S.C.C. Court File No. 30322

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

BETWEEN:

BALVIR SINGH MULTANI
and
BALVIR SINGH MULTANI, ès qualités of his minor son
GURBAJ SINGH MULTANI
Appellants
(Respondents)

- and -

COMMISSION SCOLAIRE MARGUERITE-BOURGEOYS and
ATTORNEY GENERAL OF QUEBEC
Respondents
(Appellants)

- and -

CANADIAN HUMAN RIGHTS COMMISSION,
ONTARIO HUMAN RIGHTS COMMISSION,
WORLD SIKH ORGANIZATION OF CANADA, and
CANADIAN CIVIL LIBERTIES ASSOCIATION
Interveners

Factum of the Intervener,
Ontario Human Rights Commission

PART I

STATEMENT OF THE FACTS

1. The Intervener, the Ontario Human Rights Commission ("Commission"), relies upon the statement of facts as set out in the factum of the appellants. The Commission takes no position with respect to any disagreement between the parties on factual matters.

PART II

QUESTIONS IN DISPUTE

2. The Québec Court of Appeal, at paragraph 71 of its reasons, concluded that the decision of the board of trustees of the respondent Commission Scolaire Marguerite-Bourgeoys ("CSMB") interfered with the full exercise of religious freedom and conscience of the appellant Gurbaj Singh Multani ("Multani"). In light of that conclusion, the Commission addresses the following question:

> Would permitting Multani to wear his kirpan to school, subject to the conditions set by Grenier J., cause the CSMB undue hardship?

PART III

STATEMENT OF ARGUMENT

A. The Commission's Interest in this Appeal

3. The Commission has two main interests in this appeal. The first is to ensure that the situation in Ontario, established by the *Pandori* decision, is preserved. As reflected in *Pandori*, schools in Ontario must accommodate Khalsa Sikhs by permitting them, under specified conditions, to wear kirpans while at school. In *Pandori*, the increase in violent incidents and the presence of weapons in schools was recognized. However, the board of inquiry and the Divisional Court found that there would not be undue hardship if Khalsa Sikhs wore kirpans to school subject to prescribed conditions. The conditions set by W. Gunther Plaut, the chair of the board of inquiry in *Pandori* are similar to those set by Grenier J. in this case.

> *Peel Board of Education v. Ontario (Human Rights Comm.) and Pandori ("Pandori")* (1990), 12 C.H.R.R. D/364 at para. 235 (Ont. Bd. Inq.), aff'd (1991), 3 O.R. (3d) 531 (Div. Ct.), leave to appeal to C.A. refused [1991] O.J. No. 3200 (C.A.)

4. The *Pandori* decision reflects a thorough assessment of safety concerns, realistic assessment of risk, and a balancing of all factors required in an "undue hardship" analysis. Even though Khalsa Sikh students in Ontario can wear kirpans at school, there has been no incident involving misuse of a kirpan in Ontario schools.

5. The Commission is concerned that if this Honourable Court adopts the reasoning of the Québec Court of Appeal, a large number of Khalsa Sikh students in Ontario schools may be prevented from being able to observe and practice their religion while pursuing the education of their choice.

6. The Commission's second interest in this appeal is to maintain the high accommodation standard and limited undue hardship defence recognized by this Honourable Court in *Grismer* and *Meiorin*.

> *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights) ("Grismer"),* [1999] 3 S.C.R. 868 at para. 20
>
> *British Columbia (Public Service Employee Relations Commission) v. BCGSEU ("Meiorin")*, [1999] 3 S.C.R. 3 at para. 54

7. The Commission is concerned that the decision of the Québec Court of Appeal lowers the standard for proving undue hardship. If this Honourable Court were to adopt

the approach of the Québec Court of Appeal, it would change the nature and scope of human rights protection in Ontario and negatively affect the most vulnerable in society.

