

**the POVERTY and
HUMAN RIGHTS
PROJECT**

**A Framework to Improve
the Social Union For Canadians**
**An Assessment of the Implementation of SUFA
from a B.C. Perspective**

SUBMISSION OF THE POVERTY AND HUMAN RIGHTS PROJECT
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The Poverty and Human Rights Project is a non-profit research and public education centre committed to promoting recognition and realization of rights to social and economic security. The Project Directors are Gwen Brodsky and Shelagh Day. The financial support of the Law Foundation of British Columbia is gratefully acknowledged.

The subject matter of the Social Union Framework Agreement (SUFA) is of crucial, even constitutional, importance to all Canadians. The Poverty and Human Rights Project supports the Social Union Framework Agreement, viewing it as, potentially, a central vehicle for governing social program design and administration in Canada, and a vehicle for giving effect to Canada's rights commitments.

However, we have serious concerns that SUFA has not, to date, been implemented in a way that improves social conditions and social protections for Canadians, or provides meaningful dialogue between citizens¹ and governments about the social union. The current situation of the poorest and most vulnerable people in B.C. reveals the harm of this failure.

The purpose of this submission is to examine the promise that the SUFA holds out to Canadians, and to recommend steps that will improve SUFA's usefulness and effectiveness.

This submission makes four main points: 1) the SUFA must be a vehicle for setting threshold standards for social programs and services in Canada; 2) those standards must be consistent with Canada's rights obligations under statutory human rights legislation, the Charter and international human rights treaties; 3) the SUFA must also be a vehicle for genuine citizen engagement with all levels of government about social programs and outcomes; and 4) mechanisms for citizen engagement must ensure that the most politically marginalized people in Canada can participate in designing standards for the social union that reflect Canada's rights obligations to them.

Introduction: The Social Union

Over the past 50 years Canada has made commitments to ensure that everyone has access to certain kinds of benefits and protections by virtue of their membership in the society. The 'social union' refers to that commitment, namely, that Canadians will take care of each other, and that they will share resources in order to do so. There is more that unifies Canadians than living within national borders and sharing political institutions. We also share social values. Everyone needs adequate food, clothing, and housing; fair, safe and non-discriminatory conditions of work; access to education; a degree of income security throughout his or her lifetime; and health care, including protection from environmental causes of ill health. Canadians have accepted that there is a collective responsibility to create a society in which these are entitlements, provided, not as a matter of charity, but as incidents of social citizenship.

Evidence of this commitment can be seen in the fact that Canada has constructed a social safety net of programs and protections, established rights to social assistance for persons in need, ratified the *International Covenant on Economic, Social, and Cultural Rights (ICESCR)*,² and made an express commitment in the Constitutionⁱⁱⁱ to provide essential public services of reasonable quality to all Canadians.

The SUFA itself includes a succinct statement about what the values of our social union are:

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

Further, the SUFA states that governments intend to meet the needs of Canadians by: 1) ensuring “access for all Canadians, wherever they live or move in Canada, to essential social programs and services of reasonably comparable quality;” 2) providing “appropriate assistance to those in need;” 3) respecting “the principles of medicare;” and 4) promoting “the full and active participation of all Canadians in Canada's social and economic life.”

SUFA's language is broad enough to make it an obvious vehicle for negotiating and maintaining intergovernmental arrangements regarding all social programs and social protections, including those related to employment.

The Obligations to which the Social Union Framework Agreement Must Give Effect

When considering the content of Canada's social union, current social programs and the text of the SUFA are not the only sources of information. SUFA is located within a larger legal and political framework of governmental obligations to its citizenry. What are those obligations?

As we have already noted, section 36 of the Constitution is pertinent. It states that “...Parliament and the legislatures, together with the government of Canada and the provincial governments, are committed to promoting equal opportunities for the well-being of all Canadians... and providing essential public services of reasonable quality to all Canadians.”

We note that s. 36 refers to “essential services of reasonable quality” rather than “essential services of reasonably comparable quality” as the SUFA does. Because s. 36 of the Constitution is a more authoritative statement of the social union commitment than the SUFA, we prefer its articulation of the compact.

Further, the substantive content of the social union must be informed by the values of equality and security of the person which are embodied in ss. 15 and 7 of the *Charter*, and in international human rights treaties to which Canada is a signatory.

During the same fifty year period in which Canada developed its social safety net, it simultaneously developed a framework of human rights commitments – statutory, constitutional and international. Central to this framework is a commitment to equality.

By now, Canadians have a sophisticated analysis of what the commitment to equality entails. It is understood that inequality is not just an individual phenomenon. Rather, it is disproportionately experienced by groups in the society that are vulnerable to marginalization and discrimination, in particular, Aboriginal people, women, people with disabilities, and people of colour. The deeply rooted social inequality of these groups cannot be resolved merely by enacting laws that are non-discriminatory on their face. It goes without saying that social programs and services must not discriminate in their design or delivery. However, this is only one aspect of what the right to equality encompasses.

To give life to *Charter* rights to equality and security of the person, governments must be understood to have positive obligations to ensure that benefits and protections are provided that will ameliorate the disadvantage of vulnerable groups, and ensure that everyone has an adequate standard of living.

Canada's social programs are a central means of meeting the goal of substantive equality and security of the person for all Canadians, because it is through social programs that governments can address and ameliorate the inequality of disadvantaged individuals and groups, and protect basic social and economic security.

This understanding of the positive governmental obligations that flow from *Charter* rights to equality and security of the person is reinforced by the International Covenant on Economic, Social and Cultural Rights (ICESCR), to which Canada is signatory. The *Charter* guarantees of equality and security of the person are connected to, and their meaning is illuminated by ICESCR rights which include the following: freely chosen work (Article 6); just and favourable conditions of work (Article 7); fair and non-discriminatory wages (Article 7(a)(i) and (ii)); safe and healthy working conditions (Article 7(b)); social security (Article 9); an adequate standard of living, including adequate food, clothing and housing (Article 11); the highest attainable standard of physical and mental health (Article 12); and education (Articles 13 and 14).

