-à-dos* in order for the homeless to receive the solidarity credit payment.⁵⁸

Some media have noted that the government has "backtracked" on the requirement to register for direct deposit in relation to the solidarity credit.⁵⁹

However, the government of Québec is still disseminating the same information to this day. Revenu Québec still indicates on its website, in opinions of assessment sent to taxpayers, or in the broader context of the advertising campaign organized in this regard, that registration for direct deposit to receive the solidarity credit is mandatory. It is even mentioned in bold characters in several places on the ministère du Revenu's website, namely:

- on the page explaining what the solidarity credit is: "To receive the credit, **you must be registered for direct deposit**";
- on the page concerning registration for direct deposit: "You **must** be registered for direct deposit to claim the solidarity tax credit [...]";
on the ministère's virtual information centre: "Direct deposit makes sense because it [...] guarantees that, even if there is a postal strike or you are sick or away from home, the following will be deposited into your account [...] as of July 2011, (to be entitled to the credit, you are **required** to be registered for direct deposit [...])";
- on the page explaining QST credit for low-income individuals: "To receive solidarity tax credit payments, you **must** be registered for direct deposit";
- as well, in the online guide to the income tax return: "it is the only way you can receive payments of the solidarity tax credit, **since registration for direct deposit is a prerequisite for receiving the credit.**"⁶⁰ [indicated in bold in the text]

⁵⁸ *Id.*

⁵⁹ See in particular: CLOUTIER, Jean-François, "Crédit d'impôt pour la solidarité: Québec recule", *Argent Canoe*, April 26, 2011, [online].
<http://argent.canoe.ca/lca/affaires/quebec/archives/2011/04/20110426-181312.html> (Consulted on June 15, 2011).

⁶⁰ REVENU QUÉBEC, "Your refund", *Guide to the Income Tax Return (electronic version)*, [Online].
http://www.revenuquebec.ca/en/citoyen/impots/guide/presentation/votre_remboursement.aspx (Consulted on June 15, 2011).

Only one section of Revenu Québec's website indicates that individuals with no bank account may contact the Agence du Revenu.⁶¹ However, when the number indicated was called, a voice recording mentioned from the outset that "you must register for direct deposit in order to receive the solidarity credit". The two customer service agents at Revenu Québec with whom the Commission was able to speak, told us that registration is required to receive the solidarity credit.⁶² Even if they were aware that some information regarding the establishment of potential exceptional measures could have been circulated, they had not received any instructions or specific directive in this regard. They were also not in a position to confirm whether social assistance recipients would be able to receive the solidarity credit by cheque as of July 2011.

It should be noted that a representative of Revenu Québec subsequently called the Commission back to clarify that, in the ministère's current guidelines concerning the solidarity credit aimed at encouraging recipients to register for direct deposit, Revenu Québec was trying [TRANSLATION] "to respect the taxpayer's wishes."⁶³ All claims concerning the need or wish to receive the sums by cheque are studied "on a case-by-case basis" and, if necessary, referred to the director. The Revenu Québec agent admitted that there were still [TRANSLATION] "things to clarify" and [TRANSLATION] "decisions to make" in this regard. [TRANSLATION] "Some questions remain unanswered" and all issues will not be resolved by the beginning of July 2011, at which time the solidarity credit will come into force. She did not know if other information campaigns aimed specifically at individuals who cannot, or do not want to, register for direct deposit would be launched.

Finally, the Revenu Québec representative confirmed to the Commission that the flexibility, from which social assistance recipients benefited under the QST credit, even without filing an income tax return, would no longer apply to the solidarity credit. Filing an income tax return and Schedule D are a condition *sine qua non* of receiving the solidarity credit.

⁶¹ REVENU QUÉBEC, *supra*, note 17, (Consulted on June 15, 2011).

⁶² We called Revenu Québec's customer service at the number indicated for individuals who wish to receive the solidarity credit, but who do not hold a bank account, on June 15, 2011: REVENU QUÉBEC, "Information – Citizens", *Citizens*, [Online]. http://www.revenuquebec.ca/en/nous_joindre/citoyens/default.aspx (Consulted on June 15, 2011).

⁶³ The author of these lines, having left her contact information with one of the customer service agents in order to get more answers, received a call from a representative of the same office on the following day, June 16, 2011

Moreover, the Commission notes the information published in the newspaper, *Le Soleil*, on June 22, 2011 in which Mr. Bachand mentioned that "after receiving two letters reminding them of the requirement to register for direct deposit to receive the credit, 85% of individuals who have requested the credit have registered for direct deposit. Only those who are incapable of having a bank account will be able to receive their payment in the form of a cheque."⁶⁴

2 THE DISCRIMINATORY NATURE OF THE MEASURE

The requirement to register for direct deposit to receive the solidarity credit for recipients who are entitled to it raises, among others, the issue of the measure's discriminatory character. In view of the context elements established in the first part of this opinion, we will first examine whether the definition of such a requirement to receive a financial assistance measure constitutes discrimination within the meaning of section 10 of the Charter, principally on the basis of social condition. It will also be examined according to a contextualized analysis of the grounds for discrimination at issue, namely in relation to disability, sex and to ethnic or national origin.

Moreover, since the right to equality is not considered as an independent right under the Québec Charter, but as a mode of exercising another right under the Charter,⁶⁵ we will analyze the obligation to register for direct deposit in light of the right to measures of financial assistance susceptible of ensuring an acceptable standard of living for all persons in need and their families, and the right to dignity provided for under sections 45 and 4 of the Québec Charter, respectively.

⁶⁴ TANGUAY, Louis, "Crédit d'impôt pour la solidarité : Lévis hérite de 200 nouveaux emplois", *Le Soleil*, June 22, 2011.

⁶⁵ See in particular: *Commission scolaire St-Jean-sur-Richelieu v. Commission des droits de la personne du Québec*, [1994] R.J.Q. 1227 (C.A.); *Québec (Ville de) v. Commission des droits de la personne*, [1989] R.J.Q. 831 (C.A.).

2.1 Prohibition of discrimination

The Supreme Court of Canada defines the notion of prohibited discrimination as:

"[...] a distinction which, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, has an effect which imposes disadvantages not imposed upon others or which withholds or limits access to advantages available to other members of society."⁶⁶

More simply, there is discrimination in the benefit of a guaranteed right under the Charter when the three elements provided for under section 10 are met, namely:

- A distinction, exclusion or preference;
- Based on race, colour, sex, pregnancy, sexual orientation, civil status, age except as provided by law, religion, political convictions, language, ethnic or national origin, social condition, a disability or the use of any means to palliate a disability;
- Which has the effect of nullifying or impairing the right to full and equal recognition and exercise of a human right or freedom.⁶⁷

2.1.1 A distinction, exclusion or preference

It is recognized that the distinction, exclusion or preference at issue can be indirect or as a result of prejudicial effect. This is the case when [TRANSLATION] "a person engages in a conduct, practice or rule which seems neutral at first, and applies to everyone but based on a prohibited ground, has a discriminatory effect on an individual or group which imposes disadvantages not imposed upon others."⁶⁸ Therefore, it is not necessary for a distinction based on a prohibited ground to be established "on its face."⁶⁹ On the contrary, a seemingly neutral

⁶⁶ *Andrews v. Law Society of British Columbia*, [1989] 1 S.R.C. 143, 174-175.

⁶⁷ See in particular: *Commission scolaire régionale de Chambly v. Bergevin*, [1994] 2 S.C.R. 525; *Forget v. Quebec (Attorney General)*, [1988] 2 S.C.R. 90; *Johnson v. Commission des affaires sociales*, [1984] C.A. 61.

⁶⁸ BRUNELLE, Christian, "Les droits et libertés dans le contexte civil", in *Collection de droit du Barreau du Québec*, vol. 7, *Droit public et administratif*, Cowansville, Éditions Yvon Blais, 2010, p. 57.

⁶⁹ *Ontario Human Rights Commission v. Simpsons-Sears*, [1985] 2 S.C.R. 536. See also: *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3.

measure may have a discriminatory effect on an individual or group when, for example, this measure imposes "penalties, or restrictive conditions not imposed on other members of the community"⁷⁰ because of their social condition.

