

Centre for Constitutional Studies

# Social Justice and the Constitution

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Perspectives on a Social Union for Canada

Edited by

Joel Bakan

&

David Schneiderman

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# Social Justice and the Constitution

Perspectives on a  
Social Union for Canada

"This excellent collection provides a timely forum for a number of provocative and stimulating arguments about the extent to which a social charter is desirable or feasible. The essays are impressively wide-ranging in scope, addressing the philosophy of rights, the political economy in which rights must operate, welfare policy questions and the issues of activism and strategy.... Rarely do constitutional issues get such an intelligent and critical analysis. This volume marks a significant contribution to scholarship in philosophy, law, political studies and social policy, not just in Canada, but beyond, as "rights talk" continues to dominate the agendas of theoreticians and practitioners of politics in a number of contexts."

*Christine Sypnowich, Department of Philosophy, Queen's University*

"Bakan and Schneiderman's collection of essays provides a window onto a debate within the Canadian left and social movements that bears fundamental importance to the future of Canada and to theorizing about law in general, namely, to what extent can law assist in the empowerment of the disempowered? Social Justice and the Constitution will be a must read for anyone concerned about social and economic justice in this country."

*Patrick Macklem, Faculty of Law, University of Toronto*

"The idea of a social charter will not disappear quickly from political debate, despite the failure of the Charlottetown Accord. Are social rights an oxymoronic recipe for freezing, or even rolling back, our current social obligations or an essential guarantee for attaining our highest social aspirations? Bakan and Schneiderman must be commended for collecting thoughtful and spirited essays on a topic of increasing interest to Canadians committed to social justice."

*Donna Greschner, College of Law, University of Saskatchewan*

Joel Bakan is Associate Professor of Law at the University of British Columbia.

David Schneiderman is Executive Director of the Centre for Constitutional Studies at the University of Alberta.

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## Constitutional Dialogue

Jennifer Nedelsky and Craig Scott\*

### Introduction: Texts and Matter

The Alternative Social Charter (ASC) was originally drafted and presented as an alternative to the Ontario government's proposed social charter. It was endorsed in principle by a wide variety of equality-seeking social action groups and continues to be relevant as an example of what an effective and egalitarian social charter might look like. In particular, it offers a model enforcement mechanism that we believe should be part of any social charter in the Constitution. At the most general level, the ASC provides a concrete example of how a rights strategy might be used by those committed to the gradual, imperfect, and inevitably problematic reshaping of our political structures in the direction of social justice. The ASC extends formal constitutional recognition of the existence of disadvantaged groups in Canada and, in giving their voices and claims a formal priority, tacitly acknowledges that structural injustice creates the multiple forms of disadvantage that characterize Canadian society. It extends to the least advantaged a new way of using the language of

rights and the institutional structures of power, which have been so effectively used by the advantaged.

At the least, it could provide a tool for defensive action in the face of claims in the name of "market forces" for erosion of social programs. At its best, the ASC is a bold, imaginative alternative to the dominant American vision of rights as trumps<sup>1</sup> and of the courts as the central means for institutionalizing rights. The ASC makes issues of democratic representation and participation central (rather than oppositional or peripheral) to the meaning of rights. And it presents rights claims in a context conducive to an understanding of rights as vehicles for structuring relations of equality – where the interpretive emphasis can be on patterns of relationships rather than formal, individualistic equality.<sup>2</sup> We argue for the virtues of the ASC with grand visions of its transformative potential and extremely modest expectations about the probable effects of entrenching such a document in the Constitution. Both seem important to us.

Of course we know that many of our colleagues committed to social justice oppose strategies of using legal rights to effect the kinds of fundamental changes we all think are necessary. Since we share so many of their judgements about the limits of legal reform and the deep structural changes necessary to make this society a genuinely just one, it seems appropriate to comment briefly on why we make a different *strategic* judgement about endorsing the ASC and its approach to rights discourse.

First we want to emphasize that we do not simply endorse *any* social charter. For example, we were persuaded that the proposed "Social Covenant" in the Beaudoin-Dobbie *Report* was probably worse than nothing. More broadly, we make no claim that legal rights set in opposition to democratic decision making (which still partly informs the structure of the ASC) is the optimal way to conceptualize or institutionalize the relations of equality to which we aspire. But in opting for the *Charter of Rights and Freedoms*, Canadian society committed itself to making rights a central part of its political discourse. Further, rights discourse represents an increasingly common feature of international politics. In this context, we do not see the wholesale rejection of "rights talk" as a viable political option. The quest then becomes how to use and transform the meanings of rights as well as the institutional mechanisms which continuously shape those meanings in the process of interpreting and enforcing

rights. The project must be to find mechanisms that not only provide protection for those most in need of it, but reshape our understanding of rights in the process. As we hope to show, the ASC, or something close to it, could be such a mechanism.

The judgement about the desirability of such a project turns in part on how one sees the role of legal rights in the deep structures of injustice in Canada. There is a legitimate fear that a focus on *constitutional* rights, and on rights which seem to entrench a "social services" model of equality, will only serve to divert attention from the underlying structures (often conceived primarily in economic terms) that are the real source of inequality.<sup>3</sup> If we were persuaded that that would be the effect of the ASC, we would oppose it. We share the objective of political mechanisms that will not simply ameliorate but transform the conditions of inequality. But legal rights *are* part of the structure of inequality. And the issues that some see as the real dangers to the disadvantaged – like free trade and corresponding ideologies of competition and market – are themselves incomprehensible without legal rights of private property and contract. Without imagining that the ASC can transform the political economy of Canada, we think there is a realistic hope it could contribute (in the long run) to greater democratic control of the meaning of rights – as well as to the effective participation of those now disadvantaged. We endorse the ASC because we think it holds out the possibility of institutionalizing rights in ways that will turn political attention to the underlying structures of inequality that its opponents are concerned about. Whatever its political fate in the short term, we feel that its arrival on the Canadian political scene will have implications well into the future for both practical questions of institutional design and theories of rights.

### The Alternative Social Charter: New Forms of Rights

One of the virtues of the ASC is that it facilitates both new understandings and new institutionalizations of rights. In this section we try to articulate some of the new conceptions of rights that the ASC would foster and develop. We sketch a vision of rights that we think is an improvement on dominant images of rights as "trumps,"<sup>4</sup> or rights as "fences" defining clear boundaries to protected spheres of

liberty.<sup>5</sup> In doing so, we make no claim that ours is the only way to understand rights nor do we present our views here as being much more than schematic. What we do claim, however, is that it matters which way one conceptualizes rights. In particular, we believe that the metaphors we use to describe rights influence the way we understand ourselves and society's arrangements, as well as the potential for changing and deepening those understandings.<sup>6</sup> The way in which rights are phrased carries with it implicit background images about personhood, belonging and the sources of oppression. More narrowly, rights metaphors have strong implications for questions of institutional design, just as the actual or envisaged functioning of institutions can help point the way to more appropriate metaphors for rights. We turn now to the first of our alternative metaphors and its institutional implications.

