

The Educational Rights of Special Needs Children in British Columbia

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¹ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.) 1982, c. 11.

Introduction

The following essay is a study of the legal rights of children with “learning disabilities” (“LD”) and other special needs in the education system of British Columbia. In this brief introduction, I will make a few comments about the scope, structure and argument of the paper. The exact subject of the paper is not easy to define. In terms of the kinds of disability under study, there is some stress on “learning disabilities”; but categories such as “LD” are, in both pedagogy and pathology, loose and dynamic, and LD children often have other related conditions, such as Attention Deficit Disorder (“ADD”). The paper is primarily about the rights of those with special educational needs. However, issues related to purely “physical” disabilities – such as access to buildings and transportation – will receive little attention in this paper. In terms of its jurisdictional-geographic boundary, the field of the paper is again inexact. The paper focuses on the statutory and administrative regime of British Columbia, but case law from other provinces is relevant because special education involves questions of civil and human rights.

Indeed, the most interesting and significant issue in special education law is the degree to which judicial interpretation of equality provisions in provincial human rights statutes and the *Canadian Charter of Rights and Freedoms*¹ (“*Charter*”) will overwrite education legislation. A conclusion of this paper is that courts have only begun the work of submitting special education regimes to the scrutiny of the *Charter* and human rights acts. The results are likely to be progressive and may result in some thoroughgoing alterations of educational practice, but there are many issues to settle and the future course of jurisprudence is not likely to be smooth. The problem of special education rights raises a host of difficult questions and has already tested and taxed the principles of equality jurisprudence.



The paper is divided into three sections: first, introductory comments on the history and policy concerns of special education law; second, an inspection of relevant statute provisions on special needs education in British Columbia; and third, a study of recent case law on special needs as an issue of human and civil rights. In this last section, I will not only examine questions that have been the subject of litigation – such as the right to integration – but also anticipate issues that parents may bring to court in the future. These concerns include the crucial question of whether school boards have a constitutional obligation to assess children for learning disabilities or ensure that staff members have a level of special needs training.

A "New Minority": Special Needs and Equal Rights

The practical question that this paper seeks to answer is the following: what rights do children with learning disabilities and special needs have in the education system of British Columbia? A court considering this question has to deal with four areas of controversy in the recent history of educational policy and human rights: the status of children in law and traditional concepts of the role of the state and judiciary in protecting vulnerable members of society; recognition in international human rights law of both children's rights and educational rights, and the impact of international standards on domestic law; the tension between the legislature, as the source of legal policy and legitimacy, and the courts, as guarantors of justice; finally, evolving professional and social thought on the theory and practice of special education and the nature of disability.

Special education law involves, first of all, the rights of children. Common and civil law traditions have always recognized what we might call the doctrine of "child vulnerability". Children, according to this view, have a

weaker sense of their rights than do adults, and less ability to protect their interests. Courts must keep in mind, then, the great imbalance of power between educator and pupil. Their ancient role in the exercise of *parens patriae* – the ability of the state to take parental responsibility for those unable to exert their own rights – might still have some relevance for the very modern question of what resources and rights special needs children can obtain from education bureaucracies.

But special education law concerns also new sources of protection for the young. The second aspect to note about Canadian education rights law is its relationship to a wider historical trend: the decades since World War Two have witnessed an elaboration of the natural rights of children. The young represent a minority of sorts, a discrete subgenus of humanity, with its own special experiences and necessities. In particular, children need education. Both the *Universal Declaration of Human Rights* and the *United Nations Convention on the Rights of the Child* recognize a “civil” right to education and some “welfare” or “entitlement” right to a free education.²

Canada is a signatory to these documents, but our domestic human rights law is not as explicit. No provision of the *Charter* expressly recognizes a “civil” right to education, though such basic liberties presumably come under the shelter of the s. 2 fundamental freedoms, such as thought and assembly. The “welfare” right of a child to a *free education* finds neither explicit nor implicit acknowledgment in the *Charter*. Similarly, only the human rights codes of Saskatchewan, Manitoba and Quebec even mention a right to education, and these provisions probably do not amount to a direct entitlement to free education, but simply designate education as a service that providers have to offer without discriminating on a prohibited ground.³ An *a priori* right of children to free public education is not part of rights law in Canada. Educational rights depend on the positive law of each jurisdiction. This fact means, for our purposes, that special needs groups can only use the equality principle of the *Charter* and human rights codes to ensure that provincial legislatures offer them the same rights as other children.

The third point about special education law is that it involves schools and education, which have a distinctive status in the Canadian constitutional and public administration scheme, one indeed that has recently forced the courts to consider the justice of educational statutes. Under the original *British North America Act (1867)*, now the *Constitution Act (1867)*,⁴ education is a provincial competence. Provincial governments have made full use of this authority. The various education acts regulate instruction and are the source of any entitlement to public education. Most Canadian schools are part of large, publicly funded systems. The managers of these systems are school boards that have a quasi-autonomous status; but

² The *Universal Declaration of Human Rights* GA Res. 217 (III) UN GAOR, 3rd Sess., Supp. No. 13, UN Doc A/810 (1948). Article 26(1) calls for free public education “at least at the elementary and fundamental stages.” In the *United Nations Convention on the Rights of the Child* (1990), Article 28 stipulates that primary education should be “available free to all”, while states must make various forms of secondary education “available and accessible to every child.”

³ *Saskatchewan Human Rights Code*, R.S.S. 1978, c. S-24.1, ss. 12-13; *Human Rights Code* (Manitoba), S.M. 1987-88, c. 45; *Charter of Human Rights and Freedoms*, R.S.Q. c. C-12 [Hereinafter “*Quebec Charter*”], s. 40.

⁴ *The Constitution Act 1867*, 30 & 31 Victoria, c. 3 (U.K.) s. 93.

there is no doubt that the state is deeply involved in Canadian education.

Indeed, the presence of a “state actor” transforms the social issue of special education into a subject of equality and civil rights. For instance, although the American racial desegregation controversy stands 30 years back in the past of another country, the shadow of this towering debate colours current Canadian jurisprudence and scholarship on the law of special education. But, while courts have a *Charter* obligation to police government for violations of civil rights, they retain some traditional reluctance to determine government policy.

Thus, special education law is marked by a tension between parliamentary supremacy and judicial review. Special education litigation, as we shall see, presses on courts both policy matters of a highly technical nature, as well as issues of resource allocation and entitlement, the problems of “distributive justice” that have historically been the prerogative of the legislature and executive. Problems of special education involve pedagogic theory and medical-psychological opinion; for this reason, courts have an incentive to stress the constitutional principle of the supremacy of parliament and leave much to the discretion of the legislature and educational bureaucracy. However, counterbalancing this policy of deference are two other social facts, the vulnerability of children and the relative weakness of parents in relation to government bureaucracy. Education, like health care, is one of those matters of “local or private” concern (to use the language of the *BNA Act*) that provincial governments have transformed into large, bureaucratic and very “public” operations. Faced with a public monopoly, parents have few options if they feel that their school board is not providing an adequate or fair education. The nature of modern schooling as a public utility is a strong policy reason for courts to stress the constitutional principle of judicial review. Parents often have no other redress.

