Eaton v. Brant County Board of Education

Dianne Pothier

Author's Note

My initial interest in *Eaton v. Brant County Board of Education* comes from a very personal relevance. I have been visually impaired, at or near the borderline of legally blind, since birth. Fortunately, in my assessment, my parents insisted that my older brother (who has the same condition) and I attend the neighbourhood school rather than a school for the blind. I have never had any cause to doubt the wisdom of my parents' decision. I have no doubt that attending a school for the blind would have been a very marginalizing experience. With this backdrop, my first reaction to the Supreme Court of Canada's rejection of a constitutional presumption of integration of disabled students was a very visceral one. It evoked memories of the infamous 1896 *Plessy v. Ferguson* doctrine of "separate but equal," the height of American legal endorsement of racism. Anything that followed *Plessy*'s doctrine was, by definition, bad.

Further reflections have not changed my ultimate conclusion but have made my analysis more nuanced. "Separate but equal" is not always improper, but it is invidious when it used to relegate a person or group of people to the status of inferior other, as was done in *Plessy*. Given the history of marginalization of disabled persons, one should be suspicious of its use in the context of the education of disabled students. Whether by intention or effect, "separate but equal" as official doctrine will continue to marginalize disabled persons. While segregated placement of disabled students should not be categorically rejected, the burden of justification should be on those advocating segregation. Moreover, even a presumption of integration is inadequate, by itself, to achieve equality. An integrated setting can only achieve equality if it is genuinely inclusive—that is, responsive to different needs and circumstances.

My "judgment" in *Eaton* reverses the Supreme Court of Canada's rejection of a presumption of integration of disabled students and finds a section 15 breach in not abiding by such a presumption. There is, however, no section 1 analysis, based on the mootness of the case. Although mootness is a defensible legal basis for avoiding the section 1 issues, there are more pragmatic reasons for sidestepping a discussion of section 1. First, I do not think I know enough about primary education generally to do a proper job. Second, I do not have access to the factual record. Third, and more fundamentally, even if I did have

CJWL/RFD
doi: 10.3138/cjwl.18.1.121

access to the record, it would still not be a proper basis for an adequate section 1 analysis. It would not, in my assessment, be possible, after the fact, to reconstruct the record from a disabled perspective, but nothing less would serve the purpose.

Note de l'auteure

L'arrêt *Conseil scolaire du comté de Brant c. Eaton* a une résonance spéciale et très personnelle pour moi, d'où mon intérêt initial. Depuis ma naissance, je suis atteinte de cécité partielle, à la limite—ou peu s'en faut—de la norme juridique établie pour être considérée comme aveugle. Heureusement, d'après moi, mes parents ont insisté pour que nous allions, mon frère aîné (frappé par la même condition) et moi, à l'école du quartier plutôt qu'à une école pour aveugles. Je n'ai jamais eu de raison de douter de la sagesse de la décision de mes parents. Je n'ai aucun doute que le fait de fréquenter une école pour aveugles aurait été une expérience de marginalisation. Étant donné cette toile de fond, ma réaction première au rejet par la Cour suprême du Canada d'une présomption constitutionnelle en faveur de l'intégration des élèves atteints de déficiences physiques a été très viscérale. Cela a évoqué pour moi des souvenirs de la théorie du «*separate but equal*» élaborée en 1896 dans le tristement célèbre arrêt *Plessy v. Ferguson*, l'apogée de l'approbation judiciaire du racisme aux États-Unis. Toute décision qui appliquait la théorie de l'arrêt *Plessy* était, par définition, mauvaise.

Réflexion faite, je n'ai pas changé ma conclusion ultime, mais mon analyse est plus nuancée. La théorie du «*separate but equal*», c'est-à-dire de l'égalité atteinte au moyen de traitements distincts, n'est pas toujours inappropriée, mais elle est injuste lorsqu'elle est utilisée pour reléguer une personne ou un groupe de personnes à un statut d'Autre inférieur, comme c'était le cas dans l'arrêt *Plessy*. Étant donné l'histoire de la marginalisation des personnes atteintes de déficiences physiques, il faut se méfier de son utilisation dans le cadre de l'éducation des enfants atteints de déficiences physiques. Que ce soit par l'intention ou par l'effet, l'utilisation officielle de la théorie du «*separate but equal*» va continuer à marginaliser les personnes atteintes de déficiences physiques. Même si le placement dans des classes séparées d'élèves atteints de déficiences physiques ne peut être rejeté catégoriquement, il faut néanmoins imposer aux personnes qui prônent la ségrégation le fardeau de justifier cette décision. De plus, même une présomption en faveur de l'intégration ne suffit pas, en soi, pour réaliser l'égalité. Un milieu intégré ne peut atteindre l'égalité que s'il est authentiquement inclusif—c'est-à-dire, conçu pour répondre à des besoins et des circonstances qui varient.

Mon «jugement» dans l'affaire *Eaton* infirme la décision de la Cour suprême du Canada, reconnaît qu'il existe une présomption en faveur de l'intégration d'élèves atteints de déficiences physiques et déclare que le défaut

de respecter une telle présomption viole l'article 15. Il n'y a pas, cependant, d'analyse en vertu de l'article premier, étant donné que la cause est hypothétique. Même si le caractère hypothétique de l'affaire suffit pour justifier ma décision de ne pas procéder à l'analyse des questions soulevées par l'article premier, il y a des raisons plus pratiques pour éviter le processus. Premièrement, je ne connais pas suffisamment l'éducation au primaire pour faire du bon travail. Deuxièmement, je n'ai pas accès au dossier des faits. Troisièmement, et de façon plus fondamentale, même si le dossier m'était effectivement remis, il ne constituerait tout de même pas un fondement solide pour une analyse en vertu de l'article premier. À mon avis, il ne serait pas possible, après coup, de reconstruire le dossier à partir de la perspective des personnes atteintes de déficiences physiques et nul autre dossier ne saurait suffire à la tâche.

