IN THE SUPREME COURT OF CANADA
ON APPEAL FROM THE QUEBEC COURT OF APPEAL

BETWEEN:	BALVIR SINGH MULTANI And BALVIR SINGH MULTANI, ès qualities of his minor son GURBAJ SINGH MULTANI Appellants
AND	COMMISSION SCOLAIRE MARGUERITE-BOURGEOYS Respondent
AND	THE ATTORNEY GENERAL OF QUEBEC Respondent
AND	WORLD SIKH ORGANIZATION (WSO) Invervenor

APPELLANTS' FACTUM

PART I. THE FACTS

A. The Kirpan and the Sikh religion

1. The Sikh religion was born in the late 15th century as a protest against the rigid caste system of Hinduism and the mistreatment of women under Islam; it is now recognized as a major religion with over 30 million members; it is centered in the Punjab but its adherents are found all over the world, particularly in the rest of India, in the U.K. in the U.S. and all over Canada; its peaceful aims and noble ideology were not contested by anyone and are clearly expressed in P-6; the Sikh attitude towards resistance to evil is expressed as follows in P-6:

> Love and peace have been the watch-words of a true religion as defined by Guru Nanak and other Sikh Gurus, but also, any attempt to deny man the essential virtues of equality, freedom and self-respect must be opposed.

2. Clearly, this excludes the use of Kirpan as a weapon in school and this is made clear from para. 12-17 of the uncontradicted affidavit of Mangit Singh; the Kirpan was never intended to be a physical weapon but rather a spiritual symbol;

3. The Kirpan is a small blunt metal object in the shape of a dagger whose name comes from a combination of the words "mercy" and "honour"; a Kirpan was deposited in the file; it is one of the five sacred symbols of Sikhism imposed on all baptized Sikhs in the late 17th century which include, in addition to the Kirpan, an obligation not to cut their hair, to wear a wooden comb in it, to wear a steel bracelet and to wear a special pair of shorts; because of the injunction not to cut hair, most male Sikhs wear the characteristic turban; these five symbols are imposed on both men and women; as in all religions, not all Sikhs are equally orthodox; however, orthodox Sikhs must wear a metal Kirpan at all times; even in bed and certainly in school;

B. The child

4. Gurbaj Singh was born on October 20, 1989; he is baptized and is an orthodox Sikh; his affidavit, deposited for the Superior Court, sums up his position; this affidavit is crucial for this case and it is important to note that, although he has his parents' support, the decision to insist on the Kirpan was his own in accordance with his conscience; his father's affidavit is also very important in explaining the situation; both affidavits are produced in the record; no doubt has been cast on the sincerity of his religious views;

5. Everyone admitted that Gurbaj Singh is a peaceful, well-behaved boy, who poses no discipline problem of any sort;

C. The School Board

6. The Respondent School Board was Operating École Ste-Catherine Labouré School which Gurbaj Singh attended in 2001-2002; the school through its Governing Board, a statutory body which exercises certain defined functions in all Quebec schools, adopted a Code de Vie which generally prohibits knives, weapons and dangerous objects but also irregular headwear and unacceptable attire;

7. Gurbaj Singh attended the school with his Kirpan without any incident and without any protective cover until he dropped it accidentally (examination of Danielle Descoteaux); after considerable negotiations a compromise was reached and it is expressed in P-1; clearly the Kirpan was not considered too dangerous by the Director and the Board's legal counsel;

8. However, the Governing Board of the school repudiated this compromise and expressed its repudiation in P-2; Appellant's request for revision was turned down in P-3; Appellant then initiated the present action and obtained an interlocutory order from the Honourable Mr. Justice Tellier on April 7, 2002, followed by the judgment of the Honourable Danielle Grenier;

D. The events after the judgment of Tellier J.

9. Affidavits were filed to describe angry reactions of some parents to the Tellier judgment (see Balvir Singh Multani's affidavit); Respondent School Board filed a petition by some parents as I-26; however, it is clear that, despite the outcry, no serious disruption occurred on account of the Kirpan (examination of Danielle Descoteaux);

10. Since September 2001 Gurbaj Singh has attended a private school which allows a Kirpan but a return to the public system is not excluded; the right to wear the Kirpan is for him a necessary condition for such a return;

E. The Attorney General

11. The Attorney General was absent from the debate until just before the hearing before Madam Justice Grenier; the Minister of Justice made some public remarks just before the hearing and they were filed as I-25; at the hearing, the Attorney General intervened but made no argument other than a bare affirmation that he believed in "zero tolerance"; he then appealed Madam Justice Grenier's ruling to the Court of Appeal; the position or "zero tolerance" is difficult to explain logically because there is no general prohibition in Quebec only in certain schools;

