

1987

Book Review: Equality Rights and the Canadian Charter of Rights and Freedoms, edited by Anne F. Bayefsky and Mary Eberts

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Source Publication:

Canadian Bar Review. Volume 66, Number 1 (1987), p. 185-190.

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Recommended Citation

Mossman, Mary Jane. "Book Review: Equality Rights and the Canadian Charter of Rights and Freedoms, edited by Anne F. Bayefsky and Mary Eberts." *Canadian Bar Review* 66.1 (1987): 185-190.

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Equality Rights and the Canadian Charter of Rights and Freedoms
Edited by ANNE F. BAYEFESKY and MARY EBERTS.
Toronto: Carswell. 1985. Pp. xlv, 661. (\$85.00)

Reviewed by Mary Jane Mossman*

The publication of this volume of essays on equality rights under the Charter is an important event in Canada. In appearing so soon after April 17, 1985 (the date when the Charter's main equality provision, section 15, became effective) the essays clearly preceded decisions in actual cases litigated on the basis of section 15. Yet, precisely because the book was in the vanguard of the cases, it provided a significant opportunity for the authors to have a part in defining the issues and shaping the legal arguments, and thereby influence the nature of judicial decisions in Canadian equality cases for the future.¹ Viewed from this perspective, the book is successful as a thorough analysis of the background to equality discourse in Canada, although it may be less helpful as a design for thinking about equality as we approach the twenty-first century.

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¹ Prior to the publication of *Equality Rights*, there were two articles which generally canvassed the meaning of section 15. See Marc Gold, *A Principled Approach to Equality Rights: A Preliminary Inquiry* (1982), 4 Sup. Ct. L.R. 131; W.S. Tarnopolsky, *The Equality Rights*, in W.S. Tarnopolsky and G.-A. Beaudoin (eds.), *Canadian Charter of Rights and Freedoms: Commentary* (1982), p. 396.

The book is broad in scope. Thirteen authors have provided their separate insights on the meaning of equality in differing contexts, corresponding primarily to the enumerated grounds of section 15: race and ethnicity, religion, sex, age, physical and mental disability. There are two essays as well on the non-enumerated grounds of marital status and sexual orientation, and three essays on related sections of the Charter: section 28, guaranteeing rights equally to male and female persons; the group of sections guaranteeing special status for aboriginal peoples; and section 32, defining the application of the Charter. One of the editors, Anne Bayefsky, has also contributed a very thorough essay on the general framework for equality analysis, including Canadian, American, and international law approaches.

This breadth of scope and the differing perspectives of individual contributors is at once both the book's major strength and also its weakness. Its strength comes from the richness of analysis of the nature of the grounds being examined, particularly in the essays on the enumerated grounds of section 15. For example, William Black's examination of the underlying rationale for guaranteeing non-discrimination on the ground of religion provides some excellent insights on the issues of whether courts should adopt a broad or narrow definition of religion, and the basis for distinguishing religion from secular matters.² Similarly, the essay by David Lepofsky and Jerome Bickenbach explains very clearly the nature of societal barriers for those who are physically "less-abled", and the fact that the idea of disability itself is not constant: "The extent to which one's physical disability imposes a true barrier to the undertaking of various tasks is constantly being reduced by the development of revolutionary aids and adaptive devices."³ This "non-static" aspect of the enumerated grounds in section 15 is also clearly addressed in Jeffery Wilson's essay on the age ground as it affects children. As he explains:⁴ "The definition of childhood has changed in accordance with the structure and expectations of society. The present definition of childhood and our values towards children may be no more valid than that which was articulated in earlier times." Even our definition of who is "Indian" has changed over time; moreover Douglas Sanders argues cogently for decentralized decision-making by bands as to who is to be recognized as a band member rather than a national system of determining such status,⁵ a suggestion which thereby requires even more flexibility in our understanding of such concepts. Raj Anand's essay on ethnic equality similarly recognizes that changes in legislative policies have occurred, in relation to both native

² Pp. 133-140.

³ P. 326.

⁴ P. 297.

