

Economic Recession: Hazardous to Your Rights?

**The Honourable Noël A. Kinsella
Speaker of the Senate of Canada**

**Presented at:
GLOBUS Summer Institute, June 4th, 2009
Menno Simons College, University of Winnipeg**

I. Introduction

As is true of many western countries, Canada's first foray into legislated programs to support the incomes and well-being of large groups of Canadians came with the Great Depression of the 1930s, and the decades that followed. Similarly, while human rights have a history that is centuries old, the more modern roots of human rights in general, and social and economic rights in particular, had their genesis in that same major international financial crisis. As noted by the Special Rapporteur for the UN on the right to education,

It is at a time of economic crisis that human rights guarantees become crucial, precisely when they are under the greatest strain. The association between the Great Depression and the subsequent affirmation of economic and social rights in the *Universal Declaration of Human Rights* is well known and worth recalling at this juncture.”¹

It was the “Great Depression”, and the Second World War that ended it which gave rise to the United Nations, along with its Universal Declaration of Human Rights² and the Covenants that were subsequently created almost 20 years later, in 1966. This paper addresses the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) in particular, ratified by Canada in 1976.

Before considering how Canada has responded both in terms of rights and the provision of economic and social supports, it may be helpful to review the human rights instruments themselves and their development.

II. Human Rights

1. International instruments for human rights

Article 1 of the *Universal Declaration of Human Rights* asserts that “all human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.”³ As it states in the preamble, the *Universal Declaration* is meant to serve as “a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this *Declaration* constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms.”⁴

The adoption of the *Universal Declaration of Human Rights* on December 10th, 1948, was a historic achievement and for 60 years this document has stood as the key expression of the world's commitment to human rights.

¹ Katarina Tomaševski, “Economic, Social and Cultural Rights: Annual report of the Special Rapporteur on the right to education,” United Nations Commission on Human Rights, 7 January 2002, p. 26. Accessed from <http://graduateinstitute.ch/faculty/clapham/hrdoc/docs/education2002report.pdf> 24 April 2009.

² Universal Declaration of Human Rights, GA Res. 217(III), UN GAOR, 3d Sess., Supp. No.13 UN Doc. A/810 (1948), online: <http://www.ohchr.org/EN/UDHR/Pages/Language.aspx?LangID=eng>

³ Ibid.

⁴ Ibid.

If the Declaration is the articulation of basic human rights, the Covenants that followed each articulated a subset of these rights: civil and political rights in one covenant, and social, economic and cultural rights in the other. While neither was given a higher priority by the United Nations, and Canada ratified both Covenants in 1976, after securing the agreement of provincial governments, the recognition in the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) that compliance would be proportional to resources, while civil and political rights were to be protected regardless of financial resources, creates a distinction that has effectively resulted in a second-place status for social and economic rights, not only in Canada, but when considered by legal scholars internationally.⁵

The *International Covenant on Economic, Social and Cultural Rights* provides so-called second generation rights such as rights to health care, labour rights, and rights to education. It has been argued that, unlike most civil and political rights, second generation rights are programmatic in nature. However, it should be recognized that the implementation of civil and political rights are not without government programming and expense. The conduct of elections, for example, and the existence and ample funding of a court and broader justice system are not without fiscal and programmatic requirements.

Nonetheless, it is argued that social and economic rights require the government of the state party to act and, among other things, create and enforce labour laws, build hospitals/schools, and employ doctors/teachers. Others have argued that there is no built-in requirement for government to create expansive and expensive programs; rather, there is an argument that governments must ensure that all citizens have access to basic services, whether they are provided publicly or by the private or non-profit sector.⁶

2. Canadian instruments for human rights

Even though Canadians enjoyed many of the rights contained in the *International Covenant on Economic, Social and Cultural Rights* by the time it opened for signatures in 1966, it still took a little over a decade before Canada was able to formally ratify the document in May of 1976. Because the *Covenant* states in Article 28, that “The provisions of the present *Covenant* shall extend to all parts of federal States without any limitations or exceptions,”⁷ agreement of all provincial and territorial governments was required as matters falling within their jurisdiction were involved. After all, the provision of human rights in the form of civil liberties and the responsibility for local labour laws and many of the social programs fall clearly within the areas of responsibility of provincial governments as outlined in *Section 92* of the *Constitution*. It has also been Canadian practice since the ratification of the *International Labour Organization* (ILO) conventions that where an international treaty affects provincial areas of jurisdiction the consent of the provinces will be obtained before accession.

