Court File No.: 24668

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

B E T W E E N:

BRANT COUNTY BOARD OF EDUCATION

Appellant
(Respondent)

- and -

CLAYTON EATON and CAROL EATON

Respondents
(Appellants)

- and -

ATTORNEY GENERAL FOR ONTARIO, ATTORNEY GENERAL FOR BRITISH COLUMBIA, ATTORNEY GENERAL FOR QUEBEC, EASTER SEAL SOCIETY, DOWN SYNDROME ASSOCIATION, ONTARIO PUBLIC SCHOOL BOARDS ASSOCIATION, CANADIAN FOUNDATION FOR CHILDREN, YOUTH AND THE LAW, LEARNING DISABILITIES ASSOCIATION OF ONTARIO, COUNCIL OF CANADIANS WITH DISABILITIES, CANADIAN ASSOCIATION FOR COMMUNITY LIVING, CONFEDERATION DES ORGANISMES DES PERSONNES HANDICAPPEES DU QUEBEC, PEOPLE FIRST OF CANADA, COMMISSION DES DROITS DE LA PERSONNE ET DES DROITS DE LA JEUNESSE

Intervenors

CONDENSED BOOK OF EVIDENCE AND AUTHORITIES

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B E T W E E N :

BRANT COUNTY BOARD OF EDUCATION

Appellant (Respondent)

- and -

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Intervenors

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Court File No.: C19214

COURT OF APPEAL FOR ONTARIO

THE HONOURABLE MR. JUSTICE CARTHY THE HONOURABLE MADAM JUSTICE ARBOUR THE HONOURABLE MR. JUSTICE LABROSSE	)))	WEDNESDAY, THE 15TH DAY OF FEBRUARY, 1995.

B E T W E E N:

CAROL EATON AND CLAYTON EATON

Appellants

- and -

THE BRANT COUNTY BOARD OF EDUCATION

Respondent

- and -

CANADIAN DISABILITY RIGHTS COUNCIL, ONTARIO ASSOCIATION FOR COMMUNITY LIVING, and ATTORNEY GENERAL OF ONTARIO

Intervenors

O R D E R

THIS APPEAL by the Applicants, Carol Eaton and Clayton Eaton, for an Order setting aside the Order of the Divisional Court dated February 8, 1994, which dismissed the Applicants' application for judicial review of the Order of the Ontario Special Education (English) Tribunal dated November 19, 1993, was heard on December 19, 20 and 21, 1994 at Osgoode Hall, Toronto, Ontario, and the Reasons for Judgment were released on February 15, 1995.

ON READING the Appeal Book, the Respondent's Appeal Book, the record of the Tribunal, facta filed on behalf of the parties and the intervenors, and excerpts from the Transcripts of Evidence in the proceedings before the Ontario Special Education (English) Tribunal, and on hearing the submissions of counsel for the Applicants, counsel for the Respondent, counsel for the Intervenor, Attorney General of Ontario, counsel for the Intervenor, the Ontario Association for Communication Living and counsel for the Intervenor, the Canadian Disability Rights Council,

1. **THIS COURT ORDERS** that the appeal be allowed and that the decision of the Tribunal be set aside;

2. **AND THIS COURT ORDERS** that Section 8 of the Education Act, R.S.O. 1990, c.E.2, as amended, should be read to include a direction that, unless the parents of a child who has been identified as exceptional by reason of a physical or mental disability consent to the placement of that child in a segregated environment, the school board must provide a placement that is the least exclusionary from the mainstream and still reasonably capable of meeting the child's special needs;

3. **AND THIS COURT ORDERS** that the matter be remitted to a differently constituted Tribunal for re-hearing in accordance with the direction set out in paragraph 2 above.

recognition of exceptional tribunal → of purpose was to provide a "legal framework" within which the tribunal could exercise its expertise

W. Kent Thomson
ASSISTANT REGISTRAR

EATON (Appellants) -and- BRANT COUNTY BOARD OF EDUCATION (Respondent)

Court File No.: C19214

Order of the Court of Appeal reversing the Order of the Divisional Court, dated February 15, 1995

24

COURT OF APPEAL FOR ONTARIO

Proceeding commenced at Toronto

O R D E R

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Ontario

Issued under the authority of the Minister of Education
Hon. Thomas L. Wells

Circular P1J1
Provincial Curriculum Policy for the Primary and Junior Divisions of the Public and Separate Schools of Ontario

Exhibit - The Formative Years, Ministry of Education, 1975, filed as Exhibit R-34 at Ontario Special Education (English) Tribunal, first referred to at the hearing before The Ontario Special Education (English) Tribunal on June 28, 1993

1975

The Formative Years

Exhibit - The Formative Years, Ministry of Education, 1975, filed as Exhibit R-34 at Ontario Special Education (English) Tribunal, first referred to at the hearing before The Ontario Special Education (English) Tribunal on June 28, 1993

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The Formative Years

Education in the Primary and Junior years, both in the home and in the school, is of paramount importance. The experiences of these early years mould the child's attitudes to learning and provide the basic skills and impetus for his continuing progress.

In setting out the fundamentals of the program for the Primary and Junior Divisions of the elementary schools of Ontario, recognition has been given to the following important factors:

- the philosophical commitment of our society to the worth of the individual;
- significant research conducted in Canada and abroad;
- the recommendations and viewpoints contributed by teachers, parents, trustees, administrators, and other citizens of this province through the cyclic review process.

It is the policy of the Government of Ontario that every child have the opportunity to develop as completely as possible in the direction of his or her talents and needs. On behalf of the educational community and other citizens, the Government pledges to support an education that develops basic skills, knowledge, and attitudes, that endeavours to provide a fuller life during a child's years in the Primary and Junior Divisions, and that endeavours 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 follows that the curriculum will provide opportunities for each child (to the limit of his or her potential):

- to acquire the basic skills fundamental to his or her continuing education;
- to develop and maintain confidence and a sense of self-worth;
- to gain the knowledge and acquire the attitudes that he or she needs for active participation in Canadian society;
- to develop the moral and aesthetic sensitivity necessary for a complete and responsible life.

It is also the policy of the Government of Ontario that education in the Primary and Junior Divisions be conducted so that each child may have the opportunity to develop abilities and aspirations without the limitations imposed by sex-role stereotypes.

To achieve these goals, the Ministry of Education holds certain expectations regarding the nature of the program in the Primary and Junior Divisions and the related responsibilities of teachers, principals, and supervisory officials. The responsibilities include:

(1) planning and implementing programs consistent with the goals and expectations of the Ministry of Education;
(2) assessing each child's learning on a continuous basis to ensure learning at a level and rate that are in keeping with individual abilities and, where warranted, diagnosing difficulties and making appropriate changes in the program or teaching-learning strategies;
(3) ensuring that each child experiences a measure of success in his or her endeavours, so that each may develop the self-confidence needed for further learning;
(4) organizing space and facilities and providing resources that allow scope for imaginative and varied activities;
(5) communicating with parents concerning each child's progress.

Programs developed at the local level should provide each child with opportunities to achieve the levels of competence and the forms of growth and development implied in the aims that follow. Such programs should allow individual children to move beyond the expectations of the program without subjecting those who cannot reach them to loss of self-esteem or confidence. The programs should also accommodate any modifications that may be necessary to meet the needs of children with learning or other disabilities.

Aims related to Communications (language and mathematics) have been set out separately for each division, and may be found on pages 6 to 16. Aims related to the Arts and to Environmental Studies are not allocated to particular divisions, and are outlined on pages 17 to 23. The sequence in which the aims are listed in the document does not imply an order of priority.

Listed under each aim are a number of more specific learning opportunities that contribute to the major aim.

Reasons for Judgment of the Divisional Court dated February 11, 1994

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Court File No. 42/94

ONTARIO COURT OF JUSTICE

(GENERAL DIVISION)

DIVISIONAL COURT

CARRUTHERS, DUNNET and ADAMS JJ.

B E T W E E N:	
CAROL EATON AND CLAYTON EATON Applicants	Anne Molloy and Janet Budgell for the Applicants
- and -	
THE BRANT COUNTY BOARD OF EDUCATION Respondent	Christopher Riggs, Q.C. and Brenda Bowlby for the Respondent
	Dennis Brown Q.C. and John Zarundy for the Intervenor, the Attorney General for Ontario
	Heard: February 8, 1994

ADAMS J. (ORALLY)

This application seeks to quash the determination of the Ontario Special Education Tribunal that an educational placement of Emily Eaton in a special class best meets her special needs, while a continued placement in a regular class, not only does not do so, but is detrimental to her.

Emily Eaton is a nine-year old student enrolled in the Brant County Board of Education. Emily has cerebral palsy. She is unable to communicate orally and is unable to use sign language meaningfully. The Education Act, R.S.O. 1990, c.E.2. and its

Regulations set out a comprehensive scheme for the identification of exceptional pupils and for the placement of those students into educational settings where the special educational programmes and services appropriate to meet their needs can best be delivered. This scheme also provides for a right of parents to appeal the identification and placement of their children by school boards.

Regulation 305, R.R.O. 1990, sets out the requirement that every board of education set up an Identification, Placement and Review Committee, hereinafter the IPRC, to deal with the identification and placement of exceptional pupils in the first instance. From the IPRC, there is an appeal to a special education appeal board and, from this appeal board, parents may apply for leave to appeal to the Special Education Tribunal.

In November 1989, the IPRC for the Brant County Board, identified Emily as exceptional and determined that she would be placed, on a trial basis, in a kindergarten in the parents' neighbourhood school, with an educational assistant. In June of 1990, the IPRC determined that Emily would continue in kindergarten for the 1990-91 school year. In May of 1991, it was determined that Emily would be placed in the regular grade 1 class. During Grade 1, a number of concerns arose concerning the appropriateness of her continued placement in a regular classroom.

There is no need to itemize all the concerns, save to say

that the teachers and educational assistants working with her came to the conclusion, based on this three-year experience, that the continued placement was not in Emily's best interests and, indeed, that its continuation might well harm her. These concerns were shared with the IPRC and Emily's parents. Thereafter, and by decision dated February 24, 1992, the IPRC confirmed Emily's identification as an exceptional pupil, but determined that she would be placed in a special education class. Emily's parents appealed this decision to a special education appeal board which unanimously confirmed the decision of the IPRC. The Eatons then appealed, a leave hearing being waived, to the Ontario Special Education Tribunal. This application is in respect to the resulting decision of that tribunal.

In the intervening year between the IPRC decision and the conclusion of the appeal hearing, Emily remained in a regular class placement in Grade 2, pursuant to the order of Borins J., dated September 11, 1992. Her teachers and educational assistants continued, however, to be concerned about Emily.

Before this court, it was argued that the Tribunal was not expert, as evidenced by the presence of only "a final and binding" style privative clause. The essential errors alleged to have been committed by the Tribunal were: (1) conducting its own literature search on the close of the hearing, without permitting comment by the applicants prior to the Tribunal rendering its

decision; and (2) failing to place on the Board of Education a legal burden, said to arise under the Education Act by implication from the Charter of Rights and Freedoms and the Ontario Human Rights Code, to establish that the transfer of Emily out of the regular class to a special education class would be clearly better for her. With respect to this latter ground, it was also submitted that the Tribunal had no basis for rejecting the expert evidence adduced by the applicant that "an integrated approach" was almost always the preferred approach. It was further submitted that there was no evidence before the Tribunal affirmatively establishing that the special education class proposed would redress the concerns raised about Emily's education and would be clearly better for her. Finally, it was submitted the Tribunal failed to deal with evidence that a special education class would present its own negative problems for Emily.

We are all of the view that this specialized body dealt comprehensively and thoughtfully with all the issues raised before it and with the central focus being what was best for Emily in all of the circumstances. It had before it the evidence of three years of experience with Emily in a regular class environment; the evidence of Emily's parents, based on their experience with her and their understanding of her needs; and the evidence of various expert witnesses. The Tribunal accepted that a regular class was to be considered the preferred placement, as long as this was consistent with the best interests of a student in any particular

case. The Tribunal was also conscious of the Charter of Rights and Freedoms and the Ontario Human Rights Code.

Against this backdrop and after a 21-day hearing, the Tribunal unanimously denied the appeal and affirmed the determination of the IPRC of February 24, 1992.

While we find the Tribunal to be worthy of curial deference given the structure of the legislation, the subject matter, and the composition of the Tribunal, we can find no error of law on the record before us in any event. Onus did not play a role in the Tribunal's determination. It found there was ample evidence before it establishing that the recommended placement was in Emily's best interest. This was a factual determination it was entitled to make on the evidence placed before it. There was also no legal error in giving the weight it did to the testimony of the three experts called by the applicants, having regard to the evidence they gave and the admissions they made.

Furthermore, we are not satisfied, in these particular circumstances, that the Tribunal's post-hearing review of "the literature" to which the experts generally referred did anything more than confirm its independent assessment of the evidence before it and the various admissions of the applicants' experts with regard to that research. Indeed, we note that counsel for the applicants, in an argument directed at seeking to place before the

Tribunal certain articles in the literature, stated that the Tribunal was:

> ... an expert Tribunal and what I am doing is putting forward articles which you've already read, at least know about, and I am pointing to the ones in which I would place emphasis. There's nothing to stop you from reading these articles in any event. I would expect that you probably would do that.

Accordingly, there was no denial of natural justice in the circumstances.

Finally, we have great difficulty in appreciating how the Charter of Rights and Freedoms and the Ontario Human Rights Code create a presumption in favour of one pedagogical theory over another, particularly when the implementation of either theory needs the protection of the saving provisions found in s.15 of the Charter and s.14 of the Code. But in this case, that issue is entirely academic because the Tribunal found the evidence clearly established that Emily's best interests will be better served with the recommended placement.

In dismissing this application, however, we echo the Tribunal's reminder that our decision does not relieve the School Board and the parents of the obligation to collaborate creatively in a continuing effort to meet Emily's present and future needs.

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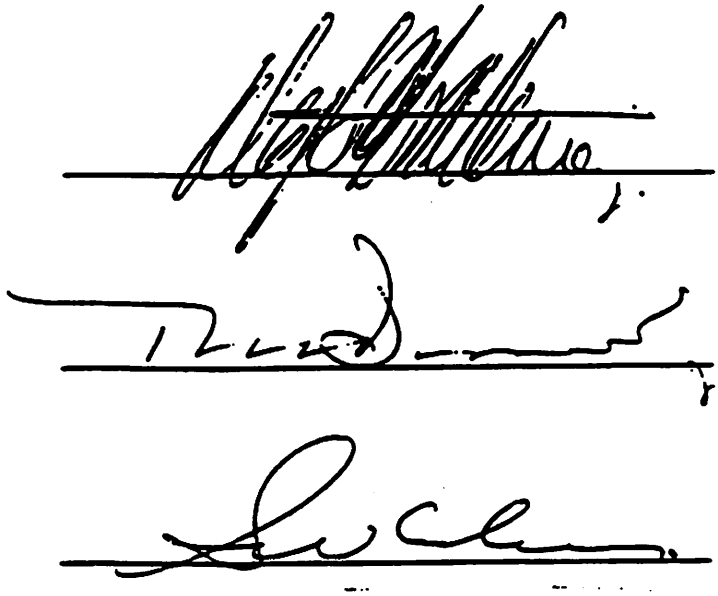
There is no order as to costs



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Reasons for Judgment of the Divisional Court dated February 11, 1994

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Court File No. 42/94

ONTARIO COURT OF JUSTICE

(GENERAL DIVISION)

DIVISIONAL COURT

CARRUTHERS, DUNNET AND ADAMS JJ.

BETWEEN:

CAROL EATON AND CLAYTON EATON

Applicants

- and -

THE BRANT COUNTY BOARD OF EDUCATION

Respondent

ORAL JUDGMENT

ADAMS J.

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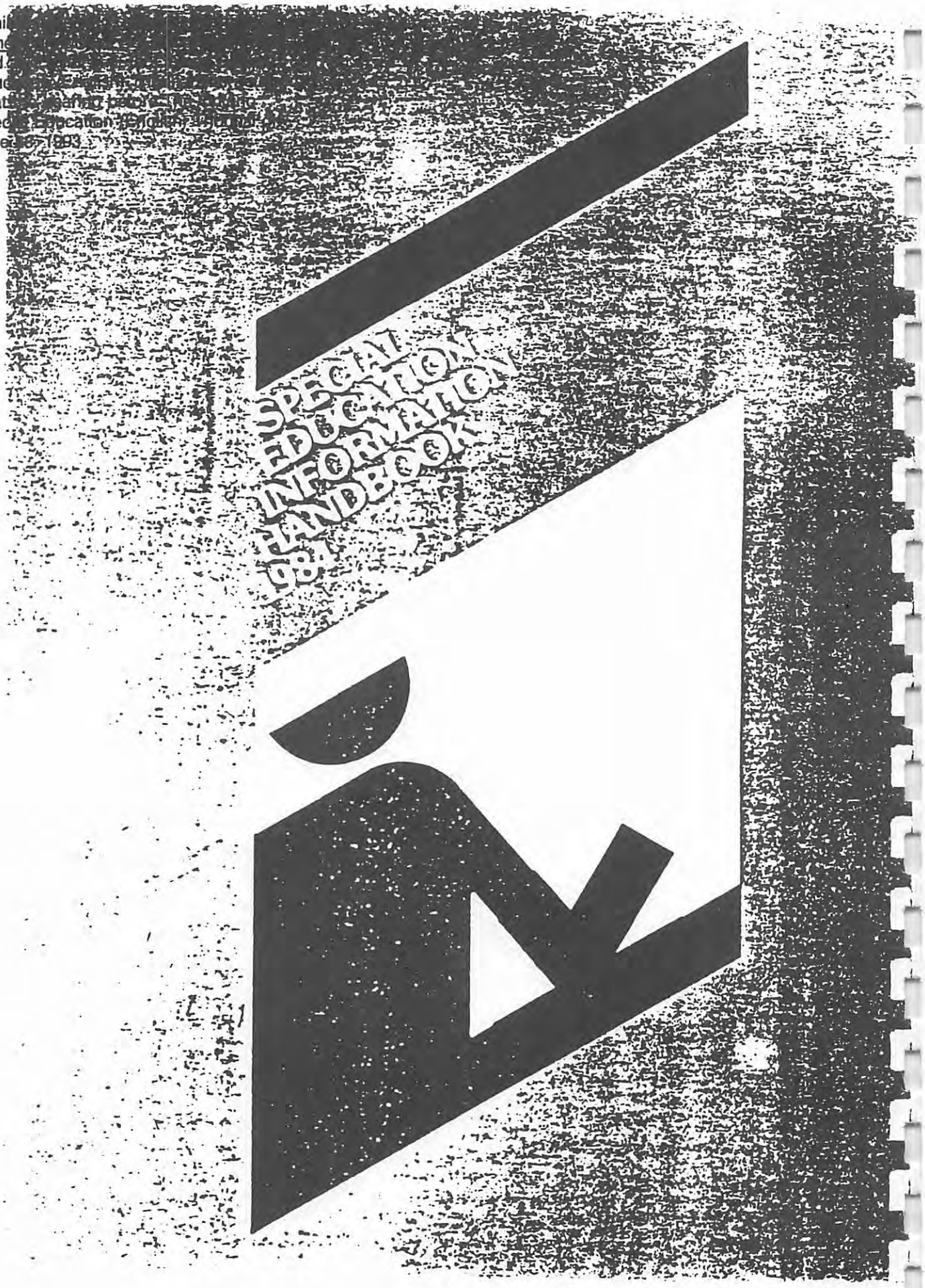

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PREFACE

This publication combines references to legislation, regulations, policies, and resources pertaining to the education of exceptional pupils in Ontario. It is intended to serve as an information resource to assist trustees and administrators in implementing, reviewing, and evaluating special education programs and services.

This publication replaces the Special Education Information Handbook 1981.

It is the Ministry of Education's intention to update this handbook regularly. Suggestions for improving this document may emerge as a result of its use. These may be submitted to:

Director
Special Education Branch
17th Floor, Mowat Block
Queen's Park
Toronto, Ontario
M7A 1L2

Provisions For Pupils

In accordance with the Education Act and regulations, by September 1985:

- each Ontario school-age pupil is entitled to access to publicly supported education in the pupil's language of instruction, regardless of the pupil's special needs;
- pupils who are exceptional are entitled to special education programs and services suited to those needs;
- parents or guardians of exceptional pupils shall be interviewed with respect to the identification and placement of such pupils.

2. Basic Principles

Programs and services for all pupils in Ontario, including those who are exceptional, are provided in accordance with the requirements of the Education Act and with principles articulated in the following circulars:

- Schools General: The Foundations of Curriculum in the Elementary and Secondary Schools of Ontario
- Circular PIJ1: The Formative Years, 1975
- Ontario Schools, Intermediate and Senior Divisions (Grades 7-12/OACs): Program and Diploma Requirements, 1984

These principles include the following:

- All persons have a right to education; society has an obligation to provide an opportunity for education through schooling.
- All pupils should have equality of educational opportunity and a curriculum of a high quality appropriate to their needs, abilities, and interests.
- Learning is a lifelong process and every person should be given opportunities to acquire the attitudes, skills, and habits that will enable him/her to derive maximum benefit from the learning opportunities he/she encounters in life.
- Both the program and the environment of the school should reflect respect for the worth of the individual and respect for the differences among individuals and groups.

Each student should have access to an educational program that fosters his/her physical, social, emotional, intellectual, and spiritual development.

-- Each person has unique needs that must be recognized and planned for in the curriculum so that each person can function effectively as an individual, as a member of a family, as a worker, and as a member of society and the global community.

-- The school and its program should reflect recognition of, and support for, the role of the family in the nurturing and education of the young.

-- The school and its program should reflect a balance between the rights of the individual and the needs of society.

-- The school and its program should continually anticipate the future and strive to respond to changes in society to enable students to live effectively in a changing environment and to use their skills, imagination, and creativity to shape their world.

-- There should be co-operation and a willingness to share responsibilities among all parties responsible for schooling: the Ministry of Education, school boards, parents, students, teachers, the community, and other ministries and agencies.

3. The Goals of Education

The goals of education in Ontario are as follows:[1]

> The Ministry of Education in Ontario strives to provide in the schools of the province equal opportunity for all. In its contribution to programs, personnel, facilities, and finances, the ministry has the overall purpose of helping individual learners to achieve their potential in physical, intellectual, emotional, social, cultural, and moral development. The goals of education, therefore, consist of helping each student to:
>
> 1. develop a responsiveness to the dynamic processes of learning

---

[1] Ministry of Education, Ontario, Ontario Schools, Intermediate and Senior Divisions (Grades 7-12/OACs): Program and Diploma Requirements, 1984. (Toronto: Ministry of Education, Ontario, 1984), p. 3. Henceforth cited as OSIS.

Volunteer Services

Volunteers are often utilized in the school. Such persons might be parents, senior citizens, or students. School boards should provide guidelines for the selection, training, and supervision of the type of volunteers best suited to their particular school needs.

4. Professional Development

Most school boards offer comprehensive programs of professional development activities for trustees, administrators, teachers and support staff. These programs respond to a wide range of needs and interests related to special education.

The Ontario Teachers' Federation and its affiliates provide speakers, program suggestions, and workshops to their members. The Council for Exceptional Children is one of many organizations that host conferences and workshops at the provincial and local levels. Faculties of education and the Ontario Institute for Studies in Education provide many conferences in addition to their degree-granting programs.

5. Spectrum of Educational Settings

Boards are encouraged to provide, directly or indirectly, a continuum of service that would provide as full a range of placements as possible to meet the needs of exceptional pupils. The primary focus in the development of such a range of placements is to provide an exceptional pupil with the strengths and capabilities needed to return to a regular classroom or achieve success in a specialized setting.

Specialized instructional settings are based on the needs of a pupil who is not experiencing success in the regular setting. The opportunity for a specialized setting allows for greater pupil-teacher interaction and a greater focus on individual needs. The hierarchy of specialized settings reflects the intensity of this interaction and individualization required for a pupil to demonstrate success.

In many cases, the degree of supplementary assistance needed by an exceptional pupil can be met in the regular classroom, through the provision of specialized consultation to the teacher, special equipment, and the availability of additional persons with specialized skills or tasks to perform.

In order to achieve a more intense learning experience it may be deemed advisable to provide a setting in which a greater degree of individualization is possible. In this instance the pupil may meet with a qualified special education teacher. Such a session may be conducted on an individual or small group basis. This option permits the pupil to maintain a regular class placement.

The needs of some pupils are such that a more highly specialized setting is required. At this level of need, the self-contained special education classroom may be the placement recommended.

For some children whose degree or complexity of need has been unresponsive to traditional methods of help, different collaborative forms of therapeutic and educational intervention in a variety of settings may be necessary.

Where school boards cannot provide placements within their local jurisdiction, they may enter into an agreement with other school boards for some or all of the appropriate special education program(s) and service(s).

Policies and procedures for early identification and ongoing assessment, in accordance with the Education Act and regulations and Ministry of Education memoranda, should be utilized as an integral part of the process leading to special education.

6. Identification and Description of a Pupil's Needs

The identification of a pupil's needs is crucial to the provision of special education programs and services. The implementation of Policy/Program Memorandum No. 11, 1982, "Early Identification of Children's Learning Needs", requires school boards to identify all pupils' strengths and weaknesses when they are first enrolled and to reassess them on a regular basis. The nature of the classroom situation and of the relationship between the teacher and the pupil can generate insightful information regarding the pupil's current level of functioning. However, the major focus in this process is on the teacher's ability to observe the pupil's behaviour and synthesize pertinent assessment data into meaningful acceptable educational objectives.

The process of early identification should alert parents, as well as teachers, to the special needs of some pupils. Referral to an Identification, Placement, and Review Committee (IPRC) may result in additional specialized assessments being conducted. A number of factors -- physical, social, emotional, cultural, and environmental -- influence pupil's learning needs. Effective liaison and communication with parents and professionals in a variety of disciplines are essential.

In the process of identifying exceptional pupils, the IPRC is obliged to employ the definitions of exceptionalities provided by the Minister of Education. (See part 1, section 9 of this document.) Each board is required, by legislation, to develop a parent guide for the information of parents/ guardians to describe the referral, identification, placement and appeal process, and set out the provisions of section 6 of Ontario Regulation 554/81.

(a) a school or class is closed for a temporary period because of failure of transportation arrangements, inclement weather, fire, flood, a breakdown of the school heating plant or a similar emergency, or a school is closed under the *Health Protection and Promotion Act* or the *Education Act*; and

(b) the school calendar is not altered under subsection (1),

the day on which the school or class is closed remains an instructional day or a professional activity day, as the case may be, as designated on the school calendar applicable to such school or class. O. Reg. 822/82, s. 6.

7.—(1) Every board shall publish annually its school calendar or school calendars and ensure that copies thereof are available at the beginning of the school year for the information of parents and pupils.

(2) A school calendar or school calendars published under subsection (1) shall, in addition to the information required to be listed under subsection 4 (1), indicate in a general manner the activities to be conducted on professional activity days. O. Reg. 822/82, s. 7.

8. In each year, every board shall undertake an annual evaluation of the activities of the professional activity days of the previous year and retain such evaluations on file. O. Reg. 822/82, s. 8, *revised*.

9.—(1) A Remembrance Day service shall be held in every school on the 11th day of November or, when the 11th day of November is a Saturday or a Sunday, on the Friday preceding the 11th day of November.

(2) Subsection (1) does not apply where the school participates in a service of remembrance at a cenotaph or other location in the community. O. Reg. 822/82, s. 9.

REGULATION 305

SPECIAL EDUCATION IDENTIFICATION PLACEMENT AND REVIEW COMMITTEES AND APPEALS

1. In this Regulation,

"Appeal Board" means a Special Education Appeal Board established by a board under section 4;

"committee" means a Special Education Identification, Placement and Review Committee established under this Regulation and includes a Special Education Program Placement and Review Committee heretofore established under the regulations that meets the requirements of this Regulation for a Special Education Identification, Placement and Review Committee;

"parent" includes a guardian of a pupil. O. Reg. 554/81, s. 1.

2.—(1) Where a board has established or establishes special education programs or provides special education services for its exceptional pupils it shall establish in accordance with section 3 one or more Special Education Identification, Placement and Review Committees and shall determine the jurisdiction that each such committee shall have.

(2) A principal,

(a) may upon written notification to a parent of a pupil; or

(b) shall at the written request of a parent of a pupil,

refer the pupil to the committee or, having regard to the jurisdiction of the committees where more than one committee has been established, refer the pupil to the committee that the principal considers to be the most appropriate in respect of the pupil.

(3) Where a committee is engaged in identifying a pupil as an exceptional pupil or in determining the recommended placement of such a pupil, the committee shall obtain and consider an educational assessment of the pupil and,

(a) where the committee determines that a health assessment or a psychological assessment or both of the pupil are required to enable the committee to make a correct identification or determination in respect of the pupil and with the written permission of the parent, obtain and consider a health assessment of the pupil by a legally qualified medical practitioner and obtain and consider a psychological assessment of the pupil;

(b) where, in the opinion of the committee, it is practicable so to do, the committee shall, with the consent of a parent of the pupil, interview the pupil;

(c) unless the parent waives or refuses to participate in an interview, the committee shall interview a parent of the pupil; and

(d) the committee shall cause to be sent to a parent of the pupil and to the principal who has made the referral, as soon as possible after the making of its determination, a written statement of,

(i) the identification it has made of the needs of the pupil,

(ii) where, in the opinion of the committee the pupil is an exceptional pupil, the recommendation made in respect of the placement of the pupil, and

(iii) the date the committee proposes to notify the board of its determination.

(4) A parent of a pupil may, prior to the date set out in a statement under subclause (3) (d) (iii) in respect of the pupil, upon written notice to the principal, request in writing a meeting with the committee to discuss the statement and the committee shall arrange to meet with the parent and the principal for such purpose.

(5) Each committee shall notify the director of education of the board, or the secretary of the board where the board does not have a director of education,

(a) on or after the date set by the committee as set out in the statement; or

(b) after the discussion of the statement held under subsection (4),

of the determination made by the committee as set out in the statement and the change, if any, made in the determination as a consequence of such discussion and shall send a copy of such notice to the parent and the principal.

(6) A board may establish procedures in addition to the requirements set out in subsection (3) that shall be followed by a committee.

(7) Each board that has established one or more committees shall prepare a guide for the use and information of parents that,

(a) describes the circumstances in which and the procedures under which a pupil may be referred to a committee;

(b) outlines the procedures referred to in subsection (3) and any additional procedures required by the board under subsection (6) that are required to be followed by a committee in identifying a pupil as an exceptional pupil and determining the recommended placement of the pupil;

(c) explains the function of and the right to appeal determinations of a committee to the Appeal Board; and

(d) sets out the provisions of section 6 of this Regulation,

and shall ensure that copies thereof are available at each school within the jurisdiction of the board and at the head office of the board and shall provide copies for the appropriate Regional Director of Education of the Ministry.

(8) Where a board provides schools or classes under Part XII of the Act, the board shall ensure that the guide referred to in subsection (7) is available in the English or French language as the case may be. O. Reg. 554/81, s. 2.

3.—(1) A committee shall consist of such number of members, not fewer than three, as the board that establishes the committee may determine, all of whom, subject to subsection (2), shall be appointed by the board and one of whom shall be a supervisory officer or a principal employed by the board, except that where the board does not employ a supervisory officer and employs only one principal, one of such members shall be a person approved by the appropriate Regional Director of Education.

(2) A supervisory officer referred to in subsection (1) may designate a person to act in his or her place as a member of the committee without the approval of the board.

(3) A member or trustee of the board is not eligible to be appointed as a member of a committee. O. Reg. 554/81, s. 3 (1-3).

(4) Where an identification, placement or review of a placement under consideration by a committee is in respect of a secondary school pupil admitted to secondary school from a separate school, or in respect of a trainable retarded pupil of a divisional board whose parent is a separate school supporter, the board that operates the secondary school, or the divisional board, as the case may be, shall advise the separate school board of the identification, placement or review under consideration and when requested so to do by the separate school board shall appoint as an additional member of the committee for the purpose only of such consideration,

(a) a supervisory officer or a principal of the separate school board from among the supervisory officers and principals designated for such purpose by the separate school board; or

(b) a provincial supervisory officer or other person designated by the Regional Director of Education for the region in which the head office of the secondary school or divisional board, as the case may be, is situate where the separate school board has appointed only one principal and does not employ a supervisory officer. O. Reg. 554/81, s. 3 (4), *revised*.

(5) Where a board provides a school or class under Part XII of the Act and is required to establish one or more committees under section 2 of this Regulation, it shall establish one or more additional committees,

(a) comprised of members who are French-speaking where French is the language of instruction in such school or class; or

(b) comprised of members who are English-speaking where English is the language of instruction in such school or class,

and where a pupil who is enrolled in such school or class is referred to a committee and a parent of the pupil so requests, the committee whose members are French-speaking or English-speaking, as the case may be, shall consider the identification, the placement and any review of the placement of the pupil. O. Reg. 554/81, s. 3 (5).