B. The Proposed Accommodation would not cause Undue Hardship

8. The Commission supports the appellants' argument that Multani could have worn his kirpan to school, subject to the conditions set by Grenier J., without causing undue hardship to CSMB. As noted by the Québec Court of Appeal at paragraph 17 of its decision, there were several safeguards built into Grenier J's order such as the following:

> (1) That the kirpan be worn under his clothes;
> (2) That the sheath holding the kirpan should not be metallic but in wood, so it no longer would have the appearance of a blunt instrument;
> (3) That the kirpan be placed in its sheath, enveloped and sewn in a safe manner within solid lining and that the entirety be sewn to the guthra;
> (4) That the personnel of the school may reasonably conduct inspections to verify that the aforementioned conditions were respected;
> (5) That the applicant may at no time surrender possession of his kirpan and that the disappearance of the latter must be reported to the authorities of the school immediately;
> (6) Failing compliance with this judgement, the applicant will absolutely lose the right to wear the kirpan to school.

Rather than considering the above safeguards, and conducting a thorough and realistic analysis of actual risk, CSMB relied upon its blanket prohibition. Further, CSMB relied on impressionistic evidence, "intuitive" or speculative safety risks, and misapprehensions about the Sikh faith in prohibiting Multani from wearing his kirpan to school.

(a) The onus is on CSMB to show that to permit Gurbaj Singh Multani to wear his kirpan at school (subject to the restrictions and conditions set by Grenier J.) would cause undue hardship.

9. The decision of CSMB prohibited Multani from wearing his kirpan to school. As recognized by the Québec Court of Appeal, the prohibition constitutes a *prima facie* infringement of Multani's right to freedom of religion. The interference is neither trivial nor insubstantial; he cannot attend his local publicly-funded school.

10. As this Honourable Court has observed repeatedly (most recently in *Syndicat Northcrest v. Amselem ("Amselem"),* [2004] 2 S.C.R. 551 at para. 36), freedom of religion is not absolute. It is subject to limits under section 1 of the *Canadian Charter of Rights and Freedoms* ("*Charter*"), or under applicable human rights legislation, such as Québec's *Charter of Human Rights and Freedoms*. Whether the claimed justification for the infringement is analyzed under the *Charter* or under human rights legislation the focus is the same: the infringement can be justified only if accommodating the needs of the person will cause undue hardship. "Reasonable accommodation" in the human rights context is generally equivalent to "reasonable limits" in a *Charter* analysis.

> *Eldridge v. British Columbia (Attorney General),* [1997] 3 S.C.R. 624 at para. 79

11. "Reasonable" accommodation and accommodation to the point of "undue hardship" are not independent criteria; but are alternate ways of expressing the same concept.

> *Renaud v. Central Okanagan School District No. 23 ("Renaud"),* [1992] 2 S.C.R. 970 at 984

12. As recognized at paragraph 75 of the Québec Court of Appeal's decision, there cannot be a justification under the *Charter* or human rights legislation if there is a "reasonable accommodation measure", *i.e.* one that does not cause undue hardship. The onus of justifying its blanket prohibition rests on CSMB. If CSMB has not proven, on a balance of probabilities, that to permit Multani to wear his kirpan to school (subject to the restrictions and conditions set by Grenier J.) will cause undue hardship, then CSMB's decision is not justified. The onus of proof operates as a "tie-breaker" against CSMB.

> *Ontario Human Rights Commission v. Simpson Sears ,* [1985] 2 S.C.R. 536 at 558

(b) CSMB's interest is to ensure reasonable safety in its schools. There cannot be "absolute" safety.

13. To determine whether CSMB's blanket prohibition on the kirpan is "reasonably necessary" and can be accommodated short of undue hardship, it must be assessed against the defined purpose or goal of the school board's rules; in this case CSMB's interest in having safe schools.

> *Grismer, supra* at para. 24

14. The purpose or goal of a school board's rules cannot be "absolute safety". CSMB's rule prohibiting weapons and dangerous objects does not extend to all objects that may cause injury. There are a variety of objects in a school that could be potentially dangerous and used as a weapon (for example, a geometry compass, scissors or a baseball bat). Moreover, there are a number of potentially dangerous or aggressive students enrolled in schools. While school boards takes some measures, such as the employment

of monitors, to "limit the risks", they do not and cannot eliminate these risks entirely. The goal or purpose of school boards' rules must be reasonable safety.

