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Case Comment

***83** Private Beliefs and Public Safety: The Supreme Court Strikes Down a Total Ban on the Kirpan in Schools as Unreasonable

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Multani v. Commission scolaire Marguerite-Bourgeois [FN1]

1. INTRODUCTION

In 1990, in *Pandori* v. *Peel Board of Education*, [FN2] an Ontario board of inquiry was called upon to resolve a dispute concerning a school board policy banning the wearing of a kirpan, a ceremonial dagger worn by Khalsa Sikhs. It held that the ban infringed the freedom of religion of the applicant students and teachers and rejected the school board defence that the wearing of a kirpan endangered public safety. The Ontario Divisional Court refused to quash the decision, leave to the Ontario Court of Appeal was refused and there the matter ended. Almost 15 years later a similar dispute occurred in Québec where the court of first record reached similar conclusions. However, this time, the matter did not stop there and was appealed up to Canada's highest court. On March 2, 2006, the Supreme Court of Canada struck down the Montréal school board ban on the wearing of a kirpan in school in what has been described as "a ringing ***84** defence of religious freedom." [FN3] The reaction of counsel for the Canadian branch of the World Sikh Organization was succinct: "I hope this decision will put this matter to rest once and for all." [FN4] However, not everyone saw this decision in the same positive light, nor is counsel's hope that this matter has been resolved reflected in the reactions to this decision.

The Québec government response was terse and guarded, declaring that: it had taken official note of the judgment; the government was reassured that it allowed school boards to take reasonable measures to provide for security concerns while respecting freedom of religion; and, the decision would be scrutinized carefully by each of the ministries concerned. [FN5] According to a report in the Montréal newspaper, *La Presse*, even this response was slow in coming, as the mandate to issue a statement bounced from one government department to another throughout the day. [FN6] The respondent school board reaction was equally laconic. It expressed its reaction as one of "deception but respect," while reserving its own decision as to *how* it would direct schools and parents to implement the Supreme Court ruling. [FN7] The Francophone school board federation was mute on the ruling, merely reproducing the school board's press release on its web site. [FN8] In contrast to the guarded reactions of government and education officials, the general public was much less restrained.

An article in the online edition of *La Presse* invited readers to comment on the case. At the time of writing, 745 readers had responded. [FN9] No attempt has been made to categorize their comments, let alone analyze

them. However, it was reported that out of 3,734 respondents to a *La Presse* survey, 87% were opposed to the decision and only 9% were in favour. [FN10] The following provides a flavour of the responses to this article:

> If the Supreme Court is not up to doing its job, then remedial action should be quickly undertaken .... I am not a racist but I believe that people who come here ***85** should conform to our ways of doing things. I say NO to the wearing of the KIRPAN and all arms in school. We already have enough problems in our schools .... We should immediately return to our fundamental values: a safe environment for a calm spirit. [FN11]
>
> It is fine to complain about this decision but simply TO REACT is not enough, we must ACT! Let's look at the reactions following this decision, the vast majority are opposed to it. What are we waiting for to protest, sign petitions, oblige our governments to respect the opinion of the vast majority. Too much is too much! WE NEED TO ACT! [FN12]
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> I think that the judges of the Supreme Court have erred. We have a non-denominational school system in Québec. Why then accept distinctive religious symbols in our schools? [FN13]
>
> Catholic religious instruction has been removed from our schools in recent years. With it almost all our religious symbols have also disappeared. I do not understand why the symbols of our religion, even if less and less practised, should be forbidden in our schools while the symbols of other religions accepted. [FN14]
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> It is delicate to react to this situation but I believe that the Charter of Human Rights and Freedoms tends to favour the minority to the detriment of the majority. [FN15]
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> This judgment is disgusting. The Supreme Court is in the process of selling Canadian values to foreigners. It is time that Québec separated from these judges named by the federal government. [FN16]
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> I am outraged by the stupidity of the comments submitted. Are you truly aware of the content of the judgment? There are severe restrictions on the wearing of the kirpan that provide maximum security. To invoke security is only an excuse for paranoia about other religions and cultures. I support and congratulate Rima Elkouri for her wisdom. [FN17]

While these comments are not presented as a representative sample of those submitted, they serve to illustrate the high level of feeling that this ruling has generated in Québec. They also provide evidence that even if a vast majority of respondents oppose the judgment, they do so for very different reasons. Some are simply concerned with school safety; others are resentful of any privileges granted to immigrants. Some bemoan the loss of the denominational school; others see a threat to the newly won ***86** secular school. Still others see one more reason for an independent Québec.By contrast, a minority applaud the judgment as a reflection of their vision of Québec society. All of these reactions must be viewed in light of the context that provides the background to the *Multani* case.

2. BACKGROUND

In an earlier comment on the appellate decision in this case, I stated that it was significant in at least two senses, one retrospective, the other prospective.

> Looking back from the case, one is struck by the historical context of a dual-denominational school system that has now been recast in a linguistic mould. Looking ahead, one wonders about the extent to which the next generation of human rights cases will have to confront *reasonable limits* invoked in the name of security in a post 9/11 world. [FN18]

The following provides a synopsis of the historical context of this case. [FN19] I will deal briefly with the

wider context of this case--human rights in a security-conscious world--in the concluding section of this comment.

Religion has been a predominant feature of Québec education from the early days of New France and led to the so-called 'Confederation compromise' over education in 1867. [FN20] The denominational education system was strengthened in post-Confederation legislation that did not change significantly until the 'Quiet Revolution' of the 1960s and remained in force until the end of the twentieth century. However, only two denominations were recognized: Roman Catholicism and Protestantism, which came to embrace all other Christian denominations. Adherents of all other religious faiths were treated as 'others,' which amounted to constitutionally permissible discrimination. [FN21] When the break with tradition finally occurred, it happened sharply and quickly, but with some exceptions.

***87** It began in 1997 with a constitutional amendment to completely abrogate constitutionally protected denominational rights in Québec, followed in 1998 by legislation to implement language-based school boards in 1999-2000. However, despite significant changes to the governance of schools enacted by other legislation, their previous denominational status remained unchanged, and discrimination on the basis of religion also continued in relation to compulsory moral and religious instruction ("MRI") courses.

No discriminatory provision could now claim constitutional immunity and therefore violated both the *Canadian Charter of Rights and Freedoms*, [FN22] and the Québec *Charter of Human Rights and Freedoms*. [FN23] However, they were allowed because Québec had previously enacted 'override' provisions in all relevant legislation. [FN24] Rather than deal with these vestiges of denominational privilege, the Minister appointed a Task Force, chaired by Professor Jean-Pierre Proulx, whose final report remains timely today, given the comments cited above concerning the *Multani* case:

> Pluralism constitutes a challenge not just for the structure of the education system, but also for safeguarding diversity while ensuring the continuity of social ties between citizens. Québec schools clearly have a major role to play in seeking a balance between the development of individual identities and a new openness toward pluralism ....
>
> [D]ecisions made at the end of the democratic process will be consistent with the normative restrictions imposed by individual rights ... to ensure that the majority will not make decisions that are detrimental to human rights, except in very serious and exceptional circumstances. [FN25]

Following the report of the Proulx Task Force, the Government began moving incrementally to deal with residual discrimination. Legislative changes were made in 2000 to eliminate denominational status for any public school. [FN26] The more contentious issue, MRI courses of study, is ***88** still, six years later, 'work-in-progress,' due in large measure to considerable pressure from parents, supported by section 41 of the *Québec Charter*:

> Parents or the persons acting in their stead have a right to require that, in public educational establishments, their children receive a religious or moral education in conformity with their convictions, within the framework of the curricula provided for by law.

