Social Rights and the Question of a Social Charter

Presentation to the Symposium on the Social Union

Canadian Centre for Policy Alternatives

September 18, 1998

Bruce Porter

CERA

Raising the question of social rights in the context of the social union discussions is really as simple as reframing the way in which the issue is being discussed.

The debate over the social union to date has been largely defined by questions of jurisdiction and power. As Chretien put it in his interview in the Citizen yesterday, for them it's a question of "who runs the government." The enforcement of national standards, within this paradigm, is an assertion of federal "power" over the provinces to run the show.

The provinces, on the other hand, appear to find the idea of accountability to standards and principles more palatable if these are agreed upon rather than imposed by the federal government, and adjudicated by a tribunal rather than "policed" unilaterally by the feds. In terms of a power discourse, this seems more equitable.

What is missing from this picture, and conspicuously absent from the process, is the citizens whose access to basic needs, to healthcare or education is at stake in these so called "standards" or "principles". Is the point merely to achieve equity between two levels of government by means of agreed terms and a dispute resolution mechanism, or is it to ensure that the needs of citizens, particularly of vulnerable groups whose interests might otherwise be ignored, are met? If, by federal provincial agreement, basic standards and principles are agreed upon, and one level of government is not complying with these, why not allow citizens themselves to go to the tribunal and ask for a remedy? The question seems an obvious one, and it gets us squarely on the terrain of institutionalizing social rights in Canada through federal/provincial agreement.

This is not so radical an idea in Canada. The rallying point for the modern social and economic rights movement in Canada outside of Quebec, and the beginning of the Charter Committee on Poverty Issues, was the Finlay standing case. Jim Finlay, an individual social assistance recipient, asserted standing to enforce the provisions of CAP. A "deal" between provinces became, in Finlay, a social and economic right - a provision which could be enforced by those whose lives are affected. While the Supreme Court in Finlay did not find that Jim Finlay had an individual right to an adequate level of social assistance in the strict legal sense, it did find that he had the right to go to court, to force a review of his province's social assistance system, to have it determined if the system met a basic standard of adequacy as articulated in CAP, and to force the federal government to with-hold transfer payments from the province until the violation of the agreement was remedied. From the standpoint of social rights, he had won all of the basics - a basic right or entitlement against which to assess the performance of his government, access to an adjudicative mechanism through which it could be determined if the government was violating that entitlement, and access to a systemic remedy of the problem.

A social rights approach means recognizing that even in the development of social policy and in decisions about how to allocate the budget, there are certain democratic values and basic human rights which elected governments must agree not to violate. It means establishing rules for a democracy in an affluent society which ensure that no one is deprived of the right to an adequate standard of living, including adequate food, clothing and housing, to work

freely chosen, to education, healthcare and necessary assistance in caring and providing for children. And it means establishing mechanisms for citizens to identify violations of these rights and have them remedied, even where the remedy forces governments to act against their will.

What is really being discussed in the social union discussions is the social rights of Canadians - the rules and principles against which government actions and spending in the social policy field are to be measured and challengeable. But it is being discussed solely within the warped discourse of power and jurisdiction, excluding the voice of those whose rights and interests are being determined - it is Charlottetown without the constitutional conferences or the referendum, without the voices of NAC, NAPO, NWAC and all of the other NGOs who spoke out for their rights.

For poor people particularly, the insertion of the citizen,s voice into the enforcement mechanism is essential. Poor people have never been able to count on the Federal Government or anyone else to act to enforce their entitlements, even when they are the subject of federal/provincial agreements. No once, in the history of CAP, did the Federal Government force a province to comply with the adequacy provisions. The real benefit of the adequacy provisions and the prohibition of workfare in CAP was not the federal power to enforce standards through its spending power but rather their implicit status as social rights around which social policy and political discourse was molded. What was lost with CAP was not so much the protection from the Federal Government but a social right to financial assistance when in need. The most vicious aspects of the social assistance changes since 1995 has been their assault on that notion of dignity and entitlement, their assault on the human rights of poor people, now deprived of any legal protection.