The Supreme Court of Canada has held that *Charter* rights must be interpreted in light of Canada's human rights treaty obligations.⁴ This is a view that the Government of Canada has also espoused. In 1993, the federal government, in response to questions from the UN Committee on Economic, Social and Cultural Rights, which was reviewing Canada's compliance with its obligations under the ICESCR, indicated that section 7 of the *Charter* "ensured that persons were not deprived of the basic necessities of life."⁵ Canada reconfirmed this position in 1998, noting that the decisions of the Supreme Court of Canada in *Slaight*⁶ and *Irwin Toy v. A.-G. Quebec*⁷ confirm that the *Charter* may be interpreted to protect ICESCR rights and that section 7 guarantees that people are not to be deprived of basic necessities.⁸

In short, the larger legal and political framework in which SUFA is located, obligates governments to provide social programs and protections that have the effect of ensuring that

all Canadians have an adequate standard of living, including access to adequate food, clothing, housing, education, health, and just and favourable conditions of freely chosen employment.⁹

The SUFA should be understood to be a mechanism not just for agreeing on funding formulas, but also for ensuring that the provision of adequate social programs and protections by all levels of government, is consistent with Canada's obligations under s. 36 of the Constitution, ss. 15 and 7 of the *Charter*, the ICESCR, and human rights legislation.x

Part I: Setting Standards

In a federal state, the only way to provide “essential services of reasonable quality to all Canadians” is through establishing standards that apply to all levels of government. By standards we mean two things: 1) the identification of the essential services that will be provided to all Canadians; and 2) an articulation of criteria for ensuring that the services provided are “of reasonable quality” (for example, adequate, accessible, and equality-supporting).

The SUFA uses the terms “developing social priorities” and “reviewing outcomes.” These are different words for the same exercise, which is setting standards, and assessing whether they are being met. The ICESCR articulates required outcomes for social programs and services - that is, an adequate standard of living, income security, just and favourable conditions of work. It does not prescribe how governments achieve these outcomes.

Historically, Canada has determined which programs and services are essential and will be provided to all Canadians either through federal programs which provide benefits directly to individuals in all parts of the country (for example, Old Age Security, Guaranteed Income Supplement) or through federal transfers of money to provincial governments with conditions attached requiring that the money be spent on designated programs (for example, medicare, social assistance).

Canada has also set some standards to define the “reasonable quality” of social assistance and social services, and health care through federal legislation (the *Canada Assistance Plan Act (CAP)* and the *Canada Health Act*). The standards were enforceable because the federal government could withdraw funds if they were not met, and because, under *CAP* citizens could legally challenge governments if they failed to meet the *CAP* standards.¹¹ The *CAP* standards, among other things, required governments to provide social assistance in an amount adequate to meet basic needs.

However, in 1995, everything changed. The federal government repealed *CAP*, ended federal - provincial 50/50 cost-sharing for a number of key programs, and rolled the federal contribution to social programs into one unconditional transfer (the Canadian Health and Social Transfer), simultaneously cutting the amount of that transfer.

The SUFA is the progeny of the ensuing struggle between federal and provincial governments. The 1995 actions of the federal government led provincial and territorial governments to seek to impose some constraints on the federal spending power.¹² In particular, they sought constraints on the federal government's ability to spend money on matters within provincial jurisdiction, and then to unilaterally cut the funds that support those programs, leaving the provincial governments to fill the void.

For its part, the federal government wished to ensure that its spending was once again within its control. Under 50/50 cost-sharing arrangements, the provinces, in effect, set the level of federal social spending because the federal government matched every dollar spent by the provinces on designated programs, such as health care and social assistance. The federal government was also, however, concerned to have its spending power acknowledged as a legitimate instrument for the creation and maintenance of social programs and services, and to ensure that any constraints were narrowly procedural, not substantive. There are unresolved tensions between federal and provincial governments, and the SUFA is an outgrowth, and a reflection, of this Canadian family quarrel.

Quebec, of course, is a special case, and has chosen to remain outside of the SUFA because it considers the federal government's spending power an intrusion on its sovereignty. Other provincial governments also try to play the jurisdictional card, arguing that the federal government should provide money, but should not otherwise interfere in matters that are constitutionally within the authority of the provinces. But they are less persuasive, since they cannot rely on arguments about the need to protect a distinctive culture, and the federal government can legally attach conditions to the money that it provides.¹³ The continuing anger with the federal government is reflected in the current ad campaign by provincial and territorial Ministers of Health, pointing out that the federal government now pays only 14% of health care costs.

This dynamic of resentment is unfortunate, however, because it ignores the simple reality of citizen interests. From the point of view of a citizen in need of adequate social assistance, for example, it makes little difference which level of government provides it. What does matter is that she can count on it being available, and available in an amount adequate to meet her needs for food, clothing and shelter. Citizen interests are best satisfied when governments agree on the ways and means of implementing adequate social programs.

The SUFA certainly recognizes this. It is a mechanism for *agreement*, which is why it has been looked to with hope by both voluntary organizations and social policy experts. In the post-1995 era. The SUFA has held out the possibility that standards would now be set by agreement among the levels of government, with the involvement of Canadians in developing social priorities and reviewing outcomes.

Though some provinces resist the setting of standards for programs or services because they view this as intrusion into their jurisdiction, the fact remains that without some agreement on threshold standards that identify essential services and articulate adequate criteria for them, there is no social union.

