Court File No. 24668

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

B E T W E E N:

THE BRANT COUNTY BOARD OF EDUCATION

Appellant

-and-

CAROL EATON AND CLAYTON EATON

Respondents

FACTUM OF THE INTERVENORS, CANADIAN FOUNDATION FOR CHILDREN, YOUTH AND THE LAW and the LEARNING DISABILITIES ASSOCIATION OF ONTARIO

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PART I - THE FACTS

1. The Canadian Foundation for Children, Youth and the Law, (the "Foundation") operates a community legal clinic specializing in children's law under the name "Justice for Children and Youth".

2. The Foundation has a province-wide membership comprised of individuals and agencies who work with children and youth or who are committed to protecting and promoting their rights. The Foundation was constituted for the purpose of promoting the rights of children and youth and their recognition as individuals under the law.

Affidavit of James Docherty and Sharon Bell-Wilson, Motion Record of the intervenors, the Foundation and the Learning Disabilities Association of Ontario, paras. 6-7

3. The Foundation has represented numerous children and parents in their dealings with the education system, and in particular in their special education issues. Justice for Children and Youth has appeared before tribunals and Identification Placement Review Committees constituted under the *Education Act*. Because pupils who are not adult pupils do not have party standing under the *Education Act* in either student discipline hearings or appeals or before IPRC's or special education tribunals, justice for Children and Youth has been required to advocate on behalf of the minor pupil through the parent. Since the clinic is not retained to and their mandate is to represent the wishes and interests of the minor pupil, if there is a conflict between the minor pupil and the parent, Justice for Children must withdraw from the proceeding, leaving the pupil without any representation. In many proceedings under other legislation, Justice for Children and Youth acts for minors who have standing, on the instructions of these minor clients.

Affidavit, *supra*, paras. 9-10

4. The Foundation has consistently advocated for the rights of the pupil to standing in special education matters, the right of the pupil to consent to placement and the right to an appropriate education including the right to a continuum of services. The program contents of a placement and the setting may be integral parts of what constitutes an appropriate placement. Further, to be appropriate, a placement must embrace the concept of equal treatment and not be

discriminatory.

Exhibit A to the Affidavit , *supra* at 2, 13.
Exhibit C to the Affidavit, *supra*
Exhibit D to the Affidavit, *supra*
Exhibit E to the Affidavit, supra

5. The Foundation has advocated for the following components of an appropriate education, based in part on Californian case law and statue:

- an individual program
- program to follow an assessment
- student is offered an opportunity to benefit
- conformity with an education plan
- periodic evaluation
- program as suitable as that offered to the non-handicapped
- proper educational setting
- procedural safeguards to be observed

Exhibit A to the Affidavit, supra., at 4

6. The Learning Disabilities Association of Ontario ("LDAO") has a mandate to further the educational, social, recreational, legal, medical, vocational and employment opportunities for the learning disabled population of Ontario and to acquaint professionals in these fields with the current literature and research in the field of learning disabilities.

Affidavit, *supra* , paras. 17-19

7. LDAO has consistently supported the view that the purpose of special education programs and services is to enable exceptional students to reach their potential, both educationally and socially. Thus, no one setting, whether in a regular or a self-contained classroom, should be mandated [or presumed to be preferable] for all exceptional pupils.

8. Justice for Children and Youth and the Learning Disabilities Associations of Ontario believe that every child should have a right to an integrated placement that is meaningful to them. For children with learning disabilities, this right may need to be preceded by a right to a specific, congregated classroom in order to give them the skills to learn. For another child, peer integration may be what makes it meaningful. Each pupil has the right to choose what is

meaningful.

9. The Foundation and LDAO believe that every child should have a right to an integrated placement that is meaningful to them. In order to actualize this goal, some children need the right to a specialized, perhaps congregated setting in order to give them the skills to eventually be integrated should they choose to be. These rights are not mutually exclusive. For other children, the right to peer interaction may be what makes the placement meaningful and hence they should have access to an integrated setting, with or without supports. Each pupil/parent should have the right to choose what facet of placement is meaningful to them.

10. In a growing number of jurisdictions, the integration of all children with special needs into the mainstream has become a priority. Self-contained or "segregated" classes are often not considered for philosophical reasons.

C. Hodder, "Balance and Diversity in Special Education" in Special Education: Bridging the Centuries, 1991 at 1

11. A concern exists among those who work with students with learning disabilities that " inclusion practices do not provide appropriate services for students with learning disabilities"

S. Vaughn and J.S.Schumm, Responsible Inclusion for Students with Learning Disabilities, (1995) 28 Journal of Learning Disabilities, 264
C. Hodder, *supra*, at 3

12. Recent research in refereed journals critically questions the focus on "where "students with learning disabilities are educated rather than the more central questions of what and how to teach them. In the setting -focused, inclusive programs examined, there was almost no specific directed, individualized, intensive remedial instruction of students who were clearly deficient academically. Special education with a unique curriculum for a child with a disability, careful monitoring of student progress, instruction based on assessment data, and advocacy for the individual student's unique needs, were not observed in these settings.

