

**HICKS MORLEY HAMILTON
STEWART STORIE**
BARRISTERS & SOLICITORS

SEP 09 1996

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September 9, 1996

TO: THE REGISTRAR OF THIS COURT
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AND TO: CAROL EATON AND CLAYTON EATON
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AND TO: ONTARIO ASSOCIATION FOR COMMUNITY LIVING
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AND TO: CANADIAN DISABILITY RIGHTS COUNCIL
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HICKS MORLEY HAMILTON
STEWART STORIE

- 2 -

**AND TO: SHEENA SCOTT AND CHERYL MILNE
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**AND TO: ATTORNEY GENERAL FOR ONTARIO
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**AND TO: ATTORNEY GENERAL FOR THE PROVINCE OF QUEBEC
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**AND TO: ATTORNEY GENERAL FOR THE PROVINCES OF BRITISH
COLUMBIA, NEWFOUNDLAND, AND FOR THE YUKON TERRITORIES
Mr. Robert E. Houston, Q.C.
Burke-Robertson
Barristers and Solicitors
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**AND TO: DOWN SYNDROME ASSOCIATION OF ONTARIO
Mr. W. Ian C. Binnie
McCarthy Tetrault
Barristers and Solicitors
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HICKS MORLEY HAMILTON
STEWART STORIE

- 3 -

AND TO: EASTER SEALS SOCIETY
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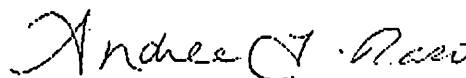
Dear Sirs/Mesdames:

**Re: The Brant County Board of Education
v. Clayton Eaton and Carol Eaton
Supreme Court File No.: 24668**

Attached please find a Notice of Hearing in respect of the above-noted matter which is hereby served upon you pursuant to the *Rules of the Supreme Court of Canada*.

Please provide us with an admission of service as soon as possible.

Yours very truly,



per : Brenda J. Bowlby

BJB/vak
Attachment

FORM G
(Rule 44 of the Supreme Court Rules)

Court File No.: 24668

**In the Supreme Court
of Canada**

)
)

**THE BRANT COUNTY BOARD
OF EDUCATION, Appellant**

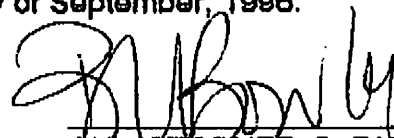
v.

**CLAYTON EATON and
CAROL EATON, Respondents**

NOTICE OF HEARING

Take notice that this appeal has been set down for hearing at the sitting of this Court, to be held in Ottawa commencing at 9:45 a.m., the 8th day of October, 1996.

Dated at Toronto this 6th day of September, 1996.



CHRISTOPHER G. RIGGS, Q.C.
BRENDA J. BOWLBY
Counsel for the Brant County
Board of Education

TO: THE REGISTRAR OF THIS COURT
301 Wellington Street
Ottawa, Ontario
K1A 0J1

- 2 -

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ADVOCACY RESOURCE CENTRE FOR THE HANDICAPPED
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**AND TO: DOWN SYNDROME ASSOCIATION OF ONTARIO
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McCarthy Tetrault
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Court File No. 24668

**IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF
APPEAL OF ONTARIO)**

B E T W E E N:

**THE BRANT COUNTY
BOARD OF EDUCATION**

Appellant

- and -

CAROL EATON and CLAYTON EATON

Respondents

*Service Admitted
Sept. 9, 1996
Lorraine Bouché for Jan Binnie
McCarthy Tétrault.*

NOTICE OF HEARING

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STORIE**

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Solicitors for The Brant County Board of
Education

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TELEPHONE TRANSMISSION OF FACSIMILE
PURSUANT TO RULE 44 OF THE SUPREME COURT RULES

NAME OF SENDER:

Andrea F. Raso

**NAME, ADDRESS AND FAX NUMBER
OF SOLICITOR TO BE SERVED:**

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Down Syndrome Association of
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TO: NAME: Valerie
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CITY: Toronto
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CM#: 150935-191730 OPERATOR: Karen TIME:
FROM: NAME: IAN BINNIE/Lorraine Burch FLOOR: 45
N.P.