This is also the case with respect to the requirement to register for direct deposit to receive the solidarity credit. This measure, which, *a priori*, appears to be the same for all concerned, imposes a particular burden on individuals who, because of their poverty or homelessness in particular, or because of their health condition, do not have a bank account. However, as discussed in the first part of this opinion, this tax credit is intended for low-income individuals, who in a significantly higher proportion in relation to the population as a whole, do not have a bank account. Moreover, it should be noted that the requirement to register for direct deposit only relates to the solidarity credit. As mentioned above, if some tax credits can be received through advance payments by registering for direct deposit, the solidarity credit is the only one for which the very payment of the amounts in question is conditional on registration for direct deposit.

In both cases, the requirement to register for direct deposit for those covered by the solidarity credit in order to receive a tax credit to which they are entitled constitutes "a restrictive condition not imposed on other members of the community" as intended by the Supreme Court of Canada. It should also be noted that it is not necessary that all members of a particular group suffer prejudice in order to conclude that a measure is discriminatory⁷¹ any more than it is necessary to establish the intent to discriminate or to be prejudicial.⁷² The discriminatory effect is sufficient.

⁷⁰ *Id.*

⁷¹ *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504; *Westmount v. Attorney General of Quebec*, [2001] R.J.Q. 2520 (C.A.); *Commission des droits de la personne et des droits de la jeunesse v. Yazbeck*, REJB 2001-25320 (T.D.P.Q.).

⁷² *Desroches v. Commission des droits de la personne du Québec*, [1997] R.J.Q. 1540 (C.A.); *Lachine General Hospital Corporation v. Attorney General of Québec*, [1996] R.J.Q. 2804 (C.A.); *Québec (Ville de) v. Commission des droits de la personne*, [1989] R.J.Q. 831 (C. A.) (application for leave of appeal before the Supreme Court dismissed (S.C.C. 1989-09 -28), 21495).

2.1.2 Prohibited grounds of discrimination to take into consideration

A Social condition

In this case, the prohibited ground is first and foremost social condition. As of 1978, Justice Tôt established that within the meaning of the Québec Charter, social condition refers to:

"[...] the rank, place, position that a person holds in our society, through birth, income, level of education, occupation; all the circumstances and events that mean a person or group has a certain status or position in society."⁷³

The guidelines set out by the Commission on the subject refer to this definition.⁷⁴ They state that the criterion of social condition listed in section 10 of the Charter refer to the rank, social position or class attributable or attributed to an individual, mainly as a result of his or her level of income, occupation and education.⁷⁵ Social condition therefore is an objective dimension, namely the economic class by which individuals are categorized according to the market power reflected by their income, occupation or education. There is also a subjective dimension to it, which rather refers to the value attributed to individuals based on their social representations, stereotypes – whether positive or negative – associated, among others, with their education, occupation or income. However, it should be noted that a social condition can be temporary state.⁷⁶

Practically, the courts have recognized that being on social assistance or on the poverty threshold must be considered a social condition.⁷⁷ Returning to the notion of financial exclusion, it should be noted, as indicated in a statement by the Law Commission of Ontario that may be

⁷³ *Commission des droits de la personne v. Centre hospitalier St-Vincent de Paul de Sherbrooke*, C.S. St-François, n° 450-05-000356-78, September 7 1978, J. T. Tôt; in particular referred to in *Johnson v. Commission of social affairs*, *supra*, note 67.

⁷⁴ COMMISSION DES DROITS DE LA PERSONNE, *Lignes directrices sur la condition sociale*, March 1994.

⁷⁵ *Id.*

⁷⁶ *Johnson v. Commission des affaires sociales*, *supra*, note 67.

⁷⁷ See in particular: *Québec (Attorney General) v. Lambert*, [2002] R.J.Q. 599 (C.A.) (application for leave to appeal before the Supreme Court dismissed (S.C.C. 2003-04-17), 29227); *Whittom v. Commission des droits de la personne*, [1997] R.J.Q. 1823 (C.A.); *Commission des droits de la personne et des droits de la jeunesse v. Huong Thu Do*, EYB 2005-86206 (T.D.P.Q.); *Commission des droits de la personne et des droits de la jeunesse v. Bernier*, EYB 2005-82766 (T.D.P.Q.); *Commission des droits de la personne et des droits de la jeunesse du Québec v. Fondation Abbé Charles-Émile Gadbois*, REJB 2001-25722 (T.D.P.Q.).

transposed in part for our purposes: "Most importantly, financial exclusion is closely associated with low income."⁷⁸

Based on the fact that the proportion of individuals living in poverty who do not have a bank account is higher than the Canadian average, often because they have been refused opening one, the requirement to register for direct deposit to receive the solidarity credit is discriminatory on the grounds of social condition. Thus, individuals living in poverty are excluded in a higher proportion than the Canadian average, from a measure to which they would be entitled based on socioeconomic characteristics. We agree with Professor Bernheim, that [TRANSLATION] "various studies demonstrate [...] the non-use of social solidarity rights and mechanisms to which vulnerable populations would be eligible, namely due to the necessary administrative matters."⁷⁹ By introducing a requirement for registration of direct deposit to receive the solidarity credit, thousands are deprived of a benefit, not only to which they are entitled, but also of which they are in dire need.

It should be noted that the prohibited ground for distinction does not have to be the only, or even the main cause of the impugned measure.⁸⁰ It must only have contributed⁸¹ to it, which is obviously the case in this matter.

⁷⁸ LAW COMMISSION OF ONTARIO, *Fees for Cashing Government Cheques*, Toronto, November 2008, p. 32.

⁷⁹ BERNHEIM, Emmanuelle, "Repenser la vulnérabilité sociale en termes d'égalité réelle: une contribution des droits de la personne", in *La protection des personnes vulnérables*, Service de la formation permanente du Barreau du Québec, Cowansville, Yvon Blais, 2011, p. 188, 196; see also: WARIN, Philippe, "Une approche de la pauvreté par le non-recours aux droits sociaux", (2009) *Lien social et Politiques*, n° 61, 137-146.

⁸⁰ See in particular: *Commission des droits de la personne et des droits de la jeunesse v. Montréal (Ville de) (Service de police de la ville de Montréal) (SPVM)*, 2008 QCTDP 23; *Commission des droits de la personne et des droits de la jeunesse v. Pâtisserie La Sept-Iloise Inc.*, REJB 2003-45408 (T.D.P.Q.); *Commission des droits de la personne et des droits de la jeunesse v. Courrex Courrier Inc.*, D.T.E. 97T-10 (T.D.P.Q.); *Commission des droits de la personne du Québec v. Systèmes internationaux de Fret Dillon Reid Inc.*, D.T.E. 96T-961 (T.D.P.Q.).

⁸¹ *University of British Columbia v. Berg*, [1993] 2 S.C.R. 353.

B Poverty and the intersectionality of prohibited grounds of discrimination

Recent data concerning accessibility to basic banking services are relatively scarce and, for the most part, only broken down on the basis of income. However, given the cumulative insecurities that individuals living in poverty must deal with, a more in-depth investigation would undoubtedly also establish the discriminatory nature of the requirement to register for direct deposit in order to receive the solidarity credit under other grounds, or even by intersecting social condition with other grounds of discrimination listed under section 10 of the Charter, such as disability, sex, or ethnic or national origin. It is recognized that poverty affects more particularly some segments of the population: people with health issues,⁸² women, and more particularly, elderly women and single-parent families headed by women,⁸³ Aboriginals,⁸⁴ and refugees or immigrants.⁸⁵

