Equality Rights and The Canadian Charter of Rights and Freedoms, by Anne F. Bayefsky and Mary Eberts, Toronto: Carswell, 1985. Pp. *xliv*, 661. $85.00 (hard-cover)

The Carswell Co. Ltd. has been promising us this book for some time now. Was it worth waiting for? In my opinion the answer to that is unequivocally yes, and not only because we are desperately in need of analysis of equality in the Canadian context.

This is no slim volume, rushed into print with some undigested thoughts on section 15 of the *Charter*. It is full of careful, in-depth discussion, by various authors, of a number of aspects of our brand-new constitutional right to equality. It is largely organised by groups of equality-seekers, containing chapters such as "Mental Disability and Equality Rights" by David Vickers and Orville Endicott[1], "Children and Equality Rights" by Jeffrey Wilson, "The Renewal of Indian Special Status" by Douglas Sanders and "Sexual Equality: Interpreting Section 28" by Katherine de Jong. It does not purport to be a comprehensive group-based approach, as, for instance, illegitimacy and political views are not covered. Since section 15 is, after all, opened-ended, it would be impossible to cover every possible form of discrimination; however, the coverage *is* very broad. As well, this approach is not exclusive. Yves de Montigny has written a concluding chapter on "Section 32 and Equality Rights". It is a chapter containing a very satisfying analysis of the issue of whether the *Charter* applies to private action. There is no hint here, in a discussion that is both practical and highly scholarly, that there is any obvious answer to this difficult question.

The editors have contributed substantial chapters of their own. Anne Bayefsky brings her extensive knowledge of equality jurisprudence to bear on the opening general chapter, "Defining Equality Rights". I am sure this chapter will be heavily used for reference purposes and by people wanting a broad and reliable introduction to the whole subject. Mary Eberts' chapter is called "Sex and Equality Rights". It contains an excellent analysis of sexual inequality in its historical and economic context.

I noticed that there were nearly as many women contributors as men, an unusual occurrence in a law book. It is difficult to tell if other disadvantaged groups are similarly represented. It would be ironic if the nature and scope of the legal discourse on equality were to be determined by privileged people without the advantages of insight into the reality of inequality. Women are perhaps in an uncommon position of having this advantage while enjoying considerable access to the legal profession.[2]

[1]Mr. Endicott is Legal Counsel for the Canadian Association for the Mentally Retarded (Toronto).

[2]While it is possible to argue that women lawyers are hardly equipped to speak of the reality of women's oppression, they have the potential at least to be in a better position than all but the most sensitive and imaginative of their male colleagues.

The format of a collection of essays has the advantage of being able to offer different skills and contrasting perspectives. There is indeed some diversity of opinion displayed. One can compare, for example, Eberts' discussion of the meaning of discrimination[3] with that of Anne McLellan in her chapter, "Marital Status and Equality Rights"[4]. There are, in contrast, some small disadvantages to the format. There is inevitably some overlap, for instance, in the discussion of the content of section 15 and the old *Bill of Rights* cases. This is only a drawback, however, if one is reading the book straight through. Readers are more likely to read different chapters from time to time or to consult the book as a reference work. More serious is the relative lack of connectedness flowing from the fact that different authors deal with different groups. For example, problems of age and sex discrimination fundamentally overlap with respect to pensions. This issue is only mentioned in passing in the chapter on retirement; one is not surprised, given the separate discussion of age and sex. Of course, as some classification method has to be adopted, any division of material has the potential to leave the reader with a sense of incompleteness at any particular point. One cannot talk about everything at once, although the subject of equality exerts a lot of pressure to make the attempt.

The book is national and international in scope, as befits a book on this topic. There is not hint, by way of illustration, in "Passage to Retirement: Age Discrimination and the Charter" by Elizabeth Atcheson and Lynne Sullivan, of "Toronto-centricity". Frequent references are made throughout the book to U.S., European and international materials. Appendix III contains provisions on equality rights from international instruments such as the *Universal Declaration of Human Rights* and the *European Convention for the Protection of Human Rights and Fundamental Freedoms*.