Pandori, *supra* at paras. 217 – 219 (Ont. Bd. Inq.)

15. The purpose or goal of "reasonable safety" in schools is similar to the State's interest in "reasonable safety" on its highways. In schools, as on highways, the purported goal of "absolute safety" is overbroad, and excludes persons that pose no genuine or realistic threat to school safety.

Grismer, supra at para. 25

16. CSMB insisted that any form of accommodation had to achieve absolute safety. The Québec Court of Appeal decision also searched for absolute safety. For example, at paragraph 95, the Court noted that, "the conditions imposed by the trial judge do not eliminate *all* the risks but delay access to the object" [emphasis added].

(c) CSMB's interest in safety must itself be viewed in the context of a school board's wider mandate.

17. A school board's goal of reasonable safety must also be assessed in the context of the school board's other goals. A special relationship exists between schools and students. Teachers and principals are placed in a position of trust that carries with it

responsibilities. Not only are schools required to teach students, but they must also provide an atmosphere that encourages learning. A school must act in a way that encourages respect and tolerance for all the diverse groups that it represents and serves.

> *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825 at para. 42
>
> *Chamberlain v. Surrey School District No. 36 ("Chamberlain"),* [2002] 4 S.C.R. 710 at paras. 25 and 115 *per* McLachlin C.J.

18. In this respect, it is important to recall what Cory J. wrote about the duty of schools to educate students as to fundamental rights:

> [S]chools also have a duty to foster the respect of their students for the constitutional rights of all members of society. Learning respect for those rights is essential to our democratic society and should be part of the education of all students. These values are best taught by example and may be undermined if the students' rights are ignored by those in authority.
>
> *R v. M (M.R.),* [1998] 3 S.C.R. 393 at para. 3

19. As noted by the Québec Court of Appeal at paragraph 91 of its decision, "a school board which manages schools frequented by students coming from different countries, 80 countries according to the solicitor of [CSMB], has the obligation to promote tolerance". CSMB's complete prohibition on Khalsa Sikh students wearing a kirpan absolves CSMB of its duty to educate staff and students on the important values of diversity and tolerance, and create a positive school environment for all persons served by it.

20. While the presence of violence and dangerous weapons in schools has created problems for educators, and schools have a legitimate safety concern, these same factors

were recognized and balanced by W. Gunther Plaut in the *Pandori* case. As Campbell J. stated in paragraph 17 of the unanimous decision of the Ontario Divisional Court upholding the board of inquiry's decision:

> That the Board of Inquiry was alive to the genuine concerns of the Board about safety and the reasons for its policy, is reflected in the many safeguards the Chair built into his order to meet the concerns of the Board, including the power of the school authorities to intervene in the case of actual or threatened misuse of kirpans and the power of the school authorities to add restrictions if a climate of increasing violence should develop.
>
> *Pandori, supra* at 535 (Div. Ct.)

21. The original agreement negotiated between the Multani family and CSMB, and the conditions set by Grenier J., similar to safeguards built into the order by W. Gunther Plaut in *Pandori*, pose no threat to safety or security in any realistic way, and, importantly, recognize students' freedom of religion. The conditions address any reasonable safety concerns, as did the conditions agreed to by the appellants in *Amselem, supra* at para. 89.

(d) CSMB did not accept the wearing of a kirpan, subject to conditions, because of its insistence on a blanket prohibition. It did not realistically assess the risk.

22. As noted in paragraph 10 of the Québec Court of Appeal's decision, the governing board rejected the "fair arrangement" negotiated with the Multani family because, in its view, the arrangement would be contrary to the blanket prohibition. The

governing board's decision does not reflect any considered analysis of the risk, as required by the procedural component of the duty to accommodate identified by this Honourable Court in *Meiorin, supra* at para. 66.

23. Similarly, the board of trustees upheld the decision of the governing board as being "subject to compliance of the rules of conduct of the school". The board's decision also does not reflect any considered analysis of the risk.

> *Commission Scolaire Marguerite-Bourgeoys v. Multani ("Multani (C.A.)")* (2004), 241 D.L.R. (4th) 336 at para. 12 (Que C.A.)