⁸² MARMOT M., "Social Inequalities in Mortality: The Social Environment", in R.G. WILKINSON, (ed.), *Class and Health: Research and Longitudinal Data* London, Tavistock Publications, 1986, pp. 21-33; MARMOT, M. and WILKINSON, R. G., *Social Determinants of Health*, New York, Oxford University Press, 1999; McDONOUGH, P., "Histories of Poverty and Self-rated Health Trajectories", in *Journal of Health and Social Behavior*, 2003, 44 (2), pp. 198-214; McDONOUGH, P., SACKER, A. and WIGGINS, R., "Time on my Side? Life Course Trajectories of Poverty and Health", in *Social Science & Medicine*, 2005, 61(8), pp. 1795-1808; PHIPPS, S., *The Impact of Poverty on Health*, Ottawa, Canadian Institute for Health Information, 2003; RAPHAEL, D., *Social Determinants of Health: Canadian Perspectives* Toronto, Canadian Scholars Press Inc., 2004; REID, C., *The wounds of exclusion: Poverty, women's health, and social justice*, Edmonton, Qualitative Institute Press, 2004; REID, C. and HÉBERT, A., "Welfare moms and welfare bums: Revisiting poverty as a social determinant of health", *Health Sociology Review*, 2005, 14(2), pp. 161-173; COMMISSION DES DROITS DE LA PERSONNE ET DES DROITS DE LA JEUNESSE, Mémoire à la Commission des affaires sociales de l'Assemblée nationale sur le document de consultation: Garantir l'accès : un défi d'équité, d'efficience et de qualité, March 2006; RAPHAEL, D., *Poverty and Policy in Canada: implications for health and quality of life*, Toronto, Canadian Scholars' press, 2007; DE KONINCK, Maria, *Santé : Pourquoi ne sommes-nous pas égaux? Comment les inégalités sociales de santé se créent et se perpétuent*, Québec, gouvernement du Québec, March 20, 2008; FROHLICH, K.L., DE KONINCK, Maria, DEMERS, Andrée, and BERNARD, Paul (ed.), *Les inégalités sociales de santé au Québec*, Montréal, Les Presses de l'Université de Montréal, 2008; MIKKONEN, J., and RAPHAEL, D., *Social Determinants of Health. The Canadian Facts*, Toronto, York University School of Health Policy and Management, 2011.

⁸³ INSTITUT DE LA STATISTIQUE DU QUÉBEC, *Taux de faible revenu, MPC, caractéristique des familles et des personnes seules*, Québec, 2000-2008, [online], http://www.stat.gouv.qc.ca/donstat/societe/famls_mengs_niv_vie/revenus_depense/revenus/mod_1_ef_1_10_13.htm (Consulted on September 12, 2011); CONSEIL NATIONAL DU BIEN-ÊTRE SOCIAL, *The Dollars and Sense of Solving Poverty*, Ottawa, National Council on Welfare, Autumn 2011; BIBI, Sami, and DUCLOS, Jean-Yves, *La pauvreté au Québec et au Canada*, Montréal, Centre interuniversitaire sur le risque, les politiques économiques et l'emploi, June 2009; WALLIS, Maria A., and KWOK, Siu-ming, *Daily Struggles: The Deepening Racialization & Feminization of Poverty in Canada*, Canadian Scholars press, 2008; BRADY, David and KALL, Denise, "Nearly Universal, but somewhat Distinct: The Feminization of Poverty in Different Western Democracy: 1969-2000", (2008) 37 *Social science research* 3, 967-1007; BESSAÏH, Nesrine, in collaboration with CATELLIER, Josette, *La pauvreté : une décision politique : analyse féministe de la pauvreté à l'intention des*

And, what about individuals with more than one of the above characteristics? Thus, the question arises about the interaction of the various prohibited grounds of discrimination, or of the [TRANSLATION] "confluence of several discrimination factors."⁸⁶ As indicated by Sirma Bilge and Olivier Roy, the one-dimensional view of discrimination leaves little room for an [TRANSLATION] "approach based on overlapping grounds of discrimination."⁸⁷ At stake is the

animatrices des centres de femmes, Montréal, R des centres de femmes du Québec, 2007; BEZANSON, Kate, *Gender, the State and Social Reproduction: Household Insecurity in Neo-Liberal Times*, Toronto, University of Toronto Press, 2006; MAXWELL, Judith, *Working for Low Pay*. Presentation to Alberta Human Resources and Employment December 4, 2002. Ottawa, Canadian Policy Research Networks, 2002; VOSKO, Leah, "Re-thinking Feminization: Gendered Precariousness in the Canadian Labour Market and the Crisis in Social Reproduction", Robarts Canada Research Chairholders Series, April 11, 2002, York University, Toronto, Ontario; DAVIS, Lorraine, McMULLIN, Julie Ann, and AVISON, William R., *Social Policy, Gender Inequality and Poverty*, Ottawa, Status of Women Canada, 2001.

⁸⁴ MAKING FIRST NATION POVERTY HISTORY COMMITTEE, *The State of the First Nation Economy and the Struggle to Make Poverty History*, Toronto, Assembly of First Nations, March 2009; FIRST NATIONS SOCIOECONOMIC FORUM, *First Nations' Socioeconomic Development Action Plan, Acting now...for the future. Working Document, Mashteuiatsh*, First Nations Socioeconomic Forum, October 2006

⁸⁵ INSTITUT DE LA STATISTIQUE DU QUÉBEC, *Taux de faible revenu, MPC, caractéristiques des particuliers de 16 ans et plus, Québec, 2000-2008*, [Online], http://www.stat.gouv.qc.ca/donstat/societe/famls_mengs_niv_vie/revenus_depense/revenus/mod1_p_1_10_13.htm (Consulted on September 29, 2011); ANTONIUS, Rachad and ICART, Jean-Claude, "Les profils de pauvreté : un outil pour mesurer les inégalités affectant les minorités racisées au Québec", in LABELLE, Micheline and REMIGGI, Frank W. (dir.), *Inégalités, racisme et discriminations : Regards critiques et considérations empiriques, Excerpts taken from Symposium Les multiples dimensions des inégalités du racisme et des discriminations*, Montréal, Chaire de recherche en immigration, ethnicité et citoyenneté, June 2009, 77; WALLIS, Maria A. and KWOK, Siu-ming, supra note 82; PICOT, Garnett, HOU, Feng and COULOMBE, Simon, *Chronic Low Income and Low-income Dynamics Among Recent Immigrants*, Ottawa, Statistics Canada, January 2007; MINISTÈRE DE L'IMMIGRATION ET DES COMMUNAUTÉS CULTURELLES, *La pleine participation à la société québécoise des communautés noires, Document de consultation*, Québec, Gouvernement du Québec, August 2005; ANDERSON J., "La racialisation de la pauvreté", Canadian Council on Social Development, in *Séminaire scientifique annuel de l'Observatoire international sur le racisme et les discriminations*, Montréal, Canadian Council on Social Development, June 2005.

⁸⁶ COMMISSION DES DROITS DE LA PERSONNE ET DES DROITS DE LA JEUNESSE, *Profilage racial et discrimination systémique des jeunes racisés*, March 2011, p. 36.

⁸⁷ BILGE, Sirma et ROY, Olivier, "La discrimination intersectionnelle : la naissance et le développement d'un concept et les paradoxes de sa mise en application en droit antidiscriminatoire", (2010) 25 *Can. J.L. & Soc.* 51, 51-52. See also: SHEPPARD, Colleen, "Grounds of Discrimination: Towards an Inclusive and Contextual Approach.", published in *Les 25 ans de la Charte québécoise*, Cowansville, Éditions Yvon Blais, 2000, p. 91; CRENSHAW, Kimberlé, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics", (1989) *Univ. of Chicago Leg. Forum* 139.

need to [TRANSLATION] "consider the interaction of grounds of discrimination".⁸⁸ As stated by the Ontario Human Rights Commission, "this approach allows the particular experience of discrimination, based on the confluence of grounds involved, to be acknowledged and remedied."⁸⁹ Justice L'Heureux-Dubé adopted a so-called contextualized or intersectional analysis of discrimination, in her dissenting opinion in *Mossop*.⁹⁰ She stated that:

"It is increasingly recognized that categories of discrimination may overlap, and that individuals may suffer historical exclusion on the basis of both race and gender, age and physical handicap, or some other combination. The situation of individuals who confront multiple grounds of disadvantage is particularly complex [...]. Categorizing such discrimination as primarily racially oriented, or primarily gender-oriented, misconceives the reality of discrimination as it is experienced by individuals."⁹¹

It is also the case in this analysis given how, for several individuals living in poverty, social condition overlaps with other grounds of discrimination and in this way, multiplies obstacles caused by the requirement of registration for direct deposit to receive the solidarity credit.

For example, the connection between poverty and poor health is today well-known and widely documented.⁹² Thus, [TRANSLATION] "the greater the disadvantage, the more individuals and families might not be able to afford basic health conditions, such as food, clothing and shelter."⁹³ In other words: [TRANSLATION] "The poorer the individual, the greater the risk of being sick and dying young. The most powerful element associated with illness and a life of poor quality turns out to be the socioeconomic status."⁹⁴

However, it should be noted that studies show that the interaction with which we are concerned here is first established by social position toward health. Thus:

⁸⁸ *Id.*, p. 66.

