

**Can Canada Afford a Charter of Social and Economic Rights?  
– Toward a Canadian Social Charter –**

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## I Introduction

The articulation of a *Canadian Social Charter* which would speak to the economic, social and cultural rights of the 21<sup>st</sup> Century is the subject-matter of this present paper. Associated with the proposed *Canadian Social Charter* is the establishment of the Office of a *Canadian Social Auditor*.

A significant foundation for a contemporary *Canadian Social Charter* has been built in Canada through the work of the federal, provincial and territorial jurisdictions in many areas of social, economic and cultural rights. Across the country a social safety net and numerous social, economic and cultural public programs have been developed to provide Canadians with a quality of life which is admired throughout the world.

In 1976, Canada ratified, with the written agreement of each province, the United Nations' *International Covenant on Economic, Social and Cultural Rights*.<sup>1</sup> This ratification action means that, as a State Party to the *Covenant*, Canada has undertaken to take steps to the maximum of its available resources to progressively realize the economic, social and cultural rights recognized in the *Covenant*.

The *Constitution Act 1982* presents an important base for a *Canadian Social Charter*. *Section 36* of the *Act* provides as follows:

- 36.(1) Without altering the legislative authority of Parliament or of the provincial legislatures, or the rights of any of them with respect to the exercise of their legislative authority, Parliament and the legislatures, together with the government of Canada and the provincial governments, are committed to
- (a) promoting equal opportunities for the well-being of Canadians;
  - (b) furthering economic development to reduce disparity in opportunities; and
  - (c) providing essential public services of reasonable quality to all Canadians.
- (2) Parliament and the government of Canada are committed to the principle of making equalization payments to ensure that provincial governments have sufficient revenues to provide reasonably

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<sup>1</sup> Order in council P.C. 1976-1156

comparable levels of public services at reasonably comparable levels of taxation.<sup>2</sup>

This section entrenches two principles relevant to the contents of a *Social Charter*: the well-being of Canadians as a goal of both levels of governments and the principle of equalization as one method of achieving it.

## **II Elements of Social Charters in General**

Labour and workplace rights, rights to healthcare, and rights to education are typical of the social rights included in discussions on a *Social Charter*. Proposals to entrench such rights in *Social Charters* have drawn on the oft-noted distinction between positive and negative rights. The latter, typically concerned with political and civil rights, set limits by describing what governments may not do: they may not deprive individuals of life, liberty and security of the person except in accordance with the principles of fundamental justice; they may not interfere with an individual's freedom of expression; they may not subject an individual to unreasonable search and seizure, and so on. Negative rights may be asserted in the courts, and have been so asserted routinely in Canada.

Positive rights, on the other hand, generally express broad social policy goals and the obligation of governments to work toward these goals by political means – legislation, funding, and so on.<sup>3</sup> The degree to which governments can implement these goals depends on available resources. It is argued by some that they are inherently political, and the “rights” that may be said to derive from them are usually too general to be justiciable in the traditional sense (that is, subject to adjudication and enforcement by the courts). Despite this distinction, in a 1991 Discussion Paper published by the province of Ontario, it was noted that some social policy standards are capable of being expressed as negative, enforceable rights; the right to portability and the right to universality were given as examples.<sup>4</sup>

Economic, social and cultural rights could be expressed in a social charter in a number of ways. Very general principles would exhort governments to protect and promote

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<sup>2</sup> Constitution Act, 1982, Part III Section 36 <http://laws.justice.gc.ca/en/Const/index.html>

<sup>3</sup> Not all “positive” rights are tied to social policy goals; for example, the right to vote and language rights require the government to facilitate rather than just not to obstruct, their exercise.

<sup>4</sup> *A Canadian Social Charter: Making Our Shared Values Stronger*, A Discussion Paper, Minister of Intergovernmental Affairs, Toronto, Ontario, September 1991., p.8

equal access to adequate health care, education, housing, income security, a clean and safe environment, and the basic necessities of life. This type of clause could stand on its own or become part of the existing *Section 36* of the *Constitution Act, 1982*.

