S.C.C. Court File No. 30322

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE QUEBEC COURT OF APPEAL)

B E T W E E N:

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, CANADIAN CIVIL LIBERTIES ASSOCIATION

OSLER, HOSKIN & HARCOURT LLP
P.O. Box 50, 1 First Canadian Place
Toronto, ON M5X 1B8

Mahmud Jamal
Patricia McMahon

Tel: (416) 862-6764 / (416) 862-4865
Fax: (416) 862-6666
E-Mail: mjamal@osler.com/pmcmahon@osler.com

Counsel for the Intervener,
Canadian Civil Liberties Association

OSLER, HOSKIN & HARCOURT LLP
Suite 1500, 50 O'Connor Street
Ottawa, ON K1P 6L2

Patricia J. Wilson
Tel: (613) 235-7234
Fax: (613) 235-2867
E-Mail: pwilson@osler.com

Ottawa Agent for the Intervener,
Canadian Civil Liberties Association

TO: **GREY CASGRAIN**
Le Cartier
3410 Peel Street
Suite 2102
Montreal, QC H3A 1W8

Julius H. Grey
Tel: (514) 288-6180
Fax: (514) 288-8908
E-Mail: julius.grey@sympatico.ca

Counsel for the Appellants

GOWLING LAFLEUR HENDERSON LLP
160 Elgin Street
Suite 2600
P.O. Box 466, Station "D"
Ottawa, ON K1P 1C3

Brian A. Crane, Q.C.
Tel: (613) 232-1781
Fax: (613) 563-9869
E-Mail: Brian.Crane@gowlings.com

Ottawa Agent for the Appellants

AND TO: **FRANÇOIS AQUIN**
500 Place d'Armes
Suite 2100
Montreal, QC H2Y 2W2

Tel: (514) 288-4241
Fax: (514) 849-9984
E-Mail: f.aquin@medicil.com

Counsel for the Respondent, Commission Scolaire Marguerite-Bourgeoys

NOËL & ASSOCIÉS, G.P.
111 Champlain Street
Gatineau, QC J8X 3R1

Sylvie Roussel
Tel: (819) 771-7393
Fax: (819) 771-5397
E-Mail: s.roussel@noelassocies.com

Ottawa Agent for the Respondent, Commission Scolaire Marguerite-Bourgeoys

AND TO: **BERNARD ROY & ASS.**
1 Notre-Dame Street East
Suite 800
Montreal, QC H2Y 1B6

René Bourassa
Tel: (514) 393-2336
Fax: (514) 873-7074
E-Mail: rbourassa@justice.gouv.qc.ca

Counsel for the Respondent, Attorney General of Quebec

NOËL & ASSOCIÉS, G.P.
111 Champlain Street
Gatineau, QC J8X 3R1

Sylvie Roussel
Tel: (819) 771-7393
Fax: (819) 771-5397
E-Mail: s.roussel@noelassocies.com

Ottawa Agent for the Respondent, Attorney General of Quebec

AND TO: **CANADIAN HUMAN RIGHTS COMMISSION**

PHILIPPE DUFRESNE
Canadian Human Rights Commission
344 Slater Street
Ottawa, ON K1A 1E1

Tel: (613) 943-9162
Fax: (613) 993-3089
E-Mail: philippe.dufresne@chrc-ccdp.ca

Counsel for the Intervener,
Canadian Human Rights Commission

AND TO: **ONTARIO HUMAN RIGHTS COMMISSION**
Legal Services Branch
180 Dundas Street West
8th Floor
Toronto, ON M7A 2R9

Rajesh Dhir
Tel: (416) 314-4519
Fax: (416) 326-9867
E-Mail: raj.dhir@ohrc.on.ca

Counsel for the Intervener,
Ontario Human Rights Commission

GOWLING LAFLEUR HENDERSON, LLP
2600 – 160 Elgin Street
Box 466, Station "D"
Ottawa, ON K1P 1C3

Eduard J. Van Bemmel
Tel: (613) 233-1781
Fax: (613) 563-9869

Email: eduard.vanbemmel@gowlings.com

Ottawa Agent for the Intervener,
Ontario Human Rights Commission

AND TO: **PETERSON, STARK, SCOTT**
300-10366, 136A Street
Surrey, B.C. V3T 5R3

Palbinder K. Shergill
Tel: (604) 588-9321
Fax: (604) 589-5391
E-Mail: pks@petersonstark.bc.ca

Counsel for the Intervener,
World Sikh Organization Of Canada

LANG MICHENER
50 O'Connor Street
Suite 300
Ottawa, ON K1P 6L2

Marie-France Major
Tel: (613) 232-7171
Fax: (613) 231-3191
E-Mail: mmajor@langmichener.ca

Ottawa Agent for the Intervener,
World Sikh Organization of Canada

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FACTUM OF THE INTERVENER, CANADIAN CIVIL LIBERTIES ASSOCIATION

PART I – OVERVIEW AND BACKGROUND FACTS

A. Overview

1. This appeal tests whether Canada can live up to the challenge this Court posed twenty years ago – that "[a] truly free society is one which can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct" (*R. v. Big M Drug Mart*, [1985] 1 S.C.R. 295, p. 336, Dickson C.J.). The central issue concerns the balance between the individual right to freedom of religion and the collective right to safety and security in our schools, or more particularly, whether the fundamental right of an orthodox Sikh schoolboy to wear a kirpan to public school according to the tenets of his faith should yield to stated security concerns. Consistent with the approach in British Columbia, Alberta and Ontario, the Quebec Superior Court found that the right to carry a kirpan could be accommodated without undermining collective safety and security. The Quebec Court of Appeal disagreed, however, approving an outright ban that confirmed that Province's "zero tolerance" policy.

2. The CCLA submits that the Quebec Court of Appeal's decision will undermine fundamental civil liberties based on speculative security concerns that lack a proper evidentiary basis. The CCLA will also argue that the Quebec Court of Appeal failed to achieve the appropriate balance between freedom of religion and security in the school setting, and has established a troubling precedent that could well be applied to many other settings.

