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SUPREME COURT GIVES STRONG ENDORSEMENT TO FREEDOM OF RELIGION

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A. INTRODUCTION

The Supreme Court of Canada has sent a strong message that Canada's public education institutions must embrace diversity and develop an educational culture respectful of the right to freedom of religion. In its decision in *Multani v. Commission scolaire Marguerite-Bourgeoys* ("Multani"),[1] the Court confirmed the right of an orthodox Sikh student to wear his ceremonial dagger at school. The Court concluded that the *Charter of Rights and Freedoms* (the "*Charter*") establishes a minimum constitutional protection for freedom of religion that must be taken into account by the legislature and by administrative tribunals. Safety concerns must be unequivocally established for the infringement of a constitutional right to be justified. As such, the Court gave new guidance to administrative bodies dealing with *Charter* issues, declaring that administrative bodies must apply the principles of constitutional justification when a *Charter* right has been infringed. This *Church Law Bulletin* will review the decision and discuss its implications for future challenges before both administrative tribunals and the courts, particularly as it relates to freedom of religion.

[1] *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6. [2006] S.C.J. No. 6. Justice Major took no part in the judgment. Justice Charron wrote the majority decision, Chief Justice McLachlin and Justices Bastarache, Binnie and Fish concurring. Justices Deschamps and Abella wrote joint concurring reasons, and Justice LeBel wrote concurring reasons.

B. BACKGROUND

In 2001, a thirteen-year-old orthodox Sikh accidentally dropped his kirpan[2] while in his schoolyard.[3] The school board sent a letter to the child's parents authorizing the child to wear his kirpan to school, provided that he complied with certain conditions to ensure that it was sealed inside his clothing. The child and his parents agreed to this arrangement. However, the governing board of the school refused to ratify the agreement citing the school's *Code de vie* (code of conduct), which prohibited the carrying of weapons on school grounds. This decision was upheld by the school board's Council of Commissioners. In place of a real kirpan, the Council of Commissioners was willing to accept the child wearing a symbolic kirpan in the form of a pendant or one in another form made of a material rendering it harmless.

The Quebec Superior Court[4] declared the Council of Commissioners' decision to be of no force and effect and authorized the child to wear his kirpan at school, provided he complied with the following conditions:

- the kirpan be worn under his clothes;
- the kirpan be carried in a sheath made of wood, not metal, to prevent it from causing injury;
- the kirpan be placed in its sheath and wrapped and sewn securely in a sturdy cloth envelope, and that this envelope be sewn to the guthra;
- school personnel be authorized to verify, in a reasonable fashion, that these conditions were being complied with;
- the petitioner be required to keep the kirpan in his possession at all times, and that its disappearance be reported to school authorities immediately; and
- in the event of a failure to comply with the terms of the judgment, the petitioner would definitively lose the right to wear his kirpan at school.

The Court of Appeal set aside the Superior Court's judgment and restored the Council of Commissioners' decision,[5] saying that the applicable standard of review was reasonableness *simpliciter*, which requires the tribunal's decision to be "clearly wrong." Such a standard requires the reviewing court to accept the tribunal's decision even if the court would have come to a different conclusion. Although finding that the child's father had proven that his son's need to wear the kirpan was a sincerely held religious belief and was

[2] A religious object resembling a dagger that orthodox Sikhs are required wear.
[3] Orthodox Sikhs must comply with a strict dress code requiring them to wear religious symbols commonly referred to as the Five Ks: (1) the kesh (uncut hair); (2) the Kangha (a wooden comb); (3) the kara (a steel bracelet worn on the wrist); (4) the kaccha (a special undergarment); and (5) the kirpan (a metal dagger or sword).
[4] See [2002] Q.J. No. 1131.
[5] See [2004] R.J.Q. 284.

not capricious, the court held that the child's freedom of religion could be limited in instances where the safety of others was at issue. The "pressing and substantial objective" to ensure the safety of the school's students and staff was directly and rationally connected to the prohibition against wearing a kirpan on school premises and the objective of maintaining a safe school environment. The court reasoned that the conditions imposed at the Superior Court level did not eliminate every risk and only "delayed access" to the kirpan, which could be used as a weapon. Allowing a student to wear a kirpan would require the school board to reduce its safety standards, which would be an undue hardship. As a result, the Court of Appeal held that the Council of Commissioners' decision was not "clearly wrong" and should not be overturned by the courts.

