

# THE CONCERN FOR NATIONAL SECURITY: THE IMPACT ON SIKH CANADIANS

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*In this article, the author considers the implications for Sikh Canadians of the Canadian response to national security concerns. The article examines a number of examples of the use of a security rationale to justify denying Sikhs the right to carry or display the kirpan, a religious symbol important in Sikhism. The author discusses the response of Canadian courts and public authorities to this issue.*

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*Dans cet article, l'auteur examine les incidences pour la population canadienne sikhe, de la réponse canadienne aux préoccupations relatives à la sécurité nationale. Il étudie certains exemples d'utilisation d'un motif fondé sur la sécurité nationale pour justifier le refus, opposé aux Sikhs, de porter ou d'arborer le kirpan, symbole religieux important pour cette communauté. L'auteur discute de l'attitude des tribunaux canadiens et des pouvoirs publics face à cette question.*

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Some observers have characterized the political climate after 9/11 as one "... in which fear is the driving force of public policy. The culture of fear has given rise to a dogma of national security, the effects of which are widespread and include the erosion of equality rights."<sup>1</sup> In western countries characterized by growing pluralism, the preoccupation of public authorities with security creates inevitable tensions with minority ethnic and religious traditions.

While the impact of this changing political climate was felt acutely by the Muslim community, the impact on the Sikh community was significant as well.

On September 12, 2001, various news outlets reported an arrest from an Amtrak train heading from Boston to Virginia. The arrest was reported in the context of the investigation of 9/11. The images shown across the world (often beside those of Osama Bin Laden) were those of a Sikh man wearing a green turban and flowing beard being led in handcuffs out of the train station. Sher Singh, with his head bowed, was seen being escorted by officers who could also be seen holding his kirpan.

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<sup>1</sup> Faisal Bhaba, "The Chill Sets In: National Security and the Decline of Equality Rights in Canada" (2005) 54 UNBLJ 191 at 191.

Sher Singh was charged with carrying a concealed knife (his kirpan). The charge was later dropped. His only fault had been that his appearance had raised the suspicions of his fellow passengers and caused them to be alarmed.

While media caricatured the perpetrators of 9/11 and terrorists in general as being “brown” men with turbans and beards, that portrayal fit largely with the image of Sikh men. As a result, Sikhs in America were regularly the victims of mistaken identity and the targets for hate crimes, racial profiling and almost guaranteed secondary screening in many airports.

The Sikh experience in Canada, however, played out in a unique manner when it came to the accommodation of the kirpan, a Sikh article of faith.

The kirpan is a stylized representation of a sword, which is worn at all times by initiated (amritdhari) Sikhs (both men and women), sheathed and worn next to the body in a fabric belt (gatra). The kirpan signifies the duty of a Sikh to stand up against injustice. It is worn along with the other Sikh articles of faith such as the turban and unshorn hair.

The wearing of the kirpan by Sikhs as an article of faith is protected by both the Canadian *Charter of Rights and Freedoms*<sup>2</sup> and human rights legislation.

As early as 1981, in a case involving the wearing of a kirpan by a Sikh patient at a hospital, a human rights Board of Inquiry in Ontario found that “the wearing of a kirpan of a reasonable length is legitimate and proper religious act of an orthodox Sikh. Although the kirpan is a strange and perhaps intimidating instrument to most Canadians, I find that Sikhs should be allowed to wear a kirpan of a reasonable length on their person.”<sup>3</sup>

The question of the accommodation of the kirpan received significant attention with the decision in *Peel Board of Education v Pandori*<sup>4</sup> decision in Ontario. Harbhajan Singh Pandori, a teacher at the Peel Board of Education had challenged the Peel Board’s policy prohibiting kirpans.

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<sup>2</sup> Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

<sup>3</sup> *Pritam Singh v Worker’s Compensation Board Hospital and Rehabilitation Centre* (1981), 2 CHRR 103 at para 4189.

<sup>4</sup> *Peel Board of Education v Pandori et al* (1990), 12 CHRR D/363 (Ont HRT) [*Pandori*].

The Board of Inquiry did not ask “‘What will happen *if* the kirpan is used improperly?’ but, ‘*Will* it be used improperly?’<sup>5</sup>”

Although the Board of Education could be permitted to develop a policy to ensure security, it would have to enact the policy in the face of a real threat.