This guarantee exceeds what is expected by international normative standards for the protection of freedom of religion and non-discrimination on the basis of religion. [FN27] Thus, if the government removed override protection, it would be forced to provide MRI courses for all faiths, to avoid a charge of discrimination. The alternative, to eliminate all such courses from the curriculum, was not a viable option, as parents could invoke their right under section 41. The obstacle has only recently been removed, by amending section 41, as had been

recommended by Québec's human rights commission. [FN28] Section 41 now reads as follows:

> Parents or the persons acting in their stead have a right to give their children a religious and moral education in keeping with their convictions and with proper regard for their children's rights and interests. [FN29]

The legislation that incorporated this amendment will eliminate all provisions of a denominational nature as of July 1, 2008, including the abrogation of the override provisions. On that date, the reform of education to remove denominational discrimination from Québec legislation will finally be complete. The fact that this will have taken more than a decade since the constitutional amendment of 1997 indicates the attachment to the past that many Québecers have and the difficulties faced by those who advocate for open pluralistic schools. It should not be surprising, therefore, to learn that the government has been cautious with respect to its policy on 'interculturalism,' Québec's version of multiculturalism. ***89** Although apparently not officially defined, this term is understood to mean:

> a social contract as one where Anglophones and other cultural communities are invited to accept their responsibilities in the development of Québec culture and in the establishment of the French language. At the same time, the Government promises to respect minorities, contribute to their development and foster their contribution to French culture. [FN30]

Access to English schooling in Québec is based on parental language of instruction, as stipulated in "Bill 101," the *Charter of the French Language*. [FN31] Bill 101 was designed to halt the admission of immigrant children to English language schools and bring about the integration of immigrants into the mainstream Francophone community. The combined impact of Bill 101 and the secularization of the school system have transformed majority Francophone schools from uni- to multi- lingual, religious and cultural institutions. Thus, the legislation that is intended to protect French language and culture "is responsible for bringing the Francophone community face to face with cultural pluralism." [FN32] From a policy perspective, Québec has tried to navigate between the Charybdis of pluralism, with its threat to the protection of Québec's identity, and the Scylla of a closed society, with its threat to immigrant populations. The government's answer to this policy dilemma in the education context is *integration*:

> Integration ... may be defined as a long-term multidimensional adaptation process, which is distinct from assimilation, the overall adoption of the host society's culture and fusion with the majority group. The process of integration, which involves accepting elements of the immigrants' cultural identity of origin and in which the achievement of proficiency in the language of the host society plays an essential role, is only complete when the immigrants or their descendants participate fully in all aspects of the community life of the host society and feel a sense of belonging in that society. [FN33]

This policy is characterized as a "two-way street" which "demands openness to diversity and the application of appropriate policies by the ***90** social and educational milieu that receives them." The central *quid pro quo* of this openness for immigrants is their proficiency in French, "the language of instruction and public life." Furthermore, they are expected to "assimilate the social codes in order to establish meaningful relations with their classmates and participate in the life of the community." [FN34] The other aspect of this policy is intercultural education:

> Intercultural education ... refers to any educational measure designed to foster awareness of the diversity--notably, ethnocultural diversity--that characterizes the social fabric and to develop skill in communicating with people from various backgrounds, as well as attitudes of openness, tolerance and solidarity ....

> The object of intercultural education is not to convey knowledge about cultures ... but rather to foster a better understanding of culture in pluralistic societies. [FN35]

The Policy also recognizes the need for reasonable accommodation of differences as well as the resistance to these demands:

> The diversity of beliefs and values, whether originating in religion, culture or personal opinion, can result in the formulation of demands by students or parents for exceptions to an educational institution's rules. These requests generally concern observance of religious obligations and practices, but may also reflect concepts of school, learning, discipline and children's rights, linguistic usage, and the status and roles of men and women.
>
> However, ... school staff ... worry about the possible contradictions between accommodations the educational institution reaches and the basic values it is supposed to instill in its students. In Québec and Canada the law provides certain guidelines for the recognition of pluralism and the exercise of rights and freedoms, such as the need to reconcile the various laws and the state's recognized responsibility to enforce the law in ways that serve the general interest. [FN36]

It is possible to view this policy as a cynical attempt to make just enough concessions to the immigrant populations so they will blend into mainstream (i.e. Francophone) Québec society. However, the tensions referred to in the passage quoted above are real. Thus the policy can be viewed as a genuine attempt to bridge the ethnic divide. This is the view espoused by Mc Andrew who also asserts that this policy reflects an evolution in attitude toward diversity. However, she also states that the policy rarely takes cultural and religious diversity into account as a means to redress power imbalances within the school community. [FN37] The four-year plan of action (1998-2002) that accompanied the policy provided for ***91** an evaluation of the extent to which the plan - and by implication the policy - had succeeded. [FN38] No such evaluation has ever been undertaken and the latest ministerial report states that the time frame for implementation has been extended. The reasons stated are a delay in allocating funds, the difficulties in effecting both the necessary partnerships and agreements between school boards and other agencies, and the various implementation measures themselves. [FN39]

In the absence of any evaluative data, [FN40] one must rely on other ‘indicators' to judge the success of government policy. First, one might consider the controversy that arose over the wearing of the Islamic veil, or hijab, in Québec schools. As reported in the previous comment, considerable debate ensued when a secondary school in Montréal refused to allow one of its female students, a convert to Islam, to wear the hijab, ostensibly because it violated the school's dress code. The conflict never resulted in a court case because the student withdrew and enrolled in another school. However, public attention to this issue led to a discussion paper published by the Québec human rights commission. [FN41] Rejecting the presumption that young women were forced to wear the hijab, the Commission stated that that school dress codes must seek reasonable accommodation with Muslim students. Reasonable limits for reasons of safety could be invoked (e.g. physical education courses and laboratory activities), provided the risks to safety were *real* and not just *presumed*.

The comments cited above regarding the *Multani* case provide an indicator of public attitudes. Another can be found in the stance taken by the government in this case, without whose intervention, the case would never have proceeded beyond the trial level.

***92 3. THE KIRPAN IN SCHOOL: SETTING ‘REASONABLE LIMITS' TO RELIGIOUS FREEDOM**

(a) Disagreement, Consent and Appeal

Gurbaj Singh Multani, a Khalsa Sikh, was, when this case began, a student in a French language school in Montréal. The case began when the kirpan which he was wearing under his outer clothes accidentally fell in the school yard. The principal informed him that he was not allowed to bring the kirpan to school. The school board subsequently agreed to a request from the family that Gurbaj be allowed to wear the kirpan at school, provided that the flap sealing the kirpan in its sheath was sewn securely, a device that could be inspected at any time by the school administration.

The school governing board refused to agree to this compromise, stating that it contravened the school's rules and regulations concerning dangerous and forbidden objects. It appears that the parents appealed this decision to the school board. The school board, ignoring its own agreement, upheld the decision of the school, causing the family to seek an interlocutory injunction and a declaratory judgment that the plaintiff had the right to wear the kirpan at school. The court granted the injunction and subsequently endorsed a new agreement between the parties that allowed Gurbaj to wear the kirpan to school in accordance with the following conditions:

- that the kirpan be worn underneath his clothes;
- that the scabbard containing the kirpan be made of wood, not metal, thereby eliminating its offensive character;
- that the kirpan be placed in its scabbard, wrapped in a secure manner ...;
- that school staff may, in a reasonable manner, verify that the above conditions are respected;
- that the plaintiff may not at any time withdraw the kirpan from its scabbard and that its loss must be reported immediately to school authorities;
- ***93** that the failure by the plaintiff to observe any of the conditions of this judgment shall cause him to lose the right to wear the kirpan at school. [FN42]

However, prior to this ruling being handed down, counsel for the Attorney General for Québec intervened on the basis of ‘public order,’ [FN43] stating: “I have received a very precise mandate, to put the following position of the Attorney General before the Court: The Attorney General has zero-tolerance for knives in school, and that includes a kirpan. That is the only representation I have to make.” [FN44] Although this last-minute intervention did not change the outcome at trial, it set the stage for the appeal, which presumably was its intended outcome.

On appeal, the school board denied that there had been any agreement on the measures of accommodation included in the trial decision, a claim that was accepted by the Court of Appeal. [FN45] In any event, the Court of Appeal considered the case to be a matter of public order not susceptible to being foreclosed from appeal by a settlement between the parties. [FN46]

The Court of Appeal first dealt with the standard of review that ought to be applied with regard to the decision of the school board. For reasons that will be discussed below (section b), it decided that the intermediate standard of reasonableness was appropriate. The court held that the school board decision infringed the plaintiff's freedom of religion. The case therefore hinged on whether its decision could be construed as a reasonable limit under the *Canadian Charter* or the *Québec Charter*. In other words, did concerns over school safety warrant restricting the plaintiff's freedom of religion. Again, for reasons that will be discussed below (in section

c), the Court of Appeal decided that this limit was reasonable and set aside the trial decision.

The Supreme Court of Canada, having agreed to hear the case, had three issues to decide: What was the appropriate standard of review of the school board decision? Did this decision infringe the plaintiff's right to freedom of religion or equality under the *Canadian Charter* or the ***94** *Québec Charter*? If so, can the infringement be justified as a reasonable limit under the *Canadian Charter* or the *Québec Charter*? [FN47]

(b) Standard of Judicial Review

Determining the standard of review speaks directly to the level of discretion which bodies like school boards should enjoy, which is especially relevant to assuring human rights in a school setting. The Court of Appeal, with reference to *Q. v. College of Physicians & Surgeons (British Columbia)*, [FN48] considered three possible standards of review from the most stringent constitutional standard of correctness, through the intermediate administrative law standard of reasonableness *simpliciter*, to the least stringent, patent unreasonableness, which allows for the near exclusive determination of the decision-maker.

