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The Elwood Case: Vindicating the Educational Rights of the Disabled

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THE ELWOOD CASE: VINDICATING THE EDUCATIONAL RIGHTS OF THE DISABLED

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The guarantees of the Charter of Rights affect the definition of education for the disabled. The case of Elwood v. Halifax County — Bedford District School Board, a landmark case in educational rights of disabled children in Canada, has major implications for educational practice.

One of the earliest and most controversial *Charter of Rights* challenges to the existing educational structure has come from the parents of disabled children. Disabled children and their parents are blazing the trail to define educational rights in Canada and in the process give some shape to the elusive concept of equality enshrined in the *Charter*. The range of complex and important issues raised by these challenges is great. Do we want a Canadian society which includes or excludes minorities, such as the disabled? How can we best accommodate the needs of the disabled and thereby allow them a real equality of opportunity? Who should have the final say about the education of a child — the parents, the school authorities or the child? What should be the respective roles of legislators, administrators and courts in trying to answer some of these difficult questions? In raising these basic value disputes, the disabled and their

advocates are on the front lines of the general struggle to define what we mean by education in Canada and how the guarantees of the *Charter of Rights* may affect this definition.

I. THE PLAYERS

The smiling and affable Luke Elwood is an unlikely shock trooper in the battle for integration of the disabled in Canadian schools. Equally unlikely front line soldiers are his soft spoken and articulate parents — Rick and Maureen Elwood. Nor should one forget Melissa, Luke's older sister, who cheerfully accepted the many babysitters necessitated by her parents' involvement in the case. Rick is a Dartmouth, Nova Scotia firefighter who is a salt of the earth personality with a quiet common sense approach to life. Maureen is a striking woman in both appearance and style, who demonstrates an incredible persistence and dedication that makes her a formidable advocate of her cause. Her cause and that of the team which orchestrated the *Elwood* case (Elwood v. Halifax County — Bedford District School Board, 1987), is the rights of the mentally disabled to be integrated into the mainstream of Canadian schooling. The Elwood victory which began with the October, 1986 mandatory injunction, which effectively integrated Luke for one school year and culminated with the June 1, 1987 court ordered settlement, is due in no small measure to the courage and vision of the Elwood family.

At the risk of being immodest, I would also suggest that the nature and dedication of the team which worked on the *Elwood* case is another important component of the victory. My co-counsel, Blaise MacDonald of Goldberg and MacDonald in Halifax provided the practical litigation experience and "street smarts" to complement my knowledge of the *Charter of Rights* and education law. We were co-counsel in the full sense of the term and all legal decisions were joint decisions. Moreover, there was a vital broader team including Debby Smith, Margie Brown and Bill Powroz of the Nova Scotia branch of the Canadian Association for Community Living (C.A.C.L.), Robin MacLean and Gordon Krinke, Dalhousie law students who provided research on the case and the Elwoods themselves. In the latter stages of the case Dulcie MacCallum from Vickers and Palmer in Victoria, British Columbia, joined the team and used her experiences in the *Bales* (Bales v. School District No. 23, 1984), *Re K.* (K. v.

Public Trustee, 1985), and *E.* (E. v. Eve, 1986) cases to assist in the drafting of the settlement agreement and prepare for trial. There was also valuable support from the Toronto offices of C.A.C.L. and meetings with the Rowetts and their counsel, who are challenging the exclusion of their Downs Syndrome child, Jocelyn, from their neighbourhood school. The *Rowett* case (Rowett v. Board of Education of the Region of York, 1986) is scheduled to go to the courts in the coming year. This team of people who delivered many of their services on a *pro bono* basis, and sacrificed many Sundays to strategy and planning sessions, provided the multi-discipline information base and moral and intellectual support which is crucial to mounting an effective *Charter* challenge to the educational *status quo*.