F. The evidence concerning the Kirpan in school

12. Although Respondent tried to argue otherwise below, there was considerable evidence produced at first instance concerning the nature of the Kirpan and Sikhism; as Appellant admitted, there was an agreement to use the Ontario jurisprudence and the expertises found there for purposes of this hearing; moreover, there was also an affidavit filed by Manjit Singh, the Sikh Chaplain at McGill University who referred to books, extracts of which were produced as Exhibit P-6, there were also numerous newspaper articles produced by consent, showing the absence of any harmful consequences from the Kirpan's presence in schools anywhere and their general acceptability by Canadian standards (Exhibits P-4, P-7, P-8, P-9, P-10 and P-11); evidence admitted by consent is admissible notwithstanding that it contains some hearsay (2859 C.C.Q.);

13. Respondent School Board also produced some affidavits which they admitted were not expertises and which opposed the presence of the Kirpan in school; all of

them admitted that the affiants had no knowledge of any incident with the Kirpan, but they brought up street gangs, ordinary knives and school violence which Respondents submit were utterly irrelevant as arguments for refusing Appellant's request to bring his Kirpan to school;

14. It was also admitted that other sharp or potentially dangerous objects e.g. paper cutters, geometry compasses, art supplies and sports equipment are available (see for instance the interrogation of France Ferland);

15. The affiants were examined out of Court and their depositions form part of the record;

16. A rigid non-distinctiveness was advocated by a policeman produced by the Board in the following terms:

> Q. Et dans certains cas, ça pourrait diminuer...si tout le monde était habillé de la même façon, on pourrait possiblement diminuer le nombre d'attaques irrationnelles.
>
> R. C'est ce qu'on encourage d'ailleurs dans les écoles, que tout le monde porte un costume, puis on viendrait de régler un gros problème à ce moment-là, parce que tout le monde serait égal, autant au niveau social, on n'aurait pas de classes économiques parce que le jeune qui porte un...un vêtement faux-vou (ph), il va être sujet d'être taxé par un gang de rue parce qu'il porte des vêtements de...
>
> Q. ...s'il y a quelque chose de...d'additionnel, comme un foulard islamique ou un kippa, il faudrait ne pas le porter parce que ça ça ouvrirait la porte à la différence.
>
> R. Euh...à certains égards, oui, mais pas tous les foulards. Comme je vous ai dit, un Sikh

> peut porter son...l'espèce de...je sais pas comment ça s'appelle, parce que c'est vraiment...
>
> R. ...on sait que c'est pas un membre de gang s'il a un foulard...un turban bleu, là. Ça, les jeunes ils vont le voir automatiquement, mais pour certaines autres choses, c'est problématique.

17. There were also editorials produced, which showed a wide variety of opinions on this subject in Quebec, but certainly no overwhelming rejection of the Kirpan;

G. The compromise

18. Appellant agreed to strict conditions with respect to the sheathing of the Kirpan and keeping it out of easy reach; the School Board accepted this at various times (i.e. the principal of the school before proceedings were taken and the School Board's attorney before Madam Justice Grenier); however, it changed its mind and withdrew its consent each time;

19. If the judgment of the Court of Appeal is reversed, the restrictions will remain in force;

H. Intervenants

20. The World Sikh Council was permitted to intervene and argue before the Court of Appeal and it fully supported the present Petitioners' position; it stressed the peaceful tenets of the Sikh religion;

PART II. QUESTIONS IN DISPUTE

1. Whether the prohibition of the Kirpan in school violates the Quebec and Canadian Charter of Rights and Freedoms?

2. Whether the accommodation created under Grenier J.'s judgment should have been maintained and whether it is reasonable for all Parties?

3. Whether the rules of administrative law also favour Petitioners' position?

PART III. THE ARGUMENT

A. Freedom of religion

21. In paragraphs 63-72 the Court of Appeal found that the School Board's policy constituted a violation of freedom of religion guaranteed by the two Charters; this part of the judgment is unquestionably correct and all courts seized with questions involving the Kirpan have found this; in particular paragraphs 70 and 71 are decisive:

> Même si l'on devait opposer aux intimés des interprétations différentes quant à la nécessité de porter le même genre de kirpan, ils ont satisfait à leur fardeau de preuve d'établir leur croyance religieuse sincère qui n'est pas unique, ni capricieuse.
>
> La décision du conseil des commissaires porte donc atteinte au plein exercice de liberté de religion et de conscience des intimés puisqu'elle a pour effet d'entraver une conduite qui fait partie intégrante de la pratique de la religion (de l'intimé).

