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 AND THE ATTORNEY GENERAL FOR QUEBEC

Interveners

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PART I - THE FACTS

A. Accepted Facts

1. The Respondents accept as accurate the background facts set out in paragraphs 1, 2, 4 and 5 of the Appellant's factum.

B. Disputed Facts

2. The Appellant states at paragraph 3 of its factum that Emily Eaton ("Emily") has a severe mental disability. It is correct that the Tribunal held that there was empirical evidence which "suggested" that Emily has an intellectual disability. However, the evidence of all the witnesses was that Emily's cognitive level could not be assessed because of her communication difficulties.

Evidence of Witnesses, Case on Appeal, Vol I, Tab 10, p. 115, line 4 to p. 117, line 29; Tab 13, p. 137, line 6 to p. 138, line 30; Tab 15, p. 148, line 25 to p. 150, line 28, p. 154, line 14 to p. 155, line 12; Tab 17, p. 161, lines 11-29; Tab 18, p. 170, line 9 to p. 173, line 29; Tab 19, p. 174, lines 10-30, p. 180, line 5 to p. 182, line 29; Volume II, Tab 23, p. 254, line 8 to p. 255, line 32; Tab 25, p. 271, line 28 to p. 273, line 23.

Reasons of the Tribunal, Case on Appeal, Volume IV, Tab 41, p. 616, lines 1-32, p. 624, lines 14-34, p. 643, lines 1-16, p. 665, lines 9-16

3. The Appellant's characterization of the legal test which was applied by the Tribunal in determining Emily's placement warrants particular comment because it is central to this appeal. The Appellant repeatedly states (in paragraphs 11, 17, 19, and 31 of its factum) that the Tribunal applied a test which considered where Emily's needs would *best* be met. This is not accurate. The Tribunal applied a test which considered only whether Emily's needs were being met in the regular class, and did not address whether or how those needs would be *better* met in a segregated class. In addition, it must be emphasized that the Education Act is silent regarding the test which is to be applied in making placement decisions. Although the Appellant characterizes the Education Act and various government policies as directing that children with disabilities be placed where their needs can *best* be met, this is not the case. The Act does not contain any test or standard, based on either where children's needs are best met, or their best

interests, which governs placement. Existing government policies refer to integration as the "norm", but do not provide any direction governing when a school board can depart from that norm.

4. The Respondents do not accept the facts set out in paragraph 26 as being fully accurate in describing Emily's placement at Maple Avenue School. Although it is correct that she did have episodes of crying and vocalizing, the evidence also shows that she was aware of her surroundings and enjoyed numerous activities, and that her physical development was improving.

Evidence of Witnesses, Case on Appeal, Volume IV, Tab 41, p.644 lines 2-15, 29-34; p.645 lines 1-5; p. 650 lines 15-21; p.651 lines 11-16; p. 661 lines 25-31; p. 662 lines 1-4, 18-21; p. 663 lines 2-5.

C. Emily's Background and Current Educational Placement

5. Emily is a twelve year old girl with cerebral palsy. As a result of her disability, she is mobility impaired and has not yet learned to communicate verbally. She requires assistance for tasks involving fine motor skills, but is fully able to bear her own weight and can walk short distances with the aid of a walker. She currently is a grade 5 student in a fully integrated class at Blessed Sacrament School, which is her neighbourhood school within the Brant County Roman Catholic Separate School Board.

Affidavit of Clayton Eaton, sworn May 1, 1995, Respondents' Record, Application for Leave to Appeal, Tab 1

Evidence of Witnesses, Case on Appeal, Vol I, Tab 1, p. 38, line 25 to p. 43, line 30, p.46, lines 9-30

D. Statutory Framework

6. The current system of special education for children with exceptional needs described in paragraphs 6-19 of the Appellant's factum came into being with the 1980 amendment to the Education Act referred to as Bill 82. The "occasion or reason for the enactment of Bill 82 was as part of the overall broader purpose of enabling children, who had formerly been in institutions ... to lead lives as normally as possible within the community."

Adler v. Ontario, [1994] 19 O.R. (3d) 1 (O.C.A.), Weiler J.A. (dissenting) at 47-48, 50. **Respondents' Book of Authorities, Tab 1.**

7. These changes to the education system did not happen in isolation. In the mid 1960's and 1970's a movement towards "normalization" for persons with disabilities gradually took hold in democratic societies across the world. This movement included the process of deinstitutionalization, by moving persons with disabilities out of institutions and integrating them back into their families and communities. In Ontario, part of the impetus towards community living for persons with developmental disabilities flowed from a 1971 report by the late Walter B. Williston. At the outset of that report he states:

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

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

Reasons for Judgment of the Court of Appeal of Ontario, Case on Appeal, Vol IV, Tab 44, p. 711, line 10 to p. 713, line 38.

Adler, supra, Weiler J.A. (dissenting) at 46 to 51, **Respondents' Book of Authorities, Tab 1.**

Williston, Walter B., "Present Arrangement for the Care and Supervision of Mentally Retarded Persons in Ontario" a report to the Minister of Health of Ontario, August, 1971, particularly at p. 5 and pp. 21 - 32, **Respondents' Book of Authorities, Tab 33.**

Welch, Robert, "Community Living for the Mentally Retarded in Ontario: A new Policy Focus", March 1973, **Respondents' Book of Authorities, Tab 32.**

8. In addition to the Education Act amendments, the early 1980s saw other legislative milestones in the disability rights movement in Ontario. In 1981, the Ontario Human Rights Code (the "Code") was amended to include for the first time protection from discrimination on the basis of physical and mental disability. The Preamble of the Code incorporates the ideal of mutual respect for the dignity of all persons "so that each person feels a part of the community." Disability was also included as a protected ground under s. 15 of the Charter which came into force on April 17, 1985.

Human Rights Code, R.S.O. 1990 c.H. 19 preamble, ss. 1, 10(1) and 17.

9. The Human Rights Code, the Charter and the Education Act speak about disability in general terms only. Although the Education Act requires schools to provide special education programs geared to the needs of each child with a disability, it is silent about where that program is to be provided or whether it can or should be an integrated or segregated class placement. The educational scheme established by the Ontario Ministry of Education provides for a continuum of service which includes both integration and segregation for "special education." Neither the Act nor Ministry guidelines define with any precision the basis upon which placement decisions are to be made or the test to be applied in doing so. However, the official policy of the Ministry of Education indicates a presumptive right to inclusion. The current relevant part of the Ministry of Education policy, in place since 1975, provides:

> Every exceptional child has the right to be part of the mainstream of education to the extent to which it is profitable. Care, however, must be taken to ensure the exceptional child's needs are met in terms of staff, curriculum, method, materials and organization. (p.8)
>
> Exhibit - Special Education Information Handbook, Case on Appeal, Vol. III, Tab 40, p. 498.

10. The Respondents are not challenging the existence of a continuum of service, nor do they dispute that children with disabilities require accommodation of their special needs in the educational setting. What is at issue in this appeal is the legal framework governing the placement of a child along the continuum of service, and in particular, the application of the Charter to placement decisions involving segregation.

E. The Decisions of the Tribunal and the Divisional Court

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

Reasons of the Tribunal, Case on Appeal, Vol IV, Tab 41, p. 664, lines 7-33.

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

Reasons of the Tribunal, Case on Appeal, Vol. IV, Tab 41, p. 665, line 1 to p. 672, line 25.

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

> Emily's need to communicate is only going to be met with very individualized, highly specialized, extremely intense, one-on-one instruction. Because this need is of such overriding importance for Emily, it makes sense to address it, at least

> initially, and until she demonstrates some minimal competence, in a setting where there will be maximum opportunity for such instruction.

Contrary to the Appellant's suggestion in paragraph 33 of its factum, the Tribunal did not make a specific finding that this need had to be met in a segregated class. In fact, the Tribunal made no finding as to what would be done to meet Emily's communication needs in a segregated setting that could not be done in a regular class setting.

Reasons of the Tribunal, Case on Appeal, Vol IV, Tab 41, p. 667, lines 25-31.

14. The Tribunal held that it may have been possible that Emily's social and emotional needs were being met in the regular class, but that because of her disability she could not communicate that fact. However, the Tribunal also held that her classroom behaviours such as crying, sleeping and vocalization suggested that they were not. It did not, however, address the question of how or if a segregated placement could meet Emily's social and emotional needs, either at all or better than her regular class placement. The Tribunal also found that Emily's personal and safety needs require that she have a high level of adult supervision or, in the alternative, that mouthable objects be removed from the class. The Tribunal stated that to ensure Emily's personal safety, "one of these conditions must prevail, and neither condition can reasonably be realized in a normal, integrated, regular classroom."

Reasons of the Tribunal, Case on Appeal, Vol. Iv, Tab 41, p. 669, lines 8-15, p. 670, lines 20-24.

