# SAMENESS/DIFFERENCE: A TALE OF TWO GIRLS

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*Equality analysis under the Canadian Charter of Rights and Freedoms typically involves the application of a simple, formal equality model that favours claims made by those more similar to dominant norms than different: those more "similarly situated" than those more differently situated. According to the author, the differing results in the equality cases of Blainey (a successful claim by an athletic girl to join a boy's hockey league) and Eaton (an unsuccessful claim by a disabled girl to join a regular elementary school class) underscore the inability of Charter equality analysis, at least in the context of disability claims, to overcome received truths about individuals claimants. In the recent case of Eaton, the Supreme Court of Canada assumes as "true" those characteristics usually assigned to the disabled rather than inquiring into the practices and institutions that help contribute to the social construction of difference. Application of a formal equality model leads the Court to affirm the decision, contrary to her parents' wishes, that Emily Eaton be placed in a segregated educational environment. Rather than simply accommodating disability claims through segregation, the author argues, equality analysis must interrogate the systemic inequities that continue to marginalize the disempowered.*

*Les analyses effectuées aux termes de la Charte canadienne des droits et libertés reposent généralement sur un raisonnement formel simple qui favorise les revendications présentées par les personnes plus conformes aux normes dominantes : celles dont les attributs sont plus proches « de l'ensemble ». Selon l'auteure, les arrêts différents rendus dans les causes Blainey (lutte menée avec succès pour obtenir le droit des filles de se joindre aux ligues de hockey junior) et Eaton (tentative infructueuse d'inscrire une élève handicapée dans une classe élémentaire ordinaire) montrent que les analyses d'égalité effectuées en vertu de la Charte — dans le contexte des revendications relatives aux handicaps, tout du moins — ne permettent pas de surmonter les idées reçues au sujet de cas individuels. Dans le cause récente Eaton, la Cour suprême considère comme « réelles » les caractéristiques habituellement attribuées aux personnes handicapées plutôt que de s'interroger sur les pratiques et les institutions qui contribuent à la construction sociale des différences. L'application d'un modèle d'égalité formel conduit la Cour à confirmer la décision, contre la volonté des parents, de placer Emily Eaton dans une classe pour élèves en difficulté. Plutôt que d'opter tout simplement pour la ségrégation, l'auteure soutient que l'analyse doit remettre en question les inégalités systémiques qui continuent à marginaliser les personnes tenues à l'écart du pouvoir.*

Equality analyses, at their best, involve critical examinations of how difference is recognized, given meaning, and valued. Their goal is to guide us towards truly inclusive institutions and social practices in which we are all recognized as different, yet full participants. Two cases — *Re Blainey and Ontario Hockey Association et al.*[1] and *Eaton* v. *Brant County Board of Education*[2] — provide good book-ends to the body of judicial decisions that take up this task: between them lies almost the full span of equality jurisprudence

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1 (1986), 54 O.R. (2d) 513 (C.A); leave to appeal denied, [1986] 2 S.C.R. 573 [hereinafter *Blainey*].

2 (1997), 142 D.L.R. (4th) 385 (S.C.C.).

under section 15 of the *Canadian Charter of Rights and Freedoms*.[3] These cases neatly encapsulate the failure of this jurisprudence to grasp the critical relationship between difference and equality.

On both an analytical and a factual level, the juxtaposition of these cases is appealing. Both cases involve twelve year-old girls. Although one case deals with gender discrimination, the other with disability discrimination, both raise issues of inclusion and exclusion in relation to traditional structures to which more privileged members of society have access. But only one girl is successful: Emily Eaton lost her case, while Justine Blainey won hers. From an analytical perspective, the same model of equality is used in both cases to distribute victory and defeat: popular notions of sameness and difference dictate whether similar or different treatment is constitutionally mandated. Aptly caught, then, but from two different angles, is the entrenchment of a formal equality model that takes as granted existing patterns of difference and the deployment of social power and privilege around them. For Justine this model worked well, although the larger implications of her victory are more troubling. But, neither Emily nor the systemic concerns her equality issue raises are given their due under this model.

Justine's case captured one of the simplest yet most powerful critical abilities of equality law. Denied membership on her local boys' hockey team purely because of her sex (despite "outstanding athletic ability"[4]), Justine used the new section 15(1) to force changes to the *Ontario Human Rights Code*[5] so that her exclusion could be recognized as prohibited discrimination under the *Code*. These changes then enabled her to use the provincial statue to challenge successfully her exclusion from the hockey team. The end result was that, with the necessary help of section 15(1), Justine was able to join the hockey team of her choice.

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3 *Part I of The Constitution Act, 1982* which is Schedule B of the *Canada Act* 1982, c. 11 (U.K).

4 Blainey, *supra* note 1 at 517, per Dubin J.A.

5 R.S.O. 1980, c. 340, s. 2 (as it then was). Section 19(2) of the *Human Rights Code* stipulated that the right to equal treatment with respect to services and facilities was not infringed where membership in an athletic organization or participation in an athletic activity was restricted to persons of the same sex. Thus, the Human Rights Commission had no jurisdiction to assist Justine, despite denial of membership in the hockey league on account of her sex. At the Court of Appeal, Justine was able to show that such restriction of the Code's anti-discrimination protection was contrary to s. 15(1) of the *Charter* and unjustifiable under s. 1 of the *Charter*.

