

**Inclusion and Diversity in Education:**  
**Legal Accomplishments and Prospects for the Future**

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## **I~ Introduction: From Platform to Secondary Rights**

An education system that is inclusive, that meets the needs of all students, and that recognizes the importance of the diversity that exists in the student population is not here yet, but much progress has been made. A look at the evolving trends in education law over the last thirty years and at the current influences and prospects indicates that the energies spent to date, working toward this goal have achieved important milestones. Although there is still significant work to be done, the law is heading in the right direction, and we are incrementally achieving higher quality, inclusive education. The goal that we seek is a high quality public education for all students that is appropriate to their needs and abilities.

In the early 1990's, W.J. Smith and W.F. Foster provided us with a useful framework for identifying and analyzing equality rights for students with disabilities in the education context.<sup>1</sup> Rights can be divided into five categories: non-discrimination, access to schooling, identification and placement, service delivery, and parental participation. Non-discrimination refers to the equal protection and benefit of the law without discrimination on the basis of disability. Access to schooling entails the admission to elementary and secondary schooling at public expense, including barrier-free access to schools and other supports. Identification and placement concern the identification of education needs and provision of appropriate educational and disability-

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<sup>1</sup> W.J. Smith, *Equal Opportunity for Students with Disabilities: Legislative Action in Canada* (Montreal: Office of Research on Education Policy, 1994).

related services. Finally, parental participation refers to the participation of parents in the education of their children, at all stages of the process.<sup>2</sup>

These areas of rights entitlements can then be grouped into two broad categories. “Platform rights”, those rights necessary to get children with disabilities to the school door. Platform rights thus include, non-discrimination and access to schooling. “Secondary rights”, are specific education rights which determine the type of education the child is entitled to once he or she actually gets into a publicly funded school system. Thus, secondary rights include: identification and placement, service delivery, and parental participation.<sup>3</sup> Included in this category is the newer issue of using public funds for appropriate specialized placements outside the public school system, as well as within. A look at the judicial decisions in the area of equality in education shows the evolution from the recognition and upholding of platform rights to the new frontier, secondary rights.

In canvassing the judicial decisions in this area over the last three decades, Monica Williams and Robert Macmillan, rightly point out that from 1978-1995 parent initiated litigation challenging provincial laws and policies and eventually applying the *Charter of Rights and Freedoms* “has advanced the rights of children displaying a wide range of special needs”.<sup>4</sup> Generally speaking, Williams and Macmillan conclude that the cases

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<sup>2</sup> W.J. Smith and W.F.Foster, “Educational Opportunity for Students with Disabilities in Canada: A Platform of Rights to Build on” (1993-4) 5 *E.L.J.* 193; These concepts are further canvassed in MacKay & Kazmierski “And on the Eighth Day, God Gave Us...Equality in Education: *Eaton v. Brant (County) Board of Education and Inclusive Education*” (1997) 7 *N.J.C.L.* 2.

<sup>3</sup> W.J. Smith & W.F. Foster, “Educational Opportunity for Students with Disabilities in Canada: Beyond the Schoolhouse Door” (1993-94) 5 *E.L.J.* 305.

<sup>4</sup> Monica A. Williams & Robert B. MacMillan, “Litigation in Special Education (1978-1995) Part I: From Access to Inclusion”, 10 *E.L.J.* (200-2001) 349 at 350.

from 1978 through 1995 reflect the evolution of special education and the associated legal issues, which emerged during successive reform initiatives.<sup>5</sup> Cases such as *Carriere*<sup>6</sup>, *Bales*<sup>7</sup> and *Elwood*<sup>8</sup>, focused first and foremost on platform rights, the basic right to an education, freedom from discrimination and educational opportunities paid for with public funds. Cases during this era began exploring trends such as integration and mainstreaming. Other developments during this period include the recognition of giftedness as an exceptionality.<sup>9</sup> Thereby, placing students at both ends of the intellectual spectrum within the purview of special education. There has been a general expansion of the concept of disability and the recognition of a broader range of special needs.

There are two big issues emerging from this period, emphasized by Williams and MacMillan, and which we continue to struggle with today. First, is the “pattern of judicial deference to educational administrators in determining the specifics of schooling

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<sup>5</sup> *Ibid.*, at 368.

<sup>6</sup> *Carriere v. County of Lamont No. 30* (unreported decision of the Supreme Court of Alberta, Trial Division [15 August 1984] “The Supreme Court of Alberta recognized Shelly [Carriere]’s right to attend school but found itself lacking the authority to rule on the specifics of that schooling” *Supra* note 4., at 351.

<sup>7</sup> *Bales v. Central Okanagan School District No. 23* (1984), 54 B.C.L.R. 203 (B.C.S.C). In this case the Court rejected three arguments. First, that placement in a segregated setting would cause hardship to the student with disabilities. Second, that a child with a handicap has a right to be educated in an ordinary school. Third, that placement in a segregated school could be considered a deprivation of life, liberty or security of the person under s.7 of the *Charter*. Finally, the Court concluded that the question of whether a particular child should receive the benefits of integration was not a question that a court may decide.

<sup>8</sup> *Elwood v. The Halifax county Bedford District School Board*: although eventually this case settled and there is no final judgment, Justice Glube’s granting of an injunction which mandated that Luke Elwood remain in the regular classroom until the dispute was settled was an important step forward in terms of using the law to challenge educational expert’s decisions, balancing of student interests against school board interests and in its use of the *Charter* to challenge education policy. For a full discussion of this case and its implications see: A.W. MacKay, “The Elwood Case: Vindicating the Educational Rights of the Disabled” in M.Csapo & L.Goguen, Eds., *Special Education Across Canada: Issues and Concerns for the 90’s* (Vancouver: Centre for Human Development & Research, 1989)149.

<sup>9</sup> *Razaqpur v. Carleton Roman Catholic Separate School Board* (Ontario Special Education Tribunal) (December 1988).

for students with special needs.”<sup>10</sup> This trend can be a deterrent to equality because education experts, in undertaking placement decisions and applying the best interests of the child test, tend to look only at the framework of education services that currently exist. Their task is not framed in terms of finding ways of making the education system more inclusive. An early example of the impact of this perspective is the case of *Hickling v. Lanark, Leeds & Grenville Roman Catholic Separate School Board*<sup>11</sup> where a Ontario Human Rights Board of Inquiry found that the relevant students in the case had been discriminated against on the basis of their disability under the *Ontario Human Rights Act* by the Catholic School Board’s decision to place the students in a segregated setting. The Catholic School Board applied to have the decision judicially reviewed and the Court held that since the school did not have the appropriate amenities to accommodate the students, there was no discrimination and that furthermore these issues were better left to the educational experts.

