SUPREME COURT OF CANADA

CITATION: Multani *v.* Commission scolaire Marguerite-Bourgeoys, [2006] 1 S.C.R. 256, 2006 SCC 6

DATE: 20060302
DOCKET: 30322

BETWEEN:

Balvir Singh Multani and Balvir Singh Multani, in his capacity as tutor to his minor son Gurbaj Singh Multani
Appellants
v.
Commission scolaire Marguerite-Bourgeoys and Attorney General of Quebec
Respondents
- and -
World Sikh Organization of Canada, Canadian Civil Liberties Association, Canadian Human Rights Commission and Ontario Human Rights Commission
Interveners

OFFICIAL ENGLISH TRANSLATION

CORAM: McLachlin C.J. and Major,* Bastarache, Binnie, LeBel, Deschamps, Fish, Abella and Charron JJ.

REASONS FOR JUDGMENT: (paras. 1 to 83)	Charron J. (McLachlin C.J. and Bastarache, Binnie and Fish JJ. concurring)
JOINT CONCURRING REASONS: (paras. 84 to 139)	Deschamps and Abella JJ.
CONCURRING REASONS: (paras. 140 to 155)	LeBel J.

* Major J. took no part in the judgment.

Balvir Singh Multani and Balvir Singh Multani, in his capacity as tutor to his minor son Gurbaj Singh Multani *Appellants*

v.

Commission scolaire Marguerite-Bourgeoys and Attorney General of Quebec *Respondents*

and

World Sikh Organization of Canada, Canadian Civil Liberties Association, Canadian Human Rights Commission and Ontario Human Rights Commission *Interveners*

Indexed as: Multani *v.* Commission scolaire Marguerite-Bourgeoys

Neutral citation: 2006 SCC 6.

File No.: 30322.

2005: April 12; 2006: March 2.

Present: McLachlin C.J. and Major,[*] Bastarache, Binnie, LeBel, Deschamps, Fish, Abella and Charron JJ.

[*] Major J. took no part in the judgment.

on appeal from the court of appeal for quebec

Constitutional law — Charter of Rights — Freedom of religion — Wearing of kirpan at school — Council of commissioners of school board prohibiting Sikh student from wearing kirpan to school — Whether decision infringing freedom of religion guaranteed by s. 2(a) of Canadian Charter of Rights and Freedoms — If so, whether infringement justifiable under s. 1 of Charter.

Constitutional law — Charter of Rights — Reasonable limit — Law — Administrative decision — Infringement of guaranteed right resulting from decision of administrative body acting pursuant to its enabling statute — Whether infringement limit prescribed by "law" within meaning of s. 1 of Canadian Charter of Rights and Freedoms.

Administrative law — Judicial review — Compliance of administrative decision with requirements of Canadian Charter of Rights and Freedoms — Council of commissioners of school board prohibiting Sikh student from wearing kirpan to school — Whether decision infringing student's freedom of religion — Appropriate approach for reviewing decision — Relationship between administrative law and constitutional law.

G and his father B are orthodox Sikhs. G believes that his religion requires him to wear a kirpan at all times; a kirpan is a religious object that resembles a dagger and must be made of metal. In 2001, G accidentally dropped the kirpan he was wearing under his clothes in the yard of the school he was attending. The school board sent G's parents a letter in which, as a reasonable accommodation, it authorized their son to wear

his kirpan to school provided that he complied with certain conditions to ensure that it was sealed inside his clothing. G and his parents agreed to this arrangement. The governing board of the school refused to ratify the agreement on the basis that wearing a kirpan at the school violated art. 5 of the school's *Code de vie* (code of conduct), which prohibited the carrying of weapons. The school board's council of commissioners upheld that decision and notified G and his parents that a symbolic kirpan in the form of a pendant or one in another form made of a material rendering it harmless would be acceptable in the place of a real kirpan. B then filed in the Superior Court a motion for a declaratory judgment to the effect that the council of commissioners' decision was of no force or effect. The Superior Court granted the motion, declared the decision to be null, and authorized G to wear his kirpan under certain conditions. The Court of Appeal set aside the Superior Court's judgment. After deciding that the applicable standard of review was reasonableness *simpliciter*, the Court of Appeal restored the council of commissioners' decision. It concluded that the decision in question infringed G's freedom of religion under s. 2(*a*) of the *Canadian Charter of Rights and Freedoms* ("*Canadian Charter*") and s. 3 of Quebec's *Charter of human rights and freedoms* ("*Quebec Charter*"), but that the infringement was justified for the purposes of s. 1 of the *Canadian Charter* and s. 9.1 of the *Quebec Charter*.

Held: The appeal should be allowed. The decision of the Court of Appeal should be set aside and the decision of the council of commissioners should be declared to be null.

Per McLachlin C.J. and Bastarache, Binnie, Fish and Charron JJ.: In the case at bar, it is the compliance of the commissioners' decision with the requirements of the *Canadian Charter* that is central to the dispute, not the decision's validity from the

point of view of administrative law. There is no suggestion that the council of commissioners did not have jurisdiction, from an administrative law standpoint, to approve the *Code de vie*. Nor is the administrative and constitutional validity of the rule against carrying weapons in issue. Since the complaint is based entirely on freedom of religion, the Court of Appeal erred in applying the reasonableness standard to its constitutional analysis. The administrative law standard of review was not relevant. [18-20]

The *Canadian Charter* applies to the decision of the council of commissioners, despite the decision's individual nature. Any infringement of a guaranteed right that results from the actions of a decision maker acting pursuant to its enabling statute is also a limit "prescribed by law" within the meaning of s. 1. Where the legislation pursuant to which an administrative body has made a contested decision confers a discretion and does not confer, either expressly or by implication, the power to limit the rights and freedoms guaranteed by the *Canadian Charter*, the decision should, if there is an infringement, be subjected to the test set out in s. 1 to ascertain whether it constitutes a reasonable limit. [22-23]

In the instant case, the Court does not at the outset have to reconcile two constitutional rights, as only freedom of religion is in issue here. However, that freedom is not absolute and can conflict with other constitutional rights. Since the test governing limits on rights was developed in *Oakes*, the Court has never called into question the principle that rights are reconciled through the constitutional justification required by s. 1 of the *Canadian Charter*. Since the decision genuinely affects both parties and was made by an administrative body exercising statutory powers, a contextual analysis under

s. 1 will make it possible to balance the relevant competing values in a more comprehensive manner. [29-30]

The council of commissioners' decision prohibiting G from wearing his kirpan to school infringes his freedom of religion. G genuinely believes that he would not be complying with the requirements of his religion were he to wear a plastic or wooden kirpan, and none of the parties have contested the sincerity of his belief. The interference with G's freedom of religion is neither trivial nor insignificant, as it has deprived him of his right to attend a public school. The infringement of G's freedom of religion cannot be justified under s. 1 of the *Canadian Charter*. Although the council's decision to prohibit the wearing of a kirpan was motivated by a pressing and substantial objective, namely to ensure a reasonable level of safety at the school, and although the decision had a rational connection with the objective, it has not been shown that such a prohibition minimally impairs G's rights. [2] [38-41] [44] [48] [77]

The analogy with the duty of reasonable accommodation is helpful to explain the burden resulting from the minimal impairment test with respect to an individual. In the circumstances of the instant case, the decision to establish an absolute prohibition against wearing a kirpan does not fall within a range of reasonable alternatives. The arguments in support of such a prohibition must fail. The risk of G using his kirpan for violent purposes or of another student taking it away from him is very low, especially if the kirpan is worn under conditions such as were imposed by the Superior Court. It should be added that G has never claimed a right to wear his kirpan to school without restrictions. Furthermore, there are many objects in schools that could be used to commit violent acts and that are much more easily obtained by students, such as scissors, pencils and baseball bats. The evidence also reveals that not a single violent incident

related to the presence of kirpans in schools has been reported. Although it is not necessary to wait for harm to be done before acting, the existence of concerns relating to safety must be unequivocally established for the infringement of a constitutional right to be justified. Nor does the evidence support the argument that allowing G to wear his kirpan to school could have a ripple effect. Lastly, 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 is not only contradicted by the evidence regarding the symbolic nature of the kirpan, but is also disrespectful to believers in the Sikh religion and does not take into account Canadian values based on multiculturalism. Religious tolerance is a very important value of Canadian society. If some students consider it unfair that G may wear his kirpan to school while they are not allowed to have knives in their possession, it is incumbent on the schools to discharge their obligation to instil in their students this value that is at the very foundation of our democracy. A total prohibition against wearing a kirpan to school undermines the value of this religious symbol and sends students the message that some religious practices do not merit the same protection as others. Accommodating G and allowing him to wear his kirpan under certain conditions demonstrates the importance that our society attaches to protecting freedom of religion and to showing respect for its minorities. The deleterious effects of a total prohibition thus outweigh its salutary effects. [51-54] [57-59] [67-71] [76] [79]

Given that G no longer attends his school, the appropriate and just remedy is to declare the decision prohibiting him from wearing his kirpan to be null. [82]

Per Deschamps and Abella JJ.: Recourse to a constitutional law justification is not appropriate where, as in this case, what must be assessed is the propriety of an

administrative body's decision relating to human rights. Whereas a constitutional justification analysis must be carried out when reviewing the validity or enforceability of a norm such as a law, regulation or other similar rule of general application, the administrative law approach must be retained for reviewing decisions and orders made by administrative bodies. Basing the analysis on the principles of administrative law not only averts the problems that result from blurring the distinction between the principles of constitutional justification and the principles of administrative law, but also prevents the impairment of the analytical tools developed specifically for each of these fields. In addition, this approach allows parties and administrative bodies to know in advance which rules govern disputes involving human rights issues. [85] [103] [125]

Simply alleging that a s. 1 analysis is required does not make administrative law inapplicable. If an administrative body makes a decision or order that is said to conflict with fundamental values, the mechanisms of administrative law — including the standard of review — are readily available. It is difficult to conceive of an administrative decision being permitted to stand if it violates the *Canadian Charter*. [86] [93] [128]

A decision or order made by an administrative body cannot be equated with a "law" within the meaning of s. 1 of the *Canadian Charter*. The expression "law" used in s. 1 naturally refers to a norm or rule of general application. The *Oakes* test, which was developed to assess legislative policies, is based on the duty of the executive and legislative branches of government to account to the courts for any rules they establish that infringe protected rights. That test, which is based on an analysis of societal interests, is better suited, conceptually and literally, to the concept of "prescribed by law". The duty to account imposed — conceptually and in practice — on the legislative

and executive branches is not easily applied to administrative tribunals. [112-113] [119-121]

Lastly, even if the concepts of reasonable accommodation and minimal impairment have a number of similarities, they belong to two different analytical categories. On the one hand, the process required by the duty of reasonable accommodation takes into account the specific details of the circumstances of the parties. The justification of minimal impairment, on the other hand, is based on societal interests. An administrative law analysis is microcosmic, whereas a constitutional law analysis is generally macrocosmic. These separate streams — public versus individual — should be kept distinct. [129-134]

In the instant case, it is the standard of reasonableness that applies to the decision of the school board's council of commissioners. The council did not sufficiently consider either the right to freedom of religion or the proposed accommodation measure. It merely applied literally the *Code de vie* in effect at the school. By disregarding the right to freedom of religion without considering the possibility of a solution that posed little or no risk to the safety of the school community, the council made an unreasonable decision. [99]

Per LeBel J.: It is not always necessary to resort to the *Canadian Charter* or, in the case of Quebec, the *Quebec Charter* when a decision can be reached by applying general administrative law principles or the specific rules governing the exercise of a delegated power. However, the dispute as presented makes a constitutional analysis unavoidable. Where a decision is contested on the basis that the administrative body's exercise of the delegated power is vitiated by the violation of a fundamental right,

the only way to determine whether the infringement of the constitutional standard is justified is to consider the fundamental rights in issue and how they have been applied. Where the exercise of such a power has an impact on the relationship between competing constitutional rights, those rights can be reconciled in two ways. The first approach involves defining the rights and how they relate to each other, and the second consists of justification under s. 1 of the *Canadian Charter*. In the case at bar, the first approach can be dispensed with, as the evidence does not show a *prima facie* infringement of the right to security of the person. It is therefore necessary to turn to justification under s. 1. In the case of an individualized decision made pursuant to statutory authority, it may be possible to dispense with certain steps of the analysis. The existence of a statutory authority that is not itself challenged makes it pointless to review the objectives of the act. The issue becomes one of proportionality or, more specifically, minimal limitation of the guaranteed right, having regard to the context in which the right has been infringed. Reasonable accommodation that would meet the requirements of the constitutional standard must be considered at this stage and in this context. In the case at bar, the school board has not shown that its prohibition was justified and met the constitutional standard. [141-144] [153-155]

Cases Cited

By Charron J.