Justine was an ideal section 15(1) claimant: she could play with the boys. The only difference between her and the other (male) members of the team, as far as playing hockey was concerned, was her sex: in this context, simply an "accident of birth."[6] Indeed, Justine was much more the "same" than she was "different." Thus, her claim against the hockey organization, and the injustice of the *Human Rights Code*'s failure to recognize such a claim were easy to formulate. All one had to do was to "degender" Justine: to make her sex irrelevant to determination of the hockey team on which she played. In recognition of the simplicity of Justine's claim against the *Human Rights Code*, the Court of Appeal acknowledged that "by any of the various tests," Justine's equality claim under section 15(1) was clear.[7]

Contrast this with Emily Eaton's situation. Emily Eaton has cerebral palsy. She is unable to speak or to sign and has established no alternative communication system. Her vision is impaired, as is her general mobility. Emily is much more "different" than she is the "same." Emily thus raises a tougher equality issue; she is not "similarly situated" to those in the environment to which she wants access. A simple formal equality analysis — one that leaves unexplored the social construction of difference — will not reveal and rectify any discrimination from which Emily might suffer. Yet, it is precisely this model that the Supreme Court of Canada applies. Emily's case, therefore, provides an excellent opportunity to unpack the shortcomings of formal equality as the model is used to deal with difference. Just as Justine's case demonstrated the power of a formal equality analysis, Emily's case illustrates its ultimate inability to deal with the complex reality of discrimination and difference. What is highlighted is the need for the development of a more substantive notion of equality, one that grants to difference the same respect and recognition that formal equality, in Justine's case, did for sameness.

Emily's equality issue arose as follows. For the last three years, Emily, designated an "exceptional pupil" by the local school board's Identification, Placement, and Review Committee (the "IPRC"),[8] had been placed in a regular

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6 C. A. MacKinnon, "Difference and Dominance: On Sex Discrimination" in *Feminism Unmodified: Discourses on Life and Law* (Cambridge: Harvard University Press 1987) 32 at 37.

7 Blainey, *supra* note 1 at 525, per Dubin J.A..

8 The relevant Ontario legislation, *The Education Act* (1980, R.S.O. 1990, c. E.2) provides in s. 1(1) that a pupil whose behavioural, communicational, intellectual, physical or multiple exceptionalities are such that she or he needs placement in a special education programme is an "exceptional pupil." The Act then assigns responsibility to the Minister of Education to ensure that all exceptional children in Ontario have access to appropriate special education programmes and services.

class where, with the aid of a full-time education assistant, she received kindergarten and grade one education in her neighbourhood school. It was her parents' wish that this arrangement continue. However, the IPRC, after consultation with teacher assistants and Emily's parents, concluded that Emily would, at this point, be better placed in a special education class, a segregated educational environment. Despite the parents' protests to the contrary, the placement was upheld by a Special Education Appeal Board. An appeal to the Ontario Special Education Tribunal (the "Tribunal") did not displace the decision, nor, ultimately, did the parents' resort to judicial review,[9] the end result of which was the Supreme Court of Canada's unanimous decision upholding Emily Eaton's placement within a segregated stream of education. At the Supreme Court level the substantive issues raised by the parents became distilled to the question of whether or not the Tribunal's decision to uphold the placement

(*Education Act*, s. 8[3]) Regulations prescribe the establishment by every Board of Education of an Identification, Placement, and Review Committee to identify and place exceptional pupils, allowing for a process whereby parents may appeal an IRPC's placement decisions to the Tribunal (Regulation 305 [Special Education Identification Placement and Review Committees and Appeals] R.R.O. 1990).

9 Although they lost at the Ontario Divisional Court [(1994), 71 O.A.C. 69], the Eatons were successful at the Ontario Court of Appeal [(1995), 22 O.R. (3d) 1]. At the Divisional Court level, the Eatons, in seeking to quash the Tribunal's decision, argued that, protected only by a privative clause of the "final and binding" style, the Tribunal was properly granted limited curial deference. Moreover, the Tribunal had erred in conducting its own literature search after the hearing and in failing to place a constitutionally and legislatively grounded burden on the School Board to establish that segregated special education was clearly better than integration in regular classes for Emily Eaton. The Divisional Court, however, held the Tribunal worthy of deference and, in any case, found no error of law, arguing that the post-hearing literature review was not a denial of natural justice and that the *Charter* did not create a presumption in favour of one theory of education over the other. The Court also concluded that the evidence clearly established that Emily Eaton's best interests would be better served in the special education class.

