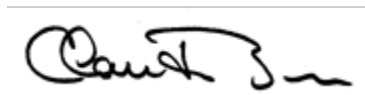


**OPINION OF THE COMMISSION DES DROITS DE LA PERSONNE ET DES DROITS DE LA
JEUNESSE SUBMITTED TO THE
COMMISSION DE RÉVISION PERMANENTE DES PROGRAMMES**

September 2014

This is a translation of the *Avis de la Commission des droits de la personne et des droits de la jeunesse à la Commission de révision permanente des programmes*, adopted at the 609th meeting of the Commission, held on September 9, 2014, by Resolution COM-609-5.1.2



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FOREWORD

It is not the Commission des droits de la personne et des droits de la jeunesse's role to interfere in the complex analyses undertaken by the Commission de révision permanente des programmes, nor in the decisions that the government will make as a result. However, the issue of the rights and freedoms of persons who may be affected by these decisions, especially the most vulnerable members of our society likely to be the first to be affected, should be a matter of concern to the Commission de révision permanente des programmes, and then to the government.

With this opinion, the Commission des droits de la personne et des droits de la jeunesse wishes to remind those concerned that the ongoing review of government programs should not be analyzed solely on the basis of economic efficiency or fiscal opportunity. A human rights and freedoms impact assessment should be carried out at every step of the process. Promoting and upholding human rights and freedoms should also be an integral part of analyses undertaken by both the Commission permanente and the government. In this regard, the analytical framework that will guide the Commission de révision permanente des programmes should comply with the provisions of the *Charter of Human Rights and Freedoms*, given that these provisions are binding and therefore apply to all government actions and decisions.

In other words, government actions and decisions must not undermine any of the rights guaranteed by the Charter. These include the right to equality whereby direct, indirect, and systemic discrimination is prohibited. Furthermore, the Commission des droits de la personne et des droits de la jeunesse finds it necessary to reiterate the importance of the social and economic rights enshrined in Sections 39 to 48 under the *Charter of Human Rights and Freedoms*. These rights are just as fundamental and are recognized by the United Nations *International Covenant on Economic, Social and Cultural Rights*. Québec has ratified this convention and is committed to upholding it. This is an essential commitment that complements Charter provisions. The obligation of States parties to promote progressive realization of the relevant rights pursuant to this International Covenant implies that they are forbidden from adopting retrogressive measures in regards to rights recognized by the Covenant.

Ignoring the human rights aspect could eventually lead to significant and likely costly litigation. The courts have reminded us on several occasions that even though we should be sensitive to

the State's financial situation when interpreting human rights and freedoms, these rights and freedoms must not be dismissed or sacrificed in the name of economic efficiency. As such, the *Charter of Human Rights and Freedoms* is key to building a Québec that is "prosperous, fair and free to make its own choices," an ideal the government says it wishes to work towards. Beyond the judicial considerations, the Commission wishes to reiterate the Charter's importance and its purpose, which is to affirm and protect rights and freedoms. These rights and freedoms stem from the recognition of the inherent dignity of human beings and their equality, and are essential to the full development of the person.

The analytical framework that will guide the Commission de révision permanente des programmes should therefore systematically include a human rights and freedoms impact assessment. This opinion presents the legal ramifications of a rights-based approach in the hope that the ongoing review of programs adopts such an approach and considers the respect for human rights as valuable a parameter as effectiveness, efficiency, funding mechanisms, and ability to pay. The government should, in turn, ensure that the Commission de révision permanente acts accordingly; it should then assess the human rights and freedoms impact of the difficult decisions it will have to make.

INTRODUCTION

Pursuant to order-in-council 491-2014 of June 11, 2014, the government of Québec has ordered “the establishment of a mechanism for the ongoing review of programs managed by the State.”¹ [Our translation] The Commission de révision permanente des programmes’ mandate is as follows:

That this commission be mandated, in collaboration with government departments and agencies, to contribute actively to the implementation of a permanent mechanism for the review of programs managed by these departments and organizations. The mechanism will pursue the following main objectives:

- a) Ensure that programs meet a priority need of citizens and are part of the State’s mission.
- b) Ensure that programs are administered effectively and efficiently, and that the governance structure in place is appropriate.
- c) Ensure that program funding mechanisms are adequate and consistent with citizens’ ability to pay.
- d) Ensure that programs are subject to an ongoing evaluation process.

More specifically, this commission’s mandate will be to:

- a) Recommend a work plan for the review to the Minister responsible for Government Administration and Ongoing Program Review and Chair of the Conseil du trésor. This plan will include determining which programs to review and establishing the nature of the work to be carried out within the review mandate.
- b) Review the results of the process as well as the opinions expressed during the social dialogue.
- c) Submit recommendations related to the review’s objectives to the Minister responsible for Government Administration and Ongoing Program Review and Chair of the Conseil du trésor.
- d) Propose a comprehensive vision for the repositioning of the State and the review of programs.
- e) Perform any other related task that marks a continuation of this present mandate, as determined by the Minister responsible for Government Administration and Ongoing Program Review and Chair of the Conseil du trésor.

[...].² [Our translation]

More specifically, this commission will help the government “reposition itself and institute a process of ongoing assessment aimed at shifting the State’s focus toward priority programs and

¹ *Décret 491-2014 concernant la constitution de la Commission de révision permanente des programmes*, (2014) 146 G.O. II, 2323.

² *Id.*, p. 2324.

to areas where needs are the most pressing.”³ This commission’s work will “enable the government to decide whether to eliminate certain programs, reduce their scope or reposition them, and to be in a position to review them on an ongoing basis.” [Our translation]

Such an exercise may raise many issues related to human rights and freedoms that are protected by the *Charter of Human Rights and Freedoms*⁴ (hereafter “the Charter”). It is important to remember that the Charter is a fundamental law that has quasi-constitutional status. Unless otherwise specifically exempted by the legislator, Section 52 of the Charter states that no provisions of any other the law may derogate from Sections 1 to 38. However, under Section 56 of the Charter, the word “law” includes any regulation, order-in-council, or decree made under the authority of a law. The Charter specifically states, under Section 54, that the “Charter binds the State.” Thus, the Charter applies to the government’s actions as well as to the actions of government departments and agencies. As such, the government must ensure that its activities fall within framework defined by the Charter.

The Charter applies therefore to the programs targeted for review by the Commission de révision. Accordingly, the recommendations that will be submitted to the government should take into account applicable Charter obligations. The same applies to the ongoing review mechanism that will be set up as part of this exercise and whose impact must be assessed with respect to the Charter.

The Commission des droits de la personne et des droits de la jeunesse (hereafter “the Commission”) is entrusted with the mission to promote and uphold the principles set out in the Charter. It is on this basis that the Commission submits its opinion to the Commission de révision permanente des programmes.⁵ The Commission also ensures that the interests of children are protected and that their rights under the *Youth Protection Act* are respected. In

³ GOUVERNEMENT DU QUÉBEC, *Commission de révision permanente des programmes - « Un effort national essentiel à la prospérité du Québec »* - Martin Coiteux, Communiqué de presse, Québec, 11 juin 2014, p. 1 [En ligne]. <http://www.fil-information.gouv.qc.ca/Pages/Article.aspx?idArticle=2206119574>

⁴ *Charte des droits et libertés de la personne* (RLRQ, c. C-12).