The Court of Appeal enunciated four factors identified by the Supreme Court of Canada in *Dr. Q* that should be considered when assessing the degree of discretion that the legislature has granted a public body; in the words of the latter, they are: (1) “the presence or absence of a privative clause or statutory right of appeal;” (2) “the expertise of the tribunal relative to that of the reviewing court on the issue in question;” (3) “the purposes of the legislation and the provision in particular;” and, (4) “the nature of the question - law, fact, or mixed law and fact.” [FN49]

In this case, the enabling legislation is the *Education Act*, which contains no privative clause but which provides a comprehensive legislative scheme for the exercise of authority by school boards and schools. While noting that school authorities were entitled to some measure of deference, [FN50] the Court of Appeal recognized that such deference must be tempered in cases of human rights, as stated in *Chamberlain* v. *Surrey School District No. 36*:

> Courts are well placed to resolve human rights issues. Hence, where the decision to be made by an administrative body has a human rights dimension, this has ***95** generally lessened the amount of deference which the Court is willing to accord the decision .... Different types of human rights issues do, to be sure, play out differently. So the extent to which deference is lessened by the presence of a human rights issue will vary from case to case. The relevant question should always be whether the courts have an expertise equal to or better than that of the board, relative to the particular human rights issue that is faced. [FN51]

The Court of Appeal appeared to have decided that it had only to choose between the least strict and the intermediate standard and, given the direction provided in *Chamberlain*, opted for the intermediate standard of reasonableness: that the court should not substitute its view for that of the school authority simply because it prefers a different solution; but should only quash the decision if it is found to be unreasonable. [FN52]

The majority of the Supreme Court disagreed. Recognizing that judicial review might involve components of both constitutional and administrative law, it stated unequivocally that: “The administrative law standard of review is not applicable to the constitutional component of judicial review.” [FN53]

> The rights and freedoms guaranteed by the *Canadian Charter* establish a *minimum* constitutional pro-

> tection that must be taken into account by the legislature and by every person or body subject to the *Canadian Charter*. The role of constitutional law is therefore to define the scope of the protection of these rights and freedoms. An infringement of a protected right will be found to be constitutional only if it meets the requirements of s. 1 of the *Canadian Charter*. [FN54]

The majority went on to state that the review of such issues was subject to the most stringent standard of correctness which is the only appropriate standard for assessing matters of constitutional law. [FN55] Although all members of the Court agreed with the disposition of the case, ***96** two minority opinions disagreed on the standard of correctness adopted by the majority. [FN56]

According to Deschamps and Abella JJ., the administrative law standard was appropriate for two reasons: the constitutional standard, which they equate with a section 1 analysis, is only appropriate to assess a norm of general application, such as a statute or regulation, and it blurs the distinction between the principles of constitutional justification and the principles of administrative law. [FN57] Lebel J. objected to resolving a case by means of a section 1 analysis when it involves two competing constitutional rights, such the freedom of religion of the plaintiff and the right of students and others to security, as guaranteed by section 7 of the *Canadian Charter*. [FN58] However, the objection was hypothetical, as he subsequently stated that there was no evidence of any breach of section 7 rights in this case. [FN59] The key issue in dispute, therefore, was the appropriateness of the section 1 analysis, which will be considered below. [FN60]

(c) Freedom of Religion and Reasonable Limits

The first substantive issue in this case was whether the school board decision constituted an infringement of the plaintiff's freedom of religion under section 2(a) of the *Canadian Charter* (or section 3 of the *Québec Charter*). The Attorney General for Québec did not dispute the allegation; however, counsel for the school board contended that the plaintiff's freedom of religion had not been infringed, because of the internal limits of section 2(a), namely, the “imperatives of public order, safety, and health, as well as by the rights and freedoms of others.” [FN61] The Supreme Court, like the Court of Appeal, [FN62] recognized that “freedom of religion can be limited when a person's freedom to act in accordance with his or her beliefs may cause harm to or interfere with the rights of others.” [FN63] However,***97** as the Court of Appeal had done, the Supreme Court rejected any contemplation of internal limits on the freedom of religion in favour of a section 1 analysis under the *Canadian Charter*, provided that, as in this case, an infringement of the plaintiff's freedom of religion were proved.

(i) The Basis of Section 1: Limits Prescribed by Law

The formal basis of section 1 is the presence of a limit “prescribed by law.” [FN64] This seemingly straightforward principle has been the subject to much debate, often generating more heat than light regarding what can and cannot be considered as ‘law’ for purposes of section 1. *R. v. Therens* first established that the phrase referred to a statute or regulation but also included actions that flow “by necessary implication from terms of a statute or regulation or from its operating requirements.” [FN65] Thus, if an administrative decision limits a *Charter* right on the basis of a statute which explicitly permits such a limitation, then the statutory authority will be subject to section 1 analysis. However, the statutory limitation must not so vague that it is unintelligible. [FN66] By contrast, if the statutory authority is contains no such explicit limit and confers discretion on state actors, it must be read so as to conform to the *Charter* and the decision of the latter becomes subject to a section 1 analysis. [FN67] However, as a review of section 1 case law reveals, determining whether a limit is vague or a state actor has discretion is far from straightforward. [FN68]

In *Multani*, the majority of the Supreme Court first held that if delegated authority is not exercised in accordance with its enabling legislation, then such a decision is not authorized by statute and cannot be considered as a limit prescribed by law. Second, following *Slaight Communications*, if the decision flows from statutory authority but the limit it creates arises from discretion rather than statutory direction then the decision itself ***98** should be subjected to a section 1 analysis. [FN69] It thus rejected the minority argument of Deschamps and Abella JJ. that section 1 should only be applied "where a plaintiff is attempting to overturn a normative rule as opposed to a decision applying that rule:"

> With respect, it is of little importance to Gurbaj Singh -- who wants to exercise his freedom of religion--whether the absolute prohibition against wearing a kirpan in his school derives from the actual wording of a normative rule or merely from the application of such a rule. In either case, any limit on his freedom of religion must meet the same requirements if it is to be found to be constitutional. [FN70]

Deschamps and Abella JJ. frame their analysis of this issue in terms of their advocacy for the use of a single administrative standard of review of administrative decisions (rather than a mix of constitutional and administrative standards, depending on the issue). They are convincing when they argue, contrary to what the majority seems to believe, that the application of section 1 to administrative decisions is not a matter of settled law. Consider, for example, the statement in *Irwin Toy*: "Where there is no intelligible standard and where the legislature has given a plenary discretion to do whatever seems best in a wide set of circumstances, there is no 'limit prescribed by law'." [FN71] This passage seems to contradict *Slaight Communications*, suggesting that in the absence of a clear limit in a statute or regulation, no such limit can be conferred by administrative decision. However, they are not as convincing in their argument for settling this question as they propose.

They point out that equating an administrative decision with a law seems anomalous but do not explore the range of what the expression 'administrative decision' might entail. In an educational context, such a list might include resolutions of a school board, formal board polices, administrative guidelines, similar documents issued by a school governing board (where such bodies exist), as well less formal documents and finally, *ad hoc* verbal decisions of school officials. The point of stipulating that a limit must be prescribed by law seems irrelevant if this requirement embraces all of the foregoing. The logical implication of rejecting such a ***99** broad interpretation is, as they suggest, to restrict the meaning of the expression to a formally recognized norm of general application. There is considerable merit in such an approach. However, neither their opinion nor that of the majority provides a satisfactory answer to the underlying question: What is the test by which one can decide if a given decision can be considered to have been prescribed by law?

It is obvious that a limit contained in a statute would be considered as one prescribed by law. Following *Therens*, one would also include a 'regulation' but this begs two crucial questions: How does one define a regulation? and How does one distinguish a regulation from an administrative decision that cannot be considered regulatory?

The majority appears content to see a chain of delegated authority from the *Education Act* to the school board and the school governing board. However, it seems well established in administrative law that the delegation of authority to a body to make decisions, including policies and rules, does not *per force* imply that this body has been granted regulatory authority - to make a decision that can be considered as law. [FN72] That surely is the essence of a regulation; it is 'subordinate legislation.' Only Parliament or a provincial legislature has the constitutional authority to make law but either may delegate this authority and when it does so, the acts adopted by the delegate constitute subordinate legislation. [FN73]

Determining whether a particular decision of a body can be considered regulatory depends on the enabling legislation, as well as other relevant statutes such as a Regulations Act or an Interpretation Act. However, one can say, in general terms, [FN74] that a decision can be considered as subordinate legislation if its regulatory authority is clearly provided for by statute; it is normative and impersonal; and has the constraining force derived from the statute which is its ultimate authority. [FN75] Thus, any administrative ***100** decision that cannot satisfy these criteria should not be considered as a limit prescribed by law. [FN76]

The minority opinion, despite its emphasis on the importance of the normative character of a regulation, seems content to let all administrative decisions be considered by a single standard without any recognition of the special status of a decision that can be considered as prescribed by law under section 1. The other aspect of the minority reasoning that is troubling is the assertion that administrative decision makers should not have to justify their decisions under section 1.