Another approach would be to entrench certain aspects of social programs on which there is a clear consensus – for example, the principles that there should be universal access to health care and to primary and secondary education. Alternatively, the goals and norms applicable to various programs could be entrenched, in the same way as certain principles are included in the *Canada Health Act*.

### **III Some Dimensions of the Development of Social Rights in Canada**

Due in part to the fact that Canada is a federal state and the responsibility for civil liberties and government services that we now consider social rights rest with provincial governments, the development of social rights in Canada has not been uniform. By the late 1960s, however, Canadians were enjoying many of the services we now consider social rights, and that would be included in a *Social Charter*. By this time, most modern provincial labour laws were in place, the federal parliament passed the *Medical Care Act* which allowed the provinces to establish healthcare systems with the federal government sharing the costs, and provinces had established public schools for elementary and secondary education and had begun subsidizing post-secondary education.

#### 1. The International Covenant on Economic, Social and Cultural Rights

In 1966, the United Nations opened for signature and ratification the *International Covenant on Economic, Social, and Cultural Rights (ICESCR)*. This *Covenant*, along with its sister *Covenant*, the *International Covenant on Civil and Political Rights (ICCPR)*, was designed by the United Nations to give the human rights originally articulated in the 1948 *Universal Declaration of Human Rights* the force of law. They were to do so by re-articulating the rights in terms of desired outcomes and creating enforcement mechanisms appropriate to the type of right enforced. For example, the right to healthcare as provided for by *Article 25* of the *Universal Declaration of Human Rights* reads:

(1) Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and *medical care* and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

(2) Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.<sup>5</sup>

By comparison with the language in the UDHR making “medical care” one element among many in terms of the right to an adequate standard of living, the right to healthcare as articulated in the ICESCR is more detailed in terms of expected outcomes:

1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:

(a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;

(b) The improvement of all aspects of environmental and industrial hygiene;

(c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;

(d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.<sup>6</sup>

The ICESCR provides so-called second generation rights such as rights to health care, labour rights, and rights to education. Unlike most civil and political rights, they are programmatic in nature. They require the government of the state party to act and, among other things, create and enforce labour laws, build hospitals/schools, and employ doctors/teachers.

Even though Canadians enjoyed many of the rights contained in the ICESCR by the time it opened for signatures in 1966, it still took a little over a decade for Canada to fully accede to the treaty in May of 1976. This was due to the fact that the *Covenant* states in Article 28: “The provisions of the present *Covenant* shall extend to all parts of

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<sup>5</sup> *Universal Declaration of Human Rights*, Article 25 <http://www.un.org/Overview/rights.html> emphasis author’s

<sup>6</sup> *International Covenant of Economic, Social, and Cultural Rights*, Article 12, <http://www.ohchr.org/english/law/cescr.htm>

federal States without any limitations or exceptions.”<sup>7</sup> The provision of human rights in the form of civil liberties and the responsibility for local labour laws and many of the social programs are the jurisdiction of the provincial governments in *Section 92* of the *Constitution*. It has also been the practice since the ratification of the International Labour Organization (ILO) conventions that where an international treaty affects provincial areas of jurisdiction the consent of the provinces will be obtained before accession.

## 2. Section 36 of the Constitution Act, 1982

It is instructive to analyze *Section 36* of the *Constitution Act, 1982* in terms of its contribution to the modern development of social rights in Canada. One provincial premier is reported to have said that in *Section 36* Canada already has a rudimentary *Social Charter*, and “it just needs some teeth.”<sup>8</sup> The Ontario discussion paper commented as follows on the section, implying its symbolic value was insufficient on its own:

However, it is generally recognized that these principles are neither specific nor comprehensive enough to ensure that the actions of governments in Canada continue to uphold and strengthen national standards of social programs across the country. A broad set of well-defined principles would make a positive contribution to placing an obligation on all Canadian governments to respect and abide by the social contract.<sup>9</sup>

A research report prepared in 1991 by the Institute of Intergovernmental Relations, Queens University, also downplayed the practical relevance of *Section 36*, but with a slightly more cautious tone:

