The Social and Economic Union:

The Social Charter that Isn't

by Bruce Porter

The most coherent aspect of a constitution created by bargains and trade-offs is the mark left by the absence of certain parties at the table. Their inability to represent their own interests leaves an incorrigible textual warp which gives constitutional status to the exclusions of the negotiating process itself.

Poor people were allowed no participation in the constitutional discussions, either through consultation or direct participation, even when it was their own rights at stake in a proposed social charter. Their exclusion has been constitutionalized in precisely the form it took during the talks. Politicians have created a constitutional package which denies poor people any rights, any empowerment, any self-representation and which may well undermine rights claims of poor people under the Charter of Rights and Freedoms.

Poor peoples' rights have been assaulted from two sides in the Charlottetown Accord. One assault, led by Premier Romanow of Saskatchewan, was an attack on the new "politics of rights" - both existing charter rights and any proposed social and economic rights. Romanow led most of the other premiers in insisting that rights should not extend into the social and economic domain, and hence, that poor people should not have rights. The other assault, led by the Federal Tories, insisted that any proposed social charter must include a statement of corporate economic "rights" in the form of the "four freedoms" -the free movement of persons, goods, services and capital."

The aim of the assault on the "politics of rights" was to ensure that the rights of disadvantaged groups do not challenge the absolute authority of governments in social and economic policy. Such a premise, of course, is antagonistic to the very notion of a social and economic rights. Thus, in every case except the rights of workers to organize and bargain collectively, the language of rights was scrupulously avoided in the Social and Economic Union. Poor peoples' rights became governments' "policy objectives".

All disadvantaged groups, and particularly those living in poverty, have been pressing in Charter litigation for a "substantive" approach to protections of equality and security of the person, requiring governments to create real conditions of equality for disadvantaged groups, not just to abide by formal "equal treatment". That requires judicial intervention in the social and economic arena to protect the interests of marginalized and disadvantaged groups, where they are so often deprived of equality, dignity and security.

During the constitutional discussions a large coalition of anti-poverty, equality, social policy and environmental groups developed an alternative social charter and advocated enforcement through a tribunal that would be insulated from the courts. While proposing an alternative to court enforcement, however, we also wanted to avoid at all costs giving the courts any excuse for refusing to protect rights in the social and economic spheres, where poor peoples' rights claims invariably fall. As we are already seeing in section 15 jurisprudence, excessive deference to the legislature in social and economic policy simply moves the courts away from more substantive notions of equality and "fundamental justice" in Charter interpretation and back toward a civil liberties or "negative rights" paradigm, which has always served more advantaged interests.

What the coalition of groups proposed was an interpretive clause instructing the courts to interpret the Charter of Rights and Freedoms in a manner consistent with the rights in the Social Charter. That position was advanced by Ontario during the summer negotiations, but it was promptly shot down by all other provinces, particularly the western NDP provinces. They certainly did not want the Charter interpreted in a manner consistent with "policy objectives" such as ensuring reasonable access to housing, food and other basic necessities. As the majority of premiers are quite hostile to the invasion of "rights" in the social and economic spheres, they wanted to prevent any expansive Charter interpretation emanating from the provisions of the Social and Economic Union.

Ontario then fought to ensure that the agreed legal text at least avoided any explicit statement of non-justiciability that would be damaging to an expansive approach to the Charter. They succeeded, and the agreed legal text simply affirmed legislative authority in these areas, in language very similar to the present section 36. However, the Charlottetown agreement does not include the legal text, and reverts to a simple statement that the provisions of the Social and Economic Union "should not be justiciable".

This may prove to be very damaging to poor peoples' rights under the Charter. Since the referendum is to be held on the Consensus Agreement rather than on the legal text, the agreement itself will attain near constitutional status. The wording of the

agreement will be used as an argument against any attempts by poor people to claim Charter rights in the social and economic arena.

The interpretive clause proposed by the coalition of groups, instructing the courts to adopt an interpretation of the Charter consistent with social and economic rights has been replaced, in this package, with a very similar preface to the Canada Clause, instructing the courts to interpret the Charter in a manner consistent with eight fundamental characteristics of Canada. The clause has the opposite effect here, however. Rather than encouraging a more expansive interpretation of the Charter, it encourages a narrow application. The Canada Clause provides additional section 1 defenses to any rights claims by poor people while offering no encouragement or foundation for a more substantive interpretation of Charter rights.

There is no mention in the Canada Clause of any commitment to address poverty, to ensure dignity and security, to overcome inequality, to ensure access to basic necessities - nothing related to poverty or disadvantage at all. Even the commitment to the "well-being of all Canadians", as orginally proposed by the Federal Government would have helped. The interpretive clause which the premiers refused to accept in the Social and Economic Union section was accepted in the Canada clause precisely because in the Canada Clause it weakens rather than expands Charter rights. The premiers consistently sought to ensure that the Charter will not be applied to poverty issues or used by disadvantaged groups to establish positive governmental obligations to alleviate disadvantage.

The other rub in the social and economic union provisions, of course, is the commitment to the free movement of goods, services and capital. If we were to convince the courts to interpret the Charter in conformity with a "policy objective" such as ensuring an adequate standard of living, we would be establishing a precedent for interpreting the Charter in conformity with the free movement of capital as well. This could reintroduce the spectre of corporate rights into charter litigation, just when we thought we had won that battle.

The amalgamation of social rights and corporate rights also means that the proposed monitoring body will monitor complex issues of social programs and benefits at the same time as monitoring trade barriers. It is hard to imagine a monitoring body with competence in both areas.

All of the other economic union provisions were relegated, in Charlottetown, to a political accord, which will include a monitoring body. It makes no sense to retain the general statement of economic union principles in the Social and Economic Union,

with a monitoring body for that, while developing some other monitoring mechanism for trade barriers pursuant to a political accord.

The Social And Economic Union Provisions can only be made acceptable if the current statement of agreement is replaced with a precise legal text, incorporating three essential changes.

1) The "four freedoms" must be removed from the provisions of the Social and Economic Union.

2) An interpretive section must be added to the Social and Economic Union, similar to that in the Canada Clause, instructing the courts to interpret the constitution, including the Charter of Rights and Freedoms, in a manner consistent with the provisions of the Social and Economic Union. Alternatively, a reference to the provisions of the Social and Economic Union (minus the "four freedoms") could be included in the Canada clause.

3) The Canada Clause must be ammended to refer to the commitments of Canadians and their governments to overcoming inequality and to ensuring the dignity and security of all residents of Canada. A specific commitment to equality for people with disabilities should also be added, as well as a generally worded commitment to achieving equality for all disadvantaged groups.