No. 24896

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL
FOR BRITISH COLUMBIA)

BETWEEN:

ROBIN SUSAN ELDRIDGE, JOHN HENRY WARREN and LINDA JANE WARREN

APPELLANTS
(PLAINTIFFS)

AND: **ATTORNEY GENERAL OF BRITISH COLUMBIA and MEDICAL SERVICE COMMISSION**

RESPONDENTS
(DEFENDANTS)

FACTUM SUBMITTED BY THE INTERVENOR,

THE ATTORNEY GENERAL OF NEWFOUNDLAND

LINDSAY M. LYSTER
Heenan Blaikie
Barristers and Solicitors
600-1199 West Hastings Street
Vancouver, B.C.
V6E 3T5
Counsel for the Appellants
Tel: (604) 669-0011
Fax: (604) 669-5101

Nelligan Power
Barristers and Solicitors
1900-66 Slater Street
Ottawa, Ontario
KlP 5H1
Ottawa Agents for the Appellants
Tel: (613) 238-8080
Fax: (613) 238-2098

HARVEY M. GROBERMAN
LISA J. MROZINSKI
Ministry of Attorney General
Legal Services Branch
6th Floor, 1001 Douglas Street
Victoria, B.C.
V8V 1X4
Counsel for the Respondents
Tel: (250) 356-8848
Fax: (250) 356-9154

Burke-Robertson
Barristers and Solicitors
70 Gloucester Street
Ottawa, Ontario
K2P OA2
Ottawa Agents for the Respondents
Tel: (613) 236-9665
Fax: (613) 235-4430

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PART I

STATEMENT OF FACTS

1. The Attorney General of Newfoundland accepts the Statement of Facts as set out in the factum of the Respondents, at paragraphs 1 to 29.

PART II

POINTS IN ISSUE

2. The Constitutional Questions, as stated by Order of Lamer C.J.C. are:

1. Does the definition of "benefits" in section 1 of the *Medicare Protection Act*, S.B.C. 1992, c.76 infringe section 15(1) of the *Canadian Charter of Rights and Freedoms* by failing to include medical interpreter services for the deaf?

2. If the answer to question 1 is yes, is the infringement demonstrably justified in a free and democratic society pursuant to section 1 of the *Canadian Charter of Rights and Freedoms*?

3. Do sections 3, 5 and 9 of the *Hospital Insurance Act*, R.S.B.C. 1979, c. 180, and the Regulations enacted pursuant to section 9 of that Act, infringe section 15(1) of the *Canadian Charter of Rights and Freedoms* by failing to require that hospitals in the Province of British Columbia provide medical interpreter services for the deaf?

4. If the answer to question 3 is yes, is the infringement demonstrably justified in a free and democratic society pursuant to section 1 of the *Canadian Charter of Rights and Freedoms?*

3. The position of the Attorney General of Newfoundland is that:

(1) Questions 1 and 3 should be answered no, and

(2) If necessary, Questions 2 and 4 should be answered yes.

PART III

ARGUMENT

4. For convenience, the issues are dealt with in the same order as in the Respondents' factum, that is, Questions 3 and 4, followed by Questions 1 and 2.

A. *Hospital Insurance Act*

5. Regarding the application of the *Charter* to the *Hospital Insurance Act,* and if necessary, the analysis under sections 15 and 1 of the *Charter*, the Attorney General of Newfoundland adopts the submissions in the Respondents' factum, at paragraphs 33 to 46.

B. *Medicare Protection Act*

(1) Application of Section 15 of the *Charter*

6. Regarding the application of section 15(1) of the *Charter* to the *Medicare Protection Act,* the Attorney General of Newfoundland agrees with the submissions in the Respondents' factum, at paragraphs 47 to102, and makes the following supplementary submissions.

7. It is submitted that section 15(1) of the *Charter* is not infringed as a result of the failure to provide for reimbursement for translation services for deaf patients under the *Medicare Protection Act.* This conclusion follows from the application of the principle succinctly stated by Sopinka J. in *Eaton* v. *Brant County Board of Education* (unreported, S.C.C., February 6th, 1997), at paragraph 62:

> *There is general agreement that before a violation of section 15 can be found, the claimant must establish that the impugned provision creates a distinction on a prohibited or analogous ground which withholds an advantage or benefit from or imposes a disadvantage or burden on the claimant.*

8. In conducting the analysis, it is submitted that the approach adopted by this Court in *Battlefords and District Cooperative Ltd.* v. *Gibbs and Human Rights Commission* (1996), 203 N.R. 131 (S.C.C.), at paragraphs 38 to 40, is helpful. The relevant principle is stated by Sopinka J., at paragraph 38:

> *As set out in Brooks, in determining whether an insurance plan discriminates, it is first necessary to determine the true character or underlying rationale of the plan in the circumstances of the particular case.*

While the *Gibbs* case dealt with provincial human rights legislation, this principle applies equally to an allegation of discrimination under the *Charter*.

