

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

BETWEEN:

BALVIR SINGH MULTANI and BALVIR SINGH MULTANI, ès qualities
of his minor son GURBAJ SINGH MULTANI

APPELLANT

AND:

COMMISSION SCOLAIRE MARGUERITE-BOURGEOYS AND
THE ATTORNEY GENERAL OF QUEBEC

RESPONDENTS

AND:

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

INTERVENERS

FACTUM OF THE WORLD SIKH ORGANIZATION OF CANADA
(World Sikh Organization of Canada, Intervener)
(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

Peterson Stark Scott
300-10366 136 A Street
Surrey, Ontario
V3T 5R3

Palbinder K. Shergill
Tel: (604) 588-9321
Fax: (604) 589-5391
Email: pks@petersonstark.bc.ca
Counsel for the Intervener

Lang Michener LLP
300 – 50 O’Connor Street
Ottawa, Ontario
K1P 6L2

Marie-France Major
Tel: (613) 232-7171
Fax: (613) 231-3191
Email : mmajor@langmichener.ca
Ottawa Agent for Counsel for the Intervener

Grey Casgrain

Solicitor for the Appellants
212-3410 Rue Peel
Montreal, Quebec
H3A 1W8

Julius H. Grey

Tel: (514) 288-6180
Fax: (514) 288-8902
E-mail: Julius_grey@sympatico.ca
Counsel for the Appellant

Francois Aquin

Bureau 2100
500 Place d'Armes
Montreal, Quebec
H2Y 2W2

Francois Aquin

Tel: (514) 288-4241
Fax: (514) 849-9984
E-mail: F.aquin@medicil.com
**Counsel for the Respondent the
Commission Scolaire Marguerite-Bourgeois**

The Attorney General of Quebec

Bernard Roy & Associates
1 Rue Notre-Dame Est, Bureau 800
Montreal, Quebec
H2Y 13B

René Bourassa

Tel: (514) 393-2336
Fax: (514) 873-7074

**Counsel for the Respondent the
Attorney General of Quebec**

Osler, Hoskin & Harcourt

Box 50, 1 First Canadian Place
Toronto, Ontario
M5X 1B8

Mahmud Jamal

Tel: (416) 362-2111

Gowling Lafleur Henderson LLP

2600-1600 Elgin Street
Box 466 Station D
Ottawa, Ontario
K1P 1C3

Brian A. Crane

Tel: (613) 232-1781
Fax: (613) 563-9869
E-mail: Brian.Crane@gowlings.com
Ottawa Agent for the Appellant

Noël & Associés

Bureau 800
1, rue Notre-Dame Est,
Montreal, Quebec
J8X 3R1

Sylvie Roussel

(819) 771-7393
(819) 771-5397
E-mail: s.roussel@noelassociés.com
Ottawa Agent for the Respondent

Noël & Associés

Bureau 800
1, rue Notre-Dame Est,
Montreal, Quebec
J8X 3R1

Sylvie Roussel

(819) 771-7393
(819) 771-5397
E-mail: s.roussel@noelassociés.com
**Ottawa Agent for the Respondent
the Attorney General of Quebec**

Osler, Hoskin & Harcourt

1500 – 50 O'Connor Street
Ottawa, Ontario
K1P 6L2

Patricia J. Wilson

Tel: (613) 235-7234

Fax: (416) 862-6666
Counsel for the Intervener
Canadian Civil Liberties Association

Fax: (613) 235-2867
Ottawa Agent for Counsel for the
Intervener, Canadian Civil Liberties
Association

Ontario Human Rights Commission
180 Dundas Street W., 7th Floor
Toronto, Ontario
M7A 2R9

Raj Dhir
Tel: (416) 314-4519
Fax: (416) 326-9867
Counsel for the Intervener
Ontario Human Rights Commission

Canadian Human Rights Commission
344 Slater Street Canada Building
9th Floor
Ottawa, Ontario
K1A 1E1

Philippe Dufresne
Tel: (613) 943-9162
Fax: (613) 993-3089
Counsel for the Intervener
Canadian Human Rights Commission

TABLE OF CONTENTS

PART 1: THE FACTS.....1

PART II: QUESTIONS IN DISPUTE1

PART III: ARGUMENT.....1

A. Jurisprudence on the Kirpan and the Sikh Religion1

B. The Canadian Charter of Rights and Freedoms5

C. Public Safety and the Kirpan.....8

D. The School Environment14

E. Accommodation of the Kirpan17

PART IV: SUBMISSIONS ON COSTS19

PART V: ORDER REQUESTED19

PART VI: TABLE OF AUTHORITIES20

PART VII: STATUTORY PROVISIONS21

PART 1: THE FACTS

1. The Intervenor adopts the facts as set out by the Appellants.

PART II: QUESTIONS IN DISPUTE

2. The Intervenor would like to address the following issues as raised by this Appeal:
 - a) Does the prohibition of the kirpan violate sections 2 and 15 of the Canadian Charter of Rights and Freedoms?
 - b) Is this prohibition justifiable under section 1 of the Charter?
 - c) Is the accommodation of the kirpan reasonable?