C. THE SUPREME COURT'S DECISION

The Supreme Court of Canada disagreed with the Court of Appeal's decision on the grounds that administrative law principles should not be used to avoid a thorough constitutional analysis, particularly where *Charter* rights are involved. More specifically, the Court stated that such an approach,

> … could well reduce the fundamental rights and freedoms guaranteed by the *Canadian Charter* to mere administrative law principles or, at the very least, cause confusion between the two. … [T]he fact that an issue relating to constitutional rights is raised in an administrative context does not mean that the constitutional 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*.[6]

Since this complaint was based entirely on the issue of freedom of religion, the Court determined that the administrative law standard of review was not relevant. In other words, the child's father was not challenging the Council of Commissioners' jurisdiction to approve the code of conduct, or the administrative or constitutional validity of the rule against carrying weapons and dangerous objects. Rather, the concern was that the refusal to agree to a reasonable accommodation violated his son's freedom of religion. The Court concluded that "it is the constitutionality of the *decision* that is in issue in this appeal, which means that a constitutional analysis must be conducted."[7] Following precedent, this required that the decision be subjected to the test set out in section 1 of the *Charter*.[8]

[6] Multani, *supra* note 1 at para. 16 [emphasis in original].
[7] *Ibid*. at para. 21 [emphasis in original].
[8] *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1308.

1. Was there a *Charter* infringement

The Court found that the Council of Commissioners' decision clearly infringed the student's freedom of religion. In this respect, the Court reviewed previous decisions on the issue, approving the key principles, such as:

- the essence of the concept of freedom of religion is:
  - the right to entertain such religious beliefs as a person chooses;
  - the right to declare religious beliefs openly and without fear of hindrance or reprisal; and
  - the right to manifest religious belief by worship and practice or by teaching and dissemination;[9]
- no one is to be forced to act in a way contrary to his or her beliefs or conscience, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others;[10]
- it is not for the state to dictate what are the religious obligations of the individual, it is for the individual to determine;[11]
- freedom of religion consists of:
  - the freedom to undertake practices and harbour beliefs, having a nexus with religion, in which an individual demonstrates he or she sincerely believes or is sincerely undertaking in order to connect with the divine or as a function of his or her spiritual faith
  - this is irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials;[12]
- in order to establish that a claimant's freedom of religion has been infringed, it must be shown that the claimant sincerely believes in a practice or belief that has a nexus with religion, and that the impugned conduct of a third party interferes with the claimant's ability to act in accordance with that practice or belief;[13] and
- this interference must be more than trivial or insubstantial.[14]

In Multani, the Supreme Court of Canada noted that the requirement for orthodox Sikhs to wear a kirpan at all times was not contested by any party, and accepted that the child's refusal to wear a symbolic kirpan made of a material other than metal, as suggested by the Council of Commissioners, was "based on a reasonable religiously motivated interpretation,"[15] and a sincere belief that he must

[9] *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 ("Big M. Drug").
[10] *Ibid*.
[11] *Ibid*.
[12] *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551 ("Amselem"). For more discussion of the Amselem decision, see e.g. Terrance S. Carter, "Supreme Court of Canada Adopts Broad View of Religious Freedom" in *Church Law Bulletin No. 5* (23 August 2004), available at www.churchlaw.ca.
[13] *Ibid*.
[14] *Ibid*.
[15] Multani, *supra* note 1 at para. 36.

"adhere to this practice in order to comply with the requirements of his religion."[16] Following the Court's lead in the Amselem decision, the Court in Multani affirmed that "the fact that other Sikhs accept such a compromise [wearing a plastic or wooden kirpan] is not relevant."[17]

As the child was being forced to choose between leaving his kirpan at home and leaving the public school system, the Court accepted that the infringement was not a trivial or insignificant interference with the child's right to freedom of religion.[18] Thus, the Court concluded that the Council of Commissioners' decision to prohibit the wearing of a kirpan on school premises constituted an infringement of the claimant's freedom of religion.