⁸⁹ ONTARIO HUMAN RIGHTS COMMISSION, *An Intersectional Approach to Discrimination: Addressing Multiple Grounds in Human Rights Claims*, Discussion Paper, October 9, 2001, p. 3.

⁹⁰ *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554.

⁹¹ *Id.*, pp. 645-646.

⁹² See note 82.

⁹³ *Id.*

⁹⁴ GOUVERNEMENT DU QUÉBEC, *Riches de tous nos enfants. La pauvreté et ses répercussions sur la santé des jeunes de moins de 18 ans. Troisième rapport national sur l'état de santé de la population du Québec*, Québec, gouvernement du Québec, 2007, p. 41.

[TRANSLATION]

"While it is true that serious health problems and physical or intellectual disabilities lead many individuals to poverty, this causal link is of little importance; in most cases, poverty has an impact on health."⁹⁵

Professor Maria De Koninck points out that: [TRANSLATION] "[...] living at the bottom of the social scale is really what makes people ill, rather than the illness which caused the downward social mobility."⁹⁶ However, the outcome is the same, and persons with disabilities declare personal incomes which are significantly lower than those declared by persons without disabilities. The more a person's disability is deemed serious, the greater the risk that the person will live in poverty. As reported by the Institut de la Statistique du Québec:

[TRANSLATION]

"Almost half of persons with disabilities aged 15 years and over (46%) reported a personal income of less than \$15,000 in 2005, compared to 34% of persons without disabilities. By contrast, approximately 41% of the latter earned a total income of at least \$30,000, compared to 21% of persons with disabilities."⁹⁷

As Professor Christopher McAll suggests:

[TRANSLATION]

"The link between social inequalities and mental and physical health is very present in the scientific literature, but understanding inequalities and their impact on health remains limited, particularly regarding discrimination and stigmatization, which constitute the core of inequalities and their replication."⁹⁸

Therefore, it is in light of this contextual evidence that we emphasize the importance of taking into consideration that physical or mental disabilities may more particularly strike individuals living in poverty targeted by the solidarity credit, thereby complicating the situation with which one must come to terms in implementing this measure. Thus, the Commission endorses the

⁹⁵ *Id.*, p. 43.

⁹⁶ DE KONINCK M., *supra*, note 82, p. 2.

⁹⁷ INSTITUT DE LA STATISTIQUE DU QUÉBEC, *Vivre avec une incapacité au Québec, Un portrait statistique à partir de l'Enquête sur la participation et les limitations d'activités de 2001 et 2006*, Québec, gouvernement du Québec, 2010, p. 100.

⁹⁸ McALL, Christopher, "Transfert des temps de vie et 'perte de la raison': l'inégalité sociale comme rapport d'appropriation", in FROHLICH, Katherine (dir.), *Les inégalités sociales de santé au Québec*, Montréal, Les Presses de l'Université de Montréal, p. 87.

statement made by the Québec Ombudsman, to whom it seemed "inevitable that some of our least privileged citizens who would otherwise be eligible for the solidarity tax credit, will not benefit from it due to a physical or mental disability or to a refusal to be allowed to open a bank account with a financial institution."⁹⁹

One should keep in mind, that within the meaning of section 10 of the Charter, the notion of disability must [TRANSLATION] "be interpreted according to a multidimensional approach with emphasis on human dignity rather than on the biomedical condition."¹⁰⁰ As Christian Brunelle states:

[TRANSLATION]

"Not only will the courts take into account an individual's biomedical condition, but they will also go beyond this single criterion to integrate social factors into their analysis."¹⁰¹

A disability "may be the result of a physical limitation, an ailment, a social construct, a perceived limitation or a combination of all of these factors."¹⁰² Moreover, this notion of disability has been extended to physical or mental disabilities, whether they are actual or perceived, permanent or temporary.¹⁰³

That being said, in the present framework, while the solidarity credit measure raises questions of law particularly targeting individuals living in poverty, it is not about dealing with the disability on its own or even adding the grounds of social condition and disability, but rather to understand that the interaction between the two is likely to create specific conditions of discrimination. The same can be said for the grounds of sex and ethnic or national origin.

⁹⁹ QUÉBEC OMBUDSMAN, *supra* note 21.

¹⁰⁰ LAFLAMME, Anne-Marie, "L'obligation d'accommodement confère-t-elle aux personnes handicapées un droit à l'emploi?" in 62 *Rev. du B.* 125, p. 141; in reference to *Montréal (City) v. Commission des droits de la personne et des droits de la jeunesse* [2000] 1 S.C.R. 665.

¹⁰¹ BRUNELLE, C., *supra*, note 68, p. 62.

¹⁰² *Montréal (City) v. Commission des droits de la personne et des droits de la jeunesse du Québec* *supra*, note 100.

¹⁰³ *Id.*

2.1.3 The discriminatory prejudicial effects arising from the obligation to register for direct deposit to receive the solidarity tax credit

As we have already mentioned, the right to equality, which prohibits discrimination on the grounds mentioned in section 10, is not considered as an independent right. It is rather a method of particularizing the various rights and freedoms recognized by the Charter and therefore must be examined within this framework. Regarding the prejudicial effects to the right to equality of the requirement to register for direct deposit analyzed in this opinion, the discriminatory effects of the measure must be considered more particularly with respect to the right to measures of financial assistance and the right to the safeguard of dignity, respectively guaranteed under sections 45 and 4 of the Charter. In the following paragraphs we will take a closer look at the prejudicial effects of the exercise of these two rights guaranteed by the Charter.

A The right to measures of financial assistance

The requirement to register for direct deposit first raises the issue of equally benefiting from any measure of financial assistance to which every person in need has a right, for himself and his family, pursuant to section 45 of the Charter. With respect to economic and social rights provided for by the Charter, this provision provides that:

"45. Every person in need has a right, for himself and his family, to measures of financial assistance and to social measures provided for by law, susceptible of ensuring such person an acceptable standard of living."¹⁰⁴

As mentioned from the outset, the purpose of the solidarity credit, its objectives as stated by the government upon its creation, and the amounts involved, lead to the conclusion that the new tax credit is a measure of financial assistance susceptible of ensuring an acceptable standard of living within the meaning of section 45 of the Charter. It is indeed a measure [TRANSLATION] "prescribed by law",¹⁰⁵ established "to better meet the needs of low and middle-income households",¹⁰⁶ which provides them with "more"¹⁰⁷ financial assistance.

¹⁰⁴ Charter, *supra* note 1, s. 45.

¹⁰⁵ *Loi donnant suite au discours sur le budget du 30 mars 2010 et à certains autres énoncés budgétaires*, *supra* note 6.

¹⁰⁶ REVENU QUÉBEC, *supra* note 9, p. A.9.

It must be acknowledged that the courts have so far shown a certain reservation in implementing the economic and social rights guaranteed under sections 39 to 48 of the Charter. We will return to this in the third chapter of this opinion. However, the absence of preponderance of these provisions over other laws must not restrain the analysis of a discriminatory situation within the meaning of section 10 of the Charter. The existing interaction between the right to equality and economic and social rights has been described as follows by the Human Rights Tribunal:

[TRANSLATION]

"[...] if the Charter permits the exercise of the right to free public instruction to be affected by various legislative restrictions, and indeed it suffers from certain restrictions [...] it prohibits the limitations that, in the development of this right, produce a discriminatory effect with regard to one of the grounds listed in section 10.

Moreover, it is to be inferred that if section 40 cannot, when taken in isolation, benefit from the effect of the rule of precedence set out in section 52, it can in a certain manner do so indirectly where the recourse in which it is invoked in a principal capacity also involves the right to equality, which profits from the protection of the precedence clause."¹⁰⁸

These comments, although originally intended to analyze a situation with discriminatory effects under section 40 of the Charter, are likely to be applied to all economic and social rights guaranteed by the Charter. The Human Rights Tribunal followed the same reasoning in an analysis of the right to fair and reasonable working conditions guaranteed under section 46 of the Charter.¹⁰⁹

Thus, if the courts are, at best, reluctant to impose positive duties on states, solely based on economic and social rights guaranteed by the Charter, this hesitation has been set aside when it comes to exercising one of those rights with full equality.

This jurisprudence is consistent with Québec's international commitments on the issue. As

¹⁰⁷ *Id.*

¹⁰⁸ *Commission des droits de la personne v. Commission scolaire de St-Jean-sur-Richelieu*, [1991] R.J.Q. 3003, 3037 (T.D.P.), confirmed by the Court of Appeal: [1994] R.J.Q. 1227 (C.A.).

