Court File No. C19214

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

CAROL EATON AND CLAYTON EATON

Appellants

- and -

THE BRANT COUNTY BOARD OF EDUCATION

Respondent

APPLICATION UNDER section 2 of the Judicial Review Procedures Act, R.S.O. 1990, c.J. 1

FACTUM OF THE APPELLANTS

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PART I - THE APPEAL

1. This is an appeal to the Court of Appeal for Ontario from the decision of the Divisional Court dated February 8, 1994, dismissing the Appellants' Application for Judicial Review of the decision of the Ontario Special Education (English) Tribunal (the "Tribunal") dated November 19, 1993. The Tribunal had upheld earlier decisions under the Education Act (the "Act") by an Identification, Placement, and Review and Committee ("IPRC") and a Special Education Appeal Board which held that the Appellants' daughter, Emily Eaton ("Emily"), could be placed by the Respondent, The Brant County Board of Education (the "School Board"), in a segregated special class for disabled students.

PART II - THE FACTS

A. Emily's Background

2. Emily is a ten year old child with cerebral palsy. As a result of her disability she is mobility impaired and has not yet learned to communicate verbally. Emily requires assistance for tasks involving fine motor skills. However, she is fully able to bear her own weight and can walk short distances with the aid of a walker.

Evidence of Carol Eaton, Transcript of Proceedings, Vol. II, p.. 100, 124-126,129, 131, and 271.

Reasons of the Tribunal, pp. 10, 18 and 37, Appeal Book, Vol. I, Tab 5.

3. When Emily reached school age she was enrolled as a student with the School Board and from April, 1990 until December 1993 attended Maple Avenue School in Burford. She is identified as an "exceptional" student under the Act. At Maple Avenue she had been placed in an age-appropriate regular class, with accommodation of her special needs, including the assignment of an education assistant to her class. In February, 1992, when Emily was in Grade 1 the School Board requested an IPRC meeting at which it sought a special class placement for Emily. The IPRC recommended the special class placement despite Emily's parents' objections. The Eatons appealed the IPRC's recommendation to a Special Education Appeal Board, which upheld the IPRC. An appeal by the Eatons of that decision was heard by the Tribunal in May, June and July, 1993. The Tribunal upheld Emily's placement in a special class.

Evidence of Carol Eaton, Transcript of Proceedings Vol. II, pp. 322-323.

Reasons of the Tribunal, pp. 14-15, Appeal Book, Vol. I, Tab 5.

B. The Decision of the Tribunal

4. In the first 57 pages of its decision, the Tribunal set out its summary of the evidence given by witnesses without making factual findings on that evidence. The Tribunal then identified what it considered to be the principal issue, that being "whether Emily Eaton's special needs can be met best in a regular class or in a special class". The Tribunal went on to set out its findings on each of the factors which it had identified as relevant. The Tribunal began by stating that Emily's needs are special and that what "distinguishes her and provokes consideration of a special placement, is the nature and extent of her particular needs." The Tribunal then considered Emily's educational placement in light of those needs under the following categories: intellectual and academic needs; communication needs; emotional and social needs; and physical and safety needs.

Reasons of the Tribunal, p. 58, Appeal Book, Vol. I, Tab 5.

5. The Tribunal held that with regard to Emily's intellectual and academic needs "it is clear that what Emily may be learning in school and what she may be expected to learn, is not remotely similar to that which is being learned by her age-level peers. There is a wide and significant intellectual and academic gap between her and her peers." The Tribunal then concluded that the parallel learning program designed to meet Emily's intellectual needs "isolates her in a disserving and potentially insidious (sic) way." The Tribunal went on to find that "Emily's intellectual and academic needs cannot be met best, if indeed they can be met at all, in a regular class." (emphasis added) The Tribunal did not identify specifically what Emily's needs are in this area and made no findings as to how or why a segregated class would be in a different or better position to meet Emily's intellectual and academic needs.

Reasons of the Tribunal, pp. 59-66, Appeal Book, Vol. I, Tab 5.

6. With respect to Emily's communication needs the Tribunal found that:

> "Emily's need to communicate is only going to be met with very individualized, highly specialized, extremely intense, one-on-one instruction. Because this need is of such overriding importance for Emily, it makes sense to address it, at least initially, and until she demonstrates some minimal competence, in a setting where there will be maximum opportunity for such instruction."

The Tribunal made no findings as to what would be done to meet Emily's communication needs in a segregated setting that could not be done in a regular class setting with accommodation of her disability.

Reasons of the Tribunal, p. 61, Appeal Book, Vol. I, Tab 5.

7. The Tribunal found that although it may be possible that some of Emily's social and emotional needs are being met in the regular class, but that because of her disability she cannot communicate that fact, her classroom behaviours such as crying, sleeping and vocalization suggest that her needs are not being met. The Tribunal also stated that "there is limited, if any, interaction between Emily and her classmates in the regular class." The Tribunal did not address the question of how or if a segregated placement

could meet Emily's social and emotional needs, either at all or better than her regular class placement.

Reasons of the Tribunal, p. 63, Appeal Book, Vol. I, Tab 5.

8. The Tribunal found that Emily's personal and safety needs require that she have a high level of adult supervision or, in the alternative, that mouthable objects be removed from the class. The Tribunal stated that to ensure Emily's personal safety, "one of these conditions must prevail, and neither condition can reasonably be realized in a normal, integrated, regular classroom".

Reasons of the Tribunal, p. 64, Appeal Book, Vol. I, Tab 5.