### *Rights as sites of dialogue*

#### *The metaphor of dialogue*

In our view, understanding is deepened if we abandon (or at least limit the all-pervasiveness of) metaphorical language that describes and justifies rights in terms of exclusion and conclusion. That is, we question both the descriptive accuracy and normative value of approaches to rights which emphasize the separateness of persons in society and which point to rights as quasi-absolute, debate-stopping conclusions.<sup>7</sup>

In contrast to the conclusory dimension of the supposed "trumping" quality of rights, we offer the notion of rights as *sites of dialogue*, metaphorical forums in which members of society converse about different claims regarding basic values and relationships. These conversations are governed by the regulative ideal of arriving at mutually acceptable understandings through argument. This metaphor is closely tied to the tradition of rhetoric, according to which legal reasoning (no less than moral or political reasoning, or, for that matter, even scientific reasoning) is best seen as a process of reason giving.<sup>8</sup> Within this enterprise, the underlying purpose is the persuasion of a given audience or interpretive community that an interpretation or application of the law is just, legally correct or meets whatever other criterion for achieving implied or actual assent is meaningful to that audience. Reasoning is about *reasons*, not Reason,

about the probable and not the necessary, about the persuasive force of mutually supportive justificatory arguments and not the inexorability of logically entailed conclusions, about the intersubjective validation of claims and not the discovery of some form of external truth.

The metaphor of dialogue offers an understanding of rights which emphasizes their dynamic as opposed to static nature. Rights as rhetoric exist in a "world of ever-shifting shapes and shimmering surfaces".<sup>9</sup> A very similar idea of the dynamic and rhetorical quality of rights has been offered by Martha Minow:

Legal rights ... should be understood as the language of a continuing process rather than the fixed rules. Rights discourse reaches temporary resting points from which new claims can be made.... Rights in this sense are not 'trumps,' but the language we use to try to persuade others to let us win this round.<sup>10</sup>

We recognize that such accounts can be unsettling, and we cannot in this essay begin to address all the implications, strategic and otherwise, of this choice of metaphor. For the time being, we only draw attention to the words of Ilmar Tammelo, who addresses the instinctive recoiling of many in the face of such rhetorical imagery:

Where does this process of constant challenge and justification finally come to a rest? In terms of rhetoric the answer is that it never finally does so.... If this seems disquieting it is only because it is forgotten that insights in a changeful human world can only rest assured, and can only remain 'fresh' and viable, through constant challenge and retesting.<sup>11</sup>

Of course this conception of rights as sites of dialogue does not on its own tell us what kinds of substantive arguments and whose voices are involved in the dialogue. Perhaps for this very reason, it may be that the notion of dialogue induces overly naive faith in rights as a source of co-operative dialogue, and obscures and leaves intact entrenched interests and structures. As Minow has put it with respect to the "interpretive turn" in legal scholarship, even as it promises demystification of the law's aura of objectivity, it may replace this with a new mystification, "one that casts an aura of cozy

conversation over official acts of domination and control."<sup>12</sup> To the notion of rights as a dialogical claiming process, some kind of notion of rights claiming as an ideological struggle for value space also has to be recognized.<sup>13</sup> To the somewhat idealistic notion of rights as *sites of dialogue* can be added the more realistic notion of rights as *sites of social struggle*, at minimum understood as an interpretive struggle over the ideological meaning of words. Thus, a co-operative regulative ideal could be seen as constantly engaged in a dialectic with some form of a conflict-laden competitive reality.

There are reciprocal implications between conceptions of rights and the institutions that have the authority to define and defend them. If rights are virtual or metaphorical sites of dialogue, it follows (in some nonstringent sense) that such institutions should self-consciously foster actual dialogic processes. There should be overlap and interplay between various institutions and the actors within civil society who invoke their processes. For if rights are sites of dialogue, then so too are rights-interpreting institutions. As we shall argue below, the institutions of the ASC are designed as such sites of dialogue.

Rights institutionalized in this way can overcome (or at least significantly mitigate) their "on-off" quality. As Joel Bakan has argued, with rights you either win or lose; little room is left for ongoing adjustment to new insights and facts or for solutions that represent an integration of both, or many, sides in a legal rights argument.<sup>14</sup> In our view, this is an institutional corollary of the trump metaphor and associated metaphors and, as such, it is not a necessary feature of rights discourse. If rights themselves are seen as metaphorical dialogues, then a corresponding dialogical approach to rights-interpreting institutions suggests an approach within which no one institution has a trumping role (at least in the "medium-term" and certainly not in the long-term). Rights claims become part of, not the end to, political debate. The process of consultation and institutional interplay set in motion by the ASC could thus transform the on-off character of rights as we have come to know them.

#### *The sites of dialogue of the ASC*

The first general observation to make is that the ASC is heavily geared toward a multilayered approach that entrenches the interdependence of all constitutional values, as well as interconnections and dialogue

among institutional actors, and between such actors and members of society. There is an emphasis on substantive rights determinations occurring within a relatively fluid, ongoing and never-ending process of mutual persuasion and co-operative scrutiny of shared problems. There is also an emphasis on a multiplicity of forums in which the needs and claims of members of presumptively disadvantaged groups can be heard, acted upon and, in general, taken more seriously by the overall political process.<sup>15</sup> We now take a detailed look at how the institutions of the ASC create those forums.

The Social Rights Council and the Social Rights Tribunal are designed to enhance the extent and quality of social and political dialogue with respect to the rights recognized in s.1 of the ASC. While both bodies have a substantive judging role to play as to the extent to which governments have complied with s.1, this judging takes place in the context of ongoing input from civil society, notably members of vulnerable and disadvantaged groups and the nongovernmental groups (NGOs) representing them, as well as from both the executive and legislative branches of government.

The Council has a set of "soft" functions to perform which collectively cast a constitutional spotlight on the rights in s.1 and ensure that policy-making decisions are made in as well-informed and educated a climate as possible. There are various axes of constitutional conversation involving the Council directly or indirectly. The Council is charged with educating the public as well as government officials (s.9(2)(d)). It may also hold inquiries as part of the process of establishing standards against which compliance with s.1 rights can be determined (s.9(2)(a)), and as part of the process of compiling the requisite data on the actual social and economic circumstances of those most requiring the Council's attention (s.9(2)(b)). In the course of these inquiries the Council can require the participation of members of the public and government (s.9(3)(a)). And in the context of these inquiries, the Council can require government to provide needed information and to report to the Council (ss.9(3)(b) and (c)).<sup>16</sup> All of these conversations may result in the Council "assess[ing] the level of compliance" of governments with s.1 (s.9(2)(c)), an open-ended evaluation which would be injected into general social and political debate. But the Council may also evaluate compliance by submitting "recommendations" to governments (s.9(2)(e)) which must be replied to within three months

(s.9(4)). Significantly, there are no limits on the power of the Council to turn this recommendation-reply exchange into an ongoing dialogue. The Council also has the role of encouraging and mediating conversations with government from below and from above, so to speak. It has the duty to encourage governments to "engage in meaningful consultations" with NGOs representing the vulnerable and disadvantaged, in general (s.9(2)(f)) and in the specific context of the preparation of Canada's reports to international human rights bodies (s.9(5)(b)). With respect to these reports which the Council is empowered to assist in preparing (s.9(5)(a)), to dissent from by appending separate opinions to the final report (s.9(5)(c)), and to comment on before the international body if requested by that body (s.9(5)(d)), the Council must itself "actively consult" with such NGOs. Thus, the Council might be seen as a constitutionally designated interlocutor with the function of keeping the s.1 social rights in the mainstream of political and social discourse through the myriad of relationships it establishes with various actors.<sup>17</sup> At one end, it is there to ensure that the voices from below are heard, so as to ensure that there is a constant dialectical interplay between general assessments of compliance with the s.1 social and economic rights and the concrete experience of those for whom these rights most matter. At the other end, the Council has some degree of symbiosis with a wealth of international activity, such as that of the Committee which oversees implementation of the International Covenant on Economic, Social and Cultural Rights. The overall effect is to make this hitherto rarefied and inaccessible process of international scrutiny more transparent, and to connect our constitutional conversation with another set of forums which are engaged in a "constructive dialogue" with the "state" of Canada.<sup>18</sup>