Unfortunately, the SUFA has not set such standards, or even embarked on the exercise of considering such standards. This is not just a disappointment, it is profoundly harmful to Canadians, particularly the most disadvantaged ones. During the SUFA period, the social union has not been improved; it has been eroded. Governments have diminished social programs and social protections. This has taken place as though the SUFA did not exist, or was simply irrelevant to governments' legislative and policy choices.

The failure of governments to seize the opportunity to identify common programs and determine common thresholds for those programs is also an affront to constitutional values, and ignores human rights obligations. If governments do not use the SUFA as a mechanism for ensuring that essential social programs of reasonable quality are available to all Canadians, they give up on the idea of a social union, and they threaten the human rights that they have chosen to endorse.

The B.C. Example

The actions taken by the government of British Columbia during this period reveal the harms caused when the SUFA fails to operate in a way that supports and protects Canadians. Cuts and changes to social assistance and to the legal aid scheme provide central examples.

The government of British Columbia has announced a new B.C. *Employment and Assistance Act* which makes the following changes to the social assistance regime:

i) Social Assistance Rates

- Shelter allowances for families receiving social assistance that have two or more children have been reduced.
- Support allowances for “employable” welfare recipients between ages 55 and 64 have been cut by between \$47 and \$98 per month. This amounts to a 20 – 35% cut in the non-shelter portion of social assistance for elderly recipients.
- Welfare benefits for employable single parents have been cut by \$51 a month. This reduction in the support portion of social assistance affects families in which approximately 60,000 children live. The overwhelming majority of the members of this group are single women with children.
- The Family Maintenance Exemption has been eliminated. All child support paid will be deducted dollar for dollar from income assistance benefits. Until now, if a single parent on social assistance was receiving child support payments from a spouse, they were entitled to keep up to \$100 per month of these payments.

- The Earnings Exemption has been eliminated for “employable” recipients. This exemption allowed people on welfare to work and keep \$100 if they were single, or \$200 if they had children or a partner.

In total, these measures mean that some single mothers have seen a drop in their benefits of as much as \$370 per month. In the income of a single mother with one child, this represents a 46% cut to the support allowance available to her. If she has two children, she will also have her shelter allowance reduced.

The Social Planning and Research Council in its December 2001 report on living costs and income assistance in British Columbia concluded that, before the cuts announced January 17, 2002, social assistance met only 45 – 65% of the minimum monthly costs of single parent families and single adults for food, clothing, household supplies, personal care, transportation, child care, shelter, and other basic costs.

ii) Eligibility

- Single parents are considered “employable” after their youngest child reaches 3 years of age (down from 7). Advocacy organizations for children and youth report that this change will affect the care of approximately 15,000 young children. This change comes just after the Government of British Columbia repealed legislation whose goal was universal access to affordable, safe child care.
- The government has introduced welfare time-limits. “Employable” people without children are only allowed to receive welfare for two years during any five year period. After two years they will be cut off.
- Similarly, “employable” parents (with children older than 3 years), are eligible for full benefits for two out of five years, after which time their support allowance will be cut by 25%.

To our knowledge, no government in Canada has ever before imposed flat time limits on eligibility for social assistance. Although some discretion is permitted to Financial Aid Workers, some needy British Columbians will simply be refused social assistance.

- In addition to the criminal penalty for fraud, those found guilty of welfare “fraud” (which may include failure to report a gift) are now banned from receiving welfare.
- Before being able to apply for assistance, individuals are required to undertake a “three-week self-directed job search.” This applies to everyone, including families with children. Most people exhaust all other avenues of survival before turning to welfare and appear at welfare offices having no income, assets or other means of support. Many are on the verge of losing their housing.
- The welfare application process begins with an assessment of whether or not an applicant is “expected to work.” An individual’s entitlement and treatment by the Ministry will depend on this assessment. Experts are concerned about the quality of

these assessments and concerned for the “hidden unemployable” who will fall through the cracks, for example, survivors of abuse or trauma in residential schools, refugees, and adults who have undiagnosed mental illness, intellectual impairment, fetal alcohol syndrome and learning disabilities.

- Young adults (19 and over) are now required to demonstrate that they have lived independent of their parents for two years before they are eligible for welfare. This means that youth who leave abusive family homes will be without support.
- Individuals who leave jobs “voluntarily”, or are fired for cause, are ineligible for assistance. Advocates are concerned that individuals may be considered ineligible for welfare even if they have left jobs because of sexual harassment, unsafe working conditions, or labour standards violations.
- The *Disability Benefits Program Act* has been repealed. This legislation provided a separate benefit scheme for people with disabilities, which recognized some of the unique needs of this group. People with disabilities are now included within the general welfare system. 18,000 people who were categorized as permanently disabled have been notified that they must re-apply for disability benefits under the general welfare scheme and prove that they are disabled according to a new, narrowed definition.

Reduced shelter allowances for families with two or more children, combined with reduced support allowances, a narrowed definition of disability, the three-week delay before one can apply for welfare, and time limits on eligibility for social assistance will predictably result in increased homelessness, and increased numbers of people living in overcrowded, inappropriate and desperate conditions.

The Government’s approach to social assistance rests on the assumptions that the majority of social assistance recipients are employable people for whom work is available. However, British Columbia is currently experiencing a downturn in its economy, due to various factors. The official unemployment rate is at over 9 % and may go higher. At the same time, training programs across government, including some designed for young low-income people, are scheduled for termination. Many “employable” social assistance recipients may not be able to find training or work opportunities, for reasons that are not in their control.

iii) Legal Aid and Advocacy

The Government of British Columbia has also announced a number of cuts to the Attorney General’s Ministry which directly affect the capacity of low-income people to seek remedies when they are denied social benefits and protections. The budget for legal aid has been cut by 38.8% over the next three years. As a result, coverage is now provided only for criminal law matters, *Young Offender Act* matters, mental health reviews, restraining orders, and child apprehensions. No services will be provided for family maintenance or custody disputes, except where there is evidence that violence is involved. Direct services for poverty law

matters, that is for landlord/tenant, employment insurance, employment standards, welfare, and disability pension claims or appeals, have been eliminated.