22. It is therefore not necessary to belabour this point and it must be taken as established; it must be pointed out that this case could be argued as easily under Sec. 15 as well as Sec. 2, but that there is no difference in result;

23. If Sec. 15 is used the groups compared are Sikhs as opposed to members of other religions as those who belong to no religion; clearly the prohibition of the Kirpan has a differential effect on the Sikhs;

24. The importance of religious freedom was emphasized by Dickson J. in R. v. Big M Drug Mart Ltd., [1985] S.C.R. 295 at p. 336-37:

> 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...
>
> What may appear good and true to a majoritarian religious group, or to the state acting at their behest, may not, for religious reasons, be imposed upon citizens who take a contrary view. The Charter safeguards religious minorities from the threat of "the tyranny of the majority".

25. Courts have continued to give religious rights great importance: Rosenberg v. City of Outremont, [2001] R.J.Q. 1556 (Hilton J.);Zylberberg v. Sudbury Board of Education, [1998] 52 D.L.R. 4th 577 (at p. 588-89) Ont. C.A.;Tenafly Eruv Association v. Borough of Tenafly, U.S. Court of Appeals 3rd Circuit Oct. 24, 2002;R. v. Edward Books, [1986] 2 S.C.R. 713;

26. In the recent Reference re Same Sex Marriage, [2004] SCC 79, this Court said at par. 53:

> The protection of freedom of religion afforded by s. 2(a) of the Charter is broad and jealously guarded in our Charter jurisprudence. We note that should impermissible conflicts occur, the provision at issue will by definition fail the justification test under s. 1 of the Charter and will be of no force or effect under s. 52 of the Constitution Act, 1982. In this case the conflict will cease to exist.

27. The Court continued at par. 57:

> The right to freedom of religion enshrined in s. 2(a) of the Charter encompasses the right to believe and entertain the religious beliefs of

> one's choice, the right to declare one's religious beliefs openly and the right to manifest religious belief by worship, teaching, dissemination and religious practice: Big M Drug Mart, supra, at pp. 336-37. The performance of religious rites is a fundamental aspect of religious practice.

28. The Ontario Court of Appeal also recently reaffirmed the continuing vigour of Big M., supra in Halpern v. Canada, [2003] CanLII 26403;

29. In June 2004 this Court decided Syndicat Northcrest v. Amselem, [2004] SCC 47 which reaffirmed the importance of religious exemptions and established as well that, once the beliefs are determined to be sincere, one should not test their orthodoxy in any religion but only the reasonableness of the accommodation required;

30. This is the natural consequence of the individual nature of freedom of religion as explained in Big M, supra, and of the fact that the Charter protects not only religion but also conscience which can only be individual in nature;

31. In short, Respondent's suggestion that other Sikhs content themselves with a small, non-metal replica of the Kirpan is simply irrelevant; Appellant's religious views must be accommodated, if reasonably possible, without regard to what other Sikhs may think or do;

32. All Charter rights and analogous rights are to be given a generous purposive reading; in C.N.R. v. Canada, [1987] 1 S.C.R. 1114 we read at p. 1134:

> Human rights legislation is intended to give rise, amongst other things, to individual rights of vital importance, rights capable of enforcement, in the final analysis, in a court of law. I recognize that in the construction of such legislation the words of an Act must be given their plain meaning, but it is equally important that the rights enunciated be given their full recognition and effect. We should not search for ways and means to minimize those rights and to enfeeble their proper impact.

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33. This has been frequently reiterated and is not in doubt: Big M Drug Mart, supra; Vriend v. Alberta, [1998] 1 S.C.R. 493;B. v. Ontario Human Rights Commission, [2002] S.C.C. 66;Libman v. P.G. Que., [1997] 3 S.C.R. 569;

34. Moreover, the Charter is not majoritarian in nature; majority views cannot prevail against it: Zylberberg, supra; Big M Drug Mart, supra; R. v. Videoflic Ltd., [1984] 14 D.L.R. 4th 10 at p. 34, (Ont. C.A.);

35. In the Amselem case supra, there was the complication of the private contractual rights of the condominium; this meant only the Quebec Charter of Rights and Freedoms could apply and not the Canadian Charter;

36. It also led to the negative judgment of Dalphond J.A. and to the dissenting opinion of Binnie J. based on freedom of contract; in the present case, the reasoning not only of the majority in the Supreme Court but also Dalphond J.A. and Binnie J. would seem to validate Appellant's position since Respondent School Board is a public body;

37. In the Court of Appeal Lemelin J. concluded there was no insurmountable cost or inconvenience from the Kirpan in paragraph 94:

> L'appelante n'a pas démontré qu'un accommodement de la nature de celui ordonné en Cour supérieure engendrait une dépense supplémentaire ou un effort plus substantiel de la part de ses employés. Tout au plus, le personnel de l'école devrait vérifier de manière ponctuelle si l'intimé se conforme aux modalités prévues dans le premier jugement. L'école devrait aussi adapter les cours d'éducation physique qu'elle dispense ou en exclure l'intimé. Je ne conclurais pas que ces inconvénients seuls entraînent une contrainte excessive, toutefois, il y a plus.

