INTERNATIONAL HUMAN RIGHTS IN CANADA

CANADA'S INTERNATIONAL HUMAN RIGHTS OBLIGATIONS AND DISADVANTAGED MEMBERS OF SOCIETY: FINALLY INTO THE SPOTLIGHT?

Craig Scott

ABORIGINAL SELF-DETERMINATION WITHIN CANADA: RECENT DEVELOPMENTS IN INTERNATIONAL HUMAN RIGHTS LAW

Andrew J. Orkin and Joanna Birenbaum

CANADA'S PROSPECTS: THE SOCIAL UNION

THE SOCIAL UNION FRAMEWORK AGREEMENT: HOLLOWING OUT THE STATE

Margot Young

A FRAMEWORK FOR CONFLICT MANAGEMENT

Barbara Cameron

CONSTITUTIONAL
FORUM
CONSTITUTIONNEL

Centre for Constitutional Studies/Centre d'études constitutionnelles

Volume 10, Number 4 Summer 1999 Edmonton, Alberta

CONSTITUTIONAL
FORUM
CONSTITUTIONNEL

Editors:
Patrick Nugent
David Schneiderman
Design & Layout:
Christine Urquhart

Constitutional **Forum** Constitutionnel is a quarterly publication of the Centre for Constitutional Studies / Centre d'études constitutionnelles published with the financial support of the Alberta Law Foundation.

The opinions expressed herein are those of the individual contributors only. Contributions and replies are invited in either official language. Notes and articles should be limited to 3,000 words in length. The Editor and Management Board reserve the right to edit any submissions. Inquiries and contributions should be directed to the Editor, Patrick Nugent (pnugent@law.ualberta.ca), 459 Law Centre, University of Alberta, Edmonton, Alberta, T6G 2H5 or by telephone at (780) 492-5681 or Fax (780) 492-9959; or e-mail: curquhar@law.ualberta.ca.

Associate Memberships to the Centre for Constitutional Studies are available at $40.00 per year (entitlements are: newsletter, notification of Centre publications, lectures and events.) Retroactive memberships are still available for an additional fee. Retroactive membership for 1989-90 through 1998/99 are available at $15.00 per year. Make cheques payable to: The Centre for Constitutional Studies.

Constitutional **FORUM** Constitutionnel is indexed in: **Index to Canadian Legal Periodical Literature, Index to Canadian Legal Literature** and **Current Law Index.**

ISSN: 0847-3889

PUBLICATION MAIL AGREEMENT #1651285

CANADA'S INTERNATIONAL HUMAN RIGHTS OBLIGATIONS AND DISADVANTAGED MEMBERS OF SOCIETY: FINALLY INTO THE SPOTLIGHT?

Craig Scott

INTRODUCTION

The *International Covenant on Civil and Political Rights* (*ICCPR*) and the *International Covenant on Economic, Social and Cultural Rights* (*ICESCR*) are the two central treaties within the United Nations' human rights system.[1] After the adoption in 1948 of the *Universal Declaration of Human Rights* (UDHR) by the UN General Assembly, Cold War politics and different ideologies of appropriate legal protection for human rights clashed over how the moral statements contained in the UDHR should be translated into binding treaty obligations.[2] In the result, states decided to apportion the holistic group of rights found in the UDHR (ranging from Article 3's classical 'liberal' "right to life, liberty and security of the person" to Article 25's "right to a standard of living adequate for . . . health and well-being") into these two separate treaties, the *ICCPR* and *ICESCR*. In so doing, they invented as much as recognized a distinction between so-called "civil and political rights" and so-called "economic, social and rights" that has ever since hovered like an albatross over the development of human rights protection.

For example, even as we approach the year 2000, it still remains something of an open question, for some in Canada's legal community, whether the right to life, liberty and security of the person in section 7 of the *Canadian Charter of Rights and Freedoms*[3] can be 'stretched' so far as to include rights to material assistance and support — a question still formally open even after the very recent judgment in the case of *Baker* v. *Canada* which some had hoped would be used by the Supreme Court of Canada as the opportunity to adopt such a reading of section 7.[4] For those inclined against

---

1 *International Covenant on Civil and Political Rights*, adopted 19 December 1966, UN Doc. ST/DPI/246, 999 U.N.T.S. 171 (entered into force 23 March 1976, accession by Canada 19 May 1976) [hereinafter *ICCPR*] and *International Covenant on Economic, Social and Cultural Rights*, adopted 16 December 1966, UN Doc. A/6316 (1966) 993 U.N.T.S. 3 (entered into force 3 January 1976) [hereinafter *ICESCR*].

2 *Universal Declaration of Human Rights*, adopted 10 December 1948, *reprinted* in 43 A.J.I.L. 127 (Supp. 1949).

3 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11 [hereinafter *Charter*].

4 Such an interpretation was left formally open by the Supreme Court of Canada in *Irwin Toy Ltd.* v. *Quebec (Attorney General)* [hereinafter *Irwin Toy*] in which it made clear that "economic" rights in the commercial and corporate context would not be protected by s.7 but that rights of a different "ilk" — those related to material human needs — were not affected by this conclusion: [1989] 1 S.C.R. 927 at 1003–1004. The extent to which such social rights could be interpreted as components of life, liberty and security of the person would be left for future cases. *Irwin Toy* had, however, to be read alongside of a case decided by the Court in the same year, *Slaight Communications v. Davidson* [1989] 1 S.C.R. 1038 at 1056–1057. Chief Justice Dickson, for a 4-2 majority, found that the *Charter* is to be interpreted in such a way as to give effect to a presumption that the *Charter* offers as least as much protection as rights Canada is bound to ensure under international human rights law; the right on which he placed some reliance in his reasoning (within his s. 1 analysis as to whether an employer's freedom of expression could be justifiably limited in order to protect a former employee) was the right to work as set out in (Article 6) of the International Covenant on Economic, Social and Cultural Rights. However, no Supreme Court case has specifically revisited that which *Irwin Toy* left open. Alongside s. 7, the interpretive evolution of s. 15 of the *Charter* has made it ideally suited to the kind of purposive interpretation that would help give full effect to the *Slaight Communications* presumption. In recent years, the Supreme Court has begun to interpret s. 15's equality rights in such a way that many aspects of "social, economic and cultural rights" should now receive protection in view of the Court's understanding of how the guarantee of equality in s. 15 relates to government responsibility to counteract social inequalities suffered by presumptively disadvantaged and vulnerable groups: *see* notably *Eldridge* v. *British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 and the discussion of the implications of the *Eldridge* reasoning in Bruce Porter, "Beyond *Andrews*: Substantive Equality and Positive Obligations After *Eldridge* and *Vriend* " (1998) 1 Constitutional Forum 71. In two sets of oral arguments heard in November 1998, the Supreme Court was asked to follow this normative trajectory and confirm that ss. 7 and 15, in combination, should be invested with a content that robustly draws on Canada's international human rights obligations towards disadvantaged members of society: see *Baker* v. *Canada (Minister of Citizenship and Immigration)*, S.C.C. No.

such a broad interpretation, a formalistic conception of international human rights law can be invoked in support of their position. Not only are these two rights mentioned in separate articles of the UDHR (the above-noted Articles 3 and 25) but they are also located in two separate treaties, only one of which — the *ICCPR* — triggers the possibility of a claim procedure analogous to bringing a rights claim under the *Charter*.[5] Thus, so the (legalistic) legal mind might reason, the *Charter* cannot be intended to protect a "social and economic" right such as that to an adequate standard of living. The present comment is not the occasion to lay bare the problematic assumptions behind this line of reasoning.[6] Suffice it to point out that the evocative preamble of each of the sibling treaties sent a normative counter-signal from the moment of the joint adoption in 1966 of the two Covenants. The rights in the two treaties are interdependent in important respects and share the over-arching animus of the ideals that underpin the parent UDHR, as reflected in each Covenant's preamble:[7]

> Recognizing that, in accordance with the Universal Declaration of Human Rights, *the ideal of free human beings* enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, *as well as* his economic, social and cultural rights. . .

25823 and *Godin* v. *New Brunswick (Minister of Health and Community Services* et al.) S.C.C. No. 26005. On 9 July 1999, judgment in *Baker* was rendered: *Baker* v. *Canada (Minister of Citizenship and Immigration)*, [1999] S.C.J. No. 39 [hereinafter *Baker*]. The Court found it unnecessary to address the *Charter* issues, opting instead to decide the case on other grounds. However, L'Heureux-Dubé J., speaking for the entire Court on this point, took care to add something to the formulation of the *Slaight Communications* interpretive presumption by noting that "international human rights law . . . is . . . a *critical influence* on the interpretation of the scope of the rights included in the *Charter*:" *Baker* at para. 70 [emphasis added]. In his minority judgment (partly dissenting, but not on this point), Iacobucci J. (Cory J. concurring) referred to the "interpretive presumption, established by the Court's decision in *Slaight Communications* . . ., and confirmed in subsequent jurisprudence, that administrative discretion involving Charter rights be exercised in accordance with similar international human rights law:" *Baker*, para. 78. For a discussion of the fact situation and the principle stated by the Court in *Baker* about the independent interpretive effect of international human rights treaties on Canadian law without the need to invoke the *Charter*, see text *infra* note 13.

5 A supervisory body called the Human Rights Committee (HRC) is charged with monitoring state compliance through a "state report" procedure under the *ICCPR* itself; states like Canada periodically must submit a written report detailing their records of compliance with the *ICCPR*, defend that report orally before the eighteen-member HRC, and then receive the HRC's evaluation of compliance in the form of a set of conclusions known as *Concluding Observations*. But, this is not the only procedure for assessing compliance available under the *ICCPR* regime. States party to the *ICCPR* can also, by ratifying another treaty called the (First) Optional Protocol to the *ICCPR*, assign the HRC responsibility to receive and pass judgment on written communications received from individuals who claim that *ICCPR* rights have been violated by their state. The assessments handed down by the HRC — taking the form of "views" — look and function much like court judgments in domestic legal systems, setting out the alleged violation, the contending claims of the claimant and the state, the facts as the HRC determines them, a discussion of the law under the *ICCPR* on the point in question, and finally an assessment of whether the facts disclose a violation of that law and, if so, what remedy follows. A good percentage of the HRC's case law that has emerged from this communication procedure over the last twenty years has been generated by claims brought against Canada. In contrast, the *ICESCR* is overseen by its own eighteen-member monitoring body (the Committee on Economic, Social and Cultural Rights — the CESCR) whose authority is limited to issuing *Concluding Observations* on state reports. Although the CESCR has put forward a draft, states (operating through the UN's Commission on Human Rights) have not yet agreed to open negotiations on an Optional Protocol which would contain a communications procedure for that treaty which would parallel the procedure long available under the *ICCPR*: see Committee on Economic, Social and Cultural Rights, *Report to the Commission on Human Rights on a Draft Optional Protocol for the Consideration of Communications Concerning Non-Compliance with the International Covenant on Economic, Social and Cultural Rights*, (1998) 5 International Human Rights Reports 527. The World Conference on Human Rights which met in Vienna in 1993 instructed the UN to look into the possibility of such an optional protocol both for the *ICESCR* and for the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW): see UN World Conference on Human Rights, *Vienna Declaration and Programme of Action*, (1993) 32 I.L.M. 1661, Pt. II, para. 75 and para. 40. On 12 March 1999, the UN Commission on the Status of Women recommended to the UN General Assembly that it adopt and open for signature such a protocol for CEDAW: for the CSW's recommendatory resolution, *see* UN Doc. E/CN.6/1999/WG/L.3 (11 March 1999) and, for the Revised Draft Optional Protocol, see UN Doc. E/CN.6/1999/WG/L.2 (10 March 1999).

6 See Craig Scott, "The Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights" (1989) 27 Osgoode Hall L.J. 769 and Craig Scott, "Reaching Beyond (Without Abandoning) the Category of 'Economic, Social, and Cultural Rights'" (1999) 21 Hum. Rts. Q. 633 (especially on "negative inferentialism" as a problematic interpretive method).

7 Third preambular paragraph of the *ICCPR*. [Italics added; underlined emphasis in original.] The corresponding preambular paragraph of the *ICESCR* conveys a similar message with some difference in word order and with the omission of the words "civil and political freedom:" "Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights . . ." [emphasis added].

The promise of a normative interplay between the two Covenants such as suggested by this statement of purpose has, with time, more and more become reality as the *ICCPR*'s Human Rights Committee (HRC) and the *ICESCR*'s Committee on Economic, Social and Cultural Rights (CESCR) have forged overlapping interpretations of the two treaties' provisions, and not only in areas where there are facially similar or identically phrased rights.[8] The HRC has long made clear in its general summaries of jurisprudence, known as General Comments, that rights often thought to be the heritage of the classical liberal tradition (and the ongoing American constitutional tradition) — those based on protection from interference by the state, or 'negative rights' — place duties on the state to address those material conditions and associated inequalities that render those rights ineffective for some members of society. So, for instance, the HRC interpreted, very early on in its mandate, the "right to life" in Article 6(1) of the *ICCPR* as requiring that positive measures be taken, *inter alia*, to reduce infant mortality that results from inadequate health and nutritional conditions.[9] That committee soon also made clear that the right to equal protection of the law in Article 26 of the *ICCPR* places affirmative duties on states to address social and economic inequalities where treating certain groups of people the same as others (including by doing nothing) either causes or exacerbates the disadvantage of such persons.[10] Consistent with such an approach, the HRC, in its questioning of states on *ICCPR* compliance as part of the treaty's state report procedure, has not infrequently ventured into areas which formalists would treat as the exclusive preserve of a discrete category of "economic, social and cultural rights" and as thus being the sole responsibility of the committee overseeing the *ICESCR*, the CESCR. Yet these efforts have been relatively *ad hoc* and cross-pollination with the human rights norms found in the *ICESCR* has not, until now, been pursued on a sustained basis.

Within the space of less than half a year, however, a remarkable pair of events occurred as a result of Canada's state reports under each of the *ICESCR* and the *ICCPR* having been before the CESCR and the HRC. On 4 December 1998, the CESCR released its *Concluding Observations* after scrutiny of Canada's most recent state report under the *ICESCR* and, on 7 April 1999, the HRC did likewise.[11] These *Concluding Observations* represent an interlinked expression of concern about a host of failures by Canada to adhere fully to its international human rights obligations in the two treaties. Indeed, it is not an overstatement to describe the two sets of *Concluding Observations* as pathbreaking in their focused treatment of the overlapping and shared obligations which emanate from the two Covenants as a partly fused legal order. In particular, the rich potential meaning the HRC has already given to the right to life and the right to non discrimination in the above-mentioned General Comments has moved from the realm of potential to the realm of firm legal obligations vis-à-vis the less advantaged in an affluent state like Canada. Significantly, both committees' *Concluding Observations* also address a number of inadequacies in the opportunities for legal protection in Canada's legal system of Covenant rights in such a way that we cannot, if we act at all in good faith, relegate the committees' concerns to some rarefied international space. If taken

---

[8] On facially similar provisions, compare, for example, Articles 10(1) and 10(3) of the *ICESCR* ("the widest possible protection and assistance should be accorded to the family, . . . particularly for its establishment and while it is responsible for the care and education of dependent children. . . . "Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reason of parentage or other conditions.") and Articles 23 and 24 of the *ICCPR* ("The family . . . is entitled to protection by society and the State" and "[e]very child shall have, without any discrimination . . ., the right to such measures of protection as are required by his status as a minor"). Or see Article 8(1)(a) of the *ICESCR* ("the right of everyone to form trade unions and join the trade union of his choice") and Article 22(1) of the *ICCPR* ("the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests"), as well as Article 6(1) of the *ICESCR* ("the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses and accepts") and Article 8(3)(a) of the *ICCPR* ("No one shall be required to perform forced or compulsory labour.").

[9] See Human Rights Committee, General Comment No. 6/16, Right to Life (Article 6), reprinted in Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (Kehl am Rhein/ Strasbourg/Arlington: N. P. Engel, 1993) at 851.

[10] See Human Rights Committee, General Comment No. 4/3, Gender Equality: General Comment No. 17/35, Rights of the Child; and General Comment No. 18/37, Non-Discrimination, in Nowak, *ibid.* at 850, 865 and 868.

[11] Committee on Economic, Social and Cultural Rights, *Concluding Observations on Canada*, 57th Session, UN Doc. E/C.12/ 1/Add.31 (4 December 1998) [hereinafter CESCR *CO* 1998] and Human Rights Committee, *Concluding Observations on Canada*, 65th Session, UN Doc. CCPR/C/79/Add.105 (7 April 1999) [hereinafter HRC *CO* 1999]. The full text of each of these *Concluding Observations* can be found on the web site of the Human Rights Directorate of Canadian Heritage, the federal department responsible for coordinating and preparing Canada's state reports to international human rights treaty bodies: see online: http://www.pch.gc.ca/ddp-hrd/ENGLISH/cesc/concobs.htm> (accessed 1 December 1999) for the CESCR's *Concluding Observations* and online: <http://www.pch.gc.ca/ddp-hrd/ENGLISH/Covenant.htm> (accessed 1 December 1999) for the HRC's *Concluding Observations*.

seriously within Canada, the two *Concluding Observations* could represent a legal landmark for the evolution of our statutory and constitutional protection of human rights.

At the very least, the interdependent approach to the content of the two Covenants now firmly demonstrated by the committees should have significant interpretive impact on the *Charter of Rights*. While this had already been made clear by the Supreme Court's *Slaight Communications* doctrine, that doctrine has, in the decade since its articulation, been little-invoked by the legal profession and little-applied by the lower courts.[12] With *Baker*, we have reaffirmation — indeed, in view of the words chosen by the Court, even a bolstering — of the *Slaight Communications* doctrine of constitutional reception of Canada's international human rights obligations.[13]

Baker dealt with the exercise of administrative discretion to deport a Jamaican woman who was a long-term, but illegal, resident of Canada. Her situation was such that her mental health could easily be detrimentally affected, as would the well-being of her four Canadian children. Her children had to 'choose' between either being separated from their mother (if they were to stay in Canada after her expulsion) or separated from their country (if they moved with her to Jamaica). In the appeal to the Court from the Federal Court of Appeal, the issue of sections 7 and 15 of the *Charter* operating as the primary sites of interpretive reception of Canada's international human rights obligations was raised.[14] The appellant, Mavis Baker, and three supporting intervenors asked the Court to understand the Charter to protect a range of associated rights found primarily in the UN Convention on the Rights of the Child (CRC or the Convention) but also in the *ICCPR* and the *ICESCR*.[15] Rather than decide on the extent to which these international human rights constrained the exercise of administrative discretion by virtue of being part of the *Charter*, the Court chose to find in favour of Ms. Baker on grounds of discriminatory and generally unreasonable consideration of her case by the immigration officials, consideration which had used her struggle with mental illness (post-partum psychosis), her status as a single mother with children, her recourse to the social assistance system, and a denigration of her contribution to Canadian society (by pointing to a lack of skills other than those of a domestic worker) as reasons to deny her the right to stay in Canada rather than reasons to look sympathetically on her case. In the course of the analysis of whether or not the refusal to allow her to stay exceeded the bounds of reasonableness, the Court addressed the issue that the trial judge in *Baker* had endorsed as a " certified question" to be dealt with on appeal, namely: were the immigration authorities' statutory powers to decide not to admit Ms. Baker to Canada limited by virtue of the constraining effect of the Convention on the Rights of the Child on the exercise of administrative discretion in accordance with the long-recognised principle of statutory interpretation that the legislature is presumed to have legislated in conformity with international law — despite the fact that the provisions of the Convention relevant to federal jurisdiction over immigration had not been formally implemented into Canadian law by Parliament? Here, the Court seized the moment to advance a robust understanding of this principle of statutory interpretation. The Court can be read as having embraced a cosmopolitan conception of the rule of law, one feature of which being that Canadian courts should show fidelity to the international legal order by seeking to harmonise domestic law with international law as much as interpretive space allows. The Court found, by a majority of 5–2, that the presumption of compliance with international law indeed includes to Canada's legal obligations under unincorporated treaties — i.e., treaties which Canada has ratified but which have not been legislatively transformed into Canadian law by Parliament or the provincial legislatures. In the course of her reasoning, Justice L'Heureux-Dubé had the following to say with respect to the impact of Canada's international human rights treaty obligations on the interpretive content of the *Charter*:[16]

> [T]he values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review. As stated in R. Sullivan, *Driedger on*

---

[12] *Slaight Communications*, *supra* note 4.

