C19214

COURT OF APPEAL FOR ONTARIO

CARTHY, ARBOUR and LABROSSE JJ.A.

B E T W E E N :

CAROL EATON AND CLAYTON EATON **Appellants** **- and -** **THE BRANT COUNTY BOARD OF EDUCATION** **Respondent** **- and -** **CANADIAN DISABILITY RIGHTS COUNCIL, ONTARIO ASSOCIATION OF COMMUNITY LIVING and ATTORNEY GENERAL OF ONTARIO** **Intervenors**	**Anne M. Molloy and Janet Budgell for the appellants** **Christopher Riggs and Brenda Bowlby for the respondent** **David Kent, Melanie Yach and Geri Sanson for the intervenor Canadian Disability Rights Council** **Harry Radomski and Jacqueline Dais-Visca for the intervenor Ontario Association for Community Living** **Dennis W. Brown, Q.C. and John Zarudny for the intervenor Attorney General of Ontario** **Heard: December 19-21, 1994**

ARBOUR J.A.:

Introduction

The appellants are the parents of Emily Eaton, a 10 year old girl with cerebral palsy. The Eatons assert, on behalf of Emily, an entitlement to being educated

in a regular classroom, in a regular public school. The nature and extent of Emily's disabilities are not directly in issue in this appeal, which is only concerned with legal issues, particularly issues related to equality rights. It is therefore only necessary to refer briefly to the nature of Emily's special educational needs. Emily does not speak, and she has no established alternative communication system. She has some visual impairment. Although she can bear her own weight and can walk a short distance with the aid of a walker, she is mostly in a wheelchair. Emily is presently in a grade 4 class in an integrated classroom in the separate school system.

History of the proceedings

When she began kindergarten, Emily attended Maple Avenue School, which is her local public school. The Identification, Placement, and Review Committee ("IPRC") of the Brant County Board of Education ("The school board") identified Emily as an exceptional pupil and, at the request of her parents, determined that she should be placed, on a trial basis, in her neighbourhood school. A full time educational assistant, whose principal function was to attend to Emily's special needs, was assigned to her classroom. This arrangement was continued into Grade 1, although toward the end of that year, at the IPRC meeting, the school board requested that Emily be placed in a special class for disabled students. Over the parents' objection, the IPRC granted the board's request. That decision was upheld by the Special Education Appeal Board and,

subsequently, by the Ontario Special Education (English) Tribunal ("The Tribunal"). The appellants' Application for Judicial Review was dismissed by the Divisional Court. Leave to appeal to this Court was granted earlier this year.

Meanwhile, we were advised at the outset of the hearing that an injunction had been granted to allow Emily to remain in a regular classroom pending the decision of the Tribunal. Once that decision was rendered, the appellants provided education for their daughter at home for one term, rather than have her attend the special class for disabled students. Mr. Eaton is a special education teacher who works in segregated classes for disabled children. Mrs. Eaton is trained as a social worker. They have other children who were then enrolled in schools with the respondent school board. At the end of the school year, the appellants enrolled Emily in a school within the separate system, where she receives instruction in a regular classroom.

Special Education in Ontario

The Education Act, R.S.O. 1990, c. E. 2, as amended, and the *Regulations* thereunder set out a comprehensive scheme for the identification of "exceptional pupils" and for the placement of these pupils in appropriate educational programs. "Exceptional pupil" is defined in the *Education Act* as follows:

> s. 1(1) "exceptional pupil" means a pupil whose behavioral, communicational, intellectual, physical or multiple exceptionalities are such that he is considered to need placement in a special education program by a committee, established under paragraph iii of paragraph 5 of subsection 11(1), of the board,...

Section 8(3) of the *Education Act* sets out the Minister of Education's responsibility with respect to the provision of special education in Ontario:

> s. 8(3) The Minister shall ensure that all exceptional children in Ontario have available to them, in accordance with this Act and the Regulations, appropriate special education programs and special education services without payment of fees by parents or guardians resident in Ontario, and shall provide for the parents or guardians to appeal the appropriateness of the special education placement, and for these purposes the Minister shall,
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> (a) require school boards to implement procedures for early and ongoing identification of the learning abilities and needs of pupils, and shall prescribe standards in accordance with which such procedures be implemented; and
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> (b) in respect of special education programs and services, define exceptionalities of pupils, and prescribe classes, groups or categories of exceptional pupils, and require boards to employ such definitions or use such prescriptions as established under this clause.

Regulation 305, enacted under the *Act*, requires that every board of education set up a Special Education Identification, Placement and Review Committee

("IPRC") to deal with the identification and placement of exceptional students. The regulation also sets up the process by which the parents may appeal the IPRC's decision.

Under that scheme, pupils who are identified as exceptional, either because they have disabilities or because they have talents that bring their educational needs outside the range of what is being offered in a regular age-appropriate program, are provided with either remedial or enriched instructions responsive to their individual needs. These programs are offered either within the child's regular classroom, or through periodic withdrawal from the regular classroom, or in special classrooms where pupils with similar needs are instructed as a group as well as individually. It is apparent that most identifications and placements are determined on a consensual basis since we were advised at the hearing of the appeal that the Tribunal whose decision is being reviewed in this case sits quite infrequently and has not sat more than a dozen times in the last decade. We were told that there are presently approximately 170,000 pupils enrolled in special education programs in various school boards throughout Ontario.