B. Background Facts And The Decisions Below

3. The CCLA wishes to highlight certain facts from the record relevant to its submissions.

4. Gurbaj Singh came to Canada in 2000. His schooling had previously been in English and his French was weak (AR, II, p. 40); he attended the Ste-Catherine-Labouré primary school to improve his French (Tellier J.'s Reasons, para. 5: AR, II, p. 5).

5. In November 2001, the school authorities learned that Gurbaj had been carrying a kirpan to school. They decided to prohibit him from returning to school with his kirpan (Que. C.A.'s Reasons, para. 8: AR, I, p. 9).

6. In December 2001, after negotiations that included the school's principal, the School Board proposed an accommodation, allowing Gurbaj to wear his kirpan under his clothes and placed in a sheath with a fold over it, and sewn off securely, such that it could not be removed (voluntarily or accidentally) from the sheath and used as an offensive or defensive weapon. The school authorities were permitted to verify compliance with these conditions (Tellier J.'s Reasons, para. 7: AR, II, p. 42; Que. C.A.'s Reasons, para. 9: AR, I, p. 9).

7. The proposal was communicated by the School Board's legal counsel, who described it as a reasonable accommodation consistent with the Supreme Court of Canada's decision in *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3. (AR, III, pp. 388-389).

8. On February 8, 2002, Gurbaj and his father accepted the School Board's proposal and entered into an agreement with the principal. The parties' lawyers were present (Tellier J.'s Reasons, para. 8: AR, II, p. 42). Gurbaj showed them his wrapped kirpan, according to the conditions stipulated, and "they could not even open the wrapping" (AR, II, p. 39).

9. On February 12, 2002, the school's Governing Board refused to ratify this agreement, finding that the "fair arrangement" proposed by the School Board was "unacceptable" (Que. C.A.'s Reasons, para. 10: AR, I, p. 9; AR, III, p. 391).

10. Gurbaj and his father appealed the Governing Board's decision to the Council of Commissioners (which administers the School Board), which on March 19, 2002 upheld the decision and refused to adopt the proposed accommodation. The Council suggested that Gurbaj wear a symbolic kirpan in the form of a pendant or other inoffensive material (Que. C.A.'s Reasons, para. 12: AR, I, p. 10; AR, III, p. 393). This did not accommodate Gurbaj's religious freedom but instead proposed an alternative to his sincerely held religious practice.

11. Gurbaj and his father brought a motion for declaratory judgment against this decision and sought an interim injunction.

(a) Quebec Superior Court (Tellier J.) Grants An Injunction

12. On April 16, 2002, Tellier J. of the Quebec Superior Court granted the interim injunction, and permitted Gurbaj to wear his kirpan to school under strict conditions. The kirpan was required to be worn under his clothes and placed in a sheath with a fold over it, and sewn off

securely, such that it could not be voluntarily or accidentally removed from the sheath and used as an offensive or defensive weapon. The school authorities were permitted to verify compliance with these conditions (Tellier J.'s Reasons: AR, II, p. 46; see also Que. C.A.'s Reasons, paras. 9, 14: AR, I, pp. 9-10).

13. Tellier J. found that the School Board would not be substantially inconvenienced if Gurbaj were permitted to wear his kirpan under these conditions. He found on the evidence before the Court that school security would not be compromised to any degree (« *Le Tribunal ne croit pas que la sécurité du milieu serait compromise* »). He also noted that no case of kirpan misuse in a school had been reported in the last 100 years, and that in a school environment there are all sorts of other things that could be misused as weapons and result in violence, such as compasses, drawing materials, and sports equipment such as baseball bats (Tellier J.'s Reasons, para. 28: AR, II, p. 45). Any security concerns were therefore without a proper evidentiary basis.

14. Tellier J. also highlighted that the school principal had agreed that Gurbaj could wear his kirpan under strict conditions, which the principal judged would appropriately protect school security (« *Les requérants ont fait à cet égard une proposition que le principal avait jugée sécuritaire et acceptable* ») (Tellier J.'s Reasons, para. 30: AR, II, p. 45).

15. When Gurbaj Singh attended school with his kirpan, as permitted by Tellier J,'s order, he was initially met with heckles and racist taunts – parents "yelling at a 12-year-old boy, calling him a Paki and telling him to go back where he came from" (*Montreal Gazette*, April 22, 2002: AR, III, p. 402). « *Hey! le Paki! Retourne dans ton pays* » (*La Presse*, April 24, 2002: AR, III, p. 404). However, Gurbaj's reinstatement did not otherwise cause any problems, and his school life went back to normal (AR, II, p. 90).

16. A little later, 450 parents signed a petition objecting to young Gurbaj's kirpan on the ground that crucifixes had been removed from display in schools (though individual believers remained free to wear them) (AR, IV, pp. 612-633).

(b) Quebec Superior Court (Grenier J.) On the Merits

17. The Attorney General of Quebec appeared at the hearing on the merits. The full extent of his submission was that Quebec had a "zero tolerance" policy towards weapons in schools, and that included kirpans (Grenier J.'s Reasons, para. 5: AR, I, p. 4).

18. The evidence, however, was unequivocal that other Canadian provinces allowed kirpans to be worn in public schools. The School Board adduced no evidence that they examined or considered the viability of the proposed accommodation in addressing real security risks.

19. The Canadian experience with kirpans in schools as of 1990 was comprehensively reviewed by the Ontario Board of Inquiry in *Pandori v. Peel Board of Education*, 12 C.H.R.R. D/364 (Chair W. Gunther Plaut), appeal dismissed (1991), 80 D.L.R. (4th) 475 (Div. Ct.), Campbell J., Austin (as he then was) and McKeown JJ. concurring, lv. to appeal refused, [1991] O.J. No. 3200 (C.A.), Finlayson J.A., Carthy and Arbour (as she then was) JJ.A. concurring. The Peel Board of Education, the largest school board in Canada (para. 45), had passed a policy banning kirpans in schools, which was successfully challenged as discriminatory under the Ontario *Human Rights Code* by Mr. Pandori, a Sikh teacher for the Peel Board.