4.—(1) A parent of a pupil who disagrees with,

(a) the identification of the pupil as an exceptional pupil;

(b) the decision that the pupil is not an exceptional pupil; or

(c) the placement of the pupil as an exceptional pupil,

as determined by a committee, may give to the secretary of the board within fifteen days of the discussion referred to in subsection 2 (4), or in subsection 10 (3), as the case may be, a written notice of appeal of the determination of the committee and the board shall within thirty days of the receipt of the notice of appeal by the secretary establish and, subject to subsections 7 (1) to (5), appoint the members of an Appeal Board.

(2) Where the parent of a pupil gives notice of appeal under subsection (1), the notice shall indicate whether the disagreement with the decision of the committee is in respect of the matter referred to in clause (1) (a), (b) or (c) or in respect of both of the matters referred to in clauses (1) (a) and (c), as the case may be, and shall include a statement that sets out the parent's disagreement with the decision. O. Reg. 554/81, s. 4.

5. An Appeal Board shall not reject or refuse to deal with an appeal by reason of any actual or alleged deficiency in the statement referred to in subsection 4 (2) or in the failure of the parent, in the opinion of the Appeal Board, to accurately indicate in the notice of appeal the subject of the disagreement, and where, during the meeting referred to in subsection 7 (7), the true nature of the disagreement and the reasons therefor are ascertained, the notice of appeal shall be deemed to be amended accordingly and shall be so reported to the secretary of the board under subsection 7 (10). O. Reg. 554/81, s. 5.

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 section 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. O. Reg. 554/81, s. 6.

7.—(1) A Special Education Appeal Board shall consist of three members none of whom shall have had any prior involvement with the matter under appeal.

(2) Where a pupil in respect of whom an appeal is brought under section 4 is enrolled in a school or class established under Part XII of the Act, a parent of the pupil may request that the appeal be conducted before an Appeal Board comprised of members who are French-speaking or English-speaking, as the case may be, and the board shall ensure that the request is complied with by appointing where necessary, a chair and members of the Appeal Board who are French-speaking or English-speaking as required, and this subsection applies even though the parent may not have requested that the identification, the placement or review of the placement of the pupil have been conducted by members of a committee who were French-speaking or English-speaking, as the case may be.

(3) The chair of the Appeal Board, who shall be designated as such by the board, shall not be, or have been,

(a) a member or a trustee of the board; or

(b) an employee or former employee of the board.

(4) One member of the Appeal Board shall hold qualifications as a supervisory officer.

(5) Where an appeal is brought in respect of a pupil, one member of the Appeal Board shall be,

(a) a member of a local association as defined in subsection 206 (1) of the Act that is designated by a parent of the pupil;

(b) a representative of the local association referred to in clause (a) who is resident in the area of jurisdiction of the board and nominated by the local association; or

(c) where no local association referred to in clause (a) has been established in the area of jurisdiction of the board, a member of the local community nominated by a parent of the pupil.

(6) Each board shall provide each Appeal Board with secretarial and administrative services required by the Appeal Board.

(7) A chair of an Appeal Board shall forthwith arrange with a parent of the pupil where an appeal is brought in respect of a pupil, for a meeting with the Appeal Board at a convenient time and place for a discussion of the disagreement of the parent with the determination of the committee and the relevant issues under appeal.

(8) Any person who in the opinion of an Appeal Board may be able to contribute information with respect to the matters before the Appeal Board shall be invited to attend the discussion and the discussion shall be conducted in an informal manner.

(9) Where in the opinion of an Appeal Board all the opinions, views and information that bear upon the matters under appeal have been presented to the Appeal Board, the Appeal Board shall adjourn the discussion and within three days thereafter may,

(a) agree with the committee and dismiss the appeal;

(b) disagree with the committee and refer the matter back to the committee stating the reasons for the disagreement; or

(c) where the Appeal Board is satisfied that a pupil in respect of whom an appeal is brought is not in need of a special education program or special education services, set aside the determination of the committee that the pupil is an exceptional pupil.

(10) An Appeal Board shall report its decision in writing to a parent of a pupil in respect of whom an appeal is brought, the committee and the secretary of the board, with reasons therefor where demanded.

(11) The board within thirty days after receiving the report referred to in subsection (10) shall accept or reject such decision and the secretary of the board shall notify in writing a parent of the pupil and the committee of the decision of the board and in such notice shall inform the parent of the provisions of section 37 of the Act.

(12) Each board shall, in accordance with its own policies, pay the travelling and living expenses and other costs of the members of the Appeal Board incurred while engaged on their duties as members of the Appeal Board. O. Reg. 554/81, s. 7.

8.—(1) Where an exceptional pupil is placed by a committee,

(a) a committee shall review the placement of the pupil at least once every twelve months or pursuant to an application made under clause (b), whichever first occurs;

(b) a parent of the pupil or the principal of the school at which the special education program is provided may, at any time after the placement has been in effect for three months, apply in writing to the chief executive officer of the board, or to the secretary of the board where the board has no chief executive officer, for a review by a committee of the placement of the pupil; and

(c) the placement of the pupil shall not be changed by a committee without,

(i) prior notification in writing of the proposed change in placement to a parent of the pupil,

(ii) a discussion of the proposed change in placement between the committee and a parent of the pupil, and

(iii) the consent in writing of a parent of the pupil.

(2) Subsection 6 (2) applies with necessary modifications to the refusal or failure of a parent to consent to a recommended change in placement under clause (1) (c). O. Reg. 554/81, s. 8.

9. A board that provides an exceptional pupil with a special education program or services shall cause a parent or guardian of the pupil to be advised in writing of the reviews, notices and discussions referred to in section 8 that are to be provided in accordance with this Regulation and the provisions of subsection 8 (2). O. Reg. 554/81, s. 9.

10.—(1) Where a committee is engaged in the review of a placement of an exceptional pupil it shall,

(a) obtain and consider an educational assessment of the exceptional pupil; and

(b) consider on the basis of written reports, and other evidence including the evidence of a parent of the exceptional pupil whether the placement of the pupil appears to meet the needs of the pupil.

(2) Where the committee is satisfied with the suitability of the placement of an exceptional pupil it shall in writing confirm the placement and so report to a parent of the exceptional pupil and to the principal of the school where the exceptional pupil attends.

(3) If a parent of an exceptional pupil who is the subject of a review so requests in writing, the committee shall within fifteen days of the receipt of the request by the board meet with the parent to discuss the report. O. Reg. 554/81, s. 10.

11. A parent of an exceptional pupil who disagrees with a placement or the refusal to change a placement recommended by a committee as a result of a review referred to in clause 8 (1) (a) may appeal to an Appeal Board in accordance with section 4. O. Reg. 554/81, s. 11.

12.—(1) A notice of appeal under section 4 acts as a stay of proceedings of a committee in relation to the placement of a pupil.

(2) For the purposes of this Regulation, where a statement, report or notice is sent by mail it shall be sent by first class mail and it shall be deemed to have been received by the person to whom it was sent on the fifth day next following the date on which it was mailed.

(3) Where a parent of an exceptional pupil refuses in writing to discuss the statement or report of a committee with the committee and wishes to appeal to the Appeal Board, the discussion shall for the purposes of section 4 be deemed to have been held on the day such written refusal is received by the committee. O. Reg. 554/81, s. 12.

REGULATION 306

SPECIAL EDUCATION PROGRAMS AND SERVICES

1. A Special Education Program Placement and Review Committee heretofore established by a board under the regulations shall be deemed to be a committee referred to in subparagraph iii of para-

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

"guardian" means a person who has lawful custody of a child, other than the parent of the child; ("tuteur") 1982, c. 20, s. 2 (1).

"head office" of a board means the place at which the minute book, financial statements and records, and seal of the board are ordinarily kept; ("siège") R.S.O. 1980, c. 129, s. 1 (1), par. 23.

"Indian" has the same meaning as in the *Indian Act* (Canada); ("Indien") 1982, c. 32, s. 1 (1), *part*.

"intermediate division" means the division of the organization of a school comprising the first four years of the program of studies immediately following the junior division; ("cycle intermédiaire") R.S.O. 1980, c. 129, s. 1 (1), par. 24.

"judge" means a judge of the Ontario Court (General Division); ("juge") R.S.O. 1980, c. 129, s. 1 (1), par. 25, *revised*.

"junior division" means the division of the organization of an elementary school comprising the first three years of the program of studies immediately following the primary division; ("cycle moyen")

"locality" means a part of territory without municipal organization that is deemed to be a district municipality for the purposes of a divisional board or of a district combined separate school board; ("localité")

"Minister" means the Minister of Education; ("ministre")

"Ministry" means the Ministry of Education; ("ministère")

"municipality" means a city, town, village, township or improvement district; ("municipalité") R.S.O. 1980, c. 129, s. 1 (1), pars. 26-30.

"occasional teacher" means a teacher employed to teach as a substitute for a permanent, probationary, continuing education or temporary teacher who has died during the school year or who is absent from his or her regular duties for a temporary period that is less than a school year and that does not extend beyond the end of a school year; ("enseignant suppléant") R.S.O. 1980, c. 129, s. 1 (1), par. 31; 1989, c. 2, s. 1 (2).

"parcel of land" means a parcel of land that by the *Assessment Act* is required to be separately assessed; ("parcelle de terrain")

«crédit» Reconnaissance que le directeur d'école accorde à un élève et qui constitue la preuve, en l'absence de preuve contraire, que l'élève a terminé avec succès la quantité de travail :

a) d'une part, requise par le directeur d'école conformément aux exigences du ministre,

b) d'autre part, jugée acceptable par le ministre en tant que satisfaction partielle aux exigences requises à l'obtention du diplôme d'études secondaires de l'Ontario, du diplôme d'études secondaires ou du diplôme d'études secondaires supérieures, selon le cas. («credit») 1982, chap. 32, par. 1 (1), *en partie*; 1984, chap. 60, art. 1, *révisé*.

«cycle intermédiaire» Partie du programme d'enseignement d'une école comprenant les quatre premières années du programme d'études qui suivent immédiatement le cycle moyen. («intermediate division»)

«cycle moyen» Partie du programme d'enseignement d'une école élémentaire comprenant les trois premières années du programme d'études qui suivent immédiatement le cycle primaire. («junior division»)

«cycle primaire» Partie du programme d'enseignement d'une école élémentaire comprenant la maternelle, le jardin d'enfants et les trois premières années du programme d'études qui suivent immédiatement le jardin d'enfants. («primary division»)

«cycle supérieur» Partie du programme d'enseignement d'une école secondaire comprenant les trois années du programme d'études qui suivent le cycle intermédiaire. («senior division»)

«dépenses courantes» Dépenses de fonctionnement ou dépenses faites pour des améliorations permanentes à partir de fonds, à l'exception de ceux qui résultent de la vente de débentures, provenant d'un emprunt de capital ou d'un emprunt souscrit en prévision de la vente de débentures. («current expenditure»)

«directeur d'école» Enseignant nommé par un conseil pour exercer, dans une école donnée, les fonctions de directeur d'école aux termes de la présente loi et des règlements. («principal»)

«district d'écoles secondaires» Secteur qui relève de la compétence d'un conseil d'écoles secondaires ou d'un conseil de l'éducation aux fins des écoles secondaires. («secondary school district»)

(ii) community groups; and

(c) prescribe the standards that shall be attained by a community group in respect of the provision of adult basic education under subsection 189 (3) and the criteria that shall be used to determine whether the standards are attainable. 1989, c. 1, s. 1 (2).

Identification programs and special education programs and services

(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.

Application

(4) An act of the Minister under this section is not a regulation within the meaning of the *Regulations Act*. R.S.O. 1980, c. 129, s. 8 (2, 3).

Accounting statement related to assistance by Ministry

9. The Minister may require a person or organization that has received financial assistance under this Act or the regulations to submit to the Minister a statement prepared by a person licensed under the *Public Accountancy Act* that sets out the details of the disposition of the financial assistance by the person or organization. 1984, c. 60, s. 3.

Powers of Minister:

10. The Minister may,

advisory body

(a) appoint such advisory or consultative bodies as may be considered necessary by the Minister from time to time;

commission of inquiry

(b) appoint as a commission one or more persons, as the Minister considers expedient, to inquire into and report upon any school matter, and such commission has the powers of a commission under Part II of the *Public*

(ii) d'autre part, par des groupes communautaires;

c) prescrire les normes auxquelles doivent satisfaire les groupes communautaires pour pouvoir dispenser l'enseignement de base aux adultes aux termes du paragraphe 189 (3) et prescrire les critères employés pour déterminer si ces normes sont réalistes. 1989, chap. 1, par. 1 (2).

Programmes d'identification et d'enseignement et services à l'enfance en difficulté

(3) Le ministre veille à ce que les enfants en difficulté de l'Ontario puissent bénéficier, conformément à la présente loi et aux règlements, de programmes d'enseignement et de services destinés à l'enfance en difficulté qui soient appropriés et pour lesquels les parents ou tuteurs résidents de l'Ontario ne soient pas obligés d'acquitter de droits. Il prévoit la possibilité, pour les parents ou les tuteurs, d'en appeler de l'à-propos du placement d'un élève dans un programme d'enseignement à l'enfance en difficulté et, à ces fins, le ministre :

a) exige que les conseils scolaires mettent en oeuvre des méthodes d'identification précoce et continue de l'aptitude à apprendre et des besoins des élèves, et il fixe des normes régissant la mise en oeuvre de ces méthodes;

b) définit les anomalies des élèves en ce qui concerne les programmes d'enseignement et les services destinés à l'enfance en difficulté, établit des classes, groupes ou catégories d'élèves en difficulté, et exige que les conseils utilisent les définitions ou les classements établis aux termes du présent alinéa.

Champ d'application

(4) Les actes du ministre en application du présent article ne constituent pas un règlement au sens de la *Loi sur les règlements*. L.R.O. 1980, chap. 129, par. 8 (2) et (3).

État relatif à l'aide financière

9 Le ministre peut exiger qu'une personne ou un organisme qui a reçu une aide financière accordée en vertu de la présente loi ou des règlements lui présente un état dressé par une personne titulaire d'un permis aux termes de la *Loi sur la comptabilité publique* et précisant de quelle façon cette aide financière a été utilisée. 1984, chap. 60, art. 3.

Pouvoirs du ministre :

10 Le ministre peut :

organisme consultatif

a) constituer les organismes consultatifs qu'il juge nécessaires;

commission d'enquête

b) constituer une commission composée d'une ou de plusieurs personnes, selon ce qu'il juge opportun, pour enquêter et présenter un rapport sur une question scolaire; cette commission dispose des pouvoirs d'une commission créée

Section 109

Notice of constitutional question

109.—(1) Notice of a constitutional question shall be served on the Attorney General of Canada and the Attorney General of Ontario in the following circumstances:

1. The constitutional validity or constitutional applicability of an Act of the Parliament of Canada or the Legislature, of a regulation or by-law made under such an Act or of a rule of common law is in question.

2. A remedy is claimed under subsection 24(1) of the *Canadian Charter of Rights and Freedoms* in relation to an act or omission of the Government of Canada or the Government of Ontario.

Failure to give notice

(2) If a party fails to give notice in accordance with this section, the Act, regulation, by-law or rule of common law shall not be adjudged to be invalid or inapplicable, or the remedy shall not be granted, as the case may be.

Form of notice

(2.1) The notice shall be in the form provided for by the rules of court or, in the case of a proceeding before a board or tribunal, in a substantially similar form.

Time of notice

(2.2) The notice shall be served as soon as the circumstances requiring it become known and, in any event, at least fifteen days before the day on which the question is to be argued, unless the court orders otherwise.

Notice of appeal

(3) Where the Attorney General of Canada and the Attorney General of Ontario are entitled to notice under subsection (1), they are entitled to notice of any appeal in respect of the constitutional question.

Right of Attorneys General to be heard

(4) Where the Attorney General of Canada or the Attorney General of Ontario is entitled to notice under this section, he or she is entitled to adduce evidence and make submissions to the court in respect of the constitutional question.

Right of Attorneys General to appeal

(5) Where the Attorney General of Canada or the Attorney General of Ontario makes submissions under subsection (4), he or she shall be deemed to be a party to the proceedings for the purpose of any appeal in respect of the constitutional question.

Boards and tribunals

(6) This section applies to proceedings before boards and tribunals as well as to court proceedings. [am. 1994, c. 12, s. 42]

This is not a satisfactory foundation upon which to mount a constitutional challenge. Whether the Act infringes the freedom of religion of Hindus or Moslems is a question which accordingly ought not to be answered in the present appeals.

To the same effect is the very useful article by Brian G. Morgan, "Proof of Facts in Charter Litigation," in R. J. Sharpe, ed., *Charter Litigation* (1987).

Submissions, Unsupported by Evidence put Forward in this Case

In this case there has been not one particle of evidence put before the Court. It will be remembered that the appellants put forward two specific concerns as to the effect of the funding legislation. First it was said that splinter parties such as the Neo-Nazis might obtain 10 per cent of the vote and thus obtain public funding although they espoused principles which were diametrically opposed to that of a democratic society. They contended that their tax funds could be used to support views to which they were fundamentally opposed. Secondly, it was said that the system of funding which required a candidate to get at least 10 per cent of the total vote favoured the three established parties to the detriment of all others.

In support of this position the appellants, in oral argument, put forward a number of unsubstantiated propositions. The problems arising from this procedure can best be illustrated by setting out but some of those submissions.

For example, counsel referred to the political process of Canada in these words:

If Your Lordship will look back to the federal legislation, since the enactment of the federal legislation insofar as political parties are concerned, the only political parties that have benefited from the legislation are the political parties that have voted for it, the three major parties in this country

. . .

But no political party has received over 10 percent of the vote, and I think one of the interveners say [sic] that the applicants make the bald statement that there are many political parties who do not receive 10 percent of the vote, but there is no Affidavit evidence to that effect. Well, Your Lordships, I say with respect that jurispru-

Ce n'est pas là un motif suffisant pour justifier une contestation constitutionnelle. La question de savoir si la Loi enfreint la liberté de religion des hindous ou des musulmans est une question à laquelle on devrait donc s'abstenir de répondre dans les présents pourvois.

On trouve une analyse similaire dans l'intéressant article de Brian G. Morgan, «Proof of Facts in Charter Litigation,» dans l'ouvrage de R. J. Sharpe, éd., *Charter Litigation* (1987).

Les allégations non étayées par la preuve offerte en l'espèce

Pas le moindre élément de preuve n'a été présenté à cette Cour en l'espèce. Rappelons que les appelants ont exprimé deux préoccupations précises quant à l'effet de la loi sur le financement des dépenses électorales. Premièrement, ils disent que des groupes extrémistes, comme les néo-nazis, pourraient obtenir 10 p. 100 des votes et donc recevoir des fonds publics même s'ils épousent des principes diamétralement opposés à ceux d'une société démocratique. Les appelants prétendent que leurs impôts pourraient servir à appuyer des opinions auxquelles ils sont fondamentalement opposés. Deuxièmement, ils disent que le système de financement qui exige qu'un candidat obtienne au moins 10 p. 100 des votes favorise les trois partis établis au détriment de tous les autres.

À l'appui de cette thèse, les appelants ont avancé, au cours du débat, un certain nombre de propositions non confirmées. Pour bien illustrer les problèmes que pose cette façon de procéder, il suffit de citer certaines de ces prétentions.

Par exemple, l'avocat parle du processus politique du Canada en ces termes:

[TRADUCTION] Si votre Seigneurie examine les lois fédérales, depuis l'adoption de lois fédérales concernant les partis politiques, vous verrez que les seuls partis politiques qui ont bénéficié de ces lois sont ceux qui les ont votées, les trois principaux partis de ce pays.

. . .

Mais aucun parti politique n'a reçu plus de 10 p. 100 des votes et je crois qu'un des intervenants dit que les requérants font la simple affirmation que de nombreux partis politiques n'ont pas reçu 10 p. 100 des votes, mais qu'il n'y a aucune preuve par affidavit à cet effet. Vos Seigneuries, je dis avec égards que la jurisprudence me

decisions cannot be based upon the unsupported hypotheses of enthusiastic counsel.

This Court has stressed the importance of a factual basis in *Charter* cases. In *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, at p. 762, Dickson C.J. stated:

> Accordingly, there is no evidentiary foundation to substantiate the contention of some of the retailers that their freedom from conforming to religious doctrine has been abridged. The second form of coercion allegedly flowing from the *Retail Business Holidays Act* has not been established in these appeals.

He also stated at pp. 767-68:

> In the absence of cogent evidence regarding the nature of Hindu observance of Wednesdays or Moslem observance of Fridays, I am unwilling, and indeed unable, to assess the effects of the Act on members of those religious groups. The record includes only the testimony of Bhulesh Lodhia, the Hindu retailer who testified at the trial of Longo Brothers. Mr. Lodhia acknowledged that the Hindu religion did not have a Sabbath Day, but said that Wednesday was observed as "a day of prayer and that's the day we would prefer closing if given the choice". I infer from this evidence that there is no religious prohibition enjoining adherents from working on Wednesdays, but that there exists some moral obligation to pray on that day. It is unclear to me whether the entire day is to be spent in prayer or whether only a portion or portions of the day are to be set aside for that purpose. The degree to which the Act interferes with the religious practices of Hindus has not been established with sufficient precision to warrant a finding that the Act abridges the religious freedoms of Hindus, particularly in the context of the present cases in which none of the retailers is a member of that faith

The evidence regarding the Islamic faith is even less adequate. It is contained in its entirety in the following exchange during Mr. Lodhia's examination-in-chief

> Q. ... You're a Hindu, what is, to your knowledge, the Sabbath of the Moslem Religion?
>
> A. I believe it is Friday.

comme celle-ci dans un vide factuel. Les décisions relatives à la *Charte* ne peuvent pas être fondées sur des hypothèses non étayées qui ont été formulées par des avocats enthousiastes.

Cette Cour a souligné l'importance d'un fondement factuel dans des affaires relatives à la *Charte*. Dans *R. c. Edwards Books and Art Ltd.*, [1986] 2 R.C.S. 713, le juge en chef Dickson dit à la p. 762:

> Par conséquent, aucun fondement probatoire ne justifie la prétention de certains de ces détaillants qu'il y a eu atteinte à leur liberté de ne pas se conformer à une doctrine religieuse. On n'a pas démontré, dans les présents pourvois, l'existence de la seconde forme de coercition qui découlerait de la *Loi sur les jours fériés dans le commerce de détail*.

Il dit également aux pp. 767 et 768:

> En l'absence d'une preuve forte quant à la nature de l'observance du mercredi par les hindous ou de celle du vendredi par les musulmans, je ne veux pas, et d'ailleurs je ne suis pas en mesure de le faire, évaluer les effets de la Loi sur les membres de ces groupes religieux. Le dossier ne comporte que la déposition de Bhulesh Lodhia, le détaillant hindou qui a témoigné au procès de Longo Brothers. Monsieur Lodhia a reconnu que la religion hindoue ne comporte aucun jour de sabbat, mais il a ajouté que le mercredi est considéré comme [TRADUCTION] «un jour de prière, aussi c'est le jour où nous préférerions fermer si nous avions le choix». Je déduis de ce témoignage qu'il n'y a aucun précepte religieux qui interdit à ces fidèles de travailler le mercredi, mais qu'il existe une certaine obligation morale de prier ce jour-là. Je ne sais pas avec certitude si toute la journée doit être passée en prière ou si seulement une ou plusieurs parties de la journée doivent être réservées à cette fin. La mesure dans laquelle la Loi porte atteinte aux pratiques religieuses des hindous n'a pas été établie de manière suffisante pour justifier la conclusion que la Loi porte atteinte à leurs libertés religieuses, particulièrement dans le cadre des présentes affaires où aucun des détaillants n'est membre de cette confession.

La preuve soumise concernant la foi islamique est encore moins suffisante. Elle est entièrement contenue dans l'échange suivant intervenu au cours de l'interrogatoire principal de M. Lodhia:

> [TRADUCTION] Q. ... Vous êtes hindou, quel est, votre connaissance, le jour du sabbat dans la religion musulmane?
>
> R. Je crois que c'est le vendredi.

We don't have such a thing as a presidential election, we don't even have a prime ministerial election, we have elections in the constituencies, which does not mean that they have to spend $20 million to get elected.

These submissions pertaining to the financing of political parties and the effect of contributions to campaign expenses were as well of great importance to the argument, yet no evidence was submitted. It may well be that one could take judicial notice of some of the broad social facts referred to by the appellants, but here there is a total absence of a factual foundation to support their case.

A factual foundation is of fundamental importance on this appeal. It is not the purpose of the legislation which is said to infringe the *Charter* but its effects. If the deleterious effects are not established there can be no *Charter* violation and no case has been made out. Thus the absence of a factual base is not just a technicality that could be overlooked, but rather it is a flaw that is fatal to the appellants' position.

These issues raise questions of importance pertaining to financing candidates in provincial elections that are obviously of great importance to residents of Canada or to any democracy. It would be irresponsible to attempt to resolve them without a reasonable factual background.

The appellants also argued an issue that does not require a factual foundation. It was said that the statutory funding of candidates could, whenever a losing candidate or candidates received 10 per cent of the vote, force a taxpayer to support a candidate whose views are fundamentally opposed to that of the taxpayer. This enforced support of a contrary view was said to infringe the taxpayer's right to freedom of expression. I cannot accept that contention. The Act does not prohibit a taxpayer or anyone else from holding or expressing any position or their belief in any position. Rather, the Act seems to foster and encourage the dissemination and expression of a wide range of views and positions. In this way it enhances public knowledge

Nous n'avons pas de système d'élections présidentielles, nous n'avons même pas de système prévoyant l'élection d'un premier ministre; nous avons des élections dans les circonscriptions, ce qui ne signifie pas qu'il faut dépenser 20 millions de dollars pour être élu.

Ces affirmations relatives au financement des partis politiques et à l'effet des contributions aux dépenses électorales étaient également de grande importance dans le débat, pourtant aucun élément de preuve n'a été soumis. Il est bien possible qu'on puisse prendre connaissance d'office de certains faits sociaux d'ordre général mentionnés par les appelants, mais il y a ici une absence totale de fondement factuel à l'appui de leurs allégations.

Un contexte factuel est d'une importance fondamentale dans le présent pourvoi. On ne prétend pas que c'est l'objet visé par la loi qui viole la *Charte*, mais ses conséquences. Si les conséquences préjudiciables ne sont pas établies, il ne peut y avoir de violation de la *Charte* ni même de cause. Le fondement factuel n'est donc pas une simple formalité qui peut être ignorée et, bien au contraire, son absence est fatale à la thèse présentée par les appelants.

Ces points soulèvent des questions importantes quant au financement de candidats aux élections provinciales, et ces questions sont évidemment de grande importance pour les résidents du Canada et pour toute démocratie. Il serait irresponsable de tenter de les résoudre sans disposer d'un contexte factuel satisfaisant.

Les appelants ont plaidé un point qui n'exige pas de contexte factuel. Ils ont dit que le financement de candidats tel que prévu par la loi pourrait en réalité forcer un contribuable à donner son appui à un candidat prônant des opinions fondamentalement opposées aux siennes, dans chaque cas où un candidat perdant recevrait 10 p. 100 des votes. Cet appui forcé à une opinion opposée est une atteinte, selon eux, au droit du contribuable à la liberté d'expression. Je ne puis accepter cette prétention. La loi n'interdit pas à un contribuable ni à quiconque d'avoir ou d'exprimer une opinion ou une croyance. Au contraire, la loi semble favoriser et encourager la diffusion et l'expression d'un large éventail d'opinions et de positions. De cette

basis that there was no factual foundation for the claim. The respondent took the position that the legislation did not in any way infringe the appellants' guarantee of freedom of expression.

The Position of the Interveners. The Attorney General of Canada, The Attorney General for Ontario and The Attorney General of Quebec

The position of the interveners was that this appeal could not and should not be resolved in the factual vacuum in which it was presented. This submission should be accepted.

The Essential Need to Establish the Factual Basis in *Charter* Cases

Charter cases will frequently be concerned with concepts and principles that are of fundamental importance to Canadian society. For example, issues pertaining to freedom of religion, freedom of expression and the right to life, liberty and the security of the individual will have to be considered by the courts. Decisions on these issues must be carefully considered as they will profoundly affect the lives of Canadians and all residents of Canada. In light of the importance and the impact that these decisions may have in the future, the courts have every right to expect and indeed to insist upon the careful preparation and presentation of a factual basis in most *Charter* cases. The relevant facts put forward may cover a wide spectrum dealing with scientific, social, economic and political aspects. Often expert opinion as to the future impact of the impugned legislation and the result of the possible decisions pertaining to it may be of great assistance to the courts.

Charter decisions should not and must not be made in a factual vacuum. To attempt to do so would trivialize the *Charter* and inevitably result in ill-considered opinions. The presentation of facts is not, as stated by the respondent, a mere technicality; rather, it is essential to a proper consideration of *Charter* issues. A respondent cannot, by simply consenting to dispense with the factual background, require or expect a court to deal with an issue such as this in a factual void. *Charter*

[TRADUCTION] «technique» que la plainte n'avait pas de fondement factuel. L'intimé soutient que la loi ne viole d'aucune manière la liberté d'expression garantie aux appelants.

La thèse des intervenants, le procureur général du Canada, le procureur général de l'Ontario et le procureur général du Québec

La thèse des intervenants est que ce pourvoi ne peut ni ne doit être tranché dans le vide factuel dans lequel il a été présenté. Cette thèse doit être acceptée.

La nécessité essentielle d'établir un fondement factuel dans les affaires relatives à la *Charte*

Les affaires relatives à la *Charte* porteront fréquemment sur des concepts et des principes d'une importance fondamentale pour la société canadienne. Par exemple, les tribunaux seront appelés à examiner des questions relatives à la liberté de religion, à la liberté d'expression et au droit à la vie, à la liberté et à la sécurité de la personne. Les décisions sur ces questions doivent être soigneusement pesées car elles auront des incidences profondes sur la vie des Canadiens et de tous les résidents du Canada. Compte tenu de l'importance et des répercussions que ces décisions peuvent avoir à l'avenir, les tribunaux sont tout à fait en droit de s'attendre et même d'exiger que l'on prépare et présente soigneusement un fondement factuel dans la plupart des affaires relatives à la *Charte*. Les faits pertinents présentés peuvent toucher une grande variété de domaines et traiter d'aspects scientifiques, sociaux, économiques et politiques. Il est souvent très utile pour les tribunaux de connaître l'opinion d'experts sur les répercussions futures de la loi contestée et le résultat des décisions possibles la concernant.

Les décisions relatives à la *Charte* ne doivent pas être rendues dans un vide factuel. Essayer de le faire banaliserait la *Charte* et produirait inévitablement des opinions mal motivées. La présentation des faits n'est pas, comme l'a dit l'intimé, une simple formalité, au contraire, elle est essentielle à un bon examen des questions relatives à la *Charte*. L'intimé ne peut pas, en consentant simplement à ce que l'on se passe de contexte factuel, attendre ni exiger d'un tribunal qu'il examine une question

interests the court is charged with determining. "[G]eneral rules that do not admit of frequent exceptions can[not] evenly and fairly accommodate all of the varying circumstances that can present themselves": *per* Morden A.J.C.O. in *Carter v. Brooks*, *supra*, at p. 62. The inquiry is an individual one. Every child is entitled to the judge's decision on what is in its best interests; to the extent that presumptions in favour of one parent or the other predetermine this inquiry, they should be rejected: "No matter what test or axiom one adopts from the many and varied reported decisions on this subject, each case must, in the final analysis, fall to be determined on its particular facts and, on those facts, in which way are the best interests of the children met" (*Appleby v. Appleby*, *supra*, at p. 315).

45 A presumption in favour of the custodial parent may also impair the inquiry into the best interests of the child by undervaluing changes in the respective relationships between the child and its parents between the time of the custody order and the application for variation. The *Divorce Act*'s provision for variation of custody and access orders recognizes that the child's needs and the parents' ability to meet them may change with time and circumstance, and may require corresponding changes in custody and access arrangements. Children grow and mature, articulating new priorities and placing new demands on their parents. To the extent that the proposed presumption would give added weight to the arrangement imposed by the original custody order, it may diminish the weight accorded to the child's new needs and the ability of each parent to meet them. Consequently, its operation might be dangerous in a case, for example, where in the period following trial the access parent has demonstrated the desire, aptitude and temperament to assume a greater role in meeting the needs of the child, and the custodial parent has evinced a corresponding inability to do so.

46 Finally, the proposed presumption in favour of the custodial parent may be criticized on the ground that it tends to shift the focus from the best interests of the child to the interests of the parents. As mentioned earlier, underlying much of the argument for the presumption is the suggestion that the custodial parent has the "right" to move where he or she pleases and should not be restricted in doing so by the desire of the access parent to maintain contact with the child. However, the *Divorce Act* does not speak of parental "rights": see *Young v. Young, supra.* The child's best interest must be found within the practical context of the reality of the parents' lives and circumstances, one aspect of which may involve relocation. But to begin from the premise that one parent has the *prima facie* right to take the child where he or she wishes may unduly deflect the focus from the child to its parents.