The Decision of the Tribunal

The Tribunal delivered extensive reasons for its decision to uphold the IPRC and Special Education Appeal Board placement decision for Emily Eaton. The hearing before the Tribunal was effectively the first hearing in the matter. The IPRC and

the Appeal Board do not hear evidence. They merely consider the representations made to them by school officials and parents. The hearing in this case took 21 days. Considerable expert evidence was called, all of which is summarized in the Tribunal's decision. The expert evidence dealt mostly with what the respondents refer to as the pedagogical controversy in education over the issue of placement, particularly whether full inclusion of exceptional students is preferable to education models that espouse segregation. The expression "segregation" is not one that the respondent favours. There is no doubt that, particularly when associated with education, the expression "segregation" evokes memories of racial segregation policies which were repudiated in the United States in the 1950's with the famous case of *Brown v. Board of Education of Topeka* (1954), 347 U.S. 483.

Despite that pejorative connotation, I think that the expression is accurate to describe the issue in the present case. To segregate is to separate (a person, a body or class of persons) from the general body, or from some particular class; to set apart, isolate, seclude (The Compact Edition of the Oxford English Dictionary, 1971). The placement that has been adjudged appropriate for Emily Eaton is a segregated placement. She is to be educated in a regular public school, albeit not the neighbourhood school that her brothers are free to attend, but in a special classroom of that school which will be attended only by other disabled pupils. Although the respondent emphasises that under

that placement model there would still be periods of integration for Emily, such as general school assemblies, recesses etc., it is unquestionable that the placement that has been recommended for her is one in which she is to be isolated from the mainstream and educated primarily in the sole company of children with similar educational needs.

It is apparent from the Tribunal's detailed and careful reasons that the choice of that segregated educational model for Emily Eaton was made in what it perceived to be in her best interest, and not without reasons. The Tribunal examined Emily's intellectual and academic needs, her communication needs, her emotional and social needs and her physical and safety needs. In each case, on the basis of evidence that was open to it to accept, the Tribunal concluded that Emily's needs were not being met in the integrated setting of the regular classroom in which she had been placed.

The Issues

The appellants raise several issues, which I find useful to regroup in the following manner. First and foremost, the appellants raise a constitutional issue. They contend that the Divisional Court erred in its interpretation of the application of the *Canadian Charter of Rights and Freedoms* to the process of placing disabled students in an appropriate educational setting. Second, the appellants raise a number of legal errors

which they submit were committed by the Tribunal and should have been reviewed by the Divisional Court.

The Scope of Judicial Review

Section 37(5) of the *Education Act*, R.S.O. 1990, c. E.2, as amended, provides that:

> The decision of a Special Education Tribunal or of a regional tribunal under this section is final and binding upon the parties to any such decision.

Guided by the principles of judicial review recently restated by the Supreme Court of Canada in *Pezim v. British Columbia (Superintendent of Brokers)* (1994), 114 D.L.R. (4th) 385 at pp. 404-405, I agree with the Divisional Court that the Tribunal is worthy of curial deference. In addition to the privative clause, the subject matter of the legislation and the actual composition of the Tribunal point to a standard of reasonableness, rather than to one of correctness, as the applicable standard under which alleged errors of law must be reviewed. However, Mr. Riggs, for the respondent, concedes that with respect to constitutional issues, the standard of review is one of correctness and that to the extent that the Tribunal purported to apply a constitutional

principle, it is not entitled to any deference as to the correctness of that principle or its application (*Cuddy Chick v. Ont.*, [1991] 2 S.C.R. 5).

I find it convenient to deal with the alleged errors of law first. Having held that the Tribunal was worthy of curial deference, the Divisional Court held that, in any event, they could find no error of law on the record . The only alleged error that, in my opinion, needs to be addressed is the independent literature review undertaken by the Tribunal. At the hearing before the Tribunal, Ms. Molloy, counsel for the appellants, sought to put various articles and studies to the experts who testified, in order to elicit their comments. The school board objected and the Tribunal reserved its decision. Ms. Molloy then asked for permission to simply file with the Tribunal the literature that she wished them to review. In the course of her submissions to the Tribunal on that issue, Ms. Molloy invited the members of the Tribunal to rely on their expertise to review that literature. The Tribunal delivered a written ruling in which it held that counsel for the appellants could not put these materials to the experts for comments, nor could she file them with the Tribunal. As I understand the ruling, both procedures were said to be offensive to the hearsay rule, since the authors were not called as witnesses themselves.

However, having so ruled, the Tribunal proceeded to conduct its own review of the literature on placement of exceptional students, purportedly under the

authority of s. 16 (b) of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22. The reasons state that the Tribunal, relying on its own expertise with that literature, completed "an extensive and intensive review of the placement literature and conclude[d] that this body of literature, taken as a whole, is seriously flawed". The Tribunal pointed out that the literature contained very few references to situations even vaguely analogous to that of Emily Eaton, and concluded that the literature did not support placing Emily in a regular class.

The procedure followed by the Tribunal was wrong. It should have permitted counsel for the appellants to put the relevant literature to the experts for their comments. This would have allowed the respondent to conduct its own examination of the experts. Both parties would then have been in a position to make submissions to the Tribunal with reference to the experts's assessment of the literature upon which the appellants wished to rely. However, this error of law does not come within the ambit of reviewable error within the standard set out above since the analysis conducted by the Tribunal does little more than confirm that there is an ongoing pedagogical debate about the various models for the placement of disabled students, and that, solely from the pedagogical point of view, integration has not yet been proven superior. In any event,

considering the total analytical framework followed by the Tribunal, I do not think that the literature review had an important impact on its decision. Even if the error was reviewable, it could therefore not serve to invalidate the decision.

