

# BALANCING COMPETING RIGHTS: A STAKEHOLDER MODEL FOR DEMOCRATIC SCHOOLS

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In this article, I discuss a Canadian public school controversy and Supreme Court of Canada decision involving competing stakeholder rights to freedom of religion, safety and equality. Policy considerations that allowed one group of stakeholders to express their constitutional rights raised concerns among other stakeholders. A policy vacuum and a lack of guidelines for educational policy-makers exist as Canadian schools become increasingly diverse, and as more individuals assert their rights under the Canadian *Charter of Rights and Freedoms*. I have provided a Stakeholder Model to help school officials navigate competing rights through non-arbitrary and constitutionally compatible policy decisions.

Key words: religious expression, secular education, safety, non-arbitrary policy decisions

Dans cet article, l'auteure se penche sur une controverse apparue dans les écoles publiques canadiennes sur la base d'une décision de la Cour suprême du Canada au sujet d'un conflit de droits opposant liberté de religion, sécurité et égalité. Les considérations de principe qui ont permis à un groupe de personnes intéressées d'exprimer leurs droits constitutionnels ont suscité des inquiétudes au sein d'autres groupes. Il existe à ce propos un vide politique et une absence de directives à l'intention des décideurs en éducation au Canada. Or, les écoles canadiennes deviennent de plus en plus diversifiées et un nombre accru de personnes affirment leurs droits en vertu de la Charte canadienne des droits et libertés. L'auteure fournit un modèle pour les parties en présence permettant d'aider les autorités scolaires à naviguer à travers des droits qui se font concurrence dans des décisions d'orientation non arbitraires et compatibles avec la Constitution.

Mots clés : expression des convictions religieuses, école laïque, sécurité, décisions d'orientation non arbitraire

Canadian schools provide a context in which educational exchange of cultural, moral, religious, and language differences has the potential to enrich students' lives. This milieu can also produce an environment where competing rights, discrimination, and the exclusion of some students is a reality. As Canada undergoes changing demographics and immigration patterns, governments and schools have introduced numerous policies to promote equality, reduce discrimination, and foster social responsibility. Many school policies and mission statements express as their stated intent the desire to foster "democratic school environments." Regrettably, research suggests that many school administrators and teachers remain ill-equipped to achieve these goals; and that the written intent of seemingly sensible policies that reflect democratic ideals is less successfully implemented in practice (Anand, 1999).

In recent years, Canadian educators have been required to make difficult choices on allowing students to dress according to their religious and cultural norms, or carry religious symbols (including knives) to school. Some institutions have been asked to provide prayer space during school hours (when space is often at a premium); allow students to wash their feet before prayer in cloakroom washbasins; or exclude books or resources in their teaching that might offend the religious beliefs of some stakeholders. Moreover, parents and students are less reluctant to bring court challenges asserting their rights to freedom of religion, expression, and equality since entrenchment of the Canadian *Charter of Rights and Freedoms* (1982, the "Charter") into the Canadian Constitution.

In this article, I address the policy challenges that confront educators in balancing religious freedoms in a democratic and secular school context. I discuss a recent Supreme Court of Canada case (Multani (*tuteur de*) *c. Commission scolaire Marguerite-Bourgeoys* 2006- "Multani") involving the banning of a Sikh religious symbol (kirpan) from a Quebec school. The case resulted in a hotly debated controversy over the right of students to carry a symbolic knife to school for religious purposes, and its perception as a potential weapon by concerned parents. Policy considerations that allowed one group of stakeholders (the Sikh

community) to express their constitutional rights raised deep concern among non-Sikh parents that their children would be harmed.

Schools need help to address these dilemmas and avoid legal liability. To that end, I introduce a simple Stakeholder Model that might better equip policy makers to avoid controversy, save enormous legal costs, and foster democracy in schools. Moreover, I propose that university professional-development and teacher-education courses incorporate knowledge and awareness of human rights principles and *Charter* guarantees to inform non-arbitrary, inclusive, and constitutionally compatible educational policies.

#### THE DILEMMA

Contemporary Canadian schools continue to grapple with the notion of secularism in a democracy despite court challenges across Canada that resulted in secular schools. Class action suits by parents in Ontario and British Columbia respectively were successful in eliminating the Lord's prayer and religious teachings from public schools (Zylberberg, 1988; Roussow, 1989). These cases resulted in amendments to provincial school statutes directing that public schools should be secular. Even in Quebec, where denominational education has prevailed for many years, new curriculum reforms direct that specific religious teachings will no longer be allowed in schools after 2008 (Proulx, 2005). And yet, the Canadian *Charter* guarantees the right to *freedom of religion and conscience* (S. 2(a)); *freedom of expression* (Section 2(b)); and *equality* (Section 15); and, most provincial human rights codes state as their objective, *reasonable accommodation* of individual, religious and cultural differences to the *point of undue hardship*. Paradoxically, as provincial school statutes move towards increased secularism in schools, Bibby (2002) suggests that a form of religious restlessness is emerging across Canada, as parents and students assert their rights to religious expression. Often, such expression takes the form of clothing and symbols, or moral values and beliefs that religious stakeholders argue cannot, and must not, be separated from their educational experiences at school.