9. Applying these principles in this Appeal, it is submitted that a distinction is not

drawn based on a prohibited or analogous ground enumerated in section 15. This conclusion follows from an identification of the nature of the services at issue, and an analysis of those services in light of the true character or underlying rationale of the *Medicare Protection Act*.

Identification of the Services

10. There are two services at issue in this case. The first are medical services. An individual, whether deaf or not, may access a wide variety of such services from a plethora of practitioners. The manner in which a particular medical service is provided is the responsibility of the practitioner.

11. In providing a medical service, the doctor may engage a second service. In some instances the second service would also be a medical service, such as would occur with referral to a specialist. In other instances, the second service would be a non-medical service.

12. This Appeal involves an example of a second service which is non-medical in nature. The need for this additional service arises from the doctor's responsibility to ensure adequate communication with the patient. If the patient has a disability, whether blindness, deafness, mental disability, or some other condition that may affect

communication between the doctor and the patient, it must be the responsibility of the doctor to take whatever steps are necessary to remedy the deficiency. Some options the practitioner may consider would be to: provide interpretation services, request the involvement of a parent or guardian, or require the patient to provide an interpreter.

13. In a particular circumstance, the patient and the doctor may assess the need for an interpreter differently. The responsibility of the practitioner to ensure adequate communication is based on such factors as the duty to provide competent care and to proceed on the basis of informed consent. The practitioner's responsibility sets a minimum standard for communication. A patient, on the other hand, may not be satisfied to rely on the doctor's assessment of what constitutes adequate communication. For example, the doctor may determine that communication by written notes is adequate in a given situation, while the patient may lack confidence in this system and prefer an interpreter.

Payment for the Services

14. Having identified each service, the second, and separate, stage of the inquiry is the question of payment. Under the *Medicare Protection Act*, direct payments, in accordance with fee schedules established by the Medical Services Commission, are made pursuant to the Medical Services Plan to the health care practitioner in respect of medical services.

However, not all medical services are covered. Payment is restricted to those medical services that are specified under the Act.

See: *Medicare Protection Act*, section 21 and Part 3.1.

15. The second service at issue in this Appeal, interpretation for a deaf patient, is non-medical in nature. Consequently, it is not a service covered under the *Medicare Protection Act.* Further, it is submitted, based on the underlying rationale of the Act, it is not a service that must, as a result of the operation of section 15(1) of the *Charter,* be included within the compensable services covered by the Act.

See: *Battlefords and District Cooperative Ltd.* v. *Gibbs and Human Rights Commission, supra,* at paragraphs 38 to 40.

16. To define and distinguish services on the basis of the nature of the service is consistent with the structure and scope of application of the *Medicare Protection Act.* Interpretation services, being non-medical in nature, are not compensable under the Act for any patient regardless of the reason for the impediment to communication between doctor and patient. For purposes of payment under the Act, there is no reason in principle to distinguish between an impediment to communication caused by a mental or physical disability and an impediment due to, for example, the inability of the patient to speak or write in a language understood by the practitioner.

17. Further, in assessing the effect of the Act, it is important to recognize that it is limited in scope even insofar as medical services are compensable. The Act does not extend to eliminate all costs associated with a medical condition. Examples of exclusions are items such as medical appliances and pharmaceuticals.

> See: Evidence of Dr. Gary Curtis, Case On Appeal, at page 289, lines 24 to 42.

18. The determination that a distinction is properly drawn between medical and non-medical services, with the result that the *Medicare Protection Act* does not extend the right to a deaf person to payment for interpretation services whenever a medical service compensable under the Act is utilized, does not lead necessarily to the conclusion that a deaf person must pay for interpretation services in the medical context.

19. Indeed, a variety of options for payment of interpretation services may be identified. The efficacy of one option, as opposed to another, may be dependent on an array of factors. The cost of an interpreter for a deaf patient could, for example, be

(a) borne by the practitioner's office as a component of overhead expenses;

(b) paid by a non-governmental organization having the mandate to provide such service;

(c) paid by the patient;

(d) paid out of the public purse pursuant to legislative directive; or

(e) paid out of the public purse where the patient qualifies pursuant to a financial means test.

20. Relevant factors to be considered in determining the appropriateness of a particular option may include:

(a) The effect of imposing the cost for interpretation services on the medical practitioner as a cost of doing business.

(b) The financial means of the patient assessed on an individual basis rather than on the basis of general population statistics. The appropriateness of focusing on individual circumstances is exemplified in such contexts as the provision of social assistance.

(c) The need for the interpretation service, which may vary with the nature of the medical service and the ability of the patient to communicate adequately by alternative means such as written notes.

(d) The characteristics and views of the individual patient and practitioner. For example, some patients and practitioners may determine that an interpreter is required in given circumstances, where others in a similar situation would be content to rely on other methods of communication.

(e) Governmental social policy determinations regarding the allocation of limited public funds. This determination would involve a consideration of

alternatives to the Appellants' request for payment for an interpreter under the *Medicare Protection Act* in all instances where a compensable medical service is involved. The factors outlined in (a) to (d) would be relevant.