⁵ Ontario Human Rights Commission, “Human Right Commissions and Social and Economic Rights,” Research paper, p. 3.

⁶ Brian Orend, “Justifying Socioeconomic Rights,” in Rhoda E. Howard-Hassman and Claude E. Welch, Jr., (editors), *Economic Rights in Canada and the United States*, 2006, p. 34/

⁷ *Ibid.* Article 28

Canada ratified the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights* in 1976, with the written support and agreement of all provinces. This ratification means that, as a State Party to the *Covenant*, Canada agreed to take steps to the maximum of its available resources to progressively realize the economic, social and cultural rights recognized in the *Covenant*. Canada also ratified the Optional Protocol to the *International Covenant on Civil and Political Rights*. This allows individuals to complain to the Human Rights Committee of the United Nations if they feel that their rights under the *Covenant* have been violated.

In addition, Canada has signed and ratified a number of other international human rights instruments over the years, including those dealing with discrimination against women, racial discrimination, the rights of the child, and torture.

The influence of the *Universal Declaration of Human Rights* and the *International Bill of Rights* was an important factor in the creation of the *Canadian Charter of Rights and Freedoms*, which became part of our Constitution in 1982. The *Charter* guarantees a number of fundamental freedoms, including democratic rights, mobility rights, legal rights, equality rights, and language rights. In the words of section 2 of the *Canadian Charter of Rights and Freedoms*, “Everyone has the following fundamental freedoms: (a) freedom of conscience and religion; (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication; (c) freedom of peaceful assembly; and (d) freedom of association.”

There are several features of the *Charter* which make it a unique bill of rights. First, all the rights in the *Charter*, except for three, are guaranteed to everyone in Canada and not just citizens. The rights that are exclusively guaranteed to citizens of Canada are: the democratic rights in section 3, the right to leave Canada and return in section 6, and the minority language educational rights contained in section 23.

Earlier, in 1977, Parliament passed the *Canadian Human Rights Act*. It protects anyone living in Canada against discrimination in or by federal government departments and federally regulated industries such as banks, airlines, and television and radio stations. It also created the Canadian Human Rights Commission to investigate and try to settle complaints of discrimination in employment and in the provision of services within federal jurisdiction.

Provinces and territories have similar laws forbidding discrimination in their own jurisdictions. The New Brunswick Human Rights Commission investigates and tries to settle complaints about alleged violations of the provincial *Human Rights Act*. That *Act* also prohibits certain types of discrimination in areas such as: the leasing and sale of premises; public accommodations, services or facilities; and labour unions and professional, business or trade associations.

III. Social and Economic Rights in Hard Economic Times

1. The International Context

During a time of international economic recession, it is important to have concrete programmes which promote social cohesion. Standards that cannot be compromised include

economic and social rights, several of which are listed in the 1948 *Universal Declaration of Human Rights*. On February 20th, 2009, at the United Nations office in Geneva, the Human Rights Council opened its tenth Special Session to consider the impact of the global economic and financial crisis on the universal realization and effective enjoyment of human rights.