Hence, the challenge for educational policy makers comes in deciding between cultural or religious artifacts and clothing (that will inform and benefit all students towards inclusive and democratic

citizenship), and information or artifacts that might be deemed morally or physically harmful to a captive audience. As agents of the state, they must interpret school statutes on secularism within constitutional parameters.

Since inception of the *Charter*, Canadian courts have heard a number of challenges by parents alleging that school policies infringe their children's fundamental rights to freedom of religion, freedom of expression, and/or equality as guaranteed by the *Charter* (*Chamberlain*, 2002; *Multani*, 2006). However, to participate in democratic schooling, individual members must, from time to time, give up certain rights and privileges for the benefit of the greater good. No right in a democracy is unfettered – there are reasonable limits. Assessing what those reasonable limits are often proves to be a difficult task in schools. The late Prime Minister Pierre Elliott Trudeau and the provincial premiers wrote “reasonable” limitations into Section 1 of the *Charter*, which states:

*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. (Schedule B, *Constitution Act, 1982, Canada Act*, c. 11 (U.K.).

Before applying this section, judges must first determine whether a protected *Charter* right has been infringed by a challenged law or policy. If they find that the rights of an individual or group are impaired, the law or policy is found to be *unconstitutional* because it overrides fundamental *Charter* rights. Judges have the authority, especially in the Supreme Court of Canada, to strike down or quash an offending law or policy. However, because no right in a democracy is unfettered, courts sometimes allow unconstitutional policies if they are implemented in the interests of the larger number of stakeholders in society. Using a balancing test adopted in the famous *R v. Oakes* (1986) case, and subsequent variations thereof, judges arrive at non-arbitrary decisions once they have assessed: a) whether the challenged policy was “pressing and substantial” (e.g., to protect stakeholders or prevent harm); b) whether it benefits the larger number of stakeholders; and c) that even when a policy impairs minority rights, an effort is made by the

policymaker and members of the institution to minimize the negative effects of the infringement (minimal impairment of rights).

Safety issues might justify restricting certain individual rights for the greater good. For example, since the tragic events of September 11, 2001, airlines justify restrictions on sharp objects including nail files and scissors to reduce the risk of terrorism. This policy is in the interests of public protection although it restricts the freedom of individual members of the public to choose what they take with them when they travel. The minimal impairment standard in this example might be that, although sharp articles may not be carried on board aircraft personally, they are generally allowed in baggage that is checked. Although it minimally impairs the rights of airline passengers, it keeps all of them safe.

Similarly, in the school context, if officials can demonstrate that a policy is needed to protect the interests of a larger number of students, it may not be struck down even though it discriminates against a few people. The case study discussed below illustrates the adjudication process that courts use to strike down or allow a challenged law or policy. However, it also demonstrates that the issues are never cut and dried, and judges are often criticized for overriding the interests of important stakeholders.

The analysis, therefore, comprises a number of steps through which the valid claims of parties to the action are matched and weighed to determine which claim carries the greatest weight. Educational policy makers can also apply this process when they address controversial policy decisions. The Stakeholder Model illustrates how this process would be beneficial to educators. It is important to note that the onus rests on schools to defend their policies as “reasonably justified in a free and democratic society” if challenged under the *Charter*.

#### LEGALLY DEFENSIBLE POLICYMAKING: THE STAKEHOLDER MODEL

The Stakeholder Model is derived from a legal test that Canadian courts use to decide whether specific laws or policies are “reasonably justified in a free and democratic society” (*R. v. Oakes*, 1986). This model ensures that policy makers take into consideration the broad range of stakeholder rights and interests and incorporate the weighing and balancing process

that judges use when they apply Section 1 of the *Charter*. This guarantees that resulting decisions are non-arbitrary and constitutional. Moreover, it makes sure that those who give up their rights find the experience as painless and non-intrusive as possible. There are three steps to the model:

Step 1: Identify all stakeholders and their significant arguments;

Step 2: Validate key concerns by matching and weighing similar competing arguments to determine which claims carry greater weight;

Step 3: Ensure minimal impairment of infringed stakeholder rights.

Although these steps may appear superficial or mechanistic, it is worth applying them to the Multani case to illustrate how they might have resulted in a less arbitrary decision than outright banning of the kirpan. Critical theorists might plausibly argue that interpretation of which claims are most “valid” is influenced by cultural hegemony and the particular lens (e.g., Eurocentric or androcentric) through which one conceptualizes the issues (Razack, 1999). This argument, however, is precisely why the model is necessary. The tendency for school officials is more often arbitrary to avoid damaging school reputation and diffusing controversy (Larson, 1997). Zero tolerance policies provide an example. This blanket approach to discipline originating in the American military often discriminates against disadvantaged students because it fails to address intersecting and interlocking systems of oppression grounded in racism, sexism, homophobia, or ableism (Razack, 1999). The result is a hostile school environment that precludes equal opportunities for all children to learn. The three steps guide decision makers to overcome hegemonic tendencies by adopting a broader understanding of stakeholder claims and perspectives. Each step allows critical assessment of systemic barriers that exist in their school system. The model encourages a democratic approach to resolving issues of competing stakeholder rights.