Other proposals circulating in the current debate go no further than recommending an entity vaguely resembling the Social Rights Council, although none has suggested in much detail what the functions of such a body would be. None of the other proposals take the idea of *claiming* rights seriously. By contrast, the ASC complements the Council with a Social Rights Tribunal. The Tribunal is a body which, like the Council, is best thought of in terms of its role as a constitutional interlocutor.<sup>19</sup> It shall have the duty to receive petitions alleging s.1 infringements, but its mandate is to scrutinize those petitions for the stories they tell about a systemic or otherwise

significant deprivation of social rights (ss.10(1) and (2)). Thus, from the outset, the Tribunal process is geared to a form of structural analysis in which rights provide both the entry points and the source of concrete information (along with interventions from the Social Rights Council) necessary to evaluate the underlying sources of and extent of ill health, illiteracy, malnutrition and so on.

Several levels of dialogue may be noted within the Tribunal processes. First of all, there are s.10(4)(a) hearings that the Tribunal organizes to scrutinize those petitions that it has, as a preliminary matter, determined are indicative of systemic infringements of s. 1 rights. The hearings themselves, then, are the first occasion for a constitutional conversation. At the end of the hearings in question, the Tribunal may "issue decisions" as to whether a right has been violated (s.10(4)(b)). This moves the process into a second dialogue, namely that provided for in s.10(5). This dialogue is in essence a second-stage hearing on the appropriate remedy, in which the Tribunal hears the views of governments and petitioners as to "measures ... required" and "time ... required" (s.10(5)(a)). It is then contemplated that on the basis of this hearing, the Tribunal will "order that measures be taken ... within a specified period of time" (s.10(5)(b)) with this order making its way into the policy-making and legislative process (s.10(7)). It is important to note that, in appropriate situations, the Tribunal does not have to issue an order for measures under s.10(5)(b) but can instead, under s.10(6)(a), order the appropriate government to report back on the measures that the government has taken or proposes to take. Thus, the Tribunal may prolong the remedial dialogue, even after a s.10(5)(a) second-stage hearing. It might do this where it judges that further reflection is needed in light of the hearing, or where it simply judges politically that the issue in question is better served by the government making the first definitive proposal. Under s.10(6)(b), the Tribunal has the option of responding to the report ordered under s.10(6)(a) by issuing the order for the measures it initially declined to issue under s.10(5)(b) (which could involve endorsing the government's proposal or substituting its own view of appropriate measures) or by deciding to prolong the exchange on measures even further by issuing another s.10(6)(a) order to report back. Much like the recommendation-reply interchange involving the Council, there is no closure to the dialogue on appropriate measures, until the Tribunal decides to issue a

s.10(5)(b) order for measures and send the question for final disposition in the legislative process. This is the third level of dialogue mentioned above. At this stage, the effect of the order is held in abeyance until the House of Commons or the relevant legislature has had a chance to consider the order; the delay could be a number of months, given that s.10(7)(a) requires the legislative body in question to have been sitting for a total of five weeks before the order comes into effect automatically.<sup>20</sup> In that time period, the legislature may override the order by a simple majority vote or, presumably, modify its scope.

This override mechanism has similarities to the s.33 "notwithstanding" clause in the *Charter of Rights and Freedoms* but is deliberately designed to avoid some of the failings of s.33. Under s.33, a legislature may override prospectively, by way of omnibus clauses applying to many pieces of legislation, and by making *pro forma* statements without indicating precisely which rights are being derogated from or which statutory provisions are at issue. The s.10(7)(a) override is an after-the-fact override which must be directed to a specific order emanating from a concrete set of facts and related hearings. What is more, the specific matter must be brought before Parliament, because of the default rule contained in s.10(7)(a) that the order goes into effect if the legislature does not act, rather than that the order's entry into force depends on whether it is endorsed by the legislature. These features of the override mechanism, along with the availability to the legislators of the record of scrutiny and dialogue within the Tribunal processes, make it likely that the debate envisaged by s.10(7)(a) will be more transparent and better informed than those which have generally accompanied the insertion of *Charter* notwithstanding clauses into statutes. All debates and votes would have to be conducted in the full glare of a constitutional spotlight.

The final point relates to the role of the courts. Section 10(8) is designed to prevent courts from entering the process too early. According to that provision, the Supreme Court of Canada is the only court capable of reviewing decisions and orders of the tribunal, and only on the grounds of a "manifest excess of jurisdiction."<sup>21</sup> Thus, in tandem with the Council, the Tribunal process is designed to get at systemic concerns and contribute to long-term remedies without having the judiciary tilt the process in undesirable or, at least,

unpredictable directions. This is not to say that the courts might not over time see their way, in the spirit of institutional dialogue, to use the interdependence clauses in Part I to adjudicate individual claims by borrowing from the jurisprudence of the Tribunal and the softer assessments and recommendations of the Council.<sup>22</sup> Such a complementary judicial role would be appropriate, for instance, in urgent individual situations for which the Tribunal is ill-suited because of its focus on group-based infringements and because of the time-delay override clause, s.10(7). Judicial intervention would also be clearly called for to enforce the integrity of the process (for instance if a government refused to report as directed to the Tribunal), culminating in a role in enforcing any orders issuing from the Tribunal that have come into effect.<sup>23</sup>

The preceding account, in introducing the metaphor of rights as sites of dialogue, has set out one feature of what an alternative approach to rights might look like. We have also argued that such a metaphor points in the direction of processes of institutional dialogue similar to those contained in the ASC. We turn now to a second metaphor, which seeks to address what the substance of rights dialogue is and should be about. As will be seen, this metaphor, like the first, has an institutional corollary in that it focuses attention on the question of the interpretive vantage points which are or should be privileged by the composition and functioning of institutions, including those of the ASC.

### *Rights as relationship – a step toward substance*

As we noted earlier, conversational metaphors can both mask and reinforce oppression.<sup>24</sup> We want, therefore, to introduce a second metaphor, *rights as relationships*, that not only complements the dialogue metaphor but also supplements it with critical bite – and helps to identify the critical potential of the ASC.

Our claim is that rights are best understood in terms of relationship. What rights do (and have always done) is structure relationships: of power, responsibility, trust, and obligation. This is as true of property (and its relations of power) and contract (defining the basic terms of exchange relations) as it is of more obvious areas like family law, which defines relations of responsibility, trust, and powers of control and decision making. Our argument is that this reality of rights as relationship should become the central focus of

the concept itself, and thus the focus of all discussion of what should be treated as rights, how they should be enforced, and how they should be interpreted. It is really a matter of bringing to the foreground of our attention what has always been the background reality. We will handle all the problems of rights better if we focus on the kind of relationships that we actually want to foster, and on how different concepts and institutions will best contribute to that fostering.