Deschamps and Abella JJ. assert that such a requirement "makes the decision making process formalistic and distracts the reviewing court from the objective of the analysis, which relates instead to the substance of the decision and consists of determining whether it is correct ... or reasonable ...." [FN77] This approach appears to by-pass a critical issue: If the administrative decision is a limit prescribed by law, then it should be subject to the same standard of review applied to any such limit. If it is not being treated as such a limit, then it must be based on some other existing limit, which must be subjected to a section 1 analysis. If such a valid limit exists, then the court should determine if the administrative decision respects this valid limit. In the absence of such a norm the court's only role should be to ascertain if the decision violated any human rights. If it did, there should be no defence possible.

Neither the majority nor the minority of the Supreme Court considered the absence of valid limits in light of provisions of the *Québec Charter*, as they both confined their analysis to the limits to freedom of religion under the *Canadian Charter*. [FN78]

(ii) Ascertaining the Reasonableness of a Legal Limit

Both the Court of Appeal and the Supreme Court analyzed the school board decision in light of the criteria set forth in the *Oakes* test, [FN79] namely ***101** that the legislative objective being pursued is sufficiently important to warrant limiting a constitutional right; there is a rational connection between the means chosen by the state authority and the objective; the means restricts the right no more than necessary; and the effect of the limitation is proportional to the objective.

The Court of Appeal quickly decided that the importance of the objective of school safety was evident to all, thereby satisfying the first criterion of the *Oakes* test. The Court did not explicitly proceed, step-by-step, through the *Oakes* test but relied on two cases to support a finding of reasonableness. The first held that it was legitimate to ban kirpans from being carried aboard a commercial aircraft, the second, to ban kirpans from the courtroom.

> In assessing whether or not the respondent's weapons policy can be modified so as to accommodate Sikhs detrimentally affected, consideration must be given to the environment in which the rule must be applied. In this regard, we are satisfied that aircraft present a unique environment. Groups of strangers are brought together and are required to stay together, in confined spaces, for prolonged periods of time. Emergency, medical and police assistance are not readily accessible. [FN80]
>
> The ruling serves a transcending public interest that justice be administered in an environment free

> from any influence which may tend to thwart the process. Possession in the court-room of weapons, or articles capable of use as such, by parties or others is one such influence. A weapon does not cease to be a weapon because it is a religious symbol subject to strictures of the faith regarding use. [FN81]

No argument was presented as to why these two cases should be considered while *Pandori*, the obviously analogous case, was ignored. The Court of Appeal simply asserted:

> The uncontradicted evidence described an upsurge of violent incidents where dangerous objects were used. School staff have an important challenge to meet, namely, the obligation to provide an environment for learning and to combat this violence. I cannot convince myself that the security requirements of schools are less than those required for the courts or airplanes. [FN82]

The Court of Appeal did consider whether some form of accommodation existed which would allow the kirpan, while respecting the school's ***102** obligation to preserve a safe learning environment. It answered this question in the negative, concluding that accommodating kirpans constituted an excessive constraint on the school. [FN83]

The Supreme Court also found little difficulty in accepting that maintaining a *reasonable* level of safety was a pressing and substantial objective, nor that the means chosen was rationally connected to this objective. However, satisfying the criterion of minimal impairment required a much more detailed analysis. In so doing, the Court raised the issue of reasonable accommodation and its relation to the Oakes test, namely that "the minimal impairment test ... corresponds in large part with the undue hardship defence against the duty of reasonable accommodation in the context of human rights legislation." [FN84] Citing this passage with approval makes it clear that the duty to accommodate is part of the obligation to respect human rights, while a claim of undue hardship is part of the defence. [FN85]

In their minority opinion, Deschamps and Abella JJ. take issue with this reasoning. They refer to the doctrine of reasonable accommodation which they argue developed primarily to balance private interests (e.g. employers versus employees) and should remain so:

> The process required by the duty of reasonable accommodation takes into account the specific details of the circumstances of the parties and allows for dialogue between them. This dialogue enables them to reconcile their positions and find common ground tailored to their own needs.
>
> The approach is different, however, in the case of minimal impairment when it is considered in the context of the broad impact of the result of the constitutional justification analysis. The justification of the infringement is based on societal interests, not on the needs of the individual parties. An administrative law analysis is microcosmic, whereas a constitutional law analysis is generally macro-***103** cosmic. The values involved may be different. We believe that there is an advantage to keeping these approaches separate. [FN86]

This reasoning appears to ignore the unavoidable metamorphosis of human rights legislation in a post-*Charter* environment. For many years, most human rights codes in Canada have contained language that allows employers and others to limit rights on the basis of a *bona fide* requirement ("BFR"), qualification or rule. [FN87] However, since the advent of the *Canadian Charter*, such rules are now scrutinized to see if they can be considered as a reasonable limit under section 1. This new reality was set forth for the first time in the *Meiorin* standard. [FN88] Although this case arose from employment in the public sector, the standard applies equally to the private sector and to non-employment situations in both sectors. This standard applies to exceptions in human rights codes and, by extension, to the BFRs and preferential programs they allow. [FN89] Following *Meiorin*, the legal basis of the limit is the enabling language of the human rights code, but the actual limit is the rule

set for by the employer of other actor. [FN90]

Showing that accommodation presents a difficulty, even a serious one, for the employer or a service provider such as a school, is not enough, it must be shown that it is *impossible* to accommodate the student, or some other member of the school community, without imposing *undue hardship* upon the school. The *Meiorin* standard can be seen as a specialized***104** application of the *Oakes* test and has changed the frame of reference for reviewing a BFR other rule.

> BFRs used to be determined in a frame that, essentially, sought to balance the rights and obligations of private actors, such as employees and employers. Now the balancing act is a matter of individual rights and public policy. It is not simply that *Charter* standards are higher; they are conceptually different. If the legislature chooses not to legislate non-discrimination in the workplace, for example, then the application of the *Charter* in that milieu is foreclosed. However, if the legislature chooses to do so, it automatically attracts *Charter* scrutiny of the legislation and, through it, of the milieu itself. That scrutiny is based on an expansive view of equality rights under section 15 that can only be limited under public policy interests that satisfy the *Oakes* test under section 1. [FN91]

In *Multani*, the substantive issue was whether the school rule - the total ban on the wearing of the kirpan - was necessary or whether some lesser form of restriction was possible without creating undue hardship. If answered in the affirmative then the total ban would fail to satisfy the minimal impairment criterion of the *Oakes* test (or the third criterion of the *Meiorin* standard). The Supreme Court found that there was a singular lack of compelling evidence to support the necessity of a total ban, citing the following passage of the trial decision:

> [T]he Court is of the view that the school board would not suffer any major inconvenience if an order were made under conditions required to ensure a safe environment. The Court does not believe that the safety of the environment would be compromised. In argument, it was stated that in the last 100 years, not a single case of kirpan-related violence has been reported. Moreover, in a school setting, there are usually all sorts of instruments that could be used as weapons during a violent incident, including compasses, drawing implements and sports equipment, such as baseball bats. [FN92]

In contrast to the Court of Appeal, the Supreme Court did not find that the ban on kirpans in airplanes and courtrooms [FN93] was persuasive, citing *Pandori* which, as mentioned above, was virtually ignored by the Court of Appeal:

> Courts and schools are not comparable institutions. One is a tightly circumscribed environment in which contending elements, adversarially aligned, strive to obtain justice as they see it, with judge and/or jury determining the final outcome. Schools on the other hand are living communities which, while subject to some controls, engage in the enterprise of education in which both teachers and students are partners. Also, a court appearance is temporary (a Khalka Sikh could conceivably deal with the prohibition of the kirpan as he/she would on an airplane ***105** ride) and is therefore not comparable to the years a student spends in the school system. [FN94]

The Supreme Court likewise rejected the claims that allowing the plaintiff to wear his kirpan to school could have a *ripple effect* causing other students to arm themselves or that the presence of kirpans in schools would contribute to a *poisoning* of the school environment because: “the kirpan is a symbol of violence and ... sends the message that using force is the way to assert rights and resolve conflict ...” [FN95] The Court took great exception to this assertion, stating:

> The argument that the wearing of kirpans should be prohibited because the kirpan is a symbol of violence and because it sends the message that using force is necessary to assert rights and resolve conflict must fail. Not only is this assertion contradicted by the evidence regarding the symbolic nature of the kirpan, it is also disrespectful to believers in the Sikh religion and does not take into account Canadian values based on multiculturalism. [FN96]

Since the Court found the prohibition unreasonable it did not need to consider the final criterion of the *Oakes* test, that the effect of the limitation is proportional to the objective. However, it agreed with the intervener Canadian Civil Liberties Association that it was important to underscore the effects that could result from an absolute prohibition. To this end it cited with approval the following passages from three previous Supreme Court decisions:

> A school is a communication centre for a whole range of values and aspirations of a society. In large part, it defines the values that transcend society through the educational medium. The school is an arena for the exchange of ideas and must, therefore, be premised upon principles of tolerance and impartiality so that all persons within the school environment feel equally free to participate. [FN97]
>
> [S]chools ... have a duty to foster the respect of their students for the constitutional rights of all members of society. Learning respect for those rights is essential to our democratic society and should be part of the education of all students. These values are best taught by example and may be undermined if the students' rights are ignored by those in authority. [FN98]
>
> ***106** Our Court [has] accepted ... that teachers are a medium for the transmission of values .... Schools are meant to develop civic virtue and responsible citizenship, to educate in an environment free of bias, prejudice and intolerance. [FN99]