The final fundamental aspect of the question “what rights do the learning disabled or special needs students have” centres on the word “disabled.” Like the rights of the child, the rights of the disabled have occupied considerable space on the public policy agenda since the Second World War. Indeed, the prerogatives of the disabled are better entrenched in Canadian domestic law than those of children: mental and physical disability is a prohibited ground of discrimination under both the *Charter* and the provincial human rights acts.⁵

However, the novelty and progressive character of these rights makes them difficult to define. Some of the uncertainty in the law of special education arises from the protean character of our philosophies of disability and equal rights as well as the changeability of educational theory and practice. If judges and legislators have not exactly been weathervanes, turned around by every new gust of pedagogic opinion, the wider social and

⁵ W.J. Smith and W.F. Foster, “Educational Opportunities for Students with Disabilities in Canada: A Platform of Rights to Build on” (1993-1994) 5 *Education & L.J.* 193 at 202; W.J. Smith and W.F. Foster, “Educational Opportunities for Students with Disabilities in Canada: How Far Have We Progressed” (1996) 8 *Education & L.J.* 183 at 189.

academic conversation about disability and rights has certainly swayed their judgment. Many authorities remark on a basic “paradigm-shift” in the theory, practice and legal regulation of special education. An older model portrayed the disabled as victims of an incapacitating affliction, unfortunates who require charity, consideration and treatment. The new model conceives of the disabled, including special needs students, as a minority group that needs most of all to stand for its own legitimate privileges, particularly the right of inclusion in society.⁶ Canadian law, as we shall see, has neither fully accepted the minority conception nor completely abandoned the older view, especially its pragmatic emphasis on treatment and special accommodation.

Unsurprisingly, the minority-rights vision of disability originates from the United States, with its deep-rooted traditions of judicial review and civil rights litigation. No doubt the link between civil rights and disability gave a vigorous and far-reaching character to the renovation of American special education policy in the 1970s. During the early years of that decade, several high profile cases, such as *Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania*⁷ and *Mills v. Board of Education of the District of Columbia*,⁸ established the principle that laws denying equal education to the disabled are unconstitutional under the 14th Amendment.⁹ These decisions, together with the general social concern with disability, prompted a broad federal intervention in special education.¹⁰ In 1975 the United States Congress approved the *Education for All Handicapped Children Act (EAHC)*, which is now the *Individuals with Disabilities Act (IDEA)*.¹¹ At a stroke, this statute put into force a vision of special needs education that Canadian law has been incrementally moving towards for 20 years.

Under the *EAHC-IDEA*, states can access federal funds for special education if they accept several principles and pedagogic devices. First, states and local educational agencies have a duty to seek out and identify handicapped children (as defined in law) and provide them with a free education and related services. Second, this schooling has to be “appropriate” rather than arbitrary or discriminatory. Appropriate education means that the needs of the specific child are paramount in the design of an academic strategy. Thus educators have to draw up an “individualized educational program” for every handicapped child. Third, instruction should occur in the “least restrictive environment”, which is a term of art for the integration of special needs students into regular courses and classes. Fourth, the *EAHC-IDEA* guarantees parents (and at some point children) rights of “due process” – what Canadians call natural justice or administrative fairness – in decision-making processes under the *IDEA*.¹²

The *IDEA* scheme has its detractors.¹³ For instance, the Act is detailed and, therefore, the special needs regime is perhaps inflexible and litigious. However, many in Canada see the *IDEA* model as something of the

⁶ Smith and Foster, 1996, *supra* note 5, at 184; W.J. Smith, “Affirmative Action for Students with Disabilities? Not Yet Says the Court of Appeal” (1994) 6 *Education & L.J.* 89.

⁷ 343 F. Supp. (1972).

⁸ 348 F. Supp. 866.

⁹ U.S. Const. amend. XIV.

¹⁰ See discussion in T.A. Sussel, *Canada’s Legal Revolution: Public Education, The Charter and Human Rights*. (Toronto: E. Montgomery Publications, 1995).

¹¹ 20 U.S.C. § 1401.

¹² D. Poirer, L. Goguen & P. Leslie, *Education Rights of Exceptional Children in Canada: A National Study of Multi-Level Commitments* (Toronto: Carswell, 1988) at 29; A. Brown & M.A. Zucker, *Education Law and Legislation in Canada* (Toronto: Carswell Publishers, 1998) at 219.

¹³ For a discussion of problems with the scheme in its early years see Sussel, *supra* note 10 at 53.

holy grail of special education litigation and lobbying crusades. In its comprehensiveness, the *EAHC-IDEA* does provide much that is absent in Canadian law. First, it represents an all-encompassing effort to reform American special education according to both the minority's right model and specific pedagogic ideas. Second, the *IDEA* has a quasi-constitutional authority, because it limits the power of state legislatures and the discretion of local governments. Finally, the provisions of the Act flow from a national recognition of the right of special needs children to a meaningful education. In this sense, the federal Canadian legislation that the *IDEA* most resembles is the *Canada Health Act*.¹⁴ It is probably true that Canadian special needs students do not have a right to appropriate education in the same way that Canadians have a quasi-constitutional right to health care. In the recent history of special education law in Canada, litigants have attempted to win rights like those in *IDEA* by means of the anti-discrimination provisions of the *Charter* and the provincial human rights acts.

The Sovereign's Will Has the Force of Law: Common Law, Courts and the British Columbia *School Act*

Provincial legislatures make school law in Canada. Enforceable rights in this area derive from statute. Positive laws dominate this important area of social regulation because, in part, the common law has little specific to say about education. Historically, matters of school law simply came under the private law fields of contract, tort or trust. The influence of private law has probably diminished because, for most of the national history of Canada, governments have exercised their powers of taxation to pay for a public system of education. Thus politics and public administration, not contractual bargains or private duties of care, shape much of the relationship between schools and their clientele. A dissatisfied electorate has the remedy of the ballot box, but children do not vote and individual parents, especially if their children have idiosyncratic needs or possibilities, have few remedies other than to negotiate with the school system. Thus special needs children, as a minority, are somewhat vulnerable to the will of the legislature and the electorate. Like any other minority, they may find democracy at times to be unresponsive, even menacing.

Courts have had neither the means nor the inclination to redress this imbalance. Traditionally, they have limited their jurisdiction to the enforcement of statutory educational rights, with considerable deference to the judgment of school officials in matters such as the placement of children who are somehow "different". Indeed, common law principles of statutory enforcement and administrative review have perhaps not changed very much since the Supreme Court of Canada discussed judicial examination of educational decisions in *Bouchard c. Saint-Mathieu-de-Dixville (Municipalité) Commissaire d'écoles*.¹⁵ At dispute in that case was the expulsion of two

¹⁴ *Canada Health Act*, R.S.C. 1985, c. C-6.

¹⁵ [1950] S.C.R.479 [hereinafter *Bouchard*].

children whom the Court found to be “backward mentally.” School authorities had ejected the boys for being unable to keep up with classes, and concomitant insubordination and misbehaviour. Rinfret, C.J.C., accepted the testimony of a doctor that it would be better for all involved if the children were placed in a special institution.¹⁶ The school trustees had, Rinfret C.J. noted, both a statutory duty to admit children and a statutory power to exclude them. In applying these provisions to particular a case, courts should, the Chief Justice held, defer to the judgement of the administrative decision-maker. Thus the Court validated the expulsions.

Similarly, in *Carriere v. County of Lamont No. 30*,¹⁷ the Alberta Court of Queen’s Bench held that it could examine issues of procedural fairness but not substance; it had no authority to determine the placement of a special needs student, since this was a matter of school board discretion. In *Yarmoloy v. Banff School District No. 102*,¹⁸ the same court declined to examine the merits of a refusal to re-register a developmentally delayed child who, in the opinion of the Banff School Board, would be better served by a special program in Calgary.