A crucial aspect of a “Social Charter” is the extent to which particular provisions are justiciable. Section 36 of the Canadian Constitution is generally considered by constitutional scholars to be non-justiciable due to the vague and political nature of its drafting. In any case, it has never been tested in the courts so it remains unclear whether its provisions have any legal force.<sup>10</sup>

*Section 36* obligates the federal government to provide an equalization program so that Canadians can enjoy social rights as government services, but, as government

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<sup>7</sup> Ibid. Article 28

<sup>8</sup> "Ottawa to float concept of constitutional 'social charter' National-unity package could include plan to entrench rights to shelter, decent living standard." *Globe & Mail* (Toronto, Canada) (Sept 10, 1991): A1.

<sup>9</sup> Ontario discussion paper, p. 15

<sup>10</sup> *Approaches to National Standards in Federal Systems*, Institute of Intergovernmental Relations, Queen's University, September 1991, p. 40.

services, the provision of social rights is largely the jurisdiction of the provinces. *Section 36* obligates that equalization funds be used by the provinces for the provision of services, including social services but not restricted to social services. It does not state how payments are determined and attaches no specific obligation to their expenditure by the provinces other than to “provide reasonably comparable levels of public services at reasonably comparable levels of taxation.”<sup>11</sup> The intention of *Section 36* in obligating the federal and provincial governments to provide the services we consider social rights is rather clear, even if some argue that the details and justiciability are lacking.

One of the shortcomings of *Section 36* is that while it clearly applies to those services that provinces were already providing in 1982, there are issues to its applicability to services the provinces may provide in the future. After the demise of the *Charlottetown Accord*, there was little government effort to create a *Social Charter*. After initially coming to power promising to ignore the constitutional questions left in the vacuum of the failure of the previous government to secure the ratification of the *Meech Lake* and *Charlottetown Accords*, the federal government became involved in using social policy as one means among many to strengthen the institutional federal-provincial relationship in the wake of the near victory of the separatist cause in the 1995 Quebec referendum. In the 1995 federal budget, the government introduced the *Canada Health and Social Transfer*, to take effect in the 1996-1997 fiscal year, that would amalgamate the *Established Programs Financing* (which paid for health care and post-secondary education) and the *Canada Assistance Plan* (which supported social assistance). Transfers consisted of both cash transfers and tax credit transfers and, unlike equalization payments which could be spent on any public service, the transfers had to be spent on health, post-secondary education or welfare. This fund was separated in 2004 into the *Canada Health Transfer* and the *Canada Social Transfer* effective April 1, 2004.<sup>12</sup> While intending to increase the transparency and accountability of the federal government’s role in social funding, the *CHST* and its successors have often been

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<sup>11</sup> *Supra* note 7

<sup>12</sup> Department of Finance; *Federal Transfers to Provinces and Territories*; <http://www.fin.gc.ca/access/fedprove.html> last updated: 2007-06-06

criticized as not adequately funding health care and other services, leaving it the responsibility of the provinces to make up the shortfall.

### 3. The 1999 Social Union Framework Agreement

Another result of the post-referendum activity was the *Social Union Framework Agreement (SUFA)*. Entered into on February 4<sup>th</sup>, 1999, the *SUFA* is a joint agreement between the Government of Canada and the provinces, except Quebec, that expands on the principles articulated in *Section 36* of the *Constitution Act, 1982* and “is based upon a mutual respect between orders of government and a willingness to work more closely together to meet the needs of Canadians”.<sup>13</sup> Unlike *Section 36*, however, it explicitly applies to social services committing governments *inter alia* to:

- 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
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- Ensure adequate, affordable, stable and sustainable funding for social programs<sup>14</sup>

The *SUFA* also obligates the federal government to consult with the provinces, and to get the cooperation of at least six provinces (with no qualification on the percentage of the population they represent) before launching new nationwide social programs and to provide provinces who do not participate in the new program with the amount of funding they would have received to establish a comparable program.