As stated at the beginning of this comment, this decision as been characterized as “a ringing defence of religious freedom.” [FN100] However, it is a carefully balanced judgment that took due consideration of the *reasonable* safety concerns of school officials. To quote the comment of one respondent to the article in *La Presse* cited earlier: “There are severe restrictions on the wearing of the kirpan that provide maximum security.” [FN101]

In contrast to the Court of Appeal, the Supreme Court understood the difference between the environment of a school and that of an airplane or courtroom and rejected the analogies presented by the school board. In schools, an ongoing infringement of human rights is measured in years, not hours. Consequently, the impact of the infringement is much greater, which argues for a more careful scrutiny of both the reasons for, and the scope of, any allowable limit. The heightened consequences of the risk presented by a kirpan on an aircraft was one of the factors that led to the *Nijjar* decision: “The relatively low likelihood that such incidents could occur on board an aircraft must, however, be considered in light of the potentially life-threatening consequences of such events ....” [FN102] Furthermore, this case explicitly recognized the differences between an aircraft and a school:

> Unlike the school environment in issue in the *Pandori* case, where there is an ongoing relationship between the student and the school and with that a meaningful opportunity to assess the circumstances of the individual seeking the accommodation, air travel involves a transitory population. Significant numbers of people are processed each day, with minimal opportunity for assessment. [FN103]

In summary then, the Supreme Court held that the plaintiff's freedom of religion had been infringed on the basis of a school rule that did not satisfy the third criterion of the *Oakes* test (minimal impairment) and would not have satisfied the fourth criterion (proportional effect) had it been necessary to apply it. For reasons that remain unexplained, the Court ***107** did not refer to the *Meiorin* standard, although the judgment is consistent with this standard.

4. IMPLICATIONS FOR POLICY AND PRACTICE

(a) Signposts to the Present and the Future

The background to this case provided important contextual data for a complete understanding of the issues. As stated by another Québec Task Force: “The process of becoming socially literate involves mastering a certain number of common historical references points that are signposts to understanding current events, public affairs, and social issues.” [FN104] Issues of accommodation in relation to religion in Québec schools have rarely been raised in the past because of the constitutionally entrenched protection of Catholic and Protestant privilege and the government's use of the override clauses for other denominational matters not covered by section 93. The combination of section 93 and the override effectively foreclosed the possibility of most cases succeeding and placed schools in a legal straightjacket. [FN105] However, for two main reasons - language and diversity - mainstream religious beliefs no longer provided an acceptable normative framework for defining rights and obligations in public education.

In 1968, a decision by a Catholic school board in Montréal to replace bilingual instruction was bitterly opposed by the local Italian community. This controversy ignited a firestorm that eventually led to Bill 101 and the restriction of access to English language instruction. [FN106] The French language, the fervent symbol of rising Québec nationalism, gradually supplanted religion as the dominant cultural icon in the province. Religion ***108** faded into the background, partly because of the ascendancy of language, partly because the rise of secularism unleashed by the Quiet Revolution but also because its place in schools was not under threat. However, religion re-emerged as an important marker of identity when it came under threat, [FN107] a shift that occurred as the threat to language was diminishing.

In the past, mainstream French, Catholic schools were relatively unaffected by successive waves of immigration. This situation changed dramatically when restrictive language legislation brought more and more immigrants into these mainstream schools, especially in Montréal. In contrast to English, Protestant schools, which have a much longer experience with diversity, French, Catholic schools have had a much shorter time in which to respond to the challenges of pluralism. These relatively abrupt changes in the demographic composition of mainstream schools explain, at least in part, the tensions that led to the dispute seen in *Multani*.

The recent reform of education has eliminated all denominational structures from the education system and the last vestiges of this discriminatory regime, namely preferential treatment of Catholic and Protestant MRI, will disappear by 2008. Government policy on educational integration and intercultural education is meant to place everyone on a more equal footing in schools. This policy reflects a certain ambivalence with regard to the proposed convergence of two policy objectives: the adoption by minorities of the *shared values* of the majority, and the latter's *openness to diversity*. However, as suggested by McAndrew, this apparent ambivalence may simply reflect a policy strategy of incremental change.

The issues raised by the *Multani* case must thus be understood against this historical backdrop and the current state of schools: “In the space of a few decades, Québec society has evolved from the quasi hegemony of the crucifix, with a few kippas here and there, to the hijab and the kirpan.” [FN108] The debate over denominational rights, previously confined to a contest between school boards and the government over the reach of section 93, [FN109] is now focused on the nature and mission of the school itself.

***109** Commenting on the trial decision in this case, Gaudreault-Desbiens deplored the intervention of the

Attorney General in what appeared at the time to be a consent judgment, and the regrettable message it communicated regarding the government's vision of tolerance in a pluralist society. [FN110] This intervention, made in the name of public order, raised the stakes in this case, pitting religious toleration against safety and security in schools.

(b) The Preoccupation with Public Security

In my earlier comment on this case, I stated that it might reflect an overlay of the broader issue of public safety and security in a post 9/1l world. As Stein has observed: “Terror challenges much of what defines open, multicultural, knowledge-based, democratic society .... Citizens will have to choose yet again the appropriate boundaries for a state that is necessarily seeking out those living among us who are prepared to exploit our openness, our diversity, and our respect for rights in order to attack what we cherish.” [FN111] While the threat of terrorism is real, there can be little doubt that certain world leaders exaggerate the scope of this threat and exploit it to support government policy that might otherwise be difficult to defend. Closer to home, Gaudreau-Desbiens asks whether the obsession with security shown by public officials since 9/11 does not mask a latent insecurity of identity and sense of helplessness in the face of the steady growth of pluralism. [FN112] To the extent that he is correct, the threat to human rights is obvious, as is the need for the courts to counterbalance such a tendency.

Although the need for vigilance is greatest in cases where issues of state security are alleged, the more insidious danger is that of *creeping apathy* toward other violations of human rights in the name of supposedly analogous situations, such as school security. The negative image of Islam since September 2001 persists, despite efforts to distinguish the small minority of Islamic terrorists from the vast majority of practising Muslims. [FN113] The adoption in France of legislation to bar the wearing of any ***110** conspicuous religious symbols in a public schools has been made in the name of the threat to *public order* posed by articles such as the Muslim hijab. [FN114] As stated previously: “It seems to this author that the legislation poses a much greater threat to public order than religious apparel might ever cause. The legislature would be much better advised to combat religious and racial intolerance that appears to be on the rise in France as well as in a number of countries, including Canada.” [FN115]

(c) The Corollary to the Protection of Human Rights - Education

Like every public agency, schools have a duty to respect human rights norms. However, they also have a special responsibility in transmitting these norms to students, one that is recognized in various international human rights instruments. Thus, for example, the *Convention on the Rights of the Child* states that the education of the child shall be directed to, among other ends: “[t]he development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations.” [FN116] As stated in the declaration of the United Nations Decade for Human Rights Education: “human rights education should involve more than the provision of information and should constitute a comprehensive life-long process by which people at all levels in development and in all strata of society learn respect for the dignity of others and the means and methods of ensuring that respect in all societies.” [FN117]

Québec's human rights commission offers a series of nine workshops for schools, beginning with Human Rights Literacy For Students: Global Citizens of the New Millennium. [FN118] Education policy encourages citizenship education as part of its policy on interculturalism, [FN119] and the *Basic School Regulation* man-

dates services designed to educate students about ***111** their rights and responsibilities. [FN120] These services stress practical applications of citizenship and values education. [FN121] Including human rights education seems a 'natural fit' even if it is not a formal component of these services.

Human rights education may be conceived of as a form of social change that begins with an individual, then extends to a group and finally to society at large. It provides an opportunity for students to explore real issues in their own environment as well as those in the broader society in which they live and in other contexts around the globe. When given a chance, students of all ages have an amazing capacity to deal constructively with complex issues, and will be much more likely to do so when these issues relate to their lives, both in and out of school.

5. CONCLUSION

The purpose of this commentary was to provide an analysis of the *Multani* case, in light of the historical context of education in Québec, especially in relation to religious and cultural minorities. This case has several implications for policy and practice, including: the importance of context in addressing human rights issues; the potential threat to human rights because of concerns over state security - both real and imagined; and the role of human rights education to inculcate the principles of human rights in the everyday lives of students, teachers and other members of the educational community.

The decision of the Supreme Court of Canada may be resented by those who see minority rights as an unwarranted infringement on the *democratic right* of the majority to adopt the policies and practices it espouses. However, democracy does not simply mean blindly following the will of the majority, which can easily become the *tyranny* of the majority. Democratic principles also require that the interests of minorities be protected and not ignored simply because they are not numerically sufficient to 'win the day.'