[13] *Baker*, *supra* note 4. For ease of reference, the quotation found in note 4 will be reproduced again here: "International human rights law . . . is . . . a *critical influence* on the interpretation of the scope of the rights included in the *Charter*" [emphasis added].

[14] For the manner in which these issues were handled by Strayer J. A. of the Federal Court of Appeal, see *Baker* v. *(Canada) Minister of Citizenship and Immigration*, [1997] 2 F.C. 127.

[15] *ICCPR* and *ICESCR*, *supra* note 2. Convention on the Rights of the Child, adopted 20 Nov. 1989, G.A. Res. 44/25, UN GAOR, 44th Sess., Supp. No. 49, UN Doc. A/44/49 (1989) (entered into force 2 Sept. 1990), reprinted in (1989) 28 I.L.M. 1448 [hereinafter the CRC]. See factums on file with the Registry of the Supreme Court of Canada of the Appellant Mavis Baker and the intervenors Charter Committee on Poverty Issues, Canadian Council of Churches and Justice for Children and Youth.

[16] *Baker*, *supra* note 4 at para. 70 [emphasis by L'Heureux-Dubé J.].

the Construction of Statutes (3rd ed. 1994), at p. 330:

> [T]he legislature is presumed to respect those values and principles contained in international law, both customary and conventional. These constitute a part of the legal context in which legislation is enacted and read. *In so far as possible therefore, interpretations that reflect these values and principles are preferred.*

Endorsement in these terms of the presumption of compliance with international law is especially relevant to the interaction of international human rights treaty law and Canadian domestic law given that the Court situates its invocation of the presumption within a broader value-laden web of "values and principles" which frame what is and is not reasonable administrative decision-making. Earlier in its judgment in *Baker*, the Court stated:[17]

> [T]hough discretionary decisions will generally be given considerable respect, that discretion must be exercised in accordance with the boundaries imposed in the statute, the principles of the rule of law, the principles of administrative law, the fundamental values of Canadian society, and the principles of the *Charter*.

It seems, then, that it is not simply a rule-of-law concern with the formal legal status of Canada's international legal commitments that determines the depth of interpretive influence of international norms on statutory interpretation but also (and more so) those commitments' resonance with Canadian law and society's fundamental constitutive values and principles. In this respect, it is useful to remember how Chief Justice Dickson spoke about a circle of "values and principles" in the following terms:[18]

> Generally speaking, the international human rights obligations taken on by Canada reflect the values and principles of a free and democratic society, and thus those values and principles that underlie the *Charter* itself.

While the principle of statutory interpretation digested from Sullivan's *Driedger* is generally applicable to Canada's international commitments, the normative force of any given commitment being called in aid must vary with the subject matter of the international norms and with some appreciation of how the context in which it has been produced relates to our "free and democratic" ideals. In other words, *Baker* helps us understand how international human rights law has a special interpretive force within Canada's legal order(s).[19]

Having linked the significance of the two UN committees' findings to a deepening embrace by Canada's highest court of international human rights law, the remainder of this article will seek to: summarize the key common findings of the two committees; draw attention to some of the inconsistent, indeed disingenuous, conduct involved in Canada's professions of compliance with the two human rights treaties over the years; and, finally, discuss the concrete suggestions made by the committees on how Canada should remedy the structural and procedural deficits in protection of the Covenants' human rights by Canada's domestic legal order.

THE COMMITTEES' FINDINGS ON CANADA'S NON-COMPLIANCE WITH ONE OR BOTH OF THE COVENANTS

The following is a *précis* of only some of the findings made by the committees in the two *Concluding Observations*. Each Concluding Observation runs to several pages; this being so, the original documents must be consulted to gain a full appreciation of the range of concerns expressed by the committees. For ease of exposition, the selected findings will be presented in point form.[20]

---

[17] *Ibid.* at para. 56.

[18] *R.* v. *Keegstra*, [1990] 3 S.C.R. 697 at 750.

[19] On the question of why the special content of international human rights treaties should distinguish them from other kinds of treaties in terms of their effects within the Canadian legal order, see Alan Brudner, "The Domestic Enforcement of International Covenants on Human Rights: A Theoretical Framework" (1985) U.T.L.J. 219.

[20] After each point, I will indicate in parentheses the paragraph number in which a given committee made comments on the subject matter in question. For example, "HRC, para. #" refers to the *Concluding Observations* of 7 April 1999, of the Human Rights Committee with reference to rights in the *ICCPR* and "CESCR, para. #" refers to the *Concluding Observations* of 4 December 1998, of the Committee on Economic, Social and Cultural Rights with reference to rights in the *ICESCR*.

COMMON FINDINGS

Inadequacy of Remedies in Canada's Legal System for Violations of Rights in the Covenants

- Both committees emphasized the failure of Canada to fully implement the two human rights treaties. This failure results from the inadequate formal legal protection that currently exists in Canada's legal system for the human rights in the Covenants, as a combined result of recalcitrant interpretation of the *Canadian Charter of Rights and Freedoms* by many lower courts and failure of Parliament and the provincial legislatures to make all Covenant rights enforceable through enactment of appropriate legislation (HRC, para. 10; CESCR, paras. 51 and 52).

- Each committee also drew special attention to ineffective remedies for breaches of rights to non discrimination in the private sector due to the inadequacy of the avenues of redress provided by the provincial and federal human rights (non discrimination) codes. Each called for legislative amendments that would allow a human rights claimant to present her case before a "competent... tribunal" rather than continue to allow the various human rights commissions across the country to continue to play a gatekeeper role as to whether or not a person can access such a tribunal (HRC, para. 9; CESCR, para. 51).

Indigenous Rights

- The practice of Canadian governments of insisting that Aboriginal rights must be extinguished as part of settlement of Aboriginal claims should be abandoned (HRC, para. 8; CESCR, para. 18).

- The economic marginalization and material deprivations of Aboriginal peoples and persons constitute a serious failure by Canada to protect human rights guaranteed under both Covenants, including the right to self-determination found in common Article 1 (HRC, para. 8; CESCR, paras. 17, 18, 43).

- The recommendations of the Royal Commission on Aboriginal Peoples (RCAP) must be "urgent[ly]" implemented (HRC, para. 8; CESCR, para. 43).

Homelessness and Poverty in General

- Canada's failure to take adequate measures to prevent and respond to homelessness represents a failure to ensure rights to housing, health and life itself. Positive measures must be taken to tackle this combined rights violation (HRC, para. 12; CESCR, paras. 24, 28, 34, 46).

- Rights to non-discrimination have been breached by program cuts — including by the replacement of the federal Canada Assistance Plan (CAP) with the Canada Health and Social Transfer (CHST) and by cuts to provincial social assistance rates (e.g., 35 per cent for single people in Nova Scotia and 21.6 per cent across the board in Ontario) — that have worsened the situation of disadvantaged groups, in part by disproportionately exacerbating poverty of women and children dependent on them (HRC, para. 20; CESCR, paras. 19–21, 23, 25, 35, 40–42).

- Non-compliance with both Covenants' guarantee of the special rights of children to protection has resulted in treaty violations in those provinces where the new federal National Child Benefit (NCB) does not reach the children of parents on social assistance because the policy of most provincial governments is to deduct the NCB payment from the amount of social assistance received by the parents (HRC, para. 18; CESCR, paras. 22, 44).

Violation of Rights to Freedom of Association of "Workfare" Recipients

- Ontario's 1998 Act to prevent unionization[21] of "workfare" participants fails to comply with both Covenants' guarantee that workers may join a trade union and bargain collectively (HRC, para. 17; CESCR, paras. 31, 55).

These nine common findings represent a remarkable overlap of legal concern about human rights violations that simultaneously engage Canada's commitments in each treaty. The purpose of the two sub-sections which follow is to make mention of some specific findings of rights violations made by one committee that either was not replicated in the *Concluding Observations* of the other committee or was not phrased in as clear a fashion;

---

21. *Prevention of Unionization Act*, S.O. 1998 c.17.

this catalogue represents only a portion of each committee's independent findings.[22]

Examples of Other Findings of *ICCPR* Non-Compliance by the Human Rights Committee

- The HRC called for the "elimination" of "increasingly intrusive measures" being taken in violation of the privacy rights of social assistance recipients, including what can only be called the Orwellian policy of some provincial governments of using fingerprinting and retinal scanning to identify such persons as a supposedly necessary means to root out welfare fraud (HRC, para. 16).

- Several paragraphs were devoted to policies and practices of the federal Immigration Department which, since the coming to power of the Liberal government, seem to have been planned and carried out oblivious to any real concern to respect Canada's international human rights obligations. The committee called Canada to account for invoking so-called national "security" rationales as justification for deporting aliens to countries where they may face a substantial risk of either torture or other cruel, inhuman or degrading treatment. It also criticized Canada's willingness to expel long-term residents of Canada who are not formally Canadian citizens without serious consideration being given to whether a breach of family rights and children's rights to care by their parents will be triggered by separation through deportation (HRC, paras. 13–15).

- As already noted, Article 1 of the *ICCPR* (which is identical to Article 1 of the *ICESCR*) guarantees the right of all peoples to self-determination. In a path-breaking interpretation which explicitly confirmed what many scholars and Aboriginal representatives have long contended to be the case, the Human Rights Committee held that this collective right is a right of Aboriginal peoples no less than of other peoples. Further, the committee also noted that the right to self-determination includes, *per* Art. 1(2) of both Covenants, the right of Aboriginal peoples to be able freely to dispose of their natural wealth and resources and not to be deprived of their means of subsistence (HRC, para. 8).

- The committee expressed "deep concern" about the failure of Ontario to hold a public inquiry into the possible role and responsibility of public officials (including the Premier of Ontario) in the shooting death of Aboriginal activist Dudley George at Ipperwash in 1995 (HRC, para. 11).

Examples of Other Findings of Non-Compliance with the *ICESCR* by the Committee on Economic, Social and Cultural Rights

- The CESCR discussed the material conditions of life of many Aboriginal people in terms of a "gross disparity" with the lot of the majority of Canadians, drawing specific attention not only to the shortage of adequate housing and endemic mass unemployment but also to what can only be called the Fourth World situation of lack of adequate and safe drinking water in some Aboriginal communities (CESCR, para. 17).

- Following up its earlier signalling of concern to Canada, as expressed in a letter sent by the committee to Canada in 1995, the committee discussed in some detail the repeal of the Canada Assistance Plan in terms that made clear this action triggered the prohibition on states taking retrogressive measures without adequate justification[23] (CESCR, para. 19). The committee then called for the re-establishment of a "national program with designated cash transfers for social assistance and social services which include

[22] It must of course be noted that, while the combined focus of both committees adds significantly to the seriousness of a given human rights violation, Canada is no less bound to respond to a finding of a rights violation limited to one Covenant.

[23] On the 1995 letter and the doctrine of non-retrogressive measures, see Craig Scott, "Covenant Constitutionalism and the Canada Assistance Plan" (1995) 6 Constitutional Forum 79 [hereinafter "Covenant Constitutionalism"], including the Appendix (at 87) in which the committee's letter to Canada is reproduced. Note that the committee's veiled reference in the last sentence of para. 19 of the *Concluding Observations* — "The committee also recalls in this regard paragraph nine of General Comment No. 3" — is to the doctrine of non-retrogressive measures. See Committee on Economic, Social and Cultural Rights, General Comment No. 3, The nature of States' parties obligations (Art. 2, para. 1 of the Covenant), UN Doc. E/1991/23 (1990) at para. 9, reprinted in Asbjorn Eide, Catarina Krause, and Allan Rosas, eds., *Economic, Social and Cultural Rights: A Textbook*, 1st ed. (Dordrecht/Boston/London: Martinus Nijhoff, 1995) [2nd ed. forthcoming in 2000] [hereinafter CESCR, General Comment No. 3].

universal entitlements and national standards, specifying a legally enforceable right to adequate assistance for all persons in need, a right to freely chosen work, a right to appeal and a right to move freely from one job to another" (CESCR, para. 42).

- The committee is trenchant in its insight into the false success claimed for restrictions on unemployment insurance benefits (UIB) that have resulted in about half the previous number of people receiving UIB. The exclusions from coverage under the UI system are canvassed; attention is then drawn to the resulting inadequate protection that now exists for many disadvantaged groups: "[T]he fact is that fewer low-income families are eligible to receive any benefits at all" (CESCR, para. 20). The committee notes that this situation does not conform to the right to social security and calls for reform of the UI scheme "so as to provide adequate coverage for all unemployed workers" in terms of both benefit amount and duration of coverage (CESCR, para. 45).

- The decline in social assistance rates and the inadequacy of the minimum wage across Canada are dealt with in detail as being breaches of the right to an adequate standard of living: "These cuts appear to have had a significantly adverse impact on vulnerable groups, causing increases in already high levels of homelessness and hunger . . . . The Committee urges the State Party . . . to establish social assistance at levels which ensure the realization of an adequate standard of living for all" (CESCR, paras. 21, 23, 25, 25, 32, 35, 40, 41, and 46; paras. 21 and 41 are quoted). The discussion shows a nuanced concern to pay special attention to the specific harms caused to certain groups like single mothers and to consider the interactive effects of the inadequacy of social assistance and lack of access to adequate housing. For example, the committee reasons:

  [T]he significant reductions in provincial social assistance programmes, the unavailability of affordable and appropriate housing and widespread discrimination with respect to housing create obstacles for women escaping domestic violence. Many women are forced, as a result of those obstacles to choose between returning to or staying in a violent situation, on the one hand, or homelessness and inadequate food and clothing for themselves and their children, on the other (CESCR, para. 28).

THE CESCR CALLS CANADA ON A MIX OF DISINGENUOUS COMPLACENCY, INCONSISTENCY AND HYPOCRISY

It seems accurate to say that, as a society, we in Canada like to think we are committed to, and governed by, the rule of law. We also tend to be proud of a culture that takes human rights seriously, in close association with a commitment to healthy communities and an ethic of social inclusion. Furthermore, given our self-understanding of our country's Pearsonian tradition in international affairs, Canadians are just as quick to associate themselves with the ideal of the *international* rule of law, especially as regards the gradual evolution of human rights standards in the international legal order.

Our governments — at least our federal governments — have tended to piggyback on such general cultural dispositions and, over the years, have tried to portray Canada as a model country in their statements not only in the international arena but also before domestic audiences. To our federal government's credit, Canada has indeed been one of the main promoters and contributors to such bulwarks of international justice as the UN peacekeeping system and the UN human rights treaty order. Yet, somehow, with respect to scrutiny by UN human rights bodies of our own record of compliance with treaties, we have collectively displayed a remarkable apathy punctuated by American-style bouts of reactionary resentment: how dare upstart UN bodies (which include, by the way, experts from states with truly bad human rights records) compromise our sovereignty by challenging our self-image of purity on the human rights front? International human rights law in Canada has lived a life outside the spotlight of both legal scrutiny and political debate, matching the near invisibility and powerlessness of those members of society who would most benefit from having those rights taken more seriously by our legal and political orders.

In the face of such resistance, a significant number of nongovernmental organizations (notably in the anti-poverty, equality-seeking, aboriginal rights and migration sectors) have been trying, despite ever-dwindling resources, to take the international human rights process seriously. They have toiled, especially over the past decade, to have Canadian society pay attention when all eighteen members of a body such as the Human Rights Committee or the Committee on Economic, Social and Cultural Rights have reached a

consensus decision that Canada has fallen short of its international human rights commitments, especially to the less-privileged groups in society. To little avail. Instead, the discourse of international human rights promoted by governments and most mainstream nongovernmental organizations in Canada has very much been one which pays attention not to the "others" of Canadian society, but rather to those "other" state-societies where "real" human rights violations occur. Our governments have been getting away with a dubious discourse of which the central rhetorical plank has been various versions of the question: Given that others are, on the whole, worse at respecting human rights, how can *we* be criticized? Opposition parties, including the New Democratic Party, have been embarrassingly inept at making UN human rights treaty bodies' judgements about Canada's international human rights compliance part of the national political agenda. The news media's coverage is sporadic at best, amounting to sketchy and brief reports the day after a UN body states its concerns — and then nothing. All told, a combination of ignorance and apathy is probably an accurate description of the attitude of Canadian society as a whole to the international human rights treaty order's relevance to Canada itself. Canada has needed a normative kick in the pants for some time. And that is exactly what the two committees have given us. A politely diplomatic kick, but a kick nonetheless.

One rhetorical strategy highly favoured by federal governments warrants specific mention. How often have we seen a Canadian prime minister stand up in the House of Commons and invoke, in a virtual chortle, Canada's second-to-none ranking in the UN Development Program's Human Development Index (HDI) as a defence to Question Period queries from the opposition following UN criticism of Canada's human rights performance? The CESCR made clear how casuistic it views this defence when it stated, in noting positive aspects of Canada's record, that:[24]

> [F]or the last five years, Canada has been ranked at the top of the United Nations Development Programme's Human Development Index (HDI). The HDI indicates that, *on average*, Canadians enjoy a singularly high standard of living and that Canada has the capacity to achieve a high level of respect for all Covenant rights. That this has not yet been achieved is reflected in the fact that UNDP's Human *Poverty* Index *ranks Canada tenth on the list for industrialized countries.*

[24] CESCR *CO* 1998, *supra* note 11 at para. 3 [emphasis added].

Canadian governments have long invoked averages and medians as adequate accounts of the state of human rights enjoyment in Canada, thereby showing just how little understanding (or sincere attempt to understand) there is of the very nature of human rights. The CESCR has, for almost a decade now, been clearly and firmly requiring governments to provide detailed information on the extent to which *all* individuals' social rights are being attended to. In order to do this, disaggregated information on the situation of those persons and social groups who fall below the median or average is indispensable. That Canadians on average are not homeless, have adequate nutrition, go to adequate schools, or can raise their children in a dignified way says *nothing at all* about whose human rights are being respected and whose are being violated.

Not only did the CESCR catch us out on our official failure to grasp the concept of rights but it went on, ever so gently, to point out the Kafkaesque situation produced by Canada's duplicitous claims with respect to those standards in Canada that come closest to tracking the incidence and nature of poverty in Canada:[25]

> While the Government of Canada has consistently used Statistics Canada's "Low Income Cut-Off" [known as LICOs] as a measure of poverty when providing information to the Committee about poverty in Canada, it informed the Committee that it does not accept the Low Income Cut-Offs as a poverty line, although this measure is widely used by experts to consider the extent and depth of poverty in Canada. *The absence of an official poverty line makes it difficult to hold the federal, provincial and territorial governments accountable to their obligations under the Covenant.*

In one fell swoop, Canada is exposed not only for acting with no small degree of hypocrisy but also for cutting international scrutiny off at the knees. We have, in effect, brazenly admitted that we have failed in the most primary of obligations under the *ICESCR*, namely that which requires states to put into place an official system of measurement and monitoring that allows each state to know the extent of poverty as the necessary first step in designing policies to address such poverty.[26] Five years earlier, in the CESCR's 1993 *Concluding Observations* on Canada, the committee was even more

[25] *Ibid.* at para. 13 [emphasis added].