15. The Tribunal stated that a fundamental component of its decision was the fact that Emily had spent three years in a regular class and that "this placement has not been successful for her." Although the Tribunal accepted that there are benefits to integration, it held that Emily was not realizing those benefits. However, the Tribunal did not address in its Reasons any factors which it considered to be advantages or disadvantages of a segregated placement for Emily. Further, it made no reference whatsoever to the uncontroverted evidence of all the experts who testified, including the School Board's own psychologist, Dr. Jeffers Toby, that segregated educational placements can cause serious and sometimes permanent psychological and emotional harm.

Reasons of the Tribunal, Case on Appeal, Vol IV, Tab 41, p. 660, line 5 to p. 672, line 25.

Expert Evidence, Case on Appeal, Vol. I, Tab 5, p. 64, lines 5-16; Tab 8, p. 84, line 20 to p. 90, line 23; Tab 10, p. 109, line 4 to p. 110, line 30, p. 128, line 10 to p. 130, line 29; Vol. II, Tab 22, p. 239, line 26 to p. 240, line 25, p. 241, line 12 to p. 244, line 25.

16. The Tribunal made the following finding of law regarding the application of the Charter and the Code to its decision making:

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

Reasons of the Tribunal, Case on Appeal, Vol. IV, Tab 41, p. 679, lines 13-21.

17. On judicial review, the Divisional Court did not find any error of law in the Tribunal's interpretation of the Charter and Code. The Court stated that:

> 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*.

Reasons for Judgment of the Divisional Court, Case on Appeal, Vol. IV, Tab 42, p. 686, lines 17-22.

F. The Decision of the Court of Appeal of Ontario

18. In considering the application of the Charter in this case, the Court of Appeal addressed whether forcing a child into a segregated class placement because of her disability constituted discrimination under s.15 of the Charter such as to require justification under s.1. The Court found that Emily had been prevented by the school board (a state actor) from attending the regular class because of her disability, and that this distinction was made on a prohibited ground.

The Court then considered whether segregating Emily imposed on her a burden or disadvantage, or deprived her of a benefit. Since "forced exclusion is hardly ever considered an advantage in society" but rather is used as a form of punishment or hardship, and "since inclusion into the main school population is a benefit to Emily", the Court found that forced segregation because of disability was discriminatory under s. 15.

> Reasons for Judgment of the Court of Appeal of Ontario, Case on Appeal, Vol IV, Tab 44, p. 714, lines 6-7, p. 715, line 8.

19. The Court next considered the School Board's argument that s.15 was not breached because it was necessary within an educational setting to make distinctions based on the abilities or disabilities of individual children. On this basis, the School Board argued that because segregating a child with a disability may be necessary to meet his or her needs, it is different from segregation on other prohibited grounds such as race or gender.

20. The Court rejected this characterization of the right to equality in education, including the Appellant's argument that disability is a relevant personal characteristic in the context of education:

> With respect, I believe that the argument is flawed. It may appear to find support in *Andrews*, *supra*, where Mr. Justice McIntyre, at p. 174, concludes his remarks on what constitutes discrimination:
>
> > Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed.
>
> I do not read this passage to suggest that distinctions based on physical or mental disability, a prohibited ground in s.15, will be less discriminatory than distinctions based on race or sex. The merits and capacities which may properly found the basis for different treatment cease to do so when they become personal characteristics, such as sex, ethnic origin or disability, which have in common a history of stereotyping. Although it may be easier to justify differences in access to educational facilities on the basis of disability than it would be if the differences were based on race, that analysis belongs to s.1...*If anything, one should be wary of accepting as inevitable and innocuous a classification on the*

basis of physical or mental disability, without the rigorous analysis required by s.15. (emphasis added)

Reasons for Judgment of the Court of Appeal for Ontario, Case on Appeal, Vol. IV, Tab 44, p. 717, line 10 to p. 718, line 10.

21. The Court of Appeal concluded that it was clear from the Tribunal's findings on the application of the Charter and Code that they "rejected any notion of a presumption in favour of inclusion, or of imposing upon the school board a requirement of demonstrating the superiority of a segregated placement for Emily Eaton, over the educational experience that she was obtaining in an integrated classroom." Further, the Court of Appeal noted that the Tribunal never answered the question as it had originally framed it, that is: "whether Emily's special needs can be best met in a regular class or in a special class." Rather, "having found that the integrated placement had not met Emily's needs, the Tribunal did not state how the segregated class would likely be more successful."

Reasons for Judgment of the Court of Appeal for Ontario, Case on Appeal, Vol. IV, Tab 44, p. 703, line 30 to p. 704, line 2.

22. The Court therefore determined that the Tribunal had erred in its interpretation of the Charter (a legal finding reviewable on a standard of correctness), leading it to apply the wrong legal test in deciding Emily's placement. That is, it did not place the onus on the School Board to demonstrate that segregation was the least exclusionary placement possible. The Court of Appeal also disagreed with the Divisional Court's view that the case simply involved choosing between pedagogical theories to which the Charter and the Code had no application. Rather, the Court stated that "the question is not one of choosing between competing pedagogical theories but one of determining the legal framework in which that choice will be made."

Reasons for Judgment of the Court of Appeal for Ontario, Case on Appeal, Vol IV, Tab 44, p. 704, line 22 to p. 705, line 2.

23. The Respondents had sought clarification from the Court on the test to be applied by Tribunals under the Education Act and had requested a new hearing as a remedy. The Court

of Appeal found, however, that the "source of the discrimination" was the Act because it authorized school boards and Tribunals to place children with disabilities in segregated classes without regard to their rights under s. 15(1) of the Charter. It therefore ruled that the legislative scheme itself (specifically, s.8(3) of the Act and s.6 of Regulation 305 of the Act) was constitutionally inadequate, unless justified under s.1 of the Charter. The legislative scheme was held not to be saved under s.1 because it did not meet the minimal impairment portion of the Oakes test. In addition to defining the appropriate test under the Charter as requiring placement in the least exclusionary setting possible which is reasonably capable of meeting a child's needs, and determining whether the Tribunal had properly applied it, the Court directed that this test be read into the Act. In the result, the Court ordered that the Tribunal's decision be set aside and a new hearing be conducted based on the constitutional principles set out in its reasons.

Reasons for Judgment of the Court of Appeal for Ontario, Case on Appeal, Vol. IV, Tab 44, line 11 to p. 725, line 3; p. 730, lines 1-4.

PART II - ISSUES

24. The Appellant has stated the issues in this appeal as follows:

(i) Did the Court of Appeal err in proceeding, *proprio motu*, to review the constitutional validity of the Education Act?

(ii) Did the Court of Appeal err in finding that the Education Act gives School Boards a discretion to violate the Charter?

(iii) If the Court of Appeal properly reviewed the constitutional validity of the Education Act, do s.8(3) of the Education Act and s.6 of Regulation 305 of the Act, infringe Emily Eaton's equality rights under s.15(1) of the Charter?

(iv) If so, are s.8(3) of the Education Act and s.6 of Regulation 305 of the Act justified as a reasonable limit under s.1 of the Charter?

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

(vi) Did the Court of Appeal err in remitting the matter back to a differently constituted Tribunal?

PART III - ARGUMENT

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

(i) Background to the Constitutional Issue

25. It is correct that no formal Notice of Constitutional Question was served in this proceeding in the courts below. However, the application of s.15 of the Charter to the placement of Emily Eaton in a segregated class has been a central issue in this case since the outset of the Tribunal proceedings and throughout the judicial review process. Moreover, the issue of the constitutional validity of s. 8(3) of the Education Act was raised directly by the Court of Appeal during argument, and counsel for both the Appellant and for the Attorney General of Ontario (which has been an intervener in this case throughout the judicial review proceedings) had full opportunity to address the point in their submissions. Neither counsel advised the Court of any prejudice arising from dealing with the issue in this manner, rather than as a matter of statutory interpretation.

26. There is only one difference between the approach ultimately taken by the Court of Appeal and the approach advocated by the Respondents throughout this case. The Respondents argued that the Charter gave rise to a presumption in favour of integration which the School Board had to rebut before Emily could be placed in a segregated setting. The Respondents requested the Court to direct school boards and Tribunals to apply this test when making placement decisions under the Education Act. However, the Court of Appeal held that this test had to be read into the Act itself in order to comply with the Charter. In the result, school boards and Tribunals are in precisely the same position as they would have been if the Court had articulated the test and directed that it be applied.

27. The fact that the Charter played a central role in this case since its beginning is obvious from the legal findings made by the Tribunal in its Reasons, and by the references to the Charter in the decision of the Divisional Court.

(ii) Legal Test Which Applies to this Issue

28. The fact that the Respondents did not directly challenge the validity of the Education Act, and did not serve a Notice of Constitutional Question, does not automatically render the Court of Appeal's decision a nullity. The Charter is the supreme law of Canada, and any law that is inconsistent with the provisions of the constitution is, to the extent of the inconsistency, of no force and effect. For this reason, courts have recognized their right to proceed *proprio motu* where they are of the view that a statute which is relevant to a case before it is unconstitutional in some respect. The case law in this area indicates that the determinative factor is whether or not any actual prejudice resulted from the failure to serve a Notice of Constitutional Question.