Marius Grinius, Canada's Permanent Representative and Ambassador Extraordinary and Plenipotentiary to the Office of the United Nations and to the United Nations Conference on Disarmament, stated that Canada “remained deeply concerned about the effects of the global financial crisis and the subsequent economic downturn”⁸. He emphasized Canada’s position that, while the current situation posed challenges for all States, respect for human rights did not depend on the economy. States are not relieved of their obligations to respect civil and political rights in times of economic recession. It is the primary responsibility of States to promote and protect the human rights of individuals under their jurisdiction. An effective immediate response from the Human Rights Council on the economic and financial crisis is therefore vital and must emphasize this primary national responsibility, which must be supported by an enabling international environment. Mr. Grinius added that the obligation to ensure economic, social and cultural rights already took into account the availability of resources. States have an added responsibility in economic downturns to make renewed efforts to respect the rights of the most vulnerable. States must not use the current economic situation as an excuse not to meet their international human rights obligations.⁹ Instead, they must use it as a reason to increase efforts to meet their international human rights obligations.

During the same session of the Human Rights Council, Ms. Navanethem Pillay, United Nations High Commissioner for Human Rights, raised her concern that efforts to improve human rights might be compromised during the global economic crisis and that there might be a disproportionate impact on those groups in society who are most vulnerable and already marginalised. During the course of her opening remarks, she said:

[Economic crises] undermine access to work, affordability of food and housing, as well as of water, basic health care and education. States must ensure that domestic policy adjustments, particularly those in fiscal spending, are not taken at the expense of the poor through cutbacks in basic services and social protection mechanisms. Programmes and institutions necessary to respect, protect and fulfil all human rights should also be preserved and endowed with adequate resources.¹⁰

⁸ United Nations Office at Geneva, “Human Rights Council Opens Special Session on the Impact of the Global Economic and Financial Crises on Human Rights,” 20 February 2009. Accessed from [http://www.unog.ch/80256EDD006B9C2E/\(httpNewsByYear_en\)/DCC777895C507A0AC1257562004D241D?OpenDocument](http://www.unog.ch/80256EDD006B9C2E/(httpNewsByYear_en)/DCC777895C507A0AC1257562004D241D?OpenDocument) 24 April 2009.

⁹ United Nations Office at Geneva, “Human Rights Council Opens Special Session on the Impact of the Global Economic and Financial Crises on Human Rights,” 20 February 2009. Accessed from [http://www.unog.ch/80256EDD006B9C2E/\(httpNewsByYear_en\)/DCC777895C507A0AC1257562004D241D?OpenDocument](http://www.unog.ch/80256EDD006B9C2E/(httpNewsByYear_en)/DCC777895C507A0AC1257562004D241D?OpenDocument) 24 April 2009.

¹⁰ Navanethem Pillay, “Statement,” Human Rights Council Tenth Special Session: “The impact of the Global Economic and Financial Crises on the Universal Realization and Effective Enjoyment of Human Rights”, 20 February 2009. Accessed from <http://www.unhchr.ch/hurricane/hurricane.nsf/0/A7A2CA2316182115C12575630035ED9F?opendocument> 24 April 2009.

Ms. Pillay suggested that an immediate and necessary response to the current crisis would include “a thorough review of the functioning of the international financial and monetary mechanisms”¹¹ but stressed that a human rights approach would “contribute to making solutions more durable in the medium and long run.”¹² By reviewing the effects of the recession through the prism of the protection and guarantee of human rights, one can target specific needs and come to the realization that those who are affected the most include women and children, migrants, refugees, indigenous peoples, minorities and persons with disabilities. As Ms. Pillay said,

A human rights framework offers the appropriate context, legal rationale and ground to guide policies and programmes countering the negative effects of the financial crisis at the national, regional and international levels. Indeed, States are not relieved of their human rights obligations in times of crisis. Rather, measures to protect not only the economic and social rights but also the civil and political rights of those groups and individuals most adversely affected and marginalized by the crises must be put in place as matters of both urgency and priority.¹³

According to the Child Rights Information Network, a 1984 UNICEF study found that during the world recession of the early 1980s children of the poorest people suffered most from recession. It said the impact was detected in many areas of child welfare and expressed concern that efforts to lower the infant mortality rate were impeded by cutbacks in social expenditures. For example, real spending in Chile for social programs in 1982 was said to be less than it was in 1974.¹⁴