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PLEASE FIND ANNEXED A COPY OF THE BACKPAGE OF THE NOTICE OF
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ADMITTED BY OUR OFFICE.

ATTN: VALERIE P.S. - HAVE NOT REC'D INTERVIEW FACTUM
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McCarthy Tétrault Facsimile Numbers:

Central Facsimile Services

49th Floor - (416) 868-0673

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45th Floor - (416) 868-1790

47th Floor - (416) 868-1793

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Revised - 15 December 1995

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McCarthy Tétrault

Toronto

MEMORANDUM

To: Karen Hayter
From: Lorraine Burch
Date: January 9, 1997
Re: Eaton v. Brant County - Down's Syndrome Association

Karen:

I am sending to you one accordion folder with the following contents, in order that you may add this to your material for file close out.

1. Factum of the Intervenor, The Down Syndrome Association of Ontario;
2. Factum of the Intervenors, Canadian Foundation for Children, Youth and the Law, and the Learning Disabilities Association of Ontario;
3. Factum of the Respondents, Carol Eaton and Clayton Eaton;
4. Factum of the Appellant, The Brant County Board of Education;
5. Condensed Book of Evidence and Authorities of the Appellant, Brant County Board of Education;
6. Thin "Correspondence" file, containing recent material (from August, 1996) for or copied to Ian Binnie, including a fax copy of Notice of Hearing dated September 6, 1996); also diskette of Intervenor's Factum (Down's Syndrome).

Once you have the close-out #, if you could let me know, I would appreciate it.

Thanks!





McCarthy Tétrault

Toronto

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To: Karen Hayter
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Thanks!

**IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)**

B E T W E E N:

THE BRANT COUNTY BOARD OF EDUCATION

Appellant

- and -

CAROL EATON AND CLAYTON EATON

Respondents

- and -

ATTORNEY GENERAL FOR ONTARIO, ATTORNEY GENERAL FOR BRITISH COLUMBIA THE ATTORNEY GENERAL FOR QUEBEC, the Canadian Foundation for Children, Youth and The Law, the Ontario Public School Boards' Association, the Down Syndrome Association of Ontario, People First of Canada, Council of Canadians with Disabilities, Confédération des Organismes de Personnes Handicapées du Québec and the Canadian Association for Community Living

Interveners

**FACTUM OF THE INTERVENOR, THE DOWN SYNDROME
ASSOCIATION OF ONTARIO**

**PART I: POSITION OF THE DOWN SYNDROME
ASSOCIATION OF ONTARIO ON THIS APPEAL**

1. The Down Syndrome Association of Ontario, ("the Association") intervenes in this appeal, with leave, to make general submissions on the general application of Charter principles to the issues raised by this appeal. The Association's position on this appeal is as follows:

- (a) The interpretation given to Section 15 of the Charter should require a School Board to place a child in a regular, age-appropriate classroom, unless the Board can establish that such a placement would constitute an undue hardship.
- (b) The onus of proof should be placed on the School Board to establish that the educational placements it provides to children with disabilities is not discriminatory.
- (c) Section 15 of the Charter and the provisions of the *Ontario Human Rights Code* require a School Board to provide whatever support is necessary to permit children with disabilities to participate fully in a regular, age-appropriate classroom setting.
- (d) It is not justifiable in a free and democratic society to deny a child with a mental disability access to education conducted in a regular classroom in the absence of the Board's ability to prove that a segregated educational placement is the least exclusionary option available to accommodate the student's disability.

2. The Association is a Provincial organization comprised of 19 local Down Syndrome Associations. It was formed in February, 1985, to advocate on behalf of children and adults with Down Syndrome, primarily in the areas of education and health care reform. Virtually all of the Association's members are parents of children with Down Syndrome.

