Court File No. 24668

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

B E T W E E N:

THE BRANT COUNTY BOARD OF EDUCATION

Appellant

- and -

CAROL EATON and CLAYTON EATON

Respondents

FACTUM OF THE APPELLANT, THE BRANT COUNTY BOARD OF EDUCATION

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IN THE MATTER of an Appeal to the Supreme Court of Canada from the Order of the Court of Appeal for Ontario dated the 15th day of February, 1995, pursuant to leave granted by this Honourable Court on the 26th day of October, 1995.

FACTUM OF THE APPELLANT

PART I - FACTS

1. This is an Appeal from the Order of the Ontario Court of Appeal dated February 15, 1995, reversing the Order of the Divisional Court which had denied an Application for Judicial Review of the Decision of the Ontario Special Education (English) Tribunal (hereinafter "the Tribunal") dated November 19, 1993. The Ontario Court of Appeal set aside the Decision of the Tribunal and directed that section 8 of the *Education Act* R.S.O. 1990, c. E.2 ("*Education Act*"), as amended, 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
10 mental disability consent to the placement of that child in a segregated environment, a school board must provide a placement that is the least exclusory from the mainstream and still reasonably capable of meeting the child's special needs. The Court of Appeal

directed that the matter be remitted to a differently constituted Tribunal for re-hearing in accordance with this direction.

Order of the Court of Appeal, Tab E of Case on Appeal, Volume I, p 23

2. The Appellant, the Brant County Board of Education, is a public school board which is responsible, under the *Education Act*, for providing educational services for the children of Brant County who qualify as resident pupils under the *Education Act*.

10 *Education Act*, R.S.O. 1990, c.E.2, Part VI

3. Emily Eaton is a young person with severe physical and mental disabilities including a profound learning deficit, a profound intellectual handicap, and an absence of an established communication system. Emily's date of birth is February 28, 1984. Emily Eaton was, at the material time, a resident pupil of The Brant County Board of Education.

Reasons for Judgment of the Tribunal, Tab 41 of Case on Appeal, Volume IV, p 615, lines 17 - 29; pp 665-667

20

4. This case arises out of a disagreement between the Respondents, (the parents of Emily Eaton), and Emily's teachers at Maple Leaf School, where she was enrolled in Grade Two, in respect of the educational placement which would most appropriately meet her educational needs. Emily's teachers, based on the experience of attempting to meet her educational needs for almost four years in a regular class, believed that her educational needs could not be met in a regular class and that she needed a special class placement. Emily's parents wished her to remain in the regular class.

Reasons for Judgment of the Tribunal, Tab 41 of Case on Appeal, Volume
30 IV, p 608, lines 1 - 23

5. There was no dispute that Emily is an "exceptional" pupil within the definition of Ontario's *Education Act* and as such required special education programs and special

education services to meet her educational needs. The dispute arose over the educational placement which will best address Emily's educational needs.

> Reasons for Judgment of the Tribunal, Tab 41 of Case on Appeal, Volume IV, p 608, lines 25-26

A. EDUCATION

6. Central to this case is an understanding of what "education" in Ontario means.

7. The Ministry of Education has, in its publication, *The Formative Years*, set out a blue print for the service of education for kindergarten through grade 6. A general overview of the service of education in Ontario is provided in this exhibit. The goal of education in Ontario is found in this passage on page 4:

> "It is the policy of the Government of Ontario that every child be granted an opportunity to develop as completely as possible in the direction of his or her talents and needs."

> Exhibit - *The Formative Years*, Tab 39 of Case on Appeal, Volume III, p 469

8. "Curriculum" (defined as "a regular course of study as at a school" by the Shorter Oxford English Dictionary, 1984) defines the content of education. *The Formative Years* sets out the approach to curriculum which school boards in Ontario must take, and thus defines, generally, what education in Ontario is intended to achieve. *The Formative Years* states (at page 4):

> "... the curriculum will provide opportunities for each child (*to the limit of his or her potential*):
>
> . to acquire the basic skills fundamental to his or her continuing education;
>
> . to develop and maintain confidence and a sense of self worth;
>
> . to gain the knowledge and acquire the attitudes that he or she needs for active participation in Canadian society;

> . to develop the moral and aesthetic sensitivity necessary for a complete and responsible life." (emphasis added)
>
> Exhibit - *The Formative Years*, Tab 39 of Case on Appeal, Volume III, p 469

9. Education in Ontario is directed towards the individual, not the "mass". Thus, on page 5 of *The Formative Years*, the responsibilities of teachers, principals and supervisory officers, *inter alia*, include:

> "... assessing *each* child's learning on a continuous basis to ensure learning at a level and rate that are in keeping with *individual abilities* and, where warranted, diagnosing difficulties and making appropriate changes in the program or teaching -learning strategies." (emphasis added)
>
> Exhibit - *The Formative Years*, Tab 39 of Case on Appeal, Volume III, p 470

10. The educational needs of most children can be met by a single curriculum presented in a "regular" class with some changes or adjustments in program or teaching to meet individual weaknesses or strengths. However, it is recognized in the provision of this service that some children, as a result of disabilities, require additional curriculum modification, special services and smaller classes, in order that their learning be continuously assessed and that they be given the opportunity to reach their maximum potential:

> "... it is occasionally necessary to accept the fact that there are children who show such divergence in their physical, intellectual, communicative, social, or emotional development that major curriculum modification and/or special services must be provided for them. The objectives of such special services or curricula are no different from those outlined in this document. ...
>
> Children who are intellectually handicapped may need, for longer periods than other children, a curriculum that is concrete, emphasizing multi-sensory and manual experiences. They also may need more guidance and structure for reading and number work. Only teacher experimentation and observation will provide the proper basis for decisions about what the child needs."
>
> Exhibit - *Special Education Information Handbook*, Tab 40 of Case on Appeal, Volume III, pp 497-498

B. SPECIAL EDUCATION - THE LEGISLATIVE CONTEXT

11. The *Education Act*, and the Regulations thereunder, set out a comprehensive scheme for the identification of "exceptional pupils" and for the placement of those students into educational settings where the special education programs and services appropriate to meet their needs can best be delivered. This scheme, which was originally set out in "Bill 82" (*An Act to amend the Education Act*), also provides for the right of parents to appeal the identification and placement of their children by school boards through to a Special Education Tribunal.

Education Act, R.S.O. 1990, c.E.2
Regulation 305, R.R.O. 1990
Regulation 306, R.R.O. 1990

12. "Exceptional pupil" is defined by the *Education Act*, as follows:

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

Education Act, *supra*, s.1(1)

13. 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,
>
> (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;"

Education Act, *supra*, s.8(3)

14. Regulation 305 sets out the requirement that every board of education set up an Identification, Placement and Review Committee ("IPRC") to deal with the identification and placement of exceptional pupils in the first instance. Once a child is found to be exceptional, a review must be held at least annually or as early as three months following the last IPRC meeting.

Regulation 305, *supra*, ss. 2(1), 8(1)

15. Regulation 305 provides for the right of parents who disagree with the identification and/or placement of their child to appeal to a Special Education Appeal Board ("S.E.A.B.") which ultimately makes a recommendation back to the I.P.R.C. or to the school board on the issue.

Regulation 305, *supra*, ss. 4, 5, and 7

16. Parents who are still in disagreement with identification or placement, following the appeal to the S.E.A.B., may apply to the statutorily established Special Education Tribunal (herein referred to as "the Tribunal") for leave to appeal to a Regional Special Education Tribunal. Alternatively, the leave hearing may be waived by the school board and the Tribunal, itself, may hear the appeal. Either way, the *Education Act* stipulates that the decision of the Tribunal is final and binding in the following terms:

> "s. 37(5) 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."