Eaton v. Brant County Board of Education

Women's Court of Canada
[2006] 1 W. C. R. 124

Dans l'arrêt Conseil scolaire du comté de Brant c. Eaton*, le Tribunal des Femmes du Canada infirme la décision de 1997 par laquelle la Cour suprême du Canada a rejeté la notion d'une présomption en faveur du placement d'enfants atteints de déficiences physiques dans des classes régulières plutôt que dans des classes pour élèves en difficulté. Le Tribunal des Femmes du Canada estime que la Cour suprême a fondé l'essentiel de sa conclusion sur la théorie du* « separate but equal »*, c'est-à-dire de l'égalité atteinte au moyen de traitements distincts, même si la Cour n'a pas invoqué directement cette théorie. D'après le Tribunal des Femmes du Canada, le rejet par la Cour suprême d'une présomption constitutionnelle en faveur de l'intégration équivaut à l'adoption d'une hiérarchie de la différence, ce qui contredit la garantie d'égalité prévue à l'article 15 de la* Charte. *Le Tribunal des Femmes du Canada juge que la reconnaissance d'une présomption constitutionnelle d'intégration scolaire des enfants atteints de déficiences physiques est nécessaire pour deux raisons. Premièrement, cette présomption s'impose pour neutraliser les séquelles du passé en vertu desquelles la ségrégation emporte la connotation d'un statut inférieur. Deuxièmement, cette présomption constitutionnelle d'intégration est essentielle pour contraindre l'État à prendre les mesures nécessaires pour que le milieu scolaire soit vraiment inclusif et qu'il réponde à divers besoins. Cette charge de la preuve force l'État à démontrer les conditions et circonstances spécifiques qui font en sorte qu'un milieu scolaire intégré n'est pas dans le meilleur intérêt des enfants atteints de déficiences et à justifier son opinion au regard de l'article premier de la* Charte. *Il en est de même dans tous les cas où l'on cherche à imposer l'éducation ségréguée ou spéciale, puisque l'article 15 exige en soi l'intégration scolaire. Le Tribunal des Femmes du Canada juge donc que l'article 15 a été violé dans le cas sous étude. Cela dit, il n'est nul besoin de procéder à l'analyse selon l'article premier dans la présente affaire.*

In Eaton v. Brant County Board of Education*, the Women's Court of Canada reverses the 1997 decision of the Supreme Court of Canada, which rejected a presumption of integrated education for disabled students. The Women's Court finds that although the Supreme Court did not actually invoke the terminology of ''separate but equal,'' that is the essence of their decision to find no breach of section 15 of the* Canadian Charter of Rights and Freedoms *arising from segregated placement. According to the Women's Court, the Supreme Court's rejection of a presumption of integration amounts to the adoption of a hierarchy of difference, which is inconsistent with the equality guarantee in section 15 of the* Charter. *The Women's Court finds that a constitutional presumption of integrated education for disabled students is necessary for two*

CJWL/RFD
doi: 10.3138/cjwl.18.1.124

reasons. First, such a presumption is required to counteract the historic legacy by which segregation has connoted inferior status. Second, a constitutional presumption of integration is necessary to place an onus on the state to make the integrated educational environment genuinely inclusive and to meet diverse needs. Such an onus puts the responsibility on the state to demonstrate the specific conditions and circumstances under which an integrated educational setting cannot meet the best interests of disabled students, which is a matter of section 1 justification. In any context in which segregated education is sought to be imposed, section 15 itself demands integrated education. Thus, the Women's Court of Canada concludes that section 15 is breached in the present case. As a result of mootness, however, section 1 is not addressed.

Reconsideration of *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241 (judgment of the Supreme Court of Canada reversed).

The decision of the Women's Court was delivered by:

DIANNE POTHIER

I. Introduction

1. What do principles of equality and non-discrimination require in relation to disabled students? Where disability significantly impacts upon the manner of learning, formal equality analysis is woefully inadequate—there are no likes to be treated alike. The non-discrimination issue in relation to the education of disabled students centres on the question of how equality analysis deals with differences that are attributable to disability. Does substantive equality, in taking account of difference, incorporate a presumption of integrated education? If so, what is required of integrated education to achieve equality for disabled students? These questions lie at the heart of the present case.
2. This is an appeal from a 1997 decision of the Supreme Court of Canada. Emily Eaton, who was twelve years old at the time of the Supreme Court of Canada decision, has cerebral palsy, resulting in multiple disabilities. Throughout the legal proceedings concerning her, Emily has had no developed method of communication. She has not been able to speak orally, use sign language, nor use assisted communication. Thus, it has not been possible to obtain input from Emily on the legal issues at stake. Submissions have been made throughout on behalf of Emily by her parents.
3. Emily began school, in kindergarten, at her local neighbourhood public school, with an educational assistant to tend to her special needs. The educational authorities in the public school system considered this arrangement to be on a trial basis. Emily's parents wanted to extend this arrangement, with Emily continuing in an integrated setting in an

age-appropriate class. However, the educational authorities in the public school system concluded that the trial in an integrated setting was not working for Emily, and they decided that Emily should be transferred to a special and segregated setting for disabled students. Emily's parents challenged this decision but were unsuccessful in their challenge at all stages except for the Ontario Court of Appeal. The Ontario Court of Appeal's decision in favour of a constitutional presumption of integrated education was reversed by the Supreme Court of Canada. This reversal by the Supreme Court of Canada is the subject of the present appeal.