10

R. v. Temela [1991] N.W.T.R. 289 at 294 (N.W.T.C.A.), **Respondents' Book of Authorities, Tab 14.**

Citation Industries Ltd. v. C.J.A., Local 1928 [1988] 53 D.L.R. (4th) 360 at 363 (B.C.C.A.), **Respondents' Book of Authorities, Tab 7.**

Ontario (Workers' Compensation Board) v. Mandelbaum, Spergel Inc. [1993] 12 O.R. (3d) 385 at 391 (O.C.A.), **Respondents' Book of Authorities, Tab 11.**

20 *Beare v. R.* [1987] 4 W.W.R. 309 at 322 (Sask. C.A.), **Respondents' Book of Authorities, Tab 3.**

Batchewana Indian Band (Non-resident members) v. Batchewana Indian Band [1994] 1 F.C. 394 at 400 (F.T.D.),**Respondents' Book of Authorities, Tab 2.**

Re Childrens Aid Society (1983), 7 C.R.R. 246 at 254 (Man. C.A.), **Respondents' Book of Authorities, Tab 17.**

Re Shewchuk and Ricard [1986] 28 D.L.R. (4th) 429 at 439 to 440 (B.C.C.A.),
30 **Respondents' Book of Authorities, Tab 18.**

Christian Horizons v. Ontario Human Rights Commission [1993] 14 O.R.(3d) 374 at 377 (Divisional Court), **Respondents' Book of Authorities, Tab 6.**

29. Such prejudice could arise from the fact that the Attorney General is not made aware of a particular proceeding and therefore does not have the opportunity to intervene. This clearly is not an issue in this case since the Attorney General has been an intervener throughout the

judicial review proceedings. As an intervener, the Attorney General was aware of the Respondents' Charter arguments, and had the opportunity to file written materials and make oral submissions in response to them.

30. It also is acknowledged that prejudice may arise in a constitutional case if a private party is denied the opportunity to call justificatory evidence. However, it is submitted that this has not occurred in the present case. At every stage in this proceeding counsel for the Respondents has raised the applicability of the Charter and the Code. The Appellant was fully aware of this and had every opportunity to address the argument both through evidence at the hearing and in argument at all stages. In fact, the Appellant did call some budgetary evidence, as well as extensive documentary evidence relating to the legislative scheme and policy framework governing special education in Ontario. Accordingly, the Appellant has not been prejudiced.

Case on Appeal, Vol. II, Tab 20, p. 187, line 15 to p. 209, line 29; Vol. III, Tab 36, Tab 37, Tab 39, and Tab 40.

31. The failure of the Appellant to adequately address s.1 issues in its argument and in evidence was solely its own doing and was not affected by the manner in which the Court proceeded. The fact is that from the outset of this case, the Appellant has taken the position that segregating a child with a disability is not *prima facie* discriminatory. On judicial review, the Attorney General also took this position. The Court of Appeal rejected this argument. However, the fact that the Appellant and the Attorney General chose to proceed in this manner does not establish prejudice, and ought not to render the Court of Appeal's decision a nullity. It is submitted that since no party suffered prejudice by the lack of notice, the Court of Appeal's decision is not assailable on this ground of appeal.

32. It is further submitted that it is in the interests of justice and efficiency for this Honourable Court to deal with the appeal on its merits. A Notice of Constitutional Question now has been issued. The Rules of the Court provide a mechanism for ensuring that any relevant evidence which is required for the adjudication of a constitutional issue can be put

Is the S.1 issue
any different under
Dagenais approach?

before the Court in the proper circumstances. Therefore, the interests of justice would not be served by rendering the Court of Appeal's decision a nullity at this stage in the proceedings.

Issue 2 - Did the Court of Appeal err in finding that the Education Act gives School Boards a discretion to violate the Charter?

33. The Appellant has stated that the Court of Appeal found that the Education Act gives school boards the discretion to place a child in a setting which best meets her needs even though this may violate the Charter. However, when the decision as a whole is read, it is apparent that this statement fails to fully describe the Court's findings. The Court held that the Education Act "authorizes the school board to require a disabled student to be educated in a segregated classroom, over the parents' objections, without having to show why less exclusionary forms of placement could not be reasonably expected to meet the child's special education needs." As a result, the legislative scheme itself was held to be invalid.

Reasons for Judgment of the Court of Appeal for Ontario, Case on Appeal, Vol. IV, Tab 44, p. 723, line 19 to p. 724, line 2.

34. It is correct, as the Appellant states, that legislation which is open to more than one interpretation must not be applied in a manner which infringes the Charter. In Slaight, this Court held that when measuring the validity of an administrative tribunal's order against the Charter, it must be presumed that legislation conferring imprecise discretion does not confer the power to infringe the Charter, unless that power is granted expressly or by necessary implication. If the legislation pursuant to which an order is made confers imprecise discretion on a tribunal, and an order is made which violates the Charter, the order itself is subjected to the test set out in s. 1. By contrast, if the disputed order was made pursuant to legislation which confers the power to infringe a protected right either directly or by implication, the legislation itself must be subjected to a s. 1 test.

Slaight Communications Inc. v. Davidson [1989] 1 S.C.R. 1038 at 1079-1080, **Appellant's Book of Authorities, Tab 17.**

but Tribunal did address this —
what it failed to address is
whether segregated facilities would
be any better.

35. The Court of Appeal in this case held that the Education Act itself "authorizes" a Charter violation. Therefore, it followed the analysis set out in Slaight and subjected the impugned legislation to a s. 1 test.

36. If this Court agrees that the Education Act authorizes a Charter violation, the Court of Appeal's approach is consistent with the process set out in Slaight. However, if the Act is viewed simply as conferring an "imprecise discretion", that discretion still must be exercised in accordance with the Charter. If this Court holds that the Court of Appeal erred in finding that the source of the discrimination was the Education Act itself, it is submitted that the "least exclusionary" test formulated by the Court is nevertheless correct as a matter of statutory interpretation. Accordingly, it is submitted that when measured against the Charter, the Tribunal's order infringes s. 15(1), is not saved under s.1, and ought to be set aside.

Reasons for Judgment of the Court of Appeal for Ontario, Case on Appeal, Vol IV, Tab 44, p. 724, line 10 to p. 726, line 17.

Issue 3 - If the Court of Appeal properly reviewed the constitutional validity of the Education Act, do s.8(3) of the Education Act and s.6 of Regulation 305 of the Act, infringe Emily Eaton's equality rights under s.15(1) of the Charter?

(a) Overview of Respondents' Position

37. The Respondents submit that the Court of Appeal was correct in its conclusion that the forced segregation of a child because of her disability is a *prima facie* violation of s.15(1) of the Charter. The Respondents do not take the position that there is an absolute right for a child with a disability to be educated in a regular class. They do, however, contend that placement in a regular class is the non-discriminatory norm, to which a child with a disability is *prima facie* entitled. The central issue in this case is whether or not s.15 of the Charter protects children with disabilities from being segregated in the education system without consent, unless to do so is a reasonable limit under s. 1.

(b) Section 15 Test

38. The extent of the Appellant's s. 15(1) argument is that in the context of education, disability is a relevant personal characteristic, and therefore that distinctions made on that basis are not *prima facie* discriminatory. It is submitted that this approach is inconsistent with the purposive approach to the Charter advanced by this Court, and is at odds with established equality rights principles.

39. In Andrews, this Court provided a framework for considering the scope and application of s.15(1). The principles which emerged from that case included identifying the purpose of s. 15(1) as ensuring that all individuals in our society must be recognized at law as human beings equally deserving of concern, respect and consideration. Further, the Court recognized that the accommodation of differences is the essence of true equality, and that determining whether different treatment is discriminatory requires consideration of the content of the law, its purpose, and its impact on those to whom it applies and those who it excludes.

40. Since Andrews, certain principles have emerged as fundamental to a s. 15 analysis. These include the recognition that the purpose of s.15(1) is to remedy and prevent discrimination against groups subject to stereotyping, historical disadvantage, and political and social prejudice. Therefore, courts must look at the larger social, political and legal context of a case in order to identify the *indicia* of discrimination which will determine whether differential treatment results in inequality. This broader context also is necessary in order to understand the impact of an impugned distinction on a particular individual or group, and to determine if the distinction perpetuates or flows from historical disadvantage, stereotyping, or prejudice.