2. Section 1 analysis

The principles of constitutional justification have been refined through a long line of decisions since the inception of the *Charter*, and are variously described in a number of multi-pronged tests.[19] In order to justify an infringement of a constitutionally protected right, the government or body acting under governmental authority needs to prove a number of elements:

- the *Charter* infringement must be reasonable;
- the infringement is prescribed by law;
- the infringement is demonstrably justified in a free and democratic society, which requires that:
  - there was a pressing and substantial objective;
  - the means are proportional to the objective:
    - the means are rationally connected to the objective;
    - there is a minimal impairment of rights; and
    - there is proportionality between the salutary and deleterious effects of the requirement.

Applying this test to the Multani case, the Court held that a total prohibition from wearing a kirpan to school "undermines this religious symbol and sends students the message that some religious practices do not merit the same protection as others."[20] While accepting that the objective of ensuring safety in schools "is sufficiently important to warrant overriding a constitutionally protected right or freedom," the Court determined that instead of pursuing an "absolute" level of safety in schools, the Council of

[16] *Ibid*. at para. 38.
[17] *Ibid*. at para. 39.
[18] *Ibid*. at para. 40.
[19] See *e.g. R. v. Oakes*, [1986] 1 S.C.R. 103; *R. v. Edwards Books and Art Ltd*., [1986] 2 S.C.R. 713; Big M Drug, *supra* note 9.
[20] Multani, *supra* note 1 at para. 79.

Commissioners had chosen to pursue a "reasonable" level, which was still recognized as a pressing and substantial objective. The ban on kirpans was found to be rationally connected to this objective. However, on the issue of minimal impairment, the Court emphasized the importance of religious tolerance in Canadian society and suggested that the arguments respecting the kirpan being a symbol of violence and its likelihood to make schools unsafe was not supported by the evidence and was "disrespectful to believers in the Sikh religion and [did] not take into account Canadian values based on multiculturalism."[21]

Fears of harm have to be justified before an infringement of a constitutional right can be justified. The Court rejected "expert" evidence presented by the Council of Commissioners that suggested that allowing a student to wear a kirpan would engender a feeling of unfairness among the students in a situation similar to the right of Muslim women to wear the chador, because "to equate a religious obligation such as wearing the chador with the desire of certain students to wear caps is indicative of a simplistic view of freedom of religion that is incompatible with the *Canadian Charter*."[22] The Court concluded that deleterious (harmful) effects of a total ban outweighed the salutary (beneficial) effects, and supported the Superior Court's decision to allow the student to wear the kirpan under certain conditions. Such an approach "demonstrates the importance that our society attaches to protecting freedom of religion and to showing respect for its minorities."[23]

D. CONCURRING REASONS

Although concurring with Justice Charron's reasons, Justice LeBel stated that he remained "concerned about some aspects of the problems of legal methodology raised by this case."[24] In his opinion, it is not always necessary to resort to the *Charter* when a decision can be reached by applying general administrative law principles or the specific rules governing the exercise of a delegated power, but admitted that "the context of a dispute sometimes makes a constitutional analysis unavoidable."[25] Still, Justice LeBel contends that not all issues can be resolved through a section 1 analysis, and in some cases the scope and content of a right does not lend itself to the necessity of justifying an infringement under section 1. As such, Justice LeBel

[21] *Ibid*. at para. 70-71.
[22] *Ibid*. at para. 74.
[23] *Ibid*. at para. 79.
[24] *Ibid*. at para. 141.
[25] *Ibid*. at para. 144.

maintained the importance of establishing the boundaries of the nature and scope of a right, saying "we not only have rights, we also have obligations."[26]

A simplistic formulaic or mechanical approach to reconciling conflicting fundamental rights was soundly rejected. Instead, it was suggested that the "Court has never definitively concluded that the s. 1 justification analysis must be carried out mechanically or that all its steps are relevant to every situation."[27] Further, it was suggested that "the approaches followed to apply the *Canadian Charter* must be especially flexible when it comes to working out the relationship between administrative law and constitutional law."[28]