9. The Tribunal stated that a fundamental component of its decision was the fact that Emily has spent three years in a regular class and that "this placement has not been successful for her." Although the Tribunal accepted that there are benefits to integration, it held that Emily is not realizing those benefits. It went on to state that "the testimony describing Emily's three years in a regular classroom indicates that the nature and extent of immediate adult intervention and care essential to meet her profound intellectual, physical and emotional needs even minimally, has the counter-productive effect of isolating her, of segregating her in the theoretically integrated setting. In the opinion of the Tribunal this is a far more insidious (*sic*) outcome than would obtain in a special class."

Reasons of the Tribunal, pp. 54 - 66, Appeal Book, Vol. I, Tab 5.

10. The Tribunal did not address in its Reasons any factors which it considered to be advantages or disadvantages of a segregated placement for Emily. Further, it made no reference whatsoever to the uncontroverted evidence of all the experts who testified, including the School Board's own psychologist, Dr. Jeffers Toby, that segregated educational placements can cause serious and sometimes permanent psychological and emotional harm.

Evidence of Dr. Harry Silverman, Transcript of Proceedings, Vol. 8, pp. 1389-90, pp. 1463-5.

Evidence of Dr. Mara Sapon-Shevin, Transcript of Proceedings, Vol. 7, pp. 1254-1260, p. 1263.

Evidence of Dr. Gary Bunch, Transcript of Proceedings, Vol. 8, p. 1048.

Evidence of Dr.Jeffers Toby, Transcript of Proceedings, Vol. 15, pp. 814, pp. 858-9, pp. 865-68.

11. The Tribunal found that there was extensive empirical evidence which pointed to Emily having a profound intellectual handicap. The Tribunal did not identify what evidence it was relying on in making this finding. Nor did the Tribunal refer to the extensive evidence from all the witnesses who testified, including Emily's teachers, her educational assistants, her principal, Dr. Silverman (an educational psychologist) and Dr. Lock (her family doctor), that they are unable to assess her cognitive abilities or to determine whether she is learning.

Reasons of the Tribunal p.59, Appeal Book, Vol. 1, Tab 5

Transcript of Proceedings, Vol. 12, pp. 214, 294-296; Vol. 9, pp. 1638-1640, 1679-80; Vol. 10, p. 1811; Vol. 11, pp. 58-61; Vol. 8, pp. 1406-1408 and 1472-1473; Vol. 14, pp. 647-649;

12. The Tribunal found that Emily's parents wishes for their daughter to be placed in a regular classroom were not based on a "reasoned empathetic assessment of what she needs and what she can do outside her family home." In the course of its reasons the Tribunal diminished the importance of the wishes of Emily's parents on the basis that they had not been actively involved in Emily's classroom and other perceived discrepancies in their views. In a page entitled "obiter dictum" at the end of its decision, the Tribunal stated that allowing the disagreement of Emily's placement to proceed to the level of the hearing before it was "a grave disservice" to Emily and that Emily's well-

being was being put at risk by "an unnecessarily rigorous adherence to principle and by the tyranny of moral certainty". The Tribunal was critical of the parents for "engaging legal counsel, turning to judicial and quasi-judicial avenues of redress, in short, taking an adversarial approach".

Reasons of the Tribunal, pp.69 and 74, Appeal Book, Vol. I, Tab 5.

13. The Tribunal referred in its reasons to an extensive and intensive review of the literature on placement which it had conducted independently after the hearing and without notice to the parties. From this review, the Tribunal concluded that taken as a whole, the literature favouring inclusive education was flawed and not supportive of an integrated placement for Emily. The Tribunal made no findings on whether the literature it reviewed supported a segregated placement for Emily. The Tribunal did not identify the literature or authors which it considered.

Reasons of the Tribunal, pp. 70-71, Appeal Book, Vol. I, Tab 5.

14. The Tribunal discounted the evidence of three experts in psychology and education who testified on behalf of the Eatons, based, at least in part, on its own review of the literature as referred to above. In addition, the Tribunal found the experts' evidence to be insignificant because of uncertainty in the area for which they were presented as experts, the fact that only one of the experts had observed Emily in a classroom setting, and the fact that each was in favour of an integrated school system.

Reasons of the Tribunal, pp. 71-72, Appeal Book, Vol. I, Tab 5

15. On the issue of the application of the Charter of Rights and Freedoms ("the Charter") and the Ontario Human Rights Code ("the Code"), to the issue before it, the Tribunal accepted that it was bound by both and that in the event of a conflict with the Act, the Charter and Code took precedence. However, the Tribunal found that the case law dealing with the Charter did not have any relevance in the matter of Emily's placement. The Tribunal did not refer to any case law nor did it deal with the substance

of the equality rights issues raised under the Charter and the Code. In addressing those issues, the Tribunal merely stated that:

> "it is our opinion that where a school board recommends placement of a child with special needs in a special class, contrary to the wishes of the parents, and where the school board has already made extensive and significant effort to accommodate the parents' wishes by attempting to meet that child's needs in a regular class with appropriate modifications and supports, and where empirical, objective evidence demonstrates that the child's needs are not being met in the regular class, the school board is not in violation of The Charter or the OHRC" (emphasis added).

Reasons of the Tribunal, p. 73, Appeal Book, Vol. I, Tab 5.

16. The Tribunal decision did not elaborate further on the legal test it applied in making its decision, on the application of the Charter or the Code to its own decision making, or on the issue of onus.

C. The Decision of the Divisional Court

17. The Divisional Court dismissed the application for judicial review, thus upholding the Tribunal decision. The Divisional Court found that the Tribunal was entitled to curial deference with respect to questions of law, but that in any event it could find no error of law on the record.

Divisional Court Reasons, p. 5, Appeal Book, Vol. I, Tab 4.