47 For these reasons, I would reject the submission that there should be a presumption in favour of the custodial parent in applications to vary custody and access resulting from relocation of the custodial parent. The parent seeking the change bears the initial burden of demonstrating a material change of circumstances. Once that burden has been discharged, the judge must embark on a fresh inquiry in light of the change and all other relevant factors to determine the best interests of the child. There is neither need nor place to begin this inquiry with a general rule that one of the parties will be unsuccessful if he or she fails to satisfy a specified burden of proof.

48 While a legal presumption in favour of the custodial parent must be rejected, the views of the custodial parent, who lives with the child and is charged with making decisions in its interest on a day-to-day basis, are entitled to great respect and the most serious consideration. The decision of the custodial parent to live and work where he

with reason, then it cannot be said that there was a loss of jurisdiction. This is clearly a very strict test.

In *CAIMAW v. Paccar of Canada Ltd.*, [1989] 2 S.C.R. 983, La Forest J. (Dickson C.J. concurring) laid out the strict test of review, at p. 1003:

> Where, as here, an administrative tribunal is protected by a privative clause, this Court has indicated that it will only review the decision of the Board if that Board has either made an error in interpreting the provisions conferring jurisdiction on it, or has exceeded its jurisdiction by making a patently unreasonable error of law in the performance of its function.

It is not enough that the decision of the Board is wrong in the eyes of the court; it must, in order to be patently unreasonable, be found by the court to be clearly irrational.

Application of These Principles to the Facts of This Case

Jurisdiction to Entertain the Reference Under Section 99

The first question that must be answered is whether the Board had jurisdiction to entertain the respondent's reference under s. 99 *PSSRA*, or whether, as the appellant submits, the only mechanism for challenging the appellant's actions was by way of individual grievances by employees affected under s. 92. It is clear from the *Bibeault* decision that the Board must have been correct in its determination of this issue. If it is not, it will have committed a jurisdictional error. In my opinion, the decision the Board made with regard to its jurisdiction to hear and determine the reference was correct.

The legislative provisions that must be considered in determining whether the Board properly assumed jurisdiction are found in the *PSSRA*, particularly:

pétence. Visiblement, il s'agit là d'un critère très strict.

Dans l'affaire *CAIMAW c. Paccar of Canada Ltd.*, [1989] 2 R.C.S. 983, le juge La Forest (avec l'appui du juge en chef Dickson) a formulé le critère strict du contrôle, à la p. 1003:

> Lorsque, comme en l'espèce, un tribunal administratif est protégé par une clause privative, notre Cour a déclaré qu'elle n'examinera la décision du tribunal que si celui-ci a commis une erreur en interprétant les dispositions attributives de compétence ou s'il a excédé sa compétence en commettant une erreur de droit manifestement déraisonnable dans l'exercice de sa fonction.

Il ne suffit pas que la décision de la Commission soit erronée aux yeux de la cour de justice; pour qu'elle soit manifestement déraisonnable, cette cour doit la juger clairement irrationnelle.

L'application de ces principes aux faits de la présente affaire

La compétence relative au renvoi fondé sur l'art. 99

Nous devons répondre d'abord à la question de savoir si la Commission avait compétence relativement à la question que lui a renvoyée l'intimée en vertu de l'art. 99 *LRTFP* ou si les actes de l'appelant, comme il le fait valoir, ne peuvent être contestés qu'au moyen de griefs présentés individuellement, en vertu de l'art. 92, par les employés touchés. Il ressort nettement de l'arrêt *Bibeault* que la Commission doit avoir tranché correctement cette question. Si elle ne l'a pas fait, elle aura commis une erreur de compétence. À mon avis, la décision qu'a rendue la Commission quant à sa compétence pour connaître du renvoi n'est entachée d'aucune erreur.

Les dispositions législatives à prendre en considération aux fins de déterminer si la Commission a été légitimement saisie de l'affaire se trouvent dans la *LRTFP*, notamment dans les paragraphes suivants:

eminently well suited for determining whether Board has exceeded the jurisdiction which is ınted to it by its enabling statute. Further, the urts are in the best position to determine whether ere has been such an error in the procedure fol- wed by it that there has been a denial of natural stice which would result in a loss of jurisdiction the tribunal. As well, all parties have the right be protected from a decision that is patently ıreasonable. Beyond that the courts need not and ıould not go. A board which is created and pro- cted by a privative clause is the manifestation of e will of Parliament to create a mechanism that ovides a speedy and final means of achieving the oal of fair resolution of labour-management dis- utes. To serve its purpose these decisions must as ften as possible be final. If the courts were to efuse to defer to the decisions of the Board, they ould negate both the very purpose of the Act and ts express provisions.

ni nécessaire. Certes, les cours de justice sont éminemment aptes à décider si la Commission a excédé la compétence que lui confère sa loi habilitante. En outre, ce sont les cours de justice qui sont les mieux placées pour déterminer si le tribunal a commis une erreur de procédure de telle nature qu'elle constitue un manquement à la justice naturelle, lequel entraînerait son incompétence. De plus, toutes les parties ont droit à la protection contre une décision manifestement déraisonnable. Il n'est pas nécessaire que les cours de justice aillent plus loin et, en fait, elles ne le devraient pas. Une commission constituée en vertu d'une clause privative et protégée par celle-ci représente l'expression de la volonté du Parlement de créer un mécanisme qui offre un moyen expéditif et définitif d'atteindre le but d'un règlement juste des conflits de travail. Pour qu'elles aient l'effet voulu, les décisions ainsi rendues doivent, le plus souvent possible, être définitives. En refusant de s'en remettre aux décisions de la Commission, les cours de justice se trouveraient à contrecarrer l'objet même de la *LRTFP* et à rendre inopérantes ses dispositions expresses.

What Constitutes a "Patently Unreasonable" Decision?

It is said that it is difficult to know what "patently unreasonable" means. What is patently unreasonable to one judge may be eminently reasonable to another. Yet any test can only be defined by words, the building blocks of all reasons. Obviously, the patently unreasonable test sets a high standard of review. In the Shorter Oxford English Dictionary "patently", an adverb, is defined as "openly, evidently, clearly". "Unreasonable" is defined as "[n]ot having the faculty of reason; irrational. . . . Not acting in accordance with reason or good sense". Thus, based on the dictionary definition of the words "patently unreasonable", it is apparent that if the decision the Board reached, acting within its jurisdiction, is not clearly irrational, that is to say evidently not in accordance

En quoi consiste une décision «manifestement déraisonnable»?

Le sens de l'expression «manifestement déraisonnable», fait-on valoir, est difficile à cerner. Ce qui est manifestement déraisonnable pour un juge peut paraître éminemment raisonnable pour un autre. Pourtant, pour définir un critère nous ne disposons que de mots, qui forment, eux, les éléments de base de tous les motifs. Le critère du caractère manifestement déraisonnable représente, de toute évidence, une norme de contrôle sévère. Dans le Grand Larousse de la langue française, l'adjectif manifeste est ainsi défini: «Se dit d'une chose que l'on ne peut contester, qui est tout à fait évidente». On y trouve pour le terme déraisonnable la définition suivante: «Qui n'est pas conforme à la raison; qui est contraire au bon sens». Eu égard donc à ces définitions des mots «manifeste» et «déraisonnable», il appert que si la décision qu'a rendue la Commission, agissant dans le cadre de sa compétence, n'est pas clairement irrationnelle, c'est-à-dire, de toute évidence non conforme à la raison, on ne saurait prétendre qu'il y a eu perte de com-

The Need for Facts

This Court has been vigilant to ensure that a proper factual foundation exists before measuring legislation against the provisions of the *Charter*, particularly where the effects of impugned legislation are the subject of the attack. For example, in *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, at pp. 767-68, this Court declined to hold that the *Retail Business Holidays Act*, R.S.O. 1980, c. 453, infringed the s. 2(*a*) *Charter* rights of Hindus or Moslems in the absence of evidence about the details of their respective religious observance. Similarly, in *Rio Hotel Ltd. v. New Brunswick (Liquor Licensing Board)*, [1987] 2 S.C.R. 59, at p. 83, this Court declined to consider a s. 2(*b*) *Charter* challenge to certain provisions of the *Liquor Control Act*, R.S.N.B. 1973, c. L-10, in the absence of evidence on the nature of the conduct that was claimed to constitute "expression" within the meaning of s. 2(*b*).

It is necessary to draw a distinction at the outset between two categories of facts in constitutional litigation "adjudicative facts" and "legislative facts". These terms derive from Davis, *Administrative Law Treatise* (1958), vol. 2, para. 15.03, p. 353. (See also Morgan, "Proof of Facts in Charter Litigation", in Sharpe, ed., *Charter Litigation* (1987).) Adjudicative facts are those that concern the immediate parties: in Davis' words, "who did what, where, when, how, and with what motive or intent . . ." Such facts are specific, and must be proved by admissible evidence. Legislative facts are those that establish the purpose and background of legislation, including its social, economic and cultural context. Such facts are of a more general nature, and are subject to less stringent admissibility requirements (see e.g. *Re Anti-Inflation Act*, [1976] 2 S.C.R. 373, *per* Laskin C.J., at p. 391; *Re Residential Tenancies Act, 1979*, [1981] 1 S.C.R. 714, *per* Dickson J. (as he then was), at p. 723; and *Reference re Upper Churchill Water Rights Reversion Act*, [1984] 1 S.C.R. 297, *per* McIntyre J., at p. 313.

La nécessité de faits

Notre Cour a toujours veillé soigneusement à ce qu'un contexte factuel adéquat existe avant d'examiner une loi en regard des dispositions de la *Charte*, surtout lorsque le litige porte sur les effets de la loi contestée. Par exemple, dans l'arrêt *R. c. Edwards Books and Art Ltd.*, [1986] 2 R.C.S. 713, aux pp. 767 et 768, notre Cour a refusé de conclure que la *Loi sur les jours fériés dans le commerce de détail*, L.R.O. 1980, ch. 453, violait les droits des hindous et des musulmans reconnus à l'al. 2*a*) de la *Charte* en l'absence de preuve concernant les détails de leur observance religieuse respective. De même, dans l'arrêt *Rio Hotel Ltd. c. Nouveau-Brunswick (Commission des licences et permis d'alcool)*, [1987] 2 R.C.S. 59, à la p. 83, notre Cour a refusé d'examiner la contestation, fondée sur l'al. 2*b*) de la *Charte*, de certaines dispositions de la *Loi sur la réglementation des alcools*, L.R.N.-B. 1973, ch. L-10, en l'absence de preuve relative à la nature de la conduite que l'on prétendait constituer une «expression» au sens de l'al. 2*b*).

Il est nécessaire d'établir au départ une distinction entre deux catégories de faits dans un litige constitutionnel: [TRADUCTION] «les faits en litige» et [TRADUCTION] «les faits législatifs». Ces expressions proviennent de l'ouvrage de Davis, *Administrative Law Treatise* (1958), vol. 2, par. 15.03, à la p. 353. (Voir également Morgan, «Proof of Facts in Charter Litigation», dans Sharpe, ed., *Charter Litigation* (1987).) Les faits en litige sont ceux qui concernent les parties au litige: pour reprendre les termes de Davis [TRADUCTION] «qui a fait quoi, où, quand, comment et dans quelle intention . . .» Ces faits sont précis et doivent être établis par des éléments de preuve recevables. Les faits législatifs sont ceux qui établissent l'objet et l'historique de la loi, y compris son contexte social, économique et culturel. Ces faits sont de nature plus générale et les conditions de leur recevabilité sont moins sévères (par exemple, voir *Renvoi: Loi anti-inflation*, [1976] 2 R.C.S. 373, le juge en chef Laskin, à la p. 391; *Renvoi: Loi de 1979 sur la location résidentielle*, [1981] 1 R.C.S. 714, le juge Dickson (plus tard Juge en chef), à la p. 723; et *Renvoi relatif à la Upper Churchill Water Rights Reversion Act*, [1984] 1 R.C.S. 297, le juge McIntyre, à la p. 313.

In the present case, the appellant contends that he ought to be entitled to proceed with his application under Rule 14.05(3)(h) in the complete absence of adjudicative facts, and, moreover, that it is sufficient that he present in argument (but not prove by affidavit or otherwise) legislative "facts", in the form of textbooks and academic material about the prevailing understanding of the concept of the independence of the bar, and material concerning the legislative history of the impugned rules. In the view I take of this matter, the appellant is not entitled to proceed with the application as presently constituted.

In the time between the granting of leave to appeal in this matter and the hearing of the appeal, this Court heard and decided *MacKay v. Manitoba*, [1989] 2 S.C.R. 357, a case concerning an action for a declaration that certain provisions of *The Elections Finances Act*, S.M. 1982-83-84, c. 45, violated the guarantee of freedom of expression contained in s. 2(*b*) of the *Charter*. Cory J., speaking for a unanimous Court, stated, at pp. 361-62:

> *Charter* decisions should not and must not be made in a factual vacuum. To attempt to do so would trivialize the *Charter* and inevitably result in ill-considered opinions. The presentation of facts is not, as stated by the respondent, a mere technicality; rather, it is essential to a proper consideration of *Charter* issues. *Charter* decisions cannot be based upon the unsupported hypotheses of enthusiastic counsel.

Later, Cory J. stated, at p. 366:

> A factual foundation is of fundamental importance on this appeal. It is not the purpose of the legislation which is said to infringe the *Charter* but its effects. If the deleterious effects are not established there can be no *Charter* violation and no case has been made out. Thus the absence of a factual base is not just a technicality that could be overlooked, but rather it is a flaw that is fatal to the appellants' position.

This is not to say that such facts must be established in all *Charter* challenges. Each case must be considered on its own facts (or lack thereof). As Beetz J. pointed out in *Manitoba*

En l'espèce, l'appelant prétend qu'on devrait lu permettre de présenter sa requête en vertu de l règle 14.05(3)h) même en l'absence totale de fai en litige et, en outre, qu'il suffit de présenter dan sa plaidoirie (mais sans en faire la preuve par affidavit ou autrement) les «faits» législatifs, sou forme d'ouvrages et de documentation savant concernant la notion d'indépendance du barreau et l'historique législatif des règles contestées. À mon avis, l'appelant en l'espèce n'a pas le droit d présenter la requête dans sa forme actuelle.

Entre la date de l'autorisation de pourvoi et son audition, notre Cour a entendu et décidé le pourvoi *MacKay c. Manitoba*, [1989] 2 R.C.S. 357, concernant une action en jugement déclaratoire portant que certaines dispositions de la *Loi sur le financement des campagnes électorales*, L.M. 1982-83-84, ch. 45, violaient la garantie de la liberté d'expression prévue à l'al. 2*b*) de la *Charte*. Le juge Cory, au nom de la Cour unanime, affirme, aux pp. 361 et 362:

> Les décisions relatives à la *Charte* ne doivent pas être rendues dans un vide factuel. Essayer de le faire banaliserait la *Charte* et produirait inévitablement des opinions mal motivées. La présentation des faits n'est pas, comme l'a dit l'intimé, une simple formalité; au contraire, elle est essentielle à un bon examen des questions relatives à la *Charte* [. . .] Les décisions relatives à la *Charte* ne peuvent pas être fondées sur des hypothèses non étayées qui ont été formulées par des avocats enthousiastes.

Plus loin, le juge Cory affirme, à la p. 366:

> Un contexte factuel est d'une importance fondamentale dans le présent pourvoi. On ne prétend pas que c'est l'objet visé par la loi qui viole la *Charte*, mais ses conséquences. Si les conséquences préjudiciables ne sont pas établies, il ne peut y avoir de violation de la *Charte* ni même de cause. Le fondement factuel n'est donc pas une simple formalité qui peut être ignorée et, bien au contraire, son absence est fatale à la thèse présentée par les appelants.

Cela ne veut pas dire que de tels faits doivent être établis dans toutes les contestations fondées sur la *Charte*. Chaque instance doit être examinée en regard de ses propres faits (ou absence de faits).

(Attorney General) v. *Metropolitan Stores Ltd.*, [1987] 1 S.C.R. 110, at p. 133:

> There may be rare cases where the question of constitutionality will present itself as a simple question of law alone which can be finally settled by a motion judge. A theoretical example which comes to mind is one where Parliament or a legislature would purport to pass a law imposing the beliefs of a state religion. Such a law would violate s. 2(*a*) of the *Canadian Charter of Rights and Freedoms*, could not possibly be saved under s. 1 of the *Charter*, and might perhaps be struck down right away; see *Attorney General of Quebec* v. *Quebec Association of Protestant School Boards*, [1984] 2 S.C.R. 66, at p. 88. It is trite to say that these cases are exceptional. [Emphasis added.]

The unconstitutional purpose of Beetz J.'s hypothetical law is found on the face of the legislation, and requires no extraneous evidence to flesh it out. It is obvious that this is not one of those exceptional cases. In general, any *Charter* challenge based upon allegations of the unconstitutional effects of impugned legislation must be accompanied by admissible evidence of the alleged effects. In the absence of such evidence, the courts are left to proceed in a vacuum, which, in constitutional cases as in nature, has always been abhorred. As Morgan put it, op. cit., at p. 162: "... the process of constitutional litigation remains firmly grounded in the discipline of the common law methodology."

The present case is, for these purposes, indistinguishable from *MacKay*, and I would respectfully adopt and apply Cory J.'s comments to these circumstances. The appellant here seeks to attack the impugned rules on the basis of their alleged effects upon the legal profession in Ontario. It would be, in my view, difficult if not impossible for a motions judge to assess the merits of the appellant's application under Rule 14.05(3)(h) without evidence of those effects, by way of adjudicative facts (i.e., actual instances of the use or threatened use of the impugned rules) and legislative facts (i.e., the purpose, history and perceptions among the profession of the impugned rules).

Comme le juge Beetz l'a souligné dans l'arrêt *Manitoba (Procureur général)* c. *Metropolitan Stores Ltd.*, [1987] 1 R.C.S. 110, à la p. 133:

> Il peut exister des cas rares où la question de la constitutionnalité se présente sous la forme d'une question de droit purement et simplement, laquelle peut être définitivement tranchée par un juge saisi d'une requête. Un exemple théorique qui vient à l'esprit est la situation où le Parlement ou une législature prétendrait adopter une loi imposant les croyances d'une religion d'État. Pareille loi enfreindrait l'al. 2*a*) de la *Charte canadienne des droits et libertés*, ne pourrait possiblement pas être justifiée par l'article premier de celle-ci et courrait peut-être le risque d'être frappée d'illégalité sur-le-champ: voir *Procureur général du Québec* c. *Quebec Association of Protestant School Boards*, [1984] 2 R.C.S. 66, à la p. 88. Or, il va sans dire qu'il s'agit là de cas exceptionnels. [Je souligne.]

Dans le cas hypothétique présenté par le juge Beetz, l'objet inconstitutionnel de la loi ressort clairement du texte même de la loi et n'exige aucune preuve extrinsèque. Il est évident qu'il ne s'agit pas en l'espèce d'un de ces cas exceptionnels. En général, toute contestation relative à la *Charte* fondée sur la prétention que les effets de la loi visée sont inconstitutionnels doit être appuyée par une preuve recevable concernant les effets contestés. En l'absence de telle preuve, les tribunaux auraient à se prononcer dans le vide ce qui est tout aussi difficile en matière constitutionnelle que dans la nature. Comme Morgan le dit, *op. cit.*, à la p. 162: [TRADUCTION] «... le processus du litige constitutionnel demeure fermement ancré à la discipline de la méthodologie de common law.»

On ne peut donc distinguer le présent litige de l'affaire *MacKay*, et, avec égards, je ferais miennes et j'appliquerais les remarques du juge Cory dans cet arrêt. L'appelant veut contester les règles en raison des effets qu'elles auraient sur la profession juridique en Ontario. À mon avis, il serait difficile sinon impossible au juge saisi de la motion d'apprécier le bien-fondé de la requête de l'appelant selon la règle 14.05(3)h) sans preuve de ces effets par l'apport de faits en litige (c'est-à-dire des cas réels d'utilisation ou de menaces d'utilisation des règles contestées) et de faits législatifs (c'est-à-dire l'objet et l'historique des règles contestées ainsi que la perception qu'en ont les membres de la profession).

a mere finding of distinction between the treatment of groups or individuals. Those words are a form of qualifier built into s. 15 itself and limit those distinctions which are forbidden by the section to those which involve prejudice or disadvantage.

I would accept the criticisms of the first approach made by McLachlin J.A. in the Court of Appeal. She noted that the labelling of every legislative distinction as an infringement of s. 15(1) trivializes the fundamental rights guaranteed by the *Charter* and, secondly, that to interpret "without discrimination" as "without distinction" deprives the notion of discrimination of content. She continued, at p. 607:

> Third, it cannot have been the intention of Parliament that the government be put to the requirement of establishing under s. 1 that all laws which draw distinction between people are "demonstrably justified in a free and democratic society". If weighing of the justifiability of unequal treatment is neither required or permitted under s. 15, the result will be that such universally accepted and manifestly desirable legal distinctions as those prohibiting children or drunk persons from driving motor vehicles will be viewed as violations of fundamental rights and be required to run the gauntlet of s. 1.
>
> Finally, it may further be contended that to define discrimination under s. 15 as synonymous with unequal treatment on the basis of personal classification will be to elevate s. 15 to the position of subsuming the other rights and freedoms defined by the Charter.

In rejecting the Hogg approach, I would say that it draws a straight line from the finding of a distinction to a determination of its validity under s. 1, but my objection would be that it virtually denies any role for s. 15(1).

I would reject, as well, the approach adopted by McLachlin J.A. She seeks to define discrimination under s. 15(1) as an unjustifiable or unreasonable distinction. In so doing she avoids the mere distinction test but also makes a radical departure from

davantage qu'une simple constatation de distinction dans le traitement de groupes ou d'individus. Cette expression est une forme de réserve incorporée dans l'art. 15 lui-même qui limite les distinctions prohibées par la disposition à celles qui entraînent un préjudice ou un désavantage.

Je suis d'avis d'accepter les critiques formulées par le juge McLachlin à l'égard de la première interprétation. Elle a souligné, premièrement, que qualifier chaque distinction législative de violation du par. 15(1) a pour effet de banaliser les droits fondamentaux garantis par la *Charte* et, deuxièmement, qu'interpréter l'expression «indépendamment de toute discrimination» comme signifiant «sans distinction» dépouille de tout contenu la notion de discrimination. Elle a poursuivi, à la p. 607.

> [TRADUCTION] Troisièmement, le Parlement n'a pu avoir l'intention d'exiger du gouvernement qu'il démontre, en application de l'article premier, que toutes les lois qui établissent des distinctions entre les individus ont une «justification [qui] puisse se démontrer dans le cadre d'une société libre et démocratique». Si l'évaluation du caractère justifiable d'un traitement inégal n'est ni exigée ni permise en vertu de l'art. 15, il s'ensuivra que des distinctions légales universellement acceptées et manifestement souhaitables, comme l'interdiction faite aux enfants et aux personnes en état d'ébriété de conduire un véhicule à moteur, seront considérées comme des violations de droits fondamentaux et devront être soumises à l'épreuve de l'article premier.
>
> Enfin, il est également possible de prétendre que définir la discrimination au sens de l'art. 15 comme synonyme de traitement inégal fondé sur une classification personnelle aura pour effet de donner à l'art. 15 une importance telle qu'il subsumerait les autres droits et libertés définis par la Charte.

Rejetant le point de vue de Hogg, je dirais qu'il relie directement la constatation de l'existence d'une distinction à la détermination de sa validité en vertu de l'article premier, mais mon objection résiderait dans le fait qu'il n'accorde pratiquement aucun rôle au par. 15(1).

Je rejetterais également le point de vue adopté par le juge McLachlin. Elle tente de définir la discrimination au sens du par. 15(1) comme une distinction injustifiable ou déraisonnable. Ce faisant, elle esquive le critère de la simple distinction,

the analytical approach to the *Charter* which has been approved by this Court. In the result, the determination would be made under s. 15(1) and virtually no role would be left for s. 1.

The third or "enumerated and analogous grounds" approach most closely accords with the purposes of s. 15 and the definition of discrimination outlined above and leaves questions of justification to s. 1. However, in assessing whether a complainant's rights have been infringed under s. 15(1), it is not enough to focus only on the alleged ground of discrimination and decide whether or not it is an enumerated or analogous ground. The effect of the impugned distinction or classification on the complainant must be considered. Once it is accepted that not all distinctions and differentiations created by law are discriminatory, then a role must be assigned to s. 15(1) which goes beyond the mere recognition of a legal distinction. A complainant under s. 15(1) must show not only that he or she is not receiving equal treatment before and under the law or that the law has a differential impact on him or her in the protection or benefit accorded by law but, in addition, must show that the legislative impact of the law is discriminatory.

Where discrimination is found a breach of s. 15(1) has occurred and — where s. 15(2) is not applicable — any justification, any consideration of the reasonableness of the enactment; indeed, any consideration of factors which could justify the discrimination and support the constitutionality of the impugned enactment would take place under s. 1. This approach would conform with the directions of this Court in earlier decisions concerning the application of s. 1 and at the same time would allow for the screening out of the obviously trivial and vexatious claim. In this, it would provide a workable approach to the problem.

It would seem to me apparent that a legislative distinction has been made by s. 42 of the *Barristers and Solicitors Act* between citizens and non-citizens with respect to the practice of law. The

mais elle s'éloigne aussi radicalement de la façon analytique d'aborder la *Charte* qui a été approuvée par cette Cour. En définitive, la décision serait prise en vertu du par. 15(1), ce qui aurait pour effet de dépouiller pratiquement de tout rôle l'article premier.

Le troisième point de vue, celui des «motifs énumérés et analogues», correspond davantage aux fins de l'art. 15 et à la définition de la discrimination exposée auparavant et renvoie à l'article premier les questions de justification. Cependant, pour vérifier s'il y a eu atteinte aux droits que le par. 15(1) reconnaît au plaignant, il ne suffit pas de se concentrer uniquement sur le motif allégué de discrimination et de décider s'il s'agit d'un motif énuméré ou analogue. L'examen doit également porter sur l'effet de la distinction ou de la classification attaquée sur le plaignant. Dès qu'on accepte que ce ne sont pas toutes les distinctions et différenciations créées par la loi qui sont discriminatoires, on doit alors attribuer au par. 15(1) un rôle qui va au-delà de la simple reconnaissance d'une distinction légale. Un plaignant en vertu du par. 15(1) doit démontrer non seulement qu'il ne bénéficie pas d'un traitement égal devant la loi et dans la loi, ou encore que la loi a un effet particulier sur lui en ce qui concerne la protection ou le bénéfice qu'elle offre, mais encore que la loi a un effet discriminatoire sur le plan législatif.

Lorsqu'il y a discrimination, il y a violation du par. 15(1) et, lorsque le par. 15(2) ne s'applique pas, toute justification, tout examen du caractère raisonnable de la mesure législative et, en fait, tout examen des facteurs qui pourraient justifier la discrimination et appuyer la constitutionnalité de la mesure législative attaquée devraient se faire en vertu de l'article premier. Ce point de vue serait conforme aux directives données par cette Cour dans des arrêts antérieurs portant sur l'application de l'article premier et permettrait en même temps d'écarter les revendications manifestement futiles et vexatoires. À cet égard, il constituerait une façon pratique d'aborder le problème.

Il me semble évident que l'art. 42 de la *Barristers and Solicitors Act* établit une distinction entre ceux qui ont la citoyenneté canadienne et ceux qui ne l'ont pas au regard de la pratique du droit.

distinction would deny admission to the practice of law to non-citizens who in all other respects are qualified. Have the respondents, because of s. 42 of the Act, been denied equality before and under the law or the equal protection of the law? In practical terms it should be noted that the citizenship requirement affects only those non-citizens who are permanent residents. The permanent resident must wait for a minimum of three years from the date of establishing permanent residence status before citizenship may be acquired. The distinction therefore imposes a burden in the form of some delay on permanent residents who have acquired all or some of their legal training abroad and is, therefore, discriminatory.

Cette distinction empêcherait ceux qui n'ont pas la citoyenneté d'être admis à la pratique du droit même s'ils se qualifient à tous autres égards. Les intimés ont-ils, en raison de l'art. 42, été privés de l'égalité devant la loi et dans la loi, ou encore de l'égalité de protection de la loi? Il convient de noter qu'en pratique l'obligation d'être citoyen ne touche que ceux qui n'ont pas la citoyenneté et qui sont résidents permanents. Avant de pouvoir obtenir la citoyenneté, le résident permanent doit attendre un minimum de trois ans à compter de la date où il établit sa résidence permanente. La distinction impose ainsi un fardeau, sous la forme d'un délai, aux résidents permanents qui ont reçu, en totalité ou en partie, leur formation juridique à l'étranger, et elle est donc discriminatoire.

The rights guaranteed in s. 15(1) apply to all persons whether citizens or not. A rule which bars an entire class of persons from certain forms of employment, solely on the grounds of a lack of citizenship status and without consideration of educational and professional qualifications or the other attributes or merits of individuals in the group, would, in my view, infringe s. 15 equality rights. Non-citizens, lawfully permanent residents of Canada, are — in the words of the U.S. Supreme Court in *United States v. Carolene Products Co.*, 304 U.S. 144 (1938), at pp. 152-53, n. 4, subsequently affirmed in *Graham v. Richardson*, 403 U.S. 365 (1971), at p. 372 — a good example of a "discrete and insular minority" who come within the protection of s. 15.

Les droits que garantit le par. 15(1) s'appliquent à tous sans égard à la citoyenneté. À mon avis, une règle qui exclut toute une catégorie de personnes de certains types d'emplois pour le seul motif qu'elles n'ont pas la citoyenneté et sans égard à leurs diplômes et à leurs compétences professionnelles ou sans égard aux autres qualités ou mérites d'individus faisant partie du groupe, porte atteinte aux droits à l'égalité de l'art. 15. Ceux qui n'ont pas la citoyenneté et qui résident légalement en permanence au Canada constituent un bon exemple, pour reprendre l'expression de la Cour suprême des États-Unis dans l'arrêt *United States v. Carolene Products Co.*, 304 U.S. 144 (1938), aux pp. 152 et 153, n. 4, confirmé par la suite dans l'arrêt *Graham v. Richardson*, 403 U.S. 365 (1971), à la p. 372, d'une [TRADUCTION] «minorité discrète et isolée» visée par la protection de l'art. 15.

Section 1

Having accepted the proposition that s. 42 has infringed the right to equality guaranteed in s. 15, it remains to consider whether, under the provisions of s. 1 of the *Charter*, the citizenship requirement which is clearly prescribed by law is a reasonable limit which can be "demonstrably justified in a free and democratic society".

The onus of justifying the infringement of a guaranteed *Charter* right must, of course, rest

L'article premier

Ayant reconnu que l'art. 42 a violé le droit à l'égalité garanti à l'art. 15, il reste à examiner si, en application des dispositions de l'article premier de la *Charte*, l'obligation d'être citoyen, clairement imposée par une règle de droit, est une limite raisonnable dont «la justification puisse se démontrer dans le cadre d'une société libre et démocratique».

La responsabilité de justifier la violation d'un droit garanti par la *Charte* incombe évidemment

was no discrimination on the basis of sex, since the class into which she fell under the Act was that of pregnant persons, and within that class, all persons were treated equally. This case, of course, was decided before the advent of the *Charter*.

I would also agree with the following criticism of the similarly situated test made by Kerans J.A. in *Mahe v. Alta. (Gov't)* (1987), 54 Alta. L.R. (2d) 212, at p. 244:

> ... the test accepts an idea of equality which is almost mechanical, with no scope for considering the reason for the distinction. In consequence, subtleties are found to justify a finding of dissimilarity which reduces the test to a categorization game. Moreover, the test is not helpful. After all, most laws are enacted for the specific purpose of offering a benefit or imposing a burden on some persons and not on others. The test catches every conceivable difference in legal treatment.

For the reasons outlined above, the test cannot be accepted as a fixed rule or formula for the resolution of equality questions arising under the *Charter*. Consideration must be given to the content of the law, to its purpose, and its impact upon those to whom it applies, and also upon those whom it excludes from its application. The issues which will arise from case to case are such that it would be wrong to attempt to confine these considerations within such a fixed and limited formula.

It is not every distinction or differentiation in treatment at law which will transgress the equality guarantees of s. 15 of the *Charter*. It is, of course, obvious that legislatures may — and to govern effectively — must treat different individuals and groups in different ways. Indeed, such distinctions are one of the main preoccupations of legislatures. The classifying of individuals and groups, the making of different provisions respecting such groups, the application of different rules, regulations, requirements and qualifications to different persons is necessary for the governance of modern

tinction illicite fondée sur le sexe. Sa demande a été rejetée par cette Cour pour le motif qu'il n'y avait pas de distinction illicite fondée sur le sexe puisque la catégorie dans laquelle elle tombait en vertu de la Loi était celle des personnes enceintes et que toutes les personnes dans cette catégorie étaient traitées également. Il va sans dire que cette affaire a été tranchée avant l'avènement de la *Charte*.