Two major issues relating to equality have been causing me some difficulty; so I was curious to see what the contributors to this book had to say about them. Firstly, I have been concerned about the appropriate conceptualisation of the interaction between sections 1 and 15 of the *Charter*. One of the most consistent themes was the view that the question of whether distinctions were justified should be dealt with under section 1. The editors are particularly explicit about this. Bayefsky states:

> With respect to equality rights in particular, the line between justified and unjustified distinction must be drawn. Is there any reason for drawing it twice, once under section 15 and once under section 1? A negative response is suggested by the fact that the issues involved in defining equality rights are clearly common to defining their limitations under section 1.'[5]

and later: "[L]imitations placed on equality rights should be justified under the terms of section 1."[6]

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[3]A.F. Bayefsky and M. Eberts (eds.), *Equality Rights and the Canadian Charter of Rights and Freedoms* (Toronto: Carswell 1985) 209-11.

[4]*Ibid.*, at 432-33.

[5]*Ibid.*, at 77.

[6]*Id.*

Eberts proposes the following structure. The party claiming inequality should make a *prima facie* case, under section 15, that a distinction exists on some offensive ground. Then the party *defending the distinction* should satisfy section 1 by establishing that the distinction is a reasonable limit on equality, demonstrably justifiable in a free and democratic society.[7] Other contributors take the same view. McLellan applies it in her discussion of *Bailey* v. *M.N.R.*[8], a case dealing with paragraph 109(1)(a) of the *Income Tax Act*[9] which permits married people to make deductions from their income where they supported their spouses during the taxation year. Arnold Bruner suggests that section 1 "is the more likely instrument by which to set a standard of judicial scrutiny"[10]. There is not, however, complete uniformity on this issue. Bill Black, in his thoughtful, sensitive and scholarly article, "Religion and the Right to Equality", identifies alternative approaches and states that each "has its advantages and disadvantages"[11].

I continue to feel a sense of ambivalence about this issue. There are two quite separate questions involved here. The first relates to the meaning of equality in any context. The second is what, if any, limitations on equality are constitutionally permissible. On the first, equality cannot be equated with identical treatment, since it is as likely to *require* different treatment of differently-situated people as it is to require similar treatment of similarly-situated people. As one American commentator has said: "[E]qual treatement may be at times elusive, for under certain circumstances diverse treatment is the essense of the doctrine while under other conditions diverse treatment is repulsive to the doctrine".[12] It is thus possible for proponents of a distinction *to have equality on their side.*

If both of these issues are dealt with under section 1, so that both the meaning of equality and acceptable limitations on it are seen as section 1 issues, then an odd result follows. The above proponent of equality as requiring a distinction would have to state the argument in terms of a limitation on equality. Surely this is bound to distort our understanding of the concept. On a much more disturbing level, the approach suggested in the book seems to me to be to put too much into section 1. It fails to isolate and discourage the use of section 1 since perfectly respectable and commonplace arguments about the requirements of equality will be classified as section 1 arguments.

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[7] *Ibid.*, at 214, italics added.

[8] (1980), 1 C.H.R.R. D/193, discussed, *ibid.*, at 438-41.

[9] S.C. 1970-71-72, c. 63 as amended.

[10] *Supra*, footnote 3, "Sexual Orientation and Equality Rights" at 466. Others take the same approach. See, *e.g.*, Raj Anand, "Ethnic Equality" at 107.

[11] *Ibid.*, at 152. See also the article by M. David Lepofsky and Jerome E. Bickenbach, "Equality Rights and the Physically Handicapped". The authors state at 349-50 that section 15(1) requires that government *must* draw distinctions between its treatment of the handicapped and the non-handicapped in those situations where a failure to distinguish between these two groups would result in a denial of equality of opportunity to the handicapped.