Education Act, *supra*, s.37(5)

17. The philosophy and, in accordance with that philosophy, the educational model espoused by the Province of Ontario through the Ministry of Education for the delivery of special education is "continuum" or "range of placements". This approach to placement holds that, where a pupil is not experiencing success in the regular setting the specific needs of the individual exceptional child must be assessed and, based on those needs, a determination made as to the setting (i.e. placement) in which special education

programs and services can most effectively be delivered to meet those needs. The available settings "range" from: the regular classroom; to a resource setting; to a self-contained class; to a special school. The primary focus in the development of such a range of placements is to provide the exceptional pupil with the strengths and capabilities needed to return to a regular classroom or to achieve success in a specialized setting. This approach employs teachers with special expertise acquired through additional qualifications and training to teach youngsters in special education placements outside the regular classroom. Placement outside the regular class allows for more intensive learning experiences for the exceptional pupil with a greater degree of individualization in program and curriculum.

Exhibit - *Special Education Information Handbook*, Tab 40 of Case on Appeal, Volume III, pp. 497-501, pp 537-538

Regulation 297, R.R.O. 1990

18. The approach espoused by the Province of Ontario through the Ministry of Education recognizes that:

> "Every exceptional child has the right to be part of the mainstream of education to the extent which is profitable. Care, however, must be taken to ensure that the exceptional child's needs are met in terms of staff, curriculum, method, materials, and organization. If the child meets too many frustrating situations, or experiences too much failure, behavioural problems or aggression may result. ..."

This approach also recognizes that:

> "The needs of some pupils are such that a more highly specialized setting is required. At this level of need, the self-contained special education classroom may be the placement recommended.
>
> For some children whose degree of complexity of need has been unresponsive to traditional methods of help, different collaborative forms of therapeutic and educational intervention in a variety of settings may be necessary."
>
> Exhibit - *Special Education Information Handbook*, Tab 40 of Case on Appeal, Volume III, pp 498 and 538

19. It should be noted that the "continuum of placements" approach does not exclude integration of exceptional pupils into regular classes. Rather integration to the extent such integration benefits and meets the needs of the exceptional pupil is a fundamental part of the continuum of placements.

> Exhibit - *Special Education Information Handbook*, Tab 40 of Case on Appeal, Volume III, pp 496, 498 and 537

C. HISTORY OF EMILY'S PLACEMENTS

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20. Upon enrolment, Emily was initially placed in a "trainable mentally retarded" class at Jane Laycock School in Brantford pending a decision by the I.P.R.C. In November, 1989, the I.P.R.C. identified Emily as exceptional and determined that she would be placed on a trial basis in a kindergarten in the parents' neighbourhood school, Maple Avenue School, with an educational assistant. Her first day at Maple Avenue school was April 30, 1990.

> Reasons for Judgment of the Tribunal, Tab 41 of Case on Appeal, Volume IV, p 620, lines 14-34

20

21. In June 1990, the I.P.R.C. determined that Emily would continue in kindergarten for the 1990-91 school year. It was further determined in May of 1991 that Emily would be placed in the regular Grade 1 class at Maple Avenue School for the 1991 - 1992 school year.

> Reasons for Judgment of the Tribunal, Tab 41 of Case on Appeal, Volume IV, p 621, lines 4-10, 15-18, and 21-23

22. However, during Emily's Grade 1 year, a number of concerns arose (i.e. her falling

30 asleep in class, her biting others, her mouthing her clothing and hair, her vocalizing at inappropriate times and the increasing difficulty in affording her opportunities which were parallel to those of other pupils at an appropriate level).

> Reasons for Judgment of the Tribunal, Tab 41 of Case on Appeal, Volume IV, p 621, lines 23-29

23. At the February 4, 1992 I.P.R.C. meeting, school personnel raised concerns respecting the difficulty of measuring Emily's academic and social growth and of assessing her level of contentment, the under-responsiveness of the peer group to Emily, her responses to auditory and visual stimuli, her co-ordination and difficulty in signing, her laughing and giggling at inappropriate times, the difficulty of assessing her receptive language, concern about Emily placing objects in her mouth, about her social interaction with peers and about the absence of a means of communication between Emily and her peers.

10

Reasons for Judgment of the Tribunal, Tab 41 of Case on Appeal, Volume IV, p 621, lines 30-34; p 622, lines 1-10

24. The I.P.R.C. confirmed Emily's identification as an exceptional pupil and determined that she should be placed in a special education class. The Eatons appealed this decision to a Special Education Appeal Board which unanimously confirmed the decision of the I.P.R.C..

Reasons for Judgment of the Tribunal, Tab 41 of Case on Appeal, Volume
20 IV, p 622, lines 10-16 and 23-26

25. The Eatons sought leave to appeal from the Tribunal and the Board agreed to waive the leave hearing and to proceed with the appeal before the Tribunal.

Reasons for Judgment of the Tribunal, Tab 41 of Case on Appeal, p 608, lines 1-30

26. In the intervening year between the I.P.R.C. decision and the conclusion of the appeal hearing before the Tribunal, Emily remained in a regular class placement in the
30 Grade 2 class at Maple Avenue Public School. However, Emily's teachers and educational assistants continued to be concerned about her. During this period, Emily's bouts of sleeping in class, crying or making loud noises which distracted the other children and resulted in her removal from class, not only continued, but increased in frequency.

Reasons for Judgment of the Tribunal, Tab 41 of Case on Appeal, Volume IV, p 644, lines 5-8; p 650, lines 15-21; p 658, lines 16-21; p 661, lines 9-11 and 25-31

27. Emily was not returned to the Brant County Board of Education following the Tribunal's decision. Her parents have moved her to the Brant County Separate School Board where she remains today.

Affidavit of Clayton Eaton, sworn May 1, 1995, Tab 1 of Applicant's Record on Application for Leave to Appeal to the Supreme Court of Canada

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C. THE SPECIAL EDUCATION TRIBUNAL'S DECISION

28. The Tribunal denied the Respondents' Appeal and upheld the decision of the IPRC that the best placement for Emily is in a special class.

Reasons for Judgment of the Tribunal, Tab 41 of Case on Appeal, Volume IV, p 664, lines 1-3

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29. In so doing, the Tribunal framed the issue before it as follows: "*The principal issue in this decision is whether Emily Eaton's special needs can be met best in a regular class or in a special class.*" The Tribunal specifically noted that one of the considerations which bore upon this principal issue was the impact of the *Charter* and the Ontario *Human Rights Code*.

Reasons for Judgment of the Tribunal, Tab 41 of Case on Appeal, Volume IV, p 664, lines 7-9 and 17-19

30. Ultimately the Tribunal concluded:

30

> "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 demonstrate 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 *Ontario Human Rights Code*."

Reasons for Judgment of the Tribunal, Tab 41 of Case on Appeal, Volume IV, p 679, lines 13-21

31. In reaching its conclusion, the Tribunal undertook a detailed analysis of Emily's needs and where they could or could not be met.