The Charter Issues

The appellants submit that the Tribunal and the Divisional Court erred in applying a legal test for determining the appropriate placement for Emily that is discriminatory, and not justifiably so under s. 1 of the Charter. They contend, essentially, that s. 15 of the *Charter* and s. 1 of the *Ontario Human Rights Code* both require that a different legal test be applied. They propose, as an acceptable test, one which would create a presumption in favour of including disabled students into regular classrooms, while imposing a burden on those who propose a segregated classroom, in this case the Board, to establish why the student's exceptional needs can be better met in that setting. I will return to the test proposed by the appellants later in these reasons. Suffice it to say that this was clearly not the approach that was taken by the Tribunal. After reviewing the evidence, the Tribunal stated that the principal issue was "whether Emily Eaton's special needs can be met best in a regular class or in a special class". When considering the application of the Charter and the Code, the Tribunal held :

The Charter of Rights. And Human Rights Issues

> We accept the argument of appellants' counsel that we are bound by *The Charter* and by the *Ontario Human Rights Code* (OHRC) in making our decision and that *The Charter* would take precedence over the *Education Act* if there is conflict between the two. We also accept that consideration of *The Charter* and the OHRC are within our mandate as a tribunal. Accordingly, we considered at great length the submissions of both counsel in regard to the impact of *The Charter* and the OHRC in Emily Eaton's case.
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> 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, that school board is not in violation of *The Charter* or the OHRC.

It is clear from the above that the Tribunal rejected any notion of a presumption in favour of inclusion, or of imposing upon the school board a requirement of demonstrating the superiority of a segregated placement for Emily Eaton, over the educational experience that she was obtaining in an integrated classroom. The decision, when viewed as a whole, concludes that the integrated classroom has not been successful in providing an education for Emily. The Tribunal never answered the question as it

framed it, that is, whether Emily's special needs can be best met in a regular class or in a special class. Having found that the integrated placement had not met Emily's needs, the Tribunal did not state how the segregated class would likely be more successful. It is apparent that the Tribunal rejected the test that the appellants contend is mandated by the Charter and the Human Rights Code.

Adams J., speaking for the Divisional Court, found no error of law in the decision of the Tribunal. He addressed the Charter issue as follows:

> Finally, we have 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*. But in this case, that issue is entirely academic because the Tribunal found the evidence clearly established that Emily's best interests will be better served with the recommended placement.

The Legal Framework of Analysis

With the greatest respect for the Divisional Court, in my view, it mischaracterized the issue. The question is not one of choosing between competing

pedagogical theories, but one of determining the appropriate legal framework within which that choice will be made.

Essentially, the appellants contend that in determining what is an appropriate placement for a disabled child, school officials cannot simply apply a test of "best interest of the child". Such a test could prove insensitive to the equality rights of the child, which, when asserted, may trump what would otherwise appear to others to be in the child's best interest.

In my respectful view, the Divisional Court erred in two respects: first, in finding that the Charter and the OHRC did not apply since the tribunal here was merely asked to choose between two competing education theories; and second, in finding that the choice of program was not subject to a Charter challenge in any event since the special education programs depend on s. 15(2) for their existence, assuming that this is in fact what was intended by the reference to the protection of s. 15 of the *Charter* and of s. 14 of the *Code*.

The applicability of s. 15(2) of the *Charter*

This point can be conveniently addressed at the outset. As I understand it, Adams J. suggested that the implementation of the special education programs required

the protection of the "saving provision" of s. 15(2) of the Charter and of s. 14(1) of the *Human Rights Code*, and , as such, were exempted from *Charter* compliance. This argument was advanced by the respondent in the appeal.

It is unnecessary to determine whether the special education programs offered pursuant to the provisions of the *Education Act* and Regulations would need the protection of s. 15(2) of the *Charter* in the event of an allegation that they discriminate against mainstream students. Even though these programs were enacted in part to ameliorate the condition of disabled students, they arguably do nothing more than to provide these students with the real equality that they are entitled to under s. 15(1). In such a case, they may not be viewed as "affirmative action" programs as understood under s. 15(2). Be that as it may, even if the special education programs could only have been implemented pursuant to s. 15(2) of the *Charter*, it does not follow that these programs would be immune from constitutional attack by the proposed recipients of the intended benefit. The decision of the Divisional Court was rendered prior to the judgment of this court in *Ontario Human Rights Commission v. Ontario* (1994), 19 O.R. (3rd) 387 which dealt with age as a basis for exclusion from an affirmative action program. Although that case was decided on the basis of s. 14(1) of the *Human Rights Code*, the result is the same under s. 15(2) of the *Charter*. The enactment of an

affirmative action program does not exempt the state from *Charter* compliance within the program.

The application of s. 15(1) of the Charter

Before embarking on the analysis of the Charter issues, two preliminary matters must be addressed. The first is the interaction between the Charter and the Ontario Human Rights Code. Section 15 of the Charter states as follows:

> (1) 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 and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
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> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Section 1 of the Ontario Human Rights Code reads as follows:

> 1. Every person has a right to equal treatment with respect to services, goods and facilities, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status or handicap.

Although there is considerable overlap between s. 15 of the Charter and s.1 of the Ontario Human Rights Code, I find it difficult to conduct a simultaneous parallel analysis of all issues under both the Charter and the Code. The Charter is the superior document and will prevail in case of conflict with the Code. The attack is on the decision of a Tribunal upholding the position taken by a school board, under the authority of the *Education Act*. Since the Charter applies to the *Education Act*, I find it unnecessary to pursue the equality analysis under the Ontario Human Rights Code.