4. The Supreme Court of Canada did not deal with this case as a challenge to a particular provision of Ontario legislation. Accordingly, the lack of official notice of a constitutional question to the Attorney General of Ontario during the administrative proceedings was not fatal to the challenge pursuant to the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act 1982*, being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c. 11. There was (and is) no statutory provision in Ontario, as there is in some Canadian jurisdictions, expressly establishing a presumption of integrated education (see A. Wayne MacKay, *Connecting Care and Challenge: Tapping Our Human Potential—Inclusive Education: A Review of Programs and Services in New Brunswick*, 2006 [on file with author]). However, nor was there any statutory provision expressly excluding a presumption of integrated education for disabled students in Ontario. The constitutional issue before the Supreme Court of Canada was whether the *Charter* demands a presumption of integration as a matter of constitutionally valid interpretation. This court approaches the case on the same basis.

5. The case is technically moot on two counts. Emily is now past the usual age of primary and secondary school attendance. More significantly, after the public school system had refused to continue Emily's placement in an integrated setting, the separate (Catholic) school board agreed to accept her. Thus, in fact, Emily continued in an integrated setting in spite of the series of legal rulings challenged in this case. However, in light of the significance of the legal issues involved, this court has exercised its discretion to reconsider the case in spite of its mootness (*Borowski v. A.G. Canada*, [1989] 1 S.C.R. 342). Nevertheless, because the issues in relation to Emily herself are moot, her particular circumstances are less central to this reconsideration than would otherwise be the case. The focus of this reconsideration is the general equality principles at stake in a case such as Emily's.

6. While the particulars of Emily's case will not be emphasized in this judgment, it is important to remember that the case involves taking into account differences. When applying the general principles articulated in this judgment to ongoing education policy, practice, and placement decisions, the particular needs and circumstances of individual students must remain in focus. Equality demands a recognition of, and response to, diversity.

II. History of the Proceedings

7. Emily began kindergarten in an integrated setting at her neighbourhood school by mutual agreement between her parents and the Brant County Board of Education (BCBE). The Identification, Placement and Review Committee (IPRC) of the BCBE considered this to be a trial placement. Due to concerns raised when Emily was in Grade 1, by decision dated 24 February 1992, the IPRC determined that Emily should be placed in a special education class. Emily's parents appealed to a special education appeal board, which confirmed the IPRC's decision. Emily's parents further appealed to the Ontario Special Education Appeal Tribunal. Emily remained in an integrated setting in the public school system pending the administrative appeals. After a twenty-one-day hearing, the Ontario Special Education Appeal Tribunal confirmed the decision for a segregated placement, following which Emily was home schooled for a term until she was accepted into an integrated setting in the separate (Catholic) school system. The record does not disclose the details of Emily's Catholic school educational experience and, hence, does not enable an assessment of her ongoing integrated education. The legal significance of the decision of the Catholic school board to integrate Emily is that the decision of the Brant County Board of Education to place Emily in a special class for disabled students was never implemented.

8. Emily's parents nonetheless sought judicial review of the decision of the Ontario Special Education Appeal Tribunal. The Ontario Divisional Court dismissed the application. Justice George Adams concluded that the decision of the tribunal was amply supported by the evidence. He further commented (*Eaton v. Brant County Board of Education* (1994), O.J. No. 203 at para. 12) that neither the *Charter* nor the Ontario *Human Rights Code* dictated a choice between pedagogical theories favouring either integrated or segregated schooling of disabled children.

9. The Ontario Court of Appeal disagreed with the Divisional Court's assumption that the case is merely about a choice between pedagogical theories. According to Justice Louise Arbour, the case is about "the appropriate legal framework within which that choice twill be made" (*Eaton v. Brant County Board of Education* (1995), 22 O.R. (3d)1 at 10 (C.A.)). Arbour J., speaking also for Justices James Carthy and Jean-Marc Labrosse, concluded that section 15 of the *Charter* dictates a presumption in favour of integrated education. Justification meeting the test of section 1 of the *Charter* would be necessary to rebut this presumption.

10. The Supreme Court of Canada unanimously reversed the decision of the Ontario Court of Appeal. Justice John Sopinka ruled against any constitutional presumption in favour of integration, concluding that "a presumption in favour of integrated schooling would work to the disadvantage of pupils who require special education in order to achieve

equality" (*Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241 at para. 69). The Supreme Court of Canada held against a violation of section 15 on the basis that the decision of the Special Education Appeal Tribunal was a determination, on the evidence, of Emily's best interests. Sopinka J. concluded that such a determination could not be a burden within the meaning of section 15.

III. Analysis

A. Introduction

11. This case is founded on a claim based on section 15(1) of the *Charter*.

> 15.(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

12. The challenge to the rulings to place Emily Eaton in a segregated educational setting for disabled students alleges that such segregation is unequal treatment amounting to discrimination on the basis of disability. It is uncontested that the effects of Emily's cerebral palsy constitute disabilities and that the challenged placement decisions were based on Emily's disabilities. Since physical and mental disabilities are enumerated grounds of discrimination under section 15, the grounds element of a section 15 claim is obviously established. The contested issues relate to the application of equality and non-discrimination in the context of the education of disabled students.