18. In addressing what test should be applied in making placement decisions under the Act in a manner consistent with Emily's equality rights under the Charter and the Code, the Divisional Court stated that it had "great difficulty in appreciating how the Charter of Rights and Freedoms and the Ontario Human Rights Code create a presumption in favour of one pedagogical theory over another, particularly when the implementation of either theory needs the protection of the saving provisions found in s. 15 of the Charter and s. 14 of the Code." The Court went on to state that in any event, "that issue is

- any gap which may exist between an exceptional child and the rest of the class is not necessarily isolating; the focus should be on enhancing the learning opportunities for an exceptional child rather than decreasing the gap;

21. The Tribunal also heard evidence from Emily's teachers, her principal, the School Board superintendent, and the School Board psychologist, Dr. Jeffers Toby. These witnesses gave the following evidence:

- none of the School Board staff, including Dr. Toby, had any previous experience working in an inclusive classroom setting in which children such as Emily were integrated;

- Dr. Toby testified that because of the risk of permanent psychological harm from segregation, he would not recommend moving a child into a segregated class without first consulting with experts on inclusive education and fully exploring programming options, such as partial withdrawal for intensive one-on-one work;

- in dealing with Emily, no one from the School Board took any of the steps listed above.

22. There was no evidence before the Tribunal establishing the following facts:

- how Emily's needs would be better met in a special class, using methods which could not be used in the regular class;

- that there was any service provided in the segregated class which could not be provided in a regular class or through services Emily was already receiving outside school;

- that Emily has been assessed as having a profound intellectual handicap; (in fact, all of the witnesses, including the Appellants' experts, Dr. Toby, her teachers, her principal and her family doctor, testified that they could not assess and did not know what Emily's cognitive abilities are because of her difficulty communicating).

PART III - ISSUES AND LAW

A. The Issues

23. The following issues are raised in this appeal:

(i) the appropriate standard for judicial review of the Tribunal;

(ii) the correct test to be applied in determining the circumstances in which a disabled child can be forced into a segregated education placement;

(iii) whether the application of the correct legal test by the Tribunal would necessarily have generated the same result;

(iv) whether the Tribunal committed fundamental and reviewable errors by:

(a) basing its decision on its own post-hearing review of the academic literature;

(b) completely rejecting the evidence of the appellant's expert witnesses;

(c) ignoring the uncontroverted evidence of serious psychological harm which would likely result from segregating Emily, while at the same time concluding on no evidence, or insubstantial evidence, that Emily would be harmed in the regular class;

(d) basing its decision on its own conclusion that the evidence pointed toward Emily having a profound intellectual handicap in the absence of any testimony to that effect;

B. Overview of the Appellant's Position

24. The interaction of the scheme set out in the Education Act with the rights guaranteed under human rights legislation and the Canadian constitution create a presumption in favour of integrated education for all children and an obligation on educators to accommodate the needs of those children unless to do so would constitute undue hardship. Forced segregation can never be justified unless it is shown that the provision of services required to accommodate a child's needs can not be provided in a regular class or can not be provided there without undue hardship. The Tribunal in this case fundamentally erred in the test it applied. Because Emily had not proven her success in the regular classroom, and because the Tribunal felt that she had needs that were not being met there, it concluded that a segregated placement should be ordered. What the

Tribunal should have done was to start from the assumption that Emily was entitled to be in a regular classroom and then require the School Board to demonstrate what benefits a segregated placement could provide that could not be provided in a regular class. Since the Tribunal consistently asked itself "Has the regular class placement been successful?" rather than "How would the segregated class be better?" it failed to apply the correct test and all of its conclusions are therefore tainted. In addition the Tribunal made serious legal errors: (i) in conducting its own study of the literature (thereby making themselves expert witnesses in the case rather than neutral decision makers); (ii) in improperly rejecting the expert evidence that was before it; (iii) in concluding Emily was profoundly intellectually disabled against the preponderance of the evidence; and (iv) in ignoring pivotal and uncontradicted evidence on the harm caused by segregation. Given the nature and extent of these errors, it is impossible to say with any certainty that the conclusion of the Tribunal would have been the same regardless of the errors and regardless of the test applied.

C. Historical and Philosophical Perspective

25. Persons with disabilities are among the most disadvantaged in our society. Until the latter half of this century, disabled people (particularly those who were viewed as "mentally retarded") were routinely subjected to isolation, segregation and institutionalization. In the mid 1960's and 1970's the movement towards "normalization" for persons with disabilities gradually took hold and democratic societies began the process of deinstitutionalization by moving persons with disabilities out of institutions and integrating them back into their families and communities. In Ontario, part of the impetus towards community living for persons with developmental disabilities flowed from a 1971 report by the late Walter B. Williston. At the outset of that report he states:

> "If a mentally retarded child is to be provided with the assistance he needs to face the problems of adult life and is to be given the opportunity to develop to his ultimate potential, he must at all times be given the greatest possible degree of participation in life. Society must maintain for him the maximum degree of normalcy in all of his experiences to

> allow him a healthy and happy development as a total person."

In 1973, the Government of Ontario adopted a new policy focus for the delivery of services to "the mentally retarded" emphasizing integrated community living. This policy is set out in a report by the Honourable Robert Welch which points out, inter alia, that while the need for special treatment of the retarded is clear, "special treatment does not necessarily imply or demand segregation of the retarded".

