SEP 0 9 1996

McCarthy Tétrault

Ottawa

MEMORANDUM

To: Robert Fenton

From: Lise Cardinal

Date: September 6, 1996

Re: Down Syndrome Assocation

Please find attached the Factum of the Attorney General of British Columbia and the Attorney General of Ontario, as interveners, which were served upon us today.

I trust the above is satisfactory.

With the compliments of

Bruce Drewett
Senior Policy Analyst
Anti-discrimination and Equal Opportunity Branch

Ministry of Education and Training

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Ontario

BOARD OF INQUIRY (*Human Rights Code*)

IN THE MATTER OF the Ontario *Human Rights Code*, R.S.O. 1990, c.H.19, as amended;

AND IN THE MATTER OF the complaint by Kathleen Lewis dated April 22, 1985, alleging discrimination in services on the basis of handicap and constructive discrimination.

B E T W E E N :

Ontario Human Rights Commission

- and -

Kathleen Lewis
by her next friends Robert Lewis and Joann Lewis

Complainant

- and -

The York Region Board of Education,
Her Majesty the Queen in right of Ontario,
The Ministry of Education,
R.A. Cressman, and J. Laughlin

Respondent

DECISION

Adjudicator : M. R. Gorsky

Date : August 6, 1996

Board File No: BI-0131-92

Decision No : 96-025

Board of Inquiry (*Human Rights Code*)
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APPEARANCES

Ontario Human Rights Commission	)	C. Pike, Counsel
Kathleen Lewis, Complainant	)	David Baker, Counsel
York Region Board of Education, R.A. Cressman, and J. Laughlin, Respondent	)	Brenda J. Bowlby, Ms. M. MacKinnon, Counsel
Ministry of Education, Respondent	)	John P. Bell Paul Howard Ms. D. Goldberg, Counsel

DECISION

I. Underlying Facts

1. This is a decision in respect of two Ontario Human Rights complaints, file numbers 70-004H and 70-368A, dated April 22, 1985, and March 13, 1986 respectively, brought on behalf of the child Kathleen ("Katie") Lewis by her parents Robert and JoAnn Lewis.

2. The nature of the complaints is adequately summarized by Mr. Baker on behalf of the Complainant:

> **The Complaints**
>
> 1. These are 2 complaints filed on behalf of Kathleen ("Katie") Lewis alleging she was denied equal treatment in education and as a result was discriminated against contrary to sections 1, 8, 10 and 46(2) of the Human Rights Code in the following:
>
> i) The refusal to provide, during her kindergarten year, any placement other than at the Fairmead School for the Trainable Retarded which is a segregated school;
>
> ii) The refusal to provide a regular (ie. non special) education placement other than at the Fairmead School for the Trainable Retarded pending the outcome of the special education appeal process under the Education Act; and
>
> iii) The discriminatory impact of the Education Act, the regulations thereunder and Ministry of Education special education policies on Katie Lewis, in particular sections of the Act and policies related to "trainable retarded" pupils.

3. As a preliminary matter, I wish to make clear that I have no doubt that all the parties before me in this case are sincere, honest and well meaning. During evidence and argument there was a good deal of "toing and froing" about the quality of various witnesses and of their testimony. For the record, upon reviewing the written arguments and the transcripts of the many days of

hearings, as well as consulting my recollection as to the demeanour of the witnesses and so on, I find nothing to question regarding the forthrightness of any witness. Moreover, as will, I hope, become clear, I formed the impression that all before me intended nothing but good for Katie Lewis.

4. Certain facts were essentially undisputed during the lengthy proceedings in this case:

(a) that Katie Lewis was born on May 31, 1979, and that therefore, at the time the first complaint was lodged, she was not quite six years old;

(b) that Katie Lewis suffered brain damage from an haemorrhage shortly after birth, and consequential cerebral palsy;

(c) that her parents Robert and JoAnn Lewis sought to have Katie placed into a fully integrated kindergarten setting in the school closest to her home commencing in September, 1984;

(d) that York Region special education consultant Mrs. Gwen Mann disagreed that such a placement was appropriate for a child with Katie's disabilities;

(e) that an Identification, Placement and Review Committee ("IPRC") meeting was held in respect of Katie Lewis in September,

1984, at which Mr. and Mrs. Lewis were present, as were various of the Respondents or their representatives;

(f) that the IPRC determined that Katie was "exceptional" and "trainable retarded," and that she should receive attention from an occupational therapist and a speech pathologist, and that she should be placed in the "development division" in a "self-contained class" with integration into a class in the school nearest her home for sixty minutes per week to start, the duration possibly increasing with time depending on perceived efficacy;

(g) that Mr. and Mrs. Lewis disagreed with the IPRC's recommended placement and appealed to the Special Education Appeal Board in October, 1994;

(h) that the Special Education Appeal Board denied the appeal and upheld the IPRC's recommendations in November, 1994;

(i) that Mr. and Mrs. Lewis appealed to the Ontario Special Education (English) Tribunal in December, 1984, and that they initiated a Human Rights Complaint in April, 1985;

(j) that a Diagnostic and Resource Teacher ("DART") who assessed Katie during May, 1985, found her to be severely "developmentally delayed" and recommended an individual program for her in a segregated school for the "trainable retarded";

(k) that the Ontario Special Education (English) Tribunal decided, in September of 1985, that Katie was "exceptional," "multihandicapped," and possibly "mentally retarded," though her difficulty communicating made precise characterization in that last regard impossible; that the Tribunal further determined that Katie needed "the specialized support of a physiotherapist, occupational therapist and a communications specialist as well as others on a regular basis"; that the Tribunal further directed placement in a suitably "specialized" class;

(l) that Mr. and Mrs. Lewis initiated the second complaint before me on March 13, 1986.

5. During the period from 1983 until 1985, Katie Lewis was assessed by several different agencies and individuals: by the Ontario Crippled Children's Centre; by Speech Language Pathologist Margaret Wolfrey; by professionals at the Newmarket Day Care Centre; by the DART at Maple Leaf School; by Doctor Donald Kennedy, Psychologist, and by Marie Thompson-Mintz of the Children and Infants Development Services ("CIDS") of the Regional Municipality of York. A common finding of these assessments was that Katie suffered severe, ongoing "delay" in the development of speech and language.

6. The psychologist, Dr. Donald Kennedy, was retained by Mr. and Mrs. Lewis to assess their daughter's capabilities. Dr. Kennedy

commented on the limitations of the tools available for assessing a young, non-verbal child with a physical handicap. Part of his testimony is quoted by Ms. Bowlby at page 166 of her argument on behalf of the Respondents YRBE, R.A. Cressman, and J. Laughlin:

> ... the thought of doing testing, as such, crossed my mind, but there were a lot of difficulties with that. Number 1, being that she was fairly young, she was just not quite six, as I recall. Testing a six year old or a five year old, under the best of circumstances, is not always the best approach, using a standardized test. With her, given the fact that she was non verbal and had significant difficulties with physical skills, that kind of test just would not be appropriate, I did not think. That would be the norm based test. The criterion based test, like the Vulpe, the Vineland, the Brigance, the Woodcock Johnson Part Four, those kinds of tests, that would not be -- well, they had been used previously by I think a resource teacher in the York Region Board or at the York Region Board. But essentially in my opinion, they are not diagnostic tools, they are basically designed to develop programming. In other words, for use for a teacher to know what the next step is in different areas. So I think basically I was left with collecting information on the medical aspects of the medical health -- let's call it health-service related reports, and observing. And in doing that I think I came to a reasonable conclusion as to what her functioning was.

7. As is quite proper and reasonably expected, different counsel placed different emphases and drew different conclusions from available evidence. Thus, in his reply argument, Mr. Baker summarized as follows:

> Page 1 of Exhibit 61, Prepared by Diane McLean-Heywood and accepted by Gwen Mann, outlines a number of things Katie could do. A number of these activities clearly involve learning through play (ie. modelling). Katie was able to play cooperatively, undo her retraining lap-belt, move objects in parallel play, attempt to string a paper/necklace, attempt to paint, demonstrate emotions, wait for program to begin, interact with others, make clear choices in non-verbal areas age appropriately, strive to make eye contact, vocalize with appropriate tone, relate to peer group, and generally communicate in a non-verbal fashion which would enable her to make herself understood by non-disabled peers. ...

8. Words and phrases such as "play cooperatively," "parallel play," "attempt to string," "attempt to paint," "wait," "interact," "age appropriately," "strive to make," "appropriate tone," "relate," and "generally communicate in a non-verbal fashion which would enable her to make herself understood by non-disabled peers" are sufficiently diffuse in meaning as to give non-specific reassurance about a child's capabilities. It may be that non-specific reassurance (or otherwise) is all that is readily available in respect of certain aspects of a given child's development at any particular instant: parents are seldom willing to turn their children over to others for repeated, rigorously scientific experimentation, which is why "social science" evidence is often suggestive rather than conclusive.

9. Yet it is clear, even according to the summary presented by Mr. Baker, that Katie's communication was non-verbal. At page 5 of his final argument, Mr. Baker stated that "Mrs. Mann's conclusion about what Katie was capable of doing were [sic] substantially similar to those of the other professionals who had contact with her." Thus Mrs. Mann's conclusion that Katie's dominant need was a communication system is supported by all the various assessments performed between 1983 and 1985.

II. Processes Followed

10. According to an essentially uncontested summary by Complainant's counsel, at page 4 of his written argument:

> 8. CIDS policy required that school age children relinquish their places in day care centres. As the Lewis family anticipated making the transition into the school system they were provided with a family support worker from York Support Services. A case conference was held at the day care centre, in February 1984, at which Mrs. Lewis authorized CIDS to inform the York Region Board of Education (YRBE) that Katie would be attending school in the fall. It was felt that the transition would be smoothed by giving them as much notice as possible.
>
> JoAnn Lewis, Vol. 9, pages 52-62
>
> 9. Just as Katie had required accommodations which Brian [her brother] did not require at the Day Care Centre, Mrs. Lewis anticipated that accommodations would be required to enable Katie to fully benefit from kindergarten. She wrote to Mr. Dubkowski, Principal of Maple Leaf School on February 23, 1983. She was seeking to register Katie as she had Brian at the "home school." The letter indicated that she recognized Katie would go through a process established under provincial law in order to have her needs accommodated. She also expressed an interest in viewing a variety of programs, including a kindergarten class at Maple Leaf School. The letter was hand delivered to Mr. Dubkowski.
>
> JoAnn Lewis, Vol. 9, Pages 64-66.
>
> Letter dated February 23, 1984 from JoAnn Lewis to Mr. Dubkowski, Exhibit 36, Tab 3.

11. It appears that subsequent to Mrs. Lewis's letter to Mr. Dubkowski, YRBE initiated the Identification and Placement process called for by Regulation under the Education Act, R.S.O. 1980, c. 129. Thus, although on March 1, 1984, Katie was not invited to "kindergarten registration day," on March 7, 1984, Gwen Mann visited the Newmarket Day Care Centre to gather information about Katie.

12. Section 2(3) of O.Reg. 554/81 provides, in part, as follows:

> 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. ...

YRBE Consultant Mrs. Gwen Mann observed Katie outside her normal day-care group setting, interacting with an adult. Mrs. Mann also spoke with Katie's mother, resource education consultant and physiotherapist. That appears not to have been intended to constitute the "educational assessment" called for by the Regulation.