The Halifax County - Bedford School Board and its special service spersonnel were not totally opposed to the integration of children with mental disabilities; indeed, they accepted the cascade model which identifies integration as the least restrictive environment for the mentally disabled child. In reality, very few children once labelled and placed in a class for the moderate or severely mentally disabled moved out of that class and into the mainstream. Accepting the advice of its Chief Educational Officer, Lloyd Gillis, and the special education staff the Board insisted on a special education placement for Luke in October, 1986 and rejected the parents' requests for integration into the neighbourhood school, Atlantic View. As a consequence of Luke's progress during his year of integration and possibly because of concern about the problems that could be posed by a judicial ruling against them based on the *Charter of Rights*, the Board reversed their stance. Even in the factum filed with the court the Board conceded that the proper placement for Luke for the next couple of years was an integrated placement. This reversal of position was a surprise to both the Elwoods and their lawyers. In the ultimate agreement the Board went even further in accepting the requests of the Elwoods in respect to both placement and parental involvement. The willingness of the Board's agents and its lawyers, Peter MacLellan and Ian Holloway of MacInnes & Cooper, to negotiate with the parents is commendable. They were not so entrenched in their views that they would fight at any price. One wonders whether there could have been an earlier settlement which could have saved time, money and effort. However, to be fair, the willingness of the Defendants to negotiate and ultimately reach agreement was vital to a satisfactory resolution of the dispute for all parties.

II. LITIGATION AND DISPUTE RESOLUTION

In legal terms the *Elwood* case was a once in a lifetime opportunity and as close as a *Charter* advocate is likely to get to a perfect set of facts. Luke was well liked by his peers in school. The parents of his fellow students supported the Elwoods by supplying supportive affidavits at the injunction hearing and stood behind the Elwood family throughout their long and sometimes difficult conflict with the Halifax County - Bedford District School Board. The weeks of Discovery Hearings provide volumes of evidence about the policies, procedures and operations of special education in the particular school district and present a dramatic record of the conflicting views about the appropriate educational setting for the mentally disabled. There is an element of disappointment that the planned three week trial, which was to begin on June 1, 1987 will never take place. This trial was to include a parade of educational experts from the United States, Ontario and the Maritime provinces. However, the June 1 settlement signed in the shadow of *Charter* litigation was clearly in Luke's best interests — which all parties agreed was the crucial guiding principle.

Leaving my legal advocates guise and adopting my academic role I believe that the settlement agreement may well have been the best way to resolve this dispute. Educators are quite rightly more comfortable about an educational plan devised by negotiations between parents and school authorities than by one imposed by judicial decree. Similarly the arbitration procedure allows for a more flexible and less expensive means of resolving conflicts than repeated trips to the courts. It is a testimony to the ultimate good will of both parties in this dispute that they were able to put aside past conflicts and agree upon an educational plan which will best serve Luke Elwood's educational needs. Even recognizing my bias as co-counsel for the Elwoods, it is fair to say that the agreement represents a significant advance in the legal rights of disabled children to be integrated into regular classes and for parents who want a meaningful involvement in the educational placement and program for their children. Because the settlement in judicially approved it has more precedential value than some out of court settlements; in practical terms it is already being used as a precedent for other Nova Scotia school boards and boards in other provinces as well. The Elwood agreement has already become an important negotiating tool for parents who want their children integrated and encounter resistant school boards. While it would have been useful to have a positive judicial ruling on the

educational rights of the disabled under the *Charter*, the Elwood agreement does represent a landmark in the rights of disabled children to equality in the schools.

It is interesting to note that the seminal United States decision on the rights of the mentally disabled within the school system was also a court ordered settlement between the parents and the school board. In the *Pennsylvania Association for Retarded Children* vs. *Commonwealth of Pennsylvania, 1972,* the court not only approved the settlement but also provided reasons. Nonetheless the parallel is there and as has been the case in the United States, there will be other legislative and judicial developments to expand the process begun with the *Elwood* case. The *Rowett* case in Ontario may be one such extension. Apart from the educational benefits of settling disputes by agreement and the obvious financial savings, there are legal advantages as well. A negative or narrowly worded court ruling can be worse than no ruling at all. The dangers of pursuing these kinds of issues in the courts is emphasized by the recent reversal of an Ontario Human Rights Board of Inquiry in the *Hickling* case (Hickling v. Lanark, Leeds and Granville County R.C. School Board, 1986). In this case the court concluded that there was no violation of human rights by sending disabled Roman Catholic children to special education classes in the public education system. While court battles are an important part of the battle for integration there are other ways to make advances. Furthermore, the October, 1986 injunction granted by Chief Justice of Nova Scotia, Constance Glube, is an important judicial precedent which can be used by litigants which follow in the footsteps of the Elwoods.