20. The Board found that at the time there were over a quarter-million Sikhs in Canada, more than ten per cent of whom were Khalsa (and thus obliged by their faith to carry a kirpan) (para. 12). The Board noted that the kirpan "long ago" lost any association as a weapon, and was now "completely spiritualized", having become a symbol of "morality, justice and order" and "an instrument of the divine itself". An expert witness on Sikhism compared the sword-like appearance of the kirpan to a mace (such as sits in the House of Commons), which was used in times of war as a club but which long ago became a symbol of power, order, and dignity (para. 15). The Board noted that a Sikh is not to use the kirpan in anger as a weapon, and doing so could result in penalties up to and including excommunication from the Sikh faith and community ostracism (para. 29).

21. The Board noted that kirpans were permitted (or not prohibited) at many schools throughout Canada: in Ontario, at schools in Toronto, Scarborough, North York, Etobicoke, Hamilton, London, Halton, Durham, Ottawa and York (paras. 53, 56, 57, 58, 78, 105, 186); in British Columbia, at schools in Surrey (where the largest group of Khalsa Sikhs were concentrated)(paras. 58, 60, 66, 186); and in Alberta (paras. 101, 114, 191). The Board found that "no evidence of kirpan-related violence has ever happened in any school system" (para. 225), even though Sikhs had been in Canada for nearly a century (paras. 176, 202).

22. The Board heard extensive evidence from Peel about the growth of "youth gangs" (para. 62) and knife-related violence in schools (para. 110), yet concluded that kirpans should be permitted under strict conditions. The Board concluded:

> [214] 1. There having been no incident in any Canadian school of a Khalsa Sikh's misuse of his/her kirpan, the argument that Khalsa students or teachers represent a particular personal risk that must be forestalled is, in my opinion, devoid of any merit.
>
> [215] 2. The argument that others might appropriate the kirpan and do harm is also not persuasive. While total safety from irrational and violent behaviour can never be ensured, a kirpan worn under a Sikhs' clothing and secured properly […] is likely to be obtained only after a considerable struggle. If a person is bent on using a knife for aggression, more easily accessible items are available on most school properties: knives, forks, screwdrivers, or cutting instruments from the craft shop. And when it comes to other potential weapons, there is always the ubiquitous baseball bat.
>
> [216] What the respondent [Peel School Board] has really claimed is that potential non-Sikh aggressors might somehow avail themselves of the kirpan and then vent their spleen on someone. In order to control these non-Sikhs who might be prone to violence, is it advisable to curtail the religious freedom of perfectly peaceable persons? For some of them, this might make it impossible to be part of the school system altogether.
>
> [217] That seems to me an unacceptable way of safeguarding students, teachers, and staff. It means sacrificing the rights of some of the best elements in the school to the worst. (emphasis in original)

23. As revealed in the record in the present case, as recently as 2002 the *Globe and Mail* noted how "in 100 years of kirpans being worn at Canadian schools, there had never been a report of a violent kirpan incident. No evidence since has suggested a growing danger" (AR, III, p. 396). Officials of Ontario's Peel School Board, which had formerly opposed the kirpan, were now of the opinion that allowing kirpans in schools is "truly not an issue" and there "has never been an issue or incident, never a complaint or problem […] It can work really well" (AR, III, p. 421). These views are consistent with B.C.'s experiences reported in *La Presse*, which noted that the Vancouver and Surrey school boards, with the largest Sikh communities in Canada, have been able to accommodate kirpans without incident or an official policy on the subject (AR, III, p. 414). The *Montreal Gazette* noted that the Surrey School Board has a strict zero-tolerance policy on weapons, but views kirpans as religious symbols, not weapons. One Surrey official noted that "[t]he key is how things are used. A pen could be used as a weapon, but we're not saying 'No pens in school'" (AR, III, p. 421). The *Gazette* concluded that kirpan accommodation "might be a new issue in Quebec, but it is not in the rest of the country" (AR, III, p. 416).

24. On May 17, 2002, Grenier J. of the Quebec Superior Court affirmed Gurbaj's right to wear his kirpan to school under strict conditions. Like Tellier J., Grenier J. found that there was no evidence of violence involving kirpans in Quebec schools (Grenier J.'s Reasons, para. 6: AR, I, p. 4).

25. Grenier J. noted that the School Board's counsel had indicated that the Board did not disagree with an acceptable accommodation measure that would render the kirpan inoffensive (Grenier J.'s Reasons, para. 3: AR, I, p. 4). Grenier J. concluded that the parties had agreed on the following accommodation: (a) the kirpan must be worn under Gurbaj's clothes; (b) the sheath holding the kirpan should not be metallic but wood, so it would not have the appearance of a blunt weapon; (c) the kirpan must be placed in its sheath, enveloped and sewn in a safe manner within solid lining, with the entirety sewn to the guthra or sheath; (d) school personnel may reasonably conduct inspections to verify that these conditions are respected; (e) Gurbaj may not at any time surrender possession of his kirpan. Its disappearance must be reported to the school authorities immediately; and (f) failure to comply with these conditions would result in absolute loss of Gurbaj's right to wear his kirpan in school (Grenier J.'s Reasons, para. 6: AR, I, pp. 4-5).

(c) Quebec Court of Appeal

26. The Quebec Court of Appeal unanimously allowed the appeal, giving the Province's zero-tolerance policy on kirpans full effect. The Court found that while freedom of religion was infringed, there was no reasonable accommodation possible in the circumstances. The Court said that kirpans are intrinsically dangerous, and concluded that allowing them in schools could escalate into other students carrying knives to defend themselves. The Court also noted that allowing kirpans, even subject to strict conditions, would reduce the School Board's norms of security, and therefore could not be reasonably accommodated in the circumstances (Que. C.A.'s Reasons, paras. 95-103: AR, I, pp. 26-27).

