Eaton *v.* Brant County Board of Education, [1997] 1 S.C.R. 241

The Brant County Board of Education
and the Attorney General for Ontario *Appellants*

v.

Carol Eaton and Clayton Eaton *Respondents*

and

The Attorney General of Quebec,
the Attorney General of British Columbia,
the Canadian Foundation for Children, Youth and the Law,
the Learning Disabilities Association of Ontario,
the Ontario Public School Boards' Association,
the Down Syndrome Association of Ontario,
the Council of Canadians with Disabilities,
the Confédération des organismes de personnes handicapées du Québec,
the Canadian Association for Community Living,
People First of Canada,
the Easter Seal Society and
the Commission des droits de la personne et
des droits de la jeunesse *Interveners*

Indexed as: Eaton *v.* Brant County Board of Education

File No.: 24668.

1996: October 8; 1996: October 9.

Reasons delivered: February 6, 1997.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

on appeal from the court of appeal for ontario

Constitutional law -- Charter of Rights -- Equality rights -- Physical disability -- Child with physical disabilities identified as being an "exceptional pupil" -- Child placed in neighbourhood school on trial basis -- Child's best interests later determined to be placement in special education class -- Whether placement in special education class and process of doing so absent parental consent infringing child's s. 15 (equality) Charter rights -- If so, whether infringement justifiable under s. 1 -- Whether Court of Appeal erred in considering constitutional issues absent notice required by Courts of Justice Act -- Canadian Charter of Rights and Freedoms, ss. 1, 15 -- Courts of Justice Act, R.S.O. 1990, c. C.43, s. 109(1) -- Education Act, R.S.O. 1990, c. E.2, ss. 1(1), 8(3) -- R.R.O. 1990, Reg. 305, s. 6.

The respondents are the parents of a 12-year-old girl with cerebral palsy who is unable to communicate through speech, sign language or other alternative communication system, who has some visual impairment and who is mobility impaired and mainly uses a wheelchair. Although identified as an "exceptional pupil" by an Identification, Placement and Review Committee (IPRC), the child, at her parents' request, was placed on a trial basis in her neighbourhood school. A full-time assistant, whose principal function was to attend to the child's needs, was assigned to the classroom. After three years, the teachers and assistants concluded that the placement was not in the child's best interests and indeed that it might well harm her. When the IPRC determined that the child should be placed in a special education class, the decision was appealed by the child's parents to a Special Education Appeal Board which unanimously confirmed the IPRC decision. The parents appealed again to the Ontario Special Education Tribunal (the "Tribunal"), which also unanimously confirmed the decision. The parents then applied for judicial review to the Divisional Court, Ontario Court of Justice (General Division), which dismissed the application. The Court of Appeal allowed the subsequent appeal and set aside the Tribunal's order. At issue here

are whether the Court of Appeal erred (1) in proceeding, *proprio motu* and in the absence of the required notice under s. 109 of the *Courts of Justice Act*, to review the constitutional validity of the *Education Act*, and (2) in finding that the decision of the Tribunal contravened s. 15 of the *Canadian Charter of Rights and Freedoms*.

Held: The appeal should be allowed.

Per: La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.: The purpose of s. 109 of the *Courts of Justice Act* is obvious. In our constitutional democracy, it is the elected representatives of the people who enact legislation. While the courts have been given the power to declare invalid laws that contravene the *Charter* and are not saved under s. 1, this is a power not to be exercised except after the fullest opportunity has been accorded to the government to support its validity. To strike down by default a law passed by and pursuant to act of Parliament or the legislature would work a serious injustice not only to the elected representatives who enacted it but also to the people. Moreover, this Court has the ultimate responsibility of determining whether an impugned law is constitutionally infirm and it is important that the Court, in making that decision, have the benefit of a record that is the result of thorough examination of the constitutional issues in the courts or tribunal from which the appeals arise.

Two conflicting strands of authority dealing with the issue of the legal effect of the absence of notice exist. One favours the view that in the absence of notice the decision is *ipso facto* invalid, while the other holds that a decision in the absence of notice is voidable upon a showing of prejudice. It is not necessary to express a final opinion as to which approach should prevail (although the former was preferred) because the decision of the Court of Appeal is invalid under either strand. No notice or

any equivalent was given in this case and in fact the Attorney General and the courts had no reason to believe that the Act was under attack. Clearly, s. 109 was not complied with and the Attorney General was seriously prejudiced by the absence of notice.

While there has not been unanimity in the judgments of the Court with respect to all the principles relating to the application of s. 15 of the *Charter*, the s. 15 *Charter* issue can be resolved on the basis of principles in respect of which there is no disagreement. Before a violation of s. 15 can be found, the claimant must establish that the impugned provision creates a distinction on a prohibited or analogous ground which withholds an advantage or benefit from, or imposes a disadvantage or burden on, the claimant. The principles that not every distinction on a prohibited ground will constitute discrimination and that, in general, distinctions based on presumed rather than actual characteristics are the hallmarks of discrimination have particular significance when applied to physical and mental disability.

The principal object of certain of the prohibited grounds is the elimination of discrimination resulting from the attribution of untrue characteristics based on stereotypical attitudes relating to immutable conditions such as race or sex. In the case of disability, this is one of the objectives. The other equally important objective seeks to take into account the true characteristics of this group which act as headwinds to the enjoyment of society's benefits and to accommodate them. Exclusion from the mainstream of society results from the construction of a society based solely on "mainstream" attributes to which the disabled will never be able to gain access. It is the failure to make reasonable accommodation, to fine-tune society so that its structures and assumptions do not prevent the disabled from participation, which results in discrimination against the disabled. The discrimination inquiry which uses "the attribution of stereotypical characteristics" reasoning is simply inappropriate here. It is

recognition of the actual characteristics and reasonable accommodation of these characteristics which is the central purpose of s. 15(1) in relation to disability.

Disability, as a prohibited ground, differs from other enumerated grounds such as race or sex because there is no individual variation with respect to these grounds. Disability means vastly different things, however, depending upon the individual and the context. This produces, among other things, the "difference dilemma" whereby segregation can be both protective of equality and violative of equality depending upon the person and the state of disability.

The Tribunal set out to decide which placement was superior, balanced the child's various educational interests taking into account her special needs, and concluded that the best possible placement was in the special class. It also alluded to the requirement of ongoing assessment of the child's best interests so that any changes in her needs could be reflected in the placement. A decision reached after such an approach could not be considered a burden or a disadvantage imposed on a child.