Of course, saying this, does not itself define optimal relationships; hence it is only "a step toward substance." But at least the debate will take place in terms of why we think some patterns of human relationship are better than others, and what sort of rights will foster them. Suppose, for example, that we have some initial agreement about what we think optimal human autonomy would look like. We could then proceed beyond conclusory claims that autonomy requires individual rights to a close look at what really fosters the human capacity for autonomy and in what ways the relationships involved can be promoted and protected by legally enforced rights.

The ASC invites just this sort of inquiry. The clearest form of the invitation is the wording of s. 1(a), which refers to the "requirements for security and dignity of the person and for full social and economic participation in their communities and in Canadian society."<sup>25</sup> To determine what the rights in s. 1(a) are (and what would constitute violations of them), we have to ask what will make security, dignity and full participation possible. And the consistent focus on disadvantage suggests that until the relations of inequality are changed, security, dignity and full participation will not be possible for everyone.

Of course, the ASC does not *require* a relational approach to rights. (No interpretation is ever simply logically required.) It could be read as just stipulating material conditions each individual can lay claim to, independent of the network of relationships and memberships of which she is a part. But the repeated emphasis on disadvantage calls our attention to where people stand in relation to one another, and thus to what it would take to change those relations to make possible the well-being of all. This is the critical bite promised above: the focus on the patterns of relationship that must be changed or achieved to give effect to the goals of the ASC.

For example, if the system of social entitlements did not enable single mothers to get the kind of training and education allowing them to break free of the role of dependent, marginalized citizens, or did not enable a parent to stay home with a young child at a level of support sufficient for full social and political participation, then we would judge that system to fail the standards of the ASC. Where the choice has been made to provide benefits related to goods like food or shelter (whether in terms of in-kind provision or of financial entitlement sufficient to secure these goods in the market place), the quantity of the benefits alone could not tell us whether the standard has been met. The recognition that rights structure relations of equality and respect (or their opposites) would focus adjudicators' attention on the network of relations established or maintained by the system of benefits – and on whether that network was one within which people could be full participants in society.

The ASC avoids the use of the term "welfare" or "welfare rights." Apart from the stigma now associated with these terms, they have connotations of complacency with the current welfare state, including the image of the passive recipient of goods which are provided by the state at a level barely adequate to allow the recipient to survive, let alone flourish. In contrast, the ASC comes closer to projecting an image of aspirations to equal membership in Canadian society and of active involvement in realizing that membership. So, in phrasing the "umbrella" right in s.1 in terms of "everyone [having] an equal right to well-being," the focus is shifted from the particular institutionalized means associated with current welfare state arrangements to a more open-ended notion of a social state in which we are connected to each other in a network of more inclusive societal arrangements, the end result of which is a substantive state of affairs, "well-being."<sup>26</sup>

Section 1(a) is the subsection most expressive of the rights to well-being. With respect to every one of the goods expressly mentioned in that subsection, there are large sectors of Canadian society which do not have adequate independent financial resources to command these goods; nor are the various social benefit programs across the country generally adequate to redress the situation. So, it is this subsection, along with those work-related rights found in ss.1(d) and (e), which will provide the greatest focus in urging and pursuing social policies that attack the causes of poverty at the source, namely

seriously unequal distribution of wealth, income and control of the conditions of work.<sup>27</sup> The expression "standard of living that ensures" connotes more of a financial entitlement conception than a "services" conception, although state organization and provision of services is not precluded, and indeed, some of the listed goods (i.e., child care) will still be the avenue of choice for many social advocates. But, in general, the wording of s.1(a) suggests that the various "requirements for security and dignity of the person and for full social and economic participation in their [sic] communities and in Canadian society" (of which the list of goods are examples) are the benchmarks for determining whether a person's "standard of living" is adequate. There is nothing that requires the state to simply give in-kind goods and services to passive beneficiaries. Nor, however, does the wording of s.1 easily lend itself to arguments that government is justified in standing back and not doing anything to meet the requirement in question by way either of income redistribution or creation of a collective good. That is to say, the current situation of food banks and full or partial dependence on charity for many other services (i.e., battered women's shelters) is something that would have to be justified in terms of "security and dignity" and "full ... participation." What is more, interpretive arguments would have to contend with the overarching *telos* expressed in ss. 2, 4 and 5, notably "alleviating and eliminating social and economic disadvantage" (ss. 2 and 5).

The preceding point ties into the text's resistance to the tendency to frame rights entirely in terms of universal entitlement. One highly significant problem with legal rights, at least fundamental ones, is created when they are locked into a paradigm based on the universal attribution of rights. If "everyone" has the right to equality or to security of the person, then the needs and interests of particular oppressed and disadvantaged groups in society can never be (at least for very long) at the core of understandings of rights.<sup>28</sup> Within all the discursive processes that would be set in motion by the ASC, there will be a textual touchstone for constantly contrasting understandings of the rights to well-being of "everyone" against the perspectives and needs of "members of [Canadian society's] most vulnerable and disadvantaged groups" (s.1). In other words, there is a presumptive privileging of those who we have good reason to believe have suffered and continue to suffer the greatest social and economic injustices in our society and, for that reason, must merit a

priority of attention. This particularization of rights in the notion of "vulnerable and disadvantaged groups" returns to condition the functions of supervisory bodies under the ASC, the Council (see ss.9(2)(b) and 9(2)(f), and 9(5)(b)) and the Tribunal (see s.10(2)), and to be a feature of the criteria for the pool from which Council and Tribunal members will be drawn (see ss.9(9)(b)(iii) and 10(12)(b)(iii)). Thus, not only must the interests and perspectives of members of these sectors of society be heard within the various interpretive processes, but also they will be institutionalized under the criteria for representation on the Council and Tribunal.<sup>29</sup> This philosophy of representation derives from what are by now almost commonplace insights into the way in which particular interests and perspectives are systemically privileged when those with the authority to give meaning to rights are unrepresentative and unable to hear effectively the voices of all.

Finally, the ASC attempts to cap the statement of rights just discussed by implicitly querying two related separations that arguably are endemic to our liberal democracy. The first separation is the public-private split. Section 5 attempts to establish the rights in s.1 as an interpretive reference point for all facets of legal interpretation, by stating that, not only "[s]tatutes, regulations, policy, [and] practice," but also "the common law" is to be "interpreted and applied" consistently with s.1 and the "fundamental value" which underlies s.1, namely (again) "alleviating and eliminating social and economic disadvantage." The second separation is that between rights traditionally imagined as primarily negative (imposing duties of noninterference on government) and rights imagined as primarily positive (imposing duties on government to act to regulate private behaviour or to fulfil needs of members of society). If it may be said that the *Charter of Rights and Freedoms* has been conceptualized to date primarily in terms of negative rights, s.2 of the ASC encourages a more holistic interpretation of the *Charter of Rights and Freedoms* that is supportive of the rights contained in the ASC.<sup>30</sup>

The overall framework of an equal right to well-being in the context of responsibility for the most vulnerable and disadvantaged invites a structural, relational analysis that would take us beyond the social services model that some of the ASC's critics rightly question. If the basic rights are to well-being and full, equal membership in the community, then the provision of social services is only a possible means to be measured against the broader ends.