Turning to the facts in Multani, Justice LeBel concluded that:

> … in the case of an individualized decision made pursuant to statutory authority, it may be possible to dispense with certain steps of the [*Oakes*] analysis. The existence of a statutory authority that is not itself challenged makes it pointless to review the objectives of the act. The issue becomes one of proportionality or, more specifically, minimal limitation of the guaranteed right, having regard to the context in which the right has been infringed.[29]

As such, Justice LeBel concluded the Council of Commissioners had not shown that the kirpan ban was justified and met the constitutional standard.

Justices Deschamps and Abella, while concurring in the conclusion, took a different approach to resolving the issue. It was their view that the case was more appropriately decided through an administrative law analysis, thereby reviewing the reasonableness of the decision. The justices suggested that "the prohibition on the wearing of a kirpan cannot be imposed without considering conditions that would interfere less with freedom of religion."[30] By applying the code of conduct literally rather than sufficiently considering the right to freedom of religion and the accommodation measure proposed which posed little or no risk, the justices concluded that the school board made an unreasonable decision.[31]

[26] *Ibid*. at para. 147.
[27] *Ibid*. at para. 150.
[28] *Ibid*. at para. 152.
[29] *Ibid*. at para. 155.
[30] *Ibid*. at para. 99.
[31] *Ibid*.

E. COMMENTARY

The Supreme Court of Canada's decision is first and foremost an important victory for freedom of religion. In this regard, there is confirmation from the Supreme Court that the principles that have been developed in such cases as Big M Drug and Amselem are not to be relegated to constitutional history. The *Charter* protects the rights of Canadians to entertain their religious beliefs and to openly declare those beliefs without fear of hindrance or reprisal. Canadians also have the right to manifest their religious beliefs through worship and practice as well as by teaching and dissemination, and to be free from discrimination because of their religious beliefs. Religious observances should be accommodated to the point of undue hardship.

The decision is also important for its dictum that there is a role for educators to play in engendering tolerance for others' culture **and** religion in Canadian society. As Canada continues to develop as an increasingly multicultural society, there will be further debates about the boundary between the "public" and "private" domain, and particularly where the two converge. Canadian society is also facing political and social changes. Religious organizations and their members are being forced to respond to these changes.

Turning to its impact on courts and administrative tribunals, the decision provides some important guidance on the interplay between freedom of religion and other socially important values. As was conceded by the claimant, the Court confirmed that the freedom of religion can be limited when the individual's freedom may cause harm to or interfere with the rights of others. However, any limitation has to be done through a reconciliation of the competing rights which must be achieved through a constitutional justification. The Court's decision makes the important declaration that safety and other concerns must be unequivocally established before an infringement of freedom of religion is justified.

Administrative tribunals and bodies that govern many important areas of our daily lives regularly encounter decisions involving competing rights. The Multani decision provides important guidance for them and for the courts as to the proper relationship between administrative decisions and the protection of fundamental rights and freedoms in Canada. Given the *Charter*'s mere two decades of existence, both courts and administrative tribunals have not yet clearly defined the exact boundaries between various rights and freedoms contained therein. As the scope of one's rights and freedoms can be affected through the decisions of administrative tribunals in a variety of situations, it is very important for there to be a clear standard of review in order to ensure that *Charter* rights are minimally infringed.

As noted above, the majority of the Supreme Court of Canada determined that the administrative law standard of review was insufficient when determining whether a *Charter* right infringement has occurred and whether such an infringement is justified. The Court determined that a constitutional analysis was required in these situations because "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*."[32]

It is generally recognized that in reviewing an administrative tribunal's decision, courts will pay "curial deference" within the tribunal's areas of specialized expertise regardless of whether there is a "privative clause" protecting the decision from judicial review. A "privative clause" may be found in the enabling legislation for an administrative tribunal, insulating the tribunal's decisions from judicial review. "Curial deference" means that the courts ought not to intervene in a tribunal's decision where the tribunal's knowledge, experience, and expertise with the subject matter, places it in a better position than the reviewing court to make the proper determination of the issues involved.[33]