For a child who is young or unable to communicate his or her needs or wishes, equality rights are being exercised on that child's behalf, usually by his or her parents. Moreover, the requirements for respecting these rights in this setting are decided by adults who have authority over this child. The decision-making body, therefore, must further ensure that its determination of the appropriate accommodation for an exceptional child be from a subjective, child-centred perspective -- one which attempts to make equality meaningful from the child's point of view as opposed to that of the adults in his or her life. As a means of achieving this aim, it must also determine that the form of accommodation chosen is in the child's best interests. A decision-making body must determine whether the integrated setting can be adapted to meet the

special needs of an exceptional child. Where this is not possible, that is where aspects of the integrated setting which cannot reasonably be changed interfere with meeting the child's special needs, the principle of accommodation will require a special education placement outside of this setting. For older children and those who are able to communicate their wishes and needs, their own views will play an important role in the determination of best interests. For younger children and for persons who are either incapable of making a choice or have a very limited means of communicating their wishes, the decision-maker must make this determination on the basis of the other evidence before it.

The application of a test designed to secure what is in the best interests of the child will best achieve that objective if the test is unencumbered by a *Charter*-mandated presumption favouring integration which could be displaced if the parents consented to a segregated placement. The operation of a presumption tends to render proceedings more technical and adversarial. Moreover, there is a risk that in some circumstances, the decision may be made by default rather than on the merits as to what is in the best interests of the child. That a presumption as to the best interests of a child is a constitutional imperative must be questioned given that it could be automatically displaced by the decision of the child's parents. This Court has held that the parents' view of their child's best interests is not dispositive of the question.

The child's placement which was confirmed by the Tribunal did not constitute the imposition of a burden or disadvantage nor did it constitute the withholding of a benefit or advantage. Neither the Tribunal's order nor its reasoning can be construed as a violation of s. 15. The approach that the Tribunal took is one that is authorized by the general language of s. 8(3) of the Act. In the circumstances, it is

unnecessary and undesirable to consider whether the general language of s. 8(3) or the Regulations would authorize some other approach which might violate s. 15(1).

Per: Lamer C.J. and Gonthier J.: Sopinka J.'s analysis of the arguments made under s. 15(1) of the *Charter* and his conclusion that the child's equality rights were not violated were agreed with.

Slaight Communications Inc. v. Davidson was incorrectly applied below in that the Court of Appeal found the constitutional imperfection of the *Education Act* to reside in what the Act does not say -- the statute must authorize what it does not explicitly prohibit, including unconstitutional conduct. *Slaight Communications*, however, held exactly the opposite -- that statutory silences should be read down to not authorize breaches of the *Charter*, unless this cannot be done because such an authorization arises by necessary implication. Whatever section of the Act or of Regulation 305 grants the authority to the Tribunal to place exceptional students, *Slaight Communications* would require that any open-ended language in that provision (if there were any) be interpreted so as to not authorize breaches of the *Charter*.

Cases Cited

By Sopinka J.

Considered: *D.N. v. New Brunswick (Minister of Health & Community Services)* (1992), 127 N.B.R. (2d) 383; *Ontario (Workers' Compensation Board) v. Mandelbaum, Spergel Inc.* (1993), 12 O.R. (3d) 385**;** *R. v. Beare*; *R. v. Higgins* (1987), 31 C.R.R. 118; *Citation Industries Ltd. v. C.J.A., Loc. 1928* (1988), 53 D.L.R. (4th) 360;

referred to: *R. v. Turpin*, [1989] 1 S.C.R. 1296; *Roberts v. Sudbury (City)*, Ont. H.C., June 22, 1987, unreported; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038; *Miron v. Trudel*, [1995] 2 S.C.R. 418; *Egan v. Canada*, [1995] 2 S.C.R. 513; *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143**;** *E. (Mrs.) v. Eve*, [1986] 2 S.C.R. 388; *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315.

By Lamer C.J.

Considered: *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 1, 15(1), (2).

Constitutional Question Act, R.S.B.C. 1979, c. 63.

Constitutional Questions Act, R.S.S. 1978, c. C-29.

Courts of Justice Act, R.S.O. 1990, c. C.43, s. 109(1).

Education Act, R.S.O. 1990, c. E.2, ss. 1(1), 8(3).

Education Act, 1974, S.O. 1974, c. 109, s. 34(1).

Education Amendment Act, 1980, S.O. 1980, c. 61.

Family Services Act, S.N.B. 1980, c. F-2.2.

Identification of Criminals Act, R.S.C. 1970, c. I-1.

Judicature Act, R.S.N.B. 1973, c. J-2, s. 22.

Human Rights Code, R.S.O. 1990, c. H.19.

R.R.O. 1990, Reg. 305, s. 6(1), (2).

Supreme Court Act, R.S.C., 1985, c. S-26, s. 45.

Authors Cited

Ontario. Department of Health. *A Report to the Minister of Health on Present Arrangements for the Care and Supervision of Mentally Retarded Persons in Ontario*. By Walter B. Williston. Toronto: 1971.

Ontario. Ministry of Education. *Special Education Information Handbook*. Toronto: 1984.

APPEAL from a judgment of the Ontario Court of Appeal (1995), 22 O.R. (3d) 1, 123 D.L.R. (4th) 43, 77 O.A.C. 368, 27 C.R.R. (2d) 53, [1995] O.J. No. 315 (QL), allowing an appeal from a judgment of the Divisional Court (1994), 71 O.A.C. 69, [1994] O.J. No. 203 (QL), dismissing an application for judicial review of a decision of the Ontario Special Education Tribunal. Appeal allowed.

Christopher G. Riggs, Q.C., *Andrea F. Raso* and *Brenda J. Bowlby*, for the appellant the Brant County Board of Education.

Dennis W. Brown, *Robert E. Charney* and *John Zarudny*, for the appellant the Attorney General for Ontario.

Stephen Goudge, Q.C., and *Janet L. Budgell*, for the respondents.

Isabelle Harnois, for the intervener the Attorney General of Quebec.

Written submissions only by *Lisa Mrozinski* for the intervener the Attorney General of British Columbia.

Written submissions only by *Cheryl Milne* for the interveners the Canadian Foundation for Children, Youth and the Law and the Learning Disabilities Association of Ontario.

Brenda J. Bowlby, for the intervener the Ontario Public School Boards' Association.

W. I. C. Binnie, Q.C., and *Robert Fenton*, for the intervener the Down Syndrome Association of Ontario.

David W. Kent, Melanie A. Yach and *Geri Sanson*, for the interveners the Council of Canadians with Disabilities, the Confédération des organismes de personnes handicapées du Québec, the Canadian Association for Community Living and People First of Canada.

Mary Eberts and *Lucy K. McSweeney*, for the intervener the Easter Seal Society.

Philippe Robert de Massy, for the intervener the Commission des droits de la personne et des droits de la jeunesse.