13. The Supreme Court of Canada has analytically split the elements of equality and non-discrimination in section 15 (see especially *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497), the former involving an analysis of differential treatment and the latter focusing on human dignity. In the context of this case, such an analytical split is unhelpful. In the context of students whose disabilities significantly impact on the manner of learning, there is no way of avoiding differential treatment. It is simply not possible to treat such students the same as non-disabled students—formal equality has no possible application. The choice is between different kinds of differential treatment, with the distinction between integrated or segregated placement being only the first choice required. Accordingly, the language of differential treatment does not assist in determining what equality principles dictate. The search is for substantive equality principles to guide the taking into account of difference attributable to disability. As such, discrimination analysis does not add new issues. Equality and non-discrimination analyses are

properly collapsed. Deviation from substantive equality amounts to discrimination contrary to section 15.

14. The essence of this case is whether equality and non-discrimination principles have any bearing on the choice between integrated and segregated education for disabled students. The Supreme Court of Canada said there could be no section 15 breach where the decision of the educational authorities was made in Emily Eaton's best interests. Yet it is necessary to look behind the meaning of "best interests." While there is no reason to doubt that the educational authorities thought they were deciding in Emily's best interests, such a conclusion cannot be determinative since intention to discriminate is not a requisite element of a section 15 breach (*Law Society of British Columbia et al. v. Andrews et al.*, [1989] 1 S.C.R. 143; and *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624).

15. It is also clear that the educational authorities did not reach their decision guided by any presumption in favour of integration. Indeed, it may be said that they did the opposite. Although the question posed was whether Emily would do better in an integrated or segregated setting, the answer given was that the integrated setting was not working for Emily. There was no actual conclusion that a segregated setting would be better for her (*Eaton* 1995, at 9). Thus, a different starting point as to the appropriate presumption could well have led to a different conclusion on the facts. The difference between the Court of Appeal's conclusion in favour of a constitutional presumption of integration and the Supreme Court of Canada's rejection of such a presumption is therefore of crucial significance.

16. There is, nonetheless, more at issue than legal presumptions. In choosing between an integrated and a segregated setting, it is also important to pay close attention to the nature of the integrated setting. In order for an integrated setting to advance equality, the integrated setting must be genuinely inclusive. An integrated setting that does not address the needs of disabled students cannot satisfy constitutional dictates of equality.

17. In assessing the statutory presumption of integrated education for disabled students in the United States, Ruth Colker has commented as follows:

> If anything, we might presume that the regular classroom poses problems for these children so that a school district should have to demonstrate that it has made significant and effective changes to the regular classroom before placing a child in that environment (Ruth Colker, "The Disability Integration Presumption: Thirty Years Later," Ohio State University Moritz College of Law Working Paper Series no. 9, 2005, at 8).

18. Although Colker made this point as part of her critique of the breadth of the integration presumption in the United States, we think the point

is more telling as a critique of the existing norms of the mainstream educational setting. Integration will be the antithesis of equality if no attention is paid to the terms upon which integration happens and with no, or insufficient, attention to meeting differing needs and circumstances of disabled students (see, in the context of racial integration, George J. Sefa Dei, ''Rethinking 'African-Centred' Schools in Euro-Canadian Contexts,'' in Keren S. Braithwaite and Carl E. James, eds., *Educating African Canadians* (Toronto: James Lorimer and Company, 1996), 295; and Derrick Bell, *Silent Covenants: Brown v. Board of Education and the Unfulfilled Promise of Racial Reform* (New York: Oxford University Press, 2004)). The choice is not just between integrated and segregated education. Segregated education cannot be relied upon as the answer to the inadequacies of integrated education.

19. In order to evaluate what equality demands in relation to education of disabled students, the historical context must be assessed.

B. Historical Context

20. Prior to 1980, there was no statutory right of universal access of children, specifically of disabled children, to public education in Ontario. In introducing amendments in 1980, the Minister of Education so acknowledged:

> [T]he basis of universal access contained within the bill guarantees the right of all children, condition notwithstanding, to be enrolled in a school. No longer will retarded children be enrolled after an assessment procedure established in law which has in fact denied universality of access. All children will now have a basic right to be enrolled (Legislature of Ontario, *Debates*, Official Report (Hansard), 31st Parl., 4th Sess., 23 May 1980, 2135-6 (per Hon. B. Stephenson, Minister of Education)).

21. This history is part of a larger context of exclusion of disabled persons from mainstream society:

> Persons with disabilities clearly constitute an underclass in Canadian society and, although there is growing willingness to discuss their issues in the context of rights, the forces of discrimination and paternalism continue to operate effectively to preserve this second class status. It is discriminatory attitudes and paternalism which are largely responsible for the warehousing of people with disabilities into institutions, sheltered

workshops and segregated "special" educational facilities (Sandra Goundry and Yvonne Peters, *Litigating for Disability Equality Rights: The Promises and the Pitfalls* (Winnipeg: Canadian Disability Rights Council, 1994) at 5).

22. Such a perspective is also shared by Marcia Rioux and Michael Prince ("The Canadian Political Landscape of Disability: Policy Perspectives, Social Status, Interests Groups and the Rights Movement," in Alan Puttee, ed., *Federalism, Democracy and Disability Policy in Canada* (Montreal: McGill-Queens University Press, 2002), 11 at 14). This history has been judicially acknowledged. In *Eldridge*, the Supreme Court of Canada relied, in part, on Goundry and Peters in saying that "[i]t is an unfortunate truth that the history of disabled persons in Canada is largely one of exclusion and marginalization" (*supra*, at para. 56).

23. The (still current) 1980 legislative change in Ontario, while incorporating a statutory right of universal access to public education, also contemplated achieving the goal of universal education through a combination of integrated and segregated education. This combination needs to be assessed against a backdrop of historical patterns of segregation, which have created and perpetuated second-class citizenship of disabled persons.