24. The accommodations that the Multani family sought as part of the "fair arrangement" should have been assessed with respect to the individual seeking the accommodation, as well as the lack of evidence of kirpan-related violence in schools. The evidence was that Multani had a sincerely held religious belief. There was no evidence that he had behaviourial or disciplinary problems or was involved in any violent or dangerous incident related to the wearing of the kirpan in school. There was no reason to believe that Multani would not have complied with all of the safety conditions associated with the wearing of his kirpan.

> *Multani (C.A.), supra* at paras. 58 and 70

(e) Evidence of "risk" sufficient to override freedom of religion must be more than impressionistic or anecdotal.

25. The use of the term "undue" infers that some hardship is acceptable. It is not sufficient for CSMB to refer to a blanket prohibition. CSMB must show actual interference with its goal of reasonable school safety; interference that is not trivial but

substantial. Minor interference is the price to be paid for religious freedom in a multicultural society.

> *Renaud, supra* at 984-985, *per* Sopinka J.

26. Risk assessment is part of the required undue hardship analysis. As Chief Justice McLachlin noted in *Grismer, supra* at para. 30:

> It is clear from *Meiorin* that the old notion that "sufficient risk" could justify a discriminatory standard is no longer applicable. Risk can still be considered under the guise of hardship, but not as an independent justification of discrimination.

27. Some risk is acceptable. Otherwise, there would be no need to assess the "magnitude of the risk" to determine whether it is undue. The risk must be "serious" to meet the test of undue hardship.

> *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*, [1990] 2 S.C.R. 489 at 521
>
> *Grismer, supra* at para. 32

28. Taken at its highest, the evidence of "risk" now relied on by CSMB is impressionistic. There has been no incident of misuse of a kirpan in a school setting. The conditions set by Grenier J. minimize, if not eliminate, any potential risk. Evidence of risk, based on impressions or conjecture, as to what "might" or "could" occur falls short of the evidence required to prove a "serious safety risk" sufficient to limit freedom of religion.

> *Grismer, supra* at para. 41
>
> *Meiorin, supra* at para. 79

Ontario Human Rights Commission v. Etobicoke (City) , [1982] 1 S.C.R. 202, at 212- 213

D. Lepofsky, "The Duty to Accommodate: A Purposive Approach" (1992) 1 Can. Lab. L. J. 1 at 11-13

Hussey v. British Columbia (Ministry of Transportation and Highways) (1999), 36 C.H.R.R. D/429 at para. 47 (B.C.H.R.T) *per* T. W. Patch (adjudicator):

> In *Grismer*, I concluded that the evidence could not be characterized as impressionistic. I noted, however, that the medical opinion was based on theory, not empirical or scientific evidence. Conclusions about risk to public safety must be treated seriously. However, it seems to me that it is consistent with the reasoning of the Supreme Court of Canada in *Etobicoke* to also be cognizant of the danger that, the further the evidence moves from the empirical end of the spectrum towards the impressionistic end, the greater the risk that the evidence may be tainted with irrelevant factors, including prejudice and stereotypes.

Gordy v. *Oak Bay Marine Management Ltd.,* [2004] B.C.H.R.T.D. No. 180 at para. 206 *per* B. Humphreys (adjudicator):

> Similarly, Oak Bay cannot rely on generalized information or broad statistics about individuals with bipolar disorder to justify its refusal to rehire Mr. Gordy.

(f) In the absence of any evidence of misuse of kirpans in schools, the unfounded concerns of other parents cannot carry the day.

29. The original compromise, made between the Multani family and CSMB, worked well. CSMB staff, cognisant of safety concerns, had agreed to the compromise. Between December 21, 2001 and February 12, 2002, there was no problem with the fact that Multani wore a kirpan to school subject to the negotiated conditions. It was only when the governing board (involving other parents) became involved that the compromise was

first seen as unacceptable. The governing board's resolution of February 12, 2002, found the existing compromise "unacceptable" because it fell short of an outright prohibition of the kirpan.