Therein lies the crux of the problem. There has historically been too much deference to special education placement experts’ opinions when assessing whether a particular student has been discriminated against. A placement expert or team of experts who engage in a best interests of the child test to determine the appropriate placement for a child with special needs look at the avenues currently available. Their mandate does not include an examination of the mainstream education structure with a view to making it more accessible for students with disabilities. It is a difficult choice indeed, to choose from a regular classroom placement with minimal attempts at accommodation on one hand

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<sup>10</sup> *Supra* note 4, at 352.

and a specialized placement geared toward meeting the specific pedagogical and instructional needs of the child on the other. Judicial review of such a decision, however, is not limited to those two choices. As will become very clear in our analysis of current trends in the law, the rights to educational services provided without discrimination include an examination of the choices available in making placement decisions and whether those choices reflect accommodation to the point of undue hardship. Equality concerns itself with omissions as well as commissions.

The second major issue arising from Williams and MacMillan's analysis relates directly to the first in that sometimes parents or guardians ask courts and tribunals to support segregation and sometimes integration, depending on whether or not they feel their child's best interests will be met in one placement or the other. This issue, dubbed "polarized views on student placement" by Williams and Macmillan, tends to make the equality issues look more complex because parents and child advocates are not consistently advocating for the same outcome. As will become apparent, this issue surfaces most often because neither segregated placements nor integrated placements, up to this point, have been capable of meeting all of the needs of students. There are benefits to both.

This is where the new frontier of working toward secondary rights for students in the mainstream setting holds the most promise. A mainstream education structure that is truly inclusive would be able to meet the needs of the full range of students. Working toward secondary rights for students with disabilities provides the analytical framework

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<sup>11</sup> (1987), 60 O.R. (2d) 441; affirmed (1989), 67 O.R. (2d) 479 (C.A.).

within which we can address the structural shortcomings of the mainstream education system. Here we are able to examine the specific outcomes, opportunities, and possibilities. It is clear, that addressing the secondary rights of students is where the work of accommodation and pushing toward an inclusive education system actually occurs.

Another new frontier that has received little analysis to date is the access of students with both physical and mental disabilities to post secondary education. In my role as a University President, I am acutely aware of the financial and academic challenges implicit in making our universities more inclusive to the disabled. My own university, Mount Allison University, has an impressive support network for students with learning disabilities in the form of the privately funded Meighon Centre and we are proud of its accomplishments. However, we face many challenges as an old university, in making our campus physically accessible without putting too much of a burden on student tuitions. We are in the process of developing an action plan and pursuing funding but it is a slow and difficult process. Pursuing the goal of more inclusive universities is a large topic best left to a later article.

## **II~ Eaton: Platform Rights Affirmed, the Seed is Planted for Secondary Rights**

Arguably the most influential case in the struggle for equality in education as it relates to disability is the case of *Eaton v. Brant County Board of Education*<sup>12</sup>. The Supreme Court of Canada delivered its judgment in February 1997 in which it held that

the decision to place Emily Eaton in a segregated special classroom should stand. This decision came as somewhat of a shock to those who had been following the case. When Justice Arbour, at that time of the Ontario Court of Appeal<sup>13</sup>, rendered her decision requiring that Emily Eaton be placed in a regular classroom and that the provisions of s.15(1) of the *Charter of Rights and Freedoms* required a legal presumption in favour of integrating students with disabilities into regular classes, advocates celebrated. They expected the Supreme Court of Canada to herald a new era in the education system. Hopes were high that Justice Arbour's "unabashedly adopted framework of equality as the focus for assessing the appropriateness of both legislation and the administrative decisions made pursuant to that legislation" would be upheld by the Supreme Court of Canada and chart a new direction for educational equality in Canada.<sup>14</sup>

The Supreme Court of Canada's decision to allow the appeal of Justice Arbour's holding was seen as a defeat by many advocates for educational equality. "There is little doubt that the decision overall is not helpful to the concept of inclusion in the Ontario education system."<sup>15</sup> School boards attempted to rely on the Eaton decision as supporting the continued segregation of students with developmental disabilities.<sup>16</sup>

Further analysis of the Eaton decision, however, revealed that the Supreme Court of Canada had in fact, established some very important principles in favour of equality in

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<sup>12</sup> [1997] 1 S.C.R. 241. [hereinafter *Eaton*].

<sup>13</sup> Justice Arbour now sits on the Supreme Court of Canada.

<sup>14</sup> MacKay & Kazmierski, "And on the Eighth Day, God Gave Us...Equality in Education: *Eaton v. Brant (County) Board of Education* and Inclusive Education" (1997) 7 *N.J.C.L.* 2 at 41.

<sup>15</sup> Canadian Association for Community Living, "Some Issues/Implications Re: the Supreme Court Decision on Emily Eaton" (February 18, 1997).

<sup>16</sup> The Coalition for Inclusive Education, "Communique to Parents of Children with Disabilities in Ontario" (September 1997).

general and particularly equality in the educational context. Most particularly, the Supreme Court of Canada unequivocally recognized platform rights and made strong statements in favour of integration, recognizing that integration offers particular educational benefits of social interaction that cannot be found in a segregated setting.<sup>17</sup>

Furthermore, the Supreme Court's decision in *Eaton* provided a solid framework for analysis of disability from a s.15(1) *Charter* point of view. The court recognized that in the disability context, the central purpose of s.15(1) is to ensure the recognition of the actual characteristics of a person's disability and to ensure the reasonable accommodation of those characteristics.<sup>18</sup> The Court recognized that discrimination on the basis of disability results from:

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.<sup>19</sup>

As we shall see in examining the use of these principles in later cases, these fundamentals, established in *Eaton*, have been important building blocks in Canadian equality law.

The most problematic area of the *Eaton* decision is in its dealing with the legal presumption in favour of integration as articulated by Justice Arbour in the Ontario Court of Appeal decision. M. David Lepofsky points out that given the court's strong statements for an equality approach favouring integration as the "normal point of departure" earlier in the decision, its statements on the legal presumption were

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<sup>17</sup> *Supra* note 12, at para 69.

<sup>18</sup> *Supra* note 12 at para 67.

<sup>19</sup> *Supra* note 12 at para 67.

unnecessary and created much confusion.<sup>20</sup> In the end, the Court's refusal to endorse a formal legal presumption in favour of integration had its biggest impact on the issue of deference to educational experts. The formal legal presumption articulated by Justice Arbour effectively addressed the burden of proof issue when a decision about a child's placement is appealed.

The existing framework, with no legal presumption, favours the educational expert's opinion about the application of the best interests of the child test. This becomes an issue most often when an education expert favours a segregated placement for a child but the parent objects. A formal legal presumption in favour of integration would have changed this dynamic by placing the onus on the defendant school boards to demonstrate that any particular segregated placement is justifiable under s.1 of the *Charter*. The outcome of the decision in *Eaton*, is that by refusing the legal presumption in favour of integration, the court keeps the issue in the realm of s.15(1) analysis where the burden of proof rests on the party alleging discrimination to prove that a particular segregated placement decision is itself discriminatory. In essence this aspect of the *Eaton* decision continues the longstanding trend of deference to the opinions of special education placement experts.