Applied: *R. v. Oakes*, [1986] 1 S.C.R. 103; **distinguished:** *Trinity Western University v. British Columbia College of Teachers*, [2001] 1 S.C.R. 772, 2001 SCC 31; *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551, 2004 SCC 47; **considered:** *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038; *Ross v.*

New Brunswick School District No. 15, [1996] 1 S.C.R. 825; **referred to:** *Chamberlain v. Surrey School District No. 36*, [2002] 4 S.C.R. 710, 2002 SCC 86; *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, 2003 SCC 19; *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504, 2003 SCC 54; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624; *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120, 2000 SCC 69; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315; *R. v. Keegstra*, [1990] 3 S.C.R. 697; *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713; *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199; *Multani (Tuteur de) v. Commission scolaire Marguerite-Bourgeois*, [2002] Q.J. No. 619 (QL); *Pandori v. Peel Bd. of Education* (1990), 12 C.H.R.R. D/364, aff'd (1991), 3 O.R. (3d) 531 (*sub nom. Peel Board of Education v. Ontario Human Rights Commission*); *Hothi v. R.*, [1985] 3 W.W.R. 256, aff'd [1986] 3 W.W.R. 671; *Nijjar v. Canada 3000 Airlines Ltd.* (1999), 36 C.H.R.R. D/76; *R. v. M. (M.R.)*, [1998] 3 S.C.R. 393.

By Deschamps and Abella JJ.

Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817; *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504, 2003 SCC 54; *Trinity Western University v. British Columbia College of Teachers*, [2001] 1 S.C.R. 772, 2001 SCC 31; *Chamberlain v. Surrey School District No. 36*, [2002] 4 S.C.R. 710, 2002 SCC 86; *Douglas/Kwantlen Faculty Assn. v. Douglas*

College, [1990] 3 S.C.R. 570; *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, [2003] 2 S.C.R. 157, 2003 SCC 42; *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227; *Syndicat des employés de production du Québec et de l'Acadie v. Canada Labour Relations Board*, [1984] 2 S.C.R. 412; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038; *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, 2003 SCC 19; *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624; *R. v. Therens*, [1985] 1 S.C.R. 613; *R. v. Oakes*, [1986] 1 S.C.R. 103; *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573; *Ontario Human Rights Commission v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536; *Bhinder v. Canadian National Railway Co.*, [1985] 2 S.C.R. 561; *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3; *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868.

By LeBel J.

R. v. Oakes, [1986] 1 S.C.R. 103; *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307, 2000 SCC 44; *Young v. Young*, [1993] 4 S.C.R. 3; *Montréal (City) v. 2952-1366 Québec Inc.*, [2005] 3 S.C.R. 141, 2005 SCC 62; *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R 835.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 1, 2, 7, 15, 24(1).

Charter of human rights and freedoms, R.S.Q., c. C-12, ss. 3, 9.1, 10.

Civil Code of Québec, S.Q. 1991, c. 64, art. 1460.

Code of Civil Procedure, R.S.Q., c. C-25, art. 453.

Constitution Act, 1982, s. 52.

Education Act, R.S.Q., c. I-13.3, ss. 12, 76.

Authors Cited

Brun, Henri, et Guy Tremblay. *Droit constitutionnel*, 4e éd. Cowansville, Qué.: Yvon Blais, 2002.

Garant, Patrice. *Droit administratif*, vol. 3, *Les chartes*, 3e éd. Cowansville, Qué.: Yvon Blais, 1992.

Garant, Patrice. *Droit scolaire*. Cowansville, Qué.: Yvon Blais, 1992.

Mendes, Errol. "The Crucible of the Charter: Judicial Principles v. Judicial Deference in the Context of Section 1", in Gérald-A. Beaudoin and Errol Mendes, eds., *Canadian Charter of Rights and Freedoms*, 4th ed. Markham, Ont.: LexisNexis Butterworths, 2005, 165.

Perrault, Gabrielle. *Le contrôle judiciaire des décisions de l'administration: De l'erreur juridictionnelle à la norme de contrôle*. Montréal: Wilson & Lafleur, 2002.

Pinard, Danielle. "Les seules règles de droit qui peuvent poser des limites aux droits et libertés constitutionnellement protégés et l'arrêt *Slaight Communications*" (1992), 1 *N.J.C.L.* 79.

Reid, Hubert. *Dictionnaire de droit québécois et canadien avec table des abréviations et lexique anglais-français*, 2e éd. Montréal: Wilson & Lafleur, 2001, "*loi*", "*règle*".

Woehrling, José. "L'obligation d'accommodement raisonnable et l'adaptation de la société à la diversité religieuse" (1998), 43 *McGill L.J.* 325.

APPEAL from a judgment of the Quebec Court of Appeal (Pelletier and Rochon JJ.A. and Lemelin J. (*ad hoc*)), [2004] R.J.Q. 824, 241 D.L.R. (4th) 336, 12 Admin. L.R. (4th) 233, [2004] Q.J. No. 1904 (QL), reversing a judgment of Grenier J., [2002] Q.J. No. 1131 (QL). Appeal allowed.

Julius H. Grey, *Lynne-Marie Casgrain*, *Elisabeth Goodwin* and *Jean Philippe Desmarais*, for the appellants.

François Aquin and *Carla Chamass*, for the respondent Commission scolaire Marguerite-Bourgeoys.

René Bourassa and *Hugo Jean*, for the respondent the Attorney General of Quebec.

Palbinder K. Shergill, for the intervener the World Sikh Organization of Canada.

Mahmud Jamal and *Patricia McMahon*, for the intervener the Canadian Civil Liberties Association.

Philippe Dufresne, for the intervener the Canadian Human Rights Commission.

Raj Dhir and *Anthony D. Griffin*, for the intervener the Ontario Human Rights Commission.

English version of the judgment of McLachlin C.J. and Bastarache, Binnie, Fish and Charron JJ. delivered by

CHARRON J. —

1. Introduction

1 This appeal requires us to determine whether the decision of a school board's council of commissioners prohibiting one of the students under its jurisdiction from wearing a kirpan to school as required by his religion infringes the student's freedom of religion. If we find that it does, we must determine whether that infringement is a reasonable limit that can be justified by the need to maintain a safe environment at the school.

2 As I will explain below, I am of the view that an absolute prohibition against wearing a kirpan infringes the freedom of religion of the student in question under s. 2(*a*) of the *Canadian Charter of Rights and Freedoms* ("*Canadian Charter*"). The infringement cannot be justified under s. 1 of the *Canadian Charter*, since it has not been shown that such a prohibition minimally impairs the student's rights. The decision of the council of commissioners must therefore be declared a nullity.

2. Facts

3 The appellant Balvir Singh Multani and his son Gurbaj Singh Multani are orthodox Sikhs. Gurbaj Singh, born in 1989, has been baptized and believes that his religion requires him to wear a kirpan at all times; a kirpan is a religious object that resembles a dagger and must be made of metal. On November 19, 2001, Gurbaj Singh accidentally dropped the kirpan he was wearing under his clothes in the yard of the school he was attending, École Sainte-Catherine-Labouré. On December 21, 2001, the school board, the Commission scolaire Marguerite-Bourgeoys ("CSMB"), through its legal counsel, sent Gurbaj Singh's parents a letter in which, as a [TRANSLATION]

"reasonable accommodation", it authorized their son to wear his kirpan to school provided that he complied with certain conditions to ensure that it was sealed inside his clothing. Gurbaj Singh and his parents agreed to this arrangement.

4 In a resolution passed on February 12, 2002, the school's governing board refused to ratify the agreement on the basis that wearing a kirpan at the school violated art. 5 of the school's *Code de vie* (code of conduct), which prohibited the carrying of weapons and dangerous objects. For the purposes of this case, it is not in dispute that the governing board had, pursuant to the authority granted to it under s. 76 of the *Education Act*, R.S.Q., c. I-13.3, approved the *Code de vie*, which imposed certain rules of conduct.

5 On March 19, 2002, based on a unanimous recommendation by a review committee to which a request by the Multanis to reconsider the governing board's decision had been referred, the CSMB's council of commissioners upheld that decision. The council of commissioners also notified the Multanis that a symbolic kirpan in the form of a pendant or one in another form made of a material rendering it harmless would be acceptable in the place of a real kirpan.

6 On March 25, 2002, Balvir Singh Multani, personally and in his capacity as tutor to his son Gurbaj Singh, filed in the Superior Court, under art. 453 of the *Code of Civil Procedure*, R.S.Q., c. C-25, and s. 24(1) of the *Canadian Charter*, a motion for a declaratory judgment together with an application for an interlocutory injunction. In his motion, Mr. Multani asked the court to declare that the council of commissioners' decision was of no force or effect and that Gurbaj Singh had a right to wear his kirpan to school if it was sealed and sewn up inside his clothing. He submitted that this would

represent a reasonable accommodation to the freedom of religion and right to equality guaranteed in ss. 3 and 10 of the *Charter of human rights and freedoms,* R.S.Q., c. C-12 ("*Quebec Charter*"), and ss. 2 and 15 of the *Canadian Charter*.

7 On April 16, 2002, Tellier J. ordered an interlocutory injunction and authorized Gurbaj Singh to wear his kirpan, provided that he complied with the conditions initially proposed by the CSMB, until a final decision was rendered in the case. On May 17, 2002, Grenier J. of the Superior Court granted Mr. Multani's motion for a declaratory judgment, declared the council of commissioners' decision to be null and of no force or effect, and authorized Gurbaj Singh to wear his kirpan under certain conditions. The Quebec Court of Appeal allowed the appeal and dismissed the motion for a declaratory judgment on March 4, 2004. Balvir Singh Multani then appealed to this Court on behalf of himself and his son.

3. Decisions of the Courts Below

3.1 *Superior Court* ([2002] Q.J. No. 1131 (QL))

8 Grenier J. began by discussing the agreement between the CSMB and the Multanis respecting the proposed accommodation measure. Noting that the need to wear a kirpan was based on a sincere religious belief held by Gurbaj Singh and that there was no evidence of any violent incidents involving kirpans in Quebec schools, she granted the motion for a declaratory judgment and authorized Gurbaj Singh to wear his kirpan at Sainte-Catherine-Labouré school on the following conditions (at para. 7):

[TRANSLATION]

– that the kirpan be worn under his clothes;

– that the kirpan be carried in a sheath made of wood, not metal, to prevent it from causing injury;

– that the kirpan be placed in its sheath and wrapped and sewn securely in a sturdy cloth envelope, and that this envelope be sewn to the guthra;

– that school personnel be authorized to verify, in a reasonable fashion, that these conditions were being complied with;

– that the petitioner be required to keep the kirpan in his possession at all times, and that its disappearance be reported to school authorities immediately; and

– that in the event of a failure to comply with the terms of the judgment, the petitioner would definitively lose the right to wear his kirpan at school.

3.2 *Court of Appeal (Pelletier and Rochon JJ.A. and Lemelin J. (ad hoc))* ([2004] Q.J. No. 1904 (QL))

9 Writing on behalf of a unanimous Quebec Court of Appeal, Lemelin J. (*ad hoc*) began by pointing out that the parties had not agreed on an accommodation measure, since the CSMB had consistently opposed the Multanis' motion and argued in favour of a measure similar to the offer made in the council of commissioners' resolution, that is, permission to wear a symbolic kirpan or one made of a material rendering it harmless.

10 Regarding the applicable standard of review, Lemelin J. conducted a pragmatic and functional analysis and concluded that the applicable standard was reasonableness *simpliciter*.

11 Lemelin J. found that the appellant had proven that his son's need to wear a kirpan was a sincerely held religious belief and was not capricious. She concluded that

the council of commissioners' decision infringed Gurbaj Singh's freedom of religion and conscience because it had [TRANSLATION] "the effect of impeding conduct integral to the practice of [his] religion" (para. 71).

12 Lemelin J. first noted that Gurbaj Singh's freedom of religion could be limited for the purposes of s. 1 of the *Canadian Charter* — in accordance with the test set out in *R. v. Oakes*, [1986] 1 S.C.R. 103 — and of s. 9.1 of the *Quebec Charter*. She stated that she could not conceive of a sufficient justification where there is a reasonable accommodation measure. Lemelin J. considered that the council of commissioners' decision was motivated by a pressing and substantial objective, namely to ensure the safety of the school's students and staff. She stated that there was a direct and rational connection between the prohibition against wearing a kirpan to school and the objective of maintaining a safe environment. Lemelin J. explained that the duty to accommodate is a corollary of the minimal impairment criterion. Given that the kirpan is a dangerous object, that the conditions imposed by Grenier J. did not eliminate every risk, but merely delayed access to the object, and that the concerns expressed by the school board were not merely hypothetical, Lemelin J. concluded that allowing the kirpan to be worn, even under certain conditions, would oblige the school board to reduce its safety standards and would result in undue hardship. In her opinion, the school's students and staff would be exposed to the risks associated with the kirpan. She stated that she was unable to convince herself that safety concerns are less serious in schools than in courts of law or in airplanes. She concluded that the council of commissioners' decision was not unreasonable and did not warrant intervention. Given this conclusion, she did not consider it necessary to conduct a separate analysis with regard to a violation of the right to equality, since the same arguments concerning justification would apply. She allowed the appeal and dismissed Mr. Multani's motion for a declaratory judgment.

4. Issues

13 Does the decision of the council of commissioners prohibiting Gurbaj Singh Multani from wearing his kirpan at Sainte-Catherine-Labouré school infringe his freedom of religion under s. 2(*a*) of the *Canadian Charter* or s. 3 of the *Quebec Charter*? Does the decision infringe his right to equality under s. 15 of the *Canadian Charter* or s. 10 of the *Quebec Charter*? If so, can the infringement be justified pursuant to s. 1 of the *Canadian Charter* or s. 9.1 of the *Quebec Charter*?

14 I will begin by discussing the freedom of religion guaranteed by s. 2(*a*) of the *Canadian Charter*. Before proceeding with the analysis, there are a few preliminary issues to address.