[26] See CESCR, General Comment No. 3., *supra* note 23 at paras. 3–4.

direct in expressing a dismay which bordered on incredulous annoyance that Canada had appeared before the committee with no official figures or solid information on the numbers of homeless in Canada.[27]

In its 1998 *Concluding Observations*, the committee followed up diplomatic hints sent to Canada in a 1995 letter in which it had indicated that the abolition of the Canada Assistance Plan had consequences for Canada's compliance with the *ICESCR*.[28] The committee incisively (but, as always, in measured and non-polemical terms) took Canada to task for its hypocrisy — or, more euphemistically, its inconsistency:[29]

> The replacement of the Canada Assistance Plan (CAP) by the Canada Health and Social Transfer (CHST) entails a range of adverse consequences for the enjoyment of Covenant rights by disadvantaged groups in Canada. The Government informed the Committee in its 1993 report that the CAP set national standards for social welfare, required that work by welfare recipients be freely chosen, guaranteed the right to an adequate standard of living, and facilitated court challenges to federally-funded provincial social assistance programmes which did not meet the standards prescribed in the Act. In contrast, the CHST has eliminated each of these features and significantly reduced the amount of cash transfer payments provided to the provinces to cover social assistance.

The committee did not stop there. It carefully homed in on the structural double standards represented by the replacement of the CAP with the CHST:[30]

> [Canada] did, however, *retain national standards in relation to health* under CHST, thus denying provincial "flexibility" in one area, while insisting upon it in others [notably social assistance]. *The delegation provided no explanation for this inconsistency.*

Finally, the committee, joined by the Human Rights Committee, drew attention to conduct of Canada that draws into question the good faith of Canada's commitment to doing what is necessary to implement Covenant rights within the Canadian legal order.[31] Reproduction of the two committees' own words, on three issues, is adequate to the task of conveying the nature of the problem. On the issue of legislative reversals of *ICESCR*-sensitive interpretations of provincial human rights codes, the Committee on Economic, Social and Cultural Rights said:[32]

> The Committee is concerned that in both Ontario and Quebec, governments have adopted legislation to redirect social assistance payments directly to landlords without the consent of recipients, *despite the fact that the Quebec Human Rights Commission and an Ontario Human Rights Tribunal have found this treatment of social assistance recipients to be discriminatory.*

On the issue of deportations from Canada, the Human Rights Committee expressed its concern that the federal government has gone so far as to adopt a policy of having full discretion to deport someone to substantial risk of danger even in defiance of an "interim measure" request by international human rights bodies to Canada not to deport until the body has had a chance to consider the merits lest deportation result in irreversible harm:[33]

> The Committee expresses its concern that that the State party considers that it is not required to comply with requests for interim measures of protection [e.g. staying a deportation order] issued by the Committee. The Committee urges Canada to revise its policy so as to ensure that

---

27 Committee on Economic, Social and Cultural Rights, *Concluding Observations* on Canada, UN Doc. E/1994/23 (1993) at para. 19 reprinted in (1995) 2 International Human Rights Reports 682 at 684.

28 Scott, "Covenant Constitutionalism" *supra* note 23 at 87.

29 CESCR *CO* 1998, *supra* note 11 at para. 19 [emphasis added]. Note that Canada, in its previous state reports and oral representations under the *ICESCR*, had proudly and prominently invoked the CAP not just descriptively (i.e.,as being, in the committee's words, "national standards for social welfare") but also normatively (i.e., as the basis on which Canada was in compliance with many of the *ICESCR* rights). By choosing not to point this discrepancy out in stronger terms, the committee has clearly chosen to be as deferential as possible without conceding the basic point it wishes to signal.

30 *Ibid.* [emphasis added]. See Scott, "Covenant Constitutionalism" *supra* note 23 at 80 for discussion of health being treated by the government as a middle-class right and how retaining protections for it but not for social assistance was, in effect, structural discrimination against economically disadvantaged groups.

31 See more generally Committee on Economic, Social and Cultural Rights, Comment No. 9, *The domestic application of the Covenant*, UN Doc. E/C.12/1998/24 (1 December 1998) reprinted in (1999) 6 International Human Rights Reports 289.

32 CESCR *CO* 1998, *supra* note 11 at para. 26 [emphasis added].

33 HRC *CO* 1999, *supra* note 11 at para. 14. One such case was the deportation of Tejinder Pal Singh by the federal immigration authorities in 1997, despite a request by the UN Committee Against Torture not to do so: Information from Barbara Jackman, Jackman, Waldman & Associates, Toronto.

> all such requests are heeded in order that implementation of Covenant rights is not frustrated.

Finally, on the stance taken by government lawyers in Canadian courts, the Committee on Economic, Social and Cultural Rights addressed submissions from NGOs that the committee should find it incompatible with the Covenant for a government to go into its country's courts and argue that Covenant rights are not judicially protected in Canada's legal order where either constitutional or statutory provisions are sufficiently broadly worded to be interpreted to protect those rights in accordance with the presumption recognized in most legal systems, including Canada's, that domestic law accords with international law. The committee first addressed a specific concern when it made the following significant criticism:[34]

> The Committee has received information about a number of cases in which claims were brought by people living in poverty (usually women with children) against government policies which denied the claimants and their children adequate food, clothing and housing. Provincial governments have urged upon their courts in these cases an interpretation of the Charter which would deny any protection of Covenant rights and consequently leave the complainants without the basic necessities of life and without any legal remedy.

It then stated clearly and unequivocally:[35]

> The Committee urges the federal, provincial, and territorial governments to adopt positions in litigation which are consistent with their obligation to uphold the rights recognized in the Covenant.

The need for the committee to expressly state something which clearly follows from the basic duty of a state to give legal effect to its Covenant obligations is obvious to anyone who litigates before Canadian courts or administrative tribunals and attempts to invoke international human rights law as interpretive support for legal arguments. For example, the federal government's lawyers, especially those serving the Department of Immigration, have been zealous in marching into court on almost a daily basis and going so far as to argue that the Canadian *Charter of Rights and Freedoms* cannot be read to prohibit deporting someone where there is a substantial risk that the person will face torture after arrival at his destination — in the face of clear textual provisions and case law laying down such a prohibition emerging from the UN Convention Against Torture regime.[36] In the aforementioned *Baker* case, government lawyers appeared to be under instructions to stand before the Supreme Court of Canada and argue that rights in international human rights treaties that protect against family separation cannot be understood as being part of "life, liberty and security of the person" protected by section 7 of the *Charter*. But here, as in other areas, Canada has gone on record before an international body claiming — or at least giving the strong impression of — the opposite. The Court was asked in oral arguments by the intervenors to take note of one arm of the same federal executive saying one thing before an international legal audience and another thing before a domestic legal audience.[37]

---

[34] CESCR *CO* 1998, *supra* note 11 at para. 14.

[35] *Ibid.* at para. 50.

[36] These arguments have tended to win the day in the Federal Court of Canada, where most refugee and immigration cases are adjudicated. For a leading example of judicial reasoning that is lacking in (international) human rights sensibilities, see the judgment of Tremblay-Lamer J. in *Suresh* v. *Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. 28 (Judgment of 16 January 1998). Compare to the reasons of Lane J. of the Ontario Court of Justice, General Division, who not only arrived at the opposite conclusion on the same facts but exercised his power to take jurisdiction over a case that had already been decided (by Tremblay-Lamer J.) in the Federal Court system: *Suresh* v. *Canada (Minister of Citizenship and Immigration)* (1998), 38 O.R. (3d) 267. These two contrasting judgments represent a rare opportunity to see how two trial judges can approach *exactly* the same case differently. In our study of judicial decision-making, we are usually limited to comparing the trial judge's reasons with those of courts on appeal in any given case.

[37] In 1995, a set of representations was made by Canada's delegation presenting Canada's state report to the Committee on the Rights of the Child — three separate times by three different spokespersons — that CRC rights are subject to protection under either or both of the *Charter* and statutory human rights codes combined: see Committee on Rights of the Child, Summary Record, 214th Meeting, 9th Sess., UN Doc. CRC/C/SR.214 (30 May 1995) p. 10/para. 40 (Mr. Duern [Canada]); p. 11/para. 47 (Mr. McAlister [Canada]); and p. 12/para. 49 (Ms. McKenzie [Canada]). In *Baker*, counsel for CCPI [the author] delivered oral arguments on this point relying on materials contained in the book of authorities prepared by another intervenor, Justice for Children and Youth: "Argument for the Intervenor Charter Committee on Poverty Issues," *Baker* v. *Canada (Minister of Citizenship and Immigration)*, Transcription of Cassettes, Wednesday, 4 November 1998, 09:46 hours, p. 32 at pp. 36–39. In its judgment in *Baker*, the Court did not allude to this problem of inconsistency of argument at the national and international levels.

LINK-UPS BETWEEN THE INTERNATIONAL AND THE NATIONAL: RECOMMENDATIONS THAT THE CANADIAN LEGAL AND POLITICAL SYSTEM TAKE PROFESSED COMMITMENTS TO INTERNATIONAL HUMAN RIGHTS OBLIGATIONS MORE SERIOUSLY

The preceding section discussed the linked problems of inconsistency and lack of commitment which plague the executive arms of Canadian governments. However, the committees also addressed the inadequate performance of the Canadian judiciary and Canadian legislatures. The CESCR deftly linked the Canadian executive's international representations to the lack of receptivity of Canadian lower courts in the following terms:[38]

> The Committee is deeply concerned to receive information that provincial courts in Canada have *routinely opted for an interpretation which excludes protection of the right to an adequate standard of living and other Covenant rights*. The Committee notes with concern that the courts have taken this position despite the fact that the Supreme Court of Canada has stated, as has the Government of Canada before this Committee, that the Charter can be interpreted so as to protect these rights.

The committee reiterates its recommendation that one part of rectifying this antipathy towards Covenant-sensitive adjudication is for the Canadian Judicial Council to "encourage training for judges on Canada's obligations under the Covenant."[39]

However, neither committee was under any illusion that a more active and sensitive judiciary could alone solve the problem of inadequate formal avenues of redress in Canadian law for seeking vindication of breached treaty rights. In this regard, rights in all categories are best understood as being a shared project amongst all branches of the state such that robust judicial protection cannot be fully achieved without a conducive legislative and regulatory environment.[40] Furthermore, on the question of the formal sources of rights protection in Canadian domestic law, the committees are not in a position to judge how far the protections of the *Charter of Rights* should or will go in including all or most human rights found in the treaties — apart, of course, from relying on representations made by Canada about those domestic law sources. Accordingly, they have no choice but to work from the assumption that some Covenant rights (or some dimensions of some rights) may not have constitutional counterparts and thus that legislatures must interact directly with the international legal order in order to put into place the necessary statutory protections to allow for conformity with the Covenant obligations. In any case, even if every Covenant right is protected by the *Charter* (notably by virtue of the combined operation of sections 7 and 15), the effective protection of human rights cannot rely on waiting for *ad hoc* court cases to be brought before legislatures which assume their self-standing responsibilities to protect human rights. Finally, neither courts nor legislatures, as currently constituted, have any

---

[38] CESCR *CO* 1998, *supra* note 11 at para. 15 [emphasis added]. Some may see the last clause as potentially misleading. While it follows from *Irwin Toy* and *Slaight Communications* combined that the *Charter* "can" be interpreted to protect *ICESCR* rights, the Supreme Court had not yet, at the time of the committee's *Concluding Observations*, taken the step of positively affirming this interpretation. Indeed, with *Baker*, the Court has further declined to take the opportunity to close the loop, although it may well use *Godin* (*supra* note 4) for that purpose. International Court of Justice Judge (and former member of the Human Rights Committee) Rosalyn Higgins convincingly discusses the difference national judicial cultures make to the extent to which international law has a life in domestic law. In drawing attention to the "culture of resistance to international law," she notes that this culture tends to feed on the formal separation between domestic statutory law and international treaty norms in Westminster-style "dualistic" systems (like Canada's) that require *legislative transformation* of treaty norms before they can have the *direct* force of law in such systems: Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Clarendon Press: Oxford, 1994) at 206–207. In his trenchant critique of the standard approach to date of the English judiciary (at least prior to the new bill of rights act), Murray Hunt goes so far as to refer to "atavistic dualism" as being at the heart of the unwillingness of most English judges to employ the presumption that domestic law conforms to international law in order to give *indirect* effect to international human rights treaty norms through interpretive acts of *judicial transformation*: see Murray Hunt, *Using Human Rights Law in English Courts* (Hart Publishing: Oxford, 1997) at 25–28.

[39] CESCR *CO* 1998, *supra* note 11 at para. 57. Note also the recommendation at para. 59: "The Committee recommends that the Federal Government extend the Court Challenges Programme to include challenges to provincial legislation and policies which may violate the provisions of the Covenant."

[40] On the notion of a shared burden of responsibility in the interpretation and implementation of human rights, see Amy Gutmann, "The Rule of Rights or the Right to Rule?" in J. Roland Pennock and John W. Chapman, eds., *Justification* (New York: NYU Press, 1987) 165 at 166 ("the unity of moral labour") and Craig Scott, "Social Rights: Towards a Principled, Pragmatic Judicial Role" (1999) 1 Economic and Social Rights Review 4 at 4 [hereinafter "Social Rights"].

necessary claim to be the best-suited institutions to monopolize the interpretation and operationalization of human rights. Various new institutional arrangements could be legislated to complement the functions of both courts and legislatures.

It is with all the foregoing in mind that we can fully appreciate the horizons that might be opened up by the following two recommendations by the Human Rights Committee and Committee on Economic, Social and Cultural Rights. The HRC suggests that some kind of interface institution might help bring Covenant norms into the legislative process(es):[41]

> The Committee . . . recommends measures to ensure full implementation of Covenant rights. In this regard, the Committee recommends the establishment of *a public body responsible for overseeing implementation of the Covenant and for reporting on any deficiencies.*

The CESCR inserts itself into the debate over how a new federal system of social rights protection should look by simultaneously insisting on the enforceability of its Covenant's rights and opening the door for pluralistic and creative institutional design:[42]

> The Committee, as in its previous review of Canada's report, reiterates that economic and social rights should not be downgraded to "principles and objectives" in the ongoing discussions between the federal government and the provinces and territories regarding social programmes. The Committee consequently urges the Federal Government to take concrete steps to ensure that the provinces and territories are made aware of their legal obligations under the Covenant *and that the Covenant rights are enforceable within the provinces and territories through legislation or policy measures and the establishment of independent and appropriate monitoring and adjudication mechanisms.*

Tied closely to the concern of both committees to prod Canada to put into place domestic institutions that will translate Covenant law into Canadian reality is the flipside: ensuring that all relevant legislative jurisdictions are engaged in the process of justifying treaty performance at the international level. The HRC said:[43]

> The Committee expresses its appreciation for the presence of the large delegation representing the Government of Canada. . . . However, the Committee is concerned that the delegation was not able to give up-to-date answers or information about compliance with the Covenant by provincial authorities.

The CESCR was more direct:[44]

> While the Committee notes that the delegation was composed of a significant number of experts too many questions failed to receive detailed or specific answers. Moreover, in the light of the federal structure of Canada and the extensive provincial jurisdiction, the absence of any expert representing particularly the largest provinces, other than Quebec, significantly limited the potential depth of the dialogue on key issues.

CONCLUSION

The committees have thus, acting in efficient partnership, shone an international spotlight on substantive, attitudinal and institutional deficiencies in Canada's approach to its human rights treaty obligations. It is crucial that their combined judgment not become yet another occasion when considered and articulate evaluations of Canada's human rights system by authoritative human rights treaty bodies sink below the horizon of the Canadian radar screen. There must be a commitment from Canadian governments, especially the federal government, and ultimately Parliament and all the legislatures, to move from these two sets of *Concluding Observations* to a new human rights dispensation. Here, it is heartening that the dialogue generated by the international human rights process has pointed the way forward. The delegation that appeared before the Human Rights Committee in March 1999 was headed by federal Cabinet minister Hedy Frye. She gave undertakings before the committee, that Canada would move forward on ensuring that the Canadian legal and political orders are, in future, institutionally better designed to take Covenant rights seriously. Her undertakings were understood by the committee as follows:[45]

---

41 HRC *CO* 1999, *supra* note 11 at para. 10 [emphasis added].
42 CESCR *CO* 1998, *supra* note 11 at para. 52 [emphasis added].
43 HRC *CO* 1999, *supra* note 11 at para. 2.
44 CESCR *CO* 1998, *supra* note 11 at para. 2.
45 HRC *CO* 1999, *supra* note 11 at para. 3.

> The Committee welcomes the delegation's commitment to ensure effective follow-up in Canada of the Committee's concluding observations and to further develop and improve mechanisms for ongoing review of compliance of the State party with the provisions of the Covenant. In particular, the Committee welcomes the delegation's commitment to inform public opinion in Canada about the Committee's concerns and recommendations, to distribute the Committee's concluding observations to all members of Parliament and to ensure that a parliamentary committee will hold hearings of issues arising from the Committee's observations.

Canada's promise cannot but hold good for the follow-up treatment of the *Concluding Observations* under the *ICESCR* as well.

The commitment by the Minister to "develop and improve [compliance] mechanisms" and to begin that process with a parliamentary committee has much potential. However, it will be crucial that this parliamentary consideration not be a token one-off affair. The movement toward a "public body" (HRC's language) and the "appropriate mechanisms" (CESCR's language) for enforcing Covenant rights can easily grind to a halt unless a special parliamentary standing committee is created to deal with the interface between Canada's human rights treaty obligations and its domestic order. At some point, this effort must fan out into other crucial institutional contexts such as the "social union" process and the legislative processes of each province. From the entirety of this effort, substantive and institutional changes must come about if Canada is not to side-step its promises to the Human Rights Committee.

At the centre of all this must be the groups from within civil society which have long taken the UN human rights treaty system seriously and without which it is unlikely the two committees would have come to understand the Canadian human rights map in the detail and with the sophistication that they have.[46] But, most of all, what is needed is a new state of mind in approaching the linking-up of the Canadian constitutional order and the international human rights order. Here I would like to rely on the evocative conceptualizations by two judges of the Supreme Court of Canada in two relatively recent speeches. Chief Justice Antonio Lamer affirmed in a keynote address at York University:[47]

> [T]he Charter should be, and has been, understood as part of the international human rights movement. . . . For international human rights law to be effective, . . . it must be supported by what I would term a "human rights culture," by which I mean a culture in which there is a firm and deep-seated commitment to the importance of human rights in our world . . . I turn now to the second aspect of what I have termed the "institutional moment" of international human rights law, the growth of institutional dialogue between international human rights bodies and national courts. Like any true dialogue, this dialogue depends on the willing participation of both parties. . . . [B]y looking to international treaties and the jurisprudence of international human rights bodies in the interpretation of domestic human rights norms[,] . . . judges raise the profile of those international treaties and further the creation of a human rights culture.

His former colleague on the bench, Justice Gérard La Forest, has spoken (generously, it must be said) about the cultivation of a certain cosmopolitan institutional orientation, or ethos, by the Canadian judiciary as a whole:[48]

> What is happening is that we are absorbing international legal norms affecting the individual through our constitutional pores . . . Thus our courts — and many other national courts — are truly becoming international courts in many areas involving the rule of law. They will become more so as they continue to

---

[46] For one account of Canadian NGO legal advocacy before the UN human rights treaty bodies, see Bruce Porter, "Socio-economic Advocacy — Using International Law: Notes from Canada" (1999) 2 Economic and Social Rights Review [forthcoming].

[47] The Rt. Hon. Antonio Lamer, Chief Justice of Canada, "Enforcing International Human Rights Law: The Treaty System in the 21st Century" (Address at York University, Toronto, 22 June 1997) at 3, 4 and 7.

[48] The Hon. Mr. Justice Gérard La Forest, "The Expanding Role of the Supreme Court of Canada in International Law Issues" (1996) 34 Can. Y. B. Int'l L. 89 at 98, 100–101. I say "generously" because the orientation which La Forest J. saw as already existing (or at least as quickly emerging) still applies much more to the Supreme Court than it does to most lower courts. As such, La Forest J. is as much speaking about a desirable orientation for the future as he is of any extant and widespread judicial ethos.