This point is quite significant in view of the "best interests of the child" model outlined in the *Eaton* decision. Although, the Supreme Court of Canada did, in its reasons identify the particular benefits of integration, by not accepting a legal presumption in favour of integration, it allowed those benefits to be subsumed as a factor in the best

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<sup>20</sup> M.David Lepofsky, "A Report Card on the *Charter's* Guarantee of Equality to Persons with Disabilities

interest of the child test. The subsequent case of *Pokonzie v. Sudbury District Catholic Separate School Board*<sup>21</sup>, demonstrates the effects of this. Royce Pokonzie, a student diagnosed with Down's Syndrome attended school in a regular class with special assistance until grade six. School officials decided that Royce should be placed in a special segregated class for grade seven. The Pokonzie's challenged this decision. Upon judicial review, the Court held that Royce Pokonzie's placement decision should stand because the Pokonzie's had failed to conclusively show that the placement decision was not in Royce's best interests. The Pokonzie case illustrates how deference to special education placement experts is incorporated into the structure of the appeal of a placement decision.

Where segregated placements with all of their resources, and special attentions for the student with disabilities exist, and integrated placements fail to fully meet the needs of a child with disabilities, it is impossible for a parent to meet the burden of proving (on a balance of probabilities) that a segregated placement is not in a child's best interests. This hurdle can be overcome by challenging the adequacy of the choices available, particularly in challenging the adequacy of accommodation initiatives in integrated placements. In other words, by demanding full secondary rights for students with disabilities and true accommodation to the point of undue hardship. As will be clear in our later analysis, this is precisely the direction of post-Eaton legal work in this area.

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after 10 Years – What Progress? What Prospects?" 7(3) *N.J.C.L.* (August 1997) 401 at 414.

<sup>21</sup> [1997] O.J. No. 4698 (Ont.Gen.Div.), online: QL; 104 O.A.C. 367.

### III~ The Changing Culture Around Equality and Accommodation

Judicial interpretation following the *Eaton* decision, shows that the fundamental equality framework begun in *Eaton* has been picked up and elaborated by the Supreme Court of Canada. The fundamental concept from *Eaton* that equality, particularly as it relates to disability, requires a recognition that it is the structure of mainstream society that is the most significant barrier to full participation by the disabled rather than the disability itself, is a monumental recognition of the nature of the problem. This recognition has shifted the focus of legal work in this area to pushing for change to the structure of mainstream society. It has had a positive impact on the actual rights and entitlements enjoyed by people with disabilities. The *Eaton* case has been frequently judicially considered and followed. While the case was a set back for integration, it advanced the rights of people with disabilities in other respects.

One of the most notable cases to further this substantive approach to equality is that of *Eldridge v. B.C.(A.G.)*<sup>22</sup>. In this case the Supreme Court of Canada more fully examined the issue of the structure of the mainstream and its impact on access to benefits and opportunities for people with disabilities. The Court expanded the principles recognized in *Eaton* and confirmed that taking into account the individual characteristics of persons with disabilities is required to avoid discrimination.<sup>23</sup> The result in this case was a finding of discrimination on the part of a discretionary health board that decided to stop funding for sign language interpreters in hospitals and emergency rooms. This

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<sup>22</sup> [1997] 3 S.C.R. 624. [hereinafter *Eldridge*]

<sup>23</sup> *Ibid.*, at para 65.

landmark case clearly establishes that omissions as well as actions can result in violations of *Charter* mandated equality.

During the 1980's and 1990's formal international efforts to address human rights and equality issues emerged. These initiatives have also had an impact on the Canadian and provincial governments' stated commitments to equality as well as, the cultural understanding of what equality means and what efforts are needed to achieve it. For example the *World Programme of Action Concerning Disabled Persons*<sup>24</sup> was adopted by the United Nations General Assembly December 3, 1982.<sup>25</sup> This document is a very broad general statement about the importance of realizing the goals of "full participation" of disabled persons in social life and development and of "equality".<sup>26</sup> It is also a guide to understanding the areas of mainstream social life from which persons with disabilities are currently excluded. This statement and resolution by the United Nations which speaks on behalf of the member states of the United Nations at the time (Canada included) indicates a recognition of these important issues. It also indicates a certain commitment to these principles and provides a degree of moral persuasion to advance these goals. These international commitments have also been used to interpret the domestic legislation and practices.<sup>27</sup>

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<sup>24</sup> United Nations (New York, 1983).

<sup>25</sup> 37<sup>th</sup> Regular Session, resolution 37/52 (A/37/51) Official Records of the General Assembly, Thirty-seventh Session, Supplement No. 51.

<sup>26</sup> *Ibid.*, I(A) Objectives at 1.

<sup>27</sup> *Baker v. Canada* [1999] 2 S.C.R. 817, at para 70-71. The Supreme Court of Canada particularly recognized the impact of international obligations on *Charter* s.1 analysis in *Slaight Communications v. Davidson*, [1989] 1 S.C.R. 1038 at 1056-7.

A further international effort influencing this area of the law is the signing of the *United Nations Convention on the Rights of the Child*.<sup>28</sup> This document ascribes certain rights to each child including equality rights, education rights and participation rights. By signing this document, Canada has made a significant commitment to work toward these goals, including rights for children with disabilities. Indeed the Supreme Court of Canada recognized this substantial commitment in a recent case *R.v.Sharpe*.<sup>29</sup>

Equality rights in domestic law were further elaborated when the Supreme Court of Canada rendered its decision in the case of *Law v. Canada (Minister of Employment & Immigration)*.<sup>30</sup> The Supreme Court of Canada undertook a thorough review of the cases on s.15(1) of the *Charter of Rights and Freedoms*. In doing so, the court made some important statements about the purposes and objectives of equality law:

...to promote a society in which all persons enjoy equal recognition at law as human beings as members of Canadian society, equally capable and equally deserving of concern, respect and consideration.<sup>31</sup>

This framework and formal statements about human dignity, and the rights to concern, respect, and consideration are important and inform the purposive approach to equality law in Canada.

The point from *Eaton* that “...it is the failure to make reasonable accommodation... which results in discrimination”<sup>32</sup>, resonates through many equality cases and was recently considered in depth by the Supreme Court of Canada in a case which looked at

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<sup>28</sup> United Nations, General Assembly Resolution. 1386 (XIV); United Nations T.S. 1577/3. This Convention was ratified by Canada in 1992, Can.T.S. 1992, no.3.

<sup>29</sup> *R.v.Sharpe* [2001] 1 S.C.R. 45.

<sup>30</sup> [1999] 1 S.C.R. 497. [hereinafter *Law*].

<sup>31</sup> *Ibid.*, at 549.