32. In considering her intellectual and academic needs, the Tribunal, having noted that considerable evidence received by the Tribunal suggested that Emily has a profound learning deficit and that extensive empirical evidence pointed to a profound intellectual handicap, stated that: "*There is a wide and significant intellectual and academic gap between her and her peers.*" The Tribunal went on to note that Emily requires a "parallel curriculum" in the regular classroom setting which is adapted to her uniquely different needs. However, the Tribunal noted that: "... *when a parallel curriculum is so adapted and modified for an individual that the similarity - the parallelism - is objectively unidentifiable, the adaptation becomes mere artifice and serves only to isolate the student.*" The Tribunal then stated that:

> "In Emily's case, it is clear from evidence and testimony that a "parallel" learning program specifically designed to meet her intellectual needs, isolates her in a disserving and potentially insidious way.
>
> It is the unanimous opinion of the Tribunal therefore, that Emily's intellectual and academic needs cannot be met best, if indeed they can be met at all, in a regular class."
>
> Reasons for Judgment of the Tribunal, Tab 41 of Case on Appeal, Volume IV, p 664, lines 20-21, 24-26 and 31-34; p 666, lines 1-7

33. In respect of her communication needs, the Tribunal stated that it appears from the evidence that Emily will not be able to use oral speech as a principal means of communication. Further, the Tribunal noted that there is reasonable doubt that she will ever be able to sign meaningfully. However, the Tribunal noted that one day, she may communicate with assistive technology. The Tribunal found that Emily's need to communicate is going to be met only with very individualized, highly specialized, extremely intense, one-on-one instruction. The Tribunal stated that because this need is

of overriding importance it makes sense to address it, at least initially, in a setting where there can be maximum opportunity for such instruction. It was clear in reading the Tribunal's Decision, that the Tribunal was referring to a self-contained class.

> Reasons for Judgment of the Tribunal, Tab 41 of Case on Appeal, Volume IV, p 666, lines 15-17 and 29-35; p 667, lines 25-31

34. The Tribunal found, with respect to Emily's emotional and social needs, that:

> "... it may be possible that some of her social and emotional needs are ... being met [in the regular class]. ... it is conceivable that she is enjoying the experience and cannot tell us. However, her classroom behaviours - the increasing incidents of crying, sleeping and vocalization - suggest that this is not the case. There appears to be little if any, social interaction between Emily and her peers in the regular class."
>
> Reasons for Judgment of the Tribunal, Tab 41 of Case on Appeal, Volume IV, p 669, lines 10-17

35. With respect to physical and personal safety needs, the Tribunal stated:

> "... 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." ...
>
> "What is unreasonable, in our opinion, is to treat lightly, Emily's habit of mouthing objects. ... 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 potential dangerous." ...
>
> "... the school has a choice of establishing a level of adult supervision of Emily that is more than mere watchfulness, or, of cleaning the classroom of mouthable material. ... neither condition can reasonably be realized in a normal, integrated, regular classroom."
>
> Reasons for Judgment of the Tribunal, Tab 41 of Case on Appeal, Volume IV, p 669, lines 24-26; p 670, lines 1-2 and 13-24

36. The Tribunal considered the experience which Emily has had in the regular classroom and found that the regular class placement had not been successful for her. In so finding, the Tribunal noted that counsel for the parents argued as follows:

"... the appellants' counsel argues that the staff has generally been doing for Emily what experts and specialists in integration would recommend for a special child in a regular class. Still, despite the fact that staff has been implementing recommended procedures, and despite the fact that appellant's counsel describes the staff as having 'positive things to say about the experience [with Emily]' ... the witnesses own testimony is that these procedures were not meeting Emily's needs." [The Tribunal went on to say that:] "...for integration of an exceptional child to be meaningful and fulfilling, the child must not be just physically placed in a regular classroom, but must be intellectually, socially and emotionally involved. He or she must be accepted naturally as a regular member of the class despite a need for special support and consideration. Integration can be given momentum by adult intervention, but at some point over a reasonable amount of time, it must of itself, grow past artifice and manipulation. There must be regular, natural, spontaneous interaction between the exceptional child and the class. We have no convincing, objective evidence or testimony that over three years, any of this has developed for either Emily or her classmates ...

In fact, the testimony describing Emily's three years in a regular classroom indicates that the nature and extent of immediate adult intervention and care essential to meet her profound intellectual, physical and emotional needs even minimally, has the counter-productive effect of isolating her, of segregating her in the theoretically integrated setting. In the opinion of the Tribunal this is a far more insidious outcome than would obtain in a special class."

Reasons for Judgment of the Tribunal, Tab 41 of Case on Appeal, Volume IV, p 671, lines 17-26; p 672, lines 1-12 and 17-25

37. The Tribunal noted the evidence of Dr. Jeffers Toby, who is employed as a psychologist with the Brant County Board of Education, that while he hates to recommend a child for special classes, he looks at whether or not the child will be lost in a regular class setting, whether the special class had the materials, personnel, time and patience to deal with the particular child and, whether or not more damage will be done especially in the area of self esteem should the child remain in a regular class.

Reasons for Judgment of the Tribunal, Tab 41 of Case on Appeal, Volume IV, p 658, lines 22-29

38. The Tribunal also noted the evidence of the teacher of the special class (which is located in a regular school) in which it was proposed to place Emily:

> "... the special class is integrated with the regular classes through morning circle and a buddy system which may include hand-over-hand art activities, music, reading, outings such as walks and recess, special activities like assemblies, mini olympics, interactive games, including rolling balls and playing catch."
>
> Reasons for Judgment of the Tribunal, Tab 41 of Case on Appeal, Volume IV, p 656, lines 2-7

10 39. The Tribunal, having concluded that the regular classroom placement was *not* meeting her special needs, determined that the placement which would best meet Emily's special needs at that point in time was a special education class. In so concluding, the Special Education Tribunal took note of the Ministry of Education's statement of intent to initiate a policy for the province that:

> "the integration of exceptional pupils into local community classrooms should be the norm in Ontario, wherever possible, when such a placement meets the pupil's needs and where it is according to parental choice."
>
20 Reasons for Judgment of the Tribunal, Tab 41 of Case on Appeal, Volume IV, p 674a, lines 30-33
>
> Exhibit - *Consultation Paper on the Integration of Exceptional Pupils*, Tab 36 of Case on Appeal, Volume III, p 406

D. DIVISIONAL COURT'S DECISION

40. An application for Judicial Review was brought by the Respondents to the Ontario Divisional Court, seeking to quash the decision of the Special Education Tribunal. The
30 grounds raised by the Respondents included: failure of the Tribunal to place a legal burden on the Board of Education to establish that a transfer of Emily out of the regular class to a special class would be clearly better for her; error by the Tribunal in rejecting the expert evidence adduced on the preferability of "an integrated approach"; absence of evidence affirmatively establishing that the special class would redress concerns raised about Emily's education and would be clearly better for her; and failure of the Tribunal to deal with evidence that a special class would present is own negative problems for Emily.

"takes note" of charter - MOE
but never dealt with either.

Reasons for Judgment of the Divisional Court, Tab 42 of Case on Appeal, Volume IV, p 684, lines 1-15

41. The Divisional Court dismissed the Application for Judicial Review and in doing so stated as follows:

> "We are all of the view that this specialized body dealt comprehensively and thoughtfully with all the issues raised before it and with the central focus being what was best for Emily in all of the circumstances. It had before it the evidence of three years of experience with Emily in a regular class environment; the evidence of Emily's parents, based on their experience with her and their understanding of her needs; and the evidence of various expert witnesses. The Tribunal accepted that a regular class was to be considered the preferred placement, as long as this was consistent with the best interests of a student in any particular case. The Tribunal was also conscious of the *Charter of Rights and Freedoms* and the Ontario *Human Rights Code*. ...
>
> Reasons for Judgment of the Divisional Court, Tab 42 of Case on Appeal, Volume IV, p 684, lines 17-26; p 685, lines 1-2
>
> While we find the Tribunal to be worthy of curial deference given the structure of the legislation, the subject matter, and the composition of the Tribunal, we can find no error of law on the record before us in any event. Onus did not play a role in the Tribunal's determination. It found there was ample evidence before it establishing that the recommended placement was in Emily's best interest. This was a factual determination it was entitled to make on the evidence placed before it. There was also no legal error in giving the weight it did to the testimony of the three experts called by the applicants, having regard to the evidence they gave and the admissions they made. ...
>
> Reasons for Judgment of the Divisional Court, Tab 42 or Case on Appeal, Volume IV, p 685, lines 8-18
>
> 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."