The reasons of Lamer C.J. and Gonthier J. were delivered by

1 THE CHIEF JUSTICE -- I concur with Justice Sopinka's analysis of the arguments made under s. 15(1) of the *Canadian Charter of Rights and Freedoms* and his conclusion that there was no violation of Emily Eaton's equality rights. However, I wish to address briefly an issue which he has chosen not to explore in light of his

conclusion on s. 15(1) — the incorrect manner in which the court below applied my judgment in *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, to find that the source of the alleged discrimination against Emily Eaton was the *Education Act*, R.S.O. 1990, c. E.2. Although it is, strictly speaking, unnecessary to address this question, because the *Charter* was not violated, I think it important that I address it because I do not want to leave the impression that I believe this portion of the Court of Appeal's judgment was correct.

2 To understand how the Court of Appeal (1995), 22 O.R. (3d) 1, erred in its application of *Slaight Communications*, it is necessary to recapitulate briefly an aspect of the proceedings in that court. After having found that the separate placement of Emily Eaton violated s. 15(1) of the *Charter*, Arbour J.A. went on to consider the source of the discrimination. This issue arose because the order to place Emily Eaton in a special classroom was taken pursuant to the regime for special education which is centred on the *Education Act*, but was made by an administrative tribunal, the Ontario Special Education Tribunal. However, Arbour J.A. characterized the respondents' argument as an attack neither on the Act, nor on the order of the Tribunal, but on the reasoning of the Tribunal. Then, citing *Slaight Communications*, she went on to hold at p. 19 that the "legislative scheme provides no impediment to the method and reasoning employed by the IPRC, Appeal Board and Tribunal", and for that reason was unconstitutional.

3 Arbour J.A.'s judgment can be summarized as follows — the constitutional imperfection of the *Education Act* resides in what it does not say; what it does not prohibit explicitly, the statute must authorize, including unconstitutional conduct. However, in *Slaight Communications*, where I dissented in the result but spoke for the majority on this very issue, I held exactly the opposite — that statutory silences should be read down to not authorize breaches of the *Charter*, unless this cannot be done

because such an authorization arises by necessary implication. I developed this principle in the context of administrative tribunals which operate pursuant to broad grants of statutory powers, and which can potentially violate *Charter* rights. Whatever section of the Act or of Regulation 305, R.R.O. 1990, grants the authority to the Tribunal to place students like Emily Eaton — a question which I need not address — *Slaight Communications* would require that any open-ended language in that provision (if there were any) be interpreted so as to not authorize breaches of the *Charter*.

4 For the reasons stated above, I agree with Sopinka J. in his disposition of this appeal.

//*Sopinka J.*//

The judgment of La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ. was delivered by

5 SOPINKA J. -- The issue in this case is whether a decision of the Ontario Special Education Tribunal (the "Tribunal") confirming the placement of a disabled child in a special education class contrary to the wishes of her parents contravenes the equality provisions of s. 15(1) of the *Canadian Charter of Rights and Freedoms*. The Court of Appeal held that it did. I have concluded that the decision of the Tribunal was based on what was in the best interests of the child and that in the circumstances no violation of s. 15(1) of the *Charter* occurred. The Court of Appeal went on to consider the validity of s. 8 of the *Education Act*, R.S.O. 1990, c. E.2 (the "Act") and found it to be constitutionally deficient in authorizing the Tribunal to proceed as it did. No notice of a constitutional question had been given in accordance with s. 109 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. I conclude that the constitutional issue was not open

to the Court of Appeal but, in any event, in view of the fact that the decision of the Tribunal complied with s. 15(1) of the *Charter*, it was not necessary to consider whether s. 8 was constitutionally valid.

Facts

6 The respondents, Carol and Clayton Eaton, are the parents of Emily Eaton, a 12-year-old girl with cerebral palsy. Emily is unable to speak, or to use sign language meaningfully. 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 mostly uses a wheelchair.

7 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 "appellant") 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. At the end of the school year, the IPRC determined that Emily would continue in kindergarten for the following year. This arrangement was continued into Grade 1. A number of concerns arose as to the appropriateness of her continued placement in a regular classroom. The teachers and assistants concluded, after three years of experience, that the placement was not in Emily's best interests and might well harm her.

8 The IPRC determined that Emily should be placed in a special education class. Emily's parents appealed this decision to a Special Education Appeal Board,

which unanimously confirmed the IPRC decision. The parents appealed again to the Tribunal, which also unanimously confirmed the decision. The Tribunal heard from a large group of witnesses and made numerous findings of fact which are described below. The parents then applied for judicial review to the Divisional Court, Ontario Court of Justice (General Division), which dismissed the application. However, the Court of Appeal allowed the subsequent appeal and set aside the Tribunal's order. The court held that s. 8 of the Act should be read to include a direction that, unless the parents of a disabled child consent to the placement of that child in a segregated environment, the appellant must provide a placement that is the least exclusionary from the mainstream and still reasonably capable of meeting the child's special needs. The court also ordered that the matter be remitted to a differently constituted Tribunal for rehearing. With leave of this Court, the appellant appealed from that decision. Shortly after the conclusion of argument, the Court gave judgment allowing the appeal with costs and with reasons to follow.

II. Relevant Statutory Provisions

9 In the *Education Act*, exceptional pupils are defined as follows:

> **1.**–(1) . . .
>
> "exceptional pupil" means a pupil whose behavioural, communicational, intellectual, physical or multiple exceptionalities are such that he or she is considered to need placement in a special education program by a committee . . . of the board. . . .

10 Section 8(3) sets out the Minister of Education's responsibility for the provision of special education in Ontario:

> **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.

11 Regulation 305 (Special Education Identification Placement and Review Committees and Appeals), R.R.O. 1990, under the *Education Act*, requires that every board of education set up an IPRC and establishes the process by which exceptional students are identified and placed, and the process by which parents may appeal the IPRC's decision.

> **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.

12 The *Courts of Justice Act*, s. 109(1), states that:

> **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).

13 The *Canadian Charter of Rights and Freedoms*, s. 15, states that:

> **15.** (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> (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.

III. Judgments in Appeal

Tribunal

14 The respondents requested that the Tribunal set aside the placement decision of the IPRC, and asked that the Tribunal direct that Emily be placed full time, in a regular, age-appropriate class, with full accommodation of her special needs. The Tribunal heard from the respondents, speech, occupational and physical therapists familiar with Emily, parents of some of Emily's classmates, a witness who, himself, had received a segregated education before high school, Emily's teachers, special assistants and principal at Maple Avenue School, the Board Superintendent, and a special education teacher with the Board.

15 The Tribunal stated the principal question as "whether Emily Eaton's special needs can be met best in a regular class or in a special class". The Tribunal considered the wishes of Emily's parents; the empirical evidence available from Emily's three school years in a regular classroom setting; the evidence from the literature on placement; the testimony of experts in the matter of classroom placement; the Ontario Ministry of Education and Training's proposed directions regarding the integration of exceptional pupils; and the *Charter* and Ontario *Human Rights Code*, R.S.O. 1990, c. H.19, in reaching its conclusion that the IPRC placement decision was the best placement for Emily.