PART II – SUBMISSIONS

1. The *Canadian Charter* Applies To The School Board's Total Ban Of Kirpans

27. The *Charter* applies to the School Board's total ban on kirpans. Discretion conferred by statute does not include the power to infringe the *Charter*. A decision-maker acting pursuant to delegated powers exceeds its jurisdiction if it makes an order that infringes the *Charter* (*Ross v.*

New Brunswick School District No. 15, [1996] 1 S.C.R. 825, para. 31, La Forest J. for the Court; *Eldridge v. British Columbia*, [1997] 3 S.C.R. 624, paras. 19, 24, La Forest J. for the Court). Here, the School Board imposed the total ban pursuant to its statutory powers under the *Education Act*, R.S.Q. ch. I-13.3. Just as the National Assembly cannot itself pass a law in breach of the *Charter*, so too it cannot authorize action in breach of the *Charter*.

28. In addition, the School Board is a branch of government, and thus subject to the *Charter* by operation of s. 32 (*Chamberlain v. Surrey School District No. 36*, [2002] 4 S.C.R. 710, para. 121, Gonthier, dissenting on other grounds; and *R. v. M. (M.R.)*, [1998] 3 S.C.R. 393, paras. 24-25, Cory J., where the parties conceded the point).

2. The Standard Of Review Is Correctness

(a) Correctness Applies To Review The Balance Between Freedom Of Religion And Other *Charter* Rights

29. In recent cases, this Court has reviewed the decisions of administrative tribunals involving freedom of religion under the *Charter* on the basis of correctness.

30. In *Ross*, the Court reviewed a decision of a human rights board of inquiry which found that a school board discriminated against a teacher for making anti-Semitic statements in his off-duty time. In defence, the teacher invoked the *Charter*'s guarantees of freedom of expression and religion, claiming that these allowed him to spread his bigoted views that Christian civilization was being undermined by an international Jewish conspiracy. The Court distinguished between the "administrative law standard" and the "*Charter* standard" of review, finding that while a human rights tribunal's fact-finding and adjudication in a human rights context would be entitled to deference and reviewable under a reasonableness standard (the administrative law standard), the constitutionality of the board's order was reviewable for correctness (the *Charter* standard) (*Ross*, paras. 21-33). La Forest J. also declined to impose internal definitional limits on rights under s. 2(*a*) of the *Charter*, noting that this approach safeguarded the "broadest possible scope to judicial review under the *Charter*" (*Ross*, para. 74).

31. Similarly, in *Trinity Western University v. British Columbia College of Teachers*, [2001] 1 S.C.R. 772, Iacobucci and Bastarache JJ. for the majority applied a correctness standard to review a decision of the British Columbia College of Teachers which denied a private religious

university the right to train teachers eligible to teach in the public school system because the university's religious code of conduct likely excluded gays and lesbians. This issue required the College to weigh freedom of religion against the right to equality in a pluralist society (para. 19). The Court applied a correctness standard, in part because the College's expertise did "not qualify it to interpret the scope of human rights nor to reconcile competing rights" (para. 17).[1]

(b) The Contextual Factors All Point To Correctness

32. Against this background, the standard of review in this case depends on four contextual factors: (1) the presence or absence of a privative clause or statutory right of appeal; (2) the expertise of the decision-maker relative to that of the reviewing court on the issue in question; (3) the purpose of the legislation and the provision in particular; and (4) the nature of the question – law, fact, or mixed law and fact. The overall aim is to discern legislative intent, keeping in mind the constitutional role of the courts in maintaining the rule of law (*Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, para. 26, McLachlin C.J.).

33. As elaborated below, the CCLA submits that these factors all point to a standard of review of correctness, when viewed in the particular context of the chain-of-command and the nature of a school's mission under the Quebec *Education Act*.

(i) The chain-of-command in Quebec schools under the *Education Act*

34. School attendance in Quebec is compulsory from the ages 6 to 16 (*Education Act*, s. 14). Students are entitled to "student services in spiritual care and guidance and community involvement" (s. 6); schools are obliged to "facilitate the spiritual development of students so as to promote self-fulfillment" (s. 36). Teachers must "take the appropriate means to foster respect for human rights" (s. 22(3)). Schools must pursue their mission within the framework of an "educational project" (s. 36), which must "respect the freedom of conscience and religion of the students, the parents and the school staff" (s. 37).

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[1] While in *Chamberlain* McLachlin C.J. for the majority applied a reasonableness standard to review a school board's decision refusing to approve three books depicting same-sex parented families for use in Kindergarten-Grade One classes, the case is distinguishable because McLachlin C.J. decided the case solely on administrative law grounds (the board's failure to act in accordance with the B.C. *School Act* by following an unreasonable process in its decision-making); she expressly declined to decide the case on the basis of the *Charter* (paras. 56-73).

35. Each school has a principal appointed by the relevant School Board (s. 96.8). The principal's functions include ensuring that the school measures up to its statutory obligations in ensuring respect for human rights and freedom of religion (s. 96.13), and proposing rules of conduct and safety measures (ss. 76, 96.13). In this case, it was the principal of the Ste-Catherine-Labouré primary school who originally concluded (with the *imprimatur* of the Board's legal counsel) that the freedom of religion of young Gurbaj could indeed be accommodated in his school.

36. Above each school's principal sits the school's Governing Board, a representative body consisting of elected parents, members of school staff, and other community representatives (s. 42). Its tasks include implementing and evaluating the school's educational project (s. 74), which as noted includes respect for freedom of religion. The Governing Board is "responsible for approving the rules of conduct and the safety measures proposed by the principal" (s. 76). Here, the school's Governing Board refused to ratify the "fair arrangement" for kirpan accommodation agreed upon between the principal and the School Board and Gurbaj and his father.