3. The mandates of the Association include:

- (a) to promote increased knowledge, understanding and awareness of Down Syndrome on the part of the public, the medical profession and those persons personally affected by Down Syndrome;
- (b) to collect and collate existing information, be it technical, general or otherwise, in respect of Down Syndrome and to make such information available to the public at large;
- (c) to provide a forum for the full and free discussion by all persons concerned about Down Syndrome including (but without being limited to) diagnosis, treatment, education, living accommodations, and available financial assistance, public or otherwise; and
- (d) to foster and encourage increased research into all aspects of Down Syndrome and improving in any manner whatsoever the educational opportunities and standard of living for those with Down Syndrome.

4. The Association has acted as a consultant to the Ministry of Education by participating in stakeholder meetings with Ministry personnel, representatives of other disability groups, and school boards to develop a fully integrated education system. These meetings eventually led to

the Ministry of Education's decision to develop Regulation 305 under the *Education Act*. This regulation would provide that a School Board would have to place a student with a disability in a regular, chronologically age-appropriate classroom, in a neighbourhood school with supports and services as required, unless the child's parent(s) chose to place him or her in a segregated classroom. Although Regulation 305 as amended has not yet been issued, the substance of the regulation is widely supported by the current Minister of Education, Ministry personnel, and disability groups. The issues covered by Regulation 305 are the very same issues that are being considered by this Court on this appeal.

Reference: Affidavit of Louise Bailey filed in support of the Down Syndrome Association of Ontario's Motion to Intervene in this appeal, sworn April 26, 1996, Motion Record, Tab 2, paragraphs 11 and 12.

PART II: THE FACTS

5. The Association makes no submissions on the facts as presented by the Appellant or the Respondents.

PART III: THE ISSUES

6. The Association accepts the characterization of the issues presented by the Appellant in Part II of its Factum. However, the Association will restrict its submissions to issues (III) and (IV) as set out therein to respond to the constitutional questions as set out below:

- (a) Do Section 8(3) of the *Education Act*, R.S.O. 1990, c. E.2, as amended, and Section 6 of Regulation 305 of the *Education Act*, infringe Emily Eaton's equality rights under Section 15(1) of the *Canadian Charter of Rights and Freedoms*?
- (b) If the answer to question 1 is in the affirmative, are Section 8(3) of the *Education Act*, and Section 6 of Regulation 305 of the *Education Act*, justified as a reasonable limit under Section 1 of the *Canadian Charter of Rights and Freedoms*?

PART IV: ARGUMENT

A. General Principles to be Applied in Charter Cases

7. This Court has consistently held that Charter rights are to be given a large and liberal interpretation which best protect the right or freedom in question.

Reference: *Hunter v. Southam Inc.* (1984), 14 C.C.C. (3d) 97, (S.C.C.);

R. v. Big M Drugmart Ltd., [1985] 1 S.C.R. 295.

8. One of the purposes which has led to the enactment of Section 15 of the Charter was to protect discrete and insular minorities from the discriminatory actions of legislatures, agencies and other entities which have been traditionally identified with government activity. In addition, Section 15 of the Charter is a constitutional entrenchment of many of the goals and objectives

first advanced in Canada's Human Rights Codes to ameliorate discrimination in Canadian society. One of the goals of both Human Rights legislation and Section 15 of the Charter is to enable disadvantaged people, such as people with disabilities, to participate fully in the activities normally engaged in by members of Canadian society without having to experience overt discrimination, stereotyping and other forms of exclusion.

Reference: *Andrews v. Law Society of British Columbia*, [1989] 3 S.C.R. 1043, (S.C.C. per McIntyre J. dissenting;

R. v. Turpin, [1989] 1 S.C.R. 1290

9. In addition to considering factors which lead to overt discrimination, exclusion and stereotyping, this Court has ruled that the political, historical, social and legal consequences of each case have to be examined to determine if the discrimination alleged has resulted in substantive inequality for the individual or group who alleges discrimination.