16 The Tribunal observed at the outset that it is the extent of Emily's special needs which provokes consideration of a special placement, and not the fact that her needs are different from the mainstream. The Tribunal then reviewed Emily's needs under a number of headings and made numerous findings of fact upon which it based its decision.

17 Intellectual and Academic Needs: Despite the difficulty in assessing Emily's intellectual abilities owing to her inability to communicate, the Tribunal nevertheless found that there was considerable evidence that Emily had a profound learning deficit, and that there was a wide and significant intellectual and academic gap between her and her peers. The Tribunal considered the testimony presented on the subject of the "parallel curriculum" approach in which an adapted curriculum is delivered in the regular classroom setting. However, the Tribunal concluded that "[e]xperience 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". The Tribunal concluded that it was clear from the evidence that "a 'parallel' learning program specifically designed to meet [Emily's] intellectual needs, isolates her in a disserving and potentially insidious way".

18 Communication Needs: Emily has very limited abilities to communicate. Carol Eaton and Emily's educational assistants testified "that to learn sign, Emily needs repetitive, hand-over-hand instruction". The evidence suggested that despite this approach, Emily cannot yet communicate using sign. The importance of communication was emphasized by the Eatons' witness, Robert Williams, an adult with cerebral palsy who communicates by means of assistive technology. The Tribunal concluded that "Emily's need to communicate is going to be met only with very individualized, highly specialized, extremely intense, one-on-one instruction. 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".

19 Emotional and Social Needs: The Tribunal relied on the testimony of Emily's parents, teachers and educational assistants in assessing these needs. The teachers and educational assistants testified that Emily's classmates tend not to involve themselves with Emily in class or at play. The Tribunal concluded 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".

20 Physical and Personal Safety Needs: The Tribunal found that Emily's physical disabilities by themselves ought not to be a deciding factor in evaluating whether her needs can be met best in a regular or special class since it is reasonable to expect that the adaptations necessary would be made in order to accommodate Emily in the regular classroom even if a special classroom may be better designed to address her special physical needs. However, the Tribunal was concerned with Emily's tendency to place objects in her mouth. Emily's parents asserted that they were not concerned, and were confident that Emily would not swallow harmful objects. The Tribunal found that "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". The Tribunal found that it was not reasonably possible to cleanse the classroom of mouthable materials or to establish the level of adult supervision necessary in the regular, integrated classroom.

21 The Tribunal then considered Emily's three years of experience in the integrated classroom. The Tribunal found "that the desired outcome of integration for an exceptional child, namely, fulfilment of intellectual and especially social and emotional needs through regular and natural interaction, has not been realized in Emily's case". It observed that the frequency and intensity of Emily's expressions of discontent – crying, sleeping, vocalizing – had been increasing over the three-year period.

22 The Tribunal agreed that integration confers great psychological benefit on disabled children, but that in Emily's case, the three years of experience in the regular classroom with the adult intervention necessary to meet her profound needs even

minimally "has the counter-productive effect of isolating her, of segregating her in the theoretically integrated setting". The Tribunal found that "this is a far more insidious outcome than would obtain in a special class".

23 Accordingly, the Tribunal concluded that "[i]t 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 [Ontario *Human Rights Code*]".

Ontario Divisional Court (Adams J. for the court) (1994), 71 O.A.C. 69

24 The respondents applied for judicial review of the Tribunal's decision and sought to quash it on several grounds. First, they argued that the Tribunal was not expert since it was protected by a privative clause of the "final and binding" style only. Second, the Tribunal committed the following errors: it conducted its own literature search after the hearing, and it failed to place a legal burden (arising from the *Charter* and Ontario *Human Rights Code*) on the Board to establish that a special education class was clearly better than a regular class for Emily.

25 The court found that the specialized Tribunal had dealt comprehensively and thoughtfully with all the issues raised before it and with the central focus being what was best for Emily. Adams J. stated that the Tribunal had accepted that a regular class was

to be preferred where consistent with the child's best interests and had been conscious of the *Charter* and Ontario *Human Rights Code*.

26 The court held that the Tribunal was worthy of curial deference given the structure of the legislation, the subject matter, and the composition of the Tribunal, but in any event there was no error of law. The court held that the Tribunal's post-hearing review of "the literature" to which the experts generally referred did nothing more than confirm its assessment of the evidence before it and the various admissions of the applicants' experts with regard to that research. Accordingly there was no denial of natural justice.

27 The court rejected the idea that the *Charter* creates a presumption in favour of one pedagogical theory over another. The issue of burden was academic in this case because the Tribunal found that the evidence clearly established that Emily's best interests would be better served in the special class.

28 The court echoed the Tribunal's reminder to the School Board that this placement did not relieve the Board and the parents of the obligation to collaborate creatively in a continuing effort to meet Emily's present and future needs.

Court of Appeal (Arbour J.A. for the court) (1995), 22 O.R. (3d) 1

29 The respondents raised several issues on appeal before the Ontario Court of Appeal. First, they contended that the Divisional Court erred in its application of the *Charter* to the process of placing disabled students in appropriate educational settings. Second, they raised a number of legal errors committed by the Tribunal which, they submitted, ought to have been reviewed by the Divisional Court.

30 Arbour J.A. discussed the scope of judicial review appropriate in this case. Owing to the privative clause, the subject matter of the legislation, and the composition of the Tribunal, she held that the Tribunal was worthy of curial deference. However, in constitutional matters, she held that the standard of review was one of correctness.

31 Arbour J.A. dealt with the alleged errors of law first and concluded at p. 8 that although the Tribunal erred in conducting its own review of the literature after the hearing, 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". Consequently, even if the error was reviewable it would not result in the invalidation of the decision.

32 Arbour J.A. then turned to the constitutional issue. She noted that the respondents submitted that the *Charter* and the Ontario *Human Rights Code* both require a presumption in favour of the integration of disabled students, and that, therefore, the Board had to establish why Emily's needs would be better met in a segregated classroom. Arbour J.A. found at p. 9 that the Tribunal asked itself "whether Emily Eaton's special needs can be met best in a regular class or in a special class".

33 Arbour J.A. held that the Tribunal clearly rejected any notion of a presumption in favour of inclusion, and that the Tribunal simply found that the integrated classroom had not been successful. The Tribunal never answered the question as it framed it, namely, whether Emily's needs could be met best in a regular class or a special class.

