Court Docket No.: 30322

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

BETWEEN:

BALVIR SINGH MULTANI

-and-

BALVIR SINGH MULTANI, in his capacity as the legal guardian of his minor son GURBAJ SINGH MULTANI

Appellants
(Respondents)

-and-

COMMISSION SCOLAIRE MARGUERITE-BOURGEOYS

Respondent
(Appellant)

-and-

ATTORNEY GENERAL OF QUEBEC

Respondent
(Appellant)

-and-

WORLD SIKH ORGANIZATION (WSO)

Intervener

-and-

CANADIAN HUMAN RIGHTS COMMISSION

Intervener

-and-

ONTARIO HUMAN RIGHTS COMMISSION

Intervener

-and-

CANADIAN CIVIL LIBERTIES ASSOCIATION

Intervener

FACTUM OF INTERVENER THE CANADIAN HUMAN RIGHTS COMMISSION

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PART I - FACTS

1. Appellant Gurbaj Singh Multani ("Gurbaj Singh") is a high school student. He is an orthodox follower of the Sikh religion and is required to wear a kirpan at all times. On November 19, 2001, he dropped his kirpan in the schoolyard, and the school administration prohibited him from bringing the object to school again.

   Multani (guardian of) v. Commission scolaire Marguerite-Bourgeoys, [2004] J.Q. No. 1904 ("Court of Appeal decision"), paragraph 7.

2. On December 21, 2001, the lower levels of Respondent Commission scolaire Marguerite-Bourgeoys ("CSMB") allowed Gurbaj Singh to wear his kirpan on the condition that it be placed in a scabbard with a flap sewn securely shut to ensure that it could net be voluntarily or accidentally removed from the scabbard and used as an offensive or defensive weapon.

   Ibid., paragraph 9.

3. However, on March 11, 2002, the CSMB overturned that decision and prohibited Gurbaj Singh from wearing the kirpan at school, adding:

   > That the Commission scolaire accept the wearing of the symbolic kirpan as a pendant or in any other form and of a material that would make it harmless.

   Ibid., paragraph 12.

4. The evidence in the docket shows that wearing the symbolic kirpan is not in keeping with Gurbaj Singh's religion.

   Ibid., paragraphs 56, 71.

5. In a decision on May 27, 2002, the trial judge overturned the CSMB's decision and allowed Gurbaj Singh to wear the kirpan on the following conditions:

   a. that the kirpan be worn under his clothes;

   b. that the kirpan be carried in a scabbard made of wood and not metal, to prevent it from causing injury;

   c. that the kirpan be placed in its scabbard and wrapped and sewn in a sturdy fabric pouch, and that this pouch be sewn to the guthra;

   d. that school personnel be authorized to verify, in a reasonable fashion, that these conditions were being followed;

   e. that Gurbaj Singh be required to keep the kirpan in his possession at all times, and that its disappearance be reported to school authorities immediately;

   f. that if the present judgment were not respected, Gurbaj Singh would definitively lose the right to wear his kirpan at school.

   Ibid., paragraph 17.

6. In a decision on March 4, 2004, the Quebec Court of Appeal overturned the Superior Court's ruling and reinstated the CSMB's decision prohibiting Gurbaj Singh from wearing his kirpan at school.

   Ibid., paragraph 103.

PART II - ISSUES

7. What elements must be demonstrated, in terms of both substance and process, to justify a safety policy that discriminates on the basis of religion?

8. Did the CSMB discharge its burden of showing that it considered and reasonably rejected all possible options that would make the kirpan reasonably inoffensive so as to maintain the necessary level of safety at school?

PART III - ARGUMENTS

1. Context

9. Public education is a right that most Quebeckers take for granted. It is recognized both in Quebec law and in international law..

> *Education Act,* R.S.Q. c. I-13.3, sections 1 and 3.
>
> *Universal Declaration of Human Rights*, U.N. Doc. A/810, p. 71 (1948), article 26.
>
> *International Covenant on Economic, Social and Cultural Rights*, [1976] R.T. Can. No. 46, article 13.
>
> M. Freeman, G. van Ert, *International Human Rights Law*, Irwin Law, Inc., 2004, at pp. 318-322.

10. Quebeckers also have basic human rights under the *Canadian Charter of Rights and Freedoms* and under human rights legislation which this Court has recognized as having quasi-constitutional status.

> *Constitution Act, 1982* (Schedule B of the *Canada Act, 1982*, 1982 (U.K.), c. 11.
>
> *Quebec (C.D.P.D.J.) v. Montréal (City)*, [2000] 1 S.C.R. 665 at p. 683.