13. Complainant's counsel, Mr. Baker, makes considerable issue of the nature of Mrs. Mann's assessment:

> 59. Gwen Mann observed Katie Lewis but maintained she had not performed the pre-educational assessment required under the Education Act regulation. She did not feel qualified to attach the label trainable retarded although she knew her "Case Conference" report was likely to see Katie end up in a developmental class at Fairmead School for the Trainable Retarded. Contrary to Board policy, Katie was not assessed by a psychologist prior to the IPRC. Mrs. Mann resisted the temptation she felt as a former teacher to consider the kind of program which would benefit Kate. Her task was placement. Unlike the practice of the Toronto Board of Education at that time, the York Region Board of Education did not have a psychologist on the IPRC in Katie's case.
>
> Gwen Mann, Vol. 36, Page 137.
> John Laughlin, Vol. 45, Page 125.
> Lynn Wells, Vol. 50, Pages 42-3.

14. Ms. Bowlby contests Mr. Baker's characterization:

> 48. Paragraph 59:
> The evidence in this paragraph has been misstated.
> (a) It is true that Mrs. Mann did not perform a formal education assessment as referred to in the Education Act. Mrs. Mann stated, starting at page 138 at Volume 36, as follows:

Well, there were a few things about the process that were different in this case, and I think the reason that those things were not carried out to the letter of the law, so to speak, was because we did not come to a consensus on what the placement would be before Katie entered school, and it was decided that she would not enter school until she had had an IPRC. [See evidence of JoAnn Lewis that she "did not want Kate to start [school] without a proper determination having been made."] Further, Mrs. Lewis did not wish to send Katie to the Maple Leaf kindergarten prior to an IPRC because she understood that there would be no special education supports and it would be a hardship to the teacher and the class. Mrs. Lewis explained that it did not make sense to send Kate for two days if she was not going to end up there. (Volume 10, pages 2 - 7)]

The cross-examination of Mrs. Mann continued:

Q. So, because there was not a consensus, therefore, the assessment was not done before the IPRC?

A. That is right. Can I add to that?

Q. Please. As you can tell I am a little bit perplexed.

A. Within the School Board assessments are usually done by the person who is working with the child, and then that information is presented to the IPRC. But in this case, no one was working with her, so there was not anyone that was appropriate to do the assessment. We relied, I relied, and so did the others in the Board, on information given to us by Katie's mom and the staff that worked with her at the Daycare. So I guess technically, if you wanted to fulfil the letter of the law, you could call that some type of assessment.

(b) Gwen Mann testified that "IPRC's are intended to consider individual pupils and individual pupil needs, because there are exceptions to everything, and that is appropriate. So not every pupil fits every single thing about every single regulation." Mrs. Mann went on to explain that in some cases, in her experience, the Y.R.B.E. would depart from the procedures set out by the Ministry or set out by her School Board in an individual basis: "Yes and that is appropriate to do so. We have already discussed certain aspects of this case where we did that. For instance, having the IPRC before Katie was attending school." (Volume 37, pages 179-180).

(c) The next sentence in paragraph 59 states: "[Mrs. Mann] did not feel qualified to attach the label trainable retarded although she knew her 'case conference' report was likely to see Katie end up on a developmental class at Fairmead School for the Trainable Retarded." Not only does the evidence cited as the source of this allegation not support the allegation at all, but the allegation is simply not true. At Volume 36, page 152, Mrs. Mann stated that she would not make a recommendation regarding identification because it was not her place to do so, nor did she see a need. She explained that there were other people whose place it was to do so and could do so quite capably. She testified that usually it was the psychologist who does the assessment which determines exceptionality. However, she also stated "And you asked me what I -- if I felt comfortable with the identification they made and I said yes, I did."

(d) Katie was not assessed by a psychologist, as this paragraph points out. What the paragraph does not point out is that Katie's parents did not wish Katie to be psychologically assessed. (See paragraph 60 of the Complainants submissions.) As well, Mrs. Lewis testified [Volume 11, page 108] that although the staff suggested at various times in the appeal process that Katie receive a psychological assessment from Board personnel, Mrs. Lewis was consistent throughout that she did not feel that psychological testing would provide any additional information than what had already been provided.

15. Thus, parties on at least two opposing sides of this dispute agree that an educational assessment as prescribed by Regulation was not what Special Education Consultant, Mrs. Mann performed prior to the Complainant's IPRC disposition in 1984. No evidence exists of any other assessment as prescribed having taken place at that time. The Regulation appears to have been breached, but with what consequence? As noted by Ms. Bowlby, at the relevant time the parents did not favour psychological testing, and nobody suggests before me that the Board should have attempted to compel it at that time in those circumstances. And as noted in paragraph 9, above, no essential disagreement existed amongst various professional

observers as to Katie's primary abilities and disabilities. I find neither the intent nor the impact of discrimination in the 1984 breach of the salient Regulation.

16. The IPRC assigned the exceptionality "trainable retarded" to Katie Lewis. The Special Education Handbook, a manual created by the Ministry of Education for the use of IPRC's prior to the relevant time, defines "trainable retarded" as:

> A severe learning disorder characterized by:
>
> (a) An inability to profit from a special education program for the educable retarded because of slow intellectual development;
>
> (b) An ability to profit from a special education program that is designed to accommodate slow intellectual development;
>
> (c) Limited potential for academic learning, independent social adjustment and economic self-support.

17. Bill 82 was enacted in December, 1980, to amend the Education Act, 1974. Bill 82 defined "trainable retarded pupil" as follows:

> 66. "trainable retarded child" or "trainable retarded pupil" means an exceptional pupil whose intellectual functioning is below the level at which he could profit from a special program for educable retarded pupils.

18. It will be seen, at paragraph 2, above, that one of the complaints advanced by Mr. Baker was:

> iii) The discriminatory impact of the Education Act, the regulations thereunder and Ministry of Education special education policies on Katie Lewis, in particular sections of the Act and policies related to "trainable retarded" pupils.

In his further written submissions, Mr. Baker argued, inter alia, that:

> ... provincial grants and provision of school services for trainable retarded pupils are ... prima facie [emphasis in original] discriminatory [because] ...
>
> > (c) they require the placement of trainable retarded pupils into segregated schools of segregated classes without regard to the legal test to be met for making a segregated placement. ...

19. Mr. Bell, on behalf of the Ministry of Education, argued, at paragraph 87 of his submissions, that neither the Education Act nor the Regulations flowing therefrom required placement in separate schools for the trainable retarded of exceptional pupils identified as trainable retarded. Mr. Bell maintained, in his discussion of section 72 of the Education Act, that the section itself did not direct any particular placement at all:

> ... a child identified as trainable retarded would be placed in "a school or class for the trainable retarded" if and only if the IPRC of a board had made that specific placement. Section 72 did not require the IPRC to make that placement [paragraph 89 of Mr. Bell's submissions].

20. In 1984, subsection 72(1) provided as follows:

> 72.(1) Subject to subsections (2) and (4) and to the regulations, every board shall provide adequate accommodation for the trainable retarded pupils
>
> (a) who are exceptional pupils of the board; and
>
> (b) in respect of whom a placement in a school or class for trainable retarded pupils has been made by a committee established under paragraph 5 of subsection 10(1),
>
> and shall establish and maintain a school or class for such trainable retarded pupils in which special education programs and services shall be provided in accordance with the regulations and in the English language or, where the pupil is

> enroled in a school or class established under Part XI, the French language, as the case may be.

A plain reading of that subsection supports Mr. Bell's interpretation.

21. In fact, in 1984, YRBE did place pupils identified as "trainable retarded" in regular kindergarten classes as well as in special classes within regular schools; per Mr. Bell:

> 92. Mr. MacLachlan also testified that not only was it possible to place a trainable retarded pupil in kindergarten, but that the School Board in fact has placed trainable retarded pupils in regular kindergarten classes in 1984/85. In cross-examination by counsel for the Complainant, Mr. MacLachlan said that 1984/85 was not even the first year that had occurred but that he first became aware of such placements in 1982.
>
> Evidence of John MacLachlan, vol. 48, pp. 22-23 [chief by Ms. Bowlby]; pp. 30-31 and 80 [cross by Mr. Baker]
>
> 93. Further, as referenced and quoted in paragraphs 32 and 33 above, with specific reference to Katie, Mr. MacLachlan testified that all possible placements were considered by the IPRC in September 1984, including the possibility of a regular kindergarten class and the multihandicapped class at Holland Landing.
>
> 94. The evidence of Gwen Mann is consistent with that of Mr. MacLachlan. Mrs. Mann testified in examination-in-chief that the School Board had in fact placed in kindergarten classes children who turned out to be trainable retarded. Mrs. Mann confirmed this when she was recalled. Further, by that time Mrs. Mann had conducted a review of "the special education files, in [her] old office in the North area office," and although this review was not exhaustive, Mrs. Mann was able to confirm that even in respect of that limited area there was one student who had been formally identified by an IPRC as trainable retarded and had been placed in a regular kindergarten class in 1984/85. That pupil was referred to as "J.S." during this proceeding.
>
> Evidence of Gwen Mann, vol. 35, pp. 125-126 [chief by Ms. Bowlby]; vol. 48, pp. 107-110 and 117 [chief

by Ms. MacKinnon]; and at pp. 120-122 [cross by Mr. Baker]:

Q. You have referred to one person by name, J.S. Can you tell me what year she was placed in kindergarten?

A. Two years actually. September 1984 and September 1985. Two different schools. She moved in between.

Q. So, September 1984, this would have been the same year when Katie Lewis was coming to the York Region Board?

A. Yes, that is right. ...

Q. So, if I am clear, we have one child who was identified as trainably retarded by an IPRC who was placed in regular kindergarten to your knowledge?

A. In my memory, there is one child in the IPRC I did that was identified that way. ...

Q. So, we have one child then, just at the end of the day we have one child you have been able to point to who has been identified by an IPRC as being trainably retarded and who was placed in a regular kindergarten?

A. That is right.

Q. That was in the 1984/1985 school year?

A. Yes. [Mr. Bell's original emphasis omitted.]

22. The IPRC based its placement decision on information about Katie Lewis provided by her parents and by Mrs. Mann. The Committee was not compelled by legislation or rigidly inflexible practice of YRBE to choose a particular placement.

23. David Baker, Complainant's counsel, raised the issue of "dismissive or stereotypical attitudes towards severely disabled

persons" supposedly possessed by the Director of YRBE, Mr. R.A. Cressman. Mr. Baker, at page 20 of his final argument, quoted from an article in a community newspaper, the Independent News, June 10, 1985, the following statements attributed to Mr. Cressman:

1. How much can they (ie. severely handicapped children) assimilate? They have I.Q.s which in many cases are immeasurable.

2. I question that benefit (ie. being with regular children could have a beneficial effect) even exists.

3. Who are we kidding when you talk about science trips? Let's get serious. Those kids don't understand -- When you say "bird" they don't know what it is.

4. Thank heavens my kids all turned out normal.

Mrs. Fran Hill, a member of the York Region Roman Catholic Separate Board of Education, subsequently telephoned Mr. Cressman to discuss the article and his views of integration. She then included a brief summary of their conversation in a letter to Lynn Ziraldo.

24. The statements from the newspaper article might or might not be perceived as offensive, depending on their context. Ms. Bowlby, counsel for Mr. Cressman, asserts the following on page 52 of her final argument:

> What Mr. Cressman was saying, and what Mrs. Hill was offended at, was Mr. Cressman's position that he would not allow total integration of non-exceptional pupils and "developmental" pupils (meaning, the most difficult to program for) unless <u>both</u> [emphasis in the original] could benefit from the integration (Volume 26, page 73). He did not state to Mrs. Hill and was not quoted as saying he was opposed to "integration to the extreme" or full inclusion of children with developmental needs which are the hardest to serve.