PART III: ARGUMENT

3. In support of its position, the Intervenor, where necessary, relies on the arguments made by the Appellants, in their Factum. In addition, the Intervenor makes the following submissions.

A. Jurisprudence on the Kirpan and the Sikh Religion

4. Sikhism is a monotheistic religion founded in 1469, in India, by Guru Nanak (the first of ten Gurus, or teachers, central to the formulation of the Sikh faith). Sikhism holds as its basic tenets, the equality of mankind, the equality of men and women, and the fundamental equality of all religions. Sikhism opposes idolatory and the caste system. After the inception of the religion by Guru Nanak, the religion went through a period of evolution over 200 years, culminating in the creation of a distinctively separate group of followers who were outwardly identifiable (the Khalsa).

See Chapter 15, *Sikhism* in World Religions – From Ancient History to the Present by Geoffrey Parrinder, © 1983 The Hamlyn Publishing Group Ltd., New York, [Intervener Book of Authorities Tab 24]

5. The 5 k's constitute articles of faith for the Sikhs, and an amritdhari (baptized or Khalsa) Sikh is required to keep them on his/her person at all times. Each of the 5 k's represents different aspects of the belief system of the Sikhs, and not one is expendable. The five k's are to be kept by both men and women, and are as follows:

- **Kesh – unshorn hair:** “They represent the inviolability of the human body” and are typically covered with a turban (or in the case of some Sikh women, a head scarf);

- **Kanga – wooden comb:** This is to be worn in the hair at all times, and is to be used for combing of one's hair, “it represents hygiene [...] ridding oneself of impurities and what is morally undesirable.”

- **Kara – an iron/steel bracelet:** The circular design of the kara signifies the oneness and eternity of God and “...is the symbol of perfection [...] a reminder of the wearer to be mindful of his role as spiritual aspirant and useful citizen [...] the kara is also on the right hand which is the hand [with which] most people perform their deeds [and] is a constant reminder to perform good deeds.”

- **Kaccha – cotton underwear:** They resemble boxer shorts with a drawstring. They are a “...symbol of restraint of passion, of chastity, and a constant reminder of the prohibition of adultery, both in lusting and in deed.”

- **Kirpan – most closely resembles a sword in a wooden or metal sheath, and wrapped in a fabric holster (gathra).** The word itself means “mercy, grace, or magnanimity.” The kirpan is to be worn around one's body and kept in place by the fabric holster. “While the kirpan arose of a particular culture and had at one time the function of a sword, it long ago lost this aspect and has become completely spiritualized. It now speaks of law and morality, justice and order and has become ‘and instrument of the divine itself’.” It represents spiritual power and is never to be used as a weapon.

Peel Board of Education v. Pandori et al. (1990), 12 C.H.R.R. D/364 (Ont.Bd.Inq.), paragraph 14; paragraph 21, stating that the kirpan is worn close to one's body, and kept in place with a gathra (a fabric holster), [Intervener Book of Authorities Tab 7]

Pritam Singh v. WCB Hospital and Rehabilitation Centre (1981), 2 C.H.R.R. D/459 (Ont.Bd.Inq.), paragraph 4199, for the proposition that the kirpan is not designed for use as a weapon, [Intervener Book of Authorities Tab 8]

Tuli v. St. Albert Protestant Board of Education (1987), 8 C.H.R.R. D/3736 (Alta.Bd.Inq.), paragraph 29585, for the proposition that the sheath is an integral part of the kirpan, [Intervener Book of Authorities Tab 23]

6. In the *Pandori* case, Chairman Gunther Plaut had this to say about the five k's:

While all Sikhs may, and are in fact encouraged, to wear the five k's, baptized or Khalsa Sikhs must wear them, lest they break their holy vows and become patit, persons who have fallen away from their religious obligation.

The five k's become central in establishing [Sikh] identity. They become physically, visibly central, but they also become spiritually central, because [...] the forms of identification not only remind others of the identity of Sikhs, they also remind Sikhs of their identity, and in that sense they become a form of inward and outward identification and recognition...