## THE CONTENTIOUS KIRPAN

(*Multani (tuteur de) c. Commission scolaire Marguerite-Bourgeoys* (2004 - 2006))

Gurbaj Singh Multani was discovered wearing a kirpan to school when it accidentally fell from his outer clothing in the schoolyard. A kirpan is a ceremonial dagger that male orthodox Sikhs are required to wear as part of their religious obligations. Male members of Sikhism belong to the Khalsa. Historically, the Khalsa was instated to give Sikhs an identity under persecution. Khalsa membership requires commitment to five rules beginning with the letter K – Kesh (uncut hair), Kangi (comb), Kacha (clean underwear), Kirpan (sheathed sword) and Kara (steel bracelet). Khalsa membership gives Sikhs a sense of spirituality and commitment to a sense of morality over forces of evil and injustice (Singh, 1998).

The school principal confiscated the kirpan because it contravened the school's zero-tolerance policy against bringing weapons of any sort to school. The school board later sent Gurbaj's parents a letter stating that as a reasonable accommodation, their son would be authorized to wear his kirpan to school provided that he complied with certain conditions: that the flap covering the kirpan in its sheath was sewn securely and that Gurbaj allow school authorities to inspect the flap sealing the kirpan to ensure safety compliance with the wearing of the ceremonial dagger. Although Gurbaj and his parents agreed to these accommodations as reasonable, the governing board (under pressure from parents and public protestors outside the school) refused to ratify the agreement, citing a violation of Article 5 of the school's *Code de vie* (code of conduct). The school board's council of commissioners upheld that decision, notifying Gurbaj and his parents that he would be allowed to wear a symbolic kirpan only in the form of a pendant that rendered it harmless.

The family then filed a motion in the Quebec Superior court for a declaration invalidating the council of commissioners' decision. In response to the parental concerns about safety, the Quebec Superior Court (2002) placed added restrictions but allowed Gurbaj to wear the kirpan to school provided that he wore it underneath his clothes, that it be contained in a scabbard made of wood, not metal, that it be wrapped

in a secure manner, that he allow school staff members to inspect it at any time, that he would not be allowed to withdraw it from its scabbard at any time, and that he would immediately report its loss to school authorities. His failure to meet any of these conditions would cost him the right to wear the kirpan to school.

The Quebec Court of Appeal (2004), however, overturned this decision, banning the kirpan from school altogether. Although the court agreed that such a decision impaired the students' religious rights under Section 2(a) of the *Canadian Charter*, and s. 3 of *Quebec Charter of Human Rights and Freedoms*, it held that the ban was justified under Section 1 of the *Canadian Charter* as a reasonable limit on Gurbaj's constitutional rights. In support of this reasoning, Lemelin J.A. noted that case law upheld a ban on the kirpan aboard commercial aircraft and that similar considerations were necessary in schools given the increase in violent incidents.

The un-contradicted evidence described an upsurge of violent incidents where dangerous objects were used. School staff have an important challenge to meet, namely, the obligation to provide an environment for learning and to combat this violence. I cannot convince myself that the security requirements of schools are less than those required for the courts or airplanes. (para. 84)

This ruling came under significant criticism from some scholars (Clarke, 2005; Smith, 2004). These academics argued that in Ontario (*Human Rights Commission v. Peel Board of Education*, 1990), the wearing of the kirpan in school was ruled to be justifiable provided students met stringent conditions similar to those that the Quebec Superior Court imposed on Gurbaj. Smith (2004) observed a lack of evidence to suggest that kirpans have been used in a threatening way in any Canadian schools. He argues the Quebec Court of Appeal was fixated on hypothetical considerations, whereas it ought to have considered available evidence.

The failure to accommodate cannot be defended on the basis of possible or hypothetical problems, but only on the basis of demonstrable problems placed in evidence. This was the position adopted by the trial judge, but rejected by the Court of Appeal that accepted the hypothetical problems presented by the appellant school board. (p. 125)



This perspective is also supported by Jean-Francois Gaudreault-Desbiens (2002) who noted that the Quebec Attorney-General's intervention at the trial level affirmed a precise mandate of zero-tolerance against knives in school. Gaudreault-Desbiens expressed his disappointment that the Attorney General sent an intolerant message about the Quebec government's conception of tolerance in a democratic and pluralist society: "[L]e Procureur général du Québec a envoyé un triste message quant à la conception qu'il se fait de la tolérance au sein d'une société québécoise libre, démocratique, mais aussi plurielle" (p. 101-102).