## Concerns, Objections and Sites of Struggle

Perhaps the leading concern among those advocating a social charter is that it not backfire so as to actually drain what modest empowering content there may be found in the *Charter* by creating a jurisdictional excuse based on the notion that what is in one part of the Constitution cannot be in another part as well.<sup>31</sup> The danger is real.<sup>32</sup> Conceptualizing the rights contained in the two parts of the Constitution as interdependent, or mutually reinforcing, is promoted by an overlapping of language between ss. 7 and 15 of the *Charter* and s.1 of the ASC, notably in the use of the words "equal" and "security ... of the person" in the latter. If the ASC's values are not incorporated into the *Charter*, at the very least the wording of s.2 should solidify the antidisadvantage principle that the Supreme Court of Canada has evolved over the first decade of interpretation of the s.1 "reasonable limits" clause of the *Charter*. This principle involves a presumption against interpretations of *Charter* rights which would thwart legislative initiatives designed to benefit disadvantaged groups.<sup>33</sup> Interdependence is a two-way street, and the social rights should be interpreted in light of the core values in the *Charter*, an idea seemingly meant to be conveyed by s. 3 of the ASC: "Nothing in s. 1 diminishes or limits the rights contained in the *Canadian Charter of Rights and Freedoms*." In our view, this interpretive clause suffers from overly general wording and could actually undermine s.2. It would be naive to think that there could never be conflict between interpretations of the ASC and claims under the *Charter*. Section 2 might be said to stack the deck against certain kinds of *Charter* rights claims (for instance, those advocating an employer's "liberty of the [corporate] person" or "freedom of [corporate] association") that s.3 seems to state are not "diminish[ed] or limit[ed]" by s.1 of the ASC. These potential conflicts, and the priorities that should guide their resolution, need to be addressed more directly through clearer wording in s.3 - probably in terms that reiterate the "fundamental value" in s.2 "of alleviating and eliminating social and economic disadvantage."

When interpreted to reinforce rather than undermine that fundamental value, s.3 can be understood as stating that government cannot in effect argue that a person must give up her *Charter* right in return for respect of a social right or rights. For example, s.3 could be a defence against a government arguing that, in exchange for a

certain social benefit, persons are entitled to less protection of their privacy rights (i.e., spot checks for an unreported income-providing "man in the house") or their mobility rights (i.e., residence in a province or city for a certain period before a social benefit will be accorded) or their right not to be subjected to cruel and unusual treatment (i.e., having names posted in public in order to discourage benefits claims and to encourage reporting on fraudulent claims) or their right not to engage in forced labour (e.g., workforce conditions on receipt of social assistance). These issues can be seen as examples of the sites of struggle that we offered as part of the sites of dialogue metaphor. The fact that the ASC cannot guarantee the outcome of such struggles is not an argument against it. The ASC *can* provide institutional forms in which the struggle can be carried out with a better chance for the disadvantaged to have their positions carry weight.

Another potential objection to the ASC is that it gives an unmanageably wide scope of authority to the Social Council and the Tribunal: the authority to inquire into anything in the Canadian political, economic, and social structure that impedes well-being and full membership. But the same is, in principle, true of the *Charter*; even the current conventions of focus on negative liberties would not prevent a far wider scope of inquiry under s. 15 than has been the practice so far. Only the (theoretically unsustainable) position that private suits at common law are outside the *Charter's* scope prevents an inquiry into whether certain dimensions of property law or contract law are at odds with the "equal protection and benefit of the law."

In practice, what we can hope for from the ASC is a focus on the issues outlined, such as health, education, housing, and conditions of work, in ways that point to the deeper structures that shape any given social program. The structural, relational context of analysis can improve the political debate the ASC is designed to foster, and gradually shift public awareness, without its institutions laying claim to the entire political arena.

There is, however, a related objection which cannot be disposed of. The invitation to pay attention to structural problems rather than just the provision of social services opens the door to deep divisions over what sort of structural changes will actually best enhance well-being and full participation. Some advocate the virtues of the market on just those terms (usually with some scope for

regulation and progressive taxation).<sup>34</sup> But we think that such debate cannot be foreclosed. The fact that many on the left and the right agree that a focus on social services turns attention away from underlying problems means that (in principle) there should be constructive debate on those terms. Clinging to an exclusive focus on entrenching social services as a rearguard action against destructive free-market ideology cannot really advance our capacity to ameliorate and eliminate disadvantage.<sup>35</sup> One of the virtues of the ASC is that it has the capacity to do more. But democratic debate cannot come with guarantees about outcome; it can only be structured in ways that give fair scope for the participation of the disadvantaged. And the ASC is an important step in this direction.

### Conclusion: Texts that Matter

The ASC would not transform the deep structures of inequality in Canada. But it could offer the hope, not only of ameliorating the conditions of the disadvantaged, but of transforming the meaning of rights and of constitutionalism.

The initial debates around a social charter hit an impasse. Among those advocating a social charter there was no consensus about the appropriate role for the courts in its enforcement. Once a social charter was proposed, there was immediate resistance to the idea that the courts should adjudicate constitutional issues for which public spending was central. For many, the conclusion then seemed to follow that a social charter could not be enforceable; it would have to be merely a statement of principle. The ASC breaks through this impasse with an enforcement mechanism which is a viable, indeed preferable, alternative to the current court system. The democratic composition of the Tribunal, together with the ongoing dialogue it can create with legislatures, sets up a system of defining and defending rights that is itself democratic. The Tribunal does hold the legislatures accountable to the basic values of the social charter, but it does so in a way profoundly different from treating rights as trumps to legislative decisions. The ASC protects rights through a "dialogue of democratic accountability."<sup>36</sup> This provides a practical, and vitally necessary, alternative to the American conception of constitutional rights. The *Charter of Rights and Freedoms* had already taken important steps in that direction through the inclusion of s.1

and s.33. The ASC moves us still further toward treating rights not simply as limits to democratic outcomes, but the proper subject of democratic debate. The ASC institutionalizes rights as sites of dialogue and invites their interpretation in relational (and thus structural) terms. In doing so it goes beyond both of the competing American conventions of treating rights simply as instrumental to democracy<sup>37</sup> or as trumps to democratic decision making. It is thus an important step toward solving a very difficult, tripartite political problem: how to protect the rights essential to genuine democracy, how to make rights work as a protective check on democracy, and how to do both in a way that is democratically justifiable. In that sense, we think the ASC is a mere text that can matter in moving towards the values that both the advocates and many of the critics of the ASC share.

## Endnotes

- \* The authors wish to thank Frank Cunningham as well as editors Joel Bakan and David Schneiderman for their comments. All standard caveats apply.
- <sup>1</sup> For the first use of this metaphor, which has subsequently taken on a life of its own, see Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1978). For commentary, see Martha Minow, *Making All the Difference: Inclusion, Exclusion, and American Law* (Ithaca: Cornell University Press, 1990); Nedelsky, "Law, Boundaries, and The Bounded Self" (Spring 1990) 30 *Representations* 162; and Nedelsky, "Re-conceiving Rights as Relationship" (1992) 30:2 *Alta. Law Rev.*
  - <sup>2</sup> See Nedelsky and Minow, *supra*, note 1.
  - <sup>3</sup> See for example Bakan, "What's Wrong with Social Rights?" (this volume).
  - <sup>4</sup> Dworkin, *supra*, note 2.
  - <sup>5</sup> For example, Wilson invokes the concept of "fences" in *R. v. Morgentaler*, [1988] 1 S.C.R. 30 at 164 even though she also says that the individual is not a totally independent entity, disconnected from society. In our view, she mixes her metaphors, invoking the notion of relationship, as well as that of fences. The strength of her opinion lies in the fact that it relies far more on the notion of relationship: "[Whether to have an abortion] is a decision that deeply reflects the way the woman thinks about herself and her relationships to others and to society at large." It is a decision "of the whole person." *Morgentaler*, at 171. See also Nedelsky, "Law, Boundaries, and the Bounded Self", *supra*, note 1.