J.M. Baker and N. Zigmond, "The Meaning and Practice of Inclusion for Students with Learning Disabilities" (1995), 29 Journal of Special Education 163, at 163, 171, 173, 175, 177, and 178.

T.E. Scruggs and M.A. Mastropieri, "What Makes Special Education Special? Evaluating Inclusions with the Pass Variables" (1995), 29 Journal of Special

Education, 224.

13. Given the unique needs of each child, even within the range of learning disabled children, it is recognised that a continuum of services with adequate resources should be available to pupils with special needs.

Vaughn, *supra* at 265.
R. Roberts and N. Mather, "The Return of Students with Learning Disabilities to the Regular Classrooms: A Sellout?" (1995), 10(1) Learning Disabilities Practice 46 at 52.
National Joint Committee on Learning Disabilities, "A Reaction To Full Inclusion: A Reaffirmation of the Right of Students with Learning Disabilities to a Continuum of Services" (1993), 26, #9 Journal of Learning Disabilities, 596.

14. For many learning disabled students, the special class or resource room with a small student teacher ratio is a necessary ingredient for learning and the student will do better in this context. Within this model, program content , teaching styles and training of personal can be critical.

Scruggs, *supra*, at 231.
C. Hodder, *supra*, at 2-3.
Roberts and Mather, *supra* at 51.
M. Carr, "A Mother's Thoughts on Inclusion" (1993), 26, #9, Journal of Learning Disabilities, 590 - 592.

15. The very nature of the disability i.e. attention deficit disorder may lead to "distractibility" and an inability on the part of the student to concentrate and therefore, learn, in a traditional classroom. For other children the inability to translate oral communication into written communication may inhibit learning in a large class, in which traditional teaching methods are utilized. The severity of a learning disability may warrant a congregated classroom.

Reference may be had to: Re Thomson et al and The Queen (1988) 63 O.R. (2d) 489 (Ont. H.C.)
Carr, *supra*

16. In Ontario, the legislation at one time provided for a "hard to serve" designation for pupils who simply could not function in the regular classroom. This designation led to funding of an appropriate education in a private school and generally for a very specialized classroom with a very low student teacher-ratio. This designation, if not used to exclude students in a

discriminatory fashion, without their consent, could be viewed as part of a continuum of services.

> **Education Act, R.S.O. 1990, c. E.2., s.35 (s.35 Repealed 1993).**
> **Re. Thomson, *supra*.**

17. With respect to consent to placement, it is of great import to examine the viewpoint of the ultimate consumer: the child. In one study which looked to the issues of peer acceptance ; impact on self image and perceived efficacy of special education programs, the researchers found that given the realities of the education system, the choice of the majority of learning disabled youth studied, was not the mainstream class.

> Instead of implementing inclusion, most respondents suggested retaining the services in small separate classrooms but removing any labels and making the special education curriculum challenging and relevant. What this group of students sought was meaningful, active learning.
>
> **B. Gutterman, "The Validity of Categorical Learning Disabilities Services: The Consumer's View" (1995), 62 Exceptional Children, No. 2, 111 at 120.**

PART II - ISSUES

18. The Appellant has stated the issues in this appeal as follows:

(1) Did the Court of Appeal err in proceeding, *proprio motu*, to review the constitutional validity of the *Education Act*, R.S.O., c. E.2?

(2) Did the Court of Appeal err in finding that the *Education Act* gives school boards a discretion to violate the *Charter*?

(3) If the Court of Appeal properly reviewed the constitutional validity of the *Education Act*, do s.8(3) of the *Education Act* and s.6 of Regulation 305 of the *Education Act*, infringe Emily Eaton's equality rights under s.15(1) of the *Charter*?

(4) If so, are s.8(3) of the *Education Act* and s.6 of Regulation 305 of the *Education Act* justified as a reasonable limit under s.1 of the *Charter*?

(5) Did the Court of Appeal err in finding that parents have the right to choose whether their children's equality rights will be overridden?

(6) Did the Court of Appeal err in remitting the matter back to a differently

constituted Tribunal?

19. The Intervenors will not address each of the issues stated by the Appellant. Instead the Intervenors will address the issues as follows:

A. Constitutional Analysis of the *Education Act* -- encompassing the Appellant's issues #1 and #2.

B. Pupil's Standing and Right to Choose -- pertaining to the Appellant's issue #5.

C. Equality Analysis -- Appellant's issues #3 and #4.

PART III - ARGUMENT

A. CONSTITUTIONAL ANALYSIS OF THE *EDUCATION ACT* (Appellant's Issues #1 & #2)

20. The Intervenors support the argument on behalf of the Respondents that the arguments raised under the *Charter* should have been addressed by the Court of Appeal. It is submitted that it would not be appropriate to deal with the *Education Act* in a vacuum and that the *Charter* as the paramount law, must be considered in order to place the issues in context.

21. In order to properly consider the constitutional framework within which the issues arise, it is submitted that this Honourable Court will need to turn its mind to the constitutional right to an appropriate education and the constitutional right to self-determination.