⁵ Notons par ailleurs que la Commission s’inscrit ainsi dans le cadre des attentes de collaboration active aux travaux de la Commission sur la révision permanente des programmes exprimées par le gouvernement du Québec. Voir à ce sujet : GOUVERNEMENT DU QUÉBEC, MINISTÈRE DU CONSEIL EXÉCUTIF, *Attentes gouvernementales 2014-2015*, Québec, 16 septembre 2014.

addition, the Commission is responsible for applying the *Act respecting equal access to employment in public bodies*.

With this in mind, the Commission believes it is important to highlight three elements of the Charter that should provide an analytical framework to guide the program review process. The first of these elements relates to Section 9.1 of the Charter that states that the law can set limits to the exercise of the fundamental rights and freedoms recognized under Sections 1 to 9. Secondly, the recognition of the right to equality in the exercise of human rights and freedoms requires an analysis that will vary depending on whether the discrimination is of a direct, indirect or systemic nature. Finally, the recognition of economic and social rights under Chapter IV of the Charter imposes certain obligations on the State of Québec, particularly pursuant to the instruments of international law to which it has adhered.

1 SECTION 9.1

1.1 Meaning and scope of Section 9.1

Section 9.1 reads as follows:

9.1 In exercising his fundamental freedoms and rights, a person shall maintain a proper regard for democratic values, public order and the general well-being of the citizens of Québec.

In this respect, the scope of the freedoms and rights, and limits to their exercise, may be fixed by law.⁶

While the first paragraph of Section 9.1 allows the State to establish a framework for the exercise of the rights and freedoms under Sections 1 to 9 of the Charter, the second paragraph is a justificatory provision similar to Section 1 of the *Canadian Charter of Rights and Freedoms*.⁷ In *Ford v. Québec (Attorney General)*, the Supreme Court stated the respective scope of these two paragraphs in the following terms:

The first paragraph of s. 9.1 speaks of the manner in which a person must exercise his fundamental freedoms and rights. That is not a limit on the authority of government but rather does suggest the

⁶ *Id.*, art. 9.1.

⁷ *Charte canadienne des droits et libertés*, partie I de la *Loi constitutionnelle de 1982*, [annexe B de la *Loi de 1982 sur le Canada*, 1982, c. 11 (R.-U.)], art. 1.

manner in which the scope of the fundamental freedoms and rights is to be interpreted. The second paragraph of s. 9.1, however – “In this respect, the scope of the freedoms and rights, and limits to their exercise, may be fixed by law” – does refer to legislative authority to impose limits on the fundamental freedoms and rights. The words “In this respect” refer to the words “maintain a proper regard for democratic values, public order and the general well-being of the citizens of Québec.” Read as a whole, s. 9.1 provides that limits to the scope and exercise of the fundamental freedoms and rights guaranteed may be fixed by law for the purpose of maintaining a proper regard for democratic values, public order and the general well-being of the citizens of Québec.⁸

The second paragraph of Section 9.1, therefore, establishes that “proper regard for democratic values, public order and the general well-being of the citizens of Québec” should serve to help define the objectives the government wishes to fulfil through legislation that may limit the scope and exercise of these fundamental freedoms and rights. The wording of Section 9.1 “shows that the legislator chose to keep only the most essential limitations”⁹ [Our translation] and, in this respect, the “democratic values” criterion was specifically targeted.¹⁰ Jurisprudence has established that the definition of “democratic values” as stated under Section 1 of the *Canadian Charter of Rights and Freedoms* applies to Section 9.1 of the Québec Charter.¹¹ These democratic values include: “respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.”¹²

With regard to the concept of public order, “as a limit to the exercise of the rights and freedoms set out in Sections 1 to 9 of the Charter, it “most likely includes [the concepts of national security, public safety, health, and public morality] as well as the proper functioning of the

⁸ *Ford c. Québec (Procureur général)*, [1988] 2 R.C.S. 712, par. 63.

⁹ Jacques-Yvan MORIN, « La constitutionnalisation progressive de la Charte des droits et libertés de la personne », dans *De la Charte québécoise des droits et libertés : origine, nature et défis*, Montréal, Éditions Thémis, 1989, p. 25, 52.

¹⁰ COMMISSION DES DROITS DE LA PERSONNE ET DES DROITS DE LA JEUNESSE, *Mémoire à la Commission des institutions de l'Assemblée nationale sur le Projet de loi n° 60, Charte affirmant les valeurs de laïcité et de neutralité religieuse de l'État ainsi que d'égalité entre les femmes et les hommes et encadrant les demandes d'accommodement*, décembre 2013, p. 31, [En ligne].
http://www.cdpedj.qc.ca/Publications/memoire_PL_60_charte_valeurs.pdf

¹¹ *Ford c. Québec (Procureur général)*, préc., note 8, par. 63.

¹² *R. c. Oakes*, [1986] 1 R.C.S. 103, par. 64.

judicial system, crime prevention, and the protection of the rights and freedoms of others.”¹³

[Our translation] According to Professor Chevrette, “the term ‘general well-being of the citizens of Quebec’ is simply equivalent to the well-being of the population or, more precisely, of persons.”¹⁴ [Our translation]

1.2 Justifying the infringement of guaranteed rights and freedoms

Once the *prima facie* case for an infringement of a guaranteed right or freedom under Sections 1 to 9 of the Charter has been established, the government must justify its standard, failing which the infringement will be deemed inconsistent with the Charter.

Such a justification follows a clearly defined process that has been validated by jurisprudence. The government must first demonstrate, with supporting evidence, that 1) the “objective relate[s] to concerns which are pressing and substantial,”¹⁵ and 2) that the means chosen must be reasonable and demonstrably justified.¹⁶ An impugned means under Section 9.1 will be recognized as reasonable and justifiable if 2a) it is rationally connected to the objective; 2b) its impact is proportional to the pursued objective; and 2c) its harmful effects are proportional to the pursued objective as well as to its intended benefits.

It should be noted that the impugned standard must meet all of these criteria to constitute a justification under Section 9.1.

1.2.1 An objective related to concerns which are pressing and substantial

It is rather rare for the courts to invalidate “a rule of law” during the examination of the pursued objective. Judges are often reluctant to invalidate a law at this preliminary examination stage,

¹³ *Forget et Québec (Commission des droits de la personne et des droits de la jeunesse) c. Bertrand*, [2001] R.J.Q. 1684 (TDPQ), par. 72, citant François CHEVRETTE, « La disposition limitative de la Charte des droits et libertés de la personne : le dit et le non-dit », dans *De la Charte québécoise des droits et libertés : origine, nature et défis*, Montréal, Éditions Thémis, 1989, p. 82.

¹⁴ F. CHEVRETTE, *Id.*, p. 82-83.

¹⁵ *R. c. Oakes*, préc., note 12, par. 69.

¹⁶ Christian BRUNELLE, « Les limites aux droits et libertés », dans Barreau du Québec, *Droit public et administratif*, Collection de droit du Barreau du Québec, vol. VII, Cowansville, Éditions Yvon Blais, 2013, p. 95.

choosing instead to exercise “caution.”¹⁷ [Our translation] In *R. v. Oakes*, the Supreme Court states however that “[t]he standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain s. 1 protection.”¹⁸

Therefore, the pursued objective must be sufficiently compelling to warrant overriding a Charter right, and it must relate to “concerns which are pressing and substantial.” Under Section 9.1 of the Charter, the pursued objective must also relate to “maintain[ing] a proper regard for democratic values, public order and the general well-being of the citizens of Québec.”¹⁹

The Commission also wishes to point out that the examination of the objective must take into consideration the particular context and the factual circumstances of each case, just as for every step required under Section 9.1,²⁰ and must clearly identify the objective being pursued.

