Court File No. 24668

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, the Canadian Association for Community Living and The Easter Seal Society of Canada

Interveners

FACTUM OF THE INTERVENOR, THE DOWN SYNDROME ASSOCIATION OF ONTARIO

McCarthy Tétrault
Barristers and Solicitors
Suite 4700
Toronto Dominion Bank Tower
Toronto-Dominion Centre
Toronto, Ontario M5K 1E6

Tel: (416) 601-7725
Fax: (416) 868-0673

W.I.C. Binnie, Q.C.
Robert Fenton

of Counsel for The Down Syndrome
of Association of Ontario

Agent:

McCarthy Tétrault
Barristers and Solicitors
Suite 1000
275 Sparks Street
Ottawa, Ontario K1R 7X9

Tel: (613) 238-2000
Fax: (613) 563-9386

Colin Baxter
Ottawa agent for the intervener
The Down Syndrome Association
Ontario

Court File No. 24668

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, the Canadian Association for Community Living and The Easter Seal Society of Canada

Interveners

FACTUM OF THE INTERVENOR, THE DOWN SYNDROME ASSOCIATION OF ONTARIO

McCarthy Tétrault
Barristers and Solicitors
Suite 4700
Toronto Dominion Bank Tower
Toronto-Dominion Centre
Toronto, Ontario M5K 1E6

Tel: (416) 601-7725
Fax: (416) 868-0673

W.I.C. Binnie, Q.C.
Robert Fenton

of Counsel for The Down Syndrome
of Association of Ontario

Agent:

McCarthy Tétrault
Barristers and Solicitors
Suite 1000
275 Sparks Street
Ottawa, Ontario K1R 7X9

Tel: (613) 238-2000
Fax: (613) 563-9386

Colin Baxter
Ottawa agent for the intervener
The Down Syndrome Association
Ontario

Hicks Morley Hamilton Stewart Storie
Barristers and Solicitors
30th Floor, T-D Bank Tower
Box 371, Toronto Dominion Centre
Toronto, Ontario M5K 1K8

Tel: (416) 864-7322
Fax: (416) 362-9680

Christopher G. Riggs, Q.C.
Brenda J. Bowlby

Solicitors for the Appellant
and for the intervener
Ontario Public School Boards'
Association

Agent:

Ogilvy Renault
1600 - 45 O'Connor Street
Ottawa, Ontario

Tel: (613) 780-8661
Fax: (613) 230-5459

Mary Gleason
Ottawa agent for the appellant
and for the intervener
Ontario Public School Boards'
Association

Advocacy Resource Centre
for the Handicapped
40 Orchard View Boulevard, Suite 225
Toronto, Ontario M4R 2B9

Tel: (416) 482-8255
Fax: (416) 482-2981

Janet C. Budgell

Solicitors for the Respondents

Agent:

Gowling, Strathy & Henderson
2600 - 160 Elgin Street
P.O. Box 466, Station D
Ottawa, Ontario K1P 1C3

Tel: (613) 232-1781
Fax: (613) 563-9869

Henry Brown
Ottawa agent for
the respondents

Attorney General for Ontario
Crown Law Office
720 Bay Street, 8th Floor
Toronto, Ontario M5G 2K1

Tel: (416) 326-2220
Fax: (416) 326-4181

Dennis W. Brown, Q.C.
John P. Zarudny

Agent:

Burke-Robertson
Barristers and Solicitors
70 Gloucester Street
Ottawa, Ontario K2P 0A2

Tel: (613) 236-9665
Fax: (613) 235-4430

Robert H. Houston
Ottawa agent for the Attorney
General for Ontario

Attorney General of British Colombia
Parliament Buildings
Room 232
Victoria, British Colombia V8V 1X4

Tel: (604) 387-4577

Agent:

Burke-Robertson
Barristers and Solicitors
70 Gloucester Street
Ottawa, Ontario K2P 0A2

Tel: (613) 236-9665

V. Jennifer Mackinnon
Ottawa agents for the
Attorney General
for British Colombia

Ministère de la Justice
1200, route de l'Eglise, 2ieme
Sainte-Foy, Quebec G1V 4M1