> rely on and benefit from one another's experience. Consequently, it is important that . . . national judges adopt an international perspective.

But, to return to an earlier theme and to revert to words I have used in another constitutional context (South Africa), "We should be cautious not to create the perception that rights are the domain of the courts alone."[49] Instead, "[w]e need a constitutional ethos to permeate all government decision-making."[50] In short, what is needed in the wake of the committees' *Concluding Observations*, as we grapple with the challenge of bringing the "international" into our "national" human rights culture, is not simply the ethic of judicial transformation advocated by Justices Lamer and La Forest (and now by *Baker*) but also a transformation in political ethics that eventually lead to a healthy interaction between the courts and other institutions which take international human rights law seriously.[51]❑

Craig Scott
Faculty of Law, University of Toronto.
The author wishes to acknowledge the generous financial assistance of the Social Sciences and Humanities Research Council of Canada.

[49] Scott, "Social Rights" *supra* note 40 at 4.

[50] *Ibid.*

[51] To that end, Canadian legislators would be well-advised to consult in addition to the Committee on Economic, Social and Cultural Rights' General Comment No. 9 on the domestic application of the Covenant, *supra* note 30, the committee's General Comment No. 10, *The role of national human rights institutions in the protection of economic, social and cultural rights*, UN. Doc. E/C.12/1998/12 (1 Dec. 1998). In addition, legislators may wish to consult the two most recent substantive General Comments of the committee, on rights to primary education and to food, in order to help get a sense of how diverse institutional roles might link up with the kinds of duties placed on states by substantive rights: see General Comment No. 11, Plans of action for primary education (Art. 14), UN Doc. E/C.12/1999/4 (10 May 1999) and General Comment No. 12, The right to adequate food (Art. 11), UN Doc. E/C.12/1999/5 (12 May 1999). See also General Comment No. 4, *The right to adequate housing (Art. 11(1))*, UN Doc. E/1992/23 (1992) reprinted in Eide *et al.*, *supra* note 22 at 446. Finally, consideration is being given to a general comment on the framework role of "benchmarks" for assessing progress in the realization of economic, social and cultural rights: for the current draft, see Committee on Economic, Social and Cultural Rights, Summary Record, 45th Meeting, 19th session, 26 November 1998, UN Doc. E/C.12/1998/SR.45 (30 November 1998) at paras. 68–69.

ABORIGINAL SELF-DETERMINATION WITHIN CANADA: RECENT DEVELOPMENTS IN INTERNATIONAL HUMAN RIGHTS LAW

Andrew J. Orkin and Joanna Birenbaum

The Government of Canada has declared that it is Canada's duty, as a nation which sees itself as a leader in the area of human rights, to set an example for other nations by complying with its obligations under the *International Covenant on Economic, Social and Cultural Rights*[1] and the *International Covenant on Civil and Political Rights*.[2] It has stated that:[3]

> Canada does not expect other governments to respect standards which it does not apply itself. As a signatory of all the principal UN treaties on international human rights, Canada regularly submits its human rights record to review by UN monitoring bodies. . . . These undertakings strengthen Canada's reputation as a guarantor of its citizens' rights and enhance our credentials to urge other governments to respect international standards.

It is significant, then, that two key international treaty monitoring bodies have recently declared that a foundation of Canadian law and policy on Aboriginal peoples breaches Canada's international human rights obligations.

In December 1998 and March 1999, the UN Committee on Economic, Social and Cultural Rights (CESCR) and the UN Human Rights Committee (HRC) judged Canada on its compliance with its human rights obligations as a signatory to the *ICESCR* and *ICCPR* . This is not the first occasion that Canada's human rights record has been put before these committees and found wanting. In past reviews, the government has been chastised for the appalling economic and social conditions of Aboriginal peoples in Canada. As observed by the CESCR, there is a "gross disparity between Aboriginal people and the majority of Canadians with respect to the enjoyment of Covenant rights."[4] The "shortage in adequate housing, the endemic mass unemployment and the high rate of suicide" in Aboriginal communities, among other indicators, were cited by the CESCR as evidence.[5]

The two UN committees' human rights analyses, however, have typically not proceeded beyond criticizing Canada in general terms for the conditions facing Aboriginal peoples; they have not previously identified or addressed the causes of these conditions. In contrast, the two recent rulings by these committees undertook a causal analysis and, what is more, identified Canada's lack of respect for Article 1 of the two Covenants, which guarantees the right of self-determination to all peoples, as the primary cause of these unacceptable economic and political conditions. In response to the facts put before them by the Government of Canada and various non-governmental organizations, the committees condemned Canada for the ongoing systemic dispossession of Aboriginal peoples, which, as is made clear in their rulings, threatens Aboriginal survival and the effective enjoyment of all Covenant rights by Aboriginal peoples in Canada.

The purpose of this comment is to highlight the far-reaching nature of the two committees' rulings on Article 1 of the two Covenants and their potential impact on the legal and policy approaches to Aboriginal peoples in Canada. By calling into question the very foundation of governmental and judicial approaches to Aboriginal peoples in Canada, the committees' substantiation of the

---

1 16 December 1966, UN Doc. A/6316 (1966) 993 U.N.T.S. 3 (entered into forced 3 January 1976) [hereinafter *ICESCR*].

2 19 December 1966, UN Doc. ST/DPI/246, 999 U.N.T.S. 171 (entered into force 23 March 1976, accession by Canada 19 May 1976) [hereinafter *ICCPR*].
The *ICCPR* and *ICESCR* are two pillars of the *International Bill of Rights*, which is comprised of these two instruments and the *Universal Declaration of Human Rights*. The government of Canada ratified the *ICCPR* and *ICESCR* in 1976.

3 Canada, "Human Rights and Canadian Foreign Policy," online: Department of Foreign Affairs and International Trade <http://www.dfait-maeci.gc.ca/human-rights/forpol-e.asp> (accessed 1 December 1999).

4 Committee on Economic, Social and Cultural Rights, *Concluding Observations on Canada*, 57th Session, UN Doc. E/C.12/1/Add.3.1 (4 December 1998) at para. 17 [hereinafter CESCR *CO*] online: <http://www.pch.gc.ca/ddp-hrd/ENGLISH/covenant.htm) (accessed 1 December 1999).

5 *Ibid.* at para. 17.

right of Aboriginal peoples to self-determination constitutes a legal and political turning point. The interpretation of the international law of self-determination by the HRC and the CESCR demands that the Government of Canada and the courts abandon the model of colonization and dispossession that has always been and continues to be the basis of Canadian Aboriginal law and policy.[6]

ARTICLE 1 OF THE *ICCPR* AND *ICESCR*: THE RIGHT OF SELF-DETERMINATION

Article 1 of both the *ICCPR* and the *ICESCR* provides that "all peoples" have a right of self-determination and that by virtue of that right, all peoples have a right to freely determine their political status and freely pursue their economic, social and cultural development. Article 1 of the *ICCPR* and *ICESCR* also provides that all peoples "may, for their own ends, freely dispose of their natural wealth and resources" and that "in no case may a people be deprived of its own means of subsistence." Clearly, the right to subsistence is framed in absolute terms.

The prominence of self-determination as the first article in the two Covenants and the fact that the strong language of Article 1 is repeated in both Covenants reflects the interdependent nature and sweeping scope of the right: "it encompasses all aspects of human development and interaction, cultural, social, political and economic."[7] These international bill of rights instruments recognize that for "all peoples" the right of self-determination is a necessary prerequisite to the exercise of all of the other human rights and freedoms guaranteed by the Covenants. This fundamental nature of the right of self-determination has been widely recognized. As one United Nations study has noted with respect to indigenous peoples: "Self-determination, in its many forms, must be recognized as the basic precondition for the enjoyment by indigenous peoples of their fundamental rights and the determination of their own future."[8]

The committees' primary attention to this "core" right of Aboriginal peoples in Canada, therefore, was an appropriate response to evidence of the chronically inferior and discriminatory political, social and economic conditions endured by Aboriginal peoples in Canada in almost every area of their lives.

THE *CONCLUDING OBSERVATIONS*

In arriving at their findings (as outlined in their *Concluding Observations*) on Canada's compliance with its Article 1 treaty obligations, the two committees analyzed the necessary connection between the conditions of endemic poverty and political marginalization of Aboriginal peoples in Canada on the one hand, and the failure by the government to meaningfully respect and protect the Aboriginal right of self-determination on the other. In particular, both committees took seriously the prediction of the Royal Commission on Aboriginal Peoples (RCAP) that:[9]

> [A]boriginal peoples need much more territory to become economically, culturally and politically self-sufficient. If they cannot obtain a greater share of the land and resources in this country, their institutions of self-government will fail. Without adequate lands and resources, Aboriginal nations will be unable to build their communities and structure their employment opportunities necessary to achieve self-sufficiency. Currently on the margins of Canadian society, they will be pushed to the edge of economic, cultural and political extinction. The government must act forcefully, generously and swiftly to assure the economic, cultural and political survival of Aboriginal nations.

Adopting this ominous warning from the RCAP, the two committees made findings directed at both the physical and legal barriers to Aboriginal peoples' meaningful exercise of their right of self-determination within Canada: the physical dispossession of Aboriginal peoples of their

---

[6] See generally, Canada, *Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Canada Communication Group, 1996) [hereinafter *RRCAP*]; Patrick Macklem, "First Nations Self-Government and the Borders of the Canadian Legal Imagination" (1991) 36 McGill L.J. 383; Kent McNeil, "Envisaging Constitutional Space for Aboriginal Governments" (1993) 19 Queen's L.J. 95; and M. E. Turpell, "Indigenous Peoples' Rights of Political Participation and Self-Determination: Recent International Legal Developments and the Continuing Struggle for Recognition" (1992) 25 Cornell International Law Journal 579: "Indigenous peoples, especially in the Americas, have yet to witness political decolonization" (at 579).

[7] Stated by Dr. Ted Moses, Ambassador to the United Nations, Grand Council of the Crees (Eeyou Istchee) at a workshop in Finland on the Right of Indigenous Peoples to Self-Determination (17 June 1999).

[8] Study of the Special Rapporteur, Jose R. Martinez Cobo, UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities, *Study of the Problem of Discrimination Against Indigenous Populations*, UN Doc. E/CN.4/Sub.2/1986/7, Add. 4 at para. 579. For a detailed discussion of the fundamental nature of the right, see Grand Council of the Crees, *Sovereign Injustice* (Nemaska: Grand Council of the Crees, 1995) and sources cited therein.

[9] *RRCAP*, vol. 2, *supra* note 6 at 557.

lands and resources and, as part of this process, the dispossession of Aboriginal status and rights in law through ongoing "extinguishment" of their inherent and constitutional Aboriginal rights and title. The HRC and CESCR concluded that Canada's continued dispossession of Aboriginal peoples through policies and practices of extinguishment violates international human rights law under Article 1 of the Covenants.

The strong language of the *Concluding Observations* of the HRC and CESCR concerning the right of Aboriginal peoples to self-determination in Canada justifies their reproduction here in full:

> The Committee notes that, as the State Party acknowledged, the situation of the Aboriginal peoples remains "the most pressing human rights issue facing Canadians." In this connection, the Committee is particularly concerned that the State Party has not yet implemented the recommendations of the Royal Commission on Aboriginal Peoples (RCAP). *With reference to the conclusion by RCAP that without a greater share of lands and resources institutions of Aboriginal self-government will fail, the Committee recommends that the right to self-determination requires,* inter alia, *that all peoples must be able to freely dispose of their natural wealth and resources* and that they may not be deprived of their own means of subsistence (art. 1, para. 2). The Committee recommends that decisive and urgent action be taken towards the full implementation of the RCAP recommendations on land and resource allocation. *The Committee also recommends that the practice of extinguishing inherent Aboriginal rights be abandoned as incompatible with article 1 of the Covenant.*[10]

> The Committee views with concern the direct connection between Aboriginal economic marginalization and the ongoing dispossession of Aboriginal people from their lands, as recognized by the RCAP, and endorses the recommendations of the RCAP that policies which violate Aboriginal treaty obligations and *extinguishment, conversion or giving up of Aboriginal rights and title should on no account be pursued by the State Party.* Certainty of treaty relations alone cannot justify such policies. The Committee is greatly concerned that the recommendations of the RCAP have not yet been implemented in spite of the urgency of the situation.[11]
>
> The Committee calls upon the State Party to act urgently with respect to the recommendations of the RCAP. The Committee also calls upon the State Party to take concrete and urgent steps to ensure respect for Aboriginal economic land and resource base rights adequate to achieve sustainable Aboriginal economies and cultures.[12]

IMPLICATIONS AND IMPACTS

The Recognition of the Right of Aboriginal Peoples in Canada to Self-Determination

The *Concluding Observations* of the HRC and CESCR are important in at least two ways. First, for over a decade, numerous state parties at the international level insisted that Aboriginal peoples are not "peoples" under international law and, accordingly, are not beneficiaries of the right of self-determination. The mere application by the HRC and CESCR of Article 1 to Aboriginal peoples as "peoples," therefore, is a significant affirmation of Aboriginal rights under international law. Second, state parties at the international level have argued that the right of self-determination cannot be applied to indigenous peoples since the right is non-justiciable and too uncertain. The recent rulings of the HRC and the CESCR demonstrate the fallacy of this argument. The committees concretely interpreted and applied Article 1 in the context of the facts presented to them by the Government of Canada and nongovernmental organizations. The

[10] Human Rights Committee, *Concluding Observations on Canada*, 65th Session, CCPR/C/79/Add.105 (7 April 1999) [emphasis added] [hereinafter HRC *CO*] online: <http://www.pch.gc.ca/ddp-hrd/ENGLISH/cesc/concobs.htm> (accessed 1 December 1999). The Human Rights Committee made many other observations which are relevant to the rights of Aboriginal peoples, for example: at para. 4 noting the final report of the RCAP and the professed commitment of the federal government to working in partnership with Aboriginal peoples to address the reforms recommended by the RCAP, at para. 5 commending the Government of Canada on the Nunavut land and governance agreement; at para. 7 criticizing the Government of Canada for failing altogether to report on its implementation of Article 1 of the Covenant; at para. 11 condemning the state party for failing to hold a thorough public inquiry into the 1995 police killing of Aboriginal protestor Dudley George; and at para. 19 expressing concern about the status of descendants of Aboriginal women under Bill C-31.

[11] CESCR *CO*, *supra* note 4 at para. 18 [emphasis added].

[12] *Ibid.* The CESCR made other observations relevant to the rights of Aboriginal peoples: see para. 7, Committee notes the appointment of the RCAP in response to the "serious issues affecting Aboriginal peoples in Canada;" para. 17, the Committee expresses "great concern" at the "gross disparity" between the standard of living of Aboriginal peoples as compared to Canadians overall; and at para. 29, the Committee notes the lack of protection of property for Aboriginal women living on reserve on marriage breakdown.

committees reviewed the Aboriginal policies and practices of the federal government, including the land claims process, and determined that current programs, policies and practices fail to fulfill Canada's obligations under Article 1 of the Covenants, insisting that "urgent" and significantly different governmental action is required.

It is perhaps surprising that, within Canada, the *Concluding Observations* should be significant simply for the very fact that the right of self-determination was applied to Aboriginal peoples. Unlike other state parties, the Canadian federal government has recently formally accepted the right of Aboriginal peoples to self-determination, both internationally and domestically. Internationally, the Government of Canada has made statements to the United Nations that it "accepts a right to self-determination for indigenous peoples" and that it is "legally and morally committed to the observance and protection of this right."[13] Domestically, the federal government's "Inherent Self-Government Policy," its claims that it is accepting and implementing the recommendations of the Royal Commission on Aboriginal Peoples,[14] and its statements to the Canadian public through its Department of Foreign Affairs that "indigenous peoples worldwide are entitled to the full enjoyment of human rights and fundamental freedoms, on the same basis as other citizens and *peoples* without discrimination,"[15] would all suggest that the protection and pursuit of Aboriginal self-determination is an uncontroversial part of Canadian domestic policy.

In reality, the Government of Canada has resisted the recognition of the right, let alone its implementation with broad remedial effect in Canada. A recent example of this resistance was the refusal by the Government of Canada to acknowledge and include a discussion of the right of Aboriginal peoples to self-determination in its arguments to the Supreme Court of Canada in *Reference re Secession of Québec*.[16] In that case, the Federal Government took the position that the rights of Aboriginal peoples living in Québec were not relevant to a determination under domestic and international law of the right of Québec to unilaterally secede from Canada. This meant that, according to the federal government, the Aboriginal, treaty and international rights of the Aboriginal peoples whose traditional lands fall within the current boundaries of the province of Québec play no part in a determination of whether these territories can be removed from Canada. In other words, the federal government appeared to hold that, once again, Aboriginal peoples could "pass with the land," in direct contravention of their domestic and international rights.[17]

In the context of the government's express acceptance, but actual resistance to the meaningful recognition of the right of Aboriginal peoples under Article 1 of the Covenants, the committees' rulings are important for their authoritative contribution to the jurisprudence and literature that confirms that Aboriginal peoples in Canada are beneficiaries of this fundamental human right.

Lands, Resources and Natural Wealth

On the question of the distribution of lands and resources in Canada, both committees condemned the Government of Canada for dispossessing Aboriginal peoples of an adequate land and resource base. Significantly, the committees found Canada in breach of this aspect of Article 1, notwithstanding having just been presented with evidence by federal representatives of "modern" land claims agreements, including the recent land and governance agreement of the eastern Arctic which established the territory of Nunavut.

While commending the Nunavut Agreement, the committees appear not to have been persuaded that the "modern" land claims agreements give effect to Article 1 of the Covenants. As submitted by the Grand Council of the Crees to the two committees, the past twenty-five years of treaty negotiations undermine any arguments by federal authorities that the purpose and effect of the lands claims process has been to achieve a viable land and resource base for self-sufficient Aboriginal nations.

In the case of the James Bay Crees, for example, while their "modern" agreement (*The James Bay and Northern Québec Agreement, 1975*)[18] provided them with many important compensatory and social-program benefits, it left the James Bay Cree Nation with very

---

[13] Commission on Human Rights, 53rd Session, *Statements of the Canadian Delegation* (31 October 1996). Statement on Article 3, the right to self-determination.

[14] Canada, *Gathering Strength — Canada's Aboriginal Action Plan* (Ottawa: Minister of Public Works and Government Services Canada, 1998), online: <http://www. inac.gc.ca/ strength/change.html> (accessed 1 December 1999).

[15] See statements online: Canadian Department of Foreign Affairs and International Trade Homepage <http://www. dfait-maeci. gc.ca/human-rights/indigen-e.asp> [emphasis added] (accessed 1 December 1999).

[16] [1998] 2 S.C.R. 217, 161 D.L.R. (4th) 385.

[17] For a more detailed discussion of the impact of *Reference re Secession of Québec* on Aboriginal peoples, see the article by the authors, "The Aboriginal Argument: the Requirement of Aboriginal Consent" and by Paul Joffe, "Québec Secession and Aboriginal Peoples: Important Signals from the Supreme Court" in David Schneiderman, ed., *The Quebec Decision: Perspectives on the Supreme Court Ruling on Secession* (Toronto: Lorimer & Co. Ltd., 1999).

[18] Canada, Québec, *The James Bay and Northern Québec Agreement, 1975* (Québec: Editeur Officiel du Québec, 1976).

limited benefit from, and meaningful control over, *less than 2 per cent* of their traditional lands. As a result, the James Bay Crees have been left, for all intents and purposes, economically dependent on two other orders of government which extract billions of dollars of resources and revenue from the Crees' traditional lands every year.