24. The long history of segregation of disabled persons, in Canada and elsewhere, has never had even the vaguest claim of being in the pursuit of equality. It has been about relegating disabled persons to the margins of society where most of the able-bodied population did not have to notice the existence of disabled persons. Segregation has been a tool used to stigmatize and marginalize virtually every oppressed group, for example, those identified by disability, race, sexual orientation, and religion.

C. "Separate but Equal"

25. Although the Supreme Court of Canada did not actually invoke the terminology of "separate but equal," it is the essence of their conclusion in the present case. By ruling against a constitutional presumption of integrated education, and finding no breach (even at the *prima facie* stage) arising from segregated placement, the Supreme Court of Canada affirmed that separate is equal. The Court's failure to expressly use the terminology of "separate but equal" is probably attributable to its historical connotations. The phrase acquired a deservedly bad reputation after it was utilized by the majority of the United States Supreme Court almost at the turn of the twentieth century in *Plessy v. Ferguson*, 163 U.S. 537 (1896). The *Plessy* case involved a challenge to racial segregation, the relevance of which to the present case is not to draw a direct analogy between race and disability segregation but rather

to highlight underlying theories of equality — or, more to the point, theories of inequality — in the analysis.

26. The Supreme Court of Canada's failure in the present case to mention *Plessy* is presumably based on the assumption that racial segregation is distinguishable from disability segregation because the latter is responding to actual differences attributable to disability. However, such an assumption fails to acknowledge how difference can be transformed into hierarchy and inequality.

27. Where segregation has been used to marginalize and stigmatize a group, a presumption of integration is necessary in order to counteract the continuing harm. The Supreme Court of Canada's decision in the present case obscures this fundamental point. The Supreme Court of Canada's rejection of a presumption of integration in education ignores the historical context that segregation of disabled persons has been used to confer and perpetuate inferior status. In this context, the rejection of a presumption of integration amounts to the adoption of a hierarchy of difference, which is unequal by definition. A hierarchy of difference is precisely what was constructed by the United States Supreme Court in 1896 in *Plessy*.

28. In upholding a Louisiana statute mandating racially segregated railway passenger cars, the United States Supreme Court in *Plessy*, explained:

> Laws permitting, and even requiring . . . [racial] separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power. The most common instance of this is connected with the establishment of separate schools for white and colored children, which has been held to be a valid exercise of the legislative power even by courts of States where the political rights of the colored race have been longest and most earnestly enforced (at 544 (majority)).

29. Despite the claim that racial segregation requirements "do not necessarily imply the inferiority of either race to the other," both the majority and the dissent in *Plessy* (at 549 (per the majority) and at 559 (per Harlan J., dissenting)) unashamedly referred to whites as the "dominant" race. The majority's capacity for rationalization, as well as its willingness to add insult to injury, seemed to know no bounds:

> We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced

> separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it (at 551).

30. Justice John Harlan's dissent, in contrast, characterized the majority's decision as:

> a state of the law which, practically, puts the brand of servitude and degradation upon a large class of our fellow-citizens, our equals before the law. The thin disguise of ''equal'' accommodations for passengers in railroad coaches will not mislead any one, nor atone for the wrong this day done (at 562).

31. Harlan J.'s reference to the ''thin disguise of 'equal' accommodations'' was an acknowledgment that, even on a theory of ''separate but equal,'' the facilities for Blacks were palpably unequal (see Bell, *Silent Covenants*, *supra*, at 13).

32. The blatant racism of the majority decision in *Plessy* has disturbing parallels to the present case. Such parallels were indirectly acknowledged by the Ontario Court of Appeal in the case at bar (at 6) by its reference to the case that ultimately overruled *Plessy*—the 1954 United States Supreme Court decision of *Brown v. Board of Education of Topeka, Kansas*, 347 U.S. 483 (1954), as support for endorsing a constitutional presumption of integration. It is noteworthy that the *Plessy* majority explicitly and tellingly invoked the example of segregated schooling as a legitimate form of separation (at 544). Thus, the Supreme Court of Canada's endorsement of segregated education in the present case can be seen as a reflection of the thinking underlying *Plessy*. Ironically, it was the issue of racially segregated schools that led to the ultimate overruling of *Plessy* in *Brown*. In *Brown*, the United States Supreme Court held that even assuming equality of ''tangible'' factors, ''[s]eparate educational facilities are inherently unequal'' (at 493 and 495). Although this claim is inadequate as a universal statement, it was compelling as a reaction to the racially segregated schooling at issue in *Brown:*

> It was not until *Brown I* was decided that blacks were able to understand that the fundamental vice was not legally enforced racial segregation itself; that was a mere by-product, a symptom of the greater and more pernicious disease—white supremacy (Robert Carter, ''A Reassessment of *Brown* v. *Board*,'' in Derrick Bell, ed., *Shades of Brown: New Perspectives on School*

> *Desegregation* (New York: Teachers College Press, 1980), 21 at 23).