III. THE LEGAL ISSUES

The *Elwood* case raised a host of important *Charter* issues. Some of these were addressed in a preliminary fashion in the October, 1986 injunction hearing and all of them were considered in detail in the factums filed with the court in late May, 1987 in preparation for the intended three week trial. I shall not attempt to properly explore these issues here but merely sketch the broad outlines of these legal arguments.

(a) A Constitutional Right to Education

In our injunction memorandum and in more detail in our pre-trial factum, we argued that there is a constitutional right to education implicit in the *Charter of Rights*. The key section for purposes of this argument is section 7 of the Charter which states:

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

Without an education there is no right to a quality of life, liberty or security of the person. Since other sections of the *Charter* expressly recognize rights to denominational education and education in one's minority language it would seem strange to deny a more general right to education in the *Charter*. Furthermore, a right to education is a prerequisite to an effective exercise of other *Charter* rights such as the right to free expression and the right to vote. The details of these legal arguments and their grounding in the morality of human rights I have discussed elsewhere (Mackay, 1987; Krinke & Mackay, 1987).

The lawyers for the School Board rejected such claims to a constitutional right to education. In their views education was still a matter to be defined by statute and regulation and delivered by the educational administrators. This debate is a crucial one for education and one that will arise in the courts at some future point. It may even be addressed in the Ontario *Rowett* case in the coming year.

(b) Due Process and Fundamental Justice

Another important aspect of the *Elwood* case was the claim that the parents and through them Luke Elwood was denied fair procedures in the various administrative and board rulings concerning Luke's placement and programming (Dolmage v. Muskoka Board of Education, 1985). We claimed that there was a denial of both natural justice and fairness at common law, as well as a breach of the procedural guarantees of fundamental justice in section 7 of the *Charter of Rights*. The components of this denial included the lack of parental access to crucial documents and meetings, the denial of the right to question school board members, the brevity of notice for crucial meetings and the

unreasonable restrictions on the length of parental submissions to the school board. There were also arguments advanced that the failure of the Board and its agents to follow their own policies and procedures with respect to the testing and asessment of Luke and the involvement of parents in the placement process, constituted a violation of the common law rules of fairness and the constitutional guarantee of fundamental justice. In relation to these issues the Discovery evidence is a mini inquiry into the procedures and operations of the Halifax County - Bedford District School Board and its administrators.

Lawyers for the school board did not directly address the claims about fundamental justice under section 7 of the *Charter*, because they argued that education is not one of the "life, liberty and security of the person" interests which trigger the section (LaForest, 1986). In relation to common law fairness, they argued, the Elwoods were treated fairly by the school board and its agents. Furthermore, they acted in accordance with the relevant statutes and regulations and any policies were only guidance and not legally binding. These process issues are important and continue to receive judicial attention in many of the court cases in respect to education.

(c) Equality and Integration

One of the most controversial legal issues, to which much of the expert testimony would have been addressed, is whether equality for Luke Elwood necessitated integration. We stopped short in our legal arguments of a frontal attack on special education; and did not contend that integration was the constitutional right of all mentally disabled children. We did argue that integration was the only way that Luke would receive the equal benefit of the law as guaranteed under section 15 of the *Charter*. Since placement of Luke in a special class was on the fact of it a discrimination based on mental disability, the burden then shifted to the school board to justify this limitation on his rights to be treated equally. The burden of proof in respect to reasonable limits under section 1 of the *Charter* rests squarely with the school board as the relevant state agent (MacKay, 1985). This idea that integration of the disabled is the norm and that special placement must be justified as a reasonable limit on rights, is incorporated into the Elwood agreement.

Lawyers for the school board argued first that there was no discrimination under section 15 of the *Charter*, because Luke as a member of a class of mentally

disabled students, was not similarly situated to non-disabled students. Thus based on the approach of the early cases there was no violation of equality. Secondly, they argued that a special placement was an affirmative action program designed to give Luke equality of opportunity rather than deny it. This is an important educational as well as legal debate. Thirdly, the lawyers for the board argued that if there was any violation of equality it was saved under the reasonable limits provision of section 1 of the *Charter*.