Multani (C.A.), *supra* at para.10

30. The concerns of other parents are further reflected in the reaction to the interlocutory injunction issued by Tellier J. As noted by the Québec Court of Appeal, "this decision displeased certain parents and caused a certain amount of controversy which was echoed in the press".

Multani (C.A.), *supra* at para.14

31. Although parental involvement is important, it cannot come at the expense of respect for the values and practices of all members of the school community. Parental views cannot override the imperative placed upon public schools to "mirror the diversity of the community and teach tolerance and understanding of difference".

Chamberlain, *supra* at para. 33 *per* McLaughlin C.J.C.

32. By relying on parental concerns, in the absence of any evidence of real risk, CSMB's decision was unreasonable in that it allowed the views of a certain part of the community to trump the need to show equal respect for the values of other members of the community.

Chamberlain, supra at para. 71

(g) Improper Reliance upon the Possibility of Wearing a "Symbolic" Kirpan.

33. The resolution of CSMB's board of trustees was based in part on the notion that a "symbolic kirpan" was somehow acceptable. Part of the resolution recited as follows:

> That the wearing of the symbolic kirpan, either in the form of a pendant or in any other form of material which would make it inoffensive, was accepted by the school board.
>
> *Multani (C.A.)*, *supra* at para.12

34. Wearing a pendant or symbolic kirpan made of plastic or wood does not conform to the sincerely held religious belief of Multani. The State is in no position to be, nor should it become, the arbiter of religious dogma (*Amselem, supra* at para. 50). The school board's reliance on the possibility of a symbolic kirpan was unreasonable; it does not remedy nor does it even address the accommodation of Multani's religious beliefs.

35. The school board's reliance on the possibility of a symbolic kirpan is analogous to the suggestion of a communal succah made in the case of *Amselem, supra*; it is "simply not an option" (at para. 74).

(h) Whether CSMB's blanket prohibition is reasonable requires consideration of the experiences of other school boards, which also seek to provide safe environments.

36. The experiences of other school boards are relevant in assessing whether the decision of CSMB is reasonable.

Pandori, supra at para. 187 (Ont. Bd. Inq.)

> *Singh v. Workmen's Compensation Board Hospital* (1981), 2 C.H.R.R. D/459 at para. 4204 (Ont. Bd. Inq.)
>
> *Grismer, supra* at para. 35

37. As recognized by the Québec Court of Appeal, there has been no incident in Ontario schools involving the misuse of a kirpan, despite the legal requirement to accommodate Khalsa Sikh students as set out in *Pandori*.

38. In *Cheema v. Thompson*, a majority of the United States Court of Appeal Ninth Circuit held that a California school district was required to accommodate three Khalsa Sikh students by permitting them to wear the kirpan under conditions similar to those set by W. Gunther Plaut in *Pandori* and by Grenier J. in this case. In so doing, the Court of Appeal noted that:

> This time the school district could not rely on our common sense to save it. Indeed, common sense cut against the school district. The simple fact – documented on the record – was that school districts with a Khalsa Sikh population had managed to accommodate kirpans without sacrificing school safety.
>
> *Cheema v. Thompson*, 67 F.3d 883 at 885 (9th Cir.1995)

39. If schools in Ontario and California have managed to accommodate Khalsa Sikh students without undue safety risk, there is no reason why Khalsa Sikh students in CSMB schools cannot be similarly accommodated.

(i) Conclusion

40. When all of the relevant factors are taken into account, permitting Multani to wear his kirpan at school (subject to the restrictions and conditions set by Grenier J.) would not cause undue hardship.

41. There is no evidence of the misuse of a kirpan in a school setting. Multani is a peaceful, well-behaved boy with no discipline problem of any sort. The decision of Grenier J. contains significant safety measures. Any imagined interference with CSMB's goal of reasonable safety is so close to zero that it cannot be "undue".

PART IV

SUBMISSIONS WITH RESPECT TO COSTS

42. The Intervener Ontario Human Rights Commission makes no submission with respect to costs.

PART V

ORDER REQUESTED

43. The Intervener Ontario Human Rights Commission supports the appellants' request that the appeal be allowed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Toronto, March 21, 2005

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PART VI

TABLE OF AUTHORITIES

Secondary Sources