Tel: (418) 643-1477
Fax: (418) 646-1696

Me. Isabelle Harnois
Solicitors for the
Attorney General for Quebec

Agent:

Noel, Berthiaume, Aubry
111, rue Champlain
Hull, Quebec J8X 3R1

Tel: (819) 771-7393
Fax: (819) 771-5397

Sylvie Roussel
Ottawa agent for the
Attorney General for Quebec

Canadian Foundation for Children, Youth & the Law
405 - 720 Spadina Avenue
Toronto, Ontario M5S 2T9

Tel: (416) 920-1633

Cheryl Milne

Solicitors for the interveners
Canadian Foundation for Children, Youth & the Law and Learning Disabilities Association of Ontario

Agent:

South Ottawa Community Legal Services
406 - 1355 Bank Street
Ottawa, Ontario K1H 8K7

Tel: (613) 733-0140

Chantal Tie
Ottawa agent for the interveners
Canadian Foundation for Children, Youth & the Law and Learning Disabilities Association of Ontario

McMillan Binch
P.O. Box 38
South Tower
Royal Bank Plaza
Toronto, Ontario M5J 2T7

Tel: (416) 865-7143

David W. Kent
Melanie Yach

Sanson & Hart
701 - 123 Edward Street
Toronto, Ontario M5G 1E2

Tel: (416) 591-9193

Geri Sanson

Solicitors for the interveners
Canadian Association for Community Living, Confédération des Organismes de Personnes Handicapées du Québec, Council of Canadians with Disabilities and People First of Canada

Agent:

Gowling, Strathy, & Henderson
2600 - 160 Elgin Street
Box 466, Station A
Ottawa, Ontario K1N 8S3

Tel: (613) 786- 0139

Henry Brown
Ottawa agent for the interveners
Canadian Association for Community Living, Confédération des Organismes de Personnes Handicapées du Québec, Council of Canadians with Disabilities and People First of Canada

Eberts Symes Street & Corbett
200 - 8 Price Street
Toronto, Ontario M4W 1Z4

Tel: (416) 920-3030
Fax: (416) 920-3033

Mary Eberts
Lucy K. McSweeney

Solicitors for the intervener
The Easter Seal Society of Canada

Agent:

Lang Michener
300 - 50 O'Connor Street
Ottawa, Ontario K1P 6L2

Tel: (613) 232-7171
Fax: (613) 232-3191

Eugene Meehan
Ottawa agent for the intervener
The Easter Seal Society of Canada

TABLE OF CONTENTS

PART I: THE FACTS

(A) Position of the Down Syndrome Association of Ontario on this Appeal

1. The Down Syndrome Association of Ontario, ("the Association") intervenes in support of the Respondents in this appeal, with leave, to make general submissions on the *Charter* issues identified by the Appellant. The Association's position on these issues is as follows:

(a) The Court of Appeal for Ontario did not err in undertaking a review of the provisions of the *Education Act* to determine if the provisions pass muster with the *Charter*. That Court did *not* declare invalid any part of the *Education Act* or *Regulation 305*. The declarations of the Court *did* appropriately address the issue of statutory interpretation in light of *Charter* rights and the Court's approach, contrary to the submission of the appellant, does not raise any issue of jurisdiction, procedural fairness, or the timely issuance of a Notice of Constitutional Question.

(b) The formal Order of the Court of Appeal merely "reads in" appropriate *Charter* protection for people with disabilities. The Court's reasons proceed on the basis, correctly, that the Order by the Appellant that violated Emily Eaton's *Charter* rights is not, on its face, *ultra vires* the *Education Act*. Accordingly, contrary to the Appellant's position, there is no conflict between the decision of the Court of Appeal herein and the decision of this Court in *Slaight Communication v. Davidson* [1989] 1 S.C.R. 1038.

(c) In the absence of the "read in" of the Court below, the position of this intervenor is that s. 8(3) of the *Education Act* and s. 6 of *Regulation 305* would fail to respect Emily Eaton's equality rights under s. 15(1) of the *Charter*, as is demonstrated on the facts of this case.

(d) The violation of Emily Eaton's equality rights has not been justified under s. 1 of the *Charter*.

(e) The reference to parental consent in the formal Order of the Court of Appeal should be read as a reference to the legal guardian (in this case, the parents) of a disabled person who is not in a position to assert his or her *Charter* rights without the assistance of such legal guardian.