11. However, those rights are not absolute and can be limited if necessary to ensure public safety, particularly the safety of children at school.

12. This appeal therefore involves conflict between two fundamental rights: 1. the right of every person to attend public school and express his or her religion without discrimination; and 2. the CSMB's right and duty to establish safety policies to protect the persons for whom it is responsible.

13. This Court will have to determine whether, in adopting a policy prohibiting the wearing of a kirpan at school without considering all possible options to make the kirpan reasonably inoffensive, the CSMB met the requirements of human rights legislation in light of the jurisprudence of this Court.

14. The Canadian Human Rights Commission has been granted intervener status and will make representations regarding the test applicable, in terms of both substance and process, to justify a safety policy that discriminates on the basis of religion.

2. Applicable test

15. In *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3 ("*Meiorin*") and *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Human Rights Commission)*, [1999] 3 S.C.R. 868 ("*Grismer*"), this Court standardized the test applicable to discrimination and rejected the old distinction between direct and indirect discrimination.

16. Under this unified approach, once the plaintiff establishes that the standard is *prima facie* discriminatory, the onus shifts to the defendant to prove on a balance of probabilities that the discriminatory standard has a *bona fide* and reasonable justification. In order to establish this justification, the defendant must prove that:

a. it adopted the standard for a purpose or goal that is rationally connected to the function being performed;

b. it adopted the standard in good faith, in the belief that it is necessary for the fulfilment of the purpose or goal; and

c. the standard is reasonably necessary to accomplish its purpose or goal, in the sense that the defendant cannot accommodate persons with the characteristics of the claimant without incurring undue hardship.

Grismer, supra, at p. 881, paragraph 20.

17. The CSMB policy prohibiting the wearing of a kirpan at school had the effect of forcing Gurbaj Singh and any other baptized Sikh to choose between attending public school and observing their religion. That is a substantial effect given the importance of education to a child. Gurbaj Singh has enrolled in a private school, but that option is not open to everyone and constitutes very clear marginalization in relation to Quebec society.

18. In *Pandori v. Peel Board of Education* (1990), 12 C.H.R.R. D/364, the Ontario Human Rights Tribunal recognized the serious impact of such a policy on students and teachers alike and ruled the policy a *prima facie* discriminatory practice:

> If [kirpans] were proscribed, practising Sikhs, if of school age, would be denied a public school education, and if accredited as teachers, would be barred from pursuing the profession of their choice. (paragraph 4)
>
> [...] The prohibition creates adverse effect discrimination for such Sikhs and constitutes a *prima facie* infringement of the *Code*.
>
> *Pandori v. Peel Bd. of Education* (1990), 12 C.H.R.R. D/364 ("*Pandori*") paragraphs 4 and 158, application for judicial review denied (1991), 14 C.H.R.R. D/403.

19. The CSMB policy is therefore a *prima facie* discriminatory practice, and the CSMB has the burden of providing, on a balance of probabilities, that the discriminatory standard had a *bona fide* and reasonable justification.

3. Elements needed to show a *bona fide* and reasonable justification

a) preliminary step: identifying the goal of the standard

20. A standard has to be analysed in the appropriate context. Before it can be determined whether a standard has a *bona fide* and reasonable justification, the goal or objective of the standard must be defined.

    Grismer, *supra*, at p. 883, paragraph 24.

21. In the case at hand, the goal of the CSMB is to ensure safety in schools. But what degree of safety? As stated in *Grismer*, the possibilities range from absolute safety to a total lack of safety.

    Grismer, supra, at p. 883, paragraph 25.

22. In a given environment, absolute safety could be achieved by prohibiting all potentially dangerous objectives, installing metal detectors or conducting a discretionary search of every person who enters the premise. At the other end of the spectrum, a total lack of safety would be demonstrated by complete freedom and the absence of any discipline or rules. Between those two extremes lies the more moderate view that reasonable safety is needed.

23. In the case at hand, the standard adopted by the CSMB appears to be the standard of reasonable safety. The safety measures put in place by the CSMB are designed to protect children, a very vulnerable group, and it is therefore necessary to demand a high level of safety and a level higher than the level applied in society at large.

24. However, the standard is not the standard of absolute safety, as more intrusive measures like metal detectors and discretionary searches are not used. Moreover, as the Court of Appeal acknowledged in this matter:

> This regulation from the Code of Conduct cannot go so far as to prohibit the possession of any object which can cause injury; indeed, even a pencil can be used to inflict injury. Nevertheless, a reasonable line must be drawn, and an inherently dangerous object falls beyond that line.