34 The respondents contended that the "best interests of the child" test is not satisfactory in determining the appropriate placement for a disabled child because this test could prove insensitive to the equality rights of the child. They stated that there ought to be a presumption in favour of integration. Accordingly, Arbour J.A. looked at whether Emily's placement in a special classroom amounted to discrimination within the meaning of s. 15 of the *Charter*. She found that Emily was prevented from attending the regular class because of her disability. Thus, a distinction had clearly been made on a prohibited ground. Arbour J.A. then turned to the question of whether the distinction resulted in the imposition of a burden or disadvantage. She held at p. 13 that "[a]lthough 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". Arbour J.A. applied *R. v. Turpin*, [1989] 1 S.C.R. 1296, in which scrutiny of the larger social, historical and political context was mandated, and found that the history of disabled persons, which the *Charter* seeks to redress and prevent, is a history of exclusion from the mainstream of society. In fact, "[i]n 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" (p. 15). Arbour J.A. concluded that, when analysed in its larger context, a segregated educational placement is a burden or disadvantage, and is therefore discriminatory within the meaning of s. 15.

35 Arbour J.A. stated at pp. 15-16:

> 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.
>
> . . .
>
> 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.

36 The School Board suggested that distinctions based on disability are not like those based on race or sex in the context of access to education because equality in education requires that the students be treated according to their actual abilities or disabilities. Arbour J.A. criticized this argument saying that although it may be easier to justify differences in access to educational facilities on the basis of disability than it would be if differences were based on race, this analysis must belong to s. 1. There is no reason to create a hierarchy of prohibited grounds within s. 15 which would elevate distinctions based on some to a more suspect category than others. Arbour J.A. stated at p. 17 that "[i]f anything, one should be wary of accepting as inevitable and innocuous a classification on the basis of . . . disability, without the rigorous analysis required by s. 15".

37 The Eatons stated that they were not attacking the *Education Act*, because, in the appropriate case and using the appropriate test, a Tribunal could order that a child like Emily be put in a special segregated class. They were attacking only the reasoning of the Tribunal. Not only did the respondents not attack the *Education Act*, but they also expressly disavowed any intention of doing so. No motion pursuant to s. 109 of the *Courts of Justice Act* had been given.

38 Arbour J.A. expressed considerable difficulty with this argument. She held that if it is true that the *Charter* mandates a presumption in favour of integration, then the deficiency must be in the failure of the *Education Act* to so provide. She stated at p. 19 that the Act infringed s. 15(1) because it "provides no impediment to the method and reasoning employed by the . . . Tribunal in the present case".

39 Arbour J.A. went on to consider s. 1 of the *Charter* and concluded that, "[s]ince it [the *Education Act*] permits a *Charter* infringement, without further guidance, I cannot say that the Act infringes the equality rights of disabled students as little as possible" (p. 20).

40 Arbour J.A. found that the appropriate remedy was to declare that s. 8 of the Act should be read to include a direction that, unless the parents of a disabled child 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.

41 Arbour J.A. held that the Tribunal would not have inevitably arrived at the same conclusion had it appreciated that the *Charter* required that segregated placement be used only as a last resort. Therefore Arbour J.A. directed that the matter be remitted to a differently constituted tribunal for re-hearing in accordance with the constitutional principles set out in her reasons.

IV. Issues

42 This appeal raises the following issues:

1. Did the Court of Appeal err in proceeding *proprio motu* and in the absence of the required notice under s. 109 of the *Courts of Justice Act* to review the constitutional validity of the *Education Act*?

2. Did the Court of Appeal err in finding that the decision of the Tribunal contravened s. 15 of the *Charter*?

43 The other issues raised below were not pursued in this Court.

V. Analysis

The Constitutionality of the Education Act and Regulations

44 Section 109(1) of the *Courts of Justice Act* provides that:

> **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).

45 No notice in compliance with this section was given either in the Divisional Court or in the Court of Appeal and no issue was raised with respect to the constitutionality of the Act. Moreover, in the Court of Appeal the respondents expressly disavowed any intention of attacking the Act or the Regulations. The Attorney General for Ontario relied on the respondents' position in the courts below and made no submissions on the constitutionality of the Act and had no opportunity to adduce evidence or make submissions to support the Act under s. 1 of the *Charter*. I am satisfied that the Attorney General for Ontario was prejudiced by the absence of notice.

46 In the order of the Chief Justice of this Court dated February 13, 1996, he stated:

> The Court of Appeal *proprio motu* found that s. 8 of the Act was a restriction to s. 15 of the *Charter* and proceeded to salvage the section by reading certain words into it. This initiative as regards s. 15 was not taken as regards s. 7.
>
> As the law as it now stands has been amended through reading in, in order to salvage the restriction to s. 15, it is for this reason and this reason only that I will state the following constitutional questions:
>
> 1. Do s. 8(3) of the *Education Act*, R.S.O. 1990, c. E.2, as amended, and s. 6 of *Regulation 305* of the *Education Act*, infringe Emily Eaton's equality rights under s. 15(1) of the *Canadian Charter of Rights and Freedoms*?
>
> 2. If the answer to question 1 is in the affirmative, are s. 8(3) of the *Education Act*, and s. 6 of *Regulation 305* of the *Education Act*, justified as a reasonable limit under s. 1 of the *Canadian Charter of Rights and Freedoms*?

47 The order stating constitutional questions did not purport to resolve the question as to whether the decision of the Court of Appeal to raise them was valid in the absence of notice or whether this Court would entertain them. The fact that constitutional questions are stated does not oblige the Court to deal with them.

48 The purpose of s. 109 is obvious. In our constitutional democracy, it is the elected representatives of the people who enact legislation. While the courts have been given the power to declare invalid laws that contravene the *Charter* and are not saved under s. 1, this is a power not to be exercised except after the fullest opportunity has been accorded to the government to support its validity. To strike down by default a law passed by and pursuant to the act of Parliament or the legislature would work a serious injustice not only to the elected representatives who enacted it but to the people. Moreover, in this Court, which has the ultimate responsibility of determining whether an impugned law is constitutionally infirm, it is important that in making that decision,

we have the benefit of a record that is the result of thorough examination of the constitutional issues in the courts or tribunal from which the appeals arise.

49 While this Court has not yet addressed the issue of the legal effect of the absence of notice, it has been addressed by other courts. The results are conflicting. One strand of decision favours the view that in the absence of notice the decision is *ipso facto* invalid, while the other strand holds that a decision in the absence of notice is voidable upon a showing of prejudice.

50 In *D.N. v. New Brunswick (Minister of Health & Community Services)* (1992), 127 N.B.R. (2d) 383, the Court of Appeal considered a situation in which the trial judge, on his own motion, set aside provisions of the *Family Services Act*, S.N.B. 1980, c. F-2.2, as contrary to the *Charter*. There had been no notice under s. 22 of the *Judicature Act*, R.S.N.B. 1973, c. J-2, as required. The Court of Appeal held, at p. 388, that "the wording of s. 22(3) leaves no doubt that notice is mandatory. For this reason, the trial judge ought not to have decided the case on a *Charter* issue raised on his own initiative without notice to the Attorneys General".