All Native and Community Law Offices have been closed. Until now these Offices have provided legal assistance for “a legal problem or situation that threatens the individual’s family’s physical or mental safety or health, the individual’s ability to feed, clothe and provide shelter for himself or herself and the individual’s dependents, or the individual’s livelihood” (s. 3(2)(d) of the *Legal Services Society Act*). Under this mandate, a legal aid lawyer would provide assistance in a case like this:

a woman and her children are locked out of their apartment because of a small amount of arrears in rent, due to a delay in the receipt of an Employment Insurance cheque. The landlord has removed all of her belongings and refuses to return them unless she pays the arrears. She has nowhere to go.

Until recently an advocate from a Native or Community Law Office could help this woman to obtain the benefits to which she is entitled and to find immediate shelter for herself and her children. However, this section of the *Legal Services Society Act* has now been repealed, and these services are no longer available. The closure of Native Law Offices deprives Aboriginal people of services designed specifically to meet their needs.

The British Columbia Human Rights Commission has also been eliminated, leaving the province with no public body with a mandate to promote human rights, to undertake education or research, to address systemic discrimination, to make special reports to the Legislature, to investigate complaints, or to conduct inquiries. With the passage of Bill 64, British Columbia is left with a severely truncated human rights system, consisting of a Tribunal alone.

These cuts and changes to welfare and legal aid are a part of the largest budget and public sector cuts in Canadian history. The range of cuts and changes include: cuts to acute care beds; closure of 10 to 15 long-term care facilities; cuts to cancer, maternity and pediatric services; limits in night-time operation of emergency rooms; cuts in psychiatric and mental health beds; cuts to home support for seniors; increase in medical insurance premiums; delisting of certain procedures and services including eye exams, and physiotherapy; increase in pharmacare deductibles; cuts in prescription drug coverage; reduced minimum wage for youth for the first 500 hours of work; reduced labour standards protections for hours of work and overtime; reduced numbers of Employment Standards Officers; deregulation of university tuition fees; cancellation of a number of youth employment programs; repeal of pay equity legislation; elimination of the Ministry of Women’s Equality; cancellation of a planned universal day care program; cancellation of the before and after school child care program; phase-out of B.C. Seniors’ Supplement; phase-out of funding for Meals on Wheels; the elimination of multicultural programs; the elimination of all women’s centres; and the closure of 24 court houses, 50 schools, 5 probation offices, 36 human

resources offices, 60 legal aid offices, and 10 apprenticeship offices.¹⁴ This is not a comprehensive list.

These changes drastically diminish social services and social protections available to the residents of the province. Those who are already socially and economically vulnerable – Aboriginal people, women, children, seniors, immigrants, people of colour, and people with disabilities – are hit particularly hard by the stripping of services and supports on which they rely.

The programmatic deepening of the disadvantage of already disadvantaged groups, and the increased physical and psychological risks to vulnerable people caused by cuts to welfare, engage Charter values of equality and security of the person. The cuts and changes also implicate treaty obligations of Canada. For example, the changes to income assistance and to legal aid alone conflict with a number of *ICESCR* rights, including:

- the general right to non-discrimination (Article 2(2)), and the right to equality between women and men (Article 3), with respect to the enjoyment of economic and social rights.

The new measures have a disproportionately severe effect on women and other disadvantaged groups because they exacerbate their pre-existing social and economic inequality. In addition, some reductions in rates and some disentanglements are targeted, directly or indirectly, at specific groups of welfare recipients defined by age, sex, disability, and refugee status.

- the right to special measures of protection and assistance to children and young persons without discrimination based on parentage or other conditions (Article 10(3)).

The new regime is particularly punitive for children of social assistance recipients, denying them supports that they need precisely because of the poverty of their parents.

- the right to an adequate standard of living, including food, clothing and housing (Article 11).

The new scheme deepens the poverty of people who are already living well below the poverty line. The ability of social assistance recipients in British Columbia to provide adequate food, clothing and housing for themselves and their children is at serious risk.

- the right of everyone to the enjoyment of the highest attainable standard of physical and mental health (Article 12).

Ample data is available to show that increased poverty means increased health risks. The new measures not only make access to adequate financial assistance and supports uncertain for persons with serious physical and mental health problems,

they are also likely to have damaging effects on the health of individuals who already at risk because of inadequate nutrition and housing.

In addition, the targeted elimination of legal aid for most family law matters and for poverty law, as well as the elimination of funding to community advocates for women and low-income people, deprives members of the most disadvantaged groups of the means to seek remedies for social rights violations. This contravenes a central *Covenant* obligation. The Committee's General Comment No. 9, *The domestic application of the Covenant*, (4 December 1998 E/C.12/1998/24), points out that it is the obligation of States parties to use all means at their disposal to give effect to the rights recognized in the *Covenant*, to provide appropriate means of redress for *Covenant* rights violations within their domestic legal schemes, and to ensure that remedies are available to any aggrieved individual or group.

If members of the most socially and economically disadvantaged groups cannot effectively exercise their rights before tenancy, welfare, and other tribunals because they have no access to legal or community advocates, and if, in addition, they have, no access to the courts to challenge rights violations because there are no funds and no legal representation available to them, the central obligation to give effect to the rights is contravened.

From the perspective of vulnerable people in the Province of British Columbia, then, the failure of Canadian governments to use the SUFA mechanism to forge agreements that would ensure that no government's programs and services fall below a threshold that meets *Charter* and treaty requirements is an abdication of responsibility of the most serious order.