Reference: *R. v. Swain*, [1991] 1 S.C.R. 933 at p. 972, (S.C.C.);

R. v. Turpin, [1989] 1 S.C.R. 1290 at 1331-2,

Symes v. Canada, [1993] 4 S.C.R. 695 at 756-7, (S.C.C.).

B. Do Section 8(3) of the *Education Act* and Section 6 of Regulation 305 of the Act, infringe Emily Eaton's equality rights under Section 15(1) of the Charter?

10. Although there is not an absolute right for a child with a disability to be educated in an integrated setting, the Association submits that removal of a child with a disability from an integrated, age-appropriate setting should only take place in very exceptional cases. The norm

of integrating children with disabilities should in general, not be departed from, unless the School Board can establish that there are reasonable limits prescribed by law to a disabled person's Section 15 rights to an integrated educational placement which can be demonstrably justified in a free and democratic society.

11. It is respectfully submitted that the Appellant's characterization of disability in the educational context as a relevant characteristic which should be taken into account in placing a child in an appropriate educational setting to immunize a School Board from claims of discrimination conflicts generally with this Court's purposive interpretation of the Charter as a whole and its interpretation of Section 15 specifically. This Court held in *Rodriguez v. B.C. Attorney-General* that:

A physical disability is among the personal characteristics listed in s. 15(1) of the *Charter*. There is therefore no need to consider at length the connection between the ground of distinction at issue here and the general purpose of s.15, namely elimination of discrimination against groups who are victims of stereotypes, disadvantages or prejudices. *No one would seriously question the fact that persons with disabilities are the subject of unfavourable treatment in Canadian society, a fact confirmed by the presence of this personal characteristic on the list of unlawful grounds ... given in s. 15(1).* (emphasis added)

Reference: *Rodriguez v. B.C. (Attorney General)*, [1993] 3 S.C.R. 519 at 550 and 555-6

12. Although the Appellant argues this Court took steps towards creating a hierarchy of Section 15 protections based on the perceived abilities or capacities of the members of some of the enumerated groups in *McKinney v. the University of Guelph*, this court has stepped back from this position in *Tetrault-Gadoury v. Canada Employment and Immigration Commission* and

in *Rodriguez, supra*. This court ruled in *Tetrault-Gadoury, supra* that the mandatory retirement decision in *McKinney, supra* should not be viewed as an invitation to legislatures to treat for example, racial minorities differently from people with disabilities, on account of their affiliation. The strength of the Appellant's argument is further diminished since this Court in *McKinney* ruled that the mandatory retirement provisions *prima facie* violated Section 15(1) of the Charter on the basis of age discrimination. The court only saved these provisions under Section 1 of the Charter.

Reference: *McKinney v. University of Guelph*, (1990) 3 S.C.R. 229;

Tetrault-Gadoury v. Canada, (Employment and Immigration Commission), [1991] 2 S.C.R. 22.

13. Finally, Justice Lamer in *Rodriguez, supra* rejected the notion that an inability to commit suicide independently on account of a disability would render a legislative scheme which prohibited assisted suicide non-discriminatory as being based on an irrelevant personal characteristic.

Reference: *Rodriguez, supra*

14. It is therefore submitted that where a child with a disability is denied access to an education program of choice and is forced into a program of forced segregation solely on account of his/her disability, the denial of access to the chosen educational program has occurred as a result of an irrelevant personal characteristic which would attract the protection of Section 15(1) of the Charter.