Je suis également d'accord avec la critique suivante que le juge Kerans de la Cour d'appel a formulé à l'égard du critère de la situation analogue dans l'arrêt *Mahe v. Alta. (Gov't)* (1987), 54 Alta. L.R. (2d) 212, à la p. 244:

> [TRADUCTION] ... le critère adopte une idée d'égalité qui est presque automatique, sans aucune possibilité d'examiner la raison à l'origine de la distinction. Par conséquent, on recourt à des nuances pour justifier une constatation de différence, ce qui réduit le critère à un jeu de classement par catégories. De plus, le critère est sans utilité. Après tout, la plupart des lois sont adoptées dans le but précis de procurer un avantage ou d'imposer une contrainte à certaines personnes et non à d'autres. Le critère décèle toutes les différences imaginables de traitement par la loi.

Pour les motifs qui précèdent, le critère ne peut être accepté comme règle ou formule figée applicable en vue de trancher les questions d'égalité soulevées en vertu de la *Charte*. Il faut tenir compte du contenu de la loi, de son objet et de son effet sur ceux qu'elle vise, de même que sur ceux qu'elle exclut de son champ d'application. Les questions qui seront soulevées d'un cas à l'autre sont telles que ce serait une erreur que de tenter de restreindre ces considérations à une formule limitée et figée.

Ce ne sont pas toutes les distinctions ou différences de traitement devant la loi qui portent atteinte aux garanties d'égalité de l'art. 15 de la *Charte*. Il est certes évident que les législatures peuvent et, pour gouverner efficacement, doivent traiter des individus ou des groupes différents de façons différentes. En effet, de telles distinctions représentent l'une des principales préoccupations des législatures. La classification des individus et des groupes, la rédaction de différentes dispositions concernant de tels groupes, l'application de règles, de règlements, d'exigences et de qualifica-

society. As noted above, for the accommodation of differences, which is the essence of true equality, it will frequently be necessary to make distinctions. What kinds of distinctions will be acceptable under s. 15(1) and what kinds will violate its provisions?

In seeking an answer to these questions, the provisions of the *Charter* must have their full effect. In *R. v. Big M Drug Mart Ltd.*, this Court emphasized this point at p. 344, where Dickson C.J. stated:

> This Court has already, in some measure, set out the basic approach to be taken in interpreting the *Charter*. In *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, this Court expressed the view that the proper approach to the definition of the rights and freedoms guaranteed by the *Charter* was a purposive one. The meaning of a right or freedom guaranteed by the *Charter* was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect.
>
> In my view this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the *Charter* itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the *Charter*. The interpretation should be, as the judgment in *Southam* emphasizes, a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the *Charter*'s protection. At the same time it is important not to overshoot the actual purpose of the right or freedom in question, but to recall that the *Charter* was not enacted in a vacuum, and must therefore, as this Court's decision in *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357, illustrates, be placed in its proper linguistic, philosophic and historical contexts. [Emphasis in original.]

These words are not inconsistent with the view I expressed in *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313.

tions différents à des personnes différentes sont nécessaires pour gouverner la société moderne. Comme je l'ai déjà souligné, le respect des différences, qui est l'essence d'une véritable égalité, exige souvent que des distinctions soient faites. Quelles seront les distinctions acceptables en vertu du par. 15(1) et quelles seront celles qui violeront ses dispositions?

Pour tenter de répondre à ces questions, les dispositions de la *Charte* doivent être appliquées intégralement. Dans l'arrêt *R. c. Big M Drug Mart Ltd.*, précité, cette Cour insiste sur ce point à la p. 344 où le juge Dickson, maintenant Juge en chef, affirme:

> Cette Cour a déjà, dans une certaine mesure, énoncé la façon fondamentale d'aborder l'interprétation de la *Charte*. Dans l'arrêt *Hunter c. Southam Inc.*, [1984] 2 R.C.S. 145, la Cour a exprimé l'avis que la façon d'aborder la définition des droits et des libertés garantis par la *Charte* consiste à examiner l'objet visé. Le sens d'un droit ou d'une liberté garantis par la *Charte* doit être vérifié au moyen d'une analyse de l'objet d'une telle garantie; en d'autres termes, ils doivent s'interpréter en fonction des intérêts qu'ils visent à protéger.
>
> À mon avis, il faut faire cette analyse et l'objet du droit ou de la liberté en question doit être déterminé en fonction de la nature et des objectifs plus larges de la *Charte* elle-même, des termes choisis pour énoncer ce droit ou cette liberté, des origines historiques des concepts enchâssés et, s'il y a lieu, en fonction du sens et de l'objet des autres libertés et droits particuliers qui s'y rattachent selon le texte de la *Charte*. Comme on le souligne dans l'arrêt *Southam*, l'interprétation doit être libérale plutôt que formaliste et viser à réaliser l'objet de la garantie et à assurer que les citoyens bénéficient pleinement de la protection accordée par la *Charte*. En même temps, il importe de ne pas aller au delà de l'objet véritable du droit ou de la liberté en question et de se rappeler que la *Charte* n'a pas été adoptée en l'absence de tout contexte et que, par conséquent, comme l'illustre l'arrêt de cette Cour *Law Society of Upper Canada c. Skapinker*, [1984] 1 R.C.S. 357, elle doit être située dans ses contextes linguistique, philosophique et historique appropriés. [Souligné dans l'original.]

Ces mots ne sont pas incompatibles avec l'opinion que j'ai exprimée dans le *Renvoi relatif à la Public Service Employee Relations Act (Alb.)*, [1987] 1 R.C.S. 313.

S.C. 1976-77, c. 33, in denying employment to women in certain unskilled positions, Dickson C.J. in giving the judgment of the Court said, at pp. 1138-39:

> A thorough study of "systemic discrimination" in Canada is to be found in the Abella Report on equality in employment. The terms of reference of the Royal Commission instructed it "to inquire into the most efficient, effective and equitable means of promoting employment opportunities, eliminating systemic discrimination and assisting individuals to compete for employment opportunities on an equal basis." (Order in Council P.C. 1983-1924 of 24 June 1983). Although Judge Abella chose not to offer a precise definition of systemic discrimination, the essentials may be gleaned from the following comments, found at p. 2 of the Abella Report.
>
> > Discrimination . . . means practices or attitudes that have, whether by design or impact, the effect of limiting an individual's or a group's right to the opportunities generally available because of attributed rather than actual characteristics . . . .
> >
> > It is not a question of whether this discrimination is motivated by an intentional desire to obstruct someone's potential, or whether it is the accidental by-product of innocently motivated practices or systems. If the barrier is affecting certain groups in a disproportionately negative way, it is a signal that the practices that lead to this adverse impact may be discriminatory.

There are many other statements which have aimed at a short definition of the term discrimination. In general, they are in accord with the statements referred to above. I would say then that discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. 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

toires en matière d'embauche et de promotions, contrairement à l'art. 10 de la *Loi canadienne sur les droits de la personne*, S.C. 1976-77, chap. 33, en refusant aux femmes la possibilité d'occuper certains emplois non spécialisés, le juge en chef Dickson affirme ceci en rendant le jugement de la Cour, aux pp. 1138 et 1139:

> On trouve une étude exhaustive de la «discrimination systémique» au Canada dans le rapport Abella sur l'égalité en matière d'emploi. La Commission royale avait pour mandat «d'enquêter sur les moyens les plus efficaces et équitables de promouvoir les chances d'emploi, d'éliminer la discrimination systémique et d'assurer à tous les mêmes possibilités de prétendre à un emploi . . .» (Décret C.P. 1983-1924 du 24 juin 1983.) Quoique le juge Abella ait choisi de ne pas donner une définition précise de la discrimination systémique, on peut en glaner l'essentiel dans les commentaires suivants, que l'on trouve à la p. 2 de son rapport:
>
> > . . . la discrimination s'entend des pratiques ou des attitudes qui, de par leur conception ou par voie de conséquence, gênent l'accès des particuliers ou des groupes à des possibilités d'emplois, en raison de caractéristiques qui leur sont prêtées à tort . . .
> >
> > La question n'est pas de savoir si la discrimination est intentionnelle ou si elle est simplement involontaire, c'est-à-dire découlant du système lui-même. Si des pratiques occasionnent des répercussions néfastes pour certains groupes, c'est une indication qu'elles sont peut-être discriminatoires.

Il existe plusieurs autres énoncés où l'on a tenté de définir succinctement le terme «discrimination». Ils sont généralement conformes aux descriptions mentionnées auparavant. J'affirmerais alors que la discrimination peut se décrire comme une distinction, intentionnelle ou non, mais fondée sur des motifs relatifs à des caractéristiques personnelles d'un individu ou d'un groupe d'individus, qui a pour effet d'imposer à cet individu ou à ce groupe des fardeaux, des obligations ou des désavantages non imposés à d'autres ou d'empêcher ou de restreindre l'accès aux possibilités, aux bénéfices et aux avantages offerts à d'autres membres de la société. Les distinctions fondées sur des caractéristiques personnelles attribuées à un seul individu en raison de son association avec un groupe sont

based on an individual's merits and capacities will rarely be so classed.

The Court in the case at bar must address the issue of discrimination as the term is used in s. 15(1) of the *Charter*. In general, it may be said that the principles which have been applied under the Human Rights Acts are equally applicable in considering questions of discrimination under s. 15(1). Certain differences arising from the difference between the *Charter* and the Human Rights Acts must, however, be considered. To begin with, discrimination in s. 15(1) is limited to discrimination caused by the application or operation of law, whereas the Human Rights Acts apply also to private activities. Furthermore, and this is a distinction of more importance, all the Human Rights Acts passed in Canada specifically designate a certain limited number of grounds upon which discrimination is forbidden. Section 15(1) of the *Charter* is not so limited. The enumerated grounds in s. 15(1) are not exclusive and the limits, if any, on grounds for discrimination which may be established in future cases await definition. The enumerated grounds do, however, reflect the most common and probably the most socially destructive and historically practised bases of discrimination and must, in the words of s. 15(1), receive particular attention. Both the enumerated grounds themselves and other possible grounds of discrimination recognized under s. 15(1) must be interpreted in a broad and generous manner, reflecting the fact that they are constitutional provisions not easily repealed or amended but intended to provide a "continuing framework for the legitimate exercise of governmental power" and, at the same time, for "the unremitting protection" of equality rights: see *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at p. 155.

It should be noted as well that when the Human Rights Acts create exemptions or defences, such as a *bona fide* occupational requirement, an exemption for religious and political organizations, or definitional limits on age discrimination, these

presque toujours taxées de discriminatoires, alors que celles fondées sur les mérites et capacités d'un individu le sont rarement.

En l'espèce, la Cour doit aborder la question de la discrimination au sens où ce terme est utilisé au par. 15(1) de la *Charte*. De façon générale, on peut affirmer que les principes qui ont été appliqués en vertu des lois sur les droits de la personne s'appliquent également à l'examen des questions de discrimination au sens du par. 15(1). Il faut cependant tenir compte de certaines distinctions qui découlent de la différence entre la *Charte* et les lois sur les droits de la personne. D'abord, la discrimination dont il est question au par. 15(1) est restreinte à celle qui découle de l'application de la loi alors que les lois sur les droits de la personne s'appliquent aussi aux activités de nature privée. De plus, et il s'agit d'une distinction plus importante, toutes les lois sur les droits de la personne adoptées au Canada spécifient un certain nombre restreint de motifs prohibés de discrimination. Il n'en est pas de même au par. 15(1) de la *Charte*. Les motifs énumérés au par. 15(1) ne sont pas exclusifs et les restrictions, le cas échéant, que la jurisprudence pourra apporter aux motifs de discrimination ne sont pas encore précisées. Les motifs énumérés traduisent cependant les pratiques de discrimination les plus courantes, les plus classiques et vraisemblablement les plus destructrices socialement, et ils doivent, selon le par. 15(1), recevoir une attention particulière. Les motifs énumérés eux-mêmes et les autres motifs possibles de discrimination reconnus au par. 15(1) doivent, dans les deux cas, recevoir une interprétation large et libérale de manière à refléter le fait qu'il s'agit de dispositions constitutionnelles qu'il n'est pas facile d'abroger ou de modifier, mais qui visent à fournir un «cadre permanent à l'exercice légitime de l'autorité gouvernementale» et, par la même occasion, à «la protection constante» des droits à l'égalité: voir *Hunter c. Southam Inc.*, [1984] 2 R.C.S. 145, à la p. 155.

Il convient également de souligner que, lorsque des lois sur les droits de la personne créent des exemptions ou des moyens de défense, comme l'exigence professionnelle normale, une exemption relative à des organisations religieuses ou politi-

Court File No. 24668

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

B E T W E E N:

BRANT COUNTY BOARD OF EDUCATION

Appellant
(Respondent)

- and -

CAROL EATON and CLAYTON EATON

Respondents
(Appellants)

- and -

ATTORNEY GENERAL FOR ONTARIO,
ATTORNEY GENERAL FOR BRITISH COLUMBIA,
ATTORNEY GENERAL FOR QUEBEC,
EASTER SEAL SOCIETY,
DOWN SYNDROME ASSOCIATION,
ONTARIO PUBLIC SCHOOL BOARDS ASSOCIATION,
CANADIAN FOUNDATION FOR CHILDREN, YOUTH AND THE LAW,
LEARNING DISABILITIES ASSOCIATION OF ONTARIO,
COUNCIL OF CANADIANS WITH DISABILITIES,
CANADIAN ASSOCIATION FOR COMMUNITY LIVING,
CONFEDERATION DES ORGANISMES DES PERSONNES HANDICAPPEES DU QUEBEC,
PEOPLE FIRST OF CANADA,
COMMISSION DES DROITS DE LA PERSONNE ET DES DROITS DE LA JEUNESSE

Intervenors

CONDENSED BOOK OF EVIDENCE
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impose that conclusion. In some circumstances they may; in some they may not.

I conclude that the ultimate criterion for determining limits on access to a child is the best interests of the child. The custodial parent has no "right" to limit access. The judge must consider all factors relevant to determining what is in the child's best interests; a factor which must be considered in all cases is Parliament's view that contact with each parent is to be maximized to the extent that this is compatible with the best interests of the child. The risk of harm to the child, while not the ultimate legal test, may also be a factor to be considered. This is particularly so where the issue is the quality of access — what the access parent may say or do with the child. In such cases, it will generally be relevant to consider whether the conduct in question poses a risk of harm to the child which outweighs the benefits of a free and open relationship which permits the child to know the access parent as he or she is. It goes without saying that, as for any other legal test, the judge, in determining what is in the best interests of the child, must act not on his or her personal views, but on the evidence.

(b) The Constitutionality of the Test

The first question is whether the *Charter* applies. Because of my conclusion later in these reasons that valid orders under the "best interests of the child" standard cannot violate the *Charter*, I find it unnecessary to decide whether the *Charter* applies to an action for access under the *Divorce Act* between two parents. For the purposes of this section, I assume that it does.

The constitutional focus in this case centres on the guarantee of freedom of religion in s. 2(*a*) of the *Charter* and the guarantee of freedom of expression in s. 2(*b*) of the *Charter*. The guarantees of freedom of association and equality apply

dice d'un préjudice, non plus que les objections de l'enfant. Dans certaines circonstances, cela constituera effectivement l'indice d'un préjudice, alors que ce ne sera pas le cas dans d'autres circonstances.

J'en conclus que le critère ultime permettant de restreindre l'accès à un enfant est l'intérêt de celui-ci. Le parent gardien n'a aucun «droit» de limiter l'accès. Pour déterminer ce qui est dans l'intérêt de l'enfant, le juge doit prendre en considération tous les facteurs pertinents, l'un d'eux étant toujours l'intention du législateur de maximiser le contact avec chacun des parents dans la mesure où cela est compatible avec l'intérêt de l'enfant. Bien que le risque de préjudice ne soit pas le critère juridique ultime, il peut aussi s'agir d'un facteur à considérer. Cela est particulièrement vrai lorsque le litige porte sur la qualité de l'accès — ce que le parent peut faire avec l'enfant ou lui dire. En pareil cas, il sera généralement pertinent de voir si la conduite en cause comporte pour l'enfant un risque de préjudice supérieur aux effets bénéfiques que pourrait lui apporter une relation libre et ouverte lui permettant de connaître la personnalité véritable du parent exerçant un droit d'accès. Il va sans dire que, comme pour tout autre critère juridique, le juge devant déterminer l'intérêt de l'enfant ne doit pas fonder son jugement sur ses opinions personnelles, mais sur la preuve.

b) La constitutionnalité du critère

La première question qui se pose est celle de l'application de la *Charte*. Étant donné la conclusion à laquelle j'arrive plus loin que des ordonnances valides au regard du critère de «l'intérêt de l'enfant» ne peuvent violer la *Charte*, il n'y a pas lieu de décider si celle-ci s'applique à une demande de droit d'accès présentée en vertu de la *Loi sur le divorce*. Pour les fins de la présente partie, je présume donc que la *Charte* s'applique.

Sur le plan constitutionnel, l'attention se porte, en l'espèce, sur la liberté de religion garantie par l'al. 2*a*) de la *Charte*, ainsi que sur la liberté d'expression garantie par l'al. 2*b*). Quant aux garanties relatives à la liberté d'association et à l'égalité,

only tangentially, if at all, and were not emphasized in argument.

The respondent says that legislative provision for the "best interests of the child" violates his religious and expressive freedom. The argument is that in some cases the "best interests of the child" will require a judge to make an order limiting expressive or religious freedom. Therefore, it is submitted, the test is unconstitutional, unless it can be saved under s. 1.

In my view, this argument cannot stand. The reason is that the guarantees of religious freedom and expressive freedom in the *Charter* do not protect conduct which violates the best interests of the child test.

Whether Application of the Best Interests Standard Violates the Charter

Does the *Charter* protect religious expression which is not in the best interests of the child? In my view, the answer to this question is no.

It is established that the guarantee of freedom of religion does not extend to religious activity which harms other people. In *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, this Court held that freedom of religion is not absolute; in particular, it does not extend to conduct that would injure or interfere with the parallel rights of others. Dickson J., (as he then was), after a lengthy historical review of freedom of religion in our society and legal system, concluded at p. 346:

> Viewed in this context, the purpose of freedom of conscience and religion becomes clear. The values that underlie our political and philosophic traditions demand that every individual be free to hold and to manifest whatever beliefs and opinions his or her conscience dictates, provided *inter alia* only that such manifestations do not injure his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own. [Emphasis added.]

The next question is whether conduct which is not in the best interests of the child amounts to an

elles ne s'appliquent qu'à titre accessoire, si tant est qu'elles s'appliquent, et on n'a pas insisté sur ce point en plaidoirie.

L'intimé affirme que la disposition législative privilégiant «l'intérêt de l'enfant» viole ses libertés de religion et d'expression. Il fait valoir que, dans certains cas, ce critère obligera en effet le juge à rendre une ordonnance limitant la liberté d'expression ou de religion. Par conséquent, soutient-il, le critère est inconstitutionnel, à moins qu'il ne puisse être justifié en vertu de l'article premier.

À mon avis, cet argument ne peut être retenu. La raison en est que les garanties de liberté de religion et d'expression énoncées dans la *Charte* ne protègent pas une activité qui viole le critère de l'intérêt de l'enfant.

L'application du critère de l'intérêt de l'enfant viole-t-elle la Charte?

La *Charte* protège-t-elle l'expression religieuse qui n'est pas dans l'intérêt de l'enfant? À mon avis, il faut répondre à cette question par la négative.

Il est établi que la garantie de liberté de religion ne s'étend pas à des activités religieuses causant un préjudice à autrui. Dans l'arrêt *R. c. Big M Drug Mart Ltd.*, [1985] 1 R.C.S. 295, notre Cour a conclu que la liberté de religion n'est pas absolue; elle ne s'étend pas en particulier à une activité qui porterait atteinte aux propres droits d'autrui. Après une longue analyse historique de la liberté de religion dans notre société et de notre système juridique, le juge Dickson, plus tard Juge en chef, a conclu, à la p. 346:

> Vu sous cet angle, l'objet de la liberté de conscience et de religion devient évident. Les valeurs qui sous-tendent nos traditions politiques et philosophiques exigent que chacun soit libre d'avoir et de manifester les croyances et les opinions que lui dicte sa conscience, à la condition notamment que ces manifestations ne lèsent pas ses semblables ou leur propre droit d'avoir et de manifester leurs croyances et opinions personnelles. [Je souligne.]

La question suivante consiste à se demander si la conduite qui n'est pas dans l'intérêt de l'enfant

"injury" or intrusion on the rights of others within the meaning of this comment. If so, the guarantee of freedom of religion will not protect such conduct.

It is clear that conduct which poses a risk of harm to the child would not be protected. As noted earlier, religious expression and comment of a parent which is found to violate the best interests of a child will often do so because it poses a risk of harm to the child. If so, it is clear that the guarantee of religious freedom can offer no protection. But I think a case can be made that even in cases where a risk of harm may not have been established, the guarantee of freedom of religion should not be understood to extend to protecting conduct which is not in the best interests of the child. I understand "injure" in the passage cited from *R. v. Big M Drug Mart Ltd.*, *supra*, to be a broad concept. To deprive a child of what a court has found to be in his or her best interests is to "injure", in the sense of not doing what is best for the child. The vulnerable situation of the child heightens the need for protection; if one is to err, it should not be in favour of the exercise of the alleged parental right, but in favour of the interests of the child. An additional factor which may come into play in the case of older children is the "parallel right" of others referred to by Dickson J., "to hold and manifest beliefs and opinions of their own". For these reasons, I conclude that the *Charter* guarantee of freedom of religion does not extend to protect conduct which is not in the best interests of the child under the *Divorce Act*.

I come then to freedom of expression. The ambit of this right has been more broadly drawn than freedom of conscience and religion, in that even harmful expression may be protected: *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927; *R. v. Keegstra*, [1990] 3 S.C.R. 697; *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123. On the other hand, some forms of harmful expression are not constitutionally protected. Violence or threats of violence are not protected: see *RWDSU v. Dolphin*

équivaut à une «lésion» des droits d'autrui ou à une intrusion dans ces droits au sens de ce passage. Dans l'affirmative, elle ne sera pas protégée par la garantie de liberté de religion.

Il est indubitable que la conduite qui comporte pour l'enfant un risque de préjudice ne serait pas protégée. Comme je l'ai souligné précédemment, l'expression et les commentaires à caractère religieux d'un parent qui sont jugés contraires à l'intérêt de l'enfant le seront souvent parce que celui-ci risque d'en subir un préjudice. Si c'est le cas, il est clair que la garantie de liberté de religion ne peut offrir aucune protection. Mais on peut, à mon avis, soutenir que, même dans les cas où le risque de préjudice n'a pas été établi, la garantie de liberté de religion ne devrait pas s'étendre à la protection d'une conduite qui n'est pas dans l'intérêt de l'enfant. À mon sens, la lésion qu'évoque le passage précité de l'arrêt *R. c. Big M Drug Mart Ltd.* est une notion large. Priver un enfant de ce que le tribunal a jugé être dans son intérêt équivaut à le «léser», au sens où on ne fait pas ce qui est le mieux pour lui. La situation de vulnérabilité dans laquelle se trouve l'enfant renforce le besoin de protection; si l'on doit se tromper, cela ne devrait pas être en faveur de l'exercice du droit parental allégué, mais en faveur de l'intérêt de l'enfant. Pour les enfants plus âgés, un facteur additionnel pourra jouer soit, comme le dit le juge Dickson, le «propre droit» des autres «d'avoir et de manifester leurs croyances et opinions personnelles.» Pour ces motifs, je conclus que la liberté de religion garantie par la *Charte* ne protège pas la conduite qui n'est pas dans l'intérêt de l'enfant au sens de la *Loi sur le divorce*.

J'en viens maintenant à la liberté d'expression. La portée de ce droit a été définie plus largement que celle de la liberté de conscience et de religion, en ce que même l'expression préjudiciable peut être protégée: *Irwin Toy Ltd. c. Québec (Procureur général)*, [1989] 1 R.C.S. 927; *R. c. Keegstra*, [1990] 3 R.C.S. 697; *Renvoi relatif à l'art. 193 et à l'al. 195.1(1)c) du Code criminel (Man.)*, [1990] 1 R.C.S. 1123. En revanche, certaines formes d'expressions préjudiciables ne sont pas protégées par la Constitution, telles la violence ou les menaces

In conclusion, an unreasonable finding, whatever its origin, affects the jurisdiction of the tribunal.

In the case at bar I consider that the adjudicator was not authorized by s. 61.5(9)(*c*) to order the employer not to answer a request for information about respondent except by sending the letter of recommendation containing the aforementioned wording, since such an order is patently unreasonable. Though the adjudicator clearly had jurisdiction to make an order he felt to be equitable and proper, he lost this jurisdiction when he made a patently unreasonable decision.

Appellant further argued that s. 61.5(9)(*c*) did not empower the adjudicator to make such an order, since that paragraph does not clearly state that the adjudicator can use a remedy that differs from the remedies usually available under the ordinary rules of common law in such circumstances. The principle underlying this argument is that, in the absence of a clear provision to the contrary, the legislator should not be assumed to have intended to alter the pre-existing ordinary rules of common law. There is no need for me to rule on the merits of this principle, since I consider that in the case at bar, by enacting para. (*c*), the legislator clearly indicated his intent to confer wider powers on the adjudicator than those he usually has under the ordinary rules of common law in such circumstances.

It now remains to assess in light of the *Canadian Charter of Rights and Freedoms* the part of the order we have found to be not unreasonable in terms of the rules of administrative law. The fact that the part of the order relating to sending the letter of recommendation is not unreasonable from an administrative law standpoint does not mean that it is necessarily consistent with the *Charter*.

The fact that the *Charter* applies to the order made by the adjudicator in the case at bar is not, in my opinion, open to question. The adjudicator is a statutory creature: he is appointed pursuant to a legislative provision and derives all his powers

En conclusion, une détermination déraisonnable, quelle qu'en soit la source, porte atteinte à la juridiction du tribunal.

En l'espèce, je suis d'avis que l'arbitre n'était pas autorisé, aux termes de l'al. 61.5(9)*c*), à ordonner à l'employeur de ne répondre à une demande de renseignements relative à l'intimé que par l'envoi de la lettre de références contenant le texte précité puisqu'une telle ordonnance est manifestement déraisonnable. Quoique l'arbitre avait clairement juridiction pour rendre une ordonnance qu'il jugeait équitable et appropriée, il a perdu cette juridiction en rendant une décision manifestement déraisonnable.

L'appelante prétend également que l'al. 61.5(9)*c*) ne permettait pas à l'arbitre de rendre une telle ordonnance puisque cet alinéa n'indique pas clairement que l'arbitre peut utiliser un remède qui diffère des remèdes habituellement disponibles en vertu des règles de droit commun dans des circonstances similaires. Le principe à la base de cet argument est celui selon lequel le législateur n'est pas censé, à défaut de disposition claire au contraire, avoir l'intention de modifier les règles de droit commun pré-existantes. Il n'est pas nécessaire de me prononcer sur la justesse de ce principe puisqu'en l'espèce je suis d'avis que le législateur, en édictant l'al. *c*), a clairement indiqué son intention de conférer à l'arbitre des pouvoirs plus larges que ceux qui lui sont habituellement dévolus, dans des circonstances similaires, par les règles de droit commun.

Il reste maintenant à soumettre au contrôle de la *Charte canadienne des droits et libertés* cette partie de l'ordonnance que nous avons jugée non déraisonnable eu égard aux principes de droit administratif. Le fait que cette partie de l'ordonnance relative à l'envoi de la lettre de références ne soit pas déraisonnable au sens du droit administratif ne signifie pas, en effet, qu'elle est nécessairement conciliable avec la *Charte*.

Le fait que la *Charte* s'applique à l'ordonnance rendue par l'arbitre en l'espèce ne fait, à mon avis, aucun doute. L'arbitre est en effet une créature de la loi; il est nommé en vertu d'une disposition législative et tire tous ses pouvoirs de la loi. La

from the statute. As the Constitution is the supreme law of Canada and any law that is inconsistent with its provisions is, to the extent of the inconsistency, of no force or effect, it is impossible to interpret legislation conferring discretion as conferring a power to infringe the *Charter*, unless, of course, that power is expressly conferred or necessarily implied. Such an interpretation would require us to declare the legislation to be of no force or effect, unless it could be justified under s. 1. Although this Court must not add anything to legislation or delete anything from it in order to make it consistent with the *Charter*, there is no doubt in my mind that it should also not interpret legislation that is open to more than one interpretation so as to make it inconsistent with the *Charter* and hence of no force or effect. Legislation conferring an imprecise discretion must therefore be interpreted as not allowing the *Charter* rights to be infringed. Accordingly, an adjudicator exercising delegated powers does not have the power to make an order that would result in an infringement of the *Charter*, and he exceeds his jurisdiction if he does so. This idea was very well expressed by Professor Hogg when he wrote in his text titled *Constitutional Law of Canada* (2nd ed. 1985), at p. 671:

> The reference in s. 32 to the "Parliament" and a "legislature" make clear that the Charter operates as a limitation on the powers of those legislative bodies. Any statute enacted by either Parliament or a Legislature which is inconsistent with the Charter will be outside the power of (ultra vires) the enacting body and will be invalid. It follows that any body exercising statutory authority, for example, the Governor in Council or Lieutenant Governor in Council, ministers, officials, municipalities, school boards, universities, administrative tribunals and police officers, is also bound by the Charter. Action taken under statutory authority is valid only if it is within the scope of that authority. Since neither Parliament nor a Legislature can itself pass a law in breach of the Charter, neither body can authorize action which would be in breach of the Charter. Thus, the limitations on statutory authority which are imposed by the Charter will flow down the chain of statutory authority and apply to regulations, by-laws, orders, decisions and all other action (whether legislative, adminis-

Constitution étant la loi suprême du pays et rendant inopérantes les dispositions incompatibles de toute autre règle de droit, il est impossible d'interpréter une disposition législative attributrice de discrétion comme conférant le pouvoir de violer la *Charte* à moins, bien sûr, que ce pouvoir soit expressément conféré ou encore qu'il soit nécessairement implicite. Une telle interprétation nous obligerait en effet, à défaut de pouvoir justifier cette disposition législative aux termes de l'article premier, à la déclarer inopérante. Or, quoique cette Cour ne doive pas ajouter ou retrancher un élément à une disposition législative de façon à la rendre conforme à la *Charte*, elle ne doit pas par ailleurs interpréter une disposition législative, susceptible de plus d'une interprétation, de façon à la rendre incompatible avec la *Charte* et, de ce fait, inopérante. Une disposition législative conférant une discrétion imprécise doit donc être interprétée comme ne permettant pas de violer les droits garantis par la *Charte*. En conséquence, un arbitre exerçant des pouvoirs délégués n'a pas le pouvoir de rendre une ordonnance entraînant une violation de la *Charte* et il excède sa juridiction s'il le fait. Le professeur Hogg a très bien exprimé cette idée lorsqu'il a écrit dans son volume intitulé *Constitutional Law of Canada* (2e éd. 1985), à la p. 671:

> [TRADUCTION] La mention du «Parlement» et d'une «législature» à l'art. 32 montre clairement que la Charte agit comme une limite aux pouvoirs de ces organes législatifs. Tout texte de loi adopté par le Parlement ou une législature, qui est incompatible avec la Charte excédera les pouvoirs (sera *ultra vires*) de l'organisme qui l'a adopté et sera invalide. Il s'ensuit que tout organisme qui exerce un pouvoir statutaire, par exemple le gouverneur en conseil, le lieutenant-gouverneur en conseil, les ministres, les fonctionnaires, les municipalités, les commissions scolaires, les universités, les tribunaux administratifs, les officiers de police, est également lié par la Charte. Les mesures prises en vertu d'un pouvoir statutaire ne sont valides que si elles se situent à l'intérieur de la portée de ce pouvoir. Puisque ni le Parlement ni une législature ne peuvent eux-mêmes adopter une loi qui contrevient à la Charte, ni l'un ni l'autre ne peuvent autoriser des mesures qui contreviendraient à la Charte. Ainsi, les limites que la Charte impose à un pouvoir statutaire s'étendront à la famille des autres pouvoirs statutaires et s'appliqueront aux règlements, aux statuts, aux ordonnances, aux décisions et à toutes les autres mesures (législatives, administrati-

and s. 136(1)(*h*) is as follows:

> 136(1) Subject to the rights of secured creditors, the proceeds realized from the property of a bankrupt shall be applied in priority of payment as follows:
>
> . . . . . .
>
> (*h*) all indebtedness of the bankrupt under any Workmen's Compensation Act, under any Unemployment Insurance Act, under any provision of the *Income Tax Act* creating an obligation to pay to Her Majesty amounts that have been deducted or withheld, rateably;

(This subparagraph is repealed by S.C. 1992, c. 27, s. 54(2). By the successor section, after November 30, 1992, the *Workers' Compensation Act* indebtedness no longer has a priority.)