Now, more than ever, it is clear that putting the Federal Government solely in charge of protecting the interests of the poor and other vulnerable groups in social policy in Canada is like putting Dracula in charge of the blood bank. It is the federal government, after all, that has orchestrated the concerted attack on the rights of poor people in Canada by revoking CAP. The maintenance of the provisions of the Canada Health Act in the CHST at the same time as revoking the most fundamental protections for poor people from being deprived of basic necessities in the name of "provincial flexibility", was a transparent attempt to sever the interests of the vulnerable from those of the majority with political clout and voting power.

Universal healthcare in Canada is a majority interest. Everyone uses, or figures they may use, the healthcare system. The federal government defends national standards that it deems to be politically popular majority interests. But when public opinion polls showed that in reaction to long term unemployment, the public was willing to scapegoat social assistance recipients by cutting assistance and forcing them to work for welfare, the federal government scrambled to jump on the bandwagon. Rather than playing a protective roll, it unilaterally removed any semblance of legal protection for the group.

The social union discussions are being carried on in the midst of the most serious violations of basic human rights to social security and to an adequate standard of living that we have seen in many years in Canada. With unprecedented levels of homelessness and hunger in the midst of unprecedented affluence, the Federal government has insisted that any restored federal transfer payments should be allocated solely to the politically popular area of health care. And it is majority's health care interests which will be defended, not those of vulnerable minorities. When B.C. allowed interpreter services for the Deaf to be eliminated, the Federal Government intervened at the Supreme Court of Canada, not to defend the principles of the Canada Health Act or the rights of vulnerable groups to healthcare, but rather to defend the rights of governments in Canada to decide for themselves how they want to spend their money. If it was not always a myth, it is certainly a myth now that the federal level of government is somehow uniquely situated to defend the rights and interests of vulnerable groups in Canada.

What the federal government should be doing in the social union talks is addressing the need for social rights protections in Canada, in part, to fulfill its obligations under international law to ensure that there are effective remedies in Canadian law to violations of these rights. But this is unlikely to happen without a strong public consensus in favour of these rights. In the year of the 50th Anniversary of the Universal Declaration of Human Rights, we will hear many affirmations of the interdependence and indivisibility of all human rights, including social and economic rights, from all sectors of Canadian society. But when it comes down to the concrete details about social rights in Canada, or what is left of them, there is very little consensus and no shared vision about how to

protect them, to enforce them, to adjudicate them - not even among allies in the social justice movement. I think this has a lot to do with the inability of progressive movements in Canada to find an effective voice in the current social union discussions. Not only are we excluded, we do not really know what to say.

The present meeting is a long overdue opportunity for us to begin to at least build some solidarity and test the waters as to whether in fact we could begin to build a movement for social and economic rights in Canada. There is certainly a new energy for social and economic rights among many constituencies. Members of the U.N. Committee on Economic, Social and Cultural Rights now think of Canada as a hotbed of social rights activism. In 1993 Canadian NGOs were the first in the world to convince the U.N. Committee to allow oral submissions during the five year periodic review of the State party. Two years later, Canadian NGOs were the first to ever appear before the Committee outside of the five year periodic review, to alert the Committee to the implications of Bill C-76 and the revoking of CAP. This year, in preparation for Canada's Third Periodic Review, groups are feverishly working across the country to prepare reports to the Committee. LIFT is organizing a "peoples report to the United Nations", NAPO is getting input from across the country for its report. Homeless people in Parkdale are making a video to document homelessness in their community.

Yet in the midst of all of this, the future of social rights in Canada is being debated in the social union discussions with barely a whisper from the constituencies affected. Restoring the entitlement to adequate financial assistance when in need is reported to be back on the table, then off the table, with little or no public reaction.