33. This ''greater and more pernicious disease—white supremacy—has presented tremendous barriers over the last half century to the implementation of *Brown, supra*, in the United States. Derrick Bell, for many years one of the most committed litigators in efforts to implement *Brown*, has now reached the conclusion that *Brown* has ultimately been a failure. Furthermore, he has come to the conclusion that there might have been greater long-term progress towards racial equality if the principle of ''separate but equal'' had been maintained, with efforts directed at making the ''equal'' part genuine, rather than rhetorical as in *Plessy* (*Silent Covenants*, *supra*). Bell's is a tactical assessment more than a principled endorsement of ''separate but equal'' (at 189). The core theme of Bell's book is captured in the following comments:

> As I suggested earlier, the *Brown* decision substituted one mantra for another; where ''separate'' was once equal, ''separate'' would be now categorically unequal. Rewiring the rhetoric of equality (rather than laying bare *Plessy*'s white-supremacy underpinnings and consequences) constructs state-supported racial segregation as an eminently fixable alternative. And yet, by doing nothing more than rewiring the rhetoric of equality, the *Brown* Court foreclosed the possibility of recognizing racism as a broadly shared cultural condition. In short, the equality model offered reassurance and short-term gains, but contained within its structure the seeds of its destruction (at 196-7).

34. ''Separate but equal'' analysis is not necessarily problematic *per se*. The objectionable aspect of *Plessy* was its use of ''separate but equal'' in support of racist notions relegating Blacks to the status of inferior other, to the status of lesser persons.

> Once it is understood that the injury results from the existence of the label of inferiority, it becomes clear that the cure must be the removal of that label. (Charles Lawrence, '''One More River to Cross' – Recognizing the Real Injury in *Brown:* A Prerequisite to Shaping New Remedies,'' in Bell, *Shades of Brown*, *supra*, 49 at 52)

35. ''Separate but equal'' does not inevitably amount to, or condone, a hierarchy of difference. There are some contexts where ''separate but equal''

is indeed necessary (as a matter of principle and not just tactics) to achieve equality. Minority language education rights, which are protected in section 23 of the *Charter*, are a case in point: ''Section 23 is . . . especially important . . . because of the vital role of education in preserving and encouraging linguistic and cultural vitality (*Mahe v. Alberta*, [1990] 1 S.C.R. 342 at 350).

36. The jurisprudence under section 23 has focused on the means of assuring management and control by the linguistic minority. The historical backdrop to section 23 is that integrated linguistic education has meant education in the language of the majority and assimilation of the minority. Even bilingual education has proven to be a route to assimilation. Accordingly, a ''separate but equal'' scheme can be vital to resisting assimilation. In the disability context, schools for the Deaf can have a language claim similar to those advanced under section 23 of the *Charter*.

37. Parallel concern about cultural assimilation of Blacks has generated some critique of *Brown, supra*, in the United States (see Bell, *Shades of Brown* at vii and x; and Bell, *Silent Covenants* esp. at 121-5 and 160–79). In Canada, those advocating for ''African-centred'' schools do so in order to promote the ''centering of cultures and experience in the learning process'' in the wake of ''the asymmetrical power relations that govern the lives of minority students in the conventional school system'' (Dei, *supra*, at 298). Aboriginal self-government in Canada can also be seen as a form of ''separate but equal'' in the name of cultural autonomy. Indeed, ''separate but equal'' can be seen as an apt description of federalism.

38. Nevertheless, ''separate but equal'' claims in the name of cultural autonomy still must be scrutinized carefully. A comparison with the South African context provides one illustration of why. In *Reference re: School Education Bill of 1995 (Gauteng)*, 1996 (3) S.A. 165 (CC), the South African Constitutional Court was asked to rule on a claim that the Constitution mandated public funding of Afrikaans schools. The plaintiffs made arguments relying on section 23 of the Canadian *Charter*. The plaintiffs' claims were rejected. The majority did so by a standard textual analysis of the South African Constitution and by distinguishing its language from that of the Canadian *Charter*. Justice Albie Sachs, concurring in the result, offered a thorough contextual analysis to enhance the textual analysis:

> [T]he present case stems from the situation of a community defending relative affluence and privilege, rather than one combatting marginalisation and the imminence of group annihilation . . . Thus, it is the equality principle rather than the nondiscrimination one which becomes the foundation for special legal and other measures to assist groups suffering from de facto rather than de jure disadvantage . . . As far as members

> of the Afrikaans speaking community are concerned, they could complain if the State treated them less advantageously than other groups; their claim to retain a privileged situation, however, would not have the same, or any, force (at paras. 70 and 73).

39. "Separate but equal" claims from marginalized minority communities may have a very different connotation than those from privileged communities. Where it is the privileged majority seeking to impose segregation on an unwilling minority, as in both *Plessy* and the present case, "separate but equal" claims ring hollow. Where the claim for "separate but equal" comes from a vulnerable minority, the context may be very different than when segregation is imposed by the dominant society. Thus, in the Court of Appeal in the present case, Arbour J. drew an important distinction between imposed and chosen separateness (at 15). Similarly, those advocating for "African centred" schools in Canada are careful to put forth the concept as based on choice, as an alternative option, and not resting on coercion against students or parents (Dei, *supra*, at 300-1).

40. Yet even separateness chosen by marginalized communities warrants questioning. It is important to ask whether the choice is genuinely voluntary, or whether it is actually a very constrained choice. In the specific context of education, it is important to scrutinize the learning environment in the integrated setting. If segregated education better meets the needs of students simply because of the inadequacy of the integrated setting, it cannot be said that either setting is promoting equality. This point is pertinent in multiple contexts, but the precise implications vary considerably. For example, what is needed from an integrated setting to respond to racial diversity is quite different from what is needed to respond to disability. In both contexts, Canadian society has a long way to go in even acknowledging, much less meeting, these challenges to dominant norms. In the present case, as will be elaborated upon later in this judgment, there is no acknowledgment by the Supreme Court of Canada that non-disabled norms are controlling in the integrated setting.