The fullest expression of the Canadian common law on the review of special education decisions is still the judgment of the British Columbia Supreme Court in *Bales v. Board of School Trustees (Central Okanagan)*.¹⁹ The case merits considerable attention because it may represent more of the current law than people recognize. The facts of the case were as follows. When Aaron Bales was eight, school officials removed him from his regular school and placed him in a segregated school. Aaron’s mental capacity was that of a child of about half his years. His parents opposed the segregated placement. Before the Court, they argued that the decision denied their child an ordinary education and that the school board had no authority to create segregated institutions.²⁰

The Court did not accept these arguments. The reasons of Taylor J. are long, perhaps because the Court felt it necessary to justify old rules to a new *zeitgeist*. When the case took place, the *Charter* was law and social inclusion for the disabled had been a visible objective of progressive social policy for more than a decade. However, the *Bales* decision preceded both the coming into force of the s. 15 equality provisions of the *Charter* and the 1989 revision of British Columbia’s school law. Thus, although Taylor J. recognized the potential benefits of integration, he decided the case simply by recognizing the authority of the school board to make placement decisions. Under the former *BC School Act*,²¹ school boards had to provide all students in their districts with “sufficient school accommodation and tuition, free of charge” (s. 155(1)(a)). The duty was enforceable, and in order to ensure that the right had some meaning, a court could, according to Taylor J., review decisions about education on *substantive grounds*. Boards

¹⁶ *Ibid.* 480.

¹⁷ August 15, 1978 (Alta.Q.B.) [unreported].

¹⁸ [1985] Alta.J. No. 562 (Alta.Q.B.), online: QL (AJ).

¹⁹ (1985), 54 B.C.L.R. 203 (S.C.) [hereinafter *Bales*].

²⁰ *Ibid.* at 205.

²¹ R.S.B.C. 1979, c. 375.

have to exercise their discretion reasonably.²²

However, a reasonableness standard of review, in administrative law, means considerable deference to the original decision-maker, and Taylor, J. noted strong reasons why the school board could expect consideration. First, the body had to deal with “politics” in the sense of policy, that is it had to establish an official position on matters of educational philosophy – such as integration – in which courts presumably have limited competence to meddle.²³ Second, the board, which was an elected body, also had to dispose of questions of “politics” in the sense of cutting the pie of public goods into individual portions. Even if integration were clearly beneficial, the Court stated, political decision-makers can withhold potential benefits, particularly since the statute did not oblige the School Board to do any more than provide a sufficient education. Similarly, Taylor J. noted that the private duty of care, according to the law of negligence, is limited to the avoidance of foreseeable harm, not the conferral of all possible benefits.²⁴ Thus, the Court dismissed the parent’s case with an evident sense of reluctance but a stronger commitment to parliamentary sovereignty.

Were *Bales* pleaded today, the outcome might be the same, but the arguments would be different, and the parents would have better ones. The first important change was that the constitutional ground for attacking segregation became much more solid. In *Bales*, the parents made a civil rights argument based on s. 7 of the *Charter*, which states:

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

The Court was not attracted to the idea that the segregation of special needs children represented a breach of s.7,²⁵ a provision designed to protect citizens from excessive state power, particularly in the justice system. However, s. 15 came into force three years after the rest of the *Charter*. Its purpose was clearly to protect against state discrimination:

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.

This language, combined with the recent history of desegregation in the United States, stimulated litigation on the issue of whether special need or disability could justify practices of separate (and perhaps equal) education.

An early example was *Elwood v. Halifax County Bedford District School Board*.²⁶ Luke Elwood had difficulty speaking and understanding when spoken to. Citing his developmental disability, the Halifax school board

²² Some commentators miss Taylor J.’s statements about reasonableness and assume that he simply validated a decision that was procedurally correct. See Sussel, *supra* note 10 at 57.

²³ *Bales*, *supra* note 19 at 215, 219 & 224.

²⁴ *Ibid.* at 225.

²⁵ *Ibid.* at 221.

²⁶ Consent order, unreported, June 1, 1987 [hereinafter *Elwood*]. See Sussel, *supra* note 10 at 58.

sought to place Luke in a class for special needs children at another school. Luke's parents challenged the decision as a breach of s. 15 equality rights. American language from the *EAHC*, such as "least restrictive environment", even made its way into the pleadings. The Nova Scotia Supreme Court saw enough merit in the claim to enjoin the school from carrying out the placement before judgement, and the s. 15 argument sufficiently impressed the school board that it consented to the parents' essential demands. The Court did no more than approve a negotiated settlement, but the case raised expectations of a constitutional prerogative to integrated education.²⁷ These hopes swelled when a similar case, *Rowett v. Board of Education*,²⁸ also resulted in a settlement favourable to the parents' view.

Rowett and *Elwood* suggested that provincial governments may have to modernize their education laws in order to meet the requirements of s. 15, and thus the second post-*Bales* change was progressive law reform. Concern for the welfare and rights of the disabled had already led Ontario to overhaul its special needs regime in the *Education Act*²⁹ (the "Ontario Act") of 1980. The new Ontario model mirrored the *EAHC* both in philosophy and structure; the statutory and regulatory provisions were detailed and specific.³⁰ Some of the particulars merit comment here because they are an interesting contrast to the BC system. Under s. 8(3) and s. 170(1) of the Ontario Act, the Minister and school boards have a duty to provide appropriate special education, but they are also responsible for "early and ongoing identification of the learning abilities and needs of the pupils." Decisions about identification and placement proceed within a fairly elaborate architecture of committees and appeal boards, so that the process has a quasi-judicial air and seems less a matter of political or bureaucratic discretion.³¹

Law reform in British Columbia was comparatively belated and circumscribed. Preparation of legislation for the rigours of judicial review was a reason Parliament postponed the effective date of s. 15. However, the BC government did not act until pressured by the early s. 15 cases and the lobbying efforts of increasingly rights-conscious parents.³² Two documents record the shift in public policy. In 1988, the Royal Commission on Education counselled the government and Ministry of Education (the "Ministry") to tailor education programs to the needs of particular students; its report stressed the need to recognize the rights of all students in the system.³³ Likewise, the Ministry of Education's *Mandate for the School System* (1989) spoke of the education of students according to their particular abilities.³⁴

This language of "appropriate education" was not hollow. Like most other education laws in Canada,³⁵ the *BC School Act*³⁶ ("BC Act") establishes a general right to education without qualifications as to disability.

²⁷ See Sussel, *supra* note 10 at 59.

²⁸ (1989), 69 O.R. (2d) 543 (Dist. Ct.).

²⁹ R.S.O. 1990, c. E.2.

³⁰ On the influence of the *EAHC* see: M.E. Manely-Casimir, "Equality in the Education of Special Needs Students: A Canadian Perspective" (1997) 9 *Education & L.J.* 276 at 277. For an overview of the law, see Brown & Zucker, *supra* note 12 at 213-218.

³¹ Manely-Casimir, *supra* note 30.

³² See Sussel, *supra* note 10 at 60.

³³ British Columbia Royal Commission on Education, *The Report of the Royal Commission on Education: A legacy for learners* (Victoria: Royal Commission on Education, 1988)

³⁴ *The Mandate for the School System* was approved at OIC 1280/89.

³⁵ Smith & Foster, *supra* note 6 at (1993-1994) 220 & (1996) 193.

³⁶ *British Columbia School Act*, R.S.B.C. 1989, c. 61. I will use the section numbers from the revised *British Columbia School Act*, R.S.B.C. 1996, c. 412.