R. v. Swain [1991] 1 S.C.R. 933 at p. 72, **Respondents' Book of Authorities, Tab 13.**

R. v. Turpin [1989] 1 S.C.R. 1290 at 1331-2, **Appellant's Book of Authorities, Tab 14.**

Symes v. Canada [1993] 4 S.C.R. 695 at 756-7, **Respondents' Book of Authorities, Tab 23.**

41. The Rodriguez case was the first in which the s. 15 rights of persons with disabilities were considered by this Court. In a dissenting opinion, Lamer, C. J. considered whether Sue Rodriguez had been discriminated against because of her disability, contrary to section 15. After finding that a legislative distinction had been made which imposed a disadvantage, the Court turned to the issue of whether the treatment was based on a personal characteristic. The analysis which follows sheds some light on the meaning of disability as a "personal characteristic" in the context of a s. 15(1). After finding that it was *only* on account of their physical disability that persons such as Sue Rodriguez were unable to commit suicide unassisted, the Court held:

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

Rodriguez v. B.C. (Attorney General) [1993] 3 S.C.R. 519 at 550 and 555-6, **Respondents' Book of Authorities, Tab 20.**

42. In Rodriguez, Lamer C.J. in effect rejected the argument that Sue Rodriguez's lack of capacity to commit suicide rendered the impugned distinction non-discriminatory as being based on a relevant personal characteristic. Similarly, the majority (conducting a s. 7 analysis) unequivocally rejected the argument that the "appellant's problems are due to her physical disabilities caused by her terminal illness, and not by government action."

Rodriguez, supra., at 584, **Respondents' Book of Authorities, Tab 20.**

43. In its most recent s.15(1) decisions, this Court has continued to place paramount importance on the broader context in which a case arises. In Miron v. Trudel the Court provides a detailed analysis of the purpose and application of s. 15, and the role of personal characteristics in a purposive Charter rights analysis:

> Unequal treatment alone - the mere fact of making a distinction - does not establish a breach of s. 15(1) of the Charter. The s. 15(1) guarantee relied on is "...equal benefit of the law *without discrimination*". To prove discrimination, the claimant must show that the unequal treatment is based on one of the grounds expressly mentioned in s. 15(1) - race, national or ethnic origin, colour, religion, sex, age or mental or physical disability - or some analogous ground. These grounds serve as a filter to separate trivial inequities from those worthy of constitutional protection. They reflect the overarching purpose of the equality guarantee in the Charter - to prevent the violation of human dignity and freedom by imposing limitations, disadvantages or burdens through the stereotypical application of presumed group characteristics rather than on the basis of individual merit, capacity, or circumstance.
>
> The enumerated and analogous grounds serve as ready indicators of discrimination because distinctions made on these grounds are typically stereotypical, being based on presumed rather than actual characteristics. Nevertheless, in some situations distinctions made on enumerated or analogous grounds may prove to be, upon examination, non-discriminatory. For example, the distinction may be found not to engage the purpose of the Charter guarantee. Thus in *R. v. Turpin*, Wilson J., while leaving open the possibility that province of residence could be an analogous ground, held that it was not used in a way that engaged the purpose of s. 15 in that case. Furthermore, if the law distinguishes on an enumerated or analogous ground but does not have the effect of imposing a real disadvantage in the social and political context of the claim, it may similarly be found not to violate s. 15. Cases where a distinction made on an enumerated or analogous ground does not amount to discrimination, however, are rare. Faced with a denial of equal benefit based on an enumerated or analogous ground, one would be hard-pressed to show that the distinction is not discriminatory.

Miron v. Trudel [1995] 2 S.C.R. 418 at 486-487, **Respondents' Book of Authorities, Tab 10.**

Thibaudeau v. Canada [1995] 2 S.C.R. 627 at 682-683, **Respondents' Book of Authorities, Tab 24.**

44. The test which has now emerged for assessing alleged violations of s.15 involves the following steps: 1) has a distinction been made by legislation or a state actor; 2) does the distinction impose a disadvantage or withhold a benefit; and, 3) is the distinction based on an enumerated or analogous ground, and if so, is it based on irrelevant personal characteristics and

stereotypes. However, the third step in this analysis cannot be conducted in a vacuum. As this Court has repeatedly held, the broader political, social and legal context is necessary in order to identify the effect of an impugned distinction on the individual or group to whom it is applied, and to determine whether the treatment is based on or promotes stereotypes, or perpetuates disadvantage.

Miron v. Trudel, supra, **Respondents' Book of Authorities, Tab 10.**

Thibaudeau v. Canada, supra, **Respondents' Book of Authorities, Tab 24.**

Egan v. Canada [1995] 2 S.C.R. 513, **Appellant's Book of Authorities, Tab 6.**

(c) The Broader Context

(i) Historical, Social and Political Situation of Persons with Disabilities

45. Persons with disabilities are among the most disadvantaged in our society. Until the latter half of this century, disabled people (particularly those who were viewed as "mentally retarded") were routinely subjected to isolation, segregation and institutionalization. In the mid 1960's and 1970's the movement towards "normalization" for persons with disabilities gradually took hold and democratic societies began the process of deinstitutionalization by moving persons with disabilities out of institutions and integrating them back into their families and communities. In Ontario, part of the impetus towards community living for persons with developmental disabilities flowed from a 1971 report by the late Walter B. Williston, quoted at paragraph 7 herein, which recognized that in order for children with disabilities to reach their full potential, they must be given the greatest possible degree of participation in life and the maximum degree of normalcy. The resulting shift in government policy led to a preference for integrated community living.

Adler et al. v. Ontario, supra, **Respondents' Book of Authorities, Tab 1.**

Williston, Walter B., "Present Arrangement for the Care and Supervision of Mentally Retarded Persons in Ontario" a report to the Minister of Health of Ontario, August, 1971, particularly at p. 5 and pp. 21 - 32, **Respondents' Book of Authorities, Tab 33.**

Welch, Robert, "Community Living for the Mentally Retarded in Ontario: A New Policy Focus", March 1973, **Respondents' Book of Authorities, Tab 32.**

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

> It has been a major undertaking on the part of handicapped people to encourage those who are not disabled to understand the desire for integration on the part of those who are. With increasing urgency, the disabled community has insisted that it not be consigned to facilities, institutions or agencies which are separate and apart. What it wants instead, are adjustments to the basic services provided by society to adapt to the range of disabilities. Only this kind of approach avoids the invidious and humiliating need to function on the fringes of the community. Disabled people want to be treated not as persons who are unable to participate fully in society, but as persons who are prohibited from participating by an unaccommodating society. Not only are they willing to participate, they properly consider it their right to participate. They cannot understand why this simple and self-evident right produces so much literature and so relatively little action.
>
> Ontario, "Access to Legal Services by the Disabled: Report of a Study by Judge Rosalie S. Abella" Queen's Printer, 1983 p. 12-13, **Respondents' Book of Authorities, Tab 28.**

47. Emily Eaton's parents testified at the Tribunal hearing that their choice of an integrated placement for their daughter was motivated by their concern that she go to school with the children who will be part of her community as an adult. Her father testified:

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

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

Case on Appeal, Vol I, Tab 3, p. 613, lines 13-24.

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

> "Almost from birth, people absorb cultural messages from their surroundings. Some of the strongest signals come from the school, a key progenitor of cultural and personal judgments, and many career choices made in later life reflect these signals consciously or unconsciously."
>
> "The school is society's instrument for preparing children for full participation in the community"
>
> "From the earliest age, disabled children should see themselves as part of the mainstream of society, and children who are not disabled should see them the same way. These *enabling perceptions*, carried into adulthood, have the power to affect, on both sides, expectations about the extent to which the community is and should be accessible and about standards of behaviour in the workplace, both for employers and employees." (emphasis added)
>
> "Wherever possible the disabled child should learn alongside children who are not disabled. *This should be the rebuttable presumption.*" (emphasis added)
>
> Canada "Report of the Commission on Equality in Employment" (Ottawa: Minister of Supply and Services, October 1984) (Judge Rosalie Silberman Abella) at 132, 135-136, **Respondents' Book of Authorities, Tab 26.**

49. Legal commentators have recognized the importance of entrenching equality rights for persons with mental disabilities in the Charter, given the history of disadvantage and social prejudice to which they have been subjected:

> Persons who are mentally disabled have traditionally been devalued individuals in Canadian society. History has seen large numbers institutionalized for life upon the erroneous assumption that custodial care was the only appropriate course of action. They have been the subject of ridicule, massive segregation, community insensitivity, needless sterilization and unfounded stereotyping.
>
> D. Vickers and O. Endicott, "Mental Disability and Equality Rights in A. Bayefsky and M. Eberts, Equality Rights and the Canadian Charter of Rights and Freedoms, (Carswell: Toronto, 1985), at 381-382, **Respondents' Book of Authorities, Tab 31.**

50. This Court also has recognized as obvious the fact that people with disabilities are discriminated against in our society, and subjected to social prejudice, historical disadvantage, stereotyping, and segregation.