Without anticipating any policy review decisions or measures that may result from the ongoing process, it is worth noting that “a measure whose sole purpose is financial, and which infringes *Charter* rights, can never be justified under s. 1.”²¹ The Supreme Court also states that “[c]ertainly the guarantees of the [Canadian] *Charter* would be illusory if they could be ignored because it was administratively convenient to do so.”²² The Supreme Court adds:

No doubt considerable time and money can be saved by adopting administrative procedures which ignore the principles of fundamental justice but such an argument, in my view, misses the point of the exercise under s. 1. The principles of natural justice and procedural fairness which have long been espoused by our courts, and the constitutional entrenchment of the principles of fundamental justice in s. 7, implicitly recognize that a balance of administrative convenience does not override the need to adhere to these principles.²³

¹⁷ *Id.*, p. 94.

¹⁸ *R. c. Oakes*, préc., note 12, par. 69.

¹⁹ *Dufour c. Centre hospitalier St-Joseph-de-la-Malbaie*, [1992] R.J.Q. 825 (T.D.P.Q.), par. 97; citant *Ford c. Québec (Procureur général)*, préc., note 8, par. 63.

²⁰ *Godbout c. Longueuil (Ville)*, [1997] 3 R.C.S. 844, par. 4.

²¹ *Renvoi relatif à la rémunération des juges de la Cour provinciale de l'Île-du-Prince-Édouard*, [1997] 3 R.C.S. 3, par. 284.

²² *Singh c. Ministre de l'Emploi et de l'Immigration*, [1985] 1 R.C.S. 177, par. 70; cité dans *Terre-Neuve (Conseil du Trésor) c. Newfoundland and Labrador Assn. of Public and Private Employees (N.A.P.E.)*, [2004] 3 R.C.S. 381, par. 66.

²³ *Id.*, par. 70.

Along similar lines, the Court states that “[b]udgetary considerations in and of themselves cannot justify violating a *Charter* right.”²⁴

That said, the Court subsequently qualified these findings, stating that they should be interpreted in context.²⁵ More specifically, the Court addressed the issue in *Newfoundland (Treasury Board) v. Newfoundland and Labrador Assn. of Public and Private Employees (N.A.P.E.)*. In this case, the Newfoundland and Labrador government invoked a serious financial crisis – unprecedented in the history of the province – to postpone wage increases provided for under the Pay Equity Agreement by three years, and cancelled the associated arrears. Before confirming the constitutionality of the contested legislation, the Court confirmed that “[b]udgetary considerations in and of themselves cannot normally be invoked as a free-standing pressing and substantial objective for the purposes of s. 1 of the *Charter*.”²⁶ The Court also added the following:

At some point, a financial crisis can attain a dimension that elected governments must be accorded significant scope to take remedial measures, even if the measures taken have an adverse effect on a *Charter* right, subject, of course, to the measures being proportional both to the fiscal crisis and to their impact on the affected *Charter* interests.²⁷

Thus, although it is true that the courts generally give the government “wide latitude to determine the proper distribution of resources in society,”²⁸ the Supreme Court has pointed out that “the leeway to be granted to the state is not infinite.”²⁹ On this subject, the Court has also stated the following:

The result of all this, it seems to me, is that courts will continue to look with strong scepticism at attempts to justify infringements of *Charter* rights on the basis of budgetary constraints. To do otherwise would devalue the *Charter* because there are *always* budgetary constraints and there are *always* other pressing government priorities. Nevertheless, the courts cannot close their eyes

²⁴ *Nouvelle-Écosse (Workers' Compensation Board) c. Martin*, [2003] 2 R.C.S. 504, par. 110.

²⁵ *Terre-Neuve (Conseil du Trésor) c. Newfoundland and Labrador Assn. of Public and Private Employees (N.A.P.E.)*, préc., note 22, par. 64.

²⁶ *Id.*, citant *Nouvelle-Écosse (Workers' Compensation Board) c. Martin*, préc., note 24, par. 109.

²⁷ *Id.*

²⁸ *Eldridge c. Colombie-Britannique (Procureur général)*, [1997] 3 R.C.S. 624, par. 85.

²⁹ *Id.*, par. 86.

to the periodic occurrence of financial emergencies when measures must be taken to juggle priorities to see a government through the crisis.³⁰

1.2.2 Reasonable and justified means

Section 9.1 is silent on the nature of the relationship that should exist between the pursued objective and the measure at issue.³¹ It should be remembered, however, that a consistent line of decisions refers to the criteria established under Section 1 of the Canadian Charter for the purposes of Section 9.1 of the Québec Charter.³² As stated by the Supreme Court, “once a sufficiently significant objective is recognized, then the party invoking s. 1 must show that the means chosen are reasonable and demonstrably justified.”³³ The Court adds that “[n]o matter how important Parliament’s goal may seem, if the state has not demonstrated that the means by which it seeks to achieve its goal are reasonable and proportionate to the infringement of rights, then the law must perforce fail.”³⁴

The standard or measure at issue must therefore meet the following criteria: A) it must be rationally connected to the objective; B) the right is impaired as little as possible; and C) its beneficial effects are proportional to the objective and outweigh any expected negative effects.

A A rational connection with the pursued objective

When it comes to the rational connection between the measure at issue and the pursued objective, jurisprudence has repeatedly stated that “the measures adopted must be carefully designed to achieve the objective in question.”³⁵ Therefore, “the government must show that the restrictive law is neither irrational nor arbitrary.”³⁶

³⁰ *Terre-Neuve (Conseil du Trésor) c. Newfoundland and Labrador Assn. of Public and Private Employees (N.A.P.E.)*, préc., note 22, par. 72.

³¹ F. CHEVRETTE, préc., note 13, p. 88.

³² Voir notamment : *Ford c. Québec (Procureur général)*, préc., note 8.

³³ *R. c. Oakes*, préc., note 12, par. 70.

³⁴ *RJR-MacDonald Inc. c. Procureur général du Canada*, [1995] 3 R.C.S. 199, par. 129.

³⁵ *R. c. Oakes*, préc., note 12, par. 70.

³⁶ *Id.* Appliqué en vertu de l'article 9.1 dans *Ford c. Québec (Procureur général)*, préc., note 8, par. 63.