(f) The Court of Appeal properly remitted the matter back to the Tribunal, differently constituted, for final disposition.

(B) Submissions on the facts

2. The Association accepts the facts as stated by the Appellant as clarified by the Respondents.

(C) The perspective of the Down Syndrome Association of Ontario

3. The Down Syndrome Association of Ontario is a Provincial organization comprised of 19 local Associations. It was formed in February, 1985, to advocate the interest 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.

4. The mandate of the provincial Association includes as its objects:

(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.

5. The Association has had lengthy involvement with the *Regulation 305* that is at issue in these proceedings. The Association has acted as a consultant to the Ministry of Education in 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 what is anticipated will become amendments to *Regulation 305*. These amendments would provide that a School Board must place a student with a disability in a regular, chronologically age-appropriate classroom, in a neighbourhood school with support and services as required, unless the child's parent(s) chose to place him or her in a segregated classroom.

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 ISSUES

6. The Association does not wholly accept the characterization of the issues presented by the Appellant in Part II of its Factum for the reasons previously stated, but will address the *Charter* issues in the order presented therein.

PART III: ARGUMENT

Overview

7. The fundamental key to the decision of the Court of Appeal herein is the proposition that *inclusion* of Emily Eaton in the normal, everyday institutions of a child's life, including the neighbourhood school, is an important aspect of her s. 15 equality right, just as *exclusion* to a special institution, however well-intentioned, is *prima facie* a violation of that s. 15 right, which mus be justified under s. 1.

Reference: *Miron v. Trudel* [1995] 2 S.C.R. 418, per McLachlin, J. at p. 495:

> "...the fundamental consideration is whether the characteristic may serve as a irrelevant basis of *exclusion* and a denial of essential human dignity in the human rights tradition."

(italics added)

8. Education provides a vehicle by which children with Down Syndrome and other children with disabilities can interact with "unexceptional" 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. 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.

9. Most of the jurisprudence interpreting Section 15 of the *Charter* 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 analysed with a view to removing historical and still existing barriers to a fully integrated educational placement so that people with disabilities are included rather than excluded from mainstream society.

10. The history of the struggle of the groups enumerated in s. 15, including people with disabilities, has largely been the struggle against such *exclusion*.

Reference: (i) *Canadian National Railway Co. v. Canada (Canadian Human Rights Commission)*, [1987] 1 S.C.R. 1114 (the *Action Travail des Femmes* case)

per Dickson, C.J.C. at p. 1138, citing with approval from the Abella Report of equality in employment:

> "Discrimination ... means practices or attitudes that have, whether by design or impact, the effect of limiting an individual's or a group's right to be *opportunities generally available* because of attributed rather than actual characteristics ..."
>
> (emphasis added)

(ii) *Rodriguez v.B.C.(Attorney General)*, [1993] 3 S.C.R. 519

per Lamer C.J.C.(dissenting in the result) at p. 550:

> "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).

11. It is disingenuous to treat the issue of exclusion or inclusion of persons with mental disabilities (as does the Appellant) as a pedagogical exercise divorced from the historical discrimination which persons with disabilities have suffered.

Reference: (i) *R. v. Turpin,* [1989] 1 S.C.R. 1296

per Wilson, J. at pp. 1331-32:

> "In determining whether there is discrimination on grounds relating to the personal characteristics of the individual or group, it is important to look not only at the impugned legislation which has created a distinction that violates the right to equality but also to the larger social, political and legal context...
>
> Accordingly, it is only by examining the larger context that a court can determine whether differential treatment results in inequality or whether, contrariwise, it would be identical treatment which would in the particular context result in inequality or foster disadvantage. *A finding that there is discrimination will, I think, in most but perhaps not all cases, necessarily entail a search for disadvantage that exists apart from and independent of the particular legal distinction being challenged."*
>
> (italics added)

(ii) *R. v. Big M Drugmart Ltd.,* [1985] 1 S.C.R. 295

per Dickson, J. at p. 344:

> "In my view this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the *Charter* itself, to the language chosen to articulate the specific right or freedom, *to the historical origins of the concepts enshrined,* and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the *Charter.*
>
> (italics added)

12. One of the goals of both Section 15 of the Charter and Human Rights legislation is to end the "insularity" of individuals isolated from the mainstream by

their *presumed* inability to participate. This theme has been central to this Court's concept of a "discrete and insular minority." If Emily Eaton is to be excluded from full participation in the activities normally engaged in by members of Canadian society, it should be because of a justification which meets the s. 1 hurdle.

