

Social and Economic Rights and the Charter of Rights and Freedoms
(A Statement to the Special Committee of the Legislature on Ontario
in Confederation)

-- Rob Robertson

August 1991



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I want to thank the committee for its invitation to be here today. Although I've been invited to address all of the questions under the heading of "The Charter of Rights", my own area of study has been on the issue of social and economic rights, and therefore I think I might be most helpful to the committee if I were to spend my time on those questions which deal specifically with that issue; they are the seventh through eleventh questions in the list. I should also say that as the right to food has been my principal area of interest and the one I have written on, I will refer to the concepts underlying that right to illustrate my presentation.

The first question asks whether economic and social rights should have constitutional standing. My answer is "Yes" because they are of equal value to civil and political rights which do have constitutional standing. They are equal within the international human rights system, and Canada is a party to international agreements which treat these two sets of rights as being equal. Neither set of rights on its own, guarantees the full development of one's personality and character. A person who is well fed and well housed, but lacks civil and political rights, is only half a person, and someone whose physical and intellectual capacity is diminished by the absence of the basic necessities of life cannot play a full role in the civil and political life of the society.

I don't think there will be much argument that the two sets of rights deal with issues of equal importance. I think where the argument arises with economic and social rights is whether it is

feasible and desirable to treat them as legal rights as opposed to policy goals. I think there are at least four good reasons why it is desirable. First, the rights have never been fully achieved in the absence of laws which do establish them as constitutional rights available to individual citizens. This argument is simple. We have one hundred and twenty four years of history as a nation. At no time have all of our citizens enjoyed economic and social security. At times many of them have been desperately deprived of it, and at the present time in the area of the availability of food for example, things seem to be getting worse. If one believes that individuals who through no fault of their own lack the basic necessities of life, should have the right to such necessities, they must have the legal means to assert such a right. Social policies alone have offered no continuing guarantees to the deprived.

The second reason to treat economic and social rights as constitutional rights is that it establishes them as priorities for the society, and as a valid expression of our deepest values. Human rights are about priority setting. They express the values of the society which act as the touchstones for its governance. I believe that societies should establish for themselves fundamental principles, the observance of which the society believes will lead to the best possible country, principles which are not subject to political or bureaucratic alteration. That being said, what could be of more value to us than the idea that a child should be well-fed, or that a disabled person should be

well-housed. If we believe that such ideas stand at the heart of our collective value system, then they should be treated as such by embodying them in the country's most important statement of principle, the constitution.

The third reason why such rights should be in the constitution is that international law would seem to require more from us than we are now doing. In the food area for example, there are over one hundred documents relevant to the right to food, and Canada has signed many of them. The most important document is the International Covenant on Economic, Social and Cultural Rights, which says in Article eleven that everyone has the right to an adequate standard of living, including adequate food, shelter and clothing. The Covenant also makes clear that states are obliged to bring to bear their maximum available resources to ensure the establishment of such rights. The wording of this Covenant, which Canada has never transformed into domestic law, points up three serious deficiencies in our country. First it is everyone who has economic and social rights. The fact that the people of this country may be generally well fed, clothed and housed is not the most important thing. The important thing is whether everyone is. We are speaking of individual human rights, and at the present time individuals do not have a constitutional mechanism to claim such rights. Second, it is government that is responsible for achieving the rights. Individuals have a right to make their claim against government. In international law private charity is not an acceptable substitute for the devoting of public resources to

feeding, clothing or housing people. And third, the state must devote its maximum available resources. There's no expectation that desperately poor third world countries can immediately establish economic and social rights. There is an expectation that issues such as food, shelter, clothing, health and education will have a priority claim on public resources, as against those uses of public funds which do not represent the fulfilling of a human right. To fully live up to our international commitments, I believe we must establish these rights as fundamental law.

And the fourth reason why such rights should be in the constitution is that establishing them as constitutional rights in Canada could have a positive effect in promoting human development in other countries and on the international human rights system. Activists and lawyers working in the human rights field know the immense value of the internationalization of civil and political rights. The international law is cited in domestic courts, it is used as a standard in denouncing such evils as torture and political imprisonment in rights-abusing countries, and developing countries look to the experience of other countries with long histories in the civil and political rights field in forming their laws to protect such rights. But economic and social rights, as important as they are, have never taken off as legal concepts designed to govern the actions of states domestically and internationally. For a respected country like Canada to recognize them in its constitution would provide a jolt of energy to such rights achieving their proper international recognition. Rights are

dynamic---their acceptance in one country speeds their acceptance and the benefits they bring in other countries. The Covenant says that countries should move toward establishing economic, social and cultural rights internationally as well as domestically. I believe that for Canada to give them constitutional recognition is one indirect way to promote them internationally.