25. Ms. Bowlby points out, at page 151 of her final argument, that Mr. Cressman was Director of Education:

> ... of a School Board which <u>was</u> [emphasis in original] prepared to and agreed to integrate T.R. pupils who had severe intellectual disabilities such as Katie's into regular kindergarten classes for part of the day. ... Further, this was a Board where, during the material time frame, children who were identified as trainable retarded were integrated into regular classes. ...

There would seem to be no evidence that Mr. Cressman's views as expressed in the newspaper article had any influence on the decision that led to Katie's placement.

26. Mr. and Mrs. Lewis decided to appeal the decision of the IPRC. Pending the decision of the Special Education Appeal Board, Mrs. Lewis requested that Katie be allowed to attend regular kindergarten at Maple Leaf School for at least one hour per week but to forego the rest of the recommended placement. She was informed that YRBE was not prepared to implement only part of the placement recommended by the IPRC. As already mentioned in paragraph 4 (h), above, in November of 1984, the Special Education Appeal Board denied the Lewises' appeal and upheld the IPRC's recommendation for a placement primarily at Fairmead.

27. During the academic year 1984-85, while the various appeals were being heard, disposed of, or commenced, there was ongoing discussion among the Lewises and the YRBE about possible placements other than that recommended: primarily at Fairmead. In May, 1985,

the Lewises again attempted to enrol Katie in the regular kindergarten at Maple Leaf School. At that time, Katie was given an educational assessment by the DART at Maple Leaf School. The DART, Ms. Sharon Carson, per Ms. Bowlby's written submissions at Appendix B, page 102, and Mr. Baker's at page 28, paragraph 61, noted Katie's severe development delay and recommended that an individual development program be provided for her within a segregated school for the trainable retarded.

28. The Lewises did not enrol Katie in any public school during academic 1984-85. Nor was Katie's attendance compelled at the school recommended for placement, Fairmead, a fact not ignored in this dispute: per Ms. Pike, for the Commission, at page 34, paragraph 95 of her reply submissions:

> In its written argument respecting the prima facie case, the Commission did not address, as a distinct allegation, the failure of the School Board to report Katie's absence to the Provincial Attendance Officer and accordingly, makes no reply.

Per Mr. Baker, at his page 52, paragraph 115:

> Under section 21(1) of the Act, attendance at school is compulsory for every child between six and sixteen.

The complainant was born on May 31, 1979, and therefore turned six years old on May 31, 1985. In the circumstances of this case, criticism of anyone for failure to come after the truant seems inappropriate.

29. The CIDS of the Regional Municipality of York provided Katie Lewis with "home support programming" and physiotherapy, and

facilitated her admission to the Newmarket Day Care Centre. Marie Thompson-Mintz was Katie's home resource educator from CIDS, and she offered to provide in-class assistance to be part of a support team for Katie for the 1984-85 school year. Ms. Thompson-Mintz prepared a report based on her assessment of Katie's abilities in June, 1985. In that report, she estimated Katie's social skills' development at that time to be roughly equivalent to the level of a "normal" child of twenty-one months' age; Katie's "self-help/independence" skills Ms. Thompson-Mintz assessed as similar to those that would usually be seen at fourteen months; Katie's "language/cognition" skills were assessed at a twelve months' level, and her motor skills at nine months.

30. Mr. and Mrs. Lewis were not keen about all the testing of their daughter, Katie. In the words of Mr. Baker, at page 28, paragraph 60 of his submissions:

> 60. The Lewises generally regarded assessments for the purpose of labelling and categorization as unhelpful and misleading. When the Board encouraged them to have Kate assessed by a psychologist they hesitated but eventually retained a private psychologist who did contract work for another board of education. They selected one who had no ideological commitment to mainstreaming or inclusion. Assessments done by Board are subject to the impunity [sic] of identification and conflicts of interest.

31. The private psychologist retained by the Lewises was Dr. Donald Kennedy, quoted above at paragraph 6. As summarized by Mr. Baker at page 25, paragraph 55 of his written submissions:

> 55. Donald Kennedy testified that Katie had experienced neurological damage which interfered with her ability to

> speak, but did not feel the damage was generalized and was guarded in his assessment of her capacity to understand.

32. Thus, around the summer, 1985, one year after disagreement initially arose regarding the proper mode of Katie's education, no qualified person who attempted to assess her abilities was prepared to state that she had abilities commensurate with those of a child of the usual kindergarten-starting age. Although, as mentioned above in paragraphs 12-15, the 1984 assessment of special education consultant Gwen Mann does not appear precisely to have complied with the relevant rules, it also does not appear to be essentially contested by any professional who actually met Katie Lewis at the relevant time.

III. The "Education Debate"

33. In their written submissions, various counsel commented in considerable detail about the existence, extent and precise nature of an "educational" or "pedagogical" debate about appropriate educational treatment of children with disabilities. There would be little benefit in my recording positions submitted to me at great length, but some excerpts may help to show the shape of argument among counsel. Thus, Mr. Baker submits, commencing at paragraph 86 of his argument:

> 86. In the 1950's a spectrum of placements approach was supported in the literature. Decisions about placement along the spectrum was said to be based on the severity of the disability of the group to which the person was felt to

belong. Generally, severely disabled children were felt to need protection from other children and the dangerous attitudes of unsympathetic, non-special educators. By 1962, this had changed. Maynard C. Reynolds proposed a dynamic model which assumed a child would only move as far as necessary in the direction of segregation and would return as soon as feasible. His position was summarized as:

> The framework outlined above may be useful in stating a general attitude or policy toward those continuing problems of separation or segregation. The prevailing view is that normal home and school life should be preserved if at all possible. (Page 368)

This model was further refined by Evelyn Deno in 1970, who pointed out additional dangers of segregation and continued the attack on the "categorical" approach. Her model recognized that new technologies and resources were becoming available which would permit ever more children to be "accommodated" in a regular classroom. She also recognized that segregation produced irreparable harm in some cases, harm she wished to see prevented for future generations:

> [The Deno system] gives opportunity for a two-pronged approach - care for the already wounded while moving ahead at the mainstream boundary to help prevent further wounding. (Page 235)

Gary Woodill, Vol. 28, Pages 135 - 136, Vol. 30, Pages 24 - 32

E. Deno, "Special Education as Developmental Capital," Exhibit 96.

M. Reynolds, "A Framework for Considering Some Issues in Special Education," Exhibit 99.

87. Phillipa Campbell testified that the academic writing was quite clearly in support of integration including integration of children with severe intellectual handicaps. She was challenged for not having done a literature search. Gary Woodill did perform a computer assisted literature search for the period 1980 to 1985 using key words selected to focus on the integration debate, if there was one. He found that it no longer existed. There was no support expressed for selecting a segregated setting such as Fairmead School for the Trainable Retarded to be found anywhere in the literature. The literature was found to be either pro-integration (which at the time might include "integrated" (ie. special) classes in regular schools with opportunities for inclusion in the regular classroom, as well as mainstreaming) or it described "how to" successfully integrate a disable child.

34. Ms. Bowlby submits, commencing at page 15:

3. THE PEDAGOGICAL DEBATE ON INCLUSION VS. CONTINUUM OF PLACEMENTS (CASCADE MODEL).

29. There is, in pedagogical circles, a debate or controversy in respect of the appropriate approach to special education placement.

30. Dr. Philippa Campbell gave testimony which suggested that inclusion or integration of severely disabled children was a well-accepted concept in the United States, both in 1984-85 and today. However, after some pressing in cross-examination, she conceded that there was and is an ongoing debate or "controversy" in respect to those who support full inclusion for every pupil and those who support a continuum of placements including inclusion.

> [Evidence of Philippa Campbell, volume 6, pp. 136 - 140 and p. 175. See also Mr. Bell's cross-examination of Campbell in Volume 7, pp. 136-149 she concedes that there is a controversy in respect of integration, based on an article which she herself wrote in 1994 - Exhibit 19]

31. On one side of the debate are those who favour the "inclusion" (or "total integration" or "mainstreaming") approach where all exceptional pupils, no matter how their particular disability interferes in the learning process, are placed in the regular classroom with all necessary modifications and supports brought into the regular classroom.

> [Evidence of Diane McLean-Heywood, Volume 15, pp. 98 - 100]
> [Evidence of Philippa Campbell, Volume 6, pp. 136 - 140, 175, Volume 7, pp. 136 -149]
> [Evidence of Jim Hansen, Volume 23, pp. 73 - 74]
> [Evidence of Ken Weber, Volume 40, pp. 51, 64, 111]

32. On the other side of the debate or controversy are those who favour a continuum of services or Cascade Model approach. In his textbook, Special Education in Ontario (3d Ed) (Exhibit #121), Dr. Weber explains the continuum of placements model at page 19:

> Cascade Model? or Integration Model?

The distinguishing feature of this model, a schema first suggested by Reynolds (1962) and adapted by Deno (1970) is

that a range of different settings for exceptional students is available on a formal, more or less permanent basis. The settings, or learning environments, are progressively more specialized, and students therefore, if it is deemed necessary and beneficial, may be formally placed in these alternative settings on a short or longer term basis. An important philosophical principle inherent in the Cascade Model is that as much as possible, exceptional students be placed in the regular classroom, and that alternative placements always be regarded as temporary.

The entire range of settings is almost always set up on a geography-cum-needs basis through a jurisdiction. For example, in the case of a very specialized setting, one that is organized to deal with, say, extremely unusual behaviour, a jurisdiction might arrange that in a geographical area containing several schools, only one would offer this special environment on behalf of all. Another school then, might be the only one with a special setting, along with appropriate technology and personnel, for blind students. And so on. Within the geographical area, each school would likely have its own "resource room" or similar, moderately specialized setting for part or full time placements.

33. Under this model (often called the "Cascade Model") the child is placed in the least restrictive placement (i.e. the placement closest to the regular classroom) where the child's educational needs can be met. ("Education" meaning to provide the child with the opportunity to learn and develop his/her maximum potential, including academic, intellectual, psychological, social and physical growth).

N.B.

[Evidence of Ken Weber, Volume 40, p. 64]

34. Under this model, if it is apparent that a child's educational needs can not be met in the regular classroom, then the goal in placing the child in a setting along the spectrum is to place the child in a setting which meets the child's needs but is as close as possible to a regular classroom type setting. The aim is to move the child back along the spectrum towards the regular class. This was the approach followed by the Y.R.B.E. (Exhibit 90).

35. Under Bill 82, an IPRC must review a child's placement annually and may do so, at the request of parents or the principal, as early as three months after the IPRC's last determination.

(Emphasis in original)

36. In her articles (put into evidence by the Commission), Deno describes the pedagogical theory underlying the Cascade

Model (at p. 235 of Exhibit 96, "Special Education as Development Capital"):

> The cascade system is designed to make available whatever different-from-the-main-stream kind of setting is required to control the learning variables deemed critical for the individual case. It is a system which facilitates tailoring of treatment to individual needs rather than a system for sorting out children so they will fit conditions designed according to group standards not necessarily suitable for the particular case.

37. Professor Weber testified that the prevailing view in 1984/1985 favoured the continuum or range of placements approach (Volume 40, pp. 64 and 156). Dr. Gary Woodill also confirmed that the Cascade Model, as reflected on page 3 of Exhibit 90, reflects what was being done in practice in Ontario in 1984/1985 (Volume 31, pp. 28 - 29).