The kirpan, as one of the five k's, is thus far more than a religious adornment. Mandated to be worn always, it is an integral part of a Khalsa Sikh's person and cannot be properly compared with a cross which a Christian might choose to wear. Not wearing the kirpan at any time, day or night, constitutes a grievous transgression for a Khalsa Sikh. (emphasis added)

Pandori, supra, paragraphs 16 and 17, [Intervener Book of Authorities Tab 7]

7. That the kirpan is a fundamental requirement of the Sikh religion is well established.

Pritam Singh, supra, paragraphs 4150 and 4174, [Intervener Book of Authorities Tab 8];

Tuli, supra, paragraph 29622, [Intervener Book of Authorities Tab 23]

See also, *State of Ohio v. Singh (1996)*, 117 Ohio App. 3d 381 (C.A. of Ohio), page 4, [Intervener Book of Authorities Tab 23]

8. Exhibited in the *Pandori* case was a letter from the Shiromani Gurdwara Prabandak Committee ("SGPC") dated February 19, 1990, "which is considered the supreme religious instance of the Sikh faith." This letter confirms the religious requirements surrounding a kirpan, and stipulates that:

(a) No definite size of the kirpan has been fixed in the Sikh religion, although it should not be reduced to a mere symbol. A one foot kirpan is usual.

- (b) Children's kirpans will usually be smaller than those of adults.
- (c) No baptised Sikh may remove his/her kirpan under any circumstances.
- (d) There is no religious injunction that the kirpan be worn in plain view. However, "it should be worn sensibly and not shyly, certainly without any sense of concealment."
- (e) The kirpan should be easily removeable from the sheath. It must not be sewn, though the handle may be tied down.
- (f) A baptised Sikh is not to use the kirpan in anger or as a weapon. If he/she does so, that person is guilty of misconduct, and may be summoned and penalized. Non-appearance or insubordination may result in religious excommunication.

Pandori, supra, paragraph 29, [Intervener Book of Authorities Tab 7]

9. It is respectfully submitted that the jurisprudence surrounding the 5 k's is established on the following points, which are also affirmed by the SGPC and the Rehat Maryada (Sikh Code of Conduct, referred to in the Tuli decision):

- that the 5 k's are an integral part of the Sikh religion;
- that wearing of all of the 5 k's is mandatory for a baptised/Khalsa Sikh;
- that the kirpan holds purely spiritual/symbolic value to a Sikh;
- that a Sikh is prohibited by the strictures of his/her faith, to never use the kirpan as a weapon;
- that the use of the kirpan in anger or as a weapon represents a serious transgression for a Sikh, and may result in penalty or sanctioning from the Akal Takhat, the highest authority in Sikhism.

Tuli, supra, paragraph 29625, [Intervener Book of Authorities Tab 23]

10. In *Syndicat Northcrest v. Amselem*, this Court held that expert evidence is not required to be adduced by a claimant, where sincerity of religious belief is at issue. Despite this, a claimant may choose to adduce expert evidence in order to help show consistency of his/her religious belief with that of other adherents of the faith, or to assist the Court to positively assess the sincerity and honesty of the belief.

Syndicat Northcrest v. Amselem, [2004] S.C.C. 47, at paras 69, 140, [Intervener Book of Authorities Tab 22]

11. The Quebec Court of Appeal (paragraphs 68-71) accepted that the Appellants had established that their religious belief was sincere, and thus their right to freedom of religion had been violated.

B. The Canadian Charter of Rights and Freedoms

12. The Appellants' right to free practice of their religion is protected in Quebec at two levels. Where discrimination is alleged to have occurred by a governmental organization or agency, protection is afforded under the Canadian Charter of Rights and Freedoms ("Charter"). In addition, the Quebec Charter also affords protection. The following analysis will focus on the *Canadian Charter of Rights and Freedoms*.

Canadian Charter of Rights and Freedoms, Part 1, Constitution Act, 1982.

13. The *Charter* protects religious freedom under sections 2,15, and 27:

2. Everyone has the following fundamental freedoms:
 (a) freedom of conscience and religion;

15. (1) Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

27. This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

14. The purpose of section 2(a) is:

To ensure that society does not interfere with profoundly personal beliefs that govern ones perception of ones self, human kind, nature, and in some cases, a higher or different order of being. These beliefs in turn, govern ones conduct and practices. The Constitution shelters individuals and groups only to the extent that religious beliefs or conduct might reasonably or actually be threatened.

R. v. Edwards Books, [1986] 2 S.C.R. 713, at 759, [Intervener Book of Authorities Tab 12]

15. It is submitted that the policy of the School Board of prohibiting the wearing of a kirpan, clearly affects the equality rights of a Sikh, thus resulting in a claim for accommodation. Prohibiting the kirpan also violates section 2 rights, and is prima facie discriminatory against Sikhs, for whom the wearing of a kirpan is mandatory.

16. In *R. v. Big M. Drug Mart*, the court referred to section 27, when stating that the *Charter* protects religious minorities from the “tyranny of the majority”.

R. v. Big M. Drug Mart Ltd, [1985] 1 S.C.R. 295 at 337, [Intervener Book of Authorities Tab 12]

17. Enabling a Sikh to exercise his/her free practice of their religion is a protected right under section 2 of the *Charter*.