The principals maintain that, by reason of s. 9 and the failure of the bankrupt to make payment as required, they are liable to make payment of the amount due to the Workers' Compensation Board and seek to set that amount off against the amount admitted to be owed to the bankrupt. The trustee maintains that to allow the set-off would amount to a breach of s. 136(1)(*h*) of the *Bankruptcy Act* and would give the Workers' Compensation Board a priority over that provided by the subsection.

The bankruptcy judge accepted the argument of the trustee and ordered the principals to pay the full sum to the trustee "free and clear of any claim by the Workers' Compensation Board".

No doubt because of the latter part of the order, it is not the principals but the board that is appealing. If the order stands, the money will all go to the trustee and the principals will not be required to make any payment to the board under s. 9. In any event, the board does not appeal the order relieving the principals of payment to it, but rather appeals the whole order and seeks to substitute an order requiring the principals to pay to the trustee only the net sum after deduction of that owing to the board under s. 9. Presumably the principals will then pay over to the board that latter sum.

The first problem we must face is the argument of the Attorney General intervener that the order below is a nullity because of the failure of any party to give notice that the constitutional validity or constitutional applicability of a statute was being challenged as required by s. 109 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, which provides:

> 109(1) Where the constitutional validity or constitutional applicability of an Act of the Parliament of Canada or the Legislature or of a regulation or by-law made thereunder is in question, the Act, regulation or by-law shall not be adjudged to be invalid or inapplicable unless notice has been served on the Attorney General of Canada and the Attorney General of Ontario in accordance with subsection (2).

> (2) The notice shall be in the form provided for by the rules of court and, unless the court orders otherwise, shall be served at least ten days before the day on which the question is to be argued.

It is common ground that no such notice was served on either the Attorney General of Canada or the Attorney General of Ontario at the initial stage. Notice was served on both Attorneys General in February and March of 1992, about a year-and-a-half after the launching of this appeal. The Attorney General of Canada declined to intervene, but the Attorney General of Ontario has done so.

As stated before, the bankruptcy judge in his reasons held that s. 9, while valid in a non-bankruptcy situation, is inapplicable when bankruptcy occurs and is superseded by s. 136(1) of the *Bankruptcy Act*. Thus the Workers' Compensation Board can only rely on the priority it is given under the *Bankruptcy Act* and cannot receive the money directly under s. 9 of the *Worker's Compensation Act*.

The intervener relies on the New Brunswick Court of Appeal case of *N. (D.) u New Brunswick (Minister of Health & Community Services)* (1992), 93 D.L.R. (4th) 668, 41 R.F.L. (3d) 1, where that court held a similar notice under New Brunswick legislation was indeed mandatory and reversed a decision rendered without it. In that case, the trial judge ruled certain sections of the New Brunswick *Family Services Act*, S.N.B. 1980, c. F-2.2, unconstitutional on his own motion and without argument from any party, much less the government concerned. Here, the failure to give notice was, on the part of the judge and both counsel, entirely inadvertent and full argument on the constitutional question was made in the lower court.

There also appears to be support for the intervener's position in the short endorsement of Callaghan A.C.J.H.C. in *Roberts u Sudbury (City)*, a judgment of the Ontario High Court delivered June 22, 1987, as follows:

> The appeal is allowed, the order of the court below is set aside and the matter is committed to the District Court in Sudbury for a hearing before another judge of that court on notice to the Attorney General of Ontario pursuant to s. 122 of the *Courts of Justice Act*.
>
> The Attorney General of Ontario was not notified thereunder of hearing in appeal and wishes to make submissions on the constitutional applicability of s. 284 of the *Municipal Act*. The failure on the part of the plaintiff to comply with s. 122 renders the order in appeal one made without jurisdiction.

In two Saskatchewan cases, namely *R. u Beare* and *R. u Higgins*, heard together and reported at (1987), 31 C.R.R. 118, [1987] 4 W.W.R. 309 (C.A.), the question of service of the notice arose. In

one it had been served; in the other it had not. Both cases concerned the validity of the *Identification of Criminals Act*, R.S.C. 1970, c. I-1, of the province. In both cases, the finding of the court of first instance had upheld the validity of the Act, and the Court of Appeal rejected that finding on the ground that the Act violated s. 7 of the *Canadian Charter of Rights and Freedoms*. The relevant section of the Saskatchewan Act [*Constitutional Questions Act*, R.S.S. 1978, c. C-29] was as follows:

> 8(1) Where in a court in Saskatchewan the constitutional validity of an Act or enactment of the Parliament of Canada or of the Legislature or the validity of an order in council is brought in question, the Act, enactment or order in council shall not be adjudged to be invalid until after notice has been given to the Attorney General of Canada or the Attorney General of Saskatchewan, as the case may be.

The court was concerned about the failure of the court below in the *Beare* case to notify the Attorney General in accordance with that section. Bayda C.J.S. had this to say at p. 140 C.R.R., p. 332 W.W.R.:

> One procedural issue, however, does need clearing up. In the *Higgins* case, the appellant served a notice on the Attorney General of Canada pursuant to the Constitutional Questions Act, R.S.S. 1978, c. C-29. In the *Beare* case, the appellant did not serve such a notice. In the *Higgins* case, the appellant relied on an alleged impingement of the rights guaranteed to the defendant under ss. 8 and 11(*d*) of the Charter. In the *Beare* case, the appellant relied upon the rights guaranteed to him under ss. 7, 8, 9, 10 and 11(*c*) and (*d*) of the Charter. Has the Attorney General of Canada been prejudiced by the failure of the appellant to serve a notice in the *Beare* case? He, of course, was given an opportunity to present an argument in the *Higgins* case and, had he done so, that argument would have applied to the *Beare* case as well. Given the circumstances of these two cases, I find that the Attorney General of Canada has not been prejudiced by the failure to file a notice under the Constitutional Questions Act in the *Beare* case.

In *Citation Industries Ltd. u C.J.A., Local 1928* (1988), 53 D.L.R. (4th) 360, the British Columbia Court of Appeal was concerned with s. 8 of the *Constitutional Questions Act*, R.S.B.C. 1979, c. 63, which is a section similar to those of Ontario and Saskatchewan. The court below had held a certain section of the *Industrial Relations Act*, R.S.B.C. 1979, c. 212, of the province unconstitutional without notice to the provincial Attorney General. In that case, all counsel asked that the matter be heard on the merits (an advantage we do not have here). It is, I think, important however that Seaton J.A. said, at p. 363: "At this stage nothing turns on the absence of earlier notice".

Neither of the courts in Saskatchewan or British Columbia specifically dealt with the argument that the judgments under appeal were nullities. Nevertheless, both relied heavily on a lack

of prejudice to the Attorney General in his argument on appeal. In the case at bar, counsel for the Attorney General was invited to show prejudice and was unable to do so. In my view, that should be the controlling factor. The failure to give notice was entirely inadvertent (and indeed the argument for constitutionality was presented by the Workers' Compensation Board in the lower court). We have heard full argument on the question. Nothing would be gained by sending it back but repetition and expense. I turn now to the main issue.

In my view, there is no conflict between ss. 9(3) and (4) of the *Workers' Compensation Act* and s. 136(1)(*h*) of the *Bankruptcy Act* as it formerly existed.

There is no suggestion that s. 9 of the *Workers Compensation Act* was enacted for the purpose of improving the ranking of the Workers' Compensation Board in a bankruptcy. Both sections have been with us for many years in more or less their present form. Section 9 was first enacted in 1915 (*Workmen's Compensation Act, 1915*, S.O. 1915, c. 24) and s. 136(1)(*h*) came into being with an amendment to the *Bankruptcy Act*, S.C. 1919, c. 36, in 1921.

This precise issue has indeed arisen before and been disposed of by this court in *Re French River Contracting Co.*, [1937] O.W.N. 665. There, the Township of Etobicoke held money due the bankrupt and there came about a contest between the trustee and the Workmen's Compensation Board of Ontario as to the disposition. Fisher J.A. for the court decided the issue as follows at p. 667:

> All that s.s. 3 of sec. 9 does is to give the Board a right of action against the principal (in this case the Township of Etobicoke) if there was a failure by it to see "that any sum which the contractor or any subcontractor is liable to contribute to the accident fund is paid", and the meaning of s.s. 4 of sec. 9 is that should the principal (in this case the township) be liable to the Board "he shall be entitled to be indemnified by any person who should have made such payment, and shall be entitled to withhold out of any indebtedness due to such person a sufficient amount to answer the same".
>
> Under The Bankruptcy Act, upon an assignment or a receiving order being made, all property of the debtor immediately becomes vested in the trustee. The question is whether these moneys ($1,911.25) were property or assets of the debtor company and whether they vested in the trustee.
>
> This Court is unanimously of the opinion that this money under the terms of the original contract, was charged or burdened in favour of the treasurer of the township with the payment to the Board of whatever amount was owing upon assessments levied or to be levied against the debtor company by the Board, and was not free and unencumbered property or an asset of the debtor company that vested in the trustee under the authorized assignment. The result, therefore, is that the Board is entitled to receive from the township the sum of $1,911.25.

As mentioned by Grange J.A., it is common ground that no notice was served on either the Attorney General of Canada or the Attorney General of Ontario at any stage of the trial. The Attorneys General were first served one-and-a-half years after the commencement of the appeal, more than one year after the appeal had been perfected. We were informed by Mr. Schwartz, counsel for the Attorney General of Ontario, that the Attorney General's office learned by chance of the decision under appeal, some two years after it had been delivered. No one suggested that the Workers' Compensation Board is an adequate substitute for the Attorney General for the purpose of the notice provision. The board is an independent entity which does not represent, and is not represented by, the Attorney General.

By virtue of s. 109(4) and (5) of the *Courts of Justice Act*, the Attorney General was entitled to adduce evidence and make submissions before the trial court, and was deemed to be a party for the purpose of any appeal with respect to the constitutional question. As it turns out in this case, a provincial Attorney General was not given the opportunity to be heard before a provincial statute was declared inapplicable in bankruptcy situations. In my opinion, the absence of further prejudice is not relevant, given the mandatory wording of s. 109(1). An adjudication made in violation of that mandatory language must be considered a nullity.

My colleague Justice Grange has reviewed the various authorities on the consequences of the failure to comply with the requirements for notice of a constitutional question. None of the authorities referred to us is binding upon this court. The absence of prejudice to an Attorney General who has not been served with a notice that the constitutionality of his statute was being litigated, was noted by Bayda C.J.S. in *R. v. Beare*, which is reported together with *R. v. Higgins* at (1987), 31 C.R.R. 118, [1987] 4 W.W.R. 309 (Sask. C.A.). The cases involved two challenges to the constitutional validity of a federal statute, the *Identification of Criminals Act*, R.S.C. 1970, c. I-1. The Attorney General of Canada had been notified in the *Higgins* case and had chosen not to intervene. The Attorney General did not receive notice of the *Beare* case, which was based, in part, on different sections of the *Canadian Charter of Rights and Freedoms*. Before concluding that the Attorney General suffered no prejudice due to the lack of notice, Bayda C.J.S. noted that the Crown did not object to the procedure adopted by the defendants to bring the issues to the court below and to the Court of Appeal. The Chief Justice then remarked that certain procedural questions had been raised by the bench during argument and, as a result, had not been fully

argued by the parties. It is not clear whether the failure in the *Beare* case to serve a notice on the Attorney General of Canada pursuant to the *Constitutional Questions Act*, R.S.S. 1978, c. C-29, was an issue raised by the court during the hearing of the appeal. Be that as it may, Chief Justice Bayda seemed to conclude that the absence of prejudice was sufficient to displace any concern about the absence of notice to the Attorney General. It is arguable that, in *Beare*, the mandatory requirements of the applicable Saskatchewan statute were not infringed by the absence of notice in the court below since the chambers judge refused to give effect to the constitutional challenge. Section 8 of the Saskatchewan Act, which is quoted by Grange J.A., provides that an enactment shall not be adjudged to be invalid until after notice has been given to the Attorney General. Although notice may not have been required in the court below, I would have thought that it should have been given before the Court of Appeal arrived at its disposition.

The case which, in my view, is the closest to the case at bar is *Citation Industries Ltd. v. C.J.A., Local 1928* (1988), 53 D.L.R. (4th) 360 (B.C.C.A.) The trial judge in that case had declared certain sections of a provincial statute *ultra vires* the province, on his own motions and without notice to the Attorney General. Notice, however, had been given by the time the case reached the Court of Appeal. All parties agreed that notice should have been given to the Attorney General before the statute was declared unconstitutional in the court below. However, all parties were properly convened in the appeal and, as indicated by Seaton J.A., all counsel asked the court to deal with the merits of the appeal. Esson J.A., in his concurring opinion, dealt more fully with that point. Referring to all parties' willingness to have the Court of Appeal deal with the merits despite the absence of notice to the Attorney General in the court below, he said, at p. 369:

> The court's agreement to deal with the ground in that way should not be seen as supporting the view that an order holding legislation unconstitutional is a valid order if made without compliance with the *Constitutional Question Act*, R.S.B.C. 1979, c. 63, s. 8.
>
> . . . . .
>
> The question, in substance, is one of parties. When the constitutional validity of a statute of the province is called into question, the party with the clearest interest in being heard on that question is the province represented by the Attorney General. When a decision is made without the requisite notice, it follows, in my view, that the proceeding is bad for want of parties.

I share the view expressed by Justice Esson. Like the British Columbia Court of Appeal, I would have been prepared to proceed with the merits of this appeal with the consent of all parties.

Absent such express consent by the Attorney General, who is merely an intervener in the appeal but is, in law, entitled to have participated in the proceedings below and to be a party in this court, this option is not open to us. In my opinion, the absence of prejudice does not alter this conclusion.

I can find nothing in the language of the *Courts of Justice Act* which purports to dispense with the notice requirements where there is no prejudice. The usual approach is to treat an adjudication as non-binding on someone who should have been, but was not, a party to the litigation; this is not a satisfactory remedy in a case such as the present one. Until reversed on appeal, the trial judgment in this case was binding on all lower courts in the province. The lower courts did not have the option of treating it as *per incuriam* (*Leroux v. Co-operators General Insurance Co.* (1991), 4 O.R. (3d) 609, 83 D.L.R. (4th) 694 (C.A.)). In my opinion, counsel for the Attorney General is correct in his contention that a decision made in contravention of the mandatory terms of s. 109 of the *Courts of Justice Act* must be considered a nullity.

I add that counsel for the Attorney General did not enthusiastically insist that a new trial be held in this matter and he candidly conceded that the Attorney General had no evidence to tender on the constitutional issue. However, the larger issue is that of the remedy for failure to comply with the mandatory requirements of s. 109 and, on that point, I must conclude that a trial court is without jurisdiction to adjudicate the constitutional invalidity or the constitutional inapplicability of a statute without notice to the appropriate Attorney General. Since we had the benefit of full argument by all parties, including the Attorney General, I would think that this is an appropriate case in which to express our opinion about the merits of the constitutional issues, albeit in *obiter* form since the intervener is correct that the decision below is a nullity (see *R. v. Seaboyer; R. v. Gayme* (1987), 61 O.R. (2d) 290, 35 C.R.R. 300 (C.A.))

As indicated earlier, I am in agreement with my colleague Grange J.A. as to the merits of the appeal.

For these reasons, I would allow the appeal and order a new trial.

Appeal allowed.

finding that the ground on which the equal treatment is denied is relevant to the legislative goal or the functional values underlying the impugned law. With respect, I cannot agree. Proof that the enumerated or analogous ground founding a denial of equality is relevant to a legislative goal may assist in showing that the case falls into the class of rare cases where such distinctions do not violate the equality guarantees of s. 15(1), serving as an indicator that the legislator has not made the distinction on stereotypical assumptions about group characteristics. However, relevance is only one factor in determining whether a distinction on an enumerated or analogous ground is discriminatory in the social and political context of each case. A finding that the distinction is relevant to the legislative purpose will not in and of itself support the conclusion that there is no discrimination. The inquiry cannot stop there; it is always necessary to bear in mind that the purpose of s. 15(1) is to prevent the violation of human dignity and freedom through the stereotypical application of presumed group characteristics. If the basis of the distinction on an enumerated or analogous ground is clearly irrelevant to the functional values of the legislation, then the distinction will be discriminatory. However, it does not follow from a finding that a group characteristic is relevant to the legislative aim that the legislator has employed that characteristic in a manner which does not perpetuate limitations, burdens and disadvantages in violation of s. 15(1). This can be ascertained only by examining the effect or impact of the distinction in the social and economic context of the legislation and the lives of the individuals it touches.

concluante si l'on juge pertinent le motif sur lequel se fonde la négation du droit à l'égalité de traitement relativement à l'objet de la loi ou aux valeurs fonctionnelles qui la sous-tendent. Avec égards, je ne partage pas cet avis. Une preuve de la pertinence par rapport à un objectif législatif du motif énuméré ou du motif analogue qui sert de fondement à une négation d'égalité peut aider à démontrer qu'il s'agit de l'un des rares cas où de telles distinctions ne violent pas les garanties d'égalité visées au par. 15(1), constituant un indice que le législateur n'a pas établi la distinction à partir d'hypothèses stéréotypées concernant des caractéristiques de groupe. Cependant, la pertinence n'est qu'un facteur servant à déterminer si une distinction fondée sur un motif énuméré ou un motif analogue est discriminatoire dans le contexte social et politique de chaque cas. Déclarer que la distinction est pertinente relativement à l'objet de la loi n'appuiera pas en soi la conclusion qu'il n'y a pas discrimination. L'examen ne peut s'arrêter là; il faut toujours se rappeler que l'objet du par. 15(1) est d'empêcher la violation de la dignité et de la liberté de la personne par l'application stéréotypée de présumées caractéristiques de groupe. Si le fait de fonder la distinction sur un motif énuméré ou un motif analogue est tout à fait non pertinent relativement aux valeurs fonctionnelles de la loi, alors la distinction sera discriminatoire. Cependant, conclure qu'une caractéristique de groupe est pertinente relativement à l'objet d'une loi ne signifie pas pour autant que le législateur a employé cette caractéristique d'une façon qui ne perpétue pas des restrictions, des fardeaux et des désavantages en contravention du par. 15(1). On ne peut s'en assurer qu'en examinant l'effet ou l'incidence de la distinction dans le contexte social et économique de la loi et la vie des personnes que cette distinction touche.

134 In approaching the concept of relevance within s. 15(1), great care must be taken in characterizing the functional values of the legislation. My colleague Gonthier J. concedes that the distinction here at issue — denial on the basis of marital status — might, for some purposes, be viewed as an analogous ground. He asserts, however, that it is not used in a discriminatory manner in this case

Dans l'analyse du concept de la pertinence dans le contexte du par. 15(1), il faut accorder une attention particulière à la détermination des valeurs fonctionnelles de la loi. Mon collègue le juge Gonthier reconnaît que la distinction en l'espèce — la négation d'un droit fondée sur l'état matrimonial — pourrait à certaines fins être considérée comme un motif analogue. Cependant, il affirme que cette

because "the functional value of the benefits is not to provide support for all family units living in a state of financial interdependence, but rather, the Legislature's intention was to assist those couples who are married" (para. 72). He concludes that distinguishing on the basis of marital status is relevant to this purpose and hence that the law is not discriminatory. On examination, the reasoning may be seen as circular. Having defined the functional values underlying the legislation in terms of the alleged discriminatory ground, it follows of necessity that the basis of the distinction is relevant to the legislative aim. This illustrates the aridity of relying on the formal test of logical relevance as proof of non-discrimination under s. 15(1). The only way to break out of the logical circle is to examine the actual impact of the distinction on members of the targeted group. This, as I understand it, is the lesson of the early decisions of this Court under s. 15(1). The focus of the s. 15(1) analysis must remain fixed on the purpose of the equality guarantees which is to prevent the imposition of limitations, disadvantages or burdens through the stereotypical application of presumed group characteristics in violation of human dignity and freedom.

The same criticism can be made of La Forest J.'s reasoning in *Egan v. Canada*, [1995] 2 S.C.R. 513, released concurrently. La Forest J. characterizes the functional value of the legislation as meeting the need to support married couples who are elderly. Because, in his view, marriage is "firmly anchored in the biological and social realities that heterosexual couples have the unique ability to procreate" (para. 21), Parliament may use the relevant ground of sexual orientation as a basis for distinguishing who should receive benefits under the Act. By defining the legislative aim in terms of the alleged discriminatory ground, namely married couples, the relevance of the ground is assured. On the assumption — misplaced in my view — that this relevance suffices to negate discrimination, s. 15(1) is said to be met without examining the

distinction n'est pas utilisée de façon discriminatoire dans le cas qui nous occupe parce que «la valeur fonctionnelle des avantages n'est pas de venir en aide à toutes les unités familiales qui vivent dans un état d'interdépendance financière; en réalité, la législature avait l'intention d'aider les couples mariés» (par. 72). Il conclut qu'une distinction fondée sur l'état matrimonial est pertinente relativement à cet objectif et que, en conséquence, la loi n'est pas discriminatoire. À l'examen, ce raisonnement peut paraître circulaire. Une fois définies les valeurs fonctionnelles qui sous-tendent la loi par rapport au motif de discrimination allégué, il s'ensuit nécessairement que le fondement de la distinction est pertinent relativement à l'objet de la loi. Cela illustre qu'il est vain de se fier au critère formel de la pertinence logique comme preuve de l'absence de discrimination au sens du par. 15(1). La seule façon de sortir de ce cercle logique est d'examiner l'incidence réelle de la distinction sur les membres du groupe visé. C'est là, si je comprends bien, la leçon qu'il faut tirer des premiers arrêts de notre Cour sur le par. 15(1). L'analyse fondée sur le par. 15(1) doit continuer de se concentrer sur l'objet des garanties d'égalité qui est d'empêcher que soient imposés des restrictions, des désavantages ou des fardeaux par le biais de l'application stéréotypée de présumées caractéristiques de groupe en violation de la dignité et de la liberté de la personne.

La même critique peut être formulée à l'endroit 135
du raisonnement du juge La Forest dans l'arrêt *Egan c. Canada*, [1995] 2 R.C.S. 513, rendu simultanément. Il affirme que la valeur fonctionnelle de la loi est de répondre à la nécessité de venir en aide aux couples mariés qui sont âgés. À son avis, parce que le mariage «repose fermement sur la réalité biologique et sociale qui fait que seuls les couples hétérosexuels ont la capacité de procréer» (par. 21), le législateur peut utiliser le motif pertinent de l'orientation sexuelle pour déterminer qui devrait recevoir les indemnités en vertu de la Loi. Si l'on définit l'objet de la loi en fonction du motif de discrimination allégué, soit le mariage, le motif est assurément pertinent. Si l'on suppose, erronément à mon avis, que cette pertinence suffit à réfuter la discrimination, on se trouve à avoir

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ONTARIO SPECIAL EDUCATION (ENGLISH) TRIBUNAL

IN THE MATTER OF the Education Act, R.S.O. 1990, c. E.2: IN THE MATTER OF Ontario Regulation 305 (formerly 554/81) made under the Education Act, as amended, AND IN THE MATTER OF the minor EMILY EATON, born 28 February 1984;

between

CAROL AND CLAYTON EATON

Appellants

- and -

THE BRANT COUNTY BOARD OF EDUCATION

Respondent

Tribunal Members:

Ken Weber	Chair
Carol Sanna	Member
Frank Turner	Member

For the Appellants:

Ms A. Molloy, Ms J. Budgell

For the Respondent

Ms B. Bowlby

The hearing was held in Brantford, Ontario on 18 January; 17, 18, 19, 26, 27, 28, 31 May; 1, 2, 3, 4, 14, 15, 21, 23, 24, 25 June; 29, 30, 31 July, 1993.

The Appellants' Request

That the determination of the Brant County Board of Education Identification, Placement, and Review Committee (IPRC) which directs that Emily Eaton be placed in a special class, be set aside, and that Emily be placed full time, in a regular, age-appropriate class at Maple Avenue School, with full accommodation of her special needs, including provision of a full-time educational assistant, any necessary assistive devices, appropriate education materials and resources, and proper training of all staff.

Chair's Note

1. From opening submissions by the appellants' counsel, from the appellants' statement of request letter to the Secretary of the Tribunal (11 December 1992) and from exhibits such as Exhibit A-13 (Minutes of the Appeal Board) the Tribunal inferred that the parents' request is that a full-time educational assistant be assigned specifically to respond to Emily's needs. In response to a request for clarification from the Tribunal, we are told in reply testimony from Carol Eaton, and from closing submissions by appellants' counsel, that the request of the parents in the matter of an educational assistant is that the assistant be assigned full time to the regular class in which Emily is enrolled.

2. The parents are not appealing Emily's designation by the IPRC as an exceptional pupil.

Respondent's Reply

That the request of the parents regarding placement be denied, and that the determination of the IPRC be upheld, on the grounds that, having regard to Emily Eaton's needs, the best placement for her is in a special class.

Witnesses

For the Appellants	For the Respondent
Rochelle Bouchir	Donna Bell
Gary Bunch	Brian Cronkwright
Kimberley Davis	Jackie Ireland
Carol Eaton	Audrey Lottridge
Clayton Eaton	June Piggott
Jennifer Huxley	John Shurvin
Malcolm Lock	Jeffers Toby
Murray McCutcheon	Diane Williams
Nerida Parkhill	
Fiona Roberton	
Mara Sapon-Shevin	
Harry Silverman	
Kathy Vanderheyden	
Sue Whittaker	
Carolyn Williams	
Robert Williams	
Cathy Winter	

Rochelle Bouchir

Ms Bouchir is a speech-language pathologist, employed by the Lansdowne Children's Centre since September, 1992. Emily is a client having check-up status, i.e., Ms Bouchir consults with Emily's parents and school personnel. She explains that because Emily is not physically able to sustain eye contact for very long, one looks for other signs of attending behaviour as well, e.g., in Ms Bouchir's words, "...when her body is still and her tone is higher and she may move her head toward a sound, we have a sign then that she's attending" (Vol.5,p.931).

Ms Bouchir asserts that people learn language skills "...through attending and then later imitating and then later speaking on their own" (p.921). She stresses the importance of turn-taking, and feels that Emily shows progress in this skill in the special services at home program. Regarding signs, Ms Bouchir describes Emily's signing as idiosyncratic, stating, "I observed her signing 'more', and what Mrs. Eaton described was Emily's sign for 'drink'" (p.927). "I know I asked her...a yes-no question. ...She made a quick breath in and Mr. and Mrs. Eaton pointed out that she was saying 'yes' at that point" (p.938).

With reference to a small doll that was new to Emily, Ms Bouchir asserts, "I asked her to point to eyes, hands, feet and the doll's stomach, I used the word tummy, and she pointed to all of them" (p.928). She explains the importance of symbolic object representation for an augmentative communication system.

Ms Bouchir delineates the rationale for a number of the communication goals in Emily's current program. Regarding Emily's response to sounds Ms Bouchir states, "I've seen her recognize people's voices...and it was reported to me at school that Emily enjoys music and interesting sounds..." (p.937). In Emily's home Ms Bouchir says she observed Emily imitating her mother's vocal intonation or stress patterns.

Gary Owen Bunch

Dr. Bunch is an Associate Professor of Education and Psychology at York University, and is accepted to give opinion evidence as an expert in the field of education of children with exceptionalities.

His expressed understanding from a review of literature is that it, in his words, "...does not speak clearly to any social and academic gains particularly resident in special education as we presently structure it. ...within the past ten or 12 years...we've come to an understanding of literature that in some cases says there is a beneficial effect of some types of regular education placements and other literature that says there is a neutral effect of special education placements and other literature that says that placement in a regular classroom has at least equal effect to placement in special education classrooms. ...we cannot consistently and concretely prove that [a separate structure] has had the effect that we wished. ...it has had some less than positive effects on the relationships of children and the acceptance of children within the school systems and within community generally" (Vol.6,pp.1043&1044).

He refers to the deinstitutionalization movement and the trend to integrate children diagnosed as mildly or moderately challenged in their learning. Regarding integrated vis a vis special class placement, Dr. Bunch asserts, "I consider the parents the most informed people to make a decision on placement" (p.1048). He speaks of the Contact Hypothesis, "That children who have been labelled, through interaction with regular children...will benefit from seeing normal behaviour... laughter...anger...abilities, exceptional abilities" (p.1051). Decisions on where to draw the line with respect to regular class placement are determined through the IPRC process, but, he says, "...the regular classroom teacher, with appropriate support and encouragement, can effectively accept responsibility for almost any student..." (p.1054).

Dr. Bunch states that standardized tests tend to become weaker as the subject to be tested becomes more distant from the average population. Determining a child's potential for learning is, in his words, "...best approached through a multidisciplinary, multiperson discussive functionally oriented type of approach" (p.1061). The educational situation is formal, and parents, according to Dr. Bunch, "...just see a heck of a lot that teachers will never see" (p.1062).

In a qualitative, three-year research study, Dr. Bunch studied 32 pupils whom he described as "...severely and profoundly challenged in their learning' (p.1067). These pupils were fully integrated into regular classes for the first time at the beginning of the study, and were enrolled at that time in Kindergarten to Grade 9 by three separate school boards. The changes in a child were evaluated through assessing the changes in stated objectives for the child. Dr. Bunch's conclusion is that "...inclusion of pretty well all children in a regular classroom is a very possible, pragmatic, and practicable educational dynamic" (p.1071).

In reply to a question, Dr. Bunch expresses the view that students with the kinds of needs he understands Emily Eaton to have can be taught by average classroom teachers "...with the support of qualified specialist personnel" (p.1081). His research study finds that special education resource personnel consult and plan with regular classroom teachers and administrators, "Sometimes directly teaching a number of children, most often in the regular classroom... Being the person...who would...make sure that things were moving well...responding to any particular glitches that came up on a day to day basis" (p.1085).

In Dr. Bunch's opinion, a teaching assistant "...is most appropriately assigned to a class...or...in a variety of classes...as a resource to the total program of a school. ...when a person is assigned one-on-one...there is a chance of a

dependency relationship...to the exclusion of interaction with other children and...the classroom teacher..." (pp.1088&1089).

Dr. Bunch describes the Circle of Friends peer support system, "...stimulating, initiating, eliciting the volunteer support of peers...to...befriend...support...assist...any child who is in the classroom" (p.1091). His opinion is that the effect of Circle of Friends would be limited in situations where an educational assistant takes care of any needs which arise with respect to a particular pupil.

From a one-year study, Dr. Bunch concludes, using an attitude scale of his own design, that whereas teachers' attitudes about inclusionary education were congruent in the absence of experience in either inclusionary or special education roles. Attitudes change after a year of such experience. Teachers who took a special education course and became special education teachers had become, quoting Dr. Bunch, "...more reserved in their approbation of inclusionary education. People who had taught in the inclusionary system...by and large liked it more...[but] there were concerns [about]...teacher/resource teacher relationships, administrative support" (p.1102). In cross-examination, Dr. Bunch reveals that there was a total of 32 teachers in the study, and that those in the inclusionary group did not necessarily have any profoundly challenged pupils in their classes, nor indeed necessarily any exceptional pupils at all. He states, "I think a variety of situations could be hypothesized" (p.1143).

Dr. Bunch says he would not integrate into a regular classroom a child who is dangerous to self or others. This is where he draws the line on integration. But for a child as severely challenged as Emily appears to be, Dr. Bunch says, "My experience is that regular classroom teachers if they have some good in-service preparation, teacher training...support of colleagues, resource teachers, leadership...good interaction with parents, appropriate in-class support systems, can work to the

benefit of children...more effective than what the child would receive in a special education setting" (p.1106).

Dr. Bunch is Chair of the Board of the Centre for Integrated Education and Community, which advocates for, consults on, and advises on inclusionary education, but he does not view himself as an advocate.

Without appropriate support in the regular classroom the exceptional pupil will not necessarily experience increased social interaction or social acceptance, according to Dr. Bunch, but the child will imitate the behaviours of normal children. He agrees that there has to be some comparability in terms of social, intellectual level for mainstreaming to work.

In a discussion about the Ministry of Education and Training Consultation Paper on the Integration of Exceptional Pupils attention was drawn to the statement that the wishes and preferences of the parents are as important as are the opinions of educators in the process of making placement decisions. Dr. Bunch asserts, "In instances where educators and parents disagree it is my position that the position of the parents is the one that should hold" (p.1121).

Asked in cross-examination whether there are data to support the Contact Hypothesis, Dr. Bunch replies, "...without being able to cite a particular study...[he] would think there is data to support the hypothesis" (p.1133).