38. This pedagogical debate is ongoing today.

[Evidence of Diane McLean-Heywood, Volume 15, p. 98]

35. Commission counsel, Ms. Pike, offered the following view of the nature of the "debate" in reply submissions, at page 13 et seq.:

> 31. The Board proposes that the other side of the "debate" was the "continuum of services" model. But the fact alone that one of the settings contemplated by the model espoused by the Board, which it referred to as "continuum of services" was a segregated school does not convert support for a model bearing the name "continuum of services" into [support] for the Board's treatment of Katie. It remains to be seen whether the "theory" was applied by various school boards and experts with respect to trainable retarded children of kindergarten age in the same fashion as it was by the Board, whether such an application was in keeping with the spirit of the model.
>
> 32. What is complained of is not the adoption of one theory over another, but specific acts by the School Board, in reliance on Ministry legislation, regulations, guidelines and policies. And if it is not a theory that is complained of, defence of a theory said to have been adopted by a respondent is not a defence to the complaint.
>
> 33. As Professor Woodill pointed out with reference to a Board document describing its "philosophy for special

education," the Board derived its model of "continuum of services" from a 1971 documents, which in turn was based upon work done in 1962 by Maynard Reynolds. The two diagrams just referred to were essentially the same as the "Cascade model," proposed in a 1970 article by Evelyn Deno.

Evidence of Gary Woodill, Transcript, Vol. 28, p. 113

Evidence of Gary Woodill, Transcript, Vol. 30, pp. 20-32

Exhibit 90, Document headed "Special Education Resource for Parents - 1984" from York Region Board of Education, pp. 2,3

Exhibit 98, Excerpt of "Standards for Educators of Exceptional Children in Canada"

Exhibit 99, Article written by Maynard Reynold entitled, "The Framework for Considering Some Issues in Special Education"

34. The idea of "cascade," according to Professor Woodill,

... is that the child would move towards the least restricted environment, which was the American term at the time. That the child may end up in one of the narrower points of the diagram, but all efforts should be made to move them towards the top as fast and as diligently as possible.

Evidence of Gary Woodill, Transcript, Vol. 28, 113

35. Thus according to the Cascade model, substantially equivalent to the continuum of services model, each child was to be kept in a restrictive environment the least time possible, rather than be permanently slotted into any one category. Having a "cascade" of services was not intended merely to give choices to the service-provided, but was intended to facilitate the progression of a child to the least restrictive environment possible.

36. It is submitted that the Board's reliance on its service model, and unwillingness to attempt a less restricted environment than Fairmead, reveals its departure from the underlying philosophy of the cascade, or continuum of services model.

37. Gwen Mann conceded that there was no setting with the Board for a child of kindergarten years with significant disabilities other than Fairmead: Holland Landing was, in her view, not really a kindergarten program and Maple Leaf was not an option.

Evidence of Gwen Mann, Transcript, Vol. 38, p. 70

38. It is submitted, accordingly, that for any "pedagogical debate" in 1984-85 to have been relevant to these proceedings, it had to involve the question of whether placement of a kindergarten age child with disabilities in a segregated school was a sound educational practice.

39. While the Board purports to rely upon the evidence of Commission witnesses to support their position that the prevailing view would have endorsed the Board's treatment of Katie, it is submitted that the evidence of these witnesses does no such thing.

40. The Board submits that "this pedagogical debate is ongoing today," and refers to the evidence of Diane McLean-Heywood on p. 98 of volume 15. In fact, Ms. McLean-Heywood stated that the "debate" today "allows for variety, but around the theme of being a member of a regular class." No reference is made to a child of Katie's years; indeed, it was Ms. McLean-Heywood's evidence that even when her school board offered self-contained classes, kindergarten-age children were in the regular setting.

Evidence of Diane McLean-Heywood, Transcript, Vol. 14, p. 133; Volume 15, p. 98

Board's Written Argument, para. 38

41. The Board makes reference to the existence of a separate school in the Lakeshore School Board. It does not mention that this school was privately funded, and it was the parents, and not the Lakeshore School Board, that placed children in it.

Evidence of Diane McLean-Heywood, Transcript, Vol. 14, pp. 104, 108

42. Jim Hansen testified that in the 1970s the Hamilton-Wentworth Roman Catholic School Board placed all kindergarten-age children with disabilities in the regular schools.

Evidence of James Hansen, Transcript, Vol. 21, p. 56

43. The Board's own expert witness, Professor Weber testified that the two schools of thought "at opposite ends of a spectrum" were "least restrictive environment" and "inclusionist" or "total integration". Elsewhere in his evidence Professor Weber suggested that the purpose of offering a spectrum of settings was so that the child could be placed in "what was also a buzz word, very popularly used, could be placed in the least restrictive setting and the more

restrictive a setting, the more likely it was to be specialized."

Evidence of Professor Weber, Transcript, Vol. 42, p. 29

Evidence of Professor Weber, Transcript, Vol. 40, p. 63

44. It was also Professor Weber's evidence that by 1985 the field was discussing at great length generally what mainstreaming should be, what form it should take, and that the sentence "there is no scarcity of information on or examples of mainstreaming methods and practices, which give reason to believe that the integration of the disabled into regular classrooms is feasible" was true in 1985.

Evidence of Professor Weber, Transcript, Vol. 42, pp. 21, 31-35

45. Professor Weber testified that while "the discussion about ... integrating severely disabled children tended to follow after the integration of children with less severe disabilities," he did not think "that there was an exclusively different argument at all, that they were talking about two different situations." He agreed that the following statement written in 1988 was applicable to trainable retarded students, and to the year 1985 as well as 1988:

> At present, the controversy over mainstreaming is not over integration versus segregation, for almost all educators agree today, that integration (i.e., mainstreaming) of all students is a desirable end.

Evidence of Professor Weber, Transcript, Vol. 42, pp. 66-68

Exhibit 130, Excerpts from "Special Education", p. 11

46. It was Professor Weber's evidence that placement in a special school or [emphasis in original] a special class within a regular school, of the child described in the various assessments of Katie would have been pedagogically sound at the relevant time.

Evidence of Professor Weber, Transcript, Vol. 40, p. 98

36. Ms. Pike states that the YRBE "has wrongly made support for the Commission's position dependent upon support for the "inclusionists":

> 29. The Commission further submits that the Board has confused the parties to the "debate." The Board identifies the debate as being between "inclusionists" and proponents of "continuum of service"; the Board's expert witness identifies the debate as being between inclusionists" and proponents of "least restrictive environment"; and the only conceivably relevant "debate" would be one between "integrationists" and "segregationists."
>
> 30. The Lewises did not complain that Katie was denied an "inclusive" setting, in the sense of placement in a regular classroom. Even if the question of whether there was a "pedagogical debate" were relevant to the establishment of a prima facie case, the Board has wrongly made support for the Commission's position dependent upon support for the "inclusionists."

37. Yet Ms. Pike seems similarly to seek support for the Commission's position, at paragraph 83 of her final argument:

> 83. Thirdly, the Court appears to give judicial notice to the "unique benefits" of integration over segregation. In comparing the benefits that the child will receive in the regular and segregated settings:
>
> ... the court must pay special attention to the unique benefits the child may obtain from integration in a regular classroom which cannot be achieved in a segregated environment, i.e., the development of social and communication skills from interaction with non-disabled peers ... Thus, a determination that a child with disabilities might make greater academic progress in a segregated, special education class may not warrant excluding a child from a regular classroom environment.
>
> (Emphasis is original).
>
> Rafael Oberti et al. v. Board of Education of the Borough of Clementon School District et al., United States Court of Appeals for the Third Circuit, No. 92-5462], pp. 22, 23

38. From all the above, one may reasonably infer merely that some sort of debate was, and continues to be, ongoing regarding what might be the best way to educate children with degrees of mental or physical handicap or "delay." In Eaton v. Brant (County) Board of

Education (1995), 22 O.R. (3d) 1 (C.A.), at p. 8, Arbour J.A. noted:

> ... [T]here 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. ...

Even if one could distinguish precisely the (always shifting) parameters of that debate at the relevant time, for we are concerned here with the situation prevalent at the time the complaints were lodged, one could not categorically determine which has the more correct position, because of what has been alluded to at paragraph 8, above: the lack of rigorously scientific evidence to prove correctness. Perhaps the most one can safely conclude is that there is a trend, probably desirable in many cases, toward "integration" in our schools, but that we can not say for certain that it is desirable or that it is desirable in a particular case. Ms. Pike herself appears to concede the point in reply:

> 28. The Commission agrees that choosing sides in the "debate," if there is and was one, is not the task of this Board of Inquiry, but disagrees that the complaint or submissions of the Commission require the Board of Inquiry to choose between the "theory of inclusion" and the "theory of continuum of services."

39. I agree that determination of what would be "the best" education is beyond the scope of this Board's jurisdiction or, for that matter, competence. Cf. Eaton at p. 17. What we must address is the two human rights complaints referred in para. 2, above.

IV. Discrimination

40. It is trite to note that "discrimination" in its protean sense is morally neutral and practically necessary. One cannot act without making distinctions -- discriminating -- and the results may be good or bad.

41. Section 15(1) of the Canadian Charter of Rights and Freedoms (the "Charter") which does not apply to this case for reasons explained in an earlier interim decision, provides that:

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

42. Section 1 of the Ontario Human Rights Code, 1981, S.O. 1981, Chapter 53 (the "Code") applicable at the relevant time, states that:

> 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, age, marital status, family status or handicap.

43. It is clear that the kind of discrimination addressed by those two sections is not always morally neutral but can be negative, pejorative and prejudicial, even where illegal discrimination is found to exist in the absence of intention.

44. Canada's leading case on the meaning of prohibited discrimination is Andrews v. Law Society of B.C., [1989] 1 S.C.R. 143 (S.C.C.), and all counsel before me submitted Andrews among

their authorities. On that meaning, Mr. Justice McIntyre, dissenting on the application of s. 1 of the Charter, but with agreement of his colleagues in these respects, in two oft-quoted paragraphs, said this:

> 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 pre-occupations 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 society. As noted above, for the accommodation of differences, which is the essence of true equality, it will frequently be necessary to make distinctions. (at. pp. 168-9)
>
> ...
>
> 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 attributable 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 or capacities will rarely be so classed.(at pp. 174-5)

45. The impermissible discrimination described, above, by McIntyre, J., concerns distinctions with respect to an individual made on the basis of personal characteristics attributed to him/her because of association with a group. An attributed characteristic may result in the attribution of a whole set of presumably associated other characteristics to the individual. This process is based on looking at people in a stereotypical fashion. The

identification process required by the Education Act worked exactly in reverse. First, the IPRC collected information from a number of people about Katie Lewis, her particular abilities and disabilities. Only then (see above, paragraph 16) did it assign the exceptionality "trainable retarded" to her, not based on her membership in the group "physically or mentally handicapped" but based on her individual capacities. The approach taken by YRBE and the "distinction" made by the IPRC did not automatically lead to a particular set of educational consequences based on a more or less predetermined view of persons with handicaps; there were "trainable retarded" children in fully "integrated" classroom settings within the jurisdiction of YRBE at that time.

46. Further, YRBE clearly did not regard Katie Lewis' particular capacities as immutable because of some stereotypical attribution of characteristics, but was trying to select a program to expand them. Neither is identification made by an IPRC immutable; it may be reviewed as early as three months after its having been made:

ONTARIO REGULATION 554/81
under the Education Act

SPECIAL EDUCATION IDENTIFICATION
PLACEMENT AND REVIEW COMMITTEES
AND APPEALS

...

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.

47. Nevertheless, the placement recommended for Katie was mostly geographically segregated and also would have segregated her most of the time from contact with her "non-disabled peers." Segregation seems to be the essential element objected to in the Commission's and the Complainant's complaints. Per Commission Counsel Ms. Pike:

> 76. It is submitted that since the education norm is placement in a class with non-disabled peers, in a neighbourhood school, a placement in a separate facility that denies access to non-disabled peers is <u>prima facie</u> discriminatory.
>
> Brown et al. v. Board of Education of Topeka et al. [(1954), 347 U.S. 483 at p. 495].
>
> 77. It is further submitted that the determination of when and to what extent it is "possible" to integrate a child, is not a matter that bears upon the <u>prima facie</u> case. The "rebuttable presumption" is that children be educated in the

mainstream of society; it then falls upon the Respondents to satisfy the tribunal, upon the balance of probabilities, that it was not possible to provide the complainant with an integrated setting.