The Eaton's appealed this decision to the Ontario Court of Appeal, where Arbour J.A. for the Court granted the appeal [(1995), 22 O.R. (3d) 1]. Justice Arbour held that in relation to its procedure, the Tribunal was worthy of curial deference. However, although the Tribunal had erred in conducting its own literature search after the hearing, this error of law was not within the ambit of reviewable error. With respect to the constitutional issue, the standard of review was one of correctness, which the Tribunal failed to meet. Justice Arbour found that the Tribunal's decision of a segregated educational placement was a disadvantage and discriminatory within the meaning of s. 15 (*ibid.* at 15-16). Furthermore, the *Education Act*'s failure to provide for a presumption in favour of integration itself infringed s. 15(1) as the Act thus provided no impediment to the faulty constitutional reasoning of the Tribunal itself. This infringement was not found to be justifiable under s. 1 of the *Charter*. In sum, Arbour J.A. argued that the *Charter* required that segregated educational placement be imposed against the parents' wishes only as a last resort.

of Emily Eaton within a special education class contrary to the wishes of her parents contravened section 15(1) of the *Canadian Charter of Rights and Freedoms*.[10]

In adjudicating the section 15(1) question, the Court faced its own conflicting precedent. Judgements in the last three equality cases — *Miron* v. *Trudel,*[11] *Thibaudeau* v. *Canada,*[12] and *Egan* v. *Canada*[13] — released together as a group in the spring of 1995, establish three divergent takes on the scope of the section. One group of four justices,[14] led by Gonthier J.'s *Miron* opinion, focused on the relevancy of a distinction to the purpose of the legislation where that purpose itself is not discriminatory. Another group of four justices,[15] led by McLachlin J.'s judgement in *Miron* also, understood discrimination to entail unequal treatment based on the stereotypical application of presumed group or individual characteristics.[16] Arguably, both of these approaches develop more formalistic notions of equality, backing away from the substantive interpretation

[10] In addition to the constitutional issue, leave to appeal was granted in relation to the question of whether the Court of Appeal's failure to give the required notice under s.109 of the *Ontario Courts of Justice Act* (R.S.O. 1990, c. C.43) before reviewing the constitutional validity of the *Education Act* was a procedural error. The Court of Appeal had found that the Tribunal's decision was unconstitutional and had then gone on to examine the constitutionality of the statutory framework itself. Section 109 of the Ontario Act, mirrored by equivalent legislation in other provincial jurisdictions and in federal law, requires that notice of any challenge to the constitutional validity or applicability of a provincial law be served on both the Attorney General of Canada and the Attorney General of Ontario. No notice complying with this section was given at either the Divisional Court level or in relation to the Court of Appeal. (Indeed, at no time did the respondent parents claim any intention of attacking the Act or its Regulations.) Thus, the procedural issue of absence of notice was raised directly for the Supreme Court of Canada in reviewing the lower court decision. Justice Sopinka, for the Court, concluded that, in this case, failure to serve notice invalidated the decision of the Court of Appeal, ironically agreeing with an earlier dissenting judgement of Arbour J.A. herself that the provision contained in s. 109 is mandatory and that no showing of prejudice is necessary (*Eaton*, *supra* note 2 at para. 53, referring to Arbour J.A.'s dissent in *Ontario [Workers' Compensation Board]* v. *Mandelbaum Spergel Inc.* (1993) 12 O.R. (3d) 385). In any case, Sopinka J. noted that it was unnecessary for him to consider the constitutional validity of the Act given his conclusion that the reasoning of the Tribunal was not contrary to s. 15 of the *Charter*.

[11] [1995] 2 S.C.R. 418 [hereinafter *Miron*].

[12] [1995] 2 S.C.R. 627 [hereinafter *Thibaudeau*].

[13] [1995] 2 S.C.R. 513 [hereinafter *Egan*].

[14] Lamer C.J, La Forest, Gonthier, and Major JJ.

[15] McLachlin, Sopinka, Cory, and Iacobucci JJ.

[16] I include within this second grouping Cory J.'s analysis in *Egan* which, although it differed in result from McLachlin J.'s judgement in the same case, explicitly endorsed her methodology (*Egan*, *supra* note 13 at 704).

given to section 15(1) by the Court in *Andrews* v. *Law Society of British Columbia*[17] and *R.* v. *Turpin.*[18] Justice L'Heureux-Dubé, writing for herself alone in each of the three trilogy cases, set out, in greatest detail in *Egan*, a third vision of discrimination involving consideration of both the vulnerability of the group adversely identified by the impugned distinction and the nature of the interest negatively affected. The interaction of these two factors indicates whether the impact of the distinction constitutes discrimination.[19]

What is at first glance, then, remarkable about the *Eaton* decision is that the Court was able to issue a unanimous opinion involving section 15(1). On second glance, this unanimity becomes disappointing when it becomes clear that it means that every member of the Court was willing to sign on to a judgement that is distressingly simplistic and unreflective in its understanding of disability as a ground of discrimination. Regardless of what result is the correct one in the particular case of Emily Eaton — and it is not clear that the Tribunal made the wrong assessment of Emily's needs — one can with confidence attack the larger analytical understanding the Court brought to its assessment of the equality concerns of the disabled.

Justice Sopinka is the author of the *Eaton* judgement. He begins his section 15 analysis by detailing the process culminating in the decision by the Tribunal to uphold the placement of Emily Eaton in a special class. He takes care to state that this process involved consultation with the parents and teacher assistants, that two levels of administrative appeal of the original decision were available and used in this case, and that the Tribunal hearing itself, the second administrative appeal, lasted twenty-one days. When Sopinka J. turns specifically to the individual case of Emily Eaton, it becomes clear that these observations and the individualized attention to the claimant they assume were

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17 [1989] 1 S.C.R. 143 [hereinafter *Andrews*].