21. These and other relevant factors would not be given due weight and consideration should a general requirement be imposed that interpretation services must be provided in every instance where a deaf patient receives a medical service compensable under the Act.

22. Finally, the separation of medical and non-medical services under the Act, and the independent consideration of a payment scheme for each service is consistent with other contexts where interpretation services may be necessary or desirable. Examples of such situations would include: accessing employment opportunities or services such as crisis counselling, social assistance, the courts and other legal services, and education whether for a child or an adult. In any of these situations, a persuasive argument may be made for interpretation services. However in these contexts, just as in the medical context, the service of an interpreter is a separate service that must be considered in its own right with respect to the need for the service, the appropriate type of service and the source of payment.

23. In summary, it is submitted that an analysis of the true character and underlying rationale of the *Medicare Protection Act* leads to the conclusion that compensable benefits are limited to specified medical services. The Act does not cover either medical services that are not specified or non-medical services. Consequently, in omitting interpretation services from the list of compensable services where, for whatever reason, there is an impediment to communication between doctor and patient, the Act does not draw a distinction based on an enumerated or analogous ground as required in order to engage section 15(1) of the *Charter*.

(2) Section 1 of the *Charter*

24. If this Court finds that the failure to include the cost of interpretation services for deaf patients under the *Medicare Protection Act* infringes section 15(1) of the *Charter*, it is submitted that the infringement is justified under section 1 of the *Charter*.

25. The Attorney General of Newfoundland agrees with the submissions made in the Respondents' factum, at paragraphs 103 to 134. In addition, it is submitted that the considerations set out at paragraphs 16 to 22, above, support the conclusion that the requirements for justification under section 1 are satisfied.

(3) Remedy

26. In the event this Appeal is successful, for purposes of a remedy, the Attorney General of Newfoundland agrees with the submissions made in the Respondents' factum, at paragraphs 135 to 138.

PART IV

ORDER SOUGHT

27. The Attorney General of Newfoundland respectfully requests that Questions 1 and 3 be answered no, and if necessary, Questions 2 and 4 be answered yes.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at St. John's, Newfoundland this 7th day of April, 1997.

B. Gale Welsh, Q.C.
Counsel for the Attorney General
of Newfoundland

LIST OF AUTHORITIES

Battlefords and District Co-operative Ltd. (appellant) v. Betty-Lu Clara Gibbs and The Saskatchewan Human Rights Commission (respondents) and The Council of Canadians with Disabilities, The Canadian Human Rights Commission, The Ontario Human Rights Commission and The Canadian Mental Health Association (interveners)
(24342)

Indexed As: Battlefords and District Co-operative Ltd. v. Gibbs and Human Rights Commission (Sask.)

Supreme Court of Canada
Lamer, C.J.C, La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major, JJ.
October 31, 1996.

Summary:

An insurance policy which was offered as a benefit of employment provided that income replacement benefits for the mentally disabled would be terminated after two years, unless the person was institutionalized. There was no such restriction on the benefits available to the physically disabled. A mentally disabled employee complained that the employer discriminated against her in the terms and conditions of her employment on the basis of disability, contrary to s. 16 of the Saskatchewan Human Rights Code. A board of inquiry ruled in favour of the employee. The employer appealed.

The Saskatchewan Court of Queen's Bench, in a decision reported at 107 Sask.R. 202, dismissed the appeal. The employer appealed.

The Saskatchewan Court of Appeal, Wakeling, J.A., dissenting, in a decision reported at 120 Sask.R. 166; 68 W.A.C. 166, dismissed the appeal. The employer appealed.

The Supreme Court of Canada dismissed the appeal.

Civil Rights - Topic 904

Discrimination - Scope of basis for discrimination - An insurance policy which was offered as a benefit of employment provided that income replacement benefits for the mentally disabled would be terminated after two years, unless the person was institutionalized - There was no such restriction on the benefits available to the physically disabled - A mentally disabled employee complained that the employer discriminated against her on the basis of disability, contrary to s. 16 of the Saskatchewan Human Rights Code - The employer argued that the mentally disabled employee should not be compared to those with physical disabilities in order to determine whether there was discrimination, rather the proper approach was to compare the disabled to the non-disabled - The Supreme Court of Canada affirmed that in the circumstances it was appropriate to compare the benefits received by the mentally disabled with those received by the physically disabled - See paragraphs 26 to 40.

Civil Rights - Topic 983

Discrimination - Employment - What constitutes discrimination - An insurance policy which was offered as a benefit of employment provided that income replacement benefits for the mentally disabled would be terminated after two years, unless the person was institutionalized - There was no such restriction on the benefits available to the physically disabled - A mentally disabled employee complained that the employer discriminated against her in the terms and conditions of her employment on the basis of disability, contrary to s. 16 of the Saskatchewan Human Rights Code - The Supreme Court of Canada affirmed that the

afforded to the persons discriminated against. The **Code** does not differentiate with respect to whether the discriminator is of the same race, sex or religion. These characteristics of the discriminator are irrelevant. Accordingly, it is not relevant that there is no historical basis for concluding that physically disabled persons treated mentally disabled persons in ways that are unfair, prejudicial or oppressive.