5. Preliminary Issues

5.1 *The Administrative Law Standard of Review Is Not Applicable*

15 Although the appropriate standard of review in the case at bar was not argued at trial, it was in the Court of Appeal. Based on the decisions in *Chamberlain v. Surrey School District No. 36*, [2002] 4 S.C.R. 710, 2002 SCC 86, and *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, 2003 SCC 19, the Court of Appeal concluded that the standard for reviewing the council of commissioners' decision should be reasonableness *simpliciter*. Having found that the decision infringed Gurbaj Singh's freedom of religion and conscience, the Court of Appeal then incorporated that administrative law standard of review into its analysis of constitutional

justification under s. 1 of the *Canadian Charter*. My colleagues Deschamps and Abella JJ. see no reason to depart from the administrative law approach adopted by the Court of Appeal (para. 95). They also believe that it is both sufficient and more appropriate, in the case at bar, to rely solely on the principles of administrative law to decide the substantive issue rather than applying the principles of constitutional justification.

16 With respect for the opinion of Deschamps and Abella JJ., I am of the view that this approach could well reduce the fundamental rights and freedoms guaranteed by the *Canadian Charter* to mere administrative law principles or, at the very least, cause confusion between the two. It is not surprising that the values underlying the rights and freedoms guaranteed by the *Canadian Charter* form part — and sometimes even an integral part — of the laws to which we are subject. However, the fact that an issue relating to constitutional rights is raised in an administrative context does not mean that the constitutional law standards must be dissolved into the administrative law standards. The rights and freedoms guaranteed by the *Canadian Charter* establish a *minimum* constitutional protection 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.* Moreover, as Dickson C.J. noted in *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, the more sophisticated and structured analysis of s. 1 is the proper framework within which to review the values protected by the *Canadian Charter* (see also *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825, at para. 32). Since, as I will explain below, it is the compliance of the commissioners' decision with the requirements of the *Canadian*

Charter that is central to this appeal, it is my opinion that the Court of Appeal's analysis of the standard of review was inadequate and that it leads to an erroneous conclusion.

17 As this Court recognized in *Ross*, judicial review may involve a constitutional law component and an administrative law component (para. 22). In that case, for example, the appeal raised two broad issues. From the point of view of administrative law, the Court first had to determine whether, based on the appropriate administrative law standard of review, namely reasonableness, the human rights board of inquiry had erred in making a finding of discrimination under s. 5(1) of the *Human Rights Act*, R.S.N.B. 1973, c. H-11, and whether that Act gave it jurisdiction to make the order in issue. (It should be noted here that the Court did not confuse the protection against discrimination provided for in s. 5(1) of the Act with the right guaranteed in s. 15 of the *Canadian Charter*.) However, the conclusion that there was discrimination and that the Act granted the board of inquiry a very broad power to make orders did not end the analysis. Since the respondent had also argued that the decision infringed his freedom of expression and religion under the *Canadian Charter*, the Court also had to determine whether the board of inquiry's order that the school board remove the respondent from his teaching position was valid from the point of view of constitutional law. As the Court recognized, "an administrative tribunal acting pursuant to its delegated powers exceeds its jurisdiction if it makes an order that infringes the *Charter*" (para. 31; see also *Slaight Communications*). The Court therefore conducted an analysis under ss. 2(*a*) and (*b*) and 1 of the *Canadian Charter* to decide the constitutional issue. The administrative law standard of review is not applicable to the constitutional component of judicial review.

18 As stated above, it is the compliance of the commissioners' decision with the requirements of the *Canadian Charter* that is central to this appeal, not the decision's validity from the point of view of administrative law. Section 76 of the *Education Act* grants the governing board the power to approve any safety measure proposed by a school principal:

> The governing board is responsible for approving the rules of conduct and the safety measures proposed by the principal.
>
> The rules and measures may include disciplinary sanctions other than expulsion from school or corporal punishment; the rules and measures shall be transmitted to all students at the school and their parents.

The governing board exercised this power to approve, *inter alia*, art. 5 of the *Code de vie*, which prohibits the carrying of weapons and dangerous objects at Sainte-Catherine-Labouré school. The council of commissioners, in turn, upheld the governing board's decision pursuant to the power implicitly conferred on it in s. 12 of the *Education Act*, which reads as follows:

> The council of commissioners may, if it considers that the request is founded, overturn, entirely or in part, the decision contemplated by the request and make the decision which, in its opinion, ought to have been made in the first instance.

19 There is no suggestion that the council of commissioners did not have jurisdiction, from an administrative law standpoint, to approve the *Code de vie*. Nor, it should be noted, is the administrative and constitutional validity of the *rule* against carrying weapons and dangerous objects in issue. It would appear that the *Code de vie* was never even introduced into evidence by the parties. Rather, the appellant argues that it was in applying the rule, that is, in categorically denying Gurbaj Singh the right to wear his kirpan, that the governing board, and subsequently the council of

commissioners when it upheld the original decision, infringed Gurbaj Singh's freedom of religion under the *Canadian Charter*.

20 The complaint is based entirely on this constitutional freedom. The Court of Appeal therefore erred in applying the reasonableness standard to its constitutional analysis. The administrative law standard of review was not relevant. Moreover, if this appeal had instead concerned the review of an administrative decision based on the application and interpretation of the *Canadian Charter*, it would, according to the case law of this Court, have been necessary to apply the correctness standard (*Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504, 2003 SCC 54, at para. 31).

21 Thus, it is the constitutionality of the *decision* that is in issue in this appeal, which means that a constitutional analysis must be conducted. The reasons of Deschamps and Abella JJ. raise another issue relating to the application of s. 1 of the *Canadian Charter*. My colleagues believe that the Court should address the issue of justification under s. 1 only where a complainant 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. In my opinion, consistency in the law can be maintained only by addressing the issue of justification under s. 1 regardless of whether what is in issue is the wording of the statute itself or its application. I will explain this.

22 There is no question that the *Canadian Charter* applies to the decision of the council of commissioners, despite the decision's individual nature. The council is a creature of statute and derives all its powers from statute. Since the legislature cannot pass a statute that infringes the *Canadian Charter*, it cannot, through enabling legislation, do the same thing by delegating a power to act to an administrative decision maker: see *Slaight Communications*, at pp. 1077-78. As was explained in *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, at para. 20, the *Canadian Charter* can apply in two ways:

> First, legislation may be found to be unconstitutional on its face because it violates a *Charter* right and is not saved by s. 1. In such cases, the legislation will be invalid and the Court compelled to declare it of no force or effect pursuant to s. 52(1) of the *Constitution Act, 1982*. Secondly, the *Charter* may be infringed, not by the legislation itself, but by the actions of a delegated decision-maker in applying it. In such cases, the legislation remains valid, but a remedy for the unconstitutional action may be sought pursuant to s. 24(1) of the *Charter*.

Deschamps and Abella JJ. take the view that the Court must apply s. 1 of the *Canadian Charter* only in the first case. I myself believe that the same analysis is necessary in the second case, where the decision maker has acted pursuant to an enabling statute, since any infringement of a guaranteed right that results from the decision maker's actions is also a limit "prescribed by law" within the meaning of s. 1. On the other hand, as illustrated by *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120, 2000 SCC 69, at para. 141, when the delegated power is not exercised in accordance with the enabling legislation, a decision not authorized by statute is not a limit "prescribed by law" and therefore cannot be justified under s. 1.

23 In the case at bar, no one is suggesting that the council of commissioners failed to act in accordance with its enabling legislation. It is thus necessary to determine,

as the Court did in *Slaight Communications*, whether the council of commissioners' decision infringes, as alleged, Gurbaj Singh's freedom of religion. As Lamer J. explained (at pp. 1079-80), where the legislation pursuant to which an administrative body has made a contested decision confers a discretion (in the instant case, the choice of means to keep schools safe) and does not confer, either expressly or by implication, the power to limit the rights and freedoms guaranteed by the *Canadian Charter*, the decision should, if there is an infringement, be subjected to the test set out in s. 1 of the *Canadian Charter* to ascertain whether it constitutes a reasonable limit that can be demonstrably justified in a free and democratic society. If it is not justified, the administrative body has exceeded its authority in making the contested decision.

5.2 *Internal Limits of Freedom of Religion, or Justification Within the Meaning of Section 1?*

24 The parties have been unable to agree on the most appropriate analytical approach. The appellant considers it clear that the council of commissioners' decision infringes his son's freedom of religion protected by s. 2(*a*) of the *Canadian Charter*. In response to the respondents' submissions, he maintains that only a limit that meets the test for the application of s. 1 of the *Canadian Charter* can be justified. The Attorney General of Quebec concedes that the prohibition against the appellant's son wearing his kirpan to school infringes the son's freedom of religion, but submits that, regardless of the conditions ordered by the Superior Court, the prohibition is a fair limit on freedom of religion, which is not an absolute right.

25 According to the CSMB, freedom of religion has not been infringed, because it has internal limits. The CSMB considers that, in the instant case, the freedom of religion guaranteed by s. 2(*a*) must be limited by imperatives of public order, safety, and

health, as well as by the rights and freedoms of others. In support of this contention, it relies primarily on *Trinity Western University v. British Columbia College of Teachers*, [2001] 1 S.C.R. 772, 2001 SCC 31, in which the Court defined the scope of the rights in issue (freedom of religion and the right to equality) in order to resolve any potential conflict. The CSMB is of the view that, in the case at bar, delineating the rights in issue in this way would preserve Gurbaj Singh's freedom of religion while, as in *Trinity Western University*, circumscribing his freedom to act in accordance with his beliefs. According to this line of reasoning, the outcome of this appeal would be decided at the stage of determining whether freedom of religion has been infringed rather than at the stage of reconciling the rights of the parties under s. 1 of the *Canadian Charter*.

26 This Court has clearly 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 (see *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 337, and *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551, 2004 SCC 47, at para. 62). However, the Court has on numerous occasions stressed the advantages of reconciling competing rights by means of a s. 1 analysis. For example, in *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315, the claimants, who were Jehovah's Witnesses, contested an order that authorized the administration of a blood transfusion to their daughter. While acknowledging that freedom of religion could be limited in the best interests of the child, La Forest J., writing for the majority of the Court, stated the following, at paras. 109-10:

> This Court has consistently refrained from formulating internal limits to the scope of freedom of religion in cases where the constitutionality of a legislative scheme was raised; it rather opted to balance the competing rights under s. 1 of the *Charter* . . . .

> In my view, it appears sounder to leave to the state the burden of justifying the restrictions it has chosen. Any ambiguity or hesitation should be resolved in favour of individual rights. Not only is this consistent with the broad and liberal interpretation of rights favoured by this Court, but s. 1 is a much more flexible tool with which to balance competing rights than s. 2(*a*). . . .

27 *Ross* provides another example of this. In that case, the Court recognized a teacher's right to act on the basis of antisemitic views that compromised the right of students to a school environment free of discrimination, but opted to limit the teacher's freedom of religion pursuant to s. 1 of the *Canadian Charter* (at paras. 74-75):

> This mode of approach is analytically preferable because it gives the broadest possible scope to judicial review under the *Charter* . . ., and provides a more comprehensive method of assessing the relevant conflicting values. . . .
>
> . . . That approach seems to me compelling in the present case where the respondent's claim is to a serious infringement of his rights of expression and of religion in a context requiring a detailed contextual analysis. In these circumstances, there can be no doubt that the detailed s. 1 analytical approach developed by this Court provides a more practical and comprehensive mechanism, involving review of a whole range of factors for the assessment of competing interests and the imposition of restrictions upon individual rights and freedoms.

28 It is important to distinguish these decisions from the ones in which the Court did not conduct a s. 1 analysis because there was no conflict of fundamental rights. For example, in *Trinity Western University*, the Court, asked to resolve a potential conflict between religious freedoms and equality rights, concluded that a proper delineation of the rights involved would make it possible to avoid any conflict in that case. Likewise, in *Amselem*, a case concerning the *Quebec Charter*, the Court refused to pit freedom of religion against the right to peaceful enjoyment and free disposition of property, because the impact on the latter was considered "at best, minimal" (para. 64). Logically, where

there is not an apparent infringement of more than one fundamental right, no reconciliation is necessary at the initial stage.

29 In the case at bar, the Court does not at the outset have to reconcile two constitutional rights, as only freedom of religion is in issue here. Furthermore, since the decision genuinely affects both parties and was made by an administrative body exercising statutory powers, a contextual analysis under s. 1 will enable us to balance the relevant competing values in a more comprehensive manner.

30 This Court has frequently stated, and rightly so, that freedom of religion is not absolute and that it can conflict with other constitutional rights. However, since the test governing limits on rights was developed in *Oakes*, the Court has never called into question the principle that rights are reconciled through the constitutional justification required by s. 1 of the *Canadian Charter*. In this regard, the significance of *Big M Drug Mart*, which predated *Oakes*, was considered in *B. (R.)*, at paras. 110-11; see also *R. v. Keegstra*, [1990] 3 S.C.R. 697, at pp. 733-34. In *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, the Court, in formulating the common law test applicable to publication bans, was concerned with the need to "develop the principles of the common law in a manner consistent with the fundamental values enshrined in the Constitution" (p. 878). For this purpose, since the media's freedom of expression had to be reconciled with the accused's right to a fair trial, the Court held that a common law standard that "clearly reflects the substance of the *Oakes* test" was the most appropriate one (p. 878).