22. It is submitted that all pupils enjoy a right to an appropriate education pursuant to section 7 of the *Charter* as a life and security of the person interest. Basic education is fundamental to daily life in today's society. Individuals who are denied educational opportunity will find themselves with severely limited options for their future. This will have profound "psychological, economic and social consequences" on an individual's life.

***R. v. Morgentaler,* [1988] 1 S.C.R. 30 per Wilson J. at 554.**

23. That children have a right to an appropriate education is supported by Canada's international human rights obligations. Pursuant to the United Nations' Convention on the Rights of the Child, a child has a right to an education which will develop the child's personality,

talents and mental and physical abilities to their fullest potential.

> ***Convention on the Rights of the Child*, Articles 28(1) and 29 (1)(a), as adopted by the National Assembly of the United Nations, November 20, 1989**
> See also: **International Covenant on Economic, Social and Cultural Rights, (1976) 993 U.N.T.S.3. , [1976] C.T.S. 46; Article 13 (in force in Canada , August 19, 1976); *Declaration on the Rights of the Child*, 1959, Principle 7.**
>
> [It is well recognized that international covenants may be relied upon when interpreting domestic legislation and the *Charter*.]
>
> ***Slaight Communications Inc. v. Davidson* [1990] 1 S.C.R. 1038, at 1078.**

24. Further, Canadian Courts have recognized the value of education as a necessity of life:

> No proof is required to show the importance of education in our society or its significance to government. The legitimate, indeed compelling interests of the state in the education of the young is known and understood by all informed citizens.
>
> ***R. v. Jones* [1986] 2 S.C.R. 284 at 289**
> ***T.O.A. v. Regional Municipality of Peel* (1982), 35 O.R. (2d) 260 (C.A.)**

25. It is submitted that the right to self-determination is a life, liberty and security of the person interest under section 7 of the Charter. The right to make decisions about ones life and body are well-recognized in our society and are subject only to reasonable limits under section 1 of the Charter. It is submitted that minors have the same rights as adults in this regard and that to hold otherwise would be contrary to section 15 of the Charter. What may differ for minors is what constitutes a reasonable limit on the right to self -determination. We have complex, flexible rules in law to accommodate the balance between rights and best interests. The common law doctrine of emancipation recognizes the evolving maturity of minors and their ability to make life decisions for themselves. The Convention and the law with respect to consent to treatment are also useful points of reference in this regard. A child who understands the nature and consequences of refusing or consenting to medical treatment is the subject of the same presumption of competency for the purposes of making decisions about his or her body as an adult.

> ***Morgentaler, supra***
> ***Health Care Consent Act*, S.O., 1995**
> **Convention, *supra***
> ***Gillick v. North West Norfolk [1985] 3 All E.R. 402 (House of Lords)***

Hewer v. Bryant [1969] 3 All E.R. 578 (C.A.)
***R. v. M(C)* (1995), 23 O.R. (3d) 629 (Ont. C.A.)**
Johnston v. Wellesley Hospital (1971) 17 D.L.R. (3d) 139 (Ont.H.C.)

26. If, in addition to the statutory right to an appropriate education, the right to self - determination and/or the right to an appropriate education are entrenched in the constitution as life, liberty and or security of the person interests then, in order that the pupil is not deprived of access to these constitutional rights, contrary to the principles of fundamental justice, party standing and consent to placement as discussed below are clearly mandated.

B. PUPIL'S STANDING AND RIGHT TO CHOOSE

(Appellants Issue #5)

27. The intervenors submit that the Court of Appeal erred by failing to address the standing of pupils to assert their own rights under the *Education Act* and under the *Charter*. As a result, the Court of Appeal articulated a test which potentially allows the rights of individuals to be waived without their input or consent. Furthermore, it allows the possibility that discrimination against an individual may be found to be justified without ensuring that individual's interests are advocated in that determination.

28. The intervenors submit that:

1) Pupils who are capable of making decisions regarding their education and of communicating them should have full party standing and the right to legal representation under the *Education Act*, or alternatively, if they have no standing, their views and wishes should be presented, considered and should be determinative.

2) The right to consent to placement is the right of the child who is capable of expressing his or her views and preferences.

3) Legal custodians (usually parents) of pupils are the best advocates for pupils who are not capable of making decisions regarding their education, unless there is evidence to the contrary.

4) Where such evidence exists an advocate or lawyer should be appointed for the child.

29. It is submitted that the overall position of these intervenors with respect to pupil standing and consent is consistent with the United Nations Convention on the Rights of the child, to which Canada is a signatory. The Convention recognizes the evolving maturity of minors and

the role of parent as substitute decision maker before any state intervention. The Convention strikes a balance between the right to be heard, the wishes of the child and the best interests of the child.

Convention, at articles 5, 12, 3, 9, 13, 14,1 8, 16.

1) FULL STANDING FOR PUPILS

30. Presently, only pupils over the age of 18 have standing under the *Education Act*. Students under 18 do not have standing to be heard at an IPRC meeting or Special Education Tribunal hearing.