Reasons for Judgment of the Divisional Court, Tab 42 of Case on Appeal, Volume IV, p 686, lines 17-25

E. THE COURT OF APPEAL'S DECISION

42. The Court of Appeal did not find that the Tribunal had made an error of law in reaching its conclusion. Rather, the Court of Appeal found that a constitutional error was made insofar as the *Education Act* violated the *Charter* because it permitted a child to be placed in an educational setting outside a regular classroom where a child's parents did not consent to such placement. This had *not* been raised as an issue before the Tribunal, nor was it raised as an issue by the Respondents at either the Divisional Court or the Court of Appeal.

Reasons for Judgment of the Court of Appeal, Tab 44 of Case on Appeal, Volume IV, p 722, lines 1-9; p 723, lines 19-20; p 724, lines 1-4

43. In finding that the *Education Act* violates s.15 of the *Charter*, the Court of Appeal reasoned as follows. The *Education Act* confers a discretion on a school board to place a child in a self-contained or "segregated" placement. Such a placement imposes a burden or disadvantage on an exceptional pupil, even if the placement is the one which best meets the pupil's special needs. The only exception to this is where the pupil's parents consent to the placement. Accordingly, by conferring a discretion on a school board to place an exceptional pupil in a special education placement which best meets the pupil's special needs where the pupil's parents do not agree, the *Education Act* violates s.15 of the *Charter*.

Reasons for Judgment of the Court of Appeal, Tab 44 of Case on Appeal, Volume IV, p 723, lines 19-20; p 724, lines 1-4

44. The Court concluded that a self-contained placement is discriminatory as follows:

> "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."
>
> Reasons for Judgment of the Court of Appeal, Tab 44 of Case on Appeal, Volume IV, p 714, lines 16-20; p 715, lines 1-19

45. In arriving at this conclusion, the Court of Appeal referred to the history of discrimination against disabled persons in Ontario canvassed by Weiler J. A. in her dissent in *Adler* v. *Ontario* referring to the 1971 Williston Report (Walter A. Williston, *Present Arrangement for the Care and Supervision of Mentally Retarded Persons in Ontario*, 1971, prepared for the Ministry of Health) and to the 1973 Welch Report (Robert Welch, Community Living for the Mentally Retarded People in Ontario). The Court of Appeal pointed out that these reports "... led to the transfer of jurisdiction over persons with disabilities from the Ministry of Health to the Ministry of Community and Social Services ... with a view to facilitating the integration of mentally disabled people into the broader community." There is no suggestion that these reports addressed the provision of education or special education for students as disabled as Emily Eaton. Nor did they touch upon the background or development of Bill 82 which enacted Ontario's scheme of Special Education in 1981.

Reasons for Judgment of the Court of Appeal, Tab 44 of Case on Appeal, Volume IV, p 711, lines 18-20; p 712, lines 1-8

46. The Court of Appeal also relied on the Report on Equality in Employment ("Equality in Employment: A Royal Commission Report", October 1984, pp 134-136) which very briefly touched on educational integration, but did not deal specifically with the background or development of Bill 82. Nor did the Report address education for pupils as severely disabled as Emily Eaton.

10 Reasons for Judgment of the Court of Appeal, Tab 44 of Case on Appeal, Volume IV, p 712, lines 11-17

47. None of these reports were proved in evidence, nor, in fact, were they put before the Tribunal or the Divisional Court, having simply been filed in the Court of Appeal in the Authorities Brief of the Respondent.

48. In reaching its conclusion that a self-contained class is discriminatory, the Court of Appeal did not refer to any of the factual findings made by the Tribunal.

20 49. The Court of Appeal, having found unequal treatment under s.15, held that the next issue for consideration was whether the unequal treatment can be justified under section 1 of the *Charter*. The Court held that section 1 did not save the *Education Act* because the *Act* did not infringe the equality rights of disabled students as little as possible.

Reasons for Judgment of the Court of Appeal, Tab 44 of Case on Appeal, Volume IV, p 722, lines 7-9; p 724, lines 6-8

50. The remedy ordered by the Court was that s.8 of the *Education Act* be read with

30 the following direction:

> "...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."

Reasons for Judgment of the Court of Appeal, Tab 44 of Case on Appeal, Volume IV, p 724, lines 17-20; p 725, lines 1-3

51. The Court of Appeal considered whether to uphold the decision of the Tribunal despite the Constitutional error but decided not to do so on the basis that the Tribunal might have come to a different decision had it appreciated that the *Charter* required a segregated placement to be used as a last resort to meet Emily Eaton's educational needs. Accordingly, the Court of Appeal remitted the matter back to a newly constituted Tribunal.

Reasons for Judgment of the Court of Appeal, Tab 44 of Case on Appeal, Volume IV, p 726, lines 19-20; p 727, line 1; p 729, lines 32-35; p 730, lines 1-4

PART II - ISSUES

1. Did the Court of Appeal err in proceeding, *proprio motu*, to review the constitutional validity of the *Education Act*, R.S.O. c. E-2?

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

3. If the Court of Appeal properly reviewed the constitutional validity of the *Education Act*:

   Constitutional Question #1: Do s. 8(3) of the *Education Act*, R.S.O. 1990, c. E.2, as amended, and s. 6 of *Regulation 305* of the *Education Act*, infringe Emily Eaton's equality rights under s. 15(1) of the *Canadian Charter of Rights and Freedoms*?

4. Constitutional Question #2: If the answer to question 1 is in the affirmative, are s. 8(3) of the *Education Act*, and s. 6 of *Regulation 305* of the *Education Act*, justified as a reasonable limit under s. 1 of the *Canadian Charter of Rights and Freedoms*?

5. Did the Court of Appeal err in finding that parents have the right to choose whether their children's equality rights will be overridden?

6. Did the Court of Appeal err in remitting the matter back to a differently constituted Tribunal?

PART III - ARGUMENT

10 **1. Did the Court of Appeal err in proceeding *proprio motu* to review the constitutional validity of the *Education Act*?**

52. Section 109(1) of the *Courts of Justice Act*, R.S.O. 1990, Chap. C. 43, states that:

> "Where the constitutional validity or constitutional applicability of an *Act* of the Parliament of Canada or the Legislature or of a regulation or by-law made thereunder is in question, the *Act*, regulation or by-law shall not be adjudged to be invalid or inapplicable unless notice has been served on the Attorney General of Canada and the Attorney General of Ontario in
20 accordance with subsection (2)."

53. It is submitted that the prohibition in section 109 of the *Courts of Justice Act* against adjudging a statute to be constitutionally invalid in the absence of notice to federal and provincial Attorneys General is intended to ensure that, at the very least, an opportunity is provided to the government to put before the Court such evidence and argument. Beyond this statutory prohibition, this Honourable Court *and* the Ontario Court of Appeal have both recognized that striking down legislation that has been enacted by Parliament or a provincial legislature is a very weighty matter, and a Court should not proceed to do so without a proper factual foundation and without providing
30 an opportunity to all interested litigants to present arguments in order to ensure that all relevant issues have been canvassed.