The Multani family appealed the case to the Supreme Court of Canada and the high court responded with clear direction on the issue. In a unanimous landmark decision handed down on March 2, 2006, the Canadian superior court set aside the Court of Appeal ruling, and declared the decision of the council of commissioners null and void.

It is worth illustrating the compatibility of the Supreme Court's decision in *Multani* with the process of analysis that would be useful to policymakers and school administrators under the Stakeholder Model.

#### APPLICATION OF THE STAKEHOLDER MODEL

The reasons for judgment in the landmark Supreme Court of Canada decision are encouraging, to the extent that if the Stakeholder Model were applied to the *Multani* case, it would support the non-arbitrary, pluralistic, and democratic approach that informed the reasoning of the Supreme Court justices. A brief stakeholder analysis is offered here.

##### *Step 1: Identifying Stakeholders and Their Significant Arguments*

The key stakeholders in the case were Gurbaj and his family at one end of the spectrum, who represented the religious rights of all Khalsa Sikhs in Canada, and parents who opposed the kirpan. The Multanis indirectly represented the right of all religious persons in Canada to religious freedoms, religious symbols, clothing, and rituals while they attend public schools. Their arguments related to:

- i) The impact of an outright ban of the kirpan on Gurbaj's ability to attend school while abiding by the deeply held religious tenets of his faith, shared by Khalsa Sikhs across Canada;
- ii) Accommodation of religious beliefs and the family's willingness to limits on that freedom.

Stakeholders who supported the ban and opposed the carrying of the kirpan in schools included non-Sikh parents (largely of Caucasian and French-Canadian background) raised three primary concerns: safety in schools, proliferation of weapons in schools, and negative or poisoned impact on the school environment.

Both groups of stakeholders (those for and against the ban) raised arguments as to the effects of the ban or the effects of allowing the kirpan in a democratic school system.

*Kirpan Supporters: Argument - Religious Freedoms under Section 2(a) Canadian Charter.* The Multani family explained that under the Khalsa religious tradition male Sikhs must carry the original kirpan as opposed to a plastic or wooden symbolic version at all times. They had no objection to having the original covered in a wooden sheath and sewn into the clothing, subject to regular inspection by school authorities. They noted that to prevent this religious requirement would significantly, and not minimally, impair Gurbaj's right to freedom of expression under Section 2(a) of the *Charter*. Moreover, it would preclude him from attending school while meeting his religious obligations.

In support of this argument, the Supreme Court of Canada (SCC) ruled that the ban clearly infringed Gurbaj's rights to freedom of religion under Section 2(a) of the *Canadian Charter*. They observed that Gurbaj genuinely and sincerely believed that he would not be complying with the requirements of his religion if he wore a plastic or wooden kirpan. Attending school without it would severely (and not minimally) impact his religious rights and beliefs.

*Kirpan Supporters: Need to Accommodate and Minimally Impair Charter Rights.* Significantly, the SCC directed that schools must carry out their responsibility to impart values of acceptance, accommodation, and tolerance in a democracy. Charron J. directed that:

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 instill in their students this value that is ... at the very foundation of our democracy. [paragraph 76]

He went on to say that a total prohibition against wearing a kirpan to school undermines the value of this religious symbol, sending students the message that some religious practices do not merit the same protection as others. Accommodating Gurbaj and allowing him to wear his kirpan under certain conditions demonstrates the importance that our society attaches to protecting freedom of religion and showing respect for its minorities.

*Stakeholders Opposed to Kirpan: Safety and Symbol of Violence.* In response to argument by stakeholders who supported the ban as a *pressing and substantial* objective under Section 1 (safety for the greater number of children in the school system), the SCC justices noted many objects in schools could be used to commit violent acts, which students can much more easily obtain, such as scissors, pencils, or baseball bats. The high court ruled that the arguments in support of a prohibition of the kirpan failed. The risk of Gurbaj using his kirpan for violent purposes or of another student taking it away from him was very low, especially when worn under the restrictions that Gurbaj had agreed to. In response to 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, the court proffered that not only does the evidence contradict this position, but that it is also disrespectful to believers in the Sikh religion because this argument does not take into account Canadian values based on multiculturalism.

*Stakeholders Opposed to Kirpan: Proliferation of Weapons in Schools.* Notably, the court found no evidence of violent incidents related to the presence of kirpans in schools, or that allowing the kirpan at school could have a ripple effect. The justices observed that in 100 years of Sikhs carrying kirpans to Canadian schools, not one incidence of violence has been reported or recorded.

