

# Supreme Court of Canada

## Analysis of SCC Kirpan Decision

**Multani v. Commission scolaire Marguerite-Bourgeoys, 2006 SCC 6**

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### 1. Key Terms

Ss. 1, 2(a), and 15 of the *Canadian Charter of Rights and Freedom* ("*Charter*"); discrimination on the basis of religion; freedoms of conscience and religion; injunction; s. 3 of Quebec's Charter of human rights and freedoms ("Quebec Charter"); kirpan a metal dagger seen by Sikhs as a religious object to be worn at all times; administrative law and constitutional standards of review.

### 2. Significance of the Decision

This decision provides some clarity on the concept of limiting religious freedom on the section 2 analysis rather than at the more usual place of the section 1 analysis. It also decides that decisions of administrative tribunals can be subject to constitutional analysis and not merely judicial review. The net effect of this is to provide a greater protection for religious freedom.

### 3. Summary of Facts

The Appellant, Balvir Singh Multani and his son Gurbaj Singh Multani are members of the Sikh religion. Gurbaj attended École Sante-Catherine-Labouré when on November 19, 2001, he accidentally dropped the kirpan he was wearing under his clothes while on the school property. The kirpan is a religious object that resembles a dagger – made of metal. Gurbaj's religious beliefs require him to wear the kirpan at all times. On December 21, 2001 the school's legal counsel sent a letter to the family stating that Gurbaj would be permitted to wear the kirpan provided he complied with certain conditions that it be sealed within his clothing. The family agreed.

The school board refused to ratify the agreement since it violated art. 5 of the Code of Conduct which prohibited the carrying of weapons. That decision was upheld by the school's "council of commissioners." He was given the right to wear a symbolic kirpan such as a pendent or a kirpan made from other material that would make it harmless. The Multanis felt that was unacceptable. On a motion for a declaratory judgment together with an application for an interlocutory injunction with the Superior Court Mr. Multani asked that the council's decision be declared of no force or effect and that Gurbaj had a right to wear the kirpan at school if sealed and sewn up

inside his clothing. He argued it was a reasonable accommodation to his freedom of religion and right to equality as guaranteed in the Canadian and Quebec Charters.

The Superior Courts agreed with the Multani position and granted the relief. The school appealed to the Quebec Court of Appeal. The Court of Appeal held that the council's decision infringed on Gurbaj's religious freedom but that the limit was justified under the section 1 analysis. The council's decision was motivated by a pressing and substantial objective – the safety of the school's student and staff. There was a direct and rational connection between the prohibition of wearing the kirpan and the objective of maintaining a safe environment. To allow the kirpan would result in undue hardship on the school – reducing its safety standards. The council's decision was not unreasonable.

#### **4. Decision**

The absolute prohibition against wearing a kirpan infringes the freedom of religion of Gurbaj under s. 2(a) of the Canadian Charter. The infringement cannot be justified under s. 1 of the Canadian Charter, since the prohibition does not minimally impair the rights. The council's decision is declared a nullity.

#### **5. The Court's Reasons**

Justice Charron wrote the majority opinion concurred by MacLachlin, C.J., Bastarache, Binnie and Fish JJ.. Charron began her reasoning by dealing with a couple of preliminary points.

First, she took the position that the proper standard of review was not the administrative law standard of reasonableness simpliciter but rather the principles of constitutional justification. She noted, "...the fact that an issue relating to constitutional rights is raised in an administrative context does not mean that the constitutional law standards must be dissolved into the administrative law standards. The rights and freedoms guaranteed by the Canadian Charter establish a minimum constitutional protection that must be taken into account by the legislature and by every person or body subject to the Canadian Charter." (Para. 16.) Applying the administrative law standard only leads to confusion and in this case, as the Court of Appeal did, leads to an erroneous decision.

The administrative law standard deals with the reasonableness of a tribunal's decision and whether the requisite legislature gave it the proper jurisdiction. There was no suggestion that the council in this case did not have jurisdiction to approve the Code of Conduct – the issue was whether the council's application of the Code violated Gurbaj's freedom of religion under the Canadian Charter. The administrative law standard of review simply was not relevant.

Deschamps and Abella JJ. disagreed – they were of the view that the administrative law standard did apply and further they argued that the court should only apply section 1 of the Canadian Charter where a complainant is attempting to overturn a normative rule as opposed to a decision applying that rule. Charron rejected that approach outright – stating that it ought to be applied to both.

Second, Charron dealt with the issue of whether there are “internal limits” of freedom of religion. The school argued that the freedom of religion was not infringed because it has internal limits – they include public order, safety, health, and the rights and freedoms of others and therefore there was no need to do a s. 1 analysis. However the Court was of the view that “a contextual analysis under s. 1 will enable us to balance the relevant competing values in a more comprehensive manner.” (Para. 29.)