> *Rodriguez*, supra., at p. 555-6, **Respondents' Book of Authorities, Tab 20.**
>
> *R. v. Swain*, supra., at p. 933, **Respondents' Book of Authorities, Tab 13.**

(ii) The Educational Context

51. It is submitted that non-consensual segregated education because of disability is a *prima facie* violation of s.15(1). Indeed, it has long been established in free and democratic societies that "separate" is not "equal". The principles enunciated by the United States Supreme Court four decades ago in the Brown case with respect to racially segregated education are equally applicable to forced segregation on other grounds such as disability. As noted by the United States Supreme Court in that case:

> We conclude that in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.
>
> *Brown v. Board of Education of Topeka* (1954), 347 U.S. 483 at p. 495, **Respondents' Book of Authorities, Tab 5.**

52. The education system has been no exception to the history of exclusion and segregation experienced by persons with disabilities in our society. Indeed, the right of children with disabilities to be enrolled in the public education system only came into being with the 1980 amendments to the Education Act contained in Bill 82. In a statement made by the Minister of Education on the introduction of Bill 82, its purpose was characterized as follows:

> This bill does two things. First, the basis of universal access contained within the bill guarantees the right of all children, condition notwithstanding, to be enrolled in a school. No longer will retarded children be enrolled after an assessment procedure established in law which has in fact denied universality of access. All children will now have a basic right to be enrolled. Second, school boards must assume responsibility for

providing suitable programming for all children. This will include the provision of special education programs and special education services for exceptional pupils in the language of instruction of such pupils.

Adler v. Ontario, supra, **Respondents' Book of Authorities, Tab 1.**

Ontario, Legislature of Ontario, Debates, No. 56 at 2135 to 2136 (May 23, 1980), **Respondents' Book of Authorities, Tab 29.**

53. Beyond the basic right to be enrolled, however, lies the question of how and where children with disabilities are to be educated. It will be recalled that the Appellant takes the position that "equality in education" for children with disabilities requires that each child be treated in accordance with his or her needs and abilities, so that they will have the opportunity to reach their full potential. This proposition merely reflects the well-established human rights principle that there is a duty on the part of educators to accommodate the special needs of children with disabilities. It does not address the real issue in this appeal, which is concerned with the legal framework in which placement decisions are made, and in particular, the application of the Charter to the issue of forced segregation.

54. By contrast, the Respondents' position is that equality in education requires placement in the least exclusionary setting possible. This view is based, in part, on the belief that one of the most important functions of education is to provide children with disabilities the opportunity to participate in and truly be part of their community. Because this need is so vital (and indeed is fundamental to equality for persons with disabilities) there ought to be a presumption in favour of a regular class setting, in which a child with a disability is educated alongside his or her age-appropriate peers.

55. This view of the purpose of education finds support in the Ministry of Education's policies. The "Formative Years", which outlines the goals of primary and junior education, refers to the "philosophical commitment of our society to the worth of the individual" as one of the core values underlying Ontario's approach to education. It goes on to state that one of the central goals of education is to ensure "that every child have the opportunity to develop as

completely as possible in the direction of his or her talents and needs" and to "nurture every child's growth so that each may be able to continue his or her education with satisfaction and may *share in the life of the community* with competence, integrity and joy." It is submitted that a presumption in favour of integration is consistent with and promotes these values.

Exhibit - The Formative Years, Case on Appeal, Tab 39, Vol. III, p. 469.

56. This Court has recognized the broad importance of education, particularly for young children, in the case of Ross v. New Brunswick:

> While the importance of education of all ages is acknowledged, of principal importance is the education of the young. As stated in *Brown, supra*, education awakens children to the values a society hopes to foster and to nurture. Young children are especially vulnerable to the messages conveyed by their teachers...The importance of ensuring an equal and discrimination free educational environment, and the perception of fairness and tolerance in the classroom are paramount in the education of young children. *This helps foster self-respect and acceptance by others.* (emphasis added)
>
> *Ross v. New Brunswick School District No. 15* [1996] 133 D.L.R. (4th) 1 at 32-33, (S.C.C.), **Respondents' Book of Authorities, Tab 21.**

57. There is a direct connection between education and the goal of full participation in the community for persons with disabilities. A rebuttable presumption in favour of inclusion is consistent with that goal. By contrast, the segregation of children with disabilities undermines it. Segregation perpetuates the disadvantages and stereotypes which develop when children with disabilities are educated in isolation.

(iii) Conclusion

58. When viewed in the broader social, political and legal context, it is apparent that the forced segregation of children with disabilities in the education system engages the overarching purpose of s.15(1), which is to protect historically disadvantaged groups from treatment which undermines their human dignity and self-worth, or which imposes barriers to their full participation in society. It should be recognized as a *prima facie* violation of s.15(1) and subjected to scrutiny under s.1.

(d) Application of s. 15 Test to this Case

(i) Step 1 - Was a distinction made on a prohibited ground?

59. It is submitted that the forced segregation of children with disabilities under the Education Act constitutes a distinction to which s.15(1) applies. That is not to say that all forced segregated education necessarily violates the Charter as there may be circumstances when it is necessary or justifiable to do so. However, since the educational norm is placement in a regular class, deviation from that norm based upon membership in a particular disadvantaged group constitutes distinctive treatment for the purposes of s. 15(1).

10 *Andrews v. Law Society of B.C.* [1989] 1 S.C.R. 143 at 174-175, **Appellant's Book of Authorities, Tab 1.**

Huck v. Canadian Odeon Theatres Ltd. (1985), 6 C.H.R.R. D/2682 (Sask, C.A.), leave to appeal to the Supreme Court of Canada refused, June 3, 1985 (McIntyre, Wilson and LaForest, JJ.), **Respondents' Book of Authorities, Tab 8.**

60. In this case, it is clear that the reason Emily was first subjected to the Identification, Placement, and Review Committee (IPRC) process under the Education Act, and the triggering fact leading to her placement in a special segregated class, is that she is disabled. Disability is
20 the shared and distinguishing characteristic of the students in the class into which the Appellant proposed placing Emily. Distinctions or differential treatment based upon membership in a particular disadvantaged group are the very types of distinctions this Court has held ought to be seen as violating s. 15(1) of the Charter. It is submitted that the Court of Appeal's conclusion that a distinction had been made on a prohibited ground is completely consistent with well-established equality rights and Charter principles, and is not in error.

(ii) Does the Distinction Impose Disadvantages or Withhold Benefits?

30 61. It is submitted that forced segregation imposes disadvantages on and deprives a benefit to children with disabilities. As noted above, participation in the mainstream of society is a central goal for persons with disabilities, and is viewed as a benefit. The corollary to this is that forced exclusion is a disadvantage.

} why else is it the "norm"?

62. The view that integration is a benefit is consistent with the Ministry of Education's Consultation Paper on the Integration of Exceptional Students, which recognizes integration as the "norm" in education:

> 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 when it is according to parental choice.

Exhibit - Consultation Paper on the Integration of Exceptional Students, Case on Appeal, Vol. III, Tab 36, p. 406

63. The reasons for recognizing "integration as the norm" were described in the Consultation Paper as follows:

i) The integration of exceptional pupils benefits both society and the pupils. Integration enables all pupils to understand disabilities and to develop respect for others. For some exceptional pupils, integration into a regular class is an important first step towards integration into society.

ii) Pupils derive benefits from being educated in local community schools where they can participated with their peers in community activities. An integrated placement provides increased opportunities for socialization. Such placement also enables many exceptional pupils to develop greater self-esteem and a better sense of belonging.

iii) Integration is the norm for non-exceptional pupils in Ontario. As a matter of equity, therefore, exceptional pupils should have access to integration as a placement option, if it meets their needs.

Case on Appeal, Vol. III, Tab 36, p. 408.

64. Thus, the Ministry of Education itself has expressly recognized the benefits of an integrated education, and positions a regular class placement as the norm against which a segregated placement must be measured. The Tribunal also accepted as a general proposition that integration is a benefit for children with disabilities. It is indisputable that segregating a child in a class attended only by other children with similar disabilities, away from her neighbourhood school, deprives her of the benefits of integration.

65. It also is submitted that forced segregation in education imposes serious disadvantages on children with disabilities. As is clear from the historical context described previously, persons with disabilities as a group have historically been isolated, segregated and excluded from the larger community. Moreover, stereotypical assumptions about the abilities, capacities and worth of persons with disabilities are inextricably linked to and perpetuated by segregation. These conclusions are self-evident and cannot reasonably be disputed.

66. Emily's parents, as her legal representatives, viewed the proposed segregated placement as both a disadvantage and the denial of a benefit. The broader social, political and historical context supports their position, as do the policies of the Ministry of Education.

67. It therefore is submitted that the Court of Appeal was correct in holding that forced segregation imposed a disadvantage on Emily and deprived her of a benefit, and that this element of the s. 15(1) test clearly is met.

(iii) Is the Distinctive Treatment Based on an Irrelevant Personal Characteristic?

68. It submitted that the Appellant's argument that disability is a relevant personal characteristic in the context of education, and therefore that segregation is beyond the reach of s.15(1), should be rejected. Persons with disabilities are not a homogeneous group to whom assumptions about group characteristics can be universally applied, particularly in the area of education. The Education Act defines "exceptional pupils" as students having behavioural, communicational, intellectual, physical or multiple disabilities. Given the incredible individual diversity covered by these categories, "disability" clearly cannot be viewed as a relevant personal characteristic such as to render educational segregation non-discriminatory in all cases. The implications of the Appellant's position are extremely serious: any child who is identified as exceptional under the Act could be segregated, without requiring a school board to justify its action as reasonable. Given the history of stereotyping and disadvantage experienced by persons with disabilities, this approach is a serious threat to their equality rights. It is therefore submitted that disability is not a "relevant personal characteristic" in the sense in which that term has been used by this Court in other cases to identify non-discriminatory distinctive treatment

which does not engage the purpose of s. 15(1). Rather, distinctions based on disability in this context are inherently suspect, and should be subjected to scrutiny under s.1.