Reference: *(i)* *Andrews v. Law Society of British Columbia*, [1989] 3 S.C.R. 1043, per McIntyre J. dissenting in part, at p. 183

(ii) *R. v. Turpin*, [1989] 1 S.C.R. 1296, per Wilson, J. at p. 1333

13. Contrary to the submission of the Appellant, the Special Education Tribunal did not decide that Emily Eaton's right to be *included* in the neighbourhood school was trumped by individualized pedagogical considerations. The reasons of the Special Education Tribunal betray no glimmer of recognition that Emily had any such s. 15 rights in the first place.

Reference: Reasons of the Special Education Tribunal, Ap. Cas. Vol IV, p. 679

Issue One: Did the Court of Appeal err in proceeding ex proprio motu *to review the constitutional validity of* the Education Act

14. Where, as in the present case, a statutory order is challenged as violative of *Charter* rights, the Court cannot avoid examining the statutory framework which gave rise to the impugned order.

15. In this case, the Order of the Ontario Court of Appeal does not declare any provision of the *Education Act* to be constitutionally invalid. The Order provides in paragraph 2 only that s. 8 should be "*read*" in a particular way, i.e. a classic case of "reading in" to *preserve* the validity of the statutory framework under which the impugned order was made.

Reference: Order of the Court of Appeal for Ontario dated February 15, 1995, para. 2, Ap. Cas. Vol I, p. 23 [Tab E]

16. While some of the comments in the Court's reasons for decision are directed to the validity of s. 8, (as distinguished from the manner in which s. 8 should be construed and applied so as to respect constitutional rights,) any ambiguity in this respect is resolved by reference to the formal order of the Court. The appeal thus presents no procedural difficulty with respect to Notice of Constitutional Question or otherwise.

17. In refusing to state a constitutional question in *Tétrault-Gadoury v. Canada (Employment & Immigration Commission)*, [1989] 2 S.C.R. 1110. Lamer, C.J.C., observed at p. 1112:

> "Notwithstanding the generality of [Rule 32] as regards the nature of the application, which included not only s. 52 challenges but also s. 24 applications for remedy not seeking a declaration of inoperability of a law, this Court, *as a matter of policy, and exercising discretion under Rule 4 of the Rules of Court, refused to state such questions when ... there was no attack on the validity of a law, but when the Court was being asked to construe a law in the light of a section of the Charter.*"

Relying on this approach, the British Columbia Court of Appeal held in *Bank of British Columbia v. Canadian Broadcasting Corporation* (1995) 10 B.C.L.R. (3d) 201 (B.C.C.A.) per Prowse, J.A. at p. 214:

> " In this case, I conclude that the main thrust of CBC and Der's submission before us is that R. 26(10) should be construed such that a judge exercising his or her discretion under that Rule must do so in accordance with *Charter* values to the extent that *Charter* values are in issue. Viewed in that light, notice under the *Constitutional Question Act* with respect to R. 26 would not be required.
>
> In my view, the legislature did not intend that notice would be required under s. 8 of the *Constitutional Question Act* every time a judge was asked to exercise his or her discretion, whether under R. 26 or otherwise, in accordance with *Charter* values. If it were otherwise, the Attorneys General might well be overwhelmed with notices where there was no real challenge to the law, but only a question as to the manner in which the discretion under that law was to be exercised."

Issue Two: Did the Court of Appeal err in finding that the Education Act *gives school boards a discretion to violate the* Charter*?*

18. This should be a non-issue. The effect of the Court of Appeal order is that s. 8 must be construed and applied consistently with *Charter* rights as the Appellant concedes at p.22, para. 56 of its factum. This is consistent with the observation of Lamer, C.J.C., in *Dagenais v. Canadian Broadcasting Corporation* [1994] 3 S.C.R. 835, per Lamer, C.J.C. at P. 875:

> "I would extend this reasoning [in *Slaight Communication v. Davidson* [1989] 1 S.C.R. 1038], and hold that a common law rule conferring discretion cannot confer the power to infringe the *Charter*. Discretion must be exercised within the boundaries set by the principles of the *Charter*; exceeding these boundaries results in a reversible error of law. In this case, then, we are dealing with an error of law challenge to a publication ban imposed under a common law discretionary rule."