Secondly, although the appellants in this case are the parents of Emily Eaton, the interest that they advance is her interest, not their own. Their views as parents are important in the special education scheme set out above. As parents, they are entitled to attend the IPRC meetings, and to appeal an identification or placement decision with which they disagree. But when it comes to asserting their daughter's constitutional right to equality, as provided by s. 15 of the Charter, they represent her, and their submissions to the courts are made for her and on her own behalf. They are entitled to do so and their position on the Charter issue must not be confused with their position as parents in opposing the school board on what is best for their daughter's education.

I now wish to return to the characterization of the issue by the Divisional Court as being merely one of choosing between two pedagogical theories. It is true that

the decision of the tribunal espouses a philosophy of education for disabled children that does not reflect a preference for integration in a regular classroom over segregation in a special class with other disabled children. But there is more to the decision than a choice between the two pedagogical theories, one which favours integration and the other which looks to meeting the special needs of the child in any setting, whether integrated or not. In legal terms, the two pedagogical theories are not on the same footing if one produces discrimination and the other does not.

This raises the question of whether the placement of Emily in a special classroom for disabled children, in an integrated school but not the neighbourhood school that she would otherwise attend, amounts to discrimination within the meaning of s. 15 of the Charter such as to require justification under s. 1. In *Andrews v. Law Society of B.C.*, [1989] 1 S.C.R. 143, an infringement of s. 15(1) was said to occur when a distinction was made by a state actor, based on a prohibited ground, that deprived a person of a benefit or imposed a burden or disadvantage on him or her. Emily Eaton is prevented from attending a regular class, in her neighbourhood school, because of her disability. I have no difficulty in concluding that a classification has been made on a prohibited ground. The decision has been made by a school board, under the authority of the *Education Act*, thereby involving state action. Does this decision create a burden or disadvantage, or deprive Emily of a benefit? The respondents submit that it does not,

since, in the special segregated classroom, Emily will be receiving the same kind of education as her peers.

The appellants, on the other hand, contend that although other forms of special programs are not a burden or disadvantage for Emily, segregation is. The appellants concede that to simply place Emily in a regular classroom in her neighbourhood, without more, would not meet her equality entitlements. This would be the equal treatment of unequals which does not yield true equality. The appellants concede, therefore, that some distinctions must be made, on the basis of her disability, to ensure her equal treatment. It would not be enough to say that she can go to her neighbourhood school. She may need assistance in transportation for getting there, and would also need considerable assistance in the classroom so that her educational experience can be as close as possible to that of her peers. Even though she would be treated differently, none of these measures, in the appellants' submissions, would amount to the deprivation of a benefit; none would be a burden or a disadvantage. Therefore, none of these would be discriminatory.

Removing Emily from the classroom altogether would, in the appellants' submission, be a burden or a disadvantage and would deprive her of a benefit. It is therefore essential to determine whether segregation of a disabled student, against the

student's wishes, is discriminatory. If the measure is not a disadvantage, or the deprivation of a benefit, it is not discriminatory, even if it is based on a prohibited ground, and there is no infringement of the person's equality rights. If the measure is discriminatory, then it will be permissible only if justified under s. 1. The appellants do not consider segregation a benefit, but rather a detriment to Emily's education. Although one should not ignore the intended recipient's perception of whether the measure designed to enhance her equality is in fact a burden rather than a benefit, that subjective perception is not in itself determinative of the issue.

Is placement in a segregated classroom discriminatory?

In *R. v. Turpin*, [1989] 1 S.C.R. 1296, Wilson J., at p. 1332, indicated that the indicia of discrimination must be found in the social, historical and political context surrounding the measure which is alleged to be discriminatory. This cannot be ascertained solely within the confines of the applicable legislation. Nor can it be determined by the intent with which the measure is offered.

The history of discrimination against disabled persons, which the Charter sought to redress and prevent, is a history of exclusion. Some of the Ontario landmarks in that history have been canvassed by Weiler J.A. in her dissenting opinion in *Adler v. Ontario* (1994), 19 O.R. (3rd) 1 at p. 48. She referred to the 1971 Williston report which

endorsed the ongoing movement for deinstitutionalization of the mentally disabled (Walter A. Williston, *Present Arrangements for the Care and Supervision of Mentally Retarded Persons in Ontario*, 1971, prepared for the Ministry of Health), and to the subsequent report by Robert Welch entitled *Community Living for the Mentally Retarded People in Ontario*, (1973). These led to the transfer of jurisdiction over persons with disabilities from the Ministry of Health to the Ministry of Community and Social Services (MCSS), with a view to facilitating the integration of mentally disabled people into the broader community.

Deinstitutionalization was the first step towards full community integration, which has been the primary objective of the disability movement. When she examined education and training as part of her Report on Equality in Employment, Judge Rosalie Abella, then acting as Commissioner, singled out the disabled and native people as groups who faced serious problems of equitable access to education ("Equality in Employment: A Royal Commission Report", October 1984, pp.134-136). She recognized the lack of consensus on whether segregated or integrated facilities best served the educational needs of the disabled and proposed an individualized approach. She then added, at p. 135-136:

> Wherever possible, the disabled child should learn alongside children who are not disabled. This should be the rebuttable presumption. It may involve extra tutoring, the use of an attendant, or specially designed programs to supplement the classroom instruction. It will most certainly involve provincial ministries of education in putting more resources into facilities, aids, and teachers for disabled children. It may be unfair to place a disabled child in a regular class in the public school system without appropriate supports, since integration may come at the cost of learning. As the child falls further and further behind, confidence and motivation may ebb accordingly. Yet in many parts of Canada no special educational facilities exist for children with special needs, and to get a basic education they have to be separated from their major support centres - their families. Where integration is not feasible, instruction should be available close to home with as early an entry into the regular school stream as possible.
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> 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.