51 However, in *Ontario (Workers' Compensation Board) v. Mandelbaum, Spergel Inc.* (1993), 12 O.R. (3d) 385, a majority of the Ontario Court of Appeal came to a different conclusion, Arbour J.A. dissenting. Grange J.A. considered an argument that, pursuant to *D.N. v. New Brunswick (Minister of Health & Community Services), supra*, s. 109 notice was mandatory so that failure to give notice rendered a decision a nullity. He found further support for this position in the short judgment of Callaghan A.C.J.H.C. in *Roberts v. Sudbury (City)*, Ont. H.C., June 22, 1987, unreported, where Callaghan A.C.J.H.C. allowed an appeal from a decision made without notice and sent the matter back to the District Court for a rehearing. Grange J.A. also reviewed two

Saskatchewan cases, *R. v. Beare* and *R. v. Higgins* heard together and both reported at (1987), 31 C.R.R. 118 (C.A.). In one case notice had been served, while in the other it had not. The cases concerned the validity of the *Identification of Criminals Act*, R.S.C. 1970, c. I-1. In both cases the trial court upheld the validity of the Act. The Court of Appeal found that there was no prejudice because the Attorney General was able to present an argument in the *Higgins* case that would have applied to the *Beare* case as well. Therefore, there was no actual prejudice in the *Beare* case resulting from the failure to file notice under *The Constitutional Questions Act*, R.S.S. 1978, c. C-29. Grange J.A. also referred to *Citation Industries Ltd. v. C.J.A., Loc. 1928* (1988), 53 D.L.R. (4th) 360 (B.C.C.A.), in which the Court of Appeal dealt with a similar section under the *Constitutional Question Act*, R.S.B.C. 1979, c. 63. In that case, all counsel asked that the matter be heard on the merits even though notice had not been given to the provincial Attorney General. Seaton J.A. agreed to hear the merits because (at p. 363) "[a]t this stage nothing turns on the absence of earlier notice". Grange J.A. observed (at pp. 390-91) that:

> 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. . . . We have heard full argument on the question. Nothing would be gained by sending it back but repetition and expense.

52 Arbour J.A. dissented. She held that s. 109 creates a mandatory requirement of notice, and that the presence or absence of prejudice is irrelevant. "An adjudication made in violation of that mandatory language must be considered a nullity" (p. 394).

53 In view of the purpose of s. 109 of the *Courts of Justice Act*, I am inclined to agree with the opinion of the New Brunswick Court of Appeal in *D.N. v. New Brunswick (Minister of Health & Community Services)*, *supra*, and Arbour J.A. dissenting in *Mandelbaum*, *supra*, that the provision is mandatory and failure to give the notice invalidates a decision made in its absence without a showing of prejudice. It seems to me that the absence of notice is in itself prejudicial to the public interest. I am not reassured that the Attorney General will invariably be in a position to explain after the fact what steps might have been taken if timely notice had been given. As a result, there is a risk that in some cases a statutory provision may fall by default.

54 There is, of course, room for interpretation of s. 109 and there may be cases in which the failure to serve a written notice is not fatal either because the Attorney General consents to the issue's being dealt with or there has been a *de facto* notice which is the equivalent of a written notice. It is not, however, necessary to express a final opinion on these questions in that I am satisfied that under either strand of authority the decision of the Court of Appeal is invalid. No notice or any equivalent was given in this case and in fact the Attorney General and the courts had no reason to believe that the Act was under attack. Clearly, s. 109 was not complied with and the Attorney General was seriously prejudiced by the absence of notice.

55 It was suggested that notwithstanding the above, this Court should entertain the question of the validity of the provisions of the Act which were addressed by Arbour J.A. It might be suggested that a refusal to do so would be based on a technical ground. The absence of notice and the absence of a record developed in the courts and tribunals below are far from technical defects. Moreover, as a general rule, we are only authorized to make the disposition that the court appealed from ought to have made (*Supreme Court Act*, R.S.C., 1985, c. S-26, s. 45). There is, however, an additional reason for not dealing

with the constitutionality of the Act. Arbour J.A. felt constrained to do so because she was of the view that the decision of the Tribunal was discriminatory and violated s. 15(1) of the *Charter*. On the basis of *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, she felt obliged to consider whether the Act purported to authorize this result. I am respectfully of the opinion that Arbour J.A. erred in this regard. If she had concluded, as I do, that the reasoning and decision of the Tribunal did not discriminate contrary to s. 15 of the *Charter*, it would have been unnecessary for her, and it is unnecessary for me, to consider the constitutional validity of the Act.

56 I will turn to the issue of the validity of the decision of the Tribunal.

Does the Decision of the Tribunal Contravene s. 15 of the Charter?

57 The placement of children in special education programs and services is carried out pursuant to the provisions of s. 8 of the *Education Act* and the Regulations thereunder. Prior to 1980, there was no mandatory requirement that school boards provide such programs and a disabled person could be denied status as a resident pupil at elementary school if that person was "unable by reason of mental or physical handicap to profit by instruction in an elementary school" (*The Education Act, 1974*, S.O. 1974, c. 109, s. 34(1)).

58 A change in attitude with respect to disabled persons was initiated by the report of Walter B. Williston entitled *Present Arrangements for the Care and Supervision of Mentally Retarded Persons in Ontario* (1971). With it came a recognition of the desirability of integration and de-institutionalization. The change in attitude was reflected in changes in the *Education Act*.

59 The current legal framework for the education of exceptional pupils was adopted on December 12, 1980 when Royal Assent was given to *The Education Amendment Act, 1980*, S.O. 1980, c. 61. The Act and Regulations made it mandatory for all school boards to provide special education programs and services for exceptional pupils. The policy of the Ministry of Education is that "[e]very exceptional child has the right to be part of the mainstream of education to the extent to which it is profitable" (*Special Education Information Handbook* (1984)).

60 Ontario Regulation 305, R.R.O. 1990, adopted as O. Reg. 554/81, deals exclusively with Special Education Identification Placement and Review Committees and appeals. It provides for the identification of exceptional pupils, a determination of their needs and placement into an educational setting where special education programs and services can be delivered. The specific program modification and services required by each exceptional pupil are outlined in the pupil's education plan. Parents and guardians are involved in the identification and placement process and provision is made for appeal of the identification with a placement decision of the board.

61 This is the process that culminated in a decision by the Tribunal in the present case. After a three-year trial period in a regular class, the IPRC, after consultation with teacher assistants and Emily's parents, determined that she should be placed in a special education class. Emily's parents appealed to a Special Education Appeal Board which unanimously confirmed the IPRC decision. The parents appealed again to the Ontario Special Education Tribunal which unanimously confirmed the decision of the Special Education Appeal Board in a hearing lasting 21 days.