> Danson v. Ontario (Attorney General), [1990] 2 S.C.R. 1086 (Sopinka J.) at 1099-1101

(amicus) AGs intervention?

Mackay v. Manitoba, [1989] 2 S.C.R. 357 (Cory J.) at 361-363, 366

Ontario (Workers' Compensation Board) v. Mandelbaum, Spergel Inc. (1993), 12 O.R. (3d) 386 (Ont. C.A.) at 388-391 and 394-396

Ontario Public Service Employees Union v. Ontario (Attorney General) (1993), 14 O.R. (3d) 476 (Ont. C.A.)

54. In the present case, despite the absence of any Notice of Constitutional Challenge to either the Attorney General of Ontario or the Attorney General of Canada, and despite the fact that no party was challenging the constitutional validity of the *Education Act*, the Court of Appeal proceeded, *proprio motu*, to review the constitutional validity of the *Education Act* and to declare s.8(3) of the *Education Act* to be invalid. In so doing, the Court of Appeal violated s.109 of the *Courts of Justice Act*.

Reasons for Judgment of the Court of Appeal, Tab 44 of Case on Appeal, Volume IV, p 705, lines 12-16; p 724, lines 10-20; p 725, lines 1-3

55. Moreover, the Court of Appeal failed to consider whether it had before it a proper factual foundation against which the constitutional validity of the *Education Act* could be measured. Since the issue before the Court of Appeal related to the Judicial Review of a Tribunal decision concerning the placement of Emily Eaton, in which the validity of the *Education Act* was *not* an issue, it could not be reasonably expected that a proper evidentiary foundation existed.

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

56. The Court of Appeal found that the *Education Act* gives to school boards a discretion to make a placement which best meets the needs of the exceptional pupil and that this placement may violate the pupil's equality rights. Therefore, the Court of Appeal concluded, the *Education Act* gives school boards a discretion to violate the *Charter*. However, this Court has clearly stated that Courts must *not* interpret legislation which confers a discretion as conferring a power to infringe the *Charter* unless the power is

expressly conferred by the statute or must be necessarily implied in the statute. Rather, legislation conferring a discretion ought to be interpreted as *not* allowing a violation of *Charter* rights.

Slaight Communications v. Davidson [1989] 1 S.C.R. 1038 at 1077-1078

57. It is submitted, therefore, that the Court of Appeal ought not to have interpreted the discretion given to school boards to provide appropriate special education placements for exceptional pupils as conferring a discretion to violate the *Charter*.
10 Rather, the discretion must be exercised in accordance with the *Charter*.

3. If the Court of Appeal properly reviewed the constitutional validity of the *Education Act*: Constitutional Question #1: Do s. 8(3) of the *Education Act*, R.S.O. 1990, c. E.2, as amended, and s. 6 of *Regulation 305* of the *Education Act*, infringe Emily Eaton's equality rights under s. 15(1) of the *Canadian Charter of Rights and Freedoms*?

58. It is respectfully submitted that the Court of Appeal erred in holding that Emily Eaton's equality rights under s.15(1) of the *Charter* were violated by virtue of the fact that
20 s.8 of the *Education Act* gave to the Brant County Board of Education the discretion to place Emily in a special class where that placement best met her special needs.

59. Section 15(1) of the *Charter* provides that:

> "15. (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."

30

60. This Court has held that the analysis under s.15(1) of the *Charter* involves three steps:

(i) determining whether the law has drawn distinctions between the claimant and others;

(ii) considering whether the distinction results in a disadvantage, and whether the impugned legislation imposes a burden, obligation or disadvantage on a group of persons to which the claimant belongs that is not imposed on others, or grants them a benefit which it does not grant others; and

(iii) assessing whether the distinction is based on an irrelevant personal characteristic which is either enumerated in s.15(1) or is analogous thereto.

This analysis, when applied to the present case, confirms the error in the Court of Appeal's approach.

Egan v. Her Majesty the Queen in the Right of Canada, [1995] 2 S.C.R. 513 (La Forest J.) at 530-532

(i) Does the *Education Act* draw a distinction between Emily Eaton and others?

61. In the *Andrews* case, this Court rejected the notion that "equality" requires the same treatment of all individuals. On the contrary, equality often demands different treatment. The Honourable Mr. Justice McIntyre stated:

> "It must be recognized at once, however, that every difference in treatment between individuals under the law will not necessarily result in inequality and, as well, that identical treatment may frequently produce serious inequality."

Andrews, v. Law Society of British Columbia, [1989] 1 S.C.R. 143 (McIntyre J.)at 164

R. v. Turpin, [1989] 1 S.C.R. 1290 (Wilson J.) at 1331-32

62. At issue in this case is Emily Eaton's right to equality in the provision of education under the *Education Act*. The concept of education does not simply mean sitting in a classroom with age-appropriate peers. It means providing an opportunity to each pupil

to profit from the curriculum presented to him/her to the maximum of his/her potential. The concept of education recognizes that there will be variations in ability between pupils, which must be addressed to allow individual pupils to obtain the maximum educational benefit. In the case of exceptional pupils, the variations from the norm will be greater, and therefore greater modifications in the content and delivery of curriculum will be necessary to provide exceptional pupils with the same opportunities to learn and profit from education as are provided to their non-exceptional peers. In other words, the service of education must be provided in a different way to exceptional pupils - including pupils with disabilities which affect their ability to learn - in order to ensure that they are provided with an equal opportunity to profit from education.

Paragraphs 6 - 10, 17 - 19, *supra*

63. To the extent that each pupil is viewed as an individual, with distinct and different needs that must be addressed, the *Education Act* does not draw distinctions but focuses on the individual needs of each pupil in order to provide an opportunity to the pupil to reach his/her maximum potential.

Paragraphs 8 - 10, *supra*

64. The *Education Act*, however, does provide a process for identifying pupils whose disabilities interfere with their ability to profit from normal instruction based on the regular curriculum. These pupils are provided with a special education placement that can best meet their special needs, including a special class.

Paragraphs 11 - 19, *supra*

(ii) If there is a distinction made, does it result in an advantage or disadvantage for Emily Eaton?

65. The Court of Appeal found that the special class placement imposed a disadvantage on Emily in that it 'isolated' her from the mainstream and thereby provided her with "*fewer opportunities to learn how other children work and how they live.*"

So? does it draw a
"distinctum" or not?
What is π's positum?

However, in so finding, the Court of Appeal relied on evidence which was not properly before it and failed to accord proper weight to the adjudicative facts found by the Tribunal. It is submitted that had the Court of Appeal properly considered the findings of the Tribunal, it would have found that placement in a regular class was a disadvantage for Emily.

> Reasons for Judgment of the Court of Appeal, Tab 44 of Case on Appeal, p 715, lines 8-15

(a) The Court of Appeal relied on evidence not properly before it to make findings of adjudicative fact.

66. The Supreme Court of Canada has held that there are two categories of fact in constitutional litigation: "adjudicative facts" and "legislative facts". Adjudicative facts are those which concern the immediate parties and which must be proved by admissible evidence. Legislative facts establish the purpose and background of legislation including its social, economic and cultural context, and which are subject to less stringent admissibility requirements.

> Danson v. Ontario (Attorney General), *supra*, at 1099

67. It is submitted that the "adjudicative facts" in this case were the findings of fact made by the Special Education Tribunal based on evidence adduced before it.

68. As noted in paragraphs 45 to 47 above, the Court of Appeal reached its conclusion that a placement in a self-contained class is discriminatory based on certain reports which had been filed, without proof, in the Respondents' Book of Authorities. It is submitted that such reports, at best, fall in the category of "legislative fact" and are not a proper evidentiary basis on which to find discrimination, particularly when adjudicative facts applicable to the case contradict this finding.