The Supreme Court has stated that at this step in the process, the government “must show a causal connection between the infringement and the benefit sought on the basis of reason or logic.” In other words, “[t]he government must show that the restriction on rights serves the intended purpose.”³⁷

The courts recognize, with relative ease, evidence of a causal relationship between a pursued objective and adopted measures. This evidence is based on the balance of probabilities that can be inferred either from reason or logic, without there being direct and tangible evidence of the relationship between the infringing measure and the legislative objective.³⁸ [Our translation]

As Professor Brunelle has stated, it is possible to conclude that examining the rational connection “does not, for the most part, represent a problem for the government.”³⁹ [Our translation] The same cannot be said about the next step that examines the criterion of proportionality.⁴⁰

B A rule to ensure that the measure causes minimal impairment

Normally, the minimal impairment criterion should ensure that only the least restrictive means are used, in terms of the right or freedom at issue.⁴¹ The Supreme Court established in *R. v. Oakes* that “the means, even if rationally connected to the objective in this first sense, should impair ‘as little as possible’ the right or freedom in question.”⁴²

Legal doctrine nevertheless points out that the courts subsequently relaxed this requirement, especially in social and economic matters where jurisprudence has given the legislator a certain leeway.⁴³ However, this leeway is not unlimited. The more demanding criterion requiring that the

³⁷ *Id.*, par. 153.

³⁸ Nathalie DES ROSIERS, « Liberté d’expression », dans *JurisClasseurs Québec*, coll. « Droit constitutionnel », *Charte canadienne : questions particulières*, fasc. 7, Montréal, LexisNexis Canada, feuilles mobiles, par. 21.

³⁹ C. BRUNELLE, préc., note 16, p. 95.

⁴⁰ *Id.*

⁴¹ F. CHEVRETTE, préc., note 13, p. 88.

⁴² *R. c. Oakes*, préc., note 11, par. 70.

⁴³ C. BRUNELLE, préc., note 15, p. 96. Voir également : N. DES ROSIERS, préc., note 38, par. 22.

government demonstrate that the measure is “necessary” is sometimes replaced with a “reasonableness” criterion.⁴⁴

The Supreme Court has qualified the minimal impairment criterion in the following terms:

As the second step in the proportionality analysis, the government must show that the measures at issue impair the right of free expression as little as reasonably possible in order to achieve the legislative objective. The impairment must be “minimal”, that is, the law must be carefully tailored so that rights are impaired no more than necessary. The tailoring process seldom admits of perfection and the courts must accord some leeway to the legislator. If the law falls within a range of reasonable alternatives, the courts will not find it overbroad merely because they can conceive of an alternative which might better tailor objective to infringement [...]. On the other hand, if the government fails to explain why a significantly less intrusive and equally effective measure was not chosen, the law may fail.⁴⁵ [Our emphasis]

The means chosen should therefore, at the very least, be part of a range of means that are likely to cause minimal impairment to the right or freedom at issue.

C The deleterious effects are proportional to the pursued objective and the expected benefit

Pursuant to the last criterion elaborated in *R. v. Oakes*, the government must demonstrate that the benefit to be derived from the measure at issue is proportional to the pursued objective and outweighs the seriousness of the infringement. As the Supreme Court has explained:

Some limits on rights and freedoms protected by the Charter will be more serious than others in terms of the nature of the right or freedom violated, the extent of the violation, and the degree to which the measures which impose the limit trench upon the integral principles of a free and democratic society. Even if an objective is of sufficient importance, and the first two elements of the proportionality test are satisfied, it is still possible that, because of the severity of the deleterious effects of a measure on individuals or groups, the measure will not be justified by the purposes it is intended to serve. The more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society.⁴⁶

⁴⁴ *Id.*

⁴⁵ *RJR-MacDonald Inc. c. Procureur général du Canada*, préc., note 34, par. 160 [Nos soulignements].

⁴⁶ *R. c. Oakes*, préc., note 12, par. 71.

As Professor Brunelle points out, “it is not so much the rule of law’s objective that is at the heart of this analysis, but rather its effect on individuals or groups.”⁴⁷ [Our translation] While some authors consider this step to be somewhat redundant with the establishment of a pressing and substantial objective, the Supreme Court has replied that the key strength of this criterion resides in the fact that it is the only one that does not require an assessment of the measure’s objective in order to take “full account of the severity of the deleterious effects of a measure on individuals or groups.”⁴⁸

The evidence should thereby allow for a balancing exercise that measures whether the beneficial effects of an impugned law outweigh its deleterious effects. As the Supreme Court has stated, the deleterious effect of a measure “requires us to consider the impact in terms of *Charter* values, such as liberty, human dignity, equality, autonomy, and the enhancement of democracy.”⁴⁹

2 RIGHT TO EQUALITY

The right to equality is recognized under Section 10 of the Charter. Unlike fundamental freedoms and rights, it is not subject to Section 9.1’s justificatory provision referred to earlier. As a result, legislative acts and regulations cannot invoke this provision in order to justify an infringement of the right to equality.

The right to equality is stated in these terms:

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.

⁴⁷ C. BRUNELLE, préc., note 16, p. 97.

⁴⁸ *Alberta c. Hutterian Brethren of Wilson Colony*, [2009] 2 R.C.S. 567, par. 75-76.

⁴⁹ *Id.*, par. 88.

Simply put, there is discrimination in the exercise of a Charter right when all three elements provided for under Section 10 are present:

- There is a distinction, exclusion or preference.
- The distinction, exclusion or preference is based on one of the recognized grounds of discrimination: race; colour; sex; pregnancy; sexual orientation; civil status; age except as provided by law; religion; political convictions; ethnic or national origin; social condition; a handicap or the use of any means to palliate a handicap.
- The distinction, exclusion or preference nullifies or impairs the right to full and equal recognition and exercise of a human right or freedom.

It is important to note that the scope of the right to equality covers all the rights and freedoms enshrined in Sections 1 to 48 of the Charter.⁵⁰

There are three types of discrimination: direct, indirect and systemic.

Direct discrimination may be defined as a differential treatment that is expressed openly and sometimes deliberately based on prohibited grounds of discrimination. A standard or measure that excludes, distinguishes, or prefers certain people based on any one of these grounds will be deemed discriminatory.

Discrimination may be indirect or have a prejudicial effect when the distinction, exclusion or preference in question results from an apparently neutral measure that has a disproportionate effect on a person or group of people.

As for systemic discrimination, the Human Rights Tribunal defines it in the following terms:

Hence, the Tribunal believes it is now appropriate to define systemic discrimination as the cumulative effects of disproportionate exclusion resulting from the combined impact of attitudes marked by often unconscious biases and stereotypes, and policies and practices generally adopted without taking into consideration the characteristics of the members of groups contemplated by the prohibition of discrimination.⁵¹

⁵⁰ Voir notamment : *Commission scolaire St-Jean-sur-Richelieu c. Commission des droits de la personne du Québec*, [1994] R.J.Q. 1227 (C.A.).

⁵¹ *Commission des droits de la personne et des droits de la jeunesse c. Gaz métropolitain inc.*, [2009] R.J.Q. 487 (T.D.P.Q.), par. 36, conf. en appel 2011 QCCA 1201.

With some exceptions provided for under Sections 20 and 20.1, such as the aptitudes or qualifications required for employment that are deemed non-discriminatory, or a distinction, exclusion or preference based on certain grounds that are part of an insurance policy or an annuity contract, discrimination is prohibited unless specific legislation expressly derogates from a Charter provision.⁵²

It goes without saying that several social or economic programs implemented by the State are aimed, directly or indirectly, at segments of the population that share one of the characteristics listed under Section 10 of the Charter. The Commission de révision permanente des programmes should therefore take into account the possible discriminatory effects of recommendations relating to the maintenance or amendment of a program aimed at or affecting the Charter rights of these people.

In addition, the systemic impacts on any one or all of the groups of people mentioned under Section 10 of the Charter should be taken into account, not only when reviewing a program, but also when the Commission de révision begins developing recommendations resulting from its review.