Issue Three: 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*?*

19. The Association does not suggest that there is 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 take place only in very exceptional cases. *Inclusion* should be the norm and *exclusion* should require a s. 1 justification on a case-by-case basis. If "stereotyping" is to be avoided, the justification cannot be on anything other than a case-by-case basis, by a Special Education Tribunal properly instructed on the s. 15 rights of persons with

disabilities. This principle is not articulated in the regulatory framework governing the school placement of exceptional children in Ontario. The interpretive declaration in paragraph 2 of the order of the Court of Appeal herein remedies the deficiency.

Reference: Order of the Court of Appeal for Ontario dated February 15, 1995, Ap. Cas. Vol I, Tab E, p. 23

20. The Appellant's argument that disability in the educational context is *a relevant characteristic* to be taken into account in placing a child in an appropriate educational setting cannot be used to immunize a School Board from claims of discrimination under s. 15(1), although it may be relevant to a s. 1 justification on a pupil-by-pupil assessment.

Reference: (i) *Andrews v. Law Society of British Columbia, supra*, per McIntyre, J. (dissenting in part) at p. 178:

> "... the right guaranteeing sections [should] 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.

(ii) *Miron v. Trudel, supra,* per McLachlin, J. at p. 488:

> "A finding that the distinction is relevant to the legislative purpose will not in and of itself support the conclusion that there is no discrimination. The enquiry cannot stop there; it is always necessary to bear in mind that the purpose of s. 15(1) is to prevent the violation of human dignity and freedom through the stereotypical application of presumed group characteristics. If the basis of the distinction on an enumerated or analogous ground is

> clearly irrelevant to the functional values of the legislation, then the distinction will be discriminatory. However, it does not follow from a finding that a group characteristic is relevant to the legislative aim that the legislator has employed that characteristic in a manner which does not perpetuate limitations, burdens and disadvantages in violation of s. 15(1). This can be ascertained only by examining the effect or impact of the distinction in the social and economic context of the legislation and the lives of the individuals it touches."

21. Although the Appellant argues that in *McKinney v. the University of Guelph*, [1990] 3 S.C.R. 229, 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. The decision in *McKinney* must be read in light of the Court's more recent decisions in *Tetrault-Gadoury v. Canada (Employment and Immigration Commission)* [1991] 2 S.C.R. 22, and in *Rodriguez, supra.* This court in *McKinney* itself ruled that the mandatory retirement provisions *prima facia* 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. In *Rodriguez v. British Columbia, supra,* the majority decision (per Sopinka, J. at p. 613) declined to consider a possible violation of the s. 15 (1) rights of people with disabilities because he considered that any such violation would be cured under s. 1. However, Lamer, C.J.C. did consider the s. 15(1) issue in his dissent, and observed at p. 550:

> "Even if this was not the legislature's intent, and although s. 241 (b) does not contain any provision specifically applicable to persons with disabilities, the fact remains that such persons, those who are or will become incapable of committing suicide unassisted, are on account of

their disability affected by s. 241(b) of the *Criminal Code* differently from others.

22. It is therefore submitted that where a child with a disability is denied access to an education program of choice and is required to accept 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, and compel a justification under s. 1.

23. Section 15(2) is of no assistance to the Appellant Board. 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 authorize attempts by school boards to reduce access for children with disabilities to mainstream society under the guise of creating parallel programs for the exclusive use of disadvantaged groups (i.e. the discredited "separate but equal" doctrine of racially segregated education). Instead, the objective of Section 15(2) of the *Charter* is to preserve legislative initiatives which ameliorate (not aggravate) the disadvantages experienced by members of the enumerated groups, and to allow choice to (not

coercion of) people with disabilities, subject always, of course, to a s. 1 justification for different treatment.