41. The ultimate conclusion of the Supreme Court of Canada in the present case is that, compared to integrated education, segregated education better met Emily's needs as a disabled student. Although the Court does not draw the analogy to minority language education, the conclusion of the Court aligns segregation on the basis of disability with segregation on the basis of language. The historical context of section 23 of the *Charter* is that linguistic integration in education has been the path to cultural assimilation. In this context, "separate but equal" is an important bedrock against assimilation and a means of promoting equality. In marked contrast, the historical context of the education of disabled students is that segregated education has been a

means of marginalization, of relegation to the status of inferior other. In this context, easy resort to imposed "separate but equal" can only perpetuate such a badge of inferiority within an unequal hierarchy of difference. Thus, a presumption of integration of disabled students, and a rejection of "separate but equal" as complying with section 15, is what equality principles demand.

D. Taking Account of Difference

42. In his dissent in *Plessy*, Harlan J. had articulated the principle that the "Constitution is color-blind"—that is, that the Constitution should ignore difference (at 559). Compared to what his colleagues were doing in 1896, this was a progressive stance. However, at this point in our equality jurisprudence, it is clear that substantive equality does require taking difference into account in order not to perpetuate discrimination. This understanding of equality is expressly acknowledged in the Canadian *Charter* in section 15(2), which was reinforced by the Supreme Court of Canada in its first section 15 decision in *Andrews* (*supra*, at 169) and reiterated by Sopinka J. in the present case (*Eaton* 1997, *supra*, at para. 66). Yet it is still necessary to consider exactly how difference is to be taken into account. Substantive equality demands taking difference into account without creating a hierarchy of difference.

43. In the context of disability it may sometimes be impossible to ignore difference, and no one in the present case is suggesting that it was possible to ignore Emily Eaton's difference. The debate is whether her difference should be dealt with via special supports in an integrated educational setting or via a segregated educational setting.

44. In determining which is the appropriate approach to difference in the present case, Sopinka J. provides the following overview:

> The principal object of certain of the prohibited grounds is the elimination of discrimination by the attribution of untrue characteristics based on stereotypical attitudes relating to immutable conditions such as race or sex. In the case of disability, this is one of the objectives. The other equally important objective seeks to take into account the true characteristics of this group which act as headwinds to the enjoyment of society's benefits and to accommodate them. Exclusion from the mainstream of society results from the construction of a society based solely on "mainstream" attributes to which disabled persons will never be able to gain access . . . [I]t is the failure to make reasonable accommodation, to fine-tune society so that its structures and assumptions do not result in the

> relegation and banishment of disabled persons from participation, which results in discrimination against them (at para. 67).

The "fine-tuning" language suggests that only minor modifications are needed to avoid "relegation and banishment."

45. Sopinka J.'s description of the tribunal's decision makes it clear that it was the extent of the challenge posed by integrating Emily that led to the decision in favour of a segregated placement.

> The Tribunal observed at the outset that it is the extent of Emily's special needs which provokes consideration of a special placement, and not the fact that her needs are different from the mainstream. The Tribunal then reviewed Emily's needs under a number of headings and made numerous findings of fact upon which it based its decision (at para. 16).

46. Sopinka J.'s limited conception of the adaptation that mainstream society should be required to make is also apparent in the following passage:

> The interplay of these objectives relating to disability is illustrated by the evolution of special education in Ontario. The earlier policy of exclusion to which I referred was influenced in large part by a stereotypical attitude to disabled persons that they could not function in a system designed for the general population. No account was taken of the true characteristics of individual members of the disabled population, nor was any attempt made to accommodate these characteristics. With the change in attitude influenced by the Williston Report and other developments, the policy shifted to one which assessed the true characteristics of disabled persons with a view to accommodating them. Integration was the preferred accommodation but if the pupil could not benefit from integration a special program was designed to enable disabled pupils to receive the benefits of education which were available to others.
>
> It follows that disability, as a prohibited ground, differs from other enumerated grounds such as race or sex because there is no individual variation with respect to these grounds. However, with respect to disability,

> this ground means vastly different things depending upon the individual and the context. This produces, among other things, the "difference dilemma" referred to by the interveners whereby segregation can be both protective of equality and violative of equality depending upon the person and the state of disability. In some cases, special education is a necessary adaptation of the mainstream world which enables some disabled pupils access to the learning environment they need in order to have an equal opportunity in education. While integration should be recognized as the norm of general application because of the benefits it generally provides, a presumption in favour of integrated schooling would work to the disadvantage of pupils who require special education in order to achieve equality. Schools focussed on the needs of the blind or deaf and special education for students with learning disabilities indicate the positive aspects of segregated education placement. Integration can be either a benefit or a burden depending on whether the individual can profit from the advantages that integration provides (at paras. 68-9).

47. While Sopinka J. gives some acknowledgment of the significance of integration, it is clear he expects only modest adaptation of the mainstream classroom to allow for integration of disabled students. In his analysis, reliance on segregated schooling is uncritically endorsed as a means to meet the needs of those who are blind, deaf, or learning disabled.

48. Margot Young has commented:

> Thus the question of integrated as opposed to segregated educational opportunities becomes a question of whether the individual herself will fit the existing educational environments rather than how those environments need be changed to fit her and others who currently occupy the margins of society (Margot Young, "Sameness/Difference: A Tale of Two Girls" (1997) 4 Review of Constitutional Studies 150 at 162).

49. Sopinka J. contemplates segregated education as frequently better for disabled students precisely because he does not contemplate a genuinely inclusive integrated education that can meet the needs of a diverse student

population (for a review of the challenges of a genuinely inclusive integrated education, see MacKay, *supra*).