And finally, the ongoing review mechanism that will stem from this process should also include an analysis of any possible discriminatory impacts.

3 ECONOMIC AND SOCIAL RIGHTS

3.1 The status of economic and social rights in the Charter

Economic and social rights enshrined in the Charter and that are subject to Québec's international commitments are among the rights that will require special attention from the Commission de révision. In fact, without anticipating what the Commission de révision may

⁵² Charte, préc., articles, 20, 20.1 et 52. Sur les conditions requises pour déroger à la Charte, voir notamment : COMMISSION DES DROITS DE LA PERSONNE ET DES DROITS DE LA JEUNESSE, *Mémoire à la Commission des institutions de l'Assemblée nationale, Projet de loi n° 28, Loi instituant le nouveau Code de procédure civile*, (Cat. 2.412.54.12), septembre 2013, p. 14 et suiv., [En ligne].

http://www.cdpcj.qc.ca/Publications/memoire_PL28_code_procedure_civile.pdf

decide, it is worth mentioning that many programs that may be recommended for review are aimed at upholding rights guaranteed economic and social rights.

Chapter IV of the Charter is dedicated to economic and social rights and sets forth the following rights: every child has a right to protection, security and attention;⁵³ every person has a right to free public education;⁵⁴ parents have a right to give their children a religious and moral education in keeping with their convictions;⁵⁵ parents have a right to choose private educational establishments for their children;⁵⁶ persons belonging to ethnic minorities have a right to maintain and develop their own cultural interests with the other members of their group;⁵⁷ every person has a right to information;⁵⁸ every person has a right to measures of financial assistance and to social measures susceptible of ensuring such person an acceptable standard of living;⁵⁹ every person has a right to fair and reasonable conditions of employment;⁶⁰ every person has a right to live in a healthful environment in which biodiversity is preserved;⁶¹ married or civil union spouses have the same rights, obligations and responsibilities;⁶² and every aged person and every disabled person has a right to protection against any form of exploitation and a right to protection and security.⁶³

It should be emphasized once again that the Charter is a unique document in Canada, particularly due to the fact that “Québec is the only Canadian jurisdiction to entrench economic and social rights in its human rights legislation.”⁶⁴

⁵³ Charte, préc., note, art. 39.

⁵⁴ *Id.*, art. 40.

⁵⁵ *Id.*, art. 41.

⁵⁶ *Id.*, art. 42.

⁵⁷ *Id.*, art. 43.

⁵⁸ *Id.*, art. 44.

⁵⁹ *Id.*, art. 45.

⁶⁰ *Id.*, art. 46.

⁶¹ *Id.*, art. 46.1.

⁶² *Id.*, art. 47.

⁶³ *Id.*, art. 48.

⁶⁴ COMMISSION DES DROITS DE LA PERSONNE ET DES DROITS DE LA JEUNESSE, *Mise en œuvre du Pacte international relatif aux droits économiques, sociaux et culturels, Examen du troisième rapport du Canada (26 et 27 novembre 1998), Questions posées par le Comité (Contribution de la Commission des droits de la personne (...suite)*

The courts have so far shown some restraint in implementing economic and social rights guaranteed by Sections 39 to 48 of the Charter, particularly due to the absence of any explicit mention that these provisions take precedence over other laws. Section 52 of the Charter – which prescribes that no provision of any Act, even subsequent to the Charter, may derogate from it – only applies to Sections 1 to 38.

However, in *Gosselin v. Québec (Attorney General)*, the Supreme Court did recognize the justiciability of economic and social rights. In a majority decision written by Madam Justice McLachlin, the Court states that “[t]here can be no doubt that s. 45 purports to create a right.”⁶⁵ Despite this, the Court does not recognize any judicial control when Section 45 is invoked before the courts. This decision was widely criticized and is particularly objectionable in that it does not take into account both Québec’s and Canada’s obligations under its international commitments to recognize economic and social rights, as we will discuss later.

While the courts have so far been reluctant to acknowledge the positive obligations on the State to respect the social and economic rights recognized under Chapter IV of the Charter, jurisprudence, however, shows that this reluctance should be set aside when it comes to the full and equal exercise of economic and social rights.⁶⁶

Consequently, the implementation of a measure taken pursuant to any of the provisions under Chapter IV of the Charter must not have a prejudicial effect on the recognition or the exercise of a Charter right based on a prohibited ground of discrimination.

Moreover, the Commission’s work has served to confirm the close relationship that can exist between the right to equality and the effective exercise of economic and social rights guaranteed by the Charter, particularly with respect to certain State programs. The following opinions and commentaries have addressed this issue: the Commission’s opinion on

et des droits de la jeunesse), août 1998, p. 1, [En ligne].
http://www.cdpedj.qc.ca/Publications/pacte_droits_economique_1998.pdf

⁶⁵ *Gosselin c. Québec (Procureur général)*, [2002] 4 R.C.S. 429, par. 87.

⁶⁶ Voir notamment : *Commission des droits de la personne c. Commission scolaire de St-Jean-sur-Richelieu*, [1991] R.J.Q. 3003 (T.D.P.Q.), 3037, conf. en appel : [1994] R.J.Q. 1227 (C.A.), portant sur le droit à l’instruction publique et *Lambert c. Québec (ministère du Tourisme)*, 1997 R.J.Q. 726 (T.D.P.Q.). Décision infirmée en appel, mais pour un autre motif : [2002] R.J.Q. 599 (C.A.), portant sur le droit à des conditions de travail justes et raisonnables.

compliance with the Charter of the obligation to register for direct deposit as a condition to receive the solidarity tax credit;⁶⁷ its opinion on the accommodation of students with disabilities in general, vocational and private colleges;⁶⁸ and its comments on the *Draft Regulation amending the Individual and Family Assistance Regulation*.⁶⁹

Beyond the right to equality, economic and social rights under the Charter have a significant influence on the implementation of every Charter right and freedom. The Charter is a coherent set of rights that should be seen as a whole.

It is within this context that economic and social rights protected by the Charter must be seen and interpreted. This is all the more true considering that some economic and social rights have been enshrined not in Chapter IV of the Charter specifically devoted to them, but rather in Chapter I.