> Liberal democracies are based on two principles. The first of these, the democratic principle, requires that the major social debates are decided by appropriate mechanisms expressing the will of the majority of the people. The second, the ***112** liberal principle, presupposes that the decisions made at the end of the democratic process will be consistent with the normative restrictions imposed by individual rights. In particular, it seeks to ensure that the majority will not make decisions that are detrimental to human rights, except in very serious and exceptional circumstances. [FN122]

The Supreme Court decision placed the micro issue of this case - the wearing of the kirpan in relation to school safety - in proper perspective. It did not dismiss the legitimate concerns of the majority for a safe school environment but held that a *reasonable* level of safety was the appropriate standard to consider. It held, correctly, that an individual's freedom of religion should not be trampled on for hypothetical concerns, let alone because of intolerance. The Supreme Court also delivered a strong message with regard to the macro issue of this case - the importance of schools as a key public institution for the promotion of human rights. The citations from *Ross* (*Attis)* and other cases, [FN123] underscore that a school must not only proclaim support for tolerance but practise it by providing a welcoming environment to all students.

Tolerance does not mean that 'anything goes,' that minority rights are all the count; that is the role of section 1, to balance human rights and freedoms and those reasonable limits that are acceptable in a free and democratic society. Tolerance does mean that all members of the school community, regardless of race, religion, ethnicity, gender, or other such characteristics, are treated and feel treated as equal members of that community, deserving of respect and dignity. That, above all else, is the first mission of a public school. The Québec *Education Act* no longer recognizes schools as Catholic or Protestant and the remaining privileges based on these two denomina-

tions will disappear in 2008. Eliminating this discrimination in law will have taken more than a decade. How long the harder task of eliminating it in practice will take remains a matter of conjecture. [FN124]

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[FN1]. *Singh-Multani c. Marguerite-Bourgeoys (Commission scolaire)*, 2006 SCC 6, 2006 CarswellQue 1368, 2006 CarswellQue 1369, reversing [2004] R.J.Q. 824, 241 D.L.R. (4th) 336, 2004 CarswellQue 11898, 2004 CarswellQue 377 (Que. C.A.), affirming [2002] Q.J. No. 1131, 2002 CarswellQue 1237 (Que. S.C.) ("*Multani*").

[FN2]. *Ontario (Human Rights Commission) v. Peel Board of Education* (1990), (sub. nom. *Pandori v. Peel Board of Education*) 12 C.H.R.R. D/364 (Ont. Bd. of Inquiry); motion to quash refused (1990), 72 O.R. (2d) 593 (Ont. Div. Ct.), affirmed (1991), 80 D.L.R. (4th) 475, 1991 CarswellOnt 969 (Ont. Div. Ct.), leave to appeal to Ont. C.A. refused (1991), (sub nom. *Peel Board of Education v. Ontario (Human Rights Commission)*) 3 O.R. (3d) 531n (Ont. C.A.) ("*Pandori*").

[FN3]. J. Brown, "Supreme Court of Canada Overturns Decision Banning Kirpans" Canadian Press, March 2, 2006 at 1, online: <http://www.canada.com>.

[FN4]. Cited in *ibid.* at 2.

[FN5]. See the press release of the Québec Minister of Justice, March 2, 2006, online: <http:// communiques.gouv.qc.ca/gouvqc/communiques/GPQF/Mars2006/02/c3602.html>.

[FN6]. D. Lessard and J.-D. Bellevance, "Satisfaction à Québec, prudence dans le milieu scolaire," March 3, 2006 at 1, online: <http:// www.cyberpresse.ca>.

[FN7]. See press release of the Commission scolaire Marguerite-Bourgeoys, "Jugement de la Cour suprême sur le kirpan : déception mais respect à la CSMB," online: <http://www.csmb.qc.ca/>.

[FN8]. See Fédération des commissions scolaires du Québec, online : < http://www.fcsq.qc.ca/>.

[FN9]. See comments following J.-L. Perrault, "Rentrée en classe du kirpan," March 3, 2006 at 1, online: <http://www.cyberpresse.ca>.

[FN10]. G. Morency, *ibid.*

[FN11]. L. Roussel, *ibid.*, free translation.

[FN12]. R. Fortin, *ibid.*, free translation.

[FN13]. P. d'Amour, *ibid.*, free translation.

[FN14]. Caroline, *ibid.*, free translation.

[FN15]. S. Verreault, *ibid.*, free translation.

[FN16]. Robert, *ibid.*, free translation.

[FN17]. Myriam L., *ibid.*, free translation. Her reference to Rima Elkouri is to another article in *La Presse*: R. Elkouri, "Chronique de Rima Elkouri : un jugement raisonable," March 3, 2006, online: <http://www.cyberpresse.ca>.

[FN18]. W.J. Smith, "Balancing Security and Human Rights: Québec Schools Between Past and Future" (2004) 14 *E.L.J.* 99 at 100.

[FN19]. For details regarding this material, please see the previous case comment, *ibid.*, which includes references to a range of primary and secondary sources.

[FN20]. *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3 (formerly the *British North America Act, 1867*), s. 93.

[FN21]. See *Adler v. Ontario*, [1996] 3 S.C.R. 609, 140 D.L.R. (4th) 385, 1996 CarswellOnt 3989, 1996 CarswellOnt 3990 (S.C.C.); *Waldman v. Canada*, CCPR/C/67/D694/1996 (4 November 1999).

[FN22]. *Canadian Charter of Rights and Freedoms*, Part I of the' *Constitution Act, 1982*, being Schedule B of the *Canada Act, 1982* (U.K.), 1982, c. 11 ("*Canadian Charter*").

[FN23]. *Charter of Human Rights and Freedoms*, R.S.Q., c. C-12 ("*Québec Charter*").

[FN24]. Override provisions refer to legislative exceptions to human rights to the extent allowed by the *Canadian Charter* and provincial human rights codes such as the *Québec Charter*. Québec had used such an override for many years to shield those denominational privileges that were not covered by section 93.

[FN25]. Task Force on the Place of Religion in Schools in Québec, *Religion in Secular Schools: A New Perspective for Québec Schools* (Québec: Ministère de l'Éducation, 1999) at 51, 75 ("Proulx Task Force").

[FN26]. *Act to Amend Various Legislative Provisions Respecting Education as Regards Confessional Matters*, S.Q. 2000, c. 24, s. 63. In addition, another provision of the *Education Act*, R.S.Q., c. I-13.3, that allowed a school to adopt a specific school project (s. 240) was amended to exclude a religious project (S.Q. 2000, c. 24, s. 32).

[FN27]. W.J. Smith and W.F. Foster, *Balancing Rights and Values: The Place of Religion in Québec Schools* (Québec: Ministère de l'Éducation, 1999) at 28: "In the international instruments considered, parents have a right to guide their children's education, including the choice of an educational establishment in keeping with their religious beliefs but these provisions do not give rise to any positive requirement on the part of public educational authorities."

[FN28]. Commission des droits de la personne et des droits des jeunes, *Après 25 ans : La Charte québécoise des droits et libertés, vol. 1, Bilan et recommandations* (Montréal, 2003) at 37, online : <http://www.cdpdj.qc.ca/>.

[FN29]. *Act to Amend Various Legislative Provisions of a Confessional Nature in the Education Field*, S.Q. 2005, c. 20, s. 11.

[FN30]. Comité sur l'École Québécoise et les Communautés Culturelles, *L'école québécoise et les communautés culturelles* (Québec: Ministère de l'Education du Québec, 1985) at 1, free translation.

[FN31]. *Charter of the French Language*, R.S.Q., c. C-11.

[FN32]. A. d'Anglejan and Z. De Koninck, “Educational Policy for a Culturally Plural Quebec: An Update” in B. Burnaby and A. Cumming, eds., *Socio-Political Aspects of English Second Language* (Toronto: OISE Press, 1992) 97 at 99.

[FN33]. Ministère de l'Éducation du Québec, *A School for the Future: Policy Statement on Educational Integration and Intercultural Education* (Québec, 1998) at 1, online :<http://www.mels.gouv.qc.ca/>.

[FN34]. *Ibid.* at 1.

[FN35]. *Ibid.* at 2.

[FN36]. *Ibid.* at 29.

[FN37]. M. Mc Andrew, *Immigration et diversité à l'école : le débat québécois dans une perspective comparative* (Montréal: Les Presses de l'Université de Montréal, 2001) at 117.

[FN38]. Ministère de l'Éducation du Québec, *Plan of Action for Educational Integration and Intercultural Education* (Québec, 1998) at 13, online :<http://www.mels.gouv.qc.ca/>.

[FN39]. Ministère de l'Éducation, du Loisir et du Sport du Québec, *Rapport annuel de gestion du ministère de l'Éducation 2004-05* (Québec, 2005) at 49, online: <http://www.mels.gouv.qc.ca/>.