<sup>32</sup> *Supra* note 12 at para.67.

the legitimacy of the specific aerobic requirements for firefighters in British Columbia.<sup>33</sup>

The court outlines an in depth analysis and test for determining when accommodation to the point of undue hardship has been reached, called the *Mieiorin* test. In an accompanying case, the Supreme Court of Canada applied the *Mieiorin* test to a public service provider.<sup>34</sup>

The *Mieiorin* test and its application to the area of public service providers is particularly important for the discussion of educational equality for two reasons. First, schooling is an area of public service provision and these decisions of the Supreme Court of Canada do apply to this area.<sup>35</sup> Second, Human Rights Tribunals across the country have begun to apply these decisions with promising results. Many parents of children with disabilities who are unhappy with the educational opportunities available to them use the human rights complaint process as an avenue for addressing their needs. This is a particularly attractive avenue if the chances for success are good because the complaint can proceed even if the complainant is not able to pay for the proceedings, unlike a court action. This would suggest that the time may be right for having secondary rights issues formally addressed. Several cases are currently either being heard or being prepared across the country.<sup>36</sup> In many of these cases parents and advocates are asking for public funds to cover the costs of educating children in specialized, segregated, private

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<sup>33</sup> *BCGSEU v. BC (Public Service Employee Relations Commission)* [1999] 3 S.C.R. 3 [hereinafter *Mieiorin*].

<sup>34</sup> *(Superintendent of Motor Vehicles) v. B.C. (HRC)* [1999] 3 S.C.R. 868 [hereinafter *Grismer*].

<sup>35</sup> The Supreme Court of Canada unequivocally accepted that educational services are an area of public service provision subject to human rights statutes in *Ross v. New Brunswick School District No. 15* [1996] 1 S.C.R. 825.

<sup>36</sup> Michael Tutton, "Parents Sue Over Special Education" in *Saint John Telegraph-Journal*, Monday, September 16, 2002, p.A1.

institutions. In evaluating whether this is the most appropriate remedy, an analysis of accommodation efforts in the mainstream educational structure must be part of the endeavour.

“Assessment & Placement”, “Service Delivery” and “Participation” were the three categories of rights that are grouped together as secondary rights. These rights refer to how a student is treated once they pass the threshold of inclusion into the public school system. Equal access to educational opportunities for a student with disabilities and the likelihood of an appropriate education are largely determined by how they are assessed and placed, by how and to what extent educational services are delivered, and by the level of their input or their parents’ input on their behalf. Indeed this is where the bulk of inclusion/exclusion happens and where the educational structure’s success at accommodation can truly be examined. This is indeed the new equality frontier for students with disabilities.

#### **IV~ The *Mieiorin* Test and Application to Public Service Provision**

The first thing that the Supreme Court of Canada says about discrimination in the landmark *Mieiorin* case is that direct and adverse effect discrimination categories ought to be replaced by a unified approach. The Court offers several reasons for this shift: “(a) Artificiality of the Distinction Between Direct and Adverse Effect Discrimination”, “(b) Different remedies Depending on Method of Discrimination”, “(c) Questionable Assumption that Adversely Affected Group Always a Numerical Minority”, “(d)

Difficulties in Practical Application of Employers’ Defences”, “(e) Legitimizing Systemic Discrimination”, “(f) Dissonance Between Conventional Analysis and Express Purpose and Terms of Human Rights Code”, “(g) Dissonance Between Human Rights Analysis and Charter Analysis”.<sup>37</sup> Particularly interesting to our discussion of educational opportunities for students with disabilities, is the Supreme Court’s recognition that under the previous “adverse effects” framework of analysis:

...if a standard is classified as being “neutral” at the threshold stage of the inquiry, its legitimacy is never questioned. The focus shifts to whether the individual claimant can be accommodated, and the formal standard itself always remains intact. The conventional analysis thus shifts attention away from the substantive norms underlying the standard, to how “different” individuals can fit into the “mainstream”, represented by the standard.<sup>38</sup>

This statement resonates particularly well with statements by the Supreme Court in *Eaton* that it is often the structures and assumptions of the norm that result in barriers to inclusion and lost opportunities for people with disabilities.<sup>39</sup> The Court in *Mieiorin* continued in this vein where it quoted this lengthy passage from Shelagh Day and Gwen Brodsky:

Accommodation seems to mean that we do not change procedures or services, we simply “accommodate” those who do not quite fit. We make some concessions to those who are “different”, rather than abandoning the idea of “normal” and working for genuine inclusiveness. In this way, accommodation seems to allow formal equality to be the dominant paradigm, as long as some adjustments can be made...Accommodation, conceived of in this way does not challenge deep-seated beliefs about the intrinsic superiority of such characteristics as mobility and sightedness. In short, accommodation is assimilationist. Its goal is to try to make “different” people fit into

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<sup>37</sup> *Supra* note 33 at 18-30.

<sup>38</sup> *Supra* note 33 at 25.

<sup>39</sup> *Supra* note 12 at para 67.

existing systems.<sup>40</sup>

A unanimous court in *Mieiorin* agreed with these observations, thereby setting the tone for a new era in discovering what “accommodation to the point of undue hardship” means.

The Court then goes on to establish what has become known as the *Mieiorin* Test. Once prima facie discrimination has been established, it can be justified if the test is met on a balance of probabilities standard. The test has three components: (1) that the standard was adopted for a purpose rationally connected to the performance of the function being performed, (2) that the particular standard was adopted in honest and good faith belief that it was necessary to the fulfillment of the legitimate purpose or goal, and (3) the standard is reasonably necessary to accomplish the legitimate purpose or goal, because the defendant cannot accommodate persons with the characteristics of the claimant without incurring undue hardship, whether that hardship takes the form of impossibility, serious risk or excessive cost.<sup>41</sup>

The Supreme Court of Canada further examined the concept of “accommodation to the point of undue hardship” as it applied the *Mieiorin* test to the area of public service delivery in the *Grismer* case<sup>42</sup>. At issue in this case was the Superintendent of Motor Vehicles standard for granting driver’s licenses that each candidate must meet an absolute standard of 120 degrees of peripheral vision on both sides. Mr. Grismer, due to a stroke,

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<sup>40</sup> Shelagh Day and Gwen Brodsky “The Duty to Accommodate: Who Will Benefit?” (1996), 75 Can. Bar Rev. 433. As quoted by SCC, *Supra* note 32 at 26.

<sup>41</sup> *Supra* note 34 at 869.

<sup>42</sup> *Supra* note 34.

could not meet that standard, but he argued he could drive safely, and that he had passed all of the other standard sight examinations and driver examinations. The Court states:

Accommodation refers to what is required in the circumstances to avoid discrimination. Standards must be inclusive as possible ...Failure to accommodate may be established by evidence of arbitrariness in setting the standard, by an unreasonable refusal to provide individual assessment, or perhaps in some other way. The ultimate issue is whether the employer or service provider has shown that it provides accommodation to the point of undue hardship.<sup>43</sup>

The result in this case was that the absolute standard was held to be discriminatory and that Mr. Grismer had the right to an individual assessment. The Court concludes that in applying its standards, which were rationally connected to safe driving, the Superintendent of Motor Vehicles must formulate an examination that individually assesses a driver's ability to recognize and react to factors occurring in respect to peripheral vision.