With this in mind, the Commission has repeatedly stated, for example, that poverty undermines the recognition and exercise of Charter rights and freedoms,⁷⁰ and that a decent standard of living, ensured if necessary through social measures as provided under Section 45 of the

⁶⁷ COMMISSION DES DROITS DE LA PERSONNE ET DES DROITS DE LA JEUNESSE, *Conformité à la Charte des droits et libertés de la personne de l'inscription obligatoire au dépôt direct comme condition de versement du crédit d'impôt pour la solidarité*, (Cat. 2.177.4), octobre 2011, [En ligne]. http://www.cdpcj.qc.ca/Publications/Depot_direct_obligatoire.pdf

⁶⁸ COMMISSION DES DROITS DE LA PERSONNE ET DES DROITS DE LA JEUNESSE, *L'accommodement des étudiants et étudiantes en situation de handicap dans les établissements d'enseignement collégial*, (Cat. 2.120-12.58), mars 2012, p. 85 et suiv., [En ligne]. http://www.cdpcj.qc.ca/Publications/accommodement_handicap_collegial.pdf

⁶⁹ COMMISSION DES DROITS DE LA PERSONNE ET DES DROITS DE LA JEUNESSE, *Commentaires sur le projet de Règlement modifiant le Règlement sur l'aide aux personnes et aux familles*, (Cat. 2.412.66.9), mars 2013, [En ligne]. http://www.cdpcj.qc.ca/Publications/commentaires_reglement-aide-personnes-famille.pdf

⁷⁰ COMMISSION DES DROITS DE LA PERSONNE ET DES DROITS DE LA JEUNESSE, *Mémoire à la Commission des affaires sociales de l'Assemblée nationale sur la réforme de la Sécurité du revenu*, (Cat. 2.412.66.5.1), 27 janvier 1997, p. 2, [En ligne]. http://www.cdpcj.qc.ca/Publications/reforme_securite_memoire.pdf; COMMISSION DES DROITS DE LA PERSONNE ET DES DROITS DE LA JEUNESSE, *Notes pour la présentation de la Commission des droits de la personne et des droits de la jeunesse devant la Commission des affaires sociales de l'Assemblée nationale à l'occasion des audiences sur le Livre vert sur la sécurité du revenu*, 11 février 1997, p. 3; COMMISSION DES DROITS DE LA PERSONNE ET DES DROITS DE LA JEUNESSE, *Mémoire sur le Projet de loi n° 186, Loi sur le soutien du revenu et favorisant l'emploi et la solidarité sociale*, (Cat. 2.412.66.7), mai 1998, p. 9, [En ligne]. http://www.cdpcj.qc.ca/Publications/memoire_pl186.pdf; 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° 57, Loi sur l'aide aux personnes et aux familles*, (Cat. 2.412.66.8), septembre 2004, p. 3, [En ligne]. http://www.cdpcj.qc.ca/Publications/pl_57_aide_personnes_familles.pdf

Charter, is a prerequisite for the effective exercise of rights and freedoms.⁷¹ In the same vein, the Commission has also stated that:

- Income insecurity and insufficiency undermine the right to life, personal security, and physical and psychological integrity guaranteed by Section 1 of the Charter, but also undermine the right to the safeguard of personal dignity recognized under Section 4 and the right of a child to the protection, security, and attention provided under Section 39.
- Certain rules governing various social assistance programs may undermine the right to the safeguard of personal dignity and the right to respect for a person's private life provided for under Sections 4 and 5 of the Charter.
- Certain employability development measures may compromise the right of every working person to fair and reasonable conditions of employment guaranteed by Section 46 of the Charter, and may compromise as well their freedom of association provided for under Section 3.

The protections offered to ensure economic and social rights must therefore be considered in light of the Charter as a whole.

3.2 Economic and social rights guaranteed by international human rights law

Economic and social rights are an integral part of international human rights law. A number of international instruments protect these rights, including the *Universal Declaration of Human Rights*⁷² (henceforth "UDHR") and the *International Covenant on Economic, Social and Cultural Rights*⁷³ (henceforth "ICESCR"), instruments that will be discussed in greater depth in this section.⁷⁴

⁷¹ COMMISSION DES DROITS DE LA PERSONNE, *Commentaires de la Commission des droits de la personne sur le projet de loi sur la sécurité du revenu*, (Cat. 2.412.66), 15 juin 1988.

⁷² *Déclaration universelle des droits de l'homme*, Rés. 217 A (III), Doc. off. A.G. N.U., 3^e sess., suppl. n° 13, p. 17, Doc. N.U. A/810 (1948).

⁷³ *Pacte international relatif aux droits économiques, sociaux et culturels*, 16 décembre 1966, [1976] R.T. Can., n° 46 (entré en vigueur au Canada le 19 août 1976).

⁷⁴ Nous pourrions également citer : la *Convention internationale sur l'élimination de toutes les formes de discrimination raciale* (1965); la *Déclaration sur le progrès et le développement dans le domaine social* (1969), la *Convention sur l'élimination de toutes les formes de discrimination à l'égard des femmes* (1979); la *Déclaration sur le droit au développement* (1986); la *Convention relative aux droits de l'enfant* (1989), la *Convention internationale sur la protection des droits de tous les travailleurs migrants et des membres de* (...suite)

It is widely recognized that these instruments should be used as an interpretation tool when applying and interpreting the Charter, especially when it comes to determining the meaning and the scope of the economic and social rights it aims to protect.⁷⁵ On the issue of economic and social rights, the UDHR states that: everyone is entitled to all the rights and freedoms set forth in the UDHR, without distinction of any kind, such as social origin or property.⁷⁶ Everyone has the right to social security and is entitled to the realization of the economic, social and cultural rights indispensable for his dignity and the free development of his personality;⁷⁷ the right to work and to freedom of association;⁷⁸ the right to rest and leisure;⁷⁹ the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services;⁸⁰ the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control;⁸¹ and the right to education.⁸²

The ICESCR, meanwhile, was adopted by the United Nations General Assembly in 1966 and came into effect ten years later, in 1976. Both Canada and Québec have been parties to the Covenant from the outset. The Québec government ratified the ICESCR by order-in-council on April 21, 1976,⁸³ a decision that has never been questioned since. In fact, Québec once again and more recently committed to promoting and implementing the economic and social rights

leur famille (1990). Voir à ce sujet : ORGANISATION DES NATIONS UNIES (HAUT-COMMISSARIAT DES NATIONS UNIES AUX DROITS DE L'HOMME), *Droits économiques, sociaux et culturels. Manuel destiné aux institutions des droits de l'homme*, Nations Unies, New York et Genève, 2004, p. 4, [En ligne].
http://www.ohchr.org/Documents/Publications/HR_P_PT_12_NHRI_fr.pdf.

⁷⁵ Voir notamment : *Commission des droits de la personne et des droits de la jeunesse c. Montréal (Ville)*, [1998] R.J.Q. 688 (C.A.), conf. par *Commission des droits de la personne et des droits de la jeunesse c. Montréal (Ville)*, [2000] 1 R.C.S. 665; *Vallée c. Commission des droits de la personne*, [2005] R.J.Q. 961 (C.A.), par. 28; Christian BRUNELLE, « L'objet, la nature et l'interprétation des Chartes des droits », dans BARREAU DU QUÉBEC, *Droit public et administratif*, Collection de droit du Barreau du Québec, vol. VII, Cowansville, Éditions Yvon Blais, 2013, p. 34; Michèle RIVET, « Les textes et les tribunaux : qu'en est-il devenu de l'esprit et du souffle de la *Déclaration universelle*? » (1998) 11.2 *R.Q.D.I.* 39, 46-47.

⁷⁶ *Id.*, art. 2.

⁷⁷ *Id.*, art. 22.

⁷⁸ *Id.*, art. 23.

⁷⁹ *Id.*, art. 24.

⁸⁰ *Id.*, art. 25.

⁸¹ *Id.*

⁸² *Id.*, art. 26.