18 [1989] 1 S.C.R. 1296 [hereinafter *Turprin*]. For a discussion that makes this argument, see H. Lessard, B. Ryder, D. Schneiderman and M. Young, "Developments in Constitutional Law: The 1994-95 Term" (1996) 7 S.C.L.R. (2d) 81 at 87-100. For a discussion of formal and substantive equality, and how such a distinction plays out in earlier constitutional equality jurisprudence, see L. Philipps and M. Young, "Sex, Tax, and the *Charter*: A Review of *Thibaudeau* v. *The Queen*" (1995) 2 Rev. Const. Studies 221; G. Brodsky and S. Day, *Canadian Charter Equality Rights for Women; One Step Forward or Two Steps Back?* (Ottawa: Canadian Advisory Council on the Status of Women, 1989).

19 For the Court's own summary of these three different approaches to a finding of discrimination under s. 15(1), see *Brenner v. Canada (Secretary of State)*, [1997] 1 S.C.R. 358 at paras. 60-66.

critical to the Court's resolution of the constitutional issue and its ultimate faith in the Tribunal's decision upholding Emily's segregation.

The resolution of the section 15(1) claim is prefaced by a general discussion of section 15(1) and how this section pertains particularly to disability discrimination. Justice Sopinka claims to identify a set of initial general principles under section 15(1) in respect of which there is no judicial disagreement: a claimant must establish that the impugned state action creates a distinction that lies along a prohibited or analogous ground which results in the imposition of a disadvantage or the denial of a benefit to the claimant.[20] These are the conditions which must successfully be established before proceeding to the next stage of the inquiry: the finding of discrimination. Justice McLachlin in *Miron*[21] and Cory and Iacobucci JJ. in *Egan*[22] are cited to confirm that this threshold principle is indeed part of the Court's earlier jurisprudence. The quote from Cory and Iacobucci JJ. adds the refinement that such a distinction must be based on a personal characteristic.

Then, rather too smoothly, the judgement elides any past disagreement over what is to count as discrimination — the last stage of the section 15(1) examination — and the role "relevance" is to play in such an inquiry. Justice Sopinka notes simply that the *Egan* minority (led by La Forest J., following Gonthier J. in *Miron*) held that discrimination occurs only when the distinction is shown to be based on personal characteristics irrelevant to the non-discriminatory legislative goal or functional value of the legislation. According to Sopinka J., the majority[23] view in *Egan* (composed of the judgements of Cory, Iacobucci, and, presumably, L'Heureux-Dubé JJ.), was that the relevance of a distinction may be a factor in showing that the case falls into the rare class of case in which a distinction on the basis of a prohibited or analogous ground does not constitute discrimination. This review allows Sopinka J. to assert that not every distinction on a prohibited ground will constitute discrimination and that distinctions based on presumed rather than actual characteristics are the hallmarks of discrimination.[24] All of which establishes a framework for discussion of disability rights under section 15(1) which not only permits but may actually require differential treatment.

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20 *Eaton*, *supra* note 2 at para. 62.

21 *Miron*, *supra* note 11 at 485, 487, per McLachlin J.

22 *Egan, supra* note 13 at 584, per Cory and Iacobucci JJ.

23 This is an odd designation, given that there was, in fact, no majority analysis. However, a majority of the Court did agree with respect to the s. 15 result, although two separate analytical routes were used.

24 *Eaton, supra* note 2 at para. 66.

Justice Sopinka's summary of this judicial debate over relevance perhaps understates McLachlin J.'s and Cory and Iacobucci JJ.'s criticism of the inclusion of relevancy within the section 15(1) test.[25] More striking, however, is Sopinka J.'s complete neglect of L'Heureux-Dubé J.'s section 15 analysis: a puzzling omission, given that L'Heureux-Dubé J. herself signed on to the *Eaton* judgement. Two elements of L'Heureux-Dubé J.'s analysis are most obviously overlooked. First, L'Heureux-Dubé J. goes to great length in *Egan* to criticize section 15 analyses which look to the ground of distinction as a structural element in the doctrinal test, arguing that such analyses are too abstract and distanced from a proper effects-based focus. Analyses whose form is determined by an initial identification of the ground of distinction incorporate reified categories of identity at the expense of assessing actual impact of the challenged governmental action.[26] Yet Sopinka J.'s formulation does just this. Also missing is L'Heureux-Dubé J.'s equally valuable warning in *Egan* that a distinction that is relevant to the purpose of the legislation may, nonetheless, have a discriminatory effect: a point in opposition to Gonthier J.'s analysis and a critical argument for a case like *Eaton*.[27] One is left wondering about the current status of L'Heureux-Dubé J.'s innovative section 15 analysis in the trilogy, given her acquiescence to its erasure from Sopinka J.'s summary.[28]

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[25] These objections are somewhat self-contradictory, given that the critique of stereotyping that McLachlin, Cory, and Iacobucci JJ. use is, itself, implicitly founded upon a requirement of relevancy. Stereotyping, the evil these judges understand s. 15(1) to address, is regarded as the association of an individual with a set of irrelevant group characteristics. Non-stereotypical distinctions are those assumptions about individual merit and circumstance which are relevant to the individual to whom they apply. See Lessard et al., *supra* note 18 at 96-99. For a critique of this understanding of stereotyping, see P.J. Oakes, S.A. Haslam and J.C. Turner, *Stereotyping and Social Reality* (Oxford: Blackwell, 1994) at 207-11.