Education Act, R.S.O. 1980, c.E.2, s.1(1)

69. The Appellant cites the McKinney case in support of its position that disability is a relevant personal characteristic. In fact, McKinney suggests the opposite conclusion. In that case, mandatory retirement was held to be a *prima facie* violation of s.15(1), which required justification under s.1. The link between age and capacity was not held to render distinctions based on age non-discriminatory. Rather, a s.1 analysis was required. It is submitted that the same principles ought to apply to distinctions based on disability.

McKinney v. University of Guelph, [1990] 3 S.C.R. 229, p. 278-9, **Appellant's Book of Authorities, Tab 9.**

70. It is further submitted that accepting disability as a "relevant personal characteristic" in this case would impose on children with disabilities the onus of proving they are worthy of attending the regular class with their non-disabled peers. Such an approach has been criticized as creating a constitutional presumption of incapacity, which "runs counter to the whole thrust of section 15, which was aimed at eradicating, not perpetuating, stereotypes about the abilities of the disabled." It is submitted that the Court of Appeal was correct in finding that the "merits and capacities which may properly found the basis for different treatment cease to do so when they become personal characteristics, such as sex, ethnic origin or disability, which have in common a history of stereotyping." The Court's approach takes into account the needs and abilities of children with disabilities, while ensuring that their equality rights are protected subject only to reasonable limits under s. 1.

Lepofsky, D. and H. Schwartz, "An Erroneous Approach to the Charter's Equality Guarantee: R v. Ertel" (1988) 67 Canadian Bar Review 115 at 122, **Respondents' Book of Authorities, Tab 27.**

Reasons for Judgment of the Court of Appeal for Ontario, Case on Appeal, Vol. IV, Tab 44, p. 717, line 10 to p. 718, line 10.

Issue is not this — what is proposed is that "relevance" trumps equality.

(e) Conclusions on s.15 (1) Issue

71. It is submitted that the forced segregation of children with disabilities under the Education Act constitutes distinctive treatment, which is based on a prohibited ground, and which imposes a burden and denies benefits. In addition, it is the type of treatment which perpetuates disadvantage, and is based on and promotes stereotypes. The forced segregation of children with disabilities is not a trivial inequity. It is worthy of constitutional protection, and clearly engages s.15's purpose of preventing the violation of human dignity. For these reasons, it is submitted that the Court of Appeal was correct in its finding that a *prima facie* violation of s.15(1) had been established.

10

(f) Education Case Law

72. The Appellant cites two Quebec cases as well as a human rights decision from British Columbia in support of its position that a special education placement does not violate a child's equality rights. However, these cases were not decided under the Canadian Charter. Furthermore, the two Quebec decisions are not inconsistent with the Court of Appeal's decision.

Commission des droits de la personne du Québec v. Commission scolaire St. Jean-sur-Richelieu (1994), 117 D.L.R. (4th) 67 (Que. C.A.), **Appellant's Book of Authorities, Tab 13.**

20 *Commission scolaire regional Chauveau v. Commission des droits de la personne du Québec* (1994), 21 C.H.R.R. D/189 (Que. C.A.), **Appellant's Book of Authorities, Tab 16.**

Bales v. Board of School Trustees, School District 23 (Central Okanagan) (1984), 8 Admin. L.R. 202 (B.C.S.C.), **Appellant's Book of Authorities, Tab 3.**

73. The Bales case is a decision by a single judge of the British Columbia Supreme Court. It was decided in 1984, over a decade ago and prior to s. 15 of the Charter coming into force. The case arose as civil action for a declaration and damages. The trial judge did reject
30 arguments based on British Columbia human rights legislation, but the analysis under this part of the judgment is not extensive. The Court accepted that the placement of disabled children in segregated schools was thought to result in a less beneficial education than they would receive

in an integrated setting. However, in the absence of proof of actual harm caused by segregation, the trial judge found that such placements were not wrongful. Further, the trial judge found that where the segregation was "reasonably directed" to providing for the special needs of disabled children, it cannot be characterized as discrimination "even though it may exceed the degree of segregation now considered by experts to be strictly necessary." It is submitted that the Bales case cannot be considered to be authoritative. It is not an appellate level decision. Further, it pre-dates much of the modern jurisprudence dealing with equality rights principles including equality concepts such as the requirement of minimal impairment of rights, and the rejection of the similarly situated test.

Bales, supra, at pp. 220-221, **Appellant's Book of Authorities, Tab 3.**

74. Chauveau and St. Jean-sur-Richelieu are recent decisions of the Quebec Court of Appeal dealing with the application of the Quebec Charter of Human Rights. Contrary to the assertion of the Appellant, it is submitted that the reasoning of the Quebec Court of Appeal in these two cases is fully consistent with that of the Ontario Court of Appeal in this case. The Quebec Court of Appeal found that there was no absolute right to be integrated into a regular class. The Ontario Court of Appeal made the same ruling and, indeed, noted that counsel for the Eatons had acknowledged this to be the case. The Quebec Education Act is more specific than its Ontario equivalent on the topic of integration. The Quebec Act requires school boards to adopt by-laws dealing, *inter alia*, with methods for integrating disabled students into regular classes, as well as the support services necessary for their integration. Further, the objective of the by-laws regarding the education of children with disabilities "must be the adaption of educational services to their needs so as to facilitate their learning and social integration." The Quebec Court of Appeal noted that the approach that "school integration should be achieved whenever possible and appropriate" was incorporated into the relevant legislation. The Quebec Court also quoted extensively from official Department of Education policy, including statements that "regular classes are a preferred means of integrating students into society"; "regular class should be the first choice for all school boards"; and "special classes or schools should be considered only for students who require services that cannot be provided in regular classes". It is respectfully submitted that these statements are strikingly similar to the rulings made by the

Ontario Court of Appeal in this case. Further, the Quebec Court of Appeal noted the obligation of school boards to provide appropriate accommodation to students with disabilities in order to make integration work, a principle also noted by the Ontario Court of Appeal.

St. Jean-sur-Richelieu, supra, at pp. 87-90, **Appellant's Book of Authorities, Tab 13.**

75. The Quebec Court of Appeal found on the facts of the St. Jean-sur-Richelieu case that the school board had breached a disabled student's human rights under s. 10 of the Quebec Charter by failing to integrate him in a regular class and by failing to provide an assistant in the classroom to facilitate his integration. Damages of $20,880.00 were awarded. Although a different factual conclusion was reached in the Chauveau case, the legal reasoning on the equality rights issues was the same as in the St. Jean case. No appeal was made from the St. Jean case. Leave to appeal was sought in the Chauveau case but was denied by the Supreme Court of Canada on February 2, 1995.

St. Jean-sur-Richelieu, supra, at pp. 99-100. **Appellant's Book of Authorities, Tab 5.**

76. The American jurisprudence in this area is helpful in understanding the operation of special education systems which apply a "least exclusionary" test to placement decisions. In the United States, the Individuals with Disabilities Education Act ("IDEA"), expressly requires that a child with a disability be educated in the "least restrictive setting" possible. There is also authority in the case law under the IDEA for the proposition that the same analysis would apply under general non-discrimination legislation. The Courts in the United States have confirmed the importance of placing the onus on schools to demonstrate that a segregated placement is justified. This is seen, in part, as a logical extension of the presumption in favour of integration, but also as an issue of fairness because of the school's better access to relevant information, and its greater control over the potentially more persuasive witnesses. This approach clearly is consistent with the proposition that the burdens of persuasion ought to be placed on the party better able to meet them, and applies equally to the rationale that school board's should be required to justify segregation under s. 1.

Rafael Oberti et. al v. Board of Education of the Borough of Clementon School District et al., 801 F. Supp. 1392 (D.N.J. 1992), **Respondents' Book of Authorities, Tab 15.**

Rafael Oberti et al. v. Board of Education of the Borough of Clementon School District, et al., 995 F. 2d 1204 (3rd Cir. 1993), **Respondents' Book of Authorities, Tab 16.**

Board of Education, Sacramento City Unified School District v. Rachel Holland et al. (1992), 786 Fed. Supp. 874, (U.S. District Court, E.D. Calif), **Respondents' Book of Authorities, Tab 4.**

Sacramento City Unified School District v. Rachel Holland et al., 14 F. 3d 1398 (9th Cir. 1994), **Respondents' Book of Authorities, Tab 22.**

Mavis v. Sobol (Commissioner of Education of the State of New York (1994), 839 F. Supp. 968 (N.D.N.Y. 1983), United States District Court, **Respondents' Book of Authorities, Tab 9.**

(g) Factual Basis of the Court of Appeal's Analysis

77. The Appellant has submitted that the Court's s. 15 analysis is flawed because it relied upon "legislative facts" which were not before the Tribunal or the Divisional Court. The "facts" at issue are the Williston Report and the Welch Report, both commissioned by the Ontario government and extensively referred to in the Adler decision, and the Canadian Royal Commission Report on Employment Equity by Judge Rosalie Abella, as she then was. These reports provided the Court with the historical and social context in which to determine the Charter issues before them. This Honourable Court also has allowed official government reports of this nature to be submitted in order to provide a broader context in which to consider constitutional issues. It is submitted that the Court of Appeal's use of the reports was not only proper, but was preferable to considering the Charter issues arising in the case outside of their broader social context.