⁵ P. 561.

peoples and other immigrant groups,⁶ and suggests that the Charter may be a useful tool in developing a climate of acceptance for multiculturalism in Canada. Arnold Bruner's essay on sexual orientation, by contrast, poignantly describes the effect of an absence of tolerance and protection from discrimination in Canadian society.⁷

At the same time however, the book is less satisfying in some aspects of the analysis of the legal effect of section 15. First, while there is substantial unanimity about the relation between section 15 and section 1, the restatement of the argument in each essay results in unnecessary repetition. Second, most of the authors reject the automatic application of the three-tier level of scrutiny approach of the American jurisprudence, but there are some important but unresolved differences in their suggestions. Anne McLellan, for example, states that the enumerated grounds of section 15 are likely to be treated as inherently suspect, except for "age and mental and physical disability",⁸ a conclusion directly contrary to that of the authors of essays on those enumerated grounds. However, neither this issue nor others are really joined in these essays in a meaningful way; there is no communication among the authors, just single voices, and their different views are not therefore fully explored. Third, there is a general expectation expressed by most authors that section 15 will effect changes and that the changes will be beneficial to those affected. Some of the conclusions drawn are supportable, however, only on the basis that judicial decisions will indeed reflect an entirely new approach to constitutional analysis,⁹ and moreover that the "activist" stance evident in the Supreme Court's decisions on legal rights under the Charter¹⁰ will not change when equality claims are presented for decision. That such conclusions are drawn in the absence of a systematic analysis of the structure of law and the role of courts, particularly in the context of equality claims, is problematic.

Thus, despite the richness of the analysis of the nature of section 15's enumerated grounds, and the evident dynamic quality in conceptualizing about such ideas as age or disability, the legal analysis of the meaning of equality under section 15 in these essays is relatively less helpful. While there is some useful information about the constitutional process out of which section 15 was created, especially in the general

⁶ Pp. 85-89.

⁷ Pp. 457-459.

⁸ P. 434.

⁹ There have been a number of contrary views expressed. For example, see P. Russell, *The Effect of a Charter of Rights on the Policy-Making Role of Canadian Courts* (1982), 25 *Can. Pub. Admin.* 1; P. Hogg, *Canada Act 1982*, Annotated (1982).

¹⁰ See *R. v. Big M. Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177.

overview essay by Anne Bayefsky and more particularly in relation to section 28 in the essay by Katherine de Jong, the legal analysis is necessarily more often directed to assessing the past treatment of particular grounds of discrimination under the Canadian Bill of Rights, federal and provincial human rights codes, American doctrines or international covenants than to thinking about whether a new conceptual framework is either necessary or desirable. What is missing is any sense of imagination as to how we could or should approach these issues, and whether the constraints of the past are inevitable. What would a world that offered equality (a world none of us has ever experienced) look like after all, and is the Charter relevant to such a question?¹¹

Equality Rights does include some thoughts of this kind. The essay on section 32 by Yves de Montigny, for example, provides a thoughtful analysis as to why we should support a broader interpretation of the application of the Charter, at least in relation to section 15, than has been recommended by other commentators¹² In his view, the need to provide protection for individuals from state actions is much less pressing than the need for such protection from other sources.¹³

It must be remembered, however, that if the state can oppress, and is seen as the main potential invader of individual liberty, it is merely because it wields more power than the individual since it is in a position of superiority. Once we recognize this fact, we are inexorably led to the conclusion that if we are to obtain the individual liberty so prized by our ancestors, both the powers of the state and those powers of large-scale private organizations and of individuals, must in our day be restricted . . . Regardless of the way we choose to implement the Charter judicially so as to make it applicable to private relations, we must realize that oppression originating from the state is only the tip of the iceberg, a particular aspect of a more general phenomenon, namely, the threat which the strong can bring to bear upon the weak.

Such re-conceptualizing about basic structures which constrain equality objectives is evident as well in Mary Eberts' essay on sex discrimination. Her recognition of the implicit male norm in existing sex discrimination theory and her suggestions for adopting a sex neutral/gender specific standard in its place¹⁴ also represent a re-vision of the equality concept.

¹¹ For two different views about the answer to this question, see P. Russell, *The Political Purposes of the Canadian Charter of Rights and Freedoms* (1983), 61 *Can. Bar Rev.* 30; and N. Lyon, *The Charter as a Mandate for New Ways of Thinking about Law* (1984), 9 *Queen's L.J.* 241.