The Board of Inquiry found that in the case of the kirpan, “There having been no incidents in any Canadian school of a Khalsa Sikh’s misuse of his/her kirpan, the argument that Khalsa students or teachers represent a particular personal risk that must be forestalled is ... devoid of any merit.”<sup>6</sup>

The Peel Board of Education was ordered to allow kirpans if they were “of a reasonable size, be worn under one’s clothing, and be well secured to the guthra [bandolier].”<sup>7</sup>

The decision was upheld by the Ontario Divisional Court and leave to appeal to the Ontario Court of Appeal was denied.<sup>8</sup>

It was clear that the accommodation of the kirpan would be based upon actual security issues that could be established on the evidence. Impressionistic or theoretical musing on possible misuse would not be a sufficient reason to justify an outright prohibition.

With a renewed focus on “security” after 9/11, however, the accommodation of the kirpan would be viewed from a fresh lens in Canada in the Supreme Court of Canada decision in *Multani v Commission scolaire Marguerite Bourgeoys*.<sup>9</sup>

On November 18, 2001, Gurbaj Singh Multani, a twelve-year-old grade seven student at Ste-Catherine Labouré school in Montreal, was playing with his friends in the schoolyard when his kirpan fell out of his clothes. The mother of another student saw the kirpan and complained to school officials that she’d seen a weapon.

After negotiations, the School Board proposed an accommodation allowing the kirpan to be worn underneath the clothes if it remained in its wooden sheath, wrapped in a cloth sack with a fold over it and sewn shut

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<sup>5</sup> *Ibid* at para 185

<sup>6</sup> *Ibid* at para 214

<sup>7</sup> *Ibid* at para 233

<sup>8</sup> *Peel Board of Education v Pandori*, [1991] OJ No 3200 (CA).

<sup>9</sup> 2006 SCC 6, 1 SCR 256, 264 DLR (4th) 577 [*Multani*].

to ensure that it could not be removed. The principal would have the authority to monitor whether the conditions were being met.

The school's Governing Board refused to ratify this agreement and this decision was confirmed by the Council of Commissioners, which administers the School Board. The Council suggested that Multani wear a pendant instead.

The Multani family was granted an interim injunction by the Quebec Superior Court allowing Gurbaj to wear the kirpan under the conditions earlier agreed upon.<sup>10</sup>

The Quebec Court of Appeal, however, overturned this Superior Court's decision. The Court of Appeal stated that while everyday objects found in the classroom such as a pencil or compass may be used to cause injury, the kirpan is "an inherently dangerous object."<sup>11</sup> Furthermore, "[t]he kirpan is a dangerous object and the conditions imposed by the trial judge do not offset all the risks."<sup>12</sup>

The Court also accepted the testimony of psycho-educator Denis Leclerc that the wearing of the kirpan "would engender a feeling of unfairness among the students, who would perceive this permission as special treatment. He mentioned, for example, that some students still consider the right of Muslim women to wear the chador to be unfair, because they themselves are not allowed to wear caps or scarves."<sup>13</sup>

The Quebec Court of Appeal decision represented a step away from previous kirpan jurisprudence. Although the Court considered *Pandori*, it indicated that it could not agree with the result. In reference to the shifting understanding of security post 9/11, the Court wondered, "Can the passage of time in a rapidly-changing society explain the difference in perception of the school environment and its dynamics?"<sup>14</sup>

For the Quebec Court of Appeal, while the kirpan may have been accommodated in 1990, the same accommodation could not be made in the world of 2001.

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<sup>10</sup> *Multani v Commission scolaire Marguerite Bourgeois* (2002), JE 2002 – 1111 (Que Sup Ct).

<sup>11</sup> *Multani v Commission scolaire Marguerite Bourgeois*, [2004] RJQ 824, 241 DLR (4th) 336 (CA) at para 87 [*Multani CA*].

<sup>12</sup> *Ibid* at para 95

<sup>13</sup> *Multani*, *supra* note 9 at para 72

<sup>14</sup> *Multani CA*, *supra* note 11 at para 84

As the Sikh community waited for the *Multani* appeal to be heard at the Supreme Court of Canada, in the fall of 2005, I had personal reason to be aware of the prevailing uncertainty, as I was removed twice from a VIA Rail train because of my kirpan. Fellow passengers had noticed the kirpan and reported it to security. VIA Rail insisted that the kirpan was a weapon and was therefore not permitted onboard. Many wondered whether the days of Sikhs freely being able to wear the kirpan were coming to an end.

