OSGOODE HALL LAW SCHOOL | YORK UNIVERSITÉ UNIVERSITY

Journal of Law and Social Policy

Volume 2 Article 6

1987

Book Review: Righting the Balance: Canada's New Equality Rights, published by Canadian Human Rights Reporter

David Baker

BOOK REVIEW
By David Baker*

RIGHTING THE BALANCE: CANADA'S NEW EQUALITY RIGHTS

PUBLISHED BY CANADIAN HUMAN RIGHTS REPORTER

Equality is good; discrimination is bad. On this all can agree. Unfortunately it is far from clear which is which.

Over the past six years the distinction has taken on more importance. After years of antipathy, the Supreme Court of Canada has turned around and accorded anti-discrimination legislation quasi-constitutional status.[1] As a result such legislation is considered to have primacy over other legislation with which it may conflict. The Court has also come to recognize that discrimination based upon stereotypes[2] and upon failure to accommodate the special circumstances of disadvantaged groups[3] is just as culpable as malicious racial attacks and slurs. Finally, the Court has been handed a constitutionally entrenched equality guarantee in the *Charter of Rights and Freedoms.*

Historically the judiciary have appeared unsympathetic to the causes and cases of low income people. Whether because of the judiciary's elite background and training, or because the courts are the playground of the wealthy, judge made law has rarely demonstrated any passion for social justice.[4] Indeed, much of the social reform legislation which character-

---

* David Baker is a lawyer and is Director of the Advocacy Resource Centre For The Handicapped, Toronto, Canada.

1 *Winnipeg School Division No. 1* v. *Craton* (1985), 2 S.C.R. 150.

2 *Ontario Human Rights Commission* v. *Etobicoke* (1982), 132 D.L.R. (3d) 14.

3 *O'Malley* v. *Simpson Sears* (1985), 2 S.C.R. 536; *Huck* v. *Canadian Odeon Theatres* (1985), 3 W.W.R. 717. (Sask. C.A.), leave to appeal to S.C.C. refused.

4 Glasbeek and Mandel, "The Legalization of Politics in Advanced Capitalism: The Canadian Charter of Rights and Freedoms" (1984), 2 Socialist Studies 84.

izes the welfare state was a response to judicial decisions which failed to respond to the needs of the disadvantaged.[5]

Assumed to be the most intrusive encroachment upon Parliamentary supremacy of all Charter rights, equality remains an enigma. Representatives of low income people understandably have expressed scepticism about removing powers (and responsibilities) from politicians and transferring them to the courts in the name of individual rights. If equality rights do no more than destroy the retirement benefit system to allow a privileged group of white collar seniors to hold onto their jobs; or strike down Criminal Code protection for women victims of sexual assault then the exercise will be proven to be an unprincipled sham.

There is reason to hope, however, that the equality guarantees in the Charter may prove to be an effective tool for removing barriers standing in the way of disadvantaged minorities. Many of the most prominent proponents of this view, from both Canada and the United States, assembled for a National Symposium on Equality, in January 1985 on the eve of the coming into force of the Charter's equality guarantee. Their papers have been collected into a volume entitled *Righting the Balance: Canada's New Equality Rights*. As the title suggests, all of the contributors are persuaded that the Charter can be used to right past wrongs.

The most important paper in the volume is the only one written by a non-lawyer. Jill McCalla Vickers is a political scientist, who, despite her enthusiasm for the Charter, succeeds in placing proponents of different types of equality along a political spectrum and in reminding enthusiasts that the legalization of politics does not remove the political struggle which goes on regardless of what the courts ultimately choose to do.

Two American contributors, Kent Greenawalt and Catherine MacKinnon, try to leave their domestic battles behind them, but ultimately fail. Greenawalt is, along with Rawls, Dworkin and Ely, a leading egalitarian liberal proponent of equality of opportunity legislation. Unfortunately, he is unable to conceive of how the unprincipled and immoral "levels of scrutiny" approach to equality, which overprotects some groups and holds out no hope to others, could have been jettisoned in Canada. Similarly, MacKinnon insists on re-fighting the Equal Rights Amendment battle all over again, perhaps unaware of the successes achieved by women in Canada who have forged new alliances. As Vickers demonstrates, the women's movement contains members with diverse and often

---

5 One need only think of welfare, workers' compensation, tenants' rights and family law reform, to name a few.

contradictory aspirations, who have pursued equality in a cooperative fashion.

Many of the Canadian authors raise thought provoking questions, but, either humility or more likely the editors (who restricted length to approximately ten pages in most cases) prevented them making any serious effort at answering their own questions. Marc Gold raises the fundamental issues of the scope and limits of the equality guarantees. Jim MacPherson provides some thoughtful suggestions on how the Charter has changed the Canadian style of legal argumentation and advocacy. Edward Ratushny illustrates how the Charter can be used to formulate governmental policy which effectively removes barriers, by referring to proposals made for improving the accessibility of air transportation for disabled and elderly persons. American Jane Picker provides a useful summary of how statistical evidence of inequality, once regarded as a panacea by plaintiffs, has been subjected to more careful examination by courts south of the border.

Lynn Smith's concluding paper is a comprehensive exception to this tantalizing patchwork. She compares the paradigms of equality, between which the courts will ultimately have to choose. This approach requires a synthesis of all the patches contibuted by others. For lack of a better term, she engages in "quiltification". The end product is both original and valuable.

Libertarian equality proponents have in the past swept away governmental privilege and protection in order to allow the marketplace to become the dominant force in society.[6] Utopian egalitarians seek to remove the marketplace altogether, and redistribute wealth on the basis of need rather than merit.[7] Between these polar positions there are the formal egalitarians who would prohibit discrimination when to do so is rational from the stand point of the initiator. Since government and business have the power to initiate action within society, "rationality" means rationality in the interests of government business. Substantive egalitarians also argue for rationality, but rationality from the perspective of the employee or the consumer. The removal of damaging stereotypes and barriers which prevent members of disadvantaged groups from realizing their potential is clearly rational to the victim.

---

6 Macpherson, *The Political Theory of Possessive Individualism* (1962) at 255-256; Thompson, *Whigs and Hunters* (1975); and Arthurs, *Without the Law: Administrative Justice and Legal Pluralism in Nineteenth-Century England* (1985).

7 John Harp and John Hofler, eds., *Structured Inequality in Canada* (Toronto: Prentice Hall, 1980).

The courts must choose between the two conceptions of equality (ie. formal and substantive). Before they choose, they, and lawyers representing low income people, would be well advised to read this book.

PUBLISHED BY: The book is only available from the publisher, Canadian Human Rights Reporter, 213 - 810 West Broadway, Vancouver, British Columbia, V6K 3C4 at a cost of $50.00.