62 While there has not been unanimity in the judgments of the Court with respect to all the principles relating to the application of s. 15 of the *Charter*, I believe

that the issue in this case can be resolved on the basis of principles in respect of which there is no disagreement. There is general agreement that before a violation of s. 15 can be found, the claimant must establish that the impugned provision creates a distinction on a prohibited or analogous ground which withholds an advantage or benefit from, or imposes a disadvantage or burden on, the claimant.

63 In *Miron v. Trudel*, [1995] 2 S.C.R. 418, at p. 485, McLachlin J. stated:

> The analysis under s. 15(1) involves two steps. First, the claimant must show a denial of "equal protection" or "equal benefit" of the law, as compared with some other person. Second, the claimant must show that the denial constitutes discrimination. At this second stage, in order for discrimination to be made out, the claimant must show that the denial rests on one of the grounds enumerated in s. 15(1) or an analogous ground and that the unequal treatment is based on the stereotypical application of presumed group or personal characteristics. If the claimant meets the onus under this analysis, violation of s. 15(1) is established. The onus then shifts to the party seeking to uphold the law, usually the state, to justify the discrimination as "demonstrably justified in a free and democratic society" under s. 1 of the *Charter*.

At p. 487 she added:

> Furthermore, if the law distinguishes on an enumerated or analogous ground but does not have the effect of imposing a real disadvantage in the social and political context of the claim, it may similarly be found not to violate s. 15: *Weatherall v. Canada (Attorney General)*, [1993] 2 S.C.R. 872.

64 In *Egan v. Canada*, [1995] 2 S.C.R. 513, at p. 584, Cory and Iacobucci JJ. stated:

> The first step is to determine whether, due to a distinction created by the questioned law, a claimant's right to equality before the law, equality under the law, equal protection of the law or equal benefit of the law has been denied. During this first step, the inquiry should focus upon whether the

> challenged law has drawn a distinction between the claimant and others, based on personal characteristics.
>
> Not every distinction created by legislation gives rise to discrimination. Therefore, the second step must be to determine whether the distinction created by the law results in discrimination. In order to make this determination, it is necessary to consider first, whether the equality right was denied on the basis of a personal characteristic which is either enumerated in s. 15(1) or which is analogous to those enumerated, and second, whether that distinction has the effect on the claimant of imposing a burden, obligation or disadvantage not imposed upon others or of withholding or limiting access to benefits or advantages which are available to others.

65 Both Gonthier J. (the Chief Justice and La Forest and Major JJ. concurring) in *Miron* and La Forest J. (the Chief Justice and Gonthier and Major JJ. concurring) in *Egan* were of the view that a distinction must be shown to be based on irrelevant personal characteristics. On this view, relevance to the legislative goal or functional value of the legislation where such is not itself discriminatory can negate discrimination. The majority view as expressed in *Miron* was that relevance may assist as a factor in showing that the case falls into the rare class of case in which a distinction on a prohibited or analogous ground does not constitute discrimination. While this does not purport to be an exhaustive treatment of the differences between the majority and the minority on this point, it is a sufficient synopsis of them for the purposes of this appeal.

66 The principles that not every distinction on a prohibited ground will constitute discrimination and that, in general, distinctions based on presumed rather than actual characteristics are the hallmarks of discrimination have particular significance when applied to physical and mental disability. Avoidance of discrimination on this ground will frequently require distinctions to be made taking into account the actual personal characteristics of disabled persons. In *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, at p. 169, McIntyre J. stated that the "accommodation of differences . . . is the true essence of equality". This emphasizes that the purpose of

s. 15(1) of the *Charter* is not only to prevent discrimination by the attribution of stereotypical characteristics to individuals, but also to ameliorate the position of groups within Canadian society who have suffered disadvantage by exclusion from mainstream society as has been the case with disabled persons.

67 The principal object of certain of the prohibited grounds is the elimination of discrimination by the attribution of untrue characteristics based on stereotypical attitudes relating to immutable conditions such as race or sex. In the case of disability, this is one of the objectives. The other equally important objective seeks to take into account the true characteristics of this group which act as headwinds to the enjoyment of society's benefits and to accommodate them. Exclusion from the mainstream of society results from the construction of a society based solely on "mainstream" attributes to which disabled persons will never be able to gain access. Whether it is the impossibility of success at a written test for a blind person, or the need for ramp access to a library, the discrimination does not lie in the attribution of untrue characteristics to the disabled individual. The blind person cannot see and the person in a wheelchair needs a ramp. Rather, it is the failure to make reasonable accommodation, to fine-tune society so that its structures and assumptions do not result in the relegation and banishment of disabled persons from participation, which results in discrimination against them. The discrimination inquiry which uses "the attribution of stereotypical characteristics" reasoning as commonly understood is simply inappropriate here. It may be seen rather as a case of reverse stereotyping which, by not allowing for the condition of a disabled individual, ignores his or her disability and forces the individual to sink or swim within the mainstream environment. It is recognition of the actual characteristics, and reasonable accommodation of these characteristics which is the central purpose of s. 15(1) in relation to disability.

68 The interplay of these objectives relating to disability is illustrated by the evolution of special education in Ontario. The earlier policy of exclusion to which I referred was influenced in large part by a stereotypical attitude to disabled persons that they could not function in a system designed for the general population. No account was taken of the true characteristics of individual members of the disabled population, nor was any attempt made to accommodate these characteristics. With the change in attitude influenced by the Williston Report and other developments, the policy shifted to one which assessed the true characteristics of disabled persons with a view to accommodating them. Integration was the preferred accommodation but if the pupil could not benefit from integration a special program was designed to enable disabled pupils to receive the benefits of education which were available to others.

69 It follows that disability, as a prohibited ground, differs from other enumerated grounds such as race or sex because there is no individual variation with respect to these grounds. However, with respect to disability, this ground means vastly different things depending upon the individual and the context. This produces, among other things, the "difference dilemma" referred to by the interveners whereby segregation can be both protective of equality and violative of equality depending upon the person and the state of disability. In some cases, special education is a necessary adaptation of the mainstream world which enables some disabled pupils access to the learning environment they need in order to have an equal opportunity in education. While integration should be recognized as the norm of general application because of the benefits it generally provides, a presumption in favour of integrated schooling would work to the disadvantage of pupils who require special education in order to achieve equality. Schools focussed on the needs of the blind or deaf and special education for students with learning disabilities indicate the positive aspects of segregated education

placement. Integration can be either a benefit or a burden depending on whether the individual can profit from the advantages that integration provides.