S. 2 provides,

2 A person is entitled to enroll in an educational program provided by the board of a school district if the person

(a) is of school age, and

(b) is resident in that school district.

Similarly, s. 75 states,

75 (1) Subject to the other provisions of this Act and the regulations and to any orders of the Minister under this Act, a board must make available an educational program to all persons of school age resident in its district who enroll in schools in the district.

In defining a “school program”, as Terri Sussell notes,³⁷ the new legislation drops the term “sufficient”, which had influenced the court in *Bales*, and adopts the vocabulary of appropriate education. Under s. 1 an “educational program” is one “designed to enable learners to develop their individual potential.” As well, the power of ejection, which had allowed the school board in *Bouchard* to keep out two handicapped children, is quite limited under the current BC statute. Unlike most of the other provincial legislation, the BC Act has no “expulsion” exception to the general duty of boards to register students and the obligation of students to enrol.³⁸ Even suspension for misconduct requires the furnishing of an alternative education program.³⁹ As far as this writer is aware, the other ground for exclusion – “a communicable disease or other physical, mental or emotional condition that would endanger the health or welfare of the other students” – has not become an excuse to suspend special needs children.⁴⁰

These provisions are significant, but the new special needs regime actually came into being because of a revolution that took place in subordinate legislation. Lobbying by parents convinced the government to supplement the BC Act with the Special Needs Students Order, Ministerial Order 150/89.⁴¹ The order represents an adoption of the idea of “least restrictive environment”:

2 (2) A board must provide a student with special needs with an educational program in a classroom where that student is integrated with other students who do not have special needs, unless the educational needs of the student with special needs or other students indicate that the educational program for the student with special needs should be provided otherwise.

Special needs is defined quite broadly:

1 In this order “student with special needs” means a student who has a disability of an intellectual, physical, sensory, emotional or behavioural nature, has a learning disability or has exceptional gifts or talents.

³⁷ See Sussell, *supra* note 10 at 60.

³⁸ On the duty of students, see s. 3 of the BC Act, *supra* note 36. On expulsion in other jurisdictions, see Smith & Foster, *supra* note 6 at (1993-1994) 219 & (1996) 196.

³⁹ See BC Act, s. 85 (2) (c) and (d), *supra* note 36.

⁴⁰ *Ibid.*, s. 91(5). The duty of alternative education applies here as well. However, some parents would argue that misconduct suspensions often result from an inability of schools to cope with social and behavioural issues related to LD and ADHD.

⁴¹ Sussell, *supra* note 10 at 63. Note that in the original order, the only criterion for rebutting the presumption was the interest of the handicapped child, not his peers.

Thus the Government of British Columbia accepted the idea that special needs children have a right to an education amongst their peers, and it did so despite the fact that no court had yet said that an integration right is implied in s. 15 of the *Charter*.

Another aspect of the *EABC* model also came to be enforceable in subordinate legislation. According to The Individual Education Plan Order, Ministerial Order 638/95, special needs students are entitled to an Individual Education Plan (“IEP”):

2 (1) A board must ensure that an IEP is designed for a student with special needs, as soon as practical after the student is so identified by the board.

The order excludes students whose disability will have little effect on the goals or manner of their education.⁴² Individualized plans have to include specific targets for the student, as well as a list of services and materials required to attain the anticipated outcome.⁴³ Boards are obliged to have the IEPs reviewed at least once a year and, finally, schools have to follow through on the IEP:

5. Where a board is required to provide an IEP for a student under this order, the board must offer each student learning activities in accordance with the IEP designed for that student.

Thus, Ministerial Order 638/95 made manifest and substantial the rhetoric of appropriate education in the 1989 BC Act.

Parents also have more say under the new regime, though the administrative system is not as elaborate or deferential to parents as the Ontario scheme. Officials have to consult with parents when making determinations under either the Individual Education Plan Order or the Special Needs Students Order.⁴⁴ S. 11 of the BC Act entitles parents and students to appeal any decision or non-decision by an employee of the board if it “significantly affects the education, health or safety of a student.” However, the BC Act leaves the appeal process in the hands of the involved school board; the legislation has little to say on the crucial matter of appeal procedure and makes no provision for a second appeal to the Ministry or a third party.

This loose administrative framework may be sufficient for some disputes, but, given the importance of matters such as placement (which touches on rights protected by the *Charter*), a school board may have to go far beyond the requirements of the statute in order to assure an adequate level of procedural fairness. It is worth noting, as well, that a second appeal, of sorts, does exist. The BC Supreme Court can review these school board reassessments, but since the BC Act describes the decision as “final,”⁴⁵ a

⁴² Ministerial Order 638/95 s.2.

⁴³ *Ibid.*, s. 1.

⁴⁴ Ministerial Order 150/89 s. 2(1); Ministerial Order 638/95, s. 4. The Individual Education Plan Order also envisions consultations with the student where appropriate. In the Act itself, see also s. 7, under which a parent can compel consultation on a child's education program.

⁴⁵ BC Act, s. 11(6), *supra* note 36.

court would presumably, under principles of administrative law, only scrutinize the decision for errors of law, unreasonableness or even patently unreasonableness in reaching a conclusion. The school board is further insulated by the s. 1 “educational program” definition, where an appropriate education is one that “*in the opinion of the board*” is designed to develop the potential of individual students. Thus, according to the BC Act, it is the board, and not parents or a court, which should decide the contents of an appropriate education.

Under the new statutory scheme, school boards and school officials continue to control education. Broad bureaucratic discretion is no doubt necessary, and some of the new limitations on that discretion are considerable. The statutory presumption in favour of integration, in particular, is a very substantial reform. But one would not describe the reformation of 1989 as comprehensive. Almost nothing is said, for instance, about identification and assessment. A school board could thus avoid its obligations under the ministerial orders simply by discounting or not seeking out evidence of special need. Through this gap in the law fall LD and ADHD students, whose disabilities teachers may be slow to suspect or may misperceive as simple intellectual or social problems. Even a board intent on identification has no incentive for timely assessment. Thus a common complaint of special needs parents in BC is that waiting lists for assessments have stretched to two years. According to the detailed research of Smith and Foster, the lack of statutory identification requirements is a pan-Canadian problem.⁴⁶

In general, the BC Act is short on the administrative details of special education. The duty to implement educational programs is cast in general terms, as is the right to resources.⁴⁷ No provisions address vital matters such as special education training requirements for teachers and teacher aids or the integration of school programs with other social services for special needs children. The Ministry does publish *A Manual of Policies, Procedures and Guidelines*.⁴⁸ This large guidebook has the comprehensive character of the *EAHC-IDEA*; but it does not have the force of law, as *Bales* recognized.⁴⁹ Thus, for instance, the *Manual* recognizes the importance of “early identification”, and makes suggestions about how to ensure that appeal procedures conform to natural justice;⁵⁰ however, these statements are binding only in so far as they stay within the four corners of the ministerial orders on special education. Thus, the enforceable special needs regime of British Columbia amounts to a handful of provisions in subordinate legislation.

Besides legal authority, the Ministry does have another means of compulsion: supplemental funding grants for special needs students. As far as this writer has been able to determine, however, the Ministry only uses

⁴⁶ W.J. Smith and W.F. Foster, “Educational Opportunities for Students with Disabilities in Canada: Beyond the School House Door” (1993-1994) 5 *Education & L.J.* 305 at 333.

⁴⁷ According to s. 85(1)(c) of the BC Act, *supra* note 36, boards must provide “educational resource materials necessary to participate in the educational program.”