- <sup>6</sup> On the metaphorical structure of language and the need to be self-conscious about the metaphors we employ, see Nedelsky, *ibid.*, including her discussion of Johnston and Lakoff, *Metaphors We Live By* (Chicago: University of Chicago, 1980).
- <sup>7</sup> See Dworkin, *supra*, note 1. And see Nedelsky, "Reconceiving Rights as Relationships", *supra*, note 1, for one critique of the Dworkinian notion of rights as trumps.
- <sup>8</sup> The treatment of rights as rhetoric is part of both an old and a "new" rhetorical tradition. Amongst the classics are Cicero, *Topica*, trans. by H.M. Hubbell (Cambridge: Harvard University Press, 1960) and Aristotle, *Rhetoric and Topica*, trans by E.S. Forster (Cambridge: Harvard University Press, 1966). On the "New Rhetoric", see Chaim Perelman, *The New Rhetoric and the Humanities: Essays on Rhetoric and its Applications* (Dordrecht: D. Reidel Publishing Co., 1979) and Chaim Perelman, *Justice, Law and Argument* (Dordrecht: D. Reidel Publishing Co., 1980). See generally Friedrich Kratochwil, *Rules, norms and decisions: On the conditions of practical and legal reasoning in international relations and domestic affairs* (New York: Cambridge University Press, 1989).
- <sup>9</sup> Fish, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies*, (Durham, N.C.: Duke University Press, 1989) at 476.
- <sup>10</sup> Martha Minow, "Interpreting Rights: An Essay for Robert Cover" (1987) 96 Yale L.J. 1860 at 1876.
- <sup>11</sup> Ilmar Tammelo, *Treaty Interpretation and Practical Reason: Towards a General Theory of Legal Interpretation* (Sydney, Australia: The Law Book Company Ltd., 1967) at 46.
- <sup>12</sup> Minow, "Interpreting Rights", *supra*, note 10 at 1894-5.
- <sup>13</sup> This seems to be what lies behind Peter Goodrich's brilliant analysis of the need to supplement (not displace) a notion of law as rhetorics with a notion of law as (materialist) social discourse. Goodrich's project is to go beyond accepting and descriptive legal rhetorics as an elaboration of the "logic of legal values" and to "treat the rhetoric of law as a primary datum to be evaluated and appraised against the background of the institutional power and social relations of inequality, of superordination and subordination, that underpin that rhetoric and determine its semantic content." Peter Goodrich, *Legal Discourse: Studies in Linguistics, Rhetoric and Legal Analysis* (London, England: MacMillan Press, 1987) 124.
- <sup>14</sup> See Joel Bakan, "What's Wrong with Social Rights?" (this volume).
- <sup>15</sup> The complexities added by the federal structure of Canada will not be discussed in this chapter except to note that part of the ASC process will necessarily involve debate on jurisdictional issues, all the while noting that s.7 of the ASC places a "special role and responsibility to fund federal-provincial shared-cost programs" on the federal level of government.

<sup>16</sup> Arguably, the amount of discretion accorded to the Council in the ASC proposal risks creating a gatekeeping mentality akin to that which has inflicted various provincial Human Rights Commissions across the country. Response from groups supporting the ASC in principle suggests the desirability of more explicit requirements for the Council to hold inquiries and require regular reports. For instance, a coalition of organizations representing the disabled has proposed adding a "barrier review" clause to the ASC draft which would read:

Once every four years, Governments *shall* publish comprehensive reviews of the systemic barriers which exclude members of groups who have been found to be disadvantaged pursuant to section 15 of the Charter of Rights and Freedoms.

See Ad Hoc Committee of Disabled People on the Constitution, *Disabled People Moving Forward Together: Finding Our Place in the Constitution* (May 24, 1992) [emphasis added] [copy in possession of authors]. Compare to s.9(3)(c) of the ASC.

<sup>17</sup> Again, however, it is arguable that the mediating role of the Council risks evolving into a gatekeeping or monopolizing role. As the text stands, only the Council, and not NGOs themselves, has the right to append separate opinions to international human rights reports and appear before international bodies; as well, the provision of a duty to consult NGOs falls directly on the Council but only indirectly on governments.

<sup>18</sup> Such as the above mentioned Committee on Economic, Social and Cultural Rights, the Committee set up under the Convention on the Elimination of Discrimination Against Women or the monitoring bodies which operate within the International Labour Organization. On the conception of the international human rights reporting procedures as a "constructive dialogue", see, for example, Andrew Byrnes, "The 'Other' Human Rights Treaty Body: The Work of the Committee on the Elimination of Discrimination Against Women" (1989) 14 *Yale J. of International Law* 1 at 19-22. It is important to note that this is a metaphor which to date has had much more to do with diplomatic nicety than with the kinds of power-unveiling dialogic interchange that feminist scholarship has begun to call for. For a discussion of that scholarship, see Hester Lessard, "Relationship, Particularity, and Change: Reflections on *R. v. Morgentaler* and Feminist Approaches to Liberty" (1991) 36 *McGill L.J.* 263-307.

<sup>19</sup> Note that there is one final axis of conversation in which the Council may engage but which was not mentioned in the preceding discussion, namely that with the Tribunal: see s.9(6) and s.10(9).

<sup>20</sup> There is also provision in s.10(7)(b) for the terms of an order to be accepted without waiting for the legislature to begin sitting and then for five weeks to pass. This acceptance may be made by the "relevant government," which indicates that the only orders that may be accepted in

this way would be those which do not require legislative change but rather can be implemented through the executive's delegated decision-making powers.

<sup>21</sup> Section 10(8) [emphasis added].

<sup>22</sup> See ss. 2, 3 and 5, which are discussed, *infra* at text associated with notes 30 and 36-37.

<sup>23</sup> The judiciary is also clearly called on to enforce intergovernmental agreements and legislation related to s.1 rights: see s.6 of the ASC.

<sup>24</sup> See text at note 12 and the citation therein to Minow, "Interpreting Rights."

<sup>25</sup> We are not going to defend every feature of the rights framed in s.1 of the ASC. Indeed, we find some criticisms to have much validity, for example those of Joel Bakan and Hester Lessard contained in this volume with respect mainly to the right to health. We would be open to revisions of the text so that its resonance in the future politics of Canada is more likely to be progressive. Such revisions, in light of feedback of this nature including (at the most ideal) a constituent assembly to draft the final wording, were in fact part of the hope when this still preliminary text was released into the general debate.

We also think that, in keeping with the overall thrust of democratization in the ASC, "political" participation ought also to be included as a reference point for "standard of living" in s.1(a).

