** Unedited **

Indexed as:
Eaton v. Brant County Board of Education

Between
Carol Eaton and Clayton Eaton, Applicants, and
The Brant County Board of Education, Respondent

[1994] O.J. No. 203
DRS 94-06591
Action No. 42/94

Ontario Court of Justice - General Division
Divisional Court - Toronto, Ontario
Carruthers, Dunnet and Adams JJ.
Heard: February 8, 1994.
Oral Judgment: February 8, 1994.
Released: February 11, 1994.
(8 pp.)

Education law -- Administrative law -- Judicial review -- Placement in special class.

Application to quash a determination of the Ontario Special Education Tribunal that an educational placement in a special class best met the special needs of a student. The student had cerebral palsy, was unable to communicate orally and to use sign language meaningfully.

HELD: Application dismissed. The Tribunal was worthy of curial deference, but in any event had not erred. Its post-hearing review of the literature to which the experts generally referred did nothing more than confirm its independent assessment of the evidence before it and the various admissions of the applicants' experts with regard to that research. The court had difficulty appreciating how the Canadian Charter of Rights and Freedoms created a presumption in favour of one pedagogical theory over another.

STATUTES, REGULATIONS AND RULES CITED:
Canadian Charter of Rights and Freedoms, 1982, s. 15.
Education Act, R.S.O. 1990, c. E.2.
Education Act Regulations, 305, R.R.O. 1990.
Human Rights Code, s. 14.

Anne Molloy and Janet Budgell, for the Applicants.
Christopher Riggs, Q.C. and Brenda Bowlby, for the Respondent.
Dennis Brown, Q.C. and John Zarundy, for the Intervenor, the Attorney General for Ontario.

The judgment of the Court was delivered by

[para1] ADAMS J. (orally):-- This application seeks to quash the determination of the Ontario Special Education Tribunal that an educational placement of Emily Eaton in a special class best meets her special needs, while a continued placement in a regular class, not only does not do so, but is detrimental to her.

[para2] Emily Eaton is a nine-year old student enroled in the Brant County Board of Education. Emily has cerebral palsy. She is unable to communicate orally and is unable to use sign language meaningfully. The Education Act, R.S.O. 1990, c.E.2. and its Relations set out a comprehensive scheme for the identification of exceptional pupils and for the placement of those students into educational settings where the special educational programmes and services appropriate to meet their needs can best be delivered. This scheme also provides for a right of parents to appeal the identification and placement of their children by school boards.

[para3] Regulation 305, R.R.O. 1990, sets out the requirement that every board of education set up an Identification, Placement and Review Committee, hereinafter the IPRC, to deal with the identification and placement of exceptional pupils in the first instance. From the IPRC, there is an appeal to a special education appeal board and, from this appeal board, parents may apply for leave to appeal to the Special Education Tribunal.

[para4] In November 1989, the IPRC for the Brant County Board, identified Emily as exceptional and determined that she would be placed, on a trial basis, in a kindergarten in the parents' neighbourhood school, with an educational assistant. In June of 1990, the IPRC determined that Emily would continue in kindergarten for the 1990-91 school year. In May of 1991, it was determined that Emily would be placed in the regular grade 1 class. During Grade 1, a number of concerns arose concerning the appropriateness of her continued placement in a regular classroom.

[para5] There is no need to itemize all the concerns, save to say that the teachers and educational assistants working with her came to the conclusion, based on this three-year experience, that the continued placement was not in Emily's best interests and, indeed, that its continuation might well harm her. These concerns were shared with the IPRC and Emily's parents. Thereafter, and by decision dated February 24, 1992, the IPRC confirmed Emily's identification as an exceptional pupil, but determined that she would be placed in a special education class. Emily's parents appealed this decision to a special education appeal board which unanimously confirmed the decision of the IPRC. The Eatons then appealed, a leave hearing being waived, to the Ontario Special Education Tribunal. This application is in respect to the resulting decision of that tribunal.

[para6] In the intervening year between the IPRC decision and the conclusion of the appeal hearing, Emily remained in a regular class placement in Grade 2, pursuant to the order of Borins J., dated September 11, 1992. Her teachers and educational assistants continued, however, to be concerned about Emily.

[para7] Before this court, it was argued that the Tribunal was not expert, as evidenced by the presence of only "a final and binding" style privative clause. The essential errors alleged to have been committed by the Tribunal were: (1) conducting its own literature search on the close of the hearing, without permitting comment by the applicants prior to the Tribunal rendering its decision; and (2) failing to place on the Board of Education a legal burden, said to arise under the Education Act by implication from the Charter of Rights and Freedoms and the Ontario Human Rights Code, to establish that the transfer of Emily out of the regular class to a special education class would be clearly better for her. With respect to this latter ground, it was also submitted that the Tribunal had no basis for rejecting the expert evidence adduced by the applicant that "an integrated approach" was almost always the preferred approach. It was further submitted that there was no evidence before the Tribunal affirmatively establishing that the special education class proposed would redress the concerns raised about Emily's education and would be clearly better for her. Finally, it was submitted the Tribunal failed to deal with evidence that a special education class would present its own negative problems for Emily.

[para8] We are all of the view that this specialized body dealt comprehensively and thoughtfully with all the issues raised before it and with the central focus being what was best for Emily in all of the circumstances. It had before it the evidence of three years of experience with Emily in a regular class environment; the evidence of Emily's parents, based on their experience with her and their understanding of her needs; and the evidence of various expert witnesses. The Tribunal accepted that a regular class was to be considered the preferred placement, as long as this was consistent with the best interests of a student in any particular case. The Tribunal was also conscious of the Charter of Rights and Freedoms and the Ontario Human Rights Code.

[para9] Against this backdrop and after a 21-day hearing, the Tribunal unanimously denied the appeal and affirmed the determination of the IPRC of February 24, 1992.

[para10] While we find the Tribunal to be worthy of curial deference given the structure of the legislation, the subject matter, and the composition of the Tribunal, we can find no error of law on the record before us in any event. Onus did not play a role in the Tribunal's determination. It found there was ample evidence before it establishing that the recommended placement was in Emily's best interest. This was a factual determination it was entitled to make on the evidence placed before it. There was also no legal error in giving the weight it did to the testimony of the three experts called by the applicants, having regard to the evidence they gave and the admissions they made.

[para11] Furthermore, we are not satisfied, in these particular circumstances, that the Tribunal's post-hearing review of "the literature" to which the experts generally referred did anything more than confirm its independent assessment of the evidence before it and the various admissions of the applicants' experts with regard to that research. Indeed, we note that counsel for the applicants, in an argument directed at seeking to place before the Tribunal certain articles in the literature, stated that the Tribunal was:

> ... an expert Tribunal and what I am doing is putting forward articles which you've already read, at least know about, and I am pointing to the ones in which I would place emphasis. There's nothing to

> stop you from reading these articles in any event. I would expect that you probably would do that.

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

[para12] Finally, we have great difficulty in appreciating how the Charter of Rights and Freedoms and the Ontario Human Rights Code create a presumption in favour of one pedagogical theory over another, particularly when the implementation of either theory needs the protection of the saving provisions found in s. 15 of the Charter and s. 14 of the Code. But in this case, that issue is entirely academic because the Tribunal found the evidence clearly established that Emily's best interests will be better served with the recommended placement.

[para13] In dismissing this application, however, we echo the Tribunal's reminder that our decision does not relieve the School Board and the parents of the obligation to collaborate creatively in a continuing effort to meet Emily's present and future needs.

[para14] There is no order as to costs.

ADAMS J.
CARRUTHERS J.
DUNNET J.

DRS

End of document list.