37. Above the Governing Board of each school sits the School Board. Quebec is divided into French and English language School Boards (s.111), which are required to "ensure that the persons who come under its jurisdiction are provided the educational services to which they are entitled under this Act" (s. 208). Each School Board is administered by a Council of Commissioners, consisting of elected commissioners and representatives of a parents' committee (s. 143).

38. A student or parents of a student affected by a decision of the school's Governing Board may ask the Council of Commissioners to reconsider such decision (s. 9), as Gurbaj and his father did here. The Council has the power to affirm the decision, in whole or in part, and to make the decision which, in its opinion, ought to have been made in the first instance (s. 12). Here, the Council of Commissioners upheld the Governing Board's decision imposing the total ban on kirpans.

(ii) Application of the contextual factors to this case

1. No privative clause under the *Education Act*

39. There is no privative clause in the *Education Act*, and therefore no special basis for judicial deference to the School Board's decisions. Further, this proceeding was brought by way

of a motion for declaratory judgment under art. 453 of the Quebec *Code of Civil Procedure*, which affords a broad right of review to the Superior Court. Both factors suggest "a more searching standard of review" (*Dr. Q.*, para. 27; *Trinity Western*, para. 17).

2. The School Board's expertise does not extend to balancing fundamental rights under the *Charter*

40. The second contextual factor, relative expertise, recognizes that legislatures will sometimes remit an issue to a decision-maker with particular topical expertise or who is adept in determining particular issues. Greater deference is more likely to be extended where the decision-maker is more expert than the courts and the question under consideration is one that falls within the scope of this greater expertise. The analysis under this contextual factor has three dimensions: the court must characterize the expertise of the decision-maker in question, consider its own expertise relative to the decision-maker, and identify the nature of the specific issue before the decision-maker relative to this expertise (*Dr. Q.*, para. 28).

41. In the present context, the expertise of the School Board (and of the Council of Commissioners that administers it) consists mainly in integrating community representation into general educational policy. On safety issues, the School Board acts upon proposals made by the relevant school principal. Here, however, the critical issue was whether freedom of religion could be accommodated consistent with safety imperatives. Given that there is no evidence that the Board examined or considered the viability of the proposed accommodation in terms of real security risks, there can be no claim of factual expertise. As for the balancing of legal rights, this does not fall within the special expertise of the Board's elected and non-elected members, who have no mandated expert qualifications in this area (*Trinity Western*, para. 17).

42. Nor does it appear that the School Board drew on its educational policy expertise in this case. The Board's original accommodation proposal, negotiated by the school principal, was communicated by the Board's legal counsel and expressed counsel's legal opinion that the proposal complied with recent Supreme Court of Canada authority. The Board therefore relied on someone else's expertise with regard to the issue now before the Court (see *Trinity Western*, para. 17, where a decision based on a legal opinion was similarly not viewed as being one within the decision-maker's expertise; and *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)*, [2004] 2 S.C.R. 650, para. 11, McLachlin C.J., where a

municipality failed to engage its expertise in evaluating a rezoning application sought by Jehovah's Witnesses).

43. Moreover, before the Quebec Superior Court the School Board's counsel agreed that the accommodation proposal was reasonable in his personal view, but stated – tellingly – that he had a "political problem", because his client School Board, consisting of elected community representatives, was a "political organization" (« *J'ai une problème politique dont je vous faire part […] mes clients qui sont, comme vous le savez, une organisme politique […] je représente une organisme politique* » (Que. C.A.'s Reasons, para. 30: AR, I, p. 13)).

44. Most importantly, there is no indication that the Board employed any special expertise, and it does not have greater relative expertise than the courts in evaluating a breach of *Charter* rights. The issue is not whether there is a general problem of violence in Quebec schools, but whether in this case the right to freedom of religion under s. 2(*a*) of the *Charter* can be accommodated in a manner consistent with safety.[2] Such a balance between rights is quintessentially a matter for the courts and reviewable on a correctness standard (*Chamberlain*, para. 11; *Trinity Western*, para. 17; *Ross*, para. 24; *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554, pp. 584-585, La Forest J.).

3. The purposes of the *Education Act* as a whole and the provision in particular do not suggest that a balancing of legal rights should be insulated from review

45. The third contextual factor is the purpose of the legislation and the provision in particular. Generally, increased deference is called for where legislation is intended to resolve and balance competing policy objectives or the interests of various constituencies. By contrast, legislation that essentially seeks to discern and apply legal rights will require less deference (*Dr. Q.*, paras. 30-31).

46. Here, the Board was concerned with an issue of school policy that involved a balancing of legal rights. The Legislature cannot have intended to insulate such a determination of legal rights from judicial oversight.

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[2] Even the Respondent School Board has framed the issue as the balance between s. 2(*a*) of the *Charter* and the rights and freedoms of other students to security of the person under s. 7 of the *Charter* (CSMB Factum, para. 82).

4. The questions at issue are questions of law

47. The final contextual factor is the nature of the problem. When the finding being reviewed is one of pure fact, this will militate in favour of showing more deference towards the administrative decision. Conversely, an issue of pure law suggests a more searching review. This is particularly so where the decision will be one of general importance or great precedential value (*Dr. Q.*, para. 34).

48. The issue at bar is a pure legal question, namely, whether there has been an unjustifiable infringement of the *Charter*. The Board was not simply balancing different interests in the community, but determining how to accommodate freedom of religion in the context of a broader program of tolerance and respect for diversity (*Chamberlain*, para. 13). The issue is the proper balance of human rights. This is a question of law that is concerned with human rights and not essentially an educational policy matter. This Court has noted that the "public dimension of religious freedom and the right to determine one's moral conduct have been recognized long before the advent of the *Charter* […] and have been considered legal issues. The accommodation of beliefs is a legal question" (*Trinity Western*, paras. 18-19).

49. Further, it is clear that the issue is one of general importance and will have great precedential value. The Attorney General of Quebec announced the Province's blanket "zero tolerance" policy, allowing the same rule to apply throughout Quebec. Evidence in the record also confirms that "[t]he ruling in the Gurbaj court case, the first kirpan-in-schools challenge in Quebec, will have repercussions for Sikh students at other schools". The principal of another Quebec school stated that he is "waiting for the judge's ruling to decide whether to allow a handful of baptized Sikh students to wear their kirpans" (AR, III, p. 420).