The *Mieiorin* test has also been applied by Human Rights Boards of Inquiry with interesting results. *Vlug v. Canadian Broadcasting Corporation*<sup>44</sup> is a case in which Henry Vlug challenged the CBC's incremental approach to captioning for the deaf. Almost none of the advertisements and no late night programming were captioned and only 76.8% of the broadcast day was captioned in 1999-2000. The result in this case was a finding of discrimination and that the incremental approach did not meet the burden of accommodation to the point of undue hardship. In arriving at this decision the tribunal

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<sup>43</sup> *Supra* note 34 at para 22.

<sup>44</sup> (2000), 38 C.H.R.R. D/404 (Can.Trib.).

found that the cost arguments made by the CBC were “largely impressionistic” and that the CBC had not fully explored all viable forms of accommodation.<sup>45</sup>

Another tribunal case comes from Ontario in the case of *Turnbull v. Famous Players Inc.*<sup>46</sup> This case involved three older theatres in Toronto which were not wheelchair accessible. Famous Players’ main defence was that they had recently undertaken a one-billion dollar expansion involving building new, fully accessible theatres and that it would be “an improvident use of resources” to renovate the old, inaccessible theatres at that point. In the end, the Board of Inquiry held, that Famous Players’ Inc. had failed to show that making the theatres accessible would cause undue hardship. This view of discrimination and what constitutes accommodation is a far cry from the *Hikling* decision referred to earlier where, on judicial review a court found two students had not been victims of discrimination at the hands of their school board because the school board did not have the appropriate amenities to deal with the children.<sup>47</sup>

A third case comes from British Columbia and also involves Famous Players’ Inc.<sup>48</sup> In this case, at issue was the fact that patrons using wheelchairs were required to use a separate, locked, unstaffed entrance to gain access to the theatre. Patrons using that entrance had to buzz a staff person who would, after a short wait, come to let them in. Famous Players’ defence in this case was the extra cost of staffing the alternate entrance. The tribunal accepted the argument that the policy was related to the economic viability of the theatre and was rationally connected to the provision of the service but it held that

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<sup>45</sup> *Ibid.*, at para 103-110.

<sup>46</sup> (2001), 40 C.H.R.R. D/333 (Ont.Bd.Inq.).

<sup>47</sup> *Supra* note 11.

Famous Players' did not demonstrate that the additional cost of staffing the alternate entrance would cause undue hardship.

Clearly, the *Mieiorin* test offers great potential for achieving equality. It sets out a clear framework within which existing structures and assumptions must be examined, and all possibilities for accommodation canvassed before the point of undue hardship is reached. It is also interesting to note that in interpreting the test, Human Rights Tribunals have not accepted defendants' cost arguments at face value. The message is clear: equality is an important goal that should not be sacrificed because it will cost money to change a system that excludes people with disabilities.

This does not mean that costs are irrelevant or that people with disabilities must be accommodated, regardless of the impact on the responding employer or institution. As President of a university founded in 1839 and with most of its buildings dating from the 1950's and 1960's, the costs of making education accessible are well known to me. The cost of adding an elevator to a single building can be in the range of one half million dollars. This can be a real challenge for a small institution to meet. However, making education facilities accessible to people with disabilities is a high priority and we are establishing a long term plan and seeking the necessary funding. Even in the new bold approach to equality, it is necessary to recognize that there are some cost limitations to reasonable accommodation and that achieving the goal of more inclusive facilities will take some time. Courts and Tribunals have recognized this reality as well.<sup>49</sup>

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<sup>48</sup> *Miele v. Famous Players Inc.*, (2000), 37 C.H.R.R. D/1, 2000 BCHRT 5.

<sup>49</sup> *Supra* note 34 at para 41; *Supra* note 44 at para 110.

Cost arguments used as limitations to reasonable accommodation measures are very difficult to evaluate, particularly for a court or tribunal if the remedy in a particular case involves ordering a positive expenditure by a government body. Government respondents to claims of discrimination frequently rely “on the constitutional principle that the expenditure of funds is a parliamentary responsibility.”<sup>50</sup> Education is an area in particular where, given the general deference to educational experts, courts and tribunals have shown a “reluctance to determine the proper level of required resources.”<sup>51</sup>

In anticipation of the 2000-2001 school year, the New Brunswick Court of Queen’s Bench refrained from granting an injunction to halt the New Brunswick Minister of Education’s decision to reduce the number of teaching assistants assigned for students with disabilities at the Albert Street Middle School. In this case, the Court found that there was a serious issue raised by the application and that there would be irreparable harm caused by fewer teaching assistants in that school. However, the court accepted as a fact that there was a finite amount of resources and that if this injunction was granted it would affect the distribution of resources to all students requiring a teaching assistant in the Province of New Brunswick. The Court refused to grant the injunction because, in the opinion of Justice Garnett, it was not the Court’s role to affect resource distribution in this way.<sup>52</sup>

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<sup>50</sup> *Auton (Guardian ad litem of) v. British Columbia (A.G.)* [2002] B.C.J. No. 2258 (Online: QL) at para 56.

<sup>51</sup> C.Clyde Spinney, Q.C., Office of the Attorney General for the Province of New Brunswick, *Respondents’ Post Hearing Brief* in the matter of the complaint between Bernadette Cudmore and the Province of New Brunswick, at para 71.

<sup>52</sup> *Acheson v. New Brunswick (Minister of Education)* 228 N.B.R. (2d) 223 at para 19.

It is often argued that not all differential treatment is discriminatory and that not all refusals to provide services are discriminatory; that sometimes there are simply difficult choices to be made about resource allocation. The British Columbia Court of Appeal very recently addressed this issue and, based on the reasoning of the Supreme Court of Canada in *Eldridge* stated:

However, the principle that government monies should be allocated only by the legislature, while strong, does not always prevail when the issue is compliance with the Constitution.<sup>53</sup>

Clearly this is an issue with which courts continue to struggle.

### **V~ Potential and Current Trends as the Law is Applied to Education**

The most significant post-*Eaton* trend in education law is toward looking at specific secondary rights. Within this trend, the two major hurdles identified are, deference to educational experts and discord over the desirability of integrated versus segregated placements. As the analysis progresses, the *Mieiorin* test may shed light on overcoming these hurdles and offer a new hope. These issues are complex and not easily resolved by educational or legal experts.

The case of *CPLD v. Saskatchewan*<sup>54</sup> squarely demonstrates these trends. In this case a group “Concerned Parents for Children With Learning Disabilities”, and the parents of six children with learning disabilities claimed that their school boards had failed in their duty to provide appropriate educational services to their children. The claim centres around a special segregated program for children with severe learning disabilities, known

as “the Carlton Connection”. The school boards had tried the program for one year and despite its apparent successes had refused to expand or continue the program. This program was compared with the services offered by the boards consisting of services provided in the classroom with the additional assistance of resource teachers. The case itself did not discuss the merits of the competing claims, as this judgment was only ruling upon the preliminary defence raised that the claim was frivolous or vexatious, and did not disclose a reasonable statement of claim.