Court of Appeal decision, *supra*, at paragraph 87.

Factum of respondent CSMB, at paragraph 51.

25. This standard of safety is akin to the standard applied to driving in *Grismer*, where the Superintendent set a goal of reasonable safety and allowed some people to drive in spite of functional limitations. Moreover, in *Central Alberta Dairy Pool v. Alberta*, [1990] 2 S.C.R. 489, the policy at issue was not absolute in that it required all staff to work on Mondays but made an exception in cases of illness.

Central Alberta Dairy Pool v. Alberta (C.H.R.C.), [1990] 2 S.C.R. 489 at p. 501 ("*Central Alberta Dairy Pool*").

26. Now that the standard at issue has been identified, the *Meiorin* and *Grismer* test can be applied.

b) Question 1: Did the CSMB adopt the standard with a goal or objective rationally connected to its function?

27. Without question, a reasonable standard of safety at school is rationally connected to the public function performed by the CSMB.

c) Question 2: Did the CSMB adopt the standard in good faith, believing it was necessary to attain that goal or objective?

28. The CHRC acknowledges the CSMB's good faith in adopting the standard of reasonable safety.

d) Question 3: Is the standard reasonably necessary to attain the goal in the sense that the CSMB cannot accommodate people with the same characteristics as Gurbaj Singh without incurring undue hardship?

General Principles

29. To meet this requirement, the CSMB had to show that it could not accommodate Gurbaj Singh's religion without incurring undue hardship, whether that hardship took the form of impossibility, serious risk or excessive cost.

> *Grismer, supra*, at p. 887, paragraph 32.

30. The following principles have been used in the case law and are germane to the analysis of this question:

> See *Howell v. Canadian Armed Forces*, 2004 CHRT 31, at paragraph 65.

31. The use of the term “undue” infers that some hardship is acceptable; it is only “undue” hardship that satisfies this test. It may be ideal from the CSMB’s perspective to choose a standard that is uncompromisingly stringent. Yet the standard, if it is to be justified, must accommodate factors relating to the unique capabilities and inherent worth and dignity of every individual, up to the point of undue hardship.

    Meiorin, supra, at p. 35, paragraph 62.

    Central Okanagan School District No. 23 v. Renaud, [1992] 2 S.C.R. 970 at p. 984.

32. A standard that excludes members of a particular group on impressionistic assumptions is generally suspect.

    Grismer, supra, at p. 886, paragraph 31.

    D. Lepofsky, “The Duty to Accommodate: A Purposive Approach”, (1992) 1 Can. Lab. L.J. 1 at p. 13.

    Central Alberta Dairy Pool, *supra*, at p. 505.

33. Moreover, evidence that a particular group is being treated more harshly than others without apparent justification may indicate that the standard applied to that group is not reasonably necessary.

    Grismer, supra, at p. 886, paragraph 31.

    Gordy v. Oak Bay Marine Management Ltd., 2004 BCHRT 225 (“*Oak Bay Marine*”), at paragraphs 162-165.

34. While it must not lower its safety standard, the CSMB cannot adopt a reasonable standard of safety for the general student population and an absolute standard of safety for students of Sikh faith without giving the rationale for that distinction.

Grismer, supra, at pp. 892-893, paragraph 42.

35. Respondents, courts and administrative tribunals have to be innovative yet practical when considering accommodation options in particular circumstances.

Meiorin, supra, at p. 36, paragraph 64.

36. If individual differences can be accommodated without imposing undue hardship on the respondent, the standard is not justified.

Meiorin, supra, at pp. 37-38, paragraph 67.

37. In a case where accommodation is flatly refused, there must be some evidence to link the outright refusal of even the possibility of accommodation with an undue safety risk.

Grismer, supra, at p. 893, paragraph 43.

38. Ultimately, the CSMB must show that it considered and reasonably rejected because of undue hardship all of the options that would make the kirpan reasonably inoffensive and maintain the necessary standard of safety in the school.

Analysis of Risk

39. This Court has confirmed that risk has a limited role in the analysis of *bona fide* and reasonable justification and rejected the old notion that “sufficient risk” alone could justify a discriminatory standard. Risk can still be considered under the guise of hardship, but not as an independent justification of discrimination. The critical issue is whether an outright ban on the kirpan was reasonably necessary to ensure safety in schools.

Grismer, supra, at p. 886, paragraph 30.