In a discussion about the qualitative research studies of pupils and teachers undertaken by Dr. Bunch, he disagrees that assessing the progress of pupils by means of examining changes in teachers' goals is unduly subjective. He says, "...I wouldn't use the term subjectivity in that context" (p.1153). He acknowledges that two of the three inclusionary school boards in which he conducted his studies did have pupils in segregated special education classes.

Dr. Bunch agrees that in his study of the 32 children his intent was not to demonstrate that educating children in a fully integrated classroom is necessarily superior to educating such children in a segregated setting. He states, "I had no comparative intent...inclusion is a challenging concept; people have to think hard about it; people have to be willing to be flexible and regear themselves to some degree" (pp.1173&1174).

Kimberley Davis

Mrs. Davis states that her daughter was in the same class as Emily in kindergarten, Grade 1 and Grade 2. Mrs. Davis feels that her daughter's exposure to Emily, a physically disabled person, enabled her to be comfortable with wheelchairs and handicapped persons in general.

Carol Eaton

Mrs. Eaton describes circumstances surrounding Emily's birth, February 28, 1984. Twenty-four to thirty hours after birth Emily had a grand mal seizure, after which she was placed in the McMaster Neonatal Intensive Care Unit. After Emily had been in McMaster for five weeks, Mrs. Eaton says she and her husband were told, "...if we really wanted...take her home and love her, but...she would never feed herself...would be very lucky if she wasn't tube-fed for the rest of her life. She was having 40 to 50 seizures every day that we were witnessing" (Vol.2,p.110). "She was on oxygen 24 hours a day" (p.115). At 18 months Emily was no longer on oxygen, bottles, or apnea monitor, and, according to Mrs. Eaton, "She was totally breast feeding" (p.116).

Mrs. Eaton explains, "Emily was extremely sensitive to any kind of stimulation...could tolerate almost no stimulation in the beginning" (p.120). Mrs. Eaton says, "It took a long time to get a label of cerebral palsy from any medical profession" (p.124).

When Emily was born, her siblings, Peter, Mark, and Brian were five, three, and twenty-one months respectively. They eventually were told that Emily had cerebral palsy, and Mrs. Eaton asserts, "They were taught to watch for her seizures...mainly just facial grimaces" (p.127). "...we had been specifically told by the doctor at Mac...she would be...I believe his exact words were 'but a vegetable'. We told them [Emily's brothers] that we were absolutely not willing to accept that diagnosis...we believed Emily had more potential than that...she was demonstrating it through her ability to learn to suck" (p.128).

Mrs. Eaton indicates that Emily's condition is such that she is hypotonic, i.e., "floppy rather than being rigid" (p.120). "...we will constantly look for methods to assist her to develop the full potential that she has...now she is able to eat table food, usually with a spoon...to eat all finger foods easily...to pick up a glass...and give herself a drink...to weight bear and...with minimal assistance to walk using a...walker...to make sounds but not articulate. She uses very little communication, but...a lot more than we were given notice that she would" (p.131). Mrs. Eaton continues, "She's been signing a limited number of signs since she was approximately three and a half years old" (p.142). "We started working with her on signs when she was about two or two and a half years old...it was particularly difficult to get her to look at what we were trying to have her look at and listen at the same time" (p.148). "She gradually built the ability to look at it when...having the sign made with her hands, hand over hand, by us" (p.149). "The limiting disability...does make some of the signs...difficult to make...signs such as 'eat' and 'drink'. She was making quite a few animal signs. Most of the ones she makes now are fairly clear..." (p.150).

Mrs. Eaton explains that without ankle/foot orthoses (AFO's) Emily has limited ability to stand unsupported. AFO's, Mrs. Eaton explains, "...cover the bottom of her foot, go up behind her heel and cover the entire back of her leg up to her knee level" (p.155).

Mrs. Eaton affirms that Emily uses a walker in the house, outside, and at school for walking to the bathroom. "Initially," says Mrs. Eaton, "she [Emily] was very resistant to touch it... She actively resisted being in it in the beginning" (p.157). "She is still touch sensitive...at times she needs to be verbally cued to keep her hands on it" (p.158). "...she mouths a lot of things...has eaten sand as have all of her brothers... We are working particularly on looking at things with her eyes rather than her hands. Children who are very tactile...like to reassure themselves with mouthing" (p.159).

Mrs. Eaton says that Carolyn Williams, a special services worker, works with Emily at the Eaton home from 3:30 to 5:30 Monday to Friday. Carolyn was shown on videotape facilitating sit-ups, tall kneels, and using a peg-board to reinforce pincer grasp, visual focus, and turn-taking. Mrs. Eaton says that Emily's "...improvements for long lengths of time tend to be quality rather than quantity changes" (p.170). "The specific goals are set by the therapists, physiotherapist, occupational therapist, and speech therapist" (p.171). The therapists are said to receive input from the parents and the school. The special services worker contacts the therapists every six weeks, or more frequently if necessary.

Mrs. Eaton asserts that Emily "...likes...stories about children or animals which, I guess, is pretty typical of kids that age" (p.180). "If I've got a lot of time I spend as much as two or three hours with her looking at books, reading stories, augmenting it with story tapes on and off" (pp.185&186). Mrs. Eaton says that Emily will vocalize if she is discontent or not interested and that Emily also indicates when she is happy

and content. "She giggles, does a lot of smiling...uses full body activity to let us know that she is really involved in what she's hearing" (p.186). "...she does have her own library card and she does check her own books out of the library" (p.189).

A videotape shows Emily's birthday party in February, 1993. Asked to comment on Emily's action of mouthing a box, Mrs. Eaton replies, "...she uses the oral method of checking in the same way that babies often mouth a lot of things...reverts to checking orally to make sure that she understands what she is getting in a visual or tactile method" (p.204). "For the most part we ask her not to put things in her mouth, but to use her vision..." (p.205). "...we don't make a thing out of it because...if you accent the negative behaviour...it only makes the negative behaviour become worse" (p.206).

Mrs. Eaton describes the slow progress of teaching Emily to use a pincer grasp. Of the videotape, Mrs. Eaton remarks, "I think it's a pretty good picture of the way the kids interact with her...when we're at home. It's also...indicative of Emily's enjoyment level of the normal activities with children her age" (p.213).

Mrs. Eaton says, "...music and food are the two incredible motivators for her" (p.222).

At about 18 months, according to Mrs. Eaton, Emily "...started...to lift herself up and sit a little bit unsupported... She gained more trunk strength...more balance" (p.226). Visual tracking activities were used with Emily, as well as auditory stimulation designed to elicit a visual focus. At three and a half or four, Emily was strapped to a standing frame to get a feeling of weight-bearing. By age four she was doing what Mrs. Eaton describes as "...a very intensive physio program...four hours per day" (p.231). When Emily was four and a half she broke her leg.

Mrs. Eaton describes Emily's acquisition of eating skills -- learning to keep food in her mouth and swallow, and learning to use a spoon, which involves overcoming her reluctance to grasp the spoon in her extremely touch-sensitive hands.

Mrs. Eaton explains that Emily has learned to roll over. "She uses rolling mainly to move herself from one place to another... Now she can get down off her bed" (p.244). "We're working on the reverse... The getting back on is very slow" (p.245). "She certainly lets us know when she is happy...not happy...if her pants are wet...if she wants to eat or drink...if she wants the radio on... Sometimes the Communication is still a little bit iffy for us" (p.246). "She will 'uh-huh' or turn her head away to indicate 'no' for an answer" (p.247).

Emily attended a developmental day centre, the Andrew Donaldson Centre, for a year before she started to school.

Mrs. Eaton describes Emily's toilet-training protocol and the regression which occurred when Emily broke her leg, and Mrs. Eaton goes on to summarize the areas of physical development currently under way: gross motor activities involving the trunk and arms; correct walking posture; body movement; fine motor skills such as grasp, release, palmer grip, pincer grasp, use of a spoon; strengthening neck muscles; kneeling. Mrs. Eaton asserts, "Most things she can do now. She can sit. She can walk. She can stand. It's building the quality of how she does it that we're working on now" (p.255).

Emily is described as having had a very strong startle reflex as an infant. Originally, Mrs. Eaton explains, Emily did not look at sounds, and then, "We started noticing that with certain sounds, Clayton and I and the boys or music, she would become quiet. Then she started looking..." (p.264). Mrs. Eaton says that Emily now "...will make and maintain eye contact...will respond yes or no in various ways" (p.267). She indicates that Emily shows preferences, "...prefers to listen to music than do physio" (p.268).

Mrs. Eaton affirms of Emily, "She's known the meaning of words like mom and dad and dog and cat and bird and fish and brothers and girl...drink, food, toilet, since she was probably around three, three and a half" (p.269). "In terms of spoken language she only has one word and that's 'mom'... (p.271). "She attempts — she will do a lot of signs when we ask her; they're not always coming close to what we would recognize even as signs, but she is physically moving her body, we feel, in an attempt to make the signs" (pp.270&271). Mrs. Eaton describes working with Emily on colours and shapes. "Initially she would have to be told what the colours were" (p.269). "She recognizes the shape triangle, circle, and square every time that she is asked at home" (p.293).

The Eatons went to Dufferin School in Brantford to register Emily for kindergarten. Mrs. Eaton explains, "So that would still have been our first choice, to have her in a school where she could be exposed to the constant French language... Then as a second choice...we looked to our neighbourhood school" (p.296). Mrs. Eaton states that she and her husband wanted Emily to have the opportunity to learn in the same school environment as other children. "We felt...that there was very limited opportunity for her to learn academically in the contained classes...we have no way of proving that she is learning academically, neither does anybody have any way of proving that she does not learn academically " (p.300). "I think the major point is that she has got to live in our world and not we in hers" (p.301).

Pending a decision by an IPRC, the Eatons agreed to let Emily attend Jane Laycock School in Brantford, where she was placed in a T.M.R. class in September, 1989. An IPRC meeting, convened in November, 1989, identified Emily as exceptional and determined that she would be placed on a trial basis in a regular grade in the neighbourhood school. Mrs. Eaton asserts, "It was agreed that Emily would need an Educational Assistant" (p.319). "Her first day [at Maple Avenue School] was April 30, 1990" (p.323).

Mrs. Eaton describes the method of communication between home and school. "We...communicate in a book which...goes back and forth in Emily's bag every day" (p.327).

An IPRC in June, 1990, determined, according to Mrs. Eaton, "...that she [Emily] would be maintained...in the regular grade with the support in place" (p.328). "Emily had a tendency to fall asleep during her first year at school and has continued to do that on occasion... Primarily we feel that's a mechanism that Emily uses when she's overstimulated" (p.329). Emily continued in kindergarten in September, 1990. The class was organized as a full-day program on alternate days. Mrs. Eaton states, "The desire to increase her physical stamina, to stay awake, to keep her chin dry, to walk like the other girls, to increase her toileting abilities were things that we felt were happening there" (p.334). "At the last meeting with school people [before the IPRC meeting of May 28, 1991] ...it was felt by the entire team...that it would be appropriate for her to remain with the peer group...and move on into the Grade 1 class..." (p.343). "On more than one occasion parents would tell me how valuable they found it to have Emily in the community school...that their children loved having Emily there..." (p.346). The IPRC determined that Emily be in the Grade 1 class at Maple Avenue School for 1991-92. Mrs. Eaton outlines a number of concerns which arose during 1991-92 regarding Emily's school experience, e.g., her falling asleep in class, her biting other pupils, her mouthing her clothing and hair, her being afforded opportunities for activities which were parallel to those of other pupils and at the appropriate level, and her vocalizing at inappropriate times.

The Eatons were notified of an IPRC meeting to be held on February 4, 1992. Mrs. Eaton delineates her disagreement with a number of written assessments about Emily contained in a conference report of the same date: "What it appeared to us they did was show all the negatives of Emily's present placement in

order to justify changing her placement" (p.374). Issues cited include the difficulty of measuring Emily's academic and social growth and of assessing her level of contentment; the under-responsiveness of the peer group to Emily; Emily's responses to auditory and visual stimuli; her co-ordination and difficulty in signing; her laughing and giggling at inappropriate times; the difficulty of assessing her receptive language; concern about Emily's placing objects in her mouth, about her social interaction with peers, and about the absence of a means of communication between Emily and her peers. The meeting is said to have confirmed Emily's identification as an exceptional pupil, and, Mrs. Eaton says, "The placement decision would be made at a later date" (p.389). The determination of the IPRC was to place Emily in a special education class.

The Eatons requested that a review meeting take place before the Board of Education be notified of the IPRC determination. Mrs. Eaton summarizes the reasons for wanting Emily in a neighbourhood school: opportunities for increased communication ability, for academic growth, for peer interaction and consequent age-appropriate development. She adds, "It is important that we normalize as many of the physical activities as possible in order to encourage Emily to be physically more able" (p.397).

The review confirmed the determination to place Emily in a special class, whereupon, in the words of Mrs. Eaton, "...we commenced the appeal of the decision" (p.401). "The Appeal Board hearing was May the 11th" (p.403). The Eatons submitted to the Appeal Board a Statement of Disagreement, With Reasons. Mrs. Eaton explains, "Because we stated that we would be going to appeal the decision of the Appeal Board to the Tribunal we anticipated that Emily would remain a student at Maple Avenue School under the stay of proceedings" (p.414). "We were offered a placement at Maple Avenue School half-time or a full-time placement in the special ed. classroom which would probably be at Banbury Heights School" (p.415). "We felt that she was entitled

to stay in the regular grade classroom full time..." (p.418).

Mrs. Eaton states that alternative special education placements mentioned following the special education appeal were Agnes Hodge, Greenbrier, and Prince Charles, none of which were considered by the Eatons to be in Emily's best interest. Mrs. Eaton describes having "...had to go to court to resolve the issue and get Emily back into school full days" (p.423). "Immediately after the injunction [granted September 11, 1992, by Mr. Justice Borins of the Ontario Court - General Division] Emily has attended full days with full support at Maple Avenue School in the Grade 2 class..." (p.427). Mrs. Eaton states that Emily's school experience during 1992-93 "...appears very positive" (p.428).

Emily is described by Mrs. Eaton as having a "...remarkable sense of humour. ...She has always liked to tease" (p.431).

Asked to comment about the effect on Emily of moving to a new school, Mrs. Eaton replies, "I think it would be a major step backwards. I think we would see negative behaviours developing. I think that she would not progress in the manner that she is able to now. I think she would lose in a lot of ways. She would lose the community. She would lose the opportunity for academics. She would lose the role modelling of peers. She would lose the opportunity to interact in the classroom with children. I think that she would become upset. I assume that the travel distance would add fatigue to her which would interrupt her opportunity to learn in the classroom. I think that it would just be an entirely negative experience for her to move" (pp.434&435).

Under cross-examination Mrs. Eaton says that Emily was probably two and a half or three years old when Doctor McIntyre, a pediatrician on the Board at Lansdowne Treatment Centre, confirmed Emily's diagnosis as cerebral palsy. Mrs. Eaton goes on to name several physicians and other medical practitioners who have treated Emily. The family physician is Dr. Lock. Emily has

not been taken to the Hugh McMillan Centre. Mrs. Eaton expresses the view that "...Hugh McMillan Centre covers basically the same treatment approach as the Lansdowne Children's Centre which is in our area" (p.446). Mrs. Eaton describes Emily's visual problems: "...eyes which both turn in and turn out...jump, do a fluttering kind of motion. She has a tendency to not use her vision or to use her peripheral vision" (pp.446&447).

Asked why medical reports were not given to the Board, Mrs. Eaton responds, "...we...have been able, we felt, to provide the information that the reports may contain to School Board officials" (p.448).

Mrs. Eaton says that Emily has been observed in the classroom by two psychologists, Dr. Toby and Dr. Silverman.

Mrs. Eaton agrees that Emily, with appropriate support including the walker, can walk about 200 metres, not 2000 as she had earlier stated. Mrs. Eaton describes the activities in which Emily is involved with the home services worker, Carolyn Williams; activities having physio, occupational, and speech therapy goals.

Mrs. Eaton asserts that Emily "...had full bowel control and had pretty close to full bladder control...at approximately age four, four and a half" (p.465). She has regressed since breaking her leg; however, bowel training at home is said to be virtually 100 percent successful, and bladder training to be at the 50 percent level. There was regression in using signs, too, after Emily started attending school. Mrs. Eaton says, "There were a lot of new people who were not seeing the signs that she made or not interpreting them. It appeared that she just quit trying" (p.467).

Mrs. Eaton cites her dissatisfaction with the school program for Emily when she was enrolled in Jane Laycock School, and she clarifies that socialization is not the primary concern for her wanting Emily in a regular class. She says, "...it was important for her to be exposed to the academics and the normalization" (p.473).

In kindergarten, according to Mrs. Eaton, Emily "...was learning correctness of movement, correctness of body position. She was learning appropriateness" (p.478). "She was communicating on a much more involved level than she ever had before" (p.479).

According to Mrs. Eaton, Emily tested negative for hepatitis B when there was concern about her biting of other pupils.

Mrs. Eaton affirms her and Emily's preference for dresses over slacks notwithstanding Emily's tendency to lift her dress to bite and chew it.

Regarding the priority which should be given to finding a communication system for Emily, Mrs. Eaton agrees that communication is very important, but Mrs. Eaton says she "...would not agree that it is the only way for her to be able to learn or for her to be able to express herself" (p.499). Mrs. Eaton expresses the view that if Emily were removed from Maple Avenue School, "...she would be seen as less worthy" (p.500) Asked about communication between the Eatons and the Board of Education, and about the communication books which have always accompanied Emily to school and back to her home, Mrs. Eaton states, "I would be willing to see that the most recent pages are photocopied by us, but I'm not prepared to give permission to the Board to copy. ...I am uncomfortable with originals, that I believe belong to me, going out of my possession" (p.512).

Under re-examination Mrs. Eaton says that she has no recollection of the Board requesting medical reports. She indicates that Emily has been referred to the Hugh McMillan Centre for a global communication assessment.

In reply to a question about the proposed placement of Emily in Prince Charles School, Mrs. Eaton says that there was not any discussion about a total communication program to be provided there. She says she was informed that the transportation to and from Prince Charles School would take an hour each way.

Mrs. Eaton clarifies her method of determining that Emily can identify colours and says, "It would probably be in the 75 to 80 percent range that she would identify the correct colour..." (p.549). Regarding Emily's signing her need for toileting, Mrs. Eaton explains, "The sounds and the face is what makes us aware that she does have to use the bathroom" (p.522). Hypotonia is said by Mrs. Eaton to affect Emily's fingers and hands significantly. Whether Emily can control the strabismus which was apparent in the videotape, Mrs. Eaton is not certain.

Emily has not taken anticonvulsant medication since she was 18 to 20 months old. Her response to overstimulation, asserts Mrs. Eaton, is "...that she goes through that process of...shutting down" (p.559). "...it is, at least to us, apparent, the difference between this shutting down due to stimulation and the shutting down due to need of sleep because of physical fatigue or illness" (p.560).

Whether Emily has startle seizures is not clear, but in view of that possibility Mrs. Eaton feels that it is inappropriate to leave Emily unattended.

Mrs. Eaton indicates that use of the Wolfe Communication System, which was tried with Emily for about four months during the latter part of 1989, was discontinued because it was unreliable, was not used consistently, and was considered inappropriate at that time.

Mrs. Eaton clarifies the details surrounding Emily's referral to the Hugh McMillan Centre, and she states that medical and other health care specialists have not been able definitively to determine whether Emily's inability to communicate verbally involves a cognitive or developmental source. Mrs. Eaton says that she has tested Emily's understanding of speech at various times using nonsense syllables and other such techniques: "...it is something that I tend to do with her a lot..." (p.787).

Mrs. Eaton says she was unaware of instructions during the past year to the educational assistant about not putting negative information in the communication book. She states that she did not know about the second record kept by the educational assistant nor of the extent of Emily's crying, vocalizing, and sleeping at school until the Tribunal hearings.

Mrs. Eaton asserts that Emily recognizes her brothers by name. She explains that the Eatons have a large variety of specialized materials for Emily, which they have offered for use at school. She says it is all right for Emily to have a nap at school, that Emily could be toileted three times per day instead of hourly at school, and that the one-to-one intervention could be reduced.

Mrs. Eaton acknowledges having received a February, 1993, letter from the principal describing Emily's increased tendency to sleep and her disruptive crying. She agrees that at the one meeting which she attended at the school during the past year, she did not offer to bring in pieces of equipment or material.

Mrs. Eaton clarifies her expectations regarding the educational assistant, indicating that the latter's assistance is not necessarily needed by Emily 100 percent of the time.

Clayton Eaton

Mr. Eaton is a teacher employed by the W. Ross Macdonald School in Brantford.

Mr. Eaton testifies, "We want Emily to be a part of our community, of her community... I think society, in its enlightenment, and provincial governments, in their attempt to save money, have decided that Emily should be integrated with our family now, with our family within the community. I think our community includes her neighbourhood school" (Vol.4,p.613).

Mr. Eaton states, "What she really needs at this point is a program in sensory integration where she needs to be able to use all of her senses at the same time... A program of sensory

integration can be offered in an integrated setting, one that would perfectly adequately meet her needs. Once that's in place then the communication goals can be met. And I don't know of any communication programs that could not be used within an integrated setting" (pp.614&615). During Tribunal questioning Mr. Eaton states, "In a school setting it most likely would be carried out by the classroom assistant... To set up a proper program there would probably need to be some expert advice from people trained in that field... These types of programs are used extensively for deaf/blind children who are integrated into the regular classroom and the expertise is provided to the interveners and they are the ones who carry out the program: (p.747).

When speaking about his own career choice (to teach in a special school) and what he chooses for Emily he states, "They're at opposite ends of that continuum, but the philosophy is that the parents should have all the choices within that continuum. And my position at Ross Macdonald offers parents one of those choices" (p.615). "The general purpose of the program was to bring the students in and provide them with basic literacy skills...and to provide the children with a way of accessing printed material so that they can go back to their home community in their home setting and complete their education there" (pp.616&617).

Mr. Eaton testifies that since breakfast and lunch are therapy sessions for Emily they try to keep supper as a meal to enjoy. He says he has "been working on a program to help her lift her elbow off the plate" (p.621). Mr. Eaton states "...when my coffee comes out Emily usually decides that she's finished her meal time... She turns around with her body and physically looks at the radio and gives her big smile to me and that's my cue to go and turn on the radio because now she knows supper is over and...she quite enjoys the program that comes on after supper" (p.623). Mr. Eaton says it takes Emily about twenty minutes to

complete her meal.

Mr. Eaton testifies, "Emily understands everything that we tell her as long as it's within the context of her life. ...she understands the words we say and she responds to them appropriately; not the same response that another eight year old might have, but an appropriate response" (p.628).

With regard to Emily's being influenced by her peers Mr. Eaton testifies, "At her birthday party we had a paper tablecloth. Emily was trying to bring the paper tablecloth up to her mouth to get a bite of the tablecloth, I guess, or maybe she was trying to get the feel of the texture and hear it rattle and crinkle. But I was trying to get her to leave it down and I was giving her the stop sign and asking her to stop lifting the crinkle. But I was trying to get her to leave it down and I was giving her the stop sign and asking her to stop lifting the tablecloth up and she wasn't listening to me... So, I said 'well she's not listening to me, why don't you girls give her the stop sign?' So, all the girls around the table...made the stop sign for Emily. And from that point on Emily didn't lift the tablecloth any more" (pp.637&638).

Mr. Eaton feels that Emily needs to be taught the appropriate times to vocalize and that people need to look at why she is vocalizing when she is.

He says Emily tried to use a Wolfe Board as a method of speech output. "She could make the choices in a situation where she was motivated...with the crackers and juice...she never got to the point where she would spontaneously use the board to make the choice on her own. But...if you prompted her and asked her to make the choice she would use it for that and that would be the one where she would have the most success... I think that the choice not to use it was more that, at that point, it wasn't a useful thing for Emily in her life either as a therapy tool or useful for her to use in her daily life" (pp.647&648&649).

Mr. Eaton comments on Exhibit A2 (a video tape). He says, "Emily reacts to the Little Rabbit Foo-Foo even before the other children...she is clearly involved with what's going on with the other children" (pp.652&653). Mr. Eaton also testifies, "She was opening the gifts at that point and when she finished the gifts and was holding it up I was asking her to look at the camera and smile while she was holding the next gift. And she was paying attention to what I was saying and responding appropriately" (p.653). He says she was not being tickled at the time.

Mr. Eaton testifies that when Emily was first placed at Maple Avenue School, "We were told that she would be placed there in a pilot project to evaluate how she could be accommodated, how she would adapt to the program" (p.660). But by the end of Grade 1 it had become his "...understanding that that was her placement. It didn't appear to be a pilot project at that point" (p.661). He further states, "We weren't given any specifics about what the [special education] program would offer to Emily other than that it would be conducted by qualified and caring teachers who would be capable of meeting Emily's needs... That was during the original IPRC. I believe it would have been in February [1992]" (pp.661&662).

Mr. Eaton testifies, "I think throughout the kindergarten year we had no indication that they were having any difficulties and they seemed quite pleased with their success" (pp.672&673). He further states, "This past year has been a generally positive year for the most part. Mrs. Williams has an excellent relationship with Emily and she has some excellent skills with providing programming for Emily, adapting the program that Mrs. Lottridge presents to Emily and providing appropriate materials that relate to what's going on in the classroom" (pp.673&674). When asked to compare Emily's Grade 1 year with her Grade 2 year he says "This year is more positive... She's really quite enjoying this year, but I'm not sure that for Emily last year was a negative year" (p.674).

When questioned about directing the educational assistant to include only positives in the communication book Mr. Eaton states "I can't recall that specific incident" (p.703).

During cross examination Mr. Eaton agrees that his position about a regular class placement has become stronger and firmer.

Mr. Eaton visited the special class at Prince Charles School for about an hour and states "...we saw what went on for that hour...specific programs for Emily were not discussed" (p.708). Mr. Eaton is aware an Individual Program Plan is created once the child is in a placement. He states "It makes it awfully difficult for parents to choose a program when they don't know what it is" (p.708).

Jennifer Huxley

Jennifer Huxley is an occupational therapist at Lansdowne Children's Centre.

She states that Emily is working on fine motor skills relating to grasp and release. When asked if she noticed any progress in the development of her grasping over the last year Ms Huxley replies, "I can't say" (Vol.5,p.883).

In a document dated 26 January 1993 Ms Huxley reports that Emily eats in her classroom with other children. She says Emily watches other children and therefore eats most of her food after they leave the classroom. With regard to chewing Ms Huxley states that "Once she has the food in her mouth she can manoeuvre it around to chew it...before she swallows (p.887). When asked about a subheading referencing choking she testifies "Carol provided...information to me that she would generally only choke if she was ill (p.888).

Ms Huxley states, "I was very impressed with the educational assistant. She works very closely and comfortably with Emily...[they]...sort of work as one when she is working hand-over-hand with Emily" (p.891).

During Tribunal questioning Ms Huxley is asked questions relating to the appropriateness of specific goals within a grade 2/3 class. Specifically, clarification is requested relating to pulling off plastic container lids independently once the lip had been started and to place five objects through a cut out top into a container independently. Ms Huxley responds "I don't see that as totally inappropriate...maybe that some variance of the activities can be done on the part of the teacher, but these are just general ideas of...types of activities that can be used to develop those skills" (pp.902&903).

Malcolm S. Lock

Dr. Lock is a physician in family practice. He says that he was in attendance at Emily's birth, and she has been one of his patients ever since. Dr. Lock confirms that Emily has cerebral palsy, and he describes this as an umbrella type of diagnosis with a collection of symptoms. He thinks it is not possible to completely predict what any child's abilities are, and he cites his experience concerning a child at whose birth he assisted 12 to 13 years ago.

This child, he explains, was born with basically half a brain and multiple disabilities. Dr. Lock says he did not expect the child to develop to be a functioning member of society, but the child is now communicating by means of a Bliss board and shows quite remarkable abilities in some academic areas. Dr. Lock asserts, "...I've altered my perceptions of what handicapped children can do" (Vol.8,p.1474). He acknowledges that the child attended a special class.

Dr. Lock asserts that Emily is not a fragile patient.

Murray McCutcheon

Murray McCutcheon is a chiropractor who sees Emily approximately once every three or four weeks to adjust her spine in the upper cervical area in an attempt to "improve the mobility

and the function of the motor units of the spine" (Vol.5,p.832). Each session lasts about five minutes.

Dr. McCutcheon states that Emily has been his patient since 1986 but did not seem to be aware of him or responsive to him until 1990. He says this awareness, along with physical gains seems to have increased with each subsequent year.

Nerida Parkhill

Ms Parkhill is employed as a physiotherapist by the Lansdowne Children's Centre. She has been treating Emily Eaton since the fall of 1984. Ms Parkhill describes Emily's condition when she first started working with her: "She just was a very floppy, nonresponsive baby" (Vol.4,p.967). Ms Parkhill further describes hypotonia and the type of physiotherapy program needed for a hypotonic client. She points out that because gravity pulls one down, one must develop enough muscle strength to resist gravity and to hold joints in place in order to be able to achieve and maintain an upright position.

Ms Parkhill designs Emily's program, and she meets regularly with Emily's parents, special services at home worker, and school personnel. She states Emily's need to feel confident doing what she is doing, and adds, "We know, and it is obvious, that she is more confident with her dad than anybody else when it comes to standing alone..." (p.977). Ms Parkhill explains that she is working with Emily on tall kneeling, on trying to get her up to standing from tall kneeling using furniture, and on trying to get her gait pattern more independent. She states, "It would be nice to see her take, say, two or three steps without somebody holding the walker even" (p.979). Ms Parkhill sees qualitative changes in Emily's walking and sitting, and confidence in tall kneeling.

Emily has the strength to perform a pointing motion, but not to do a smooth motion up against the force of gravity, Ms Parkhill explains. She possibly would be able to target a large switch plate, Ms Parkhill points out, and she states,

"...there is ongoing improvement in the gross motor at a very slow pace" (p.991). Asked about the importance of motivation for Emily, Ms Parkhill states that Emily needs "...a lot of repetition...imagination and incentive" (p.993).

Fiona Roberton

Fiona Roberton is employed at Lansdowne Children's Centre as an occupational therapist specializing in pediatrics. She states that she assumed Emily on her case load in 1988 when Emily was about four years old.

Fiona Roberton describes Emily as "a child that has low postural tone, she doesn't have a lot of strength around her shoulder and, therefore, she has trouble high reaching and...targeting to an object: (Vol.5,p.802).

With regard to feeding, Ms Roberton observed Emily at Maple Avenue School and states, "at the time she was doing some spooning and she was finger feeding and she was drinking from a cup. She needed verbal prompts and sometimes a little bit of physical prompting for spooning. She was independent, at least physically, for a large portion of the meal: (p.807). In a report Ms Roberton noted gains in fine motor skills, shoulder control and reaching.

A report dated 13 January 1992 outlined areas that were addressed during a school visit as feeding, toileting, wheelchair and classroom seating. Ms Roberton states that, "It seemed that they [the school] were trying to work on...the fine motor skills and the strengthening goals and trying to do some of the ... recommendations...around toileting that we had provided" (p.818).

With regard to recognizing objects Ms Roberton feels that Emily recognized objects that she was familiar with like "...spoon and a bowl, a cup..." (p.821).

During cross examination, Ms Roberton was read a quote from the 1991-92 communication book (exhibit A39). The quote contained instructions from Mrs. Eaton to the school: "To

reiterate, as with phys. ed., we want Emily included in classroom activities - ALL activities - in an adapted manner. We do not want you doing an O.T. or physio or speech therapy program at school. Those should ONLY be used as a guide to "how to" make her integrated into the adapted age appropriate grade level goals of the regular academic classroom program. While Clayton feels that stacking rings, et cetera, are appropriate in a Grade 1 class, that is why we would like to see them there and not because they are to be used to carry out 'Emily's O.T. program.' Emily has a daily therapy program done at home to be more specific, while we feel strongly that at school the same goals should (and same methods where appropriate) be used only as a tool to aid Emily in being involved in the regular program" (pp.854&855). Ms Roberton was asked if she was aware that Mrs. Eaton was giving instruction like this to the educational assistant at school. She replies, "Not specifically" (p.856).

Mara Sapon-Shevin

Dr. Mara Sapon-Shevin is accepted as an expert witness in the area of education of children with exceptionalities in the inclusionary system in the United States.

Dr. Sapon-Shevin explains that an "inclusive school is one in which all children regardless of level of ability or disability are educated within a common setting within a regular classroom without segregation" (Vol.7, p.1233). Children are grouped according to their chronological age, and adequate support services are provided to ensure a productive and meaningful role within the regular classroom. She feels that special education is a service not a place.

Dr. Sapon-Shevin feels that when it is not clear how much a child is learning, one should always lean towards the side of rich stimulation in the education environment. She says this would only occur in a regular class with age appropriate peers. She feels placement in a neighbourhood school ensures that

special children share the same experiences as their siblings, and there is continuity when they go out into their neighbourhood after school hours.

