



## Education Law eBulletin

A newsletter for educators.

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### in the courts

#### Freedom of religion: wearing of kirpan at school

On March 2, 2006, the Supreme Court of Canada released its decision, *Multani v. Commission scolaire Marguerite-Bourgeoys*, wherein the Court affirmed that the absolute prohibition against kirpans in schools constitutes an unjustifiable infringement on the freedom of religion of Sikh students.

The Quebec Court of Appeal had held that the religious beliefs of the student, Gurbaj Singh Multani, must yield to safety in schools, finding that when religious dogma and belief are stripped away from the kirpan (a Sikh ceremonial dagger), it remains a large blade capable of causing injury to other students. Prior to that, the Quebec Superior Court had affirmed the right of Gurbaj to wear his kirpan at École Sainte-Catherine-Labouré.

The *Multani* decision comes more than a decade after the Ontario Divisional Court visited this exact issue in *Ontario Human Rights Commission and Harbhajan Singh Pandori v. Peel Board of Education*. In *Pandori*, a complaint was filed with the Ontario Human Rights Commission about a policy adopted by the school board prohibiting the wearing of the kirpan on school property. The human rights Board of Inquiry determined that the policy was contrary to s. 10 of the *Human Rights Code, 1981*, and even though the policy was enacted in good faith, it discriminated against Sikhs and was not reasonable in the circumstances as there had never been an incident of kirpan-related violence in any school system in Canada. The Divisional Court subsequently refused to give the school board leave to appeal the decision finding that the many safeguards built into the Order were evidence that the Board of Inquiry had been cognizant of the genuine concerns of the school board regarding safety. Those safeguards included that the blunt kirpan was to be 10 centimetres in length, worn under clothing, housed in a wooden sheath, and further secured such that the removal of the kirpan would be difficult. The Court also found that the Board of Inquiry properly considered the proportionality as between the objective of safety in the schools and the requirements of freedom of religion, and in the absence of any concrete evidence of safety risk, it could not be said that the Board of Inquiry committed any error in law or in principle.

In *Multani*, the Supreme Court of Canada's 8-0 decision echoes the *Pandori* decision reached by the Ontario Divisional Court. The majority decision of the Supreme Court ultimately rests on the analysis of the restriction on the student's freedom of religion. Specifically, the Supreme Court held that the student sincerely believed that he would not be complying with the requirements of his religion if he did not wear the kirpan. This belief was not contested by the parties. Absolute enforcement of the school's zero-tolerance policy regarding weapons on school premises resulted in depriving Gurbaj of a public school education. Although the Supreme Court found that the policy was based on a pressing and substantial objective - to ensure safety in schools - it held that an absolute prohibition against wearing a kirpan did not fall within a reasonable range of alternatives.

The Supreme Court held that measures suggested by the earlier Superior Court ruling (which were themselves strikingly similar to the restrictions set out in *Pandori*) would minimize the risk that the kirpan would be used for violence by other students. The Supreme Court also cited that other potential weapons - baseball bats, pencils, etc. - exist in the school setting, and it was not feasible to ban all objects that *could* be used as weapons. Additionally, as was expected, the Supreme Court referenced *Pandori*, the fact that there had never been any reported violent incidents related to the presence of kirpans in schools, and that the allowance of kirpans would not result in a "ripple effect". Finally, the Supreme Court forcefully repudiated any suggestion that the kirpan is a symbol of violence and that its presence reinforces the use of violence.

### production of OSRs

#### Incremental approach proposed

In the recent decision, *Toronto District School Board and O.S.S.T.F. (Thomson) (Re)*, a grievance arbitration board had to decide a motion brought by the union seeking production of a student's Ontario Student Record (OSR). The union represented a teacher who had been dismissed for misconduct involving the student. The

*continued ...*

## ... Production of OSRs, *continued*

union argued that the student had acted inappropriately and that this should be taken into account in assessing the culpability of the teacher's conduct. The union argued that the student's OSR was arguably relevant in that it could contain information which would corroborate the union's suggestion that the student had acted inappropriately. Neither the student nor his parents consented to the release of the OSR. The school board argued that the provisions found in s. 266 of the *Education Act* precluded the board of arbitration from ordering production of the OSR. A majority of the board of arbitration held that it had the jurisdiction under the *Education Act* to order production of the OSR, but that it was appropriate to develop a process for the examination of the OSR that would respect the principles of confidentiality reflected in the *Act*.

The arbitration board adopted the approach to the production of arguably privileged information as set out by the Ontario Court of Appeal in *Celanese Canada Inc. v. Murray Demolition Corp.* In that case, the Court described a process whereby a judge dealing with such a motion holds a hearing on an *ex parte in camera* basis where the privileged information is examined by the judge in the presence of the party possessing the information. If the judge determines that the information is arguably relevant, then the party seeking production may be told of the nature of the information and given the opportunity to make submissions about whether and how the information should be produced. The board of arbitration in *O.S.S.T.F. (Thomson)* held that this incremental approach balanced the requirements of a fair hearing with the concerns underlying the confidentiality provisions of s. 266 of the *Education Act*, and adapted the approach for its own purposes.

Specifically, the arbitration board directed that the school board produce the student's OSR for examination by the board of arbitration in an *ex parte in camera* hearing where only the school board would be present. At that time, the arbitration board would examine the OSR and then advise the parties if there was any information in the OSR that could be deemed arguably relevant to the issues to be determined in the grievance arbitration. If there was such information, the parties would be given a further opportunity to make submissions as to whether the information should be produced.

### caselaw

#### *Young v. Bella*

##### Supreme Court of Canada

The Supreme Court of Canada held that a University and two of its employees were negligent when they reported a student to Child Protection Services for suspected child abuse without having a reasonable cause to make such a report.

#### *Mohamed v. University of Saskatchewan*

##### Saskatchewan Court of Queen's Bench

The Court upheld an appeal committee's decision to suspend a third-year student for two years, followed by an expulsion, after finding the student guilty of five counts of academic dishonesty.

#### *Lane v. School District 68 (Nanaimo-Ladysmith)*

##### British Columbia Supreme Court

The Court found that a school board was not liable for making allegedly defamatory comments about a Superintendent because each of the comments was privileged, incapable of bearing a defamatory meaning, fair comment, or true; nor was the school board liable for dismissing the Superintendent in bad faith because its contract with the Superintendent provided for dismissal without cause, and the board did not breach its obligation of good faith and fair dealing.

#### *The Board of Education for the City of Windsor*

##### Ontario Labour Relations Board

The Labour Relations Board granted a declaration, sought by various building trade unions, that the Board of Education for the City of Windsor and the Greater Essex County District School Board were one employer for all purposes of the *Labour Relations Act*.

Summaries of these cases and others can be found in the *Shibley Righton Education Law NetLetter* published by Quicklaw. Visit [www.quicklaw.com](http://www.quicklaw.com).

We welcome your comments and questions. Send them, and any updated contact information, to [paul.howard@shibleyrighton.com](mailto:paul.howard@shibleyrighton.com). If you wish to unsubscribe to this eBulletin, please send a blank e-mail to [unsubscribe@shibleyrighton.com](mailto:unsubscribe@shibleyrighton.com)

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