Ironically, the Court of Appeal had taken into consideration the fact that kirpans have been banned from airlines. But that court's reasoning was that, therefore, kirpans ought to be banned from schools as well. The

Supreme Court found this reasoning to be flawed. When the SCC considered (especially post-September 11) that scissors, box cutters, geometric instruments, and other so called harmless cutting and measuring instruments continue to be allowed in schools whereas they are longer allowed on aircraft, parents are not concerned about violence from the use of these cutting instruments or raise objections, although the world witnessed the tragedies resulting from use of box-cutters in the airline high-jackings on September 11. Thus the argument comes down on the side of those that would allow the kirpan for use as a religious symbol. Even though schools have in place zero-tolerance against weapons, and in American schools, security checks and cameras attempt to prevent violence, there is sufficient evidence to suggest that students who want to engage in violent activities will find ways to do so regardless of anti-violence policies or security barriers, especially in cases where systemic barriers of oppression persist and overlook homophobia, racism, and other forms of discrimination (DiGuilio, 2001; Shariff, 2004).

*Step 2: Validating and Weighing Stakeholder Arguments*

Under Step 2 of the Stakeholder model, it could be argued that because there was no clear evidence of violence in Canadian schools resulting from kirpans, the reasonable restrictions placed on Gurbaj by the school board (the wooden sheath sewn into his clothing and regular checks by school personnel) were justified in a free and democratic society. Although these restrictions limited his religious freedoms under the *Charter*, they did not place an outright ban or completely ignore them.

When analyzed under Step 2, it is also evident that the school commissioners, the Attorney General, and the Quebec Court of Appeal gave undue attention to the unfounded concerns of one group of stakeholders. Without presenting concrete evidence of danger from the kirpan, parents who were worried about the potential for violence successfully launched vocal protests reported by the media, to override the rights and interests of the Sikh parents and their children. The SCC has established that the arguments posed by stakeholders who were opposed to the kirpan in schools were not validated in a legal analysis and therefore carried less weight. Moreover, it is likely that some parents within the school community may not have objected to the kirpan (as

long as reasonable restrictions were in place to avoid the potential for harm, such as those the school board and the Quebec Superior Court imposed) and who, in fact, might want their children to learn about different religious practices. In any school community there are always parents who want their children to learn about other people's religious cultures and traditions so that they become democratic citizens in a pluralistic society.

*Step 3: Ensuring Minimal Impairment of Infringed Rights*

By ignoring the broad range of religious stakeholders in the school system, and their valid claims altogether, the school commissioners, the Quebec Court of Appeal, and Attorney General more than minimally impaired the religious rights of the Sikh community. Religious rights (as Supreme Court of Canada established in *Chamberlain v. Surrey School District No. 36*, [2002] S.C.J. No. 87 ("*Chamberlain*") and now in *Multani*), cannot be left at the schoolhouse gate. *Chamberlain* involved the banning of three children's books from kindergarten because they discussed same-sex families. In that case, the rights of freedom of expression collided with religious values against homosexuality. Like the *Multani* case, parents who agreed with the book ban worried about their children's safety albeit moral safety rather than physical safety.

In *Multani*, the school board had arrived at a reasonably justified compromise that did not place any hardship on school officials or teachers other than regular checks to ensure the kirpan was securely in its case and sewn into the clothing. Had their decision been honored by the school commissioners, the school board might have saved hundreds of dollars in legal costs.

The approach taken by the school board and subsequently the Quebec Superior Court carried greater weight because it met *Charter* and human rights objectives and minimally impaired Gurbaj's rights. The school commissioner's and Quebec Court of Appeal's subsequent decision not to allow the kirpan impaired Gurbaj's rights to a greater extent. The Court of Appeal's decision was not well supported by the evidence. Nor did the Court of Appeal's decision advance the democratic objectives that were given so much emphasis in the Supreme Court decision. Based on the *Oakes* test used to balance constitutional

rights under Section 1 of the *Charter*, the Supreme Court found that although the council of commissioners' decision to prohibit the kirpan was motivated by a *pressing and substantial objective* (the need to ensure a reasonable level of safety at the school), they had not demonstrated that Gurbaj's religious rights were *minimally impaired* by the decision.

Both sides were correct in their concern about creating a negative and poisoned school environment. However, the SCC confirmed at several points in the decision that: "The deleterious effects of a total prohibition [of kirpans from schools] . . . outweigh its salutary effects" [51-54] [57-59] [67-71] [76] [79]. Put simply, the ban had a negative effect on school environment because it did not advance the fundamental principles of Canadian democracy. The SCC has iterated in *Chamberlain* and *Multani* that arbitrary infringement of fundamental *Charter* rights in the school context is not acceptable in Canadian schools because censorship of this nature goes against the very tenets of a free and democratic Canadian society. The court also emphasized that, where the decision is questioned in light of other school safety policies against the bringing of weapons to school, it is incumbent on schools to educate their students about the importance of allowing religious freedoms, and assuring accommodation of those freedoms in ways that protect student safety while respecting religious and minority rights.