Dr. Sapon-Shevin testifies that when children have a positive self-image and are confident about their acceptance within a community they will be more open to learning. She is of the opinion that this can only occur in a regular class setting. She feels that parents' wishes are very important and the Individual Program Plans should be established with their input and some negotiation.

Dr. Sapon-Shevin encourages the concept of using the "educational assistant as a second teacher, as someone who maybe works with a small group of children including, maybe, the child with the disability, but not just one-on-one because that, in many ways, kind of negates the whole point of having a child included" (p.1279). She says peers can become involved in an inclusive setting as "cross age tutors" (p.1270) where older children help the younger ones. When Dr. Sapon-Shevin was asked during cross if all children should be served in the neighbourhood school in a regular class with age appropriate peers and whether that placement would meet the needs of all exceptional youngsters, she replies, "The services that are provided and the structures that are provided could meet the needs... There has to be extensive curriculum modification and teacher preparation and support systems" (p.1318).

In cross examination when asked if there is research data that may show there is no benefit to integrated settings, or that may be inconclusive about benefits, she replies "I'm sure there is. There's much that's inconclusive in this field, that's why it's tricky" (p.1330). When asked if the research supporting integration includes children who can't be assessed for intellectual ability or social awareness he replies, "because they can't be assessed it's difficult to assess their progress in either setting. So, at that point one has to make decisions

based on - given that there is some hole in our information we have to think about the things that we can observe...." (pp.1333&1334).

Dr. Sapon-Shevin acknowledges that she has not seen Emily's placement.

Harry Silverman

Dr. Harry Silverman is an associate professor at the Ontario Institute for Studies in Education in the Instruction and Special Education Department. He is accepted as an expert witness.

Dr. Silverman states that "cognitive stimulation...should be an important component of any educational process...particularly ...for children with physical difficulties or who are nonverbal because their ability to explore their world and to understand their world has limitations imposed on it" (Vol.8,p.1385). He says, "There is no substitute for effective thinking and problem solving" (p.1385) and the "point of any cognitive education program...should be to develop a generalized ability...to apply those skills to situations other than just academic areas: (p.1387).

Dr. Silverman states, "I fully subscribe to the No Reject Concept" (p.1389) and in his opinion, a school board does not have the moral or legal right to exclude any child from education in a regular classroom.

He feels that a regular classroom would provide a stimulating environment and varied opinions with regard to problem solving and that this would be lost in a segregated setting. He also feels that social stimulation and appropriate models would be missing in a segregated class setting.

In terms of meeting the needs of a child with cerebral palsy, who is physically involved and nonverbal, Dr. Silverman feels that with appropriate sensitivity to the needs and learning level of the individual and adapting the curriculum in accordance with those needs, any classroom teacher would be capable of, and

should be expected to, provide for such a child.

When asked is the program within a placement rather than the placement itself what is looked at in order to determine whether a child's needs are being met, Dr. Silverman replies that the important things he looks for can be summed up under the heading, quality of instruction. This heading carries with it the social and the academic climate and he is not convinced that a quality education, given all of the characteristics that he thinks it needs to have, can be provided in a segregated setting.

Dr. Silverman suggest that the best way to set up an augmentative communication system would be to have the "individual needs assessed by people who are occupational therapists who can determine the positioning of the board relative to the individual in the wheelchair" (p.1413). He suggests that the Hugh McMillan Centre in Toronto would be able to provide an evaluation in order to set up a Blissymbolics system, and that training of teachers could occur there or staff from the centre could present a workshop within the school board itself.

Dr. Silverman discusses how the Wellington County Separate School Board, with which he had been associated on a consultative basis for several years, adopted an inclusive system of education and postulates that positive social interaction and general benefits accrued to all students and teachers involved. He also enunciates the benefits of inclusive education as opposed to segregated education.

After observing Emily for a full morning and viewing two video tapes, the ninth birthday party and general interaction with other family members, Dr. Silverman concluded that Emily could function effectively in a regular classroom with some adaptation to programming.

Dr. Sivlerman feels that the "type of social interaction presently occurring in the classroom could be characterized as benign neglect. There wasn't any antagonism on the parts of the

other children towards Emily, there wasn't any obvious rejection of her, but by the same token there wasn't any obvious acceptance of her or interaction directly with her. The children tended to be rather indifferent to her presence in the classroom" (p.1446). He further states, "the students have not developed the notion, I don't think, that Emily is an integral part of that classroom and, therefore, perhaps after initial stage of asking, 'What happened to Emily?' they would probably just go on with their typical reactions: (p.1465).

Dr. Silverman feels that the children's interaction with Emily was modeled after the teacher, and that the teacher did not capitalize on opportunities to interact with Emily. He feels that all modelling reflects to the teacher, and when a teacher has a receptive, accepting attitude, she encourages and demonstrates these qualities to the children in her class and they in turn will adopt them. This he feels is also the basis for peer modelling.

Dr. Silverman feels that there should be consistency in terms of stimulation and inclusiveness, between the family environment and other environments. This consistency will promote a positive self-image which contributes to the levels of interest and motivation when confronted with learning tasks.

Dr. Sivlerman was asked if he was aware that Emily's brothers did not attend the neighbourhood school. He states, "It's not whether you go to the neighbourhood school necessarily. It's whether or not you are seen as different such that you cannot attend a regular classroom in any neighbourhood school" (p.1529).

Kathy Vanderheyden

Ms Vanderheyden says that her daughter, Stephanie, was in kindergarten with Emily, and, according to Ms Vanderheyden, "She loved Emily" (Vol.8,p.1360). Ms Vanderheyden describes her children's acceptance of handicapped people, and she relates that

Stephanie cried when told by her mother that Emily might be moved to another school.

Sue Whittaker

Sue Whittaker is an educational assistant with the Brant County Board of Education. She states that she worked with Emily in April 1990 for approximately six weeks and then again from September until the following May at Maple Avenue School.

Ms Whittaker states that Emily was involve in all outings and participated in the various centres within the kindergarten room. She says she feels that Emily was integrated within the class.

Carolyn Jean Williams

Employed by the Lansdowne Centre as a special services at home worker, Ms Williams has worked with Emily Eaton two hours a day, five days a week, since September, 1991. The goals and activities are written by a physiotherapist, an occupational therapist, and a speech therapist. Ms Williams typically works with Emily on feeding skills, grasping skills, walking, standing, kneeling, crawling, sit-ups, balancing, visually attending, signing, turn-taking, and imitating sounds. Ms Williams feels that Emily knows and can distinguish among several colours, and that she has a sense of humour, manifested, for example, in a teasing kind of behaviour.

Bob Williams

Mr. Williams is a Policy Associate of the United Cerebral Policy Association, Government Activities Office, Washington. He recounts his experience of being in segregated self-contained classes during a period of about ten years before he entered mainstreamed classes in high school, adding, "Well, that was when [at age eight to ten years] it started to dawn on me that being different and having a disability somehow made others think less

of me" (Vol.14,p.546). He states, about being in the segregated class, "It ripped me apart and I think still does to this day" (p.547). He asserts, "...I think because of the lack of opportunity to get to know me, many kids used to call me retard and pelt me with stones" (p.549).

Mr. Williams says of observing children with disabilities in an inclusionary education setting, "What I have seen is kids like Emily with the same labels being befriended and surrounded by other kids. In these instances communication seems to become easy, free-flowing and natural..." (p.555). He explains that the segregated class placement affected his self-esteem: "...I think I can fairly say those early feelings of inadequacy and inferiority left scars" (p.556). He asserts, "Even as a child in the special class, I knew that my teachers and others held few expectations that I would do anything in life" (p.559).

Mr. Williams says he had met Emily for an hour or two the previous day. He says she was interested in what he had to say and in his manual communication board. He outlines his impression of Emily: "She seems like a little girl who is very aware of what is going on around her and seems to make a real physical effort to be social" (p.561). Mr. Williams says that Emily cried when he stated, "I do not think that anyone is nonverbal, because we all use language, and the term has really become a shorthand for saying that somebody has nothing to say" (pp.562&563). He says that Emily cried inconsolably when he suggested to her that her tears resulted from years of having people think she didn't have anything to say.

About transferring a child like Emily to a segregated class so that a communication system can be learned, Mr. Williams says that opportunities for communication became greater after he was mainstreamed. Missing for him in the segregated setting were the opportunities, in his words, "...to see communication as the most vital means of exerting choice and control in life" (p.572). He says that a segregated class does not afford opportunities for

greater friendship and peer interaction. He says, "It robs kids with and without disabilities of the opportunity and cause to look past obvious differences in all people and to look for similarities" (p.573). About vocalization he asserts, "...kids need to know not just when to speak, but when and where it is most effective to do so" (p.574). In Mr. Williams' view toileting is not justification for segregated placement, nor is expertise of personnel.

Mr. Williams says he had a typewriter at age six, and he typed a card for his mom when he was around eight.

Cathy Winter

Ms Winter says that her daughter, Sonia, has been in the same class as Emily for the past two to three years, and her three other children also are acquainted with Emily. She says that Sonia and her older sister, Monica, have enjoyed attending two of Emily's birthday parties.

Ms Winter feels positive about her children's exposure to Emily and about the latter's presence in the grade 2-3 class.

Donna Bell

Ms Bell was the educational assistant for Emily Eaton during the school year 1991-92 and for over a month during September and October, 1992. She describes her adaptation of various programs for Emily, and says she saw no indication that Emily knew or recognized numbers, letters, colours, or shapes. The other children in the class were very kind to Emily in Ms Bell's view, and they were encouraged to interact with Emily. Ms Bell says that she did not see any friendships develop with Emily.

Ms Bell recalls one occasion when Emily, as she was crying, made a sound which sounded to Ms Bell like "mama". She describes strategies used for involving Emily in classroom activities, and she affirms that Emily showed improvement in physical development throughout the year. Ms Bell, in describing Emily's role as chip monitor, asserts that she saw Emily make the "eat" sign three or four times, and the "you're welcome" sign once. In response to questions about a videotape of Emily's class (Exhibit R10), she explains that Emily was not placed in the centre of the group of students in order to avoid overstimulation, to promote physical ease of placement and access for toileting, and to allow her proximity to Ms Bell.

Emily's toileting regime prior to and following the parents' request for hourly toileting is outlined by Ms Bell. She describes an occasion in November of Grade 1 when she found it difficult to keep Emily awake or to awaken her after she had fallen asleep.

With reference to Emily's biting, Ms Bell states, " The original incidents of biting that we saw started back in October..." (Vol.11,p.157). "...just after it started...there were a few days where there were instances of biting and then after that they would be sporadic..." (p.158). She describes an incident in which Emily tried to put a brooch she was wearing into her mouth. Ms Bell says, "Some days were worse than others. Literally everything she picked up went into her mouth and other

days, the behaviour was less frequent" (p.159).

Ms Bell elucidates an incident in which Emily vocalized in conjunction with having independently placed her hand on Ms Bell's throat, where she presumably felt vibrations.

In September of Grade 2 Emily is described by Ms Bell as having started to make a new sound which was distracting to other students, "...a sound that was very prevalent and happening often...' (p.178). Ms Bell says she would remove Emily from the classroom when she persisted in making this sound, and would return her to the classroom when the vocalization ceased. Such removal might be necessary on a couple of consecutive days, she affirms, followed by a respite of a few days. The maximum period of each removal from the class is said to be five minutes.

Ms Bell says Emily enjoyed working with the joy stick during computer games.

During the period from September, 1991 to October, 1992 Ms Bell says, "I saw changes in the relationship of the peers with Emily but not Emily's relationship with them" (p.183). She indicates that a number of Grade 2 students did not wish to be wheel chair monitors, in contrast to the situation in Grade 1, and students were doing more individual work in Grade 2 than in Grade 1.

Ms Bell describes strategies employed to encourage Emily to use more than one sense at a time. With reference to communication, physical needs, and toileting, Ms Bell says she does not feel good about Emily's present school placement, and about a special class placement she states, "I think it would provide a happy setting for Emily" (p.198).

Ms Bell agrees that Emily's episodes of crying decreased as the Grade 1 year progressed; likewise the frequency of startle responses. She also agrees that Emily teased her sometimes and that this was a form of communication. She acknowledges that Emily sometimes has a puzzled, questioning look on her face when she is faced by unfamiliar persons or situations.

Ms Bell thinks that Emily had a sense of achievement when she did well, e.g., when she performed well as chip monitor and needed only minimal reminders not to mouth the box. Ms Bell says she accepts that Emily may know her colours as indicated by her parents, but Emily hasn't communicated this to Ms Bell.

Brian Cronkwright

Mr. Cronkwright has been the principal of Maple Avenue Public School since September, 1990. He says that throughout that period he has visited Emily's class an average of three times per week.

He describes procedures implemented to ensure Emily was not left unattended when she arrived at school between 8:20 and 8:30 a.m. Mr. Cronkwright explains his consultation with Emily's parents relating to his concerns about Hepatitis B after Emily had bitten him, the teacher, the educational assistant, and another student, and relating to his suggestion that Emily wear slacks to obviate her tendency to mouth various parts of her dresses.

Regarding a February 4, 1992, conference report, Mr. Cronkwright denies any punitive intent and asserts he instructed the teacher and the educational assistant in the Grade 1 classroom to record their observations of Emily exactly. He describes a team effort by all the staff of Maple Avenue School to try to integrate Emily successfully. Although he recommended Emily's Grade 1 placement, he admits he had concerns about her fatigue in a full-time program and about her potential success with the gradually increasing independence required of students as they move beyond kindergarten. He explains that problems and activities become increasingly complex through grades 1 to 3.

Mr. Cronkwright observes that other students engage in decreasing interaction with Emily because they do not receive any response from her. He expresses concern about a reversal in her social growth under these conditions.

Mr. Cronkwright asserts that although he has not seen Emily signing, he sees her communicating through reaching gestures, smiling, and crying. He says he has not observed imitative behaviour by Emily, nor evidence that she is learning by modelling. He affirms that she has shown growth in gross/fine motor areas, but states that school personnel are unable to assess Emily academically. He expresses the opinion that a special class placement would best meet Emily's needs, which he specifies as gross/fine motor development and a communication system. Emily would be happier in a special class, Mr. Cronkwright feels. He expresses apprehension about her placement in a Grade 3 class because of her loud vocalizations, her crying, and her sleeping.

Mr. Cronkwright says that he never taught for a school board which had an inclusive policy, but that he has taught exceptional pupils in regular classes. He describes his pattern of visiting classes, the team approach used by his staff, and the typical activity groups in the classrooms. He denies having been apprehensive about Emily's placement in the school when he became principal there, and he clarifies his view about the role of the parents, the role of personnel from the Lansdowne Centre, and the role of personnel from the Special Education Department, in the functioning of the team approach at Maple Avenue School. Mr. Cronkwright acknowledges that he did not consult with personnel of a school board having an inclusive education policy regarding Emily's I.P.P.

Regarding the role of the educational assistant, Mr. Cronkwright says she is not the person primarily responsible for Emily, but she is primarily responsible for interaction and communication links. He states that all of Emily's teachers have interacted with her.

With reference again to a conference report dated February 4, 1992, Mr. Cronkwright repeatedly points out the inability of school personnel to assess Emily's receptive

language, comprehension, academic development, and rationale for various behaviours; and he acknowledges the record of two occasions when Emily was observed in the school to be making a sign, one for "welcome" and one which was an approximation for "eat". He acknowledges a consensus among school staff that Emily's needs would be better met in a special education class. There, he states, "...they would be able to use the expertise, support and materials and equipment they have to make more progress on her needs hopefully" (Vol.9,p.1713). He feels that Emily would be happier in a special education class, asserting, "Our observations indicate to us that she is less happy this year than last year and less happy last year than she was the year before..." (p.1715).

Jackie Ireland

Ms Ireland is a Superintendent of Education for the Brant County Board of Education. She explains STEP, the congregation of special classes in designated schools instead of establishing special classes in neighbourhood schools: structure, time, encouragement and praise, and the opportunity for practice. The Board's philosophy regarding inclusion of exceptional students, Ms Ireland explains, is "...integration where possible. Hence, there is support, total support for a continuum of services" (Vol.13,p.356). If all the students from special education classes were integrated, Ms Ireland asserts, "The costs would escalate out of sight" (p.359).

Ms Ireland indicates she was present for all the IPRC meetings concerning Emily Eaton except the annual review in 1991. Regarding Emily's placement in kindergarten at Maple Avenue School she explains, "...I felt...Emily's...needs would best be met at Jane Laycock School. However, Mr. and Mrs. Eaton made an impassioned plea... So, we did go along with the parents' wishes, but it was not the IPRC's recommendation. It was an agreement" (p.363).

About the 1992 determination of the IPRC that Emily be placed in a special class, Ms Ireland says, "I felt that the priority was to develop a communication system" (p.371). She identifies Emily's other needs as physical and social. Ms Ireland says that she suggested in a September 3, 1992 letter to Mr. and Mrs. Eaton a modified school day, because, she asserts, "Emily's needs were not being met... She was losing a fair amount of time sleeping...perhaps she could rest the other half of the day...it would reduce the need for a full-time educational assistant..." (p.373).

Ms Ireland describes the renovated classes for multihandicapped students, where the teacher/pupil ratio is one/six. She states that the special class students are integrated with regular students through a buddy system and through inclusion in school activities and in regular classrooms. She explains that Emily's transportation to such a class in Prince Charles School would be direct and would take about twenty minutes.

Ms Ireland acknowledges that while exceptional students are not labelled as such, there are labels on the classes they attend, e.g., developmentally delayed, developmentally handicapped, developmentally challenged. She says she has met Emily Eaton only once. She asserts she was present for about a half hour while Donna Bell and Emily were watching a video.

Of several schools having special classes which Ms Ireland considers suitable for Emily, she says she prefers Prince Charles because staff there have had experience in some of the methods of communication advised through such centres as Hugh McMillan. She describes most of the students in the special classes at Prince Charles School as multihandicapped. Ms Ireland believes Emily to be developmentally delayed, but she acknowledges that she doesn't know for sure because Emily can't communicate. She expresses disagreement with expert witnesses who state the opinion that Emily's lack of a communication system

is not an impediment to her integration into a regular class. She indicates that the Board had never, before Emily, integrated into a regular classroom a student who was multihandicapped and non verbal, and that she does not know of anyone within the Board who has experience doing that.

Ms Ireland explains that she has responsibility for the Paris family of schools, not Burford; however, she has responsibility for Special Services and the IPRC process. Emily is in the Burford family of schools.

Ms Ireland does not agree that the Board never requested from the Eatons medical information about Emily. She asserts that Dr. Lock, Emily's family doctor, did not say anything as a witness that would assist with educational programming.

Ms Ireland agrees that by August, 1992 the options offered for Emily by the Board were Maple Avenue School half time or Prince Charles full time. She thinks there would be more opportunity for Emily to communicate and to socialize in the special class setting at Prince Charles School than in the regular classroom at Maple Avenue School. At Prince Charles, in Ms Ireland's view, Emily's vocalizing would not disturb other students as in a regular class, and personnel could capitalize on the vocalization to get some two-way communication going. She states that no multihandicapped students from the special education class at Prince Charles School have moved into a regular placement.

Ms Ireland says that the Board never discussed with the Eatons the principle of maintaining a regular class enrolment for Emily with the possibility of extensive withdrawal for compelling reasons.

<u>Audrey Lottridge</u>

Ms Lottridge teaches the grade 2-3 class in which Emily is enrolled. She explains that she operates a design and technology program, which involves computers and manipulatives: saws, hand

drills, screwdrivers, awls, woodworking tools. Ms Lottridge outlines the variety of grade/group instruction/activity in her classroom.

She explains that the principal advised her and the educational assistant to record positive things about Emily in the communication book, and to deal with negative issues through the principal. Such issues are recorded in an observation book.

Ms Lottridge describes the modification of the Grade 2 program for Emily, e.g., use of tactile material and provision of multisensory stimulation. She states that she rotates around the room to speak to individual children, including Emily, and she explains, "I don't sit down and specifically work with Emily without Diane [the educational assistant] being present" (Vol.14,p.598).

About Emily's vocalizations Ms Lottridge says they vary from low sounds which do not disturb the other children in their activities, to loud crying or distracting sounds which are disturbing. She observes that lately Emily tries to sleep first thing in the morning, is revived by a walk in the hall, and again tries to sleep as soon as she is back at her desk in the classroom. Emily consistently enjoys physical activities and music according to Ms Lottridge.

She says of the other students in the classroom, "They're very careful and considerate of Emily, but I don't find they interact with her as a peer" (p.605).

Emily is described as having made physical progress in the grade 2-3 classroom, but not academic or social progress. Ms Lottridge feels that the regular class placement does not meet Emily's needs. Ms Lottridge says the necessity of removing Emily from class because of her vocalizations, and Emily's tendency to sleep or try to sleep at her desk, are of concern to her. She feels that a special class placement would have a positive impact on Emily because of the smaller number of students, the opportunity for less restricted vocalization, and the access to

physical activities within the classroom.

In Ms Lottridge's class there are two other pupils besides Emily identified as exceptional. She explains how she attempts to modify the program for individual students, and she estimates her planning time to be 10 to 12 hours per week. Ms Lottridge and the educational assistant often consult on modifications for Emily during recesses or spontaneously as required. She indicates that she and the educational assistant have not tried changing roles, the teacher working one-on-one with Emily and the educational assistant working with the rest of the class.

Ms Lottridge says that Emily enjoys sitting in the big chair in the hall. She is more alert to taped stories heard through earphones than to stories read by Ms Lottridge. She observes, "Mrs. Williams [the educational assistant] is wonderful with Emily. She loves her dearly, and she treats her with that same feeling" (p.645). She says that she and the educational assistant made the decision about how to work with Emily, and while Ms Lottridge may have consulted with Mr. Boyd, the learning resource teacher, she did not consult a psychologist or other special education consultants, nor did she visit a school board having an inclusionary policy.

Ms Lottridge acknowledges her inability to assess Emily academically. She says she doesn't know whether Emily should be learning academic things, that she wants to sleep frequently and cries or vocalizes in the academic setting of the regular classroom. Ms Lottridge states that on the basis of her teaching experience she imagines a special class would be a better setting for Emily. She acknowledges that she has not taught a special class and has not observed a special class of physically challenged students.

In Ms Lottridge's opinion, Emily needs easy access to the opportunity for physical activity and she needs a setting where her vocalization can be encouraged. She says she reached independently the conclusion that Emily's needs would be better

met in a special class, but she discussed the decision with many people. She acknowledges having been aware before Emily's placement in her class that the School Board had made a decision to place Emily in a special class.

Ms Lottridge expresses the opinion that if Emily were left unattended she would probably fall asleep or mouth articles within her reach.

June Piggott

Mrs. Piggott has been a primary teacher for thirty-two years and was Emily's Grade 1 teacher. She states, "I team teach with another Grade 1 teacher. We plan activities together that involve cooperative learning and child-centred learning. We try to plan activities which will address different learning styles and also that will address the whole child... I've taught children with learning disabilities. I've taught children with physical disabilities. I had another child with cerebral palsy, a child with Down Syndrome. I've had hard of hearing children. I had a hydrocephalic [child] that had a shunt. I currently have a child with cleft palate and a child who has alopecia (Vol.10,pp.1745&1746).

While discussing the other pupil with cerebral palsy she says, "I was able to assess the strengths and needs and plan a program and to administer the program and then I was able to assess the growth that had taken place" (p.1748).

Mrs. Piggott discusses the Individual Program Plan of December 1991 saying she had more input with it than the previous one. She states, "One of the difficulties was consistent involvement in a modified Grade 1 program. I found that in the modified program usually you're modifying your language and math to meet the child's, at the child's level. So, we worked with the parents at the December 6th meeting and came up with the word 'differentiated' and it allowed Emily to be doing a language activity that would meet her needs" (p.1752). During cross

examination Mrs. Piggott agrees that differentiated was meant to mean parallel program (Vol.11,p.39).

Mrs. Piggott states that throughout the year she utilized board resources like the "learning resource teacher, my vice-principal, the principal and special services" (Vol.10,p.1752). With regard to her understanding of what the parents wanted for Emily she testifies "...they wanted Emily integrated into the room and to be exposed to all the academic areas and that we would try to use her occupational goals as best we could" (p.1752).

Mrs. Piggott testifies that in her class the educational assistant "...was responsible for the physical needs of Emily. She prompted Emily. She intervened for Emily. She worked with me to adapt activities. She sometimes helped in the planning of activities" (p.1753).

Mrs. Piggott was asked about the amount of time she spent working on Emily's integration into the classroom, on Emily's program or issues surrounding Emily. She replies that compared with any other individual student, she spent a great deal more time.

She further testifies she spent no one-on-one time with Emily "because her academic needs were very different than the other children" (p.1757). The nature of her interactions with Emily included "...oral language input and more or less a social context...maybe an event...written in her communication book...something that was happening at the school" (pp.1757&1758). Mrs. Piggott states Emily was her responsibility and "We tried to include Emily in everything" (p.1760).

During examination in-chief Mrs. Piggott comments on an assessment for Emily for the IPRC. in the spring of 1992. When asked to comment on no accurate way to assessing her level of contentment and the difficulty in attaching a reason to observed behaviour, Mrs. Piggott testifies, "What I observed in the class was sometimes she would laugh and I could not find any

reason why she would be laughing at that particular time or she would cry and I wouldn't know shy she cried at that particular time and I could see no connection between the times that she did things" (pp.1761&1762).

Mrs. Piggott comments on Emily's signing saying, "You have to be very knowledgeable of Emily's approximations to signs in order to see her signs" (p.1765). She feels that given the size of her class she was not able to spend the amount of time with Emily necessary to gain that kind of knowledge.

When questioned about her concern that Emily might choke if she put some of the small supply materials from the classroom into her mouth Mrs. Piggott says the parents "didn't feel that was a problem...she only swallowed food" (p.1771). This did not allay her concerns because she felt she "...was ultimately responsible for Emily while she was in my class" (p.1771).

With regard to integration and interaction with peers Mrs. Piggott testifies "...[the children] would like to dress her up in the scarves and some clothing. Then they would treat her like a much younger child than they were" (p.1777). Mrs. Piggott further testifies "..[during] cooperative learning groups [when] it would come to Emily's turn they expected Mrs. Bell to respond... It seemed the ones that needed a little extra help knew that and they would go ask Emily to be their partner" (pp.1777&1779).

When questioned about socialization, and if Emily seemed to have friends, Mrs. Piggott states, "She had children who treated her kindly and friendly" (p.1790). During cross, when asked if Emily paid more attention to the other children in the class by the end of the year Mrs. Piggott testifies, "I didn't find that she socialized more with the other children" (Vol.11,p.69). During Tribunal questioning when asked about the amount of time the other children in the class spent with Emily Mrs. Piggott says, "in September...they would spend more time with Emily. In the classroom, if...everybody had to have a partner, they would

choose Emily, but...she would be one of the last ones chosen: (p.109).

When asked if she observed any academic progress, any indication that Emily was imitating or modelling the behaviours of her peers, any indication that Emily was benefitting from instruction in the regular class, Mrs. Piggott replies "no".

During cross examination when asked about the basic teaching method she uses, she states, "Any child should learn well, but it doesn't necessarily mean that the child will learn well" (Vol.10,p.1811). When questioned about making special provisions for Emily Mrs. Piggott testifies, "I would discuss with my team partner and we would prepare activities that we thought Emily would be able to participate most in...things that would be very, very difficult for her to do then we would adapt...the ones that she wasn't able to do...we would get alternatives for Emily to do right within the group with the children" (p.1814). Mrs. Piggott says planning was done before and after school and during recess.

John Shurvin

John Shurvin states that he has been with the Brant County Board of Education for eight years since September 1988. During this time he has taught in a special class setting at Prince Charles School.

Mr. Shurvin says the special classroom is a double room which currently houses twelve students whose age range is six to eighteen or nineteen years. Some of these students may be proceeding to a high school program. The nature of the disabilities in the classroom involves an intellectual and physical component, presently all students are nonambulatory and have very limited verbal skills.

He explains that the types of programs are multi-sensory, and focus on the child's skills and level of functioning. They include thematic units, self-help, feeding, communication encompassing cognitive development, community awareness and

choice making.

Mr. Shurvin says the special class is integrated with the regular classes through morning circle and a buddy system which may include hand-over-hand art activities, music, reading, outings such as walks and recess, special activities like assemblies, mini olympics, interactive games, including rolling balls and playing catch.

Mr. Shurvin says he viewed the video tapes of Emily (exhibits A1 & R10) and would not make an assumption of her cognitive potential but feels she would do well in his class and he would "look forward to having her in my class and working with her and finding out her potential and trying to realize it" (p.929).

Mr. Shurvin says each day basically runs from 9:00 a.m. to 3:00 p.m. beginning with a music circle for approximately half an hour. The children then work on their physio, occupational, gross motor and fine motor goals along with a rotation of computer, switch plate and/or tape recorder tasks. He says that work on thematic units occurs either in the morning or afternoon, depending on time allotment.

When asked during cross about Emily's intellectual abilities Mr. Shurvin states, "I would say that they're not being expressed in what I see, whether there's a potential there, I can't tell from what I've seen. The children in my class can have a potential much higher than what they express and that would be my comment that the children in my class may have a tremendous ability, a tremendous potential. It's that it's not being used and that's our focus, is to develop" (p.933).

Jeffers Toby

Dr. Toby testifies that he has been employed with the Brant County Board of Education since 1984. He visited the class to observe Emily eight times for a total of eight and a half hours. He visited twice when Emily was in Grade 1 for a total of two

hours and six times in Grade 2 for a total of six and a half hours.

Dr. Toby noticed that what appeared to be fatigue was exhibited by Emily in the morning as well as the afternoon. He says during one observation period distracting vocalizations decreased/stopped when Emily was removed from the class and increased in volume and pitch when she was returned. He states the class instruction at this time was interrupted and could not begin again until Emily was removed for the duration. He says the vocalizations sounded like there was some distress.

Dr. Toby noticed that during a lesson involving cooperative efforts between students in terms of goal completion the other children tended to interact with the educational assistant rather than go to Emily. He says during one observation session the educational assistant continuously stimulated Emily verbally and physically in an effort to get Emily to attend, which she did for only seconds to minutes. Emily was observed participating in a music period but this type of attending and participation was not noticed during sessions like reading, writing and environment studies.

Dr. Toby testifies that while observing Emily he saw no indication of imitative behaviours, modelling behaviours, general understanding of what was going on in the classroom on Emily's part. He feels that a person must understand the why of a behaviour before he will imitate it.

Dr. Toby feels that Emily would fall into the sensory motor stage of Piaget's theory of Development although, during cross, he agrees that this is difficult to determine because of the physical involvement and limited verbal skills that Emily possesses. He says this stage involves the individual identifying what kinds of motoric behaviours bring you pleasure and how your body works. He feels that a regular class placement does not reinforce these types of behaviours since certain behaviours must be stifled thus reducing the chance of imprinting

brought on by repetition of the behaviour. This repetition is often too distracting to the class to be allowed, therefore, the level of reinforcement necessary to shape a behaviour could not occur in a regular class. He also feels, the amount of stimulation in terms of pictures et cetera displayed in the classroom should be geared towards the individual. Dr. Toby feels too much can be as detrimental as too little.

Dr. Toby states that a major concern when dealing with children "...is academic or intellectual competence... In a regular class you appear to be competing with regular students in the stage where the individual cannot win...[whereas]...if you're competing on the stage where your program is so individualized, everything around you is geared towards you...the probability of achieving a higher level becomes easier and much quicker (Vol.13,p.530).

Dr. Toby feels that there could be integration to the class as well as from the class to other classes thus eliminating an either/or situation. He says by eliminating an either/or situation you create a continuum type situation where you can deal with the people who fall outside of the inclusionary concept of education.

Dr. Toby states that he hates to recommend a child for special classes but he looks at whether or not they will be lost in a regular class setting, does the special class have the materials, personnel, time and patience to deal with the particular child and, whether or not more damage will be done especially in the are of self-esteem should the child remain in a regular class.

During cross examination, when asked about Emily's level of integration Dr. Toby states, "I think the Grade 1 class is an extension of your kindergarten class and for the kids that are going into kindergarten, it's more a play atmosphere, blocks and colours and water and sand and all that kind of stuff. Most kids seem to do fairly well with that kind of material, hands on type

of...material assessment (p.809).

When he visited the class he was concerned about the physical problems with regard to space and wheelchair mobility, later the negative affects of over stimulation. During cross Dr. Toby states that there was no direct discussion between himself and Mr. and Mrs. Eaton regarding placement of Emily. During cross when asked whether or not he felt the teacher could at times spend one-on-one time with Emily while the educational assistant circulated within the room Dr. Toby says he has seen it work in other situations but that he had never seen it tried with Emily.