¹² See K. Swinton, *Application of the Canadian Charter of Rights and Freedoms*, in *Tarnopolsky and Beaudoin, op. cit.*, footnote 1, p. 41; Hogg, *op. cit.*, footnote 9.

¹³ Pp. 578-579; de Montigny relies (for inspiration at least) on D. Gibson, *The Charter of Rights and the Private Sector* (1982), 12 *Man. L.J.* 213; and R. MacDonald, *Postscript and Prelude—The Jurisprudence of the Charter: Eight Theses* (1982), 4 *Sup. Ct. L.R.* 321. De Montigny's analysis is, however, more persuasive on the issue that there is a need for protection for those who are oppressed than that the court, pursuant to the Charter, is the appropriate means of providing such protection.

¹⁴ P. 220 ff.

Yet, as a whole, Equality Rights seems more useful as a record (often somewhat dismal) of what equality has meant in the past, rather than any sustained assessment of what it could mean for the future. Moreover, the constraint of thirteen separate voices results in envisioning that is piecemeal when it does occur at all. Left out of the analysis completely is any sense of how the protection of equality rights for one individual may impact on another individual.¹⁵ Even more significantly, the book never really addresses the effect of the section 15 protection on the overall legislative programs of the modern welfare state. Some of the ideas presented about retirement and pensions in the essay by Elizabeth Atcheson and Lynne Sullivan, and those of David Vickers and Orville Endicott on mental disability, recognize the need to articulate values within our society consistent with section 15. As well, there are some hints in Anne Bayefsky's essay, as in Anne McLellan's, that problems may occur in accommodating equality claims to legislative programs directed to specific groups but they are never fully or systematically addressed. The possibility, for example, that section 15 may prohibit laws which discriminate against those who are economically disadvantaged (as an unenumerated ground), as was the case under the American equal protection analysis at one time,¹⁶ is an aspect of equality analysis that is indigenous to the Charter and relies on our re-vision of our future rather than our past. The fact that a constitutional decision was made to entrust such questions to courts rather than only to legislatures¹⁷ does not negate our need to evaluate the issues in light of our overall objectives for the future.

It happened that I read most of Equality Rights during a recent visit to Australia. While I was there, I took advantage of the time and place to travel to the central Australian desert to view Halley's Comet. While the comet was an interesting sight, it was really the Milky Way that is blazed in my memory of that night. Far out in the Australian desert, miles away

¹⁵ Also ignored is the possible impact of reading section 15 together with other rights and freedoms guaranteed by the Charter. For an analysis of section 15 in relation to section 7, section 10(b), and section 11(d)—in respect of the potential right to legal representation under provincial legal aid schemes—see M.J. Mossman, *The Charter and the Right to Legal Aid* (1985), 1 J.L. & Soc. Pol. 21. See also Christine Boyle, *Women and the Right to Counsel*, C.B.A. Conference, unpublished (1985).

¹⁶ See, for example, J. Hathaway, *Poverty Law and Equality Rights* (1985), 1 J.L. & Soc. Policy 1; F. Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment* (1969), 83 Harv. L.Rev. 7; Galloway, *The Rich and the Poor in Supreme Court History* (1982); R. Siegel, *Socioeconomic Human Rights: Past and Future* (1985), 7 Human Rts. Q. 255; D. Woodward, *Affirmative Constitutional Overtones: Do Any Still Sound for the Poor?* (1985), 7 Human Rts. Q. 268.

¹⁷ For an analysis of the impact of this choice, particularly in the context of legislatively-designed social welfare state benefits, see F.L. Morton and L. Pal, *The Impact of the Charter of Rights on Public Administration* (1985), 28 Can. Pub. Admin. 221.

from the lights of civilization, there were millions of stars visible in the Milky Way that I had never seen—or imagined—before. A phenomenon that I have seen many times before was, quite suddenly, a wholly different experience. Somehow, I think a world of real equality may be just that different from the one we now have, and it seems necessary to try to imagine what it would look like in order to get from here to there. Equality Rights is a good beginning, but only just the beginning of that re-visioning.

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