> Danson v. Ontario (Attorney General), *supra*, at 1100-1101

but "isolation" etc
is legislative fact!

69. Even if the three reports in question were properly before the Court of Appeal, it is submitted that they should have been accorded very little weight since they did not deal with the purpose and background of the *Education Act* provisions relating to special education, nor did they relate to the provision of education of children as disabled as Emily Eaton.

(b) The Court of Appeal failed to accord proper weight to adjudicative facts found by the Tribunal.

10 70. The Court of Appeal erred in failing to give proper weight to the findings of fact made by the Special Education Tribunal. This was despite the fact that the Court of Appeal agreed with the Divisional Court that the Special Education Tribunal "is worthy of curial deference", and even though the Court of Appeal noted the privative clause in the *Education Act* which was applicable to the Special Education Tribunal.

> Reasons for Judgment of the Court of Appeal, Tab 44 of Case on Appeal, Volume IV, p 699, lines 3-19

71. Findings of fact made by a specialized Tribunal, protected by a form of privative
20 clause, which findings are based upon the evidence before it, cannot be interfered with by a Court unless they are shown to be "patently unreasonable". This Court has defined "patently unreasonable" as "clearly irrational".

> Canada (Attorney General) v. Public Service Alliance of Canada (No. 2), [1993] 1 S.C.R. 941 (Cory J.) at 963-964

72. In the present case, there was *no* finding by the Court of Appeal that the Tribunal made unreasonable findings of fact.

30 73. Moreover, the Court of Appeal did not have regard to the factual findings made by the Tribunal and evidence recited by the Tribunal, and proceeded to make its own factual findings (which, as noted above, were based on evidence not before the Tribunal

does "canon deference" extend to legislative fact?

and which had not been properly proved before the Court of Appeal). In fact, the findings made by the Court of Appeal conflicted with findings the Tribunal had made:

(i) The Court of Appeal found 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.*"

However, the Tribunal noted evidence from witnesses for the Brant County Board that the special class was located in a regular school and that pupils in the class were integrated with regular (i.e. non-exceptional) pupils, including integration into regular classes such as music, art, reading, morning circle, a buddy system, auditorium, recess, lunch and special activities such as mini olympics and interactive games. Moreover, the Tribunal found that by virtue of the degree of modification of curriculum and adult intervention which Emily required in the regular class, that Emily was being isolated in the regular class. Further, the Tribunal noted that there was little, if any, social interaction between Emily and her peers in the regular class.

Paragraphs 36, 38 and 44, *supra*

(ii) The Court of Appeal stated that "*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. ... the decision to educate Emily in a special classroom for disabled students is a burden or disadvantage for her...*".

However, the Tribunal specifically found that in the regular class there was little, if any, social interaction between Emily and her peers. Moreover, the Tribunal found that the regular class imposed a disadvantage or burden on Emily. Specifically, the regular class placement was isolating or segregating Emily in a disserving and potentially insidious way because of the modifications to curriculum necessary to meet her intellectual needs and because of the amount of adult intervention necessary to meet her profound intellectual, physical and emotional needs even

minimally in that placement. The Tribunal found that this was a far more insidious outcome than would obtain in a special class. Moreover, the Tribunal found that the regular class was unsafe for Emily and that the conditions which would be necessary to ensure Emily's safety could not be reasonably realized in a regular classroom. The Tribunal found that the special class would provide a better placement to meet Emily's needs including her overriding need to be taught a communication system.

Paragraphs 33 - 36 and 44, *supra*

10

74. It is acknowledged that the placement of a student outside the regular class can be a disadvantage or burden where the reasons for the placement are not rationally tied to legitimate ends which are sought to be achieved. The Tribunal specifically recognized that placement in the regular class *is* the norm and that the fact of Emily's disabilities, alone, do not justify her placement in the regular class. Rather, the Tribunal stated that the extent and nature of Emily's special needs justifies placement in a special class. Accordingly, the Tribunal recognized that there can be a disadvantage to a special class placement insofar as it is apart from the norm. However, the Tribunal concluded, after a careful assessment of Emily's needs, and whether those needs could be met in the
20 regular class, that they could not be met. Accordingly, for Emily Eaton, a placement in the segregated class would best meet her special needs. A special class placement was *not* a disadvantage for Emily Eaton, but a regular class placement was, as it could not meet her needs.

Reasons for Judgment of the Tribunal, Tab 41 of Case on Appeal, Volume IV, p 664, lines 22-33

75. It is submitted, therefore, that s.8(3) of the *Education Act* does not violate Emily Eaton's equality rights. The identification of Emily Eaton as exceptional, and the
30 determination of a placement where special education programs and services can be delivered to best meet her special needs, pose neither an advantage or disadvantage to her. Rather, they provide her with an equal opportunity to profit from an education which

— physical disabilities
only

← Issue is that Tribunal considered it a matter of constitutional indifference which placement was made.

will allow her to reach her maximum potential, just as the regular curriculum delivered in the regular class is designed to provide for non-exceptional pupils.

76. The equality provisions of the *Charter*, as they apply to education, are directed to the equality of opportunity to all children, to develop to their full potential in accordance with their unique abilities.

(iii) Is the distinction based on irrelevant personal characteristics enumerated in s.15(1) or analogous thereto?

10

77. The Honourable Mr. Justice McIntyre stated in the *Andrews* case as follows:

> "Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the challenge of the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed."
>
> *Andrews*, *supra*, at 174-175

20 78. It is submitted that the Court of Appeal erred in finding that disability is an irrelevant personal characteristic - in the *Andrews* sense of the term - in the context of education.

> Reasons for Judgment of the Court of Appeal, Tab 44 of Case on Appeal, Volume IV, p 717, lines 10-22; p 718, lines 1-14

79. It is submitted that Emily Eaton's mental and physical disabilities have a direct correlation to her ability to learn - and therefore receive education - in the same way as non-disabled students:

30

> "Unlike the other grounds of discrimination, mental or physical disability is, by definition, an impairment in ability; and some legal restrictions may properly be predicated on mental or physical disability."
>
> P. W. Hogg, *Constitutional Law of Canada* (3d ed.) Toronto, Carswell, (Nov. 1993) at c. 52, p. 52-47

80. This Court has recognized that there are differences between the grounds listed in s.15(1) of the *Charter* insofar as certain of the grounds have a direct correlation with ability, while other grounds do not have any correlation to ability at all:

> "It must not be overlooked, however, that there are important differences between age discrimination and some of the other grounds mentioned in s.15(1). To begin with there is nothing inherent in most of the specified grounds of discrimination, eg. race, colour, religion, national or ethnic origin, or sex that supports any general correlation between those characteristics and ability. But that is not the case with age. There is a general relationship between advancing age and declining ability. ..."
>
> McKinney v. University of Guelph, [1990] 3 S.C.R. 229 (La Forest J.) at 297

81. Disability, which was not mentioned in this passage, is akin to age insofar as there is a direct relationship between disability and "ability". In the case of education, the extent of the disability and the way it interferes with the ability of the pupil to learn has a direct bearing on the manner in which education is presented and the placement appropriate for doing so. Thus, the Tribunal stated:

> "By itself, the fact that Emily Eaton has different needs does not, *ipso facto*, call for a special class placement. What distinguishes her, and provokes consideration of special placement, is the nature and extent of her particular needs."
>
> Reasons for Judgment of the Tribunal, Tab 41 or Case on Appeal, Volume IV, p 664, lines 29-33

82. In the present case, the Court of Appeal equated race and sex with disability and, in so doing, simply failed to appreciate the differences between these grounds. Race and sex do *not* inherently bear upon a student's ability to learn or receive education. Race and sex, in themselves, are irrelevant considerations in education. Mental and physical handicap are directly relevant to a child's ability to receive education. Distinctions based on mental and physical disabilities under Ontario's scheme of special education are based on the individual pupil's abilities and capacities, *not* on characteristics based on belonging to a particular group. The concept of "segregation"

must be understood within its particular historical context of race discrimination in the United States; in that context it is completely inapplicable to Ontario Special Education.