Regulation 305, (under the *Education Act*, R.R.O. 1990 s. 2, 4, 6, 8, 9, 10, 11, and 12.

31. It is the position of the intervenors that it is inappropriate to deny pupils under the age of 18 standing under the *Education Act*. According to principles of the Convention the common law and *Charter* principles, pupils should have standing to assert their own rights to equal treatment in the provision of an appropriate educational placement.

Convention on the Rights of the Child

32. Article 12 of the Convention provides that a minor who is capable of forming his or her own views has the right to express those views in all matters affecting the pupil, the views of the child being given due weight in accordance with the age and maturity of the child and that, for this purpose, the child shall be provided with the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative.

Convention, *supra*, Article 12

Standing at Common Law

33. There is a general duty of procedural fairness on public authorities making administrative decisions that affect the rights or interests of an individual.

***Nicholson v. Haldimand - Norfolk Regional board of Commissioner of Police*, [1979] 1 S.C.R. 311.**

34. Principles of natural justice and fairness require that a person have an opportunity to be heard in proceedings which may have a serious impact upon his or her life.

***Singh v. Canada (Minister of Employment and Immigration)* (1985), 14 C.R.R. 13 at 53 (S.C.C.) .**

35. In two recent decisions, this Honourable Court has emphasized the significance of the common law principle of *audi alterem partem* in a constitutional context. In both cases witnesses were making claims that their constitutional rights under s.7 of the *Charter* were in jeopardy. In *R. v. O'Connor* this Court set out the process to be followed where a defence counsel wishes access to private records of a witness. This process gives the witness and anyone else affected the right to receive notice and an opportunity to make representations. In *L.L.A. v. B.(A.)* this Court held that in order to give effect to the constitutional right of privacy, and in recognition of the principle of *audi alterem partem*, a witness has a route of appeal to the Supreme Court of Canada. The rule that the individual whose life is affected has a right to be heard is well entrenched as a principle of fundamental justice.

***R. v. O'Connor*, [1995] 4 S.C.R. 411**
***L.L.A. v. B.(A.)* [1995], 4 S.C.R. 336**

36. It is submitted that choice of a special education placement can have a very serious impact upon an individual's life. Furthermore, a determination whether or not an individual's *Charter* rights have been infringed or whether an infringement can be justified under s.1 is a most serious matter, with far reaching implications for the individual affected.

37. Accordingly, the intervenors submit that common law rules of fairness and natural justice require that the pupil whose interests are affected by a special education placement should have full standing in any and all procedures regarding his or her placement. In the alternative, the pupil should at least have access to all of the information being considered during the placement determination process, have an opportunity to be heard and to have her views considered by the decision-makers.

38. If a student is unable to participate in the decision making process, an appropriate surrogate decision-maker should have all the student's rights of participation. The determination of who is an appropriate surrogate decision-maker is discussed further below .

Standing as a Principle of Fundamental Justice Under s. 7 of the *Charter*

39. It is submitted that consideration of a child's views and wishes in matters which affect the child should be recognized as a principle of fundamental justice, in and of itself. This is a principle which is reflected not only in the Convention on the Rights of the Child, U.N. but also in other international human rights agreements and in provincial legislation.

> ***Child and Family Services Act*, R.S.O. 1990, c. C-11, at preamble, ss.57, 107, 29(2)(b), 27(6), 37.2(1)**
> ***United Nations Convention on the Rights of the Child*, U.N. Doc A/RES/44/25 concluded November 20, 1989; entry into force September 2, 1990; in force for Canada December 13, 1991, at article 12**
> ***International Covenant on Economic, Social and Cultural Rights, 1966*, UNGA Res. 220 (XXI), CTS 1976/46, entered into force for Canada August 19, 1976 at article 1**
> ***The Declaration of the Rights of the Child (1959)* UNGA Res. 1386 (XIV), Nov. 20, 1959, Princ. 6,7**
> ***The Universal Declaration of Human Rights (1948)* UNGA Res. 217A (III), Dec 10, 1948 at articles 3, 6, 7**
> ***R. v. Big M. Drug Mart* [1985] 1 S.C.R. 295 at 331, 332, 334**
> ***Canadian Charter of Rights and Freedoms*, s.15(1)**

The *LLA* and *O'Connor* cases also support this proposition.

> ***L.L.A., supra.***
> ***O'Connor, supra.***

40. The intervenors submit, accordingly, that the principles of fundamental justice require that the pupil whose s.7 life, liberty and security of the person interests are affected by a special education placement should have full standing in any and all procedures regarding his or her placement. In the alternative, the pupil should at least have access to all of the information being considered during the placement determination process, have an opportunity to be heard and to have her views considered by the decision-makers.

Legal Representation

41. The Right to independent legal advice is a corollary of the right to be heard. For children and youth, this right is of particular importance. Meaningful input by the pupil should be ensured by the provision of counsel or an advocate.