Issue Four: *Are s. 8(3) of the* Education Act *and s. 6 of* Regulation 305 *justified under s. 1?*

24. Nothing in the record of this case justifies Emily Eaton's placement in a segregated facility. (The Appellant virtually concedes as much in its Factum at p. 34, para. 92 to p. 35, para. 95.) No attempt was made by the Appellant before the Tribunal or thereafter to show how Emily would fare in a segregated facility, or that the interest of other children in the integrated school justified her exclusion. The Appellant's claim that it was taken by surprise on the Section 1 issue rings hollow. Any *Charter* challenge, whether it be to the validity of an enactment or to government action of a non-legislative character, puts Section 1 in play.

Issue Five: *Did the Court of Appeal err in finding that parents have the right to choose whether their children's equality rights will be over-ridden?*

25. This, again, is a mischaracterization by the Appellant of the real issue. Of necessity, Emily Eaton acts through her legal guardians (as Arbour J.A. observed at Ap. Cas., Vol. 4, p. 716 and p. 726). As a practical matter, if her parents as legal guardians give consent, no *Charter* challenge will be asserted, and the Board may proceed with the placement. The issue *is not* parental choice, or whether parents can over-ride the *Charter* rights of their children. The issue is whether a school board can

act on its view that there is no *Charter* violation if the legal guardians who speak for the disabled child are content with the proposed disposition. The issue is not the "over-ride" of a *Charter* right but whether there has been a *Charter* violation in the first place, and who may be relied on to speak for the disabled child on that issue.

Issue Six: *Did the Court of Appeal err in remitting the matter back to a differently constituted Tribunal?*

26. In light of the Tribunal's failure to address relevant *Charter* considerations, and consistently with this Court's disposition of an analogous oversight in *Dagenais v. Canadian Broadcasting Corporation, supra*, the matter was correctly returned to the Tribunal. Moreover, in this particular case, having regard to what the Tribunal called its *obiter dictum*, wherein the Respondents' pursuit of constitutional remedies against the Appellant was criticized by the panel as "adversarial", and a decision taken by the panel supporting the Appellant's pedagogical theory of exclusion, it would assist both justice and the appearance of justice for the new Tribunal to be differently constituted.

Schedule "A"

Tab No.

1.	*Miron v. Trudel* [1995] 2 S.C.R. 418
2.	*Canadian National Railway Co. v. Canada (Canadian Human Rights Commission)*, [1987] 1 S.C.R. 1114
3.	*Rodriguez v. B.C. (Attorney General),* [1993] 3 S.C.R. 519
4.	*R. v. Turpin,* [1989] 1 S.C.R. 1296
5.	*R. V. Big M Drugmart Ltd.*, [1985] 1 S.C.R. 295
6.	*Andrews v. Law Society of British Columbia*, [1989] 3 S.C.R. 1043
7.	*Tétrault-Gadoury v. Canada (Employment & Immigration Commission)*, [1989] 2 S.C.R. 1110
8.	*Bank of British Columbia v. Canadian Broadcasting Corporation* (1995) 10 B.C.L.R. (3d) 201 (B.C.C.A.)
9.	*Dagenais v. Canadian Broadcasting Corporation* [1994] 3 S.C.R. 835
10.	*Slaight Communication v. Davidson* [1989] 1 S.C.R. 1038
11.	*McKinney v. The University of Guelph*, [1990] 3 S.C.R. 229
12.	*Tétrault-Gadoury v. Canada (Employment and Immigration Commission)* [1991] 2 S.C.R. 22

BETWEEN:

THE BRANT COUNTY BOARD OF EDUCATION and CAROL EATON and CLAYTON EATON

Court File No. 24668

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)
Proceeding Commenced at
Ottawa

FACTUM OF THE INTERVENOR THE DOWN SYNDROME ASSOCIATION OF ONTARIO

McCarthy Tétrault
Suite 4700
Toronto Dominion Bank Tower
Toronto-Dominion Centre
Toronto, Ontario
M5K 1E6

W. Ian C. Binnie, Q.C.
Tel. (416) 601-7725
Fax (416) 868-0673

Robert J. Fenton
Tel. (416) 601-7702

Solicitors for the Intervenor,
The Down Sydrome Association
of Ontario