> Adler et al. v. Her Majesty the Queen in Right of Ontario, Court of Appeal for Ontario, July 6, 1994, unreported, per Weiler, J.A. (dissenting) at pp. 21 - 28, Appellants' Book of Authorities, Vol. 1, Tab 1.
>
> Williston, Walter B., "Present Arrangement for the Care and Supervision of Mentally Retarded Persons in Ontario" a report to the Minister of Health of Ontario, August, 1971, particularly at p. 5 and pp. 21 - 32, Appellants' Book of Authorities, Vol. 1, Tab 2.
>
> Welch, Robert, "Community Living for the Mentally Retarded in Ontario: A new Policy Focus", March 1973, Appellants' Book of Authorities, Vol. 1, Tab 3.

26. Integration into the mainstream of society has been a primary goal of the disability movement for many years. In a 1983 report commissioned by the Ontario government Judge Rosalie S. Abella (as she then was) described that goal as follows:

> "It has been a major undertaking on the part of the handicapped people to encourage those who are not disabled to understand the desire for integration on the part of those who are. With increasing urgency, the disabled community has insisted that it not be consigned to facilities, institutions or agencies which are separate and apart. What it wants instead, are adjustments to the basis services provided by society to adapt to the range of disabilities. Only this kind of approach avoids the invidious and humiliating need to function on the fringes of the community. Disabled people want to be treated not as persons who are unable to participate fully in society, but as persons who are prohibited from participating by an unaccommodating society. Not only are they willing to participate, they properly consider it their right to participate. They cannot understand why this simple and self-evident right produces so much literature and so relatively little action."

Abella, Rosalie S., "Access to Legal Services by the Disabled", 1983, pp. 12-13, Appellants' Book of Authorities, Vol. 1, Tab 4.

27. Emily Eaton's parents testified at the Tribunal that their choice of an integrated placement for their daughter was motivated by their concern that she grow up at school with those people who will be part of her community as an adult. Her father testified:

> "I think our community includes her neighbourhood school. And the people who live in our community, the children that she will grow up with and [who] will be part of her community when she's an adult go to that school. They need to have the understanding of Emily, they need to know Emily, they need to be integrated with Emily now... We can't bring her back at the end of her school career and plug her into that community. She has to be there now and grow up with those children and those children have to grow up with her..."

The experts who testified before the Tribunal also emphasized the importance of an integrated education in enabling a disabled person to be integrated into society generally.

Evidence of Clayton Eaton, Transcript of Proceedings, Vol. 4, p. 613.

28. This connection between the childhood experiences (including schooling) of a disabled person and the ultimate ability of that person as an adult to be integrated into his community was pointed out in an Ontario Royal Commission Report on employment equity authored by Judge Rosalie Abella in 1984. Among the findings in that report are:

> "Almost from birth, people absorb cultural messages from their surroundings. Some of the strongest signals come from the school, a key progenitor of cultural and personal judgements, and many career choices made in later life reflect these signals consciously or unconsciously." (at p. 132)
>
> "The school is society's instrument for preparing children for full participation in the community" (p. 132)
>
> "From the earliest age, disabled children should see themselves as part of the mainstream of society, and children who are not disabled should see them the same way. These enabling perceptions, carried into adulthood, have the power to affect, on both sides, expectations about the extent to which the community is and should be accessible and about

standards of behaviour in the workplace, both for employers and employees." (p. 135-136)

"Wherever possible the disabled child should learn alongside children who are not disabled. This should be the rebuttable presumption." (p. 135) (emphasis added)

Abella, Rosalie, S. "Equality in Employment: A Royal Commission Report", October 1984. Appellants' Book of Authorities, Vol. 1, Tab 5.

29. The current legislative scheme for the education of children with disabilities came into being with the 1980 amendment to the Education Act referred to as Bill 82. The "occasion or reason for the enactment of Bill 82 was as part of the overall broader purpose of enabling children, who had formerly been in institutions ... to lead lives as normally as possible within the community."

Adler v. Her Majesty the Queen, per Weiler, J.A. at pp. 22-23 and 28. Appellants' Book of Authorities, Vol. 1, Tab 1.

D. Statutory Framework

(i) The Education Act

30. Under section 21(1) of the Act, attendance at school is compulsory for every child between six and sixteen years of age. Section 21(5) of the Act creates a duty on the parent of a child to cause that child to attend school. Under section 30 of the Act it is an offence for a parent to neglect or refuse to cause their child to attend school.

Education Act, sections 21 and 30.

31. The Act provides for the identification of students in the school system whose needs may be exceptional. An "exceptional pupil" is defined in the Act as "a pupil whose behaviourial, communicational, intellectual, physical or multiple exceptionalities are such that he or she is considered to need placement in a special education program". A child

with exceptional needs must be provided with a "special education program" which, essentially, is a program specially tailored to meet the individual needs of that child.

Education Act, R.S.O. 1990, c.E.2, section 1.

32. The initial identification of a child as "exceptional" is made by an Identification Placement and Review Committee ("IPRC") which: identifies pupils as being exceptional; determines the appropriate placement for that child; and reviews those two decisions on a regular (at least annual) basis. The IPRC has no fewer than three members all of whom are appointed by the school board and at least one of whom must be a supervisory officer (with advanced educational qualifications) or a principal employed by the school board. The IPRC makes its decision after meeting with the child's parents and representatives of the school.

Education Act, sections 1, 11(1)5 and 6

Regulation 305 of the Education Act, sections 1, 2, 3 and 8

33. A parent dissatisfied with the determination of the IPRC may appeal to the Special Education Appeal Board which is composed of at least three members, one of whom may be designated by the parent and the others, including the Chair, by the School Board. One member is required to hold qualifications as a supervisory officer. The decision of the Special Education Appeal Board is made after an informal meeting with the parties.

Regulation 305 of the Education Act, section 4,5,6 and 7.