The Sikh community and other observers such as the Canadian Civil Liberties Association pointed out that the prohibition on the kirpan was simply not reasonable. VIA's policy allowing hockey sticks, skates and bats in addition to providing its first class passengers with steak knives for meals showed a selective approach to security which could not justify an absolute prohibition on the kirpan.<sup>15</sup>

On March 2, 2006, the Supreme Court of Canada, in an 8-0 decision, ruled that an absolute prohibition on the kirpan could not be justified. The Supreme Court returned to the approach used in *Pandori*, in examining not what would happen *if* the kirpan were used improperly but whether the kirpan *will* be misused. The fact that the kirpan had never been used as a weapon in any school was once again persuasive to the Court.<sup>16</sup>

Another significant portion of the Supreme Court judgement is the deliberation of a possible negative impact in schools by the wearing of the kirpan. The Court found that psycho-educator Denis Leclerc's arguments, which were accepted and quoted in the judgment by the Court of Appeal, were simply inappropriate. Charron J wrote, "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."<sup>17</sup>

The Court further disagreed with the assertion that the kirpan is a weapon and stated that an argument to that effect is "contradicted by the evidence regarding the symbolic nature of the kirpan, it is also disrespectful to believers in the Sikh religion and does not take into account Canadian values based on multiculturalism."<sup>18</sup>

The Court found that the absolute prohibition was not minimally impairing, as it did not attempt any accommodation. The kirpan restriction

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<sup>15</sup> Cristin Schmitz "Bid to derail VIA's kirpan ban: Libertarians sharply criticize policy" *The Gazette* (7 November 2005) A16.

<sup>16</sup> *Multani*, *supra* note 9 at para 61.

<sup>17</sup> *Ibid* at para 74.

<sup>18</sup> *Ibid* at para 71.

“would stifle the promotion of values such as multiculturalism, diversity, and the development of an educational culture respectful of the rights of others.”<sup>19</sup>

The Court set aside the Court of Appeal decision and declared the prohibition on the kirpan to be void.

*Multani* established that the kirpan would not be treated differently simply due to the “passage of time” and security could not be used as a blanket justification for the prohibition of the kirpan in the absence of actual evidence. The accommodation of the kirpan in Canada would continue to be a testament to our commitment to multiculturalism and the respect for minority rights.

Two weeks after the *Multani* decision, VIA Rail agreed to settle the human rights complaint against it and allowed the kirpan onboard so long as the kirpan was worn under the clothes and remained sheathed.

Subsequent to *Multani*, kirpan accommodation policies have been developed for high security settings such as the 2010 Vancouver Olympics, and more recently in courthouses in Ontario, Alberta and British Columbia.

There have been bumps in the road however. In January 2011, the Quebec National Assembly turned away a delegation from the World Sikh Organization of Canada, which had been invited to make submissions on Quebec’s Bill 94 on the banning of the niqab, because of the kirpan issue. The kirpan is accommodated in the Canadian Parliament and every other provincial legislature in Canada.

While the National Assembly voted unanimously to pass a motion supporting the exclusion of kirpans, the response across Canada was quite different. Various newspaper editorials and commentators supported the right of Sikhs to wear the kirpan and pointed out that the kirpan was not a weapon. A piece in the *Montreal Gazette* satirically wondered why MNAs had “bravely disregarded the constant threat to [their] safety posed by the readily available, non-religious steel cutlery in the Assembly’s restaurants” but instead focused on banning the kirpan.<sup>20</sup>

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<sup>19</sup> *Ibid* at para 78.

<sup>20</sup> Don Macpherson, “MNAs neglect duty to protection minority rights” (2011) online: *Montreal Gazette* <<http://www2.canada.com/montrealgazette/columnists/story.html?id=940f7f3d-65e1-4de6-831b-33adf2a07312>>.

While the accommodation of the kirpan continues to face the occasional hurdle, for Sikhs, it was reassuring to see that at last, people were starting to get it.