⁸³ *Arrêté en conseil 1438-76 concernant le Pacte international relatif aux droits économiques, sociaux et culturels*, (1984-1989) *Recueil des ententes internationales du Québec* 809.

enshrined in the Covenant, in particular by ratifying the *Convention on the Rights of the Child*⁸⁴ and the *Convention on the Rights of Persons with Disabilities*.⁸⁵

The ICESCR is considered the “foundational treaty”⁸⁶ for the protection of economic and social rights and it recognizes every person’s right — without discrimination,⁸⁷ between men and women, for instance⁸⁸ — to the following: the right to non-discrimination and the right to equality, the right to work,⁸⁹ the right to the enjoyment of just and favourable conditions of work;⁹⁰ the right to form and join trade unions and right of trade unions to function freely;⁹¹ the right to social security;⁹² the right to the widest possible protection and assistance to the family, to mothers and children;⁹³ the right to an adequate standard of living, including adequate food, clothing and housing, and to the continuous improvement of living conditions;⁹⁴ the right to the enjoyment of the highest attainable standard of physical and mental health;⁹⁵ the right to education;⁹⁶ the right to compulsory primary education, free of charge;⁹⁷ as well as the right to take part in cultural life, to enjoy the benefits of scientific progress, and to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production.⁹⁸

⁸⁴ *Décret 1676-91 du 9 décembre 1991 concernant la Convention relative aux droits de l’enfant*, (1992) 124 G.O. II, 51. Voir : *Convention des Nations Unies relative aux droits de l’enfant*, A/RES/44/25 (1989) R.T. Can. 1992 n° 3 (20 novembre 1989).

⁸⁵ ASSEMBLÉE NATIONALE, *Journal des débats de l’Assemblée nationale*, 9 mars 2010, vol. 41 N° 91, « Motion proposant que l’Assemblée approuve la Convention relative aux droits des personnes handicapées ». Voir : *Convention relative aux droits des personnes handicapées*, 13 décembre 2006, [2010] R.T. Can. n° 8.

⁸⁶ ORGANISATION DES NATIONS UNIES (HAUT-COMMISSARIAT DES NATIONS UNIES AUX DROITS DE L’HOMME), préc., note 74, p. 5.

⁸⁷ *Pacte international relatif aux droits économiques, sociaux et culturels*, préc., note 73, art. 2, par. 2.

⁸⁸ *Id.*, art. 3.

⁸⁹ *Id.*, art. 6.

⁹⁰ *Id.*, art. 7.

⁹¹ *Id.*, art. 8.

⁹² *Id.*, art. 9.

⁹³ *Id.*, art. 10.

⁹⁴ *Id.*, art. 11.

⁹⁵ *Id.*, art. 12.

⁹⁶ *Id.*, art. 13.

⁹⁷ *Id.*, art. 14.

⁹⁸ *Id.*, art. 15.

The Commission has stated previously that “the recognition of economic and social rights is firmly rooted the Québec Charter and is pursuant to related international human rights instruments.”⁹⁹ [Our translation] In 1988, when commenting on Canada’s third report to the United Nations on measures taken to implement the ICESCR, the Commission wrote the following:

Reference to the Covenant in interpreting and implementing the Charter is part of a growing trend by human rights tribunals to use international legal human rights instruments. Within the framework of the Charter, reference to international texts is partly explained by the importance given to them during the preparatory work for its adoption and by language similarities between Québec and international standards.¹⁰⁰

The United Nations High Commissioner for Human Rights points out that States parties have three levels of obligation with respect to these rights: “the obligations to respect, to protect and to fulfil these rights.”¹⁰¹ States parties under these obligations (3.2.1) have the obligation to ensure non-discrimination in the exercise of these rights (3.2.2) and the progressive full realization of these rights. They must also (3.2.3) avoid adopting any retrogressive measures that would undermine any of these rights.

3.2.1 Non-discrimination in the exercise of rights recognized by the ICESCR

- Non-discrimination and equality are fundamental principles in international human rights law and are “essential to the exercise and enjoyment of economic, social and cultural rights”¹⁰² guaranteed by the ICESCR. Article 2 of the Covenant’s second paragraph states the following:

⁹⁹ Voir notamment : COMMISSION DES DROITS DE LA PERSONNE ET DES DROITS DE LA JEUNESSE, préc., note 68, p. 11; 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*, (Cat. 2.412.97), septembre 2002, p. 39, [En ligne].
http://www.cdpcj.qc.ca/Publications/PL_112_pauvrete.PDF

¹⁰⁰ COMMISSION DES DROITS DE LA PERSONNE ET DES DROITS DE LA JEUNESSE, préc., note 64, p. 3. Elle cite alors *Commission des droits de la personne et des droits de la jeunesse c. Montréal (Ville)*, préc., note 75, par. 65.

¹⁰¹ ORGANISATION DES NATIONS UNIES (HAUT-COMMISSARIAT DES NATIONS UNIES AUX DROITS DE L’HOMME), préc., note 74, p. 16.

¹⁰² ORGANISATION DES NATIONS UNIES (COMITÉ DES DROITS ÉCONOMIQUES, SOCIAUX ET CULTURELS), *Observation générale n° 20, La non-discrimination dans l’exercice des droits économiques, sociaux et culturels (art. 2, par. 2 du Pacte international relatif aux droits économiques, sociaux et culturels)*, Doc. N.U., E/C.12/GC/20 (2 juillet 2009), par. 2, [En ligne].

(...suite)

The States Parties to the present Covenant undertake 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.¹⁰³

The United Nations Committee on Economic, Social and Cultural Rights states on this issue that “[i]n order for States parties to ‘guarantee’ that the Covenant rights will be exercised without discrimination of any kind, discrimination must be eliminated both formally and substantively.”¹⁰⁴

And this applies to both direct and indirect discrimination, as well as to systemic discrimination, as defined in this General Comment:

- Direct discrimination occurs when “an individual is treated less favourably than another person in a similar situation for a reason related to a prohibited ground.”¹⁰⁵
- Indirect discrimination refers to “laws, policies or practices which appear neutral at face value, but have a disproportionate impact on the exercise of Covenant rights as distinguished by prohibited grounds of discrimination.”¹⁰⁶
- Systemic discrimination can be understood as “legal rules, policies, practices or predominant cultural attitudes in either the public or private sector which create relative disadvantages for some groups, and privileges for other groups.”¹⁰⁷

Whatever the type of discrimination, States parties should also ensure that they “refrain from discriminatory practices,” but also “take concrete, deliberate and targeted measures to ensure that discrimination in the exercise of Covenant rights is eliminated.”¹⁰⁸ In this regard, the United Nations Committee on Economic, Social and Cultural Rights has identified a number of issues

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fGC%2f20&Lang=en

¹⁰³ *Pacte international relatif aux droits économiques, sociaux et culturels*, préc., note 73, art. 2, par. 2.

¹⁰⁴ ORGANISATION DES NATIONS UNIES (COMITÉ DES DROITS ÉCONOMIQUES, SOCIAUX ET CULTURELS), préc., note 102, par. 8.

¹⁰⁵ *Id.*, par. 10 a). On notera que ces définitions sont similaires à celles développées en droit québécois et canadien.

¹⁰⁶ *Id.*, par. 10 b).

¹⁰⁷ *Id.*, par. 12.