50. Therefore, all four contextual factors point towards a standard of review of correctness.

3. The School Board's Total Ban Infringed Freedom of Religion

(a) The Broad Scope And Jealous Protection Of Freedom Of Religion

51. Religion is about "freely and deeply held personal convictions or beliefs connected to an individual's spiritual faith and integrally linked to one's self-definition and spiritual fulfillment, the practices of which allow individuals to foster a connection with the divine or with the subject

or object of that spiritual faith" (*Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551, para. 39, Iacobucci J. for the majority).

52. The protection of freedom of religion under s. 2(*a*) of the *Charter* is "broad" and "jealously guarded" (*Reference re Same-Sex Marriage*, 2004 SCC 79, para. 53). The freedom encompasses "the right to believe and entertain the religious beliefs of one's choice, the right to declare one's religious belief openly and the right to manifest religious belief by worship, teaching, dissemination and religious practice" (*Same-Sex*, para. 57).

53. The freedom revolves around "the notion of personal choice and individual autonomy and freedom" (*Amselem*, para. 40). This emphasis on individual autonomy has led the Court to focus on the subjective sincerity of religious belief. The Court has eschewed the role of deciding what any particular religion believes (*Amselem*, para. 44, citing *Ross*, para. 70), affirming that courts are not arbiters of scriptural interpretation (*Amselem*, para. 45, citing *Thomas v. Review Board of the Indiana Security Division*, 450 U.S. 707 (1981), pp. 715-16, Burger C.J.).

54. An individual advancing a claim for breach of s. 2(*a*) must establish that: (a) he or she has a practice or belief, having a nexus with religion, which calls for a particular line of conduct, either by being objectively or subjectively obligatory or customary, or by, in general, subjectively engendering a personal connection with the divine or with the subject or object of an individual's spiritual faith, irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials; (b) he or she is sincere in his or her belief; and (c) that the interference is not trivial or insubstantial (*Amselem*, paras. 56-58).

(b) An Infringement Of Section 2(*a*) Was Established

55. The courts below agreed that Gurbaj Singh had established a breach of his right to freedom of religion under s. 2(*a*) of the *Charter* by virtue of Quebec's "zero tolerance" policy imposing a total ban on kirpans in schools.

56. Gurbaj established: (a) a subjective belief that wearing a kirpan is a precept of his faith; (b) that his belief is sincerely held; and (c) that the total ban on wearing kirpans interferes with his sincerely held belief in a manner that is not trivial or insubstantial. Grenier J. in the Quebec Superior Court found: « *pour le requérant, le port du kirpan fait appel à une croyance religieuse*

véritable et non à un simple caprice » (Grenier J.'s Reasons, para. 6: AR, I, p. 4). The Quebec Court of Appeal agreed, finding: « *ils ont satisfait à leur fardeau de preuve d'établir leur croyance religieuse sincère qui n'est pas unique, ni capriceuse* » (Que. C.A.'s Reasons, para. 70: AR, I, p. 21).

57. The impact of the kirpan ban on Gurbaj was far from trivial or insubstantial. Faced with the choice of abandoning his religious beliefs or attending the Ste-Catherine-Labouré primary school, he chose his religion, dropping out of public school and enrolling in a private school (Que. C.A.'s Reasons, para. 18: AR, I, p. 11).

4. The Infringement Was Not Justifiable Under Section 1

58. To justify the intrusion on freedom of religion, the government must demonstrate, through evidence supplemented by common sense and inferential reasoning, that the law meets the test in *R. v. Oakes*, [1986] 1 S.C.R. 103, and refined in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, and *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877. The goal must be pressing and substantial, and the law enacted to achieve that goal must be proportionate in the sense of furthering the goal, being carefully tailored to avoid excessive impairment of the right, and producing benefits that outweigh the detriment to freedom of religion (*R. v. Sharpe*, [2001] 1 S.C.R. 45, para. 78, McLachlin C.J.).

(a) The Government Failed To Meet Its Evidentiary Burden To Justify An Infringement of *Charter* Rights

59. The CCLA submits that the Quebec Court of Appeal erred in assessing the evidence required under s. 1 to justify limiting a *Charter* right. While this Court has acknowledged that "common sense and inferential reasoning may supplement the evidence" (*Sauvé v. Canada (Chief Electoral Officer)*, [2002] 3 S.C.R. 519, para. 18, McLachlin C.J.), this is not a license to dispense with evidence altogether. Government still has to tender "cogent and persuasive" evidence to justify infringing *Charter* rights (*Oakes*, p. 138).

60. This Court has applied the evidentiary requirement carefully and sensitively when considering infringements of freedom of religion, consistently refusing to allow speculative concerns that lack a proper evidentiary basis to override fundamental rights. In *Amselem*, the majority did not accept that the mere assertion of security risks (that succahs on balconies would obstruct emergency exits) was sufficient to override the freedom of religion. It accepted that

"security concerns, if soundly established", would require appropriate recognition to ascertain any limit on the exercise of the freedom of religion (para. 88). However, the majority found that any such concerns were obviated by the offer to set up succahs to avoid blocking exits so as to pose "no threat to safety or security in any way" (para. 89).

61. Similarly, in *Trinity Western*, the majority required "concrete" or "specific" evidence of a "real risk", rather than "speculative" evidence, before permitting limits to the freedom of religion. The issue was whether it was appropriate to infer that the religious beliefs of Trinity Western graduates that homosexual behaviour is Biblically condemned would produce an unhealthy school environment and foster discrimination against homosexuals in public schools. The majority noted that "the evidence in this case is speculative, involving consideration of the potential future beliefs and conduct of graduates from a teacher education program" (para. 19). The majority found that any such inferences were made "without any concrete evidence" (para. 32), and indeed there was "no evidence before this Court of discriminatory conduct by any graduate" (para. 35). The majority stressed that "the restriction on freedom of religion must be justified by evidence that the exercise of this freedom of religion will, in the circumstances of this case, have a detrimental impact on the school system" (para. 35). The majority called for "specific evidence", and cautioned that "any concerns should go to risk, not general perceptions" (para. 38). The majority concluded that there was no evidence that the "peculiarities" of Trinity Western "pose a real risk to the public educational system", and that it should be mindful of only "actual impact" (para. 42).