During cross Dr. Toby states that there was considerable patience and time given to Emily in the regular class, however the quality of time becomes a factor when it cannot be, due to the class structure, spent reinforcing individual goals. He feels that the necessary materials seemed to be available in the regular class.

Dr. Toby states that based on his many conversations with Mrs. Ireland, Mr. Cronkwright and the classroom teacher all possibilities had been expended and the regular class placement was not working.

Diane Williams

Diane Williams is employed as an educational assistant with the Brant County Board of Education. Her role is to, in her words, "Under the supervision of the principal and Mrs. Lottridge, I work exclusively with Emily one-on-one at all activities" (Vol.14,p.686).

Mrs. Williams kept a communication book in which she "would write back and forth to Mr. and Mrs. Eaton on a daily basis all the activities Emily and I did together in the classroom" (p.676). She also kept another book. When asked she states, "I was told only to report to the parents what went on in the classroom that day and that they were well aware that Emily did

sleep and did excessive mouthing and vocalizing in the classroom and there was no need to report that and the only time I did report that, the sleeping or the excessive mouthing or the vocalization, is if we in the classroom, Mrs. Lottridge and I, felt that maybe Emily was ill" (p.685). During cross, Ms Williams, when asked if only negative went into the book, states, "I was to record the sleeping and crying and excessive mouthing, things that mom and dad were aware that Emily does and don't need to be repeated day after day after day after day" (p.714).

Ms Williams says that she worked with the classroom teacher to adapt the curriculum and together "...[we] decide...what materials we could use to best suit Emily, a lot of tactile materials" (p.688).

Diane Williams says that Emily's program included number recognition from one to five, shapes, and rote counting from one to five. She further states that she used "lots and lots of tactile materials" (p.689). When asked whether she felt Emily recognized any one of the numbers one through five, geometric shapes, and colours, Ms Williams replies "no".

Ms Williams states that during language arts she was working on letter recognition with Emily. "I was working on the letters of her name" (p.692). When asked if she had any sense that Emily is recognizing any letters, she replies "no".

With regard to socialization Ms Williams states, "[Mrs. Lottridge and I] make sure that Emily is put in a group. Basically making sure that she's in the group and that the children know that she is a part of their group... There's little interaction. They tend to ask me questions and not really interact with Emily in the group...[I say]...I'm not part of this group. I'm here for Emily. Emily is your group member" (p.693). During cross Ms Williams states "I wanted them to ask the questions to Emily, whatever questions that they had or, you know, I wanted them to interact with her" (Vol.15,p.761).

Ms Williams says kindergarten children sometimes interact with Emily at recess but no one from her class on a regular basis. During cross when questioned about a get well card Ms Williams agrees that the children of the class had some understanding of Emily and what she enjoyed.

When asked if she observed any social development on Emily's part over the year or any indication that Emily is imitating or modelling the behaviour of her peers she replies "no".

In terms of Emily's sleeping, Ms Williams testifies, "We have found that she's sleeping more now than she did in the beginning. We find that she's - sometimes she comes and she's very, very tired and right after chip duty, if I put her at her desk, sometimes she starts to nod off right then. To the best of my ability in the afternoon she begins to get very tired again... Sometimes just by rubbing her cheek and saying 'Wake up. Em. Wake up Em.' she'll wake up for me. Sometimes I find if I loosen her top buckle or belt around her chest and just stir her a bit, that we wake her up. Sometimes I have to physically remove her and take her out and have a walk. That will do it. Sometimes if we just change activities, she'll wake up... Sometimes I continue to work with her hand-over-hand when she is sleeping and sometimes if I feel she's extremely tired and needs the sleep, I'll let her sleep and I'll sit beside her" (Vol.14,pp.597&698).

When asked about types of vocalizations Ms Williams states, "Just a soft murmur, like a humming. Sometimes it's a little bit louder than a hum and sometimes it's a very loud noise... I take her out of the classroom when it's disrupting the other students... Sometimes it could be five minutes, sometimes it could be a little bit longer, ten, fifteen minutes...just before a b.m. she becomes very vocal" (pp.699&700).

Ms Williams says she has not seen Emily sign independently.

Toileting takes approximately ten to fifteen minutes each try and Emily is toileted hourly on the half hour. Ms Williams feels there has been no progress in this area. She feels that there has been improvement in Emily's physical development.

During cross, when questioned about other people seeing Emily independently press a button on the computer, Ms Williams agrees it would surprise her "Because I haven't seen it happen and I'm with her every single day... I believe that if she could do it, I would have seen it by now and if somebody else says they have seen her do it, they have seen her do it. I only know what I see" (Vol.15,p.721).

During cross Ms Williams states, "I don't know if Emily was enjoying what was being said or Emily was enjoying the sounds that were going on in the tape, the airplane and all the other noises that go on. I don't know if she was enjoying that, the pitch of the voice of the man that was speaking. I don't know which one she was enjoying" (p.723).

During cross, a skating party is discussed where Ms Williams comments that Emily enjoyed watching the other children. She says, "her eyes were going around watching...she's staying awake, she's alert, she's happy" (pp.729&730).

During cross, when questioned about providing the opportunity for Emily to do things independently Ms Williams testifies, "I will do it first and then do it hand-over-hand with Emily and then ask Emily to do it for me... She'll go sometimes for the object, not always. I always end up doing it hand-over-hand with her... I don't know exactly how long I wait for her to do it before I help" (p.744).

During cross, when Ms Williams was presented various instances of teasing behaviour on Emily's part, she testifies she has never seen this type of behaviour displayed by Emily. Ms Williams testifies she would do physical things as well as verbal with Emily in an attempt to elicit a response. However, she does agree that Emily responded only when the verbal cue was

presented with regard to going on a walk.

During cross, Ms Williams agrees that Emily enjoys "being outside...physical activity...music and tape(s) stories" (p.762). She says "I'd say that was what she liked to do at school" (p.762).

During cross, Ms Williams was asked about the purpose of doing hand-over-hand when Emily was asleep, and she replies, "Because sometimes she'll just nod off for a few minutes and start back and be back, you know, be conscious again, so that's why I sometimes keep doing it, in case she does wake up" (p.768).

During re-examination, Ms Williams was asked about a visit from the speech pathologist who testified earlier that Emily was able to name the parts of a doll, pick out colours and was successful with choice making, for example, a ball or a shoe. Ms Williams testifies that Emily was not able to indicate the body parts and was inconsistent with choice making (pp.778&779).

Decision

The Tribunal unanimously denies the request of the appellants and affirms the determination of the IPRC of 24 February 1992.

Basis For Decision

The principal issue in this decision is whether Emily Eaton's special needs can be met best in a regular class or in a special class. Bearing upon this principal issue are several immediately relevant, significant, and interdependent considerations: the wishes of Emily's parents; the empirical evidence available from Emily's three school years in a regular classroom setting; the evidence available from the literature on placement; the testimony of individuals presented as experts in the matter of classroom placement; the effect of the Ontario Ministry of Education and Training's proposed directions in regard to integration of exceptional pupils; and the impact of the Charter of Rights and Freedoms and the Ontario Human Rights Code and related case law. We address these matters separately below.

Emily Eaton's Needs

Like those of any other unique person, Emily's needs are specific, and like those of any other person, those needs arise out of her physical, intellectual, and emotional makeup. Because *Emily is clearly exceptional her needs are special, and in school, they can only be met in a manner that is qualitatively and quantitatively different from the way in which the needs of the vast majority of students are met. By itself, the fact that Emily has different needs does not, ipso facto, call for special class placement. What distinguishes her, and provokes consideration of special placement, is the nature and extent of her particular needs.

Intellectual and Academic Needs:

The Tribunal received no convincing evidence that Emily responds to the type of curriculum and instruction typical for children at her age level. On the contrary, the weight of evidence strongly suggests that Emily has not assimilated, throughout three years in regular classes, even a fraction of the learning which she is said to have mastered in the more intimate and less anonymous environment of her home and family. In fact we received considerable evidence that, viewed with objectivity, and notwithstanding her communication needs, suggests she has a profound learning deficit. Despite the contention of the appellants that Emily's intellectual ability is undetermined and unspecified, it is unrealistic in our opinion and, we believe, a disservice to Emily to discount the extensive empirical evidence that points to a profound intellectual handicap.

From evidence and testimony 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. This is readily apparent from evidence and testimony of the school personnel who have been responsible for Emily's education.

The testimony offered by witnesses presented as experts, is that Emily requires a "parallel curriculum" in the regular classroom setting, one adapted to her uniquely different needs. The Tribunal is familiar with the concept of "parallel curriculum" and has immediate, hands-on experience with its implementation. Experience demonstrates that in practice, "parallel curriculum" benefits the receiver when it is realistically parallel. But when a curriculum is so adapted and modified for an individual that the similarity the parallelism is objectively unidentifiable, the adaptation becomes mere artifice and serves only to isolate the student.

In Emily's case, it is clear from evidence and testimony that a "parallel" learning program specifically designed to meet her intellectual needs, isolates her in a disserving and potentially insidious way.

It is the unanimous opinion of the Tribunal therefore, that Emily's intellectual and academic needs cannot be met best, if indeed they can be met at all, in a regular class.

Communication Needs:

It is clear from evidence and testimony that although Emily vocalizes, she does not appear to be developing the kinds of expressive skills that could be construed as a foundation for oral communication. Also, the evidence is very strong that Emily's comprehension of speech is extremely limited. It appears therefore, based on the evidence presently available, that Emily will not be able to use oral speech as a principal means of communication.

Carol Eaton testifies that Emily uses and comprehends a small number of manual signs. She also testifies that Emily rarely repeats signs, and that she often presents them quickly and idiosyncratically. Carol Eaton and the educational assistants, Diane Williams and Donna Bell, testify that to learn sign, Emily needs repetitive, hand-over-hand instruction; they testify further that this practice has indeed been followed with Emily for several years. Nevertheless the testimony of the teachers and educational assistants is that they have very rarely, if ever, seen her use sign spontaneously, or at least in a manner that adults versed in sign can interpret. Based on this testimony, the Tribunal concludes there is reasonable doubt that Emily will be able to use sign meaningfully.

We also have testimony that Emily may one day communicate with assistive technology, e.g., an electronic, computerized device, custom-designed to the needs and abilities of an individual. Whether such a device is currently available to meet

Emily's unique needs, or whether one can be designed for her, or whether Emily will ever be able to use such a device, is unknown and unpredictable.

Appellant witness, Robert Williams, an adult male with cerebral palsy whose limbs are fully involved, and who is non-verbal, testifies (by means of assistive technology) that once he was able to communicate, he was also able to demonstrate his abilities, and people around him then modified their view of what he could accomplish. He also testifies that he was placed in a special setting for his elementary schooling and that what was "missing in the segregated setting for me and the others were the easy, natural opportunities, not just to communicate, but to see communication as the most vital means of exerting choice and control in life." (Vol.XIV,p.572)

While this witness's personal situation is a persuasive example of the potential benefits of assistive technology, and while we have his assessment of the benefits of integration, we have no evidence that simply because, like him, Emily has cerebral palsy and is non-verbal, she will have her communication needs met in the way that he did. From Robert Williams' evidence describing his childhood, the point at which comparison with Emily is most meaningful, it is clear that his strengths at that time were significantly different from hers.

Given the evidence we have__and do not have__it is the Tribunal's unanimous opinion that Emily's need to communicate is going to be met only with very individualized, highly specialized, extremely intense, one-on-one instruction. Because this need is of such over-riding 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.

Emotional and Social Needs:

In assessing the extent to which these very important human needs can be met for Emily in the regular classroom, the Tribunal pays particular heed to the testimony of the parents, and of the teachers and educational assistants.

The testimony of the parents is that Emily responds well to her peers and is happy among them. In Exhibit A-2, a videotape presentation of Emily's birthday party in February, 1993, the parents point to examples of her response and involvement when surrounded by age peers. Although parents are frequently very subjective in assessments of their own children, family intimacy may enable them to identify behaviours in their children that strangers may not see. Nevertheless, despite several viewings of the videotape by the Tribunal, and despite granting the parents full benefit of the doubt, we are unable, separately and in concert, to detect the nature and depth of response in Emily, that they describe. We believe that if the videotape is viewed and assessed with reasoned objectivity, the contents illustrate Emily's spontaneous response to her father, but very minimal reactions to others, both peers and adults, and then only when prompted.

The testimony of Emily's teachers and educational assistants is that generally, her classmates tend not to involve themselves with her in class or at play. The contents of a videotape (Exhibit R-10) showing Emily's Grade 1 class in three different activities, illustrates that during these times there was very limited interaction between Emily and her classmates, especially compared to the interaction of the classmates among one another. The evidence of appellant witness, Harry Silverman, is that the children [in Emily's Grade 2 classroom] "have not developed the notion,...that Emily is an integral part of the classroom." (Vol. VIII, p.1465) In further testimony, he offers the opinion that this indifference is possibly a consequence of the teacher's

not pro-actively involving Emily. However, this witness saw only one class for a period of about two and one-half hours, and in our opinion therefore, would not be competent to make such a judgement. Further, the Tribunal notes that Emily had been a classmate of many of that group of children for almost three years by that point, and if a pattern of natural interaction were going to develop, it is our view that it would have developed by this time, with or without the teacher's intervention.

The Tribunal notes that although the empirical evidence is that there is limited, if any, interaction between Emily and her classmates, it may be possible that some of her social and emotional needs are nevertheless being met. Because she does not communicate effectively, it is conceivable that she is enjoying the experience and cannot tell us. However, her classroom behaviours—the increasing incidents of crying, sleeping and vocalization—suggest that this is not the case. There appears to be little if any, social interaction between Emily and her peers in the regular class.

Physical and Personal Safety Needs:

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

What is unreasonable, in our opinion, is to treat lightly, Emily's habit of mouthing objects. This habit is attested to by both appellant and respondent witnesses as consistent and well-established. The Tribunal notes that some of the objects mouthed may be relatively innocuous in small amounts (e.g., sand, paper) but we have evidence that Emily also mouths potentially harmful objects (e.g., pins).

The parents assert that they are not distressed by this habit in Emily, and that they are confident she will not swallow harmful objects. However, a home setting that is adjusted to a child with pervasive muscular dysfunction, and idiosyncratic communication abilities, and who regularly mouths objects, is significantly different from a regular classroom setting. It is unreasonable to expect Emily's age-peer classmates to manage their classroom materials with her mouthing habit in mind. It is also unreasonable to expect a school to treat Emily as though she will never swallow something potentially dangerous. Therefore the school has a choice of establishing a level of adult supervision of Emily that is more intense than mere watchfulness, or, of cleansing the classroom of mouthable materials. It is the Tribunal's unanimous opinion that for Emily's personal safety, one of these conditions must prevail, and neither condition can reasonably be realized in a normal, integrated, regular classroom.

Emily's Experience In The Regular Classroom Setting

The Tribunal regards as fundamental to its decision, the fact that Emily has spent more than three school years in a regular class, with many of the same classmates for that period of time. Our unanimous opinion is that the evidence and testimony indicate strongly, that this placement has not been successful for her.

Emily's presence. Nevertheless, for integration of an exceptional child to be meaningful and fulfilling, the child must not be just physically placed in a regular classroom, but must be intellectually, socially, and emotionally involved. He or she must be accepted naturally as a regular member of the class despite a need for special support and consideration. Integration can be given momentum by adult intervention, but at some point over a reasonable amount of time, it must of itself, grow past artifice and manipulation. There must be regular, natural, spontaneous interaction between the exceptional child and the class. We have no convincing, objective evidence or testimony that over three years, any of this has developed for either Emily or her classmates.

Thus, while the Tribunal agrees with appellants' counsel that there is "clear evidence of benefits from integration, the value of integration psychologically for children with disabilities..." (p.64) we do not agree that, from evidence and testimony, there is indication of benefits in Emily's case. In fact, the testimony describing Emily's three years in a regular classroom indicates that the nature and extent of immediate adult intervention and care essential to meet her profound intellectual, physical and emotional needs even minimally, has the counter-productive effect of isolating her, of segregating her in the theoretically integrated setting. In the opinion of the Tribunal this is a far more insidious outcome than would obtain in a special class.

The Wishes Of The Parents

The Tribunal notes the submission of appellants' counsel that the parents' "decisions in regard to Emily were carefully thought out and reasoned and based on an over-all philosophy." (29 July 1993, p.10) We note the contents of Exhibit A-6, a summary of the parents' reasoning and philosophy submitted to the IPRC of February 1992. As well, we note the testimony of both

parents, wherein they express their wishes regarding Emily's placement, particularly that they wish her to be placed in a regular class in the neighbourhood school because, in their opinion, it is here where their hopes for Emily will be fulfilled.

While we accept that the Eaton family has reflected on Emily's situation at great length, in considering the parents' wishes regarding her schooling and evaluating their testimony on the matter, we are struck by what appears to be an inordinate amount of inconsistency and contradiction.

For example, the parents state that they want Emily to attend Maple Avenue School because of the benefits that will accrue to her being in her neighbourhood. Yet Emily is not enrolled in any community activities in the neighbourhood (Burford) area. Her three brothers do not attend the neighbourhood school, and Emily herself was initially enrolled, at the parents' choice, in Dufferin School in Brantford. In Exhibit A-39 (Communication Book 3) the parents write that for Hallowe'en, the family "go[es] out trick or treating, usually in Cambridge where my parents live in a nice lengthy street as it's no fun driving from place to place in the country__esp. when we know so few people out here."

Carol and Clayton Eaton say they want Emily to be in a regular class so that she can model her peers. Their testimony is that her regular class experience thus far, offers dramatic proof of such modelling. Carol Eaton says in Exhibit A-4 "We feel...that until she had contact [in the regular class] with other girls__who walked__Emily did not realize that GIRLS (sic) are able to walk...". However, Carol Eaton acknowledges in testimony that before Emily began attending school, she had seen other girls her age in the community who could walk, and that she [Carol Eaton] "did not know" and "was supposing" (Vol.III,p.477) that it was the regular class experience which taught Emily that girls walk.

The impact of the modelling to which the parents point does not appear to extend to Emily's attire, even though it is well-established in the child behaviour field that clothing styles are an especially powerful element in peer modelling. When the school suggested to the Eaton family that Emily be dressed in pants like the other girls in the class, the reply was "it is ALWAYS (sic) Emily's preference to wear a dress". (Exhibit A-5)

Further, although the parents testify that Emily learns from modelling, it is clear from their own evidence, and from the testimony of the school staff, and from the testimony of social services personnel that she learns best with repeated, one-on-one, hand-over-hand instruction.

The Tribunal is struck by the significant discrepancy between the parents' and the school personnel's assessment of Emily's abilities. Whereas the parents testify, for example, that Emily can identify a range of colours, and even distinguish shades within a colour, both the teachers and educational assistants testify that Emily's responses indicate she is not capable of such identifications and distinctions. There are also differences in the testimony of how far Emily can walk with her walker, and of how well, when, or even if, she uses sign.

While recognizing the parents' very strong insistence that Emily attend a regular class in the neighbourhood school, and given that parent volunteering and on-site participation is a long accepted and beneficial practice in elementary education, especially in cases of unique needs like Emily's, we are perplexed by what appears to be rather limited in-class, on-site involvement on their part. We have no evidence or testimony that either parent volunteered or participated on a regular basis in Emily's kindergarten, Grade 1 and Grade 2 classes, which were in a school that they report to be only five minutes away.

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The Communication Books (Exhibit A-39) contain regular, pointed, lengthy, and extremely specific directions to the school in regard to what should or should not be done in Emily's classroom experience (e.g., from Exhibit A-39, Communication Book: "..we want Emily included in classroom activities__ALL activities__in an adapted manner. We do not want you doing an O.T. or physio or speech therapy program at school.") It is apparent that the parents were intensely involved, but from a distance, and it is apparent that imperatives and directions outweighed participation. We believe that much of the difference of opinion over Emily's needs and abilities, and quite possibly, much of the disagreement and disputation in this case, has arisen because the parents did not observe personally and at first hand, on a regular, frequent basis, what was happening in Emily's classroom. In our opinion, this lack of direct involvement diminishes the appellant counsel's argument that the parents' wishes and decisions are "carefully thought out and reasoned and based on an overall philosophy". (29 July 1993, p.10)

Taking these discrepancies, contradictions and inconsistencies into account, it is the Tribunal's view that the parents' request that Emily be placed in a regular classroom, full time, is not based on a reasoned, empathetic assessment of what she needs and what she can do, outside her family home.

Ministry of Education And Training's Proposed Directions Regarding Integration

Our decision in regard to Emily Eaton takes into account the Minister's statement in the Ontario legislature on 28 May 1991, during which she indicated her intent to initiate a policy for the province wherein "the integration of exceptional pupils into local community classrooms should be the norm in Ontario, wherever possible, when such a placement meets the pupil's needs, and where it is according to parental choice".

The Minister also stated in the same address that her Ministry recognizes that "an integrated setting will not be appropriate for every child".

Evidence Available From The Literature On Class Placement

In testimony from witnesses presented as expert, the Tribunal heard numerous references to the literature on placement as a part of special education practice. We are unable to conclude from this testimony that the literature clearly establishes any one setting as the best to meet the needs of exceptional children. (E.g., Mara Sapon-Shevin: "There is much that's inconclusive in this field; that's why it's tricky." Vol. VII, p.1330); Gary Bunch: "...we've come to an understanding of the literature that in some cases says, yes, there is a beneficial effect...and other literature says there is a neutral effect...and other that says that placement in regular classrooms has at least equal effect..." (Vol.VI, p.1044)

Accordingly, since the Tribunal itself has expertise in the literature on placement, and having regard to our discretionary powers under Section 16(b) of the Statutory Powers Procedure Act (R.S.). 1980, Chapter 484) we completed for ourselves, an extensive and intensive review of the placement literature and conclude that this body of literature, taken as a whole, is seriously flawed

1) by very poor research methods (e.g., lack of controls; cf. the study described by Gary Bunch, Vol. VI);

2) by the polemical stance taken by many of the researchers and writers (cf. Exhibits A-33, A-34, entered with the testimony of Mara Sapon-Shevin);

3) by the inherent difficulty in controlling variables while conducting research on human learning and behaviour (e.g., confounding place with what happens pedagogically and socially *in* the place);

4) by extrapolating conclusions that fit a hypothesis rather than the other way around (e.g., studies of social status and self-image among disabled children do not show that if they feel stigma and isolation, it is necessarily the result of being educated outside a regular classroom; yet the argument is regularly advanced by advocates of integration that this is indeed the case, and that a significant proportion of the literature verifies this contention);

5) by the regular use of non-cognate cases and situations to demonstrate outcomes for other cases (e.g., reference to the successful integration of, say, a child who is blind, to establish regular class placement as the best setting for a child who is deaf); and,

6) by the inexplicably wide acceptance and citation in the same context as refereed journals of what has come to be called "gee whiz" literature (e.g., descriptive, anecdotal, journalistic, and clearly unscientific reports on individual cases of exceptionality).

Most important, the references in the literature to situations that are even vaguely analogous to that of Emily Eaton are extremely limited.

The Tribunal therefore, in its own review of the literature, does not find support for placing Emily in a regular class.

Testimony Of Expert Witnesses

Three witnesses, Gary Bunch, Mara Sapon-Shevin, and Harry Silverman were presented to the Tribunal as experts by the appellants' counsel.

Harry Silverman observed in Emily's classroom for approximately two and one-half hours on the morning of 27 January 1993. Neither of the other two witnesses saw Emily in a school setting.

In our opinion, all three witnesses are committed to a philosophy of full inclusion (integration). Harry Silverman testifies "I fully subscribe to the 'no reject concept' which suggests that no school board has the right to exclude a child from education in a regular classroom...[and that a school board] does not have the moral or legal right to exclude any child". (Vol. VIII, p.1389)

Gary Bunch testifies that he is chair of the board for the 'Centre For Integrated Education' the purpose of which is to "advocate for, consult on, advise on inclusionary education". (Vol. VI, p.1112)

Mara Sapon-Shevin testifies that she is a member of 'Schools For Everyone', which is "a group devoted to promoting inclusion for children with disabilities in regular classrooms." (Vol. VII, p.1206) and of an organization called the 'Association For Persons With Severe Handicaps' and says "that my work with that organization has been primarily again, in the field of inclusion". (Ibid.) She also testifies that she has been involved in several other projects in the U.S.A. which have had inclusion of exceptional children in regular classrooms as a principal objective.

All three witness manifest an entirely subjective view of class placement, and in fact could not reasonably be expected to testify in any other way than strongly supportive of integration. Given the absence of clear research support and clear empirical support for the integration of exceptional children like Emily; viz., the uncertainty in the area for which they are presented as expert, and given that they did not, except for Harry Silverman, observe Emily in a school setting, we do not find their testimony significant in the specific matter of Emily's placement.

Obiter Dictum

The fact that the disagreement over Emily Eaton's class placement has been allowed to continue to the level of a Special Education Tribunal hearing is a grave disservice to this child. The Tribunal has no doubt that everyone involved with Emily has her present best interests and future well-being at heart. But we also feel that both are being put at risk by an unnecessarily rigorous adherence to principle and by the tyranny of moral certainty.

Having examined the historical development of this disagreement over Emily's placement, it is clear to us that Emily, the child, is now at risk of becoming Emily, the symbol. It is also clear to us that engaging legal counsel, turning to judicial and quasi-judicial avenues of redress, in short, taking an adversarial approach, has pushed this disagreement away from compromise and into competition, away from accommodation and into dispute. Emily's present and future well-being will not be served by going farther down this road.

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

The Charter Of Rights, And Human Rights Issues

We accept the argument of appellants' counsel that we are bound by The Charter and by the Ontario Human Rights Code (OHRC) in making our decision and that The Charter would take precedence over the Education Act if there is conflict between the two. We also accept that consideration of The Charter and the OHRC are within our mandate as a tribunal. Accordingly, we considered at great length the submissions of both counsel in regard to the impact of The Charter and the OHRC in Emily Eaton's case.

Although we find that the case law presented to us offers analogous principles, it does not have relevance in the matter of Emily Eaton's placement.

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.

We find that in the case of Emily Eaton, the Brant County Board of Education, in placing her in a special class, is not acting in contravention of The Charter and is not violating her human rights.

For the Tribunal

Professor Kenneth J. Weber, Chair

19 November 1993

Date

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C19214

COURT OF APPEAL FOR ONTARIO

CARTHY, ARBOUR and LABROSSE JJ.A.

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

ARBOUR J.A.:

Introduction

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

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

History of the proceedings

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

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

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

Special Education in Ontario

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

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

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

> s. 8(3) The Minister shall ensure that all exceptional children in Ontario have available to them, in accordance with this Act and the Regulations, appropriate special education programs and special education services without payment of fees by parents or guardians resident in Ontario, and shall provide for the parents or guardians to appeal the appropriateness of the special education placement, and for these purposes the Minister shall,
>
> (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, enacted under the *Act*, requires that every board of education set up a Special Education Identification, Placement and Review Committee

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

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

The Decision of the Tribunal

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

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

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

segregation

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

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

The Issues

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


interpretation

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

The Scope of Judicial Review

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

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

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

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

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

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

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

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

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

The Charter Issues

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

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The Charter of Rights And Human Rights Issues

We accept the argument of appellants' counsel that we are bound by *The Charter* and by the *Ontario Human Rights Code* (OHRC) in making our decision and that *The Charter* would take precedence over the *Education Act* if there is conflict between the two. We also accept that consideration of *The Charter* and the OHRC are within our mandate as a tribunal. Accordingly, we considered at great length the submissions of both counsel in regard to the impact of *The Charter* and the OHRC in Emily Eaton's case.

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

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

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

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

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> Finally, we have great difficulty in appreciating how the *Charter of Rights and Freedoms* and the Ontario *Human Rights Code* create a presumption in favour of one pedagogical theory over another, particularly when the implementation of either theory needs the protection of the saving provisions found in s. 15 of the *Charter* and s. 14 of the *Code*. But in this case, that issue is entirely academic because the Tribunal found the evidence clearly established that Emily's best interests will be better served with the recommended placement.

The Legal Framework of Analysis

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

Riggs – this is not true

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

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

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

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

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

← key question

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

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

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

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

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

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

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

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

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

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

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

parents
advance
Emily's

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

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

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

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

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

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

Is placement in a segregated classroom discriminatory?

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

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

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

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

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> Wherever possible, the disabled child should learn alongside children who are not disabled. This should be the rebuttable presumption. It may involve extra tutoring, the use of an attendant, or specially designed programs to supplement the classroom instruction. It will most certainly involve provincial ministries of education in putting more resources into facilities, aids, and teachers for disabled children. It may be unfair to place a disabled child in a regular class in the public school system without appropriate supports, since integration may come at the cost of learning. As the child falls further and further behind, confidence and motivation may ebb accordingly. Yet in many parts of Canada no special educational facilities exist for children with special needs, and to get a basic education they have to be separated from their major support centres - their families. Where integration is not feasible, instruction should be available close to home with as early an entry into the regular school stream as possible.
>
> From the earliest age, disabled children should see themselves as part of the mainstream of society, and children who are not disabled should see them the same way. These enabling perceptions, carried into adulthood, have the power to affect, on both sides, expectations about the extent to which the community is and should be accessible and about standards of behaviour in the workplace, both for employers and employees.

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

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

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

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

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

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

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

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

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

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

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

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

individual capacity = disability

Medical type

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

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

15.1

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

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

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

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What is the source of the discrimination?

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

Brun: how we all proceeded!

Threw her out

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

i.e. The decision here!

In her particular case

∴ act neither mandates nor excludes Charter

Mixes generic "orders"
and this specific order

generically, such orders are not nec.
~~the order is not~~ unconstitutional
~~& 4 always unconstit they~~
- act does not mandate
Charter violations
- Charter does not require it

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

In *Slaight Communications v. Davidson*, [1 he Supreme Court accepted that the order of an adjudicator coul action" under the Charter, without an attack on the empowering le ever here, the attack is not on the order. Nor is it, apparently, or slation. If the appellants are correct that the Charter mandates a prefe ionary education programs for disabled students, then the defici failure of the *Education Act* to so provide. Section 8 of the E on the Minister of Education to make appropriate special educatio to all exceptional children in Ontario. Section 6 of Regulation 305, th special education identification and placement, provides that placeme s are to be effected with the consent of the parents of the exceptional child, failing which the placement may be effected by direction of the board, subject to the parents' rights of appeal. That legislative scheme provides no impediment to the method and reasoning employed by the IPRC, Appeal Board and Tribunal in the present case and, as such, it is constitutionally inadequate, unless it can be justified under s. 1 of the *Charter*.

— In the generic sense.

—— but see JR p699.

— it is a deference, but
Charter is read in
" interpretive guidance"

parents: slight dealt with s.1

(Lamer – had the opportunity
to adduce s.1 evid to
save the order
– could this apply to the Act

— i.e ~~can~~ is "read-in" appropriate?

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As I see it, the *Education Act* confers ...ool boards to provide exceptional students, including disabled stu... ...ional program that best meets their special needs. In the absence of ... *Act* or in the *Regulations*, the statute therefore authorizes the place... for Emily Eaton. That placement is discriminatory ... attributed to the legislation, and not, as the appellants contend, to the ... school board or the Tribunal. The issue therefore become whether the *Edu*... the regulations thereunder, constitute a reasonable limit, within the meanin... of s. 1 of the *Charter*, on Emily Eaton's equality rights as provided for in s. 15 of the *Charter*.

Is exclusion justified under s.1 of the Charter?

Section 1 of the *Charter* provides that:

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

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

Ie apart from the Charter,
the order would be intra vires
the empowering legislation

absent the Charter, the
order would be ultra vires
– eg dev. of powers
–

S.1 applied by the
Court in Slaight
Italy.

Go to
p. 726

723

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

None!

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

No value attached to Isolation

- focus was discrimination not the validity of the Education Act
- focus was discrimination not justification
- discrimination was in play

Gauthier – no s.1 justification may be a surprise, but why not s.15 expert evidence?

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

The Remedy

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

- focus was discrimination not the validity of the Education Act
- focus was discrimination not justification
- discrimination was in play

Gauthier – no s. 1 justification may be a surprise, but why not s. 15 expert evidence?

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

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

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

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

follows p. 708

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

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

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

curtailing by reading down 5.8

this is the interpretive language in para 2 of the order.

balance.

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

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

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

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

} as in <u>Dagaraes</u> – for Lach to consider the balance.

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

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

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

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

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

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

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

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

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

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

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

I agree J.A.

I agree J.A.

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C19214

COURT OF APPEAL FOR ONTARIO

CARTHY, ARBOUR and LABROSSE JJ.A.

BETWEEN:

CAROL EATON AND CLAYTON EATON

Appellants

- and -

THE BRANT COUNTY BOARD OF EDUCATION

Respondent

- and -

CANADIAN DISABILITY RIGHTS COUNCIL, ONTARIO ASSOCIATION OF COMMUNITY LIVING and ATTORNEY GENERAL OF ONTARIO

Intervenors

JUDGMENT

RELEASED: FEB 15 1995