48. Mr. Baker expresses the position thus:

133. It is submitted that the forced segregation of people, whether in the education system or elsewhere, on the basis of grounds protected by the Code and the Charter is prima facie discriminatory. That is not to say that all forced segregated education necessarily violates the Code or the Charter as there may be circumstances when it is necessary or justifiable to do so. However, since the educational norm is placement in a regular class, deviation from that norm because of distinctions based upon membership in a particular disadvantaged group would constitute a violation of s. 15 of the Charter (subject to s.1) and a prima facie breach of the Code (subject to the defence provisions).

Eaton v. The Brant County Board of Education, supra.

Andrews v. Law Society of British Columbia [1989] 1 S.C.R. 143 at 174-75.

Huck v. Canadian Odeon Theatres Ltd. (1985), 6 C.H.R.R. D/2682 (Sask.C.A.) at D/2688/9, leave to appeal to the Supreme Court of Canada refused, June 3, 1985 (McIntyre, Wilson and LaForest JJ.).

134. In the educational context, this principle may also be described as a rebuttable presumption in favour of integration - i.e. in determining placement there is a rebuttable presumption in favour of the non-discriminatory norm of education in a regular class of one's peers. This is not a presumption in favour of one "pedagogical" theory over another as it is unrelated to theories about how children learn. Rather, it is a recognition of the prima facie right of children with disabilities not to be isolated from or segregated from their non-disabled peers. Although these principles have not previously been considered in this context in Ontario, there is considerable American jurisprudence on the issue. Much of the U.S. law arises under a statute in which the presumption in favour of integration is expressly stated, but there is also authority for the proposition that the same analysis would apply under general non-discrimination legislation.

Rafael Oberti et. al. v. Board of Education of the Borough of Clementon School District et al., United States District Court

of New Jersey, Civil Action No. 91-2818, Appellants' Book of Authorities, Vol. 6, Tab 34.

Rafael Oberti et al. v. Board of Education of the Borough of Clementon School District et al., United States Court of Appeals for the Third Circuit, No. 92-5462.

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

Sacramento City Unified School District v. Rachel Holland et al., United States Court of Appeals, Ninth Circuit, January 24, 1994, unreported.

Mavis v. Sobol (Commissioner of Education of the State of New York (1994), 839 F. Supp. 968 (N.D.N.Y. 1983), United States District Court.

49. In Eaton v. Brant County Board of Education (1995), 22 O.R. (3d)1 (C.A.), Madame Justice Arbour attempts to place segregation into a broad social and historical context (at page 15):

> 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.

50. A prison, as Madame Justice Arbour asserts, obviously deprives the inmate of social interaction with both his/her family and

his/her community for twenty-four hours per day. Such would clearly not have occurred for Katie Lewis. Her recommended educational placement included one hour per week in the "regular" kindergarten, with the intention of expanding that once she had a communication system, and there is no evidence that the intention was insincere. In addition, Katie was not living in an institution; when she was not in school, she would have been involved with her family and her community to the extent mandated by her parents.

51. Madame Justice Arbour, at p. 16, also considers the segregated education of students on other grounds such as race or sex to be analogous:

> 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 [of the Charter], 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?

52. Brown v. Board (supra) and cases in that line do not address the essential issue here. That the U.S. Supreme Court in Brown dealt particularly with race as an irrelevant consideration in the provision of public education is made clear by the following (at pages 493-94):

> In Sweatt v. Painter, supra, in finding that a segregated law school for Negroes could not provide them equal educational opportunities, this Court relied in large part on "those qualities which are incapable of objective measurement" but "which make for greatness in a law school." In McLaurin v. Oklahoma State Regents, supra, the Court, in requiring that a Negro admitted to a white graduate school be treated like all other students, again resorted to intangible considerations:" ... his ability to study, to engage in discussions and exchange views with other students [emphasis added], and, in general, to learn his profession.
>
> Such considerations apply with added force to children in grade and high schools. To separate them from others of similar age and qualifications [emphasis added] solely because of their race generates a feeling of inferiority as to their status in the community that my affect their hearts and minds in a way unlikely ever to be undone. The effect of this separation on their educational opportunities was well stated by a finding in the Kansas case by a court which nevertheless felt compelled to rule against the Negro plaintiffs:
>
> > Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system. (Emphasis in the submissions]

53. Provision of segregated educational facilities for persons of colour was based on the attribution of personal characteristics to individuals solely on the basis of association with a group. No attempt was made to consider each person's individual merits and capacities, and their placement in segregated educational facilities was based on irrelevant considerations. There was and is no relevant link between a person's colour and his/her functioning in a classroom. Persons of colour placed in a

segregated classroom were placed there without the expectation that they would move to the integrated system. Katie's segregated placement, so far as is discoverable, was meant by its proponents to be remedial, and for as limited a time as was found necessary by teaching professionals solely on an evaluation of her personal merits and capacities. Her not being placed in a facility that was acceptable to her parents was as a result of a decision made on due consideration of Katie as a person and of her particular merits and capacities. It was only after arriving at the conclusion that she could not realistically be furnished with the opportunity to obtain a communication system in any other placement than at Fairmead School, that her placement in that setting took place.

54. Harmful effects of segregation on the handicapped are discussed at some length in the submissions of Ms. Pike and Mr. Baker. Ms. Pike quotes Catherine Frazee thus:

> 50. The effect of a denial is "exclusion," leading to "marginalization."
>
> Evidence of Catherine Frazee, Transcript, Vol. 19, pp. 67-69

And Mr. Baker states that:

> 89. There was strong evidence presented that a child who is educated in a segregated setting, separate from her peers, will experience a "loss of self-esteem," learn she is incapable of doing things and lose motivation to learn. They [sic] would also experience serious psychological harm such experiencing [sic] spoiled self-identity, stigmatization or rejection by those peers and feeling a sense of shame, inadequacy and not belonging.
>
> Diane McLean-Heywood, Vol. 14, Pages 85 - 86

Gary Woodill, Vol. 28, Pages 121 - 127

Catherine Frazee, Vol. 19, Page 78

...

92. Catherine Frazee, testified that segregation deprives both the non-disabled and the disabled students of the opportunity to learn from each other.[...]

Catherine Frazee, Vol. 19, Pages 74, 81

55. As noted above, at paragraph 29, Ms. Thompson-Mintz of CIDS prepared a report on her assessment of Katie's abilities in June, 1985. In that report, she estimated Katie's social skills' development at that time to be roughly equivalent to that of a "normal" child of twenty-one months'; Katie's "self-help/independence" skills Ms. Thomspon-Mintz assessed as similar to those usually to be seen at fourteen months; Katie's "language/cognition" skills were assessed at a twelve-months' level, and her motor skills at nine months.

56. The assessment by Ms. Thompson-Mintz was not the first to attempt to correlate Katie's abilities with age. In her written submissions, Ms. Bowlby adverted to the following:

41. The Ontario Crippled Children's Centre report of consultation dated June 27, 1983 (Exhibit #37E) disclosed the following:

1. Speech and Hearing

Due to Katie's apparent low level of cognitive functioning despite her chronological age of four years, prognosis for speech development is very poor.

2. Psychology

> Cognitively, Katie appears to be functioning at approximately a 4 - 5 month level ... According to previous reports, Katie's developmental levels have not changed significantly over the past two years.

3. Occupational Therapy
gross motor ability is at a 4 - 5 month level.

4. Augmentative Communication
In the past Katie has been presented with the Blissymbol for "yes" that was coloured green and placed in her tray. Mrs. Lewis does not feel that Katie understood the use of the Blissymbol for "yes" and it is confirmed from this assessment that Blissymbols are not appropriate for Katie as a means of communication at this time. In addition, Katie does not appear to be appropriate for any formal system of communication: rather pre-communication behaviours, eye contact, choice making, etc. appear to be the best program for her at this time.

42. The evaluation report of Margaret Wolfrey, Speech Language Pathologist, relating to an assessment conducted January 31 and February 10, 1984 (Exhibit #49) notes that:

> Katie demonstrates a severe delay in all aspects of speech and language development. Her receptive language skills appear to be at the 5 - 7 month level. Similarly, expressive skills are in the range of 5 - 6 months developmentally.

57. These assessments raise the question -- who were Katie's "peers"? Were they "non-disabled" children of Katie's chronological age? Were they non-disabled children of Katie's developmental age? Were they physically and/or mentally handicapped children of Kate's developmental age? Some considered the first group desirable as role models, yet evidence suggests that Katie was incapable of modelling their behaviour. Neither her interaction with her twin brother nor her integrated placement into the Newmarket Day Care Centre resulted in her development of any verbal or symbolic communication system. The same evidence begs the issues of "loss of self-esteem," "learning that she is

incapable," "spoiled self-identity," and "feeling a sense of shame, inadequacy and not belonging" raised by Mr. Baker.

58. Except for placement in the kindergarten at Maple Leaf School, all alternatives considered would have brought Katie into contact with children suffering from physical, communicative, mental or multiple handicaps. If any of those placements was considered acceptable, then what is being objected to appears to be the degree of handicap exhibited by other students with whom Katie would have associated at Fairmead -- an unacceptable basis for decision pursuant to the Complainant's own argument, for a central concern of the Complainant is that society ought not to discriminate against handicapped persons.

59. "Segregation" per se does not appear to me to be a concept with an inherently negative connotation. In the case of a kidnap victim or an incarcerated convict, segregation is doubtless a negative feature; in the case of a person undergoing a heart transplant, segregation into the operating room of a hospital is equally doubtless a positive.

60. In Eaton the Court (at pp.15-16) emphasizes association (how can there be any?) with "age-appropriate peers":

> 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 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.

61. What is segregation? Is it separation by geographical distance or by a physical or psychological barrier? On the evidence before me, if Katie Lewis had gone to Maple Leaf School as her parents wished, she would have required a physiotherapist, a

speech therapist, someone to help her to interact with the "regular" class and teacher, and someone to attend to her personal needs. Until she acquired a communication system, most of her interactions with her classroom teacher, teacher's aid, and educational specialists would have had to have been "outside the group," since the education program being provided to the other five-year-olds would have been totally different. Opportunities for spontaneous interactions with her fellow students would have been very limited. As long as Katie lacked an established verbal or symbolic communication system, she would have been unable to benefit from such opportunities. In effect, she would have been "psychologically segregated" or, in the language raised in Eaton and, with respect, all too quickly dropped from consideration, "effectively isolated in a regular classroom" -- excluded, in short, from the mainstream of the other children's classroom experiences -- as surely as geography would separate her pursuant to the IPRC's recommendation, and with no greater likelihood of eventual integration. Distractions of the larger classroom might even, conceivably, have slowed her progress in developing a communication system and deferred real integration. To regard segregation as being de facto a burden or disadvantage flies in face of hospitals, rehabilitation centres, etc. -- all benign examples of segregation.

62. At page 14 of Eaton, Arbour, J.A. quotes with approval this passage from the report of (then) Commissioner Judge Rosalie Abella

in "Equity in Employment: A Royal Commission Report," dated October, 1984, at pages 134-136:

> 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 education 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.

Precisely -- and the issue is not merely integration at the expense of education, but possibly integration at the expense of meaningful integration as a beneficial result of the education.