Grant et al. v. Attorney General (Canada), [1995] 1 F.C. 158 (F.C.A.) – leave to appeal to Supreme Court of Canada denied – at paragraph 7, [Intervener Book of Authorities Tab 3]

18. Indeed, as early as the 1960’s, Mr. Justice Douglas of the United States Supreme Court, in his concurring opinion in the case of *Sherbert v. Verner*, recognized that the right of a Sikh to carry a kirpan was a religious belief which should be protected:

Religious scruples of a Sikh require him to carry a regular or a symbolic sword...The examples could be multiplied, including those of the Seventh Day Adventist whose Sabbath is Saturday and who is advised not to eat some meats...These suffice however to show that many people hold alien beliefs to the majority of our society – beliefs which could easily be trod down under the guise of “police” or “health” regulations reflecting the majority’s view.

Sherbert v. Verner (1963), 374 U.S. 398, at 411; cited with approval in *Pritam Singh, supra*, at paragraph 4171, [Intervener Book of Authorities Tab 20].

19. The Respondent argues at paragraph 62 of its factum that allowing a kirpan to be worn by a Sikh student, would “threaten the sense of fairness in schools” because non-Sikh students are

prohibited from carrying weapons. This argument is premised in the mistaken belief that the kirpan is a weapon; it also ignores the fact that equality as guaranteed in the Charter does not require equality of treatment:

If the Charter was intended to eliminate all distinctions, then there would be no place for sections such as 27 (multicultural heritage); 2(a) (freedom of conscience and religion); 25 (aboriginal rights and freedoms); and other such provisions designed to safeguard certain distinctions. Moreover, the fact that identical treatment may frequently produce serious inequality is recognized in s.15(2)...

Law Society of British Columbia et al. v. Andrews et al., [1989] 1 S.C.R. 143, at p.171, [Intervener Book of Authorities Tab 4]

20. Only section 1 of the Charter can be invoked to override these protected freedoms:

1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

21. In *R. v. Big M. Drug Mart*, the Court established the principle that public policy grounds are the only overriding concerns which may limit one's free practice of religion.

R. v. Big M. Drug Mart Ltd., *supra*, at p. 337, [Intervener Book of Authorities Tab 12]

22. The Respondents say that the wearing of a kirpan by a Sikh constitutes a danger or threat posed to the public (ie. student body). However, this assertion does not meet the rational connection test that must be passed for a section 2 violation to withstand court scrutiny: as in *Pandori*, it is not sufficient for the school board to "claim that they had safety in mind when they prohibited the kirpan, they must also show that this was a necessary action, its necessity being compelling enough to override the prior right of religious freedom."

Pandori, *supra*, paragraph 171, [Intervener Book of Authorities Tab 7]

23. When one looks at the purpose and use of the kirpan, in the context of Canadian laws on prohibited weapons, it is obvious that there exist no valid public policy grounds to support the prohibition of the kirpan in a school.

C. Public Safety and the Kirpan

24. The Respondent School Board's entire case (paragraphs 29-34) is based on the premise that the kirpan is a weapon. The School Board relies first on the Sikh belief that the kirpan cannot be replaced with a replica, as evidencing the fact that it must remain a functional weapon.

25. However, this misrepresents the true nature of the kirpan. While it is accurate that the kirpan must be made of steel, and cannot be miniaturized, there is no valid authority which supports the proposition that the kirpan must be kept this way so that it can be used as a weapon. Indeed, in *Pandori*, the evidence was that the requirement for the kirpan to be made of iron (now cast as steel) emphasized the concept of equality of all peoples, "since iron was widely available even to the poor, it assumed the aspect of commonality, simplicity and equality." Furthermore, the kirpan was to be of a reasonable size and easily removable so that it could be used for religious ceremonies for the blessing of food.

Pandori, supra, paragraphs 16, 21 and 25, [Intervener Book of Authorities Tab 7]

26. The Respondent's references to the Sikh religion taken from the *Cheema* case (paragraphs 29-33 of Respondent's Factum), are all taken from the minority dissent, and are not supported by any Canadian jurisprudence. For example, the Respondent makes reference to the Universal Encyclopedia, stating the Sikhs are known as the "sect of the sword". This is

manifestly incorrect, and every reputable source confirms that Sikhism is a major world religion, and not a sect or cult.

Chapter 15, *Sikhism, supra*, [Intervener Book of Authorities Tab 24]

See also, *State of Ohio v. Singh, supra* p. 6, [Intervener Book of Authorities Tab 21]

27. The Respondent's assertion at paragraph 34 of its factum that some Sikhs think of the kirpan as a "ceremonial dagger" is misleading. With the exception of the *Hothi* case, Canadian Courts have accepted that the kirpan serves only a spiritual and symbolic value for Sikhs.

R. v. Hothi et al.(1985), 33 Man.R. (2d) 180 (Q.B.) (indexed as *Re: Singh et al. and the Queen*), [Intervener Book of Authorities Tab 15]

28. In fact, in *Hothi*, the court did not deny that the purpose of the kirpan was symbolic for a Sikh, instead, the court was concerned about the potential for use of the kirpan for violence, by an accused who was charged with a violent act. Clearly the circumstances of that case are very different than the case at bar:

I do not believe that the trial Court's decision and its reasoning can be applied to the instant case. 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 teachers and students are partners.