31 Thus, the central issue in the instant case is best suited to a s. 1 analysis. But before proceeding with this analysis, I will explain why the contested decision clearly infringes freedom of religion.

6. Infringement of Freedom of Religion

32 This Court has on numerous occasions stressed the importance of freedom of religion. For the purposes of this case, it is sufficient to reproduce the following statement from *Big M Drug Mart*, at pp. 336-37 and 351:

> The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination. But the concept means more than that.
>
> . . . Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience.
>
> . . .
>
> . . . With the *Charter*, it has become the right of every Canadian to work out for himself or herself what his or her religious obligations, if any, should be and it is not for the state to dictate otherwise.

33 It was explained in *Amselem*, at para. 46, that freedom of religion consists

> of the freedom to undertake practices and harbour beliefs, having a nexus with religion, in which an individual demonstrates he or she sincerely believes or is sincerely undertaking in order to connect with the divine or as a function of his or her spiritual faith, irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials. [Emphasis added.]

34 In *Amselem*, the Court ruled that, in order to establish that his or her freedom of religion has been infringed, the claimant must demonstrate (1) that he or she sincerely believes in a practice or belief that has a nexus with religion, and (2) that the impugned conduct of a third party interferes, in a manner that is non-trivial or not insubstantial, with his or her ability to act in accordance with that practice or belief.

35 The fact that different people practise the same religion in different ways does not affect the validity of the case of a person alleging that his or her freedom of religion has been infringed. What an individual must do is show that he or she sincerely believes that a certain belief or practice is required by his or her religion. The religious belief must be asserted in good faith and must not be fictitious, capricious or an artifice (*Amselem*, at para. 52). In assessing the sincerity of the belief, a court must take into account, *inter alia*, the credibility of the testimony of the person asserting the particular belief and the consistency of the belief with his or her other current religious practices (*Amselem*, at para. 53).

36 In the case at bar, Gurbaj Singh must therefore show that he sincerely believes that his faith requires him at all times to wear a kirpan made of metal. Evidence to this effect was introduced and was not contradicted. No one contests the fact that the orthodox Sikh religion requires its adherents to wear a kirpan at all times. The affidavits of chaplain Manjit Singh and of Gurbaj Singh explain that orthodox Sikhs must comply with a strict dress code requiring them to wear religious symbols commonly known as the Five Ks: (1) the kesh (uncut hair); (2) the kangha (a wooden comb); (3) the kara (a steel bracelet worn on the wrist); (4) the kaccha (a special undergarment); and (5) the kirpan (a metal dagger or sword). Furthermore, Manjit Singh explains in his affidavit that the Sikh religion teaches pacifism and encourages respect for other religions, that

the kirpan must be worn at all times, even in bed, that it must not be used as a weapon to hurt anyone, and that Gurbaj Singh's refusal to wear a symbolic kirpan made of a material other than metal is based on a reasonable religiously motivated interpretation.

37 Much of the CSMB's argument is based on its submission that [TRANSLATION] "the kirpan is essentially a dagger, a weapon designed to kill, intimidate or threaten others". With respect, while the kirpan undeniably has characteristics of a bladed weapon capable of wounding or killing a person, this submission disregards the fact that, for orthodox Sikhs, the kirpan is above all a religious symbol. Chaplain Manjit Singh mentions in his affidavit that the word "kirpan" comes from "kirpa", meaning "mercy" and "kindness", and "aan", meaning "honour". There is no denying that this religious object could be used wrongly to wound or even kill someone, but the question at this stage of the analysis cannot be answered definitively by considering only the physical characteristics of the kirpan. Since the question of the physical makeup of the kirpan and the risks the kirpan could pose to the school board's students involves the reconciliation of conflicting values, I will return to it when I address justification under s. 1 of the *Canadian Charter*. In order to demonstrate an infringement of his freedom of religion, Gurbaj Singh does not have to establish that the kirpan is not a weapon. He need only show that his personal and subjective belief in the religious significance of the kirpan is sincere.

38 Gurbaj Singh says that he sincerely believes he must adhere to this practice in order to comply with the requirements of his religion. Grenier J. of the Superior Court declared (at para. 6) — and the Court of Appeal reached the same conclusion (at para. 70) — that Gurbaj Singh's belief was sincere. Gurbaj Singh's affidavit supports this conclusion, and none of the parties have contested the sincerity of his belief.

39 Furthermore, Gurbaj Singh's refusal to wear a replica made of a material other than metal is not capricious. He genuinely believes that he would not be complying with the requirements of his religion were he to wear a plastic or wooden kirpan. The fact that other Sikhs accept such a compromise is not relevant, since as Lemelin J. mentioned at para. 68 of her decision, [TRANSLATION] "[w]e must recognize that people who profess the same religion may adhere to the dogma and practices of that religion to varying degrees of rigour."

40 Finally, the interference with Gurbaj Singh's freedom of religion is neither trivial nor insignificant. Forced to choose between leaving his kirpan at home and leaving the public school system, Gurbaj Singh decided to follow his religious convictions and is now attending a private school. The prohibition against wearing his kirpan to school has therefore deprived him of his right to attend a public school.

41 Thus, there can be no doubt that the council of commissioners' decision prohibiting Gurbaj Singh from wearing his kirpan to Sainte-Catherine-Labouré school infringes his freedom of religion. This limit must therefore be justified under s. 1 of the *Canadian Charter*.

7. Section 1 of the *Canadian Charter*

42 As I mentioned above, the council of commissioners made its decision pursuant to its discretion under s. 12 of the *Education Act*. The decision prohibiting the wearing of a kirpan at the school thus constitutes a limit prescribed by a rule of law

within the meaning of s. 1 of the *Canadian Charter* and must accordingly be justified in accordance with that section:

> **1.** 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.

43 The onus is on the respondents to prove that, on a balance of probabilities, the infringement is reasonable and can be demonstrably justified in a free and democratic society. To this end, two requirements must be met. First, the legislative objective being pursued must be sufficiently important to warrant limiting a constitutional right. Next, the means chosen by the state authority must be proportional to the objective in question: *Oakes*; *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713.

7.1 *Importance of the Objective*

44 As stated by the Court of Appeal, the council of commissioners' decision [TRANSLATION] "was motivated by [a pressing and substantial] objective, namely, to ensure an environment conducive to the development and learning of the students. This requires [the CSMB] to ensure the safety of the students and the staff. This duty is at the core of the mandate entrusted to educational institutions" (para. 77). The appellant concedes that this objective is laudable and that it passes the first stage of the test. The respondents also submitted fairly detailed evidence consisting of affidavits from various stakeholders in the educational community explaining the importance of safety in schools and the upsurge in problems relating to weapons and violence in schools.

45 Clearly, the objective of ensuring safety in schools is sufficiently important to warrant overriding a constitutionally protected right or freedom. It remains to be

determined what level of safety the governing board was seeking to achieve by prohibiting the carrying of weapons and dangerous objects, and what degree of risk would accordingly be tolerated. As in *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868, at para. 25, the possibilities range from a desire to ensure absolute safety to a total lack of concern for safety. Between these two extremes lies a concern to ensure a reasonable level of safety.

46 Although the parties did not present argument on the level of safety sought by the governing board, the issue was addressed by the intervener Canadian Human Rights Commission, which correctly stated that the standard that seems to be applied in schools is reasonable safety, not absolute safety. The application of a standard of absolute safety could result in the installation of metal detectors in schools, the prohibition of all potentially dangerous objects (such as scissors, compasses, baseball bats and table knives in the cafeteria) and permanent expulsion from the public school system of any student exhibiting violent behaviour. Apart from the fact that such a standard would be impossible to attain, it would compromise the objective of providing universal access to the public school system.

47 On the other hand, when the governing board approved the article in question of the *Code de vie*, it was not seeking to establish a minimum standard of safety. As can be seen from the affidavits of certain stakeholders from the educational community, violence and weapons are not tolerated in schools, and students exhibiting violent or dangerous behaviour are punished. Such measures show that the objective is to attain a certain level of safety beyond a minimum threshold.

48 I therefore conclude that the level of safety chosen by the governing council and confirmed by the council of commissioners was reasonable safety. The objective of ensuring a reasonable level of safety in schools is without question a pressing and substantial one.

7.2 *Proportionality*

7.2.1 Rational Connection

49 The first stage of the proportionality analysis consists in determining whether the council of commissioners' decision was rendered in furtherance of the objective. The decision must have a rational connection with the objective. In the instant case, prohibiting Gurbaj Singh from wearing his kirpan to school was intended to further this objective. Despite the profound religious significance of the kirpan for Gurbaj Singh, it also has the characteristics of a bladed weapon and could therefore cause injury. The council of commissioners' decision therefore has a rational connection with the objective of ensuring a reasonable level of safety in schools. Moreover, it is relevant that the appellant has never contested the rationality of the *Code de vie*'s rule prohibiting weapons in school.

7.2.2 Minimal Impairment

50 The second stage of the proportionality analysis is often central to the debate as to whether the infringement of a right protected by the *Canadian Charter* can be justified. The limit, which must minimally impair the right or freedom that has been infringed, need not necessarily be the least intrusive solution. In *RJR-MacDonald Inc.*

v. Canada (Attorney General), [1995] 3 S.C.R. 199, at para. 160, this Court defined the test as follows:

> The impairment must be "minimal", that is, the law must be carefully tailored so that rights are impaired no more than necessary. The tailoring process seldom admits of perfection and the courts must accord some leeway to the legislator. If the law falls within a range of reasonable alternatives, the courts will not find it overbroad merely because they can conceive of an alternative which might better tailor objective to infringement . . . .

51 The approach to the question must be the same where what is in issue is not legislation, but a decision rendered pursuant to a statutory discretion. Thus, it must be determined whether the decision to establish an absolute prohibition against wearing a kirpan "falls within a range of reasonable alternatives".

52 In considering this aspect of the proportionality analysis, Lemelin J. expressed the view that [TRANSLATION] "[t]he duty to accommodate this student is a corollary of the minimal impairment [test]" (para. 92). In other words, she could not conceive of the possibility of a justification being sufficient for the purposes of s. 1 if reasonable accommodation is possible (para. 75). This correspondence of the concept of reasonable accommodation with the proportionality analysis is not without precedent. In *Eldridge*, at para. 79, this Court stated that, in cases concerning s. 15(1) of the *Canadian Charter*, "reasonable accommodation" was equivalent to the concept of "reasonable limits" provided for in s. 1 of the *Canadian Charter*.

53 In my view, this correspondence between the legal principles is logical. In relation to discrimination, the courts have held that there is a duty to make reasonable accommodation for individuals who are adversely affected by a policy or rule that is neutral on its face, and that this duty extends only to the point at which it causes undue

hardship to the party who must perform it. Although it is not necessary to review all the cases on the subject, the analogy with the duty of reasonable accommodation seems to me to be helpful to explain the burden resulting from the minimal impairment test with respect to a particular individual, as in the case at bar. In my view, Professor José Woehrling correctly explained the relationship between the duty to accommodate or adapt and the *Oakes* analysis in the following passage:

> [TRANSLATION] Anyone seeking to disregard the duty to accommodate must show that it is necessary, in order to achieve a legitimate and important legislative objective, to apply the standard in its entirety, without the exceptions sought by the claimant. More specifically, in the context of s. 1 of the *Canadian Charter*, it is necessary, in applying the test from *R.* v. *Oakes*, to show, in succession, that applying the standard in its entirety constitutes a rational means of achieving the legislative objective, that no other means are available that would be less intrusive in relation to the rights in question (minimal impairment test), and that there is proportionality between the measure's salutary and limiting effects. At a conceptual level, the minimal impairment test, which is central to the section 1 analysis, corresponds in large part with the undue hardship defence against the duty of reasonable accommodation in the context of human rights legislation. This is clear from the Supreme Court's judgment in *Edwards Books*, in which the application of the minimal impairment test led the Court to ask whether the Ontario legislature, in prohibiting stores from opening on Sundays and allowing certain exceptions for stores that were closed on Saturdays, had done enough to accommodate merchants who, for religious reasons, had to observe a day of rest on a day other than Sunday.
>
> (J. Woehrling, "L'obligation d'accommodement raisonnable et l'adaptation de la société à la diversité religieuse" (1998), 43 *McGill L.J.* 325, at p. 360)

54 The council of commissioners' decision establishes an absolute prohibition against Gurbaj Singh wearing his kirpan to school. The respondents contend that this prohibition is necessary, because the presence of the kirpan at the school poses numerous risks for the school's pupils and staff. It is important to note that Gurbaj Singh has never claimed a right to wear his kirpan to school without restrictions. Rather, he says that he is prepared to wear his kirpan under the above-mentioned conditions imposed by

Grenier J. of the Superior Court. Thus, the issue is whether the respondents have succeeded in demonstrating that an absolute prohibition is justified.

55 According to the CSMB, to allow the kirpan to be worn to school entails the risks that it could be used for violent purposes by the person wearing it or by another student who takes it away from him, that it could lead to a proliferation of weapons at the school, and that its presence could have a negative impact on the school environment. In support of this last point, the CSMB submits that the kirpan is a symbol of violence and that it sends the message that the use of force is the way to assert rights and resolve conflicts, in addition to undermining the perception of safety and compromising the spirit of fairness that should prevail in schools, in that its presence suggests the existence of a double standard. Let us look at those arguments.

7.2.2.1 *Safety in Schools*

56 According to the respondents, the presence of kirpans in schools, even under certain conditions, creates a risk that they will be used for violent purposes, either by those who wear them or by other students who might take hold of them by force.