The next question you've asked is what rights should be incorporated into the Charter. I obviously believe that rights relating to an adequate standard of living should be there, and I think that every day, as the line-ups at food banks grow longer, the Canadian people are increasingly prepared to acknowledge that we cannot go on this way. There would be a great deal of sympathy for the proposition that there should be established the right to an adequate standard of living. Beyond that I think that anything which is essential to the full physical and intellectual development of a person is a matter for constitutional recognition. My hope would be that Ontario, in setting out the rights it thinks should be in a Charter; would give priority to those rights to which Canada has committed itself internationally, and indeed that the wording in the Charter would reflect the international wording as closely as possible, so that Canadian judges could have access to some of the splendid international scholarship in order to assist them in elaborating the principles in Canadian law.

The next question is what limitations should apply to these rights. I have already hinted at my answer with respect to the rights

required to ensure an adequate standard of living. Our international obligation is to apply the maximum available resources. Therefore, the only limitation I would place on the rights is that a court may find that the resources do not exist. Despite our current fiscal problems, if absolute priority is assigned to fulfilling basic economic and social rights, I find it hard to believe that we would not have the resources to do the job.

The next question is how should such rights be enforced. I cannot deny the immense intellectual challenges facing those charged with the responsibility of determining how such rights would be enforced. I must also say that time simply would not permit me to fully explore this question, and also I make no claim to have thought through all of the implications. I certainly believe that these rights must have enforcement mechanisms as strong and accessible as those now available to people whose civil and political rights have been abused. For the enlightenment of the committee, I might simply go over what are perceived as the duties of the state in implementing the right to food, to illustrate the kinds of enforcement mechanisms which might be required. I take this list of duties from the private scholarship in the area and from United Nations reports. States have three duties: To respect the right to food, to protect the right and food and to fulfil the right to food. The first obligation, to respect the right to food, means that states should not interfere in cases where individuals or groups can take care of their own needs. For example, this would be an argument against the expropriation of food-yielding

land for non-food purposes, if people were truly dependent on that land for their nourishment. Another example where the right could be asserted would be the case of the Innu of Labrador who are fighting low-altitude NATO flights over their territory because they claim that it adversely effects the game upon which they are dependent. I think that respecting the right to food fits in very nicely with the present Charter purpose of stopping government action which is unconstitutional. The second obligation, protecting the right to food, means that states must counteract or prevent activities by others which negatively effect food security. For example, the pollution by industry of streams upon which aboriginal people depend for fish would be a case where the courts would have to mandate government to take preventive action. The third obligation, to fulfil the right to food requires the state to provide the food or the means to get it. To enforce this obligation, the courts might very well be required to examine levels of social assistance and make judgements as to their adequacy. This is how I see the right to food being enforced. Obviously it means greater judicial powers.

The final question relates to the experience of other states. There are numerous communist states and developing countries which have constitutional provisions on economic and social rights. Perhaps of greater relevance to this exercise however is the law of other Western countries. The right to health is established in the constitutions of Italy, Spain and Greece, the right to shelter is in the Greek and Spanish constitutions, and the right to social

security is in the Dutch and Spanish constitutions. Regrettably, the library resources at my disposal in Ottawa did not contain any material on how these provisions have worked in practice. One other example where there is some literature is the Irish constitution, which has a provision called "Directive Principles of Social Policy" which are stated as being for the general guidance of parliament and not cognizable by a court. However the courts have said that they will have regard to these principles as a guide to interpreting the content of other constitutional provisions. Finally of course we should not forget the fact that our present Charter itself may have economic and social rights in it. The Supreme Court of Canada has explicitly left open the possibility that the "security of the person" provisions in section 7 may encompass rights related to the basic necessities of life. The Supreme Court of British Columbia has only recently held that persons receiving social assistance constitute a group which may be protected under the section 15 equality rights provision of the Charter. Nevertheless, because the Charter is now an instrument designed essentially to prevent governmental action, it is highly unlikely that in its present form it could ever lead to the fulfilling of economic and social rights.

Obviously time restraints have required me to deal with many of these complicated issues in a cursory way. I would be most happy to try to expand on them if the committee wishes. I will also leave with you this more detailed study which I wrote on the right to food in Canada, to which some members of the committee and its

staff may wish to make further reference. Thank you very much.