⁴⁸ British Columbia Minister of Education, *Manual of Policies, Procedures and Guidelines* (Victoria: Special Education Services) [hereinafter *Manual*].

⁴⁹ The policy manual at that time did offer some argument for the plaintiffs that the Ministry supported integration, though the Court found the document to express only general policy and not binding law. *Bales*, *supra* note 19 at 212-216.

⁵⁰ See A-5, *supra* note 48, and the Information Circular #439.

this power over the purse to enforce its categorization scheme for identifying learning disabilities. Naturally, the Ministry wishes to control its own budget and needs a mechanism to ensure that school boards do not use identification criterion to inflate their transfers. For example, the Ministry includes in the test for severe learning disability a requirement that, essentially, the student be two years behind his peers.⁵¹ Funding depends on adherence to this standard.

Not all parents are pleased with this criterion. Likewise dissatisfaction about delays in assessment, the use and consequences of identifications, the allocation of resources, the efficacy of education programs, the impartiality of appeal committees – all lead us back to the question of whether the *Charter* and human rights legislation provide special needs children with rights other than those enumerated in the BC Act.

General Human Rights, Minority Needs, Specific Public Duties

As noted above, counsel would argue *Bales* differently today because of the progressive law reform and because of the coming into force of the equity provisions of the *Charter*. As well, the BC *Human Rights Code* (the “Code”)⁵² provides as follows:

- 8 (1) A person must not, without a bona fide and reasonable justification,
- (a) deny to a person or class of persons any accommodation, service or facility customarily available to the public, or
 - (b) discriminate against a person or class of persons regarding any accommodation, service or facility customarily available to the public
- because of the race, colour, ancestry, place of origin, religion, marital status, family status, physical or mental disability, sex or sexual orientation of that person or class of persons.

Thus, for the past decade Canadian courts have had to decide whether school acts such as those of Ontario and BC are compatible with s. 15 of the *Charter* and provincial human rights legislation. We will now look at those judgments.

Two introductory points should be made about the case law. The first point relates to its quantity and relevance for British Columbia. Fewer cases are on the books than one might suspect because of a tendency, which we have seen in *Elwood* and *Rowett*, to settle before appeals are exhausted.⁵³ As well, many of the cases are on the issue of integration. In BC, mainstreaming is, by ministerial order, the presumed placement method. However, the “integration” cases suggest that a BC school board can easily justify a determination that circumstances had rebutted the presumption of integration, leaving it free to exercise its right (under Ministerial Order

⁵¹ *Ibid.* E-12

⁵² R.S.B.C. 1996, c. 210

⁵³ W.A. MacKay, “Human Rights and Education: Problems and Prospects” (1996) 8 *Education & L.J.* 69 at 74.

150/89) to place a child in a segregated environment.

The second point is that the currents of jurisprudence flow around certain basic, perhaps irresolvable tensions in the case law. One way of looking at the jurisprudence is as a contest between formal and substantive notions of equity. No doubt Brown and Zucker are correct when they point out that some parents are employing s. 15 of the *Charter* to prevent schools from distinguishing their children from their peers, while other parents use the same provisions to seek more special treatment.⁵⁴ But it is probably true that those parents are not so much interested in equality, however defined, as acquiring an appropriate education for their children; and the general notion of substantive equality, as the accommodation of difference, is fairly well established in law. The great policy dilemma, rather, is that special education litigation draws the courts into territory that they rarely entered before the era of civil rights judicial review. As noted earlier, special education involves issues – from abstract pedagogy to concrete choices on placement and resources – in which the courts may be ill equipped or unwilling to pry. As LaForest, J., said in *Law Society of British Columbia v. Andrews*,

Much economic and social policy-making is simply beyond the institutional competence of the courts: their role is to protect against incursions on fundamental values, not to second guess policy decisions.⁵⁵

At the same time, however, courts have to give meaning to specific statutory provisions, as Bales noted, and they have plain obligations under both the *Charter* and human rights codes to review positive legislation – even broad, public policy legislation – for conformity to the principle of equality. Judicial review also follows the canon that remedial legislation and constitutional documents should receive a generous and liberal interpretation. In addition, beyond this clear and sanctioned task to defend and advance civil equity, courts may simply also have inclinations to facilitate appropriate education and give some support to parents whose educational choices are limited to the public education system.

With these comments in mind, we can pick up again the thread of constitutional law as it was developing after *Bales*. A point fairly well settled since that case is the general application of the *Charter* to schools and special education. This was the *ratio* of the appeal in *Rowett*,⁵⁶ and the general relevance of the *Charter* is assumed in most recent case law, though courts have struggled somewhat with the relationship between the *Charter* and bureaucratic discretion. Similarly, although the *Code* does not mention education specifically, it would seem to fall under a “service or facility customarily available to the public.” That has been, at least, the presupposition in several special education cases under the *Code*.⁵⁷

⁵⁴ Brown & Zucker, *supra* note 12 at 213-218.

⁵⁵ [1989] 1 S.C.R. 143 at 94.

⁵⁶ See Sussel, *supra* note 10 at 59.

⁵⁷ *Adamer v. British Columbia (Council of Human Rights)*, [1999] B.C.J. No. 1804, online: QL (BCJ); *Deptford and Board of School Trustees of School District No. 63 (Saanich)*, February 27, 1992, unreported letter decision, BC Human Rights Council.

Most of the rights cases have been on the question of integration, which is both one of the most basic issues in special education law and probably also the rights claim best suited to civil rights arguments. Two lines of authority have split the case law, but the Supreme Court of Canada recently gave a fairly exhaustive treatment of the matter in *Eaton v. Brant County Board of Education*.⁵⁸ However, before we come to that decision, it is important to note that the broad viewpoints that have resulted in two lines of authority. The first line of authority is reluctant to view the problem of integration simply as a matter of minority rights. It tends to be sensitive to the practical pedagogic needs of the child and conscious of the limits of jural efficacy and judicial competence. This stream of thought is evident in two significant judgements from the Quebec Court of Appeal, *Régionale Chauveau (Commission Scolaire) c. Québec (Commission des droits de la Personne)*⁵⁹ and *Saint-Jean-sur-Richelieu (Commission Scolaire) c. Québec (Commission des droits de la Personne)*.⁶⁰ In both cases, the Court of Appeal rejected arguments that separate placement of special needs children amounts to discrimination under the Quebec *Charter of Human Rights and Freedoms*.⁶¹

Chauveau involved a secondary student with William's syndrome. He had followed the mainstream curriculum in elementary school, but a placement committee decided that he should go into a segregated class after grade 6. There is at least some indication that their reasons were based upon a formal notion of equality (which would not permit special status for a person in a regular class), a general rigidity in school standards, and an inability to provide services.⁶² The Human Rights Tribunal accepted the parents' position and held that the combined application of the *Quebec Charter* and the *Quebec Education Act*⁶³ (the "Quebec Act") results in a strong (though rebuttable) presumption in favour of integration.⁶⁴ Such a holding would have given special needs students in Quebec the same rights to integration as those in BC, despite the fact that the Quebec government had never put into force anything like Ministerial Order 150/89.

The Court of Appeal rejected the idea of an "integration presumption". Its decision was in several ways realistic. First, it was in agreement with *Saint-Jean* that children in Quebec only have a right to the education set out in the positive law of Quebec. The primacy of positive law persists despite s. 40 of the *Quebec Charter* – which states that every person has a right to a free education – because the provision limits this right "to the extent and according to the standards provided by law." Second, the Quebec Act does not include a right to integration. Third, the effect of s. 40 and s. 10 – the equality provision – is that boards have to accommodate children and integration is merely one way of doing so.