57 The evidence shows that Gurbaj Singh does not have behavioural problems and has never resorted to violence at school. The risk that this particular student would use his kirpan for violent purposes seems highly unlikely to me. In fact, the CSMB has never argued that there was a risk of his doing so.

58 As for the risk of another student taking his kirpan away from him, it also seems to me to be quite low, especially if the kirpan is worn under conditions such as

were imposed by Grenier J. of the Superior Court. In the instant case, if the kirpan were worn in accordance with those conditions, any student wanting to take it away from Gurbaj Singh would first have to physically restrain him, then search through his clothes, remove the sheath from his guthra, and try to unstitch or tear open the cloth enclosing the sheath in order to get to the kirpan. There is no question that a student who wanted to commit an act of violence could find another way to obtain a weapon, such as bringing one in from outside the school. Furthermore, there are many objects in schools that could be used to commit violent acts and that are much more easily obtained by students, such as scissors, pencils and baseball bats.

59 In her brief reasons, Grenier J. explained that her decision was based in part on the fact that [TRANSLATION] "the evidence revealed no instances of violent incidents involving kirpans in schools in Quebec" and on "the state of Canadian and American law on this matter" (para. 6). In fact, the evidence in the record suggests that, over the 100 years since Sikhs have been attending schools in Canada, not a single violent incident related to the presence of kirpans in schools has been reported. In the reasons for his interim order, Tellier J. stated the following:

> [TRANSLATION] [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.
>
> (*Multani (Tuteur de) v. Commission scolaire Marguerite-Bourgeois*, [2002] Q.J. No. 619 (QL) (Sup. Ct.), at para. 28)

60 The lack of evidence of risks related to the wearing of kirpans was also noted in 1990 by a board of inquiry of the Ontario Human Rights Commission, which considered the presence of kirpans in schools in great depth in *Pandori v. Peel Bd. of Education* (1990), 12 C.H.R.R. D/364; its decision was affirmed by the Ontario Divisional Court in *Peel Board of Education v. Ontario Human Rights Commission* (1991), 3 O.R. (3d) 531, and leave to appeal was refused by the Ontario Court of Appeal. The board of inquiry allowed kirpans to be worn in Ontario schools under conditions similar to the ones imposed by Grenier J. of the Quebec Superior Court. The board noted that there had been no incidents involving kirpans in Canadian schools (at para. 176):

> Respondent has underscored that a kirpan could have the function of a weapon, but did not establish that a student had in fact so used it. In fact, there is not a single incident to which the respondent could point when the kirpan was used on school property or its environs — either in Peel or anywhere in Ontario or even all of Canada. Since Sikhs, and Khalsa among others, have been in this country for nearly a hundred years, this is a record worth considering.

The decision was affirmed by the Ontario Divisional Court, which stated the following (at p. 535):

> We can see no error in principle in the way it applied its judgment to the facts of this case, particularly in light of the lack of any incident of kirpan-related violence in any school system.

While noting the lack of kirpan-related incidents in schools, the Divisional Court summarized the evidence submitted to it regarding the violent use of kirpans in locations other than schools as follows (at pp. 532-33):

> There have been, in the Metropolitan Toronto area, three reported incidents of violent kirpan use. One involved a plea of guilty to attempted murder after a stabbing with a kirpan. In one street fight, a man was stabbed in the back with a kirpan. In one case, a kirpan was drawn for defensive purposes.
>
> None of these incidents was associated with any school. The only incident associated with a school was when a 10-year-old Sikh boy, walking home from school, was assaulted by two older boys. He put his hand on the handle of his kirpan before stepping back and running away, without drawing the kirpan from its sheath.
>
> There is no evidence that a kirpan has ever been drawn or used as a weapon in any school under the board's jurisdiction.
>
> . . .
>
> Sikhs may wear kirpans in schools in Surrey, British Columbia. Although no other Ontario school board has expressly addressed the issue with the same depth as the Peel board, students may wear kirpans in the North York Board of Education and the Etobicoke Board of Education (which has a limit of six inches in size). No school boards in the Metropolitan Toronto area have a policy prohibiting or restricting kirpans. There is no evidence that kirpans have sparked a violent incident in any school, no evidence that any other school board in Canada bans kirpans, and no evidence of a student anywhere in Canada using a kirpan as a weapon.

61 The parties introduced into evidence several newspaper articles confirming the lack of incidents involving kirpans. An article published in the March 23, 2002 edition of *The Globe and Mail* refers to the 1990 Ontario decision and mentions that there is no evidence of a growing danger since that time. In an article appearing in *The Gazette* on May 16, 2002, Surrey School District spokeswoman Muriel Wilson is quoted as saying, "We have a strict zero-tolerance policy on weapons or something that could be used as a weapon or taken to be a weapon, like a fake gun." But according to her, the kirpan is considered to be a religious symbol, not a weapon: "The key is how things are used. A pen could be used as a weapon, but we're not saying, 'No pens in schools'." The same article mentions that the Peel District School Board now says that the wearing of kirpans "[is] truly not an issue" and that there "has never been an issue or incident, never a complaint or problem" related to wearing kirpans in school since the ban was

lifted: "It can work and work really well." An article published in the May 13, 2002 edition of *La Presse* notes that there have been no problems related to the wearing of kirpans in the schools of the Vancouver and Surrey school boards, which have large numbers of Sikh students. Finally, according to an article published in *The Gazette* on February 21, 2002, "Whether a Sikh pupil should be allowed to wear a kirpan to school might be a new issue in Quebec, but it is not in the rest of the country."

62 The respondents maintain that freedom of religion can be limited even in the absence of evidence of a real risk of significant harm, since it is not necessary to wait for the harm to occur before correcting the situation. They submit that the same line of reasoning that was followed in *Hothi v. R.*, [1985] 3 W.W.R. 256 (Man. Q.B.) (aff'd [1986] 3 W.W.R. 671 (Man. C.A.)), and *Nijjar v. Canada 3000 Airlines Ltd.* (1999), 36 C.H.R.R. D/76 (Can. Trib.), in which the wearing of kirpans was prohibited in courts and on airplanes, should apply in this case. As was mentioned above, Lemelin J. of the Court of Appeal pointed out that safety concerns are no less serious in schools.

63 There can be no doubt that safety is just as important in schools as it is on airplanes and in courts. However, it is important to remember that the specific context must always be borne in mind in resolving the issue. In *Nijjar*, Mr. Nijjar's complaint that he had been denied the right to wear his kirpan aboard a Canada 3000 Airlines aircraft was dismissed because, *inter alia*, he had failed to demonstrate that wearing a kirpan in a manner consistent with Canada 3000's policies would be contrary to his religious beliefs. It was apparent from Mr. Nijjar's testimony that wearing one particular type of kirpan rather than another was a matter of personal preference, not of religious belief. While it concluded that Mr. Nijjar had not been discriminated against on the basis of his religion, the Canadian Human Rights Tribunal did nevertheless consider the

issue of reasonable accommodation. It made the following comment at para. 123 of its decision:

> 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.

Then, at para. 125, the Tribunal distinguished the case before it from *Pandori*:

> 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. It will be recalled that Mr. Kinnear testified that Canada 3000 check-in personnel have between forty-five and ninety seconds of contact with each passenger.

64 *Hothi* also involved special circumstances. The judge who prohibited the wearing of a kirpan in the courtroom was hearing the case of an accused charged with assault under s. 245 of the *Criminal Code*, R.S.C. 1970, c. C-34. Dewar C.J. of the Manitoba Court of Queen's Bench considered (at p. 259) the special nature of courts and stated the following about the prohibition against wearing kirpans in courtrooms:

> [It] 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 courtroom of weapons, or articles capable of use as such, by parties or others is one such influence.

65 The facts in the case at bar are more similar to the facts in *Pandori* than to those in *Nijjar* and *Hothi*. The school environment is a unique one that permits

relationships to develop among students and staff. These relationships make it possible to better control the different types of situations that arise in schools. The Ontario board of inquiry commented on the special nature of the school environment in *Pandori*, at para. 197:

> 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 Khalsa Sikh could conceivably deal with the prohibition of the kirpan as he/she would on an airplane ride) and is therefore not comparable to the years a student spends in the school system.

66 Although there is no need in the instant case for this Court to compare the desirable level of safety in a given environment with the desirable level in a school environment, these decisions show that each environment is a special case with its own unique characteristics that justify a different level of safety, depending on the circumstances.

67 Returning to the respondents' argument, I agree that it is not necessary to wait for harm to be done before acting, but the existence of concerns relating to safety must be unequivocally established for the infringement of a constitutional right to be justified. Given the evidence in the record, it is my opinion that the respondents' argument in support of an absolute prohibition — namely that kirpans are inherently dangerous — must fail.

7.2.2.2 *Proliferation of Weapons in Schools*

68 The respondents also contend that allowing Gurbaj Singh to wear his kirpan to school could have a ripple effect. They submit that other students who learn that orthodox Sikhs may wear their kirpans will feel the need to arm themselves so that they can defend themselves if attacked by a student wearing a kirpan.

69 This argument is essentially based on the one discussed above, namely that kirpans in school pose a safety risk to other students, forcing them to arm themselves in turn in order to defend themselves. For the reasons given above, I am of the view that the evidence does not support this argument. It is purely speculative and cannot be accepted in the instant case: see *Eldridge*, at para. 89. Moreover, this argument merges with the next one, which relates more specifically to the risk of poisoning the school environment. I will therefore continue with the analysis.

7.2.2.3 *Negative Impact on the School Environment*

70 The respondents submit that the presence of kirpans in schools will contribute to a poisoning of the school environment. They maintain that the kirpan is a symbol of violence and that it sends the message that using force is the way to assert rights and resolve conflict, compromises the perception of safety in schools and establishes a double standard.

71 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.

72 As for the submissions based on the other students' perception regarding safety and on feelings of unfairness that they might experience, these appear to stem from the affidavit of psychoeducator Denis Leclerc, who gave his opinion concerning a study in which he took part that involved, *inter alia*, questioning students and staff from 14 high schools belonging to the CSMB about the socio-educational environment in schools. The results of the study seem to show that there is a mixed or negative perception regarding safety in schools. It should be noted that this study did not directly address kirpans, but was instead a general examination of the situation in schools in terms of safety. Mr. Leclerc is of the opinion that the presence of kirpans in schools would heighten this impression that the schools are unsafe. He also believes that allowing Gurbaj Singh to wear a kirpan would engender a feeling of unfairness among the students, who would perceive this permission as special treatment. He mentions, for example, that some students still consider the right of Muslim women to wear the chador to be unfair, because they themselves are not allowed to wear caps or scarves.

73 It should be noted that, in a letter submitted to counsel for the appellants, psychologist Mathieu Gattuso indicated that, in light of the generally accepted principles concerning expert evidence, Denis Leclerc's affidavit does not constitute an expert opinion. It is clear from the examination of Mr. Leclerc that he did not study the

situation in schools that authorize the wearing of kirpans and that, in his affidavit, he was merely giving a personal opinion.

74 With respect for the view of the Court of Appeal, I cannot accept Denis Leclerc's position. Among other concerns, the example he presents concerning the chador is particularly revealing. To equate a religious obligation such as wearing the chador with the desire of certain students to wear caps is indicative of a simplistic view of freedom of religion that is incompatible with the *Canadian Charter*. Moreover, his opinion seems to be based on the firm belief that the kirpan is, by its true nature, a weapon. The CSMB itself vigorously defends this same position. For example, it states the following in its factum (at paras. 37-38):

> [TRANSLATION] Although kirpans were presented to the trial judge at the hearing, she failed to rule on the true nature of the kirpan. On the contrary, she seemed, in light of her comments, to accept the appellants' argument that in today's world, the kirpan has only symbolic value for Sikhs.
>
> Yet whatever it may symbolize, the kirpan is still essentially a dagger, a weapon designed to kill, intimidate or threaten others. [Emphasis added.]

These assertions strip the kirpan of any religious significance and leave no room for accommodation. The CSMB also makes the following statement (at para. 51):

> [TRANSLATION] It is thus a paralogism . . . to liken a weapon to all objects whose purpose is not to kill or wound but that could potentially be used as weapons, such as compasses, paper cutters, baseball bats, sporting equipment, or cars. Does this mean that we should stop studying geometry or playing baseball?

75 The appellants are perhaps right to state that the only possible explanation for the acceptance of these other potentially dangerous objects in schools is that the respondents consider the activities in which those objects are used to be important, while accommodating the religious beliefs of the appellant's son is not.

76 Religious tolerance is a very important value of Canadian society. If some students consider it unfair that Gurbaj Singh may wear his kirpan to school while they are not allowed to have knives in their possession, it is incumbent on the schools to discharge their obligation to instil in their students this value that is, as I will explain in the next section, at the very foundation of our democracy.

77 In my opinion, the respondents have failed to demonstrate that it would be reasonable to conclude that an absolute prohibition against wearing a kirpan minimally impairs Gurbaj Singh's rights.

7.2.3 Effects of the Measure

78 Since we have found that the council of commissioners' decision is not a reasonable limit on religious freedom, it is not strictly necessary to weigh the deleterious effects of this measure against its salutary effects. I do believe, however, like the intervener Canadian Civil Liberties Association, that it is important to consider some effects that could result from an absolute prohibition. An absolute prohibition would stifle the promotion of values such as multiculturalism, diversity, and the development of an educational culture respectful of the rights of others. This Court has on numerous

occasions reiterated the importance of these values. For example, in *Ross*, the Court stated the following, at para. 42:

> 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.