***Joplin v. Chief Constable of the City of Vancouver*, (1982) 144 D.L.R. (3d) 285 (B.C.S.C.)**

42. In Ontario, the right of young persons to be heard and represented in matters which affect them has been dealt with in several contexts which are akin to the education context. For example, under the Ontario child welfare legislation, a child has access to legal counsel; standing if over 12 and possibly if under 12; standing in a status review; a right to participate in a plan of care; the right to have their views and wishes heard with respect to all matters that affect them, including residential placement. A child also enjoys the right to appeal a residential placement. Under the *Ministry of Correctional Services Act*, a youth in custody has similar rights with respect to a plan of care and can appeal the place of custody. A child facing a secure treatment placement has the right to be heard and the right to counsel .

***Child and Family Services Act*, R.S.O. 1990, c. C.11 ("CFSA") at 34 s.38; 39(4)(5)(6); 105; 107; 114(6); 96.**
***Ministry of Correctional Services Act*, R.S.O. 1990, c. M22, s. 52, 54(7)(a)**

43. Pursuant to the rules of the Family Court, a child may be appointed a representative if necessary but has standing to pursue matters on his/her own. Pursuant to the Rules of Civil Procedure, a minor must defend or initiate pleadings through a litigation guardian unless the court dispenses with the need for a guardian. The child nonetheless is the party to the proceeding, with standing. Provision for legal representation through the office of the Children's Lawyer (formerly the Official Guardian) is made under the child welfare legislation, the family court rules and the Rules of Civil Procedure.

Ontario Court (Provincial Division) Family Matters, R.R.O. 1990, Re. 199, s.10;
Rules of Civil Procedure, R.R.O. 1990, Reg. 194, Rule 7.
CFSA, supra, s. 38, s.124(8)

2) THE RIGHT TO CONSENT AS THE RIGHT OF THE CAPABLE PUPIL

44. The Appellant submits that the Court of Appeal erred in finding that parents can consent to a placement on behalf of a disabled student without looking first to the pupil. The intervenors agree with the Appellant in cases where the student is able to give or withhold his or her own consent. In such a situation the student should speak for him or herself. However, in the event that the student cannot speak for herself, or if this Honourable Court does not find that students

under the age of 18 should have the right to speak for themselves in special education proceedings, the legal custodian, usually the child's parent, should be presumed to be speaking on behalf of the child. The Intervenors refer to their argument at paragraph 25 above with respect to self-determination and add the following submissions.

45. A child has a right to an education which will develop the child's personality, talents and mental and physical abilities to their fullest potential. This is the right of the child and not of the parent.

***Convention on the Rights of the Child*, Articles 28(1) and 29 (1)(a)**

46. A minor pupil who is capable of forming his or her own views has the right to express those views in all matters affecting the pupil, the views of the child being given due weight in accordance with the age and maturity of the pupil.

***Convention on the Rights of the Child, supra*, Article 12 (1).**

47. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative.

***Convention, supra*, Article 12 (2)**

48. Pursuant to the CFSA, a child who is aged 12 or older, has the right to confidential counselling; the right to consent or refuse to coming before the court for a consensual protection order and the right to enter into or withdraw from a voluntary care agreement. At the age of 16, youth may withdraw from parental control without being compelled by warrant to return home and the right to receive social assistance. At common law, a minor can contract for necessaries of life and be held liable. It is therefore submitted that it is anomalous that a student be excluded from the requisite consents under the *Education Act*.

CFSA, supra.,s, 28; Part III
T.O.A. v. Peel, supra

3) SUBSTITUTE ADVOCATE/DECISION MAKER

49. If a student is unable to communicate his or her wishes or is *incapable of making a*

decision regarding placement then the intervenors submit that the student's legal guardian is the appropriate advocate and decision maker and should be presumed to be speaking on behalf of the child, taking into consideration his or her best interests.

50. Parents have historically been recognized, and are recognized at domestic and international law as being decision makers on behalf of their children. Parents are assumed to be custodians of their children, unless another determination has been made by a court, and have a certain amount of control over decisions affecting the child as an incident of custody. For example, parents who are legal custodians determine where their child (younger than 16) will live, decide whether or not to enrol their child in a private school or to teach them through an appropriate home school program. Parents are the first, designated substitute decision makers for a child who is not competent to give or refuse medical treatment.

> ***Childrens' Law Reform Act*, R.S.O. 1990, c. C.12 , s.20**
> ***Education Act*, supra., s. 21**
> ***Health Care Consent Act*, S.O.**
> ***UN Convention on the Rights of the Child, supra*, Articles 5, 9 & 18**

51. Parents are only denied their traditional role as decision-makers for their children when it is proven that the parents will suffer harm if the parents' decision-making power is not removed or when the parent's interests clearly conflict with the best interests of their own child. For example, in *B.(R) v. CASMT* referred to by the appellant, this Honourable Court found that it was appropriate that the Children's Aid Society put the parties' child under temporary wardship because her life was in danger because of the decision of her parents not to allow her to receive a blood transfusion. The entire child protection system, which allows Children's Aid Societies to remove children from their families and place them under wardship of the state, is predicated on the requirement of the Society to prove that the child is in need of protection. This finding is based on either a history of or a substantial risk of some sort of physical and or emotional harm.