Pandori, supra, at para. 197, [Intervener Book of Authorities Tab 7] commenting on the decision in *Hothi, infra*.

29. Of the arguments made by the Respondent, the public safety argument, on the surface, appears to be the most compelling. This is rooted in the perception that the kirpan is a weapon.

30. A weapon, as defined in the *Criminal Code of Canada* means:

- d) anything used or intended for use in causing death or injury to persons whether designed for that purpose or not, or
- e) anything used or intended for use for the purpose of threatening or intimidating any person.

Criminal Code of Canada R.S.C. 1985, Ch. C-42, s.2.

31. The above definition was explored in the case of *R. v. Laidley*. In that case, the Court held that the use of the words “used or intended for use” invoke a subjective element requiring one to consider the intent of the wielder, before an object is deemed to be a weapon. In accordance with the Laidley definition, a baseball bat, pen, or a geometry compass (all of which can be found in any school), can be considered weapons where the intent of the wielder is to use them as such. Even if a device is classified as a prohibited weapon, the crown still has to establish that it was intended to be used as a weapon by the wielder of the object.

R. v. Laidley (1978), 39 C.C.C. (2d) 406 (Ont. C.A.), [Intervener Book of Authorities Tab 17]

see also *R. v. Kilpatrick* (1986), 31 C.C.C. (3d) 334 (Ont. Dis. Ct.), [Intervener Book of Authorities Tab 16]

32. In *R. v. Arrance* the Court stated that:

One must, I think, start with the premise that a knife, being an instrument that is universally used for utilitarian, peaceful purposes, is not prima facie designed to be used as a weapon, that is to say, in warfare, fighting or combat, to overcome an enemy in attack or defence... There is nothing to show that the knife in question here was designed to be used as a weapon.

R. v. Arrance [1971] 3 W.W.R. 641 at 644-5 (B.C.C.A.), [Intervener Book of Authorities Tab 11]

33. This position was supported by the Ontario Court of Appeal in *R. v. Leschyshyn*:

...a machete in a sheath, a three inch knife, a starter’s pistol with cartridges, and a small club would only be offensive weapons if they were proven to be held for a purpose dangerous to public peace.

R. v. Leschyshyn (1971), 11 C.C.C. (2d) 13 (Ont. C.A.), [Intervener Book of Authorities Tab 18]

34. The reference to the *Felawka* case, made by the Respondent, is distinguishable, as it deals with a firearm, which is clearly designed for use as a weapon. Indeed, the *Criminal Code* was modified to state that a firearm is always considered to be a weapon.

R. v. Felawka, [1993] 4 S.C.R. 199, [Intervener Book of Authorities Tab 14]

35. No such modification exists for the kirpan. Indeed, there is no indication that the wearing of the kirpan is against any Canadian laws, and in fact, a closer reading of the *Criminal Code*, would reveal otherwise. In a letter to the Calgary Sikh Society, which was marked as an Exhibit in the Grant case, the then Minister of Justice and Attorney General of Canada, Mark MacGuigan stated on May 10, 1983:

I wish to assure you that the ‘kirpan’ is not a restricted or prohibited weapon in Canada and it is not under consideration for classification as such a weapon. Generally speaking, it is not an offence for a person to possess or carry a ‘kirpan’ as a religious symbol... Whether or not a ‘kirpan’ or any other kind of knife or sword is a legal or illegal weapon depends entirely upon the intent of the wearer of the weapon...

36. This is consistent with the jurisprudence on the issue:

The Peel Board of Education bans all weapons from its schools and specifically identifies kirpans as weapons. However, baptised (Khalsa) Sikhs who must always have a kirpan on their persons, insist (and Sikh clerical authorities support this view) that a kirpan is not a weapon but a spiritual instrument and only appears as a weapon and therefore falls outside legitimate school concerns. (*footnote references deleted*)

Pandori, supra, paragraph 7, [Intervener Book of Authorities Tab 7]

See also *Pritam Singh supra*, paragraph 4199, [Intervener Book of Authorities Tab 8]

37. In the *Nijjar* case, the issue was whether the Complainant would be permitted to carry his kirpan on board an aircraft, where the kirpan “had a greater potential for injury than the eating utensils used on board the aircraft.” The kirpan in that case was pointed and had a sharp blade.

Nijjar, supra, paragraph 8, [Intervener Book of Authorities Tab 5]

38. Canada 3000 did not ban all kirpans on board their aircraft; there were kirpans that were acceptable to the airline, but which were not acceptable to the complainant. However, given the unique environment of an airplane, the accommodation being made (ie. that the kirpan not have greater potential for injury than a dinner knife) was deemed to be reasonable. It was on those grounds that the claim of discrimination was rejected by the Tribunal in *Nijjar*:

In assessing whether or not the respondent’s weapons policy can be modified so as to accommodate Sikhs detrimentally affected, consideration must be given to the environment in which the rule must be applied. In this regard, we 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.