[37] Accepting for the sake of evaluating the appellant's argument that such historical ill-treatment is a prerequisite to protection under the **Code**, there is abundant support for the view that the mentally disabled have suffered from historical disadvantage and negative stereotyping. I have referred above to the evidence supporting this conclusion. Although the physically disabled also have a claim in this regard, the treatment to which the mentally disabled were subjected sets them apart from disabled persons generally. While in many cases discrimination because of disability will involve distinctions between disabled persons and able-bodied persons, in my view the legislature also intended to extend protection in circumstances such as this in which mentally disabled persons are treated differently from other disabled persons without any apparent justification. To hold otherwise would permit the continuation of the historical disadvantages to which mentally disabled persons were subject, without recourse to human rights protection.

[38] The appellant provides several examples to illustrate what it submits are the adverse consequences of a "disability-disability"

femmes, et ainsi de suite, est interdite par le **Code**, et les personnes victimes de discrimination bénéficient de la protection qu'il offre. Le **Code** ne fait pas de différence selon que l'auteur de la discrimination est de même race, du même sexe, ou de même religion. Ces caractéristiques de l'auteur de la discrimination ne sont pas pertinentes. En conséquence, il est sans importance qu'il n'y ait aucun motif historique de conclure que les handicapés physiques ont traité les handicapés mentaux de manière injuste, préjudiciable ou oppressive.

[37] Si on accepte, aux fins d'évaluer l'argument de l'appelante, qu'un tel mauvais traitement subi dans le passé est une condition préalable pour que s'applique la protection offerte par le **Code**, l'opinion que les handicapés mentaux ont de tout temps été victimes de désavantages et de stéréotypes négatifs est amplement étayée. J'ai déjà mentionné la preuve à l'appui de cette conclusion. Quoique les handicapés physiques aient aussi des griefs à cet égard, le traitement qu'on a fait subir aux handicapés mentaux les distingue des handicapés en général. Quoique, dans bien des cas, la discrimination fondée sur l'incapacité comportera des distinctions entre les personnes handicapées et les personnes non handicapées, j'estime que le législateur a également voulu offrir la protection dans des circonstances comme celles de la présente affaire où des personnes atteintes d'incapacité mentale sont, sans justification apparente, traitées différemment des autres personnes handicapées. Conclure autrement permettrait de perpétuer les désavantages dont ont de tout temps été victimes les handicapés mentaux, sans que ceux-ci puissent recourir à la protection des droits de la personne.

[38] L'appelante donne plusieurs exemples illustrant quelles sont, d'après elle, les conséquences néfastes d'une comparaison entre

comparison, including the following example that it submits is analogous to the present case. Suppose a piano school elects to provide disability coverage in relation to hand injuries only, and does not provide coverage for emotional distress, broken legs or any other reason for missing work. Could a teacher who broke his or her leg claim discrimination since he or she did not receive benefits while a teacher who broke his or her hand would have received benefits? In my opinion, this example does not challenge the above analysis. As set out in **Brooks**, in determining whether an insurance plan discriminates, it is first necessary to determine the true character or underlying rationale of the plan in the circumstances of the particular case. As noted above, discrimination should not be found on the basis of a comparison between the benefits given to employees pursuant to different insurance purposes. While a full evidentiary record is necessary to make a determination of purpose, it appears that in the cited example the true character of the insurance plan is simply to insure against hand injuries, not to insure against disability generally. If so, in finding discrimination, the benefits allocated to employees for the particular purpose of insuring against hand injuries cannot be compared with the benefits designed to insure against other injuries. The proper comparison in determining discrimination is between those with hand injuries, not between those with hand injuries and those with leg injuries. In **Brooks**, on the other hand, the true character of the insurance plan was to insure against health-related reasons for missing work, and thus it was appropriate to compare the different benefits available depending on the health-related reason for missing work.

des personnes handicapées, dont le suivant qui, à son avis, est analogue à la présente affaire. Supposons qu'une école de piano choisisse de fournir une assurance invalidité couvrant les blessures aux mains seulement, mais non les troubles émotifs, les fractures des jambes ou tout autre motif d'absence du travail. Un professeur qui se casse la jambe pourrait-il alléguer la discrimination parce qu'il ne toucherait pas d'indemnité, alors que celui qui se fracture la main en toucherait une? À mon avis, cet exemple ne met pas en doute l'analyse ci-dessus. Comme on l'a dit dans l'arrêt **Brooks**, pour décider si un régime d'assurance crée une discrimination, il faut d'abord déterminer sa nature véritable ou sa raison d'être sous-jacente dans les circonstances de l'affaire. Comme nous l'avons vu, la discrimination ne devrait pas reposer sur une comparaison des prestations versées à des employés conformément à des objets différents en matière d'assurance. Bien qu'il faille un dossier de preuve complet pour déterminer un objet, il semble que, dans l'exemple cité, la nature véritable du régime d'assurance est simplement d'assurer contre les blessures aux mains, et non de garantir contre l'incapacité en général. Si c'est le cas, il n'est pas possible, pour conclure à l'existence de discrimination, de comparer les prestations versées aux employés conformément à l'objet particulier qui est de les assurer contre les blessures aux mains avec les prestations destinées à assurer contre d'autres blessures. La comparaison qui convient pour déterminer s'il y a discrimination est entre ceux qui souffrent de blessures aux mains, et non entre ceux qui sont blessés aux mains et ceux qui sont blessés aux jambes. Dans **Brooks**, par contre, la nature véritable du régime d'assurance était d'assurer contre l'incapacité de travailler pour des raisons de santé, de sorte qu'il convenait de comparer les divers avantages offerts selon la raison de santé invoquée pour s'absenter du travail.