70 These are the basic principles in respect of which the Tribunal's decision should be tested in order to determine whether that decision complies with s. 15(1). In applying them, I do not see any purpose in distinguishing between the order of the Tribunal and the reasons for that order. That was a distinction that was sought to be made in the Court of Appeal but, in my view, the reasons and the order are to the same effect and cannot be dealt with separately in this case. Either both are valid, as I conclude, or both are invalid.

The Tribunal's Decision

A Distinction

71 It is quite clear that a distinction is being made under the Act between "exceptional" children and others. Other children are placed in the integrated classes. Exceptional children, in some cases, face an inquiry into their placement in the integrated or special classes. It is clear that the distinction between "exceptional" and other children is based on the disability of the individual child.

Burden

72 In its thorough and careful consideration of this matter, the Tribunal sought to determine the placement that would be in the best interests of Emily from the standpoint of receiving the benefits that an education provides. In arriving at the conclusion, the Tribunal considered Emily's special needs and strove to fashion a

placement that would accommodate those special needs and enable her to benefit from the services that an educational program offers. The Tribunal took into account the great psychological benefit that integration offers but found, based on the three years experience in a regular class, that integration had had "the counter-productive effect of isolat[ing] her, of segregating her in the theoretically integrated setting".

73 Moreover, in deciding on the appropriate placement, the Tribunal considered each of the various categories of needs relevant to education. It found that it was not possible to meet Emily's intellectual and academic needs in the regular class without "isolating her in a disserving and potentially insidious way". It found that Emily's communication needs would be best met in the special class. It expressed doubt as to whether her emotional and social needs were being met in the regular class. While it is not clear that the special class would meet these particular needs better, it did appear to the Tribunal that there was little, if any, social interaction between Emily and her peers in the regular class. Although not central to the Tribunal's decision, it also found that certain adaptations to the classroom, such as the provision of a special desk, physical assistance and extra supervision from educational assistants were reasonable, but that it would not be reasonably possible to accommodate Emily's particular safety needs without radically altering the classroom or establishing a very isolating level of adult supervision.

74 The Court of Appeal, at p. 9, was of the view that the Tribunal stated the principal issue as "whether Emily Eaton's special needs can be met best in a regular class or in a special class", but that it never actually answered this question. Rather, the Court of Appeal held that the Tribunal found that the integrated placement was inadequate without finding that the segregated placement would be any better. It held

that the Tribunal ought not to have ordered a segregated placement unless it found that the segregated placement was better than the integrated placement.

75 In my view, the Tribunal did answer the question which it set itself, namely, which placement was superior. While it did not specifically state that the segregated placement was superior to the integrated placement, its findings clearly indicated this conclusion. The Tribunal grouped its findings into several categories of needs and interests implicated in education. With respect to Emily's communication needs, the Tribunal clearly found that "[b]ecause 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 [individualized, highly specialized, extremely intense, one-on-one] instruction". While the Tribunal did not indicate how Emily's academic or social needs would be better met in the segregated placement than in the integrated placement, it clearly concluded that these needs were not only unsatisfied, but that she was being isolated in a "disserving and potentially insidious way". The Tribunal also found that, with respect to Emily's physical safety, the special classroom was superior to the integrated classroom. The Tribunal looked at several categories of needs and pointed out that some, including the most important for Emily, would be better met in the segregated classroom. With respect to the others, while an express conclusion was not drawn as to how the segregated classroom would be superior, the inefficacy of the integrated classroom was established.

76 The Tribunal, therefore, balanced the various educational interests of Emily Eaton, taking into account her special needs, and concluded that the best possible placement was in the special class. It is important to note that the placement proposed was in a class located in a regular school where "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" according to the testimony of the teacher of the class in which the Board proposed to place Emily. In addition, the Tribunal alluded to the requirement of ongoing assessment of Emily's best interests so that any changes in her needs could be reflected in the placement. Finally, the Tribunal stated:

> . . . 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.

It seems incongruous that a decision reached after such an approach could be considered a burden or a disadvantage imposed on a child.

77 We cannot forget, however, that for a child who is young or unable to communicate his or her needs or wishes, equality rights are being exercised on his or her behalf, usually by the child's parents. Moreover, the requirements for respecting these rights in this setting are decided by adults who have authority over this child. For this reason, the decision-making body must further ensure that its determination of the appropriate accommodation for an exceptional child be from a subjective, child-centred perspective, one which attempts to make equality meaningful from the child's point of view as opposed to that of the adults in his or her life. As a means of achieving this aim, it must also determine that the form of accommodation chosen is in the child's best interests. A decision-making body must determine whether the integrated setting can be adapted to meet the special needs of an exceptional child. Where this is not possible, that is, where aspects of the integrated setting which cannot reasonably be changed

interfere with meeting the child's special needs, the principle of accommodation will require a special education placement outside of this setting. For older children and those who are able to communicate their wishes and needs, their own views will play an important role in the determination of best interests. For younger children, and those like Emily, who are either incapable of making a choice or have a very limited means of communicating their wishes, the decision-maker must make this determination on the basis of the other evidence before it.

78 The Court of Appeal was of the view that the Tribunal's reasoning infringed s. 15(1) because the *Charter* mandates a presumption in favour of integration. This presumption is displaced if the parents consent to a segregated placement. This is reflected in the remedy that the Court of Appeal found to be appropriate. Section 8 of the Act was to be read to include a direction that, unless the parents of a disabled child consent to the placement of the child in a segregated environment, the presumption applies.

79 In my view, the application of a test designed to secure what is in the best interests of the child will best achieve that objective if the test is unencumbered by a presumption. The operation of a presumption tends to render proceedings more technical and adversarial. Moreover, there is a risk that in some circumstances, the decision may be made by default rather than on the merits as to what is in the best interests of the child. I would also question the view that a presumption as to the best interests of a child is a constitutional imperative when the presumption can be automatically displaced by the decision of the child's parents. Such a result runs counter to decisions of this Court that the parents' view of their child's best interests is not dispositive of the question. See *E. (Mrs.) v. Eve*, [1986] 2 S.C.R. 388; *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315.

80 I conclude that the placement of Emily which was confirmed by the Tribunal did not constitute the imposition of a burden or disadvantage nor did it constitute the withholding of a benefit or advantage from the child. Neither the Tribunal's order nor its reasoning can be construed as a violation of s. 15. The approach that the Tribunal took is one that is authorized by the general language of s. 8(3) of the Act. I have concluded that the approach conforms with s. 15(1) of the *Charter*. In the circumstances, it is unnecessary and undesirable to consider whether the general language of s. 8(3) or the Regulations would authorize some other approach which might violate s. 15(1).

81 In the result, the appeal is allowed, the judgment of the Court of Appeal is set aside and the judgment of the Divisional Court is restored. The appellants are entitled to costs in this Court. I would not award any costs in the Court of Appeal.

Appeal allowed with costs.

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