No residents of Canada should be subjected to programmatic and systemic deepening of their poverty and social disadvantage. Governments acting together, to improve the social union, should protect Canadians from this.

The National Child Benefit System

The importance of failing to set clear standards is also exemplified in the National Child Benefit System, one of the main programs of the SUFA. Under this program, provinces and territories are permitted to "claw back" the benefit from a family's welfare payments if they reinvest these 'savings' in other programs designed to assist low-income children.

The objectives of this program are the amelioration of child poverty and the provision of incentives to move from welfare to work. However, the National Child Benefit does not assist in addressing the poverty among the nearly two-thirds of poor children in welfare families. Provinces have committed themselves to reinvest the money "freed-up" by the clawback in programs aimed at improving work incentives and supporting families in low income, mostly working families. Thus, only the working poor directly receive and keep the federal benefit and the working poor will, as well, disproportionately benefit from the programs funded by the monies redirected away from families on income assistance. This

program, while it is an important anti-poverty initiative, disenfranchises those whose source of income is welfare.

This benefit scheme discriminates against welfare recipients and against single mothers. As the National Council of Welfare notes: “Although single-parent mothers were raising less than a fifth of all children in Canada in 1999, they accounted for more than two-fifths of those who lived in poverty that year. ...In 1999, poor single-parent mothers with children needed more than \$8,000 using pre-tax measures and more than \$5,000 using post-tax measures to make it to the poverty line.”¹⁵

The impact of the provincial clawback of these federal benefits from welfare recipients is that single mothers are again stigmatized as undeserving and subject to financial disincentives as welfare recipients. The responsibilities of single mothers for child care go unrecognized and unvalued and they are denied desperately needed income supplements otherwise available to the working poor.

Recommendations

- Canadian governments must set standards to make the social union real. Without standards and an enforceable agreement not to fall below established thresholds, there is no social union.
- Standards must reflect and comply with the rights set out in the *Charter*, the Constitution, the *ICESCR*, and other international human right instruments to which Canada is signatory.

Part II: Citizen Engagement

On its face, the SUFA contemplates not just a more structured interaction between governments – federal, provincial and territorial – but also a fuller interaction between governments and citizens on the matter of social policy. Unfortunately, this promise has not been fulfilled.

On the contrary, as was feared by many Canadians at the time of the Charlottetown round of constitutional talks,¹⁶ the creation of this intergovernmental mechanism to deal with social policy has had the effect of removing social program design and implementation from public debate and scrutiny, placing them within the black box of executive federalism, where they are a subject matter for Ministers and officials, not politicians and not the public.

Political Context

The problem may be two-pronged: 1) the underlying dynamic of SUFA encourages concentration on relations between governments; and 2) current governments lack commitment to the development of more participatory forms of governance.

As we noted earlier, the politics of resentment, out of which SUFA has emerged, has kept governments focussed on each other, rather than on interaction with citizens.

But another impediment to the development of real citizen engagement is governments' apparent uneasiness about it. Governments appear reluctant to engage with citizens in any way that might affect their freedom to make decisions according to their own priorities. Consultations have been designed mainly as episodic, one-time-only events, such as public meetings, multi-stakeholder roundtables, and focus groups. As Susan Phillips notes, the problem with the public consultations that both federal and provincial governments hold is that "government usually determines who is invited, there are few opportunities for a real exchange of views and genuine dialogue, and participants receive limited information on how the results are used."¹⁷ At its worst, citizens are being subjected to consultation by 1-800 number, workbook and website. This is a high-tech way for governments to hide from citizens, not a way to engage with them.

In addition, governments have designed consultation procedures which sidestep or silence those who are most critical of them on social policy, often those who represent the most disadvantaged Canadians. This silencing is accomplished by going over the heads of non-governmental organizations to hold "town hall" meetings or focus groups with individuals, by questioning the "legitimacy" of some non-governmental organizations, by cutting funds to voluntary organizations thereby crippling their capacity to participate in consultative processes, and by hand-picking participants at consultations or roundtables. Many voluntary organizations now question whether governments are genuinely interested in hearing what citizens, particularly the most politically marginalized ones, have to say about social policy and social programs.

In short, both intergovernmental competition and resentment, which keeps Ministers and officials intensely focussed on each other, and governments' distrust of citizens have played a part in the failure of SUFA implementation to satisfy the SUFA commitments to citizen engagement.

i) Citizen Engagement

We have used the term "citizen engagement" in the sense that it is used by Susan Phillips, that is to denote "an interactive, deliberative dialogue between citizens (and/or their organizations) and government officials that contributes meaningfully to specific policy decisions in a transparent and accountable manner."¹⁸ Real citizen engagement, or deliberative democracy, according to Phillips, suggests that not only will participants be engaged in a process of public reasoning about the policies that will govern them, but "the

results of the process will be given weight in collective decision making and be used to guide subsequent action.”¹⁹ This does not mean that citizens, rather than politicians, will have the final say on policy but rather that processes or mechanisms will be in place so that “the results of such deliberation... [will have] an institutionalized impact on political decision-making.”²⁰

In our view, only if citizen engagement is given this meaning and is developed fully can the SUFA be a modern and useful vehicle for governing the social union.

ii) Mechanisms

Citizen engagement requires the creation of effective mechanisms, and SUFA endorses this in section 3. Mechanisms must be permanent, focussed, inclusive, and transparent. If the dialogue with governments is to be a genuine one, governments cannot select the participants, nor can they be the sole determiners of what will be discussed, or when discussion will occur.