It is, of course, difficult to become energized to try to inject some life into a process which is so warped by its lack of transparency and so insistent on coming out with limpid, wet noodle rhetoric like the Premiers' Principles. A social charter enunciating a vision for a new rights culture in Canada is clearly not what Mike Harris or any of the rest of our First Ministers have in mind.

The very phrase "social union", in fact, is historically associated with a concerted and sustained assault on the notion of social and economic human rights. The phrase emerged during the constitutional discussions leading to Charlottetown when politicians from various decided to expunge the concept of social and economic rights from the idea of a "social charter" which had been placed on the table in a very undefined form by Bob Rae.

In response to the call for a "social charter" the Beaudouin-Dobie Report, you may recall, incorporated what it called a "social covenant" containing a number of what it called "social commitments". Any reference to rights was scrupulously avoided, and the Report stated explicitly that "these commitments express goals, not rights.... We believe that the matters addressed in the Social Covenant are best resolved through democratic means."

The "social and economic union" clause in the Charlottetown Accord was simply a constitutional declaration that in Canada, there can be no legal remedies to violations of social and economic rights. Social rights became "policy objectives" subject exclusively to the authority of legislatures, and the consensus agreement on which the referendum was held stated explicitly that these values were not justiciable.

Reframing rights as policy objectives or shared values, as our First Ministers are intent on doing, is not simply a matter of nuance or vocabulary. The United Nations Committee on Economic, Social and Cultural Rights aptly noted its "concern" during its 5 year review of Canada in 1993 that the Federal and provincial governments seemed to have attempted, in Charlottetown, to downgrade fundamental human rights to the status of unenforceable policy objectives. The Committee noted the similarity in the logic in the constitutional negotiations with that of lower court judges in Canada who had refused to interpret the Canadian Charter of Rights's guarantees of equality and security so as to provide remedies to violations of social and economic rights. When poor people have launched legal challenges to violations of social and economic rights such as the vicious cuts to welfare in Ontario the language is always the same - these are noble values and policy objectives, but not enforceable human rights. The U.N. Committee made it clear that if that is truly the case in Canada, then Canada is not meeting its obligations under the Covenant to provide effective remedies to violations of social and economic rights. Social rights are not just shared values and social policy objectives. They are rules and principles to which elected governments can be held responsible by citizens. If we don't believe these are human rights, we shouldn't have ratified the Covenant, and we shouldn't advertise ourselves on the international stage to be champions of human rights.

It seems to me that since the issue of social rights is hovering over the Social Union tables, we should at least be there to assert that these are, indeed, rights, that they are rights which ought to be articulated as such in any Federal/Provincial agreement. We need to, at a minimum, inform our politicians that we do not want these rights downgraded to limpid mush. Social rights in Canada are in a state of crisis and the most obvious place to institutionalize them is through the enforceable provisions of federal/provincial agreements, through some sort of, dare I say the word, "social charter."

It is not, of course, unprecedented for NGOs to propose a social charter in Canada. In 1992 during the lead up to Charlottetown a large coalition of anti-poverty, equality seeking, First Nations and social policy organizations endorsed an alternative proposal to Beaudouin-Dobie that became known as the "Alternative Social Charter" The Alternative Social Charter was drafted and was endorsed and promoted by over 40 social justice, anti-poverty and equality seeking groups. These included NAC, NAPO, the Charter Committee on Poverty Issues, the Canadian Disability Rights Council, the Canadian Council on Social Development, the Minority Advocacy Rights Council and the Native Women's Association of Canada.

Although the Alternative Social Charter has largely been forgotten by the organizations that endorsed and promoted it in 1992, it has developed a bit of a life of its own. It has attracted considerable commentary from both Canadian and international scholars. There is a special publication of the Centre for Constitutional Studies" devoted to it, entitled "Social Justice and the Constitution". It was discovered by South African NGOs looking at options for constitutionalizing social and economic rights there, though in the end they opted, consistent with the advice from those of us involved in the social charter issue in Canada, not to sever social and economic rights from other fundamental rights in the Constitution. In his recently published book on *Reclaiming Social Rights*, the New Zealand scholar Paul Hunt, recently appointed to the U.N. Committee on Economic, Social and Cultural Rights, discusses the Alternative Social Charter proposal in Canada as a model which other countries may wish to consider.