In Canada's early years, many Canadians had access to what we would now refer to as social rights such as education and healthcare through churches and community

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<sup>13</sup> *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*

<sup>14</sup> *Ibid*



organizations. Access under this paradigm, was naturally limited on the basis of religious affiliation and community resources. Much of the work of these groups was assumed by the provincial governments during the postwar period, which allowed for universal access within provinces and the later involvement of the federal government permitted the access to these services to be portable – allowing residents from other provinces access them. By acceding to the *International Covenant of Economic Cultural and Social Rights* in 1976, the Government of Canada and the provincial governments recognized that these social *services* were, indeed, social *rights* and obligated itself to their provision. The federal government's role *vis-à-vis* the provinces' jurisdictional responsibilities in providing services was entrenched in the *Constitution Act, 1982* and further elaborated in the 1999 *Social Union Framework Agreement*. To many, all of these obligations, in sum, constitute a *de facto Social Charter*. Therefore it could be argued that Canada can indeed afford a *Social Charter*, because it is already paying for one. It is important, nevertheless, to underscore the impact that a unified and directed institution, designed to oversee and monitor Canada's domestic human rights obligations would have. Simply because some programs and mechanisms are currently in place in Canada, does not mean they cannot be more effectively realized by means of a *Social Charter*.

#### **IV Past Proposals for a National Social Charter**

While the concept of a *Social Charter*, particularly one entrenched in the *Constitution*, is a relatively new concept in Canadian constitutionalism, *Social Charters* themselves are not new. For the most part, the typical form of *Social Charters* has been regional-international instruments such as the *European Social Charter*. Signed by the members of Council of Europe in Turin, Italy, on October 18, 1961, the *European Social Charter* is an agreement obligating member states to secure for their populations the social rights specified therein to improve the standard of living and social well-being. It was intended to complement the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, which provides for civil and political rights. The *European Social Charter* addresses such rights as the rights: to work, to just conditions of work, to safe and healthy working conditions, to freedom of association, to social security, to benefit from social welfare services, etc. It was argued in 1971 that this

model of social rights offered much that could be applicable to Canada, but, as Canada had not yet come to an agreement to patriate its constitution with an entrenched human rights instrument, the situations in which it would apply were purely hypothetical.<sup>15</sup>

Many of the proposals for a *Social Charter* within the *Canadian Constitution* were inspired by the flurry of constitutional activity in Canada during the late 1980s and early 1990s. One such proposal came from the government of Ontario beginning with the release of its discussion paper, *A Canadian Social Charter: Making Our Shared Values Stronger*, which focused on three main principles:

1. To reflect the current view of who we are as a people and what it means to be Canadian. The past is characterized as being a time when unity was forged by physical ties such as the railways; now, we take our shared sense of Canada from our values and our network of social programs: health care, education, unemployment insurance and social welfare services, to name the most obvious. Canadians take pride in these social programs. They have come to be seen as fundamental to the country and enjoy widespread support. For this purpose, the charter would fulfill its goal by its symbolic nature alone.
2. To protect the implicit social contract that has grown up between governments and the Canadian people in the post-World War II period. This goal implies that the charter would have to have more than merely symbolic value, that some mechanism would have to exist to defend the programs that implemented the values and principles of the charter when they were under attack.
3. To indicate the challenges that remain to Canada in the area of social policy so that economic and social dignity may be achieved. The discussion paper noted the fact that there have been no significant new social programs for a number of years, yet numerous social problems persist.<sup>16</sup>

The eventual proposal for a *Social Charter* submitted by the Government of Ontario to the Special Parliamentary Joint Committee on a Renewed Canada on February 13, 1992, proposed expanding on the limited expression of social principles already included in *Section 36(1)* of the *Constitution Act, 1982*. Ontario proposed the following additional principles be added to *Section 36(1)*:

- (d) providing throughout Canada a health care program that is comprehensive, universal, portable, publicly administered, and accessible;

<sup>15</sup> Kinsella, Noël A.; *The European Model for the Protection of Human Rights: a continuing program of education in human rights*; the New Brunswick Human Rights Commission, Fredericton, NB; 1971.