38. The actual decision is contained essentially in the bare affirmation in paragraph 95:

> Le kirpan est un objet dangereux et les modalités imposées par la première juge n'annulent pas tous les risques mais retardent l'accès à l'objet, tel que je le mentionnais précédemment. L'argument de l'absence d'incidents de violence impliquant un kirpan à la CSMB me semble réducteur. L'appelante prohibe les armes et objets dangereux dans ses établissements qui eux ont été utilisées dans des incidents.

39. It is important to note that the judge accepts the fact that Respondents have been unable to point to a single incident involving the Kirpan in a school anywhere in the world, but considers that argument "reducteur";

40. Nor does she consider that sharper or more evidently dangerous objects (geometry compasses and baseball bats) are frequently permitted;

41. On the other hand, if the appeal judgment is correct, rights to religious accommodation must give way to hypothetical fears and to a "perception de climat de sécurité"; this runs counter to the great weight given to freedom of religion in our law and jurisprudence;

42. It is submitted that in times of heightened concern about security such as ours, it is <u>particularly</u> important not to allow unsubstantiated fears to override important rights such as freedom of religion and conscience and equality with respect to religious beliefs and practices;

43. The compromise approved by the Honourable Madame Justice Grenier in the Superior Court was reasonable; it was in fact at least temporarily accepted by Respondent School Board and no sufficient reason has been given for overriding it; nor was any evidence presented which demonstrated its unsuitability;

B. The jurisprudence on the Kirpan

44. So far the cases mentioned have been relevant by analogy; however, it is submitted that the prior jurisprudence on the Kirpan is decisive in any event; perhaps the most important case is Pandori v. Peel Board of Education, [1990] 12 C.H.R.R. D/364 aff'd by the Ontario Divisional Court in Peel Board of Education v. Ontario Human Rights Commission, [1991] 3 O.R. 3d 531; in the Divisional Court, Campbell J. said:

> The Board developed a no-weapons policy after a number of knife incidents and a concern about increasing use of knives and violence in the Peel schools. The school board took the view that the presence of a kirpan, because it can be used as a weapon and is perceived by non-Sikhs as a weapon and not as a religious symbol, can create an added danger in a volatile environment. The no-weapons policy included kirpans. That policy was supported, on the grounds of safety concerns, by the Ontario Secondary School Teachers' Federation.
>
> The Peel board tried without success to find a compromise to let the students wear, as do some Sikh members of the police force in London, England, a small symbolic replica instead of a real kirpan with a metal blade. For religious reason this proposed compromise was not acceptable to the affected individuals and their families. Another compromise was explored, the stitching of the kirpan into its sheath to prevent its removal, but this was also rejected as religiously unacceptable.
>
> 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.
>
> Kirpans are prohibited on Canadian air plane flights. The Manitoba courts have held that a judge has authority to exclude kirpans from a courtroom. Re Hothi and R., (1985), 33 Man. R. (2d) 180, [1985] 3 W.W.R. 256 (Q.B.), affd (1985), 35 Man. R.. (2d) 159, [1986] 3 W.W.R. 671, (C.A.); leave to appeal to S.C.C. refused (1986), 43 Man. R. (2d) 240n, 70 N.R. 397n.
>
> 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 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.
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45. He concluded:

> In the absence of any concrete evidence of safety risk, and having regard to the safety features built into the order by the Board of Inquiry , we are not satisfied that there was any error in principle on this issue.

46. The Ontario Court of Appeal denied leave to appeal making the judgment final;

47. This case was cited with approval in Nijar vs. Canada 3000 Airlines, (1999) C.H.R.D. 3 and distinguished as follows at p. 23:

> 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. It will be recalled that Mr. Kinnear testified that Canada 3000 check-in personnel have between 45 and 90 seconds contact with each passenger.

48. In Tuli v. St. Albert Protestant Board of Education, [1987] C.H.R.R.29577 the Alberta Human Rights Commission denied a Sikh student's complaint in the abstract because he was not a Sikh at the time of the commission's complaint; however the Superior Court granted an injunction which allowed him to finish his studies with a Kirpan; although the complaint was dismissed on technical grounds, the Human Rights Inquiry Board said at p. 29629:

> It is not enough, in my view, in endeavoring to justify a ruling on safety grounds to rely upon hypothetical or imagined circumstances.
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49. The U.S. Court of Appeal, California Circuit also granted an injunction to Sikh students in Cheema v. Thompson, 67 F.3d 883;

50. In Amselem, supra, a danger was also imagined – the obstructing of balconies which served fire exits; in the absence of serious evidence that such danger cannot be avoided, the Court did not accept this argument;