62. Assessing the evidence also requires assessing it against the right question. As the Ontario Board of Inquiry noted in *Pandori*, the Court should not ask "'What will happen if the kirpan is used improperly?' but, 'Will it be used improperly?'" (para. 185)(emphasis in original).

63. In the present case, as both justices of the Quebec Superior Court found, the proper answer to this question is that there is no evidentiary basis for the apprehension that the kirpan will be used improperly in a school, in particular, in light of the proposed accommodation. The evidence points to the contrary: kirpans have been accommodated without incident in schools in British Columbia, Alberta and Ontario. As the Board found in *Pandori*, in a century of Sikhs in Canada, there is no evidence of even a single incident of improper kirpan use in a school.

64. The Quebec Court of Appeal, however, found that the lack of evidence of kirpan misuse evaded the issue (« *réducteur* » : Que. C.A.'s Reasons, para. 95: AR, I, p. 26). It pointed to the ripple effect that could be engaged by the presence of a kirpan in a school, apparently accepting that other students might feel the need to carry knives to defend themselves in the event of an altercation (Que. C.A.'s Reasons, paras. 96-97: AR, I, p. 26). With respect, this is exactly the sort of unfounded speculation that this Court rejected in *Amselem* and *Trinity Western*.

65. The Court of Appeal also noted that it had to be mindful that even a minimal risk (« *un risque minime* ») may have substantial consequences (Que. C.A.'s Reasons, para. 98: AR, I, p. 26). However, this again falls short of the "real risk" standard required by this Court. Any such minimal risk is dealt with by the accommodation measures proposed by the principal and accepted by the Quebec Superior Court, and is far outweighed by the value of protecting freedom of religion and other related rights (below, paras. 72-77).

66. The CCLA further submits that the Court of Appeal's imposition of a total ban, in the absence of any cogent evidence, incurs a significant risk that stated security concerns will virtually always trump freedom of religion (and presumably any other *Charter* right). Such an approach suggests a hierarchy of rights, placing the asserted right to security at the pinnacle, contrary to this Court's consistent view that "the *Charter* does not create a hierarchy of rights" (*Same-Sex Marriage*, para. 50; *Trinity Western*, para. 29; and *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 at p. 877).[3]

(b) The Infringement Fails The *Oakes* Test

67. The CCLA further submits that the total ban on kirpans also fails specific branches of the *Oakes* test.

[3] The CCLA does not suggest that rights protection must necessarily be the same throughout Canada in every case. The CCLA accepts that "the principle of federalism means that the application of the *Charter* in fields of provincial jurisdiction does not amount to a call for legislative uniformity" (*R. v. Advance Cutting & Coring Ltd.*, [2001] 3 S.C.R. 209, para. 275, LeBel J.). The role of "respect for cultural and group identity" under the *Oakes* test (p. 136) suggests that the "national norms of the *Charter*" may well "accommodate at least some of the diversity that it is the role of the federal system to permit" (P.W. Hogg, *Constitutional Law of Canada*, loose-leaf, p. 35-21). However, the CCLA submits that where fundamental *Charter* rights are infringed, to permit the infringement of rights in one part of the country that are protected elsewhere requires compelling evidence. Here, there was no such compelling evidence.

1. Pressing and substantial objective

68. The CCLA accepts that the stated governmental objective of reducing violence in schools is pressing and substantial.

2. Proportionality

69. The CCLA submits, however, that the denial of religious freedom was not proportional to the objective in the circumstances of this case.

(i) *Minimal impairment*

70. The CCLA submits that even if the kirpan ban is rationally connected to the goal of reducing violence in Quebec schools,[4] the ban does not minimally impair the religious freedoms of Sikh students. The minimal impairment requirement insists that the challenged 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.; *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*, [2003] 2 S.C.R. 504, para. 112, Gonthier J. for the Court; and *Guignard*, para. 30).

71. The "zero tolerance" policy makes no attempt to accommodate religious freedom or even to balance the competing rights and interests at stake. There is no evidence that a complete ban is needed to reduce violence, and indeed, the ability to accommodate kirpans in schools elsewhere in Canada shows that lesser impairments are reasonably possible (*Martin*, para. 113, where the Court looked to the workers' compensation legislation of three other provinces that accommodated chronic pain syndrome, in finding that Nova Scotia's complete ban on chronic pain syndrome from its workers' compensation legislation was not minimally impairing of the rights of chronic pain sufferers).

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[4] The Court does not necessarily need to decide the case on this basis, although the CCLA notes that there is authority for the view that the total ban on kirpans is not rationally connected to the objective. See *R. v. Guignard*, [2002] 1 S.C.R. 472, para. 29, LeBel J. (underinclusive municipal by-law restricting certain advertising signs failed the rational connection test because other signs of a more generic nature were exempt, even though they were just as polluting visually); and *Benner v. Canada*, [1997] 1 S.C.R. 358 (holding that legislation imposing more stringent citizenship requirements on persons born outside Canada to a Canadian mother than a Canadian father was not rationally connected to the goal of keeping out dangerous persons). Similarly, here, there remain many other objects in schools that are not weapons but which could be misused, such as baseball bats, cutting instruments, screwdrivers, *etc*.

(ii) *Weighing deleterious and salutary effects*

72. The final branch of the proportionality test requires a weighing of the deleterious and salutary effects. It asks whether "the *Charter* infringement is too high a price to pay for the benefit of the law" (Hogg, *Constitutional Law of Canada*, p. 35-39).