Nijjar, supra, paragraphs 76 and 123, [Intervener Book of Authorities Tab 5]

39. The Tribunal distinguished the *Nijjar* case from *Pandori*, in the following manner:

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, paragraph 125, [Intervener Book of Authorities Tab 5]

40. The Respondent’s reliance at paragraphs 48-49 on the case of *Reference Re: Firearms Act (Canada)*, is distinguishable, as again, that case dealt with firearms whose sole purpose even by the wielder, was to hurt or kill.

Reference Re: Firearms Act (Canada), [2000] 1 S.C.R. 783, [Intervener Book of Authorities Tab 9]

41. The Respondent at paragraph 50 is only able to make reference to a handful of cases in the entire century in which Sikhs have lived in Canada, to the wrongful use of the kirpan. None of these incidents involved schools. This, if anything, shows the incredible restraint of the members of the Sikh faith in using the kirpan, and further legitimizes their assertion that the kirpan is not designed nor worn for use as a weapon.

Pandori, supra, paragraphs 22 and 198-202, [Intervener Book of Authorities Tab 7]

42. Following this line of reasoning, and given the ample evidence that has been accepted by earlier jurisprudence that the kirpan is not designed for use as a weapon, and in fact, its use as a weapon is strictly prohibited by the tenets of the Sikh faith, the arguments by the Respondents that the kirpan is a weapon, cannot stand.

43. The fact that the kirpan may resemble a sword or dagger to some, is irrelevant, "...the sword-like appearance of the kirpan [can be compared] to the mace, which was used in times of war as a club and which from that point of view is a weapon, but which long ago became a symbol of power, order and dignity."

Pandori, supra, paragraph 15, [Intervener Book of Authorities Tab 7]

44. And further:

The Kirpan is also the symbol of sovereignty and dignity. I suppose in a similar way...that in the Canadian parliament below the speaker's chair we have a mace which is an undoubted weapon and a reasonably brutal one. But this mace goes far beyond the aspect of being a weapon, but is instead a symbol of authority, a symbol of dignity, a symbol of sovereignty as it were the body that is involved.

In the same way that when one is in a long western tradition knighted with a sword, the sword here also represents the sovereignty, the authority, the dignity, which passes in this case from the sovereign to the person who is being knighted.

Tuli, supra, paragraph 29585, [Intervener Book of Authorities Tab 23]

45. The appellate Court in *State of Ohio v. Singh*, put it this way, “To be a Sikh is to wear a kirpan—it is that simple. It is a religious symbol, and in no way a weapon. As long as a kirpan remains a symbol and is neither designed or adapted for use as a weapon, laws such as R.C.2923.12 are wholly inapplicable.”

State of Ohio v. Singh, supra, paragraph 26, [Intervener Book of Authorities Tab 21]

46. A similar line of reasoning was used by the Ontario Board of Inquiry in the earliest kirpan case in the jurisprudence, *Pritam Singh v. Workers Compensation Board Hospital and Rehabilitation Centre*. The Board held that, “[t]here was absolutely no evidence that Mr. Singh intended to use his kirpan in an offensive manner. Canadian law holds that a knife is not prima facie an offensive weapon...The kirpan was not designed to be used as a weapon.”

Pritam Singh, supra, at paragraphs 4198-99, [Intervener Book of Authorities Tab 8]

47. The only kirpan case in Canada where the kirpan was deemed to be a weapon, was in the *Hothi* decision, *supra*, which did not involve any analysis of the law regarding weapons, or the tenets of the Sikh faith regarding the kirpan. Of particular note, as well, is that the *Hothi* case can be distinguished, as it involved the possession of a kirpan in a courtroom by an individual who was accused of a violent crime.

D. The School Environment

48. The Respondent asserts that the school environment is unique, and therefore, the kirpan jurisprudence in this area is not applicable. However, the cases on which the Respondents rely, are distinguishable.

49. The Respondent relies on *R. v. M.R.M.*, a case where a search of a student and his locker was deemed reasonable, on the grounds that the school environment necessitated such an action. However, in *M.R.M.*, the Court was dealing with the alleged commission of a criminal act (possession of a narcotic). Here, there is no allegation that Mr. Multani has committed an offence, rather, the court is addressing the scope of the religious freedom which should be accorded him, in the face of the school's stated desire to maintain a safe and secure environment. When schools make decisions affecting the constitutional rights of a student, they,

...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.R.M., [1998] 3 S.C.R. 393, at paragraph 3, [Intervener Book of Authorities Tab 19]

50. Further, the Divisional Court in the *Peel Board of Education* case found that, "[t]here is no reason to give a restricted application of the [human rights] Code to schools." This same sentiment could easily be applied to Charter rights.