¹⁰⁹ *Lambert v. Québec (ministère du Tourisme)*, 1997 R.J.Q. 726 (T.D.P.). The decision was reversed on appeal, but for another reason: [2002] R.J.Q. 599 (C.A.).

stated by the United Nations' Committee on Economic, Social and Cultural Rights, "[g]uarantees of equality and non-discrimination should be interpreted, to the greatest extent possible, in ways which facilitate the full protection of economic, social and cultural rights."¹¹⁰ In fact:

"Non-discrimination and equality are fundamental components of international human rights law and essential to the exercise and enjoyment of economic, social and cultural rights. Article 2, paragraph 2, of the International Covenant on Economic, Social and Cultural Rights (the Covenant) obliges each State party "to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."¹¹¹

What if this reasoning were to be applied in this case?

The Supreme Court has already established that section 45 of the Charter was not intended to make the adequacy of a social assistance regime's specific provisions subject to judicial review.¹¹² However, the implementation of a measure such as the solidarity credit, as per the meaning of section 45, cannot contain a prejudicial effect based on a prohibited ground of discrimination. Consequently, we refer once again to the right to equality provided for under section 10 of the Charter, which forms part of the rights that take precedence over all other legislative or regulatory provisions by virtue of section 52 of the same Charter.

The Commission has no doubt that associating a requirement to register for direct deposit to the solidarity credit entails a prejudicial effect on individuals who, because of their social condition, often associated with another ground, do not want to or cannot open a bank account. The discrimination that still underlies certain banking practices is well documented, and this emphasizes the unfair nature of the requirement imposed by Revenu Québec.

For some of these individuals, it is simply impossible to open a bank account because financial

¹¹⁰ COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, *Substantive issues arising in the implementation of the International Covenant on Economic, Social and Cultural Rights, General comment no. 9: The domestic application of the Covenant*, E/C.12/1998/24, Geneva, United Nations, December 3, 1998, par. 15.

¹¹¹ COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, *Non-discrimination in economic, social and cultural rights. General Comment No. 20*, E/C.12/GC/20, Geneva, United Nations, July 2, 2009, par. 2.

¹¹² *Gosselin v. Quebec (Attorney General)*, [2002] 4 S.C.R. 429.

institutions deny them access to such services. For others, barriers to opening an account are both formal and informal, and vary according to the situations and places, but, they often amount to the same result. These barriers include:

- Banking fees which are often too high in relation to the income at issue, despite the *February 14, 1997 Agreement Between the Federal Government and the Major Banks on Access* as well as the adoption in 2003 of the *Access to Basic Banking Services Regulations*¹¹³;
- The requirement to maintain a minimum balance in the account which is often a condition for lower service costs;
- The imposition of various conditions for opening an account or accessing banking services, such as the requirement to show several identity cards considered adequate;
- The accessibility to bank services that is becoming more and more difficult in rural communities and disadvantaged urban areas,¹¹⁴ affecting not only individuals living in poverty, but more particularly elderly or disabled persons, as well as those living in remote communities, especially those affected by the northern villages component of the solidarity credit;
- Seizures and compensation for various debts, of which the deposited funds are sometimes the subject;
- Barriers related to the reception, the lack of information, or to the insecurity toward new technologies that particularly affect the elderly and the illiterate, etc.

The analysis carried out by the Law Commission of Ontario, during an extensive study on the best measures to ensure that recipients of public funds have free or low cost access to these funds, proves relevant to our analysis:

¹¹³ *Access to Basic Banking Services Regulations*, SOR/2003-184. It should be recalled that, since 1978, the government of Québec forbids any financial institution, any alternative financial service, and any merchant to charge for exchanging or cashing a cheque issued by the government. *Consumer Protection Act*, R.S.Q., c. P-40.1, s. 251.

¹¹⁴ A study published by *Option consommateurs* reported that banks have closed branches located in disadvantaged areas of large cities and small rural communities to the benefit of new suburbs: OPTION CONSOMMATEUR, *Les portes closes*, Montréal, 1998, p. 125.

"While the number of unbanked or underbanked in Canada is relatively low, for these individuals, financial exclusion may have a significant impact. Individuals who are unbanked or underbanked may pay high costs for basic financial transactions, are vulnerable to unregulated or predatory practices, and miss out on access to services and benefits that would be of material benefit to them. The cumulative effects of financial exclusion may ultimately reinforce social and economic marginalization."¹¹⁵

[References omitted]

The Ontario Commission added that:

"One must keep in mind that those living in deep poverty are generally in a day-to-day struggle for survival. Long-term planning is difficult and the focus is most often on immediate and urgent needs. A bank account may well seem superfluous to those who rarely, if ever, have money left at the end of the month. The very fact of poverty limits choices: for example, while in the long-term it may be wiser to open a bank account, the immediate cost of obtaining identification may make that option unattainable in practical terms."¹¹⁶

As for the obligation to register for direct deposit that we are concerned with, victims of financial exclusion are in fact deprived of the solidarity credit, a measure to which they are otherwise entitled. This requirement, though intended to fight poverty and social exclusion, contributes to the reinforcement of their social and economic marginalization, and entails important discriminatory effects.

B The right to the safeguard of dignity

Still in accordance with the right to equality guaranteed under section 10 of the Charter, the requirement to register for direct deposit combined with a measure particularly aimed at individuals living in poverty, also raises the issue of the right to the safeguard of their dignity.

The strong connection between the right to equality and the right to dignity has been established through several international human rights instruments. For example, in its preamble, the Universal Declaration of Human Rights states that:

"Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world

¹¹⁵ LAW COMMISSION OF ONTARIO, *supra* note 78, p. 23.

¹¹⁶ *Id.*, p. 56.

[...]."¹¹⁷

In addition, section 1 of the Declaration states that "all human beings are born free and equal in dignity and rights."¹¹⁸

The preamble of the International Covenant on Economic, Social and Cultural Rights (hereinafter the ICESCR) is to the same effect:

"Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Recognizing that these rights derive from the inherent dignity of the human person [...]."¹¹⁹

Relying heavily on international law, the preamble of the Québec Charter explicitly conveys the link between human dignity and the respect, promotion and protection of human rights.¹²⁰ The Charter establishes that all human beings are equal in worth and dignity, possessing intrinsic rights and freedoms designed to ensure their protection and development, and that recognition of their rights and freedoms constitute the foundation of justice and peace.

Madam Justice Wilson, writing for the Supreme Court, stated that "the idea of human dignity finds expression in almost every right and freedom guaranteed in the [Canadian] Charter".¹²¹ Some even see a causal link defining dignity as [TRANSLATION] "the right to have other rights".¹²² It was also established that:

¹¹⁷ *Universal Declaration of Human Rights*, General Assembly resolution 217 A (III), 3rd Sess., Supp. n° 13, UN Doc. A/810 (1948) 71.

¹¹⁸ *Id.*

¹¹⁹ *International Covenant on Economic, Social and Cultural Rights*, General Assembly resolution 2200 A (XXI) of December 16, 1966.

¹²⁰ See in particular: LAMARCHE, Lucie, "The 'Made in Québec' Act to Combat Poverty and Social Exclusion: The Complex Relationship between Poverty and Human Rights", in YOUNG, Margot, BOYD, Susan B., BRODSKY, Gwen and DAY, Shelagh (dir.), *Poverty, Rights, Social Citizenship and Legal Activism*, Vancouver, UBC Press, 2007, p.153.

¹²¹ *R. v. Morgentaler*, [1988] 1 S.C.R. 30.166.

¹²² BIOY, Xavier, *Le concept de personne humaine en droit public* coll. Nouvelle Bibliothèque de Thèses, Paris, Dalloz, 2003, p. 399.

[TRANSLATION]

"[...] a close causal link between, on the one hand, the notion of dignity and, on the other hand, the recognition of fundamental rights. Since human rights stem from human dignity, it implies that that the latter entails the former [...]."¹²³

Similarly, the Human Rights Tribunal has stated that dignity is [TRANSLATION] "a transcendental value to all rights and freedoms." It became a [TRANSLATION]"first principle of interpretation"¹²⁴ since it was set out in the preamble to the Charter.

