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 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.

CJWL/RFD
doi: 10.3138/cjwl.18.1.121