63. Notwithstanding the above comments on segregation, I am mindful of the statement of Arbour, J. in Eaton, at p. 17, that the remarks of Mr. Justice McIntyre in Andrews, at p. 174:

> 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[,]
>
> [do not] suggest that distinctions based on physical or mental disability, a prohibited ground in s. 15, will be less discriminatory than distinctions based on race or sex. The merits and capacities which may properly found the basis for different treatment cease to do so when they become personal characteristics, such as sex, ethnic origin or disability, which have a common history of stereotyping. Although it may be easier to justify differences in access to educational

> facilities on the basis of disability than it would 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 differences 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 paractice. In legal terms, I believe that she has been.
>
> Whether the placement that has been 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 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.
> (Emphasis added)

64. I believe that counsel for the Commission and the Complainants would support the above statement, based on their submissions to me. Because I must consider whether Katie Lewis has been discriminated against on the basis of handicap contrary to the provisions of the Code and not under the Charter, as Mr. Baker noted in his submissions, it would be now up to the Respondents to establish a statutory defence to a prima facie finding of discrimination under s. 1 of the Code.

65. To understand the meaning of discrimination under the Code, it is necessary to bear in mind the emphasis in its Preamble at the relevant times on "the inherent dignity, and the equal and inaliable rights of all members of the human family ..." ; the

"dignity and worth of every person"; the "recognition" of the need "to provide for equal rights and opportunities without discrimination that is contrary to law"; and the "aim [to create] ... a climate of understanding and mutual respect for the dignity and worth of each person so that each person feels a part of the community and able to contribiute fully to the well-being of the community of the Province." Accordingly, when an examination is undertaken under the Code as to whether a person has been deprived of a benefit or has had a burden or disadvantage imposed upon him or her on the basis of a prohibited ground, such deprivation or burden can exist even where the person is offered alternative treatment which is objectively superior to that the person would have otherwise received, in the sense that he/she would "as a whole be better off."

66. The above point was well made by Chairman Cumming, as he then was, in Hickling v. Lanark, Leeds and Grenville Roman Catholic Seperate School Board (1986), 7 C.H.R.R. D/3546 (Ont. Bd. of Innquiry), revised on other grounds (1987), 60 O.R. (2d) 44 (Div.Ct.), affirmed (1989), 67 O.R. (2d) 479 (C.A.) at D/3555:

> If a separate school board denied a Catholic education to a pupil on the ground, for example of sex, ethnic origin or family status, all the proof in the world that the pupil would get a better education in a non-Catholic system would clearly not avail to make the denial non-discriminatory. The same is true if that denial is based on handicap, which is just as plainly listed as a prohibited ground in section 1 of the Code. The fact that the pupil may as a whole be better off as a result of the denial, or that the school board's intention is to make the pupil better off, is irrelevant to whether the denial is discriminatory.

67. In Keene, Human Rights in Ontario (2d Edn.), reference is made, at p. 10, to Tomen v. Ontario Teacher's Federation (1989), 11 C.H.R.R. D/233 (Ont. Bd. of Inquiry) where "the respondent submitted that if the net injury is insubstantial, no finding of discrimination can be made, citing the Andrews decision." The board of inquiry (see Tomen, at p.11) "rejected the argument that Mr. Justice McIntyre's analysis of effect, as set out in Andrews, excluded effects to dignitary interests."

68. In Hogg, op. cit., at pp. 52-22 - 52-23, the author states, referring to what was decided in Andrews:

> In principle, once a legislative distinction has been found to be based on listed or analogous grounds, it is surely better to leave all issues of justification to s. 1 ... .

Professor Hogg's interpretation of Andrews was agreed with in three commentaries on that case: by Marc Gold ((1989), 34 McGill Law Journal , at p. 1069; David W. Elliott,"Comment on Andrews v. The Law Society of British Columbia and s. 15 of the Charter: the Emporer's New Clothes?" (1989) 35 McGill Law Journal 235, at p. 245; and William Black and Lynn Smith (1989), 68 Can. B. Rev. 591, at p. 603.

69. In a case involving a consideration of whether there has been discrimination on the grounds of physical diasability contrary to s. 15(1) of the Charter, once it has been decided that there has been a distinction based on a prohibited ground, as is seen in

Andrews, at p. 174, the focus then shifts to whether the discrimination is justified under s. 1.

70. In a case such as the one before me, where s. 15(1) does not apply because it came into force after the filing of the complaints, the issue is limited to allegations of discrimination under the Code on the grounds of handicap. Where a prima facie case of discrimination on the grounds of handicap has been made out under the Code, as counsel for the Commission and the Complainants acknowledge, the focus then shifts to whether the respondent(s) are able to establish a statutory defence under the Code.

71. In establishing a prima facie case of discrimination contrary to the provisions of s. 1 of the Code, it would not matter whether placement in a segregated classroom was a clearly superior environment for Katie's education, as is pointed out in Eaton, at p. 17. Placing a handicapped child in a segregated classroom containing the most modern equipment and best teachers with specialized skills to meet the needs of that child, with daily time spent with children who visit from regular kindergartens would still amount to prima facie discrimination under s. 1 of the Code. This is because s. 1 of the Code is directed (see Preamble) at protecting the "inherent dignity" of persons in the protected categories. Persons in the protected categories are entitled to equal treatment; that is, the same treatment as other persons, in this case those without handicaps, subject to the need to address

certain realities that would make equal treatment unequal in the case of some persons, as referred to in Andrews. A handicapped person has the right to be treated as well or as badly as non handicapped persons - that is, to be afforded the same treatment as everyone else, unless the law provides otherwise.

72. Because, in most cases, discrimination has the effect of imposing burdens, obligations, or disadvantages on persons or groups, which are not imposed on other persons and groups, that should not obscure the overriding fact that it is the disparate treatment of persons in the protected categories because of some irrelevant characteristic ascribed to them that is the affront to their dignity and which gives rise to unlawful discrimination.

73. As Arbour, J., observes in Eaton, at p. 17, for the purposes of a s. 15 analysis (of the Charter) it does not matter if what the school placement offered a handicapped child "is of equal or even superior value," and such a finding could not affect the prima facie finding of discrimination under s. 15(1). The superiority of the impugned placement would only be "relevant to the s. 1 analysis." In a proceeding under the Code, such as the one that I am concerned with, matters of defence to the prima facie finding of discrimination only become relevant in the proceedings that may follow the preliminary finding. Arbour, J., notes, at p. 11 of Eaton, the fact that it was "difficult to conduct a simultaneous parallel analysis of all issues under the Charter and the Code."

For reasons stated by her (ibid.) it was unnecessary for her to do so and her analysis was based on her assessment of the requirements of the Charter. In the case before me, I need only deal with an analysis under the relevant Code, even though, as Arbour, J., also notes in Eaton (ibid.), "there is a considerable overlap between s. 15 of the Charter and s. 1 of the" Code.

74. The YRBE did not arrive at its conclusion concerning what kind of classroom setting was suitable for Katie Lewis on the basis of "personal characteristics attributed to [her] ... solely on the basis of association with a group," in this case persons with handicaps. There was no predetermination concerning her placement based on a stereotypical view of her "merits and capacities," which McIntyre, J. said would "rarely escape the charge of discrimination: Andrews at p. 174. Although McIntyre (ibid.) also said that distinctions "based on an individual's merits and capacities will rarely be so classed" he does not appear to be referring to "merits and capacities" related to a person's handicap. See Eaton, at p. 17:

> I do not read this passage to suggest that distinctions based on physical or mental disability , a prohibited ground in s. 15, will be less discriminatory than distinctions based on race or sex. The merits and capacities which may properly found the basis for different treatment cease to do so when they become personal charcteristics such as sex, ethnic origin or disability ... .

75. In the case of a complaint alleging discrimination because of handicap contrary to the provisions of s. 1 of the Code, where the

basis for a distinction is handicap, the finding of a prima facie case of discrimination will be automatic. As is noted above, however, the prima facie finding of discrimination contrary to s. 1 of the Code does not end the matter. It is at this stage of the proceeding that it is permissible to review the way in which a respondent has considered the "merits and capacities" of a complainant that relate to handicap. As Arbour, J.. noted in Eaton, at p. 17, in her case referring to a s. 1 analysis of the Charter, but which statement is applicable to the analysis of the provisions with respect to the defences available to a respondent under the Code:

> 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. (Emphasis added)

76. I would say that unlike attempting to justify differences in access to educational facilities on the basis of disability under either the Charter or the Code, attempting to do so on the basis of race would seem impossible.

77. The ultimate designation of a respondent's behaviour as discriminatory under the relevant Code will depend on the result of the following analysis.

V. Statutory Defence and Accomodation Arguments

78. Counsel both for the Complainant and for the Commission raised the related issues of "duty to accommodate" and "undue hardship" arising from the the Code and judicial interpretation of them. It is at this juncture that it is appropriate to consider the basis for the distinction drawn between Katie and her "age appropriate peers," and this will require an assessment of her handicap in relation to the statutory defences provided for in the Code and the duty to accomodate. The starting point for analysis of those issues is sections 1 and 8 of the Code applicable at the time the complaints were lodged:

> 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, age, marital status, family status or handicap.
>
> ...
>
> 8. No person shall infringe or do, directly or indirectly, anything that infringes a right under this Part.

Interpretational assistance is given by sections 9 and 10:

> 9. In Part I and in this Part,
>
> ...
>
> (b) "because of handicap" means for the reason that the person has or has had, or is believed to have or have had,
>
> (i) any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness and, without limiting the generality of the foregoing, including diabetes mellitus, epilepsy, any degree of paralysis, amputation, lack of physical coordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or physical reliance on a dog guide or

on a wheelchair or other remedial appliance or device,

(ii) a condition of mental retardation or impairment,

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

(iv) a mental disorder;

(c) "equal" means subject to all requirements, qualifications and considerations that are not a prohibited ground of discrimination;

...

10. A right of a person under Part I is infringed where a requirement, qualification or consideration is imposed that is not discrimination on a prohibited ground but that would result in the exclusion, qualification or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member, except where,

(a) the requirement, qualification or consideration is a reasonable and bona fide one in the circumstances; or

(b) it is declared in this Act that to discriminate because of such ground is not an infringement of a right.

79. Sections 16 and 40 of the Code provide:

16.--(1) A right of a person under this Act is not infringed for the reason only,

(a) that the person does not have access to premises, services, goods, facilities or accommodation because of handicap, or that the premises, services, goods, facilities or accommodation lack the amenities that are appropriate for the person because of handicap; or

(b) that the person is incapable of performing or fulfilling the essential duties or requirements attending the exercise of the right because of handicap.

(2) Where, after the investigation of a complaint, the Commission determines that the evidence does not warrant the

appointment of a board of inquiry because of the application of subsection (1), the Commission may nevertheless use its best endeavours to effect a settlement as to the provision of access or amenities or as to the duties or requirements.

...

40.--(1) Where the board of inquiry, after a hearing, finds that a right of the complainant under Part I has been infringed and that the infringement is a contravention of section 8 by a party to the proceedings, the board may, by order,

(a) direct the party to do anything that, in the opinion of the board, the party ought to do to achieve compliance with this Act, both in respect of the complaint and in respect of future practices; and

(b) direct the party to make restitution, including monetary compensation, for loss arising out of the infringement, and where the infringement has been engaged in wilfully or recklessly, monetary compensation may include an award, not exceeding $10,000, for mental anguish.

(2) Where the board of inquiry at the conclusion of the hearing finds that a right of a person under Part I has been infringed by discrimination because of handicap, the board may then proceed to inquire whether,

> (a) the person does not have access to premises, services, goods, facilities or accommodation of the party who is found to be a contravener, because of handicap; or
>
> (b) the premises, services, goods, facilities or accommodation of the party who is found to be a contravener lack amenities that are appropriate to persons because of the handicap,

and after making a finding thereon, the board may, unless the costs occasioned thereby would cause undue hardship and subject to the regulations, order that the party take such measures as will make such provision for access or amenities or as are set out in the order.