Because the case never went to trial there was no judicial resolution of the important and complex legal issues raised in the factums. In the process of pre-trial conferences in May, 1987 it was decided by Mr. Justice MacLeod Rogers that Luke did not appear to need separate legal representation at trial as had been suggested. Chief Justice Glube in her injunction ruling in October, 1986 did request that lawyers on both sides consider whether Luke should have separate legal representation. While Mr. Justice Rogers kept open the possibility of the appointment of separate counsel during the trial, he felt it was not necessary at the outset and unlikely to be required at all. While there are many cases where children should have separate legal representatio in educational disputes, I agree with Mr. Justice Rogers that this was not an appropriate case.

IV. THE SIGNIFICANCE OF THE ELWOOD CASE

As earlier indicated I think the Elwood case will be a landmark case in the educational rights of disabled children in Canada. The Elwood agreement itself is an important precedent in practical terms and it is a classic illustration of the out of court uses of the *Charter of Rights* as an important negotiating tool for students and parents. There is no doubt in my mind that there would have been no agreement in the *Elwood* case had we not been prepared to go to court under the *Charter of Rights*. Indeed, we were on the brink of doing do when the agreement was signed. Other parents can use the Elwood precedent, hopefully without incurring the costs and strains of pursuing legal action. Thus the Elwoods have fought an important battle from which many parents can benefit.

For parents who must litigate under the *Charter* in order to advance their claims for integration the Elwood agreement may also be useful. One of the most difficult aspects of many earlier *Charter* cases is the fashioning of just and appropriate remedies in accordance with section 24(1). Judges often feel un-

comfortable in going too far beyond traditional judicial remedies and feel particular discomfort in ordering other branches of government to spend funds. Such affirmative remedies are just and appropriate in many *Charter* cases, including those dealing with the educational rights of the disabled. Lawyers for the parents of disabled children can now use the Elwood agreement, or parts of it, as a model remedial structure. It will be of some comfort to courts that at least one school board has implemented such a remedial structure without disastrous results. Thus the Elwood agreement may be appended to the written submissions in future disability litigation as one example of a just and appropriate *Charter* remedy.

Another significant feature of the Elwood case and the agreement which resolved it is a recognition of the rights of parents in the educational process. By virtue of the agreement the Elwoods have not only obtained the placement that they wanted for Luke but also a guaranteed role in the designing of his program. If there is something in the program that they do not like they can take the dispute to an agreed upon or court appointed arbitrator. This is a considerable gain from being excluded from case conferences about Luke's future and being told where their son would be placed regardless of their wishes.

The parents do not have a veto over either placement or programming, and in that respect the school board has maintained its position. However, the school board no longer has the final say, which they argued in their factum was the proper interpretation of the education laws in Nova Scotia. When there is a dispute between parents and school authorities, which they cannot resolve themselves, the issue is referred to an independent arbitrator. This is a good compromise which respects both the rights of parents and the statutory powers of school authorities. It also protects the child against both unreasonable parents and unreasonable educators. While there is no guarantee that arbitrators will always be reasonable it does introduce an outside perspective.

There are many lessons in the Elwood case for both lawyers and educators. However, the real beneficiairies of the Elwoods' efforts are disabled children such as Luke, who will be given new opportunities to reach their full potential as human beings.

THIS AGREEMENT (Settlement Minutes) made this day of May, 1987.

BETWEEN:

RICHARD (RICK) ELWOOD and
MAUREEN ELWOOD, both for themselves
and as Guardians of their infant son,
LUKE ELWOOD

(Hereinafter referred to as the "Elwoods"
and "Luke", respectively)

OF THE FIRST PART

- AND -

THE HALIFAX COUNTY-BEDFORD
DISTRICT SCHOOL BOARD

(Hereinafter referred to as the "School Board")

OF THE SECOND PART

AGREEMENT

GOLDBERG MACDONALD
Barristers and Solicitors
1407-1959 Upper Water Street
P.O. Box 306
Halifax, Nova Scotia
B3J 2N7

NBM:jb

THIS AGREEMENT (Settlement Minutes) made this day of May, 1987.