> ***B(R) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315.**
> ***Child and Family Services Act, supra*, ss.37(2), s.40**

52. In *Goertz v. Gordon* this Honourable Court held that there was no presumption that custodial parents will act in the best interests of the child. However, that case involved a conflict between the interests of the custodial parent (ie., her desire to move) and the interests

of the child (to be with her non-custodial parent). In the absence of such a conflict, the intervenors submit, there should be a presumption that parents will act in the best interests of their children and that they are the most appropriate advocates on their children's behalf. Of course it should always be open for this presumption to be challenged, but in the absence of a clear indication that a child's custodian is not acting in the child's best interest, that custodian should be presumed to be speaking for the child, if the child cannot speak for him or herself.

> ***Goertz v. Gordon* (1996), Unreported decision of the Supreme Court of Canada, released May 2, 1996**

53. The appellant appears to submit that because parents do not always act in the best interest of their children the Court of Appeal erred by including a parental consent component in its remedy. The crux of the appellant's position seems to be that it is inappropriate to allow a parent to waive a student's equality rights, by consenting to a potentially discriminatory placement.

54. However, the appellant does not propose another advocate to represent the interests of the pupil during the placement determination process or to determine whether the *Charter* rights of the pupil should be waived. Rather, the appellant suggests that the Special Education Tribunal itself should be left to determine the best interests of the child. This analysis, in an apparent attempt to undermine the position of parents as advocates of their children's best interest, confuses the role of parental consent as set out in the remedy of the Court of Appeal. It is helpful to remember that this appeal is aimed at determining the proper legal framework in which placement decisions should be made.

55. It is the intervenors' submission that in this framework for the child's parents, not the Board of Education or the I.P.R.C., should be presumed to be speaking on the pupil's behalf, and in the child's best interests. The decision maker should not risk placing itself in the role of investigator or advocate in terms of the wishes and interests of the child as this would be contrary to the principles of fairness.

56. The Court of Appeal's remedy reads as follows:

> Section 8 of the *Act* should be read to include a direction that, unless the parents of a child who has been identified as exceptional by reason of a physical or mental disability

> consent to the placement of that child in a segregated environment, the school board must provide a placement that is the least exclusionary from the mainstream and still reasonably capable of meeting the child's special needs.

According to this test, which for the reasons outlined above the intervenors submit is inadequate, a placement is discriminatory unless it is the least exclusionary from the mainstream reasonably capable of meeting the child's needs. The role of the parent in this test is to consent, on behalf of a student, to a placement, recommended by the School Board, that is not the least exclusionary possible, and that is therefore discriminatory. The Special Education Tribunal would not be engaged at this point so, unless the appellant is submitting that every single placement determination go before the Special Education Tribunal, their argument that the Special Education Tribunal, and not the parents, should determine the best interests of the child is highly problematic.

57. Where a child is unable to participate in the decision-making process, it is submitted that the least impairment of the pupil's rights to self-determination/equality requires that the parent be placed in the role of substitute decision maker.

R. v. Oakes **[1986] 1 S.C.R. 103**

4) APPOINTMENT OF COUNSEL OR ADVOCATE

58. It is acknowledged that there may be situations in which the student's legal custodians do not have the student's best interests in mind. However, the solution to such a situation is to appoint an alternate advocate for the student's interests , not to deny parents any rights to speak on behalf of their children who cannot speak for themselves. As set out above, similar concerns are dealt with in Ontario by the appointment of the Childrens' Lawyer to represent children in child welfare proceedings. Under the predecessor the *Health Care Consent Act*, the Ontario government had a scheme of advocates set up under the *Advocacy Act*. This scheme was a means of ensuring that the rights of incapable persons were represented in their best interests by advocates, to the decision maker.

Health Care Consent Act**, supra**
Advocacy Act, s.o. 1992, (repealed in 1995)

C. EQUALITY ANALYSIS
(Appellant's Issues #3 & #4)

59. The intervenors submit that the Court of Appeal erred by providing a remedy to the discrimination suffered by Emily Eaton which, although responsive to her needs, articulates a test of general application which does not protect the equality rights of all disabled pupils. It is the position of the intervenors that the correct approach to this case involves an application of elements of both the Appellant's and the Respondents' arguments. The Appellant focuses on the individual nature of the special education system and on the necessity that placements respond to the individual educational needs of pupils. This approach reflects the importance of the efficacy of special education placements in ensuring that disabled students have an equal opportunity to benefit from the educational system. The Respondents' position underscores the primacy of *Charter* values and that it is essential that distinctions drawn on the basis of disability (as well as other enumerated or analogous grounds), regardless of their purpose, be held to the strictest scrutiny, taking into consideration the broad social, political and legal context.

60. The intervenor submits that the source of the Court of Appeal's error was the improper identification of the distinction which is the source of discrimination against Emily. By defining the distinction too narrowly, the Court of Appeal explored only one type of discrimination that may be experienced by disabled pupils in the public education system and accordingly fashioned an incomplete remedy. The Intervenors support the position of the Court of Appeal; however, that consent is an integral part of the test.