34. There is a further right of appeal from the Appeal Board to a Regional Tribunal with leave from the Special Education Tribunal or, if the parties agree (as was the case here), the Special Education Tribunal can hear the appeal itself. Section 36(1) of the Act provides that the Lieutenant Governor in Council "shall establish one or more Special Education Tribunals". No particular expertise or professional qualifications are required for appointment to the Tribunal.

Education Act, sections 36(1) and 37.

35. There are no specific provisions in the Act or Regulations governing the Tribunal's procedures. In practice, the Tribunal conducts a hearing de novo with viva voce evidence and a full record. The Tribunal level is the first and only level of consideration that involves a hearing. The Act does not define with any precision the basis upon which the Tribunal is to make a decision or the test it should apply in doing so. The Act merely provides that the Tribunal may "dismiss the appeal" or "grant the appeal and make such orders as it considers necessary with respect to the identification or placement of the pupil". The Act contains a finality clause which provides that a decision of the Tribunal "is final and binding upon the parties". There is no other privative clause.

Education Act, section 37.

36. There is nothing in the Act which stipulates where special education programs must be provided, nor is there any mention of integrated or segregated education systems. The extent of integration of children with disabilities into the mainstream of education varies from school board to school board, with some school boards being fully integrated. The provincial educational scheme provides for a continuum of service which includes the possibilities of both integration and segregation for "special education". The current relevant part of the Ontario Ministry of Education policy, in place since 1975, provides:

> "Every exceptional child has the right to be part of the mainstream of education to the extent to which it is profitable. Care, however, must be taken to ensure the exceptional child's needs are met in terms of staff, curriculum, method, materials and organization." (p.8)

Special Education Information Handbook, Exhibit R-34, Appeal Book Tab 16.

(ii) The Ontario Human Rights Code

37. Among the purposes of the protections provided in the Code, as reflected in its Preamble, is the integration of persons with disabilities into the broader community. The Preamble to the Code states that "it is public policy in Ontario to recognize the dignity and worth of every person and to provide for equal rights and opportunities without

discrimination that is contrary to law". The Code aims to create "a climate of understanding and mutual respect for the dignity and worth of each person so that each person feels a part of the community and able to contribute fully to the development and well-being of the community".

38. Section 1 of the Code provides that every person has a right to equal treatment with respect to services, goods, and facilities, without discrimination because of handicap. In addition, section 17(1) provides that a right of a person under section 1 is not infringed for the reason only that the person is incapable of performing or fulfilling the essential duties or requirements attending the exercise of the right because of handicap. However, a person is not to be considered incapable unless the needs of the person cannot be accommodated without undue hardship, arising from either cost or health and safety factors.

Human Rights Code, R.S.O. 1990 c. H.19 sections 1 and 17.

(iii) The Charter

39. Section 15(1) of the Charter provides that 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 based on mental or physical disability. Section 7 of the Charter guarantees the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

(iv) International Obligations

40. Canada's international obligations include the International Bill of Human Rights: Universal Declaration of Human Rights (1948), the Declaration of the Rights of the Child, (1959) and the Convention on the Rights of the Child (1990).

United Nations General Assembly. International Bill of Human Rights, Resolution 217-A (III). 16 December 1948. (United Nations Department of Information, Yearbook of the United Nations 1948-9, page 535, Lake Success, New York: United Nations, 1950).

United Nations General Assembly, Declaration of the Rights of the Child, Resolution 1386 (XIV). 20 November 1959 (United Nations Department of Information, Yearbook of the United Nations 1959, page 198, Lake Success, New York: United Nations, 1960).

United Nations General Assembly, Convention on the Rights of the Child, C.T.S. 1992/3 pp. 1-51. [signed May 28, 1990, ratified December 13, 1991; came into force January 12, 1992. C.T.S.- Canadian Treaty Series].

MacKay, Wayne, Rights, Freedoms and the Education System in Canada, Cases and Materials, (Toronto) Emond Montgomery, 1989 (pp. 199-204), Appellants' Book of Authorities, Vol. 1, Tab 6.

41. Article 26 of the Universal Declaration of Human Rights relates to education. It provides that everyone has a "right to education" and that "parents have a prior right to choose the kind of education that shall be given to their children."

Universal Declaration of Human Rights

42. The Declaration of the Rights of the Child similarly recognizes a child's right to an education "which will...enable him, on a basis of equal opportunity, to develop his abilities...and to become a useful member of society. It goes on to state that:

> "The best interests of the child shall be the guiding principle of those responsible for his education and guidance; that responsibility lies in the first place with his parents."

Declaration of the Rights of the Child

43. Articles 23.1 and 23.3 of the Convention on the Rights of the Child provide:

> 23.1 States Parties recognize that a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance, and facilitate the child's active participation in the community.
>
> 23.3 Recognizing the special needs of a disabled child, assistance extended in accordance with paragraph two shall be provided free of charge, whenever possible, taking into account the

financial resources of the parents or others caring for the child, and shall be designed to ensure that the disabled child has effective access to and receives education, training, health care services, rehabilitation services, preparation for employment and recreational opportunities in a manner conducive to the child's achieving the fullest possible social integration and individual development, including his or her cultural or spiritual development.

Convention on the Rights of the Child

E. Issue One - Standard of Judicial Review

44. Prior to this case, there has never been a judicial review of the Special Education Tribunal. In the absence of directly applicable case precedent, the standard of review for this Tribunal can be based on an examination of the nature, expertise and role of the Tribunal and by considering it in comparison to other tribunals. In this regard it is to be noted that the Tribunal is part-time, ad hoc, sits infrequently and is without any requirement of professional expertise or experience on the subject matter before it.