Moreover, increased unemployment during an economic recession places a heavier burden on state budgets and leaves less room for social assistance programs and social spending as these needs arise. The consequent decrease of social programs may lead to social unrest and risks the spread of intolerance, with minority groups and migrants susceptible to becoming targets.¹⁵

Starting from the premise that all human rights are equally important, ensuring that economic and social rights are implemented according to the *International Covenant on Economic, Social and Cultural Rights* is crucial, especially during a recession. As Thomas Hammerberg, the Commissioner of Human Rights for the Council of Europe, noted in November

¹¹ *Ibid.*

¹² *Ibid.*

¹³ Navanethem Pillay, “Statement,” Human Rights Council Tenth Special Session: “The impact of the Global Economic and Financial Crises on the Universal Realization and Effective Enjoyment of Human Rights”, 20 February 2009. Accessed from <http://www.unhchr.ch/hurricane/hurricane.nsf/0/A7A2CA2316182115C12575630035ED9F?opendocument> 24 April 2009.

¹⁴ Child Rights Information Network, “SPECIAL CRINMAIL: The financial crisis and child rights,” 20 November 2008. Accessed from <http://www.crin.org/resources/infoDetail.asp?ID=19021> 24 April 2009.

¹⁵ Thomas Hammerberg, ““In times of economic crisis it is particularly essential to ensure the protection of social rights,” Viewpoint, Office of the Commissioner of Human Rights, Council of Europe, 17 November 2008. Accessed from http://www.coe.int/t/commissioner/Viewpoints/081117_en.asp.

2008, “the fact that the implementation of economic and social rights could be controversial is no rational basis for treating these rights as less important or as radically different from others. They deal with some of the most critical issues on today's political agenda: the right to a job and acceptable working conditions, the right to go to school and have a meaningful education, the right to protection and care in situations of crisis.”¹⁶

2. The Canadian Context

Today, Canada is facing difficult economic circumstances due to a global recession that began beyond our borders. Although nothing like the Great Depression of the 1930s, the impact has been severe in many sectors and in most countries. While our nation has weathered the recession better than most, Canadians have seen and experienced problems associated with this slowdown. In particular, while encouraging signs of recovery are beginning to emerge, Canada has experienced significant job losses. In many western nations, second generation human rights are clearly threatened on an individual and a collective basis, with whole or parts of communities struggling just to survive. How should governments, especially those obligated by the international covenant and domestic law to meet social and economic needs, be responding?

If we turn back the pages of history, we find that the Great Depression saw a disproportionately large impact on farmers, as the agricultural sector was severely damaged both by natural devastation through drought, and by a failure of financial institutions to respond in a way which would allow farmers to sustain their incomes and farms. At that time, the Government of Canada, through its Agriculture department, stepped in with both social insurance and income support programs that have been refined over the years, but support for risk management and income fluctuations continues to this day¹⁷. This seems to fit within the words of Nobel-Prize winning economist Dr. Milton Friedman, who once said “nothing is so permanent as a temporary government program.”

Between the Depression of the 1930s and today's financial crisis, Canada put in place many programs that protect the social and economic rights of Canadians, whether by coincidence or design. As with programs for veterans put in place as early as World War I, the federal government sought to cushion economic blows facing particular groups. In the 1930s, Canada sought to implement legislation to bring it into compliance with international labour standards; in 1937 the Judicial Committee of the Privy Council was asked whether unemployment insurance could be a federal program, and it determined that the program fell within provincial jurisdiction under the heading of property and civil rights¹⁸. Since then, more steps have been taken using the federal spending power in cooperation with provincial governments that have resulted in programs that have served as shock absorbers to cushion blows from economic change and the business cycle.

¹⁶ Thomas Hammerberg, ““In times of economic crisis it is particularly essential to ensure the protection of social rights,” Viewpoint, Office of the Commissioner of Human Rights, Council of Europe, 17 November 2008. Accessed from http://www.coe.int/t/commissioner/Viewpoints/081117_en.asp.