51. In Pritam Singh v. Workman's Compensation Board Hospital, [1981] C.H.R.R. par. 4144 an Ontario Board of Inquiry authorized the wearing of a Kirpan in a hospital; the Ohio Court of Appeal quashed a conviction for carrying a concealed weapon to a Sikh with a Kirpan in Harjinder Singh v. State of Ohio, A.C-950777; in this case Painter J. said in par. 6:

> Free expression of religion has been a cornerstone of the inalienable rights of Americans even as the religiously persecuted separatist Puritan Pilgrims reached Plymouth Rock in 1620, as states such as Rhode Island were established solely as a haven for those persecuted for their religious beliefs, as religious freedom was established in Section 14, Article I of the Northwest ordinance of 1787, all well before the free exercise clause was formally set out in the First Amendment to the United States Constitution and Article 1, Section 7 of the Ohio Constitution. The Sikh religion has been part of world history since the fourteenth century. An integral part of that religion is the symbolism embodied in the "five kid" worn by its members. To be a Sikh is to wear a Kirpan - it is that simple. It is a religious symbol, and in no way a weapon. As long as the Kirpan remains a symbol and is neither designed or adapted for use as a weapon, laws such as R.C. 2923.12 are wholly inapplicable.
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52. Even the one Canadian case which went against Sikh beliefs, Bhinder v. C.N., [1985] 2 S.C.R. 589 established there was prima facie discrimination and only refused the claim on the basis of a specific statutory exception of a bona fide occupational requirement of wearing a hard hat; this case was specifically not pleaded under the Charter which was not in force when the issue arose and therefore it cannot have any application here; moreover Bhinder, supra, was largely disapproved in Alberta v. Central Alberta Dairy Board, [1990] 2 S.C.R. 489; the Supreme Court made it clear it would have decided differently in the Charter age; it follows that until the present case, the matter had been resolved in Canada and everywhere else, in favour of accommodation;

53. Moreover, uncontradicted evidence showed tolerance of the Kirpan, even without the strict limits Petitioner agreed to before Grenier J. in all of Canada, the U.S. and the U.K.; all of these places have larger Sikh populations than Quebec and therefore more potential for unfortunate incidents, but no such incidents could be found;

C. A Sec. 1 analysis

54. Issues of indirect religious or other discrimination are characteristically dealt with not under Sec. 1 but under the obligation to accommodate; the two issues are connected; if the accommodation is reasonable and possible there cannot be a Sec. 1 justification for total prohibition;

55. However, there is no reason one could not apply the test in R. v. Oakes, [1986] 1 S.C.R. 103 to this situation;

56. In the present case, the safety preoccupation of the School Board can pass the first test, that is the laudable purpose; total prohibition will necessarily fail both the proportionality and the minimal impairment test; the situation is similar to that in Montreal v. Cabaret Sex Appeal, [1994] R.J.Q. 2331 where Tyndale J.A. said at p. 2142:

> As to the Oakes test, which all agree applies in this case, Respondents concede that part one is satisfied; that the objectives of defending the dignity of women and youth protection are of sufficient importance to warrant the limitation of a charter right...
>
> The trial judge found in favour of Appellant on the first element of part two of the test-achieving the objective and rational connection; that is evident, and Respondents do not object.
>
> As to the second element, minimal impairment, she also found in favour of the Appellant; to this Respondents do object, and I am inclined to agree. Was it necessary to prohibit the image of any human form, male or female, clad or unclad, erotic or sedate? However, this element is closely linked to the third, which in my view is decisive.
>
> There is disproportion, in my opinion, between the effects of the measures and the objective. As the judge pointed out, there is no evidence that the images do any harm; the Supreme Court has upheld the celebration of human

> sexuality. A total ban of a lawful form of expression is out of proportion to the subject of complaint; the remedy is worse than the disease. It is an effort at thought control, at the suppression of improper opinions. What will they be banning next?

57. It is clearly not enough to imagine a danger; if it were compasses, paper cutters and indeed use of automobiles during excursions would have to be banned for school use; the total ban must be found to be necessary; given the total absence of any incident over years of practice in Ontario, British Columbia, the UK and the U.S. all jurisdictions with a much larger Sikh population than Quebec, it is difficult to see why a total ban would be necessary and to characterize a total ban as the minimal impairment borders on the fantastic;

58. The fact that imagined or feared consequences do not suffice to override Charter rights even when there exists a very laudable goal, was recently made clear in Nova Scotia (Workers' Compensation Board) v. Martin, [2003] SCC 54 where Gonthier J. said at par. 109 and 110:

> The first concern, maintaining the financial viability of the Accident Fund, may be dealt with swiftly. Budgetary considerations in and of themselves cannot normally be invoked as a free-standing pressing and substantial objective for the purposes of s. 1 of the Charter: see Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island, [1997] 3 S.C.R. 3 ("P.E.I. Reference"), at para. 281; see also Schacter v. Canada, [1992] 2 S.C.R. 679, at p. 709. It has been suggested, however, that in certain circumstances, controlling expenditures may constitute a pressing and substantial objective: see Eldridge, supra, at para. 84. I find it unnecessary to decide this point for the purposes of the case at bar. Nothing in the evidence establishes that the chronic pain claims in and of themselves placed sufficient strain upon the Accident Fund to threaten its viability, or that such claims significantly contributed to its present unfunded liability. Admittedly, when a court finds the budgetary considerations may become relevant to the minimal impairment test: see P.E.I. Reference, supra, at para. 283. But at the present stage of the analysis, such a non-financial purpose remains to be identified.
>
> Likewise, the second objective, developing a consistent legislative

> response to chronic pain claims, could not stand on its own. Mere administrative expediency or conceptual elegance cannot be sufficiently pressing and substantial to override a Charter right. In my view, this objective only becomes meaningful when examined with the third objective, i.e., avoiding fraudulent claims based on chronic pain. That objective is consistent with the general objective of the Act, as avoiding such claims ensures that the resources of the workers' compensation scheme are properly directed to workers who are genuinely unable to work by reason of a work-related accident. In my view, it is clearly pressing and substantial. As I believe that is the strongest s. 1 argument raised by the respondents, I will first apply the Oakes test to this objective. I will then briefly consider the fourth and last objective alleged by the respondents.

59. Gonthier J. continued at p. 112:

> The same reasoning, however, makes it patently obvious that the challenged provisions do not minimally impair the equality rights of chronic pain sufferers. On the contrary, one is tempted to say that they solve the potential problem of fraudulent claims by preemptively deeming all chronic pain claims to be fraudulent. Despite the fact that chronic pain may become sufficiently severe to produce genuine and long-lasting incapacity to work, the provisions make no effort whatsoever to determine who is genuinely unable to work and who is abusing the system. As the respondents correctly point out, the government is entitled to a degree of deference in its weighing of conflicting claims, complex scientific evidence and budgetary constraints, especially given the large unfunded liability of the Accident Fund. In other words, it is not sufficient that a judge, freed from all such constraints, could imagine a less restrictive alternative. Rather, s. 1 requires that the legislation limit the relevant Charter right "as little as is reasonably possible" (R. v. Edwards Books and Art Ltd., [1986] 2 S.C.R. 713, at p. 772 (Dickson C.J.)). However, even a brief examination of the possible alternatives, including the chronic pain regimes adopted in other provinces, clearly reveals that the wholesale exclusion of chronic pain cannot conceivably be considered a minimum impairment of the rights of injured workers suffering from this disability.

60. Indeed, the only explanation for Appellants' readiness to accept a compass, a paper cutter, sports equipment is that they consider the activities in which those objects are used important while accommodating Sikhs does not seem to be an important preoccupation to them;

61. It was argued that an object in the shape of a dagger automatically sends the wrong message to students and is undesirable per se as the ads in Irwin Toy Ltd. v. Quebec, [1989] 1 S.C.R. 927; this is a spurious objection and one which promotes an undesirable political correctness; it is sufficient to consider the French text of "O Canada", the text of "La Marseillaise" and indeed the "Arthurian" legends to realize that the notion of resistance to evil and the symbolic value of the sword or dagger is not always negative; there is simply no way of justifying a total ban unless a reasonable accommodation is not possible;

62. In any event, fear of the symbolism comes close to attempting to control and limit what a person might think or how he or she might reason; this is not compatible with fundamental Charter values such as individual autonomy and freedom of conscience;

D. The compromise proposed by Grenier J.

63. The School Board admitted before Grenier J. that the accommodation proposed before her was reasonable; the principal also accepted this; these restrictions go beyond those in other jurisdictions where there has been no incident in decades of use;

64. The burden of proof on accommodation is on the party required to accommodate, that is on Respondent: Desroches, supra; Ontario Human Rights Commission & O'Malley v. Simpson Sears, supra; Central Alberta Dairy Board,supra; Public Service Employee Relations v. B.C.G.S.E.U., supra; a Commission de Droit de la Personne v. Collège Notre Dame, [2002] R.J.Q. 5 (C.A.); this duty is an onerous one and in Desroches, supra, we read at p. 1559:

> In the matter of housing, as in employment matters, the first option to be explored by a landlord should be to fulfill the wishes of the party who suffers from the indirect effect of the policy in question.