This represents more than the endorsement of a pedagogical theory. It puts the educational choice in the broader context of equality rights, freedom of choice, and the community benefit which is derived from the early interaction of all members of society.

In all areas of communal life, the goal pursued by and on behalf of disabled persons in the last few decades has been integration and inclusion. In the social context, inclusion is so obviously an important factor in the acquisition of skills necessary for each of us to operate effectively as members of the group that we treat it as a given. Isolation by choice is not necessarily a disadvantage. People often choose to live on the margin of the group, for their better personal fulfilment. But forced exclusion is hardly ever considered an advantage. Indeed, as a society, we use it as a form of punishment. Exile and banishment, even without more, would be viewed by most as an extremely severe form of punishment. Imprisonment, quite apart from its component of deprivation of liberty, is a form of punishment by exclusion, by segregation from the mainstream. Within the prison setting, further segregation and isolation are used as disciplinary methods. Even when prisoners are segregated from the main prison population for their own safety, the fact that they will have to serve their sentences apart from the main prison population is considered an additional hardship.

When segregated education for the disabled is understood in a broader context, it is easier to understand why the appellants draw the distinction between the necessity for the school board to provide extra assistance to Emily, in the form of a full-time educational assistant in her regular classroom, amongst other things, and the boards' decision to educate her in a segregated facilities for pupils with similar disabilities. It

has been argued that the distinction is merely one of geography, as a student can be effectively isolated in a regular classroom if he or she is unable to participate in a meaningful way in the life of the group. This form of isolation must also be combated, but it remains that the opportunities for interaction with mainstream students are simply not available when the disabled child is segregated in the plain geographical sense of the word.

Inclusion into the main school population is a benefit to Emily because without it, she would have fewer opportunities to learn how other children work and how they live. And they will not learn that she can live with them, and they with her.

Thus, it seems to me that when analyzed in its social, historical and political context, the decision to educate Emily Eaton in a special classroom for disabled students is a burden or disadvantage for her and therefore discriminatory within the meaning of s. 15 of the *Charter*. When a measure is offered to a disabled person, allegedly in order to provide that person with her true equality entitlement, and that measure is one of exclusion, segregation, and isolation from the mainstream , that measure, in its broad social and historical context, is properly labelled a burden or a disadvantage. The loss of the benefit of inclusion is no less the loss of a benefit simply because everyone else takes inclusion for granted.

Segregation of a child with disabilities in a special class for disabled children, against the child's wishes as expressed by the child's legal representatives, is therefore discriminatory within the meaning of s. 15(1) of the Charter. Under the *Education Act,* children are permitted to attend a school in their neighbourhood in which they will associate freely with their age-appropriate peers. The school board has denied Emily this opportunity on the basis of her disability. This is not a mere innocuous classification. It deprives the child of a benefit or imposes on her a disadvantage or a burden within the meaning of *Andrews, supra.*

If there was any doubt about whether the segregation of disabled students is discriminatory, it would be useful, in my opinion, to reflect on whether a similar kind of segregation could be effected on any of the other grounds enumerated in s. 15, without an infringement of that section. Could public school officials determine, on the basis of a pedagogical theory, that, at a certain age, girls would learn better in an all girl environment, and exclude them on that basis from the neighbourhood school that they wished to attend? Could they determine that native children should be educated "in their own schools" against their wishes? Or that black children should attend identical but separate school facilities? The respondent argues that there is no analogy between race and disability when it comes to classifying access to educational facilities. The respondent contends that, except in the context of affirmative action, race would always

be an impermissible criterion upon which to determine access to an education program. However, that aside, the respondent says that education is unique in its attention to individual characteristics. Therefore, it is argued, the equality right that is involved here is the right to equality in education, which translates into providing an equal educational opportunity. That, in turns, requires an educational experience which is individualized to take into account each child's needs. In other words, as I understand the argument, the respondent contends that to the extent that education is to be both meaningful and equal, it must treat each student according to his or her needs and abilities.

It is on that basis that disability is said to be unanalogous to race. With respect, I believe that the argument is flawed. It may appear to find support in *Andrews, supra,* where Mr. Justice McIntyre, at p. 174, concludes his remarks on what constitutes discrimination:

> Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed.

I do not read this passage to suggest that distinctions based on physical or mental disability, a prohibited ground in s. 15, will be less discriminatory than

distinctions based on race or sex. The merits and capacities which may properly found the basis for different treatment cease to do so when they become personal characteristics, such as sex, ethnic origin or disability, which have in common a history of stereotyping. Although it may be easier to justify differences in access to educational facilities on the basis of disability than it would be if the differences were based on race, that analysis belongs to s. 1. For s. 15 purposes there is no hierarchy of prohibitions elevating some grounds of discrimination to a more suspect category and requiring a higher degree of scrutiny. If anything, one should be wary of accepting as inevitable and innocuous a classification on the basis of physical or mental disability, without the rigorous analysis required by s. 15. The present case is a good example. The combination of the obvious difference in ability between Emily Eaton and the other children of her age, and the obvious good intentions of all those concerned with her best interest, make it difficult to conclude that she has been the object of a discriminatory practice. In legal terms, I believe that she has been.