[39] I respectfully disagree with McLachlin, J.'s, assertion that the analysis proposed here "reframes" the purpose test found in **Brooks**. McLachlin, J., asserts that my analysis of the present case would permit the type of reasoning that led courts to deny benefits to pregnant women on the ground that the schemes were designed to compensate illness, not pregnancy. She correctly notes, however, that **Brooks** rejected such reasoning by defining the true character or underlying rationale of the insurance as providing income for those unable to work because of health-related reasons; excluding pregnancy thus discriminated against pregnant women, which amounted to sex discrimination. In my view, the reasoning in **Brooks** is directly analogous to my analysis of the case at bar: following a purposive approach, the true character or underlying rationale of the insurance plan was to provide income replacement for those unable to work because of disability, and thus limiting benefits on the basis of mental disability discriminated. By following an approach to defining the purpose of the insurance scheme that is consonant with the goals of human rights legislation, the narrow, formalistic approach to discrimination found in earlier pregnancy cases is avoided under the analysis here and in **Brooks**.

[39] En toute déférence, je ne suis pas d'accord avec l'affirmation du juge McLachlin selon laquelle l'analyse proposée en l'espèce "reformule" le critère de l'objet visé qui est établi dans l'arrêt **Brooks**. Le juge McLachlin affirme que mon analyse de la présente affaire revient à autoriser le type de raisonnement qui a amené des tribunaux à refuser de verser des indemnités aux femmes enceintes, pour le motif que les régimes en cause étaient conçus pour l'indemnisation de maladies et non de la grossesse. Elle fait cependant remarquer, à bon droit, que, dans l'arrêt **Brooks**, la cour a rejeté ce raisonnement en définissant la nature ou raison d'être véritable de l'assurance comme étant de fournir un revenu aux personnes incapables de travailler pour des raisons de santé; l'exclusion de la grossesse était donc discriminatoire envers les femmes enceintes et constituait de la discrimination fondée sur le sexe. À mon avis, le raisonnement dans **Brooks** est directement analogue à mon analyse de la présente affaire: suivant une méthode fondée sur l'objet visé, la nature ou raison d'être véritable du régime d'assurance était de fournir une indemnité de remplacement de leur revenu aux personnes qui ne pouvaient travailler en raison d'une incapacité, et ainsi la restriction des prestations pour cause d'incapacité mentale était discriminatoire. En adoptant une façon de définir l'objet du régime d'assurance qui soit compatible avec les objectifs des lois en matière de droits de la personne, l'analyse à laquelle on a procédé en l'espèce et dans l'arrêt **Brooks** permet d'éviter la façon stricte et formaliste dont la discrimination a été abordée dans la jurisprudence antérieure sur la grossesse.

[40] In the present case, the true character of the insurance is to insure against the income-related consequences of disability, and thus it is appropriate to compare the benefits available for different disabilities. If,

[40] En l'espèce, la nature véritable de l'assurance est d'assurer contre les conséquences de l'invalidité sur le revenu, et il convient donc de comparer les indemnités offertes pour différentes incapacités. Si, dans

in either **Brooks** or the present case, the true character of the plan in all the circumstances were simply to insure against particular injuries, it may be inappropriate to compare the benefits for different injuries. However, given the true character of the plan in the case at bar, and given the particular disadvantage faced by those with a mental disability, a "disability-disability" comparison is appropriate.

l'arrêt **Brooks** ou dans la présente affaire, la nature véritable du régime, compte tenu de l'ensemble des circonstances, était simplement d'assurer contre des blessures particulières, il ne conviendrait peut-être pas de comparer les prestations accordées pour des blessures différentes. Toutefois, étant donné la nature véritable du régime en l'espèce et étant donné le désavantage particulier dont sont victimes ceux qui sont atteints d'une incapacité mentale, il convient de faire une comparaison entre des personnes handicapées.

The Insurance Context

[41] The appellant submits that, following **Zurich**, supra, discrimination in the present case must be analysed in the insurance context. In **Zurich**, I stated at pp. 338-339 [S.C.R.] that:

> "The determination of insurance rates and benefits does not fit easily within traditional human rights concepts. The underlying philosophy of human rights legislation is that an individual has a right to be dealt with on his or her own merits and not on the basis of group characteristics. Conversely, insurance rates are set based on statistics relating to the degree of risk associated with a class or group of persons."