40. The aim is not to lower the safety standard, but rather to find options that will make it possible to meet that objective and at the same time respect human rights.

Grismer, *supra*, at pp. 892-893, paragraph 42.

Oak Bay Marine, *supra*, at paragraphs 222, 231-237.

41. In this context, the magnitude of the risk caused by the presence of kirpans and the identity of those who bear that risk are pertinent considerations.

Central Alberta Dairy Pool, supra, at p. 521.

42. In order to determine the magnitude of the risk, the likelihood that loss or injury may occur and the seriousness of the loss or injury that may result must be considered.

Nijjar v. Canada 3000 Airlines Limited, [1999] C.H.R.T. No. 3, at paragraph 55.

Woolverton v. B.C. Transit (1992), 19 C.H.R.R. D/200 aux para 124-125.

43. The CSMB had an obligation to consider the following questions:

a. What is the likelihood that injury will occur if kirpans are permitted at school? The greater the likelihood of injury, the more justifiable the measure.

b. How serious would the injury be if there were an injury? The more serious the consequences, the more justifiable the measure.

c. Who will bear the risk? The greater the risk to third parties, the more justifiable the measure.

d. What is the environment in which the risk occurs? The higher the applicable safety standard, the more justifiable the measure.

e. What means are available to reduce the risk? The measure cannot be justified unless all options that would help reduce the risk were considered and reasonably rejected on the grounds of undue hardship.

Nijjar, supra.

See also K.D. MacNeill, *The Duty to Accommodate in Employment*, Canada Law Book Inc., 2004, at pp. 12-33 to 12-41.

44. In applying these questions to the facts before it in *Pandori* and *Singh v. Workmen's Compensation Board Hospital* (1981), 2 C.H.R.R. D/459, the Ontario Human Rights Tribunal allowed kirpans to be worn with some restrictions in Ontario schools and hospitals because of the low likelihood of risk and the absence of attempts to accommodate.

Pandori, supra.

Singh v. Workmen's Compensation Board Hospital (1981), 2 C.H.R.R. D/459 ("*Singh*").

Tuli v. St. Albert Protestant Separate School (1985), 8 C.H.R.R. D/3906 (Alta Q.B.), at paragraph 30968. ("*Tuli*")

Tuli v. St. Albert Protestant Separate School (1986) 8 C.H.R.R. D/3736 (Alta Bd. Inq.), at paragraph 29632.

45. Meanwhile, in *Nijjar*, the Canadian Human Rights Tribunal upheld the prohibition on bringing kirpans aboard aircraft. That decision was heavily influenced by the environment in question and the standard of absolute safety which that environment requires:

> [W]e are satisfied that aircraft present a unique environment. Groups of strangers are brought together and are required to stay together, in confined

> spaces, for prolonged periods of time. Emergency medical and police assistance are not readily accessible. [...]
>
> 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.
>
> *Nijjar, supra* aux paras 123-125.

46. Similarly, in *R v. Hothi et al.*, [1985] M.J. No. 376, the Manitoba Court of Appeal upheld the prohibition on kirpans in courtrooms after observing that the court environment is unique and cannot allow objects that could have a bearing on the process. The Court also deferred to the judge in maintaining order in the courtroom.

    R. v. Hothi et al., [1985] M.J. No. 376.

47. In the case at hand, the environment is the same as in *Pandori* and is very different from the environment in *Nijjar* and *Hothi*. Not only are safety standards higher in aircraft and courtrooms, but flights and hearings are measured in hours or days, whereas school is measured in years. That longer period increases the injury to human rights if there is discrimination, but also provides more options for accommodation.

48. The CSMB contends that other students will be inclined to carry a weapon if they know that Gurbaj Singh is allowed to wear his kirpan, even with restrictions. That fear must be taken seriously, but it cannot preclude accommodation unless there is undue hardship. This Court has confirmed that uninformed views cannot justify refusal to accommodate to the point of undue hardship.

    Meiorin, supra, at p. 43.

Renaud, supra, at p. 988.

Singh, supra, at paragraph 4213:

> There is no evidence that after the explanation patients were still apprehensive, but had they been, I am of the opinion that their fears would have been unreasonable and an insufficient cause to deny Mr. Singh his religious rights. [...]

49. Considering that fear, the CSMB should have explored available means of mitigating the risk, such as information sessions about the kirpan and the Sikh religion, all the more so since the institution is a school and education can and must contribute to better understanding of others.