> Reasons for Judgment of the Court of Appeal, Tab 44 of Case on Appeal, Volume IV, p 716, line 10 to p 718, line 14 (inclusive)

83. There are three other Canadian court cases (discussed below) which have dealt directly with the issue of whether a special class placement, effected for the purpose of meeting an exceptional pupil's special needs, violates that child's equality rights.

10

84. In the *Bales* case, the parents of a mentally handicapped child argued that the placement of the child in a "segregated" setting was discriminatory, contrary to the British Columbia *Human Rights Code* and the *Universal Declaration of Human Rights*. The British Columbia Supreme Court stated as follows at page 221:

> "Nor can I accept the contention that the placement of a handicapped child such as Arron (*sic*) in a properly conducted "segregated" school such as Glenn Avenue can be regarded as a deprivation of liberty or security of the person, or as an act of discrimination. *In so far as special education involves discrimination between handicapped and non-handicapped, the distinction is drawn for the purpose of providing the handicapped with the special treatment they require. Where, as here, the segregation involved is reasonably directed to the achievement of that objective - even though it may exceed the degree of segregation now considered by experts to be strictly necessary - it cannot be characterized as discrimination in an objectionable sense*, nor as a breach of any other guarantee or commitment contained in the enactments and conventions cited by the plaintiffs." (emphasis added)

20

30

> Bales v. Board of School Trustees, School District 23 (Central Okanagan) (1984), 8 Admin. L.R. 202 (B.C.S.C.) at 221

85. In two recent cases, the Quebec Court of Appeal concluded that the protection of equality rights under the Quebec *Charter of Human Rights and Freedoms* does not confer an absolute right upon mentally handicapped students to be placed in a regular classroom. Rather, every case will turn upon an examination of what placement will provide the student with the maximum learning opportunities. In considering certain

regulations and guidelines which provided, in essence, for a range of placements for handicapped students, the Court stated [English translation]:

> "These special provisions establish some distinctions based on handicap. However, they do not have the effect of impairing or nullifying the right to equality recognized by the [Quebec] *Charter*. This right to equality, in the context of the situation of pupils with a mental disability, cannot mean that such students must be treated in the education system as if they had no handicap. ... Respect for individual differences is now, it seems, an essential condition to the pursuit of genuine equality. ...
>
> The full and equal recognition of the right to free public education guaranteed by s. 40 [of the *Charter*] must be examined in this context. *The standard of equality guaranteed to handicapped students, therefore, cannot be integration in a regular class, but rather the adaptation of educational services in the framework of the terms and conditions prescribed, for adaptation, i.e., integration in a regular class and grouping in a specialized class or school.*
>
> *An educational institution does not, therefore, automatically infringe the right to equality when it fails to offer a pupil a choice between a special class in which instruction is dispensed by specialized staff, and a regular class with the necessary support services."* (emphasis added)
>
> Quebec (Commission des droits de la personne) v. St. Jean-Sur-Richelieu, Commission Scolaire (1994), 117 D.L.R. (4th) 67 (Quebec C.A.) at 92-94
>
> Regionale Chauveau, Comm. Scolaire C. Quebec (Comm. des droits de la personne) (1994), 21 C.H.R.R. D/189 (Quebec C.A.) at paras 20, 23, 36 and 37 (Leave to Appeal to the Supreme Court of Canada denied)

(iv) Alternatively, did the Court of Appeal err in not finding that Ontario's scheme of special education protected by s.15(2) of the *Charter*?

86. Section 15(2) of the *Charter* provides as follows:

> "s.15(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."

87. It is submitted that the special education provisions of the *Education Act* and the mechanisms for determining the appropriate educational placement for exceptional students constitute a "special program" designed to ameliorate the disadvantage in education experienced by students with disabilities which interfere with their ability to learn and profit from education. Accordingly, by virtue of s.15(2) of the *Charter*, the special education scheme does not infringe s.15(1).

Paragraphs 11 - 19, *supra*

10 88. In the *Roberts* case, the Ontario Court of Appeal considered the scope of review of "special programs" under s.14(1) of the *Ontario Human Rights Code*. It is submitted that the reasoning in the *Roberts* case is equally applicable under s.15(2) of the *Charter*.

Ontario Human Rights Commission v. Ontario ("Roberts") (1994), 19 O.R.(3d) 387 (Ont. C.A.) at 405

89. In *Roberts*, the Ontario Court of Appeal considered the scope of protection given to "special programs" under s.14(1) of the *Ontario Human Rights Code*. This protection parallels the affirmative action exemption in s.15(2) of the *Charter*. The majority held that
20 s.14(1) has two purposes: the exemption of affirmative action programs from review and the promotion of substantive equality. With respect to the latter purpose the majority stated that it is necessary to consider whether a provision in a special program in fact discriminates against a person or group with the disadvantage the program was designed to benefit, and whether the impugned provision is reasonably related to the scheme of the special program.

Ontario Human Rights Commission v. Ontario ("Roberts"), *supra*, at 396, 399-400, 407 and 429

30 90. It is submitted that assuming (in the alternative) that Ontario's special education provisions discriminate against Emily in the manner in which they address her educational needs, it cannot be said that this is not reasonably related or rationally connected to the overall scheme of the special education provisions. Emily's particular placement was the

direct result of a sophisticated, comprehensive program which is directed to the best interests of the child, allows for extensive input from teachers, parents and experts, is ultimately reviewed by a tribunal possessing special expertise, and which attempts to allocate resources to best serve the educational needs of exceptional students. It would be contrary to the overall scheme, and the promotion of substantive equality for students with disabilities, to mandate a particular kind of educational placement which will, ultimately, not be in the best interests of some of the very students the legislative scheme is designed to assist. Indeed, differentiation between individual students on the basis of level of impairment is critical to ensure that each student is provided with a program that meets his or her needs. As such, the scheme is consistent with s.15(2) of the *Charter*.

91. It is submitted that in the instant case the Court of Appeal erred in failing to find that the special education scheme was, in fact, a program that fits within the meaning of the s.15(2) exemption, and in failing to consider the second branch of the *Roberts* analysis, namely the promotion of substantive equality by the program as a whole.

Reasons for Judgment of the Court of Appeal, Tab 44 of Case on Appeal, Volume IV, p 706, line 19, to p 707, lines 1-2

4. **Constitutional Question #2: If the answer to question 1 is in the affirmative, are s. 8(3) of the *Education Act*, and s. 6 of *Regulation 305* of the *Education Act*, justified as a reasonable limit under s. 1 of the *Canadian Charter of Rights and Freedoms*?**

92. As the Court of Appeal noted, "*Very little time has been spent in this case addressing the s.1 issue.*" However, the Court of Appeal failed to note that no party had been given proper notice that the constitutional validity of the *Education Act* would be an issue.

Reasons for Judgment of the Court of Appeal, Tab 44 of Case on Appeal, Volume IV, p 723, line 12

CA not control this!