Peel Board of Education v Ontario Human Rights Commission, [1991] 3 OR (3d) 53, paragraph 16, [Intervener Book of Authorities Tab 7]

51. The Respondent asserts that by allowing the Appellant to wear his kirpan, this will increase violence in schools because of the media publicity attached with such a decision. However, numerous publicized cases over the years have been decided in favour of the kirpan, with no negative fallout. Of significance, in *Tuli*, as in this case, the student's challenge to the

school policy was well publicized in the media, yet despite this, the student completed his high school year with his kirpan and without any incidence.

Tuli, supra, paragraph 29595, [Intervener Book of Authorities Tab 23]

52. The Quebec school environment is not any more unique than other school environments across the country. In *Pandori* evidence was provided by experts from B.C. where Asian gangs were already a phenomenon in the school system. Despite this, kirpans are allowed in all schools in B.C., where there are far more practicing Sikhs in Surrey, than in Peel, and this has not given rise to any kirpan related violence.

Pandori, supra, paragraphs 62 and 66, [Intervener Book of Authorities Tab 7]

53. The Respondent relies on affidavit evidence that the presence of gangs in schools means that any difference in attire of a student, could result in violence. Yet the Codes de vie of the schools in the Respondent's jurisdiction, do not mandate that there be a uniform worn by students.

Code de vie – École des Sources, [Respondent's C.S.M.B. Book of Documents, Vol II, p. 155]

Code de vie – École Saint-Germain-de-Saint-Laurent, [Respondent's C.S.M.B. Book of Documents, Vol II, p. 179]

54. The Respondent's reliance on the Affidavit of Denis Leclerc does not assist its case, as it is clear that the position taken by Mr. Leclerc, that a Jewish student should not even be allowed to wear a kippa for fear of gang related violence, is highly questionable. The School Board would have us remove all distinguishing features to avoid gang violence, yet have disingenuously not sought to mandate the wearing of a uniform to prevent any unnecessary gang violence.

55. This Intervenor in no way wishes to belittle legitimate fears of potential violence in schools, but asserts that the potential for violence is not heightened by the wearing of a kirpan by

a student, and indeed, there is no rational connection between the prohibition of a kirpan, and keeping the school environment safe. The fears of potential violence flowing from the wearing of a kirpan in a school setting are based on speculation, and not empirical evidence. Speculation cannot be the basis to trump a fundamental human right. As stated by this Court in *Syndicat Northcrest* (*supra*, para. 88), security concerns, if any, must be “soundly established”.

E. Accommodation of the Kirpan

56. The Respondent at paragraph 85 states that it is prepared to accommodate the Appellant, by allowing him to wear a kirpan as a pendant, or made out of a non-offensive material.

57. However, the courts have accepted the sincerity of the Sikh belief that the kirpan must be made out of steel, and be of a reasonable size (larger than a pendant). Thus the “accommodation” offered by the Respondent does not accord with the Appellant’s own sincerely held belief, which is of paramount consideration.

Syndicat Northcrest (*supra*, para. 88), [Intervener Book of Authorities Tab 22]

Pritam Singh, *supra*, paragraphs 4172 and 4189, [Intervener Book of Authorities Tab 8]

Nijjar, *supra*, paragraphs 38-39, [Intervener Book of Authorities Tab 5]

58. The Respondent’s offer does not meet the standard of reasonable accommodation, as there is no real evidence that the kirpan poses any danger to persons in a school:

The onus of proof on the question of reasonableness was on the Peel board and the Board of Inquiry dealt with the evidence exhaustively... We can see no error in principle in the way it applied its judgment to the facts of this case, particularly in light of the lack of any incident of kirpan-related violence in any school system.

Peel Board of Education, *supra*, paragraph 17, [Intervener Book of Authorities Tab 7]

59. Assuming that, as alleged by the School Board, the wearing of a kirpan by a student makes some teachers or students feel insecure, this is a small price to pay for the upholding of the Appellant's right to free practice of his religion (especially where such feelings are unfounded on the facts and law):

...the protection of fundamental rights is usually accompanied by costs, either financial or otherwise. There is a cost associated with making buildings wheelchair accessible for persons with disabilities. There is also a cost for ensuring that women have equal access to employment opportunities. The present case is not unique in that regard.

Dhillon v. British Columbia (Minister of Transportation and Highways) (1999), 35 C.H.R.R. D/293 (B.C. Trib.) paragraph 52, [Intervener Book of Authorities Tab 2]

60. The Appellant's right to accommodation cannot be defeated based on the evidence presented in this case.

[M]ore than minor inconvenience must be shown before the complainant's right to accommodation can be defeated...Minor interference or inconvenience is the price to be paid for religious freedom in a multicultural society.