<sup>16</sup> *A Canadian Social Charter: Making Our Shared Values Stronger*, A Discussion Paper, Minister of Intergovernmental Affairs, Toronto, Ontario, September 1991. pp. 1 - 3

- (e) providing social services and welfare based on need, so as to ensure that all Canadians have access to a minimum level of housing, food, and other basic necessities;
- (f) providing high quality public primary and secondary education to all persons resident in Canada;
- (g) protecting, preserving and improving the quality of the environment within a sustainable economy; and
- (h) generally promoting the quality and standard of life of Canadians.<sup>17</sup>

Additional amendments to the *Constitution* in the Ontario submission included proposing, but not specifically defining, amendments to *Section 6* of the *Charter of Rights and Freedoms* to expand the definition of mobility rights with respect to social benefits, the addition of a clause to ensure that the *Social Charter* operated in harmony with the *Charter of Rights and Freedoms* as well as the enshrinement of funding arrangements in the areas covered by the *Social Charter*. To implement the *Social Charter*, Ontario proposed an independent commission be established to monitor implementation and report annually on the progress of the governments.

*The Consensus Report on the Constitution*, better known as the *Charlottetown Accord*, released on August 28<sup>th</sup>, 1992, concluded, among other things, that a new provision be added to the *Constitution* entitled *The Social and Economic Union*. It did not detail the amendment but did set out the policy objectives which the eventual amendment should include, but not be limited to:

- providing throughout Canada a health care system that is comprehensive, universal, portable, publicly administered and accessible;
- providing adequate social services and benefits to ensure that all individuals resident in Canada have reasonable access to housing, food and other basic necessities;
- providing high quality primary and secondary education to all individuals resident in Canada and ensuring reasonable access to post secondary education;
- protecting the rights of workers to organize and bargain collectively; and,
- protecting, preserving and sustaining the integrity of the environment for present and future generations.
- The policy objectives set out in the provision on the economic union should include, but not be limited to:
- working together to strengthen the Canadian economic union;

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<sup>17</sup> *Ontario's Proposal for a Social Charter for Canada*; Office of the Premier, February 13, 1992

- the free movement of persons, goods, services and capital;
- the goal of full employment;
- ensuring that all Canadians have a reasonable standard of living;  
and
- ensuring sustainable and equitable development.<sup>18</sup>

The provision would not be justiciable and implementation along with a method for monitoring would be determined at a future First Minister's Conference. The social principles of *Section 36* would be amended to include the territories, commit the federal government to meaningful negotiations before introducing legislation relating to equalization payments and entrench commitments to regional economic developments.<sup>19</sup> Given the broad scope of the accord, the defeat of the *Charlottetown Accord* in a national referendum on October 26<sup>th</sup> of that year should not be seen as a defeat for a *Social Charter*. There is little evidence to suggest the social union provisions were a deciding factor for any voter.

With the growing recognition of the effects of globalization in the 1990's, the concern arose of its effects on social cohesion. Beginning in October of 1998, the Senate of Canada's Standing Senate Committee on Social Affairs, Science and Technology<sup>20</sup>, undertook a study on the dimensions of social cohesion in Canada in the context of globalization. The Committee heard multiple witnesses testify that a *Social Charter* would enhance social cohesion without any additional consequences to Canada's economic position in the world. A *Social Charter* would recast what is normally considered social *services* as social *rights*. Under a social services model, one receives the benefits of services from the state as taxpayers (or potential taxpayers in the case of not earning sufficient income to pay taxes) and voters. Under such a model, the state determines the services available and the citizenry either continues the *status quo* or seeks less/more services/taxation by removing the current officeholders. Under a social

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<sup>18</sup> *Consensus Report on the Constitution Final Text*, Charlottetown, August 28, 1992; Part I, B(4).  
<http://home.cc.umanitoba.ca/~sprague/char92.htm>

<sup>19</sup> *Ibid*; Part I, B(5)