Whether the placement that is offered to Emily is of equal or even superior value is not relevant to a finding of discrimination. It is only relevant to the s.1 analysis which needs to be embarked upon if the discriminatory treatment is to be justified. Under s. 15(1) it is sufficient to find a classification, on a prohibited ground, which deprives the person of a benefit or imposes a burden or disadvantage.

Moreover, it cannot be said that her placement in a special class is a form of accommodation necessary to grant her a true equality of access to education. That reasoning would offer a justification to any "separate but equal" treatment under s. 15(1) without the need to examine the separate treatment under s. 1 of the Charter. The proper analysis, in equality adjudication, must respect the separate functions of s. 15 and s.1. The constitutional right that is at issue in these proceedings is not the right to education but the right to equality. Access to public education cannot be governed by classifications based on prohibited grounds such as race, sex, religion (except where otherwise provided for in the Constitution) or physical or mental disability, if the classification creates a burden or denies a benefit. When that is the case, as it is here, the unequal treatment must find its justification in s. 1. The importance of respecting the analytical boundaries between s. 15 and s. 1 was recognized in *Andrews*. McIntyre J. said, at p. 178:

> The distinguishing feature of the *Charter*, unlike the other enactments, is that consideration of such limiting factors is made under s. 1. This Court has described the analytical approach to the *Charter* in *R. v. Oakes*, [1986] 1 S.C.R. 103; *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, and other cases, the essential feature of which is that the right guaranteeing sections be kept analytically separate from s. 1. In other words, when confronted with a problem under the *Charter*, the first question which must be answered will be whether or not an infringement of a guaranteed right has occurred. Any justification of an infringement which is

> found to have occurred must be made, if at all, under the broad provisions of s. 1. It must be admitted at once that the relationship between these two sections may well be difficult to determine on a wholly satisfactory basis. It is, however, important to keep them analytically distinct if for no other reason than the different attribution of the burden of proof. It is for the citizen to establish that his or her *Charter* right has been infringed and for the state to justify the infringement.

What is the source of the discrimination?

Although I stated earlier that the *Charter* was engaged here because state action was involved in the school board acting under the authority of the *Education Act*, the actual source of the discrimination must be scrutinized further in order to understand whether it can be justified under s. 1, and , if not, what remedies would be appropriate to redress the *Charter* violation.

The appellants have developed an argument with which I have considerable difficulty. They say, essentially, that they are not attacking the *Education Act*. They also concede that the order of the tribunal is not in itself unconstitutional, in the sense that, in an appropriate case, using an appropriate test, a Tribunal could order that a child like Emily be put in a special segregated class. What they say they are attacking is the reasoning of the tribunal, or the test that it used in exercising its discretion. That test, or reasoning, they submit, violates the Charter and the Human Rights Code. As I understand

the appellants' position, it seems to amount to little more than asking the courts to require that the adjudication by the tribunal be made in accordance with Charter and Human Rights values and principles.

In *Slaight Communications v. Davidson*, [1989] 1 S.C.R. 1038, the Supreme Court accepted that the order of an adjudicator could be attacked as "state action" under the Charter, without an attack on the empowering legislation. However here, the attack is not on the order. Nor is it, apparently, on the legislation. If the appellants are correct that the Charter mandates a preference for non-exclusionary education programs for disabled students, then the deficiency must, in my view, be in the failure of the *Education Act* to so provide. Section 8 of the *Education Act* imposes a duty on the Minister of Education to make appropriate special education programs available to all exceptional children in Ontario. Section 6 of Regulation 305, which deals with special education identification and placement, provides that placements are to be effected with the consent of the parents of the exceptional child, failing which the placement may be effected by direction of the board, subject to the parents' rights of appeal. That legislative scheme provides no impediment to the method and reasoning employed by the IPRC, Appeal Board and Tribunal in the present case and, as such, it is constitutionally inadequate, unless it can be justified under s. 1 of the *Charter*.

As I see it, the *Education Act* confers a discretion upon school boards to provide exceptional students, including disabled students, with an educational program that best meets their special needs. In the absence of other language in the *Act* or in the *Regulations*, the statute therefore authorizes the placement that the school board selected for Emily Eaton. That placement is discriminatory. The discrimination must thus be attributed to the legislation, and not, as the appellants contend, to the reasoning of the school board or the Tribunal. The issue therefore become whether the *Education Act*, and the regulations thereunder, constitute a reasonable limit, within the meaning of s. 1 of the *Charter*, on Emily Eaton's equality rights as provided for in s. 15 of the *Charter*.

Is exclusion justified under s.1 of the Charter?

Section 1 of the *Charter* provides that:

> The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

The appellants do not contend that segregation of disabled students for educational purposes could never be permissible, nor do they contend that Emily Eaton has an absolute right to be educated in a regular classroom, with the requisite support.

They merely contend that there should be "a presumption " in favour of inclusion, and that the burden should be on those who advocate otherwise to show that it is the preferable course of action. They submit that unguided discretion conferred upon IPCRs, Appeal Boards and Tribunals to order a placement which may be discriminatory does not comply with s. 1 of the *Charter*, as interpreted in *R. v. Oakes*, [1986] 1 S.C.R. 103. The test articulated in *Oakes* requires that the impugned legislative measure be enacted in pursuit of a valid government objective of sufficient importance to override the constitutionally protected rights; that the legislative measure be rationally connected to the objectives; that it infringe the rights as little as possible; and that the effects of the measure be proportional to the objectives that it pursues.