The appellant contends that this court should be sensitive to the insurance aspects of the present case.

[42] Contrary to the appellant's submission, **Zurich** has no impact on the case at bar, at least in the way the case has been argued. In **Zurich**, an insurance company conceded that in assessing the risk of accidents, and therefore the cost of automobile insurance, on the basis of prohibited grounds such as

Le contexte de l'assurance

[41] L'appelante soutient que, suivant l'arrêt **Zurich**, précité, la discrimination en l'espèce doit être analysée dans le contexte de l'assurance. Dans **Zurich**, je dis ceci, aux pp. 338 et 339 [R.C.S.]:

> "La détermination des taux et des prestations d'assurance ne se rattache pas facilement aux concepts traditionnels des droits de la personne. La philosophie sous-jacente de la législation des droits de la personne est qu'une personne a le droit d'être traitée selon ses propres mérites et non en fonction des caractéristiques d'un groupe. Inversement, les taux d'assurance sont calculés à partir de statistiques ayant trait au degré de risque présenté par une catégorie ou un groupe de personnes."

L'appelante affirme que notre cour doit tenir compte des aspects de la présente affaire relatifs à l'assurance.

[42] Contrairement à ce que soutient l'appelante, l'arrêt **Zurich** n'a aucune incidence sur la présente affaire, du moins telle qu'elle a été plaidée. Dans **Zurich**, une compagnie d'assurances avait admis qu'en évaluant le risque d'accident, et donc les primes d'assurance-automobile, en fonction de motifs

** Preliminary Version **

Indexed as:
Eaton v. Brant County Board of Education

The Brant County Board of Education and the Attorney General for Ontario, appellants;
v.
Carol Eaton and Clayton Eaton, respondents, and
The Attorney General of Quebec, the Attorney General of British Columbia, the Canadian Foundation for Children, Youth and the Law, the Learning Disabilities Association of Ontario, the Ontario Public School Boards' Association, the Down Syndrome Association of Ontario, the Council of Canadians with Disabilities, la Confédération des organismes de personnes handicapées du Québec, the Canadian Association for Community Living, People First of Canada, the Easter Seal Society, la Commission des droits de la personne et des droits de la jeunesse, interveners.

[1996] S.C.J. No. 98

Supreme Court of Canada
File No.: 24668.
1996: October 8; 1996: October 9.
Reasons delivered: February 6, 1997.
Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.
ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO
(50 pp.)

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

of Rights and Freedoms, ss. 1, 15 -- Courts of Justice Act, R.S.O. 1990, c. C.43, s. 109(1) -- Education Act, R.S.O. 1990, c. E.2, ss. 1(1), 8(3) -- Regulation 305, R.R.O. 1990, s. 6.

The respondents are the parents of a 12-year-old girl with cerebral palsy who is unable to communicate through speech, sign language or other alternative communication system, who has some visual impairment and who is mobility impaired and mainly uses a wheelchair. Although identified as an "exceptional pupil" by an Identification, Placement, and Review Committee (IPRC), the child, at her parents' request, was placed on a trial basis in her neighbourhood school. A full-time assistant, whose principal function was to attend to the child's needs, was assigned to the classroom. After three years, the teachers and assistants concluded that the placement was not in the child's best interests and indeed that it might well harm her. When the IPRC determined that the child should be placed in a special education class, the decision was appealed by the child's parents to a Special Education Appeal Board which unanimously confirmed the IPRC decision. The parents appealed again to the Ontario Special Education Tribunal (the "Tribunal"), which also unanimously confirmed the decision. The parents then applied for judicial review to the Divisional Court, Ontario Court of Justice (General Division), which dismissed the application. The Court of Appeal allowed the subsequent appeal and set aside the Tribunal's order. At issue here are whether the Court of Appeal erred (1) in proceeding, proprio motu and in the absence of the required notice under s. 109 of the Courts of Justice Act, to review the constitutional validity of the Education Act, and (2) in finding that the decision of the Tribunal contravened s. 15 of the Canadian Charter of Rights and Freedoms.

Held: The appeal should be allowed.

Per: La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.: The purpose of s. 109 of the Courts of Justice Act is obvious. In our constitutional democracy, it is the elected representatives of the people who enact legislation. While the courts have been given the power to declare invalid laws that contravene the Charter and are not saved under s. 1, this is a power not to be exercised

of a record developed in the courts and tribunals below are far from technical defects. Moreover, as a general rule, we are only authorized to make the disposition that the court appealed from ought to have made (Supreme Court Act, R.S.C., 1985, c. S-26, s. 45). There is, however, an additional reason for not dealing with the constitutionality of the Act. Arbour J.A. felt constrained to do so because she was of the view that the decision of the Tribunal was discriminatory and violated s. 15(1) of the Charter. On the basis of Slaight Communications Inc. v. Davidson, [1989] 1 S.C.R. 1038, she felt obliged to consider whether the Act purported to authorize this result. I am respectfully of the opinion that Arbour J.A. erred in this regard. If she had concluded, as I do, that the reasoning and decision of the Tribunal did not discriminate contrary to s. 15 of the Charter, it would have been unnecessary for her, and it is unnecessary for me, to consider the constitutional validity of the Act.