¹⁰⁸ *Id.*, par. 36.

that the Commission de révision permanente des programmes should take into account during the review process it is undertaking, including:

- “States parties should regularly assess whether the measures chosen are effective in practice.”¹⁰⁹
- “Economic policies, such as budgetary allocations and measures to stimulate economic growth, should pay attention to the need to guarantee the effective enjoyment of the Covenant rights without discrimination.”¹¹⁰
- “Eliminating systemic discrimination will frequently require devoting greater resources to traditionally neglected groups.”¹¹¹

3.2.2 Achieving progressively the full realization of recognized rights

Pursuant to the ICESCR, Québec has committed to the following:

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.¹¹²

As the Commission has in fact repeatedly pointed out, the commitment made by States parties to “progressively” achieve the full realization of the rights recognized by the ICESCR includes the obligation to take immediate, deliberate, concrete, and targeted steps towards the realization of the rights recognized by the Covenant, by making use of all available resources.¹¹³ This obligation to take steps per se is “not qualified or limited by other considerations.”¹¹⁴

¹⁰⁹ *Id.*, par. 36

¹¹⁰ *Id.*, par. 38.

¹¹¹ *Id.*, par. 39.

¹¹² *Pacte international relatif aux droits économiques, sociaux et culturels*, préc., note 73, art. 2, par. 1.

¹¹³ COMMISSION DES DROITS DE LA PERSONNE ET DES DROITS DE LA JEUNESSE, *Après 25 ans, La Charte québécoise des droits et libertés, Étude n° 5 Les droits économiques et sociaux, parents pauvres de la Charte?*, 2003, p. 241-242; citant ORGANISATION DES NATIONS UNIES (COMITÉ DES DROITS ÉCONOMIQUES, SOCIAUX ET CULTURELS), *Observation générale n° 3, La nature des obligations des États parties*, Doc. N.U., CCPR/C/21/Rev.1 (14 décembre 1990), par. 2 et 9, [En ligne].
[http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolNo=E%2f1991%2f23\(SUPP\)&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolNo=E%2f1991%2f23(SUPP)&Lang=en)

¹¹⁴ ORGANISATION DES NATIONS UNIES (COMITÉ DES DROITS ÉCONOMIQUES, SOCIAUX ET CULTURELS), *Id.*, par. 2.

In this regard, the Commission has repeatedly recommended that the economic and social rights provisions of the Charter be reinforced to better reflect the “meaning advocated by both international human rights law and the constitutional law of many democratic states.”¹¹⁵ [Our translation]

3.2.3 Prohibiting retrogressive measures

The necessary corollary to the States parties’ obligation of progressively realizing the rights recognized by the ICESCR as discussed above is the obligation not to adopt any retrogressive measures.¹¹⁶ As stated in the Committee on Economic, Social and Cultural Rights’ General Comment No. 3, any retrogressive measure “would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.”¹¹⁷

A “retrogressive measure” is any measure that “directly or indirectly, leads to backward steps being taken with respect to the rights recognized in the Covenant,”¹¹⁸ whether deliberately or otherwise. As such:

[T]he prohibition applies to any measure taken consciously that reduces the enjoyment of economic, social and cultural rights, whether or not the regression was an intended and wanted consequence of the measure.

States are expected to act with care and deliberation in taking action that might violate human rights, directly or indirectly. The prohibition therefore extends to measures taken negligently that reduce the enjoyment of human rights.¹¹⁹

In summary, the key considerations regarding Québec’s ICESCR obligations are as follows:

¹¹⁵ COMMISSION DES DROITS DE LA PERSONNE ET DES DROITS DE LA JEUNESSE, préc., note 113, p. 241, 244-245.

¹¹⁶ ORGANISATION DES NATIONS UNIES (HAUT-COMMISSARIAT DES NATIONS UNIES AUX DROITS DE L’HOMME), préc., note 74, p. 13.

¹¹⁷ ORGANISATION DES NATIONS UNIES (COMITÉ DES DROITS ÉCONOMIQUES, SOCIAUX ET CULTURELS), préc., note 113.

¹¹⁸ ORGANISATION DES NATIONS UNIES (HAUT-COMMISSARIAT DES NATIONS UNIES AUX DROITS DE L’HOMME), préc., note 74, p. 29.

¹¹⁹ *Id.*, p. 30.

- Non-discrimination and the right to equality are founding principles of international human rights law and extend to economic and social rights guaranteed by the UDHR and the ICESCR.
- Therefore, “[i]n addition to refraining from discriminatory actions, States parties should take concrete, deliberate and targeted measures to ensure that discrimination in the exercise of Covenant rights is eliminated,”¹²⁰ and must ensure that their budgetary allocations support this objective.¹²¹
- The commitment made by States parties to “progressively” achieve the full realization of the rights recognized by the ICESCR includes the obligation to take immediate, deliberate, concrete, and targeted steps towards the realization of these rights, by making use of all available resources.
- Any retrogressive measure “would require the most careful consideration and would need to be fully justified.”¹²²

CONCLUSION

The important mandate entrusted to the Commission de révision permanente des programmes must be carried with a view towards respecting human rights and freedoms. The Charter’s fundamental text specifies, under Section 54, that the “Charter binds the State.” In addition, the overriding nature of the Charter on Québec legislation carries with it the obligation to ensure a thorough review process of government programs provided to the population, in order to ensure that proposed reforms comply with the principles and values enshrined in the Charter.

In this document, the Commission has examined three elements that must, in its opinion, provide the analytical framework that will guide the program review process and that should be integrated into the ongoing review mechanism.

The first of these elements is compliance with the criteria for setting the scope and defining the exercise of fundamental freedoms and rights enshrined in Sections 1 to 9 of the Charter. In this respect, the State must demonstrate that:

¹²⁰ Préc., note 102, par. 36.

¹²¹ *Id.*, par. 38.

¹²² Préc., note 117.

- 1) The pursued objective relates to concerns that are pressing and substantial.
- 2) The means chosen are reasonable and demonstrably justified, which implies that the supporting evidence shows that:
 - a) it is rationally connected to the pursued objective;
 - b) the right in question is impaired as little as possible; and
 - c) its beneficial effects are proportional to the objective and outweigh any negative effects.

The second element focuses on the recognition of the right to equality, more specifically as it relates to indirect discrimination or a prejudicial effect, but also as it relates to systemic discrimination. A thorough human rights impact analysis of recommended changes to programs or even the continuation of certain programs should be undertaken. This should examine the impact on segments of the population affected by one or more recognized grounds of discrimination. This analysis must take into account the specific characteristics of members of these groups, especially the most vulnerable members of our society most likely to be affected. In addition, the ongoing review mechanism should use an analytical method that incorporates the principle of non-discrimination.

And finally, the third element is a reminder of Québec's obligations specifically with respect to both the economic and social rights recognized by the Charter and the rules for the recognition of these rights under international human rights instruments that Québec has ratified and committed to enforcing. The rules for the recognition and enforcement of economic and social rights should therefore be part of the analytical framework that will guide the program review process, and should be an integral part of the ongoing review mechanism. These rules can be summarized as follows:

- a) Non-discrimination in the recognition of economic and social rights.
- b) Concrete and targeted measures to ensure equality in the exercise of these rights.
- c) Commitment to achieve "progressively" the full realization of these rights by taking immediate, deliberate, concrete, and targeted steps towards the realization of these rights, by making use of all available resources.
- d) Obligation not to adopt any retrogressive measures, whether deliberately or otherwise, unless they have been thoroughly examined and fully justified by reference to every right provided for in the Covenant.

The Commission therefore recommends that these three elements related to the protection of human rights and based on the Charter be part of the analytical framework that will guide the program review process, and be incorporated into the ongoing program review mechanism.