¹⁷ For a sample of such programs, see lists of such services provided on Agriculture and Agri-Food Canada's website, at <http://www4.agr.gc.ca/AAFC-AAC/display-afficher.do?id=1204137480722&lang=eng#a>

¹⁸ Hamish Telford, “The Spending Power Revisited: Can Open Federalism Bridge the Divide between Quebec and the Rest of Canada,?” *IRPP Policy Matters*, Institute for Research on Public Policy, September 2008, p. 48.

Statistics Canada and Finance Canada data show that, historically over the last several decades, social spending has risen during economic recessions, as more people have relied on social assistance and services, as well as Unemployment Insurance, to get through the rough times. In fact, the major federal program that contributed to income security and social services for Canadians – the Canada Assistance Plan – shared the costs of provincial spending in these areas, without a ceiling, as long as the spending met some federal conditions. Notable among them were that programs could not be conditional on participation in any training or employment programs and that the levels of income assistance had to be sufficient to meet basic needs of recipients. For some, this legislation was the most significant instrument, one which brought Canada into compliance with its social and economic rights obligations under the *International Covenant on Economic, Social and Cultural Rights*.¹⁹

That same program and its conditions, however, can be seen as contributors to very different circumstances than existed in previous recessions since the ratification of the Covenant. Following the last recession, with its substantial increases in federal spending, the federal government found itself in what it deemed to be an unsustainable deficit position. To alleviate this problem, the Canada Assistance Plan was terminated without notice, and was replaced with a capped transfer to provincial governments for income assistance and social services, rolled into a fiscal transfer that also included what had previously been funded under the per-capita transfer for health and post-secondary education. The new transfer was called the Canada Health and Social Transfer. At the time, this change resulted in a reduction in federal spending from a high of more than \$59 billion (on health, post-secondary education and social spending) in 1994-95 to just over \$51 billion in 1997-98.²⁰ Thus, the federal funding for areas covered by social and economic rights was not only to be constrained, rather than being open-ended, but was actually reduced. However, these amounts have since increased to almost \$90 billion, and are scheduled to continue to rise.

A second significant change, from about the same time period, applied to the long-standing social insurance program intended to buffer the economic shock of unemployment. Unemployment Insurance was renamed Employment Insurance, with qualifying and benefit periods significantly altered, and premiums used to fund not only benefits, but training. While this was done at a point when the labour market was undergoing a shift which saw more work that was part-time and temporary, at the present time 82 per cent of those who pay premiums are eligible for benefits. The most recent budget responded to the current rise in unemployment by extending by five weeks the period during which claimants may receive benefits. As well, the budget extended the use of work-sharing to help almost 100,000 workers remain on the job, and provided an additional one billion dollars for skills training.

3. Today's Challenge

Like the Great Depression, this economic shock is affecting some sectors more than others, the two prime examples being construction and manufacturing, particularly the auto

¹⁹ M. Magdalena Sepúlveda, et. al., *The nature of the obligations under the International Covenant on Economic, Social and Cultural Rights*, 2003, p. 326.

²⁰ Department of Finance, "Fiscal Reference Tables, 2008." Accessed from http://www.fin.gc.ca/frt-trf/2008/frt08_e.pdf 22 May 2009.

industry and its supply chain. Like agriculture in the 1930's, it is widely anticipated that components of the manufacturing sector will not entirely “bounce back” with the next business cycle. Those who work in this sector will have to find other kinds of employment. The challenge lies in the period of transition, which may prove particularly difficult for older workers. As long as the supporting social safety net holds, Canada should be able to fulfil its obligations under the *International Covenant on Economic, Social and Cultural Rights*.