More generally, although Canada is one of the largest and richest countries in the world,[19] Aboriginal peoples in Canada control and are in a position to extract — *qua* Aboriginal peoples — collective benefit from less than one-half a per cent of the Canadian land mass south of the sixtieth parallel.[20] Moreover, much of the lands reserved by the Government of Canada for Aboriginal peoples are marginal and depleted of resources. As noted by the RCAP:[21]

> Aboriginal peoples have had great difficulty maintaining their lands and livelihoods in the face of massive encroachment. This encroachment is not ancient history. In addition to the devastating impact of settlement and development on traditional land use areas, the actual reserve community land base of Aboriginal people has shrunk by almost two-thirds since Confederation, and on-reserve resources have largely vanished . . . . As a result, Aboriginal people have been impoverished, deprived of the tools necessary for self-sufficiency and self-reliance.

In their admonishment of the Government of Canada in spite of "ongoing" treaty negotiations, the two committees have confirmed that Canada's past and present approaches and policies that leave Aboriginal peoples with minimal and economically unproductive lands and resources have more to do with neo-colonialism than respect for fundamental human rights. Accordingly, the committees issued their strongly worded recommendations "urging" the government to take "decisive," "concrete" and "urgent" action to implement the recommendations of the RCAP to ensure an adequate land and resource base for Aboriginal peoples. By these strong words, the committees are clearly stating that, as a matter of international law and respect for fundamental human rights — after over two hundred years of treaty-making and twenty-five years of "modern" treaty negotiations which continue to require (explicitly or in effect) the extinguishment of Aboriginal rights — the government's approach must be fundamentally transformed.

In this way, the rulings of the committees set an important standard for the interpretation of modern land agreements. The Government of Canada can no longer use its involvement in scores of self-government negotiations and specific claims and comprehensive claims negotiations as *prima facie* evidence that it is complying with its international human rights obligations. Nor can the Government of Canada assure itself, its citizens or other states that it respects and promotes the rights enshrined in the Covenants simply because it has signed "modern" land agreements with particular Aboriginal peoples. In order to satisfy international human rights standards, the question that must be answered in the affirmative is:

> Do the land or self-government dispensations concerning Aboriginal peoples in Canada secure effective access to and control over a land and resource base of adequate quality and quantity to ensure the overall political, economic, social and cultural viability of Aboriginal peoples in Canada?

The two committees have signalled to Canadians that the right of self-determination and the issue of lands and resources must be translated, urgently and decisively, into concrete reforms with overall effect. The *Concluding Observations* repeat and give international force to the alarms sounded by the Royal Commission on Aboriginal Peoples that the only way to redress and resolve "the most pressing human rights issue facing Canadians"[22] is to achieve a "fundamental reallocation of lands and resources" in this country.[23]

Extinguishment of Aboriginal Rights and Title

Directly related to the committees' findings on lands and resources are the committees' pronouncements that the practice of "extinguishment" of Aboriginal rights and title, by any name or means, violates the right of self-determination.

The doctrine of extinguishment — the "destruction or cancellation"[24] of Aboriginal rights or title — arose historically in the context of treaty negotiation and formation between the Crown and Aboriginal peoples. From the perspective of the Crown, treaties with Aboriginal peoples effected the formal cession, surrender, release or blanket extinguishment by the Aboriginal party of its inherent Aboriginal title to land in exchange for

---

[19] Year after year, Canada has been ranked at the top of the United Nations Human Development Index.

[20] *RRCAP, supra* note 6, vol. 2 at 422.

[21] *Ibid.* at 425.

[22] Canadian Human Rights Commission, *Annual Report 1994* (Ottawa: Minister of Public Works and Government Services, 1995).

[23] *RRCAP, supra* note 6, vol. 5 at 3.

[24] Royal Commission on Aboriginal Peoples, *Treaty Making in the Spirit of Co-Existence* (Ottawa: Minister of Supply and Services Canada, 1995) at 5.

reserve land and a limited set of benefits conferred on the Aboriginal people by the Crown under the treaty. This practice of extinguishment in treaty formation has continued from the "historic treaties" to the present. In the past thirty years of treaty negotiations, the government parties have insisted on the extinguishment of Aboriginal rights as a precondition to entering into the negotiation process.

It is widely understood among Aboriginal peoples and expert commentators and bodies that the purpose of the "legal" tool of extinguishment, when used by the Government of Canada or any state party in treaty or other negotiations, is and always has been to dispossess Aboriginal peoples of their lands and resources:[25]

> The ongoing implementation of state extinguishment policies constitute a very serious threat to indigenous societies. It is another relic of colonialism. Extinguishment is used to ensure state domination of indigenous peoples and to sever their ancestral ties to their own territories.

Given its colonial purpose, it is perhaps not surprising that the discredited foundations of the concept of extinguishment have not been explored or adverted to in any way by the Canadian government or courts. This silence conceals that the doctrine of extinguishment is implicitly rooted in notions of racial inferiority — notions which are anathema to our national legal and political culture of equality before the law, the rule of law and respect for human rights. The doctrine of extinguishment is built on the bald assertion of sovereignty by the Crown over Aboriginal lands. This assertion of sovereignty — particularly in the face of nation-to-nation treaties between the Crown and Aboriginal peoples in Canada to *share* the land on the basis of co-occupation — was justified by the (purported) inferiority of Aboriginal governance, societies and title to land. As well, the doctrine of extinguishment is related to the corollary notion of *terra nullius* which justified colonization on the basis of "discovery" of land, despite the obvious presence of organized indigenous societies on the land "discovered."

While the Supreme Court of Canada in *Delgamuukw* v. *British Columbia*[26] may have at last begun to expunge the concept of *terra nullius* from the legal and political landscape in Canada, it continued to affirm the racially discriminatory doctrine of extinguishment. The Court's plea at the end of its judgment for negotiated resolutions between Aboriginal peoples and governments in Canada, therefore, remains a plea that Aboriginal peoples subject themselves to negotiations which take place — by definition — under conditions of disadvantage and duress. The legal inferiority of Aboriginal peoples entrenched in Canadian law by the doctrine of extinguishment is a primary (though not exclusive) cause of this disadvantage and duress.[27] The UN committees' rulings starkly expose the doctrine of extinguishment, as pursued by the Government of Canada as a basis of treaty negotiations and implicitly permitted by our highest court, as fundamentally incompatible with international human rights norms.

While it may yet be difficult for Aboriginal peoples to go directly to Canadian courts to enforce the committees' determinations that the practice of extinguishment violates Article 1 of the covenants, the *Concluding Observations* nevertheless present our courts and governments with a serious legal and moral conundrum. The Supreme Court of Canada has repeatedly recognized the "important role of international human rights law as an aid in interpreting domestic law,"[28] including interpretation of the common law, statutes and the constitution. No doubt the two *Concluding Observations*, which clearly and unequivocally hold that any doctrine resulting in the extinguishment — or unalterable expunging or destruction —of Aboriginal rights is contrary to fundamental human rights norms, will eventually be put before the Supreme Court of Canada. Most likely, the *Concluding Observations* will be used to challenge the Supreme Court of Canada's rulings that section 35 of the *Constitution Act, 1982* permits the extinguishment of Aboriginal rights, provided a series of "justificatory" steps and conditions are met. The Supreme Court of Canada can now only pursue this analysis in express contravention of international human rights law as articulated by the HRC and CESCR and, more specifically, in contravention of an area of international

---

[25] Dalee Sambo, "Indigenous Peoples and International Standard-Setting Processes: Are State Governments Listening?" (1993) 3 Transnat'l L. & Contemp. Probs 13 at 31–2 as cited in Paul Joffe and Mary Ellen Turpel, *Extinguishment of the Rights of Aboriginal Peoples: Problems and Alternatives*, research submission prepared for the Royal Commission on Aboriginal Peoples (June, 1995) at 255.

[26] [1997] 3 S.C.R. 1010.

[27] The duress experienced by Aboriginal peoples in treaty negotiation is also caused by the conditions of individual and collective poverty due to centuries of dispossession, by extraordinary inequality of bargaining power, by dependence on the Crown for access to legal counsel, by a jurisprudence forged in their absence and by negotiation contexts in which third parties are at the same time being granted interest in or occupation of traditional lands without the consent of the Aboriginal party.

[28] *Baker* v. *Canada (Minister of Citizenship and Immigration)*, [1999] S.C.J. No. 25823 at para. 70. See also *Reference Re Public Service Employees Relations Act* (1987), 38 D.L.R. (4th) 161 (S.C.C.), *Davidson* v. *Slaight Communications* (1989), 59 D.L.R. (4th) 416 (S.C.C.), and the decision of Justice L'Heureux Dubé in *R.* v. *Ewanchuk*, [1999] 1 S.C.R. 330 at para.73.

human rights law — the right of self-determination — that the Supreme Court of Canada has accepted as a "general principle of international law" applicable within Canada.[29]

While some are still sceptical about the normative force of international human rights law, in this era of international consciousness and assertion of human rights values, governmental practice and the common law can and do in fact change to reflect developments in human rights norms. The High Court of Australia in *Mabo* v. *Queensland*,[30] for example, altered centuries of discrimination by recognizing the land title of the Torres Strait Islanders on the basis that:[31]

> Whatever the justification advanced in earlier days for refusing to recognize the rights and interests in land of the indigenous inhabitants of settled colonies, unjust and discriminatory doctrine of that kind can no longer be accepted . . . . The opening up of international remedies to individuals *pursuant to Australia's accession to the Optional Protocol to the* International Covenant on Civil and Political Rights *brings to bear on the common law the powerful influence of the Covenant and the international law standards it imports. The common law does not necessarily conform with the international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights.* A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration. It is contrary both to international standards and to the fundamental values of our common law to entrench a discriminatory rule. . . .

Similarly, the Government and courts of Canada are surely now forced to choose whether to perpetuate a discriminatory and infamous colonial practice in overt contravention of international human rights law, or at long last, to genuinely reconsider and eliminate in real terms all forms of extinguishment of Aboriginal rights.[32]

The Draft Declaration on the Rights of Indigenous Peoples

Finally, the committees' reliance on Article 1 should carry significant weight in the drafting and adoption of the *United Nations Declaration on the Rights of Indigenous Peoples*.[33] The most heated and political battle in the drafting of the current text of the Declaration concerned the inclusion of the right of self-determination as a right guaranteed to Indigenous peoples. Many state party delegates, including for many years the delegation from Canada, opposed the inclusion of the right. While the draft *Declaration* presently contains a right of self-determination under Article 3, with language that closely mirrors Article 1 of the *ICCPR* and *ICESCR*, there likely remains a long and difficult road ahead.

The draft *Declaration* is now before a newly constituted and open-ended working group of the United Nations Commission on Human Rights (CHR working group). The CHR Working Group has been established "for the sole purpose of *elaborating* a draft declaration" based on the draft *Declaration* developed and adopted by the Subcommission Working Group on Indigenous Peoples.[34] This broad mandate enables the CHR Working Group to focus on drafting a new text rather than commenting on and reviewing the existing draft *Declaration*. It is almost certain, therefore, that the battle over the inclusion of the right of self-determination and the recognition of Aboriginal peoples as "peoples" will have to be fought all over again.

The recent confirmation by the HRC and CESCR that Aboriginal peoples are beneficiaries of all aspects of the right of self-determination under Article 1, including the right to fully dispose of natural wealth and resources and the right to their own means of subsistence, must now remove any "uncertainties" concerning the application at international law of the right of self-determination to Aboriginal peoples and any basis for refusing to include the right in a final draft *Declaration* proposed by the CHR Working Group.

---

[29] *Reference re Secession of Québec, supra* note 17 at paras. 23 and 114.

[30] (1992), 175 C.L.R. 1.

[31] *Ibid.* at 42 [emphasis added].

[32] The Government of Canada has recently begun to assert that it is pursuing "certainty" through the full and final settlement of claims and the "conversion" of Aboriginal rights to other rights. The legal effect being sought would appear to be extinguishment of Aboriginal title.

[33] *Declaration on the Rights of Indigenous Peoples*, UN Docs E/CN.4/1995/2, E/CN.4/Sub.2/1994/56 /. This document is presently only in draft form [hereinafter the *Declaration*].

[34] Commission on Human Rights, *Report on the 51st Session*, HRC Res. 1995/32, UN Doc. E/1995/23 [emphasis added].

CONCLUSION

The recent rulings of the two United Nations committees have significant normative force, if not the force of binding law. But how best to ensure their practical effect in Canada?

The *Concluding Observations* are, at the very least, an authoritative source of legitimacy for Aboriginal peoples' efforts to achieve recognition in Canada of their right of self-determination and end the gross economic and social disparities they endure. For example, the Government of Canada is obligated under the treaties and by the ruling of the CESCR to widely disseminate the *Concluding Observations*. In the face of governmental non compliance, however, it is ultimately for advocates to place these rulings, and Canada's professed commitment to adhere to them, before the government and courts as frequently and forcefully as possible.

It took at least ten years of pressure before the Government of Canada abandoned its opposition to recognizing Aboriginal peoples as "peoples" under domestic and international law. How long will it take before the government — and courts — abandon the doctrine of extinguishment and its recent surrogates such as "conversion" of Aboriginal rights? How long will it be before the Government of Canada meaningfully achieves a viable land and resource base for Aboriginal peoples on a foundation of co-occupation and sharing rather than displacement?

The Federal Government has promised to achieve its goal of "certainty" in treaty relations without extinguishment. Until this promise translates into concrete results, however, these rulings should be applied to make the extinguishment of Aboriginal rights an increasingly unpalatable and untenable legal tool.

Similarly, these rulings can and ought to be used to repeatedly remind the government and the courts of the growing international and domestic view that Canada's international human rights reputation and integrity will be undermined unless an adequate Aboriginal land and resource base is achieved in fact and law. As noted by the Canadian Human Rights Commission in 1994:[35]

> It . . . remains the position of our Commission that the plight of native Canadians is *by far the most pressing human rights problem in Canada*, and that failure to achieve a more global solution can only continue to tarnish Canada's reputation and accomplishments.

The HRC and CESCR have now given Canada a clear and direct message as to where those global solutions must start.

Andrew J. Orkin
Joanna Birenbaum
Andrew Orkin (LLB, BCL) and Joanna Birenbaum (LLB) of Andrew J. Orkin and Associates, Hamilton, Ontario acted as legal counsel to the Grand Council of the Crees at the United Nations before the Committee on Economic, Social and Cultural Rights and the Human Rights Committee in November 1998 and March 1999 respectively. The authors wish to acknowledge the Grand Council of the Crees, whose work and commitment to the advancement of indigenous rights has contributed greatly to the progressive international recognition of the rights of indigenous peoples and has made this comment possible. In particular, Grand Chief Dr. Ted Moses, formerly Cree Ambassador to the U.N., and Grand Chief Dr. Matthew Coon Come have contributed greatly to this work over the years. The authors wish to thank Robert Epstein and Murray Klippenstein for their contributions to this paper.

FORTHCOMING IN VOLUME 11:1

June Ross on *R.* v. *Sharpe*

Sakej Henderson and **Russel Barsh** on *R.* v. *Marshall*

Dianne Pothier on the *B.C. Firefighter* case

Barb von Tigerstrom on Equality Rights and the Allocation of Health Care Resources

---

[35] Annual Report, *supra* note 22 [emphasis added].

THE SOCIAL UNION FRAMEWORK AGREEMENT: HOLLOWING OUT THE STATE

Margot Young

On February 4, 1999 nine provincial governments (all but Québec) and the federal government signed a document titled "A Framework to Improve the Social Union for Canadians."[1] While the Agreement bears a three year renewal clause and is not rich in determinative provisions, its significance should not be under-estimated. It represents an important, albeit extra-constitutional, development in Canadian federalism. The Social Union Framework agreement captures the spirit of a number of key recent developments in the welfare state, formalising certain parameters of the current policy arena for social program reconsideration. It retains some resonance of post-war notions of Canadian social citizenship, but is also strongly threaded throughout with elements of the more recent neo-liberal rejection of the welfare state.

Four important factors shape the Agreement's larger political context. The first is the course of evolution of the Canadian welfare state, in particular, the current ascendance of neo-liberalism as the orthodoxy of state restructuring. Advocacy of restricted state involvement in social and economic spheres is paired with an enhanced emphasis on individualism and the role of private structures — the market, community and family — in providing support services and distribution of resources previously delivered by the state. The result has been government retrenchment and the reduction of social program funding at both the federal and the provincial level.

The second feature, a practical instance of the shift in orthodoxy referred to above, is the recent set of unilateral and large cuts in federal contributions to provincial programs. A critical single event has been the transformation of the 1966 Canada Assistance Plan[2] (CAP) (the last major federal conditional-grant program) and the 1977 Established Programme Financing into the 1995 Canada Health and Social Transfer (CHST).[3] This transformation has involved several important elements: unilateral and large cuts in cash transfers from the federal government to the provincial governments;[4] abolition of the national standards attached to the Canada Assistance Plan;[5] and the switch to block funding from shared-cost funding for provincial spending in social assistance and services. The result has been increased pressure on provincial budgets (with consequent political heat over provincial reductions in health and education spending),[6] and the

[1] A Framework to Improve the Social Union for Canadians — An Agreement between the Government of Canada and the Governments of the Provinces and Territories (February 4, 1999). Online: Government of Canada, Publications and Forms, Resource Centre Publications and Links <http://socialunion.gc.ca/news/020499_e.html> (accessed 1 December 1999). The text of the Agreement is reproduced in this issue at page 133.

[2] *Canada Assistance Plan Act*, R.S.C. 1985, c. C-1 [hereinafter CAP].

[3] *Budget Implementation Act 1995* S.C. 1995 c. 17. This transformation has been termed "a fundamental watershed in the evolution of Canadian social assistance policy." Isabella Bakker and Janine Brodie, *The New Canada Health and Social Transfer (CHST): The Implications for Women* (Ottawa: Status of Women Canada, 1995) at 1.

[4] Paul Boothe, "Is It Time To Reform Fiscal Transfers?" (November 1998) 19 Policy Options 53 at 53: from 1994–95 to 1998–99, the CHST was cut by 35 percent, from $19.3 to $12.5 billion.

[5] CAP is well-remembered for its imposition of the following five conditions to provincial receipt of federal funding: provision of assistance to any person in need; provision of an amount consistent with a person's basic requirements; no imposition of a residency requirement as a condition of eligibility; establishment of an appeal procedure; and no work requirement. (CAP, *supra* note 2, s. 2, s. 6(2)(a)) Only the condition that provinces impose no residency requirement on social assistance applicants has been retained. For a discussion of the importance of these standards, see Shelagh Day and Gwen Brodsky, *Women and the Equality Deficit: The Impact of Restructuring Canada's Social Programs* (Ottawa: Status of Women Canada, 1998) at 14 –17.

[6] The result of such changes is that provincial governments now foot close to 85% of the funding for health, post-secondary education and social assistance: Monique Jérôme-Forget, "Canada's Social Union: Staking Out the Future of Federalism" (November 1998) 19 Policy Options 3 at 4.

loosening of federal control over how the provincial governments spend transferred monies in the core areas of social services. Importantly, as well, the unilateral nature of these changes has added to already existing provincial mistrust and irritation with the federal government's deployment of its spending power.[7]

The third configuration of the context out of which the Framework Agreement has emerged is that this reshaping (some say demise) of the social welfare state in Canada is occurring in a period of constitutional impasse, perhaps even crisis.[8] Thus, the Social Union Agreement follows two failed attempts at overhaul of the Constitution — Meech Lake Accord in the 1980s and the Charlottetown Accord in the 1990s — both of which devoted considerable attention to modification of the federal spending power.

The fourth important feature is the historical importance of the federal spending power. The federal spending power "lies at the constitutional heart of the Canadian social welfare state."[9] Faced with a constitutional division of powers that assigns the broadest revenue raising powers to the federal government, yet rests jurisdictional authority over most social welfare matters with provincial governments, development of the Canadian social safety net was, at least initially, a constitutional puzzle. In fact, it has been transfers of federal funds to provincial programs which have enabled much of the network of programs developed since the Second World War.[10] Thus, the fiscal imbalance of the constitutional division of powers has been addressed largely through deployment of the federal spending power.