45. One of the factors influencing the degree of curial deference afforded to an administrative tribunal is the existence and strength of any privative clause. The high degree of deference reflected by the "patently unreasonable" test which courts have applied on review of tribunals such as the Labour Board is attributable, at least in part, to the presence of strong privative clauses. The Supreme Court of Canada has ruled that the difference between the strong privative clause protecting Labour Board decisions and the "final and binding upon the parties" clause relating to decisions of labour arbitrators indicates "a more limited shield against judicial review for decisions of an arbitrator."

Canada (A.G.) v. Mossop, [1993] 1 S.C.R. 554, per La Forest at 583-584. Appellants' Book of Authorities, Vol. 2, Tab 7.

Dayco (Canada) Ltd. v. C.A.W. Canada (1993), 102 D.L.R. (4th) 609 (S.C.C.), per La Forest at 630, Appellants' Book of Authorities, Vol. 2, Tab 8.

Labour Relations Act, R.S.O. 1990, c.L.2, s. 110.

46. The Supreme Court of Canada has also drawn a distinction between tribunals with a broad role to administer an entire statutory scheme (such as the Labour Board or the Canadian Human Rights Commission) as compared to tribunals which settle disputes between parties (such as labour arbitrators and Human Rights Tribunals) with the latter category receiving less deference. It is submitted that the nature and function of the Special Education Tribunal is similar to the latter category. It is therefore submitted that the standard of review for the Special Education Tribunal with respect to any question of law, and in particular with respect to questions of constitutional law, is that the Tribunal is required to be correct.

Mossop, supra, at 585, Appellants' Book of Authorities, Vol. 2, Tab 7.

Douglas Kwantlen Faculty Assn. v. Douglas College, [1990] 3 S.C.R. 570 at 605, Appellants' Book of Authorities, Vol. 2, Tab 9.

F. Issue Two - The Correct Legal Test

(i) Introduction

47. It is submitted that the formulation of a test for determining when a child can be ordered against her parents' wishes into a segregated education placement based on disability cannot be undertaken without careful consideration of the human rights and fundamental freedoms guaranteed to that child under the Charter and the Code. The respondent School Board seeks to reduce the central issue in this case to a mere "pedagogical debate". The Divisional Court expressed "great difficulty" in appreciating how the Charter and the Code "create a presumption in favour of one pedagogical theory over another". It is respectfully submitted that the existence of any pedagocical debate is irrelevant to the formulation of a legal test for determining placement. Rather, equality rights principles must be applied so as to ensure that all decision making under the Act is carried out in a manner consistent with the rights and freedoms of all Canadians, including those of disabled children in our public schools.

48. It is submitted that in light of the Act, the Code and the Charter, the legal test to be met by a School Board seeking a segregated placement includes the following principles:

a) there is a presumption in favour of an integrated placement;

b) the onus of justifying a segregated placement is on the school board;

c) in determining placement, it must be assumed that a school board will provide any accommodation required to meet the needs of a student unless to do so would constitute an undue hardship within the meaning of the Code;

d) a respondent cannot establish that a segregated placement is justified unless the services provided there either can not be provided in a regular class, or can not be provided in the regular class without undue hardship;

e) if some degree of segregation is required, it should nevertheless be kept to a minimum and all other options along the continuum of services must be exhausted before a full time placement in a segregated class can be justified.

49. It is clear that human rights legislation protects against discrimination on the basis of disability in education and that the Code takes priority over anything to the contrary in the Act. It is also clear that the Act is subject to the Charter and that the Charter protects equality rights for persons with disabilities. The Act is silent as to which party bears the onus of proof before the Tribunal or at any stage of the process leading up to the Tribunal hearing. The Act also fails to define with any precision the question or questions to be answered by the Tribunal. It is therefore submitted that the equality rights principles developed under the Code and the Charter are applicable and useful as an interpretive guide in determining the correct legal test to be applied by the Tribunal.

Human Rights Code, R.S.O. 1990, c.H. 19, ss. 1, 17 and 47(2).

Canadian Charter of Rights and Freedoms, s. 15.

University of British Columbia v. Berg, [1993] 2 S.C.R. 353, Appellants' Book of Authorities, Vol. 4, Tab 24.

Canada (A.G.) v. Mossop, [1993] 1 S.C.R. 554, at 581-2 Appellants' Book of Authorities, Vol. 2, Tab 7.

(ii) Segregation is Prima Facie Discriminatory

50. It has long been established in free and democratic societies that "separate" is not "equal". The principles enunciated by the United States Supreme Court four decades ago in the Brown case with respect to racially segregated education are equally applicable to forced segregation on other grounds such as disability. As noted by the United States Supreme Court in that case:

> 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.
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> Brown v. Board of Education of Topeka (1954), 347 U.S. 483 at p. 495, Appellants' Book of Authorities, Vol. 6, Tab 33.

51. It is submitted that the forced segregation of people, whether in the education system or elsewhere, on the basis of grounds protected by the Code and the Charter is prima facie discriminatory. That is not to say that all forced segregated education necessarily violates the Code or the Charter as there may be circumstances when it is necessary or justifiable to do so. However, since the educational norm is placement in a regular class, deviation from that norm because of distinctions based upon membership in a particular disadvantaged group would constitute a violation of s. 15 of the Charter (subject to s. 1) and a prima facie breach of the Code (subject to the defence provisions).

> Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143 at 174-75, Appellants' Book of Authorities, Vol. 3, Tab 18.
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> Huck v. Canadian Odeon Theatres Ltd. (1985), 6 C.H.R.R. D/2682 (Sask. C.A.) at D/2688/9, leave to appeal to the Supreme Court of Canada refused, June 3, 1985 (McIntyre, Wilson and LaForest JJ.).