#### OTHER CONTROVERIES: BANNED CLOTHING AND PRAYER SPACE

Finally, it is worth mentioning similar controversies briefly. Over the last few years, international governments and public institutions have objected to religious clothing such as the hijab, niqab, and sikh turbans (CBC News, 2005; Lampert, 2005; Schmitz, 2005; Zine, 2001) resulting in court challenges. Some have been successful; whereas others continue to be debated. In all cases, the issue is one of control – and the extent to which schools can manage what their students wear and bring to school, especially when these items have perceived negative impact on safety and learning.

In England, a 15-year-old Bangladeshi student, Shabina Begum, was successful in her court action against the school to allow her hijab instead of the school uniform (Jun, 2005). In France, members of the Muslim and

Sikh communities have had minimal success due to the French policy of separation of the church and state. This policy, rooted in the 1800s, was reaffirmed by public referendum in 2004 supporting complete separation of religion from secular schools. Under this policy, turbans, hijabs, yarmakahs, niqabs, and any other form of religious clothing are banned.

In Quebec, the debate has taken many forms and remains unresolved. The case of a grade-11 student, Irene Waseem, was brought before the Quebec Human Rights Commission which delayed a decision indefinitely (Lampert, 2005). Irene was barred from wearing her hijab to a private school. In response to the Muslim community's anger on the issue, the commission finally made an official ruling stating that private secular schools (many of which are partially funded by the Quebec government), do not have the legal right to ban the hijab under Quebec's *Charter of Human Rights and Freedoms*. Despite this ruling, the Quebec government has publicly stated that each institution is free to apply the rule as it sees fit.

Another controversy was sparked in Quebec over the right of Muslim students to wear the niqab to school because teachers perceived it as being too restrictive. They argue it affects student learning and teachers' ability to assess their students effectively. The niqab covers the entire face, allowing only a slit for the eyes. Some teachers argue it is difficult to ensure correct identify – how can they tell if another student is writing the exam instead of the student who is registered to write it? The face cannot be identified because of the extensive covering (Lampert, 2005). Moreover, some teachers cannot assess whether their teaching is well received or understood because facial expressions are not visible. An example is a tourism (customer service) course where reading other people's expressions is an aspect of classroom activities.

Schools have also objected to religious clothing on the basis of safety issues during physical education classes because it does not conform to the school uniform. They contend that if all other students are required to wear the same school uniform, religious students should not be exempted (Clarke, 2005; Lampert, 2005). Physical education teachers worry about hijabs and burkhas getting caught in physical education equipment and endangering student safety. Administrators for these schools might consider the initiatives being taken by corporations such

as IKEA, the furniture manufacturer. Ikea has designed a blue and yellow hijab with the IKEA trademark sewn onto it. It is available for female employees who want to wear the hijab and also complies with the corporation's uniform policy (The Hijab Shop Team, 2005). Similarly, sports corporations have begun to design hijabs made from fleece. These are suitable for winter sports activities such as skiing. Such an approach reflects human rights principles of "accommodation to the point of undue hardship" and would certainly pass the minimal impairment judicial standard under Section 1 of the *Charter*.

Finally, a number of post secondary institutions in Quebec have been challenged (or threatened with challenges) under the Quebec *Human Rights Act* as it relates to their rights to on-campus prayer space (Lampert, 2005). In educational institutions where classroom, office, and laboratory space is at a premium, some students are using stairwells and fire exits to conduct their daily prayers. This practice creates another safety issue in case of fire or other emergencies that require those spaces to be accessible in case of mass evacuations.

Censorship in schools is a reflection of stakeholder conflict in the larger democracy. For example, a well-known Canadian railway company, Via Rail, has also recently banned the kirpan from its trains, generating significant public debate. A Sikh law student was ordered off a train twice for carrying his kirpan. This action resulted in a complaint by the Canadian Civil Liberties Association for unjust violation of his freedom of religion rights under the *Charter* (Schmitz, 2005). The former federal government allowed Sikh Member of Parliament, Navdeep Bains, to carry his kirpan in the House of Commons.

The Supreme Court of Canada has finally provided clear direction regarding the extent to which educational institutions are required to accommodate religious obligations. Assessing the threshold for reasonable accommodation and undue hardship will continue to remain a challenge in Canadian schools. However, school commissioners, school boards, and educational policy makers will no longer be at liberty to ban religious symbols from schools without concrete and substantial evidence that they are harmful to the safety of the greater number of children.



## CONCLUSION

The above school controversies and application of the Stakeholder Model illustrate that it is no easy task to balance competing rights in a diverse school context. Changing times call for creative and innovative approaches to fostering and sustaining democracy in schools. It is interesting to note that corporations like IKEA have taken the lead in accommodating religious clothing. What schools perceive as an undue hardship, corporations have (not surprisingly) seized as an economic opportunity!

The examples discussed in this article illustrate that parents become especially concerned when they perceive threats to their religious values or physical threats to their children's safety. These threats are magnified when parents are continually exposed to negative media stereotypes relating to certain racial or religious groups (Kincheloe, 2005) or stakeholders of a different sexual orientation. School censorship controversies (Herzog, 1997) disclose that over-protective parents have often successfully effected arbitrary censorship decisions through vocal protests and media controversies. Such decisions do not always support democratic interests. In this regard, educational policy makers need improved and in-depth knowledge of their legal obligations by gaining a better understanding of substantive *Charter* and human rights obligations.