73. It is trite that the *Oakes* test should be applied flexibly so as to achieve a proper balance between individual rights and community needs. This involves a close attention to context (*Ross*, para. 78; *Thomson Newspapers*, para. 87).

74. The Quebec Court of Appeal considered the value of protecting religious freedoms, but failed to consider other important effects of the total ban appropriate to the school context. These include the values of promoting multiculturalism, diversity, and an educational culture respectful of rights. These important values have been consistently emphasized in this Court's decisions:

> Teachers are a medium for the transmission of values […] Schools are meant to develop civic virtue and responsible citizenship, to educate in an environment free of bias, prejudice and intolerance. (*Trinity Western*, para. 13).
>
> Learning respect for […] 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, para. 3, Cory J.).
>
> A school is a communication centre for a whole range of values and aspirations of a society. In large part, it defines the values that transcend society through the educational medium. The school is an arena for the exchange of ideas and must, therefore, be premised upon principles of tolerance and impartiality so that all persons within the school environment feel equally free to participate […] a school board has a duty to maintain a positive school environment for all persons served by it […] Today, education is perhaps the most important function of state and local governments […] It is the very foundation of good citizenship […] education awakens children to the values a society hopes to foster (*Ross*, paras. 42, 81-82)

75. It may be that allowing kirpans in Quebec schools will occasion a certain amount of "cognitive dissonance" among some who are unfamiliar with its symbolism and role within Sikhism. But, as McLachlin C.J. noted in *Chamberlain*, "[t]he cognitive dissonance that results from such encounters is simply part of living in a diverse society. It is also part of growing up. Through such experiences, children come to realize that not all of their values are shared by others" (para. 65). As the Chief Justice explained:

> Exposure to some cognitive dissonance is arguably necessary if children are to be taught what tolerance itself involves. As my colleague points out, the demand

> for tolerance cannot be interpreted as the demand to approve of another person's beliefs or practices. When we ask people to be tolerant of others, we do not ask them to abandon their personal convictions. We merely ask them to respect the rights, values and ways of being of those who may not share those convictions. The belief that others are entitled to equal respect depends, not on the belief that their values are right, but on the belief that they have a claim to equal respect regardless of whether they are right. Learning about tolerance is therefore learning that other people's entitlement to respect from us does not depend on whether their views accord with our own. Children cannot learn this unless they are exposed to views that differ from those they are taught at home. (para. 66)

76. Indeed, the Alberta Court of Queen's Bench has expressed the desirability of such cognitive dissonance specifically in the context of allowing kirpans in schools. In *Tuli v. St. Albert Protestant Separate School District No. 6* (1985), 8 C.H.R.R. D/3906, paras. 4, 6 (Alta. Q.B.), Wachowich J. observed:

> To allow the applicant to wear the requirements of his religion upon baptism, including the kirpan, would provide those who are unfamiliar with the tenet of his faith an opportunity to be introduced to and to develop an understanding of another's culture and heritage. In this case, that being the traditions of a very well established, respected and old religion. […]
>
> I might also comment, perhaps this Court secretly wishes it had been fortunate enough during my own formative years to have been exposed during that period of youth to the benefits of another's culture and religion so as to have developed a better appreciation of the richness of one's heritage.

77. The Quebec Court of Appeal failed to weigh any of these benefits in the balance. The CCLA submits that the benefits of respecting fundamental rights far outweigh any speculative risk of inappropriate kirpan use.

78. The Quebec Court of Appeal also erred in finding that the school context is indistinguishable from the context of courtrooms and airplanes (Que. C.A.'s Reasons, paras. 81-82, 84: AR, I, pp. 23-24). Courts and schools are not comparable. As the Ontario Board of Inquiry noted in *Pandori*:

> Courts and schools are not comparable institutions. One is a tightly circumscribed environment in which contending elements, adversarially aligned, strive to obtain justice as they see it, with judge and/or jury determining the final outcome. Schools on the other hand are living communities which, while subject to some controls, engage in the enterprise of education in which both students and teachers are partners. Also, a court appearance is temporary (a Khalsa Sikh could conceivably deal with the prohibition of the kirpan as he/she would on an airplane ride) and is therefore not comparable to the years a student spends in the school system. (para. 197)

79. Nor are airplanes and schools comparable. As the Canadian Human Rights Tribunal explained in *Nijjar v. Canada 3000 Airlines Ltd.*, [1999] C.H.R.D. No. 3, paras. 121, 123:

> […] aircraft present a unique environment. Groups of strangers are brought together and are required to stay together, in confined spaces, for prolonged periods of time. Emergency medical and police assistance are not readily accessible. […] Unlike the school environment in issue in the *Pandori* case, where there is an ongoing relationship between the student and the school and with that a meaningful opportunity to assess the circumstances of the individual seeking the accommodation, air travel involves a transitory population. Significant numbers of people are processed each day, with minimal opportunity for assessment. […] Canada 3000 check-in personnel have between 45 and 90 seconds of contact with each passenger.

80. Accordingly, the CCLA respectfully submits that the Court should focus on the present school context, and not allow other contexts that are not at issue to cloud the present ruling.

(c) Conclusion

81. In conclusion, the CCLA submits that community security founded on a proper evidentiary basis may well have a legitimate role in limiting individual rights in appropriate cases. Here, however, there are only speculative security concerns. The CCLA submits that when the very real effects of the kirpan ban on Gurbaj Singh Multani are properly weighed against the spectres raised by the School Board, there was no proper basis in this case to warrant the infringement of his basic civil liberties.

PART III – ORDER SOUGHT

82. The CCLA respectfully submits that the appeal should be allowed. The CCLA does not seek costs, and asks that no costs be awarded against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,

March 18th, 2005

Mahmud Jamal

AS FILED

Patricia McMahon

OSLER, HOSKIN & HARCOURT LLP
Counsel to the Intervener,
Canadian Civil Liberties Association

PART IV – LIST OF AUTHORITIES

PART V – STATUTORY PROVISIONS