93. The result of this lack of notice is that evidence was not called by the Appellant in respect of s.1 issues as they pertain to the constitutional validity of the *Education Act*. Such evidence could have included: the historical, social and political context in which Bill 82 was passed; the costs of the competing approaches to special education; and the cost to other students in the regular classroom of modifying the classroom to the degree necessary to "reasonably meet" the special needs of each exceptional pupil whose parents wish the pupil to be placed in the regular class.

94. The Respondents did call expert opinion evidence with respect to the pedagogical philosophy of inclusion before the Tribunal. However, the Tribunal specifically rejected the opinion evidence of these experts:

> "All three witnesses manifest an entirely subjective view of class placement, and in fact could not reasonably be expected to testify in any other way than strongly supportive of integration. Given the absence of clear research support and clear empirical support for the integration of exceptional children like Emily; viz, the uncertainty in the area for which they are presented as expert, and given that they did not, except for Harry Silverman, observe Emily in a school setting, we do not find their testimony significant in the specific matter of Emily's placement."
>
> Reasons for Judgment of the Tribunal, Tab 41 of Case on Appeal,Volume IV, p 677, lines 22-30

95. It is submitted, therefore, that, because the Court raised the issue on its own, there is simply insufficient evidence on which to make an argument under s.1 of the *Charter*.

5. Did the Court of Appeal err in finding that the parents have the right to choose whether their child's equality rights will be overridden?

96. In its analysis, the Court of Appeal held that a special class placement for a disabled pupil would only violate the pupil's equality rights if the pupil's parents objected to the placement on the pupil's behalf. It is respectfully submitted that this approach is equivalent to allowing the pupil's parents to waive his or her equality rights, and/or to making the pupil's equality rights contingent on parental consent.

Reasons for Judgment of the Court of Appeal, Tab 44 of Case on Appeal, Volume IV, p 726, lines 5-7

97. In addition, it is respectfully submitted that the Court of Appeal's conclusion that Emily Eaton's s.15(1) equality rights are contingent upon her parents' consent, or may be waived by them, is fundamentally inconsistent with the *Charter's* role as the "supreme law" of Canada, and its goal of protecting the most vulnerable members of society. It is also fundamentally inconsistent with the long-recognized principle - as reflected in the role of the Official Guardian and in the courts' *parens patriae* jurisdiction - that parents' interests must be treated as secondary to the best interests of the child.

B. (R.) v. Children's Aid Society of Metropolitan Toronto, [1995] 1 S.C.R. 315 (Iacobucci and Major JJ.) at 430-434

Re MacVicar and Superintendent of Family & Child Services (1986), 34 D.L.R. (4th) 488 (B.C. S.C.) at 495-496

98. The Supreme Court of Canada has recognized that parents' rights to make fundamental decisions on behalf of their children are not absolute, and will not receive *Charter* protection in circumstances where the parents' decision conflicts with the child's best interests.

B. (R.) v. Children's Aid Society of Metropolitan Toronto, *supra*, at 430-434

99. It is submitted that the fact that the *Education Act* provides for an appeal by parents, ultimately, to an expert Tribunal whose decision is final and binding, is reflective of this principle: parents' decisions respecting placement for their children may conflict with the child's best interests from an educational perspective and, in this event, it will be left to an expert Tribunal to determine the best interests of the child.

6. Did the Court of Appeal err in remitting the matter to a differently constituted tribunal, despite its finding of a violation of Section 15 of the Charter?

100. The argument of the Respondents that there was a "presumption in favour of inclusion" was not adopted by the Court of Appeal and was answered by Adams J. in the

Issue is whether parents can speak for the child

Re EM?

Divisional Court. He noted that onus played no role in the Tribunal's decision and that there was "ample evidence before it establishing that the recommended placement was in Emily's best interest".

> Reasons for Judgment of the Divisional Court, Tab 42 of Case on Appeal, Volume IV, p.685, lines 11-14

101. The Court of Appeal's approach was that a 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". To accomplish this objective, "the school board must select a segregated class as a last resort, having made all reasonable efforts to integrate the disabled child".

> Reasons for Judgment of the Court of Appeal, Tab 44 of the Case on Appeal, volume 4, p.726 lines 7-9 and p. 727, lines 5-10

102. However the reasons of the Tribunal make it overwhelmingly clear that reasonable efforts had been made over a long period of time to integrate Emily into a regular class and that these efforts had not succeeded. It was the expert Tribunal which was in the best position to make such an assessment after hearing the evidence.

103. The Tribunal carefully considered Emily's needs, and the extensive modifications and supports provided for her in the regular class. The Tribunal found that the regular class could *not* meet Emily's needs, including her intellectual and academic needs, communication, emotional, physical and personal safety needs, and that the outcome for Emily in the regular class was more insidious than would obtain in a special class. Accordingly, if the Court of Appeal was correct in the direction it ordered to be read into the *Education Act*, the facts found by the Tribunal make clear its view that Emily's needs could *not* reasonably be met in the regular class.

> Reasons for Judgment of the Tribunal, Tab 41 of Case on Appeal, Volume IV, p.672, lines 13-15
>
> Reasons for Judgment of Court of Appeal, Tab 44 of Case on Appeal, Volume IV, p. 724, lines 19-20; p.725, lines 1-3

104. Moreover, the Court of Appeal stated that "The Tribunal saw no need to examine the desirability of providing Emily with a modified integrated setting . . .". This is not so. In fact, the Tribunal noted that the school board had made extensive and significant efforts to meet the parents' wishes to keep Emily in a regular class "with appropriate modifications and supports". However, the Tribunal went on to state that the objective and empirical evidence demonstrated that Emily's needs were not being met in the regular class.

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Reasons for Judgment of the Court of Appeal, Tab 44 of Case on Appeal, Volume IV, p.727, lines 17-19

Reasons for Judgment of the Tribunal, Tab 41 of Case on Appeal, Volume IV, p.670, lines 29-31; p.678, lines 19-22; p.679, lines 15-20

105. Furthermore, contrary to the view of the Court of Appeal, the Tribunal noted the evidence of a number of witnesses to the effect that not only was a regular, or modified,

20 class not working, but that a special class would in fact be a better placement for Emily.

106. In any event, since Emily has not been enrolled with the Brant County Board since 1993, the matter of her proper placement with the Board is now moot and the matter should not be remitted back to a differently constituted Tribunal.

Affidavit of Clayton Eaton, sworn May 1, 1995, Tab 1 of Applicant's Record on Application for Leave to Appeal to the Supreme Court of Canada

PART IV - REMEDY REQUESTED

107. The Appellant requests that the appeal be allowed and that the Order of the Divisional Court be restored with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

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CHRISTOPHER G. RIGGS, Q.C.
of counsel for the Appellant

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BRENDA J. BOWLBY
of counsel for the Appellant

30 **NOTICE TO THE RESPONDENT:** Pursuant to subsection 44(1) of the *Rules of the Supreme Court of Canada, this appeal will be inscribed by the Registrar for hearing after the respondent's factum has been filed or on the expiration of the time period set out in paragraph 38(3)(b) of the said Rules, as the case may be.*

APPENDIX "A"

1. Constitutional Question #1: Do s. 8(3) of the *Education Act*, R.S.O. 1990, c. E.2, as amended, and s. 6 of *Regulation 305* of the *Education Act*, infringe Emily Eaton's equality rights under s. 15(1) of the *Canadian Charter of Rights and Freedoms*?

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2. Constitutional Question #2: If the answer to question 1 is in the affirmative, are s. 8(3) of the *Education Act*, and s. 6 of *Regulation 305* of the *Education Act*, justified as a reasonable limit under s. 1 of the *Canadian Charter of Rights and Freedoms*?

PART V - LIST OF AUTHORITIES

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

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