[FN40]. The latest ministerial strategic plan now foresees 2008 as a date by which such an evaluation might occur: Ministère de l'Éducation, du Loisir et du Sport du Québec, *Plan stratégique 2005-2008 du ministère de l'Éducation* (Québec, 2005) at 13, online:<http://www.mels.gouv.qc.ca/>.

[FN41]. Commission des droits de la personne du Québec, *Religious Pluralism in Québec: A Social and Ethical Challenge* (Montréal, 1995), online: <http:// www.cdpdj.qc.ca/>.

[FN42]. *Multani*, above, note 1 (Sup. Ct.) at para. 6, free translation.

[FN43]. The C.C.P., R.S.Q., c. C-25, art. 99 states: “In any action relating to the application of a provision of public order, the Attorney General may *ex officio* and without notice take part in the proof and hearing as if he were a party thereto.”

[FN44]. *Multani*, above, note 1 (Sup. Ct.) at para. 5, free translation.

[FN45]. *Multani*, above, note 1 (C.A.) at paras. 21, 29-32

[FN46]. *Ibid.* at para. 35; see art. 2633, C.C.Q.

[FN47]. In fact, the Supreme Court confined its analysis to freedom of religion and reasonable limits under the *Canadian Charter*, finding it unnecessary to consider either equality rights or the *Québec Charter*; see *Multani*, above, note 1 (C.A.) at para. 80.

[FN48]. *Q. v. College of Physicians & Surgeons (British Columbia)* (sub nom. *Dr. Q. v. College of Physicians & Surgeons of British Columbia*), [2003] 1 S.C.R. 226, 223 D.L.R. (4th) 599, 2003 CarswellBC 713, 2003 CarswellBC 743 (S.C.C.) [cited to S.C.R.] (“Dr. Q.”).

[FN49]. *Ibid.* at para. 26; see *Multani*, above, note 1 (C.A.) at para. 40.

[FN50]. *R. v. M. (M.R.)*, [1998] 3 S.C.R. 393, 166 D.L.R. (4th) 261, 1998 CarswellNS 346, 1998 CarswellNS 347 (S.C.C.) [cited to S.C.R.] at para. 49: "School authorities must be accorded a reasonable degree of discretion and flexibility to enable them to ensure the safety of their students and to enforce school regulations."

[FN51]. *Chamberlain v. Surrey School District No. 36*, [2002] 4 S.C.R. 710, 221 D.L.R. (4th) 156, 2002 CarswellBC 3021, 2002 CarswellBC 3022 (S.C.C.) [cited to S.C.R.] at para. 11 ("*Chamberlain*").

[FN52]. *Multani*, above, note 1 (C.A.) at para. 49.

[FN53]. *Multani*, above, note 1 (S.C.C.) at para. 17.

[FN54]. *Ibid.* at para 16. Section 1 of the *Canadian Charter* reads as follows: "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

[FN55]. *Ibid.* at para 20, with reference to *Martin v. Nova Scotia (Workers' Compensation Board)*, (sub nom. *Nova Scotia (Workers' Compensation Board) v. Martin*) [2003] 2 S.C.R. 504, (sub nom. *Nova Scotia (Workers' Compensation Board) v. Martin*) 231 D.L.R. (4th) 385, 2003 CarswellNS 360, 2003 CarswellNS 361 (S.C.C.) [cited to S.C.R.] at para. 31.

[FN56]. The majority opinion was delivered by Charron J., with McLachlin C.J. and Bastarache, Binnie and Fish JJ. concurring.

[FN57]. *Multani*, above, note 1 (S.C.C.) at para. 85.

[FN58]. *Ibid.* at para. 145.

[FN59]. *Ibid.* at para. 153.

[FN60]. Lebel J. also took issue with the section 1 analysis, but merely with regard to the need to apply all steps of this analysis in a case of an administrative decision made pursuant to statutory authority; *ibid.* at para 155.

[FN61]. *Ibid.* at para. 25.

[FN62]. *Multani*, above, note 1 (C.A.) at para. 72, with reference to *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315, 122 D.L.R. (4th) 1, 1995 CarswellOnt 105, 1995 CarswellOnt 515 (S.C.C.).

[FN63]. *Multani*, above, note 1 (S.C.C.) at para. 26, with reference to *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, 18 D.L.R. (4th) 321, 1985 CarswellAlta 316, 1985 CarswellAlta 609 (S.C.C.).

[FN64]. Above, note 54.

[FN65]. *R. v. Therens*, [1985] 1 S.C.R. 613, 18 D.L.R. (4th) 655, 1985 CarswellSask 368, 1985 CarswellSask 851 (S.C.C.) [cited to S.C.R.] at para. 60.

[FN66]. See *Irwin Toy Ltd. c. Québec (Procureur général)*, [1989] 1 S.C.R. 927, 1989 CarswellQue 115F, 1989

CarswellQue 115 (S.C.C.) ("*Irwin Toy*").

[FN67]. See *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, 59 D.L.R. (4th) 416, 1989 CarswellNat 695, 1989 CarswellNat 193 (S.C.C.) ("*Slaight Communications*").

[FN68]. See E. Mendes, "The Crucible of the Charter: Judicial Principles v. Judicial Deference in the Context of Section 1," in G.-A. Beaudoin and E. Mendes, eds., *Canadian Charter of Rights and Freedoms*, 4th ed. (Markham ON: LexisNexis, 2005) at 170-173.

[FN69]. This reasoning also seems to follow *British Columbia (Public Service Employee Relations Commission) v. B.C.G.S.E.U.*, (sub nom. *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*) [1999] 3 S.C.R. 3, (sub nom. *British Columbia (Public Service Employee Relations Commission) v. B.C.G.S.E.U.*) 176 D.L.R. (4th) 1, 1999 CarswellBC 1907, 1999 CarswellBC 1908 (S.C.C.) [cited to S.C.R.] ("*Meiorin*"); see below, note 90.

[FN70]. *Multani*, above, note 1 (S.C.C.) at para. 21.

[FN71]. *Irwin Toy*, above, note 66, at 983.

[FN72]. See S. Blake, *Administrative Law in Canada* (Markham ON: Butterworths, 1992) at 125-126.

[FN73]. See D.P. Jones and A.S. de Villars, *Principles of Administrative Law*, 4th ed. (Toronto: Thomson Carswell, 2004) at 94-95. Thus, the acts of a territorial legislature, although treated as analogous to the acts of provincial legislatures, are in fact a delegation of the authority of the federal Parliament.

[FN74]. See P. Garant, *Droit administratif*, 5th ed. (Cowansville QC: Yvon Blais, 2004) at 284ff.

[FN75]. Thus, Blake, above, note 72 at 126, states that the order of a tribunal "that resolves a dispute between two or more persons or applies to a specific set of facts or to specific parties is not a regulation. An order of general application may be a regulation. A regulation establishes the criteria to be applied in all cases."

[FN76]. There is nothing to prevent Parliament or a provincial legislature from delegating its legislative authority to a private body (see Jones and de Villars, above, note 73, at 98). However, considering the policy of a private actor as a limit prescribed by law does seem to stretch the notion of subordinate legislation beyond the point which the language defining such regulatory acts can reasonably bear. See discussion below, surrounding note 87.

[FN77]. *Multani*, above, note 1 (S.C.C.) at para. 120.

[FN78]. See above, note, 47; for an analysis of the importance of a separate consideration of limits under the *Québec Charter*, see above, note 18, at 119ff.

[FN79]. *R. v. Oakes*, [1986] 1 S.C.R. 103, 26 D.L.R. (4th) 200, 1986 CarswellOnt 95, 1986 CarswellOnt 1001 (S.C.C.) ("*Oakes*").

[FN80]. *Nijjar v. Canada 3000 Airlines* (1999), 36 C.H.R.R. D/76, 1999 CarswellNat 3193 (Can. Human Rights Trib.) ("*Nijjar*"), para. 639 [*sic*, actually para. 126].

[FN81]. *R. v. Hothi*, (sub. nom. *Hothi v. R.*) [1985] 3 W.W.R. 256, 18 C.C.C (3d) 31, 1985 CarswellMan 170

(Man. Q.B.) at 34 [C.C.C.] [cited to C.C.C.], affirmed (1985), [1986] 3 W.W.R. 671, 35 Man. R. (2d) 159, 1985 CarswellMan 235 (Man. C.A.), leave to appeal to S.C.C. refused (1986), 43 Man. R. (2d) 240 (note), 70 N.R. 397 (note) (S.C.C.) ("*Singh*").

[FN82]. *Multani*, above, note 1 (C.A.) at para. 84, free translation.