In *R. v. M. (M.R.)*, [1998] 3 S.C.R. 393, at para. 3, the Court made the following observation:

> [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.

Then, in *Trinity Western University*, the Court stated the following, at para. 13:

> 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.

79 A total prohibition against wearing a kirpan to school undermines the value of this religious symbol and sends students the message that some religious practices do not merit the same protection as others. On the other hand, accommodating Gurbaj Singh and allowing him to wear his kirpan under certain conditions demonstrates

the importance that our society attaches to protecting freedom of religion and to showing respect for its minorities. The deleterious effects of a total prohibition thus outweigh its salutary effects.

8. Section 15(1) of the *Canadian Charter* and the *Quebec Charter*

80 Having found that the commissioners' decision infringes Gurbaj Singh's freedom of religion and that this infringement cannot be justified in a free and democratic society, I believe it is unnecessary to consider the alleged violation of s. 15 of the *Canadian Charter*. I am also of the view that a separate analysis with respect to the *Quebec Charter* is not necessary in the circumstances of the case.

9. Remedy

81 Section 24(1) of the *Canadian Charter* reads as follows:

> Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

82 Given that Gurbaj Singh no longer attends Sainte-Catherine-Labouré school, it would not be appropriate to restore the judgment of the Superior Court, as requested by the appellants. The Court accordingly considers that the appropriate and just remedy is to declare the decision prohibiting Gurbaj Singh from wearing his kirpan to be null.

10. Disposition

83 I would allow the appeal, set aside the decision of the Court of Appeal, and declare the decision of the council of commissioners to be null, with costs throughout.

English version of the reasons delivered by

84 DESCHAMPS AND ABELLA JJ. — This case raises two issues. The first relates to the right of a Sikh student to wear his kirpan to school; the second concerns the relationship between administrative law and constitutional law in the context of human rights litigation.

85 We have come to the same conclusion as Charron J. but do not agree with her approach. In our view, the case is more appropriately decided by recourse to an administrative law review than to a constitutional law justification. Two main reasons dictate that an administrative law review be conducted. First, the purpose of constitutional justification is to assess a norm of general application, such as a statute or regulation. The analytical approach developed uniquely for that purpose is not easily transportable where what must be assessed is the validity of an administrative body's decision, even on a human rights question. In such a case, an administrative law analysis is called for. Second, basing the analysis on the principles of administrative law averts the problems that result from blurring the distinction between the principles of constitutional justification and the principles of administrative law, and prevents the impairment of the analytical tools developed specifically for each of these fields.

86 In *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 56, the Court recognized that an administrative law analysis does not exclude, but incorporates, arguments relating to the *Canadian Charter of Rights and Freedoms* ("*Canadian Charter*"):

> The pragmatic and functional approach can take into account the fact that the more discretion that is left to a decision-maker, the more reluctant courts should be to interfere with the manner in which decision-makers have made choices among various options. However, though discretionary decisions will generally be given considerable respect, that discretion must be exercised in accordance with the boundaries imposed in the statute, the principles of the rule of law, the principles of administrative law, the fundamental values of Canadian society, and the principles of the *Charter*.

Simply put, it is difficult to conceive of an administrative decision being permitted to stand if it violates the *Canadian Charter*. The administrative body's decisions can, indeed must, be judicially reviewed in accordance with the principles of administrative law where they do not have the normative import usually associated with a law. For the reasons that follow, we accordingly believe that it is preferable to adhere to an administrative law analysis where resorting to constitutional justification is neither necessary nor appropriate.

1. Administrative Law Analysis

1.1 *Facts and Judgments Below*

87 A brief review of the facts provides the necessary background. The *Code de vie* (code of conduct) of the school attended by the appellant's son prohibits the carrying of weapons and dangerous objects. The validity of this code is not in issue. Relying on it, the school board — the Commission scolaire Marguerite-Bourgeoys — prohibited the appellant's son, a Sikh student, from wearing his kirpan — a 20-cm knife with a metal blade — to school. At the time the school board first became involved in this matter, the student claimed the right to wear his kirpan under his clothes. The father and the student offered to wrap the kirpan in cloth. The school board accepted this as a reasonable accommodation. When the father and the student met with school officials, these officials expressed concerns about safety at the school. The governing board of the school refused to ratify the proposed accommodation measure and instead proposed that the student wear a harmless symbolic kirpan. On review, the council of commissioners of the school board endorsed the governing board's position.

88 The father contested the decision on behalf of himself and his son, filing a motion for a declaratory judgment. He initially asked the Superior Court to declare, based on ss. 3 and 10 of the *Charter of human rights and freedoms*, R.S.Q., c. C-12 ("*Quebec Charter*"), and ss. 2 and 15 of the *Canadian Charter*, that his son had the right to wear his kirpan. He also asked the court — in what was in fact an offer of accommodation — to declare that the kirpan had to be worn under the student's clothes. Finally, he asked for a declaration that the school board was not entitled to prohibit the

kirpan and that its decision was of no force or effect. In the Superior Court, the debate involved further conditions that would permit the concerns about safety at the school to be more effectively taken into account, while preserving the right to freedom of religion. The Superior Court judge stated that, in her view, wearing a symbolic kirpan was not acceptable, and the father and the student agreed to secure the kirpan in a wooden sheath and wrap it in cloth sewn to a shoulder strap ([2002] Q.J. No. 1131 (QL)). The Superior Court included in an order the following accommodation measures:

- the kirpan was to be worn under the student's clothes;

- the kirpan was to be placed in a wooden sheath and wrapped and sewn securely in a sturdy cloth envelope, which was to be sewn to a shoulder strap (guthra);

- the student was required to keep the kirpan in his possession at all times, and its disappearance was to be reported to school authorities immediately;

- school personnel were authorized to verify, in a reasonable fashion, that the conditions for wearing the kirpan were being complied with; and

- if these conditions were not complied with, the student would definitively lose the right to wear a kirpan.

The Superior Court declared the school board's decision prohibiting the wearing of a kirpan to be null.

89 The school board and the Attorney General of Quebec appealed to the Court of Appeal. While the father and the student were still willing to accept the conditions set by the Superior Court, the Attorney General of Quebec and the school board again submitted that the kirpan was a weapon that could legitimately be prohibited in a school setting, that the decision did not infringe freedom of religion, and that the offer to allow the student to wear a symbolic kirpan represented a reasonable accommodation. They added that if the decision did infringe freedom of religion, it was nonetheless justified under s. 9.1 of the *Quebec Charter* and s. 1 of the *Canadian Charter*.

90 The Court of Appeal first addressed the issue of the applicable standard of review ([2004] Q.J. No. 1904 (QL)). Taking into consideration the four factors of the pragmatic and functional approach, it concluded that the standard of reasonableness should apply. The court then turned to the substantive issue, concluding that the kirpan is a weapon and that although the decision to prohibit a weapon did impair the full exercise of freedom of religion, it was not unreasonable given the school board's obligation to preserve the physical safety of the school community.

91 In this Court, the parties are relying on the same arguments as in the Court of Appeal.

1.2 *Analysis*

1.2.1 Standard of Review

92 In his motion for a declaratory judgment, the student's father contested the validity of the school board's decision. In this Court, the father and the student say that they are still prepared to accept the conditions imposed by the Superior Court. What must be examined in this case, therefore, is the validity of the school board's decision in light of the offer of accommodation made by the father and the student, not the validity of the school's *Code de vie*.

93 Our colleague Charron J. (at para. 20), relying on *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504, 2003 SCC 54, at para. 31, finds that since the dispute concerns the compliance of the school board's decision with the requirements of the *Canadian Charter*, an analysis of the standard of review is unnecessary and that this analysis led the Court of Appeal to an erroneous decision. With respect, we do not believe that *Martin* established a rule that simply raising an argument based on human rights makes administrative law inapplicable, or that all decisions contested under the *Canadian Charter* or provincial human rights legislation are subject to the correctness standard. In *Martin*, the correctness standard applied because the decision concerned the Workers' Compensation Board's authority to determine the validity of a provision of its enabling statute under the *Canadian Charter*.

94 Moreover, it should be noted that an administrative law approach was adopted in reviewing decisions made by, respectively, university and school authorities

in *Trinity Western University v. British Columbia College of Teachers*, [2001] 1 S.C.R. 772, 2001 SCC 31 ("*T.W.U.*"), and *Chamberlain v. Surrey School District No. 36*, [2002] 4 S.C.R. 710, 2002 SCC 86. In those cases, the Court had to determine what standard applied to decisions on issues that unquestionably concerned values protected by the *Canadian Charter*.

95 In the case at bar, the Court must determine the standard of deference to be applied to the school board's decision, which had an impact on freedom of religion, the right to equality and the right to physical inviolability. We see no reason to depart from the approach taken in *T.W.U.* and *Chamberlain*.

96 The *Education Act*, R.S.Q., c. I-13.3, contains no privative clause limiting intervention by the courts. However, the authority to establish rules of conduct in educational institutions is clearly conferred on the governing board by s. 76, while s. 12 authorizes the council of commissioners to reconsider a decision of the governing board. The establishment of an internal appeal mechanism suggests that the legislature intended to leave the power to make decisions to local stakeholders. Furthermore, the issue in the case at bar is not limited to interpreting the scope of the protection of the student's right to freedom of religion under ss. 2(*a*) and 15 of the *Canadian Charter* and ss. 3 and 10 of the *Quebec Charter*. The school board also had to consider the right of all students to physical inviolability, and the specific circumstances of its schools. The situation in one school board's schools can be very different from that in another board's schools. The assessment of the facts is therefore of considerable importance. Where safety in the schools under its responsibility is concerned, the respondent school board unquestionably has greater expertise than does a court of law reviewing its decision. If

the reasonableness standard applied in *Chamberlain*, there is even more reason to conclude that it applies in the instant case because of the factual element associated with determinations of safety requirements.

1.2.2 Reasonableness of the Decision

97 The Court of Appeal focused on the kirpan's inherent dangerousness. This approach fails to take account of the other facts that were presented. It is true that the kirpan, considered objectively and without the protective measures imposed by the Superior Court, is an object that fits the definition of a weapon. According to the evidence of psychoeducator Denis Leclerc, the kirpan would contribute to a perception that schools are unsafe because a student might [TRANSLATION] "think it necessary to have a knife at school . . . [in case of] an altercation with another student, since he or she knows that certain students have the right to carry knives and that other students have as a result also assumed the right to carry one without telling anyone about it". Such a categorical approach to the kirpan and to safety in the schools disregards the risks inherent in the use of other objects that are part of the everyday school environment, such as compasses. Risks can — and should — be limited in the school environment, but they cannot realistically ever be completely eliminated.

98 The Court of Appeal's approach also disregards the strict conditions imposed by the Superior Court. No student is allowed to carry a "knife". The young Sikh is authorized to wear his kirpan, which, while a kind of "knife", is above all a religious object whose dangerous nature is neutralized by the many coverings required by the Superior Court. The kirpan must be enclosed in a wooden sheath and the sheath must

be sewn inside a cloth envelope, which must itself be attached to a shoulder strap worn under the student's clothing. Secured in this way, the kirpan is almost totally stripped of its objectively dangerous characteristics. Access to the kirpan is not merely delayed, as was the case with the first offer made by the father and the student, it is now fully impeded by the cloth envelope sewn around the wooden sheath. In these circumstances, the argument relating to safety can no longer reasonably succeed.

99 In making its determinations, the school board must take all fundamental values into consideration, including not only security, but also freedom of religion and the right to equality. The prohibition on the wearing of a kirpan cannot be imposed without considering conditions that would interfere less with freedom of religion. In the case at bar, the school board did not sufficiently consider either the right to freedom of religion or the accommodation measure proposed by the father and the student. It merely applied the *Code de vie* literally. By disregarding the right to freedom of religion, and by invoking the safety of the school community without considering the possibility of a solution that posed little or no risk, the school board made an unreasonable decision.

2. Inappropriateness of Constitutional Law Justification

2.1 *The Court's Prior Decisions*

100 The courts, and particularly this Court, have devoted a great deal of energy to determining the jurisdiction conferred on administrative bodies and developing the standard of review.

101 From *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570, through to *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, [2003] 2 S.C.R. 157, 2003 SCC 42, the Court has made it clear that administrative tribunals and arbitrators can decide claims or grievances based on provisions that are implicitly or explicitly incorporated into their mandates. The jurisdiction of decision makers expanded at the same time as the scrutiny of their decisions, through the standards of review, was evolving. These changes in the standards of review were meant to acknowledge the expertise and the specific nature of the work of administrative boards and should not be disregarded simply because a party argues that a constitutional justification analysis is instead appropriate. The fact that a party chooses to characterize an issue as one requiring a s. 1 analysis does not make it so. The changes in the standard of review cannot be disregarded just because the decision maker also has to deal with an argument based on human rights.

