24668

Supreme Court of Canada

Cour suprême du Canada

THE BRANT COUNTY BOARD OF EDUCATION and THE ATTORNEY GENERAL FOR ONTARIO

v.

CAROL EATON and CLAYTON EATON

- and -

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

LE CONSEIL SCOLAIRE DU COMTÉ DE BRANT et LE PROCUREUR GÉNÉRAL DE L'ONTARIO

c.

CAROL EATON et CLAYTON EATON

- et -

LE PROCUREUR GÉNÉRAL DU QUÉBEC,
LE PROCUREUR GÉNÉRAL DE LA COLOMBIE-BRITANNIQUE,
LA CANADIAN FOUNDATION FOR CHILDREN, YOUTH AND THE LAW,
LA LEARNING DISABILITIES ASSOCIATION OF ONTARIO,
L'ASSOCIATION DES CONSEILS SCOLAIRES PUBLICS DE L'ONTARIO,
L'ASSOCIATION SYNDROME DOWN DE L'ONTARIO,
LE CONSEIL DES CANADIENS AVEC DÉFICIENCES,
LA CONFÉDÉRATION DES ORGANISMES DE PERSONNES HANDICAPÉES DU QUÉBEC,
L'ASSOCIATION CANADIENNE POUR L'INTÉGRATION COMMUNAUTAIRE,
LES PERSONNES D'ABORD DU CANADA,
LA SOCIÉTÉ DU TIMBRE DE PÂQUES,
LA COMMISSION DES DROITS DE LA PERSONNE ET DES DROITS DE LA JEUNESSE

CORAM:
The Rt. Hon. Antonio Lamer, P.C.
The Hon. Mr. Justice La Forest
The Hon. Mme Justice L'Heureux-Dubé
The Hon. Mr. Justice Sopinka
The Hon. Mr. Justice Gonthier
The Hon. Mr. Justice Cory
The Hon. Madam Justice McLachlin
The Hon. Mr. Justice Iacobucci
The Hon. Mr. Justice Major

Appeal heard:
October 8, 1996

Judgment rendered:
October 9, 1996

Reasons delivered:
February 6, 1997

Reasons for judgment by:
The Hon. Mr. Justice Sopinka

Concurred in by:
The Hon. Mr. Justice La Forest
The Hon. Mme Justice L'Heureux-Dubé
The Hon. Mr. Justice Gonthier
The Hon. Mr. Justice Cory
The Hon. Madam Justice McLachlin
The Hon. Mr. Justice Iacobucci
The Hon. Mr. Justice Major

Concurring reasons by:
The Rt. Hon. Antonio Lamer, P.C.

Concurred in by:

The Hon. Mr. Justice Gonthier

CORAM:
Le très hon. Antonio Lamer, c.p.
L'honorable juge La Forest
L'honorable juge L'Heureux-Dubé
L'honorable juge Sopinka
L'honorable juge Gonthier
L'honorable juge Cory
L'honorable juge McLachlin
L'honorable juge Iacobucci
L'honorable juge Major

Appel entendu:
le 8 octobre 1996

Jugement rendu:
le 9 octobre 1996

Motifs déposés:
le 6 février 1997

Motifs de jugement par:
L'honorable juge Sopinka

Souscrivent à l'avis de l'honorable juge Sopinka:
L'honorable juge La Forest
L'honorable juge L'Heureux-Dubé
L'honorable juge Gonthier
L'honorable juge Cory
L'honorable juge McLachlin
L'honorable juge Iacobucci
L'honorable juge Major

Motifs au même effet par:
Le très hon. Antonio Lamer, c.p.

Souscrit à l'avis du très hon. Antonio Lamer, c.p.:
L'honorable juge Gonthier

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

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Argumentation écrite seulement par Lisa Mrozinski pour le procureur général de la Colombie-Britannique.

Argumentation écrite seulement par Cheryl Milne pour la Canadian Foundation for Children, Youth and the Law et la Learning Disabilities Association of Ontario.