The Québec legislator took it a step further by enshrining the right to dignity in the wording of section 4 of the Charter¹²⁵, prescribing that:

"Every person has a right to the safeguard of his dignity, honour and reputation."

This distinction must necessarily be acknowledged and given effect. Thus:

[TRANSLATION]

"If the preamble may infuse standards and interpretations, the principle of dignity it harbours essentially remains an 'incantation', i.e. it is 'not subject to judicialization'. However, the emancipation, or the mutation of this 'principle' into 'law' under section 4 paves the way for a remedy and a claim for compensation based on a violation of dignity itself."¹²⁶

[References omitted]

Therefore, the distinction is not intended to define the concept so much as its scope. Specifically focusing on defining the concept of dignity within the meaning of section 4 of the Charter, the Supreme Court wrote in *Syndicat national des employés de l'hôpital St-Ferdinand*:

"Having regard to the manner in which the concept of personal "dignity" has been defined, and to the principles of large and liberal construction that apply to legislation

¹²³ PROULX, Daniel, "Le concept de dignité et son usage en contexte de discrimination: deux Chartes, deux modèles", (2003) N.S. R. du B. 487, 491.

¹²⁴ *Commission des droits de la personne et des droits de la jeunesse v. Transport en commun La Québécoise inc.*, EYB 2002-34220 (T.D.P.), par. 31.

¹²⁵ See in particular: BRUNELLE, Christian, "La dignité dans la *Charte des droits et libertés de la personne*: de l'ubiquité à l'ambiguïté d'une notion fondamentale", (2006) N.S. R. du B. 143, 146.

¹²⁶ *Id.*, p. 169.

concerning human rights and freedoms, I believe that s. 4 of the Charter addresses interferences with the fundamental attributes of a human being which violate the respect to which every person is entitled simply because he or she is a human being and the respect that a person owes to himself or herself.

Moreover, in my opinion, because of the underlying concept of respect, the right to personal dignity, unlike the concept of inviolability, does not require that there be permanent consequences in order for interference with that right to be found. Thus, even a temporary interference with a fundamental attribute of a human being would violate s. 4 of the Charter."¹²⁷

Here, the concept of respect is fundamental. Furthermore, the Supreme Court confirmed that the Québec Human Rights Tribunal properly expressed the essence of the right to the safeguard of dignity when it wrote, in *Commission des droits de la personne du Québec v. Lemay*, that:

"Consequently, every human being has intrinsic value which makes him or her worthy of respect. For the same reason, every human being is entitled to recognition of the rights and freedoms of the person and to the fully equal exercise thereof."¹²⁸

A few years later, the Supreme Court outlined as follows the concept of dignity in the case of *Law*:

"Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society."¹²⁹

[Emphasis added]

Admittedly, the concept of dignity is abstract and ambiguous. Based on the leading cases on the subject, the jurisprudence acknowledges, however, that violation of dignity within the meaning of

¹²⁷ Québec (Public Curator) v. Syndicat national des employés de l'hôpital St-Ferdinand, [1996] 3 S.C.R. 211, par. 105.

¹²⁸ *Commission des droits de la personne du Québec c. Lemay*, T.D.P.Q. Abitibi, 1995-06-12, j. Sheehan, p. 5, cited in *Québec (Public Curator) v. Syndicat national des employés de l'hôpital St-Ferdinand*; *Id.*

¹²⁹ *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, par. 53; cited for the sole purpose of clarifying the scope and extent of the right to safeguard of dignity provided for under section 4 of the Québec Charter.

the Québec Charter occurs when a discriminatory situation namely contributes to hurt, humiliate, demoralize or exclude a targeted individual or group. It is also the case when a measure or action causing discrimination is based on stereotypes or reinforces the stereotypes.¹³⁰

Professor Christian Brunelle pointed out that, for him, the right to the safeguard of dignity within the meaning of section 4 of the Charter refers to at least two fundamental requirements, the first is respect (or safeguard), and the second is solidarity (or generosity).¹³¹ Thus, he said that:

[TRANSLATION]

"The requirement of *respect* compels human beings to respect, on the one hand their own dignity [...] and, on the other hand, the dignity of others [...].

[...]

To recognize others as equals, to consider them as similar, to treat them with respect, entails another obligation, the obligation of *solidarity*. Dignity thus condemns indifference in favour of a "duty of reciprocity."¹³²

In analysing the right to the safeguard of dignity under the right to equality guaranteed by section 10, the Commission considers that the requirement to register for direct deposit in order to receive the solidarity credit infringes in a discriminatory manner upon the right to safeguard of the dignity of individuals who cannot or do not want to open a bank account, by reason of their social condition itself, or the interaction of their social condition with another prohibited ground of discrimination.

More specifically, financial exclusion refers to the concepts of exclusion, stigmatization on the basis of stereotypes, and humiliation, all considered by jurisprudence as manifestations of a

¹³⁰ See in particular: *Québec (Attorney General) v. Lambert*, supra note 77; *Ordre des comptables généraux licenciés du Québec v. Québec (Attorney General)*, [2004] R.J.Q. 1164 (C.A.), par. 33; *Commission des droits de la personne et des droits de la jeunesse v. Latreille*, J.E. 2000-1082 (T.D.P.Q.), par. 40; *Commission des droits de la personne et des droits de la jeunesse v. Thu Do*, J.E. 2005-609 (T.D.P.Q.), par. 41; *Commission des droits de la personne et des droits de la jeunesse v. Bernier*, J.E. 2005-335 (T.D.P.Q.), par. 53; *Commission des droits de la personne et des droits de la jeunesse v. Dion*, J.E. 2008-744 (T.D.P.Q.), par. 86.

¹³¹ BRUNELLE, C., supra, note 125, p. 167.

¹³² *Id.*, p. 167-168.

discriminatory infringement of the right to dignity. It should be noted that the solidarity credit particularly targets low-income individuals for whom the amounts in issue are substantial. Practically however, the requirement to register for direct deposit has the effect of unfairly excluding such individuals from benefiting from a measure for who it is more specifically intended. They are put aside without consideration of their needs and capacities, which is nevertheless required by the respect of their right to dignity.¹³³ Thus, there is a risk that the situations of exclusion experienced by individuals one is trying to help, along with the resulting humiliation, will be aggravated.

Moreover, it must be generally recognized that the insufficiency or insecurity of income itself, with which the majority of individuals targeted by the solidarity credit are faced, jeopardizes the right to dignity.¹³⁴ Indeed, as previously pointed out by the Commission, the respect for human dignity and other fundamental rights cannot be conceived of without the effective exercise of economic and social rights for all, and without discrimination.¹³⁵ Hélène Tessier indicates that:

[TRANSLATION]

"Impediments to the exercise of rights, which derive from situations of exclusion related to poverty, appear [...] hard to reconcile with the undertakings made in human rights. The question arises as to whether these impediments are acceptable in societies that base the foundations of their democracy on the right to equality.

[...]

Where the right to equality is the subject of such deference in discourse, it is disturbing to see that the often definite marginalization the poorest have to endure is tolerated without being deemed a serious infringement of the principle of equality."¹³⁶

¹³³ *Law v. Canada (Minister of Employment and Immigration)*, *supra*, note 129.

¹³⁴ See in particular: COMMISSION DES DROITS DE LA PERSONNE ET DES DROITS DE LA JEUNESSE, *Mémoire à la Commission des affaires sociales de l'Assemblée nationale, Projet de loi n° 57, Loi sur l'aide aux personnes et aux familles*, September, 2004, p. 3.

¹³⁵ COMMISSION DES DROITS DE LA PERSONNE ET DES DROITS DE LA JEUNESSE, *Déclaration de la Commission des droits de la personne et des droits de la jeunesse sur la lutte contre la pauvreté et l'exclusion sociale. Assurer pleinement l'exercice de tous les droits humains: un enjeu fondamental pour lutter contre la pauvreté et l'exclusion sociale*, May 2010, p. 4.

¹³⁶ TESSIER, Hélène, "Pauvreté et droit à l'égalité : égalité de principe ou égalité de fait?", in *Développements récents en droit administratif*, Service de la formation permanente du Barreau du Québec, Cowansville, Éditions Yvon Blais, 1998, p. 45, 63-64.