Rousseau-Houle, J.A., did not defend her position on the basis of formal equality, as had school officials. Quite the reverse, she argued that the

⁵⁸ (1995) 123 D.L.R. (4th) 43 (Ont. CA), rev'd [1997] 1 S.C.R. 241.

⁵⁹ (1994), 21 C.H.R.R. D/189 [hereinafter *Chauveau*].

⁶⁰ (1994), 21 C.H.R.R. D/173 [hereinafter *Saint-Jean*].

⁶¹ R.S.Q. c. C-12, *supra* note 3.

⁶² See Smith, *supra* note 6 at 90.

⁶³ R.S.Q. c.I-13.3, ss. 4, 239.

⁶⁴ Smith, *supra* note 6 at 99. Rivet J. did not go so far as to say that any segregated placement was a *prima facie* breach. Thus a school board would not necessarily have a burden to justify every special placement.

insistence on integration as a right is formalistic, while a flexible approach to the adaptation of services recognizes that the accommodation of difference is the real meaning of equality.⁶⁵ But if flexibility means substantive equality, why would parents oppose it? One reason is that an inflexible right is a right upon which a person can rely; the alternative to integration is somewhat foggy. As Rousseau-Houle J.A. noted, the combination of s. 10 and s. 40 of the *Quebec Charter*, together with the Quebec Act itself, means that special needs children have a right to an education, a right that includes the prerogative of accommodation. But how can a court assess whether school boards respect this right? What resources or services are necessary to satisfy it? Rousseau-Houle J.A. wrote:

One of the natural consequences of the recognition of a right must be the undertaking of the obligation to take reasonable measure to protect it (*Ontario Commission of Human Rights & O'Malley v. Simpsons-Sears Ltd.*, p. 554). Thus the issue to determine is, in essence, if the C.S.R.C. has taken reasonable measures to ensure that D.R. can exercise, in complete equality, his right to educational services adapted to his needs....⁶⁶

This test of “reasonable measures taken” leads back to *Bales*.

It is important to understand why the law has not advanced much past *Bales*. All that constitutional or quasi-constitutional equality guarantees is that special needs students receive the same educational benefits as other students. Neither s. 40 of the *Quebec Charter* nor s. 15 of the *Canadian Charter* establishes a right to an education, but only an equal right to any education that a province offers. When a court recognizes the special needs of an individual child, it cannot simply check to see if all children have the same education program. How can a court, then, decide if a province is complying with a statutory duty to offer education to children? The test is whether the ministry or school board has taken reasonable steps to do so. Anything more severe would amount to magisterial meddling in bureaucratic discretion and a court-made constitutional right to an education. Thus, fairness principles, even when they have a status above positive law, may not take us much farther than court enforcement of a statute that promises – as in *Bales* – to educate all children.

Chauveau did not just reject the holding of the Human Rights Tribunal, but its philosophy as well. We will examine the “minority rights” view of integration by looking at how it influenced the Ontario Court of Appeal in *Eaton v. Brant Board of Education*.⁶⁷ The subject of the case was Emily Eaton, a 12 year old with cerebral palsy. She had very limited abilities to communicate, difficulties with vision, and was dependant on a wheelchair. After several years in mainstream programs, Emily’s “Identification, Placement and Review Committee” decided that a special needs program, involving a partially segregated environment, would better suit Emily’s needs

⁶⁵ *Chauveau*, *supra* note 59 at para. 50.

⁶⁶ *Ibid.* at para. 51. Translation is that of the author.

⁶⁷ Ont. C.A., *supra* note 58.

and abilities. A “Special Education Tribunal” approved the decision, and the parents took the matter to Divisional Court; it deferred to the opinion of the previous decision-makers on what was best for Emily.⁶⁸

The Court of Appeal overturned this decision. Arbour J.A. (as she was then) held that s. 15 of the *Charter*⁶⁹ creates a presumption in favour of integration of special needs students into regular classes. As a result, schools that intend to segregate children have the burden to justify the placement. She said that the Special Education Tribunal had not considered this presumption in its deliberations and ordered it to rehear the matter. Arbour noted the lower court’s deferential, respectful approach to education decision-makers; the issue involved, after all, such a degree of expertise and difficulty that pedagogues could not reach a consensus on it. But Arbour responded that more than the mechanics of instruction were at stake. The disabled are not patients needing special care,⁷⁰ but a minority defined by its marginalization. S. 15 has as its purpose, she argued, the prevention and amelioration of circumstances that lead to the domestic exile of minorities. Arbour made her strongest points by looking back and reviving some of the rhetoric of the 1970’s and 1980’s “inclusion movement”:

The history of discrimination against disabled persons...is a history of exclusion...Deinstitutionalization was the first step towards full community integration, which has been the primary objective of the disability movement.⁷¹

Integration derives directly from this inclusion imperative and thus “represents more than the endorsement of a pedagogical theory.”⁷² Segregation has an inherently discriminatory character and, therefore, s. 15 requires, in Arbour’s view, strict justification for any separate placement.

Both in terms of history and principle, Arbour has a point. “Segregation” is a word we instinctively suspect, and “inclusion” is a principle that compels some immediate respect as an inherently preferable social norm. But one can question whether the right under construction is not too abstract. Is education (and educational theory), as Arbour suggests, about mere instruction, divorced from wider social and human concerns? Does, on the other hand, the right to physical inclusion really stand separate from and above other values in the hierarchy of goods? Certainly inclusion is preferable, if at all, for concrete or at least identifiable reasons, and the language of pragmatic learning even slips into Arbour’s justification for integration:

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.⁷³

⁶⁸ For a discussion of the Tribunal and Divisional Court judgements, see Manely-Casimir, *supra* note 30 at 280.

⁶⁹ The appellants argued that provincial human rights legislation also applied, but Arbour J.A. considered the *Charter* alone, given both the similarity of the documents and the *Charter*’s superiority. See *Ontario Human Rights Code*, R.S.O. 1990, c. H.19, ss 1 & 14.

⁷⁰ Indeed, Arbour J.A. notes as an important moment in the history of disabled emancipation the transfer of responsibility for the disabled in Ontario from the Ministry of Health to the Ministry of Community and Social Services. *Eaton* (CA) at 57.

⁷¹ *Ibid.*

⁷² *Ibid.*

⁷³ *Ibid.* at 58.

Thus inclusion would seem to serve practical purposes, such as mutual edification.

In any case, Arbour concluded that the Ontario Act was unconstitutional because it allowed school boards to exercise discretion on placement without the presumption in favour of inclusion. Oddly, however, she held that a segregated placement would not violate the *Charter* if parents consented to it. This notion, as well as the holdings on presumption and burden, came under scrutiny on appeal to the Supreme Court of Canada.

The Supreme Court disappointed many in the special education field. Arbour's decision had won accolades from commentators and lobbying groups attracted to the idea that the disabled could have such a definite constitutional right in education;⁷⁴ but the decision of the Supreme Court turned in large part on a rejection of the presumption of integration. Still, the reasons in *Eaton* are probably the most comprehensive treatment of special needs education law, and much of what the Court said was progressive.

