Importing from South of the Border

By J. Paul R. Howard

When you're driving westerly to Windsor, Ontario, highway 401 ends in a fork, leaving you with two options: bank left and, as the sign will tell you, take the Ambassador "Bridge to U.S.A." or bear right for the "Tunnel to U.S.A.". (And without re-visiting those tired "elephant and mouse" analogies, it still seems rather culturally disquieting to think that the primary means by which the road signs here in Canada distinguish between two routes is how each of them will get you to the United States.) Just as they are used for exporting purposes, every day those routes are travelled upon by scores of truck and cars, importing goods, employees and tourists from our American neighbour.

But the impulse to import is not limited to users of the 401. Thus, it was inevitable that after our Canadian constitutional make-up was fundamentally altered in 1982 by the entrenchment of individual civil liberties in the *Canadian Charter of Rights and Freedoms* – some aspects of which we borrowed, in part, from the quintessential example of such instruments, the American Bill of Rights – our courts and commentators would look to the American experience when interpreting our domestic laws.

However, while Canadian courts will often be greatly assisted by considering the wealth of American jurisprudence on constitutional and human rights issues, we need to exercise caution whenever importing American legal concepts, given the significant differences between our two countries' constitutional framework. For instance, the notion underlying the American establishment clause in the First Amendment, which mandates the separation of church from state, is utterly foreign to the denominational school rights protected by the guarantees under section 93(1) of the *Constitution Act*.

One of the more instructive examples of the difficulties that can result when one seeks to apply American constitutional concepts in starkly different, and inappropriate, contexts arose within the pedagogical debate in special education wherein proponents of full inclusion challenged the range of placements model because of its failure to guarantee all special needs students with a fully integrated placement in the regular classroom with their age-appropriate peers.

Full inclusion sought to justify its position by reliance, in part, upon analogies to racial segregation in American history generally[1] and the landmark decision of the U.S. Supreme Court in *Brown v. Board of Education* specifically.[2] For full inclusion, the point made by *Brown v. Board of Education* "about slavery applies also to current segregationist practices in Canada and the United States. If we want an integrated society in which all persons are considered of equal worth and as having equal rights, segregation in the schools cannot be justified".[3] Such analogies seemed to occupy a favoured place in full inclusion's arsenal of arguments and, thus, it was hardly surprising that various proponents of full inclusion sought to harness the power of *Brown v. Board of Education* and its ringing rejection of the notorious "separate but equal" doctrine, citing, almost invariably, the following passage from the Court's opinion:

> We conclude that in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.[4]

The power of the *Brown* analogy was too much for the Ontario Court of Appeal in *Eaton v. Brant County Board of Education*, where it accepted the argument of the parents, which posited a presumption in favour of inclusion based, in part, on the assumption that the American constitutional principles concerning racially segregated education are equally applicable to "forced segregation" on other grounds such as disability. Indeed, citing *Brown v. Board of Education*, the Court of Appeal's decision in *Eaton* began with the premise that placement of a severely disabled pupil in a special class in a regular school is tantamount to "segregation", and the segregation motif permeated the balance of its judgment, especially evident in the following passage, where Madam Justice Arbour for the Court contended that:

> If there was any doubt about whether the segregation of disabled students is discriminatory, it would be useful, in my opinion, to reflect on whether a similar kind of segregation could be effected on any of the other grounds enumerated in s. 15, without an infringement of that section. Could public school officials determine, on the basis of a pedagogical theory, that ... black children should attend identical but separate school facilities?[5]

The inclusionist attempt to invoke the imagery of racial segregation was tactical, made full well in the knowledge that the racial paradigm occupies a central place in American constitutional history. The historical treatment of African-Americans in North American society is singularly captured by the mere word "segregation", and the inclusion argument hoped to exploit that term's connotation of discrimination by unfailingly referring to special classrooms as "segregation", implicitly suggesting that the use of the very same word in the context of the education of mentally disabled people must be more than coincidence.

However, despite its superficial appeal, the analogy to *Brown* is ultimately unconvincing because it ignores crucial differences between racial segregation in educational facilities and the education of disabled children. The evil of racial segregation was that it attempted to justify a belief that the races were of unequal worth or value, and it consequently supposed a difference in abilities, along with other allegedly scientific theories, in order to rationalize the oppression of blacks. In contrast, when it happens that particular students are identified as having special needs and placed in settings other than the regular classroom, the occurrence does not seek to further a belief that these children are inherently of less value. The educational practice does not seek to devalue pupils under the guise of differences in ability; rather, it seeks to identify students of different needs, and those differences which are relevant, in order that it may accommodate those different needs when providing an appropriate education. In this manner, it seeks to reaffirm the equal worth of the pupil, which is the essence of equality in the disability context.

In other words, one of the logical errors of racial segregation was that it treated blacks as if race were a relevant factor determinative of educational service delivery. But differences in race do not

need accommodation in this specific context, unlike differences of impairment. In this regard, Professor Barbara Bateman observed that:

> A lot of people have falsely applied the lessons of racial segregation to the segregation of the disabled. They don't understand that skin colour has never been an educational variable, whereas a disability may imply different kinds of teaching.[6]

More importantly, the misappropriation of *Brown v. Board of Education* served to impede the thoughtful development of equality rights analysis in the special education context. Precisely because the evils of segregation are so well entrenched in the collective consciousness of North American society, long cemented in legal doctrine by *Brown*, the very use of the term has had an unfortunate tendency to stifle constructive debate in the special education forum. Full inclusion steadfastly, albeit simplistically, maintained that instruction in the self-contained classroom is "segregation", and "segregation" is quite obviously unlawful discrimination. Period.

Thankfully, the issue was resolved, at least insofar as the misapplication of *Brown* in the Canadian special education context is concerned, by the Supreme Court of Canada's judgment in *Eaton*, where, in overturning the Ontario Court of Appeal, Mr. Justice Sopinka correctly observed that, "segregation can be both protective of equality and violative of equality depending upon the person and the state of the 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". What we need to do, then, is learn from the mistakes of our past, and when we go cross-border shopping, make informed consumer decisions, marked more by reason than rhetoric.

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1. See, for e.g., Lipsky & Gartner, "Restructuring for Quality" in *The Regular Education Initiative: Alternative Perspectives on Concepts, Issues and Models* (1991) at p. 52.

2. *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954), cited in, for e.g., Stainback & Stainback, "A Rationale for Integration and Restructuring: A Synopsis" in *The Regular Education Initiative, supra* at p. 228.

3. Stainback, Stainback & Bunch, "Introduction and Historical Backgroung" in *Educating All Students in the Mainstream of Regular Education* (1989) at p. 4.

4. *Brown v. Board of Education, supra* at pp. 493-95, cited in, for e.g., Vickers & Endicott, "Mental Disability and Equality Rights" in *Equality Rights and the Canadian Charter of Rights and Freedoms* (1985) at p. 397.

5. *Eaton v. Brant County Board of Education* (1995), 22 O.R. (3d) 1 at pp. 6 and 16 (C.A.); reversed on appeal (1997), 142 D.L.R. (4th) 385 (S.C.C.).

6. B. Bateman quoted in A. Nikiforuk, "Fifth Column: Education" *The [Toronto] Globe and Mail* (30 April 1993).

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