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Case Note

***251** The Placement of Students with Disabilities and the "Best Interest" Standard

William J. Smith [FNa1]

Eaton v. Brant (County) Board of Education [FN1]

Constitutional law - Discrimination - Exceptional pupils - Right to inclusion in regular classroom - Canadian Charter of Rights and Freedoms, s. 15(1)

In February 1997, the Supreme Court of Canada handed down its long-awaited reasons in the case of *Eaton v. Brant (County) Board of Education* [FN2] in support of its decision rendered the previous October. The case began when a Special Education Tribunal was asked to adjudicate a special education dispute, where the parents of a student with multiple disabilities sought a regular class placement for their daughter. [FN3] The Tribunal rejected the claim, [FN4] a decision that was upheld by the Divisional Court, [FN5] but overturned by the Ontario Court of Appeal. [FN6] The critical questions to be answered by the Supreme Court of Canada were: (1) did the original decision of the Special Education Tribunal contravene section 15(1) of the *Canadian Charter of Rights and Freedoms*, and (2) if this question were answered in the affirmative, are the relevant provisions of the Ontario *Education Act* and the regulation governing placement constitutionally invalid? All ***252** members of the Court concurred with the decision written by Sopinka J.

The Court grounded its decision in the two-step analysis set forth in *Miron v. Trudel*, [FN7] and *Egan v. Canada*, [FN8] namely, proving (1) that "equal protection" or "equal benefit" of law has been denied, and then (2) that the denial constitutes discrimination, "based on *irrelevant* personal characteristics." [FN9] Moreover, in *Eaton*, the Court stated that "relevance may assist as a factor in showing that the case falls into the rare class of case in which a distinction on a prohibited or analogous ground does not constitute discrimination." [FN10] The Court thus emphasized that "distinctions based on *presumed* rather than *actual* characteristics are the hallmarks of discrimination," [FN11] especially in relation to disability related cases. Here the Court referred to the classic discussion of discrimination by McIntyre J. in *Andrews v. Law Society (British Columbia)*, [FN12] where it is recognized that not only must one avoid the attribution of stereotypical characteristics to individuals but one must also seek to ameliorate the conditions of those who have been discriminated against; in other words, *equal opportunity*, broadly defined, must be provided for. The Court distinguished disability from other prohibited grounds such as race and sex, in that only the latter type were defined by immutable characteristics. In the case of disability, the Court argued, eliminating stereotypical images is not enough:

> 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. ... Rather, it 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. [FN13]

The Court then set forth the following statement of principle by which to assess the decision of the Tribunal in relation to the equality provisions of section 15(1) of the *Charter*:

> ***253** 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. [FN14]

In analyzing the decision of the Tribunal, the Court found that it had "balanced the various educational interests of Emily Eaton, taking into account her special needs, and concluded that the best possible placement was in the special class." [FN15] The Court went on to say that "[i]t seems incongruous that a decision reached after such an approach could be considered a burden or a disadvantage imposed on a child." [FN16]

The final issue dealt with by the Court, albeit briefly, was the exercise of the child's rights on her behalf by her parents and the decision of the Court of Appeal that a segregated placement was presumed to be discriminatory, unless the parents consented. The Court noted that the parents' view of their child's best interest was an inadequate approach; what mattered was the child's best interest as determined by "the appropriate accommodation for an exceptional child ... from a subjective child-centred perspective, one which attempts to make equality meaningful from the child's point of view as opposed to that of the adults in his or her life." [FN17] The test of best interest should not therefore be encumbered by a presumption in favour of integration:

> ***254** Moreover, there is a risk that in some circumstances, the decision may be made by default rather than on the merits as to what is in the best interests of the child. 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. [FN18]

Based on the foregoing, the Court held that the decision of the Tribunal did not contravene section 15(1) of the *Charter* and there was therefore no need to consider the finding of the Court of Appeal that the *Education Act* was constitutionally deficient. However, Lamer C.J.C., with Gonthier J. concurring, felt it necessary to add, in his concurring opinion, that the Court of Appeal had erred in its analysis of the constitutionality of the Act and in its application of the Supreme Court decision in *Slaight Communications Inc. v. Davidson*. [FN19] Lamer C.J.C. stated that

> statutory silences should be read down to not authorize breaches of the *Charter*, unless this cannot be done because such an authorization arises by necessary implication. ... *Slaight Communications* would require that any open-ended language in that provision (if there were any) be interpreted so as to not authorize breaches of the Charter. [FN20]

In the final analysis, the only test which survived the *Eaton* saga is the "best interest" of the child. However,

whether this result will end the long-standing debate on the equality rights of students with disabilities remains to be seen.

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[FN1]. (1997), 142 D.L.R. (4th) 385.

[FN2]. Ibid.

[FN3]. The Tribunal was constituted under the authority of the Ontario *Education Act*, R.S.O. 1990, c. E.2, and the Special Education Identification, Placement and Review Committees and Appeals Regulation, R.R.O. 1990, Reg. 305.

[FN4]. (19 November 1993), (Ontario Special Education Trib.) [unreported].

[FN5]. (1994), 71 O.A.C. 69 (H.C.).

[FN6]. (1995), 22 O.R. (3d) 1, 123 D.L.R. (4th) 43 (C.A.). For further details, see W.J. Smith, "*Eaton v. Brant County Board of Education*: Implications for Legislation in Canada" (1995) 5:1 CAPLSE Comments 1. See also B. Greenstein, "Exceptional Child's Right to Inclusion" (1995-96) 7 E.L.J. 77.

[FN7]. [1995] 2 S.C.R. 418, 124 D.L.R. (4th) 693.

[FN8]. [1995] 2 S.C.R. 513, 124 D.L.R. (4th) 609.

[FN9]. *Eaton*, above, note 1 at 405 [emphasis added].

[FN10]. Ibid.

[FN11]. Ibid. [emphasis added].

[FN12]. [1989] 1 S.C.R. 143, 56 D.L.R. (4th) 1.

[FN13]. *Eaton*, above, note 1 at 405, 406.

[FN14]. Ibid. at 406-407; for an analysis of the "difference dilemma", see M. Minow, *Making All the Difference: Inclusion, Exclusion and American Law* (Ithaca, N.Y.: Cornell University Press, 1990).

[FN15]. *Eaton*, above, note 1 at 409.

[FN16]. Ibid.

[FN17]. Ibid.

[FN18]. Ibid. at 410.

[FN19]. [1989] 1 S.C.R. 1038, 59 D.L.R. (4th) 416.

[FN20]. *Eaton*, above, note 1 at 389.

8 Educ. & L.J. 251

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