61. The intervenors submit that consent of the pupil or substitute decision maker as the case may be, is the starting point for the analysis. The intervenors submit that placement should be driven by the wishes of the pupil/parent and that the onus should rest with the Board to demonstrate why the placement is not viable.

62. The traditional test for identifying discrimination within the meaning of s.15 of the *Charter* was articulated by McIntyre J. of this Honourable Court in *Andrews v. Law Society of British Columbia*:

> 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.

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

63. Applying this test the Court of Appeal held that the distinction in this case was the decision to put Emily in a segregated class:

> In *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, 36 C.R.R. 193, an infringement of s.15(1) was said to occur when a distinction was made by a state actor, based on a prohibited ground, that deprived a person of a benefit or imposed a burden or disadvantage on him or her. Emily Eaton is prevented from attending a regular class, in her neighbourhood school, because of her disability. I have no difficulty in concluding that a classification has been made on a prohibited ground.
>
> Case on Appeal, pg. 12

64. It is the position of the intervenors that the distinction made by the Board was the identification of Emily as an exceptional student, within the meaning of the *Education Act*, and her subsequent progression through the special education system, which ultimately resulted in the decision that Emily be placed in a segregated class for the disabled. The imposition of the entire special education system is a distinction made by Boards of Education, in accordance with the *Education Act*, between some disabled students and non-disabled students, and it is that distinction which may give rise to discrimination. The Appellant, in its factum, recognizes that such a distinction is drawn.

Appellant's factum, para 64, pg 24 and para 75, pg 28

65. The intervenors do not take the position that the entire special education system in Ontario is always discriminatory and recognize that special education is an attempt to provide individuals with the real equality in education to which they are entitled under s.15(1). However, the system can have a discriminatory effect. For example, the intervenors agree that the application of the system resulted in discrimination against Emily Eaton. It is the position of the intervenors that it is important to consider other circumstances in which the special education system may result in discrimination, particularly when a broad remedy, which applies

to all exceptional pupils, is being fashioned.

66. In order to determine how the distinction of special education can be discriminatory it is necessary to examine the second part of the *Andrews* test, 'does the distinction impose a burden or disadvantage or withhold a benefit?'.

67. In Emily's case the benefit being withheld was the right to attend class with her age-appropriate peers. The intervenors do not dispute that in Emily's case this indeed is a benefit that she was denied, and that accordingly, placement in a segregated classroom imposed a burden on her. In their factum the Respondents thoroughly canvas the reasons why forced segregation of a disabled student is discrimination and must meet the test under s.1 in order to be justified.

68. However, the right to attend class with age appropriate peers is not the only benefit of the education system in Ontario. A very significant benefit of public education is the right of a pupil to be in an environment which allows and enables him or her to learn. Put in another way, one of the benefits of public education is the equal opportunity to be educated.

69. Furthermore, it is important to remember that not all disabled are alike nor do they experience discrimination in the same way. Many, perhaps the majority of disabled people suffer predominantly from exclusion from the mainstream. However some have suffered from being denied identification as disabled people, denied separation from the mainstream to the extent required to accommodate their special needs. In the educational context this type of treatment can be seen in the placement of those with specific learning disabilities like dyslexia

or of those with attention deficit hyperactivity disorder in integrated classroom settings. To assume that the primary concern of a disabled student is maximizing peer interaction is to fall prey to another form of stereotyping, presuming that all disabled individuals have difficulty socializing with their peers.

Gutterman, supra

70. Some children with disabilities, for example, those with attention deficit disorder or those with learning disabilities , have been discriminated against by being denied identification as exceptional pupils and by being denied an education in a smaller self-contained class or school with access to the necessary instructional and remedial expertise. For many learners with disabilities, educational separation in the comparatively short term provides an equal educational opportunity for lifetime integration and equality.

Re Thomson, supra

71. Emily Eaton did not allege that she was being denied an equal opportunity to be educated. The crux of her claim of discrimination was that she was being denied an opportunity to experience her education in a particular setting, a setting which is the norm for non-disabled students and which provides Emily with the benefit of early interaction with her peers. As a result, the question of which setting was most conducive to Emily's learning was, *in Emily's case*, not the issue. The Court of Appeal recognized this in their reasoning below:

> Whether the placement that is offered to Emily is of equal or even superior value is not relevant to a finding of discrimination. It is only relevant to the s.1 analysis which needs to be embarked upon if the discriminatory treatment is to be justified.
>
> Case on Appeal, pg. 17, emphasis added

72. However, the Court of Appeal erred, the intervenors submit, by overgeneralizing and assuming Emily's experience of discrimination in the public education system is representative of that of all disabled students. The Court of Appeal went on to say that "[t]he constitutional right that is at issue in these proceedings is not the right to be educated but the right to equality". The intervenor submits that although it is possible to articulate Emily's position in such a manner, because she is claiming that the benefit she has been denied is the benefit of receiving her education in the same setting as her peers, the right to equality in the educational context does include the right to be educated, or more accurately, the right to have an opportunity to be educated that is equivalent to that of others pupils.