You will see from the copies I have distributed that the Alternative Social Charter proposed the constitutional entrenchment of "an equal right to well-being", including a right to "a standard of living that ensures adequate food, clothing, housing, child care, support services and other requirements for security and dignity of the person and for full social and economic participation in their communities and in Canadian society". It affirmed the right to health care and included the principles of the Canada Health Act as components of that right. It also affirmed the right to education, employment opportunities and just and favourable conditions of work. The wording of many of the rights mirrored the provisions of the Univeral Declaration and the International Covenant on Economic, Social and Cultural Rights.

The Social Charter established both a Social Rights Council, charged with monitoring and reporting on social and economic rights, and a Social Rights Tribunal to adjudicate them. The Tribunal was to be made up of experts in social and economic rights, and since there are very few lawyers and judges who would qualify, we can assume that the adjudication of social rights claims would be very different from traditional court proceedings - open to non-lawyers, to NGOs as intervenors and others, and developing its own distinctive jurisprudence. Judicial review was directly to the Supreme Court and only on manifest errors of jurisdiction.

In terms of remedy, the tribunal could either order the government to itself propose a remedy within a particular time period or, where necessary, order compliance. Any order of the tribunal, however, would not come into effect until the House of Commons or the relevant legislature had sat for five weeks, during which time the decision could be over-ridden by a simple majority vote. The Social Charter also enhanced other remedial options as well. It made the provisions of federal/provincial cost sharing agreements enforceable by affected individuals, applying the Finlay model to all other cost-sharing agreements. And it encouraged the interpretation of the Charter of Rights that would include, wherever possible, social and economic rights.

The "Alternative Social Charter" was proposed as an addition to the constitution but the basic model could easily be achieved through federal/provincial agreement. The Federal Government and the provinces could simply agree to sign onto a social charter, making both levels of government accountable to the principles and rights contained in it and subject to the decisions of the tribunal and the powers of the Social Rights Council to monitor and report on social rights. Compliance with the social charter and with the rulings of the tribunal could become a requirement for participation in cost-sharing agreements, with the tribunal acting as the adjudicator where either an affected person

or group, or a government, alleges non-compliance. All of this could be achieved quite simply, by modifying the premiers's proposed tribunal.

As a constitutional addition, the Alternative Social Charter was more sparely worded and more open textured than what we would want in a federal-provincial agreement. A social charter redrafted for the present context should protect particular programs and re-establish CAP-like requirements as fundamental entitlements. Nevertheless, it embodies a number of principles which I think are important to consider in looking at the social charter option and provides a starting point from which we could begin to find a consensual vision.

The first principle I would identify as being essential to a social charter is reference to international human rights law, either implicitly, through the wording of the rights, or explicitly, so as to effectively incorporate the provisions of international human rights law into enforceable provisions. This avoids a minimizing of social rights in Canada or restricting protection to a partial list of popular standards which will invariably leave out the rights of the most vulnerable.

The jurisprudence on social and economic rights internationally, primarily from the U.N. Committee on Economic, Social and Cultural Rights, is a positive benefit. The failure of governments in Canada to incorporate this aspect of international human rights law into domestic law must be surely be remedied. And grounding "national standards" in international human rights law binding on Canada must surely make them more palatable to provinces, which have usually agreed to the international legal commitments when the Covenant was ratified.i

There are a number of principles of international human rights law which might also be explicitly affirmed in a social charter. The principle of non-retrogression and progressive realization, affirming that legislatures cannot deliberately go backward in the protection of social rights is crucial. Another is the standard of by which to assess governments' realization of social and economic rights "to the maximum of available resources." These principles from international law distinguish a social charter from a set of core minimum requirements which may simply produce backsliding to the lowest common denominator. They frame the Sociall Charter not around uniformity of standards but around progressively improving protections of social rights.