The Commission has confirmed many times that poverty is a pressing problem with regard to human rights and freedoms in today's Québec¹³⁷ particularly with respect to the following:

- Poverty constitutes a major obstacle to the exercise and enjoyment of human rights and freedoms, including fundamental rights;
- Poverty is a denial of the ideals, values and commitments affirmed in this Charter;
- Poverty is especially a denial of the right to have recognized and enjoy, all rights and freedoms in conformity with section 10 of the Charter, without any discrimination based on social condition;
- Poverty also ignores one of the basic features of the Québec Charter: the recognition of economic and social rights;
- Finally, poverty is incompatible with the international instruments that have been ratified by Canada and adhered to by Québec, in particular, the International Covenant on Economic, Social and Cultural Rights.¹³⁸

Measures to fight poverty, such as the solidarity credit, should help remove the barriers facing individuals living in poverty from exercising of their rights. In this regard, the United Nations' Committee on Economic, Social and Cultural rights deplored that the "human rights" dimension is often absent from poverty eradication policies.¹³⁹ However, it is clear that the imposed requirement to register for direct deposit to receive the solidarity credit, a Québec policy to eradicate poverty, causes discriminatory prejudicial effects to human rights.

¹³⁷ COMMISSION DES DROITS DE LA PERSONNE ET DES DROITS DE LA JEUNESSE, *Statement issued by the Commission des droits de la personne et des droits de la jeunesse, Poverty is the Most Pressing Human Rights Issue in Today's Quebec*. Statement issued on the occasion of the World March of Women against poverty and violence against women, October 2000; Commission des droits de la personne et des droits de la jeunesse, *supra*, note 134.

¹³⁸ *Id.*

¹³⁹ COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, *Substantive issues arising in the implementation of the International Covenant on Economic, Social and Cultural Rights: Poverty and the International Covenant on Economic, Social and Cultural Rights, Statement adopted by the Committee on Economic, Social and Cultural Rights, on May 4, 2001, E/C.12/2001/10*, United Nations, Geneva, May 9, 2001; United Nations Development Programme, *Human Development Report 2000: Human Rights and Human Development*.

2.2 An inapplicable requirement

The Commission, in reaching the conclusion that the requirement to register for direct deposit to receive the solidarity credit could lead to a discriminatory effect for many within the meaning of section 10 of the Charter, must now refer to section 52 of the Charter in order to declare the legislative provision establishing this requirement inapplicable. This section provides as follows:

"No provision of any Act, even subsequent to the Charter, may derogate from sections 1 to 38, except so far as provided by those sections, unless such Act expressly states that it applies despite the Charter."¹⁴⁰

In the words of professors Henri Brun, Guy Tremblay and Eugénie Brouillet, it should be noted that section 52 of the Charter:

[TRANSLATION]

"[...] authorizes the declaration of unconstitutionality of acts and regulations which are incompatible with the individual rights set out under sections 1 to 38 of the Charter. Unless it can be interpreted and applied in accordance with the Charter, such a rule of law must be deemed unconstitutional, and therefore invalid, in whole or in part, or even completed or corrected."¹⁴¹

It should be noted that the solidarity credit was established under section 1029.8.116.12 and following included under Division II.17.2 of the Taxation Act¹⁴², and that no exemption from the Charter was provided therein. However, as noted in the above analysis, only the requirement to register for direct deposit as a condition to receive the solidarity credit is a violation of the right to equality guaranteed under section 10 of the Charter. This requirement to register for direct deposit was provided for under section 1029.8.116.16 of the Taxation Act:

"1029.8.116.16. The amount determined by the following formula is deemed, for a particular month that is subsequent to the month of June 2011, to be an overpayment of tax payable under this Part for a taxation year by an eligible individual in respect of the particular month, if the eligible individual makes an application to that effect in accordance with section 1029.8.116.18, if the individual has filed a document in which the individual agrees that the payment of the amount be made by direct deposit in a bank account held at a financial institution having an

¹⁴⁰ Charter, *supra*, note 1, s. 52.

¹⁴¹ BRUN, Henri, TREMBLAY, Guy and BROUILLET, Eugénie, *Droit constitutionnel*, 5^e édition, Cowansville, Éditions Yvon Blais, 2008, p. 1031.

¹⁴² *Taxation Act*, *supra*, note 7.

establishment situated in Québec and if the individual and, if applicable, the individual's cohabiting spouse at the beginning of the particular month file the document specified in section 1029.8.116.19 for the base year relating to the particular month [...]."¹⁴³

[Emphasis added]

However, section 52 of the Charter may involve only one part of a law.¹⁴⁴ The Commission does not wish to question the implementation of the solidarity credit, nor even the possibility of receiving it through direct deposit. The above-mentioned provision is only disputed insofar as its incompatibility with the Charter, which, in this case, concerns the obligatory character of the direct deposit.

3 THE IMPORTANCE OF REINFORCING THE SCOPE OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS

The analysis of a measure containing a discriminatory effect with regard to the exercise of a right guaranteed under section 45 of the Charter would not be complete without recalling the importance of economic and social rights guaranteed by the Charter. As pointed out by Professor Tétrault, [TRANSLATION] "the exercise of this 'right' [to measures of financial assistance] is subject to so many restrictions that it is still virtual, for the time being."¹⁴⁵

It is appropriate, however, to establish the scope of these rights beyond mere wishful thinking.

As the Québec Charter's 25 years were being celebrated, the Commission recalled that [TRANSLATION] "in 1975, when the bill that was to become the Charter was tabled, the Minister of Justice pointed out that economic and social rights signify more than the expression of a simple and good will,"¹⁴⁶ The need to reinforce the guarantee of the legal rights of economic and

¹⁴³ *Id.*, s.1029.8.116.16.

¹⁴⁴ BRUN, H., TREMBLAY, G. and BROUILLET, E., *supra* note 141, p.1004.

¹⁴⁵ TÉTRAULT, Robert, "Le droit à un niveau de vie décent", in BOSSET, Pierre and LAMARCHE, Lucie, *Droit de cité pour les droits économiques, sociaux et culturels. La Charte québécoise en chantier*, Cowansville, Éditions Yvon Blais, 2011, p. 207, 209.

¹⁴⁶ COMMISSION DES DROITS DE LA PERSONNE ET DES DROITS DE LA JEUNESSE, *Après 25 ans – La Charte québécoise des droits et libertés. Volume 1, Review of recommendations*, 2003, p. 17; citing ASSEMBLÉE NATIONALE, *Journal des débats*, November 12, 1974, p. 2744 (Mr. Jérôme Choquette).

social rights enshrined in the Charter in 1975 was one of the strongest consensuses to emerge from public consultations organized by the Commission to mark the 25th anniversary of the Charter.¹⁴⁷

However, it should be recalled that the Supreme Court of Canada has recognized the justiciability of economic, social and cultural rights. Madam Justice McLachlin, writing for the majority, stated in the above-mentioned *Gosselin* that "there can be no doubt that s. 45 purports to create a right."¹⁴⁸ The Court then explained that:

"While it is true that courts lack the power to strike down laws that are inconsistent with the social and economic rights provided in Chapter IV of the *Québec Charter*, it does not follow from this that courts are excused from considering claims based upon these rights. Individuals claiming their rights have been violated under the *Charter* are entitled to have those claims adjudicated, in appropriate cases. The *Québec Charter* is a legal document, purporting to create social and economic rights. These may be symbolic, in that they cannot ground the invalidation of other laws or an action in damages. But there is a remedy for breaches of the social and economic rights set out in Chapter IV of the *Québec Charter*: where these rights are violated, a court of competent jurisdiction can declare that this is so."¹⁴⁹

If the need to increase the effectiveness of economic and social rights must be reaffirmed, it would rather be due to the fact that they have no clear prevalence over laws and regulations, as opposed to other rights guaranteed under sections 1 to 38 of the Charter. Thus, beyond their justiciability, it is still imperative to guarantee the effectiveness of economic and social rights. Moreover, the Commission¹⁵⁰ has repeatedly reaffirmed this imperative, which must particularly go through the establishment of explicit primacy of these rights over other laws. Professors Samson and Brunelle went a step further in stating that the absence of prevalence explicitly guaranteed to economic and social rights under the Charter [TRANSLATION] "does not deprive

¹⁴⁷ *Id.*

¹⁴⁸ *Gosselin v. Quebec (Attorney General)*, *supra*, note 112, par. 87.

¹⁴⁹ *Id.*, par. 96.