50. However, we cannot ignore the evidence put forward by the CSMB showing that safety is a serious problem in schools. Further, because of the vulnerability of the populations they serve, schools are entitled to demand an adequate level of safety in order to protect their students.

51. For all these reasons, the CSMB had a duty to undertake a careful and comprehensive evaluation of all these questions, particularly the question of measures that could help reduce the risk and ensure safety at school by making the kirpan reasonably inoffensive. If it turns out that those solutions cannot be applied without compromising the goal of reasonable safety at school, the prohibition is justified. However, without clear evidence that those solutions are unworkable, the measure is inconsistent with the jurisprudence of this Court.

4. Importance of the decision-making process

52. This Court has acknowledged that both the decision-making process and the final decision have to be taken into consideration in analysing *bona fide* and reasonable justification because it is sometimes too tempting to reject a request

for accommodation that is out of the ordinary.

> *Meiorin, supra*, at p. 37.
>
> See also *Oak Bay Marine*, *supra*, at paragraphs 84-86.
>
> Lepofsky, *supra*, at p. 14:
>
> > It is perhaps a regrettable reality in the workplace, that when a person asks for something out of the ordinary, the first knee-jerk response on the part of some is simply to say no. It is often only after the matter receives further thought and reflection that stereotypical concerns can give way to imaginative solutions.

53. The CSMB had a duty to show not only that the policy itself had a *bona fide* and reasonable justification, but also that the process which led to that decision complied with human rights legislation. The following questions are pertinent in analysing that process:

    a. Did the Respondent investigate alternative approaches that do not have a discriminatory effect, such as individual testing against a more individually sensitive standard?

    b. If alternative standards were investigated and found to be capable of fulfilling the Respondent's purpose, why were they not implemented?

    c. Is there a way to do the job that is less discriminatory while still accomplishing the Respondent's legitimate purpose?

    d. Is the standard properly designed to ensure that the desired qualification is met without placing an undue burden on those to whom the standard applies?

    Meiorin, supra, at pp. 36-37.

54. Author David Lepofsky adds the following questions about the process:

    a. Who was involved in the discussions and the decision-making process?

    b. What accommodation options were considered?

c. Was sufficient effort made to obtain the perspective of the person to whom the standard applies?

Lepofsky, *supra*, at pp. 11-15.

Oak Bay Marine, *supra*, at paragraphs 147-148.

55. In the case at hand, the CSMB rejected the accommodation proposed by Gurbaj Singh, allowing him to wear only a symbolic kirpan made of a material other than metal. For all intents and purposes, that amounted to rejection of all kirpans because of the religious requirement that a kirpan be made of metal.

56. To justify that decision, the CSMB had a duty to show that it considered and reasonably rejected the option proposed by Gurbaj Singh and any other possible accommodations that would make the kirpan reasonably inoffensive. In addition to those identified by the trial judge, possible accommodations could include the following restrictions, provided they comply with the Sikh religion:

a. impose a size limit on kirpans;

b. require kirpans to have a dull blade;

c. require periodic inspections;

d. use technological means (such as an alarm) to alert the CSMB if the kirpan is removed from its scabbard;

e. impose disciplinary requirements before allowing a kirpan to be worn;

f. organize information sessions to make other students aware of the kirpan and reassure them by explaining the applicable safety measures;

g. any other option that might be put forward in consultations between the CSMB and the Sikh community.

See *Pandori, Singh, Tuli, supra*.

Conclusion

57. The CSMB has the right and a duty to ensure safety in its schools. However, to maintain its policy prohibiting the kirpan, it had to show that it carefully analysed the magnitude of the risk caused by the presence of a kirpan at school and that that risk is incompatible with the standard of safety necessary in schools. It had a duty to show, if applicable, that it considered and reasonably rejected any accommodations that would reduce the risk by making the kirpan reasonably inoffensive.

58. For all these reasons, we respectfully submit that the Court of Appeal erred in not compelling the CSMB to consider all possible accommodations before upholding its ban on the kirpan.

PART IV - ARGUMENTS REGARDING COSTS

59. The Canadian Human Rights Commission makes no arguments regarding costs.

PART V - ORDER SOUGHT

60. The Canadian Human Rights Commission respectfully requests that the appeal be allowed and that the Quebec Court of Appeal's decision be set aside.

ALL RESPECTFULLY SUBMITTED this 18th day of March 2005.

____

Philippe Dufresne

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PART VI - SOURCES

JURISPRUDENCE **PARAS.**

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PART VII: ACTS AND REGULATIONS

PARAS.

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