## Freedom of Religion

Freedom of religion as outlined in the Big M Drug Mart includes the right to entertain such religious beliefs as a person chooses, the right to declare them openly, without fear of hindrance or reprisal, and the right to manifest them by worship, practice or by teaching and dissemination. Subject to such limitations as necessary to protect public safety, order, health, or morals or the rights and freedoms of others, no one is to be forced to act contrary to his beliefs or conscience. It is up to every individual to work out for himself what his or her religious obligations, if any, should be – it is not for the state to dictate.

In Anselm the Court ruled that to establish infringement of religious freedom the claimant must show (1) that he or she sincerely believes in a practice or belief that has a nexus with religion; (2) that the impugned conduct of a third party interferes, in a non-trivial manner with his or her ability to act in accordance with the practice or belief.

Gurbaj does not have to show that the kirpan is not a weapon – he only needs to “show that his personal and subjective belief in the religious significance of the kirpan is sincere.” (Para. 37) All of the evidence indeed established that he was sincere. He was not capricious. The fact that other Sikhs accept a compromise of a plastic or wooden kirpan is not relevant.

The interference with his faith was neither trivial nor insignificant as he was forced to follow his religious convictions and left public school to attend a private school because of being denied the right to wear the kirpan. There is no doubt that the council’s decision infringed his freedom of religion. That limit must be justified under s. 1 of the Canadian Charter.

## Section One Analysis

The onus is on the respondents to show first, the objective pursued was of sufficient importance to warrant the limiting of the constitutional right; second, the means chosen was proportional to the objective.

First, the objective was to ensure the safety of the students and staff – a laudable objective and therefore pass the first stage of the test. The question is to what degree of risk was the council trying to achieve. It ranges from a degree of absolute safety to a total lack of concern. In the between is “a reasonable level of safety.” That middle level is what must have been sought and is a pressing and substantial concern.

Second, the proportionality test requires that there be a rational connection between the decision and the objective. Despite the religious significance of the kirpan it also has characteristics of a weapon and could cause injury. There was a rational connection.

Proportionality also requires that the limit must minimally impair the infringed right or freedom but it need not be the “least intrusive solution.” Courts allow some flexibility – if the impairment falls within a range of reasonable alternatives the courts will be satisfied. The council’s arguments that the absolute prohibition was justified on the grounds of:

Safety in school – the fear was that Gurbaj would use the kirpan violently or some other student would take it from him and use it violently. The evidence showed that Gurbaj did not have a behavioural problem. If another student took it from him then they “would first have to physically restrain him, then search through his clothes, remove the sheath from his guthra, and try to unstitch or tear open the cloth enclosing the sheath in order to get to the kirpan.” (Para. 58.) If a student was intent on violence then they could bring a weapon to the school or take an item from the school such as scissors, pencils or baseball bats. For over 100 years of Sikhs living in Canada there has not been one incident of a student violently using a kirpan.

Kirpans are banned in courts and airplanes – however the Court noted that such contexts are much different than that of a school where there is a long term relationship between teaching staff and students and therefore an ability to assess the likelihood of violence. Unlike the confined areas of an airplane where people are largely unknown or in a court room where appearances are temporary – the school is different. “Each environment is a special case with its own unique characteristics that justify a different level of safety, depending on the circumstances.” (Para. 66.)

The proliferation of weapons argument also fails on the above analysis.

The negative impact on the school environment argument suggests that kirpans sends a message that using force is necessary to assert rights. There is no evidence of such and it does not address the religious nature of the kirpan in a multicultural society. “Religious tolerance is a very important value of Canadian society. If some students consider it unfair that Gurbaj Singh may wear his kirpan to school while they are not allowed to have knives in their possession, it is incumbent on the schools to discharge their obligation to instil in their students this value that is... at the very foundation of our democracy.” (Para. 76.)

The respondents fail to demonstrate the limit was reasonable. The effects of the ban “stifle the promotion of values such as multiculturalism, diversity, and the development of an educational culture respectful of the rights of others.” (Para. 78.) “A total prohibition against wearing a kirpan to school undermines the value of this religious symbol and sends students the message that some religious practices do not merit the same protection as others. On the other hand, accommodating Gurbaj Singh and allowing him to wear his kirpan under certain conditions demonstrates the importance that our society attaches to protecting freedom of religion and to

showing respect for its minorities. The deleterious effects of a total prohibition thus outweigh its salutary effects.” (Para. 79.)

## **6. Commentary**

This decision is following a familiar path of religious freedom cases at the Supreme Court – Big M Drug Mart, Edward’s Books, Trinity Western, Chamberlain and Anselm. Increasingly the Court finds itself in an unenviable position of trying to adjudicate religious freedom of minorities. As Canada becomes more diverse in its constituent people groups it is not surprising that minority religious practice conflict in the broader society.

The Multani decision is an example of how flexible the Court has become in seeking to provide accommodation to religious groups. For all practical purposes a kirpan is an intimidating piece of weaponry – but it has a religious significance to the members of the Sikh religion that is only intimately known by them. For the outsider, the kirpan’s appearance reveals a weapon designed to inflict harm. The Court is to be admired for its willingness to go beyond the societal biased opinion of the kirpan, as expressed in the council of commissioners’ decision, to seek a compromise that respects both the religious sensibility of the Appellant and the public safety concerns of the Respondents. Both sides had legitimate positions – both are respected by this decision.