Another potential problem is that obligations in the *Covenant* are not necessarily measured in expenditures but rather in outcomes. Healthcare rights are measured in quantifiable terms such as life expectancy and infant mortality. Post-secondary education is to become “progressively freer” to the point of being free to the student. In these cases, it does not matter how much the government does or does not spend; if people are not living as long or university tuition is going up, Canada will not be seen as meeting its obligations. It is important to remember that expenditures do not necessarily lead to outcomes, but that most outcomes will not occur without expenditures.

There is a tendency for government stimulus to focus on infrastructure rather than long-term reinvestments in social programs. So-called “shovel ready” projects have certainly been getting a great deal of attention, but even in this time of recession the current government is spending infrastructure funds for the common good in areas that go beyond sewers and roads.

In particular, Canada's 2009 Economic Action Plan outlined an initiative to direct money toward university infrastructure, thereby supporting post-secondary institutions and “ensuring that Canada maintains a knowledge advantage by offering substantial additional support for skills and training programs, plus significant investments in university and college research infrastructure.”²¹ Budget 2009 states that the Canadian government “will provide up to \$2 billion to support deferred maintenance and repair projects at post-secondary institutions. Preference will be given to projects at universities that can improve the quality of research and development at the institution. Projects at colleges will strengthen their ability to deliver advanced knowledge and skills training.”²²

Decent, affordable housing has long been seen by many as a basic right. As part of its stimulus package, the government announced significant new investments in social housing. This includes \$1 billion for renovations and energy retrofits to up to 200,000 social housing units on a cost-shared basis with the provinces, \$400 million to construct social housing units for low-income seniors, \$75 million for new social housing units for persons with disabilities, \$400 million to build and renovate social housing stock on First Nations Reserves, and an additional \$200 million to support social housing in the North.

III. Conclusion

A major concern that arises during a time of economic crisis is whether or not economic, social and cultural rights are being compromised, such as access to work, affordability of food,

²¹ Canada's Economic Action Plan, Budget 2009. Accessed from <http://www.budget.gc.ca/2009/pdf/budget-planbugetaire-eng.pdf> 30 May 2009.

²² *Ibid.*, p. 145.

water and housing, basic health care and education. While the *International Covenant on Economic, Social and Cultural Rights* does not account for times of economic crisis, it does recognize that all human rights are of equal value. The ratification of the *International Covenant on Economic, Social and Cultural Rights* indicates that all State Parties to the *Covenant* agree to acknowledge and take the necessary measures to the maximum of their available resources to progressively guarantee economic, social and cultural rights recognized in the *Covenant*.

In order to answer the question of whether or not a recession is hazardous to one's rights we must first consider the consequences of government spending. If the development of social programs is not only being put on hold but the money for those initiatives is also being reallocated, there may be a problem. If social spending is increasing, but the impact appears to be negligible, there may also be a problem. One thing which appears to be missing from the equation is a mechanism by which to measure the effectiveness of government spending. Perhaps what is required is an on-going social audit process to help ensure that allocated funding is achieving the stated objectives, which would have the incidental effect of helping to identify programs which are being better managed and those which might require a closer look.

However we look at it, the one thing that is certain is that Canada is responding to the economic recession. That response tells us that the terms of the *International Covenant on Economic, Social and Cultural Rights* will be and are being respected. There will be many countries where governments simply do not have the resources or the borrowing capacity to provide the required assistance to ensure that the impact does not infringe upon their *Covenant* obligations.

The current economic recession will push us to re-evaluate our economic and social rights in particular, the challenges they face and the mechanisms by which they are fostered and protected. Our social safety net has not reached the point at which we can say that it cannot be improved, and there will be people in Canada who will fall through the net and wonder how that could happen in a country with such tremendous wealth and resources.

In closing, times of economic recession do pose a significant risk that economic and social rights will be affected adversely. There is little doubt that that is happening in many parts of the world, possibly due to a simple lack of resources. In Canada, we generally deal with these issues fairly well, although that does not imply there is no room for improvement. A recession provides us with information about the weaknesses in the system, which makes it more likely that we will be better able to safeguard everyone's rights the next time around.