Reference re Residential Tenancies Act (1981), 123 D.L.R. (3d) (S.C.C.) 554 at 560, 563, **Respondents' Book of Authorities, Tab 19.**

Adler, supra, at pp. 48-49, **Respondents' Book of Authorities, Tab 1.**

? 60 - 11 says ... 11 Factum p. 25
reports used as "adjudicative facts"

78. It is further submitted that the Royal Commission and government studies referred to do not have to be proved in evidence:

> These documents are admissible without proof on the basis of their inherent reliability because documents made by a public official for the information of the Crown or its subjects ... are presumed to be true when they are made.
>
> Sopinka, J. et al., The Law of Evidence in Canada, (Toronto: Butterworths, 1992) at 941, **Respondents' Book of Authorities, Tab 30.**

10 79. Contrary to the Appellant's argument, it is submitted that the Court of Appeal did not, based on these documents, reverse the Tribunal's findings of fact in coming to the conclusion that forced segregation is *prima facie* discriminatory. Rather, the Court found that the Tribunal committed a legal error in its interpretation of the Charter, an issue on which it had to be correct. The Court then considered whether the Tribunal would inevitably have come to the same conclusion if it had appreciated Charter requirements. In order to make this determination, it was necessary for the Court to consider whether the Tribunal's factual findings could have supported the same conclusion under the correct legal test. The Court was not persuaded that the Tribunal "would have necessarily concluded as it did, had it appreciated that legal impediments to the selection of a segregated setting." This analysis does not constitute a review
20 of the Tribunal's factual findings, but rather considers the application of the correct test under the Charter to the facts found by the Tribunal. This form of judicial review is proper where a court finds, as it did in this case, that a legal error has been made. It is therefore submitted that this argument is unfounded.

> Reasons for Judgment of Court of Appeal for Ontario, Case on Appeal, Vol IV, Tab 44, p. 698, lines 7-13, p. 727, line 1 to p. 731, line 21.

(h) Potential Application of Section 15(2)

30 80. The Appellant submits as an alternative argument that the special education scheme under the Education Act is a "special program" designed to ameliorate the disadvantage experienced by children with disabilities in education, and therefore, by virtue of s.15(2) of the Charter, does not infringe s. 15(1). The Court of Appeal rejected this argument, and stated that even if special

education programs could only be implemented under s.15(2), which it did not agree was the case, it would not follow that such programs would be immune from constitutional attack by the proposed recipients of the intended benefit. In coming to this conclusion, the Court referred to Ontario Human Rights Commission and Roberts v. Ontario. Although that case was decided under s. 14 of the Ontario Human Rights Code, the Court found that the result would be the same under s.15(2). Relying on Roberts, the Court held that the enactment of an affirmative action program does not exempt the state from Charter compliance within the program.

> *Ontario Human Rights Commission v. Ontario (Roberts)* (1994), 19 O.R. (3d) 387 (Ont. C.A.) at 405, **Appellant's Book of Authorities, Tab 11.**

81. It is submitted that the Court of Appeal is correct on this point. Section 15(2) is not intended to shield affirmative action programs from charges of discrimination by those persons whom they are purportedly designed to benefit. Rather, s.15(2) protects a special program from challenges by relatively advantaged groups seeking access to its benefits. Section 15(2) can never be used to justify excluding a child from the regular class and forcing her into a special program on the basis of a prohibited ground of discrimination, as suggested by the Appellant.

82. The Court in Roberts held that a distinction based on prohibited ground will *only be allowed* under s.14(1) if it is rationally connected to the purpose of the program. This analysis involves first considering whether a particular provision or limitation of a special program results in discrimination against a person suffering from the disadvantage the program was designed to benefit, and second, whether the provision or limitation is rationally connected to the purpose of the special program. In this context, a section 15(2) analysis would arise if the Appellant's special education program itself contained a provision or limitation which discriminated against a person who it was intended to benefit, on a prohibited ground. Only then would the rational connection test be applied. The issue in this case, however, is Emily's exclusion from the regular class based on her disability, not whether her disability is rationally connected to a provision or limitation contained in a special education program. Section 15(2) is not relevant to the analysis of whether the former is discriminatory under s.15(1). However, under the Appellant's analysis, which attempts to characterize disability itself as forming a rational

connection justifying exclusion from the regular class, no discriminatory treatment based on a person's disability could ever violate s.15(1), for the very reason that it would always be based on disability. This argument clearly is circular and defeats any purposive or logical interpretation of the Charter.

Roberts, supra, at p. 406, **Appellant's Book of Authorities, Tab 11.**

Issue 4 Are s.8(3) of the Education Act and s.6 of Regulation 305 of the Act justified as a reasonable limit under s.1 of the Charter?

83. The extent of the Appellant's argument on this point is that it did not have notice that the constitutional validity of the Education Act was being challenged, and therefore could not address s. 1 issues. However, as noted in paragraphs 25 to 31 herein, the application of the Charter, as well as the Code, has been directly at issue in this case since the commencement of the Tribunal hearing. The Appellant had notice of those arguments, and had ample opportunity to call evidence in response to them. In fact it did call some justificatory evidence before the Tribunal. Moreover, the nature of the evidence necessary to respond to the Charter and Code arguments raised by the Respondents is precisely the same type of evidence required under s. 1: for example, evidence relating to cost or safety concerns such as would be used to establish undue hardship; evidence relating to what options other than complete segregation, if any, were explored; and evidence regarding Ontario's approach to special education.

84. The only specific evidence which the Appellant claims it would have called if it had "proper notice" is the "historical, social and political context" in which Bill 82 was passed. However, it is clear from the record that the Appellant filed extensive evidence regarding Ontario's approach to special education following the Bill 82 amendments, as well as on the purpose of education generally, and Ontario's scheme of special education in particular.

Case on Appeal, Vol. III, Tab 40, p. 491, 502-512.

Case on Appeal, Vol. III, Tab 39 and Tab 36.

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85. The fact is that rather than responding to the Court's concerns about whether segregation was justified under s. 1, the Appellant chose to argue that segregation was not *prima facie* discriminatory, or alternatively, that it was protected from challenge by s. 15(2) of the Charter.

86. The Appellant did not, and has not, addressed whether the special education scheme under which it is operating is a reasonable limit under s. 1, and in particular, whether it infringes the equality rights of children with disabilities as little as possible. As the Court of Appeal held, the Education Act authorizes a segregated placement, without requiring a school board to show why less exclusionary forms of placement could not meet the child's needs. Therefore, the Charter rights of children with disabilities are not impaired as little as possible. In the specific matter of Emily's placement, it is clear from the Tribunal's Reasons that other less exclusionary placements for Emily were not considered by the Appellant. Therefore, the Court of Appeal did not err in finding that the test under s. 1 was not met.

Reasons of Tribunal, Case on Appeal, Vol IV, Tab 41, lines 2-5, 14-29.

R. v. Oakes, [1986] 1 S.C.R. 103, **Respondents' Book of Authorities, Tab 12.**

Issue 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?

87. In paragraphs 96 to 99 of its factum, the Appellant asserts that the Ontario Court of Appeal held that a child's equality rights are contingent upon parental consent, and that parents may "waive" the equality rights of their children. It is submitted that this is not an accurate synopsis of the Court of Appeal's ruling on this point. The Court recognized that Emily's parents are her legal guardians and are entitled to assert their daughter's constitutional rights on her behalf. The Court also recognized that segregated classes are not always an infringement of equality rights. This could be because a child cannot be accommodated in a regular class, therefore justifying segregation notwithstanding parental objections. It also could occur where parents consent on behalf of their child to a school board's recommendation of a segregated class because all parties believe this to be the best placement. There is no reason why a parent consenting to a segregated placement for a disabled child should be on a different footing from

a parent consenting to a child attending an all-girls school or a Catholic school. It is the coercive nature of imposing a segregated setting over a parent's objections which gives rise to a Charter issue, just as it would create a problem to insist that a Catholic child was required to attend a separate school because of her religion.