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Melanie A. Yach
Geri Sanson

The Easter Seal Society:
Mary Eberts
Lucy K. McSweeney

La Commission des droits de la personne et des droits de la jeunesse:
Philippe Robert de Massy

Le Conseil des canadiens avec déficiences, la Confédération des organismes de personnes handicapées du Québec, l'Association canadienne pour l'intégration communautaire et les Personnes d'abord du Canada:
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La Société du timbre de Pâques:
Mary Eberts
Lucy K. McSweeney

La Commission des droits de la personne et des droits de la jeunesse:
Philippe Robert de Massy

Citations	Références
Ontario Special Education Tribunal, November 19, 1993.	Tribunal de l'enfance en difficulté de l'Ontario, le 19 novembre 1993.
Ontario Divisional Court: (1994), 71 O.A.C. 69, [1994] O.J. No. 203 (QL).	Cour divisionnaire de l'Ontario: (1994), 71 O.A.C. 69, [1994] O.J. No. 203 (QL).
Ontario Court of Appeal: (1995), 22 O.R. (3d) 1, 123 D.L.R. (4th) 43, 77 O.A.C. 368, 27 C.R.R. (2d) 53, [1995] O.J. No. 315 (QL).	Cour d'appel de l'Ontario: (1995), 22 O.R. (3d) 1, 123 D.L.R. (4th) 43, 77 O.A.C. 368, 27 C.R.R. (2d) 53, [1995] O.J. No. 315 (QL).

PARAGRAPH NUMBERING

The reasons are published in the SCRs by order of precedence and the paragraph numbering included in those reasons has been prepared accordingly. For this case, the reasons will be published in the following order:

Lamer C.J. (paras. 1 to 4)
Sopinka J. (paras. 5 to 81)

N.B.: The paragraph numbering will now appear in the SCRs.

NUMÉROTATION DES PARAGRAPHES

les motifs sont publiés dans le RCS par ordre de préséance et les paragraphes contenus dans ces motifs ont été numérotés en conséquence. Dans le présent cas, les motifs seront publiés dans l'ordre suivant:

Le juge en chef Lamer (par. 1 à 4)
Le juge Sopinka (par. 5 à 81)

N.B.: La numérotation des paragraphes figurera désormais dans le RCS.

eaton *v.* brant co. bd. of educ.

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

v.

Carol Eaton and Clayton Eaton *Respondents*

- and -

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

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

File No.: 24668.

1996: October 8; 1996: October 9.

Reasons delivered: February 6, 1997.

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

on appeal from the court of appeal for ontario

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

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

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

Held: The appeal should be allowed.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Cases Cited

By Sopinka J.

Considered: *D. N. v. New Brunswick (Minister of Health & Community Services)* (1992), 127 N.B.R. (2d) 383; *Ontario (Workers' Compensation Board) v. Mandelbaum, Spergel Inc.* (1993), 12 O.R. (3d) 385; *R. v. Beare and R. v. Higgins*, (1987), 31 C.R.R. 118; *Citation Industries Ltd. v. C.J.A., Loc. 1928* (1988), 53 D.L.R. (4th) 360; **referred to:** *R. v. Turpin*, [1989] 1 S.C.R. 1296; *Roberts v. Sudbury (City)*, Ont. H.C., June 22, 1987, unreported; *Slaight Communications Inc. v. Davidson*, [1989]

1 S.C.R. 1038; *Miron v. Trudel*, [1995] 2 S.C.R. 418; *Egan v. Canada*, [1995] 2 S.C.R. 513; *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143; *E. (Mrs.) v. Eve*, [1986] 2 S.C.R. 388; *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315.

By Lamer C.J.

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

Statutes and Regulations Cited

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

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

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

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

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

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

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

Family Services Act, S.N.B. 1980, c. F-22.

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

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

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

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

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

Authors Cited

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

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

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

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