More satisfactory mechanisms must be developed that will involve voluntary organizations which are knowledgeable about the delivery of social services, about the conditions and needs of particular groups of citizens, and about the social and economic impacts of social programs, in an ongoing deliberative dialogue with governments.

An essential feature of mechanisms for citizen engagement is that they provide greater opportunity for dialogue with elected representatives, not just Ministers and officials. A danger of the SUFA, as we have already pointed out, is that it removes social policy from the realm of open political process, and hides it in the black box of executive federalism. SUFA mechanisms should operate to re-vitalize political process, by creating a more active and involved civil society, and by increasing the involvement of elected representatives, as well as others, with citizens.

The B.C. Example

The impact of there being no “effective mechanisms for Canadians to participate in developing social priorities and reviewing outcomes” is that the most disadvantaged residents of provinces which have governments that are committed to dismantling social protections find themselves alone. There is no effective mechanism for dialogue with their own provincial government, and there is no mechanism for engaging other governments or residents in other provinces in assessing whether the policies of their government meet an accepted standard for the social union as a whole. The most disadvantaged and vulnerable people are isolated and politically abandoned.

In B.C. there is an unparalleled “democratic deficit.” In the May 2001 election, the Liberal Party gained 77 of 79 seats. Faced with the implementation of an agenda of drastic cuts to social programs and social protections, which was not announced in the Liberals’ pre-election platform, individuals and voluntary organizations have found their efforts to

participate in dialogue with government about the harms that are being inflicted, and possible alternative courses of action, stymied. Consultative processes have been truncated and, for those who are most disadvantaged, empty. Those who are troubled and frightened by the cuts and changes, and who express their dissent, have been publicly written off by the government as merely supporters of the New Democratic Party which was roundly defeated.

It is clear from section 3 of the SUFA, with its promise to involve Canadians “in developing social priorities and reviewing outcomes”, that Canada has not endorsed a thin version of democracy that begins and ends with casting a ballot once every four or five years. Section 3 takes for granted that democracy requires an ongoing conversation between governments and citizens, particularly when matters as fundamental as the design and effectiveness of social programs and social services, which are essential to well-being, are at stake.

However, currently the SUFA offers nothing to those whose ability to feed and clothe themselves and to keep a roof over their heads is threatened by a provincial government’s policies. A provincial government committed to dismantling social programs and protections can ignore with impunity those who are directly harmed, as they have little political power or influence. And, in these circumstances, there is no tangible social union, or no effective mechanisms through which to give it reality. The most disadvantaged people can be left alone with a hostile provincial government, with no other place to turn.

The Right to Participate: Section 15 and Section 7 Implications

Article 25 of the *International Covenant on Civil and Political Rights* states that:

Every citizen shall have the right and the opportunity, without...unreasonable restrictions:

- a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
- b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors....

Section 3 of the SUFA contemplates a means of fulfilling the right to “take part” in the conduct of public affairs, moving beyond the matters of voting and standing for office.

However, the value of equality requires us to question who will actually take part, and with what weight, in non-electoral processes that will guide the development of social policy.

If disadvantaged groups cannot participate, with equal political weight, in these processes, the likelihood of improving the social union as it has to do with their material conditions is minimal. Participation in political decision-making processes is integrally linked to the achievement of material and social equality for those who do not currently enjoy it.²¹

The connection between the right to participate and the social and economic advancement of disadvantaged groups has been recognized by both courts and governments.

In *Native Women's Association of Canada v. Canada* the Supreme Court stated that:

...issues of expression may on occasion be strongly linked to issues of equality. In *Schachter v. Canada*, [1992] 2 S.C.R. 679, the Court said that s. 15 of the Charter is indeed a hybrid of positive and negative protection, and that a government may be required to take positive steps to ensure the equality of people or groups who come within the scope of s. 15. It might well be that, in the context of a particular equality claim, those positive steps may involve the provision of means of expression to certain groups or individuals.²²

In 1995 more than 170 governments worldwide adopted *The Report of the Fourth World Conference on Women: Platform for Action* which states that women's participation in decision-making is necessary to the achievement of equality for women.

Women's equal participation in decision-making is not only a demand for simple justice or democracy but can also be seen as a necessary condition for women's interests to be taken into account. Without the active participation of women and the incorporation of women's perspective at all levels of decision-making, the goals of equality, development and peace cannot be achieved.²³

Ensuring that disadvantaged groups can participate as equals means more than simply declaring that they have the right to do so. It requires creating the conditions that permit participation on a footing of equality.

This point is eloquently made by British scholar, Anne Phillips in her book *Which Equalities Matter?*²⁴ She explains that the political equality of all citizens cannot be achieved simply by proclaiming that citizens who are otherwise unequal - socially and economically - are, for political purposes, equal. True political equality cannot be created by mere assertion. Rather, democracies have to establish certain conditions which make it possible for every citizen to participate and be heard as a person of equal worth and influence.²⁵

Recognizing this leads to the conclusion that section 3 SUFA mechanisms must be designed and operated in such a way as 1) to foster participation as equals by those who are most disadvantaged, and 2) to support the purpose of eliminating the material inequality of the most disadvantaged Canadians. Otherwise, these mechanisms will simply perpetuate the status quo of inequality; and they will not be fora in which social programs that will support the well-being of all members of society can be designed or reviewed.