[26] "We will never address the problem of discrimination completely, or ferret it out in all its forms, if we continue to focus on abstract categories and generalizations rather than on specific effects. By looking at the grounds for the distinction instead of at the impact of the distinction on particular groups, we risk undertaking an analysis that is distanced and desensitized from real people's real experiences" (*Egan*, *supra* note 13 at 551, per L'Heureux-Dubé J.).

[27] To this, L'Heureux-Dubé J. adds a number of other reasons that support the conclusion that relevance should be treated as a consideration under s. 1 of the *Charter*, not s. 15(1) (*Egan, supra* note 13 at 547-48).

[28] L'Heureux-Dubé J.'s analysis does reemerge in *Brenner,* a case released by the Court three weeks after *Eaton*. Here, in a unanimous decision written by Iacobucci J., the Court reviewed all of the equality trilogy judgements, including L'Heureux-Dubé J.'s. No selection emerges among the different approaches; the Court simply concluded that all approaches would, in the case before it, reach the same result (*supra* note 19).

To continue with the unanimous judgement in *Eaton*, it soon becomes apparent why Sopinka J. need not unpack any further the Court's disagreements over section 15(1). Having apparently established that past jurisprudence is in accord with the argument that not every distinction on a prohibited ground will constitute discrimination and that it is, generally, distinctions based on presumed rather than actual characteristics that mark discrimination,[29] Sopinka J. proceeds to apply these insights to equality issues involving physical and mental disability, coming up with a loose blueprint on how to parse out such claims.[30] And, it is here that the thinness of his analysis begins to show.

Justice Sopinka well recognizes that one of the purposes of section 15(1) is "to ameliorate the position of groups within Canadian society who have suffered disadvantage by exclusion from mainstream society as has been the case with disabled persons" and that such amelioration can require accommodation of difference.[31] But Sopinka J.'s elaboration of what section 15(1) demands in the case of disabled individuals is distorted by reliance on a formal distinction between "true" and "untrue" characteristics. Anti-discrimination measures in relation to disability, Sopinka J. asserts, will frequently require making distinctions on the basis of the actual personal characteristics of disabled persons.[32] This is because such characteristics are "true," not falsely presumed. Equality law, in Sopinka J.'s analysis, thus has two objectives: the elimination of discrimination arising from the attribution of *untrue* characteristics based on stereotypical attitudes and the accommodation of *true* characteristics that (in Sopinka J.'s words) "act as headwinds" to full enjoyment of society's benefits.[33] It is reasoning associated with the latter objective — recognition of "true" characteristics — which, alone, is appropriate here.[34]

So it is, Sopinka J. asserts, the failure to recognize true characteristics — reverse stereotyping — which accounts for much of the harm disabled individuals experience in society. Individual disability is ignored, with the result

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29 That this formulation achieved unanimous agreement in this case may be indication that the McLachlin, Cory, Iacobucci JJ. vision of equality from the trilogy cases may emerge as the dominant s. 15(1) analysis on the Court.

30 *Eaton*, *supra* note 2 at para. 66.

31 *Eaton*, *supra* note 2 at para. 27. For an insightful discussion of accommodation as the notion features in non-constitutional human rights law, see S. Day and G. Brodsky, "The Duty to Accommodate: Who Will Benefit?" (1996) 75 Can. Bar Rev. 433.

32 *Eaton*, *supra* note 2 at para. 66.

33 *Eaton*, *ibid*. at para. 67.

34 "The discrimination inquiry which uses "the attribution of stereotypical characteristics" reasoning as commonly understood is simply inappropriate here" (*ibid.*).

that disabled individuals founder in mainstream society. Prevention of such a situation requires recognition of actual characteristics and reasonable accommodation of such characteristics. This, Sopinka J. argues, is "the central purpose of section 15(1)in relation to disability."[35]

Accommodation thus becomes the appropriate response to true, yet disadvantaging, characteristics: "[t]he blind person cannot see and the person in a wheelchair needs a ramp."[36] The premise is that the disabled truly are different. However, lost in this analysis are two important insights about difference and disability. The first involves the practical recognition of the role that stereotyping and social construction play in our understanding of disability and accommodation.[37] What Sopinka J. might consider as "true" is actually much more complex and variable than his analysis admits. Put slightly differently, "the biological condition ... [needs to be] conceptually disentangled from the ... social ramifications ... of the condition."[38] Disabled individuals are no less vulnerable and subject to negative misunderstandings than other disadvantaged groups within Canadian society. Received truths about what such individuals can or cannot do often dissolve upon scrutiny, revealed as simple falsehood. As well, and perhaps more significantly, the conceptual, technological, and physical environment selectively creates, names, and eliminates disability.[39] People have all sorts of different levels and kinds of abilities, relevant to a wide and variable range of activities, opportunities, and contexts. The distinctions which conventionally lie between "normal" and "abnormal" abilities are arbitrary and shift, depending upon the social, historical or physical context in which the designation is being made. As Brodsky and Day note, traditional notions of competition, merit, and normalcy prefigure our evaluative environment such that the (dis)abled really do appear to be less able: their (dis)ability seems "true."[40] But encoded with such evaluative concepts are the very kinds of exclusionary