(3) In addition to the powers conferred by subsection (2), where the board of inquiry at the conclusion of the hearing under subsection (1) finds that a right of a person under Part I has been infringed by discrimination because of handicap, the board may then proceed to inquire and make a finding as to whether the equipment or essential duties attending the exercise of the right could be adapted to meet the needs of the person whose right is infringed and, after making a finding thereon, the board may, unless the costs occasioned thereby would cause undue hardship and subject to the

regulations, order that the party take such measures to adapt the equipment or duties as will meet such needs and as are set out in the order.

80. The duty to accommodate short of "undue hardship" arises out of s. 40, which prescribes the powers of a board of enquiry. What are the implications of that? In Lanark, Leeds and Grenville County Roman Catholic Separate School Board v. Ontario (Ontario Human Rights Commission) (1978), 8 C.H.R.R. D/4235, referred to above, at page D/4237, the Ontario Division Court, per Rosenberg, J., held as follows:

33285 The Code provides in section 16(1):

> 16.(1) A right of a person under this Act is not infringed for the reason only,
>
> (a) that the person does not have access to premises, services, goods, facilities or accommodation because of handicap, or that the premises, services, goods, facilities or accommodation lack the amenities that are appropriate for the person because of the handicap;

In my view, if interpreted literally, both alternatives as described could apply here. The complainants do not have access to a full Catholic education because of handicap and fit squarely within those terms. However, giving the first alternative its literal interpretation would have the effect of eliminating any discrimination because of handicap. In the context in which it is used here it must relate to physical access only. The second alternative, however, clearly applies, that is, that the premises lack the amenities that are appropriate for the person because of handicap. The separate schools do not have the appropriate amenities, either physically in terms of special rooms for appropriate classes or special personnel both in the general classroom and the special classroom.

...

33289 The next question to be addressed is whether or not the infringement of the right is only for lack of facilities. If, for example, the Separate School Board had said, "These

> parents are trouble-makers and we are not prepared to accommodate their children" or the refusal of services was for any other reason besides handicap or lack of amenities then the section would not apply. There is no such additional reason. Until the commencement of these proceedings in June of 1984, the Separate School Board has considered reasonable steps to accommodate the parents' wishes notwithstanding that the children were not registered with them nor their responsibility. Accordingly, in my view, there has been no discrimination.
>
> ...
>
> 33291 In my view, the application of section 40(2) was inappropriate and improper since the inquiry could not find discrimination because of section 16(1) of the Code and, accordingly, should have considered that the finding of discrimination was a condition precedent to application of section 40, subsection (2).

81. That the duty to accommodate short of undue hardship is a judge-made rather than a statutory requirement is re-emphasised by the Divisional Court, per Lane, J., in Youth Bowling Council of Ontario vs. McLeod (1990) 74 D.L.R.(4th)625 at page 629:

> 3. The appellant council relied on s. 16(1)(b) of the Code which it said protected it in these circumstances because Tammy could not perform the essential element of bowling, namely manual release. It therefore followed that her rights were not infringed and there was no obligation to accommodate. The respondent commission argued that even under s. 16 as it existed in 1985, there was a duty on the council to seek reasonable means to accommodate a handicapped person, even one who cannot perform an essential element.
>
> Since the initial events of this case in 1985, there have been changes in ss. 10 and 16 of the Code to introduce an express statutory requirement to accommodate, up to the point of undue hardship, a handicapped person who is unable to perform the essential duties or requirements of the exercise of a right: S.O. 1986, c. 64, s. 18.
>
> Even before these amendments were enacted, the Supreme Court of Canada had introduced an obligation upon an employer to make a reasonable effort, short of undue hardship, to accommodate the religious needs of an employee who is unintentionally the object of discrimination by an apparently neutral rule imposed by the employer in the bona fide conduct of the business. In Re Ontario (Human Rights Commission) and

> Simpsons-Sears Ltd. (1985), 23 D.L.R.(4th)321, [1985] 2 S.C.R. 536, 9 C.C.E.L. 185, the Supreme Court was dealing with a complaint brought under s. 4(1)(9) of the Code alleging the complainant, a Seventh Day Adventist, was the victim of adverse effect discrimination on the basis of creed because she was discharged for refusing to work on Saturdays. While the case did not involve ss. 10 and 16 of the Code, there was no more an express statutory basis in s. 4(1)(9) than there was in 1985 in ss. 10 and 16 for the concept of a duty to accommodate. The court drew upon the purpose and policy of the Code to find such a duty and to define its limit -- undue hardship -- in cases of adverse effect discrimination on the basis of religion or creed. I see no reason why these same policy consideration should not be brought to bear upon the provisions of ss. 10 and 16 in respect of unintentional adverse effect discrimination by reason of handicap.

82. The parties were in general agreement that a duty to accommodate short of undue hardship was applicable here. Per Ms. Bowlby, at pages 85 - 86 of the her written submissions:

> 239. Under s. 16(1)(a) and (b), a duty of accommodation arises. Although the Code under which these complaints arise did not incorporate a duty to accommodate, nevertheless, Courts found such a duty to be inherent in s. 16(1)(a) and (b) provided that accommodation could be provided without undue hardship.
>
> [Re Lanark Leeds and Grenville Roman Catholic Separate School Board (1987), 40 DLR (4th)316 at p. 322 (Y.R.B.E.'s Book of Authorities, Tab 13);
> Re Youth Bowling Council of Ontario et al. and McLeod (1990) 74 DLR (4th) 625 (Div. Ct.) (Y.R.B.E.'s Book of Authorities, Tab 14) (upheld on appeal)]
>
> 240. In the Lanark Leeds and Grenville case, the children of separate school supporters who had been identified as trainable retarded had been registered with the co-terminus Public Board in accordance with the requirements of the Education Act. The Separate School Board had not obtained an order in council permitting it to educate its trainable retarded pupils. However, representatives of the Separate School Board attended IPRC's for the children and the children spent some time in a separate school each week. The parents, in their complaint, sought full-time attendance in the Separate School Board for their children. The court (at p. 324) found that the Board had considered reasonable steps to accommodate the parents' wishes notwithstanding that the

children were not registered with them nor their responsibility.

241. The Supreme Court of Canada stated, in Central Okanagan School District No. 23 v. Renaud: "The complainant cannot expect a perfect solution. If a proposal that would be reasonable in all the circumstances is turned down, the employer's duty is discharged."

[Central Okanagan School District No. 23 v. Renaud (1992), 95 D.L.R. (4th)577 (S.C.C.); Y.R.B.E.'s Book of Authorities, Tab 15]

242. It is submitted that, in the present case, the provision of education appropriate for Katie was offered at the Fairmead School, together with an opportunity to be in the regular class for integration purposes, commencing with one hour a week. It is submitted that this was a reasonable accommodation offered by the Board which met its obligations under the Human Rights Code.

In Eaton, at p. 17, Arbour, J. responded to such a suggestion:

> ... [I]t cannot be said that [Emily Eaton'] placement in a special class is a form of accomodation necessary to grant her a true equality of access to education.

83. An examination of some of the leading cases regarding the nature and extent of "duty to accommodate" and "undue hardship" -- for example, Central Okanagan School District No. 23 v. Renaud (1992) 95 D.L.R.(4th)577 (S.C.C.), Ontario (Human Rights Commission) v. Simpsons-Sears Ltd. (1985), 23 D.L.R.(4th)321, Re Lanark Leeds and Grenville Roman Catholic Separate School Board (1987), 40 D.L.R. (4th)316, Re Bowling Council of Ontario et al. and McLeod (1990) 74 DLR (4th) 625 (Div. Ct.)-- suggests that "reasonable accommodation short of undue hardship" is decided empirically on a case-by-case basis. In Syndicat de l'enseignement de Champlain et al. v.Commission scolaire regionale de Chambly et

al. , [1994] 2 S.C.R. 525, at p. 546, Mr. Justice Cory states, in considering the duty to accomodate:

> They should be applied [the factors to be considered in deciding what constitutes undue hardship] with common sense and flexibility in the context of the factual situation presented in each case. The situations presented will vary endlessly. For example, in a large concern it may be a relatively easy matter to replace one employee with another. In a small operation replacement may place an unreasonable or unnacceptable burden on the employer. The financial consequences of accommodation will also vary infinitely. What may be eminently reasonable in prosperous times may impose an unreasonable financial burden on an employer in times of economic restraint or recession. However, the listed factors can provide a basis for considering what may constitute reasonable accomodation.
>
> It is important to remember that the duty to accommodate is limited by the words "reasonable" and "short of undue hardship." Those words do not constitute independent criteria. Rather they are alternate methods of expressing the same concept: see Renaud, supra, at p. 584 (D.L.R.).

84. In reply submissions, Ms. Pike, for the Commission, argued at pages 29 - 30, as follows:

> 79. Finally, even if it were to be held that placements other than Fairmead lacked the needed amenities, and that such a lack was the sole reason for the denial of an alternative placement, it is submitted that the Board cannot avail itself of the s. 16(1)(a) defence because it had, within the Board, all the needed amenities, in contrast to the situation that obtained in Lanark Leeds.
>
> 80. The Board had adopted a service model whereby resources were allocated in a particular fashion. The allocation of resources, according to Gwen Mann, was a "given" only because it reflected a prior decision taken.
>
> Evidence of Gwen Mann, Transcript, Vol. 37, p. 8.
>
> 81. The Board could, of course, and did make decisions to allocate more resources to particular facilities.
>
> Evidence of John MacLachlan, Transcript, Vol. 38, p. 46
>
> 82. As the Board concedes, both subsections of s. 16 have been found to be subject to an implied duty to accommodate short of undue hardship. Gwen Mann testified

> that at no time did she request that the Board reallocate resources. On the facts, no effort, let alone efforts short of undue hardship, were made to provide Katie with the access to services referred to in s. 16(1)(a).
>
> Re Youth Bowling Council of Ontario et al. and McLeod (1990), 74 D.L.R. (4th) 625 (Div. Ct.)
> Evidence of Gwen Mann, Transcript, Vol. 38, p. 67

85. In Re Lanark Leeds and Grenville Roman Catholic Separate School Board (1987), 40 DLR (4th) 316, 60 O.R.(2d)441 at 450, the Ontario Divisional Court held as follows:

> Does this decision deprive the complainants of any appropriate remedy? It would be unfortunate if the result of this decision was that the decision of the Separate School Board could not be reviewed to determine whether or not they had taken appropriate steps to accommodate the needs of the complainants. There may be instances where a separate school board has adequate funds to create appropriate facilities to provide both a special programme for handicapped as well as full Catholic education. We are advised that this is being done in some areas particularly where the concentration of students is larger and the school board has a larger number of handicapped children in particular category to deal with. It is more appropriate that the decisions of this nature be reviewed under the Education Act. It is only there that the balancing of the factors that the Inquiry attempted to deal with can be properly done. What are the factors that, amongst others, would be considered?
>
> (a) What is the total budgetary allotment that the Separate School Board can expect for the year and for the foreseeable future?
> (b) What would be the cost of providing the special services for the present number of handicapped students in this category and what would be the likely projected cost for the numbers expected in future years?
> (c) What would be the cost impact on the rest of the budget?
> (d) How would this impact on the rest of the budget affect the quality of education delivered to other students in the school system administered by the Separate School Board?