Very little time has been spent in this case addressing the s. 1 issue. In my view, it is unnecessary to embark upon every analytical step of the *Oakes* test. It is sufficient to recognize that the *Education Act* does not infringe the equality rights of disabled students as little as possible. It puts the selection of a segregated placement on the same footing as an integrated one. In the words of the Divisional Court, the *Education Act* permits the school board to reach its placement decision on the basis of its preference for one pedagogical theory over another, without having to weight the discriminatory impact of the selected theory. The *Act* authorizes the school board to require a disabled student to be educated in a segregated classroom, over the parents'

objection, without having to show why less exclusionary forms of placement could not reasonably be expected to meet the child's special educational needs. Although the *Education Act* does not mandate a *Charter* infringement, it grants a discretion which may be used, and was used in this case, in a way that infringes s. 15. (See: Carol Rogerson, "The Judicial Search for Appropriate Remedies Under the Charter: The Examples of Overbreadth and Vagueness" in Sharpe, ed., *Charter Litigation* (1987), at p. 291). Since it permits a *Charter* infringement, without further guidance, I cannot say that the *Act* infringes the equality rights of disabled students as little as possible.

The Remedy

Having identified a discriminatory provision in the *Education Act* that is not justified under s. 1 of the *Charter*, I think that the situation can be easily remedied without jeopardizing the entire structure of special education in Ontario, most of which, as indicated earlier, operates on a consensual basis, to the advantage of thousands of exceptional students whose learning needs might otherwise not be met. The present legislative and regulatory structure under which exceptional students are identified and placed into appropriate programs should therefore be left largely undisturbed. This can be achieved by curtailing the discretion conferred upon school boards by the *Education Act*. Section 8 of the *Act* should be read to include a direction that, unless the parents of a child who has been identified as exceptional by reason of a physical or mental disability

consent to the placement of that child in a segregated environment, the school board must provide a placement that is the least exclusionary from the mainstream and still reasonably capable of meeting the child's special needs.

In *Schachter v. Canada*, [1992] 2 S.C.R. 679, at p. 705, the court makes it clear that "striking down, severing or reading in may be appropriate in cases where the second and /or third elements of the proportionality test are not met." At p. 695, Lamer C.J. discussed reading in as a remedial option under Section 52:

> A court has the flexibility in determining what course of action to take following a violation of the *Charter* which does not survive s. 1 scrutiny. Section 52 of the *Constitutional Act, 1982* mandates the striking down of any law that is inconsistent with the provisions of the Constitution, but only "to the extent of the inconsistency". Depending upon the circumstances, a court may simply strike down, it may strike down and temporarily suspend the declaration of invalidity, or it may resort to the techniques of reading down or reading in. In addition, s. 24 of the *Charter* extends to any court of competent jurisdiction the power to grant an "appropriate and just" remedy to "[a]nyone whose [*Charter*] rights and freedoms...have been infringed or denied". In choosing how to apply s. 52 or s. 24 a court will determine its course of action with reference to the nature of the violation and the context of the specific legislation under consideration.

In the present circumstances, curtailing the discretion conferred upon school boards by the *Education Act* achieves *Charter* compliance while minimizing interference with the legitimate legislative objectives of the *Act*.

When parents agree, on behalf of their child, that he or she should be educated in a special class for disabled students, there is no constitutional impediment to the school board proceeding accordingly. However, when this is not the case, the school board must select a segregated class as a last resort, having made all reasonable efforts to integrate the disabled child. Reasonable efforts are analogous to reasonable accommodation under *Human Rights* legislation. It is unnecessary here to speculate as to what reasonable inclusionary measures would be. Such measures could obviously include partial or occasional withdrawal from the regular class. The measures would only have to meet a reasonableness standard, which incorporates concerns for the needs of the other pupils in the classroom. In short, the *Charter* requires that, regardless of its perceived pedagogical merit, a non-consensual exclusionary placement be recognized as discriminatory and not be resorted to unless alternatives are proven inadequate.

Should the decision of the Tribunal be upheld despite the constitutional error?

It remains to determine whether the Tribunal would have inevitably arrived at the same conclusion had it appreciated that the Charter required that segregated

placement be used only as a last resort to meet Emily Eaton's educational needs. As indicated earlier, the Tribunal proceeded on a methodical and detailed review of the evidence and articulated its conclusions in a forthright manner on every contentious point. It is therefore easier to appreciate the impact of the approach that it took in arriving at the ultimate choice of placement. The tribunal concluded that none of Emily's needs were being met in the integrated classroom in which she had been placed. It did not specifically examine whether the evidence revealed that these needs would be better met, if at all, in a segregated environment. Indeed, in the case of her intellectual and academic needs, the Tribunal concluded that these "cannot be met best, if they can be met at all, in a regular class". As for her emotional and social needs, the Tribunal recognized the difficulty in determining the level of her enjoyment of the educational experience that she had received so far, since she does not communicate effectively. Relying on the increasing incidents of crying, sleeping and vocalizing, and the almost total absence of interaction between Emily and her classmates, the Tribunal concluded that those needs were also not being met in the current integrated setting. No finding was made that these needs would likely be better met in a special classroom, or that she would likely interact better with other disabled students. More to the point, in proceeding as it did, the Tribunal saw no need to examine the desirability of providing Emily with a modified integrated setting, such as assigning her to a regular class but with a different teacher, more experienced in integrating disabled students, or withdrawing her periodically from

the classroom for individual instruction. I do not wish to suggest that any of these measures would have been perceived by the Tribunal as likely to succeed where the integration in place, in its opinion, was failing. I simply remark that the Tribunal did not consider measures short of segregation, nor did it consider directly whether and how segregation offered better promise than the integrated model in place.