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35 *Ibid.*

36 *Ibid.*

37 This insight rests simply on the observation that the biological does not exist in isolation from the social. For discussion of this, in a variety of contexts, see for example, A. Asch and M. Fine, "Introduction: Beyond Pedestals" in M. Fine & A. Asch, eds., *Women with Disabilities: Essays in Psychology, Culture, and Politics* (Philadelphia: Temple University Press, 1988) 1; R.C. Lewontin et al., *Not In Our Genes: Biology, Ideology, and Human Nature* (New York: Pantheon Books, 1984).

38 Asch and Fine, *ibid.* at 5.

39 "A change in environment ... can change abilities by many orders of magnitude. Moreover, the differences between individuals are abolished by cultural and mechanical inventions:" R.C. Lewontin, *Biology as Ideology: The Doctrine of DNA* (Ontario: Anansi, 1991) at 29.

40 Day and Brodsky, *supra* note 31 at 471.

and subordinating assumptions that privilege the majority and which equality law must challenge. Thus, the most damaging, invidious stereotypes about ability are those which lie deep within our society's most cherished principles. Recognition of this is crucial if any significant, systemic progress in relation to disability discrimination is to be made using equality law.

Technological environments also arbitrarily position individuals as disabled or not. Absent "taken-for-granted" technologies such as, say, eyeglasses, calculators, or elevators, many of us would be deemed much less abled than we currently are. The same is true in relation to our physical environment. Arbitrary decisions about doorway width or the use of stairs rather than ramps create some disabilities and eliminate others. Thus, the problem lies with the structures themselves, not with the bodies or capacities of those who are barred.[41] By treating the distinction between true and untrue characteristics so unproblematically, Sopinka J. denies all these forms of subtle, yet pervasive and fundamental, construction in our physical and social architecture of what we understand to be disability. Moreover, no guidance is given as to when historically attributed qualities are acceptable markers of difference or not. Our highest court, while somewhat able to recognize the role stereotyping plays in how biological differences in the genders affect social treatment and how environment can selectively disadvantage women as a group based on their unique characteristics,[42] is unable to transfer this wisdom to its conceptualization of disability.

The second important insight ignored in Sopinka J.'s understanding of accommodation is that "differences are features of relationships rather than traits residing in the 'different' person."[43] While obviously related to the preceding arguments, it bears emphasizing separately that we are all equally different from and in relation to each other. There is no neutral spot from which to designate difference. Thus, the focus of equality analysis should not be on the sameness or the difference of the equality claimant but on the practices and institutions which "construct and utilize differences to justify and enforce exclusions — and

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41 For a discussion of this see Asch and Fine, *supra* note 37 at 5.

42 In *Brooks* v. *Canada Safeway*, [1989] 1 S.C.R. 1219, overruling *Bliss* v. *A.G. Canada*, [1979] 1 S.C.R. 183, the Supreme Court of Canada recognized that disfavourable treatment of pregnancy, a characteristic unique to women, constituted sex discrimination. By placing the costs of pregnancy disproportionately on pregnant women, the benefit plan in question in this case imposed unfair disadvantages.

43 M. Minow, *Making All the Difference: Inclusion, Exclusion, and American Law* (Ithaca: Cornell University Press, 1990) at 86. See also I. M. Young, *The Politics of Difference* (Princeton: Princeton University Press, 1990) at 170.

the ways in which such institutional practices can be changed."[44] In ignoring this, the Court turns aside from what should be a primary preoccupation of equality law: "the socially constructed inequalities that are associated with difference, ... [not] difference itself."[45]

Added to this is a comment by Sopinka J. that, unlike gender or race cases, disability claims permit more individual variety in circumstance.[46] Perhaps, in one sense, this is true. The term disability covers a tremendous range of individual variation in physical, emotional, and intellectual capacities:[47]

> There are many (dis)abilities and no one (dis)ability is monolithic. For example, there are many variations among people in their ability to see, and each person who is labelled blind is unique: one person who is blind may use tapes to receive or convey information, another braille, another a computer.

But, Sopinka J. does not draw from his observation of this variation the important conclusion that the category itself is artificial and that this reduction of infinite traits into a single named strand of difference is the means by which the powerful exclude the powerless. And this, ultimately, is no less true of gender and race.

Disabled individuals, regardless of their individual variation, are all similarly socially positioned as disadvantaged. What is also necessary, therefore, are measures which recognize the systemic subordination of disabled persons.[48] Justice Sopinka ignores this latter element; all he achieves by distinguishing disability from other grounds of discrimination is an individualization of disability claims and a retreat from understanding disability discrimination as systemic, patterned, and shaped by general themes and traditions: in other words, a "group-based [inequality] in power."[49] This reflects his failure to acknowledge the role stereotyping and environment play in arbitrarily constructing and stigmatizing the characteristics of disability. It also determines the more individualistic, less systemic approach to the demands of integration his judgement takes.