[para56] I will turn to the issue of the validity of the decision of the Tribunal.

Does the Decision of the Tribunal Contravene s. 15 of the Charter?

[para57] The placement of children in special education programs and services is carried out pursuant to the provisions of s. 8 of the Education Act and the Regulations thereunder. Prior to 1980, there was no mandatory requirement that school boards provide such programs and a disabled person could be denied status as a resident pupil at elementary school if that person was "unable by reason of mental or physical handicap to profit by instruction in an elementary school" (The Education Act, 1974, S.O. 1974, c. 109, s. 34(1)).

[para58] A change in attitude with respect to disabled persons was initiated by the report of Walter B. Williston entitled Present Arrangements for the Care and Supervision of Mentally Retarded Persons in Ontario (1971). With it came a recognition of the desirability of integration and de-institutionalization. The change in attitude was reflected in changes in the Education Act.

[para59] The current legal framework for the education of exceptional pupils was adopted on December 12, 1980 when Royal Assent was given to The Education Amendment Act, 1980, S.O. 1980, c. 61. The Act and Regulations made it mandatory for all school boards to provide special education programs and services for exceptional pupils. The policy of the Ministry of Education is that "[e]very exceptional child has the right to be part of the mainstream of education to the extent to which it is profitable" (Special Education Information Handbook (1984)).

[para60] Ontario Regulation 305, R.R.O. 1990, adopted as O. Reg. 554/81, deals exclusively with Special Identification Placement and Review Committees and appeals. It provides for the identification of exceptional pupils, a determination of their needs and placement into an educational setting where special education programs and services can be delivered. The specific program modification and services required by each exceptional pupil are outlined in the pupil's education plan. Parents and guardians are involved in the identification and placement process and provision is made for appeal of the identification with a placement decision of the board.

[para61] This is the process that culminated in a decision by the Tribunal in the present case. After a three-year trial period in a regular class, the IPRC, after consultation with teacher assistants and Emily's parents, determined that she should be placed in a special education class. Emily's parents appealed to a Special Education Appeal Board which unanimously confirmed the IPRC decision. The parents appealed again to the Ontario Special Education Tribunal which unanimously confirmed the decision of the Special Education Appeal Board in a hearing lasting 21 days.

[para62] While there has not been unanimity in the judgments of the Court with respect to all the principles relating to the application of s. 15 of the Charter, I believe that the issue in this case can be resolved on the basis of principles in respect of which there is no disagreement. There is general agreement that before a violation of s. 15 can be found, the claimant must establish that the impugned provision creates a distinction on a prohibited or analogous ground which withholds an advantage or benefit from, or

imposes a disadvantage or burden on, the claimant.

[para63] In Miron v. Trudel, [1995] 2 S.C.R. 418, at p. 485, McLachlin J. stated:

> The analysis under s. 15(1) involves two steps. First, the claimant must show a denial of "equal protection" or "equal benefit" of the law, as compared with some other person. Second, the claimant must show that the denial constitutes discrimination. At this second stage, in order for discrimination to be made out, the claimant must show that the denial rests on one of the grounds enumerated in s. 15(1) or an analogous ground and that the unequal treatment is based on the stereotypical application of presumed group or personal characteristics. If the claimant meets the onus under this analysis, violation of s. 15(1) is established. The onus then shifts to the party seeking to uphold the law, usually the state, to justify the discrimination as "demonstrably justified in a free and democratic society" under s. 1 of the Charter.

At p. 487 she added:

> Furthermore, if the law distinguishes on an enumerated or analogous ground but does not have the effect of imposing a real disadvantage in the social and political context of the claim, it may similarly be found not to violate s. 15: Weatherall v. Canada (Attorney General), [1993] 2 S.C.R. 872.

[para64] In Egan v. Canada, [1995] 2 S.C.R. 513, at p. 584, Cory and Iacobucci JJ. stated:

> The first step is to determine whether, due to a distinction created by the questioned law, a claimant's right to equality before the law, equality under the law, equal protection of the law or equal benefit of the law has been denied. During this first step, the inquiry should focus upon whether the challenged law has drawn a distinction between the claimant and others, based on personal characteristics.

> Not every distinction created by legislation gives rise to discrimination. Therefore, the second step must be to determine whether the distinction created by the law results in discrimination. In order to make this determination, it is necessary to consider first, whether the equality right was denied on the basis of a personal characteristic which is either enumerated in s. 15(1) or which is analogous to those enumerated, and second, whether that distinction has the effect on the claimant of imposing a burden, obligation or disadvantage not imposed upon others or of withholding or limiting access to benefits or advantages which are available to others.