<sup>26</sup> The text is more or less successful in following through on that image in the nonexhaustive list of rights which derive from this umbrella right. The text appears to endorse a "services" conception of social rights in ss.1(b) and (c) by in essence entrenching quite general features of the current system of public provision of health and education services. This represents a pragmatic choice to recognize two sets of institutional baselines as an expression of what "we all" have achieved to date. The assumption is that such an approach is likely to marshal greater support for the overall package, especially in view of similarly phrased inclusions in both federal and Ontario New Democratic Party initiatives. There are also more principled reasons justifying such a strategic decision, not least of which is that it is often the wisest course to endorse a universal system, thereby putting all members of society in the same boat. This helps foster a situation in which the well-off have vested interests in humane and appropriate health care and quality education which are similar to those of the less socially powerful. Where gaps in health care or education begin to appear (whether in terms of basic access or quality), claims by those excluded can be more easily addressed by reference to the standards already enjoyed by others. That being said, it is admittedly still a weakness that these institutional features in ss.1(b) and (c) are protected, but not then explicitly linked to similar teleological statements as those that are found in s.1(a).

<sup>27</sup> Bakan, "What's Wrong with Social Rights?" (this volume).

<sup>28</sup> See Joel Bakan, "Constitutional Interpretation and Social Change: You Can't Always Get What You Want (Nor What You Need)" in Richard Devlin, ed., *Canadian Perspectives on Legal Theory* (Toronto: Emond Montgomery, 1991) (on underinclusiveness and overinclusiveness in rights discourse).

<sup>29</sup> Note s.9(8), which also links representation on the Social Rights Council to "demonstrated experience in the area of social and economic rights and a commitment to the objectives of the Social Charter" and s.10(10) according to which the Social Rights Tribunal "shall be made accessible to members of disadvantaged groups and their representative organizations by all reasonable means, including the provision of necessary funding by appropriate governments."

<sup>30</sup> Constitutional rights embedded within a conception of negative freedom project onto society an image of truncated personhood and an impoverished understanding of the positive bonds that connect us and that give meaning to our intermeshed individual and communal lives: Craig Scott, "The Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Human Rights Covenants", (1989) 27 *Osgoode Hall L.J.* 769-878; Craig Scott and Patrick Macklem, "Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a Future South African Constitution", (1992) 141 *U. Pennsylvania L. Rev.*—[forthcoming].

That being said, it is crucial to note that the language of the *Charter of Rights and Freedoms* is still open to more holistic interpretations. See the discussion by Gwen Brodsky of the Supreme Court of Canada's still tentative approaches to s.7 and s.15 of the *Charter* in Brodsky, "Social Charter Issues" (this volume). And see Lessard, "Relationship, Particularity and Change," *supra*, note 21, esp. at 306, arguing for a new conception of s.7 "liberty" based on rights discourse being understood as "the language of democratic inter-relationships."

<sup>31</sup> See Brodsky, *ibid.*

<sup>32</sup> Lessons can be learned from the international human rights system and the existence of two different documents within both the United Nations system (the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights) and the Council of Europe system (the European Convention on Human Rights and the European Social Charter). In cases involving trade union rights in both systems, governments argued strongly that separate textual locations of rights entailed a presumption against overlapping interpretations by the organs charged with interpretation of those rights. These arguments were neither explicitly endorsed nor explicitly refuted by either the European Court of Human Rights or the Human Rights Committee, but the results in the cases in question suggest that, at the least, the phrasing

of rights in the "social and economic rights instrument" can easily be seized on to put a ceiling on the interpretation of the rights in the "civil and political rights instrument": see Scott, "Interdependence and Permeability", *supra*, note 30 at 869-874 and J.G. Merrills, *The Development of International Law by the European Court of Human Rights* (Manchester: Manchester University Press, 1988) 202-204.

<sup>33</sup> See Ruth Colker, "Section 1, contextuality, and the anti-disadvantage principle" (1992) 47 U.T.L.J. 77. To the cases discussed by Colker should be added *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, esp. at 1051-2, 1056-7.

Apart from the general reaffirmation and solidification of the anti-disadvantage principle, it is well worth noting the way in which Chief Justice Dickson, for the majority, explicitly adopted a relational analysis of rights and their limits in *Slaight Communications*. In addressing the question of the freedom of expression of an employer with respect to an unjustly dismissed employee, Dickson C.J. made the unequal nature of the employment relationship pivotal to his analysis.

Quoting from Davies and Freedland, *Sir Otto Kahn-Freund's Labour and the Law* (3d ed.) (London: Skvens, 1983) at 18, he noted that such a relationship "is typically a relation between a bearer of power and one who is not a bearer of power ... [being] ... [i]n its inception ... an act of submission, in its operation... a condition of subordination" (at 1051-2). He went on to state at p.1052:

The courts must be ... concerned to avoid constitutionalizing inequalities of power in the workplace and between societal actors in general.... On the facts of this case, constitutionally protecting freedom of expression would be tantamount to condoning the continuation of an abuse of an already unequal relationship.

Dickson C.J. went on to interpret freedom of expression and its limits in light of a detailed analysis of the particular power relations involved in the case.

<sup>34</sup> See, for example, Joel Bakan's concern about arguments against regulation, rent control, socialized medicine, and collective bargaining in this volume.

<sup>35</sup> For example, there may be trade-offs in choosing the wording of the ASC. To the extent that the wording in s.1 (b) was changed to reflect Joel Bakan's and Hester Lessard's concern that the underlying causes of ill-health be addressed (rather than guarantees that health care will be provided once you get sick), it might have weakened easy claims to the provision of services at the same time that it opened debate to disagreements over structural causes and solutions. But, arguably, the debate would then be on the terms that matter.

<sup>36</sup> See Nedelsky, "Rights as Relationship," *supra*, note 1 for a fuller discussion of constitutionalism as a dialogue of democratic accountability.

<sup>37</sup> John Hart Ely, *Democracy and Distrust* (Cambridge: Harvard University Press, 1980) is the best-known form of this position.

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# Appendix I

## Draft Social Charter\*

### Part 1

#### Social and Economic Rights

1. In light of Canada's international and domestic commitments to respect, protect and promote the human rights of all members of Canadian society, and, in particular, members of its most vulnerable and disadvantaged groups, everyone has an equal right to well-being, including a right to:
  - (a) a standard of living that ensures adequate food, clothing, housing, child care, support services and other requirements for security and dignity of the person and for full social and economic participation in their communities and in Canadian society;
  - (b) health care that is comprehensive, universal, portable, accessible, and publicly administered, including community-based non-profit delivery of services;

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\* As released March 27, 1992 from the National Anti-Poverty Organization by a broad coalition of concerned citizens, organizations and constitutional experts from St. John's to Vancouver.

- (c) public primary and secondary education, accessible post-secondary and vocational education, and publicly-funded education for those with special needs arising from disabilities;
  - (d) access to employment opportunities; and
  - (e) just and favourable conditions of work, including the right of workers to organize and bargain collectively.
2. The Canadian Charter of Rights and Freedoms shall be interpreted in a manner consistent with the rights in s.1 and the fundamental value of alleviating and eliminating social and economic disadvantage.
  3. Nothing contained in s.1 diminishes or limits the rights contained in the Canadian Charter of Rights and Freedoms.
  4. Governments have obligations to improve the conditions of life of children and youth and to take positive measures to ameliorate the historical and social disadvantage of groups facing discrimination.
  5. Statutes, regulations, policy, practice and the common law shall be interpreted and applied in a manner consistent with the rights in s.1 and the fundamental value of alleviating and eliminating social and economic disadvantage.
  6. Any legislation and federal-provincial agreements related to fulfilment of the rights in section 1 through national shared cost programs shall have the force of law, shall not be altered except in accordance with their terms and shall be enforceable at the instance of any party or of any person adversely affected upon application to a court of competent jurisdiction.
  7. (1) The federal government has a special role and responsibility to fund federal-provincial shared cost programs with a view to the achievement of a comparable level and quality of services throughout the federation, in accordance with s.36.  
(2) Accordingly, federal funding shall reflect the relative cost and capacity of delivering such programs in the various provinces, with equalization payments where required to address serious disparities in relative cost and capacity.