A second principle is that of inter-dependency and indivisibility of all human rights. It must be made clear that a social charter does not occupy the entire space of social rights in Canada. Equality rights under the Charter must continue to be interpreted substantively and expansively so as to include many of the social and economic rights recognized in international law and social rights must be applied with an equality orientation, focusing on the needs of women and other historically disadvantaged groups. This is in fact an advantage in a social charter that is outside the constitution. A social charter by federal/provincial agreement can be framed as an implementation of governments' obligations under the Charter to protect equality and security of the person as well as of its obligations under international human rights law to protect social and economic rights. Thus, a claim such as the *Eldridge* challenge to B.C.'s denial of interpreter services in the provision of health care would continue to be a valid Charter case even though it would also be a possible challenge to the obligation under a social charter to protect, respect and fulfill the right to health and abide by the principles of universality and accessibility in the Canada Health Act.

A third principle is the recognition of the distinctness and primacy of human rights over corporate rights or agreements of trade and investment. The Alternative Social Charter did not include, as did the Charlottetown Accord, any reference to trade barriers or the free movement of goods, services and capital, as if these are somehow on a par with human rights. Human rights law has a distinctive jurisprudence and interpretive framework. They should not be mixed with trade and investment rules or corporate rights which, in Canada, enjoy no constitutional status. Social rights ought not then to be framed as minimum standards for trade and investment and they ought not to be adjudicated by trade and investment lawyers.

And a fourth principle we see in the Alternative Social Charter is the assertion of "joint" responsibility in line with s.36 of the constitution. The role of a tribunal and council to protect social rights is to protect those interests which may be ignored by a democratic government responding to majority interests and demands. They may fall through the cracks because of the marginal and disadvantaged status of the constituency involved, but they may also fall

through the cracks because of jurisdictional overlap or confusion. A tribunal looking into the violation of the right to housing in Canada, for example, would want to consider the actions and inactions of both levels of government and find the federal and provincial governments jointly responsible for remedying the problem.

So it seems to me that the vision of a social charter promoted by the NGO coalition in 1992 remains viable. It has, in fact, a key selling points in the context of the social union discussions.

The imposition of requirements on provinces by the Federal government is far less palatable to most provinces than would be an agreement to protect the rights of all citizens. The U.N. Committee's review of Canada in November will undoubtably find that there is crisis in social rights in Canada which must be remedied, in part, by the restoration of the right to adequate financial assistance for persons in need, at least to the extent that it existed under CAP. Rather than framing shared cost agreements as creating provincial accountability to federally imposed standards, a social charter can frame them as necessary to ensure compliance by all levels of government in Canada with basic human rights norms to which Canada, with the consent of the provinces, have already become bound under international law.

Yet there are serious political risks in proposing a social charter within the context of the social union discussions as well. The assault on social rights has remained a dominant strategy in federal provincial negotiations since Charlottetown and it lives on in the "social union" discussions. A crucial component of the strategy seems to be a wordprocessing macro held over from Charlottetown (perhaps from Bob Rae's famous laptop) which automatically replaces the word "rights" with limpid, mushy kinds of words like "commitment", "shared values", or "policy objectives". There is a curious hostility to the idea of human rights placing positive obligations on governments to DO things in Canada, as a social charter most certainly does. We most recently witnessed this in the public and political reaction to the Supreme Court of Canada's decisions in Eldridge and Vriend where governments' freedom in Canada to violate the human rights of vulnerable groups was widely defended as a "democratic value" by may, like Jeffrey Simpson and the editorial board of the Globe and Mail, who should know better.