Notwithstanding the legislature's attempt to shield the decisions of administrative tribunals from the preying eyes of the courts through the use of privative clauses, reviewing courts have tended to regard privative clauses as just one factor to look at in determining the appropriate standard of review. The other factors include: statutory rights of appeal; expertise of the tribunal; the purpose of the enabling legislation as a whole, and the impugned provision in particular; and the nature of the problem.[34] Based on the review of these factors, the reviewing court will determine where upon the spectrum of standards the decision should be reviewed. Although the list is not closed, there are presently three standards recognized on the spectrum:

- Patently unreasonable: a patently unreasonable decision is one that involves a breach of the rules of natural decision and for which there is no evidence to provide support. In such situations, the reviewing court will pay the highest level of deference and the decision must be found to be patently unreasonable for the court to substitute its own decision;

[32] *Ibid*. at para. 16.
[33] Melanie Aitken, Russell Cohen and Mariana Silva, "Curial Deference to Administrative Tribunals" (Paper presented to the The Law Society of Upper Canada Special Lectures 2001 Constitutional and Administrative Law).
[34] Guy Pratte and Michelle Flaherty, "Appeals, Judicial Review and Standard of Review" in *Public Law Reference Materials*, Law Society of Upper Canada, 48th Bar Admission Course, 2005 at 127*ff*.

- Correctness: under the correctness standard of review, the reviewing court will pay the lowest level of deference. The decision must be appropriate and proper in the circumstances or the court will substitute its own opinion;

- Reasonableness *simpliciter*: falling somewhere in between the two extremes, if the decision is defective, it will survive if it can stand up to a somewhat probing examination.

Applying these standards of review in a case involving a possible *Charter* violation may result in a diminution of an individual's rights and freedoms in any given area governed by administrative law. Through the application of the stricter constitutional justification analysis, reviewing courts across the country now have a mandated method for reviewing administrative decisions dealing with constitutional issues. Administrative bodies, on the other hand, have a single, common direction for appropriately and justly dealing with their cases. In the end, individual Canadians are the winners, as they can ensure that their constitutionally protected rights and freedoms will not receive a lesser form of protection through administrative tribunals than through the courts.

F. CONCLUSION

Despite the Court's proclamations concerning the importance our society attaches to protecting freedom of religion and to showing respect for its minorities, reaction from the general public to the Multani decision ranged from support to strong opposition.[35] Still, the Multani decision is an important victory for freedom of religion that can be applied to all rights and freedoms that may be affected by any one of the thousands of administrative tribunals rendering decisions affecting the rights and freedoms of Canadians every day. The Court's conclusion that the administrative law standard of review was inappropriate for dealing with the infringement of a constitutionally protected right means that the minimum constitutional protection as set out by the *Charter* must be taken into account by the legislature and by every person or body subject to the *Charter*.

[35] Aside from anti-religious postings on the *Globe and Mail* website comments section, the decision met with resistance from parents of school children and educators. As reported in the *National Post*, a teacher at the school at the centre of this decision said the court had gone too far and asked if someone could "bring a Kalashnikov to school in the name of whatever religion and fire on anyone?" Janice Tibbetts, "Dagger Ban Struck Down: Supreme Court says schools must allow kirpans" *National Post* (3 March 2006) A1.

Looking at the Multani decision with respect to its impact on the exercise of freedom of religion, it is an important confirmation that in these challenging times for many of the world's religions, the Courts are still willing to recognize the importance of protecting religious freedom from unjustifiable interference from state authorities. In the increasingly multicultural society that is Canada, we are bound to continue to run into conflicts between religious freedom and other important social values. As such, it is increasingly important for courts and administrative tribunals to ensure that an appropriate balance is found between competing rights and obligations. In the Multani decision, the court has firmly established the principles that religious observances must be accommodated to the point of undue hardship and that infringement of freedom of religion will not be justified unless there is substantial evidence that the infringement is necessary to protect the safety of the public and that the right is being infringed as minimally as possible.

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