The school boards in this case argued that there was not a reasonable statement of claim because there was “at least an honest difference of opinion between the defendants and the plaintiffs as to the most appropriate way to educate the children...it is not open to the courts...to review the exercise of this discretion on its merits.”<sup>55</sup> The defendant school boards based their arguments on the authority of *Trofimenkoff*<sup>56</sup> where the following statement was made, “whether the quality of the educational services is comparable to that provided by the school is not a matter which may be investigated under the guise of discrimination law...our function is a narrow legal function...”<sup>57</sup> The proper role of the courts continues to be a vital issue.

Justice Smith, who presided in this case, bravely took on the issue of deference to educational experts with the help of the then very recently decided *Eldridge* case. He took the view that the statements of law presented by the school board “do not go so far

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<sup>53</sup> *Supra* note 50 at para 57.

<sup>54</sup> [1998] S.J. No. 566. Online: QL.

<sup>55</sup> *Ibid.*, at para 59.

<sup>56</sup> *Patti Trofimenkoff et. al., v. Ray Meiklejohn et. al.*, [1991] Sask D. 58-02 (Sask. C.A.) Online: QL.

<sup>57</sup> *Ibid.*, at 2.

as to indicate that decisions of education policy are in no circumstances reviewable on their merits by the courts”.<sup>58</sup> Furthermore, Justice Smith stated, “the quality of the educational services provided “must now be determined in light of the recent decision of the Supreme Court of Canada in *Eldridge*”<sup>59</sup> and that this is a claim of adverse effect discrimination similar to *Eldridge*. Finally, Justice Smith concluded, “the effect of *Eldridge* is to elevate this statutory right [to appropriate educational services] to a constitutional entitlement”.<sup>60</sup> This decision squarely holds that the opinions of educational experts are not sacrosanct and that a review and comparison of the quality of education provided is a matter of discrimination law under s.15(1) of the *Charter*.

One case, currently being heard by a New Brunswick Human Rights Tribunal, is the case of Glen and Bonnie Cudmore against the New Brunswick Department of Education and School District 2. This case has the potential to push the boundaries for equality in education. This case involves a student with Attention Deficit Hyperactive Disorder (ADHD) and learning disabilities who, did not thrive in the regular classroom and who, once moved to a segregated school with specialized programs for students with ADHD/learning disabilities, allegedly did very well. The parents of the student in this case, through their complaint before the Human Rights Tribunal, argue that their son’s rights were violated by the school board and the school district by what the Cudmores consider a failure to provide equality in educational services to their son. They are asking for the public school system to pay for the costs associated with sending their son to a

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<sup>58</sup> *Supra* note 54 at para 53.

<sup>59</sup> *Supra* note 54 at para 54.

<sup>60</sup> *Supra* note 54 at para 59.

specialized school for students with disabilities. A lawyer involved in the case representing the Human Rights Commission (Charles Ferris) stated that the Human Rights Commission is arguing the application of the *Mieiorin* test and asserting that the Ministry of Education and the School District did not accommodate the Cudmore's son to the point of undue hardship.

A variety of secondary rights issues are raised by the facts of this case. First, when their son first began having difficulties, the school was very slow to react. It was the Cudmores who endeavoured to have their son tested and his disabilities were discovered. Second, once his disabilities were properly identified and an Individual Pupil Plan (IPP) was developed and consented to by the school board and the Cudmores, the IPP was not followed. In his sixth grade class, 20 out of 27 pupils had special needs. Although there were resource teachers, the ratio of students with a wide variety of special needs in this one class was overwhelming. The parents allege that their son did not receive the attention he needed. This class, an English curriculum class, is apparently not an isolated situation in New Brunswick where French immersion is so popular. Up to 70% of students with disabilities are in English curriculum classrooms. According to the Cudmores, their son experienced great improvements after attending the private institution, Landmark East, where he benefited from smaller classes and teachers trained to handle special needs children.

As part of their defence, the New Brunswick Ministry of Education and School District #2 claim that there was no intent to discriminate and that the Cudmores' must

prove the requisite negative impact in order to make out their claim of discrimination.<sup>61</sup>

Furthermore, in examining the purposes of the education system as it applies to students with disabilities, the defendants in this case, question whether accommodation to the point of undue hardship would include the provision of “every special service necessary to maximize each handicapped child’s potential.”<sup>62</sup> No doubt the issue of how accommodations for students with disabilities would negatively impact on the rest of the students in the classroom is an issue as well, as it was in discussions surrounding the *Eaton case*.<sup>63</sup> This is a particularly important issue in the context of the *Cudmore* complaint where up to 70% of students in the English curriculum classes are students with special needs.

It is not difficult to see the attractiveness of removing a student with disabilities from a reluctant mainstream and placing them in a program where special services are provided with the goal of maximizing the child’s potential. This option, however, is only available for those who can afford to pay private fees. Thus, arises the request for public funds to pay for the private opportunities as it has in the *Cudmore* complaint.

Another case in progress is *Moore v. BC (Min. of Education)*, in which a parent, through their complaint with the British Columbia Human Rights Commission, claims that their child’s equality rights were violated because the BC Ministry of Education does not provide adequate services for students with the learning disability, dyslexia. In this case, the parent argues in favour of segregation and points to a successful special

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<sup>61</sup> *Supra* note 51 at para 73.

<sup>62</sup> *Supra* note 51 at para 74.

education program available in other localities. Here the father compares the issue to that of providing English as a Second Language services for students who are new to Canada. This case, also ongoing, landed in the British Columbia Supreme Court for a preliminary ruling on an issue, because the Minister of Education claimed not to be the responsible party.<sup>64</sup> He argued that since he only provides the resources, the actual allocation is a matter for individual school boards. Justice Shaw clearly rejected this argument in this case by saying that “the Ministry’s duties and responsibilities are far broader than [simply funding]”. The judge cites several sections of *British Columbia’s Education Act* and Regulations and concludes that those duties and responsibilities are “separate and distinct from the Ministry’s responsibility to allocate funds”. The question of who is responsible for discrimination or a lack of accommodation, and who should be sued in these kinds of cases is an important one, often depending on the particular wording of the education statute that applies.

## **VI~ Concluding Thoughts & Role of Courts and Tribunals in Creating Remedies**

An overall assessment of the success of accommodation in education is difficult, because accommodation has generally taken the form of individual placement decisions for students with disabilities and discretionary initiatives by local education officials.<sup>65</sup> This

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<sup>63</sup> Chip Sutherland, “Case Commentary—*Eaton v. Brant County Bd. Of Education* (Supreme Court of Canada)”, Atlantic Canada Lawyers (March 3, 1997).

<sup>64</sup> *British Columbia (Ministry of Education) v. Moore*, [2001] B.C.J. No. 488, Online: QL.