### **Internal Limits of Religious Freedom**

The Court was wise not to accede to the demands of the Respondents to seek “internal limits” of the right of religious freedom. Religious groups have a keen interest in seeing that religious freedom not be circumscribed from the get go. There are as many different religious practices as there are belief systems – all ought to gain access to section 2(a) of the Charter. To limit the concept of religious freedom to be anything less than that articulated in the foundational case of Big M Drug Mart would be a step backward in the Canadian Charter evolution of religious freedom. Society’s majority opinion of what constitutes a religious practice ought not to be the lens through which minority practices are judged. Such would eliminate the effectiveness of the Canadian Charter. The general principles that have been guiding the court for over two decades have served Canadian jurisprudence well and ought to continue.

However that is not to say religious freedom is unlimited. What it means is that the limits of that freedom have to be justified in the section 1 analysis of the Canadian Charter – i.e. subject only to those reasonable limits as can be demonstrably justified in a free and democratic society and NOT in the section 2(a) analysis.

The analysis of Charter protection for religious freedom should be seen as a two step process – first, “Does the practice warrant protection?” That question is to be answered using the approach found in the Anselm case which decided a claimant must show (1) that he or she sincerely believes in a practice or belief that has a nexus with religion; (2) that the impugned conduct of a third party interferes, in a non-trivial manner with his or her ability to act in accordance with the practice or belief. Once passed that hurdle the next question is “Is the limit on the religious

practice a reasonable limit in a free and democratic society?” Of course, that analysis is based on the Oakes test.

Such a paradigm provides a very comprehensive and analytical approach to the issue of religious freedom. It is an approach that has developed some considerable jurisprudential authority which should not be tampered with lightly. Religious freedom under section 2(a) therefore should not have internal limits – as noted above such limits will be reviewed under section 1.

### The Administrative Law Discussion

The opinion of Deschamps and Abella JJ. does give reason for concern. Their view would have decided the case on the application of administrative law principles – namely reasonableness. While there is considerable precedent in the Trinity Western and Chamberlain cases their approach, as discussed below has some unique challenges.

Deschamps and Abella argue that the decision of the council of commissioners was an administrative decision and could not be considered “law” as understood in s. 1 of the Canadian Charter. In making its decision, they argued, the council had to take all fundamental values into consideration – not only security but the freedom of religion and the right to equality. Since it “...did not sufficiently consider either the right to freedom of religion or the accommodation measure proposed by the father and the student...” (Para. 99.) the school made an unreasonable decision. Thus Deschamps and Abella appear to come to the same net effect as the majority in this case – however that may be simplistic.

Using their approach the administrative law standard is all that would be applied – if the tribunal is “reasonable” its decision will stand. One could easily frame an argument, as was done in the Quebec Court of Appeal, that the council did consider the issue of religious freedom – after all they made their decision after their legal counsel informed Gurbaj that he would be accommodated under certain conditions – the council reviewed that agreement and said that their safety requirement, as envisioned by the Code, overrode the religious freedom issue. They acted within their jurisdiction; it could be argued it was reasonable concerning the issue at hand.

Deschamps and Abella’s approach is that, “Yes, but the religious freedom was not “sufficiently considered.”” But how under the administrative law approach can it be “sufficiently considered?” What are the hallmarks of “sufficiently considered” – what is the test? We do not know.

It would appear the administrative law approach of Deschamps and Abella is limiting. It does not allow a tribunal’s decision to undergo further analysis under section 1 of the Charter – since it is not “a norm such as a law, regulation, or other similar rule of general application.” This is problematic. Surely all decisions made by an administrative body that seeks to enforce government regulation or law is subject to the Charter – otherwise where is the relief for the complainants? Judicial review will only be helpful as long as the entire legal arsenal of administrative law and constitutional law principles can be garnered to bring about justice.

While they argue “...it is difficult to imagine a decision that would be considered reasonable or correct even though it conflicted with constitutional values,” (Para. 109) they also say that a possibility exists for a legislature to expressly indicate that an administrative body can disregard constitutional values. This is confusing. It would seem to me, that every decision making body, including administrative bodies, are required to keep in mind the highest law of the land – the constitution - when making its decisions. The only way a legislature could possibly set up a body that can disregard the Charter is by means of the s. 33 “Notwithstanding Clause.” Even then a tribunal’s decision ought to be analysed using the Charter so that at the end the judicial reviewer could state, “But for the use of s. 33 here is how the decision would hold up under Charter scrutiny.” Thus there would be an educating process of the public of what rights are being lost by the decisions of such a tribunal. The Deschamps and Abella approach would not provide for such an analysis ab initio.

### Conclusion

This case will prove helpful to the law’s understanding of how minority religious practice ought to be addressed - allowing for a greater access to the protection of s. 2(a) of the Charter and the use of s. 1 analysis to justify limits to that freedom even from decisions of an administrative tribunal.

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