- (3) The federal government and provincial governments shall conduct taxation and other fiscal policies in a manner consistent with these responsibilities and with their obligations under shared cost programs.
8. The provisions of sections 1 to 7 shall apply to territorial governments where appropriate.

## Part II

### Social Rights Council

9. (1) By [a specified date], there shall be established by the [REFORMED] Senate of Canada the Social Rights Council (the Council) to evaluate the extent to which federal and provincial law and practice is in compliance with the rights contained in s.1.
- (2) In evaluating compliance the Council shall:
  - (a) establish and revise standards according to which compliance with the rights in s.1 can be evaluated;
  - (b) compile information and statistics on the social and economic circumstances of individuals with respect to the rights in s.1, especially those who are members of vulnerable and disadvantaged groups;
  - (c) assess the level of compliance of federal and provincial law and practice with respect to the rights in s.1;
  - (d) educate the public and appropriate government officials;
  - (e) submit recommendations to appropriate governments and legislative bodies;
  - (f) encourage governments to engage in active and meaningful consultations with non-governmental organizations which are representative of vulnerable and disadvantaged members of society; and
  - (g) carry out any other task that is necessary or appropriate for the purpose.

- (3) In evaluating compliance with Part I the Council shall have the power to:
  - (a) hold inquiries and require attendance by individuals, groups or appropriate government officials;
  - (b) require that necessary and relevant information, including documents, reports and other materials, be provided by governments; and
  - (c) require any government to report on matters relevant to compliance.
- (4) The government or legislative body to which recommendations in s.9(2)(e) are addressed has an obligation to respond in writing to the Council within three months.
- (5) With respect to Canada's obligations under international reporting procedures that relate to the rights in s.1, the Council shall:
  - (a) assist in the preparation of Canada's reports under such procedures;
  - (b) actively consult with non-governmental organizations representative of vulnerable and disadvantaged groups, and encourage governments to engage in similar consultations;
  - (c) have the right to append separate opinions to the final versions of such reports before or after they are submitted to the appropriate international body; and
  - (d) make available a representative of the Council to provide any information requested by the appropriate international body.
- (6) The Council shall respond to any request for information or invitation to intervene from the Tribunal established under s.10 and the Council shall have the right to intervene in any proceedings before the Tribunal.
- (7) The Council shall be independent and shall be guaranteed public funding through Parliament sufficient for it to carry out its functions.
- (8) Persons appointed to the Council shall have demonstrated experience in the area of social and economic rights and a commitment to the objectives of the Social Charter.
- (9) (a) All appointments to the Council shall be made by the [REFORMED] Senate of Canada.

- (b) One-third of the appointments shall be from nominations from each of the following sectors:
    - (i) the federal government;
    - (ii) provincial and territorial governments; and
    - (iii) non-governmental organizations representing vulnerable and disadvantaged groups.
- (10) [self-governing aboriginal communities]

### Part III

#### Social Rights Tribunal

10. (1) By [a specified date], there shall be established by the [REFORMED] Senate of Canada the Social Rights Tribunal of the Federation (the Tribunal) which shall receive and consider petitions from individuals and groups alleging infringements of rights under s.1.
- (2) The Tribunal shall have as its main purpose the consideration of selected petitions alleging infringements that are systemic or that have significant impact on vulnerable or disadvantaged groups and their members.
- (3) The Tribunal shall have the power to consider and review federal and provincial legislation, regulations, programs, policies or practices, including obligations under federal-provincial agreements.
- (4) Where warranted by the purpose set out in s.10(2), the Tribunal shall:
  - (a) hold hearings into allegations of infringements of any right under s.1; and
  - (b) issue decisions as to whether a right has been infringed.
- (5) Where the Tribunal decides that a right has been infringed it shall:
  - (a) hear submission from petitioners and governments as to measures that are required to achieve compliance with the rights in s.1 and as to time required to carry out such measures; and

- (b) order that measures be taken by the appropriate government within a specified period of time.
- (6) (a) In lieu of issuing an order under s.10(5)(b), the Tribunal shall, where appropriate, order that the appropriate government report back by a specified date on measures taken or proposed to be taken which will achieve compliance with the rights in s.1.
- (b) Upon receiving a report under s.10(6)(a), the Tribunal may issue another order under s.10(6)(a) or issue an order under s.19(5)(b).
- (7) (a) An order of the Tribunal for measures under s.10(5)(b) shall not come into effect until the House of Commons or the relevant legislature has sat for at least five weeks, during which time the decision may be overridden by a simple majority vote of that legislature or Parliament.
- (b) The relevant government may indicate its acceptance of the terms of an order of the Tribunal under s.10(5)(b) prior to the expiry of the period specified in s.10(6)(a).
- (8) Tribunal decisions and orders shall be subject to judicial review only the Supreme Court of Canada and only for manifest error of jurisdiction.
- (9) The Tribunal may, at any stage, request information from, request investigation by, or invite the intervention of the Social Rights Council.
- (10) The Tribunal shall be made accessible to members of disadvantaged groups and their representative organizations by all reasonable means, including the provision of necessary funding by appropriate governments.
- (11) The Tribunal shall be independent and shall be guaranteed public funding through Parliament sufficient for it to carry out its functions.
- (12)(a) All appointments to the Tribunal shall be made by the [REFORMED] Senate of Canada.
- (b) One-third of the appointments shall be from each of the following sectors:
- (i) the federal government;
  - (ii) provincial and territorial governments; and

- (iii) non-governmental organizations representing vulnerable and disadvantaged groups.
- (13) [The Province of Quebec] [Any province] may exclude the competence of the Tribunal with respect to matters within its jurisdiction by establishing a comparable tribunal or conferring competence on an existing tribunal.
- (14) [self-governing aboriginal communities]

## Part IV

### Environmental Rights

11. In view of the fundamental importance of the natural environment and the necessity for ecological integrity,
  - (a) everyone has a right:
    - (i) to a healthful environment;
    - (ii) to redress and remedy for those who have suffered or will suffer environmental harm; and
    - (iii) to participate in decision making with respect to activities likely to have a significant effect on the environment;
  - (b) all governments are trustees of public lands, waters and resources for present and future generations.

A Note on Enforcement of Environmental Rights: The Canadian Environmental Law Association, Pollution Probe, and the Constitutional Caucus of the Canadian Environmental Network endorse an amendment to the Canadian Charter of Rights and Freedoms protecting the right to a healthy environment.

This is not to say that the mechanism for enforcement of environmental rights must rely solely on the courts. The proposed Environmental Bill of Rights for Ontario provides an example of an enforcement mechanism by a specialized tribunal.