<sup>65</sup> W.J. Smith & W.F. Foster, make the point in “Educational Opportunity for Students with Disabilities in Canada: Beyond the Schoolhouse Door” (1993-4) 5 *E.L.J.* 305 and later in “Educational Opportunity for Students with Disabilities in Canada: How Far Have We Progressed” 8 *E.L.J.* 183, that secondary rights for students are not well protected by the various provincial education statutes and regulations at all. With a few exceptions, there are “very few rights to identification and placements provided in most jurisdictions” and “very few rights to service delivery are provided” (at p.332). They conclude, “once students with disabilities have crossed the threshold of the schoolhouse door, board discretion rather than individual rights is the general rule. (at p.334).

shows that the attitude toward accommodation has been largely to favour formal equality (as articulated by Shelagh Day and Gwen Brodsky, cited by the Supreme Court of Canada<sup>66</sup>) for individual students rather than a focused examination of the structures and assumptions of the mainstream that create barriers for students with disabilities. The latter would lead to a more substantive equality.

An examination of the instances where segregated placements are favoured certainly sheds light on the failures of accommodation efforts thus far. In *Eaton*, Emily Eaton had been attending a regular classroom for several years with the help of a special education assistant. One of the outcomes of this placement was that Emily was not well received by the mainstream class and that she was in a sense more isolated than before.<sup>67</sup> Again in *Pokonzie*, Royce Pokonzie had attended a regular classroom with individual support for several years before the placement was deemed a failure and Royce was placed in a segregated class. In both *CPLD* and *Moore* the applicants compare techniques and services available in the segregated “special education” sector to evaluate the shortcomings of the educational services their children received in the public school system. This puts into perspective their children’s relative lack of success in the public school. In *Cudmore* the parents argue that a segregated placement demonstrates the gap between what the student was capable of achieving and what he had achieved in the regular classroom placement. The trend is clear, simply placing a student with disabilities in a mainstream setting, even with individual help, without actually altering,

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<sup>66</sup> *Supra* note 40.

<sup>67</sup> *Supra* note 12 at para 19.

adjusting, or examining the impact of the mainstream structure, does not create an inclusive educational environment.

There is also the perennial problem of inadequate resources to meet the needs of the children in the class. What does the *Mieiorin* test require? Perhaps, diagnostic tools readily available for assessing all students? Perhaps, teachers trained and provided with the tools to successfully operate a fully integrated classroom program? Perhaps, more thought and energy put into discovering how the mainstream educational structure can be feasibly altered to make it more inclusive? Granted, these are not inexpensive solutions. However, the amount of resources spent fighting lawsuits or paying for students with disabilities to attend private specialized educational institutions, if astutely allocated, might just about cover the costs involved. Certainly it is an avenue for educational policy makers to explore. The accommodation efforts of the past where a student is placed for awhile (albeit with some resource help), and then the experiment is deemed a failure, resulting in the sending of the student off to a segregated special education setting, is not sufficient. This type of accommodation amounts to still trying to jam a square peg into a round hole, albeit with the help of a little grease.

Another possible avenue for education policy makers to explore is a statutory initiative in British Columbia and the North West Territories where the right to an Individual Education Plan (IEP) is extended to all students.<sup>68</sup> What if an individualized education path was made the norm? What if it was no longer the norm for thirty to forty elementary level students to spend the entire school day together, working on exactly the

same material all of the time? Would this more easily accommodate students with a variety of education needs? Would this facilitate identification and placement for all students, at all points on the intellectual spectrum? *Eaton* and *Grismer* both point in this direction, as the Supreme Court of Canada stated in both that individual assessment is necessary to avoid discrimination as individual assessment avoids the need to set an arbitrary standard with which people can be excluded.<sup>69</sup> One size does not fit all.

Certainly there are limits to accommodation built in to the “point of undue hardship” test and in s.1 of the *Charter*. It is unlikely, that those limits have been reached by accommodation efforts to this point. Accommodation efforts must get beyond formal equality and undertake that difficult work of examining the existing mainstream educational structure and exploring what the actual options and possibilities are before the “point of undue hardship” has been reached. This is required by the *Mieiorin* test and is certainly a reasonable first step in a free and democratic society in order to fulfill our duty to provide each student in our public school system with equal “concern, respect, and consideration.”<sup>70</sup>

Some parents and advocates seek to have private, specialized educational services paid for out of public funds as a remedy to the discrimination suffered by some students with disabilities. This type of remedy has immediate benefit for those particular students whose needs will be addressed. Understandably, for a frustrated and exasperated parent

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<sup>68</sup> W.J. Smith & W.F. Foster, “Educational Opportunity for Students with Disabilities in Canada: Beyond the Schoolhouse Door” 5 E.L.J. at 321.

<sup>69</sup> This point is further explored in a study prepared for the Ontario Law Reform Commission on psychological testing. W. MacKay & P. Rubin, *Study Paper on Psychological Testing and Human Rights In Education and Employment*, (Toronto: Ontario Law Reform Commission, 1996).

<sup>70</sup> *Supra* note 31.

of a child with disabilities, not being well served by the current public education system, this may seem like the best remedial option. The questions for courts and tribunals, however, are, first, whether or not this is an appropriate remedy in the case of discrimination by a public educational institution. Second, whether or not it has the authority to mandate so specific an expenditure and budgetary priority for a government department.

On the issue of whether this is an appropriate remedy or not, the purpose of the equality provisions should be born in mind. Cases like *Eaton*, *Eldridge* and *Mieiorin* emphasize the point that discrimination often results from the design of the mainstream structure that excludes people with disabilities. The emphasis in *Eaton* and *Grismer* is on the necessity of individualized testing and evaluation to avoid unnecessary, arbitrary standards that exclude. This continues the focus on the impact of the existing structure on those who are excluded from its benefits. By granting as a remedy, funds to pay for a private educational placement, the mainstream structure is not challenged and is permitted to continue. Thus, except for its immediate remedial impact for the individual applicant, this remedy does not address the source of discrimination. Unless accompanied by some other remedy, such as requiring educational policy makers to improve the education structure, this remedy does nothing to directly address the discriminatory action that gave rise to the claim in the first place.

Second, does a court or tribunal have the authority to require a government body to expend money on an individual student's attendance at a private educational institution? Is this treading into previously forbidden territory protected by the

longstanding tradition of deference to the legislatures in figuring out how best to allocate public funds? A recent Nova Scotia Court of Appeal case<sup>71</sup>, which has been granted leave by the Supreme Court of Canada<sup>72</sup>, wades into some of these issues. In this case a judge's decision to retain jurisdiction over the matter in order to ensure compliance with the order granted under the authority of s.24(1) of the *Charter* is questioned. Freeman, J.A., in dissent at the Nova Scotia Court of Appeal level<sup>73</sup>, reminds us of then Chief Justice Dickson's words in *Mahe v. Alberta* where it is stated that:

...The provision [s.23] provides for a novel form of legal right, quite different from the type of legal rights which courts have traditionally dealt with. Both its genesis and its form are evidence of the unusual nature...Section 23 confers upon a group a right which places positive obligations on government to alter or develop major institutional structures. Careful interpretation of such a section is wise: however, this does not mean that courts should not 'breathe life' into the expressed purpose of the section, or avoid implementing the possibl[e] novel remedies needed to achieve that purpose.<sup>74</sup>

However, Justice Freeman was in dissent and the Majority of the Court held that the trial judge has no jurisdiction to monitor compliance with a court order. It will be interesting to see what the Supreme Court of Canada says on this issue.