88. The Court of Appeal recognized that parents do not have an absolute right to make decisions for their children. Indeed the Court stipulated that integration itself was not an absolute right. The fact that parent's wishes can be overridden in some cases does not, however, mean that Charter rights should not be taken into account in making placement decisions. There is absolutely no authority for the proposition that Charter rights are irrelevant to a consideration of "best interests" of a child, including the authorities cited by the Appellant. Further, overriding a parent's decision because a child's life is in danger or because the child will be seriously harmed is a situation which is fundamentally different from the case at hand. The Appellant has asserted throughout that this case involves a pedagogical dispute about the setting in which a child should be educated. Surely this is not the kind of issue that warrants completely disregarding Charter rights asserted by parents for their children.

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

89. The Court of Appeal concluded that on each of the factors identified by the Tribunal as governing their decision (that is, Emily's intellectual and cognitive needs; her communication needs; her emotional and social needs; and her physical and safety needs) it was "not persuaded that [the Tribunal] would have necessarily concluded as it did had it appreciated the legal impediments to the selection of a segregated setting." Therefore, its decision was set aside.

> Reasons of the Court of Appeal for Ontario, Case on Appeal, Vol. IV, Tab 44, p. 729, lines 29-31.

90. It is submitted that this conclusion is correct. It is clear that the Tribunal based its decision on Emily's placement solely on its determination of whether she was "profiting" from

a regular class placement, and that it applied the evidence before it to that question alone. The Tribunal did not recognize Emily's *prima facie* right to education in the mainstream, and did not take into account the Charter in any meaningful way in reaching its decision. The Tribunal concluded that Emily's failure to achieve measurable success in a regular class mandated her removal to a segregated class without addressing why or how it considered the segregated class to be superior, or what would be done for Emily there that was not or could not be done in a regular class.

91. In failing to identify and apply the correct test and in failing to correctly place the onus on the party supporting segregation, the Tribunal throughout its reasons misdirected itself, or asked itself the wrong questions, on the central issue before it and as a result drew conclusions which are not responsive to the questions that needed to be addressed. For example:

a) The Tribunal concluded "the Emily's intellectual and academic needs cannot be met best, if indeed they can be met at all, in a regular class". The Tribunal did not consider how a segregated class would be any better able to meet those needs or what was provided in the segregated class that could not be provided in the integrated class. The evidence on this point was that the services provided in the segregated class were either being received by Emily outside school or were capable of being provided in a regular class.

b) The Tribunal concluded "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 did not consider how that instruction might be provided in a regular school setting, whether it would be provided by specialists outside the school altogether or whether the staff in the special segregated class was any better able to perform this task than the personnel available in the regular school setting, including School Board resource staff and outside consultants.

c) The Tribunal concluded that "there appears to be little, if any, social interaction between Emily and her peers in the regular class". The Tribunal did not address how, if at all, a segregated class could possibly improve upon Emily's interaction with her same-age non-disabled peers. Indeed, the proposition is logically absurd.

d) The Tribunal held that it was unable to conclude from the evidence before it "that the literature clearly establishes any one setting as the best to meet the needs of exceptional children." Applying the correct test, the Tribunal ought to have then gone on to conclude that the advantages of special segregated classes are therefore

not established. In the absence of evidence to support the superiority of segregation the Tribunal ought to have then found that the presumption in favour of regular class placement had not been rebutted.

e) The Tribunal, based on its own review of the literature, concluded that it did "not find support for placing Emily in a regular class". In doing so it was requiring proof that Emily would profit from a regular class placement. What it failed to consider is that the literature does not support the ability of segregated education systems to meet the needs of disabled children any better than regular class placements.

f) The Tribunal failed to consider whether other less exclusionary placement options had been explored by the Appellant, and did not consider such options in making own order for Emily's placement.

Reasons of the Tribunal, Case on Appeal, Vol. IV, Tab 41, p. 666, lines 5-7, p. 667, lines 24-31, p. 669, lines 15-17, p. 675, lines 7-9, p. 676, lines 22-23.

92. For these reasons, it is submitted that the Court of Appeal was correct in its conclusion that the Tribunal's decision would not necessarily have been the same had it appreciated Charter requirements, and properly identified and applied the correct test to the evidence. Moreover, although Emily currently is attending an integrated class within the separate school board, her parents still have the right to enroll her in the Appellant school board. Thus, the issue of her placement is not moot. Therefore, the Court's order that the matter be remitted to a differently constituted tribunal to determine Emily's placement in accordance with Charter principles is not in error.

PART IV - REMEDY REQUESTED

93. It is respectfully submitted that this appeal should be dismissed with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

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PART V - TABLE OF AUTHORITIES

A. Cases:

B. Other Materials

Lepofsky, D. and H. Schwartz, "An Erroneous Approach to the Charter's Equality Guarantee: R v. Ertel" (1988) 67 Canadian Bar Review 115. 28

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Sopinka, J. et al., The Law of Evidence in Canada, Toronto: Butterworths, 1992. . . . 33

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Welch, Robert, Community Living for the Mentally Retarded in Ontario: A new Policy Focus, March 1973. 20

Williston, Walter B., Present Arrangement for the Care and Supervision of Mentally Retarded Persons in Ontario a Report to the Minister of Health of Ontario, August, 1971. 19

C. Statutes

Human Rights Code, R.S.O. 1990 c.H. 19 preamble, ss. 1, 10(1) and 17. 3

Appendix "A"

Canadian Charter of Rights and Freedoms

**Part I of the Constitution Act, 1982,
being Schedule B of the Canada Act 1982 (U.K.), 1982,
c. 11, ss. 1, 15.**

...

Guarantee of Rights and Freedoms

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

...

Equality Rights

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.

(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.

Human Rights Code,

R.S.O. 1990 c. H.19, preamble and s.1.

WHEREAS recognition of the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world and is in accord with the Universal Declaration of Human Rights as proclaimed by the United Nations;

AND WHEREAS it is public policy in Ontario to recognize the dignity and worth of every person and to provide for equal rights and opportunities without discrimination that is contrary to law, and having as its aim the creation of a climate of understanding and mutual respect for dignity and the worth of each person so that each person feels a part of the community and able to contribute fully to the development and well-being of the community and the Province;

AND WHEREAS these principles have been confirmed in Ontario by a number of enactments of the Legislature and it is desirable to revise and extend the protection of human rights in Ontario;

Therefore, Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario enacts as follows:

PART I
FREEDOM FROM DISCRIMINATION

1. Every person has a right to equal treatment with respect to services, goods and facilities, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status or handicap. 1981, c. 53, s. 1; 1986, c. 64, s. 18(1).

Human Rights Code,

R.S.O. 1990 c. H.19, s.10(1).

PART II
INTERPRETATION AND APPLICATION

10. (1) In Part I and in this Part,

...

"because of handicap' means for the reason that the person has or has had, or is believed to have or have had,

(a) any degree of physical disability, infirmity malformation or disfigurement that is caused by bodily injury, birth defect or illness and, without limiting the generality of the foregoing, including diabetes mellitus, epilepsy, any degree of paralysis, amputation, lack of physical coordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or physical reliance on a guide dog or on a wheelchair or other remedial appliance or device,

(b) a condition of mental retardation or impairment,

(c) a learning disability, or a dysfunction in one or more of the processes involved in understanding or using symbols or spoken language,

(d) a mental disorder, or

(e) an injury ir disability for which benefits were claimed or received under the Workers' Compensation Act; ("a cause d'un handicap")

Human Rights Code,

R.S.O. 1990 c. H.19, s.17.

17.(1) A right of a person under this Act is not infringed for the reason only that the person is incapable of performing or fulfilling the essential duties or requirements attending the exercise of the right because of a handicap. 1986, c. 64, s. 18(9).

(2) The Commission, a board of inquiry or a court shall not find a person incapable unless it is satisfied that the needs of the person cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.

Education Act,

R.S.O. 1990, c. E.2, s.1(1).

DEFINITIONS

1.(1) In this Act and the regulations, except where otherwise provided in the Act or regulations,

...

"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 board,

(a) of which the pupil is a resident pupil,

(b) that admits or enrols the pupil other than pursuant to an agreement with another board for the provision of education, or

(c) to which the cost of education in respect of the pupil is payable by the Minister; ("eleve en difficulte") R.S.O. 1980, c. 129, s. 1(1) pars. 20, 21.

Education Act,

R.S.O. 1990, c. E.2, s.8(3).

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; and

(b) in respect of special education programs and services, define exceptionalities of pupils, and prescribe classes, groups or categories of exceptional pupils, and require boards to employ such definitions or use such prescriptions as established under this clause.

REGULATION 305
SPECIAL EDUCATION IDENTIFICATION PLACEMENT AND REVIEW COMMITTEES AND APPEALS

R.R.O. 1990, Reg. 305, s. 6; Fr. version O. Reg. 663/91

6. (1) An exceptional pupil shall not be placed in a special education program without the written consent of a parent of the pupil.

(2) Where a parent of an exceptional pupil,

(a) refuses or fails to consent to the placement recommended by a committee and to give notice of appeal under s. 4; and

(b) has not instituted proceedings in respect of the determinations of the committee within thirty days of the date of the written statement prepared by the committee,

The board may direct the appropriate principal to place the exceptional pupil as recommended by the committee and to notify a parent of the pupil of the action that has been taken.