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44 Minow, *ibid.* at 86.

45 Day and Brodsky, *supra* note 31 at 435.

46 Sopinka J. writes: "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" (*Eaton*, *supra* note 2 at para. 69).

47 Day and Brodsky, *supra* note 31 at 469.

48 *Ibid.*

49 *Ibid.* at 435.

This latter failing is caught by Sopinka J.'s simple equation of accommodation with the "fine-tuning" of society.[50] Implicit in this formulation is the notion that change of a marginal and individualized character only is required. Absent really comprehending the social and, therefore, variable, character of disability, Sopinka J. will not be pushed to see that real accommodation requires more than fine-tuning or minimal adjustment of otherwise sound social systems and structures; it requires more than merely "manageable" concessions.[51] The disabled will continue to be disempowered until the structural barriers which themselves ensure such marginalization are changed. And, the requisite change itself will not be minor. However, Sopinka J.'s minimalist understanding of accommodation is connected to his deterministic notion of disability. Thus, the question of integrated as opposed to segregated educational opportunities becomes more 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.

Minow refers to such an understanding as the "rights-analysis approach" to disability discrimination. Special treatment is justified as an entitlement based on unique characteristics of the group; maintained is an unstated norm, divergence from which is termed difference. The role of existing institutions in constructing such "difference" is left unexamined; difference continues to reside in the individual.[52] The approach simply reinstates the problem of difference, as the dominant within our society conceptualize it. The analysis, despite *Andrews*' advice to the contrary,[53] in effect reasserts the similarly-situated test.[54]

From such a framework, it is not surprising that Sopinka J. rejects a section 15(1) mandated presumption in favour of integration:[55]

> [A] presumption in favour of integrated schooling would work to the disadvantage of

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50 Sopinka J. writes: "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 participation, which results in discrimination against them" (*Eaton*, *supra* note 2 at para. 67).

51 Day and Brodsky, *supra* note 31 at 435.

52 Minow, *supra* note 43 at 108.

53 In *Andrews*, *supra* note 17 at 168, McIntrye J., writing for the majority on this point, explicitly rejects the similarly situated test: "... the test cannot be accepted as a fixed rule or formula for the resolution of equality questions arising under the *Charter*."

54 For a discussion of this point in relation to earlier equality jurisprudence, see Philipps and Young, *supra* note 18 at 230-39.

55 *Eaton*, *supra* note 2 at para. 69.

> pupils who require special education in order to achieve equality. ... Integration can be either a benefit or a burden depending on whether the individual can profit from the advantages that integration provides.

Absent often quite radical restructuring, it may very well be the case that segregation will better provide for the needs of disabled individuals. But this formulation completely forecloses consideration of larger systemic equality concerns, leaving unchallenged current discriminatory assumptions about such things as general as normalcy, merit, and ability or as specific as appropriate classroom atmosphere and acceptable levels of special assistance within that environment. Thus, Sopinka J., begins his assessment of Emily Eaton's case with an already weakened understanding of what section 15(1) should guarantee for disabled individuals.

Considerably less space in Sopinka J.'s judgement is given to direct consideration of the actual claim at stake in this case. In fact, as Sopinka J.'s application of section 15(1) evolves, it becomes clear that much of his consideration of the anti-discrimination requirements of section 15(1) has been unnecessary to resolve the immediate case before the Court. Justice Sopinka finds that the legislation clearly meets the first stage of the section 15(1) test he sets out: a distinction is made under the Act between "exceptional children" and others.[56] And, in relation to the second element of the test — imposition of a burden — Sopinka J. accepts that the Tribunal found that, given Emily Eaton's special needs, segregated placement was superior to integrated placement.[57] Thus no disadvantage was imposed upon Emily Eaton; her claim fails to pass this second element. Buttressing this conclusion is Sopinka J.'s apparent faith in the Tribunal's process and its concern with Emily's best interests. Justice Sopinka states: "It seems incongruous that a decision reached after such an approach could be considered a burden or a disadvantage imposed on a child."[58] The presumption of integration is rejected in favour of the Tribunal's invocation of the best interest of the child.

The result is that Sopinka J. turns on its head current wisdom about what equality for disabled individuals demands and, in so doing, imports into equality jurisprudence, at least as it applies to disabled individuals, a significant

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[56] *Ibid.* at para. 71.

[57] This point had been contested by the Court of Appeal, which found that the Tribunal failed to answer its principal issue of "whether Emily Eaton's special needs can be met best in a regular class or in a special class." Justice Sopinka finds that the Tribunal did answer this question, although it did not specifically state but, rather, implied the answer (*Eaton*, *ibid.* at paras. 74-76).