15. Education provides a vehicle by which children with Down Syndrome and other children with disabilities can interact with other members of society, interact with children of the same chronological age, gain self-confidence and self-worth, develop the skills to financially support themselves later in life, and learn other skills which permit them to conduct their other activities of daily living independently. Children with disabilities have historically suffered significant disadvantages in their attempts to obtain an integrated education. For example, many children with Down Syndrome have been denied access to their neighbourhood school that they would otherwise be able to attend in favour of placing them in a segregated classroom. Schools have sometimes resisted integration by refusing to provide adequate support or by refusing to advance children with severe disabilities into age-appropriate grades. Still other schools have required students with mental disabilities to perform non-academic tasks such as assisting the janitorial staff in their day to day responsibilities. Many parents have had to move across the country to provinces which provide integrated education for students with Down Syndrome and other disabilities. Families within Ontario have had to move to school districts which are more supportive of integration in education.

16. Most of the jurisprudence interpreting Section 15 of the *Canadian Charter of Rights and Freedoms* and the various Human Rights Codes has involved cases of sex, race and religious discrimination. People with Down Syndrome, like other people with disabilities face unique barriers in obtaining an education which members of the general public are not required to experience. Section 15(1) of the Charter should be analyzed with a view to removing existing barriers to a fully integrated educational placement so that people with disabilities are included

rather than excluded from mainstream society.

C. Application of Section 15(2) of the Charter

17. Although the special education scheme as prescribed by the *Education Act* does provide for special education programs for children with disabilities, these programs were created to permit children and parents to have a choice between a segregated and an integrated education alternative based on the needs of the child. Section 15(2) was not drafted to encompass attempts by governments and their other actors to reduce access to mainstream society under the guise of creating parallel programs for the exclusive use of disadvantaged groups. Instead, the objective of Section 15(2) of the Charter is to preserve legislative initiatives which ameliorate the disadvantages experienced by members of the enumerated groups.

18. Section 15(2) was not designed to shield affirmative action programs from Charter attack by those who are seeking the benefit of the program. Instead, the section is designed to prevent members of advantaged groups from securing greater benefits for themselves.

Reference: Factum of the Respondents, paragraph 81.

19. A legislature which creates an affirmative action program is not immune from Charter compliance solely as a result of the creation of the affirmative action program. The Court of Appeal has held that the enactment of an affirmative action program does not exempt the state from Charter compliance within the program. The state is still required to provide services to

the beneficiaries of the program without discrimination on the basis of an enumerated ground. A state will be able to save a legislative scheme under Section 15(2) only if there is a rational connection between the distinction made on the prohibited ground and the purpose of the program. The rational connection does not exist in this case for the reasons set out in paragraph 82 of the Respondents' Factum. In addition, the program makes no provision to ensure that children with disabilities are placed in age-appropriate classes, even when they are placed in a segregated educational setting.

Reference: Factum of the Respondents, paragraphs 80 and 82, and the cases referred to therein.

D. Section 1 of the Charter

20. The Association contends that the legislative scheme set out in Section 8(3) of the *Education Act* and Section 6 of Regulation 305 made under the *Education Act* does not require the Individual Placement and Review Committee to design an education program that results in as little segregation as possible from the general student population to accommodate a student's disability. A School Board is permitted, on the advice of an Individual Placement and Review Committee, to place an exceptional pupil in a specialized class, even though solutions involving partial or total integration may accomplish the same educational objectives when appropriate staff and technological support is provided to the student.

Reference: *R. v. Oakes*, [1986] 1 S.C.R. 103.

PART V: ORDER REQUESTED

21. It is respectfully submitted that the first constitutional question should be answered in the affirmative and the second in the negative. The Association does not seek to recover its costs of its intervention.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Ian Binnie

Robert Fenton

Of Counsel to the Down Syndrome Association of
Ontario

MCMILLAN BINCH

BARRISTERS & SOLICITORS

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Reply Attention of **Melanie A. Yach**