Recommendations

Effective mechanisms for Canadians to participate in developing social priorities and reviewing outcomes need to meet certain criteria:

- **mechanisms must be permanent, stable, inclusive, and transparent.** Ad hoc, one-time-only consultation processes with government-selected participants cannot fulfill the goal of improving the social union, or enhancing the participation of Canadians in the development and maintenance of effective social programs.
- **mechanisms should involve legislators.** Each government member of SUFA should establish a legislative committee on the social union with a mandate to examine proposals and outcomes.²⁶ This would enhance transparency, and break SUFA out of the executive federalism box.
- **some mechanisms must be intergovernmental ones.** Section 3 states that “each government... agrees to ...”ensure effective mechanisms...” This suggests that the mechanisms contemplated will operate within each jurisdiction, and will confine citizens to interacting with their provincial government only, or with the federal government only. Such mechanisms will not permit citizens to interact with all levels of government about the design, implementation and impacts of agreements that are intergovernmental. Citizens are not permitted to be involved in the “union” element of the social union if they are understood to have nothing to say about the relationships among governments and about the priorities and outcomes of social programs and services for the union as a whole.
- **mechanisms must include a forum for complaints.** Section 3 contemplates this, as it states that governments have agreed that there should be appropriate mechanisms “for citizens to ...bring complaints about access and service.” Again, it appears that this mechanism is envisioned as operating inside each jurisdiction with no reference to other governments, even though the actions of other governments may be relevant to the cause of the complaint. In our view, while provincial and territorial mechanisms that can deal with individual complaints are essential to natural justice, there should also be an intergovernmental mechanism that can deal with petitions from individuals or groups regarding systemic problems with respect to access and services. Individuals or groups should be able to bring forward complaints alleging that they do not benefit equally from particular programs or services,²⁷ that the levels of benefits or services are inadequate, or that there is an absence of benefits and services that causes or deepens the social and economic disadvantage of particular groups of Canadians.²⁸ An independent expert body should be authorized to consider whether there has been a failure to meet undertakings or standards, and recommend measures to governments that should be taken to remedy identified failures.

An essential feature of this model is that citizens could initiate review of a social program or service.

- **mechanisms must ensure participation by members of disadvantaged groups and their organizations.** As Barbara Cameron pointed out in a recent *Globe and Mail* opinion piece, the *status quo* is that consultative processes with governments are dominated by well-funded, elite organizations. While in the past, Canadian governments provided funding to organizations that represent the disadvantaged sector of the society, precisely in order to offset the political influence of the powerful and to broaden democratic participation, in more recent times this funding has dried up or to the extent that there are funds for such organizations “government budgeting ...treats [them] as contractors providing services (such as research or social welfare services) for the government.”²⁹

To take seriously the recognition underlying democracy, that all persons have equal worth, and to permit the voices of the politically marginalized to be heard, governments must provide funds to organizations that represent women, low income people, people with disabilities, people of colour, Aboriginal people, single mothers, and others in order to support their right to participate.

Other Recommendations

Canadian governments should agree to expand the mandate of the Court Challenges Program and to provide additional funds to the Program. What governments do under the SUFA must comply with the *Charter*. This submission is principally concerned with governments’ responsibilities as legislators and administrators to give concrete reality to those rights through the provision of social programs and social protections, and to provide mechanisms for democratic participation in the decision-making about them. However, Canadians should be able, when they believe that governments have erred or failed, to challenge a government law or practice by exercising their constitutional rights. This is part of what is required to sustain and improve the social union.

The Court Challenges Program has been invaluable in providing individuals and groups access to modest funds to bring test cases to challenge the constitutionality of federal laws and policies. But the laws and policies that are of most immediate moment for people who are disadvantaged are provincial ones that determine their access to social benefits and supports. Here the Court Challenges Program cannot help them, because it is restricted to providing test case funds to challenges of federal laws and programs. Consequently, they have, in effect, no access to the exercise of their rights.

To improve the social union, Canadian governments should agree to the expansion of the mandate of the Court Challenges Program so that the most vulnerable and politically marginalized groups can exercise their constitutional rights, as they apply to social programs and social services, when and if they need to.

Part III: The Section 7 Review

With respect to citizen engagement, the current review of the SUFA has been entirely inadequate. The review has consisted of a call for written submissions, three roundtables, and a website where some papers and submissions are posted.

The timeline for written submissions was too tight. Many non-profit organizations cannot prepare briefs and obtain Board and membership approval within a six week time period.

The three roundtables were convened hastily, with participants hand-picked by governments. At the Western Roundtable, there were five organizations from British Columbia represented: the B.C. Progress Board, the Fraser Institute, The Poverty and Human Rights Project, the Social Planning and Research Council, and the Canadian Women's Health Network (B.C. region). There were no B.C. grassroots organizations representing women, Aboriginal people, people with disabilities, seniors, single mothers, newcomers, or people with low incomes. Some B.C. community organizations wrote to the Co-Chairs of the Ministerial Council on Social Policy Renewal, the Honourable Jane Stewart and the Honourable Peter Christie, asking for a second roundtable in which they could participate. To date, they have received no answer.

There has been no apparent involvement of legislators in this review.

Conclusion

The SUFA holds out a promise to Canadians. It recognizes that as Canadians we have shared concerns and responsibilities for each other's well-being. SUFA in its opening paragraph states that the fundamental values of Canadians include "mutual aid and respect for our responsibilities for one another." All levels of government, and all citizens, as taxpayers and as members of a common body politic, are responsible for the well-being of all Canadian residents. A clear purpose of the SUFA is to provide a vehicle that improves our ability to discharge our shared responsibilities for social well-being, both within and across jurisdictional lines.

However, in this first period of the SUFA's life, governments have failed to set standards that Canadians can rely on, and that reflect Canada's rights undertakings. Governments have also failed to establish effective mechanisms for citizen engagement with governments so that they can participate in the improvement of the social union. This is a time when Canadians need the social union more than ever, and need governments to give it tangible reality.

Significant work needs to be done now if the SUFA is to fulfill its promise.