[58] *Eaton*, *ibid.* at para. 76.

impediment to equality aspirations. Activists, while acknowledging that there are some instances where biology does and should matter, have also insisted that these instances are rare and in most cases can be minimized by altering society such that fuller participation of all is possible.[59] Accommodation, as mandated by section 15(1), should thus demand systematic and substantial change to the environment in which and through which the difference the challenged legislation presumes is initially constructed and given meaning.[60] One might understand such accommodation to mean the obligation "to permit all groups to participate as equals in the negotiation of social norms."[61] Justice Sopinka, however, reads it to justify and to be constituted by differential treatment that further excludes the identified group. The focus shifts from demanding inclusion to justifying exclusion; indeed, exclusion in this judgement is held up as an uncomplicated positive equality act. It should not be surprising, however, that Sopinka J. will not find that section 15(1) demands an initial presumption of inclusion; he cannot, given his understanding of disability as easily and simply rendered into "true" characteristics on which legislative distinctions can safely and often are required to rest. Yet, the outcome is that Sopinka J.'s approach to accommodation under section 15(1) ensures that constitutional discourse will serve to "limit how much difference 'the powerful and the majority' must absorb."[62] The "departure from the norm" that disabled individuals such as Emily Eaton represent will be accentuated.[63]

This returns us to the beginning of this paper: the contrast between Emily Eaton's equality case and the earlier case of Justine Blainey. With Emily we see that the further away a claimant is from the mainstream, privileged norm, the more difficult it will be for her or him to persuade the Court it is the norm, not the individual, in which the fault lies. Justine, on the other hand, is allowed to pass for a "normal" hockey player, illustrating that formal equality is at its most potent when it deals with different treatment of the (mostly) same.

But, apart from result, these cases are more similar than different. Both judgements are distracted from the structural marginalization really at issue: in one case, of those we considered disabled and, in the other case, of female athletes. Thus, the Court in Justine's case also ignored the larger institutional

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59 Asch and Fine, *supra* note 37 at 26.

60 It should, thus, be apparent why L'Heureux-Dubé J.'s recognition that even relevant distinctions can nonetheless result in discriminatory impact is apposite to the issues this case raises. See text associated with notes 26-27, *supra*.

61 Day and Brodsky, *supra* note 31 at 435.

62 *Ibid.*

63 Minow, *supra* note 43 at 94.

issues underlying the equality dilemma before it. A wider lens, one which took in the environment that determined why it was Justine wanted to play in the boys' hockey league, would have pulled into range a different set of equality concerns and observations. Girls' hockey is typically less well resourced and regarded than boys' hockey. When Justine jumps to the boys' league — to the play with greater status, deeper financing, better rink time, and superior prospects for university sports scholarships — she leaves behind the "truly different," the other female players who will continue to occupy the margins of the hockey world. The institutional practices that associate being female with inferior athletic ability and involvement remain intact. The equality issue in Justine's case, viewed more broadly, is the gender discrimination systemic to the sporting world — manifested in children's hockey by the gap in quality and opportunities between boys' and girls' leagues. Until this larger systemic inequity is addressed, the issues Justine raises will continue to confront equality law in cases brought forward by individual girls and women.[64] And the solutions formal equality leads to will continue to leave the underlying problem intact.

A substantive equality analysis might require that the two cases switch results.[65] In Emily's case, the most radical restructuring of the environment that marks her as different would require her integration into a regular classroom, with all the attendant changes to a "normal" classroom environment that might entail. For individuals in these circumstances, such as Emily, integration may, alone, mean equal. In Justine's case, however, amelioration of the systemic marginalization of female athletes might require that exceptional individuals like Justine remain in the girls' league, lending the status and skill they bring as elite athletes to the separate institution of girls' hockey. Otherwise, the wicking away of top girl athletes into boys' leagues simply ensures that female leagues retain secondary and subordinate status. Here, perhaps, separate is the only path to equal. The larger point is that the strategy of integration or separation rests not on whether individuals of disadvantaged groups can or cannot fit the norm. Rather, it ought to rest on what option best appreciates difference, destabilizing what counts as normal so that all participate in its constitution. The choice of

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64 In fact, a number of similar cases in hockey and other sports have occurred since Justine's victory. For example, in October 1993, two teen-age girls were successful before an Ontario human rights inquiry in challenging the disqualification of their team from the quarter-final round of a tournament by the Ontario Soccer Association because of the presence of two girls on an otherwise all-boys' team. See L. Robinson, *The Globe and Mail* (8 November 1993). Last year, a complaint was lodged with the B.C. Human Rights Council (now Human Rights Commission) against the B.C. Amateur Hockey Association's policy that girls may only play on male teams in the absence of available female teams. See D. Penner, *Kitimat Sentinel* [October 1996].

65 Particular thanks are owed to Hester Lessard for her input on this part of my discussion.

option will depend upon the larger, systemic circumstances of disadvantage present in each case.

These are difficult issues. They often pit the immediate best interests of an individual against longer term systemic change. And their solutions may demand compromise and trade-offs. But what is certain is that when various instances of the injustices of our social, political, and economic world come before the Court, the Court must look beyond the formal appearances of difference or sameness in which individuals are cloaked. There is no magic formula which will lead unerringly to the right answer in these cases, but there are better and worse ways of understanding the roots of the problems that bring these cases to the attention of the courts. It is only by engaging critically with difference and the challenges it poses for equality that we will move towards a society where difference is celebrated, respected, and shared.