The point that has caused me the greatest difficulty is the Tribunal's conclusion that Emily's physical and personal safety needs could not be met in a regular classroom. The Tribunal examined that issue as follows:

> Physical and Person Safety Needs:
>
> There is extensive testimony from both appellant and respondent witnesses that while Emily's physical abilities when walking, sitting, standing, focusing, and using her hands in purposeful activity, have improved, these abilities are significantly less well-developed than the norm for her age. However, Emily's physical abilities by themselves ought not to be the deciding factor in evaluating whether her needs can be met best in a regular or special class. Although her need for a wheelchair, a walker, and a special desk, as well as physical assistance, together require much extra time and attention from the responsible adults in a classroom setting, it is not unreasonable to expect this of them, even though a special classroom may be better designed and equipped to address special physical needs.
>
> What is unreasonable, in our opinion, is to treat lightly, Emily's habit of mouthing objects. This habit is attested to

> by both appellant and respondent witnesses as consistent and well-established. The Tribunal notes that some of the objects mouthed may be relatively innocuous in small amounts (e.g., sand, paper) but we have evidence that Emily also mouths potentially harmful objects (e.g., pins).
>
> The parents assert that they are not distressed by this habit in Emily, and that they are confident she will not swallow harmful objects. However, a home setting that is adjusted to a child with pervasive muscular dysfunction, and idiosyncratic communication abilities, and who regularly mouths objects, is significantly different from a regular classroom setting. It is unreasonable to expect Emily's age-peer classmates to manage their classroom materials with her mouthing habit in mind. It is also unreasonable to expect a school to treat Emily as though she will never swallow something potentially dangerous. Therefore the school has a choice of establishing a level of adult supervision of Emily that is more intense than mere watchfulness, or, of cleansing the classroom of mouthable materials. It is the Tribunal's unanimous opinion that for Emily's personal safety, one of these conditions must prevail, and neither condition can reasonably be realized in a normal, integrated, regular classroom.

Even on that issue, which could by itself justify a segregated placement, I am not persuaded that the Tribunal would have necessarily concluded as it did, had it appreciated the legal impediments to the selection of a segregated setting. Emily is, for the most part, confined to a wheelchair in the classroom. If the Tribunal had appreciated the constitutional framework within which it is required to operate, I believe that it might have been less ready to dismiss increased adult supervision , or the removal of mouthable dangerous materials from Emily's vicinity, as unreasonable options.

For these reasons, I have come to the conclusion that the appeal should be allowed, the decision of the Tribunal should be set aside and the matter should be remitted to a differently constituted Tribunal for re-hearing in accordance with the constitutional principles set out in these reasons.

The "*obiter dictum*" in the tribunal's decision

The Tribunal concluded its reasons under a heading entitled "Obiter Dictum" in which it stated the following:

> Obiter Dictum
>
> The fact that the disagreement over Emily Eaton's class placement has been allowed to continue to the level of a Special Education Tribunal hearing is a grave disservice to this child. The Tribunal has no doubt that everyone involved with Emily has her present best interests and future well-being at heart. But we also feel that both are being put at risk by an unnecessarily rigorous adherence to principle and by the tyranny of moral certainty.
>
> Having examined the historical development of this disagreement over Emily's placement, it is clear to us that Emily, the child, is now at risk of becoming Emily, the symbol. It is also clear to us that engaging legal counsel, turning to judicial and quasi-judicial avenues of redress, in short, taking an adversarial approach, has pushed this disagreement away from compromise and into competition, away from accommodation and into dispute. Emily's present and future well-being will not be served by going farther down this road.

> We have evaluated her school situation in a manner we consider rational and dispassionate, and we are convinced by the evidence, and by common sense, that a regular class is not the best place for Emily. Nevertheless, our decision in favour of a special class placement does not relieve the school board and the parents of the obligation to collaborate creatively in a continuing effort to meet her present and future needs. Emily's is so unusual a case that unusual responses may well be necessary for her. Such achievements can only be realized through cooperation, and most important, compromise.

The Divisional Court reiterated the need for creative collaboration between Emily's parents and the school board in a continuing effort to meet Emily's present and future needs.

I agree that cooperation is a desirable course of action in such matters. However, I do not agree with the Tribunal's suggestion that the pursuit of Emily's legal rights to equality , by her parents who are her legal representatives, was ill-conceived and detrimental to the child. It could just as easily be suggested that it was ill-conceived and detrimental to the child for the school board not to simply yield to her parents' wishes and leave her in an integrated setting. The fact that the process for determining the validity of their respective positions was protracted and became adversarial cannot be visited on the parents. They did not design the statutory framework which sets up the IPCR process, the Appeal Board and the hearing before the Tribunal.

They availed themselves of the only procedures made available to them by the legislation. Meanwhile, the child has remained in an integrated setting, which may not be the program that the tribunal felt was the most appropriate for her. It is, however, a non-discriminatory program, and the one that the parents, on behalf of their daughter, prefer.

In legal terms, the choice of a discriminatory alternative, even if it were justified under s. 1 of the Charter, is not one that a disabled child should be made to accept without the legal scrutiny to which she is entitled. There may be an ongoing pedagogical debate as to what is best for Emily's education. There can be no doubt, however, that as a person with disabilities, it is not against her best interest to assert her equality rights.

I agree J.A.

I agree J.A.