Equally worth recalling is that use of the federal spending power speaks to two other critical dimensions of the Canadian internal social union: efficiency and national citizenship.[11] Centralized policy is better able to achieve economies of scale and to avoid adverse spillover effects otherwise produced by regional, decentralized decision-making processes.[12] The other dimension — national social citizenship — is embodied through the articulation of national standards by the federal government and their enforcement or advancement through the federal spending power. Such nation-wide standards recognize that Canadians, despite regional diversity, have common orientations towards a number of key social issues. The argument is that: "Canada is one of the important communities in which we live, one of the instruments through which we respond to our collective needs."[13] An important element of such national citizenship is the notion of equality, that the federal government has access to the broader national constituency so as to be able to balance competing regional interests and to guarantee some standard of comparable treatment of citizens regardless of regional residency. From these perspectives, the spending power is a critical policy tool for the federal

---

[7] Paired with this has been the creation of a limited number of new federal government programs which involve federal transfers to individual citizens in areas within provincial jurisdiction without, in at least one instance, prior consultation with the provinces. Examples of this are the National Child Benefit, developed co-operatively with provinces and the unilaterally developed Millennium Scholarship Fund. The "Millennium Scholarship Fund" was announced in the 1998 budget with a price tag of $2.5 billion dollars. It was introduced without first obtaining provincial input even though education lies within provincial jurisdiction.

[8] Joel Bakan and David Schneiderman, "Introduction" Bakan and Schneiderman, eds., *Social Justice and the Constitution: Perspectives on a Social Union for Canada* (Ottawa: Carleton University Press, 1992) 1 at 5.

[9] Keith Banting, "Federalism and Income Security: Themes and Variations" in *Ottawa and the Provinces: The Distribution of Money and Power*, vol. 1, Thomas J. Courchene, David W. Conklin, and Gail C.A. Cook, eds., (Toronto: Ontario Economic Council, 1985) 253 at 255.

[10] Apart from equalization payments, Ottawa spends its money in the provinces in three ways. First, Ottawa distributes monies through shared-cost programs. These programs establish a formula of sharing costs between the federal government and the provincial governments. Typically the formula provides that the federal government provides fifty percent for every dollar provinces put in the shared-cost programs, with or without conditions attached. The most obvious example of this is the now defunct Canada Assistance Plan which provided for federal sharing of provincial social programs and which has been significant in encouraging the expansion of provincial welfare states. The second kind of federal transfer is block-funded programs. Here, the federal government transfers a fixed amount or "block" of funding to the provinces, again with or without conditions attached as to how or on what it is spent. Importantly, the amount of federal money is not necessarily directly related to the actual amount provinces are spending in the area. Established Programme Financing grants (which actually consisted of both block cash transfers and transferred tax points) to provinces for spending on hospital insurance, medicare insurance and post-secondary education are examples of block funding. The Canada Assistance Plan's replacement program, the Canadian Health and Social Transfer, is also an example of block funding. Provinces receive a fixed sum which can be spent according to provincial discretion. No direct relation is claimed between the social spending costs of the provinces and the amount of the CHST transfer. The last category of federal transfers covers grants issued by Ottawa to individual Canadians. Historically, the federal Family Allowance was an example of this kind of federal spending. Currently, the new Child Tax Benefit and the Canada Millennium Scholarship fund are examples. See David Cameron, "The Social Union Pact Is Not A Backward Step For Québec" *The Globe and Mail* (12 February 1999) A17.

[11] Robin Boadway, "Delivering the Social Union: Some Thoughts on the Federal Role" (November 1998) 19 Policy Options 37 at 38.

[12] *Ibid.*

[13] Keith G. Banting, "Social Citizenship and the Social Union in Canada" (November 1998) 19 Policy Options 33 at 34.

government to meet its unique social, constitutional and economic obligations.[14]

The Social Union Framework Agreement must be read with this context in mind. When this is done, the document confirms some disturbing trends in the Canadian social union.[15] True, the Social Union Framework Agreement does acknowledge that use of the federal spending power has been important to the development of Canada's social union. More specifically, the agreement notes that the federal spending power has been "essential to the development of Canada's social union," that "conditional social transfers have enabled governments to introduce new and innovative social programmes . . .," and that federal transfers support the delivery of both social programs and social services. Certainly, this is recognition of the legitimacy of the exercise of the federal spending power, even with conditions attached, in areas of exclusive provincial jurisdiction.[16] However, other elements of the agreement's text communicate a vision of Canada's social union that is not supportive of the strong continuation of this federal power and that appears more responsive to the other background conditions just described. In illustration of this latter contention, this comment examines the Framework Agreement in terms of four connected concerns, all of which figure as important touchstones in the restructuring of the welfare state: national standards, equality, decentralization, and privatization of social responsibility.

NATIONAL STANDARDS

One concern is that the Framework Agreement signals that public debate has, for the most part, moved away from consideration of federal articulation of national standards, at least as such standards might underpin a shared social citizenship.[17] True, the Framework Agreement begins with a series of principles to which the governments commit, but few of these statements offer much by way of concrete additions to the social policy obligations government already bear. Essentially, only the two remaining sets of conditions currently attached to actual federal funding programs — health care standards and prohibition of residency requirements for social assistance and services — are determinatively and strongly provided for in this document.[18]

Thus, the initial section of the Framework Agreement states that the principles of medicare will be respected, repeating the five conditions under the Canada Health Act: comprehensiveness, universality, portability, public administration and accessibility. Residency considerations are dealt with in two different places. The first section states that the governments will ensure access for all Canadians, wherever they live or move in Canada, to essential social programs of reasonably comparable quality. Captured here is the one remaining condition attached to the CHST block grant (abolition of residency requirements), mixed with horizontal equity concerns about regional differences. In another section, entitled "Mobility in Canada," governments agree to create no new barriers to mobility with respect to social policy initiatives and to dismantle pre-existing barriers. The most detailed and concrete commitment of this section, however, lies in relation to the Agreement On Internal Trade (AIT): full compliance by July 1, 2001 is pledged with the AIT's requirements for mutual recognition of occupational qualifications and for elimination of residency requirements for employment opportunities.[19]

---

[14] Boadway, *supra* note 11 at 37. Section 36 of the *Constitution Act 1982* marks these aspects of the social and economic union. It confirms an inter-governmental commitment to "providing essential public services of reasonable quality to all Canadians" and the federal government's acknowledgement of "the principle of making equalisation payments to ensure that provincial governments have sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation." Articulated clearly is the federal government's role (either singular or shared) in ensuring both horizontal equity (effective equalisation between regions) and vertical equity (effective equalisation between individuals) within the Canadian polity. See Boadway, *ibid.* at 38; Harvey Lazar, "Social Union: Taking The Time To Do It Right" (November 1998) 19 Policy Options 43 at 43. The notion of vertical balance has also been used to capture recognition of the fact that the federal government has greater taxing powers than the provinces, which bear the larger spending responsibilities.

[15] For more laudatory comments, see Barbara Cameron and Judy Rebick, "The Social Union Framework is a Step Forward" *The Globe & Mail* (8 February 1999) A11; Judy Rebick, "Union Rules" *Elm Street* (April 1999) 112.

[16] It is this aspect of the agreement that enrages right-wing commentators. See, for example, Kevin Steel, "Still Under Ottawa's Thumb: The Social Union Agreement is a Victory for the Feds and a Defeat for the Provinces" *Alberta Report* (February 1999) 7.

[17] Robin Boadway, a professor of economic theory, gives the same reading to the public mood: "It has become accepted wisdom that the federal government should refrain from interfering with the rightful provincial role in the formulation and delivery of social policy. Providing money is fine, but using that to lever provincial policies is not." *Supra* note 11 at 37.

[18] Apart from a commitment to appropriate appeals procedures, the only other significant program-specific provision relates to making eligibility criteria and service commitments for social programs publicly available.

[19] The Agreement on Internal Trade (AIT) was signed in 1994 by all of the provinces and the federal government with the goals of reducing discriminatory barriers to trade, increasing the transparency of a number of trade-related measures, and

Much is revealed by this inclusion of certain standards and exclusion of others. To begin with, the presence of some national standards within the agreement is not necessarily a signal the federal government has fought for and won acknowledgment of the importance of national standards, *per se*, to Canada's social union. The fact that there is clear protection for health standards, for example, bears witness only to the peculiar Canadian politics that pairs ambivalence towards central social policy and government involvement within the social welfare sphere with fierce pride in our federally-enforced public medicare system. Publicly funded and universally accessible medical services almost alone of our social programs resonate deeply within the Canadian identity and retain strong public support. This is no endorsement of a collective Canadian social conscience: medical services are one of those universally provided goods (like post-secondary education) disproportionately accessed by middle and high income families. Thus, affluent and politically powerful sectors of the electorate care deeply about its continued adequate provision — and politicians respond accordingly. Also important, of course, is the fact that the Social Union Framework Agreement comes flush on the heels of the federal/provincial agreement to inject more federal money into provincial health programs and can be seen as a continuing phase of the same federal/provincial agreement process.[20]

It is revealing to consider what provisions, if any, lie within the Agreement with respect to other less popular social programs — say, income assistance. The Framework Agreement does stipulates a general commitment to providing "*appropriate* assistance to those in need."[21] What this might mean is uncertain but it is a clear departure from the way in which such obligations have been stated in the past. For instance, the preamble to CAP provided that Parliament recognized "the provision of *adequate* assistance to and in respect of persons in need."[22] The substantive provision of the CAP Act stated that provinces receiving federal funding under the statute will provide assistance to any person in need "in an amount or manner that takes into account the basic requirements of that person,"[23] a provision which has been held to stipulate a relationship between an income assistance recipient's actual needs and the benefit level.[24] As another example, the Charlottetown Consensus Report on the Constitution of August 1992 would have added a new provision to the Constitution describing the commitment of the governments to the policy objective of "providing *adequate* social services and benefits to ensure that all individuals resident in Canada have reasonable access to housing, food, and other basic necessities. . . ."[25] The terms of the Social Union Agreement are a significant move away from these past statements.

Two important political points can be made here. First, in the context of current welfare ideology, this switch from "adequacy" to "appropriateness" recollects the now popular right-wing emphasis on individual responsibility, moral desert, and minimal assistance of last resort.[26] Invocation of such values heralds and justifies the range of social program reductions observable across federal and provincial levels. Second, it is not surprising that the agreement fails to express collective commitments to adequate and generous social programs for individuals in need. Such programs, particularly income assistance programs, are unprotected by popular opinion or personal relevance to the ruling classes. Those who rely on the programs are politically disempowered and socially marginalized. Thus, there are few powerful and influential voices raised in protest against recent cutbacks to and increasing bureaucracy in these programs. Indeed, income assistance has become the pariah of government social spending, used to invoke the spectre of the overextended, overgenerous and morally soft state. As the most residual component in the structure of Canadian social programs — at both the federal and provincial levels — income assistance programs are especially subject to changing political and economic fortunes.

The Social Union Agreement is disappointing in its failure to shore up such a central part of Canada's social safety net. Lost is even the rather weak vision of social

harmonizing standards.

[20] Robert Lewis, "Rewrite of Federalism" *Maclean's* 112:1 (15 February 1999) 2.

[21] *Supra* note 1 at s.1 [emphasis added]. The agreement also provides that governments commit to "appropriate mechanisms" for citizens to appeal unfair administrative practices and to bring complaints about program access and services As well, the agreement commits the governments to ensuring "adequate, affordable, stable and sustainable funding for social programmes." Note that this latter provision applies to funding for programs, not to program details, such as benefit levels. The terms "affordability" and "sustainability" are key words in the fight against social spending.

[22] CAP, *supra* note 2 at s. 6(2)(a) [emphasis added].

[23] *Ibid.*

[24] *Finlay* v. *Canada (Minister of Finance)*, [1983] 1 S.C.R. 1080.

[25] Ottawa, *Consensus Report on the Constitution, Charlottetown, August 28, 1992, Final Text*, para. 4 (Ottawa: 1992) [emphasis added].

[26] These notions are evoked more explicitly by the Agreement's articulation of "individual dignity and responsibility" as fundamental values. *Supra* note 1 at s. 1.

assistance captured by the full text of CAP's Preamble:[27]

> Whereas the Parliament of Canada, recognizing that the provision of adequate assistance to and in respect of persons in need and the prevention and removal of the causes of poverty and dependence on public assistance and the concern of all Canadians, is desirous of extension of assistance and welfare services programmes throughout Canada by sharing more fully with the provinces in the cost thereof.

For governments in a country where a disturbingly high rate of poverty coexists with great wealth, a country recently chastised by two United Nations human rights committees for its failure to deal with this problem,[28] provincial and federal governments are to be criticized for having opted out of an important opportunity to speak collectively to this central crisis for our shared national citizenship. And, against the background of current neo-liberal welfare politics, the Agreement's failure to establish a collective commitment to at least *adequate* income assistance and other social program benefit levels seems pointed.

Equally revealing of the changing face of our governments' collective understanding of national citizenship is the Agreement's inclusion of mobility rights. Undoubtedly, these rights are important to the ability of individual Canadians to access needed social services: witness the hardships caused by the British Columbian Government's attempted imposition of residency requirements for access to its social assistance program.[29] Thus, when we think about a national social citizenship, part of that vision must be some guarantee that provincial tenure will not be a barrier to access to social programs and services. The Social Union Agreement does provide for this (although its failure to set out, as well, substantive program protections runs the risk that interprovincial mobility will simply result in downward pressure on social programming.) However, the mobility rights provided for in the Framework Agreement — indeed the ones most precisely provided for — are equally about a national economic citizenship: the unimpeded pursuit of economic interests across provincial boundaries. The collapse of the social aspects of citizenship into primarily economic connections and guarantees of interprovincial mobility is consistent with the neo-liberal concern for free markets, reduced government involvement in social programs, and erasure of the economic impact of political boundaries.[30]

EQUALITY

Also of concern is the Agreement's potential to mark a political turn away from more substantive notions of equality as a foundational element of social citizenship. There is sufficient ambiguity as to the notion of equality at play in this agreement to raise doubts about the Agreement's informing vision of equality.

The first section of the Agreement lists a series of principles identified as fundamental values of Canadian society. This section begins with the declaration that "All Canadians are equal," under which governments commit to: "Treat all Canadians with fairness and equity;" "Promote equality of opportunity for all Canadians;" and, "Respect the equality, rights and diversity of all Canadian women and men and their diverse needs."[31] There is no doubt that it is important that the Agreement talks about the centrality of the values of equality and fairness as elements informing Canada's social union. What is disturbing are indicators that the version of equality referred to is a formal, rather than substantive, one.

By formal equality, I mean a notion of equality that stresses equal treatment, independent of consideration of individual particularities or circumstances. The emphasis is on equal opportunity, not equality of result or condition and fails to appreciate the effect of systemic disadvantage, turning limitations of life circumstances into simple acts of individual choice or reflections of natural ability for which the state bears no responsibility. Substantive equality, conversely, focuses on equality of outcome, taking into account individual or group differences in recognition of the fact that same treatment is not always equal treatment. Systemic inequalities are specifically targeted. In the context of social welfare provision, the difference between these two models of equality can be materially important. Without consideration of individuals' real social and economic conditions and absent program design that addresses systemic inequalities, state action will do little to effect substantive amelioration of the pre-existing conditions of

---

[27] CAP, *supra* note 2.

[28] The United Nations Committee on Economic, Social and Cultural Rights, *Concluding Observations on Canada*, UN Doc. E/C.12/1/Add.31 (4 December 1998); United Nations Human Rights Committee, *Concluding Observations on Canada*, UN Doc. CCPR/C/79/Add.105 (7 April 1999).

[29] Robby Yateman, "The What's and Who's of the Residency Requirement Court Case" *The Long Haul* (August 1996) 9.

[30] Nikolas Rose, "The Death of the Social? Re-figuring the Territory of Government" (1996) 25 Economy and Social 327.

[31] *Supra* note 1 at s.1.

deprivation and disadvantage that currently deny social citizenship to large groups of Canadians.[32]

In favour of a substantive interpretation of the document's commitment to equality are the references within the agreement to the values of "fairness and equity" and to respect for the "equality, rights and dignity of all Canadian women and men and *their diverse needs*."[33] Respect for the diversity of needs implies recognition that same treatment of all may not be the path to realized equality. Equally, the statement that governments have committed themselves to promoting "the full and active participation of all Canadians in Canada's social and economic life,"[34] by stressing the value of participation, implies a more substantive vision of what equality will entail. These are positive statements to have in a social union agreement.

However, the message that a notion of formal equality informs the Agreement is are also powerful. Worrisome is the commitment to promotion of "equal opportunity" for all Canadians as an elaboration of the norm that "All Canadians are equal."[35] Equal opportunity is standard coda for formal equality and is a particularly unfortunate elaboration of what is meant by equality in a document which should focus on social condition, needs, and program outcomes. Such a limited commitment seems confirmed under the next section which sets out in more detail what is meant under the heading of "Meeting the needs of Canadians." Here we read that this involves such things as working to "ensure access for all Canadians . . . to essential programmes and services."[36] Access guarantees alone speak little to concerns of quality and extent of programs and services. In sum, the Social Union Agreement's failure to elaborate explicit commitments to substantive equality and its use of formal equality terms are consistent with the larger observable political move away from understanding social citizenship in substantive and meaningful terms.

Ironically, the one aspect of the Social Union Framework Agreement acknowledged by the signatory governments as a failure — the absence of Québec from the accord — is perhaps the Agreement's strongest, albeit clearly unintended, promise of substantive equality. Québec's refusal to sign establishes, in practice and only in relation to the subject matter of this Agreement, a form of asymmetrical federalism.[37] Asymmetrical federalism rests upon rejection of the notion of equality as identical treatment, recognizing instead the idea that "equal" treatment of Québec, in light of its historic and current differences, may demand special or distinctive (different) treatment (In such a way is asymmetrical federalism, through its recognition of difference, illustrative of a substantive equality outlook on the issue of federal relations). So, in light of the new Social Union Framework Agreement, Québec now faces a slightly different set of obligations — most notably those regarding mobility concerns — than the other nine provinces. For instance, Québec, is under no special obligation to start eliminating residency-based barriers, such as higher tuition fees to out-of-province students. Some commentators have argued that this kind of structure holds the best promise for resolution of the tension between "the social rights of English Canadians and the national rights of Québec"[38] as it permits some nationalization of standards and program delivery for English Canadians outside of Québec with more autonomy and opportunity for specific provincial policy within Québec. Possibly, the exclusion of Québec from this Agreement will press governments towards the eventual acknowledgment of the necessity of unique arrangements for Québec with regard to social programs. Of course, the Québec government's perspective on Québec's absence from the agreement is less sanguine than this.[39] And, spoiling any attempt to paint the Agreement as establishing substantively equal relations among the different constituents of the Canadian federation, is the agreement's notable lack of involvement of and specific arrangements for Aboriginal peoples.

DECENTRALIZATION

The Social Union Agreement places significant restrictions on the otherwise constitutional exercise of the federal spending power. This is the first time this has

---

[32] For a discussion of some of the failures of federal and provincial social policy in this regard, see Shelagh Day and Margot Young, *Canadian Women and the Social Deficit: A Presentation to the International Committee on Economic, Social and Cultural Rights* (Ottawa: National Association of Women and the Law, 1999).

[33] *Supra* note 1 at s. 1 [emphasis added].

[34] *Ibid.*

[35] *Ibid.*

[36] *Ibid.*

[37] See Cameron and Rebick, *supra* note 15.

[38] Barbara Cameron, "Social Citizenship in a Multinational State: The Social Charter Revisited" (Paper presented to Federal Constitutions in Comparative Perspective: A Conference in Honour of Douglas V. Verney, May 1996, York University, Toronto) at 24, quoted in Day and Brodsky, *supra* note 5 at 24.