<sup>20</sup> *Final Report on Social Cohesion*; The Standing Senate Committee on Social Affairs, Science and Technology; Senate of Canada; June 1999; <http://www.parl.gc.ca/36/1/parlbus/commbus/senate/com-e/soci-e/rep-e/repfinaljun99-e.htm>

rights model, one receives the benefits of the state because the people are entitled to them as members of the state. As right's obligations, they represent minimum standards that cannot be abrogated by the state. As such, social rights become part of the identity of Canadians and draw citizens closer to the larger society. Others testified that at the very least more transparency in how Canada was progressing towards its social policy goals was needed. It was argued in the Senate of Canada on February 11, 1999, when considering Canadian progress, or regrettable lack thereof, in combating child poverty, that:

For eight or nine years have we been monitoring the steps that we have been taking federally and provincially towards reducing child poverty and homelessness? I do not know of any mechanism of the state that does this. There are many non-governmental organizations with particular areas of interest and particular interest groups that focus on aspects of social development. However, we do not have a social audit mechanism. We have the Auditor General, who tells us how well or how poorly public funds are being spent. We do not have a social audit mechanism that addresses how well we have been doing with these tremendous resources that I submit we are applying to areas of poverty, and yet we are not attaining the desired results.<sup>21</sup>

It seemed at the time that what was required to achieve these goals was a social audit, similar to the process Canada already participates in to comply with its obligations under the *ICECSR*. The passage of time has not changed this.

## V **The Present Proposal for a Canadian Social Charter**

This paper, in arguing for the merit of a *Social Charter*, advances a basic model for implementation in the Canadian context. Constitutional entrenchment might be considered the ideal, the post-Meech Lake, post-Charlottetown antipathy towards constitutional reform, while an insufficient reason not to proceed, does mean that such a proposal will meet with hostility from policymakers, and that will only complicate matters unnecessarily. If the ultimate goal is to promulgate a *Social Charter* for Canada that will ensure Canada continues to fulfill its obligations to secure the social rights of Canadians, there are ways to proceed that have higher likelihood for success. Canadians had recognized civil and political human rights before the *Charter of Rights and Freedoms* was entrenched in the *Constitution*, the same is true for social rights.

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<sup>21</sup> *Hansard – Debates – Issue 110*; February 11, 1999

In terms of form, two are available regardless of content. Short of constitutional entrenchment, a federal-provincial agreement would be the ideal form. This would have the benefit of the explicit consent of all levels of government and would vest all levels of government with its successful execution. It would also serve to institutionalize federal-provincial relations with regards to each level's role and responsibility for social rights. It would also make cooperation between governments on the enforcement side easier to facilitate. The model for this approach would be the aforementioned *Social Union Framework Agreement*.

Should a federal-provincial agreement on a *Social Charter* for Canada be unattainable, the Parliament of Canada could pass legislation, possibly entitled "A *Social Charter* for Canada". This Act of Parliament would recognize the social rights to which Canadians are already entitled, and provide an enforcement mechanism for at least those responsibilities that fall under the responsibility of the Parliament of Canada. The model for this approach would be John Diefenbaker's 1960 *Canadian Bill of Rights*. Diefenbaker's *Bill* is significant because the language of *Section 1* of this act of Parliament recognized that human rights, even though the rights specified were civil and political in nature, existed in Canada prior to the creation of the legislation:

It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely...<sup>22</sup>

The negatives of this approach aside, the public promulgation of Canadians' social rights would serve as a first step towards a more entrenched form just as Diefenbaker's *Canadian Bill of Rights* eventually led to the *Charter of Rights and Freedoms*.

Regardless of form, the content of the social rights contained in a *Social Charter* for Canada should be no less an obligation than already exists for Canada under the *International Covenant of Economic, Social and Cultural Rights*. Those who negotiate the *Social Charter* can determine the language of our social rights. The various

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<sup>22</sup> *Canadian Bill of Rights*, 1960 C-44, s.1

agreements and statutes that currently provided us with our social rights can be drawn upon for inspiration as to how social rights are parsed in the *Social Charter*, but as the *Covenant* is the earliest recognized explication of Canadians' social rights, it should serve those negotiators as the minimum standard of the obligations a *Social Charter* for Canada must meet.