[para65] Both Gonthier J. (the Chief Justice and La Forest and Major JJ. concurring) in Miron and La Forest J. (the Chief Justice and Gonthier and Major JJ. concurring) in Egan were of the view that a distinction must be shown to be based on irrelevant personal characteristics. On this view, relevance to the legislative goal or functional value of the legislation where such is not itself discriminatory can negate discrimination. The majority view as expressed in Miron was that relevance may assist as a factor in showing that the case falls into the rare class of case in which a distinction on a prohibited or analogous ground does not constitute discrimination. While this does not purport to be an exhaustive treatment of the differences between the majority and the minority on this point, it is a sufficient synopsis of them for the purposes of this appeal.

[para66] The principles that not every distinction on a prohibited ground will constitute discrimination and that, in general, distinctions based on presumed rather than actual characteristics are the hallmarks of discrimination have particular significance when applied to physical and mental disability. Avoidance of discrimination on this ground will frequently require distinctions to be made taking into account the actual personal characteristics of disabled persons. In Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143, at p. 169, McIntyre J. stated that the "accommodation of differences ... is the true essence of equality". This emphasizes that the purpose of s. 15(1) of the Charter is not only to prevent discrimination by the attribution of stereotypical characteristics to individuals, but also to

ameliorate the position of groups within Canadian society who have suffered disadvantage by exclusion from mainstream society as has been the case with disabled persons.

[para67] The principal object of certain of the prohibited grounds is the elimination of discrimination by the attribution of untrue characteristics based on stereotypical attitudes relating to immutable conditions such as race or sex. In the case of disability, this is one of the objectives. The other equally important objective seeks to take into account the true characteristics of this group which act as headwinds to the enjoyment of society's benefits and to accommodate them. Exclusion from the mainstream of society results from the construction of a society based solely on "mainstream" attributes to which disabled persons will never be able to gain access. Whether it is the impossibility of success at a written test for a blind person, or the need for ramp access to a library, the discrimination does not lie in the attribution of untrue characteristics to the disabled individual. The blind person cannot see and the person in a wheelchair needs a ramp. Rather, 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. The discrimination inquiry which uses "the attribution of stereotypical characteristics" reasoning as commonly understood is simply inappropriate here. It may be seen rather as a case of reverse stereotyping which, by not allowing for the condition of a disabled individual, ignores his or her disability and forces the individual to sink or swim within the mainstream environment. It is recognition of the actual characteristics, and reasonable accommodation of these characteristics which is the central purpose of s. 15(1) in relation to disability.

[para68] The interplay of these objectives relating to disability is illustrated by the evolution of special education in Ontario. The earlier policy of exclusion to which I referred was influenced in large part by a stereotypical attitude to disabled persons that they could not function in a system designed for the general population. No account was taken of the true characteristics of individual members of the disabled population, nor was any attempt made

to accommodate these characteristics. With the change in attitude influenced by the Williston Report and other developments, the policy shifted to one which assessed the true characteristics of disabled persons with a view to accommodating them. Integration was the preferred accommodation but if the pupil could not benefit from integration a special program was designed to enable disabled pupils to receive the benefits of education which were available to others.

[para69] 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 Interveners whereby segregation can be both protective of equality and violative of equality depending upon the person and the state of disability. In some cases, special education is a necessary adaptation of the mainstream world which enables some disabled pupils access to the learning environment they need in order to have an equal opportunity in education. While integration should be recognized as the norm of general application because of the benefits it generally provides, a presumption in favour of integrated schooling would work to the disadvantage of pupils who require special education in order to achieve equality. Schools focussed on the needs of the blind or deaf, and special education for students with learning disabilities indicate the positive aspects of segregated education placement. Integration can be either a benefit or a burden depending on whether the individual can profit from the advantages that integration provides.

[para70] These are the basic principles in respect of which the Tribunal's decision should be tested in order to determine whether that decision complies with s. 15(1). In applying them, I do not see any purpose in distinguishing between the order of the Tribunal and the reasons for that order. That was a distinction that was sought to be made in the Court of Appeal but, in my view, the reasons and the order are to the same effect and cannot be dealt with separately in

this case. Either both are valid, as I conclude, or both are invalid.

The Tribunal's Decision

A Distinction

[para71] 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.

Burden

[para72] In its thorough and careful consideration of this matter, the Tribunal sought to determine the placement that would be in the best interests of Emily from the standpoint of receiving the benefits that an education provides. In arriving at the conclusion, the Tribunal considered Emily's special needs and strove to fashion a placement that would accommodate those special needs and enable her to benefit from the services that an educational program offers. The Tribunal took into account the great psychological benefit that integration offers but found, based on the three years experience in a regular class, that integration had had "the counter-productive effect of isolating her, of segregating her in the theoretically integrated setting".

[para73] Moreover, in deciding on the appropriate placement, the Tribunal considered each of the various categories of needs relevant to education. It found that it was not possible to meet Emily's intellectual and academic needs in the regular class without "isolating her in a disserving and potentially insidious way". It found that Emily's communication needs would be best met in the special class. It expressed doubt as to whether her emotional and social needs were being met in the regular class. While it is not clear that the special class would meet these particular needs better, it did appear to the Tribunal that there was little, if any, social interaction between Emily and her peers