Yet even this knowledge is not enough. It is essential that educators and the courts recognize that human rights and *Charter* considerations are generally conceptualized and implemented through a Eurocentric lens (Kincheloe, 2005; Razack, 1999; Shariff, 2004). *Multani* has begun this process. A Eurocentric perspective no longer benefits a diverse and pluralistic society. Neither does it advance the goals of democratic schooling. An emerging approach among legal academics is that of legal pluralism. Legal pluralism approaches human rights from the perspective of a range of legal responses that take into consideration not only individual and group rights, but also institutional obligations to address pluralism. This approach shows greater promise in meeting the needs of a diverse Canadian society. It is compatible with the Stakeholder Model because it takes into account the broad range of pluralistic approaches and obligations. Thus it is important for

university faculties of education and law to collaborate on research and course development on the intersection of law and education, the study of legal pluralism, and the impact of judicial decisions and human rights jurisprudence on educational policy and practice. Informed knowledge of legal pluralism in the context of human rights will go further towards non-arbitrary implementation of educational policy in a democratic school system

Finally, to inform legal considerations, professional-development and teacher-education programs would benefit from incorporating courses in cultural studies, social justice, and critical pedagogy. These would provide prospective teachers and school administrators with opportunities to examine their own assumptions and conceptions about religious and cultural differences and better understand their obligations to students from diverse backgrounds. For example, most educators in Canada's public schools have limited knowledge of the histories or contributions of scholars from the Middle East, Asia, India, or Africa or the historical background of ethnic students who attend their schools (Kharem, 2004; Kincheloe, 2005). Consider for example the intellectual, scientific, and artistic contributions of scholars such as Ibn Rushd (known as Averroes in medieval Spain), a Muslim judge and scholar who was the first to interpret Aristotle's works; Al-Birunia to physics; Ibn Al Haythan, Ibn Sinha, and Al Ghazali to science, astronomy, and medicine (8<sup>th</sup> – 16<sup>th</sup> Centuries – Kharm, 2004; Tejpar, 2003). Democracy in schools requires attention to positive histories and contribution of Canada's diverse racial and religious groups to demystify and counter pervasive and negative stereotypes of Muslims and Sikhs as terrorists. Similarly, it is important to overcome myths about homosexuality that create fears about the spread of HIV/AIDS and reduced procreation. This goal can be achieved by creating a scientifically informed knowledge base on such issues that can be presented in teacher-preparation programs, professional development for administrators, and eventually in sex education classes in schools.

Accessing and incorporating this knowledge into university and school curriculums is by no means an easy task. There is substantial diversity of religious beliefs, practices, language, and culture within the broader religions of Islam, Hinduism, and Sikhism. Therefore, gaining

accurate knowledge about diversity within Canada's multicultural groups will require significant research, program development, and commitment by Canadian government funding agencies, policy makers, academics, and teacher educators.

The Stakeholder Model introduced in this article is a small but important example of simple guidelines that would better equip educators to navigate the dilemmas of competing rights. To ensure that democracy and pluralism thrive in contemporary Canadian schools, it is of fundamental importance that educational policy makers are guided towards ethical, educational, pluralistic, and legally defensible decisions. Without this guidance, some students will continue to be marginalized, making it difficult to keep schools out of court.

#### REFERENCES

- Anand, S. S. (1999). Preventing youth crime: What works, what doesn't and what it all means for Canadian juvenile justice. *Queen's Law Journal*, 25(1), 177-249.
- Bibby, R. (2002). *Restless gods: The renaissance of religion in Canada*. Toronto: Stoddart.
- CBC news (2005, November 9). School won't allow hijab, says Montreal student. Retrieved June 29, 2006, from [http://www.cbc.ca/story/canada/national/2003/09/23/hijab\\_030923.html](http://www.cbc.ca/story/canada/national/2003/09/23/hijab_030923.html)
- Canadian Human Rights Commission. Retrieved March 2, 2006 [http://www.chrc-ccdp.ca/legislation\\_policies/factum/multani\\_p2-en.asp](http://www.chrc-ccdp.ca/legislation_policies/factum/multani_p2-en.asp).
- Canadian Charter of Rights and Freedoms*, Schedule B, *Constitution Act*, 1982, *Canada Act*, c. 11 (U.K.)
- Charter of Human Rights and Freedoms*, R.S.Q., c. C-12. *Loi de l'Instruction Publique*, L.R.Q., c. C-1.
- Clarke, P. (2005). Religion, public education and the Charter. Where do we go now? *McGill Journal of Education*. Special Issue, 40(3), 351-381.
- Gaudreault-Desbiens, J-F. (2002). Du crucifix au kirpan : Quelques remarques sur l'exercice de la liberté de religion dans les établissements scolaires. Dans P. Chagnon (Dir.), *Développements récents en droit de l'éducation* (89-110). Québec: Yvon Blais.