102 Decisions by administrative bodies were originally reviewed using two standards, jurisdictional error and patent unreasonableness (*Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227; *Syndicat des employés de production du Québec et de l'Acadie v. Canada Labour Relations Board*, [1984] 2 S.C.R. 412; and G. Perrault, *Le contrôle judiciaire des décisions de l'administration: De l'erreur juridictionnelle à la norme de contrôle* (2002), at p. 51). The Court was still confined in that straitjacket when it decided *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038. The emphasis is now on the deference owed to administrative bodies. Over the past few years, the Court has even insisted that a single analytical approach be used for all administrative decision makers: *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, 2003 SCC 19. Once

again, this change would have little impact if administrative decisions had in addition to be assessed under s. 1 of the *Canadian Charter*. We doubt that this is what the Court had in mind in *Slaight*, *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825, and, later, *Dr. Q.*

103 Charron J. considers that the analysis must be based on the rules of constitutional justification because of comments made by Lamer J. in *Slaight* and by La Forest J. in *Ross*, at para. 32. In *Slaight*, Lamer J. expressed the view that an order can be analysed using the same rules as are used to analyse a law in the context of a constitutional challenge, and can thus be justified under s. 1 of the *Canadian Charter*. We do not think that the analytical approach proposed by Lamer J. is the most appropriate one, nor do we believe that this question has been settled. In our opinion, the administrative law approach must be retained for reviewing *decisions* and *orders* made by administrative bodies. A constitutional justification analysis must, on the other hand, be carried out when reviewing the validity or enforceability of a *norm* such as a law, regulation, or other similar rule of general application. We also note the words of Dickson C.J. who, writing for the majority in *Slaight*, refused to accept the approach proposed by Lamer J. as the definitive one, stating (at p. 1049):

> The precise relationship between the traditional standard of administrative law review of patent unreasonableness and the new constitutional standard of review will be worked out in future cases.

104 We take this comment to mean that Dickson C.J. did not consider that case to be an appropriate occasion to distinguish cases in which a constitutional analysis is necessary from those in which an analysis based on the principles of administrative law

should be preferred. However, in anticipation of the confusion we are now facing, he stressed that the chosen approach should not impose a more onerous burden on the government (at p. 1049):

> A few comments nonetheless may be in order. A minimal proposition would seem to be that administrative law unreasonableness, as a preliminary standard of review, should not impose a more onerous standard upon government than would *Charter* review.

105 In *Ross*, La Forest J. briefly addressed the question, and in his view this comment meant that Dickson C.J. favoured a constitutional analysis whenever constitutional values are in issue, even where a decision of an administrative body is being reviewed. However, such an approach is not imperative, as is clearly illustrated by *T.W.U.* and *Chamberlain*, both of which were decided after *Ross*.

106 Moreover, in *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, at para. 84, La Forest J. expressly declined to decide whether the Medical Services Commission's decision not to fund medical interpreter services was a law within the meaning of s. 1: he assumed this to be the case but did not rule on the issue. Such reserve would have been unnecessary had the required approach been clear.

107 While administrative bodies do have the power and the duty to take the values protected by the *Canadian Charter* into account, it does not follow that their decisions must be subjected to the justification process under s. 1 of the *Canadian Charter*.

108 More than 15 years have passed since Dickson C.J. stated that the relationship between the administrative law standard of review and the constitutional law standard would be worked out in future cases. The contrast between the approach taken by the Court in *T.W.U.* and *Chamberlain* and the one adopted by the majority in the instant case, as well as the ambiguity of the parties' arguments in the case at bar, are clear signs of the uncertainty resulting from the unified analytical approach proposed by Lamer J. We therefore consider it necessary to review Lamer J.'s approach to determine whether it is useful and appropriate.

109 The idea that norms of general application should be dealt with in the same way as decisions or orders of administrative bodies, as suggested by Lamer J. in *Slaight*, may be attractive from a theoretical standpoint. However, apart from the aesthetic appeal of this unified approach, we are not convinced that there is any advantage to adopting it. The question is not whether an administrative body can disregard constitutional values. The answer to that question is clear: it cannot do so absent an express indication that the legislature intended to allow it to do so. The question is rather how to assess an administrative body's alleged breach — in a decision — of its constitutional obligations: by means of the analytical approach under s. 1 of the *Canadian Charter* or under an administrative law standard of review? As the instant case shows, and as we stated previously, it is difficult to imagine a decision that would be considered reasonable or correct even though it conflicted with constitutional values. Given the demanding nature of the standard of judicial review to be met where an administrative body fails to consider constitutional values, the result can be no different, as Dickson C.J. noted in *Slaight*, at p. 1049; see also *Ross*, at para. 32.

110 In short, not only do we think that this Court's past decisions do not rule out the applicability of an administrative law approach where an infringement of the *Canadian Charter* is argued, we also disagree with an approach that involves *starting* with a constitutional review in such a case.

111 In addition to the fact that we believe the question was not settled definitively by *Slaight* and *Ross*, there are several incongruities that prompt us to reflect upon the approach proposed in those cases. First, there is the bifurcated obligation imposed on an administrative body to justify certain aspects of its decision pursuant to an administrative law analysis while other aspects are subject to s. 1 of the *Canadian Charter*. There are also problems related to the attribution of the burden of proof and to the nature of the evidence that an administrative body with quasi-judicial functions would have to adduce to justify its decision under s. 1 in light of the fact that it is supposed to be independent of the government. However, these practical problems obscure more important legal problems, which we will now discuss. The first is the equating of a decision with a law within the meaning of s. 1 of the *Canadian Charter*, and the second is the undermining of the integrity of the tools of administrative law and the resulting further confusion in the principles of judicial review.

2.2 *Meaning of the Expression "Law" in Section 1 of the Canadian Charter*

112 An administrative body determines an individual's rights in relation to a particular issue. A decision or order made by such a body is not a law or regulation, but is instead the result of a process provided for by statute and by the principles of administrative law in a given case. A law or regulation, on the other hand, is enacted or

made by the legislature or by a body to which powers are delegated. The norm so established is not limited to a specific case. It is general in scope. Establishing a norm and resolving a dispute are not usually considered equivalent processes. At first glance, therefore, equating a decision or order with a law, as Lamer J. does in *Slaight*, seems anomalous.

113 A law (*loi*), in the broad sense, is [TRANSLATION] "any legal or moral norm or set of norms" (H. Reid, *Dictionnaire de droit québécois et canadien* (2nd ed. 2001), at p. 344). A rule (*règle*) is a [TRANSLATION] "[p]rinciple of a general and impersonal nature that determines a line of conduct" (Reid, at p. 475). Thus, the expression "law" (*règle de droit*) used in s. 1 of the *Canadian Charter* naturally refers to a norm or rule of general application:

> **1.** The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits <u>prescribed by law</u> as can be demonstrably justified in a free and democratic society.

114 The general nature of the expression "law" seems to emerge from the earliest judicial definitions of the expression. In *R. v. Therens*, [1985] 1 S.C.R. 613, at p. 645, Le Dain J. wrote the following:

> The limit will be prescribed by law within the meaning of s. 1 if it is expressly provided for by <u>statute</u> or <u>regulation</u>, or results by necessary implication from the terms of a statute or regulation or from its <u>operating requirements</u>. [Emphasis added.]

115 This definition is also consistent with the meaning conveyed by the equivalent expression (*règle de droit*) used in the French version of s. 1 of the *Canadian Charter*, and by the same expression as used in both versions of s. 52(1) of the *Constitution Act, 1982*:

> **52.** (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.
>
> **52.** (1) La Constitution du Canada est la loi suprême du Canada; elle rend inopérantes les dispositions incompatibles de toute autre règle de droit.

Professors Brun and Tremblay define "law" as follows (H. Brun and G. Tremblay, *Droit constitutionnel* (4th ed. 2002), at p. 944):

> [TRANSLATION] A law, within the meaning of s. 1, is an "intelligible legal standard". The notion of a legal standard relates to the unilaterally coercive and legally enforceable character of the act in question.

These authors express surprise at the unified approach suggested in *Slaight* (at p. 945):

> [TRANSLATION] It would appear that an order of a court or tribunal is also a law within the meaning of s. 1. The Supreme Court has applied the reasonableness test under s. 1 to such orders on several occasions. This means that limits on rights can arise out of individualized legal standards, which is surprising. Such orders are of course law, but to have s. 1 apply to them without reservation means that litigants may often be unable to determine the status of their fundamental rights in advance, as in the case of limits resulting from general norms, such as statutes and regulations. We would have thought that limits on rights could not result from individualized orders unless the legislation conferring authority for those orders envisaged such a possibility. [Citations omitted.]

116 Professor D. Pinard also criticizes the inconsistency of the approach proposed in *Slaight*, noting that equating a decision with a law does violence to the traditional and usual meaning of this concept: D. Pinard, "Les seules règles de droit qui peuvent poser des limites aux droits et libertés constitutionnellement protégés et l'arrêt *Slaight Communications*" (1992), 1 *N.J.C.L.* 79, at p. 119 (see also P. Garant, *Droit administratif* (3rd ed. 1992), vol. 3, *Les chartes*, at p. XXXV).

117 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. 2005), 165, attempts to reconcile the various approaches the Court has taken in dealing with the expression "law" (at pp. 172-73):

> An analysis that could reconcile the various cases in this area is one which argues that the courts have distinguished between arbitrary action that is exercised without legal authority and discretion that is constrained by intelligible legal standards and they have held that the latter will meet the "prescribed by law" requirement. However, in *Irwin Toy*, the Supreme Court held that it would not find that a law provided an intelligible standard if it was vague. The "void for vagueness" doctrine comes from the rule of law principle that a law must provide sufficient guidance for others to determine its meaning. . . .
>
> Put another way, the phrase "prescribed by law" requires that "the legislature [provide] an intelligible standard according to which the judiciary must do its work."

118 To include administrative decisions in the concept of "law" therefore implies that it is necessary in every case to begin by assessing the validity of the statutory or regulatory provision on which the decision is based. This indicates that the expression "law" is used first and foremost in its normative sense. Professor Mendes does not seem

totally convinced that it is helpful to apply s. 1 of the *Canadian Charter* to assess a decision (at p. 173):

> One could argue that this is a form of double deference: first, to the legislature to allow them to enact provisions which, although vague, are not beyond the ability of the judiciary to interpret. Second, there is a form of self-deference that the judiciary can turn such legislated vagueness into sufficient precision and certainty to satisfy the requirements of section 1. Depending how consistent the courts are in interpreting the vastly open-textured terms of section 1, this form of self-deference may or may not be justified.

119 The fact that justification is based on the collective interest also suggests that the expression "law" should be limited to rules of general application. In *R. v. Oakes*, [1986] 1 S.C.R. 103, Dickson C.J. wrote the following (at p. 136):

> The rights and freedoms guaranteed by the *Charter* are not, however, absolute. It may become necessary to limit rights and freedoms in circumstances where their exercise would be inimical to the realization of collective goals of fundamental importance. [Emphasis added.]

120 To suggest that the decisions of administrative bodies must be justifiable under the *Oakes* test implies that the decision makers in question must incorporate this analysis into their decision-making process. This 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 (*T.W.U.*) or reasonable (*Chamberlain*).

121 An administrative decision maker should not have to justify its decision under the *Oakes* test, which is based on an analysis of societal interests and is better suited, conceptually and literally, to the concept of "prescribed by law". That test is based on the duty of the executive and legislative branches of government to account to the courts for any rules they establish that infringe protected rights. The *Oakes* test was developed to assess legislative policies. The duty to account imposed — conceptually and in practice — on the legislative and executive branches is not easily applied to administrative tribunals.

122 In commenting on the application of the *Canadian Charter* to the common law, McIntyre J., writing for the majority in *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, at p. 600, wrote the following:

> The courts are, of course, bound by the *Charter* as they are bound by all law. It is their duty to apply the law, but in doing so they act as neutral arbiters, not as contending parties involved in a dispute.

123 The same reasoning applies in the context of administrative law. Like the courts, administrative tribunals are bound by the *Canadian Charter*, their enabling legislation and the statutes they are specifically responsible for applying. Like the courts, they cannot be treated as parties with an interest in a dispute. A tribunal's decision should not be subject to a justification process as if it were a party to a dispute.

124 Although our colleague LeBel J. does not agree with the norm-decision dichotomy (at para. 151), his reformulation of the s. 1 test as stated in *Oakes* reveals the

inherent shortcomings of that test when it is applied to administrative decisions (para. 155).

125 We accordingly believe that the expression "law" should not include the decisions of administrative bodies. Such decisions should be reviewed in accordance with the principles of administrative law, which will both allow claimants and administrative bodies to know in advance which rules govern disputes and help prevent any blurring of roles.

2.3 *Analytical Consistency*

126 The mechanisms of administrative law are flexible enough to make it unnecessary to resort to the justification process under s. 1 of the *Canadian Charter* when a complainant is not attempting to strike down a rule or law of general application. The use of two different processes can even be a source of confusion for the parties.

127 To illustrate this risk of confusion, it is enough to mention that the parties in the case at bar have raised all possible arguments, that is, both those relating to constitutional justification and those based on administrative law. Given the state of the case law, no one can blame them for doing so. In Quebec, an application for judicial review of an administrative body's decision must be made to the Superior Court, as can an application based on the *Canadian Charter* or the *Quebec Charter*. However, this is not the case in all provinces. If, as in *Ross*, the decision were bifurcated with the administrative law review on the discrimination issue being conducted separately from the analysis of the validity of the order, litigants — and reviewing courts — would very

likely lose their way. It is therefore in this Court's interest to suggest consistent approaches.