65. It is to be noted that both Respondents offered no instances of danger; therefore the first option to be explored is the accommodation of Appellants;

66. It is clear that some hardship may be imposed on the majority and accommodation can only be refused if it is excessive: Eldridge, supra p. 681; Simpson-Sears, supra; Central Alberta Dairy Board, supra; CDPQ v. College Notre Dame, supra, p. 11; this point was made clear by Professor José Woehrling, L'Obligation d'accomodement raisonnable et l'adaptation de la société à la diversité religieuse, (1998) 43 McGill L.J. 325 at p. 346:

> En second lieu, concernant la sévérité du critère de la contrainte excessive, il faut souligner que les tribunaux canadiens ont clairement rejeté le critère de minimis retenu par la Cour suprême des États-Unis dans l'arrêt Hardison c. Trans World Airlines, selon lequel il y a contrainte excessive dès qu'une mesure d'accommodement entraîne des coûts plus que minimes pour l'employeur ou le fournisseur de biens ou de services. Un tel critère, dans la mesure où il est fort peu exigeant, constituerait évidemment une limite sérieuse à l'obligation d'accommodement, voire une négation pure et simple de celle-ci...
>
> Enfin, la jurisprudence et la doctrine souteinnent que celui qui veut écarter une obligation d'accommodement en invoquant la contrainte excessive doit démontrer les coûts et les autres conséquences indésirables de l'accommodement sur la base de preuves factuelles, et non à partir de simples hypothèses ou de spéculations théoriques.
>
> **underlining ours**

67. It is evident that the accommodation ordered by Grenier J., which is in fact less permissive than in other jurisdictions, does not cause excessive harm under any standard; there is no reason for Quebec to be less sensitive than other jurisdictions to the particular needs of Sikhs;

68. To suggest that an imaginable, hypothetical danger is sufficient would clearly violate B.C. (Superintendent of Motor Vehicles) v. B.C. (Council of Human Rights), [1999] 3 S.C.R. 868; moreover, the fact that most Canadian associations and schools have found no need for the ban militates against the use of "danger" in this case; it follows that the Court of Appeal clearly erred in overturning the trial judgment;

E. The social issue

69. There are several ways to oppose the right to a Kirpan in school in a consistent manner, although Appellant submits that each of them fails; what is not permitted is to jump from one argument to another;

70. One type of opposition to the Kirpan could be expressed by a French republican ethic which has recently led to the banning of all religious symbols from school in France, indifferently as to the religions;

71. The sweeping new French law is clearly an anomaly caused by France's very special demographic and political situation;

72. Whatever the merits of such a system may be, it is not ours and it is clearly not consistent with cases such as Big M., supra, Amselem, supra, Pandori, supra, Rosenberg, supra, B.C. Superintendent of Motor Vehicles, supra. Eldridge, supra, Desroches v. Commission des droits de la Personne, [1997] R.J.Q. 1540, and Commission scolaire Régionale de Chambly v. Bergevin, [1994] 2 S.C.R. 525;

73. It is no longer possible to impose such a system in Canada except by constitutional amendment;

74. In any event, it is difficult to imagine a serious human rights law Charter anywhere in the world that does not protect religious and free conscience rights

and accommodate believers and even those foreign societies which have a strict separation of church and state tend to allow the exemptions:

> Tenafly Eruv Association v. Borough of Tenefly, U.S. Court of Appeals 3rd circuit, 01-3301, March 21, 2002;
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> Wisconsin v. Yoder, [1972] 406 U.S. 205;
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> Sherbert v. Verner, 374 U.S. 398;
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> Affaire Cha'are Shalom Ve Tsedek v. France, Cour Européenne des Droits de l'Homme, 27417/95 27 juin 2000;

75. The second argument could be the impossibility of reasonable accommodation if this were demonstrated; however, the Court of Appeal accepts that Grenier J.'s solution could be applied effectively, supra par. 16;

76. The small difficulties that might arise in gymnastic classes are clearly not as serious as those for handicapped students who are accommodated without complaint;

77. Given the rule that some inconvenience may be imposed on the majority, impossibility cannot be seriously defended as an answer to Appellant;

78. This leaves the argument of safety which the Court of Appeal invoked;

79. In general, danger is a matter of statistics and empirical evidence;

80. For instance, the dangerous nature of pharmaceutical substances or tobacco is normally demonstrated empirically (RJR MacDonald v. A.G. Canada, [1995] 3 S.C.R. 199);

81. In the present case, no empirical evidence of danger has been put forward;

82. A geometry compass or a baseball bat and, indeed, an automobile used for an excursion and all gymnastic equipment are per se even more dangerous than a Kirpan protected in the way Grenier J. ordered;

83. In the case of automobiles and gymnastic equipment, there would be no difficulty in finding examples of injuries and fatalities (B.C. Superintendent of Motor Vehicles, supra);

84. Yet, the Respondents do not wish to ban the use of automobiles, gymnastic equipment and compasses from schools because they perceive the positive gains from their use;