[12] S. Maloney, "Rape in Illinois: A Denial of Equal Protection" (1975), 8 *J.M.J.* 457 at 477.

I am *inclined* at the moment to the view that usage of section 1 should be confined to the distinctive question of when some other value, such as administrative or economic efficiency, or Indian special status, is more important than equality, once it has been determined what equality requires in any particular context: Here is what equality is (section 15) and here is why you are not getting it (section 1). The amalgamation of the issues could make section 1 respectable and allow the consideration of non-equality values to blend into the consideration of what equality is, in any setting.

Fundamentally, to me, the issue is not an abstract, conceptual, legal one, but a pragmatic one: which approach is the more likely to produce more equality as I understand it. It is not discussed at that level in this book. That is one reason why this is a conventional book, utilizing traditional forms of legal discourse. Who can blame the contributors for that? If you want to get into the game of legal equality, no doubt you have to play by the rules.

The second major equality question relates to discrimination in effect as opposed to discimination on the face of laws or government practices. If one sees section 15 as permitting arguments relating to inequality in outcomes, the problem of where to draw the line is a very obvious one. U.S. jurisprudence has tended to choose the limit of intent — only purposive discriminatory effects are constitutionally offensive.[13] This limitation is a severe one; but if it is abandoned, it needs to be replaced by something else. It would be ludicrous to find the sexual assault law, for instance, attacked on the basis that it has a different effect on men than on women. Professor Black recognises this problem very clearly:

> Since so many laws have a disporportionate adverse effect on poor people, the [U.S. Supreme] Court appears to have been concerned that, if it adopted a definition of equality in terms of effect, there would be no logical stopping-point short of judicially mandating complete economic equality.[14]

This is a very big question. Just how radical is section 15? Just how radical can we suggest it might be without appearing "flaky" and being left out of the game of legal equality? It is probably true that talking about section 15 as if it could make *some* difference without making *too much* difference is one of the rules of the game.

The problem is, however, that if section 15 is only a little radical, where is the limiting concept that will keep it little? Why do we not have serious discussions of "complete economic equality"? There is not a chapter in this book on poverty and inequality.

I find, after reading the book, that I am still struggling with the scope of equality of outcomes, once the limiting principle of intent is abandoned. Raj Anand in "Ethnic Equality" argues that we need not be concerned about the

[13] *Washington* v. *Davis*, 426 U.S. 229 (1976). This is a simplistic statement of the U.S. position. For a full discussion see Bayefsky, *supra*, footnote 3 at 31-38.

[14] *Supra*, footnote 3 at 151.

"slippery slope"[15]. This position is similar to that of Bayefsky, who argues that "American jurisprudence does not provide convincing reasons for shying away from such a conclusion [discriminatory results irrespective of intent] by a fictitious parade of horrors"[16]. The parade of horrors, which led to the U.S. emphasis on intent, had to do with potential challenges to a "whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white"[17]. This parade is "fictitious" because such disproportionate and disadvantageous effects can be justified in terms of government objectives: "[W]here the governmental objective was benign, the necessity and importance of the governmental objective which would justify disproportionate and disadvantageous effects could vary...."[18]

In other words, section 15 is only a little radical because "benign" government objectives can justify disproportionate outcomes. I am not sure why, but I do not really feel comforted by this result.

These questions are not susceptible to easy answers. No doubt many people are struggling to grasp the dimensions and the full significance of the incredible fact that we all now have a constitutional right to equality. This book will be of tremendous assistance to those engaged in that struggle. It will be a major part of the ongoing academic, political and practical debate about equality. This is an erudite and stimulating book. I recommend it warmly.

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[15] *Ibid.*, at 115. Of course this is reassuring or not, depending on whether one *wants* to slide down the slippery slope to absolute equality of outcomes.

[16] *Ibid.*, at 37.

[17] *Washington* v. *Davis, supra,* footnote 13 at 248, quoted, *ibid.*, at 34.

[18] *Ibid.*, at 35.

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