52. In the educational context, this principle may also be described as a rebuttable presumption in favour of integration - i.e. in determining placement there is a rebuttable presumption in favour of the non-discriminatory norm of education in a regular class of one's peers. This is not a presumption in favour of one "pedagogical" theory over another as it is unrelated to theories about how children learn. Rather, it is a recognition of the prima facie right of children with disabilities not to be isolated from or segregated from their non-disabled peers. Although these principles have not previously been considered in this context in Ontario, there is considerable American jurisprudence on the issue. Much of the U.S. law arises under a statute in which the presumption in favour of integration is expressly stated, but there is also authority for the proposition that the same analysis would apply under general non-discrimination legislation.

> Rafael Oberti et. al v. Board of Education of the Borough of Clementon School District et al., United States District Court of New Jersey, Civil Action No. 91-2818, Appellants' Book of Authorities, Vol. 6, Tab 34.
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> Rafael Oberti et al. v. Board of Education of the Borough of Clementon School District, et al., United States Court of Appeals for the Third Circuit, No. 92-5462, Appellants' Book of Authorities, Vol. 6, Tab 35.
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> Board of Education, Sacramento City Unified School District v. Rachel Holland et al. (1992), 786 Fed. Supp. 874, (U.S. District Court, E.D. Calif), Appellants' Book of Authorities, Vol. 6, Tab 36.
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> Sacramento City Unified School District v. Rachel Holland et al., United States Court of Appeals, Ninth Circuit, January 24, 1994, unreported, Appellants' Book of Authorities, Vol. 6, Tab 37.
>
> Mavis v. Sobol (Commissioner of Education of the State of New York (1994), 839 F. Supp. 968 (N.D.N.Y. 1983), United States District Court, Appellants' Book of Authorities, Vol. 6, Tab 38.

53. It is clear that the reason Emily was first subject to the IPRC process, and the triggering fact leading to her placement in a special segregated class is that she is disabled. Disability is the shared and distinguishing characteristic of the students in the class into which the School Board proposed to place Emily. Distinctions or differential

treatment based upon membership in a particular disadvantaged group are prima facie discriminatory. It is therefore submitted that forcing Emily into a segregated placement is prima facie discriminatory under s.1 of the Code and s. 15 of the Charter.

Andrews, supra, at p. 174-5, Appellants' Book of Authorities, Vol. 3, Tab 18.

Huck v. Canadian Odeon Theatres, supra, Appellants' Book of Authorities, Vol. 3, Tab 19.

(iii) The Onus of Justifying Segregation is on the Respondent

54. The corollary of the principle that forced segregated education is prima facie discriminatory, is that the onus of proof in such cases must be on the party seeking to impose or force the segregated placement. This is in accordance with Charter principles in which the onus of justifying the reasonableness of discriminatory distinctions would, under s. 1 of the Charter, be on the government seeking to uphold those distinctions. Likewise, under the Code, upon a finding of a prima facie case of discrimination on the basis of disability, the onus would shift to the respondent to establish that the distinctions were necessary because the needs of the complainant could not be accommodated short of undue hardship. It is submitted that the onus of justifying the segregated placement ought not to be different as between a human rights proceeding and a proceeding under the Act. Accordingly, in this case the onus should be on the School Board. Further, "impressionistic evidence" alone will not be sufficient to discharge that onus.

Andrews, supra, at 153 and 183-4, Appellants' Book of Authorities, Vol. 3, Tab 18.

Ontario Human Rights Commission and O'Malley v. Simpsons-Sears, [1985] 2 S.C.R. 536 at 558-9, Appellants' Book of Authorities, Vol. 3, Tab 22.

Ontario Human Rights Commission v. London Monenco (1992), 93 D.L.R. (4th) 233 at 239 and 244 (Ont. C.A.), Appellants' Book of Authorities, Vol. 3, Tab 20.

Ontario Human Rights Commission v. Etobicoke (1982), 132 D.L.R. (3d) 14 (S.C.C.) at p. 23. Appellants' Book of Authorities, Vol. 3, Tab 21.

55. As a general principle, the burden of proof should lie with the party which is in the best position to have the necessary information to meet it. In cases of this nature, it is more logical and appropriate to require a School Board to demonstrate the merits and necessity of the segregated placement it is proposing, rather than requiring the parents to prove the negative.

> Ontario Human Rights Commission v. Simpson-Sears, supra. p. 559. Appellants' Book of Authorities, Vol. 3, Tab 22.

56. Courts in the United States have placed the onus on schools to demonstrate that a segregated placement is justified. This is seen, in part, as a logical extension of the presumption in favour of integration, but also as an issue of fairness because of the school's better access to relevant information. As stated by the U.S. Court of Appeals for the Third Circuit in the Oberti case:

> "In practical terms the school has an advantage when a dispute arises under the Act: the school has better access to the relevant information, greater control over the potentially more persuasive witnesses (those who have been directly involved with the child's education), and greater overall educational expertise that the parents. See Lascart, 560 A.2d at 1188 (placing burden of proof on school is "consistent with the proposition that the burdens of persuasion and production should be placed on the part better able to meet those burdens"); *Engel, Law, Culture, and Children with disabilities, 1991 Duke L.J. at 187-94* (arguing that parents are generally at a disadvantage vis-a-vis the school when disputes arise under IDEA because parents generally lack specialized training and because their views are often treated as "inherently suspect" due to the attachment to their child).
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> In light of the statutory purpose of IDEA and these practical considerations, we believe that when IDEA's mainstreaming requirement is specifically at issue, it is appropriate to place the burden of proving compliance with IDEA on the school. Indeed, the Act's strong presumption in favour of mainstreaming, 20 U.S.C. 1422(5)(B), would be turned on its head if parents had to prove that their child was worthy of being included rather than the school district having to justify a decision to exclude the child from the regular classroom."
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> Rafael Oberti et al. v. Board of Education of the Borough of Clementon School District, et al., supra, at p. 28, Appellants' Book of Authorities, Vol. 6, Tab 34.