Endnotes

- 1 By using the term “citizen” in this submission we do not intend to make a distinction between those who are legally citizens of Canada and those who are landed immigrants, refugee claimants, or migrant workers. We have used the word “citizen” to evoke a notion of both social belonging and democratic entitlement. We refer to those who are affected by Canadian social policy, and by the effectiveness of Canadian democratic institutions and processes, and who are holders of legitimate expectations about their social inclusion.
- 2 GA Res. 220A (XXI), 21 UN GAOR, (Supp. No. 16), UN Doc., A/6316 (1966), 993 U.N.T.S. 3, Can. T.S. 1976 No. 46 [hereinafter ICESCR].
- 3 *Constitution Act*, 1982, s. 36 (1) (c).
- 4 *Slaight Communications v. Davidson*, [1989] 1 S.C.R. 1038; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at 860-862; *R. v. Ewanchuk*, [1999] 1 S.C.R. 330 per LHeureux-Dube J. at 365; *United States v. Burns*, [2001] 1 S.C.R. 283.
- 5 CESCR, *Summary Record of the 5th Meeting: Canada*, UN Doc. E/C.12/1993/SR.5, 25 May 1993 at para. 21.
- 6 *Slaight*, *supra* note 5..
- 7 *Irwin Toy v. A.-G. Quebec*, [1989] 1 S.C.R. 927.
- 8 Government of Canada, *Responses to the Supplementary Questions to Canada’s Third Report on the International Covenant on Economic, Social and Cultural Rights*, UN Doc. HR/CESCR/NONE/98/8/, (October 1998) at 33.
- 9 A fuller discussion of the jurisprudence on *Charter* rights to equality and security of the person, as well as Canada’s international human rights obligations can be found in Gwen Brodsky and Shelagh Day, “Beyond the Social and Economic Rights Debate: Substantive Equality Speaks to Poverty, “ in *Canadian Journal of Women and the Law, Women and Poverty: The Challenge for Social and Economic Rights*, Volume 14, No. 1, 2002 at 185.
- 10 Human right legislation prohibits discrimination in employment, the provision of public services, and housing. Québec’s human rights legislation also includes explicit social and economic rights protections similar to those contained in the ICESCR.
- 11 *Finlay v. Canada (Minister of Finance)* [1986] 2 S.C.R. 607.
- 12 Roger Gibbins, “Shifting Sands: Exploring the Political Foundations of SUFA”, *Policy Matters*, Volume 2, no. 3, July 2001 at 6.
- 13 For a discussion of the federal spending power, and the authority of the federal government to attach conditions to monies that it transfers to the provinces to spend on matters that are within provincial jurisdiction, see Peter Hogg, *Constitutional Law of Canada*, 4th ed. (loose leaf), Volume 1 (Scarborough: Carswell, 1997) at 6.8(a).
- 14 For a summary of the cuts see Caledon Institute of Social Policy, *A New Era in British Columbia: A Profile of Budget Cuts across Social Programs*, (Ottawa: Caledon Institute, 2002).
- 15 National Council of Welfare, *Submission to the Social Union Framework Agreement Review*, (Ottawa, 2002).
- 16 See for example Linda Trimble, “Federalism, the Feminization of Poverty and the Constitution”, *Conversations Among Friends: Women and Constitutional Reform*, ed. David Schneiderman, (Edmonton, Centre for Constitutional Studies, 1992) at 87.
- 17 Susan Phillips, “SUFA and Citizen Engagement: Fake or Genuine Masterpiece?”, *Policy Matters*, Vol. 2, no. 7, December 2001 at 10.
- 18 *Ibid.*
- 19 *Ibid.* at 11.
- 20 *Ibid.*

- 21 Another example of the right to participate being considered a part of, and essential to the achievement of, a substantive right can be found in *General Comment 4: The Right to Adequate Housing* adopted by the United Nations Committee on Economic, Social and Cultural Rights, December 13, 1991, contained in document E/1992/23. In that Comment at paragraph 9 the Committee states:
- the right to adequate housing cannot be viewed in isolation from other human rights contained in the two International Covenants and other applicable international instruments. Reference has already been made in this regard to the concept of human dignity and the principle of non-discrimination. In addition, the full enjoyment of other rights – such as the right to freedom of expression, the right to freedom of association (such as for tenants and other community-based groups), the right to freedom of residence and the right to participate in public decision-making – is indispensable if the right to adequate housing is to be realized and maintained by all groups in society.
- 22 *Native Women's Assn. of Canada v. Canada*, [1994] 3 S.C.R. 627 at 655.
- 23 United Nations, *Report of the Fourth World Conference on Women A/CONF.177/20*, 17 October 1995 at para 181.
- 24 Anne Phillips, *Which Equalities Matter?* (Cambridge, Polity Press, 1999).
- 25 *Ibid.* at 129-130.
- 26 Harvey Lazar, "The Social Union Framework Agreement and the Future of Fiscal Federalism" in *Canada: The State of the Federation 1999/2000*, ed. Harvey Lazar (Montreal and Kingston: McGill-Queen's University Press, 2000) at 109.
- 27 In *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624. the Supreme Court of Canada found that deaf people did not benefit equally from medical services they were not provided with interpreter services so that they could interact with medical personnel, as they needed.
- 28 Mechanisms for undertaking systemic reviews of the implementation of social rights were proposed in the 1992 *Draft Social Charter*, as well as by scholars and commentators in other contexts. The *Draft Social Charter* proposed two mechanisms: 1) a Social Rights Council to evaluate the extent to which federal and provincial law and practice are in compliance with specified rights; and 2) a Social Rights Tribunal, which would be an independent expert body, authorized to receive petitions from individuals and groups alleging infringements of specified rights. See Joel Bakan and David Schneiderman, *Social Justice and the Constitution* (Ottawa: Carleton University Press, 1992) at 155.
- 29 Barbara Cameron, "It's not enough, Mr. Martin", *The Globe and Mail*, October 24, 2002 at A19.