Direct Line **(416) 865-7138**

Our File No. **0047073**

Date **July 5, 1996**

BY FAX

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Date:	July 5, 1996	File:	0047073
To:	Janet I. Budgell	Fax:	(416) 482-2981
Firm:	Advocacy Resource Centre	Phone:	(416) 482-8255
City:	Toronto, Ontario		
And To:	Brenda J. Bowlby	Fax:	(416) 362-9680
Firm:	Hicks Morley Hamilton	Phone:	(416) 362-1011
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And To:	W. Ian Binnie	Fax:	(416) 868-0673
Firm:	McCarthy Tétrault	Phone:	(416) 362-1812
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And To:	Robert J. Fenton	Fax:	(514) 868-0673
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And To:	Sheena Scott	Fax:	(416) 920-5855
Firm:	Canadian Foundation for	Phone:	(416) 920-1633
City:	Children Youth and the Law		
	Toronto, Ontario		
From:	Melanie A. Yach	Phone:	(416) 865-7138
Secretary:	Rosalie DaCosta	Phone:	(416) 865-7817

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TORONTO

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Toronto

MEMORANDUM

COPY

To: Bob Fenton

From: Ian Binnie

Date: August 8, 1996

Re: Eaton v. Brant County Board of Education

This will confirm that Danielle Beaulieu of the Supreme Court of Canada Registry, advised us that this appeal will be heard on October 8, 1996. This means we should be filing our Factum at the beginning of September. I understand that you will be working on a draft Factum on your return from holiday. I will be away the latter part of August but will work with you to finalize the Factum at the beginning of September.

The October 8th date also conflicts with the discoveries in Ontario Hydro at C.U.P.E. Could you advise the other parties that we are conflicted out of October 8th by discoveries by the Supreme Court of Canada commitment and endeavour to arrange an alternate date satisfactory to everybody. It is of particular importance to explain this carefully to Jim Hinds and Mr. Hearn, as they will be understandably irritated at being jerked around on dates.

Ian Binnie

From: Robert J. Fenton (RFENTON)
To: ibinnie
Date: Tuesday, August 6, 1996 4:16 pm
Subject: eaton v. brant county board of education

I have completed the draft of the factum and it has been sent for clean-up to the secretaries in 45 ss. I have asked them to bring it to you tonight.

I will work with a student when I get back to put in the page numbers for the cases I have referred to. I was working with electronic copies of the cases from the scj database which do not have the reporter page numbers. I will also do the schedules and the front cover page and contents once I get back. I just wanted you to have the content so that you could make as many revisions as you like.

EBERTS SYMES STREET & CORBETT
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File No.: 129-002

DATE: August 2, 1996

PLEASE DELIVER TO:

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✓ Christopher Riggs	Hicks Morley	(416) 362-9680
✓ Mary Gleason	Ogilvy, Renault	(613) 230-5459
✓ AG for British Columbia		(604) 387-6411
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FROM: Lucy K. McSweeney

EXTENSION: 302

COMMENT: Please see attached.

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Writer's Extension: 302

August 2, 1996

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(Canadian Association for Community Living)
(Confederation des Organismes de
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(Council of Canadians with Disabilities)
(People First of Canada)

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(The Down Syndrome Association)

Dear Counsel:

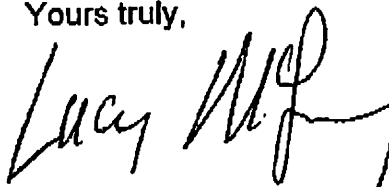
Re: *Brant County Board of Education v. Eaton*
SCC Court File No. 24668

This is to inform you that we have just been retained by the Easter Seals Society of Ontario to prepare an application for leave to intervene on their behalf in the above

EBERTS SYMES STREET & CORBETT

appeal. We are in the process of preparing our application and would be pleased to discuss with you the position our client proposes to take if granted leave. In particular we would be pleased to hear from any party who may be disposed to agree to our intervention.

Yours truly,

A handwritten signature in black ink, appearing to read 'Lucy K. McSweeney', written in a cursive style.

Lucy K. McSweeney

:cn