Sopinka J. wrote the decision for the Supreme Court of Canada. Before coming to the specific question of the presumption, he laid out the test for discrimination under s. 15.⁷⁵ A plaintiff has to show that the act under review makes a distinction on a prohibited ground and that this discrimination either imposes a burden on the plaintiff or denies her an advantage. Some implications of the first requirement – a distinction – are worth noting. Sopinka J. repeated the established law that not all distinctions are discriminatory. Perhaps the most meaningful indication of discrimination is separate treatment grounded on presumed rather than actual characteristics. The obligation to assess the actual person prohibits not just rank prejudice but also excessive use of a “label”:

Avoidance of discrimination on this ground will frequently require distinctions to be made taking into account the actual personal characteristics of disabled persons.⁷⁶

This statement does suggest that *when* a school board provides an educational program different from the ordinary scheme, it has to be appropriate to the actual child and not a mere template. Further, the prohibition against the indiscriminate application of distinctions might also mean that schools cannot distinguish among students on scant or half-knowledge; and it could, therefore, furnish material for an argument that s. 15 demands a certain level of special education training for people making such distinctions in the education system. “Labeling” and training levels are important concerns for parents, but the danger in challenging identifications is that schools will simply make fewer of them. This hazard is particularly perilous for LD or ADD children, whose special needs are not immediately

⁷⁴ Bertha Greenstein, *Exceptional Child's Right to Inclusion* (1995) 7 Education & L.J. 77; Manely-Casimir, *supra* note 30 at 283; MacKay, *supra* note 53 at 77.

⁷⁵ For the origins of test, see: Andrews, *supra* note 55. Sopinka reviews certain unresolved problems in the case law: Eaton (SCC), *supra* note 58 at 270.

⁷⁶ Eaton (SCC), *supra* note 58 at 272.

obvious.

The second requirement for a finding of discrimination is that the distinction be burdensome; it must result in the denial of a benefit or the imposition of hardship. Here Sopinka J. parted ways with Arbour J.A. It was not that he had a mean view of what society must do to accommodate special needs; indeed, Sopinka J. in *Eaton* recognizes the paramountcy of substantive equality, particularly in regard to the disabled, stating that people with special needs look at society from the outside not so much because of exclusionary bigotry but because of “indirect discrimination”:

Exclusion from the mainstream of society results from the construction of a society based solely on “mainstream” attributes to which disabled persons will never be able to gain access...it is the failure to make reasonable accommodation, to fine-tune society so that its structures and assumptions do not result in the relegation and banishment of disabled persons from participation, which results in discrimination against them.⁷⁷

Since prejudice is not the problem, the separation of people with special needs from the rest of society will not disappear as a result of formal inclusion. Indeed, real accommodation requires not formality but flexibility. Students with special needs differ from other social groups in that they are a minority more by virtue of their difference from the norm, and less by way of what they share with each other:

It follows that disability, as a prohibited ground, differs from other enumerated grounds such as race or sex because there is no individual variation with respect to these grounds. However, with respect to disability, this ground means vastly different things depending upon the individual and the context. This produces, among other things, the “difference dilemma” referred to by the intervenors whereby segregation can be both protective of equality and violative of equality depending upon the person and the state of disability.⁷⁸

Sopinka J. concluded that integration is an educational norm, but not a legal presumption, for while it benefits most special needs children, it can potentially burden others.

Sopinka J. held that the Special Education Tribunal asked the right question: which placement is in the best interests of the child? I have suggested that parents may prefer an inflexible right to integration over a general right of accommodation because the latter is vague and because the former may give them a base from which to negotiate. Sopinka J. did realize that the clientele of schools are in a weak position, but, rather than finding a presumption, he held that,

We cannot forget, however, that for a child who is young or unable to

⁷⁷ *Ibid.* at 272.

⁷⁸ *Ibid.* at 273-274.

communicate his or her needs or wishes, equality rights are being exercised on his or her behalf, usually by the child's parents...For this reason, the decision-making body must further ensure that its determination of the appropriate accommodation for an exceptional child be from a subjective, child-centred perspective, one which attempts to make equality meaningful from the child's point of view as opposed to that of the adults in his or her life.⁷⁹

Here is a recognition, then, of the doctrine of child weakness. The child-centred imperative may prove difficult to enforce, but it should give parents a pry bar to shift the weight of administrative inertia and crack open the walls of bureaucratic self-protection. Yet Sopinka J. was also likely correct to warn against the dangers of parents determining placement from their perspective. Arbour J.A.'s stress on parental consent was, according to Sopinka J., inconsistent with previous case law, and he affirmed that parents' views of best interest are not legally definitive.⁸⁰ *Pokonzie v. Sudbury District Roman Catholic Separate School Board*⁸¹ applied this principle to deny the wish of parents who very much wanted their child in the mainstream.

Pokonzie raises a question that we might briefly consider before assessing the wider meaning of *Eaton*. An issue in *Pokonize* was the degree of deference that the Ontario Divisional Court should give to the Special Education Tribunal. The Court was inconclusive:

If the test on this Judicial Review be whether the Tribunal's decision is patently unreasonable, then our answer is: "No, it is not patently unreasonable." If the test be the higher test of: "Was the Tribunal correct," in our view: "yes, the Tribunal was correct."⁸²

The judgements in *Eaton* proceeded from Arbour J.A.'s conclusion that in constitutional matters courts can review subordinate or administrative agencies for correctness in their decisions, and the same is true if the jurisdiction of the body is in question.⁸³ But *Eaton* did not determine the issue of the appropriate standard of review to apply to educational decision-makers in academic matters. While the Supreme Court displayed some deference to the Special Education Tribunal, the standard of review will likely vary – depending on the nature of the administrative body and the issues being decided – from reasonableness to patent unreasonableness. However, the front line of future litigation may be in the "no-man's land" where constitutional and pedagogic questions are hard to distinguish. School boards will call for deference while parents will argue that a correctness standard should apply in such grave matters as placement.

Standard of review is not the only weighty issue that will continue to burden courts after *Eaton*. The dispute in *Eaton* inspired well-reasoned judgements, and certainly the issues were emotional and significant; but the case avoided some difficult, outstanding questions in special education law.

⁷⁹ *Ibid.* at 277.

⁸⁰ *Ibid.* at 278-279.

⁸¹ [1997] O.J. No. 4698 (Ont. Ct. J. Gen. Div.) [hereinafter *Pokonzie*].

⁸² *Ibid.* at para. 30.

⁸³ *Halifax Regional School Board v. Nova Scotia (Department of Education and Culture)*, [1998] N.S.J. No. 412 (N.S.S.C.) at 5, online: QL (NSJ).

It is important to recognize the limits of its *ratio*. First, the Court applied the “best interests of the child” test among existing educational options, and it certainly did not mean that the state had an obligation to provide a special needs child with the best of all possible educations. But what remedy could a court offer, for instance, if a statute did not mention integration and a school board did not offer it at all? Could a court use s. 15 to force a board to have an integration option, and if so, would that not be, in certain situations, the establishment of a welfare right to a better education?

Similarly, the Court ruled that schools have a duty to provide appropriate education – that is education based on actual and individual characteristics – when they distinguish special needs children from their peers. But what if the school chooses not to make distinctions at all? Sopinka J. concluded the first part of the discrimination test as follows:

It is quite clear that a distinction is being made under the Act between “exceptional” children and others. Other children are placed in the integrated classes. Exceptional children, in some cases, face an inquiry into their placement in the integrated or special classes. It is clear that the distinction between “exceptional” and other children is based on the disability of the individual child.⁸⁴

The *special needs program* itself was, thus, the distinction; and, potentially, a court might not have a justification for constitutional review where positive special needs programs are absent. Substantive equality makes it possible to argue that schools have to treat differently students with disabilities where necessary, and they cannot therefore be wilfully blind to the presence of special needs. But does a school board have to look for these special needs? Can a duty to do so derive from the principle of equality in s.15 or is it, again, a welfare right that the legislature must decide to recognize or not? What level of benefit is required to achieve equality? Such questions remain outstanding despite *Eaton*.