Renaud v. Central Okanagan School Board, [1992] 2 S.C.R. 970 at 983, [Intervener Book of Authorities Tab 10]

61. The Appellant has been willing to allay concerns for fear of misuse of the kirpan by third parties, by adhering to the restrictions imposed by Justice Grenier and arrived at by agreement with the Respondent.

62. It is important to note here that where the kirpan has been allowed by the courts in circumstances similar to the one at bar, there has been no stipulation made that the kirpan be kept in a wooden sheath, as was agreed to by the Parties in the within case. Indeed, there is no evidence in any of the case law that the traditional metal sheath or wood/metal combination sheath, poses a safety risk. Thus the accommodations agreed to by the Parties before the lower

Court are reasonable and serve to address any fears of potential violent use of the kirpan in a school setting.

See for example, *Cheema v. Thompson*, 67 F. 3d 883 [1995] CA9-QL 3279 (U.S.C.A. 9th Circuit), [Intervener Book of Authorities Tab 1], *Pandori, supra*, [Intervener Book of Authorities Tab 7], or *Tuli, supra*, [Intervener Book of Authorities Tab 23]

PART IV: SUBMISSIONS ON COSTS

63. None

PART V: ORDER REQUESTED

64. It is respectfully submitted that this Appeal be allowed.

All of which is respectfully submitted, this 21st day of March, 2005.

Palbinder K. Shergill
Attorney for the Intervener,
WORLD SIKH ORGANIZATION

PART VI – TABLE OF AUTHORITIES

CASES

<i>Cheema v. Thompson</i> , 67 F.3d 883 [1995] CA9-QL 3279 (U.S.C.A. 9 th Circuit)	26
<i>Dhillon v. British Columbia (Minister of Transportation and Highways) (1999)</i> , 35 C.H.R.R. D/293 B.C.Trib.).....	59
<i>Grant et al. v. Attorney General (Canada)</i> [1995] 1 F.C.J. 158 (F.C.A.).....	17
<i>Law Society of British Columbia et al. v. Andrews et al.</i> (1989) 1 S.C.R. 143 at page 171 (S.C.C.).....	19
<i>Nijjar v. Canada 3000 Airlines Ltd.</i> , [1999] C.H.R.D. No.3.....	37,38,39,57
<i>Peel Board of Education v. Ontario Human Rights Commission</i> [1991] 3OR (3d) 531 (Div. Ct.) leave to appeal to C.A. refused [1991] O.J No. 3200 (C.A.)	5,50
<i>Peel Board of Education v. Pandori et al.</i> (1990), 12 C.H.R.R. D/364 (Ont. Bd. Inq.).....	6,8,22,25,28,36,41,43,52
<i>Pritam Singh v. WCB Hospital and Rehabilitation Centre</i> (1981), 2 C.H.R.R. D/459 (Ont. Bd. Inq.)	5,7,36,46,57
<i>Reference Re: Firearms Act (Canada)</i> , [2001] 1 S.C.R. 783.....	40
<i>Renaud v. Central Okanagan School Board</i> , [1992] 2 S.C.R. 970.....	60
<i>R. v. Arrance</i> [1971] 3 W.W.R. 641 (B.C.C.A.).....	32
<i>R. v. Big M. Drug Mart Ltd.</i> [1985] 1 S.C.R. 295	21
<i>R. v. Edwards Books</i> . [1986] 2 S.C.R. 713	15
<i>R. v. Felawka</i> , [1993] 4 S.C.R. 9.....	34
<i>R. v. Hothi et al.</i> 91985), 33 Man.R (2) 180 (Q.B.).....	18, 27,28
<i>R. v. Kilpatrick</i> (1986), 31 C.C.C. (3d) 334 (Ont. Dis. Ct.).....	31
<i>R. v. Laidley</i> (1978), 39 C.C.C. (2d) 406 (Ont. C.A.).....	31

<i>R. v. Leschyshyn</i> (1971), 11 C.C.C. (2d) 13 (Ont. C.A.).....	33
<i>R. v. M.R.M.</i> , [1998] 3 S.C.R. 393 (S.C.C.).....	49
<i>Sherbert v. Verner</i> (1963), 374 U.S. 398.. ..	18
<i>State of Ohio v. Singh</i> (1996), 117 Ohio App. 3d 381 (C.A. of Ohio)	7,26,45
<i>Syndicat Northcrest v. Amselem</i> , [2004] SCC	10,56
<i>Tuli v. St. Albert Protestant Bard of Education</i> (1987), 8 C.H.R.R. D/3736 (Alta.Bd.Inq.)	5, 7, 9, 44, 51

OTHER AUTHORITIES

Chapter 15, <i>Sikhism in World Religions – From Ancient History to the Present</i> , by Geoffrey Parrinder (1983) The Hamlyn Publishing Group Ltd., New York.....	4, 26
---	-------

PART VII – STATUTORY PROVISIONS

LEGISLATIVE ENACTMENTS

Criminal Code of Canada R.S.C. 1985, Ch. c-42, s.2	
--	--