86. That government and its appendages can raise taxes or redeploy spending, so that a claim of hardship could often be met with the

answer "self-imposed" bears remembering; nevertheless, the provision in this case, based on Katie's urgent need for a communications system, of a "communication-bestowing team" at the "home school" of each and every child needing such (and why stop there -- many other needs were surely well served by individualised, hands-on teaching) would doubtless stretch resources. Therefore, the service-provider's centralizing of resources in this case, even "amenities," is reasonable and not lightly to be interfered with absent evidence of the meretricious discrimination discussed elsewhere in this decision. Furthermore, removing a communications specialist from the place where such services were most required (at Fairmead School) would have had a serious negative impact on the students at that school: cf. Central Alberta Dairy Pool v. Alberta (Human rights Commission) (1990), 72 D.L.R.(4th) 417, at 439 per Wilson, J., writing for the majority in referring, in that case, to the impact of an accommodation on other employees. I must also be concerned with the impact of an accommodation on other students who would be affected by its being made.

87. At page 8 of her reply submissions, Ms. Pike asserts that "with reference to the Board's s. 16 defences, no determination was made of the 'essential requirements' of a kindergarten class, nor assessment done of Katie's strengths and needs, and her ability to function in a kindergarten class." I take a different view of whether this was the case: See reference in this decision at

paragraphs 12 - 15, above. The information provided to Gwen Mann gave a very clear picture of Katie's "merits and capacities." She was not regarded as a person who because of her association with a group could not deal with the requirements of a regular kindergarten. There was no stereotyping in the way her situation was dealt with. She was treated with due respect for her dignity and worth as a human being. Her handicap could not, at this stage, be ignored in conducting an analysis of whether she could fulfil essential duties expected of a student in a regular kindergarten. Her handicap was part of what she was, and it was important that it be respected and not be relied upon to arrive at conclusions of what she was or could become.

88. Mrs. Mann focused upon Katie's real merits and capacities at the material time, and realistically concluded that she could only achieve her maximum educational potential if she was first placed in an environment where she had a real opportunity to acquire a communication system. Without such a system, she could not receive equal treatment in a regular kindergarten. On the basis of Mrs. Mann's evidence, I am satisfied that it was unrealistic to have Katie placed in any of the educational environments acceptable to her parents and expect her to be taught a commumication system. The kind of urgent attention Katie needed could, on any assessment, only be reasonably provided at Fairmead School, given the limited number of communications specialists available to serve not only Katie, but other pupils with similar needs. I am also

mindful of the fact that Katie would have to have most of her time directed at satisfying that initial educational need.

89. At page 30 of her reply submissions, Ms. Pike argues thus:

> 4. Section 16(1)(b)
>
> 83. The Board asserts that there is evidence of "no" reason other than lack of facilities to explain the Board's decision not to educate Katie in the regular kindergarten class. That being the case, the Board is precluded from making any arguments pursuant to s. 16(1)(b) of the Code.
>
> 84. It is submitted that s. 16(1)(b) would not have provided a defence in any ease.
>
> 85. This subsection requires that the Board of Inquiry find, as a fact, that there is a set of essential requirements or duties attendant on the right to attend kindergarten (or Holland Landing). The Board has offered no such list for the tribunal's consideration, nor can it, in view of the evidence that was provided.
>
> 86. Diane McLean-Heywood testified that there were no entrance requirements for kindergarten, just goals, which were capable of adaptation.
>
> Evidence of Diane McLean-Heywood, Transcript, Vol. 14, pp. 133, 144-7
> Evidence of Diane McLean-Heywood, Transcript, Vol. 15, pp. 26-43.
>
> 87. Gwen Mann testified with reference to a Board document entitled "Kindergarten" that there were "learning outcomes expected of a child at the end of kindergarten." In answer to a question as to the skills that it is anticipated a child will need in going into kindergarten, Mrs. Mann replied
>
> > That is difficult to answer. I think you can tell by looking at it the type of activities that happen in the kindergarten and it is when the child is in kindergarten and is able to do those things that you find out what skills are needed.
> >
> > When a child is not able to manage in kindergarten, it is usually not a question of particular skills, it is a question of much more basic things, such as socially acceptable behaviour, being able to be with other

children, conversely, being able to be away from parents, and that type of thing.

Evidence of Gwen Mann, Transcript, Vol. 34, p. 105

It will be noted that this answer utterly contradicts the position of the Board set out, although not elaborated, in its written submissions.

90. But as Ms. Bowlby points out at page 4 of her written submissions to the replies of Ms. Pike and Mr. Baker, Mrs. Mann's testimony went further than that:

> Q. Now, how appropriate would this curriculum be for a pupil of kindergarten age who had no communication system?
> A. Most of it would not be appropriate, in two ways. A child cannot participate in very much of it without a communication system, he would just be an onlooker. And it is not appropriate in another way because the time should be spent in teaching that child a communication system, so he can participate in these activities. However, there are things here that a child without a communication system could do and could participate in. And of course, there are times in any regular class when it is appropriate to be a spectator.

91. A child must surely be able to communicate in order to be able to benefit from and partake of what is offered in kindergarten. I conclude on the evidence that Katie could have not done so until she had some kind of communication system. Without that system she was "incapable of performing or fulfilling essential duties or requirements attending the exercise of the right" to attend a regular kindergarten. One of the essential duties etc. is to be able to function as more than an "onlooker" most of the time. Again, per Ms. Bowlby at page 85 of her reply submissions:

> 237. It has been established by the evidence that the kindergarten program was designed to prepare five and six year olds for Grade One. The curriculum was devised to build on

presumed levels of development of a normal five or six year old, and the program and activities were designed with that in mind. The evidence was that the activities in the kindergarten classroom, including play-based activities, were designed to move the students in the class forward to the point of readiness for the more academic activities they would encounter in Grade One and depended on the student having the ability to communicate.

[Paragraphs 64, 65, 66, 67, 69, 70]

238. These activities were not appropriate for Katie, not only because of her physical handicaps, but because she was at a much lower developmental level than her same aged peers. Katie had not developed a consistent communication system which would permit her to communicate reliably with her teachers or peers. Accordingly, Katie was incapable both physically and mentally of "performing or fulfilling the essential duties or requirement attending the exercise of the right" to be educated in a regular classroom.

[Paragraphs 39 - 52]

92. Even if Ms. Bowlby was placing requirements etc. of kindergarten at too high a level, Katie Lewis was unable to perform or fulfil an essential requirement for kindergarten; i.e., she was unable to communicate receptively or transmissively, according to all accounts. I find on the evidence before me that no reasonable accommodation could have been achieved if she had been allowed to enter one of the facilities that would have been acceptable to her parents.

VI. Decision

93. I find that the approach taken by the YRBE in deciding where children of kindergarten age with hadicaps should be placed was in accord with the Cascade model. This meant, in practice, that doubts

were resolved in favour of higher placement. I find that this is what was done in the case of Katie Lewis. Her placement at Fairmead resulted from an assessment of her merits and capacities and not from stereotypical thinking. The assessor reasonably concluded that Katie could not function in a regular kindergarten without the ability to communicate, and that communication could only be acquired by her at Fairmead School because that is where she could receive intensive one-on-one instruction by a trained communications consultant. Attempting to accommodate Katie's handicap in a regular kindergarten would have amounted to an undue hardship on the YRBE. The complaints based on these allegations must therefore be dismissed.

94. In the circumstances of this case, because of the decision of the Court of Appeal in Eaton, no purpose would be served by my now making any decision with respect to whether the provisions of the Education Act and Regulations or the policies of the Ministry of Education violate the provisions of s. 1 of the Code.

95. If I am wrong in my analysis of Andrews, and if the reasoning in Eaton should have been followed by me, I find that the result would be the same. This is because the YRBE demonstrated that Katie's placement in a segregated class at Fairmead School followed a consideration of whether her needs could be met in an integrated kindergarten or in another less restrictive classroom setting than Fairmead School. After such consideration there was the bona fide

and reasonable conclusion that Katie's special needs could not be met in a less exclusionary setting. Unlike the case in Eaton, there was a conclusion, after considering all of the relevant evidence, that Katie's needs could not be met in a regular kindergarten until she acquired a communication system, and that realistically, this could only be accomplished at Fairmead School. The placement was not a permanent one and would be reviewed within a reasonable period of time. In Eaton, at pp. 21-2, the Court states:

> 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 concern for the needs of the other pupils in the classroom. In short, the Charter requires that, regardless of its perceived pedagogical merit [emphasis added], a nonconsensual exclusionary placement be recognized as discriminatory and not be resorted to unless alternatives are proven inadequate.

I have concluded, for the reasons set out above, that alternative placements would be inadequate to take care of Katie Lewis's urgent need for a communication system. The evidence satisfied me that providing Katie with a communication system would have represented more than "partial or occasional withdral from the regular class." Her special needs at that time would have necessitated her almost total withdral from the class. Furthermore, assigning a communications specialist to her at a school other than Fairmead,

would have had to be on a permanent basis until a communication system was imparted. Requiring such accomodation would be unreasonable in the circumstances, given the number of other handicapped students who required such assistance.

VII. The Preliminary Motion

96. At the outset of the hearing, counsel for YRBE moved to have the complaints dismissed or stayed because of the prejudice that would affect her clients arising from the inordinate delay in a Board of Inquiry being appointed from the time the complaints were filed. Ms. Bowlby relied on a number of different arguments to support her application and the argument, in which counsel for all of the parties participated, took up several hundred pages of the transcript and involved the citation of numerous cases.

97. After considering the arguments submitted, I concluded that there was insufficient evidence to allow me to dimiss or stay the complaints because of delay, although I would entertain a further motion should events at the hearing demonstrate such prejudice and unfairness as to warrant the order sought, and so advised the parties. Because of the many issues raised and fully argued, the complete text of my preliminary decision runs to well over a hundred pages.

98. Having heard over 50 days of evidence, I am satisfied that the passage of time did not render it impossible for the Board to determine whether a breach of the Code occurred. Although I found that the case of YRBE, and those of the other Respondents for whom Ms. Bowlby acted would likely be more difficult to argue as a result of the delay, after having heard the evidence I am satisfied that my statutory mission had not been rendered impossible and that there was insufficient prejudice to any of the Respondents to require me to allow the motion.

99. In Anita Hall and OHRC v. A1 Collision and Auto Services et al. (1995) 23 C.H.R.R. D/155 (Ont. Div. Ct.), at D/157, the Court, per O'Driscoll, J., found that under either test cited to it, there was no prejudice to the respondent caused by the Commission's delay.

100. One of the two tests referred to is derived from: (a) Hyman v. Southam Murray (Printing(No.1) (1981), 3 C.H.R.R. D/617; and (b) Gale V. Miracle Food Mart (No.2) (1992), 17 C.H.R.R. D/495, a decision of an Ontario Board of Inquiry, where it is said, at D/500, para. 24:

> The appropriate test then appears to be whether the passage of time has rendered it impossible for this Board of Inquiry to dertermine whether a breach of the Code occurred. ...

101. The other test was stated in a decision of the Manitoba Court of Appeal in Nisbett v. Manitoba Human Rights Commission (1993), 18

C.H.R.R. D/504 (leave to appeal to the Supreme Court of Canada refused) at D/510, para 33:

> [T]he question is simply whether or not on the record there has been demonstrated evidence of prejudice of sufficient magnitude to impact on the fairness of the hearing.

102. Although, as the Court noted in Anita Hall, at D/157, para. 16:"memories do fade with time," I conclude in this case, as the Court did in that one: I am "able to complete [my] task without the [respondents] being denied natural justice, and a fair hearing."

103. Given the result on the merits, and given the length of the complete reasons on the preliminary application, I will only release them if requested to do so by any of the parties.

Dated at Toronto, Ontario, this 6th day of August, 1996

M.R. Gorsky
Board of Inquiry