We are hamstrung, in Canada, by what used to be a healthy skepticism about the American rights culture, but which has now, ironically, become an American style rejection of social rights. It is ironic that when Jeffrey Simpson and others write so critically of the new "rights" culture, they suggest that Canadian political cultural is being "Americanized". It is the U.S, after all, which has played a leading role in opposing social and economic rights, positing instead a rights culture based on the restraint of government from undue interference with corporate and individual freedoms. Not only does the U.S. still refuse to ratify the Covenant on Economic, Social and Cutlural Rights but it is one of two two nations in the world to have refused to ratify the Convention on the Rights of the Child. And it is the U.S. which has peddled its paradigm of rights into the global regulation of trade and investment, first through the NAFTA investment chapter and now through the MAI, granting corporations unprecedented powers to over-rule regulatory and protective measures adopted by democratically elected governments, not in the name of higher rights of citizens, but rather of the super-human rights of corporations. One of the more remarkable shifts in the history of Canadian foreign policy is the extent to which Canada, once a critic of the U.S. assault on social rights, has jumped on board the U.S. led initiative to impose a truly American model of economic rights on the global regulation of governments through trade and investment agreements. If we do not very quickly find a way of retrieving Canada's historic difference from the U.S. rights paradigm, and find a basis for institutionalizing social and economic rights in Canada, we will surely end up with a social and economic union modelled on the MAI and NAFTA.

While there is a danger that by the time any proposed social charter emerged from the political process the rights framework would be lost, as in Charlottetown, and we would end up with a declaration denouncing social and economic rights in Canada. However, it seems to me that our silence about social rights while they are being horse-traded in the social union discussions may have an even more negative result. Social rights in Canada will be quietly flushed down the drain or thrown off the train or lost on the golf course or whatever First Ministers do at these private meetings, without a sound of protest.

I would like to suggest, late in the day as it is, that the time has come to consolidate an emerging movement for social rights in Canada. There are a couple of key components to a successful strategy.

We should focus on restoring an enforceable right to adequate financial assistance when in need as had existed in CAP. In this way, we are not proposing a radically new model of rights but rather restoring what we lost, in recognition that the loss of CAP has provoked the most serious crisis in social rights in Canada in a generation.

We should use the upcoming review of Canada by the U.N. Committee on Economic, Social and Cultural Rights as an opportunity to raise the critical question about why Canada is failing to live up to its obligations under the Covenant to provide effective remedies to violations of social and economic rights. The U.N. Committee will likely recommend that the social union discussions ought to restore and expand the protections of social and economic rights in Canada. Thus, we should associate the campaign for social rights with an international culture of human rights, not a judicial culture which provokes critiques of courts taking over social policy.

And finally, we must build solidarity among allies in the social justice movement. The alternative social charter initiative in 1992 was lost, not simply to a political elite, but to a lack of consensus within the social justice community. It was when the CLC and the Federal New Democrats opted against enforceable social rights, with the exception of workers' rights, that the alternative social charter initiative lost. We really had no way of getting our proposals onto the table at Charlottetown because we had no support from anyone with any access to the table. The differences between human rights groups and labour that emerged leading up to Charlottetown are still with us, showing up, for example, in different approaches to trade and investment issues. Human rights groups favour a broader enforceability of social and economic rights which would protect from retrogressive measures affecting all marginalized groups. Labour has focused on the rights of workers to organize and bargain collectively and minimal core labour standards. There has, however, been little discussion among us, to flesh out our different concerns and to begin to develop alliances and joint strategies. If we cannot forge a consensus for social rights among our social justice allies, we surely have little chance of succeeding on the broader political stage.

Charlottetown has bad memories but it also has good memories. The point, it seems to me, is to begin to define our own agenda and to promote it in our own terms. There is a crisis in social rights in Canada and we ought to be working together to propose ways to address it head on. I propose that we at least take today as a jumping off point, to start to work together to create a movement for social and economic rights in Canada and see where it leads. Our silence is becoming deafening. Let's find our collective voice.