[FN83]. *Ibid.* at paras. 91-100. In reaching this conclusion it relied on *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*, [1990] 2 S.C.R. 489, 72 D.L.R. (4th) 417, 1990 CarswellAlta 149, 1990 CarswellAlta 656 (S.C.C.). It made reference to *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868, 181 D.L.R. (4th) 385, 1999 CarswellBC 2730, 1999 CarswellBC 2731 (S.C.C.) ("Grismer"), but not *Meiorin*, above, note 69, nor the recent decision of the Québec Court Appeal in *Collège Notre-Dame du Sacré-Coeur (Corp.) c. Québec (Commission des droits de la personne)* , (sub nom. *Commission des droits de la personne du Québec c. Corp. du collège Notre-Dame du Sacré-Coeur*) [2002] R.J.Q. 5, 41 C.H.R.R. D/268, 2001 CarswellQue 2896 (Que. C.A.) ("*Notre-Dame*").

[FN84]. *Multani*, above, note 1 (S.C.C.) at para. 53, citing J. Woehrling, "L'obligation d'accommodement raisonnable et l'adaptation de la société à la diversité religieuse" (1998) 43 *McGill L.J.* 325, at 360.

[FN85]. See W.J. Smith and W.F. Foster, "Equal Opportunity and the School House: Part I: Exploring the Contours of Equality Rights" (2003) 13 *E.L.J.* 1 at 38-39.

[FN86]. *Multani*, above, note 1 (S.C.C.) at paras. 131-132. Reference is made, at para. 130, to the case law on reasonable accommodation, including *Meiorin*, above, note 69, but without any distinction between pre and post *Charter* cases.

[FN87]. For example: "A contravention of this Act shall be deemed not to have occurred if the person who is alleged to have contravened the Act shows that the alleged contravention was reasonable and justifiable in the circumstances." *Human Rights, Citizenship and Multiculturalism Protection Act*, R.S.A. 2000, c. H-14, s. 11.

[FN88]. *Meiorin*, above, note 69, at para. 54. In brief, an employer (or other actor) can rely on a BFR in order to refute a charge of discrimination if the employer has adopted, honestly and in good faith, a standard that is for a purpose rationally connected to the performance of the job that is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that a BFR is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the person who is discriminated against without imposing undue hardship upon the employer. See K. Schucher, "Weaving Together the Threads: A New Framework for Achieving Equality in Workplace Standards" (2000) 8 *Can. Lab. & Emp. L.J.* 325 at 348; T. Witelson, "From Here to Equality: Meiorin, TD Bank, and the Problems with Human Rights Law" (1999) 25 *Queen's L.J.* 347 at 381.

[FN89]. *Grismer*, above, note 83 at para. 19.

[FN90]. *Meiorin*, above, note 69, at para. 16. As discussed above (see note 76), its seems incongruous that the rule or other BFR of a private sector employer can be considered as a limit prescribed by law, yet that is the inescapable conclusion to be drawn from *Meiorin.*

[FN91]. Smith and Foster, above, note 85, at 63.

[FN92]. *Ibid.* at para. 59, citing from Sup. Ct. at para. 6.

[FN93]. See passages associated with notes 80 and 81.

[FN94]. *Multani*, above, note 1 (S.C.C.) at para. 65, citing *Pandori*, above, note 2, at para. 197.

[FN95]. *Ibid.* at para. 70.

[FN96]. *Ibid.* at para. 71.

[FN97]. *Ibid.* at para. 78, citing *Attis v. New Brunswick District No. 15 Board of Education*, (sub nom. *Ross v. New Brunswick School District No. 15*) [1996] 1 S.C.R. 825, (sub nom. *Ross v. New Brunswick School District No. 15*) 133 D.L.R. (4th) 1, 1996 CarswellNB 125, 1996 CarswellNB 125F (S.C.C.) [cited to S.C.R.] at para. 42.

[FN98]. *Ibid.* at para. 78, citing *R. v. M. (M.R.)*, [1998] 3 S.C.R. 393, 1998 CarswellNS 346, 1998 CarswellNS 347 (S.C.C.) at para. 3.

[FN99]. *Ibid.* at para. 78, citing *Trinity Western University v. College of Teachers (British Columbia)*, [2001] 1 S.C.R. 772, 2001 CarswellBC 1016, 2001 CarswellBC 1017 (S.C.C.) at para. 13.

[FN100]. Above, note 3.

[FN101]. Above, note 17.

[FN102]. *Nijjar*, above, note 80, at para. 134.

[FN103]. *Ibid.* at para 128.

[FN104]. Task Force on the Teaching of History, *Learning from the Past* (Québec: Ministère de l'Éducation, 1996) at 3.

[FN105]. *Chambly (Commission scolaire régionale) c. Bergevin*, (sub nom. *Commission scolaire régionale de Chambly v. Bergevin)*, [1994] 2 S.C.R. 525, 115 D.L.R. (4th) 609, 1994 CarswellQue 78, 1994 CarswellQue 114 (S.C.C.), is the exception to this general rule. It illustrates both the resistance to making such accommodation and the need to do so, when human rights norms can be invoked. The case involved three teachers of the Jewish faith who were given a day off to observe the religious holiday of Yom Kippour. However, because the collective agreement did not include such religious holidays in those covered by the paid special leave provisions of the collective agreement, the time off was without pay. The teachers grieved the salary deduction, claiming religious discrimination. As in the *Multani* case, the court of first record (an arbitration tribunal) agreed, was overturned by the Québec Court of Appeal but finally saw its decision restored by the Supreme Court of Canada..

[FN106]. See W.J. Smith and H.M. Donahue, *Historical Roots of Québec Education* (Montréal: McGill University, Ed-Lex, 2002) at 30-31, 52-53.

[FN107]. M. Mc Andrew, “Le remplacement du marqueur linguistique par le marqueur religieux en milieu scolaire” in Renaud, Pietrantonio and Bourgeault, above, note 113, at 131.

[FN108]. Gaudreault-Desbiens, “Du crucifix au *kirpan*: quelques remarques sur l'exercice de la liberté de religion dans les établissements scolaires” in P. Chagnon, ed.,*1#eveloppements récents en droit de l'éducation (2002)* (Cowansville, QC: Yvon Blais, 2002) 89 at 102, free translation.

[FN109]. See W.J. Smith and W.F. Foster, "Religion and Education in Canada: Part I - The Traditional Framework," 10 *E.L.J.* 393.

[FN110]. Gaudreault-Desbiens, above, note 108 at 101-102: "... le Procureur général du Québec a envoyé un triste message quant à la conception qu'il se fait de la tolérance au sein d'une société québécoise libre, démocratique, mais aussi plurielle."

[FN111]. J.G. Stein, *The Cult of Efficiency* (Toronto: Anansi, 2001) at 231, 233.

[FN112]. Gaudreault-Desbiens, above, note 108 at 108.

[FN113]. See e.g., D. Helly, "Occidentalisme et Islamisme : leçons de guerres culturelles pour la recherche" in J. Renaud, L. Pietrantonio and G. Bourgeault, eds., *Les relations ethniques en question* (Montréal: Les Presses de l'Université de Montréal, 2002) at 229.

[FN114]. P. Bosset, *Le droit et la régulation de la diversité religieuse en France et au Québec : Un même problématique, deux approches* (Montréal: Commission des droits de la personne et des droits de la jeunesse du Québec, 2004), online : <http://www.cdpdj.qc.ca/>.

[FN115]. Above, note 18, at 131.

[FN116]. *Convention on the Rights of the Child*, UN Doc. A/Res/44/25, 20 November 1989, art. 29(b).

[FN117]. United Nations Decade for Human Rights Education, General Assembly resolution, A/RES/49/184,December 23, 1994.

[FN118]. Commission des droits de la personne et des droits de la jeunes, online: <http://www.cdpdj.qc.ca/>. For information on other programs, see: Equitas, the International Centre for Human Rights Education, online: <http:// www.chrf.ca/>; the Human Rights Research and Education Centre, online: <http:// www.cdp-hrc.uottawa.ca/>; and Teaching Human Rights on Line, online: <http:// oz.uc.edu/thro/index.html>.

[FN119]. MEQ, *A School for the Future*, above, note 33, at 8.

[FN120]. *Basic School Regulation for Preschool. Elementary and Secondary Education*, O.C. 651-2000, 1 June 2000, G.O.Q. 2000.II.2593, as am. O.C. 865-2001, O.C. 488-2005, s. 5(2).

[FN121]. Ministère de l'Éducation du Québec, *Complementary Educational Services: Essential to Success* (Québec, 2002) at 36, online: <http:// www.mels.gouv.qc.ca/>.

[FN122]. Proulx Task Force, above, note 25, at 75.

[FN123]. See above, text associated with notes 97, 98 and 99.

[FN124]. In an ironic post script to this case, when I wrote the previous comment on this case, the City of Montréal was considering the formation of a hate crimes squad in response to a number of incidents, including a recent fire bombing of a Jewish school (see above, note 18, at n. 151). This time, a newspaper article reported the defacing of two synagogues with swastikas: J. Ravensbergen, "Hatefull Scrawls Shock Community," *The Gazzette*, 2006, March 27 at A7. Plus ça change ....

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