[39] The Premier of Québec, Lucien Bouchard has said that no Québec premier would agree to a deal under which "six provinces and the federal government could trigger a new program, define national objectives, devise a framework for accountability, and then Québec, to get compensation for its part of the program, would have to abide by the national objectives:" John Geddes, "New departure: after many delays the social union train finally leaves the station" *Maclean's* 112:7 (15 February 1999) 25.

happened in a federal/provincial agreement that has been finalized, although it has certainly been attempted in previous constitutional negotiations. Ottawa is restricted from introducing new cost-shared or block-funded programs in the areas of health care, post-secondary education, social assistance and social services unless half of the provinces agree to such an initiative. This means that the federal government will need the approval of six provinces before any new cost-shared or block funded program, say a national home-care or a pharmacare plan, could be initiated. The federal government is also under an obligation to work with the provincial governments to develop the priorities and objectives of any new cost-shared or block funded program and to agree on an accountability framework.[40] The Agreement thus significantly limits federal ability to initiate new programs, a historical example of which would be the *Canada Health Act* whose unilateral imposition of federal conditions on health funding could not happen under this agreement unless a majority of the provinces agreed.[41]

To be fair, this formulation is less restrictive than other proposals on the negotiating table which would have required the approval of a majority of (or even seven) provinces representing at least 50% of the population. As some commentators have already noted,[42] the Social Union Framework Agreement will allow the poorer provinces to approve a new federally funding program, regardless of whether the wealthier or more populous provinces — Alberta, British Columbia, Ontario, Québec — agree. However, the Social Union Framework Agreement does go further than the formula employed by both the Meech Lake and Charlottetown Accords. Those agreements would have covered only shared-cost programs, not block-funded programs, and did not require that the federal government obtain a set level of support for new programs. Nor did those agreements require the joint development of program objectives.

Additionally, dispersed throughout the Social Union Framework Agreement are provisions or statements that closely parallel other constraints on the federal spending power proposed in Article 25 of the Charlottetown Accord. Article 25 provided that a framework would be developed to guide the use of federal spending power in all areas of exclusive provincial jurisdiction to ensure that the federal spending power would: "contribute to the pursuit of national objectives;" "reduce overlap and duplication;" "not distort and should respect provincial priorities;" and "ensure equality of treatment of the provinces, while recognizing their different needs and circumstances."[43] These four conditions are fairly closely replicated in the Social Union Agreement. Thus, the concern about national objectives is caught in relation to the conditions imposed on shared-cost and block-funded federal programs. The stipulation about reducing duplication of government services finds expression in three parts of the Social Union Framework Agreement. Section 4 mentions the concern twice: first in connection with its provisions on joint planning and second in relation to proposals about consultation between governments. Section 5 mentions that governments must have an opportunity to identify potential duplication in consultations over direct federal spending. It is section 5, as well, which deals directly with the impact of federal spending power transfers for social programs, stating that when the federal government uses conditional transfers it will proceed in "a co-operative manner that is respectful of the provincial and territorial governments and their priorities." Finally, the concern about equality of treatment is replicated in Section 4 of the Social Union Agreement under the heading of "Equitable treatment" and reads: "For any new Canada-wide social initiatives, arrangements made with one province/territory will be made available to all provinces/territories in a manner consistent with their diverse circumstances." The point here is not that these concerns are necessarily undesirable ones — although possibly, from some perspectives, some of them may be. Rather, this congruence is highlighted to situate the Social Union Agreement as consistent with recent historic attempts to harness the federal spending power and decentralize social policy and program generation.

As a last point of note, the Social Union Agreement stipulates that regardless of whether a province has supported or opposed the new federal initiative, regardless of whether the federal transfer is cost-shared or block-funded, a province will receive its share of the

---

[40] The federal government had already committed itself to this consent-seeking process. In its 1996 Throne Speech the government said:

> The Government of Canada will not use its spending power to create new cost-shared programs in areas of exclusive [provincial] jurisdiction without the consent of the majority of the provinces. Any new program will be designed so that non-participating provinces will be compensated, provided they establish equivalent or comparable initiatives.

Canada, *Speech From the Throne to Open the Second Session of the Thirty-fifth Parliament of Canada* (Ottawa: Supply and Services Canada, 1996) at 9.

[41] Ottawa must also give a year's notice to the provinces of any intention to cut existing transfer programs. This requirement addresses provincial concerns about provincial revenue stability and has obvious origin in such unilateral federal moves as, most notably, the early 90's freeze on EPF transfers, the "cap on CAP," and the switch from CAP to the CHST.

[42] Cameron and Rebick, *supra* note 15.

[43] Charlottetown Accord, *supra* note 25 at para. 25.

funding, as long as that province meets the national objectives and respects the accountability framework of the new program. If a province already has a program in place that satisfies the agreed objectives of the new federal program, then that province will still receive its share of the funding and will be able to spend those monies in the same or a related priority area. This "opting-out" provision is similar to the provisions in both the Meech Lake and Charlottetown Accords.[44] It differs primarily in the fact that it has wider application, given that the Social Union Agreement applies to more types of federal initiatives than did the other Accords.[45]

What is left open to unilateral federal initiative are those programs where the federal government transfers funds directly to Canadian individuals. The provinces have no ability to block such federal plans. The Agreement requires only that the federal government give the provinces three months notice and an offer to "consult."[46] This may serve as some limitation on the federal government's ease in initiating such programs. Or if the rules about joint agreement on new federal cost-shared agreements prove to be too unwieldy, it may well be that it is to this type of programming that Ottawa's new initiatives will migrate. Indeed, the new trend already observable seems to be for the federal government to move towards highly visible and direct interventions in support of the traditional target groups of social programming: families, students and patients (poverty, education, health). The Canadian Millennium Scholarship Fund and the National Child Benefit are examples of this. The dangers are that this is not always the most effective or efficient route in policy terms.[47]

In sum, the Social Union Framework Agreement establishes a significant requirement of agreement between federal and provincial governments over most types of federal social program funding initiatives, instituting a degree of what Banting calls "co-determination federalism," strong co-ordination of federal and provincial preferences.[48] The problems associated with this model of federalism are primarily those of impasse or inaction: "interlocking decision making can easily become inter-blocking decision making, creating the 'joint decision' trap . . . ."[49] This runs the risk of reducing the likelihood that federal governments will opt to put money into joint programs,[50] which, in turn, threatens the maintenance of a national social citizenship.

Political scientists argue, with convincing examples culled from other federal states, that decentralized federations tend to devote a smaller proportion of state resources to social security programs.[51] Provincial initiative in this area is hampered by such things as mobility of capital and labour, as well as problems of fiscal capacity.[52] There is, then, an observed link between degree of political decentralization and lower levels of welfare spending. Indeed, it has been argued that decentralization is part of the neo-liberal strategy for the atrophy of the welfare state, as, by weakening the powers of the central government, opportunities for centralized economic and social intervention are reduced.[53]

Moreover, in the exercise of its spending power, it is not clear why the federal government should necessarily seek provincial agreement. As Boadway writes, the national objectives of the federal government are legitimate, as is its national electoral authority. Boadway points out that restraining federal ability to initiate constitutionally legitimate programs using its spending power removes from the federal government its main policy instrument for realizing legitimate economic and constitutional objectives relating to a fair and efficient internal economic and social union.[54] As well, it forces the federal government to search for other policy instruments, such as direct transfers to individuals and institutions, to accomplish the same national ends. This, Boadway argues, introduces inefficiencies into the

---

[44] The Meech Lake and Charlottetown Accords would have amended the constitution so that the federal government would provide reasonable compensation to the government of a province choosing not to participate in any shared-cost program established by the federal government in an area of exclusive provincial jurisdiction, if that province carries on a program or initiative compatible with the national objectives.

[45] The problem with allowing some form of opting out by the provinces relates to the conditions for the option. Requiring provinces that opt out to implement programs with similar objectives, the terms of Meech Lake, clearly impinges less on the federal government's ability to initiate federal programs, than opting out provisions which impose lower thresholds. The danger is that the opting out provisions will gut federal spending power. Boadway, *supra* note 11 at 39.

[46] *Supra* note 1 at s. 5.

[47] Banting, *supra* note 13 at 36.

[48] *Ibid.* at 35.

[49] *Ibid.*

[50] *Ibid.* at 36.

[51] R.D. McKinlay, "Testing Hypotheses on Welfare State Provision" in Francis G. Castles, ed., *Democratic Politics and Policy Outcomes* (Walton Hall Milton Keynes: The Open University Press, 1979) 105 at 109; Banting, *supra* note 9 at 260.

[52] For alternative accounts of the impact of decentralization see, for example, Andrew Petter, "Federalism and the Myth of the Federal Spending Power" (1989) 68 Canadian Bar Review 448; Thomas Courchene, "The Fiscal Arrangements: Focus on 1987" in Courchene, Conklin, and Cook, eds., *supra* note 9 at 3.

[53] Stephen McBride and John Shields, *Dismantling a Nation: Canada and the New World Order* (Halifax: Fernwood Publishing, 1993) at 105–6.

[54] Boadway, *supra* note 11 at 39.

system and he cites the Millennium Scholarship Fund as a possible example of such a scenario.[55]

PRIVATIZATION

One of the characteristics of the current neo-liberal transformation of the welfare state is the privatization of welfare functions, conceptualized in part as a return to "emphasis on the personal responsibilities of individuals, their families, and their communities."[56] This invocation of the notion of community, for the political right, appeals to private, rather than public or social, responsibility. Such privatization strategies fit clearly within the neo-liberal agenda of scaled-down government, reduced government spending, and dismantling of the welfare state. Individuals are urged to look to strategies of self-reliance — the family, the community — before the state, resulting in the increased residual nature of social programs. Linked notions are the values of neo-liberal individualism: choice, personal responsibility, self-promotion, and self-government.[57]

The emphasis within these strategies on community and on local organization shares common rhetoric with the more progressive protest against the "bureaucratic, centralized, universalized and often fragmented nature of service delivery" of the post-war welfare state.[58] Here, prescriptions for community involvement stand for the revival of the public as "a less rigid and bureaucratized, more democratic mechanism for collective provision for social need."[59] The call is not for reduced state involvement but for different involvement of the state as funder, facilitator, and regulator, rather than direct service provider.[60] But, the invocation of community and family involvement in the social welfare process resonates with both of these discourses of change, lending a progressive and appealing gloss to reforms which are often quite regressive in impact.

The Social Union Agreement too joins the call for enhanced non-governmental involvement in social programming. So the first section of the Agreement, which, to repeat, sets out the principles underlying the Agreement, contains the pledge by governments to "[w]ork in partnership with individuals, families, communities, voluntary organizations, business and labour. . . ."[61] Linked with other elements of the Agreement — emphasis on formal equality, constraint of the federal government's spending power, and failure to articulate significant benchmarks for social program content and delivery standards — this call for private partnership bodes badly for the continued public nature of the Canadian welfare state.

While the text of the Agreement does not make clear the underlying politics of this invocation of non-state actors, the larger context of the Agreement hints strongly that the welfare pluralist vision is the least likely catalyst for the reference. It is worth remembering that the signatories include governments (Alberta and Ontario, for example) whose own social program reforms have relied heavily upon the appeal to family and to community in order to shift public responsibility for social programs to local, private control.

CONCLUSION

The Social Union Framework Agreement is too indefinite a document on which to rest the claim that the battle over the soul of the Canadian welfare state has been lost. Moreover, the Agreement does contain, as noted, a strong assertion of the continued legitimacy of some form of the federal spending power. What is called for, then, is a kind of watching brief. Clearly, the Agreement flags a set of specific perspectives on issues related to the federal spending power and social programs. Whether or not this Agreement also marks the end of a transitional moment for the Canadian welfare state and the capture of the public debate by neo-liberal outlooks remains an important concern and a possibility to which we must remain alert.❑

Margot Young
Faculty of Law, University of Victoria.
Thanks to Joel Bakan and Ted McDorman for their helpful comments.

---

[55] *Ibid.*

[56] Rose, *supra* note 30 at 328–29.

[57] *Ibid.* at 335. For example, a Reform Party dissenting committee opinion states the following: "Government programs have crowded out the traditional role of families, communities and local organizations in the delivery of personal security." ("Reform Party Dissenting Opinion for the Standing Committee on Human Resources Development" in *Security, Opportunities ad Fairness: Canadians Renewing Their Social Programs, Report of the Standing Committee on Human Resources Development* (Ottawa: House of Commons, 1995) 302).

[58] Marlee Kline, "Blue Meanies in Alberta: Tory Tactics and the Privatization of Child Welfare" in Susan B. Boyd, ed., *Challenging The Public/Private Divide: Feminism, Law, and Public Policy* (Toronto: University of Toronto Press, 1997) 330 at 332.

[59] Kline, *ibid.* at 347; Paul Leduc Browne, *Love in a Cold World? The Voluntary Sector in an Age of Cuts* (Ottawa: Canadian Centre for Policy Alternatives, 1996) at 2–3. Rose makes the interesting observation that both critical perspectives share a similar "changed specification of the *subjects* of government" [original emphasis]. Individuals are conceived as "active in their own government," situated in an assembly of networks constituting their primary allegiance and support. Rose, *supra* note 30 at 330–31.

[60] Kline, *ibid.* at 347; Rose, *supra* note 30 at 335.

[61] *Supra* note 1 at s. 1.

A FRAMEWORK FOR CONFLICT MANAGEMENT

Barbara Cameron

The Social Union Framework Agreement[1] outlines the rules that First Ministers (minus Québec) have pledged to follow in dealing, mainly, with each other. It is not being submitted to any legislature for approval, so it has less legal status than the *Calgary Declaration*. It is an executive federalist statement of good intentions, common understandings and shared commitments. Its significance is political and it needs to be assessed from that perspective.

Within the context of the constitutional division of powers and the political traditions surrounding the exercise of the federal spending power, the Agreement offers the federal government room to manoeuver in dealing with the demands of the provinces and citizens concerning social programs. With respect to Québec, it signals little flexibility on the principle of the federal role in social programs but offers some possibilities for case-by-case crisis management in the form of bureaucratic, bilateral side agreements. There is plenty of space in the Agreement for federal government initiative — provided a government wishes to act. However, there are also opportunities for a federal government intent on delay to bury issues in processes of consultation and expert evaluation. The Agreement is not so much a framework for a social union as a framework for the political management of disputes between Québec and English Canada, and between elites and non-elites around social programs.

FEDERAL SPENDING POWER

Despite concerns voiced during the social union negotiations about the erosion of the federal role, the provisions in the Agreement regarding the federal spending power, "opting in," and Canada-wide objectives do not seriously restrict and, in some cases, may even strengthen the federal capacity to act.

Section 5 of the Social Union Framework Agreement dealing with federal spending power would not have been out of place in the 1960s, the expansionary period of the Canadian welfare state. It affirms the legitimacy of the federal spending power in the promotion of equality of opportunity and mobility for all Canadians and in the pursuit of Canada-wide objectives. It recognizes that conditional social transfers are useful in encouraging new and innovative social programs for social services, as well as income support programs. It also reaffirms the virtually unrestricted right of the federal government to transfer funds directly to individuals and organizations. At the same time, it acknowledges what has never been in doubt: provinces have jurisdiction over program design and delivery. This strong, positive affirmation of federal spending power goes far beyond what any Québec government could accept.

Provincial Consent

Constitutionally, there is no requirement for the Government of Canada to obtain provincial support before exercising its spending power. In the Agreement, the federal government pledges to obtain the support of a majority of the provinces before proceeding with a new Canada-wide initiative.[2] Formally, this appears to be a significant limitation. The political reality, however, is quite different. The threshold for provincial support in the Agreement is set at six provinces, with no stipulation about the proportion of the total Canadian population represented. When placed in the context of the political traditions surrounding spending power, this formula emerges as a weak limitation.

The federal government has always assumed, with the notable exception of one instance, that some support from

[1] A Framework to Improve the Social Union for Canadians — An Agreement between the Government of Canada and the Governments of the Provinces and Territories (February 4, 1999). Online: Government of Canada, Publications and Forms, Resource Centre Publications and Links <http://socialunion.gc.ca/news/020499_e.html> (accessed 1 December 1999). The text of the Agreement is reproduced in this issue at page 133.

[2] *Ibid.* at s. 5.

provincial governments is necessary to demonstrate a "national consensus" in the case of shared-cost programs. While flexibly interpreted, the operating assumption for federal-provincial negotiations has generally been that a "national consensus" was needed: the threshold for this was support by the Parliament of Canada and a majority of the provinces representing a majority of the Canadian population. The notion of a double provincial majority — a majority of provinces and a majority of the population — was first articulated in the 1950s by Prime Minister Louis St. Laurent and the requirement of six provinces with a majority of the population was built into the Hospital Insurance Act. John Diefenbaker removed the so-called "six provinces clause" when his government assumed office, but retained the majority-of-the-population criteria. By that time the five provinces that had signed on to the cost-shared program represented 56.3 per cent of the population.[3]

The one notable, and highly influential, exception was medicare. Here, the federal government adopted the strategy of announcing that funds would be available to any province that established a medicare plan that met four principles: universality of benefits, comprehensiveness of services covered, portability of benefits and public administration. There was no stipulation that a certain number — or even any — of the provinces had to be onside. Prime Minister Lester Pearson announced the federal conditions to the provinces, without prior negotiation, at a 1965 federal-provincial conference, the same time they were announced publicly. Provincial opposition to medicare from Québec, Ontario and Alberta was bitter. The strategy angered the provinces and damaged federal-provincial relations to the extent that Prime Minister Pierre Elliott Trudeau promised "there will be no more medicares."[4] At a constitutional conference a year after the inaugural date of medicare, Trudeau's government proposed a formula for establishing a national consensus that implicitly acknowledged a "double provincial majority" as the threshold required for federally funded, cost-shared initiatives.[5] Since 1982, the constitutional amending formula of seven provinces with fifty per cent of the population has frequently surfaced as the appropriate one for shared-cost programs.[6]

Neither the Meech Lake Accord nor the Charlottetown Agreement contained a requirement for provincial approval and so, formally at least, the Social Union Framework Agreement places a greater limitation on the federal capacity to act. In theory, the federal government could have acted under the proposed constitutional amendment, as it did with medicare. However, the political costs of doing so would be much higher today than in the mid-1960s, before the consolidation of a strong Québec sovereignty movement and before the abandonment of the welfare state by Canada's economic elites. In the absence of both a strong positive affirmation of the federal spending power and a specific formula for determining a national consensus, the traditions surrounding provincial consent would likely have shaped the provinces' expectations.

In the light of the history of federal-provincial negotiations around cost-shared programs, specifying the level of provincial consent at the low threshold contained in the Framework Agreement can be seen as strengthening the real capacity of the federal government to spend in areas of exclusive provincial jurisdiction. The formula of six provinces with no population minimum legitimizes federal action with the support only of "have not" provinces in English Canada and without the participation of Québec and the three "have" provinces of Ontario, Alberta and British Columbia. This rule potentially gives the "have not" provinces additional influence in the design of Canada-wide programs. Provided that new initiatives attract the support of six provinces, a federal government with the will to do so could proceed with a Canada-wide initiative, inviting the other provinces to join in if they choose.

"Opting In"

Under the Framework Agreement, a province cannot "opt out" of a program and still receive money. It must demonstrate, through an unspecified accountability framework, that its existing programming completely or partially fulfills the objectives of the Canada-wide initiative and only then will it receive its share of the federal transfer to use for another, related purpose.[7] Whatever is left over after the province brings programs

---

[3] Malcolm G. Taylor, *Health Insurance and Canadian Public Policy: The Seven Decisions that Created the Canadian Health Insurance System and Their Outcomes*, 2nd ed. (Kingston/Montreal: McGill-Queen's University Press, 1987) 182, 231 and 227.