## **VI The Enforcement Model for Social Charter Rights**

It is important to address the question of the most appropriate enforcement machinery for the proposed Canadian *Social Charter*. There are a variety of mechanisms which are effective in the protection and promotion of rights. The competent tribunal model of direct justiciability has been successful in safeguarding civil and political rights. In the era of the *Charter of the Rights and Freedoms* the courts have, when appropriate, acted to restrain government action that stood in violation of the rights set out in the *Charter*. The civil and political rights in the *Charter* lend themselves to direct justiciability through the practice of judicial review because in such cases the court is faced with either/or scenarios. Does the government act in question comply with the grounds of the *Charter*? The rationales maybe long and the research behind it exhaustive, but, ultimately, the answer is either “yes” or “no” because the government either acted where it should have exercised restraint or it did not.

As social rights are programmatic in nature they do not lend themselves to justiciability in the same way as civil and political. For the most part, social rights require government action in the form of expenditures on appropriate programs.

Since the courts are not a proper enforcement mechanism for a *Social Charter* for Canada, this proposal turns to a method that is appropriate because it is already in use in fulfillment of our international obligations – the social audit. As per its obligation under Part IV of the *International Covenant on Economic, Social and Cultural Rights*, the Government of Canada, submits regular reports, typically in five-year intervals to the United Nations Committee on Economic, Social and Cultural Rights on its compliance with its obligations under the *Covenant*. These reports are prepared by the Human

Rights Program in the Department of Canadian Heritage with input from the provincial and territorial governments.<sup>23</sup> These reports are analyzed, or audited, by the committee and address its concerns with recommendations in the form of concluding statements. While individual complaints are presently not allowed, non-governmental organizations can submit reports to supplement the state parties' presentation and which facilitate the committee's deliberations.<sup>24</sup> This process has served Canada well as it has been instrumental in the identification of child poverty an area where Canada has been negligent in its obligations.

This proposal would see that this process that is already established be undertaken more often and made more accessible to Canadians. It would create an Office of the Social Auditor, somewhat similar to the Office of the Auditor-General, which would collect reports from the federal and provincial departments responsible for social rights, analyze and report back with recommendations for improvement on the compliance with the *Social Charter* for Canada. Both non-governmental organizations and individuals should be allowed to submit supplementary reports and bring issues of non-compliance to the social auditor. Ideally, these reports would be gathered on an ongoing basis, but, at a bare minimum, should be scheduled to be due in between reports to the United Nations. In this way the *Social Charter* of Canada and Office of the Social Auditor would be able to encourage elected representatives, civil servants, and the public at large to think about social rights on an ongoing basis in the same way that they think of civil and political rights.

## **VII Conclusion**

Human rights have for many years been understood as more than restraints on government action. In order to enjoy the fulfillment of rights, the people require governments to act and to provide certain services that have been codified in international law as social rights. Canada, as a country, has not taken social right's obligations and

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<sup>23</sup> *Schedule for submission of Canada's reports to the United Nations*; Human Rights Program, Canadian Heritage; [http://www.pch.gc.ca/progs/pdp-hrp/docs/publications/report\\_e.cfm](http://www.pch.gc.ca/progs/pdp-hrp/docs/publications/report_e.cfm) (Date modified: 2007 - 07 - 17)

<sup>24</sup> *Committee on Economic, Social and Cultural Rights*; Office of the United Nations High Commissioner for Human Rights <http://www.ohchr.org/english/bodies/cescr/index.htm>



promulgated them in domestic law. There are various programs and agreements in place that seek to fulfill these obligations but no one publicly promulgated document to tell Canadians what to expect from their governments in terms of their social rights' obligations. A *Social Charter* for Canada would serve to inform Canadians of their social rights and protect them by translating what might normally be thought of as public services into enforceable rights. It would recognize those rights Canadians already hold and that governments are already expending money to provide. A *Social Charter* for Canada would also provide for enforcement of our social rights through increased transparency. A *Social Charter* for Canada is affordable given the present investment in social rights by all governments in Canada. Its time has come.