

## THE SOCIAL UNION FRAMEWORK AGREEMENT: HOLLOWING OUT THE STATE

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

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

The second feature, a practical instance of the shift in orthodoxy referred to above, is the recent set of unilateral and large cuts in federal contributions to

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

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

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

<sup>4</sup> Paul Boothe, "Is It Time To Reform Fiscal Transfers?" (November 1998) 19 *Policy Options* 53 at 53; from 1994-95 to 1998-99, the CHST was cut by 35 percent, from \$19.3 to \$12.5 billion.

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

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

<sup>1</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). Online: Government of Canada, Publications and Forms, Resource Centre Publications and Links <[http://socialunion.gc.ca/news/020499\\_e.html](http://socialunion.gc.ca/news/020499_e.html)> (accessed 1 December 1999). The text of the Agreement is reproduced in this issue at page 133.

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

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

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

fiscal imbalance of the constitutional division of powers has been addressed largely through deployment of the federal spending power.

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

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

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

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

<sup>10</sup> Apart from equalization payments, Ottawa spends its money in the provinces in three ways. First, Ottawa distributes monies through shared-cost programs. These programs establish a formula of sharing costs between the federal government and the provincial governments. Typically the formula provides that the federal government provides fifty percent for every dollar provinces put in the shared-cost programs, with or without conditions attached. The most obvious example of this is the

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

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

<sup>12</sup> *Ibid.*

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

government to meet its unique social, constitutional and economic obligations.<sup>14</sup>

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

## NATIONAL STANDARDS

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

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

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

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

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

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

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

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

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

It is revealing to consider what provisions, if any, lie within the Agreement with respect to other less popular social programs — say, income assistance. The Framework Agreement does stipulate a general commitment to providing “*appropriate* assistance to those in need.”<sup>21</sup> What this might mean is uncertain but it is a clear departure from the way in which such obligations have been stated in the past. For instance, the preamble to CAP provided that Parliament recognized “the provision of *adequate* assistance to and in respect of persons in need.”<sup>22</sup> The substantive provision of the CAP Act stated that provinces

receiving federal funding under the statute will provide assistance to any person in need “in an amount or manner that takes into account the basic requirements of that person,”<sup>23</sup> a provision which has been held to stipulate a relationship between an income assistance recipient's actual needs and the benefit level.<sup>24</sup> As another example, the Charlottetown Consensus Report on the Constitution of August 1992 would have added a new provision to the Constitution describing the commitment of the governments to the policy objective of “providing *adequate* social services and benefits to ensure that all individuals resident in Canada have reasonable access to housing, food, and other basic necessities. . . .”<sup>25</sup> The terms of the Social Union Agreement are a significant move away from these past statements.

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

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

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harmonizing standards.

<sup>20</sup> Robert Lewis, “Rewrite of Federalism” *Maclean's* 112:1 (15 February 1999) 2.

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

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

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<sup>23</sup> *Ibid.*

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

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

<sup>26</sup> These notions are evoked more explicitly by the Agreement's articulation of “individual dignity and responsibility” as fundamental values. *Supra* note 1 at s. 1.

assistance captured by the full text of CAP's Preamble:<sup>27</sup>

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

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

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

of citizenship into primarily economic connections and guarantees of interprovincial mobility is consistent with the neo-liberal concern for free markets, reduced government involvement in social programs, and erasure of the economic impact of political boundaries.<sup>30</sup>

## EQUALITY

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

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

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

<sup>27</sup> CAP, *supra* note 2.

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

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

<sup>30</sup> Nikolas Rose, "The Death of the Social? Re-figuring the Territory of Government" (1996) 25 *Economy and Society* 327.

<sup>31</sup> *Supra* note 1 at s.1.

deprivation and disadvantage that currently deny social citizenship to large groups of Canadians.<sup>32</sup>

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

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

Ironically, the one aspect of the Social Union Framework Agreement acknowledged by the signatory governments as a failure — the absence of Québec from the accord — is perhaps the Agreement's strongest, albeit clearly unintended, promise of substantive

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

## DECENTRALIZATION

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

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

<sup>33</sup> *Supra* note 1 at s. 1 [emphasis added].

<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid.*

<sup>37</sup> See Cameron and Rebeck, *supra* note 15.

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

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

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

To be fair, this formulation is less restrictive than other proposals on the negotiating table which would have required the approval of a majority of (or even seven) provinces representing at least 50% of the population. As some commentators have already noted,<sup>42</sup> the Social Union Framework Agreement will allow the poorer provinces to approve a new federally funding program, regardless of whether the wealthier or more populous provinces — Alberta, British Columbia, Ontario, Québec — agree. However, the Social Union Framework Agreement does go further than the formula employed by both the Meech Lake and Charlottetown Accords. Those agreements would have covered only shared-cost programs, not block-funded programs, and did not require that the federal government obtain a set

level of support for new programs. Nor did those agreements require the joint development of program objectives.

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

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

<sup>40</sup> The federal government had already committed itself to this consent-seeking process. In its 1996 Throne Speech the government said:

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

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

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

<sup>42</sup> Cameron and Rebeck, *supra* note 15.

<sup>43</sup> Charlottetown Accord, *supra* note 25 at para. 25.

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

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

In sum, the Social Union Framework Agreement establishes a significant requirement of agreement between federal and provincial governments over most types of federal social program funding initiatives, instituting a degree of what Banting calls "co-determination federalism," strong co-ordination of

federal and provincial preferences.<sup>48</sup> The problems associated with this model of federalism are primarily those of impasse or inaction: "interlocking decision making can easily become inter-blocking decision making, creating the 'joint decision' trap . . ."<sup>49</sup> This runs the risk of reducing the likelihood that federal governments will opt to put money into joint programs,<sup>50</sup> which, in turn, threatens the maintenance of a national social citizenship.

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

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

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

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

<sup>46</sup> *Supra* note 1 at s. 5.

<sup>47</sup> Banting, *supra* note 13 at 36.

<sup>48</sup> *Ibid.* at 35.

<sup>49</sup> *Ibid.*

<sup>50</sup> *Ibid.* at 36.

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

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

<sup>53</sup> Stephen McBride and John Shields, *Dismantling a Nation: Canada and the New World Order* (Halifax: Fernwood Publishing, 1993) at 105-6.

<sup>54</sup> Boadway, *supra* note 11 at 39.



system and he cites the Millennium Scholarship Fund as a possible example of such a scenario.<sup>55</sup>

## PRIVATIZATION

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

The emphasis within these strategies on community and on local organization shares common rhetoric with the more progressive protest against the “bureaucratic, centralized, universalized and often fragmented nature of service delivery” of the post-war welfare state.<sup>58</sup> Here, prescriptions for community involvement stand for the revival of the public as “a less rigid and bureaucratized, more democratic mechanism for collective provision for social need.”<sup>59</sup> The call is not for reduced state involvement but for different involvement of the state as funder, facilitator, and regulator, rather than direct

service provider.<sup>60</sup> But, the invocation of community and family involvement in the social welfare process resonates with both of these discourses of change, lending a progressive and appealing gloss to reforms which are often quite regressive in impact.

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

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

## CONCLUSION

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

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<sup>55</sup> *Ibid.*

<sup>56</sup> Rose, *supra* note 30 at 328–29.

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

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

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

<sup>60</sup> Kline, *ibid.* at 347; Rose, *supra* note 30 at 335.

<sup>61</sup> *Supra* note 1 at s. 1.