BETWEEN:

RICHARD ELWOOD and MAUREEN
ELWOOD, both for themselves and as
Guardians of their infant son, LUKE ELWOOD

(Hereinafter referred to as the "Elwoods"
and "the Child" respectively)

OF THE FIRST PART

- and -

THE HALIFAX COUNTY-BEDFORD
DISTRICT SCHOOL BOARD

(Hereinafter referred to as the "School Board")

OF THE SECOND PART

WHEREAS the Child was enrolled in an integrated pre-school program in the years 1981-82 and 1982-83, and enrolled in Special Classes provided by the School Board for the school years 1983-84, 1984-85 and 1985-86;

AND WHEREAS for the school year 1986-1987 the Child has been attending Atlantic View Elementary School, the School normally attended by elementary-aged students in the Child's geographic neighbourhood;

AND WHEREAS the Child has been in a Grade 3 Class at Atlantic View Elementary School with certain supports provided by the School Board;

AND WHEREAS the parties have perceived that certain advances have been made by the Child during the School Year 1986-87;

AND WHEREAS it is the present intention of the parties that the Child will remain in his School as hereinafter defined during the term of this Agreement and will continue to be enrolled in a class of age appropriate peers in such School;

AND WHEREAS all parties to this Agreement are committed to the Child reaching his maximum potential;

AND WHEREAS all parties to this Agreement acknowledge and accept that the fundamental principle underlying this Agreement is the best interests of the Child;

AND WHEREAS the School Board is committed to the principles of integration and "least restrictive environment" in the placement and delivery of services to its students having special needs.

NOW THEREFORE the parties agree as follows:

1. Definitions

(a) "Class" means any class of regular students of age appropriate peers for the Child in his School as defined herein and being a class without a disproportionate number of students with special learning needs;

(b) "Classroom Teacher" means the teacher assigned to the Class and who is the person who has primary responsibility for the instruction of all the students enrolled in that class regardless of the grade level, and that in grades 7, 8 and 9, Classroom Teacher as herein defined shall be the homeroom teacher of the Child;

(c) "Principal" means the Principal designated to the School attended by the Child pursuant to this Agreement;

(d) "Program" means the Student Program Plan individually designed for the Child;

(e) "Resources" includes, but is not restricted to, the Principal, Program Assistants, Psychologists, Resource Teachers, Special Education Teachers, Speech Therapists and volunteers;

(f) "School" means for the period from the date of this Agreement to June 30, 1988, the Atlantic View Elementary School and for the period from September 1, 1988 to June 30, 1993, the Ross Road School;

(g) "School Board" includes the School Board members, the administrative staff, the employees, representatives and the agents of the Halifax County-Bedford District School Board; and

(h) "Team" means the Educational Support Team responsible for the design and implementation of the Program planned for the Child as constituted in accordance with Clause 7 of this Agreement.

2. THAT, subject to Clause 3, during the term of this Agreement, the Child will attend his School and be enrolled in a Class of age appropriate peers in such School and any change in such placement requires the consent of both the School Board and the Elwoods, and more particularly such placement shall

be as follows during the term of this Agreement:

Age of the Child	Class	School
9 years	Grade 3	Atlantic View Elementary School
9-10 years	Grade 4	Atlantic View Elementary School
10-11 years	Grade 5	Ross Road School
11-12 years	Grade 6	Ross Road School
12-13 years	Grade 7	Ross Road School
13-14 years	Grade 8	Ross Road School
14-15 years	Grade 9	Ross Road School

3. **THAT** notwithstanding Clause 2, either the Elwoods or the School Board shall have the right to refer the matter of placement for arbitration pursuant to the terms of this Agreement. In any such arbitration, the onus shall be on the party requesting a placement for the Child which is other than that placement set out in Clause 2 to demonstrably justify such other placement on clear and convincing evidence.

4. **THAT** the Classroom Teacher assigned to the Child's Class will have primary responsibility for the delivery of the Program for the Child but subject at all times to the supervisory practices and procedures of the School Board. Subject to this Agreement, the development of program and curriculum, both generally and for the Child, will remain within the jurisdiction of the School Board.