85. They do not perceive any gains from respecting Appellant's religious views; yet the purpose of the Charter is precisely to bestow dignity and value upon the religious beliefs and the conscience of individuals who find themselves in the minority;

86. Respondents thus mix the arguments of safety and secularism even though logically they are totally distinct;

87. It is therefore essential that the Charter be applied to make certain that this relatively easy accommodation is made and the Kirpan, subject to Grenier J.'s restrictions, is permitted in the public schools of Quebec;

F. The administrative law issue

88. The Court of Appeal clearly deferred to the school board on this matter; Respondent had strenuously asked for such deference before the Court of Appeal;

89. This deference fails to take into account Chamberlain v. Surrey School District No. 36, [2002] C.S. 86;

90. The majority in that case held that, in ordinary matters, a standard of "reasonableness simpliciter" is applicable to school boards; this is clearly not the highest standard of deference; however, in paragraph 11, McLachlin C.J.C. continued:

> On the other hand, the decision of whether to approve the three books has a human rights dimension. The Board must decide whether to accommodate certain parents' concerns about the books at the risk of trumping a broader tolerance program and denying certain children the chance to have their families accorded equal recognition and respect in the public school system. Courts are well placed to resolve human rights issues. Hence, where the decision to be made by an administrative body has a human rights dimension, this has generally lessened the amount of deference which the Court is willing to accord the decision: Ross v. New Brunswick School District No. 15, [1996] 1 S.C.R. 825, at Para. 24; Trinity Western University v. British Columbia College of Teachers, [2001] 1 S.C.R. 772, 2001 SCC 31, at para. 17; Pezim, supra, at p. 590; Canada (Attorney General) v. Mossop, [1993] 1 S.C.R. 554, at pp. 584-85, per La Forest J.
>
> **underlining ours**

91. In other words, one cannot separate the administrative law and the Charter arguments completely, and in a case such as this where basic rights are involved, there should be little deference; moreover, reliance on other parents' sense of outrage was deemed in that case to be an irrelevant consideration; in paragraph 33, McLachlin J.C. said:

> Parental views, however important, cannot override the imperative placed upon the British Columbia public schools to mirror the diversity of the community and teach tolerance and understanding of difference.

underlining ours

92. A related argument, that of absolute secularism in schools since the constitutional amendment terminating the era of confessional school boards would be equally irrelevant and was an issue fully addressed by Lebel J. in his concurring opinion in Chamberlain where he said in paragraph 209;

> I share the view of both Mackenzie J.A. and the Chief Justice that s. 76 does not prohibit decisions about school governance that are informed by religious belief. As Mackenzie J.A. points out, the history of the words "secular" and "non-sectarian", which at the time they were adopted meant something like "non-denominational Christian", makes such a conclusion impossible. Furthermore, it is precluded by the language and the spirit of s. 76, which aims to foster tolerance and diversity of views, not to shut religion out of the arena. I respectfully disagree with the opinion of the chambers judge that s. 76 forbids the Board to make any decision based on religious considerations, and requires its members to confine their religious beliefs to the private sphere. In my opinion, this approach would almost make religious unbelief into a species of sectarianism or dogma.

underlining ours

93. Reliance on the spurious safety issue, in the light of Canadian jurisprudence and practise and the solution in similar democratic countries is also an illustration of the use of wrong criteria; this is particularly evident when one invokes arguments based on issues of street gangs and past cases which dealt with proved drug use (R. v. M. (M.R.), [1998] 3 S.C.R. 393) as an argument in a situation where Appellant is admitted to be peaceful and law-abiding, where other, sharper objects are available to all; and where not a single school incident with a Kirpan can be demonstrated despite decades of practise in Canada and the U.K.; it is helpful as well to consider the case of Smitherman v. Powers, 02 CU-227705CM3 in which the Ontario High Court set aside a school decision to prevent Plaintiff from

bringing his same-sex date to the graduation dance; school rules cannot prevail against basic rights and no deference is due were such rights are violated;

94. In administrative law, the conclusion would be clearly that, although the prohibition on weapons is perfectly reasonable, a Kirpan is not included in it and is certainly not included when combined with all the safeguards stipulated by Grenier J.; the School Board's decision to affirm a blanket prohibition is manifestly unreasonable and is a fortiori unreasonable on the simpliciter standard;

G. Costs

95. Appellant asks for costs in all Courts and, in this Court, on a solicitor-client basis given the disparity of means between the Parties;

PART IV. CONCLUSION

Applicant asks that the appeal be allowed with costs on a solicitor-client basis in this Court and with party and party costs in the courts below and that the Court of Appeal judgment be set aside and Madame Justice Grenier's judgment be restored;

MONTREAL, this 20th day of December 2004

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