Some have argued that the law has already passed *Eaton*.⁸⁵ Equality’s orbit and extent was at issue in two recent and controversial Supreme Court of Canada judgments, *Eldridge v. British Columbia (Attorney General)*⁸⁶ and *Vriend v. Alberta*.⁸⁷ *Vriend* read “sexual preference” into the list of prohibited grounds of discrimination in the Alberta human rights legislation.⁸⁸ The justification for this aggressive judicial re-writing of positive legislation was the logic of inclusion and group membership that Arbour had illustrated in *Eaton*. Donna Greschner argues that the “full membership” principle would have affected the decision in *Eaton* had the Court considered it.⁸⁹ One should not underestimate, however, the degree to which Sopinka J. understood and rejected Arbour J.A.’s application of the minority rights argument to the facts in *Eaton*. *Vriend* fits neatly into his analysis. Prejudgment – not the natural economy of building social spaces

⁸⁴ *Eaton* (SCC), *supra* note 58 at 274-275.

⁸⁵ Manely-Casimir, *supra* note 30 at 287.

⁸⁶ [1997] 3 S.C.R. 624 [hereinafter *Eldridge*].

⁸⁷ [1998] 1 S.C.R. 493 [hereinafter *Vriend*].

⁸⁸ *Individual Rights Protection Act*, RAS 1980, c.1-2.

⁸⁹ D. Greschner, “The right to belong: the promise of *Vriend*” (1998) 9:3 N.J.C.L. 417.

according to the needs of the majority – bars greater participation by homosexuals in society. Gay people experience “separateness” because of two relatively homogenous things – their sexual preference and attitudes towards it – not because of a diverse mélange of mental and physical conditions that clash in innumerable ways with the ordered habits of mainstream social and economic endeavour. A court dealing with *Vriend*-like facts need not, therefore, balance the necessity for inclusion with the requirement for flexibility in the delivery of a public service or the protection of a human right.

Eldridge may have a greater impact, particularly given the gloss it received from *Concerned Parents for Children With Learning Disabilities Inc. v. Saskatchewan (Minister of Education)*.⁹⁰ *Eldridge* held that BC hospitals and the Medical Services Commission had violated s. 15 of the *Charter* by exercising their general discretion under BC health legislation not to have translation services for deaf patients. The denial of this benefit resulted in unequal treatment and was therefore indirect or adverse discrimination. Smith, J. of the Saskatchewan Court of Queen’s Bench, flagged the emphasis on “discretion” and “benefits” when he read *Eldridge* in light of the facts of *Concerned Parents*.

Concerned Parents is an important case, because it involves not a demand for integration – which fits fairly easily into equal treatment arguments – but a rejection of integration in the name of appropriate education. The facts of the case are as follows. Concerned Parents for Children with Learning Disabilities Inc. (“Concerned Parents”), a Prince Albert non-profit group, sought to force the local school board to segregate six LD children in a comprehensive special education course, the “Carlton Connection”. This was a novel education program, but the board had already experimented with it on a trial basis. The Government of Saskatchewan and the school board applied to have the Court strike the statement of claim as disclosing no reasonable cause of action. Smith J. expressed considerable scepticism about most of Concerned Parents’ case, and he reiterated typical concerns about busybody courts encroaching on political autonomy and impeding bureaucratic discretion. The issue in the case was, he stated,

the ability of parents to seek the assistance of the courts to obtain the quality of public education to which they believe their children are entitled.⁹¹

Put in these terms, the parents were in effect asking the court to enforce welfare rights not positively expressed in law. However, Smith J. thought that *Eldridge* might provide Concerned Parents with an argument, and therefore the claim should proceed to trial. Both cases, he noted, involved minorities seeking access on an equal footing to public services. Thus, the six children could expect the school board to use its discretion to

⁹⁰ [1998] S.J. No. 566 (Q.B.), online: QL (SJ) (hereinafter “Concerned Parents”).

⁹¹ *Ibid.* 1.

provide them with a benefit that would allow them equal access. *Eldridge* might lead to a constitutional entitlement to “appropriate education”:

While the defendants in the case at bar do not deny the plaintiffs’ statutory right to appropriate educational service, the effect of *Eldridge* is to elevate this statutory right to a constitutional entitlement.⁹²

It is not clear exactly what Smith J. meant by appropriate education, nor why *Eldridge* principles were necessary to enforce a statutory right to appropriate education.

Whether the abstract right derives from statute or the constitution, the question remains how to measure its implementation. The difference between *Eldridge* and *Concerned Parents* was that the Prince Albert school board was offering special education to the children in order to facilitate equality and the dispute was simply about the efficacy of the program. Presumably, the program in place would have been sufficient to meet the traditional test for the implementation of statutory right. As we saw in *Bales* and *Chauveau*, this test was reasonable efforts to make the right meaningful. However, Smith J. seemed to think that appropriate education might require a “correctness analysis” under administrative law and the recognition of a welfare right to effective education under constitutional law,

...if the plaintiffs are able to establish, at trial, on the basis of expert evidence, that special educational services provided in the classroom with the additional assistance of resource teachers are significantly ineffective, in comparison to the Carlton Connection model, for education of children such as the infant plaintiffs.⁹³

From the standpoint of administrative law, one can criticize this argument for not allowing due deference to decision-makers; but the more fundamental question is constitutional: where does s. 15 require the government to provide effective education? S. 15 is about equality, not the quantity or quality of public benefits in themselves.

Some Conclusions: Rights – Natural, Constitutional and Positive

This critique of *Concerned Parents* demonstrates the limits of the equality principle as a means to achieve wider educational rights for the learning disabled. The ultimate right to education in Canada derives from provincial statute. It depends on the will of the legislature and thus the electorate. In British Columbia, special needs students have a right to integration, subject to considerations of practicality, and to education tailored to their individual needs. Rights to assessment, parental input and appeal, program implementation, teacher-training levels – all are vague or non-existent.

Most Canadians would, I imagine, accept a natural right to

⁹² *Ibid.* 59.

⁹³ *Ibid.* 60.

appropriate education, but Canadian constitutional and human rights law does not recognize this privilege. Thus minorities are able to use the *Charter* and human rights legislation only to insist on equal access to public benefits. Equality does not provide a fundamental right to education but one relative to other children. Theoretically, if regular students received a generally poor education, the disabled would not have a constitutional argument to ask for anything more effective. Practically, the relative right does not offer a standard for judging whether a special needs student is receiving an equal education, since her needs may be so different from other students as to make comparison an illusive measurement.

Does the absence of a constitutional or quasi-constitutional (as in the United States) right to appropriate education matter? The experience in British Columbia indicates that it does. If special needs children have a natural right to education, and were it recognized in constitutional law, then parents would be able to insist, for instance, that schools both identify children with special needs and do so without excessive delay. The existence of a duty to educate properly, balanced with a need for deference and political choice, would allow parents to press for improvements without having to make what are at times essentially empty arguments about inequality between students. In general, special education would not be at the whim of a legislature composed mostly of parents who do not have special needs children. The complexities of special education law suggest that, in order to avoid the tempest of welfare rights, we may have turned into the rocks of absolute legislative discretion, with its potential dangers for minorities, and the shoals of equal opportunity rights litigation, where the language of equality seems unable to deal with a problem of social policy.