5. **THAT** the Resources, including personnel and material, special services and other assistance, that are required for the Program of the Child as determined by this Agreement shall be provided by the School Board to the School.

6. **THAT** a Program shall be prepared for the Child and shall be reviewed from time to time as required but at least every twelve (12) months.

7. **THAT** the administrative implementation of the Program for the Child shall be at the direction of the School Board and the day-to-day implementation of the Program shall be the responsibility of the Classroom Teacher under the direction and supervision of the Principal.

8. **THAT** the following shall be the procedure adopted in the development of the Program for the Child:

(a) The Principal of the School shall determine who shall be members of the Educational Support Team ("Team") but the Team shall always include the Classroom Teacher and the Elwoods;

(b) The Team shall be responsible for the design and implementation of the Program for the Child;

(c) The Principal of the School shall set the time and place for all meetings of the Team and reasonable notice of all meetings of the Team is to be delivered to all members of the Team;

(d) All members of the Team shall make all reasonable efforts to be in attendance at all Team meetings;

(e) The Principal shall decide if a person who is not a member will be permitted to attend a Team meeting and, if so, reasonable prior notice shall be given to the members of the Team;

(f) For the purpose of updating and preparing the Program, if the Team so requests, the School Board shall provide a psychological, speech or other assessment and/or evaluation of the Child for the sole purpose of Program monitoring, reviewing, updating and development but no psychological assessment or evaluation can be made except with the prior consent of the Elwoods. Subject to Clause 8(a) and 8(e), the person responsible for any assessment and/or evaluation may be invited to attend the Team meetings as requested.

(g) Full copies of any and all such assessments so prepared shall be provided as soon as is reasonably possible to all members of the Team;

(h) The Elwoods have the right to challenge any Program developed for the Child and such challenge may be referred to arbitration pursuant to this Agreement.

9. **THAT** the Elwoods have the right to have access to all records kept by the School Board regarding the Child.

10. **THAT** should a dispute arise regarding this Agreement, the Child's School or Class placement or any matter whatsoever regarding the Child's Program, the dispute may be referred by the parties to arbitration in accordance with the following provisions:

(a) No resolution of any dispute is binding unless approved by both the School Board (by its duly authorized representative(s)) and the Elwoods, or determined by arbitration pursuant to this clause;

(b) Where a dispute arises, the party concerned shall as a first step advise the Classroom Teacher and/or the Elwoods, as the case may be;

(c) There shall be a meeting between the Classroom Teacher and the Elwoods with a view to resolution of the dispute;

(d) If after that meeting, the matter is not resolved, then notice in writing shall be delivered by the party concerned to the Principal of the School or the Elwoods as the case may be requesting a meeting pursuant to Clause 10(e);

(e) The Principal shall then call and attend a meeting between the Elwoods and the Classroom Teacher with a view to resolution of the dispute;

(f) If after that meeting, the matter is not resolved then notice in writing shall be delivered by the party concerned to the Chief Executive Officer of the School Board or the Elwoods as the case may be requesting a meeting pursuant to Clause 10(g);

(g) The Chief Executive Officer of the School Board, or their delegate, shall then call and attend a meeting between the Elwoods and the Principal of the School with a view to resolution of the dispute (and at such meeting both the Chief Executive Officer of the School Board and the Elwoods may bring up to three persons to assist);

(h) If a resolution is not reached, then either party may put in writing within seven (7) days of the last meeting arranged pursuant to Clause 10(g) their desire to have the dispute referred to arbitration, which notice shall be delivered by the party issuing the notice with service on the other party;

(i) While no time limits are specified in certain of the preceding subparagraphs of this Clause, it is agreed that either party shall have the right to proceed to the next stage in the

foregoing arbitration process by giving seven (7) days' notice to such effect to the other party;

(j) Any time limits referred to in this Agreement are directory and the right to proceed to arbitration shall not be affected by failure to comply with such time limits;

(k) Arbitration for the purpose of this Agreement shall be governed by the provisions of the Arbitration Act, R.S.N.S. 1967, c. 12, as amended but will be by a single Arbitrator;

(l) Notwithstanding the provisions of the aforementioned statute, the parties agree that in the event they are unable to agree on a person to sit as a single arbitrator, either party may apply to the Chief Justice of the Supreme Court of Nova Scotia (Trial Division) to have the Chief Justice appoint a single arbitrator, and, at the time of the application, each of the three (3) parties shall supply three (3) suggestions to the Chief Justice for the single arbitrator but the Chief Justice is not restricted to such suggestions for the single arbitrator;

(m) The powers of the Arbitrator shall be those contained in the Arbitration Act and, in addition thereto, remedial powers to make an Order to render a party whole;

(n) During the dispute resolution and arbitration process up to the date on which the Arbitrator renders his award, the status quo in existence prior to the event giving rise to the dispute will be maintained in regard to the issue in dispute.