[4] Accounts of this strategy are found in works by two participants in the events. See A.W. Johnson, *Social Policy in Canada: the Past as it Conditions the Present* (Ottawa: Institute for Research on Public Policy, 1987) at 15-16 and Tom Kent, *A Public Purpose: An Experience of Liberal Opposition and Canadian Government* (Kingston and Montreal: McGill-Queen's University Press, 1988) at 364-369.

[5] Canada, *Federal-Provincial Grants and the Spending Power of Parliament. Working Paper on the Constitution* (Ottawa: 1969).

[6] The initial proposals of the government of Brian Mulroney in the Charlottetown constitutional round proposed to entrench the formula of seven provinces with fifty per cent of the population. This formula was widely opposed in English Canada and did not make it into the final *Charlottetown Agreement. Shaping Canada's Future Together* (24 September 1991) 59.

[7] *Supra* note 1 at s. 5.

up to the objectives may be used to achieve "objectives in the same or a related priority area."[8] This requirement makes receiving compensation dependent on meeting (or agreeing to meet) objectives and rewards any province that already has such programs in place. Provided a province meets the "agreed objectives" and agrees to an accountability procedure, it is entitled to its share of the funds.[9]

In contrast, Meech Lake and Charlottetown allowed a province to opt out with compensation, provided it carried on a "program or initiative that is compatible with the national objective." There was no provision for an accountability process and the word "compatible" was open to very broad interpretation. Whether the language "fulfill the agreed objectives" will be different in practice from "compatible with" depends very much on the nature of both the objectives and the accountability procedure.

Objectives

The Framework Agreement is most ambiguous on the crucial question of "objectives." The document uses a variety of terms to describe what might fall into this category. In the section on the federal spending power, it speaks of Canada-wide objectives in a way consistent with the English Canadian notion of "national standards." The criteria for medicare are described as "principles."[10] In other places, it uses "Canada-wide priorities and objectives,"[11] "agreed objectives,"[12] "social priorities"[13] and even "outcomes."[14] It refers to "outcome measures" and "comparable indicators to measure progress on agreed objectives."[15]

The procedure for establishing the agreed objectives is also a bit unclear. In section 5, which deals with the spending power, the federal government commits itself to "work collaboratively with all provincial and territorial governments to identify Canada-wide priorities and objectives."[16] Yet the Agreement does not specifically assign the task of establishing Canada-wide objectives to a federal-provincial body. Significantly, this is not listed as a responsibility of the Ministerial Council which will monitor the implementation of the Agreement. While the federal government does agree to subject the interpretation of the *Canada Health Act* to a non-biding dispute resolution process, nowhere does it give up its power to enforce "Canada-wide objectives."[17]

The consultation commitments may not result in any significant departure from existing practice. The federal government has usually negotiated with the provinces around the conditions attached to its cost-shared transfers both collectively and bilaterally and will continue to do so under the Framework Agreement. In negotiations over criteria, the federal government's power will lie, as it has in the past, in its financial resources. If it cannot reach agreement with at least six provinces on conditions it considers acceptable, it can withdraw its offer of funding. Yet, in exchange for a commitment to "proceed in a cooperative manner that is respectful of the provincial and territorial governments and their priorities,"[18] the federal government gained from the provinces an explicit endorsement of the principles of the *Canada Health Act* — something sought by federal Liberal governments since at least 1981.[19]

ACCOUNTABILITY PROVISIONS

The Framework Agreement holds out the promise of greater public accountability of governments and even of democratic participation around social policy. Governments commit themselves to "ensure appropriate opportunities for Canadians to have meaningful input into social programs."[20] Indeed, Canadians are told that "Canada's Social Union can be strengthened by enhancing each government's accountability to its constituents."[21] The review of the Framework Agreement after three years will "ensure significant opportunities for input and feedback from Canadians and all interested parties, including social policy experts, private sector and voluntary organizations."[22] But no mechanisms or institutions are identified to facilitate public accountability and participation. In a parliamentary democracy, the Parliament of Canada and the provincial legislatures are the obvious institutions to be assigned the task of holding executives accountable. Yet, the Agreement calls for governments to report regularly to constituents — not legislatures — on the performance of programs. It is

---

[8] *Ibid.*

[9] *Ibid.* at s. 3.

[10] *Ibid.* at s. 1.

[11] *Ibid.* at s. 5.

[12] *Ibid.* at s. 3.

[13] *Ibid.*

[14] *Ibid.*

[15] *Ibid.*

[16] *Ibid.* at s. 5.

[17] *Ibid.*

[18] *Ibid.*

[19] Allan J. MacEachen, *Federal-Provincial Fiscal Arrangements in the Eighties. A Submission to the Parliamentary Task Force on the Federal-Provincial Fiscal Arrangements by the Honourable Allan J. MacEachen Deputy Prime Minister and Minister of Finance , April 23, 1981* (Ottawa: Supply and Services Canada, 1981) 18.

[20] *Supra* note 1 at s. 1.

[21] *Ibid.* at s. 3.

[22] *Ibid.* at s. 7.

almost wholly silent on the principle of responsible government.[23]

The main emphasis in the Agreement is on technocratic, administrative accountability rather than democratic accountability. Great importance is given to monitoring and measuring outcomes. It seems that reports drafted by experts will be the major instrument of public accountability, although not all reports will be made public as a matter of course. Fact-finding or mediation reports produced during dispute resolution processes will be made public only if one of the governments involved in the dispute so requests. The Ministerial Council will receive expert reports prepared for federal, provincial and territorial governments on progress on meeting commitments under the Agreement.[24] One gets the impression that the drafters of the Agreement hoped to depoliticize the fundamentally political conflicts surrounding social programs by recasting them as technical or administrative issues. Debates around social policy will be framed by reports of experts issued directly to citizens; elected legislatures will be bypassed by executive agreements. The conflicts between the federal and provincial governments will be channelled into sector negotiations and dispute resolution processes, where expert advice will again play a role.

A Framework for Managing Conflict

The Framework Agreement provides some openings for English Canadian social policy groups to put their demands for Canada-wide social programs back on the federal political agenda. The strong affirmation of the federal spending power removes the jurisdictional excuse for inaction that federal governments have used since the mid-1980s. Specifying a low threshold for provincial consent clarifies the rules and makes it easier for social policy advocates to target their lobbying efforts. The passages in the Agreement about transparency and public accountability can be used as a wedge to force open some of the administrative and political secrecy surrounding federal-provincial negotiations. Social policy activists can also attempt to influence the criteria used to measure the performance of social programs. The "opting in" formula might neutralize Québec's opposition to new Canada-wide social programs in areas where it already has in place advanced programs of its own. In child care, for example, the compensation formula would mean that Québec could receive funds to use in the same general area because its existing programs would almost certainly meet the "agreed objectives." The catch, of course, for Québec is the requirement of an accountability process. Nonetheless, the absence of Québec from the Agreement and the institutions it proposes does open up possibilities for an asymmetrical approach to the Canadian social union, which is essential if Canada is to move beyond the Québec/English Canada impasse.

The Framework Agreement, especially in the language used in relation to the spending power, reflects a distinctly English Canadian perspective on the role of the federal government in social programs. It takes a very tough stand with respect to Québec's traditional demands concerning the federal spending power. Any subsequent federal government that wishes to step back from the strong affirmation of federal spending power and the low threshold for provincial consent will run into difficulty in English Canada. At the same time, however, the Agreement does contain provisions that will make accommodation with Québec at a practical level possible; for example, through bilateral federal-provincial agreements around particular programs. Provided there is enough money on the table and the accountability procedures are not too stringent, an arrangement with even a Parti Québécois government could be concluded. In the event a federalist Québec government is elected, certain provisions of the Agreement, such as those on consultation and accountability, could be interpreted to give the provinces an enlarged role.

A federal government that sought to take the initiative on social programs would find plenty of space within the Framework Agreement to do so. A government that did not wish to act, however, would find opportunities for delay. The consultation requirements around "objectives" could be extended, with expert studies being commissioned. Discussions could be bogged down in sector negotiations for long periods of time. The amount of money being put on the table for the "have not" provinces could be insufficient to bring them onside. The success of a government in diffusing demands by burying proposed new initiatives in administrative procedures will depend very much on the ability of social policy advocates to mobilize. In the absence of sustained mobilization around focused demands, the Agreement will serve as an administrative arrangement for regularizing intergovernmental relations and a flexible instrument to manage conflicts around social programs as they arise.

Barbara Cameron
Department of Political Science, Atkinson College, York University.

[23] There are two nods in the direction of executive accountability to legislatures in the Agreement, one in connection with prior notice for changes to a social program that may affect another government and the other in connection with the use of third-party experts in dispute resolution processes. Both have more to do with preserving the room to manoeuvre of governments, especially the federal government, than public accountability.

[24] *Ibid.* at s. 6.

A Framework to Improve the Social Union for Canadians

An Agreement between the Government of Canada
and the Governments of the Provinces and Territories

February 4, 1999

The following agreement is based upon a mutual respect between orders of government and a willingness to work more closely together to meet the needs of Canadians.

1. PRINCIPLES

Canada's social union should reflect and give expression to the fundamental values of Canadians — equality, respect for diversity, fairness, individual dignity and responsibility, and mutual aid and our responsibilities for one another.

Within their respective constitutional jurisdictions and powers, governments commit to the following principles:

All Canadians are equal

- Treat all Canadians with fairness and equity
- Promote equality of opportunity for all Canadians
- Respect the equality, rights and dignity of all Canadian women and men and their diverse needs

Meeting the needs of Canadians

- Ensure access for all Canadians, wherever they live or move in Canada, to essential social programs and services of reasonably comparable quality
- Provide appropriate assistance to those in need
- Respect the principles of medicare: comprehensiveness, universality, portability, public administration and accessibility
- Promote the full and active participation of all Canadians in Canada's social and economic life
- Work in partnership with individuals, families, communities, voluntary organizations, business and labour, and ensure appropriate opportunities for Canadians to have meaningful input into social policies and programs

Sustaining social programs and services

- Ensure adequate, affordable, stable and sustainable funding for social programs

Aboriginal peoples of Canada

- For greater certainty, nothing in this agreement abrogates or derogates from any Aboriginal, treaty or other rights of Aboriginal peoples including self-government

2. MOBILITY WITHIN CANADA

All governments believe that the freedom of movement of Canadians to pursue opportunities anywhere in Canada is an essential element of Canadian citizenship.

Governments will ensure that no new barriers to mobility are created in new social policy initiatives.

Governments will eliminate, within three years, any residency-based policies or practices which constrain access to post-secondary education, training, health and social services and social assistance unless they can be demonstrated to be reasonable and consistent with the principles of the Social Union Framework.

Accordingly, sector Ministers will submit annual reports to the Ministerial Council identifying residency-based barriers to access and providing action plans to eliminate them.

Governments are also committed to ensure, by July 1, 2001, full compliance with the mobility

provisions of the Agreement on Internal Trade by all entities subject to those provisions, including the requirements for mutual recognition of occupational qualifications and for eliminating residency requirements for access to employment opportunities.

3. Informing Canadians — Public Accountability and Transparency

Canada's Social Union can be strengthened by enhancing each government's transparency and accountability to its constituents. Each government therefore agrees to:

Achieving and Measuring Results

- Monitor and measure outcomes of its social programs and report regularly to its constituents on the performance of these programs
- Share information and best practices to support the development of outcome measures, and work with other governments to develop, over time, comparable indicators to measure progress on agreed objectives
- Publicly recognize and explain the respective roles and contributions of governments
- Use funds transferred from another order of government for the purposes agreed and pass on increases to its residents
- Use third parties, as appropriate, to assist in assessing progress on social priorities

Involvement of Canadians

- Ensure effective mechanisms for Canadians to participate in developing social priorities and reviewing outcomes

Ensuring fair and transparent practices

- Make eligibility criteria and service commitments for social programs publicly available
- Have in place appropriate mechanisms for citizens to appeal unfair administrative practices and bring complaints about access and service
- Report publicly on citizen's appeals and complaints, ensuring that confidentiality requirements are met

4. Working in Partnership for Canadians

Joint Planning and Collaboration

The Ministerial Council has demonstrated the benefits of joint planning and mutual help through which governments share knowledge and learn from each other.

Governments therefore agree to

- Undertake joint planning to share information on social trends, problems and priorities and to work together to identify priorities for collaborative action
- Collaborate on implementation of joint priorities when this would result in more effective and efficient service to Canadians, including as appropriate joint development of objectives and principles, clarification of roles and responsibilities, and flexible implementation to respect diverse needs and circumstances, complement existing measures and avoid duplication

Reciprocal Notice and Consultation

The actions of one government or order of government often have significant effects on other governments. In a manner consistent with the principles of our system of parliamentary government and the budget-making process, governments therefore agree to:

- Give one another advance notice prior to implementation of a major change in a social policy or program which will likely substantially affect another government
- Offer to consult prior to implementing new social policies and programs that are likely to substantially affect other governments or the social union more generally. Governments participating in these consultations will have the opportunity to identify potential duplication and to propose alternative approaches to achieve flexible and effective implementation

Equitable Treatment

For any new Canada-wide social initiatives, arrangements made with one province/territory will be made available to all provinces/territories in a manner consistent with their diverse circumstances.

Aboriginal Peoples

Governments will work with the Aboriginal peoples of Canada to find practical solutions to address their pressing needs.

5. THE FEDERAL SPENDING POWER — IMPROVING SOCIAL PROGRAMS FOR CANADIANS

Social transfers to provinces and territories

The use of the federal spending power under the Constitution has been essential to the development of Canada's social union. An important use of the spending power by the Government of Canada has been to transfer money to the provincial and territorial governments. These transfers support the delivery of social programs and services by provinces and territories in order to promote equality of opportunity and mobility for all Canadians and to pursue Canada-wide objectives.

Conditional social transfers have enabled governments to introduce new and innovative social programs, such as Medicare, and to ensure that they are available to all Canadians. When the federal government uses such conditional transfers, whether cost-shared or block-funded, it should proceed in a cooperative manner that is respectful of the provincial and territorial governments and their priorities.

Funding predictability

The Government of Canada will consult with provincial and territorial governments at least one year prior to renewal or significant funding changes in existing social transfers to provinces/territories, unless otherwise agreed, and will build due notice provisions into any new social transfers to provincial/territorial governments.

New Canada-wide initiatives supported by transfers to Provinces and Territories

With respect to any new Canada-wide initiatives in health care, post- secondary education, social assistance and social services that are funded through intergovernmental transfers, whether block-funded or cost-shared, the Government of Canada will:

- Work collaboratively with all provincial and territorial governments to identify Canada-wide priorities and objectives
- Not introduce such new initiatives without the agreement of a majority of provincial governments

Each provincial and territorial government will determine the detailed program design and mix best suited to its own needs and circumstances to meet the agreed objectives.

A provincial/territorial government which, because of its existing programming, does not require the total transfer to fulfill the agreed objectives would be able to reinvest any funds not required for those objectives in the same or a related priority area.

The Government of Canada and the provincial/territorial governments will agree on an accountability framework for such new social initiatives and investments.

All provincial and territorial governments that meet or commit to meet the agreed Canada-wide objectives and agree to respect the accountability framework will receive their share of available funding.

Direct federal spending

Another use of the federal spending power is making transfers to individuals and to organizations in order to promote equality of opportunity, mobility, and other Canada-wide objectives.

When the federal government introduces new Canada-wide initiatives funded through direct transfers to individuals or organizations for health care, post-secondary education, social assistance and social services, it will, prior to implementation, give at least three months' notice and offer to consult. Governments participating in these consultations will have the opportunity to identify potential duplication and to propose alternative approaches to achieve flexible and effective implementation.

6. DISPUTE AVOIDANCE AND RESOLUTION

Governments are committed to working collaboratively to avoid and resolve intergovernmental disputes. Respecting existing legislative provisions, mechanisms to avoid and resolve disputes should:

- Be simple, timely, efficient, effective and transparent
- Allow maximum flexibility for governments to resolve disputes in a non-adversarial way
- Ensure that sectors design processes appropriate to their needs
- Provide for appropriate use of third parties for expert assistance and advice while ensuring democratic accountability by elected officials

Dispute avoidance and resolution will apply to commitments on mobility, intergovernmental transfers, interpretation of the Canada Health Act principles, and, as appropriate, on any new joint initiative.

Sector Ministers should be guided by the following process, as appropriate:

Dispute avoidance

- Governments are committed to working together and avoiding disputes through information-sharing, joint planning, collaboration, advance notice and early consultation, and flexibility in implementation

Sector negotiations

- Sector negotiations to resolve disputes will be based on joint fact-finding
- A written joint fact-finding report will be submitted to governments involved, who will have the opportunity to comment on the report before its completion
- Governments involved may seek assistance of a third party for fact-finding, advice, or mediation
- At the request of either party in a dispute, fact-finding or mediation reports will be made public

Review provisions

- Any government can require a review of a decision or action one year after it enters into effect or when changing circumstances justify

Each government involved in a dispute may consult and seek advice from third parties, including interested or knowledgeable persons or groups, at all stages of the process.

Governments will report publicly on an annual basis on the nature of intergovernmental disputes and their resolution.

Role of the Ministerial Council

The Ministerial Council will support sector Ministers by collecting information on effective ways of implementing the agreement and avoiding disputes and receiving reports from jurisdictions on progress on commitments under the Social Union Framework Agreement.

7. Review of the Social Union Framework Agreement

By the end of the third year of the Framework Agreement, governments will jointly undertake a full review of the Agreement and its implementation and make appropriate adjustments to the Framework as required. This review will ensure significant opportunities for input and feed-back from Canadians and all interested parties, including social policy experts, private sector and voluntary organizations.

STYLE GUIDE

MANUSCRIPT FORMAT:

- We prefer that manuscripts are double spaced, with at least one inch margins all around.
- Please avoid using computer codes, other than those concerning font and line spacing. Use hard returns only at the end of a paragraph.

COMPUTER SOFTWARE:

- We prefer submissions in WordPerfect 9 or in other PC-DOS systems. Please use 3½" diskettes.

SPELLING:

- Please follow *The Canadian Oxford Dictionary* for spelling usage.

STYLE:

- Please follow *The Chicago Manual of Style*, 14th ed. where not inconsistent with the *Canadian Uniform Guide to Legal Citation.*
- Use double quotation marks, except for quotes within quotes.
- Commas, periods, and other marks should be inside quotation marks, except for colons and semi-colons.

CITATIONS:

- Please follow the *Canadian Uniform Guide to Legal Citation,* 4th ed. for citations. Author's first names may be used, but we ask that the style be uniform throughout. Footnotes or endnotes are acceptable for submissions.
- For books: P.J. Williams, *The Alchemy of Race and Rights* (Cambridge: Harvard University Press, 1991).
- For edited books: R.F. Devlin, ed., *Canadian Perspectives on Legal Theory* (Toronto: Emond Montgomery, 1991) or S.L. Elkin and K.E. Soltan, eds., *A New Constitutionalism: Designing Political Institutions for a Good Society* (Chicago: University of Chicago Press, 1993).
- For edited books by separate author: C. Taylor, *Reconciling the Solitudes: Essays on Federalism and Nationalism,* ed. by G. Laforest (Montreal and Kingston: McGill-Queen's University Press, 1993).
- For translated works: A. Honneth, *The Struggle for Recognition: The Moral Grammar of Social Conflicts,* trans. J. Anderson (Cambridge: Polity Press, 1995).
- For newspaper articles: "Nunavut Proposal Would Ensure Half of Government Seats Go to Women" *The Edmonton Journal* (25 November 1996) A8.
- For articles: B.S. Turner, "Outline of a Theory of Human Rights" (1993) 27 Sociology 489.
- Subsequent references: *Ibid.* if immediately above or *supra* note # if further above. You may use *infra*, note # for references below.
- Pinpoint Citations: Use "at [page number]". As in: *Supra* note 10 at 29.