128 Our comments do not mean that we believe the Court must always exclude the s. 1 approach. That approach remains the only one available to demonstrate that an infringement of a right resulting from a law, in the normative sense of that expression, is consistent with the values of a free and democratic society. However, where the issue concerns the validity or merits of an administrative body's decision, resorting to this justification process is unnecessary because of the specific tools that have been developed in administrative law. The standard of review is one of those tools. If an administrative body makes a decision or order that is said to conflict with fundamental values, the mechanisms of administrative law are readily available to meet the needs of individuals whose rights have been violated. Such individuals can have the decision quashed by obtaining a declaration that it is unreasonable or incorrect.

2.3.1 Reasonable Accommodation

129 The apparent overlap between the concepts of minimal impairment and reasonable accommodation is another striking example of the need to preserve the distinctiveness of the administrative law approach. Charron J. is of the opinion that there is a correspondence between the concepts of accommodation and minimal impairment (para. 53). We agree that these concepts have a number of similarities, but in our view they belong to two different analytical categories.

130 The case law on reasonable accommodation developed mainly in the context of the application of human rights legislation to private disputes: *Ontario Human Rights Commission v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536, and *Bhinder v. Canadian National Railway Co.*, [1985] 2 S.C.R. 561. In *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3 ("*Meiorin*"), and *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868 ("*Grismer*"), the Court developed a mechanism that permits a balance to be struck between the requirements of the enforcement of a right or freedom and the constraints imposed by a given environment. This duty, which is more than a mere *bona fide* occupational requirement, was extended in *Meiorin* to all cases of direct or indirect discrimination, and in *Grismer* (at para. 19), to all persons governed by human rights legislation.

131 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.

132 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 macrocosmic. The values involved may be different. We believe that there is an advantage to keeping these approaches separate.

133 Furthermore, although the minimal impairment test under s. 1 of the *Canadian Charter* is similar to the undue hardship test in human rights law, the perspectives in the two cases are different, as is the evidence that can support the analysis. Assessing the scope of a law sometimes requires that social facts or the potential consequences of applying the law be taken into account, whereas determining whether there is undue hardship requires evidence of hardship in a particular case.

134 These separate streams — public versus individual — should be kept distinct. A lack of coherence in the analysis can only be detrimental to the exercise of human rights. Reasonable accommodation and undue hardship belong to the sphere of administrative law and human rights legislation, whereas the assessment of minimal impairment is part of a constitutional analysis with wider societal implications.

135 The scope of the *Canadian Charter* is broad. Section 52 of the *Constitution Act, 1982* guarantees the supremacy of the Constitution of Canada. This incomparable tool can be used to invalidate laws that infringe fundamental rights and are not justified by societal goals of fundamental importance. However, where the concepts specific to administrative law are sufficient to resolve a dispute, it is unnecessary to resort to the *Canadian Charter*.

136 Constitutional values have breathed new life into the *Civil Code of Québec*, S.Q. 1991, c. 64, the common law and legislation in general. Courts and administrative tribunals must uphold them, as must Parliament and the legislatures. However, the same

rules should not apply to the review of legislative action as to the review of the exercise of adjudicative authority.

3. Conclusion

137 Administrative law review has been designed to scrutinize administrative boards' decisions. Administrative law review has become a full-fledged branch of the law. Its integrity should be preserved.

138 If the *Code de vie* itself or one of its provisions had been challenged on the ground that it did not meet the minimal impairment standard, a s. 1 analysis would have been appropriate. But the appellant did not challenge it. When the validity of a rule of general application is not in question, the mechanisms of administrative law are called for. This approach makes it possible to avoid the blurring of concepts or roles and enhances the proper application of both administrative and human rights law.

139 For these reasons, we would allow the appeal and set aside the decision of the Court of Appeal.

English version of the reasons delivered by

LeBel J. —

I. Introduction

140 As can be seen from the reasons of my colleagues Deschamps, Abella and Charron JJ., the approach to applying s. 1 of the *Canadian Charter of Rights and Freedoms* ("*Canadian Charter*") continues to be problematic and to raise new questions even after it has been followed for more than 20 years. The analytical framework established in *R. v. Oakes*, [1986] 1 S.C.R. 103, for applying the *Canadian Charter* has not settled every question or averted every problem. Thus, the case at bar once again raises the issue of how the constitutional law of civil liberties relates to quasi-constitutional legislation on fundamental rights, such as the *Charter of human rights and freedoms*, R.S.Q., c. C-12 ("*Quebec Charter*"), and, in an even more subtle way, to administrative law in general. The need to find an appropriate solution therefore makes it necessary to consider how the operation of the *Canadian Charter* itself is structured, that is, what relationship exists between the guaranteed rights and the approach to limiting those rights under s. 1.

141 Although I agree with the disposition proposed by my colleagues, I remain concerned about some aspects of the problems of legal methodology raised by this case. As can be seen, the case involves diverse legal concepts that, although belonging to fields of law that are in principle separate, are still part of a single legal system the coherence of which must be adequately ensured.

A. *Nature of the Legal Issue*

142 The fact that education legislation obliges the school board to ensure the safety of its students is not in issue in this appeal. Nor is it disputed, as regards the performance of this obligation, that the *Code de vie* (code of conduct) prohibiting the carrying or use of any type of weapon is a valid exercise of the administrative powers delegated to the board for the purpose of ensuring safety. The board's specific decision to prohibit the appellant's son from wearing a kirpan on the basis that the kirpan is a weapon is not being contested on administrative law grounds, such as abuse or excess of power.

143 Rather, the appellant contests the decision by arguing that the respondent school board's exercise of the delegated power is vitiated by the violation of one of his son's fundamental rights. He submits that the school board's refusal to agree to a reasonable accommodation measure violates his son's freedom of religion. Although the board's decision was formally authorized by a delegation of powers under the *Education Act*, R.S.Q., c. I-13.3, it was null because it was an unjustified infringement of the constitutional guarantee of freedom of religion set out in s. 2(*a*) of the *Canadian Charter* as well as of similar rights protected by the *Quebec Charter*.

144 The case as it stands before this Court therefore appears to involve an issue of constitutional law. I readily acknowledge that it is better, where problems arise in such circumstances, to begin by attempting to solve them by means of administrative law principles. I do not think that it is always necessary to resort to the *Canadian Charter* or, in the case of Quebec, the *Quebec Charter* when a decision can be reached by

applying general administrative law principles or the specific rules governing the exercise of a delegated power. I had occasion to point this out in my reasons in *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307, 2000 SCC 44, at para. 138. However, the context of a dispute sometimes makes a constitutional analysis unavoidable. If the reasoning proposed by my colleagues Deschamps and Abella JJ. were accepted, an administrative decision would, of course, be quashed. In this sense, the case can be said to come under administrative law. However, if the decision is quashed because of the violation of a constitutional standard, it then becomes necessary to consider the fundamental rights in issue and how they have been applied. Only in this way can it be determined whether the infringement of the constitutional standard is unjustified. In such a case, the outcome of the case depends on how the constitutional issue is resolved.

145 The proceedings before this Court bring into play, at least in theory, the constitutional guarantee of freedom of religion and the right of children and other persons at educational institutions to security, which is protected by s. 7 of the *Canadian Charter*. What relationship can be found between these sometimes competing rights when it is alleged that freedom of religion has been violated because of the failure to make reasonable accommodation? How can these rights be analysed?

146 In such circumstances, it becomes very tempting to go directly to the stage of s. 1 justification, which provides courts, tribunals and litigants with the advantage of a familiar, well-established framework. However, in applying the *Canadian Charter*, not everything can be resolved under s. 1. To begin with, it is still necessary to analyse the right in issue, define its content and, where relevant, consider the scope of competing

rights. The definition of the content of a right does not correspond systematically to a limit that must be justified by means of the approach developed in the cases on s. 1.

B. *Delimitation and Reconciliation of Guaranteed Rights*

147 A question that arises in the initial stages of the review of an alleged violation of a constitutional right is that of the nature and scope of the right. What the right is must be determined, and its boundaries must be established. Establishing these boundaries requires consideration of the guaranteed right's relationship with competing rights and sometimes leads to the necessary finding that rights come with corresponding obligations. We not only have rights, we also have obligations. How the *Canadian Charter* is applied, and the flexibility with which it is applied, are an acknowledgment of this reality. The application of the *Canadian Charter* does not always involve solely the relationship between the guaranteed rights of individuals and government action limiting those rights. The relationship is often more complex, as it could have been in the instant case. The school board's decision could have affected the competing right of all the students to security of the person under s. 7. It is therefore necessary to find approaches to applying the *Canadian Charter* that reflect the need to harmonize values and reconcile rights and obligations.

148 With respect for those who disagree, while this Court has indeed favoured resorting to the s. 1 justification process with respect to freedom of religion, its decisions have never definitively established that this approach is the only way to reconcile competing or conflicting fundamental rights. This is not what emerges from the Court's decisions. Nor would it be desirable. The complexity of the situations to which the

Canadian Charter applies is unsuited to simplistic formulas, as it is to rigid classifications.

149 Case law developed over 20 years or more can no doubt be used to support any opinion or position. A variety of quotations can be taken from this Court's successive decisions. Attempts can be made to distinguish those decisions or to reconcile them. Doing this would probably not lead to the conclusion that the Court intended to create a straitjacket in which it would be confined when trying to resolve issues relating to the application of the *Canadian Charter* fairly and efficiently. The Court has not ruled out the possibility of reconciling or delimiting rights before applying s. 1. This is shown by two cases decided more than 10 years apart, *Young v. Young*, [1993] 4 S.C.R. 3, and a very recent decision, *Montréal (City) v. 2952-1366 Québec Inc.*, [2005] 3 S.C.R. 141, 2005 SCC 62, at paras. 56-57 and 60-61, the first of which deals with freedom of religion and the second with freedom of expression.

150 Moreover, this Court has never definitively concluded that the s. 1 justification analysis must be carried out mechanically or that all its steps are relevant to every situation. *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, is one case that recognizes the flexibility of the *Oakes* analysis and the usefulness of that flexibility. In *Dagenais*, the Court reviewed common law rules that affected two protected rights, the right to a fair trial and freedom of expression, and used a simplified approach that was based on the balancing of rights and dispensed with certain steps of the now classical approach.

151 This flexibility also makes it possible to apply the *Canadian Charter* and its values to a wide range of administrative acts without necessarily being confined by the norm-decision duality. Although appealing from the standpoint of legal theory, this dualism underestimates the problems that arise in applying the classifications it invites. It also entails a risk of narrowing the scope of constitutional review of compliance with the *Canadian Charter* and its underlying values. In this regard, I share the concerns expressed by my colleague Charron J. in her reasons.

152 The approaches followed to apply the *Canadian Charter* must be especially flexible when it comes to working out the relationship between administrative law and constitutional law. In verifying whether an administrative act is consistent with the fundamental normative order, recourse to administrative law principles remains initially appropriate for the purpose of determining whether the adopted measure is in conformity with the powers delegated by legislation to school authorities. If it is authorized by that delegation, the exercise of the discretion to adopt safety measures to protect the public and students must then be assessed in light of constitutional guarantees and the values they reflect.

153 Where the exercise of such a discretion has an impact on the relationship between competing constitutional rights, those rights can be reconciled in two ways. The first approach involves defining the rights and how they relate to each other, and the second consists of the justification process developed in the cases on s. 1. In the case at bar, the first approach can be dispensed with. The evidence does not show a *prima facie* infringement of the right to security of the person. Wrapped as it would be, the kirpan

does not seem to be a threat to anyone. It is therefore necessary to turn to the second approach.

154 In attempting to justify the infringement under s. 1 of the *Canadian Charter*, as we know, the school board bears the burden of proving that prohibiting the kirpan is a reasonable limit on the constitutional right of the appellant's son to protection of his freedom of religion. In such an analysis, it is certainly necessary to bear in mind the importance of the obligations of safety and protection that school authorities have, under the law of civil liability and education legislation, to their students and also to third persons in respect of acts committed by students (P. Garant, *Droit scolaire* (1992), at pp. 319-45; *Civil Code of Québec*, S.Q. 1991, c. 64, art. 1460). It is possible that a justification could be found in the need to fulfil such obligations.

155 Moving on now to the application of s. 1, it must be asked whether the analytical approach established in *Oakes* need be followed in its entirety. In the case of an individualized decision made pursuant to statutory authority, it may be possible to dispense with certain steps of the analysis. The existence of a statutory authority that is not itself challenged makes it pointless to review the objectives of the act. The issue becomes one of proportionality or, more specifically, minimal limitation of the guaranteed right, having regard to the context in which the right has been infringed. Reasonable accommodation that would meet the requirements of the constitutional standard must be considered at this stage and in this context. In the case at bar, I must conclude that the respondent school board has not shown that its prohibition was justified and met the constitutional standard. I therefore agree with the conclusion proposed by my colleagues.

Appeal allowed with costs.

Solicitors for the appellants: Grey, Casgrain, Montréal.

Solicitor for the respondent Commission scolaire Marguerite-Bourgeoys: François Aquin, Montréal.

Solicitors for the respondent the Attorney General of Quebec: Bernard, Roy & Associés, Montréal.

Solicitors for the intervener the World Sikh Organization of Canada: Peterson, Stark, Scott, Surrey, British Columbia.

Solicitors for the intervener the Canadian Civil Liberties Association: Osler, Hoskin & Harcourt, Toronto.

Solicitor for the intervener the Canadian Human Rights Commission: Canadian Human Rights Commission, Ottawa.

Solicitor for the intervener the Ontario Human Rights Commission: Ontario Human Rights Commission, Toronto.