- DiGiulio, R. C. (2001). *Educate, medicate, or litigate? What teachers, parents, and administrators must do about student behavior*. Thousand Oaks, CA: Corwin Press.
- Giroux, H. (2003). *The abandoned generation: Democracy beyond the culture of fear*. New York: Palgrave MacMillan.
- Herzog, M. J. R. (1995). School censorship experiences of teachers in Southern Appalachia. *International Journal of Qualitative Studies in Education*, 8(2) (April-June), 137-148.
- Jun, J. (2005). Supreme Court backs Muslim schoolgirl in uniform dispute. Retrieved November 14, 2005, from Radio Free Europe: <http://www.rferi.org/features.article/2005/03/69>
- Kharem, H. (2004). The great European denial: Misrepresentation of the Moors in Western Education. In J. Kincheloe & S. Steinberg (Eds.), *The miseducation of the West: How schools and the media distort our understanding of the Islamic world* (pp. 117-126). Westport, CN: Praeger.
- Kincheloe, J. L. (2005). *Classroom teaching: An introduction*. New York: Peter Lang Publishing Inc.
- Lampert, A. (2005, October 24). Students want right to prayer space: Multi-faith room. Religious tolerance meets universities' secular character. Montreal, *The Gazette*. A6.
- Larson, C. L. (1997). Is the Land of Oz an alien nation? A sociopolitical study of school community conflict. *Educational Administration Quarterly*, 33(3), 312-350.
- Proulx, J. P. (2005). L'éducation, un bien commun bien partaiculier. Report to the Ministry of Education on secular schooling. Conseil Superior de l'éducation. La gouverne de l'éducation: logique marhance ou processus politus? Rapport annuel sur l'état at les besoins de l'éducation 2000-2001, Quebec: [www.cse.gouv.qc.ca](http://www.cse.gouv.qc.ca).
- Razack, S. (1999). *Looking white people in the eye: Gender, race, and culture in courtrooms and classrooms*. Toronto: University of Toronto Press.
- Schmitz, C. (2005, November 7). Bid to derail Via's kirpan ban: Libertarians sharply criticize policy. Railway gives its passengers steak knives, Civil Liberties Association points out. Montreal, PQ. *The Gazette*, A16.

- Shariff, S. (2004). Keeping schools out of court: Legally defensible models of leadership to reduce cyber-bullying. *Educational Forum. Delta Kappa Pi*, 68(3), 222-233.
- Singh, H. (1998). *These are not symbols*. Retrieved June 29, 2006, from <http://www.sikhs.org/nosymbol.htm>
- Smith, W. J. (2004). Balancing security and human rights: Quebec schools between past and future. *Education & Law Journal*, 14(1), 99-136.
- Tejpar, A. (2003, February). Knowing the world: "Science" in Muslim Cultures of the 8<sup>th</sup> to 16<sup>th</sup> Centuries. Lecture presented at McGill University, Faculty of Education.
- The Hijab Shop Team (2005). *Ikea launches own brand hijab for Muslim staff*. Retrieved June 29, 2006 from <http://www.thehijabshop.co.uk/press/index.php>
- Zine, J. (2001). Muslim youth in Canadian schools: Education and the politics of religious identity. *Anthropology & Education Quarterly*, 32, 399-423.

#### List of Cases

- Chamberlain v. Surrey School District No. 36*, [2002] S.C.J. No. 87 *Egan v. Canada* [1995] 2 S.C.R. 513
- Multani (tuteur de) c. Commission scolaire Marguerite-Bourgeoys* [2002] J.Q. No. 1131 (Que. Sup. Ct.).
- Multani (tuteur de) c. Commission scolaire Marguerite-Bourgeoys*, [2004] J.Q. no. 1904 (C.A.). Leave to appeal to the S.C.C. granted – see [2004] S.C.C.A. No. 198
- Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6.
- Ontario (Human Rights Commission) v. Peel Board of Education* (1990), (sub nom. *Pandori v. Peel Board of Education*), 12 C.H.R.R. D/364 (Ont. H.R. Comm.); motion to quash refused (sub nom. *Peel Board of Education v. Ontario Human Rights Commission*) (1990), 72 O.R. (2d) 593 (Div. Ct.), affirmed (1991), 80 D.L.R. (4<sup>th</sup>) 475, leave to appeal to Ont. C.A. refused (1991), 3 O.R. (3d) 531 (C.A.)
- R. v. Oakes*, [1986] 1 S.C. R. 103, 26 D.L.R. (4<sup>th</sup>) 200 (S.C.C.)
- Russow and Kathryn Lambert v. Attorney General of British Columbia* (1989), 35 B.C.L.R. 29 (S.C.)
- Zylberberg v. Sudbury Board of Education (Director)* (1988) 55 O.R. (2d) 149.