73. Another individual may claim that he or she is being denied an equal opportunity to be educated because the particular placement being imposed upon him or her by the Board does not provide him or her with an opportunity to learn that is equivalent in value to that provided to non-disabled students. Whether a disabled student's opportunity to learn is equivalent to that of her non-disabled peers depends entirely on the nature of her disability, whether and how that disability effects the manner in which she learns, and whether the special education placement provided to her appropriately accommodates her needs. Thus an effects approach to the *Charter* analysis as set out in the *Big M* and *Morgentaler* cases is the key. One must look to the impact on the group in question such as learning disabled students, women in regional communities trying to access therapeutic abortions, or Seventh Day Adventists.

Big M., supra.
Morgentaler, supra.

74. Accordingly, the legitimacy of such a pupil's claim of discrimination would have everything to do with educational efficacy and may have little or nothing to do with issues of socialization and peer interaction. Some disabled individuals may be unable to learn in an

integrated environment or it may be more important to others that they receive the best education possible within the system (at least to the equivalent educational opportunity of non-disabled students) than that they receive the full benefit of peer association. The remedy provided by the Court of Appeal to Emily Eaton will not assist those disabled individuals who experience discrimination by being denied special classes that they require in order to learn. In fact, the direction that the Court of Appeal read into the *Education Act* could exacerbate the situation of some disabled individuals by creating a *de facto* presumption of a particular educational placement.

75. It is when dealing with any possible trade-off between these different benefits of public education that the issue of the wishes and consent of the pupil becomes paramount. Both learning opportunity and socialization and peer interaction are benefits to which disabled students are entitled in public education, but it may not be possible for both to be fully obtained. It should be the student (or their substitute decision maker/advocate who decides which benefit should have paramountcy, if a choice between them is necessary.

76. The intervenor recognizes that there are many uncertainties surrounding pedagogical theories of efficacy of different educational settings. It is because of these uncertainties that the intervenors suggest that the wishes of the pupil (or their substitute decision maker/advocate) should be given paramount consideration and why the school Board should bear an onus of showing the placement choice of the student is definitely inappropriate. Although the Board may argue that it is the 'expert' regarding special education placements, School Boards also are concerned with interests other those of the individual student (budgetary etc.). Accordingly the student (or appropriate substitute decision maker/advocate) is in the best position to make decisions based solely on her own best interests in terms of protection of the constitutional right to equality in education (both learning & socializing aspects). The educational expertise of board educators ought not to displace the right of the individual pupil to be protected from the unchecked powers of the state.

77. It is the position of the intervenor that the power to make decisions of a fundamental nature, such as the way in which one's special educational needs are addressed, is a matter of human dignity. Disabled individuals have historically been forced to accept the 'help' of the

abled under the auspices of their 'best interests'. The right to decide what 'help' to accept is essential to human dignity and is connected to one's right to self-determination. It is necessary to consider these issues in discussing s.15 equality rights.

SECTION 15 (2) OF THE *CHARTER*

78. It is the position of the intervenors that the legislative and regulatory scheme regarding special education should not be characterized as an affirmative action programme under s.15(2), but rather as an attempt to meet the requirements of substantive equality in s.15(1):

> ... for the accommodation of differences, which is the essence of true equality, it will frequently be necessary to make distinctions. (Andrews, McIntyre, S.C.R. p. 169)

Section 1

The Intervenors submit that the arguments set out above would have equal bearing on an analysis of the issues which was framed within section 1 of the *Charter*.

PART IV: ORDER REQUESTED

The Intervenors respectfully request that this Honourable Court :

i) Consider the *Charter* arguments before it;

ii) Articulate a constitutional right to an appropriate education and to self-determination in the education context;

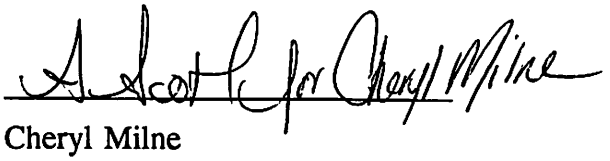
iii) Provide for or at least leave room for the right to standing for pupils under the *Education Act* and in the special education context;

iv) In formulating its relief for the discrimination faced by Emily Eaton, leave the door open for a continuum of placement options, the finding of discrimination and relief with respect to other types of discrimination which may be faced in educational placements by other children, including children with learning disabilities;

v) Incorporate the consent of the child or where appropriate the parent or if necessary, appointed advocate/decision maker into the analysis of discrimination and into the remedy as a pre-requisite to placement.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 30TH DAY OF JULY, 1996

BY:



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SCHEDULE A - LIST OF AUTHORITIES

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3.	*Slaight Communications Inc. v. Davidson* [1990] 1 S.C.R. 1038	7
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9.	*Nicholson v. Haldimand - Norfolk Regional board of Commissioner of Police*, [1979] 1 S.C.R. 311.	9
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13.	*R. v. Big M. Drug Mart* [1985] 1 S.C.R> 295 at 331, 332, 334	11, 21
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17.	*Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 at 174	18