11. **THAT** the parties to this Agreement agree to make every effort to resolve issues under the Agreement and, particularly, through the process prior to the matter being referred to arbitration and without the necessity of the involvement of lawyers.

12. **THAT** the parties agree that if a project is implemented at the Child's School similar in kind and in principle to the Pilot Project for Integration at Sycamore Lane Elementary School:

(a) The Elwoods agree to act as resource or be an active participant to assist in preparing parents at the School as part of the preparation work for integration to be initiated by the School Board;

(b) The School Board will make every effort to avoid affecting the Program of the Child while implementing the integration program for other students at the School;

(c) Resources which are available to the Child's Classroom Teacher for the implementation of the Child's Program can be used as deemed necessary and expedient to provide similar support services for all students in the School without interfering with the Child's Program.

13. **THAT** if at any time during the term of this Agreement, a statutory scheme is introduced which changes or alters this Agreement in any way whatsoever, it is agreed that this Agreement will continue and will apply except as necessarily altered or affected by such statutory scheme.

14. **THIS AGREEMENT** shall expire and be of no further effect after June 30, 1993, unless the parties have agreed in writing to extend and renegotiate this Agreement.

15. **THIS AGREEMENT** can be amended or changed at any time with the consent of all parties.

16. **THIS AGREEMENT** is subject to the approval of the Supreme Court of Nova Scotia as it settles or compromises the claim made by the Child in the proceeding in the Supreme Court of Nova Scotia bearing S.H. No. 58650.

17. **THIS AGREEMENT** shall form part of the Consent Order.

18. **THIS AGREEMENT** shall be interpreted in accordance with the Laws of Nova Scotia.

19. **THIS AGREEMENT** and everything herein contained shall extend, bind and enure to the benefit of the heirs, executors, administrators, successors, employees, representatives, agents and assigns of each of the parties hereto.

IN WITNESS WHEREOF the parties hereto have hereunder signed and sealed this Agreement on the day and year first-above written.

SIGNED, SEALED AND DELIVERED in the presence of:

"Maureen Elwood"
MAUREEN ELWOOD, as Guardian and guardian ad litem for Luke Elwood

"Richard Elwood"
RICHARD ELWOOD, as Guardian for Luke Elwood

"Richard Elwood"
RICHARD ELWOOD

"Maureen Elwood"
MAUREEN ELWOOD

HALIFAX COUNTY-BEDFORD DISTRICT SCHOOL BOARD

"Lloyd Gillis"
Representative for the School Board

THIS AGREEMENT (Settlement Minutes) made this day of May, 1987.

BETWEEN:

RICHARD ELWOOD and MAUREEN ELWOOD, both for themselves and as Guardians of their infant son, LUKE ELWOOD

(Hereinafter referred to as the "Elwoods" and "the Child" respectively)

OF THE FIRST PART

- and -

THE HALIFAX COUNTY-BEDFORD DISTRICT SCHOOL BOARD

(Hereinafter referred to as the "School Board")

OF THE SECOND PART

AMENDMENT AGREEMENT

GOLDBERG MACDONALD
Barristers and Solicitors
1407-1959 Upper Water Street
P. O. Box 306
Halifax, Nova Scotia
B3J 2N7

THIS AMENDMENT made this day of May, 1987, to the Agreement dated the day of May, 1987.