The new interpretation of discrimination and accommodation to the point of undue hardship arising from the *Mieiorin* test and its applications suggests a similar type of rights have been formed in that it does imply positive obligations on government to alter or develop discriminatory institutional structures. The British Columbia Court of

<sup>71</sup> *Doucet-Boudreau et. al., v. N.S. (Minister of Education) et. al.*, (2001), 194 N.S.R. (2d) 323.

<sup>72</sup> *Doucet-Boudreau et. al., v. N.S. (Minister of Education) et. al.*, [2001] S.C.C.A. No. 459 Online: QL.

<sup>73</sup> *Supra* note 62 at 343.

<sup>74</sup> [1990] 1 S.C.R. 342 at 365.

Appeal very recently held that remedying discrimination found under s.15(1) of the *Charter* in the provision of health care services for children with the disability autism was a high enough priority that the Court did:

not consider that the inevitable expenditure of funds consequent on a decision in favour of the petitioners to be so extraordinary that this Court must conclude that s.1 justifies the state's failure to fund treatment for Autism.<sup>75</sup>

Particularly salient to the Court's decision in this case was the Court's finding that the impact of the discrimination would

Very likely lead to an adult life of isolation and institutionalization, and in which the individual's development has been so compromised that the or she likely will be unable to access service programs such as education...<sup>76</sup>

Does a court or tribunal have a different level of discretion in fashioning a remedy if the claim arises from a Human Rights statute rather than a claim under section 15(1) of the *Charter of Rights and Freedoms* with its accompanying broad remedial authority under s.24(1)? A full comparison of the remedies available under a Human Rights statute as compared to the *Charter of Rights and Freedoms* is beyond the scope of this presentation. However, it is important to point out the novel nature of a remedy that requires a specific expenditure of public funds for private educational opportunities. This kind of remedy has not been embraced by the courts in the past, except where the right claimed explicitly requires it. Whether or not equality rights, and claims for accommodation under the new interpretations of substantive equality, requires a positive

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<sup>75</sup> *Supra* note 50 at para 58.

<sup>76</sup> *Supra* note 50 at para 49.

obligation on the parts of governments to the point of paying for private educational, has yet to be determined.

The longest tribunal hearing in the history of the New Brunswick Human Rights Commission is scheduled to be the first tribunal to decide on this issue in the *Cudmore* case. This high profile case, which has been frequently debated in the newspapers and on radio, truly brings home many of the most important issues in the search for a quality education system. The Cudmores' frustration over an education system that they feel was not sufficiently responsive to their son's needs turned to the only alternative available, a private institution. Now, their house is for sale and they have no funds left with which to continue this path. The unfortunate and ironic aspect is that the battleground over the appropriateness of a court or tribunal mandating public expenditure is fraught with issues that have little to do with remedying the Cudmores' son's lack of access to quality education.<sup>77</sup>

The Government of New Brunswick, as the respondent in the *Cudmore* case, takes a very different view of the facts from the parents and discrimination must be proved before the Human Rights Tribunal will look at the issue of remedy. The strong government resistance to paying for educational opportunities outside the public education system means that in the event the complaint is substantiated, the battle over these issues is likely to go on to the courts, thereby extending into the future the difficulties for the Cudmores and particularly their son. Ironically, New Brunswick was

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<sup>77</sup> J. Wishart, "Case shone light on flaws in education system" *The Moncton Times and Transcript*, October 30, 2002 at A-3.

one of the early provinces to have a policy of full inclusion for disabled students and it still pursues this objective, albeit in a climate of diminishing resources.

Janice Gross Stein in her book, *The Cult of Efficiency*<sup>78</sup>, expanding upon her 2001 Massey Lectures raises some interesting questions about consumer choice in the public market for education. She suggests that citizens are less deferential to governments in the modern age and insist on accountability in the delivery of public services, such as education and health. Dr. Stein explores the use of education vouchers and charter schools as vehicles for enhancing parental choice in education and producing more efficiency by way of competition. In this approach the role of government would be as one service provider, but not the only one. In addition, it would be charged with the important task of regulating the other service providers.

Dr. Stein's conclusion is that there is little solid evidence of more efficiency, in the sense of better performance, in this public/private market place. If the vouchers are targeted to give more resources to the poorer segments of society that exit poorly funded public systems, this does advance the cause of equality. She prefers expanding public markets in the form of charter schools or other means of providing more diversity within the public system. Her emphasis is on expanding parental choice. In her analysis, the rhetoric of efficiency used by governments are really attempts at cost containment rather than enhanced performance, which is a crucial distinction.

In the end Dr. Stein comes down on the side of a robust public education system, rather than a more fragmented public/private one. Even the creation of niche

schools within the public system can have the effect of producing inequalities by concentrating more students with challenges in the remaining schools. This may be one of the unintended effects of the popular French Immersion program in New Brunswick, which appears to result in a significant number of students with disabilities attending the English only schools. This could explain the high concentration of disabled students in the Cudmores' son's public school class.

It is also important to remember that schools have important socializing and citizen building agendas as well as academic ones.<sup>79</sup> In a country that espouses the virtues of multi-culturalism, a diverse public school system that is broadly inclusive is very important. This does not mean that no group should be in a segregated situation but rather that the norm should be the inclusive public school system and that there should be continuous efforts to evaluate and improve on the opportunities the education system supports. If this system is given the proper resources, then it should be able to change to accommodate the many different needs of the students. Properly investing in this system is basic to the values that we celebrate in the Canadian democracy. There would be many negative consequences to significant public funding of private school education. Many of those negative consequences impact on issues of equality.<sup>80</sup> Doing a better job within our public system is the much preferable option.

Ultimately, the goal that we seek is an education system that provides quality educational opportunities that meet the needs of each student and so that each student

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<sup>78</sup> *Cult of Efficiency* (Toronto: House of Anansi Press, 2001).

<sup>79</sup> *Ross v. New Brunswick School District No. 15* [1996] 1 S.C.R. 825.

may reach his or her potential. It is possible for one public education system to achieve this goal efficiently and cost effectively. Particularly if compared to the existing situation where resources are spent defending lawsuits rather than on more accommodation efforts. Creative ideas and initiatives can bring us closer to our goal of a quality, publicly funded education for the full spectrum of students. Indeed the social benefits of inclusion to both students with disabilities who get the opportunity to participate with able-bodied students, and the benefits to able-bodied students of knowing and interacting with disabled students, should be kept in mind. Let us not throw the baby out with the bath water! Accommodation efforts must be examined and improved but integration is not a failed experiment. Full secondary rights for students in the mainstream setting, is the new frontier and the wave of the future in remedying the discrimination experienced by students with disabilities in our public education system.

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<sup>80</sup> Jerry Paquette, "Public Funding for Private Education: Enhanced Choice at What Price in Equity" (2002) 12(2) *E.L.J.* 133.