¹⁵⁰ See in particular: COMMISSION DES DROITS DE LA PERSONNE ET DES DROITS DE LA JEUNESSE, *Statement issued by the Commission des droits de la personne et des droits de la jeunesse*, *supra*, note 137; COMMISSION DES DROITS DE LA PERSONNE ET DES DROITS DE LA JEUNESSE, *Mémoire à la Commission des affaires sociales de l'Assemblée nationale sur le Projet de loi n° 112, Loi visant à lutter contre la pauvreté et l'exclusion sociale*, September 2002; COMMISSION DES DROITS DE LA PERSONNE ET DES DROITS DE LA JEUNESSE, *supra*, note 134.

these rights of their quasi-constitutional status, which consequently gives them a prevalent status."¹⁵¹

In addition, the effective recognition of economic and social rights is consistent with international Human Rights instruments concerning human rights to which Québec has subscribed. As noted by the authors, Gwen Brodsky, Rachel Cox, Shelagh Day and Kate Stephenson:

"When the National Assembly adopted the *Québec Charter*, it clearly expressed a desire to establish a domestic law regime that reflects the principles and standards set forth in international law of human rights. Justice Robert (*Gosselin C.A.Q.*) and then Justice L'Heureux-Dubé (*Gosselin S.C.C.*) have exhaustively noted this in their respective dissents, in the following terms: 'Section 45 of the Québec Charter thus bears a very close resemblance to article 11 of the *International Covenant on Economic, Social and Cultural Rights*, which, as the Court of Appeal notes, para. 10 of the *Report on the Fifth Session* of the United Nations Committee on Economic, Social and Cultural Rights further specifies as containing: 'a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels [of subsistence needs and the provision of basic services]'. "¹⁵²

[References omitted]

For many decades, the Committee on Economic, Social and Cultural Rights "reiterated [...] that economic and social rights should not be downgraded to principles and objectives [...]" and that "concrete steps" must be taken to ensure that they are complied with, especially "through legislation or policy measures and the establishment of independent and appropriate monitoring and adjudication mechanisms."¹⁵³

In light of the jurisprudence, the issue of remedies for breach of economic and social rights also has to be discussed once again. As noted by Professor Robitaille:

¹⁵¹ SAMSON, Mélanie et BRUNELLE, Christian, "Nature et portée des droits économiques, sociaux et culturels dans la Charte québécoise : ceinture législative et bretelles judiciaires", dans Pierre BOSSET et Lucie LAMARCHE, *supra*, note 145, p. 19.

¹⁵² BRODSKY, Gwen, COX, Rachel, DAY, Shelagh and STEPHENSON, Kate, "Gosselin v. Québec (Attorney General)", (2006) 18 *RFD* 255, 304.

¹⁵³ COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, *Concluding observations of the Committee on Economic, Social and Cultural Rights: Canada*, E/C.12/1/Add.31, Geneva, United Nations, 1998, para. 57.

[TRANSLATION]

"To fully retain its normative principle, a legal standard must therefore be subject to mandatory sanctions, which is clearly not the case with social rights to the extent where the only possible remedy against their breach is a symbolic declaration with no direct legal effects."¹⁵⁴

The Commission is of the opinion that turning to the courts is not, and should not, be the only accessible means to ensure that the government respects its commitments made under the ICESCR. However, this means must be made available in the same way as any other means.

However, while it has generally agreed that an effective judicial remedy is essential for violations of civil and political rights, the idea is called into question most of the time for violations of economic and social rights. This differential treatment remains unjustified to this day.¹⁵⁵ On the contrary, States parties to the ICESCR "are to provide for legal remedies in two ways: through consistent interpretation of domestic law and through the adoption of legislative measures to provide legal remedies for violations of social and economic rights."¹⁵⁶

As for whether issues of resource allocation should remain within the jurisdiction of the political authorities and not of the courts, the jurisdictions conferred in light of the separation of powers principle should obviously be respected. However, we should acknowledge that "the courts are already involved in a wide range of issues which have significant financial implications."¹⁵⁷ Systematically excluding economic and social rights from the courts' jurisdiction for this reason therefore becomes "arbitrary and incompatible with the principle that the two sets of human rights are indivisible and interdependent."¹⁵⁸

¹⁵⁴ ROBITAILLE, David, "Les droits économiques et sociaux dans les relations État-particuliers après trente ans d'interprétation : normes juridiques ou énoncés juridiques symboliques?", (2006) Special thematic issue, *R. du B.* 455, 493.

¹⁵⁵ COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, *supra*, note 139, par. 10.

¹⁵⁶ ONTARIO HUMAN RIGHTS COMMISSION, *Human Rights Commissions and Economic and Social Rights*, p. 20.

¹⁵⁷ COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, *supra*, note 139, par. 10.

¹⁵⁸ *Id.*

4 RECOMMENDATIONS

The Commission is of the opinion, as have suggested other stakeholders, that it is useful to encourage the payment of various government benefits through direct deposit whenever possible. As previously pointed out, this type of service has many benefits, both economic and environmental, as well as in terms of ensuring the security of transactions. We believe that it is wise for the Québec government to encourage every individual in a position to do so to register for direct deposit voluntarily.

However, it must be recognized that the effectiveness of direct deposit programs is severely limited by persistent barriers preventing individuals living in poverty or with a disability from accessing basic financial services at a relatively higher percentage. Implementing such programs can only succeed if such barriers are taken into account and plans to eliminate them are put in place, in particular, by adequate rights-based policies to fight poverty.

Therefore, in light of the foregoing analysis, associating the payment of a benefit to a requirement to register for direct deposit that does not in any way take into account the needs of individuals appears inappropriate. On the contrary, we should rather try to understand why some recipients targeted by the measure refuse to use such a service, correct the source of the problem that prevents them from benefiting from such a measure, and, in any case, offer to each and every one of them all the relevant information and leave the choice of payment up to them.

Therefore, the recommendations the Commission wishes to make to Revenu Québec, the department responsible for implementing the solidarity credit, are two-fold. First, the situation requires a legislative amendment in order to render the terms of the solidarity credit compliant with the Charter. We recommend that:

- The Taxation Act¹⁵⁹ be amended so registration for direct deposit to receive the solidarity credit is no longer a requirement;

¹⁵⁹ *Taxation Act, supra*, note 7.

- Until legislative amendments are made, Revenu Québec waive the requirement to register for direct deposit to receive the credit of solidarity, both for individuals who cannot open a bank account and for those who do not wish to do so;
- Without delay, Revenu Québec make public and establish the measures that the ministre du Revenu promised to take so all individuals who do not have a bank account may benefit from the solidarity credit;
- And all measures taken in this regard be adapted to the needs and situation of the targeted individuals.

Second, it appears necessary to us that:

- Revenu Québec launch without delay an information campaign on the solidarity credit that would target all those likely to benefit from it.

In a broader context, and for the sake of consistency and clarity, it is also imperative that the Québec government, while respecting its jurisdiction, works to implement concrete measures to combat financial exclusion faced by a still too high proportion of the population.

CONCLUSION

In 1948, the Universal Declaration of Human Rights stated that poverty was a Human Rights issue.¹⁶⁰ One of the "central concerns" of the Committee on Economic, Social and Cultural Rights is that poverty "constitutes a denial of human rights."¹⁶¹ Having the same concern, the Commission has repeatedly stated that it is important that the fight against poverty must not be disassociated from the rights guaranteed under the Charter of Human Rights and Freedoms.¹⁶²

Yet, the requirement to register for direct deposit that came with the issuance of the new solidarity credit is a blatant example of a measure to fight poverty established without effective

¹⁶⁰ *Universal Declaration of Human Rights, supra*, note 117. See in particular COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, *supra*, note 139.

¹⁶¹ *Id.*

¹⁶² See in particular: *Commission des droits de la personne et des droits de la jeunesse, supra*, notes 135 et 137.

consideration of these guaranteed rights. As a result, thousands of individuals living in poverty are likely to be deprived, in a discriminatory manner, of a benefit to which they are entitled under section 45 of the Charter on the ground of their social condition or of a disability. The exercise of the right to dignity in full equality guaranteed by section 4 of the Charter is also widely compromised for such individuals.

It is therefore important to correct the situation, namely by eliminating the requirement to register for direct deposit imposed on solidarity credit recipients; by widely disseminating adequate information on this subject; and by guaranteeing the choice of payment to individuals targeted by this measure. It is only in this way that this measure can qualify as a rights-based policy to fight against poverty and social exclusion.