BETWEEN:

RICHARD ELWOOD and MAUREEN ELWOOD, both for themselves and as Guardians of their infant son, LUKE ELWOOD

(Hereinafter referred to as the "Elwoods" and "the Child" respectively)

OF THE FIRST PART

- and -

THE HALIFAX COUNTY-BEDFORD DISTRICT SCHOOL BOARD

(Hereinafter referred to as the "School Board")

OF THE SECOND PART

WHEREAS an Agreement was signed between Richard and Maureen Elwood on their own behalf and on behalf of the child ("Elwoods") and the Halifax County-Bedford District School Board ("School Board");

AND WHEREAS this Agreement covers in a very extensive manner both the placement and the student program plan which will apply to the Child for the next number of years;

AND WHEREAS under this Agreement both the Elwoods and the School Board have the right to arbitrate placement;

AND WHEREAS both the Elwoods and the School Board wish to ensure that the program which was discussed and agreed upon is actually implemented;

AND WHEREAS both the Elwoods and the School Board wish to have a chance to demonstrate what can be accomplished, in particular, through the program which the School Board has planned for Ross Road School;

AND WHEREAS both the Elwoods and the School Board recognize that in this Child's particular circumstances a period of stability is desireable;

AND WHEREAS Clause 15 of the Agreement provides that it may be amended or changed with the consent of all parties;

NOW THEREFORE the parties consent and agree to amend the Agreement as follows:

1. THAT notwithstanding the provisions of the Agreement, Clause 3 of the Agreement shall not be in force and effect until July 1, 1990.

2. THAT should the School Board advocate a change to a placement other than the placement set out in Clause 2 of the Agreement, the costs of the Arbitrator and the reasonable costs of the Elwoods, including reasonable legal costs, shall be paid by the School Board.

IN WITNESS WHEREOF the parties hereto have hereunder signed and sealed this Amendment on the day and year first-above written.

SIGNED, SEALED AND DELIVERED in the presence of:

"Maureen Elwood"
MAUREEN ELWOOD, as Guardian and guardian ad litem for Luke Elwood

"Richard Elwood"
RICHARD ELWOOD as Guardian for Luke Elwood

"Richard Elwood"
RICHARD ELWOOD

"Maureen Elwood"
MAUREEN ELWOOD

HALIFAX COUNTY-BEDFORD DISTRICT SCHOOL BOARD
"Lloyd Gillis"
Representative for the School Board

REFERENCES

Bales v. *School District No. 23 (Central Okanagan)* (1984), 54 B.C.L.R. 203 (S.C.).

Dolmage v. *Muskoka Board of Education* (1985), 49 O.R. (2d) 546 (Div. Ct.).

E. (Mrs.) v. *Eve,* (1986) 2 S.C.R. 388.

Elwood v. *Halifax County - Bedford District School Board* (1987), settlement approved by court order, N.S.S.C. (T.D.), June 1, 1987. In October, 1986 a mandatory interlocutory injunction was obtained from Chief Justice Glube of the N.S.S.C. (T.D.) which effectively integrated Luke Elwood for the full school year before trial.

Hickling v. *The Lanark, Leeds and Granville County Roman Catholic School Board* (1986), an unreported decision of a Board of Inquiry established under the Ontario *Human Rights Code*. The result of this decision has now been over-turned in the Ontario courts and thus the victory for integrating the disabled children into the Roman Catholic school system was short-lived.

K. v. *Public Trustee* (1985), 63 B.C.L.R. 145 (C.A.).

Krinke, G. & MacKay, W. (1987). Special education and the Charter: The right to equal benefit of the law — A response, *Canadian Journal of Law and Society* (in press).

La Forest, J., for the majority in *Jones* v. *R.,* (1986) 2 S.C.R. 284 assumed without deciding that education was one of the "life, liberty and security of the person" interests. Wilson, J. in dissent, expressly concluded that education was encompassed within section 7 of the *Charter*.

MacKay, W. (1987). The Charter of Rights and special education: Blessing or curse? (In press).

MacKay, W. (1985). Bales v. Board of School Trustees: Parents, school boards and reasonable special education. *Administrative Law Review,* **8**, 225.

P.A.R.C. v. *Commonwealth of Pennsylvania* (1972), 343 F. Supp. 279.

Rowett v. *Board of Education of the Region of York* (1986), an unreported decision of the Central Region (English) Special Education Tribunal. Judicial review of this decision is being sought in the Ontario Supreme Court.