E. ''Best Interests''

50. The Ontario Special Education Tribunal, as affirmed by the Supreme Court of Canada, concluded that the decision in favour of segregated education met Emily Eaton's ''best interests'' without seriously questioning the meaning of this term. More specifically, it did not question the perspective from which ''best interests'' was being assessed, uncritically evaluating ''best interests'' of disabled students from a non-disabled (able-bodied) frame of reference. The tribunal's findings that a segregated placement met Emily's best interests were made in a disaggregated way, and the assessment of Emily was based on able-bodied norms. It is the failure to assess Emily as a whole person that enabled the tribunal and the Supreme Court of Canada to downplay the significance of integration and to ignore the historic context that segregated education for disabled students connotes inferior status.

51. Ruth Colker calls for a re-assessment of the breadth of the statutory presumption of integrated education of disabled students in the United States (*supra, passim*). She concludes that there are contexts where segregated education better meets the needs of disabled students. To a large extent, however, she reaches this conclusion by comparing segregated placement with the *status quo* of the integrated classroom. If the mainstream educational environment is not fully adapted to the needs of disabled students, it will often be easy to conclude that a segregated placement will be in their best interests (see MacKay, at 32-3). However, such a choice has already compromised equality principles.

52. A decision based on ''best interests'' will not be consistent with equality unless basic norms of integrated education are open to challenge. The Supreme Court of Canada did not acknowledge the need for such fundamental transformation away from non-disabled norms and, hence, did not engage with the real equality issues at stake in the present case. ''Equality by proclamation'' does not produce transformative results (Bell, *Silent Covenants*, at 186). As George Dei has commented in the context of race, ''[m]ixing students is not by itself a sufficient guarantee for integration and social acceptance'' (at 298).

53. This is not meant to suggest that segregated educational placements cannot be appropriate for disabled students as being in their best interests. Even a genuinely inclusive integrated environment may not be capable of adequately responding to disability difference in some cases. Attention to individual circumstances makes it important to consider all possible options. Nonetheless, in order for integrated education to be held accountable, the burden of showing the need for segregated placement should rest on those advocating it, as a section 1 justification.

F. Parental Choice

54. Sopinka J. further explains his rejection of a presumption of integration:

> In my view, the application of a test designed to secure what is in the best interests of the child will best achieve that objective if the test is unencumbered by a presumption . . . I would also question the view that a presumption as to the best interests of a child is a constitutional imperative when the presumption can be automatically displaced by the decision of the child's parents [as held by the Court of Appeal]. Such a result runs counter to decisions of this Court that the parents' view of their child's best interests is not dispositive of the question (para. 79; see also *E. (Mrs.) v. Eve*, [1986] 2 S.C.R. 388; and *B.(R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315).

55. The danger of automatically assuming that parents of disabled children always act in their best interests is glaringly exposed in *R.* v. *Latimer*, [2001] 1 S.C.R. 3. In the present case, it is also fair to say that it is a legal fiction to say that Emily's parents are expressing Emily's choice (*Eve*, at 435, para. 95). In reality, we do not know Emily's wishes. Barriers to knowing the wishes of disabled students are a valid basis for challenging the Court of Appeal's conclusion that there should be an automatic right of parents to displace the presumption of integration. They are not, however, a valid basis for challenging the presumption of integration in the first place. As a practical matter, if both the parents and the educational authorities agree that there should be segregated education, it will probably happen because there will be no one to challenge the decision. There is no need to find a legal right of the parents to override the presumption, and we make no such finding.

G. Conclusion Respecting Section 15

56. The Supreme Court of Canada's rejection of a presumption of integration amounts to the adoption of a hierarchy of difference, which is inconsistent with the equality guarantee of section 15 of the *Charter*. A bare presumption in favour of integration is, however, insufficient to satisfy section 15. Integrated education only meets the dictates of section 15 if it is genuinely inclusive and addresses the actual needs of disabled students. The worst of all worlds for disabled students who have special needs is to be placed in an

integrated school setting with no or inadequate supports. Compliance with section 15 requires fundamental transformation of the traditional mainstream classroom.

57. A constitutional presumption of integrated education for disabled students is necessary for two reasons. First, a constitutional presumption of integration is required to counteract the historic legacy by which segregation has connoted inferior status. Second, a constitutional presumption of integration is necessary to place an onus on the state to make the integrated educational environment genuinely inclusive in order to meet diverse needs. Such an onus puts the responsibility on the state to demonstrate the specific conditions and circumstances under which an integrated educational setting cannot meet the best interests of disabled students. Such an assignment of onus makes any argument for segregated education a matter of section 1 justification. In any context in which segregated education is sought to be imposed, section 15 itself demands integrated education.

H. Section 1 of the Charter

58. A constitutional presumption in favour of integration implies that such a presumption can be rebutted. It is a section 1 issue precisely because the burden is on the state to rebut. Any rebuttal should not be in abstract terms but must be grounded in the actual needs and circumstances of the disabled student. As A. Wayne MacKay has commented: "While regular classrooms may be the norm, other options may be preferable in some cases. Inclusion is an approach, not a place. Flexibility is vital" (*supra*, at 201).

59. The mootness of the present case makes this an inappropriate occasion to consider the circumstances under which the presumption could be rebutted.

IV. Disposition

60. Based on this reconsideration of *Eaton v. Brant County Board of Education*, we find that there is a constitutional presumption of integrated education for disabled students. Were it not for the mootness of the present case, the appropriate disposition would be to send the case back for redetermination in accordance with the present reasons. However, there is no point to a redetermination in the actual circumstances.