(iv) The Right to Be Accommodated

57. The Code requires the accommodation of special needs of students with disabilities unless this would cause undue hardship. This concept is consistent with the scheme of the Education Act which provides for the identification of exceptional students and mandates an individualized approach in developing education programs for those children. Similarly, this is consistent with the principle established in Andrews that true equality will require different treatment for people who are unequal. It is accepted that merely placing Emily in an integrated placement would not be sufficient to meet her needs or to comply with her equality rights. Appropriate supports must be provided. However, in determining whether Emily can be placed in a regular class, it must be assumed that the degree of accommodation required by law will in fact be provided there. The failure of the school to fully or properly accommodate her needs in the regular class can not be the basis for segregating Emily. It is not consistent with Emily's equality rights force her into a segregated class in a different community in order to deliver services which could be provided in the more normalized environment of a regular class placement in her neighbourhood school. It is therefore submitted that the respondent can only justify the segregated placement by establishing that the services provided there are necessary to meet Emily's needs and cannot be provided to her in a regular class setting. The School Board in this case did not present such evidence. It is therefore submitted that the Tribunal erred in law in choosing a segregated placement without considering whether the services needed by Emily could only be provided in a segregated setting and could not be provided in a regular class.

Ontario Human Rights Code, R.S.O. 1990, s. 17.

Andrews, supra., Appellants' Book of Authorities, Vol. 3, Tab 18.

(v) Least Restrictive Alternative

58. The accommodation of students with disabilities is contemplated by and consistent with the Act, the Code and the Charter and under general human rights case law. The limit of that accommodation is the undue hardship standard imposed under the Code. The

(vi) Impact of s.7 of Charter and Canada's International Obligations

60. It is submitted that the foregoing analysis of the correct legal test under the Education Act (as informed by the Code and s.15 of the Charter) is consistent with and enhanced by the application of the principles and values underlying s.7 of the Charter and reflected in Canada's international obligations. The principles which Canada has endorsed in its international treaties are useful in interpreting domestic law. Wherever possible, domestic laws should be interpreted in a manner consistent with Canada's international obligations and with the provisions of our Charter.

> Slaight Communications v. Davidson, [1989] 1 S.C.R. 1038 at 1056-57, Appellants' Book of Authorities, Vol 5, Tab 31.
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> R. v. Videoflicks Ltd. (1984), 14 D.L.R. (4th) 10 (Ont. C.A.) at 35-6 and 46, Appellants' Book of Authorities, Vol. 5, Tab 32.

61. One of the principles underlying s.7 of the Charter is respect for an individual's right to control his or her own body and physical integrity. Section 7 rights include the notion of autonomy and freedom from state imposed psychological and emotional stress. Also protected is the right to self determination in making fundamental life decisions. As stated by the Supreme Court of Canada in Morgantaler:

> "Liberty in a free and democratic society does not require the state to approve the personal decisions made by its citizens; it does, however, require the state to respect them."
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> R. v. Morgentaler (1988), 44 D.L,R, (4th) 385 at 487, Appellants' Book of Authorities, Vol. 4, Tab 27.
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> Rodriguez v. British Columbia (Attorney General) (1993), 107 D.L.R. (4th) 342, Appellants' Book of Authorities, Vol. 4, Tab 26.
>
> Fleming v. Reid (1991), 4 O.R. (3d) 74 (C.A.), Appellants' Book of Authorities, Vol. 4, Tab 28.

62. All compulsory school attendance involves, to some extent, an element of physical compulsion and loss of liberty. In most cases, however, this can be justified because of

the importance of education and the minimal impairment of the right. Parents with philosophical or religious objections to the public school system are able to educate their children at home subject to obtaining the appropriate approvals under the Act. However, the option of home schooling is not a meaningful alternative for parents objecting to the placement of a disabled child in a segregated class as it would be directly counter-productive to the parents' goals of integration and normalization. It is submitted that forcing a disabled child into a segregated setting is a much more restrictive invasion of her right to life, liberty and security of the person than compulsory school attendance in a regular class. This is particularly the case in light of the strong and uncontradicted evidence from acknowledged experts that such segregation may result in serious and perhaps irreversible psychological harm to the child. Because of the importance of these rights and the seriousness of the possible consequences of infringing them, it is appropriate that there be an onus on the party seeking to impose the segregation to demonstrate that it is necessary. Indeed, fundamental justice would require that the onus for justifying a deprivation of liberty be on the party infringing the right. This analysis is supportive of the test proposed in paragraph 48.

63. These principles are also reflected in Canada's international obligations (as set out in paragraphs 40 to 43 above) which recognize the parents as having the primary role in determining a child's best interests and in "choosing the kind of education that shall be given to their children." In addition, the Convention on the Rights of the Child requires that a disabled child is entitled to be educated "in a manner conducive to the child's achieving the fullest possible social integration." It is consistent with these international commitments to imply a presumption in favour of an integrated education placement, and to require upon a party seeking to override a parent's choice of integration to prove the necessity of segregation.

64. The right of parents to make fundamental life decisions for their children is recognized in our common law as well as by Canada's international obligations. It is accepted that parental rights over their children are not absolute and that protection of